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—Preamble, NLG Constitution

editor's preface

In 1983 Harvard Law School Professor Duncan Kennedy exposed the hidden agenda and unspoken values prevailing in legal education in "Legal Education and the Reproduction of Hierarchy," the most brilliantly subversive essay ever written by a law professor still working within the system. Kennedy's argument, reduced to a few sentences, was that law schools were factories of ideological indoctrination designed to create a kind of elite guardian class to preserve the economic and political status quo. He argued that law schools teach the guiding tenets of the ruling class, the foremost of which is that positions of wealth, power, and domination in society are earned through a fair and just process and that, to a large extent, the role of the attorney is to protect this process from subversion. Law schools inculcate the ideology of hierarchy in countless ways—through the use of the Socratic Method, a form of pedagogy that casts the professor as an omniscient figure whom students are trained to please and emulate; by putting students in a perpetual state of competition and stress—over grades, summer associateships, law review positions, moot court contests, and so on; and, perhaps most disconcertingly given the traditional understanding of the classroom as a forum for the search for truth, by presenting the study of law as a formalistic academic discipline, like logic or math, that can result in absolutely "right" and "wrong" answers independent of social realities or political agendas. The essay was a masterpiece and remains as timely as ever—because things have gotten much worse since its publication.

Writing in the tradition of Kennedy's essay," Howard University Law School Professor Harold McDougall's "The Challenges of Legal Education in the Neoliberal University" explains the dangers accompanying the new "corporatized" system of legal education that is becoming increasingly pervasive in the U.S. It's a system administered by professional bureaucrats rather than independent-minded legal scholars. Whereas the traditional or "guild" model of law school governance, still used in Europe, had faculty members serve as administrators on a rotating basis to ensure the prioritization of free inquiry, the promotion of

Continued inside the back cover

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Harold McDougall

THE CHALLENGES OF LEGAL EDUCATION IN THE NEOLIBERAL UNIVERSITY

Neoliberalism, a business-oriented ideology promoting corporatism, profit-seeking, and elite management, has found its way into the modern American university. As neoliberal ideology envelops university campuses, the idea of law professors as learned academicians and advisors to students as citizens in training, has given way to the concept of professors as brokers of marketable skills with students as consumers. In a legal setting, this concept pushes law students to view their education not as a means to contribute to society and the professional field, but rather as a means to make money. These developments are especially problematic for minority students and faculty who wish to remain grounded in their communities.

Today, as neoliberalism impinges upon the lives and jobs of legal academics, it is time for us to rethink the teaching of law. Part I explores what neoliberalism is. Part II describes the challenges of the neoliberal university as a work context for all faculty, including law professors, and especially "rebellious" ones. Part III suggests that faculty must reassert their autonomy and agency despite the neoliberal university's push to deny them. Part IV is the conclusion.

I. What is Neoliberalism?

According to Prof. David Harvey of Johns Hopkins University, neoliberalism is an ideology promoting deregulation, privatization, and the internationalization of the market economy.[1] Neoliberalism has caused stunning increases in poverty and inequality worldwide,[2] and is increasingly associated with domestic and international authoritarianism.[3]

Neoliberalism has its roots in the neoconservative resurgence of the 1980s, marked by the rise of Margaret Thatcher in the U.K. and Ronald Reagan in the United States.[4] Neoliberalism arose as previously left-of-center political parties made a "right turn," abandoning the lower socio-economic classes in favor of corporate largesse,[5] making common ground with the neocons in that regard. Modern neoconservatism is merely neoliberalism's extreme right wing. Driven by the "righteous indignation of the economically comfortable," neoconservatism seeks to recreate a past in which "abuses of power and authority, portioned out by privilege, went unexamined, unspoken and were good for business."[6]

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Today, the neoliberal/neocon consensus includes politicians regardless of their left or right designation.[7] (Think of Bill Clinton or Tony Blair.) Christopher Hitchens in *Vanity Fair* describes countries governed by this consensus. They are operated as commercial enterprises for private profit, "reinforced by collusion between the state and favored corporations, through which the profits from private exploitation of public resources remain private property and the debts incurred become public responsibility. [Manipulated by corporations,] the government is unaccountable to its citizens; the legislature is "for sale and functions mostly as a ceremonial rubber-stamp."[8]

The neoliberal/neocon consensus accompanies a "worldwide shift of power away from the public realm [and] toward those who control the global economy."[9] It aims to convince citizens that "personal solutions to collective problems [are] the only viable option," leaving individuals and families facing entrenched profit-making interests on their own as they try to protect their health, seek an education, or look for social support.[10] A subset of this privatization of social justice is the ideological construct that historically oppressed and exploited people of color must succeed, if at all, in a "colorblind" world.[11] Aiding the neoliberal/neocon consensus, the media works to discredit those who raise issues of social justice and the interests of disadvantaged groups, dismissing them as advocates for special interests[12] or worse.[13]

II. The challenges of the neoliberal university

"What's happening at other kinds of institutions around the country is now coming home to roost in higher education," said one faculty member.[14] A "cult of corporate expertise and private-sector savvy has corralled the upper reaches of university life."[15] The neoliberalization of universities thus replicates neoliberalism's pattern in virtually every other sphere of its influence. One author has described that pattern as one of corporatization, managerialism, deprofessionalization, contingent labor, and "precaritization."[16]

A. Corporatization

The role of corporations actually begins at the founding of the American university. Prof. Judy Areen, former Dean of Georgetown Law School, observed in the Yale *Daily News* that when higher education began here in the 1600s, colonial authorities looked first to the English model of all-faculty governance. However, they determined that there were insufficient faculty available in the colonies to both teach in and operate the new institutions.[17] Instead, authorities established academic corporations[18] such as Harvard, Yale, Brown, constituting private universities over which lay governing boards exercised complete legal authority.[19]

Corporate universities with lay governing boards are unique to the United States.[20] The boards have "complete legal authority and responsibility for the institution."[21] In practice, they delegate part of that authority to the officers

and faculty, who manage the program and educational standards. They typically do not delegate their authority over adequacy of the plant, determination of overall policies, selection of a president, or the assurance of adequate financing, however.[22] Universities elsewhere in the world, such as Oxford and Cambridge are guilds,[23] not corporations, and are completely operated by the faculty.[24] (Though neoliberalism has its sights on even these.[25])

By the late 19th century, university governing boards in America included more businessmen and fewer community leaders and ministers than the original model.[26] Public universities[27] chartered by state governments in the mid-19th century also experienced increased business intervention, as corporate and "robber baron" influence on state governments and educational institutions increased.[28]

All told, businessmen began wielding increasing power over curriculum and otherwise encroaching upon faculty autonomy in private universities as well as public. Professors, feeling an urgent need to protect academic freedom, tenure, and the faculty's role in governance, formed the American Association of University Professors (AAUP) in 1915.[29]

The tension continues, but business and corporate interests rapidly gain ground as neoliberalism strengthens the lay board's role. The term "neoliberal university" is generally applied to ostensibly public institutions such as state colleges or universities that have become subject to the dictates of neoliberal state legislators who serve corporate interests.[30] It is no stretch to use the term also to describe those private universities whose governing boards and administrators have gotten comfortably into bed with corporate and/or neoliberal actors.[31] Corporate officers now heavily populate private university governing boards—ostensibly to raise operating funds and bolster endowments.[32] Today's neoliberal university runs more like a business than an academy of learning.[33]

Katherine Franke of Columbia University Law School, speaking on "The Corporate University," during a Pacifica radio interview, observed that when corporatization of a university takes place, top management—the President or Chancellor—

> see themselves as responsible to investors or donors more than [they do] to the constituency on campus, the academics and students. A university is not just a business, where you have to have a bottom line that satisfies your board of directors every year like other businesses. We have a particular mission in the university, perhaps to do things that are unpopular, that challenge what your donors think is the right way in which you should be thinking about particular problems. If we're not doing that, then we're not running a university, we're running some…kind of ideological machine.[34]

B. Managerialism

A key feature of the corporate governing style is "managerialism," which uses governing structures that are "hierarchical, bureaucratized, and secre-

tive."[35] In the neoliberal university, managerialism heightens the role of administrators and governing boards in governance and curriculum, at the faculty's expense.

The number of administrators and administrative staff at neoliberal universities relative to the number of faculty has dramatically increased over time,[36] while transparency and leadership accountability have steadily decreased.[37] In fact, the number of administrators and professional staff has more than doubled, and their rate of increase is more than double the growth rate of the student population.[38] Nationwide, there are now more full-time administrators than full-time faculty, and the disparity is widening.[39]

Whereas administration used to be handled by faculty members rotating through the administrative structure, today's typical mid-level administrator or staff person is not directly involved in teaching students, and may have little or no professional academic background. As a consequence, these "deanlets" may experience the incentives to carry out their assignments as abstract and amorphous. Under such conditions, they may shirk their duties, squander resources, and even engage in corrupt behavior.[40] And they are typically even less responsive to students than they are to faculty.[41]

Power, perks, and pay concentrate at the upper levels of this system.[42] Top administrators not only pull in astronomical salaries, says Professor Benjamin Ginsberg of Johns Hopkins University, they also surround themselves with status symbols—luxurious offices and residences, chauffeurs, household staff, lavish entertainment—all at the university's expense.[43] Governing board meetings are themselves lavish affairs, resplendent with first-class air tickets, chauffeured limousines, and five-star hotels.[44]

Administrative costs skyrocket as a result.[45] These expenses are borne primarily by students through tuition increases[46] which far outstrip the consumer price index.[47] Students and their families fall deeper and deeper into debt.[48]

At the same time, faculty participation in shared governance is rolled back.[49] Major new programs, handling of student issues and the appointment of senior administrators are all undertaken with little or no faculty input.[50] Faculty members "learn about major new programs and initiatives from official announcements or from the campus newspaper."[51]

At National University, faculty complained of dramatic changes in "policies governing faculty work and welfare without the faculty consultation required by board-approved faculty policy documents."[52] Faculty at Pennsylvania State University faced paycheck docks if they didn't participate in an insurance company's wellness plan, which included questionnaires requesting some rather personal information. The VP for Human Resources said the administration considered assessing higher premiums for those who didn't participate, but opted for the pay docking because it was "more transparent" and they wanted

to send a clear message.[53] At the University of Florida Law School, a Dean search failed because of the central administration's "incessant interference" with faculty governance.[54]

At the University of Virginia, highly-regarded President Teresa Sullivan was abruptly ousted in 2012 by governing board members "steeped in a culture of corporate jargon and buzzy management theories," who "wanted the school to institute austerity measures and re-engineer its academic offerings around inexpensive, online education.[55] The board is heavily weighted with corporate/neoliberal types, including "a coal company magnate, a Wall Street professional, a top lawyer for General Electric, a nursing home executive, a beer distribution entrepreneur, [and] the son of conservative televangelist Pat Robertson."[56] Many are UVA alumni, but few have any experience in delivering higher education.[57] Due to popular outrage, Sullivan was quickly re-instated.

C. Deprofessionalization, contingent labor, and "precaritization"

Deprofessionalization is "a new attitude toward specialized knowledge, which aims to discredit or eliminate all independent expertise and subject it to management-generated criteria."[58]Deprofessionalization in the neoliberal university rolls back the traditional role of academics in the generation and transmission of knowledge,[59] as new modes of delivering coursework narrow the role of tenured and tenure-track faculty.[60]

Internet-based learning approaches, especially MOOCs (massive open online courses) raise concerns about the centrality of the faculty's role in the transmission of knowledge.[61] Even the faculty's ownership of their own intellectual property has come into question.[62] For example, the Rutgers University graduate faculty recently boycotted a university contract with Pearson Corp. that would give Pearson the intellectual property rights to any on-line courses the faculty develops.[63]

Research and teaching are more and more corporate-funded and corporate-designed, as the university seeks to increase revenue through corporate sponsorships[64] and partnerships.[65] The resulting research and scholarship tends to affirm rather than challenge the corporate/neoliberal worldview or critique its impact on social and cultural life.[66] Even curriculum and teaching is affected.[67]

Contingent labor, transforming jobs that once promised "full long-term employment" into "part-time positions adjustable to changing demand," minimizes the institution's commitment to its employees.[68] Labor contingency advances on the neoliberal university campus as buyouts and "post-tenure review" reduce tenure, restrict it, or eliminate it entirely.[69] The number of adjuncts and part-time lecturers increases as the numbers of full-time teachers decrease. Today, half the instructional staff at American colleges and universities are part-time, almost doubling the number of part-timers since 1987.[70]

At the same time, *precaritization* proceeds, as the administration cuts jobs, reduces salaries, and strips away health care, pensions, and other benefits. A clear, and possibly deliberate result is a state of "permanent insecurity and anxiety" among all those employed at the university.[71] Academic salaries in neoliberal universities stagnate across the board, while "outcomes assessments" increase.[72]

D. Changes in the mission and purpose of the university

Finally, the neoliberal university transforms the identities of those who work and learn there.[73] A blogger known as the "Homeless Adjunct" observes that the universities of the 1960s convened "well-educated, intellectual, and vocal people," creating incubators of popular dissent "against the Vietnam War, against racism, against destruction of the environment in a growing corporatized culture, against misogyny, [and] against homophobia."[74] This was unacceptable to "the corporations, the war-mongers, those in our society who would keep us divided based on our race, our gender, our sexual orientation."[75] Neoliberalism has not only reintroduced hierarchy, patriarchy and authoritarianism, it has reinforced them as well.[76]

Today, the neoliberal university encourages the "little people" on campus to think of themselves as solitary individuals, trying to get ahead or simply survive, always ready to respond to managerial commands and to identify with the top leadership's world view.[77] Not only is education for the "99 percent" at risk, but even secure jobs[78] and a social safety net, "occupying" them with ceaseless worry and crisis and draining their energy for social activism.[79] It is now very difficult for many of us "to look up from the struggle for survival" and figure out how we got into this mess.[80]

Students are encouraged to see themselves as consumers of marketable skills[81] rather than citizens in training.[82] Neoliberal culture "hijacks the narrative" of a university education—no longer to develop your mind, but so you can get a "good job."[83] Learning for the purpose of income generation becomes the primary goal of education,[84] undercutting the university's role in producing the informed population that is one of the foundations of democracy.[85]

Fewer and fewer students become "social engineers"[86] with the analytical and practical skills needed to reconstruct community and protect it from corrupt and overbearing private and public forces.[87] Minority students, especially, experience stress and tension as they seek to accommodate the demands of the neoliberal world while trying to remain grounded in their own communities and cultural contexts.[88] Standardized tests screen out more and more of such "grounded" minority candidates, increasing the number of minority and female students who have learned to adapt to white male ways of thinking.[89]

To effect this transformation, neoliberal university leadership does everything possible to undermine real solidarity and cohesiveness among faculty, students, and lower-level staff, often by creating the illusion of university-wide

solidarity with "pomp and circumstance."[90] The Homeless Adjunct sees this as part of the process of killing of the American University, in "five easy steps."[91]

Faculty at neoliberal American universities have put little energy into resistance, however, and not merely because they fear for their jobs.[92] Faculty members at National University believe that the administration "fosters an environment where…freedom to ask questions and critique administrative policies are restricted, and resources and support for developing new ideas are unavailable."[93] Saslow warns that "for preaching that education is for public citizenship, not private productivity, [faculties] are now besieged by an inquisition-cum–hostile takeover [including a media campaign] to undermin[e] public sympathy for the professoriate, represented as a bunch of expensive, meddlesome, and unaccountable slackers."[94]

Canadian professor Magda Lewis poignantly observes that progressive faculty in neoliberal universities have to "think one way and live another, to believe in a more egalitarian and open society while working within increasingly elitist and closed institutions."[95] Though they believe deeply in the need to build a different kind of society, they feel "compelled to struggle for resources and power within the one that actually exists."[96]

She's preaching to the choir. Here's Prof. Saslow:

> Though sixty-four isn't so old today, I yearn to retire as soon as my precarious 401(k) may permit. I can't bear any longer my front-row seat at the relentless boxing match between the corporate deanlets and us dwindling holdouts. [W] e've been up against the ropes for years, continually punch-drunk from the latest dictatorial, wrong-headed, or merely superfluous 'innovation' that management keeps jabbing at faculty. I used to be an honored professional, with valued expertise and integrity certified by peers. Now educators, like everyone else, are being beaten down [as lazy unreliables] who must be monitored and kept hungry and ignorant of everything outside our assigned task. I only hope we still have strength enough to fight off these pandemic assaults. [97]

David Harvey urges progressive academics to do more than simply engage in critical analysis of existing conditions at the neoliberal university, however.[98] We must develop solidarity within our ranks. We must locate the community that potentially exists among our colleagues, understand its "stock stories" (such as those told by Professors Lewis, Franke, and Saslow[99]) and attempt to ground those stories with narratives about how neoliberalism affects us and what we can do about it. I call this "rebelling on campus."

III. Resisting the neoliberal university

The first step is to revive the "guild paradigm" of university faculties.[100] University faculty members should be "long-term, active members," of this guild, not "alienated part-timers." This means reconstituting ourselves as a collective. Only in this way can we resist the neoliberal regime, which seeks to convert university values and practices from serving the common good to serving societal privilege and its entrenched elites.[101]

Faculty are beginning to organize.[102] The AAUP reports an increasing number of faculty union drives at public universities, for example. Faculty at the University of Illinois at Chicago (a public university) recently organized a union called the UIC United Faculty. They are the first faculty from a large research university in Illinois to do so. In the spring semester of 2014, virtually the entire tenure-track and non-tenure track faculty voted to ratify United Faculty's labor contract with university management.[103]

Tenure-line faculty at private institutions, in contrast, have been blocked from organizing formal unions since 1980 by the U.S. Supreme Court decision in *NLRB v. Yeshiva University*.[104] In that case, the court ruled that Yeshiva tenured and tenure-track faculty had significant managerial authority and therefore collective bargaining rights were inappropriate.[105] According to the Court, individual schools within the University are "substantially autonomous, and the faculty members at each school effectively determine its curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules."[106] "[T]he overwhelming majority of faculty recommendations as to faculty hiring, tenure, sabbaticals, termination, and promotion are implemented…. [giving Yeshiva's faculty a] crucial role . . . in determining other central policies of the institution."[107] (Faculty in today's neoliberal universities should ask themselves whether they think they have a "significant" managerial authority, or a "crucial" role in determining the central policies of their institutions.)

Regardless, the AAUP charters and sponsors collective bargaining units in private universities that lack only the power to collect dues or to call a strike.[108] Moreover, faculty "handbooks" have been recognized as a contractual obligation of private universities to respect faculty rights at least since the case of *Greene v. Howard University* (1969).[109] Several cases following *Greene* have come to similar conclusions.[110] In addition, some authors urge faculty to participate more vigorously in college governance institutions and even seek a larger faculty role in them as an alternative or supplement to the labor union approach.[111] (The University of Toronto, for example, has significant faculty and student representation on its governing body.[112])

According to one report, faculty guilds comprise the university's "quality engine," and administrators should give them sufficient autonomy to ensure the integrity of their work and thereby the success of the university.[113] On the other hand, the work of the "administrative shell" surrounding the guilds is essential to their success, supporting the recruitment and retention of students as well as faculty, to say nothing of "libraries, laboratories, computers, buildings, travel, research assistance, and the like." The "defining function" of the shell is to raise money from donors and to facilitate "grant and contract application and awards to expand the research base," as well as ensuring "the efficient and effective operation of the institution."[114]

Though the "administrative shell" surrounding the quality engine supplies crucial management and support, its hierarchical organizational structure should not spill over into the "quality engine's academic core."[115] That upsets the balance, and that is the story of the neoliberal university. It is out of balance.

To restore the balance, we faculty "guild" members in neoliberal universities must regain our lost autonomy,[116] by unionizing in public universities, by putting real energy into AAUP chapters in private universities, and by generally stepping up when it comes to university governance. Doing this, we will be better able to use the university as a base from which to help protect the public at large from neoliberalism's onslaught.[117]

Professor Lewis points out that progressive faculty today, like progressive public intellectuals in general, are more and more likely to stand alone, "disconnected from social movements in a way that would have been difficult to predict two decades ago."[118] That's a real problem, and it's especially important because neoliberalism affects not only our university, but our planet, and all its residents.[119]

That leads those of us who are academics to the next step, re-engagement with the community, which I discuss in another article.[120] This is essential to help us struggle against our own elitism as well as to help us make common cause with skilled and resourceful people who are struggling with the neoliberal political economy as surely as we are.

IV. Conclusion

We must protect the honor of our profession[121] and our rights as faculty, not only for our own autonomy and agency, but also to strengthen our engagement with today's fragmented social movements and, indeed, with the communities from which we have come.[122] In the epiphany process, we think outside our respective boxes together, creating a broad-based program out of their work and our own,[123] serving all our interests.[124]

As we undertake such important projects, developing strategies and tactics to solve the economic, social, political, and environmental imbalances that undergird global inequality and exclusion, it is crucial that we model consensus, community and solidarity in our own ranks. This must be a democratic, collegial process involving our students and alumni as well as the participants in today's social movements, and it needs to begin now.[125]

NOTES

1 DAVID HARVEY, NEOLIBERALISM: A BRIEF HISTORY (2005).

2. *See*. James M. Saslow, *Losing Our Faculties,* ACADEME, AMERICAN ASS'N OF UNIVERSITY PROFESSORS (May-June 2012), http://www.aaup.org/article/losing-our-faculties#.VE7inOd9fAo.

3. James Collins, *Foreword,* STRUCTURE AND AGENCY IN THE NEOLIBERAL UNIVERSITY xiii, xiii–xiv (Joyce E. Canaan & Wesley Shumar eds., 2011); *see also* Robert Parry, *The Human Price of Neocon Havoc*, CONSORTIUM NEWS (Oct. 27, 2014), *available at* http://

readersupportednews.org/opinion2/277-75/24843-focus-the-human-price-of-neocon-havoc.

4. *See* HARVEY, *supra* note 1.
5. THOMAS FERGUSON & JOEL ROGERS, RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS (1986).
6. Magda Lewis, *Public Good or Private Value: A Critique of the Commodification of Knowledge in Higher Education—A Canadian Perspective*, in STRUCTURE AND AGENCY IN THE NEOLIBERAL UNIVERSITY 51–52 (Joyce E. Canaan & Wesley Shumar eds., 2011).
7. Collins, *supra* note3, at xiii–xiv.
8. Saslow, *supra* note 2; *see, e.g.*, Rosalind S. Helderman, *Updates: Day Two of the McDonnell Corruption Trial*, WASH. POST (July 29, 2014), http://www.washingtonpost.com/blogs/liveblog-live/liveblog/updates-corruption-trial-begins-for-mcdonnell/?wpisrc=al_lclpolitics.
9. Lewis, *supra* note 6, at 47.
10. *Id.* at 48.
11. *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATIONS IN THE UNITED STATES Ch. 8 (Routledge, 3rd ed. 2014).
12. *Id.* at 49.
13. *See* Saslow, *supra* note 2. ("[F]or preaching that education is for public citizenship, not private productivity, [faculties] are now besieged by an inquisition-cum–hostile takeover. The managerial strategy is to surround and blockade, cutting off all aid and supplies to propel surrender in the face of starvation. For the ivory tower, that means choking off public funds, stripping us of the robes of authority, and undermining public sympathy for the professoriate, represented as a bunch of expensive, meddlesome, and unaccountable slackers.")
14. Carter & Linkins, *infra* note 55 (quoting Prof. Tal Brewer, chair of the University's Philosophy Department.)
15. *Id.*
16. Saslow, *supra* note 2 (Another characteristic, privatization, refers specifically to public universities.)
17. Gavan Gideon, *UP CLOSE: The challenge of 'shared governance,'* YALE DAILY NEWS, (Apr. 12, 2012), http://yaledailynews.com/blog/2012/04/12/up-close-the-challenge-of-shared-governance/.
18. *See, e.g.*, PRESIDENT AND FELLOWS (HARVARD CORPORATION), http://www.harvard.edu/about-harvard/harvards-leadership/president-and-fellows-harvard-corporation (last visited Oct. 27, 2014).
19. *See, e.g.*, Algo D. Henderson, *Association of Governing Boards of Universities and Colleges, The Role of the Governing Board*, 10 AGB REPORTS 2 (1967), *available at* http://eric.ed.gov/?id=ED017244.
20. *See* Gideon, *supra* note 17; *see also* M.M. Chambers, *The University as Corporation*, 2 J. OF HIGHER EDUC. 24, 24-29 (1931).
21. Henderson, *supra* note 19.
22. *Id.*
23. *See* Saslow, *supra* note 2.
24. Oxford is comprised of "constituent colleges," all of which are "self-governing." University-wide affairs are managed by a University Council elected by "Congregation," the members of the University's academic and administrative staff.). *See* UNIVERSITY OF OXFORD, http://en.wikipedia.org/wiki/University_of_Oxford (last visited Oct. 27, 2014); *see also* UNIVERSITY OF OXFORD: STRUCTURE OF THE UNIVERSITY, http://www.ox.ac.uk/new_to_the_university/university_structure.html (last visited Oct. 27, 2014).
25. In Ukraine, advocates of the corporate university have emerged, *see, e.g.*, Alexander Spivakovsky et al., *The University as a Corporation Which Serves Educational Interests*, 347

Communications in Computer and Information Science 60, 60-71 (2013), *available at* http://link.springer.com/chapter/10.1007%2F978-3-642-35737-4_4; *see also* Andrew Chitty, *Burying the Haldane Principle*, Storm Breaking Upon the University (Apr. 1, 2011), http://stormbreaking.blogspot.com/2011/04/burying-haldane-principle.html.

26. *See* Gideon, *supra* note 17.
27. *See, e.g*., University of California, Board of Regents, Bylaw 5: Composition and Powers of the Corporation**,** http://regents.universityofcalifornia.edu/governance/bylaws/bl5.html.
28. Christian Fleck, A Transatlantic History of the Social Sciences: Robber Barons, The Third Reich, and the Invention of Empirical Social Research (2011), *available at* https://www.bloomsburycollections.com/book/a-transatlantic-history-of-the-social-sciences-robber-barons-the-third-reich-and-the-invention-of-empirical-social-research/ch1-the-building-of-an-american-empire.
29. *See* Gideon, *supra* note 17.
30. Saslow, *supra* note 2, introducing *privatization* (the "transfer of universally accessible public services into the realm of private enterprise for profit, largely through cuts in government budgets"; *see also* Scott Peters, *The Faculty's Role in Shared Governance in an Administrative Age*, Universitas (2012-2013), http://www.uni.edu/universitas/print/539 ("[D]eclining state support for higher education has remade the public university.").
31. Pablo Eisenberg, *Quit Corporate Boards*, Inside Higher Ed (March 29, 2010), http://www.insidehighered.com/views/2010/03/29/eisenberg#ixzz39MLfgHhp.
32. *Id.*
33. Katherine Franke, *University of Illinois Urged to Reinstate Professor Steven Salaita, Critic of Israeli War in Gaza*, Democracy Now (Sept. 9, 2014) http://www.democracynow.org/2014/9/9/university_of_illinois_urged_to_reinstate#; *see also* Joyce E. Canaan & Wesley Shumar, *Higher Education in the Era of Globalization and Neoliberalism*, in Structure and Agency in the Neoliberal University 4-5 (Joyce E. Canaan & Wesley Shumar eds., 2011) ("[U]niversities are themselves…having their infrastructure reconfigured in a corporate manner,…[this] [m]arks a profound difference from the universities of the 1970s and 1980s").
34. Franke, *supra* note 33.
35. Saslow, *supra* note 2.
36. Benjamin Ginsberg, The Fall of the Faculty: The Rise of the All-Administrative University and Why It Matters, Ch. 1 (2011).
37. Wanda P. Red, Customer Book Review (reviewing Benjamin Ginsberg, The Fall of the Faculty (2011)), Amazon, http://www.amazon.com/The-Fall-Faculty-Benjamin-Ginsberg/product-reviews/0199975434.
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41. Reynolds, *supra* note 40.
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44. *See, e.g.,* Ashley Woods, *Michigan State University Trustees Spend Lavishly As Student Tuition Skyrockets*, HUFF. POST (Nov. 7, 2013), http://www.huffingtonpost.com/2013/11/07/msu-trustees-spending-college-tuition_n_4233942.html; Erica Perez & Agustin Armendariz, *UCLA Officials Bend Travel Rules With First-Class Flights, Luxury Hotels*, CENTER FOR INVESTIGATIVE REPORTING (Aug. 1, 2013), http://cironline.org/reports/ucla-officials-bend-travel-rules-first-class-flights-luxury-hotels-5072
45. Scott Carlson, *Administrator Hiring Drove 28% Boom in Higher-Ed Work Force*, CHRONICLE OF HIGHER EDUCATION (February 5, 2014), http://chronicle.com/article/Administrator-Hiring-Drove-28-/144519/ ("You see it on every campus—an increase in administration and a decrease in full-time faculty, and an increase in the use of part-time faculty…[along with]rising tuition…." [N]ew administrative positions…drove a 28-percent expansion of the higher-ed work force from 2000 to 2012. [During the same time] the number of full-time faculty and staff members per professional or managerial administrator…declined 40 percent, to around 2.5 to 1…. [and] faculty salaries were "essentially flat"…)
46. Collins, *supra* note 3, at xv; *see also* Marcus, *supra* note 40.
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49. *See* Saslow, *supra* note 2.
50. Benjamin Ginsberg with Robin Young, *Are Bloated Bureaucracies Undermining Higher Education?*, HERE AND NOW, NPR (Nov. 2, 2011), http://hereandnow.wbur.org/2011/11/02/university-cost-bloated.
51. *Id.*
52. Kevin Kiley, *Taking a Precarious Stance*, INSIDE HIGHER ED (Sept. 6, 2012), http://www.insidehighered.com/news/2012/09/06/national-university-faculty-say-administration-cutting-them-out-governance#ixzz362aIwygt.
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59. Collins, *supra* note 3, at xiv; *see also id*., at xv ("[There has been] a shift away from older forms of academic value…and toward more frankly economic calculation.'")
60. Peters, *supra* note 30.
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62. Canaan & Shumar, *supra* note 33, at 19 (Faculty increasingly seen as "subject matter experts"—only one part of a team that packages an educational commodity for on-line distribution).
63. *See* Carl Straumsheim, *Rutgers Boycott Expands*, INSIDE HIGHER ED (Dec. 13, 2013), http://www.insidehighered.com/news/2013/12/13/rutgers-u-liberal-arts-and-science-faculty-join-graduate-school-pearson-boycott.
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67. Douglas Belkin & Caroline Porter, *Corporate Cash Alters University Curricula*, WALL ST. J. (Apr. 7, 2014), http://online.wsj.com/news/articles/SB10001424052702303847804579481500497963552; *see also* Mark Feldman, *More On "Corporate Cash Alters University Curricula,"* INSIDE HIGHER ED (Apr. 8, 2014), http://www.inside-higher-ed.com/more-on-corporate-cash-alters-university-curricula/.
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72. Saslow, *supra* note 2.
73. Canaan & Shumar, *supra* note 33, at 4-6.
74. *How The American University Was Killed in Five Easy Steps*, JUNCTREBELLION BLOG (Aug. 12, 2012), http://junctrebellion.wordpress.com/2012/08/12/how-the-american-university-was-killed-in-five-easy-steps/.
75. *Id.*
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77. *Id*. at 4-6.
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79. *See* Saslow, *supra* note 2
80. *Id.*
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120. *See* Harold McDougall, *The Rebellious Law Professor*, (forthcoming), J. LEGAL ED., (Nov. 2015), with a great debt to Prof. Gerald Lopez of UCLA Law (discussing ways in which our own narratives might open to consider our similarities to and connections with marginalized people and communities who face neoliberalism's onslaught as well, supporting the adage that if one of us is not free, then none of us are. I call this "rebelling off campus.)"
121. *See* DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 285 (Revised ed. 2009) (describing the displacement of professionalism with "the laws of commerce, and the urge for wealth," causing the "bedrock of ethics and values on which the professions had been built" to disappear. "You could look at almost any professional group and see signs of similar problems.")
122. McDougall, *supra*, note 120.
123. *See also* Saslow, *supra* note 2 ("structural problems of higher education" cannot be changed unless we "change priorities in society at large, ultimately a political task." (citing Martha C. Nussbaum's *Not for Profit*, "'we must….work … to give students the capacity to be true democratic citizens of their countries and the world'….For what is at stake in the current academic wars is, quite starkly, the nature of our still nominally democratic society.")
124. *See* Angelo N. Ancheta, *Community Lawyering*, 81 CAL. L. REV. 1363, 1372-73 (1993), at 1398 (Community lawyers must consider themselves "part of the community for which they work," so "[p]ersonal empowerment can go hand-in-hand with…client empowerment.)
125. In one promising development, members of the Denver Law faculty have formed the Rocky Mountain Collective on Race, Place, and Law (RPL) to more fully incorporate the study of racial and other inequities into the school's curriculum and to provide students and faculty an opportunity to study issues of power, locality, law, and the "impact of these forces on subordinated communities." Rocky Mountain Collective on Race, Place & Law, UNIVERSITY OF DENVER: STRUM COLLEGE OF LAW (2014), http://www.law.du.edu/index.php/rocky-mountain-collective-on-race-place. The group has sponsored faculty reading groups, conferences, speakers, seminars, and public information events. Rocky Mountain Collective on Race, Place & Law, *The Equal Protection Initiative*, UNIVERSITY

of Denver: Strum College of Law (2014), http://www.law.du.edu/index.php/rocky-mountain-collective-on-race-place/sponsored-activities/equal-protection-initiative. RPL seems to have reignited the "guild" idea as a community of practice, creating a social movement of sorts among some members of the faculty and student body, and their numbers are growing. They have not yet attempted to exercise agency in faculty governance or by collaborating with community organizations in the field, however. These would both be necessary steps towards achieving the relatively autonomous and socially engaged law faculty guilds which I envision. But they are off to a very good start.

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Crystal N. Abbey

AGENTS OF CHANGE: HOW POLICE AND THE COURTS MISUSE THE LAW TO SILENCE MASS PROTESTS

I. Introduction

In the fall of 1997, nonviolent activists united at Headwaters Forest in northern California to protest redwood tree logging in the area.[1] As part of their demonstration, protesters formed a human chain, linking themselves together with "black bear" devices. The "black bear" device consists of a heavy metal tube housing a welded center rod, within which demonstrators can link arms together while protecting their arms from external force.[2] The device allows protesters to separate at will, but prevents police from doing so forcibly.[3] When police arrived at Headwater Forest, the protesters refused to release themselves.[4] After several failed attempts to pull protesters apart, law enforcement resorted to deliberately violent tactics—including jamming pepper spray-soaked Q-tips into the corners of the protesters' eyes.[5] Even so, the protesters refused to release. The officers again wedged pepper spray-soaked Q-tips into the protesters' eyes.[6]

During a second, similar protest in the fall of 1997 at the Pacific Lumber Company, protesters employed "black bears."[7] In response, police again forced pepper spray-soaked Q-tips into the corners of the protesters' eyes.[8] However, this time, immediately following instructions to release the "black bears,"[9] an officer—from only a few inches away—also sprayed short bursts of pepper spray directly into protesters' faces.[10]

At a third protest against redwood tree logging, this time taking place at a state congressional office, demonstrators relied on "black bears" during their action. Predictably, upon seeing the "black bear" devices, the police officers plied their Q-tips.[11] Officers even pried protesters' eyes open and sprayed pepper spray directly into them.[12] But this time officers went even farther. Instead of deescalating the use of force once protesters were eventually separated from one another, police deliberately continued their gratuitous violence against them—spraying more pepper spray directly into their faces—even after protesters had submitted.[13]

Current international human rights law aspires to defend protesters' freedom of expression and assembly. However, there are shortcomings. Despite

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international bans against the use of chemical agents[14] during international (and non-international) armed conflict[15] and using such weapons as riot control agents,[16] some nations' domestic laws inexplicably permit chemical weapon use against peacefully assembled citizens.[17] Permitting such barbaric practices in domestic situations[18] undermines the underlying principles and values behind various bans on chemical weapon use in war.[19] The First Amendment of the U.S. Constitution protects peaceful protesters' activities, yet First Amendment jurisprudence seemingly does not extend protections to protesters when police use chemical agents against them. Aside from this Constitutional asymmetry, domestic laws permitting chemical agent use against civilians are also fundamentally at odds with international law and the treatment of chemical agents in other comparable international contexts.

Both international customary law[20] and various treaties[21] proscribe offensive (as opposed to defensive) chemical agent use in armed conflicts, including as riot control agents. Yet, at the same time, international law cannot enter into domestic realm and bind unwilling States. Further, the treaties binding the United States currently distinguish between using such weaponry "during hostilities as a method of warfare, which is prohibited, and use for purposes of law-enforcement, which is permitted."[22] Consequently, domestic police forces in the United States may use chemical agents, identical to those forbidden in international contexts, offensively against peacefully assembled citizens.[23]

Adding further to the contradiction,[24] domestically the United States prohibits chemical riot control agent use against enemy combatants,[25] permitting their use only during "*defensive* military modes."[26] To an extent, this approach is in line with international law.[27] Permissible defensive military uses include using chemical riot control agents to discipline rioting prisoners of war under U.S. military control, using chemical riot control agents to minimize civilian casualties, using chemical riot control agents for rescue missions, and using chemical riot control agents to combat "civil disturbances, terrorists, and paramilitary organizations."[28] In light of the narrow range of contexts allowing for chemical weapons use, the use of chemical riot control weapons on peaceful protesters, such as those used against the redwood tree logging demonstrators, violates domestic and international law on its face. Specifically, using domestic chemical riot control agents in peaceful contexts isn't defensive, but *offensive*. While military personnel may only use riot control agents *defensively* during international *armed conflicts*, domestic police are permitted to use riot control agents *offensively* during domestic *peaceful protests*—and regularly do so.

The United States preserves the right to use chemical weapons offensively against civilian demonstrators, because it does not consider chemical riot control agents as "a method of warfare." Under its own exceedingly narrow interpretation of international law, the U.S. uses riot control agents far more

aggressively against its own citizens than would be lawful in actual military contexts, such as during armed conflict.

In doing so, the U.S. has made itself an outlier in the international community. "[T]he vast majority of States, including Australia and the United Kingdom, were of the view that riot-control agents must not be used in hostilities."[29] The point is not that the United States violates international law when it uses such riot control agents domestically. Rather, the paradox revolves around such use of force against peacefully protesting citizens when identical usage during armed hostilities would be patently illegal under international laws that the United States claims to respect. Respect for international law would preclude the use of chemical riot control agents for either offensive or defensive purposes.

Existing international non-treaty (also known as "soft law") standards also restrict offensive chemical agent use, such as when used by police against civilians.[30] For example, the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* instructs governments and law enforcement officers to use the most *proportional* methods of force, so as to avoid unnecessary death or injury.[31] Specifically, General Provision 5 states, "Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall exercise *restraint* in such use and act in *proportion* to the seriousness of the offence."[32] General Provision 8 provides, "Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles."[33] The General Provisions instruct law enforcement officials to "avoid the use of force, or… restrict such force to the minimum extent necessary" when policing unlawful, but non-violent, assemblies.[34]

Police use of force should be proportional to the actual threat posed by demonstrators. The peaceful, nonviolent nature of the protest must be taken into account. Often, as illustrated by the cases below, it is the officers—not the protesters—escalating the need for force and violence. Police either responded disproportionately to demonstrators or police created the exigent circumstances requiring force within the upper (or highest) limits of available responses. In this way, the cases outlined in this article are paradigmatic and they are merely representative of a longstanding and systemic police practice of disproportionately and indiscriminately using potentially lethal chemical agents[35] against peaceful protesters.[36]

International humanitarian and customary law, as well as basic internationally recognized principles on policing, provide the fulcrum for this article. Given current U.S. policy and practice, several important questions must be answered.[37] Chiefly, how can a "civilized" nation, such as the United States, permit chemical weapon use against civilians exercising a fundamental right to

free expression?[38] In light of the history and evolution of prohibitions against chemical agent use both in international and non-international armed conflict, where both sides are *armed*, it would seem that use against peaceful citizens would clearly be prohibited. The ongoing practice is counterintuitive, the legality aberrant and abhorrent. Relatedly, the following question must also be considered: is it the case that, as police forces become more militarized and U.S. law enforcement more closely resembles a *de facto* paramilitary organization, has the definition of "conflict" has changed?[39] Are the police literally waging a kind of war against protesters? Common sense suggests that "conflict," in a legal sense, cannot actually arise when only one party is armed and is the only aggressor. But if the rules of force are in fact changing as police assume a more militarized role, we must understand the evolving nature of the "conflict" and the accompanying legal implications.

II. History as a guide to the explain the savagery of chemical agent use

Chemical agent prohibitions are ancient, dating as far back as the Indian prohibition against toxic weapons in the *Ramayana* and *Mahabharata*.[40] Similar proscriptions are also found in ancient Chinese, Greek, Roman, and Islamic texts.[41] These regulations and restrictions were valued as clear, principled restraints necessary to avoid conflict and, until the end of the nineteenth century, were familiar edicts.[42] At the turn of the nineteenth century, Europe gave birth to modern chemical warfare, a corollary to the Industrial Revolution.[43] Nevertheless, such weaponry was still prohibited and considered "barbarous," in large part because it greatly endangered civilians in close proximity to warring troops.[44]

Despite longstanding cultural prohibitions and more recent cautionary approaches, nations heavily employed chemical weapons during World War I. Germany, in particular, with its vast industrial power, manufactured liquefied chlorine gas in mass quantities in response to intense trench-warfare.[45] Chlorine gas proved to be a very effective weapon for trench-warfare and its advantages encouraged the manufacture of other chemical weapons, such as mustard gas.[46] Many World War I soldiers exposed to mustard gas experienced injuries, such as severe eye trauma and chronic respiratory failure, that lasted long after the war—some injuries persisting nearly 40 years later.[47] The international community was outraged at these outcomes. In response, nations that employed poisonous gases during World War I agreed to express international prohibitions against such weaponry in future warfare.[48]

During World War II nations did not employ chemical agents to the same extent that they used them during World War I, with one notable exception: Germany. Before the Final Solution, Germany used chemical agents to sterilize and euthanize millions of people.[49] I.G. Farben, a German chemical manufacturer, provided the Nazis with those chemical agents. I.G. Farben

provided the original canisters of carbon monoxide gas for the Nazi killing centers.[50] By 1943 it had provided the Nazis with an even more deadly weapon, hydrogen cyanide, or Zyklon B. Zyklon B is a powerful pesticide fumigation agent, and I.G. Farben's mass production of the weapon helped the Nazis to murder millions.[51]

At the end of World War II, the Allied Powers (the United States, France, China, Russia, and Britain) formed the International Military Tribunal in Nuremberg.[52] The Allied Powers also created National Military Tribunals, held in different allied-occupied territories. In the United States' National Military Tribunal case *United States v. Krauch* [Trial No. 6],[53] the United States prosecuted I.G. Farben for participating in crimes against peace, plunder, spoliation, and involvement in slave labor.[54] Part of the indictment stated that I.G. Farben "knowingly supplied Zyklon B poison gas . . . , conducted notorious medical experiments upon unwilling prisoners at Auschwitz, and operated a massive industrial complex next to Auschwitz."[55] The Court, however, dismissed the poison gas allegations because the prosecution failed to prove I.G. Farben had significant knowledge[56] that the SS (*Schutzstaffel*) murdered millions of people with Zyklon B, instead of using it as an insecticide.[57] Notably, neither the prosecution, as a legal basis for its indictment, nor the final opinion of the tribunal mentioned any of the international treaties prohibiting the use of this type of chemical agent during warfare.[58]

Following the Nuremberg trials and the Cold War, the United Nations General Assembly passed a resolution applying the 1925 Geneva Gas Protocol to any armed conflict.[59] Accordingly, in either international or non-international armed conflicts, chemical agent use against civilians violates customary international law.[60]

United Nations' resolutions banning chemical agents are gaining increasing international acceptance. In 1972, the U.N. adopted the Biological Weapons Convention and, later, the 1993 Chemical Weapons Convention.[61] Notably, 1993 Chemical Weapons Convention regulates international armed conflicts and non-international armed conflict in identical fashion, applying broad prohibitory language in both circumstances.[62] For example, Article I prohibits States Parties[63] from developing, producing, acquiring, stockpiling, retaining, transferring, or using chemical weapons "under any circumstances,"[64] in both international armed conflicts and non-international armed conflicts.[65]

A close review of the history and evolution of international chemical weapons bans reveals a strong disconnect between international prohibitions against chemical weapon use during wartime (under almost all circumstances) and the domestic laws in the United States permitting chemical agent use against peaceful protesters. One common attempt to reconcile these conflicting approaches suggests that domestic police use of chemical weapons is qualitatively

different in nature and lethality than chemical agents deployed in combat. However, this answer is proves too much, for reasons explained below. In actuality, the historical, worldwide ban against most forms of chemical agent use exposes the depravity of United States law enforcement officers' treatment of peaceful protesters.

III. Responding to peaceful protests: Deliberate excessive police force?

A. Non-lethal vs. less-lethal weapons—still excessive?

The United States' and NATO's definition of non-lethal weapons is problematically narrow.[66] For example, the United States Department of Defense defines non-lethal weapons as those that are "designed to incapacitate while minimizing fatalities and permanent" injuries.[67] NATO similarly defines non-lethal weapons as those weapons that incapacitate with a "low probability of fatality or permanent injury."[68] However, the term "non-lethal" connotes that there are *no* fatalities when police, paramilitary, or military organizations use such weapons.[69] By contrast, the U.S. and NATO definitions plainly state that non-lethal weapons merely diminish the number of fatalities. Tellingly, these definitions fail to specify how many lives are actually spared by non-lethal weapons use.[70] Clearly, these two definitions do not describe *non*-lethal weapons, but rather *less*-lethal weapons.

To determine the lawfulness of whether a weapon is non-lethal, the following factors must be considered: (1) design, (2) range, (3) power settings, (4) environmental impact, (5) discriminate or indiscriminate use, (6) whether the weapon complies with the prescribed rules and standards governing weapon use (such as proportionality) and (7) which rules apply to the weapon's technology.[71] But the difference between a "lethal" and "non-lethal" agent is sometimes merely nominal.[72] Pepper spray, for example, "can cause respiratory failure in susceptible individuals."[73] Other riot control agents such as chlorobenzylidene-malononitrile (CS) and chloroacetophenone (CN) gas can be lethal at a rate of 0.5 percent or higher.[74] These riot control agents can become lethal even when used according to specifications. Less-lethal weapons also have the potential to kill.[75]

Modern police forces model themselves after paramilitary organizations by stockpiling and deploying rubber bullets, pepper spray, beanbag launchers, paint-ball guns, and concussion grenades to combat protesters.[76] Again, this creates a baffling absurdity in which various legal mechanisms prohibit the military from using riot control agents against enemy combatants, but domestic police officers may use riot control agents against domestic peaceful protesters.

Pepper spray is the most common, less-lethal chemical agent currently used by law enforcement for riot control. Police believe "[t]he ability to use force remains a necessary and critical aspect of policing"[77] because it allows police to constrain and repress people's behavior.[78] Law enforcement employs

three different types of chemical agents against citizens. First, officers use CN gas, which is a type of tear gas that is dispersed into the air. Exposure to CN "causes the eyes to water uncontrollably . . . shortness of breath, stinging sensations on the skin[,] and nausea."[79] Psychological effects include "fear and panic, simultaneously."[80] Second, officers use CS gas, which "immediately affects the mucous membranes of the eyes, nose, and throat, producing tears, incessant coughing, respiratory distress and a burning sensation on the skin."[81] Psychological effects include "fear, panic[,] and cognitive disorientation."[82] Lastly, officers deploy oleoresin capsicum (OC, or pepper spray), derived from the cayenne pepper plant.[83] Physical effects from OC exposure include "swelling in the mucous membranes of the eyes, nose, and throat."[845] Pepper spray exposure also causes capillary dilation and involuntary eye closure; "nasal and sinus drainage; constricted airway; temporary [larynx paralysis precipitating] gagging, coughing, and shortness of breath[,]"[85] and skin irritation and inflammation.[86] The physical and psychological effects resulting from pepper spray are precisely why law enforcement finds pepper spray so effective—the chemical agents incapacitate and force protesters into submission.

In short, law enforcement does not actually use non-lethal weapons. Protester fatalities would be zero if this were the case. However, the use of less-lethal weapons, like pepper spray and other riot control agents, do not necessarily provide law enforcement with less violent means to respond to peaceful protesters—particularly when police use these weapons *offensively*. The weapons described above are attempts to limit fatalities and injuries, but such they may not always succeed.

B. Hypermilitarized excessive force and questions regarding proportionality

Police use gentler tactics against those they deem "good protesters." Police use more aggressive or violent tactics against "bad protesters."[87] A "good protester" is a protester police think has a legitimate reason for protesting, e.g. union picketing.[88] Law enforcement generally responds to this type of protest with more tolerance and exercises more generous restraint. Police deem those who protest impersonal issues, like environmental abuses, as "bad protesters." Law enforcement tends to look down upon these more politicized protesters, even as they exercise their same protected right to free expression.[89] Thus, police are more likely to employ violent tactics against "bad protesters," most often with pepper spray, because of cultural attitudes that encourage less tolerance and less generous discretion toward mass political demonstrations. All protesters have a Constitutional and human right to freely express themselves. Despite this basic principle, police officers often make arbitrary determinations and deliberately apply excessive force against peaceful protesters—the same excessive force that military personnel are prohibited from using against enemy combatants.

Nowadays police officers look increasingly like armed forces heading off to battle and less like civilians enforcing the rule of law. This is especially the case when police respond to mass protests. Take Ferguson, Missouri, for example. Various pictures and videos taken by private citizens and uploaded to the internet show police officers in army fatigues, guns aimed at unarmed civilians, and military-grade equipment at the ready. Images like these have become ubiquitous.

To cite one of the most famous historical examples, foreshadowing countless others, is the 1968 Chicago Democratic National Convention (DNC). There, protests erupted and police responded with brute force. Protesters rallied against the Vietnam War peacefully until police physically attacked them. Police beat protesters with their batons[90] and sprayed them with pepper spray and tear gas. In response, Chicago Mayor Richard Daly further escalated the antagonism by calling up more than 20,000 police and National Guard troops to secure the convention.[91] One senator at the DNC compared Daley's response to the Gestapo, proclaiming "With George McGovern, we wouldn't have Gestapo tactics on the streets of Chicago!"[92] Mayor Daley did not do much to distance himself from the Nazi analogy. Rather, lip readers later alleged that he shouted up from the convention floor, "Fuck you, you Jew son of a bitch! You lousy motherfucker! Go home!"[93]

Fast forward to a more recent historical example, the 1999 World Trade Organization protest.[94] Protesters withstood Seattle law enforcement's use of pepper spray, tear gas, concussion grenades, and rubber bullets[95] as police on the ground used force to incapacitate them.[96] Nonetheless, non-threatening protesters sat in an intersection and locked arms forming a human knot.[97] Police then informed the protesters that failure to disengage and vacate the intersection would result in arrests.[98] When none of the protesters moved, the police hurled tear-gas at the protesters.[99] Chaos ensued and the Seattle mayor, Paul Schell, criminalized gas mask possession, among other constitutionally questionable acts.[100] Law enforcement's more appropriate response would have been to use no force against peaceful protesters and instead arrest only those protesters committing violent crimes. The Seattle police response is an all too familiar one. It was excessive and dangerous.

At the Denver Democratic National Convention in 2008 plainclothes officers wore t-shirts emblazoned with phrases like: "I get up early to beat the crowds" and "We kicked your father's ass in 1968 … Wait 'til you see what we do to you!"[101] As if that did not send a clear enough message to protesters, cops showed up to the convention in "shiny black armor, batons in hand, surrounding a small, vastly outnumbered group of protesters."[102] The most violent clash occurred between county deputies and undercover Denver cops posing as violent protesters.[103] County deputies pepper-sprayed the undercover

Denver cops, not knowing they were undercover—it was a shoot-first-ask-questions-later scenario, an all too familiar scene with mass protests. Law enforcement attempted to use agent provocateurs to incite peaceful protesters to violence.[104] That is, they were creating crimes for themselves to police—and undermining the protesters' right to expression and assembly in the process.

The following year at the G20 Summit in Pittsburgh, protesters described an even more aggressive and militant scene. One protester's photo depicted a police officer standing in the middle of an intersection wearing an olive-drab top, forest camo pants, and combat boots.[105] The officer also wore a handgun strapped to his thigh and carried another in hand.[106] The camo looks distinctly out of place in this quintessential urban setting. The officer's absurd costume emphasizes the hyper-militarized persona so many officers display when countering mass protests.[107]

Throughout the protest, several citizen-journalists posted YouTube videos of police officers dressed in military gear, yanking students up off the street and tossing them into unmarked cars.[108] Other citizen-journalists tweeted and uploaded pictures and videos of police shooting tear-gas, beanbags, and rubber bullets into dorm rooms.[109] Still others blogged about the protests and documented how law enforcement arrested people under the theory that they could *potentially* disrupt traffic and exits. No one had actually broken the law prior to his or her arrest.[110] Police officers, including a freelance security unit from Chicago, arrested anyone who *looked like* they might break the law, namely young students.[111] According to the Pennsylvania ACLU Director, Vic Walczak, "the police presence 'seemed to focus almost exclusively on peaceful demonstrators[.]'"[112] In the end, police arrested 190 people, one of which was an actual journalist. Police not only confiscated the journalist's camera but also destroyed the camera and deleted all the photographs and videos she took during the protests, which included pictures of the officers' response.[113]

Yet again in 2011, during the Occupy Protests, a University of California police officer hosed a peaceful protester with pepper-spray.[114] Captured on film, the image went viral and the internet had a field day manipulating the image.[115] Across the nation, police met Occupy protesters in full riot gear looking to pick a fight.[116] One encounter in New York included officers spraying pepper spray at a group of protesters that officers penned in with police fencing.[117]

Occupy reignited public discussion about police militarization thanks in large part to citizen reporting on social media sites like Instagram, YouTube, Twitter, Facebook, Reddit, blogs, and more.[118] Young people armed with smart phones live-streamed video coverage of police using deliberate physical aggression. Oftentimes, even if an officer was able to take the phone or arrest the protester, another protester was already documenting the incident and, as a result, the police could not suppress these stories.

In August 2014 a Ferguson, Missouri police officer named Darren Wilson shot and killed Michael Brown, an unarmed black teenager. Fed-up citizens, enraged by an oppressive police regime routinely targeting black people, erupted in protest. In response, Ferguson police, Missouri state police, and the National Guard came to quell the protests—to no avail. The incident hit national news and demonstrations continued, with varying degrees of frequency and intensity, for months. Not long after the shooting, John Oliver, host of HBO's satirical news show "Last Week Tonight," explained the hyper-militarized and wildly disproportionate response to citizen unrest.[119] Oliver compared images from the war in the Middle East with images from Ferguson. The images were eerily similar.[120] The situation worsened when, predictably, a grand jury failed to find sufficient evidence to support an indictment against Officer Wilson.[121]

War-like images are a common way for for-profit companies to hawk their made-for-war weapons and gear to municipal police departments, just as they do the military. The idea that police and military forces are fighting wars—the war on crime, the war on drugs, war on terror, all faceless and abstract enemies—permits these companies to sell MP5 semi-automatic machine guns, for instance, under the slogan: "From the Gulf War to the Drug War—Battle Proven."[122] With advertisements like this, it is no wonder that cops, who are civilians, see themselves as a military unit fighting a war on home soil.[123] Armed with violent, less-lethal riot control and chemical agents, the modern police officer is armed for war against citizen protesters.

IV. Judicial responses to police deliberate excessive use of force: chilling free speech and assembly

A. Excessive force law in the United States

Meanwhile, the Supreme Court often allows law enforcement to use violent measures to break up protests without any consequences. The Supreme Court applies a reasonableness standard for excessive force. [124] The Court discerns whether law enforcement used reasonable "non-deadly" force by balancing law enforcement's "intrusion on the individual's Fourth Amendment interests" against the government's interests.[125] This balancing approach has created confusion. Some courts will find law enforcement's use of pepper spray on an arrestee actively resisting arrest or refusing police requests to be excessive, while other courts hold that the use was reasonable.[126] As a result, police officers apply these standards to criminal suspects and peaceful law-abiding citizens indiscriminately. Yet, the use of force applied to a criminal resisting arrest should not be the same as the force applied to peaceful law-abiding citizens exercising their constitutional right to expression and assembly.

Protesters may sue law enforcement for unreasonable and excessive use of force under 42 U.S.C. §1983, the Federal Civil Rights Act. Courts examine

Section 1983 violations to determine (1) which specific constitutional right the officer-defendant violated via excessive force, thereby determining the standard to measure excessiveness, (2) "whether the defendant's use of force actually violated the governing constitutional standard," and (3) "whether the constitutional right was 'clearly established' at the time of the defendant's actions," an analysis relevant to a defendant's qualified immunity.[127] Courts determine whether an officer-defendant's use of force is unreasonable based on the totality of the circumstances, which may include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[128] While the standard is objective—meaning the officer's specific intentions are irrelevant[129]—courts tend to give the officer extreme deference, recognizing the officer's need to make split-second decisions during tense situations.[130]

In *Headwaters Forest Defense v. County of Humboldt*, the Ninth Circuit Court of Appeals held that the police used excessive force against environmental protesters.[131] The court reasoned, "pepper spray was unnecessary to subdue, remove, or arrest the protesters" and that the officers could have reached their desired results by using safer and less excessive means to release the protesters from the "black bears."[132] Consistent with this reasoning, the court found the protesters did not actively resist the officers but rather peacefully conducted a sit-in, which further contributed to the court's conclusion that the police used more force than reasonably necessary.[133]

By contrast, the Supreme Court determined in *California v. Hodari D.*[134] that the Fourth Amendment might not provide constitutional protection against excessive use of force. The Court held that the Fourth Amendment applies to only two types of seizures:[135] (1) physical contact between the officer and suspect and (2) an officer's nonphysical demonstration of authority where the suspect surrenders. [136] The Fourth Amendment's narrowly defined "seizure" provision does not apply to chemical agent use or other less-lethal weapon use that police administer from a distance, such as pepper spray or tear gas.[137] The ruling, in effect, heightens the protester's burden by having to prove that the officer intended to cause the protester harm, and in doing so violated the protester's due process rights.[138] Accordingly, the Court's standard tilts the scales in favor of the police and does not provide protesters a successful avenue to seek relief for law enforcement's excessive use of force.[139]

Statements such as "Officers' safety comes first, and not infringing on people's rights comes second,"[140] and "I have my own army in the NYPD—the seventh largest army in the world,"[141] are illustrative of a new, militarized police ideology that has become as pervasive as it is frightening.

B. Civil disobedience law in the United States.

In the United States, courts do not consider civil disobedience to be legal defense per se, regardless of the act's moral content. Courts may or may not allow a defendant charged with a crime arising out of civil disobedience to present an argument justifying the act. Acts of civil disobedience, when prosecuted, often result in convictions.

In general, most courts refuse to acknowledge rights to freedom of expression, assembly, and petition as a defense where the defendants violated laws that only incidentally burden speech—for example, when violating a simple anti-trespassing law, a common offense in many protest cases.[142] One court found that the police did not violate the defendant's right to expression and assembly where the defendant trespassed on a military base to express anti-war beliefs.[143] Another court determined that the right to expression and assembly did not apply when the defendant criminally trespassed at a nuclear power plant, operated by the Department of Energy, to protest nuclear policies.[144] A third court also found that student demonstrators did not have rights under free expression, assembly, or due process to obstruct a state university building to protest the Vietnam War.[145]

In addition to measures censoring content, courts examine laws limiting the time, place, and manner in which expression can occur. The Supreme Court determined that limits on the right of speakers to access public property differs depending on the type of property on which they wish to express themselves.[146] First, streets and parks "'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[147] In order to validly exclude someone from public property because of the content of what the person is saying, the regulation must be "necessary to serve a compelling state interest" and be "narrowly drawn to achieve that end."[148] The court closely scrutinizes any restrictions a state places on speech occurring in a public forum because everyone has a constitutional right of access. In fact, "the state must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject."[149] Alternatively, the state may enforce time, place, and manner restrictions on expression where the regulation is content-neutral, the regulation is narrowly tailored to serve a significant government interest, and the regulation leaves open "ample alternative channels of communication."[150]

A second category of public spaces are those that a state has provided as open places for expressive activity, such as: university meeting facilities,[151] school board meetings,[152] and municipal theaters.[153] A state is not required to keep the facility open and public indefinitely, but as long as the state does so, the same standards as a traditional public forum apply.[154] In other words, a state

may not exclude certain viewpoints or persons from a forum that is usually open to the public even if the state was not required to establish the forum.[155] However, public property that is not traditionally a public forum does not have the same freedom of expression and assembly protections "simply because it is owned or controlled by the government."[156] Rather, a state may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[157]

1. Civil disobedience and rules of evidence in protesters' trials

In light of courts' reluctance to recognize civil disobedience as a legal defense or recognize free speech and assembly as a protection for protesters' civil disobedience, protester-defendants in the United States have attempted to raise necessity defenses as an affirmative defense to charges relating to their protests. But defendants have so far raised such defenses unsuccessfully. The federal courts do not recognize necessity as a defense in an indirect civil disobedience case.[158] Indirect civil disobedience "involves violating a law or interfering with a government policy that is not, itself, the object of the protest."[159] Indeed, one court stated, "'[necessity] is obviously not a defense to charges arising from a typical protest.'"[160] By contrast, another court noted that necessity may be a defense in direct civil disobedience cases. Direct civil disobedience "involves protesting the existence of a law by breaking that law or by preventing the execution of that law in a specific instance in which a particularized harm would otherwise follow."[161] Examples of direct civil disobedience occurred during the Civil Rights Movement when, for example, activists protested laws prohibiting blacks from sitting at the same lunch counters as whites by doing exactly what the law prohibited.[162]

In order to raise a successful necessity defense to direct civil disobedience, defendants must show: (1) they had no other options and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct link between their violation of the law and the object of their protest; and (4) they had no legal alternative to violating the law.[163] During the process of considering defenses, judges have broad discretion to exclude defense evidence if these elements are not satisfied. Even if a defendant satisfies these criteria, courts will likely bar protester-defendants from raising necessity as a defense. The bottom line is "that civil disobedients cannot raise the defense of necessity in court."[164]

One federal court found that protesters could not raise a necessity defense where the law they violated was not the law they were protesting—in other words, committing indirect civil disobedience. In that case, thirty people protested at a federal tax office chanting, "keep America's tax dollars out of El Salvador" and splashed fake blood throughout the office.[165] At trial, defendants

raised the necessity defense, arguing that their protest was necessary to prevent other deaths in El Salvador.[166] The court, as a matter of law, prohibited the protesters from raising the necessity defense.[167] The district court denied the defense on the basis that the defendants failed to prove immediacy, their actions would not prevent the evil, and that other legal alternatives existed for them to make their point.[168] The court also determined that because the protesters did not challenge the law they broke, necessity could not be raised.[169] The court stated that, as a matter of law, "the mere existence of a policy or law validly enacted by Congress cannot constitute a cognizable harm."[170]

But, perhaps most commonly, courts will determine that a defendant failed to successfully raise the necessity defense because the defendant had other legally reasonable alternatives to make their point. A defendant "must show that [the defendant] had actually tried the alternative or had no time to try it, or that *a history of futile attempts* [to remedy the dire situation] revealed the illusionary benefit of [any] alternative [to civil disobedience]."[171] A single contact to the authority, i.e. Congress, will not satisfy the "history of futile attempts" requirement. As a result, absent evidence that the defendant attempted a reasonable alternative, most protester-defendants will fail to meet this high standard.[172]

Applying this high standard, one court prohibited defendants from presenting any evidence at trial relating to a duress or justification defense, as well as necessity, self-defense, defense of others, and defense of property.[173] An appellate court upheld the lower court's decision finding that defendants failed to offer evidence supporting a necessity defense because the defendants had avenues other than criminal trespass to make their protest.[174] Yet another court determined that just because a defendant is unlikely to effectuate his or her desired change through legal alternatives, does not render those alternatives as nonexistent.[175] Such legal alternatives, according to one court, include the electoral process; public speeches in public forums such as streets, parks, auditoriums, churches and lecture halls; and media releases.[176] Likewise, another court determined that protesters destroying government property[177] had other legally reasonable alternatives such as petitioning Congress or the President. The court determined that necessity is not a defense just because Congress or the President does not consider, follow, or heed the message and that the direct consequence of the protesters' actions would not be nuclear disarmament.[178] In sum, "a defendant's legal alternatives will rarely, if ever, be deemed exhausted when the harm of which he complains can be [abated] by political action."[179]

What is more, several courts reasoned that protester-defendants failed to demonstrate a direct causal link between their violation of the law and the object of their protest. For example, a court determined that the defendant

had not proven that there was a lack of other adequate means or a direct causal relationship between the criminal act and the object of the protest. In that case, the court prohibited testimony regarding nuclear weapons in the United States, the policies governing those nuclear weapons, and the legality of nuclear weapons in international law.[180] The court prohibited this testimony because defendants lacked sufficient evidence to support how they lacked other means to demonstrate that there was a direct relationship between their criminal act and the object of their protest.[181] In another case, a court found that the defendant failed to prove that the criminal act would reasonably result in achieving the goal of the protest. The court stated that, "[a] defendant must demonstrate cause and effect between an act of protest and the achievement of the goal of the protest by competent evidence."[182] Unsurprisingly, the court determined that the defendant failed to provide any evidence to support this part of its defense.[183]

Despite the courts' general reluctance to allow protester-defendants to raise necessity as a defense, there have been a few exceptions. In one case, a court found that a protest by trespass was the only effective option for expressing the protesters' message.[184] In another case, a court likewise determined that protest via trespass was the only effective option for protests against nuclear proliferation. The court reasoned:

> There isn't another thing these two people can do. A letter to Congress has been sent and has not accomplished anything. The Congress voted for nuclear freeze in one vote and voted for the arms race in another. There are some who say that there is absolutely no prospect of the administration or the Congress to bring this matter to a successful conclusion and that the track record proves it and that the only possibility, however remote, the only possibility of survival lies in protest. If people believe that, who can say they are wrong?[185]

These two cases illustrate the sympathy that some courts have displayed towards protester-defendants. However, these two cases are the exception, not the rule.

2. Civil disobedience and jury instructions

If a judge permits a defendant to present evidence relating to necessity, the judge may still prohibit the jury from considering that evidence via jury instructions. In protester-defendant cases, judges usually do not instruct the jury on the necessity defense, even in those rare instances when the judge allows the defense. In one such case, protesters broke into, vandalized, and destroyed the Dow Chemical Company's property.[186] The purpose was to protest Dow's napalm manufacturing and its use in the Vietnam War.[187] However, the trial court denied a jury nullification instruction.[188] The trial judge instructed the jury to disregard the defendant's political motivations for breaking the law while deliberating.[189] Such an instruction undermines the necessity defense altogether.

In contrast, two courts actually issued jury nullification instructions. In one case, regarding Vietnam anti-war activists who destroyed draft records, the judge permitted the jury to disregard the law if the jurors believed that convicting the defendants would be "offensive to the basic standards of decency, and shocking to the universal sense of justice."[190] Similarly, in a case where anti-war protesters blocked a train carrying bombs destined for Vietnam, a jury acquitted the defendants despite believing they were guilty because the jurors "sympathized with the protesters' opposition to President Nixon's continuation of the Vietnam war."[191]

In sum, courts generally do not recognize protesters' First Amendment rights as a shield from criminal prosecution. The necessity defense, although creative, has been unsuccessful for protesters and cannot prevent the chilling effect that prosecutions of protesters have on the exercise of free expression and assembly.

C. The right to free speech and assembly and police excessive use of force claims: the First and Fourth Amendment collide

Excessive force cases arising out of protests often involve First and Fourth Amendment claims. The First Amendment protects individuals against police tactics that (may) chill speech, while the Fourth Amendment protects against aggressive police tactics amounting to unreasonable searches and seizures.[192] Courts should interpret the two amendments in conjunction with one another.[193] Additionally, legislatures should place legal limits on police responses to protests.

"Protest policing" is one area of police discretion that should be curtailed in order to protect demonstrators' First Amendment rights. "Protest policing" consists of monitoring and limiting public demonstrations. It requires police to reach a difficult balance between protecting the social order and ensuring individual citizens' rights to political association and expression—"the very essence of the democratic system."[194] Under prevailing "protest policing" strategies, law enforcement's only tactic to control protests is through force that escalates in severity. The escalation does not reach a climax until the police either end their violent attacks, arrest the protesters or the protesters give up.[195] Courts should not afford police a wide range of discretion during these situations because discretion creates more opportunities for violence, which in turn violates protesters' First Amendment rights.[196]

Speech involving civil disobedience is important to maintaining democratic society, worthy of First Amendment protection, and should not be subject to law enforcement's use of chemical agents. Civil disobedience plays an essential role advancing democracy in the U.S. The idea that citizens should limit government power has always been an essential part of the U.S. political orthodoxy—and for good reason.[197] Civil disobedience allows marginalized

minorities to affect political change within democratic systems, as ours purports to be.[198] Law enforcement retains legitimate authority to maintain order but not at the expense of demonstrators' First Amendment rights.[199]

The right to free speech is empty and meaningless without the right to do so in relevant public places. The state should curtail speech only when there is a "'probability of serious injury to the State,'" or a clear and present danger.[200] Yet law enforcement will arrest a protester who temporarily obstructs a sidewalk but does not cause a serious threat to passersby, needlessly separating the speaker from his audience.[201] Responding to protesters engaged in acts of civil disobedience with chemical agents such as pepper spray or tear gas is a radically disproportional and needlessly aggressive overreaction.

As mentioned above, courts should appreciate the connection between the First and Fourth Amendment in protester cases. However, relevant Supreme Court cases indicate that the high court has no such appreciation.[202] For example in, *Heller v. New York,* the Court reasoned that the Fourth Amendment should be applied with "'particular exactitude,'" when a search may have endangered First Amendment rights.[203] Nevertheless, if a plaintiff cannot make a Fourth Amendment claim, the Court dismisses the case without examining the First Amendment implications.[204] If a plaintiff raises a First and Fourth Amendment claims, the Court separates the issues without recognizing the interplay between the two.[205] Some commentators observed, "This type of analysis short-changes the interests protected by both amendments."[206]

For instance, while addressing a protester's Fourth Amendment excessive force claim in *Smith v. Ball*, the Ninth Circuit Court of Appeals neglected the protester's First Amendment claim.[207] The court held that even if the protester's excessive force complaint had merit, her First Amendment argument failed.[208] The court reasoned that expressive conduct on public property is subject to time, place, and manner restrictions and the National Forest Service did not violate the protester's First Amendment rights.[209] Because the court did not find a First Amendment violation, the court effectively decided that no use of force would chill the protester's speech. The court's finding not only chilled the protester's speech but other protesters' speech as well. By not finding a First Amendment violation, the court failed to consider the First Amendment analysis when examining the protester's Fourth Amendment Claim. By not addressing First and Fourth Amendment claims simultaneously, or at least in conjunction with one another, police have the same broad discretion to respond to demonstrations and protest as they do in dealing with serious criminals.[210] Allowing law enforcement so much discretion serves only to chill protesters' speech.[211]

By considering the free speech interests in excessive deliberate force claims, courts will promote less violent and less aggressive police tactics and

responses.[212] Officers should not resort to arrests when the First Amendment interest is greater than the public safety concern, either on an individual or on a crowd control basis.[213] One simple solution might be for law enforcement to write tickets or citations to protesters. This would be a more proportional response that avoids intruding on protesters' First Amendment rights.[214] Moreover, the Fourth Amendment's current reasonableness standard for searches and seizures require courts to balance the states' interest and protesters' individual rights[215]—a balance that is currently out-of-whack.

Law enforcement should only use physical force when such a response would be proportional to the suspect's actions.[216] Police should respond to protests and demonstrations by the most minimally intrusive means possible.[217] Such minimally intrusive responses might include negotiation, patience in waiting for the demonstration to end, or removing protesters with minimal force.[218] More peaceful tactics like these convey respect for the protesters' speech and assembly rights and therefore pose a lower risk of chilling the exercise of those rights.[219] Conversely, when using violence, as when police employ chemical agents against peaceful protesters, tensions between law enforcement and protesters needlessly grow in scope and intensity.[220]

V. Conclusion

The historical international law prohibition against chemical agent use as a method of warfare dates far back before the development of modern chemical agents. This history of concern for human rights explains why the international community bans chemical agents as a method and means of warfare. Chemical agents cause inhumane and disproportional physical and psychological damage. Nearly all nations, including the United States, recognize that chemical agents should be banned in armed conflicts but do not recognize the same principle in domestic law enforcement responses against peaceful protesters. This is evidenced in the international legal mechanisms—treaties, customary law, and non-treaty instruments—that prohibit chemical weapon use during armed conflict. The reasoning behind the ban during armed conflicts should also apply to one-sided armed conflict, namely scenarios where law enforcement turns advances in chemical science into a weapon against peaceful protesters.

The only check or balance against this type of force are civil suits without criminal liability, whereas criminal liability and even war crimes charges are possible consequences to military use of chemical agents outside domestic borders. If domestic law enforcement acts like a military organization, it should be subject to the rules of military engagement. Moreover, individuals cannot effectively exercise their right to protest, the allowance of which is necessary to a democracy, without fear of police attacking protesters with a chemical agent. The United States cannot and should not maintain a police

practice that violates deep-seated historical, humanitarian, constitutional, and moral principles.

Even less-lethal weapons, like pepper spray and tear gas, when used deliberately and with excessive force, chills the speech of unarmed and nonviolent protesters and those who might otherwise be inclined to join them. In order to promote the spirit of the First Amendment, courts must move toward punishing officers who employ deliberate excessive force that is disproportionate to the threat posed by suspects. The courts must also recognize the First Amendment as a viable defense to criminal charges stemming from mass public demonstrations. If the courts recognize the interplay between the First and Fourth Amendments, the court will give less weight to officers' subjective split-second decision-making and more weight to the rights to free expression and assembly.

NOTES

1. Headwaters Forest Defense v. County of Humboldt, 276 F.3d 1125, 1127–28 (9th Cir. 2002).
2. *Id.* at 1128.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 1129.
12. *Id.*
13. *Id.*
14. "A chemical agent or weapon is one that is toxic; 'its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.'" GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR, 607 (2010) (quoting Convention on the Prohibition of the Development, Production, and Stockpiling, of Bacteriological (Biological) and Toxin Weapons, art. 2, Feb. 25, 1972, 18 U.S.C.A. § 175, 26 U.S.T. 583 (entered into force Mar. 26, 1975) [hereinafter Biological Weapons Convention]). However, the Chemical Weapons Convention has not defined CS gas as a riot control agent as opposed to a wartime weapon. CS gas is i-chlorobenzylidenemalononitrule. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (entered into force April 29, 1997) [hereinafter 1993 Chemical Weapons Convention or CWC] *See also*. *infra* section III. A. Article I(5) does not appear to prohibit all CS gas use. Specifically, Article I(5) states, "Each State Party undertakes not to use riot control agents as a method of warfare."
15. These terms are broader, capturing armed conflicts where one side or the other refuses to formally acknowledge the conflict as a war or a civil war. With that being said, international armed conflicts may be thought of as "wars" and non-international armed conflicts may be thought of as "civil wars." The latter is distinguishable from ordinary domestic conflicts, which are less organized and usually smaller in scale. Therefore, this article

will use the term "war" without making this distinction. However, these distinctions are worth bearing in mind because legal consequences flow from whether a conflict can be characterized as "international armed conflict" versus "non-international armed conflict" versus "domestic conflict." For further discussion on the distinction between international armed conflict and non-international armed conflict, as well as what constitutes "armed conflict," *see*, Prosecutor v. Tadic, Case No. IT-94-1-I, Judgment, ¶557–71 (Int'l Crim. Former Yugoslavia, July 15, 1999).

16. The 1993 Chemical Weapons Convention defines riot control agents as, "'any chemical not listed in a Schedule which can produce rapidly in humans [*sic*] sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.'" 1993 Chemical Weapons Convention, *supra* note 14, art. 2(7).
17. The reason for the prohibition in international armed conflict and non-international armed conflict appears to be a type of slippery slope argument that such use may escalate into the use of even more deadly chemical weapons. *See infra* note 20. If one accepts such argument under international law, it applies equally to domestic riot control situations. As the examples throughout this article demonstrate, use of such agents domestically often escalates far beyond any plausible need and beyond what is constitutionally acceptable. *See* L.A. Whitt, *Acceptance and the Problem of Slippery-Slope Insensitivity in Rule Utilitarianism*, 13 DIALOGUE 649 (1984) (explaining that slippery slope arguments are inherently dubious, absent the kind of empirical support that is available in this instance).
18. *See* 1993 Chemical Weapons Convention, *supra* note 14, art. 2(9)(d) (permitting States to allow police units to use chemical agents consistent with the Convention's restrictions).
19. The Chemical Weapons Convention , art. 2(7) defines riot control agents as "any chemical not listed in a Schedule which can produce rapidly in humans [*sic*] sensory irritation or disabling physical effects which disappear within a short time following termination of exposure." 1993 Chemical Weapons Convention, *supra* note 14, art. 2(7). *See also,* WILLIAM BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT, 16–17 (2009).
20. According to the International Committee of the Red Cross (ICRC), international customary law prohibits the use of tear gas and other chemical riot control agents in either international armed conflict or non-international armed conflict. As stated by the ICRC, "A party which is being attacked by riot control agents may think it is being attacked by deadly chemical weapons and resort to the use of chemical weapons. It is this danger of escalation that States sought to avert by agreeing to prohibit the use of riot control agents as a method of warfare in armed conflict. This motivation is equally valid in international and non-international armed conflict." Moreover, "[t]he United States has stated that the prohibition of the use of riot control agents as a method of warfare 'applies in international as well as internal armed conflict.'" International Committee of the Red Cross (ICRC), *Customary IHL Rule 75: Riot Control Agents*, INTERNATIONAL COMMITTEE OF THE RED CROSS (last visited Feb. 19, 2015), https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter24_rule75 [hereinafter ICRC].
21. The 1925 Geneva Gas Protocol is one example. In part, the Protocol condemns "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices…" Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 (entered into force on Feb. 8, 1928) [hereinafter 1925 Geneva Gas Protocol]. However, the Protocol is unclear as to whether it encompasses tear gas and other riot control agents. SOLIS, *supra* note 14, at 602, 604. Currently, the 1925 Geneva Gas Protocol has 137 States Parties. The United States ratified it on April 10, 1975, but entered a reservation to reserve the ability to stop recognizing the treaty if another State failed to comply with the treaty. ICRC, *War & Law*: *Treaties and States Parties to Such Treaties*, INTERNATIONAL COMMITTEE OF THE RED CROSS (last updated May 14, 2012), http://www.icrc.org/ihl/INTRO/280?OpenDocument. *See also,* 1993 Chemical Weapons Convention, *supra* note 14, which permits chemical weapon use in "industrial, agricultural, research, medical, pharmaceutical, or other peaceful purposes; protective purposes…;for military purposes…[not] as a method of warfare; and for law enforcement, including domestic riot control purposes." BOOTHBY, *supra* note 19, at 132 (citing *CBW Conventions Bulletin* 58 (December 2002));

Currently, 190 countries (98 percent of the world) are State Parties to the 1993 Chemical Weapons Convention. The United States ratified it on April 25, 1997, without entering any reservations. Organisation for the Prohibition of Chemical Weapons (OPCW), *Status of Participation in the CWC, Organisation for the Prohibition of Chemical Weapons*, http://www.opcw.org/about-opcw/member-states/status-of-participation-in-the-cwc/ (last visited Nov. 9, 2013). However, the United States did file a declaration stating that "no sample collected in the United States pursuant to the Convention will be transferred for analysis to any laboratory outside the territory of the United States." *Id.*

22. ICRC, *supra* note 20.
23. An additional basis for permission stems from the broad realm of "State Sovereignty."
24 ICRC, *supra* note 20
25. Solis, *supra* note 14, at 604.
26. *Id., see also* United States Exec. Order No. 11,850, 3 C.F.R. 980 (1971–1975) (emphasis added).
27. ICRC, *supra* note 20.
28. Solis, *supra* note 14, at 604.
29. ICRC, *supra* note 20.
30. These non-treaty standards help influence customary international law and can provide a basis for future treaties.
31. 8th UN Congress on the Prevention of Crime and Treatment of Offenders, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Sept. 7, 1990 (hereinafter "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials"). This non-treaty instrument is considered "soft law," or a non-treaty standard provided by the United Nations General Congress on the Prevention of Crime and Treatment of Offenders. This sort of primary "soft law" is a part of a body of law not adopted in treaty form but addressed to the entire international community. Specifically, the United Nations Economic and Social Council recommended the Use of Force and Firearms by Law Enforcement Officials to every State. *See, e.g., Dinah Shelton, Commentary and Conclusions, in* Compliance and Commitment: The Role of Non-Binding Instruments in the International Legal System, 449–63 (Dinah Shelton ed., 2000).
32. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, General Provision 5(a) (emphasis added).
33. *Id.*, General Provision 8.
34. *Id.,* General Provision 13.
35. Terrence McCoy, *Tear Gas is a Chemical Weapon Banned in War. But Ferguson Police Shoot it at Protesters*, Wash. Post (Aug. 14, 2014), http://www.washingtonpost.com/news/morning-mix/wp/2014/08/14/tear-gas-is-a-chemical-weapon-banned-in-war-but-ferguson-police-shoot-it-at-protesters/?tid=hp_mm.
36. *See, e.g.*, Chris Ford, *Reclaiming the Public Forum: Courts Must Stand Firm Against Government Efforts to Displace Dissidence*, 2 Tenn. J.L. & Pol'y 146 (2006).
37. *See* Jordan J. Paust, *Does your Police Force Use Illegal Weapons? A Configurative Approach to Decision Integrating International and Domestic Law*, 18 Harv. Int'l L.J 19 (1977) (using international legal mechanisms, particularly emphasizing proportionality, as well as the Fifth, Eighth, and Ninth Amendments to condemn police officers from using .357 magnum ammunition in the United States).
38. Particularly when the freedom of expression was a keystone in the founding of this country. So much so, that the First Amendment of the United States Constitution is the freedom of expression.
39. *See* Radley Balko, Rise of the Warrior Cop: the Militarization of America's Police Forces (2013) and Roger Roots, *Are Cops Constitutional?*, 11 Seton Hall Const. L.J. 685 (2001) (arguing states have empowered the modern police officer so much that their power exceeds their constitutional bounds).

40. Julian Perry Robinson, *The negotiations on the Chemical Weapons Convention: a historical overview*, *in* THE NEW CHEMICAL WEAPONS CONVENTION—IMPLEMENTATION AND PROSPECTS, 17 (M. Bothe, N. Ronzitti, & A. Rosas eds., 1998).
41. *Id*.
42. *Instructions for the Government of the Armies of the United States in the Field*, General Orders No. 100 (Apr. 24, 1863) (emphasis added), states, "The Lieber Code, the world's first war law code, which later influenced the Hague and Geneva Conventions states in Article 16:Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes return to peace unnecessarily difficult."
43. Robinson, *supra* note 40, at 18.
44. SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 394 (2012) (footnote omitted).
45. Robinson, *supra* note 40, at 18.
46. *Id*. at 19. Mustard gas was much more effective than chlorine gas because the mustard gas affected the skin and liquefied on surfaces long after the gas dissipated—much more serious consequences than merely inhaling the gas. *Id.* Even more, mustard gas is classified as a "blistering and tissue-injuring agent" because victims suffer from burn-like blisters on the skin, severe damage to the eyes, respiratory system, and internal organs. Organisation for the Prohibition of Chemical Weapons (OPCW), *Mustard agents: description, physical and chemical properties, mechanisms of action, symptoms, antidotes, and methods of treatment*, ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS, http://www.opcw.org/about-chemical-weapons/types-of-chemical-agent/mustard-agents/ (last visited Nov. 25, 2013) [hereinafter OPCW].
47. Robinson, *supra* note 40, at 19.
48. Stefan Oeter, *Methods and Means of Combat*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 126, 171 (Dieter Fleck ed., 2008). After World War I, the 1925 Geneva Gas Protocol became the first successful prohibition on chemical agents as weapons. *See* 1925 Geneva Gas Protocol, *supra* note 21; *see also*, BOOTHBY, *supra* note 16, at 16–17 (noting the Hague Declaration II of 1899 addressed some gas weapons). The Protocol's preamble explains that bans are necessary because such warfare "has been justly condemned by *the general opinion of the civilized world*; and . . . to the end that this prohibition shall be *universally* accepted as a part of International Law." ICRC, *supra* note 21 (emphasis added). The 1925 Geneva Gas Protocol bans "asphyxiating, poisonous, or other gases, all analogous liquids, materials, or devices" as well as bacteriological weaponry. BOOTHBY, *supra* note 16, at 17. In some respects, the Protocol was considered a successful effort to promote international consensus against chemical weapon use; however, World War II tested its limited application to non-international conflicts, especially regarding the use of riot control agents that are not technically within the Protocol's scope. *See* Oeter, *supra*, at 171.
49. MICHAEL S. BRYANT, CONFRONTING THE GOOD DEATH, 25–27 (2005).
50. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 (entered into force Aug. 8, 1945).
51. BRYANT, *supra* note 49, at 59–60. *See also* Matthew Lippman, *War Crimes, Trials of German Industrialists: The "Other Schindlers,"* 9 TEMPLE INT'L & COM. L.J. 173, 207 (1995) (explaining that I.G. Farben also developed chlorine, yperite, and mustard gas).
52. Charter of the International Military Tribunal, 59 Stat. 1544 (Aug. 8, 1945).
53. Michael Bazyler & Jennifer Green, *Nuremberg-Era Jurisprudence Redux: The Supreme Court in Kiobel v. Royal Dutch Petroleum Co. and the Legal Legacy of Nuremberg*, 7 CHARLESTON LAW REV., 23, 51 (2012–13).
54. Lippman, *supra* note 51, at 206.

55. Bazyler, *supra* note 53, at 48.
56. Lippman, *supra* note 51, at 227, (citing United States v. Carl Krauch, VIII TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1169 (1950) (noting that only five I.G. Farben representatives served on the eleven person board for Degesch, the firm that supplied Zyklon B gas, and five did not provide "persuasive influence on the management policies of Degesch or any significant knowledge as to the uses to which its production was being put.")).
57. *Id.* at 226–27.
58. This may, in part, be a result of the nature of the Tribunals. The nexus for all the crimes charged at the International Military Tribunal and the National Military Tribunal was crimes against peace and all other crimes stemmed from that crime, including crimes against humanity. *See* Bryant, *supra* note 49, for a more detailed analysis on the Tribunal's decisions and analyses. The International Military Tribunal major war criminals' trial did deal with both gas chambers and the use of poisons in its October 1, 1946 decision in its treatment of "Murder and Ill-treatment of Civilian Population." However, the Court decided that it did not have jurisdiction over pre-war wrongdoing because it lacked the necessary nexus with aggressive war. Crimes against humanity as a peacetime international crime did not become a matter of customary international law until relatively recently. *See also,* Prosecutor v. Tadić, Case No. IT-94-I-T, Decision on the Defense Motion on Jurisdiction, ¶ 82–83 (Int'l Crim. Trib. For the Former Yugoslavia Aug. 10, 1995). While international customary law does not proscribe the use of chemical riot control agents in a domestic conflict, it is arguable that their use, if sufficiently widespread, systematic and violent, and in the case of persecution, with the requisite mens rea, could come within the proscription of modern international customary law. The argument here is more circumscribed because the United States' current practices do appear to constitute a crime against humanity. But, some of the practices described in this article might well be characterized as torture within the meaning of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force Jun. 26, 1987).
59. SIVAKUMARAN, *supra* note 44, at 393 (quoting General Assembly Resolution 2677 (XXIV) (1970)).
60. *Id.*
61. BOOTHBY, *supra* note 19, at 17. *See also,* Oeter, *supra* note 48, at 171 (finding the Convention "settle the controversy by explicitly prohibiting the use of 'irritant agents' [also known as riot control agents] in warfare.").
62. SIVAKUMARAN, *supra* note 44, at 61.
63. States Parties are States that have "consented to be bound by the treaty and for which the treaty is in force." Vienna Convention on the Law of Treaties, art. 2(1)(g), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).
64. 1993 Chemical Weapons Convention, *supra* note 14, art. 1(1)(a)–(d).
65. SIVAKUMARAN, *supra* note 44, at 62.
66. BOOTHBY, *supra* note 19, at 246.
67. United States Department of Defense, Directive No. 3000.03E, para. 2(a)(3) (Apr. 25, 2013).
68. NATO Policy on Non-Lethal Weapons, Annex B.
69. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, 60 (2004).
70. BOOTHBY, *supra* note 19, at 246.
71. *Id.* at 249.
72. DINSTEIN, *supra* note 69, at 60.
73. Benjamin Kastan, *The Chemical Weapons Convention and Riot Control Agents: Advantages of a "Methods" Approach to Arms Control*, 22 DUKE J. COMP. & INT'L L. 267, 278 (2011–12) (quoting M.C. Jordan, *Legal review of Oleroresin Capsicum (OC) Pepper Spray*,

Report to the Commander, Marine Corps Systems Command 5 (1998) (internal quotation omitted)), http://www.sunshineproject.org/incapacitants/jnwdpdf/jagocrev.pdf.

74. *Id.* at 278, (quoting James D. Fry, *Gas Smells Awful: U.N. Forces, Riot-Control Agents and the Chemical Weapons Convention*, 31 Mich. J. Int'l L. 475, 538 (2010)).
75. Dinstein, *supra* note 70, at 60, (quoting D.P. Fidler, *The International Legal Implications of "Non-Lethal" Weapons*, 21 Mich. J. Int'l L. 51, 55 (1999–2000)).
76. John Noakes & Patrick F, Gillham, *Aspects of the 'New Penology' in the Police Response to Major Political Protests in the United States, 1999–2000*, The Policing of Transnational Protest 97, 110 n. 4 (Donatella della Porta, Abby Peterson, & Herbert Reiter eds., 2006).
77. Tammi S. Rogers & Scott L. Johnson, *Less Than Lethal: An Analysis of the Impact of Oleoresin Capsicum*, 3 Int'l. J. of Police Sci. & Mgmt. 55, 55 (2000).
78. *Id.* at 55.
79. *Id.* at 56.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 57.
84. *Id.*
85. *Id.* (quoting S.M. Edwards et al., *Evaluation of pepper spray*, Int'l Ass'n Chiefs of Police, 1, 2 (1997)). *See also,* Brad Turner, *Cooking Protesters Alive: The Excessive-Force Implications of the Active Denial System*, 11 Duke L. & Tech. Rev. 332, 338 (2012) (describing pepper spray's effects as "a burning sensation on the skin, causing shortness of breath, inflaming the respiratory tract, and causing fear and disorientation by producing tears in the eyes and causing the eyelids to swell shut.").
86. *Id.*
87. Noakes & Gillham, *supra* note 76, at 102.
88. *Id.*
89. *Id.*
90. Trey Jolly, *1968 Democratic National Convention,* Culture through Politics. Propaganda. Art. (Sept. 16, 2012, 9:32 AM), http://artandpoliticalwarfare.blogspot.com/2012_09_01_archive.html.
91. Balko, *supra* note 39, at 68–69.
92. Todd Gitlin, The Sixties: Years of Hope, Days of Rage, 337 (1987).
93. *Id. See also*, Douglas O. Linder, *A Trial Account*, Famous American Trials: The Chicago Seven (or Chicago Eight) Trial, 1969–1970 (last visited Nov. 30, 2014), http://law2.umkc.edu/faculty/projects/ftrials/chicago7/chicago7.html (stating that Daley denied making such remarks).
94. The 1999 World Trade Organization protesters demonstrated against "workers' rights, sustainable economies, and environmental and social issues." Office of the City Clerk, *World Trade Organization Protests in Seattle*, Seattle Municipal Archives (2013), http://www.seattle.gov/cityarchives/Exhibits/WTO/default.htm.
95. Noakes & Gillham, *supra* note 76, at 106.
96. *Id*., at 110.
97. Balko, *supra* note 39, at 235.
98. *Id.*
99. *Id.*
100. *Id*. at 235 (also "declared a state of emergency, imposed a curfew, and banned protests in and around the conference.").
101. Chuck Sudo, *"I Cracked Heads At The NATO Summit And All I Got Was This Lousy T-Shirt,"* Chicagoist (Jun. 7, 2012, 1:20 PM), http://chicagoist.com/2012/06/07/police_officers_nato_summit_t-shirt.php.

102. BALKO, *supra* note 39, at 295–96.
103. *Id.*
104. Felisa Cardona, *ACLU Wants Probe into Police-Staged DNC Protest*, DENVER POST (Nov. 7, 2008), *available at* http://www.denverpost.com/breakingnews/ci_10920817.
105. BALKO, *supra* note 39, at 293.
106. *Id.*
107. *Id.*
108. *Id.* at 293–94.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 295.
113. *Id.*
114. Katharine Q. Seelye, *Pepper Spray's Fallout, From Crowd Control to Mocking Images*, N.Y. TIMES, at A14 (Nov. 23, 2011), http://www.nytimes.com/2011/11/23/us/pepper-sprays-fallout-from-crowd-control-to-mocking-images.html?_r=0.
115. Just googling "UC Davis cop meme" reveals a plethora of images that photo-shopped "casually pepper-spray everything cop" into historical art such as: Georges Seurat's *A Sunday on La Grande Jatte* (pepper-spraying a woman in the park) and John Trumbull's *Declaration of Independence* depicting the Committee of Five presenting the Declaration of Independence to Congress (pepper-spraying the Declaration of Independence). *See* Know Your Meme, http://knowyourmeme.com/memes/casually-pepper-spray-everything-cop (last visited Nov. 19, 2014).
116. BALKO, *supra* note 39, at 296–97.
117. *Id.*
118. *Id. See also*, Jolly, *supra* note 90 (blogging about the police response to Occupy); UpTakeVideo, *Chicago Police Attack Press, Uses Bikes as Weapons*, YOUTUBE (May 20, 2012), http://www.youtube.com/watch?v=qGEoxDdurHg (showing officers beating the crowds with batons and their bikes); Steven A. Lautt, Note, *Sunlight is Still the Best Disinfectant: The Case for a First Amendment Right to Record the Police*, 51 WASHBURN L.J. 349, 353–54 (2012) (explaining that smartphones have "significantly eroded the police's control over public perceptions.").
119. *See also,* Glenn Greenwald, *The Militarization of U.S. Police: Finally Dragged into the Light by the Horrors of Ferguson*, INTERCEPT (Aug. 14, 2014), https://firstlook.org/theintercept/2014/08/14/militarization-u-s-police-dragged-light-horrors-ferguson/; Lorenzo Franceschi-Bicchierai & Dustin Drankowski, *Ferguson or Iraq? Photos Unmask the Militarization of America's Police*, MASHABLE (Aug. 13, 2014), http://mashable.com/2014/08/13/ferguson-police-protests-vs-iraq/; ACLU, https://www.aclu.org/blog/tag/militarization-police (last visited Nov. 30, 2014).
120. Terrence McCoy, *supra* note 35.
121. Chico Harlan, et al., *Ferguson police officer won't be charged in fatal shooting*, WASH. POST (Nov. 25, 2014), http://www.washingtonpost.com/politics/grand-jury-reaches-decision-in-case-of-ferguson-officer/2014/11/24/de48e7e4-71d7-11e4-893f-86bd390a3340_story.html.
122. BALKO, *supra* note 39, at xii.
123. *See id.* at 148, 191, and 193–95 (detailing the battle mentality officers exhibit during drug raids which one officer described as a "war zone." Balko also explains the government's program providing municipal police departments with military grade weapons under the Posse Comitatus Act and the 1033 Program, including Reagan's amendments to the Act, Clinton's troops to cops program.).
124. Alicia A. D'Addario, *Policing Protest: Protecting Dissent and Preventing Violence Through First and Fourth Amendment Law* 31 N.Y.U. REV. L. & SOC. CHANGE 97, 108–09 (2006) (citing Graham v. Connor, 490 U.S. 386, 388 (1989)).

125. Graham v. Connor, 490 U.S. 386 (1989).
126. Turner, *supra* note 85, at 338 (quoting Vinyard v. Wilson, 311 F.3d 1340, 1348 (11th Cir. 2002))
127. *Id.* at 339–40.
128. *Id.* at 342, (quoting *Graham*, 490 U.S. at 396 (internal quotations omitted)).
129. D'Addario, *supra* note 124, at 125.
130. Turner, *supra* note 85, at 342.
131. *Headwaters*, 276 F.3d at 1130.
132. *Id.*
133. *Id.*
134. California v. Hodari D., 499 U.S. 621 (1991) (discussing a Fourth Amendment seizure issue during the course of an arrest for cocaine).
135. *Id.* at 626–27.
136. *Id.*
137. D'Addario, *supra* note 124, at 125.
138. *Id*.
139. *Id.*
140. Balko, *supra* note 39, at 333, (quoting Philadelphia Police Department Spokesperson Fran Healy).
141. *Id.* (quoting New York City Mayor Michael Bloomberg).
142. Barbara J. Katz, *Civil Disobedience and the First Amendment*, 32 UCLA L.Rev. 904, n.4 (1985).
143. *Id.* at 912 n.56 (citing Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960)).
144. *Id.* (citing United States v. Best, 476 F.Supp 34 (D.Colo. 1979)).
145. *Id.* (citing People v. Harrison, 178 N.W.2d 650 (Mich. 1970)).
146. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).
147. *Id.* (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).
148. *Id.* (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).
149. *Id.* at 55.
150. *Id.* (citing collected cases).
151. Widmar v. Vincent, 454 U.S. 263 (1981).
152. City of Madison Joint Sch. Dist. v. Wisconsin Pub. Emp't Relations Comm'n, 429 U.S. 167 (1976).
153. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).
154. *Perry*, 460 U.S. at 46.
155. *Id.* at 45, (citing *Widmar*, 454 U.S. 263).
156. *Id.* at 46, (citing United States Postal Serv. v. Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981)).
157. *Id.* (citing *Greenburgh*, 453 U.S. at 131, n.7).
158. United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1991).
159. *Id.*
160. *Schoon*, 971 F.2d at 198, (citing United States v. Seward, 687 F.2d 1270, 1276 (10th Cir. 1982) (internal citations omitted).
161. *Id.*
162. *Id.* at 196.
163. *Id.* at 195.
164. Katz, *supra* note 142, at 916. *See also, Schoon*, 971 F.2d at n.72 (citing United States v. Lowe, 654 F.2d 562, 566–67 (9th Cir. 1981)); United States v. Cassidy, 616 F.2d 101, 102 (4th Cir. 1979) (per curium); State v. Warshow, 410 A.2d 1000, 1002 (1979) (holding

demonstrators at nuclear power plant were not permitted to raise necessity defense); *see also,* United States v. Best, 476 F.Supp. 34, 45–47 (D. Colo. 1979). *But cf.* United States v. Kroncke, 459 F.2d 697, 699–700 (8th Cir. 1972); State v. Marley, 509 P.2d 1095, 1099, 1109 (1973). *See generally*, Fed. R. Evid. 104(a)–(c) (when admissibility of evidence is dependent on answers to preliminary questions).

165. *Schoon*, 971 F.2d at 195.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 197 (concluding "necessity can never be proved in a case of indirect civil disobedience.").
170. *Id.* at 198.
171. United States v. Gant, 691 F.2d 1159, 1163–64 (5th Cir. 1982) (citing United States v. Bailey, 444 U.S. 394, 410–11, n.8 (1980)) (emphasis added).
172. *Id.* at 1164, (citing United States v. Colacurcio, 659 F.2d 684 (5th Cir. 1981) (internal citations omitted)).
173. *Seward*, 687 F.2d at 1273.
174. *Id.* at 1275.
175. *See* United States v. Maxwell, 254 F.3d 21, 29 (1st Cir. 2001) (citing United States v. Dorrell, 758 F.2d 427 (9th Cir. 1985)).
176. United States v. Quilty, 741 F.2d 1031, 1033 (7th Cir. 1984).
177. Protesters broke into a building where "they hammered and poured blood onto both nuclear and conventional missile launchers and components belonging to the United States Army, hung banners and distributed pictures and documents condemning nuclear weapons around the scene, and remained on the premises signing and praying until they were taken into custody." United States v. Montgomery, 772 F.2d 733, 735 (11th Cir. 1985).
178. *Montgomery*, 772 F.2d at 736–37.
179. *Maxwell*, 254 F.3d at 29.
180. *Cassidy*, 616 F.2d at 102.
181. *Id.*
182. *Maxwell,* 254 F.3d at 26 (citing *Bailey*, 444 U.S. at 414–15, where the court found "it 'essential' that a defendant's proffered evidence on a defense meet a minimum standard as to each element before that defense may be submitted to [the] jury").
183. *Maxwell*, 254 F.3d at 29.
184. Laura J. Schulkind, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U.L. Rev 79, 93 (1989), citing State v. Keller, No. 1372-4-84 (Vt. Dist. Ct. Nov. 17, 1984).
185. *Id.* at 93–94 (citing Transcript of Judge's Order, People v. Lagrou, Nos. 85-000098 to 85000100, 85, 000102, *slip op.* at 10–11 (Mich. Dist. Ct. Mar. 22, 1985)). *See also id.* at n.91 (stating "Defendants also provided evidence of a history of attempts to alter the course of the arms race through legal means.").
186. United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).
187. *Id.*
188. *Id.* at 1113–38 n.54.
189. *Id.*
190. Matthew Lippman, *Civil Resistance: Revitalizing International Law in the Nuclear Age*, 13 Whittier L. Rev. 17, 47 (1992) (citing United States v. Anderson, Crim. No. 602–71 (D.N.J. 1973), cited in Alan W. Scheflin & Jon M. Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 Law & Contemp. Probs. 51, 53 (1980)).
191. *Id.* at 47.
192. D'Addario, *supra* note 124, at 100.
193. *Id.*

194. Donatella della Porta, et al, *Policing Transnational Protest: An Introduction*, THE POLICING OF TRANSNATIONAL PROTEST 3 (Donatella della Porta, Abby Peterson, & Herbert Reiter eds. 2006).
195. Noakes & Gillham, *supra* note 76, at 99.
196. D'Addario, *supra* note 124, at 105–06.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 102, (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). *See also, id.* at 103 (defining the clear and present danger test as a protection for speech that gives rise to civil disobedience, especially peaceful protests.).
201. *Id.*
202. *Id.* at 112.
203. *Id.* at 113, (quoting Heller v. New York, 413 U.S. 483, 565–67 (1973)).
204. *Id.* at 114.
205. *Id.*
206. *Id.*
207. Smith v. Ball, 278 Fed.Appx. 739, 740–41 (9th Cir. 2008).
208. *Id.*
209. *Id.*
210. *See* D'Addario, *supra* note 124, at 115 (examining *Ellsworth v. City of Lansing* and concluded that the court's failure to examine a protester's First Amendment claim when police used tear gas to disperse protesters chilled protesters' speech and failed to find a violation of due process by not taking into account "the First Amendment interests in the due process analysis." Ellsworth v. City of Lansing, No. 99-1045, 2000 WL 191836 (6th Cir. Feb. 10, 2000)).
211. D'Addario, *supra* note 124, at 115.
212. *Id.* at 120.
213. *Id.* at 121–22.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*

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Laura Lane-Steele

MASKING DISCRIMINATION: HOW THE "SECOND WAVE" OF RFRAS CAN WEAKEN PROTECTIONS FOR LGB INDIVIDUALS

Introduction

Mya is an accountant for a small publicly held corporation, Smallcorp in Louisville, Kentucky. Though she is out as a lesbian in all other sectors in her life, she remains closeted at work because of the pervasive religiosity and anti-gay attitudes of Smallcorp's board, management, and most of her supervisors. One day, her boss, Jack, sees Mya and her partner out on a date. He approaches the two and asks Mya who her friend is, not wanting to lie, she comes out to him. The next week, Jack fires her, explaining that Smallcorp employs only individuals of a "certain moral pedigree." Although Kentucky has no statewide protections for lesbian, gay, or bisexual (LGB) workers, Mya decides to sue Smallcorp for violating a Louisville anti-discrimination ordinance that protects workers based on their sexual orientation.[1] Smallcorp plans to defend against Mya's claim by asserting that the anti-discrimination ordinance violates its religious freedom under Kentucky's Religious Freedom Restoration Act (RFRA) and that it should be granted an exemption from the ordinance.[2] Much like the federal RFRA, Kentucky's law prohibits government action that substantially burdens a person's free exercise of religion unless the government is protecting a compelling interest and the law is the least restrictive means of protecting this interest.[3]

This piece will examine the legal framework and likely outcome of a case like this by exploring how state RFRAs, particularly those in Kansas and Kentucky have the potential to substantially weaken anti-discrimination laws based on sexual orientation. LGB rights groups and other progressive politicians and organizations have protested the proposal and enactment of recent state RFRAs because of this potential,[4] but no article to date examines the doctrinal framework of exactly how the RFRAs damage existing anti-discrimination laws. Additionally, while there has been some litigation involving the clash between religious freedom and gay rights, many of these cases were decided under First Amendment jurisprudence, not the RFRAs.[5] As this piece explains, religious litigants have more protections under RFRAs than they do under First Amendment and thus are more dangerous to anti-discrimination ordinances.

This article concludes that these states' RFRAs will seriously decrease the effectiveness any current or future law protecting LGB citizens from discrimi-

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nation in housing, employment, and public accommodations. Violators of the existing anti-discrimination ordinances in these states can likely successfully assert these RFRAs as an affirmative defense. Granting that (1) intolerance of LGB people is a valid religious belief and (2) compelling the inclusion of LGB individuals in employment, housing, and public accommodations likely places a substantial burden on people's exercise of religion, these anti-discrimination ordinances will have to pass strict scrutiny. Preventing discrimination based on sexual orientation is not likely going to rise to the level of compelling in the eyes of a court, failing the strict scrutiny test imposed by the RFRAs. In order protect the free exercise of religion while maintaining the utility of these anti-discrimination laws, these RFRAs should be amended to include a civil rights exception. Such an exception would prevent the RFRAs from being used as a defense in a lawsuit like Mya's or any suit involving anti-discrimination laws.

Part I of this article will outline the current state of LGB rights in this country and discuss how despite the massive gains the movement has made in the realm of marriage equality, many LGB Americans can still be legally discriminated against in employment, housing, and public accommodations. Part II outlines the history of the federal RFRA and subsequent state level RFRAs.Although this general analysis can apply to any RFRA (state or federal), the focus is on Kentucky's and Kansas' because the legislative history and political climate in which they were passed differs significantly from the federal and other state RFRAs. Part III begins the analysis of the RFRAs and examines the boundaries of valid religious beliefs. It concludes that a court will likely accept that intolerance of LGB individuals and wanting to exclude them in housing and places of business is a religious belief. Part IV tackles the question of who and what count as "people" under the RFRAs and therefore, the number of entities that can use the RFRAs as a defense in a discrimination lawsuit. Part V discusses whether these anti-discrimination laws impose a "substantial burden" on the free exercise of religion. Deducing they probably do, Part VI discusses why these laws will not likely pass the heightened scrutiny test imposed by the RFRAs. Considering the high likelihood that all prongs of the RFRAs are met, this article concludes that these laws have the potential to seriously undermine the few legal protections for LGB people and calls for a simple fix: adding a civil rights exception to the RFRAs.

I. Current state of LGB rights

Despite the recently signed executive order prohibiting employment discrimination against LGBT government contractors,[6] there are no federal protections for LGB individuals. Therefore, most forms of discrimination are legal under federal law. Employers can fire workers solely because of their sexual orientation,[7] any and all businesses can refuse service to LGB people, and landlords are permitted to discriminate in advertising and practice against

LGB individuals[8] without fear of a federal civil rights lawsuit. The Employment Non-Discrimination Act (ENDA), a law that would ban employment discrimination based on sexual orientation and gender identity, has not reached any president's desk despite numerous attempts. Its most recent version passed the Senate in April, 2013, but the Speaker of the House of Representatives, John Boehner, has not yet scheduled a vote, calling the legislation "unnecessary."[9] The forthcoming analysis of how RFRAs have the potential to serve as an affirmative defense to city and statewide LGB protections would also generally apply to any federal LGB anti-discrimination laws. The only major difference being that the federal RFRA would control the analysis, not the particular state's.[10]

Because of the lack of federal anti-discrimination laws, LGB individuals must rely on legal protections on the state and municipal level. To date, twenty-two states and the District of Columbia have bans on discrimination based on sexual orientation in employment, housing, and public accommodations.[11] In the remaining twenty-seven states that do not have side-wide protections, eighteen of those states contain at least one city with local non-discrimination ordinances.[12] For example, and important for this article, Lawrence is the only city in Kansas with this type of ordinance, after two other cities repealed theirs,[13] and seven cities in Kentucky prohibit discrimination based on sexual orientation.[14] Because many of these states also have RFRAs, the threat to the anti-discrimination laws described in this analysis is widespread and could substantially weaken the few protections that LGB Americans have.

A quick note must be inserted here on why transgender individuals are left out of this analysis. First, many state and local anti-discrimination ordinances do not include gender identity. Second, although gender identity is not explicitly protected in federal civil rights law, many courts have read Title VII's and similar state laws' protections based on sex to include transgender individuals.[15] Therefore, if transgender individuals are possibly protected against discrimination on the federal level in housing, employment, and public accommodations, they do not need to rely on the local anti-discrimination ordinances. Third, the question of whether intolerance of people who do not conform to gender norms violates religious beliefs is not as clear as with sexual orientation. And finally, the analysis of whether laws protecting gender identity pass the strict scrutiny imposed by the RFRA is markedly different from that of laws protecting sexual orientation.[16] This is not to say that research on the clash between religious freedom laws and anti-discrimination laws based on gender identity should not be explored. Indeed, the stark lack of legal scholarship surrounding transgender issues makes this an even more important topic for exploration; it is just beyond the scope of this article.

II. Background

A. The federal RFRA

In order to understand why states have RFRAs in the first place, the history of the federal RFRA must be traced. In the seminal cases of *Sherbert v. Verner*[17] and *Wisconsin v. Yoder*,[18] the Supreme Court reiterated the doctrinal boundaries of the Free Exercise clause of the First Amendment: When laws that are facially neutral towards religion, laws of general applicability, substantially limit religious practices, the government must provide a compelling interest for the law. Unlike the full strict scrutiny test, where a compelling governmental interest along with a narrow fit are required, the *Sherbert/Yoder* standard only required a compelling interest.[19] However, in 1990, the Supreme Court significantly altered Free Exercise jurisprudence when it held in *Employment Division v. Smith*[20] that the government need only demonstrate that the law bears a rational relationship to a legitimate government interest. In other words, it shifted the standard of review from modified strict scrutiny to rational basis. The *Smith* standard only applies to laws of general applicability; laws that specifically target religion, either facially or through their intent, are still subjected to full strict scrutiny.[21]

The shift from strict scrutiny to rational basis review for laws impinging on religious freedom left organizations from both ends of the political spectrum unhappy. Groups from the progressive American Civil Liberties Union (ACLU) to the conservative, evangelical Traditional Values Coalition were concerned with increased government intrusion on individuals' free exercise of religion.[22] Therefore, with wide support and without much controversy, Congress passed the federal RFRA in November of 1993.[23] Intended to restore the strict scrutiny of the *Sherbert/Yoder* standard,[24] the RFRA provides that the "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . [unless] it demonstrates that the application of the burden to the person 1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that compelling governmental interest."[25] The federal RFRA was intended to apply on both the state and the federal level.[26] However in *City of Boerne v. Flores*, the Court held that the federal RFRA does not apply to the states because it was not a proper exercise of Congress' enforcement power.[27]

B. The "first round" of state RFRAs

Almost immediately after the Court's decision in *Boerne*, ten states passed their own RFRAs,[28] with four additional states passing similar laws from 2002 to 2010.[29] Like the federal RFRA, there was generally bipartisan support for these bills and many of them passed their state legislatures by an overwhelming majority. While most of these RFRAs are triggered when a law of general applicability places a "substantial burden" on a person's free exercise of re-

ligion,[30] some simply require plaintiffs to show that the government imposed *any* burden on their religious freedom.[31] In theory, the "any burden" RFRAs are considerably more plaintiff-friendly; however due to the relative lack of state-level RFRA litigation,[32] the actual difference between the "any burden" and "substantial burden" RFRAs has yet to play out. Additionally, most of these RFRAs precisely model the federal RFRA's strict scrutiny test and all of them require the government's purported interest to undergo some form of heightened scrutiny.[33]

Deviating from most of the states with RFRAs, Missouri included a civil rights exception in their version, stating "nothing in [the RFRA] shall be construed to establish or eliminate a defense to a civil action or criminal prosecution based on a federal, state, or local civil rights law."[34] In other words, individuals charged with violating any civil rights law may not use the RFRA as a defense. This exception was added because the Missouri legislature was concerned that the statute could be interpreted as providing less protection than federal law, causing the state to lose federal funding.[35] Although no Missouri case law exists to define the boundaries and applications of this exception, Missouri's law serves as a model for how states can balance religious freedom with other civil rights concerns.

C. The "second wave" of RFRAs

Since 2013, three states, Kansas, Kentucky and Mississippi have passed RFRAs, the most per year since the two years after the *Boerne* decision.[36] Although the language of these statutes are practically identical to the federal RFRA and most other states' RFRAs, the political climate in which these bills were passed as well as their lack of bipartisan support, indicate that they may, at least in part, be a response to fear that LGB rights will infringe on people's religious beliefs. In the past several years, there has beena stark increase in rights for LGB individuals: the Supreme Court declared the Defense of Marriage Act unconstitutional,[37] it has also recognized same-sex marriage as a fundamental constitutional right, [38] and almost half of the country has included gay people in state level anti-discrimination laws in housing, employment, and public accommodations.[39] While most conservatives deny that RFRAs were enacted to provide ways around following these pro-gay laws, many progressive organizations disagree. Counsel from the ACLU is quoted as saying, "We are really seeing [RFRAs] dovetailing with LGBT people across the country gaining greater rights . . . .We are now seeing this reaction where people are claiming based on religious belief that there should be special authorization to break laws or have new rights."[40]

The timing and political climate of the RFRAs passed in Kentucky, Kansas, and Mississippi are not the only things that speak to their controversial nature. Unlike the federal RFRA and many state RFRAs, Democrats and other

progressives largely do not back the legislation. The list of supporters for Kentucky's RFRA include The Family Foundation, a conservative Christian organization, which believes that marriage is a "one-flesh union of sexually complementary spouses," the Catholic Conference of Kentucky, and the Kentucky Baptist Convention.[41] Its opponents consist of the ACLU and the governor of Kentucky. The ACLU cited concerns that the RFRA would override local protections for LGBT residents,[42] and the governor vetoed the bill for similar reasons, stating the bill will "cause serious unintentional consequences that could threaten public safety, health care and individuals' civil rights."[43]

In Kansas, conservative Christian organizations also put their support behind the RFRA. For example, the Kansas Family Policy Council Action posted the following in an article warning against the "homosexual lobby":

> The legislation [the RFRA] would extend important legal protections to individuals, business owners and religious institutions when it comes to their rights to stand on their religious views when declining to participate in and celebrate homosexual 'weddings.' [I]t is vital that we enact these protections quickly before any judicial mandate affects Kansas in a most unfortunate way.[44]

Adding to evidence of the anti-LGB sentiment behind the Kansas law, the RFRA was introduced immediately after the city of Manhattan, Kansas passed an ordinance protecting sexual orientation, and the hearings on the RFRA bill focused on the threat of same sex marriage.[45] During the discussion of the RFRA, state senator and one of the bill's proponents, Jan Pauls, referenced Lawrence's anti-discrimination law and said it could force business owners to violate their religious beliefs by forcing them to hire LGBT individuals.[46]

Mississippi's RFRA was also accused of allowing discrimination against LGB individuals.[47] However, unlike Kansas and Kentucky, no city in Mississippi currently has anti-discrimination laws protecting LGB people. Thus, the Mississippi RFRA will not be the focus of this article. If the state or cities within it decide to pass these laws, then this analysis can readily apply to the clash between the RFRA and those laws.[48]

Although worded slightly differently,[49] both Kentucky's and Kansas's RFRAs have the same essential elements.[50] The remainder of the piece will determine if and how Kansas' and Kentucky's RFRAs can undermine anti-discrimination laws by breaking down the laws' elements as follows: 1) what exactly constitutes an "exercise of religion," 2) the definition of a "person" under the acts, 3) whether the anti-discrimination ordinances would be considered a "substantial burden" on the free exercise of religion and 4) whether these ordinances would pass strict scrutiny.

III. What constitutes an "exercise of religion"

Kansas's RFRA defines exercise of religion as the "practice or observance of religion" under the free exercise clause of the Kansas and the United States

Constitution.[51] Kentucky's RFRA does not define the phrase at all and state courts "have looked to the United States Supreme Court for guidance in interpreting provisions of the Kentucky Constitution that deal with religious freedom."[52] Thus, in order to determine whether discriminating against LGB individuals would qualify as an "exercise of religion" under these states' RFRAs, it is necessary to examine federal law in this area.

Prior to 2000, the federal RFRA defined "exercise of religion" as the "exercise of religion under the First Amendment."[53] Under the First Amendment, courts generally allow a broad interpretation of what constitutes a religious belief because, according to the courts, judges should not be ones defining the boundaries of religion. The purported religious belief does not need to be "acceptable, logical, consistent, or comprehensible to others" in order to be considered valid.[54] Although courts do ensure that the claimant *sincerely* holds the belief, the court does not analyze if he or she interpreted religious doctrines correctly; an honest conviction is sufficient.[55]

In 2000, immediately following the *Borne* decision that limited RFRA's reach to federal law only, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUPIA) as a way to apply the heightened *Sherbert/Yoder* standard to certain state actions, specifically land use decisions and regulations involving institutionalized persons.[56] Additionally, and more importantly for this analysis, the RLUPIA amended the definition of "exercise of religion" in the federal RFRA. Now, religious exercise "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[57] The legislative history of the bill suggests this change was intended to clarify the scope of the protected range of religious beliefs protected under the RFRA[58] and to completely sever RFRA analysis from First Amendment doctrine.[59] Reinforcing the broad scope of a valid religious belief, the RLUPIA dictates that religious belief must "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[60]

Under the federal RFRA, there are not many beliefs or practices that are not considered valid religious beliefs.[61] Moreover, courts have readily accepted conservative Christian opinions as valid religious beliefs. In the recent case *Burwell v. Hobby Lobby*, neither the government nor the Court questioned whether the idea that life begins at conception was sincere or qualified as a belief deserving protection under the RFRA.[62] There have been no federal decisions involving LGB issues and the definition of "religious freedom" under the RFRA, but cases decided under the First Amendment indicate that courts have no issue accepting organizations' views about the immorality of homosexuality.[63] The courts' quick acceptance of these claimants' viewpoints is partially due to the fact that there is a shared cultural understanding that

some versions of Christianity morally object to LGB people and the sexual and romantic behavior that often accompanies that identity. A 2014 study reports that 69 percent of evangelical Protestants are opposed to same-sex marriage, that most Americans identify Mormon, Catholic, and evangelical Christian churches as "unfriendly" to LGB people, and over one in seven Americans believe that AIDS is God's punishment to gay people for immoral sexual behavior. [64]

Due to the expansive definition of "religion" under the amended RFRA, courts' previous acceptance of other conservative Christian beliefs, including moral objections to homosexuality, and the societal recognition of homophobia as a part of some religions, courts will likely accept an assertion that the actions required by the anti discrimination laws—providing goods and services, housing, and equal employment opportunities to LGB people—can violate someone's religious beliefs.

VI. Who can have religious beliefs?

Kansas's, Kentucky's, and the federal RFRA all protect "people's" freedom of religion. While this is facially simple piece of these statutes, the boundaries of legal personhood are the subject of extensive debate. The answer to the question "who qualifies as a person" under these state RFRAs will determine the number of entities that can assert the RFRAs as an affirmative defense to violating an anti-discrimination ordinance and in turn, the extent to which these RFRAs can nullify protections for LGB individuals.

Kansas' RFRA does not explicitly define personhood, defining a legal person as "any legal person or entity under the laws of the state of Kansas and the laws of the United States."[65] However, other sections of Kansas' law define personhood fairly expansively, including at least natural persons, corporations, and associations.[66] While these definitions imply that a Kansas court may interpret personhood broadly under the RFRA, the state senate did introduce a resolution urging the United States Congress to overturn the *Citizens United v. Federal Election Commission* decision,[67] suggesting states may choose a narrower reading when it comes to First Amendment issues.[68] Although this proposed resolution might indicate that some Kansas lawmakers do not want to extend free speech protections to corporations, it does not necessarily suggest that Kansas's courts would decide that corporations cannot have religious views. Kentucky does not define the boundaries of personhood in their RFRA either. As in Kansas, other sections of the Kentucky code include corporations, partnerships, and associations in the definition of a person, which suggest a broad interpretation of the term.[69]

Due to the lack of guidance around the definitions of personhood in the context of these states' RFRAs and free exercise clauses, Kansas and Kentucky state courts are likely to look to federal interpretations when deciding if

various entities qualify as "persons" under their RFRAs. Sole proprietorships and most partnerships, unlike corporations, are not separate legal persons. In other words, a legal separation does not exist between these entities themselves and their owners. When an unincorporated business entity asserts that it has religious beliefs under the RFRA, it is not actually the business' beliefs that are being asserted, but rather its owners'.

When it comes to corporations, the question of whether non-profit corporations are people with religious beliefs under RFRA has not been challenged.[70] Additionally, the *Hobby Lobby* decision resolved the debate on whether closely held for-profit corporations are people with standing under the RFRA.[71] The Court held that there was no reason to deviate from the Dictionary Act's definition of personhood, which includes corporations unless the context indicates otherwise.[72] Because non-profit corporations are people under the RFRA, it saw no reason to make a distinction solely because of the profit-making objective of the business.[73] Not only did the majority hold that for-profit corporations are people but also that they are people who can exercise religion.[74]

Importantly, this decision was limited to corporations that were not large, publically traded corporations. The claimants in this case, Hobby Lobby and Mardel, are closely held family businesses with explicitly religious missions.[75] The Court only briefly addresses and immediately dismisses the possibility that a public corporation would attempt to bring a claim or defense under RFRA:

> [I]t seems unlikely that the sort of corporate giants to which HHS [Department of Health and Human Services] refers will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable. In any event, we have no occasion in these cases to consider RFRA's applicability to such companies.[76]

There are a number of problems with the Court's analysis here. First, there are many publicly held corporations that could conceivably want to bring a RFRA claim or use it as a defense. For example, Tyson Foods, states fairly explicit religious values and employs over one hundred chaplains,[77] and Alaska Air serves a Bible quote alongside breakfast.[78] Moreover, because the board of directors, not the shareholders, makes corporate decisions, a few religious board members can quickly dictate policy and practices for the entire corporation. Shareholders could, in theory, vote to remove directors who make religiously motived decisions they do not agree with, but shareholders often have low ownership stakes and vote for whatever management recommends.[79] While the Court was correct that shareholders often have diverging interests and religious beliefs, it is not "improbable" that a large public company with thousands of shareholders could assert religious beliefs under RFRA.

At this point then, it seems certain that most business entities can assert religious claims or defenses as "persons" under the federal RFRA and, if Kentucky and Kansas follow suit, given the lack of state law precedent on the issue, the state RFRAs can as well.[80] The only question that the Court left open is if public corporations could be people who exercise religion. And while the Court inaccurately downplayed the probability of such corporations asserting RFRA claims, it said nothing about the likelihood of their success. Thus, Smallcorp could have standing to use Kentucky's RFRA as a defense to Mya's antidiscrimination claim.

V. Substantial burden test: Do the anti-discrimination ordinances impose a substantial burden on religious beliefs?

RFRAs do not completely bar the government from impinging on people's free exercise of religion through laws of general applicability. The federal, Kentucky, and Kansas RFRAs apply only if the law imposes a "substantial burden" on religious practice and does not pass strict scrutiny.[81] Therefore, whether RFRAs can be used as a defense against anti-discrimination violations turns in part on whether laws protecting LGB people inflict a sufficiently substantial burden on religious freedom.

Kentucky does not define "substantial burden" in its RFRA, and there has not yet been any litigation with this new law to further explain its meaning. Kansas, on the other hand, does define "burden" in its RFRA:

> Burden means any government action that directly or indirectly constrains, inhibits, curtails or denies the exercise of religion by any person or compels any action contrary to a person's exercise of religion, and includes, but is not limited to, withholding benefits, assessing criminal, civil or administrative penalties, or exclusion from government programs or access to government facilities.[82]

But, as in Kentucky, there are no cases that expand on this definition. Hence, a state court would be likely to rely heavily on interpretations of the substantial burden test of the federal RFRA.

The federal RFRA did not define "substantial burden" in its text. Instead, Congress directed courts to examine pre-*Smith* decisions for a definition of substantial burden.[83] The *Sherbert* court defined such a burden to exist when the government forces that person to "choose between following the precepts of her religion and forfeiting [government] benefits" [84] and *Yoder* defined it as a law that "compels [people] under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[85] A more recent case, *Washington v. Klem*, consolidated these definitions when deciding whether a Department of Corrections policy limiting the number of books in a prisoner's cell to ten substantially burdened the plaintiff prisoner's exercise of religion. The court articulated such a burden to exist when: (1) "a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other [persons]"; or

(2) "the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs."[86]

Courts have determined that forcing an organization to include LGB people can substantially burden its free exercise of religion. In *Boy Scouts of America v. Dale* the Court held that requiring the Boy Scouts to have gay scoutmasters significantly burdens the Boy Scouts desire not to promote homosexuality as an acceptable lifestyle.[87] The Court was extremely lenient on this point, implying that the organization itself can tell the Court what constitutes a burden.[88] Under a First Amendment analysis, one that is less protective of religious freedom, the Court decided that requiring an Irish-American parade to include a gay rights group in the parade would violate the group's First Amendment rights because it would give people the false impression that they believed LGB individuals were just as socially acceptable as heterosexuals.[89]

With the *Dale* and *Hurley* cases as precedent, a court may determine that the statute imposes a substantial burden merely because it forces the inclusion of LGB people in employment, housing, and public accommodations. If inclusion alone does not satisfy the court, the penalties Kentucky and Kansas impose for violating anti-discrimination ordinance will likely suffice. In Kansas's cities, employers who violate the ordinance must hire or promote the injured employee, institutions that breach the public accommodations section must provide full and equal access to the goods and/or services provided, and landlord or homeowners in violation are forced to rent/sell to the LGB individual and also may be forced to pay a fine.[90] Kentucky's cities have similar penalties that call for specific performance of the law with a potential fine for housing violations.[91] Additionally, it allows for compensatory monetary damages resulting from the violation for things like inconvenience and embarrassment.[92]

These penalties fit squarely within the definitions of substantial burden under federal law, as they compel "people" to violate their religious beliefs. Unlike in *Hobby Lobby* where the plaintiffs could avoid providing certain contraceptives by paying a massive fine, there is not an option simply to pay a fine in order to stay true to their religious beliefs. Kansas and Kentucky law requires equal treatment of LGB individuals. Monetary damages are an additional add-on. These anti-discrimination ordinances also clearly satisfy Kansas's definition of burden since they directly constrain and deny "the exercise of religion by any person" and "[compel] any action contrary to a person's exercise of religion."[93] Therefore, a court would likely hold that these anti-discrimination ordinances create a sufficient burden on the free exercise of religion.

VI. Do the anti-discrimination ordinances pass strict scrutiny?

The last step in determining the likelihood of these state RFRAs' creating large loopholes in legal protections for LGB individuals is analyzing whether the anti-discrimination ordinances pass strict scrutiny. The Kansas, Kentucky,

and federal RFRAs all allow laws of generally applicability to substantially burden the free exercise of religion but only if the law the is protecting a compelling interest, and the law is the least restrictive means for achieving this interest.[94]

Federal case law sets a high bar to satisfy the compelling interest prong of the strict scrutiny test. The *Yoder* court held that "only those interests of the highest order … can overbalance legitimate claims to the free exercise of religion,"[95] and the *Sherbert* court uses similarly strong language, stating the government's interest "must be more than colorable; it must be paramount."[96] Thus, under the *Sherbert/Yoder* analysis, most government interests have not qualified as compelling enough to pass this test.[97]

Given the prior case law and the heightened standard imposed on the government, city governments in Kansas and Kentucky will have a difficult time defending their anti-discrimination laws. In *Dale* the Court established that New Jersey's state law forbidding discrimination on the basis of sexual orientation did not pass strict scrutiny. The Boy Scouts' policy of denying admittance to LGB scoutmasters was upheld because the "interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."[98] Again in *Hurley*, the Irish parade case, the Court likened prohibiting the inclusion of LGB among the people in the parade to prohibiting them from a private club and rejected any government interest that could intrude on their First Amendment rights.[99]

Despite the progress the LGB rights movement has made, particularly in the realm of marriage equality, sexual orientation discrimination does not yet receive heightened review. Although the *Windsor* and *Lawrence* decisions were wins for the movement, neither of the laws in these cases was examined under heightened scrutiny. The Court struck them down under rational basis review.[100] On the state level, neither Kansas nor Kentucky courts have reviewed the local level anti-discrimination laws protecting sexual orientation. Therefore, under either a state or federal analysis, preventing discrimination against LGB people will not likely be compelling enough to pass strict scrutiny.

Even if a court accepts the city's interest as compelling, it would then turn to the question of whether the anti-discrimination law is the least restrictive means of achieving its interest. Thus the government would need to show that "no alternate forms of regulation" would serve the government's interest without infringing on the free exercise of religion.[101] The government does not need to show that no other alternative exists, but at a minimum, it must rebut the alternatives proposed by the opposition.[102]

The violator of the anti-discrimination law could put forth a number of alternatives that could arguably decrease discrimination against LGB people.

The government could run an extensive education and public relations campaign to encourage acceptance of LGB people and demonize homophobia. It could also provide incentives to businesses that have anti-discrimination policies. Or, more simply, the government could provide a religious exemption to the anti-discrimination law. Given these possibilities and the government's burden under strict scrutiny, it is unlikely that a court would find that the ordinances are the least intrusive form of regulation that would achieve the government's interest.

VII. Conclusion

This analysis has revealed how a company like Smallcorp could use the state RFRA to subvert anti-discrimination laws and fire someone like Mya based on her sexual orientation without any repercussions because (1) intolerance of LGB individuals is likely to be considered a valid religious belief, (2) Smallcorp probably qualifies as a "person" (3) the law places a substantial burden on Smallcorp's exercise of religion, and (4) the law will have a difficult time passing strict scrutiny. As discussed, this ability to subvert civil rights laws is not limited to the Smallcorp example. Any individual or type of business entity could assert RFRA as a defense in firing or refusing to hire an LGB person, declining to provide good and services to LGB people, or excluding LGB people from housing. Additionally, this is not only a threat in Kansas and Kentucky. While this article focuses on these two states because of the suspicious timing and legislative history of the bills, the RFRA affirmative defense could be used in any jurisdiction that has a RFRA and legal protections for LGB individuals.

These RFRAs of these states, and all RFRAs, need to be amended to include a civil rights exception, modeled after Missouri's, that prevents the RFRA from being a defense to any anti-discrimination law. This solution would strike an appropriate balance between upholding religious freedom and preventing discrimination based on sexual orientation. Since sexual orientation discrimination is not prohibited under federal law, these ordinances are the only protections LGB individuals have. Therefore, in order for state/local laws to effectively protect LGB individuals, a civil rights exception must be included in the RFRAs.

NOTES

1. *See* LOUISVILLE, KY. CODE §92.06.
2. *See* KY. REV. STAT. ANN. § 446.350 (2013).
3. *See id.*
4. *See e.g.*, Paresh Dave, *Miss. Governor Signs Religious Freedom Bill; Civil Rights Groups Dismayed,* L.A. TIMES (Apr. 4, 2014) http://articles.latimes.com/2014/apr/04/nation/la-na-nn-mississippi-governor-signs-religious-freedom-bill-20140404 (describing the fear of many groups that the RFRAs could "pave the way for businesses to legally refuse service to gays and lesbians); Jonathon Oosting, *House Approved Religious Freedom Restora-*

tion Act: A License to Discriminate, MICHIGAN LIVE, (Dec. 9, 2014, 11:31 AM) http://www.mlive.com/lansing-news/index.ssf/2014/12/proposed_michigan_religious_fr.html (quoting the mayor of East Lansing, Michigan in response to the proposed RFRA: "[The RFRA] will undermine some of these [anti-discrimination] ordinances which, as a result of the Legislature's inaction, will be the only protections that LGBT residents have from discrimination.") These ordinances would be the only protections for LGBT East Lancing residents because there are no Michigan or federal anti-discrimination laws based on sexual orientation or gender identity. *See infra* notes 5-11 and accompanying text.

5. *See e.g.*, Elane Photography, LLC v. Willock, 284 P.3d 428, 445 (N.M. Ct. App. 2012), *aff'd,* 309 P.3d 53 (N.M. 2013) (deciding that the New Mexico sexual orientation anti-discrimination did not violate a photographer's First Amendment rights); North Coast Women's Medical Group, Inc. v. San Diego, 189 P.3d 959 (Cal. 2008) (holding that the First Amendment did not shield doctors from following the anti-discrimination law and declared they must provide fertility treatments to their lesbian patients).
6. *See, President Obama Signs New Executive Order to Protect LGBT Workers*, WHITE HOUSE BLOG (Jul. 21, 2014), http://www.whitehouse.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers.
7. *See e.g.*, *Small South Carolina Town Rallies for Fired Police Chief*, CBS NEWS (Jul. 13, 2014, 2:32 PM), http://www.cbsnews.com/news/small-south-carolina-town-rallies-for-fired-gay-police-chief/ (describing when an openly lesbian police chief was fired because the mayor objected to her "questionable" lifestyle); Sunnivie Brydum, *Meet the People Fired for Being LGBT in 2013*, ADVOCATE (Dec. 18, 2013, 5:30 AM) http://www.advocate.com/year-review/2013/12/18/meet-people-fired-being-lgbt-2013?page=full (listing eleven workers who were fired either explicitly or implicitly because they were LGBT in 2013 alone).
8. *See* Samantha Friedman et al., *An Estimate of Housing Discrimination Against Same-Sex Couples*, U.S. Dep't of Hous. and Urban Dev., 20 (2013) (reporting that "same-sex couples experienced significant levels of adverse treatment relative to comparable heterosexual couples when they responded to electronically advertised rental housing in metropolitan rental housing markets nationwide") available at http://www.huduser.org/portal//publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf.
9. *See* Daniel Reynolds, *John Boehner: 'No Way' ENDA Will Pass This Year*, ADVOCATE, (Jan. 30 2014, 2:32 PM), http://www.advocate.com/politics/politicians/2014/01/30/john-boehner-no-way-enda-will-pass-year. It is appropriate to note here that some LGBT organizations do not fully support ENDA because of its proposed religious exception. This exception would allow religious institutions to continue to discriminate on the basis of sexual orientation and gender identity in both ministerial and non-ministerial positions. *See* H.R. 3685, 110th Cong. § 3(a)(8) (2007); Chris Johnson, *State LGBT Groups Split on ENDA's Religious Exemption*, WASHINGTON BLADE (June 12, 2014) http://www.washingtonblade.com/2014/06/12/state-lgbt-groups-split-enda-religious-exemption.
10. *See* City of Boerne v. Flores, 521 U.S. 507, 535 (1997) (holding that the federal RFRA does not apply to the states but allows states to enact their own versions of the law).
11. *See* Statewide Employment Laws and Policies, Human Rights Campaign (May 15, 2014) http://hrc-assets.s3-website-us-east 1.amazonaws.com//files/assets/resources/statewide_employment_5-2014.pdf; Public Accommodation Laws and Policies, Human Rights Campaign (May 15, 2014), http://hrc-assets.s3-website-us-east 1.amazonaws.com//files/assets/resources/public_accommodations_5-2014.pdf; Statewide Housing Laws and Policies, Human Rights Campaign (May 15, 2014) http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/statewide_housing_5-2014.pdf.
12. Local Employment Non-Discrimination Ordinances, Movement Advancement Project (Jan. 1, 2015), http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances.
13. *See* Trudy Ring, *Voters in Two Kansas Cities Repeal Antidiscrimination Laws*, ADVOCATE (Nov. 8, 2012, 7:13 PM), http://www.advocate.com/politics/election/2012/11/08/voters-two-kansas-cities-repeal-antidiscrimination-laws.

14. These cities are Lexington, Louisville, Covington, Frankfort, Morehead, Vicco, and Danville. *See* Greg Kocher, *Danville Adopts Fairness Ordinance, Joining 6 Other Kentucky Cities*, Lexington-Herald Leader (Jun. 9, 2014) http://www.kentucky.com/2014/06/09/3283758_danville-adopts-fairness-ordinance.html?rh=1.
15. *See* Smith v. Salem, Ohio, 378 F.3d 566, 572 (6th Cir. 2004) (holding that Title VII prohibits discrimination based on gender identity); Buffong v. Castle on the Hudson, 824 N.Y.S.2d 752 (Sup. Ct. 2005) (finding that the state sex discrimination statute protected transgender person); Jillian T. Weiss, *The First Amendment Right to Free Exercise of Religion, Nondiscrimination Statutes Based on Sexual Orientation and Gender Identity, and the Free Exercise Claims of Non-Church-Related Employers*, 12 Fla. Coastal L. Rev. 15, 17 (2010).
16. 374 U.S. 398 (1963).
17. 406 U.S. 205 (1972).
18. Weiss, *supra* note 15 at 25-26.
19. 494 U.S. 872 (1990).
20. *See* Weiss, *supra* note 15, at 42.
21. Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 Tex. L. Rev. 247, 248 (1994); Ruth Marcus, *Reins on Religious Freedom?; Broad Coalition Protests Impact of High Court Ruling* Wash. Post Mar. 9, 1991 at A01.
22. *See* 42 U.S.C. §§ 2000bb-2000bb-4 (2012).
23. *See id.* 2000bb(b)(1).
24. *Id.* § 2000bb–1(a)-(b). Despite this purpose, the RFRA goes further than the *Sherbert/Yoder* standard because it also imposes a least restrictive means requirement. This "indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations" of religious freedom. *See* City of Boerne v. Flores, 521 U.S. 507, 535 (1997).
25. 42 U.S.C. § 2000bb.
26. *See* City of Boerne v. Flores, 521 U.S. 507, 530 (1997).
27. Ala. Const. art. I, §3.01; Ariz. Rev. Stat. Ann. §§41-1493.01 (2013); Fla. Stat. Ann. §§761.01-.05 (West 2010); Idaho Code Ann. §§73-402 (West 2013); 775 Ill. Comp. Stat. Ann. 35/1-99 (West 2009); N.M. Stat. Ann. §§28-22-1 to -5 (West 2012); Okla. Stat. Ann. tit. 51, §§251-258 (West 2010); R.I. Gen. Laws Ann. §§42-80.1-1 to .4 (West 2006); S.C. Code Ann. §§1-32-10 to -60 (2010); Tex. Civ. Prac. & Rem. Code Ann. §§110.001-.012 (West 2009); *see* Natacha Lam, *Clash of the Titans: Seeking Guidance for Adjudicating the Conflict Between Equality and Religious Liberty in LGBT Litigation*, 23 Tul. J.L. & Sexuality 113, 119 (2014).
28. La. Rev. Stat. Ann. §§ 13:5231-5242 (2010); Mo. Rev. Stat. §§1.302-.307 (2013); 71 Pa. Cons. Stat. Ann. §§2401-2407 (West 2013); Tenn. Code Ann. §§4-1-407 (2009); Va. Code Ann. §§57-2.02 (2009).
29. *E.g.*, Okla. Stat. Ann. tit. 51, §§251-258 (West 2010); Pa. Cons. Stat. Ann. §§2401-2407 (West 2013).
30. *E.g.*, Ala. Const. art. I, §3.01; Conn. Gen. Stat. §52-571b (2006).
31. *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs,* 55 S.D. L. Rev. 466, 479 (2010) (noting that as of 2010, there were less than two litigated RFRA cases in ten of the states that have them and that four states had none).
32. *See* Lam, supra note 30, at 119.
33. Mo. Rev. Stat. § 1.307.2.
34. *See* James A. Hanson, *Missouri's Religious Freedom Restoration Act: A New Approach to the Cause of Conscience*, 69 Mo. L. Rev. 853, 871, note 108 (2004) (explaining that the legislative history of the bill does not state which particular federal protections they were concerned about).

35. KAN. STAT. ANN. § 60-5303 (2013); KY. REV. STAT. ANN. § 446.350 (2013); MISS. CODE ANN. § 11-61-1. Other states have proposed, but not yet passed, RFRAs. *See e.g.*, H.B. 5958 (Mich. 2014) (passed by house and waiting on senate vote).
36. *See* United States v. Windsor, 133 S. Ct. 2675, 2695 (2013) (holding that DOMA's definition of marriage is a deprivation of liberty provided by the Fifth Amendment).
37. *See Pending Marriage Equality Cases*, LAMBDA LEGAL (Dec. 19, 2014). Marriage equality in many states is currently being litigated. *See id.* Additionally, the circuit split regarding the state marriage bans invites a grant of *certiorari* by the Court to resolve the issue. *See id.* The Sixth Circuit upheld a state same sex marriage ban, the only circuit to do so. *See* DeBoer v. Snyder, 772 F.3d 388(6th Cir. 2014). But the Fourth, Tenth, and Seventh Circuits have declared these bans unconstitutional. *See* Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir 2014); Kitchen v. Herbert, 755 F.3d 1193, 1199 (10th Cir. 2014); Baskin v. Bogan, 766 F.3d 648, 672 (7th Cir. 2014).
38. Obergefell v. Hodges, 135 S. Ct. 1039.
39. Sarah Posner, *Wave of new state bills: Religious freedom or license to discriminate?* ALJAZEERA AMERICA (Feb. 7, 2014), http://america.aljazeera.com/articles/2014/2/7/wave-of-new-statebillsreligiousfreedomorlicensetodiscriminate.html.
40. *See Religious Freedom Amendment*, THE FAMILY FOUNDATION, (last visited Jan. 7, 2015) http://new.kentuckyfamily.org/wp-content/uploads/2013/08/201203-SB158.pdf; *Veto Override Needed to Protect our Right to Worship*, CATHOLIC CONFERENCE OF KENTUCKY, (Mar. 23, 2013) http://ccky.org/2013/03/veto-override-needed-to-protect-our-right-to-worship; Tom Deaton, *Ky. Lawmakers Override Religious Freedom Veto*, BAPTIST PRESS (Mar. 27, 2013) http://www.bpnews.net/39958.
41. The organization posted the following on its website: "And though laudable in its purpose, the bill, as currently drafted, would undermine existing civil rights protections in the Commonwealth .... We are particularly concerned that this bill could be used to undermine existing LGBT Fairness protections for individuals covered by local statutes in Louisville, Lexington, Covington, and Vicco, Kentucky." *ACLU of Kentucky Statement on the Passage of HB279,* AMERICAN CIVIL LIBERTIES UNION, (Mar. 11, 2013).
42. *See* Beth Musgrave, *Kentucky Gov. Vetoes Religious Freedom Bill*, MIAMI HERALD, (Mar. 25, 2013, 7:09 AM). http://www.miamiherald.com/incoming/article1948543.html. The state legislature eventually overrode the veto by a large margin. *See* Heather Green, *Looking Closer at Kentucky's New Religious Freedom Restoration Act*, THE WILD HUNT, (Apr. 7, 2013), http://wildhunt.org/2013/04/looking-closer-at-kentuckys-new-religious-freedom-restoration-act.html.
43. *Religious Liberties Regarding Marriage: The Homosexual Lobby is Forcing Their Agenda Through the Courts. Kansans Need to Be Aware of How This Affects Them*, KANSAS FAMILY POLICY COUNCIL ACTION, (last visited Jan. 6 2015) http://www.kansasfpcaction.com/index.php/key-issues/religious-liberty-regarding-marriage.
44. *See* Scott Rothchild, *Lawrence Ordinance at Center of Fight Over Kansas Preservation of Religious Freedom Act*, LAWRENCE JOURNAL WORLD (Feb. 20, 2012) http://www2.ljworld.com/news/2012/feb/20/lawrence-ordinance-center-fight-over-kansas-preser/ (quoting the representative as saying "The situation in Lawrence, it then trumps the freedom of religion in our Constitution .... You cannot use your religion as a defense under that existing ordinance.").
45. *See id.*
46. *See* Reid Wilson, *Mississippi Passes Arizona-Style Religious Freedom Bill*, WASH. POST (Apr. 1, 2014) http://www.washingtonpost.com/blogs/govbeat/wp/2014/04/01/mississippi-passes-arizona-style-religious-freedom-bill/ (commenting on the disagreement between opponents and supporters of the bill over the bill's intent and purpose).
47. Recent developments in Mississippi suggest that these protections for gays are coming. For example, the Human Rights Campaign (HRC) recently launched an initiative called "Project One America" where it will spend $8.5 million dollars in Mississippi, Alabama, and Arkansas, the three states with no laws protecting LGBT individuals from any form

of discrimination. *See Project One America*, HUMAN RIGHTS CAMPAIGN, (last visited Jan. 8, 2015) http://www.hrc.org/campaigns/project-one-america. Additionally, six Mississippi cities have passed resolutions affirming the worth of LGBT people. *See* Dustin Barnes, *Miss. Cities' LGBT Resolutions Signal Shift in Opinion*, CLARION LEDGER, (May 7, 2014, 3:25 PM). One called discrimination on the basis of sexual orientation anathema to the pubic policy of their cities. *See* Sarah Goodyear, *Mississippi College Towns are Leading the Fight for Gay Rights*, CITY LAB, (Mar. 5, 2014) http://www.citylab.com/politics/2014/03/mississippi-college-towns-are-leading-fight-gay-rights/8568/.

48. The Kentucky RFRA states:

> Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A 'burden' shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

KY. REV. STAT. ANN. 446.350 (2013).

The Kansas RFRA states:

> Government shall not substantially burden a person's civil right to exercise of religion even if the burden results from a rule of general applicability, unless such government demonstrates, by clear and convincing evidence, that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

KAN. STAT. ANN. § 60-5303 (a)

49. These are the same essential elements found in the federal and most states' RFRAs, allowing the same general analytical framework from this article to apply to those as well.
50. *See* KAN. STAT. ANN. § 60-5302(c):

> "Exercise of religion" means the practice or observance of religion under section 7 of the bill of rights of the constitution of the state of Kansas and the free exercise clause of the first amendment to the constitution of the United States and includes the right to act or refuse to act in a manner substantially motivated by a sincerely-held religious tenet or belief, whether or not the exercise is compulsory or a central part or requirement of the person's religious tenets or beliefs.

Id.

51. Hyman v. City of Louisville, 132 F. Supp. 2d 528, 539 (W.D. Ky. 2001).
52. U.S.C. §2000bb–2(4) (1994 ed.)
53. *See* Thomas v. Review Board of Indiana, 450 U.S. 707 (1981).
54. *See* Korte v. Sebelius, 735 F.3d 654, 683 (7th Cir. 2013).
55. *See* 42 U.S.C.A. § 2000cc (2012). Congress used dicta in *Employment Division v. Smith* as authority to pass the Act, stating that the heightened standard could still be used for individualized government assessments, *See* Jonathan Knapp, *Making Snow in the Desert: Defining A Substantial Burden Under RFRA*, 36 ECOLOGY L.Q. 259, 289 (2009); *see also* Employment Div. v. Smith, 494 U.S. 872, 884 (1990).
56. 42 U.S.C.A. § 2000cc-5.
57. Knapp *supra* note 55 at 290. There was a circuit split over whether RFRA protections extended to only the practices *required* by the adherent's religion, or all conduct motivated by religion. *See id.* at 265-66.
58. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761-62 (2014).
59. *See* U.S.C. 42 § 2000cc–3(g); *Hobby Lobby*, 134 S. Ct. at 2762.
60. *See* John Rhodes, *Up in Smoke: The Religious Freedom Restoration Act and Federal Marijuana Prosecutions*, 38 OKLA. CITY U. L. REV. 319, 361 (2013) (reiterating the Court's leniency under this prong of the RFRA). The rare times where the claimant's beliefs were not covered under the federal RFRA are not analogous in any way to the contention that an objection to LGB people's identity and sexual activity is a valid religious belief. *See*

eg., United States v. Meyers, 906 F. Supp. 1494, 1509 (D. Wyo. 1995) *aff'd*, 95 F.3d 1475 (10th Cir. 1996) (holding that membership in the "Church of Marijuana" was not legally protected conduct under the federal RFRA although his belief was sincere).

61. *See Hobby Lobby,* 134 S. Ct. 2774; Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59 (2014).
62. *See e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 651 (2000) ("The Boy Scouts asserts that it 'teach[es] that homosexual conduct is not morally straight, . . . and that it does not want to promote homosexual conduct as a legitimate form of behavior. We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality."); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 574-75 (1995)(requiring an Irish-American parade, organized by private citizens, to include an LGBT group in the parade would violate the group's First Amendment rights because it would give people the false impression that they believed homosexuals were just as socially acceptable as heterosexuals).
63. *See Executive Summary*, A SHIFTING LANDSCAPE: A DECADE OF CHANGE IN AMERICAN ATTITUDES ABOUT SAME-SEX MARRIAGE AND LGBT ISSUES, PUBLIC RELIGION RESEARCH INSTITUTE (2014) *available at* http://publicreligion.org/research/2014/02/2014-lgbt-survey/.
64. KAN. STAT. ANN. § 60-5302. It is unclear if the entity attempting to use the RFRA must be a person under both Kansas *and* United States law or either one.
65. *See e.g.*, KAN. STAT. ANN. § 82a-902. (in the context of water resource planning)("[A] natural person, partnership, organization, association, private corporation, public corporation, any taxing district or political subdivision of the state, and any department or agency of the state government."); KAN. STAT. ANN. § 12-4901 (in the chapter on cities and municipalities) ("[A]n individual, corporation, association, partnership or any organization."); KAN. STAT. ANN. § 44-637 (in the context of labor and industries)("[A]n individual, corporation, partnership, company, agency, institution or association.").
66. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010)(granting both non-profit and for profit corporate entities with free speech protections under the First Amendment).
67. *See* KAN. S.C.R. 1607 (2013). This resolution died in committee and did not reach a vote. *See id.*
68. *See* KY. REV. STAT. ANN. § 446.350.
69. *E.g.*, KY. REV. STAT. ANN. § 138.810 (in the context of the taxation of contaminated waste) ("every natural person, fiduciary, association, state or political subdivision, or corporation"); KY. REV. STAT. ANN. § 332.015 (5) (in the context of driver training schools)("person, firm, partnership, association, or corporation).
70. *See* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 398 (3d Cir.) (Jordan, J. dissenting) *cert. granted sub nom*; Conestoga Wood Specialties Corp. v. Sebelius, 134 S. Ct. 678 (2013) and *rev'd and remanded sub nom*; Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 189 (2014) (citing a number of cases that recognized religious beliefs of not for profit corporations). Religiously oriented non-profit businesses are unquestionably "people" under the federal RFRA. *See e.g.*, Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295, 1306 (11th Cir. 2006).
71. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2769 (2014).
72. *See id.* The Dictionary Act defines a person in the section that follows: "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (2012). The "unless context indicates otherwise" part of the Dictionary Act should be used when Congress does not define the word in the statute and the definition in the Dictionary Act does not seem to apply. *See* Rowland v. California Men's Colony, 506 U.S. 194 (1993).

While Congress does not define person in the RFRA, the Court found no reason to look beyond the definition provided in the Dictionary Act. *See, Hobby Lobby*, 134 S. Ct. at 2769.

73. *See id.* ("No known understanding of the term 'person' includes some but not all corporations. The term "person" sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.").
74. *See id.* at 2775 (dismissing the argument that it would be difficult to ascertain the actual beliefs of a corporation since, in this case, the beliefs of the corporations were clear and undisputed).
75. *See id.* at 1136-37.
76. *Id.* at 2774.
77. *See Faith in the Workplace*, TYSON FOODS (last visited Jan. 21, 2015) http://www.tysonfoods.com/ways-we-care/faith-in-the-workplace.aspx.
78. *See* Patrick Smith, *Ask the Pilot*, SALON (Feb. 7, 2004, 3:30 PM), http://www.salon.com/2004/02/27/askthepilot76/. *See also Seventeen Big Companies That Are Intensely Religious*, BUSINESS INSIDER (last visited Jan. 20 2015), http://www.businessinsider.com/17-big-companies-that-are-intensely-religious-2012-1#alaska-air-7 (listing both public and private corporations that have religious practices and/or leadership).
79. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 310-11 (1999) (highlighting that the dispersed shareholder vote in a public company is often meaningless due to legal and practical obstacles as well as "rational apathy").
80. This analysis assumes that *Hobby Lobby* is not overturned. Given the 5-4 decision in the case and the political divisiveness of this issue, the Court could foreseeably overrule itself in a later case with the appointment of a fairly liberal judge. A Democratic Congress could also modify the law in this area. Republicans in the Senate defeated a bill last July that would overturn *Hobby Lobby*. *See* Alan Greenblat, *Democratic Effort to Override* Hobby Lobby *Ruling Fails*, NAT'L PUB. RADIO (July 16, 2014, 2:35PM) http://www.npr.org/blogs/thetwo-way/2014/07/16/332026634/democratic-effort-to-overturn-hobby-lobby-ruling-fails.
81. *See* 42 U.S.C. §§ 2000bb-1(a) ("Government shall not substantially burden a person's exercise of religion. . . ."); KY. REV. STAT. ANN. 446.350("Government shall not substantially burden a person's freedom of religion. . . ."); KAN. STAT. ANN. § 60-5303 ("Government shall not substantially burden a person's civil right to exercise of religion.").
83. KAN. STAT. ANN. § 60-5302.
84. *See Senate Comm. On the Judiciary, Religious Freedom Restoration Act of 1993*, S. Rep. No. 111, 103rd Cong., 1st Sess., at 8-9 (1993); *House Comm. On the Judiciary, Religious Freedom Restoration Act of 1993*, H. Rep. No. 88, 103d Cong., 1st Sess. at 6 (1993).
85. Scholars have combined the *Sherbert/Yoder* definition into what is called the substantial impacts test, which applies when the government exerts any "pressure, direct or indirect, to modify behavior." Knapp, *supra* note 54, at 268.
86. Washington v. Klem, 497 F.3d 272, 280 (3d Cir.2007).
87. *See* Boy Scouts of America v. Dale, 530 U.S. 640, 659 (2000).
88. *See id.* at 653 (As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").
89. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 574-75 (1995).

> [T]hey [the parade organizers] may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's [the gay rights group] message out of the parade. But … it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."

90. *See e.g.*, Lawrence Ordinance 10-108.15.
91. KY. REV. STAT. ANN. § 344.230(3)).
92. KY. REV. STAT. ANN. § 344.230(3)(h).
93. KAN. STAT. ANN. § 60-5302.
94. 42 U.S.C. 2000bb–1(a)-(b); KAN. STAT. ANN. § 60-5303; KY. REV. STAT. ANN. § 446.350.
95. 406 U.S. 205, 215 (1972).
97. 374 U.S. 398 (1963).
98. *See* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 231 (1993).
99. Boy Scouts of America v. Dale, 530 U.S. 640, 659 (2000).
100. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 574-75 (1995). ("GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.").
101 *See* United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) ("The federal statute is invalid, for no *legitimate purpose* overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.") (emphasis added); Lawrence v. Texas, 539 U.S. 558, 560 (2003)("The Texas statute furthers *no legitimate state interest* which can justify its intrusion into the individual's personal and private life.").
102. Sherbert v. Verner, 374 U.S. 398, 407 (1963).
103. *See* United States v. Wilgus, 638 F.3d 1274, 1288-89 (10th Cir. 2011) (explaining how difficult it is for the government to prove that "no matter how long one were to sit and think about the question, one could never come up with an alternative regulation that adequately serves the compelling interest while imposing a lesser burden on religion.").

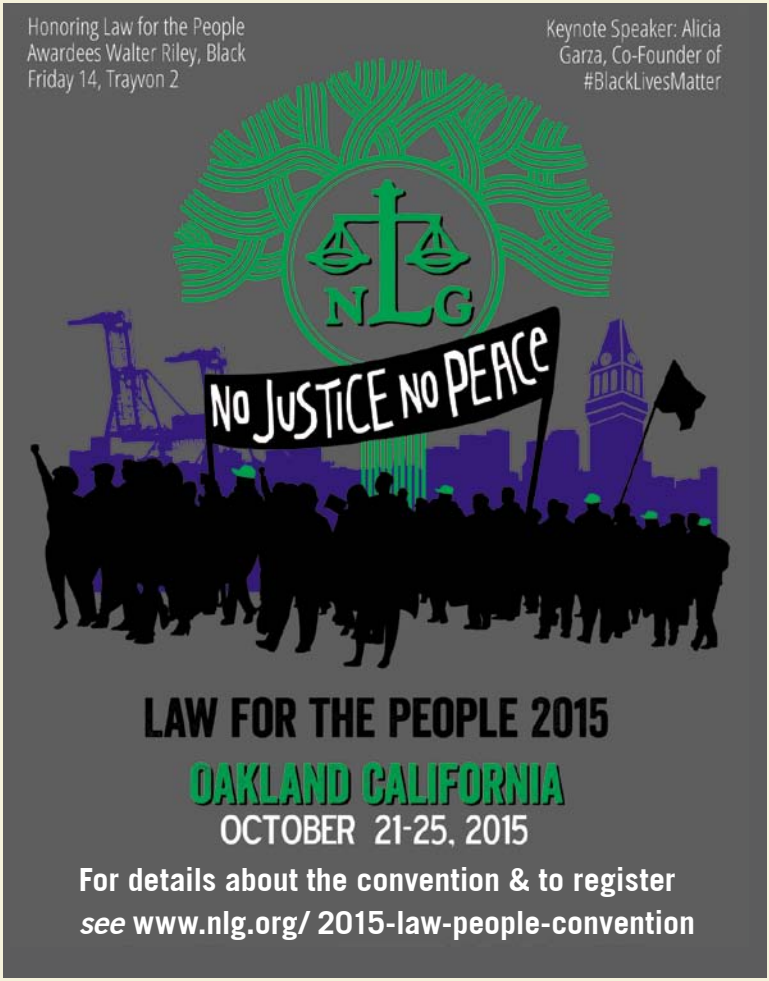
intellectual curiosity, and other core educational values, MacDougall explains that the top priority of the new deans and "deanlets" is to concentrate power in their own hands and maximize profits for their institutions. To do this they must neutralize resistance from the professors they employ. Since the sixties, when members of the working class were first able to join the professoriate as a result of the GI Bill and other progressive reforms, academics have been known to cause their employers fantastic headaches by asserting their own political independence, exercising their right to academic freedom by publishing controversial material, and, perhaps worst of all, showing solidarity with students expressing grievances against their schools.

As a result, law school administrators across the country, as if they'd attended the same Powerpoint presentation, have sought to disempower, intimidate, and pauperize their own professors. MacDougall's article explains the origin, method, and potential consequences of this effort. He also describes the type of solidarity and rebellion legal academics should employ to end it.

With the Supreme Court's ruling in *Obergefell v. Hodges*, LGB Americans finally enjoy the constitutional right to marry. This victory has energized homophobes in legislatures throughout the country, many of whom are raging with fundamentalist theocratic zeal. In "Masking Discrimination: How the 'Second Wave' of RFRAs Can Weaken Protections for LGB Individuals" Harvard Law student Laura Lane-Steele forecasts the extent to which LGB civil rights will be protected when challenged by those determined to use religion as a basis for denying basic civil rights and access to public accommodations to LGB persons. The homophobic faithful claim that the Religious Freedom Restoration acts ("RFRAs") described in this article are shields protecting the exercise of their faith against an onslaught of blasphemous sex and moral laxity. The truth is that they seek to use them as swords against minority groups they've long enjoyed stigmatizing, shaming, and discriminating against.

In the wake of the mass uprisings against racist police brutality in Ferguson, New York, Baltimore, and elsewhere, Crystal N. Abbey's "Agents of Change: How Police and the Courts Misuse the Law to Silence Mass Protests" could hardly be timelier. Abbey examines how some of the gratuitously severe and theoretically incoherent methods the U.S. criminal justice system resorts to are used to quell popular demonstrations and uprisings. Abbey gives particular attention to the alarming and obnoxious fact that police routinely deploy certain types of chemical agents for crowd dispersal against peaceful civilian protesters while binding international law forbids their use by the military against foreign soldiers on the battlefield. Some of the chemicals used against protesters are more dangerous than might be suspected, which is why they're banned in wartime. The government's routine use against non-violent political protesters betrays the extent of its contempt for the mass exercise of First Amendment rights. Abbey also analyzes the effectiveness, or lack thereof, of necessity as an affirmative defense in criminal cases involving protester-defendants.

—Nathan Goetting, *editor-in-chief*



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