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EXTENDING THE NORMATIVITY OF THE EXTENDED FAMILY: REFLECTIONS ON *MOORE V. CITY OF EAST CLEVELAND*

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INTRODUCTION

For decades, legal scholars have praised[1] Justice William Brennan's concurring opinion in *Moore v. City of East Cleveland*.[2] Scholars have applauded Justice Brennan's concurring opinion for its acknowledgment of the many family forms existing in society and its recognition of the ways in which African American and immigrant family patterns have historically differed from the nuclear family pattern that is so commonly found in white suburban households.[3]

In many ways, such widespread admiration of Justice Brennan's concurrence is merited. Unlike Justice Lewis Powell's plurality decision, which does not mention race at all, Justice Brennan's concurrence, joined

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1. *See, e.g.*, Robin Morris Collin & Robert William Collin, *Are the Poor Entitled to Privacy?*, 8 HARV. BLACKLETTER J. 181, 213–14 (1991) (using Justice Brennan's analysis about African American families to show how zoning laws can become a powerful tool that "exclude[s] poor families based not only on physical attributes of land use but also on more nebulous attributes of the character of the community").

2. 431 U.S. 494 (1977); *id.* at 506–13 (Brennan, J., concurring).

3. *See* Enid Trucios-Haynes, *"Family Values" 1990's Style: U.S. Immigration Reform Proposals and the Abandonment of the Family*, 36 BRANDEIS J. FAM. L. 241, 245–46 (1998) (relating Justice Brennan's comments about the prevalence of extended families among African Americans and his critiques about the disparate effects of East Cleveland's ordinance on African American families to constructions of families in the immigration context); *see also* Angela Mae Kupenda, *Two Parents Are Better Than None: Whether Two Single, African American Adults—Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other—Should Be Allowed to Jointly Adopt and Co-Parent African American Children*, 35 U. LOUISVILLE J. FAM. L. 703, 707–10 (1996) (praising and using Justice Brennan's analysis to argue for single-parent adoptions by African Americans).

by Justice Thurgood Marshall, rejects this approach of colorblindness.[4] Instead, the concurrence attempts to engage the many ways in which legal and social constructions of family have been shaped by factors like race, immigrant status, and socioeconomic class, as well as the means by which purportedly neutral laws can have a negative, disparate effect on historically marginalized groups such as African Americans.[5]

While Justice Brennan rejected the plurality's colorblind approach, he unintentionally fortified the hierarchy of family structures in society by reinforcing an understanding of a common family form among African Americans—the extended family—as deviant. This Article briefly examines and analyzes Justice Brennan's concurring opinion in *Moore* as a means of exposing how deeply embedded the notion of African American familial deviance is in our society. Specifically, this Article argues that the assumption of African American deviance in families is so strong that even the U.S. Supreme Court's two most progressive justices at that time—Justices Brennan and Marshall—failed to acknowledge and appreciate the inherent strengths of extended family forms when presented with an opportunity to do so.[6] Indeed, rather than explaining why extended family forms are a model toward which all families can aspire, Justices Brennan and Marshall instead reduced extended families to an option that should be utilized only "in times of hardship" and "under the goad of brutal economic necessity."[7] Additionally, Justices Brennan and Marshall failed to advance judicial understandings about the complexities of racism when they chose not to explore and analyze the intraracial dynamics involved in East Cleveland's regulation of families. Such an exploration would have added a vital layer of understanding about the operation and practice of racism in contemporary society by exposing how internalized racism creates incentives for more-privileged African Americans to discriminate against less-privileged African Americans, precisely because more-privileged African Americans wish to distance themselves from negative stereotypes and perceptions that are associated with being black.

Part I of this Article briefly recounts the plurality decision in *Moore* before analyzing Justice Brennan's concurring opinion and detailing how the concurrence affirms, rather than deconstructs, the notion of African American deviance in families. Next, Part II specifies the ways in which Justice Brennan could have truly uplifted African American families and other families of color by identifying and explicating the strengths of extended or multigenerational family forms among people of color and by showing how such family forms can be a model, or even the model (if one must be chosen), for all families. Then, Part III concludes by enumerating

4. *See Moore*, 431 U.S. at 509–10 (Brennan, J., concurring). *See generally* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012) (offering a critique of colorblindness in legal doctrine).

5. *See Moore*, 431 U.S. at 509–10 (Brennan, J., concurring).

6. PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 47 (2d ed. 2000) ("In general, everything the imagined traditional family ideal is thought to be, African-American families are not.").

7. *Moore*, 431 U.S. at 508 (Brennan, J., concurring).

how Justice Brennan missed a key opportunity to explore and expose the intricacies and complications of both race and racial discrimination when he chose not to address the intraracial dynamics involved in the case. After all, the City of East Cleveland that targeted and prosecuted Inez Moore, the African American plaintiff in the case, was a majority-African-American city with an African American City Manager and African American City Commission.[8] Such an exploration of the case's intraracial undercurrents not only could have disrupted societal understandings of the nuclear family as the normative ideal but also would have laid bare the pressures that African Americans have faced, both in history and at that time, to conform to the nuclear family structure. Further, it would have revealed the internalization of myths about African American familial deviance by the black middle class in East Cleveland and would have shown the damaging consequences of such pressures and internalization.

I. REDRAWING THE BOUNDARIES OF FAMILY: THE DECISIONS IN *MOORE V. CITY OF EAST CLEVELAND*

In *Moore*, the Supreme Court issued an important plurality decision in support of the principle of family autonomy when it held that an East Cleveland housing ordinance, which limited occupancy of a dwelling unit to members of one single family, violated the Due Process Clause of the Fourteenth Amendment.[9] The plaintiff in the case was Mrs. Inez Moore, an African American grandmother who was living together with her son, Dale Moore Sr.; Dale's son and her grandson, Dale Moore Jr.; and another grandson, John Moore Jr., whose mother, the daughter of Inez Moore, had passed away when John Jr. was a baby.[10]

In early 1973, the City of East Cleveland sent Inez Moore a notice informing her that her grandson John Jr. was an illegal occupant of her home according to section 1351.02 of the municipality's Housing Code and ordering her to comply with the section by permanently removing John Jr. from her home.[11] Because Inez Moore refused to remove her grandson John Jr.—a child who had already experienced significant loss with the death of his mother—from the safety of her home, the City filed criminal charges against her and prosecuted the case.[12] Inez Moore moved to dismiss the charge on the ground that section 1351.02 was unconstitutional.[13] However, she lost her motion and was criminally convicted, sentenced to five days' imprisonment and forced to pay a $25 fine.[14]

8. *See id.* at 537 (Stewart, J., dissenting).
9. *See id.* at 496 (plurality opinion).
10. *See id.* at 496–97.
11. *See id.* at 497.
12. *See id.*
13. *See id.*
14. *See id.*

After Inez Moore had exhausted all appeals, the Supreme Court granted certiorari.[15] Analyzing Moore's due process claim, the Court acknowledged that it "has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment,"[16] and it asserted that there is a "private realm of family life which the state cannot enter."[17] Noting that the "family is not beyond regulation," the Court closely examined the applicable East Cleveland housing ordinance to determine whether its "intru[sion] on choices concerning family living arrangements" was required to serve the city's stated motivations behind the statute: "preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system."[18] Ultimately, the Court concluded that the invasive nature of the statute was not narrowly tailored to serve the purposes identified by the state, as the statute's impact was both underinclusive and overinclusive.[19] The Court explicated:

> [T]he ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation. The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces Mrs. Moore to find another dwelling for her grandson John, simply because of the presence of his uncle and cousin in the same household. We need not labor the point.[20]

In so doing, the Court made a point of distinguishing *Moore* from *Village of Belle Terre v. Boraas*,[21] where the Court held that the township had not violated the due process rights of the plaintiffs, a group of unrelated college students who lived together in one dwelling, by having and enforcing a statute that prevented groups of more than two unrelated individuals from occupying one-family units.[22] *Belle Terre*, the Court asserted, did not control the decision in *Moore* because the "ordinance there affected only *unrelated* individuals" and "expressly allowed all who were related by 'blood, adoption, or marriage' to live together."[23] By contrast, the East Cleveland ordinance was "slicing deeply into the family itself," so deeply in

15. *See id.* at 498.
16. *Id.* at 499 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1979)).
17. *Id.* (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
18. *Id.* at 499–500.
19. *See id.*
20. *Id.* at 500.
21. 416 U.S. 1 (1973).
22. *See id.* at 6–9 (upholding an ordinance imposing limits on the types of groups that could occupy a single dwelling unit).
23. *Moore*, 431 U.S. at 498.

fact that it made it "a crime [for] a grandmother[] . . . to live with her grandson in circumstances like those presented here."[24]

The Court went on to explain its rejection of the city's contention that "any constitutional right to live together as a family extends only to the nuclear family."[25] Specifically, the Court asserted that despite the "risks [involved] when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of . . . the Bill of Rights," history made it clear that protection was required in this instance, for there was a rich tradition "of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children" in the United States.[26] Ultimately, the Court, while citing to *Pierce v. Society of Sisters*,[27] declared that neither East Cleveland nor any other municipality could force "all to live in certain narrowly defined family patterns," particularly because many close relatives "come together for mutual sustenance" in "times of adversity."[28]

Two of the Justices in the plurality, Justices William Brennan and John Paul Stevens, each authored concurring opinions. Justice Brennan's concurrence became the subject of longstanding praise in legal academia because it acknowledged how notions of family can be raced and classed.[29] In that opinion, Justice Brennan, joined by Justice Thurgood Marshall, criticized East Cleveland for adopting a statute that identified the nuclear family, "the pattern [of family] so often found in much of white suburbia," as the primary, if not the only, family form that should be promoted within its boundaries.[30] Without mentioning that Inez Moore, her son, and her grandsons are African American, Justice Brennan detailed how East Cleveland's housing ordinance was likely to have a disproportionate impact on African American families because extended and nonnuclear families are more common among African American citizens than white citizens.[31] In so doing, Justice Brennan offered comparative statistics on white and black families, noting that "13% of black families compared with 3% of white families include[d] relatives under 18 years old, in addition to the couple's own children" and that "48% of . . . black households" that are headed by "an elderly woman," as compared to only "10% of counterpart white households, include related minor children not offspring of the head

24. *Id.* at 498–99.

25. *Id.* at 500.

26. *Id.* at 502–04 (noting that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition" and that history counseled against "cutting off any protection of family rights at the . . . arbitrary boundary . . . of the nuclear family").

27. 268 U.S. 510 (1925); *id.* at 534–35 (holding state compulsory education law requiring students to attend solely public schools "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children under their control").

28. *Moore*, 431 U.S. at 505–06.

29. *See supra* note 3 and accompanying text.

30. *Moore*, 431 U.S. at 508 (Brennan, J., concurring).

31. *See id.* at 508–09.

of household."[32] More so, Justice Brennan argued, the ordinance was troubling because it intensified the economic burdens of families who were struggling financially and working hard to survive "under the goad of brutal economic necessity."[33] These nonnuclear families, Justice Brennan proclaimed, were regularly formed as "a means of survival[] for large numbers of the poor and deprived minorities of our society," as demonstrated by the family forms utilized by the "successive waves of [white] immigrants who populated our cities" and had "been victims of economic and other disadvantages that would [have] worsen[ed]" had they been "compelled to abandon extended, for nuclear, living patterns."[34]

Despite his recognition of the manner in which families can be and are raced and classed, Justice Brennan indicated that he did not believe the East Cleveland ordinance was racially motivated.[35] Indeed, he proclaimed that "[t]he record of this case would not support that implication" (though he provided no explanation for this conclusion).[36] Still, Justice Brennan noted that he was concerned about disparate effects because, "in prohibiting [the nonnuclear, extended] pattern of family living as a means of achieving its objectives, appellee city ha[d] chosen a device that deeply intrude[d] into family associational rights that historically have been central, and today remain central, to a large proportion of our population."[37]

Only in Justice Potter Stewart's dissent did it become clear why Justice Brennan was reluctant to believe that East Cleveland's enforcement was motivated by a racially discriminatory intent. In that dissent, Justice Stewart revealed how a number of the decision makers in East Cleveland shared the racial background of Inez Moore, writing:

> I fail to understand why it follows that the residents of East Cleveland are constitutionally prevented from following what Mr. Justice Brennan calls the "pattern" of "white suburbia," even though that choice may reflect "cultural myopia." In point of fact, East Cleveland is a predominantly Negro community, with a Negro City Manager and City Commission.[38]

In essence, Justice Stewart's concurrence exposed both his and Justice Brennan's mistaken assumption that somehow African Americans were incapable of discriminating against other African Americans—here, that

32. *Id.* at 509–10; *see also* Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865, 901–10 (2003) (detailing how the prevalence of multigenerational families among African Americans and Latinos is not simply due to economic concerns but also cultural values and norms about closeness to family). Additionally, in her book *Failure to Flourish: How Law Undermines Family Relationships*, Clare Huntington highlights how "[m]ore than 51 million families now live in multigenerational homes." CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 99 (2014).

33. *Moore*, 431 U.S. at 508 (Brennan, J., concurring).

34. *Id.* at 508–09.

35. *See id.* at 510.

36. *Id.*

37. *Id.*

38. *Id.* at 537 n.7 (Stewart, J., dissenting).

Inez Moore could not be the victim of racial discrimination, because the alleged perpetrators were African American.

II. REIFYING OR CHALLENGING THE NOTION OF THE NUCLEAR FAMILY AS THE NORMATIVE IDEAL?

To be sure, Justice Brennan should be commended for his willingness to recognize the role that race has played in constructing families as well as family law. It is important to acknowledge, however, that even Justice Brennan's attempt to champion African American families reified notions of black families as deviant. Although Justice Brennan's concurring opinion highlighted how facially neutral statutes like East Cleveland's section 1351.02 could "intrude" on African American families in ways that are exclusionary[39] and expressed the centrality of extended family units for African American families and white immigrant families in the past, it also reinforced the notion of the nuclear family as the ideal for American families, an ideal that should be pursued in all communities unless the families were facing challenging financial and social circumstances.[40] As Justice Brennan explained, he saw the prevalence of "the 'extended' form . . . among black families" as a reflection of "the truism that black citizens, like generations of white immigrants before them, have been victims of economic and other disadvantages."[41] Indeed, it was not the way that the East Cleveland housing ordinance placed nuclear families at the center that Justice Brennan found troubling but rather the way that the ordinance "display[ed] a depressing insensitivity toward the economic and emotional needs of a very large part of society."[42] Similarly, when Justice Brennan spoke of the role that extended families had played "for successive waves of immigrants who populated our cities," he did so in a way that implied that such immigrant families quickly and rightfully left behind those purported "nonideal" family forms once they had climbed out of their economically depressed situations.[43]

Additionally, rather than detail the many strengths of extended or multigenerational family forms as a general matter or express how such family forms can be a strong model of the kind of support and love that all family members should provide for each other, Justice Brennan authored his concurrence with a presumption that families turned to the support that extended families can provide only "in times of hardship" and "under the goad of brutal economic necessity."[44] For economically struggling families, he wrote, "*compelled* pooling of scant resources require[d] *compelled sharing of a household*."[45]

39. *See id.* at 510 (Brennan, J., concurring).
40. *See id.*
41. *Id.* at 509.
42. *Id.* at 507–08.
43. *Id.* at 508.
44. *Id.*
45. *Id.* (emphasis added).

That Justices Brennan and Marshall, two progressive jurists with strong records of upholding the rights of subordinated citizens, including African Americans, would presume the deviance of prevalent family forms in black communities is not surprising given the historical demonization of black families by politicians and policymakers, many of whom were also well intentioned.[46] For example, in 1965, Senator Daniel Patrick Moynihan, a liberal politician, articulated a narrative about black female-headed households as the source of the destruction and dysfunction of African American families that plagued the black community in U.S. society.[47] Referring to black female-headed households as a "tangle of pathology,"[48] Senator Moynihan blamed black mothers—not past and present racism or other structural impediments that make it difficult to climb out of difficult circumstances—for problems with drug use, poverty, and educational disparities in the black community.[49] He argued that the black family is "the principal source of most of the aberrant, inadequate, or antisocial behavior that [it] did not establish, but now serves to perpetuate."[50] Like Senator Moynihan and other critics, Justice Brennan simply failed to appreciate how extended families are great examples of the support obligations and commitments that family members can satisfy for each other.

III. EXPLORING AND EXPOSING THE COMPLEXITIES OF RACE AND RACIAL DISCRIMINATION

In addition to failing to underscore the inherent value of multigenerational families, both the majority and concurring Justices missed out on an important opportunity to flesh out the complexities of racial subordination when they failed to address the role that middle-class African Americans, who constituted the majority of residents in East Cleveland, played in reinforcing a racialized normative vision for families. Specifically, the Justices failed to acknowledge and explain how the actions of the black middle class in East Cleveland constituted a form of racism, not just classism, against poor and working-class African Americans. Had

46. *See, e.g.*, DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 29–46 (1965); Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233 (2014).

47. MOYNIHAN, *supra* note 46, at 9–14; *see also* Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, 25 S. CAL. INTERDISC. L.J. 363, 391 (2016) (indicating that Senator Moynihan's "report immediately provided the lynchpin for successful efforts to defund the social safety net through welfare reform, and conservative theorists continue to use it in order to give voice to victim-blaming theories of poverty"); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1670 (2005) ("Senator Daniel Patrick Moynihan's 1965 governmental report reinforced race-based stereotypes in its examination of the negative influence of illegitimacy and the lack of marriage on the black family.").

48. MOYNIHAN, *supra* note 46, at 29.

49. *See id.* at 29–46.

50. *Id.* at 30; *see also* Alycee Lane, *"Hang Them If They Have to Be Hung": Mitigation Discourse, Black Families, and Racial Stereotypes*, 12 NEW CRIM. L. REV. 171, 192 (2009).

the Justices explored such intraracial complexities in *Moore*, they not only could have revealed the pressures that African Americans have faced (both in history and at that time) to conform to the nuclear family structure but also could have revealed the internalization of myths about African American familial deviance by the black middle class in East Cleveland that has resulted in racial discrimination by African Americans against other African Americans.

The first scholar to fully delve into the intraracial dynamics of the *Moore* case was Robert Burt, who defended the city of East Cleveland's ordinance and criticized the majority and concurring opinions.[51] As with Justice Brennan, Burt viewed the nuclear family model as the ideal model for which to strive.[52] In Burt's eyes, the real losers in *Moore* were black-middle-class families in East Cleveland.[53] Viewing East Cleveland's black middle class as "socially and economically upwardly mobile" and seeing its housing ordinance in section 1352.02 as an understandable effort by the black middle class to distance itself from what he identified as "the ghetto life-style," Burt argued that the decision in *Moore* made it such that "the nuclear families that had come together in East Cleveland could find nowhere to remain together as a self-consciously contained community."[54]

Burt, however, failed to understand that African Americans can also discriminate against other African Americans. As numerous social psychologists have shown in their research, African Americans can be just as susceptible as other races to internalizing negative racial stereotypes about African Americans as a group, developing implicit as well as conscious biases against their own group and, more so, acting on those negative implicit perceptions.[55] No work illustrates this phenomenon better than Professor Audrey McFarlane's article "*Operatively White?*: Exploring the Significance of Race and Class Through the Paradox of Black Middle-Classness."[56] McFarlane, a land use and economic development scholar, has highlighted how the inclusion of middle-class blacks in middle-class neighborhoods (even as they are experiencing white flight like East Cleveland was) or gentrifying neighborhoods can obscure the racial nature of problems in transitioning locations.[57] Specifically, McFarlane explains that "affluent Blacks sometimes demonstrate that they have similar incentives to Whites—to avoid, run away from, or oppose projects or

51. *See* Robert A. Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 388–91.

52. *See id.*

53. *See id.*

54. *Id.* at 390; *see also* Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 VA. L. REV. 1261, 1323–25 (1991).

55. *See, e.g.*, Audrey G. McFarlane, Operatively White?*: Exploring the Significance of Race and Class Through the Paradox of Black Middle-Classness*, LAW & CONTEMP. PROBS., Fall 2009, 163; Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101, 105 (2002).

56. *See* McFarlane, *supra* note 55.

57. *See id.* at 163–67.

endeavors that would benefit lower-income Blacks"[58]—in part because black middle-class neighborhoods are more likely to border poor neighborhoods than white middle-class neighborhoods and are often "communities with less retail, inferior services, [and] less commercial services."[59] Thus, McFarlane notes, "[T]he black middle class are not as successful at protecting their turf as [the] white middle class are."[60] In fact, my own work explicates the practice of "distancing," in which the most racially palatable African Americans form their identities in ways that can purposefully distinguish them from those African Americans viewed as falling in line with negative racial stereotypes.[61] Had Justice Brennan directly challenged Justice Stewart's dissenting contention that racism could not be at play in *Moore*, because the majority of East Cleveland was black, he would have articulated an understanding of the practice of racism that could have helped guide the development of antidiscrimination jurisprudence in other areas of law such as employment and housing discrimination.

CONCLUSION

Justice Brennan's concurring opinion in *Moore* illustrates the power of negative stereotypes about and perceptions of black families. In American society, the black family has long been demonized and painted as deviant and dysfunctional—as the very root of social problems and inequities in the black community. In a world where champions for racial justice like Justices Brennan and Marshall are just as likely to operate under an assumption of black deviance as those who have pathologized black families, it is hard to imagine things changing at any point soon without greater emphasis on and greater understanding of black families and racism in all its complexities.

58. *Id.* at 165.

59. *Id.* at 187; Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls for* Brown*?*, 103 MICH. L. REV. 1507, 1526 (2005) (discussing how black middle-class neighborhoods are more vulnerable to "poverty, higher crime, failing schools, and fewer services than . . . white middle-class neighborhoods"); *see also* Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729, 755–70 (2001) (same).

60. McFarlane, *supra* note 55, at 187.

61. Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1898, 1921–26 (2007).