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Escape Denied: The Gretna Bridge and the Government's Armed Blockade in the Wake of Katrina

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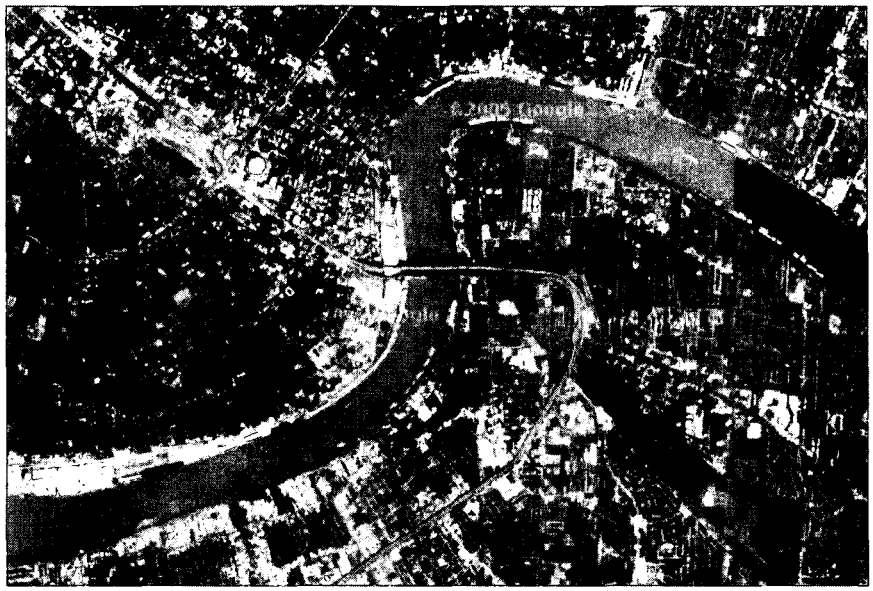
ESCAPE DENIED: THE GRETNA BRIDGE AND THE GOVERNMENT'S ARMED BLOCKADE IN THE WAKE OF KATRINA†



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"We call hurricanes and earthquakes 'natural disasters,' but the contours of these disasters are manmade."[2]

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1. Google Maps, http://maps.google.com/maps?hl=en&t=k&ll=29.9353,-90.06403&spn=0.078545,0.130463&t=k (last visited Sept. 11, 2006) (satellite image of Gretna Bridge).

2. Jordan Flaherty, *Crime and Corruption in New Orleans*, ALTERNET, Oct. 17, 2005, http://www.alternet.org/katrina/26871.

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I. INTRODUCTION

In the wake of Hurricane Katrina, our country witnessed the complexities that natural disasters and their aftermaths pose when people are forced to flee from uninhabitable areas. When Katrina made landfall on August 29, 2005, it unleashed the most expensive and one of the most deadly storms in United States history.[3] In Louisiana, the New Orleans levees gave way, and floodwaters submerged the city.[4] People were stranded on rooftops and waited for helicopters to airlift them to safety.[5] Others were subjected to unbearable conditions in the Superdome and the Convention Center: they sat in blistering heat amid failed sewage systems, with little or no food and water.[6] Almost 1,500 people died in Louisiana alone and 135 are still missing.[7] In

3. SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE, H.R. REP. NO. 109-377, at 7 (2006) [hereinafter A FAILURE OF INITIATIVE].

4. *Id.*

5. *Id.*

6. *Id.*

7. Louisiana Department of Health and Hospitals, Hurricane Katrina: Reports of Missing and Deceased, http://www.dhh.louisiana.gov/offices/page.asp?ID=192&Detail=5248 (last visited Nov. 2, 2006) (statistics as of Aug. 6, 2006).

Mississippi, another 238 people died as a result of the hurricane.[8] However, instead of breached levees, Mississippi experienced a massive storm surge that extended as far as ten miles inland.[9] Over half of Mississippi suffered serious wind and water damage and was without electricity.[10] Within a matter of days, Katrina resulted in the largest displacement of Americans in over 150 years: Katrina displaced as many as one million people.[11]

Even before the storm passed and the waters receded, people began to ask questions about what could have been done differently to save lives and to spare people from the storm-induced misery. After Katrina, the House of Representatives formed a committee to investigate the preparation for and the response to Hurricane Katrina.[12] The introduction to the committee's report states, "It's been said that experience is the best teacher. The unfortunate thing is that the learning process is sometimes such a painful one."[13] As a society, we will always have lessons to learn about preparedness and post-disaster response. However, Katrina's message was weightier than these lessons: decades from now, when teachers and historians reflect back on the Katrina disaster, the lesson that will emerge will be one about humanity.

A grim side of humanity revealed itself in the aftermath of Katrina when desperate storm victims attempted to flee the city of New Orleans. In the face of severe natural disasters, migration is inevitable and unstoppable;[14] and, most people would be appalled if migrants were prohibited from leaving a hazardous and contaminated disaster area. Yet, in the midst of the Katrina disaster, a city on the outskirts of New Orleans did just that. Armed with machine guns,[15] Gretna City police officers collaborated with officers from the Jefferson Parish Sheriff's Office and the Crescent City Connection Police Department[16] to block off the Gretna Bridge[17]—the only way out of New Orleans—for

8. National Weather Service, Hydrometeorological Prediction Center, http://www.hpc.ncep.noaa.gov/tropical/rain/katrina2005.html (last visited Nov. 2, 2006) (statistics as of June, 2006).

9. A FAILURE OF INITIATIVE, *supra* note 3, at 7.

10. *Id.*

11. Peter Grier, *The Great Katrina Migration*, CHRISTIAN SCI. MONITOR, Sept. 12, 2005, http://www.csmonitor.com/2005/0912/p01s01-ussc.htm.

12. A FAILURE OF INITIATIVE, *supra* note 3.

13. *Id.* at 9.

14. Suzette Brooks Masters, *Environmentally Induced Migration: Beyond a Culture of Reaction*, 14 GEO. IMMIGR. L.J. 855, 856 (2000).

15. Pascal Riche, Gretna's Choice, http://www.tpmcafe.com/story/2005/9/10/94823/6592 (last visited Sept. 11, 2006).

16. Gardiner Harris, *Police in Suburbs Blocked Evacuees, Witnesses Report*, N.Y. TIMES, Sept. 10, 2005, at A13 ("Arthur Lawson, chief of the Gretna, La., Police Department, confirmed that his officers, along with those from the Jefferson Parish Sheriff's Office and the Crescent City Connection Police, sealed the bridge").

17. The bridge is actually named the "Crescent City Connection"; however, most of the news reports have referred to the bridge as the "Gretna Bridge." Because

at least two days,[18] thereby preventing hungry, injured, and desperate people from escaping the toxic city.[19] Evacuees scurried as officers fired their weapons into the air[20] and yelled, "We're not going to have any Superdomes over here .... This is not New Orleans .... Get the f*** off the bridge."[21]

Many of the evacuees who had made their way to the bridge were elderly and disabled and suffered from critical health conditions.[22] Others carried children who had not eaten for days.[23] As a result of the police blockade, many people died before they could be rescued.[24]

On December 22, 2005, Tracey and Dorothy Dickerson filed a lawsuit against the City of Gretna and the individual police officers that blocked the Gretna Bridge.[25] Among the claims that the Dickersons assert in their lawsuit are violations of their constitutional right to

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many people are now familiar with the name "Gretna Bridge," that is how the Author will refer to it in this Comment.

18. Phillip Clark, *Bridge to Nowhere* 5 (Apr. 28, 2006) (unpublished comment, on file with author), *available at* http://www.law.berkeley.edu/library/disasters/Clark.pdf).

19. Posting of sfsocialists to http://www.livejournal.com/users/sfsocialists/3687.html (Sept. 5, 2006, 17:39:36).

20. *Id.*

21. *The Bridge to Gretna*, Dec. 18, 2005, http://www.cbsnews.com/stories/2005/12/15/60minutes/main1129440.shtml.

22. Posting of sfsocialists, *supra* note 19; *see also* Rogers Cadenhead, *Two Americas, One Bridge*, WORKBENCH, Sept. 17, 2005, http://www.cadenhead.org/workbench/news/2762/two-americas-one-bridge.

23. *See* Posting of sfsocialists, *supra* note 19.

24. *See* First Supplemental and Amending Class Action Complaint at 2–3, 5, Dickerson v. City of Gretna, No. 05-0667 (E.D. La. filed Apr. 11, 2006).

25. Complaint at 1–2, Dickerson v. City of Gretna, No. 05-6667 (E.D. La. Dec. 22, 2005). The original complaint—filed as a class action—named as defendants the City of Gretna, the City of Gretna Police Department, and the individual police officers whose names were to be added to the complaint once the plaintiffs were able to identify them. *Id.* at 2. However, the First Supplemental and Amending Class Action Complaint, *supra* note 24, only named the City of Gretna and the City of Gretna Police Department as defendants. On May 19, 2006, the district court granted in part the defendants' Motion to Dismiss and dismissed the claim against the City of Gretna Police Department. Court's Order and Reasons on Def.'s Mot. to Dismiss at 1, Dickerson v. City of Gretna, No. 05-6667 (E.D. La. May 19, 2006). Presumably, the court dismissed the claim against the police department because it "is not a separate juridical entity and has no legal capacity to sue or be sued." Def.'s Mot. to Dismiss at 1, Dickerson v. City of Gretna, No. 05-6667 (E.D. La. Mar. 20, 2006). In light of plaintiffs' Second Supplemental and Amending Complaint, filed on August 30, 2006, the Dickersons' case is no longer a class action lawsuit. Second Supplemental and Amending Complaint at 1, Dickerson v. City of Gretna, No. 05-6667 (E.D. La. filed Aug. 30, 2006). Furthermore, while the Dickersons "realleged all allegations in their initial Complaint and First Supplemental and Amending Complaint," several individuals and entities were added as defendants. *Id.* at 2–3. The named defendants include: "City of Gretna Police Department through the City of Gretna[;] . . . Arthur Lawson, Chief of Police for the City of Gretna [in his individual capacity][;] . . . officers of the City of Gretna Police Department [in their individual capacities], whose identities are not known at present[;] . . . Jefferson Parish Sheriff's Office[;] . . . Harry Lee, Jefferson Parish Sheriff [in his individual capacity][;] . . . [and] deputies of the Jefferson Parish Sheriff's Office [in their individual capacities], whose identities are not known at present." *Id.*

travel; their right to peaceful assembly; their right to due process; their right to equal protection; their right to be protected against unreasonable search and seizure; and their right to be protected against cruel and unusual punishment.[26] Damages listed in the complaint included, "Physical pain past and future; Mental Anguish; Medical Expenses; Future Medical Expenses; Loss of Life; Loss of Consortium; and Loss of Earning Capacity."[27]

The police officers who blocked the Gretna Bridge may have in fact violated several rights guaranteed by the Constitution. However, this Comment focuses on only one—the right to the freedom of travel. This Comment argues that the City of Gretna should be held civilly liable for its actions; and, that the individual police officers who blocked the bridge should be held both civilly and criminally liable for their actions. By blocking the bridge, the officers intentionally deprived New Orleans residents of their right to the freedom of travel.

Part II contextualizes this argument by providing a history of the poverty and racism long faced by many New Orleans residents. To a large extent, poverty and health shaped New Orleanians' evacuation and survival strategies; and, examining the reasons behind the strategies employed by different sectors of the population is fundamental to understanding why so many New Orleans residents did not or could not evacuate. Racism further complicated these strategies. The history of police brutality in and around New Orleans indicates that routine abuse may have been an aggravating factor in Katrina's aftermath. In addition, both the media and government officials perpetuated negative stereotypes about New Orleans residents, which prolonged evacuation and rescue efforts and greatly exacerbated evacuees' suffering. The Gretna Bridge incident is just one illustration of how, in the wake of Katrina, poverty and racism collided to produce unjust consequences for residents who were simply struggling to survive.

Part III reviews the fundamental right to travel under the Due Process Clause and discusses this right in the context of emergency situations. Part IV considers the possible civil and criminal consequences under 42 U.S.C. § 1983 and 18 U.S.C. § 242 for depriving individuals of their right to travel.

Finally, Part V applies the fundamental right to travel and the remedies afforded under § 1983 and § 242 to the Gretna Bridge incident. This section argues that the City of Gretna should be held civilly liable for the officers' actions and that the individual police officers who blocked the Gretna Bridge should be held both civilly and criminally liable for their actions.

26. Second Supplemental and Amending Complaint, *supra* note 25, at 5–6.

27. *Id.* at 7–8.

II. BACKGROUND

Underlying the Katrina disaster and the Gretna Bridge incident is a history of poverty in the areas of New Orleans hit hardest by the storm. The low-income residents of these areas were the least able to leave the city before the storm, and thus were most likely to be stranded on the wrong side of the Gretna Bridge—the only way out of New Orleans after Katrina. Also permeating the Gretna Bridge incident is a history of police brutality rife with racism—a history that has earned local police departments a foul reputation and has bred a fierce animosity among local residents. When the actions of the police officers who blocked the Gretna Bridge are viewed in the context of routine abuse, and further seen as being directed at the poorest residents of New Orleans, the mindset of those officers becomes clear: the police who blocked the Gretna Bridge acted willfully and with total disregard for the residents whose lives depended on crossing it.

A. *Survival Strategies in the Wake of Katrina: An Illustration of the Role that Social Stratification Plays in "Choosing" How to Cope With a Hurricane*

The nation watched in horror as picture after picture flashed across television sets and unmasked the devastation wreaked by Hurricane Katrina. Some reporters blamed the government for its slow response.[28] Others blamed the tens of thousands of hurricane victims who did not evacuate.[29] But, without understanding social stratification and its effects on residents' abilities to evacuate, blaming the victims of Katrina is unfair.[30]

Before Katrina, New Orleans had "one of the highest levels of income inequality in our country."[31] Almost twenty-eight percent of New Orleans's residents lived below the poverty line; almost 12% were over the age of sixty-five, and over 27% did not have a car.[32] These demographics did not bode well for the victims of Katrina as several recent natural disasters have demonstrated that, "who lives and who dies is intricately related to issues of poverty and access . . . . [T]he [safety of the areas in which] homes are built, . . . the soundness of the structures, [and] the length of time it takes for relief to arrive,

28. Elizabeth Fussell, *Leaving New Orleans: Social Stratification, Networks, and Hurricane Evacuation*, SOC. SCI. RES. COUNCIL, Sept. 26, 2005, http://understandingkatrina.ssrc.org/Fussell/.

29. *Id.* In fact, in a television interview, Senator Rick Santorum suggested punishing people who do not evacuate during hurricanes: "There may be a need to look at tougher penalties on those who decide to ride [out hurricanes] and understand that there are consequences to not leaving." *Santorum, Barbara Bush Criticized for Evacuee Comments*, Sept. 7, 2005, http://www.nbc10.com/news/4943604/detail.html.

30. *See* Fussell, *supra* note 28.

31. *Id.*

32. *Id.*

[are] all . . . intricately tied to poverty . . . ."[33] Clearly, the Katrina disaster was no exception. Residents who remained in New Orleans to ride out the storm had few alternatives.

In an article discussing the relationship between social stratification and hurricane evacuation strategies, Elizabeth Fussell explains that social stratification shaped residents' abilities to deal and their strategies for dealing with the arrival of Hurricane Katrina.[34] Evacuation strategies were largely impacted by "income-level, age, access to information, access to private transportation, . . . physical mobility and health, . . . occupations[,] and . . . social networks outside of the city."[35]

For example, in most hurricanes upper- and middle-class residents evacuate twenty-four to forty-eight hours before a hurricane is predicted to hit.[36] Prior to Katrina, most upper- and middle-income New Orleans residents had evacuation strategies that were straightforward: "make a hotel reservation or arrange a visit with out-of-town friends and family, board the house windows[,] . . . pack the car, get some cash and leave town."[37] For these residents, the cost of missing a few days of work was less likely to be a determinative factor in deciding whether or not to evacuate.[38]

On the other hand, in most hurricanes low-income residents tend to have fewer choices in deciding how to prepare for a hurricane, and they are often the least able to evacuate.[39] Because Hurricane Katrina hit at the end of the month, many New Orleans residents who lived from paycheck-to-paycheck did not have the economic resources necessary to evacuate.[40] Not surprisingly, these residents were also less likely to own a vehicle.[41] Moreover, the people who were least able to leave the city also lived in the most poverty-stricken neighborhoods, hardest hit by the flooding.[42]

In addition to low-income residents, elderly, sick, and disabled people are typically less able to evacuate during hurricanes than people

33. Flaherty, *supra* note 2.

34. Fussell, *supra* note 28. Generally speaking, social stratification is the hierarchy of social classes and social statuses within a society. *See* Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 470–73 (2004). While "the source of institutionalized inequality can vary," social stratifications are often thought to result not from personal differences, but from "contrived or artificial criteria" or "characteristic[s] that [have] subjectively been assigned social importance." *Id.* at 470–71.

35. Fussell, *supra* note 28.

36. *Id.*

37. *Id.*

38. *See id.*

39. *See id.*

40. *Id.*

41. *Id.*

42. *Id.*

who are in good health.[43] Many elderly and disabled people simply choose not to evacuate during a hurricane because of the difficulties in managing their health conditions outside of their homes.[44] Katrina was no exception. In the aftermath of Katrina, many residents died of complications related to asthma, diabetes, and high blood pressure—conditions that are normally easy to manage unless medicine or treatment is inaccessible.[45]

Hurricane Katrina was a reminder of an unfortunate reality: inequalities in income often result in dire, life-and-death consequences for those who lack the means to prepare for and survive natural disasters. When developing city-wide disaster plans, residents will greatly benefit if city leaders take into account the role that social stratification plays in shaping residents' evacuation strategies. Considering the reasons behind the choices that people make in the midst of a disaster may help lessen the discriminatory impact that future disasters have on select populations.

B. *Racial Discrimination and Police Brutality in New Orleans*

The Gretna Bridge incident was foreshadowed not only by poverty, but also by the attitudes of disreputable local officials. News reports that describe incidents of police brutality rarely surprise the people who live in and around New Orleans.[46] Unfortunately, in a city that is almost 70% African-American,[47] police brutality is commonplace.[48] There are too many incidents to discuss each one in this Comment, but one thing is certain: discriminatory police policies and practices begin at the top with law enforcement officials who have the highest authority.

For example, Sheriff Harry Lee of Jefferson Parish is infamous for being the nucleus of racist philosophies as well as the initiator of blatantly prejudicial policies.[49] In fact, Jefferson Parish, one of the four parishes that make up the Greater New Orleans region,[50] has been described as "Louisiana's most notoriously racist parish."[51] Sheriff Lee made headlines when, in the 1980s, he ordered his officers to stop

43. *Id.*
44. *See id.*
45. *Id.*
46. *See* Flaherty, *supra* note 2.
47. A FAILURE OF INITIATIVE, *supra* note 3, at 444 (supplementary report of Rep. Cynthia A. McKinney).
48. *See* Flaherty, *supra* note 2.
49. *Id.*
50. The New Orleans Metropolitan Area is composed of seven parishes; of those, four comprise the Greater New Orleans region: Jefferson, Orleans, Plaquemines, and St. Bernard. *See* New Orleans: Tourism, http://ccet.louisiana.edu/03a_Cultural_Tourism_Files/02.5_Greater_New_Orleans.html (last visited Sept. 8, 2006).
51. Rogers Cadenhead, *Grand Jury Will Investigate Gretna Bridge Blockade*, WORKBENCH, Aug. 4, 2006, http://www.cadenhead.org/workbench/news/2987/grand-jury-investigate-gretna-bridgeG. Roger Cadenhead states that, "Jefferson Parish

African-Americans if they were seen crossing the Gretna Bridge into the predominately-white City of Gretna: "[If] two young blacks [are seen] driving a rinky-dink car in a predominately white neighborhood . . . [t]hey'll be stopped."[52] In April 2005, when Sheriff Lee's officers were found using a "'blatantly racist caricature' of a black male" for target practice, Sheriff Lee laughed at the allegations stating, "I've looked at it, I don't find it offensive, and I have no interest in correcting it."[53] About a month later, Jefferson Parish police fired 110 shots into a truck that had been reported as stolen, killing a sixteen-year-old African-American boy and injuring two of his passengers.[54] When black ministers criticized the incident, Sheriff Lee responded, "They can kiss my ass."[55]

Jefferson Parish is known not only for being "notoriously racist," but also for having an unusual number of police brutality incidents. A federal study conducted in 1991 concluded that Jefferson Parish police are "seven times more likely to use deadly force than the national average."[56] While its population is only about 500,000, Jefferson Parish ranks third in the nation—behind only the cities of New Orleans and Los Angeles—for the number of police brutality complaints.[57] The City of Gretna has also had its fair share of brutality complaints. In fact, the Metropolitan Crime Commission has accused Gretna's police department of "systematic brutality."[58] In 2000, five officers were fired for beating a suspect.[59] The following year, in a separate incident, a resident sued the police department in federal court for police brutality.[60]

Not surprisingly, Sheriff Lee and Gretna's Chief of Police[61] were at the center of the Gretna Bridge incident. However, to discuss only the local law enforcement's role in the discrimination long faced by

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was described . . . as 'Louisiana's most notoriously racist parish' by the Louisiana Capital Assistance Center . . . ." *Id.*

52. Flaherty, *supra* note 2; A FAILURE OF INITIATIVE, *supra* note 3, at 458 (supplementary report of Rep. Cynthia A. McKinney).

53. Flaherty, *supra* note 2; A FAILURE OF INITIATIVE, *supra* note 3, at 458 (supplementary report of Rep. Cynthia A. McKinney).

54. Flaherty, *supra* note 2; A FAILURE OF INITIATIVE, *supra* note 3, at 458 (supplementary report of Rep. Cynthia A. McKinney).

55. Flaherty, *supra* note 2; A FAILURE OF INITIATIVE, *supra* note 3, at 458 (supplementary report of Rep. Cynthia A. McKinney).

56. Elisa Waingort, *Two Black Men Die in Louisiana Sheriff's Custody*, Apr. 3, 1994, http://www.hoboes.com/pub/Prohibition/Crime%20and%20Punishment/Corruption/United%20States/Drugs%20Cause%20Bruises%3f.

57. *Id.*

58. Dennis Persica, *After 26 Years, Gretna Police Chief B.H. Miller Jr. Says He Knows 'When To Hold and . . . When To Fold,'* TIMES-PICAYUNE, June 29, 2005, *available at* 2005 WLNR 10241747.

59. *Id.*

60. *Id.*

61. The incidents of police brutality mentioned above occurred while Chief B.H. Miller Jr. was Gretna's Chief of Police. *Id.* In April of 2005, Arthur Lawson became the new Chief of Police. *Id.*

residents of the Greater New Orleans region would minimize an unfortunate reality. As the next section demonstrates, racial prejudice is not just a New Orleans problem: racial prejudice still plagues this country as a whole.

C. *Racial Discrimination Following Katrina*

"Something is wrong in America!" Roslyn Brock said to the audience at an NAACP state convention while discussing Katrina in the context of her speech about civil rights.[62] Following Katrina, many people likely shared Brock's concern. And, unfortunately, the minute-by-minute news reports provided a constant reminder that our country was floundering and the world was watching. Most unflattering were the remarks that came from the mouths of our country's leaders, whose tones ranged from plainly insensitive to unequivocally bigoted.

After touring the Houston Astrodome that temporarily housed thousands of hurricane victims, Barbara Bush was quoted as saying, "So many of the people here, you know, were underprivileged anyway, so this is working very well for them."[63] Former House Majority Leader Tom DeLay, in apparent agreement with Barbara Bush, reportedly compared children's experiences of living at the Astrodome with being at camp and asked a group of boys, "Now, tell me the truth, boys, is this kind of fun?"[64] Some politicians were more blatant with their remarks. Representative Richard H. Baker told lobbyists, "We finally cleaned up public housing in New Orleans. We couldn't do it, but God did."[65] With crime in mind, Senator Rick Santorum suggested that people who "ignored" the evacuation orders should be punished.[66] A suggestion by former Secretary of Education Bill Bennett went even further: "If you wanted to reduce crime . . . you could abort every black baby in this country and your crime rate would go down."[67] Bennett later admitted "that race was on his mind because of recent stories . . . about New Orleans after Hurricane Katrina."[68]

Further degrading to the African-American residents of the Greater New Orleans region were the negative racial stereotypes that

62. Michael Paul Williams, *NAACP Official: 'Freedom Needs Voice,'* RICHMOND TIMES DISPATCH, Oct. 30, 2005, http://www.timesdispatch.com/servlet/Satellite?pagename=RTD/MGArticle/RTD_BasicArticle&c=MGArticle&cid=1128767840408&path=!news!localupdates&s=1045855935074.

63. *Santorum, Barbara Bush Criticized for Evacuee Comments*, *supra* note 29.

64. Charles Babington, *Some GOP Legislators Hit Jarring Notes in Addressing Katrina*, WASH. POST, Sept. 10, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/09/09/AR2005090901930.html.

65. *Id.*

66. *See Santorum, Barbara Bush Criticized for Evacuee Comments*, *supra* note 29.

67. Media Matters, *Bennett Cited Katrina Aftermath, Swift's* "A Modest Proposal" *As Inspiring His Comments*, Sept. 30, 2005, http://mediamatters.org/items/200509300004.

68. *Id.*

news reporters relentlessly reinforced. These stereotypes were perpetuated by false media reports of utter pandemonium. The report by the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina stated, "[f]alse media reports impeded the relief effort and affected decisions on where to direct resources."[69] When asked whether these false reports had hindered rescue efforts, the Director of Homeland Security for the City of New Orleans stated, "absolutely."[70] Furthermore, "[o]nce the seed of fear was planted it spread like an out of control virus,"[71] resulting in President George Bush's declaration of "zero tolerance" for looting and Governor Kathleen Blanco's shoot-to-kill orders.[72] Not only were the media reports of rampant violence never substantiated, none "[o]f the six deaths in the Superdome . . . were crime-related."[73] Similarly, National Guard officials reported that "they encountered no lawlessness or any resistance when they moved in to clear out the Convention Center."[74] In fact, in the crowd of 19,000 people, only thirteen weapons were found.[75] Reports of gunfire in the streets of New Orleans were also later found to be exaggerated or false.[76] For example, on September 1, CNN repeatedly reported that evacuations of the Superdome had been suspended because someone fired a gun at a helicopter;[77] however, this story was never verified and "in the end, there were no bullet holes found in any helicopters."[78] State and local officials stated later that the "rampant shooting" reported by the media actually came from people trapped in their homes who were attempting to attract rescuers.[79]

In addition to the false reports, news reporters tended to attribute the suffering of African-American residents to poverty. For example, Wolf Blitzer of CNN stated, "You simply get the chills every time you see these poor individuals . . . so many of these people, almost all of them we see, are so poor and they are so black."[80] While African-Americans largely populated the poverty-stricken neighborhoods hardest hit by Katrina, many people would be surprised to learn that in "the Greater New Orleans Area[,] in the wake of Katrina, a greater number of whites (85,000) live[d] below the poverty line than [did]

69. A FAILURE OF INITIATIVE, *supra* note 3, at 248.
70. *Id.*
71. Michael I. Niman, *Katrina's America: Failure, Racism, and Profiteering*, THE HUMANIST, Nov.–Dec. 2005, at 11, *available at* http://www.thehumanist.org/humanist/articles/Niman.Katrina.pdf.
72. *Id.* at 11–12.
73. A FAILURE OF INITIATIVE, *supra* note 3, at 248.
74. *Id.* at 248–49.
75. *Id.* at 249.
76. *Id.* at 247.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 446 (supplementary report of Rep. Cynthia A. McKinney).

minorities (65,000)."[81] In fact, many Katrina victims suffered not because of poverty, but because of sickness, disability, and age.[82] "Fourteen percent of residents in the Lower Ninth [Ward] were senior citizens. Another fourteen percent were handicapped."[83]

While the media echoed racist stories of violence that instilled fear and apprehension in the minds of relief workers, sick and elderly people sat under bridges and overpasses in trash, feces, and urine, with guns aimed at them by police officers.[84] "When they died in their wheelchairs, . . . the authorities . . . push[ed] them aside."[85] One paraplegic was removed from his home and taken to the Superdome where he sat "without food, water[,] or medical care for five days."[86] Another woman recalled her struggle to get medical help for her mother who was seriously ill and in danger of having a stroke.[87] The first time she approached military personnel and explained that her mother was dehydrated and close to death, a worker gave her water.[88] But, the next time she approached Homeland Security personnel and explained the urgency of her mother's condition, one of the workers stated, "Well, let 'em die, that's one less nigger we gotta' worry about."[89] While people might be skeptical of these accounts, stories like these were repeated over and over to the Select Committee responsible for investigating the response to Katrina.[90]

Finally, racism existed in the strange, yet widely accepted, use of the term "refugee" to describe evacuees.[91] Because the term "refugee" typically describes "a person [who is] crossing a national border in search of security," the Katrina evacuees were ostensibly painted as "others"—not on equal footing with the residents of the nearby cities and states that they fled to. However, as one evacuee stated, "We ain't refugees. [We're] citizen[s]."[92] Once it became evident that the use of the term "refugee" was not sitting well with Katrina evacuees, George Bush asked that the media stop using the term; and, many reporters did.[93]

For many, Katrina came in two parts. First, the natural disaster swept away homes and flooded cities. But the second storm—the manmade disaster created by a string of human errors and further compounded by factors such as poverty and racism—increased and

81. *Id.* at 444.
82. *See id.* at 496.
83. *Id.*
84. *Id.* at 454–55.
85. *Id.* at 455.
86. *Id.*
87. *Id.* at 455–56.
88. *Id.* at 456.
89. *Id.*
90. *See generally* A FAILURE OF INITIATIVE, *supra* note 3.
91. *Id.* at 446 (supplementary report of Rep. Cynthia A. McKinney).
92. *Id.* at 446–47.
93. *Id.* at 447.

prolonged suffering and resulted in hundreds, if not thousands, of unnecessary deaths. Katrina was the first time in decades in which the face of discrimination was so mercilessly unmasked. The nation watched in bewilderment as the floodwaters engulfed not only the cities along the Gulf Coast, but also a century of progress in the civil rights movement.

Few, however, were prepared for what happened on the Gretna Bridge.

D. *The Gretna Bridge Incident*

It has been compared to Bloody Sunday.[94] Others have called it "the worst American civil rights episode . . . in the 21st Century."[95]

As the "hurricane-ravaged [city of] New Orleans filled with sewage-tainted floodwaters and corpses," the mayor of New Orleans, Ray Nagin, urged residents to escape the city by crossing "a bridge . . . [that lead] to . . . the city's suburban west bank."[96] The Crescent City Connection, also known as the Gretna Bridge, carries U.S. Route 90 and Interstate 910 over the Mississippi River into New Orleans.[97] After the hurricane, this bridge was the only remaining route out of New Orleans; all other bridges and highways out of New Orleans were flooded in both directions.[98] Yet, about three days after the storm, "dehydrated, starved, [and] tired people," many of whom had walked miles to reach the outskirts of New Orleans, were met with machine guns and attack dogs and were told to turn around.[99] The City of Gretna, whose website boasts that it enhances its citizens' lives through "new and innovative approaches" to crime,[100] collaborated with the Jefferson Parish Sheriff's Office and the Crescent City Connection Police to block the Gretna Bridge in an effort to prevent evacuees from escaping the flooded city.[101] As one witness recounted, a

94. Glen Ford & Peter Gamble, *Whose Plan for New Orleans?: Blacks Need a Vision for the Cities*, BLACK COMMENTATOR 2, Nov. 10, 2005, http://www.blackcommentator.com/158/158_cover_no_vision.pdf. Representative Cynthia McKinney said, "The Gretna City Bridge incident will live on in civil rights history just as does Bloody Sunday at the Edmund Pettus Bridge," as she marched across the Gretna Bridge with approximately 100 other protestors. *Id.*; *see also* Emerging Minds, Cynthia McKinney Makes Statement on Racist Blocking of Bridge During Hurricane Katrina, Nov. 2, 2005, http://www.emergingminds.org/magazine/content/item/2713/catid/15.

95. Emerging Minds, *supra* note 94.

96. *Id.*

97. *See* Louisiana at SouthEastRoads.com, U.S. Highway 90 Business, http://www.southeastroads.com/us-090_bus_la.html (last visited on Sept. 11, 2006).

98. Wikipedia, Crescent City Connection, http://en.wikipedia.org/wiki/Crescent_City_Connection (last visited Sept. 11, 2006).

99. *The Bridge to Gretna*, *supra* note 21; *see also* Riche, *supra* note 15.

100. Gretna Police Department, Mission Statement, http://www.gretnapolice.com (last visited Sept. 11, 2006).

101. Harris, *supra* note 16. "Arthur Lawson, chief of the Gretna, La., Police Department, confirmed that his officers, along with those from the Jefferson Parish Sheriff's Office and the Crescent City Connection Police, sealed the bridge." *Id.*

group consisting of people using wheelchairs and crutches, parents with strollers, and elderly people who were very sick,[102] approached the bridge and were confronted by a wall of armed officers.[103] Before the evacuees were close enough to speak, the officers began firing their weapons over the evacuees' heads.[104] All the while officers were heard screaming, "We don't want another Superdome . . . . This isn't New Orleans."[105]

As a result of the officers' actions, people were trapped in deplorable conditions for days.[106] Several of the stranded victims died.[107]

In a journal that Larry Bradshaw and Lorrie Beth Slonsky later posted online, they described their experience following Katrina and their attempts to leave New Orleans, culminating in their attempt to cross the Gretna Bridge.[108] Bradshaw and Slonsky live in San Francisco but were in New Orleans for a paramedics' conference.[109] Unlike the majority of the people that the police prevented from crossing the Gretna Bridge, Bradshaw and Slonsky are white.[110] However, the couple's account confirms that in the aftermath of Katrina, "the official relief effort was callous, inept, and racist."[111]

The couple's journal begins forty-eight hours after Hurricane Katrina hit shore.[112] By that time, any food that had been available was already spoiled, mostly due to the ninety-degree heat. Not surprisingly, residents and tourists were growing thirsty and hungry.[113] In the journal, the couple describes how they and a group of people pooled together $25,000 to have ten buses take them out of the city.[114] The group, including Bradshaw and Slonsky, waited for several days; but, the buses never came. They later learned that the buses had been "commandeered by the military."[115] Within six days of the storm, the

102. *See* CNN.com, Transcripts, http://transcripts.cnn.com/transcripts/0509/12/asb.02.html (last visited Sept. 10, 2006).

103. Posting of sfsocialists, *supra* note 19.

104. Harris, *supra* note 16. "Arthur Lawson, chief of the Gretna, La., Police Department, confirmed that his officers, along with those from the Jefferson Parish Sheriff's Office and the Crescent City Connection Police, sealed the bridge." *Id.*

105. *Id.*

106. *See* Posting of sfsocialists, *supra* note 19.

107. *See* First Supplemental and Amending Class Action Complaint, *supra* note 24, at 5.

108. Posting of sfsocialists, *supra* note 19.

109. Harris, *supra* note 16; Chip Johnson, *Police Made Their Storm Misery Worse*, SAN FRANCISCO CHRON., Sept. 9, 2005, http://sfgate.com/cgi-bin/article.cgi?file=/C/a/2005/09/09/BAGL1EL1KH1.DTL&type=printable.

110. Johnson, *supra* note 109.

111. Posting of sfsocialists, *supra* note 19.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

sanitation was "dangerously abysmal."[116] The hotels had run out of fuel and water and were forced to close down and lock their doors.[117] Officials told the hotels that their guests needed to report to the Convention Center to wait on buses.[118] With the group, the couple entered the center of the city and walked towards the Convention Center where they experienced their first hostile encounter with law enforcement.[119] National Guard officials told the group that it would not be allowed in the Superdome because the Superdome had "descended into a humanitarian and health hellhole."[120] Furthermore, the officials informed the group that it could not enter the Convention Center—the city's only other shelter—because the Convention Center "was also descending into chaos and squalor."[121] The couple asked the officials what the alternative was, but the officials replied that it was not their problem.[122] Discouraged, the group asked the officials if they at least had any water, but the officials did not have any to spare.[123]

With few alternatives, the group decided to camp outside of the police command center where they would be in plain view of the media.[124] However, their strategy of drawing the media's attention failed when a police commander told the group that they could not stay.[125] The police commander said that police officers had buses lined up at the Gretna Bridge to take people out of the city.[126] Because the group had continually received wrong information during the preceding days, the couple explained to the commander that they were skeptical.[127] But, the commander assured them that buses were waiting: "I swear to you that the buses are there."[128]

The group marched towards the bridge with enthusiasm and told people it passed that buses were waiting at the bridge.[129] The evacuees walked for two to three miles in the rain until they approached the bridge.[130] But, when the group finally arrived, there were no buses.[131] The commander had lied.[132] Instead of buses, armed sheriffs lined the

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *See id.*
131. *Id.*
132. *Id.*

bridge.[133] Before the group could ask questions, the sheriffs fired their weapons into the air causing the crowd to scatter in fear.[134]

A few people from the group were able to get close enough to the officers to explain what they had been told.[135] But, the sheriffs said that there were no buses; the police commander had lied to the group to get them to move.[136] When the group asked why they could not cross the bridge, the police officers "responded that the West Bank was not going to become New Orleans . . . there would be no Superdomes in their City."[137]

The group eventually built an encampment on a median where they knew they would be visible and secure.[138] From the encampment, the group watched as others also approached the police officers: "All day long, we saw other families, individuals and groups make the same trip up the incline in an attempt to cross the bridge, only to be turned away. Some [were] chased away with gunfire . . . ."[139] Other witnesses corroborated Bradshaw and Slonsky's account: officers "verbally berated and humiliated" evacuees,[140] "press[ed] . . . firearms against [their] bodies, [placed them into] headlocks and/or chokeholds, and violently thr[ew them] to the ground."[141] "Thousands of New Orlean[ians] were . . . prohibited from self-evacuating the [c]ity on foot."[142] However, those with vehicles were permitted to cross the highway.[143] The group watched as people stole "trucks, buses, moving vans, semi-trucks"—"any car that could be hotwired."[144] Each vehicle contained people who were desperately trying to escape the miserable city.[145]

The couple's group soon grew to almost 100 people.[146] As more and more people congregated around the bridge, the media began to pay attention.[147] In two separate Fox News reports, Geraldo Rivera

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. Shaun Waterman, *Cops Trapped Survivors in New Orleans*, Sept. 9, 2005, http://www.libertypost.org/cgi-bin/readart.cgi?ArtNum=108700.
141. First Supplemental and Amending Class Action Complaint, *supra* note 24, at 3.
142. Posting of sfsocialists, *supra* note 19.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Hannity and Colmes* (FOX News Channel television broadcast Sept. 2, 2005), *available at* http://homepage.mac.com/mkoldys/iblog/C168863457/E20050902214254/index.html.

and Shepard Smith described what they saw at the Gretna Bridge.[148] In tears, Geraldo made an emotional plea:

> There are so many babies here . . . . It's not a question [of] sensitivity. It's a question of reality . . . . How do you . . .? I don't know man . . . . Let them walk the hell out of here. Let them get on that interstate and walk out . . . . All you have here is thousands and thousands of people who have desperate, desperate needs—six days [after Katrina]! These people are in the same clothes. Where do you think they are going to the bathroom? They don't wash their hands . . . . These babies—what the hell . . . ? Let them go . . . . Let them walk over this damned interstate and let them out of here.[149]

Shepard Smith also criticized the officers' actions:

> [Officials have] *watched* people being killed around them, and they [have] *watched* people starving, and they [have] *watched* elderly people not get any medicine . . . . And you know what they are doing now . . . ? [Officers] have set up a checkpoint at the bottom of this bridge . . . . It's the only way out . . . . It's the connection to the rest of the world . . . . And anyone who walks up out of that city . . . is turned around. You are not allowed to go to Gretna, Louisiana from New Orleans, Louisiana. Over there, there's hope. Over there, there's electricity. Over there, there's food and water. But you cannot go . . . . The government will not allow you to do it.[150]

Upon seeing all of the people stranded in and around the bridge, the media began questioning the officers about what the city was going to do with all of the evacuees.[151] "The [officers] responded [that] they were going to take care of [them]."[152] And, just after dusk set in, the officers did.[153] However, as Bradshaw and Slonsky explained, this time the officers not only forced the group to disperse at gunpoint, the officers also took the group's food and water:

> [A] Gretna Sheriff showed up, jumped out of his patrol vehicle, aimed his gun at our faces, screaming, 'Get off the [f***ing] freeway.' A helicopter arrived and used the wind from its blades to blow away our flimsy structures. As we retreated, the sheriff loaded up his truck with our food and water. Once again, at gunpoint, we were forced off the freeway . . . . [W]e scattered once again . . . [and] sought refuge in an abandoned school bus, under the freeway . . . . [W]e were hiding from the police and sheriffs . . . .[154]

While the Bradshaw and Slonsky account of the Gretna Bridge incident has circulated through the media more than any other story, sev-

148. *Id.*
149. *Id.*
150. *Id.*
151. Posting of sfsocialists, *supra* note 19.
152. *Id.*
153. *Id.*
154. *Id.*

eral other evacuees have come forward to share their stories. One woman described how the police blockade trapped her, her sons, and her ex-husband in New Orleans.[155] Her ex-husband, Otis, had diabetes and was confined to a wheelchair because his leg had been amputated.[156] "Otis had gone without dialysis for five days when [his] sons . . . decided to push his wheelchair down the highway in search of help."[157] They walked for miles, but just when they were near safety—almost across the Gretna Bridge—armed officers made them turn around.[158] "By the time they made it out of New Orleans . . . Otis . . . had fallen out of his wheelchair three times . . . and had open wounds on his head. He was nearly in a coma."[159]

As the news reports about the bridge incident surfaced, the City of Gretna was anything but apologetic. Mayor Ronnie Harris said that Arthur Lawson, chief of the Gretna Police Department, made the decision to block the bridge.[160] But, Harris stated that he supported the decision "wholeheartedly."[161] While police officers later claimed that "they feared for their personal safety,"[162] immediately after the incident Lawson stated, "Our city was locked down . . . for the sake of the citizens that left their valuables here . . . ."[163] And, in another interview Lawson said, "If we had opened the bridge, our city would have looked like New Orleans does now: looted, burned and pillaged."[164] City officials admitted that they "turned everyone around—even the elderly and children—because there might be some bad apples . . . ."[165] Mayor Harris explained, "I'm sure that there were very good people. There were scared people. There were desperate people. And, unfortunately, contained within that crowd was a criminal element. That criminal element burned, looted, stole, threatened and terrorized."[166] Gretna residents proudly supported their city's decision. Residents flagrantly displayed their gratification to the police officers with "thank you" yard signs, and the city council went as far as to shamelessly express its formal approval of the officers' actions in

155. Cadenhead, *supra* note 22.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *The Bridge to Gretna*, *supra* note 21.

161. *Id.*

162. Jessica Fender, *Attorney General Investigating Gunfire at Bridge During Katrina*, BATON ROUGE ADVOC., Nov. 23, 2005, at B2, *available at* 2005 WLNR 24898718.

163. CNN.com, *supra* note 102.

164. Rogers Cadenhead, *Police Trapped Thousands in New Orleans*, WORKBENCH, Sept. 9, 2005, http://www.cadenhead.org/workbench/news/2748/police-trapped-thousands-new-orleans.

165. *The Bridge to Gretna*, *supra* note 21.

166. *Id.*

a city-council resolution.[167] In further defense of its actions, the City promised to "secure" the bridge the same way in the next hurricane.[168]

But there should not be a next time. As the Dickersons' complaint states, the City of Gretna violated evacuees' constitutional right to the freedom of movement and travel.[169] The next section of this Comment explains that the freedom to travel is deeply engrained in our country's history[170] and that neither the government nor private individuals may engage in conduct that has the sole purpose of prohibiting travel.[171] The remainder of this Comment analyzes Gretna's actions in light of this prohibition and argues that both the City of Gretna and the individual police officers who blocked the Gretna Bridge should be held liable for their actions.

Our justice system must hold Gretna and its officers accountable. The Select Committee's report is right: "the learning process is sometimes . . . a [very] painful one."[172] And, we cannot afford to learn Katrina's lessons twice.

III. THE FUNDAMENTAL RIGHT TO TRAVEL

> Free movement . . . is . . . as dangerous to a tyrant as free expression of ideas or the right of assembly . . . . [However, while] [t]hose with the right of free movement use it at times for mischievous purposes[,] . . . that is true of many liberties we enjoy. We nevertheless place our faith in them . . . knowing that the risk of abusing liberty . . . is part of the price we pay for this free society . . . . [For,] [o]nce the right to travel is curtailed, all other rights suffer . . . .[173]

The Due Process Clauses of the Fifth and Fourteenth Amendments protect fundamental rights and liberties that are "'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[174] While the freedom of travel is not expressly granted by the Constitution, the Supreme Court has long recognized

167. *Id.* ("Allowing individuals to enter the city posed an unacceptable risk to the safety of the citizens of Gretna.").

168. Bruce Hamilton, *Bridge Standoff Still Under Scope: Gretna Faces Lawsuit for Stopping Evacuees*, TIMES-PICAYUNE, Jan. 4, 2006, *available at* 2006 WLNR 354152.

169. Complaint, *supra* note 25, at 3–4.

170. Kent v. Dulles, 357 U.S. 116, 126 (1958).

171. Shapiro v. Thompson, 394 U.S. 618, 631 (1969), *overruled in part on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974); *see* Saenz v. Roe, 526 U.S. 489, 499 (1999).

172. A FAILURE OF INITIATIVE, *supra* note 3, at 9.

173. Aptheker v. Sec'y of State, 378 U.S. 500, 519–20 (1964) (Douglas, J., concurring).

174. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) and Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)); *see also* Jones v. Helms, 452 U.S. 412, 418–19 (1981).

that the freedom of travel is a fundamental right.[175] In 1849 the Supreme Court stated, "[W]e are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption . . . ."[176] More recently, the Supreme Court said that the right to travel freely between states, "which was expressly mentioned in the text of the Articles of Confederation, may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'"[177]

Thus, even though it is not explicitly recognized in the Constitution, the right to travel is nonetheless fundamental.[178] The Supreme Court has recognized that the right to travel embraces at least three different components: the right to travel freely between states; "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present" in another state; and, for those who choose to become permanent residents of another state, "the right to be treated like other citizens of that [s]tate."[179] This section focuses on the first of these rights: the right to travel freely between states. The first part of this section reviews Supreme Court precedent in the area of interstate passage. The second part of this section considers the boundaries of this right: that is, to what extent may a state curtail an individual's right to travel when limiting that right is deemed necessary to protect other social and governmental interests?

A. *The Fundamental Right to Interstate Travel*

A state may not interfere with a citizen's exercise of, or penalize a citizen for exercising, the "right to leave one State and enter another."[180] A state law or state action violates the freedom of travel if it: (1) actually deters travel, (2) has the primary objective of impeding travel, or (3) penalizes the exercise of free travel on the basis of impermissible classifications, such as race.[181] However, the right to interstate travel is not absolute. Rather, this right only protects individuals from state regulation or action that unreasonably burdens or restricts travel. In emergencies, for example, governments may temporarily limit or suspend the right to travel in the interest of health and safety.[182]

175. Griffin v. Breckenridge, 403 U.S. 88, 105 (1971) ("Our cases have firmly established that the right of interstate travel is constitutionally protected . . . .").

176. Smith v. Turner, 48 U.S. 283, 492 (1849).

177. Saenz v. Roe, 526 U.S. 489, 501 (1999) (quoting United States v. Guest, 383 U.S. 745, 758 (1966)).

178. *Jones*, 452 U.S. at 418–19.

179. *Saenz*, 526 U.S. at 500.

180. *Jones*, 452 U.S. at 419.

181. Att'y Gen. v. Soto-Lopez, 476 U.S. 898, 903 (1986) (plurality opinion).

182. *See* United States v. Chalk, 441 F.2d 1277, 1280 (4th Cir. 1971).

If a state enacts a regulation for the sole purpose of inhibiting migration, the regulation is "constitutionally impermissible."[183] On the other hand, if a state regulation or state action has the *effect* of restricting interstate movement, courts consider whether the regulation is reasonable in light of the government's purported interests.[184] However, for states, this burden is heavy: regulations that have the effect of burdening or restricting interstate travel are subject to strict scrutiny.[185] Under the strict scrutiny test, the law or action must further a compelling state interest.[186] Furthermore, the law or action must be narrowly tailored to accomplish that particular state interest.[187] If the law or action sweeps too broadly and places a larger burden on the right to travel than is necessary in light of the state's compelling interest, the state law or action is unconstitutional.[188] The same strict scrutiny test applies to municipalities: if a municipality restricts the right to travel, the municipality must also demonstrate a compelling interest and show that the action taken by the municipality was narrowly tailored to meet that compelling interest.[189]

In *Shapiro v. Thompson*, the Supreme Court considered the constitutionality of statutory provisions from Connecticut, the District of Columbia, and Pennsylvania, all of which denied welfare assistance to residents who had not resided in their state for at least one year.[190] Legislative history from the states' legislatures indicated that the actual objective of the waiting periods was to deter travel:[191] state welfare agencies feared that, without waiting periods, indigents would flock to states that provided the most generous benefits.[192] Thus, the Supreme Court held that durational residency requirements were "constitutionally impermissible" because the actual purpose of the requirements was to fence out indigents.[193]

Despite the fact that the waiting periods were *per se* unconstitutional, the Court entertained the states' arguments that the legislatures did not intend to fence out indigents.[194] The states argued that the legislatures had other important government objectives in mind

183. Shapiro v. Thompson, 394 U.S. 618, 631 (1969), *overruled in part on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974).
184. *See id.* at 634.
185. *See* Saenz v. Roe, 526 U.S. 489, 499, 504 (1999).
186. *See id.* at 499; *Shapiro*, 394 U.S. at 638.
187. *See Saenz*, 526 U.S. at 499; *Shapiro*, 394 U.S. at 637.
188. *Shapiro*, 394 U.S. at 638; Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.").
189. *See* Voorhees v. Shull, 686 F. Supp. 389, 393 (E.D.N.Y. 1987).
190. *Shapiro*, 394 U.S. at 618, 621–22.
191. *Id.* at 628.
192. *Id.*
193. *Id.* at 631.
194. *Id.* at 633–34.

when they created the waiting-period requirements and that these interests justified the resulting burden on travel.[195] According to the states, the waiting periods: (1) facilitated the planning of the welfare budget; (2) provided an objective test of residency; (3) minimized fraud; and (4) encouraged new residents to enter the labor force quickly.[196] Because the statutory classifications touched on the fundamental right to travel, the Court said that the states had to show more than a rational basis for the waiting periods; instead, the states had to show that the waiting periods promoted a compelling state interest.[197] The Court determined that the states' justifications were not compelling.[198]

First, the argument that the waiting periods facilitated budget planning was unfounded because the states had not presented evidence to show that they used the one-year requirement to predict their welfare budgets.[199] But, even if the states did use the requirement to predict their budgets, the predictions would be very unreliable because they would not account for the long-term residents who continued to receive payments.[200] Second, the Court said that the waiting periods did not increase administrative efficiency, as asserted by the states.[201] The waiting-period requirements and the residency requirements were independent of each other, and because welfare authorities conducted extensive background checks to determine whether each prerequisite had been satisfied, the authorities would have had the information to determine residency without referring to the waiting-period requirement.[202] Third, the states' interests in safeguarding against welfare fraud did not justify the waiting requirements.[203] Because less drastic means were available to minimize fraud, attempting to prevent fraud "by the blunderbuss method of denying assistance to all indigent newcomers" was unreasonable.[204] Furthermore, this method would be inefficient because it would only address fraud committed by newcomers; and, presumably, states would have an equal interest in preventing fraud committed by both new and long-time residents.[205] Finally, the Court said that the states' interests in encouraging residents to join the workforce were not sufficiently compelling because the states had an interest in encouraging all residents—new and old—to join the

195. *Id.*
196. *Id.*
197. *Id.* at 638.
198. *Id.* at 633–38.
199. *Id.* at 634.
200. *Id.* at 635.
201. *Id.* at 636.
202. *Id.*
203. *Id.* at 637.
204. *Id.*
205. *Id.*

workforce.[206] Thus, the waiting requirements were an under-inclusive means of achieving the workforce objective.[207]

While the focus in *Shapiro* was on state regulations that deter travel, conduct that has the purpose of impeding travel on highways and other instruments of interstate commerce is also unconstitutional—even if the actor is not a state actor.[208] In *U.S. v. Guest*, the Supreme Court considered the right to travel in the context of a criminal conspiracy by non-state actors to prevent African-Americans from traveling on highways. The prosecution alleged that the defendants conspired to injure, oppress, threaten, and intimidate African-Americans with the intent of impeding their right to travel freely between states and their right to use the highways and other instruments of interstate commerce.[209] Specifically, the defendants attempted to impede travel by, among other things, shooting, beating, and killing African-American travelers; damaging and destroying the property of African-Americans; and pursuing African-Americans in automobiles and threatening them with guns.[210] The Court said that while an action that merely has the effect of deterring travel is not necessarily unconstitutional, if the predominant purpose of the action "is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right," the action is constitutionally impermissible.[211] The Court explained that "[t]he constitutional right to travel from one State to another . . . necessarily [includes the right] to use the highways and other instrumentalities of interstate commerce . . . ."[212] Of course, unlike *Shapiro*, in *Guest* the defendants were not state actors; however, in a footnote, the Court explained that the "constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private."[213]

B. *The Right to Travel in the Midst of Domestic Emergencies*

While the right to travel is fundamental, it is not absolute.[214] The right to travel is subject to reasonable regulation such as restrictions on the time, place, and manner of travel.[215] As this section discusses,

206. *Id.* at 637–38.
207. *Id.*
208. *See* United States v. Guest, 383 U.S. 745, 757 (1966).
209. *Id.* at 748 n.1.
210. *Id.*
211. *Id.* at 760.
212. *Id.* at 757.
213. *Id.* at 759 n.17.
214. *See* Jones v. Helms, 452 U.S. 412, 419 (1981).
215. *See* United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

the right to travel may be temporarily limited or even suspended in the context of a domestic emergency.[216]

In *Korematsu v. United States*,[217] the Supreme Court said, "[t]he liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited . . . ."[218] States retain broad discretion in exercising their police powers to pass laws that protect public health and safety.[219] In the context of a domestic emergency, courts recognize that extreme action is often "necessary to protect the public from immediate and grave danger."[220] Because states must act swiftly and do not have the same benefit of retrospection that judges have, courts are very reluctant to substitute their judgment for that of a state's.[221] Thus, when evaluating emergency actions that incidentally affect fundamental rights, courts will uphold the action if the state's emergency powers "appear to have been reasonably necessary for the preservation of order."[222] Generally, the emergency action is acceptable if the state acts in good faith and has a factual basis for deciding that the restrictions are necessary to maintain order.[223] Furthermore, in choosing how to preserve order, the state must choose the least drastic means available.[224]

In particular, in a domestic emergency, limitations on travel are often necessary. For example, if a natural disaster has caused an area to become hazardous and uninhabitable, the government may ban travel into that area to protect the health and safety of citizens.[225] In *Zemel v. Rusk*,[226] the court stated that "[t]he right to travel . . . is of course . . . constitutionally protected . . . . But that freedom does not mean that areas ravaged by flood, fire[,] or pestilence cannot be quarantined when . . . travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a

216. *See generally* Smith v. Avino, 91 F.3d 105 (11th Cir. 1996) (holding that a Governor's Executive Order imposing a curfew after a hurricane was constitutional) *abrogated on other grounds by* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).

217. Korematsu v. United States, 323 U.S. 214 (1944).

218. *Id.* at 231 (Roberts, J., dissenting).

219. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

220. Moorhead v. Farrelly, 723 F. Supp. 1109, 1112–13 (D.V.I. 1989).

221. United States v. Chalk, 441 F.2d 1277, 1281 (4th Cir. 1971).

222. *Id.*

223. *Id.*

224. *See id.* at 1283.

225. *See* Zemel v. Rusk, 381 U.S. 1, 15–16 (1965).

226. In *Zemel*, the plaintiff argued that the Secretary of State violated his right to travel when, for reasons of national security, the Secretary of State refused to validate the plaintiff's passport for travel to Cuba. *Id.* at 3–4. The Court stated, "the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited." *Id.* at 14. Because travel to Cuba "might involve the Nation in dangerous international incidents," the Court held that the Constitution did not require the Secretary of State to validate passports for travel to Cuba. *Id.* at 15.

whole."[227] Aside from limiting travel into a dangerous area, during domestic emergencies states may invoke their police powers to implement and enforce curfews. Because the Supreme Court has correlated the freedom of speech to the freedom of travel,[228] several federal appellate courts have justified travel restrictions as "reasonable limitations" under the First Amendment's "time, place, and manner" doctrine.[229] As illustrated in *Chalk v. United States*, in the context of domestic emergencies courts will almost always affirm that restrictions on the time and place of travel are "reasonable limitations."[230]

In *Chalk v. United States*, the Fourth Circuit upheld as constitutional a curfew imposed by the mayor of Asheville, North Carolina after a battle broke out between police officers and African-American students at a local high school.[231] The mayor issued a state of emergency in accordance with state law.[232] Under his emergency authority, the mayor imposed a nighttime curfew from 9 p.m. to 6 a.m. for three days.[233] One day after the mayor imposed the curfew, a highway patrol officer stopped Chalk and placed him under arrest for violating the curfew.[234] Subsequently, a search of Chalk's car revealed a shotgun, a roll of dynamite, and bomb-making materials.[235] Chalk contended that the search of his car was unlawful because absent "the mayor's overbroad and unlawful restrictions," the officer would not have stopped Chalk's car.[236] First, Chalk argued that the statutory scheme, which authorized the mayor to declare the state of emergency, was unconstitutional because it infringed on the fundamental right to travel.[237] Second, Chalk argued that the threat to public safety was not sufficient for the mayor to impose the emergency restriction.[238]

The court said that the challenge to the constitutionality of the statute was without merit because controlling civil disorders that have the potential to threaten the state are within the police powers of the government.[239] Under these police powers, the state has "broad discretion" to decide what is necessary in an emergency situation.[240] While

227. *Id.* at 15–16.
228. Aptheker v. Sec'y of State, 378 U.S. 500, 517 (1964).
229. *See Chalk*, 441 F.2d at 1283; *see also* Lutz v. City of York, 899 F.2d 255, 269 (3d Cir. 1990) (relying on time, place, and manner doctrine to regulate public travel).
230. *Chalk*, 441 F.2d at 1283; *see also Lutz*, 899 F.2d at 269 (allowing intermediate scrutiny of time, place, and manner restrictions on localized travel).
231. *Chalk*, 441 F.2d 1277.
232. *Id.* at 1278.
233. *Id.*
234. *Id.*
235. *Id.* at 1278–79.
236. *Id.* at 1280.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*

"[t]he invocation of emergency powers necessarily restricts activities that would normally be constitutionally protected[,]" restrictions—like curfews—that have incidental affects on fundamental rights are nonetheless valid if the declared state of emergency and the associated restrictions "appear to have been reasonably necessary for the preservation of order."[241] However, the court said that a mayor's decision to invoke emergency measures is not free from judicial review.[242] The scope of judicial review is limited to whether the mayor took the actions in good faith and whether the mayor had a factual basis for deciding that the restrictions were necessary to maintain order.[243] Because dealing with emergency situations "requires an immediacy of action that is not possible for judges," the court said that substituting its own judgment for that of the mayor's would be highly inappropriate.[244]

Upon reviewing the mayor's actions, the court said that the mayor made the decision to impose emergency restrictions in good faith after considering many facts:[245] the battle with officers involved a large group of students; the battle resulted in physical injury and property damage; and, based on public meetings the mayor had attended prior to the incident, the mayor believed that tensions in the community were high.[246] Furthermore, the curfew did not unnecessarily restrict the right to travel.[247] The court said that the "freedom of travel[,] like [the] freedom of speech[, is] subject to reasonable limitations as to time and place."[248] Because the curfew was in effect city-wide, and was not limited to black neighborhoods, the restriction was not "immediately suspect" as being racially motivated.[249] Moreover, the mayor limited the curfew to nighttime hours; thus, it was not overly burdensome.[250] Noting that research has shown that nighttime curfews can be an effective means of controlling civil disorders, the court said that it could not conclude that the curfew was unnecessary, or that less extreme measures would have been sufficient to restore order.[251]

In *Smith v. Avino*,[252] decided twenty-five years after *Chalk*, the Eleventh Circuit held that a curfew imposed after Hurricane Andrew

241. *Id.* at 1280–81.
242. *Id.* at 1281.
243. *Id.*
244. *Id.*
245. *Id.* at 1282.
246. *Id.*
247. *Id.* at 1283.
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. Smith v. Avino, 91 F.3d 105 (11th Cir. 1996), *abrogated on other grounds by* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).

was constitutional.[253] In 1992, Hurricane Andrew caused widespread destruction to Florida homes and businesses, as well as to the infrastructure and to utility services.[254] The governor declared a state of emergency and authorized Miami city and Metropolitan Dade County officials to implement curfews that required residents to remain in their homes during specified hours.[255] The plaintiffs alleged that the curfew, implemented by the county manager, was unconstitutional because it was vague and overly broad.[256] The court said that the state properly exercised its police powers by imposing a curfew, even though the curfew curtailed movement that would otherwise be free from restriction.[257] Using the same test that the Fourth Circuit used in *Chalk*, the Eleventh Circuit reviewed the constitutionality of the curfew by evaluating whether the county manager took the actions in good faith and whether the county manager had a factual basis for deciding that the restrictions were necessary to maintain order.[258] The plaintiffs conceded that the curfew was necessary, and the plaintiffs never alleged that the city manager acted in bad faith.[259] Furthermore, the plaintiffs conceded that the state and the city manager had a factual basis for the decision to impose the curfew.[260] However, the plaintiffs argued that the curfew was unconstitutionally vague because it failed to advise residents of the parameters of their right to travel.[261] Specifically, the plaintiffs argued that the curfew was unconstitutional "because it did not contain 'built-in exceptions' for necessary activity."[262]

The Eleventh Circuit held that the curfew did not unduly burden the right to travel.[263] First, the court pointed out that, in fact, the curfew did allow for exceptions: police officers were given guidelines to permit travel for medical reasons or for responsibilities related to work or school.[264] The court noted that "[f]lexibility in any such curfew is a key ingredient to provide the enforcing authorities with the practical ability to carry out the purpose[ ]" of the curfew.[265] Second, the court said that the length of the curfew was tailored to the nature and exigency of the emergency.[266]

253. *Id.* at 107.
254. *Id.* at 108.
255. *Id.*
256. *Id.* at 107.
257. *See id.* at 109.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* (quoting State v. Boles, 240 A.2d 920, 923 (Conn. Cir. Ct. 1967)).
263. *See id.* at 109–10.
264. *Id.* at 109.
265. *Id.*
266. *Id.* at 110.

In *Lutz v. York*, decided four years before *Avino*, the Third Circuit similarly held that a cruising ordinance was a reasonable restriction on the time, place, and manner of travel.[267] While *Lutz* did not involve a domestic emergency, the case further illustrates the latitude that local officials have in regulating the time, place, and manner of travel—especially when the regulations are implemented to protect the health and safety of a community. The city ordinance in question prohibited cruising—driving past clearly-identified locations more than two times— in a particular part of York, Pennsylvania.[268] According to legislative history, the legislators thought the ordinance would reduce dangerous traffic congestion, excessive noise and pollution, and insure sufficient access for emergency vehicles to and through city thoroughfares.[269] Unlike *Chalk* and *Avino*, the plaintiff in *Lutz* claimed that the cruising ordinance unnecessarily burdened his right to *intra*state travel.[270]

To address the plaintiff's claim, the court turned first to the issue of "whether there exists an unenumerated constitutional right of *intra*-state travel."[271] The Third Circuit acknowledged that the Supreme Court has never recognized a fundamental right to intrastate travel; however, it noted that a few old Supreme Court cases contain dicta suggesting that the Due Process Clause of the Fourteenth Amendment substantively protects the right to intrastate travel.[272] Specifically, in *Williams v. Fears*,[273] the Supreme Court said that "the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of liberty . . . secured by the 14th amendment."[274] Thus, the Third Circuit held that the right to intrastate travel is fundamental. The court then proceeded to decide what level of scrutiny to apply.[275]

The court said that "[n]ot every governmental burden on fundamental rights must survive strict scrutiny."[276] Instead, the Third Circuit turned to the "time, place, and manner" doctrine associated with the fundamental right to free speech.[277] The court said that just like the freedom of speech "cannot conceivably imply the right to speak whenever, wherever and however one pleases—even in public fora specifically used for public speech—so too the right to travel cannot conceivably imply the right to travel whenever, wherever and however

267. Lutz v. City of York, 899 F.2d 255, 270 (3d Cir. 1990).
268. *Id.* at 257.
269. *Id.*
270. *Id.* at 270.
271. *Id.* at 256.
272. *Id.* at 266–67.
273. *Id.* (citing Williams v. Fears, 179 U.S. 270 (1900)).
274. *Id.*
275. *Id.* at 268–69.
276. *Id.* at 269.
277. *Id.*

one pleases—even on roads specifically designed for public travel."[278] Unlimited access to roadways would result in chaos; thus, state and local governments must have some flexibility in regulating the instrumentalities of travel.[279] Therefore, under the time, place, and manner doctrine, the court said that the ordinance was subject to intermediate scrutiny and would be upheld if it was narrowly tailored to meet significant—not necessarily compelling—city objectives, while still leaving open alternative channels of travel.[280] The court pointed out that, unlike strict scrutiny, the intermediate scrutiny standard does not require that the state employ the least restrictive means of achieving its end.[281] Furthermore, in a footnote, the court emphasized that not all traffic regulations are subject to intermediate scrutiny; rather, only nontrivial traffic regulations deserve this level of scrutiny.[282]

The Third Circuit concluded that York's cruising ordinance was a reasonable time, place, and manner restriction on localized intrastate travel.[283] York had a significant interest in ensuring public safety and reducing congestion caused by cruising.[284] Moreover, the ordinance was limited in scope: it was limited to only those locations that were undisputedly affected by the cruising problem; it left open "ample alternative routes" to travel around the city without difficulty; it prohibited only certain repetitive driving in one area of the city; and it did not prohibit travel into or out of the problem areas altogether.[285] Thus, the city narrowly tailored the ordinance to combat the safety and congestion problems.[286]

As *Chalk*, *Avino*, and *Lutz* illustrate, the right to travel—either interstate or intrastate—is not absolute, and state and local governments may impose reasonable regulations. In domestic emergencies, local governments will have significantly wider latitude in implementing restrictions that affect the right to travel because emergency situations usually require swift action to protect the public from immediate and grave danger.[287] Regulations cannot be unduly burdensome on the right to travel: regulations must be narrowly tailored to achieve the governmental interest, and, in domestic emergencies, the government must choose means that are no more burdensome than necessary to deal with the emergent circumstances.[288] However, even when

278. *Id.*
279. *Id.*
280. *Id.* at 270.
281. *Id.* at 269–70.
282. *Id.* at 270 n.41 ("Nothing we say today suggests that more conventional traffic regulations such as speed limits, stop signs, and the like need now be subjected to heightened judicial scrutiny.").
283. *Id.* at 270.
284. *Id.*
285. *Id.*
286. *Id.*
287. *See* United States v. Chalk, 441 F.2d 1277, 1280 (4th Cir. 1971).
288. *Id.* at 1280–83.

danger is not imminent, local governments are afforded leeway in regulating the time, place, and manner of travel if the purpose of the regulation is to protect the health and safety of the community.[289] Important to note is the fact that *Chalk*, *Avino*, and *Lutz* all dealt with regulations that affected local movement. While, unlike *Lutz*, the courts in *Chalk* and *Avino* did not specifically make a distinction between interstate and intrastate travel, the curfews arguably had a more direct impact on local travel. Furthermore, in none of these cases was travel completely cut off: the curfews limited only the timing of travel, and the cruising ordinance limited only the amount of driving in particular locations.

While the government is permitted to restrict travel in the aftermath of a natural disaster, the government should not restrict an individual's right to travel when it is necessary for self-preservation.[290] In *Zemel*, the court said that the freedom of travel could be limited when travel *into* an area would be dangerous to the safety and welfare of the area or the Nation as a whole;[291] but, the court did not say that restricting people from *leaving* a disaster area would be constitutional. An individual should have the opportunity to make choices in pursuit of self-preservation as long as those choices do not harm the safety or welfare of the community.[292]

In *Chalk*, the Fourth Circuit said, "[t]he courts cannot prevent abuse of power, but [they] can sometimes correct it."[293] As the next section discusses, when the government unnecessarily infringes upon a fundamental right, the government may be subject to civil liability; and, in some circumstances, government actors may be subject to both civil and criminal liability.

IV. Civil And Criminal Liability For Constitutional Deprivations

A. *Civil Liability Under 42 U.S.C. § 1983*

Congress has the power to enforce the Fourteenth Amendment—including the right to travel—against state officials "who carry a badge of authority."[294] Congress created the Civil Rights Act of 1871, the predecessor to § 1983, to provide a remedy to anyone from whom the government has deprived a constitutional right.[295] The Act was born out of distrust: Congress "was concerned that state instrumental-

289. *See Lutz*, 899 F.2d at 269–70.

290. *See* L.R. McInnis, *The Municipal Management of Emergencies: The Houston Plan*, 4 Tex. F. on C.L. & C.R. 139, 146 (1999).

291. Zemel v. Rusk, 381 U.S. 1, 15–16 (1965).

292. *See id.*

293. *Chalk*, 441 F.2d at 1280.

294. Monroe v. Pape, 365 U.S. 167, 171–72 (1961), *overruled in part on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

295. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617–18 (1979).

ities could not protect [federally created] rights [and] it realized that state officers might, in fact, be antipathetic to the vindication of those rights."[296] Congress's purpose was to assign the federal courts with "guardians[hip] of the people's federal rights—to protect the people from unconstitutional action under color of state law."[297] While § 1983 provides a remedy for constitutional infringements, it is not a source of substantive rights in itself; a plaintiff cannot bring a suit under § 1983 without first establishing that the defendant deprived the plaintiff of a constitutional right.[298] Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured . . . .[299]

In an action for relief under § 1983, the plaintiff must establish: (1) that he or she was deprived of a constitutional right, and (2) that the person who deprived the plaintiff of his or her constitutional right was acting under the color of state law.[300]

1. Civil Liability for Municipalities

Under § 1983, municipalities are considered "persons"; thus, a plaintiff may sue government actors in their individual capacities for the actor's own actions as well as municipalities for the actions of their employees.[301] To establish a municipality's liability for the acts of an employee, a plaintiff must show: (1) that the employee deprived the plaintiff of a constitutional right; (2) the employee's "action . . . implement[ed] or execute[d] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers;"[302] and (3) that the policy was the "moving force" behind—or the cause of—the deprivation.[303]

In *Monell v. New York City Department of Social Services*,[304] the Supreme Court made clear that municipalities cannot be held liable under § 1983 unless the action in question is taken pursuant to official municipal policy.[305] However, subsequently in *Pembaur v. City of Cincinnati*,[306] the Supreme Court explained that "official policy" includes more than just formal rules; it also includes courses of action

296. Mitchum v. Foster, 407 U.S. 225, 242 (1972).
297. *Id.*
298. *Chapman*, 441 U.S. at 617–18.
299. 42 U.S.C. § 1983 (2000).
300. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49–50 (1999).
301. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978).
302. *Id.* at 690.
303. *Id.* at 694.
304. *Monell*, 436 U.S. 658.
305. *Id.* at 691.
306. Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

that government decision makers adopt or authorize.[307] Moreover, an official municipal policy may be a single decision that arises in and is tailored to a particular situation.[308]

To prove that a municipal policy caused the constitutional deprivation in issue, a plaintiff must establish that the cause was either direct or indirect, following the tort principles of cause-in-fact and proximate cause.[309] Thus, causation may be direct where a state policy—on its face—directs the harm suffered by the plaintiff; or, causation may be indirect where the harm the plaintiff suffers is the natural consequence of the state law or policy.[310]

While its criminal counterpart, 18 U.S.C. § 242, contains a state-of-mind requirement, § 1983 does not require proof of bad intentions: "clear[ly] . . . one reason [that] the legislation was passed was . . . because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities . . . might be denied . . . ."[311] There are circumstances, which will not be discussed in this Comment, where a plaintiff may nonetheless have to establish some form of culpability to make a case under § 1983. For example, a plaintiff may have to establish that a municipality acted with "deliberate indifference" if it did not formally approve a law or policy,[312] but where the municipality's inaction indicates implied approval.[313] Another example where culpability may be required is where the underlying constitutional claim that permits a plaintiff to seek a remedy under § 1983 requires culpable conduct.[314]

2. Civil Liability for State Actors: Qualified Immunity

To hold a state actor individually liable under § 1983, a plaintiff must be able to circumvent the hurdle of qualified immunity; to do this, the plaintiff must establish that the state actor had fair warning that his or her actions were unlawful but acted anyway.[315] While § 1983 does not accord immunity to municipalities,[316] qualified immunity may shield an individual government actor from liability if the actor's conduct does not violate a clearly established right; however, a government actor will not escape liability if a reasonable person in the same circumstances would clearly realize that the conduct is unlaw-

307. *Id.* at 480–81.
308. *Id.* at 480.
309. *See* Rizzo v. Goode, 423 U.S. 362, 384 (1976).
310. *See* Slakan v. Porter, 737 F.2d 368, 376 (4th Cir. 1984).
311. Monroe v. Pape, 365 U.S. 167, 180 (1961), *overruled in part on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).
312. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978).
313. Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994).
314. *See* County of Sacramento v. Lewis, 523 U.S. 833, 845–54 (1998).
315. *See* Hope v. Pelzer, 536 U.S. 730, 740 (2002).
316. Owen v. City of Independence, 445 U.S. 622, 639–40 (1980).

ful.[317] The policy behind qualified immunity is to ensure that state actors are not individually held liable for their unlawful actions unless the actors had fair warning that their conduct would subject them to liability.[318] However, in *United States v. Lanier*,[319] the Court made clear that even where the circumstances are novel, officials can still be aware that their conduct is unlawful.[320] While cases that are "fundamentally similar" or have "materially similar" facts can strongly support that the law is clearly established, the more important question is "whether the state of the law . . . gave [the defendants] fair warning that their alleged [conduct] was unconstitutional."[321]

While municipalities may be liable for compensatory damages under § 1983, they cannot be held liable for punitive damages.[322] However, a government actor may be liable for both compensatory and punitive damages.[323] To establish punitive damages, a plaintiff must show that the individual defendant acted with reckless or callous disregard for the plaintiff's rights, or that the defendant intentionally violated federal law.[324] The premise for allowing plaintiffs to collect punitive awards in suits against individual public officials is closely tied to the policy behind the fair-warning requirement: individual actors are less likely to repeat constitutional deprivations if the actors know that they can be held personally liable for their actions.[325]

B. *Criminal Liability Under 18 U.S.C. § 242*

Government actors not only may be held civilly liable for constitutional deprivations under § 1983, they may also be held criminally liable for their conduct.[326] According to § 242, a defendant acting under "color of law" may be held criminally liable for willfully depriving a person of his or her constitutional rights.[327] Section 242 states: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined . . . or imprisoned not more than one year, or both."[328] Furthermore, § 242 provides for criminal consequences that grow increasingly more severe if the constitutional depri-

317. Brosseau v. Haugen, 543 U.S. 194, 198–99 (2004) (per curiam) (citing Saucier v. Katz, 533 U.S. 194, 201–02 (2001)).
318. *See Hope*, 536 U.S. at 739–40.
319. United States v. Lanier, 520 U.S. 259 (1997).
320. *Hope*, 536 U.S. at 741 (citing *Lanier*, 520 U.S. at 268).
321. *Id.* at 741.
322. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267–70 (1981).
323. *Id.*
324. Smith v. Wade, 461 U.S. 30, 51 (1983).
325. *Newport*, 453 U.S. at 269–70.
326. *See* 18 U.S.C. § 242 (2000).
327. *Id.*
328. *Id.*

vation results in bodily harm or death.[329] If the conduct results in bodily injury, or if the conduct involves "the use, attempted use, or threatened use of a dangerous weapon," the defendant may be fined as well as imprisoned for up to ten years.[330] Moreover, if the defendant's conduct results in death, or if the defendant's conduct includes an attempt to kill, the defendant may receive a fine as well as a sentence of up to life in prison, or even death.[331]

The elements that the prosecution must establish under § 242 are very similar to the elements required under § 1983. The principal difference is that, under § 242, the prosecution must establish that the defendant acted willfully—that is, that the defendant acted with the specific intent to deprive the victim of a constitutional right.[332] Section 242 includes the same "color of law" requirement as § 1983.[333] While, unlike § 1983, § 242 does not provide for a private cause of action, the consequences under § 242 can be much harsher—criminal consequences can include a fine, imprisonment, or even death.[334] Criminal charges brought under § 242 will support a conviction if the charges are proven beyond a reasonable doubt.[335]

1. Specific Intent

In *Screws v. United States*,[336] the Supreme Court explained the specific intent required under § 242.[337] A defendant acts with specific intent if he or she acts willfully—that is, if the defendant acts with the "purpose to deprive a person of a specific constitutional right."[338] The dispositive issue is not whether a defendant has a bad purpose; rather, the important issue is whether the person "acts in defiance of announced rules of law."[339] An example given by the Third Circuit in *United States v. Delerme*[340] best illustrates the difference between an officer who merely "goes too far" in carrying out his or her duties, and one who acts with the purpose of depriving someone of a constitutional right.[341] The court said:

> It is one thing to be guilty of excessive force, and thus chargeable with violating the law of the state and territory; it is quite another for a policeman to administer a physical beating [for the purpose of] punish[ing an individual] for allegedly breaking the law. In the lat-

329. *Id.*
330. *Id.*
331. *Id.*
332. *See* United States v. Guest, 383 U.S. 745, 760 (1966).
333. *See* 18 U.S.C. § 242.
334. *See id.*
335. *See* United States v. Cross, 899 F. Supp. 1410, 1413 (W.D. Pa. 1995).
336. Screws v. United States, 325 U.S. 91 (1945).
337. *Id.*
338. *Id.* at 101.
339. *Id.* at 104.
340. United States v. Delerme, 457 F.2d 156 (3d Cir. 1972).
341. *Id.* at 161.

> ter case the police officer has acted as prosecutor, judge, and jury; he has brought the charges, found the suspect guilty, and administered punishment.[342]

In *United States v. Shafer*,[343] a case that involved the shooting of several university students by National Guard officials, a district court in Ohio also offered a helpful explanation of the specific intent that is required under § 242:

> If the defendants fired their weapons out of fear, anger, or frustration, then their actions may be cognizable under the State criminal code. If, and only if they fired with the specific intent to deprive the students of a right secured by the Constitution (e.g. trial by jury), may culpability be found under § 242.[344]

Generally, proving willfulness under § 242 is not difficult because it "can easily be inferred from the egregious circumstances."[345] Relevant circumstances that a court should consider include: whether the "defendant ha[d] pre-existing malice toward his victim, deprived him of his rights at close range with weapons designed to beat or maim, continued his assault for some time, and acted without any provocation."[346]

2. Fair Notice

A defendant cannot be convicted under § 242 unless the defendant had "fair warning"—by either specific provisions of a law or court decisions interpreting the law—that the defendant's conduct would violate constitutional rights.[347] However, the Supreme Court has made clear that "general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question," even where a court has not held that the precise conduct is unlawful.[348] The Supreme Court discussed this requirement in *United States v. Lanier*,[349] in the context of a sexual assault charge under § 242. In *Lanier*, a state judge was charged with sexually assaulting five women—one of whom had divorce and custody proceedings that were still subject to Lanier's jurisdiction.[350] The prosecution alleged that the defendant, while acting under color of state law in his judicial capacity, had willfully deprived his victims of their constitutional right to liberty.[351]

342. *Id.*
343. United States v. Shafer, 384 F. Supp. 496, 500 (N.D. Ohio 1974).
344. *Id.* at 502.
345. *Id.* at 500.
346. *Id.*
347. *See* United States v. Lanier, 520 U.S. 259, 268–69 (1997).
348. Hope v. Pelzer, 536 U.S. 730, 741 (2002).
349. *Lanier*, 520 U.S. at 259.
350. *Id.* at 261.
351. *Id.* at 261–62.

Before trial, the defendant moved to dismiss the indictment and claimed that § 242 was void for vagueness.[352] The defendant argued that he did not have "fair warning" that he could be held criminally liable for his conduct under § 242.[353]

While the Sixth Circuit had reversed the defendant's sentence, holding that the defendant did not have "fair warning" specific enough to the circumstances of his case, the Supreme Court disagreed.[354] The Court said that the "fair warning" standard is the same standard used to determine qualified immunity under § 1983—the "clearly established" standard.[355] Under these standards, neither a Supreme Court decision nor an extreme level of factual specificity is necessary to afford a defendant sufficient warning.[356] Rather, liability may be imposed for a constitutional deprivation if pre-existing law, including prior court decisions, gave reasonable warning that the defendant's conduct violated constitutional rights.[357] For example, the Supreme Court noted that while *United States v. Guest* was the first case to address the deprivation of the right to travel by private persons, fair warning was established by prior cases that set out the right of interstate travel in general.[358] The Court said, "[g]eneral statements of the law are not inherently incapable of giving fair and clear warning."[359] Furthermore, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has not previously been held unlawful.'"[360]

In sum, a state actor may be criminally liable for his or her acts committed under "color of law." While § 242 is significantly similar to § 1983, if a prosecutor can prove that the defendant acted "willfully" and also show that the defendant had "fair warning" that the conduct in issue would likely subject the defendant to liability, the defendant could face much harsher consequences than he or she would otherwise face under § 1983 alone.[361]

V. THE CIVIL AND CRIMINAL RAMIFICATIONS OF THE GRETNA BLOCKADE

> Lincoln said this Nation was "conceived in liberty and dedicated to the proposition that all men are created equal. . . ." [This Nation] cannot endure if [it] falls short on the guarantees of liberty, justice,

352. *Id.* at 262.
353. *See id.*
354. *Id.* at 268.
355. *Id.* at 270–71.
356. *See id.* at 268–71.
357. *Id.* at 271–72.
358. *Id.* at 269–70.
359. *Id.* at 271.
360. *Id.* (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
361. *See* 18 U.S.C. § 242 (2000).

> and equality . . . . But it also cannot endure if we allow our precious heritage of ordered liberty to be ripped apart amid the sound and fury of our time.[362]

The City of Gretna and the individual police officers who blocked the Gretna Bridge violated Katrina evacuees' constitutional right to the freedom of interstate travel and should be held civilly liable; moreover, the individual officers should also be held criminally liable. The sole purpose of the Gretna policy, and the intent of the officers who enforced the Gretna policy, was to prevent Katrina evacuees from crossing the Gretna Bridge—an objective that is constitutionally impermissible.[363] While the City of Gretna should be afforded latitude for its decision-making because the policy was made in the midst of emergency conditions, the policy was not a reasonable limitation on the evacuees' right to travel. First, the policy was not necessary to preserve order. Even if the city believed that it had a factual basis for the decision to implement the policy, and even if the city implemented the policy in good faith, the city took measures that were too drastic. Latitude is generally afforded to cities in emergency conditions because courts understand that cities have to act quickly to protect health and safety. However, Gretna and its officers did not protect Katrina's victims. Instead, the city implemented a policy that protected property interests at the expense of lives. As a result of the officers' actions, the suffering of the already weary and distraught evacuees was further prolonged. And, some evacuees, who otherwise might have survived, died. While plausible, less restrictive alternatives to Gretna's decision existed, the city chose instead to take measures that unnecessarily and unreasonably infringed on the evacuees' right to escape the horrid conditions and survive. Because the city's actions violated evacuees' constitutional rights, and because the police officers acted pursuant to a city policy, the city and the officers should be held civilly liable under § 1983 for their actions. Furthermore, because the individual officers acted willfully and with the specific intent to impede evacuees from crossing the bridge, the officers should be held criminally liable under § 242.

A. *The Fundamental Right to Travel Across the Gretna Bridge*

The City of Gretna and the individual police officers violated New Orleans residents' right to the freedom of travel because their actions had the primary objective of impeding travel across the Gretna Bridge—a federal highway.[364] Moreover, even though the policy was implemented in the midst of an emergency, the policy was not a reasonable limitation on evacuees' rights to travel. Given Gretna's pur-

362. Illinois v. Allen, 397 U.S. 337, 348 (1970) (Brennan, J., concurring).

363. Shapiro v. Thompson, 394 U.S. 618, 631 (1969), *overruled in part on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974).

364. *See* Jones v. Helms, 452 U.S. 412, 418–19 (1981).

pose behind blocking the bridge—protecting residents' property[365]—the city's policy was too drastic. Instead of creating a policy out of concern for the health and safety of people, Gretna attempted to protect property at the expense of lives.[366] Furthermore, Gretna had alternatives—alternatives that would have allowed Gretna to protect property without risking the lives of thousands of evacuees.

As the Supreme Court held in *Shapiro*, a state regulation that has the sole purpose of inhibiting migration is constitutionally impermissible.[367] Furthermore, in *Guest* the Supreme Court specifically held that purposefully impeding travel on highways is unconstitutional.[368] The Gretna policy clearly had the purpose of impeding travel on an interstate highway. The city used physical force to prevent evacuees from crossing the Gretna Bridge because the city feared that the evacuees would cause property damage.[369] Chief Lawson stated: "Our city was locked down . . . for the sake of the citizens that left their valuables here . . . ."[370] "If we had opened the bridge, our city would have looked like New Orleans does now: looted, burned and pillaged."[371] The City of Gretna felt that "securing" the bridge would prevent this property damage. Impeding travel was not merely an effect of Gretna's policy; blocking the bridge *was* the policy. Thus, Gretna's policy to block the bridge was *per se* unconstitutional.

Because cities affected by Katrina were in the midst of an emergency, city officials had broad discretion to exercise authority to protect the health and safety of residents.[372] The City of Gretna had authority to take action that was reasonably necessary to preserve order, even if the action consequently infringed on fundamental rights.[373] However, Gretna's actions were not necessary to preserve order. Whether Gretna made its decision in good faith, based on facts that indicated that the restrictions were necessary, is arguable. In *Smith v. Alvino*, the Eleventh Circuit upheld a county-wide curfew after a hurricane because the curfew did not unnecessarily infringe on residents' rights to travel: the curfew was implemented in good faith

365. CNN.com, *supra* note 102.

366. *Id.*

367. Shapiro v. Thompson, 394 U.S. 618, 631 (1969), *overruled in part on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974).

368. United States v. Guest, 383 U.S. 745, 757 (1966).

369. *See* Nicholas Riccardi, *After Blocking the Bridge, Gretna Circles the Wagons*, L.A. TIMES, Sept. 16, 2005. After a fire broke out at a local mall, Mayor Harris "had had enough," stating, "I am not going to give up our community." *Id.* Harris called the state police and the next morning, fearing that more property damage would ensue, Gretna Police Chief Arthur Lawson made the decision to seal the Gretna Bridge. *Id.*

370. CNN.com, *supra* note 102.

371. Cadenhead, *supra* note 164.

372. *See* Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996) *abrogated on other grounds by* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).

373. *See id.*

and the decision was based on information that indicated the action was necessary to maintain order.[374] Furthermore, based on the facts noted by the court, the curfew was flexible, and the length of the curfew was tailored to the nature of the emergency.[375]

Unfortunately, Gretna's decision was drastically different. The circumstances indicate that Gretna's decision to block the Gretna Bridge may not have been made in good faith. First, while more recently Gretna asserted that its reason for blocking the bridge was to protect the safety of its residents,[376] comments made by city officials during the blockade and immediately thereafter indicate that protecting the safety of its residents was not Gretna's true purpose. Police Chief Arthur Lawson announced on CNN that the officials locked down the city "for the sake of the citizens that left their valuables [t]here."[377] Lawson said that if the city let "these people" in, the city would look like New Orleans—"burned, looted and pillaged."[378] Thus, the city's intention appears not to have been the protection of its residents, but rather the protection of its residents' property.

Second, accounts of the Gretna Bridge incident indicate that the city's and the officers' actions may have been racially motivated.[379] Given Jefferson Parish's reputation for being "Louisiana's most notoriously racist parish,"[380] this would not be surprising. Bradshaw and Slonsky, a white couple, support the contention that the officers' actions appeared to be, at least in part, racially motivated.[381] Furthermore, survivors who testified before the Select Committee repeated stories of officials' racist behaviors ranging from threats that were accompanied by racial slurs to the priority status given to white survivors in evacuation transportation.[382]

Even if the city claims that the decision was implemented in good faith, the city did not have a factual basis for its decision to deprive all New Orleans residents of their right to travel. While there may have been evidence of criminal activity in the aftermath of Katrina, there were no facts from which Gretna could have reasonably inferred that the entire city of New Orleans was dangerous.

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374. *Id.* at 109–10.

375. *See id.* at 108 (the curfew was limited to specific hours and to specific geographical areas; furthermore, while the curfew was in place, it "was modified as to geographical area and time of enforcement," as the emergency circumstances changed).

376. *The Bridge to Gretna*, *supra* note 21; *see* Fender, *supra* note 162.

377. CNN.com, *supra* note 102.

378. Cadenhead, *supra* note 164.

379. Posting of sfsocialists, *supra* note 19 (stating that the "relief effort was callous, inept, and racist").

380. Cadenhead, *supra* note 51.

381. Posting of sfsocialists, *supra* note 19;

382. A FAILURE OF INITIATIVE, *supra* note 3, at 458 (supplementary report of Rep. Cynthia A. McKinney).

In addition, Gretna's actions were not tailored to the emergent circumstances. Gretna's policy swept too broadly, placing a dangerously larger burden on the right to travel than was necessary under the circumstances. Like *Shapiro*, where the Supreme Court struck down the residency requirement that employed a "blunderbuss method of denying [welfare] assistance to all indigent newcomers,"[383] Gretna's policy was also overly inclusive. Gretna repeatedly asserted that it decided to block the bridge to protect the city.[384] Specifically, the officials said that they were trying to keep out the "bad apples"[385] Yet, the city admitted that it "turned *everyone* around—even the elderly and children."[386] Especially troublesome is the fact that many of these people were ill or had serious health conditions.[387] In *Avino*, the post-hurricane curfew permitted exceptions for medical reasons.[388] Gretna's policy, however, was not only over-inclusive, it was also inflexible because the policy did not allow exceptions for medical emergencies. Furthermore, Gretna's policy was also under inclusive. The police officers permitted people to drive across the bridge, but they did not permit people to walk across the bridge.[389] The officers assumed that the people driving cars were not criminals even though there was no evidence for this distinction. In fact, according to Bradshaw and Slonsky, they watched people steal "any car that could be hotwired."[390] Thus, not only did Gretna's policy fail to consider that criminals might be driving cars, Gretna's actions actually encouraged desperate evacuees to engage in criminal behavior so that they could cross the bridge.

Gretna's policy was not just overly-inclusive, it was also overly intrusive because there were plausible alternatives to Gretna's decision to block the bridge. Instead of blocking the Gretna Bridge, Gretna's law enforcement could have blocked off roads within Gretna and offered only one route through the city. This would have at least provided an escape route to the evacuees while still keeping Gretna safe. However, despite plausible alternatives, Gretna endangered the lives of New Orleans residents by choosing a course of action that unnecessarily burdened the evacuees' right to travel. Because the city took measures that constituted a larger deprivation of individual liberty than was necessary, Gretna's actions were unreasonable.[391]

383. Shapiro v. Thompson, 394 U.S. 618, 637 (1969), *overruled in part on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974).

384. *The Bridge to Gretna*, *supra* note 21; Cadenhead, *supra* note 164.

385. *See The Bridge to Gretna*, *supra* note 21.

386. *Id.* (emphasis added).

387. Posting of sfsocialists, *supra* note 19; Cadenhead, *supra* note 22.

388. Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996), *abrogated on other grounds by* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).

389. Posting of sfsocialists, *supra* note 19.

390. *Id.*

391. Shapiro v. Thompson, 394 U.S. 618, 638 (1969), *overruled in part on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974).

Even under the *Lutz* analysis, which employs intermediate scrutiny to travel restrictions that regulate the time, place, and manner of travel, Gretna's actions were unconstitutional. Under *Lutz*'s intermediate-scrutiny analysis, Gretna's actions would have been constitutional if they were narrowly tailored to meet a significant city objective. But, while Gretna's objective may have been significant, it was not narrowly tailored. In *Lutz*, the cruising ordinance was sufficiently tailored because it "le[ft] open ample alternative routes to get about town without difficulty . . . ."[392] However, Gretna blocked off the only channel of travel, knowing that there were no other alternative routes to escape New Orleans. Thus, unlike *Lutz*, Gretna's policy was not narrowly tailored, and—even under intermediate scrutiny—the policy impermissibly infringed on New Orleans residents' rights.

In addition to Gretna's actions, the actions of the individual police officers were also unconstitutional. As the Supreme Court noted in *Guest*, the "constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private."[393] Like the defendants in *Guest*, who physically impeded travel on highways by shooting, beating, and killing African-Americans,[394] the Gretna police officers also physically impeded travel through violent means. The officers demonstrated that they were willing to use deadly force to preserve the blockade: the officers shot their guns over evacuees' heads and assaulted people who did not back down.[395] Further, like *Guest*, the officers' intent was to prevent travel on a federal highway;[396] thus, the officers' conduct was *per se* unconstitutional. The officers' conduct and language clearly indicated that obstructing travel was their intent: the officers repeatedly announced that they were blocking the bridge to prevent Gretna from becoming a Superdome.[397]

Finally, while discussing the Equal Protection implications of the Gretna Bridge incident is not within the scope of this Comment, in evaluating the reasonableness of blocking the Gretna Bridge, the discriminatory impact of Gretna's actions on African-American, indigent, and disabled residents cannot be ignored. In *Shapiro*, the Supreme Court was concerned with the states' intent to "fence out indigents" because the state statutes had the purpose of discouraging

392. Lutz v. City of York, 899 F.2d 255, 270 (3d Cir. 1990).

393. United States v. Guest, 383 U.S. 745, 759 n.17 (1966).

394. *Id.* at 748 n.1.

395. First Supplemental and Amending Class Action Complaint, *supra* note 24, at 2–3.

396. *See id.* at 2 (stating that the Gretna Bridge is "a federal roadway under the jurisdiction of the Federal Highway Administration); *see also* Louisiana at SouthEastRoads.com, *supra* note 97.

397. *The Bridge to Gretna*, *supra* note 21.

poor people from migrating.[398] Whether Gretna's actual purpose was to discourage certain categories of people from crossing the bridge is arguable; however, Gretna's actions certainly had discriminatory consequences. By blocking the bridge, Gretna imposed the most severe burdens on the neediest residents of New Orleans. Many, if not most, of the New Orleans residents that remained in the city either did not have the economic resources to evacuate, or—because they were elderly, sick, or disabled—were unable to evacuate due to their health.[399] In addition, because cars were allowed to cross the bridge but people traveling on foot were not, Gretna's policy directly discriminated against New Orleans residents who did not have cars—over 100,000 people—the majority of whom were low-income residents.[400] Furthermore, when the levees failed, the New Orleans neighborhoods that suffered the worst flooding were predominantly populated by African-American residents.[401] Thus, many of the evacuees whose houses were washed away and whose lives depended on crossing the Gretna Bridge, were African American.[402]

Because the right to travel is a fundamental right, the City of Gretna should be held civilly liable for blocking the Gretna Bridge. Furthermore, because the officers' actions were so egregious, the officers—in their individual capacities—should be held both civilly and criminally liable for blocking the Gretna Bridge.

B. *Civil Liability for the Officers' Actions*

The City of Gretna and the individual officers should be held liable in a § 1983 lawsuit: pursuant to a city policy, the police officers blocked the Gretna Bridge depriving New Orleans residents of their right to travel and seek refuge from their hurricane-ravaged city.

Because municipalities are "persons" under § 1983, the City of Gretna may be held liable for blocking the Gretna Bridge.[403] Even though Gretna's policy had not been formally approved, Chief of Police Arthur Lawson—with the support of the mayor and the city council—handed down the directive to block the Gretna Bridge and used police officers from three different departments to enforce it.[404] Thus, in enforcing the policy, the police officers were acting on behalf of the city, under color of law. Mayor Ronnie Harris extinguished any doubt that the city endorsed the policy when he said that he supported the

398. Shapiro v. Thompson, 394 U.S. 618, 631 (1969), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974).

399. Fussell, *supra* note 28.

400. *See* A FAILURE OF INITIATIVE, *supra* note 3, at 113 (stating that over 100,000 New Orleans residents do not have means of personal transportation).

401. *Id.* at 446.

402. *Id.*

403. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978).

404. Harris, *supra* note 16; *see also supra* note 369 and accompanying text.

decision "wholeheartedly."[405] Further indicating its support of the policy, the Gretna City Council passed a resolution that stated, "[a]llowing individuals to enter the city posed an unacceptable risk to the safety of the citizens of Gretna."[406]

In addition, the policy was the "moving force" behind, or the cause of, the evacuees' loss of the freedom to travel. In all likelihood, but for Arthur Lawson's directive to block the bridge, the New Orleans residents who attempted to cross the bridge would have been successful. Immediately after Katrina, officers were not blocking the bridge. The officers did not block the bridge until three days after Katrina when Gretna city leaders decided to lock down the city to protect residents' property.[407] Furthermore, by preventing New Orleans residents from crossing the bridge, many evacuees suffered physical harm—harm from having no access to food and water, no access to bathrooms, and no access to necessary medications or medical aid.[408] Thus, the city policy was the direct cause of the evacuees' constitutional deprivation, as well as the cause of the additional, preventable harm suffered by the evacuees who could not escape.

The individual police officers who blocked the Gretna Bridge should also be held individually liable for their actions under § 1983. To prevent the officers from proving the affirmative defense of qualified immunity, the evacuees must argue that the individual officers violated a clearly-established constitutional right and, therefore, had "fair warning" that their actions could subject them to liability.[409] The Supreme Court has long recognized that the freedom of travel is a fundamental right,[410] "'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty . . . .'"[411] Moreover, a reasonable person in the same circumstances as the police officers would have realized that this conduct was unlawful: few people would believe that preventing unarmed, hungry, thirsty, tired, and ill evacuees from escaping a flooded city—by shooting guns into the air—was reasonable. The fact that the residents were made to get off the bridge when the large groups began to attract media attention indicates that the officers knew that blocking the bridge was unlawful.[412] Furthermore, many people that heard about the Gretna Bridge incident were immediately enraged by the news. The few reporters

405. *The Bridge to Gretna*, *supra* note 21.
406. *Id.*
407. *See* Riccardi, *supra* note 369.
408. *See* Posting of sfsocialists, *supra* note 19.
409. *See* Hope v. Pelzer, 536 U.S. 730 (2002).
410. Griffin v. Breckenridge, 403 U.S. 88, 105 (1971) ("Our cases have firmly established that the right of interstate travel is constitutionally protected . . . .").
411. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) and Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)); *see also* Jones v. Helms, 452 U.S. 412, 418–19 (1981).
412. *See* Posting of sfsocialists, *supra* note 19.

that were able to shoot footage of the bridge were irate at the sight,[413] and members of Congress were so incensed that they passed bills to condemn the City of Gretna and its officers.[414] The police department's history of rights violations may have numbed the police officers as to their legal boundaries, but reasonable people in the officers' situation would have realized that the officers' actions were clearly unlawful.

While Gretna may be held liable for compensatory damages under § 1983,[415] the individual police officers who blocked the bridge may be held liable for both compensatory and punitive damages.[416] Considering the circumstances, the police officers should have to pay punitive damages for the harm caused to the Katrina evacuees who could not escape New Orleans; the officers acted with callous disregard for the evacuees' rights and violated the clearly-established constitutional right to the freedom of travel.[417] Furthermore, requiring the officers to pay punitive damages would promote the important policy underlying any award of punitive damages: in the future, officials will be less likely to prohibit all travel in the aftermath of a natural disaster if they know that they can be held personally liable for their actions.[418]

C. *Criminal Liability for the Officers' Actions*

Not only should the officers be held civilly liable under § 1983, they should also be held criminally liable for their actions under § 242. To establish liability under § 242, prosecutors must establish that the individual police officers, acting under color of law, willfully deprived Katrina evacuees of their right to travel.[419] Furthermore, under § 242 the prosecution will have to show that the police officers had fair warning that their actions would violate constitutional rights.[420]

Under § 242, the individual police officers should be held liable because they enforced Gretna's directive and willfully deprived New Orleans residents of their right to travel across the Gretna Bridge. As established in the first two sections of Part V, the officers acted under color of law and violated the evacuees' right to travel. However, to prove criminal liability under § 242, the prosecution must also establish that the officers acted willfully—that is, that the officers acted with the specific intent to prevent New Orleans residents from crossing the bridge.

413. *Hannity and Colmes* (FOX News Channel television broadcast Sept. 2, 2005), *available at* http://homepage.mac.com/mkoldys/iblog/C168863457/E20050902214254/index.html.

414. H.R. 4209, 109th Cong. (2005); H.R. Res. 530, 109th Cong. (2005).

415. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 269–70 (1981).

416. *Id.*

417. Smith v. Wade, 461 U.S. 30, 51 (1983).

418. *See City of Newport*, 453 U.S. at 269–70.

419. *See* 18 U.S.C. § 242 (1976).

420. *See* U.S. v. Lanier, 520 U.S. 259, 269 (1997).

As the Supreme Court pointed out in *Delerme* and *Shafer*, if the officers had simply gone "too far" by, for example, using excessive force,[421] or if the officers had simply acted out of fear, anger, or frustration,[422] the officers would not have had the intent required under § 242.[423] However, the officers neither acted solely out of fear, anger, or frustration, nor merely went "too far" in carrying out their duties. Rather, the officers' specific intent was to prevent the evacuees from crossing the bridge. The officers repeatedly announced that their purpose was to prevent the evacuees from crossing the bridge: "We're not going to have any Superdomes over here . . . . This is not New Orleans . . . ."[424] By shooting their guns into the air when evacuees approached, the officers demonstrated that they were not afraid to use their guns and that evacuees who attempted to cross the bridge would be shot. Their intent to use violence to prevent travel across the bridge was further demonstrated when officers assaulted several people in front of the growing crowd of stranded evacuees.[425]

As the Supreme Court noted in *Shafer*, proving willfulness under § 242 is usually not difficult because it "can easily be inferred from the egregious circumstances."[426] Circumstances indicating willfulness include that the "defendant ha[d] pre-existing malice toward his victim, deprived him of his rights at close range with weapons designed to beat or maim, continued his assault for some time, [or] acted without any provocation."[427] Because the police officers' willfulness can easily be inferred from the circumstances prior to and during the Gretna Bridge incident, prosecutors should not have a difficult time proving willfulness.

First, the history of racism within the police department suggests that the officers may have had "pre-existing malice" towards the black Katrina evacuees.[428] Second, the officers deprived the evacuees of their right to travel—oftentimes at close enough range to assault individuals who attempted to cross the bridge—while brandishing machine guns and clutching attack dogs.[429] Witnesses reported that the officers fired their weapons,[430] "verbally berated and humiliated evacuees,"[431] "press[ed] . . . firearms against [evacuees'] bodies, [placed

421. United States v. Delerme, 457 F.2d 156, 161 (3d Cir. 1972).
422. United States v. Shafer, 384 F. Supp. 496, 502 (N.D. Ohio 1974).
423. *Id.*; *Delerme*, 457 F.2d at 161.
424. *The Bridge to Gretna*, *supra* note 21.
425. *See generally* First Supplemental and Amending Class Action Complaint, *supra* note 24, at 2–3, 5.
426. *Shafer*, 384 F. Supp. at 500.
427. *Id.*
428. *See* A FAILURE OF INITIATIVE, *supra* note 3, at 458 (supplementary report of Rep. Cynthia A. McKinney); Cadenhead, *supra* note 51; Flaherty, *supra* note 2.
429. *The Bridge to Gretna*, *supra* note 21; Posting of sfsocialists, *supra* note 19; Riche, *supra* note 15.
430. *See* Posting of sfsocialists, *supra* note 19.
431. Waterman, *supra* note 140.

evacuees into] headlocks and/or chokeholds, and violently thr[ew evacuees] to the ground."[432] Third, the officers' conduct continued for at least two days.[433] While in some circumstances two days might not be a long time, because of the dire circumstances created by Katrina, every hour was crucial. Finally, there is no evidence indicating that the individuals who were trying to cross the bridge provoked the officers. Even if the officers felt the need to protect their city's property from the supposed chaos that had broken out in New Orleans, the injured, hungry, disabled, and elderly people who were trying to cross the bridge did not provoke the officers' actions. For all of these reasons, a prosecutor should not have a difficult time establishing that the officers acted willfully.

Finally, as established in the previous section, the officers had "fair warning" that their actions could subject them to criminal liability: the Supreme Court has long recognized that the freedom of travel is a fundamental right.[434] And, several cases have also established that a willful deprivation of an individual's right to travel can result in criminal liability.[435]

Because the officers' actions prevented New Orleans residents from crossing the Gretna Bridge, many residents were stranded in deplorable conditions with little if any food or water. Evident from personal accounts and from the recent lawsuit that was filed against Gretna and the police officers, many of the people that were stranded were severely harmed or even killed as a result of the officers' conduct.[436] Thus, because the officers' actions resulted in both bodily harm and death, the officers' sentences could range anywhere from a fine, up to life imprisonment, or even death.[437]

VI. CONCLUSION

Hurricane Katrina taught our country a number of lessons. As we witnessed the flight of thousands upon thousands of people from the uninhabitable city of New Orleans, many Americans asked what went wrong. Natural disasters and other emergency situations present challenges and demand solutions that aid both the migrants and the areas affected by the migrants' relocation.[438] We, as Americans, cannot allow local government to seek solutions that protect property at the expense of health and safety.

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432. First Supplemental and Amending Class Action Complaint, *supra* note 24, at 4.

433. Clark, *supra* note 18.

434. Griffin v. Breckenridge, 403 U.S. 88, 105 (1971) ("Our cases have firmly established that the right of interstate travel is constitutionally protected . . . .").

435. United States v. Guest, 383 U.S. 745, 757 (1966).

436. *See* Complaint, *supra* note 25, at 5–6.

437. *See* 18 U.S.C. § 242 (2000).

438. Masters, *supra* note 14, at 856.

When news of the Gretna Bridge incident became public, people were appalled. And, in an attempt to defend its actions, the City of Gretna boasted that their city made the right decision and would block the bridge again in the next hurricane. Our justice system must hold Gretna and its officers accountable. Never again should our people have to suffer like the New Orleans residents suffered in the aftermath of Katrina.

The City of Gretna and the individual police officers who blocked the Gretna Bridge violated Katrina evacuees' constitutional right to the freedom of interstate travel and should be held civilly liable; moreover, the individual officers should also be held criminally liable. The sole purpose of the Gretna policy, and the intent of the officers who enforced the Gretna policy, was to prevent Katrina evacuees from crossing the Gretna Bridge. While Gretna's policy was made in the midst of emergency conditions, the policy was not a reasonable limitation on evacuees' right to travel because it was not necessary to preserve order, nor was it narrowly tailored to protect the safety of Gretna residents. Gretna and its officers did not protect Katrina's victims; instead, Gretna and its officers further prolonged the evacuees' misery. The officers' actions resulted in additional pain and suffering, and even death. Because the city's and the officers' actions violated evacuees' constitutional rights, and because the police officers acted pursuant to a city policy, the city and the officers should be held civilly liable under § 1983 for their actions. Furthermore, because the individual officers acted with the specific intent to impede evacuees from crossing the bridge, the officers should be held criminally liable under § 242.

Certainly, the right to travel on interstate highways is fundamental; but, the right to flee from a hazardous disaster area is not just implicit in the concept of ordered liberty, it is essential to human dignity. Hopefully, decades from now when teachers and historians reflect back upon the Katrina disaster, we will be able to say that Katrina taught us this lesson—and, that we listened.

New Orleans Talking Blues[439]

When levees are flooded and hurricanes roar,
When the waters start seeping up under the door,
You'd expect the escape plans to include the poor
But this isn't that kind of song.

They shut the bus-stations, they shut down the train,
Two days in advance of the start of the rain.
The drivers drove out and the careless remain,
For all you're expecting is wrong.

439. Posting of papersky to http://papersky.livejournal.com/237021.html (Sept. 8, 2005, 13:43:00).

You good folk responded with money and pity,
To help all survivors and each dog and kitty,
But nothing got through, for they'd cut off the city
And the time folks were waiting grew long.

The slow rising waters were foul and polluting
Survivors were starving and thirsting and looting,
They called them insurgents and said they were shooting,
But this isn't that kind of song.

Those poor folks, those black folks, they vote the wrong way,
They left them to rot, said they wanted to stay,
"This all worked out well for them," Barbara Bush say,
For all you're expecting is wrong.

You wanted to help and you really did care,
Those bastards in charge stand with weapons laid bare.
They laugh when they tell you that life isn't fair,
And the time we are waiting grows long.

Rebecca Eaton