

The Modern American

Volume 5
Issue 1 *Spring 2009*

Article 1

2009

Volume 5, Issue 1

The Modern American

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/tma>



Part of the [Law and Society Commons](#)

Recommended Citation

The Modern American, Spring 2009, 1-60.

This Entire Issue is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in The Modern American by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

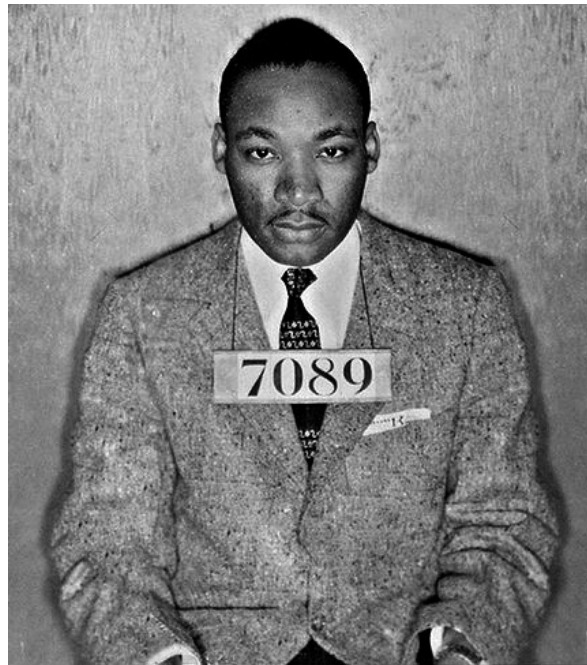
Volume 5, Issue 1

THE MODERN AMERICAN

A Publication Dedicated to Diversity in the Law

*“Injustice anywhere
is a threat to justice
everywhere.”*

—Dr. Martin Luther King Jr.,
Letter from Birmingham Jail,
April 16, 1963



- | | |
|--|---|
| <p>3 TRANSITIONING OUR PRISONS TOWARD AFFIRMATIVE LAW: EXAMINING THE IMPACT OF GENDER CLASSIFICATION POLICIES ON U.S. TRANSGENDER PRISONERS
<i>By Richael Faithful</i></p> <p>10 AIN'T NO PEACE UNTIL WE GET A PIECE: EXPLORING THE JUSTICIABILITY AND POTENTIAL MECHANISMS OF REPARATIONS FOR AMERICAN BLACKS THROUGH UNITED STATES LAW, SPECIFIC MODES OF INTERNATIONAL LAW, AND THE COVENANT FOR THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION
<i>By Dekera Greene</i></p> <p>23 CUTTING FUNDS FOR ORAL CONTRACEPTIVES: VIOLATION OF EQUAL PROTECTION RIGHTS AND THE DISPARATE IMPACT ON WOMEN'S HEALTHCARE
<i>By Rachel V. Rose</i></p> <p>32 JONES V. BENNET: THE BIFURCATED LEGAL STATUS OF EARLY NINETEENTH CENTURY FREE BLACKS IN KENTUCKY
<i>By Alexander J. Chenault</i></p> | <p>37 ROBUST EXCHANGE OF IDEAS AND THE PRESENCE OF THE AFRICAN-AMERICAN VOICE IN THE LAW SCHOOL ENVIRONMENT: A REVIEW OF LITERATURE
<i>By Artika Tyner, Esq.</i></p> <p>42 THIS GAME IS RIGGED: THE UNEQUAL PROTECTION OF OUR MENTALLY-ILL INCARCERATED WOMEN
<i>By Joanna E. Saul</i></p> <p>50 COMMENTARY ON PROPOSITION 8: MUCH ADO ABOUT NOTHING; OR A WAKE-UP CALL TO DO SOMETHING
<i>By Lydia Edwards, Esq.</i></p> <p>55 MOVIE REVIEW: VINCENT WHO?
<i>By Yeon Me Kim</i></p> <p>57 LEGISLATIVE UPDATES
<i>By Guadalupe A. Lopez</i></p> |
|--|---|



AMERICAN
UNIVERSITY

WASHINGTON COLLEGE of LAW

LETTER FROM THE EXECUTIVE BOARD

It is with pride, relief, and not a little astonishment that *The Modern American* offers our first issue published under a non-white president—Mr. Barack Obama. Mr. Obama's election and inauguration represent the renewal of American energy and the hope of increased diversity and equality in American politics. As the President stated on the night of his inauguration: "It's the answer spoken by young and old, rich and poor, Democrat and Republican, black, white, Latino, Asian, Native American, gay, straight, disabled and not disabled—Americans who sent a message to the world that we have never been a collection of Red States and Blue States: we are, and always will be, the United States of America."

Mr. Obama's election, however, does not represent the end of racism or the end of discrimination in America. It is a milestone, but only one along the road to equality. The American people should and will continue to question the *status quo* of American law and politics, and *The Modern American* hopes to be a strong voice in that dialog.

This year has been an interesting one, both for America and *The Modern American*. On April 14, 2009, our Fourth Annual Symposium will gather renowned scholars to address the separation of church and state and the regulation of morality as it affects

cross-cultural relations in our community. We are also proud to announce that our readership base continues to expand; subscribers will now be able to access *The Modern American* through Vlex, LexisNexis, HeinOnline, and the Westlaw database. In the spirit of environmentalism, we are pleased to continue to offer a green publication.

The Modern American would like to thank our former Executive Board and staff members who are graduating in May 2009. We commend them for their contribution to the prevalent discussion of legal issues affecting minorities in our country, and their outstanding dedication to our publication. We encourage them to keep moving forward in their roles as social engineers by facilitating conversations about diversity and the law, and by challenging existing discrimination through education and action.

In closing, we hope our issue inspires you to continue fostering the discourse on diversity and embracing everyday change in your community.

Sincerely yours,

The Executive Board
The Modern American

STAFF

Editor-in-Chief

Tatiana Miranda

Senior Articles Editor

Heron Greenesmith

Senior Marketing Editor

Aaron Jones Wong

Executive Editor

Diana Mendez

Senior Staff Editor

Shiwali Patel

Managing Editor

Michelle Benitez

Marketing Editors

Daniel Broughton

Ya-Wen Chang

Fatima Henson

Faculty Advisors

Professor Anthony E. Varona

Ms. Sherry Weaver

Articles Editors

Dorothy Hwang

Emma Nelson-Munson

Karine Noncent

Alex Perlin

Sherra Wong

Staff Writers

Meghan Boone

Amalia Greenberg

Dekera M. Greene

Yeon Me Kim

Leila Jade Levi

Guadalupe A. Lopez

Junior Staff

Emily Ames

Shari D'Andrade

Richael Faithful

Kara L. Fischer

Zahra Khan

Priscilla Ro

Julia Saladino

Cover Art

Stock Photo

Advisory Council

Mara Giorgio

LeeAnn O'Neil

Lydia Edwards

Tanisha James

TRANSITIONING OUR PRISONS TOWARD AFFIRMATIVE LAW: EXAMINING THE IMPACT OF GENDER CLASSIFICATION POLICIES ON U.S. TRANSGENDER PRISONERS

By
Richael Faithful*

I. INTRODUCTION

“I’m raped on a daily basis. I’ve made complaint after complaint, but no response. No success. I’m scared to push forward with my complaints against officers for beating me up and raping me. I was in full restraint when the correctional officers assaulted me. Then afterwards they said I assaulted them. All the officers say is ‘I didn’t do it.’ The Inspector General said officers have a right to do that to me. That I’m just a man and shouldn’t be dressing like this...”¹

Bianca is a female-identified prisoner currently incarcerated in the general population of a New York state men’s prison. Bianca’s experience is traumatic, shocking, and real. Every day, transgender people like Bianca face painful choices about their well-being in our society. Transgender people who are in prison have even fewer choices. Our prison system not only punishes them, but it further sentences them to live within their own bodies’ betrayal.

Modern ideas about gender have fast-outpaced the law. Theorists today describe gender identity as a complex reflection of how we see our genotypic, physical, and social selves.² Gender expression is the manifest gender identity usually expressed by “masculine” and “feminine” choices from hair length to clothing.³ Every person possesses a gender identity and expresses this identity; many social scientists call this phenomenon “doing gender.”⁴ An increasing number of scholars and advocates (including lawyers) argue that “both sex and gender are socially constructed and both sex and gender are socially real.”⁵

Conventional notions establish a binary gender classification system: male and female. Transgender people may be considered a third group: their gender identity or expression does not conform to their assigned birth gender, and they may transition from one gender to another.⁶ Sexual orientation, defined by the gender of those to whom a person is sexually attracted, is a distinct identity from a person’s gender. In fact, “transgender people have all sexual orientations.”⁷

Few statistics are available about the transgender population.⁸ Nonetheless, one international transgender study found that 8% of respondents self-identified as a gender other than “male” or “female.”⁹ Among the U.S. population, an estimated .25% to 1% of the population has undergone at least one sex reassignment surgery.¹⁰ Transgender women (male-to-female) are “1.5 to 3 times more prevalent than female-to-male” persons.¹¹

Even fewer data are available for transgender prisoners. A 2005 study shows, however, that transgender people are two or three times more likely to be incarcerated than the general population.¹² Many corrections departments’ policies fail to recognize transgender people despite this disproportionate representation.

Some areas of law enforcement are beginning to recognize gender variant people (non-gender conforming people who may include transgender and intersex people). Even so, law enforcement, particularly prison systems, are quickly discovering that they are unable to adequately respond to the increasing number of transgender-identified and intersex people entering their doors. Bianca and others are subject to the constant threat of physical and sexual violence, creating legally inhumane and morally intolerable conditions. The American prison system has reached a moral crisis regarding transgender rights that impinges on basic constitutional protections¹³—a crisis which must be tackled with policy and law-making that fundamentally changes incarceration practices.

Our prison system not only punishes them, but it further sentences them to live within their own bodies’ betrayal.

This article will trace how sexual violence related judicial and legislative history has framed and impacted transgender prisoners’ rights. I will first explain the prevailing U.S. prisoner classification standard and the policy incongruence that undermines its intended purposes and rationales. Then I will then discuss the District of Columbia’s proposed policy, which promises to be a small step forward for prisons in their treatment of transgender prisoners. Finally, I will share recommendations for the District of Columbia and other jurisdictions wishing to move forward a positive transgender prisoners’ rights law.

II. SEXUAL VIOLENCE LITIGATION AND LEGISLATION CREATE OPENING FOR TRANSGENDER RIGHTS

1. SUPREME COURT DECISION RECOGNIZES FEDERAL LIABILITY FOR EXPOSING TRANSGENDER PRISONERS TO HIGH-RISK ENVIRONMENTS

Transgender prisoners’ rights are a newly recognized area in U.S. jurisprudence. They have been deliberated largely on the state level, in which state prisons have more or less successfully addressed transgender prisoners’ needs through administrative policy-making. Several court cases, however, have intervened to more firmly establish rights that affect transgender prisoners. A particular concern involves the safety of trans-women confined

within male populations, such as their vulnerability to sexual violence. Lower court decisions have variably affirmed transgender prisoners' rights to safer living conditions, but no ruling has definitively objected to the administrative status quo that allows and even promotes genitalia-based classification.

The only U.S. Supreme Court case to touch this issue is a 1994 case, *Farmer v. Brennan*. *Farmer* was a narrow decision holding that a federal official could be liable under the Eighth Amendment by acting with "deliberate indifference" to a prisoner's health or safety, but only if she or he knew that the prisoner faced "substantial risk of serious harm."¹⁴ The petitioner, Dee Farmer, was a trans-woman (male-to-female) who had undergone estrogen therapy, two sex reassignment surgeries, and was diagnosed by the Bureau of Prisons as having gender dysphoria.¹⁵ Farmer was placed with the general male population during a transfer from a state to a federal prison. Within two weeks, her cellmate had brutally attacked and raped her.¹⁶ This ruling opened federal officials to a lawsuit only if two things were true: if they had substantial certainty that a prisoner was at risk and they failed to prevent or minimize the risk.¹⁷ Other authors have examined the case's constitutional elements in depth,¹⁸ so I will only examine its concrete impact on transgender prisoners.

Farmer was a seminal case because it affirmed transgender prisoners' right to humane confinement conditions under the Eighth Amendment's prohibition against "cruel and unusual punishment." At the same time, *Farmer* was an extremely limited holding because of the narrow construction and application of the "deliberate indifference" test. The test requires a liable party to have *actual subjective knowledge* of a risk. This too easily favors an "ignorance" defense, and sets up a high standard for transgender prisoners seeking relief.

"Deliberate indifference" lies between negligence and malice. It is sometimes referred to as recklessness "that is more than ordinary lack of due care for the prisoner's interests or safety"²⁰ but is "something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."²¹ Such harm must be substantial or be sufficiently serious to be considered a deprivation of rights.²² It is unclear from the opinion whether wrongly classifying a trans-woman *alone* constitutes a sufficiently serious deprivation, and for this reason is it clear how the test may apply to Farmer and other transgender prisoners who may or may not come forward about sexual abuse. Although the Court implies that exposure to targeted sexual violence may constitute a violation of the Eighth Amendment (assuming that the "deliberate indifference" test is met), it will fall to future cases to clarify the test's application on transgender prisoners.

The *Farmer* Court chose not to alter the objective "deliberate indifference" test even though the fact that Farmer was a transgender person should have deserved separate attention. The Court rejected petitioner's request to make deliberate indifference an objective test, finding that "Section 1983 (which provides a cause of action) 'contains no state-of-mind requirement independent of that necessary to state a violation of the underlying

constitutional right.'"²³ By construing a federal statute in this way, prisoner protections are subject to a wide outcome range rendering inconsistent application for members belonging to vulnerable prison communities. A subjective test or modified objective test would have more broadly protected Farmer and other transgender prisoners.

Farmer's counsel made a compelling argument about the adverse implications of a subjective test. The concern was that the absence of an objective test would permit prison officials to ignore danger toward prisoners.²⁴ On first impression, this argument implies a legal-gaming problem, especially given the nature of prison environments whose culture is predicated on dominance and control. The more salient danger may be the confusion of issues due to the pervasiveness of gender myths in our correctional and legal institutions. For example, if a transgender woman is believed to be an effeminate gay man, then the "deliberate indifference" test is not met

The American prison system has reached a . . . crisis which must be tackled with policy and law-making that fundamentally changes incarceration practices.

because an objective prison official might reasonably (though incorrectly) believe that the transgender prisoner is still male-identified. Objective "reasonable" tests invariably fail new, marginalized classes of plaintiffs. They are a weak liability indicator for invisible or marginalized prisoners who are most at risk. A "deliberate indifference" standard becomes even more difficult to reach for transgender prisoners who must *prove* an official had 1) sufficient knowledge about gender identity and gender expression and 2) an adequate appreciation for how a prisoner's gender identity may expose a prisoner to a substantial harm. The likelihood of a transgender prisoner proving "deliberate indifference" appears extremely low.

Lower court decisions have inconsistently protected transgender prisoners from improper classification. In *Crosby v. Reynolds*, in 1991, a female prisoner brought a Fifth Amendment privacy violation suit against prison officials for housing her with a transgender woman.²⁵ The Court stated that "officials here were confronted with a situation that had no perfect answer" and held that prison officials were entitled to qualified immunity for reassigning the transgender woman into the women's facility.²⁶ Four years later, in *Lucrecia v. Samples*, a federal court rejected a transgender woman's numerous constitutional violation claims, including one claiming an Eighth Amendment Due Process violation based on an exception allowing actions for "legitimate penological interests."²⁷ Most recently in 1999, in *Powell v. Schriver*, an HIV-positive transgender woman sued the prison on Fifth and Eighth Amendment grounds when the prison staff informed other prisoners of the plaintiff's gender identity. Although the plaintiff's jury award for privacy violation set aside by the lower court was not reinstated, the plaintiff successfully had her Eighth Amendment claim remanded upon the court's finding that no qualified immunity existed for disclosure of her gender identity.²⁸ The two latter cases (*Lucrecia* and *Powell*), like *Farmer*, involved prisoners who experienced sexual violence resulting from misplacement. These cases suggest that there has been a positive judicial evolution over the years that charts a path for advocates seeking greater legal recognition and protection for transgender prisoners.

2. PRISON RAPE ELIMINATION ACT (“PREA”) ENACTS NATIONAL STANDARDS DESIGNED TO BETTER PROTECT PRISONERS FROM SEXUAL VIOLENCE

Congress is beginning to recognize transgender prisoners’ rights. The Prison Rape Elimination Act of 2003 was the first piece of federal legislation to address prisoner sexual violence. Among its stated purposes, the Act aimed to “(1) establish a zero-tolerance standard for the incidence of rape in prisons in the United States” and “(2) make the prevention of prison rape a top priority in each prison system.”²⁹ To reach its goals, Congress established a bipartisan panel, the National Prison Rape Elimination Commission (“NPREC”), which was charged with making national standard recommendations to the Attorney General.³⁰ NPREC held eight public hearings throughout the country where transgender lawyers and advocates testified about the problems faced by transgender prisoners.³¹

San Francisco-based Transgender Law Center (“TLC”) testified in the California hearing entitled “At-Risk: Sexual Abuse and Vulnerable Groups Behind Bars.”³² TLC shared that in addition to rape and coercion, sexual violence experienced by transgender prisoners may include “unnecessary strip searches, and forced nudity, and harassment.”³³ Most striking was the testimony that “this violence does not exist, and cannot be understood, [for transgender people] in a vacuum,”³⁴ referring to the widespread transgender discrimination outside prison that leads to over-incarceration.³⁵

Since PREA’s passage over five years ago there has been significant scrutiny over the Act’s efficacy.³⁶ There is little evidence that PREA has curbed transgender violence. Of PREA’s national standard recommendations, those that are most relevant to transgender prisoners have yet to be broadly reflected in administrative policies (discussed later in this article). For example, Recommendation CI-2 on Classification Assessment provides:

During the internal classification process, staff assesses every inmate to determine his or her potential to be sexually abused by other inmates and his or her potential to be sexually abusive...Every inmate’s classification assessment is reviewed and updated, as necessary, at regular intervals, following significant incidents, and whenever new and relevant information is available.³⁷

This recommendation does not explicitly enumerate transgender prisoners, but calls for procedures that would better protect them from abuse by advising case-by-case consideration. When given the opportunity, PREA and NPREC failed to challenge genitalia-based classification policies. Instead they chose to draft flexible individualized policies that stop short of addressing transgender prisoners as a class. Although flexible classification policies are better than the current binary male/female system, discretionary policies are unlikely to improve conditions for prisoners whose needs remain deeply misunderstood.

III. FAILURE TO PRESERVE TRANSGENDER PRISONERS’ HUMAN RIGHTS IS ROOTED IN ANTIQUATED GENITALIA-BASED CLASSIFICATION POLICIES

1. GENITALIA SERVES AS THE PREVAILING PRISONER GENDER CLASSIFICATION STANDARD IN U.S. AND FAILS TO TREAT TRANSGENDER PEOPLE FAIRLY

Generally, U.S. jurisdiction classifies prisoners by their perceived anatomical sex (genitalia): male or female.³⁸ As articulated in the Transgender Law Center’s testimony, as long as the inmate possesses internal and external sex organs corresponding with a specific sex, he or she will be housed in accordance with that sex.³⁹ Genitalia-based policies represent a rarefied reality of gender-segregated facilities that have no place for gender variant people. Gender segregation itself may not be the most critical issue; some argue “just as culpable, and possibly more so, are the gendered expectations that this segregation creates.”⁴⁰ Most jurisdictions do not recognize transgender people within procedural policies—classification-based or otherwise—at all.

Some state and local jurisdictions, including California, Illinois, Minnesota, New York, Oregon, and Washington, have established non-discrimination policies, hormone treatment guidelines, and staff training requirements for transgender prisoners.⁴¹ But only one jurisdiction’s youth division, in New York, provides a self-identification classification policy in which transgender prisoners may self-select their placement.⁴²

Many prisons confront this issue with administrative segregation (solitary confinement) as an alternative to placement with the general population,⁴³ believing it to be the best available solution.⁴⁴ In reality, administrative segregation “allows a prisoner minimal interaction with other people, no access to jobs or treatment programs, and greatly restricted privileges The stated purpose of administrative segregation is that people being confined within it are a proven danger to themselves, staff, or other inmates the message is being sent that a person’s gender identity itself is threatening to the institution”⁴⁵ Gender variance has proved to be threatening to prisons that are balancing two imperatives: preserving order and protecting its prisoners and officials from violence and legal issues associated with violence. Nonetheless, transgender prisoners should not be punished for a dilemma that prisons have been unable to resolve.

Legislatures sometimes distinguish between post-operative prisoners and pre-operative prisoners.⁴⁶ Post-operative prisoners, known as transsexuals, are transgender people who have had sex reassignment surgery (“SRS”) that changes a person’s external anatomy from a particular sex to another.⁴⁷ The consequence of differentiating between pre- and post-operative transgender prisoners is significant. Post-operative prisoners are usually able to be classified according to their gender identity. Pre-operative or non-operative prisoners are not. When prisoners are sorted by post-operative or pre-operative status, they are in reality being sorted by economic class. The umbrella term “sex reassignment surgery” is misleadingly simplistic because it refers to a large set of costly medical procedures.⁴⁸ SRS tends to be

. . . this violence does not exist, and cannot be understood, [for transgender people] in a vacuum . . .

prohibitively expensive or otherwise unavailable to most people for a variety of reasons,⁴⁹ ensuring that an overwhelming majority of transgender prisoners are housed within high-risk environments, based primarily by their economic means. Another related problem is the post- and pre-operative distinction is a social and legal fiction. It makes classification results random, disparate, unequal, and unfair.

2. CURRENT POLICIES FAIL TO TREAT TRANSGENDER PEOPLE EQUALLY

The high level of scrutiny directed toward gender variant people's bodies is patently unfair and impracticable. During intake, gender-variant people often undergo a higher level of scrutiny of their bodies than others when prison and medical staff try to place them within the binary system.⁵⁰ Simply envision this scenario for yourself. It may be difficult to imagine being classified, housed, and referred to by a gender with which you do not identify. It may be even harder to conceive being poked, prodded, and examined by several prison and medical staff to determine "which one you are." Such an experience may stretch beyond imagination, but it may happen if your body is perceived to be different from other women or men. Truth is our bodies do not necessarily resemble one sex more than the other. After all, "Some women have wombs, some do not. Some men have facial hair, some do not."⁵¹ At times, our anatomical and sexual characteristics bear greater resemblance across the sexes than within. For instance, where does a prison place a trans-woman who has developed breasts but has testes and a penis? Transgender people who may manifest sexual characteristics from "both" genders cannot be properly classified because no place currently exists for them.

A genitalia-based classification system privileges so-called post-operative prisoners over pre-operative and non-operative prisoners. Existing policies provide drastically different fates for similarly situated people. Transgender prisoners experience extremely inconsistent treatment based on the whims of the staff. Likewise, non-discrimination policies designed to produce policy consistency and accountability are undermined by genitalia classification policies.

3. NON-DISCRIMINATION POLICIES ARE RENDERED INEFFECTIVE BY CLASSIFICATION POLICIES

The overall prevalence of transgender discrimination, such as unequal access to programs or extensive verbal abuse, is unknown. A 2003 survey by the Transgender Law Center and National Center for Lesbian Rights revealed that, from a 150-person sample, 14% of respondents reported experiencing discrimination within prisons.⁵² Such a high report expresses the need for prisons' responsiveness, and is demonstrative of the prisons' failure to address bias against transgender prisoners. Failure to recognize transgender prisoners or their rights is an example of institutional discrimination by the criminal justice system. Until the U.S. prison system can systemically recognize transgender rights, isolated jurisdictional efforts will have a limited impact. Most anomalous, however, is the dual existence of non-discrimination policies protecting transgender prisoners and codified discrimination against them within some jurisdictions.⁵³ When jurisdictions adopt trans-inclusive non-discrimination

policies and yet maintain genitalia-based classification, neither policy is effective.

Prisons and associated agencies undermine their own non-discrimination policy by simultaneously adopting a classification-by-genitalia policy. There are legitimate reasons for each policy, which serve independent functions. Non-discrimination policies are part of a larger prison accountability system that helps protect prisoners from inequity. On the other hand, classification policies are essential for efficient procedural systems. On their face, these systems appear to have distinctive purposes. While a non-discrimination policy requires equal treatment among prisoners, they can also mask the existence of discrimination. If all prisoners are subject to the same procedures, including classification for housing and other purposes, then it may be reasoned that no discrimination is present. The interaction of non-discrimination policies and genitalia-based classification policies in the case of transgender prisoners, however, demonstrates systemic weaknesses.

Systemic weaknesses should be remedied, not ignored. If the criminal justice system incarcerates large numbers of transgender people, it must accept the necessity of reform to accommodate their needs.⁵⁴ Well-intentioned efforts to recognize transgender people are rendered ineffective by antiquated classification policies. To address this moral and practical problem, the District of Columbia is offering an innovative model.

IV. THE DISTRICT OF COLUMBIA PROPOSES A NON-GENITALIA BASED CLASSIFICATION SYSTEM

1. TRANSGENDER PEOPLE ARE THE NEWEST PROTECTED CLASS UNDER D.C.'S NON-DISCRIMINATION LAW

Patti Shaw was involved in a domestic dispute with her husband on October 26, 2003 in the District of Columbia. During booking at the police station, the officers found court records indicating a prior arrest under the name Melvin Lee Hammond. The court system did not have a way to change her name or gender identification without a judge's order, even though Patti had a legal name change and sex re-assignment surgery. She was placed in a male cellblock overnight while awaiting arraignment. The next morning Patti Shaw reported being sexually assaulted by one or more male prisoners. The incident prompted D.C. law enforcement to examine its criminal records system.⁵⁵

Two years later, the D.C. City Council passed the Human Rights Clarification Amendment Act of 2005. The amendment added "gender identity or expression" to its non-discrimination law, the D.C. Human Rights Act of 1977.⁵⁶ The primary impetus for the amendment came from a desire to clarify lawmakers' original intent to protect transgender people. Public testimony on the Act from the Gay and Lesbian Activists Alliance ("GLAA"), D.C.'s major gay and lesbian rights organization, revealed that D.C. had historically protected transgender people against discrimination based on "personal appearance."⁵⁷ GLAA and transgender rights' advocates argued that lawmakers had always intended to protect transgender people even though the statute did not identify "gender identity and expression" as a protected status.⁵⁸

Whatever the act's original intention, transgender D.C. residents needed its protection. Different Avenues, a non-profit

for young adults affected by violence, HIV, and discrimination, reported that 60% of the transgender population surveyed by the D.C. Administration of HIV and AIDS had a yearly income of \$10,000 or less.⁵⁹ The D.C. Council adopted the addition on December 6, 2005.⁶⁰ D.C. residents like Patti Shaw were unambiguously included in the protection of the city's non-discrimination law.

2. D.C.'s DEPARTMENT OF CORRECTIONS PROPOSED NEW POLICY ESTABLISHES DELIBERATIVE BODY FOR GENDER CLASSIFICATION

Led by the D.C. Trans-Coalition ("D.C.T.C."), a transgender political advocacy group, a campaign was launched to enforce the Human Rights Act within the city's Department of Corrections ("D.O.C."). D.C.T.C., along with other local and national advocates and lawyers sought to alter D.O.C.'s policy regarding transgender prisoners, including its classification and hormone therapy procedures.

On January 5, 2009, the D.O.C. issued a new directive revising its classification and housing policies within its operations.⁶¹ The policies' purpose is substantially broad as it seeks to establish procedures appropriate for "transgender, transsexual, inter-sex, and gender variant persons" incarcerated by the D.O.C.⁶² Like the previous May 10, 2008 policy, the directive includes definitions for "gender expression," "inter-sex," "sexual orientation," "transsexual," and "gender variant"; a non-discrimination statement, and initial intake procedures for gender determination. Gender determination has been a routine procedure for all prisoners, but the directive made it more detailed for gender-variant inmates. If staff believes that there is a discrepancy between a prisoner's gender and genitalia after a physical examination, then the policy calls for more extensive protocol including a genitalia examination by medical staff.⁶³

Two significant changes appeared in the new policy. First, transgender prisoners who wish to begin hormone therapy are permitted to do so with medical authorization. Although some other jurisdictions currently permit hormone therapy continuation, very few permit new therapy to begin while in prison. This change is a significant step forward for prisoners' mental and physical well-being (for those who can afford it). More important, however, is the second revision creating a Transgender Committee. The Transgender Committee is an appointed D.O.C. body comprised of a "medical practitioner, mental health clinician, a correctional supervisor, a case manager, and D.O.C. approved volunteer knowledgeable about transgender issues."⁶⁴ It is charged to determine prisoner classification after reviewing a prisoner's records, conducting a prisoner interview, and evaluating a prisoner's vulnerability to abuse within the general prison population. After an initial intake, a prisoner will remain in protective custody (consistent with the prisoner's genitalia) up to 72 hours until classification is determined by the Transgender Committee.⁶⁵ These revisions reflect a sea change that corresponds with increased transgender visibility, advocacy, and understanding.

No other U.S. prison policy provides for a collaborative body for gender classification, and no other peer nation⁶⁶ has an equivalent prison policy. Most similar to this model is the United Kingdom's legal sex change panel process established by the Gender Recognition Act of 2004.⁶⁷ Any person over 18 who

wishes to legally change his or her sex must apply to a regional committee that considers "evidence" from medical professionals confirming that person's gender dysphoria.⁶⁸ An approved application issues a gender recognition certificate that changes a person's legal documentation to reflect his or her "acquired" gender.⁶⁹ There is no comparable federal process within the United States, where birth certificates, driver's licenses, and other legal documents may be changed depending on each state's law. The District of Columbia has adopted the most progressive transgender prisoner classification in the country to date.

V. MOVING TOWARD A POSITIVE TRANSGENDER PRISONER RIGHTS LAW

1. ENHANCING D.C.'s MOST RECENT POLICY PROPOSAL

Representatives from D.C.T.C., the Washington Lawyers' Committee for Civil Rights and Urban Affairs, and Just Detention International submitted several recommendations to D.O.C. about how to improve the new proposed policy previously discussed in the last section.⁷⁰ Concerns evident in these recommendations stress the need for more accountability, particularly as community advocates fear that the Transgender Committee will become a mere formality by declining to take an active role in re-classifying prisoners.

Three recommendations reflect this concern. First, although the Transgender Committee would conduct important work, "further clarification [i]s needed to specify how the Committee will make and document its decisions."⁷¹ Aware that D.O.C. has adopted the most transgender-friendly policy in the country, this recommendation identifies Committee transparency as a key component for gauging its progress. Second, the policy should "explicitly state that the Transgender Committee's recommendation can be appealed."⁷² Any deliberative body without an appeals process lies contrary to current national standards, such as PREA, that recommend periodic review for vulnerable prisoners.⁷³ An appeals process will ensure that transgender prisoners will have more opportunity to protect their rights, especially when a genitalia policy remains the default classification policy. Finally, "in some cases, placing a transgender inmate in collective protective custody with other transgender inmates may be the least restrictive option for maintaining the inmate's safety, and therefore should be included as a possibility."⁷⁴ This recommendation underlines administrative segregation problems and offers an alternative: a transgender housing unit. "Collective protective custody" is perhaps the fairest option compared to general population or segregation, but it runs the risk of prisoner ghettoization.

Flexible self-identification remains the ideal classification policy. Several non-U.S. jurisdictions have adopted some form of this policy. New South Wales, Australia, for example, presumes that "inmates have a right to be placed in the facility of their 'gender identification' unless it is determined, on a case-by-case basis, that they should be placed elsewhere."⁷⁵ Within this system, default classification falls on gender identity, not genitalia. Flexibility is essential for the same reasons discussed in previous sections about the complex relationships among gender identity, expression, and body diversity. A trans-man, for

instance, may be extremely vulnerable in a male population, even though he is male-identified. Most importantly, self-identification policies do not only best serve gender variant prisoners, but are a reasonable management option.⁷⁶

2. TARGETING TRANSGENDER CRIMINALIZATION

Self-identification prison policies affirm prisoners' basic human dignity and preserve their rights under the U.S. Constitution. However, such policies alone will not fully address the issue. Transgender over-incarceration remains the heart of the problem. The criminal justice system cannot understand the increase of this community within prisons walls if it does not examine the reasons underpinning the trend.

Transgender criminalization is part of an insidious continuum of societal discrimination against gender nonconformity. The U.S. imprisoned population has grown 390% in 24 years.⁷⁷ People of color and poor people have been disproportionately affected by this increase, and "transgender and gender non-conforming people are disproportionately poor, homeless, criminalized, and imprisoned."⁷⁸ Entrenched job discrimination, low income levels, and exposure to other risk factors essentially create a prison pipeline. Many transgender people are forced to commit "survival crimes" such as sex work and healthcare supply theft due to narrowed economic access and opportunity; and evidence of police trans-profiling further compounds imprisonment rates.⁷⁹ Opposing workplace discrimination, cracking down on

profiling, and providing community-based, gender-appropriate alternatives to imprisonment are all proactive, systemic legal approaches to transgender over-incarceration recommended by the Sylvia Rivera Project. These suggestions show that the criminal justice system alone cannot combat transgender de-humanization; legislatures and cultural leaders must also contribute to a positive social climate for gender variant people.

VI. CONCLUSION

Moving toward a more affirmative transgender rights jurisprudence is an emerging challenge facing the U.S. prison system. Legal advocates have shown that our current system is not sustainable; functionality or the means by which prisons can prevent physical and sexual violence will be limited if law-makers are too slow to respond. Even more important, however, is the tragedy that transgender prisoners collectively suffer from discrimination in our society and are perhaps the least among us. Although many Americans may not know that transgender people exist, they do know and likewise react to gender non-conformity. Transgender rights are an indicator by which we can gauge our moral and legal advancement. Our institutional failures implicate our legal system's humane treatment standards. Attention and effort toward improvement, nonetheless, brings us ever closer to moral restoration.

ENDNOTES

* Richael Faithful is a first year law student at Washington College of Law. Prior to WCL she was a community organizer with the Virginia Organizing Project and Board of Director at Equality Virginia. Special thanks to Deb Golden for her guidance on this article.

¹ SYLVIA RIVERA PROJECT, IT'S WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 19 (2007), <http://www.srlp.org/files/warinhere.pdf> [hereinafter IT'S WAR IN HERE] (last visited Mar. 6, 2009).

² Sylvia Rivera Law Project, Trans 101, available at <http://www.srlp.org/node/123> (last visited Mar. 6, 2009).

³ See *id.* (summarizing the notion that everyone has gender identity and expresses it in different ways).

⁴ RECONSTRUCTING GENDER: A MULTI-CULTURAL ANTHOLOGY 113 (Estelle Disch ed., McGraw Hill Higher Education 4th ed. 2006).

⁵ *Id.*

⁶ *Id.* (noting that transgender individuals may self-identify as transgender instead of either male or female).

⁷ *Id.* (emphasizing that diversity exists within the transgender community, such as sexual orientation, self-identification; and that gender does not solely exist in a binary system of male and female).

⁸ Human Rights Campaign, Transgender Population and Number of Transgender Employees available at <http://www.hrc.org/issues/9598.htm>. (last visited Mar. 2, 2009).

⁹ See *id.* (referring to the results from the study conducted by T.M. Witten, Executive Director of the TranScience Research Institute).

¹⁰ Human Rights Campaign, *supra* note 8.

¹¹ AMERICAN PSYCHOLOGICAL ASSOCIATION, REPORT OF THE TASK FORCE ON GENDER IDENTITY AND GENDER VARIANCE 30 (2008), <http://www.apa.org/pi/lgbctransgender/2008TaskForceReport.pdf> (last visited Mar. 2, 2009).

¹² Transgender Law Center, National Prison Rape Elimination Commission testimony before the Commission in San Francisco, CA, http://www.ncrlrights.org/site/DocServer/prison_daley081905.pdf?docID=941 (last visited Mar. 6, 2009).

¹³ To clarify, I do not mean to convey that gender misclassification is the only moral failing of our prison system. Concerns about prison violence, the Prison Industrial Complex, capital punishment, among others are profound moral issues. Instead, here, I only wish to bring attention the legal system's moral failure to protect gender non-conforming people who are very likely to part of other groups marginalized by the prison system and beyond.

¹⁴ *Farmer v. Brennan*, 511 U.S. 826 (1994).

¹⁵ AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 11, at 29. Gender identity disorder "has been included in the DSM since 1980 as a medical condition. Its diagnostic criteria include '(a) a strong or persistent cross-gender identification, (b) persistent discomfort with one's sex or a sense of inappropriateness in the gender role associated with one's sex, and (c) clinically significant distress or impairment in functioning.'"

¹⁶ *Farmer*, 511 U.S. at 830.

¹⁷ *Id.* at 847.

¹⁸ See Nikko Harada, *Trans-Literacy Within Eighth Amendment Jurisprudence: De/fusing Gender and Sex*, 36 N.M. L. REV. 627 (2006).

¹⁹ Shannon Minter, The National Center for Lesbian Rights, Representing Transsexual Clients: Selected Legal Issues available at <http://www.transgenderlaw.org/resources/translaw.htm> (last visited Mar. 2, 2009).

²⁰ *Farmer*, 511 U.S. at 835.

²¹ *Id.*

²² *Id.* at 834.

²³ *Id.* at 841.

²⁴ *Id.*

²⁵ *Crosby v. Reynolds*, 763 F. Supp. 666 (1991).

ENDNOTES CONTINUED

- ²⁶ *Id.* at 669.
- ²⁷ *Lucrecia v. Samples*, 1995 W.L. 630016, at *5 (N.D. Cal. Oct. 16, 1995).
- ²⁸ *Powell v. Schriver*, 175 F.3d. 107 (1999).
- ²⁹ Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 3, 117 Stat. 972 (2003).
- ³⁰ *See id.* at § 7.
- ³¹ National Rape Elimination Commission, Public Hearings, *available at* <http://www.nprec.us/proceedings.htm> (last visited Mar. 5, 2009).
- ³² *Id.*
- ³³ Transgender Law Center, *supra* note 12, at 1.
- ³⁴ *Id.*
- ³⁵ *Id.* at 2-4.
- ³⁶ *See Sarah K. Wake, Note, Not Part of the Penalty: The Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 220 (2006).
- ³⁷ National Prison Rape Elimination Commission, Draft Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails and Supplemental Standards for Facilities with Immigration Detainees, http://www.nprec.us/UpcomingEvents/5.1_MasterAdultPrison_andJail_andImmigrationStandardsClean.pdf at 30.
- ³⁸ National Center for Lesbian Rights, Rights of Transgender Prisoners, *available at* www.nclrights.org (last visited on Mar. 6, 2009) (“Transgender people who have not had genital surgery are generally classified according to their birth sex for purposes of housing, regardless of how long they may have lived as a member of the other gender, and regardless of how much other medical treatment they may have undergone...”).
- ³⁹ Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just An American Problem—A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and A ‘Universal’ Recommendation To Improve Treatment*, 15 LAW AND SEXUALITY 91, 105 (2006).
- ⁴⁰ Transgender Law Center, *supra* note 12, at 4.
- ⁴¹ Washington Lawyers’ Committee for Civil Rights and Urban Affairs DC Prisoners’ Project, Transgender-Friendly Policy Resource (Nov. 2008) (on file with author).
- ⁴² New York State Office of Children and Family Services, *Lesbian, Gay, Bisexual, Transgender and Questioning Youth* (Mar. 17, 2008), http://www.srlp.org/files/LGBTQ_Youth_Policy_PPM_3442_00.pdf (last visited on Mar. 6, 2009).
- ⁴³ *Id.*
- ⁴⁴ *Powell v. Schriver*, 175 F.3d. 107, 109 (1999).
- ⁴⁵ Transgender Law Center, *supra* note 12, at 6.
- ⁴⁶ *Supra* notes 24 – 26.
- ⁴⁷ HOLLY DEVOR, FTM: FEMALE-TO-MALE TRANSSEXUALS IN SOCIETY 38 (1997).
- ⁴⁸ *Id.*
- ⁴⁹ IT’S WAR IN HERE, *supra* note 1, at 28.
- ⁵⁰ *See id.* at 21 (“Unnecessary frisks and abusive strip searches are also commonly reported by SRLP’s imprisoned clients.”).
- ⁵¹ Sylvia Rivera Law Project, *supra* note 2, at 3.
- ⁵² Transgender Law Center, *supra* note 12, at 2. (The 2003 cited report, Trans-Realities, relied on self-reports of discrimination because “it is often hard to determine if discrimination is based on any one characteristic...or a combination...”); Transgender Law Center, TRANSREALITIES (2003) *available at* <http://www.transgenderlawcenter.org/tranny/pdfs/Trans%20Realities%20Final%20Final.pdf>.
- ⁵³ Washington Lawyers’ Committee, *supra* note 41.
- ⁵⁴ *See, e.g.* Women’s Prison Association, Trends in Incarceration 1, http://www.wpaonline.org/pdf/Focus_August2003.pdf (last visited Mar. 7, 2009) (An analogous trend can be identified among women prisoners).
- ⁵⁵ Lou Chibbaro Jr., Trans woman reports sexual assault in D.C. male cellblock, WASHINGTON BLADE, Nov. 28, 2003, <http://www.washingtonblade.com/2003/11-28/news/localnews/transabuse.cfm>.
- ⁵⁶ D.C. CODE § 2-1401.01 (2009). Protects against discrimination “for any reason other than of individual merit, including, but not limited to discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, and place of residence or business.”
- ⁵⁷ Gay and Lesbian Activist Alliance, GLAA endorses transgender protections in Human Rights Act, <http://www.glaa.org/archive/2005/glaaonhumanrightsclarificationact1017.shtml> (last visited on Mar. 7, 2009).
- ⁵⁸ *Id.*
- ⁵⁹ *See* Different Avenues, DC Human Rights Clarification Act of 2005 Talking Points, www.differentavenues.org/DCHRA_talking_points_on_introduction_for_our_people.doc (last visited on Mar. 7, 2009) (citing the results of the Washington Transgender Needs Assessment Survey).
- ⁶⁰ D.C. City Council, Seventeenth Legislative Meeting, Linda W. Cropp, Chairman *available at* http://www.octt.dc.gov/services/channel13/December2005/describe_2734.shtml (last visited on Mar. 7, 2009).
- ⁶¹ District of Columbia Department of Corrections Operations Memorandum 4020.3 (Feb. 20, 2009), http://doc.dc.gov/doc/frames.asp?doc=/doc/lib/doc/program_statements/4000/PS4020_3GenderClassificationandHousing022009.pdf (last visited on Mar. 7, 2009).
- ⁶² *Id.* at 1.
- ⁶³ *Id.* at 3.
- ⁶⁴ *Id.* at 2.
- ⁶⁵ *Id.* at 4.
- ⁶⁶ I use the term “peer nation” fairly loosely. It may be understood as a country similar in population, political structure, economic development, and prevalent languages.
- ⁶⁷ Gender Recognition Act of 2004, http://www.opsi.gov.uk/acts/acts2004/pdf/ukpga_20040007_en.pdf (last visited at Mar. 7, 2009).
- ⁶⁸ *Id.* at 2.
- ⁶⁹ *Id.* at 3.
- ⁷⁰ Just Detention International, Washington Lawyers’ Committee for Civil Rights and Urban Affairs, and DC Trans Coalition Joint Letter to D.O.C Director (Jan. 15, 2008) (on file with author).
- ⁷¹ *Id.* at 3.
- ⁷² *Id.*
- ⁷³ National Prison Rape Elimination Commission, *supra* note 37.
- ⁷⁴ *Id.*
- ⁷⁵ Mann, *supra* note 39, at 119.
- ⁷⁶ I should emphasize that I am not particularly concerned with prison management but I felt compelled to include this point because it may be persuasive to the law enforcement community.
- ⁷⁷ IT’S WAR IN HERE, *supra* note 1.
- ⁷⁸ *Id.* at 14.
- ⁷⁹ *Id.* at 15.

AIN'T NO PEACE UNTIL WE GET A PIECE: EXPLORING THE JUSTICIABILITY AND POTENTIAL MECHANISMS OF REPARATIONS FOR AMERICAN BLACKS THROUGH UNITED STATES LAW, SPECIFIC MODES OF INTERNATIONAL LAW, AND THE COVENANT FOR THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (“CERD”)

By
Dekera Greene*

I. THE PROLOGUE¹

In the beginning was the word
And the word was Death
And the word was nigger
And the word was death to all niggers
And the word was death to all life
And the word was death to all
peace be still . . .

In the name of peace
They waged the wars
ain't they got no shame

In the name of peace
Lot's wife is now a product of the Morton company
nah they ain't got no shame . . .

Cause they killed the Carthaginians
in the great appian way
And they killed the Moors
“to civilize a nation”
And they just killed the earth
And blew out the sun in the name of a god
Whose genesis was white
And war wooed god
And america was born
Where war became peace
And genocide patriotism
And honor is a happy slave
cause all god's chillun need rhythm
And glory hallelujah why can't peace
be still

The great emancipator was a bigot
ain't they got no shame
And making the world safe for democracy
Were twenty million slaves
nah they ain't got no shame . . .

The rumblings of this peace must be stilled
be stilled be still

ahh Black people
ain't we got no pride?²

* * *

As Germany and other interests that profited *owed* reparations to Jews following the holocaust of Nazi persecution, America and other interests that profited *owe* reparations to blacks following the holocaust of African slavery which has carried forward from slavery's inception for 350-odd years to the end of U.S. government-embraced racial discrimination.³

* * *

The civil-rights struggle involves the black man taking his case to the white man's court. But when he fights it at the human-rights level, it is a different situation. It opens the door to take Uncle Sam to the world court. The black man doesn't have to go to court to be free. Uncle Sam should be taken to court and made to tell why the black man is not free in a so-called free society. Uncle Sam should be taken to the United Nations and charged with violating the UN charter of human rights. You can forget civil rights. . . . It is absolutely impossible to do it in Uncle Sam's courts—whether it is the Supreme Court or any other kind of court that comes under Uncle Sam's jurisdiction. The only alternative that the black man has in America today is to take it out of Senator Dirksen's and Senator Eastland's and President Johnson's jurisdiction and take it downtown on the East River and place it before that body of men who represent international law, and let them know that the human rights of black people are being violated in a country that professes to be the moral leader of the free world.⁴

* * *

The imagination of the academic philosopher cannot recreate the experience of life on the bottom . . . The technique of imagining oneself black and poor in some hypothetical world is less effective than studying the actual experience of black poverty and listening to those who have done so. When notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes and identifiable normative priorities emerge . . . reparations is a legal concept generated

from the bottom. It arises not out of abstraction, but from experience.⁵

* * *

I am an invisible man . . . I am invisible, understand, simply because people refuse to see me . . . When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me.⁶

II. INTRODUCTION

*Kugichagulia – Self-determination: To define ourselves, name ourselves, create for ourselves and speak for ourselves.*⁷

The oppression of people of color,⁸ particularly Black people,⁹ and the economic growth of America has historically been in direct proportion. The success, then, of American capitalism and imperialism has rested in the marginalization of Black people through chattel slavery, *de jure* and *de facto* segregation, and racial discrimination.¹⁰ These institutional and structural hindrances¹¹ result in several challenges, including: low rates of home, land, and resource ownership; overrepresentation in jails and prisons; underrepresentation in areas of educational attainment; significantly larger proportions of unemployed and underemployed persons and low rates of business ownership; the lack of access to healthcare and high rates of disease contraction¹²; and single parenthood, orphanage, and the destruction and disconnection of the Black family. The perpetuation of such marginalizing and interweaving systems wrought ills on a people, ultimately dispossessing and disenfranchising the whole. Reparations, then, while owed as repair for previous harms and their resulting ills, are key to remedying the current condition and instrumental in closing the gap of disparity.¹³ While damages cannot account for all losses, and it is impossible to restore the aggrieved wholly, it is backwards to maintain a structure that profits the beneficiaries of a maliciously designed system, while simultaneously discounting the real harms of the injured parties—American Blacks. Those who disagree engage in the malicious cycle that continues to marginalize Black people.

This indignation demonstrates ignorance of history, economics, and sociology, and manifests the damage of American imperialism and the perversion of its design. Even the language that typifies this dynamic is inverted to further confuse and detract from this perpetually marginalizing structure. Such behavior maintains a system where the ugly become beautiful, the oppressed become the oppressors, and the powerful become the powerless. As rapper Nas describes it: “Anytime we mention our history, existence or condition, they calling it reverse racism.”¹⁴ Brother Malcolm¹⁵ contended the same:

So I don’t believe in violence—that’s why I want to stop it. And you can’t stop it with love, not love of those things down there. No! So, we only mean vigorous action in self-defense, and that vigorous action we feel we’re justified in initiating by any means necessary. Now, for saying something like that, the press calls us racist and people who are “violent in reverse.”



Kara Walker, *Camptown Ladies*, May 1, 2006.

This is where they psycho you. They make you think that if you try to stop the Klan from lynching you, you’re practicing violence in reverse. Pick up on this, I hear a lot of you parrot what the man says. You say, “I don’t want to be a Ku Klux Klan in reverse.” Well, if a criminal comes around your house with his gun, brother, just because he’s got a gun and he’s robbing your house, and he’s a robber, it doesn’t make you a robber because you grab your gun and run him out. No, the man is using some tricky logic on you. I say it is time for black people to put together the type of action, the unity, that is necessary to pull the sheet off of them so they won’t be frightening black people any longer. That’s all. And when we say this, the press calls us “racist in reverse.” “Don’t struggle except within the ground rules that the people you’re struggling against have laid down.” Why this is insane, but it shows how they can do it. With skillful manipulating of the press they’re able to make the victim look like the criminal and the criminal look like the victim.¹⁶

Rapper and activist Immortal Technique simply encapsulates the idea of deconstructing the language and systems of the oppressor through revolutionary empowerment—a sentiment present in the philosophies articulated above: “My revolution is borne out of love for my people, not hatred for others.”¹⁷ It is understandable that a pervasive backward sentiment continues to inform and foment a malicious infrastructure in both law and society, unfortunately to the detriment of an already historically-maligned people. This paper, then, explores the usage of international law and American law under the auspices of international law to access reparations and facilitate the carving out of self-determination for Black people. This presents a unique irony where the law is applied as an inversion of its design since it has historically protected others’ rights while marginalizing Black people.

III. AN HISTORICAL OVERVIEW OF THE FRAMEWORK OF DISPOSSESSION OF AMERICAN BLACKS AND THE NEED FOR REPARATIONS

To tell the truth, the proof of success lies in a whole social structure being changed from the bottom up. The extraordinary importance of this change is that it is willed, called for, demanded. The need for this change exists in its crude state, impetuous and compelling, in the consciousness and in the lives of men and women who are colonized. But the possibility of this change is equally experienced in the form of a terrifying future in the consciousness of another "species" of men and women: the colonizers.¹⁸

The Transatlantic Slave trade,¹⁹ the beginning of Maafa, the African Holocaust, lasted from the 15th century to the 19th century, and brought enslaved Africans to America shortly after the settlement of Jamestown, Virginia in 1607.²⁰ The Thirteenth Amendment to the U.S. Constitution ended the practice of slavery in 1865 after the Civil War,²¹ though the marginalization of Black people persisted long after. Through a series of *de jure* and *de facto* mechanisms of racial segregation—manifested in Southern Black Codes and Jim Crow laws,²² the practice of racial discrimination continued throughout the country. These laws marginalized Blacks, dispossessing them of civil and political rights in fair trials²³, enfranchisement²⁴ and equality of education, and use of public and private facilities.²⁵ The discriminatory mechanisms also denied American Blacks economic, social, and cultural rights, affecting their access to employment, housing and property ownership, healthcare, the expression of their culture and heritage, and their right to life, generally.²⁶ Many of these inequities continue, and their unequal effects are easily linked to the enslavement and ownership of Africans.

These practices, resulting in the detachment of American Blacks as right-bearers, stakeholders, and full participants in a purportedly democratic society, illustrated that access to citizenship and entitlement to rights required something more than Black people possessed. This is evident because they were still not guaranteed the full promise of these rights after the passage of legislation and adoption of court rulings. Collectively, American Blacks continued to face structural impediments, not often overcome by individual successes (though they are celebrated), because of the traditional lack of value ascribed to the people. This development of a Black underclass ultimately disconnects Blacks from society.²⁷ *Whiteness*,²⁸ then, as a social construct provided subjectively positive value, democratic participation, and general acceptance in the society, particularly applied in connection with citizenship. This privilege is compounded by centuries of imperialism and concomitant devaluation of communities of color, specifically the Black community.

Since America's political and economic traditions are based on a system of private property and capitalism, borne of thinkers like John Locke, democratic participation is premised on property ownership.²⁹ Property is a natural right derived through labor, with ownership contingent upon "useful" development and value of the land.³⁰ This natural right³¹ precedes governmental sovereignty, based on a social contract in which the people consent to being governed. As such, the government is subject to the will and volition of the people³²—presupposing the people's right to revolution.³³ This ultimately connects fundamental rights (including the right to revolt or hold government

accountable),³⁴ democratic participation (governmental access and engagement),³⁵ and value (societal contribution and intrinsic worthiness),³⁶ to ownership of private property. The benefactors of this oppressive structure designed it for their own success (and continued success for their progeny) by directly exploiting³⁷ and dispossessing enslaved Africans of private property ownership and depriving them of control over their own labor. The government sanctioned this system, and White society perpetuated it. It deprived enslaved Africans of property ownership (inherited value in *this* society)⁴⁰ and subjected them to the expropriation of their work.⁴¹ The direct result of this systemic marginalization influenced the place Black people stand in today—deprivation of access to democracy, citizenship, and participation in governmental functions,⁴² and the intrinsic value⁴³ manifested in subjective conceptions of cognizable societal contributions and "earned" wealth.

Extending the elimination of American Blacks' democratic participation for almost four centuries,⁴⁴ these economic, political, white supremacist, and governmental systems fundamentally led to the incapacitation of Black self-determination in this country. The harm done is three-fold: (1) American Blacks were denied value⁴⁵ and worth, which in a zero-sum framework of capitalism protects whiteness and privilege⁴⁶ as a core value (this dictated Black inability to engage in the development and execution of the democratic and political processes that have sustained this society and government); (2) they were deprived of the capacity to acquire capital and resources to sustain a living for themselves and their descendants,⁴⁷ and (3) they were deprived of this right so long that there have not been sufficient gains to overwhelm the ills designed to marginalize them.

IV. AN OVERVIEW OF THE FIGHT FOR REPARATIONS FOR AMERICAN BLACKS

Mr. Backlash, Backlash who do you think I am. You raise my taxes and freeze my wages, send my son to Vietnam. You give me second-class houses, second-class schools; do you think that all colored people are just second-class fools. Mr. Backlash, I'm gonna leave you with the blues, yes I am. When I try to find a job, to earn a little cash. All you got offer is your mean old white backlash, but the world is big, big and bright and round. And it's full of other folks like me who are black, yellow, beige, and brown. Mr. Backlash, I'm gonna leave you with the blues, yes I am. When Langston Hughes died, when he died he told me many months before, he said Nina keep on working till they open up the door. And one of these days when you made it and the doors are open wide, make sure you tell 'em exactly where its at so they'll have no place to hide. So Mr. Backlash, Mr. Backlash, Hear me now, someone in here, yeah somehow, someday. I'm gonna leave you with the blues.⁴⁸

The fight for Black reparations began in the 16th century in pre-colonial African rebellions, demanding reparations for the enslaved Africans traded throughout the New World.⁴⁹ The struggle was documented in other periods including: (1) pre- and post-Reconstruction, (2) the beginning of the 20th century, (3) the Marcus Garvey Back to Africa Movement, (4) the Civil Rights Movement of the 1960s and 1970s, and (5) today, as the post-Civil Liberties Act era, beginning in 1989.⁵⁰ These periods

brought about increasingly polarized attitudes, particularly during the pre- and post-Reconstruction periods and the Civil Rights Movement of the 1960s and 1970s.⁵¹ The existence of affirmative action changed only the dialogue of reparations, and did not avert the goals of those seeking repair for the damage caused by the racially-perverse and oppressive systems under American governance, which diminished the collective capacity of American Blacks for self-determination.

The pre- and post-Reconstruction reparations movements can be characterized in consonant terms with the movement of abolitionism. Not all abolitionists favored reparations for enslaved Africans in the pre-Reconstruction period, or freedmen in the post-Reconstruction period. The central arguments for reparations generated mostly from this group (though surely the marginalized persons themselves were ardent supporters of reparations, an idea typically lost in the historical characterization, as Levitt points out).⁵² In the pre-Reconstruction period, Special Field Order No. 15 issued by General William Tecumseh Sherman, on January 16, 1865, provided that 485,000 acres of white-owned land would be taken and redistributed to more than 18,000 newly freed Black families. This granted them possessory titles to the land and settled them respectively, on 40-acre plots and the loan of a federal government mule to work the land.⁵³ General Sherman did not have congressional authority but acted lawfully under his power through the Freedman Act.⁵⁴ In 1865, after the assassination of President Lincoln, President Andrew Johnson revoked the orders and pardoned many white Southerners for their treasonous secession.⁵⁵ The order became popularized⁵⁶ in American history, by proponents of reparations as the promise of 40-acres and a mule for Black families.⁵⁷

White people became more vocal supporters of reparations for the enslaved African,⁵⁸ as when Congressman Thaddeus Stevens demanded land be redistributed to provide remedy to American Blacks for the ills of slavery, and to combat one of the central problems of the South: “a landed gentry and a landless proletariat.”⁵⁹ In 1861, Stevens introduced a bill to Congress authorizing the President to seize Confederate lands to redistribute to the formerly enslaved Africans.⁶⁰ In 1865, President Johnson, reversed this legislative victory for enslaved Africans and restored lands to their white antebellum owners.⁶¹ The reparations movement came to a halt in the 1880s as a result of his stifling.⁶² Johnson’s actions single-handedly undermined the beginning of the cause for Black reparations at a crucial point in time, circumventing a true Reconstruction.

The reparations movement at the beginning of the 20th century persisted in various capacities. Industrialization of Northern cities and the birth of Black ghettos encouraged the growth of the movement in cities. The cause for Black reparations in rural and agrarian areas grew due to land reform during Reconstruction, sharecropping, and partition, voluntary, and tax sale of heirs’ property—all contributors to Black rural land loss (all from the design of (White) business interests—protected and facilitated by the American legal system).⁶³ This played a significant role in the increasing marginalization of American Blacks.⁶⁴ Reparations in this period were borne not just from past injustices, but from contemporary wrongs, including malicious government and complicit white-owned industry action against the interests of American Blacks.

The reparations movement was simultaneously championed and eclipsed by the Marcus Garvey Movement. Marcus

Garvey called for pan-Africanism of Black people and the formation of a Black homeland.⁶⁵ This was the major focus of his Universal Negro Improvement Association (“UNIA”).⁶⁶ Garvey also favored reparations for the exploitation of Black labor and saw this as critical to generating funding for the creation a Black homeland.⁶⁷ But, the movement lost footing when Garvey was indicted for mail fraud and deported to Jamaica⁶⁸ (with much speculation that his indictment was a political tactic by the White power structure to defray Black economic and social mobility). One of the Founders of UNIA, Queen Mother Audly Moore, continued championing the cause for reparations, and is commonly recognized as the mother of reparations.⁶⁹ She sought redress and reparations of American Blacks through the American democratic structure.⁷⁰ Others focused on the attainment of civil and political rights, and this cause expanded in the subsequent period.

The Civil Rights Movement of the 1960s and 1970s, like the turn of the century movement, included reparations for ills perpetuated against American Blacks under the marginalizing governmental structure, as part of the focus on economic development.⁷¹ Dr. Martin Luther King, Jr. wrote:

No amount of gold could provide an adequate compensation for the exploitation and humiliation of the Negro in America down through the centuries Yet a price can be placed on unpaid wages. The ancient common law has always provided a remedy for the appropriation of the labor of one human being by another. This law should be made to apply for American Negroes. The payment should be in the form of a massive program by the government of special, compensatory measures, which could be regarded as a settlement in accordance with the accepted practice of common law.⁷²

Though their mechanisms and means of attaining Black self-determination were different, both Dr. King and Malcolm X agreed. Brother Malcolm contended:

If you are the son of a man who had a wealthy estate and you inherit your father’s estate, you have to pay off the debts that your father incurred before he died. The only reason that the present generation of white Americans are in a position of economic strength . . . is because their fathers worked our fathers for over 400 years with no pay We were sold from plantation to plantation like you sell a horse, or a cow, or a chicken, or a bushel of wheat All that money . . . is what gives the present generation of American whites the ability to walk around the earth with their chest out . . . like they have some kind of economic ingenuity. Your father isn’t here to pay. My father isn’t here to collect. But I’m here to collect and you’re here to pay.⁷³

The Black Manifesto, penned at the National Black Economic Development Conference⁷⁴ in 1969 demanded, “Fifteen dollars per nigger,” or “\$500 million from White Christian churches and Jewish synagogues.”⁷⁵ James Forman, once leader

of the Student Nonviolent Coordinating Committee (“SNCC”), contended that this amount be assessed against the groups for their participation in the exploitation of the American Negro who was, “kept in bondage and political servitude and forced to work as slaves by the military machinery and the Christian church working hand in hand.”⁷⁶ It is notable that, with the deaths of civil rights leaders like Medgar Evers (1963), El Hajj Malik El-Shabazz (1965), and Dr. Martin Luther King Jr. (1968), among others, there was a strong collective support of reparations for American Blacks within the Black community⁷⁷ (with some exceptions), but also by white individuals and groups. This is reminiscent of the Reconstruction period where White abolitionists supported Black reparations, probably because of the polarizing nature of the social climate.

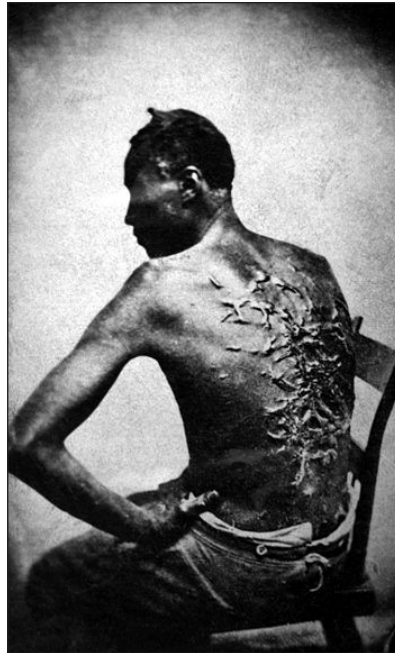


Photo credit unknown, Peter, an enslaved Black man, whipped by his overseer, taken April 12, 1863.

In the post-Civil Liberties Act era, there was renewed vigor in the reparations movement, after the passage of an act formally apologizing and providing reparations to Japanese-Americans interned during World War II.⁷⁸ Though the marginalization of Japanese-Americans was egregious, it did not arise to the level nor continue for the length of chattel slavery of enslaved Africans and the continued marginalization of their descendants in America.⁷⁹ Reparations activists felt that these reparations were a victory for marginalized groups, generally, but in some respect, represented continued contempt for American Blacks, by acknowledging concrete harms exacted against one group for a period of several years and refusing the acknowledge the harm done to another—concrete and enduring—for centuries.⁸⁰ Though the Civil Liberties Act of 1988 did nothing substantive for the goals of black reparations, it still increased fervor for the cause.

In 1989, Representative John Conyers and in the early 1990s Massachusetts State Senator William Owens introduced reparations legislation,⁸¹ that failed to garner enough support. Conyers’ proposed legislation required the U.S. government to (1) acknowledge the fundamental inhumanity and injustice of slavery, (2) establish a commission to study the effects of economic and racial discrimination against formerly enslaved Africans, (3) study the impact that these institutional disparities have had, and (4) allow the Commission to make recommendations to Congress for the redress of harm. Conyers has introduced HR 40 every year since.⁸² In the 21st century, many city councils have passed resolutions to urge Congress to consider reparations for slavery, in support of Conyers’ bill.⁸³ Other coalitions have organized to develop strategies on how best to pursue efforts for reparations.⁸⁴ There have been many unsuccessful claims for reparations for American Blacks in U.S. courts.⁸⁵ The cases in the following section had some measure of success or present a unique opportunity to gain some ground in this struggle for reparations, to counteract the pernicious system of marginalization that plagued American Blacks, and this country, for centuries.

VI. CLAIMS FOR REPARATIONS THROUGH THE UNITED STATES LEGAL STRUCTURE

*The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submission on the other. Our children see this, and learn to imitate it; for man is an imitative animal . . . For in a warm climate, no man will labour for himself who can make another labour for him. This is so true, that of the proprietors of slaves a very small proportion indeed are ever seen to labour. And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just; that his justice cannot sleep forever: that considering numbers, nature and natural means only, a revolution of the wheel of fortune, an exchange of situation, is among possible events: that it may become probable by supernatural interference!*⁸⁶

In examining the U.S. legal structure and consideration of reparations, two things must be considered: (1) will it actually work and (2) who will reap the benefits.⁸⁷ The commitment (or lack thereof) to racial justice in the U.S. places those seeking repair from racial discrimination in a peculiar predicament. Judging from the past, reparations through the U.S. legal structure would prove useless since it has been U.S. law that has oppressed American Blacks.⁸⁸ This does not mean that reparations will never be won, just that other avenues may need to be explored. Some contend that the difficulty in assessing whom reparations should benefit overcomes the need to provide them, but this does not justify the beneficiaries of these marginalizing institutional systems, keeping the ill-gotten wealth themselves.⁸⁹ In working towards a world without privilege, repair must be given to those so severely damaged.

Identifying plaintiffs for claims has not been as difficult as opponents have depicted. The class of claims that have been dismissed throughout the years have identified individuals or classes of people harmed by *de jure* and *de facto* discrimination and racial segregation. For those who contend American constitutional and contractual issues of privity, standing, and nexus preclude damages outside of these structures, some suggest examining the reparations issue in a broader perspective. Critical legal scholar Mari Matsuda suggests the structure below, similar to a class action suit:⁹⁰

The standard legal claim resembles:

Plaintiff A
(individual victim)
v.
Defendant B
(perpetrator of recent wrong-doing)

A claim in reparations looks like this:

Plaintiff Class A
(victim group members)
v.
Defendant Class B
(perpetrator descendants and current beneficiaries of past injustice)

This is because according to Matsuda:

Several components of the standard legal claim are not apart of the second illustration. First, the horizontal intragroup connections are absent. Not all members of the group are similarly situated. Some are rich, some poor. Some feel betrayed, others do not. Some are easily identified as group members, others have weak claims to membership.

A. INDIVIDUAL CLAIMS FOR REPARATIONS FROM AMERICAN BLACKS, STATUTORY CLAIMS, AND LEGISLATIVE PROVISIONS FOR REPARATIONS

*But you did everything you could to be ill-informed by developing the art of forgetting.*⁹¹

Civil suits for damages have been marginally more successful than claims for reparations from the ills of slavery. What is unique about the following claims is that they seek reparations for ills not from slavery, but practices that deprived them of resources already acquired, with the exception of the Ohio case. These can be examined, then, as claims for restitution, which are not very far-removed from claims of reparations, as they are more akin to suits alleging race-based wrongdoing through exploitation, deprivation, or marginalization, which are a kind of Black reparations. *Kennedy* presents a unique parameter with which to examine the future of reparations because it was a tort-based claim based solely on deprivation and access to a fundamental resource. The cases are included because it is beneficial to examine attempts at restitution through the law for race-based wrongs exacted against American Blacks, as many civil rights cases were based on negative rights—government and industry restraint from discrimination and segregation—and positive rights to the extent of provision of education, not recompense for such wrongs.

A. PIGFORD V. GLICKMAN: ⁹¹ REPARATIONS FOR BLACK FARMERS

This case was a class-action lawsuit of Black farmers from fifteen states against the U.S. Department of Agriculture (“USDA”).⁹³ It resulted in a settlement of \$2.25 billion awarded to the plaintiffs for the denial of federal benefits,⁹⁴ discriminatory USDA lending practices, and ultimately lost land for Black farmers.⁹⁵ The consent decree in the class-action suit was thought “fair, adequate and reasonable” by Judge Paul L. Friedman, since it provided discharge of farmers’ outstanding USDA debt, injunctive relief, and the receipt (for some) of \$50,000 cash payments (less \$12,500 in taxes to the IRS).⁹⁶ The Judge acknowledged, however, that the case would “not undo all that has been done,”⁹⁷ since the 401 claimants named in the case⁹⁸ only wanted their land back.⁹⁹

There are more than 66,000 Black farmers today who were excluded when they missed notifications of the lawsuit in 1999.¹⁰⁰ In February of 2005, some of them met with the Chairman of the House Judiciary Committee on civil rights hearings, hoping to urge Congress to develop a legislative solution to the discriminatory practices.¹⁰¹ This case represents some recognition

of wrongdoing and move towards recompense through the U.S. legal structure. It has, however, failed to fundamentally address the needs of the petitioners, evidenced by the value of land in America¹⁰² in comparison with \$37,500 allotments, especially when a good tractor costs at least that much.

B. KENNEDY, ET AL. V. CITY OF ZANESVILLE, ET AL.: ¹⁰³ EVERY DROP COUNTS

Sixty-seven of the Black residents of the predominantly Black neighborhoods of Coal Run and Langan Lane, Ohio won a \$10.9 million lawsuit¹⁰⁴ against the local government for intentionally denying them public water service for almost fifty years,¹⁰⁵ though they lived within one mile of public water lines.¹⁰⁶ White residents on the same street were extended the public water service, and one of the Muskingum County Commissioners informed the Black residents that they would not get water “until President Bush drops spiral bombs in the holler.”¹⁰⁷ This deprivation fundamentally speaks to the marginalization of American Blacks.

C. ROSEWOOD, FLORIDA: RECOMPENSE?

In 1923, a race riot occurred in Rosewood, Florida after a White woman falsely claimed to have been raped by a Black man.¹⁰⁸ A mob of Whites took to the streets and destroyed an all-Black neighborhood, burning houses to the ground and killing six Black residents.¹⁰⁹ In 1994, the state of Florida passed the Rosewood Compensation Act paying each of the nine survivors of the tragedy \$150,000, and establishing a college fund.¹¹⁰ The Rosewood community, however, was never rebuilt, and twenty-five to thirty families lost their homes to the violence.¹¹¹ Here there was a failure to account for the economic value of all losses. Again, we see that while debts must be assessed for egregious acts, monetary compensation does not account for making persons whole again.

D. ALEXANDER, ET AL. V. OKLAHOMA, ET AL.: ¹¹² BLACK WALL STREET

In Tulsa, in 1921, a race riot was sparked on a similar basis as that in Rosewood, Florida.¹¹³ A White woman alleged to have been raped by a Black man (the veracity of the claim was contested, but at this time the only proof of falsity was his word against hers), and again a white mob took to the streets.¹¹⁴ Three hundred people were killed and a good deal of the Greenwood District, recognized as Black Wall Street, because of the prominence of its businesses and the accumulation of Black wealth,¹¹⁵ was destroyed.¹¹⁶ This included over 600 businesses, churches, restaurants, movie theaters, libraries, schools, private airplanes, a hospital, bank, and other public goods.¹¹⁷ The estimated property damage was \$1.5 million (in early 20th century dollars), not accounting for the loss of life and livelihood, and the cost of the marginalization of Black people.¹¹⁸

A 2001 report by the state of Oklahoma assessed that \$12 million in damages should be awarded, but the state governor decried the ability of the state to pay for “past mass crime[s] committed by its officials on the state’s behalf.”¹¹⁹ The Oklahoma state legislature responded by passing the 1921 Tulsa Oklahoma Race Riot Reconciliation Act, awarding more than 300 college

scholarships to the descendants of Greenwood residents.¹²⁰ A lawsuit was filed by five of the elderly survivors with the assistance of Professor Charles Ogletree (Harvard law professor, former director of the Public Defender Service for the District of Columbia) and the late Johnnie Cochran (represented OJ Simpson in his double-homicide case).¹²¹ The plaintiffs were more interested in securing resources in education and healthcare than financial capital,¹²² but their suit was thrown out. The courts cited the exhaustion of the statute of limitations,¹²³ and the Supreme Court refused to grant certiorari. Professor Ogletree appealed to Congress to extend the statute of limitations for the case,¹²⁴ though there has not been a response to date.

Statutory and legislative provisions for reparations have not gained winning ground, though they seem like viable sources. None have been wholly successful as damages in individual suits have at times proven. Damages have been grossly less than what they should be. Statutory claims through citizen-suit provisions have been less than marginally successful, but the most promising options seem to be: (1) The Federal Tort Claims Act (“FTCA”), 28 USC § 1346(b)(1); (2) The Civil Rights Act of 1866, 42 U.S.C. § 1981; or (3) The Civil Rights Act of 1979, 28 U.S.C. § 1983.¹²⁵ They each still require the constitutional meeting of standing and jumping through the other hurdles as required by American jurisprudence.¹²⁶ Still, the main problem with these statutes is in their application.

The FTCA, commonly used for toxic torts claims, cannot overcome the retroactivity that only allows its use for harms occurring after January 1, 1945.¹²⁷ Though marginalization of American blacks occurred after 1945, this presents a serious impediment to obtaining the amounts owed by the beneficiaries of Black marginalization, including the American government since the 16th century. The Civil Rights Act of 1866 seems more promising as it was designed to protect the rights of newly enslaved Africans and their progeny.¹²⁸ It is however, unlikely, that this statute would prove helpful as the ensuing 142 years since its adoption have been filled with the failure of the government (and at times government facilitation in marginalization) to protect the rights of Black people from racial discrimination and *de jure* and *de facto* segregation.

The Civil Rights Act of 1979, commonly known as § 1983,¹²⁹ has not been helpful for Black people, particularly in the criminal context. We consistently see the abuse of state actors, particularly state police and prosecutorial misconduct towards Black people in the civil, but particularly in the criminal context. The recent Oscar Grant, Jena Six, Sean Bell, and Genarlow Wilson controversies and in a larger context, the failure of the government to protect Blacks of the lower 9th Ward of New Orleans in the aftermath of the Hurricane Katrina tragedy, demonstrate the abuse of state power against Blacks. In short, it is not likely that § 1983 would be a viable source of reparations for American Blacks.

The legislative capacity for reparations could be viable if enough political capital is established. The historical actions of this country and its responses to racial justice seem problematic if seeking a result through this avenue; though it is more likely to generate a result than a court ruling awarding Black reparations for the harms of slavery. While we wait for the outcome of *Alexander*, to see if a Congressional extension of the statute of limitations is provided, we can look to the past successes within the

political arena. As assessed with Representative Conyers’ efforts, legislation too is a disappointing avenue of redress.

VII. EXAMINATION OF REPARATIONS THROUGH SPECIFIC MODES OF INTERNATIONAL LAW

While the U.S. is a state party to the International Covenant on Civil and Political Rights (“ICCPR”),¹³⁰ and can be held accountable for violations under the auspices of its provisions (particularly as a nation that adopted and agreed to respect human rights),¹³¹ the Covenant requires the exhaustion of all state and administrative remedies.¹³² As outlined above, citizen-suit provisions under specific statutes and civil suits for damages can be wholly denied or granted in part. When suits are partially won, this creates a greater challenge for remedies under the Covenant, as the state has provided some sort of relief to the claimants.

Similar to the ICCPR state-party membership, the U.S. is required to observe *jus cogens* peremptory norms under the Universal Declaration of Human Rights (“UDHR”).¹³³ In this case, the U.S. has continuously violated this provision by its systemic and systematic discrimination against American Blacks. Again, these claims must first be exhausted in federal courts,¹³⁴ but this is problematic because the U.S. debates the binding nature of the UDHR.

VIII. EXAMINATION OF REPARATIONS THROUGH THE COVENANT FOR THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (“CERD”)

The U.S. became a state party to the Covenant for the Elimination of All Forms of Racial Discrimination (CERD) in 1994.¹³⁵ The International Convention on the Elimination of All Forms of Racial Discrimination required all states parties member to the Covenant to refrain from marginalization and the denial of rights (negative rights) and to provide guarantees and protection (positive rights) for everyone (not just citizens) in its territories and under its jurisdiction.¹³⁶ States parties must also condemn propaganda against specific racial and ethnic groups,¹³⁷ provide particular economic, social, and cultural, and civil and political rights,¹³⁸ incorporate “immediate and effective measures in the field of teaching, education, culture, and information” with the intent of combating prejudice and promoting cultural understanding,¹³⁹ and provide remedies through its courts, legislation, and institutions,¹⁴⁰ among other very progressive measures.¹⁴¹ While CERD provides the opportunity for state parties to denounce their membership in writing (effective one year after the date of receipt by the UN Secretary-General)¹⁴² and does not provide for military force, the phenomenon of globalization places an incredible amount of pressure on states, particularly Western states (specifically those who denounce other nations for their human rights violations) to preserve some semblance of equality for their own legitimacy and transparency in the global socio-political marketplace.

CERD also has the force of requiring states parties to submit reports to the Committee every two years.¹⁴³ They accept reports from groups and individuals claiming to be victims of actions by states parties,¹⁴⁴ though petitioners must have



Kara Walker,
My Complement,
My Enemy, My
Oppressor, My Love,
Darkytown Rebellion,
October 11, 2007–
February 3, 2008.

exhausted all domestic remedies before seeking redress through CERD (this is not so if domestic proceedings have been unnecessarily long).¹⁴⁵ The Committee also views reports of non-profit organizations and others citing issues prevalent in the state party with respect to CERD to give them a more full picture of happenings there. States parties must also undergo review by the Committee for the Elimination of All Forms of Racial Discrimination comprised of eighteen committee members of “good moral standing.”¹⁴⁶ Committee members are those serving of their own accord and not nationals to the particular state party under review. The Committee submits recommendations and the state party must submit written explanations or statements of clarification citing how they have complied with the recommendations by providing remedies for violations or explaining how they will.¹⁴⁷

CERD, then, as a mechanism requiring some accountability and transparency from its states parties, provides a more hopeful measure for American Blacks to seek recourse through reparations, particularly with an international audience. As a party to CERD the U.S. is subject to Committee Evaluations and reports after the submission of their reports¹⁴⁸ and since reports are designed to monitor the success of states in eliminating racial discrimination within its jurisdiction, they provide powerful evidence of an entire nation’s noncompliance with the Covenant, their racial inequities, generally, and recourse for wronged parties. The Committee of CERD has found multiple violations for the two reports the American government has submitted since enacting the international provision (it should have been eight reports by 2009 since the U.S.’s membership in 1994, though the U.S. submitted its fourth, fifth, and sixth report in a single document). It seems likely that the problems found by the Committee will be helpful in developing the contentions for which American Blacks seek redress. The Committee commented on the disproportionate amount of Blacks and Latinos incarcerated in America’s jails and prisons, as well as police brutality, particularly applied to minorities.¹⁴⁹

The Committee also highlighted the severe disparity in access and retention of education and employment (particularly because affirmative action has been under attack), in addition to discriminatory housing and lending practices, racial profiling, zero tolerance and three strikes measures that disparately impact minorities (Blacks and Latinos in particular), voter discrimination and disenfranchisement, violence against migrants and minority women, abuse of non-citizens during detention, racial bias in capital punishment, failure to enforce federal ameliorative statutes, inferior provision of healthcare/medical services disparately impacting minorities and women, diminished protection of workers’ rights, and insufficient provision of civil remedies, among many other problematic and systemic violations of CERD.¹⁵⁰ In its most recent 2007 report to the CERD Committee, the U.S. mentions Hurricane Katrina in relation to equitable housing stating that, “concern has been expressed about the disparate effects of Hurricane Katrina on housing for minority residents of New Orleans,” asserting that, commentators found that Katrina was a result of “poverty (i.e. the inability to evacuate) rather than racial discrimination *per se*.”¹⁵¹ As if the two could be separated into clean boxes whereby those victimized by government and other designers and beneficiaries of the oppressive systems and structures, get to choose how they are discriminated against—either by race or class. More often than not in this country, the latter is informed by the former, and they are inextricably bound to one another. In this respect, reparations provide an interesting dimension to examine this privileged denial of blame, fault, or benefit against the marginalization of Black people, people of color, poor people, and particularly poor people of color. In this respect, CERD has been useful in requiring some kind of response for the blatant and disparate treatment of American Blacks.

The most attractive prospect of CERD’s vitality in the cause for reparations is the Committee’s indictment of the U.S. on its interpretation of no violation for actions that have not been proven to be intentionally discriminatory despite their impact.¹⁵²

This particular aspect seems encouraging because the standard for proving intentional discrimination domestically, essentially requires the demonstration of malintent almost through the certainty of physical documentation, because the domestic impact standard is so limited. It does not account for the subjective and normative sociological orientations of humans injected into their laws and their interpretation of them. The truth is that this critical part of examining harms against groups based on the impact of racial prejudice (instead of the victimized demonstrating the intent of the victimizer) is unlikely to become inhered in the American system of jurisprudence. This is particularly because of the state of race relations in this country, and the status of Black people today.

Among other ills plaguing the Black community, in 2004, 25% of Black people were living below the poverty line,¹⁵³ since 2007, 40.9% of America's prisons and jails were populated with Black bodies with Blacks incarcerated at rates 5.6 times that of Whites,¹⁵⁴ and recent Supreme Court cases affirmed limitations on voluntary integration,¹⁵⁵ a severe detriment to Black education when taken in conjunction with the reality of no fundamental right to education or second look given to educational funding as a means of *de facto* segregation.¹⁵⁶ To boot, the latter is exacerbated by laws like No Child Left Behind, which absolve government of responsibility to provide critical educational funding, good teachers, and adequate school buildings, among other critical entities, to facilitate the learning and engagement process of Black children. The effect of connecting such a dire reality (with empirical illustration) to systemic harms caused by chattel slavery and harms perpetuated by this society, is too hard a pill

to swallow for the beneficiaries of this system. As such, while CERD is seemingly an attractive legal prospect for remedying harms, it serves more as a public, international indictment of the U.S.'s refusal to eliminate forms of racial discrimination, and the country's continued commitment to racial injustice.

The problematic application of CERD is again, the requirement that domestic remedies be exhausted,¹⁵⁷ which places the precarious nature of the condition of a people back into the domestic courts that have not time and again failed them. One hope is that in the increasingly global politicization of nations, more care will be given to the perception of domestic policy abroad. Though the past eight years have been even more difficult generally, hope for grassroots leadership at this juncture to play a critical role in remedying past wrongs and current marginalization, seems more feasible. It is understood that movements come from the bottom up—not just with presidencies or Congressional majorities and the same is true for the success of securing reparations for the marginalization of American Blacks. For whether the battle for reparations is won or not, the penultimate goal of carving out the self-determination of Black people will provide the peace and begin the healing the community so desperately needs.

IX. EPILOGUE

I want my people to be free, to be free, to be free, want black people to be free, to be free, to be free. . . . That's all that matters to me, that's all that matters to me.

ENDNOTES

* Dekera Greene is a native of St. Stephen, SC, graduate of Clemson University, in Clemson, SC, and a 2nd year law student at the Washington College of Law at American University. I would like to thank my mother, Que Glover, and my grandmother Alphair Ferguson, for showing me what it means to love and teaching me profound lessons about the strength and beauty of my blackness, particularly my black womanhood in the face of the harried history of our people; thus developing the place from which this article begins. Many thanks to my comrades, Shaunté Preer, Seema Sadanandan, and Sarah Ihn for their eternal support, infinite wisdom, and valuable kinship. Thanks for the many mind-stretching discussions that have occupied the space of our friendship—challenging me to evolve to another level of reflection, always proving that iron sharpens iron.

¹ The following pieces illustrate the paradigm through which I write about the topic, and they hopefully place the subject in an operable and understandable framework for analysis.

² NIKKI GIOVANNI, *The Great Pax Whitie* (1968), in *THE COLLECTED POETRY OF NIKKI GIOVANNI* 54-56 (2003).

³ RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 18 (2000).

⁴ MALCOLM X, *Chapter 4 The Black Revolution, Speech April 8, 1964*, in *MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS* 53-54 (1990).

⁵ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 325, 362 (1987).

⁶ RALPH ELLISON, *INVISIBLE MAN* 1 (1952).

⁷ One of the seven principles of Kwanza, or seven principles of Blackness.

⁸ There exists a vast body of literature on the oppression of indigenous peoples, non-Black people of color, and European immigrants generally in the U.S., and while this is acknowledged, my focus is solely on the marginalization and oppression of the descendants of enslaved Africans in America in this paper.

⁹ I will refer to those traded in the Transatlantic system of free labor as enslaved Africans, not slaves: slavery was their condition, and defined and typified their treatment but did not constitute their existence. I posit that their resounding strength and the resilience of their progeny are a testament to this. I will refer to the descendants of enslaved Africans in the U.S. as Black people or American Blacks throughout this paper. It is my fundamental belief that "African-Americans" is yet another distinction crafted by the majority to characterize a people they have historically marginalized and misunderstood. Black inheres at the core of our identity because it connects us to other members of the African Diaspora, and largely characterizes our familiar yet distinct conditions. Nikki Giovanni encapsulates my sentiment best, "For me the noun is Black; American is the Adjective." NIKKI GIOVANNI, *RACISM* 101 at 54 (1994).

¹⁰ See generally *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964); *Brown vs. Bd. of Educ.*, 347 U.S. 483 (1954); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Scott v. Sanford*, 60 U.S. 393 (1857) (demonstrating the history of *de jure* and *de facto* segregation and racial discrimination in the U.S.).

¹¹ While some would argue, that institutional impediments are only part of the problem (a large part), and that there should also be a focus on building the esteem of Black people to address community needs, I will not address that discussion here, though I agree. I will say that the two are not mutually-exclusive, and I believe that we must combat institutional harms by tearing down structural strongholds and also building up the love, connectedness, unity, compassion, and trust of our community in order to carve out self-determination. The paper is limited to discussion of governmental wrongs. Though I recognize the finite nature of reparations—that they will not repair all of the damage caused to both enslaved Africans and their descendants in America, they certainly provide a sound beginning to attaining *kujichagulia*.

¹² Though it will not be explored fully in this work, there is an argument to be made that the instruments of gentrification and ghettoization of urban communities promote population density (by respectively pushing urban Blacks

ENDNOTES CONTINUED

into outlying areas and warehousing them within other areas) and increase the likelihood of the passage of communicable diseases. It is to be said that personal responsibility in the form of diet, and exercise, in addition to either employer or state responsibility for facilitating access to regular health check-ups, play a pivotal role in general disease prevention. Prophylactic protection, education, and awareness play a critical role as it relates to the contraction of HIV/AIDS specifically, in America, so personal responsibility is most definitely a factor in preventing the HIV/AIDS epidemic. However, education is not the only factor in disease contraction and passage, generally, as population density has historically been linked to communicable disease transference, even and including HIV/AIDS.

¹³ Some argue that reparations ought not be ‘given’ to Black people, but my discussion is premised on the fact that reparations are owed not rewarded. Beyond the historical contextualization that follows, I try not to engage in providing “reasoning” for reparations, but attempt to demonstrate how marginalization affected other aspects of life and why reparations are the beginning of an equitable remedy for American Blacks. There exists a heated and polarized debate, centrally focused on two sides: black and white (not surprisingly). Detractors argue that reparations should not be paid to American Blacks principally because (1) slavery is over and American Blacks should improve their own condition (2) not all White people owned enslaved Africans and the descendants of those who did they should not be subjected to paying the debts of their ancestors, and (3) Black reparations establish a slippery slope of wrongs to be corrected with no tenable end in sight. I will not debate or provide responses to these contentions specifically, though it could be said the larger nature of the paper speaks to them. They are easily negated by understanding that (1) reparations are assessed as repayment for a debt owed not a charity won, (2) beneficiaries of the design of this American system currently profit from the construct of their ancestors, and (3) specific models of past reparations paid to other groups marginalized by the American government demonstrate that such assessments, can in fact be made if government is willing to admit obvious wrongs. I find such assertions lacking in insight, history, and understanding of the structural effects of enslavement on the condition of American Blacks, and posit that reparations are more to repair harm done, though they can be used to improve a condition; these are separate distinctions. Though this ignorance is troublesome to me, my goal here is not to “educate” or “enlighten” those who don’t understand. I only aim to provide my own prescription to black self-determination in America to the scholarship of proponents of reparations, so that the analysis focuses on international mechanisms of grappling with remedies to counteract the plight of my people in the existing global economy.

¹⁴ NAS, *N.I. * .E.R. (The Slave and the Master)*, on NAS (Island Def Jam Music Group 2008).

¹⁵ Malcolm X will intermittently be referred to as Brother Malcolm or El Hajj Malik El-Shabazz, the name he used towards the end of his life after his journey to Mecca. I use Malcolm X because that is the familiar historical recognition of him, while El Hajj Malik El-Shabazz is his formal name and Brother Malcolm describes my personal affinity for our Black shining prince.

¹⁶ Malcolm X, Speech (Feb. 13, 1965), in MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS 164-65 (George Breitman ed., 1990).

¹⁷ IMMORTAL TECHNIQUE, *The Poverty of Philosophy*, on REVOLUTIONARY VOL. 1 (Viper Records 2005) (2001).

¹⁸ FRANTZ FANON, *Concerning Violence*, in THE WRETCHED OF THE EARTH 36 (2004).

¹⁹ “The word “Maafa” (also know as the African Holocaust) is derived from a (Kiswahili) word meaning disaster, terrible occurrence or great tragedy. The term today collectively refers to the 500 hundred years of suffering of people of African heritage through Slavery, Imperialism, Colonialism, Oppression, Invasions and Exploitation.” http://www.africanholocaust.net/html_ah/holocaustspecial.htm. Maafa is an indictment on the benefactors of Black marginalization—it immortalizes the intentional degradation of Black people.

²⁰ JOHN READER, *AFRICA: A BIOGRAPHY OF THE CONTINENT* 377-390 (1999). Consequently, Virginia was the first of the 50 states to apologize for the enslavement of Black people in America with the passage of House Joint Resolution 728 in 2007, on the 400th anniversary of the settlement of Jamestown. <http://leg1.state.va.us/cgi-bin/legp504.exe?071+ful+HJ728H2>. Maryland, North Carolina, and Alabama issued apologies through resolutions in the same year

either through their respective legislatures. <http://www.foxnews.com/story/0,2933,276724,00.html>. These are the only four states to formally apologize for the dehumanization of American Blacks through chattel slavery.

²¹ U.S. CONST. amend. XIII, § 1.

²² Ronald L. F. Davis, *From Terror to Triumph: Historical Overview*, available at http://www.jimcrowshistory.org/resources/pdf/From_Terror_to_Triumph.pdf.

²³ This was crucial particularly in state courts where Black people (including civil rights activists, typically) consistently faced due process rights violations. They faced all-white juries, had little access to legal counsel, and had no guarantee of a fair trial under the Sixth Amendment of the U.S. Constitution, in addition to obviously not having equal protection under the laws.

²⁴ See Veterans of the Civil Rights Movement, *Civil Rights Bill Passes in the House*, <http://www.crmvet.org/tim/timhis64.htm#1964cra64h>; Daniel Levitas, Ira Glasser, et. al., *The Case for Extending and Amending the Voting Rights Act – Voting Rights Litigation 1982–2006: A Report of the Voting Rights Project of the American Civil Liberties Union* (2006); Hazel Trice Edney, *Rally Planned for Re-authorizing Voting Rights Act*, BIRMINGHAM TIMES, Aug. 2, 2005 at 1 (Though Blacks were granted the right to vote in 1870 with the passage of the 15th Amendment to the U.S. Constitution, the National Voting Rights Act of 1965 was passed to outlaw race-based discriminatory practices designed to foster disenfranchisement. Title I of the Civil Rights Act of 1964 outlawed the unequal application of voter registration requirements based on race, as another measure of protection for Black voters. This protection is recognized as not holistic because the provision did not eliminate violence against those who attempted to vote, did not prevent gerrymandering and annexation of districts, did not combat police and state suppression of Black voters, did not address voter intimidation of non-state actors, roll-purging, and literacy tests designed to exclude Black Southern voters, and did not guard against economic retaliation exacted by Whites angry with Black voters. Many of these problems persist today).

²⁵ See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (granting Blacks access to public facilities like schools, movies, private movie theaters, restaurants, and hotels, etc.).

²⁶ Though mechanisms like the Title VII of the 1964 Civil Rights Act protect against discrimination in employment (outlawing race as a discriminatory factor in granting employment and promotion) and the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, guards against discrimination in housing (outlawing race as a mechanism for not selling or renting), there are no provisions to provide access to either of these “protections” or any other of the above-mentioned. Though the creation of federal government entities monitor the implementation of the law, respectively the U.S. Department of Housing and Urban Development (HUD) and the Equal Employment Opportunity Commission (EEOC), in their existence, discriminatory practices still persist, and there is no available mechanism for access to these entities.

²⁷ Jeremy Levitt, *Black African Reparations: Making A Claim for Enslavement and Systematic De Jure Segregation and Racial Discrimination Under International Law*, 25 S.U. L. REV. 7 (1997).

²⁸ Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack* (1988), in CLASSROOM CONVERSATIONS: A COLLECTION OF CLASSICS FOR PARENTS AND TEACHERS 169, 169-177 (Alexandra Miletta and Maureen Miletta, ed., 2008) (contending that the disadvantages of people of color, particularly those historically marginalized, are inverse to the overprivileges of Whites, because racism goes beyond individual acts, and is incorporated into entire systems that purport to be objective, but confer privileges to those with white-skin, regardless of other factors contributing to their lives. In addition, Whites are taught not to recognize or notice this. She asserts that this privilege cannot be easily quantified, though she lists fifty examples of benefits of the privilege, and refers to them as “an invisible package of unearned assets that I can count on cashing in each day, but about which I was ‘meant’ to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks.”).

The oblivion inherited in the knapsack of White privilege provides the opportunity to freely disparage and disregard anything outside of the dominant culture, as the privilege is elusive and easy to ignore for its recipients. McIntosh further posits that whiteness protects from backlash, alienation, hostility, and distress and allows the projection of those things onto people of color.

ENDNOTES CONTINUED

Whiteness enables a certain level of comfort for its beneficiaries to the direct disadvantage of others, while creating a society that ignores this privilege and provides the added benefit of touting a meritocracy when no such system, in fact exists. Some of the privileges provided by whiteness like: not having to educate your children on systemic racism for their own daily protection; knowing that if a cop pulled you over or the IRS audits you, you were not singled out because of your race; possessing the ability to avoid spending time with people whom you were trained to mistrust or distrust your kind or you; having the ability to purchase or rent a house in an area which you can afford to live should you need to move; possessing the ability to do well in a challenging situation without being called a credit to one's race; the certainty that asking to speak to a person in charge (anywhere) that the person will be of your race; the ability to find academic courses and institutions which give attention only to people of your race; and the ability to feel welcomed and "normal" in the usual walks of life, public, institutional, and social; among other facts not listed here, or in the fifty tenets by McIntosh, are benefits of whiteness. Such systems are active and embedded, and must be deconstructed and examined to assess whether the privilege encompasses a facet of life that should be enjoyed by all, or is simply an unearned power that has no place in society. McIntosh recommends consciousness and raising levels of saliency and awareness to begin this process of reversal or the unpacking of the white privilege knapsack.

²⁹ While I find the writings of this particular sophist offensive, (based on imperialist attitudes about resources, people, and value) and could foray into a discussion of the underlying accepted natural law and economic principles on which he bases his theories of property to deconstruct this premise, I use this to demonstrate that even if the philosophical underpinnings of the creation of this society are accepted, the dispossession of American Blacks that follows is still counter in theory to this proto-capitalistic law/labor/land principle. JOHN LOCKE, *Of Property*, in *SECOND TREATISE OF CIVIL GOVERNMENT*, § 45 (1690).

³⁰ *Id.* §§ 32-35, 38, 39, 40.

³¹ *Id.*

³² *Id.* § 42.

³³ JOHN LOCKE, *Of the Ends of Political Society and Government*, in *SECOND TREATISE OF CIVIL GOVERNMENT*, § 123 (1690); *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776) (providing "[t]hat whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.").

³⁴ JOHN LOCKE, *Of Civil and Political Society*, in *SECOND TREATISE OF CIVIL GOVERNMENT*, § 90 (1690).

³⁵ *Id.* § 123.

³⁶ LOCKE, *supra* note 33, § 45.

³⁷ JOHN LOCKE, *Of Slavery*, in *SECOND TREATISE OF CIVIL GOVERNMENT*, §§ 22-23 (1690) (asserting that man's state of nature is to be free, thereby presenting himself as an opponent of slavery). Still, he describes a paradigm of a state of war (akin to American slavery) and drudgery (likened to the bondage of the Israelites in Egypt), but contends that the duration of both, at best are *ephemeral*, while acknowledging their existence. It seems odd to describe the condition of a people as short in duration when systems are designed to continually oppress them, and ironic when his theories were central in legitimating this oppression. Locke's other theories connecting property, government, and political participation, too, create the inescapable condition of chattel slavery at worst and involuntary servitude and feudalism at best.

³⁸ U.S. CONST. art. I, § 2 (stating that originally, the Constitution demonstrated that slaves could not have ownership or possession even in themselves, because they were not whole persons. This clause details the tax apportionment and elected representation in the House of Representatives to the exclusion of "three-fifths of all other persons," a legacy of the compromise between Northern and Southern States at the Philadelphia Convention in 1787 in developing the Constitution, to count enslaved Africans and their Black progeny as three-fifths of persons for purposes of maintaining a Southern relevance in national politics, but discounting the status of Blacks as whole persons in order to sustain slavery. This clause was rendered moot after the passage of the 13th Amendment); see ANGELA DAVIS, *The Legacy of Slavery: Standards for a New Womanhood*, in

WOMEN, RACE, & CLASS 5 (1981) (Enslaved men and women were viewed as profitable labor-units, not human beings in the American chattel race-based slave system).

³⁹ See U.S. CONST. art. I, § 2. (sanctioning slavery); see McIntosh, *supra* note 28, at 171-172 (demonstrating that slavemasters were not the only profiteers of the race-based economic system because other whites benefited from the subjugation of the enslaved Africans monetarily and sociologically, and still do in some capacity or other through their white-skinned privilege).

⁴⁰ LOCKE, *supra* note 29, §§ 32-35, 38, 39, 40.

⁴¹ The expropriation and undervaluation of Black labor specifically refers to the use of Blacks in chattel slavery for the development and sustaining of industry, agriculture, and the economic system, without or with little monetary compensation, aside from the "provision" of despicable housing and clothing, and oftentimes the inedible remains of the food of their White contemporaries. Further, the Black intellectual and creative capacities were co-opted for the benefit of white society, in the same respect as the theft of their physical labor.

⁴² *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

⁴³ LOCKE, *supra* note 29, §§ 32-35, 38, 39, 40.

⁴⁴ Though 1776 marked the beginning of what we now recognize as the U.S. Government, the former colonies were not fault-free where these practices were instituted overnight under the newly confederated states. They carried their treatment of Blacks and valuation of the people-group from their colonial settlements in the New World over into the newly formed American government, so that when there is discussion of marginalization of the American Blacks, we must account for the years preceding the formal organization of the nascent American government. For purposes of considering reparations, the colonies themselves profited from the free labor of Blacks as well, and instituted the practice of disconnecting Blacks from participation in society-building and sustaining institutions.

⁴⁵ See LOCKE, *supra* note 29, §§ 32-35, 38, 39, 40 (demonstrating that value is contrived).

⁴⁶ McIntosh, *supra* note 28, at 171-172.

⁴⁷ U.S. CONST. art. I, § 2. Before the 13th Amendment, referring to enslaved Africans and their inclusion in determining apportionment for state representation in the Congress: Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, *three fifths of all other Persons* [emphasis added]. No right to enslaved African ownership (particularly no right to self-possession) or citizenship; *Scott v. Sandford*, 60 U.S. 393, 393-394 (1857) Stating:

A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a "citizen" within the meaning of the Constitution of the United States. When the Constitution was adopted, they were not regarded in any of the States as members of the community, which constituted the State, and were not numbered among its "people or citizens." Consequently, the special rights and immunities guaranteed to citizens do not apply to them [. . .] The only two clauses in the Constitution which point to this race treat them as persons whom it was morally lawfully to deal in as articles of property and to hold as slaves. Since the adoption of the Constitution of the United States no State can by any subsequent law make a foreigner or any other description of persons citizens of the United States, nor entitle them to the rights and privileges secured to citizens by that instrument. A State, by its laws passed since the adoption of the Constitution, may put a foreigner or any other description of persons upon a footing with its own citizens as to all the rights and privileges enjoyed by them within its dominion and by its laws. But that will not make him a citizen of the United States, nor entitle him to sue in its courts, nor to any of the privileges and immunities of a citizen in another State. The change in public opinion and feeling in relation to the African race which has taken place since the adoption of the Constitution cannot

ENDNOTES CONTINUED

change its construction and meaning, and it must be construed and administered now according to its true meaning and intention when it was formed and adopted.

⁴⁸ NINA SIMONE, *Backlash Blues (2005 Remix)*, on FOREVER YOUNG, GIFTED, AND BLACK: SONGS OF FREEDOM AND SPIRIT (RCA 2006).

⁴⁹ Levitt, *supra* note 27, at 7. Levitt argues, citing to Paiewonsky, *Eyewitness Accounts of Slavery in the Danish West Indies* (1989), that the oral traditions in West Africa indicate that Kings demanded the return of their brothers and sisters, reparations for the murders and rapes committed against their peoples, and damages for the breach of international trade agreements. Both free and enslaved Africans sought payment for the services of enslaved Africans, and petitioned for their release. While some may be doubtful of this prospect, I do not find it so unbelievable that Black people in this entire scheme of stolen, commodified, and exploited bodies, lasting for centuries, sought recompense for the expropriation of their own labor, and the labor of their relatives. It is paternalistic to say that since it was not recorded in Western history, this phenomenon did not exist.

⁵⁰ *Id.* at 6 (explaining that the Civil Liberties Act of 1988 was a formal apology to Japanese Americans interned throughout World War II, which provided reparations from the American government of over \$1.6 billion).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Levitt, *supra* note 27, at 10; Freedmen and Southern Society Project, *Sherman's Special Field Orders, No. 15*, <http://www.history.umd.edu/Freedmen/sfo15.htm>.

⁵⁴ Levitt, *supra* note 27, at 10.

⁵⁵ *Sherman's Special Field Orders, No. 15*, *supra* note 53.

⁵⁶ The demand for reparations was popularized by the descendants of enslaved Africans and Black people in America, through writings, art, music, media, film, and culture. Writer/director Spike Lee (*Do the Right Thing*, *Malcolm X*, *Jungle Fever*, *She's Gotta Have It*) named his production company 40 Acres and a Mule Filmworks.

⁵⁷ *Pigford v. Glickman*, 185 F.R.D. 82, 85 (D.D.C. 1999).

⁵⁸ Levitt, *supra* note 27, at 7.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U.L. REV. 505, 506, 513-519 (2001).

⁶⁴ *Id.* at 506.

⁶⁵ Marcus Garvey, Speech at Carnegie Hall: Aims and Objectives of UNIA (Feb. 23, 1923).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Levitt, *supra* note 27, at 12.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² DR. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT, 137-138 (1964).

⁷³ MALCOLM X, *Speech at a Meeting in Paris*, in MALCOLM X: BY ANY MEANS NECESSARY, November 23, 1964, at 123 (1970).

⁷⁴ See *A Black Manifesto*, TIME MAGAZINE, May 16, 1969 (stating that the National Black Economic Development Conference was sponsored by the Inter-religious Foundation for Community Organization (IFCO) as an "effort by a liberal interfaith group to draw black ideas for the economic betterment of urban ghettos. . . [designed to] bring black leaders together for discussions and action on the economic aspects of Black Power.").

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Levitt, *supra* note 27, at 12 (The Southern Christian Leadership Conference, Nation of Islam, NAACP, among countless other black churches, organizations, and voluntary associations supported reparations for American Blacks in this period).

⁷⁸ *Id.* at 13.

⁷⁹ I agree with Marx that a trick of the enemy is to divide and conquer, and I in no way attempt to disparage the ills suffered by Japanese Americans in this time, I simply draw the contrast to demonstrate the contempt of American society for American Blacks who endured more than 360 years of *de jure* and *de facto* segregation and racial discrimination. It is estimated that between 15 million to 100 million African people were murdered during enslavement, not including the rape and labor exploitation of Black people in this period. Levitt, *supra* note 27, at 13. Nor does it address the commodification of Black bodies in the periods after slavery. DAVIS, *supra* note 33, at 7. Here the breeder strong-buck Black male slave typology is manifested in American professional athletics, namely the NBA and the NFL, and the commodification of Black female bodies are continuously oversexualized as pop-culture vixens in the entertainment industry. Today's video vixen is yesterday's mystical Negress who conjured spells on her master to seduce him: to justify their dominant-perspective of the rape of enslaved Black women by their White masters or overseers.

⁸⁰ Levitt, *supra* note 27, at 13.

⁸¹ *Id.*

⁸² John Conyers Jr., *Reparations*, available at <http://www.johnconyers.com/issues/reparations>.

⁸³ *Id.*; Jet, *Chi. City Council Votes to Urge Congress to Consider Reparations*, JET, June 5, 2000.

⁸⁴ Dora Muhammad, *Ndaba: 'A Great Sitting Down,' THE FINAL CALL*, August 9, 2003 (including groups such as: National Coalition of Blacks for Reparations in America (N'COBRA), the Universal Negro Improvement Association (UNIA), the New Afrikan People's Organization (NAPO), the Republic of New Afrika (RNA), the Restitution Study Group, the National Association for the Advancement of Colored People (NAACP), the New Black Panther Party, and countless churches, activists, academics, lawyers, community members, and other distinguished individuals); see also Matsuda, *supra* note 10, at 327 (There also exists a voice in support of American Black reparations within Critical Legal Studies (CLS), and within the Critical Race Theory philosophy. Critical Legal Studies (CLS) is the legal academic movement based on the deconstruction of law and power, emphasizing a focus on the subaltern. It reveals a structure, de-constructs it, and de-legitimizes the foundations on which they are based. CLS is premised on the idea "that legal ideals are manipulable and that law serves to legitimate existing maldistributions of wealth and power.").

⁸⁵ Levitt, *supra* note 27, at 13.

⁸⁶ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 162-63 (William Peden ed., 1982) (1782).

⁸⁷ A third consideration—where the money will come from is not explored but directly suggested throughout the paper by holding the American government and capitalistic business interests responsible for facilitating the exploitation and marginalization of Blacks. Reparations or restitution for such harms can be assessed against government, corporate, and private entities that profited and continue to benefit from Black marginalization. An excellent representation of this continued marginalization, though not discussed in this paper would be the government, construction companies, and corporate entities that utilize and profit from the prison industrial complex—the new slaveocracy through the undervaluation and exploitation of prison labor (institutionalized marginalization of Black people—both young and old, particularly Black men since Black people account for almost 41% of the jail and prison population).

⁸⁸ See Thurgood Marshall, *Bicentennial Speech – Remarks at the Annual Seminar of the Patent and Trademark Law Association* (May 6, 1987) (acknowledging that the life of Black people in America has been dictated by the law: "What is striking is the role legal principles have played throughout America's history in determining the condition of Negroes. They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law.")

⁸⁹ McIntosh, *supra* note 28, at 174-175.

⁹⁰ Matsuda, *supra* note 5, at 364-375.

ENDNOTES CONTINUED

- ⁹¹ Unknown.
- ⁹² *Pigford v. Glickman*, 185 F.R.D. 82, 85 (D.D.C. 1999).
- ⁹³ See Mitchell, *supra* note 63, at 506 (stating that the fifteen states were AL, AR, CA, FL, GA, IL, KS, MO, MS, NC, OK, SC, TN, TX, and VA).
- ⁹⁴ *Id.*
- ⁹⁵ Daniel Peete, *African American Farmers and Civil Rights (Pigford v. Glickman)*, 78 J. OF S. HIST. 1, 1-2 (2007).
- ⁹⁶ *Id.*
- ⁹⁷ *Id.* at 2.
- ⁹⁸ See generally *Pigford*, 185 F.R.D. 82 (discussing a class action lawsuit in which former slaves tried to recover land).
- ⁹⁹ Mitchell, *supra* note 63, at 506.
- ¹⁰⁰ Tadlock Cowan & Jody Feder, *The Pigford Case: USDA Settlement of a Discrimination Suit by Black Farmers*, CONGRESSIONAL RESEARCH SERVICE, RS20430, 5 (2008).
- ¹⁰¹ *Id.*
- ¹⁰² *Supra* notes 19-46.
- ¹⁰³ See generally *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio 2007) (demonstrating the disparity between black and white citizens of Langan Lane, Ohio).
- ¹⁰⁴ Claire Suddath, *Making Water a Matter of Race*, TIME MAGAZINE, July 14, 2008.
- ¹⁰⁵ Relman & Dane, PLLC, *Our Cases: Selected Current Cases*, <http://www.relmanlaw.com/cases.html>.
- ¹⁰⁶ See *id.* (forcing Black residents to collect rainwater, haul water from the City, and store water in cisterns, endangering their own consumption because of the storage mechanism).
- ¹⁰⁷ *Id.*
- ¹⁰⁸ Thomas Dye, *The Rosewood Massacre: History and the Making of Public Policy*, 19 PUB. HIST. 29-34 (1997).
- ¹⁰⁹ *Id.* at 31-32.
- ¹¹⁰ Raymond A. Winbush, ed., *Should America Pay? Slavery and the Raging Debate on Reparations* at 69 (2003).
- ¹¹¹ *Id.*
- ¹¹² 382 F.3d 1206 (10th Cir. 2004)
- ¹¹³ *Id.*
- ¹¹⁴ *Id.*
- ¹¹⁵ Darren Briscoe, *A Day of Reckoning*, NEWSWEEK, March 10, 2005.
- ¹¹⁶ Tim Madigan, *The Burning: Massacre, Destruction, and the Tulsa Race Riot of 1921*, at 4, 131-32, 144, 159 (2001).
- ¹¹⁷ *Id.* at 164.
- ¹¹⁸ *Id.* at 249.
- ¹¹⁹ Winbush, *supra* note 110, at 369.
- ¹²⁰ *Id.*
- ¹²¹ *Alexander v. Oklahoma*, 382 F.3d 1206, 1212 (10th Cir. 2004).
- ¹²² Darren Briscoe, *A Day of Reckoning*, NEWSWEEK, March 10, 2005.
- ¹²³ *Alexander*, 382 F.3d at 1206, 1219.
- ¹²⁴ Jim Myers, *Race Riot Bill Gets House Hearing*, TULSA WORLD, April 25, 2007.
- ¹²⁵ Levitt, *supra* note 27, at 31. I again, reproduce the structure Levitt cited in this respect because these three statutory provisions have been, and seem like the most viable constructs with which to pursue reparations.
- ¹²⁶ See generally *Massachusetts v. EPA*, 549 U.S. 497 (2007) (demonstrating the difficulty of enforcing statutes and litigating statutory claims).
- ¹²⁷ The Federal Tort Claims Act, 42 USC § 1346(b)(1) (2000).
- ¹²⁸ The Civil Rights Act of 1866, 42 U.S.C. § 1981 (2000).
- ¹²⁹ The Civil Rights Act of 1979, 42 U.S.C. § 1983 (2000).
- ¹³⁰ G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).
- ¹³¹ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 701 n.4 (1987).
- ¹³² *Id.* § 701(4).
- ¹³³ G.A. Res. 217, U.N. GOAR Doc. A/810 at 71 (1948). Jus cogens, includes prohibitions on slavery, torture, genocide, maritime piracy, and wars of aggression. Per the Vienna Convention, no treaties can derogate *jus cogens*.
- ¹³⁴ RESTATEMENT § 701(4).
- ¹³⁵ G.A. Res. 2106 (XX), at 47; U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966).
- ¹³⁶ G.A. Res.2106 (XX), at 47, U.N. GOAR 20th Sess., 1046th plen. mtg., U.N. Doc A/3, A/2 (Dec. 21, 1965). Providing:
- Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.
- ¹³⁷ *Id.* at A/4.
- ¹³⁸ *Id.* at A/5.
- ¹³⁹ *Id.* at A/7.
- ¹⁴⁰ *Id.* at A/6.
- ¹⁴¹ *Id.* at A/14 at 6.
- ¹⁴² *Id.* at A/21.
- ¹⁴³ *Id.* at A/9.
- ¹⁴⁴ *Id.* at A/14.
- ¹⁴⁵ *Id.* at 7(a).
- ¹⁴⁶ *Id.* at A/8.
- ¹⁴⁷ *Id.* at A/14.
- ¹⁴⁸ *Id.* at A/9.
- ¹⁴⁹ Office of the High Commissioner for Human Rights, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶¶ 380-407, U.N. Doc. A/56/18 (July 30–Aug. 17 2001).
- ¹⁵⁰ RACE AND ETHNICITY IN AMERICA: TURNING A BLIND EYE TO INJUSTICE (2007), http://www.aclu.org/pdfs/humanrights/cerd_full_report.pdf
- ¹⁵¹ *Id.* at 38.
- ¹⁵² Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations on the Committee on the Elimination of Racial Discrimination, at 2. The Committee responds to the US report by recommending:
- The Committee recommends that the State party review the definition of racial discrimination used in the federal and state legislation and in court practice, so as to ensure, in light of the definition of racial discrimination provided for in article 1, paragraph 1, of the Convention,—that it prohibits racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.
- ¹⁵³ *Id.* at 14.
- ¹⁵⁴ MARC MAUER AND RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 3 (2007), http://sentencingproject.org/Admin/Documents/publications/rd_stateratesofincbyraceandethnicity.pdf.
- ¹⁵⁵ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 U.S. 2738 (2007).
- ¹⁵⁶ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).
- ¹⁵⁷ G.A. Res.2106, GAOR UN Doc A/14 at 7, Dec. 21, 1965; Restatement (Third) Foreign Relations Law, Volume 2 § 703, Comment d, Reporters Notes 6 & 7.
- ¹⁵⁸ MOS DEF, *Umi Says, on BLACK ON BOTH SIDES* (Rawkus Ent. 1999).

CUTTING FUNDS FOR ORAL CONTRACEPTIVES: VIOLATION OF EQUAL PROTECTION RIGHTS AND THE DISPARATE IMPACT ON WOMEN'S HEALTHCARE

By
Rachel V. Rose*

INTRODUCTION

Cutting funding for oral contraceptives has far reaching implications for women, including adverse impacts on women's health, negative economic impacts on society, and constitutional violations. In a country whose governmental health plans (Medicare and Medicaid) reimburse men's costs for Viagra®,¹ it is hardly appropriate to deny women access to prescribed oral contraceptives that have traditionally been defined as supplementary services falling under the umbrella of primary care.² Due to the wording of a provision within the Deficit Reduction Act of 2005, some contend that non-profit clinics and campus health centers can no longer offer oral contraceptives at reduced rates.³ This article will show how decreasing funding for oral contraceptives violates equal protection and embodies a disparate impact in relation to women's health for Medicaid and Title X beneficiaries—low-income Americans who would benefit from access to contraceptives and other preventative health-care services.

Part I of this article addresses the history, uses, and economics of oral contraceptives. Part II highlights the government's role and policies in funding oral contraceptives over the past 35 years. Part III discusses the present regulatory landscape, including The Deficit Reduction Act of 2005 ("DRA"), the Department of Health and Human Services ("DHHS") proposed regulations, Prevention Through Affordable Access Act, and Title X. Finally, Part IV shows how the history, politics, and regulations culminate in a violation of the Constitutional right to equal protection.

I. ORAL CONTRACEPTIVES: HISTORY, USES, ECONOMICS

A. HISTORY

Oral contraceptives are relatively recent forms of contraception.⁴ Between 1950 and 1954, Gregory Pincos, a scientist, and John Rock, a renowned Harvard obstetrician and gynecologist, developed a chemical contraceptive and performed the first human clinical trial.⁵ The "Pill" regime that they established (21 days on progesterone to inhibit ovulation, 7 days to menstruate) is still in use today.⁶ The "Pill," called Enovid, was approved by the United States Food and Drug Administration ("FDA") for the treatment of severe menstrual disorders.⁷

In the 1960's, the FDA approved the first oral birth control pill.⁸ The FDA required Searle pharmaceutical company to complete field trials for all doses of its oral contraceptive, Enovid.⁹ Ortho Pharmaceutical introduced its first oral contraceptive in 1963. By 1965 the "Pill" became the leading method of pre-conceptual and reversible contraception in the United States.¹⁰

During the 1970's, United States Senator Gaylord Nelson convened Senate hearings on the safety of the "Pill."¹¹ The FDA ordered that all oral contraceptive packages contain information detailing possible side effects.¹² By 1988, the FDA recognized additional potential benefits of oral contraceptives, including decreased incidence of the following: ovarian cancer, endometrial cancer, pelvic inflammatory disease, ovarian cysts, and benign breast disease.¹³

In the twenty years since the FDA recognized additional potential benefits of oral contraceptives, manufacturers have received FDA approval to use oral contraceptives for the treatment of acne and for the severe condition of premenstrual dysmorphic disorder ("PMDD").¹⁴ Oral contraceptives have been used to treat a variety of conditions and are proven to positively affect many aspects of women's health, including preserving fertility.

B. USES AND BENEFITS OF BIRTH CONTROL PILLS

Over the past 50 years, the FDA has recognized potential benefits in the area of women's health, such as decreased incidence of the following: ovarian cancer, endometrial cancer, pelvic inflammatory disease, ovarian cysts, mid-cycle pain (dysmenorrhea), heavy bleeding and benign breast disease.¹⁵ Manufacturers have also received FDA approval to distribute oral contraceptives for the treatment of acne and for PMDD.¹⁶ Physicians regularly prescribe oral contraceptives for other debilitating conditions such as polycystic ovarian syndrome ("PCOS"), and endometriosis.¹⁷ These conditions, as well as PMDD, may cause irregular menstrual cycles, increased risk of high blood pressure, diabetes, high cholesterol, and infertility. These physical and emotional conditions may be mitigated by taking oral contraceptives, which are proven to preserve fertility.

One of the most threatening conditions to a woman's fertility is endometriosis, a condition in which deposits of endometrium (uterine lining) are found outside the uterus.¹⁸ It is a common disorder, yet it is one of the most enigmatic gynecologic diseases.¹⁹ Endometriosis occurs when endometrial tissue outside the uterus responds to changes in hormones,²⁰ breaking down and bleeding like the lining of the uterus does during the menstrual cycle.²¹ This breakdown of tissue often creates adhesions (scar tissue), which causes tremendous pain and binds surrounding organs together.²² Aside from surgery, the most common way to control symptoms of endometriosis and shrink existing implants is through the use of oral contraceptives.²³

As indicated, the uses of oral contraceptives extend far beyond the indication for contraception. Ironically, PMDD, PCOS, and endometriosis have been shown to cause infertility.²⁴ Oral contraceptives, however, have been shown to temper these conditions enabling a woman to retain her reproductive abilities.²⁵

C. THE ECONOMICS OF BIRTH CONTROL

The present cost of oral contraceptives is high.²⁶ The cost to society, however, of preventing college students and low-income women from purchasing them at a reduced rate is even higher.²⁷ In 2004, researchers estimated a net public savings of \$4.3 billion by clinics through averting 1.4 million unintended pregnancies.²⁸ This number does not include the costs of infertility treatments or the cost to treat the escalation of other diseases (Type 2 diabetes and cardiovascular disease) not associated with PMDD, PCOS, and endometriosis.²⁹

Funding from Medicaid programs and Title X of the Public Health Service Act has helped millions of women maintain a healthy reproductive life.³⁰ In fact, almost seventeen million women in the United States utilized these publicly subsidized services in 2002.³¹ The federal and state governments spent a combined \$1.26 billion on reversible contraceptive services.³² Yet, despite these health benefits and substantial savings, the government enacted a provision that has forced pharmaceutical companies to stop providing oral contraceptives at reduced rates.³³

At a time when demand for subsidized contraceptives has increased, public funding for family planning clinics has stagnated.³⁴ Exacerbating this situation is the unwillingness of many pharmaceutical companies to continue to provide oral contraceptives to the public system funded by Title X at a relatively low cost.³⁵ This appears to be the result of the 2005 DRA revamping the average manufacturer price (“AMP”) formula and altering the 340B drug-pricing program. The Omnibus Reconciliation Act of 1990 established AMP and Best Price for use in the Medicaid program.³⁶ Thereby, sales by a manufacturer of covered outpatient drugs below ten percent of AMP were generally excluded from Best Price.³⁷ In 1992, the 340B program that was created when the Public Health Services Act (“PHSA”) was amended to require pharmaceutical manufacturers to provide prescription drugs at reduced prices to “covered entities.”³⁸

Calculating pharmaceutical costs for a 340B program is a semi-complex formula based on the AMP that is provided to the Center for Medicare/Medicaid Services (“CMS”).³⁹ AMP is defined as “[t]he average price paid to manufacturers by wholesalers for drugs distributed to the retail pharmacy class of trade.”⁴⁰ The lowest price available from “the manufacturer to any wholesaler, retailer, provider, health maintenance organization, or non-profit or government entity, with some exceptions” is considered the Best Price.⁴¹ Although Best Price is required to be reduced to account for price adjustments such as rebates and discounts, it does not include prices charged to certain federal purchasers.⁴² The two factors involved in calculating 340B price are the AMP and a “rebate percentage” (consideration of both the AMP and the Best Price reported to CMS).⁴³ This calculation is the “ceiling price” formula for brand name pharmaceuticals (AMP for the previous month—15.1% discount off the AMP) considered by CMS.⁴⁴

Beginning in 2007, seemingly small language changes in the DRA impacted the calculation of AMP, Best Price, and limited the number of facilities that qualify for discounted prices on birth control.⁴⁵ The concerns over that the AMP, which

pharmaceutical companies providing covered outpatient drugs are required to calculate and submit to CMS, is not affected by the increase in customary portion of the new formula were directed at how pharmacies would be reimbursed.⁴⁶ The Office of the Inspector General (“OIG”) and the General Accounting Office (“GAO”) found that this new formula may “result in reimbursements to pharmacies that are below pharmacy acquisition costs.” Specifically, the DRA of 2005 requires manufacturers to report AMP and Best Price to CMS on a monthly basis compared to the previous quarterly basis and imposes several important changes regarding AMP and Best Price calculations.⁴⁷ However, the act has a provision that extends the “exclusion of customary prompt pay discounts [to wholesalers].”⁴⁸ This means that the AMP is

Yet, despite these health benefits and substantial savings, the government enacted a provision that has forced pharmaceutical companies to stop providing oral contraceptives at reduced rates.

not affected by the increase in customary prompt pay wholesaler discounts.⁴⁹ Therefore, the language should have no effect on pharmaceutical manufacturers ability to continue providing oral contraceptives to public health and campus health clinics, because the prices these facilities pay are not included in the AMP, Best Price, or ceiling price calculations.

Equally important is the limitation that certain entities will be excluded from the calculation of the AMP and the “rebate

percentage” on which pharmaceutical companies base their profits.⁵⁰ These entities include those defined in section 340B(a)(4) of the Public Health Service Act; intermediate facilities for the mentally retarded; a State-owned or operated nursing facility; and any other entity determined by the Secretary of DHHS to be a safety net provider.⁵¹ The Office of Pharmacy Affairs oversees the 340B pricing program and its administration.⁵² Entities that have been identified as qualifying 340B organizations under the Social Security Act and the Public Health Services Act (“PHSA”) include: federally-qualified health centers; a family planning project receiving a grant or contract under Section 1001 of the PHSA; and any entity receiving assistance under section 318 (42 USCS § 247c) (relating to the treatment of sexually transmitted diseases).⁵³

Even if campus health centers do not qualify as 340B organizations, the Secretary of DHHS has the discretion to determine what facilities qualify as safety net providers to which the sales of drugs at nominal prices would be appropriate based upon four factors.⁵⁴ The factors are: 1) facility or entity type; 2) the nature of the services provided; 3) the patient population served; and 4) the number of other facilities or entities eligible to purchase at nominal prices in the same service area.⁵⁵ Based upon these criteria, it is reasonable for the Secretary to include campus health centers as qualifying entities.

By interpreting the language to mean a 340B qualifying facility does not include community health and college health centers as an exclusion when calculating the AMP and the “rebate percentage,” and interpreting the language that exempts certain “safety net providers” to exclude family planning clinics; pharmaceutical manufacturers, including Organon, the maker of Cyclessa® and Desogen® oral contraceptives, made an economic decision not to provide drugs at a discounted rate.⁵⁶ Despite the company being unhappy about increasing the prices for colleges, “Nick Hart, Organon’s executive director of contraception, says they were forced to make ‘a business decision’ after the law went

into effect.”⁵⁷ As a result, women who were paying between \$3–\$10 per month for oral contraceptives are now paying nearly 900% more for the same prescription.⁵⁸

Sadly, this price increase was unnecessary. The decision of pharmaceutical companies to stop offering low-priced oral contraceptives to health centers and clinics was an independent decision that the DRA of 2005 did not mandate.⁵⁹ On the contrary, four types of entities, including 340B qualifying facilities and certain safety net providers determined by the Secretary of DHHS, were excluded from the best price determination (meaning that pharmaceuticals offered at reduced rates to these four types of entities would not be included in the price determination).⁶⁰ Additionally, Congress passed a provision to delay the application of new payment limits for multiple source drugs under Medicaid until September 30, 2009.⁶¹ Therefore, the AMP or the “ceiling price” is not impacted by the DRA.⁶²

Pharmaceutical companies’ interpretations of the DRA of 2005 have affected over three million college and low-income women.⁶³ Many hard-working women can no longer access FDA approved methods of birth control, including oral contraceptives.⁶⁴ The only entities benefiting are manufacturers and savvy entrepreneurs through higher prices and arbitrage opportunities.⁶⁵ Overall, there is no logical explanation for repealing access to low price oral contraceptives based on the statutory language of the DRA of 2005.

II. GOVERNMENT FUNDING AND POLICIES RELATED TO ORAL CONTRACEPTIVES

It is hard to fathom that President Dwight Eisenhower stated in 1959 that birth control “is not a proper political or government activity or function or responsibility” and emphatically added that it is “not our business.”⁶⁶ Only five years later, President Lyndon B. Johnson pushed legislation for federal support of birth control for the poor.⁶⁷ During the Nixon administration, this trend continued.⁶⁸ Title X of the Public Health Services Act (“Family Planning Services and Population Research Act of 1970”) authorized the Secretary to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects, appropriating \$180 million between 1971 and 1973.⁶⁹ The only method of birth control not entitled to funds was a surgical abortion because it was not considered a *preventive* family planning service.⁷⁰ Under the Ford Administration, Congress extended grants for comprehensive public health services⁷¹ and expressly defined “community health centers” as entities that provide primary health services and referrals to providers of supplementary health services.⁷² Primary health services included family planning, and supplemental health services included pharmaceutical and health education services.⁷³ The Secretary could “make grants to public and nonprofit private entities for projects to plan and develop community health centers which will serve medically underserved populations.”⁷⁴ Clearly, there was a commitment to ensure that women received the care and treatment they needed to preserve their reproductive health.

Under the Reagan Administration, public and nonprofit entities encountered a setback in funding, in light of the conflicting interpretations of Title X equating oral contraception with surgical abortions.⁷⁵ However, the language, on its face, confirms that the intent of Congress was not to equate the two.

In 1988, the Secretary of DHHS promulgated new regulations to differentiate between Title X programs and abortions,⁷⁶ emphasizing that “the purpose and the demonstrated effect of contraceptive counseling is to promote the use of contraception.”⁷⁷ Unfortunately, DHHS also adopted regulations (the “Gag Rule”) prohibiting Title X facilities from providing information, counseling, or referrals concerning abortions.⁷⁸ During the first 18 years of the Title X program, the Act was interpreted to mean that the funds could not be used to perform abortions, but it did not restrict the ability of clinics to provide counseling or referrals.⁷⁹

In 1991, the Supreme Court stipulated that, by clearly defining “family planning,” the regulations clarify that Congress intended Title X funds to be expended to support preventive family planning services.⁸⁰ According to the General Accounting Office, the majority of clients of Title X-sponsored clinics are not pregnant and their services include and were restricted to physical examinations, education on contraceptive methods, pre-conceptional counseling, and general reproductive healthcare.⁸¹ The Clinton Administration recognized that, while abortions are not a method of family planning, the “Gag Rule” endangered women’s lives and health by preventing them from receiving accurate medical information from their physicians.⁸² Consequently, the “Gag Rule” was repealed.⁸³

III. THE PRESENT REGULATORY LANDSCAPE’S ROLE IN THE CRISIS

Without publicly funded clinics providing contraceptive services, there would be 1.4 million more unintended pregnancies and 49% more abortions annually in the United States.⁸⁴

Moreover, for every \$1.00 spent to provide services in the nationwide network of publicly funded clinics, \$4.02 is saved in Medicaid birth costs.⁸⁵

Unfortunately, the pharmaceutical companies’ unwillingness to offer oral contraceptives at nominal prices to publicly funded clinics has created a birth control crisis.⁸⁶ Now, millions of women are paying up to nine or ten times what they were paying before, if they can afford it.⁸⁷ The companies’ decisions undermine the benefits under

Title X and are detrimental individually on women’s reproductive health and collectively on our nation’s economic welfare.⁸⁸

A. TITLE X v. DRA

Statutes or provisions relating to the same individual or class of individuals, or to a closely allied subject or object may be regarded under the rule of *in pari materia*,⁸⁹ to ascertain and effectuate Congressional intent by proceeding upon the supposition that several statutes were governed by one spirit and policy and were intended to be consistent and harmonious.⁹⁰ In the present case, Title X and section 6001 of the DRA, both

Without publicly funded clinics providing contraceptive services, there would be 1.4 million more unintended pregnancies and 49% more abortions annually in the United States.

provisions related to funding, should be read together for the intent of providing funding so all women could have access to reproductive healthcare, family planning, and preconceptional birth control.⁹¹

1. TITLE X: SETTLED POLICY

Since 1970, the purpose of Title X has been to assist in making voluntary family planning services available to all persons by enabling public and non-profit private entities to plan and develop comprehensive programs. Understanding the need for a high standard for ethical delivery of services, Title X required that clients be offered a broad range of contraceptive methods.⁹² Today, Title X supports approximately 4,400 out of 7,700 family planning clinics, serving nearly five million women.⁹³ The current guidelines were developed in conjunction with the American College of Obstetricians and Gynecologist (“ACOG”) and require a complete physical exam (including Pap test) and education about the importance of preventive care.⁹⁴ Title X is indicative of settled policy that women should have access to reproductive healthcare, family planning, and preconceptional birth control.

2. 2005 DRA – EFFECTIVE JANUARY 2007

An unintended consequence of the DRA, specifically Section 6001, is that health centers no longer receive prescription contraceptives at a nominal or base price. Because there is a provision in the DRA that insulated publicly funded health clinics from paying a higher premium and in turn exempted these prices from the AMP calculations, there is no acceptable explanation for this consequence. The only explanation proffered by the pharmaceutical companies is that they made a “business decision” to no longer follow established legislative precedent. Furthermore, Congress has done nothing since the implementation of the DRA to rectify the situation. The result is that the objective of Title X and Medicaid is being undermined while pharmaceutical manufacturers are realizing higher profit margins.

The provisions in section 6001 of the DRA should be construed to mean that because of the “safe harbor” exempting nominal sales pricing to certain entities from being included in the calculation, Congress intended to preserve the Title X objective, while not adversely impacting the reimbursement of pharmaceuticals through Medicaid. It is imperative that Congress continue to uphold the original legislative intent of providing access to high quality contraceptive services and preventive care to young and low-income citizens.⁹⁵

B. DHHS INITIATIVES TO UNDERMINE WOMEN’S REPRODUCTIVE HEALTHCARE FUNDING

In the summer of 2008, the Bush Administration called on DHHS to draft new rules that would severely restrict women’s healthcare options by defining “abortion” so broadly that it would encompass many types of birth control, including oral contraceptives.⁹⁶ The DHHS proposal defined abortion as “any of the various procedures—including the prescription, dispensing and administration of any drug or the performance of any procedure or any other action—that results in the termination of the life of a human being in utero between conception and natural birth, whether before or after implantation.”⁹⁷ This definition defies

Congressional intent and the Supreme Court’s interpretation of abortion.⁹⁸

In addition to posing serious threats to the reproductive health of millions of uninsured and low-income Americans, the language could prevent health facilities from guaranteeing their patients access to the full range of comprehensive reproductive healthcare.⁹⁹ On July 15, 2008, several Senators signed a letter addressed to the Secretary of DHHS urging reconsideration of the regulations.¹⁰⁰ One argument was that the proposed definition would allow common forms of contraception such as the birth control pill to be classified as abortion, thereby denying contraception to women who need it.¹⁰¹ In a follow-up letter, they emphasized the medical definition of pregnancy,¹⁰² specifically that a pregnancy does not begin until a fertilized egg implants itself to the uterine wall,¹⁰³ and most modern forms of birth control work by blocking implantation.¹⁰⁴ Calling a pre-implanted fertilized egg a “human being in utero” is incorrect.¹⁰⁵ Ultimately, confusing the definitions of contraception and abortion would wreak havoc on law, regulations, and policy.¹⁰⁶

C. PREVENTION THROUGH AFFORDABLE ACCESS ACT

The Prevention Through Affordable Access Act was introduced in the House of Representatives¹⁰⁷ to clarify any ambiguity in the DRA language and protect student health centers and public or nonprofit private entities providing health services.¹⁰⁸ It received bipartisan support and aimed to “rectify an allegedly flawed condition in the DRA, which caused national pharmaceutical companies to stop selling birth control to college clinics [and publicly funded health clinics] at discounted prices.”¹⁰⁹ Both the House and the Senate versions of the bill were introduced and referred to Committees nearly a year ago.¹¹⁰ No other action has been taken since the initial introduction.¹¹¹

IV. THE 2005 DRA – VIOLATION OF EQUAL PROTECTION

In December 1961, it was still a crime to use birth control in Connecticut.¹¹² Boldly, C. Lee Buxton, M.D. and Estelle Griswold opened four Planned Parenthood Clinics.¹¹³ Their arrest brought national attention to anachronistic state laws, which culminated in a 7–2 ruling by the United State Supreme Court that Connecticut’s law prohibiting the use of birth control was unconstitutional, violating a couple’s right to privacy.¹¹⁴ *Eisenstadt v. Baird* made it clear that a state cannot impede the distribution of birth control to an unmarried person, thus striking down a Massachusetts law.¹¹⁵ Less than a year later, the Supreme Court ruled on one of the most controversial issues of our time—abortion.¹¹⁶ These judicial precedents not only set the tone for the adoption of Title X, but also laid the foundation for recognizing women as a protected class.

A. EQUAL PROTECTION ANALYSIS

The fundamental question under consideration is whether there is something in the DRA requiring pharmaceutical companies to no longer offer nominal pricing on oral contraceptives to public, non-profit, and campus health clinics. The Equal Protection Clause of the United States Constitution provides

that no person shall be denied the equal protection of the law.¹¹⁷ Fundamentally, equal protection deals with “governmental classifications that deprive a certain class of persons of benefits that persons in other classes are entitled to receive, or that subject a certain class of persons to burdens that are not imposed on persons in other classes.”¹¹⁸ By making oral contraceptives unavailable because of the exorbitant cost, women are the class of persons being deprived of benefits of reproductive healthcare and family planning they are entitled to under Medicaid and Title X.¹¹⁹ Although men also use the same federally funded centers, they do not carry the burden of paying more for prescriptions under the DRA.

On its face, the DRA does not discriminate because it contains no explicit gender classification language.¹²⁰ However, just because it is facially neutral does not mean it is free from discrimination. The difference is that courts will not merely assume that the DRA is intentionally discriminatory; instead, evidence of discrimination must be found through its administration and purpose or effect.¹²¹ In *Yick Wo v. Hopkins*, the Supreme Court held that even if a law “be fair on its face and impartial in its appearance, [equal protection will still be violated] if it is applied and administered by public authority with an evil eye and an unequal hand.”¹²² There, equal protection was denied when the discrimination and public administration of the law was found to be illegal.

Personnel Administrator of Massachusetts v. Feeney dealt with discriminatory intent in the purpose and effect of a law giving preferential treatment to veterans.¹²³ There, the Supreme Court asserted that proof of discriminatory “impact provides ‘an important starting point,’ but purposeful discrimination is the condition that offends the Constitution.”¹²⁴

The DRA must be considered *in pari materia* with Title X and Medicaid when considering the administration and purpose and effect of the law. The situation of women being denied access to affordable oral contraceptives because of the AMP calculation is akin to the situation in *Yick Wo* and distinguishable from *Feeney*. In fiscal year 2006, the Medicaid program spent \$1.3 billion for family planning services, and Title X funds contributed \$215 million to approximately 7,683 clinics.¹²⁵ Each year, approximately seven million women received contraceptive services.¹²⁶ Of the total number of patients treated, men accounted for only 5% of the overall caseload.¹²⁷ Here, Congressional intent points toward the “evil eye and unequal hand” and “purposeful discrimination” because Congress knew the DRA AMP formula was being applied in a way that denied women access to oral contraceptives to which they were entitled under federal programs.¹²⁸ Congress also knew of executive initiatives to equate oral contraceptives to a surgical abortion.¹²⁹ Therefore, the discrimination against women, public administration, and purpose and effect of the DRA should be violations of equal protection.

For purposes of the DRA, the classifying factor distinguishing between two similarly situated classes is gender, which receives intermediate scrutiny. Men’s access to prescriptions related to reproductive health has not been rendered inaccessible due to cost while women’s prescriptions for oral contraceptives have been affected by the DRA.

When assessing a statute under an intermediate scrutiny level of review, two operative parts must be considered—the “means” and the “ends.”¹³⁰ The “ends” or the objective the government seeks to achieve must be actual and important. The “means” or the classification the government has used must be “substantially related” to the ends. Here, the means (the gender-based reproductive health access exclusion) and the ends (presumably, reducing Medicaid spending by \$4.7 billion between 2006–2010) can be compared to *United States v. Virginia*, where the Supreme Court subjected Virginia Military Institute’s (“VMI”) male-only admissions policy to intermediate scrutiny.¹³¹

The Court determined that Virginia’s male-only admissions policy to VMI was not “substantially related” to the state’s objective of maintaining the adversative method, and the objective of educating “citizen soldiers” was not “substantially advanced by women’s categorical exclusion, in total disregard of their individual merit.”¹³² Likewise, the federal government’s gender-based reproductive health access exclusion in the DRA is not “substantially related” to the objective of spending reduction. For every tax dollar spent on contraceptive services, \$3.00 in Medicaid costs for pregnancy-related healthcare and medical care of newborns is saved, 1.3 million unplanned pregnancies are avoided, and without publicly supported services, there would be an annual increase of 40% more abortions.¹³³ Furthermore, the DRA defies the purpose of other statutes, Title X and Medicaid, which have ensured women’s affordable access to oral contraceptives in relation to reproductive health and family planning for over a quarter of a century. When a heightened level of scrutiny is applied, economic reasons are not enough to uphold a statute as constitutional. Therefore, in terms of the DRA, the government has failed to demonstrate the requisite “exceedingly persuasive justification” for denying women access to affordable oral contraceptives to which they are entitled under federal law.¹³⁴

A final step in the “means/ends” analysis is the assessment of the concepts of over-inclusiveness and under-inclusiveness. A law is over-inclusive when it applies to some situations that do not serve its objectives.¹³⁵ Conversely, a law is under-inclusive when it “does not apply to some situations that do serve its objectives.”¹³⁶ The DRA, although it contains no express language regarding gender differentiation and denial of access

to oral contraceptives, can be seen as over-inclusive because it affects all women procuring oral contraceptives from federally funded or campus health clinics, including those individuals not traditionally covered under the umbrella of Title X or Medicaid. There is a strong likelihood that the classification will meet the applicable means test.

As a matter of public policy, we, as a nation, want women to have affordable access to oral contraceptives. As a plurality of the Supreme Court acknowledged 35 years ago, “our Nation has had a long and unfortunate history of sex discrimination.”¹³⁷ Public policy has been defined as “the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good.”¹³⁸ Preventing access to oral contraceptives for the treatment of medical conditions that inhibit women from being productive and efficient citizens, for family planning purposes, which in turn decreases abortion rates and government costs, and for discouraging healthy living at every stage of life are acts that are injurious

*As a matter of public policy,
we, as a nation, want women
to have affordable access to
oral contraceptives.*

to the public good.¹³⁹ Therefore, as a matter of public policy, it is imperative that access to oral contraceptives at pre-DRA prices be reinstated.

B. REMEDIES

The Supreme Court has held that 42 U.S.C. § 1983 broadly construes a private federal right of action for damages and injunctive relief to redress violations by state officials of rights created by the United States Constitution as well as federal statutes.¹⁴⁰ For example, a reading of the Public Health Service Act does not “reveal a precise or elaborate remedial scheme that would be obfuscated by allowing enforcement through a § 1983 action.”¹⁴¹ Also, the statutory language and legislative history indicate an intent to improve and expand all aspects of family planning services by providing grants to public or nonprofit private entities or state health authorities.¹⁴² Therefore, the Court in *Planned Parenthood of Billings v. Montana* concluded that the Public Health Services Act created federally enforceable rights in the plaintiffs and since no Congressional intent to preclude private enforcement existed, § 1983 provided a cause of action to remedy an alleged violation of the Act.¹⁴³

Relying on Supreme Court decisions, a U.S. District Court recently held in *Children’s Hosp. of Philadelphia v. Horizon NJ Health* that a hospital’s claims against an insurance provider for deprivation of constitutional rights in violation of 42 U.S.C. § 1983 could proceed.¹⁴⁴ The court noted that a symbiotic relationship was present because approximately 50% of funding received was federal and that the insurance company derived a substantial benefit.¹⁴⁵ Additionally, the doctrine of third party standing and in turn associational standing was upheld because “the hospital had alleged facts sufficient to establish the third-party standing of its doctors to bring their patients’ claims.”¹⁴⁶

Similarly, the DRA, because it is read *in pari materia* with Title X and Medicaid, creates federally enforceable rights in women who utilize clinics that qualify for federal funding and since no Congressional intent is presently precluding private enforcement, § 1983 should be applicable. As in *Children’s Hosp. of Philadelphia*, a symbiotic relationship exists between the government and the pharmaceutical companies because the

drug manufacturers derive a substantial benefit from the billions of dollars the government expends annually on prescriptions.¹⁴⁷ In addition, Congress knew of the denial of access to oral contraceptives and has not passed any legislation or enforced correct application of the AMP formula.¹⁴⁸

The pharmaceutical companies’ interpretations of Section 6001 of the DRA to no longer offer oral contraceptives to federally funded and campus health clinics based on the AMP formula is also possibly unconstitutional. Federal courts have held that private corporations that contract with the government may not be entitled to qualified immunity under § 1983.¹⁴⁹ The Supreme Court, applying the nexus approach, held the appropriate inquiry is “whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”¹⁵⁰

Moose Lodge No. 107 v. Irvis is an instructive example of the application of the inquiry.¹⁵¹ Focusing on the state’s involvement, the challenged action was the lodge’s racial discrimination against private guests.¹⁵² The Supreme Court emphasized that a nexus would exist and state action would be present, if the state had “fostered or encouraged” the allegedly unconstitutional action.¹⁵³ Applying this reasoning to the DRA and the “business decisions” made by pharmaceutical companies, it could be found that a “sufficiently close nexus” between the State, the pharmaceutical companies and the potentially challenged action exists to impose liability on both the State and the private companies under § 1983.

CONCLUSION

There is no comparable situation for men. Women’s overall healthcare is at issue and this type of funding reduction of medical treatment options promulgated by the DRA is constitutionally invalid. As shown, cutting funding for oral contraceptives has far reaching implications for women including the Deficit Reduction Act of 2005, which embodies the notion that what is not good policy is also not good politics.

ENDNOTES

* Rachel V. Rose holds an MBA from Vanderbilt University – Owen Graduate School of Management and is a second year law student at Stetson University College of Law with an interest in healthcare policy and law. She would like to thank the following individuals for their support, guidance, and encouragement: Stetson University College of Law Professor Ann Piccard, JD, LL.M., for advising and editing this paper; Crystal Ellis, anticipated JD, May 2010, for review and citation assistance; Pamela Burdett, Associate Director & Head of Public Services, Stetson University College of Law Library, for assistance with research; Stetson University College of Law Professors Michael Allen and William Kaplin for assistance with Constitutional issues.

¹ See Viagra® [package insert]. NY(NY): Pfizer, Inc.; 2007 (listing a single indication under the “Indications and Usage” section, “VIAGRA® is indicated for the treatment of erectile dysfunction.”).

² See Letter from Sally K. Richardson, Director, HCFA, to State Medicaid Directors (Nov. 30, 1998), available at www.coms.hhs.gov/smd/downloads/smd103098.pdf (requiring that a State’s Medicaid program cover Viagra as required by the Omnibus Budget Reconciliation Act of 1990); *Medicare Prescription Benefit to Cover Viagra, Other ‘Lifestyle’ Drugs*, (Feb. 21, 2005),

available at www.NewsRx.com (reporting that sexual performance drugs like Viagra will be covered under Medicare’s new prescription drug benefit beginning in 2006); Patricia Anstett, *Medicare Limits Coverage for Viagra*, SEATTLE TIMES, Jan. 27, 2007, at A4 (limiting coverage of Viagra® through an amendment to the Social Security Act, to allow reimbursement if a man takes Viagra®, Cialis®, or Levitra® for a primary medical condition not labeled erectile dysfunction).

³ The Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6001(b)(1) (2006).

⁴ Ortho-McNeil Pharmaceuticals, Inc., *History of Birth Control 1-2*, <http://www.thepill.com/thepill/aboutbirth-history.html> (last visited Sept. 14, 2008) [hereinafter *History of Birth Control*].

⁵ PBS, *Timeline: The Pill*, <http://www.pbs.org/wgbh/amex/pill/timeline/index.html> (last visited Sept. 10, 2008) [hereinafter *The Pill*].

⁶ *Id.*

⁷ See *id.* (funding the large scale clinical trials, G.D. Searle and Co., on Oct. 29, 1959, filed an application with the FDA for approval of Enovid as a contraceptive).

ENDNOTES CONTINUED

- ⁸ *The Pill*, *supra* note 5.
- ⁹ *Id.*
- ¹⁰ *Id.* (discussing how the birth control pill rendered *Griswold v. Connecticut* invalid, where the Supreme Court held that laws prohibiting birth control were unconstitutional).
- ¹¹ *Id.*
- ¹² *Id.*
- ¹³ *Id.*
- ¹⁴ *Id.*; see also YAZ[®] [package insert]. Wayne (NJ): Bayer Healthcare 2007; Ortho Tri-cyclen[®] [package insert]. Raritan (NJ): Ortho McNeil Pharmaceuticals, Inc. 2007.
- ¹⁵ *History of Birth Control*, *supra* note 4.
- ¹⁶ *Id.*
- ¹⁷ See Interview with Dr. Lisa Fish and Dr. Robert Jaffe (Dec. 4, 2003), available at <http://womenshealth.about.com/cs/pcos> (highlighting PCOS because it is the most common hormonal disorder in women and acknowledging the role of birth control pills in its treatment); R.L. Barbieri, *Hormone Treatment of Endometriosis: The Estrogen Threshold Hypothesis*, 166 AM. J. OBSTET-GYN. (Feb. 1992) (hypothesizing that hormonal therapy with a gonadotropin-releasing hormone agonist is an effective alternative to the surgical treatment of endometriosis).
- ¹⁸ *Treatment Options for Endometriosis*, The National Endometriosis Society, June 2006, available at www.endo.org.uk.
- ¹⁹ D.L. Oliver and L.B. Schwartz, *Endometriosis*, 328 NEW ENG. J. MED., 1759–1769, (June 17, 1993).
- ²⁰ *ACOG Education Pamphlet AP103 – Endometriosis*. American College of Obstetricians and Gynecologists; Sept. 2008, available at <http://www.acog.org>.
- ²¹ *Id.*
- ²² *Id.*
- ²³ *Id.*; see also S. Ferrero, M.D., V. Remorgida, M.D., *Endometriosis – Images in Clinical Medicine*, NEW ENG. J. MED., 357 (Aug. 16, 2007) (showcasing pictures of endometriotic nodules in the diaphragm and indicating a follow-up regime of norethindrone [a type of birth control pill] enabled the patient to be pain free one year post-operative).
- ²⁴ Deficit Reduction Act § 6001(d)(2).
- ²⁵ *Id.*
- ²⁶ Walgreen's Pharmacy, LoEstrin[®] 24 FE Tablets (Retail price: \$64.99, United Healthcare Student Resources Copay \$50.00), Feb. 12, 2008; see also <http://www.plannedparenthood.org/health-topics/birth-control/birth-control-pill-4228.htm> (last visited Sept. 10, 2008) (indicating that family planning clinics often charge less than private health care providers for an exam and for the pill).
- ²⁷ J.J. Frost, L.B. Finer, A. Tapales, *The Impact of Publicly Funded Family Planning Clinic Services on Unintended Pregnancies and Government Cost Savings*, 19 J. HEALTH CARE FOR POOR & UNDERSERVED, (2008); see also, *Government Saves Money by Funding Family Planning Clinics*, available at <http://www.medicalnewstoday.com/articles/118423.php>. [hereinafter *Government Saves Money*].
- ²⁸ See *Government Saves Money*, *supra* note 27 (reaching this figure by “factoring only the public-sector costs for maternity care, delivery, and one year infant related care for those contraceptive clients who would be eligible for Medicaid maternity care in their state if they became pregnant); see also, Mark Niese, *Hawaii Ending Universal Child Health Care*, Associated Press, Oct. 17, 2008 (ending the only state universal child health care program in the country just seven months after its inception because of the 2011 projected \$900 million general fund shortfall).
- ²⁹ See *Government Saves Money*, *supra* note 27 (acknowledging that the savings reflects the increasing costs of health care services as well as an expansion for Medicaid. “By fiscal year 2001, Medicaid accounted for 61% of public dollars spent for contraceptive services, \$770 million.”); see also, Kevin Freking, *Strong Growth in Medicaid Anticipated*, Associated Press (Oct. 17, 2008), available at http://www.examiner.com/a-1643483~Strong_growth_in_Medicaid_anticipated.html?cid=rss-Health (indicating Medicaid's growing strain on state and federal budgets will grow at 7.9% while the overall economy is projected to grow at 4.8% over the next 10 years).
- ³⁰ Adam Sonfield & Rachel Benson Gold, *Conservatives' Agenda Threatens Public Funding for Family Planning*, 8 The Guttmacher Report on Public Policy (2005).
- ³¹ *Id.*
- ³² See *id.* (citing a survey of public agencies by The Alan Guttmacher Institute).
- ³³ Deficit Reduction Act § 6001(d)(2).
- ³⁴ *The 340B Drug Pricing Program: What Family Planning Clinics Need to Know*, National Family Planning and Reproductive Health Association, (Feb. 2008). available at www.nfprha.org/main/family_planning.cfm?Category=Fact_Sheets&Section=Main-16k – [hereinafter *340B*].
- ³⁵ *Id.*
- ³⁶ See U.S. Government Accountability Office, *States' Medicaid Payments for Prescription Drugs*, Pub. No. GAO-06-69R (Oct. 31, 2005), available at <http://www.gpoaccess.gov/gaoreports/index.html> (highlighting the results of the study in a letter to Chairman Edward Whitfield of the Subcommittee on Oversight and Investigations which included total Medicaid expenditures on prescription drugs growing from 7% in 1990 to 13% in 2003).
- ³⁷ See *Medicaid Drug Pricing Regulation: A Summary*, Centers for Medicare and Medicaid Services, (July 6, 2007), available at <http://www.cms.hhs.gov/pdf> (reviewing changes to AMP in light of the DRA of 2005 and recognizing that the final rule “continues to define nominal sales as those sales at less than ten percent of AMP, but limits the Best Price exemption.”).
- ³⁸ *340B*, *supra* note 34; see also Deficit Reduction Act § 6001(d)(2).
- ³⁹ 42 U.S.C. § 1396r-8 (2006); Deficit Reduction Act § 6001(b)(1)(B).
- ⁴⁰ See <http://www.gao.gov/newitems/d0669.pdf> (last visited Oct. 16, 2008) (“According to CMS, transactions used to calculate AMP are to reflect cash discounts and any adjustments that affect the price realized, but are not to include prices to direct federal purchasers based on the Federal Supply Schedule (FSS), prices from direct sales to hospitals or health maintenance organizations or prices to wholesalers when they re-label drugs they purchase under their own label. There is no definition in the statute for “retail pharmacy class of trade.”); see also Deficit Reduction Act § 6001(d)(2); 42 U.S.C. § 1396r-8.
- ⁴¹ See *id.* (noting that in the February 2005 report, considerable variation in the methods manufactures used to determine AMP and Best Price was found); see *Medicaid Drug Rebate Program: Inadequate Oversight Raises Concerns about Rebates Paid to States*, Pub. No. GAO-05-102, (Feb. 4, 2005), available at <http://www.gpoaccess.gov/gaoreports/index.html> (last visited Oct. 2, 2008); see also 42 U.S.C. § 1396r-8(c)(1)(C) (stipulating “CMS has further defined Best Price as the lowest price at which the manufacturer sells the drug to any purchaser in any pricing structure, including capitated payments, with some exceptions.”).
- ⁴² Deficit Reduction Act § 6001(d)(2).
- ⁴³ *340B*, *supra* note 34.
- ⁴⁴ *Id.* For example, if AMP equals \$100.00 and the rebate percentage is 15.0%, then the ceiling price for this example would be \$85.00.
- ⁴⁵ Covington and Burlington, *The Impact of the Deficit Reduction Act of 2005 on Pharmaceutical Manufacturers* (Mar. 3, 2006), available at www.cov.com.
- ⁴⁶ See Press Release, US Federal News, *Sens. Roberts, Lincoln, Salazar Offer Medicaid Pharmacy Reimbursement Amendment to SCHIP*, (July 19, 2007) (highlighting the concerns and continuing efforts on behalf of pharmacists to oppose the way pharmacies would be reimbursed under the new AMP formula in the DRA of 2005) [hereinafter *Roberts*]; see also, Press Release, State News Service, *Finance Committee Senators Introduce Legislation to Fix Unfair Medicaid Rules for Kansas Pharmacists*, (Aug. 2, 2007) (reporting that in response to the DRA of 2005, The Fair Medicaid Drug Payment Act of 2007 was introduced to stave off some of the most severe cuts and enable pharmacies to continue serving Medicaid patients by increasing the Medicaid payment rate to pharmacies from 250% of AMP to 300% of AMP).
- ⁴⁷ See *Roberts*, *supra* note 46 (emphasizing that the calculation of AMP for a covered outpatient drug will exclude customary prompt pay discounts extended to wholesalers and only certain sales of covered outpatient drugs will be excluded from the rebate percentage. Previously, the exclusion applied to all [emphasis added] sales at a nominal price, regardless of the purchaser.); see also, Pub. L. No. 109-171, § 6001(d)(2) (2006).
- ⁴⁸ 42 U.S.C.A. § 1396r-8(k)(1)(B).

ENDNOTES CONTINUED

- ⁴⁹ *Id.*; see also Deficit Reduction Act § 6001(e)(2)(5) (USE OF AMP IN UPPER PAYMENT LIMITS.—“Effective January 1, 2007, in applying the Federal upper reimbursement limit under paragraph (4) and section 447.332(b) of title 42 of the Code of Federal Regulations, the Secretary shall substitute 250 percent of the average manufacturer price (as computed without regard to customary prompt pay discounts extended to wholesalers) for 150 percent of the published price.”).
- ⁵⁰ Deficit Reduction Act § 6001(d)(2).
- ⁵¹ See 42 U.S.C.A. § 1396r-8(c)(1)(D)(i) (limiting sales at a nominal price to be only sales by a “manufacturer of covered outpatient drugs at nominal prices to the following shall be considered to be sales at a nominal price or merely nominal in amount.” This is significant because the sales of covered outpatient drugs to entities identified in the “safe harbor” are not included in the AMP and therefore, do not have a negative effect on prices the pharmaceutical companies are receiving under Medicaid or Title X programs).
- ⁵² See <http://www.hrsa.gov/opa/introduction.htm>, (last visited Sept. 25, 2008) (introducing the 340B pricing program which resulted from the enactment of Public Law 102-585, the Veterans Health Care Act of 1992, which is codified as Section 340B of the Public Health Services Act).
- ⁵³ See <http://www.hrsa.gov/opa/introduction.htm> (last visited Sept. 25, 2008) (citing: The Social Security Act, section 1905(1)(2)(B), Section 330(e),(g),(h)(i) of the Public Health Services Act in identifying organizations eligible for the 340B discount).
- ⁵⁴ Deficit Reduction Act § 6001(d)(2).
- ⁵⁵ *Id.*
- ⁵⁶ *Id.*; see also Katie Rooney, *The High Price of Birth Campus Birth Control*, TIME MAGAZINE, (Aug. 7, 2007).
- ⁵⁷ Deficit Reduction Act § 6001(d)(2).
- ⁵⁸ *Id.*; see also *Save Birth Control: College Students and Low-Income Women Need Your Help*, <http://www.plannedparenthood.org> (last visited Sept. 8, 2008).
- ⁵⁹ 42 U.S.C.A. § 1396r-8.
- ⁶⁰ See Deficit Reduction Act § 6001(d)(2) (2006) (emphasizing that under the DRA, nominal sales to facilities that qualify under the 340B program, intermediate care facilities for the mentally retarded, state-owned or operated nursing facilities, or any other facility the secretary determines is a qualifying safety net provider are excluded from the best price determination).
- ⁶¹ Pub. L. No. 110-275, Title II, § 203, (July 15, 2008).
- ⁶² See Deficit Reduction Act § 6001(d)(2) (2006) (emphasizing that under the DRA, nominal sales to facilities that qualify under the 340B program, intermediate care facilities for the mentally retarded, state-owned or operated nursing facilities, or any other facility the secretary determines is a qualifying safety net provider are excluded from the best price determination).
- ⁶³ Marie Recalde, *Bill Takes Aim at Costly Contraception*, 88 Daily Nexus at UC, (Nov. 9, 2007).
- ⁶⁴ Congressional Press Release, *Reps. Crowley, Schiff, Ryan, Ramstad, Kirk Unveil Bill to Restore Birth Control Access at College Clinics* (Nov. 1, 2007), available at www.crowley.house.gov/news/record.asp?id=1076.
- ⁶⁵ See Adam J. Fein, PhD, *An AMP Timeline Appears*, (June 19, 2007), available at <http://www.drugchannels.net/2007/06/amp-timeline-appears.html>, (last visited Oct. 14, 2008) (discussing the short term and long term effects of the changes related to AMP and the impact on the pharmacy supply chain).
- ⁶⁶ *The Pill*, *supra* note 5.
- ⁶⁷ *Id.*; see The Social Security Act of 1965, Pub. L. No. 89-97 (1965).
- ⁶⁸ See Title X, Pub. L. No. 91-572 (Dec. 24, 1970) (defining the purpose of promoting “public health and welfare by expanding, improving, and better coordinating the family planning services and population research activities of the Federal Government.”)
- ⁶⁹ *Id.* at § 1001(a); 42 U.S.C. § 300-300(a)-41 (1970).
- ⁷⁰ Title X, § 1008; see also, H.R. Conf. Rep. No. 91-1667, p. 8.
- ⁷¹ See Pub. L. No. 94-63 (July 29, 1975), 42 U.S.C. 254(b) (1975) (amending the Public Health Service Act to extend funding for fiscal year ending June 30, 1976).
- ⁷² 42 U.S.C. § 254(c), § 330(a)(1), (3); (b)(1)(A)(B)(C); (b)(2)(I)(L); (b)(3) (1975).
- ⁷³ *Id.* at (b)(2)(I)(L).
- ⁷⁴ *Id.* at (c)(A).
- ⁷⁵ See *id.* (comparing the funding available from 1978–1981 in subsection (c) (\$200 million to \$264.5 million) to the reduced funding available from 1982–1984 (\$126.5 million to \$150.8 million)).
- ⁷⁶ 53 Fed. Reg. 2923-2924 (1988).
- ⁷⁷ *Id.*; 42 C.F.R. Part 59.
- ⁷⁸ See 58 Fed. Reg. 7455 (Jan. 22, 1992) (providing the “Memorandum for the Secretary of Health and Human Services” that President Clinton signed overturning the ‘Gag Rule’).
- ⁷⁹ *Id.* (suspending the ‘Gag Rule’ pending the promulgation of new regulations).
- ⁸⁰ *Rust v. Sullivan*, 500 U.S. 173, 179 (1991) (citing H. R. Conf. Rep. No. 91-1667, p. 8).
- ⁸¹ See *id.* at note 2 (citing 53 Fed. Reg. 2925 (1988)).
- ⁸² See 58 Fed. Reg. 7455 (reinforcing that the ‘Gag Rule’ “contravenes the clear intent of a majority of the members of both the United States Senate and House of Representatives, which twice passed legislation to block the ‘Gag Rule’s’ enforcement but failed to override Presidential vetos.”).
- ⁸³ *Id.*
- ⁸⁴ Letter from United States Senators to Secretary of Department of Health and Human Services, (July 23, 2008) [hereinafter Letter from Senators].
- ⁸⁵ *Id.*
- ⁸⁶ *Birth Control Price Crisis Continues*, Daily Women’s Health Policy Report, (Jan. 28, 2008).
- ⁸⁷ Rob Hotakainen, *Cost of Birth Control Pill Leaps at University Clinics – Pressure Rising to Change Law*, THE BELLINGHAM HERALD, Jan. 27, 2008.
- ⁸⁸ *Family Planning Clinics Prevent 1.4 Million Unplanned Pregnancies Annually, Save Billions of Government Dollars*, 11 Guttmacher Policy Review, (Summer 2008) (“According to a 2006 Guttmacher study, each \$20 million increment in new funding for Title X would help avoid another 17,200 unintended pregnancies, including 7,000 that would end in abortion. Notably, health and fiscal benefits derived from other clinic services were not measured.”).
- ⁸⁹ *Stanford’s Estate v. Comm’r of Internal Revenue*, 308 U.S. 39, 60 (1939).
- ⁹⁰ *Ball v. Univ. of Md.*, 768 A.2d 105 (2001); see also, 73 Am. Jur. 2d Statutes § 103 (Sept. 2008).
- ⁹¹ The Prevention Through Affordable Access Act, H.R. 4054 (Nov. 1, 2007); see also Guttmacher Institute, *Facts on Publicly Funded Contraceptive Services in the United States* (2005) (noting that oral contraceptives are the foremost utilized means of preconceptual birth control and preserving fertility by controlling certain conditions. In fact, “[t]he pill is the only contraceptive method provided at virtually all family planning agencies; more than nine in ten agencies offer the pill, the male condom, and the injectable.”).
- ⁹² H.R. 4054.
- ⁹³ *Id.*
- ⁹⁴ *Id.*
- ⁹⁵ *Id.*
- ⁹⁶ Karina, The Gavel, *Financial Services Committee Holding Hearing on Financial Regulation*, <http://www.speaker.gov/blog> (last visited Oct. 16, 2008).
- ⁹⁷ Deficit Reduction Act § 6001(b)(1).
- ⁹⁸ Title X; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869-870 (1992).
- ⁹⁹ *An Outrageous Attempt by the Bush Administration to Undermine Women’s Rights*, available at www.huffingtonpost.com/hillary-clinton/an-outrageous-attempt-by_b_114064.html.
- ¹⁰⁰ See Letter from the United States Senate to the Secretary of the Department of Health and Human Services, (July 15, 2008) (opposing the redefinition of abortion to include birth control pills).
- ¹⁰¹ *Id.*
- ¹⁰² Letter from Senators, *supra* note 84.
- ¹⁰³ *Id.*
- ¹⁰⁴ *Id.*
- ¹⁰⁵ *Id.*

ENDNOTES CONTINUED

- ¹⁰⁶ See *id.* (including specific examples of adverse implications: allowing health care institutions to claim “conscious objection”; undermining important state laws which enable rape survivors access to emergency contraception; and conflicting with Medicaid and Title X which require contraceptive services to be provided).
- ¹⁰⁷ See H.R. 4054 (proposing to amend Title XIX of the Social Security Act to restore and protect access to Medicaid discount drug prices for university-based and safety-net clinics).
- ¹⁰⁸ *Id.* at § (2)(a)(2).
- ¹⁰⁹ Recalde, *supra* note 63 (relaying that the DRA was a direct result of changes in Medicaid reimbursement rules that limited the number of facilities that qualify for discounted prices.)
- ¹¹⁰ H.R. 4054; S. 2347.
- ¹¹¹ H.R. 4054
- ¹¹² *The Pill*, *supra* note 5.
- ¹¹³ *Id.* (Dr. Buxton was the chairman of the Department of Obstetrics and Gynecology at Yale Medical School and Ms. Griswold was the executive director of Connecticut Planned Parenthood).
- ¹¹⁴ *Griswold v. Conn.*, 381 U.S. 479 (1965).
- ¹¹⁵ See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (deciding, on Equal Protection grounds, that a Massachusetts law banning the distribution of contraceptives was invalid).
- ¹¹⁶ *Roe v. Wade*, 410 U.S. 113 (1973).
- ¹¹⁷ *Crego v. Coleman*, 615 N.W.2d 218, 223 (2000).
- ¹¹⁸ See WILLIAM A. KAPLIN, *AMERICAN CONSTITUTIONAL LAW: AN OVERVIEW, ANALYSIS, AND INTEGRATION*, 264 (Carolina Academic Press, 2004) (acknowledging that when an equal protection claim arises under the Federal Government, the 5th Amendment’s Due Process Clause is triggered because the Supreme Court has determined that it applies in the same manner as the equality concept of the 14th Amendment applies to the states).
- ¹¹⁹ See Timothy Stotlzfus Jost, *The Tenuous Nature of Medicaid Entitlement*, HEALTH AFFAIRS (2003), <http://content.healthaffairs.org/cgi/content/full/22/1/145>. (noting that unlike Medicare which has express entitlement language, Medicaid’s entitlement was recognized through a series of Supreme Court cases between 1968–1975).
- ¹²⁰ *Crego v. Coleman*, 615 N.W.2d 218, 234 (2000).
- ¹²¹ *Id.* at 234.
- ¹²² See 118 U.S. at 373–374. ([T]he cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the . . . Constitution of the United States).
- ¹²³ *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979).
- ¹²⁴ *Id.* at 280.
- ¹²⁵ *Facts on Publicly Funded Contraceptive Services in the United States*, Guttmacher Institute, (Aug. 2008).
- ¹²⁶ *Id.*
- ¹²⁷ *Id.*
- ¹²⁸ Letter from the United States Senate to the Secretary of the Department of Health and Human Services, (July 15, 2008).
- ¹²⁹ Letter from Senators, *supra* note 84.
- ¹³⁰ *Crego v. Coleman*, 615 N.W.2d 218, 228 (2000).
- ¹³¹ *United States v. Virginia*, 518 U.S. 515 (1996) (leading case demonstrating intermediate scrutiny review and the Court’s analysis of gender classifications); See also, Pub. L. No. 109-171 (2006) and the GAO report 06-69R (Oct. 31, 2006).
- ¹³² 518 U.S. at 545-546.
- ¹³³ *Contraceptive Services*, The Alan Guttmacher Institute (2005).
- ¹³⁴ 518 U.S. at 531.
- ¹³⁵ *Crego v. Coleman*, 615 N.W.2d 218, 228 (2000).
- ¹³⁶ *Id.*
- ¹³⁷ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).
- ¹³⁸ *Petermann v. Int’l Brotherhood of Teamsters*, 344 P.2d 25 (1959). See also Pub. L. 85-554 § 2, 72 Stat. 415 (1958) (amending 28 U.S.C. § 1332(c), provided that a corporation is to be deemed a citizen of any State in which it has been incorporated and of the State in which it has its principal place of business. 78 Stat. 445 (1964), amending 28 U.S.C. § 1332(c), was enacted to correct the problem revealed by *Lumbermen’s Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954)).
- ¹³⁹ See Nicole Coffin, MA, Yvonne Green, RN, MSN, CNM, *Prevention Works for Women: Women’s Health at the CDC*, available at <http://www.amwa-doc.org> (emphasizing the critical role the Center for Disease Control and Prevention (CDC) plays in promoting health and safety of women “across the lifespan, through the programs on human immunodeficiency virus infection, injury, contraceptive safety and efficacy, adolescent health, smoking breast and cervical cancer, cardiovascular disease and reproductive health.”).
- ¹⁴⁰ *Maine v. Thiboutet*, 448 U.S. 1, 4-8 (1980) (addressing that § 1983 is available to enforce a particular statute depending on two factors: (1) Congress must not have foreclosed private enforcement of the statute and (2) the statute must create enforceable rights); see also, *On First Impression, Tenth Circuit Holds That An Unincorporated Business Is Not A “Person” Within the Meaning of 42 U.S.C. § 1983* (Nov. 16, 2006), available at http://lawprofessors.typepad.com/unincorporated_business/2006/11/on_first_impres.html (noting that, “under common law, unincorporated associations, unlike corporations, did not have the capacity to sue or be sued.”).
- ¹⁴¹ *Planned Parenthood of Billings, Inc. v. State of Mont.*, 648 F.Supp. 47, 50 (D. Mont., 1986) (satisfying the first prong of the test set forth in *Thiboutet*); see *Crego v. Coleman*, 615 N.W.2d 218, 250 (2000).
- ¹⁴² 648 F.Supp. at 50 (satisfying the second prong of the test set forth in *Thiboutet*); see *supra* n. 191. See also 1970 U.S. Code Cong. and Adm. News, pp. 5054, 5068-5082; 42 U.S.C. §§ 300, 300a, et seq.
- ¹⁴³ *Id.*
- ¹⁴⁴ *Children’s Hosp. of Philadelphia v. Horizon NJ Health*, No. 07-5061 (E.D. Pa. Sept. 22, 2008) (according to the court, “a private party may be deemed a state actor if it: (1) is acting under government compulsion (see *Brentwood acad. V. Tenn. Secondary School Athletic Ass’n.*, 531 U.S. 288, 296 (2001)); (2) performs a function that has traditionally been the exclusive domain of the government (see *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)); or (3) has a symbiotic relationship with the government.”).
- ¹⁴⁵ *Id.* (“taking the allegations of the first amended complaint as true, Children’s Hospital of Pennsylvania (CHOP) has alleged a significant, albeit covert, encouragement by government officials to steer Horizon members away from CHOP.”).
- ¹⁴⁶ *U.S. Court In Pennsylvania Allows Hospital to Pursue § 1983 Claims Against Insurance Plan*, AHLA, Health Lawyers Weekly (Oct. 10, 2008), available at <http://www.healthlawyers.org>; see *Children’s Hosp. of Philadelphia*, No. 07-5061; *Planned Parenthood of Billings, Inc. v. State of Mont.*, 648 F.Supp. 47, 50 (D. Mont., 1986).
- ¹⁴⁷ *Children’s Hosp. of Philadelphia*, No. 07-5061; *Planned Parenthood of Billings, Inc.*, 648 F.Supp. at 50. See also Deficit Reduction Act § 6001(d)(2).
- ¹⁴⁸ *Planned Parenthood of Billings, Inc.*, 648 F.Supp. at 50.
- ¹⁴⁹ See *McDuffie v. Hopper*, 982 F.Supp. 817 (M.D. Ala. 1997) (holding that private corporate health care providers who contract with government agencies are not entitled to qualified immunity); *Hartman v. Correctional Medical Services, Inc.*, 960 F.Supp. 1577, 1582 (M.D. Fla. 1996); *Smith v. United States*, 850 F.Supp 984, 986 (M.D. Fla. 1994); see also, Ian Forsythe, *A Guide to Civil Rights Liability Under 42 U.S.C. § 1983: An Overview of Supreme Court and Eleventh Circuit Precedent*, available at <http://forsythe@forsthelaw.com> (last visited Oct. 10, 2008).
- ¹⁵⁰ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).
- ¹⁵¹ *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).
- ¹⁵² *Id.*
- ¹⁵³ See *Crego v. Coleman*, 615 N.W.2d 218, 229 (2000) (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) for the proposition that other cases make clear that “state action would also be found if the state has coerced or compelled the challenged action.”).

JONES V. BENNET: THE BIFURCATED LEGAL STATUS OF EARLY NINETEENTH CENTURY FREE BLACKS IN KENTUCKY

By
Alexander J. Chenault*

I. INTRODUCTION

In 1829, Henry Clay, then President of the American Colonization Society for the Free People of Color, pronounced:

“Of all the descriptions of our population, and of either portion of the African race, the free people of color are, by far, as a class, the most corrupt, depraved and abandoned. . . . They are not slaves, and yet they are not free. The laws, it is true, proclaim them free; but prejudices, more powerful than any law, deny them the privileges of freemen.”¹

This pronouncement accurately describes the existence of Levi Jones. Jones, a free man of color, was emancipated by his master, William Chenault, on the 31st of May, 1830, in Madison County, Kentucky.² Jones’ family’s story, told through the case of *Jones v. Bennet*, sheds light on the struggles faced by free persons of color in Kentucky. This struggle took place against the background of the first half of the 19th century before Lincoln signed the Emancipation Proclamation, freeing millions of black slaves.³ This paper will discuss the bifurcated status of early 19th century free blacks in Kentucky, both as “free blacks” under the eyes of the law and as second-class American citizens.

On May 8, 1840, the Court of Appeals of Kentucky decided the case of Levi Jones versus John and Samuel Bennet.⁴ Levi Jones’ master, William Chenault, emancipated Jones 10 years earlier.⁵ Unfortunately, this colored man, husband, and father of four would face a new burden with his new legal status. The Jones family would find itself defending the family’s freedom on at least two occasions because of unpaid debts.⁶

II. 1801–1830: PROPERTY OF WILLIAM CHENAULT

William Chenault, Jr. was a member of one of the oldest families in Kentucky. His father, William Chenault, Sr., served in the Revolutionary war under General George Washington.⁷ Chenault, Sr. was born in Albemarle, Virginia. Chenault was a descendant of Estienne Chenault, a French Huguenot who came to America with hundreds of others in 1701.⁸

Before Chenault settled in Kentucky, and after the Revolutionary War, the government issued soldiers land grants, encouraging the rapid settlement of Kentucky following the war.⁹ Kentucky became part of Virginia’s Fincastle County in 1772 and

remained part of Virginia until officially gaining its statehood on June 4, 1792.¹⁰ Many of the “old issue” free blacks (those freed before the civil war) descended from Africans born during the colonial period in Virginia.¹¹ Around 1786, William Chenault, Sr. settled in Kentucky with his slaves after purchasing a tract of land located near the present site of the city of Richmond, in Madison County. Chenault, Sr. died of the “cold plague” in the spring of 1813.¹²

William Chenault, Jr. was just thirteen when his parents brought him to Kentucky.¹³ He became influential in public affairs, and in 1822 he served as a representative in the state legislature. William married Susanna Phelps, the daughter of Josiah Phelps, another pioneer of Madison County, Kentucky.¹⁴ By 1802, Chenault was 27 years old. That same year, Levi Jones was born.¹⁵ According to the 1810 Census for Madison County, Chenault was listed as having eight slaves.¹⁶

The African-American presence in early Kentucky was due primarily to the transplant of Virginia’s model of slavery into the “trans-Appalachian West.”

The African-American presence in early Kentucky was due primarily to the transplant of Virginia’s model of slavery into the “trans-Appalachian West.”¹⁷ Kentucky had fewer slave laws than one might find in other slave states, but the patterns were similar. The first Constitution of the State in 1792 provided that all the laws then in force in the State of Virginia should be in force in Kentucky, with a few exceptions.

“Similar to the laws of Virginia, Kentucky laws legally defined enslaved blacks as real estate, with no civil or human rights.”¹⁸ Kentucky laws also promulgated the punishment for offenses committed by slaves; white legislators used the law to make sure that slaves could not travel freely, hoping thereby to curb the number of runaway slaves. Furthermore, if a captain hired or allowed a slave to travel on board a ship without the permission of that slave’s owner, his ship could be seized and sold. The law punished whites for selling liquor to blacks or assisting them in travel. The law also punished enslaved blacks for conspiracy against whites or for resisting whites. Several statutes, however, afforded slaves some religious standing, equal to some of the benefits enjoyed by free blacks, and also enabled owners to testify on a slave’s behalf.¹⁹

Under these laws, some slaves preceded their owners into the Kentucky frontier; clearing the land, building homes, roads, and other structures, and planting and harvesting crops. Other slaves entered Kentucky with their masters and, once settled, performed essentially the same domestic and agricultural tasks.²⁰ As the white population increased, the black population increased proportionately. At the time of the first federal census in 1790, in Kentucky there were 11,944 African-Americans and 114 of them were free people of color.²¹

III. MANUMISSION: PATHWAY TO FREEDOM

Manumission was a method whereby enslaved blacks could be emancipated. One of the earliest Kentucky statutes on the issue passed in 1800, providing that the last will of any person 18 years of age or older could emancipate slaves.²² Slaves could also try to buy their own freedom. Kentucky's economic system of small farms and small slave holdings encouraged a practice of slave leasing. This activity worked to the benefit of slaves. Rental slaves, who were allowed to hire themselves out, might after a number of years save money and eventually buy their freedom.²³

Just as early as slaves came to Kentucky, some were being manumitted. In 1782, even before Kentucky officially became a state, an enslaved man named Monk Estill helped prevent the destruction, by American Indians, of Estill's Station, his owner's property. Monk attempted to find Captain James Estill to warn him of the attack, and found him near present day Mt. Sterling just as the ambush began. Though Captain Estill was killed, Monk brought his body back to the station. For his bravery, Captain Estill's oldest son freed Monk through a process of "manumission." Monk moved to Fort Boonesboro wherein he became a skilled maker of gunpowder and the father of the first free African-American child to be born in Kentucky.²⁴

In 1830, William Chenault's cousin, John Bennet,²⁵ liberated a female slave named Sally Ann, the wife of Levi Jones and the mother of their four children.²⁶ Bennet was at some point a slave owner but seemed to have been opposed to slavery in principle. Regardless of his age or condition, a slave in Kentucky could be manumitted provided that his or her master posted sufficient security that the slave would not become a public charge. From 1794 to 1842 this posting of security was optional. Thereafter, and up until 1851, the posting of sufficient security was mandatory.²⁷ The omission of the bond provision after 1851 can be traced to the requirement that the ex-slaves leave the state. Other states such as Virginia had a certain period within which ex-slaves must leave; Kentucky did not specify such a time period.²⁸

The large number of slaves in Kentucky and the decreasing profits of slavery might have encouraged the practice of manumission. As the economic demands for more slaves increased in southern states, both Kentucky and Virginia's slave markets responded to the cotton belt's demands. In 1840, Robert Wickliffe, the largest slave owner in Fayette County, Kentucky, bragged to the Kentucky Legislature that up to 6,000 slaves per year were being sold to southern states from Kentucky.²⁹ Wickliffe's manumission of some of his slaves, sending them to Liberia, evinces the popularity of the practice. In a letter sent from Liberia, an octoroon woman, Milly—once owned by Wickliffe and who gave birth to a baby sired by Wickliffe's stepson—wrote a long letter thanking her former owners for their benevolence. Milly arrived in Liberia on July 11, 1833, along with 145 other new settlers. According to the ship records, 119 of the passengers were from Kentucky: 16 born free, the rest manumitted.³⁰

It was not uncommon for emancipated slaves to leave Kentucky. Upon manumission, most southern states did not allow freed slaves to reside within their borders. In 1691, Virginia enacted a law insisting that no Negro be set free unless the owner paid for his transportation out of the colony.³¹ Similarly, starting in 1851, a Kentucky master could free a slave, over sixty-five years old or infirm, but only if he gave the freed slave the means for transportation out of Kentucky and enough money to support the freed slave for one year.³² During the same period, Louisiana enacted a law requiring emancipated slaves to leave the country within a year. The law required the owner to pay for the freed slave's trip to Africa and for his support upon arrival.³³

Such statutes tended to discourage manumission. Undoubtedly, had Levi and Sally Ann's story taken place in the 1850's, their manumission would have been unlikely because of the increased financial responsibilities placed on the owners. Between 1830 and 1850, the number of free blacks in Kentucky doubled, increasing from 4,917 to just over 10,000. According to the Federal Census of 1860, however, the number of free blacks stagnated, suggesting that few slaves were manumitted after the laws were toughened in 1851.³⁴

While the date of Levi and Sally Ann's union is unknown, marriage between free blacks would not become legal until 1825. Moreover, the law absolutely did not recognize marriages between free blacks and slaves. The progeny of such unions assumed the status of the mother. As a result, many male slaves who achieved financial success by hiring themselves out purchased the freedom of their wives first, preventing their children being born into slavery.³⁵ Even if one had the means to do so, free persons of color could not purchase the freedom of their friends or extended family. The law provided that "[n]o free negro was capable of acquiring in fee, or holding for any length of time, any slave other than the husband, parent or descendant of such free negro."³⁶

The fact that free black owners, such as Jones, did not always emancipate their purchased relatives also proved problematic. Most free blacks purchased their slave relatives with the intent of emancipating them, but the threat of re-enslavement was possible.³⁷ Few free men could afford to post the sometimes-required bonds to ensure that newly freed slaves would not become wards of the county.³⁸ The possible fines for free blacks were plentiful; the homes of free families were often subject to raids by patrolmen searching for enslaved blacks illegally visiting their friends and family.³⁹ Fines were imposed for violators, such as having his or her slaves seized and sold for those slave owners who fell into debt.⁴⁰

IV: THE NOT SO PRETTY EXISTENCE OF FREE BLACKS IN KENTUCKY

"The liberty of colored free men has not been sufficiently guarded by the laws of the United States, nor any of the separate states."⁴¹

Around the date of Levi's manumission, Bennet, who was about to move to Missouri, entered into an agreement with

Levi Jones to sell him his own children for 300 dollars, payable in three annual installments, with legal interest from the date of the contract.⁴² The contract however, was not committed to writing until sometime after the date of the verbal agreement and the delivery of the children to Jones.⁴³

When John Bennet returned to Kentucky in the autumn of 1831, Levi was unable to pay the first installment for the purchase of his children.⁴⁴ His financial difficulties were not unique. Because free blacks competed with slaves and white labor, their wages were less than they might otherwise have been. On the other hand, some freemen prospered, holding themselves out as ministers, teachers, barbers and tailors.⁴⁵

Almost a year later, in May of 1832, Bennet's son, Samuel, who still lived in Kentucky, procured from his father a document purporting to be a bill of sale for the four children for the sum of three hundred and thirty-six dollars—the sum then due from Jones according to the terms of the contract.⁴⁶ Shortly thereafter, Samuel Bennet abducted Levi's three oldest children and detained them as slaves without Levi's consent.⁴⁷

Free people of color in Kentucky constantly feared kidnapping. Although the state had enacted anti-kidnapping laws, they were scarcely enforced and thus of little use. Kidnapping cases were difficult to prosecute because they often involved interstate travel.⁴⁸ Though selling free blacks into slavery became a crime after 1801, it was rumored that the practice continued throughout the antebellum period. As Marion B. Lucas explains, "corrupt patrollers" sold freemen to slave traders who took a policy of asking no questions about the status of the "slaves."⁴⁹ Particularly, free blacks who worked along the lower Mississippi were intimidated and forced into slavery.⁵⁰

Levi instituted his case not in a criminal court, but rather in chancery, a court authorized to apply principles of equity as opposed to law. In 1836, Levi filed a bill in Chancery against John and Samuel Bennet. He prayed for a decree upon equitable terms, which would return his children to him as restitution.

In court, free blacks operated from an inferior position to their white counterparts. Freemen did possess some important rights such as the right to trial by jury, the right to challenge jury selections, and the right to offer evidence in their own behalf.⁵¹ In capital cases, however, free blacks could not testify against whites.⁵² These limitations did not intimidate Jones. He went full force ahead, "averring that he had offered, and was still willing to pay the full amount of the conventional price."⁵³ Defendant John Bennet never answered the bill. His son Samuel resisted any decree for relief, insisting that the Chancellor—the judge of the Chancery—had no jurisdiction.⁵⁴ He also alleged that:

the terms of the contract of sale to Levi, authorized John Bennet to vacate the sale, in the event of a failure by Levi to make punctual payment of any one of the annual installments of the consideration; and which, as he averred, . . . John Bennet had done by selling the children to Samuel for 336 dollars.⁵⁵

The Chief Justice from the Circuit Court for Madison County thought otherwise. He was of the opinion that Levi was

entitled to relief. In regards to the jurisdiction argument, the court reasoned that:

A court of equity has jurisdiction to enforce a contract for movable property, or to coerce its restoration to its rightful owner, from whom it has been taken, whenever the property is of such a peculiar character that the recovery of damages, in lieu of the specific thing, would be but an inadequate or inappropriate remedy And there can be no stronger case of that class, than where a parent brings a bill to coerce the restoration of a child that has been abducted from him, and is held in slavery.⁵⁶

The Court found that "the abduction and detention of the children by Samuel Bennet, were unauthorized and tortious."⁵⁷

*Free people of color in
Kentucky constantly feared
kidnapping.*

The Court further held that Samuel Bennet should "be compelled to pay damages for the wrongful detention, and make restitution of the children, upon receiving the price which his father would have been entitled to receive from Levi, and the accruing interest thereon from the date of the contract in 1830."⁵⁸ The

Court declared: "One who has taken away and detained wrongfully the children of a colored man, is liable [to] him, for damages equal to the value of their hire."⁵⁹

The Jones family's peace was short lived. In 1845, just five years after the chancery held that Levi was entitled to the return of his family, two of his children, Betsy, 23, and Emily, 19, along with Betsy's two children, Spicy and Edmund, were in the Woodford Circuit Chancery Circuit Court suing again for their freedom.⁶⁰ A 1789 Kentucky statute allowed Jones to bring suit before the court providing that enslaved blacks should receive the same judgment and stand in the same condition with respect to the benefit of clergy as free blacks or mulattoes.⁶¹ According to the petition, they asserted that Jones purchased Emily and Betsy "upon the express consideration that said Emily and Betsy were to be free whenever they should attain the age of twenty-one years as likewise all their children born before that time."⁶²

Unfortunately, Levi Jones' children had been levied upon for debts and were about to be sold back into slavery to either Robert Adams or Benjamin Bailey to satisfy the judgments. They prayed to the chancery court for an injunction and a declaration of freedom.⁶³ The outcome of this prayer is unknown. According to the 1850 Census, Emily and Betsy were living with their mother and father. In fact, Levi had managed to purchase more relatives. The records list a 73-year-old, Anny, residing with the Jones household.⁶⁴ Levi, who was then 48, worked as a farmer in Versailles but owned no land.⁶⁵ The desire to purchase more of his relatives and the cost associated with doing so had put a strain on his ability to acquire property.

Free blacks in Kentucky walked a thin line between living as freemen and living in bondage. Freemen always had to be prepared to prove their legal status; they had to walk with their "free papers" or face jail time.⁶⁶ They lacked the right of privacy; "watchmen" could enter their homes at anytime without a warrant.⁶⁷ Moreover, if a free black was found to be loitering or "misbehaving," they could be captured and hired out for up to

three months per instance.⁶⁸ The rationale behind the policy was that the sight of free blacks encouraged slaves to seek their own freedom.⁶⁹

Free black children could also be bound out as apprentices if their parents were found to have no visible employment. Although when the Kentucky legislature enacted this law children bonded out had to be provided education, by 1843 the legislature had removed the requirement.⁷⁰ Transportation in and out of Kentucky was heavily restricted. In 1818, a state law forbade the migration of free blacks from other states into Kentucky.⁷¹ Railroads frequently refused free blacks passage even with their “free papers.”⁷²

V. ANTI-SLAVERY PRESSURE FROM THE BAPTIST CHURCH

Undoubtedly, slave owners were motivated by a variety of factors—financial, religious, sentimental, moral and ethical—to free slaves. Baptists in Virginia expressed opposition to slavery as early as 1787.⁷³ This may have influenced Chenault, who was a Baptist from Virginia, to free Jones. A number of the members of Baptist churches, acting independently of the churches, organized an anti-slavery society called the Kentucky Abolition Society.⁷⁴ Baptists and slaveholders hotly contested slavery in the Baptist church with emancipating Baptists consistently refusing to commune with slaveholders.⁷⁵ It is quite possible that William was at least influenced by the anti-slavery movement in the Baptist church.

Between 1829 and 1859, the Kentucky Colonization Society for Free People of Color helped 658 free blacks leave the state and settle in Liberia.⁷⁶ Kentucky’s public opposition to

slavery was carried out primarily through the work of the Kentucky Abolition Society and the Kentucky Colonization Society, the latter a branch of the National American Colonization Society. Founded in 1808, the Kentucky Abolition Society defined African slavery as “a system of oppression pregnant with moral, national and domestic evils, ruinous to national tranquility, honor and enjoyment.”⁷⁷ The Kentucky Abolition organized local anti-slavery societies in Kentucky. Eight local societies were reported by 1827.⁷⁸

“The colonization movement enabled influential slaveholding politicians like Henry Clay to favor sending free blacks and manumitted slaves back to Africa, while allowing them to also distance themselves from supporting the principle of immediate abolition.”⁷⁹ In addition to helping free blacks leave the country, abolition societies defended free blacks before the law and advocated to “ameliorate the condition of the slaves and to prevent the separation of families.”⁸⁰

VI. CONCLUSION

In Kentucky, when the state revised its constitution in 1799, free blacks further lost rights. They were “discriminated against and excluded from enjoying key citizenship rights, including being prohibited from voting, holding public office, and serving in the militia and from bearing arms.”⁸¹ The Jones family, suffering from many of these prejudices pronounced by Clay and by the State Constitution, did not leave the country or even their small town. While the Jones family could have fled to the North and its more lenient laws for free people of color, they stood their ground, fought back, and made the best of their complicated existence.

ENDNOTES

* Alexander Chenault is a 2009 J.D. Candidate at Tulane University Law School. After graduating cum laude from Morehouse College in 2003, he returned to his hometown of New York City and taught at a local middle school in Harlem. Chenault also holds a Master’s of Science in Education from the City College of New York. He is currently serving as a judicial extern to Judge Ivan L.R. Lemelle in the United States Eastern District of Louisiana.

¹ Henry Clay, An Address; Delivered to the Colonization Society of Kentucky, at Frankfort, December 17, 1829, by the Hon. Henry Clay, at the request of the Board of Managers, *in* 6 AFR. REPOSITORY & COLONIAL J. 1, 12 (1830). The American Colonization Society was an organization that helped in founding Liberia, a colony on the coast of West Africa.

² Jones v. Bennet, 39 Ky. (9 Dana) 333 (1840).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 333; 1850 FEDERAL CENSUS, NORTH CENTRAL KENTUCKY: COUNTIES OF ANDERSON, BULLITT, FRANKLIN, NELSON, SHELBY, SPENCER, WASHINGTON AND WOODFORD 389 (Byron Sistler & Assoc., Inc. 1995) (1850) [hereinafter 1850 FEDERAL CENSUS].

⁶ Brief of Petitioner, Jones v. Bennet, No. 20784506 (Woodford C.C. Sept. 1, 1845), available at <http://library.uncg.edu/slavery/details.aspx?pid=6375>.

⁷ Z. F. SMITH, THE HISTORY OF KENTUCKY 838 (1892).

⁸ The History of Estienne Cheneau/Stephen Chenault and His Descendants, http://www.chenault.org/NoFrames/family_history%20rev.htm (last visited Feb. 28, 2009) [hereinafter History of Estienne Cheneau].

⁹ The Library of Virginia, About the Revolutionary War Bounty Warrants, <http://www.lva.lib.va.us/whatwehave/mil/bountyabout.htm> (last visited Feb. 28, 2009).

¹⁰ Kentucky: Secretary of State, Frequently Asked Questions, <http://www.sos.ky.gov/land/nonmilitary/coformations/faq.htm> (last visited Feb. 28, 2009).

¹¹ Paul Heinegg, Free African Americans of Virginia, North Carolina, South Carolina, Maryland, and Delaware, <http://www.freeafricanamericans.com> (last visited Feb. 28, 2009).

¹² William A. LaBach, Ancestry of William Chenault (1773–1834) (2000), available at <http://members.tripod.com/~labach/chenaula.htm>.

¹³ SMITH, *supra* note 7, at 838; *Id.*

¹⁴ WILLIAM ELSEY CONNELLEY & ELLIS MERTON COULTER, HISTORY OF KENTUCKY 75 (Charles Kerr ed., 1922).

¹⁵ 1850 FEDERAL CENSUS, *supra* note 5, at 389.

¹⁶ 1810 FEDERAL CENSUS, MADISON COUNTY, KENTUCKY 204 (1810), available at <http://www.usgarchives.org/ky/madison/census/1810>.

¹⁷ J. Blaine Hudson, *African American Religion in Ante-Bellum Louisville, Kentucky*, 17 GRIOT 43, 43 (1998).

¹⁸ Slavery in America, Kentucky Slave Law Summary and Record, http://www.slaveryinamerica.org/geography/slave_laws_KY.htm (last visited Feb. 28, 2009) [hereinafter Slavery in America].

¹⁹ *Id.*

²⁰ Hudson, *supra* note 17, at 43.

²¹ *Id.*

²² Slavery in America, *supra* note 18.

ENDNOTES CONTINUED

- ²³ MARION BRUNSON LUCAS, *A HISTORY OF BLACKS IN KENTUCKY: FROM SLAVERY TO SEGREGATION* (1760–1891) 116-17 (2d ed. 2003).
- ²⁴ Kentucky Educational Television, Kentucky Historical Timeline, <http://www.ket.org/underground/timeline/kytime.htm> (last visited Feb. 28, 2009).
- ²⁵ See The History of Estienne Cheneau, *supra* note 8; See also CONNELLEY & COULTER, *supra* note 14, at 75; SMITH, *supra* note 7, at 838. The Chenaults first settled in America around 1700 after coming from Southern France. They were Huguenots and followers of John Calvin. They with about two hundred other Huguenots were granted by the Colonial Government of Virginia a tract of land in Monikin Town, then Powhattan, now Goochland County. The first Chenault settlers in this country were Stephen Chenault and his wife. His son was Hugo; Hugo's son was Felix, who married a Miss Dabney (or D'Aubigne); their son was William, who married Elizabeth Mullins; and their son William, Jr. married Susanna Phelps. A son of William and Susanna, Waller, married Talitha Harris, and they were the parents of Col. Christopher David Chenault. John Bennet was Christopher's cousin and his teacher. John Bennet's son, Samuel, married Elizabeth Chenault, the daughter of William, Jr. and Susanna.
- ²⁶ Jones v. Bennet, 39 Ky. (9 Dana) 333, 333 (1840).
- ²⁷ Benjamin Joseph Klebaner, *American Manumission Laws and the Responsibility for Supporting Slaves*, 63 VA. MAG. OF HIST. & BIOGRAPHY 443, 445 (1955).
- ²⁸ See *id.* at 448 (stating that in Virginia, ex-slaves had 12 months to leave. Other states were stricter. Tennessee required ex-slaves to leave immediately. In Louisiana, the time period for ex-slaves to leave ranged from 1 month in 1830 to 12 months by 1852; but by 1855, it was left up to a jury).
- ²⁹ See T.D. Clark, *The Slave Trade Between Kentucky and the Cotton Kingdom*, 21 MISS. VALLEY HIST. REV. 331-342 (1934).
- ³⁰ Four Letters from Liberia to Kentucky, Milly Crawford on Her Way to Liberia from Lexington, Kentucky, A Letter to Mary Owen Todd Russell Wickliffe (Mar. 10 1833) (on file with the University of Kentucky Special Collections and Archives), available at <http://www.bluegrass.kctcs.edu/LCC/HIS/scraps/liberia.html> (last visited Feb. 28, 2009).
- ³¹ Klebaner, *supra* note 27, at 449.
- ³² *Id.*
- ³³ *Id.*
- ³⁴ LUCAS, *supra* note 23, at 108.
- ³⁵ *Id.* at 109.
- ³⁶ Reed v. Reed, 5 Ky. Op. 408, 409 (1871).
- ³⁷ *Id.* at 114.
- ³⁸ *Id.*
- ³⁹ *Id.* at 114-16.
- ⁴⁰ *Id.*
- ⁴¹ CAROL WILSON, *FREEDOM AT RISK: THE KIDNAPPING OF FREE BLACKS IN AMERICA, 1780–1865* 67 (1994) (quoting *Report on the Slave Trade*, LIBERATOR, June 7, 1834, at 1).
- ⁴² Jones v. Bennet, 39 Ky. (9 Dana) 333 (1840).
- ⁴³ *Id.*
- ⁴⁴ Jones, 39 Ky. at 333.
- ⁴⁵ LUCAS, *supra* note 23, at 108-15.
- ⁴⁶ Jones, 39 Ky. at 333.
- ⁴⁷ *Id.*
- ⁴⁸ WILSON, *supra* note 41, at 67.
- ⁴⁹ LUCAS, *supra* note 23, at 115.
- ⁵⁰ *Id.*
- ⁵¹ *Id.* at 109.
- ⁵² *Id.*
- ⁵³ Jones v. Bennet, 39 Ky. (9 Dana) 333, 334 (1840).
- ⁵⁴ *Id.*
- ⁵⁵ *Id.*
- ⁵⁶ *Id.*
- ⁵⁷ *Id.* at 337.
- ⁵⁸ *Id.*
- ⁵⁹ *Id.*
- ⁶⁰ Brief of Petitioner, *supra* note 6.
- ⁶¹ Slavery in America, *supra* note 18.
- ⁶² Brief of Petitioner, *supra* note 6.
- ⁶³ *Id.*
- ⁶⁴ 1850 FEDERAL CENSUS, *supra* note 5, at 389.
- ⁶⁵ *Id.*
- ⁶⁶ LUCAS, *supra* note 23, at 113.
- ⁶⁷ *Id.* at 109.
- ⁶⁸ *Id.*
- ⁶⁹ Jim Reis, Editorial, *Free Blacks Seen as Threat in 1839*, KY. POST, Jan. 15, 2001, at Section: Editorial.
- ⁷⁰ LUCAS, *supra* note 23, at 114.
- ⁷¹ *Id.* at 115.
- ⁷² *Id.* at 113.
- ⁷³ William Dudley Nowlin, The Issue of Slavery Emancipation in Early Kentucky Baptist Churches – 1807, http://www.geocities.com/baptist_documents/emancipation.ky.bapt.html (last visited Mar. 2, 2009).
- ⁷⁴ ASA EARL MARTIN, *THE ANTI-SLAVERY MOVEMENT IN KENTUCKY PRIOR TO 1850*, at 40 (Negro Universities Press 1970) (1918).
- ⁷⁵ *Id.*
- ⁷⁶ Kentucky Educational Television, Westward Expansion and Development of Abolitionist Thought, <http://www.ket.org/underground/history/westexpansion.htm> (last visited Mar. 2, 2009) [hereinafter Kentucky Educational Television, Westward Expansion].
- ⁷⁷ *Id.* (quoting *The Apologist*, ABOLITION INTELLIGENCER AND MISSIONARY MAG. 81, 81 (1822)).
- ⁷⁸ Kentucky Educational Television, Westward Expansion, *supra* note 76; see also Nowlin, *supra* note 73.
- ⁷⁹ Kentucky Educational Television, Westward Expansion, *supra* note 76.
- ⁸⁰ MARTIN, *supra* note 74, at 47.
- ⁸¹ Dyana Bagby, Free Blacks in Upper Cumberland, <http://www.tntech.edu/publicaffairs/rel/1999/oct99/freeblacks.html> (last visited Mar. 2, 2009).

ROBUST EXCHANGE OF IDEAS AND THE PRESENCE OF THE AFRICAN AMERICAN VOICE IN THE LAW SCHOOL ENVIRONMENT: A REVIEW OF LITERATURE

By
Artika Tyner, Esq.*

People of color represent about 30% of the United States population, but less than 10% of lawyers.¹ African-Americans represent approximately 13% of the United States population, but only 6.8% of enrolled law students.² The rate of admission of African-Americans to law schools has experienced a continual decline, diminishing the racial diversity of the law student body and the legal profession.³

The primary purpose of this literature review is to explore the research related to the enrollment of African-American students in law school, the effects of low enrollment on law school culture, and the evidence of successful initiatives that have increased the number of African-Americans admitted to law school. The search strategy explored the following key search terms: racism, law school, law-study and teaching, law social aspects and African-American law students. The search yielded 23 articles, 1 newspaper article and 1 book.

In the first section, I describe the historical and current statistics related to low enrollment and I provide research related to the underlying reasons for the past and current enrollment trends. In the second section, I examine the impact of low enrollment on the law school environment and classroom dynamics. The final section provides a summary of methods used to increase the enrollment of African-Americans in law school, focusing specifically on replenishing the pipeline of competitive applicants and removing barriers in the law school admission process.

HISTORICAL RATES OF AFRICAN-AMERICAN ENROLLMENT IN LAW SCHOOLS

Segregationist policies in legal education were enforced from 1896 to the enactment of the Civil Rights Act of 1964.⁴ These policies created a barrier for African-Americans who sought to pursue a law degree and enter the legal profession.⁵ Law schools were impacted by the doctrine of “separate but equal” that was adopted in *Plessy v. Ferguson*,⁶ which required separate White and Colored race designations in public institutions and accommodations, including law schools. This doctrine directly impacted the enrollment opportunities available for African-Americans to enter law school and later practice law. In order to create access to the legal profession, litigation was necessary.⁷ For example, in the case of *Murray v. University of Maryland*,⁸ the State of Maryland was not able to provide a “separate but equal” law school for African-Americans. As a result of subsequent litigation, they were required to admit an African-American male,

Donald Murray. Simultaneously, “Blacks only” law schools were created to offer alternative opportunities for African-American applicants.⁹

One such example was the establishment of Howard Law School.¹⁰ The training at Howard Law School focused on effectuating social change by dismantling racial segregation and defeating Jim Crow laws. For instance, on January 26, 1947, civil rights leaders met to brainstorm ideas and strategically plan for ending racially restrictive covenants. Those in attendance included Howard alumni who had become civil rights pioneers, like William Hastie, Thurgood Marshall, Spottswood Robinson, and James Nabrit. Howard alumnus Justice Thurgood Marshall also served as counsel of the landmark court case *Brown v. Board of Education*, which overturned *Plessy v. Ferguson* by holding that separate educational facilities are inherently unequal.¹¹

Although admission to law school is no longer limited by the “separate but equal” doctrine, these historical barriers have had a lingering effect.¹² Presently, there are still a relatively low number of African-Americans admitted into law school and practicing law.¹³ In recent years there has been a decline in the rate of enrollment of African-American law school applicants, down 8.6% since 1992.¹⁴ The American Bar Association (“ABA”) Commission on Racial and Ethnic Diversity has found that advances for people of color in the legal profession have stalled.¹⁵ The 2000 ABA-sponsored Miles to Go report illustrates that there is still progress to be made. The report notes: “The legal profession—already one of the least integrated professions in the country—threatens to become even less representative of the citizens and society it serves.”¹⁶

Law schools have voluntarily used affirmative action initiatives to address the declining enrollment of people of color and promote racial diversity.¹⁷ Justice Marshall in *Bakke v. Regents of University of California*,¹⁸ expressed the importance of using race as a consideration in admission due to the historical barriers that restricted African-Americans from pursuing opportunities in higher education. Justice Marshall referred to affirmative action plans as a method of remedying over 200 years in which the Constitution did not prohibit the most “ingenious and pervasive” forms of racial discrimination.¹⁹ The University of Michigan Law School has used race as a plus factor in its admission process to promote racial diversity. In *Grutter v. Bollinger*,²⁰ the University of Michigan Law School’s practice passed muster of the Fourteenth Amendment’s Equal Protection clause. The Court held that the plan was narrowly tailored to derive the educational benefits

The rate of admission of African-Americans to law schools has experienced a continual decline, diminishing the racial diversity of the law student body and the legal profession.

of diversity.²¹ These educational benefits included the creation of a multicultural environment.

IMPACTS OF LOW ENROLLMENT ON LAW SCHOOL CULTURES

In *Grutter v. Bollinger*, the United States Supreme Court recognized that diversity of the law student body is essential to create the most “robust exchange of ideas.”²² Many benefits will be derived through this “robust exchange of ideas,” including: promoting cross cultural understanding, helping breakdown racial stereotypes, and enabling students to better understand different races. In order to reap the many benefits derived from racial diversity, law schools must admit a “critical mass” of qualified applicants of color, including a representation of African-American law students. *Grutter v. Bollinger* followed the precedent set forth in *McLaurin v. University of Oklahoma Board of Regents*, in which the Supreme Court held that the lack of exchanges across racial lines impairs the ability of diverse students to engage in discussions, exchange ideas, develop as a professional, and gain leadership skills.²³

Racial diversity is an important factor for reaching the mission of higher education. As a result, it is necessary to bring students of diverse ideas, backgrounds and experiences together.²⁴ The inclusion of law students from different racial backgrounds creates a healthy debate derived from diverse opinions; the absence of diversity creates a void in the learning environment and a correlating void in the legal profession.²⁵ In addition to the “robust exchange of ideas,” there is also a need for diversity in perspectives and life experiences to prevent feelings of isolation and alienation experienced by students when they are separated from a “critical mass” of others that share their same racial heritage.²⁶

Law schools have a mandate to ensure racial diversity in the classroom.²⁷ The ABA standards on equal opportunity and diversity require law schools to take “concrete action” to grant full opportunities for the study of law and professional opportunities to practice law to members of underrepresented populations, like African-Americans.²⁸

The benefits derived from diversity move beyond the classroom to the society as a whole since low enrollment of African-American law students leaves fewer attorneys of color in America’s history and less diversity on the bench and in the legal bar.²⁹ Achieving diversity is important for ensuring the “survival of our justice system, which is the connecting link between the rule of law and society,” according to 2000 ABA President William G. Paul.³⁰ Diversity in the law school student body will also alter the perception that the legal profession is not responsive to the needs of diverse populations.³¹ Former Detroit Mayor Dennis W. Archer stated that “[t]he strength of the justice system and our profession depends on the level of respect that people have for it.”³² The lack of racial diversity threatens the future of the justice system because racial equality cannot be reached until access to legal education is made available to all members of society.³³

METHODS FOR INCREASING THE ENROLLMENT OF AFRICAN-AMERICANS

The absence of a racially diverse student body in law schools across the nation has diminished the possibility of obtaining the benefits derived from a diversity of opinion in the classroom and collaboration outside of the classroom.³⁴ Researchers have attributed this decline to the dwindling pipeline of African-American students interested in pursuing a law degree³⁵ and barriers in the law school admission process, specifically Law School Admission Test (“LSAT”) performance percentiles and *U.S. News and World Report* rankings.³⁶

PIPELINE OF FUTURE LAW SCHOOL APPLICANTS

Due to the historical barriers to higher education that flowed from *Plessy v. Ferguson*, there is a need to implement measures that provide a large number of African-American students with quality education to compete in higher education opportunities, such as law school.³⁷ Despite the promise of equal opportunity embodied in *Brown v. Board of Education*, a disproportionate number of African-American children today attend rural and under-funded schools that are predominantly Black and unequal to their suburban counterparts.³⁸ Justice Thurgood Marshall highlighted in *Bakke v. Regents of University of California*, the need to be intentional in promoting racial diversity by creating a racial class-based remedy to address America’s history of discrimination against African-Americans.³⁹

Class-based discrimination is evidenced by the unequal opportunities in primary and secondary schooling that have placed applicants of color at an academic disadvantage.⁴⁰ Research in career choice and counseling psychology demonstrates that in order to encourage young people to pursue a particular career, they must be provided with the following opportunities: “career pathway education, career role models, social support and persuasion, and a chance to experience and enjoy career-related tasks.”⁴¹

SUCCESSFUL PIPELINE INITIATIVES

A partnership has been established between the National Association for Legal Career Professionals (“NALP”) and Street Law Incorporated to offer career development opportunities to low-income school children.⁴² This program will pair NALP sponsored law firms with local high schools. Practicing attorneys will teach law-related topics at high schools, including substantive areas of the law, the legal profession, and legal career paths. Street Law Inc.’s three decades of experience in academic training helps it provide ongoing support to participating law firms and high schools. Street Law Inc.’s efforts in improving diversity have focused on increasing the number of young people who express an interest in legal careers.

Advocates committed to replenishing the pipeline of African-American applicants strongly support mentorship pro-

. . . the United States Supreme Court recognized that diversity of the law student body is essential to create the most “robust exchange of ideas.”

gramming.⁴³ Mentorship offers the guidance needed to aid youth in career development.⁴⁴ These efforts should begin in elementary schools, focusing on fourth and fifth grades, while students have time to explore long-term career goals and see the practice of law as a realistic possibility.⁴⁵ One such opportunity can be found in serving as a mock trial coach. Monte Squire suggests that mentorship can help to prepare the next generation of lawyers.⁴⁶ Squire's work includes mentoring students at Howard High School and coaching their mock trial team. As a result of Squire's involvement, students have expressed increased self-confidence as well as interest in legal careers.⁴⁷ Twelfth grader Terrance Potter is determined to become an attorney: "I want to be an attorney because I have an interest in the political and legal process."⁴⁸ Gursimrat "Simmy" Kaur gained valuable skills to prepare for his future in higher education through Squire's mentoring. Simmy said "[Mock trial] challenges me academically and hones my group interaction skills, which are skills that I may need in college."⁴⁹

It is important to have lawyers and students of color involved as mentors.⁵⁰ Young students can then see themselves in the mentors' images and adopt higher goals of academic success.⁵¹ Maya Harris, Executive Director of the American Civil Liberties Union of Northern California, is devoted to mentoring students and describes her commitment as a "responsibility."⁵² She acknowledges that others opened doors for her and she challenges attorneys of color to open the door wider for future generations. Community involvement is an integral part of helping students to explore career options. Replenishing the pipeline requires a collective effort of the African-American community in encouraging African-American students to pursue a career in the legal profession.⁵³

FINANCING A LEGAL EDUCATION

Socioeconomic barriers limit access to law school for African-American students.⁵⁴ Law school is a substantial investment of at least \$100,000; the average amount of law school debt is \$85,000.⁵⁵ Some initiatives have been successful in making law school accessible by providing financial support. For example, Seattle University admits 30 diverse students that demonstrate an "indicia of success" and offers financial and academic support for each.⁵⁶ At a national level, the 2000 ABA President William G. Paul raised \$1.3 million in less than a year to offer scholarship funds to students of color in need.⁵⁷ These efforts address the financial challenges experienced by African-American students as they seek to finance a legal education.

BARRIERS IN LAW SCHOOL ADMISSION

The decline of African-American law student enrollment has been attributed to the over-reliance on standardized tests and influence of national rankings.⁵⁸ According to Nussbaumer, efforts during the past ten years to further diversity by enrolling more African-American law school students have

failed because law school admission and accreditation practices have in effect created a system of de facto racial segregation in America's law schools.⁵⁹ The majority of law schools use the LSAT scores as a factor in determining admission eligibility. The LSAT/UGPA index demonstrates a measure of cognitive ability but only predicts about 25% of a law student's success during the first year.⁶⁰

African-American students tend to score lower on the LSAT than the national average.⁶¹ The average LSAT scores for African-Americans are 143–144,⁶² while the national average is 150.⁶³ Okechukwu Oko argues that this poor academic performance is not reflective of an innate lack of academic skills, but is caused by factors such as racial and socioeconomic barriers.⁶⁴ Oko attributes poor performance on the LSAT to poor academic training, lack of mentorship, and limited access to financial resources.⁶⁵ Low scores serve as a bar to admission. When law schools receive pressure from ABA accreditors to limit the number of applicants with LSAT scores less than 141,⁶⁶ this limits the number of African-Americans that will enter law school.

A more holistic, individualized approach to the admission process would be to provide an in-depth analysis of each applicant's qualifications.⁶⁷ By applying this approach, Louisiana State University has made strides in increasing African-

*A more holistic,
individualized approach
to the admission process
would be to provide
an in-depth analysis
of each applicant's
qualifications.*

American law student enrollment.⁶⁸ Studies have shown that there are a number of alternative assessment measures of academic success in law school beside the LSAT: emotional intelligence (determining how a person can regulate, manage and perceive emotions), accomplishment record history (highlighting achievements in strategic planning, problem solving and research), situational judgment (evaluating one's decision making skills), and moral responsibility (examining the evolution of one's moral development).⁶⁹ The use of alternative cognitive assessment tools has decreased the difference in performance results between African-American and White-American students. Dr. Zedeck has used a variety of measures to test cognitive ability: instead of giving exams administered through traditional paper and pencil methods, he has used videotape demonstrations and then asked test participants to respond to the video.⁷⁰ Through this method, he was able to reduce the performance gap between African-Americans and White-Americans by half of a standard deviation.⁷¹

Universities have also tried alternative methods that offer a more individualized selection process without taking into account LSAT scoring. The University of Michigan has created a new special admissions program called the "Wolverine Scholars Program." This program will not consider LSAT scores.⁷² Admission will be determined instead by a student's grade point average, leadership experience, community service, and resilience in dealing with adversity.

LSAT scores also influence national law school rankings for the U.S. News and World Report.⁷³ This ranking system does not measure a law school's ability to reach the most "robust exchange of ideas;" instead the rankings focus on numerical data, like the LSAT. This influences the admission selections of law schools as they strive to build a national reputation.⁷⁴

CONCLUSION

This literature review explored the research related to the enrollment of African-American students in law school, the effects of low enrollment on the law school culture, and evidence of successful initiatives that have increased the number of African-Americans admitted to law school. The literature review began by examining the historical barriers of racial segregation in law schools which led to the birth of affirmative action and emphasis on racial diversity. The key case in this analysis, *Grutter v. Bollinger*, created precedent by allowing law schools to use race as a plus factor during the admission process analysis. The underlying goal of *Grutter v. Bollinger* was to create the most “robust exchange of ideas” through the inclusion of voices from various different racial backgrounds. Despite these efforts, the matriculation of African-American law students has continued to remain comparatively low.

The question then becomes: “How do law schools increase the presence of the African-American voice in the law school environment to create the most ‘robust exchange of ideas?’” Researchers assert that law schools and attorneys alike must make a concerted effort to increase racial diversity by creating a

“How do law schools increase the presence of the African-American voice in the law school environment to create the most ‘robust exchange of ideas?’”

pipeline of qualified African-American law school applicants.⁷⁵ Researchers have also found barriers in the admission process due to LSAT scores and U.S. News World and Report rankings.⁷⁶

The literature available does not adequately address attrition rates. The literature challenges the validity of LSAT scores being a measure of future academic success but fails to offer data that either approves or disapproves this premise. There is still a need for studies that explore the role of the LSAT in predicting academic performance, bar passage, and ability to practice law. I would recommend additional research in these areas. The students recently admitted to the University of Michigan without taking the LSAT would make an ideal research sample. Researchers should monitor their performance from their first year at school through their bar passage.

In closing, the United States Supreme Court’s vision of creating a most “robust exchange of ideas” is an inspirational goal that should become a reality. The law school culture would benefit immensely from an environment where students of various different racial heritages can gather together to discuss the nation’s most challenging issues and use their analytical and critical-thinking skills to address them.

ENDNOTES

* J.D., University of Saint Thomas School of Law, B.A., Hamline University (Certificate in Conflict Studies). Artika Tyner is a Clinical Law Fellow in the Community Justice Project (CJP) of the University of St. Thomas Interprofessional Center for Counseling and Legal Services. She serves on the Ramsey County Bar Association Youth and the Law and Diversity Committees. She also is an ABA Diversity Fellow and ABA Young Lawyers Division member.

¹ M. Buckley, *Pitching in to expand the pipeline*, A.B.A. Section of Litigation *Minority Trial Lawyers*, 10 (2006).

² John Nussbaumer, *Misuse of the law school admissions test, racial discrimination, and the de facto quota system for restricting African-American access to the legal profession*, 80 ST. JOHN’S L. REV. 167, 170-181 (2006).

³ *Id.*

⁴ Dr. A’Leila Robinson Henry, *Perpetuating inequality: Plessy v. Ferguson and the dilemma of black access to public and higher education*, 27 J.L. & EDUC., 47, 59 (1998).

⁵ R.C. Howell, *The mission of black law schools toward the year 2000*, 19 N.C. CENT. L.J. 40, 43 (1990).

⁶ 163 U.S. 537 (1896).

⁷ Henry, *supra* note 4, at 56.

⁸ 169 Md. 478 (1936).

⁹ Okechukwu Oko, *Laboring in the vineyards of equality: promoting diversity in legal education through affirmative action*, 23 S. U. L. REV., 189, 200-12 (1996).

¹⁰ Howell, *supra* note 5, at 40.

¹¹ *Brown v. Board of Ed.*, 347 U.S. 483 (1954).

¹² Oko, *supra* note 9.

¹³ Nussbaumer, *supra* note 2.

¹⁴ *A disturbing trend in law school diversity*, (last visited Sept. 28, 2008) <http://www2.law.columbia.edu/civilrights/>.

¹⁵ Pamela J. Podgers, *Progress hits a wall: minority law school enrollment stalls, prompting calls for new diversity efforts*, A.B.A. J., 86, 94 (2000).

¹⁶ *Id.*

¹⁷ Oko, *supra* note 9, at 196.

¹⁸ 438 U.S. 265 (1978).

¹⁹ *Id.* at 387.

²⁰ 539 U.S. 306 (2003).

²¹ Athena D. Mutua, Frank H. Wu, Charles E. Daye, Margaret E. Montoya, Marjorie M. Shultz & David L. Chamber, *Who gets in? The quest for diversity after Grutter*, 52 BUFF. L. REV., 531 590-595 (2004).

²² 539 U.S. at 332.

²³ *McLaurin v. Univ. of Oklahoma Board of Regents*, 332 U.S. 631 (1950).

²⁴ Mutua, *supra* note 21, at 533.

²⁵ W. DeCuir, *Diversity in the legal profession: What is the goal? Where do we stand?: Diversity within La. law schools*, 53 LA. B. J., 124, 125 (2005).

²⁶ Charles Richard Calleros, *Patching leaks in the diversity pipeline to law school and the bar*, CAL. W. L. REV., 131, 132 (2006).

²⁷ Andy Guess, *Diversity meets data at George Mason Law*, INSIDE HIGHER EDUCATION, Sept. 26, 2008, <http://www.insidehighered.com/news/2008/06/26/gmu>.

²⁸ Oko, *supra* note 9, at 199.

²⁹ *A disturbing trend in law school diversity*, SOCIETY OF AMERICAN LAW TEACHER (visited Sept. 28, 2008) <http://www.saltlaw.org/news/disturbing-trend-law-school-diversity-0>.

³⁰ Podgers, *supra* note 15, at 94.

³¹ Oko, *supra* note 9, at 190.

³² Podgers, *supra* note 15, at 94.

³³ Oko, *supra* note 9, at 194.

³⁴ DeCuir, *supra* note 25, at 125.

ENDNOTES CONTINUED

- ³⁵ See Susan Kostal, *Attorneys working toward the tipping point for diversity*, SAN FRANCISCO ATTORNEY, 18-29 (2007); M. Buckley, *Pitching in to expand the pipeline*, A.B.A. Section of Litigation *Minority Trial Lawyers*, 10 (2006) (showing that less African-Americans are enrolling into law schools).
- ³⁶ Nussbaumer *supra* note 2; Mutua *supra* note 21; Buckley *supra* note 1.
- ³⁷ Henry, *supra* note 4.
- ³⁸ *Id.*
- ³⁹ Bakke v. Regents of Univ. of Ca., 438 U.S. 265 (1978).
- ⁴⁰ Calleros *supra* note 26.
- ⁴¹ National Association for Legal Career Professionals (NALP) Bulletin, (visited Feb. 16, 2009), <http://www.nalp.org>.
- ⁴² Olivia Clarke, *Improving diversity through pipeline programs*, STREET LAW, (visited July 8, 2008) <http://www.streetlaw.org/en/Article.69.aspx>.
- ⁴³ Calleros, *supra* note 26; Monté T. Squire, *Replenishing the pipeline: preparing the next generation of lawyers by mentoring high school students*, STREET LAW, (visited July 8, 2008) <http://www.streetlaw.org/en/Article.69.aspx>.
- ⁴⁴ Buckley, *supra* note 1, at 10.
- ⁴⁵ Calleros, *supra* note 26.
- ⁴⁶ Squire, *supra* note 43, at 1.
- ⁴⁷ *Id.* at 2.
- ⁴⁸ *Id.*
- ⁴⁹ *Id.*
- ⁵⁰ Kostal, *supra* note 35.
- ⁵¹ Calleros, *supra* note 26.
- ⁵² Kostal, *supra* note 35, at 20.
- ⁵³ Niraj Sheth, N., *Diversifying the law school*, THE STANFORD DAILY, May 19, 2008, available at <http://daily.stanford.edu/article/2006/5/19/diversifying> TheLawSchool.
- ⁵⁴ Oko, *supra* note 9, at 196.
- ⁵⁵ Andrew P. Morris & William D. Henderson, *The new math of legal education*, A.B.A. (2008).
- ⁵⁶ M. Weyenberg, J. Crittenden, U. Furi-Perry, & K. Dybis. *Disappearing Act*, 17 NATIONAL JURIST 6, Mar. 2008 available at <http://www.nxtbook.com/nxtbooks/cypress/nationaljurist0308/index.php>.
- ⁵⁷ Podgers, *supra* note 15, at 94.
- ⁵⁸ Dianne Hayes. *Members of Congress want investigation into black law student decline*, DIVERSE ONLINE, Oct. 8, 2006, http://www.diverseeducation.com/artman/publish/article_6491.shtml.
- ⁵⁹ Nussbaumer, *supra* note 2, at 167.
- ⁶⁰ Mutua, *supra* note 21, at 590-595.
- ⁶¹ Nussbaumer, *supra* note 2; Oko, *supra* note 9.
- ⁶² Nussbaumer, *supra* note 2, at 176.
- ⁶³ LSAT Center, 2005, available at <http://www.lsats-center.com/lsat-page2.html>.
- ⁶⁴ Oko, *supra* note 9, at 202.
- ⁶⁵ *Id.* at 201.
- ⁶⁶ Hayes, *supra* note 58.
- ⁶⁷ Decuir, *supra* note 25, at 125.
- ⁶⁸ *Id.*
- ⁶⁹ Mutua, *supra* note 21, at 549.
- ⁷⁰ *Id.*
- ⁷¹ *Id.*
- ⁷² Debra Cassens Weiss, *No LSAT allowed in Michigan Law School's special admissions program*, A.B.A. J., Sept, 26, 2008 available at http://abajournal.com/news/no_lsats_allowed_in_michigan_law_schools_special_admissions_program/.
- ⁷³ Nussbaumer, *supra* note 2, at 175.
- ⁷⁴ See Calleros, *supra* note 26.
- ⁷⁵ Olivia Clarke, *Improving diversity through pipeline programs*, STREET LAW, (visited July 8, 2008) <http://www.streetlaw.org/en/Article.69.aspx>; Squire, *supra* note 43.
- ⁷⁶ Weiss, *supra* note 72; Nussbaumer, *supra* note 2; Hayes, *supra* note 58.

The Modern American
is now available on the
Westlaw, LexisNexis, HeinOnline,
and V.lex databases.

THIS GAME IS RIGGED: THE UNEQUAL PROTECTION OF OUR MENTALLY-ILL INCARCERATED WOMEN

By
Joanna E. Saul*

INTRODUCTION

More mentally-ill women fill our jails and prisons every day.¹ Within the past few years, the number of women entering our state prisons has increased at almost twice the rate of men.² Even more astonishing is that 73% of these women in state prisons have a mental health problem, in striking contrast to only 55% of male state inmates.³ Both male and female inmates are equally dependent on the state to provide mental health treatment and both have an equal right to care under the Constitution.⁴ However, women often receive mental health services inferior in quality and quantity to those received by men.

If denied treatment, female inmates may have to resort to the courts. In 2005, several female inmates at the Taycheedah Correctional Institution in Wisconsin filed *Flynn v. Doyle*⁵ with the assistance of the Wisconsin ACLU on behalf of all women incarcerated in Taycheedah. The lead plaintiff, Kristine Flynn, is a 48 year old woman who suffers from bipolar mood disorder and social anxiety syndrome.⁶ She is considered seriously mentally-ill by the Wisconsin Department of Corrections.⁷ According to the complaint, Flynn was prescribed eight different psychotropic medications within one year, taking some of them simultaneously.⁸ Yet she only had her blood drawn once to test her liver function during that year.⁹ In 2002, prison staff ordered her to be immediately taken off of all medications.¹⁰ Flynn attempted suicide six days later.¹¹ After being taken to the hospital, she took one person hostage and assaulted a security guard.¹² The court-appointed psychiatrist testified that her behavior was due to the interruption in her medication, yet an entire month passed after the assault before she was re-medicated.¹³ Four years were added to her sentence, she was housed in segregation, and she still did not receive her medication.¹⁴ Flynn was unable to eat, sleep, or take care of her basic needs during this period¹⁵ and she attempted suicide again.¹⁶ She did not receive any group or individual therapy, despite having requested counseling several times.¹⁷ This case is still pending in the Eastern District Court of Wisconsin.

Flynn is representative not only of women in the Wisconsin correctional system, but of mentally-ill women in correctional institutions across the nation who receive inadequate and ultimately harmful treatment. Imprisoned litigants, such as Flynn, will have to battle separately in each state for their mental health needs. And indeed, if the prison system ignores their needs, courts may be the best recourse. According to the Supreme Court, “[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.”¹⁸ Yet this promise may be mere talk: in reality, the courts have granted “substantial deference” to prison authorities¹⁹ and have perpetuated gender discrimination.

This paper will examine recent inmate equal protection cases and will argue that Flynn and similar plaintiffs nationwide stand little chance of success, given the impossible standard established by the federal appellate courts that defeats any equal protection claim brought by female inmates. Part I will introduce the problem of inadequate mental health treatment for female inmates, including the current level of illness in the female population entering prison, and the gender-based differences in care that the women receive. Part II will examine the Equal Protection clause of the Fourteenth Amendment in relation to the American correctional system. It will compare the most recent Equal Protection cases brought by prison inmates to the seminal case of *United States v. Virginia*, involving female college students. This section will also advocate for a similar application of the law to the claims of female inmates. Part III will conclude that courts need to create a workable standard that ensures the constitutional equal protection rights of female inmates.

*... the courts have granted
“substantial deference”
to prison authorities and
have perpetuated gender
discrimination.*

I. THE INADEQUATE TREATMENT OF MENTALLY-ILL WOMEN PRISONERS

Mental illness is a serious problem for the majority of America’s female inmate population. Inadequate mental health resources for female inmates affect more than just the residents within the prison walls: most inmates eventually leave the prison and return to the community from which they came.²⁰ The following sections examine first the prevalence of mental health illnesses among female inmates; second, gender-based differences in mental health treatment in prisons; and third, the constitutional right of inmates to adequate mental health treatment.

A. THE MENTAL ILLNESS OF AMERICA’S PRISON POPULATION

The mental health of America’s inmates is in a crisis: 73% of women in state prisons have a mental health problem.²¹ The cause of this crisis is clear: as public mental hospitals have emptied due to cost and other pressures, the mentally-ill, who rightfully should be treated in a hospital setting, have entered our prison systems.²² From 1955 to 2000, the number of patients housed in state mental hospitals dropped from almost 560,000 to about 56,000.²³ Between 2000 and 2003, the average number of residents in state- and county-run mental hospitals was less than 50,000.²⁴ Similarly, the lengths of stays in private psychiatric hospitals dropped from twenty-one days per episode in 1980 to five or six days in 2004.²⁵ Conversely, the adult population in

under correctional supervision grew from 1,842,100 in 1980 to 7,211,400 in 2006.²⁶ According to a recent Bureau of Justice Statistics' estimation, 705,600 inmates in state prisons had a mental health problem at midyear 2005.²⁷ Assuming these numbers are correct, there are currently fourteen times as many mentally-ill persons housed in our correctional facilities as in our state mental hospitals. Women in particular are afflicted, as a greater percentage of female inmates are reported to have a mental health problem,²⁸ while there is lesser availability of treatment.

In addition to their basic mental health needs, inmates with mental health problems also have a higher probability of substance abuse²⁹ and self-harm, including suicide.³⁰ Drug abuse has serious public health implications, including the increased risk of disease transmission, such as HIV/AIDS, as well as the risk of injury to any children the women may be carrying. A strong correlation exists between severe mental disorders and suicidal inclinations³¹—suicide is therefore a substantial concern with any mentally-ill incarcerated population and particularly with female inmates.³² Common methods of suicide attempts by inmates include hanging, overdose, laceration, asphyxiation, and ingestion of toxic substances such as shampoo.³³

Female inmates across America are afflicted with mental health problems that require attention. Without effective treatment, these women return to the community with the same illnesses, if not made worse due to the length of time without treatment.

B. GENDER BIAS IN THE PROVISION OF MENTAL HEALTH SERVICES IN PRISON

Gender bias in prison has resulted in both over-diagnosis and under-diagnosis of mental illness. Historically, prison staff have used medication to sedate inmates and control disruptive behavior.³⁴ Criminal women in particular have been "treated" because they exhibited "male" characteristics such as anger or aggression that did not fit the societal mold of the docile homemaker.³⁵ Conversely, female mentally-ill inmates often suffer from inadequate treatment because they are not correctly identified as mentally-ill or because the prison does not have the resources to treat them.³⁶ Prisons that do not have the necessary resources frequently house the mentally-ill in disciplinary segregation, limiting the inmates' access to programming or social interaction.³⁷

A primary obstacle to the adequate treatment of mentally-ill female inmates is the lack of a national validated instrument for mental health screening for adult prison.³⁸ Each state has come up with its own system, with varying success. In general, prisons' tools for screening inmates with mental illnesses are faulty.³⁹ Without a standardized, reliable system, prison staff are subject to the gender stereotypes that have been shown to affect treatment choices and they are more likely to overlook inmates who do need treatment. The inmates themselves may not know that they have a problem and therefore may not bring themselves to the attention of a mental health professional. For example, in a Bureau of Justice Statistics' study in 1999, only 24% of women in state prison and local jails evaluated themselves as being

mentally-ill.⁴⁰ In comparison, in a 2006 study, when others within the prison were surveyed regarding symptoms demonstrated by the inmate population, 73% of the female state inmate population were identified as mentally-ill.⁴¹ Clearly, better screening tools need to be developed and used.

Even when women are successfully identified by a screening instrument, men have better access to medical services⁴² by virtue of their larger population. Many treatment programs have been designed with men in mind⁴³ and have not taken into account the unique needs of the female population.⁴⁴ In addition, several state prison systems have facilities designated solely for use as a psychiatric hospital

for men, but have no corresponding facilities for women.⁴⁵ This is a primary basis for complaint in *Flynn v. Doyle*: in Wisconsin, only men have access to a facility providing round-the-clock care and individualized treatment.⁴⁶ The prisons justify gender separations in prison based on security reasons and limited finances. However, under the Equal Protection Clause, women should not be denied the same level of care available to men simply based on their gender.

C. THE CONSTITUTIONAL REQUIREMENT FOR MENTAL HEALTH TREATMENT IN PRISON

Under the Eighth Amendment, prisons are constitutionally required to provide medical health care for inmates.⁴⁷ The Fourth and Fifth Circuits have interpreted this obligation as inclusive of mental health care.⁴⁸ According to the Fourth Circuit,

[an inmate] is entitled to psychological or psychiatric treatment if a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty (1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial.⁴⁹

The numerous phrases open to interpretation in the above standard render it useless for practical guidance to prison officials.⁵⁰ Thus, several district courts have provided more definite guideposts by which to judge a prison health care system:

The six components are: (1) a systematic program for screening and evaluating inmates to identify those in need of mental health care; (2) a treatment program that involves more than segregation and close supervision of mentally ill inmates; (3) employment of a sufficient number of trained mental health professionals; (4) maintenance of accurate, complete, and confidential mental health treatment records; (5) administration of psychotropic medication only with appropriate supervision and periodic evaluation; and (6) a basic program to

identify, treat, and supervise inmates at risk for suicide.⁵¹

While this standard provides more definite boundaries for a prison healthcare program, it has not been affirmed by a higher court.⁵² Ultimately, female inmates' constitutional right to and need for adequate mental health care is not being met.

II. THE UNEQUAL PROTECTION OF FEMALE INMATES

Female inmates wishing to sue prisons based on their inadequate treatment will find that the federal courts have narrowed prison-based equal protection law such that it is nearly impossible for female inmates to succeed. The courts have established two barriers to a successful action: (1) splitting hairs over what constitutes "similarly situated" inmate groups and (2) deference to prison finances.

A. THE COURTS' DISCRIMINATORY APPLICATION OF EQUAL PROTECTION LAW

The Equal Protection Clause of the Fourteenth Amendment requires the government to treat similarly situated people alike.⁵³ It prohibits intentional discrimination on the basis of gender by state actors.⁵⁴ Under this standard, discriminatory classification or treatment between men and women is subject to heightened scrutiny.⁵⁵ For a gender-based classification to withstand the heightened standard of scrutiny, it must "serve important governmental objectives," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives."⁵⁶ To succeed on an equal protection claim, a plaintiff must pass a threshold showing that she is similarly situated to others who received more favorable treatment.⁵⁷ The next sections will examine the recent history of equal protection jurisprudence, providing an in-depth look at the courts' reasoning.

1. EQUAL PROTECTION OF FEMALE INMATES

Flynn's biggest challenge in the Equal Protection arena is finding a "similarly situated" group to satisfy the courts. "Similarly situated" has been broadly defined by the Supreme Court: the two groups do not have to be alike in every aspect.⁵⁸ In fact, in *City of Clebourne v. Clebourne Living Center*, the Supreme Court said that even though the group home for the mentally disabled, which was denied a permit by the city, was different from other facilities that were permitted permits, the main question was whether the proposed group home would affect the legitimate governmental interests in a way that the permitted uses did not.⁵⁹ In *Parents Involved in Community Schools v. Seattle School District No. 1*,⁶⁰ a case involving students of different ages and races, and schools of different sizes, the question of whether the students were similarly situated did not even arise.

Female inmates, however, have received far different treatment in the lower courts. For example, in *Klinger v. Dep't of Corrections*, the plaintiffs housed at Nebraska's female institution stated for the purposes of litigation that they were similarly situated to a male facility.⁶¹ The trial court agreed that the two groups were similarly situated because they were both housed in

Nebraska correctional institutions, the institutions had a similar range of custodial levels, and the purposes of incarceration were the same for both groups.⁶² The Eighth Circuit, however, reversed the lower court's decision by highlighting the differences between the two institutions: the male facility housed six times as many inmates as the women's; the average stay at the men's facility was two to three times as long as at the women's; the men's facility was two security grades higher than the women's; and the women had different characteristics from the men due to their parental status and likelihood of past abuse.⁶³ Further, the appellate court highlighted economic limitations: "[W]hen determining programming at an individual prison under the restrictions of a limited budget, prison officials must make hard choices."⁶⁴ Thus, the court was willing to allow inferior programming for women based on "limited resources."⁶⁵ The court seemed to conclude that comparing male and female institutions is not just comparing apples and oranges, but comparing apples and Volkswagens.

The Eighth Circuit also granted substantial deference to the prisons.⁶⁶ The court concluded that doing any prison-to-prison program comparison was "futile" and that doing such a comparison "places the burden on prison officials to explain decisions that resulted from the complicated interplay of many variables."⁶⁷ The court stated that any such asking of explanation would result in "micro-management" and worried that the facilities would end up providing only the "bare constitutional minimum of programs and services to avoid the threat of equal protection liability."⁶⁸ The aim of the litigation was to show that the prison already was failing to provide the "bare constitutional minimum." Thus, in providing its worst-case scenario of the prison sticking to the bare minimum, the court avoids forcing the prisons to abide by the Constitution so as to avoid litigation.

In the murkiness of prison-based equal protection litigation, at least one court has made clear what "similarly situated" does *not* mean: in *Women Prisoners of the D.C. Dep't of Corrections v. D.C.*, the Court of Appeals for the District of Columbia rejected a three-factor test that included similar custody levels, sentence structures, and purposes of incarceration.⁶⁹ Instead, the court emphasized that there are "many considerations" and "innumerable variables," including the characteristics of the inmates and the size of the institution.⁷⁰ This standard is extremely vague and presents difficulties to future female prisoner litigants in choosing a similarly situated group to which to compare themselves. Yet even after this rhetoric of innumerable variables, the court focused on but one: the fact that the men's prison had 936 inmates and the women's prison had only 167.⁷¹ The court concluded that "it is hardly surprising, let alone evidence of discrimination" that the smaller facility had fewer programs.⁷² This holding is disturbing because it in effect denies to women inmates any potential success on equal protection grounds. Women compose a much smaller percentage of the total inmate population.⁷³ The smaller number of female inmates allows most states to house all women in the same, multi-classification prison, while men by virtue of their greater population size can be broken into institutions by individual classifications.⁷⁴ Under the court's holding, even if the women were housed in separate institutions by classification, they would not be similarly situated to the men due to population; and if the women were housed together, they would not be similarly situated due to classification. The court fails to acknowledge this reality.

Other courts have also adhered to this belief that differing sizes in population necessitates differing number and quality of programs. In *Keenan v. Smith*, in which female inmates brought an equal protection action based on denial of post-secondary education programs and prison industry employment, the Eighth Circuit stated that “because women account for such a small proportion of the total prison population, their facilities are necessarily smaller in size than any of the male-only prisons.”⁷⁵ It further admitted that due to the small size of the institution, the most comparable in size of the male institutions is an institution of the highest security classification.⁷⁶ The *Keenan* court concluded that two sets of dissimilarly situated inmates cannot be meaningfully compared.⁷⁷ At least in this case, Judge Heaney acknowledged the reality that under these standards, no group of female inmates could ever have standing for an equal protection claim.⁷⁸ His is a lone voice. The logical extension of the court’s opinions is that women must wait until an equal number of women and men are incarcerated before they can ask for equal services and programs.

As a thought experiment, let us follow the courts’ logic to its conclusion. For women to establish themselves as similarly situated to men, they must compare themselves by either (1) security classification or (2) population. Female inmates have a low chance of successful comparison under the first prong because while most of female prisons include prisoners of all classifications, the men’s prisons are often broken up into individual classifications due to the number of inmates at each classification level.⁷⁹ Thus, no such similarly situated group exists. Under the second prong, if women were to use population size to establish a similarly situated group, they would be limited to the highest security men’s prisons. The highest security men’s prisons often house their inmates in solitary confinement for twenty-three hours a day and therefore offer few, if any, programs.⁸⁰ Fighting for these programs would not win the female inmates more programming than they already have. For the female inmates, it is a losing game.

In shocking contrast, when *men* raise the equal protection issue, the courts take an entirely different view. Only a year before *Keenan*, a male inmate brought an equal protection claim before the Eighth Circuit in *Bills v. Dahm*⁸¹ and received significantly different treatment. In *Bills*, the male inmate alleged that he was denied overnight visitation from his infant son while female inmates were allowed such visitation.⁸² Instead of reviewing its laundry list of differences between a male Level 2 facility and a female Level 4 facility—the same levels of facilities contemplated in *Klinger*⁸³—the court stated that “[b]oth prisons hold a significant number of maximum security offenders.”⁸⁴ Presumably, no drastic changes had occurred in the Nebraska correctional system, yet the court offered no analysis of the differing population sizes. Instead, the court concluded that “the make-up of the inmate population at each of the prisons are not markedly dissimilar,” yet allows, grudgingly, that it is “objectively reasonable” for a prison official to have believed that the two groups of inmates were not similarly situated.⁸⁵ This is a quite a change from the previous opinions that found an insurmountable difference between male and female prisons.

The court finishes with a parting lecture to the correctional authorities on the constitutional rights of inmates—a lecture notably absent from the cases involving female inmates. The court begins with the lofty statement that “[t]he great object of our Constitution is to preserve individual rights” and that “prison inmates are not completely stripped of these rights as they step through the prison gates.”⁸⁶ Further, the court chides that a “prisoner may not be denied equal treatment afforded those who share his relevant characteristics, simply because statistics show that he belongs to a group that typically does not bear those relevant characteristics.”⁸⁷ This is remarkable: in other words, a prisoner cannot be denied equal treatment afforded to others, “simply” because statistics and data demonstrate that he is not actually equal to the others. No such allowance for numerical discrepancies was evident in the women’s cases. The gender discrimination evident in the courts’ opinions mars any chance that female inmates might have to bring a successful equal protection suit.

Even if the inmates could prove that they were similarly situated, they would still have to show that the statute or regulation intentionally discriminated against them. In *Canterino v. Wilson*, the Sixth Circuit found that the female inmates “failed to prove that the denial of study and work release to members of their class is gender-based discrimination on its face, because both men and women are included in the class of people who may be denied study and work release.”⁸⁸ Under this standard, a claim based on the denial of programs could potentially fail simply because not all male inmates received care.

In some cases, gender segregation in prison may provide sufficient evidence of gender discrimination so that discriminatory intent need not be established. A Fourth Circuit opinion found that “discriminatory intent need not be established independently when the classification is explicit.”⁸⁹ Prisons across the nation are segregated by gender and, although such segregation has been found to be constitutional,⁹⁰ the practice of sending women to one prison and men to another facially classifies on the basis of gender.⁹¹ If the court finds that the resulting difference in access to services imposes a burden on the female inmates, discriminatory intent may not need to be established.

Overall, the courts have created an unworkable standard, yet refuse to acknowledge that it effectively bars incarcerated female litigants from recovery. Courts should not dismiss an Equal Protection case based on population differences, but should start from the premise that male and female inmates are similarly situated due to the equal dependence on the state to provide mental health services and both have an equal right to care under the Constitution.

2. UNITED STATES V. VIRGINIA: SEPARATE BUT NOT EQUAL

In *United States v. Virginia*, decided shortly after the above cases, the Supreme Court contemplated the Equal Protection Clause in regard to gender segregated institutions of higher education, coming to a very different result. The Virginia Military Institute (“VMI”) historically accepted only men into its

academy.⁹² VMI enrolled about 1,300 male cadets each year.⁹³ In response to litigation contesting its refusal of female candidates, VMI proposed a separate, parallel program for women: Virginia Women's Institute for Leadership ("VMIL"), which had an expected first-year class of twenty-five women.⁹⁴ While the institutions would share the same mission, "the VWIL program would differ from VMI in academic offerings, methods of education, and financial resources,"⁹⁵ largely based on the perceived differences and needs of a female population.⁹⁶ The different population sizes and program options are analogous to those in male and female prisons, yet here the Court ruled in favor of the female plaintiffs, finding that VWIL was not an appropriately parallel program and that VMI must admit female cadets. A court has even more reason to make a similar ruling in favor of female inmates; students have the option of choosing whether to attend an inferior school whereas female inmates have no choice.

Justice Ginsburg began her opinion in *Virginia* with the core instruction of equal protection analysis: "Parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action."⁹⁷ The court "has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."⁹⁸ Any justification of such a policy must demonstrate "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."⁹⁹ Sex-based classifications may not be used "to create or perpetuate the legal, social, and economic inferiority of women."¹⁰⁰ In Flynn's case, the gender differences in availability of treatment result in distinct disadvantages to female inmates: they receive inferior mental health services, which will affect their ability to participate in vocational training and other programming integral to post-release success. When the prison denies them equal services, they are maintained in an inferior position relative to the men who receive the services, a disadvantage that affects the women even post-incarceration.

In examining VMI's justification for the male-only classification, the court stated that a justification "must describe actual state purposes, not rationalizations for actions in fact differently grounded."¹⁰¹ The court rejected Virginia's claim that VMI furthered diversity in educational institution choices; although single-sex institutions may in fact promote diversity, Virginia's public institution history provided no evidence that VMI's single-sex admission policy was intended to further this purpose.¹⁰² Applying this analysis to Flynn's case, the primary reason for gender-segregation in prison appears to be population management or security. Neither reason, however, bears any rational relation to the differing quality of mental health treatment between the male and female institutions.

Differences in institutional populations did not keep the Supreme Court in *United States v. Virginia* from finding similarly situated groups. The Court of Appeals for the District of Columbia justified its holding denying programs to the smaller female correctional institutions by stating that parents of students at Smith College, an all-female institution, would not raise an eyebrow to discover that Harvard University, many times Smith's size, offers

considerably more classes.¹⁰³ In contrast, the Supreme Court did not even discuss in *Virginia* the 1,300 student enrollment of VMI in comparison with the twenty-five student enrollment of VWIL.

In addition, inmates have an even stronger claim for medical and mental health services than for educational programming.¹⁰⁴ The Court of Appeals for the District of Columbia stated that "an inmate has no constitutional right to work and educational opportunities."¹⁰⁵ Yet under an Eighth Amendment analysis in *Estelle v. Gamble*, the Supreme Court declared that the government has an obligation to provide medical care for those whom it is punishing by incarceration.¹⁰⁶ If the Supreme Court was dissatisfied with a facility that planned to enroll a mere twenty-five female students a year, surely the federal courts can do better for the 112,498 women in prison who are denied not just educational opportunities, but health care to which they have a constitutional right.

The second prong of the *Virginia* analysis focused on the proposed remedial measures to be taken by Virginia to remedy the equal protection violation. Any remedy must "closely fit the constitutional violation [and] must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination."¹⁰⁷ In the context of prisons, the mental health resources currently available to men—such as separate facilities solely for the treatment of mentally-ill inmates and additional health staff and programs—must be made equally available to female inmates.

Overall, the federal circuit courts have largely dismissed female inmates' suits based on a flawed notion of what constitutes a "similarly situated" party. In contrast, the Supreme Court has always treated the similarly situated analysis as inclusive of groups with some differences and has applied it to higher education institutions much more leniently than the appellate courts have to the female inmate litigants.

B. THE 'IMPORTANT GOVERNMENTAL OBJECTIVE' OF PARSIMONY

The primary justification for a prison's discriminatory policies often comes down to economics. If gender discrimination is established, it may still survive heightened scrutiny if the correctional authorities can establish important governmental objectives that are accomplished through this discrimination.¹⁰⁸ The Court of Appeals of the District of Columbia has already declared that, even allowing that a burden has been imposed on female inmates due to gender discrimination, limited financial resources are enough reason to justify the prison's discrimination.¹⁰⁹ The Eighth Circuit has also found that any analysis of gender discrimination in female inmates' programming must make allowances for the prison's limited resources and economic constraints.¹¹⁰ Even in *Bowring v. Godwin*, a case that extended an inmate's constitutional right to medical care to also include mental health care,¹¹¹ the Fourth Circuit stated:

The right to treatment is, of course, limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical necessity and not simply that which may be considered merely desirable.¹¹²

No one would argue that gender or racial discrimination could exist in greater society based on financial considerations; consider the obvious costs of providing equal pay for equal work. The courts' argument that a constitutional right can be limited by cost therefore seems inherently wrong and solely based on the prisoners' incarcerated status.¹¹³ Thus, even when the female inmates have a winning hand in proving discrimination, they may still fail because the house is bankrupt.

III. CONCLUSION

Flynn should use *United States v. Virginia* to argue that differing populations and genders cannot be a basis for discrimination in correctional facilities. The broader, national concern,

however, is with the attitude of the courts toward inmates, and the allowances made for discrimination based on imprisonment status. Tellingly, none of the Equal Protection cases found in favor of the inmates. The courts have erected serious obstacles to a successful claim by creating an unworkable standard for "similarly situated" prison groups and allowing finances to limit constitutional rights. Inadequate services for mentally-ill female inmates harm not just the women, but also the poor, urban communities to which many of these women return. Without mental health care, the women are at a greater risk of recidivism. The bottom line is that female inmates have a constitutional right to medical and mental health care and a right to equal treatment to that received by the male inmates, which is not currently being provided in America's prisons.

ENDNOTES

* J.D., Georgetown University Law Center (expected May 2009); B.A., The Ohio State University. Thanks to Erica Weisgerber for her superior assistance.

¹ See, e.g., Lucy Adams, *In jail . . . and no desire to get out*, THE HERALD, June 18, 2007, available at <http://www.theherald.co.uk/misc/print.php?article=1477986>.

² BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, PRISON STATISTICS, available at <http://www.ojp.usdoj.gov/bjs/prisons.htm> [hereinafter PRISON STATISTICS].

³ BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, 1 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf> [hereinafter MENTAL HEALTH PROBLEMS]. Individual states may have even greater discrepancies; see Act Relative to MassHealth Enrollment for Persons Leaving Correctional Facilities in Massachusetts: Hearing on S.B. 598 Before J. Comm. on Healthcare, 180th Gen. Ct. 2 (2003) (statement of Massachusetts Public Health Association) available at http://www.mphaweb.org/testimony/test_masshealth_enroll_prison.10_03.pdf ("In Massachusetts state prisons, more than 17% of male inmates and more than 50% of female inmates have open mental health cases."); NORTH CAROLINA DEPARTMENT OF CORRECTION OFFICE OF RESEARCH, STATISTICS MEMO: MENTAL HEALTH DIAGNOSES IN THE PRISON POPULATION 3 (2007), available at <http://crrp41.doc.state.nc.us/docs/pubdocs/0007052.PDF> ("Comparatively, the percentage of female inmates with a mental health concern has consistently outpaced that of men (five year averages of 58.1% and 29.8%, respectively)."); OKLAHOMA DEPARTMENT OF CORRECTIONS, MENTAL HEALTH FACT SHEET (2007), available at http://www.doc.state.ok.us/treatment/mental_health/fact_sheet.html (reporting 79% of female inmates in Oklahoma state prisons have a history or are currently exhibiting symptoms of a mental health problem, compared to 46% of men).

⁴ See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) ("These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.")

⁵ Complaint at 3, Flynn v. Doyle, No. 06-539 (E.D. W.I. filed May 1, 2006), available at http://www.aclu-wi.org/wisconsin/police_prisons/TCI%20Complaint%20-%20for%20filing.pdf.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* Most drugs are predominantly metabolized by the liver; See generally ALEX J. MITCHELL, NEUROPSYCHIATRY AND BEHAVIOR NEUROLOGY 401 (Saunders Ltd. 2004) (concluding that liver function needs to be monitored to ensure proper distribution of the drug into the patient's system and because overmedication can result in liver damage).

¹⁰ *Id.* at 4.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Turner v. Safely*, 482 U.S. 78, 84 (1987).

¹⁹ *Id.* at 84-85 ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have, as we indicated in *Martinez*, additional reason to accord deference to the appropriate prison authorities."); see also *Beard v. Banks*, 126 S. Ct. 2572, 2578 (2006) ("[C]ourts owe 'substantial deference to the professional judgment of prison administrators.'") (citing *Overton v. Bazzetta*, 539 U.S. 126, 130 (2003)); *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977) ("Because the realities of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators."); *Procnunier v. Martinez*, 416 U.S. 396, 405 (1974) ("Most [prisons] require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.")

²⁰ *Turner*, 482 U.S. at 84. ("Most prisoners return to communities within major counties and cities; within these metropolitan areas, released prisoners are further concentrated in a handful of neighborhoods.")

²¹ MENTAL HEALTH PROBLEMS, *supra* note 3, at 1.

²² See HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 16-17 (2003), available at <http://www.hrw.org/en/reports/2003/10/21/ill-equipped> [hereinafter ILL-EQUIPPED] ("Jails and prisons have become, in effect, the country's front-line mental health providers.")

²³ R. W. Manderscheid & G. P. Hutchings, *Building Comprehensive Community Care Systems*, 13 J. MENTAL HEALTH 37 (2004).

²⁴ Mark S. Salzer, et al., *State Psychiatric Hospital Census After the 1999 Olmstead Decision: Evidence of Decelerating Deinstitutionalization*, 57 PSYCHIATRIC SERVICES 1501, 1502 (2006).

²⁵ Manderscheid & Hutchings, *supra* note 23, at 38.

²⁶ BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, NUMBER OF PERSONS UNDER CORRECTIONAL SUPERVISION (2006), available at <http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm>.

²⁷ MENTAL HEALTH PROBLEMS, *supra* note 3, at 1 (determining these numbers by either a recent history of mental health problems or symptoms of a mental health problem).

²⁸ *Id.*

²⁹ *Id.*

ENDNOTES CONTINUED

- ³⁰ Jason Rodrigues, *Did my sick husband have to die in jail?*, THE OBSERVER, May 20, 2007, available at <http://www.guardian.co.uk/society/2007/may/20/socialcare.deathincustody> (detailing a bipolar British man's death after arrested for being a threat to himself).
- ³¹ T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. J. CRIM. L. 283, 302-03 (1997); see also ANDI RIERDEN, THE FARM, 57 University of Massachusetts Press (1997) (“[A]n inmate strapped a cord around a metal ceiling beam in her cell and hanged herself. In and out of the Farm for years, the young woman had been a drug addict with severe psychiatric problems and was rumored to have HIV.”).
- ³² CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL. WEB-BASED INJURY STATISTICS QUERY AND REPORTING SYSTEM (WISQARS), www.cdc.gov/ncipc/wisqars (last visited on Feb. 9, 2009) (For women in general, suicide is a national problem: it was the fourth-leading cause of death in 2004 for women in the United States aged 18–44 years. In 2004, 3,036 women aged 18–44 committed suicide in the United States, representing 6.0% of all deaths for women in the same category).
- ³³ OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, PIECES OF THE PUZZLE: FY 2006 ANNUAL REPORT, 45 (2006), available at <http://www.drc.state.oh.us/web/Reports/Annual/Annual%20Report%202006.pdf> [hereinafter PIECES OF PUZZLE].
- ³⁴ See generally Kathleen Auerhahn & Elizabeth Dermody Leonard, *Docile Bodies? Chemical Restraints and the Female Inmate*, 90 J. CRIM. L. & CRIMINOLOGY 599 (2000) (discussing the use of psychotropic medications on inmates for nonmedical reasons); AMNESTY INTERNATIONAL, “NOT PART OF MY SENTENCE”: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY, available at <http://www.amnestyusa.org/document.php?id=D0F5C2222D1AABEA8025690000692FC4> (“Various sources have expressed concern to Amnesty International that psychotropic drugs—medication for the treatment of serious psychiatric illness—are sometimes used improperly to control and sedate inmates rather than as medication for psychiatric conditions.”).
- ³⁵ See generally Auerhahn & Leonard, *supra* note 34 (showing that female crime has a long history of being attributed to physio-psychological causes); Deborah R. Baskin, *Role Incongruence and Gender Variation in the Provision of Prison Mental Health Services*, 30 J. HEALTH & SOC. BEHAV. 305 (1989) (showing that mental health placement of female inmates is attributable to both psychiatric need and to a response to role-incongruent behavior); Robert T. Roth & Judith Lerner, *Sex-Based Discrimination in the Mental Institutionalization of Women*, 62 CAL. L. REV. 789 (1974) (arguing that the label of mentally-ill has been used to subordinate women).
- ³⁶ See NANCY STOLLER, IMPROVING ACCESS TO HEALTH CARE FOR CALIFORNIA’S WOMEN PRISONERS, 35-39 (2001), available at <http://prisonerswithchildren.org/pubs/stoller.pdf> (reporting the numerous inadequacies of the California correctional system health care system to treat women inmates); BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS, 9 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhptip.pdf> [hereinafter TREATMENT OF INMATES] (reporting that of 24% of incarcerated women in state prisons who could identify themselves as having a mental health problem, only 67.3% of those women received treatment).
- ³⁷ See Stone, *supra* note 31, at 333-34 (“Moreover, inmates with mental disabilities often lack access to prison programs simply because they reside in segregated housing, placed there by prison officials who believe that inmates with mental disabilities are unable to cope with the prison environment. Studies show that inmates with mental disabilities ‘vegetate’ in segregated housing because of the lack of human and physical resources.”).
- ³⁸ COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, CONSENSUS PROJECT REPORT, 17 (2002), available at http://consensusproject.org/the_report/toc/ch-IV/ps17-intake-inmates (“There are no validated instruments for mental health screening in adult populations. . . In many correctional systems, a different mental health screening instrument is employed at each prison in the system.”).
- ³⁹ See Andrew Goldberg, *Brief Mental Health Screening for Corrections Intake*, CORRECTIONS TODAY, Aug. 1, 2006, available at <http://www.thefreelibrary.com/Brief+mental+health+screening+for+corrections+intake.-a0151055492> (“Available instruments are often costly and time-consuming, making them impractical for daily screening of a large number of inmates at intake. As a result, even though most prisons and jails screen inmates for mental illness during booking, research has shown that they miss the majority of inmates with mental health problems, particularly those with less obvious symptoms.”).
- ⁴⁰ TREATMENT OF INMATES, *supra* note 36, at 3.
- ⁴¹ MENTAL HEALTH PROBLEMS, *supra* note 3, at 1.
- ⁴² See Christine H. Lindquist & Charles A. Lindquist, *Health Behind Bars: Utilization and Evaluation of Medical Care Among Jail Inmates*, 24 J. COMMUNITY HEALTH, 285 300 (1999) (“An unusual gender difference emerges, however, with female inmates reporting more difficulty in accessing medical care, yet greater satisfaction with the care received.” This study, however, clearly is problematic as support as it is based completely on inmates’ self-report rather than an objective analysis of actual difference in access.).
- ⁴³ See, e.g., FEDERAL BUREAU OF PRISONS, GENDER DIFFERENCES AMONG PRISONERS ENTERING DRUG TREATMENT: EXECUTIVE SUMMARY, (2002), available at http://www.bop.gov/news/research_projects/current_projects/oretridesgender.jsp [hereinafter GENDER DIFFERENCES] (“Nearly all prison based substance abuse treatment programs have been designed with male prisoners in mind.”); NATIONAL EVALUATION DATA SERVICES, NEDS ANALYTIC SUMMARY, EFFECTIVENESS OF WOMEN’S SUBSTANCE ABUSE PROGRAMS: A META-ANALYSIS 2 (2001) available at http://www.icpsr.umich.edu/SAMHDA/NTIES/NTIES-PDF/SUMMARIES/21_womens_meta_analysis.pdf (“Historically, substance abuse treatment programs have been designed for the needs of a predominantly male client population.”).
- ⁴⁴ GENDER DIFFERENCES, *supra* note 43 (reporting that inmate substance abuse programs generally do not take into account that women were significantly more likely to have used drugs daily, to have suffered domestic abuse, and to have depression, among other factors).
- ⁴⁵ Alabama, for example, has the Bullock Correctional Facility, which houses men. See ALABAMA DEPARTMENT OF CORRECTIONS IMPROVEMENTS IN MENTAL HEALTH SERVICES FOR INMATES, 8 (2003), available at http://hrw.org/reports/2003/usa1003/Alabama_Update_Haddad.pdf. (“[T]he Bradley Settlement Agreement applies only to male inmates, however, since implementation of the agreement, the ADOC has attempted to include Tutwiler, the female institution, into the Bradley mandates.”).
- ⁴⁶ WISCONSIN ACLU PRESS RELEASE, WOMEN AT WISCONSIN’S TAYCHEEDAH PRISON SUFFER MEDICAL NEGLECT AND RECEIVE WORSE MENTAL HEALTH CARE THAN MEN (2006), available at <http://www.aclu.org/prison/women/25405prs20060502.html>.
- ⁴⁷ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (“These elementary principles [of the Eighth Amendment] establish the government’s obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical ‘torture or a lingering death,’ the evils of most immediate concern to the drafters of the Amendment.”).
- ⁴⁸ *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1975) (“We see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart.”); *Newman v. Alabama*, 503 F.2d 1320, 1324 (5th Cir. 1974) (including mental health care within its analysis of the Alabama correctional system’s violations of the Eighth Amendment).
- ⁴⁹ *Godwin*, 551 F.2d. at 47.
- ⁵⁰ Possible questions may include what counts as reasonable medical certainty; where is the line that demarcates a “serious” disease; and what clairvoyance would a mental health practitioner have to have to be able to determine that the disease is either curable or that delay in treatment will result in “substantial” harm?
- ⁵¹ *Coleman v. Wilson*, 912 F. Supp. 1282, 1298 (E.D.C.A. 1995) (citing *Balla v. Idaho State Board of Corrections*, 595 F. Supp. 1558, 1577 (D. Idaho 1984)).
- ⁵² As will be discussed in later sections, the above list may be considered an unwarranted intrusion by the judiciary into the private administration by prison authorities.
- ⁵³ See, e.g., *City of Clebourne v. Clebourne Living Ctr.*, 473 U.S. 432, 439 (1985) (“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.”).
- ⁵⁴ See, e.g., *J.E.B. v. Ala. ex. rel. T.B.*, 511 U.S. 127, 130-31 (1994). (“Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause. . .”).

ENDNOTES CONTINUED

- ⁵⁵ See Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003); *City of Clebourne*, 432 U.S. at 440 ("Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment.").
- ⁵⁶ *United States v. Virginia*, 518 U.S. 515, 533 (1996) (citing *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)); *City of Clebourne*, 473 U.S. at 441 ("A gender classification fails unless it is substantially related to a sufficiently important governmental interest.").
- ⁵⁷ *Klinger v. Dep't of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994).
- ⁵⁸ *Miller-El v. Dretke*, 545 U.S. 231, 247 (2005) ("None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respect, and there is no reason to accept one.").
- ⁵⁹ *City of Clebourne*, 473 U.S. at 448. ("It is true, as already pointed out, that the mentally retarded as a group are indeed different from others not sharing their misfortune, and in this respect they may be different from those who would occupy other facilities that would be permitted in an R-3 zone without a special permit. But this difference is largely irrelevant unless the Featherstone home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the Featherstone home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.").
- ⁶⁰ 127 S. Ct. 2738 (2007).
- ⁶¹ *Klinger*, 31 F.3d at 731.
- ⁶² *Id.*
- ⁶³ *Id.* at 731-32.
- ⁶⁴ *Id.* at 732.
- ⁶⁵ *Id.*
- ⁶⁶ *Id.* at 732-33 ("Subjecting prison officials' decisions to close scrutiny 'distorts the decisionmaking process' and 'seriously hampers [officials'] ability to . . . adopt innovative solutions to the intractable problems of prison administration.' Analyzing this case using a program comparison between NSP and NCW, however, places dozens of substantive administrative prison decisions under close judicial scrutiny and subjects them to after-the-fact second-guessing by a federal court."); see also *Rouse v. Benson*, 193 F.3d 936, 942 (8th Cir. 1999) ("[I]n prison cases, courts will ordinarily defer to the expert judgment of prison authorities, due to the difficulty of running a prison and the commitment of the task to the responsibility of the legislative and executive branches.").
- ⁶⁷ *Klinger*, 31 F.3d at 732-33.
- ⁶⁸ *Id.* at 733.
- ⁶⁹ *Women Prisoners of the D.C. Dep't of Corrections v. D.C.*, 93 F.3d 910 (D.C. Cir. 1996).
- ⁷⁰ *Id.* at 924.
- ⁷¹ *Id.* at 925.
- ⁷² *Id.*
- ⁷³ PRISON STATISTICS, *supra* note 2 (According to the Bureau of Justice Statistics, on December 1, 2006, there were 112,498 women in state and federal facilities, compared to 1,458,363 men).
- ⁷⁴ PIECES OF THE PUZZLE, *supra* note 33, at 30 (For example, Ohio's primary female prison, Ohio Reformatory for Women (ORW), houses inmates of all security classification levels. All of the other facilities approximating ORW's size are strictly male facilities of single or grouped security classifications).
- ⁷⁵ 100 F.3d 644, 649 (8th Cir. 1996).
- ⁷⁶ *Id.*
- ⁷⁷ *Id.* ("There can be no such meaningful comparison for equal protection purposes between two sets of inmates who are not similarly situated. The substantial differences discussed above between male and female prisoners demonstrate the dissimilarity of the two distinct groups and the irrelevance of any attempt to compare the number or type of programs offered.") (internal citations omitted).
- ⁷⁸ *Id.* at 652 (J. Heaney, dissenting).
- ⁷⁹ PIECES OF THE PUZZLE, *supra* note 33, at 23-24 (Using Ohio as an example, there were 3,840 female inmates total in the system as of midyear 2007. Half were Level 1 and half were Levels 2 and 3. A mere eight composed the highest security levels, 4 and 5. In comparison, there were 45,851 males at midyear 2007. Of these, 13,613 were Level 1, 30,674 were Levels 2 and 3, and 1,564 were Levels 4 and 5).
- ⁸⁰ *Ohio State Penitentiary*, <http://www.drc.state.oh.us/public/osp.htm> (last visited Feb. 9, 2009) [hereinafter OHIO STATE PENITENTIARY] (For example, Ohio's supermax facility, the Ohio State Penitentiary, offers a handful of community service and academic programs); Ohio Department of Rehabilitation and Correction, Ohio Department of Rehabilitation and Correction, London Correctional Institution, <http://www.drc.state.oh.us/public/loci.htm> (last visited Feb. 9, 2009) [hereinafter LONDON INSTITUTION] (In comparison, a low security prison, London Correctional Institution, offers several industries, career technical programs, college programs, and more involved community service programs).
- ⁸¹ 32 F.3d 333 (8th Cir. 1994).
- ⁸² *Id.* at 334.
- ⁸³ *Klinger v. Dep't of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994).
- ⁸⁴ *Dahm*, 32 F.3d at 336.
- ⁸⁵ *Id.*
- ⁸⁶ *Id.*
- ⁸⁷ *Id.*
- ⁸⁸ *Canterino v. Wilson*, 869 F.2d 948, 954 (6th Cir. 1989).
- ⁸⁹ *Faulkner v. Jones*, 51 F.3d 440, 444 (4th Cir. 1995).
- ⁹⁰ *Women Prisoners of the D.C. Dep't of Corrections v. D.C.*, 93 F.3d 910, 926 (D.C. Cir. 1996) ("[T]he segregation of inmates by sex is unquestionably constitutional."); see *Pitts v. Thornburgh*, 866 F.2d 1450, 1453 (D.C. 1989) ("[T]he [gender] classification substantially and directly furthers an important government interest (reducing prison overcrowding within the context of finite resources).").
- ⁹¹ See *Pitts*, 866 F.2d at 1453 ("It is clear that the government's policies facially classify on the basis of gender: long-term, D.C. women offenders, because they are women, are imprisoned considerably farther from the District than are similarly situated male offenders and consequently suffer a substantial burden.").
- ⁹² *United States v. Virginia*, 518 U.S. 515, 519 (1996).
- ⁹³ *Id.* at 521.
- ⁹⁴ *United States v. Virginia*, 852 F.Supp. 471, 481-82 (W.D.Va. 1994).
- ⁹⁵ *Virginia*, 518 U.S. at 526.
- ⁹⁶ *Id.* at 526-27.
- ⁹⁷ *Id.* at 531.
- ⁹⁸ *Id.* at 532.
- ⁹⁹ *Id.* at 533.
- ¹⁰⁰ *Id.* at 534.
- ¹⁰¹ *Id.* at 535-36.
- ¹⁰² *Id.* at 539-40.
- ¹⁰³ *Women Prisoners of the D.C. Dep't of Corrections v. D.C.*, 93 F.3d 910, 925 (D.C. Cir. 1996).
- ¹⁰⁴ For the argument that the heightened level of scrutiny should be applied to female inmates' work and educational programming, see Jennifer Arnett Lee, Note, *Women Prisoners, Penological Interests, and Gender Stereotyping: An Application of Equal Protection Norms to Female Inmates*, 32 COLUM. HUMAN RIGHTS L. REV. 251 (2000).
- ¹⁰⁵ *Women Prisoners of the D.C. Dep't of Corrections*, 93 F.3d at 927.
- ¹⁰⁶ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).
- ¹⁰⁷ *United States v. Virginia*, 518 U.S. at 547.
- ¹⁰⁸ *Id.* at 533; see also *Pitts v. Thornburgh*, 866 F.2d 1450, 1455 (D.C. 1989) (concluding "that the court must determine that the classification is substantially related to the achievement of important government objectives").
- ¹⁰⁹ *Thornburgh*, 866 F.2d at 1456 ("Especially in light of the budgetary concerns that the District also cites, we are persuaded that the governmental interest in reducing prison overcrowding is, at the least, an important and legitimate interest for purposes of equal protection analysis.").
- ¹¹⁰ *Klinger v. Dep't of Corrections*, 31 F.3d 727, 732 (8th Cir. 1994).
- ¹¹¹ *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1975).
- ¹¹² *Id.* at 47-48.
- ¹¹³ General society has long held the patronizing belief that female correctional institutions are akin to summer camp or a health spa, implicit in which is the feeling that the inmates cannot be lacking for anything. See Krysten Crawford, *Martha, out and about*, CNN/MONEY, March 4, 2005, available at http://money.cnn.com/2005/03/03/news/newsmakers/martha_walkup/index.htm (calling Martha Stewart's federal facility "Camp Cupcake"); *Inside a Women's Prison: Ohio's Reformatory Is the Vassar of U.S. Penology*, SPOT, Dec. 1941 (emphasizing inmates' pinocle games and beauty treatments).

COMMENTARY ON PROPOSITION 8: MUCH ADO ABOUT NOTHING OR A WAKE UP CALL TO DO SOMETHING

By
Lydia Edwards, Esq.*

On November 4, 2008, California voters passed Proposition 8 (“Prop 8”), amending the California Constitution to declare, “[o]nly marriage between a man and a woman is valid or recognized in California.”¹ On that same night Barack Obama was elected the first African-American President of the United States. The concurrence of these two events spurred emotionally charged accusations from the Lesbian, Gay, Bisexual, and Transgender (“LGBT”) community towards the African-American community. Also telling about the night of November 4, 2008 was the discourse about who was a victim and who was perpetrator of Prop 8. Much of the media reports and immediate reaction created a dichotomy of straight African-Americans discriminating against white gays and lesbians.

BACKGROUND

In March 2000, California voters passed Proposition 22, declaring that only marriage between a man and a woman would be valid or recognized in California. On May 15, 2008, the California Supreme Court ruled in a 4–3 decision that the statute enacted by Proposition 22, and other similar statutes limiting the definition of marriage, violated the equal protection clause of the California Constitution.² The Court ultimately found that individuals of the same sex have the right to marry under the California Constitution and that same-sex marriage should therefore be valid and recognized in California.³ In reaction to the Court’s decision, opponents to same-sex marriage put forward Proposition 8 to add the language of Proposition 22 to the California Constitution.

The campaign to pass Proposition 8 was largely led by two organizations: “Protect Marriage” and “Yes on Proposition 8.” Their arguments for the passage of Proposition 8 were three-fold.⁴ First, they argued that Prop 8 restored the definition of marriage to the same language Californians voted for in 2000.⁵ Second, they stated that Prop 8 overturned the decision of the four California Supreme Court judges who acted undemocratically to ignore the will of the people and legislated from the bench to declare Prop 22 unconstitutional.⁶ Finally, the two proponents argued that Prop 8 protects children from being taught in public schools that marriage between members of the same sex is the same as “traditional” heterosexual marriage.⁷ They argued that Prop 8 would “prevent other consequences to Californians who will be forced to not just be tolerant of gay lifestyles, but face mandatory compliance regardless of their personal beliefs.”⁸

The campaign to defeat Proposition 8 was led by “No on Prop 8, Equality for All.” This group argued that by defining marriage as between a man and a woman, Prop 8 eliminated the

possibility of marriage for a targeted group and is, therefore, a violation of the civil rights of all Californians. They argued that because the California Supreme Court declared marriage a fundamental right, Prop 8 is a violation of state equal protection.

Finally, they argued that domestic partnerships and civil unions are not comparable to marriage because the doctrine of “separate but equal” is unconstitutional.

On election night, the Los Angeles Times (“L.A. Times”) reported that Proposition 8 passed with 52.2% of the vote.⁹ On November 5, 2008, the L.A. Times, along with several major newspapers, cited an AP exit poll showing

that 70% of African-American voters supported Proposition 8.¹⁰ Along with religious organizations such as the Mormon Church, African-Americans were seen as one of the key components to the measure’s passage.¹¹

Reactions to the news that African-American voters had overwhelmingly supported Prop 8 were swift and emotional; eliciting pain, frustration, shock, and in some cases bigotry. Dan Savage, a gay columnist and civil rights activist, can summarize the frustration of many gay activists in this November 5 post:¹²

I’m done pretending that the handful of racist gay white men out there—and they’re out there, and I think they’re scum—are a bigger problem for African Americans, gay and straight, than the huge numbers of homophobic African Americans are for gay Americans, whatever their color.¹³

Blogs and news broadcasts throughout the country discussed the passage of Prop 8 in a dichotomous tone with African-Americans on one side and gay men and lesbians on the other. As seen in this comment from Jeff Jacoby, a white columnist for the Boston Globe:

If black voters overwhelmingly reject the claim that marriage amendments like Proposition 8 are nothing more than bigotry-fueled assaults on civil rights, perhaps it is because they know only too well what real bigotry looks like. Perhaps it is because they resent the assertion that adhering to the ageless meaning of marriage is tantamount to supporting the pervasive humiliation and cruelty of Jim Crow.¹⁴

Yet another example,

White gay media like to presume they are absolved from racism because they are steady

riding on the backs of the civil rights movement as if the victimization is of the same creed. As a black gay woman this is a conundrum that I live with daily, but in the end I agree with the larger black populace that is often resentful of how white gay America has hijacked the civil rights movement without any effort to create coalitions.¹⁵

As the fervor of election night died off, people went back to examine the actual statistics from the exit polls. Further analysis of the population of African-Americans in the state of California—6.2%—demonstrates that if 70% of African-Americans did vote for the passage of Prop 8, it would still be highly unlikely that they alone would account for the initiative's passage.¹⁶ Later polls threw suspicion onto the high numbers recorded at the exit polls. Final analysis shows that the voting patterns of African-Americans mirrored those of other groups and broke down generationally.¹⁷

HOW BLACKS BECAME STRAIGHT AND GAYS BECAME WHITE

People could debate for an eternity as to why voters in California decided to overturn their state supreme court and void thousands of marriages, but that is not this article's focus. Instead, we propose that the passage of Proposition 8 and the subsequent media description of the issue as "black v. gay" was a call to action; a call to truly analyze the way the United States discusses sexuality and race and to point out that people in both the LGBT and African-American communities are in part to blame for the "black v. gay" dichotomy.

This falsehood, based on stereotypes of African-Americans as wholly heterosexual and the LGBT community as mainly white and upper-middle class, has injured both movements' quest for equality and silenced the voices of many LGBT people of color. As Wanda Sykes states in *The Advocate*, "We're literally killing ourselves over this fear of homosexuality."¹⁸ To provide any guidance for better discourse it is necessary to understand how the discourse created the dichotomy that many observe today.

African-Americans have suffered extreme and often violent discrimination from the beginning of American history. One might expect a greater sense of empathy on the part of African-Americans for the struggle for gay rights, and indeed much of the initial surprise and hurt over the reported disproportionate percentage of African-American vote for Proposition 8 arose from a belief that there should have been a greater sense of empathy.

The relationship between African-Americans and the LGBT community is hard to characterize. Religion, family, experience, and education influence each person within a community. If one is going to generalize, however, that homophobia is prevalent in many black communities, this may stem in part from the lack of visibility of African-American LGBT people as leaders or prominent members of the community. That is not to say African-Americans are not as open about their sexuality as White Americans—it is more a critique of the historical

lack of African-American gay and lesbian leaders. Those civil rights activists and trailblazers who were gay were encouraged or required to stay in the closet and prioritize the struggle for race or gender equality. As scholars have noted, for many in the African-American community, homosexuality is not "black."¹⁹ Identification as gay or lesbian for many is viewed as representative of European society; being out as an African-American may be seen as race-negating.²⁰ Far too often, homosexuality is considered comical, disgusting, or a form of betrayal. Books like *On the Down Low*,²¹ by J. L. King, continue to perpetuate the notion that homosexuality is a home-wrecking, AIDS-spreading virus that steals African-American men from their families. These stereotypes result in homosexual people of color being perceived as less black, encouraging a form of in-group passing.²²

The role of religion should not be ignored for its contribution to the ostracism of gay men and lesbians of all colors from the African-American community. Religious leaders in large churches often preach about homosexuality as one of the worst sins against God.²³ This rhetoric spreads from the same pulpits that inspired the non-violent Civil Rights Movement. Donny McClerkin,²⁴ for example, is a very popular gospel singer and a self-proclaimed "ex-gay," who has described homosexuality as "a curse against which he must do battle."²⁵

Bayard Rustin is an evocative example of how an African-American man is lauded for his commitment to civil rights, but encouraged to quiet his sexuality.²⁶ Rustin was one of the primary organizers of the 1963 March on Washington but was kept out of public roles in the Civil Rights Movement and forced to downplay his sexuality. Rustin was a leading advisor and speech writer for Dr. Martin Luther King,²⁷ helped to integrate non-violent direct action into the Civil Rights Movement, and was a powerbroker for organized labor, the American Democratic Party, and world affairs.²⁸

"Few African-Americans engaged in as broad a protest agenda as did Rustin; even fewer enjoyed his breadth of influence in virtually every political sector of American life. Nevertheless, Rustin remained the quintessential outsider in black civil rights circles for much of his life due to his 'deviant' sexual identity."²⁹

Pauli Murray is another example of an African-American committed to causes of gender and racial equality, but conflicted about her sexuality, which she kept hidden from many people.³⁰ Murray was the co-founder of NOW (National Organization of Women),³¹ and the first black attorney to publish in an academic law review. Among many writings on civil rights, Murray drafted the *States' Laws on Race and Color*, which Thurgood Marshall called the "Bible for civil rights lawyers."³² She is also credited with coming up with the Fourteenth Amendment legal theories used by Ruth Bader Ginsburg in the 1970s.³³ Least known, but one of her greatest contributions to the African-American community and American legal thought, was her conviction to attack the essence of the long held legal theory of "separate but equal."³⁴ Yet, Murray never declared herself a lesbian. Between fighting for gender inclusion in the Civil Rights Movement and racial understanding in the Women's Rights Movement, Murray may have felt overwhelmed.

The African-American community's reluctance to celebrate diversity among its leaders and heroes helps to perpetuate

*"We're literally killing
ourselves over this fear of
homosexuality."*

a heterosexual normalcy of the African-American experience. This refusal also allows negative stereotypes about gay men and lesbians to pervade unchecked. It is of no surprise, therefore, that the headlines following the passage of Proposition 8 talked about the African-American community as though it were wholly heterosexual. As Marlon T. Riggs stated in *Tongues Untied*: “In the great gay mecca, I was an invisible man, still I had no shadow, no substance, no history, no place, no reflection.”³⁵

LGBT legal analysis evolves from parallel arguments advanced in gay and lesbian political activism.³⁶ Gay and lesbian Americans of all colors have suffered discrimination and ostracism from “mainstream” American ideals and legal equality. Still, conversations about racial inequality are largely absent from LGBT discourse unless when comparing gay and lesbian quest for equality with that of African-Americans. This comparison and discourse contribute to the “black v. gay” dichotomy. Along with other factors, this comparison has helped to create a “white-washed” portrayal of the incredibly diverse LGBT community and the false dichotomy following the passage of Proposition 8.

This “white-washing” may be a result of conscious efforts in some of the LGBT leadership to ignore issues of race and gender. Richard Mohr, noted gay rights activist, urged gay organizations not to build coalitions with other groups, including African-Americans and women, because it was a wasteful drain on the movement.³⁷ Others feel, in some respects, gays and lesbians are more discriminated against than African-Americans. Andrew Sullivan, gay conservative columnist, explained such when comparing slavery for heterosexual African-Americans and white gays and lesbians.

But even slaves, if they were heterosexual, were occasionally allowed the right to marry the person they loved. That right was often peremptorily taken away, but when it was, the hideousness of the injustice was clear. But that injustice is unavailable to homosexuals, because they haven’t even been deemed eligible for the institution of marriage in the first place; they have been, from one particular perspective, beneath slave. And they still are.³⁸

Many people believe the prioritization of marriage equality for the LGBT movement is a result of the lack of diversity in LGBT leadership and the failure to listen to gay men and lesbians of color. As Paula Ettelbrick explains: “[T]hose closer to the norm or to power in the country are more likely to see marriage as a principle of freedom and equality. Those who are acceptable to the mainstream because of race, gender and economic status are more likely to want the right to marry. It is the final acceptance, the ultimate affirmation of identity.”³⁹

The LGBT movement historically and presently seems to have prioritized becoming part of the American “mainstream.” People of color often meet comparison arguments, such as Andrew Sullivan’s above, with disdain. For many, the “use of racial analogies is suspect, coming as it does from a movement

deeply splintered over the relevance of racism to the fight against homophobia.”⁴⁰ For others it seems to trivialize the experience of people of color in the United States. For still others, there is a sense of disgust and abhorrence for any likening of African-Americans to gays and lesbians. As explained by Colin Powell,

“homosexuality is not a benign . . . characteristic such as skin color It goes to one of the most fundamental aspects of human behavior.”⁴¹

Like most civil rights movements, the LGBT movement uses the faces of average Americans to engender empathy. The face of the LGBT movement has been overwhelmingly portrayed as white and middle class. As Devon W. Carbado explains, the movement seems to use “but for” gay people.⁴² These are people “who, but for their sexual orientation, [are] perfectly mainstream.”⁴³ The use of the “but for” gay people seems like a missed opportunity to be inclusive and obscures history.

PERRY WATKINS: A CASE STUDY IN WHITE-WASHING

A perfect example of the failure of the LGBT movement to be racially inclusive is the case of Sergeant Perry Watkins. Watkins was nineteen years old when he was drafted into the military.⁴⁴ At the time he was drafted he acknowledged he was gay. Watkins again acknowledged his homosexuality in an affidavit after being subject to a criminal investigation. Watkins explained, “he had been a homosexual from the age of thirteen and that, since his enlistment, he had engaged in sodomy with two other servicemen.” The army ended the investigation due to “insufficient evidence.”⁴⁵

Watkins performed in drag at official and unofficial military gatherings that were heavily attended.⁴⁶ So it came as a surprise when in 1982, Watkins was separated from the Army for being a homosexual. In all Watkins served 14 years in the Army and became in the words of his commanding officer, “one of our most respected and trusted soldiers.”⁴⁷ Watkins fought back to be reinstated in the Army and *he won*. To this day, Watkins is the first openly gay serviceman to successfully challenge the military’s antigay policy.

Despite Watkins’ significant civil rights milestone for the LGBT movement, he is virtually unknown. Instead of using Watkins as the face of the fight against the military ban on gay men and lesbians, the LGBT leadership chose to focus their campaigns on white soldiers such as Keith Meinhold, Joseph Steffan and Margarethe Cammermeyer. Commenting on how the LGBT community promoted Cammermeyer, Watkins remarked “we’ll go with a [white] woman who lied for twenty years before we go with a black man who had to live the struggle nearly every day of his life.”⁴⁸

For Watkins’ case, along with the cases of many others, race helps explain the lack of attention gay rights proponents paid to him and to his story.⁴⁹ Tom Stoddard, the lawyer who directed the Campaign for Military Service, commented that there was a public relations problem with Watkins because he wore a nose ring and had a counter culture image, not because Watkins was

black.⁵⁰ This seems unlikely considering the PR problem with Watkins could have been solved by taking out his nose ring and putting him in a suit. More likely than not, Watkins' case was more complicated than the "but for" gays the movement chose to promote.⁵¹ Watkins' story would have required a discussion of race, complicating the LGBT movement's strategy for fighting the military ban.⁵²

When Watkins died of AIDS at the age of 47, he still felt a sense of betrayal by the national gay leaders who chose to promote white soldiers over himself. "It's blatant racism," said Watkins, when the same LGBT activists disinvited him from testifying at 1993 Congressional hearings on the ban, even though he was the only openly gay service person to go to the top of the court system and emerge victorious.⁵³

SO WHERE DO WE GO FROM HERE

An attempt to solve this discourse dilemma in one article is impossible. However, by continuing the conversation about how we talk about race and sexuality in the United States, we hope to answer the call to action prompted by the passage of Prop

8. We suggest to both groups to make conscious efforts to support one another in their common goal. We also suggest that each group individually assess its message and visible representation to ensure an inclusive discourse.

A common expression of discrimination faced by the African-American and LGBT community alike is police brutality. It would be a positive step to see and hear from more LGBT organizations on issues of police violence and racial profiling of people of color. In addition, organizations that deal with race relations with the police should dedicate some of their message to

the harassment that gay men and lesbians face.

We suggest that organizations dedicated to racial equality make sure to be consistent in their message for equality for all Americans and support the LGBT community in its fight for equality. More importantly, we suggest that these organizations diversify their leadership and ensure that their leaders and role models are no less celebrated because they are gay or lesbian. Similarly, gay and lesbian organizations need to diversify their leadership to include more people of color. When presenting the face of the LGBT movement to engender empathy, LGBT organizations should make a conscious effort to include racial diversity.

... "we'll go with a [white] woman who lied for twenty years before we go with a black man who had to live the struggle nearly every day of his life."

ENDNOTES

* Lydia Edwards Esq., Founding Editor-in-Chief of *The Modern American*, JD American University, Washington College of Law 2006, wishes to give a special thanks to Julio Capo Jr. Doctoral Candidate of Florida International University for his insight and guidance.

¹ CALIFORNIA SECRETARY OF STATE, VOTER INFORMATION GUIDE 128 (2008), available at <http://www.voterguide.sos.ca.gov/text-proposed-laws/text-of-proposed-laws.pdf>.

² Maura Dolan, *California Supreme Court Overturns Gay Marriage Ban*, L.A. TIMES, May 16, 2008, available at http://www.latimes.com/news/local/la-mega-marriage16-2008may16_0,6182317.story; League of Women Voters of California Education Fund, Proposition 8: Eliminates Right of Same-Sex Couples to Marry, <http://www.smartvoter.org/2008/11/04/ca/state/prop/8/> (last visited March 1, 2009).

³ *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

⁴ Protect Marriage, About Prop. 8, <http://www.protectmarriage.com/about> (last visited March 1, 2009).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Proposition 8, County-by-County Map, L.A. TIMES, available at <http://www.latimes.com/news/local/politics/cal/la-2008election-california-results,0,1293859.htmlstory?view=8&tab=0&fnum=0>.

¹⁰ Shelly Grad, *70% of African Americans Backed Proposition 8, Exit Poll Finds*, L.A. TIMES, Nov. 5, 2008, available at <http://latimesblogs.latimes.com/lanow/2008/11/70-of-african-a.html>; see also CNN Election Center 2008, Local Exit Poll, <http://www.cnn.com/ELECTION/2008/results/polls/#CAI01p1>.

¹¹ See Grad, *supra* note 10 ("California's black and Latino voters, who turned out in droves for Barack Obama, also provided key support in favor of the state's same-sex marriage ban. Seven in 10 black voters backed a successful ballot measure to overturn the California Supreme Court's May decision allowing same-sex marriage, according to exit polls for The Associated Press. More than

half of Latino voters supported Proposition 8, while whites were split. Religious groups led the tightly organized campaign for the measure, and religious voters were decisive in getting it passed. Of the seven in 10 voters who described themselves as Christian, two-thirds backed the initiative. Married voters and voters with children strongly supported Proposition 8. Unmarried voters were heavily opposed.")

¹² The post has been taken down from his website.

¹³ Dan Savage, *Black Homophobia*, THE STRANGER, Nov. 5, 2008, available at http://74.125.45.104/search?hl=en&q=cache%3Aslog.thestranger.com%2F2008%2F11%2Fblack_homophobia&btnG=Google+Search&aq=f&oq=

¹⁴ Jeff Jacoby, *Playing the Race Card on Gay Marriage*, BOSTON GLOBE, Nov. 12, 2008, available at http://www.boston.com/news/specials/gay_marriage/articles/2008/11/11/playing_the_race_card_on_gay_marriage/.

¹⁵ Some Thoughts: When White Gays Show their True Rainbow, <http://suckaforlife.com/upodcast/tag/dan-savage/> (last visited March 1, 2009).

¹⁶ See Shannika, *Facts Belie the Scapegoating of Black People for Proposition 8*, Nov. 7, 2008, available at <http://www.dailykos.com/story/2008/11/7/34645/1235/704/656272>.

¹⁷ See, e.g., Ta-Nehisi Coates, *African Americans, Prop 8, and the Beguiling Art of Polling*, THE ATLANTIC, Jan. 12, 2009, available at http://ta-nehisicoates.theatlantic.com/archives/2009/01/africanamericans_prop_8_and_the_beguiling_art_of_polling.php.

¹⁸ Ari Karpel, *Black and Gay Like Me*, THE ADVOCATE, March 2009, Issue 1024, available at http://www.advocate.com/issue_story_ektid71760.asp.

¹⁹ Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1457, 1473-1514 (2000) [hereinafter Carbado, *Rights*].

²⁰ Angelo Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 892-893 (2006).

²¹ J.L. KING, ON THE DOWN LOW: A JOURNEY INTO THE LIVES OF 'STRAIGHT' BLACK MEN WHO SLEEP WITH MEN (Harlem Moon 2005).

²² Onwuachi-Willig, *supra* note 20, at 892.

ENDNOTES CONTINUED

- ²³ See, e.g., Tom Standifer, *Religious Leaders Clash on Validity of Gay Marriage*, DAILY NEXUS, May 29, 2008, available at <http://www.dailynexus.com/article.php?a=16990> (explaining that religious leaders in California hold different opinions on gay marriage based on whether or not it clashes with religion); Joseph Berger, *New York Church Leaders Divided Over Homosexual-Rights Measures*, N.Y. TIMES, Feb. 9, 1986 (describing the conflict between religious leaders in accepting homosexuality and protecting people from discrimination based on their sexual orientation).
- ²⁴ See Richard Leiby, *Donnie McClurkin, Ready to Sing Out Against Gay 'Curse'*, WASHINGTON POST, Aug. 29, 2004, at D03, available at <http://www.washingtonpost.com/wp-dyn/articles/A42982-2004Aug28.html>.
- ²⁵ *Id.*
- ²⁶ *Id.* at 893.
- ²⁷ Victor C. Romero, *Rethinking Minority Coalition Building: Valuing Self-Sacrifice, Stewardship and Anti-Subordination*, 50 VILL. L. REV. 823, 824 (2005).
- ²⁸ Devon W. Carbado & Donald Weise, *The Civil Rights Identity of Bayard Rustin*, 82 TEX. L. REV. 1133, 1133-1134 (2004).
- ²⁹ *Id.* at 1135.
- ³⁰ Pauli Murray never declared herself to be gay. However, based on personal writings and supposed relationships with women Pauli Murray was more than likely by today's standards a lesbian. For an in depth discourse on the complicated relationship Murray had with her sexuality one should read, Doreen Marie Drury, *Experimentation on the Male Side: Race Class Gender and Sexuality in Pauli Murray Quest for Love and Identity, 1910-1960* (Dec. 2000) (unpublished Ph.D. dissertation, Boston College) available at <http://escholarship.bc.edu/dissertations/AAI3008606/>.
- ³¹ National Organization for Women, Honoring Our Founders, <http://www.now.org/history/founders.html> (last visited March 1, 2009).
- ³² Answers.com, Pauli Murray: Biography, <http://www.answers.com/topic/pauli-murray> (last visited March 1, 2009).
- ³³ National Organization for Women, Honoring Our Founders, <http://www.now.org/history/founders.html> (last visited March 1, 2009).
- ³⁴ See MARRISA LACKEY, PAULI MURRAY, (2004) available at <http://womenslegalhistory.stanford.edu/papers04/MurrayP-Lackey04.pdf> (last visited March 1, 2009).
- ³⁵ Marlon T. Riggs, *Tongues Untied*, in BROTHER TO BROTHER: NEW WRITINGS BY BLACK GAY MEN 203 (Essex Hemphill ed., 2007).
- ³⁶ Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 619 (1997).
- ³⁷ *Id.* at 620.
- ³⁸ *Id.* at 631.
- ³⁹ *Id.* at 591.
- ⁴⁰ Hutchinson, *supra* note 36, at 630.
- ⁴¹ *Id.* at 628.
- ⁴² Carbado, *Rights, supra* note 19, at 1506.
- ⁴³ *Id.*
- ⁴⁴ *Id.* at 1508; see *Watkins v. United States Army*, 875 F.2d 699, 701 (9th Cir. 1989).
- ⁴⁵ *Watkins*, 875 F.2d at 701-702.
- ⁴⁶ Carbado, *Rights, supra* note 19, at 1506.
- ⁴⁷ See *Watkins*, 875 F.2d at 699.
- ⁴⁸ Gowri Ramachandran, *Intersectionality as Catch 22: Why Identity Performance Demands Are Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 332 (2005).
- ⁴⁹ *Watkins*, 875 F.2d at 699.
- ⁵⁰ Ramachandran, *supra* note 48, at 332.
- ⁵¹ Carbado, *Rights, supra* note 19, at 1513.
- ⁵² *Id.*
- ⁵³ Su Docekal, *Perry Watkins: A Soldier Whose Weapon Was the Truth*, FREEDOM SOCIALIST, (July-Sept. 1996), available at <http://www.socialism.com/fsarticles/vol17no2/watkins.html>.

PRINTING INFORMATION

The Modern American will print issues in accordance with the standards established by the Forest Stewardship Council ("FSC") that are designed to eliminate habitat destruction, water pollution, displacement of indigenous peoples, and violence against people and wildlife that often accompanies logging.

Achieving FSC Certification requires that every step of the printing process, from lumber gathering to transportation to printing to paper sorting, must comply with the chain of custody established by the FSC which runs a strict auditing system to maintain the integrity of their certification process.

Currently, FSC Certification is one of four methods a publisher can employ to ensure its publications are being produced using the best sustainable practices. It is also the method practiced by our printer, HBP, Inc. (FSC Chain-of-Custody Certification: SW-COC-002553).

Printed by HBP, Inc. on partially recycled paper.



MOVIE REVIEW: *VINCENT WHO?*

*Directed by
Tony Lam and Produced by Curtis Chin, 2008*

By Yeon Me Kim

On June 19, 1982, two white autoworkers killed Vincent Chin, a Chinese-American man whom they mistook as Japanese at the peak of anti-Japanese sentiments in Detroit. The American auto industry was going through a severe recession; Japan, its competitor, was blamed for the countless layoffs of U.S. autoworkers as Japan's auto industry was growing while the American auto industry was in a severe recession. Vincent Chin was brutally bludgeoned to death with a baseball bat during a night out when he was celebrating his bachelor's party. Because of this hate crime, Vincent's life ended at the young age of twenty-seven.

Ronald Ebens and Michael Nitz, Vincent's murderers, pled guilty to manslaughter and were sentenced to three years of probation and a \$3,720 fine. Judge Kaufman said that imprisoning a man who has committed to the same company for 17–18 years would not do any good for the society. This lenient ruling outraged Asian-Americans and galvanized them to organize a protest movement. Lisa Chan, an attorney, initiated "The American Citizens for Justice," to help publicize the incident. Publication led to rallies and public outrage eventually became the drive for the 1984 federal civil rights case against the defendants. The jury gave Ebens a twenty-five year sentence and found him guilty of violating Vincent's civil rights under 18 U.S.C. Section 245(b)(2)(F). Nitz was acquitted of all charges. Eben's case was overturned on appeal, however, because the trial court had refused to admit certain evidence. On retrial in Cincinnati, Ohio, a jury acquitted Ebens of all charges.

The documentary "Vincent Who?" directed by Tony Lam and produced by Curtis Chin, examines how Vincent Chin's case has influenced the Asian-American community especially with regards to the recognition of their civil rights. The documentary focuses on a national town hall meeting memorializing the 25th anniversary of Chin's death. "Vincent Who" includes interviews of Asian-Americans involved in the case and Asian-American civil rights activists sharing their stories and reflections. The documentary suggests that the pan-Asian-American movement emerged after the murder. The biased court ruling for the defendants became a watershed event for Asian-Americans to recognize the need to call for protection of their civil rights.

The Asian-American community was outraged by Chin's murder. Not only was he killed because of his outward appearance, but the defendants' sentences for his murder were unfairly lenient. One of the interviewees, Ms. Nhung Truong, a District Representative for California Congressman Adam Schiff, described her outrage when she heard the story for the first time. A person selling "V. Chin" t-shirts at a local festival told her about the murder. The case changed her life and motivated her into politics and community activism. She became an agent for preventing the abuse of Asian-Americans' civil rights by seeking to raise the Asian-American voice in the American political

system. Ms. Truong expressed that Chin would have been alive if he were not Asian-American. She said that the ruling for Chin's murderers would not have come out so unfairly if he were not Asian-American.

The outrage of Asian-American community forced them to come together and fight for their rights. The documentary suggests that the murder brought the Asian-American community together. The stark injustice perhaps tapped into a grudge subconsciously harbored for feeling as outsiders in the American society. The interviewees in "Vincent Who?" were amazed at how the murder fired up a local Asian-American movement that eventually sparked a national pan-Asian-American civil rights movement.

Dale Minami, a civil rights attorney featured in the documentary, explained that the race issue in the U.S. is always framed as a dichotomy between black and white. "Asian-American" is not part of the discussion of civil rights under the Fourteenth Amendment. This is partly because the immigration history of Asian-Americans is short, especially compared to that of African-Americans. Minami theorizes that, unlike African-Americans, Asian-Americans are still influenced by the culture of their country of origin. Often, people regard Asian-Americans' lingering ties to their country of origin as being disloyal to the U.S. This view may lead people, like Chin's murders, to view Asian-Americans with suspicion. The autoworkers expressed their anger against the Japanese auto industry toward Chin, who they assumed was a Japanese-American.

This documentary suggests that the pan-Asian-American civil rights movement rejects the view that Asian-Americans are necessarily tied to their country of origin. They also reject the view that these ties reinforce the gap between Asian-Americans and the majority of U.S. society. Although some Asian-Americans have cultural ties to their country of origin, this is not unique within U.S. society.¹ The U.S. has traditionally been a melting pot of immigrants, who have always brought new cultures to this country.² Yet, these cultures have been assimilated into the mainstream. Relative to other immigrant groups, Asian-Americans are late arrivals to U.S. society.³ They are now going through the transition of full-fledged integration into society, as other immigrants did in the past.⁴ Thus, they should not be discouraged from melting into the U.S. mainstream.⁵ Once Asian-Americans become citizens, they should be treated equally in every aspect; origin or culture should not be grounds for discrimination.

"Vincent Who?" describes an important historical landmark served by Vincent Chin, an unintended martyr. The discrimination against Asian-Americans during the Chin trials inspired the pan-Asian-American civil right movement which continues to address the problems of discrimination. Through the efforts of this movement, realization of the Fourteenth Amendment's Equal Protections Clause rights will become whole by rendering equal rights to every American citizen.

ENDNOTES

¹ The Fundamentals of Identity and Culture, Asian American Alliance, <http://www.asianamericanalliance.com/The-Fundamentals-of-Identity-and-Culture.html> (last visited 3/16/09).

² 'Melting pot' America, BBC News, <http://news.bbc.co.uk/1/hi/world/americas/4931534.stm> (last visited 3/16/09).

³ Asian American History Timeline, <http://www.cetel.org/timeline.html> (Though very early Asian immigrants came to the U.S. continent in the 1600s, a large number of Asian immigrants started coming to the States in the 1800s.) (last visited 3/16/09); *see also*, Immigration History and Statistics, Asian American Alliance, <http://www.asianamericanalliance.com/Immigration-History-and-Statistics.html> (last visited 3/16/09).

⁴ SRILATA BHATTACHARYYA, FROM "YELLOW PERIL" TO "MODEL MINORITY": THE TRANSITION OF ASIAN AMERICANS. 7-8 (2001), http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/19/db/ec.pdf (2001).

⁵ Asian American Alliance, Advancing Equality: Stopping Prejudice against Asian Americans, *available at* <http://www.asianamericanalliance.com/Advancing-Equality.html> (last visited 3/16/09).

National South Asian Summit

Founder's Celebration

April 24th – 26th, 2009

The 2009 South Asian Summit is hosted by the South Asian Law Students Association at the American University Washington College of Law & South Asian Americans Leading Together (SAALT).

The Summit provides an opportunity for South Asian organizational leaders, community members, and students to engage with policymakers in DC; to learn about issues of concern; and to strategize around best practices and future collaborations.

This will be a great opportunity to meet lawyers, advocates, students, professionals, service providers, and non-profit staff members from around the country.

The event is FREE for WCL Students, Faculty, Staff, Alumni, and Affiliates.

A Quick Look at the Agenda

- ▶ **Friday, April 24th/10AM–4PM:** Briefing to and from Congress, meetings with Congressional members, briefings with Administration officials, and DC site visits
- ▶ **Friday, April 24th/7PM–9PM:** ChangeMaker Awards Reception (K&L Gates – 1601 K St. NW)
- ▶ **Saturday, April 25th/9AM–8PM:** Discussions and workshops on issues affecting the South Asian community as well as skills-building trainings (American University, Washington College of Law), followed by a reception (6:30–8PM)
- ▶ **Sunday, April 26th/9AM–12:00PM:** Regional Breakouts, Open Space, Closing Session (American University, Washington College of Law)

Register using this link: www.wcl.american.edu/secl

For more information: visit www.saalt.org or email summit09@saalt.org

LEGISLATIVE UPDATES

By Guadalupe A. Lopez

H.R. 11: Lilly Ledbetter Fair Pay Act of 2009

The Lilly Ledbetter Fair Pay Act was signed into law on January 29, 2009. It was passed by a House vote of 250–177 and was promptly signed by President Obama, becoming Public Law No. 111-2. The Act amends Title VII of the Civil Rights Act of 1964 which prohibits discrimination in compensation on the basis of color, religion, sex or national origin. The Act provides that unlawful employment practice occurs when 1) a discriminatory compensation decision or other practice is adopted, 2) an individual becomes subject to the decision or practice, or 3) an individual is affected by the application of the decision or practice, including each time wages, benefits, or other compensation is paid.¹ The Act effectively overrules the Supreme Court's holding in *Ledbetter v. Goodyear Tire and Rubber Co.* In *Ledbetter*, in a 5–4 decision, the Court held that under Title VII, an employee may only seek redress against pay discrimination within 180 days of the alleged discriminatory act.² This meant that an employee could not bring an otherwise valid pay discrimination claim against an employer if he or she did not discover the initial discriminatory act within 180 days. The Court's decision failed to address that often times employees will not learn that they have been victims of discrimination until after 180 days from the time when the employer decides to take such action. Under the Court's ruling, an employee was left without recourse; the employer was then free to continue discriminating.

In her EEOC claim, Lilly Ledbetter argued that the 180-day statute of limitations should be renewed each time an employer issues an intentionally discriminatory wage or salary paycheck.³ Congress agreed with Mrs. Ledbetter, recognizing that the Court's decision “unduly restricted the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.”⁴ Proponents of the Act maintain that the Supreme Court's interpretation in the *Ledbetter* decision was unrealistic and unfair. The Court's interpretation ignored the real-world facts of discrimination and harmed thousands of women.⁵ Critics of the Act argue that it will encourage needless decades-old litigation against employers who may not have had committed the initial discriminatory act.⁶ However, the Act limits the amount of recovered back pay to those withheld within the two years preceding the filing of the complaint. This limitation discourages employees from delaying to bring their claims. The Act similarly amends provisions on the Age Discrimination Employment Act of 1967 and the American with Disabilities Act of 1990.⁷

H.R. 2: Children's Health Insurance Program Reauthorization Act of 2009

The State Children's Health Insurance Program Reauthorization Act of 2009, or SCHIP, was signed on January 14, 2009. It became Public Law 111-3 after passing the House with a vote

of 290–135. The Act will allow 7 million children to continue receiving health insurance while extending this same coverage to an additional 4.1 million uninsured children. The SCHIP will assist children in low-income households which earn too much to qualify for Medicaid but are still unable to afford health insurance.

The Act will extend Medicaid eligibility by changing the eligibility rules including documentation of citizenship. Rather than requiring documentation of citizenship, the Act gives States the option to verify an applicant's citizenship through their Social Security number. This will allow an applicant to obtain coverage while being in the process of securing citizenship documentation.⁸ The Act will also provide States with the option to assist legal immigrant children and pregnant women without the 5-year legal residence restriction.

The Bush Administration firmly opposed this legislation when it was first introduced in 2007, vetoing it on two separate occasions.⁹ Like the Bush Administration, critics of the Act argue that it will provide needless health insurance to an estimated 2.4 million children who would otherwise be covered by private health insurance.¹⁰ Sponsors of the Bill refute this claim by pointing to the estimated 4 million jobs which have reportedly been lost within the past year. The children within those households, in the end, will no longer receive private health insurance.¹¹ The Congressional Budget Office estimates the cost of expanding coverage under the Act to average around \$32.8 billion from 2009–2013.¹² Funding for the program will be provided through a 62-cent increase on cigarette tax which will raise the price of cigarettes \$1.01 a pack. It will also require an increase in tax for other tobacco products.¹³

H.R. 1064: “The Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support, and Education Act”

The Youth Promise Act seeks to provide alternatives to prosecution and incarceration which have proven to be more effective in reducing crime and violence in young offenders.¹⁴ The Act is a bipartisan effort which acknowledges that excessively punitive juvenile justice policies increase long-term crime risks. Instead, the Youth Promises Act is aimed at intervention and preventive measures targeting at-risk youths as well as their families. It proposes providing local communities with the resources necessary to develop all-inclusive plans designed primarily by representatives from local faith organizations, law enforcement, schools, community organizations, and health and social service providers.¹⁵ The objective behind these community-based programs is to develop crime prevention, research, and intervention services for gang members and at-risk youths. This evidence-based approach to juvenile delinquency will furnish grants for the research of adolescent development through methods responsive to the needs and strengths of individual communities, focusing on cultural and linguistic differences.

Proponents of the Act claim that this preventive approach will yield a greater decrease of recidivism of juvenile delinquents. Furthermore, this approach will be less costly than punishment-oriented approaches such as the Gang Abatement and Prevention Act. That Act seeks to deter criminal gang activity by imposing stricter criminal penalties on juvenile offenders.¹⁶ Groups such as the American Civil Liberties Union (“ACLU”), National Association for the Advancement of Colored People, and Human Rights Watch have applauded the Youth Promises Act after noting that incarcerated offenders disproportionately belong to low income and minority communities.¹⁷ The ACLU has acknowledged that the Bill is a step towards “breaking the vicious ‘school-to-prison pipeline’ wherein children, overwhelmingly children of color, in elementary, middle and high schools are pushed out of the classroom and into the juvenile and eventually adult criminal justice system.”¹⁸ The Bill was introduced by Robert C. Scott (D-VA) and Mike Castle (R-DE) with 69 original co-sponsors in the House of Representatives. An identical bill was introduced in the Senate, S. 435, by Rover Casey (D-PA) and Olympia Snow (R-ME).

H.R. 738: “Deaths in Custody Reporting Act of 2009”

The Act requires States to report to the Attorney General information regarding the death of any person who is detained, under arrest, or being arrested, in a State-run prison or State-run detention center (including immigration and juvenile detention facilities).¹⁹ Among the information required by the Act

are 1) a description of the person, 2) the date, time and location of the death, 3) the law enforcement agency under which the death occurred, and 4) a brief description of the circumstances surrounding the death.²⁰ The Act addresses certain deficiencies within the “Deaths in Custody Reporting Act of 2000.” The 2000 Act, for instance, required only reporting from State-run and not federal detention facilities. It directed States to make only an initial report to the Attorney General concerning the death of a detainee. The proposed 2009 Act, in addition to this initial report, directs the Attorney General to conduct a study to “examine the relationship, if any, between the number of such deaths and the actions of management of such jails, prisons, and other specified facilities.”²¹ Such a requirement will reject vague descriptions such as “unresponsive” or “undetermined” as reasons behind a person’s death.²² Proponents of the Act assert it will ensure transparency and accountability by requiring proper documentation and inquiry into a person’s death while in government hands.²³ The Act comes at a time of mounting concern over the questionable deaths and alleged neglect occurring within federal-run immigrant detention facilities.²⁴ Reports of the reprehensible treatment of immigrant detainees have resulted in increasing support for this Act by groups such as the ACLU.²⁵

Compliance with the Act shall be enforced through eligibility for federal funding. The Bureau of Justice as well as facilities currently receiving federal government funding will lose 10% of such funding if they fail to provide details regarding the death of a detainee in a timely manner.²⁶ States in compliance with the program would receive this funding. The bill, introduced by Representative Robert Scott (D-VA), has been referred to the Senate Committee after passing through the House with a 407–1 vote.

ENDNOTES

¹ Lilly Ledbetter Fair Pay Act of 2009, H.R. 11, 11th Cong. (2009).

² Ledbetter v. Goodyear Tire and Rubber Co., 127 S. Ct. 2162 (2007).

³ *Id.* at 2164.

⁴ H.R. 11.

⁵ 155 CONG. REC. H116-H117 (statements of Rep. Mazie Hirono and Rep. Steny Hoyer).

⁶ 155 CONG. REC. H117 (statement of Rep. Howard McKeon).

⁷ H.R. 11.

⁸ *SCHIP Reauthorization in 2009: An Update on the Debate and Side-by-Side of Key Bills Under Consideration*, Georgetown University of Health Policy Institute Center for Children and Families, Jan. 29, 2009.

⁹ Christopher Lee, *Bush: No Deal on Children’s Health Plan*, WASH. POST, July 19, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/18/AR2007071801434.html?referrer=emailarticle>.

¹⁰ *Id.* See also 155 CONG. REC. H256 (statement of Rep. John Boehner).

¹¹ 155 CONG. REC. H256 (statement of Rep. Edward Markey).

¹² CONGRESSIONAL BUDGET OFFICE COST ESTIMATE, H.R. 2, Children’s Health Insurance Program Reauthorization Act of 2009 (Feb. 11, 2009).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Youth Promises Act, H.R. 1064, 111th Cong. (2009).

¹⁶ *Human Rights Watch Calls on Congress to Support the “Youth PROMISE Act,”* H.R. 3846, April 6, 2008, available at <http://www.hrw.org/en/news/2008/04/06/human-rights-watch-calls-congress-support-youth-promise-act-hr-3846>.

¹⁷ *Id.* See also Letter from Caroline Fredrickson, Director, and Jesselyn McCurdy, Legislative Counsel, American Civil Liberties Union, to Congress in Support of H.R. 3846, the Youth PROMISE Act, December 17, 2007, available at <http://bobbyscott.house.gov/pdf/ACLU.071217.pdf>.

¹⁸ Letter from Caroline Fredrickson, Director, and Jesselyn McCurdy, Legislative Counsel, American Civil Liberties Union, to Congress in Support of H.R. 3846, the Youth PROMISE Act, December 17, 2007, available at <http://bobbyscott.house.gov/pdf/ACLU.071217.pdf>.

¹⁹ Death in Custody Reporting Act of 2009, H.R. 738, 111th Cong. (2009).

²⁰ *Id.*

²¹ *Id.*

²² Immigration and Customs Enforcement Report, *Detainee Deaths 2004–November 2007*, available at http://graphics8.nytimes.com/packages/pdf/nyregion/ICE_FOIA.pdf. See also Nina Bernstein, *Few Details on Immigrants Who Died in Custody*, N.Y. TIMES, May 5, 2008, available at http://www.nytimes.com/2008/05/05/nyregion/05detain.html?_r=1.

²³ 155 CONG. REC. H887 (statement of Rep. Michael Honda).

²⁴ Nina Bernstein, *U.S. Issues Scathing Report on Immigrant Who Died in Detention*, N.Y. TIMES, Jan. 16, 2009, at A14, available at <http://www.nytimes.com/2009/01/16/us/16detain.html>. See also Nina Bernstein, *Ill and in Pain, Detainee Dies in U.S. Hands*, N.Y. TIMES, August 13, 2008, available at <http://www.nytimes.com/2008/08/13/nyregion/13detain.html>.

²⁵ American Civil Liberties Union, *House Passes Bill to Expand Reporting of Immigrant Deaths in Detention*, Feb. 4, 2009, available at <http://www.aclu.org/immigrants/gen/38668prs20090204.html>.

²⁶ H.R. 738.

ABOUT *THE MODERN AMERICAN*

Diversity is one of America's greatest assets. It continues to reshape and refine our laws and culture daily. *The Modern American* is the Washington College of Law's non-partisan, student-run publication dedicated to cutting-edge issues in diversity and the law. It promotes a provocative, fresh dialogue evaluating legal and social issues influencing minority groups in our country today. *The Modern American* discusses America's legal and social systems' treatment of racial, ethnic, sexual, and other underrepresented peoples from a wide range of political and social viewpoints.

Featuring a broad spectrum of stimulating articles by legal scholars and practitioners from all over the country, *The Modern American* publishes submissions regardless of their political sway, social leaning, or limitation to legal issues. To submit or subscribe to the publication for free, send a "Letter to the Editor," or request more information, please email tma@wcl.american.edu.

For more information, please visit our web site at:

<http://wcl.american.edu/modernamerican/>

SUBMISSION GUIDELINES

The Modern American accepts articles on a rolling basis. We will not publish articles over 50 pages in length. Please email all articles submissions to tma@wcl.american.edu and a cover letter with your name, phone number, address, biographical sketch of all authors, as well as a short abstract of the article. Articles should be in MS Word, in Times New Roman, and double-spaced. Citations should conform to *A Uniform System of Citation* (18th Ed.) (the *Bluebook*). For questions of literary style, authors should consult *The Chicago Manual of Style* (15th Ed).

Articles or portions of articles already published may be eligible with permission. Please indicate all publications in which your proposed article appears or is forthcoming. Please contact *The Modern American* with any questions regarding the eligibility of your article.

***THE MODERN AMERICAN* DISCLAIMER**

No portion of this publication may be reprinted without the express written permission of *The Modern American*. The views expressed in this publication are those of the writers and are not necessarily those of the editors or American University. American University Washington College of Law is an equal opportunity, affirmative action university.

Copyright *The Modern American*, 2006.

THE MODERN AMERICAN

American University
Washington College of Law
4801 Massachusetts Avenue, NW
Suite 615
Washington, DC 20016-8181
(202) 274-4247

NON-PROFIT
U.S. POSTAGE
PAID
WASHINGTON, D.C.
PERMIT NO. 1158

Return Postage Guaranteed
Forwarding Service Requested

<http://wcl.american.edu/modernamerican>
tma@wcl.american.edu



AMERICAN
UNIVERSITY

WASHINGTON COLLEGE of LAW

ANNOUNCING

PROGRESSIVE PEOPLE OF COLOR CAUCUS

- Progressive People of Color Caucus is a new initiative founded by students of color interested in creating a supportive space for color-and-politics consciousness at WCL.
- We invite any WCL community member who self-identifies as a person of color and who is passionate about the politics of race and ethnicity to join PPOCC.
- We intend to sponsor several informal and formal conversations about our guiding principles and future activities through semester's end.
- As a self-governed group that depends on individual contributions rather than a chain of command we'll need your involvement and input to sustain our vision.

To join our listserve, please contact
ppocc.wcl@gmail.com