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Volume 1, Issue 1

THE MODERN AMERICAN

A Publication Dedicated to Diversity and the Law



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LETTER FROM THE EXECUTIVE BOARD

The history of *The Modern American* is a very short one. In April 2004, I approached the newly elected leaders of the diverse student organizations: Asian Pacific American Law Students Association (APALSA); Black Law Students Association (BLSA); Hispanic Law Students Association (HLSA); Lambda Law Society; and the South Asian Law Students Association (SALSA), about starting a legal publication dedicated to diversity and the law. Many people expressed interest in getting the publication off the ground but Angela and Preeti remained steadfast in their dedication and we began to create a publication.

Over the summer, we worked hard to assure the new publication would have a distinct voice. From the beginning, we knew we did not want the publication to be a rant and rave about what's wrong with American society. We wanted to convey the message that many people experience America differently because of many factors. Although labeled as minorities, their experience is no less patriotic, typical, or American. In a time of modern Americans, we wanted to start a publication that expressed the distinct perspective of our generation, while conveying the sense of pride we have as Americans for our history and hope for the future.

We live in a time where the lines that separate issues of race, ethnicity, sexuality, and gender are rapidly moving closer together. As an increasingly diverse nation, we cannot limit the discussion of legal issues and civil rights to simple sound bites such as "blacks vs. whites," "liberal vs. conservative," or "women vs. men." We, at *The Modern American*, want to initiate a full discussion encompassing all the complexity of the minority community, gender relations, and sexuality by publishing articles that provide a unique perspective in analyzing diversity and the law. However, our philosophy is to present a balanced perspective on critical issues of minority communities by including both liberal and conservative views. We are a diverse population and it would be a travesty to only present one voice.

The Modern American's purpose is to provide a discourse with regards to the legal and social issues that affect groups that have traditionally experienced discrimination, including but not limited to, people of color, ethnic groups, and the gay, bisexual, lesbian and transgender community. For so long the legal community's analysis of issues that affect these groups has been in a tone of "uniqueness," instead of a one that reflects their ever growing presence and influence in America. The legal community has also virtually ignored any discourse concerning the intra-group and inter-group conflicts that arise within these groups in their growing efforts to assert their voices, protect and maintain civil rights, and find their respective niche in American politics. We believe that any discussion that brings to light this particular struggle will only help groups form cohesive bonds within their constituency and increase problem solving discourse

among the groups. This publication will also examine the way people associated with minority groups have been treated by the legal system and we intend to present a critical analysis of the current social and legal remedies for minority issues.

Since this is our first issue, we thought that an appropriate theme would be the "State of Our Union." Having recently inaugurated a president who gave a State of the Union address, it seemed only fitting to inaugurate our first issue with a variety of issues that affect Americans. What you will find in the following pages are articles that provide a new perspective on topics in the mainstream media as well as articles that discuss issues neglected by the legal community and larger public.

In closing, this publication has been the dream of many generations at American University Washington College of Law and is finally coming to fruition. Many alumnae have shown their support, proving that "we are all descendants of the good works of others." Therefore, we would like to thank our advisors Professors Jamin Raskin, Pamela Bridgewater, Perry Wallace, Jr., and the director of Diversity Services, Ms. Sherry Weaver for all their support. Also an integral ingredient to this publication's success is the energy from a dynamic staff that believed in this publication for over a year. It is with great humility and admiration that we would like to thank them for all of their contributions, whether editing, writing, or advising. We continue to be amazed by their endurance, dedication, and energy. As such, it is with great anticipation that we can finally say, "Here is the first issue of *The Modern American*."

Sincerely,

Lydia Edwards
Angela Gaw

Preeti Vijayakumaran

Founding Editor-in-Chief

Managing Editor

Senior Articles Editor

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SAVE A HUNTER, SHOOT A HMONG: A COMMUNITY HELD RESPONSIBLE—THE ASSIGNMENT OF BLAME BY THE MEDIA

By Aimee J. Baldillo, Esq., Jeanette Mendy, and Vincent Eng, Esq.*

It was the weekend before Thanksgiving, the second day of the hunting season, and like many Americans, Chai Soua Vang, a 36 year old Hmong American and U.S. citizen who had served in the U.S. Army, spent his weekend hunting in the woods in Meteor, Wisconsin. By the end of the day, instead of returning to his home with his game, Chai Soua Vang was in police custody for the alleged shooting of eight hunters. Chai Soua Vang's involvement in the tragedy that occurred at 12:30 p.m. on November 21, 2004 would not be limited to assignation of his own guilt or innocence. Rather, the case would have repercussions for all Hmong Americans by putting an entire community on national trial for the actions of one man.

Rice Lake is a small town in the northwest corner of Wisconsin. Hunting is a way of life in the state, and by the start of the 2004 season the Department of Natural Resources had granted 640,000 hunting licenses.¹ The season officially kicks off the Saturday before Thanksgiving and lasts nine days.² It is a special time in the community, as families come together and take part in celebration. Family deer hunts are a deeply rooted part of the culture in the area, and it is not uncommon for schools to close during this time and for families to travel to be together at the start of the season.³

Anyone who followed the news concerning Chai Soua Vang and the Wisconsin hunting tragedy is familiar with the story. According to news reports,⁴ Chai Soua Vang said the confrontation began when he was hunting on public land and got lost, ending up in a vacant tree stand. He did not realize he was on private property and remained in the tree stand until another hunter, Terry Willers, came along and informed him that he was on private property. Chai Soua Vang then climbed out of the tree stand at which point Willers made a call on his walkie-talkie. Other hunters arrived in all-terrain vehicles and surrounded him. Chai Soua Vang stated that some of the people in the group yelled racial slurs at him and that one individual pointed and fired a gun at him from about 30 feet away. He dropped to a crouch as the bullet hit the ground about 10 feet away. He then took the scope off his rifle and began shooting at them.

Of the eight victims, six were killed – Jessica Willers, Dennis Drew, Mark Roidt, Robert and Joseph Crotteau, and Allan Laski. The other two – Terry Willers and Lauren Hesebeck – went to the hospital with injuries. The news reported that there was only one gun found among the group of eight victims.⁵ According to Terry Willers and Lauren Hesebeck, no one in their hunting group pointed a gun at Chai Soua Vang or yelled racial slurs before he started shooting.⁶ They claimed that Chai Soua Vang fired the first shot after he was confronted on private property.⁷

Chai Soua Vang was charged with six counts of first-degree

intentional homicide by use of a dangerous weapon and two counts of attempted first-degree intentional homicide.⁸ This case has gained such national prominence that the Attorney General of Wisconsin directly prosecuted the case in her first courtroom appearance since being elected in 2002.⁹

This article neither makes judgments with respect to Chai Soua Vang's innocence or guilt, nor does it comment on the discrepancies in the different versions of the facts. Rather, it focuses on the aftermath and effects of this tragedy on the Hmong American community and the assignment of blame and responsibility the media and certain individuals have levied upon them.

BRIEF HISTORY OF HMONG AMERICANS

Americans know very little about the Hmong—even within the Asian Pacific American community. What we do know of the Hmong—their recruitment by the Central Intelligence Agency (CIA) during the Vietnam War and why they are in the United States—was only recently disclosed when government documents were declassified in the early 1990s.¹⁰ Our knowledge of the Hmong is also limited because they did not develop a written language until the 1950s and their history has been passed down orally through the generations. But in the 30 years that they have been in the United States, Hmong Americans (numbering 169,428 according to the Census 2000) have emerged as successful small business owners, professionals, and politicians.

The Hmong are an ancient ethnic group without a country who can trace their history back to China circa 1200 B.C.¹¹ Living in oppression, the Hmong, called *Miao* (savage) by the Chinese, were agriculturally based nomadic clans.¹² In the late 1700s and early 1800s, the Hmong fled the oppression they faced in China and settled into Laos, Vietnam, and Thailand.¹³

During the Vietnam War, the CIA recruited the Hmong to assist the United States against the North Vietnamese.¹⁴ In exchange for their assistance, the Hmong were promised resettlement in the United States if the war was lost.¹⁵ By 1969, 40,000 Hmong soldiers were fighting with the United States against the Viet Cong and North Vietnamese government.¹⁶

After the withdraw of the United States in 1973 and the collapse of South Vietnam in 1975, the North Vietnamese and Pathet Lao actively sought out the Hmong for execution or imprisonment in re-education camps.¹⁷ In 1975, the United States immediately resettled the high ranking Hmong military officers and their families.¹⁸ Many of those who were not resettled in the United States in the first group fled to Thailand to live in refugee camps.¹⁹ By 1978, these refugee centers held about 50,000 people.²⁰

Since 1975, the U.S. government has allowed groups of Hmong from these refugee centers to resettle in the United

States.²¹ Originally, Hmong refugees were dispersed in over 53 cities in 25 different states. Between 1981 and 1985, the Hmong began to re-form their traditional clan communities in the United States by undertaking a secondary migration, mostly to California and parts of Wisconsin and Minnesota in small family groups.

Due to cost of living and other economic reasons, a third migration occurred from the west coast to the Midwest in the 1990s, primarily to the Minneapolis/St. Paul area.²² This migration made St. Paul the city with the largest Hmong American population in the United States at 24,389.²³ That number is expected to grow larger as many of the remaining thousands of Hmong who are still in Thailand waiting to be resettled are expected to resettle in the Twin Cities region.

NEW HOME, NEW PROBLEMS

Assimilation into American communities, including those in the Twin Cities region, has not been without difficulty for Hmong Americans. The Hmong brought old customs and traditions to their new homes. Many of these customs and traditions are difficult for the new American neighbors to understand. For example, a Hmong funeral can last up to four days and services typically include many cultural rituals foreign to traditional American funerals. Citizens in a Sheboygan, Wisconsin neighborhood complained that mourners attending Hmong funerals created parking problems on the city streets for the multiple day ceremonies.²⁴ Additionally, it is not uncommon for Hmong to rely upon a shaman to cure illnesses rather than a medical doctor.²⁵ Abiding by such traditions and customs has resulted in social and legal problems for members of the Hmong population living in the United States. Animal sacrifices performed by Hmong during traditional religious rituals on a farm caused one Minnesota city to sue the owner for violating a zoning ordinance.²⁶ Living in the United States while trying to preserve certain customs and traditions of their home country has proved to be difficult for the Hmong Americans as well as for their neighbors whose frustration with these cultural traditions have made tensions apparent.

Other issues that face the Hmong and the communities in which they live are problems with barriers to employment due to difficulties with written and spoken language,²⁷ and increased Hmong gang activity.²⁸ These problems may have aided the development of an environment ripe for assigning blame to the Hmong as a whole in the latest incident involving a member of the Hmong community.

THE MEDIA'S ROLE IN ATTRIBUTING THE KILLINGS TO CULTURE

In early September of 1998, Khoua Her strangled her six children to death and then tried unsuccessfully to kill herself.²⁹ Media reports on Her's case focused on the Hmong culture and

recounted her hardships being a Hmong in the United States as an explanation for her actions.³⁰ Contrastly, when Andrea Yates, a stay at home mother of five living in Houston, Texas, killed all of her children, the media focused on her mental state as an excuse for her actions.³¹ Both women killed their own children by their own hands but the media assigned blame to the Hmong culture and population as a group in Her's case and blame was removed from Yates and assigned to a mental illness.

In Chai Vang's case the focus is again on the Hmong culture as an explanation. Almost immediately after the killings of the hunters, the media began examining the Hmong American community in an attempt to make causal connections between the Hmong culture and the incident. Reporting on details of the case soon gave way to commentary and complaints about Hmong Americans as a whole. For example, several news articles made mention of how the Hmong have difficulty understanding and abiding by laws such as fishing limits and hunting permit requirements because such laws do not exist in their countries of origin.³² Although there was acknowledgment of the fact that there was a lack of outreach to Hmong American residents to educate them about hunting regulations by the Department of Natural Resources, the image painted of Hmong American hunters was one of a people who held hunting laws and regulations in total contempt and violated such rules at higher rate than other hunters.³³ Prominent members of the Hmong American community noted the media's reporting of a so-called "Hmong hunting culture" and voiced concern to members of the press about their stunted portrayal. As Minnesota state Senator Mee Moua, a Hmong American, told members of the Asian American Journalists Association, "I keep reading about the 'Hmong hunting culture' or that Hmong don't understand public and private land use. There is no Hmong hunting culture. Of course the terrain is different so hunters may hunt differently in Laos than they do in America. But hunting is hunting. And within that culture, all hunters are deeply territorial about where they hunt. And by the way, we are Hmong Americans. We are law-abiding citizens who respect the rights of others."³⁴

Members of the Hmong American community recognized that people looked to them, collectively, to answer for Chai Soua Vang's actions. "It's difficult to be Hmong American right now," said state Senator Mee Moua.³⁵ "There's an expectation that the Hmong American community ought to be answerable, or ought to be responsible for this one man's actions."³⁶ The leaders in the Hmong American community were barraged with questions from the local and national press exploring the fact that Chai Soua Vang was Hmong and whether his Hmong heritage had any effect on why he would have committed this act.³⁷

With the advent of the internet to deliver news instantaneously, this country has seen its share of local stories rushed to the national headlines: the OJ Simpson case, the Columbine

"I keep reading about the 'Hmong hunting culture' or that Hmong don't understand public and private land use. There is no Hmong hunting culture"

shootings, the Oklahoma City bombing, and the events of 9/11. What differentiates the Chai Soua Vang case from these others is that the media focused on the responsibility of the community for the alleged actions of this single man.

“SAVE A HUNTER, SHOOT A MUNG”

A week after the killings, there were reports of hate bumper stickers appearing on vehicles in Wisconsin that read “Save a Deer. Shoot a Hmong.”³⁸ The next month, Custom Now, a store in Mankato, Wisconsin, carried bumper stickers that read “Save a Hunter. Shoot a Mung.”³⁹ The store manager for Custom Now insisted that the sticker was not racist, as Mung was an acronym for “Minuscule Unseen Naughty Gnat.”⁴⁰ In Menomonie, Wisconsin, a 39-year-old Caucasian man was charged with spray painting “Killers” on the homes of Hmong Americans.⁴¹ In January 2005, the National Socialist Movement, an organization dedicated to the “preservation of our Proud Aryan Heritage” and fights for “Race and Nation”⁴² in the St. Paul/Minneapolis area, distributed hundreds of flyers with pictures of the six slain Wisconsin hunters that read, “Is diversity worth even *ONE* American life? These six Americans were killed protecting their private property / hunting rights...Are you next?”⁴³ The National Asian Pacific American Legal Consortium, a prominent civil rights legal advocacy organization in Washington, D.C. that monitors and responds to hate crimes against Asian Pacific Americans, have received further reports of Hmong Americans being sent death threat letters, assaulted and having guns pointed at them, and victimized by hate property crimes. The Hmong National Development, Inc. and the Southeast Asia Resource Action Center, both national advocacy organizations, have received similar reports. In most instances, the hate crime victims are reluctant to even report the crime or incident for fear of further reprisal.

CRAFTING A COLLECTIVE BLAME

*I would like to ask that anyone who is trying to make this a racial issue either white or minority would please stop this and know that is a dishonor to all of our loved ones to continue these acts of prejudice. If you are not of Native American blood, we are all immigrants.*⁴⁴

Theresa Hesebeck

Sister of victim Lauren Hesebeck, December 13, 2004

Immediately after the shooting, the local news broadcast Chai Soua Vang’s home address on the news. Chai Soua Vang’s family quickly moved to an undisclosed area for their safety. The news media also quickly began reporting on Chai Soua Vang’s military enlistment history and involvement in a domestic disturbance incident in 2001.⁴⁵ What was not reported was the vigil that Chai Soua Vang’s neighbors, his white neighbors, held to ensure the safety of his family and his house. Likewise, not a single major media outlet covered Theresa Hesebeck’s statement of tolerance or the website she established to memori-

alize the victims. In its coverage of the Chai Soua Vang case and related events, the media chose a distinct path by holding the Hmong American community suspect. This characterization has resulted in members of the Hmong American community taking a defensive stance on the case or constantly make a public distinction between the Hmong American people as a whole and the defendant as an individual.

*It does not in any way represent who we are as a people*⁴⁶

Shwaw Vang

Madison School Board Member

Why did Shwaw Vang feel the need to say this? What compelled him to take a defensive stance on behalf of an entire population of people that had no involvement whatsoever with the shootings? The examples of graffiti and bumper stickers exemplify the backlash that the Hmong American community faced, and that many held their Hmong neighbors responsible for Chai Soua Vang’s actions. Why were there no such vigilante reprisals in the wake of the Columbine shootings or the Oklahoma City bombings? Why was there no questioning of “White America” on whether the actions of Timothy McVeigh and Terry Nichols were related to their race? Did America hold German Americans responsible for the actions of Jeffrey Dahmer’s brutality? Should we hold all whites accountable for the actions of those individuals?⁴⁷

The absurdity of the thought begs the question of why Hmong Americans are being held accountable. These very observations were made in editorial opinions published in Minnesota and Wisconsin newspapers.⁴⁸ When a crime is perpetrated by a white person, the press does not call out to a specifically white population for answers. The media does not seek out “white community leaders” to speak about the criminal actions of an individual. As Susan Lampert Smith notes in her editorial, “[B]eing white means you hardly ever have to feel sorry for the bad things done by members of your race. And no one asks you whether you should feel responsible or explain the crimes of others.”⁴⁹

*There are two communities hurting*⁵⁰

Melissa Paulette

Resident, Rice Lake, Wisconsin

Paulette’s statement in response to the “Save a Deer. Shoot a Hmong” bumper sticker is extremely poignant in light of the racial tensions that have enveloped the area. The Rice Lake community in Meteor, Wisconsin will never be the same. Thanksgiving and the festive start of the hunting season will forever be a painful reminder of what happened in 2004. Likewise, the Hmong American community will never be the same. Hmong American hunters will be viewed as a hostile threat and

perhaps worry about becoming a target themselves when they enter the woods to enjoy the sport of hunting.⁵¹ As noted by Norman Rademaker, a member of the Exeland Area Rod and Gun Club, at a forum in Eau Claire, Wisconsin, "For the safety of all concerned hunters, the only way to avoid future possible trouble is for Hmong to not return to hunt anywhere near the area where the greatest tragedy in hunting memories occurred."⁵²

After the shootings, the Hmong American community found itself in a strange position; they had no involvement with the case whatsoever and yet, were expected to have an opinion on the case nonetheless. Members of the Hmong American community had to consciously ask the public and the media to keep the actions of Chai Soua Vang separate from a Hmong Ameri-

can community group identity. However, they have experienced what happens when individuals cannot not do just that; a shared ethnicity with a defendant became the basis of senseless, racist acts committed by people who could not distinguish between Chai Vang and a greater group of people who are uninvolved with the case. The future of the criminal case against Chai Soua Vang will be a concern for the Hmong American community because they will need to be vigilant of a continued backlash. An arguably unwelcome and unfair connection has been formed between the defendant and the Hmong American community because the public has already seen the individual facts and merits of the case attached to an aspect of group identity. Now the Hmong American community must bear the burden of the media's decision to craft a collective blame.

ENDNOTES

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Jeanette Mendy is a second year part-time student at the American University, Washington College of Law and is a full time Program Analyst for a federal agency in Washington, D.C.; Ms. Mendy has spent Spring 2005 semester researching the Chai Soua Vang case. She plans to practice in the field of elder law.

Vincent A. Eng, Esq. is a graduate of the Washington College of Law and is the Deputy Director of the National Asian Pacific American Legal Consortium. Currently, he is an adjunct associate professor of law at the American University, Washington College of Law and a lecturer in law at the Columbia Law School where he has lectured on Asian Americans and the Law, Criminal Sentencing, and Legal Research and Writing.

¹ P.J. Huffstutter and Stephanie Simon, *Shock, Anger Pierce a Hunter's Paradise*, L.A. TIMES, Nov. 23, 2004, at A1.

² Rene Sanchez and Bob von Sternberg, *Wisconsin Shootings - Tracing Two Paths to Tragedy*, STAR TRIBUNE, Nov. 28, 2004, at 1A.

³ Stephen Kinzer, *Motive in Hunting Deaths is a Riddle*, N.Y. TIMES, Nov. 23, 2004, at 16 [hereinafter Kinzer].

⁴ See generally Lisa Schuetz, *The Slaughter in the Woods*, WIS. STATE J., Nov. 23, 2004, at A1 (article discussing reported facts of the case); Lee Bergquist, *Accused Shooter Says He Was Fired at First; He Claims Hunters Surrounded Him, Used Racial Slurs*, MILWAUKEE J. SENTINEL, Nov. 24, 2004, at 1.

⁵ *In Rampage, Hunters Became the Hunted*, ST. PETERSBURG TIMES, Nov. 23, 2004, at 1A.

⁶ Jill Burcum, *In Brief Court Appearance, Chai Vang Pleads Not Guilty*, STAR TRIBUNE, December 30, 2004, at 13A.

⁷ *Id.*

⁸ Compl. at ¶ 2-4, *Wisconsin v. Vang* (No. 04-CF-141) (2004) available at http://www.doj.state.wi.us/news/vang_information_122804.pdf.

⁹ Steven Walters, *Lautenschlager Aims to Seek Re-election*, MILWAUKEE J. SENTINEL, Dec. 28, 2004, at 1.

¹⁰ See generally, JANE HAMILTON-MERRITT, *TRAGIC MOUNTAINS* [hereinafter HAMILTON-MERRITT] (1993).

¹¹ KEITH QUINCY, *HONG HISTORY OF A PEOPLE* 30 (2d ed. 1995) [hereinafter QUINCY].

¹² *Id.*

¹³ ASIAN AMERICAN ALMANAC 21 (Irene Natividad & Susan B. Gall eds., 1996) [hereinafter ALMANAC].

¹⁴ See HAMILTON-MERRITT, *supra* note 10, at 130.

¹⁵ *Id.* at 92.

¹⁶ See ALMANAC, *supra* note 13.

¹⁷ See QUINCY, *supra* note 11, at 21.

¹⁸ Yvonne Y. Lee, *Guilt By Ethnic Association*, SINGTAO U.S. MAGAZINE, page numbers unavailable (Dec. 11, 2004).

¹⁹ See QUINCY, *supra* note 11, at 21.

²⁰ *Id.*

²¹ *Id.* See also Wayne Carroll, Tua Lor, Elina Camane, *Hmong Population Research Project*, available at <http://www.uwec.edu/Econ/research/Hmong/256,6> (last visited Mar. 4, 2005).

²² David Peterson, *More Hmong Find Home in Midwest*, STAR TRIBUNE, Aug. 15, 2001, at 1A.

²³ U.S. CENSUS BUREAU, CENSUS 2000.

²⁴ Bob Petrie, *Funeral Home Tries to Ease Parking Concerns During Long Services*, THE SHEBOYGAN PRESS, Nov. 14, 2003, at 1A.

²⁵ Laura Ueber, *Cultural Barriers to Health Care for Southeast Asian Refugees*, Public Health Rep 107: 544-548, September-October 1992 (explaining that Hmong believe minor illnesses have organic origins and serious illnesses are caused by supernatural causes that can be cured by services of a shaman.).

²⁶ Kimberly Hayes Taylor, *Slaughterhouse Dispute*, STAR TRIBUNE, Mar. 19, 2000, at 1B.

²⁷ Thomas Moore, Ph.D. and Vicky Selkove, *The Impact of Welfare Reform on Wisconsin's Hmong Recipients*, THE INSTITUTE FOR WISCONSIN'S FUTURE, Dec. 1999.

²⁸ Jessica McBride, *Gang Crime Spreading, Study Says*, MILWAUKEE JOURNAL SENTINEL, May 31, 2001, at 1A. See also Richard Straka, *The Violence of Hmong Gangs and the Crime of Rape*, FBI Law Enforcement Bulletin, Vol. 72, No. 2, Feb. 2003, 12-16.

²⁹ Curt Brown and Lourdes Medrano Leslie, *Mother: Killing Kids Saved Them From Suffering*, STAR TRIBUNE, Jan. 9, 1999, at 1A (discussing interview conducted with Khoua Her before her sentencing).

³⁰ *Id.* See also Curt Brown and Lourdes Medrano Leslie, *A Young Mother Accused of Murder*, STAR TRIBUNE, Nov. 15, 1998, at 1A; Kimberly Hayes Taylor, *Hmong Leaders Meet to Ponder Impact, Reasons for St. Paul Children's Death*, STAR TRIBUNE, Sept. 14, 1998, at 6B; Jon Jeter, *In Disintegration of a Marriage, Six Children are Strangled*, WASH. POST, Sept. 6, 1998, at A2.

³¹ Miriam Garcia and Alan Bernstein, *A Life Unraveled*, THE HOUSTON CHRONICLE, June 24, 2001, at 1A (discussing Andrea Yates reported problems with depression).

³² See generally Dirk Johnson, *Slaughter in the Woods*, NEWSWEEK, Dec. 6, 2004, at 28 ("It's not a secret some whites grouse that Hmong hunters are poachers, and some of the Hmong consider the whites bigots."); *In Rampage, Hunters Became the Hunted*, ST. PETERSBURG TIMES, Nov. 23, 2004, at 1A ("Locals in the Birchwood area, about 120 miles northeast of the Twin Cities, have complained that the Hmong (pronounced mung), refugees from Laos do not understand the concept of private property and hunt wherever they see fit.")

³³ See generally, Stephanie Hemphill, *Hunting Deaths Spur Concern about Backlash*, MINNESOTA PUBLIC RADIO, Nov. 23, 2004 ("Bartz says 20 years ago some Hmong people sometimes got into trouble because they were used to unregulated hunting and fishing. But 11 years ago, the Department of Natural Resources (DNR) hired a liaison to teach them about Wisconsin's regulations. Bartz says now, Hmong hunters are just as responsible as most hunters."); *Forum Shows Tensions After Killing of Hunters*, THE CAPITAL TIMES, Dec. 18, 2004 ("Eau Claire City Council member Thomas Vue told the forum that Rademaker's statement (that Hmong hunters repeatedly have trespassed on private hunting land in recent years, severely straining relations with other hunters and

ENDNOTES CONTINUED

landowners) assumes Hmong hunt irresponsibly and are prone to violence. 'That's simply not the case. Many Hmong people hunt the right way,' he said, acknowledging more education of Hmong hunters is needed. A statement from a Hmong resident at the forum in reaction to Rademaker's statement reveals his frustration with the depiction of Hmong - 'I'm hearing a lot about how dumb and stupid the Hmong are.'"); Todd Richmond, *DNR, Hmong Debate How to Spread Respect in Wake of Shootings*, THE ASSOCIATED PRESS STATE AND LOCAL WIRE, Dec. 7, 2004 [hereinafter Richmond] ("Kou Xiong, the state's DNR Hmong liaison is the only one in the agency that deals directly with the Hmong and can't educate the approximately 14,000 Hmong hunters that take to Wisconsin's woods.").

³⁴ Esther Wu, *Hmong Americans Feel Fallout From Hunters' Deaths*, THE DALLAS MORNING NEWS, Dec. 9, 2004, at 7B.

³⁵ See Kinzer, *supra* note 3.

³⁶ *Id.*

³⁷ See Richmond, *supra* note 33. (Task force chairwoman Kaying Xiong said, "It's sad the media keeps referring to Chai Soua Vang as a Hmong immigrant. That casts an entire group in a bad light. It's difficult to respond to questions, respond to reading the newspaper, and not feel it's our fault".

³⁸ *600 Gather for Healing Prayer Service*, MILWAUKEE J. SENTINEL, Dec. 1, 2004, at 16.

³⁹ Alex Friedrich, *Anti-Hmong Bumper Sticker Creates a Stir*, ST. PAUL PIONEER PRESS, Dec. 14, 2004, at 38.

⁴⁰ *Sticker Advocated Violence Against Hmong*, ASSOCIATED PRESS ONLINE, Dec. 13, 2004, available at <http://www.philly.com/mld/state/10410448.htm>.

[hereinafter *Sticker Advocated Violence*] (last visited Mar. 8, 2005).

⁴¹ *Hmong Homes Targeted*, WISCONSIN STATE JOURNAL, Dec. 4, 2004, at B3.

⁴² National Socialist Movement, available at <http://www.nsm88.com/> (last visited Mar. 8, 2005).

⁴³ *Nazi Organization Distributes Anti-Hmong Flyers Throughout Twin Cities*, HMONG TODAY, Jan. 13, 2005, available at <http://www.hmongtoday.com/displaynews.asp?ID=1822> (last visited Mar. 7, 2005).

⁴⁴ Rice Lake Hunters Memorial, available at [\[memorial.com/letter.html\]\(http://memorial.com/letter.html\) \(last visited Mar. 8, 2005\).](http://www.rice-lake-hunters-</p></div><div data-bbox=)

⁴⁵ Ted Gregory, Glenn Jeffers, and John McCormick, *Cops Try to Unravel Hunting Massacre*, CHI. TRIB., Nov. 23, 2004, at 1C.

⁴⁶ Sandy Cullen, *Hmong Leaders Worry There Will Be Backlash*, WISCONSIN STATE J., Nov. 23, 2004, at A5.

⁴⁷ *Our View*, WISCONSIN RAPIDS DAILY TRIBUNE, Dec. 11, 2004, at 6A ("The Hmong community is no more responsible for the crime than German-Americans are accountable for Jeffrey Dahmer's brutality.").

⁴⁸ See generally, Ashwin Vinod Raman, *Race Isn't the Issue in Recent Shootings*, ST. CLOUD TIMES, Dec. 20, 2004, at 5B. ("I can understand there are people who are furious about Vang's actions, but why should the rest of the Hmong community have to suffer these racial abuses? [Referring to the bumper stickers] Don't say the larger issue here is that some Hmong and other immigrants have poor command of the English language, or that they have no respect for the law. The majority of crimes in Minnesota are committed by white people, and I have encountered some whites who can't even put a sentence together."); Susan Lampert Smith, *The Perils of Group Coverage*, WISCONSIN STATE J., Dec. 15, 2004, at B1 ("All kinds of media, our newspaper included, thought it was an important part of the story to get the 'Hmong reaction' and explore the Hmong angle. One Associated Press story quoted a 'Hmong community leader' as saying, 'What happened in Wisconsin is in no way representative of the Hmong people and what they stand for. We stand before you as representatives of the greater law-abiding Hmong community to unconditionally condemn these atrocities.' If you substitute the word 'white' for 'Hmong,' you get an idea of how really strange this gets.").

⁴⁹ *Id.*

⁵⁰ See *Sticker Advocated Violence*, *supra* note 40.

⁵¹ *Forum Shows Tensions After Killing of Hunters*, THE CAPITAL TIMES, Dec. 18, 2004, at 6A.

⁵² *Forum Shows Depths of Racial Tensions*, WISCONSIN STATE J., Dec. 18, 2004, at B3.

OUR FORGOTTEN COLONY: PUERTO RICO AND THE WAR ON DRUGS

By LeeAnn O'Neill and Jennifer Gumbrewicz, Esq.*

Inter arma silent leges—in time of war, the laws are silent¹

In a time where the war in Iraq and the war on terrorism dominates the front page news, the War on Drugs has been relegated to a second class position. However, for decades, the War on Drugs has silently “hunted” minorities, sending them to jails in disproportionate numbers and infringing on their Constitutional rights. Despite the nation’s new focus in the Middle East, the effects of the War on Drugs are still as devastating as when it began. A “country of minorities,” Puerto Rico is not only a prime target of the War on Drugs, it is also a key drug portal to the U.S. and the Caribbean and the rates of crime and drug addiction are among the highest in the world.² The War on Drugs in Puerto Rico has created an inner city ghetto in a beautiful tropical paradise.

HISTORICAL BACKGROUND OF PUERTO RICO

The contentious relationship between the United States and Puerto Rico creates a complicated background for the War on Drugs. The United States acquired Puerto Rico as a colony from Spain through the Treaty of Paris in 1899. In 1900, the Foraker Act allowed Puerto Rico to establish a civil government. The Jones Act followed in 1917, wherein Congress granted Puerto Ricans “statutory citizenship.”³ Although this technically granted U.S. citizenship to Puerto Ricans, the rights of a statutory citizen are different than those of a constitutional citizen. In 1950, Public Law 600 gave Puerto Rico the right to adopt its own constitution and establish a relationship with the United States via a compact.⁴ Just two years later, the Commonwealth of Puerto Rico was established under its own constitution.⁵ Despite several status referendums, Puerto Rico still has a nebulous position as an unincorporated U.S. territory – somewhere in between a colony and a state.⁶ The status debate alone is fraught with constitutional and self-determination issues that cannot even begin to be explored in this article.⁷

This quasi-state, quasi-territory status creates tensions between Puerto Rico and the federal government. Congress and the Supreme Court wield the ultimate authority as to which constitutional provisions apply to Puerto Rico and whether or not federal law preempts local law on the island.⁸ This treatment, however, has been extremely inconsistent. For example, in *Examining Board of Engineers, Architects and Surveyors v. de Otero*, the Supreme Court held that the District Court of Puerto Rico was obligated to enforce the federal civil rights statute to protect rights secured by the Constitution.⁹ Just a year later, in *Harris v. Rosario*, the Court held that rights invoked under the Equal Protection Clause did not have to be protected because “Congress, which is empowered under the Territory Clause of the Constitu-

tion... may treat Puerto Rico differently from States so long as there is a rational basis for its actions.”¹⁰ Equally controversial is the Puerto Rican Federal Relations Act, which states that the statutory laws of the United States apply equally in Puerto Rico as in the rest of the United States unless “locally inapplicable.”¹¹ The Act also provides the Supreme Court with discretion to determine what the U.S. government deems “locally inapplicable.”¹²

THE WAR ON DRUGS

In the early half of the 20th century, a number of federal drug laws passed through Congress criminalizing drug use.¹³ The Nixon administration first coined the phrase “War on Drugs.”¹⁴ The Comprehensive Drug Abuse Prevention and Control Act of 1970 centralized the piecemeal federal legislation involving the prohibition and regulation of illicit drugs.¹⁵ The Act “classifies substances... into five categories of controlled substances... [and]... criminalizes manufacturing, distributing, dispensing, and possessing controlled substances in violation of the Act’s comprehensive regulatory scheme.”¹⁶ The Reagan administration escalated the War on Drugs by passing the Anti-Drug Abuse Act of 1986.¹⁷ The Act “increased penalties and instituted mandatory minimum sentences for most drug offenses.”¹⁸ The 1980s brought a massive increase in the number of drug cases brought to federal courts. “While the overall rate of criminal cases filed in the United States district courts rose sixty-nine percent [from 1980 to 1990], the number of drug cases increased nearly three hundred percent.”¹⁹

The War on Drugs is primarily adjudicated in the federal criminal justice system. Given the transient nature of drug smuggling, which crosses not only national but international borders, only the federal government has the proper jurisdiction and enough resources to combat this problem.²⁰

The main U.S. suppliers of cocaine are South and Central American countries. Texas, Florida, California, Puerto Rico and New York consistently lead the country in total cocaine seizures.²¹ Their positions as border states make them ideal for drug trafficking due to access via numerous waterways and infrastructures designed to distribute drugs to large markets.

THE WAR ON DRUGS—DRUG EXCEPTIONALISM

The courts tend to view the War on Drugs in a favorable manner, often giving more leeway to law enforcement officers investigating drug related crimes, and analyzing drug cases using more flexible standards, such as “reasonableness.”²² This concept of viewing the War on Drugs favorably is best described as

DRUG TRAFFICKING IN PUERTO RICO

Central and South American drug traffickers have used Puerto Rico as a portal to the U.S. because of the diminished border scrutiny in that area, allowing for an easier exchange of people and goods from Puerto Rico to the United States.³⁴ “An important incentive for the traffickers in reaching Puerto Rico is the possibility that illicit drugs can be transported to the continental United States in cargo that is not subject to further inspection by [Customs and Border Patrol]. Puerto Rico also is an attractive sea and air transportation site in the Caribbean because the island has one of the busiest seaports in North America, and an abundance of commercial flights to the United States.”³⁵ In 1995, Puerto Rico was designated as a High Intensity Drug Trafficking Area (HIDTA), which prompted the Drug Enforcement Agency to direct more resources to Puerto Rico.³⁶

THE WAR ON DRUGS AS A WAR ON PUERTO RICO

The Federal District Court of Puerto Rico plays a central role in the War on Drugs because approximately 68% of federally sentenced defendants in Puerto Rico are drug offenders.³⁷ Unlike other high drug offense jurisdictions, Puerto Rico is the only one that is a “state” of minorities.³⁸ Coupled with Puerto Rico’s tenuous status as a “commonwealth” with its citizen’s rights dictated by Congress and the Supreme Court and not by the United States Constitution, the War on Drugs has transformed into a war on Puerto Rico. Furthermore, it is important to note that the uncertainty of Puerto Rico’s status magnifies the effects of the War on Drugs as a war on minorities. In addition to the traditional inherent racial bias of the War on Drugs discussed above, the United States justifies trampling on the rights of Puerto Ricans as an extension of the War on Drugs. The government’s violation of the right to a jury trial and due process, its application of the death penalty, and drug exceptionalism are just a few issues highlighted by the War on Drugs in Puerto Rico.

RIGHTS IN A WAR ZONE

Since Puerto Rico is an unincorporated territory, not all of the fundamental rights granted by the U.S. Constitution are granted to the citizens of Puerto Rico. Unlike states, Puerto Rico cannot incorporate these rights through the Fourteenth Amendment.³⁹ Arguably, the biggest exclusion is the *right to jury trial*.⁴⁰ Although Puerto Rico is constitutionally protected under the due process clause,⁴¹ the U.S. Constitution does not grant Puerto Rico the protection of the Sixth Amendment right to jury trial because it is not deemed to be a fundamental constitutional right.⁴² The implication is a devastating psychological injury to Puerto Rico. The logic of the court stigmatizes Puerto Ricans as second class U.S. citizens – they are not “good enough” to be afforded the right to jury trial, which was deemed a fundamental right in *Duncan v. Louisiana*⁴³ and is twice guaranteed by the U.S. Constitution.⁴⁴ However, the local constitution of Puerto Rico grants a right to jury trial for felonies in lieu of the U.S.

“drug exceptionalism” and is explained by Erik Luna in his article entitled, “Symposium: New Voices on the War on Drugs: Drug Exceptionalism.”²³ His argument introduces the proposition that constitutional criminal procedure should be applied the same no matter the crime.²⁴ However, many legal scholars note that, in reality, courts make exceptions in drug cases.²⁵ Primarily in the context of Fourth Amendment cases, the U.S. Supreme Court has found that probable cause is not always necessary in a number of drug related seizures.²⁶ Additionally, in light of the so-called “border exception,” the Supreme Court has decreased the legal protections normally applied for searches, seizures, and detentions that occur near the U.S. borders.²⁷

THE WAR ON MINORITIES

The escalation in drug enforcement dramatically affects minority communities, particularly the African American and Latino communities. The rates of incarceration for minorities are significantly higher than those for Caucasians.²⁸ Consequently, minorities are overrepresented in the federal prison system in relation to their representation in the overall population.

Two major reasons for higher rates of incarceration for minorities involved in drug related offenses are the drug laws themselves and the nature of their enforcement. First, the laws are more likely to be enforced against minorities. Presumably, in an effort to catch more drug offenders, the police are more likely to patrol inner city streets where people are outside in plain view rather than the suburban neighborhoods where much of the drug activity occurs behind closed doors. Not only are there higher rates of patrol in areas where drug use is concentrated, but race is also considered one of a list of legal and acceptable factors law enforcement uses in routine traffic stops and drug courier profiles.²⁹ Most drug courier profiles from various law enforcement agencies include characteristics such as the destination or city of origin, nervousness, at what point a person deplanes, and race.³⁰ Race can also be used as a factor in other brief detentions by law enforcement.³¹

Second, the laws target the minority population. While on their face the laws seem to be racially neutral, they are not racially neutral in their application. (See Table I below). For example, the Federal Sentencing Guidelines have the same sentence for *500 grams* of powder cocaine and *5 grams* of crack cocaine.³² On its face, this crack/cocaine disparity in sentencing does not seem to be a racial issue; however, powder cocaine is generally used by a predominantly suburban, upper class, white population and crack cocaine is used predominately by an urban and minority population.³³

Table I – All Offenders Sentenced in 1989

	Pre-Guidelines	Guidelines
Total	16,027 (100%)	21,057 (100%)
White	10,618 (66.3%)	9,372 (44.5%)
Black	3,580 (22.3%)	5,523 (26.2%)
Hispanic	1,265 (8.5%)	5,538 (26.3%)

Source: Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*. 28 Am. Crim. L. Rev. 161, 204-208 (1991)

Constitution.⁴⁵

To add insult to injury, federal courts in Puerto Rico require jurors to be proficient in English because the “overwhelming national interest served by the use of English in a United States court... justifies conducting proceedings in the District of Puerto Rico in English and requiring jurors to be proficient in that language,” and therefore precludes alternatives like simultaneous translation.⁴⁶ If the Sixth Amendment applied in Puerto Rico, the language qualification would clearly violate the Amendment because it guarantees the right of the accused to have a jury composed from a cross section of his community.⁴⁷ It is nearly impossible to find such a jury that meets the language proficiency because 71.9% of Puerto Ricans are not proficient in English.⁴⁸ Consequently, juries consist of an English-speaking elite and thus systematically excludes the Spanish-speaking population.

The federal government has also preempted local law with federal statutes to facilitate the War on Drugs. For example, the First Circuit Court of Appeals in *United States v. Quinones* held that the Omnibus Crime Control Act, which regulates the use of wiretap evidence, preempts the Puerto Rican constitutional ban against such evidence.⁴⁹ Authorizing wiretapped evidence, despite a local constitutional ban against it, violates the rights of Puerto Rico’s citizens. Considering that 78% of court-authorized wiretaps are used for narcotics-related crime investigations, it is clear that the local rights of Puerto Rico’s citizens are not taken very seriously by the federal government or by the judicial system.⁵⁰ More grievous than the federal government’s preemption with regard to wiretapping is the federal government’s disregard of Puerto Rico’s constitutional ban against the death penalty.⁵¹

U.S. District Judge of Puerto Rico Salvador Casellas expressed his indignation by asserting that “it shocks the conscience to impose the ultimate penalty, death, upon American

citizens who are denied the right to participate directly or indirectly in the government that enacts and authorizes the imposition of such punishment.”⁵² In 1988, the Drug Kingpin Statute allowed federal prosecutors to seek the death penalty for murders that occur during the course of a drug-kingpin conspiracy.⁵³ More notably, the Federal Death Penalty Act (FDPA) of 1994 allowed the death penalty to be sought for the running of a large-scale drug enterprise.⁵⁴ The First Circuit Court of Appeals in *United States v. Acosta-Martinez*,⁵⁵ a case where the U.S. Attorney pursued the death penalty for a murder committed during a drug offense, overturned a successful challenge to the enforcement of the death penalty in the district court of Puerto Rico.⁵⁶ Many jurors were excluded from the *Acosta-Martinez* jury pool because of their anti-death penalty sentiments.⁵⁷ Thus, it should come as no surprise then that the U.S. Attorneys in Puerto Rico have submitted the largest number of potential capital cases for review than any of the other 94 federal judicial districts, making Puerto Ricans subject to more federal prosecutions than other jurisdictions.⁵⁸

Unlike states, Puerto Rico cannot incorporate these rights through the Fourteenth Amendment. Arguably, the biggest exclusion is the right to jury trial

CONCLUSION

As second-class citizens with diminished constitutional rights, Puerto Ricans have been further disenfranchised by the War on Drugs. We have seen that in times of war, including the War on Drugs, certain fundamental rights are pushed to the side. In the case of Puerto Rico, the War on Drugs has affected certain fundamental rights with regards to life, fair trials and privacy. The U.S. government has become the distant slumlord of the fundamental rights of Puerto Rico’s citizens. The U.S. should learn a valuable lesson with regards to the way it has treated Puerto Rico: “treat a nation like a ghetto and it will behave like a ghetto.”⁵⁹

ENDNOTES

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¹ BLACK’S LAW DICTIONARY 811 (6th ed. 1990).

² Ruben Berrios Martinez, *Puerto Rico’s Decolonization*, 76 FOREIGN AFF. 110 (1997) [hereinafter Berrios Martinez].

³ JOSE TRIAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD, at vii-xi (1997) [hereinafter Trias Monge].

⁴ *Id.*

⁵ *Id.*

⁶ The *Insular Cases* establish the framework for applying the U.S. Constitution to the acquisitions of the Philippines, Cuba, Puerto Rico, and Guam. The doctrine of incorporation asserts that only territories with the express promise of statehood were guaranteed the same constitutional rights incorporated by the Fourteenth Amendment. Territories, such as Puerto Rico, which do not have the

promise of statehood are subjected to a different constitutional standard. See *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Examining Bd. of Architects, Eng’rs & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976) [hereinafter *Examining Bd. of Architects*].

⁷ See Berrios Martinez, *supra* note 2.

⁸ See *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465 (1979), citing *Mullany v. Anderson*, 342 U.S. 415, 419-420 (1952) (“Congress may make constitutional provisions applicable to territories in which they would not otherwise be controlling”); *Examining Bd. of Architects*, 426 U.S. at 590 (1976) (holding that Congress left to the Supreme Court the question of what constitutional guarantees apply to Puerto Rico).

⁹ *Examining Bd. of Architects*, *supra* note 8.

¹⁰ *Harris v. Rosario*, 446 U.S. 651 (1980).

¹¹ U.S. CONST. art. IV, § 3, cl. 2.

¹² 48 U.S.C. § 734 (2004).

¹³ Various drugs were criminalized at different times. One of the first laws passed to eradicate drug trafficking was the Harrison Narcotic Drug Act. Passed in 1914, the Act regulated the production and use of opium and coca leaves and

ENDNOTES CONTINUED

their derivatives. See Kathleen Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1148-1149 (1995) [hereinafter Brickey] (citing Ch. 1, 38 STAT. 785 (1914)).

¹⁴ See Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 246 (2000) [hereinafter Whitebread].

¹⁵ See Brickey, *supra* note 13, at 1149.

¹⁶ See *id.*

¹⁷ See *id.* at 1149, citing Pub. L. No. 99-570, 100 STAT. 3207 (1986) (codified as amended at 21 U.S.C. §§ 801 to 971 (1988 & Supp. V 1993)).

¹⁸ See *id.* at 1149-1150.

¹⁹ See *id.* at 1153, citing Rehnquist, Ch. J., *1989 Year-End Report on the Judiciary 4*, reprinted in ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE THIRD BRANCH 1 (1990).

²⁰ See *id.* at 1143 (“[B]y crossing the state line, the [criminal offender] could defy hot pursuit by local authorities. But it was precisely at the border that federal jurisdiction began.”).

²¹ U.S. Drug Enforcement Agency, Drug Intelligence Brief on Federal-Wide Drug Seizures: Drug Seizures Ranked by Top Five Areas, (June 2004), available at <http://www.usdoj.gov/dea/pubs/intel/04026.html>.

²² See Erik Luna, *Symposium: New Voices on the War on Drugs: Drug Exceptionalism*, 47 VILL. L. REV. 753, 759 (2002) [hereinafter Luna].

(“[R]easonableness” may well be the law’s favorite weasel word, beyond hard definition, simple in application and sufficiently elastic to reach nearly any result. Nowhere does this seem more evident than in the Court’s drug-related cases testing reasonable expectations of privacy.”).

²³ *Id.*

²⁴ *Id.* at 755.

²⁵ *Id.*

²⁶ See *Florida v. Rodriguez*, 460 U.S. 1, 5 (1984) (The U.S. Supreme Court noted that “Certain constraints on personal liberty that constitute ‘seizures’ for purposes of the Fourth Amendment may nonetheless be justified even though there is no showing of ‘probable cause’ if ‘there is articulable suspicion that a person has committed or is about to commit a crime’ . . . Such a temporary detention for questioning in the case of an airport search is reviewed under the lesser standard enunciated in *Terry v. Ohio*, 392 U.S. 1 (1968), and is permissible because of the ‘public interest involved in the suppression of illegal transactions in drugs or of any other serious crime.’” [Internal citations omitted]); See also *Florida v. Royer*, 460 U.S. 491 (1983).

²⁷ See WAYNE LAFAYE, JEROLD H. ISRAEL, NANCY J. KING, CRIMINAL PROCEDURE 236 (3rd ed., West Group, 2000) (characterizing this “exception” to search and seizure principles of the Fourth Amendment in the following way: “[R]outine searches of persons and things may be made upon their entry into the country without first obtaining a search warrant and without establishing probable cause or any suspicion at all in the individual case.”); see also *U.S. v. Ramsey*, 431 U.S. 606 (1977) (finding that “searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.”).

²⁸ See PAIGE M. HARRISON AND ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2003, at 9 (2004).

²⁹ See Luna, *supra* note 22, at 763 (Racial profiling can best be defined as “the use of race as a proxy for crime, allegedly justified by a propensity toward crime which, in turn justifies the detention and search of individuals in public spaces—standing or walking on the streets, driving on the highways, commuting on buses or trains, flying on airplanes and engaging in other activities of modern life. Under this definition, statistical data, high-profile cases and anecdotal evidence all seem to point toward a pervasive problem in America today.”).

³⁰ See Irene Dey, *Drug Courier Profiles: An Infringement on Fourth Amendment Rights*, 28 U. BALT. L.F. 3, 4 (1998); see Stephen E. Hall, *A Balancing Approach to the Constitutionality of Drug Courier Profiles*, 1993 U. ILL. L. REV. 1007, 1011 (1993) (A source city is defined as “those cities from which drugs are shipped to other points for sale or further distribution and those cities that receive the drugs”).

³¹ See *Florida v. Royer*, 460 U.S. 491 (1983); *U.S. v. Mendenhall*, 446 U.S. 544 (1980); *Md. State Conference of NAACP Branches v. Md. Dept. of State Police*, 72 F. Supp. 2d 560 (D. Md., 1999).

³² See Whitebread, *supra* note 14, at 247.

³³ John Lewis and Robert Wilkins, *Fix Sentencing Guidelines; Move to End Disparity Along Racial Lines Hasn't Worked*, ATLANTA JOURNAL-CONSTITUTION, (Dec. 16, 2004) at 19A.

³⁴ Testimony, Thomas Constantine, Drug Enforcement Agency, Puerto Rico and Law Enforcement Efforts in the Caribbean Region: Hearing Before Subcommittee on Crime, House Judiciary Comm., 104th Cong. (1997); Testimony, Michael Vigil, Drug Enforcement Agency, Hearing Before House Government Reform Comm. (2000).

³⁵ See U.S. DEP’T. OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, THE DRUG TRADE IN THE CARIBBEAN: A THREAT ASSESSMENT 29 (2003); see also Press Release, U.S. Dep’t of Justice, Operation Clear Skies and Operation Dirty Cargo: Twenty-One Individuals Indicted in the District of Puerto for Drug Trafficking Through the Luis Muñoz-Marin International Airport as a Result of Two Organized Crime Drug Enforcement Task Force Investigations (Mar. 11, 2004), available at www.usdoj.gov/dea/pubs/states/newsrel/carib031104p.html.

³⁶ See Whitebread, *supra* note 14, at 247.

³⁷ See *id.*

³⁸ Office of Drug Control Policy, Drug Policy Information Clearinghouse, Puerto Rico Profile of Drug Indicators, Mar. 2004, at p. 2; see U.S. CENSUS BUREAU, CENSUS 2000 (Puerto Rico is 98.8% Hispanic/Latino according to the 2000 Census).

³⁹ See *supra* note 6.

⁴⁰ The other fundamental right denied Puerto Rico is the right to vote for president and representation in Congress. Trias Monge, *supra* note 3, at 161-163.

⁴¹ *Mora v. Mejias*, 206 F.2d 377, 182 (1st Cir. 1953).

⁴² See *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Santana v. Collazo*, 533 F. Supp. 966 (D.P.R. 1982).

⁴³ *Duncan v. Louisiana*, 391 U.S. 145 (1968).

⁴⁴ U.S. CONST. art. III, § 2 and U.S. CONST. amend. VI. Furthermore, U.S. courts recognize that a right to jury trial extends to misdemeanors with a possible sentence of imprisonment for at least six months, whereas the constitution of Puerto Rico only grants trials for felonies, which creates a gap between the two documents. See *Baldwin v. New York*, 399 U.S. 66 (1970).

⁴⁵ P.R. CONST. art. II, § 11; *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 617 (1st Cir. 1956).

⁴⁶ *United States v. Flores-Rivera*, 56 F.2d 319, 326 (1st Cir. 1995), quoting *United States v. Aponte-Suarez*, 905 F.2d 483, 492 (1st Cir. 1990).

⁴⁷ 28 U.S.C. § 1861 (2004); *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

⁴⁸ U.S. CENSUS 2000, Language Use and English-Speaking Ability: 2000 (issued October 2003), available at www.census.gov/population/www/cen2000/briefs.html.

⁴⁹ P.R. CONST. art. II, § 10; *United States v. Quinones*, 758 F.2d 40 (1st Cir. 1985).

⁵⁰ Press Release, Administrative Office of U.S. Courts, Total Wiretap Applications Drop in 2002; Fewer States Report Wiretap Activity (Apr. 28, 2003) available at http://www.uscourts.gov/Press_Releases/02wtreport.pdf.

⁵¹ P.R. CONST. art. II, § 7.

⁵² Press Release, American Civil Liberties Union, U.S. Judge Rules Against Death Penalty in Puerto Rico (July 19, 2000), available at <http://archive.aclu.org/news/2000/w071900a.html>.

⁵³ See the Federal Death Penalty Information Center website at www.deathpenaltyinfo.org.

⁵⁴ See 18 U.S.C. § 3591(b) (2004).

⁵⁵ *United States v. Acosta-Martinez*, 265 F. Supp. 2d 181 (D.P.R. 2003).

⁵⁶ John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1719 (2003).

⁵⁷ Adam Liptak, *Puerto Ricans Angry That U.S. Overrode Death Penalty Ban*, N.Y. TIMES, July 17, 2003, at A1.

⁵⁸ Sean Morton, Comment, *Death Isn't Welcome Here: Evaluating the Federal Death Penalty In the Context Of a State Constitutional Objection To Capital Punishment*, 64 ALB. L. REV. 1435, 1446 (2000), citing Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 357 (1999).

⁵⁹ See Berrios Martinez, *supra* note 2.

AFRICAN AMERICANS AND THE REPUBLICAN PARTY: POSITIONING FOR 2008

By Sophia A. Nelson, Esq. *

The 2004 campaign is over and the second term of the Bush Administration has begun. It is clear that Christian conservatives, the “red states,” Hispanics, big business, and other key constituencies are the big winners of election 2004, but what about African Americans? African Americans have once again locked themselves out of the majority political party and the ramifications could be serious. Democrats came out in full force to mobilize black voters. Using their typical mantra, they blasted the black community with messages such as: “Get out and vote!” “Don't let the Florida voter fiasco deter you!” “Don't be intimidated!” The Democrats made advance allegations about voter intimidation, voter suppression, and any other violation one can imagine to mobilize and fire up their much needed African American base of voters into action. Yet, when the final numbers were counted, the Democrats and black voters came up short, again. This divisive election day pandering needs to stop. It is time African Americans learned to play the game much more effectively and make both parties court us for our votes come 2008.

As an African American woman raised in southern New Jersey (near Camden and the Philadelphia suburbs), I am quite familiar with the last minute “get out the black vote” efforts including: “walking” around senior citizen breakfast rallies on election morning; buses taking blacks to the polls; door knockers who literally get people out of their homes to vote; wild and unsubstantiated allegations of voter suppression and intimidation; and last minute flyers sent to people's homes warning them of racist GOP tactics and allegations. I remember New Jersey's Governor Christie Whitman's 1993 upset election victory over Democrat incumbent Jim Florio being tainted by allegations of black voter suppression. We are told that if we vote Republican, we threaten the reversal of our civil rights. The tactics of the Democratic party in the 2004 election were no different than those employed in 2000 and were just as effective.

The Democrats have a serious message problem based on inflammatory and false rhetoric and that is why they keep coming up short. On the other hand, the Republican party has basically written off black voters and focused instead on Hispanics, who are the fastest growing minority group in America. In this respect, the Hispanics actually delivered George W. Bush's reelection and, in return, he rewarded them with the appointment of a Hispanic Attorney General, Alberto Gonzalez, and Secretary of Commerce, Carlos M. Gutierrez, two positions that wield significant power in the federal government. The question I have for the Democratic Party is: Why are blacks consistently singled out

in the final weeks of the election as “crucial” to a victory for the Democrats, yet the issues that uniquely affect African Americans are never discussed in presidential campaigns by the party that supposedly represents them. Despite having three Presidential debates in the 2004 elections, only one question concerned affirmative action. In the Vice Presidential debate, PBS commentator Gwen Ifill asked one question about AIDS/HIV and its disproportionate effect on black women in the United States. In addition to neither side providing an adequate response to those questions, there was no discussion of the high unemployment rate in the black community or of the clear breakdown of the black family in America. Bill Cosby was 100% correct when he took black parents and black leaders to task for the way in which we are allowing our young people to speak, dress, and dumb down in school. But, those of us who are black know that the problems run far deeper and wider than what Mr. Cosby pointed out.

Here are just a handful of troubling statistics to ponder: two out of three black children are born out of wedlock.¹

A large segment of the black male population cannot exercise their right to vote in elections due to prior felony convictions on their record.² In a new policy brief, “Education and Incarceration,” the Justice Policy Institute (JPI) showed that by 1999, 1 in 10 white male dropouts, and an astonishing 52 % of black male high school dropouts had prison records by their early thirties.³ The JPI brief also showed that African American men in their early 30s are nearly twice as likely to have prison records (22 %) than college degrees (12 %).⁴ Blacks are less likely than whites to have health care insurance.⁵ Black men and more specifically black women are at an alarmingly disproportionate risk for contracting the AIDS/HIV virus in America.⁶ In 2000, the black-to-white ratio in infant mortality was 2.5.⁷ Finally, blacks are more likely to get cancer than other ethnic groups, due in part to greater exposure of black men to carcinogens on the job.⁸

With all of this, President Bush and the Democratic leadership should speak with our black leaders in order to come up with real tangible solutions to address these spiraling social problems. While President Bush and his administration have taken steps to address specific issues that plague the black American community, the Democrats continue to spew the same rhetorical scare tactics. Isn't the Republican approach more constructive than confusing black voters and scaring them into voting for the Democratic presidential candidate every four years but then neglecting these voters otherwise?

The Democrats have been offering the same old prescription for the problems of the unemployed, homeless, and poorly edu-

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cated since I was a child in the 1970s and even further back to the presidency of John Kennedy and Lyndon B. Johnson. A feckless debate is once again thrust upon us as to which party best represents our community. This debate never moves this nation any closer to dealing with the real issues that affect the lives of everyday African Americans. In fact, it only serves to further alienate African Americans from fully participating in a two-party, democratic process of governance.

It is time for black Americans to become full participants in our government like every other racial minority group in America. We need to hold the President as well as the Democrats accountable. It is up to us to demand equal access and equal representation. Power concedes nothing without demand. What really offends me as a black American is the assumption that all black people should blindly vote Democrat and that the Republicans don't even deserve my consideration. Many African Americans assume that if and when a Democrat becomes President, all of black America's problems will somehow be resolved. They will not. They did not end under Bill Clinton or Jimmy Carter or under any term of a Democratic president.

In order to seize our political power and to use it for our best interests, blacks should at least consider the President and the Republican party as a viable option for building political alliances and improving political access over the next four years. I also want to implore African Americans, regardless of your economic, social, or political bent to call on our black leaders to find new solutions to some very real problems going on in our community at large. A white colleague asked me the other day, "Why is it such a big deal if President Bush courts the black vote or not?" It is a big deal because he is the President of the United States. He is the President of *all* Americans. In fact, the President's record reflects his commitment to addressing the needs of the black community.

Immediately upon taking office, the President established the Office of Faith-Based and Community Initiatives, which rests on a basic principle: when it sees social needs, the federal government will look to faith-based programs and community groups as partners to help those in need.⁹ The President signed an Executive Order to end discrimination against faith-based groups, helping to bring down barriers that had prevented faith-based organizations from being considered in the federal grants process.¹⁰ As a result of the President's efforts, billions of dollars in competitive grants administered by the federal government were awarded to faith-based groups in 2003.¹¹ Whose lives will be more affected and touched by faith based programs than African Americans, particularly with drug interdiction programs which assist recovering addicts in a positive and meaningful

way?¹² The President also made a commitment to mentoring children of prisoners by calling for grants for faith-based and community organizations that provide mentors for these children.¹³ This three-year \$150 million initiative focuses on providing 100,000 new mentors for some of the two million at-risk children with one or more parents in prison.¹⁴

Also noteworthy, President Bush and his administration hosted the first White House Conference on Minority Home Ownership. As a result, more blacks and minorities owned single family homes in 2004 than ever before in American history.¹⁵ In addition, the President's tax cut assisted middle class and working American families of all backgrounds. Black Americans, in particular, benefited from the child tax credits and tax cuts that the President ushered through Congress early in his term.

In the final analysis, the black vote is important because it accounts for a large portion of the votes that are cast each November. African Americans account for 13% of the U.S. population.¹⁶ The success of President Bush's re-election campaign turned on this ability to speak to black voters. We as black citizens need to understand that we are in a position of power and strength and not one of weakness and powerlessness. We must learn to be shrewd and stop basing our votes on emotion. Our vote must be based on sound policies and issues, not on who the Reverend Al Sharpton, the Reverend Jesse Jackson, or the NAACP sanction as "worthy" of our vote.

Like all Americans, I too care about high taxes, the military, high health care costs, the national security of this nation, poverty, education, my retirement, and my future. I want someone to talk to me about how we can solve our problems-how we can build strong, healthy black families again. I deeply resent commercials on TV that show dragging chains, or attempt

to tell me that my right to vote will be taken away. Black Americans, like it or not, have a unique set of challenges here in America. These challenges are born out of our past when we came on hundreds of slave ships crossing the Atlantic Ocean hundreds of years ago. Our legacy of slavery, legalized segregation, Jim Crow, and the 1960s Civil Rights Movement cannot and must not be ignored; but it is time that we demand change in our community and take responsibility for ourselves to make that change come to pass. Many of the ills that face us as black Americans must be addressed within our own homes and within our own communities. Period. However, in order to enact widespread initiatives to help our community, we must feel empowered by our political strength and seize control for our best interests.

...blacks should at least consider the President and the Republican party as a viable option for building political alliances and improving political access...

ENDNOTES

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LEGISLATIVE UPDATES

By Michelle Woolley and Lydia Edwards

Over the next few months, Congress will be working on several major legislative areas that could significantly impact minority and underrepresented communities. Listed below are a selection of important initiatives, many of which are relevant to the minority community, anticipated to be on the Congressional calendar over the spring and summer.

Privatization of Social Security

President Bush is making privatization of Social Security a top legislative priority in his second term. The President proposes allowing workers to invest a portion of their payroll taxes in private bonds and stock mutual funds that the Administration predicts will have higher yields than traditional Social Security benefits. Critics point out that the expenses incurred by the estimated 100 million new private accounts would substantially impact the forecasted investment returns. Opponents are particularly concerned that changing the safety-net program will cut the incomes of women and African Americans. These groups disproportionately rely on retirement, disability, and survivor benefits from the government, and a reduction in this significant part of their income could result in increased economic hardship.

Other bills, acts and resolutions that have been introduced this term or are pending include:

S. 450 Count Every Vote Act

Introduced by the Senators Clinton (D-NY), Boxer (D-CA), Kerry (D-MA), Lautenberg (D-NJ) Tubbs Jones (D-OH)

This act will make several new voting requirements including: all voting systems to produce a voter-verified paper record for use in manual recounts; at least one machine per precinct must provide for paper, audio, pictorial verification, and be ac-

cessible to language minorities; and a mandatory recount of voter-verified paper records in 2 percent of all polling places or precincts in each state.

H.R. 663 Ex-Offenders Voting Rights Act of 2005

Introduced by Representative Rangel

This bill is introduced to override state laws that currently bar ex-felons from voting in federal elections. Currently, 3,900,000 individuals in the United States, or 1 in 50 adults, cannot vote as a result of a felony conviction. Women represent about 500,000 of those 3,900,000 and thirteen percent of the African-American adult male population, or 1,400,000 African-American men, are disenfranchised.

Joint Resolution to Protect the Boy Scouts

S. Con. Res. 4 and H. Con. Res. 6

Senator Nelson (R-FL) introduced in the Senate and Representative Hefley (R-Colo.) introduced in the House of Representatives

This resolution, introduced in the Senate and the House, asserts that Congress should continue to exercise its statutory authority to support the activities of the Boy Scouts of America, in particular the national and world Boy Scout Jamborees, despite the Boy Scouts policy of excluding gay scout masters and members.

H. R. 1259 Gold Medal for Tuskegee Airmen

Introduced by Representative Rangel (D-NY)

This bill will authorize the President to award a gold medal on behalf of the Congress, collectively, to the Tuskegee Airmen in recognition of their unique military record, which inspired revolutionary reform in the Armed Forces.

SOUTH ASIAN AMERICANS IN U.S. POLITICS

By Roopa Nemi and Amala Nath*

Asian Americans as a group, are largely underrepresented in United States politics. However, as the second largest and fastest growing demographic, there is a pressing need for our political leaders to reflect the people they represent. This article will highlight the careers of three South Asian American politicians and their efforts to balance the needs of the minority community and the interests of their constituency.

REPRESENTATIVE SWATI DANDEKAR



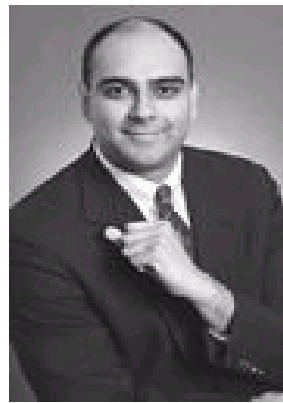
Iowa state Representative Swati Dandekar was born in India and moved to Iowa after getting married.¹ She initially got involved in the community by volunteering to teach elementary school children.² After having her two sons, she remained actively involved with their education by serving as a school board member.³ It was her desire to improve education that launched her political career. As she served on the board, others impressed with her work recommended she run for the Iowa House of Representatives.⁴

She approached her campaign with a focus on building a grassroots foundation.⁵ She went door to door to chat with her fellow citizens to hear their concerns and also to inform them of the issues she planned on addressing.⁶ Her campaign strategy allowed people in her community a chance to get to know Rep. Dandekar as a person beyond the color of her skin because⁷ she did not try to flaunt nor hide her ethnicity.⁸ Her opponent, Karen Balderston, questioned Rep. Dandekar's ability to represent the community because of her ethnic background.⁹ She expressed this concern in an email, which after being intercepted by the media, cost Karen the support of her own party: "While I was growing up in Iowa, learning and reciting the Pledge of Allegiance to the Flag, Swati was growing up in India, under the still existent caste system. How can that prepare her for legislating in Iowa or any other part of our great United States?"¹⁰

Rather than respond to her opponent's attack, Rep. Dandekar chose to run a positive campaign.¹¹ She believed that people in Iowa treated her as just another member of the community regardless of the color of her skin.¹² In turn, she sought to take the same approach in her campaigning. She reflected on how values in the Indian community and the Iowa community are similar since both focus on education and family.¹³ There was no need for her to specifically address just the South Asian American community. When asked about what she felt were important issues for her as a South Asian American politician she responded, "I think the issues important for Asian American politicians are the same as those for any other politician - they

are issues of education for your children, the economy, family security, and health care."¹⁴ As a result, Rep. Dandekar's campaign addressed issues such as improving education, encouraging new businesses to come to the community, improving the quality of jobs, and property tax relief.¹⁵ By representing herself as a member of the Iowa community rather than just the South Asian American community, Rep. Dandekar became the first South Asian American woman elected to a U.S. legislative body in 2002.¹⁶

SENATOR SATVEER CHAUDHARY



Minnesota state Senator Satveer Chaudhary has also made significant strides for South Asian Americans in U.S. politics.¹⁷ Unlike Rep. Dandekar, Sen. Chaudhary was born and raised in the United States in his home state of Minnesota.¹⁸ Sen. Chaudhary has acknowledged that being born in Minnesota made it easier to transition to public office as a South Asian American because he was

able to enjoy the "dual enrichment" of both cultures.¹⁹

Sen. Chaudhary initially became involved with social issues during high school.²⁰ He then joined Minnesota's Democratic Party where he held various state offices.²¹ However, it was not until law school, when he served on the campaigns of several local representatives, that Sen. Chaudhary considered politics as a career.²²

In 1996, he became the first South Asian American elected to the Minnesota legislature.²³ In 2002, at the age of 30, Sen. Chaudhary was looking to become the youngest member of the state senate.²⁴ He acknowledges that his appeal to supporters during the campaign "stem from the fact that I am a politician for everyone and not just Indian Americans."²⁵ Like Iowa, the South Asian American community in Minnesota is small, around 16,000.²⁶ Thus, he had to appeal to the community as a whole during his election campaign. Sen. Chaudhary believes that his "first priority is to the geographic area" that he represents but he also recognizes that his unique situation as an Indian-American politician "cannot be denied...and so I do shoulder extra duties."²⁷ Similar to Rep. Dandekar, when asked about what the concerns of South Asian Americans, Sen. Chaudhary responded, "Indian issues often coincide with mainstream issues, such as education, health care, technology, freedom from discrimination, and so taking up those causes often serves a dual purpose."²⁸ With his belief in representing the community as a whole and his strong work ethic, Sen. Chaudhary defeated his

opponent to win a seat in the state senate.²⁹

As a senator, Satveer Chaudhary still considers the full representation of his geographical community to be his first priority.³⁰ This was evident when he was invited to help brief the President on his visit to India but declined to do so because of his duties in Minnesota.³¹ Sen. Chaudhary has also shouldered the responsibility of being a South Asian American politician through his involvement in reviving the South Asian language program at the University of Minnesota and by helping to speed up alien labor certification.³² However, with these projects, Sen. Chaudhary is quick to point out that while they do address some of the South Asian American's community's needs, they are meant to serve all Minnesotans.³³

CONGRESSMAN BOBBY JINDAL



Perhaps the most prominent South Asian American in U.S. politics today is Congressman Bobby Jindal. Rep. Jindal's origins mirror that of countless other immigrants who came to the U.S. to fulfill their own personal and professional aspirations as well as to provide a better future for their children.

Rep. Jindal's parents migrated from India to the U.S. a few years prior to Rep. Jindal's birth in Baton Rouge in 1971.³⁴ Although his parents initially named him "Piyush" he went on to trade that name for "Bobby" when he was four years old based on a character in the popular television show, "The Brady Bunch."³⁵ Rep. Jindal attended Baton Rouge High School, graduated from Brown University in 1991,³⁶ and later became a Rhodes Scholar from Oxford University.³⁷ Upon graduation, Rep. Jindal worked as a consultant with McKinsey and Company and was subsequently appointed Secretary of the Department of Health and Hospitals by Governor Mike Foster in 1996.³⁸ Capitalizing on the opportunity, Rep. Jindal transformed Louisiana's Medicaid program by converting a \$400 million deficit to a \$220 million surplus in just three years.³⁹ In 1998, Rep. Jindal became Executive Director of the National Bipartisan Commission on the Future of Medicare which was comprised of a 17-member panel responsible for reforming Medicare.⁴⁰ Thereafter, he went on to serve as the President of the University of Louisiana System and in 2001 at the age of 29, he was appointed the Assistant Secretary for Planning and Evaluation of Health and Human Services by President George W. Bush.⁴¹

However, despite Rep. Jindal's academic and professional successes, certain areas in his personal life, in particular his decision to convert from Hinduism to Christianity, created controversy among the South Asian American community.⁴² As a graduate student, Rep. Jindal stated "my journey from Hinduism to Christianity was a gradual and painful one" which began years earlier with the influence of a close friend who encouraged Rep. Jindal to convert to Christianity.⁴³ However, unconvinced by conversations with his friend, Rep. Jindal started reading the Bible which not only led him to question Hinduism as a faith but moreover captivated his attention and intellectual curiosity.⁴⁴ Thereafter, based on studies of historical accounts of the Bible, films about the life and sacrifices of Jesus Christ and thought-provoking dialogues with a pastor, Rep. Jindal decided "to take that leap of faith and accept Christ into my life."⁴⁵ His next great challenge, however, was making his parents accept and understand his new found faith. Rep. Jindal wrote: "I long for the day when my parents understand, respect and possibly accept my faith. For now I am satisfied that they accept me."⁴⁶ In time, although his parents grew to accept his choice, he was still confronted with skepticism from the South Asian American community. In an article by Ramesh Rao, Professor of Communication at Truman State University in Missouri, the author criticized Rep. Jindal's conversion to Christianity and also labeled Rep. Jindal as an "extreme social conservative."⁴⁷ Although Rao acknowledged Rep. Jindal's professional achievements, he remained concerned about Rep. Jindal's attempt to disregard his socio-cultural roots and heritage and wrote that Rep. Jindal's conversion was perhaps "the only way as an Indian-American Hindu [Bobby] could achieve his political ambitions."⁴⁸

However, despite the admonishment of certain members of the South Asian American community, Bobby Jindal continued his foray into politics by announcing his decision to run for governor in 2003.⁴⁹ While campaigning, he appealed to his constituents by not identifying himself as ethnically divergent but rather as an individual born and raised in the state who shared the same values and concerns of its citizens and would help them accomplish "their American dream."⁵⁰ Although Bobby Jindal lost the gubernatorial elections by a narrow margin to his opponent, Kathleen Blanco, he went on to become the Congressional Representative of the 1st District of Louisiana. While following Bobby Jindal's campaign trail, John Fund, a noted journalist, commented that "he treats his Indian background as an overall plus but won't trade on it."⁵¹ Bobby Jindal further advocated: "I'm against all quotas, all set-asides...America is the greatest. We got ahead by hard work. We shouldn't respond to every problem with a government program. Here, anyone can succeed."⁵²

ENDNOTES

* Roopa Nemi and Amala Nath are both first year students at American University Washington College of Law.

** All photos courtesy of the Indian American Center for Political Awareness

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POST OPERATIVE TRANSSEXUALS' RIGHT TO MARRIAGE

By Sarah Leinicke*

Can people born female and who identify as men, whose birth certificates and drivers licenses state they are men, and have masculine names, beards, chests, who wear men's clothing, and go by the pronoun "he" marry women? Similarly, can people born male and who identify as women, whose birth certificates and drivers licenses state they are women, and have feminine names, breasts, vaginas, who wear women's clothing, and go by the pronoun "she" marry men?

As medical and societal understandings of gender change, courts are grappling with who defines a person's gender for legal matters such as marriage. The medical community no longer considers gender a clear, simple factor determined by sex at birth. For example, the Merriam Webster Medical Dictionary, reflecting a more complicated and nuanced concept of gender, now defines it as a combination of behavioral, cultural and psychological traits.¹ In response to this change, some courts have found that a person's gender was a medical factor for doctors to define.² Other courts have considered gender a matter of social policy that the legislative branch should define.³ None, thus far, have determined that one's gender is for the individual alone to determine. This article will examine how the definition of gender impacts a transsexual person's the right to marriage.

DEFINITIONS: THE TRANSGENDER UMBRELLA

"Transgender" is an umbrella term for people whose gender identity does not conform to traditional notions of their biological sex. Examples of transgender people include cross-dressers, drag queens, and transsexuals.

Transgender people who want to change their physical sex characteristics, through hormone treatment and/or sex reassignment surgery, are transsexuals. If they have already undergone hormone treatment or surgery, they are called "post-operative transsexuals," as opposed to "pre-operative transsexuals." Today, transgender people endure discrimination in employment, housing, health care, social services, and face disproportionate police harassment.⁴ As a result of such rampant inequity, transgender people are disproportionately poor, homeless, and incarcerated, and are 7-10 times more likely to be a victim of murder.⁵

SEXUAL REASSIGNMENT HORMONE TREATMENT AND SURGERY

Psychiatrists repeated attempts to treat transsexuals without hormones or surgery have been ineffective in combating the population's high incidence of self-mutilation or suicide.⁶ In contrast, sex reassignment treatment significantly reduces suicide rates among transsexuals and improves their mental stability, socioeconomic functioning and partnership experience.⁷

In order to undergo sex reassignment treatment, potential patients must prove they meet the requirements of Gender Identi-

tity Disorder as defined by the Diagnostic and Statistical Manual of Mental Illness (DSM – IV).⁸ The DSM – IV has a long list of criteria for transsexuals, such as "persistent discomfort" in the gender role that causes "clinically significant distress or impairment" in their work or personal lives.⁹

However, despite satisfying these strict requirements, many people still do not have access to sex reassignment treatment due to the high cost of the procedure and few alternative sources to provide funding. Medical treatment for Gender Identity Disorder can cost thousands of dollars and is rarely covered by insurance plans. Medicare does not cover sex reassignment surgery and Medicaid very rarely extends coverage for the treatment.¹⁰ Furthermore, all private insurance plans in the U.S. explicitly exclude coverage for sex reassignment treatments.¹¹

Low-income transsexuals who cannot afford hormones or surgery are more visibly gender non-conforming and thus prone to employment and other discrimination. Also, people cannot change the gender on their driver's licenses or birth certificates if they have not undergone sex reassignment treatment.¹² Absent proper identification documents, low-income, pre-operative transsexuals do not have the advantages of their wealthier, post-operative counterparts in trying to access legal marriage. For that reason, this article only addresses the right to marriage for post-operative transsexuals.

THE FIGHT FOR EQUAL MARRIAGE BENEFITS

Post-operative transsexuals have joined queers and their allies in the fight to access federal and state benefits for married couples that are not offered in civil unions, including benefits in health insurance, taxes, unemployment compensation, immigration status, family leave, inheritance, and hospital visitation.¹³ The marriage equality movement suffered a significant setback in the November 2004 elections, when many states adopted constitutional amendments banning same-sex marriage. Due to recent case holdings, state governments now have the responsibility to determine whether the marriage of post-operative transsexual to persons of their birth-sex falls into the category of same-sex marriage.

KANTARAS V. KANTARAS: A LANDMARK CASE

The holdings of the trial and appellate courts in *Kantaras v. Kantaras* each reflect two different perspectives on a post-operative transsexual's right to marry.¹⁴ The Circuit Court for Pasco County ruled that a post-operative female-to-male transsexual's marriage to a non-transgender woman was legal.¹⁵ The Florida Second District Court of Appeals reversed the trial court's decision, ruling that the legislature should determine whether medical advancements support a change in the meaning of the words "female" and "male."¹⁶

In 1959, Margo Kantaras was born female in Ohio.¹⁷ In 1986, after coming to terms with her gender identity, Margo legally changed his name to Michael in Texas.¹⁸ In 1987, Michael was approved by the Gender Treatment Program at the Rosenberg Clinic in Texas for sex reassignment surgery.¹⁹ He underwent hormonal treatment, a hysterectomy, and a double mastectomy.²⁰ In 1988, he met Linda, who was pregnant by a former boyfriend.²¹ Linda knew that Michael was a transsexual.²² In 1989, Michael married Linda in Florida and adopted her son.²³ In 1992, Linda gave birth to a daughter after undergoing artificial insemination with the sperm of Michael's biological brother.²⁴ Michael and Linda raised their two children together for nine years.²⁵ In 1998, Michael filed for divorce and custody of both children.²⁶ Linda counterpetitioned for dissolution and/or annulment claiming that the marriage was void because it violated the Florida law banning same-sex marriage.²⁷ One year later, the Probate Court of Mahoning County, Ohio granted Michael's request to change his birth certificate to read "Michael Kantaras" with the sex marked as "male."²⁸

TRIAL COURT: MARRIAGE IS VALID

In a landmark 809-page opinion aired nationally on Court TV, the Circuit Court for Pasco County found that Michael Kantaras was legally male when he married Linda and that their marriage was valid.²⁹ The court also gave Michael primary residential custody of their two children.³⁰ It was the first known case in the United States that included testimony from medical experts concerning transsexual marriage.³¹ Previous transsexual marriage cases in Kansas and Texas were pre-trial defense motions that did not include such medical testimony.³² This is an example of a court's deference to medical expert testimony with regards to defining gender.

The trial court's reasons for determining that Kantaras was legally male included: 1) his parents and siblings observed male characteristics and agreed he should have been born as a boy; 2) Michael always perceived himself as a boy while he was growing up; 3) he completed the medical surgeries and hormone treatments to gain a male body and voice; 4) Linda was fully informed about Michael's sex reassignment status when they married; 5) Michael had been accepted as a man in "a variety of social and legal ways," including on his driver's license, birth certificate, and in legal adoption proceedings; 6) Michael was diagnosed with Gender Identity Disorder at age 20; 7) Michael had no secondary female characteristics, such as ovaries, fallopian tubes, or breasts; 8) the only female feature remaining on Michael's body, the vagina, was not typically female because of an enlarged and elongated clitoris; 9) no chromosome tests were conducted to determine that Michael had a female chromosomal pattern (XX); and 10) chromosomes were only one factor in determining sex and did not overrule gender or self identity.³³

The trial court's reasons for concluding Micheal Kantaras gender as legally male, as outlined above, focused on scientific advancements in gender determination that strayed from tradi-

tional notions of biologically determined gender. The court treated Kantaras' gender as a matter of fact rather than a matter of law.³⁴ In contrast, the Texas Court of Appeals and the Kansas Supreme Court had both found that post-operative transsexual marriage cases presented matters of law.³⁵

In the closing arguments of the trial court case, counsel for Linda Kantaras, Claudia Wheeler, cautioned against the disastrous consequences if the court deemed Micheal to be legally male. "If you open the door this much it's going to be like the barnyard door coming open. If Michael can be a male because Michael thinks he is a male, and because of some surgery, your Honor, then we're headed for big trouble... It will create utter chaos. I believe the floodgates will be opened."³⁶ Apparently, the appellate court agreed.

APPELLATE COURT: MARRIAGE RULED INVALID

The Florida Second District Court of Appeals reversed the trial court decision, ruling that a post-operative female-to-male transsexual could not validly marry a female in Florida.³⁷ The court ruled that the guidelines for transsexual marriage was an issue for the legislature to decide.³⁸ "We must adhere to the common meaning of the statutory terms and invalidate any marriage that is not between persons of the opposite sex determined by their biological sex at birth."³⁹ In its decision the court noted the Probate Court of Ohio, the Kansas Supreme Court, and the Texas Court of Appeals decisions all delegated the issue of transsexual marriage to the legislature.⁴⁰

The Florida Second District Court of Appeals relied on the public policy view that the purpose of marriage was to procreate as the basis for their decision.⁴¹ The court noted that the New York Appeals Division voided a post-operative transsexual marriage because the marriage could not produce genetic offspring,⁴² and that marriage "exists for the purpose of begetting offspring."⁴³ Thus, the court associated gender with sexual function. Since sex reassignment surgery does not enable people to fully perform sexual functions, the New York court argued that post-operative transsexuals could not fulfill this purpose of marriage.⁴⁴ Similarly, the Kansas Supreme Court relied on sexual function in defining gender. The court used a 1970s definition of sex contained in Webster's dictionary that males are the "sex that fertilize the ovum and beget offspring" and females "produce ova and bear offspring."⁴⁵ As a point of contrast, the Florida court also examined one United States case where a transsexual marriage was ruled valid. The New Jersey court held that a transsexual could marry in his or her reassigned sex if the person could "fully function sexually."⁴⁶ However, in the New Jersey case, sexual function referred to the act of having sex rather than to "begetting offspring."

Ruling that sexual function and the ability to procreate are requisites for marriage raises complications for other infertile couples, such as sterile men or post-menopausal women.⁴⁷ Such complications underscore the inadequacy of the Florida court's decision in an age where gender and sex no longer align with

traditional roles in procreation.

AUSTRALIAN AND EUROPEAN COURT POSITIONS

Michael Kantaras drew on Australian precedent to defend his case.⁴⁸ Australia also prohibits same-sex marriage but found that a post-operative female-to-male transsexual could legally marry a woman.⁴⁹ In contrast to most U.S. courts, the Australian Family Court recognized advancements in medical knowledge surrounding gender identity and found that a female-to-male transsexual was a man for purposes of marriage.⁵⁰

The European Court also allows post-operative transsexuals to marry.⁵¹ In 2002, the European Court held that the United Kingdom violated a male-to-female transsexual's right to marriage under the European Convention on Human Rights.⁵² The European court contrasted the stress and humiliation caused by the disjuncture between the transsexual person's legal and personal lives with the impact that changing the law would have on United Kingdom authorities.⁵³ The court concluded that "[S]ociety may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost."⁵⁴ The European Court held that member countries could not bar transsexuals from marrying; however, each country could determine the specific requirements applicants must meet in order to be eligible for legal sex reassignment.⁵⁵

In contrast to the Australian Family Court and the European Court, U.S. federal courts, like the Florida Second District Court of Appeals, do not recognize the right of post-operative transsexuals to marry.⁵⁶ A Filipino man filed suit against the Citizenship and Immigration Services (CIS) for denying him citizen-

ship based on his marriage because his American wife was transsexual.⁵⁷ The woman had undergone male-to-female sex reassignment nearly 20 years prior.⁵⁸ The Filipino man married the woman a year after legally entering the U.S. and applied for permanent resident status.⁵⁹ This case is likely the first suit to challenge the CIS in federal court over the immigration status of married transsexuals.⁶⁰ The U.S. federal government currently has no statute or regulation that addresses whether people can legally change their sex.⁶¹

CONCLUSION

At a time when scientific understandings of gender have outgrown traditional definitions, the societal benefits of denying transsexual marriage are vague. In contrast, the benefits of marriage to transsexual people are clear. They would not only gain the traditional legal advantages of marriage, but formal and legal recognition of their lives as reflected on their birth certificates and drivers licenses – the lives they lead in their homes and in their jobs. The Florida District Court of Appeals called on the state legislature to amend marriage law if it wanted the courts to include post-operative transsexuals in marriage.⁶² The decision of the Florida state legislatures and other state legislatures will bear great implication for transsexuals and their partners. As Michael Kantaras' attorney Karen Doering said during the closing arguments of the trial court case: "[Michael's] family knows [that he is a man], the community knows it, and the medical community knows it. And now, your honor, you've been asked to decide whether the legal community knows that Michael Kantaras is a man."⁶³

ENDNOTES

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¹ MERRIAM WEBSTER'S MEDICAL DICTIONARY, available at <http://www.nlm.nih.gov/medlineplus/medlineplusdictionary.html>

² *Kantaras v. Kantaras*, No. 98-5375CA (Fla. Cir. Ct. Feb. 19, 2003), *rev'd* 884 So. 2d 155 (Fla. 2d Dist. Ct. App. 2004) [hereinafter *Kantaras I*]; *In re Kevin*, (2001) 28 Fam. L.R. 158; *Goodwin v. UK*, (2002) 35 EHRR 18, 471-472.

³ *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. 2d Dist. Ct. App. 2004) [hereinafter *Kantaras II*]; *In re Ladrach*, 513 N.E.2d 828 (Ohio Probate 1987); *In Re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002), *cert. denied*, 537 U.S. 825 (2002); *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. App. 1999).

⁴ See Shannon Minter and Christopher Daley, *Trans Realities: A Legal Needs Assessment of San Francisco's Transgender Communities*, National Center for Lesbian Rights and the Transgender Law Center (2002), available at <http://nclrights.org/publications/transrealities0803.htm> (reporting that in a survey of 155 transgender people in San Francisco, reported that nearly one in two transgender people faced employment discrimination, one in three endured housing discrimination, 30 percent had been discriminated against while trying to access health care, more than one in four had been harassed by a police officer, one in five had been discriminated against while trying to access social services, and 14 percent suffered discrimination while in prison).

⁵ See generally SYLVIA RIVERA LAW PROJECT, at <http://www.srlp.org/index.php?sec=01A&page=about>.

⁶ See RICHARD GREEN & JOHN MONEY, *TRANSSEXUALISM AND SEX REASSIGNMENT*, (John Hopkins Press 1968).

⁷ Pfäfflin Friedemann & Junge Astrid, *SEX REASSIGNMENT: THIRTY YEARS OF INTERNATIONAL FOLLOW-UP STUDIES AFTER SRS -- A COMPREHENSIVE REVIEW, 1961-1991*, IJT Electronic Books (1998), available at <http://www.symposium.com/ijt/pfaefflin/1000.htm>.

(This is the most comprehensive review of sex reassignment surgery over 30 years, including more than 2000 patients in 13 countries).

⁸ AMERICAN PSYCHIATRIC ASSOCIATION, *THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. 2000).

⁹ *Id.*

¹⁰ Shannon Minter, *Representing Transsexual Clients: Selected Legal Issues, 12-13*, National Center for Lesbian Rights (2003), available at <http://nclrights.org/publications/tgclients.htm>; see also Medicare Program: National Coverage Decisions, 54 Fed. Reg. 34555, 34572 (Aug. 21, 1989).

¹¹ *Id.*

¹² See *id.* (stating that 18 states allow transsexuals to change the sex on their birth certificate providing they have undergone sex reassignment).

¹³ U.S. General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO-04-353R (Washington, D.C. Jan. 23, 2004) (identifying 1,138 federal rights and responsibilities that turn on marital status), at <http://www.gao.gov/new.items/d04353r.pdf>.

¹⁴ *Kantaras I*, *supra* note 2.

¹⁵ *Id.* at 808.

¹⁶ *Kantaras II*, *supra* note 3, at 161.

¹⁷ *Id.* at 155.

¹⁸ *Id.*

¹⁹ *Kantaras I*, *supra* note 2, at 792.

²⁰ *Kantaras II*, *supra* note 3.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Arthur S. Leonard, *Transsexual Dad Wins Custody*, GAY CITY NEWS, Feb. 28-

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Mar. 6, 2003, at 2 [hereinafter Leonard].

²⁶ Kantaras II, *supra* note 3.

²⁷ *Id.*

²⁸ Kantaras I, *supra* note 2, at 762.

²⁹ Kantaras II, *supra* note 3; *see also* Leonard, *supra* note 25, at 1.

³⁰ Kantaras II, *supra* note 3.

³¹ *Id.* at 2.

³² *Id.*

³³ Kantaras II, *supra* note 3, at 156.

³⁴ Leonard, *supra* note 25, at 3-4.

³⁵ Kantaras II, *supra* note 3, at 158; *see Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. App. 1999); *see also In Re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002).

³⁶ Transcript of Closing Arguments, *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. 2d Dist. Ct. App. 2004) (No. 2D03-1377), available at http://www.courtvtv.com/trials/kantaras/020802_ctv.html.

³⁷ Kantaras II, *supra* note 3.

³⁸ *Id.*

³⁹ *Id.* at 159.

⁴⁰ *Id.* at 158; *In re Ladrach*, 513 N.E.2d 828 (Ohio Probate 1987); *In Re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. App. 1999).

⁴¹ Kantaras II, *supra* note 3 at 158.

⁴² *Id.*; *see also B. v. B.*, 355 N.Y.S.2d 712, 717 (N.Y. App. Div. 1974).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Press Release, Transgender Law & Policy Institute, Kansas Supreme Court

Decision is a Call to Action (March 26, 2001); *see In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).

⁴⁶ Kantaras II, *supra* note 3, at 158; *M.T. v J. T.*, 355 A.2d 204, 210-211 (N.J. 1976).

⁴⁷ *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).

⁴⁸ Kantaras II, *supra* note 3, at 159.

⁴⁹ *Id.*; *see also In re Kevin*, (2001) 28 Fam. L.R. 158.

⁵⁰ Kantaras II, *supra* note 3, at 159; *see generally* Fiona David and Jake Blight, Understanding Australia's Human Rights Obligations in Relation to Transsexuals: Privacy and Marriage in the Australian Context, *DEAKIN LAW REVIEW*, Vol. 9 No. 2, pp. 315-316, 2004 [hereinafter David]; *see also Goodwin v. UK*, (2002) 35 EHRR 18, 471-472.

⁵¹ David, *supra* note 50; *see also Goodwin v. UK*, (2002) 35 EHRR 18, 471-472.

⁵² David, *supra* note 50.

⁵³ *Id.* at 314-315.

⁵⁴ *Id.*; *see also Goodwin v. UK*, (2002) 35 EHRR 18, 477.

⁵⁵ David, *supra* note 51, at 316.

⁵⁶ Ann Rostow, *Man Who Wed Transsexual Faces Exile*, PLANETOUT NETWORK, (Dec. 2, 2004) at 1.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Gillian Flaccus, *Lawsuit: Filipino Husband Denied U.S. Citizenship Because Wife Was Transsexual*, ASSOCIATED PRESS, (Nov. 30, 2004), at 2.

⁶¹ *Id.*

⁶² Kantaras II, *supra* note 3 at 159.

⁶³ *Supra* note 36.

SPOTLIGHT ON JON VELIE: A MAN ON A THIRTEEN YEAR MISSION

By Lydia Edwards*



Dan Wahl

It all started one month after he passed the bar. Sylvia Davis, a black Seminole, came to Jon for help. She had been to many lawyers already. She told Jon Velie her story about how her 13 year old son was denied clothing benefits because he is black. “It hit me as obviously wrong. So I naively took the case on a contingency basis not knowing there would be no real payment. I naively thought I could inform the Bureau of Indian Affairs (BIA) and the tribe they missed this.” What Jon really stepped into was something like the uphill civil rights battles of the 1960s. “It was straight up racism in conversations with the involved parties including the tribe and BIA; the ‘N word’ was thrown all around.” For his entire legal career, Jon Velie has sought to bring justice to Ms. Davis and other black Seminoles as well as black Cherokees.

BACKGROUND INFORMATION

Jon Velie graduated from University of Oklahoma Law School in 1993. As an undergraduate at U.C. Berkeley he was a Native American studies major. During law school he was a research assistant for Rennard Stickland, a renown Indian Law scholar who is now Dean of Oregon Law School. Before attending U.C. Berkeley, Jon had already developed an affinity for Native American issues. As a child he grew up in the Absentee Shawnee tribal community. Many of his friends were from the tribe and he was exposed to sacred activities otherwise unseen by outsiders. His father, Alan Velie, taught the first course in contemporary Indian studies.

Alan Velie was a Shakespearean professor at the Oklahoma University in the 1970s in the midst of the American Indian rights movement when he was approached by Native American students and agreed to teach a course on American Indian literature. At the time, all the courses taught about Native Americans were concentrated on the past and more in the anthropological sense. He now travels the world talking about Native American literature and has written seven books on the subject.

WHO ARE THE BLACK INDIANS?

Unbeknownst to most Americans, the Five Civilized Tribes (Choctaw, Chickasaw, Cherokee, Seminole, and Creek) have had long traditions of African membership and enslavement.¹ The Cherokee, Creek, Choctaw and Chickasaw tribes had a form of African slavery that closely mirrored that of Southern white plantation owners. The Seminole tribe, however, has had a unique relationship with its African members. The Seminole tribe and its African members (commonly referred to as Freed-

men) have coexisted together since the 16th Century.² Many slaves of white plantation owners ran away to live with the Seminole tribe. Both Seminole Wars were fought over the number of runaway slaves who lived with the tribe. African members could intermarry and take on positions of leadership. Many served as translators between the Spanish, the tribe, and southern white plantation owners.

During the Civil War, the Five Civilized Tribes fought with the Confederacy against the Union. After the war, all of the tribes signed treaties with the United States government in order to maintain their sovereignty and reinstitute an autonomous government. In all of their treaties, there were clauses ordering the tribes to free their slaves and treat them and their descendants equally.³ Over the years, Congress and the courts have enforced the treaties to assure equal rights for the black Indians.

In the late 1800s and early 1900s, Congress set up the Dawes Commission to record all the members of respective Indian Tribes. Their records are called the Dawes Rolls. The commission recorded black Indians on separate rolls for all of the tribes. Cherokees and Seminoles that were $\frac{3}{4}$ white were recorded on a “full blood” list while their black members were enrolled on the Freedmen list. The quantity of Indian blood of each black Indian was not recorded by the Dawes Commission.

DISENFRANCHISEMENT

In 1823, the United States acquired land from the Seminole Nation. The tribe was later compensated for the land in the 1970s. The tribe received 56 million dollars, often referred to as the “Judgment Fund,” for the land. This transaction also marked the tribe’s dispute with the Freedmen because many blood line tribal members did not want to share the money with the Freedmen. The Freedmen were quickly stripped of their membership and denied access to the funds. The Cherokee also denied their black members’ voting rights and membership. In both cases, by losing their membership the Freedmen lost access to federally funded programs such as clothing funds, burial funds, elderly programs, and day care programs.

LEGAL ISSUES

As sovereign nations, Indian Tribes have immunity from lawsuits in federal and state courts. All civil matters against a tribe must be brought in tribal court. As a result, most suits against a tribe brought in federal court are usually dismissed. So instead of suing the tribe, Mr. Velie tried suing the federal government for not monitoring the discrimination in the tribe. Mr. Velie filed suit against the Bureau of Indian Affairs in the Tenth Circuit Court of Appeals. The government claimed that the tribe was an indispensable party.⁴ The court agreed with the govern-

ment and dismissed the suit.⁵ The Supreme Court later denied a writ of certiorari.

In response to the Seminole tribe's refusal to share the "Judgment Fund" with the Freedmen, the BIA discontinued payment of the Fund.⁶ Although the tribe sued to reinstate their rightful settlement, a district court upheld the BIA's actions to deny funding and refusal of recognition of the Seminole government.⁷

Years later, the Cherokee Nation denied black Cherokees their voting rights in a 2003 election. In the same election, that in which black Cherokees could not vote, the Cherokee Nation changed their membership qualification so that members were defined by blood quantity. This act effectively eliminated the black Cherokees from membership. Although many Freedman can trace their ancestry to a person on the Dawes Roll, the Dawes Commission failed to quantify the amount of blood in the black members. As a result, many Freedmen cannot trace their ancestry through blood and were pushed out of the tribe. Jon Velie filed suit against the BIA for recognizing the 2003 vote and recognizing the tribe's new leadership.⁸ In particular, Mr. Velie argued that the BIA's treatment of the Seminole tribe versus its treatment of the Cherokee tribe was inconsistent. The suit is currently being litigated; most recently the Cherokee Nation sought to intervene in the suit in order to file a motion to dismiss.

"SOME THINK THAT I'M THE BAD GUY"

Since taking Sylvia Davis' case, Mr. Velie has faced criticism. "I have lost clients because of this. I represented the Chickasaw Nation (one of the Five Civilized Tribes) in economic development. That was what I really wanted to do, to help tribes increase their ability to support themselves. After I filed the case for the black Seminoles, one of the Chickasaw council members pulled me aside at a conference and told me I couldn't represent them anymore. Some think I'm the bad guy. My position is that I am a supporter for tribal sovereignty. I believe in [tribal] self-government. I am opposed to government corruption. If a tribal official wants to hide behind the concept of [sovereignty] to oppress other people then I'd like to stop that. Indians and tribes aren't corrupt but corrupt people have discovered the pocket where jurisdiction doesn't exist. They aren't more a part of the tribe than the people they have kicked out. As wrong as it would be for the chief to take money and leave, it is just as wrong to violate their treaties. When they do it, it is a slippery slope. This can really hurt [the tribes] by vio-

lating the treaty. If a tribal official feels that I am the person hurting sovereignty, the real person hurting it is someone hiding behind sovereignty to break laws. I feel no loyalty to them." Indeed some Indian law professors have expressed concern that the continued bickering will only serve to hurt tribal sovereignty. If the federal government doesn't believe the tribes are capable of handling their affairs without excluding half the tribe when money is at stake, the federal government may just completely take over the distribution of future monetary settlements. Many Congressional Black Caucus members, who traditionally are the biggest supporters of Native American rights, have expressed disdain for the treatment of the black Seminoles.

"TO WHAT END AM I FIGHTING FOR?"

"Most lawyers don't get to deal with law from centuries ago. It is really fun to go litigate something on the violation of the Thirteenth or Fourteenth Amendment. Most lawyers can't argue provisions from treaties from two centuries ago. Indian law is fascinating. It changes from week to week. However, Indian law isn't for the money. I just do what I can where I can on these types of issues. I intended to go into Indian law for development and stay away from civil rights but you end up doing what you do. I am torn fighting for particular clients. To what end am I fighting for? I won't defend the rights of people who think they are above the law and can oppress other people's rights. This is one of the blackest hours in Indian Law. This is not the United States termination of a tribe. Individual Indians are terminating the identity of other Indians. If certain tribal officials are angry at me for calling that up then I'll take that."

"Whether it is Indians oppressing other Indians or black Indians or white Indians oppressing black Indians, their rights are worth fighting for. It's like someone telling you that you are not American. It's like the United States government saying you are no longer an American and taking away your status. The \$125.00 clothing fund denied to Ms. Davis' son was not the point of the thirteen year fight. It was identity. For example, Ms. Marilynn Vann, a black Cherokee, who was excluded from the tribe is the first cousin of the Chief of the Cherokee Nation of Oklahoma and doesn't have a right to vote for him. I thought we were past this as a country but I feel lucky to be the first to do something about it."

Jon Velie graduated from University of Oklahoma Law School in 1993. He is married to Laura Velie and has three children: Gabbey 8; John 7; and Chloe due May 5. He owns his own practice with his brother Will in Norman Oklahoma and their legal specialties include immigration and Indian law.

ENDNOTES

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¹ See generally DANIEL F. LITTLEFIELD JR., AFRICANS AND SEMINOLES: FROM REMOVAL TO EMANCIPATION 4-6 (1977); WILLIAM LOREN KATZ, BLACK INDIANS: A HIDDEN HERITAGE 50 (1986).

² *Davis v. United States*, 199 F. Supp. 2d 1164, 1173 (W.D. 2002).

³ See generally Treaty with Seminole, Mar. 21, 1866, U.S.-Seminole Nat., art. 2, 14 Stat. 755; Treaty with the Cherokee, July 19, 1866, U.S.-Cherokee Nat., art. 9, 14

Stat. 799; Treaty with the Creeks, June 14, 1866, U.S.-Creek Nat., art. 2, 14 Stat.

785; Treaty with the Choctaw and Chickasaw, Apr. 28, 1866, U.S.-Choctaw Nat. and Chickasaw Nat., art. 2, 14 Stat. 769.

⁴ See *Davis v. United States*, 199 F. Supp. 2d 1164, 1173 (W.D. 2002).

⁵ See *Davis v. United States*, 192 F. 3d 951 (10th Cir. 1999).

⁶ See generally *Seminole Nation of Okla. v. Norton*, 223 F. Supp. 2d 123, 124 (D.D.C. 2002).

⁷ *Id.*

⁸ See *Vann v. Norton*, No. 03-1711, (filed Aug. 11, 2003 D.D.C.).

CULTURAL DISPLACEMENT: IS THE GLBT COMMUNITY GENTRIFYING AFRICAN AMERICAN NEIGHBORHOODS IN WASHINGTON, D.C.?

By Chris McChesney*

Washington, D.C. is a city physically divided along 16th Street, NW (Northwest) by race and socioeconomic status. Poverty resides in east D.C. with a large concentration of minority communities, while prosperous and mostly Caucasian residents live in northwest D.C.¹ Starbucks, one of the many cultural amenities that correspond with gentrification, clearly illustrates the divide. Among the nearly 50 Starbucks locations in the District, only three stores are in east D.C. These three Starbucks are all near busy downtown neighborhoods, such as Eastern Market, that are frequented by people from other parts of the city and tourists.² Moreover, this same division is not only in the District, but also evident in surrounding Maryland and Virginia counties. The eastern side of the District, along with Prince George's county, MD (the only county adjacent to District's eastern border) accounts for 70% of the region's total black population. However, Jim Graham, a D.C. councilmember, observed that while the division between communities still falls along 16th Street, NW, it has begun to push eastward because of gentrification.³

Gentrification is a complex process with both positive and negative effects and various definitions, including one that is synonymous with the revitalization of a community. The definition used in this article closely parallels that of The Brookings Institution Center on Urban and Metropolitan Policy, which defines gentrification as a process in which higher socioeconomic households move into a neighborhood causing the non-voluntary displacement of lower socioeconomic households resulting in a change in the culture of the community.⁴ Specifically, this article will explore the validity of the common belief that the Gay, Lesbian, Bisexual and Transgender (GLBT) community is one of the driving forces of gentrification by examining the role of the community in the gentrification of Washington, D.C.

WASHINGTON, D.C. AND GENTRIFICATION

Councilmember Jim Graham described D.C.'s transformation in the past thirty years as a city that has gone from "a sleepy southern town to a sophisticated world capital."⁵ This revitalization may be attributed to gentrification, which is evident in many neighborhoods in the District. As a whole, the city's population, which is predominantly African American, has been on the decline since the 1950s.⁶ This decrease in the population size may be due, in part, to a trend of suburbanization in the 1970s and 1980s, mostly driven by middle-class white householders looking to improve the lives of their families by moving out of the city. Beginning in the 1980s, African American residents also began to move out to the suburbs, but constituted only a fraction

of the total new suburban population.⁷ However, within the last few years, the migration to the suburbs seems to be reversing within certain demographic groups, such as single professionals. The GLBT community is a significant part of this expanding demographic group.

While the city's total population remains predominantly African American, the current influx of new residents has resulted in a proportional shift in the minority community. In 1990, African Americans accounted for roughly 66% of the D.C. population; in 2000, the number decreased to 60% of D.C.'s total population. Two predominant factors explain the moving trend of single professionals: (1) the attractions of urban life for those with high disposable income and (2) the absence of children, which allows them to live in areas with poorer public schools and provides them with the mobility necessary to adjust to the high crime rates of most cities.⁸

GENTRIFICATION OF THE AFRICAN AMERICAN COMMUNITY IN WASHINGTON, D.C.

The African American majority is steadily declining,⁹ and as one African American resident observed, "'Chocolate City' is rapidly becoming 'Condo City.'"¹⁰ U Street, one of many historically black neighborhoods, is quickly becoming another gentrified area of the city. In September 2004, escalating rent prices forced Sisterspace and Books, one of the last African American local businesses, to close its doors. Many in the community rallied to save the bookstore from the pressures of gentrification, which they compared to colonization.¹¹ In Columbia Heights, located around the intersection of Columbia Pike and Walter Reed Drive and recently ranked one of the top eight neighborhoods to watch,¹² many residents have been protesting an attempt to close a youth center in order to build luxury condos. Along with the anger resulting from the loss of a safe place for children, many in the area see this initiative as another sign of increasing property value, more white neighbors, and an abrupt shift in their way of life.¹³

In a Washington Post editorial, Colbert King, deputy editor, compares the results of the gentrification of his childhood neighborhood of the 1940s and 1950s to Columbus' 'discovery' of America because "...all we shared and held dear was destroyed."¹⁴ "[L]ost forever ... the sense of community and belonging"¹⁵ is the way King nostalgically recalls his childhood neighborhood and friends. In his time, Foggy Bottom and the West End were working-class neighborhoods; today the gentrified area is home to the Mayor of Washington, D.C.¹⁶ King also frequently highlights the mayor's disregard for "the faceless peo-

ple forced to concentrate in D.C.'s impoverished areas" as the outcome of gentrification; the only viable options suggested by the mayor's office are homeless shelters and public housing.¹⁷ Additionally, the mayor's website touts the Earned Income Tax Credit (EITC), a special city tax break for low- and moderate-income workers designed to assist the lower socio-economic households in D.C.¹⁸

THE GLBT COMMUNITY AND DUPONT CIRCLE

While D.C. has a large GLBT population, it pales in comparison to the city's African American population. African American residents account for 60% of D.C.'s population while GLBT households make up less than one percent.¹⁹ The dynamics of the GLBT community's role in the gentrification of African American neighborhoods is difficult to analyze, due in large part to a lack of demographic information regarding the GLBT community. The U.S. Census did not establish a methodology to accurately measure and identify the GLBT community in the United States until 1990. Prior to 1990, a gay couple living together would have been categorized as roommates and therefore indistinguishable from straight roommates.²⁰ However, despite the efforts of the U.S. Census, it still lacks a method to identify single persons of the GLBT community and thereby makes it difficult to identify GLBT persons in demographic studies. While 3.6% of women and 4.7% of men have had same-sex sexual experiences, only 1.1% of women and 2.5% of men identified themselves as lesbian, gay, or bisexual.²¹ Recently, researchers using online surveys have found the percentage of self-identified gays and lesbians to be as high as 6%.²² In spite of the small total percentage, an overwhelming number of GLBT persons live in cities.

According to the 1990 Census, while 20 U.S. cities accounted for 60% of all gay couples, they only accounted for 26% of the total U.S. population.^{23,24} In 1990, Washington, D.C., in particular, was home to 4.42% of all gay couples in the United States while only home to 1.54% of the total US population. Lesbian couples followed the same trend, but not in as high of a percentage. The same 20 cities only accounted for 46% of lesbian couples and D.C. only accounted for 2.84% of lesbian couples.²⁵ Overall, D.C. had the fourth highest gay population and the fifth highest lesbian population.²⁶

The childless factor is thought to be one of the central reasons for D.C.'s large GLBT population. Many gay and lesbian couples do not have children, either out of choice or because of state laws that do not allow homosexual couples to adopt children. In 1990, 95% of gay couples and almost 80% of lesbian couples did not have children.²⁷ As a result, gays and lesbians were able to spend more money on personal amenities, such as entertainment and living expenses, cultural events unique to Washington, D.C., and more expensive real estate investments.²⁸ Aside from a lack of children, many GLBT persons fall into a class of people in the higher socio-economic bracket who are often characterized as prioritizing "close proximity to downtown entertainment and cultural venues" and historic architecture

when choosing residency.²⁹ The conflict within gentrification lies in this shared appreciation of urban culture by both outside parties and pre-existing residents. However, this appreciation has spurred the evolution of Washington, D.C. into an important cultural center for the GLBT community. The large number of gay and lesbian residents within D.C. and the continuing influx of new residents has resulted in the open acceptance of the gay community in several D.C. neighborhoods. Thus, for many GLBT residents, Washington, D.C. symbolizes a cultural haven marked by the celebration and free expression of the GLBT lifestyle.

DUPONT CIRCLE, D.C.'S GLBT CULTURAL CENTER

Dupont Circle, one of D.C.'s more affluent neighborhoods in west D.C., was once an African American neighborhood and home to low income families. Recently, the zip code that encompasses Dupont Circle (20009) was ranked number 36 in a study of highest home prices in the D.C. metropolitan area, and the average price of a home has nearly doubled in the past three years.³⁰ According to Dupont Circle Advisory Neighborhood Committee (ANC) member Karyn-Siobhan Robinson, Dupont was predominately African American in the 1960s and several of its buildings had government-assisted housing. Today, Robinson feels it is no longer appropriate to call Dupont the city's "gay ghetto."³¹ The area is home to the majority of D.C.'s GLBT households and only two buildings have government-assisted housing.³²

Dupont Circle, referred to as both the 'gay ghetto' and the 'fruit loop' by locals, is the cultural center for D.C.'s GLBT community. Paul Kafka-Gibbons recently described the circle in his novel entitled *Dupont Circle*: "In Dupont Circle, poor meets rich, old meets young, gay meets straight, native meets new arrival, and the peoples, styles, and languages all squish together."³³ Lambda Rising, a GLBT bookstore, opened its original store in Dupont Circle in 1974.³⁴ Nearby is a Human Rights Campaign (HRC – the nation's leading GLBT advocacy organization) store and the HRC national headquarters is located near the circle.³⁵ Recently, The Center, an organization dedicated to helping the local GLBT community, opened in Logan Circle, the neighborhood adjacent to Dupont Circle.³⁶ The offices of The Washington Blade, D.C.'s weekly GLBT newspaper since 1969 (then called The Gay Blade),³⁷ and Metro Weekly, D.C.'s GLBT magazine, are also located near the circle.³⁸ A copy of both can be found on just about any street corner in the Dupont neighborhood. Over 15 bars, clubs, and restaurants in Dupont cater to the GLBT community along with a number of retail stores, such as Universal Gear.³⁹

Many annual GLBT cultural events call Dupont Circle home. D.C.'s annual High Heel Race takes place along 17th St., NW (just a few blocks off of the circle) on the Tuesday before Halloween. The race was started eighteen years ago by, "...a bunch of drunk drag queens who had a race." The race is seen by the city as "...truly a community event."⁴⁰ Reel Affirmations is the District's international gay and lesbian film festival. While

there is no central location for the festival, tickets can be purchased at many Dupont area stores and one the main theatres is in Dupont.⁴¹ Most notably, Dupont Circle is home to D.C.'s annual Pride Parade.⁴²

While Robinson believes gentrification is more a matter of affluence and a lack of people's sensitivity to their surrounding community, she stated that the GLBT community fuels the revitalization of neighborhoods and follows the retreat of the black community eastward.⁴³ The Logan Circle neighborhood, east of Dupont Circle, is currently experiencing gentrification by the GLBT community. Many younger GLBT persons who wish to live near Dupont can no longer afford to and are now buying up realty in the adjacent Logan Circle neighborhood.⁴⁴

CONFLICTING INTERESTS

In some areas of the country, gentrification is the source of major conflict between pre-existing black communities and an increasing gay population. In Kirkwood, one of the African American neighborhoods in Atlanta, Georgia, one minister held community meetings to protest what he saw as "the white homosexual and lesbian takeover," of his neighborhood. During one of these meetings, a gay rights group, whose size surpassed the number of concerned community members left in the neighborhood, held their own protest outside.⁴⁵

In contrast, while there has been protest by D.C. residents over gentrification, they have not been directed at the GLBT community.⁴⁶ Despite the recognition of the GLBT community as one of the driving forces behind gentrification in D.C., there has been little conflict with the African American community. Ward One, the area home to Columbia Heights, U Street and other neighborhoods feeling the pressures of gentrification, is 44% African American. However, Ward One recently elected an openly gay councilmember, who carried a majority of the vote in several African American precincts.⁴⁷

Robinson does not believe that the two communities have conflicting interests, only different interests. In her opinion, tension arises when those moving into a predominately-black neighborhood are not sensitive to the interests of the pre-existing community.⁴⁸ As the GLBT community moves further eastward, the existing residents are forced to learn to live with their new neighbors. On one hand, these old neighborhoods will experience a surge of growth due to the investment and the sheer commercial buying power of the GLBT residents. However, while recognizing that neighborhoods often grow and evolve, Robinson expressed unease that older residents often feel left out of the changes and have concerns of whether the city they call home still values them.⁴⁹

PUBLIC POLICY AND GENTRIFICATION

Gentrification is not always a bad word to politicians. Many see it as another word for much needed revitalization. Through the revitalization of run down neighborhoods, a city can reduce its concentrations of poverty, upgrade the housing stock by increased property value, and increase revenue from property

taxes.⁵⁰ The D.C. council and the federal government have both pursued the revitalization of Washington D.C. by implementing several public policy initiatives, such as tax incentives.⁵¹ Congress, which remains deeply involved in D.C.'s local politics, passed a \$5,000 tax credit to assist first-time homebuyers within the District. This credit has been widely used and has often been an incentive for people to buy homes in the District. In fact, 70% of homebuyers used this credit in 1998.⁵² Another method of encouraging neighborhood growth is through public spending. A visible example in D.C. is the Metrorail system, the public subway system which connects different parts of the city as well as to Virginia and Maryland. The opening of a Metro station in Columbia Heights and Shaw multiplied gentrification pressures in the surrounding areas as the area became more accessible and attractive to commercial investment. Additionally, the privately financed Convention Center in Shaw has increased pressure in adjacent neighborhoods.⁵³ These increased gentrification pressures have lead to a 116% increase in house prices between 2001 and 2004.⁵⁴

In recognition of the investing power of the GLBT community, many cities are increasing efforts to attract GLBT people in their desire to revitalize neighborhoods. In addition to an influx of new investment, the movement of a large GLBT population to an existing community has been shown to increase tolerance for diversity within neighborhoods. Additionally, some studies have shown economic benefits for cities that welcome GLBT people.⁵⁵ San Francisco, the city with the highest gay and lesbian concentration, also ranks very high for patents per capita.⁵⁶ Several other cities that have large GLBT concentrations also rank very high among other economic indicators.⁵⁷ The top 15 high-tech cities, according to the Milken Institute High-Tech Rankings, were also among the cities with the highest gay populations.⁵⁸ Washington, D.C. ranked fourth in the high-tech rankings and came in second for the gay index rankings used in the study.⁵⁹

However, the positive economic growth brought on by the GLBT population should not be confused with individual wealth within the community. One misconception is that GLBT professionals are often wealthier than their heterosexual counterparts. While studies show little to no disparity among incomes, gay men on average make less than married men of an equal occupational level.⁶⁰ The reason behind the misconception goes back to a lack of children among GLBT people. This creates a large amount of disposable income that helps fuel economic growth, while many married couples save money in order to support their children.⁶¹ Because of this difference in spending patterns, many cities actively try to attract new gay residents. D.C., for example, has amended its definition of domestic partnerships to recognize gay and lesbian couples and give them economic benefits.⁶²

CONCLUSION

Economic revitalization and growth does not automatically result in the gentrification of a neighborhood, but if this growth

proceeds without consideration for the pre-existing neighborhoods, gentrification is the likely result. While the GLBT community's expanding presence in D.C. is not the sole reason for gentrification, it is a driving force. Gays and Lesbians are often more willing to move into areas that have high crime rates and typically seen as run down. Once there, they have a greater potential to renovate their homes leading to many improvements in the neighborhood. This is apparent in Dupont Circle and can already be seen in Columbia Heights.

Not all aspects of gentrification are negative. Some of D.C.'s most prosperous and prestigious areas were once poverty-stricken neighborhoods. While the African American community's opposition to their displacement is understandable, the creation of a new cultural community should be encouraged. A community may lose one of their neighborhoods, but a new minority community then gains a neighborhood. The GLBT community now has a home in Dupont Circle, a place that they can

feel safe and walk down the street openly with their partner. Thus, alongside the economic development has come a new diverse and tolerant culture. The danger in gentrification occurs when there is economic growth without regard for the residents that have historically called the neighborhood home. This causes displacement of older residents and resentment of the newer residents.

While growth is good for the city, leaders must be careful not to overzealously promote a neighborhood's rebirth without addressing the concerns of the existing residents. The district is becoming more diverse and is GLBT friendly, but only half of the city is receiving the benefits. As the nation's capital grows and experiences a "face lift" in many of its neighborhoods due to an increasing number of GLBT professionals, city leaders must be careful not to neglect the African American community and other minorities that contribute to the great diversity within Washington, D.C.

ENDNOTES

*Chris McChesney received his BSA from the University of Florida and is currently a first year student at American University Washington College of Law.

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¹⁴ Colbert King, *Turning a Deaf Ear to the Displaced*, WASH. POST, Jan. 8, 2005, at A19 (expressing his disappointment in both the city and journalist for ignoring those displaced by gentrification).

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¹⁷ *Id.*

¹⁸ District of Columbia Mayor's Office, *Issues & Answers: Earned Income Tax Credit*, available at http://www.dc.gov/mayor/issues/2005/january/tax_credit.shtm.

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²⁰ Dan Black, *Demographics of the Gay and Lesbian in the United States: Evidence from Available Systematic Data Sources*, 37 DEMOGRAPHY 139, 140 (2000) [hereinafter Black].

²¹ *Id.* at 142.

²² Gary Gates, Ruth Eisenberg and Robert Witeck, Remarks at the Tuesday Forum of the Urban Institute (June 3, 2003).

²³ Black, *supra* note 20, at 148 (stating that the U.S. Census data only includes coupled GLBT persons since that is the only GLBT status identified in the collected information).

²⁴ U.S. CENSUS BUREAU, *Technical Note on Same-Sex Unmarried Partner Data from 1990 and 2000 Censuses*, Census Alert, available at <http://www.census.gov/population/www/cen2000/samesex.html> (There are discrepancies between the 1990 and 2000 same-sex partners status due to a change in how the Census handles two people of the same sex who respond that they are a married couple. In accordance

with the 1996 Federal Defense of Marriage Act (H.R. 3396) the Census cannot recognize such entries because the federal government only recognizes opposite-sex married couples).

²⁵ Black, *supra* note 20, at 148.

²⁶ *Id.*

²⁷ *Id.* at 150.

²⁸ *Id.* at 152-153.

²⁹ Kennedy, *supra* note 4, at 11-12.

³⁰ *Golden Zip Codes*, WASHINGTONIAN, Mar. 2005 at 100-101.

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⁴⁵ Sean Scully, *In Atlanta, God, Gays and Gentrification; Pastor Decries Influx of White Homosexuals in Black Area*, WASHINGTON TIMES, June 10, 1998, at A1.

⁴⁶ Wilgoren, *supra* note 13.

⁴⁷ Graham, *supra* note 3.

⁴⁸ Robinson, *supra* note 31.

⁴⁹ *Id.*

⁵⁰ Kennedy, *supra* note 4, at 5.

⁵¹ *Id.* at 12.

⁵² *Id.* at 56.

⁵³ *Id.*

⁵⁴ *Hot Neighborhoods*, WASHINGTONIAN, March 2005 at p. 99.

⁵⁵ Richard Florida and Gary Gates, *Technology and Tolerance: The Importance of Diversity to High-Technology Growth 4* (June 2001) [hereinafter Florida] (survey series, on file at The Brookings Institution Center for Urban and Metropolitan Policy).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Florida, *supra* note 55.

⁵⁹ *Id.*

⁶⁰ Black, *supra* note 20, at 152.

⁶¹ Wilgoren, *supra* note 13.

⁶² 29 D.C.M.R. 80.

BEYOND HIGHER EDUCATION: THE NEED FOR AFRICAN AMERICANS TO BE “KNOWLEDGE PRODUCERS”

By Alex M. Johnson*

“[I]f Blacks want to prosper [and] survive in this country, it is imperative... to make sure that we not only have a piece of the knowledge production pie in America, but also help to significantly determine the ingredients of the pie and the shape of the pie pan.”¹

INTRODUCTION

Consider this purely hypothetical situation. Marcus, Bridgett, and Jonathan were twelfth-graders at a highly regarded college preparatory school located in the southeast ward of the District of Columbia. Jonathan was primarily a straight-A student taking advanced placement level curricula at READ Public Charter School, while Bridgett’s academic feats mirrored those of Jonathan. Upon graduation, Bridgett was selected as class valedictorian. Marcus, however, believed school to be futile and an institutionalized system of boredom. Although Marcus had the same intellectual capacity of his peers, distinguishing himself on READ’s entrance exam by scoring higher than Jonathan, Bridgett, and the rest of his peers, he was content with simply passing his classes so he could participate in an array of extracurricular activities: Boy Scouts, co-captain of the varsity basketball team, and avid reader. Yet today, nine years after graduating from READ high school, Marcus stands placidly behind the counter of the neighborhood McDonalds, his hands clasping the sides of the cash register, an otherwise simple life momentarily interrupted by the startling presence of his former classmates, Jonathan and Bridgett. While Marcus earns a meager seven dollars an hour, having never continued on to college; Jonathan and Brenda earned scholarships to Morehouse and Harvard respectively, went on to earn masters and law degrees, and presently work in the private sector where their annual salaries approximate that of a senior partner in a major law firm.

While this is an entirely fictional narrative, it highlights the potential life-changing implications stemming from educational attainment. As the Supreme Court observed in *Brown v. Board of Education*, “[T]oday education is perhaps the most important function of state and local governments . . . [I]t is a principal instrument in . . . preparing [an individual] for later professional training.”² Further, the court emphasized that “it is doubtful that any [individual] may reasonably be expected to succeed in life if he is denied the opportunity of education.”³ Few, if any, political and social issues are more contentious or more thought-provoking than the furor surrounding the “Leviathan” issue of education.⁴ The exponential amount of rhetoric encompassing the debate over education continually changes as many institu-

tions and commentators - from courts, executive agencies, legislative bodies, and privately funded think tanks – have become instrumental in shaping the conceptualization of this critical issue.

In that regard, a sundry of arguments and approaches have been promulgated within the rubric of educational reform. These reform approaches have sparked a furor of controversy, the most recent attacking the relative worth of public school systems. Perhaps one of the most important, or at a minimum, the most recent effort at elementary and secondary education reform is the No Child Left Behind Act.⁵ The efficacy of school vouchers as an alternative to the public school system is another primary topic of dispute.⁶ The recent Supreme Court decisions of *Grutter v. Bollinger*⁷ and *Gratz v. Bollinger*⁸ exemplify the contentious nature, as well as the fundamental importance, of education. These decisions particularly highlight education as a means of ensuring equality in underserved communities historically afflicted by racial strife and class discrimination.⁹

Despite the relative triumphs towards equality in education, the search for culprits who promulgate standards of inequality is not difficult to ascertain.¹⁰ Aside from the deluge of litigation mounting challenges to the constitutionality of affirmative action and school financing policies,¹¹ various state and local ballot initiatives have sought to impose a deleterious effect on educational opportunities. Proposition 209 in California, Initiative 1-200 in Washington, and the One Florida Initiative are illustrative of this problem.

While much attention has been focused on legislative and judicial efforts intended to remedy the various problems afflicting students in the higher education landscape, far less discussion has been directed at those students under the auspices of elementary and secondary educational systems. However, this essay addresses the broader implications of higher education for African Americans, specifically the need for African Americans to enter academia and pursue intellectual scholarship.¹² Part I outlines the problem confronting African Americans in academia in relation to developing ideas and shaping norms. Part II surveys the various historical impediments that have littered African Americans path toward educational attainment at all levels. Finally, Part III discusses the ramifications associated with higher education and knowledge production in society.

DEFINING THE PROBLEM

As the Court opined in *Brown*, education retains a ubiquitous and life-altering function in the shaping of community norms.¹³ One of the seminal concomitant functions of education is the

dominant role it plays in the development and critique of ideas that wield significant force and hold sway over the malleable contours of public opinion.¹⁴ John H. Stanfield, in his critical essay “The Race Politics of Knowledge Production,”¹⁵ brilliantly explicates this point by articulating the relationship between academia, the implementation of ideas, and empowerment for the African American community. In echoing a popular argument put forth by many of his contemporaries, Stanfield further contends that “[e]mpowerment is the only way [African Americans] can successfully make it in a country in which those who are the best organized and who are the most assertive organizationally, are those who are heard and listened to.”¹⁶ While Stanfield often focuses more on a critical examination of the state of black intellectuals, he shrouds this discussion within a veil considering the broader applicability of so-called “knowledge producers.” This nugget sets the framework for the discussion of higher education and its pertinence to African Americans.

As explained by Stanfield, knowledge production is “the development, critique, and implementation of ideas about human nature, human development, and the realities of human life.”¹⁷ Some would argue, in the alternative, that the origination of ideas is not confined to the academic arena, but rather derives from other social institutions. However, that approach mischaracterizes the predominant role that academia has historically played in perpetuating and reinforcing widely held values.¹⁸

It is no surprise that the Supreme Court has acknowledged the role of education as an essential factor for the viability of government.¹⁹ The ability to monopolize the dissemination of ideas within the mainstream allows for the implementation of ideas, both positive and negative, some which categorically sustain myths and stereotypes denigrating various cultural groups.²⁰ Proponents of this view highlight two examples: scientific racism in the form of intelligence testing, and theories suggesting that extensive poverty in the African American community results from natural family characteristics rather than exploitive institutions.²¹ Stanfield suggests that, “it is more than apparent that historically and today, academic scholars . . . have been the developers of ideas which have had major impacts on American institutions, including those in [b]lack communities and those affecting [b]lack quality of life.”²² Accordingly, some pundits have gone so far as to surmise, perhaps correctly, that education represents hope for black America to ameliorate centuries-old forms of discrimination.²³

In that frame of reference, the underlying logic of advancing the notion of knowledge production gains clarity. As a cultural and racial group, African Americans have subsisted as one of the most vehemently discriminated classes of people in American society. This pattern of discrimination, once *de jure* segregation²⁴ and now *de facto* segregation, has had prolonged and far reaching effects. Nothing highlights this more than the plight of public schooling in the majority-minority populace of the District of Columbia. It is no secret that the District is replete with failing schools representing a mixture of despondency, complacency, and despair. The seemingly overwhelming view that many

schools in the District are educationally inferior gives rise to an inevitable domino effect: money will not go into those schools to enable them to purchase new materials to facilitate classroom learning; teachers, lacking the necessary materials to teach particular subjects, will become disinterested and less motivated, to the detriment of their students; because of the low standard of achievement, colleges and universities will not recruit at these schools that predominantly serve African American students. This detrimental course of events may serve as an unmovable barrier towards the attainment of higher education. The continuance of this problem is a major disadvantage to society in general. Just as one of the arguments in favor of diversity in educational settings suggests, students from divergent backgrounds bring a wealth of knowledge to the classroom which translates into the enormous benefit they would serve in the global community. But first, they must have the opportunity to enter into academia.

HISTORICAL BACKGROUND

Some commentators have suggested that over the course of the past few decades African Americans have made “notable progress”²⁵ in the area of education. However, in light of these relative advancements, the sad reality is that African Americans have historically been subjected to legal impediments, as well as institutional racism, which has had a prolonged debilitating effect on the African American community.²⁶

As a prelude to exploring the correlation between knowledge production and higher education, it is helpful to first review some basics concerning: (a) the historical barriers which have excluded African Americans from participation in the educational system and (b) the judicial decisions that have illuminated how courts act as social policymakers. Since early U.S. history, African Americans have been resigned to compete in an educational system that is deeply embedded with discrimination and designed to “exclude Americans of color from full participation in the economy, politics, and society.”²⁷ This oppressive social construct has existed since slavery. It can be maintained that slavery was the genesis for centuries of oppression, segregation, discrimination, and repeated exclusion from participating in education. The enslavement of African Americans was buttressed by an elaborate system of laws structured to guarantee that African Americans remained at the depths of society. These classifications, formally labeled slave codes, circumscribed even the most diminutive of aspects concerning a slave’s daily life. In addition, these laws perpetuated ignorance by strictly forbidding slaves from learning how to read and write.²⁸ Further, the prevention of literacy among African Americans was justified as “a measure of policy essential to the tranquility, nay to the existence of Southern Society.”²⁹

The apparatus of slavery subsisted on an ideology of resigning the slave to a state of absolute ignorance. This ignorance was maintained by withholding education; an essential component of productive assimilation into mainstream society. Education was believed to be a dangerous device because it would have de-

stroyed the institution of slavery and contributed to raising African Americans above servile status.³⁰ Following the Civil War, newly freed African Americans “continual quest for educational parity” in education remained limited as the dominant ideological stance still viewed African Americans as inferior.³¹ By the year 1900, over seven hundred American colleges and universities had been founded; yet these institutions retained the same segregationist practices manifested during slavery.³²

In several cases, most notably *Brown v. Board of Education*,³³ the Supreme Court’s response to the efforts of African Americans to achieve educational attainment have resulted in monumental decisions mitigating the scope of legislative and judicial enactments that have contributed to the general exclusion of minority Americans in educational settings. Prior to the decision in *Brown*, the Court jettisoned the notion of “separate but equal” established in *Plessy v. Ferguson*.³⁴ However, according to some critics, the “vestiges” of these discriminatory practices have yet to be fully exterminated.³⁵

BENEFITS OF EDUCATIONAL ATTAINMENT

It is logical to understand why challenges pertaining to education have been met with so much contention: its fundamental importance upon class stratification, generational wealth, and social status enhances its value. Moreover, the added value attained from becoming known as a “knowledge producer” or a faculty member at a university or college generally catapults that individual into a prestigious class of intellectuals whose ideas shape the conformity of society’s thoughts and values.

Educational attainment is outcome determinative and translates into “differences in high school graduation rates, college attendance and completion, and ultimately, the differences in income and socioeconomic status that underlie our most critical social problems.”³⁶

Williams and Ladd posit a Posnerian³⁷ line of reasoning, contending that educational attainment enjoys an intrinsic economic utility by functioning as “a socializing agent for middle class values and life styles” while “public school serves as an accrediting agency, determining one’s value in the market place and controlling one’s access to the market place.”³⁸ While the collective value of education is often poignantly articulated in both utilitarian and economic terminology,³⁹ to assert that educational attainment is solely a means for African Americans to augment their financial standing wrongly ignores the importance of academia as critical vehicle for the development of ideas and social norms.

WHY KNOWLEDGE PRODUCTION IS AN IMPORTANT END-RESULT OF HIGHER EDUCATION

In exploring the importance and advantages of intellectualism within the realm of academia, I cannot help but recall some remarks that my former political science professor, Tobe Johnson, conveyed to me. One day in his office he asked me what plans I had after graduation. I informed Professor Johnson that law school was my next step, and from there working in a large

corporate law firm. To my utter surprise, Professor Johnson then began ranting and raving about how so many of his African American students are looking for the quick buck and neglect to explore opportunities leading to prestigious fellowships, academic paths toward teaching in colleges and universities, and positions as influential academically-trained social thinkers. Being somewhat on the defensive, I tried to mitigate this onslaught by further stating that I eventually wanted to become a teacher. However, the point of this story is significant and Professor Johnson was correct in his assessment. His argument falls in line with John Stanfield, who emphasized the “profound power scholars in major [academic institutions] have in developing, critiquing, and implementing ideas.”

It must be noted that in his article, Stanfield somewhat deemphasizes the critical role of vocational education and casts it aside as a negative vestige of early civil rights remedies.⁴⁰ Although Stanfield makes a valid point regarding the disassociation of African Americans from traditional intellectual pursuits, this point a contentious one. While this essay expresses a desire to witness more African Americans taking on the role of knowledge producers, the goal is to effectuate a productive citizenry to contribute to society. Taking into account the social problems of gang warfare, drugs, crime, and economics coupled with the fact that many people just don’t have the resources or motivation to contend with the rigorous university environment, it is irrational to completely disregard the benefits of vocational education. The roots of whether to pursue higher education, vocational education, or neither, is manifested in the early fundamental stages of academic development at the elementary and secondary school level. Subsequently, teachers at this stage of a student’s development play a critical role in steering students towards higher education.

Ultimately, academicians control the way we think. Consider the collection of textbooks utilized in the learning environment that afford students the tools to grasp the subject they are studying. Moreover, the information and ideas contained within the textbook are ingrained within the students who will undoubtedly contribute to the intellectual progression of the next generation of scholars. These empirical and practical thinkers will control the dissemination of ideas emanating from think tanks, executive agencies, legislatures, and state and local governments who in turn will exert considerable influence over the manner in which society operates. And the cycle continues when these thinkers are recruited into leading institutions of education thereby continuing to exert an influence through scholarly publications, articles, and speeches.

This phenomenon is no more readily apparent than in law school where publication in a law review or journal is often considered the pinnacle of achievement. Well-published law professors, such as Paul Butler, Erwin Chemerinsky, and Joshua Dressler, are accepted as authorities in their respective fields of study, influencing how important issues are discussed within the academic community. Indeed education, moreover “knowledge,” wields enormous power in those who hold it.

Some critics would likely contend that access to the upper echelons of academia should be tightly restricted to avoid innumerable unqualified individuals clamoring for acceptance. The response to this criticism looks to the historical annals of constitutional law and early attempts to define constitutionally protected freedom of expression. In his famous dissent contained in *Abrams v. United States*,⁴¹ one of the leading cases in First Amendment jurisprudence, Justice Holmes espoused the concept of a “marketplace of ideas.” While that case concerned the distribution of leaflets objecting to the presence of troops in Eastern Europe, it conveys an important substantive message: in the “marketplace of ideas,” all ideas, both good and bad, should be allowed to flourish; any restrictions will result in a detriment to our society.

CONCLUSION

With the 50th year anniversary of *Brown v. Board of Education* behind us, it is comforting to see the effects that it has had on schooling. However, there is still much to be done. The dearth of African Americans that choose to pursue intellectual positions in academia is an issue that has provoked Stanfield to

emphasize that “it is so crucial for black community leaders. . . opinion leaders in public schools and in higher education, black parents, and black young people to develop a greater interest in the virtues of becoming a scholar.” Moreover, it must be realized that educational attainment creates a society of thinkers and dreamers. Even the utilitarian benefits of education are overwhelming as educated people have access to jobs and careers that add to the betterment of historically disadvantaged communities. Lack of educational attainment is social castration. Education opens the doors for thousands of African Americans to become professionals, return to those communities, and add knowledge and wealth into them. But this goal, this promising reality, can only be evidenced if higher education is emphasized, if knowledge production is elevated to the upper echelons of student’s agendas on the hierarchy of goals, and if elementary and secondary teachers effectively develop their students into leaders and thinkers. Knowledge is power.

ENDNOTES

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¹ John H. Stanfield, Commentary: The Race Politics of Knowledge Production, Address Before the North Carolina Agricultural and Technical University, W.T. Gibbs Lecture (Mar. 28, 1989), RESEARCH IN SOCIAL POLICY Vol. 2, 1989, at 194 [hereinafter Stanfield].

² 347 U.S. 483, 493 (1954).

³ *Id.*

⁴ See, e.g., Jay P. Lechner, *Learning From Experience: Why Racial Diversity Cannot be a Legally Compelling Interest in Elementary and Secondary Education*, 32 SW. U. L. REV. 201 (2003) [hereinafter Lechner]; Wilbur C. Rich, *Putting Black Kids Into a Trick Bag: Anatomizing the Inner-City Public School Reform*, 8 MICH. J. RACE & L. 159 (2002) [hereinafter Rich]; Kassie Freeman, *Increasing African Americans Participation in Higher Education: African American High School Student’s Perspectives*, 68 J. HIGHER EDUC. 523 (1997).

⁵ See 20 U.S.C. § 6301, No Child Left Behind Act (amending the Elementary and Secondary Education Act of 1965) (“ensur[ing] that all children have a fair, equal, and significant opportunity to obtain a high quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments”) [hereinafter Act]; see also Kimberly D. Bartman, *Public Education in the 21st Century: How do we Ensure That No Child is Left Behind?*, 12 TEMP. POL. & CIV. RTS. L. REV. 95, 110-14 (2002) [hereinafter Bartman] (arguing that the No Child Left Behind Act retains an increased role in public education spending, and accountability, in a manner that the judicial system has been unable to rectify).

⁶ See Rich, *supra* note 4, at 178-79 (assessing the worth of school vouchers by measuring public support and analyzing state legislative responses).

⁷ See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that diversity can be a factor in the law school admissions process); but see, *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (“consideration of race or ethnicity . . . for the purposes of achieving a diverse student body is not a compelling interest under the 14th amendment”).

⁸ See *Gratz v. Bollinger*, 539 U.S. 244 (2003); see also, *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (holding race or minority status is a factor that can be used in the admissions process).

⁹ But see Derrick Bell, *Diversity’s Distraction*, 103 COLUM. L. REV. 1622 (2003) (criticizing diversity in higher education as a distraction that ignores issues of racism and class bias while legitimizing the reliance of grades and test scores in admissions policies).

¹⁰ Lechner, *supra*, note 4; see generally, Beth Harry and Mary G. Anderson, *The Disproportionate Placement of African American Males in Special Education*

Programs: A Critique of the Process, 63 JOURNAL OF NEGRO EDUCATION 602 (1994) (arguing that racial bias remains an integral component of special education, particularly in the “overrepresentation of African Americans in special education [programs], and their corresponding *under representation* in programs for the gifted and talented”) (emphasis added); Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, in *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education*, at 53 (Orfield et al. eds. 1996) (“The extremely strong relationship between racial segregation and concentrated poverty in the nation’s schools is a key reason for the educational differences between segregated and integrated schools. . . Schools with large numbers of impoverished students tend to have much lower test scores, higher dropout rates, fewer students in demanding classes, less well prepared teachers, and a low percentage of students who will eventually finish college”).

¹¹ See *San Antonio v. Rodriguez*, 411 U.S. 1 (1973) (discussing Texas property tax based school financing scheme).

¹² But see Joyce E. Williams and Ron Ladd, *On the Relevance of Education for Black Liberation*, 47 JOURNAL OF NEGRO EDUCATION 266, 269 (1978) [hereinafter Williams and Ladd].

“Not only has education not functioned to substantially improve the occupational status and earning capacity of Blacks in relation to whites, it may have impeded their progress as a race...[because] education has drained off the upper echelon of the Black community and erected a barrier between the Black masses and the Black bourgeoisie.”

¹³ See *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (extolling the virtues of education as central to a democracy and fundamental towards developing productive members of society).

¹⁴ See Stanfield, *supra* note 1.

¹⁵ *Id.*

¹⁶ *Id.* at 193.

¹⁷ *Id.* at 179.

¹⁸ *Id.* at 185 (emphasizing the “profound power” held by academic scholars).

¹⁹ See *Brown*, 347 U.S. at 493 (“[E]ducation is perhaps the most important function of state and local governments”).

²⁰ See Stanfield, *supra* note 1, at 189.

²¹ *Id.* at 186.

²² *Id.* at 185.

²³ *Contra* Williams and Ladd, *supra* note 12, at 269 (arguing that education subsists to impede the progression of Blacks in terms of “occupational status” and “earning capacity”) with Bartman, *supra* note 5 (recognizing education as an important quality of life factor and addressing the continued disparities of resources and opportunities existing in public education that confront minority groups).

ENDNOTES CONTINUED

²⁴ *But see* Dora W. Klein, *Beyond Brown v. Board of Education: The Need to Remedy the Achievement Gap*, 31 J.L. & EDUC. 431, 438-39 (2002) [hereinafter Klein] (suggesting that vestiges of de jure segregation may still remain, particularly within the nation's public school systems).

²⁵ *See* Richard Delgado, *Derrick Bell's Toolkit – Fit to Dismantle That Famous House?*, 75 N.Y.U.L. REV. 283 (2000) (highlighting that “despite periodic ebbs and flows, the fortunes of Blacks in American society remain roughly constant, as though obeying a melancholy law of racial thermodynamics”); *see also* Antoine M. Garibaldi, *Four Decades of Progress . . . and Decline: An Assessment of African American Educational Attainment*, 66 JOURNAL OF NEGRO EDUCATION 105 (1997) (quantifying educational achievements among African Americans: (1) 77% - 87% high school completion rate; (2) 35% college attendance rate, including 59% who attended four-year institutions, compared to national college attendance averages of 42%; (3) 83,576 baccalaureate degrees awarded. However the rate of attainment for master's and doctoral degrees has continually fluctuated.).

²⁶ *See generally* discussion in Part. I.

²⁷ *See* Gwendolyn Zoharah Simmons, *Racism in Higher Education*, 14 U. FLA. J.L. & PUB. POL'Y 29 (2002).

²⁸ *Id.* at 29 (describing the severity of punitive measures imposed on slaves caught reading or writing; these included whipping, mutilation or murder); *see also* *Brown*, 347 U.S. at 490 (recognizing that state sanctioned policies prohibited African Americans from benefiting from educational opportunities).

²⁹ *See* Williams and Ladd, *supra* note 12, at 266.

³⁰ *See* JOHN E. FLEMING, *THE LENGTHENING SHADOW OF SLAVERY: A HISTORICAL JUSTIFICATION FOR AFFIRMATIVE ACTION FOR BLACKS IN HIGHER EDUCATION* 16 (Howard University Press 1976).

³¹ Walter Allen and Joseph Jewell, *The Miseducation of Black America, in An American Dilemma Revisited* (Obie Clayton Jr. ed., 1998) [hereinafter Allen and Jewell].

³² *See* DERECK J. ROVARIS, *MAYS AND MOREHOUSE: HOW BENJAMIN E. MAYS DEVELOPED MOREHOUSE COLLEGE* 32 (Beckham Publishers 1990) (describing the development of historically black institutions of higher learning, the availability of higher education for disadvantaged groups, and organizations that

helped to establish and financially support these academic institutions). Public higher education was virtually nonexistent for African American students. Conversely, due to the systematic exclusion of African Americans from admission into white institutions, over 80 predominantly black private institutions had been founded by 1900. These institutions were typically small and unable to provide adequate resources for their students. For a discussion of the problems encountered by black institutions, *see* Allen and Jewell, *supra* note 31, at 187.

³³ 347 U.S. 483 (1954).

³⁴ 163 U.S. 537 (1896) (holding that “equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate”) (quoted in *Brown*, 347 U.S. at 487).

³⁵ *See* Klein, *supra* note 24.

³⁶ *See* Bartman, *supra* note 5, at 96.

³⁷ Judge Richard Posner currently serves on the Seventh Circuit Court of Appeals and is a faculty member of the University of Chicago School of Law. He has written several books on the theory of law and economics. *See* <http://www.law.uchicago.edu/faculty/posner-r/>

³⁸ *See* Williams and Ladd, *supra* note 12, at 274.

³⁹ Some arguments advanced by proponents of the utilitarian vision of education suggest that the values of education include: participation in the work force and accordingly the mainstream economy, access to professional career opportunities and entrance into the vaunted middle class, and elimination of a caste-ridden society where the same class conditions are perpetuated from generation to generation.

⁴⁰ *See* Stanfield, *supra* note 1, at 188 (“[T]oday, [to] the extent to which there is a dominant societal philosophy of [B]lack education, the focus is still on preparing [B]lacks for practical fields . . . [and] sustained through popular stereotypes about blacks being naturally better dancers, athletes and laborers, while being natural underachievers in intellectual areas.”).

⁴¹ 250 U.S. 616 (1919) (Holmes, J., dissenting).

⁴² *See* Stanfield, *supra* note 1, at 187.

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