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Volume 2, Issue 2

# THE MODERN AMERICAN

A Publication Dedicated to Diversity and the Law



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Sylvania Woods Conference on  
African Americans and the Law*

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WASHINGTON COLLEGE of LAW

# FOREWARD

Ten years ago, as the Washington College of Law prepared for its centennial, Professor Angela Davis and I were among a small group who met with Dean Grossman to discuss how, within the context of the celebration, to rectify the absence of African Americans in the founding and early history of the law school. He listened. Then he asked what we would like to do.

Ultimately, we all agreed to hold a day-long conference during which we would gather lawyers, legal scholars, judges, journalists, and students to examine the state of the relationship between the African-American community and the justice system. And that is what we did: a committed group of faculty and staff members organized into a planning committee and “brought forth” the African Americans and the Law Conference. To our collective surprise and delight, people came to see and participate in a great day of discussion, reflection, and celebration. Thus, when the Centennial Celebration morphed into the annual Founders Celebration, our conference came along.

Judge Sylvania Woods played a key role in that first conference as one of a group of judges who talked with us that afternoon about their individual journeys to the bench and how each had triumphed over moments of racism and other obstacles. Each narrative was compelling, but we remember Judge Woods for his common sense and humor, qualities that had been his mainstays along the way. Later that summer, we learned that he had passed away, and we decided to dedicate the conference to the memory of a man, a jurist, and an alumnus who had lived an honorable life.

So for the last nine years, the Sylvania Woods Conference on African Americans and the Law has occurred each spring as the result of the collaborative process that began that very first year. The Planning Committee—many of whom are valued original members—puts together a program of experts who enlighten our audiences on topics from legal education, to criminal law, to politics, their nexus with the law, and the ultimate impact on the African-American community. We pay tribute to the accomplishments of those who have excelled all along the continuum from law school to practice. And we celebrate our having taken our place in the progressive institution that is the Washington College of Law. I am honored to have worked with Dean Grossman, the members of the fabulous Planning Committee, the African-American alumni, the very gracious Woods family, and everyone else who has made a resounding success of the Woods Conference as we observe its tenth anniversary.

Finally, I thank *The Modern American* for dedicating time, ink, and space to a special issue focusing on the Woods Conference. That this conference and this publication have met in this way and time says much for the success of the achievement of diversity as a concept in this law school community.



Sherry Weaver, Chair  
Woods Conference Planning Committee

*The Modern American* is the Washington College of Law's (WCL) non-partisan, student-run publication dedicated to cutting-edge issues in diversity and the law. *The Modern American* promotes a provocative, fresh dialogue analyzing America's legal and social systems' treatment of racial, ethnic, sexual, and other underrepresented peoples from a wide range of political and social viewpoints.

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

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# A PHENOMENAL MAN: JUDGE SYLVANIA WOODS

*By Pamela Mitchell-Crump, Ed.D\**

Judge Sylvania Webb Woods, more affectionately known as “Uncle Butley,” was truly one of a kind. He was, and still is, my favorite uncle. Despite his status as a judge for Prince George's County, Maryland, he was one of the most down to earth, giving individuals I have ever known. He always helped others in need. He loved to talk about the law, his humble beginnings, family, and the importance of education. I remember him offering to pay for me to attend law school when I was an undergraduate studying Justice and Law Administration. My maternal grandmother, his sister, told me that when my uncle was a young teenager, he would sit in front of the fireplace at night and talk about the importance of an education.

One of the most memorable occasions with my uncle was back in 1993 when my family and I traveled in a van from Massachusetts, stopping in Connecticut to pick up my grandmother, his only surviving older sister, then on to Maryland to get him to travel to Alabama for a family reunion. Uncle Butley was surprised and very pleased by the spunkiness of the van we drove -- an Oldsmobile Silhouette. He was so pleased that he proceeded to take over the wheel and do the majority of the driving. He drove, told many interesting stories, and we frequently stopped to get a bite to eat. Talking and eating were two things my Uncle truly enjoyed.

It was the night of the family reunion banquet. My uncle, Judge Sylvania Woods, was the featured speaker. The tone, tenor, and skill with which he delivered his presentation were impressive, to say the least, inspirational, and uplifting. He delivered a message to which people of all ages and educational levels could relate. His commitment to his work, and true love for and desire to help the disenfranchised and underrepresented populations of society that had no voice, came through loud and clear in his message.

Just being around my uncle was a treat. He was always full of stories, sharing personal experiences, words of wisdom, and

encouraging me -- as well as hundreds of others -- as evidenced by the testimonies given at his going home service, to be true to yourself, help others who are less fortunate than yourself, and the importance of education.

During those times when my uncle was ill, my grandmother and I would go visit him and he always seemed to be very pleased to see us. He would still do a lot of talking and sharing interesting stories or words of wisdom. In my uncle's last days, I shared my deepest thoughts and feelings about him, with him; primarily, thanking him for being himself, his unselfish giving of himself—heart, mind and money, and the joys of sharing precious time with him. He truly was a blessing in my life and the lives of many others. I tried to comfort him with my words knowing in my heart that he would soon be going to a much better place along with his mother, my great grandmother, and an older sister and three older brothers. He was too weak to respond to my words. This uncharacteristic phenomenon of my uncle not being able to speak made my heart cry. The deafening silence of not hearing his voice was a true sign that the end was near. I often think of my uncle and envision him in all his grandeur in Heaven. This time, however, in a white robe with gold trim, still telling stories in God's Kingdom.

American University Washington College of Law's tribute to my uncle, his words, and work through an annual conference is truly a wonderful acknowledgement and tribute to a legendary man. A heartfelt thank you goes out to all those who help plan and administer the conference each year. The fact that the conference is in its tenth year is a testament to American University's commitment to the man and his mission. I thank the University, its conference planners, all conference participants and attendees for keeping my uncle, Judge Sylvania Woods' memory alive.

\* Dr. Mitchell-Crump is Associate Dean of Academic Finance and Assistant to the Senior Vice President of Academic Affairs at Westfield State College, located in Westfield, Massachusetts. She has worked in the area of human resource management for over 21 years and has extensive background in equal opportunity, affirmative action, and diversity.

Dr. Mitchell-Crump received a bachelor of science degree in Justice and Law Administration from Western Connecticut State University, a masters of public administration in Public Law and Management from the University of Hartford and a

doctorate of education in Higher Education Administration from the University of Massachusetts at Amherst. She has also completed Harvard University's Management Development Program.

Her research interests include higher education administration, institutional diversity, and women of color in the academe. Dr. Mitchell-Crump has presented at national conferences and published articles relative to African-American women in the academe.

# CONFERENCE HIGHLIGHT—PANEL: FROM INMATE TO LEGAL ADVOCATE

*Speech by Kemba Smith\**

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**I**t was only a little over five years ago that I was identified as an inmate number. Today I continue to speak on behalf of those currently incarcerated, those who will be in district court on Monday, and those in the future who are being sentenced under federal mandatory drug sentencing.

Three days before Christmas 2000, President Bill Clinton commuted my sentence of twenty-four and a half years for a drug conspiracy charge. If he had not done so, this afternoon, instead of talking to you, I would still be sitting in federal prison. If my parents had not waged a campaign in the news media, in the churches, and among the criminal justice reform community, I would not have been freed from prison to raise my eleven-year old son.

I grew up as an only child of professional parents in a Richmond, Virginia suburb, leading an advantaged and sheltered childhood. After graduating from high school in 1989, I left the security of my family to continue my education at Hampton University in Hampton, Virginia. I was not a drug trafficker. I was a college student. And at the age of 19, away from the protective watch of my mother and father, and in an attempt to fit in, I met a man while a sophomore in college who I became romantically involved with. Unbeknownst to me at the time, according to the Government, he was the head of a \$4 million violent crack cocaine ring.

He eventually became verbally and physically abusive. I continued to have a relationship with him for over three and a half years in which, during this time, he increasingly drew me into his drug activities. The prosecutor stated that I never handled, used, or sold any of the drugs involved in the conspiracy, yet I was sentenced as a first-time non-violent drug offender to twenty-four and a half years -- one for every year of my life. I remained in prison from the moment I turned myself in September 1994, seven months pregnant with my first child, until Dec 22, 2000. My boyfriend at the time did not do any time because he was killed. After he was murdered, the Government came after me and held me accountable for the total amount of drugs involved in the conspiracy, which was 255 kg of crack cocaine, even though according to the Government's investigation, the drug dealing started two years before I even met him.

I did not traffic in drugs, but I knew my boyfriend did. I knew while living with him that he did not have a job and that we were living off the proceeds of his drug crimes. I never claimed total innocence and this is why I plead guilty. The prosecutor added extra incentive. In negotiating a guilty plea, he would allow me a bond so that I could go home until sentencing to give birth to my son and that I would receive only a two-year sentence. Unfortunately, due to his unethical conduct, after pleading guilty, I remained in jail. Minutes after giving birth in a hospital guarded by two prison officials, the U.S. Marshals Ser-

vice walked into my room and ordered that I be shackled to the bed. And two days later my son was taken away. I was sent back to a cold jail cell with my breasts gorging in extreme pain. If my parents had not been able to take and raise my son, my parental rights would have been terminated.

Since being released from prison in 2000, I graduated from Virginia Union University with a bachelors degree in social work, worked at a law firm in Richmond for over four years, and bought a home. I'm currently a first-year law student at Howard. I have spoken across the country to youth audiences, inspiring them to become educated about the injustices of the U.S. criminal justice system and hoping that they will realize that there are consequences to their life choices. But most importantly, I am raising my only child, who's now eleven years old. Unfortunately, my burden is that I represent the thousands of others still currently incarcerated, some of them my friends that I left behind, that deserve an opportunity to raise their children as well.

Mandatory minimum sentences are sentences, usually of imprisonment, created by legislative bodies that must be imposed by courts upon a finding of guilt based upon a fact or some other fact not withstanding any other factors that are traditionally relevant to just sentences, including the degree of culpability and the accused's role in the offense. U.S. law provides that any person who is an accessory to a crime or who aids and abets the commission of a crime is a principal and is treated and punished as the principal perpetrator in the offense. In the Anti-Drug Abuse Act of 1988, Congress applied the mandatory minimum sentences it enacted in 1986 to the crimes of attempt and conspiracy in the Control Substances Act. The consequence is that most minor participants in the activities of a drug trafficker are charged with all the crimes of the drug trafficker. This means they are facing the equivalent punishment. The threat of imprisonment for over 20 or 30 years or more leads many to plead guilty and seek a departure below the mandatory minimum sentence. In 1986, the U.S. Department of Justice insisted on a provision to the mandatory minimums to permit the Government to move the court to sentence below the statutory minimum if the government found that the defendant had provided substantial assistance in the investigation or prosecution of another person who has committed an offense.

Many women are unwilling to provide the substantial assistance in order to be loyal to the man they love, even if they're not married. This results in what is called the "Girlfriend Problem." The drug trafficker pleads guilty, cooperates in the prosecution of his colleagues and is sentenced below the mandatory minimum. His girlfriend, having no information about the criminal organization other than the acts of the boyfriend, feels morally and emotionally compelled not to testify against him. Therefore, she is unable to qualify for the substantial assistance departure

and receives the full mandatory minimum sentence -- even though, in fact, her culpability is substantially less than that of the principal offender. Aside from mandatory minimum sentencing, various features of drug enforcement in the United States have a racially disparate impact.

The United States Housing Act of 1937 was amended by Section 5101 of the Anti-Drug Abuse Act of 1988 to permit the termination of a lease in a public housing facility if any member of the tenant's household or guest of anyone under the tenant's control engaged in criminal activity including drug-related criminal activity on or near public housing premises while the tenant is a tenant in public housing. This has been implemented as the "One Strike And You're Out" housing provision that has resulted in eviction of public housing tenants. This policy was recently unanimously upheld by the United States Supreme Court in *Department of Housing and Urban Development v. Rucker*. Rucker's daughter was found with cocaine and a crack pipe three blocks away from her apartment, and Rucker was evicted.

A person with a drug conviction has a lifetime ban from food assistance and temporary assistance to needy families. Any student convicted of a drug offense shall be denied federal higher education financial aid.

Fortunately, when I came home, I went to back to school to complete my degree -- but I was tempted not to even go online to fill out the financial aid application because I already had in my mind that I wasn't going to have the opportunity to receive any based on what I'd heard about the Higher Education Act of 1998. But ultimately, I went ahead because I just wanted to see what their response was going to be. How were they going to deny me? What was their language going to be? Luckily, I did receive it, but I believe it was because my conviction came before this actual act went into place.

One of the things, especially when I talk to youth audiences and people in the community, I try to get them to look at is why this provision just target people with a drug offense? A person can commit murder, rape, and incest and still receive financial assistance. And so, it somewhat shows that we're disproportionately impacted within the system, within sentencing and punishment. But even once a person has done their time and paid their debt to society, when they come home to try to make a better life for themselves, they are still penalized with education as well.

A non-U.S. citizen convicted of a drug offense or regulation must be barred from entry from the United States or deported from the United States no matter when the offense took place. And I can recall, a young girl I met while I was incarcerated, who was eighteen. She had been in the country ever since she was a little girl. All of her family members had come over to this country, and pretty much, she knew because of her drug

conviction that she was automatically going to be deported. She was somewhat hopeless. She didn't know who was going to be there to support her there resource-wise because she didn't know anyone there anymore.

It is evident that the people who are disproportionately impacted by these federal drug-sentencing laws are people of color. And I'm not ashamed to say that I represent those who are currently incarcerated people just like me, who are capable of being productive taxpaying citizens. When the Congress created the mandatory minimum sentences and the collateral consequences of the drug offenses, they may not have been acting with intent

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*"When the Congress created the mandatory minimum sentences and the collateral consequences of the drug offenses, they may not have been acting with intent to inflict special punishment on people of color, but that has unquestionably been the effect."*

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to inflict special punishment on people of color, but that has unquestionably been the effect. In 2003, Supreme Court Justice Kennedy proclaimed being against this particular policy in a speech at the ABA Annual meeting and challenged the organization to begin a new dialogue. Basically, after Justice Kennedy made this public announcement, the ABA formed the Justice Kennedy Commission that found that since the advent of manda-

tory minimum sentencing policies, the average length of incarceration in the United States has increased three-fold. They found that mandatory minimum sentencing was one of an array of policy changes which, in the aggregate, produced steady, dramatic and unprecedented increase in the population of the nation's prisons and jails—in spite of a decrease in the number of crimes committed in the past several years.

With mandatory minimum sentences, there are a lot of disastrous social consequences that go along with having an over-reliance on punitive sentencing policies. Basically, there are excessively severe sentences. When I speak before people, I try to emphasize that it's bigger than just me and my story, that there are hundreds and thousands of other Kemba Smiths that are still currently incarcerated that have served more time than I had, and their kids are going off to college and they haven't had the opportunity to be there for them. Mandatory minimum sentences lead to arbitrary sentences. They produce the very sentencing disparities that determinate sentencing was intended to eliminate.

Honorable Charles B. Rangle, Congressman, stated that No one can justify the 100:1 ratio. Although there are larger numbers of documented white crack cocaine users, federal drug enforcement and prosecutorial practices have resulted in the so-called War on Drugs being centered on inner-city communities. This has caused an overwhelming number of prosecutions and convictions coming from these communities with African Americans disproportionately subject to the unreasonably harsh crack cocaine penalties. Clearly, we're talking about different neighbor-

hoods, not different crimes. Ironically, crack and cocaine have the same level of high, so the difference is merely cosmetic. Tough on crime rhetoric be damned—this discrepancy is stupid and inconsistent with a civilized country.

Every time when I see or hear things like that, coming from political members, and I realize the risk they are taking in making those particular statements, I just wish that we could have more of them. It's more than likely that political members don't want to make statements like that because it will make them seem as though they are soft on crime. Also, with mandatory minimum sentences, it undermines judicial discretion, where the judge should be the appropriate person to decide on a particular sentence within a designated range, not the legislator or sentencing commission. As judicial discretion relates to these collateral consequences to drug offenses, I don't understand why these policies were put into effect because ultimately, if the judge wants to impose that as part of sentencing, he's clearly able to do that, versus having policy do that automatically.

There are economic implications, where there's a waste of money, as seen in increased expenditures in maintenance and healthcare dependent inmates, lost tax revenue from income that might have been earned. There are intangible harms, such as emotional, economic and developmental damage to children. Disenfranchisement, which is a big issue I'm hoping, in the near future, there will be a lot more success. That's an issue that more people are willing to accept as being unfair; that once a person has done their time, they should be allowed to be a part of the political process, especially because they are taxpaying citizens. With this disenfranchisement, there is consequent political alienation of our communities of color.

Another economic factor with mandatory minimum sentencing, and with the increased population in the prisons, is the fact that while I was incarcerated in 2000, during the U.S. Census, I can remember them locking the entire institution down, and they were telling us that they need to give us U.S. Census paperwork to fill out. When they brought us the paper to fill out, I wondered, "Why are we being counted as part of the prison?" At the time I was in Danberry, Connecticut, and from working with scholars and advocates since I've been home, I've been enlightened to the economic factors that surround these smaller prison industry communities where they are creating jobs and resources by doing the Census and counting us where they would offer more funding and resources to that community.

I believe that those resources should go back to where those people eventually end up going back to.

I guess the fight still continues and I had the opportunity, at the beginning of March, to testify at a hearing with the Inter-American Commission on Human Rights. We all came together to ask them to determine whether the U.S. Government is violating international law and norms protected under the American Declaration of Rights and Duties of Man by the implementation as well as the application of mandatory minimum sentencing in a discriminatory manner. We're saying that in the application of these laws in relation to following human rights norms protected by the American Declaration, the following things should be looked at -- the right to equal protection of the law, the right to a fair trial, and the right to due process.

I'm grateful that you all have this conference in honor of Judge Woods. I was at a conference in Minneapolis at the University of St. Thomas Law School, it's a mostly liberal white institution, but it was very interesting that they were dialoguing on alternatives to incarceration. There were three women of color that were talking about these particular issues, and then directly following, there was a White judge that basically echoed the exact same things we were talking about. One of the things that we all came to the conclusion of was that we need to continue nudging the system.

For me, I question myself as far as why I chose this route. But for me, it's a sense of survivor's guilt. When I do public speaking, I want to give myself a little bit more credibility in the things I talk about. But it's a survivor's guilt that I still have people who are still there that deserve a second chance just like I do. And I'm grateful for what President Clinton did, but like I said, there are just so many others that are still there.

But when you are put in a position where too much is given, too much is required, it can be an overwhelming experience. You have this mentality starting off that you want to save the world, but I hope we all recognize that we have the fight from the past and when I think of our fight from the past, and our ancestors, how tough their battle was, it motivates me more and makes me want to remain committed and not lose hope—because their fight was tougher than what we're experiencing now. It's up to us to continue the legacy of our ancestors, and despite whether you're going into corporate law, or entertainment law, criminal law, we still need to understand that we have a responsibility to our community.

\* Kemba Smith was a featured panelist at the 10th Annual Sylvania Woods Conference for "The African American Woman in Law and Legal History: An Important, Individual Moment in Law and History." This is an edited transcript of her panel presentation.

Ms. Smith's case drew support from across the nation and the world. Her story has been featured on Nightline, Court TV, and the Early Morning Show, the Washington Post, the New York Times, Glamour, People, and Essence.

As an advocate and public speaker, Ms. Smith has received numerous awards and recognitions for her courage and determination to educate the public about the devastating social, economic and political consequences of current drug policies. Her advocacy led to the creation of the Kemba Smith Foundation, a 501(c)(3) non-profit organization.

For more information about the Kemba Smith Foundation or to contact Ms. Smith, please visit its website at <http://www.kembasmithfoundation.org>.

# CONFERENCE HIGHLIGHT—RISING STAR AWARD: COMMENTARY

By Lydia Edwards, J.D.\*

It means a great deal to receive this year's Rising Star award. I am especially honored because the African-American students in the law school, rather than the faculty or administration, gave me this award. The fact that so many of my peers think as highly of me as I do of them is humbling.

Receiving the award on the 10<sup>th</sup> Anniversary of the Sylvania Woods Conference on African Americans and the Law is also incredibly humbling. So many leaders in the African-American legal community I have only read about or heard of their greatness at the law school before my time attended the conference. To all of the amazing speakers, professors, students, judges, and lawyers before whom I am honored, I would like to say both "thank you" and "I shall try." The "thank you" is not just for the award, but also for the much easier road that I traveled into law school.

While Sylvania Woods was not there to see that incredibly beautiful room filled with brilliant legal minds, civil rights leaders, and the next generation of African-American scholars, I was wholly moved. To all the unnamed people before me, especially in the legal field, who paved the way for me to be the first lawyer in my family, I thank you. I thank you for the opportunity to exercise my potential. I am not forgetful that it was only a gen-

eration ago that the room I saw filled with brilliant African-American legal minds could have represented all of the African-American lawyers in existence in some states. To Ms. Weaver, especially, I extend a special "thank you." She is the surrogate mother to so many of us at the law school. She has been my calming force and voice of reason. She has also encouraged me and been there from the very beginning in helping *The Modern American* come into being.

Because of the support and trailblazing of so many ahead of me, I promise "I shall try." I shall try to be the best lawyer I can be and represent myself in a professional and ethical manner at all times. I shall try to break as many glass ceilings and limitations and bring with me as many people representing the incredible diversity of the United States as I possibly can. I shall try to fight against injustice. I promise never to let any person be disrespected, denigrated, or abused in my presence without speaking out. I shall try simply to be a better person, to give back and follow the tenants of my religion, to love my neighbor, and treat others the way I want to be treated. I shall try to remember most of all to be a flea for justice and keep biting, no matter how daunting the amount of injustice. Enough fleas can bring down the mightiest of dogs.



\* At the 10<sup>th</sup> Annual Sylvania Woods Conference, Lydia Edwards received the Rising Star Award. This prestigious award is given to the outstanding African-American graduate at the American University Washington College of Law ("WCL") each year who best exemplifies fellowship, congeniality, and willingness to help others during his or her tenure at the school.

Ms. Edwards' contributions to the WCL community include, founding *The Modern American: A Publication Dedicated to Diversity and the Law*, serving the and Finance Chair of the Student Bar Association, and serving as a member of the Moot Court Honor Society.

In addition to her studies and many contributions to WCL,

Ms. Edwards tutored children in Washington, D.C.'s Shaw District, helped protect voters' rights during the 2004 national election, taught constitutional law to public high school students in the District of Columbia through the Marshall-Brennan Fellow Program, and spearheaded efforts at WCL to help victims of Hurricane Katrina by organizing an "Alternative Spring Break" trip to Gulfport, Mississippi. After her first year of law school, Ms. Edwards clerked at Henrichsen Siegel, P.L.L.C., where she worked on employment discrimination and civil rights cases. During her second year of law school, Ms. Edwards clerked at the Lawyers' Committee on Civil Rights Under Law, where she worked to ensure local governments and municipalities complied with affirmative action plans. Finally, the Berkeley Journal for African American Law and Policy selected her article, *Protecting the Black Freedmen: Is the Thirteenth Amendment the linchpin to securing Civil Rights in Indian Country?* for publication. It discusses the civil rights of black members of the Cherokee and Seminole tribes.

Currently, Ms. Edwards is a law clerk for Massachusetts Superior Court where she will rotate between civil and criminal dockets and four judges. She will join the Boston office of Holland & Knight, LLP in 2007.

# CONFERENCE HIGHLIGHT—NORTHSTAR AWARD: SPOTLIGHT ON ANGELA DAVIS\*

*Interview by Professor Jamin Raskin\*\**

*Introductory Message by Professor Cynthia Jones\*\*\**

It is my honor and pleasure to introduce the Spotlight on my very dear friend and mentor, Professor Angela Davis. No other person is more deserving of an award or a Spotlight for contributions to the African-American community at the Washington College of Law (“WCL”) than Angela Davis. I will let others speak in glowing terms about her numerous professional accomplishments in the criminal justice community as a preeminent legal scholar and advocate. I will restrict my comments to Professor Davis’ unyielding commitment to the success of African Americans in the law as aptly illustrated by her steady hand in guiding my career.

I first met Angela Davis in 1989 when she was the Deputy Director of the Public Defender Service for the District of Columbia (“PDS”). I was in my third year of law school at WCL, working as an intern at PDS, and she supervised my internship. I did not work directly with her then, but our paths crossed again in 1992 when I applied to be a staff attorney at PDS. She was then the director of PDS and hired me. She gave me the most challenging and rewarding professional experience a young lawyer could hope to receive. Eventually, she left PDS, but in 1999, our paths crossed again when I applied to be the Director of PDS and Angela was a member of the PDS Board of Trustees. She played an instrumental role in my selection as the PDS director. Once she became Chair of the Board of Trustees, we worked together constantly and our friendship grew exponentially.

As the director of PDS, I aspired to be the kind and gentle director that Angela had been. She was immensely popular, well-loved, and fostered a tight, nurturing community environment that kept morale high. She left very big shoes to fill, and neither I, nor any subsequent PDS director, was ever quite able to establish the kind of relationship with the staff that she enjoyed.

In 2002, when I decided to explore teaching law, Angela guided me through the process of becoming a visiting professor and then being selected as a full-time law professor at WCL. Even today, she continues to guide and mentor me. In fact, I was not able to be present at the Sylvania Woods Conference because Angela unselfishly declined an invitation to speak at a prominent national conference at UCLA. She encouraged the organizers to

invite me to participate instead so that I could present my scholarship and establish myself among the leading criminal justice professors in the country. I am not sure what I have done to deserve such a wonderful and devoted mentor and friend who invests herself so completely and wholeheartedly in my success and well being, but I am so very grateful.

Quite simply, WCL is a better educational institution because Angela Davis is here. WCL students are better educated about criminal law and procedure, criminal defense, and trial advocacy because Angela Davis is here. Furthermore, the larger legal community is better educated about the pervasive problems of racism in the criminal justice system and the use and abuse of prosecutorial discretion because Angela Davis’ voice is here.

To borrow the words of the great Chaka Khan, Angela Davis is EVERY WOMAN when it comes to advancing the cause of African Americans in the law. Whether it is getting on the phone to find a job for a deserving BLSA student or alumna, or hiring African-American students as her dean’s fellows, or calling on her many friends and colleagues to come to WCL events, or moderating panels for BLSA events, or hosting an annual celebration at her home to honor all the African-American graduates of WCL, or mentoring aspiring law professors of color all over the country to enable them to transition into academia, or hosting an event at her home each summer to bring together all of the law professors of color in the DC metropolitan area, or simply giving sage advice to the other African-American professors at WCL, Angela is EVERY WOMAN in this African-American legal community because she constantly and energetically works to help African Americans succeed in the law.

So, Angela, (or, “Amani,” as you are known by your closest friends), I know you do not feel comfortable receiving an award for simply helping black folks succeed in the legal profession. I know you feel that this is just the “right thing to do.” But not everybody does it, and even less do it as well and as often as you do. So, thank you. If Shirley Chisholm was right when she said: “*service [to the community] is the rent we pay for room on this earth,*” you have overpaid what you owe. With this award and this Spotlight, we attempt to give some of that back to you.

*The Modern American* honors Professor Angela Davis for being chosen as the recipient of the Northstar Award for the 10<sup>th</sup> Anniversary of the Sylvania Woods Conference on African Americans and the Law. Professor Jamin Raskin recently sat down with Professor Angela Davis to discuss her extensive experience with the criminal justice system, activism, and her new book.

## ACTIVISM IN A MUCH NEEDED AREA

**You're known for having a very upbeat, optimistic and buoyant personality and approach to life. A lot of people who deal with the criminal justice system as liberals get depressed, despondent, and cynical. So why are you not a cynical, jaded person after everything you've seen?**

I am a little bit discouraged and frustrated about problems I've seen in the criminal justice system, because I've worked hard to change some of them and I don't see those changes taking place. For example, around issues that I care about in criminal justice like the sentencing laws that are so draconian, the policies and practices that perpetuate racial disparity in the criminal justice system are awful, and the Supreme Court's cases really make it impossible to do anything about that. And there's not a lot of legislation out there dealing with issues like racial profiling or selective prosecution, and those are issues that I care deeply about. But I don't give up hope on those issues, and I continue to lobby around and write about those issues, but it is discouraging. I see a little bit of progress being made, especially around issues like racial profiling, and I see people making baby steps. I remain hopeful, but I'm not feeling totally optimistic.

**What's your answer to the question all criminal defense lawyers get about how you can represent "those" people who are doing x, y, and z, knowing that some of them are guilty?**

Oh, depending on who asks me on what day, I give different answers. *[Laughs]* I have *never* felt bad for hearing the words "not guilty." It's always been a feeling of great joy because I feel that the criminal justice system really fails particularly poor people so much, that I felt a lot of joy in doing what I did. But the bottom line is you never know. I have never in my life judged a client -- never. It's not my role to judge them. And the people I represented, I always said, "There but for the Grace of God go I." We're not talking about bad, evil people. If I lived the lives my clients had to live, who knows what I would have done, and I can say that to every single person.

I never thought about whether they did it or not, because frankly I didn't care. My role there was to make sure I was standing beside them, as probably the only person in the system who was going to ensure they got respect, were well-represented, and who was not going to let the almighty hand of the government come down on them and take advantage of them, as often happens when people don't have good representation. And I always felt really, really good about that. I mean, my personality is such that I've always been for the underdog. Whoever people hate, I just want to help them because I don't like the idea of folks looking down on them and judging them. And I always stand up for the underdog. So it was a good fit for me. I always felt good about it.

## GROWING UP IN THE SEGREGATED SOUTH

**Most people who attain a certain level of education and social privilege prefer to forget about unpleasant things, like**

**arrest, incarceration, prison, rape and abuse. What is it in your past that has motivated you to stay focused on something that you clearly have the luxury of forgetting about if you want?**

Well, I'm an African-American woman born in Phenix City, Alabama, on the border of Alabama and Georgia near Fort Benning, in 1956, so it's kind of hard to forget. I grew up in segregated Alabama, and I remember separate water fountains and public accommodations. I have very distinct memories of that. Traveling from Alabama to my aunt's house in South Carolina with my parents, my father, who was in the Army, used to drive all that long distance wearing his formal dress uniform because he thought that if he wore that when we traveled, we would be able to stop and get gas and food. A police officer arrested me when I was nine years old, *[chuckles]*, because I was walking in a White neighborhood, and got into an altercation with this White kid who didn't want me and my friends riding our bikes on *their* street, which was a public street. I tell this story in my Criminal Procedure Class every year when we talk about arrest. So I've had life experiences.

But the bottom line is, it's not just about my past, it's about everyday being faced with these issues, even now in 2006. I have family members, young, male family members being constantly stopped by the police. As a middle-class Black woman, I'm confronted by issues of race all the time. I have been followed around stores. I have been in a grocery store—this was before I started teaching, when I was at Public Defender Service ("PDS")—I had on a suit that day and was carrying a briefcase. And I had a woman come up to me and ask me where the canned peas were -- in a way that she *clearly thought I worked there*. And it was kind of like I was invisible as a Black woman. I mean, she sees this Black face, and she immediately assumed I was supposed to be waiting on her.

And that happens to me all the time. You can talk to most Black folks who have come to certain points in their life, where they've achieved certain things, and they still are confronted with race issues. You are constantly reminded about the fact that you are Black and somehow people treat you differently, see you differently, don't see you, you're invisible, or if they see you they have certain assumptions. Those things don't change because your socioeconomic or professional status changes. It's not the same as it was a long time ago. But it's still there.

**But I can see somebody saying that that would make them want to distance themselves even more from the underclass, the people that were caught up in prison. I remember my [Harvard Law School] teacher Randall Kennedy wrote this article about the politics of respectability. I took his point to be, we have to distance ourselves from the criminal underclass and the people who are the objects of police attention, in order to make clear that our race is not a criminal race.**

I'm not sure he meant that, I think he meant, not "distance from them" in a sense that you forget about those people and you don't want to be helpful to them, or you don't want to do any-

thing to change it. It's that you distance yourself in a sense that you're gonna create this different persona so that this idea of Blacks as criminal, as bad, as evil, is changed. It's sort of changing people's minds about behavior in a certain way. I'm not sure, I won't try to interpret Kennedy and what he meant.

But if your interpretation is correct, I could never do that. I've wanted to be a lawyer since I was in the sixth grade. And at the time, I thought I wanted to be a civil rights lawyer, whatever that meant. I didn't really know what that meant. But given my experiences growing up, I knew I wanted to help Black people to overcome discrimination and the vestiges of slavery. I ended up becoming a Public Defender, and I still think that was, in a way, being a civil rights lawyer. But, I guess my point is, from when I first had aspirations of being a lawyer, I knew that I was going to be doing something to help poor people and people of color, and I didn't know exactly how that was going to happen. That's what I've always wanted to do. There's no way I could have done anything else.

#### FROM HARVARD TO THE PUBLIC DEFENDER SERVICE TO THE NATIONAL RAINBOW COALITION

**So take us through your experience at Harvard Law School?**

My experience at Harvard Law School [1978-1981] was not that great. I had a great experience at Howard [1974-1978]. I met my now-husband [a Howard University graduate student and assistant Tae Kwon Do teacher, where they met, and were married after she finished law school] and had a great four years there.

At the time, there was only one Black professor [at Harvard Law] and that was Clyde Ferguson. Derek Bell was there for part of the time, and he was one of my favorite professors. I had no other Black professors. I just felt very isolated at Harvard because at the time, there was not really much of a focus on public interest work. Now, Charles Ogletree is there running the Criminal Justice Institute, and there's a much greater focus on public interest work. When I was there, you had to really struggle if you were interested in doing public interest work. And I felt very isolated nervous, scared, and out of my element. But I made it through. And now I go up there every year to teach trial advocacy. It's different now.

Being a public defender was truly what I was born to do. I loved the whole twelve years I was there, both when I was representing clients and when I was running the office. I just feel like it's probably the most important contribution that I've made in the world, or will probably ever make.

The way I ended up going [to the National Rainbow Coalition] was, when I was the director at PDS, I heard that Jesse Jackson was starting this new program called "Save Our Youth"—a mentoring program for kids who were in the criminal justice system. I heard that he was having these meetings in these local churches in DC with prosecutors and judges. As usual, the Public Defender Service was left out. So I just crashed one of the meetings. I just showed up and introduced

myself and said "I heard you were meeting about *our* clients, and I would like to participate." And the rest is history. You know how Rev. Jackson is—"Oh yeah, I want her to work on this!"

At that time I'd been at PDS for 12 years and I was the director, which was very different from representing actual clients. I was doing budget and administrative stuff. And it also felt like, instead of representing just the clients in my individual caseload, I was representing every single client in the office. I didn't get the money and the resources, I was letting all the clients down, and it was getting to be quite stressful. I'd been there for 12 years and I thought, let me try to do something different and affect change in a different way. So I went to the Rainbow Coalition and I stayed there for one wild, intense, and crazy year. *[Laughs]* I did some interesting things, and learned a lot about politics – a lot that discouraged me and some that encouraged me.

#### NOT BLIND TO RACISM

**An important part of your career is that you've refused to be blind to racism and its effects on the criminal justice system. But you've never defined yourself, in exclusive ways, as a "race person," and you're a hero to students who are Black, Hispanic, White, Asian American, gay, straight. And so, your moral and political beliefs go beyond just fighting racism. Right?**

Yes they do. Very much of what I think about, write about, and do is about race, pretty much because that's been my life experience, and that has been what has defined my life experience. I haven't defined myself in that way. Race and racism have defined that for me. I've been accused by people of seeing race in everything -- "playing the race card" – whatever that means. I hate that phrase. You know, it's not as if I go around looking for race in everything. But it has been a part of my life experience, and I have refused to close my eyes to it

Having said that, I don't think that racism is the only issue we need to be concerned about. Issues of class are so important. And quite frankly I see those two things as inextricably bound together. People of color are disproportionately poor, and the poor in this country are disproportionately people of color. Even as I talk about issues of race in the criminal justice system, I always qualify that to say that it's often very hard, if not impossible, to determine whether it's issues of class or issues of race that account for so many of the disparities and problems in the criminal justice system. I make that clear in my writings, and I try to make that clear when I talk to people all the time.

**Certainly a lot of students arrive at law school with a view that crime has to be looked at in a vacuum, and that a person who commits a crime is a criminal—A bad person, a sinful person, or an immoral person. And that it's wrong to inject these larger questions of history, racism, sexism, class, into our analysis in criminal law. So how do you engage with that perspective?**

It's impossible to teach my courses without talking about issues of race and class. I try to teach students what all students who've studied criminology know, which is the connection between poverty and crime. And I think most of our students really do understand that. I think most of our students understand how issues of race play a role as well. But I think more see the issues of class than they do race. And I try to teach that as much as I can.

I'm so glad you raised that, because it reminds me of when I was teaching the *Bernard Goetz* case. Goetz said, "If I had more bullets, I would have shot more. I'd been mugged before and I'd shoot again" – the whole vigilante mentality. The case always generates a very tense discussion in class. And it's interesting because I'm always the first one to mention that the four boys were Black. Nobody wants to say it! And I always go through this scenario where the students say "Well they could have been four White guys." And it makes people uncomfortable but we always have an intense discussion. I always feel as if there's no closure to the discussion and that there's never enough time in the class to talk about it.

So what I was thinking is that next year I might want to do something I've tentatively call the "Race Project," where anyone in the WCL community informally gathers once a month in a non-classroom setting because that's always a problem, when you have a classroom dynamic with a Black professor, talking about race, and students not always feeling comfortable to say what they feel for fear of other students judging them. It would be great to have a space where anyone in our community—students, staff, faculty—can come together to talk about issues of race, in a non-threatening environment, to talk through some of these issues. Race is such an important issue, but it's one of the issues that I think most people feel uncomfortable talking about in any context, and certainly in the classroom. It shouldn't be that way. So I think we have to try to create space, particularly as professors, for students to feel comfortable talking about those issues no matter what your experience may be.

#### EFFECTING CHANGE—ONE ISSUE AT A TIME

##### **Tell us about your book.**

I'm very excited about it. The title I'm currently working with is *Arbitrary Justice: The Power of the American Prosecutor*. It's all about prosecutorial discretion and power—how the ordinary everyday exercise of prosecutorial power and discretion, which we as a society tend to accept, what a great influence it has on the disparities we see in the criminal justice system. And about how prosecutors are unique in our society in that they're the only public officials, in my view, that we really don't hold accountable.

Our whole system of democracy is about transparency and accountability through the democratic process. However, prosecutors, who have more power than anyone else in the criminal justice system in my view, are the most powerful but the least accountable. Most judges around the country are elected, and even those that are appointed go through a cycle and have to be

reappointed. Judges can be impeached. And of course, defense attorneys have no power. Most people would respond by saying that prosecutors are accountable because they are elected officials or appointed through the appointments process. But what I say to them is that the democratic process doesn't really hold prosecutors accountable. If you ask most people what their elected prosecutors do, they will not be able to tell you. Prosecutors run for office, and there is this democratic process, but no one knows what they do. There's absolutely no transparency in prosecutors' offices so people don't know what they do. They don't know anything about prosecutors' charging powers or plea bargaining power or policies. They don't even know what those things are.

When prosecutors run for office, they don't tell people about these important responsibilities, but they are the most important powers prosecutors have, and they have such a fundamental impact on people. Prosecutors make the charging decision single-handedly, and it's almost impossible to challenge either the charging decision or the failure to charge. How can people hold prosecutors accountable if they don't know what they do and how they exercise their immense power and discretion?

##### **Do you want to retain that power and deploy it for positive purposes, or do you want to reduce that power and figure out how to really rein them in?**

Both. I want the power to be reined in, in the sense that I want them to be held accountable to the people. I want the democratic process and the mechanisms of accountability that are there in theory now to actually work in practice. But in the meantime, and if that happens, I want prosecutors to maintain discretion. I think the federal sentencing guidelines proved that totally eliminating discretion is a bad idea. At the same time, when you have discretion and it's totally unrestrained, and when there's no accountability for the exercise of that discretion, you're gonna end up with unfairness and discrimination. Kenneth Davis, who writes about discretion in the criminal justice system, talks about how the power to have discretion is the power to discriminate. So I want the prosecutors to be reined in and held accountable, and as they continue to exercise that discretion, I want them to use that discretion in ways that can further justice. The Supreme Court said "the role of the prosecutor is not to seek convictions but to do justice." A paraphrased version of that quote is actually inscribed over the entrance to the Justice Department. But in fact the reality is that most prosecutors are very political and they're all about getting convictions and running for office.. And it's fine to fight crime, but they use crime in political ways, instead of keeping their eyes on what justice is all about. It's complicated. It's not an "either or"—it's both.

#### THE BEST IS YET TO COME

**Ok, looking forward—you've just finished a book, that's a huge accomplishment. Where do you see your research**

**going? Are you going to step outside of the criminal law and procedure at any point?**

I don't see myself stepping out. I'm actually working on another book now, with Michael Tigar, in Foundation Press' Stories series. It's called Trial Advocacy Stories. We'll include essays about famous or significant civil and criminal trials and about the trial strategies of the prosecution or plaintiff and the defense. The essays will discuss the trial strategies and significant aspects of the advocacy in the trials. Some will also discuss the social or historical significance of the cases. I also teach trial advocacy and a criminal defense course here. I love teaching students how to be trial lawyers. It's a wonderful skill, and I think so few lawyers have that skill. Trial advocacy is definitely something that I want to explore more -- both as a teacher and a scholar. But no, I do not see myself stepping outside of criminal

law or procedure because there is so, so much more to do there. There are many other projects I'm working on, but I'll only mention one. The Vera Institute of Justice, a non-profit institute in New York, does significant work to improve the criminal justice system. They now have a project called the "Prosecution and Racial Justice Project," in which they have convinced three chief prosecutors across the country—Michael McCann in Milwaukee, Wisconsin, Peter Gilchrist in Charlotte, North Carolina, and Paul Morrison in Johnson County, Kansas—to allow Vera's staff to come in and gather statistics to try to determine whether or not the exercise of discretion in their offices is having a racial effect. I serve on the Project's Advisory Board. I am really excited about this project because I proposed something similar in one of my first law review articles – *Prosecution and Race: The Power and Privilege of Discretion*.



\* Professor Angela J. Davis graduated *summa cum laude* in 1978 from Howard University with a Bachelor of Arts degree in Political Science and continued onto Harvard Law School, graduating in 1981. After graduating from law school, Professor Davis worked for the Public Defender Service for the District of Columbia.

As a Staff Attorney in 1982, Professor Davis represented indigent defendants in the Criminal Division and juvenile respondents in delinquency proceedings in the Family Division of the Superior Court of the District of Columbia. Later, she became Deputy Director and continued as the Executive Director of the Public Defender Service from 1991 to 1994. In this capacity, Professor Davis represented indigent adults and juveniles charged with serious felony offenses in the District of Columbia.

Professor Davis' first teaching appointment was at the Public Defender Service Training Program. Since then, Professor Davis has taught at various prestigious institutions including Harvard Law School, Georgetown University Law Center, and George Washington University Law School. Her expertise includes trial advocacy and racism in the criminal justice system. Currently, she is a professor of criminal law, criminal procedure, and criminal defense at the Washington College of Law at American University.

During her law career, Professor Davis has continuously been recognized for her outstanding achievements. From 1993 to 1994, she was a Morris Wasserstein Public Interest Fellow at

Harvard Law School. In 1997, the National Council on Crime and Delinquency awarded Professor Davis with the New American Community Award. In 2000, the Washington College of Law at American University recognized Professor Davis as a Pauline Ruyle Moore Scholar for her scholarly contribution in the area of public law. Two years later, American University again recognized Professor Davis for her outstanding teaching. More recently, Professor Davis was recognized as a Soros Senior Justice Fellow commissioned to write a book on prosecutorial discretion and power. Earlier this year, she was awarded the Northstar Award at the 10<sup>th</sup> Annual Sylvania Woods Conference on African Americans and the Law for her contributions to the African-American community.

In addition to her teaching duties, Professor Davis actively writes on the American criminal system. She has co-authored two books, *Basic Criminal Procedure* and *Trial Advocacy Stories*, to be released in 2007. Her current publication, *Arbitrary Justice: The Power of the American Prosecutor*, will be released later this year. She has also written a chapter entitled "Incarceration and the Imbalance of Power," published in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*. Additionally, she has written editorials on criminal justice for the *Washington Post*, *The Legal Times*, and *Criminal Justice*.

Professor Davis has made frequent presentations and participated in many collegiate and professional panels. Most recently, she spoke at the Association of American Law Schools Annual Meeting and at the American Bar Association Criminal Justice Section Fall Meeting. She has also made presentations at the American Bar Association and the L'Égalité devant la justice in Paris, France. Professor Davis' media appearances include ABC's Nightline, CNN, Fox Morning News, and the Koyo Nambdi Show on NPR.

Professor Davis is an active member of the Sentencing Project, Peter Cicchino Social Justice Foundation, Southern Center for Human Rights, Fredrick Douglas Jordan Scholarship Fund, Vera Institute of Justice Prosecution & Racial Justice Project, and American Bar Association.



\*\* Professor Jamin Raskin graduated *magna cum laude* with a Bachelor of Arts in Government with a concentration in Political Theory from Harvard College. He received the Benjamin A. Trustman Traveling Fellowship. He had the honor of interviewing the late French philosopher-historian, Michel Foucault. Professor Raskin's achievements continued onto law school, graduating *magna cum laude* from Harvard Law School in 1987. During law school, Professor Raskin won the First Circuit Prize for an essay on the *Principles of Constitutional Federalism from Commission on the Bicentennial of the Constitution* and taught Political Theory at the Department of Government at Harvard University.

After law school, Professor Raskin worked as the Assistant Attorney General for the Commonwealth of Massachusetts. He served a joint appointment in the Government and Executive Bureaus. After writing administrative comments opposing a Health and Human Services Regulation prohibiting abortion counseling at federally funded family planning clinics, Professor Raskin briefed a successful challenge to the regulation in federal court. He also effectively litigated two architectural access cases for the disabled in state appeals court.

After briefly working as General Counsel for the National Rainbow Coalition, Professor Raskin joined the law faculty at the Washington College of Law at American University. For more than sixteen years, Professor Raskin has taught courses in Constitutional law, the First Amendment, the Constitution and Public Education, and Law of the American Political Process. As part of law faculty, Professor Raskin has directed the LL.M

program and chaired both the Appointments and Speakers Committees. From 1994 to 1996, he served as the Associate Dean for Faculty and Academic Affairs.

As part of the law faculty at American University, Professor Raskin's achievements have continued to be remarkable. In 2001, American University conferred its highest honor and named him its Scholar-Teacher of the Year. As a Visiting Professor at the Institut D'Etudes Sciences Politique in Paris, France, Professor Raskin lectured throughout the country for the United States Embassy. In 2005, he was named the Pauline Ruyle Moore Scholar for excellence in public law scholarship. In 1999, Professor Raskin began the Marshall-Brennan Constitutional Literacy Project at WCL and currently serves as its director. Organized with the widows of the Justices Thurgood Marshall and William Brennan, the Project uses law students to teach Constitutional Law to local public high school students. The Marshall-Brennan Project has spread to other universities including but not limited to Howard University Law, Rutgers Law School, and the University of Pennsylvania School of Law.

Professor Raskin is also an active civil rights and civil liberties attorney. He has represented Greenpeace, the Service Employees International Union, United Students Against Sweatshops, Global Exchange, and the National Voting Rights Institute. He is a member of the Board of FairVote, a leading electoral reform group, and the Public Justice Center. Backed by the ACLU, Professor Raskin defended the legality of vote trading under the First Amendment. Currently, Professor Raskin's tireless commitment to public issues has led him to run for the Maryland State Senate.

Professor Raskin's publications include, *We the Students: Supreme Court Cases for and about America's Students*, *Youth Justice in America*, *Overruling Democracy: The Supreme Court versus The American People*, and various articles, essays, and op-ed pieces for law journals, magazines, and newspapers. He is a frequent guest on local and national television shows, such as CBS News, NBS News, Larry King Live, Crossfire, and Diane Rehm Show on PBS.



\*\*\* Cynthia Jones holds expertise and teaches in the fields of criminal law, criminal procedure, evidence, and Race, Crime and Politics. She has made various presentations in the areas of ethnic and racial justice, racial profiling, and the juvenile death penalty. Professor Jones was an associate at the law firm of Dickstein, Shapiro and Morin from 1990 through 1992. She has served as an adjunct instructor at American University Washington College of Law, UDC, and George Washington University. Previously, she was staff attorney at D.C. Public Defender Service; deputy director of the D.C. Pretrial Services Agency and executive director of the D.C. Public Defender Service. She has lectured extensively on criminal law and sentencing issues.

# CHILDREN OF INCARCERATED MOTHERS AND THE STRUGGLE FOR STABILITY

*By Professor Nekima Levy-Pounds\**

As though poor African-American families do not have enough problems to contend with stemming from the lingering effects of slavery, Jim Crow laws, and the institutional racism of the last twenty years or so, these families have been forced to square off against the U.S. government in the so-called “war on drugs.” In the mid-1980s when lawmakers initiated the war on drugs, their purported intent was to catch and incarcerate drug kingpins and high-level dealers who were thought to be responsible for the increased accessibility of illegal drugs in the U.S.<sup>1</sup> To accomplish this goal, Congress implemented harsh federal sentencing guidelines and mandatory minimum sentences that called for convicted drug offenders to serve lengthy prison terms for involvement in drug-related crimes.<sup>2</sup> Though Congress’ intent in launching the war on drugs was laudable, after twenty years and hundreds of billions of dollars being spent to fight the war, there has yet to be a marked decrease in the flow of illicit drugs in the U.S.<sup>3</sup>

Yet, since the war on drugs began, tens of thousands of first-time, non-violent offenders, and low-level dealers, including a substantial number of women, have been added to the prison rolls in nearly every state.<sup>4</sup> According to the Bureau of Justice Statistics (“BJS”), in 1981, 26% of incarcerated women were serving time for involvement in drug-related crimes.<sup>5</sup> However, recent estimates indicate that over 72% of women serving time in U.S. prisons are incarcerated for drug trafficking convictions.<sup>6</sup> Additionally, while African Americans account for approximately 13% of the U.S. population, African-American women account for nearly 50% of state female prison populations and 35% of females incarcerated in federal prison.<sup>7</sup> Interestingly, these women are not kingpins and high-level dealers,<sup>8</sup> but are often the girlfriends, wives, and relatives of low-level dealers. Sadly, they are also, more often than not, the mothers and primary caregivers of young children.<sup>9</sup>

Women who have been caught and incarcerated for seemingly violating drug-trafficking laws are least likely to have a substantial impact on the flow of drug trafficking in the U.S. However, astonishingly, these women are likely to serve longer sentences than drug kingpins and suppliers due to the unfair application of drug conspiracy laws and inordinate levels of prosecutorial discretion.<sup>10</sup> Under current drug conspiracy laws, a woman’s level of involvement and motivation for participating in a drug-related crime is irrelevant to prosecutorial discretion in bringing charges against her.<sup>11</sup> Therefore, in many cases, women are more likely to serve a prison sentence that is disproportionate to their level of participation in a drug-related activity. As 95% of drug trafficking cases end in guilty pleas due to inequitable bargaining power and access to information when dealing with prosecutors,<sup>12</sup> a woman may admit guilt at the urging of her public defender, even if she has never actually sold, manufactured,

or distributed drugs. Thus, off to prison she goes. Then the eminent question becomes: “But where do her children go?”

## WHAT HAPPENS TO CHILDREN WHOSE MOTHERS ARE INCARCERATED

Nearly two thirds of incarcerated women are mothers of young children. In fact, approximately 200,000 U.S. children, under the age of 18, are “parented” by an incarcerated mother.<sup>13</sup> Once a mother has been incarcerated, her children are most often left at the mercy of state foster care systems and the courts to make temporary and long-term care arrangements.<sup>14</sup> This occurs because many of the fathers of these children are often already incarcerated, another disparate result of the war on drugs on poor African-American men.<sup>15</sup> The fragile families left behind, overwhelmingly consisting of poor African-American female-headed-households, are often the last line of defense to ensure family preservation in poor African-American communities.<sup>16</sup> Thus, when single mothers are incarcerated, these fragile families become dismantled and the futures of their children are placed in jeopardy.<sup>17</sup>

Incarcerated mother’s children, who range in age from a few days old to age eighteen, may be sent to live with relatives, placed in foster homes with strangers, or placed in institutional settings such as group homes.<sup>18</sup> In addition to the trauma these children face as a result of being separated from their mothers - often their primary and sometimes only caregivers - these children face additional emotional and psychological distress stemming from the break-up of their families and placement in foreign environments.<sup>19</sup> A virtual lack of attention to and dearth of research focusing on the impact of maternal incarceration on minor children forces these children to navigate state foster care systems with little or no access to resources and little control over their lives in general.<sup>20</sup>

## PLACEMENT WITH FINANCIALLY DISTRESSED RELATIVES

In some instances, when a mother is incarcerated, she may be fortunate enough to have parents or other relatives willing to provide care for her children. Although there are benefits to this type of arrangement, there are setbacks as well which may warrant concern. Firstly, due to the substantial increase in the number of single mothers facing incarceration, there has been an unprecedented increase in the number of elderly grandparents providing full-time care for their grandchildren.<sup>21</sup> A number of these grandparents are disabled or have chronic health issues such as diabetes or high blood pressure.<sup>22</sup> Once grandparents are placed in the position of providing full-time care for grandchildren, their existing health conditions may be exacerbated. Moreover, beyond the natural stresses of child-rearing, grandparents

may find the heightened stress of raising teenagers overwhelming. Despite such consequences to themselves, elderly grandparents opt to provide care for their motherless grandchildren to prevent these children from entering state foster care systems.

As the majority of incarcerated African-American women hail from poor families,<sup>23</sup> it is also likely that their parents and other relatives charged with caring for their children are extremely poor. Although these relatives may be struggling to provide adequate financial support for their own families, they may be tempted to stretch already scarce financial resources to help support children whose mothers are incarcerated. While some families do receive foster care subsidies to help meet the needs of children in their care, these funds are often insufficient, forcing families to fall deeper into poverty and marginalization.<sup>24</sup>

### PLACEMENT IN BROKEN FOSTER CARE SYSTEMS

If an incarcerated mother has no available relatives that are willing and able to care for her children, the children will inevitably be sent to live with strangers through foster care placements.<sup>25</sup> These children face a myriad of problems when they enter foster care. For example, these children are likely to suffer severe emotional and psychological distress, partly stemming from the trauma of being separated from their mothers, and partly due to the uncertainty that goes along with being displaced from their homes.<sup>26</sup> In addition to the stress, anxiety, and fear that accompanies being placed in an unfamiliar environment, these children may also be separated from their siblings,<sup>27</sup> which can increase their level of emotional distress. Further, these children may experience a form of post traumatic stress disorder and may experience perpetual grieving or mourning processes, which can manifest as feelings of sadness, anger, hurt, and extreme emotional anxiety.<sup>28</sup> Not surprisingly, these children are likely to use drugs, alcohol, and sexual intimacy as coping mechanisms to deal with the stress, grief, and frustration resulting from having a parent in prison.<sup>29</sup> In addition to everything else, these children may suffer shame, low self-esteem, and insecurity because of the stigma of having an incarcerated parent and being placed in the foster care system.<sup>30</sup>

As every child is different, it is impossible to predict how he or she will adapt to life with a parent behind bars. While some children are resilient and seemingly able to adjust to their new living arrangements, others are more likely to exhibit violent behavior and aggression.<sup>31</sup> Because most public schools are ill-equipped to handle the diverse and multi-faceted needs of these children, their cries for attention may go unnoticed or simply be dismissed as behavioral problems.<sup>32</sup> For a variety of reasons, schools may fail to intervene by providing access to appropriate services for these children and may suspend or expel students who are actually in need of emotional or psychological counseling services.<sup>33</sup>

As a result, although these children face extraordinary circumstances in their personal lives, and may preemptively be labeled as “problem children.” Such categorization may lead to separation from their classmates or being disciplined for acting

outside the scope of seemingly normative behaviors during the school day.<sup>34</sup> At the same time, schools faced with the pressure to meet federal testing standards or risk losing precious federal funding, may opt to place these children in special education. By doing so, schools are consigning these children unintentionally to the fast track toward academic failure. Meanwhile, the mental, emotional, and psychological needs of these children will likely go unmet.

Additionally, children in foster care face the likelihood of being shuffled from foster home to foster home with little regard for the impact that such constant disruption will have on their emotional, mental, or physical health. Although the vast majority of foster parents provide loving, caring homes to children in need, there is always the risk that the health, safety, and security of children will be jeopardized by placing them in the foster care system.<sup>35</sup> While foster care was originally envisioned to provide safe shelter for displaced children, in some states it has become a proverbial breeding ground for sexual and physical abuse of foster children.<sup>36</sup>

Notably, a great deal of abuse of foster children occurs at the hands of other children in foster care.<sup>37</sup> A recent study of a group home in Baltimore, Maryland showed that sexual abuse for foster children occurred at a rate of more than 28 times the rate of sexual abuse in the general population.<sup>38</sup> Other studies, supporting lawsuits filed on behalf of children abused while in foster care, show disturbingly high levels of child-on-child sexual abuse.<sup>39</sup> In some instances, the results of these studies have led to civil judgments amounting to tens of millions of dollars, against state foster care systems.<sup>40</sup>

These studies illustrate the potentially grave consequences of separating children from their mothers that may, with appropriate social services and financial resources, provide more loving, caring, and safer homes than state foster care systems. Furthermore, when one calculates the billions of dollars being spent by states to operate foster care systems, coupled with the expense of lawsuits; it would make more sense from an economic and societal perspective to invest American tax dollars in programs that promote family preservation and upward mobility. This alternative seems more prudent than the current practice of hastily dismantling fragile families in the name of the war on drugs.

### LACK OF PARENT-CHILD CONTACT DURING MATERNAL INCARCERATION

While a mother is incarcerated, it may be difficult, if not impossible, for her to remain connected to her children. If a mother is incarcerated in federal prison, she may be relocated to any federal prison in the U.S., without regard for the impact of her relocation on her children.<sup>41</sup> Since most incarcerated women and their children are poor, oftentimes these children are unable to afford trips out of state to visit their mothers in prison.<sup>42</sup>

Furthermore, even when a mother is serving time in state prison, it may be difficult for her children to have ongoing visits with her.<sup>43</sup> Since the rate of female incarceration is still rela-

tively small compared to male rates of incarceration, most states have only one or two prisons for women.<sup>44</sup> Additionally, many of the prisons for women are located in rural parts of a given state, making transportation from urban areas difficult for children to attain.<sup>45</sup> To date, only a handful of programs exist to help ease the burden on children of incarcerated mothers by providing access to transportation for children wishing to visit their mothers in prison. Due to many of these barriers, the rate of mother/child visitation has drastically declined over the years. Sadly, 54% of women in 1999 had never received a single visit from their children, as compared with 8% of incarcerated women in 1978.<sup>46</sup>

Even when children are fortunate enough to be able to travel to prisons to visit their mothers, the trauma caused by actually visiting a prison may be too overwhelming for children. In order to visit an incarcerated mother, most prisons have protocols such as security checkpoints, physical searches, and the sustained presence of armed correctional officers which may frighten children or cause them to experience psychological distress.<sup>47</sup> Beyond that, some correctional departments, such as the State of California, have implemented rules prohibiting children over age seven, for example, from sitting on their mothers' laps during visits.<sup>48</sup> At most, children are only able to hug their mothers once upon entry and once upon exit. Such an inane rule, at least as far as young children are concerned, can contribute to feelings of emotional detachment and insecurity for children longing for maternal affection.<sup>49</sup> As a result, children may feel more traumatized and overwhelmed once they leave prison than when they arrived.

Additionally, for some children, even telephone contact with their incarcerated mothers is a luxury they cannot afford. The high cost of collect telephone calls from incarcerated mothers stretches a poor family's resources even further. Sadly, some states benefit from the desire of family members to contact relatives by telephone. The State of California for example, receives up to \$35 million a year from telephone companies as commission on collect call services provided between inmates and those outside prison walls.<sup>50</sup> Thus the exorbitant cost of collect telephone calls often may force poor families to decide between remaining in contact with an incarcerated loved one and putting food on the table.

Even when a family is provided with a foster care subsidy, the amount of money provided is usually not enough to cover transportation expenses and other costs associated with maintaining the parent-child bond during a mother's incarceration. Additionally, when children are placed in a non-relative foster home arrangement, the foster parent is under no real obligation to facilitate contact between an imprisoned mother and her children. Therefore, for many children, this inability to maintain ongoing contact with their mothers can often increase their sense of anger and frustration about having a mother behind bars.

For some children, separation from their mothers will end once their mothers are released from prison; meanwhile, a growing number of children will never be reunited legally with their mothers. In 1997, Congress passed the Adoption and Safe Families Act ("ASFA") as a purported attempt to limit the amount of time children spend languishing in state foster care systems.<sup>51</sup>

Under ASFA, if a child has been in foster care for 15 of the last 22 months, the state has the right to terminate a parent's rights and place that child on the fast-track for adoption.<sup>52</sup> While some states have adhered to the recommended guidelines established under ASFA for termination of parental rights, other states have adopted even shorter time frames prior to permanently severing a parent-child relationship.<sup>53</sup> The underlying presumption supporting ASFA is that children in foster care receive a greater benefit by being adopted, rather than being reunified with their mothers after release. Thus, ASFA has the unintended effect of creating double punishment for incarcerated mothers - the emotional and psychological distress caused by physical separation during incarceration and the anguish of becoming legal separated from their children. Unfortunately, it is not clear whether the enactment of ASFA alone has reduced "foster care drift," as approximately 20% of children age out of foster care, many of whom are unprepared for life outside the foster care system.

### PIPELINE TO PRISON FOR CHILDREN OF INCARCERATED MOTHERS

The severe emotional and psychological trauma that some children face as a result of being separated from their mothers may cause these children to behave in ways that virtually guarantees their involvement in the juvenile justice system, and in some cases, the adult criminal justice system. Recent studies confirm that children of incarcerated parents are more likely than children in the general population to end up behind bars. As can be expected, these children often find unconventional ways to deal with the pain they face stemming from the break-up of their families. These coping mechanisms may include violence, delinquency, and involvement in illicit drug use and drug trafficking.<sup>55</sup> In fact, children of incarcerated parents are also more likely to participate in gang-related activities as a means of substituting the family they lost "to the system," arguably paving the way for future involvement in the criminal justice system.<sup>56</sup>

Though many children of incarcerated mothers are suffering internally from the pain of maternal separation, they may also experience an emotional desensitization which minimizes their ability to feel pain for others. This indifference to harm is arguably partly to blame for disturbing levels of young male violence in inner city communities. In particular, poor, young African-American men may be especially susceptible to masking emotional distress due to societal expectations of machismo and bravado.<sup>58</sup>

Unfortunately, law enforcement officers, legislators, nor members of the judiciary do an adequate job of assessing these underlying causes of juvenile delinquency. Thus, these children, often bereft of adequate access to counsel and maternal input, due to parental incarceration, are forced to navigate the juvenile justice system, and more increasingly the adult criminal justice system, without sufficient protection and attendance to their needs.

In conclusion, given the disproportionate and deleterious impacts of the war on drugs on fragile African-American families, Congress needs to repeal drug sentencing laws, and commit

to a holistic approach to address underlying socio-economic conditions which fuel drug-related involvement. Instead of continuing to funnel hundreds of billions of dollars into a largely ineffective war on drugs, Congress should redirect its spending to build programs that increase access to quality education for poor children, provide comprehensive job training and child care assis-

tance for families in need, and promote family preservation and upward mobility for poor families. Until our government decides to loosen its reliance on over-incarceration to address drug-related crime, we can expect to see tens of thousands more innocent children become casualties of the war on drugs.

## ENDNOTES

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<sup>1</sup> See generally Marc Mauer, *Race to Incarcerate, The Sentencing Project* 76 (New Press 1999); see also Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. & 28 U.S.C.); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; see also U.S. GAO REP. TO THE CHAIRMAN, SUBCOMM. ON CRIME AND CRIMINAL JUSTICE, COMM. ON THE JUDICIARY, H.R., MANDATORY MINIMUM SENTENCES: ARE THEY BEING IMPOSED AND WHO IS RECEIVING THEM? 2-3 (1993) [hereinafter *GAO Report*].

<sup>2</sup> See *United States v. Booker*, 543 U.S. 220 (2005) (holding that the federal sentencing guidelines were merely presumptive, as opposed to mandatory for sentencing judges. The Court stated, "Ours of course, is not the last word. The ball now lies in Congress' court."); see also *Blakely v. Washington* 542 U.S. 296 (2004); *U.S. v. Fan Fan*, 543 U.S. 220 (2005). Although judges have more discretion in deciding sentence lengths for individual defendants, they have largely continued to follow the sentencing guidelines when making sentencing determinations. This reluctance by judges to deviate from the guidelines stems from their fear that Congress will enact legislative changes that reduce judges' discretion. As a result of the court's ruling in *Booker*, Congress is considering how best to restructure the federal sentencing guidelines; a move that might bring some relief for federal drug defendants wishing to avoid a determinate sentencing.

<sup>3</sup> See Mauer, *supra* note 1.

<sup>4</sup> See Mauer, *supra* note 1.

<sup>5</sup> See Meda, Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 79, 80 (Marc Mauer & Meda Chesney-Lind, eds., New Press 2002) (showing an increase in the number of incarcerated women from 12,000 in 1980 to over 90,000 by 1999).

<sup>6</sup> See U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT by Lawrence A. Greenfield and Tracy L. Snell, *Women Offenders* 7 (1999, rev. 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf> [hereinafter *Women Offenders*].

<sup>7</sup> *Id.*, see U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULL.: PRISON & JAIL INMATES AT MIDYEAR 2004 at 11 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjm04.pdf> (showing that in 2004, African-American women were twice as likely than Latinas to serve time in prison and four times as likely as White females to serve time in prison); see also Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, U.C. DAVIS L. REV. 1005, 1017 (2001).

<sup>8</sup> See Myrna Raeder, *The Forgotten Offender: The Effect of Sentencing Guidelines and Mandatory Minimums on Women and Their Children*, 8 FED. SENT. REP. 157 (1995); See Meda Chesney-Lind, *THE FEMALE OFFENDER: GIRLS, WOMEN AND CRIME* 147 (Sage Publications 1997) (showing increase in female prison population, largely due to the war on drugs).

<sup>9</sup> See *Women Offenders*, *supra*, note 6 at 7; see also Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV., 135-36 (1999).

<sup>10</sup> See 16 AM. JUR. 2D CONSPIRACY § 41 (2005), *Direct or Circumstantial Evidence* (stating that a conspiracy may be proven by circumstantial evidence); see also David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, JOURNAL OF LAW AND ECONOMICS (2005), available at [http://socserv.mcmaster.ca/bjerk/JLE\\_Oct05.pdf](http://socserv.mcmaster.ca/bjerk/JLE_Oct05.pdf); see also Alexander Smith & Harriet Polack, *Curtailing the Sentencing Power of Trial Judges: The Unintended Consequences*, COURT REVIEW 6 (American Judges Association 1999), available at <http://aja.ncsc.dni.us/courtrev/cv36-4/36-4Index.pdf>.

<sup>11</sup> Heneefah A. Jackson, Comment, *When Love is a Crime: Why the Drug Prosecutions and Punishments of Female Non-Conspirators Cannot be Justified by Retributive Principles*, 46 HOW. L.J. 517 (2003).

<sup>12</sup> See U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULL.: FELONY SENTENCES IN STATE COURTS 2002 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf>; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464-65 (2004); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005); SEE U.S. SENTENCING COMMISSION, *Guilty Pleas and Trials in Each Circuit and District tbl.10* (2005), available at <http://www.ussc.gov/ANNRPT/2003/table10.pdf>.

<sup>13</sup> See *Women Offenders* *supra* note 6.

<sup>14</sup> See Child Welfare Information Gateway, *Foster Care: Numbers and Trends*, <http://nccanch.acf.hhs.gov/pubs/factsheets/foster.cfm> (last visited Jan. 27, 2006) [hereinafter *Foster Care*].

<sup>15</sup> See *Women Offenders*, *supra* note 6 (illustrating that African-American men face disproportionate rates of incarceration, largely stemming from the war on drugs).

<sup>16</sup> See Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, U.C. DAVIS L. REV. 1005, 1017 (2001); see also Velma LaPoint, *Prison Effect on the African-American Community*, 34 HOW. L. J. 537 (1991).

<sup>17</sup> See Roberts, *supra* note 16.

<sup>18</sup> See *Foster Care*, *supra* note 14.

<sup>19</sup> See generally Marcy Viboch, *Childhood Loss and Behavioral Problems: Loosening the Links*, [http://www.vera.org/publication\\_pdf/324\\_598.pdf](http://www.vera.org/publication_pdf/324_598.pdf) (last visited Jul. 24, 2006).

<sup>20</sup> See also Children of Incarcerated Parents, A Bill of Rights, found online at <http://www.cwla.org/programs/incarcerated/billofrights.pdf>, [hereinafter *Children of Incarcerated Parents*]; see generally, Barbara Bloom & David Steinhart, *National Council on Crime and Delinquency, Why Punish the Children?* (1993).

<sup>21</sup> See *Caught in the Net: The Impact of Drug Policies on Women and Families*, 2004, <http://www.nicic.org/Library/020392> [hereinafter *Caught in the Net*]; see also Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV., 135-36 (1999).

<sup>22</sup> See generally Jennifer Gonnerman, *Life on the Outside: Prison Odyssey of Elaine Bartlett* (Farrar, Straus and Giroux 2004).

<sup>23</sup> See *Women Offenders*, *supra* note 6.

<sup>24</sup> See Gonnerman, *supra* note 22 (showing how the family's financial stability weakened during Elaine Bartlett's incarceration and was partly responsible for a series of unfortunate events that occurred and how Elaine's children and mother were often without food and other necessities during Elaine's incarceration).

<sup>25</sup> See *Foster Care*, *supra* note 14 (detailing that at least 38 % of children in foster care are African-American even though African Americans represent only 13 % of the U.S. population).

<sup>26</sup> See Child Welfare League of America, *What Happens to Children?* <http://www.cwla.org/programs/incarcerated/whathappens.htm> (last visited Mar. 22, 2006); see also Sandra Bass, Margie Shields & Richard Behrman, *Children, Families and Foster Care: Analysis and Recommendations*, in 14, THE FUTURE OF CHILDREN, 14-15 (2004).

<sup>27</sup> See Katherine Gabel & Denise Johnson, CALIFORNIA RESEARCH BUREAU: CHILDREN OF INCARCERATED PARENTS (Katherine Gabel & Denise Johnson, eds., Lexington Books 1995), <http://www.library.ca.gov/crb/00/notes/v7n2.pdf>.

<sup>28</sup> See generally, Vera Institute of Justice, *Childhood Loss and Behavioral Difficulties at School: Overview* (Jan. 1, 2006), available at [http://www.vera.org/project/project1\\_1.asp?section\\_id=5&project\\_id=66](http://www.vera.org/project/project1_1.asp?section_id=5&project_id=66).

<sup>29</sup> *Id.*; see also Viboch, *supra* note 19.

<sup>30</sup> See Vera Institute of Justice, *supra* note 29; see also "Caught in the Net," *supra* note 21 at 50.

<sup>31</sup> See also Viboch, *supra* note 19.

<sup>32</sup> See also Viboch, *supra* note 19.

<sup>33</sup> See also Viboch, *supra* note 19.

<sup>34</sup> See Children of Incarcerated Parents, *supra* note 20.

<sup>35</sup> See Wilson, *supra* note 36 (discussing the case of Rilya Wilson, a four year old girl who was taken from the home of her biological mother addicted to crack-cocaine and placed in the home of a foster parent who murdered her; also discussing the case of Gregory Love, as 23 month old who was taken from his birth parents because they failed a drug test, and placed in a foster home where he died of a purported head injury); see also NATIONAL COALITION FOR CHILD PROTECTION, FOSTER CARE VS. FAMILY PRESERVATION: THE TRACK RECORD ON SAFETY, available at <http://www.nccpr.org/newissues/1.html>.

<sup>36</sup> See Catherine Wilson, *Children Who Die or Are Murdered in Foster Care*, <http://www.ejfi.org/family/family-90.htm>; see also *Foster Care*, *supra* note 14.

<sup>37</sup> See *Foster Care*, *supra* note 14; see also *A Critical Look at the Foster Care System: How Wide-spread a Problem?*, <http://liftingtheveil.org/foster04.htm> (detailing that foster children are 28 more times likely to suffer sexual abuse) [hereinafter *Critical Look*].

<sup>38</sup> See *Foster Care*, *supra* note 14; see also *Critical Look*, *supra* note 37.

<sup>39</sup> See *Foster Care*, *supra* note 14; see also *Critical Look*, *supra* note 37; see also Tom Price, *Will Recent Changes Make At Risk Children Safer?*, CQ RESEARCHER 15 (April 22, 2005), <http://pewfostercare.org/press/files/cq042205.htm>.

<sup>40</sup> See *Critical Look*, *supra* note 37.

<sup>41</sup> See Justin Brooks & Kimberly Bahna, "It's A Family Affair"—*The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271 (1994); see *Olim v. Wakinekona* 461 U.S. 238, 244-48 (1983) (holding distant inmate relocation, 2,500 miles from family across the Pacific Ocean, is constitutional).

<sup>42</sup> See *Caught in the Net*, *supra* note 21 at 51; see also U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT by Christopher Mumola, *Incarcerated Parents and Their Children* 5, <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf> (2000)

<sup>43</sup> See Gonnerman, *supra* note 22.

<sup>44</sup> According to the U.S. Department of Justice, Bureau of Justice Statistics, women represent 6.6 % of the total state inmate population, see <http://www.ojp.usdoj.gov/bjs/crimoff.htm#findings>.

<sup>45</sup> See *Caught in the Net*, *supra* note 21 at 51.

<sup>46</sup> See Children of Incarcerated Parents, *supra* note 20.

<sup>47</sup> See *Caught in the Net*, *supra* note 21 at 51.

<sup>48</sup> See *Caught in the Net*, *supra* note 21 at 51.

<sup>49</sup> See *Caught in the Net*, *supra* note 21 at 51.

<sup>50</sup> See *Caught in the Net*, *supra* note 21 at 51.

<sup>51</sup> See Adoption and Safe Families Act of 1997, 42 U.S.C. § 675 (2004).

<sup>52</sup> *Id.*; see also Children of Incarcerated Parents, *supra* note 20.

<sup>53</sup> See Dorothy Roberts, *The Challenge of Substance Abuse for Family Preservation Policy*, 3 J. HEALTH CARE L. & POL'Y 72 (1999); see also Barbara White Stack, *When the bough breaks: Beaver County moves faster than average to sever parents' legal rights to their children*, PITTSBURGH POST-GAZETTE (Dec. 13, 1999), available at <http://www.post-gazette.com/registerate/19991213beaver1.asp>.

<sup>54</sup> See Casey Family Programs, *Outcomes for Youth Exiting Foster Care*, [http://www.hunter.cuny.edu/socwork/nrcfcp/downloads/outcomes\\_for\\_youths\\_exiting\\_foster\\_care.pdf](http://www.hunter.cuny.edu/socwork/nrcfcp/downloads/outcomes_for_youths_exiting_foster_care.pdf), (According to a four-year study conducted by the Casey Foundation of youth who had aged out of foster care, only half of the children had high school diplomas, about half were unemployed, 60 % of females had given birth to children of their own, and at least 60 % of the youth studied had been homeless at one point in time following their exit from foster care.); see also Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 661 (2006).

<sup>55</sup> See generally Aaron Kipnis, *Angry Young Men. How Parents, Teachers, and Counselors Can help "Bad Boys" Become Good Men* (Jossey-Bass, Inc. 1999).

<sup>56</sup> *Id.* at 145.

<sup>57</sup> *Id.*; see also J. Mark Eddy & John B. Reid, *The Antisocial Behavior of the Adolescent Children of Incarcerated Parents: A Developmental Perspective* 21 (Oregon Social Learning Center 2002); see also generally, Franklin Zimring, *American Youth Violence* (Oxford University Press 1998).

<sup>58</sup> See generally Dylan Conger & Timothy Ross, *Reducing the Foster Care Bias in Juvenile Detention Decisions. The Impact of Project Confirm* (Vera Institute of Justice 2001) [http://www.vera.org/publication\\_pdf/146\\_182.pdf](http://www.vera.org/publication_pdf/146_182.pdf).

# A CASE FOR REPARATIONS: THE PLIGHT OF THE AFRICAN-AMERICAN WORLD WAR II VETERAN CONCERNING FEDERAL DISCRIMINATORY HOUSING PRACTICES

By LaDavia S. Hatcher \*

In 1997, thousands of people celebrated the 50th anniversary of the Levittown suburb in Long Island, New York.<sup>1</sup> However, the happiness shared by the community who moved into Levittown in 1947 was not shared by the over one million African-American World War II veterans,<sup>2</sup> most of whom were systematically locked out of Federal Housing Authority (“FHA”) and Veterans Authority (“VA”) funded communities because of the color of their skin.<sup>3</sup>

Although VA loans made housing assistance available to African-American World War II veterans, the federal government supported FHA insurance policies that made it nearly impossible for VA loans to be insured for African Americans.<sup>4</sup> This practice began with the 1944 enactment of the Servicemen’s Readjustment Act<sup>5</sup> and continued until President Kennedy’s 1962 Executive Order that renounced federally funded housing with restrictive covenants.<sup>6</sup>

By the mid 1970s, 11 million Americans had purchased homes through FHA-VA financing.<sup>7</sup> Yet, an overwhelmingly large percentage of the 11 million homes that were federally-insured and federally-guaranteed were acquired by, and limited to, ownership by White Americans.<sup>8</sup> Therefore, as a result of racial restrictions, less than 2% of the housing financed and insured with federal mortgage assistance was available to African Americans.<sup>9</sup> In fact, World War II African-American servicemen still remember the pain caused by federal financed restrictive covenants.<sup>10</sup> During a 1997 interview commemorating the Levittown anniversary, World War II veteran Eugene Burnett stated, “The anniversary leaves me cold . . . [W]hen I hear ‘Levittown’ what rings in my mind is when the salesman said: ‘It’s not me, you see, but the owners of this development have not as yet decided whether they’re going to sell these homes to Negroes.’”<sup>11</sup>

This article presents the arguments and substance of a proposed reparations statute to address the federal government’s housing discrimination practices, which led to systematic housing prejudice toward over one million African Americans that fought in World War II.

## HISTORY

The long history of housing discrimination has had a lasting effect on African-American communities.<sup>12</sup> Housing is the largest component of wealth for most American families.<sup>13</sup> However, African Americans are less likely to be homeowners and their homes tend to be less valuable than those of White Americans.<sup>14</sup> This disparity can be traced back to deliberate government policies and programs that predominantly provided homeownership for White Americans.<sup>15</sup> Although all African Ameri-

cans were prejudicially targeted as unworthy for federal housing assistance, this article focuses on the narrow group of African-American World War II veterans who were statutorily entitled to federal financing through the Servicemen’s Readjustment Act of 1944<sup>16</sup>, but were denied these entitlements because of their race.

The Roosevelt administration created the New Deal legislation, a portion of which sought societal stability by making continued homeownership a reality.<sup>17</sup> The Home Owners Loan Corporation (“HOLC”), the FHA, and the VA implemented this legislation.<sup>18</sup> The HOLC, which provided longer term and fully amortized mortgages, came into being in the 1930s.<sup>19</sup> Thereafter, the FHA was created.<sup>20</sup> However, unlike the HOLC, the FHA insured federal mortgage loans instead of making mortgage loans.<sup>21</sup> Since home loans were now insured by the FHA, lenders were willing to make loans on terms that were acceptable by the FHA.<sup>22</sup> Then the Servicemen’s Readjustment Act of 1944 created the VA, offering federally financed mortgage loans to World War II veterans.<sup>23</sup> To the dismay of African-American servicemen, the administration of VA loans conformed to the attitudes and accepted the procedures of the FHA.<sup>24</sup> The FHA used its biased discretion to decide which loans it would insure. As a result, loans in “high-risk” areas, such as urban communities and inharmonious racial areas, would most likely not be insured. Thus, in order to make certain that its loans were insured, the VA complacently conformed to the FHA’s prejudice.

In essence, from its conception, the FHA set itself up as the protector of the all-White-American neighborhood by implementing several racially restrictive policies. One policy focused on specific appraisal standards in the FHA Underwriting Manual. The manual blatantly instructed that “the presence of inharmonious racial or nationality groups made a neighborhood’s housing undesirable for insurance.”<sup>25</sup> Moreover, the underwriting explicitly recommended racially restrictive covenants and warned, “[I]f a neighborhood is to retain stability, it is necessary that properties should continue to be occupied by the same social and racial classes.”<sup>26</sup> Thus, although racially restrictive covenants were made judicially unenforceable after *Shelley v. Kraemer*,<sup>27</sup> the FHA and VA continued to require the covenants.<sup>28</sup> In fact, Franklin D. Richards, the FHA commissioner during *Shelley*, stated that the court’s action would “in no way affect the programs of [the FHA].”<sup>29</sup>

In response to advocacy by the National Association for the Advancement of Colored People and Presidential intervention, the FHA lifted its ban against integration. In 1949, FHA officials announced that the FHA would refuse to issue mortgage insurance on properties bound by racially restrictive covenants recorded after February 15, 1950.<sup>30</sup> Nevertheless, FHA officials

publicly announced that the newly adopted policy in no way encouraged open occupancy.<sup>31</sup> In a clearly prejudicial effort to encourage federally funded housing discrimination, the executive board of the FHA agreed that “it should be made entirely clear that violation [of the new rules] would not invalidate insurance.”<sup>32</sup> Consequently, both the Truman and Eisenhower presidential administrations rejected requests to bar FHA aid to any segregated housing.<sup>33</sup>

It was not until President Kennedy issued Executive Order 11,063 that the government considered federal assistance for housing that excluded people because of their race, color, or creed unfair and against the public policy of the United States.<sup>34</sup> Furthermore, it was only after there seemed to be no hope for the World War II-generation minorities seeking federally financed homeownership that President Kennedy issued the order.<sup>35</sup> Therefore, although the Servicemen’s Readjustment Act of 1944 made federally financed home loans exclusively available to World War II veterans, these loans were not available to African-American veterans for at least two and a half decades. As a result, a lasting dent was impressed into their wealth portfolios and overall future advancements.

While, federally encouraged racial restrictive covenants did appear to end in 1962, the effects of the prejudice live on today in the form of lost opportunities, wealth, and property accumulation. Acclaimed authors Melvin Oliver and Thomas Shapiro stated it best when they described the plight of African Americans as follows:

[L]ocked out of the greatest mass-based opportunity for wealth accumulation in American history, African Americans who desired and were able to afford home ownership found themselves consigned to central-city communities where their investments were affected by the self-fulfilling prophecies of the FHA appraisers: cut off from sources of new investment, their homes and communities deteriorated and lost value in comparison to those homes and communities that FHA appraisers deemed desirable.<sup>36</sup>

### BASIC APPROACH TO THE CONCEPT OF REPARATIONS

Before presenting why reparations are owed to African-American World War II veterans, it is important to place the concept of reparations into perspective by breaking it down into its essential parts. Historically, the term “reparations” takes on a different definition for different people in different cultures. Nevertheless, a constant theme in reparations is the concept of human injustice. In his anthology, *The Age of Apology*, Roy Brooks captures the ideas of many by describing reparations as, “responses that seek atonement for the commission of an injustice.”<sup>37</sup> Furthermore, Brooks defines human injustice as, “the violation or suppression of human rights or fundamental freedoms recognized by international law.”<sup>38</sup> For this article, the concept of reparations will be generally defined as a response that seeks atonement for the commission of an injustice that is a violation or suppression of human rights or fundamental free-

doms recognized by international law.

However, before an argument for reparations can be asserted, there are five prerequisites for a meritorious reparations claim: (1) a human injustice has been committed; (2) the human injustice is well documented; (3) the victims are a distinct group that is identifiable; (4) the current members of the group continue to be harmed; (5) and the harm is causally connected to the injustice.<sup>39</sup> After a meritorious claim is presented, the decision as to appropriate redress follows. Examples of such redress include apologies, apologies with payment, payment without apologies, and the investment of money or services into the communities of the harmed groups.<sup>40</sup> The events that cause the need for reparations are sometimes ignited by racism, power, greed, or complacency. This article argues that reparations continue to serve as the only concrete way to create mass public awareness of previous human injustices to prevent human tragedies in the future.

### REPARATIONS PARADIGM

During recent history, redress for injustice has become a phenomenon in both the international and national arenas. Apologies, sometimes coupled with monetary and non-monetary payments for human injustices, have gained both national and international momentum. Brooks calls it the “Age of Apology.”<sup>41</sup> Yet, the distinction between an apology with payment and simple payment is of paramount importance. The apologies by individuals or entities, even without monetary reparations, send a message of atonement, whereas offered and paid reparations without more seem to be settlements. Apologies send a message of acknowledgment and a desire to recognize the past in order to change the future. However, the offered and paid reparations without apologies appear to be mere settlements to quiet the claimants and relieve the perpetrators of liability.

Domestically, federal and state governments have offered apologies and in some instances granted reparations to prejudicially affected groups. For example, President Clinton apologized to Hawaiians for the illegal U.S.-aided overthrow of their sovereign nation. Similarly, the federal government offered reparations to the African-American victims of the Tuskegee syphilis experiment.<sup>42</sup> In addition, the U.S. government apologized and offered limited reparations for Japanese Latin Americans kidnapped from Latin American countries and held hostage in U.S. internment camps during World War II.<sup>43</sup> It also granted statutory reparations to Japanese-American survivors of the World War II Japanese internments camps.<sup>44</sup> Further still, the Florida legislature awarded reparations to survivors of the Rosewood Massacre.<sup>45</sup>

Specifically, the internment of Japanese in America began in 1942 under the direction of President Roosevelt, when he issued Executive Order 9066.<sup>46</sup> The mission of the order was to “prescribe military areas from which any or all people may be excluded who might threaten national security by sabotage or espionage.”<sup>47</sup> As a result, 120,000 people of Japanese ancestry from the West Coast were evaluated, relocated, and interned by

the U.S. military. Almost two-thirds or over 77,000 of those interned were American-born citizens.

A Commission on Wartime Relocation and Internment of Civilians (“CWRIC”) was set up by the United States Congress to consider redress for the Japanese affected by the internment orders.<sup>48</sup> It provided five recommendations, which were all enacted as the Civil Liberties Act of 1988.<sup>49</sup> First, CWRIC recommended creation of a joint congressional resolution acknowledging and apologizing for the wrongs done in 1942. Second, it recommended a presidential pardon for persons convicted of violating the statutes establishing and enforcing evacuation and incarceration. Third, it encouraged Congress to instruct the government to deal with applicants for restitution. Fourth, CWRIC recommended that Congress set aside money for the establishment of a special foundation to sponsor research and public educational activities.<sup>50</sup> Finally, it recommended that Congress grant a one time, tax free, per capita compensation of \$20,000 to each person that survived incarceration.<sup>51</sup>

Then, in 1995, arising from the legal claims of families and survivors of the 1923 Rosewood Massacre, the Florida legislature passed the Rosewood Compensation Act.<sup>52</sup> This legislation marked the first time in American history that an American administration accepted responsibility for an act of racial violence committed against African Americans.<sup>53</sup> Prior to the massacre, the town of Rosewood was a prosperous oasis for African Americans, despite its geographical placement in a predominately White-American county in Florida. The Massacre began when White-American residents of the county believed that an African-American man sexually assaulted a White-American woman. Local and state law enforcers either participated or stood by and idly watched White-American residents kill African-American men, women, and children and burned their small town to the ground.<sup>54</sup> As a result of the violence, Rosewood was literally wiped off the Florida state map.

Although the Florida government did not apologize for the massacre, the state acknowledged its responsibility for failing to prevent the tragedy and recognized that White Americans were responsible for destroying Rosewood. In addition, the Act required a criminal investigation and directed state universities to conduct research on the Rosewood incident. Monetary reparations were paid to nine survivors of the horrific tragedy in the amount of \$150,000; while, the 145 decedents of residents were paid between \$375 and \$22,535 for property damage.<sup>55</sup> Moreover, in the form of non-monetary reparations, individual educational grants under the Rosewood Family Scholarship Fund were made available.<sup>56</sup> The scholarship gives preference to those students that are direct descendants of the Rosewood family.<sup>57</sup>

These events mark essential published accounts where American governmental entities granted and actually paid monetary reparations. Drawing specifically from the rationales for awarding Japanese interment detainees and Rosewood survivors statutory reparations, a foundation should be created for the successful implementation of a statute granting monetary compensation and an apology to African-American World War II veterans - standing as a definite and concrete apology with tangible weight.<sup>58</sup>

## DEFEATING GENERAL ARGUMENTS AGAINST AFRICAN-AMERICAN CLAIMS TO REPARATIONS

Critics of African-American reparations employ legalisms to support reparation resistance.<sup>59</sup> Specifically, African-American reparation opponents present five distinct arguments. First, they argue the statute of limitations has run, asserting that slavery happened over one hundred years ago. Next, they argue the absence of directly harmed individuals because all ex-slaves have been dead for at least a generation. Third, critics point to the absence of individual perpetrators, stating that White Americans living today have not injured African Americans and should not be required to pay for the sins of their slave master forbearers.

Fourthly, critics use a lack of direct causation argument. This critique states that slavery did not cause the present ills of African-American communities. Last is the indeterminacy of compensation amounts. In this argument, critics claim that it is impossible to determine who should get what and how much.<sup>60</sup>

All of the mentioned criticisms are legally strong. However, not one can defeat the argument for granting reparations to African-American World War II veterans. For instance, both the Japanese internment camp and the Rosewood Massacre challenges were brought decades after the tragedies. Thus, the statute of limitations did not restrain those successful challenges. The second and third arguments are defeated because perpetrators and harmed individuals are identifiable by way of military and government official records. Furthermore, direct causation exists between federally supported FHA racially restrictive policies and those veterans who were directly harmed by those policies. This disproves the fourth argument. Finally, compensation is easily calculated by using the increased value of homes financed and insured by FHA and VA assistance, which will be paid directly to veterans or their surviving spouses.

## FRAMING THE REPARATIONS ARGUMENT FOR THE AFRICAN-AMERICAN WORLD WAR II VETERANS

The following presents a model by which the African-American World War II veterans’ claim for reparations has an

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*“ . . . the distinction between an apology with payment and simple payment is of paramount importance. The apologies by individuals or entities, even without monetary reparations, send a message of atonement, whereas offered and paid reparations without more seem to be settlements.”*

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even higher probability of success. In general, the paradigm suggests that a claim must be able to identify the victims and perpetrators, successfully identify causation, and ascertain damages that serve as final payment in order to fit in the individual rights paradigm. Furthermore, admittedly, research has revealed short-comings associated with general reparations arguments. Nevertheless, the Japanese-American and Rosewood survivors' claims succeeded because they fit tightly within the individual rights paradigm of the law. The claim for African-American World War II Veterans does so as well.<sup>61</sup>

In fact, there are several reasons why the Japanese-American reparations claim was successful under the individual rights paradigm. First, the Japanese-American internees' claims addressed a specific executive order and ensuing military orders. Second, the challenge was based on then-existing constitutional norms. Yet, more importantly, a congressional Commission and the courts identified specific facts that proved a violation of those norms. Third, the claimants and the government agents were easily identifiable and those governmental agents' wrongful acts were the direct cause of harm, stemming from the imprisonment of innocent people. Lastly, while the damages were uncertain, they were fixed by time and limited to survivors.

The claim by African-American World War II veterans also fits tightly within the individual rights paradigm, mirroring the rationale applied in claims asserted by Japanese Americans. First, discriminatory policies of the FHA administration and governmental materials<sup>62</sup> provide tangible evidence of the discrimination sought to be redressed. Second, this challenge is based on then-existing constitutional norms (the Equal Protection Clause and the Privileges and Immunities Clause of the U.S. Constitution). In addition, the court in *Shelley v. Kramer* found that racially restrictive covenants were unenforceable,<sup>63</sup> providing support for the proposition that factual findings prove violation of those constitutional norms. Moreover, the government agents, FHA Commissioner Franklin D. Richards, the FHA executive board, and the Truman and Eisenhower administrations, are all easily identifiable as perpetrators of the wrong.<sup>64</sup> In short, the perpetrators were directly responsible for the systematic denial of federal housing funding and insuring,<sup>65</sup> to which African-American World War II veterans were entitled vis-à-vis the Servicemen's Readjustment Act of 1944.<sup>66</sup> This denial resulted in wealth-advancement harm. Lastly, the damages may be uncertain, but they are fixed by time (from the end of World War II until the issuance of Executive Order 11,063 in 1962)<sup>67</sup> and limited to African-American veterans of World War II or their surviving spouses.

#### THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION

The grant of statutory reparations is a remedy that can retroactively cure the effects of unlawful discrimination, whereas legislative measures only seek to prevent such conduct in the future. In contrast, Congress has enacted numerous laws to prevent discrimination and its effects. In theory, claimants could

use these statutory measures to claim reparations. The Fourteenth Amendment grants equal protection under the law for all persons born or naturalized in the United States.<sup>68</sup> By its terms, the Equal Protection Clause appears only to restrain state governments.<sup>69</sup> However, the Fifth Amendment's Due Process guarantee, beginning with the 1954 decision in *Bolling v. Sharpe*,<sup>70</sup> is interpreted as imposing the same restrictions on the federal government.<sup>71</sup>

Pursuant to the Equal Protection Clause, African-American World War II veterans are entitled to a remedy for federally encouraged housing discrimination. The legislature provided for the enactment of the Servicemen's Readjustment Act of 1944<sup>72</sup> and the Constitution provides the means by which all men entitled to that right are protected.<sup>73</sup> African-American World War II veterans were and have always been citizens of the United States; thus, they should be afforded protection under its laws. The federal government abandoned and traded in its own Constitution to subject its veterans to racially motivated housing discrimination. Accordingly, the U.S. government is constitutionally obligated to right this immoral abandonment of the laws of the Constitution by granting them equal protection under the law. Reparations serve as the most effective vehicle to reverse a monetary loss of a constitutional right.

#### THE FAIR HOUSING ACT

Although veterans were without substantial legal recourse to fight institutionalized discrimination during and shortly after the war, the Civil Rights Act of 1964<sup>74</sup> provided hope. Subsequently, other legislation sought to continue the purposes set forth by the Civil Rights Act, including the Fair Housing Act of 1968 which prohibited housing discrimination in the lease, sale, or rental of housing on the basis of race, color, religion, sex, familial status, or national origin.<sup>75</sup>

The Fair Housing Act provides relief for housing discrimination in the following forms: compensatory damages, civil penalties, punitive damages, injunctions, and attorney's fees.<sup>76</sup> There are two types of compensatory damages, tangible and intangible.<sup>77</sup> Some examples of tangible relief include "lost wages for time spent searching for alternative housing, the cost of temporary housing...and time spent preparing the case and attending the hearing." With regard to intangible loss, the majority of its claims are brought under the theory of emotional distress. The two ways to establish a claim of emotional distress<sup>79</sup> due to housing discrimination are by a complainant using direct testimony or the fact finder inferring emotional distress from the evidence even without medical evidence.<sup>80</sup> In fact, case law provides a foundation for the proposition that African-American World War II servicemen have a valid legal claim for reparations by asserting emotional distress as an additional factor for relief.<sup>81</sup> Three cases provide precedent demonstrating that emotional distress is an intangible loss for which relief can be sought in claims of housing discrimination under the Fair Housing Act and other civil rights laws.

In *United States Department of Housing and Urban Devel-*

opment (“HUD”) v. Kogut,<sup>82</sup> the court awarded the plaintiff tenant relief for emotional distress as a result of discriminatory eviction due to her sex.<sup>83</sup> The tenant was evicted after refusing a sexual advance made by the defendant property manager.<sup>84</sup> The court found that the defendant violated the Fair Housing Act when he denied the plaintiff housing and caused her embarrassment and temporary concern for her security. Both amounted to emotional distress.<sup>85</sup>

Similarly, in *HUD v. Lashley*,<sup>86</sup> the court awarded the plaintiff and her children compensatory damages for intangible losses due to emotional distress.<sup>87</sup> The plaintiff and her children were continually harassed in their previous neighborhood.<sup>88</sup> White Americans in the community called them “Niggers” and caused the family to fear for their lives by placing a bomb under their house containing a flammable liquid and wick.<sup>89</sup> As a result of the constant threat and torture to their lives, the family was forced to move from their suitable community into a less desirable community.<sup>90</sup> Pursuant to the Fair Housing Act, the court ordered the two perpetrators to compensate the family for their emotional distress due to housing discrimination (denying a dwelling) based on race.<sup>91</sup>

Finally, in *HUD v. Sams*,<sup>92</sup> the court awarded the plaintiff compensatory relief for housing discrimination based on familial status. The plaintiff family was set to relocate and join the father in a new city until their plans were halted by a landlord who decided not to rent to the family because of the number of children.<sup>93</sup> The plaintiff’s marriage suffered and the children became distressed due to the sudden denial.<sup>94</sup> The family was awarded \$24,000 for emotional distress due to housing discrimination.<sup>95</sup>

These cases illustrate the types of discrimination against protected classes that warrant compensation for intangible harms under the Fair Housing Act. They also provide support for the proposition that monetary compensation for emotional distress due to housing discrimination is a reality and it should be considered in this case. Like the plaintiffs in the above cases, the African-American World War II servicemen endured housing discrimination that is prohibited by the Fair Housing Act. They were discriminated against while serving in the military and emotionally abused after their service, as a result of being denied the right to federal housing assistance. The government assumed that these men were not men at all under the laws of the United States. For these reasons, statistical information providing proof of emotional distress may be unavailable, but the veteran’s emotional abuse from discrimination is a reality and should be considered as an additional factor supporting a grant of reparations.

#### RECOMMENDATIONS: COMPENSATING THE VICTIM

Beginning with compensation, the statute granting reparations to Japanese Americans based payment amounts on personal and real property loss and damages.<sup>96</sup> Similarly, the basis for African-American World War II veterans’ compensation is the loss of real property and the damage to the wealth portfolios due to exclusion from federal assistance. Opponents may argue that

compensation for such a loss is too illusory and hard to calculate. However, hard evidence is available to demonstrate the increased value of homes that were financed and insured with federal assistance. For example, White-American homeowners who took advantage of FHA and VA assistance saw the value of their homes increase dramatically, especially when housing prices tripled in the 1970s.<sup>97</sup> Thus, those locked out of the housing market by FHA racially restrictive covenants and who later sought to become first time homebuyers faced an increase in housing costs.<sup>98</sup>

Calculating compensation for the loss incurred could follow a method created by Professor Kathleen Engel known as the “Calculating Lost Access to Community Method” or the “CLAC Method.”<sup>99</sup> This method seeks to approximate the value of living in a desirable community versus the value that a complainant of housing discrimination has incurred by obtaining housing in a less desirable community.<sup>100</sup> Using the sales price differentials between the two homes in different communities, Engle provides an example of how her method would work. She describes a person who sought to purchase a home for \$150,000 in a good neighborhood versus his alternative, purchasing a home in a less desirable neighborhood for \$100,000.<sup>101</sup> The value of his lost access to the community that he originally sought to purchase a home in, based on the price differential, would be \$50,000. The complainants “opportunity cost is the discounted present value of the interest that he could have earned on the \$50,000 if he had invested it in an income-generating vehicle.”<sup>102</sup> The argument that not all African-American World War II veterans would have invested their opportunity cost fails to consider that the investment could have been made in intangible assets such as education or wealth advancements that would have provided entry into aspects of society otherwise unattainable.

Additionally, Professor Engel offers two other methods of calculation. The first involves establishing the value of a community based on the difference in the size of a complainant’s actual interest payments.<sup>103</sup> By applying the housing prices in the above example, the first step would be to calculate the discounted present value of the interest the complainant actually would have paid on the \$50,000. Next would be to compound the discounted present value of the interest. This calculation would account for the opportunity cost that arose because the complainant would not be able to invest the money that he would be spending on interest. In the end, the total after discounting and compounding would reflect the value the complainant placed on living in the more desirable community.<sup>104</sup> The third method is to simply calculate the loss by estimating the appreciated property value of homes that were federally financed and insured by the FHA and VA between the 1944 enactment of the Servicemen Readjustment Act<sup>105</sup> and the 1962 Executive Order formally restricting federal support of racially restrictive housing.<sup>106</sup>

#### IDENTIFYING THE VICTIM

The Japanese-American statute provided eligibility to “persons of Japanese ancestry detained, interned, or paroled and

subsequently released."<sup>107</sup> Likewise, African-American World War II veterans are easily identified as those who served in World War II from 1941 to 1945 or their spouse if they are deceased.

### RECOMMENDED REPARATION PAYMENT DURATION

The Civil Liberties Act of 1988 set the claim and payment duration for Japanese Americans in motion.<sup>108</sup> Before enactment of the Civil Liberties Act of 1988, there was a payment duration discrepancy. This is demonstrated by the fact that the original duration was supposed to last only eighteen months after July 2, 1948 and the actual first reparation payment in 1991.<sup>109</sup> To avoid such a discrepancy in future reparation payments, African-American World War II veterans should be allowed to assert claims until all possible recipients are identified and notified of their entitlement. A response from the veteran or his spouse should be required to ascertain that notification was achieved. This claim process will curb common mistakes by the government and beneficiaries regarding administrative and human errors.

### CONCLUSION

The prerequisites for legal success in granting reparations to African-American World War II veterans who were discriminated against by the federal government are present in this case. Several conditions are necessary for redress. First, legislators, not judges, must receive demands or claims for redress. Second, political pressure must be applied uniformly to the legislature. Freedom has no color, therefore all citizens of free America must pull together to support this measure. Finally, the claim must present independent legal merit.

A federally supported statute granting reparations to World War II veterans will educate many federally sanctioned discrimination policies in American history that need not be repeated. The American government must acknowledge its liabilities addressed by this article and take steps to correct the harm caused. The substance of this article should prevent future African-American veterans from reliving the struggle and bitter feelings of those African-American World War II veterans locked out of governmentally encouraged communities such as Levittown. Our society must learn from its transgressions and honor the sacrifice of all African-American veterans in an effort to correct the past by placing the families of African-American World War II veterans in their rightful financial positions.

### ENDNOTES

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<sup>1</sup> See Bruce Lambert, *At 50, Levittown Contends with Its Legacy of Bias*, N.Y. TIMES, Dec. 28, 1997, at A1, available at 1997 WL 4817282 (Levittown, Long Island, New York, is one of many communities built post World War II to provide federally funded communities for veterans returning from the war).

<sup>2</sup> See Richard Wormser, *Jim Crow Stories: U.S. in World War II (1941-45)*, in THE RISE AND FALL OF JIM CROW (2002), [http://www.pbs.org/wnet/jimcrow/stories\\_events\\_ww2.html](http://www.pbs.org/wnet/jimcrow/stories_events_ww2.html).

<sup>3</sup> See generally Lambert, *supra* note 1, at A1 (discussing Levittown housing discrimination policy against African Americans).

<sup>4</sup> See Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665, 676-80 (2002).

<sup>5</sup> See 38 U.S.C.A. § 3701 (West 2006).

<sup>6</sup> See Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963), reprinted as amended in 42 U.S.C.A. § 1982 (West 2006).

<sup>7</sup> See Thomas W. Hanchett, *The Other "Subsidized Housing:" Federal Aid to Suburbanization, 1940-1960's*, in FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA 163, 165-66 (John F. Bauman et al. eds., 2000).

<sup>8</sup> See Roisman, *supra* note 4, at 681.

<sup>9</sup> See MARK I. GELFAND, A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA 1933-1965, 221 (Oxford University Press, Inc. 1975).

<sup>10</sup> See Lambert, *supra* note 1, at A1.

<sup>11</sup> See Lambert, *supra* note 1, at A1.

<sup>12</sup> This statement is a fact through the eyes of the author of this article who was born and raised in one of America's largest inner-cities.

<sup>13</sup> See generally John Karl Scholz & Kara Levine, *U.S. Black-White Wealth Inequality: A Survey*, in SOCIAL INEQUALITY 895 (Kathryn Neckerman ed., 2004), available at [http://www.econ.wisc.edu/~scholz/Research/Wealth\\_survey\\_v5.pdf](http://www.econ.wisc.edu/~scholz/Research/Wealth_survey_v5.pdf) (discussing the disparity in wealth between white and black Americans).

<sup>14</sup> *Id.* at 30.

<sup>15</sup> Scholz & Levine, *supra* note 13, at 30.

<sup>16</sup> See 38 U.S.C.A. § 3701 (West 2006).

<sup>17</sup> See Arnold R. Hirsh, *Choosing Segregation: Federal Housing Policy Between Shelly and Brown*, in FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF

AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA 163, 208 (John F. Bauman et al. eds., 2000).

<sup>18</sup> See generally Hirsch, *supra* note 17, at 208.

<sup>19</sup> See Roisman, *supra* note 4, at 676.

<sup>20</sup> 12 U.S.C. § 3701 (1994) (The FHA was created by the National Housing Act of 1934).

<sup>21</sup> See Roisman, *supra* note 4, at 677.

<sup>22</sup> See Roisman, *supra* note 4, at 677.

<sup>23</sup> See 38 U.S.C.A. § 3701 (West 2006).

<sup>24</sup> See Roisman, *supra* note 4, at 677.

<sup>25</sup> See Roisman, *supra* note 4, at 677.

<sup>26</sup> See Roisman, *supra* note 4, at 677-78.

<sup>27</sup> See, 334 U.S. 1, 20 (1948).

<sup>28</sup> See Roisman, *supra* note 4, at 678.

<sup>29</sup> See Roisman, *supra* note 4, at 678.

<sup>30</sup> See Hirsh, *supra* note 17, at 221.

<sup>31</sup> See GELFAND, *supra* note 9, at 221.

<sup>32</sup> Roisman, *supra* note 4, at 680.

<sup>33</sup> See GELFAND, *supra* note 9, at 426 n.64.

<sup>34</sup> See Exec. Order No. 11,063, 3 C.F.R. at 652, reprinted as amended in 42 U.S.C.A. § 1982.

<sup>35</sup> *Id.*

<sup>36</sup> MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 18 (Routledge 1997) (1995).

<sup>37</sup> Roy L. Brooks, *The Age of Apology*, in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 3, 8 (Roy L. Brooks ed., New York University Press 1999).

<sup>38</sup> *Id.* at 8.

<sup>39</sup> *Id.*

<sup>40</sup> See generally Brooks, *supra* note 37, at 8-11.

<sup>41</sup> See generally Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477, 483-84 (1998) (reviewing Japanese-American reparations and the claims by African Americans).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 483-84.

<sup>44</sup> *Id.* at 477.

<sup>45</sup> *Id.* at 483.

## ENDNOTES CONTINUED

<sup>46</sup> See Roy L. Brooks, *Japanese American Redress and the American Political Process: A Unique Achievement*, in *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE*, *supra* note 37, at 157.

<sup>47</sup> See Roy L. Brooks, *Japanese American Redress and the American Political Process: A Unique Achievement*, in *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE*, *supra* note 37, at 157.

<sup>48</sup> See Yamamoto, *supra* note 41, at 490, 523 n. 48; See generally Roger Daniels, *Relocation, Redress and the Report: A Historical Appraisal, Redress Achieved, 1983-1990 & Relocation, Redress, and the Report: A Historical Appraisal in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE*, *supra* note 37, at 185-89.

<sup>49</sup> See 50 U.S.C.A. § 1989 (2006).

<sup>50</sup> *Id.*

<sup>51</sup> 50 U.S.C.A. § 1989b-4 (2006).

<sup>52</sup> See Kenneth B. Nunn, *Rosewood*, in *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE*, *supra* note 37, at 435.

<sup>53</sup> See Kenneth B. Nunn, *Rosewood*, in *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE*, *supra* note 37, at 435.

<sup>54</sup> See Kenneth B. Nunn, *Rosewood*, in *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE*, *supra* note 37, at 435.

<sup>55</sup> Yamamoto, *supra* note 41, at 490.

<sup>56</sup> See Nunn, *supra* note 52, at 436.

<sup>57</sup> See Nunn, *supra* note 52, at 436.

<sup>58</sup> It is important to note that reparations were paid in these instances because in the past the American government has offered reparations without a record of payment and apologies without reparations payment.

<sup>59</sup> See Yamamoto, *supra* note 41, at 487-88.

<sup>60</sup> *Id.* at 491.

<sup>61</sup> *Id.* at 490.

<sup>62</sup> See Roisman, *supra* note 4, at 677-80 (the policies noted include the FHA manual, which specifically instructed that the presence of inharmonious racial and nationality group made a housing undesirable for insurance and recommended of racially restrictive covenants neighborhood's); see also Exec. Order No. 11,063, 3 C.F.R. at 652, *reprinted as amended in* 42 U.S.C.A. § 1982 (Executive Order No. 11,063, which sought to right the wrong of prejudicial federal housing assistance exclusion of African Americans).

<sup>63</sup> See 334 U.S. at 20.

<sup>64</sup> See generally Roisman, *supra* note 4, at 678-80.

<sup>65</sup> See generally Roisman, *supra* note 4, at 678-80.

<sup>66</sup> See 38 U.S.C.A. § 3701 (West 2006).

<sup>67</sup> See Exec. Order No. 11,063, 3 C.F.R. at 652, *reprinted as amended in* 42 U.S.C.A. § 1982.

<sup>68</sup> See U.S. CONST. amend. XIV, § 1.

<sup>69</sup> See generally U.S. CONST. amend. XIV, § 1.

<sup>70</sup> See 347 U.S. 497 (1954).

<sup>71</sup> See *Bolling* Explanation, 347 U.S. 483 (1954) (the majority opinion held that while the Fourteenth Amendment, whose Equal Protection Clause was cited in *Brown v. Board of Education* 347 U.S. 483 (1954), in order to declare segrega-

tion unconstitutional did not apply in the District of Columbia, the Fifth Amendment did apply.).

<sup>72</sup> See 38 U.S.C.A. § 3701 (West 2006).

<sup>73</sup> See generally U.S. CONST. amend. XIV, § 1.

<sup>74</sup> See Civil Right Acts of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

<sup>75</sup> See Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C.A. §§ 3601-3631 (West 2006)).

<sup>76</sup> *Id.* at 1161.

<sup>77</sup> See 42 U.S.C.A. § 3613 (West 2006).

<sup>78</sup> Alan W. Heifetz & Thomas C. Heinz, *Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Adjudications*, 26 J. MARSHALL L. REV. 3, 10-14 (1992).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 14-17.

<sup>81</sup> See Kathleen C. Engel, *Moving Up the Residential Hierarchy: A Remedy for An Old Injury Arising From Housing Discrimination*, 77 WASH. U. L.Q. 1153, 1159 (1999) (providing a unique remedy for the loss of access to communities because of discrimination through a case study analysis in cases where monetary damages were awarded under the Fair Housing Act for emotional distress).

<sup>82</sup> See 2 Fair Housing-Fair Lending (P-H) P 25,100 (H.U.D.A.L.J. April 17, 1995) at 1.

<sup>83</sup> *Id.* at 15.

<sup>84</sup> *Id.* at 2-6.

<sup>85</sup> *Id.* at 6.

<sup>86</sup> See, 2 Fair Housing-Fair Lending (P-H) P 25,039 (H.U.D.A.L.J. December 7, 1992) at 1.

<sup>87</sup> *Id.* at 7.

<sup>88</sup> *Id.* at 2.

<sup>89</sup> *Id.* at 2.

<sup>90</sup> *Id.* at 2-3.

<sup>91</sup> See Lashley, 2 Fair Housing-Fair Lending (P-H) P 25,039 at 7.

<sup>92</sup> See 2 Fair Housing-Fair Lending (P-H) P ¶ 25,069 (H.U.D.A.L.J. March 11, 1994).

<sup>93</sup> See generally *id.* at 4-5.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 10.

<sup>96</sup> Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 904 (1988) (codified as amended at 50a U.S.C. § 1981(a) (West 2006)).

<sup>97</sup> Roisman, *supra* note 4, at 682.

<sup>98</sup> Roisman, *supra* note 4, at 682.

<sup>99</sup> See Engel, *supra* note 81, at 1168.

<sup>100</sup> See generally Engel, *supra* note 81, at 1168-69.

<sup>101</sup> See Engel, *supra* note 81, at 1171-72.

<sup>102</sup> See Engel, *supra* note 81, at 1172.

<sup>103</sup> See Engel, *supra* note 81, at 1173.

<sup>104</sup> See Engel, *supra* note 81, at 1173.

<sup>105</sup> See 38 U.S.C.A. § 3701 (West 2006).

<sup>106</sup> See Exec. Order No. 11,063, 3 C.F.R. at 652, *reprinted as amended in* 42 U.S.C.A. § 1982.

<sup>107</sup> See Civil Liberties Act, *supra* note 96, at § 1981(b)(3).

<sup>108</sup> See Civil Liberties Act, *supra* note 96.

<sup>109</sup> See Yamamoto, *supra* note 41, at 477.

# WHERE THE STREETS HAVE MANY NAMES: ZONING, COMMUNITY POWER, AND THE FUTURE OF SHAW, WASHINGTON D.C.

By Parag Khandhar\*

*“Prepare to participate!*

*Prepare to participate and your young men (and women) will get the jobs rebuilding this community.*

*Prepare to participate and the businesses of the community will not only serve you but sustain you.*

*Prepare to participate and health, welfare and municipal services will go up.*

*Prepare to participate!”*

-Dr. Martin Luther King, Jr. in a speech delivered in the Shaw district of Washington, D.C. on March 12, 1967

*“It’s a shame that I survived the war zone era here but now I’m being forced out.*

*Changes in this neighborhood are for the better in terms of quality of life, but I feel I should be able to be included in that change.”*

-Curtis Mozie, a lifelong Shaw resident who had been displaced from his home.<sup>1</sup>

Once plagued with violent crime, poor reputations, and decay from neglect and mismanagement, many major cities in the United States have experienced a significant face-lift over the past 30 years, with the majority of change coming over the past ten to fifteen years.<sup>2</sup> Residents and outsiders alike have embraced some of these changes, including more comprehensive efforts to rebuild and maintain city infrastructure, open public spaces, rehabilitate historic buildings, and transform the use of residential and commercial districts. However, longtime residents in cities experiencing rapid development have also been concerned about the impact of such development upon their neighborhoods. They worry about the future of the neighborhoods they struggled to preserve and improve and are now fighting to stay in due to skyrocketing rents and other cost of living expenses associated with increased demand by more affluent newcomers. Longtime residents are also concerned about the ease with which the real estate market can erase a neighborhood’s history and transform a once vibrant place into a generic, virtual replica of other “renewed” neighborhoods.

The balance between the old and the new, and the respect that city planners and developers observe for the historical and emotional character of neighborhoods targeted for renewal initiatives are at the core of most conflicts concerning urban development. Municipal governments, private developers, commercial

interests, and community stakeholders such as residents, locally-owned businesses, and advocates are all involved in the process of deciding what happens to a neighborhood in question, each using different tools to push the development towards her own vision.

City zoning and other designations that focus on and stimulate economic development are critical tools in this process. Often, they are considered to be at odds with community stakeholders who engage in inclusive, participatory planning processes that emphasize community development and increasingly “equitable development.” The theory of equitable development expands upon traditional community development definitions, adding principles of economic justice and job development for community members, to the development of physical structures, businesses, and buildings.

What is the ultimate impact of the new wave of development that is sweeping through many of the old neighborhoods in cities throughout the United States? Can private and public stakeholders develop and revitalize old neighborhoods without erasing their histories, or upsetting the balance of local residents and businesses with too great an influx of gentrification<sup>3</sup> agents, like wealthy new residents and chain stores, that threaten the very character of the place itself? Will the fast-paced real estate market have the patience or interest in development that prevents the uprooting of communities that embraced their streets long before they became marketable?

This article will explore some of these questions as they relate to Shaw, an historic African-American neighborhood in the District of Columbia that is undergoing a rapid metamorphosis fueled by real estate speculation and historical preservation initiatives. This article will examine how different interests use zoning, land use regulation, and public perception to affect (or deflect) attempts to redevelop urban neighborhoods that are often occupied by low-income communities of color. Using the Shaw neighborhood in Washington, D.C. as an example, it will explore the ability of community groups to stave unchecked development driven by commercial interests, and to imagine and advocate their own vision for their communities.

## SHAW, WASHINGTON, D.C.

Washington, D.C. occupies a particular constitutional and jurisdictional limbo in which its local government cannot act without the approval of the United States Congress, in which it has no true representation.<sup>4</sup> While it is a popular tourist destination for visitors from around the world, its own history and residents are not widely known. With a sizzling real estate market in

recent years,<sup>5</sup> D.C. is filled with old and embattled neighborhoods that have changed dramatically as the city has evolved.

The D.C. region of Shaw is a crossroads. The Shaw area stretches between Florida Avenue and M Street on the North and South, and North Capitol Street and 7th Street to the East and West<sup>6</sup> respectively. What is now recognized as Shaw, encompasses a number of historic neighborhoods, including the Greater U Street area, Logan Circle, and Bates Street.<sup>7</sup> A metropolitan “city within a city,” Shaw’s transition over the decades have been unpredictable.<sup>8</sup> Shaw’s legacy as an historic African-American neighborhood stems from the creation of a majority African-American district through the dual impact of “White flight” from Shaw at the turn of the 20th century and restrictive housing covenants<sup>9</sup> that disallowed African-American homeowners and renters from occupying property in much of D.C. During the heyday of the Black Renaissance, from the 1920s through the 1940s, when Duke Ellington, Langston Hughes, and countless others lived and found their inspiration in the neighborhood, Shaw was a self-sustained center for African-American life and culture, featuring buildings designed by African-American architects and more than 300 locally-owned businesses.<sup>10</sup>

However, after housing restrictions were lifted and segregation policies abolished in D.C., Shaw underwent a gradual economic and cultural decline. The downturn precipitated from the movement of middle-class African-American families into the newly accessible suburbs, and the closing of African-American owned businesses that could not compete once integration decreased their customer base.<sup>11</sup> Riots that decimated U Street and destroyed many of the neighborhood’s businesses immediately after the assassination of Dr. Martin Luther King, Jr. in April 1968 punctuated this period, and delayed further development in the area for nearly two decades.

In recent years, Shaw has enjoyed another “renaissance,” with unique independent and immigrant-owned small businesses gradually opening along the U Street corridor, new art spaces and galleries, and community groups and government agencies working to rehabilitate and make affordable housing units available. With the opening of a large convention center to the south, and the recent addition of a Shaw/U Street station on the local subway system, Shaw has suddenly become one of the most sought after neighborhoods for developers in D.C. A number of premium condominium buildings have already been built in the area, and more are planned.

Dubbed the “U-Street Corridor,” the main strip of new activity remains around the intersection of 14th and U Streets, just minutes away from a number of African-American Heritage Trail stops. The Heritage Trail makes note of the history of “Black Broadway”<sup>12</sup> and such landmarks as the Lincoln Theater and the African-American Civil War Memorial and Museum. The rejuvenated area includes an assortment of new sit-down restaurants and a number of eclectic and independent businesses selling everything from modern furniture to stationary and other goods.<sup>13</sup> Additionally, the area is quickly becoming a visual arts destination point for non-Shaw residents, featuring many small

galleries that are almost hidden amidst the mixed storefronts and residences. As a result of many of these changes, the street life around the main U Street Corridor has steadily increased, both in volume and diversity.<sup>14</sup> However, while the initial developments suggested positive change and rebirth for the neighborhood, longtime local residents and advocates have been wary. They fear that the new establishments, renewed attention in local media, and even the demographic composition of the businesses’ new patrons - the majority of who are White and more affluent than the majority African-American residents - herald a new era of displacement for longtime residents.

While development and diversity have been welcomed as indicators that the neighborhood is once again becoming economically viable, questions still remain about the long-term implications of the growth. While appreciating many of the quality of life changes that accompany urban development, longtime community residents and activists are worried that the character of the neighborhood will be lost, and that the face of Shaw may be changing forever.<sup>15</sup> Shaw has been losing its African-American residents, while gaining residents with much higher incomes and who are predominantly White American.<sup>16</sup> One resident wonders poignantly what he would see if he drove through Shaw in five to ten years: “Would only Whites come out of those front doors?”<sup>17</sup>

This quote underscores the sentiment of many African-American residents who worry private developers and other interests would rather memorialize the historic African-American community than work to develop the neighborhood responsibly to preserve the current community that lives there. Unresponsive development can cause irreparable harm by displacing residents with deep roots in the neighborhood. While the recent changes in Shaw, bringing life and new commerce back to D.C.’s streets, seem positive at first, these changes are also raising property values and rents. As a result, longtime residents in low-income jobs or with fixed incomes are fearful that they will be unable to stay in the neighborhood. As they move out, property owners anxious to reap the benefits of the development are renting their apartments out at much higher rates, or converting and selling them at market price, both of which slowly change the composition of the neighborhood. If this process continues unchecked, the vital core of Shaw - its people - will no longer remain in the neighborhood.

#### ZONING, LAND USE, AND LOW-INCOME COMMUNITIES OF COLOR

Shaw’s experience with urban redevelopment is not a unique phenomenon in major American cities. Traditionally, municipal governments, as well as private developers, used laws regarding zoning, eminent domain, and public land use to control and manage the composition of designated areas, at times dramatically changing the character of neighborhoods forever.<sup>18</sup> Municipalities also use various designations to revitalize or preserve neighborhoods. The United States Supreme Court declared zoning to be a constitutional practice for local governments in

1916.<sup>19</sup> Since that time, city zoning has often been used to make wholesale changes to large swathes of city land. While the American and European “urban renewal” movement of the 1940s through 1970s sought to elevate cities from their run-down conditions, many of its architects had little regard for the existing neighborhoods, no matter how vibrant. As a result, “urban renewal” was sometimes called “urban removal” because of the ultimate displacement of low-income and minority residents from the communities undergoing “renewal.” While this period was responsible for a number of beautiful buildings and many new roadways, it was also the era that wiped out many good neighborhoods in cities across the United States.

“Urban renewal” today is often referred to as “community development.” Unlike the earlier movement, community development tries to integrate renovation and renewal of existing neighborhoods with the new development. Planners and community developers solicit community perspectives and input, and strive to simultaneously preserve the historical character of older neighborhoods while promoting new development. However, even good intentions can be subverted by other circumstances, including an open-market economy that tilts the power to control land use decidedly in the developers’ favor. In some people’s eyes, while the new wave of urban development is not brazenly plowing through communities, it is pushing out disadvantaged renters as wealthier residents and businesses begin to move in through the process of gentrification.<sup>20</sup>

Gentrification carries different connotations for different people. Generally, the conditions necessary for gentrification include when run-down or neglected neighborhoods become attractive to middle-class and affluent outsiders because of the solid housing stock, proximity to the center of the city, and relatively inexpensive rents and purchase prices.<sup>20</sup> In addition, real estate agents and local media have a role in promoting the potential of these neighborhoods as reasonable alternatives to overpriced and overexposed popular areas in the city. As the new residents gradually move into the neighborhood, the impact upon current residents is not always immediate. However, eventually, while city services (like police presence and garbage pick-up) improve, rents also begin to escalate and longtime residents are often forced to move. Many factors converge to keep individuals from working together to resist unresponsive development and preserve their communities, including political disenfranchisement, estrangement or unfamiliarity with legal rights and processes, the challenges of survival with limited income, complicated immigration and familial status, and language barriers. As a result of these barriers, disadvantaged communities with limited access to power, including those comprised of racial and ethnic minorities and working class residents, may have the most at stake in planning initiatives and renewal programs that affect their neighborhoods, yet the hardest time making their voices heard.

There are many examples of low-income neighborhoods that have been lost or destroyed in the process of urban renewal and unresponsive community development. One of the most poignant local examples of a neighborhood effectively lost to gentrification is the case of D.C.’s Chinatown. In the recent past, D.C.’s Chinatown was a lively, boisterous hub for the region’s growing Chinese American population. Now, Chinatown is home to less than 700 Chinese residents (100 less than it had in 1930) and the population continues to dwindle.<sup>22</sup> While the buildings maintain some of the Asian flourishes added by commercial tenants and owners over the years, the residents have largely moved away, and businesses held within families for generations are closing down one by one.<sup>23</sup> The neighborhood is now overrun by national retail chain stores like Starbucks, TGIF, Anne Taylor, and Hooters.<sup>24</sup> While the physical preservation of select characteristics of the D.C.’s Chinatown, such as the 90-foot tall “Friendship Arch” and the translation of signs, regardless of function or audience, into written Chinese, is provided for in the city code, buildings alone do not make up a neighborhood.<sup>25</sup>

While a thorough analysis of what has happened to D.C.’s Chinatown has not yet been completed, it is not difficult to imagine the impact of the new development in the immediate area, from the convention center in the 1970s to the MCI (now Verizon) Sports Center and shopping and retail areas near the Metro Station. The development likely renewed strong interest in the area by outsiders seeking a neighborhood with amenities and proximity to the principal corridors in the City, including downtown and Capitol Hill. While the D.C. area Chinese-American population has grown significantly in the past ten years, much of the growth has occurred outside of D.C. – where the small resident population of Chinese Americans in Chinatown is still getting smaller. With the general decline of community businesses and venues for cultural commerce like restaurants and grocers, Chinese Americans in the area have fewer reasons to go into Chinatown.<sup>26</sup> The prospect of living in Chinatown after the development was best summed up by the chairman of the Chinese Consolidated Benevolent Association when asked last year: “A one-bedroom costs \$450,000, and not too many young Chinese can afford it.”<sup>27</sup>

D.C.’s zoning regulations recognize the historic character and importance of Chinatown, with the language emphasizing an interest in protecting and preserving “Chinatown as Downtown’s only ethnic cultural area,” and preserving the “area’s economic viability by encouraging mixed use development, including substantial housing, cultural and community facilities, offices, retail and wholesale businesses, and hotels.”<sup>28</sup> However, the focus of subsequent development projects has been on increasing the economic viability of the district, with less emphasis on the importance of managing growth so that it does not result in the displacement of the resident community. The primary discourse around development revolved around maintain-

ing the diversity of buildings and the aesthetic “charm” of Chinatown (with Asian-inspired architectural design and translated signs) without much emphasis on the people of Chinatown.<sup>29</sup> In some ways, developers’ statements highlighting the historic nature of D.C. Chinatown – that “preserving historic structures and neighborhoods is a physical reminder of our cultural history,” – can be deceptive.<sup>30</sup> The historic nature of a neighborhood can detract attention from the current struggles to establish community stakeholder control of development programs by suggesting that the community’s interest in an area is only historical in nature. Especially in D.C., the urge to “monumentalize” and relegate events and traditions to the past, including community presence in a neighborhood, can lead to the dilution of present and future community control of the rapid changes in their neighborhoods.

Though there are many examples of neighborhoods that have been destroyed by unresponsive urban renewal programs, through a combination of public education, community organizing, and innovative legal strategies, diverse communities have found ways to work together to fight the tide of commercial gentrification, empowering themselves while advancing the cause of equitable development in their neighborhoods. In rare occasions, the residents have also been able to use zoning and other regulatory designations to preserve the character of neighborhoods and enhance the prospect for community and equitable development.

The Shaw area in D.C. provides a timely example of how development plans advanced by the District of Columbia could affect African-American residents and immigrant commercial populations, and how the responses of local communities may yet impact the future of the area.

### THE SHAW PLAN

In D.C., various governmental agencies handle issues related to zoning, land use, and neighborhood development.<sup>31</sup> Some of the zoning regulations and ordinances enacted and implemented by these agencies have been challenged for their discriminatory impact over the years. For example, in 2003, a federal judge found that a D.C. ordinance classifying a permanent home for five homeless men as a social services facility that required extensive certifications discriminated against people with disabilities.<sup>32</sup> The settlement in this case included a stipulation that the officials of the Office of Zoning take a training course on fair housing. In 2004, the United States Department of Justice settled a lawsuit against the District of Columbia for discrimination on the basis of disability by imposing unlawful conditions on a building permit application submitted by Girls and Boys Town which sought to build housing for neglected and abused children near Capitol Hill.<sup>33</sup>

Clearly, in D.C. and in municipalities around the country, residents and advocates must vigilantly monitor the impact of zoning ordinances and other land use regulations on all communities. With low-income communities of color and immigrants, this need is even more urgent. As local governments are given greater latitude in their definition of revitalization projects,<sup>34</sup> it is

important to take a closer look at cultural and historic preservation designations to assess their positive and negative effects on residents.

Specifically, with respect to the Shaw area, D.C. has taken an ambitious stance on its revitalization. The municipal government has framed the revitalization as an effort to preserve the area as a “cultural destination district”<sup>35</sup> to highlight its historic significance as a vital, central, and independent African-American cultural community.

In its draft planning document, “DUKE: Draft Development Framework for a Cultural Destination District within Washington, D.C.’s Greater Shaw/U Street,” the government presents information collected through a community planning process involving 500 community, business and institutional stakeholders.<sup>36</sup> The plan sets forth the range of development initiatives and uses to be undertaken in the Shaw area.

The plan also emphasizes the importance of the neighborhood as a symbol of the entrepreneurial, cultural, and economic independence of African Americans in the nation’s capital, and evokes the spirit of a community that struggled against racially restrictive covenants and segregation in public and private services. The plan focuses on the redevelopment of landmark buildings and underutilized public land, such as Howard Theater and Grimke School on Vermont Avenue. Finally, the plan recognizes the work of community groups to garner recognition of the area as a National Register Historic District and push for further development and rejuvenation of the district.<sup>37</sup>

Once finalized, the plan will be submitted to the D.C. City Council, and upon approval by council members, the document will guide future decisions concerning the ongoing development in the district. The process is expected to take between five to seven years from inception to conclusion.<sup>38</sup>

The municipal plan’s emphasis on the district as a “cultural destination district” may have positive and also potentially negative results. On one hand, a comprehensive approach that gives credence to local community interests in preserving the commercial and residential character of the neighborhood could benefit many of the residents who have been in the area for a long time. For example, it could be beneficial to longtime residents if the city commits to preserving housing stock at affordable levels through mechanisms like inclusionary zoning, while integrating limited new development that increases the economic heterogeneity of the area.

On the other hand, the plan suffers from a tendency to emphasize features like the African-American Heritage Trail over substantial development decisions that affect affordable housing and small businesses. Widespread displacement may result if the city focuses on the “cultural destination” and economic revitalization of the district without taking steps to address the economic inequity between disadvantaged longtime residents and the more affluent residents who are moving into Shaw. If longtime residents are forced out of the area because the redevelopment of Shaw courts wealthy tenants, owners, and businesses, the process could destroy the very character of the area that the

plan seems to promote. If managed poorly, the area's growth could replicate the result in D.C. Chinatown, where community-based tourism and urban renewal have pushed the development of certain features of neighborhoods to make the districts more appealing to outsiders at the expense and distress of longtime residents. Although the draft plan mentions affordable housing and emphasizes the preservation of the "community's people as well as its housing and structures," the extent to which the municipal government and private developers can keep the best interests of the longtime residents at the forefront of the development agenda is unknown.<sup>39</sup>

Meanwhile, the demand for market value, high-density housing (such as condominiums) in Shaw continues to grow. The development of a number of large condominium projects in the neighborhood may indicate that the transformation of the Shaw area from a historically African-American neighborhood to a new destination for the young and affluent is already well under way.

### PEOPLE-BASED, EQUITABLE DEVELOPMENT

While the D.C. comprehensive plan for the Shaw area focuses primarily on commercial redevelopment and the renovation of the physical streetscape through the lens of historical and cultural preservation, some of the community-based efforts taking place have focused on the residents and other stakeholders. Arguing that development should not emphasize place over people, some community organizations have challenged the traditional community development model that better buildings and businesses will result in better opportunities for the longtime residents of a targeted district.<sup>40</sup>

One such organization, Organizing Neighborhood Equity D.C. ("ONE DC")<sup>41</sup>, located in Shaw, has distinguished itself from traditional community development groups. ONE DC focuses on equitable development and instead of identifying as a community development corporation, considers itself a non-profit community organizing corporation. ONE DC states that it is not interested solely in place-based development. The organization emphasizes that simply creating new small businesses, new housing, and new jobs will not change things for the people who live in the community.<sup>42</sup> While ONE DC is not opposed to all development, its mission to preserve and protect economic and racial equity may not easily comport with developers' tendency to rely on the market economy to resolve conflicting interests resulting from the wealth disparity between longtime and new residents in the area.

ONE DC's Shaw Housing Initiative works, "to preserve and build housing that Shaw people can actually afford given the neighborhood's lower average income, and that will remain affordable for future generations... [A]ll of this work requires building resident capacity to control and own a significant share of future development in Shaw."<sup>43</sup> By working with and enabling community residents to identify and advocate their goals for the redevelopment, ONE DC is creating alternative development options that value community control and preservation of

the local community. ONE DC's Executive Director, Dominic Moulden, noted in a recent interview, "[T]he only way that things change for the people who live here is if the longtime residents shape the jobs policy, the economic policy, and the housing policy. We're concerned with community-controlled development, and community organizing is the tool that gets us there."<sup>44</sup>

To achieve its mission of economic and racial equity in Shaw, ONE DC employs a number of community organizing strategies to mobilize longtime Shaw residents. First, ONE DC organizers conduct tenant-based organizing, during which they speak with residents in the Shaw neighborhood to get a sense of what the residents are seeing, and to incorporate the residents themselves into a broader community development context. Additionally, by reaching out to the disadvantaged renter community in Shaw, ONE DC organizers find tenants facing the conversion of their apartment building into condominiums. In those instances, the organizers ensure that the tenants know about the "first right of purchase" law in D.C., which allows them the opportunity to pool their resources and buy the building before the landlord sells it to a third party.<sup>45</sup>

The second strategy engages residents and members in popular education and direct training to familiarize them with the issues and empower them to take action through existing initiatives. Popular education is used because it enables community residents to believe that they can collectively overcome the challenges ahead of them.

Institutionally, ONE DC is working in collaboration with agencies like the National Capital Revitalization Corporation ("NCRC"), the District of Columbia's Department of Housing and Community Development ("DHCD"), and other local stakeholders to identify equitable development solutions. One example of such a partnership is a recent collaboration with 35 community stakeholders, including individuals, renters, homeowners, churches, and non-profits to establish the Broadcast Center One development on Seventh and S Streets.<sup>46</sup> The Center represented a mixed-use project containing commercial, retail, and residential space, with more than 200 new residential units, and underground parking. The development was reported to be the first deal in the city in which the development process was resident-led and community-controlled.<sup>47</sup> Together, they created a community-benefits agreement that will provide for jobs, housing, and retail opportunities for local residents in the development. Three residents, an ANC Commissioner, and the government agency that controls the land signed the document.

ONE DC is also working with the NCRC on two developments that will bring affordable housing and neighborhood-based retail to the community. One of these sites could be the first time in 40 years that truly affordable rental housing would be built on Seventh Street.<sup>48</sup> The building may include up to 96 units, and if the organizers are successful in bringing in a grant from DHCD, they plan to make the units extremely affordable, targeting the price for a one bedroom at \$500 or less.<sup>49</sup> Additionally, the organizers are hoping to support "super-local" <sup>50</sup>

retail businesses on the ground level with rent subsidies for the first five years. Though the principle of community control guides these and other projects, they are initiated and implemented with the express goals of, “creating real jobs, creating real housing opportunities, and creating real business opportunities.”<sup>51</sup> The future of Shaw depends on the ability of groups like ONE DC, working with community stakeholders and city agencies, to create innovative, responsive development projects that integrate community-control and identify opportunities to retain longtime residents

### THE ONGOING STRUGGLE OF DEVELOPMENT IN SHAW

As community-organizing efforts continue, and the government’s redevelopment plan is implemented, several factors are emerging which warrant special consideration when pondering the future of the Shaw/U Street Corridor. Firstly, because the threat of displacement includes small local businesses in Shaw, the increasing numbers of African immigrants who are populating the Eastern U Street Shaw area with restaurants and small businesses must be consulted as stakeholders with an interest in the area’s future.<sup>52</sup> In recent decades, the largest Ethiopian community outside of Ethiopia has settled in the D.C. area, and the Shaw district has become a cultural crossroads for that community. Ethiopian immigrants have opened nearly two dozen restaurants, grocery stores, and other service-oriented businesses.<sup>53</sup> While the size of the resident Ethiopian immigrant population in Washington is nominal compared to the local African-American population, the commercial nexus is important enough to warrant a campaign for city recognition of the local “Little Ethiopia” designation for the strip of 9th Street between U and T Streets.<sup>54</sup> There is still an opportunity for dialogue around common issues between the resident African-American community and the Ethiopian business owners in the area.

Secondly, even in Shaw, where community organizing has been strong since the neighborhood’s inception, longtime residents face the challenges of determined developers with deep pockets and an upcoming city mayoral election that could impact the future of the area tremendously. The current mayor will leave a legacy of economic development (including the D.C. Chinatown “renewal” and some of the first steps in Shaw)

that is viewed in some circles as a vast improvement and a step in the right direction for D.C. While this development has had a positive impact on some aspects of city life, it has also resulted in the rocketing real estate market and escalating rent for longtime residents. Before a new mayor is lured by the appeal of this growth, longtime residents must establish the importance of equitable development to preserve the character of these neighborhoods.

The residents in the community must be given the opportunity to stay in the area, so that they can preserve the historical and cultural aspects of Shaw. If the redevelopment efforts, including zoning and land use decisions, fail to provide a meaningful opportunity for Shaw residents to stay in the community, it is likely that the historical and cultural character of the Shaw/U Street corridor will change completely.

Community-based initiatives continue to organize tenants whose landlords have announced their intention to sell their properties and cash in while the market is still active. The goal of this organizing is to preserve the community by keeping longtime residents in the area. Organizers can use a variety of tools – from legal responses to issue campaigns – to achieve these goals. Moreover, local stakeholders must remember the lessons of Chinatown and other ethnic neighborhoods that lost their fundamental character due to urban renewal and development projects.

Meaningful partnerships with local organizations such as Shaw Main Streets, ONE DC, tenants associations and other groups will be important to ensure that the comprehensive plan for the development of Shaw is not removed from the local communities. Additionally, increased opportunities for local longtime residents to actively inform and influence the ongoing planning and implementation could tip the scale in the favor of the resident community’s interests in the area.

While a new heterogeneous generation of Washingtonians is now learning about and visiting the neighborhood regularly, it still remains to be seen whether this phase of mixed enjoyment and use is only an intermediary and fleeting stage; a stage between the neighborhood’s historic past as a self-determined, independent hub of African-American culture and experience, and a possible future as a gentrified, affluent, and detached district that is only a hollow monument to what it once was.

## ENDNOTES

<sup>1</sup> Parag Khandhar studied at the State University of New York, at Albany, and is currently a second-year law student at the American University Washington College of Law. My love and thanks to Deepa Iyer for her support and critical insight during the different stages of this article. Special thanks also to Mr. Dominic Moulden of ONE DC for his time. Many thanks to LeeAnn O’Neill, Jennifer E. Jones, Emily Nugent, Shannon Leary, and the rest of *The Modern American* staff for their encouragement and support.

<sup>2</sup> Manna Community Development Corporation, *The Changing Face of Shaw: Stories from the Frontline*, 2003, at 10, available at <http://www.onedconline.org/pdf/The%20Changing%20Face%20of%20Shaw%202003.pdf> (hereinafter *The Changing Face of Shaw*). Mr. Mozie is known for his street video documentation project that has collected hundreds of hours of video of life and death in Shaw over the past

two decades. See Transcript, *Profile: Neighborhood Of Shaw In Washington, D.C., As Seen Through The Eyes Of An Amateur Filmmaker*, Morning Edition, NATIONAL PUBLIC RADIO, (Washington, D.C., Dec 26, 2002).

<sup>3</sup> Some mayors focused on hiding and sometimes criminalizing the most visible populations, targeting the symptoms of systemic failure like homelessness, panhandling, and prostitution. Others worked to upgrade police presence, and effectively control common quality of life complaints like potholes, litter, and car horns to quite literally “clean up” their cities and encourage tourism and new residents. Coupled with the economic upturn in the Eighties and Nineties that brought new money into the cities, the demand for upscale housing by people with higher salaries drove real estate speculation, and therefore prices, through the roof.

<sup>4</sup> See Chris McChesney, *Cultural Displacement: Is The GLBT Community Gentrifying African American Neighborhoods In Washington, D.C.?* 1 MODERN AM. 24

## ENDNOTES CONTINUED

(Spring 2005) (discussing gentrification in Washington, D.C., and analyzing the prevalence of Starbucks Coffee retail outlets in the District).

<sup>4</sup> D.C. Vote, *D.C. Fair and Equal House Voting Rights Act: One-Pager*, 2006, available at <http://www.dcvote.org/pdfs/congress/D.C.vrafactsonepager.pdf>. At the time of writing, Washington, D.C. residents have only one non-voting delegate in the House of Representatives, and no representation in the U.S. Senate.

<sup>5</sup> Paul Schwartzman, *A Bittersweet Renaissance: Longtime Shaw Residents Ponder: Cash Out or Stay*, WASH. POST, Feb. 23, 2006, A01 [hereinafter *Cash Out or Stay*].

<sup>6</sup> *Id.* These original boundaries are based on when the designation was first given to the neighborhood, in 1966. The boundaries are now regarded as U Street and M Street to the North and South, respectively, and 13th Street and New Jersey Avenue to the West and East, respectively (see map in original article).

<sup>7</sup> Marcia M. Greenlee, *Shaw: Heart of Black Washington*, in WASHINGTON AT HOME: AN ILLUSTRATED HISTORY OF NEIGHBORHOODS IN THE NATIONS CAPITAL 119, 119 (Kathryn Scheider Smith, ed., 1988). According to Greenlee, the “Shaw” designation itself is rather new, assigned in 1966 when the National Capital Planning Commission and city government established an urban renewal area with boundaries that were coterminous with the attendance boundaries of Shaw Junior High School.

<sup>8</sup> See *A History of Shaw*, WASHINGTONPOST.COM, Feb. 23, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/graphic/2006/02/23/GR2006022300137.html> (summarizing key milestones in Shaw’s history).

<sup>9</sup> Greenlee, *supra* note 7, at 121-2. In 1948, the Supreme Court ruled that restrictive housing covenants were unconstitutional in the local case of *Hurd v. Hodge*, finally opening the gates of many communities that had been off-limits for African American homeowners. Some scholars have written that the restrictive covenants allowed Shaw to remain a mixed-income community, self-sufficient community because the growing middle class of African Americans were still compelled to stay in the neighborhood where they could buy houses and remain close to the cultural hub of the community.

<sup>10</sup> Theresa Wiltz, *U Turn: The Fabled D.C. Street That Played Host To Duke Ellington And Pearl Bailey Reinvents Itself Once More*, WASH. POST, March 5, 2006, at W24.

<sup>11</sup> HARRY S. JAFFE & TOM SHERWOOD, *DREAM CITY: RACE, POWER, AND THE DECLINE OF WASHINGTON, D.C.*, 31-32 (Simon & Schuster, 1994) (explaining that when the neighborhood lost class heterogeneity, the Washington decision-makers neglected the needs of the neighborhood residents, and the community fell upon hard times).

<sup>12</sup> The U Street corridor was known as “Black Broadway” for its history of drawing African-American artists and cultural institutions from around the nation. See Joe Kovacs, *Renaissance Continues Along Capital’s “Black Broadway.”* MIAMI HERALD, Feb. 5, 2006, Travel & Vacations Section, available at <http://www.miami.com/mld/miamiherald/living/travel/13767821.htm> (Last visited July 21, 2006).

<sup>13</sup> Teresa Wiltz, *U Turn: The Fabled D.C. Street That Played Host To Duke Ellington And Pearl Bailey Reinvents Itself Once More*, WASH. POST, March 5, 2006, at W24.

<sup>14</sup> *Id.*

<sup>15</sup> Schwartzman, *Cash Out or Stay*, *supra* note 5.

<sup>16</sup> *The Changing Face of Shaw*, *supra* note 1, at 3 (citing Census data between 1990 and 2000, which suggests that while the African-American population decreased in Shaw by more than 17%, the White population increased by nearly 25%, for a total “share” of the Shaw population of 61.8% and 14.4%, respectively. However, the more telling statistic may be that the median income for African-American households in Shaw was significantly less than half the \$54,520 for White households in Shaw).

<sup>17</sup> Schwartzman, *Cash Out or Stay*, *supra* note 5.

<sup>18</sup> See generally, JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (Randomhouse 1961).

<sup>19</sup> *The Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1916) (holding that a comprehensive zoning ordinance was a valid exercise of authority, and that before a zoning ordinance can be declared unconstitutional, it must be said that its provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare).

<sup>20</sup> See Kathy Newman and Elvin Wyly, *Gentrification and Resistance in New York City*, Shelterforce Online, National Housing Institute (Issue 142, July/August 2005), available at <http://www.nhi.org/online/issues/142/gentrification.html>.

<sup>21</sup> Rick Hampson, *Gentrification a Boost for Everyone*, USA TODAY, April 19, 2005. This piece, which cited three recent studies on the effect of gentrification upon resident populations, was answered by Newman and Wyly, *supra* note 20.

<sup>22</sup> Steven Knipp, *Lost in Transformation: Can a Tiny American Chinatown Survive its Success?*, PACIFIC NEWS SERVICE, May 12, 2005, available at [http://www.imdiversity.com/villages/asian/business\\_finance/pns\\_chinatown\\_development\\_0505.asp](http://www.imdiversity.com/villages/asian/business_finance/pns_chinatown_development_0505.asp) (last visited July 5, 2006) (citing data from Census 2000).

<sup>23</sup> Audrey Edwards, *Chinatown Loses A Fixture on H Street: Restaurant May Give Way to Development*, WASH. POST, June 24, 2006, at B03.

<sup>24</sup> Knipp, *supra* note 23.

<sup>25</sup> Knipp, *supra* note 23.

<sup>26</sup> See Marc Fisher, *A Decade Later, Still the Last Days of Chinatown*, THE WASHINGTON POST.COM, June 30, 2006 [http://blog.washingtonpost.com/rawfisher/2006/06/a\\_decade\\_later\\_still\\_the\\_last.html](http://blog.washingtonpost.com/rawfisher/2006/06/a_decade_later_still_the_last.html). One commenter noted: “My grandparents before they passed away, lived in Wah-Luck house [Chinese Senior housing] since the beginning, nearly twenty-five years ago. There are a lot of emotional ties to that building and to Chinatown from the Chinese community. Unfortunately, that is it; most of us Chinese live in the suburbs, and are within miles to Chinese grocery stores or restaurants. Very seldom do I go to D.C. to shop in Chinatown. And it brings sorrow to see what was a great Chinatown diminished to half of block of restaurants and convenience stores.”

<sup>27</sup> Eric M. Weiss, *Chiseling Away at Chinatown: Traditional Businesses Pulling Out as the D.C. Neighborhood Booms*, WASH. POST, Feb. 14, 2005, at B01.

<sup>28</sup> CDCR 11-1705 (2006).

<sup>29</sup> Melissa Cohen, *D.C. Chinatown Restoration*, ARCHITECTURE WEEK, 14 April 2001, at B1.1. The author, an architect that was part of the redesign and restoration of the face of D.C. Chinatown, emphasizes the diversity of building stock and working with cultural elements to evoke the area’s history, but there is little, if any, concern about the residents and communities tied to Chinatown. Her claim that “the aspiration of any commercial redevelopment is that the property will generate long-term revenue, provide local employment opportunities, and turn an abandoned area back into a vibrant, growing neighborhood” underlines the dismissal of the local community’s stake in the development.

<sup>30</sup> *Id.*

<sup>31</sup> These include the Zoning Commission, the Board of Zoning Adjustment, the Office of Zoning, and the Department of Consumer and Regulatory Affairs.

<sup>32</sup> *Community Housing Trust v. Dept. of Consumer and Regulatory Affairs*, 2003 U.S. Dist. LEXIS 6197, (D.C. April 16, 2003).

<sup>33</sup> The National Low Income Housing Coalition, *THE NIMBY REPORT* (May 2004), available at <http://www.nlihc.org/nimby/052004.htm>. Complaint available at [http://www.usdoj.gov/crt/housing/documents/g\\_b\\_towncomp.htm](http://www.usdoj.gov/crt/housing/documents/g_b_towncomp.htm) (requiring (1) developers to secure special exceptions or to request reasonable accommodation to build housing for people with disabilities; (2) that certain classes of housing for people with disabilities be separated from similar uses by 500 feet; and (3) a cap on the number of people with disabilities who may live in such housing).

<sup>34</sup> *Kelo v. City of New London*, 125 S.Ct. 2655 (2005) (holding that the City of New London could rightfully use its power of eminent domain in transferring land from private owners to a private entity in order to further economic development in the area).

<sup>35</sup> DUKE: DRAFT DEVELOPMENT FRAMEWORK FOR A CULTURAL DESTINATION DISTRICT WITHIN WASHINGTON D.C.’S GREATER SHAW/U STREET, D.C. Office of Planning, September 2004, available at <http://www.planning.dc.gov/planning/cwp/view,a,1285,q,619223,planningNav,{32341}.asp>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 7 (mentioning the work of the Cardozo Shaw Neighborhood Association).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 9.

<sup>40</sup> Interview with Mr. Dominic Moulden, Executive Director, ONE DC (June 30, 2006) [hereinafter Moulden].

<sup>41</sup> Formerly Manna Community Development Corporation.

<sup>42</sup> Moulden, *supra* note 40.

<sup>43</sup> ONE DC, <http://www.oneDCOnline.org/ShawHousingInitiatives.htm> (last visited July 21, 2006).

<sup>44</sup> Moulden, *supra* note 41.

<sup>45</sup> *The Changing Face of Shaw*, *supra* note 1, at 11.

<sup>46</sup> Moulden, *supra* note 40.

<sup>47</sup> Moulden, *supra* note 40.

<sup>48</sup> Moulden, *supra* note 40.

<sup>49</sup> Moulden, *supra* note 40.

<sup>50</sup> “Super-local” businesses are defined by ONE DC as those that are owned and operated by local residents, and do not encompass national or even regional chains like Starbucks or Ben & Jerry’s. See ONE DC, *supra* note 43.

<sup>51</sup> *Id.*

<sup>52</sup> Paul Schwartzman, *Shaw Shuns ‘Little Ethiopia’: Black Leaders Note Immigrants’ Pride but Resist Designation*, WASH. POST, JULY 25, 2005, at B01 [hereinafter *Shaw Shuns*].

<sup>53</sup> Walter Nicholls, *Washington’s Little Ethiopia: A New Cluster of Restaurants Brings Exotic (Yet Inexpensive) Appeal to Ninth and U Streets*, WASHINGTON POST, MAY 18, 2005, at F01 (noting that the restaurants alone are more than twice the number in Adams Morgan, another central neighborhood for Ethiopian food).

<sup>54</sup> Schwartzman, *Shaw Shuns*, *supra* note 52 (noting that the resident population of people reporting Ethiopian ancestry in Census 2000 was just over 15,000 individuals).

# NARROWING RACIAL DISPARITIES IN SENTENCING THROUGH A SYSTEM OF MANDATORY DOWNWARD DEPARTURES

By Douglas Smith\*

I met Allen in Danville, Virginia in the spring of 1993 when I was the Safety and Security Manager for the Danville Redevelopment and Housing Authority. Allen was 16 and lived in a public housing development with his mother and sister. A model teenager in many respects and an anomaly among those I often encountered in public housing. Allen was highly motivated, attended school regularly, and had aspirations of attending college. Most importantly, he avoided all of the pitfalls that doomed many of his friends: drug and alcohol use, premature parenthood, and contact with the criminal justice system. Then on October 16, 1994, after succumbing to peer pressure and in a semi-drunken haze, Allen participated in the armed robbery of a Pizza Hut. The police caught up with him after the robbery at the local hospital, where he was being treated for a gunshot wound to his leg, which he sustained accidentally after abandoning the robbery.<sup>1</sup> He initially lied to the police about the circumstances of injury. However, the next day, he voluntarily admitted being involved in the robbery. After taking his statement, the police arrested and charged him with armed robbery and use of a firearm in the commission of a felony.

Allen decided to plead guilty to the charges. He had many mitigating factors in his favor including his regular high school attendance, his cooperation with the police in identifying his accomplices, the fact that no one was injured during the robbery, his clean adult record, and testimony received by the court from family members, one of his high school teachers, and myself. Yet, the judge sentenced Allen to 40 years for armed robbery with ten years suspended, and three years for the use of a firearm in the commission of a felony, all to be served consecutively. His sentence was nearly *four and one half times* the national average maximum state court sentence for robbery and virtually *double* the national average maximum state court sentence for murder.<sup>2</sup> The only “positive” was that Allen was eligible for parole, having committed his offense less than two months before Virginia abolished parole.

As of March 2, 2005, Allen had served ten years in prison, more than double the average time served by individuals with a prior felony record who committed robbery before Virginia’s abolition of parole,<sup>3</sup> and nearly three years more than the average number of years served by those without a prior felony record who committed robbery after the abolition of parole.<sup>4</sup> If Allen remained imprisoned until his mandatory release date of 2012, he will have served 17 years, a sentence virtually identical to the average post-abolition robbery sentence for those with the most serious felony records.<sup>5</sup>

The shocking reality is that Allen’s sentence was well within the range of punishment available for his crimes.<sup>6</sup> Most state courts hold that prison sentences within the legislatively pre-

scribed range of a valid statute do not constitute cruel and unusual punishment under the Eighth Amendment.<sup>7</sup> Moreover, in Virginia, a sentence that does not exceed the maximum sentencing guidelines prescribed by statute is not reversible on grounds of abuse of discretion.<sup>8</sup> Thus, the validity of Allen’s sentence seemed indisputable, albeit harsh for a first-time offender with such strong mitigating factors. Indeed, it is difficult to imagine the sentence Allen would have received if he had a prior felony record. The court reporter’s notes suggest that the judge weighed societal intolerance of robbery, the need to protect victims, the fact that Allen was armed and masked, and the fact that shots were fired during the robbery in determining a sentence. While these are legitimate and reasonable concerns, news reports on arguably more heinous crimes<sup>9</sup> coupled with my own observations of the racial dynamic in Danville, suggested that race may have affected the judge’s decision.

Without assuming conscious or unconscious racial bias, this essay examines racial sentencing disparities between African-American and White-American offenders at the state and federal levels,<sup>10</sup> and advocates a legislative solution to ensure that mitigating factors are not arbitrarily disregarded by judges. This proposal will address the U.S. Supreme Court’s assertion that “[a]pparent disparities in sentencing are an inevitable part of our criminal justice system.”<sup>11</sup> Removing judicial discretion in downward departures may promote racial parity in criminal sentencing.

This article first provides a brief historical overview of racial sentencing disparities, discussing indeterminate and determinate sentencing. It then briefly discusses the futility of pursuing a judicial solution, focusing on key decisions by the Supreme Court in *Washington v. Davis*, *McCleskey v. Kemp*, and *United States v. Armstrong*, and will analyze two radical and unrealistic proposals for reducing racial sentencing disparities. The article then proposes mandatory downward departures, considering standardized offender characteristics and mitigating factors, including the pros and cons of the proposal. Finally, it concludes that society should use non-race based solutions such as mandatory downward departures in sentencing to create parity in sentencing between White Americans and African Americans and restore confidence and fairness to the criminal justice system.

## RADICAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM

As a historical matter, African Americans have routinely been singled out for harsher punishment than White Americans. During slavery, states enacted separate statutes known as “Slave Codes” to punish slaves who committed specified offenses.<sup>12</sup> Punishment under the Slave Codes for even minor transgressions

was often brutal and inhumane.<sup>13</sup> Meanwhile, these same codes completely exonerated slave masters who killed slaves in the course of punishing them for “resisting.”<sup>14</sup>

African Americans fared little better under the Black Codes of 1865, which controlled the movement and activities of newly freed slaves.<sup>15</sup> The Black Codes penalized African Americans for “offenses” similar to those for which they faced punishment under slavery.<sup>16</sup> While the Black Codes were eventually struck down by Congress after the Fourteenth and Fifteenth Amendments were passed,<sup>17</sup> and African Americans gained certain rights and freedoms during Reconstruction, these victories were eventually whittled away by Jim Crow laws in the wake of *Plessy v. Ferguson*.<sup>18</sup> Under Jim Crow laws, African Americans continued to face differential treatment and punishment under state laws.<sup>19</sup>

Above and beyond Jim Crow laws, African-American offenders were subject to the vagaries of indeterminate sentencing, a punishment philosophy which emerged during Reconstruction, eventually becoming the predominant method until the 1960s.<sup>20</sup> Under indeterminate sentencing schemes, punishment is individually tailored to an offender’s unique situation or circumstances. The trial judge has complete discretion to determine a sentence that falls within legislatively-determined minimum and maximum terms applicable to each offense.<sup>21</sup> The driving philosophical force of indeterminate sentencing is based on the theory that crime is a “moral disease” and punishment’s goal is “reformation of criminals...not the infliction of vindictive suffering.”<sup>22</sup> The ultimate length of an offender’s sentence is determined by a parole board based on its view of whether or not the offender has been rehabilitated after a period of incarceration.<sup>23</sup>

While indeterminate sentencing schemes enjoyed early support<sup>24</sup> and appeared arguably beneficial to offenders in theory, history suggests that, in practice, due to their highly discretionary nature, African-American offenders were often victims of racial bias under such schemes. Indeed, as early as 1933, researchers noted “striking differences and wide disparity in sentence type and length” under indeterminate sentencing schemes and suggested that “racial discrimination [manifested] itself in the form of more severe sentences for minority defendants than for equally situated white offenders.”<sup>25</sup> The futility of addressing these disparities was increased by the fact that such sentences were generally not reviewable and judges were not required to explain their rationale.<sup>26</sup> As parole was used to alleviate prison overcrowding rather than for rehabilitation,<sup>27</sup> doubts about the ad hoc nature of parole board decisions, the potential for misleading victims, and high recidivism rates prompted concerns about discrimination in the parole process.<sup>28</sup> By the early 1970s, mounting research suggested rehabilitation had failed,<sup>29</sup> and growing concerns about sentencing disparities, prison overcrowding, and

the perception that criminals were being coddled signaled the demise of indeterminate sentencing.<sup>30</sup>

In the mid-1970s, as support for indeterminate sentencing declined, scholars and researchers advocated a less discretionary form of sentencing known as determinate or presumptive sentencing, in which similarly situated offenders receive similar sentences.<sup>31</sup> At the heart of the proposal was a mandate to create a set of guidelines to establish specified periods of incarceration for corresponding levels of seriousness.<sup>32</sup> Judges would then have limited discretion to consider aggravating or mitigating circumstances which would raise or lower the presumptive sentence respectively.<sup>33</sup> Under the proposal, parole would be phased out.<sup>34</sup> While early determinate sentencing proposals did not completely rule out rehabilitation as a goal, determinate sentencing has often been characterized as eschewing the rehabilitation of offenders in favor of pursuing retribution or “just desserts” as its main goal.<sup>35</sup>

In 1984 Congress established the U.S. Sentencing Commission to develop sentencing guidelines similar to those originally proposed by advocates of reduced judicial discretion.<sup>36</sup> The Commission was authorized to consider the relevance of “an offender’s age, education, vocational skills, mental and emo-

tional condition, physical condition (including drug dependence, previous employment record, family and community ties, role in the offense, criminal history, and dependence on criminal activity for a livelihood.”<sup>37</sup> The final draft guidelines retained some original features but fell short in other respects in that these guidelines for criminal offense levels failed to account for the full panoply of potentially

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*His sentence was nearly four and one half times the national average for robbery and virtually double the national average maximum state court sentence for murder.*

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relevant offender characteristics originally suggested by Congress in the enabling legislation.<sup>38</sup> Also absent was a clear purpose for the sanctions, despite the clear legislative history in which Congress sought to “require the judge to consider the four purposes of sentencing [rehabilitation, retribution, incapacitation, and restitution] before imposing a particular sentence.”<sup>39</sup>

State reforms of earlier indeterminate sentencing schemes preceded federal reforms, albeit for many of the same reasons which drove federal reforms.<sup>40</sup> Today, approximately 25 states have some form of either guideline-based sentencing, presumptive sentencing, or a hybrid of the two.<sup>41</sup> Many states also established mandatory minimum penalties for certain offenses that a judge was required to impose upon conviction.<sup>42</sup>

However, the statistics gathered after most federal and state sentencing reforms were implemented are startling.<sup>43</sup> A Bureau of Justice Statistics study on trends in discretionary and mandatory parole reported that, on average, African Americans remain incarcerated three months longer than White Americans in discretionary parole systems and seven months longer than White Americans in mandatory state parole systems. In studying the issue, several states invariably agreed that racial bias has at least

some influence on the decision-making process in state criminal justice systems.<sup>44</sup>

Though much of the literature acknowledges the presence of at least some racial bias at all levels of the criminal justice system,<sup>45</sup> from arrest to incarceration, many other factors are cited for their “superior explanatory power” - in particular, African-American patterns of offending and prior criminal records of African-American offenders.<sup>46</sup> Furthermore, some scholars assert that society need not be concerned about racial disparities in the criminal justice system if the system appears, for the most part, objective and unbiased.<sup>47</sup> Despite these arguments, there are a number of valid reasons why racial sentencing disparities warrant concern, chief of which is that most researchers even those that conclude that legally relevant sentencing factors are the chief reason for racial sentencing disparities, refuse to dismiss the possibility that racial discrimination does play a role in sentencing.<sup>48</sup>

### WHY “POSSIBLE” SOLUTIONS ARE NOT “PROBABLE” SOLUTIONS

Pursuing a constitutional remedy for racial sentencing disparities, specifically an Equal Protection challenge, would be an exercise in futility because the court has typically upheld government action with a racially disparate impact.<sup>49</sup> *McCleskey* and *Armstrong* demonstrate that, notwithstanding clear evidence of racial bias, claims that reach the threshold for an equal protection violation based on disparate impacts are “available in theory, but unattainable in practice.”<sup>50</sup>

Additionally, two methods proposed to cope with racial sentencing disparities are affirmative action and racially-based jury nullification. Both remedies are targeted primarily at non-violent drug offenders engaged in “victimless crimes,” which seek to ameliorate concerns about releasing violent minority offenders into the community and providing the same opportunities for community-based treatment, in lieu of incarceration, as are afforded White drug offenders.<sup>51</sup> Butler justifies affirmative action using a modified version of the “diversity” rationale he calls “parity diversity,”<sup>52</sup> which presumes that disproportionate African-American criminality results from “the distorting influence of [W]hite supremacy on the political and legal processes by which ‘criminals’ are named and selected for punishment”<sup>53</sup> In order to combat this influence, the criminal justice system must artificially limit the number of non-violent African-American drug offenders that come within its purview, regardless of their guilt or innocence, to achieve the parity that would be had in a truly color-blind system.

Butler’s racially-based jury nullification thesis rests on a similar rationale. To combat the influence of White supremacy in the criminal justice system, African-Americans may be mor-

ally obligated to engage in jury nullification (i.e. the acquittal of some non-violent African-American drug offenders without regard to their culpability).<sup>54</sup> Butler seeks “subversion of American criminal justice” by using jury nullification by African Americans “to cause retrial after retrial, until, finally, the United States ‘retries’ its idea of justice.”<sup>55</sup>

Butler’s arguments are persuasive but idealistic at best.<sup>56</sup> Even if the U.S. Supreme Court’s position changes on affirmative action, Butler’s proposal would be limited if Justice O’Connor’s proposed 25 year sunset on affirmative action prevails.<sup>57</sup> Butler attempts to skirt the substantive infirmities of his proposal by couching his requirement for proportionality of arrest and imprisonment of African Americans in terms that suggest “goals,” not quotas. Even if the proposal were to survive the political process, it would not likely survive strict scrutiny.<sup>58</sup> Butler’s racially-based jury nullification proposal suffers on two accounts. The proposal is intentionally radical and subversive<sup>59</sup> and its implementation strategy might give prosecutors a sufficiently race-neutral reason to use preemptory strikes against African-American jurors.<sup>60</sup>

### THE CASE FOR MANDATORY DOWNWARD DEPARTURES IN SENTENCING

A standardized system of mandatory downward departures in sentencing synthesizes two seeming incompatible ideas - namely, reduced judicial discretion and the consideration of offender characteristics and mitigating factors. Under this proposal, relevant mitigating factors and offender characteristics

would be numerically standardized for judicial consultation, based on their empirical relevance in explaining criminal behavior and how often they are cited by judges in downward departures from sentencing.<sup>61</sup> Judges would consult the standardized form at sentencing to assess the factors and characteristics in a particular case. If the factors were present, the judge would be required to reduce the sentence, accord-

ing to the applicable sentencing guidelines, by the factors’ weight. Judges would retain minimal discretion to depart further downward based on factors not enumerated in the form, but would be required to provide a written explanation for this departure. Judges would be prevented from considering the race of the offender.

This proposal would have several benefits. First, by defining mandatory factors for consideration and virtually eliminating judicial discretion, a mandatory downward departure system might significantly reduce the effect of racial bias at sentencing<sup>62</sup> and ease the concern that judges will “use departures to impose sentences according to their own ideals.”<sup>63</sup> By the same token, using those mitigating factors most often cited by judges to justify downward departures ensures that a mandatory departure system reflects sentencing considerations judges deem most per-

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*“A mandatory downward departure system reflects a modest attempt to preserve certain elements of both determinate and indeterminate schemes in an objective package.”*

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minent.

Second, to the extent that the selected mitigating factors are disproportionately present in cases involving African-American offenders, mandatory departures based on these factors may close the racial disparity gap between African Americans and White Americans without relying on race. Downward departures as a means of closing this racial gap would be far less vulnerable to a constitutional challenge, would potentially reduce sentencing disparities with respect to other minorities, and could foster increased confidence in the criminal justice system among African Americans.

Third, a mandatory downward departure system comports well with the rough consensus among legislators and commentators that mitigating factors and offender characteristics should be considered at sentencing.<sup>64</sup> Thus, the proposal would ensure the consistency which indeterminate sentencing schemes lack.

Lastly, to the extent that sentences are ultimately reduced across the board, a mandatory downward departure system might help to reduce prison overcrowding and correctional costs, a growing concern in many states with determinate sentencing.<sup>65</sup> Moreover, the system continues to stress deterrence and incapacitation as society's preferred goals of punishment in order to equalize the system. Criminals are not "coddled" by this system, but merely treated as equally and fairly as possible.

Objections to indeterminate sentencing schemes recognize that the system's discretionary nature invites the influence of racial bias at sentencing, invariably leading to disproportionately severe sentencing outcomes for African Americans. By the same token, determinate sentencing schemes either do not give judges adequate leeway to individualize sentences, or are voluntary in nature and therefore susceptible to the same infirmities found in indeterminate sentencing schemes. Inadequate consideration of mitigating factors and circumstances disproportionately impact African Americans.

This proposal is vulnerable to several criticisms. First, a mandatory downward departure system may only increase the influence of prosecutorial discretion in charging decisions, which greatly influences sentencing.<sup>66</sup> Prosecutors may begin to "charge strategically to gain the upper hand in plea negotiations or introduce evidence of prior criminal activity or aggravating circumstances at trial."<sup>67</sup> Because of the courts' extreme deference to prosecutors, resulting sentencing disparities would likely continue. However, this proposal presumes that sentencing reform will not occur in a vacuum. Concomitant reforms in other areas of the criminal justice system, like prosecutorial discretion, may help manage this problem.<sup>68</sup>

Second, this proposal would be vulnerable to an equal pro-

tection challenge despite being race neutral.<sup>69</sup> Since strict scrutiny is "strict in theory, but fatal in fact,"<sup>70</sup> a race-neutral mandatory downward departure system ostensibly aimed at reducing racial sentencing disparities, particularly for African-American offenders, might be seen as presumptively invalid even if it simultaneously helps White Americans. Nevertheless, the Supreme Court will tolerate remedies addressing the underrepresentation of racial minorities which define in a race neutral manner "the disadvantages... that racial minorities disproportionately face."<sup>71</sup>

A third objection might lie in the U.S. Supreme Court's recent decisions in *Blakely v. Washington*<sup>73</sup> and *United States v. Booker*,<sup>74</sup> which rendered both state and federal sentencing guideline essentially advisory. The concern of the U.S. Supreme Court in those cases, however, was the judicial enhancement of sentences above the maximum dictated by statute based on facts

not decided by the jury,<sup>75</sup> which violated the Sixth Amendment right to jury trial.<sup>76</sup>

A mandatory downward departure system presents the converse situation and, therefore, would not implicate the Sixth Amendment but instead pursues the permissible goal of sentencing parity.<sup>77</sup>

Perhaps the strongest objections to this proposal are the further reductions of judicial discretion and its low political viability. Determinate schemes have been criticized for being rigid and difficult to apply.<sup>78</sup> The Supreme Court clearly prefers maintaining as much judicial sentencing discretion as possible.<sup>79</sup> Furthermore, this proposal appears to coddle

criminals, particularly violent criminals, at a time when citizens are siding with politicians who adhere to tough crime policies. But most of the criticism has been directed towards the lack of judicial discretion to consider offender characteristics in order to adjust sentences downward. This proposal for mandatory downward departures would squarely address that issue. While warehousing criminals for long periods of time may help reduce crime to a minor extent in the short term, it hardly constitutes a long term solution.<sup>80</sup>

A mandatory downward departure system reflects a modest attempt to preserve certain elements of both determinate and indeterminate sentencing schemes in an objective package. It is by no means a panacea for racial disparities in sentencing or for all of the ills afflicting the criminal justice system. Rather, it is an additional tool that can be used to achieve the ultimate goals of racial parity and fairness in sentencing. Perhaps, if such a system had been in place in Virginia a decade ago, Allen would have received a fair and just sentence for his misdeeds; one that would have allowed him to return to society two years ago instead of seven years from now.<sup>81</sup>

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*"A Bureau of Justice Statistics study on trends in discretionary and mandatory parole reported that, on average, African Americans remain incarcerated three months longer than White Americans in discretionary and seven months longer than White Americans in mandatory state parole systems."*

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\* Douglas Smith earned his JD from University of Virginia School of Law. He earned his B.A. from University of Virginia and earned a M.S. in Administration of Justice/Forensic Science from Virginia Commonwealth University.

<sup>1</sup> Allen indicated in his statement to police that he did not enter the restaurant with his accomplices. Rather, he entered through the back door of the restaurant, at which point one of his accomplices handed him a gun. He stated that he became scared and immediately ran out of the restaurant with the gun in his pocket, leaving his accomplices behind in the restaurant. The gun discharged in his pocket as he was running away. Witness statements taken from some of the victims in the restaurant offer some corroboration of Allen's story. They were either unaware of a third robbery participant or caught a fleeting glimpse of a third robber. No witness definitively identified Allen.

<sup>2</sup> See Jodi M. Brown and Patrick A. Langan, *State Court Sentencing of Convicted Felons, 1994*, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE (1998), <http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf94.pdf>.

<sup>3</sup> See VIRGINIA CRIMINAL SENTENCING COMMISSION 2004 ANNUAL REPORT, A DECADE OF TRUTH IN-SENTENCING IN VIRGINIA 2 (2005).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> VA. CODE ANN. § 18.2-58 (2006) (indicates that the punishment for armed robbery may be anywhere from 5 years to life in prison); VA. CODE ANN. § 18.2-53.1 (2006) (requires a mandatory minimum sentence of 3 years for the use of a firearm in the commission of a felony).

<sup>7</sup> See generally Howard J. Alperin, Comment Note, *Length of Sentence as Violation of Constitutional Provisions Prohibiting Cruel and Unusual Punishment*, 33 A.L.R.3d 335 (2005).

<sup>8</sup> See *Perry v. Commonwealth*, 208 Va. 283, 156 S.E.2d 566, 571 (1967); *Satterwhite v. Commonwealth*, 201 Va. 478, 111 S.E.2d 820, 824 (1960).

<sup>9</sup> See Erin Moriarty, *Queens of Armed Robbery*, <http://www.cbsnews.com/stories/2004/03/30/48hours/main609390.shtml>.

<sup>10</sup> While fully acknowledging that sentencing disparities exist within the criminal justice with respect to other racial/groups—particularly Latinos, see generally Tushar Kansal and Marc Mauer, *RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE, THE SENTENCING PROJECT* (2005), <http://www.sentencingproject.org/pdfs/disparity.pdf> (hereinafter “SENTENCING PROJECT II”),—for the purposes of this paper I focus exclusively on African-Americans, mainly because of their overrepresentation in the criminal justice system by almost every standard of measure. See generally Wade Henderson, *JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 25, LEADERSHIP CONFERENCE EDUCATION FUND - LEADERSHIP CONFERENCE ON CIVIL RIGHTS (2000) (hereinafter “JUSTICE ON TRIAL”).

<sup>11</sup> *McKleskey v. Kemp*, 481 U.S. 279, 312 (1987).

<sup>12</sup> Because of their status as property under the Constitution, African Americans were ineligible for punishment under the system applicable to whites accused of crimes. See Paula C. Johnson, *At the Intersection of Injustice: Experiences of African-American Women in Crime and Sentencing*, 4 AM. U. J. GENDER SOC. POL'Y & L. 1, 16 (1995).

<sup>13</sup> For example, under the Virginia slave codes, slaves guilty of rape or murder would be hanged; those guilty of robbery would have their ears cut off, be placed in stocks, and be whipped 60 times; and those guilty of associating with whites would be whipped or mutilated through branding or maiming. See Africans In America: The Terrible Transformation, Part 1: 1450-1750, at <http://www.pbs.org/wgbh/aia/part1/1p268.html>.

<sup>14</sup> See J. THORSTEN SELLIN, *SLAVERY AND THE PENAL SYSTEM* 135 (1976).

<sup>15</sup> See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 273, 516 (2000). It is widely acknowledged that Black Codes were enacted primarily to maintain white Southerners access to a ready pool of cheap labor. See *id.* at 273.

<sup>16</sup> Punishments included public whippings for carrying a weapon of any kind, imprisonment for failing to obtain special advance permission to come within the town limits of a particular town, and forced indentured servitude to the highest bidder for failing to provide oneself “a comfortable home and visible means of support.” See *Black Codes in the former Confederate States*, Shotgun's Home of the American Civil War, <http://www.civilwarhome.com/blackcodes.htm> (last visited Apr. 14, 2005); see also SELLIN, *supra* note 14, at 137–38.

<sup>17</sup> See BELL, *supra* note 15, at 273.

<sup>18</sup> 163 U.S. 537 (1896) (upholding the constitutionality of “separate but equal” segregation to be constitutional).

<sup>19</sup> See BELL, *supra* note 15, at 273.

<sup>20</sup> See Ilene H. Nagel, *Structuring Sentencing Discretion: the New Federal Sentencing Guidelines*, 80 J. CRIM. L. CRIMINOLOGY 883, 895 (1990); SANDRA SHANE-DUBOW ET AL., U.S. DEP'T OF JUSTICE, *SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 4* (1985) (stating that by 1922, forty-four states had adopted some form of parole practice).

<sup>21</sup> The trial judge examines a number of individual offender characteristics, including the existence of a prior record, education level, employment history, evidence of drug or alcohol abuse, and other information considered germane to sentencing. See *Developments in the Law: Race and the Criminal Process IX. Race and Noncapital Sentencing*, 101 HARV. L. REV. 1626, 1627 (1988) (hereinafter “*Developments*”).

<sup>22</sup> See Nagel, *supra* note 20, at 893.

<sup>23</sup> See *Developments*, *supra* note 21, at 1627.

<sup>24</sup> See *Williams v. New York*, 337 U.S. 241, 248 (1949) (noting early Supreme Court support for indeterminate sentencing because “[r]eproduction is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”); See also SHANE SANDRA SHANE-DUBOW ET

AL., U.S. DEP'T OF JUSTICE, *SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 4*, 4–6 (1985) (acknowledging early support for indeterminate sentencing from state governments and Congress).

<sup>25</sup> Jane A. Dall, Note, *A Question for Another Day: The Constitutionality of The U.S. Sentencing Guidelines Under Apprendi v. New Jersey*, 78 NOTRE DAME L. REV. 1617, 1620 (2003); See also SHANE-DUBOW, *supra* note 25, at 8.

<sup>26</sup> See Dall, *supra* note 25, at 1620–21.

<sup>27</sup> *Developments*, *supra* note 21, at 1637–38. Indeed, many critics bemoaned the absence of any treatment or rehabilitation programs in prisons purporting to carry through the philosophy behind indeterminate sentencing. See Frankel, *infra* note 31, at 93 (stating that “[t]he sentence purportedly tailored to the cherished needs of the individual turns out to be a crude order for simple warehousing. The prison characteristically has no treatment facilities of any substantial nature. The means for rehabilitation, undefined and probably unknown, are not at hand.”).

<sup>28</sup> MICHAEL H. TONRY, U.S. DEP'T OF JUSTICE, *SENTENCING REFORM IMPACTS 7* (1987) (hereinafter “SENTENCING REFORM”).

<sup>29</sup> See Nagel, *supra* note 20, at 896–97.

<sup>30</sup> See SHANE-DUBOW, *supra* note 20, at 6–8; See also Nagel, *supra* note 20, at 895.

<sup>31</sup> Former Federal District Court Judge Marvin E. Frankel, often cited as being the catalyst for change in sentencing at the federal level, expressed the concern of many at the time, noting that “the almost wholly unchecked and sweeping powers [given] to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.” MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER 5* (1973). Other early proponents of indeterminate sentencing included Harvard Law Professor Alan Dershowitz and Andrew von Hirsch; see SHANE-DUBOW, *supra* note 20, at 8; see also Johnson, *supra* note 12, at 36 (1995).

<sup>32</sup> See Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1944–46 (1988); see also Johnson, *supra* note 12, at 38.

<sup>33</sup> See Johnson, *supra* note 12, at 38; see also SHANE-DUBOW, *supra* note 16, at 8; *Developments*, *supra* note 22, at 1639.

<sup>34</sup> *Developments*, *supra* note 21, at 1639.

<sup>35</sup> *Id.* at 37.

<sup>36</sup> The guidelines became federal law on November 1, 1987. See Ogletree, *supra* note 32, at 1945.

<sup>37</sup> Congress also required the Commission to remain neutral with respect to the “race, sex, national origin, creed, and socio-economic status of offenders.” *Id.*; See also Nagel, *supra* note 20, at 904.

<sup>38</sup> Instead, the Commission highlighted only the characteristics of a prior criminal record, the offender's dependence on crime for a livelihood, and the offender's acceptance of responsibility. See SHANE-DUBOW, *supra* note 20, at 18.

<sup>39</sup> See Ogletree, *supra* note 32, at 1952 (quoting S. REP. NO. 225, at 75 (1984), reprinted in 1984 U.S.C.C.A.N. 3220, 3221); see generally Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence about the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043 (2003). It should also be noted that deterrence is recognized as a major purpose of sentencing.

<sup>40</sup> See generally BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT. OF JUSTICE, *TRUTH IN SENTENCING IN STATE PRISONS* (1999) (hereinafter “TRUTH IN SENTENCING REPORT”); see also *infra* note 32 and accompanying text.

<sup>41</sup> See generally JON WOOL & DON STEMEN, VERA INSTITUTE OF JUSTICE, *AGGRAVATED SENTENCING: BLAKELY V. WASHINGTON: PRACTICE IMPLICATIONS FOR STATE SENTENCING SYSTEMS* (2004), [http://www.vera.org/publication\\_pdf/242\\_456.pdf](http://www.vera.org/publication_pdf/242_456.pdf) (hereinafter “VERA REPORT”).

<sup>42</sup> See *JUSTICE ON TRIAL*, *supra* note 11, at 21; Johnson, *supra* note 13, at 39–40. In Virginia, sentencing reform moved at much more deliberate pace. While Virginia courts had adopted a set of voluntary sentencing guidelines several years prior, wholesale sentencing reform did not begin until 1994 when former Governor (now U.S. Senator) George Allen took office. See VIRGINIA CRIMINAL SENTENCING COMMISSION, 2004 ANNUAL REPORT 24, 43 (2004) (hereinafter “VIRGINIA REPORT”).

<sup>43</sup> The percentage of African-Americans admitted to state and federal prisons between 1979 and 1992 increased from 39% to 54%. Nationwide, twenty-three percent of African-American males between the ages of 20 and 29 were under control of the criminal justice system in 1990, a number that rose to 42% the next year in Washington, D.C. and 56% in Baltimore. See MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA* 37, (1995).

<sup>44</sup> See, e.g., TONRY, *supra* note 28, at 49 (stating that “[a] conclusion that black overrepresentation among prisoners is not primarily the result of racial bias does not mean that there is no racism in the system.”); Alfred Blumstein, *Racial Disproportionality Of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 759 (1993) (stating that, while the bulk of racial disproportionality is explained by other factors, “[t]here are too many anecdotal incidents and analysis of particular jurisdictions reflecting blatant discrimination to reach [the] naive conclusion [that there is no racial discrimination in the criminal justice system].”).

<sup>45</sup> *Id.*

<sup>46</sup> See Patrick A. Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMINOLOGY 666, 683 (1985) (concluding that his test results supported the proposition that differential involvement in imprisonable crimes were the primary cause of the disparity).

<sup>47</sup> See UNITED STATES SENTENCING COMMISSION, *FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM* 131–32, 113 (2004) (hereinafter

"FIFTEEN YEAR REPORT") ("As long as the individuals in each group are treated fairly, average group differences simply reflect differences in the characteristics of the individuals who comprise each group. Group disparity is not necessarily unwarranted disparity."); see also *Developments*, *supra* note 21, at 1639-40 (noting that "although sentencing guidelines may help to eliminate racial discrimination in the correctional system, they will not eliminate all racial disparities, because some relevant offense-related characteristics correlate significantly with race."); Randall Kennedy, *The State, Criminal Law, and Race Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1260 (1994); TONRY, *supra* note 28, at 80-81; Ernest van den Haag, *Refuting Reiman and Nathanson*, in *PHILOSOPHY OF PUNISHMENT* 148 (Robert M. Baird & Stuart E. Rosenbaum eds., 1988).

<sup>48</sup> See THE SENTENCING PROJECT, *REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS* (2000) (hereinafter "SENTENCING PROJECT"); Cassia Spohn, NATIONAL INSTITUTE OF JUSTICE, THIRTY YEARS OF SENTENCING REFORM: THE QUEST FOR A RACIALLY NEUTRAL SENTENCING PROCESS 474-75 (2000). See also FINAL REPORT OF THE CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON RACIAL AND ETHNIC BIAS IN THE COURTS 184-5 (1997) (hereinafter "CALIFORNIA REPORT"); FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 150-1 (hereinafter "PENN REPORT"); Angela J. Davis, *Crime and Punishment: Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1675-77 (1996); Bell, *supra* note 15, at 518-19; LEADERSHIP CONFERENCE EDUCATION FUND, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 4 (2000) (hereinafter "JUSTICE ON TRIAL"); Angela J. Davis, *Prosecution And Race: The Power And Privilege Of Discretion* 67 FORDHAM L. REV. 13, 26-30 (1998) (hereinafter "Prosecution").

<sup>49</sup> See *Washington v. Davis*, 426 U.S. 229 (1976). See also *McKleskey v. Kemp*, 481 U.S. 279, 312-3 (1987) (declining to infer discriminatory intent in the administration of Georgia's facially neutral death penalty statute "where the discretion that is fundamental to our criminal justice system is involved"); *United States v. Armstrong*, 517 U.S. 456, 470 (1996) (denying respondent's discovery motion for insufficient evidence of "selective prosecution"). See generally Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331 (2000) (quoting *Personal Administrator v. Feeney*, 442 U.S. 256, 279 (1979) (citation omitted)).

<sup>50</sup> See JUSTICE ON TRIAL, *supra* note 11, at 32 (citation omitted). Professor Charles Lawrence argues that the Supreme Court's requirement of proof of discriminatory intent in equal protection cases involving racially disparate impacts should be supplanted by what he calls the "cultural meaning" test, which would require the application of heightened scrutiny. Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 356 (1987). This test would arguably be helpful in cases involving racial sentencing disparities. He acknowledges, however, that he does not "anticipate that either the Supreme Court or the academic establishment will rush to embrace and incorporate [this] approach." *Id.* at 387.

<sup>51</sup> See Paul Butler, *Diversity of Opinions: Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841 (1997) (hereinafter "Affirmative Action"); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice*, 105 YALE L.J. 677 (1995) (hereinafter "Jury Nullification").

<sup>52</sup> See *Affirmative Action*, *supra* note 51, at 867-69.

<sup>53</sup> *Id.*

<sup>54</sup> See *Jury Nullification*, *supra* note 51, at 679.

<sup>55</sup> See *Jury Nullification*, *supra* note 51, at 680, 725.

<sup>56</sup> See *Affirmative Action*, *supra* note 51, at 843 n.11 (conceding that "the legal case for many forms of affirmative action is moribund"). But also see Margaret E. Montoya, *Of "Subtle Prejudices," White Supremacy, And Affirmative Action: A Reply To Paul Butler*, 68 U. COLO. L. REV. 891, 915 (1997) ("Proposing changes that have no possibility of being implemented under the current political regime diverts us from the more difficult work of designing remedial programs that are palatable to those in power and that stand a chance of improving the material conditions of communities of color.").

<sup>57</sup> See *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [i.e. diversity] approved today.").

<sup>58</sup> See Montoya, *supra* note 56, at 917-18.

<sup>59</sup> See *Jury Nullification*, *supra* note 51, at 680 ("My goal is the subversion of American criminal justice, at least as it now exists. Through jury nullification, I want to dismantle the master's house with the master's tools.").

<sup>60</sup> For example, Butler suggests that advocates of racially based jury nullification "stand outside a courthouse and distribute flyers explaining the proposal to prospective jurors." See *Jury Nullification*, *supra* note 54, at 724.

<sup>61</sup> See, e.g., UNITED STATES SENTENCING COMMISSION, *DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES* 44-51 (2003).

<sup>62</sup> See *Developments*, *supra* note 21, at 1634.

<sup>63</sup> This creates the disparities which, in part, prompted the implementation of determinate sentencing at the state and federal level. Cf. Michael S. Gelacak et. al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 314 (1996).

<sup>64</sup> See *Tonry supra* note 28; MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA* 37, 195 (1995); Gelacak, *supra* note 63, at 311-18; Ogletree, *supra* note 32, at 1957-58; Cf. Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 96-104 (2000).

<sup>65</sup> See, e.g., Chris L. Jenkins, *State Is Paying Higher Price for Crime Crackdown*, WASH. POST, Mar. 4, 2004, at B4.

<sup>66</sup> See Angela J. Davis, *Prosecution And Race: The Power And Privilege Of Discretion* 67 FORDHAM L. REV. 13, 17-18 (1998) (hereinafter "Prosecution"). (stating that "[t]hrough the exercise of prosecutorial discretion, prosecutors make decisions that not only often predetermine the outcome of criminal cases, but also contribute to the discriminatory treatment of African Americans as both criminal defendants and victims of crime.").

<sup>67</sup> *Developments*, *supra* note 21, at 1640.

<sup>68</sup> Such reforms have been proposed by a number of commentators. See generally *Prosecution*, *supra* note 66; JUSTICE ON TRIAL, *supra* note 10.

<sup>69</sup> See Forde-Mazrui, *supra* note 49, at 2333 (noting the Supreme Court's Equal Protection jurisprudence makes clear that "strict scrutiny under the Equal Protection Clause is triggered by a law motivated by a racially discriminatory purpose, regardless of whether the law employs an express racial classification or is race-neutral on its face").

<sup>70</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

<sup>71</sup> See Forde-Mazrui, *supra* note 49, at 2334. Compare *Adarand Constructors, Inc.*, 515 U.S. at 2118-19 ("In the eyes of the government, we are just one race here. It is American.") with *Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 528 (1989) ("Any race-neutral remedial program aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks.").

<sup>72</sup> 124 S.Ct. 2531 (2004).

<sup>73</sup> 125 S.Ct. 738 (2005).

<sup>74</sup> See Vera Report, *supra* note 44.

<sup>75</sup> See *Booker*, 125 S.Ct. at 749; *Blakely*, 124 S.Ct. at 2531.

<sup>76</sup> U.S. CONST. amend. VI.

<sup>77</sup> See *Blakely*, 124 S.Ct. at 2540 (stating that its decision in *Blakely* did not "impugn [the] salutary objectives" of achieving parity in sentencing among defendants).

<sup>78</sup> See Berman, *supra* note 64.

<sup>79</sup> See *Koon v. United States*, 518 U.S. 81 (1996).

<sup>80</sup> See Alfred Blumstein, *Race and Criminal Justice, in AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES, VOLUME II* (2001) ("Disproportionality alone, regardless of its legitimacy, conveys a profound sense of unfairness to the overrepresented groups.").

<sup>81</sup> Allen Farmer was finally granted parole in December of 2005. He was released from prison on March 18, 2006 and currently resides in Chesterfield County, Virginia.

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# THE INTERGRATION MYTH: AMERICA'S FAILURE TO PRODUCE EQUAL EDUCATIONAL OUTCOMES

By Samuel E. Brown\*

The progeny of the landmark case *Brown v. Board of Education*<sup>1</sup> have impacted high schools today in several important ways. Currently, a high school education does little to significantly improve students' chances for higher income and employment stability. Preparing students for college is primarily a responsibility that falls on the shoulders of high school educators. A college degree is becoming the standard threshold for identifying someone as "educated," and therefore able to take advantage of expanding opportunities for upward mobility. Creating a society that facilitates that preparation is the responsibility of that society's government and citizens. When society fails to fulfill that responsibility, especially in the case of minority citizens, it is often difficult for those citizens to find redress through legislative representatives and bodies. Therefore, the judicial system can lend itself as the most effective governmental branch through which minorities can find redress for their legitimate grievances.

In the past, equal protection was understood to mean equality not only in natural, political and civil rights, but also in social rights. However, after decades of failures caused by the abandonment of our social rights to the hands of private citizens, it is time Americans sought to activate equal protection to compel our government to secure these rights for all citizens. In this way, a vital and fundamental right, such as the right to equal access, opportunities, and outcomes in education, will become a day-to-day reality that will replace the shallow, unsubstantiated façade of equality that exists today.

This article examines how and why America has yet to fulfill the dream of *Brown*. First, I examine the integration, or lack thereof, of America's public schools and scrutinize the effectiveness of past efforts to desegregate public schools after the *Brown* decision. Second, I illustrate the effects of court cases, school tracking, and re-segregation of public schools by using African-American high school students in Washington, D.C. ("D.C.") as a specific case study. Finally, I discuss whether equal protection should merely facilitate equal opportunity in education, or if it should go further in securing equality in educational outcomes as well.

## BEYOND BROWN: ALL DELIBERATE SPEED

In deciding *Brown*, the Supreme Court refused to look back 58 years to the decision in *Plessy v. Ferguson*.<sup>2</sup> Instead, *Brown* considered the full development of public education and "its present place in American life throughout the nation."<sup>3</sup> Similarly, it is not sufficient to compare the current state of education for African-American students to what it was in 1955. Our analysis today should look to the relationships between education and segregation, the development of segregation in America, and "its present place in American life."<sup>4</sup>

In *Brown*, Chief Justice Warren recognized that segregation with the sanction of law detrimentally deprived African-American students of some of the benefits they would receive in an integrated setting.<sup>5</sup> Following *Brown*, a U.S. Supreme Court order in *Brown II* mandated that schools desegregate with "all deliberate speed."<sup>6</sup> At present, the *Brown* ruling has failed to secure the right to attend integrated schools for African-American students for longer than a cursory twenty to thirty year period. This suggests that curing de jure or ostensibly state-sanctioned segregation does not make desegregation a reality. Thus, perhaps one of the shortcomings of the U.S. Supreme Court order was the lack of foresight to ensure that once desegregated, American schools would remain so.

Additionally, after *Brown*, Americans became steeped in the belief that once public schools became racially integrated, disparities in education might begin to disappear. Fifty years later, high schools in urban areas are as segregated as ever and the educational disparities persist. Phenomena such as "White flight" and the creation of small, one high school districts have resulted in the same pre-1955 segregation of students. Notably, in the middle of the twentieth century, the courts were the most effective places for African Americans to find redress for their educational grievances. However, because the courts were once effective does not necessarily mean they are the best tool to cure social and civil justice for African Americans today. Yet still, it is crucial that the judicial system, with its history of curing social and civil injustices in upholding the Constitution, continues to serve as a foundation for securing equal protection.

While African Americans have made great strides in "catching up" to White Americans, they still remain over-represented in prisons,<sup>7</sup> under-represented in the workforce,<sup>8</sup> and under-represented in higher education. In 1955, African Americans faced blatant state-sanctioned discrimination in education. In 2005, African Americans face an entirely new monster: a subtle manifestation of discriminatory ideals cloaked under a veil of seemingly equal access. Some would argue the latter poses an even greater challenge to African Americans' efforts to obtain meaningful, substantial educational opportunities than the former discrimination of 50 years earlier. At best, "all deliberate speed" was an ambiguous phrase that has not brought African Americans beyond the evils revealed by *Brown*, namely the equalization of educational opportunities for children of all races.

## BIRDS OF A FEATHER: DE JURE AND DE FACTO DISCRIMINATION

The *Brown* ruling was in line with the original purpose of the Fourteenth Amendment. At its inception, the Fourteenth Amendment recognized that whether discrimination was state-

sanctioned or the result of private actions and choices, the results on its victims were the same. The Fourteenth Amendment sought to alleviate oppression and segregation not only from government, but from all sources both public and private, an ideal which the U.S. Supreme Court recognized in the Slaughter-House Cases.<sup>9</sup> However, *Brown* has largely failed because it does not address private as well as public-sanctioned discrimination, or in other words, the difference between de jure and de facto discrimination. This is compounded by the U.S. Supreme Court's failure to find that the Constitution requires schools to remedy de facto segregation. Even the lower courts have split on whether the failure to remedy de facto segregation in schools constitutes a constitutional violation.

For example, in *Spencer v. Kugler*,<sup>10</sup> the U.S. Supreme Court upheld a District Court ruling against African-American parents and students who were seeking a more racially-balanced school system. The District Court adopted the longstanding notion that schools should only be required to continue desegregation efforts where de jure discrimination had been proven. Justice Douglas' dissent recognized that the current situation of school segregation is not accidental or purely de facto. He further asserted that the distinction between de facto and de jure segregation "is not as clear-cut as it appears."<sup>11</sup> Four years later, in *Washington v. Davis*,<sup>12</sup> the U.S. Supreme Court held that a law is not unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose. The fact that there are both predominantly African-American and predominantly White-American schools in a community does not itself indicate a constitutional violation.

This line of thinking continued into the 1980s, as shown in *Crawford v. Board of Education*.<sup>13</sup> After a California state court ordered busing of students to remedy segregation in Los Angeles, California voters adopted a state constitutional amendment that limited any State court-ordered busing for desegregation purposes that went above and beyond what the federal Constitution required. The U.S. Supreme Court held that the amendment did not employ a racial classification, had no discriminatory purpose, and the Fourteenth Amendment did not preclude a state from amending prior measures that went beyond the requirements of the Fourteenth Amendment. In his dissent, Justice Marshall recognized the fundamental fact that a state constitutional amendment should not override federal constitutional guarantees; if it did, it would effectively deprive California's minority children of their federal right to equal protection.<sup>14</sup>

Unfortunately, the pattern of re-segregation that began in

the early 1980s continued throughout the 1990s. In *Board of Education v. Dowell*,<sup>15</sup> the U.S. Supreme Court authorized a return to segregated neighborhood schools. In 1972, the District Court entered a desegregation decree against the school district, finding that it had not eliminated de jure segregation. By 1977, the school district had achieved "unitary" status, meaning it had desegregated its schools but had not necessarily satisfied the 1972 decree. Eight years later in 1985, the school district adopted a "student reassignment plan" ("SRP"), whereby previously desegregated schools would return their student bodies to primarily one-race status. The U.S. Supreme Court held that desegregation decrees were not intended to operate in perpetuity. The U.S. Supreme Court also proposed a test: in determining when to dissolve such a decree, courts should consider whether the school district has met the terms of the decree in good faith and whether the vestiges of past discrimination had

been eradicated to the greatest extent possible. Apparently, the majority felt 13 years of desegregation was sufficient to eliminate the vestiges of centuries of segregated education.

In *Dowell*, Justice Marshall dissented again, this time joined by Justices Blackmun and Stevens. Marshall pointed out that the SRP superimposed attendance zones over some residentially segregated areas, resulting in a racial imbalance in over half of the district's schools where student bodies were either more than 90% African-American, or 90% non-African-American. Marshall rejected the majority's suggestion that the Court's decision would differ if residential segregation resulted from private

decision-making. Marshall believed that the District Court's conclusion that the school district's racial identity was due to personal preference did not sufficiently hold state and local officials or the school board accountable. He asserted that the decision failed to address the unique role the school board plays in creating "all-Negro" schools. Marshall also stated that the existence of personal preferences does not mean a school district is no longer accountable for helping to create such preferences or absolves the district from its obligation to desegregate schools as much as possible. In his mind, the mandate from *Brown* imposed an affirmative duty on school districts to eliminate any conditions that furthered ideas of racial inferiority underlying state-sponsored segregation.

Despite these stinging dissents, Justices Douglas and Marshall never quite convinced the U.S. Supreme Court of the illogical distinction between de jure and de facto segregation when it came to the pragmatic application of the Fourteenth Amendment to educational segregation jurisprudence. Still, their words ring true today. Regardless of the source of segregation, the evils that the *Brown* decision sought to obviate are re-

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curing in force in today's major metropolitan areas, often with the same effect on African-American school children - a sense of inferiority, unequal educational opportunities and facilities, and a serious dearth of racially diversified populations.

### RE-SEGREGATION ON A NATIONAL LEVEL

A 2001 Harvard University Report entitled "*Brown* at 50: King's Dream or *Plessy*'s Nightmare?" ("Harvard study") examined the decade of re-segregation that followed the 1991 Dowell decision.<sup>16</sup> Some of its major findings include:

- A major increase in segregation in many districts where court-ordered desegregation ended in the past decade. The courts assumed that the forces that produced segregation and inequality had been cured. However, this [Harvard] report shows they have not.
- Rural and small town districts are, on average, the nation's most integrated; large cities and suburbs of large metropolitan areas are the epicenter of segregation.
- American public schools are now only 60% White American and nearly one-fourth of U.S. students are in states with a majority of non-White-American students. However, except in the South and Southwest, most White-American students have little contact with non-White-American students.

The Harvard study confirms that approximately 20 years of integration means absolutely nothing if schools are permitted to re-segregate in ways that result in unequal educational opportunities. However, some interesting arguments exist to counter the theory that this trend of resegregation is necessarily bad. Anthony Bradley of the Acton Institute highlights some of these arguments in his article countering the Harvard study.<sup>17</sup> First, Bradley asserts that no ethnic minorities today are denied admission to schools in their districts on the basis of race because *Brown* successfully prohibits districts from using race to prevent children from attending schools in their own district. In his view, the Harvard study incorrectly thinks it is wrong for schools to reflect racial composition of their respective communities. Second, Bradley wonders why community schools have to be integrated at all, criticizing the Harvard study's lack of support for the conclusion that exposure to interracial settings has positive implications for minority academic achievement and White American socialization. Third, he believes that minority teachers, administrators, and parents should be insulted at the notion that increasing their children's exposure to White-American children and teachers will increase their academic performance. Bradley also identifies what he believes is the true evil in the equation - discrimination. He claims if minority parents want their kids to be in better schools, they have two options: as taxpayers, they can pick up and move to a good school district, or they can demand excellence in their own community's schools. Bradley goes on to label the Harvard study as "overly simplistic and reductionistic" because Americans are no longer simply divided by race. He believes instead that the racial phenomenon of segregated residential areas is more closely tied to class and

other related factors such as income level.

I challenge Bradley's contentions on several points. First, the goal of the *Brown* decision and subsequent desegregation order was to eliminate the vestiges of racial discrimination. School districts have reshaped their boundaries to reflect segregated residential patterns with the Supreme Court's blessing. This is merely an indirect way of achieving what *Brown* sought to prevent districts from doing directly: segregating students on the basis of race. Second, it is well-known that corporate America and most of our institutions of higher education have found time and again that diversity serves a valuable purpose for both White American socialization and minority integration into the upper echelons of academia and business. If it works for these institutions and the adults they employ, then how and why is it somehow undesirable for our children? Third, Bradley thinks that the true evil in this equation is not segregation but discrimination. He believes that African-American parents, over-represented in the lower-classes (especially in the metropolitan areas where segregation is most profound), should simply pack up and move to a better school district. Yet, I wonder how many working single mothers, living paycheck-to-paycheck in the inner city, Bradley actually knows, or if he realizes the tremendous difficulty in finding extra time, money, or energy to move?

Furthermore, the reason the courts have been the last resort for achieving educational justice is precisely because African-American political power has proven ineffective to create change. Claiming that Americans are no longer divided by race but by class blatantly ignores the very real links between race and class. African Americans find themselves on unemployment and in the military at a rate proportionately double that of their population. Does this mean African Americans volunteer for military duty out of some overwhelming sense of civic duty, or is there just a serious lack of other viable opportunities for upward mobility? Can we explain away the fact that half of America's prison population is African American as a function of economics? Bradley, and all of us, should keep in mind:<sup>18</sup>

- As of 1997, the net worth of White-American families was eight times that of African Americans and 12 times that of Hispanics. The median financial wealth of African Americans (net worth less home equity) is \$200 while that of Hispanics is zero.<sup>19</sup>
- African-American applicants were granted less than 1% of total home mortgages approved between 1930 and 1960.<sup>20</sup> Only in 1999 did home ownership among African Americans recover ground lost since 1983.
- In 1865, African Americans owned one half of 1% of the nation's net worth. In 1990, their net worth totaled 1%.<sup>21</sup>
- On average, African-American students scored 144 points less on the Scholastic Aptitude Test (SAT) than White-American students where the parents of both races earn over \$70,000.<sup>22</sup>

Regardless, racism, discrimination, or segregation are still a very real and tangible phenomenon that adversely affects the

ways in which Americans interact in all of our major institutions - most importantly - in education.

### RE-SEGREGATION CASE STUDY: WASHINGTON, D.C.

Although America is gradually becoming integrated in some areas, major metropolitan areas and schools still experience high levels of racial segregation. D.C. is no exception. African Americans make up approximately 60% of D.C.'s total population, non-Hispanic White-Americans constitute 25%, and Hispanics are approximately 8%.<sup>23</sup> Surprisingly, a recent study by the University of Wisconsin-Milwaukee ranks D.C. twenty-third in African-American White-American residential integration for the nation's 50 largest cities.<sup>24</sup> However, this residential integration does not lead to the kind of educational integration the *Brown* court anticipated in its desegregation order. Nearly half of all public high schools in D.C. are at least 95% African-American.<sup>25</sup> D.C. public schools have a total African-American population of 84.4%.<sup>26</sup> Certainly, the frequency of White-American students attending private schools in D.C. might account for some of this disparity. Still, it seems odd that only two schools in D.C. have a White-American student population over 20%, one only has 12%, another two combine for 5%, and the rest have 1% or less. So why are the schools not integrated here as in other places? Often, the execution of integration policies involves transporting African-American students to predominantly White-American schools, not the other way around. This, in and of itself, is an entirely new form of discrimination.

However, it is important to keep in mind that D.C. is a special case, since the ruling in *Bolling v. Sharpe*<sup>27</sup> found D.C. school segregation violated Fifth Amendment due process rather than equal protection. Still, the fundamental goal of racially integrated schools is the same: to provide equality in educational access to foster equality in educational outcomes. One D.C. Circuit Court case, *Hobson v. Hansen*,<sup>28</sup> is in line with this sentiment, but demonstrates a very different conclusion from the nationwide equal protection cases alluded to earlier.

*Hobson* concerns the system of tracking that was introduced into the D.C. public school system ("DCPS") in the 1960s to address the academic gaps between African-American and White-American students who were by then attending more integrated schools.<sup>29</sup> Under the tracking system, African-American and poor children were disproportionately assigned to the lower educational tracks.<sup>30</sup> In 1967, a school segregation suit was brought against the Superintendent of DCPS, the D.C. Board of Education, and others, charging that the DCPS system violated Fifth Amendment due process for not fully complying with the principles announced in *Bolling*. The D.C. Circuit Court found that the tracking system denied African-American schoolchildren equal educational opportunities when compared to those

provided to the more affluent White-American school children. The court ordered the abolition of the tracking system and barred any future tracking system that failed to bring the majority of D.C. children into the mainstream of public education.

Judge Skelly Wright's opinion set out several reasons for the decision. First, Judge Wright noted that the law is especially concerned for minority groups because the judicial branch is often the only hope for redressing grievances. Wright recognized that American society is based on White-American and middle-class values that, intentionally or not, create barriers apparent in most aptitude tests for lower-class and African-American children. Second, Wright alluded to the fact that the vestiges of three hundred years of slavery and discrimination remain intact as psychological senses of inferiority, worthlessness, fear and despair tend to transmit from one generation to the next through a child's parents. While some would argue that this is a debilitating and almost racist attitude toward the state of

African-American children, it is in fact a very realistic and pragmatic view of the effects of the vestiges of American racism. I believe that this sort of view, at the very least, brings to light certain issues that most people would rather sweep under the rug and pretend do not exist. Furthermore, Wright poignantly notes that "when the school is all

[African American] or predominantly so, this simply reinforces the impressions implanted in the child's mind by his parents, for the school experience is then but a perpetuation of the segregation he has come to expect in life generally."<sup>31</sup> The goal, therefore, should not simply be to achieve numerically balanced racial ratios, but should go further to eliminate the vestiges of centuries of educational discrimination in the true spirit of *Brown* and its progeny.

### CONCLUSION: EQUAL EDUCATION DOES NOT MEAN EQUAL OUTCOMES

The *Brown* Court voiced its doubt that any child could be reasonably expected to succeed without having the opportunity of education. It further reasoned that this opportunity is a right that must be made available to all on equal terms.<sup>32</sup> Could the U.S. Supreme Court have meant that equal opportunity did not encompass the fundamental concept that, beyond simply giving the appearance of fairness, equal opportunity should in some way affect and create real fairness in reality? If so, that would seem to conflict with what the U.S. Supreme Court said nearly twenty years after *Brown* in *San Antonio Independent School District v. Rodriguez*<sup>33</sup> when it announced that education was not a fundamental, constitutionally-protected right.

Given the U.S. Supreme Court's apparent split on the subject, the apprehension created by the idea to use the judicial branch to ensure equal opportunity and equal outcomes seems appropriate. This is solidified by the mere fact that reliance on the judicial system as a means of repairing the disparity in out-

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comes also seems misplaced. Furthermore, there is a valid argument that judicial victories in achieving equal opportunity have been a false source of hope, leaving African Americans complacent in the vital struggle for equal outcomes. However, we must remember that as a consequence of our majority governance system, the executive and legislative branches often do not operate in the best interests of minority groups.

While I personally do not purport to have the solution, it is my hope that we will continually discuss and analyze these issues. That discussion should stem from the idea that equal protection without equal outcomes is adverse to the very purpose of providing equal protection. Furthermore, equal protection should signify not only literal protection under the law, but equality of outcomes under state schemes that discriminate by subverting existing laws. In the future, it is American schools that must strive for equal outcomes if we hope to fulfill the dream of *Brown*: equal educational opportunities facilitated by integrated schools, which will lead to a truly integrated society where the equality of educational outcomes is a reality.

Admittedly, there is some truth to the argument that the focus on segregation, as opposed to discrimination, is the one of

the greatest tricks ever played on America's struggle for racial harmony. The widespread acceptance of the idea that eliminating segregation will somehow cure our racial problems is detrimental to our society as a whole. Although it is true that integration is an important step to creating exposure and facilitating racial interaction, the effects of racist discrimination will not cease to exist based solely on taking this step. Instead, Americans must take the next step and challenge the core discrimination that leads to disparate educational outcomes. If education is the key to upward mobility in America, then the disparities in equal educational outcomes in the African-American community, particularly for high school students, may be the snare that entraps a significant portion of its members into a perpetual cycle of indifference, apathy, and poverty. Not only do these disparities eventually lead to disparate representation in higher education, they also lead to disparities in the job market, home ownership, and a host of other indicators which, if nonexistent, may inevitably eradicate discriminatory beliefs. As Americans begin to see actual equality in their colleges and jobs, the vestiges of discrimination will truly fall away and *Brown's* goal will be achieved.

## ENDNOTES

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<sup>1</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (hereinafter "Brown").

<sup>2</sup> 163 U.S. 537, 552 (1896).

<sup>3</sup> *Brown*, 347 U.S. at 492-3.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 494 (quoting *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951)).

<sup>6</sup> 349 U.S. 294, 301 (1955) (hereinafter "Brown II").

<sup>7</sup> See Press Release, U.S. Dep't of Justice Bureau of Justice Statistics, Nation's Prison and Jail Population Grew 2.6 Percent During 12 Months That Ended June 30, 2005, available at <http://www.ojp.usdoj.gov/bjs/pub/press/pjim05pr.htm> (last visited July 8, 2006).

<sup>8</sup> See U.S. Dep't of Labor Bureau of Labor Statistics, Employment Situation Summary May 2006, available at <http://www.bls.gov/news.release/empsit.nr0.htm> (last visited July 8, 2006).

<sup>9</sup> 83 U.S. 36, 71 (1872).

<sup>10</sup> 404 U.S. 1027 (1972).

<sup>11</sup> *Id.* at 1030 (Douglas, J., dissenting) (quoting Hearings before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, 91st Cong., 2d Sess., 352-4 (1970)).

<sup>12</sup> 426 U.S. 229, 241 (1976).

<sup>13</sup> 458 U.S. 527 (1982).

<sup>14</sup> *Id.* at 551 (Marshall, J., dissenting).

<sup>15</sup> 498 U.S. 237 (1991).

<sup>16</sup> Gary Orfield and Chungmei Lee, The Civil Rights Project Harvard University, *Brown at 50: King's Dream or Plessy's Nightmare?* available at <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf> (January 2004) (last visited July 8, 2006).

<sup>17</sup> Anthony B. Bradley, Acton Commentary, *Counter Argument to Harvard Study; Harvard's Civil Rights Project Misses the Mark*, available at <http://www.acton.org/ppolicy/comment/article.php?id=101> (last visited July 8, 2006).

<sup>18</sup> Edward N. Wolff, *Recent Trends in Wealth Ownership*, available at <http://www.sharedcapitalism.org/scfacts.html> (last visited July 8, 2006) (hereinafter "Recent Trends").

<sup>19</sup> *Id.* (quoting Edward N. Wolff, *A Scholar Who Concentrates ... on Concentrations of Wealth*, TOO MUCH, Winter 1999), at 41 n.6.

<sup>20</sup> *Recent Trends*, supra note 18 (quoting Results of 1991 Federal Reserve Board study analyzing 1990 Home Mortgage Disclosure Act data) (emphasis added).

<sup>21</sup> *Recent Trends*, supra note 18 (quoting DALTON CONLEY, BEING BLACK, LIVING IN THE RED (1999)).

<sup>22</sup> *Id.*

<sup>23</sup> Wikipedia, available at [http://en.wikipedia.org/wiki/Washington,\\_D.C.#Demographics](http://en.wikipedia.org/wiki/Washington,_D.C.#Demographics) (last visited July 8, 2006).

<sup>24</sup> Lois Quinn and John Pawasarat, *Racial Integration in Urban America: A Block Level Analysis of African-American and White Housing Patterns*, rev. Jan. 2003, available at <http://www.uwm.edu/Dept/ETI/integration/integration.pdf> (last visited July 8, 2006).

<sup>25</sup> GreatSchools.net, available at [http://www.greatschools.net/cgi-bin/cs\\_where/DC](http://www.greatschools.net/cgi-bin/cs_where/DC) (enter "4850 Connecticut Ave. NW, Washington, DC 20008" in the Street, City and Zip Code fields, and select "20" in the mileage drop-down field and "High" in the "I'm interested in \_\_\_ schools" drop-down field; then follow "Ethnicity" tab) (last visited July 8, 2006).

<sup>26</sup> District of Columbia Public Schools: Just the Facts, available at <http://www.k12.dc.us/dcps/offices/facts1.html#2> (last visited July 8, 2006).

<sup>27</sup> 347 U.S. 497, 498-99 (1954).

<sup>28</sup> 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

<sup>29</sup> See KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA 249 (2005).

<sup>30</sup> See *id.* at 250.

<sup>31</sup> See *id.* at 250-1 (quoting *Hobson*, 269 F. Supp. at 482).

<sup>32</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>33</sup> 411 U.S. 1 (1973).

# REPARATIONS CONFERENCE KEYNOTE SPEECH: SHOULD AMERICA PAY?

*Speech by Professor Raymond Winbush\**

I'm going to let you know that I'm not an attorney, I'm a psychologist by trade. And some of you may say, well why did you get involved with reparations if you're a psychologist? About twenty years ago, I heard a woman give a speech by the name of Audrey Moore. She was more popularly called Queen Mother Moore. You know, sometimes you can listen to one sentence in a speech and say "that's it." She said that, "all of the struggles of African Americans in this country since 1690 has been to repair the damage of enslavement and white supremacy." Just that one sentence. That's why I thought about the civil rights movement -- Harriet Tubman, Sojourner Truth, and others -- and I said "that's it." It was the issue of repairing.

So, Africans and Americans have talked about reparations since 1690 in some form or another. We always talk about the modern reparations movement. I always ask the question, well, when did it begin? It began in the 17th century. I discovered one of the earliest documents discussing whether America should pay. In 1782, a woman by the name of Belinda, who was a former slave in the state of Massachusetts, asked her former master right after the revolutionary war for reparations because she had worked for him. She asked for a pension of \$15 a month for the rest of her life, because, as she says in her petition, she made him rich. She worked for the Isaac Royal family, right outside of Boston. Believe it or not, the Massachusetts state legislature granted her a pension. This is the first indication of reparations won by an African in this country in 1782. There's nothing new about the issue of reparations.

About three weeks ago, I got a call from, the International Lawyers Guild. A group of Liberian workers with Firestone in California brought a lawsuit against their former employer, Firestone, for slave-like conditions in Liberia. They are currently living in California, and have fled the regime of Charles Taylor. Charles Taylor was arrested and will be tried for war crimes for preventing workers from suing Firestone, even though he knew of the slave-like conditions in gathering rubber throughout Liberia. This petition describes the conditions of the workers in Liberia, which is horrendous. The children get up every morning at 4:00 and they have to tap the latex rubber out of the trees at the rate of 1,500 trees every day. Their entire families and their whole lives are centered around gathering this rubber. I remember when I was little, my father used to say, you should never buy Firestone tires. I don't know if it was for that reason, but I never did. And now I never will because of what has happened with those workers. The issue of reparations is global. It involves African people and other groups throughout the entire world, not only in this country.

In the past seven months, there have been two women in my life that have been the center of my life. The first woman has the name of Katrina. The storm Katrina that hit the Gulf Coast last

summer is probably the single biggest social damage done to African Americans in this country since enslavement. The Institute for Urban Research has stated that all of the survivors of Katrina are now scattered in 50 states. The aftermath of Katrina should have removed all doubt from the minds of African Americans about how this nation looks at black folk. I'm still amazed that there are some 3,000 children missing from Katrina and no one knows where they are.

The second woman is Oprah Winfrey. I was in Barbados in late August of last year. My cell phone rang and on the other side of the phone the person asked, "May I speak to Dr. Winbush?" And I said, "This is he." The voice said, "This is Oprah Winfrey." I said, "Who is this?" I thought it was one of my students at Morgan playing a joke, but it really was her. And Oprah asked me if I had seen the movie *Crash*. I said that I had. She asked me would I be on the show and you don't say "no" to Oprah, so I agreed to do the show. I became kind of the Dr. Phil of the show when it was first broadcast in September. The criticism I have of *Crash* is that it talked about individual racism. But it does not talk about institutional racism. It's almost like after you leave the film, you're saying "everybody is racist." It really doesn't do justice to the idea of what racism is all about, but go see *Crash*. I know a lot of people have been using it as a springboard for discussion.

I believe three things about racism and White supremacy in the world. First of all, the issue of racism is a global issue. It is not confined to the nation of the United States. It's all over the world. When I taught at Fisk University before coming to Morgan, my assistant there was Naomi Tutu, the daughter of Archbishop Desmond Tutu. I've had many privileges of talking to what we call, La Arch, about the global nature of racism. The second thing about racism is that it is embedded in the very fabric of the United States. It's a part of this nation. In Derek Bell's book, a law professor who resigned at Harvard, and is at NYU now, *Faces at the Bottom of the Well*, Bell says that there will never be a time in this country where there is no racism. I don't think in twenty or thirty years we're going to say "remember when we had racism back in the early 21st century." Racism is a part of who we are as a nation. And a lot of times we're in a state of denial about it. I was very struck by the arguments right after Katrina, because we always have this discussion. Well, they weren't discriminated against or they weren't left on the rooftops because they were black, they were left on the rooftops because they were poor. So it's a class issue rather than a race issue. This country has always been in denial about that very issue. Then the third point that I believe about racism is that it is very difficult to talk honestly about race in the United States. If you lie about racism, you can become a Justice on the United States Supreme Court. You can become National Secu-

rity Advisor and be promoted to Secretary of State. But if you tell the truth about racism, you could be in trouble. Ask Martin Luther King, Fanny Lou Hamer, or Mother Rosa Parks.

I think what reparations does is afford us an opportunity to talk honestly about race in the country. I heard it on the previous panel where someone said that this country has so many myths floating around about racism. We have myths from “Lincoln freed the slaves” to “Sally Hemmings and Thomas Jefferson were in love with each other.” I remember right before I moved to Baltimore, I was packing and saw this CBS mini-series about Thomas Jefferson and Sally Hemmings, which they advertised as the greatest love story ever told. Thomas Jefferson did not love Sally Hemmings. He raped Sally Hemmings, systematically, beginning when she was only 15 years old. If he had been alive today, he would be on trial for statutory rape. So we have these myths, these American myths that govern how we look at everything, including the issues of reparations. If you listen to Limbaugh, he will say things like, well I’m not going to pay people any money for reparations, they just want a handout from the government. But, the reality is that it’s not a handout from the government.

I’m going to read something from *Warrior Method*, something that took place in 1918 in this country. How many of you know how many lynchings took place in the United States, roughly from 1865 up until 1994? Tuskegee University kept track of them - an estimated 24,000. I’m always fascinated by the pictures of the lynchings of White people looking at the black people as their bodies were being burned. I want to read this one story, “The lynching of Mary Turner,” reported in *The Crisis Magazine* in 1918. In the article, W.E. Dubois “confirms the inability of black men and black women to protect one other from violence. After her husband had been lynched in Valdosta, Georgia, Turner made the mistake of making public her intention of seeing her husband’s murderers put to death.” Now let me set this up, Mary Turner’s husband had been lynched in Valdosta, Georgia on a Tuesday in October of 1918. The myth is that most black men were lynched because they had whistled at a White woman. In fact most black men were lynched in the South for their land. The boys, in fact, coined a phrase “White happy.” Mary Turner’s husband had been lynched for this reason on a Tuesday. She asked her employer, a White woman, if she could have the next day off from work. Her employer said no, that she had to come to work, clean the house, wash the dishes, take care of the children. I can imagine, as Mary Turner walked to her employer’s house that she was angry, she was hurt, she was grieving, and she made the mistake of telling the White woman that she was going to see that her husband’s murderers were put to death, not knowing that the husband of her boss, was one of the men who lynched her husband. “When word of her defiant promise reached those who had participated in her husband’s murder, they kidnapped her from her house. Although she was eight months pregnant, she was hanged upside down from a tree and bathed with gasoline. After burning her clothes from her body, her stomach was cut open and the infant fell to the ground. It gave out a whimper before a man crushed the baby’s head with

his shoe. When found, Ms. Turner’s body was riddled with hundreds of bullets. The autopsy report said 538. Her murder was casually reported by the press as the result of her ‘unwise remarks concerning her husband’s death.’”

That was the lynching of Mary Turner. Mary Turner wanted justice, she wanted reparations. Reparations have nothing to do with a handout, no more so than if somebody breaks the window out of your car and you go to court and the person who broke the window says you just simply want a handout. No, you just want justice, and Mary Turner wanted the same thing.

I want to read a letter that was written in 1865. It’s in *Should America Pay?* and was written by a man by the name of Jordan Anderson. He had been enslaved on the Anderson plantation. In 1865 his former master Colonel P.H. Anderson wrote Jordan who was living in Dayton, Ohio. It said, “Jordan, would you come back to Big Spring, Tennessee and work on the plantation again?” Jordan was living with his wife and his children, and this is the actual letter that he wrote back to Colonel Anderson. “To my old master Colonel P.H. Anderson, Big Spring, Tennessee. Sir, I got your letter and was glad to find that you had not forgotten Jordan and that you wanted me to come back and live with you again, promising to do better for me than anybody else can. I have often felt uneasy about you.” The black folk called that a signifier. He didn’t say I hate you, you make me sick, you must be crazy to think I’m coming back to Tennessee. He said I have often felt uneasy about you. “I thought the Yankees would have hung you long before this for harboring Rebs they found at your house. I want to know particularly what the good chance is you propose to give me. I am doing tolerably well here. I get \$25 a month with vittles and clothing. I have a comfortable home for Mandy. The folks here call her Mrs. Anderson.” Now he’s signifying again because he knew that his former slave master would not call his wife Mrs. Anderson. “And the children Millie, Jane, and Gruden go to school and are learning well. We are kindly treated here in Dayton. As to my freedom, which you can say I can have, there is nothing to be gained on that score, as I got my free papers in 1864 from the Provost Marshal General of the Department of Nashville,” and in doing the research, I found out that was on the campus of Fisk University where I used to teach, which you know was founded in 1866 as a haven for the formerly enslaved Africans in this country. “Mandy says she would be afraid to go back without some proof that you were disposed to treat us justly and kindly.” Black folk are always talking about justice, always talking about justice. “And we have concluded to test your sincerity by asking you to send us our wages for the time we served you. This will make us forget and forgive old scores, and rely on your justice and friendship in the future. I served you faithfully for 32 years and Mandy, 20 years. And \$25.00 a month for me and \$2.00 a week for Mandy, our earnings would amount to \$11,680.” That’s reparations. Notice the stages of reparations that John Van Dyke, a legal scholar, talks about it. First, apology, tell us that you’re going to pay us, and then accountability. A lot of times I’m disturbed in the reparations struggle when people say, “Well this ain’t about money.” It is about money, and it’s about

scholarships, and it's about justice. "Add to this the interest for the time our wages have been kept back and deduct what you paid for our clothes and three doctors visits to me and pulling a tooth for Mandy, and the balance will show what we are in justice, entitled to." He's used the word justice three times before the letter is even over. "Please send the money by Adams Express. In care of V. Winters Esquire, Dayton Ohio. If you fail to pay us for our faithful labors in the past, we can have little faith in your promises in the future." Now see, this is one of the reasons why I think there's always been this tension between black folk in this country, because we know that this country has been a fickle lover to us at so many levels. "We trust the good maker has opened your eyes to the wrongs which you and your fathers have done to me and my fathers in making us toil for you for generations without recompense. Surely there will be a day of reckoning for those who defraud the labor of his hired," quoted from the Bible. "In answering this letter, please state if there will be any safety for my Millie and Jane who are now grown up and both good looking girls." The first sexual encounter of most White males on the plantation was with black women. "You know how it was for poor Matilda and Catherine. I would rather stay here and starve and die, if it come to that, than have my girls brought to shame by the violence and wickedness of their young masters. You will also please state reparations if there has been any schools opened for the colored children in your neighbor-

hood." Now you know good and well that there were no schools for black children in Big Springs, Tennessee in 1865, but he asked, "The great desire of my life now is to give my children an education and have them form virtuous habits. Say howdy to George Carter and thank him for taking the pistol from you when you were shooting at me. From your old servant, Jordan Anderson."

What was interesting about that letter, when I was doing research on *Should America Pay?* I actually contacted the descendants of Colonel Anderson, I couldn't find Jordan's descendants, but I did find some of them were still living in Big Springs, Tennessee. What's amazing is that the current living relatives of Colonel Anderson are still angry at Jordan for not coming back or to say that he should have been faithful and come back to the plantation to help out because he knew that the plantation was in such disrepair because of the Civil War.

But the point I'm making is this that all of these wounds in South Hampton County, in Big Springs, Tennessee, and unfortunately New Orleans are still open. We have not done the repair in this country that is necessary to heal about racism. As I grow older, I am very cynical about the fact of whether this country will ever resolve its issues of racism, because in this country, people do not want to speak the truth about it. They're in a state of denial about it, I think in order for reparations to begin we must all engage in the necessary dialogue.



**"Until lions have historians,  
hunters will be heroes."**

**-Kenyan Proverb**

\*Raymond A. Winbush, Ph.D. studied psychology at Oakwood College in Huntsville, Alabama. At the University of Chicago, Dr. Winbush earned his Masters and Ph.D. in psychology in 1973 and 1976 respectively. In 1976, Dr. Winbush took adjunct professorships at Oakwood College and Alabama A&M University in Huntsville. In the fall of 1980, Dr. Winbush accepted a position as Associate Professor of Human Resource Development at Peabody College at Vanderbilt University. While at Vanderbilt, Dr. Winbush studied African-American culture and served as an adjunct professor in the Department of Psychology. Dr. Winbush soon accepted the position as Assistance Provost and Director of the Johnson Black Cultural Center at Vanderbilt.

In 1995, Dr. Winbush left Vanderbilt to be named a Benjamin Hooks Professor of Social Justice at Fisk University and Director of Fisk University's Race Relations Institute. In 1996, as part of his work as a consultant and web site curator of the Encyclopaedia Africana Project, Dr. Winbush traveled to Ghana

for a research fellowship where he studied the last two years of Du Bois' life in Accra, Ghana, and West Africa. Upon his return to Fisk University in 1997, Dr. Winbush received a \$2.6 million grant from the Kellogg Foundation to establish a "National Dialogue on Race" and promote regional conversations on about race relations. Dr. Winbush organized and engaged in provocative dialogues focused on race relations with social and political figureheads such as Dr. John Hope Franklin, Chuck D, Max Roach, U.S. Rep. John Conyers, Erykah Badu, and Goodie Mob. In 2001, Dr. Winbush authored and published *The Warrior Method: A Program for Rearing Healthy Black Boys*, and in 2003, Dr. Winbush edited and published *Should America Pay? – The Raging Debate on Reparations*.

Dr. Winbush currently serves as the Director of the Institute for Urban Research at Morgan State University where his research interests include infusing African-American studies into school curricula, African-American adolescent development, Black male and female relationships, and the influence of hip-hop on contemporary American culture. He is also working on a special project called the Institute for Reparations Information Strategies and Education with the mission of educating the American public on the issues of reparations. Dr. Winbush sits on the executive board of the National Council for Black Studies (NCBS) and is the former president of the Southern Region of the Association of Black Cultures Center. Radio and television guest appearances include the CBS Morning Show and Black Entertainment Television (BET).

# BOOK REVIEW

## WHITE MONEY/BLACK POWER

BY NOLIWE M. ROOKS. BEACON PRESS (2006). ISBN 0807032700.

*Reviewed by Cecily Chambliss\**

Sociate Director of Princeton University's African-American Studies program, Noliwe M. Rooks, details the history of African-American Studies programs in the United States and questions their future in *White Money/Black Power*. Rooks divided her analysis into two sections. The first section chronicles the programs' turbulent beginnings on the campus of San Francisco State University and its initial support from the Ford Foundation. In the remaining section, Rooks questions the survival of such programs amidst a variety of factors, including negative stereotypes and declining African-American student enrollment. The programs, which transitioned from the name "Black Studies" to "African-American Studies" in the 1990s, have become an integral part of African-American history within the academic community.

The emphasis Rooks' historical account places on the multicultural group of students who sparked this movement is distinct. The images associated with the San Francisco State University protests in the late 1960s typically depict militant African-American students pitted against armed police officers. However, Rooks stresses that these efforts began as a multicultural endeavor among African Americans, Whites, American Indians, Asian Americans, and Latinos. Together these students demanded the creation of a Black Studies Department and a separate Ethnic Studies Department to meet the needs of "third-world" students. According to Rooks, between 1968 and 1971, these diverse groups of students committed themselves to create nearly 300 Black Studies Departments on college campuses throughout the country.

As the title suggests, Rooks highlights the influence of the philanthropic efforts of the predominantly White institution, the Ford Foundation. The fruits of the students' endeavors were generally attributed to college administrators succumbing to the pressure of their demands. In 1966, however, the Ford Foundation's new president McGeorge Bundy made it the foundation's priority to address the country's race problem by realizing his goal of racial inclusion in the United States. The initial direction of Black Studies programs is credited to college administrators and African-American intellectuals. However, the leading intellectuals of the day could not agree on the curriculum or overall direction. Many felt Black Studies programs should serve as a means of integrating African-American students into the university settings, a recruitment tool, or even a form of segregating the students from their White peers. Rooks recounts the 1968 Yale University conference where Mr. Bundy enthusiastically an-

nounced his curriculum plans for a degree in Black Studies programs, which became a guideline for programs across the country. To Rooks, Mr. Bundy's conference appearance signified the Ford Foundation's dedication to the program, which would eventually donate nearly \$20 million throughout the programs' existence.

Despite the strong emphasis placed on the Ford Foundation, Rooks does not give the highly revered organization a proper introduction. She discusses the Ford Foundation without even a brief history of the charitable organization. It is as if Rooks continues an earlier conversation with an acquaintance already familiar with the subject matter. This noticeable oversight stands out when compared to the extensive background information Rooks provides about the events surrounding the programs' inception.

In *White Money/Black Power's* second section, Rooks evaluates the current state of African American Studies programs on today's college campuses. She makes much of her analysis through her own personal experience as the creator and director of the African-American Studies program at University of Missouri-Kansas City in 1995. Along with accounts from other program directors and scholars, Rooks suggests that today's programs are shrouded by stereotypes and misunderstandings. For instance, a variety of students question the viability of a degree in such a field, while college administrators only see the program as a recruitment tool for African-American students and faculty. Rooks states that such stereotypes led to the declining enrollment of African Americans in these programs in recent years. These and several other factors lead Rooks to believe that these programs will struggle to re-define themselves for future college students.

Although Rooks does an excellent job recounting the history of African-American Studies, her efforts become more convoluted when discussing the book's second section regarding the programs' future. Rooks does not devote enough energy in exploring the future of African-American Studies, devoting only one fourth of her analysis to this element which makes the book culturally relevant today. Despite the book's brief analysis of the program's future, Rooks recounts the programs' history exceptionally. By demonstrating the programs' multicultural roots, Rooks contradicts the customary images of this era. Her excellent historical account provides readers with a solid foundation to help ensure the survival of African-American Studies programs of tomorrow.

\* Cecily Chambliss is a second-year law student at American University Washington College of Law and staff writer for *The Modern American*.

# LEGISLATIVE UPDATES

By Daniel Raposa\*

## **H.R. 161 Healthy People, Healthy Choices Act of 2005 (Millender-McDonald)**

This bill would let the Centers for Disease Control and Prevention (CDC) create minority health programs. The bill cites the obesity epidemic and the staggering 61% of American adults who are considered to be overweight. Complicating this scenario is the lack of culturally sensitive healthcare which delves into the intricacies of cultural attitudes and ways of life, particularly toward eating. The result is exacerbated obesity and health problems for minority citizens. The bill also finds that many African-American and Latino individuals are afforded less leisure-time physical activity than whites and so the health issues can be more endemic.

The bill would let CDC conduct outreach and awareness programs to minority populations concerning: nutrition, fitness, dietary supplements, cooking, and other lifestyle issues.

It would allow for grants to nonprofit health organizations serving minority populations. It would also allow grants to community organizations who facilitate healthy food products

## **H.R. 663 Ex-Offenders Voting Rights Act of 2005 (Rangel D-NY)**

This bill secures voting rights of certain qualified ex-offenders who have served their sentences. It defines the right to vote as “the most basic constitutive act of citizenship and regaining the right to vote reintegrates offenders into free society.” Congress has the ultimate say on federal elections and must ensure that state laws comply with the Constitution. Just under 4,000,000 Americans are disenfranchised due to a felony conviction. This disenfranchisement severely affects minorities relative to the populace at large. Particularly, among African-Americans, 13% of males are unable to vote.

The crux of the law states that the right of an individual citizen of the United States, who has committed a criminal offense, to vote for elections for federal office will not be abridged unless that citizen is currently in a correctional institution or is on parole or probation.

## **HCON 234 IH Whereas 8.2 percent of Whites, 11.8 percent of Asians, 22.5 percent of Latinos, and 24.4 percent of blacks lived in poverty in 2003,**

This bill reaffirms the obligation of the U.S. to improve the lives of the now estimate 37,162,000 Americans living in poverty and also the 15.6 million Americans living in extreme poverty. The resolution cites particularly that surveys on food security have revealed that those at greatest risk of being hungry or on the edge of hunger are households headed by blacks or Latinos. It also recognizes that families with children are the largest growing section of the homeless population.

## **S 2504 End Child Poverty Act (Kennedy D-MA)**

The bill aims to eliminate child poverty. It finds that 13,000,000 children in the U.S. live below the poverty line. Most of these children’s parents are working and otherwise leading lives which should produce decent standards of living. This poverty among youth stifles their ability, in turn, to become productive adults: often keeping them back in school and exposing them to myriad health risks such as lead poisoning.

The bill also notes the rise in child poverty since 2000. Child poverty is much higher in the United States than in other developed nations. Particularly, nearly one third of Latino and African-American children live below the poverty line.

Citing Prime Minister Blair’s public commitment to cut poverty by 50% in 10 years, the bill ends it completely by 2020. The initiative has successfully lifted 2,000,000 children out of poverty in Great Britain. The bill sets a national goal of cutting child poverty in half within a decade, and eliminating it as soon as possible. It would also establish a Child Poverty Elimination Trust Fund as a measure to fund Federal programs to achieve that goal.

The bill would also establish a Child Poverty Elimination Board which would have 12 voting appointees, 2 senators and 2 representatives chosen in a bipartisan fashion, and other members to be determined. The board would meet regularly to build upon strategies at meeting the goal of reducing child poverty and also to oversee the Trust Fund.

\* Daniel Raposa is a second-year law student at American University Washington College of Law and staff writer for *The Modern American*.

# CLOSING FROM THE WOODS CONFERENCE

Along with all who were privileged to attend, I remember meeting Judge Woods at the very first conference back in 1997. He had not been back to the law school since his graduation in 1960, which was regrettable for all concerned. However, he graciously shared details of his journey through very challenging times from humble origins and ultimately to a seat on the bench in Prince Georges County, Maryland. He also expressed his great pride in having graduated from the Washington College of Law. When we heard later that year that Judge Woods had passed away, we were saddened that we would not be able to spend more time with him, but also gratified to have had that all-too-brief opportunity to learn something of life from a wise man.

As we celebrate the tenth conference, now so appropriately named in his honor, we reflect on the objective of the gathering: to examine the impact of law and its profound effects on African American life, work, and learning. We hold in highest regard the many honorable men and women award winners and other participants alike who have deliberated with us each year. We offer sincere thanks to the steadfast men and women of the Woods Conference Planning Committee for their great effort

and care in implementing each of these gatherings. We appreciate anew the Woods family for their yearly presence, their warmth, and their generosity. We contemplate the futures of the young lawyers whom this conference has touched as they step into their places in the profession, and we thank all those alumni who return to take part in the conference every spring.

Thus, as we look back upon the last ten years and all that has made this conference an unqualified success, we hope—we believe—that we continue to honor the pride of place and accomplishment that its namesake—the Honorable Sylvania Webb Woods—conveyed to us in our brief and remarkable meeting of ten years ago. We were, and are, no less proud to claim him as one of our own.



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