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Lizbet Simmons

Book Interview: The New Jim Crow
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Frank Anderson

Conference Highlight: Fifteenth Annual Lat.Crit. Conference
Alex Bernshteyn

Commentary: Environmental Justice and the BP Oil Spill
Perry E. Wallace

Legislative Updates
Keyla Bade
Letter from the Executive Board

The Modern American re-emerged this summer even more modern than ever, after the completion of our seven-month Strategic Plan Initiative. Many of the publication’s changes readers will never see, but others, like our new cover art, design, and content features, are exciting changes for our six-year old publication.

In addition to a newer look and content, TMA has gone digital. Now, TMA offers twenty-first century discussion about law and politics on twenty-first century platforms, including our new blog, Modern America, and our new Digital Commons website. Modern America features regular contributions about current happenings in law, politics, and culture, much like The Modern American print issue. Readers will notice a number of recommended blog entries at the end of articles and features that are topicically-related to the print content, for example. TMA has also joined the Digital Commons, the leading online repository for scholarly legal work in the country. TMA’s Digital Commons page will include dual platform publication of current issues, volume archives, featured content ranked by popularity, as well as another submission venue for authors. We are delighted to join the Digital Commons community, and hope you visit us at our new cyberspace home.

Finally, amidst all of these changes, we are interested in hearing from YOU, our readers, about yourselves and TMA’s coming-of-age. At the back of this issue is our first Readers’ Survey. Please take a few minutes to fill-out the paper or online survey so that we can learn more about our growing audience, and your thoughts about the publication. More we learn about who you are, the better we can fulfill our mission to elevate non-traditional and marginalized voices and issues in the law. Plus, participants will enter a raffle to win an Ipod shuffle. More information can be found at the survey announcement toward the end of the issue.

As the Volume 6 Executive Board makes way for the Volume 7 leaders, we want to thank our readers, authors, staff, advisors, and every other person who helped make Volume 6 and the Strategic Plan such a huge success. We are excited about the publication’s future and wish The Modern American six more ground-breaking years.


The Modern American @ the Digital Commons, http://digitalcommons.wcl.american.edu/tma/.

Sincerely Yours,
The Executive Board
The Modern American

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<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Author(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>A Fraudulent Sense of Belonging: The Case for Removing the ‘False Claim to Citizenship’ Bar for Noncitizen Voting</td>
<td>Anne Parsons</td>
</tr>
<tr>
<td>20</td>
<td>Insecure Communities: How Increased Localization of Immigration Enforcement under President Obama through the Secure Communities Program Makes Us Less Safe, and May Violate the Constitution</td>
<td>Rachel Zoghlin</td>
</tr>
<tr>
<td>36</td>
<td>Caster Semenya and the Myth of a Level Playing Field</td>
<td>Erin Buzuvis</td>
</tr>
<tr>
<td>43</td>
<td>A Price Tag on Constitutional Rights: Georgia v. Weis and Indigent Right to Continued Counsel</td>
<td>Katy Bosse</td>
</tr>
<tr>
<td>51</td>
<td>Buying into Prisons, and Selling Kids Short</td>
<td>Lizbet Simmons</td>
</tr>
<tr>
<td>57</td>
<td>Book Interview: The New Jim Crow: Mass Incarceration in the Age of Colorblindness</td>
<td>Michelle Alexander, Associate Professor of Law, Moritz College of Law, Ohio State University Richael Faithful</td>
</tr>
<tr>
<td>60</td>
<td>Personal Essay: My Ordeal of Regaining Voting Rights in Virginia</td>
<td>Frank Anderson</td>
</tr>
<tr>
<td>62</td>
<td>Conference Highlight: Fifteenth Annual LatCrit Conference</td>
<td>Alex Bernshteyn</td>
</tr>
<tr>
<td>65</td>
<td>Commentary: Environmental Justice and the BP Oil Spill: Does Anyone Care about the “Small People” of Color?</td>
<td>Perry E. Wallace</td>
</tr>
<tr>
<td>68</td>
<td>Legislative Updates</td>
<td>Keyla Bade</td>
</tr>
</tbody>
</table>

I. Introduction

I have been a permanent resident for about 10 years. When I decided to apply for US citizenship, I realized that I might be ineligible because when applying for my first driver's license I also became registered to vote. At the time, I did not understand that permanent residents are not allowed to vote. The fact that a governmental official asked me to register (even though at that point my green card was my only official ID) and actual issuance of a registration card made me even more sure that I am an eligible voter. If I recall correctly, the Election Day was shortly after and I am almost positive that I voted during these elections. However, soon later, when talking with another green card holder I was informed that I am not eligible to vote. Since that point on, I never voted and whenever asked if I wish to register I make a point to inform those who ask that “as a permanent resident I am not eligible.” Other than that, my record is perfectly clean. Do I still have a chance to become naturalized? Is it truly a deportable offense? Is there a way, and should I try to find out whether I actually voted? There must be more people who made the same mistake as I did, is there a way to find out what percentage is denied citizenship on similar grounds?

A little known fact in U.S. history is that noncitizens once had the right to vote in local, state, and even national elections. Today, not only are noncitizens largely prohibited from voting, except in a few local jurisdictions, noncitizens may lose their chance to become citizens, and face the additional threats of deportation and criminal sanctions for voting or merely registering to vote. While noncitizens have always faced consequences for fraud or willful misrepresentation of a material fact under the Immigration and Nationality Act (“INA”), the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (commonly known as “IIRIRA” or “IIRAIRA”) changed the law in several ways, including by adding specific grounds of inadmissibility and removability related to voting in any local, state, or federal election.

This paper criticizes IIRIRA’s addition of the “false claim to citizenship” provision to regulate noncitizen voting as inconsistent with the proper role of immigration law in creating and defining the body politic. Part I explores democratic concepts of citizenship in the context of noncitizen voting rights. This view of citizenship as political voice and belonging, however, must inevitably confront the perceived imperative of the modern nation-state to create legal distinctions between citizens and non-citizens. Part I then explores how the U.S. does so by examining theories underlying the naturalization process and looking specifically at how “citizenship” is defined in current U.S. immigration law.

Part II briefly examines the connection between immigration policy and the gradual erosion of noncitizen voting rights as a backdrop to IIRIRA’s creation of the “false claim to citizenship” provisions. In Part III, the paper argues that the IIRIRA amendments to the “false claim to citizenship” provisions have several negative consequences. First, the provisions risk unnecessarily excluding or deporting viable candidates for citizenship, including long-time legal permanent residents (“LPRs”) like the individual in the epitaph. Second, these provisions validate unfounded concerns about noncitizen voter fraud, thereby further polarizing the immigration debate in unproductive ways. And third, the provisions are inconsistent with the underlying goals of the naturalization process, and jeopardize noncitizens’ opportunity for meaningful political participation.

The paper concludes by suggesting various ways the false claim to citizenship provisions could be reformed, arguing that removing the immigration consequences for noncitizens who vote is most in line with democratic ideals. It calls upon immigrants’ advocates to reconsider arguments for extending voting rights to noncitizens in light of predicted demographic change and the growing push for Comprehensive Immigration Reform.

II. What Makes a Citizen?

The legal definition of “citizen” is “a person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections.” Constitutional democracies are premised on the notion of consent by the governed, with the vote serving as the primary mechanism through which members of the polity realize democratic ideals. All democracies index insiders and outsiders based on existing members’ collective notions of who constitutes “the people.” If formal citizenship is the marker of membership in the political community, this means that in a democracy, noncitizens are governed by the laws but do not have a formal voice. Why and how is formal citizenship taken into account in defining noncitizen voting rights? This view of citizenship as political voice and belonging, however, must inevitably confront the perceived imperative of the modern nation-state to create legal distinctions between citizens and non-citizens. Part I then explores how the U.S. does so by examining theories underlying the naturalization process and looking specifically at how “citizenship” is defined in current U.S. immigration law.

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the body politic? In its reference to naturalization, the
definition of citizenship hints at another fundamental
question: how do nations, and the U.S. in particular,
determine who becomes a citizen in the first place?

a. Citizenship as Political Voice and Belonging

Today, with a few exceptions, formal citizenship is
the primary marker of an individual’s inclusion or exclusion
in the body politic in the U.S. Despite the fact that certain
classes of noncitizens, LPRs in particular, share many
characteristics with citizens—they pay taxes, own property, and serve in the
armed forces—only citizens can vote. And yet, this has not always been the case.

In his socio-historical account of noncitizen voting rights in the
U.S., Maryland State Senator and Law Professor Jamin Raskin, notes that the
extension of voting rights to noncitizens by states stemmed from a strong federalist paradigm. Depending on the time
period, states had different reasons for allowing noncitizens to vote. In the eighteenth century, states extended the
right to vote to property-holding white male noncitizens both because they exhibited those attributes most valued in
electors, and because doing so allowed states to justify the exclusion of people without those attributes from the
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vote. In the nineteenth century, states had different reasons for allowing noncitizens to vote. Depending on the time
period, states had different reasons for allowing noncitizens to vote. First, allowing noncitizens to vote served the practical function of assimilating them to local values, a rationale Raskin terms “citizenship as integration.” A third and similar rationale, “citizenship as standing,” reconstitutes the vote as a form of public acknowledgement that noncitizens belong in American society. The latter two rationales provide strong justification for extending the vote to individuals who intend to naturalize. Although current U.S. immigration law does not explicitly distinguish between those who intend to become citizens and those who do not, LPR status is the closest proxy even though LPRs are not required to naturalize. Not surprisingly, serious arguments have been made that LPRs should be able to vote at the local level, and a few localities in the U.S. have extended the franchise to this group. Serious consideration of the first rationale, however, has
noncitizens’ political voice and sense of belonging. As one scholar points out, this may explain why “[noncitizen] suffrage is, at once, insignificant and central” in the U.S.

b. Citizenship as Membership in a Nation-State

In today’s world of increased border restrictions, the effect of immigration law in defining the body politic has become increasingly important. The increasing
overlap between immigration, criminal, and national security law has greatly enhanced the gate-keeping function of immigration law in the U.S. As a prime symbol of these conceptual overlaps, IIRIRA’s amendments to the Immigration and Nationality Act (“INA”) significantly expanded the exclusionary function of immigration law. Historically, immigration law played a minimal role in regulating noncitizen voting rights, which instead were regulated by state election laws. Generally, laws that govern the lives of noncitizens already living in the U.S. are termed “alienage laws,” as distinct from immigration laws which determine who has the right to be present in the first place. In the U.S., both alienage laws that restrict noncitizens’ right to vote, and immigration laws that delineate the grounds of inclusion and exclusion, play a role in defining the body politic. In comparison, in countries such as New Zealand that allow noncitizens to vote in national elections, immigration laws alone define the people. In reality, alienage and immigration laws often overlap, but they remain nonetheless analytically distinct. For example, alienage laws often receive strict scrutiny by the courts, while Congress retains plenary power over immigration law. Though both types of laws play a role in defining the electorate, essentially, this paper argues that using immigration law, rather than alienage law,
to regulate noncitizen voting undermines the democratic ideals the immigration system should seek to promote. A society’s immigration statutes reflect its perception of how the process of national self-definition should take place. Conversely, whether and how a society permits noncitizens to vote depends on that society’s ideas about how the integration of noncitizens should occur. According to Immigration Scholar and Historian Hiroshi Motomura, U.S. immigration law is a blend of three competing views of immigration: immigration as contract, immigration as affiliation, and immigration as transition. Each view reflects a model of justice based on differing notions of the relative equality between citizens and noncitizens. Under the contract theory, citizens and noncitizens are not equal. Lawful immigrants have the right to remain in the U.S. only so long as they obey the rules. For Motomura, contract theory is inadequate as an exclusive foundation for immigration law because the contract is one-sided—the immigrant must take it or leave it. This violates the requirement of consent underlying modern democratic politics. Affiliation is the second conceptual foundation and serves as immigration law’s counterpart to Raskin’s notion of “citizenship as integration.” Viewing immigration as affiliation means that the longer that lawful immigrants remain in the U.S., the more citizen-like rights they gain. Paradoxically, the more the law prioritizes a person’s ties to the U.S., the less important formal citizenship becomes as a means of gaining rights. One form of relief in U.S. immigration law that seems to reflect the affiliation concept is cancellation of removal. Cancellation of removal is a form of relief that allows noncitizens who are otherwise inadmissible or deportable to stay in the U.S. based, in part, on their length of residence in the country and other equities including the presence of family, property, or business ties. In general, Motomura sees current U.S. immigration law as a blend of the contract and affiliation theories. While the rationale for cancellation of removal recognizes the inherent unfairness in severing an individual’s ties to the U.S., in reality, the law also contains an element of contract. To be eligible for cancellation of removal, for example, both LPRs and other noncitizens (“non-LPRs”) must prove that they have not committed certain types of crimes. It is also worth mentioning, though perhaps not surprising, that the law as applied to non-LPRs includes more stringent “contractual terms” in addition to requiring a longer period of residence to establish eligibility.

In contrast to the first two views, immigration as transition means that all lawful immigrants are treated as potential citizens upon entry and thus benefit from a presumption of equal rights. Only when an immigrant expresses her intention not to naturalize would that person lose her citizen-like rights. While not erasing the distinction between lawful immigrant and citizen completely, the view of immigration as transition would tend to support voting rights for intending citizens. Motomura argues that, historically, the concept of transition played an important role. In particular, he points to declarations of intent to naturalize, a feature of U.S. immigration law from 1795 to 1952, which could be filed by eligible noncitizens several years in advance of a naturalization application, and which elevated the noncitizen to a pre-citizen status. For Motomura, the history of transition and its emphasis on inclusion is an antidote to the logic of the other two concepts, which pervades the U.S.’s increasingly restrictive immigration policies.

c. Citizenship in U.S. Immigration Law

If immigration law plays a role in defining the body politic, citizenship and naturalization are the primary means by which it does so. People gain citizenship by birth in the U.S., through naturalization, or in limited cases, by blood. The naturalization process in the U.S. has traditionally been characterized as easy or open by international standards, which reflects the importance of naturalization as a governmental objective. In other words, the U.S. government can justify retaining a firm citizen/noncitizen distinction as an incentive for people to naturalize, so long as it compensates by making the transition to citizenship a relatively quick process. Very generally, to qualify for citizenship, naturalization applicants must have lived in the U.S. for at least five years as an LPR, or three years if they are spouses of U.S. citizens. Applicants must meet a minimum period of physical presence in the U.S., in addition to demonstrating “good moral character.”

In practice, the transition to citizenship is easy for many people, and the denial rate is relatively low. Still, denial rates do not account for those who fail to apply out of fear of being denied. Many potential citizens find the English and civics requirements insurmountable obstacles. Others may not be able to pay the $675 application fee. Still others may not apply out of fear that past crimes or violations of immigration law will lead to a denial, or even deportation. With IIRIRA’s dramatic expansion of the grounds for inadmissibility to, and removal from, the U.S., these fears have gained new currency.
III. From Suffrage to “Falsely Claiming Citizenship”

a. Restrictive Immigration and the Erosion of Noncitizen Voting Rights

An undeniable correlation exists between U.S. immigration policy and noncitizen voting rights. Noncitizens voted and held local office throughout the colonies beginning as early as 1692. The extension of voting rights to noncitizens in the U.S. occurred during a period of relatively open immigration. During the early colonial period, the federal government left the regulation of immigration, including alien suffrage, largely to the states. Its first attempt to create uniformity among the states came with the passing of the 1790 Naturalization Act, which regulated who could become a U.S. citizen. The federal government only began to centralize control of immigration in the late nineteenth century.

Not surprisingly, throughout history, “the rise and fall of xenophobic and nationalist tendencies” has greatly impacted both immigration law and immigrant voting rights. During the War of 1812, for example, increasing suspicion of non-English immigrants decreased popular support for noncitizen voting, though voting rights expanded again in the years leading up to the Civil War. At the height of noncitizen voting in 1875, twenty-two states and territories had extended the franchise to noncitizens. As anti-immigrant sentiment began to rise around the turn of the century, states one by one terminated voting rights for noncitizens. The final end to noncitizen suffrage roughly coincides with the end of World War I, which also put an end to unlimited immigration and led to the creation of a nation-origins quota system.

Even though the U.S. government eventually centralized control over immigration matters, it did not seek to regulate noncitizen voting. In fact, the government did not create a provision barring entry for misrepresentation, the statutory precursor to IIRIRA’s false claims provisions, until after World War II. In 1952, the drafters of the INA supported incorporation of the misrepresentation provision into the permanent statute as an anti-communist measure. Initially, the INA’s provisions related to false claims were narrowly drawn: noncitizens were only guilty of making a false claim to citizenship if the claim was made to a U.S. government official for the purpose of receiving immigration benefits. The 1986 Immigration Marriage Fraud Amendments significantly strengthened the fraud provisions, but continued to limit their application to noncitizens who made material representation for the purpose of receiving immigration benefits.

b. IIRIRA: A Fraudulent Sense of Belonging?

These provisions changed again for the worse in 1996 when President Clinton signed IIRIRA into law. IIRIRA closely followed another piece of legislation, the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which was enacted one year after the Oklahoma City bombing to combat domestic and international terrorism. IIRIRA, on the other hand, focused on illegal immigration reform. According to former INS General Counsel, Paul W. Virtue, IIRIRA represented the culmination of immigration-reform efforts that began with the Republican Party assuming majority control of the House and Senate in 1994. Congress was faced with the task of trying to strengthen our national security in the wake of the 1992 terrorist attacks on the World Trade Center, while at the same time, trying to find a way to discourage illegal migration. What had started as separate bills, one designed to reduce the annual number of family and employment-based immigrants to the United States (legal immigration) and the other designed to address border security and deportation issues (illegal immigration), were combined in each house and then split again due to a concerted grass-roots lobbying effort. Separated from the more popular illegal-immigration bills, the legal-immigration measures were defeated in both houses.

Although Congress rejected the proposed bill on restrictions for “legal immigration,” many of IIRIRA’s provisions, including those related to noncitizen voting, have nonetheless affected authorized immigrants.

Few of IIRIRA’s sixty-plus provisions are immigrant-friendly. To achieve its goal of curbing unauthorized immigration, IIRIRA strengthened border security, initiated the border fence project, added three and ten-year bars to re-admission for immigration violators, tightened eligibility for cancellation of removal, streamlined removal proceedings for certain classes of immigrants, and severely restricted judicial review. The legislation also instituted electronic employment verification pilot programs, and removed public benefits for most undocumented immigrants while tightening eligibility restrictions for lawful immigrants.

Similarly, AEDPA and IIRIRA both expanded the criminal and non-criminal grounds of inadmissibility and removal. IIRIRA also broadened the fraud
provisions of the INA and made penalties more stringent to support efforts to curb unauthorized immigration at the border and in the workplace. IIRIRA added a ground of inadmissibility, which effectively extended the applicability of the general misrepresentation ground to false claims of citizenship made to private employers. It also added a comparable ground of removability and made it a crime to make a false claim of citizenship.

Even though the general false claim to citizenship provisions could technically encompass unlawful voting by immigrants, Congress added parallel provisions to deal specifically with that issue. Section 347 of IIRIRA creates new grounds of inadmissibility and removal for noncitizens who vote in violation of “any Federal, State, or local constitutional provisions, statute, ordinance, or regulation.” Though section 347 technically only applies to noncitizens who have actually voted, a noncitizen who unlawfully registers to vote may also be inadmissible or removable under the broad “any purpose” language of the general false claim to citizenship provisions. In contrast to the unlawful voting provisions, the false claim provisions do not require a finding that the individual violated underlying election law, only that the person falsely represented herself as a U.S. citizen on or after September 30, 1996 for the purpose of registering to vote or voting. Unlike the general false claims provisions, the provisions that apply specifically to unlawful voting are applicable retroactively.

Interestingly, IIRIRA creates two separate criminal penalties for unlawful voting. Section 216 makes noncitizen voting in federal elections a general intent crime, punishable by fine and/or one year prison sentence. In addition, IIRIRA further provides that knowingly making a false statement or claim to vote or register to vote in any Federal, state, or local election constitutes a felony punishable by fine and/or five years in prison. In 2000, the Child Citizenship Act (“CCA”) added an exception to the inadmissibility, removability, criminal prosecution, and finding of lack of good moral character provisions related to false claims to citizenship and unlawful voting, but it is extremely limited in its application.

Given Congress’s addition of specific and undeniably harsh provisions to deal with noncitizen voting, this was presumably an issue of major concern. The legislative history, however, is silent on these provisions. On one hand, their addition makes sense given Congress’s general intent to curb fraud with the enactment of IIRIRA. On the other hand, the provisions do not even loosely relate to the prevention of unauthorized immigration—the prospect of voting in U.S. elections is not likely a main reason that people cross the border without authorization. Perhaps the provisions were meant to appease those voters who believe that politicians should not pander to noncitizens who cannot vote anyway, though this is merely speculation. Whatever the reason, as discussed below, the impact of the provisions clearly falls hardest on legal immigrants, specifically those applying to adjust status and legal permanent residents.

IV. The Negative Consequences of an Illogical Punishment

a. Immigration Consequences of Falsely Claiming Citizenship

Although noncitizens are prohibited from voting in all federal, and most state and local elections, registering to vote as a noncitizen is fairly easy and many noncitizens may do so inadvertently. The National Voter Registration Act of 1993 (also known as the “Motor Voter Act”) requires states to provide individuals with the opportunity to register to vote when they apply for or renew their driver’s license. Only fifteen states require documentary proof of citizenship at the Department of Motor Vehicles (“DMV”). Many states simply require the driver’s license applicant or the DMV clerk to check a box to indicate the individual’s citizenship status. Other states do not require any proof of citizenship. DMV employees routinely ask driver’s license applicants whether they would like to register to vote and do not have to verify that the person is actually eligible to vote. Noncitizens asked by a governmental official may assume they are eligible. Similarly, community-based organizations and voter registration campaigns may also encourage noncitizens to vote. Lastly, in contrast to the first two situations in which the noncitizen registers inadvertently, the possibility exists that some noncitizens knowingly, and without encouragement, register to vote and vote.

The above scenarios raise a key question—the issue of intent. The provisions that specifically address unlawful voting do not explicitly require intent. If a noncitizen votes in violation of federal, state, or local election law, that individual may be found inadmissible or removable under these provisions.

Intent does come into play, however, in the determination of whether the noncitizen violated election law by voting if the election statute requires a showing of specific intent. Department of Homeland Security (“DHS”) policy guidelines clarify that in cases where the underlying election law requires a finding of specific intent, adjudicating officers must assess the circumstances surrounding the voting accordingly. If the officer determines the individual knowingly violated the relevant election law, the individual is removable subject to the officer’s exercise of discretion.
or removability under the false claims provisions, for noncitizens who are charged with inadmissibility would clearly result in fewer immigration consequences. It is less clear whether an individual can be deemed inadmissible or removable absent a showing of intent under the general provisions, which apply to false claims of citizenship for any purpose or benefit under state or Federal law. The answer may hinge on the meaning of “false” in the context of these provisions, a question which, to date, no courts have addressed. One citizenship expert suggested conflicting interpretations of the provision based on two distinct meanings of “false.” A court may construe the provision as embodying an intent requirement based on the common understanding that false implies “intentionally untrue.” On the other hand, a court may construe Congress’s use of “falsely claiming” as an attempt to distinguish this provision from adjacent ones dealing with fraud and misrepresentation. The former provision would clearly result in fewer immigration consequences for noncitizens who are charged with inadmissibility or removability under the false claims provisions, but for the moment, there is little indication how the immigration agencies are actually implementing them.

The fact that a noncitizen voted or registered to vote may become relevant at four points: application for a nonimmigrant visa, application for relief from removal, adjustment of status, and naturalization. It is unclear if and how the various immigration agencies’ policies for handling noncitizen voting issues differ, and whether some agencies go to greater lengths than others to determine whether a noncitizen has unlawfully voted or registered to vote. Still, the following discussion outlines the provisions’ potential to negatively impact noncitizens at each stage.

### i. Application for Nonimmigrant Visa

The provision may impact “nonimmigrants,” a legal term used to designate noncitizens whose presence in the U.S. is authorized on a temporary basis. A nonimmigrant visa applicant who violates the false claims or unlawful voter provisions can apply for a waiver. An otherwise inadmissible applicant may only be granted admission as a temporary nonimmigrant at the discretion of the Attorney General. To qualify for a nonimmigrant visa, however, most applicants must demonstrate that they do not intend to stay in the United States. An individual who has previously voted or registered to vote in the U.S. will likely have a hard time convincing a consular office that she does not have the intention of staying. Thus, in most circumstances the waiver will mean very little.

### ii. Adjustment of Status

Under the INA, adjustment of status is treated as an admission to the U.S. Thus, if a noncitizen becomes inadmissible as result of making a false claim to citizenship for the purpose of voting or registering to vote, or voting unlawfully, this will bar her from adjusting her status to permanent residence. While there is a waiver available for immigrants who are inadmissible under the general misrepresentation provision, there are no waivers available for those who are found inadmissible as a result of false claims to citizenship or unlawful voting.

Currently, it is unclear how aggressively DHS checks whether an applicant has registered to vote at the adjustment of status stage. There are no questions pertaining to unlawful voting on the adjustment of status application. Still, some applicants have been denied on these grounds. Regardless, given the increasing integration of government databases, a mere change in policy could make screening of this kind routine procedure.

### iii. Relief from Removal

If a noncitizen is found removable as a result of voting-related violations, she can still apply for relief from removal. Unlawful voting or a false claim to citizenship can affect eligibility for relief in several ways. First, if the individual is in exclusion proceedings and the violation constitutes a crime involving moral turpitude, the individual will be statutorily barred from applying for non-LPR cancellation of removal. DHS has determined that a conviction under 18 U.S.C. § 1015(f), the specific intent provision, constitutes a crime involving moral turpitude. There do not appear to be any cases challenging this designation, perhaps because convictions for knowingly making a false statement or claim to vote or register to vote are rare. In the same policy statement, DHS indicates that a conviction under 18 U.S.C. § 611, the general intent provision, likely do not constitute a crime involving moral turpitude. Interestingly, if a noncitizen were found to have been convicted of a crime involving moral turpitude as a result of unlawful voting or false claims to citizenship, theoretically that individual could apply for a discretionary waiver, even though there is no way to directly waive the false claim to citizenship or unlawful voting grounds of inadmissibility. If the individual is in removal proceedings, rather than exclusion proceedings, false claims to citizenship constitute an independent bar to non-LPR cancellation of removal. Second, even if the conviction does not constitute a crime involving moral turpitude a violation may preclude an individual from establishing good moral character, a statutory requirement for certain forms of relief such as non-LPR
cancellation of removal and voluntary departure. Any two or more convictions, regardless of whether the offenses involve moral turpitude, can preclude a finding of good moral character if the aggregate sentences to confinement were five years or more. Additionally, confinement to a penal institution for 180 days or more bars a finding of good moral character. An individual can only avoid the bar if he or she met the narrow exception established by the CCA.

Lastly, even in the absence of a criminal conviction, a violation negatively affects into the discretionary analysis accompanying many applications for relief including asylum, voluntary departure, and both LPR and non-LPR cancellation of removal. For noncitizens who lack strong equities, voting or registering to vote, could be a deciding factor in a denial of relief, depending on the immigration judge. Further, many types of discretionary decisions are not subject to judicial review.

iv. Naturalization

The provisions’ biggest impact is likely to be at the naturalization stage. After IIRIRA, all officers conducting naturalization interviews are required to ask the applicant if she has ever voted or registered to vote in any election in the United States. In addition, the application for naturalization was amended to include questions related to false claims and voting. If the individual violated relevant election law or made a false claim to citizenship when registering to vote or voting, and the applicant does not qualify for one of the CCA exceptions, the adjudicator’s decision to initiate removal proceeding is one of prosecutorial discretion.

If the adjudicator decides that the case merits prosecutorial discretion, the adjudicator must still make a good moral character finding. If a noncitizen has actually been convicted under either of the voting related provisions, then the same analysis outlined above applies. In the absence of a conviction or a finding that a conviction constitutes a crime involving moral turpitude, DHS policy guidelines suggest that if the violation occurred in the distant past and the individual can establish good moral character “in spite of making a false claim to U.S. citizenship,” the adjudicator may exercise her discretion favorably, though DHS guidelines set the bar fairly high. If the adjudicator denies the application, the noncitizen must apply for administrative review of the decision within thirty days. If she fails on the second review, as a last resort, the applicant can petition a federal district court to conduct a de novo review of her eligibility for naturalization.

It is impossible to tell how often voting-related false claims determine the outcome of an application because DHS does not publish statistics of its denial rate specific to these grounds. It is equally impossible to tell how many LPRs do not file applications for fear that they will be denied. The lack of immigrant waiver and very limited exception means the laws will have the hardest impact on applicants at the adjustment of status and naturalization stages, in other words, the most viable candidates for citizenship.

b. Polarizing the Immigration Debate

Immigration law defines the body politic “by establishing a ladder of accession to permanent residence and then formal U.S. citizenship.” The immigration debate focuses on what set of criteria a noncitizen must be required to meet before her inclusion into the body politic. Although lawmakers may have rational reasons for withholding voting rights for noncitizens, it does not follow that it is thus rational or necessary to deny immigration benefits to and potentially deport noncitizens who vote or register to vote in violation of election law.

Congress enacted IIRIRA in response to the growing fears over “illegal immigration.” Ironically, since the enactment of IIRIRA, immigration experts have criticized the legislation on the grounds that it has contributed to an increase in the number of unauthorized immigrants in the U.S. It is no coincidence that IIRIRA passed shortly after AEDPA, which Congress enacted primarily to combat the threat of international terrorism. Advocates and academics alike have decried the increasingly frequent discursive linkages made by lawmakers between illegal immigration, crime, and terrorism as a sort of fear-mongering. While the rule of law and national security are undeniably of utmost importance to all members of a society, the negative consequences of this rhetoric are clear: an increasingly polarized, and oftentimes vitriolic, immigration debate.

The thrust of the debate is the big question of line drawing—who is “in” and who is “out” and, just as important, who has the right to decide. In the context of voting rights, the debate centers on the issue of voter fraud. Anti-immigrant advocacy groups and media personalities frequently allege that noncitizen voting is undermining the integrity of the electoral process and manipulating election outcomes. These voices use fear of widespread voter fraud by noncitizens to gain support for stricter immigration policies. The false claims and unlawful voter provisions validate and legitimize those fears, regardless of the real—de minimis—extent of the problem.

Those seeking to counter claims of widespread voter fraud by noncitizens frequently argue that voter fraud is rare,
largely because the consequences of committing voter fraud are so disproportionate to the individual’s gain of a single vote.\textsuperscript{152} Though convincing, this argument is not alone sufficient to counter arguments in favor of maintaining the IIRIRA provisions. For one, if noncitizen voter fraud is a myth then the false claims and unlawful voting provisions do no harm. Likewise, one might argue, if noncitizens do commit voter fraud, then the provisions are necessary as a deterrent in the rational actor’s cost-benefit analysis. There are several responses, however, that highlight both the irrationality and the destructive effect of IIRIRA’s false claims and unlawful voting provisions.

First, even if noncitizens are voting or registering to vote, studies have largely debunked the myth that noncitizen voting has improperly influenced elections.\textsuperscript{153} Those individuals who violate election laws likely do so unintentionally. Either they believe they are citizens, or they are not aware that only citizens can vote. Many noncitizens may register to vote, at the DMV for example, but never actually cast a vote, in which case they have no effect on the outcome of elections. There have been a few incidents or allegations of larger-scale voter fraud.\textsuperscript{154} In those types of cases, however, individual noncitizens are led to believe they can vote by trusted community-based organizations. These situations are likely to be rare. Even where noncitizens face draconian enforcement measures, like what is currently happening in Arizona,\textsuperscript{155} immigrant advocacy groups are unlikely to risk the political and criminal consequences of encouraging noncitizens to vote when alternate methods of advocacy exist. Thus, as long as advocacy groups are aware of the voter restrictions, they are unlikely to use noncitizen voting as a strategic tool.

Second, the IIRIRA provisions are not necessary to deter voter fraud. The laws likely do not factor into the individual’s decisional calculus because most noncitizens, and even many immigration attorneys, are not aware of the consequences of making a false claim to citizenship or even what making a false claim entails.\textsuperscript{156} Even assuming that noncitizens are aware of the consequences of making a false claim in the context of voting, the threat of deportation or denial of immigration benefits is not necessary to deter noncitizens. Noncitizens who knowingly commit voter fraud can be prosecuted under existing state and federal laws, which impose significant penalties for unlawful voting.\textsuperscript{157} Immigration law can then treat these convictions the same way they treat all convictions. From a deterrence perspective, it is simply not necessary to create separate grounds of inadmissibility and removal.

Using deportation to sanction noncitizens for voting or registering to vote is grossly disproportionate to the offense, especially if the noncitizen did so unknowingly.\textsuperscript{158} A single fraudulent vote is not likely to undermine the integrity of the electoral process, and yet, the consequences of deportation to an individual are enormous.\textsuperscript{159} Neither agency discretion nor the availability of forms of relief mitigates this fact.\textsuperscript{160} For one, cancellation of removal and other forms of removal relief are quite limited in their availability.\textsuperscript{161} Second, in both cases, the adjudicator—either an immigration judge or an agency official—is choosing between imposing the sanction or not imposing the sanction.\textsuperscript{162} Thus, the exercise of discretion does not “inject proportionality” into the immigration system, simply put, because there are no alternative sanctions available.\textsuperscript{163}

Lastly, even if noncitizen voting is rare, the IIRIRA false claims and unlawful voting provisions are far from benign. For one, the provisions apply not only to those who vote, but also to those who register to vote.\textsuperscript{164} Those noncitizens that are found inadmissible or removable for either violation are equally negatively impacted—they may be denied immigration benefits and face possible deportation.\textsuperscript{165} In addition, the provisions bolster the rhetoric of anti-immigration advocates. Perhaps most disturbing, however, is their symbolic import. In essence, the IIRIRA provisions use elections, the symbol of the democratic process itself, to enforce immigration law. It is difficult to imagine what could be further from the aspirational view of democracy as “citizenship as presence.”\textsuperscript{166}

c. An Improper Role for Immigration Law

The tension between democratic norms of inclusion and the inherently exclusive function of immigration law may never be fully resolved. Still, as Motomura suggests in his analysis of three different conceptions of immigration law, society can choose the degree to which it incorporates notions of equality into the immigration system.\textsuperscript{167} Regardless of a society’s ultimate decision to incorporate noncitizens into the political process, the body politic has a duty to ensure that U.S. immigration law both serves the needs of society and reflects societal ideals.\textsuperscript{168} In this respect, IIRIRA’s provisions represent a huge step backwards.

Motomura’s call to view immigration as transition requires revisiting the idea of extending voting rights to noncitizens.\textsuperscript{169} For Motomura, “immigration as transition means treating lawful immigrants as Americans in waiting from their first day in this country.”\textsuperscript{170} Because immigration as transition presumes full equality for LPRs who intend to naturalize, logically, this leads to the conclusion that LPRs should have some voting rights.\textsuperscript{171} Raskin and others have convincingly argued that LPRs should be allowed to
vote in local elections. Motomura echoes these proposals with the qualification that voting rights for LPRs should be temporally limited to the five-year period during which they are not allowed to naturalize. Motomura’s proposal to view immigration as transition bears significant resemblance to the history of noncitizen voting in the U.S. as described by Raskin. For Motomura, immigration law could do a better job of recognizing the role of LPRs in modern American society (“citizenship as standing”). In addition, extending the franchise to LPRs serves the practical function of “fostering civic education and involvement as aspects of integration and transition to citizenship” (“citizenship as integration”).

Prior to the enactment of IIRIRA, noncitizen voting in the U.S. most closely resembled Motomura’s second concept of immigration as affiliation. The logic of immigration as affiliation prescribes that lawful immigrants gain rights proportionate to their length of time in the country. In a system that is mostly based on the affiliation concept, the importance of naturalization is deemphasized since LPRs eventually gain most of the rights of citizenship. Motomura points out that in certain European countries that closely fit the immigration as affiliation model of citizenship, resident noncitizens are allowed to vote in local elections. If naturalization is a priority in the U.S., under the affiliation rationale, it makes sense to withhold certain rights, such as the right to vote, in order to provide noncitizens with the incentive to naturalize. The withholding of voting rights, however, is only justified so long as noncitizens actually benefit from other constitutional protections. While it is debatable whether the rights of noncitizens were sufficiently protected prior to the enactment of IIRIRA, when noncitizen voting rights were governed exclusively by election law (with criminal sanctions attached), the balance, though perhaps not ideal, was still justifiable under democratic principles.

The landscape changed with the enactment of IIRIRA, which essentially gave immigration law a role to play in regulating noncitizen voting. This aspect of immigration law now most fully embodies the view of immigration as contract, with the grounds of inadmissibility and removal representing the “terms” of the contract. Before, noncitizens who voted unlawfully had only to suffer the criminal consequences, though still severe, of their actions. Now, the fact that a noncitizen voted or registered to vote is by itself, sufficient grounds for terminating that individual’s “contract” to remain in the United States. The contract theory of immigration, as described by Motomura, is premised on the notion that fairness and justice can be achieved through notice, promise, and expectations, rather than through any assumption that noncitizens are entitled to equal rights.

There are numerous problems with this rationale in the case of the false claims and unlawful voting provisions. First, the terms of the contract are unclear—what is a “false claim to citizenship” anyway? Second, at least in the case of the unlawful voting provision, which applies retroactively, noncitizens do not get notice. Third, noncitizens may not reasonably expect to be denied immigration benefits or deported for voting or merely registering to vote. Motomura echoes the concerns, discussed above, about the inadequacy of cancellation of removal and discretion for preserving fairness. Lastly, noncitizens have little choice over the terms. While Motomura highlights the unequal bargaining power of noncitizens vis-à-vis many aspects of the immigration system, nowhere is this more clearly reflected than in the IIRIRA provisions: noncitizens may be deported for participating, even unknowingly, in the process through which their political rights are denied in the first place. In that sense, the IIRIRA provisions are doubly punitive.

While these provisions make up only a small part of the immigration system as a whole, they are nevertheless important because of the values they reflect. The provisions’ attempt to validate the concerns of some citizens that the line between citizen and noncitizen has grown blurry risks further marginalizing noncitizens from the political process. Noncitizens have the right to participate politically through grassroots organizing and other informal channels. Even if one accepts the premise that denying noncitizens the right to vote is a legitimate part of self-definition in a democracy, the IIRIRA provisions go one step too far in that they deny noncitizens even the potential to have a voice—formal or informal. In Motomura’s words, “In the context of national self-definition, focusing only on promises, notice, and expectations is too narrowly utilitarian and cavalier in its dismissal of equality, even where, as in immigration and citizenship, some inequality is assumed.”

V. Time for Radical Reform?: The Meaning of “Citizenship” for Noncitizens

As currently written, the IIRIRA false claims and unlawful voting provisions solidly reject the notion of “citizenship as presence.” This paper has argued that these provisions have threatened rather than protected American democratic ideals. There are many easy fixes that could mitigate their effects to some degree. Congress could amend the provisions to explicitly incorporate a specific intent requirement, or make an immigrant waiver available, similar to one that exists for fraud and misrepresentation. In the end, however, these solutions
do not go far enough. If naturalization and integration are main goals of the immigration system, immigration law cannot treat formal citizenship as an impermeable border. At the very least, the provisions must be removed. Even then, more is required to transition to a system that more fully accounts for the true role of noncitizens in society. \(^\text{190}\)

From an advocacy perspective, these provisions should be a wake-up call. Certainly, for the time being, immigration attorneys must pay greater attention to the implications of these provisions for their individual clients. But, the provisions raise even greater issues in the context of immigration reform: in whatever form it is likely to take, it is ironic that those most likely to be affected do not have a formal voice in the process. Advocacy groups should push for the removal of these provisions, which both literally and symbolically silence the noncitizen voice. Advocates should also consider pushing for more radical reform, perhaps even going so far as to reinvigorate the noncitizen suffrage movement. Given the growing political influence of recently naturalized citizens, \(^\text{191}\) the time may soon be right for such a movement, even if its scope is limited to voting rights at the local level. \(^\text{192}\) In the end, if the project of self-definition excludes individuals like the one whose story began this paper, we have to question the validity of the project.

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**Endnotes**

1 Anne Parsons is a third-year student at American University Washington of Law, and a student attorney in the Immigrant Justice Clinic. She would like to thank Professor Elizabeth Keyes and *The Modern American* for their significant contributions to this article. Any errors are entirely her own.


3 Throughout this paper, I make an attempt to use terms that are both neutral and precise. In making general references to all categories of immigrants, I use the term “noncitizen” rather than the legally accurate, but more inflammatory, “alien.” In addition, rather than “alien suffrage,” I use various iterations of “noncitizen voting rights.” Lastly, I avoid the use of “undocumented” or “illegal” and instead refer to “unauthorized” migrants or immigration. See Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1725-26 (2010) (commenting on language’s power to depersonalize noncitizens).


8 BLACK’S LAW DICTIONARY 278 (9th ed. 2009).


10 *Cf.* Cabell v. Chavez-Salido, 454 U.S. 432, 439-40 (1982) (“The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community’s process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.”).

11 Most states also prohibit convicted felons from voting while in prison, on probation, or in parole. A few states impose a lifetime denial of the right to vote on all citizens with a felony record. See Brennan Center for Justice, Criminal Disenfranchisement Laws Across the United States (May 3, 2007), http://www.brennancenter.org/page/-/d/download_file_48642.pdf.


14 *See* id. at 1395.

15 *See* id. at 1401.

16 *See* id. at 1405 (discussing Illinois’s early policy of
encouraging settlement through the vote as also expressing the notion that political inclusion should be based not on formal citizenship, but on habitation, residence, and social membership).

17 See id. at 1398.
18 Id.
19 Id.
20 See, e.g., id. at 1441-67; Harper-Ho, supra note 4, at 298-305 (refuting arguments against permanent resident voting).
21 See Harper-Ho, supra note 4, at 310-22 (describing several city and state initiatives to enfranchise noncitizens); see also Immigrant Voting Project, http://www.immigrantvoting.org/ (last visited Apr. 26, 2010) (providing updates on current efforts to restore voting rights for noncitizens in the U.S.).
22 See Erin E. Stefonick, Note, The Alienability of Alien Suffrage: Taxation Without Representation in 2009, 10 FLA. COASTAL L. REV. 691, 696-97 (2009) (arguing that denying taxpaying noncitizens benefits, including the right to vote, is unjust). But see Raskin, supra note 13, at 1468 (expressing doubt that arguments for noncitizen voting in local elections apply with equal force in state and national elections due to the strong ideological hold of nationalism); Harper-Ho, supra note 4, at 294 (echoing Raskin's assertion that extending suffrage to noncitizens at the national level would implicate valid foreign policy concerns).
23 See Rodriguez, supra note 9, at 35 (stressing that although a democratic regime must find ways to account for the interests of noncitizens subject to its jurisdiction, it can do so without extending voting rights to noncitizens).
24 See Raskin, supra note 13, at 1421-31 (arguing that alien suffrage is consistent with the principles of republicanism, the suffrage amendments, and the Naturalization Clause).
25 With regards to whether noncitizens have a constitutionally protected right to vote, the Supreme Court has remarked: "This Court has never held that aliens have a constitutional right to vote . . . under the Equal Protection Clause. Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights." Sugarman v. Dougall, 413 U.S. 634, 648-49 (1973).
26 See Rodriguez, supra note 9, at 36.
27 See id. at 39.
28 Id.
29 Id. at 40.
30 See id. at 46 (noting that a society’s manner of selecting immigrants dictates the character of the polity).
33 See Rodriguez, supra note 9, at 45.
34 See MOTOMURA, supra note 32, at 47-48 (discussing the overlap between alienage laws that limit noncitizen eligibility for public benefits and the “public charge” exclusion and deportation grounds). Before 1996, noncitizen voting was regulated exclusively by alienage laws. IIRIRA effectively made noncitizen voting the subject of immigration law as well. See infra Part III(b).
35 See MOTOMURA, supra note 32, at 46.
37 See Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889) (establishing Congress’s plenary power to exclude noncitizens).
38 See infra Part IV.
39 See Rodriguez, supra note 9, at 36.
40 See MOTOMURA, supra note 32, at 9-12.
41 See id. at 10 (observing that the contract model holds that providing notice, keeping promises, and protecting expectations are sufficient to secure justice for noncitizens).
42 See id.
43 See id. at 60 (analogizing immigration to an unenforceable “adhesion contract”).
44 See id.
45 See id. at 11 (discussing that immigration as affiliation is premised on the notion of “earned equality”).
46 See id. at 94-95 (expressing concern that reducing incentives to naturalize will lead to a large population of noncitizens who are less than full participants in society).
48 See MOTOMURA, supra note 32, at 11.
49 LPRs must prove that they have not committed any aggravated felonies. INA § 240A(a)(3). Other noncitizens must prove that they have not committed certain crimes involving moral turpitude, aggravated felonies, or certain types of document fraud. INA § 240(A)(b)(1)(c).
50 Additional requirements include: proof of good moral character, “exceptional or extremely unusual hardship” to a U.S. citizen child, spouse, or parent, and proving ten years of continuous residence instead of the seven years


The United States Citizenship and Immigration Services ("USCIS") posts its approval and denial statistics for naturalization benefits each month. In February 2010, USCIS approved 50,520 and denied 4346 applications for citizenship. In that same month, the number of USCIS approved 50,520 and denied 4346 applications for FY2009 totaled 741,982 and 109,832 respectively.


See MOTOMURA, supra note 32, at 143.

Several categories of people are precluded from establishing "good moral character," including habitual drunkards, persons convicted of serious criminal offenses, and noncitizens who make false claims of citizenship, or who unlawfully register to vote or vote in a local, state, or federal election. INA § 101(f), 8 U.S.C. § 1101(f) (2009).

See MOTOMURA, supra note 32, at 143 (noting that average denial rates were once as low as 3 percent but spiked dramatically in the late 1990s to around 35 percent). The United States Citizenship and Immigration Services ("USCIS") posts its approval and denial statistics for naturalization benefits each month. In February 2010, USCIS approved 50,520 and denied 4346 applications for citizenship. In that same month, the number of approvals and denials for FY2009 totaled 741,982 and 109,832 respectively. See USCIS, Naturalization Benefits (Feb. 2010), available at http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/static_files/n-400-natz-benefits-2010-feb.pdf.

See Rodríguez, supra note 9, at 44 (concluding that a society’s immigration regime reflects its method of balancing democratic accountability and sovereignty). One interesting comparative study of resident alien voting rights in twenty-five democracies found that states that offer birthright citizenship, and hence tend to view the nation as a multicultural community, are more likely to extend voting rights to noncitizens than are states operating on the doctrine of jus sanguinis. See also David C. Earnest, Neither Citizen Nor Stranger: Why States Enfranchise Resident Aliens, 58 World Pol. 242, 263 (2006).

See Harper-Ho, supra note 4, at 274.

70 Id. at 275-76 (commenting that Michigan’s decision to extend the vote to noncitizens when it entered the Union in 1835 sparked controversy among nativist Congressmen).

71 Id. at 276-77 (describing how frontier states used the franchise to draw immigrant settlers during this period).

72 Id. at 281.

73 See Ewing, supra note 67, at 3 (discussing the Immigration Act of 1875 that excluded criminals, prostitutes, and Chinese contract laborers; the infamous Chinese Exclusion Act of 1882; and a separate 1882 act that excluded “lunatics” and persons likely to become a “public charge”).

74 See Harper-Ho, supra note 4, at 282.

75 Id. (noting that four of the last states allowing noncitizens to vote terminated noncitizen suffrage in 1918).

76 In 1921, Congress passed the first immigration law imposing numerical limits on immigration, which created an annual immigration cap of 350,000 with geographical restrictions favoring immigrants from northwestern Europe. See Ewing, supra note 67, at 4.

77 Refugee Relief Act of 1953, Pub. L. No. 83-203, § 11(e), 67 Stat. 400; see also Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, 5-63 IMMIGRATION LAW & P. § 63.07 (201) (explaining that inhibiting the entry of former Nazis, spies, and terrorists was the primary purpose of the Act).

78 Id. § 63.07(3)(a).

79 Id.


81 Id. § 212(a)(6)(C)(i) (providing “[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission in the United States or other benefit provided under this Act is inadmissible”).

82 Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended...
in scattered sections of 8 U.S.C.)).


84 Id. at 29-30 (referring to the retroactive changes to the “aggravated felony” definition and other new bars to admissibility and their effect on lawful permanent residents).


86 Id.

87 See generally Kathleen Sullivan, IIRIRA: Comparative Charts, 2 BENDER’S IMMIGR. BULL., Feb. 1, 1997, at 90 (comparing the pre- and post-IIRIRA grounds of excludability, inadmissibility, and deportability). As part of these extensive changes, IIRIRA also introduced the concepts of “admission” and “removal” to replace the old concepts of “entry” and “deportation.” §§ 301, 304(a).

88 See 142 Cong. Rec. S4577 (daily ed. May 2, 1996) (statement of Sen. Simpson) (agreeing that creating a disincentive for immigrants to make a false claim to citizenship in the form of new grounds of exclusion and deportation will counteract any weaknesses in the electronic employment verification pilot programs).

89 § 344(a) (creating new INA § 212(a)(6)(C)(ii), 8 U.S.C. § 1182(a)(6)(C)(ii) (2009)). The provision bars admission to any noncitizen who falsely claims citizenship “for any purpose or benefit under [the INA] . . . or any other Federal or State law,” expressly including benefits under INA § 274A, which deals with the unlawful employment of noncitizens.


91 § 215 (creating new 18 U.S.C. § 1015(e) (2009)).


93 § 344.

94 Id.

95 See id. (applying to noncitizens who vote unlawfully before, on, or after Sept. 30, 1996).


99 The exception applies if the noncitizen meets three conditions: 1) reasonable belief of citizenship; 2) both parents are U.S. citizens; and 3) permanent residence in the U.S. before the age of sixteen.


101 Id. § 1973gg-2.


103 Id. at 3.

104 Id.


106 See INA §§ 212(a)(10)(D), 237(a)(6).


See ING V. McDonald v. Gonzales, 400 F.3d 684 (9th Cir. 2005) (finding the government failed to prove that a naturalization applicant was removable by clear and convincing evidence since she lacked the requisite mens rea necessary to establish a violation of state election law).


111 Id.

112 Id.


116 Id. § 212(d)(3A).

117 See Mautino, supra note 110.

118 Id.

\[\text{§ 1101(13)(A) (2009).}\]

INA §§ 212(a)(6)(C)(ii), 212(a)(10)(D); see also, Martin Memo, supra note 107 (noting that the INS has little discretion when making admissibility determinations).


Note, however, that DHS has broad authority to waive these grounds of inadmissibility for U and T visa applicants pursuant to INA § 212(d)(14). The U and T visa are nonimmigrant visas that provide a pathway to adjust status, thus, these visas may provide an indirect waiver for the inadmissibility grounds at INA §§ 212(a)(6)(C)(ii) and 212(a)(10)(D) for U and T visa holders.


INA § 240(A)(b)(1)(C).

See Yates Memo, supra note 108, at 8.

See id. The Board of Immigration Appeals addressed this issue in Matter of K-, 3 I&N 180, 180-2 (BIA 1949) (holding that a noncitizen who voted in a national election because his union required its member to vote was not precluded from establishing good moral character even though he knew he was not eligible, when he retracted his claim in a timely manner). Subsequent decisions finding that offenses that entail “a deliberate deception and impairment of governmental functions” constitute crimes involving moral turpitude cast doubt on the holding in Matter of K-. See Matter of Flores, 17 I&N 225, 230 (BIA 1980) (denying voluntary departure based on a finding that a conviction for selling counterfeit documents relating to the registry of aliens constitutes a crime involving moral turpitude); see also Martin Memo, supra note 108, n. 6 (speculating that the Board may reconsider its holding in Matter of K- based on its holding in Matter of Flores, and noting that actual intent to deceive the government may weigh heavily in the determination of whether a particular voting related offense constitutes a crime involving moral turpitude).

INA § 212(h) (authorizing waiver of certain crimes if the offense occurred more than fifteen years before the date of the noncitizen’s application for a visa, admission, or adjustment of status, the admission is not contrary to the national welfare or security of the U.S., and the noncitizen can prove rehabilitation).

See id. (referencing INA § 237(a)(3)(D), the false claim to citizenship grounds for removal).


INA § 101(f)(3).

INA § 101(f)(7).

INA § 101(f)(9).

INA § 242(a)(2)(B)(i) (barring judicial review of any judgment regarding the granting of relief under the waiver provisions in § 212(h) and § 212(i), cancellation or removal, voluntary departure, and adjustment of status). Note that judicial review is available for asylum, also a discretionary form of relief, but under a highly deferential standard. See INA § 242(b)(4)(D).


See Yates Memo, supra note 108.

Id. (directing adjudicators to consider factors such as family ties and background, criminal history, education, employment history, community involvement and other law-abiding behavior, credibility, and the length of time in the U.S.).

See supra notes 131-37 and accompanying text.

See id. For example, the guidelines suggest that an officer might find good moral character if the applicant registered to vote in a federal election fifteen years ago, but did not actually vote. In addition, the guidelines state the applicant must have been “specifically told by a community organization that he or she was entitled to vote.” Further, if the applicant has any other criminal history, the officer is more likely to find lack of good moral character. Id.

See INA § 336(a) (providing that a naturalization applicant may request a hearing before another immigration officer if her application is denied).

See INA § 312(c).
This paper accepts that denying noncitizens the right to vote may not be inherently at odds with democratic principles, especially in societies where the right to vote constitutes the only meaningful distinction between citizens and noncitizens. See supra Part II(a). For a detailed analysis of the arguments for and against extending voting rights to noncitizens, see Harper-Ho, supra note 4, at 294-305.

See Motomura, supra note 3, at 1725-26 (noting the use of such charged terms by anti-immigration advocates to stimulate public emotion over immigration issues).


See, e.g., von Spakovský, supra note 125.


A widely publicized incident in 1997 involved a Latino rights organization in California that distributed voter registration forms to noncitizens whom it was helping through the naturalization process. The charges were dropped after a year-long investigation failed to substantiate the allegations of widespread voter fraud. See Michael G. Wagner & Nancy Cleeland, D.A. DROPS VOTER PROBES AFTER INDICTMENTS REJECTED, L.A. TIMES, Dec. 20, 1997, at A1. In 2008, national community group Acorn came under scrutiny for fraudulently registering voters in poor neighborhoods, though there were no specific allegations of widespread voting by noncitizens. See John Schwartz, REPORT UNCOVERS NO VOTING FRAUD BY ACORN, N.Y. TIMES, Dec. 23, 2009, at A15.


See Murdoch, supra note 105.

See LEVITT, supra note 152, at 7 (noting the penalty for violating federal election law includes five years in prison and a $10,000 fine).


Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (“We have long recognized that deportation is a particularly severe ‘penalty’ . . . but it is not, in a strict sense, a criminal sanction.”) (citing Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).

See Stumpf, supra note 158, at 1693-1706.

Id. at 1699.

Id. at 1705.

Id. at 1704.

INA §§ 212(a)(6)(C), 237(3)(D).

See supra Part IV(a).

See Raskin, supra note 13, at 1392 (“But if ‘universal suffrage’ for all persons living in the governed jurisdiction is not logically required by democratic ideology, through social struggle it has almost always become a political imperative in democratic history.”).

See generally MOTOMURA, supra note 32, at 9-14 (articulating the differences between the concepts of immigration as contract, affiliation, and transition).

There are those who argue that the only alternative to “open borders” is a “tightly controlled immigration system.” See, e.g., Shortfalls of the 1996 Immigration Reform Legislation, supra note 83, at 55 (prepared statement of Mark Krikorian). Motomura’s approach is not inconsistent
with the rule of law, and in fact, he argues that when our immigration system does not adhere to concepts of due process, checks and balances, and discretion, immigration law itself undermines the rule of law. See id. at 42-47 (prepared statement of Hiroshi Motomura).

See MOTOMURA, supra note 32, at 191.

Id. at 155.

Id. (admitting that affording LPRs greater rights will likely mean that the distinction between intending citizens and other categories of noncitizens will become more distinct).

Id. at 191.

See Raskin, supra note 13, at 1460-66; see also Harper-Ho, supra note 4, at 294-98.

See MOTOMURA, supra note 32, at 193.

Id.

Id. at 194.

Id. at 154 (describing affiliation as a system of “earned equality”).

Id. at 157.

Id. (hypothesizing that the noncitizen suffrage movement has not gained currency in the U.S. because of the relative ease with which long-time LPRs can naturalize).

Id.


See MOTOMURA, supra note 32, at 55.

Id. at 60.

For a comprehensive discussion of LPR's First Amendment right to donate to U.S. political campaigns and arguments for why nonimmigrants should be afforded the same rights, see generally, Bruce D. Brown, Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System, 15 YALE L. & POL'Y REV. 503 (1997). It is worth mentioning that, absent a criminal conviction, apparently no immigration consequences attach to a non-LPR's violation of campaign finance laws, an anomaly which further undermines arguments that the IIRIRA provisions are necessary to prevent noncitizens from influencing election outcomes.

Id. at 62.

Id. at 202 (arguing that “new lawful immigrants [should] be treated just like citizens in a number of key areas, including family reunification, public education, public assistance, voting, and public employment”).


See Raskin, supra 13, at 1468 (discussing the foreign policy implications of noncitizen voting at the national level).

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See Anne Parson’s “Inside the Authors’ Studio” interview on our website to learn more about her inspiration for the article, and her thoughts about the issues and questions emerging from the article.
An undocumented immigrant who lives in Maryland was recently stopped by the police while walking to the Hyattsville Metro Station to go to work. Short, dark-skinned and Latino, with long, black hair, the police told him that he resembled someone suspected of mugging an old woman a few blocks away. The police questioned him about his whereabouts (home) and what he was doing that morning (getting ready for work). After approximately forty-five minutes, the police officers received a signal that some the real mugger had been apprehended across town, so the officers allowed the man to continue on his commute to work. What would have happened if he lived in Virginia (where Secure Communities is active state-wide) and not Maryland (where Secure Communities is only active in three counties)? What if the police never got the call that other officers had located the actual culprit? A completely innocent Mexican waiter with no criminal record, who takes English classes, pays his taxes, and supports his family, may have been deported.

In the wake of fiery controversy surrounding Arizona’s contentious immigration bill, S.B. 1070, the issue of localization of immigration enforcement sprung to the forefront of national political debate. Yet, S.B. 1070 is certainly not the first instance of localities, unhappy with federal immigration enforcement, taking matters into their own hands. De-centralization of immigration enforcement is a growing trend, and has been the subject of much legal debate. Virginia recently adopted one method of localized immigration enforcement, the Secure Communities program, making it “active” in all Virginia jurisdictions. Similarly, D.C. Police Chief Cathy Lanier has lobbied for the implementation of Secure Communities in the District of Columbia. In the D.C., Maryland and Virginia area, advocates on both sides of the debate have been ramping up their efforts to sway legislators and constituents.

Of the three million sets of fingerprints taken at local jails between the onset of the Secure Communities program in October 2008 and June of this year, nearly 47,000 fingerprints belonged to undocumented immigrants, against whom deportation proceedings were initiated. Nearly half of the individuals removed from the United States through Secure Communities have never been convicted of a crime.

This article will introduce the Secure Communities program within the context of the increased localization of immigration enforcement. It will also discuss some inherent problems with the program. Part I will explain how the program works and address arguments made for and against the program. Part II will discuss the rights maintained by immigrants, and the rights they are denied by virtue of their non-citizen status. Part III will examine the constitutionality of Secure Communities through an Equal Protection lens. Finally, Part IV will address the future of the Secure Communities program and the future of localized immigration enforcement, by discussing the potential impact of pending litigation, legislation, and advocacy within the immigration law field. Part VI will also propose an alternative to the localized immigration enforcement movement, and will advise interested individuals on ways to advocate against the implementation of the Secure Communities program in our local community.

I. The Move Towards Localized Immigration Enforcement

In 1976, the Supreme Court held in De Canas v. Bica that although the “[p]ower to regulate immigration is unquestionably exclusively a federal power . . . [not every state law] which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power.” Still, the Supremacy Clause, in Article VI, clause 2 of the Constitution, has been frequently invoked to give the Federal Government exclusive jurisdiction over matters as international in nature as immigration. The Supreme Court has repeatedly held that state attempts to enact legislation governing immigrants and immigration are unlawful because they are preempted by Federal law. Reaffirming the Federal Government’s power over immigration, the Supreme Court remarked that “[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.”

More recently, the Federal Government again argued that a state unlawfully preempted Federal power by designing and implementing its own laws dealing with immigration within the state. For primarily that reason, Arizona’s controversial anti-immigration legislation, S.B. 1070, has been enjoined.

Recent studies show that nearly eleven million immigrants may be living in the United States without documentation. Immigrations and Customs Enforcement (ICE), a division of the Department of Homeland Security,
faced with an overwhelming task and caseload, has sought alternative means to achieve their objective of “enforce[ing] federal laws governing border control, customs, trade and immigration.” Over the past decade, increasing numbers of state and local law enforcement agencies have begun to collaborate with the federal government to enforce federal immigration law.

Congress amended the Immigration and Nationality Act (INA) of 1952 through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 to facilitate more rigorous enforcement of immigration laws. In particular, section 287(g) of IIRIRA authorizes the federal government to enter into Memorandums of Agreement (MOAs) with state and local law enforcement agencies, so that local police can help enforce Federal immigration law. In response to the positive reception of 287(g) by state and local law enforcement agencies, ICE created the Office of State and Local Coordination (OSLC) in 2007. OSLC builds and maintains a handful of programs, collectively known as “ACCESS” (Agreements of Cooperation in Communities to Enhance Safety and Security), which equip local law enforcement agents with a wealth of tools to enforce federal immigration law. The Secure Communities initiative falls under ACCESS’s umbrella of programs through which local law enforcement agencies can help with federal immigration enforcement. Congress further amended sections 274 and 276 of the INA to give state and local law enforcement agents express authority to enforce the prohibition of “smuggling, transporting, or harboring of illegal immigrants” and to establish “criminal penalties for illegal reentry following deportation.”

Similar to efforts of the Legislature, throughout the George W. Bush Administration, the Executive branch ramped up efforts to utilize local law enforcement officials in enforcing immigration law. In 2002, Attorney General Ashcroft issued a memorandum stating that the Department of Justice was mistaken in asserting that local officers did not have the power to enforce civil immigration violations (e.g., overstaying a visa). Ashcroft’s memo stipulated that local officers have “inherent authority” to make immigration arrests based on violation of civil immigration laws. The notion that local law enforcement maintains this “inherent authority” has been a powerful tool for law enforcement agencies attempting to substantiate their role as immigration enforcers. This language has never been written into federal regulation, and the actual legal weight of this memo is debated.

In increasing numbers, ICE has signed MOAs with local law enforcement agencies, giving state and local law enforcement officers authority and responsibility to enforce immigration laws within the normal course of their duties. Although law enforcement officers must undergo sensitivity training under 287(g) agreements, and should make complaint procedures available in various languages, myriad problems remain: prominent racial profiling; chilling effect on Latino/a communities; lack of oversight and accountability; potential infringement of constitutional rights and denial of due process.

a. About Secure Communities

Although local law enforcement officers have been increasingly involved in helping ICE identify and remove criminal aliens, Secure Communities takes the localization of immigration enforcement to a new level. Under 287(g)/ACCESS programs, local police officers train with immigration enforcement to implement federal immigration laws by checking immigration status of individuals stopped on the street or brought into jail. Under Secure Communities, local law enforcement officers (not trained by federal immigration enforcement officers) are authorized to send the fingerprints of all individuals charged with, but not yet convicted of crime to ICE, enabling cross-checking mechanisms with the Department of Homeland Security (DHS) immigration database and the FBI criminal history database. If the fingerprints match a DHS or FBI record, ICE is automatically notified, even if the individual has never been convicted of a crime. Local police can hold an individual suspected of being in the country illegally for 48 hours, until ICE arrives to take him or her into custody.

To achieve its goals, Secure Communities uses a three-tiered priority list for detaining and removing the most dangerous and high-risk criminal aliens. Level 1, the top priority, is to apprehend violent offenders: murderers, rapists, kidnappers, and major drug offenders. The Level 2 priority is to identify and remove individuals convicted of minor drug offenses and property offenses such as...
burglary, larceny, fraud, and money laundering. Level 3 represents the lowest priority of aliens to detain and deport and includes individuals who commit “public disorder” and minor traffic violations, such as driving without a license, or running a stop sign. Level 3 also includes the catch-all, “all others” arrested for other minor offenses.

The program falls short, however, of meeting its projected goal of “Identifying and Removing Dangerous Threats to [the] Community.” In 2009, ICE data showed that, of the 111,000 aliens successfully identified and detained through the Secure Communities program, approximately 11,000 (10%) were charged with or convicted of “Level 1” crimes; meanwhile, the other 90% of aliens identified and detained were charged with or convicted of lesser crimes, and not necessarily “dangerous threats” to their communities. Nearly half of those currently detained in immigration detention have no criminal convictions at all. Moreover, five to six percent of those identified and detained through Secure Communities are mistakenly identified as aliens, when they are actually U.S. citizens.

Although the Secure Communities program was first introduced under the Bush Administration, it has expanded rapidly during the Obama Administration. As of July 20, 2010, it was activated in 467 jurisdictions in twenty-six states. By September 28, 2010, the program was activated in 658 jurisdictions in thirty-two states. It is activated in all Virginia jurisdictions, and in four out of twenty-four counties in Maryland. The District of Columbia has refused police department attempts to implement the program. ICE hopes to make the program available in every state by 2011, and in effect nation-wide by 2013. As the program grows, political debate surrounding the controversial program continues.

b. Problems with Secure Communities

i. Prominent Racial Profiling

Although ICE maintains that the goal of the Secure Communities program is to identify and remove dangerous criminal aliens, it effectively serves as a green-light for local law enforcement agencies to use racial profiling tactics to target Latino individuals they suspect to be undocumented immigrants. Once a law enforcement officer finds a pretext to arrest someone, the police officer can bring the arrested individual to the station for fingerprinting. When all fingerprints are immediately sent to ICE and the FBI for immigration enforcement cross-checking, it matters very little what the purpose of the initial arrest was, and whether the arrest ever led to a criminal conviction. Police officers motivated to rid their communities of Latino immigrants not only have an avenue to do so, but because their motives are never monitored or questioned, they are given nearly limitless power to enforce federal immigration law.

ii. Chilling Effect on Latino/a Communities

If police use the Secure Communities program as an excuse to identify and deport immigrants, fewer immigrants will feel comfortable calling the police to report criminal activity. Alienating a subset of a community, and, in urban neighborhoods, a very substantial percentage of the community, frustrates the goals and purposes of law enforcement. Police will have less information regarding the whereabouts of individuals involved in actual criminal activity, because when some community members feel targeted and vulnerable, they stop cooperating with local police, making the entire community less safe.

iii. Lack of Oversight and Accountability

A program, such as Secure Communities, wholly designed by an administrative agency, has never received legislative input as to specific procedures for oversight or accountability. Indeed, ICE outlines priorities for the Secure Communities program, but it is solely responsible for ensuring that those priorities are met; if they are not met, the impetus is on ICE alone to adjust its methods. Furthermore, besides the initial agreements between ICE and local law enforcement agencies, ICE has shown no indication that it intends to train or monitor local law enforcement in anti-racial profiling practices when utilizing Secure Communities. Consequently, local law enforcement agents are free to use their increased power without supervisory guidance or interference. Finally, ICE has been exceedingly reluctant to publish data regarding how effective the program has been in achieving its purported goals. The program was launched in October 2008, but ICE only recently, after various Freedom of Information Act (FOIA) requests and complaints filed by advocacy groups suspicious of foul play, acquiesced and published data on the number of arrests connected to the program, the type of criminal records of aliens identified through the program, and the number of individuals deported through Secure Communities. Despite access to this information, many questions remain unanswered.

iv. Potential Infringement of Constitutional Rights and Denial of Due Process

Because the Secure Communities program implicitly condones the use of racial profiling (and racial discrimination) to achieve its goals, the program must be examined through a
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constitutional lens to ensure the protection of fundamental rights. If the program is not narrowly tailored to achieve a specific and permissible government purpose, the program’s inherent discrimination violates the Equal Protection clause of the Fourteenth Amendment. Secure Communities is not narrowly tailored to suit its purported goal; in fact, it is not tailored in the least. It encourages checking the immigration status of all persons accused and arrested of crimes, even where criminal charges are never pressed and individuals are never convicted. The vast majority of aliens identified and removed through the program have never been convicted of a dangerous crime, or never been convicted of any crime at all. What is worse, about 5% of the database “hits” through the Secure Communities program identify United States Citizens, not criminal aliens.

Furthermore, as many immigration law scholars note, what was once considered a non-punitive consequence of a civil infraction, immigration detention and deportation are increasingly likened to criminal punishment. As the consequences of civil immigration violations become more severe, many argue that individuals involved in the immigration system should be afforded more substantial due process rights, like in the criminal system. Without such procedural safeguards, our government runs the risk of embodying an unfortunate hypocrisy, glorifying the protection of liberty and freedom at all costs by ensuring proper due process before convicting and punishing the accused, while simultaneously denying such due process and enforcing severe judgments on others accused, on the basis of immigration status.

c. Community Tension

Many advocates of Secure Communities base their support on anti-terrorism efforts. Bringing to light the fact that some of the 9/11 terrorists had been stopped for minor traffic violations before the infamous plane hijacking, some argue that if local police officers had access to Secure Communities technology at the time, the suspects may have been identified earlier as criminal aliens, and could have been taken into custody and placed in deportation proceedings. According to some, if Secure Communities had been implemented more broadly, and earlier, the entire devastating terrorist attack could have been averted, and the lives of thousands of innocent people could have been saved. Utah Republican Senator Orrin Hatch even proposed legislative amendments to immigration law that would require all localities to sign on to either 287(g) programs or Secure Communities.

Proponents of Secure Communities in Ohio praise the program as a tool to help identify dangerous criminals that would otherwise go undetected. Butler County Sheriff Rick Jones attested, “[i]t’s really a heaven-sent for us. [. . .] I don’t want [criminal aliens] in my community, I’ve got enough homegrown criminals here.” Indeed, as traditional methods of law enforcement fail to target immigrant criminals specifically, Secure Communities helps differentiate between American citizen criminals and immigrants. For law enforcement officials seeking to rid their localities of criminal aliens, the goals of Secure Communities certainly align with their own.

Similarly, in Virginia, Fairfax County Sheriff Stan Barry remarked that the Secure Communities program was “a win-win situation both for the community and law enforcement.” Barry boasts, “[w]e will be able to identify illegal immigrants who commit crimes in Fairfax County and get them in the process for deportation, and it does not require additional funds or manpower from us.” Indeed, Fairfax County will be able to identify undocumented immigrants much sooner in the criminal process, without needing to specifically recruit, employ, or train special teams of law enforcement to deal exclusively with immigration enforcement. Still, despite Barry’s contention that the program will not cost Virginia taxpayers money, the State is in the process of building the largest immigration detention center in the Mid-Atlantic, a $21 million project that hopes to house up to 1,000 immigrant detainees by next year.

In contrast, opponents of Secure Communities argue that the program ultimately will result in communities being less safe. Noting that Secure Communities enforcement has not resulted in significant deportation of violent or dangerous criminals, CASA de Maryland Attorney, Enid Gonzalez, remarked that although the Program “claims to keep violent criminals off the streets, [. . .] it’s just incarcerating innocent busboys.” Furthermore, many advocates worry that the program has a chilling effect on Latino members of the community, dissuading them from coming forward as crime victims and witnesses, and thereby enabling actual criminals to continue terrorizing the community. An opponent of Secure Communities in Utah, Police Chief Chris Burbank recognized this problem in his own community of Salt Lake City: “Fighting crime without the help of one’s community [. . .] is like trying to disarm a hidden mine by stomping on the ground. By the time you have found the problem, it is already too late.”

Opponents in Virginia argue that the State unjustly instituted the Program without the approval or consent of the local government. Although Secure Communities is most frequently enacted through individual agreements between localities and ICE, Virginia recently implemented Secure Communities state-wide, leaving many immigrants’ rights advocates in Arlington arguing that it was unfairly instituted, since the agreements had not been negotiated with Arlington law enforcement, or Arlington County government.
Raising the level of confusion about the implementation and possible dissolution of Secure Communities, ICE first announced there are no opt-out options, but then later explained that despite discouragement, cities could opt out.\textsuperscript{51} ICE Deputy Press Secretary has stated that localities like Arlington cannot opt-out of the program through ICE, rather, the locality must settle the matter with the state government.\textsuperscript{52} Oddly, in a letter dated September 8, 2010, the Arlington County Board voted to opt-out of the program.\textsuperscript{53} After indications that opting-out was possible,\textsuperscript{60} the Arlington County Board voted to with the right to vote.\textsuperscript{66} Voting was considered a privilege, or "political right," subject to the discretion of the State.\textsuperscript{67} In United States v. Esparaza-Mendoza, the Supreme Court determined in 1874 that "citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage."\textsuperscript{68} However, scholars note that in early October 2010, in stark contrast to its declaration one month earlier, ICE announced that local governments would not be able to opt-out of the program.\textsuperscript{63} ICE Director John Morton conceded that "the agency would meet with the localities to discuss the issue, but in the end the agreement is with the state."\textsuperscript{64} After meeting with ICE officials on November 5, 2010, Arlington County Manager Barbara Donnellan explained to the rest of the County Board, "ICE stated that Secure Communities is a federal information-sharing program which links two federal fingerprint databases... The program does not require state and local law enforcement to partner with ICE in enforcing federal law."\textsuperscript{65} Whether local jurisdictions will be free to opt-out remains to be definitively explained to confused law enforcement and government officials nation-wide.

As the debate grows, and immigrants’ rights groups advocate for the end of the Secure Communities program, the concern of whether and how the program infringes upon the rights of immigrants becomes more ubiquitous. Although immigrants to the United States do not enjoy all of the Constitutional rights as American citizens, the courts have held that immigrants enjoy some Constitutional protection. As such, the Secure Communities program may need careful scrutiny to determine whether it satisfies Constitutional precedent.

II. Immigrants’ Rights

In determining whether constitutional rights extend to immigrants, courts have frequently considered whether the framers of the Constitution would have meant for terms like “persons,” “people,” and “citizens,” to include immigrants. If the terms were intended to include immigrants, which immigrants should be included? Most often, whether constitutional rights are afforded to immigrants depends on their status.

Some rights guaranteed to United States citizens have rarely been afforded to immigrants, and have rarely been contested. For example, interpretations of the Constitution dating back to the early 1800s indicate that aliens were not included in “the people of the several states” who enjoyed the right to vote.\textsuperscript{66} Voting was considered a privilege, or at most, a “political right,” subject to the discretion of the State.\textsuperscript{67} In United States v. Esparaza-Mendoza, the Supreme Court determined in 1874 that “citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage.”\textsuperscript{68} However, scholars note that...
un-naturalized alien immigrants were not officially excluded from suffrage until 1928.69 The conclusion that immigrants are not included in “the people of the several states” has left the door open to the determination that immigrants are excluded from several other Constitutional protections as well.

a. Equal Protection

Despite being denied the right to vote, immigrants are afforded some constitutional rights. Plyler v. Doe ensured that immigrants are protected under the Equal Protection clause of the Fourteenth Amendment.70 In Plyler, a group of undocumented Mexican children sought declaratory and injunctive relief against a Texas statute that excluded them from access to free education at state public schools.71 The Supreme Court struck down the statute, noting that even though the children had not been “legally admitted” to the United States, discrimination against them on the basis of their immigration status was impermissible because the State did not establish a rational basis sufficient to deny the benefit of public education.72 Reflecting on the text of the Fourteenth Amendment, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws[,]”73 the court held that “an alien is surely a ‘person’ in any ordinary sense of that term.”74 Because undocumented alien children are protected by the Fourteenth Amendment, a law discriminating against them on the basis of immigration status violated their Constitutional right to Equal Protection because, although conserving the state’s financial resources may be a legitimate government interest, the law was not narrowly tailored enough to advance such an interest.75

Even facially neutral laws have been found to violate the Equal Protection clause if they are applied in a racially discriminatory manner against immigrants. In the 1880s, many Chinese citizens immigrated to the Western United States and opened small businesses. A San Francisco ordinance gave the San Francisco Board of Supervisors the power to oversee and authorize the opening and maintenance of laundromats, particularly laundromats in wooden buildings. Although the ordinance was not discriminatory on its face, the custom of the Board of Supervisors was to deny laundry permits to Chinese laundry shop owners. The Supreme Court held in Yick Wo v. Hopkins that the arbitrary and discriminatory practices of the Board of Supervisors, effectively barring Chinese immigrants from the entire profession of owning and operating laundromats, constituted racial discrimination and therefore infringed upon the Constitutional rights of Chinese immigrant applicants.76 The court noted that, “[t]he rights of the petitioners . . . are not less because they are aliens and subjects of the emperor of China.”77 Reflecting upon

In invalidating the San Francisco ordinance, the court held that the Equal Protection clause applied universally to all people, without regard to race, color, or nationality.79 Indeed, the Supreme Court recently reinforced the notion that laws based on alienage or immigration status be subject to a higher level of judicial scrutiny.80 As such, “the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.”81

b. Confusion, Abridgement and Reinforcement of Immigrants’ Rights

In the years since Yick Wo, Constitutional rights afforded to immigrants have been substantially abridged. Indeed, as the court in Mathews v. Diaz noted, “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”82

In 1904, John Turner, an Irish citizen and immigrant to the United States, filed a writ of habeas corpus after his detention and the commencement of deportation proceedings. Turner was a self-proclaimed anarchist, and the 1903 Act to Regulate the Immigration of Aliens into the United States prohibited anarchists from entering the country.83 Many later courts have co-opted one famous line of dicta from Turner, in order to further deny rights to immigrants: “[A]n alien does not become one of the people to whom these things are secured by our Constitution by an attempt to enter, forbidden by law.”84 The Supreme Court held that the 1903 Act was not an unconstitutional abridgment of First Amendment rights; the First Amendment’s guarantee of free speech did not extend to an alien anarchist, particularly when his entry into the country was prohibited by an act of Congress.85

Similarly, in 1945, an Australian citizen and immigrant to the United States filed a writ of habeas corpus
appealing his detention and imminent deportation after he was determined to be affiliated with the Communist party in violation of an amendment to the Immigration Act of 1917. Unlike Turner, however, the court determined that Bridges’ “isolated instances” of affiliation with the Communist party did not necessitate his immediate deportation. Somewhat confusingly, the court asserted that aliens residing within the United States are afforded Constitutional protections of freedom of speech and freedom of press. In reversing the Circuit court’s dismissal of Bridges’ habeas petition, the court reiterated that,

although deportation technically is not criminal punishment . . . it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling . . . As stated by Mr. Justice Brandeis . . . deportation may result in the loss ‘of all that makes life worth living’.

As such, procedures involving such a deprivation must “meet the essential standards of fairness.” The court determined that the lower courts misconstrued the definition of “affiliation” when considering Bridges’ relationship to the communist party, and therefore his detention under the deportation order was indeed unlawful. In his concurring opinion, Justice Murphy remarked famously upon the importance of safeguarding Constitutional rights:

The record in this case will stand forever as a monument to man’s intolerance of man. Seldom if ever in the history of this nation has there been such a concentrated and relentless crusade to deport an individual because he dared to exercise the freedom that belongs to him as a human being and that is guaranteed to him by the Constitution. . . . [T]he Constitution has been more than a silent, anemic witness to this proceeding. It has not stood idly by while one of its subjects is being excommunicated from this nation without the slightest proof that his presence constitutes a clear and present danger to the public welfare. Nor has it remained aloof while this individual is being deported, resulting in the loss ‘of all that makes life worth living.’ . . . When the immutable freedoms guaranteed by the Bill of Rights have been so openly and concededly ignored, the full wrath of constitutional condemnation descends upon the action taken by the Government. And only by expressing that wrath can we give form and substance to ‘the great, the indispensable democratic freedoms,’ to which this nation is dedicated.

Although seemingly progressive and forward-thinking, Justice Murphy’s remarks have been used to both bolster the rights of lawfully present immigrants, and to deny Constitutional rights to undocumented immigrants. Justice Murphy recognized the limitations of the Constitution, noting that “[s]ince an alien obviously brings with him no constitutional rights,” Congress may enact laws excluding him or her as it sees fit. Murphy reasoned, “once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders . . . [including] the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment.”

In 1982, the Supreme Court seemingly defied earlier case law regarding the Constitutional rights of immigrants when it found valid a California statute requiring United States citizenship for employment as a government officer. The court explained that,

[the exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community’s process of political self-definition. Self-government . . . begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.]

The exclusion of aliens from the definition of community stands in contrast to prior declarations that aliens are included within the definition of “people” protected under the Constitution.

Diverging interpretations of whether immigrants should be afforded Constitutional protections continue to result in differing and sometimes conflicting case law. A recent local case in a Virginia circuit court held that an undocumented immigrant was barred from bringing a workers’ compensation claim against his employer. The court determined that, although Virginia code defined “employee” as “every person, including aliens and minors, in the service of another under any contract of hire . . . whether lawfully or unlawfully employed[,]” an undocumented immigrant could not be included in that definition “without subverting federal immigration policy.” Relief like worker’s compensation “is foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and
Looking back, the Plyler decision may have been either an aberration on a historical tradition of denying rights to immigrants, or it may be a turning point towards broader assurance of rights for aliens in the United States. While some immigrants are afforded Constitutional and other legal protections, others are excluded due to various interpretations of “person,” “people,” “employee,” and even “immigrant.” Still, precedent set by Plyler assures that all immigrants (documented and undocumented alike) are protected by the Equal Protection clause. Considering both the broad power of Congress with respect to immigration, and the rights that immigrants maintain under the Constitution, is Secure Communities a permissible exercise of government power?

III. Secure Communities: An Equal Protection Analysis

A law violates the Equal Protection clause when it denies a benefit to a discrete class of people while it is afforded to others similarly situated. In analyzing the constitutionality of a law under Equal Protection, a court will first determine what level of scrutiny must be applied. A law is presumed valid unless a challenger shows that the law in question falls within exceptions to this presumption: if the law infringes upon a fundamental right; if the law distorts the political process; if the law targets a racial or religious minority; or if the law targets another “discrete and insular minority.”

The next step in an Equal Protection analysis is discerning whether the law seeks to achieve a permissible government purpose. If the purported goal of the law is impermissible, it fails an Equal Protection review, and is unconstitutional. However, the actual purpose of a law may differ from its purported goal. If the actual purpose of a law is impermissible, it also fails an Equal Protection review, and is unconstitutional. If the government purpose is legitimate, the final step is to determine whether the law is related to the achievement of its goal.

a. What Level of Scrutiny Should be Applied?

For the purposes of an Equal Protection challenge, a law is presumed valid, and subject to rational basis review, unless a challenger can show either that the benefit denied is a fundamental right, or that individuals denied the benefit are part of a discrete or suspect class. If the benefit denied is a fundamental right, the court will review the questionable law or practice with strict scrutiny. If the law discriminately affords the benefit, and denies it to a group of individuals on the basis of race or religion, the court similarly applies strict scrutiny review. However, if the law denies a benefit on the basis of legitimate differences between differentiated classes, or the characteristic upon which the discrimination is based is not an immutable characteristic, the court may apply an intermediate level of review, less stringent than strict scrutiny, but more stringent than rational basis review. Although discrimination on the basis of race and national origin are afforded strict scrutiny review, discrimination on the basis of immigration status is analyzed under intermediate scrutiny. Immigration status is largely considered a voluntary condition, and therefore not an immutable characteristic. Still, immigrants are a discrete and vulnerable class, and often the target of discrimination. While laws analyzed under rational basis review are given much deference, and only rarely overturned, laws evaluated under intermediate review or strict scrutiny are subject to a higher standard; as such, they are examined more critically to determine if the discrimination in question is sufficiently invidious to be deemed unconstitutional.

According to Plyler, although immigrants are a discrete class of individuals, and frequently discriminated against, their status is at least partly voluntary (and not immutable); therefore, their Equal Protection claim may be subject to an intermediate level of scrutiny. One could argue that the immigration status of most undocumented immigrants is involuntary because there are few and near-impossible legal avenues for an undocumented immigrant to adjust his/her status. Furthermore, many individuals faced with poverty, political persecution, or gang violence in their home country, feel as though they have no choice but to immigrate to the United States. Still, some would argue that, albeit an unappealing choice between remaining in the United States undocumented or returning to one’s country of origin, the fact that an individual chooses to remain in the United States without documentation is evidence of his/her voluntarily determined status; therefore an Equal Protection claim would require an analysis under intermediate scrutiny.

b. Permissible Government Purpose

i. Purposed Purpose

Does the Secure Communities program seek to achieve a permissible government goal? ICE’s purported goals of Secure Communities are to identify aliens in law enforcement custody, prioritize apprehending and removing criminal aliens who pose the greatest threat to public safety, and efficiently identify, process and remove criminal aliens from the United States.

First, identifying aliens in law enforcement custody may be problematic. Although deportation was
always considered a civil penalty, the current process and consequences of deportation make the reality of deportation more like criminal punishment. If deportation is more akin to a criminal punishment, aliens in custody should be given proper due process, including notice, an opportunity to be heard, and an opportunity to contest charges against them, before punishment is exacted. Identifying, apprehending and removing criminal aliens from the United States may be a permissible goal for the federal government, but is it a permissible responsibility for localities? Surely efficiency in the process of identifying and removing criminal aliens should be a permissible government goal, but is it permissible to delegate this power to localities, and require locality compliance? It is likely permissible if localities opt-in to the program on their own accord, but ICE expects to have the Secure Communities program in effect nation-wide by 2013. Requiring states and localities to enforce federal law is a violation of the Tenth Amendment. If Secure Communities defies the Tenth Amendment by unlawfully forcing state participation in the enforcement of federal law, it will have an impermissible goal and will consequently violate Equal Protection principles as well.

ii. Actual Purpose

Where a facially-neutral law has a dubiously impermissible actual purpose, the court will take into account the actual purpose in analyzing whether the law violates the Equal Protection clause. However, the court most often defers to decisions of the legislature where the level of scrutiny is not heightened. If the impermissible outcome of the law is simply an unintended effect, a law may not necessarily be invalidated for having an impermissible purpose. However, if the court determines that a law has an impermissible intended purpose, despite being facially neutral, the court may invalidate it for violating Equal Protection.

ICE maintains that the actual purpose of Secure Communities is to ensure community safety by removing dangerous criminal aliens. However, ICE’s own statistics show that the majority of those identified and removed through Secure Communities have been Level 2 and Level 3 offenders. Indeed, only 8-10% of those identified through the program are Level 1 offenders, those specifically targeted as dangerous and high-risk threats. Interestingly, the number of Level 1 offenders is only slightly higher than the number of U.S. citizens who are identified as a “hit” through the Secure Communities program (5%).

Specific data on the race and national origin of individuals identified and deported through Secure Communities is seriously lacking, and is the subject of both FOIA investigations and complaints. If this specific data were published, it may very likely show that the overwhelming majority of individuals identified through the program are Latino. Although the program does not overtly require discrimination on the basis of race, its intended effect is to remove as many Latino immigrants from the United States as possible. If this were the case, the program would fail an Equal Protection challenge, for promoting an impermissible government objective.

c. Ends and Means Nexus

i. How Closely Should the Program Fit its Purported Goals?

Assuming that an analyzing court determines that the purpose of the Secure Communities program is not dubious, but rather a permissible government goal, how broad or narrow must be program be tailored to remain constitutionally valid under Equal Protection? Under a rational basis review, a law challenged under Equal Protection must be rationally related to a legitimate government purpose. It is unlikely that Secure Communities, a program highly contested for its overwhelming reliance on racial profiling, would be subject to such a low level of constitutional review. If Secure Communities were analyzed under rational basis review, because the court pays high deference to existing laws and administrative programs, Secure Communities would likely be found constitutionally permissible.

Under strict scrutiny review, a challenged program is presumed invalid. In order to remain valid, the program must be necessary to achieve a compelling government purpose. Under intermediate scrutiny review, a challenged program must be narrowly tailored to achieve an important government goal. If ICE’s important government goal is prioritizing the identification and removal of criminal aliens, it may need to clarify the definition of a “criminal alien.” If violating a civil immigration law is not a crime, undocumented aliens who have never been convicted of criminal offenses would not be “criminal aliens,” and therefore would not be reached by the Secure Communities program. If this is the case, the fact that some non-criminal undocumented workers have been removed under the Secure Communities program may constitute prima facie evidence that the government’s program is not sufficiently tailored to meet its goal. It is unlawfully over-inclusive, catching in its net far more individuals than it purports to identify and deport. If the program is too broad in attempting to achieve its purported goal, it may be an unconstitutional violation of Equal Protection.

ii. Negative Externalities and Policy Concern
If the goal of Secure Communities is to promote safety, it is deeply and ironically flawed since a troubling consequence of Secure Communities is its profound chilling effect on immigrants with respect to reporting crimes. Concerned about their potential vulnerability to inquiries about immigration status, fewer immigrants who are crime witnesses or victims will come forward to the authorities. Increased reluctance to report criminal activity can only result in insecure communities, where criminals remain free to commit more crimes.

Additionally, although ICE admitted that 5% of individuals identified through the Program are U.S. citizens, it never mentioned how many of those identified were Lawful Permanent Residents. ICE’s data fails to include how often U.S. Citizens or Lawful Permanent Residents were arrested, fingerprinted, identified, and detained by ICE as a result of Secure Communities. The Supreme Court cautioned against imposing substantial burdens on lawful immigrants, because “our traditional policy [is] not treating aliens as a thing apart.” Highlighting Congress’s role in specifically regulating immigration, the Court held that the purpose of immigration regulation is to “protect the personal liberties of law-abiding aliens . . . and to leave them free from the possibility of inquisitorial practices and police surveillance.” Because Secure Communities effectively facilitates removals for many individuals who, though arrested and fingerprinted, have never have been convicted of a crime, the Program inherently stands in stark contrast to the Supreme Court’s mandate of leaving law-abiding aliens free from invasive police practices.

Furthermore, the Secure Communities program relies heavily on racial profiling to achieve its goal of identifying and removing alien immigrants. The practice of racial profiling alone is problematic because it perpetuates negative stereotypes and bias-related crime against individuals on the basis of their skin color. Furthermore, it makes already-vulnerable groups even more vulnerable to discrimination and socio-economic oppression. It reinforces despicable notions of inferiority, and deeply offends the dignity of people of color, regarding both an individual’s sense of self-worth and the presumptive social value of such and individual in the community. As Justice Murphy remarked in his dissent in Korematsu v. United States, giving constitutional sanction to that inference [that race could be used as a proxy for criminal suspicion] . . . is to adopt one of the cruellest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

More recently, Justice Goldberg, reflecting upon the Civil Rights Act of 1964, emphasized the importance of protecting the dignity of individuals discriminated against on the basis of race: “Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.”

Governmental utilization of racial profiling programs serves to aggravate these issues. Condoning racial profiling tactics is not only unethical, but may soon be explicitly unlawful as well. Considering the multitude of negative externalities of Secure Communities program, Congress must specifically address the program, and local governments must reconsider their involvement in the enforcement of federal immigration law.

IV. The Future of Secure Communities

a. Litigation Against Secure Communities

In February 2010, the National Day Laborer Organizing Network, Center for Constitutional Rights, and Immigration Justice Clinic of the Benjamin N. Cardozo School of Law (the “Network”) filed a Freedom of Information Act (FOIA) request, to obtain data related to the two-year old Secure Communities program. In late April 2010, they commenced a lawsuit against ICE, DHS, Executive Office for Immigration Review, the FBI, and the Office of Legal Counsel, for failing to release agency records under the Freedom of Information Act. After much delay, ICE and DHS reluctantly disclosed information about the Secure Communities program, confirming what advocates at the Network feared: the Program functions as a “dragnet,” funneling individuals into a highly flawed detention and removal system; 79% of those caught in the Program’s net are not criminals or were picked up for minor offenses; the Program serves as a smokescreen for racial profiling, allowing police officers to make arrests that could lead to deportations, rather than to convictions; and although the Program is not mandatory, there is no clear opt-out procedure. Although ICE complied with FOIA requests, many of the questionable practices inherent in Secure Communities remain. As such, it is likely that the Network, or other like-minded advocacy organizations, will continue to pursue litigation against ICE to remedy these issues.
b. Effect of Judicial Findings in United States v. Arizona

If Arizona’s SB 1070 withstands Constitutional scrutiny, it may provide a dangerous foundation for racial profiling and the expansion of Secure Communities. Like Secure Communities, Arizona’s recent anti-immigration bill has been the subject of much political debate. Both programs involve delegating significant responsibility to unsupervised local law enforcement officers, which implicates a grave potential for racial profiling tactics to be tacitly enacted in day-to-day policing.

The most prominent argument in the Federal Government’s case against the State of Arizona regarding Arizona’s anti-immigration law, SB 1070, is that the state impermissibly attempts to preempt an area of law specifically reserved for the Federal Government. Control over immigration policy and enforcement, a clear responsibility of the Federal Government, is reinforced by the Tenth Amendment. However, considering the proliferation of ICE programs that delegate significant power in immigration enforcement to localities, this argument may no longer be persuasive. Arizona District Court Judge Bolton granted a preliminary injunction against SB1070, concurring with the Federal Government’s argument that Arizona unlawfully attempted to preempt Federal law, but in the absence of clear Congressional discussion of ICE’s current programs, and authority to delegate the power of immigration enforcement, the Secure Communities program may similarly be found to be an impermissible co-opting of Federal authority. Furthermore, ICE’s attempt to delegate its clearly federal responsibility to state and local governments may violate the Tenth Amendment.

c. The Impact of Congressional Legislation: The End Racial Profiling Act of 2010

Legislative efforts to end discrimination are evident in HR 5748, also known as the End Racial Profiling Act of 2010. The bill, introduced in Congress in July of 2010, seeks to eliminate racial profiling by law enforcement by giving individual victims of racial profiling a private right of action to sue; by creating a disparate impact private right of action; by requiring the Attorney General’s oversight; and by requiring data collection and publication, allowing the public to provide external oversight.

If passed, this bill has the potential to change the current state of immigration enforcement radically, and ensure the liberty and dignity of all citizens, immigrants, residents and visitors to the United States. Granting individual victims of racial profiling a private right of action to sue would force ICE and local law enforcement to exercise discretion and care in routine practices. Rather than receiving mealy declarative relief, victims may finally witness unlawful government action being judicially sanctioned. Rather than receiving apologies, victims would receive financial compensation. Additionally, allowing a disparate impact private right of action ensures that if racially-neutral, or even unintentional discrimination is avoided. Perhaps most significantly, the bill would require agencies like ICE to regularly publish data to show how its program functions, and whether it is achieving its goals. Making such data available to the public would force ICE to be responsible for the way in which its programs are executed. It would better equip advocacy organizations to ensure that civil rights are not violated. The bill would require steadfast and dedicated oversight to ensure that racial profiling be eradicated. Still, although this bill would deeply de-claw some of the problematic aspects of the Secure Communities program, it would not rectify all of its injustices.

d. Alternative Approaches to Immigration Enforcement

Rather than engaging in complicated, ad-hoc, non-congressionally authorized, federal-local collaborations to identify and deport all undocumented immigrants, the Federal government needs to re-examine and reinstate comprehensive immigration reform, including just and fair immigration enforcement. This reform should consider why individuals come into the United States illegally. As experts at the Migration Policy Institute point out, “our immigration laws provide inadequate legal avenues to enter the United States for employment purposes at levels that our economy demands.”

By issuing visas like the H1-A and H1-B, U.S. Customs and Immigration Services grants temporary legal status to immigrants coming to work in the United States. Unfortunately, the government offers only 66,000 visas to individuals coming to work in low-skilled, non-agricultural settings inside the United States; this number falls grossly below the number of people interested, and actually performing this work. If the U.S. issued more visas to low-skilled workers, more people would follow legal avenues to obtain employment here. Furthermore, because applying for and obtaining visas through family members take many immigrants nearly a decade, there is little incentive to follow government rules. Rather, as experts note, immigrants and their employers follow market rules.

Indeed, changes in immigration enforcement are an empty and foolish attempt to solve what is a tremendously decisive issue to all sides of the contemporary political debate. Before reforming immigration enforcement, the federal government
first needs to address much-needed reforms to federal immigration policy.

e.  Local Advocacy Efforts Against Secure Communities

Rights Working Group (RWG) a group of hundreds of progressive local, state and national organizations, committed to protecting civil liberties and human rights, spearheads two campaigns closely tied to addressing and reforming recent changes in immigration enforcement: Face the Truth (addressing racial profiling), and Hold DHS Accountable (urging President Obama to issue a moratorium on current immigration enforcement policies that deny due process). In addition to supporting pending legislation by the Network and the Center for Constitutional Rights, RWG also worked closely with Virginia-based attorneys in Arlington to investigate the possibility of Arlington opting-out of the state-mandated Secure Communities program. After Secretary Napolitano announced to Congress that jurisdictions could opt out, the Arlington County Board voted to officially withdraw from participating in the program, despite Virginia’s statewide activation of Secure Communities.134 Despite this seemingly successful event, the outcome of which remains vague, Secure Communities continues to spread rapidly across the country.

Conclusion

In the wake of Virginia Attorney General Ken Cuccinelli’s recent opinion, authorizing law enforcement to check the immigration status of anyone stopped by police officers for any reason, it is likely that local immigration enforcement policies will be thrust further into the center of political debate.135 Is Secure Communities Constitutional? Probably not. The Supreme Court has held and reaffirmed that immigrants constitute a discrete class of individuals, worthy of at least an intermediate standard of review in an Equal Protection claim. The program relies substantially on racial profiling, and laws enabling or condoning racial classifications are always strictly scrutinized by a reviewing court. Considering the heightened level of scrutiny to be applied, the program certainly is not narrowly tailored enough to warrant deference. ICE’s own data proves that Secure Communities broadly overreaches its goal of identifying and removing dangerous criminal aliens; nearly 80% of the immigrants removed through Secure Communities since 2008 were neither dangerous, nor criminals.

Too many people get caught up in popular political fervor, repeating uninformed rhetoric without fully considering the realities of the debate. Despite our embarrassing history of slavery, oppression and racism, the United States has a strong history of protecting the disenfranchised, impoverished, and vulnerable from tyranny of an unrelenting majority.136 This nation was founded upon the premise that all individuals, even the politically unpopular, are free from persecution, and afforded due process and equal protection of the laws. However contentious this debate may be, considering the high stakes of constitutional and human rights violations at hand, legal advocacy cannot wait.

Endnotes

1 Rachel Zoghlin is a second-year student at American University Washington College of Law. She is a graduate of Vassar College, and is involved in immigrant advocacy through her work with the UNROW Human Rights Impact Litigation Clinic (litigating on behalf of a derivative U.S. citizen in ICE custody) and the Central American Resource Center (CARECEN) (assisting clients filing various visa petitions and applications for Temporary Protected Status). She extends a special thanks to TMA Editor-in-Chief Richael Faithful for her thoughtful advice and support in the creation and evolution of this piece.


8 See Henderson v. Mayor of New York, 92 U.S. 259, 272-74 (1875) (holding that “[w]e are of the opinion that this whole subject (immigration) has been confided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other body known to our law, state or national; that by providing a system of laws in these matters, applicable to all ports and to all vessels, a serious question, which has long been matter of contest and complaint, may be effectually and satisfactorily settled). See also Hines v. Davidowitz, 312 U.S. 52, 62 (1941) (citing Article VI of the Constitution to illustrate that “[w]hen the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land.”).

9 Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 419 (1948) (citations omitted).


14 See Office of State, Local and Tribal Coordination, Immigration and Customs Enforcement, www.ice.gov/about/offices/leadership/osltc/.


16 Id. at 219-20.

17 Id.

18 ACLU Immigrants’ Rights Project, (Sept. 6, 2005), http://www.aclu.org/FilesPDFs/ACF3189.pdf

19 Chandler, supra note 15, at 216-17.

20 Secure Communities, supra note 6.

21 Id.

22 Id.

23 Id.

24 Interview with Margaret Huang, Executive Director, Rights Working Group, in Washington D.C. (July 28, 2010).


27 Secure Communities Presentation, supra note 25; Interview with Margaret Huang, supra note 24.

28 Secure Communities Presentation, supra note 25,


remain in the United States may be more important to the client than any potential jail sentence.”


41 See id.; see generally Janice Kephart, Dallas Would-Be Bomber Hosam Smadi: The Case for 287(g) and Exit Tracking, CENTER FOR IMMIGRATION STUDIES, (Nov., 2009), http://cis.org/exit-tracking.


44 Ivan Moreno, Immigrant Groups Criticize Fingerprint Initiative, ASSOCIATED PRESS (July 26, 2010), abcnnews.go.com/US/wireStory?id=11253152.

45 Sheriff’s Office Partners with ICE to Launch Secure Communities Program (Mar. 9, 2009), http://www.fairfaxcounty.gov/sheriff/news/ice.htm.

46 Id.


50 See Secure Communities Program, ARLINGTON COUNTY (Aug. 5, 2010), http://www.arlingtonva.us/departments/Communications/page77334.aspx (attempting to clarify its participation in the Secure Communities Program and to answer its residents’ frequently asked questions, Arlington County has published a news alert on its website).

51 See Denvir, supra note 18.

52 Id.


58 Id.

59 Interview with Margaret Huang, supra note 24.


64 Id.

65 See Cooper, supra note 54.


71 Id. at 205.
See Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (citing United States v. Carolene Prod. Co., 304 U.S. 144, 152-153, n. 4 (1938)) (holding that “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”).

Torao Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 420 (1948).


Id. at 292.

Id. at 284.


Id. at 144-45.

Id. at 148 (citing Bridges v. California, 314 U.S. 252, 280 (1941)) (holding that, although one of the petitioners was an alien, editorials published in the newspapers were protected by the First Amendment).

Id. at 147 (citations omitted).

Id. at 154.

Id. at 157 (Murphy, J., concurring).

Id. at 159-60 (Murphy, J., concurring) (citations omitted).

Id. at 161 (Murphy, J., concurring) (citing Turner v. Williams, 194 U.S. 279 (1904)).

Id. (emphasis added).


Id.

See e.g., United States v. Virginia, 518 U.S. 515, 563 (1996) (Rehnquist, J., concurring) (agreeing that the exclusion of women from the Virginia Military Institute violated Equal Protection, but explaining that “[i]f Virginia made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation.”).


Id. at 219, n.19.


See Maureen A. Sweeney, Fact or Fiction: The Legal Construction of Immigration Removal for Crimes, 27 YALE J. ON REG. 47, 51 (2010) (arguing that the doctrinal foundation for the assertion that immigration removals are not punishment for crime but rather remedial civil sanctions and collateral consequences has disintegrated, and that changes in immigration law have rendered removal for many crimes a direct consequence of a defendant’s conviction).


Printz v. United States, 521 U.S. 898, 909 (1997) (emphasizing that, “[n]ot only do the enactments of the early Congresses . . . contain no evidence of an assumption that the Federal Government may command the States’ executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite assumption.”).


See, e.g., Allegheny Pittsburgh Coal Co. v. County Com’n of Webster County, 488 U.S. 336, 344 (1989) (citing Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910)) (noting that, “[i]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.”)

Secretary Napolitano and ICE Assistant Secretary Morton announce that the Secure Communities Initiative identified more than 111,000 aliens charged with or convicted of crimes in its first year, HOMELAND SECURITY (Nov. 12, 1999), http://www.dhs.gov/ynews/releases/pr_1258044387591.shtm.


National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency, No. 10 CV 3488 (S.D. N.Y. filed Apr. 27, 2010); National Day


117 Id. at 74.


119 Toyosaburo Korematsu v. United States, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting).

120 Bracey, supra note 118, at 698 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 291-92 (1964) (Goldberg, J., concurring).


129 See Rachel Zoghlin’s “Inside the Authors’ Studio” interview on our website to learn more about her inspiration for the article, and her thoughts about the issues and questions emerging from the article.
CASTER SEMENYA AND THE MYTH OF A LEVEL PLAYING FIELD

By: Erin Buzuvis

In August of 2009, policies and procedures to verify the sex of female athletes were called into question when South African runner Caster Semenya won the 800 meter event of the World Championships in Berlin. Responding to rumors of gender fraud, and fueled by Semenya’s speed, musculature, and deep voice, the International Association of Athletics Federations (IAAF) requested that Semenya submit to sex verification to confirm her eligibility for the women’s division.2

Some saw the suspicion cast on Semenya as the product of intersecting racism and sexism, namely, Semenya’s failure to conform to standards of white femininity and to stereotypes about women’s inferior athleticism. The scrutiny of Semenya’s personal life is reportedly taking a heavy toll, as evidenced by reports that she has gone into hiding due to the distress and embarrassment generated by the controversy. Underscoring concerns for Semenya’s emotional well-being are comparisons of Semenya to Santhi Soundarajan, an Indian runner who was stripped of her silver medal in the 2006 Asia Games after failing a sex test and was later rumored to have attempted suicide.3

The IAAF did not publicize its sex-verification testing methods, but according to its policy, an athlete whose sex is challenged or raises suspicion can be asked to submit to a multidimensional medical evaluation conducted by a panel comprised of a gynecologist, endocrinologist, psychologist, internal medicine specialist, and an “expert on gender/transgender issues.”4 While the IAAF will not officially disclose the results of these tests,5 unconfirmed reports leaked to the media suggest that Semenya has an intersex condition related to the presence of internal testes and testosterone levels that are higher (perhaps three times higher) than those of the average woman. In November of 2009 the IAAF announced that Semenya would not lose the gold medal and prize money she won in Berlin.6 Shortly thereafter, the International Olympic Committee (IOC) held a conference but was not successful in producing guidelines to help governing bodies address the eligibility of athletes with “disorders of sex development.”7

The IAAF recently cleared Semenya to run in future events.8 Still, the confidential nature of the decision, coupled with a failure to repudiate current policy allowing for sex-verification testing on a case-by-case basis, holds open the possibility that the IAAF could disqualify other athletes for failing a sex verification test, even without accompanying evidence or a charge that the athlete or her agents intentionally attempted to deceive the sporting world as to her sex. Similarly, the IOC allows sex-verification testing in response to charges or suspicion that an athlete competing in a women’s sport or event is not physically eligible to do so. Most recently, the Chinese organizers of the 2008 summer Olympics in Beijing boasted famously that a state-of-the-art sex verification laboratory would be available throughout the games to run expedient sex tests on “suspicious looking women.”9

The controversy surrounding Caster Semenya’s sex provides a useful touchstone for an analysis of sex-verification testing at the Olympic level as well as within the IAAF. The justification for sex-verification testing incorporates two presumptions: first, that sex exists in a binary, and second, that fairness in sport requires a strict separation of the sexes. Once both of these presumptions are exposed as myths, it becomes clear that attempts to medically police the boundary between men’s and women’s sports are futile and unwarranted. As long as we continue to organize separate athletic contests for men and women, athletes should be allowed to participate in events consistent with their bona fide gender identity.

I. IOC Policy on Sex Testing: History and Current Practice

The ancient Olympic Games excluded women from both participation and attendance, due to fear that their presence would usurp the strength of Hercules, the hero and warrior in whose honor the Games were held.10 Some historians consider enforced nudity at the ancient games to be the first Olympic sex verification policy.11

Female athletes have been allowed to attend and participate in the Olympic Games for most of the modern Olympic era, but they have been subject to sex scrutiny throughout this time. During the Cold War, the IOC required female athletes to submit their bodies to visual inspections by medical officials. In 1968, the IOC abandoned the “nude parades” in favor of a less invasive and humiliating chromosomal test on cells swabbed from the lining of the athlete’s mouth.12

Until 1998, and subject to limited exceptions, athletes were only allowed to participate in women’s events if a compulsory chromosomal sex testing
confirmed an XX genotype.\textsuperscript{13} Today, such testing is not mandatory, but Olympic organizing committees (such as in Beijing) and athletic federations (such as the IAAF) may conduct testing on a case-by-case basis.

The IOC has justified sex verification policies as necessary to prevent men from cheating by disguising themselves as women and entering women’s athletic events.\textsuperscript{14} Yet there is only one known instance in Olympic history of this actually happening. In 1936, “Dora” Ratjen of Germany finished fourth in the women’s high jump.\textsuperscript{15} Twenty years later, the athlete admitted that he was actually Hermann Ratjen, a former Hitler Youth member whom the Nazis had forced to compete as a woman.\textsuperscript{16} During the Cold War era, in which the Olympic medal count became politically significant, suspicions of gender fraud by Communist countries—such as suspicions surrounding masculine-looking Soviet throwers Tashana and Irina Press—motivated the IOC to impose sex verification testing.\textsuperscript{17} The testing methods, which merely looked for evidence of the second inactive X chromosome, would not have been effective at detecting other kinds of cheating, such as doping female athletes with high doses of testosterone. This inconsistency casts doubt on the IOC’s stated objective, to police fraud, and suggests instead an objective of policing gender—that is, replicating hegemonic femininity by narrowly defining the category “woman.”\textsuperscript{18}

Sex-verification testing has also affected women with chromosomal anomalies that likely or demonstrably produce no competitive advantage. The first athlete to fail a sex-verification test was a Polish sprinter named Ewa Klobukowska.\textsuperscript{19} In 1967, she was banned from sports and stripped of her Olympic medals after genetic testing revealed anomalous sex chromosomes in some cells (likely an XX/XY mosaicism\textsuperscript{20})—notwithstanding the fact that she passed a visual inspection the year before.\textsuperscript{21} Twenty years later, another runner, Maria Jose Martinez Patino, discovered for the first time during a sex verification test that she lacked a second X chromosome typical of most women.\textsuperscript{22} Patino, who was encouraged to fake an injury and withdraw quietly, was not a man despite her XY chromosomes.\textsuperscript{23} She had Androgen Insensitivity Syndrome (AIS), an inability to process testosterone, effectively neutralizing the development in utero of male sex characteristics typically triggered by the Y chromosome.\textsuperscript{24} Patino challenged the IAAF’s decision and was reinstated two years later.\textsuperscript{25} By then, Patino was past her athletic prime, but due to her efforts, the IAAF’s sex-verification policy today includes AIS on its list of conditions that will not preclude athletes from competing in women’s sport.\textsuperscript{26} In the 1990s, the IOC updated its sex verification methods and adopted a Polymerase Chain Reaction (PCR) process designed to test for the presence of a Y chromosome rather than the absence of a second X chromosome.\textsuperscript{27} Even PCR testing resulted in many false positives. Eight of the over 3,000 female athletes at the Summer Games in Atlanta tested positive for the Y chromosome but were permitted to compete either because further testing revealed AIS or another condition that inhibits the masculinizing function of testosterone.\textsuperscript{28}

In 1999, the IOC Executive Board responded to mounting criticism, including criticism by the American Medical Association and other professional associations,\textsuperscript{29} that compulsory sex-verification testing was expensive, unreliable, and an affront to the dignity of female athletes, by voting to abandon it. The IOC was also responding to the argument that existing drug testing procedures, including monitored urine sample requirements, were effective protection against intentional fraud. However, in abandoning the compulsory sex test, the IOC endorsed a policy that, like the IAAF’s policy, permits “suspicion-based testing” on a case-by-case basis.\textsuperscript{30} Organizers of Olympic Games in Beijing were responding to that policy when they established a laboratory to verify the sex of suspicious-looking women at the 2008 Summer Games. Recognizing the possibility that athletes could present with “ambiguous gender orientation,” the Chinese organizers planned comprehensive evaluations of sexual hormones, chromosomes and genes as well as clinical observation, should the need arise.\textsuperscript{31} While no such testing was conducted, the laboratory’s existence underscores the fact that IOC policy would have permitted sex-verification testing to occur at the Olympic Games.

\section*{II. The Myth of Sex-Verification Testing}

Even in the comprehensive form anticipated by Beijing Olympic organizers and used in the case of Caster Semenya, sex verification is problematic for two main reasons. The first reason is that sex verification supposes that every athlete can be assigned to one of two sex categories and ignores the reality of gender multiplicity. As suggested by the brief overview of the history of sex-verification testing provided here, scientific inquiry into sex is often inconclusive. Sex cannot be distilled to a single, determinable factor. Many biological and social factors—including chromosomes, hormones, genitals, gender identity and gender expression—contribute to our interpretation of whether an
individual is male or female. In most people, these factors appear consistent: sex chromosomes that are either XX or XY will trigger hormones in utero, and again in puberty, that cause genitalia and other sex-related physical features to develop in the “typical” way. Most individuals identify with and experience themselves to be the sex that matches those chromosomes, hormones, and physical features.

However, variations at the chromosomal, hormonal, physical, and psychological levels preclude conclusive assignment of “male” and “female” labels in all cases. As Ewa Kloubowska’s case demonstrates, sex chromosomes can defy the usual XX or XY categories. Individuals may present with XO, XXY, XY, XXX or a mosaic condition in which different cells in the same individual’s body have different sex chromosomes. Conditions like AIS produce a body that might be chromosomally male but hormonally female, while other conditions like congenital adrenal hyperplasia cause individuals with XX chromosomes to have masculine genitalia. Other conditions affecting physical development produce internal or external genitalia that defy classification as entirely male or female; indeed, for one out of every 1500 to 2000 births, an expert in sex differentiation must be called in to interpret atypical presentation of the baby’s gender.32 Transsexual and transgender individuals, who have a gender identity that differs from their physical sex, also challenge the assumption that sex and gender indicators are always consistent. Based on variations such as these, Brown University scientist and author Anne Fausto-Sterling dismisses Euro-American culture’s rigid insistence on only two sexes, stating, “The body’s sex is simply too complex. There is no either/or. Rather, there are shades of difference.”33

By permitting sex-verification testing, the IOC and other athletic governing bodies impose a binary structure onto a reality in which sex exists on a continuum.34 The IOC’s recent policy allowing for participation by transsexual athletes, while a progressive step toward including athletes who would have otherwise been excluded from women’s events due to their Y chromosomes, still operates on and underscores the false premise that sex is a binary.35 By requiring transsexual athletes to have undergone sex reassignment surgery, completed at least two years of hormone treatment, and obtained legal recognition of the new sex, the policy only allows for participation by those gender non-normative individuals most able and willing to conform to the gender binary by placing themselves through surgical, medical, and legal means, firmly on one side of the continuum or the other.36 It excludes any individual whose physical sex or gender identity places them in the gray area in between.

In sum, “sex verification” testing is a myth. It operates on, and harmfully reinforces, the false premise that medical testing can determine sex as either male or female.

III. The Myth of the Level Playing Field

The second reason that sex verification is problematic is that it places undue emphasis on sex-segregation as a means for achieving fairness. The idea that fairness requires the strict separation of men’s and women’s sports is simultaneously overinclusive and underinclusive. It is overinclusive in that it applies even in situations where strict separation does not produce fairness. It is underinclusive because it ignores factors other than sex that are more likely to create an uneven field for competition.

My first point, that sex segregation is applied more than fairness requires, is another way of saying that sex, or more precisely, male-ness, is an imperfect proxy for competitive advantage in sport.37 Sorting athletes by sex does not necessarily sort them by physical characteristics that are considered relevant to sport. Owing to the wide variation of physical characteristics within sex categories (a term I use loosely, in light of my criticism above), some of the athletes in the female group will be similar in size, shape, and musculature to those in the male group. An approach more narrowly tailored to producing a level playing field would sort athletes by physical characteristics, much the same way sports like wrestling group athletes by weight. Even this approach, however, would not necessarily produce a level playing field, as correlations between physical characteristics and athletic performance, thought widely assumed, are largely illusory.

Research about competitive advantage and race illustrates this point. When scientists demonstrated that blacks generally have narrower pelvic girdles than whites, many people interpreted this as support for widely held assumptions about the competitive advantage of black sprinters. Yet there is no evidence that narrower pelvic girdles are, independent of race, a predictor of speed. As one physiologist told Sports Illustrated in 1997, “there’s not a single characteristic that is unique and always present and responsible for [athletic] performance.”38 He was discussing generalizations about physical differences based on race, but the same point—that physical traits do not predict performance—applies to sex differences as well. The absence of a perfect correlation between sex and athletic performance explains examples of men competing against women and
losing—such as when Hitler Youth Hermann Ratjen finished fourth in the women’s high jump, or when tennis player Bobby Riggs famously lost to Billy Jean King. The absence of a perfect correlation between sex and athletic performance also explains why the existing gender gap in athletic performance is demonstrably waning as female athletes begin to overcome their historical exclusion and marginalization from sports. One Oxford University study predicts that, at the rate women’s running speed is improving, women will be outrunning men at certain track events sometime after 2064.39

Thus, separating men and women is neither a perfect way, nor the best way, to ensure that athletes only compete against those with comparable physical features and athletic ability. It also fails to ensure fairness because disparities other than sex-related physical differences tilt the playing field.

In the sporting world, “fairness” is defined as universal adherence to the same rules. It is unfair to give a runner a head start, break the rules of play, or gain a physical advantage through such unnatural means as doping. While unnaturally obtained physical advantages may run afoul of fairness, fairness requires no such categorical limitation on naturally obtained physical advantages. Saying that no one can use natural advantage is antithetical to sport. The average individual does not become a world-class or Olympic athlete; indeed, it has been said that “elite sport selects for physiological outliers whose genetic potential for excellence has been realised through fortuitous interaction with environmental and cultural factors.”40 Yet variation due to non-sex-related conditions is not challenged as beyond the bounds of fair play. For example, the sport of volleyball does not exclude athletes with Marfan’s syndrome, even though individuals with that condition have physical characteristics, including tallness and long arms, that could provide a competitive advantage in that sport.41 The IAAF may determine that Caster Semenya has high testosterone levels resulting from an intersex condition, but it is possible—if not likely—that her opponents have physical features or testosterone levels that are outside the typical range of most women. If those opponents conform to the arbitrary, heteronormative and white standards of femininity, they are not “suspicious,” and they are not tested.

To underscore even further the shortcomings of sex-segregation as a means of ensuring fairness, consider that the so-called level playing field accommodates athletes not just with natural physical advantages, but social and environmental advantages as well.42

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The idea that segregation of athletes by sex produces a level playing field is nothing short of myth

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Some athletes receive coaching at an early age, some have financial advantage due to class or affiliation with sponsors, and some have technologically superior equipment such as shark skin swimsuits or clap-skates.43 In some sports, players are advantaged or disadvantaged by changes in the weather44 or the position of the sun. Even some physical advantages obtained by unnatural means,45 such as laser eye surgery or ligament replacement, are permissible. These variables are likely to enhance an athlete’s performance in the same way that sex-related variables can. Thus, the idea that segregation of athletes by sex produces a level playing field is nothing short of myth.

IV. Proposal: Prohibit Sex Verification Testing

I am not proposing, at least not here, that the IOC should abandon sex-segregated athletics. I do support reconceptualizing sports to allow for more integrated competitions that group athletes by physical characteristics other than sex. Weight classes in wrestling, handicapping in golf, grouping of common times in road racing are examples of how similar principles are already being applied. In this new paradigm, sex verification would be unnecessary because an athlete’s sex would be irrelevant to determining the field of competition most appropriate for each competitor. By abandoning the constraints of the sex binary, this paradigm would reflect a more intellectually honest approach to sport and would be inclusive of intersex and transgender athletes. While such a paradigm shift may be a valid long term goal, sex-segregation of sports is not going away in the short term. I simply argue here that, as an intermediate step, the IOC should prohibit sex-verification testing. The concept of testing for sex defies reality in which sex is a construct—a reality in which our interpretation of a person is based on a number of factors (genes, hormones, anatomy, identity, expression) that may or may not consistently conform to the concept of male and female. If sport is to continue to rely on the myth of discernable sex categories, it must acknowledge it as such, rather than insist that categorization is possible or that categorization is deterministic of a level playing field. In short, the IOC and other athletic governing bodies must shed the overly rigid application of a sex binary in favor of a more flexible approach that allows athletes to participate in the category that is consistent with, or at least most closely approximates, their gender identity.

The IOC could implement a flexible approach by prohibiting sex verification testing and ensuring that the only participants disqualified from women’s events are those intentionally committing gender fraud. Under this approach, an intersex athlete like Caster
Semenya would be eligible for women’s track events because her female gender identity is not in dispute. Under this proposal, the only sex-related challenges that the IOC or other governing bodies would consider would be those rooted in evidence tending to show that an athlete’s self-selection into women’s competition is not consistent with the life she leads outside of sport.46 This intent-based standard should be interpreted to exclude competitors like Hermann Ratjen who are manipulated or forced to cheat by a government. An intent-based standard should not be used to exclude transsexual athletes who comply with the IOC’s policy on transgender athlete participation; such competitors should have an absolute defense to charges that their gender identity at the time of competition is inconsistent with the gender expression earlier in their lives or athletic careers.

Currently, sex-verification policies treat an athlete’s eligibility based on sex similarly to an athlete’s eligibility based on involvement with banned substances. In both contexts, eligibility is determined by medical evidence, with no consideration given to whether the athlete intended to cheat.47 However, the strict liability that applies in doping cases is not warranted in cases where sex is in dispute. One important difference is that doping policies target individual and categorical substances “because of their potential to enhance performance.”48 Sex-verification policies, however, are not so narrowly tailored. The risk of unfairness that strict liability poses in the context of sex, compared to the risk in the context of doping, is not as strongly outweighed by a benefit to the field of competition. Moreover, the risk of unfairness posed by a strict liability approach is arguably stronger when the ground for exclusion is a naturally occurring chromosomal or hormonal variation than when the ground for exclusion is an exogenously-obtained competitive advantage.

This proposal does not seek to create a level playing field. Rather, it recognizes that sex-verification and the level playing field are illusory goals,49 and in so doing avoids many of the problems that result from the IOC’s current policy of suspicion-based sex-verification testing. As Caster Semenya’s case shows, the policy is rife with abuse and selective application. Moreover, considering the myth of the level playing field created by numerous personal advantages that all athletes bring to the starting line, sex-verification testing inflicts harm on the athlete’s dignity, privacy and personal life that are far disproportionate to any unfairness that is being targeted by examining sex.

Endnotes

1 Erin E. Buzuvis is an Associate Professor at Western New England College School of Law. A version of this paper was presented at the University of Baltimore School of Law Amateur Sports Law Symposium on October 29, 2009. The author thanks Ann Gillard, Art Leavens, and Kris Newhall for helpful comments on earlier drafts.
3 See Nilanjana Bhowmick & Jyoti Thottam, Gender and Athletics: India’s Own Caster Semenya, TIME MAG. WORLD, Sept. 1, 2009 (stating that shortly after receiving the silver medal in the 800 meter at the Asian Championship, Soundarajan was asked to undergo a sex test, where she was later diagnosed with androgen insensitivity syndrome (AIS), a condition in which a “male is resistant to androgens, the male sex hormones”).
4 INT’L ASS’N OF ATHLETICS FED’N, IAAF POLICY ON GENDER VERIFICATION (2006) (“The crux of the matter is that the athlete should not be enjoying the benefits of natural testosterone predominance normally seen in a male.”).
6 See id. (acknowledging that it is rare to have disputes over an athlete’s sex, where Semenya’s sport was unprepared to handle cases in which athletes have both male and female characteristics).
7 Meg Handley, IOC Grapples with Sex Testing, TIME MAG. WORLD, Feb. 11, 2010. The conference reportedly produced only recommendations that the IOC support medical centers that would “treat” athletes with DSD with hormone therapy and surgery, a recommendation that pathologizes sexual variation and raises both practical and ethical questions about the idea of reducing an athlete’s natural hormone level in an attempt to level and already-variable playing field. Id.
8 See Assoc. Press, Semenya Sets Comeback, N.Y. TIMES, July 7, 2010 (reporting that after being cleared by the IAAF, Semenya will compete in a European meet before making her return to the African championships in Kenya).
9 See Jane Macartney & Hattie Garlick, Girls Will Be Girls at the Beijing Olympics—Sex Tests Will Prove It, TIMES (U.K.), July 29, 2008 (“Suspect athletes will be evaluated from their external appearance by experts. They will then undergo four tests, including blood tests, to examine their sex hormones, genes and chromosomes for sex determination” because there’s the need for a “full battery of examinations,” where chromosome tests might be insufficient and external checks alone could result in negative reactions from athletes).
11 Id.
(explaining that prior to the 1966 European athletics championship, “compulsory gender verification in the form of a gynaecological examination” was used where athletes had to stand “naked in front of a committee and were subjected to inspection of their external genitalia”); Wackwitz, supra note 10, at 555.

13 Wackwitz, supra note 10, at 553-54.


16 Id.

17 Id.; see also Ritchie et al., supra note 12, at 396-97 (stating that when compulsory gender verification was introduced, mandating female athletes to submit to sex testing by standing naked in front of a Committee, neither of the Press sisters took the examination and never appeared in an athletic competition again).

18 Richards v. U.S. Tennis Ass’n, 400 N.Y.S.2d 267, 272 (Sup. Ct. 1977) (recognizing the inadequacy of the Barr Body test to test for femaleness); see also Cavanagh & Sykes, supra note 15, at 81. Moreover, even as a sex-policing practice, the Barr body test comes up short because it would not detect all individuals with male chromosomes. Those with a rare XXY genotype or male physical characteristics would test positive for the Barr body and be counted as women by the IOC. The Barr body test also fails to detect chromosomally female athletes with non-chromosomal masculinizing conditions, such as androgen-secreting tumors. Myron Genel, Gender Verification No More?, 5 Women’s Health (2000), http://ai.eecs.umich.edu/people/conway/TS/OlympicGenderTesting.html.

19 See Ritchie et al., supra note 12, at 397 (asserting that while Klobukowska failed the Barr body test after it was first introduced, the test itself created various problems because it confirmed or refuted an individual’s sex based solely on a chromosomal test, when such a test “fails to take account of the complexities of sex determination itself”).

20 Id.

21 See Wackwitz, supra note 10, at 556 (acknowledging that protests against sex testing have stated that it is neither a test based on physical appearance nor chromosomal make-up is completely determinative of biological sex); see also Cheryl L. Cole, One Chromosome Too Many? In The Olympics at the Millennium: Power, Politics, and the Games 128, 129 (Kay Schaffer & Sidonie Smith, eds., 2000) (discussing the “procedural shift from the body’s surface to its interior,” where Klobukowska had one sex chromosome too many to be declared a woman for purposes of an athletic competition).

22 Wackwitz, supra note 10, at 556.

23 Id.


25 Wackwitz, supra note 10, at 556 (“I knew I was a woman. . . . If I hadn’t been an athlete my femininity would never have been questioned.”).

26 Genel, supra note 18. In addition to AIS, the IAAF policy lists gonadal dysgenesis, and Turner Syndrome as conditions, which afford no competitive advantage, and thus allowed. It also recognizes congenital adrenal hyperplasia, androgen-producing tumors, and anovulatory androgen excess as conditions, which “may afford competitive advantage”, but should nevertheless be allowed. Int’l Ass’n of Athletics Fed’n, supra note 4, ¶ 6.

27 See Cole, supra note 21, at 142-43 (explaining that the IOC “sought to improve and standardize laboratory-based testing,” where recent studies on chromosomal analysis has shown that the absence of the SRY gene was the key element in determining a person’s sex).

28 Genel, supra note 18; Reeser, supra note 24, at 696.

29 Genel, supra note 18.

30 See Cavanagh & Sykes, supra note 15, at 76 (holding that if the IOC questioned the sex of an athlete it reserved the right to conduct a sex test).

31 Wang Wei & Zhang Ming’ai, Sex Testing Lab for Beijing Olympics, August 18, 2008, http://www.china.org.cn/olympics/news/2008-08/18/content_16263487.htm (stating that the sex of athletes with such “ambiguous gender orientation” would be determined by clinical observation, testing of the chromosomes and genes, and the presence of abnormal male hormone because “one single test is not enough”).

32 See Anne Fausto-Sterling, Sexing the Body: Gender Politics and the Construction of Sexuality 4-5 (2000) (asserting that “labeling someone a man or a woman is a social decision”); see also Jennifer Finney Boyle, The XY Games, N.Y. Times, Aug. 3, 2008 (acknowledging that for some women whose internal genitalia defy classification, they live their lives without knowing they have such a condition).

33 Fausto-Sterling, supra note 32, at 3

34 See Boyle, supra note 32 (“The Olympic hosts [in Beijing] seem to want to impose a binary order upon the messy continuum of gender. They are searching for correctness and certainty in a world that contains neither.”).

35 See Cavanagh & Sykes, supra note 12, at 75 (addressing the controversy behind allowing the participation of transsexual athletes, where opponents feel that gender self-determination results in unfair competitive advantages).
compromising the level playing field by pointing out that “it is impossible to ensure that all competitors will play under exactly the same conditions or that an individual's ability will be the sole determinant of the outcome”).


Id.

PGA Tour, 523 U.S. at 686-87 (“[C]hanges in the weather may produce harder greens and more head winds for the tournament leader than for his closest pursuers. A lucky bounce may save a shot or two….Pure chance may have a greater impact on the outcome of elite golf tournaments than [an advantage a disabled player may receive from a golf cart accommodation].”).

Cf. Pistorius v. Int’l Ass’n of Athletics Federations, CAS 2008/A/1480 (2008) (rejecting a narrow view of competitive advantage in reasoning that the advantageous energy return a runner received from using prosthetic limbs had to be considered against the disadvantages of doing so).

Boylan, *supra* note 32 (“The best judge of a person’s gender is not a degrading, questionable examination. The best judge of a person's gender is what lies within his, or her heart….A quick look at the reality of an athlete’s life ought to settle the question.”).

Cf. *PGA Tour*, 523 U.S. at 686-87 (“[C]hanges in the weather may produce harder greens and more head winds for the tournament leader than for his closest pursuers. A lucky bounce may save a shot or two….Pure chance may have a greater impact on the outcome of elite golf tournaments than [an advantage a disabled player may receive from a golf cart accommodation].”).

WORLD ANTI-DOPING AGENCY, *Anti-Doping Code* ¶ 2.1.1 (2009) (“It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his or her body. . . . Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping violation under Article 2.1.”); *C. v. Federation Internationale de Natation Amateur*, CAS 95/141 (1996) (swimmer given banned substance by her coach was disqualified).

WORLD ANTI-DOPING AGENCY, *supra* note 47, ¶ 4.2.1.

Boylan, *supra* note 32 (arguing that Olympic officials “have to learn to live with ambiguity, and make peace with a world in which things are not always quantifiable and clear”).

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See Katy Bosse’s “Inside the Authors’ Studio” interview on our website to learn more about her inspiration for the article, and her thoughts about the issues and questions emerging from the following article.
A PRICE TAG ON CONSTITUTIONAL RIGHTS: GEORGIA V. WEIS 
AND INDIGENT RIGHT TO CONTINUED COUNSEL

By: Katy Bosse

“Thou shalt not ration justice.” –Judge Learned Hand

On February 2, 2006, Jamie Weis was arrested and charged with the robbery and murder of a local senior citizen. Nearly seven months after his initial arrest, the state notified the Griffin trial court of its intention to seek the death penalty. In the Georgia Public Defender system, created by the Georgia Indigent Defense Act of 2003, all death penalty cases are assigned to the Georgia Capital Defender Division instead of the local public defender’s office. In Weis’s case, the overtaxed Capital Defenders Division had a tremendous caseload. And instead of assigning another case to the already overtaxed Capital Defenders Division, the Council decided to assign private attorneys Robert Citronberg and Thomas West on a contractual basis.

From January 24, 2007 through November 26, 2007, the defense attorneys filed over sixty motions on Weis’s behalf. During that time, the Georgia Capital Defenders also handled the high profile case of Brian Nichols, which exhausted most of its 2007 annual budget and depleted the funds available for other cases. Citronberg and West filed for four continuances between January 24 and November 26, 2007, because the state could no longer afford to pay them for their time. On November 26, 2007, District Attorney Scott Ballard made an oral motion to remove Citronberg and West from the case, and suggested that attorneys from the local public defender’s office be placed on the case instead. Judge Caldwell sustained the state’s motion and removed Citronberg and West. Subsequently, two public defenders, Tamara Jacobs and Joseph Saia, were assigned as counsel.

This article explores the origins of an indigent defendant’s right to counsel and demonstrates how the facts of the Weis case illustrate the need for a definitive right to continued counsel. Part I traces the procedural history of Weis, the history of the right to counsel in America, and the current jurisdictional split on the right to continued counsel. Part II analyzes the current Supreme Court language on indigent right to continued counsel, and suggests how Weis provides an opportunity for the Court to resolve the issue in favor of indigent defendants. Analyzing the procedural history and arguments described below, it is evident that denying Weis the right to retain his court appointed counsel violates his Sixth Amendment right to a fair trial, because he was without effective counsel for over a year during which the prosecution continued to mount its case.

I. How We Got to a Continued Counsel Split

a. The Georgia Decision

“I guess the Supreme Court will have to earn their money.” –Judge Caldwell

On December 10, 2007, the two public defenders assigned to Weis’s case, Jacobs and Saia, filed a motion to withdraw as counsel due to “their inability to duplicate the familiarity with the case.” The motion was denied. Subsequently, Weis filed another motion on December 20, which contained an affidavit from Joseph Saia that detailed the current workload of his office and his ninety-one open felony cases. Additionally, Weis and his public defenders filed several other motions to withdraw, along with a motion requesting Judge Caldwell recuse himself from the case, and a petition for mandamus and prohibition against Judge Caldwell.

On April 25, 2008, the Georgia Capital Defenders indicated in discussions that funding would again be available to Citronberg and West. However, when provided a contract, the Georgia Capital Defenders refused to process the bills. On December 31, 2008, Weis filed a petition for a writ of mandamus against the judge and the Public Defender Standards Council, which was dropped after the judge agreed to reinstate Citronberg and West. Citronberg and West were reassigned as counsel on February 11, 2009. However, as a New York Times article describes, “[t]he[p]rosecutors had steadily built a case while the defense did nothing. Leads went cold, memories faded, witnesses went missing.” Nevertheless, the trial was set for August 3rd, 2009, with evidentiary motions scheduled for July 8, 2009. On July 8, Weis filed a motion to dismiss due to the denial of his right to a speedy trial. The motion was denied and counsel appealed. The decision was affirmed by the Georgia Supreme Court on March 25, 2010.

The Georgia Supreme Court analyzed the case under the Barker v. Wingo four-part balancing test for assessing a speedy trial claim. Under the test, a court must balance (1) the length of the delay and (2) the reasons for the delay with (3) the defendant’s assertion of a right to a speedy trial and (4) the prejudice to the defendant. The court found that the length of the delay did not violate the defendant’s right to a speedy trial, and that the reasons for the delay did not constitute a “systemic
breakdown of the public defender system.”31 The court concluded that the delay was due to Weis’s failure to cooperate with Jacobs and Saia, the public defenders appointed after Citronberg and West were removed.32

Specifically, the court ruled that a defendant could not assert the right of counsel of choice to delay judicial proceedings.33 The court acknowledged that the lack of funding contributed to the delay but decided that it was not the sole factor.34 The court ruled that a lack of funding from the Georgia Capital Defenders was not a “systemic breakdown” of the public defender system, and thus was not the primary reason for the delay.35 Instead, the court found that the defendant’s conduct and the conduct of Citronberg and West, i.e., not being able to work without compensation, was the primary reason for the delay.36 Rather than acknowledge that the state’s public defender system had failed the very people it was designed to protect, the court chose to blame the public defenders assigned to the case requested to be removed almost immediately.42 The majority also erred, the dissent indicated, in finding that Weis and his attorneys were at fault, when it was the state’s organization that initially hired and then could not compensate Citronberg and West.43 The dissent reasoned that even though the state agency is focused on the defense rather than the prosecution of criminals, the state is still obligated to provide adequate funding, concluding that the state’s budgetary constraints were not a valid excuse for depriving a citizen his appointed counsel.44

Conversely, the dissent examined the right of an indigent defendant to continued counsel, citing the Alabama Court of Criminal Appeals decision *Late v. Alabama*, which quotes Smith v. Superior Court of Los Angeles County:

> [O]nce counsel is appointed to represent an indigent defendant, whether it is the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused.40

The dissent concluded that a defendant should not be forced to choose between his original counsel and new counsel in order to receive a speedy trial at the hands of the state.41 The dissent also correctly assailed the majority’s argument by emphasizing that Weis could hardly be held responsible for the delay when the public defenders assigned to the case were not able to work without compensation, was the primary reason for the delay.35 Instead, the court found that the defendant’s conduct and the conduct of Citronberg and West, i.e., not being able to work without compensation, was the primary reason for the delay.36 Rather than acknowledge that the state’s public defender system had failed the very people it was designed to protect, the court chose to blame the public defenders assigned to the case requested to be removed almost immediately.42 The majority also erred, the dissent indicated, in finding that Weis and his attorneys were at fault, when it was the state’s organization that initially hired and then could not compensate Citronberg and West.43 The dissent reasoned that even though the state agency is focused on the defense rather than the prosecution of criminals, the state is still obligated to provide adequate funding, concluding that the state’s budgetary constraints were not a valid excuse for depriving a citizen his appointed counsel.44

After the unfavorable Georgia Supreme Court decision, Citronberg and West filed a petition for writ of certiorari before the Supreme Court of the United States.45 The writ called for the Court to resolve the division among state courts regarding indigent defense and the continuity of representation.46 On October 4th, 2010, the Court denied the petition for writ without comment.47

b. The History of the Right to Counsel

“[T]here is an absolute right to appointment of counsel in felony cases. . . . [A]ppointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused might be affected.”48

The Sixth Amendment of the United States Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the assistance of counsel for his defense.”49 The Supreme Court first recognized the fundamental nature of the right to counsel in 1932 in *Powell v. Alabama*, noting that the assistance of counsel was essential to a fair trial.50 Later, in the landmark decision, *Gideon v. Wainwright*, the Supreme Court recognized this right for indigent defendants, stating “[t]he right of one charged with [a] crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”51 The *Gideon* Court held that when a defendant is unable to obtain counsel, the state must assign counsel because “[t]his noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”52 However, the decision in *Gideon*, while obligating the states to appoint counsel, maintained a narrow focus that did not identify to what extent the right to counsel extended.53

While states instituted *Gideon*’s mandate with varying success, the Supreme Court continued to attempt to define the right to counsel and its effect on the practice of criminal law. In 1970, the Court indirectly analogized that the right to counsel was the right to competent counsel. In 1983, in *Morris v. Slappy*, the assigned public defender fell ill and the client was assigned a new public defender rather than
being granted a continuance. The Supreme Court in Morris held that the Sixth Amendment does not guarantee a meaningful relationship between a defendant and counsel. However, in Justice Brennan’s concurring opinion, he argued that judicial efficiency should not stand in the way of an indigent defendant’s continued representation by an attorney with whom he has a relationship of trust and confidence.

This point aside, viewing the Court’s decisions from 1970-1983 retrospectively, had the court drafted clearer language regarding the right to counsel, the Court could have reshaped attitudes and created a much more organized and superior indigent defense system. Had the Court been more willing to provide guidelines for what constitutes meaningful representation, the Court would have likely drafted a set of minimum requirements that all public defenders must meet when conducting a criminal defense. Furthermore, State legislatures could have taken such standards into account when drafting legislation and appropriating funds to the state criminal defense agencies. However, without such standards, many states are unable to effectively allocate the appropriate level of funds needed by these agencies, and as a result, those needing representation, the state agencies, and the already dwindling budgets suffered. The vague standard of “effective” allowed state legislatures to both design and fund the bare minimum of criminal defense.

Finally, in 1984 in Strickland v. Washington, the Court attempted to address the guidelines of what should constitute “effective counsel.” In an opinion by Justice O’Connor, the Court adopted the standard adopted by all the Federal Courts of Appeals and held that assistance of counsel should be “reasonably effective.” The Court adopted a two-prong analysis that considers “(1) whether the lawyer’s performance fell below acceptable levels and (2) whether that performance prejudiced the accused.” Although the Court refused to set rigid standards for what qualifies as reasonable, Justice O’Connor enumerated basic duties of counsel: to be loyal, to avoid conflicts of interest, to advocate the defendant’s cause, and to consult with the defendant on important decisions.

Justice O’Connor also suggested that American Bar Association (ABA) guidelines should help to determine what is reasonable, and that strict rules on reasonableness should be avoided so as to give counsel flexibility in making strategic decisions. Justice Marshall, in his dissent in Strickland, laments the majority’s refusal to set stricter standards for the definition of “reasonably effective.” He describes the many aspects of the criminal defense system, such as preparing for trial, applying for bail, making timely objections, and filing for appeals, that would all benefit from judicial oversight. As Justice Marshall’s dissent points out, the majority’s vague language in Strickland left the states on their own to determine how to enforce Gideon’s right to counsel mandate. Justice Marshall reasoned that if stricter and more specific standards for the various aspects of trial had been concretely set, states would have had a clearer idea of how to build and fund their criminal defense systems. More importantly, the criminal justice system around the country could operate on a more uniform level, providing equal access and fair processing for all defendants.


c. Varied State Responses

In the years since Strickland and Gideon, states have individually fashioned their own standards in defining what constitutes “reasonably effective” counsel. Unfortunately, these standards can vary greatly from state to state. In 2004, forty years after Gideon, the ABA published a scathing report on the nation’s indigent defense systems. The report noted the extreme disparities in funding between the prosecution and the defense, the excessive caseload of public defense attorneys, and the inadequate assistance provided to indigent defendants as a result.

No standard provides more evidence of the disparities in state systems than the right to continued counsel, also known as vertical representation. While Georgia and Louisiana still do not recognize an indigent defendant’s right to continued counsel, state courts have ruled that indigent defendants have a right to continued counsel as part of their Sixth Amendment right to counsel. This point is evidenced by the fact that even the states surrounding Georgia have chosen to support and uphold the right to counsel for indigent defendants.

For example, in Lane v. Alabama, a defendant’s initial attorney was removed because of the state’s intention to call him as a necessary witness. In assessing whether such an act violated the defendant’s Sixth Amendment right to a fair trial, the court claimed that “[w]ith respect to continued representation…there is no distinction between indigent defendants and non-indigent defendants.” Essentially, once counsel has been appointed, the trial judge is required to respect the attorney-client relationship as if it were privately retained counsel.

Similarly, in Weaver v. Florida, the Florida Supreme Court held that the attorney-client relationship is not dependant on the source of compensation because the attorney should be loyal to the person he or she represents, not to the person who pays for the services.

States that recognize the right to continued counsel for indigent defendants have created exceptions to this right. The Weaver court laid out several reasons why it may be appropriate to substitute counsel, such as incompetence, physical incapacity,
inappropriate conduct, or the efficient administration of justice. In Tennessee v. Huskey, a case in which the trial judge attempted to dismiss counsel for filing an abundance of motions, the court analogized that an attorney-client relationship involves “an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney.” The Tennessee court concluded that based on case law from other states, the removal of original counsel is only permitted when all other remedies have been exhausted.

While many states have interpreted the Supreme Court’s decisions in Gideon and Strickland to include an indigent right to continued counsel, Georgia and Louisiana have expressly denied the right of an indigent defendant to retain counsel. In Weis, the Georgia Supreme court relied on the Louisiana decision, Louisiana v. Reeves, to support its holding that moving the case forward was a sufficient reason to justify the substitution of counsel. The facts of Reeves are extremely similar to Weis, in that in Reeves the court removed non-local counsel who was paid by the Capital Defense Project, and replaced him with the local Chief Public Defender. The court justified the removal by claiming that the right to counsel of choice does not extend to defendants who require court appointed counsel. In Louisiana, an indigent defendant is entitled only to “effective representation.”

The Sixth Circuit of the United States Court of Appeals upheld this interpretation of the Sixth Amendment in Daniels v. Lafker. The Daniels court held that an indigent defendant represented by a court appointed attorney has no right to his or her choice of counsel. While serving on the Second Circuit of the United States Court of Appeals, current Supreme Court Justice Sonia Sotomayor also ruled that “there is no constitutional right to continuity of appointed counsel.”

II. Indigent Continued Counsel Needs More Support

a. A Meaningful Relationship

The Supreme Court needs to clarify its dicta in Morris and hold that the non-existence of a right to chosen counsel is not the denial of a right to continued counsel once an attorney-client relationship has been established. Determining that the Sixth Amendment guarantees a right to continued counsel does not overturn Morris, nor does it affect the Court's decision that an indigent defendant does not have the right to choose his initial counsel. Instead, it extends the rights of indigent defendants and grants them rights equal to defendants with paid counsel.

The language used in Morris makes it clear that the Court was referring only to the creation of a new Sixth Amendment right to “meaningful representation.” The frequently quoted language reads:

No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney – privately retained or provided by the public – that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel. Accordingly, we reject the claim that the Sixth Amendment guarantees a “meaningful relationship” between an accused and his counsel.

Rejecting the idea that the Sixth Amendment contains a guarantee of a “meaningful relationship” between the defendant and counsel is not the same as rejecting an indigent defendant's right to retain his original counsel once an attorney-client relationship has been forged. While the court has been explicit that it will not create a constitutional guarantee that the relationship will be meaningful, they have not denied a defendant's right to continuity of appointed counsel.

b. Strickland's Vagueness Problem

The reasonableness standard set forth in Strickland is intentionally vague. While the court does not set specific standards, Justice O'Connor's opinion makes it clear that standard legal practice and ABA guidelines should guide both lawyers and judges to determine what constitutes a reasonably effective level of counsel. Unfortunately, as Kim Taylor-Thompson, a veteran Washington, D.C. public defender, explains, “[t]he unappreciated cost of the Court's lack of specificity has been a legacy of ineffective assistance that has now shifted the onus of defining the components of the right to counsel to the indigent defense community.” As a result of the vague standard in Strickland, an indigent defendant is currently only entitled to relief if the court appoints a new attorney and does not allow for sufficient time to prepare, thus forcing the counsel's representation to be ineffective.

The current ABA Ten Principles of a Public Defender System guide maintains that “the same attorney continuously represents the client until completion of the case.” Additionally, the guide further asserts that the same attorney should represent the client from the initial assignment through the trial and sentencing. In Gideon's Broken Promise, the ABA's 2004 study of the nation's indigent criminal defense standards, the ABA reported that national standards have long recognized a right to continued counsel as an essential...
c. Strickland's Guidelines

The language used in Strickland demonstrates that even though the court has been vague in its rulings on what constitutes “effective representation,” the duties they believe apply to all defense attorneys are more effectively performed when there is a right to continued counsel. The Court stated that “the Sixth Amendment imposes on counsel a duty to investigate,” and that “access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Based on the author's experience observing and clerking in several public defender offices and local criminal court systems, when multiple attorneys handle a single case, investigation is often neglected or left until witnesses' memories have faded and the “trail” has gone cold. Similarly, the author has also found that each attorney might have different knowledge and defense strategies that will affect the outcome of a case. Switching between attorneys causes confusion not only for the defendant, but also for the prosecuting attorney who must adjust to different defense strategies, and the judges who must rule on differing motions filed by different attorneys or rule on the same motion several times due to the change in counsel.

The Strickland Court also imposed a “duty of loyalty” and “the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.” Continuing to keep the defendant informed of important developments, seeking the client's opinion on important decisions, and guiding the client through those decisions are extremely difficult when the same attorney does not represent the client throughout the entire case.

d. The Benefits of Continued Counsel

The language in Strickland, though vague, makes it clear that the Supreme Court upholds certain standards for effective criminal defense, all of which are easier to adhere to when there is continued counsel. A lack of continued counsel generates the following problems: (1) it prevents the establishment of an attorney-client relationship, (2) it encourages a lack of accountability, and (3) it increases the likelihood that necessary and important work will be neglected as the case moves between attorneys.

i. The Attorney-Client Relationship

The relationship between an attorney and a client is a vital component of conducting an effective defense. Ideally, a defense attorney creates a collaborative relationship with a client, instead of merely dictating to the client his decisions and legal strategy. A collaborative relationship requires open communication, which necessitates a substantial amount of interaction between the attorney and client. Through this communication, the attorney and the client will collaboratively answer many of the essential questions that are presented during a criminal trial, such as how to plead, whether to proceed to trial, and whether or not the client should testify. To answer these questions and facilitate open communication, many public defender offices view continued counsel as a fundamental requirement.

ii. Lack of Accountability

Similarly, when a client moves between multiple attorneys during the progression of a case, files get lost, motions are not filed, and discovery does not get examined. Because a new attorney may have been assigned to a specific portion of the case, or perhaps has taken over the case completely, a predicament is created in which the client does not know who to go to for information, or even what information is needed. This disorganization fosters a lack of accountability and usually results in inadequate defense. A client, particularly an indigent client, is generally unaware and does not understand the legal process and procedural requirements for motions for continuances, or the steps to assure that previous motions were filed correctly. When more than one attorney represents a client at different junctures throughout the case, the client does not know whom to hold accountable, and thus, is without recourse. A right to continued counsel ensures that the client knows exactly who to contact and would also hold the specific attorney accountable for all files and motions associated with the case.

iii. Neglected Work

Attorneys also differ in their trial strategy, oratory skills, and the weight they give to certain legal issues. The same case in the hands of two different attorneys can look extremely different; thus, a client may suffer from an involuntary change in
counsel. Following an involuntary change in counsel, the new attorney may develop a divergent strategy or need to re-conduct investigation. But most important, a new attorney must gain the defendant’s trust. The chances of discovery being overlooked or a motion not being filed in a timely manner increase exponentially when a case shifts between attorneys.

A right to continued counsel permits continued communication between the client and counsel that builds client confidence and enables the relationship to evolve over time. Evidenced by the irrefutable benefits of continued counsel detailed above, to deny a defendant continued counsel undermines their Sixth Amendment right to the assistance of counsel. As Anne Poulin, a Villanova law professor and prolific writer on Criminal Procedure, argues in *Strengthening the Criminal Defendant’s Right to Counsel*, “[a] defendant should not be forced to reestablish an attorney-client relationship with each of a series of attorneys, repeatedly explaining the case and her understanding of it to new counsel.”

e. Jamie Weis’s Lasting Legacy

“Whenever possible, substitution of counsel over the defendant’s objection should be avoided. Changing counsel without the defendant’s consent reduces the likelihood that the defendant will receive effective assistance, and will perceive the process as fair.”

In *Weis*, Citronberg and West, Weis’s original counsel, though court appointed, worked tirelessly for over a year to investigate and prepare Weis’s capital murder defense. They developed an open communication with Weis and learned about his mental health problems, family history, and his life both before and after the alleged murder. Weis submitted an affidavit stating that he could “trust Mr. West and Mr. Citronberg with my case and . . . my life. They truly care about me and I believe they have the knowledge and skill to prepare a defense.” The public defenders assigned to replace Citronberg and West did not have access to investigators trained in uncovering the mitigating circumstances surrounding Weis’s case, which can be pivotal in a capital murder defense. When Citronberg and West were removed from the case, more than a year lapsed in which there was no investigation. Based on the Supreme Court’s language in *Strickland*, it is evident that once West and Citronberg were removed from the case, there was no longer “effective” representation.

The procedural history of this case raises a myriad of issues. Ranging from the state’s burden to fund its criminal defense and prosecution agencies equally, to the attempts on the part of Citronberg and West to use Weis’s case as a test case for structural litigation to improve Georgia’s indigent defense system. The most obvious, however, is whether Weis has the same right to keep his original counsel, as he would if he had privately retained counsel with his own funds. When Judge Caldwell removed Citronberg and West, despite Weis’s objections, and replaced them with public defenders who were unable to continue the work necessary to provide Weis with effective counsel, they effectively denied Weis’s Sixth Amendment rights.

The Supreme Court of Georgia and the Supreme Court of Louisiana both cite *Morris* in their rulings. Both courts held that there is no right to “meaningful representation” between an attorney and a client, and also that there is no right for an indigent defendant to choose his initial attorney. Accordingly, both concluded that an indigent defendant has no right to continuity of appointed counsel, regardless of the established attorney-client relationship. Both the prosecution and the Georgia Supreme Court have misinterpreted these rulings when they connote that there is no right to continued counsel to be found in the Sixth Amendment. While the obvious solution to the prosecution in *Weis* was to replace Citronberg and West, who refused to continue without pay, with already salaried public defenders, the Constitutional rights of an indigent defendant are no less substantial because he or she is indigent. The benefits of an attorney-client relationship and the continuity of that relationship have been discussed above. These benefits are constitutionally guaranteed to those who retain private counsel, and should not be diminished for those who cannot. Although they declined to do so in the *Weis* case, the Supreme Court needs to find that its language in *Strickland* and in *Morris* does not preclude it from holding that an indigent defendant has a right to retain counsel as if he or she had privately retained the counsel. To find otherwise is to put a price tag on our constitutional rights and continue to ignore the injustice that *Gideon* sought to correct over forty-five years ago.

Conclusion

The Supreme Court has continually refused to set specific guidelines for effective counsel, assuming that states and local bar associations would conform to certain agreed-upon standards. However, twenty-five years after *Strickland*, it is clear that this is not always the case. The Court needs to recognize many of the base standards of effective defense counsel, beginning with the right to continued counsel. The Georgia Supreme Court erred in finding that Weis and his attorneys were to blame for the delay in his case, and thus, erred in concluding that it was acceptable to remove Weis’ original appointed counsel despite Weis’ objections. The dissent in *Weis* was correct; a state
cannot adequately fund its prosecution and underfund its defense.\textsuperscript{109} However, the real harm done by the state’s lack of funding was to deprive Weis of his appointed counsel. Depriving Weis of his appointed counsel gave the prosecution an automatic advantage, and thus, denied Weis of his Constitutional right to a fair trial. The Supreme Court erred in not granting certiorari to Weis’s case and taking the opportunity to rule that a state cannot deny an indigent defendant his right to continued counsel. The State of Georgia has already begun applying its decision in \textit{Weis} to other cases and will continue to deprive Georgia’s indigent defendants of their constitutional rights until the Supreme Court takes action.\textsuperscript{110}

\section*{Endnotes}

\begin{enumerate}
\item Katy Bosse is a second year law student at American University: Washington College of Law. She is on the \textit{Journal of Gender, Social Policy, and the Law}, is a Legal Rhetoric Dean’s Fellow, and a staff writer for \textit{The Modern American}. Prior to law school, she was the Senior Public Policy Associate at Matz, Blancato, and Associates and attended the University of the South.
\item \textit{Weis}, 694 S.E.2d at 353; see also, Jessica Dweck, “Light Him Up Before the Jury Goes Home,” \textit{Slate}, June 2, 2010, \url{http://www.slate.com/id/2253644/} (reporting that the Georgia Public Defender Standards Council ran out of funds to support a rigorous investigation, pay expert witnesses, and pay for mitigation specialists for the case after six months after the Council spent almost all of its resources on a single case).
\item \textit{Weis}, 694 S.E.2d at 353.
\item \textit{The Nichols Case: Evolution of a Murder Trial}, \textit{Atlanta J.-Const.}, Dec. 14, 2008, available at \url{http://www.ajc.com/services/content/printedition/2008/12/14/nicholstime.html}.
\item Id. at 6, 2009 WL 4028414, at *6 (“Counsel for defense had been told verbally that there is no money in the Georgia Public Defender Standards Council or the Georgia Capital Defender budget to pay counsel.”).
\item Id.
\item Id. at 7, 2009 WL 4028414, at *7.
\item Id.
\item Id. at 9, 2009 WL 4028414, at *9.
\item Id. at 8-9, 2009 WL 4028414, at *8-9.
\item Id. at 9, 2009 WL 4028414, at *9.
\item Id. at 9-10, 2009 WL 4028414, at *9-10.
\item Id. at 10-12, 2009 WL 4028414, at *10-12.
\item Brief for Appellee at 8, \textit{Weis}, 694 S.E.2d 350 (No. S09A1951), 2009 WL 4028415, at *8.
\item Petition for Writ of Certiorari at 9, \textit{Weis}, No. 09-10715 (U.S. May 10, 2010), 2010 WL 3922882, at *15.
\item Weis v. Georgia, No. 09-10715, 2010 WL 1903558, at *1 (U.S. Oct. 4 2010).
\item Mempa v. Rhay, 389 U.S. 128, 134 (1967).
\item U.S. Const. amend. VI.
\item See \textit{Powell v. Alabama}, 287 U.S. 45, 71 (1932) (“the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment.”).
\item Id.
\item See \textit{Morris v. Slappy}, 461 U.S. 1, 5-6 (1983).
\item Id. at 13-14.
\item See id. at 21-26 (Brennan, J. concurring).}

\section*{S P R I N G  2 0 1 1}
75 See Taylor-Thompson, supra note 53, at 1479 (“By pinning down the expectations embedded in the right to effective counsel, the Court could have set a meaningful threshold.”).

58 By comparison, England spends about $34 per person on indigent criminal defense; the United States spends about $10 per person. See ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON’S BROKEN PROMISE: AMERICAN’S CONTINUING QUEST FOR EQUAL JUSTICE 8 (2004), available at http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf (hereinafter GIDEON’S BROKEN PROMISE) (examining the problems of funding for state indigent defense programs and the problems with state versus local funding).


60 Id. at 687.

61 Taylor-Thompson, supra note 53, at 1464.

62 Strickland, 466 U.S. at 688.

63 Id.

64 Id. at 700 (Marshall, J., dissenting).

65 Id. (noting various courts of appeals alternate attempts to provide standards for reasonable effectiveness). See also Jennifer M. Allen, Free For All a Free for All: The Supreme Court’s Abdication of Duty in Failing to Establish Standards for Indigent Defense, 27 LAW & INEQ. 365, 379 (2009) (noting that the Strickland decision provides zero guidance to states on minimum standards or funding).

66 Strickland, 466 U.S. at 712-713 (Marshall, J., dissenting).

67 See id. at 713.

68 See id. at 713-715.

69 Allen, supra note 65, at 386 (“As a result of the Court’s failure to address systemic standards, States are able to perpetuate indigent defense systems that should render their attorneys ineffective by default.”).

70 See GIDEON’S BROKEN PROMISE, supra note 58.

71 See id. See also Taylor-Thompson, supra note 53, at 1478 (“Thus began the states’ race to the bottom in providing little more than technical compliance with the Sixth Amendment guarantee of counsel.”). This paper will refer to vertical representation as “continued counsel” or the right to continued counsel.


74 Id. at *7.

75 Id. at *13 (examining relevant federal and state law to demonstrate that most courts have not found a difference between appointed or retained counsel for the purposes of continued counsel).

76 Id. at *15 (citing Buntion v. Harmon, 827 S.W.2d 945, 949 (Tex. Crim. App. 1992)). See also Stearnes v. Clinton, 780 S.W.2d 216, 223 (Tex. Crim. App. 1989) (“the power of the trial court to appoint counsel to represent indigent defendants does not carry with it the concomitant power to remove counsel at his discretionary whim.”). Weaver v. Florida, 894 So. 2d 178, 188-189 (Fla. 2004).

78 Id. at 189. See also Clements v. Arkansas, 817 S.W.2d. 194, 198 (Ark. 1991) (“the right to counsel of one’s choosing is not absolute and may not be used to frustrate the inherent power of the court to command an orderly, efficient, and effective administration of justice.”).


80 Id. at 307 (citing Smith, 440 P.2d at 75).


82 Weis, 694 S.E.2d at 355.

83 Louisiana v. Reeves, 11 So. 3d 1031, 1055 (La. 2009).

84 Id. at 1056 (citing Wheat v. United States, 486 U.S. 153, 159 (1988) (“those who do not have the means to hire their own lawyers have no cognizable complaint”); United States v. Gonzalez-Lopez, 548 U.S. 140, 151 (2006) (holding that the right to counsel of choice does not apply to defendants with appointed counsel).

85 Reeves, 11 So. 3d at 1056.

86 Daniels v. Laffler, 501 F.3d 735, 739 (6th Cir. 2007).
There is an increasing need to account for the role of the nation’s failing public school system in structuring incarceration risk among minority populations and to link theories of the minority achievement gap with those of disproportionate minority confinement. The minority achievement gap is so named, because, on average, minority students’ school performance is much lower than that of White students. The disparity is greatest between African-American and White students and persists in a range of assessments, including standardized test scores, dropout rates, and graduation rates. Disproportionate minority confinement refers to racial disparities in incarceration rates, and again, the disparity is greatest when comparing African-Americans and Whites.

The incarceration rate for minorities is highly disproportionate to their total percentage in the population. African-Americans represent about 12% of the national population but make up 40% of the U.S. prison population. If the current trend of incarceration holds, one in three African-American male children born in 2001 will go to prison at some point during their lives. The disparity is greatest between African-American and White students. For Latino males, the ratio is one in seven, and for Caucasian males, the ratio is one in seventeen. These data shows that extant race and gender dynamics put African-American male children at significant risk for incarceration. Educational failure within this population only increases this vulnerability.

The prison system began a massive expansion during the War on Crime era. In 1980, 300,000 people were in prison in the United States. By 2005, there were 1.5 million individuals in prison. Today, it is estimated that the prison and jail system holds 2.3 million. One explanation for a steep rise in incarceration rates should be a corresponding steep rise in crime. However, crime rates in the 20-year span between 1980 and 2000 either dropped or stagnated, the rapid rise in incarceration does not actually correspond to a rise in crime. A significant factor in prison expansion was a 975% increase in commitments for non-violent offenses, such as drug charges, between 1982 and 1999. During that time, African-Americans were at an extreme disadvantage in drug charge processing and were ultimately incarcerated at significantly higher rates than Whites even for virtually identical crimes. The terrain of these data, which is well charted with respect to race and incarceration, undergirds my inquiry into how the war on crime has directly affected minority populations in childhood.

The ideologies and policies of the War on Crime are made manifest in disciplinary arrangements in urban public schools. As French philosopher Michel Foucault suggests, schools have always been disciplinary institutions. Schools organize students, control them, grade them, rank them, track them; this is the making of Foucault’s docile body. Presently, though, we are experiencing a unique cultural moment in which the gold standard of school discipline is punitive. In this era, youth are exposed to the criminal justice system by way of their public education and prior to criminal activity. The consequences include the expansion of the minority achievement gap and increased risk of incarceration that leads to disproportionate minority confinement. What is at stake here is the loss of educational opportunity, the acculturation of youth to criminalization, and a negative redirection of students’ life paths. These risks are borne not only by individual students, but also by their communities and the larger democracy.

The criminal justice system has significantly influenced schools nationally in terms of policy, cultural practice, staffing and technology. School disciplinary policies are increasingly designed to mirror criminal justice enforcements, and zero-tolerance measures originating in the war on crime are now common in the education system. In fact, zero-tolerance became a requirement for school funding by way of the Gun-Free Schools Act of 1994. Though the term “zero-tolerance” is not used in the Gun-Free Schools Act, the law dictated an automatic punishment of school expulsion of at least one year for gun possession on school grounds. In time, this kind of strict disciplinary enforcement came to be known as zero-tolerance and began to play a significant role in regulating a wide range of student behaviors, including tardiness, disrespectful language, the expression of violent threats, and inadvertent transgressions of school rules.

Zero-tolerance policies sponsor exclusionary school disciplinary practices, such as suspension and expulsion. Because these policies do not allow for discretion, even minor offenses can be deemed intolerable. Fairly recently, an adolescent boy with a hyperactive diagnosis was punished under a zero-tolerance policy for saying during a cafeteria conversation, “I am going to get you,” to classmates whom he suspected of eating potatoes intended for him. The child was suspended from school, placed in the custody of the local police, charged with “terrorist threats,” and incarcerated for two weeks while awaiting his trial.

The penchant for youth criminalization has sponsored increased police presence at schools, including uniformed and armed guards. The field of school policing is expanding faster than every other division of law enforcement. Carceral technologies have also been
employed at schools, and surveillance cameras are now common features of school security. A large majority of newly built schools are fully equipped with surveillance systems. With the addition of metal detectors, biometric devices, and similar technologies, the school security market has grown into a multi-billion dollar industry – big business in the neo-liberal state. This privatization of the public sphere supports capital expansion and sponsors social control ideologies. Further, it reinforces a shift in governance away from the social welfare state and toward the penal state.

The new punitive culture of public schools is deeply troubling, because it negatively affects the lives of children. While children are vulnerable, it is a gross error to reduce their vulnerability to the “problem” of crime – especially when doing so masks more significant challenges. We should also be clear that children are victims of crime less frequently in school than out of school. Less than 1% of child homicides happen in school, and non-fatall school crime has been reduced over 60% between 1992 and 2004. While it would be convenient to interpret this crime decline as proof that school security is effective, it would be inaccurate.

Crime began dropping in school prior to the institutionalization of zero tolerance policies and prior to advances in school surveillance and fortification. Crime against youth continued to drop in schools just as it dropped in society at large, suggesting that school security features were not the catalyst.

Is it possible that crime in schools could have dropped further had it not been for the ramping up of school security? Pedro Noguera, an expert in urban education, has argued that punitive school disciplinary policies dehumanize students and, thereby, produce a harsh school climate that sponsors violence. Recently, other scholars have joined Noguera in focusing on the negative effect of criminalizing school cultures. The sociologist Paul Hirschfield claims that the harsh school disciplinary policies that result in student suspension and expulsion label youth as “future prisoners in need of coercive control or exclusion” and generate “a self-fulfilling prophesy.” This claim is supported by the work of educational scholars, Richard Arum and Ireen Beattie, who have statistically proven that punitive treatments in school, such as suspension, increase the risk of adult incarceration. In short, these data suggests that we are expanding childhood vulnerability with the very measures we have employed to provide safety.

The research on school discipline indicates that punitive policies, practices, and ideologies are magnifying the vulnerability of our most marginalized student groups. Compared to Whites in their peer group, African-American students experience nearly 6% more school surveillance, 24% more campus security guards, and navigate five times more metal detectors. African-American students comprise about 17% of all students but are over 33% of those suspended from school for disciplinary reasons. This punishment falls disproportionately on African-American males and has significant consequences for incarceration risk. The experience of school suspension more than doubles the likelihood of adult incarceration.

In other words, punitive school disciplinary policies further the expansion of the prison system itself, largely at the expense of the African-American community.

New Orleans, where I have conducted research since 2002, provides the quintessential example of school and prison coordination. The disciplinary culture of New Orleans Public Schools is influenced by the war on crime’s priority for law and order in governance. I began my research in New Orleans when a small group of local students were suspended or expelled from their schools – most for minor and non-violent offenses such as insubordination or tardiness. The students were reassigned to a new school that opened at the Orleans Parish Prison, and this institution became the center of my interpretive case study and the focus of my field note observations and locally conducted interviews, which spanned approximately two years. I contextualized the qualitative data I gathered with statistical information on school performance and school punishment from local school and district archives, and I supplemented the data set with a vast collection of local documents including school board minutes and newspaper clippings.

The school was in a building on the grounds of the prison complex, and the students were there for twelve hours a day. At the school, the law and order paradigm was palpable. There were surveillance cameras at every corner, bars on the windows, and armed deputies to keep the students in line. Educational advancement was de-prioritized. There were no credentialed teachers, no textbooks, and no courses leading to high school graduation. This program was actually a school reform initiative designed by the Criminal Sheriff and supported by the superintendent of schools, who was a former colonel in the Marines.

In 2002, the year the prison school opened, there were many signs of socioeconomic distress in New Orleans that preceded Hurricane Katrina and then exacerbated the storm’s effects. The severely underperforming Orleans Parish Public Schools were serving a student population that was 93% African-American and 80% low-income, and the schools ranked at the bottom of the nation. In 2000, only 25% of third graders and 29% of ninth graders in New Orleans met national averages on the standardized Iowa Test
of Basic Skills.41 Two of the young boys I came to know in my research reflected these larger patterns. They were low-income, African-American boys, each with a long history of academic failure. Both attended a middle school where 40% of the eighth grade class in one year did not advance to the ninth grade. When I asked the students what traditional school was like for them, one explained that he always felt behind in his lessons and could not seem to catch up in his classes, where the student-teacher ratio was as high as thirty-three to one.42 His mother said he often came home in tears.

The academic failure of New Orleans Public Schools is further revealed by school disciplinary measures. On the district level in 2000-2001, almost 16% of all district students were suspended during the school year.43 When these data is analyzed by race and gender, however, the numbers become even more striking. In the 2002-2003 school year, for example, over 25% of African-American males in the New Orleans Public School System were suspended at least once and lost instruction time as a result.44 One of the students in my research was suspended and sent to the prison school because he had skipped classes; another because he had often been late to homeroom. Neither saw their disciplinary offenses as warranting a prison-style punishment.

The space and experience of the school in the prison were completely baffling to the New Orleans public school students who found themselves constantly restricted, regimented and surveilled. One student explained that the security arrangements at the school forced him to confront a negative image of himself, which he rejected. He explained that he was the exception in this regard, as most kids responded to the aggressive treatment in kind and started acting even more “crazy.” There is a great deal of educational research on the powerful role that expectations play in youth identity development. The theory of the self-fulfilling prophecy suggests that when we treat children like criminals, we help them construct a sense of themselves that aligns with the criminal identity we have assigned to them. What motivation is there for them to behave otherwise? Even students who find ways to resist the criminalizing power relations at school must struggle to cast themselves in a more positive light.

As the story of the students at the prison school suggests, tough on crime policies in school exacerbate societal and educational disenfranchisement. The low-income, underperforming, African-American male students from New Orleans were socially, economically, and educationally disadvantaged before they were ever sent to school at a prison. By obsessing over their disciplinary infractions rather than addressing their academic challenges, we nearly ensure that these students will drag further behind. Incarceration poses the ultimate risk of harsh disciplinary treatment in school because imprisonment marks an individual for his or her lifetime, as well as his or her family and community. Imprisonment means total confinement and a loss of identity, and it is attended by deprivation and violence. In his research on incarceration and the life course, sociologist Bruce Western has shown that a prison term shapes an individual’s job, marriage, and family prospects.45 Incarceration also significantly shapes voting rights, as Jeff Manza and Chris Uggen and have shown in their study of felon disenfranchisement.46 They reveal that one in forty Americans cannot vote due to a past felony. When you consider voter disenfranchisement along the axis of race, an even larger problem emerges. In some states one in four African-American men are ineligible to vote. Suddenly, the problem is not one borne solely by the individual or even by the group. Voter disenfranchisement is a problem for democracy, since it poses a threat to full representation.

There are many ways to interrupt the trend of disproportionate minority confinement, beginning with a rethinking of our priorities for public education. The first step is in the direction of schools that reflect educational priorities and serve as positive sources of social capital. Positive social capital, according to sociologist Loïc Wacquant, are those accrued institutional resources that promote a community.47 For schools to be positive sources of social capital they must embrace tenets of inclusion rather than exclusion and build school communities that students and their families can be proud of and want to be a part of. A further step in the right direction is engendered by a commitment to high expectations for all students. Roslyn Mickelson’s work on the achievement gap has shown that students who have clear and positive future goals are more successful in school.48

Punitive school discipline does not engender a positive student trajectory, while an elaboration of positive school resources does. A recent study by scholars, Richard Arum and Gary LaFree, proves a theory long-held by school advocates that “states and schools with higher teacher-student ratios produce adults who face lower risks of incarceration.”49 Similar investments in education—focusing on teaching staff and classroom resources—could have the same positive result. These investments are costly, but the financial and social cost of school security may, indeed, be even higher. In New Orleans post-Katrina, the Recovery School District spent nearly $22 million dollars for school security.50 The students in New Orleans needed this investment in academic opportunities, and not in the technologies and tactics of criminalization.

Ultimately, the students I studied in New Orleans left the prison school when local activists, some of whom had been formerly incarcerated, protested the institution and pressured the school board to shut it down. None of the students I worked with ever re-enrolled in traditional public schools, and they now formally occupy the status of the African-American male high school dropout. The
chances that they will end up in prison are higher than the
chances that they won’t. So far, they’ve defied the odds.

Endnotes

1 Lizbet Simmons is an Assistant Professor of Criminal Justice Studies at San Francisco State University. She holds a MA and a Ph.D. from University of California, Berkeley.


3 See Ann Arnette Ferguson, Bad Boys: Public Schools and the Making of Black Masculinity 55 (2000) (comparing the results of the California Test of Basic Skills); Michelle Fine, Framing Dropouts: Notes on the Politics of an Urban Public High School 17 (1991) (discussing the dropout and graduation rates of New York City’s predominantly African American and Latino Comprehensive High School); Douglas G. Glasgow, The Black Underclass: Poverty, Unemployment and Entrapment of Ghetto Youth 159 (1981); Noguera, supra note 2, at 86 (explaining that Oakland schools’ dropout rates reinforce the idea that Oakland schools are failing); Pedro A. Noguera, The Trouble with Black Boys: The Role and Influence of Environmental and Cultural Factors on the Academic Performance of African American Males, 38 Urb. Educ. 431, 432 (2008) (“When compared to their White peers, middle-class African American males lag significantly behind in both grade point average and on standardized tests”).


11 Id.


Punishment: Can Punishment Lead to Safe Schools?

(William Ayers, Bernadine Dohrn & Rick Ayers eds., 2010); Paul J. Hirschfield, Preparing for Prison? The Criminalization of School Discipline in the U.S.A, 12 THEORETICAL CRIMINOLOGY 79, 80 (2008) (explaining schools with “rule-breaking and troubling-making students are more likely to be defined as criminals... and treated as such in policy and practice).

See generally WESTERN, supra note 4, at 131-68.


See Note, supra note 3, at 343 (asserting community organizations’ involvement with African American male students may be essential to improving academic outcomes and keeping such students out of prison);Loïc J.D. Wacquant, Negative Social Capital: State Breakdown and Social Destitute in America’s Urban Core, 13 NETH. J. OF HOUSING AND THE BUILT ENV’T. 25, 27-29 (1998) (discussing resources and values that people may turn to by virtue of membership).
48 Roslyn Arlin Mickelson, *The Attitude-Achievement Paradox Among Black Adolescents*, 63 Soc. of Educ. 44, 55 (1990) (stating “The more optimistic students feel about the potential value of education for their future, the better their performance in school.”).


As a summer law clerk at Advancement Project, I read an excited e-mail chain about a newly-published book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, by Michelle Alexander, a professor at Ohio State Moritz College of Law. In my experience, racial justice advocates are always excited about race-related progressive-minded works that receive a scintilla of national attention, because the sad truth is that much of America’s public racial dialogue is simplistic, sterilized, and sound-bited. My co-workers were most thrilled by the book’s provocative name—“The New Jim Crow”—a name that accurately colors the present crisis in the American criminal system.

Beyond the book’s name is an equally firm punch from cover to cover. *The New Jim Crow* has received rave reviews by the public interest community in particular and social justice advocates in general. By mid-summer I knew that I needed to interview Michelle Alexander for *The Modern American* to learn more about her as an author and advocate and her personal reasons for writing such an inevitably controversial book. Her message is plain and poignant: mass incarceration is the new racial caste system of the twenty-first century, built on colorblindness’s dual weapons of systemic racism and willful ambivalence, and racial caste must be finally confronted and dismantled in the United States once and for all. Her ambitious vision is well-outlined in *The New Jim Crow*, a self-described “call to action,” which meticulously details the history and law of mass incarceration, namely through the “War on Drugs,” and the devastation wrought by the so-called war on racial politics and communities of color, from black-brown criminalization to the creation of a new underclass. Our hour-long conversation explored: why this book and why now?

Michelle Alexander makes clear that her book is written for racial justice advocates who need to care more about mass incarceration. In other words, she wrote this book for people who are now in the position that she was in about a decade ago. She acknowledged that she had always been acutely aware of racial injustice, as a child of an inter-racial marriage between a white mother and black father. When younger, Alexander noticed that her parents’ marriage had drastic consequences—both families disapproved, but her mother was ex-communicated from her church and disowned by her family. “My mother was treated radically different,” Alexander observed, elaborating that her parents faced rental discrimination, and other mistreatment, which her mother had not experienced before. Their hardships occurred in the backdrop of a landmark Supreme Court case, *Loving v. Virginia*, which ruled bans against inter-racial marriage as unconstitutional. Alexander was born within months of *Loving*, and she developed a sensitivity to issues of race in America from an early age.

But, like most racially-conscious people, her political analysis was deepened by more personal experiences. During college, Alexander volunteered at a newly de-segregated high school attended by poor Black children. The severity of the segregation was so stark and so dire that in her mind it was the first time she witnessed “how race operated to lock poor people of color into inferior status.” Her experience at the schools, along with another volunteer experience during college at a women’s prison, impressed the meaning of systemic racism onto her political awareness. It was during this time that she learned that race served to mark certain people as second-class citizens in the present, even if less overtly.

This is the level at which most racial justice advocates operate today. Many advocates defensively resist systemic racism through policy reform at national or state levels. In contrast, *The New Jim Crow*, emphasizes that systemic racism is the tip of the stratification iceberg, and our criminal system is the Titanic about to come to head.

Alexander explained that the inspiration for the book came during her time as the former American Civil Liberties Union-Northern California (ACLU-NC) Racial Justice Project Director. At the time, the ACLU-NC’s main project was the Driving While Black Campaign, an effort against law enforcement racial profiling. One of the strategies adopted by the organization was litigation, which led Alexander in search of potential plaintiffs. Screening interviews proved to be a rigorous task, consisting of speaking to “one young African-American man after the other,” hearing one shocking story after the other.

One young man in particular helped guide her to “enlightenment.” He was yet another young African-American man who entered the interview room. Unlike the others, though, he carried a stack of papers, the weight of which reverberated with a “plunk” when dropped onto a table in front of Alexander. He was a clean-shaven young man who easily articulated his numerous racial profiling experiences. He had even painstakingly documented every stop and search he had experienced in the last nine months. By all accounts he was a perfect plaintiff—certainly a rare find.

Alexander was eager and ready to take his case and assumed, because of a pre-interview screening, that he had no criminal history. But during the course of the interview, he let it slip that he had been convicted of a drug felony. He tried to explain that he was set up in a drug bust during which his friend was beaten by a specific
police officer. Before he continued, Alexander simply told him that she was sorry that she could not represent him, but that she had no other choice. He was obviously disappointed. Alexander tried to explain, “they [state lawyers] would tear you apart because of your record.” Another otherwise ideal plaintiff was struck off the list, leaving Alexander sorry that he was no longer a candidate.

It was clear, however, that he was even sorrier. He jolted up from his seat and yelled that because of his conviction he couldn’t get a job, public housing, food stamps, or other benefits that he desperately needed to re-start his life. He was trapped living with his grandmother, unable to find work, or a way to get unstuck. He poised his words and said, “You’re no better than the police…doing the same thing that they did to me.” He told her that she had written him off, like all of the others had done, for no other reason than that he was labeled a felon.

Several months later, the Oakland police scandal broke on the front page of a local paper, naming the same officer that the young man identified in his interview. Alexander immediately realized that the young man was telling the truth in more ways than one. She had made a terrible mistake—he was right. She reflected that, even as a civil rights lawyer, “I replicated the very same kind of discrimination and marginalization that I was fighting against.” The reality set in that although she intellectually knew that labels were empty brands, “management and control of dispossessed people trapped in second class status is eerily reminiscent of Jim Crow”—a bygone, but familiar era of her childhood—and she had perpetuated the same stereotyping that kept that caste system intact.

He “shook me from a colorblind slumber,” Alexander said. “[I]t was like an optical illusion, but now, being able to see the picture clearly, the outline was traced where it was hidden before.”

Alexander’s revelation after her interview experience is the driving force of the book. She stresses that because the caste system, melded together by mass incarceration, has become literally set—normalized by false crime rationalizations—it’s future depends on one factor alone: complicity. Historians are quick to point out that Jim Crow was also an accepted way-of-life until, over several decades, the popular movement had swelled to its climax. As she explains in the book, just like with the Jim Crow myth that “races couldn’t mix together,” American society has bought into crime and punishment myths that justify the War on Drugs against poor Blacks. The truth is that drug crime was declining when the War on Drugs was declared,2 crime rates have remained steady in recent years even as incarceration rates have sky-rocketed,3 and whites, more than any other racial group, are perpetrators of most drug crimes, despite the fact that Blacks and Latino/as are locked up at alarmingly high disproportions.4

The New Jim Crow goes a long way to explain these contradictions within the colorblind and mass incarceration phenomena. The book’s first chapter, The Rebirth of Caste, explains that the “law and order” rhetoric strategically deployed in the 1960s to quell the Civil Rights Movement ripened into justification for the Black drug “crackdown” of the 1980s. The lucidity of these historical cycles, Alexander suggested in our interview, puts forth the question, “what will historians say about us?” After all, she explained, “people thought that they understood Jim Crow until it was challenged in the 1960s,” because fundamentally, it was racial indifference, not racial hostility, that kept the caste system intact.

The same ambivalence also feeds the colorblindness myth—the myth that racism no longer exists and that race is therefore irrelevant—as the United States willfully ignores the staggering truth that it locks up more of its racial minorities than does any other country in the world.5 Moreover, Alexander shared, colorblindness actually depends on racial exceptionalism to survive. In other words, without the Barack and Michelle Obamas, which are fewer in number but greater in visibility, mass incarceration would be exposed as so evidently a racial caste system that its indictment of the United States would be “unavoidable,” as was Jim Crow exploitation during the Cold War. Alexander argued to me that, unless the “opportunity to move people utterly indifferent to the harm and suffering that the system has inflicted” is seized, the magnitude of harm caused by mass incarceration will never be appreciated.

When I asked Alexander why she wrote this book, her reply, in essence, was because she could. As an accomplished civil rights lawyer-turned-law professor, she lends credibility to the words, stories, and realities of less privileged people lost in the mass incarceration underworld. Her ultimate challenge to racial justice advocates is that “reform is not enough—we need to work toward movement.
building work...not just to end mass incarceration but to end racial caste in America.” In her mind, this enormous undertaking begins with a very simple belief: “care, compassion, and concern across racial lines” is necessary to build racial empathy, the skill to “hear the voices of people who are handcuffed” and to do something about it.

She further stressed that racial justice advocates must send more than a political message—they must send the message that real change means “all of us or none of us.” She emphasized that advocates urgently need to turn their focus to removing the stigma attached to people convicted of felonies in the Black church and other community pillars, so that the paralyzing fear in these communities can transform into grassroots action.

The promise or peril of American racial justice may hang by a thread of shared compassion, a message pushed by then-candidate Barack Obama in his well-known Philadelphia address. Alexander takes a sobered view of President Barack Obama’s racial agenda, but hopes to remind communities of color that they cannot expect anything more from the President, who operates in a precarious, colorblind political landscape. If anything, she urges, “we need to be more willing to engage around aggressive advocacy and organizing” and to rouse America from its colorblind dream. She writes in the final chapter, “The Fire This Time,” that Martin Luther King Jr.’s dream had evolved in the Poor People’s Movement into a recognition that “the time had come for racial justice advocates to shift from a civil rights to human rights paradigm, and that the real work of movement building had just begun.”


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Endnotes

3 Id. at 97.
4 Id.
5 Id. at 6.
6 Id. at 245.

For more commentary on mass incarceration, see Modern America: Law & Politics Blog posts, “A Modern Twist on the Prison Industrial Complex,” by Isis Goldberg and “Prison Labor, Human Experimentation, & The BP Oil Disaster” by Zannie Carlson.
I was convicted of burglary in 1998, and I served two years and two months in jail and prison. Several years after serving my time, I got interested in politics and learned of a process where I could restore my voting rights. Although the struggle of incarceration was long over, I didn’t know that I was about to begin another struggle to become a full citizen again.

In the Commonwealth of Virginia an ex-offender can get a job, get married, get a driver’s license, even raise children; but he or she cannot vote unless restored by the Governor. I applied in 2008 to have my rights restored, but a few months later I was denied. No reason was given. There is no appeals process, and there was a two-year waiting period to reapply. I thought I had done everything right. I met all the requirements specified on the application: I was off parole for over three years, paid all my fines, and had not been convicted of a misdemeanor since 1998.

Working with some voting rights groups, activists, and local elected officials, we tried to get Governor Tim Kaine to reconsider his decision in my case. But beyond that, we wanted him to take action to restore the rights of the 300,000 Virginians who were disenfranchised like myself. The Virginia State Constitution gives the Governor the power to restore rights in any way he sees fit, and the type of action we were asking for was not without precedent. Other governors had issued Executive Orders to automatically restore rights, such as Governor Vilsak of Iowa and Governor Crist of Florida. Even Texas, under then-governor George W. Bush, moved to a system of automatic restoration.

But time was running out. Governor Tim Kaine’s term was set to expire in January, 2010. It was exactly one month before that, December 2009, that I received an email from the Virginia Secretary of the Commonwealth’s Office: It is the policy of the Office of the Governor not to provide specific reason why the Governor exercises his discretion not to grant requests for restoration of rights . . . However, one requirement is that applicants have no convictions for violations of the law . . . prior to applying for restoration of rights. This includes moving violations, such as speeding.

I had two reactions. First, I thought, “moving violations? What kind of policy denies basic rights based on speeding tickets?” My second thought was can you really call it a policy when, until that point, it had been a complete secret, and probably was never written down that moving violations could affect restoration applications. (Not to mention the fact that they broke their other supposed policy of not giving specific reasons why the Governor exercised his discretion to deny my application). I’m not a lawyer, but it was clear to me—it was not a policy, it was an arbitrary and capricious decision of the Governor’s Office.

It was December 2009, and a coalition of groups that I joined called Virginia Restore Our Vote (which included the Virginia ACLU, NAACP, Poverty Law Center, League of Women Voters, Progressive Democrats of America, interfaith and many others) had recently formed to address the felony disenfranchisement issue on several fronts. Many of the coalition groups had been trying for quite some time, even for years, to convince the Governor to take action to restore rights before he left office. We tried conventional methods; we tried working behind-the-scenes. But Governor Kaine was unwilling to do the right thing. We also knew that in less than a month, Kaine was going to be succeeded by a Republican Governor who may not be as willing to make any progress on the issue. That’s when I decided to go public with this new information that they were denying restorations because of traffic tickets.

We hoped that putting some public pressure on the Governor would convince him to act. We held two demonstrations, had frequent media coverage, and made numerous public calls for Kaine. Legal teams had gone into great detail to show exactly how, and why, he had the authority to issue a blanket restoration if he chose to do so. Even the Washington Post agreed with our position that Governor Kaine should issue a blanket restoration and create an automatic restoration system.

Unfortunately he lacked the courage, and in January Tim Kaine went on to devote himself full-time to his position as Chairman of the Democratic National Committee as Governor Bob McDonnell was sworn into office.

In the beginning of 2010, Governor Bob McDonnell declared April to be Confederate History Month. It was at this time his office announced that they would be requiring rights restoration applicants to submit a letter explaining why they think their rights should be restored. Officials also stated that this letter should include any community service, including church activities. This “essay requirement,” as people were calling it, seemed
legally wrong on so many levels, posing potential First and Fifteenth Amendment problems. It was hard to believe that this development could be ignored by the public.

It turned out that the essay requirement was a public relations nightmare for the McDonnell Administration, just on the heels of the flap over Confederate History Month. So once again, advocacy groups met with the Governor and a few weeks later, they announced a new “policy” for nonviolent offenders applying for restoration of rights. There would be no essay requirement. Applications were to be processed in 60 days or less. The waiting period to apply was shortened, and the period to re-apply was also shortened.

Moreover, I learned through unofficial channels that the Governor would no longer be using traffic tickets as a sole reason to deny applicants. I immediately drove to Richmond to hand-deliver my application. About one month later, I received a certificate from the Governor. The big golden seal both formalized my regained rights and at long last, my full citizenship. The very next day, I went to the Board of Elections to register to vote. A few days later, I received my voter card in the mail.

I thank Governor McDonnell for making the restoration process even easier than it was under his predecessors. I encourage him to do even more to expand voting rights for every ex-offender in Virginia who has completed his or her sentence. But the problem remains that as long as Virginia’s Constitution puts the power of restoration solely in the hands of the Governor, thousands of Virginians can and will be disenfranchised. The fact that Governor McDonnell was able to change the “policy” so significantly from that of his predecessor proves that the process is truly arbitrary.

During this process, I was surprised at how many people, even some supposed progressives, actually believed that I shouldn’t be allowed to vote. I was being held to a higher standard than people who run for office, just to get my right to vote restored. I ask them: what are the requirements of citizenship? Didn’t I meet the requirements when I was released from prison and I was able to work and pay taxes? Those who say that I shouldn’t be allowed to vote are in essence saying that my sentence was too light and that my punishment should continue. Although I’m out here, they insist that my civil rights remain incarcerated. This is the moral hypocrisy that Virginians need to confront.

The Commonwealth of Virginia’s political hypocrisy is that forty-eight other states have better restoration laws. Why don’t people from the other states complain about the fact that ex-offenders have their rights restored automatically? Because it’s normal. Virginia is abnormal.

This is why we need Congress to act. Legislators are currently considering the Democracy Restoration Act, which will grant automatic restoration for all people convicted of felonies (who are no longer incarcerated) to vote in federal elections. People like me shouldn’t have to go through years of uncertainty about whether they would be able to vote again. They shouldn’t have to re-live the entire conviction and incarceration process as they pore through archived records to find the right information to send to the Secretary of the Commonwealth, in the hopes that the Governor would be nice enough to grant them a right that should never have been taken away.

I urge you to remember my story, and push Congress to act now. Free people should not be relegated to second-class citizenship after they have paid their debt to society.

Endnotes

1 Frank Anderson is an advocate against felon disenfranchisement who recently re-gained his own right-to-vote in Virginia where he is currently a resident. This essay is based on remarks that he made at the University of the District of Columbia Law School in October 2010.

For more commentary on rights restoration for people convicted of felonies, see Modern America: Law & Politics Blog posts, “Modern Day Poll Tax,” by Michael Faithful.
The Fifteenth Annual Latino/a Critical Legal Theory Conference, which took place from October 8-10, 2010 in Denver, Colorado, was themed “The Color of the Economic Crisis: Exploring the Downturn From the Bottom Up.” The conference explored how the economic crisis affects marginalized populations differently—such as socio-economically disadvantaged people, racial minorities, immigrants, and domestic violence victims—and how their realities must be a central point of discussion when considering economic justice and reform. Most of the conference attendees were law school professors who shared their relevant research. Students, practitioners, and advocates also came to present ideas, learn from others, and build collective support for a call to progressive action.

A main focus of the conference was the impact of the economic crisis on immigrants living in the United States. Immigrants, broadly speaking, are vulnerable to scapegoating during economic downturns, as evidenced by the new Arizona immigration law. The opening lunch presentation included an engaging speech by Hans Meyer, from the Colorado Immigrants’ Rights Coalition, who began by asking immigrants in the room to stand. Only a handful of people stood up. He then asked those whose parents or grandparents were immigrants to stand, those in love with an immigrant to stand, those who were in solidarity with immigrants to stand, and, finally, those who simply were in solidarity with immigrants to stand. By the end of the speech, the whole room was on its feet.

Many of the panel discussions on opening day focused on the current immigrants’ rights battle. For example, experts on a panel titled “Immigration, Economic Crisis, & the State” examined U.S. immigration policy from a number of angles. Gabriella Sanchez, from the Arizona State University School of Justice and Social Inquiry, gave an anthropological evaluation of how Arizona’s immigration law isolates, ostracizes, and places immigrants in Maricopa County under a spotlight of criminal investigation. Tania Valdez, a student at the University of California, Berkeley Boalt Hall School of Law, reminded attendees that American laws that affect immigrants often have unintended yet severe consequences on immigrants’ families who were left behind in home countries. Valdez’s paper focused on The North American Free Trade Agreement’s effect on indigenous women in Mexico and laid the foundation for a critical analysis of how the inherent inequalities of that regional trade agreement push men to migrate for work, leaving their wives wholly dependent on remittances for their family’s survival. Maria Pabon Lopez, from Indiana University Maurer School of Law, gave a comparative overview of how Spain has developed a creative solution to deal with its shrinking economy and influx of immigrants—the country has begun paying immigrants to return to the countries from which they came. While she did not advocate for a similar solution in the United States, she did argue for innovative immigration reform that acknowledges the potential clash between an influx of immigrants and an economic downturn, and for a solution that preserves the dignity of all people.

During the event’s main dinner, Mary Romero, from Arizona State University, gave a powerful speech, bolstered by photographs, focusing on Arizona’s new unjust immigration laws. She offered anecdotal information related to the new laws, including how listening to Mexican music or not looking directly into the eyes of police officers may constitute reasonable suspicion for police to stop a person for “papers.” Some of the photographs featured Latinos and Latinas being shoved into the back of police cars. Other photographs were captioned and showed children crying out hysterically, “they told me to shut up and that mommy was leaving.” The real impact of anti-immigrant backlash during the current
Great Recession spoke for itself in these photographs. Other panels explored the experiences of people who not only suffer economically, but also endure other forms of injustice. Robert Ashford, from Syracuse University, conveyed his thesis that the economic crisis did not cause poverty, but rather that poverty caused the economic crisis. Judy Goldscheid, from The City University of New York School of Law, spoke on the hidden dangers of economic fluctuations in the family setting, where domestic violence tends to increase with economic hardship. James Hackney, from Northeastern University School of Law, made the case that critical race theory must be examined as an inherent element in economic crises because race is a critical part of every aspect of solution-building. Danne Johnson, from Oklahoma City University School of Law, argued that lifeline non-governmental organizations, which provide food and shelter to those in poverty, should benefit from government bailouts because they provide essential services that the government has neglected to offer.

These examples of innovative and thoughtful speakers, theories, and arguments are just a small sample from the Fifteenth Annual LatCrit Conference. Over 200 attendees gathered for meals and ideas. Each of us exchanged smiles and handshakes upon recognizing that we were advocates for the same issue: social justice during economic crisis.

LatCrit student Scholars and one of the LatCrit founders cutting a cake to mark LatCrit’s Quinceañera. 
Credit: Tayyab Mahmud

Endnotes

1 Alexandra Bernshteyn is a third-year law student at American University, Washington College of Law. She serves as an Assistant Marketing Editor for The Modern American, and she attended this year’s LatCrit conference on the publication’s behalf.

For brief interviews of LatCrit attendees and participants, see The Modern American website at www.wcl.american.edu/modernamerican.
Honoring the Past, Celebrating the Future,
The Women’s Bar Association of DC, and
The Modern American Third Annual Dinner

Above: Former and current TMA staff members, Cheryl Chado, Heron Greenesmith, and Julia Saladino, at pre-dinner reception.
Credit: Hilary Schwab

Bottom: Caption: Associate Dean for Library and Information Resources, Billie Jo Kaufman, and former TMA Editor-In-Chief, Mara Giorgio, Volume 4.
Credit: Hilary Schwab

Above: TMA staff member and WBA and WBA Foundation attendees at pre-dinner reception.
Credit: Hilary Schwab

Left: Keynote speaker, Professor Brenda Smith, American University, The Washington College of Law, November 3, 2010.
Credit: Hilary Schwab

Above: Representatives from three student organizations, including TMA, presenting donation to Jessica Salsbury of The Tahirih Justice Center from month-long fundraising efforts for the organization. Credit: Hilary Schwab
COMMENTARY: ENVIRONMENTAL JUSTICE AND THE BP OIL SPILL: DOES ANYONE CARE ABOUT THE “SMALL PEOPLE” OF COLOR?
By: Perry E. Wallace

Introduction

“We care about the small people” declared BP Chairman Carl-Henric Svanburg on June 16, 2010, just eight weeks after the start of the company’s now-famous oil spill. Ironically, the Swedish corporate chief uttered those clumsy words while leading a campaign to stem the growing, spill-related reputational damage to BP. Compounding the irony in Mr. Svanburg’s statement is the fact that he had been sent as a substitute for British CEO Tony Hayward, whose earlier efforts to repair BP’s corporate image had also failed miserably.

Throughout these missteps, the media were providing the world with daily images of the spill. Every day, we watched as 2.6 million gallons of oil surged out of the ocean floor, constantly and uncontrolled, into the Gulf of Mexico. Surely this was a time for curative action and adroit public relations. Against this background, the highly-publicized gaffe was an especially aggravating contribution to BP’s loss of favor in a time of great crisis. The spill betrayed a gigantic, multi-dimensional corporate ineptitude—not merely in linguistic and cultural facility but also, more broadly, in corporate governance and social responsibility. With the oil leak finally plugged (we hope), one would think that the flow of BP corporate governance failures should have similarly been plugged. But this apparently has not happened. Moreover, BP is not the only actor facing disapproval on the long and arduous path to recovery. Governmental and other actors have also incurred the wrath of many and varied critics ranging from environmental groups and ordinary citizens to politicians, businesses and the media.

On the other hand, certain affected groups have scarcely been mentioned in efforts to address the environmental, economic, social and cultural impacts of the oil spill. These forgotten groups include minorities, (small) businesses and communities that have also suffered. In fact—as usually happens with environmental justice matters—they have endured disproportionately greater injury and they have received disproportionately less assistance, by comparison with other impacted persons and groups. The following discussion explores the general nature and status of environmental justice, describes the plight of traditionally forgotten groups in the BP oil spill recovery efforts, and makes some observations about the elements of a curative approach to the problems of those groups.

Environmental Justice: Of People, Power and Pollution

One commonality between environmental justice and other social and economic justice topics is the notion of power imbalances: (1) the relative powerlessness of those being harmed and (2) the superior power of those causing, or allowing, that harm. Whatever the technical classification of the more powerful forces (governmental, corporate or individual) and whatever the impetus to cause or allow the harm (animus, greed, negligence, or mere thoughtlessness), the imbalance of power is a core operative element in social and economic injustice.

Obviously, the environmental or other injustice is grounded in some actual or perceived difference between those with power and those without it. Equally clear is the fact that the more powerful groups view themselves as being more privileged or entitled based on that difference. Focusing on power highlights a key enabling feature of the negative interaction between the two opposing groups. Further, certain pivotal characteristics of powerlessness (ignorance, lack of resources, lack of organization and lack of leadership) not only shed light on its causes but also contain the keys to the cures for the powerlessness and perhaps even the power imbalance itself.

Environmental Justice Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” signed by President William J. Clinton in 1994, sought to establish an official federal policy on environmental justice.² The Executive Order required each federal agency to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”

This policy was a welcome development and appears to have resulted in some improvement in environmental justice matters, but a thorough analysis of the years since the Executive Order confirms that progress has not been, and will not be, automatic. Only determined advocacy and leadership will produce successful solutions to environmental justice problems. Frederick Douglass once famously declared that “Power concedes nothing without a demand. It never did and it never will.”³ The following discussion of the BP oil spill’s impact on people of color illustrates the truth of Douglass’ declaration.
The Devastating Impact of the Oil Spill: Interconnected and Cumulative Harm to People of Color

From the start of the spill, there was both lay speculation and professional study on the magnitude and types of harms that would result from it. Although BP and the federal government at times downplayed the potential impact, the overwhelming public and scientific consensus was that we were witnessing a historic environmental, economic and social catastrophe in the making. In fact, we were: BP was creating the largest environmental catastrophe in American history.

On the other hand, United States Representatives Mike Honda (D-Calif.) and Anh “Joseph” Cao (R-La.) concluded that the particularly harsh way in which minority communities were affected during the recovery period was not well-reported:

What is equally disastrous, but less frequently reported, is the impact to the physical health, economy and livelihoods of communities living adjacent to the Gulf Coast. Among these communities, perhaps the most vulnerable are thousands of Southeast Asian and African-American families. The adverse effects experienced by this population are potent and unique. (Emphasis added)

As these observations become public knowledge, they shed light on the paucity of basic understandings about the minority communities in that region. For example, most Americans (including many in the local media) hardly knew about the African-American commercial fishing community on the Gulf Coast. Many of these families have been in the fishing business for generations, going back to a time when people in the area spoke mainly French. These and other African-Americans are now beginning to explain how the BP spill not only brought to them the same harms affecting others in the region but also exacerbated historic race-based problems.

Specifically, African-American businesses are not receiving many of the oil spill cleanup contracts. Nor are they as likely to be hired by white-owned business as employees when those contracts are let—other than for the most hazardous and dangerous of jobs. Additionally, the substantial lingering effects of Hurricane Katrina had already weakened this community in fundamental and disproportionate ways. Finally, there is the matter of waste disposal from the oil spill. Where is the waste being sent? Here, the BP oil spill matter becomes both symbol and substance of the environmental justice dilemma. The following quote from Robert Bullard, Director of the Environmental Justice Resource Center at Clark Atlanta University, puts it this way:

Given the sad history of waste disposal in the southern United States, it should be no surprise to anyone that the BP disposal plan looks a lot like “Dumping in Dixie,” and has become a core environmental justice concern, especially among low-income and people of color communities in the Gulf coast—communities whose residents have historically borne more than their fair share of solid waste landfills and hazardous waste facilities before and after natural and man-made disasters.

Similarly, Southeast Asian fishermen make up one-third of the 13,000 fishing vessels registered in the Gulf Coast. Among the phenomena creating special challenges for Southeast Asians is the language barrier, which, along with general problems of discrimination and distrust of government, makes for a stultifying blockage in gaining access to mainstream services and information. Their history, like that of the African-American communities, is one of challenges and difficulties that left them especially vulnerable to the oil spill: arrival in the U.S. as political refugees, harsh resettlement camp conditions, racial discrimination and isolation, and, of course, Katrina.

The United Houma Nation of that region has been recognized by Louisiana but not by the federal government. Sources allege that oil-related interests have successfully opposed federal recognition in order to have access to their lands for oil and gas operations. Federal protection would bestow significant rights, benefits and protections to this group and increase their prospects for responding properly to the devastations of Katrina and the oil spill. In the meantime, oil from the spill is slowly threatening their livelihood and culture. It has destroyed oyster plots, ruined crab traps and blocked shrimp trawlers from choice fishing grounds.

These examples tell an all-too-typical story of environmental injustice in action, replete with all the usual characteristics of power imbalance, unequal treatment, widespread indifference and tragic consequences. It is with these examples in mind that the search for solutions must proceed. What should be the nature of solutions to this particular environmental justice dilemma?

Seeking Solutions to Environmental Injustice; Some Considerations

From May 27 through June 10, the National Office of the National Association for the Advancement of Colored People (NAACP) conducted an extensive...
investigation of the BP oil spill. After touring affected areas in the Gulf and meeting with important constituencies involved in, or affected by, the spill, the NAACP issued a report, BP Oil Drilling Disaster—NAACP Investigation (the NAACP Report) containing a list of Recommendations. Those Recommendations were the result of a thorough and considered process and deserve serious consideration in seeking solutions to the BP oil spill. The main points of the Recommendations are as follows:

• Financial Support for Community Based Organizations
• Accessible and Effective Claims Process
• Physical and Mental Health Care for All
• Equal Access to Contracting Opportunities for Businesses Owned by People of Color
• Community and Worker Safety Provisions
• Impact Assessments—Analysis of Physical and Mental Health, Financial, and Socio-Cultural Short and Long Term Impacts
• Safe, Quality Housing Provisions for Displaced Persons
• Federal Recognition for the Houma Tribe
• Direct Troubled Asset Relief Program and Small Business Administration Funding to Community Development Financial Institutions
• Improved Information Dissemination
• Comprehensive Ongoing Environmental Assessments
• Preservation of the Gulf, Marshlands, Estuaries, and Other Waterways and Dependent Sea Life
• Clean Energy, Green Jobs, and Increased Regulation of Oil Drilling

Without question, the Recommendations are expansive and would require considerable expenditures of money and time. The simple reality is that such a sacrifice is necessary to bring about a true and permanent solution to the problems of the affected communities. First, to a great degree, these expenditures would comprise resources that should have already been applied over many past years. Past failures set the stage for the disproportionately calamitous impact of the oil spill on these groups. Second, the expenditures would address the larger economic and socio-cultural infrastructure of the communities and make them stronger and less vulnerable—a benefit that would be shared far beyond the communities themselves. These considerations speak to the dire need for just the sort of expansive, comprehensive approach suggested by the Recommendations in the NAACP Report.

Conclusion

The BP oil spill, unfortunately, has generated yet another sad example of environmental injustice. Moreover, the stakes are higher than ever before, as the tragedies associated with it promise to be greater than ever before. As discussed in this article, the elements of environmental justice dilemmas are always profound and they set the stage for profoundly adverse consequences for the affected communities and others.

Yet, lawmakers and other leaders could turn this tragedy into something more like a victory, if they have the will and the courage. Failure to do so, in an era in which natural threats are now augmented by human-made errors such as anthropogenic global warming and in which human-made political and economic instability reign, only promises great trouble for us all. Guidance such as that so thoughtfully prepared and offered in the NAACP Report should be the basis for forceful action by all those concerned with good governance in society.

Endnotes

1 Professor Perry Wallace is a professor of law at American University, Washington College of Law, specializing in Environmental Law, Corporate Law and Finance. He is a member of the National Panel of Arbitrators, National Association of Securities Dealers Dispute Resolution and has recently been elected to the Board of Directors of the Environmental Working Group.


6 See National Association for the Advancement of Colored People, BP Oil Drilling Disaster—NAACP Investigation Overview, available at http://naacp.3cdn.net/b827a4ca75a4bbbd5c_jfm6bec32.pdf (summarizing the report’s key findings).

The National Defense Authorization Act is the annual appropriations bill, approving Department of Defense military activities for fiscal year 2011. An amendment to the National Defense Authorization Act, which the House has already approved and included in Section 536 of the National Defense Authorization Act, would repeal the ban on homosexuals from serving openly in the military. The 1993 law, widely known as “Don’t Ask, Don’t Tell” (DADT), is mandated by federal law and codified in 10 U.S.C. § 654 and prohibits homosexuals from serving in the military stating that it would “create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.” More than 13,000 people in the military have been forced to leave since the “Don’t Ask, Don’t Tell” policy has been in place, including more than 400 last year.

The language of Section 536 allows Congress to vote to repeal DADT with actual repeal occurring 60 days after the completion of a study due December 1, 2010. The study conducted by the Pentagon Working Group examined the effects of fully integrating homosexuals into the armed forces, considering such issues as whether gay and heterosexual troops could be required to share housing and whether the military would be required to extend benefits to same-sex partners. President Obama, Defense Secretary Robert M. Gates, and the Chairman of the Joint Chiefs of Staff Mike Mullen, must then certify that this new policy would not impede military effectiveness or “unit cohesion.” Army Chief of Staff General George Casey, Jr. said that “[t]he law before the completion of the review will be seen by the men and women of the Army as a reversal of our commitment to hear their views before moving forward.” This legislation represents a major step for gay rights advocates who have been trying to repeal this policy since its inception in 1993, arguing that it effectively allows one of the nation’s most powerful agencies to discriminate on the basis of sexual orientation.

Senator John McCain (R-AZ) and other critics of the bill argue that repealing DADT “would be really harmful to the morale and battle effectiveness of our military.” Supporters believe that the repeal would be a positive change reflective of the U.S.’s shifting sentiments towards gay and lesbian people. “In the land of the free and the home of the brave, it is long past time for Congress to end this un-American policy,” said Representative Tammy Baldwin (D-WI), who is the first female openly gay congressional representative. President Obama is also pleased with the House’s passage of the repeal saying, “[t]his legislation will help make our armed forces even stronger and more inclusive by allowing gay and lesbian soldiers to serve honestly and with integrity.”

Patrick Murphy (D-PA) first introduced the amendment on April 10, 2010. It was first referred to the House Committee on Armed Services. On May 27, 2010, the House of Representatives approved the amendment. The bill was passed on May 28, 2010 with 229 Democrats and five Republicans in favor. Senate received it on June 28, 2010 and placed it on the Senate Legislative Calendar under General Orders.

On September 21, 2010, the National Defense Authorization Act was stalled on a 56-43 vote, four short of the sixty votes needed to overcome the Republican opposition and begin the debate. On October 12, 2010, a federal district court judge, Judge Virginia Phillips, ordered the military to immediately stop enforcing DADT. The case was brought forth by the Log Cabin Republicans, a 19,000-member partisan gay advocacy group that includes current and former military members. The group argued during a two-week trial in July 2010 that the policy is unconstitutional and should be struck down. The judge ultimately ruled in their favor on the grounds that DADT violated Due Process and the First Amendment rights of gay service members. On October 14, the Department of Justice asked the judge to suspend her ruling while the government prepared a formal appeal. In its appeal, the Department of Justice argued that repeated and sudden changes in DADT would be “enormously disruptive and time-consuming, particularly at a time when this nation is involved in combat operations overseas.” Although the District Court upheld the injunction, effectively repealing DADT, the Ninth Circuit granted a stay requested by the Department of Justice, which re-instated the policy.

The Pentagon announced that it will comply with the Ninth Circuit order to retain the policy, but gay rights advocates have cautioned service members to avoid revealing their sexual orientation in the meantime. On October 21, 2010, Defense Secretary Robert Gates announced that the Pentagon, in order to mitigate any confusion or unjust discharges, is changing the way under which DADT discharges are processed. He issued a directive instructing the secretaries of each branch of the armed services to personally sign off on the dismissal of any gay or lesbian service member under the policy. Further, the Pentagon’s chief legal counsel and its top personnel official have to coordinate all DADT discharges. At the time of print,
time of print, a DADT repeal bill had just passed into law, after vigorous efforts were made to pass the measure.

S.729 “Development, Relief, and Education for Alien Minors Act of 2009”

The Development, Relief, and Education for Alien Minors Act of 2009 (DREAM Act) is legislation that would allow certain undocumented immigrant students the opportunity to apply for permanent residency. The Act would amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 “to repeal the denial of an unlawful alien's eligibility for higher education benefits based on state residence unless a U.S. national is similarly eligible without regard to such state residence.”

Under the DREAM Act, those eligible are undocumented students between the ages of twelve and thirty-five of “good moral character”, who arrived to the United States before the age of sixteen, have lived in the United States for five consecutive years prior to the Act’s enactment, and who have graduated from a high school in the United States or have earned a GED. These students would then have the opportunity to gain conditional permanent residency. Within six years of approval for conditional permanent residency, the individual must complete at least two years in a program for a bachelor's degree or higher in the United States or serve in the uniformed services for at least two years and, if discharged, receive an honorable discharge. If the individual does not meet these qualifications within six years, the conditional residency will be revoked and he or she will be once again removable.

Senator Richard Durbin (D-IL) introduced this Act on March 26, 2009 and it currently has forty sponsors. After its introduction in the Senate, the Act was referred to the Committee on the Judiciary. The companion bill in the House of Representatives, the American Dream Act of 2009, was also introduced on March 26, 2009 and was referred to the Subcommittee on Higher Education, Lifelong Learning, and Competitiveness.

Similar forms of this bill have been introduced in Congress before but have not progressed. The DREAM Act has received a lot of media attention though, stirring up documented and undocumented people alike to place pressure on Congress to move this bill forward. On September 14, 2010, the DREAM Act was placed on the agenda to be included as an amendment to the National Defense Authorization Act for 2011. The Senate was scheduled to vote on September 21, 2010 on whether to attach the measure to the Act but a Republican filibuster halted the debate. As of September 22, 2010, Richard Durbin introduced the bill once again along with Richard Lugar, and it had two sponsors.

The possibility for full immigration reform this year is looking bleak, but the passage of the DREAM Act would be a significant step in that direction. As Majority Leader Reid assured, “We must have immigration reform. When we have enough groups telling me that we can’t do it this year, then we will consider the DREAM Act alone. But we are not at that point now.”

The Convention on the Elimination of all Forms of Discrimination against Women

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) is often regarded as an international bill of rights for women. CEDAW defines what constitutes discrimination against women and designs an implementation plan, to be fulfilled by each country in agreement to end it. The convention asserts women's rights and freedoms to political, economic, and social equality.

The Convention was adopted by the United Nations’ General Assembly in 1976 and has been ratified by 186 countries. The United States is one of only seven countries that have not ratified CEDAW. The others are Iran, Sudan, Somalia, Palau, Nauru, and Tonga. Commentators believe that the U.S. may have put off ratifying CEDAW partly because of national conservative sentiments that oppose or fail to fully support the Convention’s affirmation of women’s right to reproductive choice. For example, the Convention provides for the right to equally shared responsibility for child-rearing by both sexes, the right of child-care including mandated child-care facilities and maternity leave, and the right to reproductive choice and family planning. CEDAW is the only treaty that has made such specific provisions for reproductive rights and family planning. Because CEDAW is an international convention, the Senate must ratify it.

According to CEDAW, discrimination is “... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women ...” Countries that ratify the Convention are required to implement measures that would eradicate any kind of discrimination against women. These measures must include acknowledging the equality between men and women in the country’s constitution. Further, the country must establish and enforce equal legal protection through legislative measures. Countries that have ratified the Convention are legally bound to put its provisions into practice and must submit national reports at least once every four years concerning measures they have taken to comply with their treaty obligations.

The Obama Administration put CEDAW on the list of priorities for ratification in May 2009. In November
6, 2009, Secretary of State Hillary Clinton said during a speech in Washington, DC, “there is nothing that has been more important to me over the course of my lifetime than advancing the rights of women and girls. And it is now a cornerstone of American foreign policy.” Secretary Clinton has been expected to revive the discussion of women’s issues on Capitol Hill. In March 2010, Secretary Clinton reassured the United Nations Commission on the Status of Women that the administration would “continue to work for the ratification of CEDAW.” However, months have passed since this statement and there has been no substantial action from executive and legislative bodies. Several human rights groups emphasize the importance of CEDAW’s ratification, believing that it would add credence to the equal status of women internationally as well as domestically.

The Obama Administration faces continued pressure to urge the Senate to introduce this Convention and schedule hearings in order to seriously contemplate ratification.

S.3113 “Refugee Protection Act of 2010”

The Refugee Protection Act amends the Immigration and Nationality Act (INA) that would strengthen the United States’ commitment to refugees who have fled their countries due to persecution or torture. One of the major provisions of this Act is the elimination of the one-year limit for filing asylum claims currently placed on refugees in the U.S. The Act also authorizes the U.S. Attorney General to appoint counsel for refugees to represent them throughout their proceedings. Previously, many refugees have had to advocate for themselves during their proceedings. Studies have shown that asylum seekers, of whom a third have counsel, are six times more likely to be granted asylum if they have legal representation. The Refugee Protection Act also deals with concerns regarding aliens’ detention periods. The Act directs the Secretary of Homeland Security to establish specific conditions of detention and to give notice of charges to the court and to the individuals within forty-eight hours of the alien’s detention, guaranteeing a system of faster review.

Furthermore, the Act develops the list of social categories upon which asylum claims can be based. As of now, when an individual claims to be seeking asylum based on “membership in a particular social group”, it has generally been difficult for individuals who have fled a country because of gang violence, gender discrimination, or gender orientation. The broader definition of “social groups” in S.3113 can be used to include these individuals. The definitions of “terrorist activity” and “terrorist organization” are also refined and narrowed in order to protect refugees that do not pose a threat to U.S. security from inappropriate exclusion.

This Act emerges from numerous criticisms of the United States’ lack of commitment to refugees. It comes thirty years after the landmark Refugee Protection Act of 1980 led by the late Senator Edward Kennedy (D-MA). Many people believe that since the passage the 1980 Refugee Protection Act, the United States has fallen short of meeting its obligations. The advocacy organization, Human Rights First, elucidates this point in stating, “... [A] barrage of new laws and policies have undermined the institution of asylum in the United States, leading this country to deny asylum or other protection to victims of persecution.”

Judiciary Committee Chairman Patrick Leahy (D-VT) introduced the Refugee Protection Act of 2010 in the Senate on March 15, 2010 with four sponsors. After it was introduced, it was referred to the Committee on Judiciary. Hearings were held and the Act was discussed on May 19, 2010. This Act is the Senate’s solid attempt to address and resolve some of the refugee and asylum systems’ most serious issues and to sincerely consider and recommit to the interests of refugees and asylum seekers.

H.R. 3564 “Children’s Act for Responsible Employment of 2009”

The Children’s Act for Responsible Employment of 2009 (CARE Act) amends the child labor provisions relating to agricultural work in the Fair Labor Standards Act (FLSA). Currently, FLSA law allows for children as young as twelve years old to be hired to work agricultural jobs, such as harvesting fruits and vegetables. The law does not place any limits on the number of hours per week a child can work or on how early an employer can require the child to report to work. Critics argue that this lack of regulations exposes children to risks of exploitation as well as educational compromises, since at present, FLSA does not mandate hourly limits for children’s work on school days. Human rights groups report that the drop-out rate for children who work in agriculture is four times higher than the national rate. The CARE Act revises the age requirement for agricultural employment under FLSA regulations, authorizing it to apply to any child under the age of eighteen unless that child is working for his or her parents or on a family-owned farm. The Act also increases civil and criminal penalties for violating the law in order to ensure employer compliance.

Representative Lucille Roybal-Allard (D-CA) introduced the CARE Act on November 15, 2009, and it currently has ninety-one sponsors. After its introduction, the Act was referred to the Subcommittee on Workforce Protections on November 16, 2009. The Act is supported by over eighty leading organizations including the American Federation for Teachers (AFT), the National Association for the Advancement of Colored People (NAACP), the National Parent Teacher Association (PTA), and Human Rights
Watch. “The United States is a developing country when it comes to child farm workers,” said Zama Coursen-Neff, deputy director of the Children’s Rights Division at Human Rights Watch. “Children who pick America’s food should at least have the same protections as those who serve it.”

Children and human rights advocates were encouraged recently after the Labor Department announced a large increase in the fines that farmers can face for employing children, to as much as $11,000 per child. For a deeper rooted and longer lasting change to come about, however, the law has to change and it is unlikely that the CARE Act will get out of committee during this Congress.

Endnotes

1 Keyla Bade is a second-year law student at American University Washington College of Law.


9 Bacon & O’Keefe, supra note 7, at 2.

10 Id.

11 Herszenhorn & Hulse, supra note 8, at 1.

12 Id.

13 Id.


17 Id.


19 Id.


23 Id.


26 DREAM Act, S. 729, 111th Cong. § 3 (2010).
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Minority Majority: The Social and Legal Implications of a Post-White America

Minorities are expected to become the majority in America by the year 2050, ending nearly 300 years of a white majority. How have societies dealt with such changes throughout history, and how will Americans react to this change? Does recent backlash, such as elements of the Tea Party Movement, indicate growing recognition of, and resistance to, this reality? Or does the election of President Obama and the appointment of Justice Sotomayor indicate that the American people have already begun to accept this inevitability? Finally, will the constitutional and statutory protections set in place to protect minorities continue to be relevant in a Minority Majority America?

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