ESSAY

ON “WATERBOARDING”: LEGAL INTERPRETATION AND THE CONTINUING STRUGGLE FOR HUMAN RIGHTS

Daniel Kanstroom

Abstract: While some aspects of the “waterboarding” debate are largely political, the issues also implicate deeply normative underpinnings of human rights and law. Attorney General Michael Mukasey has steadfastly declined to declare waterboarding illegal or to launch an investigation into past waterboarding. His equivocations have generated anguished controversy because they raise a fundamental question: should we balance “heinousness and cruelty” against information that we “might get”? Mr. Mukasey’s approach appears to be careful lawyering. However, it portends a radical and dangerous departure from a fundamental premise of human rights law: the inherent dignity of each person. Although there is some lack of clarity about the precise definition of torture, all is not vagueness, or reliance on “circumstances,” and post hoc judgments. We have clear enough standards to conclude that waterboarding is and was illegal. Official legal equivocation about waterboarding preserves the potential imprimatur of legality for torture. It substitutes a dangerously fluid utilitarian balancing test for the hard-won respect for human dignity at the base of our centuries-old revulsion about torture. That is precisely what the rule of law (and the best lawyers) ought not to do.
ARTICLES

RACIAL REIFICATION AND GLOBAL WARMING: A TRULY INCONVENIENT TRUTH

Bekah Mandell

[pages 289–344]

Abstract: Scientists have warned of the dangers of climate change for decades, yet no meaningful steps have been taken to address its underlying causes; instead ineffective strategies to reduce CO₂ emissions incrementally have become popular because they do not disturb the racial hierarchy that sustains the social, economic, and legal structure of the United States. The segregated land use patterns and transportation systems that dominate the U.S. landscape have reified race through the perpetuation of a distinct white over black racial hierarchy; those same land use patterns and transportation systems have contributed significantly to global warming by causing a dangerous spike in CO₂ emissions. To address the root causes of climate change thus requires a dismantling of the land use and transportation patterns that protect racial hierarchy and preserve white privilege in the United States. As a result, a consensus of inaction has developed to prevent meaningful reductions in emissions.

LOOKING BEYOND AMNESTY AND TRADITIONAL JUSTICE AND RECONCILIATION MECHANISMS IN NORTHERN UGANDA: A PROPOSAL FOR TRUTH-TELLING AND REPARATIONS

Cecily Rose

[pages 345–400]

Abstract: This article examines the role that amnesty and traditional practices play in fostering justice and reconciliation in northern Uganda. Although the twenty-year conflict involving the Lord’s Resistance Army (LRA) in northern Uganda has not yet come to an end and peace talks are still ongoing, many former LRA rebels have begun to return to their communities after taking advantage of the amnesty offered by the government of Uganda. Consequently, reintegration, accountability, and reconciliation are currently prominent legal issues in northern Uganda. Literature on this subject, however, mainly touches upon how the amnesty process and the peace talks are in tension with the International Criminal Court’s pending arrest warrants for LRA leaders. This article, by contrast, argues
that given the shortcomings of the amnesty process and the traditional practices, a truth commission and a reparations process could play a critical role in northern Uganda’s transition from conflict to peace.

NOTES

DEPRIVATION OF CARE: ARE FEDERAL LAWS RESTRICTING THE PROVISION OF MEDICAL CARE TO IMMIGRANTS WORKING AS PLANNED?

Ryan Knutson

[pages 401–436]

Abstract: The Personal Responsibility and Work Opportunity Act of 1996 has severely limited immigrants’ access to medical care. In enacting the legislation, Congress stated that immigrants were too great a burden on the U.S. medical system and cost the federal government too much. In reality, immigrants do not place an unduly high burden on the medical system. The Act also limits the autonomy of local medical providers by restricting their ability to provide preventive medical care, care that is better for patients’ health and, in the long run, more cost effective. Further complicating this issue is that medical providers are often unable to recover complete reimbursement from the federal government because the Act authorizes repayment only for services rendered to patients in an emergency condition. This note calls for a repeal of the anti-immigrant provisions of the Act and suggests that decisions regarding the provision of care are best left to medical providers at the local level.

BIRTHRIGHT CITIZENSHIP: THE FOURTEENTH AMENDMENT’S CONTINUING PROTECTION AGAINST AN AMERICAN CASTE SYSTEM

Nicole Newman

[pages 437–482]

Abstract: Intending to reverse Dred Scott and to abolish the southern “Black Codes,” Congress ratified the Fourteenth Amendment in 1868, guaranteeing automatic citizenship to most people born on U.S. soil. However, the Amendment’s framers specifically excluded particular groups, including those considered not “subject to the jurisdiction” of the United States. In 1898, the Supreme Court clarified the meaning of this Citizenship Clause in Wong Kim Ark, and citizenship by birth has been
part of American jurisprudence ever since. Currently, many Americans oppose providing birthright citizenship to children of undocumented immigrants. This note examines the basic purpose of the Citizenship Clause and how Americans have made similar attempts in the past to exclude unwanted minority groups. Such attempts have failed over time and should be rejected now because they would recreate the hereditary caste system the Fourteenth Amendment sought to eliminate and are unnecessary considering the existing legal barriers to chain migration.

BOOK REVIEWS

Recognizing Women’s Worth: The Human Rights Argument for Ending Prostitution in India

Nicole J. Karlebach

[pages 483–512]

Abstract: In Indian Feminisms: Law, Patriarchies and Violence in India, Geon-tanjali Gangoli recounts how the Indian feminist movement, identifiable for its uniquely Indian concepts of womanhood and equal rights, has been effective in promoting equality for women. Gangoli attributes this success to the fact that Indian feminists have influenced legislation and dialogue within the country, while also recognizing the reality of intense divides among castes and religions. This book review examines the vague nature of Indian law in regard to prostitution, a topic that has been the source of extensive feminist debate. India should fully outlaw the practice of prostitution in order to protect the fundamental human rights of women. This ban must phase out prostitution and its related activities by providing education and commensurable profit-earning alternatives to women.

Following Lozano v. Hazleton: Keep States and Cities out of the Immigration Business

Rachel E. Morse

[pages 513–538]

Abstract: In Immigrants: Your Country Needs Them, Phillipe Legrain makes an economic argument for open borders. While he describes an ideal, the reality is that the United States will not implement an open border policy anytime soon. In recent years, Congress has been unable to reach a consensus regarding immigration policy reform. While Congress is
stalled on the issue, there are twelve million undocumented immigrants living in the United States and that number is increasing. In response to the lack of a federal movement on the issue, many states, cities, and towns have begun passing their own laws regulating the rights of illegal immigrants. This book review examines the legality of these laws in light of recent challenges brought in federal courts and concludes that during this period of federal legislative transition, it is the responsibility of the courts to invalidate those local laws that violate the preemption doctrine. Immigration and naturalization are exclusively federal legal territory, and laws passed on the local level must not be permitted to thwart federal progress in creating and enforcing a uniform national policy.

**Legislating Beyond an Educated Guess: The Growing Consensus Toward a Right to Education**

*Stephen E. Spaulding*

[pages 539–558]

**Abstract:** In *Retained by the People*, Daniel A. Farber argues for a robust renaissance of Ninth Amendment jurisprudence in analyses of fundamental rights, because this amendment and its history most clearly encompass the Framers’ belief that certain rights are retained by the people. Farber argues that fundamental rights are at their most vulnerable when rooted in the inherently procedural structure of the Due Process Clause of the Fourteenth Amendment. This book review criticizes the factors Farber uses to determine whether a given right is fundamental and argues that legislation must be the most important factor in discerning fundamental rights that are so-retained, particularly when the Court has explicitly denied the existence of a disputed right. When applied to the right to education, the overwhelmingly bipartisan passage of the No Child Left Behind Act indicates that this right is indeed retained by the people.

**The Medical Legal Partnership For Children: Policy Strategies For Expanding A Gateway Program**

*Arianna Tunsky-Brashich*

[pages 559–580]

**Abstract:** The authors featured in *Ending Poverty in America* propose progressive strategies for combating poverty, including the creation of gateway programs through which the poor can obtain comprehensive services. One of these programs, the Medical Legal Partnership for Children, has effectively implemented a new kind of preventative medical care by placing law-
yers alongside pediatricians to address health issues with a related legal dimension. This book review analyzes MLPC and suggests that revising the Medicaid statute and earmarking a portion of the State Children’s Health Insurance Program block grant will help ensure the long-term viability of this important program.
Editor’s Note

The year before I began law school, the United States received undeniable evidence of prisoner abuse at Abu Ghraib prison in Iraq. A 60 Minutes special and an article by Seymour Hersh in The New Yorker revealed that Iraqi detainees had suffered extraordinary cruelty and dishonor at the hands of the U.S. military.1 By the time my law classes were starting, the U.S. Army had court martialed and dishonorably discharged nine soldiers, some receiving prison terms.2 Although the United States had lost respect among many in the international community, the legal response to these incidents indicated that our country had not abandoned the rule of law. There were, thankfully, still acts that were too gruesome, too inhumane, for the U.S. government or its people to ever tolerate.

Three years later, when Michael Mukasey testified before Congress during his confirmation hearings as Attorney General of the United States, the line between the inhumanity of torture and respect for human dignity was publicly blurred.3 Mr. Mukasey, through his unwillingness to state clearly that waterboarding constitutes torture, sanctioned the U.S. government’s distortion of the plain meaning of its own laws.4 To suggest that, in effect, drowning a man may be neither torturous nor illegal struck many as an over complication of a seemingly

---

1 60 Minutes II: Abuse of Iraqi POWs by GI Probed (CBS television broadcast Apr. 24, 2004); Seymour Hersh, Torture at Abu Ghraib, NEW YORKER, May 10, 2004, at 42.
4 See Letter from Michael B. Mukasey, Att’y Gen. of the United States, to Patrick Leahy, Chairman, S. Comm. on the Judiciary (Jan. 29, 2008) at 2, available at http://www.usdoj.gov/ag/speeches/2008/letter-leahy-013008.pdf. The issue drew significant attention at Boston College Law School when Mr. Mukasey was invited to speak at the Law School commencement and to receive the Founders Medal, the highest honor bestowed by the Law School on those who “embody the traditions of professionalism, scholarship and service which the Law School seeks to instill in its students.” See Peter Schworm, BC Law School Will Not Bestow Honor on Mukasey, BOSTON GLOBE, Mar. 5, 2008, at B1. Many students and faculty members expressed disappointment and anger with the invitation and intended award; soon after the Law School announced that it would no longer bestow the Founders Medal on commencement speakers. See id.
simple question. The three men whom the United States has con-
fessed to waterboarding—Khalid Sheikh Mohammed, Abu Zubaydah, and Abd al-Rahim al-Nashiri—undoubtedly felt as though they were
tortured.\(^5\) And torture is explicitly illegal under U.S. law.\(^6\) The in-
vitation to Mr. Mukasey to speak at our commencement, therefore, was a
source of confusion and anger for many, especially in light of the ar-
ticulated ideals the school endeavors to instill in its students.

As my fellow editors and I prepare to leave the Law School, I am
reminded of a reading from my professional responsibility class; it is
about the danger of losing one’s perspective: “When one is invisible
he finds such problems as good and evil, honesty and dishonesty, of
such shifting shapes that he confuses one with the other, depending
on who happens to be looking through him at the time.”\(^7\) The Boston
College Third World Law Journal was founded as part of an effort to
make visible both the legal concerns of those whom history has ren-
dered invisible and of those in the legal profession who labor to rep-
resent them.\(^8\) Staying silent or accepting the Attorney General’s asser-
tion that the legality of waterboarding is too complex to articulate
would put our Journal on a sad path to invisibility.

And so we take this opportunity to make clear our understanding
that waterboarding is illegal and immoral, and our insistence that
those held up to us as role models in the legal profession should
clearly espouse unwavering standards of professional ethics. We are
grateful to Professor Daniel Kanstroom for his willingness—on very
short notice—to craft the following brief essay on the illegality of wa-
terboarding, and the basic issues torture raises in our legal system.
The brevity of Professor Kanstroom’s essay reflects only the Journal’s
limited time available for editing; a full articulation of his analysis is
forthcoming.

---

\(^5\) See Hearing on Worldwide Threats Before the S. Select Comm. on Intelligence, Fed. News
Serv. (LEXIS), Feb. 5, 2008 (statement of Michael Hayden, Director, Central Intelligence
Agency).


\(^8\) The Journal was founded in 1980 in hopes that “[t]hrough the dialogue that we cre-
ate, issues and positions can be identified and clarified; the intellectual process of working
through necessary changes can be furthered within the legal community; and the frontiers
of legal thinking can be expanded to include actors and issues . . . which have heretofore
been neglected.” Bernard W. Greene, Toward a Definition of the Term Third World, 1 B.C.
ON “WATERBOARDING”: LEGAL INTERPRETATION AND THE CONTINUING STRUGGLE FOR HUMAN RIGHTS

DANIEL KANSTROOM*

Abstract: While some aspects of the “waterboarding” debate are largely political, the practice also implicates deeply normative underpinnings of human rights and law. Attorney General Michael Mukasey has steadfastly declined to declare waterboarding illegal or to launch an investigation into past waterboarding. His equivocations have generated anguished controversy because they raise a fundamental question: should we balance “heinousness and cruelty” against information that we “might get”? Mr. Mukasey’s approach appears to be careful lawyering. However, it portends a radical and dangerous departure from a fundamental premise of human rights law: the inherent dignity of each person. Although there is some lack of clarity about the precise definition of torture, all is not vagueness, or reliance on “circumstances,” and post hoc judgments. We have clear enough standards to conclude that waterboarding is and was illegal. Official legal equivocation about waterboarding preserves the potential imprimatur of legality for torture. It substitutes a dangerously fluid utilitarian balancing test for the hard-won respect for human dignity at the base of our centuries-old revulsion about torture. That is precisely what the rule of law (and the best lawyers) ought not to do.

This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit . . . .

* Director, Boston College Law School Human Rights Program; Associate Director, Boston College Center for Human Rights and International Justice, and Clinical Professor of Law. This essay is the first part of a larger attempt to analyze the deep legal and ethical issues raised by the waterboarding debate. I am deeply grateful to Ellen Downes for encouraging me to undertake this project, and to Kent Greenfield, David Hollenbach SJ, and Zyg Plater for helpful critique.

INTRODUCTION: WHAT IS “WATERBOARDING”?

The selection of Attorney General Michael Mukasey as this year’s commencement speaker has prompted serious, thoughtful, respectful, and wide-spread discussions at Boston College Law School and beyond. As the Director of Boston College Law School’s Human Rights Program, I was pleased to be asked to write a short analysis of what I believe to be at stake in this debate. Although it is clearly not intended to be a complete treatment of all the complex legal issues, I hope this brief review will be of some use and may help focus future conversations.

The questions are basic: Is “waterboarding” torture? Is it “cruel” and “inhuman treatment”? Does it “shock the conscience”? If the answer to any of these is yes then what ought we to do about it? While some of the debate surely derives from political disagreements, the waterboarding questions also involve core ideas and methodologies of human rights and law.

Let us be clear about what we are discussing. Although the word, “waterboarding,” is of recent vintage, the practice is one of the oldest and most widely recognized forms of torture. This is its essence: a person is forcibly seized and restrained. He or she is then immobilized, face up, with the head tilted downward. Water is then poured into the breathing passages. The exact methods recently used by the Central Intelligence Agency (CIA) are still unknown, but likely have involved placing a cloth or plastic wrap over or in a person’s mouth, then pouring the water. As you first think of it, the practice might seem rather mild compared to other forms of torture. But the effects are dramatic and severe. The inhalation of water causes a gag reflex, from which the victim experiences what amounts to drowning and feels that death is imminent.

---


4 See William Safire, On Language; Waterboarding, N.Y. Times, Mar. 9, 2008, (Magazine), at 16 (“If the word torture, rooted in the Latin for ‘twist,’ means anything (and it means ‘the deliberate infliction of excruciating physical or mental pain to punish or coerce’), then waterboarding is a means of torture. The predecessor terms for its various forms are water torture, water cure and water treatment.”).


6 See id.

7 See id.
Waterboarding is a viscerally effective, coercive interrogation technique designed to overcome the will of the individual. It causes severe physical suffering in the form of reflexive choking, gagging, and the feeling of suffocation. Indeed, if uninterrupted, waterboarding can cause death by suffocation. The victim immediately realizes this on the most basic level. By producing an experience of drowning, and eliciting a visceral panic response, it causes severe mental pain and suffering, distress, and the terror of imminent death. A medical expert on torture has testified that waterboarding “clearly can result in immediate and long-term health consequences. As the prisoner gags and chokes, the terror of imminent death is pervasive, with all of the physiologic and psychological responses expected . . . . Long term effects include panic attacks, depression and PTSD.”

Waterboarding has long been understood as torture, from its earliest incarnations during the Spanish Inquisition through its systematic use by the Khmer Rouge. It has been called torture by modern authorities ranging from the tribunals that tried Japanese war criminals in the aftermath of the Second World War to Senator John McCain, who has stated that waterboarding a detainee is torture—“no different than holding a pistol to his head and firing a blank.” Similarly, former Secretary of Homeland Security Tom Ridge has said, “There’s just no doubt in my mind—under any set of rules—waterboarding is torture.”

The vast majority of experts in the field concur in this view—and by this I do not only mean human rights scholars and activists, among

---


9 See George Ryley Scott, The History of Torture Throughout the Ages 171–72 (2003) (describing the “torture of water” (“[s]ometimes referred to as tormento de toca”) which was used “when the racking, in itself, proved ineffectual. The victim . . . was compelled to swallow water, which was dropped slowly on a piece of silk of fine linen placed in his mouth. . . . A variation of the water torture was to cover the face with a piece of thin linen, upon which the water was poured slowly, running into the mouth and nostrils and hindering or preventing breathing almost to the point of suffocation.”); Dana Milbank, Logic Tortured, Wash. Post, Nov. 2, 2007, at A2.


11 Former Bush Official: Waterboarding is Torture, MSNBC, Jan. 18, 2008, available at http://www.msnbc.msn.com/id/22735168/. “One of America’s greatest strengths is the soft power of our value system and how we treat prisoners of war, and we don’t torture. . . . And I believe, unlike others in the administration, that waterboarding was, is—and will always be—torture. That’s a simple statement.” Id.
whom I am sure there is unanimity. Waterboarding is explicitly barred by the new Army Field Manual.\textsuperscript{13} Indeed, in a November 2007 letter to the Senate, four retired U.S. Judge Advocates General stated: “Waterboarding is inhumane, it is torture, and it is illegal. . . . [I]t is not, and never has been, a complex issue, and even to suggest otherwise does a terrible disservice to this nation. . . . This must end.”\textsuperscript{14}

However, CIA director, General Michael Hayden, has admitted that the CIA used waterboarding on three prisoners during 2002 and 2003.\textsuperscript{15} As is now well-known, the CIA had been advised by the Justice Department Office of Legal Counsel (OLC) that the practice was not illegal.\textsuperscript{16} We now know that certain OLC lawyers, responding to immense political pressure and engaging in shockingly poor legal technique, gave incorrect legal advice to interrogators.\textsuperscript{17} Depending on how one interprets the Nuremberg precedents, this could amount to what Jack Goldsmith has called “get-out-of-jail-free cards” for the inter-

\begin{itemize}
\item \textsuperscript{12} See, \textit{e.g.}, \textsc{Human Rights First \& Physicians for Human Rights, Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality} 17–18 (2007) (examining ten interrogation techniques, including waterboarding, and noting that doctors have documented that survivors of water torture suffer from long lasting-trauma and, even more than a decade after the event, physical pain), \textit{available at} http://physiciansforhumanrights.org/library/documents/\textit{reports/2007-phr-hrf-summary.pdf}.
\item \textsuperscript{14} Letter from Donald J. Guter et al., Retired Judge Advocate General, to Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary (Nov. 2, 2007), \textit{available at} http://leahy.senate.gov/press/200711/110207RetGeneralsOnMukasey.pdf. In 2006, the Senate Judiciary Committee held hearings on the authority to prosecute terrorists. \textit{Id.} The sitting Judge Advocates General of the military services were asked to respond to a series of questions regarding “the use of a wet towel and dripping water to induce the misperception of drowning (i.e., waterboarding).” \textit{Id.} They unanimously and unambiguously agreed that such conduct is inhumane and illegal and would constitute a violation of international law, particularly Common Article 3 of the 1949 Geneva Conventions. \textit{Id.}
\item \textsuperscript{15} \textit{See} \textit{Hearing on Worldwide Threats Before the S. Select Comm. on Intelligence, Fed. News Serv. (Lexis)}, Feb. 5, 2008 (statement of Michael Hayden, Director, Central Intelligence Agency).
\item \textsuperscript{16} See \textit{infra} text accompanying notes 80–83. The job of the OLC is to interpret federal law within the executive branch. \textit{See} U.S. Dep’t of Justice, Office of Legal Counsel, \textit{http://www.usdoj.gov/olc/index.html} (last visited Apr. 24, 2008).
\item \textsuperscript{17} \textit{See generally Jack Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration} (2007). As Jack Goldsmith reports being told by David Addington, “The President has already decided that terrorists do not receive Geneva Convention protections. . . . You cannot question his decision.” \textit{Id.} at 41.
\end{itemize}
rogators.\textsuperscript{18} Perhaps that is fair. But the lawyers themselves may not escape unscathed.\textsuperscript{19}

I. Is Waterboarding Legal?

Mr. Mukasey has maintained a strikingly equivocal approach to waterboarding. He has admitted that he would view waterboarding as torture, were it done to him.\textsuperscript{20} He properly has criticized the disgraceful “Bybee Memo” of August 2002—which, among other flagrant errors, redefined the legal standard for torture as: “equivalent to the pain that would be associated with serious physical . . . injury so severe [as to cause] death, [or] organ failure. . . .”\textsuperscript{21} He called it “worse than a sin.”\textsuperscript{22} Perhaps more to the point, he said it was “a mistake” and “unnecessary.”\textsuperscript{23}

But he still has declined steadfastly to declare waterboarding illegal. He sometimes has adopted a sophisticated judicial posture, befitting his past role as a well-respected judge: “one should refrain from addressing difficult legal questions in the absence of concrete facts and

\begin{itemize}
  \item \textsuperscript{18} \textit{Id.} at 97; see Report of the International Law Commission to the General Assembly, 5 U.N. GAOR Supp. (No. 12), at 11–14, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int’l L. Comm’n 375, U.N. Doc. A/CN.4/34 (Principle IV provides that “the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.”); United States of America v. Alstötter et al. (The Justice Case) 6 L.R.T.W.C. 1 (1948) (trial of sixteen defendants, from the Reich Ministry of Justice or People’s and Special Courts, raising the issue of what responsibility judges have for the enforcement of alleged war crimes and crimes against humanity that were authorized by arguably binding laws); \textit{In re} Yamashita, 327 U.S. 116–17 (1946) (recognizing the doctrine of command responsibility, under which commanding officers are liable if they exercised effective control over subordinates who engaged in torture in violation of the law of nations or knew or had reason to know of their subordinates’ unlawful conduct but failed to take reasonable measures).
  \item \textsuperscript{19} See Press Release, Sen. Sheldon Whitehouse, Durbin and Whitehouse: Justice Department is Investigating Torture Authorization: Senate Judiciary Democrats Called for Inquiry into DOJ’s Role in Overseeing CIA’s Use of Waterboarding (Feb. 22, 2008). In February 2008, the Justice Department revealed that its internal ethics office was investigating the department’s legal approval for waterboarding by the CIA. \textit{See id.}
  \item \textsuperscript{20} \textit{Jan. 30, 2008 Hearing, supra} note 3. “Would waterboarding be torture if it was done to you?” Senator Kennedy asked. “I would feel that it was,” Mr. Mukasey answered. \textit{Id.}
  \item \textsuperscript{22} \textit{Nomination of Michael Mukasey to be the Attorney General of the United States: Hearing of the S. Comm. on the Judiciary, Fed. News Serv. (LEXIS), Oct. 17, 2007} [hereinafter \textit{Oct. 17 Nomination Hearing}].
  \item \textsuperscript{23} \textit{Oct. 17 Nomination Hearing, supra note 22}.
\end{itemize}
circumstances.” He finds the legality of waterboarding to be a “difficult” legal question “about which reasonable minds can and do differ.”

He says that “it is not an easy question” and that assessing the legality of the practice depends upon an evaluation of “circumstances.”

As to the consequences of past waterboarding, Mr. Mukasey has said that because Justice Department lawyers concluded that the CIA’s use of waterboarding was legal, the department cannot investigate whether a crime had occurred. “That,” he stated, “would mean that the same department that authorized the program would now consider prosecuting somebody who followed that advice.” Before the Senate, Mr. Mukasey put it this way: “I start investigations out of some indication that somebody might have had an improper authorization. I have no such indication now.” But one might well ask, if the 2002 memo was “worse than a sin” and “a mistake” how can it not have been an “improper authorization?”

The answer, as we shall see, is that Mr. Mukasey apparently does not believe that waterboarding necessarily was or would be illegal. He likely believes that clarity is a simplistic virtue—indeed only one among many professional virtues required of an Attorney General—and that he has powerful ethical and institutional constraints in this matter, including OLC morale, and protection against civil lawsuits and criminal

---


25 Letter from Michael B. Mukasey to Patrick Leahy, supra note 24, at 2.

26 Id. At times, though, his tone has been more that of the executive branch and notably consequentialist: “any answer that I could give could have the effect of articulating publicly and to our adversaries the limits and the contours of generally worded laws that define the limits of a highly classified interrogation program.” Id.


28 Id. He also opined, “For me to use the occasion of the disclosure that that technique was once part of the CIA program, an authorized part of the CIA program, would be for me to tell anybody who relied, justifiably, on a Justice Department opinion that not only may they no longer rely on that Justice Department opinion, but that they will now be subject to criminal investigation for having done so. That would put in question not only that opinion, but also any other opinion from the Justice Department. . . . And that’s not something that I think would be appropriate, and it’s not something I will do.” Id.


30 Id.; Oct. 17 Nomination Hearing, supra note 22.
prosecutions.\textsuperscript{31} There is surely truth to this, but I do not think it is the deepest truth.

To my mind, perhaps the most interesting testimony given by Mr. Mukasey was the following rather simple exchange:

SEN. BIDEN: When you boil it all down . . . it appears as though whether or not waterboarding is torture is a relative question, where it’s not a relative question whether or not you hung someone by their thumbs from, you know, or you stuck someone, you know, hung them upside down by their feet. . . .

ATTY GEN. MUKASEY: With respect, I don’t think that that’s what I’m saying. I don’t think I’m saying it is simply a relative issue. There is a statute under which it is a relative issue. . . . Essentially a balancing test of the value of doing something as, against the cost of doing it.

SEN. BIDEN: When you say against the cost of doing it, do you mean the cost in—that might occur in human life if you fail to do it? Do you mean the cost—

ATTY GEN. MUKASEY: No.

SEN. BIDEN: —in terms of our sensibilities, in what we think is appropriate and inappropriate behavior as a civilized society? What do you mean?

ATTY GEN. MUKASEY: I chose—I chose the wrong word. I meant the heinousness of doing it, the cruelty of doing it balanced against the value.

SEN. BIDEN: Balanced against what value?

ATTY GEN. MUKASEY: The value of what information you might get.\textsuperscript{32}

Why have Mr. Mukasey’s equivocations generated such anguished controversy, even though the practice is, according to him, not “authorized for use” in the current CIA interrogation program?\textsuperscript{33} The answer, I believe, is revealed by the above dialogue. Waterboarding implicates the very deepest values of our legal system. This includes a basic methodological question: do we balance “heinousness and cruelty” against


\textsuperscript{32} Jan. 30, 2008 Hearing, supra note 3.

\textsuperscript{33} Letter from Michael B. Mukasey to Patrick Leahy, supra note 24, at 2 (explaining that the CIA Director, Attorney General, and President would all have to approve use of a currently unauthorized technique).
information that we “might get”?\textsuperscript{34} Or should we demand forceful and clear statements of principle about certain practices? Do we rely on the hidden judgments of OLC lawyers, on post hoc assessments by reviewing courts after a future detainee is waterboarded, or can we put the issue to rest once and for all?

Certain legal words, such as genocide, slavery, and torture, carry unusually deep resonance and weight. They are the embodiments, the crystallizations and, one would hope, the points of repose of once contentious but now settled political, legal, and moral disputes. Thus, much is at stake when Mr. Mukasey states that he believes there are circumstances in which waterboarding would not be torture and could be legal: “There are some circumstances where current law would appear clearly to prohibit the use of waterboarding. Other circumstances would present a far closer question.”\textsuperscript{35}

I respectfully, but fundamentally, disagree. On first blush, Mr. Mukasey’s approach might appear to be the prudent reasoning of a careful lawyer, steeped as we all are, in the broad realist tradition. However, to many observers, and especially to a human rights lawyer such as myself who has counseled and represented many torture victims, it appears to be something quite different.\textsuperscript{36} It portends a radical and dangerous departure from the fundamental premises of human rights law: the inherent dignity of each person and the basic ideal of inalienable rights.\textsuperscript{37}

\textsuperscript{34} Jan. 30, 2008 Hearing, supra note 3.
\textsuperscript{35} Letter from Michael B. Mukasey to Patrick Leahy, supra note 24, at 2.
\textsuperscript{36} Mr. Mukasey also said that he has concluded that other current methods used by the CIA to interrogate terror suspects “comply with the law.” Id. at 2. Elisa Massimino, Washington Director of Human Rights First, responded, “If Attorney General Michael Mukasey thinks there are circumstances under which waterboarding is legal, that’s all the more reason Congress should not defer to his judgment on the legality of any other interrogation technique used in the CIA’s enhanced interrogation program.” Press Release, Leading Rights Group Rejects AG’s Testimony On Waterboarding, Legality of CIA Program (Jan. 30, 2008), available at http://www.humanrightsfirst.org/media/usls/2008/alert/411/.
It therefore implies a deep disagreement over what Felix Cohen once called “the social ideals by which the law is to be judged.”

II. The Iconic Abhorrence of Torture

To see why this is so, we must understand that torture is a special case, iconically abhorred by our law. The nascent idea of the modern legal system, the rule of reason in law—and indeed the very idea of rights—were all linked to the abolition of torture. Rejection of torture has been accurately described as “a distinguishing feature of the common law,” admired by authorities ranging from William Blackstone to Voltaire. Lord Hoffmann has recently noted that “the rejection of torture by the common law has a special iconic significance as the touchstone of a humane and civilised legal system.”

The objections to torture were always of two types. First, in the Anglo-American tradition, torture came to be seen as “totally repugnant to the fundamental principles of English law” and “repugnant to reason, justice, and humanity.” Many also abhor it on moral grounds. As Bishop Thomas G. Wenski has written, “the question of how we treat detainees” is a “profound moral question” that “has a major impact on human dignity. Prisoner mistreatment compromises human dignity.

---

38 Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935) (“When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.”). Moreover, it raises ethical concerns as “lawying.” See Richard B. Bilder & Detlev F. Vagts, Editorial Comment, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689, 691–95 (2004) (considering the ethical requirements of the ABA Model Rules of Professional Conduct as “professional qualities that protect against legal advice or advocacy that might undermine the national interest in respect for law, or subvert or erode the international legal order”).


42 [2005] UKHL 71, at [83].

A respect for the dignity of every person, ally or enemy, must serve as the foundation of security, justice and peace.”

Torture was also frequently viewed as forensically unreliable, though this argument was generally linked to the fundamental condemnation. We should also, perhaps recall, in light of recent debates about the power of the U.S. president, that the abolition of torture in English history was part of the struggle to determine the limits of Royal prerogative as against the common law. This connects to yet another concern about torture: its tendency to spread; what Henry Shue has called its “metatastic tendency.” As William Holdsworth wrote, “Once torture has been acclimatized in a legal system it spreads like an infectious disease. It saves the labour of investigation. It hardens and brutalizes those who have become accustomed to use it.”

In this broad tradition, I hold to a view about torture that is rather simple, straightforward and, I believe, apolitical and non-ideological. To paraphrase Justice Robert Jackson, if there is any fixed star in our constitutional and human rights constellation, it is that torture is illegal. There are simply no exceptions to this rule under the corpus of human rights law. There can be no balancing, no utilitarian calculus, no “torture warrants,” and no “ticking bomb” hypotheticals. We simply

---


45 See, e.g., Beccaria, supra note 41, at 57–69. There is a potential distinction between the use of torture evidence in judicial-type proceedings versus its use for security-based or investigative purposes. David Hume once described the latter practice as “a barbarous engine.” 2 David Hume, Commentaries on the Law of Scotland Respecting Crimes 324 (Edinburgh, Bell & Bradfute 1844).

46 William Holdsworth, A History of English Law 194–95 (2d ed. 1937). For a time, torture—though illegal under the common law—was “justified by virtue of the extraordinary power of the crown which could, in times of emergency, override the common law.” Id. at 194. Coke, who initially accepted the existence of this power, later saw it as “incompatible with the liberty of the subject” and concluded “that all torture is illegal.” Id.


48 Holdsworth, supra note 46, at 194 (citation omitted).


50 Space limitations preclude complete repetition of the persuasive de-bunking of this facile trope here. As Jeremy Waldron has pointed out, among other defects,

[t]he hypothetical asks us to assume that the power to authorize torture will not be abused, that intelligence officials will not lie about what is at stake or about the availability of the information, that the readiness to issue torture warrants in one case (where they may be justified by the sort of circumstances Dershowitz stipulates) will not lead to their extension to other cases (where the circumstances are somewhat less compelling), that a professional corps of torturers will not emerge who stand around looking for work, that the exis-
do not legally torture people under any circumstances.\textsuperscript{51} As Jeremy Waldron writes, “We can all be persuaded to draw the line somewhere, and I say we should draw it where the law requires it, and where the human rights tradition has insisted it should be drawn.”\textsuperscript{52}

Fortunately, the rejection of torture, grounded in a respect for human dignity, has long been a foundational legal principle for the United States. Although U.S. statutory and constitutional law may use different phrasing than certain international legal instruments, I believe that the ultimate rule is and must be the same.\textsuperscript{53}

To cite just a few brief examples, Common Article 3 of the Geneva Conventions, long accepted by the United States, clearly prohibits “cruel treatment and torture” as well as “outrages upon personal dignity.”\textsuperscript{54} Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, which the United States has ratified, each state simply and absolutely that: “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”\textsuperscript{55} And of course there is the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which the United States has ratified.\textsuperscript{56}

\begin{flushright}
\textsuperscript{51} Waldron, \textit{supra} note 43, at 1714–15.\hspace{1em}
\textsuperscript{52} \textit{Id.} at 1715.\hspace{1em}
\textsuperscript{53} See Wallach, \textit{supra} note 5.\hspace{1em}
\textsuperscript{54} Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.\hspace{1em}
\end{flushright}
The CAT not only prohibits torture but it also requires states to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction,” and to “ensure that all acts of torture are offences under its criminal law.” 57

Let us pause on this point for a moment. Not only is torture definitively rejected under any circumstances, but states are affirmatively obliged to prohibit it, to punish it, and to prevent it.58 As the former U.N. Special Rapporteur on Torture observed more than twenty years ago, “If ever a phenomenon was outlawed unreservedly and unequivocally it is torture.”59 To carry out the United States’ obligations under the CAT, Congress enacted the Torture Convention Implementation Act (the Torture Act) which provides that:

[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.60

Thus, if the waterboarding, now admittedly conducted by CIA agents, was “torture” and was committed outside the United States there are very serious potential criminal consequences.61

The prohibition against torture is also widely recognized as jus cogens (that is, a “peremptory norm”) and a “non-derogable” principle, as fundamental a rule as law can sustain.62 It is clearly an obligation of the

57 Id. arts. 2(1), 4(1).
62 See Vienna Convention on the Law of Treaties, supra note 55, art. 53; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 & n.6 (1987); Erika de Wet, The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law, 15 EUR. J. INT’L L. 97, 98 (2004). This means it is a principle of international law so fundamental that no nation may ignore it or attempt to contract out of it in any way. A treaty that violates jus cogens is void. Id.
type recognized by the Nuremberg Tribunals as the “very essence,” pursuant to which “individuals have international duties which transcend the national obligations of obedience imposed by the individual State.”

Human rights law recognizes that certain rights may be suspended by governments during a “time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.” But the prohibition against torture—like those against slavery and genocide—is exempted from this provision. Such actions may never be done to anyone under any circumstances. Article 2 of the CAT provides: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

Article 15 of the CAT makes clear that statements made as a result of torture are inadmissible in any proceedings. Put simply, these principles are the clear embodiment of what many deem the most important achievement of human rights law: the crystallization of legal norms to protect the basic dignity of the individual. At base, we do not torture because:

- torture’s object is precisely not just to damage but to destroy a human being’s power to decide for himself what his loyalty and convictions permit him to do . . . to reduce its victim to a screaming animal for whom decision is no longer possible—the most profound insult to his humanity, the most profound outrage of his human rights.

As one court has noted, “the torturer has become like the pirate and slave trader before him, hostis humani generis, an enemy of all mankind.”

If an Attorney General endorses or fails to clearly condemn the use of torture, we are on the dangerous road described so well by Jus-

---

63 See Judgment, Monday, Sept. 30, 1946 in 1 Trial of the Major War Criminals Before the International War Tribunal 223 (1947).
64 International Covenant on Civil and Political Rights, supra note 2, art. 4.
65 See id. arts. 4, 6–8 (barring derogation from prohibitions on genocide, torture, and slavery).
66 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 56, art. 2.
67 See id. art. 15 (except “against a person accused of torture as evidence that the statement was made”).
69 Filartiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980).
tice Jackson in his Korematsu dissent. The rationalization of such conduct “to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that [it] sanctions such an order, [validates the principle which then] lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”

For all these reasons, Mr. Mukasey has vigorously and properly condemned torture in the abstract. This is where the complexity arises. The clarity with which torture is rejected is not matched by similar clarity in its definition. Indeed, there is a well-recognized definitional problem regarding torture, the full complexities of which are beyond the scope of this short essay. Still, all is not vagueness and reliance on “circumstances” and on post hoc judgments. If that were the case, then the abhorrence of torture would be meaningless. We have clear enough definitions for many purposes, including to conclude that waterboarding, even if perhaps not the worst of tortures, is and was clearly illegal.

III. The Interpretation Dilemma: Underlying Values and the “Shocking” of Conscience

I think it would be very difficult to be a Kantian and to have any responsibility in the government.

Torture is formally defined by the CAT as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession . . . .”

The Torture Act defines the term “severe mental pain or suffering” in relevant part as “the prolonged mental harm caused by or resulting from—(A) the intentional infliction or threatened infliction of severe

70 See Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).
71 Id.
physical pain or suffering; . . . [or] (C) the threat of imminent death . . . .”\textsuperscript{75}

How should these standards be interpreted? The disgraceful and now repudiated outer limit of the interpretive exercise regarding torture was the so-called “Bybee Memo” of August 1, 2002.\textsuperscript{76} Written by John Yoo, the memo argued that torture required that “[t]he victim experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in loss of significant body function will likely result.”\textsuperscript{77} This interpretation was expressly reversed by a memo written by Daniel Levin on December 30, 2004, which concluded that “severe” pain under the statute is not limited to such “excruciating or agonizing” pain.\textsuperscript{78} But the OLC still declined to conclude that waterboarding was torture.\textsuperscript{79}

It is beyond the scope of this essay to consider why OLC lawyers may have acted as they did. However, as one reviews the description of waterboarding with which this essay begins, recall that the ultimate question is not only whether waterboarding is torture. It is whether it is \textit{clearly illegal}. As to this, I do not think there can be any doubt.

Consider the War Crimes Act (WCA), which criminalizes “war crimes” whether they occur inside or outside the United States.\textsuperscript{80} From 1997 until 2006, the WCA defined “war crimes” to include grave breaches of any of the Geneva Conventions or conduct that constituted a violation of Common Article 3 of the Geneva Conventions.\textsuperscript{81} The Supreme Court’s \textit{Hamdan} decision made clear that Common Article 3 of the Geneva Conventions \textit{does} apply to suspected al-Qaeda detainees,


\textsuperscript{76} See Bybee Memo, supra note 21; Memorandum from Daniel Levin, Acting Assistant Att’y General, on Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A for James B. Comey, Deputy Att’y General (Dec. 30, 2004), \texttt{available at news.findlaw.com/hdocs/docs/terrorism/doi/}
\texttt{torture123004mem.pdf} [hereinafter Levin Memo].

\textsuperscript{77} Bybee Memo, supra note 21, at 13; see GOLDSMITH, supra note 17, at 142.

\textsuperscript{78} Levin Memo, supra note 76, at 2.

\textsuperscript{79} See id. at 2 n.8. Levin further determined that the statute also prohibits certain conduct specifically intended to cause “severe physical suffering” as distinct from “severe physical pain.” \texttt{Id. at 10–12}. In a footnote, however, Levin maintained, that “we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.” \texttt{Id. at 2 n.8}.


\textsuperscript{81} \textit{Id.}; see Geneva Convention Relative to the Treatment of Prisoners of War, supra note 54, art. 3.
requiring that they be “treated humanely,” and prohibiting “outrages upon personal dignity, in particular humiliating and degrading treatment.”

The 2006 Military Commissions Act (MCA) retroactively narrowed the WCA to a “grave breach” of Common Article 3. The category, however, still includes both torture and “cruel or inhuman treatment.” Indeed, under the MCA, mental harm need not be “prolonged” as required by the Torture Act, but may be “serious and non-transitory.”

“Cruel, inhuman or degrading” conduct that does not quite rise to the level of “torture” is also prohibited by the CAT. The Detainee Treatment Act of 2005 (DTA) specifically prohibited “cruel, unusual and inhuman treatment or punishment” against any individual in U.S. custody regardless of location or nationality. The DTA, however, states that “the term ‘cruel, inhuman, or degrading treatment or punishment’ means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States . . . .”

It was in regard to this statute that Mr. Mukasey testified: “There is a statute under which it is a relative issue . . . which is a shocks-the-

---

84 §6 (b)(1)(B)(d)(1)(A)–(B), 120 Stat. at 2633. The definition is essentially the same as that of the Torture Act, except that the WCA requires that the act be “for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.” See §6 (b)(1)(B)(d)(1)(A), 120 Stat. at 2633.
85 § 6(b)(2)(E), 120 Stat. at 2634–35. The MCA also authorized the potential admission of coerced testimony (but not torture evidence) in military trials. § 5(a)(1), 120 Stat. at 2607. Put simply, it is now possible that Guantánamo defendants could receive the death penalty based on evidence obtained from witnesses who were subjected to waterboarding, if it is not considered to be torture. Therefore, in that regard at least, the question of whether waterboarding is torture could have profound significance. See §5 (a)(1), 120 Stat. at 2607.
86 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 56, pmbl.
88 Id. The United States added the following to its instrument of ratification of the CAT: “The United States understands the term, ‘cruel, inhuman or degrading treatment or punishment,’ as used in Article 16 of the Convention, to mean the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.” S. TREATY DOC. No. 100–20, at 15–16.
conscience standard, which is essentially a balancing test of the value of doing something as, against the cost of doing it.”

One may well differ about how far this balancing test can legitimately go. But note, first, that the shocks-the-conscience analysis only becomes necessary if one concludes that waterboarding is not necessarily torture. Further, we might recall that the very DTA language relied upon by Mr. Mukasey to invoke the shocks-the-conscience test was part of an amendment offered by Senator John McCain, who has specifically called waterboarding a form of torture and clearly illegal. The shocks-the-conscience test is one formulation of a due process standard. It is sometimes—incorrectly, in my view—cited by supporters of harsh interrogation tactics as authorizing a utilitarian balance between the nature of the conduct and the government’s interest in doing such things. Clearly, the test tends towards the subjective and the retrospective. But can it be, when applied to waterboarding, “essentially a balancing test of the value of doing something as, against the cost of doing it”? I do not think so. Indeed, I believe that this balancing approach is as fundamental an error as one can make in this setting because it replaces what should be primarily a “dignity-based” analysis with an impermissible and dangerously utilitarian one.

90 See infra note 11. Indeed, Senator McCain has taken a clear position on the relationship between the DTA standard and waterboarding:

[T]he President and his subordinates are . . . bound to comply with Geneva. That is clear to me and all who have negotiated this legislation in good faith.

. . .

. . . We expect the CIA to conduct interrogations in a manner that is fully consistent not only with the Detainee Treatment Act and the War Crimes Act but with all of our obligations under Common Article 3 of the Geneva Conventions.


91 See, e.g., Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997). In a substantive due process analysis, a court must first determine if a statute infringes upon a fundamental right and then whether such infringement is “narrowly tailored to serve a compelling state interest.” In County of Sacramento v. Lewis, the Court stated that “conduct deliberately intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.” 523 U.S. 833, 834 (1998) (emphasis added). More recently, in Chavez v. Martinez, Justice Thomas, in a plurality opinion, wrote “the need to investigate whether there had been police misconduct constituted a justifiable government interest . . . .” 538 U.S. 760, 775 (2003). However, as Justice Kennedy wrote, “[a] constitutional right is traduced the moment torture or its close equivalents are brought to bear.” Id. at 789–90 (Kennedy, J., concurring in part and dissenting in part).

The shocks-the-conscience test (in this context) derives from the 1952 case of *Rochin v. California*, in which the police had unsuccessfully attempted to remove suspected capsules of morphine from a suspect’s mouth. They later took him to a hospital and ordered doctors to pump his stomach. In his majority opinion for the Court, Justice Frankfurter noted that the due process question implicated “‘canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.’” The Court derived from this a resonant holding that explicitly used the prohibition against torture as its touchstone: “the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism . . . . They are methods too close to the rack and the screw to permit of constitutional differentiation.”

The *Rochin* Court also specifically recognized the role played by human dignity in its analysis: noting that its decision related to “force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record.” Although there have been intimations by some justices in recent cases that a review of all the circumstances is required before a court declares a particular practice to shock-the-conscience, this is not necessary or proper as to waterboarding. The inquiry always requires a determination of what the United States has traditionally considered to be out of bounds. In short, there are—indeed, there must be—some acts that are prohibited regardless of the surrounding circumstances. Imagine if the question were whether cutting off the toes of a detainee shocks-the-conscience. Do we balance? Does it depend upon the circumstances? To be sure, none of these definitions and standards are completely clear nor generally thought to be immutable. The question is: to which principles should one turn to as interpretive guides? And, in the waterboarding context, do those principles counsel vagueness and reliance on *post hoc* judgments or prophylactic clarity? Justice Frankfurter’s reasoning appears to be vastly superior in this regard to that of John Yoo. Let us look to canons of decency and fairness, to abhorrence of torture, and to human dignity.

---

93 342 U.S. 165, 166, 172 (1952).
94 *Id.* at 169 (citing *Malinski v. New York*, 324 U.S. 401, 417 (1945)).
95 *Id.* at 172.
96 *Id.* at 174 (emphasis added).
97 See infra note 92.
Official legal equivocation about waterboarding is not merely a technical matter. It is wrong and it is dangerous. It preserves the imprimatur of legality for torture and it shields the wrongful conduct of the past from proper scrutiny and judgment. Perhaps even worse, it substitutes a dangerously fluid utilitarian balancing test for the hard-won respect for human dignity at the base of our centuries-old revulsion about torture. That, in my view, is precisely what the rule of law (and the best lawyers) ought not to do.

Even if one were inclined to quibble about the precise definition of torture, surely there can be no doubt—and surely a responsible government official ought to be able to say—that waterboarding is illegal.98 As the editors of the Los Angeles Times put it: “[Mukasey’s] statements . . . set a dangerous and hypocritical standard of convenience for torturers. Such repugnant equivocation will be mimicked and distorted in dark corners around the world . . . .”99

I would never presume to interpret for others the deep values that I believe have long sustained Boston College and its law school. I certainly do not think that those values mandate or support any kind of ideological litmus test. I am completely comfortable with the general proposition that a range of ideological viewpoints among commencement speakers is a healthy and necessary practice. But, in my view, this matter of waterboarding is not an essentially political question. Nor is it an especially close call as a matter of law. It does, however, cut to the heart of the most profound legal and ethical questions of our time.

---

98 See Ken Gormley, Archibald Cox: Conscience of a Nation 338–58 (1997); Bilder & Vagts, supra note 38, at 693.
Abstract: Scientists have warned of the dangers of climate change for decades, yet no meaningful steps have been taken to address its underlying causes; instead, ineffective strategies to reduce CO₂ emissions incrementally have become popular because they do not disturb the racial hierarchy that sustains the social, economic, and legal structure of the United States. The segregated land use patterns and transportation systems that dominate the U.S. landscape have reified race through the perpetuation of a distinct white over black racial hierarchy; those same land use patterns and transportation systems have contributed significantly to global warming by causing a dangerous spike in CO₂ emissions. To address the root causes of climate change thus requires a dismantling of the land use and transportation patterns that protect racial hierarchy and preserve white privilege in the United States. As a result, a consensus of inaction has developed to prevent meaningful reductions in emissions.

Introduction: The Global Climate Crisis

We are facing a global climate crisis. The release of the 2007 U.N. Intergovernmental Panel on Climate Change Report eliminates any legitimate doubt that human activities have caused carbon dioxide (CO₂) to accumulate in the earth’s atmosphere, dangerously increasing the earth’s average temperature.¹ Already, increasing atmospheric temperatures are having disastrous effects on the earth’s climate.² Traditional ways of life for indigenous peoples of Alaska face extinction as

² See id. at 5–9.
polar ice caps and permafrost continue to melt, unfreezing seas and unleashing storm surges that engulf villages and endanger lives.3

The rapid changes in northern coastal regions foreshadow the danger more southern latitudes are just beginning to encounter.4 The climate crisis also promises to bring more severe weather events to more heavily populated regions of the world, causing famine and disease in warmer areas.5 The concentration of CO2 in the atmosphere derived from anthropogenic sources has already brought more severe weather to much of the earth’s most populated areas, illustrated most famously by the Hurricane Katrina disaster.6

However, despite decades of irrefutable evidence about the credibility of the global climate crisis and its anthropogenic causes, climate change is not a priority for most Americans7. The American public successfully has ignored the increasing visibility of the effects of climate change for years, developing an attitude of willful ignorance despite the immediacy of the problem.8 A Gallup poll conducted in 2004 found that the percentage of Americans who worried a “great deal” or a “fair amount” about the “greenhouse effect” or “global warming” had decreased from the previous year, with only fifty-one percent of respondents noting that they were concerned about the climate crisis.9 The other half of those surveyed reported that they worried “only a little” or “not at all” about global warming or the greenhouse effect.10 This public attitude towards global warming legitimates inaction from the gov-

---

3 See id.; Elizabeth Kolbert, Field Notes from a Catastrophe: Man, Nature, and Climate Change 7–8 (2006); Andrew Shepherd et al., Larsen Ice Shelf Has Progressively Thinned, 302 Sci. 856, 856 (2003).
4 IPCC Summary, supra note 1, at 9–12.
5 Id. at 7; see Kolbert, supra note 3, at 123; James Howard Kunstler, The Long Emergency 9 (2005).
6 See Kolbert, supra note 3, at 185. Global warming promises to increase the severity of hurricanes and other weather events according to scientists, including James Elsner of Florida State University whose study of air and sea temperatures supported a link between global climate change and increased hurricane severity. See Establishing a Connection Between Global Warming and Hurricane Intensity, Sci. Daily, Aug. 15, 2006, http://www.sciencedaily.com/releases/2006/08/060815160934.htm.
7 See Bill McKibben, The End of Nature 5 (1989) (calling attention to the threat of global warming in the late 1980s); Fred Pearce, Climate Evidence Finds Us Guilty As Charged, New Scientist, June 11, 2005, at 17; see also Stephanie B. Ohshita, The Scientific and International Context for Climate Change Initiatives, 42 U.S.F. L. Rev. 1, 3 (2007) (noting that as far back as the 1890s, scientists warned of the global warming consequences of burning fossils fuels).
9 Id.
10 Id.
ernment and the private sector, as businesses and even national environmental non-profits have generally failed to make it an issue.\textsuperscript{11}

Facing an apathetic American public, the federal government of the United States has steadfastly rejected the science, declining to ratify the Kyoto Protocol\textsuperscript{12} or take any other meaningful action on the subject of climate change, despite U.S. production of more greenhouse gases than any other nation.\textsuperscript{13} The current administration has gone to great lengths to deny the tremendous scope of the problem.\textsuperscript{14} Echoing the rhetoric of previous administrations, the official response from the Bush administration to calls for action on climate change is that decisive action to curb global warming would harm the very foundation of the U.S. economy.\textsuperscript{15}

\textsuperscript{11} Id. at 20 (“[N]on-governmental organizations (NGOs) and the media . . . have not afforded the climate issue the urgent priority that it deserves.”). Even when corporations do make global warming an issue, their attention is focused on their bottom line, rather than the percentage of greenhouse gases in the atmosphere. See, e.g., Darcy Frey, \textit{How Green is BP?}, N.Y. Times, Dec. 8, 2002, § 6 (Magazine), at E98. BP’s campaign to promote ethanol is a particularly good example. See id.

\textsuperscript{12} Speth, \textit{supra} note 8, at 19–20. Ratification by the United States of the Kyoto Protocol “would have created substantial disincentives for urban sprawl in the US.” George A. Gonzalez, \textit{Urban Sprawl, Global Warming and the Limits of Ecological Modernisation}, 14 \textit{Envtl. Pol.} 344, 352 (2005). A statement by President George W. Bush in June of 2001 represents the administration’s long-standing position on climate change. See Press Release, Office of the Press Sec’y of the White House, President Bush Discusses Global Climate Change (June 11, 2001), available at http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html. Explaining his refusal to sign the Kyoto Protocol, the President said, “for America, complying with those mandates would have a negative economic impact, with layoffs of workers and price increases for consumers. And when you evaluate all these flaws, most reasonable people will understand that it’s not sound public policy.” Id. In a later statement, President Bush was more specific about the negative economic consequences of following the Kyoto Protocol, warning that it “would ultimately result in the loss of $400 billion to the U.S. economy and a loss of 4.9 million jobs.” See Kelly Wallace, \textit{Bush to Unveil Alternative Global Warming Plan}, CNN, Feb. 14, 2002, http://archives.cnn.com/2002/ALLPOLITICS/02/13/bush.global.warming/index.html. The Bush administration was not the only U.S. presidential administration to refuse to support the Kyoto Protocol. See Kolbert, \textit{supra} note 3, at 156–57. The Clinton administration “supported the Kyoto Protocol in theory, but not really in practice,” and declined to push for its ratification in the Senate after it was signed by the U.N. ambassador. Id. Indeed, President Clinton’s rhetoric on the Kyoto Protocol sounds remarkably similar to President Bush’s. See George Monbiot, \textit{Heat: How to Stop the Planet from Burning}, at v (2007).


\textsuperscript{14} See Robert S. Devine, \textit{Bush Versus the Environment} 175–79 (2004). The Bush administration has edited out references to global warming and the climate crisis from its Reports on the Environment over the protests of its own Environmental Protection Agency staffers. See id.

\textsuperscript{15} See Wallace, \textit{supra} note 12. Ari Fleischer, former White House Press Secretary for the Bush administration, has been quoted as saying, “The president is very concerned about
The response to global warming in other branches of government has been similar. Although the majority of Congress and many state and local politicians acknowledge both the human causes of global warming and its threat, they too have failed to take meaningful action to reduce the United States’s greenhouse gas emissions. For decades, this lack of leadership, “has been blatantly obvious with the debate over global warming . . . . American political leaders have continuously deflected public opinion from the urgent need to curb fossil fuel consumption while the problems with greenhouse gases radically worsen.”

Although the government justifies its inaction on the climate crisis and its refusal to ratify the Kyoto Protocol as a result of its concern for the very survival of the U.S. economy, this article will demonstrate that the government’s response actually reflects a deeper, though related, concern—one with even higher stakes for political power brokers and other influential members of society.

the effect Kyoto would have on America’s workers, on American jobs and on the American economy.” Id.

16 See, e.g., S. Res. 98, 105th Cong. (1997) (enacted). Though the executive branch, particularly under the leadership of President George W. Bush, is often blamed for stalling action on global climate change; Congress has likewise squelched meaningful efforts to act—for example, it discouraged President Clinton from signing the Kyoto Protocol. See, e.g., id. Before it was finalized and brought to a vote, the U.S. Senate passed, by a unanimous vote of 95-0, a resolution declaring that the United States should not sign any climate change protocol unless developing nations were required to limit their greenhouse gas emissions. See id.; see also Randall S. Abate, Kyoto or Not, Here We Come: The Promise and Perils of the Piecemeal Approach to Climate Change Regulation in the United States, 15 CORNELL J.L. & PUB. POL’Y 369, 372 (2006) (“Not only has the United States failed to ratify the Kyoto Protocol, but it also has no comparable federal legislation on point. Instead, its Global Climate Change Policy calls for only modest industrial efficiency improvements, which are significantly less ambitious than the emission reduction targets imposed on industrialized nations under the Kyoto Protocol.”).

17 The most significant climate change bill to come before Congress is the America’s Climate Security Act of 2007, which calls for a market-based strategy to combat global warming. See generally S. 2191, 110th Cong. (2007). The bill is likely to be considered by the full Senate in the early summer 2008, but the bill and similar market-based strategies, do not have the power to reduce greenhouse gas emissions significantly. See Brian Tokar, Global Warming and the Struggle for Justice: The Disturbing and Sometimes Catastrophic Reality of Worldwide Climate Collapse, Z MAG., Jan. 2008, at 43, 46–47; see also Larry Lohmann, Carry on Polluting, NEW SCIENTIST, Dec. 2, 2006, at 18 (criticizing the use of market-based strategies, like carbon emissions trading and offset credit purchasing programs, to limit global climate change); Bill McKibben, Sanders Takes Brave Stand on Climate Change Bill: Vermont Senators Counters Limp-Wristed Proposal with Principled Initiative, SUNDAY RUTLAND HERALD/SUNDAY TIMES ARGUS (Vt.), Oct. 21, 2007, at C1 (calling the bill a “half-measure”).

18 See Betsy Taylor, How Do We Get from Here to There?, in SUSTAINABLE PLANET: SOLUTIONS FOR THE TWENTIETH CENTURY 233, 236 (Juliet B. Shore & Betsy Taylor eds., 2002) (“Political leaders reinforce this resistance to change, proposing remedies that skirt the real problems at hand.”).
Part I of this article discusses the climate inaction consensus and its root causes. Part II provides an overview on the social construction of race in our society. Part III explains the historical background of the spatial and transportation hierarchies that have been used to perpetuate race in the United States; in particular, it focuses on suburbanization and domestic transportation policies and how they contribute to the reification and perpetuation of race in American society. Part IV illustrates how land-use and transportation policies have produced the global climate crisis by creating a social system dependent on unsustainable fossil fuel consumption. Finally, this paper concludes that racist transit and land-use policies have not only reified race, but have been responsible for bringing the global climate to crisis levels.

I. The Inaction Consensus

Lawmakers and politicians have not taken action to combat climate change because effectively arresting climate change will challenge the foundational values of American society.\(^\text{19}\) Meaningful action would require changes in the way we live, which would undermine the foundation of our hierarchical political and social structure.\(^\text{20}\) The behaviors and lifestyles in the United States that emit the lion’s share of CO₂ into the atmosphere are the very same as those that have actualized the idea of race and maintained the “white-over-black” hierarchy that is the essence of our social, economic, and legal structure.\(^\text{21}\) These environmentally destructive behaviors and lifestyles have created and protected white privilege in American society.\(^\text{22}\) Thus, meaningful action to com-

\(^{19}\) See Andrew L. Barlow, Between Fear and Hope: Globalization and Race in the United States 25 (2003) (explaining that the white middle class suburban lifestyle is the basis of the American imagination of self); see also Frey, supra note 11. Effectively addressing climate change “will require nothing less than a new industrial revolution, an overwhelming retreat from society’s mass reliance on the carbon fuels—oil, gas and coal—that have powered the global economy for more than a hundred years.” Frey, supra note 11.

\(^{20}\) See Anthony Paul Farley, Perfecting Slavery, 36 Loy. U. Chi. L.J. 225, 227 (2005). Farley explains that our society, from the moment of slavery until the present, has been built on the foundation of a white-over-black hierarchy. See id. This hierarchy is such a part of our society that “white-over-black has become the form of our institutions and the orientation required to move through them.” Id. at 230.


\(^{22}\) See id. White privilege “refers to the hegemonic structures, practices, and ideologies that reproduce whites’ privileged status,” maintaining and reifying the very idea of whiteness itself. See Laura Pulido, Environmental Racism and Urban Development, in Up Against the Sprawl: Public Policy and the Making of Southern California 71, 73 (Jennifer Wolch et al. eds., 2004).
bat climate change will require a dismantling of the systemic policies and norms that have both caused global warming and protected the racial hierarchy that underlies contemporary America. This reality explains why meaningful action on the issue of climate change has eluded policy-makers for decades.

The structures, practices, and ideologies of the suburban American dream—with its detached single-family homes in spread-out neighborhoods, far from commercial and urban areas—have been some of the strongest forces in creating and perpetuating white privilege in American society. Henry Holmes explains the role of the suburbs in that process:

Suburbia, as we know it today, became the preferred middle-class lifestyle. With it came patterns of economic development, land use, real estate investment, transportation and infrastructure development that reflected race, class and cultural wounds deeply embedded in the psyche and history of the United States. Jim Crow—institutionalized segregation and apartheid against African Americans and other nonwhites—was reflected in urban and suburban zoning codes, restrictive racial covenants in real estate investment and lending practices, redlining by financial institutions, discriminatory private business practices, and the distribution of public investments. All these served the interests of the policy-makers, usually the corporate elite who were typically European-American and middle class or wealthy.

In addition to concretizing the abstract concept of race in American society, the growth of the suburbs has become a major factor in

---

23 Cf. Anthony Paul Farley, The Apogee of the Commodity, 53 DePaul L. Rev. 1229, 1241 (2004). Farley notes that true reparation for slavery would require the state to dismantle its system of race, property and law—in effect it would require the state to destroy itself. See id. Reparation for slavery, like meaningful action on climate change, is a conflicted dream because it too would require the system of race, property and the laws that support it to dismantle itself in favor of an environmentally sustainable and less hierarchical system. See id.

24 See Kenneth T. Jackson, Crabgrass Frontier: The Suburbanization of the United States 8 (1985) (“In the United States, status and income correlate with suburbs, the area that provides the bedrooms for an overwhelming proportion of those with college educations, of those engaged in professional pursuits, and of those in the upper-income brackets.”).

changing the earth’s climate.\textsuperscript{26} Transportation, electricity generation, and deforestation represent the most harmful human activities because they release large amounts of carbon dioxide, the main greenhouse gas, into the atmosphere.\textsuperscript{27} Suburbanization and private car-centered transportation policies require that more energy be spent on transportation, demand far more electricity, and cause more deforestation than any other lifestyle.\textsuperscript{28}

Global warming is an unforeseen side effect of the policies and behaviors that have been used to “race” our society.\textsuperscript{29} Therefore, a meaningful response to the global climate crisis requires a dismantling, or at the very least a reordering, of the spatial systems we have created to construct and perpetuate the concept of race in the United States.\textsuperscript{30} The unsustainable land-use and consumption that define the American dream—an inherently white ideal—create cultural and racial hierarchies by setting up two classes of citizens in American society: those who can consume space and those who cannot.\textsuperscript{31} Representative Nydia M. Velázquez, who represents in Congress a predominantly poor urban district of New York, points out,

\begin{flushleft}
\textsuperscript{26} See Gonzalez, supra note 12, at 357–58.
\textsuperscript{28} See Gonzalez, supra note 12, at 345 (noting that more dense, urban settlement patterns with more compact homes, in contrast to suburban land use patterns featuring larger detached homes, require less land, fewer cars, less electricity, less gas use, fewer appliances and result in lower consumption generally).
\textsuperscript{29} See John A. Powell, A Minority-Majority Nation: Racing the Population in the Twenty-First Century, 29 Fordham Urb. L.J. 1395, 1402 (2002) (explaining that race can function as a verb—racing thus means the act of separating people from the dominant group in order to affirm the dominant group’s superior place in the resulting racial hierarchy).
\textsuperscript{30} See McKibben, supra note 7, at 14. Bill McKibben warns of the extent to which the American way of life will need to be dismantled in order to combat global warming effectively:

[B]ecause so much of our energy use is for things like automobile fuel, even if we mustered the political will and economic resources to quickly replace every single electric generating station with a nuclear plant, our total carbon dioxide output would fall little more than a quarter . . . . So the sacrifices demanded may be on a scale we can’t imagine and won’t like.

Id. As Farley points out those with power to lose in such a re-ordering are unlikely to consent to such dismantling. See Anthony Paul Farley, Accumulation, 11 Mich. J. Race & L. 51, 55 n.11, 59 n.21 (2005).
\textsuperscript{31} See Barlow, supra note 19, at 12, 48–49.
\end{flushleft}
the simple fact is that our current unsustainable “more-is-better” culture undermines any hope of achieving justice—at home or abroad. We often hear about how the United States consumes a vastly disproportionate amount of resources relative to the rest of the world. Americans are building bigger houses, driving bigger cars, consuming more and more of everything than just about anyone else anywhere.

This is certainly true, and the long-term environmental effects of this overconsumption may well prove disastrous . . . .

... [A]nd one thing is for sure—Americans are not doing all this overconsuming in congressional districts like the one I represent . . . .

In my district, crime is high, test scores are low, schools are crumbling, and the “American Dream”—however you choose to define it—is very, very difficult to attain.32

Those who currently enjoy the privileges of consumption fear losing the bigger houses, bigger cars, and the economic power to consume, not only because they provide material comforts, but because they have become the signifiers of wealth, power, and whiteness in American society.33 As Professor Farley stated, “The system of property [and all of its trappings] is white-over-black.”34 Those material comforts that identify whiteness do so in dialectic opposition to the high crime, low test scores, and crumbling schools that mark blackness in American society.35


33 See Barlow, supra note 19, at 75–77.

34 Farley, supra note 23, at 1235.

Fear of eroding the hierarchies that define race explains why politicians and other elites have consistently championed ineffectual “market-based approaches” to global warming.\textsuperscript{36} By focusing public and private energy on relatively insignificant individual behavior changes, the Bush administration and other privileged elites are able to maintain the racial hierarchy that consolidates their economic and social power.\textsuperscript{37} Politicians know that “[w]ithout white-over-black the state withers away.”\textsuperscript{38} Therefore, they have a profound incentive to maintain the racial hierarchy. Unsurprisingly, “because th[ese elites] accrue social and economic benefits by maintaining the status quo, they inevitably do.”\textsuperscript{39} This white consensus to maintain the spatial and mobility hierarchies that reify race is possible because, “[w]hite privilege thrives in highly racialized societies that espouse racial equality, but in which whites will not tolerate being either inconvenienced in order to achieve racial equality . . . or being denied the full benefits of their whiteness . . . .”\textsuperscript{40} With so much white privilege to lose, it becomes clear why even most passionate environmental advocates are far more willing to call for, and make, small non-structural changes in their behavior to ameliorate

\textsuperscript{36} See, e.g., Climate Stewardship & Innovation Act of 2007, S. 280, 110th Cong. (2007). One of the most championed pieces of legislation introduced to combat global climate change in the United States is the McCain-Lieberman Climate Stewardship and Innovation Act, which has been introduced several times by the two senators. See S. 280; S. 1151, 109th Cong. (2005). According to the two senators, whose bill relies on a market-based approach to addressing climate change, “harness[ing] the power of the free market and the engine of American innovation to reduce the nation’s greenhouse gas emissions” is the only way to forestall “catastrophic global warming.” John McCain & Joe Lieberman, Op-Ed, The Turning Point on Global Warming, Boston Globe, Feb. 13, 2007, at A15. Senators McCain and Lieberman have argued that Congress “must be open to a good faith business perspective that can help solve this urgent global problem.” Id. These market based approaches are generally viewed by climate change scientists as unlikely to achieve the changes necessary to curb climate change. See Tokar, supra note 17, at 46–47.

\textsuperscript{37} See Monbiot, supra note 12, at viii, 20–22.

\textsuperscript{38} See Farley, supra note 23, at 1241.

\textsuperscript{39} Pulido, supra note 22, at 73; accord Monbiot, supra note 12, at 20–22. These elites have the most freedom to lose and the least to gain from an attempt to restrain [global warming].

... [A]sking wealthy people ... to prevent climate change means asking them to give up many of the things they value—their high performance cars, their flights to Tuscany and Thailand and Florida—for the benefit of other people . . . .

Monbiot, supra note 12, at 20–22.

\textsuperscript{40} Monbiot, supra note 12, at 20–22.
global warming, but are unwilling to embrace significant or meaningful actions to address the crisis.41

Even as global warming is starting to become the subject of increasing media coverage and as more environmental groups call for action to halt the crisis, most activism is limited to changes that maintain the existing spatial, social, economic and legal framework that defines American society.42 Despite knowing for decades that we have been living unsustainable lifestyles, and “hay[ing] had some intuition that it was a binge and the earth couldn’t support it, . . . aside from the easy things (biodegradable detergent, slightly smaller cars) we didn’t do much. We didn’t turn our lives around to prevent it.”43

Greenhouse emissions reduction challenges have cropped up on websites across the country, encouraging Americans to change their light bulbs, inflate their tires to the proper tire pressure to ensure optimal gas mileage, switch to hybrid cars, run dishwashers only when full, telecommute, or buy more efficient washers and dryers.44 However, popular emissions challenge web sites are not suggesting that Americans give up their cars, move into smaller homes in more densely populated urban neighborhoods near public transportation, or take other substantive actions to mitigate the global climate crisis.45 Even Al Gore,

41 See Ian F. Haney López, White By Law: The Legal Construction of Race 23 (2006). Whites may be “willing to protect that value [conferred on them by their white privilege], even at the cost of basic justice” for those without whiteness. Id.; see also Monbiot, supra note 12, at viii (“[S]tate and federal legislators . . . seek to avoid environmental measures which might interfere with the relative luxury of heating or cooling . . . [their] homes or driving or flying whenever and however [they like] . . . and [instead] substitute measures, like biofuels, which transfer the costs onto less powerful people.”).

42 See James Howard Kunstler, The Geography of Nowhere: The Rise and Decline of America’s Man-Made Landscape 10 (1993) (“The newspaper headlines may shout about global warming . . . but Americans evince a striking complacency when it comes to their everyday environment and the growing calamity that it represents.”).

43 See McKibben, supra note 7, at 86.

44 See, e.g., Alliance for Climate Action, Residential Resources, http://www.10percentchallenge.org/ (follow “Resources” hyperlink; then follow “Residential Resources” hyperlink) (last visited Apr. 18, 2008) (linking to web sites which provide, among other things, information on how to limit home energy use and fuel efficient and alternative energy vehicles).

45 See, e.g., id. The popular and widely respected 10% Challenge, run by a public-private partnership in Burlington, Vermont, has encouraged local residents and businesses owners to reduce their energy consumption with an innovative web-based program which allows residents to track the energy savings made by installing energy efficient light bulbs, switching to reusable bags, insulating their homes, and similar changes. See Alliance for Climate Action, About Us, http://10percentchallenge.org/ (follow “About Us” hyperlink) (last visited Apr. 18, 2008); see also Alliance for Climate Action, How It Works, http://10percentchallenge.org/ (follow “How It Works” hyperlink) (last visited Apr. 18, 2008). Despite its initial success in reducing energy consumption in the city, it has not been able to
the most famous voice in the climate change movement, reminds his fellow Americans that “[l]ittle things matter . . . buy a hybrid if you can, buy a flex-fuel car if you can. Get a higher mileage car that’s comfortable for your needs.”46 “[M]any yuppie progressive ‘greens’ are the mark a sustained reduction in CO₂ production, underscoring the ineffectiveness of small, incremental changes in combating climate change. See Kolbert, supra note 3, at 176.

[The 10% Challenge] makes the limits of local action obvious . . . . Since the 10 percent challenge was initiated, in 2002, electricity demand in the city has actually started to creep back up again and is now slightly higher than it was at the campaign’s launch. Meanwhile, whatever savings have been made in electricity usage have been offset by increased CO₂ emissions from other sources, mostly cars and trucks.

Id.; see also Victoria Scanlan Stefanakos, earth Day, Every Day: Feel Good About Doing Your Part for the Environment (with Hardly Any Effort), REAL SIMPLE, Apr. 2007, at 197. Victoria Scanlan Stefanakos writes that following her article’s twenty-six tips can “have a big cumulative impact on the environment and a not-so-big impact on your daily life.” Stefanakos, supra, at 197. The tips include eating less red meat, installing a low-flow showerhead, recycling, using biodegradable cat litter, idling less in your car, and buying organic cotton. Id. at 198–205. Nowhere does the article suggest that readers live in smaller homes, drive less or make drastic changes to their lifestyles. See id.

The substantive changes that emissions web sites avoid advocating would have significant impacts on the average individual’s CO₂ emissions. For example, if all of the drivers in the United Kingdom were suddenly to abandon their cars and exclusively ride public transportation, the country’s transportation emissions would immediately be reduced by ninety percent. See Monbiot, supra note 12, at 147. Because personal transportation accounts for about twenty-two percent of all greenhouse gas emissions in that country, the savings would have a profound impact on atmospheric CO₂ emissions. See id. at 146–47; see also Gonzalez, supra note 12, at 357–58 (noting that changes to land use and land management planning will “directly and assuredly reduce climate change emissions,” in contrast to technological innovation or market-based approaches).

46 Moira Macdonald, Al Gore: “Action” Movie Star, SEATTLE TIMES, May 28, 2006, at J1 (interviewing Al Gore). As it becomes fashionable for educated consumers to be concerned about emissions, other organizations have emerged to encourage Americans to make nearly effortless changes in the way they use energy. For example, carbon offset programs allow Gore to achieve “carbon neutrality” for both his twenty-room home in Tennessee and his other home in Washington, by purchasing “carbon credits” to offset his homes’ emissions, enabling him to sacrifice little as he buys his way to environmental salvation. See Gore Defends His Carbon Credentials: Group Skeptical of Global Warming Notes His Home Is Big Energy User, MSNBC.COM, Feb. 28, 2007, http://www.msnbc.msn.com/id/17382210/ . Promoted by both non-profits and for-profit companies, “carbon credits” allow consumers to pay about five dollars per ton to offset the carbon emitted by their cars and homes for a day, a week, or a year. See Drake Bennett, Have Yourself a Carbon-Neutral Christmas . . . , BOSTON GLOBE, Dec. 17, 2006, at K1. Because an average car emits five to six tons of CO₂ in a year, consumers can offset their vehicular emissions for as little as twenty-five dollars a year with a few clicks of the mouse. Id. However, scientists and climate activists question the utility of carbon credits and carbon trading programs as tools to combat global warming because organizations that plant trees on behalf of consumers to reduce their carbon footprint may do so in areas that provide little or no CO₂ sequestration potential; not all trees offer the same benefits. See Michael Snyder, Forests, Carbon & Climate Change, N.
ones who drove their SUVs to environmental rallies and, even worse, made their homes at the far exurban fringe, requiring massive car dependence in their daily lives,” taking residential segregation and racial and spacial hierarchies to previously unimagined dimensions.47 This focus on maintaining one’s privileged lifestyle while making minimal changes reflects the power of the underlying structural impediments blocking a comprehensive response to global climate change in the United States.48

It is not just political inaction that prevents a meaningful response. Millions of Americans do not demand a change in environmental policy because, just as with political elites, it is against the interests of those enjoying white privilege to take genuine steps to combat climate change.49 Real climate action would ultimately require relinquishing the spatial, social, and economic markers that have created and protected whiteness and the privilege it confers.50 Although “we too often fail to appreciate how important race remains as a system for amassing and defending wealth and privilege,” the painfully slow reaction of the American public to the growing dangers of global warming highlights just how important racial privilege remains and how reluctant its beneficiaries are to give it up.51 Elite reformists make meaningful change even more remote as they push for behaviors to tweak, but not to change the existing social, economic, and legal hierarchy in the face of

Woodlands Mag., Autumn 2000, at 43, 46. Moreover, the purchase of carbon credits can lull consumers into complacency, giving them an excuse to not limit their CO₂ emissions. Bennett, supra, at K1.

47 Kunstler, supra note 5, at 30.

48 See Farley, supra note 20, at 229; see also Gonzalez, supra note 12, at 345.

49 See Monbiot, supra note 12, at 40; Lydia Saad, Americans Still Not Highly Concerned About Global Warming, Gallup News Serv., Apr. 7, 2006, http://www.gallup.com/poll/22291/Americans-Still-Highly-Concerned-About-Global-Warming.aspx (noting that Americans are not “especially concerned” about global warming). Monbiot explains that “one of the reasons why the professional climate-change deniers have been so successful in penetrating the media is that the story they have to tell is one that people want to hear.” Monbiot, supra note 12, at 40.

50 See, e.g., Alex Beam, A Silent Springtime for Hitler?, Boston Globe, Apr. 11, 2007, at C1 (pointing out the hypocrisy in Robert F. Kennedy Jr.’s “rant[ing] and rav[ing]” about the un-green-ness of George Bush’s EPA, while he and his family work overtime to scuttle a renewable energy wind farm project located a bit too close to the family manse in Hyannis”).

51 See Derrick Bell, Silent Covenants 81 (2004) (“[Racial privilege is so] tied to an individual’s sense of self that it may not be apparent, the set of assumptions, privileges, and benefits that accompany the status of being white can become a valuable asset that whites seek to protect.”); Haney López, supra note 41, at xvi; see also Farley, supra note 30, at 54; Ford, supra note 21, at 1850.
“problems, [like global warming] that arise to threaten the predomi-
nance of the traditionalist, capitalist ruling class.”

II. THE SOCIAL CONSTRUCTION OF RACE

Race is a social and legal construct. It is not the result of any sort
of natural order, nor does it exist genetically. Indeed, “[i]n nature, no
races exist. Nature only provides a vast array of physical variations
that have been used to construct categories that are ultimately ascribed
meaning far beyond the hazy physical differences that serve as their
basis.” Despite an entrenched cultural conviction that attaches racial
meaning to phenotypical markers of “hazy physical difference” like skin
tone and hair texture, “[a]pects of human variation like dark skin or
African ancestry are . . . not denotations of distinct branches of hu-
mankind.”

Race is a system of marks imposed on the subordinate
groups of society by the dominant group and the “system of marks de-
deps on an imagined connection between the essence of a person and
the marks on the person’s body, a physical feature or set of features,
such as the marks of race and sex.”

52 Farley, supra note 30, at 55 n.11. Derrick Bell elaborates on the protection of white
privilege by whites through concessions and reforms that actually perpetuate and maintain
the legal status quo. In Silent Covenants, Bell explores the interests that converge at a par-
ticular historical moment to offer blacks some sort of concession or long-sought right in
exchange for “a clear benefit for the nation or portions of the populace” that matter in the
racial hierarchy. See Bell, supra note 51, at 49. He calls this phenomenon “interest conver-
gence,” and explains that any gains made by blacks as a result of a momentary conver-
gence of their interests with those of whites, “will be abrogated at the point that policy-
makers fear the remedial policy is threatening the superior social status of whites,
particularly those in the middle and upper classes.” See id. at 69. He explains that the his-
toric Brown v. Board of Education Supreme Court decision was a prime example of this in-
terest convergence that served to quash black outrage over Jim Crow racism with a largely
symbolic reform that did nothing to undermine the dominant white power structure, but
made further advocacy for real change politically and practically impossible. See id. at 59–

53 See Haney López, supra note 41, at 13–14, 78.

54 Guillaumin, supra note 35, at 133; see Ian F. Haney López, The Social Construction of
Race, in CRITICAL RACE THEORY: THE CUTTING EDGE 163, 166 (Richard Delgado & Jean
Stefancic, eds., 2d ed. 2000) (“[C]ontrary to popular opinion . . . intra-group differences
exceed inter-group differences. That is, greater genetic variation exists within
the populations typically labeled Black and White than between these populations.”). Though race is
not actually the result of any natural order, it is perceived popularly to be a “self-evident
. . . ‘fact of nature.’” Guillaumin, supra note 35, at 133.

55 Brian K. Obach, Demonstrating the Social Construction of Race, 27 Teaching Soc. 252,

56 See Haney López, supra note 54, at 172; see also Obach, supra note 55, at 253.

57 Maria Grahn-Farley, The Law Room: Hyperrealist Jurisprudence and Postmodern Politics,
Race is a relatively recent, “plastic and inconsistent” construction of the legal and social system, not a fixed or natural classification. The fluid and relational nature of race is demonstrated throughout history. For example, though now considered white, until early in the middle of the last century, Irish and Italian immigrants were not socially or legally “white.” Both groups only became white when they were granted the right to become U.S. citizens. With whiteness came economic and social domination over blacks, along with middle class comforts. Despite the artificially constructed foundation of racial categories, the process of racial reification—the transformation of abstract racial categories “into concrete things,” which “take on material forms which in turn reinforce the ideas that shape the world”—has had, and continues to have, a tangible and profound impact on our society.

Racial classifications have evolved over time both to shape and to reflect predominant belief systems in the United States. Race has been developed and preserved to serve a peculiar purpose in society: to justify disparate treatment of particular individuals, elevating one group of individuals to superior status, while marking another group as inferior. John a. powell calls this stratification process “racing”:

“Racing” is a practice of separating people out from the general population with the specific purpose of fortifying the dominance of the remaining majority. Thus, race is not a passive recognition of natural qualities, but rather the sum of intentional actions taken to stratify the population in order to maintain white privilege and non-white subordination. Race becomes a signifier of a person’s attachment to a segregated group only after this racialization process has occurred. Fur-

---

58 Haney López, supra note 54, at 168; see Guillaumin, supra note 35, at 143; see also Haney López, supra note 41, at xv.
59 See powell, supra note 29, at 1401–03.
60 See Haney López, supra note 41, at 84.
61 See id.
62 Barlow, supra note 19, at 39, 87. For whites, this economic and social domination over blacks has value in and of itself because it confers privileges such as access to better education, employment, and social services. Id. at 87.
64 See Farley, supra note 30, at 64 (“Race is a mark on the body. Before the mark there can be neither ownership nor class. Before the mark there can be no division of labor, no hierarchy, no law. . . . The mark divides all into haves and have-nots.”).
ther, the dominant group then relies on essentialist justifications for its newly formed racial category. Essentialism becomes the veil for the systematic racial ordering of society.\textsuperscript{65}

Similarly, Michael Omi and Howard Winant describe “racial formation” as the separation of individuals into racial groups through social, economic, and political hierarchies.\textsuperscript{66} Racing or racial formation has been used to maintain white, European privilege and economic dominance in the United States and the world.\textsuperscript{67}

The use of race as a tool for social and economic dominance is most clearly illustrated by the way in which the concept of race in the United States came to justify the enslavement of Africans by Europeans.\textsuperscript{68} The “modern notion of race and the ideology of white superiority were seventeenth and eighteenth century cultural constructs designed to answer these otherwise unacceptable contradictions between principle and practice in a way that would permit continued super-exploitation of blacks under the emerging capitalist system.”\textsuperscript{69} Once enslaved Africans were categorized as fundamentally different from their owners by virtue of their newly prescribed “race,” inhuman exploitation ceased to be legally or morally problematic.\textsuperscript{70} If slaves were not like whites (humans), then there was no reason to treat them as human (white).\textsuperscript{71} Slavery’s racially justified economic exploitation of Africans laid the groundwork for continued legal and economic exploitation of the subordinated group to this day.\textsuperscript{72}

As capitalism began to replace the mercantile economy in the United States and as the industrial revolution exploded on American
soil, an even greater need for a subordinate race emerged. 73 Capitalism, with its necessary inequalities, needed an underclass to survive and prosper as an economic system. 74 Blacks, by virtue of the racially inferior status imposed upon them by the legal system, were perfectly situated to play the necessary role. 75 Thus, after constructing race as a way to ameliorate the moral discomfort of slavery, the political system passed and enforced laws to ensure that blacks remained a distinct subordinate race in the interest of capitalism. 76 By legislating into existence a permanent race-based proletariat class, white elites ensured that the capitalist system could continue to deliver enormously disproportionate benefits to those lucky enough to have received whiteness. 77

III. RACIAL HIERARCHIES AND THE REIFICATION OF RACE

A. “Chocolate cities, vanilla suburbs”. 78 Federal and Private Suburbanization Policies

A cursory glance at metropolitan demographics in the United States demonstrates that decades of federal, state, and local government policies, reinforced by government-sanctioned private behavior, have created impoverished black inner cities surrounded by affluent,

---

73 See Sherry Cable & Tamara L. Mix, Economic Imperatives and Race Relations: The Rise and Fall of the Apartheid System, 34 J. Black Stud. 183, 186–87 (2003) (describing how post-Civil War industrialization created demand for cheap labor and how state actions accommodated this need by “weakening the foundation of Black rights”).

74 See Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 66–67 (Random House 1985) (1776) (explaining that the division of labor on which capitalism is founded requires laborers and owners who retain part of the value of what their laborers produce); see also Cable & Mix, supra note 73, at 201 (“Economic imperatives drive the structure of the labor market in capitalist societies . . . . A competitive labor market is necessary to keep wages down and profits up. Someone must be at the bottom of the labor heap and dark skin is an easily identifiable mark: Skin color matters.”).

75 See Cable & Mix, supra note 73, at 186–87.

76 See id. at 196–201.

77 See id. at 187–88.

78 This now ubiquitous phrase, introduced in the “Chocolate City” Parliament album in 1975 and appropriated by Reynolds Farley et al. in a 1978 article on the causes of segregation in Detroit, continues to reflect the contemporary demographics of major metropolitan areas of the United States. See Rima Wilkes & John Iceland, Hypersegregation in the Twenty-First Century, 41 Demography 23, 34 (2004). Farley’s article appeared in the wake of the Kerner Commission Report, published in 1968, which showed that the United States was on its way to becoming two separate societies, one black and one white. See generally Reynolds Farley et al., “Chocolate City, Vanilla Suburbs”: Will the Trend Toward Racially Separate Communities Continue?, 7 Soc. Sci. Res. 319 (1978).
mostly white suburbs. Modern residential segregation in the United States is the result of a long series of racist federal and local policies. Although legally enforced segregation ended with *Loving v. Virginia* in 1967, the forces maintaining segregation did not disappear with that decision. De facto segregation continues today without legal sanction because, although officially ended and now constitutionally disfavored, its structure was never dismantled.

Though there is a powerful tendency in our post-*Loving* world to describe racial segregation “as a natural expression of racial and cultural solidarity, a chosen and desirable condition for which government is not responsible,” it is in fact a result of centuries of racist government action. Beginning with the separate living and working spaces of southern slave states, segregation continued to thrive in the Jim Crow south and the segregated schools and neighborhoods of the north.

Just as race is not the result of static or inevitable differences between distinct groups of people, contemporary residential demographics are not the result of any innate or natural racial or spatial hierarchies. Rather, the heavy hand of the legal and political systems, aided and abetted by private actors, created the “natural” racial segregation that continues to define contemporary U.S. society. The parallel hierarchies of suburban-urban and white-black are no organic

---

79 See *Arnold R. Hirsch, Making the Second Ghetto: Race and Housing in Chicago, 1940–1960*, at 9–11 (1998); *Jackson, supra* note 24, at 11 (“[U.S.] suburbanization has been as much a governmental process as a natural process.”).

80 See *Barlow, supra* note 19, at 37–41; *Ford, supra* note 21, at 1845.


82 See *Ford, supra* note 21, at 1844–45. In his article *The Boundaries of Race: Political Geography in Legal Analysis*, Richard Thompson Ford writes:

> [R]acial segregation persists in the absence of explicit, legally enforceable racial restrictions. Race-neutral policies, set against an historical backdrop of state action in the service of racial segregation and thus against a contemporary backdrop of racially identified space—physical space primarily associated with and occupied by a particular racial group—predictably reproduce and entrench racial segregation and the racial-caste system that accompanies it. Thus, the persistence of racial segregation, even in the face of civil rights reform, is not mysterious.

*Id.*

83 *Barlow, supra* note 19, at 37–41; *Ford, supra* note 21, at 1844, 1848.

84 See *Jackson, supra* note 24, at 241–42.

85 See *Ford, supra* note 21, at 1848 (“Explicit governmental policy at the local, state, and federal levels has encouraged and facilitated racial segregation.”).
accident, but rather are the result of an interconnected web of policies and laws designed to maintain race through strict segregation.\textsuperscript{86}

The evolution of segregated, all-black neighborhoods . . . was not the result of impersonal market forces. It did not reflect the desires of African Americans themselves. On the contrary, the black ghetto was constructed through a series of well-defined institutional practices, private behaviors, and public policies by which whites sought to contain growing urban black populations.\textsuperscript{87}

The black ghetto protects white privilege by maintaining separately racialized spaces.\textsuperscript{88}

Beginning with the great migration in the early twentieth century, which saw rural blacks moving in significant numbers to northern urban areas in search of work, the real estate industry—acting on concerns from their elite white clients—built residentially segregated cities.\textsuperscript{89} However, this mostly private segregation of the early twentieth century was augmented by the federal government’s segregation project, which intensified as the century progressed.\textsuperscript{90} Segregation in the post World War II era “was carried out with government sanction and support. After World War II . . . government urban redevelopment, and renewal policies, as well as a massive public housing program had a direct and enormous impact on the evolution of the ghetto.”\textsuperscript{91} Not only did these various government policies create the black ghetto, they simultaneously created its positive, the white suburb.\textsuperscript{92} Keeping space racially defined and isolating blacks in urban ghettos away from

\textsuperscript{86} See id. at 1861.
\textsuperscript{87} Massey & Denton, supra note 35, at 10.
\textsuperscript{88} See Pulido, supra note 22, at 72.
\textsuperscript{89} See Hirsch, supra note 79, at 9 (“[A]s black migration northward increased in the first quarter of the twentieth century and racial lines began to harden, it was apparent that white hostility was of paramount importance in shaping the pattern of black settlement. Sometimes violent, sometimes through the peaceful cooperation of local real estate boards, white animosity succeeded, informally and privately, in restricting black areas of residence.”).
\textsuperscript{90} See id. at 9–10. Some suburbs continued to enforce private racial covenants well into the last quarter of the twentieth century. See William Julius Wilson, When Work Disappears: The World of the New Urban Poor 47 (1996). Levittown on Long Island, New York, the icon of middle-class suburbanization, included covenants prohibiting blacks from purchasing or renting property until the late 1960s. See Margaret Lundrigan Ferrer & Tova Navarra, Levittown: The First Fifty Years 16 (1997); Jackson, supra note 24, at 241.
\textsuperscript{91} Hirsch, supra note 79, at 10.
\textsuperscript{92} See Peter Dreier et al., Place Matters: Metropolitics for the Twenty-First Century 109 (2d ed. 2004).
affluent whites in the suburbs were major outcomes of federal housing policy during the last century.93

In particular, two different federal housing policies worked in concert to subsidize the expansion of the white suburbs, while concentrating blacks in the urban ghetto.94 Federal homeownership promotion programs made suburban growth possible, while public housing projects were concentrated in inner city ghettos.95 Together, the two initiatives created an entire nation of racially segregated spaces.96

Governmental suburban subsidy began in earnest with the creation of the Homeownership Loan Corporation (HOLC) in 1933.97 The HOLC was a depression-era program designed to preserve and encourage homeownership by making long-term mortgages feasible for most middle-class Americans.98 As part of its program, HOLC appraisers developed an elaborate set of standards for determining which homes were worthy of HOLC credit, and these standards laid the groundwork for redlining—the refusal of banks and the federal government to issue or guarantee loans in non-white or racially mixed urban neighborhoods.99 The standards developed by the HOLC “gave the highest ratings to the newer, affluent suburbs that were strung out along curvilinear streets well away from the problems of the city,” and the lowest ratings to older, more urban black neighborhoods or neighborhoods with any black presence at all.100

93 See id. at 119; see also Pulido, supra note 22, at 90 (“The history of suburbanization reveals that although many forces contributed to decentralization, it was largely an exclusionary undertaking.”).
94 See Hirsch, supra note 79, at 10.
95 See Carolyn B. Aldana & Gary A. Dymski, Urban Sprawl, Racial Separation, and Federal Housing Policy, in Up Against the Sprawl, supra note 25, 99, 102–03 (2004). Such federal homeownership programs include the Federal Housing Administration (FHA), Veterans Housing Administration (VHA), and the Homeownership Loan Corporation (HOLC). Jackson, supra note 24, at 195–218. The HOLC, VHA, and FHA programs laid the groundwork for discriminatory lending practices in the private sector that continued to isolate blacks in deteriorating housing stock in the inner cities long into the 1970s. See Massey & Denton, supra note 35, at 105. Until a year after they were outlawed by the Supreme Court in 1948, the FHA was a strong proponent of racial covenants on the properties it guaranteed. See Jackson, supra note 24, at 208; see also Ford, supra note 21, at 1848 (“[T]he federal government continued to promote the use of such covenants until they were declared unconstitutional . . . [and] federally subsidized mortgages often required that property owners incorporate restrictive covenants into their deeds.”).
96 See Barlow, supra note 19, at 38.
97 See Jackson, supra note 24, at 196.
98 See id.
99 See id. at 197, 362 n.26.
100 See id. at 198–200, 201 (“Even those neighborhoods with small proportions of black inhabitants were usually rated fourth grade or ‘hazardous’ by HOLC’s parent agency.”).
Rating neighborhoods with any black population at all as uncreditworthy caused racial segregation because it encouraged whites who were otherwise eligible for HOLC financing to cluster in neighborhoods with higher HOLC grades, where they would be granted mortgages and would be able to achieve the white American dream of homeownership. With its focus on financing newly-built homes in newly-built neighborhoods with fresh infrastructure and housing stock available to whites only, the HOLC appraisal program marked the first of many federal programs that used government power to simultaneously subsidize suburban sprawl and racial segregation.

The Federal Housing Administration (FHA) and the Veterans Housing Administration (VHA) furthered the racist precedent set by the HOLC appraisal standards by focusing white investment on the suburbs. The FHA and VHA programs increased government subsidy of suburban homeownership for white Americans in the post-war period so that hundreds of thousands of World War II veterans could finance their slice of the American dream. Through its rating system, the FHA’s programs were responsible for “subsidizing suburban housing construction, contributing to and exacerbating neighborhood deterioration in inner cities, and institutionalizing a racially segregated housing market on a national scale.” Because “FHA/VHA loans were made with greater frequency in suburban than in inner city areas . . . these federal policies promoted racial separation. And because population pressures pushed the suburbs ever outward, while expanding the space ceded to minorities, these policies also underwrote urban sprawl.”

The FHA’s suburban bias was so pronounced that its mortgage guarantee programs made it cheaper for white Americans to buy a home in the suburbs than to rent an apartment or townhouse in the city. Because they made suburban homeownership affordable exclusively for whites, “the FHA’s housing subsidies . . . had a major impact on post-World War II migrations of middle-income whites to suburban

101 See id. at 198–99, 201; see also Barlow, supra note 19, at 40.
102 See Barlow, supra note 19, at 38–41; Jackson, supra note 24, at 190–218; Deborah Kenn, Paradise Unfound: The American Dream of Housing Justice for All, 5 B.U. Pub. Int. L.J. 69, 84–86 (1995); see also Pulido, supra note 22, at 103.
103 See Jackson, supra note 24, at 204, 206–09; see also Kevin Fox Gotham & James D. Wright, Housing Policy, in The Handbook of Social Policy 241–42 (James Midgley et al. eds., 2000).
104 See Barlow, supra note 19, at 38; Gotham & Wright, supra note 103, at 239.
105 See Gotham & Wright, supra note 103, at 237, 242.
106 Aldana & Dymski, supra note 95, at 103.
107 See Jackson, supra note 24, at 205–06.
areas and the concentration of low-income, mostly African American families, in the deteriorating inner cities.”

FHA and VHA loans were offered only to white suburban residents as a result of three of the FHA’s rating system policies: (1) favoring the construction of new single family homes over multi-family projects; (2) offering unfavorable terms on loans for the repair of existing structures, making it more economical to purchase a new home than to repair an existing one; and (3) using a racially biased appraisal procedure to refuse to guarantee mortgages in black or racially mixed urban neighborhoods. These three institutional mechanisms ensured that “FHA insurance went to new residential developments on the edges of metropolitan areas, to the neglect of core cities,” which became enclaves of deteriorating housing stock that could not be improved or repaired because loans were made unavailable. These increasingly dilapidated dwellings became the exclusive province of black renters, as whites made their American dream of homeownership in the suburbs possible through the support of the FHA and VHA. Later, the decaying urban housing stock, entirely a result of government policy, would become a cultural mark of race, as blacks were associated with squalid, ghetto housing conditions.

Beyond merely favoring suburban over urban homeownership, the FHA justified its overtly segregationist policies with warnings of the dire economic and social consequences of allowing “adverse influences,” like blacks, to “infiltrate” stable all-white neighborhoods. The FHA did not just condone existing segregationist trends, it “exhorted segregation and enshrined it as public policy,” by legitimizing the fear that “an entire area could lose its investment value if rigid black-white separation was not maintained.”

---

108 Gotham & Wright, supra note 103, at 241.
109 See Jackson, supra note 24, at 206–07.
110 Id. at 206; see Massey & Denton, supra note 35, at 54–55; Gotham & Wright, supra note 103, at 241 (“African Americans . . . were officially excluded from FHA subsidies and segregated by the agency’s refusal to underwrite mortgages in predominately minority areas.”).
111 See Massey & Denton, supra note 35, at 55; Kenn, supra note 102, at 85–86.
113 Gotham & Wright, supra note 103, at 241–42.
114 Jackson, supra note 24, at 208, 213. The FHA was probably right about the economic consequences of “mixed” neighborhoods; private land developers also shared this sentiment. For example, William Levitt, the mastermind behind post-war suburbs famously said, “I have come to know that if we sell one house to a Negro family, then 90 or 95 per-
Any mixing of the races, the theory went, risked two disastrous consequences: the decline of property values for whites, and the decline of the human race itself.115 If blacks were allowed to own homes alongside whites, it would lead to their “intermarry[ing] with whites and thus send[ing] the ‘whole white race . . . downhill’ . . . . [T]he one naturally flowed from the other.”116 To prevent this existentially and economically damaging mixing of the races, the FHA continued the HOLC policy of giving black and mixed neighborhoods the lowest ratings possible in its appraisals.117

To further ensure that the properties it guaranteed remained available to whites only, and that their investments were protected from default due to black ownership, the FHA strongly advocated racial covenants, until a year after they were outlawed by the Supreme Court in 1948.118 These racial covenants, combined with exclusionary zoning schemes that restricted development in suburban areas to large lots, ensured that only wealthy and middle class whites could enjoy the benefits of suburban living.119

Although officially excluded from HOLC and FHA programs, urban blacks were the targets of other governmental housing programs during the twentieth century: federal and state subsidized public housing.120 Federal, state, and local public housing policies were designed to concentrate poor blacks in ghetto high-rises in urban neighborhoods left blighted by disinvestment from FHA lending polices.121 These racist public housing policies resulted in projects like the infamous Robert Taylor Homes projects in Chicago.122
Public housing was concentrated in urban neighborhoods as a result of two simultaneous policies. First, racist homeownership lending policies meant that rental housing for blacks was unwelcome in white suburban neighborhoods. Rental housing for blacks had a perceived detrimental effect on housing prices and social stability, resulting in a public-private consensus to locate large public housing projects away from middle-class and affluent white suburban neighborhoods. Second, for much of the twentieth century, the federal government engaged in a systemic campaign to eradicate “urban blight.” From the beginning, urban blight was a label applied to urban neighborhoods regardless of their economic, social, or cultural vitality. Federal, state, and local governments systematically classified thriving black urban neighborhoods as blighted in order to justify their razing. Once razed, these desolate swaths of rubble and concrete became the site of most of the nation’s public housing projects. Particularly in the decades following World War II, public housing policy in the United States was used as “an institutional means of reinforcing racial segregation” by concentrating public affordable housing in decaying inner city neighborhoods, far from more affluent white settlements in the suburbs. The data on housing in the United States demonstrates that today, “whites are the overwhelming beneficiaries of single-family suburban housing whereas African Americans and other racial minorities are likely to be restricted to multifamily projects, conventional public housing units, and deteriorating and substandard housing in inner cities.”

The “result, if not the intent, of the public housing program of the United States was to segregate the races, to concentrate the disadvantaged in inner cities, and to reinforce the image of suburbia as a place

---

124 See Barlow, supra note 19, at 38; Gotham & Wright, supra note 103, at 241–42.
125 See Massey & Denton, supra note 35, at 56–57; Gotham & Wright, supra note 103, at 242.
126 See *Jeff Chang, Can’t Stop Won’t Stop: A History of the Hip-Hop Generation* 11 (2005). Indeed, urban blight was little more than a synonym for black neighborhoods during most of the twentieth century. See Massey & Denton, supra note 35, at 56.
127 Barlow, supra note 19, at 41.
128 Aldana & Dymski, supra note 95, at 103 (“Public housing units in these years were almost entirely located in lower-income, heavily minority areas.”).
129 Massey & Denton, supra note 35, at 227; see Dreier et al., supra note 92, at 129.
130 Gotham & Wright, supra note 103, at 246.
of refuge from the problems of race, crime, and poverty.”

As a result, “[p]ublic housing projects in large measure accounted for the high levels of poverty concentration in urban neighborhoods. Prolonged marginalization from the mainstream economy, economic restructuring, and housing segregation via the efforts [of] government, bankers, realtors, and private citizens, resulted in neighborhoods with high levels of joblessness.” Blackness became synonymous with inner city public housing residents suffering economic isolation and unemployment.

The concentration of public housing projects in low-income black neighborhoods was the result of a “white consensus” that complemented FHA housing loan programs and its subsidy of suburbanization to protect and perpetuate racial segregation.

B. Segregation and the Reification of Race

Racist residential segregation in the United States has created two racialized spaces: desirable white suburbs and decaying black urban ghettos. These racialized spaces have naturalized the idea of race in American law and society. Racial segregation has become a powerful self-perpetuating system in American society, enforcing a physical separation between races while simultaneously upholding the structure that makes distinct racial categories possible—as much creating racial identities as regulating them. This section explains how these policies and covenants did not merely regulate race; they perpetuated its very existence. The maintenance of the idea of race in U.S. society would not have been possible without strictly enforced residential segregation.

131 Jackson, supra note 24, at 219.
132 Karen J. Gibson, Race, Class, and Space: An Examination of Underclass Notions in the Steel and Motor Cities, in The African American Urban Experience: Perspectives from the Colonial Period to the Present 187, 204–05 (Joe W. Trotter et al. eds., 2004). For example, in Los Angeles there is a concentration of subsidized housing units in lower-income and heavily minority areas. The fact that these units are disproportionately occupied by lower-income and minority residents reinforces income polarization and racial separation in the region . . . . [C]oncentrating low income households in areas with high unemployment and low educational attainment reinforces these households’ separation from access to social and personal resources.
133 See Massey & Denton, supra note 35, at 118.
135 See Haney López, supra note 41, at 93.
136 See id.; Ford, supra note 112, at 130.
137 See Guillaumin, supra note 35, at 135–38; Haney López, supra note 41, at 83.
1. Segregation and Racial Classification

Segregation reifies race by the very fact that it uses race as a means of classifying people. Urban/suburban segregation accomplishes this by separating people into distinct physical spaces according to their “race” and preventing association between the two groups as a way to maintain their distinct, relational identities.\(^{138}\) Racial segregation is so integral to the reification of race that “[w]ithout the clear spatial line between the races, nothing would be left with which to deploy race with accuracy and secure it with permanency.”\(^{139}\) The act of classifying people by race carries and confers racial meaning. Racial segregation ostensibly separates people by race, but in doing so, it actually “facilitate[s] the assignment of racial identities according to separation.”\(^{140}\) Space becomes a key tool for maintaining racial classification because of the constant mutability of race.\(^{141}\)

Without the system of marks that segregation provides, racial identities become dangerously fluid.\(^{142}\) Keeping track of who is black and who is white, to maintain the social order and to allocate commodities and services, becomes vastly more complicated in a non-segregated world.\(^{143}\) Because of the practical difficulty inherent in maintaining a

\(^{138}\) See Guillaumin, supra note 35, at 150 (explaining the necessity of imbalanced relationships for maintaining and marking race); Massey & Denton, supra note 35, at 160 (“The high degree of residential segregation imposed on blacks ensures their social and economic isolation from the rest of American society.”).

\(^{139}\) Ford, supra note 112, at 138.

\(^{140}\) Haney López, supra note 41, at 84.

\(^{141}\) Ford, supra note 112, at 120–126, 130–31. As explained earlier, race is a socially constructed category which constantly changes to reflect evolving cultural ideas about race, but the phenotypical markers that are often used to classify individuals by race are remarkably fluid as well. See Haney López, supra note 41, at 45; Obach, supra note 57, at 253.

\(^{142}\) See Ford, supra note 112, at 130.

\(^{143}\) See Farley, supra note 23, at 1235. Maintaining racial categories and keeping track of how to distribute white privilege becomes increasingly difficult in more integrated settings, especially those where everyone has attained a high level of education or wealth, two other common markers of racial difference. See Barlow, supra note 19, at 41–47. As Haney López notes from his personal experiences as someone whose race changed depending on his context, race in contemporary American society “is highly contingent, specific to times, places and situations. Whiteness, or the state of being White, thus turns on where one is” in time, but most particularly, in place. Haney López, supra note 41, at xxi. Cheryl Harris offers an illuminating illustration of this reality when she describes her grandmother’s physical journey between the races. Cheryl Harris, Whiteness As Property, 106 Harv. L. Rev. 1707, 1710–11 (1992). Each morning, the woman left her home in a predominantly black neighborhood on the south side of Chicago as a black woman and arrived at her job in an upper-middle class department store in the central business district as a white woman. See id.
strict (and artificial) white-over-black hierarchy in the face of the over-
whelming plasticity of phenotypical traits, spatial markers like segrega-
tion are essential to maintain a racialized society. As Professor Ford writes:

[T]he line of demarcation, the boundary line, the undrawn but universally felt line between neighborhoods, the line between city and suburb . . . .

. . . [T]his line that regulates and performs the spatial movement and organization of bodies . . . is a (perhaps the) prerequisite for racial differentiation and the deployment of race as a (perhaps the) regulatory fiction in late capitalist America.

Segregation eliminates the ambiguity that would otherwise surround fluid, socially constructed racial categories by constructing distinct, physical boundaries. Strictly enforcing residential segregation, whether through private covenants, government policy, or “facially race-neutral” public policy “is essential to the (re)production of a particular racial formation.”

It is not surprising, then, that one of the reasons for the virulent white anti-integration backlash was that “[m]any white southerners feared . . . that racial equality [as promised by the civil rights laws of the 1960s] would not only end segregation but also dissolve racial distinc-

---

144 See Haney López, supra note 41, at 84, 140–41; Farley, supra note 23, at 1235; Ford, supra note 112, at 130. An anti-miscegenation case from the middle of the twentieth century illustrates the long history of place-based classification by race in American society. See Knight v. State, 42 So. 2d 747 (Miss. 1949). Davis Knight, a “white negro” was accused of violating anti-miscegenation laws by marrying a white woman. Victoria E. Bynum, “White Negroes” in Segregated Mississippi: Miscegenation, Racial Identity, and the Law, 64 J. of S. Hist. 247, 247 (1998). At his trial, evidence offered by the prosecution to prove the defendant’s blackness, in spite of his phenotypical whiteness, included testimony that the defendant’s relatives lived in the black neighborhood. See id. at 268. Then, as now, separate racial space served not only as a proxy for race, but as an essential framework for maintaining it. See Barlow, supra note 19, at 40–41; Ford, supra note 112, at 117, 130. In Knight’s day, as now, “race often follows from neighborhoods.” Haney López, supra note 41, at 84.

145 Ford, supra note 112, at 117.

146 See id. at 136, 138; see also Haney López, supra note 41, at 84 (“Segregation has increased the stability of racial categories by fixing mutable racial lines in terms of relatively immutable geographic boundaries.”).

147 See Ford, supra note 21, at 1845, 1848–53 (arguing that, in addition to public and private action, facially race-neutral public policy can also reinforce segregation “in a society with a history of racism”).

148 Pulido, supra note 22, at 74.
tions.” Because “space is a resource in the production of white privilege,” the fear of losing racially identified space terrified white southerners. Such was the case for northern whites as well, whose opposition to school integration busing illustrated that northerners understood the dangers of integration as clearly as their southern neighbors. This fear resulted in the comprehensive package of racist public policies and private actions that ensured that space and race would be perpetually linked in American society as a way to police racial difference.

2. Spatial and Racial Hierarchy

By separating living spaces according to race, federal, state, and local governments created and perpetuated a white-over-black spatial and racial hierarchy. Once in place, this hierarchy became self-fulfilling, naturalizing the idea of race in American society by creating a closed feedback system. Racist, legally enforced segregation provided the physical separation necessary for the concept of racial power hierarchies to crystallize in American society. However, racist power hierarchies in the United States no longer require the support of the legal system to maintain the same power imbalance. De facto residential segregation continues unabated today, further legitimizing the hierarchies created in the centuries prior to Loving. This entrenched seg-

---

149 Bynum, supra note 144, at 255.
150 Pulido, supra note 25, at 86.
151 See generally RONALD P. FORMISANO, BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970S (1991). School busing in Boston was fraught with racial violence as historically white neighborhoods venomously protested against allowing black children into their communities. See id. at 1. Similarly, in Chicago, the threat of integration represented a threat to the recently acquired whiteness of many of Chicago’s “ethnic” residents, making their reaction to racially mixed neighborhoods particularly violent, as they fought to protect their whiteness from potentially damaging association with black neighbors. See Hirsch, supra note 79, at 195–96.
152 Farley, supra note 30, at 52. Race is the hierarchical classification of bodies based on blackness; indeed, “race is the way that the skin is made to mean hierarchy (white-over-black).” Farley, supra note 20, at 227 n.9. Thus without segregation, race disappears because segregation maintains the white-over-black hierarchy that is its foundational element. See Farley, supra note 30, at 52.
153 See Ford, supra note 21, at 1844–45. Richard Thompson Ford explains that even after overt racist segregation policies have been removed, these racial hierarchies remain unchecked in the contemporary United States and continue to reinforce and contribute to racial segregation across the country. See id.
154 See Barlow, supra note 19, at 47–48.
155 See Ford, supra note 21, at 1844–45.
156 Id. See generally Loving, 388 U.S. 1.
regation is no less racist and no less damaging than the overtly legalized segregation that dominated the American landscape until the late 1960s.157

Racial segregation created and reinforced the white-over-black hierarchy by institutionalizing a power imbalance based on spatially defined racial differences.158 By consolidating power and wealth in the suburbs and restricting access to suburban life to whites for decades through a series of racist housing and credit policies, segregation centralized economic, social, and political disenfranchisement in inner city black neighborhoods.159 The ultimate result is that wealthy whites settle in the suburbs, while poor blacks remain confined to poor ghetto neighborhoods.160 This economic and spatial segregation translates into political disenfranchisement with resultant power imbalances between those who are welcome in the suburbs and those who are not.161

By excluding blacks from the locus of power in contemporary American society (the suburbs), racist land-use patterns have preserved the racist power imbalances that slavery began.162 Spatial configurations predicated on race are not incidental, but integral, to racial power relations because they create the framework for exclusion from powerful

157 See Ford, supra note 21, at 1844–45.
158 See Ford, supra note 112, at 135–39; Kenn, supra note 102, at 89–90.
159 See Massey & Denton, supra note 35, at 118; Gotham & Wright, supra note 103, at 240–41.
160 See Jackson, supra note 24, at 242.
161 See Ford, supra note 21, at 1851, 1874. Racist zoning policies, supported by racist housing and transportation policies, build an exclusionary conception of space as local and racialized. See id. This local, racialized space works to “exclude ‘outsiders’ [blacks] from the political processes of the locality,” unless they are able to conform to the norms of the homogenous political jurisdiction. See id. at 1874. Only if they can conform to the homogenous character (generally white and wealthy enough to purchase the type of housing stock the jurisdiction has decided to allow) will they be able to join the political entity that is the local jurisdiction. See id. In essence, consolidation of white privilege in wealthy and middle class suburbs localizes political control. See id. (The political disenfranchisement and “impoverished condition of segregated minorities is, at least in part, a function of their very exclusion from the communities that control wealth and employment opportunities.”)

This local disenfranchisement has broader political and social consequences, explains Ford: “[I]t is a matter of political fragmentation and economic stratification along racial lines . . . [because] [s]egregated minority communities have been historically impoverished and politically powerless. Today’s laws and institutions need not be explicitly racist to ensure that this state of affairs continues—they need only to perpetuate historical conditions.” Id. at 1844; see also Kenn, supra note 102, at 97 (noting that the black/white, urban/suburban dichotomy created as a result “of historical patterns of deliberate segregation [ensures that blacks] remain the disenfranchised members of society”).

162 See Ford, supra note 21, at 1844, 1852.
spaces, and power itself. Indeed, in contemporary American society, “[r]esidential segregation is the institutional apparatus that supports other racially discriminatory processes and binds them together into a coherent and uniquely effective system of racial subordination.” Without segregation, racial hierarchy and race itself would be impossible to maintain.

3. Segregation and Racial Stereotyping

Blacks in the United States continue to live in neighborhoods that are predominantly black and poor, and are culturally defined as ghettos; meanwhile, whites live in neighborhoods that are predominantly white, are less poor, and are perceived as desirable places to make one’s home. More than forty years after legally enforceable segregation ended, U.S. metropolitan areas with substantial black populations continue to be “hypersegregated.”

163 See David Delaney, Race, Place, and the Law 1836–1948, at 6–7 (1998) (“[T]he spatiality of racism was a central component of the social structure of racial hierarchy . . . .”).
164 Massey & Denton, supra note 35, at 8.
165 See Dreier et al., supra note 92, at 129. In 2000, blacks were three times more likely to live in concentrated poverty than whites. Id.
166 See Massey & Denton, supra note 35, at 74–78. See generally Loving, 388 U.S. 1 (declaring laws prohibiting interracial marriage unconstitutional). Loving followed the major desegregation cases like Brown v. Board of Education, 347 U.S. 483 (1954), but until Loving, segregation was still legally enforceable in the personal lives of Americans. See Loving, 388 U.S. at 2. Hypersegregation refers to neighborhoods with high levels of segregation across five factors that describe population distribution. See Wilkes & Iceland, supra note 78, at 23. The five factors are: evenness, or “the differential distribution of groups across neighborhoods”; exposure, which “measures the probability of interaction between groups”; concentration, which “refers to the amount of physical space occupied by the minority group”; centralization, which “indicates the distance to the center of the urban area”; and clustering, which “indicates the degree to which minorities live in areas that adjoin one another.” Id. When taken together, these five factors offer a picture of how black settlement is concentrated away from white and non-poor settlements. See id. at 29 (noting that a review of data from the 2000 Census shows that across the five segregation factors, “[t]wenty-nine metropolitan areas could be classified as having black-white hypersegregation in 2000,” including six major cities that were hypersegregated along all five dimensions—Chicago, Cleveland, Detroit, Milwaukee, Newark, and Philadelphia). The list of cities that were hypersegregated along four dimensions reads like a list of the most important cities in the United States and includes Atlanta, Baltimore, Buffalo-Niagara Falls, Houston, Los Angeles, Miami, New Orleans, New York, St. Louis, Washington, D.C., and fourteen other major U.S. metropolitan areas. Id. The U.S. Census, however, does report a decline in black-white residential segregation in the 2000 Census from data collected in the 1990 and 1980 Censuses, but the declines were registered predominantly in the south and west, leaving rates of segregation in older rust-belt and northeastern cities mostly unchanged. See John Iceland et al., U.S. Dep’t of Commerce, Racial and Ethnic Residential Segregation in the United States: 1980–2000, at 15, 17 (2002).
This hypersegregation perpetuates race in the American consciousness by creating the foundational white-over-black hierarchy that makes race possible.\textsuperscript{167} In addition, segregation continues to maintain the social construction of race, by creating a space in which certain behaviors and consequences become racialized in the consciousness of society.\textsuperscript{168} The consequences of the spatial hierarchy and unequal distribution of privilege that accompany segregation are transformed into proxies for race—and become an evolving system of marks.\textsuperscript{169} In turn, those marks are used to support the proposition of natural racial categories.\textsuperscript{170}

By isolating blacks socially, economically, and legally, residential segregation has allowed race to adapt to changing social, economic, and political realities, ensuring that the system of marks with distinct racial categories remains culturally relevant and identifiable, even as traditional racial characteristics disappear.\textsuperscript{171} Segregated social and political barriers generate a continuous feedback loop within racialized communities, creating a hypersegregated black urban underclass with particular visible marks, in stark definitional opposition to a white suburban middle and upper class.\textsuperscript{172}

\textsuperscript{167} See Farley, supra note 23, at 1235.
\textsuperscript{168} See Barlow, supra note 19, at 10; Haney López, supra note 41, at 92, 93.
\textsuperscript{169} See Farley, supra note 30, at 68; Farley, supra note 20, at 227; Grahn-Farley, supra note 57, at 31–32. Anthony Farley builds upon Colette Guillaumin’s writings and explains that it is through this system of marks, which “must be written on the body,” that “[t]he will of the powerful ones, the would-be owners, becomes, through force and habit and force of habit, the system of marks. The powerful group marks itself and marks its others and then forces its less powerful others to respect the system of marks, to accept its will.” Farley, supra note 23, at 1231–32. See generally Guillaumin, supra note 35.
\textsuperscript{170} Grahn-Farley, supra note 57, at 31 (“The system of marks [the mark of race—blackness] is born when people start believing that the way they see people being treated is the reflection of an internal essential quality rather than the imposition of an external social order.”). Maria Grahn-Farley explains how this process of essentialism works to construct a social order that seems natural. See id. Through our system of racial marks, we “guarantee[] that the material treatment of a person is also what the person is seen to be.” Id. Thus, as the mark of blackness correlates with economic, social, and political isolation in urban ghettos, the mind begins to believe that blackness is the mark of an internal and innate shortcoming within the marked group, conflating the results of the hierarchical system with a set of physical features, or marks, of race. See id.

\textsuperscript{171} See Farley, supra note 23, at 1235 (explaining that once the white-over-black hierarchy is created, all institutions and cultural, economic, and social training in society is oriented to that hierarchy which allows society to forget that it created the system of marks and the white-over-black hierarchy, even as it “bows down” before it).

\textsuperscript{172} See Wilson, supra note 90, at 16; see also Guillaumin, supra note 35, at 133 (“[N]atural groups only exist by virtue of the fact that they are so interrelated that effectively each of the groups is a function of the other. In short, it is a matter of social relations within the same social formation.”); Haney López, supra note 41, at 92 (“[T]he signi-
These new racial identifiers, the products of spatial, economic, social, and political isolation, are perceived as natural results of racial difference by white elites.\textsuperscript{173} Segregation contributes to the economic isolation and “problems of social organization in inner city ghetto neighborhoods”\textsuperscript{174} by concentrating poverty and thus, “male joblessness, teenage motherhood, single parenthood, alcoholism, and drug abuse.”\textsuperscript{175} These social problems are then perceived, by many whites, as both naturally linked to blackness and signs of racial inferiority; mere “problems of social organization” become a proxy for blackness—a euphemism for black dysfunction.\textsuperscript{176}

The spatial, social, political, and economic isolation of the urban black ghetto has given rise to behaviors and consequences that are “rational accommodations to social and economic conditions within the ghetto.”\textsuperscript{177} Despite the conditionality of these behaviors, they are considered natural for blacks; “they are not widely accepted or understood outside of [the ghetto], and in fact are negatively evaluated by most of American society.”\textsuperscript{178}

In contrast to black underclass urban neighborhoods, and the dysfunction that marks them, suburbs are defined as the home of the American dream—middle class, safe, and white.\textsuperscript{179} The system of marks created by segregation’s spatial, economic, social, and political hierarchy

cance of legally mandated segregation . . . lies . . . in the power of segregation to create and maintain the poverty and prosperity that society views as the results of innate racial character, rather than as predictable consequences of social and specifically legal discrimination.”).

\textsuperscript{173} See Wilson, supra note 90, at 24 (pointing out that blacks experience an acute “degree of segregation, isolation and poverty” which separates them from “resources and privileges”).

\textsuperscript{174} Id. Although William Julius Wilsons’ work has been criticized by critical race theorists for failing to take sufficiently into account the structural inequalities of centuries of racism and racist laws and practices in the United States, his work has played an important role in illuminating the economic, social, and cultural isolation of the black urban ghetto. See generally Jack Niemonen, Race, Class, and the State in Contemporary Sociology: The William Julius Wilson Debates (2002); Stephen Steinberg, Turning Back: The Retreat from Racial Justice in American Thought and Policy (2001).

\textsuperscript{175} Massey & Denton, supra note 35, at 170.


\textsuperscript{177} Massey & Denton, supra note 35, at 165–66.

\textsuperscript{178} See id. at 166.

\textsuperscript{179} See Kunstler, supra note 42, at 101, 105 (“The Dream, more specifically, was a detached home on a sacred plot of earth in a rural setting, unbesmirched by the industry that made the home possible . . . [and] a place that was, most of all, not the city.”).
seduces us with pernicious messages in the forms of ghettos and suburbs, littered streets and manicured lawns, corner liquor stores and sprawling malls, welfare recipients and white-collar professionals, school violence and college graduates . . . . These contrasting realities follow neighborhood lines—in fact, racial boundaries—and thus testify to the ultimate difference race makes . . . . On these streets, racial differences seem fundamental, immutable, real, and self-evident, confirming not only the existence of races, but also every negative suspicion about racial characteristics.180

Because “housing is not just a dwelling and a place to live[,] it is a symbol of personal worth, social status, and security,” a house in the suburbs determines whiteness by serving as a both a mark and a key to power and privilege.181 This concentrates white privilege in the suburbs even further by “perpetuat[ing] educational segregation and imped[ing] access to employment opportunities and upward mobility for disadvantaged groups. In this way, housing expresses and perpetuates the stratification of classes and races that exists within society as a whole.”182

The consequences of segregation have been and continue to be so powerful that they persist as the unexamined bedrock of our system of racial marks, despite the fact that assignment of race based on segregation’s consequences ignores the social relationships that bring those consequences into existence:

The . . . idea of nature introduces an erroneous relationship between the facts . . . . Nature proclaims the permanence of the effects of certain social relations on dominated groups. . . . A social relationship, here a relationship of domination, of power, of exploitation, which secretes the idea of nature, is regarded as the product of traits internal to the object which endures the relationship, traits which are expressed and revealed in specific practices. To speak of a specificity of races or of sexes, to speak of a natural specificity of social groups is to say in a sophisticated way that a particular ‘nature’

180 Haney López, supra note 41, at 93.

181 Gotham & Wright, supra note 103, at 237 (“[I]n addition to lifestyle and social status, housing and neighborhood heavily influence the types and kinds of jobs and cultural amenities to which one has access.”).

182 Id. at 238.
is directly productive of a social practice and to bypass the social relationship that this practice brings into being.\textsuperscript{183}

Thus, segregation gives legitimacy to the concept and marks of race in American society by concentrating black poverty in urban ghettos, while concentrating white prosperity in suburban neighborhoods.\textsuperscript{184}

4. Segregation and the Physical Mark

Finally, segregation maintains distinct racial categories by preserving the phenotypical characteristics (marks) assigned racial meaning by preventing members of different racial groups from interacting and, therefore, from procreating across established racial boundaries.\textsuperscript{185} Segregation, even in the absence of anti-miscegenation laws, prevents interracial marriage and interracial childbearing while promoting same-race family units.\textsuperscript{186} If blacks and whites are not permitted to live near each other and are not allowed to go to school together, they are far less likely to date, marry, and produce children whose physical characteristics would challenge the very notion of a natural racial order.\textsuperscript{187} On a very practical level, segregation reifies race because the physical markers, such as skin color and hair color and texture, that are used to mark race are artificially preserved.\textsuperscript{188}

\textsuperscript{183} \textit{Guillaumin, supra} note 35, at 143.

\textsuperscript{184} See \textit{Gibson, supra} note 132, at 204 (showing that white poverty is decentralized—integrated into white middle-class neighborhoods in a way that allows the perpetuation of the idea that blacks are poor and urban and that whites are middle class or affluent and suburban). Even poor whites live in white neighborhoods and most of the neighborhoods where poor whites live are not “poor” neighborhoods. \textit{See id.}

\textsuperscript{185} See \textit{Haney López, supra} note 41, at 82. Like segregation laws, anti-miscegenation laws were passed to maintain these visible markers. \textit{See id.}

Antimiscegenation laws “purported merely to separate the races. In reality, they did much more than this: they acted to prevent intermixture between peoples of diverse origins so that morphological differences that code as race might be more neatly maintained …. Antimiscegenation laws maintained the races they ostensibly merely separated by insuring the continuation of the ‘pure’ physical types on which notions of race are based in the United States. \textit{Id.}


\textsuperscript{187} \textit{See id.; see also Hirsch, supra} note 79, at 196 (noting that many Chicago residents’ fears about integration stemmed from “[t]heir fear of losing their identity as ‘whites’ [from] the prospect of interracial marriage or sexual assault in transition areas”).

\textsuperscript{188} \textit{Haney López, supra} note 41, at 82 (“Cross-racial procreation erodes racial differences by producing people whose faces, skin, and hair blur presumed racial boundaries. Forestalling such intermixture is an exercise in racial domination and subordination. It is
C. Mobility, Race, and Power: Federal and Private Transportation Policy

Racist federal transportation policy has reified race in American society in a number of ways. First and foremost, federal transportation policy contributed to racial segregation in American society through decades of spending on an interstate highway system, which made private car transportation possible. Beginning with legislation in 1916 that made state and federal cooperation in highway funding possible, a combination of state and federal dollars eventually paid to build the extensive interstate highway system that now crisscrosses the nation. This federal and state financial commitment to passenger car travel contrasts sharply with its laissez-faire attitude towards funding public transport. According to the Federal Highway Administration, the federal subsidy of passenger car travel on the interstate highway system had cost more than $119 billion by 1996.

Though the groundwork was laid in 1916, the government’s commitment to subsidizing the automobile reached its zenith during the Eisenhower administration. The Federal-Aid Highway Act of 1956 ushered in the era of the interstate highway building, calling for 41,000 miles of highway between cities and countryside. The act created the Highway Trust Fund, with specially earmarked tax funds to ensure that there would always be money available for highways. The federal commitment to an interstate highway system was so profound that the

---


190 See Wilson, supra note 90, at 46.

191 See Federal Aid Road Act, ch. 241, 39 Stat. 355 (1916); Wilson, supra note 90, at 46.

192 See Lewyn, supra note 189, at 88 (noting that all levels of government, from the federal to the local, were committed throughout the twentieth century to promoting private transportation over public transportation). The federal government subsidized local government’s dedication to private transportation by paying for ninety percent of the bill for the interstate system after the passage of the Federal-Aid Highway Act of 1956. See Ch. 462, 70 Stat. 374 (1956). No such bill was ever passed to create a national network of public transportation.

193 Robert L. Reid, Paving America from Coast to Coast, Civ. Eng’g, June 2006, at 37, 40.

194 See Jackson, supra note 24, at 249–50.

195 See 70 Stat. 374.

Federal-Aid Highway Act pledged to reimburse states for ninety percent of their final construction costs, regardless of the total price.\textsuperscript{197} Government subsidy of the highways was so important that the new car-dependent suburbs would not have been possible “without sustained public investment in highways” from the Federal-Aid Highway Act and the Trust Fund.\textsuperscript{198} This government spending to facilitate passenger car travel between city and suburb helped to make the suburbs economically feasible housing arrangements for millions of white Americans.\textsuperscript{199} The federal interstate highway program became a literal path to suburbia for middle-class whites during the post war period; building super-highways from suburbs directly into urban downtowns facilitated such travel with insulated ease.\textsuperscript{200} In New York, middle class whites followed [Robert] Moses’ Cross-Bronx and Bruckner Expressways to the promise of [the American Dream of home] ownership in one of the 15,000 new apartments in Moses’ Co-op City. They moved out to the cookie cutter suburbs that sprouted along the highways in New Jersey and Queens and Long Island.\textsuperscript{201}

Without wide, smooth roads to transport suburbanites easily between the center cities where they worked, the malls where they shopped, and the cul-de-sacs where they lived, the growth of the suburbs in America simply would not have happened.\textsuperscript{202}

Federal and state transportation policy has engaged simultaneously in a process of neighborhood destruction in the nation’s mostly black urban areas.\textsuperscript{203} Highway policy matched housing policies throughout the twentieth century to create profound black urban isolation.\textsuperscript{204} In addition to funneling middle class whites out to the growing suburbs, federal transportation policy asphyxiated black urban neighborhoods by

\textsuperscript{197} See Reid, supra note 193, at 40.
\textsuperscript{198} Pietro S. Nivola, Laws of the Landscape: How Policies Shape Cities in Europe and America 13 (1999); see Reid, supra note 193, at 42.
\textsuperscript{199} See Wilson, supra note 90, at 46; see also Hank Dittmar, Sprawl: The Automobile and Affording the American Dream, in Sustainable Planet: Solutions for the Twenty-First Century, 109, 112 (noting that by subsidizing private passenger car travel, the “interstate highway system made possible the suburbanization of America” for middle-class whites).
\textsuperscript{200} See Lewyn, supra note 189, at 88; Reid, supra note 193, at 42.
\textsuperscript{201} Chang, supra note 126, at 12. Robert Moses was a powerbroker and highway baron who became one of the most influential figures in twentieth century American history. See Jackson, supra note 24, at 294.
\textsuperscript{202} See Lewyn, supra note 189, at 88.
\textsuperscript{203} See id.
\textsuperscript{204} See Wilson, supra note 90, at 48.
routing vast super-highways through once vibrant black areas to facilitate movement along the suburban-urban pipeline. Urban planning matriarch Jane Jacobs called these expressway scars “border vacuums.”

For decades, government policy was to route highways through less valuable neighborhoods in already developed areas, concentrating these border vacuums in black neighborhoods and ensuring that they bore the brunt of urban highway construction. The urban arm of the national interstate highway project was focused on demolishing “entire swaths of apartment complexes or thousands of individual homes [in] densely populated neighborhoods—usually poor neighborhoods inhabited main[ly] by members of minorities.” Chosen because public opposition would be easiest to quell among the already disenfranchised black and Latino community members that inhabited them, hundreds of minority neighborhoods were cleared or bifurcated to make way for arteries and overpasses.

As direct result, “[p]reviously stable and sustainable communities [have been] ruptured and destroyed by massive highway projects designed to transport more people in automobiles to and from suburbs and out of the urban core.” The damage done to once vibrant black residential and commercial areas has been profound:

The superhighways not only drained [cities] of their few remaining taxpaying residents [by facilitating their migration to the newly accessible suburbs], but in many cases the new beltways became physical barriers, “Chinese walls” sealing off the disintegrating cities from their dynamic outlands. Those left behind inside the wall would develop, in their physical isolation from the suburban economy, a pathological ghetto culture.

---

205 See Reid, supra note 193, at 42.
206 JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 257 (1961). Border vacuums are the areas adjacent to railroad yards, expressways, walled compounds, and other urban barriers that bifurcate neighborhoods. Id. at 258–59. As Jane Jacobs points out, these border vacuum areas tend to be lifeless, devoid of the social, economic, and cultural activity that may occur a few blocks away from the border. Id. at 259–60.
207 See Reid, supra note 193, at 42.
208 See id.
209 See Lewyn, supra note 189, at 88–89.
210 Holmes, supra note 25, at 25.
211 KUNSTLER, supra note 42, at 107.
Referring to a newspaper story about Manhattan, Jacobs explained how destructive these border vacuums were to the social, cultural, and economic fabric of a once-vibrant neighborhood:

The slaying in Cohen’s butcher shop . . . was no isolated incident, but the culmination of a series of burglaries and hold-ups along the street . . . . Ever since work started on the Cross-Bronx Expressway across the street some two years ago, a grocer said, trouble has plagued the area . . . . Stores which once stayed open to 9 or 10 o’clock are shutting down at 7 p.m. Few shoppers dare venture out after dark, so storekeepers feel the little business they lose hardly justifies the risk in remaining open late . . . .

The affect of these policies on black neighborhoods has been acute, creating a black urban underclass, cut off economically, socially, and culturally from the safety and stability found in white society.

The 1950s construction of the Cross-Bronx Expressway exemplifies the damage these policies caused, isolating blackness away from white society and facilitating the continued reification of race in American society. Under the banner of urban renewal rights, highway baron Robert Moses condemned entire neighborhoods in the Bronx, demolishing thriving businesses and driving families of color from their neighborhood.

212 Jacobs, supra note 206, at 260.
213 See Pulido, supra note 22, at 85.
214 Dreier et al., supra note 92, at 131. Other examples abound, including the construction of I-10 through the Treme section of New Orleans, a once vital black residential and commercial area. See Beverly H. Wright, New Orleans Neighborhoods Under Siege, in JUST TRANSPORTATION: DISMANTLING RACE AND CLASS BARRIERS TO MOBILITY, supra note 25, at 121, 132–33. Although the highway was originally proposed for the historic French Quarter, white preservationists and residents protested, successfully blocking its construction. Id. at 124, 128. No protests from preservationists followed the decision to relocate the highway to the historic and historically black Treme district. Id. at 137. After its construction, which required the removal of businesses and homes, the highway became a physical barrier that was unsightly and literally divided in half a beautiful neighborhood with strong social networks. In stark contrast to the clusters of tall oak trees that lined Claiborne Avenue and provided countless hours of pleasure for residents in the cool shade of the trees, there now appear tall, sterile concrete pillars . . . .

This once beautiful neighborhood has become host to an array of illicit and illegal activities. Drugs and prostitution run rampant in the community. Once the home of many businesses and great musicians such as Louis Armstrong and Mahalia Jackson, Treme was a very viable financial community. With the onslaught of urbanization, Treme lost its economic viability.

Id. at 134.
homes.\textsuperscript{215} Once built, his highway in the sky cut off the borough from the rest of the city, leaving it a gutted shell of the vibrant neighborhood it once was.\textsuperscript{216}

In addition, the federal government waged a campaign to eradicate non-automobile travel across the United States.\textsuperscript{217} The private car, as a mode of transportation and a piece of the American dream, became possible through the work of a powerful highway lobby and a campaign by car companies to replace existing public transportation systems with private automobiles and buses.\textsuperscript{218} In early twentieth century America, horses and trolleys were the dominant transportation modes, but the increasingly powerful American automobile industry saw an opportunity to change transportation modes to its benefit.\textsuperscript{219} Beginning in the early 1900s, General Motors, Standard Oil, and Firestone Tire embarked on a campaign to end public trolley and rail transportation in the United States.\textsuperscript{220} The campaign was an economic one, designed to create a captive market for the companies’ products by ensuring American dependence on cars, gasoline, and tires; it was a success.\textsuperscript{221}

The three manufacturing giants oversaw the coordinated dismantling of more than 100 street car operations in cities across America, signaling the end of public rail and trolley transportation as a viable alternative to the passenger car in the United States.\textsuperscript{222} Though the participating companies were convicted of engaging in a criminal conspiracy to end street car transportation in the United States, the mini-

\textsuperscript{215} See Kunstler, supra note 42, at 100. Moses began his long career as Parks Commissioner, and eventually became the head of the Triborough Bridge and Tunnel Authority in New York City. Id. at 97–98. Because he headed an Authority, Moses had unfettered discretion to build what he wanted, where he wanted. See id. at 98. He was not accountable to an electorate and he had a steady stream of guaranteed funding over which he had sole control. Id.

\textsuperscript{216} See id. at 98.

\textsuperscript{217} David G. Oedel, The Legacy of Jim Crow in Macon, Georgia, in Just Transportation: Dismantling Race and Class Barriers to Mobility, supra note 25, at 97, 97.


\textsuperscript{219} Kunstler, supra note 42, at 87. The highway lobby was responding to a public fear about the democratizing effects of public streetcar travel. See Sikivu Hutchinson, Waiting for the Bus, 63 Soc. Text 107, 117–18 (2000). Travel by streetcar forced riders to come in close contact with members of different classes and races. Id. at 118 (“During the streetcar era, this familiarity implied an onerous breach of class, race and ethnic boundaries. In the highway era, the auto has strenuously protected against this threat.”).

\textsuperscript{220} See Kunstler, supra note 42, at 91–92, 211–12.

\textsuperscript{221} See id.

\textsuperscript{222} Id. at 91–92; Jackson, supra note 24, at 170.
mal fine levied against them did nothing to stop the campaign.\textsuperscript{223} In fact, the conspiracy was strengthened by local, state, and federal government action.\textsuperscript{224} General Motors became the largest contributor to the American Road Builders Association, a lobbying organization comprised of businesses and trade groups poised to benefit from an increase in passenger car use in the United States.\textsuperscript{225} The organization’s political clout led the federal government to create the interstate highway system, causing the passenger car to become the preeminent mode of transportation in the United States.\textsuperscript{226}

Meanwhile, federal highway policy ensured that suburbs were preserved as enclaves of whiteness far removed from the squalor of the black urban core by limiting access to personal vehicles.\textsuperscript{227} The white consensus to limit access to the suburbs is best exemplified in the work of Robert Moses, whose work at the Tunnel Authority in New York City made him one of the most influential figures in twentieth-century American history.\textsuperscript{228} Though based in New York, his massive highway projects were replicated throughout the country, profoundly impacting the creation and segregation of the suburbs.\textsuperscript{229} In refusing to allow infrastructure for public transportation along his gateway to the Long Island suburbs, the Long Island Expressway, Moses both embodied and enabled the post-war suburban vision of segregated metropolitan areas.\textsuperscript{230} His vision was made possible in New York and across the country by unlimited federal funding for highway construction.\textsuperscript{231}

As federal transportation policy poured money into highway and personal car travel, it limited funding for public transport, ensuring that public transport would not be available to facilitate access from urban areas to the newly built suburbs.\textsuperscript{232} Federal, state, and local transportation engineers and policy makers have long “been in an open

\textsuperscript{223} See Jackson, \textit{supra} note 24, at 170. General Motors was fined a total of $5000, a nominal amount compared to its profits from converting streetcar operations to buses and private autos. \textit{Id}.

\textsuperscript{224} See Jackson, \textit{supra} note 24, at 170–71.

\textsuperscript{225} See \textit{id.} at 248.

\textsuperscript{226} See Mumford, \textit{supra} note 218, at 508.

\textsuperscript{227} See Oedel, \textit{supra} note 217, at 100; \textit{see also} Jackson, \textit{supra} note 24, at 241 (noting that the car “accentuated” discriminatory housing patterns).

\textsuperscript{228} See Kunstler, \textit{supra} note 42, at 97–98.

\textsuperscript{229} See \textit{id.} at 97.

\textsuperscript{230} See John-Michael Rivera, \textit{The Emergence of Mexican America} \textit{104} (2006).

\textsuperscript{231} See Weiner, \textit{supra} note 196, at 15 (contrasting the federal government’s decision to fund ninety percent of new highway construction with its refusal to fund mass transportation projects).

\textsuperscript{232} See Dreier \textit{et al.}, \textit{supra} note 92, at 115.
conspiracy to dismantle all the varied forms of transportation necessary to a good system, and have reduced our facilities to the private motor car.”

This overt dismantling of the public transportation system, in concert with the massive funding of the private transportation systems, has meant that those who can afford to maintain private cars can make the move to the suburbs, while those who cannot are locked in the cities. U.S. transportation policy’s role in entrenching segregation in American society emerged through a steady stream of seemingly innocuous funding and operational decisions . . . [which] effectively restricted the mobility of poor African-Americans and other disfavored minorities who do not own cars. Meanwhile, those same officials and citizens have simultaneously lavished public funds on transportation accommodations favored by the car-owning majority, who have used the new and improved roads, streets and highways in effect to live free from close contact with poor African-Americans and others similarly situated.

By limiting access to the suburbs to personal vehicular travel, Moses and other federal transportation power brokers guaranteed that the suburbs would remain bastions of white privilege, insulated from the black urban core by their private cars.

The legacy of anti-public transportation policies continues today. Public transportation continues to be under-funded in all areas of the country, meaning that those without cars are relegated to inconvenient, often dirty, and generally unreliable transportation. Though public transportation is insufficiently funded and substandard in general, the U.S. bus systems, which generally serve lower income populations of color, are particularly poorly run and under-funded. In many urban areas, blacks make up the vast majority of the riders on these inadequate

---

233 See Mumford, supra note 218, at 508.
234 See Jackson, supra note 24, at 171.
235 Oedel, supra note 217, at 97–98
236 See Kuswa, supra note 189, at 65–66.
237 See Lewyn, supra note 189, at 105 (pointing out that federal spending on highways is five times greater than federal spending on public transit, due in large part to the continued influence of the car, tire, and homebuilding industries).
238 See John Pucher & John L. Renne, Socioeconomics of Urban Travel: Evidence from the 2001 NHTS, Transp. Q., Summer 2003, at 47, 58. In particular, “low-income neighborhoods suffer from inferior service, excessively high fares, overcrowding, and routes that do not match their desired trip patterns.” Id.
239 See, e.g., Hutchinson, supra note 219, at 111 (describing complaints about the Los Angeles Metropolitan Transit Authority).
bus systems, mandating that they disproportionately bear the brunt of these seemingly innocuous transportation funding decisions.\textsuperscript{240}

D. Transportation Policy and the Reification of Race

There are three distinct avenues through which racist transportation policies have preserved and naturalized race in the United States. First, transportation in the United States is divided into a two class system—the car-owners over the non-car-owners, replicating the white-over-black hierarchy and marking the “haves and have nots.”\textsuperscript{241} Second, access to the spaces where power and wealth are accumulated in American society is limited by the precondition of personal car ownership.\textsuperscript{242} This limited access protects white privilege from incursions by car-less blacks, insulating whiteness from the dangers of blackness, and reestablishing privilege as marked by exclusivity—the absence of blacks.\textsuperscript{243} Third, transportation policy has created highway border vacuums, which reinforce the economic, political, and social isolation that underlies the construction of blackness by physically cutting off black neighborhoods from the rest of society through highway siting decisions.\textsuperscript{244} Like the slaves relegated to slave quarters on plantations, the resulting urban underclass is kept separate from and foreign to the white privilege of the suburbs.\textsuperscript{245} The consequence of this economic, social, and political isolation has become the basis of “natural” racial difference in American society.\textsuperscript{246}

1. The Hierarchy of Transportation

In our two-tiered transportation system, the first-class citizens are people who own their own cars or who have access to private automobile transportation; the second-class citizens are people who do not own their own cars.\textsuperscript{247} By and large, people who do not own their

\textsuperscript{240} See Robert D. Bullard et al., \textit{The Routes of American Apartheid}, F. FOR APPLIED RES. & PUB. POL’Y, Fall 2000, at 66 (noting that in Macon, Georgia, a city with a population that is fifty percent black, blacks make up over ninety percent of the city’s bus riders).

\textsuperscript{241} See \textit{id.} at 68; Farley, \textit{supra} note 30, at 64.

\textsuperscript{242} See Hutchinson, \textit{supra} note 219, at 118.

\textsuperscript{243} Harris, \textit{supra} note 143, at 1737 (“Inherent in the concept of ‘being white’ [is] the right to own or hold whiteness to the exclusion and subordination of Blacks.”).

\textsuperscript{244} See \textit{Kunstler}, \textit{supra} note 42, at 107; Bullard et al., \textit{supra} note 240, at 67–68.

\textsuperscript{245} See Wilson, \textit{supra} note 90, at 48.

\textsuperscript{246} See Grahn-Farley, \textit{supra} note 57, at 33.

means of transportation in the United States are poor, black, and female;\textsuperscript{248} in contrast, those who do own a car are more likely to be middle-class or wealthy, white, and male.\textsuperscript{249} Membership in the first class provides a broad range of benefits and is a requisite for full economic, social, and political citizenship in this country.\textsuperscript{250} Membership in the second class dooms members to a life of riding unreliable public transportation, limiting their economic, political, and social mobility.\textsuperscript{251} This dichotomy’s power lies in its equation of car ownership with whiteness, mobility, and success.\textsuperscript{252} Because “[r]ace is the mark of dispossession,” carlessness leads to joblessness and limited mobility—synonymous with blackness.\textsuperscript{253}

In contrast, car ownership in American society is equated with wealth, success, and power—the characteristics that are used to define whiteness.\textsuperscript{254} Car ownership is a fundamental element of the American dream, an indication of status and of one’s place within the racial and economic hierarchy.\textsuperscript{255} It is culturally understood in America that “[t]he wealthier a household is, the more vehicles it owns.”\textsuperscript{256} Automobile ownership is so closely tied to success that to be carless in many parts of the country is to be without an identity, to be invisible.\textsuperscript{257}

Across economic classes, whites are more likely to own cars and therefore gain membership into the powerful and wealthy car owning class than blacks.\textsuperscript{258} In urban areas, thirty percent of black families do

\textsuperscript{248} See Alan E. Pisarski, Cars, Women, and Minorities: The Democratization of Mobility in America 7, 10 (1999) [hereinafter Cars, Women & Minorities].

\textsuperscript{249} See Alan E. Pisarski, Transportation Research Board, Commuting in America III: The Third National Report on Commuting Patterns and Trends, at xxi (2006) [hereinafter Commuting in America].

\textsuperscript{250} See Lewyn, supra note 189, at 84–85, 98–99 (noting that our two-tiered transportation system limits transportation to those who can participate in the suburban car culture).

\textsuperscript{251} See Cars, Women & Minorities, supra note 248, at 10.

\textsuperscript{252} See Robert D. Bullard, Introduction, in Highway Robbery: Transportation Racism and New Routes to Equity 1, 4–5 (Robert D. Bullard et al. eds., 2004).

\textsuperscript{253} See Farley, supra note 30, at 68.

\textsuperscript{254} See Hank Dittmar, Sprawl: The Automobile and Affording the American Dream, in Just Transportation: Dismantling Race and Class Barriers to Mobility, supra note 25, at 109, 109.

\textsuperscript{255} See Barlow, supra note 19, at 34.

\textsuperscript{256} Dittmar, supra note 254, at 109.

\textsuperscript{257} See, e.g., Hutchinson, supra note 219, at 117 (describing carlessness in Los Angeles).

\textsuperscript{258} See Bullard et al., supra note 240, at 69. A greater number of middle to upper income households own cars than poor households, and a greater number of white households own cars than black households. See Commuting in America, supra note 249, at xxi. One can surmise that a greater number of poor whites than poor blacks own cars. See id.
not own cars, while only six percent of white households do not.\textsuperscript{259} This carlessness is dispossession.\textsuperscript{260}

As car ownership has become a requisite for achieving the American dream, our economic and social system has been designed to function most efficiently for the benefit of the car owning (white) majority.\textsuperscript{261} Car owners have access to the best jobs, many of which are located in the car-dependent suburbs.\textsuperscript{262} Car owners are granted unfettered agency and privacy in their transportation choices because they are not dependent on public transportation to carry them to and from their chosen destinations.\textsuperscript{263} This mobility and agency translates into increased earning power and integration into the economy and society.\textsuperscript{264}

As the suburbs became synonymous with personal automobile transportation, inner cities became enclaves of carlessness, where “for millions of inner city residents, public transportation is the only means of getting around.”\textsuperscript{265} Excluded from the whiteness of car-ownership, riders of public transportation are disproportionately persons of color.\textsuperscript{266} Thus, ridership on public transportation has become a racialized and stigmatized exercise, reproducing the white-over-black hierarchy through transportation modes.\textsuperscript{267} Because it has been made black, public transportation—in particular, the bus—has become “a largely

\textsuperscript{259}{}\textsc{Cars, Women & Minorities, supra} note 248, at 10.

\textsuperscript{260}{}\textit{See id.}

\textsuperscript{261}{}\textit{See} Holmes, \textit{supra} note 25, at 22.

\textsuperscript{262}{}\textit{See Cars, Women & Minorities, supra} note 248, at 11. More commuters now travel to work in the suburbs than into the urban core. \textit{Commuting in America, supra} note 249, at xiv. William Julius Wilson documents the flight of high-wage jobs to the suburbs and the effect that move has had on the black urban population. \textit{See Wilson, supra} note 90, at 28–39 (noting that good jobs, requiring an educated workforce, followed the educated white workforce to the pro-growth suburbs). Job growth in the suburbs is consistent across economic sectors, from high-tech, to manufacturing to retail, service and wholesale. Shin Lee et al., \textit{The Decentralising Metropolis: Economic Diversity and Commuting in the US Suburbs}, 43 J. Urb. Stud. 2525, 2535 (2006). In a 2006 paper, Shin Lee, Jong Gook Seo, and Chris Webster analyzed job growth in twelve major U.S. cities in both the rust belt and the sun belt and found that across the board, job growth was fastest in the suburbs and slowest in central cities. \textit{Id.} In many of the cities studied, suburban areas added jobs, while central cities lost them or added far fewer. \textit{Id.} In a particularly startling example, the suburbs surrounding Seattle saw a job growth across sectors of approximately sixty-six percent, while the urban core saw a growth of only approximately twenty-two percent. \textit{See id.} at 2534 tbl.6.

\textsuperscript{263}{}\textit{See Lewyn, supra} note 189, at 84–85.

\textsuperscript{264}{}\textit{See Robert D. Bullard, Epilogue, in Just Transportation: Dismantling Race and Class Barriers to Mobility, supra} note 25, at 173, 173.

\textsuperscript{265}{}Bullard, \textit{supra} note 252, at 4.

\textsuperscript{266}{}Mann, \textit{supra} note 247, at 68.

\textsuperscript{267}{}\textit{See Bullard, supra} note 252, at 8; Hutchinson, \textit{supra} note 219, at 117.
reviled figure within the American cultural imagination.”

In contemporary American society, not only is “auto ownership . . . associated with wealth, [and] style . . . [but] transit use, rail, biking, and walking are seen as . . . dangerous and degrading activities.”

Beyond degrading, ridership on public transit closes the door to full participation by limiting the mobility and agency of carless blacks who depend on unreliable and inconvenient buses. The “bus system effectively enforces the racial . . . hierarchies that underlie suburban ‘manifest destiny.’” Thus, public bus ridership has both created and perpetuated a white-over-black racial hierarchy based on a self-reinforcing cycle: blacks live in the inner city; they can’t afford cars because they don’t have good jobs; they don’t have good jobs because they are economically and physically isolated from good suburban jobs.

Because inner city blacks cannot get to good suburban jobs so that they can afford a car and become fully integrated into American social and economic society, they remain stuck in the ghetto, unemployed, undereducated, and increasingly isolated economically and culturally. “Thus, the bus system—conveyance of the raced body, the transient, the low-income, the immigrant—has metamorphosed . . . into an emblem of the postapocalyptic vision of Third World dystopia.”

268 See Hutchinson, supra note 219, at 117.
269 Dittmar, supra note 254, at 109 (emphasis added).
270 See Holmes, supra note 25, at 25–26. There are no buses to get out to the good suburban jobs from their neighborhoods, or if there are buses, they are sporadic, unreliable, and incredibly time-consuming to use. See Oedel, supra note 217, at 99–100. For example, in Macon, Georgia,

[i]t is well known . . . that poor people without cars, most of whom are African-American, cannot navigate meaningfully in the modern decentralized environment of Bibb County and Macon . . . . [T]he Transit Authority provides very limited services that make it effectively impossible for thousands of poor people in Macon without cars, most of whom are African-American, to integrate commercially in the community.

Id.

271 Hutchinson, supra note 219, at 117. Suburban manifest destiny is as “destined” as is the United States’s domination of the North American continent; both are the product of the series of policies rather than any sort of natural destiny or order.
272 See Barlow, supra note 19, at 41; Wilson, supra note 90, at 38–42; Kenn, supra note 102, at 86.
273 See Hutchinson, supra note 219, at 113–14 (describing how “black residents [were] tethered to public transportation” in south central Los Angeles during World War II).
274 Id. at 117.
2. The Transportation Hierarchy’s Role in Racing American Society

Racing bus ridership has dire consequences for blacks living in urban neighborhoods; “many young African-Americans faced with substantial transportation obstacles in addition to the normal difficulties associated with beginning work become discouraged about their chances to make it in a traditional occupation. The consequences in some cases—crime, drug abuse, sexually transmitted disease, and teenage pregnancy—are disastrous.” Additionally, the consequences fuel the persistent cultural construction of the naturalness of race by creating new marks of racial inferiority; in the public consciousness, blackness becomes associated with, and then defined by, this economically isolated ghetto culture.

The transportation hierarchy polices access to enclaves of power and privilege by limiting entry to those with private vehicles. White-ness itself may be considered property, in that one of the essential property rights is the right to exclude—to exclude blacks from the privilege of whiteness. Indeed, the suburbs were popular not just because they offered mobile whites their very own quarter-acre of the American dream, but because their auto-dependency ensured that access would also be limited. Restricted access was key because the creation and maintenance of homogenous white neighborhoods increased

---

275 Oedel, supra note 217, at 103.
276 See Grahn-Farley, supra note 57, at 33 (“The system of marks blinds [one] from seeing others as human beings . . . .”).
277 See Kuswa, supra note 189, at 44.
278 See Harris, supra note 143, at 1737.
279 See Hutchinson, supra note 219, at 116–17. Sikivu Hutchinson discusses a 1917 advertisement for maintaining segregation in jitney transportation in Los Angeles. Id. at 116. The advertisement invoked white fear of having pure white women exposed to overly sexualized black men. See id. Hutchinson explains that

the jitney ad underscored how public space was racialized. By using the white female body as its “selling point” the ad traded on the historic connection between white femininity and the maintenance of white racial purity. White femininity—and whiteness by extension—was produced and validated through this hierarchy of special relationships . . . . Exploiting the white passenger’s sense of entitlement, the jitney ad vividly deployed the language of antiurbanism—a language that has been so crucial to the construction of American national identity. It was within this climate that the automobile overtook Southern California.

Id. at 116–17. Indeed, the advertisement underscores the extent to which separately racialized space is essential to maintaining and reifying race in society and explains why limiting access to suburban settlements was so important to their white residents. See id.
and protected white privilege. The privatization of travel allowed residential segregation to become institutionally entrenched in American culture to an unprecedented extent by excluding undesirable elements from desirable spaces.

What is most significant about residential settlement patterns in the United States “is not that some whites refused to live among non-whites, but the extent to which social status and a desired quality of life are predicated on homogenous whiteness.” For example, in the 1960s some suburban communities outside of Atlanta “resisted MARTA [Metropolitan Atlanta Rapid Transit Authority] for fear it would bring blacks and the poor from the city to [the] outlying suburbs,” undermining the whiteness and privilege of their suburban communities. Limiting private transportation by race means that “[i]n transit, behind the wheel, alongside the center divider, the racial boundaries of cityhood could be preserved.” Even more importantly, however, racial boundaries could be preserved by limiting access to white suburban enclaves through private transportation.

Finally, the transportation hierarchy compounds the economic, social, and political isolation of the ghetto. As vibrant black neighborhoods were demolished by whites who considered them less valuable than highway construction, the neighborhoods became socially isolated, plagued by gangs, arson, and crime. Congressman Daniel Patrick Moynihan famously used these consequences of racist

---

280 Holmes, supra note 25, at 24. The shift from the dominance of urban residential patterns to suburban ones, “driven by newfound American affluence, federal highway subsidies and corporate interests, and influenced by social attitudes, including racism . . . solidified the personal motor vehicle as the dominant transport mode” for affluent and middle class America, precisely because it facilitated the exclusion of blacks from enclaves of whiteness. Id.

281 See Jackson, supra note 24, at 241–42.

282 Pulido, supra note 22, at 86.

283 See Robert D. Bullard & Glenn S. Johnson, Just Transportation, in JUST TRANSPORTATION: DISMANTLING RACE AND CLASS BARRIERS TO MOBILITY, supra note 25, at 7, 15.

284 Hutchinson, supra note 219, at 118.

285 See Kuswa, supra note 189, at 48–49.

286 See id. ("[T]he urban highway materializes the stratification of groups based on race and class. The rhetoric . . . arguing that certain people deserve their immobility—is complemented by a highway machine that allows an extreme differentiation between living conditions within a limited region.").

287 See Chang, supra note 126, at 13–14; Jacobs, supra note 206, at 260; Reid, supra note 193, at 42. However, much the arson was orchestrated by building owners looking to cash in on insurance. See Chang, supra note 126, at 13–14. This urban mess became a symbol of blackness in American society and evidence of the naturalness of race. See Grahn-Farley, supra note 57, at 33.
transportation policies to justify the abandonment of black inner cities in a note to President Richard Nixon, suggesting that it was time to enact a policy of “benign neglect” toward the nation’s black inner cities.\textsuperscript{288} The Congressman’s suggestion underscores the way in which the consequences of racist transportation policies that sited highways in black urban areas were used to prove the naturalness of race and to justify continued racism at all levels of government. The economic and social devastation that inevitably followed in the wake of federal, state, and local highway siting policies thus contributed to the reification of race in American society by coloring and shaping the idea of a particular subordinate black identity in diametric opposition to a superior suburban white identity.

IV. How These Policies and Actions Have Caused and Continue to Cause Global Warming

The racialization of space and mobility has been a significant cause of global climate change because it requires vast amounts of fossil fuels while devouring inordinate amounts of land.\textsuperscript{289} This section explains how the systems and hierarchies that polarized land use and transportation along racial lines in the United States have been a significant cause of global climate change.

A. The Causes of Global Warming

Climate change is a result of a concentration of greenhouse gases in the earth’s atmosphere.\textsuperscript{290} The concentration of greenhouse gases in the earth’s atmosphere has risen significantly since industrialization in the 1800s, but has spiked precipitously in the decades after World War II, a rise that tracks the increasing suburbanization of the United States.\textsuperscript{291} Despite rhetoric from political leaders about the unchecked CO\textsubscript{2} emissions of developing nations, the United States remains the most significant producer of greenhouse gases in the world, responsible for nearly a quarter of the world’s total emissions.\textsuperscript{292} It is significant

\begin{itemize}
  \item\textsuperscript{288} See Chang, supra note 126, at 14.
  \item\textsuperscript{289} See Gonzalez, supra note 12, at 357 (describing how urban sprawl affects climate change).
  \item\textsuperscript{290} See Thomas R. Karl & Kevin E. Trenberth, Modern Global Climate Change, 302 Sci. 1719, 1720 (2003).
  \item\textsuperscript{291} See McKibben, supra note 7, at 12; Karl & Trenberth, supra note 290, at 1720.
  \item\textsuperscript{292} Kolbert, supra note 3, at 148–49; see Monbiot, supra note 12, at xiii; China Resists Mounting Pressure to Cut Emissions (NPR radio broadcast Dec. 8, 2005), available at http://www.npr.org/templates/
then that the increasing concentration of CO₂ in the earth’s atmosphere correlates temporally with the rise of suburbanization and personal transportation in the United States. Suburban land use, and the racist policies that created and support such land use, have led to a spike in the United States’s CO₂ emissions. Large, inefficient, single-family homes on large lots, located far from commercial centers, accessible only by personal vehicles, consume energy and land in correlation with the three most significant sources of greenhouse gases in the atmosphere: electricity production, transportation, and deforestation.

B. Land Use and Climate Change

The suburbanization of whiteness has created endless acres of suburbs in the United States. Between 1982 and 2003, the growth in developed land in the United States far outpaced population growth, increasing by nearly half, as more and more of the population moved out to the suburbs. In 1982, 72.9 million acres of the land in the United States were developed; twenty-one years later, by 2003, 108.1 million acres had been developed. This new development transforms fields, farms, and forest into inefficient housing, featuring large footprints on large lots. As whites have had to move farther and farther

---

294 See Gonzalez, supra note 12, at 357–58 (criticizing urban sprawl for “significantly contributing to global climate change”).
295 See Kolbert, supra note 3, at 134; see also Pew, CLIMATE CHANGE 101: THE SCIENCE AND IMPACTS, supra note 27, at 2–3 (“The main culprit [of global warming] is emissions of carbon dioxide and other greenhouse gases from human activities, primarily the burning of fossil fuels such as coal and oil. Other human sources of these gases include deforestation.”).
297 See id.
298 See id.
299 See U.S. CENSUS BUREAU, POPULATION PROFILE OF THE UNITED STATES: 1999, at 28 (2001), available at http://www.census.gov/population/p23-205.pdf (“[H]ousing in suburban and nonmetropolitan areas was more likely than housing in central cities to be newly constructed . . . .”) The term “footprints” here denotes the amount of land that the first floor of the house occupies, like a person’s foot on the ground.

In 2005, the average newly constructed suburban home was 2268 square feet, and the majority of those homes were sited on a lot larger than a quarter acre. U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005, at 24 tbl.1C-3 (2006), available at http://www.
from cities and inner-ring suburbs to preserve their privilege, the lots on which they have built their new homes have grown in size, eating up more land that was once forest or grassland. This increased distance from basic needs and larger home sizes require increasing amounts of fossil fuels for transportation and for heating, cooling, and power.

Large, detached homes that define suburban living use much more energy than urban dwellings for several reasons. Because newer suburban homes are much larger than the homes in the urban core and older first-ring suburbs, they demand much more energy to heat and cool than more compact homes. Though they may take advantage of more efficient technologies, they are much less energy efficient than the townhouses or apartments that make up the bulk of urban housing stock because they cannot take advantage of the efficiency of shared heating and cooling systems that reduce overall energy consumption. Moreover, the disastrous consequences of these inefficiencies are compounded by heating homes with fossil fuels such as oil or gas, the extraction of which releases CO₂ into the atmosphere. Additionally, cooling large homes (many of which are located in the south where cooling systems are run year-round) is equally damaging to the CO₂ levels in the earth’s atmosphere because of the vast amounts of

---

300 See Pres. Inst., The Limits of Sprawl 1 (2000), available at http://www.preservenet.com/studies/LimitSprawl.pdf (noting that early streetcar suburbs featured average densities of fifteen residents per acre with houses built on one-tenth acre lots, in comparison to today’s suburbs, which may have densities as low as two residents per acre); Pulido, supra note 22, at 86.

301 See Margot Adler, All Things Considered: Behind the Ever-Expanding American Dream House (NPR radio broadcast July 4, 2006), available at http://www.npr.org/templates/story/story.php?storyId=5525283 (noting that the average American home has more than doubled in size since the 1950s and now averages 2349 square feet).

302 See Gonzalez, supra note 12, at 345.

303 See Sierra Club, Global Warming: Sprawling Across the Nation 1, available at http://www.sierraclub.org/sprawl/globalwarming.pdf (last visited Apr. 18, 2008) (noting that larger homes require much more energy to power their infrastructure and therefore release larger amounts of CO₂ than smaller homes).

304 See id. (“The infrastructure needs arising from sprawling development cost a household $630 more per year and produces 8 more tons of CO₂ emissions.”); see also U.S. Census Bureau, supra note 299, at 28 (“[F]orty-three percent of housing units in central cities were multifamily, compared with 20 percent of the housing units in suburban areas and 12 percent in nonmetropolitan areas.”); Douglas Foy & Robert Healy, Cities are the Answer, Boston Globe, Apr. 4, 2007, at A7 (noting that New York City, one of the densest areas in the United States, is also the most energy efficient, using less energy per capita than anywhere else in the country).

electricity these large homes use to run air conditioners and other cooling apparatuses.\textsuperscript{306}

Moreover, large, detached suburban homes consume much more energy in the form of electricity per dwelling than do urban homes.\textsuperscript{307} Each suburban home has more electricity–consuming features than a typical urban home: more lights and more appliances.\textsuperscript{308} Consuming increased amounts of electricity, these extra appliances demand increased electricity production.\textsuperscript{309} Because “[t]he largest single source of carbon emissions in the United States is electricity production,” these large homes have caused the release of hundreds of millions of tons of CO\textsubscript{2} into the earth’s atmosphere.\textsuperscript{310}

The increased energy consumption of each individual suburban house is again compounded by the increased energy that low-density developments demand for public services.\textsuperscript{311} Sprawling neighborhoods require more street lighting than dense, urban neighborhoods because they cover more ground with fewer efficiencies.\textsuperscript{312} These added street lights put more pressure on power grids, increasing demand for electricity and requiring the generation of more power—a significant source of greenhouse gas emissions.\textsuperscript{313} Additionally, suburban neighborhoods require more energy from fossil fuels to pump water and waste over larger

\textsuperscript{306} See Reay & Pidwirny, supra note 305 (noting that up to forty percent of CO\textsubscript{2} emissions arising from fossil fuel combustion come from electricity generation). A typical detached family home with central air conditioning uses 3008 kWh a year for cooling; in contrast, a two to four unit apartment building uses 2161 kWh per household and a building with five or more units reduces its consumption of electricity for cooling by nearly half as compared to the detached single family home, needing only 1870 kWh per household. See U.S. DEP’T OF ENERGY, ENERGY INFO. ADMIN., A LOOK AT RESIDENTIAL ENERGY CONSUMPTION IN 2001, at tbl.CE3-4c, available at http://ftp.eia.doe.gov/pub/consumption/residential/2001ce_tables/ac_consump2001.pdf.

\textsuperscript{307} See Gonzalez, supra note 12, at 345.

\textsuperscript{308} See Monbiot, supra note 12, at 74. A staggering amount of the energy consumption of modern appliances is a result of their sucking power while in “standby” mode—plugged into the wall, but not actively in use. See id. The appliances and technology that draw electricity while in standby mode are features of every room in a modern home—televisions, DVD players, telephones, computers. See id. Since suburban homes are larger and have more appliances, their energy consumption is higher. See id. (noting that suburban homes contain plasma television sets—which use nearly five times as much electricity as older televisions—in more than one room, and even larger appliances like extra-large refrigerators, multiple computers, and washing machines).

\textsuperscript{309} See id.

\textsuperscript{310} Kolbert, supra note 3, at 134.

\textsuperscript{311} See Sierra Club, supra note 303, at 1.


\textsuperscript{313} See Reay & Pidwirny, supra note 305.
distances; they are unable to take advantage of infrastructure efficiencies in the way that more densely developed, urban neighborhoods do.\textsuperscript{314}

The lower-density development of suburban communities requires more miles of asphalt roads to be built and maintained.\textsuperscript{315} Because a primary element of asphalt is oil, the construction and repaving of extensive suburban roadways contribute to increased levels of atmospheric CO\textsubscript{2}.\textsuperscript{316}

The significantly larger carbon footprint of these suburban homes actually begins before residents move in; the suburban construction boom has contributed to and continues to affect global warming as fossil fuels are burned during the construction of acre after acre of new homes.\textsuperscript{317} The dump trucks, bulldozers, and other heavy machinery that make building a new home possible guzzle vast amounts of gasoline and spew CO\textsubscript{2} into the earth’s atmosphere as they run.\textsuperscript{318} The damage done by machines on the construction sites of the hundreds of thousands of suburban homes built since World War II is compounded further by the energy consumed to transport the building materials from their place of production to sprawling housing sites.\textsuperscript{319}

Furthermore, the materials commonly used to build larger suburban houses are yet another source of increased greenhouse gas emissions.\textsuperscript{320} Most suburban homes have been constructed from wood, little of it sustainably harvested, contributing to deforestation, which is a sig-

\begin{enumerate}
\item See \textsc{Sierra Club}, \textit{ supra note} 303, at 1.
\item See \textsc{Geoff Hammond & Craig Jones}, \textit{Inventory of Carbon and Energy} (ICE) 4, 11 (Version 1.5a Beta 2006); Kay Lazar, \textit{Cost of Asphalt Rising: Local Road Repairs are Likely to Lag}, \textsc{Boston Globe}, June 8, 2006, at 1.
\item See \textsc{Empty Homes Agency, New Tricks with Old Bricks: How Reusing Old Buildings Can Cut Carbon Emissions} 14 (2008), \textit{ available at} http://www.emptyhomes.com (follow “papers & Publications” hyperlink, then follow “Publications” under “Categories” heading) (noting that the construction of a new house emits fifty British tons of CO\textsubscript{2} during construction, as compared to the renovation of an existing home, which emits only fifteen British tons of CO\textsubscript{2}).
\item See \textsc{Empty Homes Agency, supra note} 317, at 7.
\end{enumerate}
significant source of global warming. \textsuperscript{321} Deforestation and unsustainable harvesting undermine the earth’s ability to sequester CO\textsubscript{2} and keep it from entering the earth’s atmosphere. \textsuperscript{322} Though different forests offer varying degrees of carbon sequestration, or “sink” properties, forests are net carbon sinks, meaning they draw CO\textsubscript{2} out of the atmosphere as part of the photosynthesis process and trap it inside living trees where it cannot contribute to climate change. \textsuperscript{323} As trees are cut down for lumber, the earth loses a precious source of carbon sequestration. \textsuperscript{324} The degradation and loss of forested land effectively eliminates that land’s ability to act as a sink to absorb new carbon emissions, undermining the earth’s ability to regulate CO\textsubscript{2} levels in its atmosphere. \textsuperscript{325} The process of clearing land to make way for development causes forests to become sources of CO\textsubscript{2} as the trees are unsustainably cleared or thinned and the carbon they had previously stored is released into the atmosphere. \textsuperscript{326} Not only has suburban development caused a spike in the production of greenhouse gases, its land use patterns have reversed the planet’s natural ability to store and regulate the amount of CO\textsubscript{2} in the atmosphere. \textsuperscript{327}


\textsuperscript{322} See Union of Concerned Scientists, supra note 321.

\textsuperscript{323} See Hal Salwasser, Introduction: Forests, Carbon and Climate—Continual Change and Many Possibilities, in FORESTS, CARBON AND CLIMATE CHANGE: A SYNTHESIS OF SCIENCE FINDINGS 2, 3 (2006). Healthy forests, particularly large ones like those located in tropical regions, “are capable of removing enormous quantities of carbon from the atmosphere and storing it in their vast, treed expanses.” Snyder, supra note 46, at 45.

\textsuperscript{324} See Reay & Pidwirny, supra note 321. The forests and grasslands cut down to prepare land for suburban development are much more effective at storing and sequestering CO\textsubscript{2} than suburban lawns and roadways. See Gregg Marland et al., The Climatic Impacts of Land Surface Change and Carbon Management, and the Implications for Climate-Change Mitigation Policy, 3 CLIMATE POL’Y 149, 152–53 (2003).

\textsuperscript{325} See Salwasser, supra note 323, at 2.

\textsuperscript{326} See McKibben, supra note 7, at 33; Salwasser, supra note 341, at 2. The reduced ability to sequester CO\textsubscript{2} that results from the clearing of land for suburban development contributes to global warming by making the earth far less able to regulate greenhouse gases in its atmosphere and causing more CO\textsubscript{2} to be released into the air. See Marland et al., supra note 324, at 150.

As the suburbs have come to symbolize whiteness, the status that they confer on residents has caused them to become home to more of the country’s population than any other type of development.\textsuperscript{328} Since sprawl is by definition low-density, increasing suburban populations have converted millions of acres of land from forest and grassland to \textit{CO}_2 producing uses.\textsuperscript{329}

C. Transportation and Climate Change

Increased auto dependency further adds to the suburbs’ effect on the climate by necessitating increased vehicular travel and fossil fuel consumption.\textsuperscript{330} The federal subsidy of the suburbs and the passenger car has turned the suburbs into vast auto-dependant cul-de-sacs.\textsuperscript{331} Because the suburbs are built to be navigated by individual vehicles, rather than public transit, the only reasonable means of getting around for the bulk of the country’s population is private passenger cars.\textsuperscript{332} The particular zoning of the suburbs requires that residents drive between home and school, between home and work, and between anywhere and the grocery store.\textsuperscript{333} Auto-dependent development and the transportation hierarchy have increased car ownership in the United States, making it essential for every member of suburban households to have access to a car or risk complete isolation, both economic and social.\textsuperscript{334}

As the American population has become increasingly suburban, the number of trips taken by the average American in a private automobile has risen.\textsuperscript{335} As a result of the increased need to travel by car for simple daily tasks, residents in low-density suburbs drive twenty to thirty percent more than residents living in neighborhoods with double the

\textsuperscript{328} \textit{See} U.S. Census Bureau, \textit{supra} note 299, at 28 (noting that forty-six percent of the nation’s housing units were located in the suburbs in 1999).

\textsuperscript{329} \textit{See} Reid Ewing \textit{et al.}, \textit{Growing Cooler: The Evidence on Urban Development and Climate Change} 3 (2008).

\textsuperscript{330} \textit{See} Sierra Club, \textit{supra} note 303, at 1; \textit{see also} Ewing \textit{et al.}, \textit{supra} note 329, at 2.

\textsuperscript{331} \textit{See} Kunstler, \textit{supra} note 42, at 104–05.

\textsuperscript{332} \textit{See} Sierra Club, \textit{supra} note 303, at 1; \textit{see also} Kunstler, \textit{supra} note 42, at 107 (“The farther apart things spread, the more cars [are] needed to link up the separate things . . . .”).

\textsuperscript{333} \textit{See} Dittmar, \textit{supra} note 254, at 110.

\textsuperscript{334} \textit{See} Mumford, \textit{supra} note 218, at 506.

\textsuperscript{335} \textit{See} Cars, Women & Minorities, \textit{supra} note 248, at 12; \textit{see also} Sierra Club, \textit{supra} note 303, at 1 (noting that sprawl accounts for almost seventy percent of the recent increase in driving).
density. This increase in driving means that suburban residents’ travel patterns alone cause them to consume twenty to thirty percent more fossil fuels, and emit twenty to thirty percent more greenhouse gases than their non-suburban counterparts.

To accommodate this increase in per capita automobile trips, car ownership has increased in the past few decades in the United States. Though “the average household stayed roughly the same size from 1983 to 1990, as measured by the Nationwide Personal Transportation Survey . . . its auto travel grew by about 12,000 miles per year,” due in large part to changes to suburban settlement patterns countrywide. All of this driving contributes significantly to global climate change because cars burning gasoline emit millions of tons of CO$_2$ into the atmosphere, causing greenhouse gases to build up in the atmosphere. Personal automobile trips are one of the most significant causes of CO$_2$ emission: fossil fuel emissions from car travel represent almost twenty-five percent of annual CO$_2$ emissions in the United States. Considering that the average suburban household consumes 415 more gallons of gasoline per year than a household in a denser development and emits five metric tons more carbon per year than its more densely developed counterpart would, there can be no question regarding the environmental impact of the United States’s pro-suburban, white-over-black policies. The marked increase in personal automobile trips and car ownership in America is a direct result of suburbanization and the creation of the racialized transportation hierarchy.

**Conclusion**

People resist change, especially if it undermines their status. It is even more difficult, though, when what must be changed are the sys-

---


See id.


Dittmar, *supra* note 254, at 110.

*Id.* at 111. For every gallon burned, approximately nineteen pounds of CO$_2$ are emitted into the atmosphere. *Id.*


See Bürer et al., *supra* note 336, at 7.

See Dittmar, *supra* note 254, at 110 (“[B]oth auto ownership and miles driven per adult increases significantly as population density declines.”).
tems that have been used to define and preserve cultural power hierarchies. But this change must happen to address the global climate crisis effectively. Though it will not be easy, an effective response to global warming will require a reversal of decades of racist housing, land-use, and transportation policies that have been used to reify race in American society. Combating global warming will not be successful until we take into account the investment that white elites have in the current unsustainable system. We must respond to these deeply entrenched systemic barriers by crafting a solution that overcomes the structural and institutional blocks resisting any meaningful responses to the climate crisis.
LOOKING BEYOND AMNESTY AND TRADITIONAL JUSTICE AND RECONCILIATION MECHANISMS IN NORTHERN UGANDA: A PROPOSAL FOR TRUTH-TELLING AND REPARATIONS

Cecily Rose*

Abstract: This article examines the role that amnesty and traditional practices play in fostering justice and reconciliation in northern Uganda. Although the twenty-two year conflict involving the Lord’s Resistance Army (LRA) in northern Uganda has only recently come to an end, many former LRA rebels have been returning returning for years to their communities after taking advantage of the amnesty offered by the government of Uganda. Consequently, reintegration, accountability, and reconciliation are currently prominent legal issues in northern Uganda. Literature on this subject, however, mainly touches upon how the amnesty process and the peace talks are in tension with the International Criminal Court’s pending arrest warrants for LRA leaders. This article, by contrast, argues that given the shortcomings of the amnesty process and the traditional practices, a truth commission and a reparations process could play a critical role in northern Uganda’s transition from conflict to peace.

Introduction

After twenty-two years of conflict in northern Uganda, a movement toward reconciliation has begun, even though the Ugandan government and the Lord’s Resistance Army (LRA) have only recently concluded a peace deal. Although peace long eluded northern Uganda, literature on the subject has already begun to discuss how Uganda can foster long-term reconciliation.1 While negotiators struggle to achieve

* J.D., Columbia; B.A., Yale. Associate Legal Officer, Appeals Chamber, Special Court for Sierra Leone. Law Clerk to Judge Sepúlveda and Judge Shi, International Court of Justice, 2006–2007. Many thanks to Professor Francis Ssekandi for his guidance and encouragement and to Régine Gachoud, Rebecca Jenkin, Marko Milanović, Peter Prows, and Eleanor Wilkinson for their helpful comments.

1 For literature discussing how Uganda might foster long term reconciliation, see Tim Allen, Trial Justice: The International Criminal Court and the Lord’s Resistance Army 162–68 (2006) [hereinafter Trial Justice]; Tim Allen, War and Justice in North-
peace, victims of the LRA struggle to forgive and reintegrate thousands of former LRA rebels who have returned to their communities from the bush after taking advantage of the amnesty granted by the government of Uganda under the Amnesty Act of 2000. In this context of reintegration, many non-governmental organizations (NGOs) and academics, within and outside of Uganda, initially seized on the potential for traditional Acholi ceremonies and conflict resolution methods to play a role in northern Uganda. With the announcement that the International Criminal Court (ICC) would begin investigating the senior leaders of the LRA in 2004, intense speculation ensued about how the ICC’s role might conflict with peace negotiations and the traditional justice and reconciliation mechanisms. Uganda now faces the simultaneous operation of regional traditional ceremonies, a national amnesty process, and international criminal prosecutions. To this already complex and controversial mixture of transitional mechanisms in Uganda,  


4 See, e.g., PAIN, supra note 3, at 1.

this article argues for two additions: a truth commission and a reparations system.

Ideally, reconciliation in post-conflict northern Uganda would involve admission of guilt by perpetrators and forgiveness by victims through some sort of dialogue. Communities would reintegrate former members of the LRA and victims would receive support to enable them to return to their homes and resume their lives. Communities would receive economic and social assistance so that the region as a whole could overcome a conflict that has left it impoverished and marginalized. Though methods of reconciliation necessarily differ according to the particular context, some tools foster it more successfully than others. This article examines how effectively Uganda’s Amnesty Act and traditional justice and reconciliation mechanisms have fostered reconciliation both during and post-conflict.

Justice and reconciliation in northern Uganda require more than amnesty and the use of traditional mechanisms, which respectively work more toward ending the conflict and fostering reintegration of former combatants. The prosecution of a handful of LRA leaders by the ICC could play a limited, though important, role in promoting accountability and reconciliation in Uganda. To address the interests of victims of the conflict, however, a truth-telling process and reparations for victims and communities are necessary. A complex and unprecedented blend of transitional mechanisms would better serve Uganda than the current combination of amnesty, traditional practices, and criminal prosecutions. Refining and adding to the current mixture will ultimately facilitate northern Uganda’s transition from conflict to peace.

Part I of this article provides a sketch of the conflict in northern Uganda, from its origins in 1986, to the resumption of peace talks in Juba, Sudan in April 2007. Part II describes Uganda’s Amnesty Act of 2000 as well as three traditional Acholi justice and reconciliation mechanisms, and then analyzes the problems with the amnesty process and the traditional mechanisms. In light of these shortcomings, Part III explains the need for a truth-telling process and a reparations system and explores the relevance of various mechanisms used previously in Uganda, Sierra Leone, South Africa, and Rwanda. Finally, Part IV examines the utility of ICC prosecutions, particularly in light of Sierra

---

6 See Amnesty Act; Trial Justice, supra note 1, at 165–66.
8 See Pham et al., supra note 1, at 35–36.
Leone’s experience with post-conflict criminal justice. Despite the amnesty process, traditional mechanisms, and ICC indictments, this article concludes that Uganda will only be able to effectively promote justice and reconciliation in northern Uganda through the addition of a truth-telling process and a reparations system.

I. BACKGROUND ON THE CONFLICT IN NORTHERN UGANDA

The conflict in northern Uganda has persisted since 1986, when President Yoweri Museveni and the National Resistance Movement (NRM) took power. The Lord’s Resistance Army emerged from Alice Auma Lakwena’s Holy Spirit Movement (HSM), which aimed to overthrow the newly established NRM government and enjoyed popular support from 1986 to 1987. In 1987, when Lakwena fled to Kenya after her forces suffered heavy casualties in a battle with the NRM, her supposed cousin, Joseph Kony, assumed leadership of the remnants of the HSM. Under Kony’s command, the LRA purportedly aimed to overthrow Uganda’s government, based in the southern capital of Kampala, and to rule Uganda according to the Ten Commandments. The LRA does not, however, have a “coherent ideology, rational political agenda, or popular support.” The LRA never crosses the Nile River, which divides the northern and southern regions of Uganda, and though the LRA attacks government forces at times, it primarily targets northern Uganda’s civilian population, whom Kony claims to be punishing for their sins—particularly that of not supporting him. The fighting has largely taken place in the Gulu, Kitgum, and Pader districts of northern Uganda where the Acholi ethnic group dominates.

The LRA’s atrocities include killings, beatings, mutilations, abductions, forced recruitment of children and adults, and sexual violence against girls who serve as “wives,” or sex slaves, for LRA commanders.

10 Id.
11 Id.
12 Id.
14 Int’l Crisis Group, supra note 13, at 1.
Because the LRA lacks a popular base of support, it populates its forces almost exclusively through abduction and forced conscription of children, usually ages eleven to fifteen.\textsuperscript{16} It has used these abducted children to carry loot, sustain combat, and serve as sex slaves, while mutilations have served to create perpetual insecurity among the civilian population.\textsuperscript{17} According to estimates, the LRA’s membership ranges from 1000 to 3000, with a core of 150 to 200 commanders and the rest consisting of abducted children (the LRA has abducted approximately 20,000 children during the twenty year conflict).\textsuperscript{18} During the course of the conflict the LRA has looted and burned houses, storage granaries, shops, and entire villages in northern Uganda.\textsuperscript{19} The Ugandan People’s Defense Force (UPDF), the national military, has also committed human rights violations against civilians in northern Uganda, including extrajudicial execution, arbitrary detention, torture, rape and sexual assault, recruitment of children, and forcible relocation.\textsuperscript{20} Altogether, this prolonged conflict has had a severe socio-economic and psychosocial impact . . . on the entire Acholi population.”\textsuperscript{21}

The government of Sudan heavily supported the LRA until 2002, when the governments of Uganda and Sudan signed a treaty by which both countries agreed to stop supporting each other’s insurgents.\textsuperscript{22} With the permission of the Sudanese government, the UPDF launched a military offensive in March 2002 against the LRA, known as “Operation Iron Fist.”\textsuperscript{23} Although the UPDF aimed to eradicate the LRA by attacking its camps in southern Sudan, the LRA instead fled back into

\textsuperscript{16} Akhavan, \textit{supra} note 9, at 407.
\textsuperscript{17} \textsc{Int’l Crisis Group}, \textit{supra} note 13, at 1.
\textsuperscript{18} \textsc{Pham et al.}, \textit{supra} note 1, at 14.
\textsuperscript{19} Press Release, \textsc{Int’l Criminal Court}, Background Information on the Situation in Uganda (Jan. 1, 2004), http://www.icc-cpi.int/cases/UGD/s0204/s0204_b.html (follow “Background information on the situation in Uganda” hyperlink).
\textsuperscript{22} The Ugandan government had allegedly supported the Sudan Peoples’ Liberation Movement/Army (SPLM/A). \textsc{Human Rights Watch}, \textit{supra} note 15, at 9. The unlikely alliance between the Islamist government of Sudan and the nominally Christian LRA grew out of the Sudanese government’s fear that the NRM would threaten its control over the non-Islamic, non-Arab southern part of Sudan. Akhavan, \textit{supra} note 9, at 406. Sudan perceived a link between the NRM and the SPLM/A and consequently supported the remnants of the forces of Idi Amin, General Tito Okello, and Milton Obote. \textit{Id.}
\textsuperscript{23} Human Rights First, \textit{supra} note 20.
northern Uganda where fighting and abductions intensified. The LRA also expanded the violence into eastern Uganda which had previously been less affected by the conflict. Since the start of Operation Iron Fist, the number of internally displaced persons (IDPs) has grown from 450,000 to over 1.7 million. Since the mid-1990s, approximately three-fourths of the populations in the Gulu, Kitgum, and Pader districts of northern Uganda have been displaced.

In December 2003 President Museveni referred the problem of the LRA to the International Criminal Court. The government of Uganda reportedly conceived of the referral as a strategy for generally engaging the international community and specifically increasing international pressure on Sudan to stop it from supporting the LRA. In October 2005, the ICC prosecutor Luis Moreno-Ocampo unsealed arrest warrants for Kony and four other leaders: Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Rasaka Lukwiya. Their alleged crimes include rape, murder, slavery, sexual slavery, and forced enlistment of children. As of this writing none of the indictees are in the custody of the Ugandan government or the ICC. Meanwhile, the ICC has confirmed the death of Rasaka Lukwiya, and Vincent Otti has reportedly been killed by Kony. Nevertheless, these arrest warrants reportedly rattled the LRA commanders who thereafter began to talk of a peace agreement which would bring them immunity from prosecution.

27 Human Rights First, supra note 20.
28 Press Release, Int’l Criminal Court, supra note 5.
29 Akhavan, supra note 9, at 410.
30 Moreno-Ocampo, supra note 7, at 4–7.
31 Id. at 6.
34 Int’l Crisis Group, supra note 13, at 1–2.
In the spring of 2006, a significant shift in the dynamics of this conflict occurred as the LRA began portraying itself as a politically motivated movement with legitimate grievances about the marginalization of northern and eastern Uganda.\(^{35}\) In this vein, Kony appeared for the first time in May 2006 on a video in which he discussed peace, and denied the LRA’s involvement in the commission of war crimes.\(^{36}\) Most importantly, in May and June 2006, a series of meetings took place between Kony and Riek Machar, the vice-president of southern Sudan and the second in command of the Sudan People’s Liberation Movement.\(^{37}\) The government of southern Sudan took on the role of peace mediator because its leaders recognized that the LRA threatened the potential for stability and development in southern Sudan.\(^{38}\)

After years of military campaigns and indifferent or disingenuous participation in peace initiatives, the government of Uganda finally committed to high-level, sustained peace negotiations, called the Juba peace process, with the LRA in mid-July 2006.\(^{39}\) The agenda of the Juba peace process includes cessation of hostilities, a comprehensive solution to the conflict, reconciliation and accountability, a formal ceasefire, and a plan for disarmament, demobilization, and reintegration.\(^{40}\) The LRA and the government of Uganda successfully reached an agreement on the first of these issues.\(^{41}\) A cessation of hostilities agreement came into effect on August 4, 2006, and was renewed in November and December 2006, though both sides had violated it.\(^{42}\) The agreement expired at the end of February 2007 after the LRA withdrew from the talks in January, demanding a change in venue and the re-

\(^{35}\) Id. at 10–11. According to the International Crisis Group:

> The motivation behind the image remaking is probably mixed. Defining itself as a politically-motivated insurgency may be part of an attempt to get a better practical deal. But constructing a vague and expanding agenda that the military leaders have not shown much concern for in the past may as well be a tactic in a campaign to regroup. The LRA wants to escape the ICC warrants and the U.S. terrorism list, and the peace talks offer a forum for its leaders to cultivate an image as misunderstood freedom fighters.


\(^{39}\) Int’l Crisis Group, *supra* note 13, at 7; Cobban, *supra* note 32.

\(^{40}\) Int’l Crisis Group, *supra* note 13, at 3.

\(^{41}\) Id.

\(^{42}\) Id.
placement of Machar as chief mediator.\textsuperscript{43} However, on April 26, 2007 formal talks resumed in Juba, with representatives from South Africa, Kenya, Congo, Tanzania, and Mozambique acting as observers.\textsuperscript{44} Meanwhile, President Museveni has promised that once the LRA and the government sign a peace deal, the government of Uganda will work to have the ICC drop its charges against the LRA leaders.\textsuperscript{45} The government has also announced that it will establish a $340 million fund to help northern Uganda.\textsuperscript{46}

II. Transitional Mechanisms in Uganda

Even before the conflict in northern Uganda had no clear end in sight, literature on the subject had already begun to address issues of reintegration and reconciliation.\textsuperscript{47} This discussion merits attention because thousands of former members of the LRA have sought amnesty and returned to their communities.\textsuperscript{48} Well before the Juba peace process began in 2006, communities in northern Uganda had begun reintegrating former LRA rebels and working towards reconciliation through traditional conflict resolution mechanisms.\textsuperscript{49} The following section first examines Uganda’s Amnesty Act and the traditional Acholi practices and then analyzes how these two mechanisms alone may fall short of achieving reintegration and reconciliation.

A. Amnesty

1. The Contours of the Amnesty Act

Religious and cultural leaders in northern Uganda led the movement towards ending the conflict through amnesty rather than through

\textsuperscript{43} Id. at 3, 5.
\textsuperscript{44} Id. at 6.
\textsuperscript{46} Tristan McConnell, Uganda Sees Local Justice as Key to Peace, CHRISTIAN SCI. MONITOR, Sept. 8, 2006, at 6.
\textsuperscript{47} See sources cited supra note 1.
\textsuperscript{48} See Hovil & Lomo, supra note 1, at 7–8. According to the Ministry of Internal Affairs, at the end of January 2005, the number of applicants seeking amnesty was numbered at approximately 15,000. Id. at 7.
\textsuperscript{49} See Peace in Northern Uganda?, supra note 45, at 2; Afako, supra note 1, at 67 (noting that, as early as 2001, ex-combatants from the LRA participated in a mato oput ceremony and were welcomed back to the community).
military force. Because of their efforts, the Ugandan Parliament enacted the Amnesty Act of 2000, which aimed to break the cycle of violence in northern Uganda by encouraging combatants of various rebel groups to leave their armed groups without fear of prosecution. Since its passage into law, Ugandans have largely supported the Amnesty Act and perceived it as a crucial tool for ending the violence and promoting reconciliation. The Ugandan Parliament has repeatedly extended the expiration date of the Amnesty Act.

The Act provides amnesty for any Ugandan who has engaged in, or is engaging in, war or armed rebellion against the government of Uganda since January 26, 1986. Those granted amnesty under the Act receive “a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State.” Amnesty is available for any Ugandan who has actually participated in combat, collaborated with perpetrators of, committed a crime in furtherance of, or assisted or aided the conduct or prosecution of the war or armed rebellion. Thus, there are two broad categories of Ugandans eligible for amnesty: combatants who took up arms and non-combatants who were dependents, camp workers, porters, and other abducted persons. According to the Amnesty Act, the government will not prosecute or punish such persons if they report to the nearest local or central government authority, renounce and abandon involvement in the war or armed rebellion, and surrender any weapons in their possession. In renouncing involvement, the rebels’ declarations need not be onerous or specify the crimes for which they seek amnesty. After a rebel has completed the above steps, he or she becomes a “reporter”

---

50 Hovil & Lomo, supra note 1, at 3, 5. For a thorough analysis of the intervention of the Acholi Religious Leaders Peace Initiative, see Khadiagala, supra note 1.

51 Amnesty Act, 2000, pmbl. (Uganda); Pham et al., supra note 1, at 46.


53 Id.

54 Amnesty Act, ¶ 2.

55 ¶ 3.

56 Id. The Amnesty Act is silent as to the age of the person to be granted amnesty, but the Amnesty Commission has decided that only persons over twelve years old may qualify for amnesty because twelve is the age of criminal responsibility in Uganda. U.N. Disarmament, Demobilization, and Reintegration Resource Centre, supra note 52 (follow “DDR Strategy and Approach” hyperlink).


58 Amnesty Act, 2000, ¶ 4 (Uganda); Pham et al., supra note 1, at 47.

59 Pham et al., supra note 1, at 47.
whose file the Amnesty Commission reviews before a Certificate of Amnesty is issued and the process is completed.\textsuperscript{60} According to the United Nations Disarmament, Demobilization and Reintegration Center, the total number of potential reporters is in the tens of thousands, and as of December 2006, 21,000 reporters had received amnesty.\textsuperscript{61}

In addition, the Amnesty Act establishes the Amnesty Commission, whose objectives are “to persuade reporters to take advantage of the amnesty and to encourage communities to reconcile with those who have committed the offenses.”\textsuperscript{62} The Commission consists of a chairperson, a judge of the Ugandan High Court (or a person qualified to be a judge of the High Court), and six other “persons of high moral integrity.”\textsuperscript{63} The Commission’s functions specifically require it to monitor programs of demobilization, reintegration, and resettlement of reporters and to coordinate a program to sensitize the general public about the Amnesty Act.\textsuperscript{64} In 2005 the Commission began to run a Disarmament, Demobilization, and Reintegration Program (DDR), which involves sensitization and dialogue, the processing of reporters, social and economic reintegration, support for children and women, and monitoring and evaluation.\textsuperscript{65} The Commission fulfills its mandate

\textsuperscript{60} Amnesty Act, ¶ 4.
\textsuperscript{61} U.N. Disarmament, Demobilization, and Reintegration Resource Centre, supra note 52 (follow “DDR Strategy and Approach” hyperlink). Of the 21,000 reporters who received amnesty, 19,000 have received an initial reinsertion or resettlement kit. Id. Additionally, of the 21,000 reporters, 17,106 (79\%) were male and 4547 (21\%) were female, and 6718 were children between twelve and eighteen years of age. Id.
\textsuperscript{62} Hovil & Lomo, supra note 1, at 7 (quoting Amnesty Commission Handbook, § 3.11).
\textsuperscript{64} Amnesty Act, 2000, ¶ 9(a)–(b) (Uganda).
\textsuperscript{65} Int’l Crisis Group, Building a Comprehensive Peace Strategy for Northern Uganda 8 (2005); U.N. Disarmament, Demobilization, and Reintegration Resource Centre, supra note 52 (follow “Area of Activity” hyperlink). Sensitization and dialogue encourages reporters to return to their communities and also builds confidence between the reporters and the government by providing promotional materials in local languages, organization for community gatherings, support for reconciliation, and education to potential reporters about the advantages of reporting for amnesty. U.N. Disarmament, Demobilization, and Reintegration Resource Centre, supra note 52 (follow “Area of Activity” hyperlink). Under the direction of DDR, the processing of reporters involves identifying and screening potential reporters, issuing Certificates of Amnesty, providing gender sensitive psychosocial support, administering medical assessments, distributing in-kind and cash assistance, and providing counseling and referral services regarding reintegration. Id. The in-kind assistance packages consist of a mattress, blanket, jerry can, plastic basin, a \textit{panga} (a knife used for cutting vegetation), two saucepans, two sets of clothing, two hand hoes, and five kilograms each of bean seeds and maize seeds. Id. The cash assistance consists of US$122.00 as a general support fund, US$10.50 for medical costs, and US$10.00 for trans-
through implementing partners, which include national and international NGOs and international organizations, such as various U.N. agencies.\textsuperscript{66} According to the International Center for Transitional Justice, the Commission is efficient and well-functioning despite challenging circumstances.\textsuperscript{67} It also maintains good relationships with northern Uganda’s civil society.\textsuperscript{68} Finally, the Act creates a seven-member Demobilization and Resettlement Team (DRT) which functions at a regional level by establishing programs for decommissioning arms, demobilization, resettlement, and reintegration of reporters.\textsuperscript{69}

The Multi-Country Demobilization and Reintegration Program (MDRP) played a highly significant role in implementing the Amnesty Commission’s mandate, and therefore merits brief mention. The MDRP “is a multi-agency effort that supports the demobilization and reintegration of ex-combatants in Central Africa’s greater lakes region, including Uganda.”\textsuperscript{70} MDRP complements national and regional peace initiatives by providing financial and technical support for demobilization as well as social and economic reintegration.\textsuperscript{71} MDRP’s Uganda project aimed to reintegrate approximately 15,300 reporters into civilian life within the context of the Amnesty Act.\textsuperscript{72} The project supported

\textsuperscript{66} U.N. Disarmament, Demobilization, and Reintegration Resource Centre, supra note 52 (follow “Area of Activity” hyperlink).
\textsuperscript{67} Pham et al., supra note 1, at 47 (noting that the Commission is inadequately funded).
\textsuperscript{68} Id.
\textsuperscript{69} Amnesty Act, ¶¶ 11–13.
\textsuperscript{70} Multi-Country Demobilization and Reintegration Program, About Us, http://www.mdrp.org/about_us.htm (last visited Apr. 26, 2008). MDRP currently targets approximately 450,000 ex-combatants from Angola, Burundi, Central Africa Republic, Democratic Republic of Congo, Republic of Congo, Rwanda, and Uganda. Id. MDRP is a collaborative effort of over forty entities, including regional governments and organizations, the United Nations, and international financial institutions. Id. Financing for the MDRP comes from the World Bank as well as Belgium, Canada, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Sweden, the United Kingdom, and the European Commission. Id.
\textsuperscript{71} See id.
\textsuperscript{72} MULTI-COUNTRY DEMOBILIZATION AND REINTEGRATION PROGRAM, MDRP FACT SHEET 1 (2007), available at http://www.mdrp.org/PDFs/MDRP_UGA_FS_1007.pdf. MDRP demobilized and provided reinsertion support to 16,256 and 14,816 ex-combatants, respectively. Id. Most of the target group consisted of ex-LRA rebels and abductees, but the target group also included ex-members of the Allied Democratic Forces (ADF), West Nile Bank Front
the implementation of nearly every aspect of the Amnesty Commission’s activities. In addition, the project was involved in strengthening the Amnesty Commission as an institution by recruiting and training staff, installing a financial management system, and procuring equipment. A US $4.2 million MDRP trust fund grant contributed to relieving the funding shortages suffered by the Amnesty Commission. When the Commission officially launched this project in mid-2005, the backlog of reporters who had not received reinsertion assistance at the time when they were granted amnesty had climbed to nearly 11,200. Because of this fund, however, by August 2006 the Commission had delivered resettlement support to 11,851 reporters and had made preparations to support ninety-five percent of registered reporters by the end of October 2006. The MDRP formally closed its Uganda effort on June 30, 2007 after successfully meeting its target goals to strengthen the Amnesty Commission and provide support for the reintegration of approximately 15,000 ex-combatants.

2. The Shortcomings of the Amnesty Process

Despite the accomplishments of the Amnesty Commission, the Amnesty Act may fail to achieve reconciliation because the resettlement packages have been so contentious, basic operational problems have plagued the Commission, and because the Commission has not ex-


73 See id.
74 See id.
75 U.N. Disarmament, Demobilization, and Reintegration Resource Centre, supra note 52 (follow “Funding” hyperlink). By comparison, from 2002 to 2004, the Internal Organization for Migration (IOM), United States Agency for International Development, UNICEF, and the European Union (EU) provided support totaling US $694,004. Id. The UNDP provided US $300,000 in 2003 and US $553,774 from 2005 to 2006. Id.
78 See Multi-Country Demobilization and Reintegration Program, supra note 72, at 1. It is unknown whether the MDRP will launch another Ugandan effort in the future.
panded its functions to include a truth-telling process.\textsuperscript{79} The resettlement packages have been particularly contentious in northern Uganda and may foster resentment and hinder reconciliation unless the government handles them with greater sensitivity.\textsuperscript{80} According to the Refugee Law Project, the issue of resettlement packages has “become the primary focus . . . of the Amnesty Law for the majority of ex-combatants interviewed, and is the major issue when considering the current potential for reintegration into the region.”\textsuperscript{81} Many former rebels view the government’s untimely distribution of resettlement packages as a failure to honor its commitments to the reporters.\textsuperscript{82} In addition, resentment exists among some displaced, impoverished non-combatants who perceive the packages as perversely rewarding the former rebels for having committed atrocities.\textsuperscript{83} Communities sometimes fail to understand why the government offers assistance to the former rebels but not to the other community members they victimized.\textsuperscript{84}

The issue of resettlement packages has created divisions not only between former rebels and their communities, but also between the former rebels themselves.\textsuperscript{85} The treatment of former high-level rebels and average returnees is widely disparate.\textsuperscript{86} Many former LRA rebels have returned to their homes or IDP camps with delayed or nonexistent resettlement packages and with little further monitoring or follow-up by the government.\textsuperscript{87} Because reporters sometimes reintegrate into IDP camps, where the living conditions are quite harsh, a risk persists that such reporters will return to the bush.\textsuperscript{88} In contrast, some former high-level rebels receive twenty-four hour armed protection by the UPDF and live as guests in UPDF barracks or in a renovated hotel associated with the UPDF.\textsuperscript{89}

\textsuperscript{80} Human Rights Watch, supra note 15, at 38–39.
\textsuperscript{81} Hovil & Lomo, supra note 1, at 16.
\textsuperscript{82} See id.
\textsuperscript{83} Human Rights Watch, supra note 15, at 38–39.
\textsuperscript{84} Hovil & Lomo, supra note 1, at 14.
\textsuperscript{85} Id. at 18.
\textsuperscript{86} See Human Rights Watch, supra note 15, at 39 (noting that rebel commanders live in relative luxury compared to average reporters).
\textsuperscript{87} Id.
\textsuperscript{88} See U.N. Disarmament, Demobilization, and Reintegration Resource Centre, supra note 52 (follow “Area of Activity” hyperlink).
\textsuperscript{89} Human Rights Watch, supra note 15, at 39.
A second problem with the amnesty process is that resource issues have severely constrained the effectiveness of the Amnesty Commission.\textsuperscript{90} The release of World Bank funds, via the MDRP, was inexplicably delayed by approximately two years, during which time virtually no reintegration took place.\textsuperscript{91} Consequently, the credibility of both the Commission and the amnesty process has often been threatened by large backlogs of reporters who have not received reinsertion assistance.\textsuperscript{92} Long delays have plagued the ability of reporters to receive assistance packages and Certificates of Amnesty.\textsuperscript{93} This lack of final certificates is very troubling for LRA returnees because the certificates indicate compliance with the Amnesty Act and, thus, are seen as protection against future harassment and prosecution.\textsuperscript{94} Furthermore, “[s]uch failings are significant, as the peace process envisaged by the Acholi community depends heavily on the successful reintegration of the first wave of ‘reporters’ serving as an incitement to additional LRA fighters to desert and come forward.”\textsuperscript{95} The Commission’s credibility is particularly important given that LRA members may already mistrust the government’s amnesty offer because former Ugandan governments had previously offered amnesties, which had resulted in the mass murder of soldiers who had accepted the offers.\textsuperscript{96}

Finally, the Amnesty Act could fail to reach its potential as a tool for reconciliation because the Commission has not fulfilled its broader functions, including a truth-telling process.\textsuperscript{97} Under the Amnesty Act, the Commission must consider and promote appropriate reconciliation mechanisms in northern Uganda, encourage dialogue and reconciliation within the spirit of the Amnesty Act, and “perform any other func-

\textsuperscript{90} See Ginifer, supra note 79, at 17.

\textsuperscript{91} See id.

\textsuperscript{92} See U.N. Disarmament, Demobilization, and Reintegration Resource Centre, supra note 52 (follow “Area of Activity” hyperlink).

\textsuperscript{93} Willet Weeks, Pushing the Envelope: Moving Beyond “Protected Villages” in Northern Uganda 16 (2002).

\textsuperscript{94} Id.

\textsuperscript{95} Id. at 17.

\textsuperscript{96} See Citizens for Global Solutions, supra note 1, at 26. According to one scholar:

Part of the lukewarm response to the Amnesty by the rebels results from the history of mistrust. While the ARLP has tried to allay the fear of returning about retribution, there are past publicized cases of the disappearance of returnees. More recently, widespread reports of the army inducting former abducted children into its structures do not often help the [sic] sell the Amnesty.

\textsuperscript{97} See Human Rights Watch, supra note 15, at 38.
tion that is associated or connected with the execution of the functions stipulated in [the] Act.” In keeping with this provision, the Commission has supported the use of traditional cleansing ceremonies, thereby working to fulfill its mandate to promote appropriate reconciliation mechanisms. Yet this provision of the Amnesty Act also suggests that the Commission can, and should, adopt a truth-telling function or establish formal links with traditional conflict resolution mechanisms. A truth-telling process, perhaps in the form of a truth commission, would help to foster dialogue, which could promote reconciliation in northern Uganda and between northern Uganda and the rest of the country. Instituting such a process would also be in keeping with the language of the Act’s provisions, as well as the goal of fostering reintegration.

B. Traditional Justice and Reconciliation Mechanisms

Traditional Acholi leaders have strongly advocated the use of traditional justice and reconciliation ceremonies as mechanisms for reintegration in the post-conflict context. According to Acholi customs, when an offender declares that he or she has committed a wrong, the traditional conflict management system is triggered.

98 Amnesty Act, 2000, ¶ 9(c)–(e) (Uganda).
99 See Amnesty Act, ¶ 9(a), (e).
100 See ¶ 9(a), (c).
101 Baines et al., War-Affected Children and Youth in Northern Uganda: Toward a Brighter Future 4 (2006). The Amnesty Commission enjoys trust and respect on the local level, but “lacks the expertise and resources to capitalize on this good will by initiating discussions aimed at implementing new programs,” such as those that could incorporate traditional justice and reconciliation mechanisms. Id. at 26–27.
102 See Pham et al., supra note 1, annex 4, at 50. Although traditional chiefs did not have any legal status for most of the last century, their legitimacy was never destroyed and many continued to operate informally. See id.; Afako, supra note 1, at 65. In 1911, colonially appointed chiefs, known as rwodi kalam, replaced the traditional chiefs, known as rwodi. Afako, supra note 1, at 65. The 1965 Constitution abolished the system of traditional chiefs altogether. Pham et al., supra note 1, annex 4, at 50 n. 81. The 1995 Constitution, however, led to the revival of traditional institutions and allowed traditional leaders to exist throughout Uganda. Afako, supra note 1, at 65. Furthermore, in 2000, a civil society initiative reinstated many traditional leaders, including the Acholi Traditional Leaders Council and the head chief, known as lawi rwodi. See Pham et al., supra note 1, annex 4, at 50 (noting that rwodi elect the lawi rwodi); Afako, supra note 1, at 65. In general, the chiefs’ political independence gives them enhanced credibility in mediation and reconciliation. Afako, supra note 1, at 65.
103 Pham et al., supra note 1, annex 4, at 50.
104 See id.
offenses “may range from the criminal to the antisocial—violent acts, disputes over resources, and sexual misconduct—including behavior that would prevent the settlement of the dispute.”\textsuperscript{105} Clans must then cleanse the kir through rituals, which help to reaffirm communal values.\textsuperscript{106} Many argue that such traditional mechanisms for cleansing, justice, and reconciliation represent important channels for reintegration and reconciliation which can and should be widely adopted.\textsuperscript{107} The following details a cleansing ceremony, known as nyono tong gweno (the stepping on the egg ceremony), and two justice and reconciliation processes and ceremonies, known as mato oput (drinking of the bitter root), and gomo tong (the bending of the spears).\textsuperscript{108}

1. Three Ceremonies

a. Nyono Tong Gweno (Stepping on Eggs)

The cleansing ceremony, known as nyono tong gweno, or stepping on eggs, takes place upon the return of an individual who has spent a significant amount of time away from the community, particularly after having done something immoral or amoral.\textsuperscript{109} According to anthropologist Tim Allen, “[n]yono tong gweno is a ritual that just about anyone can perform, although it should be performed at someone’s own home.”\textsuperscript{110} The ritual cleanses foreign elements to prevent them from entering the community and bringing it misfortune.\textsuperscript{111} During the ceremony the returnee steps on a raw egg which symbolizes innocence, or something pure or untouched.\textsuperscript{112} Its crushed shell represents how foreign elements crush the community’s life.\textsuperscript{113} In addition, a twig from the opobo tree and the layibi, which is the stick for opening the granary, also accompany the ceremony.\textsuperscript{114} The twig symbolizes cleansing because soap is traditionally made from the opobo tree and the layibi marks

\textsuperscript{105} Id.
\textsuperscript{106} Id. at 50–51.
\textsuperscript{107} For literature advocating the use of traditional mechanisms, see generally Pain, supra note 3, at 2; Hovil & Lomo, supra note 1, at 26; Hovil & Quinn, supra note 3, at 18–19.
\textsuperscript{108} See Trial Justice, supra note 1, at 166.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Pham et al., supra note 1, annex 4, at 51.
\textsuperscript{112} Id.; Mark Lacey, Victims of Uganda Atrocities Choose a Path of Forgiveness, N.Y. Times, Apr. 18, 2005, at A1.
\textsuperscript{113} Trial Justice, supra note 1, at 166.
\textsuperscript{114} Id.
the individual’s return to eat where he or she has eaten before.\textsuperscript{115} These individual cleansing ceremonies have been adapted to the current context in northern Uganda and now routinely take place whenever former LRA members return to their communities.\textsuperscript{116} Most agencies that receive and reintegrate former combatants ensure that the somewhat bureaucratic amnesty process also incorporates traditional ceremonies, which are usually performed at the agencies.\textsuperscript{117}

b. Mato Oput (\textit{Drinking of the Bitter Root})

In his 1997 report, \textit{The Bending of Spears}, sociologist Dennis Pain identified \textit{mato oput} as an important mechanism for fostering peace and justice in northern Uganda.\textsuperscript{118} Pain’s report has since generated much speculation about \textit{mato oput}’s exact contours and current applicability.\textsuperscript{119} Because Pain appears to have conflated \textit{mato oput} and \textit{gomo tong}, this article draws instead upon the field research of other scholars and NGOs, including a relatively recent and highly detailed report by the Liu Institute for Global Issues and the Gulu District NGO Forum (Liu Institute).\textsuperscript{120} As detailed below, \textit{mato oput} is both a process and a ceremony which takes place in the context of an intentional or accidental killing.\textsuperscript{121} This long and sophisticated process of reconciliation, which may last for weeks, months, or even years, involves a separation of the affected clans, mediation, and payment of compen-

\textsuperscript{115} Id. For another example of this cleansing ceremony, see Lacey, \textit{supra} note 112 (noting that after stepping in a freshly cracked egg, brushing against a \textit{pobo} tree, and stepping over a pole, the returnees were welcomed back to the community). In the case of returning children, the \textit{nyono tong gweno} ceremony is sometimes followed by a “washing away the tears” ceremony. Pham \textit{et al.}, \textit{supra} note 1, annex 4, at 51. In this ceremony, which symbolizes the “washing away the tears shed over the child,” the child’s parents slaughter a goat and pour water on the roof of the home where the child will live. Id. (noting that because many cannot afford to slaughter a goat, the ceremony is not very common).

\textsuperscript{116} See \textit{Trial Justice}, \textit{supra} note 1, at 165–66.

\textsuperscript{117} See Afako, \textit{supra} note 1, at 65.

\textsuperscript{118} See Pain, \textit{supra} note 3, at 2.

\textsuperscript{119} See \textit{Roco Wat I Acoli}, \textit{supra} note 1, at 54. Pain describes \textit{mato oput} as involving an acceptance of responsibility, indication of repentance, and compensation. Pain, \textit{supra} note 3, at 82. Reconciliation occurs with the simultaneous shared drinking of bitter root from a common calabash and with the bending of two spears. Id. Pain argues that the donor community should fund the payment compensation required by \textit{mato oput}. Id. at 2–3. He generally champions traditional Acholi mechanisms for the resolution of conflict and violence as “among the highest practices anywhere in the world” and “far beyond the limited approaches of conservative western legal systems and formal amnesty for offences against the state.” Id. at 2.

\textsuperscript{120} See Pain, \textit{supra} note 3, at 82. See generally \textit{Roco Wat I Acoli}, \textit{supra} note 1.

\textsuperscript{121} Id. at 54.
tion. The process might not begin until as many as ten or twenty years following the killing, after misfortunes have befallen the offending clan and social pressure has motivated the perpetrator, or the perpetrator’s family, to seek reconciliation.

The first step in the process of mato oput involves a separation of the affected clans which serves as a cooling off period to prevent immediate revenge killings. This separation requires the complete suspension of relations between the families of the perpetrator and the victim, during which time the clans are forbidden to intermarry, trade, socialize, or share food and drink. Such separation is significant because of the communal nature of Acholi culture, wherein families from various clans share food, water, land, and social relations. The second step in mato oput involves a mediation process, which allows the affected families to create an account of the facts which emphasizes the perpetrator’s voluntary confession, including the motives, the circumstances of the crime, and an expression of remorse. In Acholi culture, until the perpetrator confesses and seeks rectification, the spirit of the dead may plague the perpetrator’s family through nightmares, sickness, and death. Finally, in the last step, the family of the perpetrator pays compensation raised through the contributions of clan members. Such compensation must be “affordable, so as not to prevent the restoration of relations, and will usually consist of cattle or money.” After this process, a day-long mato oput ceremony takes place. The local chief, rwot moo, presides over this ceremony, which brings together the clans of the perpetrator and the victim in order to re-

122 See Sverker Finnström, Living with Bad Surroundings: War and Existential Uncertainty in Acholiland, Northern Uganda 297 (2003) (reporting that one ceremony lasted for ten years); Roco Wat I Acoli, supra note 1, at 54–56.
123 See Finnström, supra note 122, at 297; Roco Wat I Acoli, supra note 1, at 55.
124 Roco Wat I Acoli, supra note 1, at 55.
125 Finnström, supra note 122, at 297; Roco Wat I Acoli, supra note 1, at 55.
126 Roco Wat I Acoli, supra note 1, at 55.
127 See id. at 55–56.
128 Id. at 55.
129 Id. at 56.

To compensate for a life (culo kwor), can mean several forms of compensation, people pointed out. For example, it can also describe the nation’s responsibility to pay pensions or to compensate economically the family of a person who dies on duty. Ultimately this is the responsibility of the president, people said.

Finnström, supra note 122, at 296.
130 Pham et al., supra note 1, at 51.
131 See Finnström, supra note 122, at 291.
establish harmony. Communal involvement in the ceremony as well as the process of *mato oput* reflects the Acholi belief that the perpetrator’s offense affects the whole clan. The *mato oput* ceremony consists of an elaborate set of final, symbolic acts which conclude the reconciliation process and restore unity between the parties. Although different clans follow a similar process leading up to the ceremony, the ceremony itself varies widely across clans. Despite these variations, the following symbolic acts generally take place during a *mato oput* ceremony.

First, the offending party beats a stick to broadly symbolize *mato oput*’s restorative purpose and then runs away to signify acceptance of guilt for the murder. Second, the parties cut in half a sheep and a goat and exchange opposite sides. The offending clan supplies the sheep, which represents the *cen*, or misfortune, haunting the clan of the offender, while the injured clan supplies the goat, which symbolizes unity and a willingness to forgive and reconcile. Third, the clans eat *boo mukwok*, spoiled *boo*, or local greens, which signifies that tension between the clans persisted long enough for food to spoil, and also symbolizes the clans’ readiness to reconcile after this long period of time. Fourth, a representative from each party drinks *oput*, bitter

---

132 See Pham et al., supra note 1, at 51; Roco Wat I Acoli, supra note 1, at 54. Even in the midst of war, this reconciliation ritual has taken place in Acholiland to settle clan feuds. Finnström, supra note 122, at 296.

133 Roco Wat I Acoli, supra note 1, at 54. Also, according to Finnström, “compensation and reconciliation rather than revenge or blood vengeance is the institutionalized Acholi way of handling disputes, homicides and unnatural deaths.” Finnström, supra note 122, at 291.

134 Id. at 57–58. Scholar Tim Allen describes *mato oput* as follows: “[A] ritual performed to reconcile social divisions after a case of killing. It deals with the consequences of homicide. Those who play the main part in performing it are the wrongdoer and a representative of the family he or she has harmed (and clan elders).” Trial Justice, supra note 1, at 133.

135 Roco Wat I Acoli, supra note 1, at 56. According to the Liu Institute, “[t]here is need for further documentation of these differences if *Mato Oput* is to be applied communally by Ker Kwaro in the context of the new conflict.” Id. Ker Kwaro is an executive institution of the head Acholi Chief comprised of nineteen *Rwodi* and Elders, a youth representative, and two women representatives. Id at 125.

136 Id. at 57. The Liu Institute provides several differing accounts of the precise ways in which the beating of the stick symbolizes restoration. Id. According to one elder, “[t]he beating of the stick illustrates to the spirit of the murdered person that he or she is cared for.” Id. Another elder noted that the stick symbolizes “truth.” Id.

137 Id. at 10, 57. An elder stated that, “the sheep and goat represent the two parties prior to *Mato Oput* (separate entities), and the cutting and mixing symbolize the uniting of the two parties.” Id. at 57. “In another account, however, the sheep was said to symbolize humility, because a sheep is a humble animal.” Id.

138 Id. at 57.
root, from a calabash. The root represents the bitterness between the clans, and drinking it symbolizes washing away the bitterness between them. Fifth, both parties cook and eat the acwiny, liver, of the sheep and the goat to show that their blood has been mixed and united and to symbolically wash away the bitterness within the blood of the human liver. One of the last rituals involves consuming odeyo, the remains of a saucepan, which is thought to free the parties to eat together again. The ceremony is not complete until the parties have eaten all of the food prepared for the day; finishing the food means that no bitterness remains between the two clans.

c. Gomo Tong (the Bending of the Spears)

Gomo tong, or the bending of the spears, is a peace-making ceremony, which marks the resolution of violent conflict. Sverker Finnström describes gomo tong as “an inter-ethnic reconciliation ritual” which does not involve economic compensation. The parties make vows that the killings will not be renewed and each party then bends a spear into the shape of a “U” and gives it to the other, thereby signaling that renewed violence will “turn back on them.” The performance of this ritual is reportedly very rare and may have been last performed when the Acholi people and the people of the West Nile reconciled in the 1980s after the fall of Idi Amin.

---

139 Id.
140 Roco Wat I Acoli, supra note 1, at 57. According to a report from the International Center for Transitional Justice, “[r]epresentatives from the perpetrator’s and victim’s clans kneel together, with their hands behind them and their foreheads touching, to drink the concoction . . . . Sometimes all members of a clan will drink (in pairs) until the juice is finished.” Pham et al., supra note 1, at 51. The report also noted that the root’s bitterness “symbolizes the nature of the crime and the loss of life.” Id.
141 Roco Wat I Acoli, supra note 1, at 58.
142 Id.
143 Id. According to some elders, “Mato Oput was not formally completed until the life lost was replaced with a new one. Historically, a young girl from the offending clan was given as compensation to the victim’s clan for marriage.” Id. at 56.
144 See Trial Justice, supra note 1, at 133.
145 Finnström, supra note 122, at 291, 298.
146 War and Justice, supra note 1, at 67; Finnström, supra note 122, at 298–99.
147 See Trial Justice, supra note 1, at 133; War and Justice, supra note 1, at 86; Finnström, supra note 122, at 298–99. A particularly famous use of a gomo tong reconciliation ceremony occurred between the Payira and Koch clans in order to protect the clans against invading colonialists. See Trial Justice, supra note 1, at 133; Finnström, supra note 122, at 298. Another use occurred during the Amin years, from 1971 to 1979, when Acholi people were targeted by state violence. See Finnström, supra note 122, at 298. Sverter Finnström explains that, after Amin’s fall, revenge killing of people living in the
2. Problems with the Application of Traditional Mechanisms

Although Acholi chiefs have advocated the use of traditional mechanisms, and the Amnesty Commission has supported their use, such mechanisms may fall short of significantly promoting justice.\textsuperscript{148} The application and relevance of such ceremonies to the atrocities committed by the LRA is questionable for a variety of reasons, including the lack of knowledge among the Acholi of \textit{mato oput}, the degree to which the Acholi capacity to forgive has been overestimated, and the unusually severe nature of this conflict.\textsuperscript{149}

\textbf{a. Lack of Knowledge of Mato Oput}

Widespread firsthand knowledge of \textit{mato oput} is lacking among the Acholi.\textsuperscript{150} According to Tim Allen, most local knowledge of \textit{mato oput} and \textit{gomo tong} is secondhand and relatively few elders have actually performed \textit{mato oput}.\textsuperscript{151} Not only is there a general absence of systematic documentation of \textit{mato oput}, but there is also wide variation in \textit{mato oput} practices and ceremonies throughout Acholiland, which thereby exacerbates the need for such documentation.\textsuperscript{152} Also, because the Acholi no longer widely practice \textit{mato oput}, younger generations are unable to fully understand \textit{mato oput}.\textsuperscript{153} Furthermore, those who are unfamiliar with the rituals generally do not gain exposure to them because they are typically held at reception centers in district centers where only small audiences bear witness.\textsuperscript{154} In addition, non-Acholis in northern Uganda and southern Sudan have also been greatly affected by the LRA conflict since 2002, but have relatively little knowledge of Acholi traditional practices and may question their relevance to them.\textsuperscript{155} In the context of

\textsuperscript{148} See Baines \textit{et al.}, supra note 99, at 27; Pham \textit{et al.}, supra note 1, annex 4, at 50.
\textsuperscript{149} See Roco Wat \textit{i Acoli}, supra note 1, at 66; Trial Justice, supra note 1, at 166; \textit{War and Justice}, supra note 1, at 86.
\textsuperscript{150} \textit{War and Justice}, supra note 1, at 86.
\textsuperscript{151} \textit{Id.} (noting that \textit{gomo tong} has likely only occurred once or twice within living memory).
\textsuperscript{152} See Roco Wat \textit{i Acoli}, supra note 1, at 65–66.
\textsuperscript{153} \textit{Id.} at 65.
\textsuperscript{154} See Int’l Crisis Group, supra note 65, at 10.
\textsuperscript{155} See Human Rights Watch, supra note 15, at 56 (“The Langi of Lira district and Teso in Soroti district to the south and southeast of Gulu respectively have been greatly affected by the LRA conflict since 2002, as have southern Sudanese, most of whom are non-Acholi.”).
this lack of knowledge of *mato oput*, the newly re-established *rwodi*, traditional chiefs, have allocated a different or more generalized meaning to *mato oput*, which now sometimes refers to *nyono tong gweno* or to the ceremonies performed by the *rwodi moo* to promote forgiveness and the re-integration of former LRA combatants.  

b. *Overestimation of the Acholi Capacity to Forgive*

The efficacy of these ceremonies and the Acholi capacity to forgive may have been inflated or overestimated by researchers, journalists, humanitarian aid organizations, Acholi elders, and Catholic leaders in the region.\(^{156}\) According to the received wisdom, these traditional mechanisms reflect the special capacity of the Acholi people to forgive and to reintegrate offenders into society.\(^{158}\) International aid agencies have tended not to question such portrayals of local beliefs and practices by Acholi leaders.\(^{159}\) Also, Catholic leaders in northern Uganda have very successfully promoted the idea of forgiveness through NGOs and the local council system and have thereby played a significant role in pressuring the Ugandan government to pass and implement the Amnesty Act.\(^{160}\) Additionally, the perception that children, who are less responsible for their actions, have largely perpetrated this war has generally reinforced the promotion of forgiveness.\(^{161}\)

Assertions about Acholi views on forgiveness should be closely questioned, however, as attitudes towards forgiveness, amnesty, and criminal justice are more inconsistent than many have often claimed.\(^{162}\) First, the very existence of *mato oput* does not necessarily signify that Acholi conceptions of forgiveness are unique.\(^{163}\) Mechanisms for cleansing, social healing, and dispute settlement are not unusual within this region of Africa and are as likely to concern setting aside or forgetting offenses as recalling and forgiving them.\(^{164}\) Second, in recent years,

---

156 Trial Justice, *supra* note 1, at 133–34.

157 See *id.* at 129, 132, 137, 140, 164. Specifically, Allen notes that, “[s]ome researchers, however, seem to have been carried away by their enthusiasm for them, treating them as ‘a kind of magic bullet to solve any kind of conflict.’” *Id.* at 164 (quoting Caritas, Traditional Ways of Preventing and Solving Conflicts in Acholi 12 (2005)).

158 See *id.* at 129 (noting that the perspective had become “institutionalized” and was expressed at almost every public meeting discussing the event).

159 See *id.* at 138.

160 *Id.* at 137.

161 See Trial Justice, *supra* note 1, at 138.

162 *Id.* at 131.

163 See *id.* at 166.

164 See War and Justice, *supra* note 1, at 84.
academics, NGOs, human rights activists, and journalists have begun to challenge the widely accepted notion that the Acholi people have a “special capacity to forgive.” A survey by the International Center for Transitional Justice shows that community leaders and victims are divided on the topics of justice, accountability, and reconciliation. Victims interviewed by Human Rights Watch apparently “did not agree with the prospect of having the LRA leaders forgiven . . . but instead wanted justice, even retribution.” Many former child soldiers have reportedly returned from the bush to find themselves homeless because “[t]hey cannot go back to villages where people recall the night they returned with the rebels and massacred their relatives and neighbors—and sometimes, even, their own parents.” While Acholis “know that all but a few of the oldest commanders were themselves once abducted children, their pity for the rebels as victims is overlaid with hatred and fear of them as victimizers.” Human Rights Watch asserts that even if the community has accepted perpetrators back into the community, individual victims may not want to forgive the perpetrators of serious crimes.

Just as assumptions about Acholi notions of forgiveness merit scrutiny, so do claims about Acholi opposition to criminal justice. Many have seized on the contrasting approaches of traditional Acholi mechanisms and the ICC and have emphasized Acholi support for the former and opposition to the latter. Tim Allen found in his field research that most of his informants in IDP camps did not generally reject international criminal justice, but instead expressed a willingness to see Kony and his senior commanders prosecuted, coupled with con-

---

165 Id. at 65–66. Allen found that interviewees often contradicted their initial statements concerning the need for forgiveness by expressing “much greater enthusiasm for prosecution and punishment than other researchers have suggested.” Id. at 66. He concluded that:

[A]rguments about Acholi forgiveness need to be closely interrogated, and certainly not taken at face value. In the course of our fieldwork we became concerned that there was too ready an acceptance of the idea that the Acholi people have a special or even unique capacity to forgive those who abuse them.

Id. at 65–66.

166 PHAM ET AL., supra note 1, at 23–27.
167 HUMAN RIGHTS WATCH, supra note 15, at 40.
168 Thernstrom, supra note 13.
169 Id. at 36.
171 TRIAL JUSTICE, supra note 1, at 129–30.
cerns about the security implications of their arrest warrants. Allen found that many people seemed to be embarrassed about wanting accountability, revenge, or compensation and his informants were generally only willing to talk of such desires in private. Allocation of responsibility by an external actor seemed more appealing than was assumed and mato oput did not garner particularly widespread enthusiasm. Also, Allen very significantly notes that he has “not yet come across any confirmed instances of mato oput being performed to reinte grate a former LRA combatant, although this is often claimed to be taking place.” Ultimately, perhaps the people of northern Uganda require some of the same conventional legal mechanisms as those enjoyed by people living in more developed States.

c. Mato Oput May Not Apply to These Circumstances

Finally, mato oput, in its traditional form, does not readily apply to the mass atrocities committed by the LRA. First, mato oput ceremonies may not be sufficient given the scale and nature of the LRA atrocities. Mato oput traditionally applied only to less serious cases of manslaughter, not to wanton killing, rape, or mutilation or a killing between enemies during a war. According to Tim Allen, even those promoting the use of mato oput acknowledge that it was a mechanism used for individual cases, not for collective dispute settlement. Also, the nature of the atrocities committed by the LRA often precludes reconciliation between the perpetrator’s and victim’s clans because of the perpetrator’s inability to identify his or her victim and thereafter to confess, ask for the forgiveness of, and pay compensation to the victim’s clan. Perpetrators are typically unaware of the victim’s identity or clan or the location of the crime because the LRA’s movement around the three districts of northern Uganda often leaves its abductees unfamiliar with the

172 Id. at 160. Allen further notes that in his experience, the majority of Acholi, Madi, Langi, and Teso people affected by the conflict want the perpetrators in the LRA and the UPDF to be held legally accountable in some manner. Id. at 167.

173 Id. at 138–39.

174 Id. at 147, 167.

175 Id. at 165.

176 Trial Justice, supra note 1, at 168.

177 See Roco Wat I Acoli, supra note 1, at 66.

178 See id.

179 See id. at 67.

180 War and Justice, supra note 1, at 86.

181 See Roco Wat I Acoli, supra note 1, at 66.
people and the places they attack. Additionally, because the atrocities committed during this conflict are new to the Acholi culture, parties may be unsure as to what type of compensation is necessary for reconciliation, or whether compensation for these types of crimes is possible at all.

The second problem is that the ongoing nature of this conflict also obstructs the application of *mato oput* and *gomo tong*. *Mato oput* may not apply to the current situation in northern Uganda because a conflict must end before reconciliation may be fostered through *mato oput*. Because *mato oput* and *gomo tong* must consist of a mutual act of reconciliation, which involves all parties in a profound way, the LRA would have to come out of the bush and participate in the ceremony as a group. Therefore, so long as a core component of the LRA remains in the bush and the peace has not been finalized, *mato oput* may not be able to foster sustainable peace. Also, the ongoing conflict has largely caused a persistent lack of resources, which has posed a major obstacle to the completion of *mato oput* in northern Uganda. The offending parties have not been able to pay compensation because people living in displacement camps do not have access to income and cannot raise the funds as their family or clan members usually suffer from the same levels of poverty.

A final challenge is that the ethnic identity of the perpetrators in this conflict, as well as their willingness to reconcile, will significantly affect *mato oput*’s applicability. UPDF perpetrators come from different ethnic groups throughout Uganda and their crimes fall under separate Ugandan legislation to which traditional justice does not apply, unless they are Acholi. The UPDF’s role in this conflict also significantly complicates the reconciliation process because the peaceful settlement of this conflict through *mato oput* would require the Ugandan government to acknowledge the offenses committed by the Ugandan army. Reconciliation through *mato oput* would therefore depend

---

182 See id.
183 See id. at 67.
184 See id. at 66.
185 See id.
186 Finnström, *supra* note 122, at 299–300; Trial Justice, *supra* note 1, at 166.
187 Roco Wat I Acoli, *supra* note 1, at 67.
188 See id. at 65.
189 Id.
190 See id. at 67.
191 Id.
on the willingness of high-ranking UPDF, as well as LRA, leaders to admit responsibility for offenses which they ordered or committed themselves.\textsuperscript{193} Meanwhile, the ethnic identity of LRA perpetrators poses its own problems.\textsuperscript{194} Because the LRA has abducted children from neighboring districts with different ethnic groups, some of the LRA perpetrators in this conflict are non-Acholi who may hold different cultural beliefs which do not include \textit{mato oput}.\textsuperscript{195}

Altogether, these problems suggest that traditional chiefs would have to educate the Acholi population about these ceremonies and also adapt them to the present circumstances. These challenges are not necessarily insurmountable, but they do indicate that other non-traditional mechanisms may be necessary in guiding the reconciliation process among the Acholi. The following section examines alternative mechanisms which Uganda could implement to assist in its transition from conflict to peace.

\textbf{III. Alternative Transitional Mechanisms Which Uganda Could Implement}

This section looks to the experiences of other post-conflict African states and explores alternative transitional mechanisms which the government of Uganda could pursue to promote peace and reconciliation in the region. This article proceeds under the assumption that other mechanisms are necessary in Uganda because the amnesty and traditional justice and reconciliation mechanisms are insufficient by themselves.\textsuperscript{196} With only the amnesty and the traditional mechanisms in place, unrealistic demands of forgiveness may be placed on victims who may never receive compensation or an acknowledgment of guilt from perpetrators. While the Amnesty Act currently does not offer reparations for victims, or foster a dialogue, or truth-telling process, the traditional mechanisms also have not, as of yet, begun to foster those processes in a robust way.\textsuperscript{197} The following discusses the approaches previously taken in Uganda, Sierra Leone, South Africa, and Rwanda, and then explains how truth-telling and compensation could play important roles in promoting peace and reconciliation in northern Uganda.

\textsuperscript{193} \textit{Roco Wat I Acoli}, supra note 1, at 67.
\textsuperscript{194} \textit{See id.} at 67.
\textsuperscript{195} \textit{Id.}
\textsuperscript{196} \textit{See supra} text accompanying notes 79–101, 150–197.
\textsuperscript{197} \textit{See Amnesty Act, 2000} (Uganda); \textit{Pham et al., supra} note 1, annex 4, at 51.
A. Truth-Telling Process

In a post-conflict northern Uganda, a truth commission could play a critical role in the region’s transition from civil war to peace. Despite the often inherently difficult and controversial nature of truth commissions, as well as the checkered history of past truth commissions in Uganda, many of the basic goals of truth commissions would be particularly applicable in Uganda today. In addition, the specific features of this conflict would heighten the potential utility of a Ugandan truth commission. Commentators, as well as local leaders, appear to have widely overestimated the Acholi capacity to forgive the perpetrators of this conflict, who range from abducted children to UPDF soldiers to LRA rebels. Neither the amnesty process nor the traditional justice and reconciliation mechanisms adequately respond to these realities in northern Uganda.

A discussion of the merits of a Ugandan truth commission first warrants a brief sketch of what the basic features of such a commission might be. After the conflict is officially over, a Ugandan truth commission would investigate abuses by both the LRA and UPDF in northern Uganda from the time President Museveni came to power in 1986 up until the present day. The government of Uganda would officially sanction this commission, which would operate for a relatively short amount of time, such as two years, after which the commission would produce a report. If the Ugandan Parliament were to leave the Amnesty Act untouched, then amnesty would not be formally linked to the truth-telling process as it was in South Africa. A Ugandan commission could potentially be given the power to grant amnesty based on the testimony of individuals before the commission, however, which might encourage more perpetrators to participate in the truth commission. Presumably this commission could successfully operate parallel to the ICC, as was the case in Sierra Leone, where the Special Court for Sierra Leone (Special Court) and the Truth and Reconciliation Com-

198 See Priscilla Hayner, Unspeakable Truths: Facing the Challenge of Truth Commissions 23 (2002); infra text accompanying notes 234–256.
199 See supra text accompanying notes 159–178.
201 See Hayner, supra note 198, at 74.
202 See id. at 41.
203 See id.
mission (TRC) existed side by side. Ideally, a Ugandan commission would function as a central component of northern Uganda’s transition from civil war to peace, alongside, though not necessarily in conjunction with, the amnesty process and trials at the ICC.

1. Reasons Why Uganda Should Have a Truth Commission

Both the process and the product of a truth commission in Uganda could play an important role in Uganda’s transition for a wide range of reasons. First, a truth commission would promote sanctioned fact finding by discovering, clarifying, and formally acknowledging the atrocities and abuses which have taken place in northern Uganda for over two decades. Interviews with victims would allow for a detailed accounting of the conflict in the region over the course of this period. According to Priscilla Hayner, “[t]he detail and breadth of information in a truth commission report is usually of a kind and quality far better than any previous historical account, leaving the country with a written and well-documented record of otherwise oft-disputed events.”

Second, a truth commission would respond to the needs of victims in northern Uganda. Without a truth-telling mechanism in Uganda, the amnesty process could place unrealistic demands on victims and unnecessarily sacrifice the truth for peace. Unlike criminal prosecutions, such as those at the ICC, the primary focus of a Ugandan truth commission would be on the victims rather than on the specific acts of the perpetrators. By taking the testimony of victims

---


205 Alternatively, apart from a truth commission, the Amnesty Commission could encourage a more informal truth-telling process involving greater dialogue between victims and perpetrators. See Amnesty Act, 2000, ¶ 9(c)–(e) (Uganda). The Commission could work to ensure that more dialogue and participation takes place during the traditional ceremonies. ¶ 9(c). For example, instead of holding the cleansing ceremonies at the reception centers, as is typical, the Commission could facilitate meetings between the communities and the former combatants. See INT’L CRISIS GROUP supra note 65, at 10. This could provide an opportunity for combatants to express remorse and for victims to hear the truth. See id.

206 Hayner, supra note 198, at 24–25.

207 Id. at 25.

208 Id.

209 See id. at 28.

210 See Hovil & Lomo, supra note 1, at 27.

211 Hayner, supra note 198, at 28.
and witnesses, holding public hearings, and publishing a report, the
commission would provide victims with a public voice.\textsuperscript{212} It would also
be possible for a truth commission to serve victims’ needs through a
reparations program.\textsuperscript{213} Additionally, the Acholi population appears
to desire a truth commission even though many Acholi victims may
already know the truth about what happened and who was responsi-
ble.\textsuperscript{214} A survey by the International Center for Transitional Justice
reveals that the population of northern Uganda would, in fact, be
overwhelmingly in favor of a truth-telling process.\textsuperscript{215} While only
twenty-eight percent were aware of the existence of truth commissions
in other countries, such as in Sierra Leone and South Africa, ninety-
two percent said that Uganda needed a truth-telling process.\textsuperscript{216} Fur-
thermore, eighty-four percent said that the population of northern
Uganda should remember the legacy of past abuses.\textsuperscript{217} Although the
population already desires a truth-telling process, a formal process is
necessary because people fear openly discussing the war and experi-
ence shame in association with the atrocities that have taken place.\textsuperscript{218}
Thus, while a truth commission would not necessarily provide victims
in northern Uganda with a “new truth,” it could still play a valuable
role by creating a forum for such truth-telling, and by “formally rec-
ogniz[ing] a truth they may already . . . know.”\textsuperscript{219}

Finally, a truth commission could play an important role in
Uganda by outlining the responsibility of the government of Uganda
for the long-lasting nature of the conflict and for the abuses of the

\textsuperscript{212} Id.

\textsuperscript{213} See infra text accompanying notes 309–375.

\textsuperscript{214} See Pham et al., supra note 1, at 35. Priscilla Hayner further writes:

This sense of victims already knowing the truth, and thus gaining little new
truth from a commission, is compounded by the unfortunate fact that few vic-
tims who provide testimony to truth commissions are able to learn new in-
formation about their own case. . . . Most of the thousands of testimonies are
recorded exactly as reported by the deponents and used for a statistical analy-

\textsuperscript{215} See Pham et al., supra note 1, at 35.

\textsuperscript{216} Id. (noting that forty-three percent would speak to anyone, twenty-six percent to
the government, nine percent to religious leaders, and six percent to traditional leaders).

\textsuperscript{217} Id. (“The three top rationales for remembrance were to honor the victims (44 per-
cent), prevent the violence from happening again (36 percent), and establish a historical
record (22 percent).”).

\textsuperscript{218} Hovil & Lomo, supra note 1, at 14.

\textsuperscript{219} Hayner, supra note 198, at 26.
The commission could then recommend reforms, most likely for the military and the police. A truth commission would be well-positioned to undertake such an assessment because of its status as an institution independent of those under review and because of its ability to base its assessment on a detailed, well-developed record. While the commission’s recommendations for reform would likely not be mandatory, they could still provide useful guidance for change, depending on the political will of the Museveni government and the pressure applied by the international community. Such an assessment and prescription could play a critical role in Uganda’s transition given the allegedly widespread abuses by UPDF forces and the relative impunity they have enjoyed. As mentioned above, UPDF soldiers have reportedly raped women and girls, committed extrajudicial execution and torture, recruited former LRA child soldiers into the UPDF, and forcibly displaced civilians for reasons linked to the conflict. Yet UPDF forces have not been held accountable for these atrocities to any significant extent by the government of Uganda. In addition, the ICC chose to issue arrest warrants only for the top leaders of the LRA, despite the well-known abuses of the UPDF. While these UPDF perpetrators will most likely never face criminal prosecutions, national or international, the government of Uganda could at a minimum engage in security sector reform to promote a sustainable peace in northern Uganda. A truth commission would be uniquely well-positioned to point Uganda in the direction of such reform.

220 Id. at 29.
221 See id.
222 See id.
223 See id. at 29–30.
226 See Human Rights Watch, supra note 225, at 41 (noting that the investigations, when initiated at all, have sometimes not been disclosed to the public); Human Rights Watch, supra note 15, at 41–48.
2. Potential Problems Facing a Ugandan Truth Commission

Any thorough exploration of a possible truth commission in Uganda should mention the potential pitfalls, especially given that a truth commission in Uganda would most likely co-exist beside an amnesty process as well as ICC trials in The Hague. Additionally, as Hayner writes:

The task of these truth bodies will never be easy. Truth commissions are difficult and controversial entities; they are given a mammoth, almost impossible task and usually insufficient time and resources to complete it; they must struggle with rampant lies, denials, and deceit and the painful, almost unspeakable memories of victims to uncover still-dangerous truths that many in power may well continue to resist.

Not only have two prior truth commissions in Uganda encountered serious problems, but the TRC in Sierra Leone has met with its own share of difficulties, as well as successes. The following therefore touches upon the challenges faced by these commissions in Uganda and Sierra Leone, with a view to how a Ugandan truth commission might structure itself to avoid or to deal with such challenges.

a. The Experiences of Prior Truth Commissions in Uganda

In June 1974, President Idi Amin Dada established the Commission of Inquiry into the Disappearance of People in Uganda in response to pressure to investigate disappearances effected by Ugandan military forces since he came into power in January 1971. The Commission consisted of a Pakistani judge as the chair, two Ugandan police superintendents, and a Ugandan army officer. Although the Commission’s powers allowed it to compel witness testimony and to call for the production of evidence, many government sectors, including the military police and intelligence, blocked access to information on the disappearances. The Commission held hearings, which were generally public, during which it heard the testimony of 545 witnesses.

---

229 See Amnesty Act, 2000 (Uganda); Press Release, Int’l Criminal Court, supra note 5.
230 Hayner, supra note 198, at 23.
231 See infra text accompanying notes 257–308.
233 Hayner, supra note 198, at 51; Carver, supra note 232, at 397.
234 Hayner, supra note 198, at 51–52; Carver, supra note 232, at 397–98.
and documented 308 disappearances.\textsuperscript{235} Though the Commission criticized the government of Amin, assigned responsibility for the abuses, and issued recommendations for reform of the police and security forces, the Commission had little impact on the abusiveness of Amin’s forces, because little commitment to change accompanied the establishment of the Commission.\textsuperscript{236} Unsurprisingly, President Amin neither published the report nor implemented its recommendations.\textsuperscript{237} Although this exercise in truth-telling was quite insincere, it is nonetheless widely considered to have been a truth commission, however unsuccessful.\textsuperscript{238}

By contrast to the 1974 Commission, the 1986 Commission took place as part of a political transition in Uganda.\textsuperscript{239} Soon after President Museveni came into power in January 1986, he appointed a Commission of Inquiry into Violations of Human Rights to investigate human rights violations by state forces from the time of Uganda’s independence in 1962 to Museveni’s overthrow of the government in 1986.\textsuperscript{240} Through public hearings and live television and radio broadcasts, the Commission initially “attrac[ted] wide popular support and an emo-

\textsuperscript{235} Carver, \textit{supra} note 232, at 399. According to Richard Carver, although this number reflects only a small fraction of the total number of disappearances, the achievement was remarkable, “[i]n view of the considerable practical difficulties [the Commission] faced and the highly unfavourable political climate in which it operated.” \textit{Id.}

\textsuperscript{236} \textit{Id.} at 399–400 (noting that the government expressed little commitment to support the Commission).

\textsuperscript{237} Hayner, \textit{supra} note 198, at 52; Carver, \textit{supra} note 232, at 397–400. In contrast to Hayner, Carver offers a positive gloss on the accomplishments of the 1974 Commission. Hayner, \textit{supra} note 198, at 52. \textit{But see} Carver, \textit{supra} note 232, at 397–400. Whereas Hayner points out that abuses by Amin’s forces drastically increased in the years following, and that by 1986 the Commission had been “all but forgotten,” Carver counters that:

It could be argued that the whole exercise was futile. However, there are already revisionist views of the 1970s in Uganda, attempting a partial rehabilitation of Amin. What better evidence to refute such interpretations than the findings of this Commission, conducted impartially while the abuses were still continuing? The Commission also had some short-term effect in alleviating human rights abuse. At least for as long as it was sitting, ‘disappearances’ were reduced significantly. In the longer term, of course, there was no improvement, but this need not have been the case. It is scarcely surprising that Amin’s regime paid no heed to the Commission’s recommendations, but blame also attaches to those foreign allies of Amin who continued to supply him with arms and other essentials until the very end. Their failure to act was scarcely the Commission’s fault.

Hayner, \textit{supra} note 198, at 52; Carver, \textit{supra} note 232, at 400 (footnotes omitted).

\textsuperscript{238} Hayner, \textit{supra} note 198, at 52.

\textsuperscript{239} \textit{See id.} at 52.

\textsuperscript{240} \textit{Id.}
tional reaction from the public.”\textsuperscript{241} The Commission, however, suffered from an absence of political will as well as institutional failures, including a limited capacity to manage its very broad and unwieldy mandate, a lack of funding and resources, and a lack of time.\textsuperscript{242} In addition, northern Ugandan participation in the Commission was extremely limited as rebel activity in the area made travel to the region difficult if not impossible; five years into its public hearings, the Commission spent only four days in the north.\textsuperscript{243} Also, the Commission operated without a deadline for completion, and finally submitted its report in 1994, after eight years of investigation.\textsuperscript{244} By this time the public had lost interest in the Commission, as new abuses, not covered by the Commission had taken place under the Museveni government, and the report and summary were reportedly never distributed, though thousands of copies were published.\textsuperscript{245} Both within and outside of Uganda, the work of this Commission has been virtually forgotten.\textsuperscript{246} Finally, the Amnesty Commission, the possibility of which was publicly discussed during the period in which the Commission of Inquiry was in existence, may have undermined the Commission by eliminating culpability and negating the need to investigate the truth about the past.\textsuperscript{247}

These two commissions point both to the need for a successful Ugandan truth commission, and to the problems which could befall yet another attempt at a truth-telling process in Uganda.\textsuperscript{248} Beyond the issue of limited public awareness among Ugandans of the 1986 Truth Commission, the highly limited participation of northern Ugandans in that Commission suggests that a truth-telling process virtually never even took place in the north.\textsuperscript{249} Additionally, to the very limited degree that northern Ugandans did participate, the Commission, according to its mandate, focused on abuses prior to 1986, before the LRA had even come into existence.\textsuperscript{250} Moreover, to the extent that today’s Amnesty

\textsuperscript{242} Quinn, \textit{supra} note 241, at 408, 411–17.
\textsuperscript{243} \textit{Id.} at 421.
\textsuperscript{244} \textit{Id.} at 414–15.
\textsuperscript{245} Hayner, \textit{supra} note 198, at 56–57; Quinn, \textit{supra} note 241, at 425. \textit{But see}, Carver, \textit{supra} note 232, at 396. According to Carver, the Commission “played a psychologically important role in helping Ugandans to come to terms with their own past, as well as proposing a number of future safeguards against human rights abuse.” \textit{Id.}
\textsuperscript{246} Quinn, \textit{supra} note 241, at 409.
\textsuperscript{247} \textit{Id.} at 419.
\textsuperscript{248} \textit{See} Hayner, \textit{supra} note 198, at 51–52, 56.
\textsuperscript{249} Quinn, \textit{supra} note 241, at 420–21.
\textsuperscript{250} \textit{Id.} at 419.
Commission now effectively buries the past instead of illuminating it, another truth commission in Uganda would bring much needed public awareness to the conflict endured by northern Ugandans.\textsuperscript{251} Given the checkered history of truth commissions in Uganda, however, another commission would require careful planning so as to ensure that President Museveni’s second truth commission would not suffer from the same problems which undermined the 1986 Commission.\textsuperscript{252} This commission would require a deadline for completion as well as a carefully circumscribed mandate.\textsuperscript{253} The international community would most likely have to play a critical role, not only by providing financial support, but also by pressuring President Museveni to throw his political will behind the commission, without which history suggests the commission would be doomed to fail.\textsuperscript{254}

b. The Co-existence of Sierra Leone’s Special Court and Truth and Reconciliation Commission

The co-existence in Sierra Leone of the TRC and Special Court is especially relevant for northern Uganda because a truth commission in Uganda could conceivably operate contemporaneously with trials at the ICC in The Hague.\textsuperscript{255} Given that post-conflict States have traditionally instituted truth commissions as an alternative to criminal justice, thereby replacing or at least suspending criminal prosecutions, Sierra Leone’s mixture of these two options represents a unique and unprecedented experiment.\textsuperscript{256} Ultimately, Sierra Leone’s experiment in transitional justice demonstrates some of the tensions between the two mechanisms as well as the feasibility of their coexistence.\textsuperscript{257} The following briefly outlines the key features of the TRC and Special Court, and discusses the particularly notable aspects of their largely successful relationship.

The 1999 Lomé Peace Agreement marked the beginning of the end of the conflict in Sierra Leone.\textsuperscript{258} The Agreement provided for the creation of a truth and reconciliation commission “to address im-

\textsuperscript{251} See id. at 419–21.
\textsuperscript{252} See id. at 425.
\textsuperscript{253} See id. at 412–13, 415–16.
\textsuperscript{254} See Quinn, supra note 241, at 417.
\textsuperscript{255} See Tejan-Cole, supra note 204, at 316.
\textsuperscript{257} Schabas, supra note 256, at 189.
\textsuperscript{258} Id.
punity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, [and to] get a clear picture of the past in order to facilitate genuine healing and reconciliation.”

The TRC exercised temporal jurisdiction over human rights violations from the beginning of the conflict on March 23, 1991 to the signing of the Lomé Peace Agreement on July 7, 1999. It had the authority to recommend measures for the rehabilitation of victims and to make recommendations regarding the Special Fund for War Victims. The TRC was mandated to give special attention to the experiences of children in the conflict.

While the success of the South African Truth and Reconciliation Commission originally inspired the establishment of Sierra Leone’s Commission, it did not have the same power held by the South African Commission to grant amnesty as an incentive for admissions by perpetrators. Instead, the Lomé Peace Agreement provided for a blanket amnesty for the acts of all combatants and collaborators up to the signing of the Agreement. Upon the signing of the Lomé Agreement however, the U.N. Special Representative entered a reservation stipulating that the United Nations did not recognize the application of amnesty to genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.

The government of Sierra Leone later requested that the United Nations establish a special tribunal after renewed fighting in May 2000 resulted in a reassessment of the amnesty provided by the Lomé Agreement. The United Nations and the government of Sierra Leone then reached an agreement establishing the Special Court, which would be composed of both national and international judges who would apply
international as well as Sierra Leonean law. The Special Court is authorized “to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.” Despite intense speculation about how the Special Court and the TRC would interact, the two institutions never came to any formal agreement on cooperation between them, but instead seemed to value polite and neighborly relations and nothing more.

In mid-2002 both the Special Court and the TRC began their operations in Freetown in buildings, coincidentally, neighboring each other. In March 2003, the Court began to issue what would amount to a total of thirteen indictments for high profile individuals associated with all three warring factions. Trials at the Special Court did not begin until June 2004, at which point the TRC’s work was nearly complete. During the statement-taking phase, which began in December 2002, the TRC interviewed approximately seven-thousand victims and perpetrators throughout the country. It then held public hearings


The decision to require a mixed tribunal of national and international judges was due primarily to practical considerations and fears about the neutrality of national trials. The Sierra Leonean judicial system was largely decimated as a result of the war. It is only functional in Freetown and lacks the enormous human and financial resources required to undertake such trials.

Tejan-Cole, supra note 204, at 318.

268 Statute of the Special Court for Sierra Leone, art. 1(1).


270 Schabas, supra note 256, at 190.

271 See id.; About the Special Court for Sierra Leone, http://www.sc-sl.org/about.html (last visited Apr. 26, 2008). However, only ten of the original thirteen had been indicted as of May 2007. About the Special Court for Sierra Leone, supra (noting that the Special Court withdrew two indictments and terminated another following the death of three accused).

272 Schabas, supra note 256, at 190.

273 Id.
throughout Sierra Leone between March and August 2003 and presented its final report in October 2004, by which time the TRC and the Special Court had been operating simultaneously for over 18 months.274

When the two bodies began their work, a major concern emerged that because of their overlapping mandates and jurisdictions, the two institutions would conflict with each other, confuse the Sierra Leonean public, and waste resources by duplicating each other’s work.275 The subject matter jurisdiction of the TRC encompassed, and went beyond, that of the Special Court, while the temporal jurisdiction of the two institutions overlapped from November 30, 1996 to July 7, 1999.276 William Schabas, one of the TRC commissioners, argues that concerns about overlapping mandates and jurisdictions did not actually play out in any significant way.277 Their day-to-day work shared little common ground and the two institutions demonstrated that they could work side-by-side without conflict or tension.278 Schabas further posits that, “[g]iven an appropriately benign and non-confrontational attitude of the personalities involved, there is no reason why this experience cannot be repeated in other contexts,” as potential sources of conflict can be managed.279 Schabas also suggests that although many Sierra Leoneans did not appreciate the distinction between the TRC and Special Court, as long as they simply understood that both institutions were working towards accountability for the atrocities suffered during the war, then perhaps a failure to grasp the distinctions between the two really did not represent a significant problem.280

The initial debate about the relationship between the two bodies was also dominated by the concern that information sharing by the TRC with the Special Court would deter perpetrators from telling the


275 Tejan-Cole, supra note 204, at 322–23.

276 Id. at 319, 322.

277 Schabas, supra note 266, at 179–80.

278 Id. at 180. Schabas writes that perhaps the appropriate metaphor for describing the synergistic relationship of the two bodies is that of building a house:

The Truth and Reconciliation Commission is the plumber, and the Special Court is the electrician. The two trades work in different parts of the house, on different days, at different stages of the construction, and using different tools and materials. Nobody would want to live in a finished house that lacked either electricity or plumbing.

279 Id.

280 Schabas, supra note 269, at 54.
truth or from even attending the TRC out of fear that such evidence would be used against them by the Special Court.281 The TRC, however, insisted that it would not share confidential information with the Special Court, and the Special Court Prosecutor David Crane publicly stated that the Court would not use evidence presented to the TRC.282 According to one commentator, some Sierraleonians were nevertheless suspicious of information exchanges between the two institutions and refrained from giving statements to the TRC to avoid incriminating themselves.283 Another commentator even argues that perhaps the TRC should not have begun to function until after the Special Court had finished its work so that witnesses would not fear that revealing admissions would lead to prosecution by the Court.284

Schabas, on the other hand, argues that it is difficult to assess how such concerns about information sharing actually affected the work of the TRC, as the willingness of perpetrators to participate in accountability processes, such as truth-telling has little to do with the threat of criminal trials or the promise of amnesty.285 Instead, “[w]illingness or unwillingness to testify seems to have more to do with the mysteries of the human soul than it does with issues of amnesty, use immunity and compulsion to testify.”286 While only small numbers of perpetrators testified before the TRC, other truth commissions that functioned with no threat of prosecution were no more successful in persuading perpetrators to testify.287 In fact, several detainees of the Special Court—Sam Hinga Norman, Augustine Gbao, and Issa Sesay—actually approached the TRC about giving public testimony before it, thereby suggesting that the threat of prosecution played a relatively insignificant role in discouraging testimony before the TRC.288 Ironically, these requests to testify provoked the only public tension between the two bodies during their co-existence.289

---

281 Schabas, supra note 266, at 166–67; Tejan-Cole, supra note 204, at 326.
282 Tejan-Cole, supra note 204, at 326. For a detailed examination of information-sharing issues, see Schabas, supra note 269, at 30–41.
283 See Kelsall, supra note 274, at 381. In contrast to William Schabas, Tim Kelsall argues that, “an important factor deterring witnesses from speaking openly in the hearings was the troubled relationship between the TRC and the Special Court,” which “was a source of considerable frustration to some TRC staff, who felt that the court was impeding their work to an unacceptable degree.” Id.
284 Elagab, supra note 263, at 259.
285 See Schabas, supra note 256, at 192.
286 See Schabas, supra note 269, at 54.
287 Schabas, supra note 266, at 167.
288 Schabas, supra note 269, at 44; Schabas, supra note 266, at 167.
289 Schabas, supra note 266, at 167; see Schabas, supra note 269, at 43–50.
lic hearings for these three detainees, and a ruling on appeal by the Court’s President, Geoffrey Robertson, allowed the defendants to testify before the TRC, but not in public. Defendant Norman then refused to cooperate with the TRC after having been deprived of his public platform. Schabas describes this as a most unfortunate quarrel between the two institutions at the close of what had been an essentially “cordial and uneventful relationship.”

Sierra Leone’s experiment demonstrates that the co-existence of a Ugandan truth commission and ICC trials would be a feasible and even desirable combination of transitional justice mechanisms. Like the TRC in Sierra Leone, a Ugandan truth commission could focus on the needs of children and of victims, more generally. The conflicts in Sierra Leone and northern Uganda are similar in that both involved the large-scale use of child soldiers as well as massive population displacement. Neither the Special Court nor the ICC, however, can effectively play a significant role in addressing these realities, as both courts necessarily focus on a relatively very small number of perpetrators, not on the very large number of victims. Such a highly selective focus on the actions of a few perpetrators is, of course, in the very nature of international criminal justice. The massive scale of these conflicts essentially demands a complementary mechanism, however, which addresses the needs of victims, including the need to hear and tell the truth. The ICC’s outreach program and its plans for victim participation do not provide a substitute for a truth commission. The outreach program logically consists primarily of the Court informing Ugandans about the Court, not of Ugandan victims informing the Court about the atrocities they have suffered. Also, although the Rome Statute does include unprecedented provisions for the participation of victims in the Court’s

290 Schabas, supra note 269, at 45–46, 48.
291 Id. at 48.
292 Id. at 50.
293 See Schabas, supra note 266, at 180.
295 Human Rights Watch, Universal Jurisdiction in Europe: The State of the Art 1 (2006) (noting that due to finite resources, international courts can only try a limited number of perpetrators involved in specifically identified conflicts and territories).
296 See id.
298 International Criminal Court, Outreach, Uganda, supra note 297.
proceedings, the narrowly confined nature of this participation does not resemble that of a truth commission at all.\footnote{299} In addition, a mixture of truth-telling and criminal justice for northern Uganda could meet with fewer challenges than did Sierra Leone’s simultaneous pursuit of these two approaches.\footnote{300} First, a temporal, as well as a physical, separation between the ICC and a commission would help to separate the two institutions in the minds of Ugandans to a greater extent than was the case in Sierra Leone.\footnote{301} Ugandans would probably not be as likely to confuse or conflate the two institutions because the ICC’s investigation and issuance of arrest warrants would have occurred years before the creation of a truth commission.\footnote{302} In Sierra Leone, by contrast, the Commission and the Court began to operate at approximately the same time. Given that the ICC resides in The Hague, while the truth commission would operate in Uganda, the ICC and the commission would not literally be neighbors, as the Special Court and TRC were in Freetown. Second, Uganda’s combination of truth telling and criminal justice may be less problematic than in Sierra Leone, because perpetrators might be less concerned about information sharing between a commission and the ICC because the ICC has already issued its indictments in the Uganda situation.\footnote{303} Leaving aside the unlikely possibility that the ICC will issue further arrest warrants years after unsealing the first warrants, perpetrators would not be faced with fears about future prosecutions based on their testimony before the commission.\footnote{304} Finally, in contrast to the TRC in Sierra Leone, a commission in Uganda would be less likely to face severe under-funding because the ICC and the commission would not be in direct competition with each other for funding as were the Special Court and the Commission.\footnote{305} Because the ICC obtains its funding through the contributions of States parties as well as the United Nations, the commission would be drawing

\footnote{300} See Tejan-Cole, supra note 204, at 316.
\footnote{301} See id. at 322.
\footnote{302} See Moreno-Ocampo, supra note 7, at 3.
\footnote{303} See Schabas, supra note 266, at 166–67; Moreno-Ocampo, supra note 7, at 3.
\footnote{304} See Elagab, supra note 263, at 259 (suggesting that potential witnesses would be encouraged to provide statements if the criminal justice component was completed prior to the commencement of the commission).
\footnote{305} See Schabas, supra note 269, at 7–8 (noting that donor enthusiasm for the ICC may have inhibited the TRC from raising sufficient funds).
upon a separate pool of money from the international donor community.\(^{306}\)

**B. A Reparations System**

The range of physical, psychological, and socio-economic harm suffered by northern Ugandans as a result of this twenty-two year conflict with the LRA necessitates the provision of reparations by the government.\(^{307}\) The LRA has killed and mutilated civilians and abducted tens of thousands of children and adults, while the UPDF has committed its own share of atrocities.\(^{308}\) The conflict has produced approximately 1.7 million IDPs who have little prospect of employment, health care, education, or returning home.\(^{309}\) Meanwhile, an untenable situation has developed wherein perpetrators who have been granted amnesty have received resettlement packages while victims have received nothing.\(^{310}\) According to the International Center for Transitional Justice, a majority of those surveyed said that victims of the conflict should receive some form of reparations.\(^{311}\) Fifty-two percent wanted victims to receive financial compensation and fifty-eight percent thought that such compensation should be for the community as opposed to individual victims.\(^{312}\) While a majority (sixty-three percent) of respondents believed that the return of IDPs to their villages should be prioritized once peace is achieved, respondents also gave priority to rebuilding village infrastructure (twenty-nine percent), providing compensation to victims (twenty-two percent), and providing education to children (twenty-one percent).\(^{313}\) In this context, reparations could encompass

\(^{306}\) See Rome Statute, supra note 299, art. 115.

\(^{307}\) See text accompanying notes 15–21. The question of whether Uganda is under an international legal obligation to provide reparations is beyond the scope of this article, which argues instead, that under these circumstances, Uganda is morally obligated to provide reparations.

\(^{308}\) Human Rights First, supra note 20.

\(^{309}\) See Internal Displacement Monitoring Ctr., supra note 26, at 17–18.

\(^{310}\) See Int’l Crisis Group, supra note 65, at 8. In an interview conducted by the International Crisis Group, President Museveni apparently stated that benefits for former LRA members must be balanced by benefits for the LRA’s victims, both as a matter of equity and to generate support for DDR. Id.

\(^{311}\) Pham et al., supra note 1, at 36.

\(^{312}\) Id. Respondents also mentioned other forms of reparations including food support (forty percent), educational support (twenty-six percent), counseling support (twenty-six percent), and livestock (seventeen percent). Id. In addition, respondents mentioned alternatives to reparations including justice (eight percent), apologies (nine percent), and reconciliation (six percent). Id.

\(^{313}\) Id. at 25.
an expansive definition, including restitution (the restoration of the victim to the original situation before the violations occurred), compensation (for economically assessable damage), rehabilitation (medical and psychological care and legal and social services), and satisfaction and guarantees of non-repetition (to acknowledge the violations and prevent their recurrence).\footnote{See G.A. Res. 60/147, ¶¶ 19–23, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).}

The government of Uganda, however, has failed to respond to victims’ need for reparations. Neither the Amnesty Act nor the traditional justice and reconciliation mechanisms currently provide victims with significant compensation.\footnote{See Hovil & Lomo, supra note 1, at 14 (noting that some victims are not benefiting from the Amnesty Act in any way); Pham et al., supra note 1, annex 4, at 51 (noting that traditional ceremonies that include compensation mechanisms are not common).} The Amnesty Act, in fact, provides no reparations for victims but instead provides the perpetrators with resettlement packages.\footnote{See Amnesty Act, 2000, ¶ 9(a)–(b) (Uganda).} Although mato oput is traditionally supposed to include compensation in the form of cattle or money, such payments may no longer be possible because the vast majority of the Acholi population now lives in poverty in IDP camps.\footnote{See Roco Wat I Acoli, supra note 1, at 65 (noting that those who live in displacement camps lack sufficient resources to compensate victims).} In addition, former LRA rebels typically escape from the bush with no ability to offer any compensation themselves.\footnote{Id. at 67.} Consequently, this article proposes that the government of Uganda could compensate the victims through the Amnesty Commission or by funding the compensation mechanism embodied in mato oput. Alternatively, if the government of Uganda were to establish a truth commission, then reparations could be provided through this institution as well.

The reparations systems of South Africa and Rwanda may provide models for Uganda’s post conflict situation. South Africa provides an example of how compensation may be tied to a larger truth commission, while Rwanda’s gacaca tribunals alternatively show how a traditional justice mechanism may be codified and expanded to include compensation.\footnote{See Lyn S. Graybill, Truth & Reconciliation in South Africa: Miracle or Model? 6–8 (2002) (discussing the South African Truth and Reconciliation Commission); Stef Vandeginste, Victims of Genocide, Crimes Against Humanity, and War Crimes in Rwanda: The Legal and Institutional Framework of Their Right to Reparation, in Politics and the Past 258, 260 (John Torpey ed., 2003) (discussing the Rwandan gacaca tribunals).} In post-conflict northern Uganda, a compensation system similar to that of South Africa or Rwanda could work toward adequately addressing victims’ interests.
1. South Africa’s Committee on Reparation and Rehabilitation

South Africa’s TRC included a Committee on Reparations and Rehabilitation that recommended symbolic reparations as well as substantial payments to victims of gross human rights violations.\textsuperscript{320} When the Committee began its work in 1996, many South Africans expected that compensation would be only symbolic because of the vast number of claims and the difficulties involved in adequately compensating victims.\textsuperscript{321} The Committee, however, shifted its emphasis from symbolic to substantial compensation after conducting workshops throughout South Africa over two years.\textsuperscript{322} While the Committee did propose symbolic reparations, including memorials, reburials, renaming of streets, and days of remembrance, it also proposed individual reparation grants.\textsuperscript{323} In addition, the Committee determined that certain victims required urgent interim relief, including victims who had lost a wage-earner, who required psychological support after testifying, who required urgent medical attention, or who were terminally ill and not expected to outlive the South African TRC.\textsuperscript{324}

Despite these substantial recommendations by the Committee, the reparations process in South Africa has generated significant dissatisfaction among victims.\textsuperscript{325} First, the government was very slow to respond to the South African TRC’s recommendations about payments to the 22,000 victims.\textsuperscript{326} Second, the Promotion of National Unity and Reconciliation Act, which authorized the South African TRC, included no requirements for reparations from perpetrators or beneficiaries of apartheid.\textsuperscript{327} The Act did not call for reparations directly from perpetrators to victims even though under traditional systems, \textit{ubuntu}, an African philosophy of humanity, requires \textit{ulihlawule}, paying the debt, by

\textsuperscript{320} \textit{Graybill}, supra note 319, at 6.
\textsuperscript{321} \textit{Id.} at 149.
\textsuperscript{322} \textit{Id.} at 150.
\textsuperscript{323} \textit{See id.} at 151. The Committee proposed reparation grants of a minimum of 17,000 rand per year for each victim for six years. \textit{Id.} The recommended grant was 23,000 rand per year for victims with many dependents or living in rural areas. \textit{Id.} The average grant was 21,700 rand, which was based on the median income of black South African households. \textit{Id.}
\textsuperscript{324} \textit{Id.} at 149–50.
\textsuperscript{325} \textit{Graybill}, supra note 319, at 152–53; \textit{Hayner}, supra note 198, at 178–79.
\textsuperscript{326} \textit{See Hayner}, supra note 198, at 178.
\textsuperscript{327} \textit{Graybill}, supra note 319, at 151.
the one who violates community law. The Act thus broke this link between the violation and the obligation.

2. Reparations Through Rwanda’s Gacaca Tribunals

Rwanda, by contrast, developed a compensation system linked not to a truth and reconciliation commission, but to its gacaca system. Rwanda’s gacaca tribunals grew out of the government’s struggle to detain and prosecute over 100,000 people charged with the commission of genocide, war crimes, and crimes against humanity during the 1994 Rwandan genocide. However, because of the modest prosecution rates of both the International Criminal Tribunal for Rwanda (ICTR) and the national judiciary, by 2000 the Rwandan government had begun to seek an alternative form of justice. According to Chiseche Mibenge:

There was an emphasis on establishing a model of justice that would embrace traditional Rwandan values by advocating restoration over retribution; a model that would expedite the process of justice, ease overcrowding in detention centres and uphold the rights of the accused while remaining palatable to the survivors of the genocide. Gacaca tribunals emerged as the only viable solution to the impasse in Rwanda’s domestic transitional justice process.

Rwanda’s Gacaca Law of 2001 therefore codified a modified version of Rwanda’s traditional community-based dispute resolution mechanism whereby village elders would assemble all parties to a dispute in order to mediate a solution. The Gacaca Law of 2001 designed a participatory judicial system that would involve a large part of the Rwandan

---

328 Id. at 151–52. Discussions about a possible wealth tax on those who benefited financially from apartheid fell by the wayside when Thabo Mbeki succeeded Nelson Mandela to the presidency in the spring of 1999. Id.
329 See id.
331 Id. at 410–12.
332 Id. at 411–12 (noting that by the year 2000 approximately 2500 accused had been tried at the national judiciary and of 70 indicted at the ICTR, only 9 had stood trial).
333 Id. at 412.
population as judges or witnesses.\textsuperscript{335} While the \textit{gacaca} typically dealt with disputes over property rights, livestock, marriage, succession, and attacks on personal integrity, the Gacaca Law of 2001 established \textit{gacaca} tribunals for the prosecutions of genocide and crimes against humanity committed between October 1, 1990 and December 31, 1994.\textsuperscript{336} Additionally, the Gacaca Law of 2004, which amended the earlier Law of 2001, created three categories for prosecuted persons based on the gravity of their crime.\textsuperscript{337} \textit{Gacaca} tribunals exercise jurisdiction over the lesser category two and three offenses, which include crimes against the person and crimes against property.\textsuperscript{338}

The unusual nature of the \textit{gacaca} tribunals compelled the Rwandan legislature to clarify the extent to which the tribunals could render decisions concerning compensation.\textsuperscript{339} While the Gacaca Law of 2001 provided for a compensation fund, the Gacaca Law of 2004, which now prevails over the 2001 Law in this respect, contains significantly different provisions for compensation.\textsuperscript{340} Under the Gacaca Law of 2001, the rulings and judgments of the \textit{gacaca} tribunals included lists of victims, the damages they suffered, and the compensation to which they were entitled.\textsuperscript{341} The \textit{gacaca} tribunals would then forward rulings and judgments, with these lists, to the Compensation Fund for Victims of the Genocide and Crimes against Humanity, which would make payments.\textsuperscript{342} Based on total damages suffered, the Fund would then fix the modalities for granting compensation.\textsuperscript{343}

\textsuperscript{335} See Mibenge, \textit{supra} note 330, at 412; Vandeginste, \textit{supra} note 319, at 258, 260.
\textsuperscript{336} Mibenge, \textit{supra} note 330, at 413.
\textsuperscript{338} Art. 2. \textit{Gacaca} tribunals do not however exercise jurisdiction over the most serious offenses or perpetrators, which compose category one offenses. Arts. 2, 51.
\textsuperscript{339} See Vandeginste, \textit{supra} note 319, at 258.
\textsuperscript{341} Gacaca Law 2001, \textit{supra} note 334, art. 90. These rulings must indicate “the identity of persons who have suffered material losses and the inventory of damages to their property; the list of victims and the inventory of suffered body damages; as well as related damages fixed in conformity with the scale provided for by law.” \textit{Id}.
\textsuperscript{342} See \textit{id}. The Compensation Fund is distinct from the National Fund for Assistance to Survivors of Genocide and Massacres (NFASGM), which came into existence in 1998. Vandeginste, \textit{supra} note 319, at 264. The NFASGM provides assistance to the most economically disadvantaged victims. \textit{See id}. Its activities focus on housing, education, health, and social reintegration. \textit{Id}.
\textsuperscript{343} Gacaca Law 2001, \textit{supra} note 334, art. 90.
By contrast, the Gacaca Law of 2004 contains narrower provisions for compensation which largely avoid the issue of damages or other forms of compensation.\textsuperscript{344} Under this law, reparations only involve the “restitution of the property looted whenever possible” and “repayment of the ransacked property or carrying out the work worth the property to be repaired.”\textsuperscript{345} In addition, “[o]ther forms of compensation the victims receive shall be determined [only] by a particular law,” a reference to the Fond d’Indemnisation (FIND)—draft legislation concerning a victims compensation fund.\textsuperscript{346} Consequently, until FIND becomes law, the Gacaca Law of 2004 has effectively reduced the scope of damages which victims may receive because the law covers only property damages, not bodily harm.\textsuperscript{347}

Although the compensation provisions of the Gacaca Law of 2004 now prevail over the more robust provisions of Gacaca Law of 2001, the advantages and risks of the earlier Law are more relevant for our purposes because the 2001 Law more adequately addresses victims’ interests and therefore provides a more suitable model for a reparations system in Uganda.\textsuperscript{348} According to Stef Vandeginste, some of the advantages of the Gacaca Law of 2001 included:

the active participation of the victims, the acknowledgment of their status as victims, the recognition of the damages they have incurred, the acknowledgment of their right to reparation independent of any sentencing of the perpetrator of a crime, the consistency and realism in the sums awarded, and the more than merely symbolic value of the amounts concerned.\textsuperscript{349}

Additionally, the law entitled victims to receive compensation without a criminal conviction of the perpetrator, thus eliminating the role of criminal evidence in the determination of compensation.\textsuperscript{350}

Potentially problematic aspects of this system, however, included its dependence on the transparent, proper operation and financial

\textsuperscript{344} See Gacaca Law 2004, supra note 337, art. 95.
\textsuperscript{345} Id.
\textsuperscript{346} Art. 96; Mibenge, supra note 330, at 420. FIND originated out of a 1996 Rwanda law that created a fund for genocide victims in need of financial assistance. Id. For an in-depth analysis of FIND draft legislation, see HEIDY ROMBOULTS, VICTIM ORGANISATIONS AND THE POLITICS OF REPARATION: A CASE STUDY ON RWANDA 411–13 (2004).
\textsuperscript{347} See Gacaca Law 2004, supra note 337, art. 95; Rombouts, supra note 346, at 413.
\textsuperscript{349} Vandeginste, supra note 319, at 265.
\textsuperscript{350} Id. at 259–60.
wherewithal of the Compensation Fund.\textsuperscript{351} Also, claimants still encountered difficulties in proving damages, such as through the provision of medical certificates, so many years after the genocide.\textsuperscript{352} Finally, raising awareness of the \textit{gacaca} tribunals and of the Fund among the most ill-informed and destitute victims also posed a great challenge to the Gacaca Law of 2001.\textsuperscript{353} The advantages and risks of the reparations system created by the Gacaca Law of 2001 are most likely not specific to Rwanda’s \textit{gacaca} system and could easily characterize a reparations system linked to traditional Acholi mechanisms as well.

3. Reparations in Uganda

Uganda faces many potential alternatives for a reparations system. The government could implement reparations through a stand-alone government agency or through another mechanism such as a truth commission, the Amnesty Commission, or \textit{mato oput}. While the experiences of both South Africa and Rwanda are relevant for northern Uganda, the following discussion focuses on the pertinence of Rwanda’s \textit{gacaca} system, which is perhaps most immediately relevant, as traditional mechanisms currently exist in northern Uganda but, as of yet, no truth commission has come into being.\textsuperscript{354} Although Uganda will very likely not implement the equivalent of Rwanda’s \textit{gacaca} tribunals, the compensation system set forth in the Gacaca Law of 2001 could still be relevant to the victims of the conflict in northern Uganda.\textsuperscript{355} Rwanda’s Gacaca Law of 2001 demonstrates how government-funded compensation can take place through traditional justice mechanisms, as opposed to a truth commission.\textsuperscript{356}

It is possible that the Amnesty Commission could implement a reparations system tied to \textit{mato oput}.\textsuperscript{357} The government of Uganda could strengthen this traditional mechanism by pledging to provide the funds for the compensation upon which the parties have agreed. The Amnesty Commission could establish a compensation fund under its power to “perform any other function that is associated or con-

\footnotesize{\textsuperscript{351} See id. at 259, 266.}
\footnotesize{\textsuperscript{352} See id. at 266.}
\footnotesize{\textsuperscript{353} See id.}
\footnotesize{\textsuperscript{354} See supra text accompanying notes 332–340.}
\footnotesize{\textsuperscript{355} See Gacaca Law 2001, supra note 334, arts. 90–91.}
\footnotesize{\textsuperscript{356} See id.}
\footnotesize{\textsuperscript{357} See Amnesty Act, 2000, ¶ 9(e) (Uganda) (granting the Amnesty Commission the right to “perform any other function that is associated or connected with the execution of the functions stipulated in this Act”).}
nected with the execution of the functions stipulated in [the] Act.\footnote{358} Because the Commission’s functions include the promotion of reconciliation, a compensation fund would be a permissible expansion of the Commission’s current operations.\footnote{359} The two parties performing \textit{mato oput} could agree upon an appropriate level of compensation and then submit a claim to the compensation fund.\footnote{360} The Commission could issue guidelines for parties to use when determining appropriate levels of compensation. Such a system could restore efficacy to \textit{mato oput}, which is currently somewhat dysfunctional partly due to the inability of perpetrators to provide compensation.\footnote{361}

Some caveats, however, are in order. This compensation system would, of course, be premised on a general revival of \textit{mato oput} and its use by LRA perpetrators and their victims, neither of which may actually happen.\footnote{362} Also, third-party interference by the government in the \textit{mato oput} process could conceivably harm the integrity of a process that has traditionally taken place between clans with no government involvement. Given these potential problems, the Amnesty Commission could, alternatively, provide benefits to victims who apply to receive compensation packages, which could be similar to the resettlement packages given to reporters.\footnote{363} Thus, the provision of reparations by the Amnesty Commission could exist totally apart from \textit{mato oput}.

Finally, Rwanda also serves as a useful example of how broad poverty reduction, in addition to compensation for individual victims or clans, may contribute to reconciliation.\footnote{364} Poverty reduction is one of the priorities of the Rwandan Patriotic Front (RPF)-led government, as President Paul Kagame has reiterated in public statements.\footnote{365} For Rwandans whose livelihood was destroyed during the genocide, economic assistance may lay the groundwork necessary for the process of forgiveness and reconciliation.\footnote{366} Similarly, in northern Uganda, compensation for whole communities could also play an important role in

\begin{flushleft}
\footnote{358}{Id.}
\footnote{359}{See ¶ 9(c).}
\footnote{360}{See \textit{Roco Wat I Acoli}, supra note 1, at 56 (noting that compensation is typically determined by reference to clan by-laws).}
\footnote{361}{See id. \textit{Mato oput} is not officially completed until compensation has been paid to the victim. \textit{Id.}}
\footnote{362}{See \textit{id.} at 67 (stating that \textit{mato oput} cannot occur until all LRA fighters return home from the bush).}
\footnote{363}{See supra note 65 and accompanying text.}
\footnote{365}{Id.}
\footnote{366}{See \textit{id.} at 37–38.}
\end{flushleft}
helping the region achieve reconciliation. The government could focus on providing the infrastructure necessary for the Acholi people to achieve reintegration because northern Ugandans cannot truly reintegrate the former rebels until they have left the IDP camps and returned to their homes. Communal compensation could therefore concentrate on rebuilding infrastructure, resettlement packages for farming, and resources for education.

Measures aimed at broader poverty reduction, beyond support for reintegration, could also be an important tool for achieving national as well as regional reconciliation. The International Crisis Group writes of how the north-south divide in Uganda must be bridged so that the Acholi feel that they are a part of Ugandan society. Unifying the country “will require specific political, economic and social initiatives aimed at building the North’s connections with the central government while enhancing autonomy and localized decision-making.” Such initiatives could include post-conflict reconstruction assistance through “support for agricultural production,” affirmative action through scholarships and employment opportunities, “social reform,” “settlement and reintegration of IDPs,” and “psychological and social support” for former LRA rebels and victimized communities.

IV. INTERNATIONAL CRIMINAL JUSTICE

The final section of this article examines the degree to which the ICC may be able to play a role in fostering reconciliation in northern Uganda, particularly in light of the Special Court for Sierra Leone.
The experience of the Special Court is highly relevant to the situation in northern Uganda because the Special Court has narrowly focused on prosecuting only those bearing the greatest responsibility for the civil war in Sierra Leone.375 In June 2000, Sierra Leone’s President Ahmad Tejan Kabbah requested the assistance of the international community in establishing a court to try high level Revolutionary United Front (RUF) officers.376 Having taken RUF leader Foday Sankoh into custody in May 2000, the government was apprehensive that a national trial of Sankoh and other RUF leaders would aggravate the conflict and produce further instability.377 By January 2002, the government of Sierra Leone and the United Nations had concluded the Agreement on the Special Court, which established a hybrid tribunal based in Freetown.378

The Special Court’s statute limits the Court’s prosecutorial scope to only those “who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law” committed during the conflict.379 The Court’s limited prosecutorial discretion enabled the Court to keep its time frame relatively short and its costs relatively low, as compared with the ad hoc tribunals for Rwanda and the former Yugoslavia.380 The Court only indicted thirteen persons, and ten arrests resulted, including that of former Liberian President Charles Taylor in March 2006.381 While questions linger about whether such limited prosecutions will produce incomplete or unsatisfactory justice in Sierra Leone, the prosecution of Charles Taylor will likely have a highly significant impact on the Court’s ultimate credibility as well as Sierra Leonean perceptions of the Court.382

The Special Court for Sierra Leone is relevant to northern Uganda because limited prosecutions of the LRA by the ICC are currently the only practicable and available options for Uganda, though they may be

---

376 Id. at 10.
377 Id.
378 Id. at 15, 40.
379 Statute of the Special Court for Sierra Leone, art. 1(1).
380 Perriello & Wierda, supra note 375, at 31, 43.
381 Id. at 27.
382 Id. at 43, epilogue.
undesirable. In post-conflict northern Uganda, the widespread use of retributive justice would not be an effective tool for achieving reconciliation. Many argue that justice can theoretically deter similar acts in the future by ensuring respect for human rights and the rule of law. In fact, “[t]he basic argument in support of prosecutions is that trials are necessary in order to bring violators of human rights to justice and to deter future repression.” Yet prolonged trials of all or most of the Ugandan perpetrators on the scale of those in Rwanda—through ordinary domestic courts, the gacaca tribunals, and the ICTR—would be inappropriate in northern Uganda for a number of reasons.

First, on a pragmatic level, northern Uganda could not accommodate mass prosecutions of former LRA rebels. Northern Uganda currently lacks the infrastructure necessary to conduct trials for UPDF soldiers, let alone thousands of former LRA rebels. The courts are grossly understaffed and little or no judicial presence exists in the Kitgum and Pader districts. As of March 2005, a large backlog of cases, two to three years old, existed in Gulu because no High Court judge had sat in Gulu in more than five months. Thus the judiciary’s capacity to guarantee fair trials is very limited and the resources necessary to rebuild the judiciary and to support mass justice in the Acholi region could perhaps be better spent on other initiatives geared more directly towards reconciliation.

Second, even a less expensive, mass justice system such as the gacaca tribunals in Rwanda would be inappropriate for northern Uganda because of the circumstances of this conflict. Trials would be unsuitable for most of the perpetrators of the atrocities in northern Uganda because the vast majority of the reporters were abducted into

---

384 Id. at 148 (noting that the aim of criminal justice process is not to assist victims in the recovery process). This article certainly acknowledges, however, that mass criminal justice can play an important role in other post-conflict societies, such as the gacaca tribunals in Rwanda. See Mibenge, supra note 330, at 410–12.
385 Sarkin, supra note 383, at 147.
386 Id.
387 See Human Rights Watch, supra note 15, at 50–51 (noting the weakness of the judicial system).
388 See id. at 50 (noting a general lack of police presence).
389 Id.
390 Id.
391 See id.
392 Hovil & Lomo, supra note 1, at 12.
the LRA as children and carried out atrocities under duress.\textsuperscript{393} Deterrence has a very limited role to play because most of the perpetrators would not have voluntarily joined the LRA or committed atrocities.\textsuperscript{394} Thus, criminal justice is inappropriate given the identity of the perpetrators and the circumstances surrounding their crimes.\textsuperscript{395} Additionally, because victims and perpetrators often belong to the same families or neighborhoods, finding credible evidence against perpetrators may be difficult.\textsuperscript{396}

Finally, the cultural norms of the victims contribute to the inappropriateness of mass prosecutions. Widespread use of retributive justice would conflict with Acholi traditions and with the current perspective of the population in northern Uganda.\textsuperscript{397} The Acholis’ traditional mechanisms are geared towards reconciliation and reintegration rather than punishment.\textsuperscript{398} Interviews conducted by various NGOs note that many interviewees wished to forgive the perpetrators for the sake of peace after so many years of conflict.\textsuperscript{399} Also, according to a survey conducted by the International Center for Transitional Justice, fifty-eight percent of respondents did not want low ranking members of the LRA to be held accountable for their crimes.\textsuperscript{400} Sixty-six percent of respondents who thought LRA leaders should be held accountable supported processes such as trial and imprisonment.\textsuperscript{401} Given how ill-suited mass criminal justice would be in this context, the ICC could play an important, but limited, role in achieving justice by prosecuting the LRA leaders.\textsuperscript{402}

The ICC has the potential to play an important role in national, as well as regional, justice, though President Museveni’s recent shift in attitude towards the ICC does seriously threaten the Court’s efficacy.\textsuperscript{403}

\begin{footnotes}
\item[393] See id.
\item[394] See Sarkin, supra note 383, at 147.
\item[395] See Hovil & Lomo, supra note 1, at 12.
\item[396] See id.
\item[397] See Pham et al., supra note 1, annex 4, at 50–52.
\item[398] See Hovil & Lomo, supra note 1, at 4.
\item[399] See, e.g., Pham et al., supra note 1, at 23; Hovil & Lomo, supra note 1, at 23, 31.
\item[400] See Pham et al., supra note 1, at 26. The percentages of respondents who opposed accountability for lower ranking members of the LRA varied considerably by district. See id. In Gulu, this number was as high as seventy-two percent, and in Lira, sixty-two percent. Id. Conversely, in Soroti and Kitgum, many were in favor of holding lower-ranking LRA members accountable (sixty-one and forty-one percent, respectively). Id.
\item[401] Id.
\item[402] See id.; Press Release, Int’l Criminal Court, supra note 5.
\item[403] See Int’l Crisis Group, supra note 45, at 15 (noting that President Museveni has promised the LRA that no indicted leaders will be turned over to the ICC). The compati-
In light of the historic mistrust between Uganda’s north and south, credible international trials could function as a depoliticized venue for justice, if and when the indicted commanders are arrested.\textsuperscript{404} As in Sierra Leone, prosecution by an international body could help to prevent the political instability that could result from national prosecutions.\textsuperscript{405} The ICC’s prosecutions could also help to promote regional peace by ensuring that the Amnesty Act does not amount to total impunity.\textsuperscript{406} Through its referral to the ICC, Uganda essentially withdrew its offer of amnesty to the top leadership of the LRA.\textsuperscript{407} While prosecution of the lower ranking former LRA rebels would not be appropriate or possible, trials for the leaders might signify some degree of accountability and justice, however limited. Despite the very small number of prosecutions, the trials could nonetheless be significant if those most responsible for the atrocities are held accountable.\textsuperscript{408}

Also, after a somewhat rocky start to its investigations, the ICC has subsequently made significant efforts to explain its mission to northern Ugandan communities, which have been concerned about the implications of the ICC process and their right to continue using traditional reconciliation procedures.\textsuperscript{409} Initially some Acholis reportedly perceived the ICC referral as an anti-Acholi policy aimed at foiling peace negotiations and prolonging the war in order to keep northern Uganda weak.\textsuperscript{410} Others viewed the ICC’s Office of the Prosecutor as biased and acting on behalf of President Museveni, who referred the situation to the ICC in December 2003.\textsuperscript{411} Because of increased contact

\textsuperscript{404} See Int’l Crisis Group, supra note 371, at 2; Akhavan, supra note 9, at 410. The north-south divide originated during colonial times and was exacerbated by post-independence Ugandan governments. Int’l Crisis Group, supra note 371, at 2. The political victory of the NRM in 1986 produced new animosity between the North and the South, partially as a result of southern dominance in the new government, and has fueled the current conflict. See id.

\textsuperscript{405} See Sarkin, supra note 383, at 147 (arguing that the effects of politically charged criminal prosecutions have the potential to fracture fragile governments).

\textsuperscript{406} Akhavan, supra note 9, at 410.

\textsuperscript{407} Id.

\textsuperscript{408} See Press Release, Int’l Criminal Court, supra note 5 (noting that the most senior LRA leaders, including Kony, have already been indicted).

\textsuperscript{409} Int’l Crisis Group, supra note 65, at 9.

\textsuperscript{410} Akhavan, supra note 9, at 416.

\textsuperscript{411} See Pham et al., supra note 1, at 18. After President Museveni referred the situation to the ICC in December 2003, he and the ICC Chief Prosecutor, Luis Moreno-Ocampo, held a joint press conference in London on January 29, 2004 to announce the referral. Id. By announcing the referral with President Museveni by his side, the Prosecutor created
between Acholi leaders and ICC officials, a spirit of cooperation in northern Uganda has reportedly replaced suspicions about the Court’s intentions. Within this context of cooperation, Uganda’s decision to relinquish jurisdiction to the ICC could allow the ICC to function as an instrument for achieving justice and full closure of the conflict.

An important caveat to the above analysis stems from President Museveni’s change of position regarding the ICC indictments. He has publicly stated that if the LRA reaches a peace agreement with the Ugandan government, then the government will grant Kony and the other indicted commanders total amnesty and seek to persuade the ICC to drop the indictments against them. In accordance with Article 53 of the Rome Statute, the Prosecutor has the discretion to end prosecutions that are not in the “interests of justice.” Under these circumstances, however, it is highly unlikely that the Prosecutor will drop the charges because justice requires some form of accountability, and President Museveni has promised to grant the LRA leaders amnesty, which would ensure that they would not face any sort of criminal prosecution. Unfortunately, because of President Museveni’s use of doubt as to whether he would investigate the UPDF with the same rigor as the LRA. Id.; Trial Justice, supra note 1, at 96–97. In response to public perception, the Chief Prosecutor addressed this issue in a letter to the ICC President, in which he wrote: “My Office has informed the Ugandan authorities that we must interpret the scope of the referral consistently with the principles of the Rome Statute, and hence we are analyzing crimes within the situation of northern Uganda by whomever committed.” See International Criminal Court, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, ICC-02/04, annex 1 (July 5, 2004) available at http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/Decision_on_Assignment_Uganda-OTP_Annex.pdf (emphasis added).

If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because: . . . (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

Rome Statute, supra note 299, art. 53(2)(c). Specifically, article 53(2)(c) provides:

Art. 53(2).

See Int’l Crisis Group, supra note 45, at 16–17 (suggesting that the Prosecutor would only drop the charges if an accountability mechanism were in place). In accordance with the principle of complementarity, the ICC might drop the charges if the Ugandan
the ICC indictments as a bargaining chip in the government’s peace negotiations with the LRA, the indictments have become a complicating factor in the peace talks. Consequently, the threat of ICC prosecutions may be exacerbating, rather than diminishing, northern Uganda’s instability.

**Conclusion**

This article examines the weaknesses of Uganda’s current Amnesty Act and traditional justice and reconciliation mechanisms. With only the Amnesty Act and the traditional Acholi ceremonies in place, northern Uganda’s transition to peace may be hindered by Uganda’s failure to adequately address the interests of victims. While the path to reconciliation in Uganda will be difficult and uncertain, the experiences of other African countries like Sierra Leone, South Africa, and Rwanda offer useful examples upon which Uganda may draw. Rwanda’s *gacaca* tribunals offer guidance as to how Uganda could combine the use of its traditional practices with the pursuit of reconciliation and community participation. Uganda could promote compensation as well as dialogue through traditional Acholi mechanisms, while at the same time maintaining the integrity of those traditional customs. Alternatively, should Uganda formally establish a truth-telling process, it could look to the TRC of Sierra Leone as an example of how another African country promoted dialogue and forgiveness in the context of ongoing criminal prosecutions. Although the circumstances of Sierra Leone’s civil war, Rwanda’s genocide, and South Africa’s apartheid regime differ greatly from northern Uganda’s conflict with the LRA, the innovative legal approaches of Sierra Leone, South Africa, and Rwanda serve as useful examples and inspiration for Uganda.

government itself prosecuted the commanders. *Id.* at 17. In such a situation, it might be appropriate for the government to create a mixed tribunal, similar to that adopted in Sierra Leone, to avoid creating the perception that the trials represent retribution by the southern-dominated Ugandan government against northern Uganda. See Int’l Crisis Group, *supra* note 371, at 2; Schabas, *supra* note 256, at 189; Tejan-Cole, *supra* note 204, at 316.

418 See Int’l Crisis Group, *supra* note 45, at 15 n.112 (concluding that Museveni’s options are limited and that he “apparently want[s] to maintain the threat of [ICC] prosecutions”).
DEPRIVATION OF CARE: ARE FEDERAL LAWS RESTRICTING THE PROVISION OF MEDICAL CARE TO IMMIGRANTS WORKING AS PLANNED?

RYAN KNUTONSON*

Abstract: The Personal Responsibility and Work Opportunity Act of 1996 has severely limited immigrants’ access to medical care. In enacting the legislation, Congress stated that immigrants were too great a burden on the U.S. medical system and cost the federal government too much. In reality, immigrants do not place an unduly high burden on the medical system. The Act also limits the autonomy of local medical providers by restricting their ability to provide preventive medical care, care that is better for patients’ health and, in the long run, more cost effective. Further complicating this issue is that medical providers are often unable to recover complete reimbursement from the federal government because the Act authorizes repayment only for services rendered to patients in an emergency condition. This note calls for a repeal of the anti-immigrant provisions of the Act and suggests that decisions regarding the provision of care are best left to medical providers at the local level.

Introduction

After spending over a month at various New York City hospitals, Ming Qiang Zhao suffered an unexpected and costly death.1 During the summer of 2005, Mr. Zhao, a fifty-year-old Chinese immigrant who had been living in New York City for over ten years, began to feel ill.2 With no doctor and no access to the health care system, Mr. Zhao


2 See id. After spending the voyage packed into the cargo hold area of a smuggling ship, Mr. Zhao entered the country without documentation in 1993. Id. Mr. Zhao, like many of his fellow Chinese immigrants, came to the United States with the hope of providing a better life for himself and his family back in mainland China. See id. For a thorough analysis of illegal Chinese migration, see Zai Liang & Wenzhen Ye, From Fujian to New York: Understanding the New Chinese Immigration, in Global Human Smuggling: Comparative Perspectives 187, 199–200 (David Kyle & Rey Kosloski eds., 2001). Liang and Ye contend that economic motivations play a large role in Chinese emigration from Fujian province, the province with the largest migration outflow. See id. at 191, 199–200.
sought the advice of an unlicensed practitioner in Manhattan’s Chinatown district. Mr. Zhao walked away with three bags of unknown and unlabeled white pills that the practitioner claimed were an herb-based remedy for high blood sugar, high blood pressure, and insomnia. A week later, on July 6, Mr. Zhao collapsed in the street.

An ambulance rushed the unconscious Mr. Zhao to the bankrupt St. Mary’s hospital in Brooklyn. Scheduled to close its doors only weeks after Mr. Zhao arrived, St. Mary’s transferred Mr. Zhao to St. John’s Hospital in Queens. Mr. Zhao’s coma lasted several weeks. In an attempt to determine the cause of Mr. Zhao’s sudden medical emergency, doctors administered a host of diagnostic tests including spinal taps, EKGs, and CAT scans, and treated Mr. Zhao with antibiotics, anticonvulsants, and blood thinners. Visitors began to hope for a recovery when, after three weeks of unconsciousness, Mr. Zhao appeared to respond to his name. Despite his improved responsiveness, doctors, acting through an interpreter, asked Mr. Zhao’s closest confidants if they would agree to a “Do Not Resuscitate” order. Mr. Zhao’s friends refused. On August 9, 2005, as the doctors discussed the order again, Mr. Zhao attempted to break free of the tubes and oxygen mask attached to his mouth. Despite subsequent resuscitation attempts, Mr. Zhao died without uttering a word. During his combined stay at St. Mary’s and St. John’s, Mr. Zhao’s medical bills exceeded $200,000.

3 Bernstein, supra note 1. Five years earlier, Mr. Zhao was diagnosed with nasal cancer; through successful treatment the cancer was eradicated. Id. Mr. Zhao’s treating physician requested that he make routine follow-up visits for the remainder of his life. Id. Because of a lack of ability to pay and administrative difficulties at the hospital, Mr. Zhao did not go back for check-up procedures. Id.

4 Id.

5 Id.

6 Id.

7 Id. St. Vincent’s Catholic Medical Centers, the parent organization to both St. Mary’s and St. John’s, was also in financial ruin and had recently filed for bankruptcy protection. See id.

8 See Bernstein, supra note 1.

9 Id. The tests revealed diabetes and high blood pressure, though their respective roles in Mr. Zhao’s ultimate death were unknown. Id.

10 Id.

11 Id. Bernstein’s story does not shed light on the motivation behind the doctor’s request for a “Do Not Resuscitate” order. See id.

12 Id.

13 Bernstein, supra note 1.

14 Id.

15 See id. Mr. Zhao spent a total of thirty-nine days in the intensive care beds at St. Mary’s and St. John’s at a cost $5400 per day. See id.
Mr. Zhao’s tragic story highlights the growing problems facing both immigrants and health care providers under the current statutory framework, a regime that denies most preventive medical care to immigrants.\(^\text{16}\) Unfortunately, the Personal Responsibility and Work Opportunity Act of 1996 (PRWOA), along with other federal and state legislation, has ushered in a new anti-immigrant era in the United States.\(^\text{17}\) PRWOA severely curtailed immigrants’ access to public welfare benefits by eliminating access to most federal, state, and local benefits, the notable exception being access to emergency medical care.\(^\text{18}\) Furthermore, as a result of infectious anti-immigrant rhetoric, immigrants like Mr. Zhao fear the adverse consequences that may result if they seek out or rely on governmental assistance.\(^\text{19}\) This fear has, in turn, led immigrants to seek alternative forms of care or delay primary care and wait until their health


\(^{18}\) See Personal Responsibility and Work Opportunity Reconciliation Act §§ 401, 411. Because this note discusses the original PRWOA legislation, subsequent amendments, and the current codified version, it is appropriate and helpful to account for this distinction. Accordingly, citations including the original public law indicate reference to the original legislation, whereas citations including only the U.S. Code indicate reference to the statute as it is currently in force.

problems become critical emergencies before they seek medical attention.\textsuperscript{20}

Hospitals and medical providers are also struggling under the general prohibition on providing preventive care to immigrants.\textsuperscript{21} Compounding the fact that emergency care is an expensive undertaking, high levels of unrecouped medical costs place significant financial pressure on medical providers.\textsuperscript{22} Hospitals that provide emergency care to patients who are unable to pay may request reimbursement from state and federal funds.\textsuperscript{23} However, because state and federal reimbursement programs cannot provide complete reimbursement, hospitals and medical providers often absorb a significant amount of the cost associated with providing emergency care.\textsuperscript{24} Despite a recent study which illustrates that immigrants’ share of total medical costs is less than their population share, it is undeniable that immigrants are partially responsible for the dire economic picture facing the U.S. medical system.\textsuperscript{25}

\begin{flushright}


\textsuperscript{22} See Am. Hosp. Ass’n, Fact Sheet: Uncompensated Hospital Care Cost 4 (2006), available at http://www.aha.org/aha/content/2006/pdf/uncompensatedcarefs2006.pdf (providing national statistics on uncompensated care which reveal that in 2005 $28.8 billion, or 5.6% of total expenses, were never compensated). Uncompensated care includes both charity care (care to those patients for whom a hospital does not expect payment) and bad debt (care that a hospital is unable to recoup). Id. Medicare and Medicaid underpayment is the difference between the cost of the medical services provided and the reimbursement received from the state and federal government for providing care. See Am. Hosp. Ass’n, Fact Sheet: Underpayment By Medicare and Medicaid 3 (2006), available at http://www.aha.org/aha/content/2006/pdf/underpaymentfs2006.pdf [hereinafter Underpayment] (providing national statistics on underpayment of Medicare and Medicaid which reveal more than $25 billion in underpayments to hospitals providing Medicare and Medicaid services in fiscal year 2005).


\textsuperscript{24} Id. at 47.

\textsuperscript{25} Dana P. Goldman et al., Immigrants and the Cost of Medical Care, 25 Health Aff. 1700, 1708–09 (2006) (concluding that legally residing immigrants and undocumented immi-
Although Congress intended to relieve the financial strain on hospitals and medical centers with the passage of PRWOA, in reality, the Act imposes significant economic hardships on hospitals and emergency rooms. A separate, pre-existing piece of legislation, the Emergency Medical Treatment and Active Labor Act (EMTALA), requires that any hospital that receives Medicaid funding provide appropriate screening and subsequent stabilizing care to anyone who enters its emergency room doors. Thus, the current legal framework forbids medical practitioners from providing most preventive care to immigrants who fall under PRWOA, yet obliges these same practitioners to treat immigrants with emergency medical conditions under EMTALA. As one doctor explained, treating emergency medical conditions that could have been prevented through primary care is both “bad medicine” and “bad economics.”

Recently, Congress was forced to recognize the “bad economics” of PRWOA’s prohibition on preventive care in its approval of $1 billion of additional aid to help defray the increasing costs of providing emergency care to undocumented immigrants. The Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA) appropriates $250 million per year from years 2005 through 2008 to help defray the increased cost of providing emergency medical care to undocumented immigrants. Given that Congress’s ultimate goal was to reduce the financial burden that immigrants like Mr. Zhao place on the

---

26 See 8 U.S.C. § 1601 (2000) (stating that immigrants are not to burden the public benefit system); Jim Yardley, Immigrants’ Medical Care Is Focus of Texas Dispute, N.Y. TIMES, Aug. 12, 2001, at A18 (quoting Dr. Kenneth L. Mattox of Ben Taub Hospital in Houston, Texas that emergency treatment can cost upwards of four to ten times as much as primary care).

27 See Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd(a)–(b) (2000). While in theory participation in Medicare and Medicaid is voluntary, in reality hospitals cannot afford to opt out of participation. See Underpayment, supra note 22, at 1.


29 See Yardley, supra note 26 (noting weaknesses of the current statutory regime). Doctors are also compelled to provide care by their own code of medical ethics. See Jaklevic, supra note 20, at 52 (indicating that the Hippocratic oath requires doctors to provide medical care to all who are in need, regardless of their immigration status).


31 See § 1011(a)(1), 117 Stat. at 2066. MMA provides funding directly to hospitals and medical centers with unpaid Emergency Medicaid bills. See § 1011(c)(1), 117 Stat. at 2066.
health care system, increased funding for emergency care calls into question the efficacy of prohibiting preventive care.\textsuperscript{32}

This note will examine the effectiveness of PRWOA, after more than a decade of implementation. Part I discusses changing immigration patterns in the United States and analyzes the impact of these changes on the U.S. health care system. Part II outlines the history of immigrants’ access to health care. This section begins with a brief analysis of the constitutional basis for immigrant access to public welfare benefits and then provides an analysis of the statutory frameworks by which immigrants have accessed welfare benefits like medical care. Part III explores the legislative history of PRWOA to discern congressional intent, addresses subsequent related federal legislation, and analyzes post-PRWOA studies that call into question the effectiveness of the Act in light of Congress’s intended goals. Part IV provides a salient example of a preventive care program which may result in greater realization of Congress’s intent to reduce the medical care costs of immigrants. Finally, this note concludes that PRWOA has been an economic failure for state and local governments, and thus advocates that in addition to giving medical practitioners’ greater autonomy to provide preventive care, the federal government must provide more adequate funding to state and local governments.

I. IMMIGRANTS: NUMBERS AND EXPERIENCES

Over the past thirty years the United States has seen a rapid rise in its immigrant population, and, currently, immigration is at the highest level in U.S. history.\textsuperscript{33} According to a recent study of the U.S. Census figures, the total number of immigrants in the country increased from 9.6 million in 1970 to 35.2 million in 2005, an increase of more than...
Immigrants as a percentage of the overall population increased significantly as well, from 4.7% in 1970 to 12.1% in 2005. From 2000 to 2005 alone, an additional 7.9 million immigrants entered this country. Since 1970, the number of naturalized citizens has decreased in relation to the total number of immigrants. As a result, the total number of immigrants has, since 1970, included more and more non-naturalized residents, such as undocumented and legally residing immigrants. Of the 35.2 million estimated immigrants in 2005, a recent study suggests that between 9.6 and 9.8 million of these immigrants are undocumented. Undocumented immigrants comprise approximately one-fourth of the foreign-born population. Even more illustrative is the fact that undocumented immigrants account for approximately half of the recent overall growth in the immigrant population.

America’s new wave of immigration differs from its historical roots. Over fifty percent of immigrants now hail from Latin America, with Mexican immigrants accounting for approximately thirty percent

---

34 Camarota, supra note 33, at 5 fig.2.
35 Id.
36 Id. at 4.
37 See Schmidley, supra note 33, at 20 (finding that from 1970 to 2000 naturalized citizens decreased from 63.6% to 37.4% of the foreign-born population).
38 See id.
40 Camarota, supra note 33, at 4.
42 See Schmidley, supra note 33, at 13 tbl.3-1 (illustrating that historically most immigrants hailed from Europe while most newly arriving immigrants hail from Latin America and Southeast Asia).
of the total number of immigrants.\footnote{U.S. Census Bureau, The Foreign-Born Population: 2000, Census 2000 Brief Series C2KBR-34, at 2 (2003), available at http://www.census.gov/prod/2003pubs/c2kbr34.pdf.} Not surprisingly, the areas with the highest ratio of immigrants to native citizens are traditional “gateway” areas of the United States—the southwestern border states from California to Texas, New York City, and Miami.\footnote{Id. at 6. Of the 3141 counties in the United States, only 199 counties had a percentage of immigrants at or above the national average. Id.} Moreover, undocumented immigration patterns mirror the settlement trends of overall immigration.\footnote{See U.S. Dep’t of Homeland Sec., supra note 41, at 1.} In 2005, California, Texas, Florida, New York, Illinois, and Arizona accounted for over sixty percent of the total number of unauthorized immigrants.\footnote{See id. at 7 tbl.4. The estimated number and percent of total unauthorized immigrants per state are as follows: California 2.77 million (26%), Texas 1.36 million (13%), Florida 850,000 (8%), New York 560,000 (5%), Illinois 520,000 (5%), and Arizona 480,000 (5%). Id.} Geographic disparities in settlement illustrate the varied effects that immigration has on local communities.\footnote{See id.}

To understand the manner in which immigrants affect local communities, one must be aware that immigrants’ lifestyles differ remarkably from their native-born U.S. citizen counterparts.\footnote{See Schmidley, supra note 33, at 30--53 (comparing education levels, household size, occupation, income levels, welfare participation, and other lifestyle differences). Admittedly, Schmidley’s analysis distinguishes only between the foreign-born and native-born. Id. at 56. However, her findings represent one of the most comprehensive analyses of the economic and social realities facing immigrants today. See id. at 30--53.} On the whole, immigrants’ educational and economic progress is significantly lower in comparison to native-born citizens.\footnote{Camarota, supra note 33, at 10 tbl.6.} Immigrants are more likely than the native born to live in poverty, with 17.1\% of immigrants in poverty compared to 12\% of native-born citizens.\footnote{See id. at 14 tbl.10. Because this statistic compares foreign-born immigrants to native-born citizens, children of immigrants who were born in America fall under citizens as opposed to immigrants. Id. When native-born children of immigrant mothers are counted as immigrants, the immigrant poverty rate rises to 18.4\% while the native citizen rate declines to 11.7\%. Id.} Despite accounting for only 12.1\% of the total population, immigrants and their U.S. born children account for nearly one in four of those living in poverty in America.\footnote{Id. at 14--15.} As can be imagined, immigrants’ incomes are approximately twenty-five percent lower than natives.\footnote{Id. at 10. The median annual earnings of immigrants and natives are $20,800 and $27,600, respectively. Id. The lower median income of immigrants can be partially attributed to their lower level of education. See id. Approximately thirty percent of immigrants in}
likely to have health insurance.\footnote{See \textit{id.} at 9.} One third of all immigrants lack health insurance compared to only thirteen percent of native-born citizens.\footnote{See \textit{id.} at 15 (attributing the lack of insurance to immigrants holding jobs that do not offer insurance and to low income levels that prevent the purchase of individual plans).} Undocumented immigrants fare even worse with an estimated sixty-five percent lacking health insurance.\footnote{See \textit{Camarota}, \textit{supra} note 33, at 15.} Given the stark educational and economic hurdles, it is not surprising that immigrants use public benefit programs more often than native citizens.\footnote{\textit{Id.} at 26. Undocumented immigrants, 3.3% of the total U.S. population, account for 14\% of all persons without medical insurance in the United States. \textit{Id.}} However, despite their greater need for public benefits, recent studies have shown that low-income immigrants are actually less likely to have access to regular health care.\footnote{See \textit{id.} at 16 (finding that even after the 1996 welfare reforms, immigrants are more likely than citizens to use welfare assistance).}

In fact, immigrants use relatively fewer health services in comparison to their native-born citizen counterparts.\footnote{See \textit{Goldman et al.}, \textit{supra} note 25, at 1700 (finding disproportionately less use of medical care in comparison to representation in the U.S. population); \textit{Leighton Ku \& Sheetal Matani, Left Out: Immigrants’ Access to Health Care and Insurance, 20 Health Aff. 247, 249–50 (2001) (finding that immigrants were relatively less likely to visit private clinics or health maintenance organizations).} A recent study by the Rand Corporation revealed that being an immigrant correlated to a “substantial and significant reduction in access” to health care compared to native citizens.\footnote{\textit{Ku \& Matani}, \textit{supra} note 57, at 251.} Lack of health insurance, language barriers, and fear of deportation are all cited as contributing factors that inhibit immigrants from seeking medical care.\footnote{See \textit{Marc L. Berk \& Claudia L. Schur, The Effect of Fear on Access to Care Among Undocumented Latino Immigrants, 3 J. of Immigrant Health 151, 155 (2001) (concluding that fear and anxiety about immigration status is a powerful deterrent to accessing medical care for undocumented immigrants); \textit{Ku \& Matani}, \textit{supra} note 57, at 253–54 (finding both lack of health insurance and an absence of translators, which created language barriers for Spanish speaking immigrants, inhibited access to care).} Researchers for the Rand study found that being a non-citizen adult or child resulted in dramatic
reductions in a person’s actual number of doctor and emergency room visits compared to both native-born and naturalized citizens. When immigrants did seek medical treatment, community clinics and hospital outpatient departments accounted for the most frequent sources of care.

In 2000, a subsequent study completed by Rand revealed that due to reduced medical care access, immigrants accounted for only a small fraction of total health care expenditures in the United States. The 2000 study found that despite comprising approximately 13% of the total population, immigrants accounted for only 8.5% of total medical expenditures. Moreover, immigrants accounted for an even smaller percentage of total public spending on health care. The native-born accounted for 93.3% of the total public spending on health care compared with 6.6% for the foreign-born. Focusing on undocumented immigrants revealed that only 1.5% of total national health care expenditures went to the undocumented. Public supported health care for immigrants totaled only $1.1 billion, or 1.3% of the total $88.5 billion in publicly funded care. Studies evidencing immigrants’ lower use and overall expenditures of medical care suggest that policy makers

---

61 See Ku & Matani, supra note 57, at 251. The 1997 study noted that forty-one percent of immigrant adults and thirty-eight percent of immigrant children visited no medical center or emergency room. Id. at 252. In comparison, only twenty-one percent of native-born adults and thirteen percent of native-born children reported no medical center visits. Id. Another independent study, based on data from 2000, revealed similar results which showed that the foreign-born were twice as likely as the native born to have no contact with the formal health care system. See Goldman et al., supra note 25, at 1705.

62 Ku & Matani, supra note 57, at 250. The study revealed that few immigrants reported that the emergency room was their primary source of care. Id.

63 See Goldman et al., supra note 25, at 1708–09. Researchers collected data by questioning over 2000 English and Spanish speaking residents of Los Angeles County, the largest immigrant community in the United States, regarding their health status, health insurance coverage, use of health services, and immigration status. Id. at 1701. The researchers then extrapolated nationwide statistics based on the results of the local findings in Los Angeles county. Id. at 1708 (noting that nationwide figures had the potential to overstate the true costs because Los Angeles is an immigrant-friendly city).

64 Id. at 1708 exhibit 4 (estimating total health care expenditures of approximately $37 billion on the foreign-born compared with $393 billion on the native-born).

65 See id. (comparing expenditures for health care from public, private, and out-of-pocket sources).

66 See id. Out of a total of $88.5 billion in public sources, native-born patients received $82.6 billion in public aid compared to $5.8 billion for immigrants. Id.

67 Id. at 1709.

68 Goldman et al., supra note 25, at 1708 exhibit 4.
have been incorrect in charging that immigrants place an unduly high burden on taxpayers via their use of the medical system.\footnote{69 See id. at 1711 (“Health care costs are not the major component around which a policy debate about the fiscal benefits or burden of immigrants should focus.”).}

Evaluating immigrants’ impact on the medical system at the national level does not provide a complete picture of the problems that PRWOA has inflicted.\footnote{70 See Uncompensated Care in Southwest Border Counties, supra note 23, at 5 tbl.1.2 (illustrating that if the counties along the U.S.-Mexico border were combined into a single state, this theoretical state would rank last in important economic measures such as the rate of unemployment, per capita income, children living in poverty, and residents without health insurance). The Border Counties Study estimated that over $190 million out of a total of approximately $830 million, or twenty-three percent, of uncompensated care was provided to undocumented immigrants in 2000. See id. at 26.} Regardless of disproportionately low use of medical care by immigrants, the cost of providing care to immigrants is felt most in particular communities.\footnote{71 See id. at 47 (noting that although federal reimbursement programs provide some relief, the programs fail to cover the high costs that exist in the counties along the U.S.-Mexico border).} In an effort to improve outcomes and ultimately lower costs, local communities, acting through private funds, have expanded primary and preventive care to the uninsured, without regard to citizenship status.\footnote{72 Tanya Alteras et al., Econ. & Soc. Research Inst., Community-Based Health Coverage Programs: Models and Lessons 5 (2004), available at http://www.wkkf.org/Pubs/Health/CommunityBasedCoverageFINAL_00250_03763.pdf. Because these types of plans are privately funded, the programs are financially limited and cannot serve all who are eligible. See id. at 4.} As a result of inadequate reimbursement programs and the high degree of bureaucracy involved in securing reimbursement, local governments and medical centers have absorbed much of the costs associated with providing care to immigrants.\footnote{73 See Uncompensated Care in Southwest Border Counties, supra note 23, at 43, 47.} Given this reality, local medical providers, and not the federal government, are best poised to develop sound policies to address serious community health needs.\footnote{74 See Alteras et al., supra note 72, at 5.} 

II. Undocumented Immigrants’ Right to Health Care: A Diminished Landscape

Although the goal of PRWOA was to limit immigrants’ access to public health care subsidies, the full impact of its new restrictions is only clear in the context of immigrants’ historical access to public benefits.\footnote{75 See 8 U.S.C. § 1601(4) (2000).} Prior to the passage of PRWOA, federal and state laws estab-
lishing immigrants’ access to health care were neither uniform nor consistently applied.\textsuperscript{76} In the absence of clear restrictions, health care professionals often provided preventive care without reference to a patient’s immigration status.\textsuperscript{77} Despite \textit{actual} access to the health care system, an immigrant’s \textit{legal} access depended on his or her immigration status and the statutory requirements for the specific benefit.\textsuperscript{78} This section examines the constitutional issues in restricting public benefits to immigrants and additionally discusses both historical and current legislation aimed at restricting immigrant access to health care.

A. Constitutional Considerations

Restrictions on immigrant access to public health benefits are a relatively recent trend.\textsuperscript{79} Throughout the 1970s and 1980s, courts ruled in favor of immigrants contesting the denial of public benefits based on immigration status and alienage.\textsuperscript{80} The Supreme Court struck down state restrictions on federal benefit programs when those restrictions were based solely on immigration status.\textsuperscript{81} In the 1971 case of \textit{Graham v. Richardson}, the Supreme Court struck down long-term residency and citizenship requirements for federal public health benefits on both equal protection and supremacy grounds.\textsuperscript{82} At issue in \textit{Richardson} were an Arizona restriction based on long-term residency and citizenship and a Pennsylvania restriction based exclusively on citizenship.\textsuperscript{83} The Court concluded that the States’ desire to preserve public benefits for

\begin{footnotes}
\item[77] See Costich, supra note 16, at 1046. Additionally, it appears that health care providers were guided by professional ethics in their provision of services to those in need regardless of a patient’s legal status. \textit{Id.} at 1047.
\item[78] See Carton, supra note 76, at 1035–36 (explaining the interplay between seven major legal classifications and how each particular classification applied to specific public benefit programs); Costich, \textit{supra} note 16, at 1047.
\item[79] See Carton, supra note 76, at 1036 (noting that states only began restricting eligibility for public programs in the 1970s).
\item[81] See Graham v. Richardson, 403 U.S. 365, 376–77 (1971); Carton, \textit{supra} note 76, at 1039.
\item[82] 403 U.S. at 376, 380.
\item[83] \textit{Id.} at 367–68.
\end{footnotes}
its own citizens by providing a classification based on alienage did not pass constitutional muster.\(^{84}\) The Court also ruled that immigration and alienage determinations were purely federal matters and the States’ intrusion violated the Supremacy Clause.\(^{85}\)

Any hope that \textit{Richardson} provided for immigrants was short lived, however.\(^{86}\) In the 1976 case of \textit{Mathews v. Diaz}, the Court upheld a federal regulation that restricted Medicare benefits to citizens and legal immigrants residing in the United States for at least five years.\(^{87}\) The Court, while acknowledging that all persons were protected by the Due Process Clause, rejected arguments that all aliens were entitled to the full benefits and advantages of citizenship and denied claims that all aliens were entitled to the same legal classification.\(^{88}\) In reaching its decision, the Court explicitly referenced and distinguished the \textit{Richardson} case.\(^{89}\) Because it was Congress, and not a state, conditioning immigrants’ access to Medicare, no federalism issues were involved.\(^{90}\) Furthermore, Congress’s federal power over immigration meant that the equal protection analysis in \textit{Richardson} did not apply in \textit{Diaz}.\(^{91}\) Rather, the Court ruled that decisions made by Congress in the area of immigration, an area of plenary power, dictate a narrow standard of review.\(^{92}\) Ultimately, \textit{Richardson} and \textit{Diaz} led to the understanding that state restrictions, subject to strict scrutiny, would in most cases be struck down, while federal restrictions, dictated by a narrow standard of review, would likely be upheld.\(^{93}\)

\section*{B. PRUCOL: A Period of Flexible Access}

Prior to major welfare reform in 1996, the legal landscape by which immigrants received public benefits was fragmented according to the type of benefit desired.\(^{94}\) This fragmentation resulted not from any state or federal distinction, but rather from the varying requirements of the different programs as well as non-uniform judicial inter-

---

\(^{84}\) \textit{Id.} at 374.

\(^{85}\) \textit{Id.} at 378.


\(^{87}\) \textit{Id.} at 69.

\(^{88}\) \textit{Id.} at 78.

\(^{89}\) \textit{Id.} at 84–85.

\(^{90}\) \textit{See id.}

\(^{91}\) \textit{See Diaz}, 426 U.S. at 86–87.

\(^{92}\) \textit{Id.} at 81–82.

\(^{93}\) \textit{See id.}; \textit{Richardson}, 403 U.S. at 376–77; Carton, \textit{supra} note 76, at 1039.

\(^{94}\) \textit{See Carton}, \textit{supra} note 76, at 1033 (noting that access to particular benefits had been the subject of extensive legislation and litigation).
pretation of whether an immigrant was “permanently residing under color of law” (PRUCOL).\textsuperscript{95} It is important to note that PRUCOL is a legislatively-enacted category for public benefits eligibility, not a specific immigration status.\textsuperscript{96}

The PRUCOL provision originated in a 1972 amendment to the Social Security Act that restricted immigrant access to the Supplementary Security Insurance program.\textsuperscript{97} The amendment conditioned eligibility on whether the applicant was “either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law.”\textsuperscript{98} PRUCOL gradually was incorporated as a requirement into other major public benefit programs, including Aid to Families with Dependant Children (AFDC), unemployment insurance, and Medicaid.\textsuperscript{99} Despite wide incorporation of the provision, Congress’s failure to provide an initial statutory definition or leave any legislative history as to the proper meaning of PRUCOL was problematic.\textsuperscript{100} As a result of this ambiguity, a broad category of undocumented immigrants were eligible for benefits despite their uncertain legal status.\textsuperscript{101} The lack of a definitive understanding as to what PRUCOL actually entailed led to extensive litigation and differing judicial interpretations.\textsuperscript{102} During the PRUCOL era, many courts protected undocumented immigrants from being denied public benefits.\textsuperscript{103}

While PRUCOL first appeared in federal regulations and statutes, it was the judiciary that gave the term its operative meaning.\textsuperscript{104} In \textit{Holley v. Lavine}, the first case to address the meaning of PRUCOL, the U.S. Court of Appeals for the Second Circuit liberally interpreted PRUCOL

\begin{footnotes}
\textsuperscript{95} See id.
\textsuperscript{96} Id. at 1035.
\textsuperscript{98} § 1614, 86 Stat. at 1471.
\textsuperscript{99} See Carton, supra note 76, at 1039.
\textsuperscript{100} See id. at 1033, 1042. Congress finally provided a definition of PRUCOL in 1986. See infra notes 111–115 and accompanying text.
\textsuperscript{101} See Costich, supra note 16, at 1046.
\textsuperscript{102} See Carton, supra note 76, at 1033, 1049.
\textsuperscript{103} See, e.g., Holley, 553 F.2d at 847, 851 (upholding an undocumented immigrant’s access to AFDC benefits); Lewis, 663 F. Supp. at 1177, 1183–84 (rejecting a federal agency’s imposition of a more stringent alienage requirement than Congress originally imposed in determining Medicaid eligibility).
\textsuperscript{104} See 42 U.S.C. § 1382c(a)(1)(B) (2000); Holley, 553 F.2d at 849–50. The court’s analysis of the federal regulation that governed the AFDC program presents an informative example of the language typically found in federal and state statutes and regulations and how that language came to be interpreted by the courts. See Holley, 553 F.2d at 849–50.
\end{footnotes}
and ultimately granted AFDC benefits to the plaintiff Gayle Holley de-
spite her undocumented status. At issue was whether Holley could 
properly be designated as either “(a) a citizen or (b) an alien lawfully 
admitted for permanent residence or otherwise permanently residing in 
the United States under color of law.” In embracing an expansive reading 
of the phrase “under color of law,” the Court ruled that the regulation 
deliberately sanctioned the inclusion of cases that were “in strict terms, 
outside the law but . . . near the border.” Specifically, the Court 
found that Holley should be designated as PRUCOL because the Im-
migration and Naturalization Service (INS) had issued a letter of intent 
stating that it knew of her residency and did not intend to deport her 
and because her residency was “continuing or lasting” as opposed to 
“temporary.” Thus, an immigrant whose status was unclear or am-
biguous, like the plaintiff in Holley, could be eligible for public bene-
fits. Although the majority of undocumented immigrants’ lack of le-
gal status was clear, a significant number of immigrants were 
nevertheless able to access public benefit programs because of their 
unclear legal status. While most courts followed Holley’s broad read-
ing, others interpreted PRUCOL more narrowly to confer access only 
to citizens and legal permanently residing immigrants.

It was not until 1986, when Congress first provided a definition of 
PRUCOL, that the phrase began to gain a consistent meaning. Congress’s definition came in response to a judicial ruling that rejected a federal agency regulation, in the absence of explicit statutory support, limiting Medicaid eligibility to citizens, legal permanent residents, and PRUCOLs. Section 9406 of the Omnibus Budget Reconciliation Act

105 See Holley, 553 F.2d at 851; Carton, supra note 76, at 1042–43.
106 Holley, 553 F.2d at 848–49 (emphasis added). Holley had entered the United States lawfully on a student visa, married a citizen, and subsequently had six children who were American citizens. Id. at 847–48. However, at the time of the suit, Holley had separated from her husband, and thus, was determined to be unlawfully residing in the country. Id. at 848–49.
107 See id. at 849–50.
108 Id. at 847, 850.
109 See id.; Costich, supra note 16, at 1046.
110 See Costich, supra note 16, at 1046.
111 See, e.g., Sudomir v. McMahon, 767 F.2d 1456, 1459, 1462–63 (9th Cir. 1985) (denying asylum seekers eligibility for AFCD benefits because while they reside under color of law, their residence is not deemed to be permanent); Esparza v. Valdez, 612 F. Supp. 241, 244 (D. Colo. 1985) (restricting unemployment compensation benefits to immigrants whose lawful status allows residency in the United States for an indefinite period of time).
112 See Carton, supra note 76, at 1041.
of 1986 (OBRA-86) restored the federal agency’s interpretation and stated that PRUCOL should encompass “all of the categories recognized by immigration law, policy, and practice.” Additionally, Congress urged the federal agency and the states to broadly interpret the phrase “under color of law.” Thus, it appears that Congress embraced the expansive interpretation of eligibility as first understood in Holley.

Even with Congress’s definition of PRUCOL and legislative history to aid in interpretation, PRUCOL has never enjoyed universal application to the various public benefit programs. Generally, courts in some jurisdictions continued to interpret PRUCOL liberally, just as the first court to interpret PRUCOL had done in Holley. One commentator has remarked that eligibility for public benefits during this time was “a legal morass marked by wide inconsistency and topical controversy.” Nevertheless, compared to later restrictions, the PRUCOL provision was generally sympathetic to undocumented immigrants seeking public benefits. The passage of PRWOA in 1996 brought an end to PRUCOL’s expansive eligibility and ushered in an anti-immigrant era that has seen the elimination of public benefit eligibility for many immigrants.

C. PRWOA: A Drastic Step Backwards

On August 22, 1996, President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act, drasti-
PRWOA fundamentally altered the way eligibility for public benefits is determined by shifting authority away from the federal government and to the states. Under the Act, states have great flexibility in determining which immigrants are eligible for state and locally funded benefits. For the first time, citizen status requirements for the major federal and state public benefit programs became standardized. The legislation’s greatest impact on both documented and undocumented immigrants is its broad repudiation of public benefits.

In determining public benefit eligibility PRWOA distinguishes between “qualified aliens” and non-qualified aliens. Under the original PRWOA legislation, qualified aliens included legally permanent residents, asylum seekers, refugees, aliens paroled into the United States for a period of at least one year, aliens whose deportation is being withheld by INS, and aliens granted conditional entry. A subsequent amendment, the Balanced Budget Act of 1997, added certain Cuban and Haitian entrants and aliens subjected to domestic violence who are in the process of obtaining status as qualified aliens. All other immigrants, including the undocumented, are not classified as qualified aliens.

---


123 See Zimmermann & Tumlin, supra note 122, at 1–2 (noting that prior to the passage of PRWOA the federal government enjoyed plenary power for determining immigrant eligibility for benefits while the states could not determine eligibility by alienage).

124 See id. at 9. In addition to determining eligibility for already existing state programs, states were given the choice of whether to create new programs to fill the gap created by the loss of all federal assistance for non-qualified immigrants. Id.

125 See §§ 401, 411, 431, 110 Stat. 2261–62, 2268–69, 2274 (defining all federally funded assistance together as “Federal Public Benefit” and all state or locally funded assistance as “State or Local Public Benefit”).


127 § 431, 110 Stat. at 2274.


130 See § 1641(a). In nearly every situation an undocumented immigrant would likely fail to meet the requirements of a qualified alien. See id.
Because in most circumstances undocumented immigrants cannot be deemed qualified immigrants, they fare poorly under PRWOA. PRWOA denies undocumented immigrants access to all non-emergency health care benefits. With few exceptions, undocumented immigrants are foreclosed from receiving federal public benefits, including Medicare and Medicaid. Moreover, PRWOA restricts the states’ ability to provide any state or local public benefits. A state can provide non-emergency health care only by enacting a state law that affirmatively makes unqualified immigrants eligible. In theory then, in order for a local health care provider to administer preventive health care, it must wait for the state legislature to pass affirmative legislation countering PRWOA’s anti-immigrant provisions.

Qualified immigrant access to public benefits is similarly curtailed under PRWOA. Prior to 1996, most PRWOA-qualified immigrants fell under the PRUCOL classification and were eligible for most public benefits, including Medicaid. However, under PRWOA, qualified immigrants’ access to public benefits is dependent upon additional fac-

---

131 See §§ 1611, 1621.
132 See id.
133 See § 1611(c)(1)(B) (including in “[f]ederal public benefit” any “retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit or any other similar benefit” funded by the federal government); Costich, supra note 16, at 1052.
134 See § 1621(c)(1)(B) (including in “state or local benefit” the same classification of benefits as defined at the federal level, but funded through the state or local community).
135 8 U.S.C. § 1621(d) (2000); see Doe v. Wilson, 67 Cal. Rptr. 2d. 187, 190 (Cal. Ct. App. 1997) (upholding PRWOA’s ability to require pre-existing state benefit programs to be terminated in absence of affirmative, post-PRWOA legislation). In Doe v. Wilson, the Governor of California and Director of the California Department of Health Services sought to implement an interim emergency regulation that would prohibit doctors from providing publicly funded prenatal care to undocumented immigrants. Id. The emergency regulation would bring California hospitals into compliance with PRWOA by prohibiting previously allowed prenatal care until a new law had been passed authorizing such care. Id. The Court of Appeals for the First District vacated, and ultimately denied, an injunction to prevent implementation of the emergency regulation granted by the district court. Id. at 199.
136 See § 1621(d). One commentator has argued that based on federalism principles, the constitutionality of PRWOA as it applies to the states is unsound. See Alison Fee, Note, Forbidding States from Providing Essential Social Services to Illegal Immigrants: The Constitutionality of Recent Federal Action, 7 B.U. Pub. Int. L. J. 93, 99 (1998).
137 See 8 U.S.C. §§ 1612, 1622. One exception is that PRWOA contains a grandfather clause that maintains assistance for most immigrants who were receiving benefits prior to its passage. See § 1612(a)(2)(D)(i)(III), (ii)(III).
138 See §§ 1601–1646; Carton, supra note 76, at 1034–35 (stating that lawful permanent residents, refugees, asylees, and conditional entrants were generally eligible for public benefits).
tors. Immigrants who are refugees and asylum seekers are entitled to most public benefits for a minimum of seven years from the date of their arrival into the United States. For non-refugee or -asylum immigrants, eligibility for certain programs is dependent on the applicant’s date of immigration. Immigrants entering the country after the date of enactment, even if properly documented, are prohibited from receiving federal public benefits for their first five years of residency. After this five-year residency period, qualified immigrants become eligible for public benefits. PRWOA is generally more lenient to immigrants who entered the country prior to the date of its enactment.

Despite a number of restrictions, PRWOA provides limited exceptions under which undocumented immigrants and qualified immigrants barred from eligibility due to the five-year residency requirement may retain access to health care. Specifically, these immigrants continue to have access to emergency medical care, disaster relief, immunizations and treatment for communicable diseases, and certain programs designated by the U.S. Attorney General as necessary for the protection of life or safety, such as soup kitchens and short-term shelter. However, health care providers complain that PRWOA effectively bars non-qualified immigrants from receiving any social services or preventive health care.

139 See ZIMMERMANN & TUMLIN, supra note 122, at 15–16 (explaining that eligibility turns on the type of immigrant and the date of immigration).
140 § 1612(a)(2).
142 See § 1613(a). Post-enactment immigrants are generally prohibited from enrolling in Supplemental Security Income, food stamp, non-emergency Medicaid, and state child health insurance programs. ZIMMERMANN & TUMLIN, supra note 122, at 14. Qualified immigrants are thus treated the same as unqualified immigrants during the initial five year period of residency. See § 1613(a).
143 See §§ 1612, 1613(a).
145 See § 1611(b).
146 Id.
147 See, e.g., Steve Brewer, Opinion Supports Immigrant Care: County Attorney Says Federal Law Would Not Be Violated as a Result, HOUSTON CHRON., Sept. 7, 2001 at A29 (discussing cloud of criminal liability that may result from providing treatment to undocumented immigrants).
States are free to enact legislation that uses state and local resources to provide public benefits to unqualified and undocumented immigrants. Both California and Texas, two states with high immigrant populations, recently enacted laws affirming the ability of public hospitals to provide medical care to immigrants who would otherwise be foreclosed from receiving care under PRWOA. Neither state law mandates that local hospitals provide health care to undocumented immigrants. Instead, like the devolution of determining eligibility from the federal to the state level under PRWOA, these affirmative state laws defer responsibility over eligibility to the local level. The impact of the California and Texas laws is still unknown, especially in light of the fact that several hospitals in both California and Texas continued to provide non-emergency care prior to the enactment of affirmative state laws.

Given PRWOA’s clear mandate, it is surprising that Congress neglected to include any enforcement mechanism against local health care providers who violate the law. Discussion and interpretation of enforcement has received little attention. The only known discussion of possible consequences for violation of PRWOA resulted from a letter of inquiry from a county hospital to the Texas Attorney General.

---

149 See Cal. Welf. & Inst. Code §§ 17850–17851 (West Supp. 2007); Tex. Health & Safety Code Ann. § 285.201 (Vernon Supp. 2006); Camarota, supra note 33, at 6 tbl.1. In 2006, California enacted a law that “affirm[s] the ability of counties, cities, and hospital districts to provide health care and other services to all residents, if any of these entities has decided to do so at its own discretion.” See Cal. Welf. & Inst. Code §§ 17850–17851. In 2003, the Texas state legislature affirmatively authorized local hospitals to provide preventive, non-emergency medical care to resident immigrants regardless of citizenship status, provided the services are locally funded. See Tex. Health & Safety Code Ann. § 285.201.
152 See Ed Fletcher, Health Costs Scrutinized: Debate Resumes on County Care for Illegal Immigrants, Sacramento Bee, Jan. 1, 2007, at B1 (reporting that county hospitals in Sacramento, California routinely provided care without ascertaining the patient’s legal status in possible violation of federal law); Yardley, supra note 26 (noting that hospitals in Houston, Dallas, San Antonio, and El Paso provide non-emergency care to undocumented immigrants).
154 See Fletcher, supra note 152.
providing his Opinion, the Texas Attorney General acknowledged that PRWOA itself provided no enforcement procedure or penalties.\(^ {156}\) However, that did not eliminate the potential for both federal and state sanctions.\(^ {157}\) Since, at the time of the Attorney General’s Opinion, Texas had not passed an affirmative state law after PRWOA, providing non-emergency care could have constituted a violation of both federal and state law.\(^ {158}\) Because the county hospital received federal and state funds, conditioned on compliance with each, the hospital risked losing all of its public funding.\(^ {159}\) While the Attorney General’s Opinion was and is not binding, it nevertheless is a persuasive authority.\(^ {160}\) As a result, many hospitals in Texas have chosen to cut non-emergency health care to immigrants rather than be subject to funding cuts or potential criminal sanctions.\(^ {161}\)

**D. EMTALA’s Emergency Care Mandate**

It is ironic that on one hand federal law denies both non-qualified and undocumented immigrants access to most public benefits, yet on the other hand explicitly affirms these immigrants’ right to emergency medical care.\(^ {162}\) Understanding this apparent dichotomy requires an analysis of the Emergency Medical Treatment and Active Labor Act (EMTALA), a separate, pre-existing piece of federal legislation.\(^ {163}\) EMTALA was enacted in 1986 to prevent “patient dumping,” or the refusal to provide necessary emergency treatment because the person seeking care was poor, indigent, or uninsured.\(^ {164}\) EMTALA imposes two primary

---

\(^ {156}\) *Id.* at 6.

\(^ {157}\) *See id.*

\(^ {158}\) *See id.* at 4, 6.

\(^ {159}\) *See id.* at 6–7.

\(^ {160}\) *See* Kerby v. Collin County, 212 S.W.2d 494, 497 (Tex. Civ. App. 1948).

\(^ {161}\) *See* Harvey Rice, *Cuts in Immigrant Care Questioned: Hospital Trustees Want AG to Reconsider Rules*, Houston Chron., Aug. 23, 2001, at A17 (recognizing that county hospitals were fearful of criminal prosecution for providing care that violated PRWOA).

\(^ {162}\) *See* 8 U.S.C. § 1611(b)(1)(A) (2000) (excluding non-eligibility “for care and services that are necessary for the treatment of an emergency medical condition” that is not related to an organ transplant procedure).


\(^ {164}\) *See* 131 Cong. Rec. 28569 (1985) (statement of Sen. Dole) (stating that hospitals must provide an “adequate first response to a medical crisis”). EMTALA “send[s] a clear
obligations on hospital emergency rooms. First, the emergency room must provide an appropriate screening to any individual who presents himself or herself at the emergency room. Secondly, if the emergency department determines that an emergency medical condition exists, the hospital must stabilize the patient or provide for an adequate transfer.

EMTALA requires that health care providers follow the same procedures in all potential emergency cases; thus, immigration status must not be an impediment to accessing care. Immigrants who are neither qualified under PRWORA nor documented can secure a minimum level of care by showing up at a hospital with an emergency department. Viewed in this manner, EMTALA provides immigrants with a much needed safety net of medical care. In addition to admirably providing emergency care to everyone, EMTALA also has magnified the effects of some pre-existing problems within the U.S. health care system, such as the rising rate of uninsurance. In enacting EMTALA, Congress did not provide any method of compensation or direct any funds to hospitals for the losses incurred in providing emergency care to undocumented immigrants and the indigent. Hospitals treating large uninsured and undocumented immigrant populations have borne the financial burden of providing this mandated level of care. Because EMTALA, at a minimum, mandates that hospitals provide emergency care that can often be more costly and less effective than preventive care, PRWORA’s prohibition on cost-effective preventive care is economically irrational.

signal to the hospital community . . . that all Americans, regardless of wealth or status, should know that a hospital will provide what services it can when they are truly in physical distress.” Id. at 28568 (statement of Sen. Durenberger).

---

165 See § 1395dd(a)–(b).
166 § 1395dd(a). Extensive litigation has addressed what constitutes an adequate screening. See, e.g., Baber v. Hosp. Corp. of Am., 977 F.2d 872, 878 (4th Cir. 1992) (ruling that a hospital provides an appropriate screening when it applies its normal screening procedure uniformly to all similarly situated patients).
167 See § 1395dd(b).
168 See Costich, supra note 16, at 1051.
170 See id. at 725.
171 See id. at 709.
172 Id. at 723.
173 See UNCOMPENSATED CARE IN SOUTHWEST BORDER COUNTIES, supra note 23, at iii; Hermer, supra note 169, at 715.
III. CONGRESSIONAL INTENT AND SUBSEQUENT FUNDING LEGISLATION: 
AN EVALUATION OF PRWOA

In enacting PRWOA, the Republican-led 104th Congress, riding a 
wave of popular support to curtail federal spending under the “Con-
tract with America,” slashed federal expenditures without regard to the 
consequences.\textsuperscript{175} Responding to anecdotal evidence of mass immigra-
tion motivated by the desire to access the U.S. health care system, 
PRWOA curtailed immigrants’ access to health care in an unprece-
dented manner.\textsuperscript{176} PRWOA enjoyed easy passage with over seventy-five 
percent of lawmakers supporting it in both the House of Represen-
tatives and the Senate.\textsuperscript{177} However, despite significant support, several 
lawmakers correctly anticipated the dire economic consequences of 
denying immigrants access to most forms of preventive health care.\textsuperscript{178} 
Furthermore, Congress allocated as little funding as possible to cover 
the expenses associated with providing minimal, but mandated, levels 
of care.\textsuperscript{179}

A. Congressional Intent

As evidenced in its introductory text, Congress’s intent in enacting 
PRWOA’s anti-immigrant provisions was multi-fold.\textsuperscript{180} First, Congress 
saw self-sufficiency as the basic principle of U.S. immigration law.\textsuperscript{181} 
Congress maintained that immigrants should “not depend on public 
resources to meet their needs” and that “public benefits must not con-
stitute an incentive for immigration.”\textsuperscript{182} Second, Congress believed that 
the then-existing eligibility require ments for public benefits “proved 
wholly incapable of assuring that individual aliens not burden the pub-
lic benefits system.”\textsuperscript{183} Additionally, it appears that Congress was re-
responding, in part, to complaints from states that the rising costs of pro-

\textsuperscript{175} See Costich, \textit{supra} note 16, at 1043–44.
\textsuperscript{176} See \textit{id}.
\textsuperscript{177} See 142 \textit{Cong. Rec.} 20731, 20991 (1996). The bill passed 78-21, with one absti-
tion, in the Senate and 328-101, with five abstentions, in the House of Represen-
tatives. \textit{Id}.
\textsuperscript{178} Costich, \textit{supra} note 16, at 1043.
that PRWOA “unfairly shifts costs to States with high numbers of . . . immigrants”); 
\textsuperscript{180} 8 U.S.C. \S 1601 (2000).
\textsuperscript{181} \S 1601(1) (stating that the self-sufficiency principle extends back to the earliest 
immigration statues).
\textsuperscript{182} \S 1601(2)(A)–(B)
\textsuperscript{183} \S 1601(4).
viding medical care to immigrants were hindering their ability to provide adequate services for the rest of their citizens. 184

A review of the legislative history suggests that Congress was motivated, in part, by the expected federal expenditure savings and elimination of the “fraud and abuse” of public resources by immigrants. 185 Congress employed studies that estimated the annual receipt of public benefits by immigrants at approximately $26 billion. 186 It was believed that restricting immigrant access to welfare and other public benefits would save the federal government approximately $24 billion over the first six years of PRWOA’s implementation. 187 Specifically, by restricting immigrant eligibility to Medicaid, Congress anticipated saving a mere $1 million in 1997 with the savings rising to $1.5 billion annually by 2002. 188 Congress intended PRWOA to be a fiscally responsible measure aimed at reducing the federal deficit. 189 Congressional debates also illustrated intent to foreclose immigrants from fraudulently gaining eligibility to public benefits. 190 Senator Lamar Smith of Texas remarked that PRWOA took “a number of steps toward ending the abuse of the welfare system by those legal immigrants who come to America not to go to work, but to go on welfare.” 191 Congress appeared to be con-

191 Id. The issue of whether access to public benefits drives illegal immigration was frequently debated during the 1990s. See Costich, supra note 16, at 1044. Studies reveal that government subsidies are not a compelling draw for most undocumented immigrants to seek entry into the United States. See Marc L. Berk et al., Health Care Use Among Undocumented Latino Immigrants, 19 Health Aff. 51, 56 exhibit 2 (2000) (finding social services as a motivating factor for less than one percent of Latino immigration); Liang & Ye, supra note 2, at 199–200 (finding that economic motivations attract many Fujianese Chinese undocumented immigrants).
cerned with the systematic waste, fraud, and abuse that existed throughout the overall welfare system.\textsuperscript{192}

The legislative history additionally illustrates the existence of a spirited opposition to PRWOA.\textsuperscript{193} Opponents of the measure appeared to be most strongly moved by PRWOA’s unfair targeting of legal immigrants.\textsuperscript{194} Specifically, many lawmakers were troubled by the retroactive change in public benefits eligibility for legal immigrants who were on the path to citizenship.\textsuperscript{195} Another significant concern for lawmakers was that PRWOA effectively shifted costs away from the federal government onto the states.\textsuperscript{196} Senator Tom Daschle of South Dakota remarked that PRWOA “shift[s] the welfare problem to the states” and “tell[s] local taxpayers that they have to pick up the tab.”\textsuperscript{197} In a letter addressed to members of Congress, the National Association of Counties urged lawmakers to vote against PRWOA because of its potential to “shift costs and liabilities” and “create new unfunded mandates upon local governments.”\textsuperscript{198} Specifically, opponents asserted that this cost-shifting change in Medicaid would negatively impact local healthcare providers and the public’s overall health.\textsuperscript{199} The record indicates that hospitals feared the restriction on Medicaid would result in a loss of funds and a corresponding reduction in services available to everyone, citizens and non-citizens alike.\textsuperscript{200} However, the funding crisis would especially affect those hospitals serving communities with large numbers of immigrants.\textsuperscript{201} To fully understand the concept of cost-shifting, a


\textsuperscript{194} See id. Representative Ed Pastor (D.-Ariz.) believed that a misconception exists, both in the country at-large and in the House, that legal immigrants are here for one purpose only: to take advantage of welfare. Id. Pastor stated that in reality, most legal immigrants had been in this country for many years and have worked hard while here. Id.

\textsuperscript{195} See, e.g., id. at 20721 (statement of Rep. Bentsen) (noting that despite supporting the measure, he was troubled with the elimination of benefits).


\textsuperscript{197} Id. (stating that a contingency fund would help alleviate shifts in costs).


\textsuperscript{199} See id. at 18295 (statement of Sen. Kennedy). In discussion of an amendment to delay implementation of the new Medicaid eligibility requirements, Senator Kennedy (D.-Mass.) noted that several of the nation’s hospital groups urged a transition. See id. (relaying the opinions, among others, of the American Hospital Association, National Association of Children’s Hospitals, National Association of Community Health Centers, and National Association of Public Hospitals).

\textsuperscript{200} Id.

\textsuperscript{201} Id. For example, Cambridge City Hospital in Massachusetts counted forty-eight percent of its patients as immigrants and thus, risked losing up to half of its Medicaid funding under PRWOA. Id.
brief examination of reimbursement mechanisms available to Medicaid hospitals is in order.

**B. Federal Reimbursement Schemes**

Hospitals providing emergency care to immigrants may qualify for reimbursement under Emergency Medicaid, the Disproportionate Share Hospital Program, or Section 1011 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. None of these current federal programs provide full reimbursement to cover the entire cost associated with treating non-qualified PRWOA and undocumented immigrants. Bureaucratic red tape, restrictions on classifying treatment as emergency care, and other issues reduce the incentive for hospital participation.

Emergency Medicaid is a joint federal-state program that provides federal matching funds directly to hospitals that provide emergency care to eligible patients. Reimbursable services include only those services provided in response to “emergency medical conditions” that lead to acute symptoms that could place the patient’s life in jeopardy, seriously impair bodily functions, or cause serious dysfunction of a bodily organ. In order to qualify for reimbursement, the care must be for

---

202 See 42 U.S.C. §§ 1396b(v), 1396r-4 (2000); Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 1011(a)(1), 117 Stat. 2066, 2432 (to be codified in scattered sections of 26, 42 U.S.C.). From 1998 to 2001 Congress implemented a reimbursement scheme that appropriated $25 million per fiscal year to the twelve states with the highest undocumented immigrant populations. See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4723, 111 Stat. 251, 515--16 (1997). However, unlike Emergency Medicaid, § 4723 funds were available only to reimburse emergency costs provided to undocumented immigrants who did not meet Medicaid eligibility. See Alison M. Siskin, Cong. Research Serv., Federal Funding for Unauthorized Aliens’ Emergency Medical Expenses 3 (Oct. 18, 2004), available at http://digital.library.unt.edu/govdocs/ CRS/permalink/meta-crs-82061. Section 4723 funds were distributed according to each state’s share of the total estimated number of undocumented immigrants living in the twelve states. Id. Eighty-nine percent of the total funds went to the five states with the highest concentration of immigrants, which were California, Texas, New York, Florida, and Illinois. Id. at 4.


204 See Stephen Franklin & Bruce Japsen, No Rush to Claim Cash for ER Bills: Hospitals Cite Ethics, Red Tape as Obstacles, Chi. Trib., Sept. 17, 2006, at C1 (noting that only fifteen percent of the funds available under § 4723 of the Balanced Budget Act of 1997 were handed out after nine months of the program).

205 See 42 U.S.C. § 1396b(v).

206 See § 1396b(v) (3). While Emergency Medicaid describes “emergency medical condition” in substantially the same manner as is found in EMTALA, it appears as though
an immigrant who meets all the state specific eligibility requirements, except citizenship status, as defined by that state’s Medicaid program.\textsuperscript{207} Accordingly, in order to make a claim to the federal agency administering the program, a hospital must ascertain whether the patient would be eligible for Medicare in absence of any citizenship requirement.\textsuperscript{208} States with less restrictive state Medicaid eligibility criteria are able to make claims for a more expansive group of patients.\textsuperscript{209} The rate of federal reimbursement varies according to each particular state’s relative wealth index, with no hospital receiving less than fifty percent and no hospital receiving more than eighty-five percent of claimed costs.\textsuperscript{210}

The Omnibus Budget Reconciliation Act of 1981 (OBRA-81) created the Disproportionate Share Hospital Program (DSH), a federally funded program that requires states to identify and reimburse hospitals that provide a disproportionate level of care to indigent patients.\textsuperscript{211} DSH was designed to help hospitals that serve large numbers of Medicaid and indigent patients.\textsuperscript{212} Because Congress designed DSH to alleviate the aggregated costs of providing care to indigent patients, this program differs from the other federally funded programs because reimbursement is not tied directly to individual patients.\textsuperscript{213} Upon receipt from the federal government, states are required to distribute DSH funds to qualifying hospitals and medical centers.\textsuperscript{214} There is no restric-

\textsuperscript{207}§ 1396b(v)(2)(B). Different states have different eligibility criteria for Medicaid enrollment. See Uncompensated Care in Southwest Border Counties, supra note 23, at 13 tbl.2.3. For example, to be eligible in 2002, the maximum level of income for a family of three in California was $15,708 compared with only $4740 in Texas. Id.


\textsuperscript{209}Uncompensated Care in Southwest Border Counties, supra note 23, at 12.

\textsuperscript{210}See § 1396d(b).


\textsuperscript{212}Teresa A. Coughlin et al., Reforming the Medicaid Disproportionate Share Hospital Program, 22 HEALTH CARE FINANCING REV. 137, 137 (2000).

\textsuperscript{213}Uncompensated Care in Southwest Border Counties, supra note 23, at 14.

\textsuperscript{214}See Coughlin, supra note 212, at 138. DSH provides considerable latitude to states in determining qualification criteria. Id. However, a state must grant eligibility to medical providers that provide a certain minimum level of care to the indigent. See § 1396r-4(c)(2); Coughlin, supra note 212, at 138–39.
tion on using DSH funds to reimburse hospitals for providing treatment to undocumented or PRWOA non-qualifying immigrants.\footnote{See Uncompensated Care in Southwest Border Counties, supra note 23, at 14.}

The most recent of the three programs, the Medication Modernization Act of 2003 (MMA), provides $1 billion over fiscal years 2005 to 2008 directly to medical providers to reimburse them for emergency care delivered to undocumented immigrants.\footnote{See Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 1011(a)(1), 117 Stat. 2066, 2432 (to be codified in scattered sections of 26, 42 U.S.C.).} Two-thirds of the $250 million per year is allotted for use in all states, based upon each state’s relative share of the nation’s total undocumented immigrant population.\footnote{Id.} The remaining one-third provides additional relief to medical providers in the six states with the highest number of undocumented immigrant apprehensions by federal authorities.\footnote{§ 1011(b), 117 Stat. at 2432–33. The six states with the highest number of apprehensions are Arizona, Texas, California, New Mexico, Florida, and New York. See Dep’t of Health & Human Servs., Ctr. for Medicare & Medicaid Studies, FY 2007 State Allocations For Section 1011 of the Medicare Modernization Act 1–2 (2006), available at http://www.cms.hhs.gov/UndocAliens/downloads/fy07_state_alloc.pdf.} Thus, medical providers in states with low numbers of undocumented immigrants and apprehensions receive less than $12,000 annually compared to medical providers in those states with high numbers of undocumented immigrants and apprehensions, such as California, Texas, and Arizona, which receive between $40–70 million annually.\footnote{See Dep’t Health & Human Servs., supra note 218, at 1–2 (revealing that Maine, Montana, North Dakota, and Vermont were each allocated $11,923 for fiscal year 2007).} Under MMA, the Secretary of the Health and Human Services pays reimbursement funds directly to hospitals and medical providers based on their individual expenditures.\footnote{See Siskin, supra note 202, at 10.} Additionally, advanced payments may be requested quarterly based on each emergency care provider’s anticipated expenditures.\footnote{See § 1011(a)(1), 117 Stat. at 2432; Siskin, supra note 202, at 10.}

Despite the presence of federal and state reimbursement programs, many hospitals are suffering an economic crisis due, in part, to large uncompensated and underpayment costs.\footnote{See Uncompensated Care in Southwest Border Counties, supra note 23, at 47.} A recent estimate from California suggests that the state provided approximately $700 million of care to undocumented immigrants in 2006, with just $73 million in reimbursement from the federal government.\footnote{See Nicole Gaouette, Plan to Cut Hospital Funds Draws Uproar: Border States Stood to Lose Federal Aid for Care of Illegal Immigrants, L.A. Times, Mar. 15, 2007, at A1 (noting that a
uncompensated and underpayment costs are a result of many factors.\textsuperscript{224} Hospitals complain that demonstrating an immigrant’s undocumented status is both time-consuming and challenging.\textsuperscript{225} Undocumented immigrants are often reluctant to provide information about their status for fear of deportation.\textsuperscript{226} Some hospitals choose not to ask patients their immigration status, which means that the hospital is foreclosed from seeking reimbursement under either Emergency Medicaid or MMA.\textsuperscript{227}

Each program has flaws that hinder health care providers from recouping the cost of care provided to undocumented and PRWOA non-qualified immigrants.\textsuperscript{228} Emergency Medicaid provides no reimbursement for care provided to immigrants who fail to meet state Medicaid eligibility.\textsuperscript{229} Additionally, EMTALA mandates more extensive care than that which is reimbursable under Emergency Medicaid.\textsuperscript{230} While in theory DSH allows medical providers to recover costs associated with providing care to undocumented immigrants, its primary function is to reimburse medical providers for providing charity care to uninsured citizens.\textsuperscript{231} As a result, DSH funding has historically offset only a fraction of uncompensated care costs.\textsuperscript{232} Even MMA, a program designed specifically to reimburse hospitals that provide care to undocumented immigrants, is not achieving its maximum impact.\textsuperscript{233} During the two fiscal years 2005 and 2006, $233 of the $500 million available went unused.\textsuperscript{234} In Illinois, just six percent of the $12 million

\textsuperscript{224} See Uncompensated Care in Southwest Border Counties, \textit{supra} note 23, at 43–44.
\textsuperscript{225} See id. at 43.
\textsuperscript{226} See id. at 44.
\textsuperscript{229} See 42 U.S.C. § 1396b(v); Uncompensated Care in Southwest Border Counties, \textit{supra} note 23, at 44 (noting that many single men do not meet eligibility because state Medicaid programs are restricted to single-parent families with dependent children, pregnant women, children, elderly, and the disabled).
\textsuperscript{230} See §§ 1395dd, 1396b(v); Uncompensated Care in Southwest Border Counties, \textit{supra} note 23, at 44.
\textsuperscript{231} See Uncompensated Care in Southwest Border Counties, \textit{supra} note 23, at 14.
\textsuperscript{232} Id.
\textsuperscript{233} See Franklin & Japsen, \textit{supra} note 204 (noting that federal officials cannot explain why communities have not sought out the funds appropriated under MMA).
\textsuperscript{234} Gaouette, \textit{supra} note 223 (noting that despite low utilization in fiscal years 2005 and 2006, the number of hospitals making claims has increased steadily).
available annually under the program had been spent three quarters of the way into year 2006.\textsuperscript{235} Reasons cited for hospitals’ tepid response to MMA funds include the time consuming paperwork, lower recalculation costs by the federal government that reduces hospitals’ claims, and concerns about providing the government with immigration information that might scare undocumented immigrants from seeking needed care.\textsuperscript{236} The funding programs’ inherent limitations, coupled with administrative burdens and moral concerns, have resulted in hospitals being unable to fully utilize the allotted funding made available by the federal government.\textsuperscript{237}

\textbf{C. PRWOA’s Lasting Legacy}

One of PRWOA’s most important changes is its dramatic shift in transferring decisions regarding immigrant eligibility for public benefits from the federal to the state level.\textsuperscript{238} Along with this decision-making authority, PRWOA brought about significant cost-shifting from the federal to the local level in the provision of medical care to immigrants.\textsuperscript{239} Because PRWOA restricts states’ ability to provide non-emergency care to unqualified and undocumented immigrants, hospitals are forbidden from providing the most cost- and medically-effective care.\textsuperscript{240} PRWOA’s financial strain on U.S. hospitals is illustrated through the steady increase in uncompensated care and underpayment of care, that are, in part, symptoms of a growing immigrant population.\textsuperscript{241} Certainly, states are free to pass post-PRWOA affirmative laws that can restore the ability of hospitals and medical centers to provide non-emergency care to im-

\textsuperscript{235} Franklin & Japsen, \textit{supra} note 204.
\textsuperscript{236} See id. The New York City health network, the country’s largest public health system, announced that it would forgo MMA funds because of its desire to protect patient confidentiality. \textit{Id.}
\textsuperscript{237} See Uncompensated Care in Southwest Border Counties, \textit{supra} note 23, at 43–44.
\textsuperscript{238} See Hull, \textit{supra} note 122, at 486 (asserting that Congress transferred authority to the states to design, implement, and determine eligibility for most public benefits).
\textsuperscript{239} See Uncompensated Care in Southwest Border Counties, \textit{supra} note 23, at 47 (finding that states and local governments have absorbed many of the costs associated with providing emergency care to undocumented immigrants).
\textsuperscript{240} See Care for Immigrants, \textit{supra} note 21, at 1 (discussing the cost benefits of preventive care in the context of prenatal and diabetes care).
migrants. However, given the current anti-immigrant political climate, it is unlikely that many states will do so. Furthermore, because non-emergency care must be funded without any federal funds, states and local governments will nevertheless carry the burden of providing preventive care should a state decide to pass an affirmative law.

Congress’s current funding programs, and the resulting administrative hurdles, have been unable to alleviate the immense cost-shift to the local level. As the congressional opponents to PRWOA correctly hypothesized, the Act has effectuated an unfunded mandate that requires the states to carry the financial burden of an inadequate federal immigration policy. MMA calls into question the efficacy of PRWOA given that Congress explicitly intended to reduce the financial burden that immigrants place on the public benefit system. Studies revealing that immigrants utilize health care services less than their citizen counterparts further question whether restricting access to comprehensive health care actually reduces the alleged burden immigrants place on the American economy and people. Rather, these studies suggest that immigrants do not overburden America’s health care system. In light of the current economic reality, PRWOA’s restriction on immigrant access to health care cannot be seen as effective public policy.

IV. Proposed Solutions

PRWOA is a major public health blunder. One commentator has remarked that identifying a growing population known to have high communicable disease and fertility rates, denying them access to

---

243 See Fed’n for Am. Immigration Reform, supra note 241, at 11 (noting that many states are curtailing public benefits to reduce state deficits); Hull, supra note 122, at 488 (stating that states committed to caring for welfare of immigrants may be unwilling or unable to provide care, especially if this would reduce care to citizens or lead to higher taxes).
244 See § 1622(d) (allowing for state or local public benefits only upon passage of affirmative state law); Tex. Health & Safety Code Ann. § 285.201 (Vernon Supp. 2006) (allowing non-emergency care to undocumented and non-qualified PRWOA immigrants only if such care is funded locally).
248 See, e.g., Goldman et al., supra note 25, at 1708–09.
249 See id. (evaluating costs compared to percentage of the overall population).
250 See Uncompensated Care in Southwest Border Counties, supra note 23, at 47.
251 See Costich, supra note 16, at 1043.
care other than emergency services, and devoting as little funding as possible “sounds like every public health practitioner’s worst nightmare.”

PRWOA is flawed in two respects: first, its prohibition on preventive care unnecessarily restricts local medical providers from providing the most meaningful care; and second, inadequate federal funding has resulted in significant economic distress for America’s public health care providers. It is time to end PRWOA’s draconian restrictions on providing public benefits to immigrants; the federal government must increase funding so as to provide hospitals and community health care centers with appropriate resources to address this country’s growing health care crisis. Through an analysis of a workable alternative to the current statutory regime, this note concludes by highlighting the need for flexibility that will be essential in addressing the complex issues associated with providing and funding immigrant medical care.

A. Repeal PRWOA’s Restrictions on Immigrant Access to Preventive Care

A natural first step in improving both immigrant health access and hospital solvency is to repeal PRWOA’s provision restricting immigrant access to public benefits, specifically publicly funded preventive health care. PRWOA is an unnecessary piece of legislation that restricts hospitals and medical providers from providing the best possible medical care to immigrants. Repealing PRWOA would reinstate a medical practitioner’s right to choose to provide preventive care to any patient who seeks such care. Repealing PRWOA would not create an affirmative duty on practitioners to provide preventive care to all immigrants. Rather, repeal comports with the reality that medical providers at the local level are in a better position to anticipate the medical needs of their own communities than the federal government.

Admittedly, PRWOA already allows states to override the restriction on providing public benefits to immigrants by affirmatively passing

---

252 Id.
253 See id. at 1069 (asserting that repealing bans on providing care to immigrants alone is not the answer but rather, state and federal governments need to identify additional funding resources).
254 See ALTERAS ET AL., supra note 72, at 1; Costich, supra note 16, at 1069.
256 See Costich, supra note 16, at 1069.
257 See Yardley, supra note 26.
258 See §§ 1601–1646.
259 See id.
260 See ALTERAS ET AL., supra note 72, at 1 (“[T]he ability of communities to address this growing [medical] crisis is critical.”).
a subsequent state law.\textsuperscript{261} However, a more prudent approach is to recognize that PRWOA is bad policy and repeal its anti-immigrant provisions outright.\textsuperscript{262} By allowing states to opt out of PRWOA’s mandate, PRWOA does not create an absolute ban on providing medical care to immigrants.\textsuperscript{263} Rather, it simply, but unfortunately, mandates the passage of affirmative legislation to allow practitioners to continue to provide medical care to immigrants.\textsuperscript{264} This creates a significant and unnecessary burden on local and state governments to spend valuable resources and energy in order to pass legislation, the ultimate effect of which is to maintain the status quo.\textsuperscript{265} Furthermore, because it appears that many medical providers are simply ignoring PRWOA and providing non-emergency care to immigrants regardless of whether they are “qualified aliens,” the effectiveness of the PRWOA statutory regime is questionable.\textsuperscript{266}

While repeal of PRWOA is an important first step, the federal government must also commit additional funding to hospitals and other medical centers that provide care to immigrants.\textsuperscript{267} Even if states, reacting to PRWOA, reaffirmed practitioners’ ability to provide preventive care to non-qualified immigrants, inadequate federal funding limits the capacity of local communities to provide the authorized care.\textsuperscript{268} Given that the current federal funding system does not provide adequate reimbursement for the mandated level of care under EMTALA, any attempt at solving increasing hospital insolvency requires a more firm commitment from the federal government to fund medical care.\textsuperscript{269} An important first step for the federal government in helping to meet the economic void that has resulted under PRWOA is to invest in community-based programs that aim to reduce long-term health care costs, as well as improve health outcomes.\textsuperscript{270}

\textsuperscript{262} See Yardley, supra note 26.
\textsuperscript{263} See § 1621(d).
\textsuperscript{264} See id.
\textsuperscript{265} See id.
\textsuperscript{266} See §§ 1611, 1612, 1621, 1622; Fletcher, supra note 152; Rice, supra note 161.
\textsuperscript{267} See Uncompensated Care in Southwest Border Counties, supra note 23, at 47; Costich, supra note 16, at 1069.
\textsuperscript{268} See 8 U.S.C. § 1622(d) (2000); ALTERAS ET AL., supra note 72, at 1.
\textsuperscript{269} Uncompensated Care in Southwest Border Counties, supra note 23, at 47.
\textsuperscript{270} See ALTERAS ET AL., supra note 72, at 1.
B. An Innovative and Successful Approach: The Alliance Family and Group Care Program

The Alliance Family and Group Care program in Alameda County, California provides an insightful example of success in combining public and private funds to provide greater access to preventive care that ultimately reduces long term health costs. The Alliance Program is a not-for-profit managed care program that, in essence, is publicly supported health insurance. Responding to disparities in accessing health care within the county, Alliance created its program in an attempt to fill the preventive care gap. The program provides access to comprehensive preventive health care services, including vision and dental care, through a primary care provider chosen by the enrollee. The Alliance Program is funded primarily by private funds, although it does receive some state contributions.

The Alliance Program is but one of many examples of alternative community health care models that can “make preventive and primary care services available to low-income people, improve health outcomes, and thereby reduce costs in the long run.” However, sustainable financing is a major problem facing these community-based programs. The federal government would be wise to invest in community movements that may ultimately provide workable programs for wider reform. Such programs offer a more balanced approach to addressing health care issues facing immigrants primarily because the programs can be tailored to the individual needs of the local community.

\[\text{271 See id. at 1, 10–13.} \]
\[\text{272 See id. at 10–11. The Alliance Program has approximately 9500 enrollees and an impressive retention rate of over ninety-seven percent. Id. at 10. Unfortunately, limited funding means that the Alliance Program cannot accept any new enrollees. Id. at 11.} \]
\[\text{273 See id. at 10.} \]
\[\text{274 Id. at 11. The enrollees are responsible for a monthly premium that ranges from$10 for children age eighteen or younger to$20 to$120 for adults between the ages of nineteen and sixty-four. Id.} \]
\[\text{275 See Alteras et al., supra note 72, at 12.} \]
\[\text{276 Id. at 1.} \]
\[\text{277 Id. at 2.} \]
\[\text{278 Id. at 4 (noting that with additional state and federal support many community-based programs could flourish).} \]
\[\text{279 Id. at 2 (noting the importance of taking culture and values into account in the design of successful community-based programs).} \]
Conclusion

The Personal Responsibility and Work Opportunity Act of 1996 unnecessarly eliminated the ability of many immigrants to access public benefits.\textsuperscript{280} Looking at the goal of PRWOA through the lens of congressional intent has shown that the measure was an attempt to reduce the alleged burden that immigrants place on the U.S. welfare system.\textsuperscript{281} Studies reveal that immigration trends are on an upswing and that both the legally residing and undocumented immigrant populations are at their highest levels in decades.\textsuperscript{282} Because PRWOA forbids hospitals and medical practitioners from providing publicly supported preventive care, immigrants’ minor medical conditions are more likely to turn into emergency conditions resulting in the need for an emergency room visit.\textsuperscript{283} Emergency care is expensive and many providers are unable to obtain adequate reimbursement for services rendered in compliance with the federal EMTALA mandate.\textsuperscript{284} Given this economic reality, fundamental change is needed in the federal government’s approach to solving the issues surrounding immigrant medical care access.\textsuperscript{285} Repealing PRWOA and allowing for greater flexibility in providing preventive care to immigrants, coupled with increases in federal funding, may provide a more appropriate and workable solution than the current statutory framework.\textsuperscript{286}

\textsuperscript{281} See § 1601(4).
\textsuperscript{282} See Schmidley, supra note 33, at 20.
\textsuperscript{283} See Yardley, supra note 26.
\textsuperscript{284} See Uncompensated Care in Southwest Border Counties, supra note 23, at 47.
\textsuperscript{285} See Alteras et al., supra note 72, at 1; Uncompensated Care in Southwest Border Counties, supra note 23, at 47.
\textsuperscript{286} See supra text accompanying notes 256–264.
BIRTHRIGHT CITIZENSHIP: THE FOURTEENTH AMENDMENT’S CONTINUING PROTECTION AGAINST AN AMERICAN CASTE SYSTEM

Nicole Newman*

Abstract: Intending to reverse Dred Scott and to abolish the southern “Black Codes,” Congress ratified the Fourteenth Amendment in 1868, guaranteeing automatic citizenship to most people born on U.S. soil. However, the Amendment’s framers specifically excluded particular groups, including those considered not “subject to the jurisdiction” of the United States. In 1898, the Supreme Court clarified the meaning of this Citizenship Clause in Wong Kim Ark, and citizenship by birth has been part of American jurisprudence ever since. Currently, many Americans oppose providing birthright citizenship to children of undocumented immigrants. This note examines the basic purpose of the Citizenship Clause and how Americans have made similar attempts in the past to exclude unwanted minority groups. Such attempts have failed over time and should be rejected now because they would recreate the hereditary caste system the Fourteenth Amendment sought to eliminate and are unnecessary considering the existing legal barriers to chain migration.

Introduction

Our perception that we are “a nation of immigrants” is as fundamental to the American identity as our deep-seated fear of the “other.” ¹ Throughout history, those comprising “We the people” have defined

---


¹ See Kenneth L. Karst, Belonging to America: Equal Citizenship and the Constitution 81–84 (1989); Kevin R. Johnson, Fear of an “Alien Nation”: Race, Immigration, and Immigrants, 7 Stan. L. & Pol’y Rev. 111, 118 (1996) (noting the fear of cultural and other changes brought by immigrants, the fear of the “other,” and the fear of losing control over economic and social life, underlie much of today’s call for immigration reform); Robert J. Shulman, Children of a Lesser God: Should the Fourteenth Amendment Be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?, 22 Pepp. L. Rev. 669, 669 (1995). The concept that America is a “nation of immigrants” stems from the fact that, besides Native Americans, everyone now living in the United States is an immigrant or has descended from immigrants. See Shulman, supra, at 669 & n.3.
inclusion in the American community by simply excluding outsiders. Frequently, those who consider themselves the “true” Americans do so at the expense of outsiders, deeming them inferior beings whose inclusion would infest and degrade society. With each passing generation, the question of who really belongs in American society reopens to face a new outsider. The dirtiest little trick of American community members, used repeatedly and now predictably, is to declare that the “people of the United States” were never originally intended to include anyone other than the current community members themselves.

Unsurprisingly, reports that the United States has lost control of its borders strike at the heart of the American fear of being “overrun by another and a different race.” For those on the inside, this loss of control means inundation and dilution of so-called American values. While restrictions on immigration to America have existed since the late eighteenth century, systematic efforts to stem the tide of immigration began with the Chinese Exclusion Acts of the 1880s. Since then,  

---

2 U.S. Const. pmbl.; see Karst, supra note 1, at 2. For example, during the senate debates over the Civil Rights Act of 1866, Kentucky Senator Garrett Davis struggled to define citizenship, concluding, “It is easier to answer what [a citizen] is not than what [a citizen] is, and I say that a negro is not a citizen.” Cong. Globe, 39th Cong., 1st Sess. 529 (1866).  
4 See Karst, supra note 1, at 2 (quoting Robert H. Weibe, The Segmented Society 95 (1975)).  
5 See Dred Scott, 60 U.S. at 404–05. At the Civil Rights Act of 1866 debates, Senator Davis articulated this premise:  

My position is that this is a white man’s Government. It was made so at the beginning. . . . When the troubles with the mother country commenced in 1764, and culminated in revolution and a Declaration of Independence in 1776, all of that protracted and important transaction was by white men, and by white men alone. The negro had nothing to do with it, no more than the Indian; he was no party to it. . . . I say that the negro is not a citizen. Cong. Globe, 39th Cong., 1st Sess. 528 (1866).  
6 See Cong. Globe, 39th Cong., 1st Sess. 2890 (1866). “[T]here has always been apprehension of the stranger. This suspicion and anxiety can escalate into the terror of believing that the stranger will grow into a horde of strangers sweeping across the land, taking whatever it can, and crushing one’s way of life and culture in the process.” Shulman, supra note 1, at 675.  
there has been no shortage of nativist bills aimed both at excluding others from entering and at forcing assimilation upon those already within U.S. borders.⁹ In fact, American history is replete with radical proposals of how to terminate unwanted immigration, all under the well established assertion that “Congress regularly makes rules [for immigrants] that would be unacceptable if applied to citizens.”¹⁰

Recently, in the wake of the terrorist attacks of September 11, 2001, the demand for absolute control of U.S. borders, and consequently an end to illegal immigration, has grown fierce.¹¹ Whereas Americans have historically viewed “the stranger as the enemy,” the stranger has now become the terrorist.¹² Heightened fears over national security have not only brought illegal immigration issues to the forefront, but have also

---

⁹ See Karst, supra note 1, at 84–85; Shulman, supra note 1, at 672–73.

¹⁰ See Mathews v. Diaz, 426 U.S. 67, 80 (1976). Since 1918, proposals introduced in Congress and state governments include doubled income tax on nonresident aliens, suppression of the foreign language press, mass internments, denial employment, and bans on teaching foreign languages in public schools or speaking them in public places. See Karst, supra note 1, at 84–85. In the 1990s, proposals included forcing doctors to report illegal alien patients, requiring all citizens to carry a tamper proof identification card, and California’s controversial Proposition 187, cutting off all but emergency medical and social services to illegal aliens and denying public education to undocumented children. See 1994 Cal. Serv. Prop. 187 (West) (approved on Nov. 8, 1994) (codified at Cal. PENAL CODE §§ 113, 114, 834b; Cal. WELF. & INST. CODE § 10001.5; Cal. HEALTH & SAFETY CODE § 130; Cal. EDUC. CODE § 48215; Cal. EDUC. CODE § 66010.8) [hereinafter Prop. 187]; Shulman, supra note 1, at 672–73. Proposition 187 passed by a wide margin in 1994 through voter initiative, but it was never implemented due the success of several court challenges on constitutionality and a final mediation with newly elected Governor Gray Davis. See League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1249 (C.D. Cal. 1997); Evelyn Nieves, California Calls Off Effort to Carry Out Immigrant Measure, N.Y. Times, July 30, 1999, at A1.


provided a forum to promulgate racist and xenophobic policies. In
stead of improving the failed legal processes of immigration, however, impassioned Americans stubbornly focus their fears on ways to communicate to illegal immigrants that they are unwanted—now more than ever. Unfortunately, this effort has become centered on the most vulnerable group possible: the children of undocumented immigrants.

Many frightened Americans fervently call for an elimination of the “loophole” in the Fourteenth Amendment, which currently grants automatic citizenship to children of undocumented immigrants physically present in the United States during birth. Those in favor of overturning more than a century of consistent jurisprudence cite unbear-

---

13 Román, supra note 11, at 575–78. Román explains that the “plenary power” doctrine, which grants complete power to Congress over immigration issues, evolved over a series of judicial decisions that assert national security concerns, while espousing racism and xenophobia. See id. at 578 & nn.115–32. For a detailed discussion of the plenary power doctrine as a legal rationale which creates significant human rights problems for immigrants, Indians, and colonial subjects, see generally Natsu Taylor Saito, Asserting Plenary Power Over the “Other”: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law, 20 YALE L. & POL’Y REV. 427 (2002).


15 See NEUMAN, supra note 8, at 178.

16 One recent poll showed that forty-nine percent of Americans believe that a child of an illegal alien should not be entitled to U.S. citizenship. Scott Rasmussen, 60% Favor Barrier on Mexican Border (Nov. 7, 2005), http://www.rasmussenreports.com/2005/Immigration%20November%207.htm; see Abrahms, supra note 8, at 469. Granting automatic citizenship based on birth on U.S. soil has remained the basic assumption in American jurisprudence since the Supreme Court’s landmark 1898 decision in U.S. v. Wong Kim Ark. 169 U.S. 649, 693–94 (1898) (holding that a child born to resident alien parents in the United States is entitled to birthright citizenship); Abrahms, supra note 8, at 484–85. This interpretation has never been successfully challenged, but the Supreme Court has yet to rule whether this principle properly applies to children of illegal immigrant parents. See Katherine Pettit, Comment, Addressing the Call for the Elimination for Birthright Citizenship in the United States: Constitutional and Pragmatic Reasons to Keep Birthright Citizenship Intact, 15 TUL. J. INT’L & COMP. L. 265, 268 (2006).
able burdens on American public services and “perverse” incentives that reward illegal immigration. These incentives, they claim, include not only granting citizenship to children, but also allowing parents who manage to circumvent immigration laws to use their children as a conduit to avoid deportation, and ultimately to obtain their own citizenship. This threat of chain migration, pejoratively called the “anchor baby” phenomenon, is the most inflammatory rhetoric that opponents of birthright citizenship employ.

Many of those clamoring to deny birthright citizenship assert one basic premise: the current interpretation of the Fourteenth Amendment is the result of a huge, costly mistake. The Citizenship Clause of the Fourteenth Amendment reads, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

---

17 See Hsieh, supra note 12, at 512–13; Wood, supra note 7, at 497; Abrahms, supra note 8, at 472. “[A] nation may struggle to provide a basic level of well-being or opportunity to its own citizens, but it cannot subsidize the well-being of the entire world.” Christopher L. Eisgruber, Birthright Citizenship and the Constitution, 72 N.Y.U. L. REV. 54, 82 (1997).

18 See Abrahms, supra note 8, at 471–72.

19 See Wood, supra note 7, at 522.

[E]very week that passes thousands more children of illegal aliens are born in this country, and each is now granted citizenship. The political impact of such individuals increases greatly when . . . at age twenty-one, they can petition for the legal immigration of their parents and other relatives, each of whom can naturalize and each of whom can petition for additional immigrants who may also become citizens.

Id. The “anchor baby” theory assumes that pregnant women illegally cross the U.S.-Mexico border just as they are about to give birth with the sole intention of gaining U.S. citizenship for their children. See Hsieh, supra note 12, at 520. The myth continues that not only is the citizen child given free, indefinite access to American welfare, education, and healthcare services, but the illegal alien parents are able to avoid deportation and eventually to bootstrap their own citizenship off of the child. See id. at 513 n.16, 521. Therefore, the citizen child provides the “anchor” of a chain by which his or her entire immediate and extended family may receive social benefits and gain citizenship, all derived from a single act of illegal immigration. See Wood, supra note 7, at 494. Moreover, opponents conclude, this system sends a problematic message to law abiding foreigners who patiently wait years on visa waiting lists only to watch illegal immigrants gain a slew of unfair advantages and rewards. See Hsieh, supra note 12, at 512–13.

20 See John C. Eastman, Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment over Bush v. Gore?, 94 GEO. L.J. 1475, 1484 (2006) (“[C]ourt rulings . . . have rested on a flawed understanding of the Citizenship Clause.”); Natalie Smith, Developments in the Legislative Branch: Bill Challenges Birthright Citizenship, 20 GEO. IMMIGR. L.J. 325, 326 (2006) (“[T]he Fourteenth Amendment has been misapplied over the years and was never intended to grant citizenship automatically to babies of illegal immigrants.”) (citation omitted); Dan Stein & John Bauer, Interpreting the 14th Amendment: Automatic Citizenship for Children of Illegal Immigrants?, 7 STAN. L. & POL’Y REV. 127, 127 (1996) (“[F]rom a noble cause comes an unintended modern dilemma.”).
the United States and of the State wherein they reside.”21 The traditional interpretation of this Citizenship Clause follows a version of the *jus soli* rule of citizenship, or citizenship by right of the soil, which means that citizenship follows birth within a national territory.22 Frequently, those who claim that the clause has been severely misinterpreted believe that the mistake should be remedied either through a constitutional amendment, or through a legislative act to reinterpret the phrase “subject to the jurisdiction thereof” to exclude explicitly children born to anyone illegally present.23

Recently, Georgia Republican Representative Nathan Deal introduced the Citizenship Reform Act of 2005, intended to revoke birthright citizenship “to children born in the U.S. to parents who are not citizens or permanent resident aliens.”24 While the proposed legislation never made it out of committee, it drew the support of more than eighty cosponsors.25 A similar bill proposed in 2003 was backed by Seventh Circuit Judge Richard Posner, who wrote that the current interpretation of the Citizenship Clause “makes no sense” and should be rethought by Congress.26 In addition, the Federation of American Immigration Reform backed Representative Deal’s proposal, stating, “it doesn’t make any sense for people to come into the country illegally,

---

21 U.S. Const. amend. XIV, § 1.
22 See Neuman, supra note 8, at 165. That principle is one of the three mechanisms by which a person may become a U.S. citizen. *Id.* The other two are naturalization and *jus sanguinis*, or citizenship by right of the blood, meaning that only the children of citizens may inherit citizenship at birth. *See id.* Those who oppose the *jus soli* rule support these other two mechanisms as the sole ways to become a U.S. citizen. *See id.*
23 See Abrahms, supra note 8, at 489. The concept that birthright citizenship for children of illegal immigrants could be voided through mere legislative act, as opposed to a new amendment to the Constitution, originated with scholars Peter Schuck and Rogers Smith. *See generally Peter H. Schuck & Rogers M. Smith, Citizenship Without Consent* (1985).
24 Citizenship Reform Act of 2005, H.R. 698, 109th Cong. (1st Sess. 2005). More specifically, the bill would amend the Immigration and Naturalization Act (INA) to limit the grant of automatic citizenship at birth to children who are born in wedlock where at least one parent is a U.S. citizen or lawful permanent resident, or born out of wedlock to a mother who is a U.S. citizen or lawful permanent resident. *Id.; Smith, supra note 20, at 325.* By no means is this the first proposed legislation of this kind. *See, e.g., H.R.J. Res. 396, 103d Cong. (2d Sess. 1994) (proposing an amendment to the Constitution to provide that no person born in the United States will be a citizen on account of birth unless a parent is a citizen); H.R.J. Res. 117, 103d Cong. (1st Sess. 1993) (proposing an amendment to the Constitution to restrict the requirement of citizenship by virtue of birth in the United States to persons with a legal resident mother or father).*
25 See Smith, supra note 20, at 325.
give birth and have a new U.S. citizen.” Moreover, Americans across the country articulate their fervent support for such a change, claiming that “[b]ecoming a U.S. citizen should require more than your mother successfully sneaking past the U.S. Border Patrol.” These views have become so popular, in fact, that Representative Ron Paul advocated absolute termination of birthright citizenship during his 2008 presidential campaign.

Even the most zealous revisionists recognize, however, that such proposals are unlikely to succeed because “advocates for illegal immigrants will make a fuss . . . [claiming] you’re punishing the children.” While it is true that effectuating either new legislation or a new amendment remains unlikely, such insinuations miss the crux of the debate. At issue is an understanding of the fundamental purpose of the Citizenship Clause of the Fourteenth Amendment and whether it remains legitimate today.

This note will confront the arguments in favor of denying birthright citizenship to the children of undocumented immigrants born in the United States. Part I discusses the historical underpinnings of the

---


30 See Birthright Debate, supra note 27.

31 See NEUMAN, supra note 8, at 166.

32 Id.

33 In the main text, this note will refer to 8 U.S.C. §§ 1101–1537 by its popular name, the Immigration and Nationality Act (INA). Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2000). In the footnotes, this note will provide citations to both the INA section numbers and the United States Code section numbers. This note is limited to the discussion of citizenship given automatically to the children of illegal immigrants. The term “illegal” refers to those who cross the U.S. border without gaining legal admission through inspection as defined in the INA, and those who stay beyond the expiration of their visa, rendering them undocumented and inadmissible. INA § 2212(a), 245(a), 8 U.S.C.A. §§ 1182(a), 1255(a) (West 2007). In addition, the term “immigrant” refers to those who intend to reside in the country permanently, as opposed to “nonimmigrants” who intend to stay only temporarily and must prove so in order to obtain a visa. INA § 101(a)(15), 8 U.S.C.A. § 1101(a)(15).

Furthermore, although this note seeks to interpret the Citizenship Clause of the Fourteenth Amendment, it will not discuss several significant issues that contributed to the formation of the Clause, including: state sovereignty over citizenship, substantive rights provided by the privileges and immunities clause, violation of or conformity with interna-
Fourteenth Amendment, providing a contextual understanding of citizenship in the nineteenth century. Part II explores the Framers’ intentions behind the construction of the Citizenship Clause, demonstrating that the current interpretation is not a mistake. Part III identifies the common themes among failed American movements that resisted applying the Clause to non-whites; it uncovers how these themes parallel arguments currently made against the children of illegal immigrants, showing that contemporary resistance efforts are as inconsistent with the purpose of the Clause as their historical counterparts. Part IV details the reality of chain migration and the provisions of the Immigration and Nationality Act (INA) which prevent birthright citizenship from becoming the enormous loophole opponents portray it to be. Finally, this note concludes that singling out children of undocumented immigrants as scapegoats for the serious problems caused by illegal immigration is a violation of the most fundamental purpose of the Fourteenth Amendment, that “no hereditary caste of exploitable denizens should be created.”

I. HISTORICAL UNDERPINNINGS OF THE FOURTEENTH AMENDMENT’S CITIZENSHIP CLAUSE

A. Developing Notions of American Citizenship

The *jus soli* principle of citizenship embodied in the Fourteenth Amendment’s citizenship clause has roots reaching back to early seventeenth century English common law. These roots are significant because the early U.S. Supreme Court relied on them to interpret the constitutional meaning of “citizenship” in the absence of a constitutional law, and children’s rights. For discussion of these significant issues, see Hsieh, *supra* note 12, at 522 (contrasting U.S. citizenship policy to that of other countries); Shulman, *supra* note 1, at 696–710 (explaining history of children’s rights and presumption against corruption of blood principle); Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 *San Diego L. Rev.* 681, 802–04 (1997) (discussing Citizenship Clause’s affect on privileges and immunities); Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 *U. Pitt. L. Rev.* 281, 309–16 (2001) (examining intention of Citizenship Clause to establish federal citizenship paramount to state citizenship).

---


tional definition. In particular, these conventions were drawn from Sir Edward Coke’s report on Calvin’s Case. The main issue in the case was whether Calvin, a man born in Scotland after Scotland and England had been combined under King James’ sovereignty, should be considered an alien; if so, he would be prohibited from inheriting land or bringing suit in England.

Both arguments for and against Calvin’s subjecthood centered on his allegiance to the King. Calvin’s opposition argued that his allegiance was necessarily divided between King James’ two separate bodies politic—England and Scotland. In contrast, Coke found that the law of nature deemed Calvin a native because he had been born under King James’ natural body, ruling over both England and Scotland simultaneously. Furthermore, Coke reasoned that in exchange for allegiance, King James had a reciprocal obligation to protect Calvin’s rights as he would for any subject born within his domain. Calvin’s Case thus established the jus soli precedent, whereby birth within the territory constituted subjecthood along with the legal protections accompanying that status. Debated extensively in the U.S. Supreme Court and nu-

36 See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1872) (“No such definition [of citizenship] was previously found in the Constitution, nor had any attempt been made to define it by act of Congress.”); Jonathan Drimmer, The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States, 9 GEO. IMMIGR. L.J. 667, 683–84 (1995); Smith, supra note 33, at 691; Meyler, supra note 35, at 526.

37 See Calvin’s Case, 77 Eng. Rep. at 409; Price, supra note 35, at 74; Meyler, supra note 35, at 526. Sir Edward Coke was one of the judges deciding Calvin’s Case, and his report became one of the most significant English common law decisions in early American jurisprudence. See Price, supra note 35, at 74, 83.

38 See Calvin’s Case, 77 Eng. Rep. at 405–06; Price, supra note 35, at 73; Meyler, supra note 35, at 527 & n.52.


43 See Meyler, supra note 35, at 528. However, natural allegiance and jus soli were not exactly synonymous: “[I]f alien armies should occupy English soil, their children would not be under the protection of the king and would not be subjects.” Gerald L. Neuman, Back to Dred Scott?, 24 SAN DIEGO L. REV. 485, 487 (1987) (reviewing Schuck & Smith, supra note 23). Furthermore, the king’s protection would extend to children born to his ambassadors while abroad. Id.
merous federal and state courts, *Calvin’s Case* became American law in *Lynch v. Clarke*.\(^{44}\)

Some scholars contend that the American notion of citizenship was not only formed by this traditional *ascript*ion, in which objective characteristics of individuals result in their assignment of a polity, but also a second tradition of citizenship by *consent*, in which assignment of a polity depends on a mutual and voluntary consent between both the individual and the polity.\(^{45}\) This concept of consent may be more dangerous than it sounds, though, considering that the state could potentially abuse its power by withholding or withdrawing consent arbitrarily.\(^{46}\) Although American citizenship law largely followed the ascriptive common law tradition, the failure of the Constitution to define citizenship opened the door to potential abuse of the consensual interpretation realized by the infamous *Dred Scott* decision in 1857.\(^{47}\)

B. Dred Scott v. Sandford: A *Caste System of Hereditary Citizenship*

In *Dred Scott*, the Supreme Court held that emancipated African Americans were not, and could not, become citizens of the United States, despite having been born on U.S. soil.\(^{48}\) Born in Missouri, Dred Scott was a slave who was temporarily brought by his master to Illinois, a free state, and was then returned to Missouri.\(^{49}\) Embracing the consensual conception of citizenship, Chief Justice Roger B. Taney found that the country had never consented to the inclusion of free African Americans, who were considered “property of a master,” into the national political community.\(^{50}\) Taney deviated dramatically from the ascriptive

\(^{44}\) 1 Sand. Ch. 583 (N.Y. Ch. 1844) (finding federal common law that plaintiff’s birth in United States made him a “natural born citizen,” entitled to inherit land); see, e.g., Dawson’s Lessee v. Godfrey, 8 U.S. (4 Cranch) 321, 323 (1808) (reaffirming common law right to inherit land based on obligation of allegiance at birth).


\(^{48}\) See *Dred Scott*, 60 U.S. at 404; see Smith, *supra* note 33, at 757, 771. For a detailed analysis of the *Dred Scott* decision, see Karst, *supra* note 1, at 43–49; Smith, *supra* note 33, at 757–92.

\(^{49}\) *Dred Scott*, 60 U.S. at 397.

\(^{50}\) Id. at 476 (Daniel, J., concurring). In his concurring opinion, Justice Daniel wrote, “[A] slave, the *peculium* or property of a master, and possessing within himself no civil nor political rights or capacities, cannot be a CITIZEN.” *Id.*; see Schuck & Smith, *supra* note
common law tradition, where mere birth within the territory of the sover-


eign established citizenship without regard for parental lineage.51

Instead, Taney reasoned that the Framers of the Constitution

formed a closed community in which membership was restricted to descen-
dants of the founders, and that the colonial community had regarded

African Americans “as beings of an inferior order, and altogether unfit to

associate with the white race.”52 Thus, the Court ruled that citizenship
depended more on genealogy than place of birth or even allegiance.53

By providing no means by which a free African American could gain citi-

zenship status, this ruling made American citizenship an exclusive club
for whites.54 It effectively created a constitutionally mandated racial caste
system within the United States.55

II. Overcoming Dred Scott: Intentions behind the Citizenship Clause

The Citizenship Clause, section one of the Fourteenth Amend-

ment, is widely recognized as a response to Dred Scott’s decree that free

African Americans were not and could not become citizens without a
constitutional amendment.56 However, before the Fourteenth Amend-
ment, Congress tried and failed twice to confer certain basic rights
upon free African Americans; the first attempt was the Thirteenth
Amendment, and the second was the Civil Rights Act of 1866.57

Taking effect in December 1865, the Thirteenth Amendment
proved inadequate because it merely prohibited slavery, but did not
provide any protected status based solely on being free.58 Most nota-

bly, it did not prevent states from inventing an intermediate status be-

tween slavery and full citizenship specifically intended to deprive Afri-

can Americans of fundamental civil capacities considered inherent in

23, at 72; Drimmer, supra note 36, at 692; Smith, supra note 33, at 758–60, 774; Neuman, supra note 43, at 488..
51 See Schuck & Smith, supra note 23, at 72; Neuman, supra note 43, at 488; Drimmer, supra note 36, at 692.
52 Dred Scott, 60 U.S. at 407; see Karst, supra note 1, at 44; Drimmer, supra note 36, at 692, 693.
53 See Dred Scott, 60 U.S. at 407; Drimmer, supra note 36, at 693.
54 See Smith, supra note 33, at 795; Neuman, supra note 43, at 488.
55 Smith, supra note 33, at 795.
56 See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1872); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 406 (1857); Smith, supra note 33, at 792.
57 See U.S. Const. amend. XIII; Cong. Globe, 39th Cong., 1st Sess. 570 (1866); Smith, supra note 33, at 792.
58 U.S. Const. amend. XIII; Karst, supra note 1, at 50; Smith, supra note 33, at 793.
citizenship. Therefore, in response to the Thirteenth Amendment, eight southern states passed their own “Black Codes,” reaffirming the very caste system that the Thirteenth Amendment attempted to abolish. These Black Codes deprived free African Americans of many of the rights inherent in citizenship, such as the right to move, contract, own property, assemble, speak freely, and bear arms.

Consequently, the Civil Rights Act of 1866 was designed to abolish this new racial caste by conferring citizenship upon free African Americans through legislation. However, under the social compact model of citizenship articulated by the Dred Scott Court, membership in a political community was based on mutual consent. Therefore, mere legislation to include African Americans in the polity would be insufficient because it lacked the consent of the whole people. Ultimately, it became apparent that a new constitutional amendment would be necessary to grant citizenship status to African Americans, to restore the common law tradition of ascriptive, birthright citizenship, and to eliminate racial caste systems in southern states.

A. Competing Interpretations of the Citizenship Clause

The primary purpose of the Fourteenth Amendment’s Citizenship Clause was to overturn the caste systems imposed by Dred Scott and the Black Codes by providing a firm constitutional foundation for the citizenship of African Americans born in the United States. Beyond this primary goal, however, the broader intentions of the Amendment’s Framers were varied and complicated. Upon first glance, the follow-

59 See Smith, supra note 33, at 795.
60 See Karst, supra note 1, at 50; Smith, supra note 33, at 797. For a more detailed description of the Black Codes and the intentions behind them, see Abel A. Bartley, The Fourteenth Amendment: The Great Equalizer of the American People, 36 Akron L. Rev. 473, 480–82 (2002).
61 Smith, supra note 33, at 797 n.384; see Román, supra note 11, at 574 n.99. The Black Codes combined vagrancy laws with a convict-lease system, which assured that former slaves would remain laborers for plantation owners. Karst, supra note 1, at 50.
62 Civil Rights Act, 14 Stat. 27 (1866) (codified in U.S. Const. amend. XIV, § 1); Karst, supra note 1, at 50; Smith, supra note 33, at 792.
63 Smith, supra note 33, at 792–93; see Dred Scott, 60 U.S. (19 How.) at 426.
64 Smith, supra note 33, at 793. Much of the senate debate over the Civil Rights Act of 1866 dealt with whether Congress had the authority to pass a bill conferring citizenship on free African Americans or if defining citizenship required a constitutional amendment. See Cong. Globe, 39th Cong., 1st Sess. 474, 497 (1866).
65 See Drimmer, supra note 36, at 695–96; Smith, supra note 33, at 793, 797.
66 See Neuman, supra note 8, at 167; Smith, supra note 33, at 797.
ing sentence may seem clearly applicable to anyone born in the United States: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”68 Claiming otherwise, though, many scholars assert that the phrase “subject to the jurisdiction thereof” functions as a strict limit on those who may receive birthright citizenship.69 This controversy turns on one question: who is born in the United States but not subject to the jurisdiction thereof?70

1. Subject to the Complete Jurisdiction Thereof: Arguments of Opponents of Broad Birthright Citizenship

Many of those who oppose the current interpretation of the Citizenship Clause insist that the phrase “subject to the jurisdiction thereof” is based on the concept of exclusive allegiance.71 Opponents make their case by citing one of the principle authors of the clause, Illinois Senator Lyman Trumbull as he explained the purpose and meaning of his text during the senate debates of both the 1866 Civil Rights Act and the Fourteenth Amendment.72

During the Civil Rights Act debates Trumbull defended his text, which read, “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby to be declared citizens of the United States . . . .”73 Before Trumbull added the phrase “excluding Indians not taxed” to the 1866 Act, he faced intense questioning from fearful Kentucky and Kansas senators regarding whether Native Americans would be included in the citizenship legislation.74 Forced to detail the explicit purpose of his text and who it was meant to exclude, Trumbull stated,

[My desire] is to make citizens of everybody born in the United States who owe allegiance to the United States. We cannot make a citizen of the child of a foreign minister who is

---

68 U.S. Const. amend. XIV, § 1.
69 See Eastman, supra note 20, at 1485; Abrahms, supra note 8, at 477.
70 Eisgruber, supra note 17, at 63.
71 See Abrahms, supra note 8, at 479.
72 Cong. Globe, 39th Cong., 1st Sess. 572, 2893 (1866); Wood, supra note 7, at 509; Abrahms, supra note 8, at 479. Because the text of the Fourteenth Amendment was derived from the 1866 Act, many look to the 1866 Act in order to shed light on the final text of the Amendment. See Abrahms, supra note 8, at 480.
73 Civil Rights Act, 14 Stat. 27 (1866) (codified in U.S. Const. amend. XIV, § 1); see Abrahms, supra note 8, at 478.
temporarily residing here. There is a difficulty in framing the amendment so as to make citizens of all the people born in the United States and [only those] who owe allegiance to it. . . . [A] sort of allegiance was due to the country from persons temporarily resident in it whom we would have no right to make citizens . . . .

The senator went on to explain that, “[t]he term ‘Indians not taxed’ means Indians not counted in our enumeration of the people of the United States,” in fact he agreed that they should be “considered virtually as foreigners.” Opponents use this language to claim five basic points, all of which, they allege, would yield the exclusion of the children of today’s undocumented immigrants.

First, the text manifests the importance of allegiance and that being born within the borders is necessary but not sufficient for citizenship. To owe the requisite allegiance, as described in Calvin’s Case, there must be an exclusive connection between the individual and the nation, where subjects exchange their allegiance and obedience for the protection of the sovereign. Opponents interpret this allegiance exchange as mandating that “a person had to be born under the protection and control of the Crown and, at the time and place of birth, the sovereign had to be ‘in full possession and exercise’ of its power.” Therefore, they reason, Trumbull must have relied on a consensual view of allegiance, dependent on the will of the community as well as the will of the people. Any abstract language, opponents assert, should be interpreted consistently with the principles of this version of underlying common law.

---

75 Id. at 572.
76 Id.
77 See Abrahms, supra note 8, at 480. For the most part, systematic and quantitative restrictions on immigration did not exist before 1875. See Neuman, supra note 8, at 19–20. Therefore, no comprehensive parallel can be drawn between the contemporary concept of an “illegal immigrant” and any term used to describe “foreigners” or even “aliens” by the framers of the Fourteenth Amendment. See generally Cong. Globe, 39th Cong., 1st Sess. 2890 (1866). Frequently, opponents will cite this “open borders” myth as evidence that illegal immigrants could not have been included in the Citizenship Clause’s automatic grant of birthright citizenship because they did not exist at the time. See Abrahms, supra note 8, at 477.
78 Wood, supra note 7, at 510; Abrahms, supra note 8, at 479.
80 Id.
81 See id.; Abrahms, supra note 8, at 480.
82 See Wood, supra note 7, at 506–07.
Second, Trumbull articulated the difficulty he faced in framing the clause such that all of the people who are born here but who do not owe any allegiance would be excluded.\textsuperscript{83} Opponents claim that this explains why he later changed the text to more abstract language in the Fourteenth Amendment, but did not change his intent to include only those with exclusive allegiance.\textsuperscript{84}

Third, Trumbull clearly rejected any form of common law allegiance established by temporary residents.\textsuperscript{85} In \textit{Calvin’s Case}, Coke actually provided citizenship for temporary sojourners who are born in the territory.\textsuperscript{86} Trumbull understood this, and for that reason, he explicitly chose not to state that all those “who owe allegiance” would be born U.S. citizens.\textsuperscript{87} Therefore, the text he selected was specifically intended to exclude temporary residents from any allegiance the common law would have otherwise assumed.\textsuperscript{88}

Fourth, Trumbull justified his exclusion of Native Americans by emphasizing that they were technically not part of the population, not included in the census, and not intended parties of the original Constitution’s vision of “people of the United States.”\textsuperscript{89} Trumbull later explained that Native Americans could only become citizens if they separated from their tribes.\textsuperscript{90} In so separating, he reasoned, Native Americans integrate into American communities and thereby came within the jurisdiction of the United States, “so as to be counted.”\textsuperscript{91}

Finally, Trumbull specified that Native Americans could be considered “virtually as foreigners,” which means that they did not come within the jurisdiction of the Citizenship Clause.\textsuperscript{92} Trumbull explained

\textsuperscript{83} See Abrahms, supra note 8, at 480.
\textsuperscript{84} See Eastman, supra note 20, at 1486. In fact, during the Fourteenth Amendment debates, Trumbull explained the congruence between the phrase “subject to the jurisdiction thereof” in the Fourteenth Amendment and the phrase “not subject to any foreign power” in the 1866 Act. Cong. Globe, 39th Cong., 1st Sess. 2893 (1866). He asserted that “subject to the jurisdiction thereof” meant, “[n]ot owing allegiance to anybody else . . . subject to the complete jurisdiction of the United States.” Id. (emphasis added). Factors that removed Native Americans from the complete jurisdiction of the United States included: (1) they could not be sued in court, (2) the United States made treaties with them, (3) they were not taxed, and (4) the United States did not punish crimes committed by one Native American on another. See id.
\textsuperscript{85} Abrahms, supra note 8, at 480.
\textsuperscript{86} Calvin’s Case, 77 Eng. Rep. at 377; Meyler, supra note 35, at 528.
\textsuperscript{87} Cong. Globe, 39th Cong., 1st Sess. 572 (1866).
\textsuperscript{88} See id.; Abrahms, supra note 8, at 480.
\textsuperscript{89} Cong. Globe, 39th Cong., 1st Sess. 572 (1866); Abrahms, supra note 8, at 480.
\textsuperscript{90} Cong. Globe, 39th Cong., 1st Sess. 572 (1866).
\textsuperscript{91} Id.
\textsuperscript{92} Id.; see Abrahms, supra note 8, at 480.
that belonging to a foreign government, as the Native Americans remaining in their tribes did, should be an obvious bar to U.S. citizenship.93

Many opponents of the current interpretation of birthright citizenship assert that an extension of these five principles to contemporary illegal immigrants would render them outside the intended jurisdiction of the Citizenship Clause as articulated by Trumbull.94 First, illegal immigrants lack the consent of the nation to protect them in exchange for their allegiance.95 In addition, the children of illegal immigrants are not born “within the allegiance” required by English common law because their unlawful presence manifests constant disobedience to the State, which is a determining factor.96 Second, although a broad reading of the jurisdiction requirement in the Citizenship Clause might arguably include illegal immigrants, Trumbull stated that his exact intentions were otherwise, but that he simply had trouble framing it explicitly.97 Third, Trumbull’s overt exclusion of temporary residents would likely exclude illegal aliens, “as at best they are temporarily in the United States until the I.N.S. discovers their illegal presence and excludes them.”98 Fourth, just as Native Americans were excluded because they were not counted in the census and not “regarded as part of our people,” neither are illegal immigrants.99 Finally, Trumbull’s most obvious example of a person outside the jurisdiction is one who is virtually a foreigner; an illegal immigrant is nothing if not a foreigner.100 Therefore, although the framers of the Citizenship Clause could not have contemplated the application of birthright citizenship to the children of illegal

94 See Abrahms, supra note 8, at 480.
95 See id.
96 Wood, supra note 7, at 507.
97 See Abrahms, supra note 8, at 480.
99 Cong. Globe, 39th Cong., 1st Sess. 572 (1866); Abrahms, supra note 8, at 480. Today, undocumented immigrants are counted by the U.S. Census Bureau. See U.S. CENSUS BUREAU, POPULATION DIVISION, CENSUS 2000, PROFILE OF SELECTED DEMOGRAPHIC AND SOCIAL CHARACTERISTICS FOR THE NON-U.S. CITIZEN POPULATION tbl.FBP-1, http://www.census.gov/population/cen2000/stp-159/noncitizen.pdf (last visited, Mar. 1, 2008). The Bureau attempts to count every person residing in the country, including “people born outside the U.S. who have not been conferred U.S. citizenship, such as lawful permanent residents, students, refugees, and people illegally present in the United States.” See id.
100 Abrahms, supra note 8, at 480.
immigrants, opponents believe that the legislative history shows that they never would have intended to provide such a loophole.  

2. Subject to the Laws of the Jurisdiction Thereof: Arguments of Proponents of Broad Birthright Citizenship

Despite the rationale of birthright citizenship opponents, those who support the validity of the current interpretation minimize these specific points and emphasize instead the plain meaning of the phrase “subject to the jurisdiction thereof,” within the context of different passages from the same legislative history. Proponents claim that within that clause, the word “jurisdiction” retains its natural reading of “actual subjection to the lawmaking power of the state.” This does not reduce the phrase to mere redundancy, because it excludes those people who fell under common law exceptions of immunity to U.S. law. Most notably, this language describes children born to foreign diplomats, who have always enjoyed diplomatic immunity, and children born to parents accompanying an invading army, who receive enemy combatant immunity.

Moreover, proponents claim that this more natural interpretation explains the confusion of many senators over the inclusion of some Native Americans. Because no common law exception existed that would incorporate the unique situation of Native Americans living under tribal quasi-sovereignty, the framers struggled to invent a new definition under which some Native Americans would be included and others excluded.

Proponents find support in the words of Trumbull’s co-author, Michigan Senator Jacob Howard, who stated,

This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to

---

101 See id. at 477.

102 See Neuman, supra note 8, at 171–72.

103 Id. at 172.


105 See Neuman, supra note 8, at 171; Ho, supra note 104, at 369. These were the two common law exceptions for aliens closely aligned with a foreign government when the Fourteenth Amendment was adopted. Neuman, supra note 8, at 171.

106 See Neuman, supra note 8, at 171–72.

their jurisdiction, is by virtue of natural law and national law a citizen of the United States.\textsuperscript{108}

Proponents assert that this statement manifests that the best interpretation of the Citizenship Clause is one that applies basic common law exceptions and the plain meaning of the word “jurisdiction.”\textsuperscript{109} They reason that such an interpretation is the only way to grasp what the framers would have considered “the law of the land already.”\textsuperscript{110}

Furthermore, proponents claim that the opponents’ reading of the legislative history is flawed because it alters the meaning of the language by removing certain phrases from the context of the debate.\textsuperscript{111} For example, immediately after the text cited above, Howard explained, “This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.”\textsuperscript{112} By omitting the italicized text, opponents have alleged that foreigners and aliens were never meant to be included.\textsuperscript{113} Proponents, on the other hand, emphasize the importance of the italicized text as obvious clarification of whom Howard considered to be a foreigner or alien.\textsuperscript{114}

Finally, one of the proponents’ strongest arguments gives meaning to the portion of the debates where the senators argue over whether birthright citizenship should include the children of Chinese immigrants and Gypsies.\textsuperscript{115} During both the debates on the Civil Rights Act and the Fourteenth Amendment, Pennsylvania Senator Edgar Cowan spearheaded efforts to exclude both groups, the Chinese immigrants who he believed were overrunning California, and the gangs of Gypsies he regarded as infesting his state.\textsuperscript{116} In both scenarios, Cowan was confronted by other senators who explicitly told him that these immigrant children would be included in the grant of citizenship.\textsuperscript{117} Ultimately, considering that the overarching goal of the legislation and the

\textsuperscript{108} Id. at 2890 (emphasis added); see Neuman, supra note 8, at 171.
\textsuperscript{109} See Neuman, supra note 8, at 171.
\textsuperscript{110} Cong. Globe, 39th Cong., 1st Sess. 2890 (1866); see Neuman, supra note 8, at 171.
\textsuperscript{111} See Ho, supra note 104, at 372.
\textsuperscript{112} Cong. Globe, 39th Cong., 1st Sess. 2890 (1866) (emphasis added).
\textsuperscript{113} See Abrahms, supra note 8, at 481.
\textsuperscript{114} See Ho, supra note 104, at 372.
\textsuperscript{115} See id.
\textsuperscript{117} Id. For example, during the Civil Rights Act debates, Cowan asked, “whether [the Act] will not have the effect of naturalizing the children of Chinese and Gypsies born in this country?” Id. at 489. Trumbull responded with one word: “Undoubtedly.” Id.
amendment was to abolish the racial caste of *Dred Scott* and the Black Codes, proponents argue that only a more inclusive, ascriptive definition of citizenship can be consistent.\textsuperscript{118}

\textbf{B. Resolving the Controversy}

The flaw in both sides of the contemporary version of this debate is that many have felt driven to make broad assertions that the legislative history clearly and unquestionably weighs in their favor.\textsuperscript{119} Although this results-based investigation may seem convincing, it reveals weaknesses in both arguments as neither is willing to concede that the senators who drafted and voted on each phrase of the text were, in fact, confused.\textsuperscript{120}

Indeed, it is actually through this confusion that we may best understand underlying principles often missed in narrowly tailored inquiries that seek only to find references to “foreigners” or “aliens.”\textsuperscript{121} Such inquiries overlook three major points: (1) both theories of citizenship existed among the framers of the Fourteenth Amendment, (2) the consensualist theory was plagued by racism and xenophobia, and (3) the framers’ tactical decisions to reject certain language manifests overarching principles in line with abolishing the *Dred Scott* decision’s racial caste system.\textsuperscript{122}

First, during the debates, the senators explicitly articulated both theories of citizenship.\textsuperscript{123} Disagreement over these theories existed

\textsuperscript{118} See Neuman, *supra* note 8, at 172.

\textsuperscript{119} See, e.g., Ho, *supra* note 104, at 374 (“History confirms that the Citizenship Clause applies to the children of aliens.”); Abrahms, *supra* note 8, at 477 (“The historical background of both the 1866 Civil Rights Bill and the Fourteenth Amendment is unambiguous and the debates make intentions clear. The essential limiting principle that was discernable from the debates was consensualist in nature, mandating that citizenship required the existence of conditions indicating mutual consent to political membership, in addition to being born in the United States.”).

\textsuperscript{120} See Cong Globe, 39th Cong., 1st Sess. 2894 (1866). Moreover, academic scholars at the time were also confused about how to interpret the terms and the intentions of the drafters. Compare George D. Collins, *Citizenship by Birth*, 29 Am. L. Rev. 385, 386 (1895) (“upon birth alone . . . citizenship can never be predicated”), with Henry C. Ide, *Citizenship by Birth—Another View*, 30 Am. L. Rev. 241, 242 (1896) (“[A]ll persons (generally speaking, not including children of foreign ministers, etc.) born within the United States . . . were citizens of this country . . . both before and after the adoption of the Fourteenth Amendment to the constitution.”).

\textsuperscript{121} See Abrahms, *supra* note 8, at 481.


\textsuperscript{123} See id. at 2897.
even among those who voted in favor of the language selected.\textsuperscript{124} This disagreement has allowed both proponents and opponents of the current interpretation of the Citizenship Clause to find legislative history conveniently replete with examples of ascriptive and consensual theories of citizenship, respectively.\textsuperscript{125} However, neither may be considered necessarily wrong because both theories existed among the framers of the Fourteenth Amendment.\textsuperscript{126}

Second, although the theory of consent and exclusive allegiance is articulated throughout the legislative history, it is a mistake to ignore the theory’s explicitly racist and xenophobic justifications, which are embarrassing and repugnant in today’s society.\textsuperscript{127} Afraid of granting citizenship to the children of Gypsies and Chinese immigrants, Cowan

\textsuperscript{124} See id. The prime example of this occurs at the end of the May thirtieth debate over the constitutional amendment. See id. After extensive debate, two senators who both voted to omit the phrase “excluding Indians not taxed” from the text of the Amendment offered contradictory explanations just before the vote was held. See id. Oregon Senator George Williams explained,

I think it is perfectly clear . . . . In one sense, all persons born within the geographical limits of the United States are subject to the jurisdiction of the United States, but they are not subject to the jurisdiction of the United States in every sense. . . . I understand the words here, “subject to the jurisdiction of the United States,” to mean fully and completely subject to the jurisdiction of the United States. . . . [I]n any court or by any intelligent person, these two sections [of the Fourteenth Amendment] would be construed not to include Indians not taxed, I do not think the amendment is necessary. \textsuperscript{Id.} Williams’ version aligns with consensualist theories, emphasizing the concept of full and complete jurisdiction as requiring something more than mere birth within the borders. See id.; Abrahms, supra note 8, at 480. However, immediately juxtaposed against Williams’ explanation is that of Delaware Senator Willard Saulsbury:

I do not presume that any one will pretend to disguise the fact that the object of this first section is simply to declare that negroes shall be citizens of the United States. . . . \textsuperscript{Id.} I feel disposed to vote against [the addition of the phrase “excluding Indians not taxed”] because if these negroes are to be made citizens of the United States, I can see no reason in justice or in right why the Indians should not be made citizens.

\textsuperscript{125} See Ho, supra note 104, at 374; Abrahms supra note 8, at 477.

\textsuperscript{126} See Eastman, supra note 20, at 1484.

\textsuperscript{127} See Shulman, supra note 1, at 685; Abrahms, supra note 8, at 480 (“[T]he limitations [on birthright citizenship] are not racist but philosophical.”).
argued against their inclusion at every turn. A number of other senators employed similar racially charged arguments throughout the debates in blatant attempts to draw the arbitrary line of allegiance in a manner that would exclude the particular group of outsiders present in his state. Although analyzing these perspectives sheds light on some of the framers’ consensualist theory of citizenship, there can be no doubt that these perspectives fail to achieve the primary purpose of the Citizenship Clause: to eliminate systems of racial caste.

Lastly, some of the most instructive elements of the legislative history are the texts that the framers explicitly rejected as mechanisms of ascertaining their primary goal. Two of these significant rejections


Is the child of the Chinese immigrant . . . [or] of a Gypsy born in Pennsylvania a citizen? . . . He has a right to the protection of the laws; but he is not a citizen in the ordinary acceptation of the word.

. . . .

. . . . It is utterly and totally impossible to mingle all the various families of men, from the lowest form of the Hottentot up to the highest Caucasian, in the same society.

. . . . I am as liberal as anybody toward the rights of all people, but I am unwilling [to give up the State’s right] . . . of expelling a certain number of people who invade her borders; who owe to her no allegiance; who pretend to owe none; who recognize no authority in her government; who have a distinct, independent government of their own . . .; who pay no taxes; who never perform military service; who do nothing, in fact, which becomes the citizen . . .

Id. Throughout this passage and others, Cowan continues to insist that the influx of Chinese immigrants will end the republican government in California. Id. at 499.


129 See Cong. Globe, 39th Cong., 1st Sess. 506, 526, 528–29 (1866). For example, California Senator John Conness sought to exclude the “Digger Indians,” whom he considered “the lowest class known of Indians, and utterly and totally unfit to become citizens;” Kentucky Senator Garrett Davis sought to make the United States “a close white corporation,” open only to Europeans because the Government was formed with the interests of only their ancestors in mind; Kansas Senator James Lane was even laughed at by the other senators because his racial bias against the inclusion of Native Americans was so blatant. See id.

130 See Smith, supra note 33, at 795.

included a phrase that would have limited the Amendment’s grant of automatic citizenship solely to African Americans, and a clause that would have conferred on Congress the power to define the criteria for national citizenship.\textsuperscript{132}

Originally, Trumbull’s 1866 Act read, “[t]hat all persons of African descent born in the United States are hereby declared to be citizens of the United States”\textsuperscript{133} In an effort ostensibly to subvert the Bill, West Virginia Senator Paul Van Winkle attacked that language because it confined citizenship exclusively to African Americans.\textsuperscript{134} Presumably, Van Winkle invoked the image of white Americans sharing their citizenship rights with hordes of “inferior races,” who “could only tend to the deterioration of the mass” in order to garner opposition to the legislation.\textsuperscript{135}

However, Trumbull’s reaction was likely unexpected: he immediately asked to withdraw his previous amendment and replace it with the words, “All persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States, without distinction of color.”\textsuperscript{136} This dramatic maneuver is significant because it combats contemporary assertions that although the Citizenship Clause uses inclusive and broad terms, the framers only intended to grant citizenship to the very narrow class of African Americans harmed by \textit{Dred Scott}.\textsuperscript{137} It shows that this restrictive application could not have satisfied the primary purpose of the amendment because the

\textsuperscript{132} Id.
\textsuperscript{133} Id. at 474.
\textsuperscript{134} See id. at 497, 498. He stated:

[This] is one of the gravest subjects that ever could be submitted to the people of the United States, and it involves not only the negro race, but other inferior races that are now settling on our Pacific coast, and perhaps involves a future immigration to this country of which we have no conception . . . . I need not pause to say that this would be detrimental to the best interests of our country.

. . . . I would like to see it tested by a fair vote of the people of the United States whether they are willing that these piebald races from every quarter shall come in and be citizens with them in this country, and enjoy the privileges which they are now enjoying as such citizens.

\textit{Id.}

\textsuperscript{135} See id. at 497.
\textsuperscript{137} See, \textit{e.g.}, Abrahms, \textit{supra} note 8, at 478 (“The narrow purpose of the Fourteenth Amendment was to elevate to constitutional status the purposes of the Civil Rights Bill.”).
option was both considered and discarded in the face of rather threatening opposition.\textsuperscript{138}

As an alternative to such a narrow reading, some suggest that the framers used more flexible terminology in order to confer implicitly upon Congress the power to define and change the criteria for national citizenship.\textsuperscript{139} This possibility, however, was also considered and rejected as failing to meet the primary purpose of the amendment.\textsuperscript{140} During the Fourteenth Amendment debates, Wisconsin Senator James Doolittle stridently argued that the text include the phrase “Indians not taxed” because without it, Native Americans would otherwise be included as “subject to the jurisdiction thereof.”\textsuperscript{141} Nearing the end of his case, he asked, “why amend the Constitution” if there is no doubt “as to the constitutional power of Congress to pass the civil rights bill”?\textsuperscript{142} Howard, Trumbull’s co-author, interjected,

\begin{quote}
We desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen as the Senator from Wisconsin [Doolittle], who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters.\textsuperscript{143}
\end{quote}

Howard’s statement illustrates that his goal was to eliminate the racial caste system that oppressed African Americans, and that the Amendment was necessary to prevent racist and nativist fears from determining U.S. citizenship requirements.\textsuperscript{144} The framers siding with Howard, who voted against Doolittle’s amendment, did not trust that future members of Congress would recognize the rights of African Americans, Asian Americans, or other immigrants, over their own xenophobia.\textsuperscript{145} The next section details why “[h]istory has amply vindicated that judgment.”\textsuperscript{146}

\textsuperscript{139} See Eastman, supra note 20, at 1486.
\textsuperscript{140} Cong. Globe, 39th Cong., 1st Sess. 2896 (1866).
\textsuperscript{141} Id. Throughout his speech, Senator Doolittle openly and repeatedly declared that he sought to “exclude the wild Indians from being regarded or held as citizens of the United States.” Id. at 2897.
\textsuperscript{142} Id. at 2896.
\textsuperscript{143} Id. at 2896.
\textsuperscript{144} See id.
\textsuperscript{145} See id.; Neuman, supra note 8, at 186–87.
\textsuperscript{146} Neuman, supra note 8, at 187.
III. REPEATED REJECTION OF RACIST EXCLUSION: APPLICATIONS OF THE CITIZENSHIP CLAUSE TO OTHER MINORITY GROUPS

In 1873, the Supreme Court ruled on the Thirteenth and Fourteenth Amendments for the first time in the Slaughter-House Cases.\(^{147}\) The central issue in the Slaughter-House Cases was the extent to which the Thirteenth, Fourteenth, and Fifteenth Amendments protected the privileges and immunities of New Orleans butchers whose businesses had been taken over by a state-run corporation.\(^{148}\) Although the plaintiff butchers’ complaints did not actually implicate the Citizenship Clause, Justice Miller, writing for the majority, addressed it in controversial dicta.\(^{149}\) Regarding the pervading purpose and underlying foundation of all three of the Reconstruction Amendments, Justice Miller cited “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”\(^{150}\) Justice Miller further elaborated on the language and spirit of the Amendments, asserting,

> We do not say that no one else but the negro can share in this protection. . . . [I]n any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished. . . .\(^{151}\)

Despite Justice Miller’s instruction, other minority groups have encountered harsh barriers to their inclusion within the protections of

---

\(^{147}\) 83 U.S. (16 Wall.) 36, 67 (1872); Meyler, supra note 35, at 539.

\(^{148}\) See 83 U.S. at 66. The Court ruled in favor of the new corporation, holding that the butchers’ Fourteenth Amendment rights had not been violated because the Amendment only affected the rights of national citizenship, not state citizenship. See id. at 74, 78–79.

\(^{149}\) See id. at 72–74. Much of the controversy revolves around Justice Miller’s statement that “[t]he phrase, ‘subject to the jurisdiction’ was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.” Id. at 73. Opponents of the current interpretation of birthright citizenship emphasize this sentence as evidence of the consensualist theory of citizenship, requiring exclusive allegiance in order to be “subject to the jurisdiction.” See Collins, supra note 120, at 393; Eastman, supra note 20, at 1486–87. In contrast, proponents of the birthright citizenship minimize its importance as “pure dicta.” See, e.g., Ho, supra note 104, at 377; Ide, supra note 120, at 244.

\(^{150}\) Slaughter-House Cases, 83 U.S. at 71.

\(^{151}\) Id. at 72.
the Citizenship Clause. For example, restrictive interpretations of the clause specifically excluded Chinese Americans and Native Americans, subverting the “pervading spirit” of the amendments intended to remedy the evil of racial caste.

Both of these exclusionary interpretations have failed over time. Chinese Americans struggled until 1898, when the Supreme Court held, in United States v. Wong Kim Ark, that a child born in the United States to Chinese parents is a natural born citizen. Meanwhile, Native Americans were held in limbo until 1924, when a federal statute declared that all Indians born in the United States are natural born American citizens. The opposition each of these groups faced in obtaining birthright citizenship is significant because the same failed arguments employed then have reemerged against the inclusion of the children of illegal immigrants today.

A. Resistance to the Birthright Citizenship of Chinese Americans

The California gold rush of 1848 commenced the first wave of large scale Chinese immigration into the United States. During the construction of the Central Pacific Railroad, between 1864 and 1869, Chinese laborers were welcomed to alleviate labor shortages. In fact, in 1868, the United States and China ratified the Burlingame Treaty to increase trade and ensure unrestricted migration. Although the Chi-

155 169 U.S. at 704.
156 43 Stat. at 253.
159 See id.; Saito, supra note 13, at 434.
160 Additional Article to the Treaty between the United States and China of June 18, 1858, U.S.-P.R.C., July 28, 1868, 16 Stat. 739; Saito, supra note 13, at 434. The treaty emphasized “the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of free migration . . . for purposes of curiosity, of trade, or as permanent residents.” Additional Article to the Treaty between the United States and China of June 18, 1858, supra, art. V.
Chinese laborers were welcomed on the West Coast, many Americans expressed fears of being “overrun by a flood of immigration of the Mongol race.”161 These fears were mitigated by assurances that all Chinese immigrants intended to return to China, which made them “useful” and relatively unthreatening.162 For decades, Americans convinced themselves that the Chinese were only temporary residents who did “not expect permanently to remain in this country.”163

With the end of the gold rush and the completion of the transcontinental railroad, the demand for Chinese laborers plummeted and nativism spread.164 The Chinese were attacked violently; they were accused of being criminals, prostitutes, and opium addicts.165 When the United States entered into an economic depression in 1877, extreme anti-alien fervor centered on forcing the Chinese out of California through federal legislation.166 The United States responded with the Treaty of 1880, authorizing the regulation or suspension of immigration of Chinese laborers whenever their entry or residence “affects or threatens to affect the interests of [the United States].”167 In 1882, less than a year later, Congress enacted the first set of Chinese Exclusion Acts, prohibiting all Chinese laborers from immigrating for ten years.168 These laws, intended to keep the “undesirable” Asians out of U.S. territory, became increasingly restrictive over the following decade.169

162 Id. In response to Pennsylvania Sen. Edgar Cowan’s fanatical fears over the Chinese immigrants flooding the Pacific coast and receiving birthright citizenship, California Sen. John Conness assured him that “They will return . . . either living or dead.” See id.
163 See Ide, supra note 120, at 250; Pettit, supra note 16, at 273–74. For example, Henry Ide rationalized, “They all look forward to a return, sooner or later, to China. Their original allegiance has never been weakened. Hence they may consistently be considered to stand upon an entirely different basis as to their children born here, from other nationalities.” Ide, supra note 120, at 250.
164 See ALENIKOFF ET AL., supra note 158, at 171–73; Saito, supra note 13, at 434.
165 ALENIKOFF ET AL., supra note 158, at 171. For example, in Wyoming, white miners attacked and killed twenty-eight Chinese laborers who refused to join a strike. Id.
166 See id. at 171–73. Californians sought a change in federal policies after state statutes discriminating against the Chinese since the 1850s had been struck down. Id. at 172–73. See generally Lin Sing v. Washburn, 20 Cal. 534 (1862) (voiding capitation tax on Chinese); People v. Downer, 7 Cal. 169 (1857) (invalidating fifty dollar tax on Chinese passengers).
169 Chiu, supra note 153, at 1066. The Chinese Exclusion Acts were the first federal immigration statutes to be subjected to judicial scrutiny. ALENIKOFF ET AL., supra note 158, at 171. The landmark Supreme Court decisions formed the basis of the plenary power doctrine in immigration law. See Chae Chan Ping v. United States (Chinese Exclusion Case) 130 U.S. 581, 609 (1889) (upholding Congress’ plenary power over the exclusion of foreigners at any
Despite acknowledging the significant economic contributions of Chinese laborers, Americans alienated them by denying access to citizenship.\textsuperscript{170} Many argued that the Chinese refused to assimilate, were racially inferior, and would degrade the national polity if ever included.\textsuperscript{171} Because Americans perceived the Chinese laborers as seeking “to make a quick fortune and return home,” they saw them as permanent foreigners who intended to retain their culture, language, and heredity—refusing to become “Americans.”\textsuperscript{172} Rampant racism was used to justify the exclusion of all Asians from political recognition, as articulated by Senator Cowan,

\begin{quote}
[If] this door shall now be thrown open to the Asiatic population. . . . [T]here is an end to republican government [on the Pacific coast], because it is very well ascertained that those people have no appreciation of that form of government; it seems to be obnoxious to their very nature; they seem to be incapable either of understanding it or of carrying it out.\textsuperscript{173}
\end{quote}

Even though parental lineage was supposed to be irrelevant to birthright citizenship, the children of Chinese immigrants born here were denied citizenship because they were deemed temporary laborers, who were racially and culturally inferior.\textsuperscript{174}

The first step towards remedying this injustice was an 1884 decision by California’s Circuit Court, \textit{In re Look Tin Sing}, where a boy was born in the United States to Chinese parents, left for China at the age

\textsuperscript{170} See Drimmer, \textit{supra} note 36, at 687–88.
\textsuperscript{171} See id.
\textsuperscript{172} McClain, \textit{supra} note 152, at 532; see Drimmer, \textit{supra} note 36, at 687.
\textsuperscript{173} Cong. Globe, 39th Cong., 1st Sess. 499 (1866); see also People v. Hall, 4 Cal. 399, 405 (1854) (holding testimony of Chinese witness inadmissible because he represents “a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation”).
\textsuperscript{174} Drimmer, \textit{supra} note 36, at 689; see Cong. Globe, 39th Cong., 1st Sess. 498–99 (1866). Americans considered the Chinese to be morally and culturally subordinate, “utter heathens, treacherous, sensual, cowardly and cruel.” Chiu, \textit{supra} note 153, at 1066 n.84 (quoting Henry George, \textit{The Chinese in California}, N.Y. Trib., May 1, 1869, at 1). The refusal to allow Chinese persons to assume U.S. citizenship through naturalization was challenged and upheld in \textit{In re Ah Yup}, where the California Circuit Court held that the Chinese did not fit under the term “white person” as designated in the statute. 1 F. Cas. 223, 224 (C.C.Cal. 1878) (No. 104).
of nine, and then sought to return five years later.\textsuperscript{175} Writing for the court, Justice Field held that the boy was a natural born citizen and could not be excluded by the Chinese Exclusion Acts.\textsuperscript{176} He recognized that the boy had been born within the territory to parents who had resided in California for twenty years, who were Chinese, and who had “always been subjects of the emperor of China,” but who were not here in any diplomatic capacity.\textsuperscript{177} Justice Field then interpreted the Citizenship Clause’s phrase, “subject to the jurisdiction thereof,” as excluding only the children of foreign diplomats.\textsuperscript{178} Thus, he concluded, the boy was a citizen at birth, which meant that he could not be prevented from reentering the country.\textsuperscript{179} Justice Field’s analysis of birthright citizenship as it applied to minorities other than African Americans was the beginning of the interpretation that the Supreme Court would definitively affirm fourteen years later in \textit{Wong Kim Ark}.\textsuperscript{180}

The \textit{Wong Kim Ark} Court unambiguously explained the meaning of the Citizenship Clause as it applied to non-whites and non-citizens domiciled in the United States, and it has never been challenged successfully.\textsuperscript{181} Wong Kim Ark was a laborer, born in San Francisco to Chinese parents who were legal permanent residents and who were never employed in any diplomatic capacity.\textsuperscript{182} In 1895, he visited China for about a year and was denied reentry upon his return because the collector of customs did not consider him to be a citizen.\textsuperscript{183} Because of the

\textsuperscript{175} \textit{In re Look Tin Sing} (\textit{The Citizenship of a Person Born in the United States of Chinese Parents}), 21 F. 905, 906, 908–09 (1884) (holding Chinese boy born in United States cannot be prohibited from reentering).

\textsuperscript{176} See id. at 908–09.

\textsuperscript{177} Id. at 906.

\textsuperscript{178} Id. Justice Field explained,

\begin{quote}
The jurisdiction . . . must, at the time [of birth], be both actual and exclusive. The words mentioned except from citizenship children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence, by a fiction of public law, is regarded as part of their own country.
\end{quote}

\textit{Id.}

\textsuperscript{179} \textit{In re Look Tin Sing}, 21 F. at 908–09.

\textsuperscript{180} \textit{Wong Kim Ark}, 169 U.S. at 705; \textit{In re Look Tin Sing}, 21 F. at 909 (explaining that the Citizenship Clause was meant to overturn \textit{Dred Scott}, thereby eliminating the requirement of congressional naturalization before conferral of citizenship by birth).

\textsuperscript{181} 169 U.S. at 705; Pettit, \textit{supra} note 16, at 268. This is the landmark decision that opponents of birthright citizenship contend misread the Citizenship Clause, catalyzing more than a century of a consistently “erroneous interpretation of that language.” \textit{See Testimony, supra} note 11, at 15.

\textsuperscript{182} 169 U.S. at 652.

\textsuperscript{183} \textit{Id.} at 653.
aggressive enforcement of the Chinese Exclusion Acts at the time, Wong Kim Ark could only be admitted if his birthright citizenship was recognized.\textsuperscript{184} Writing for the majority, Justice Gray relied on English common law and the senate debates to decipher the meaning of the Citizenship Clause and the intent of its framers.\textsuperscript{185} Based on that analysis, he stated that the jurisdiction requirement should be read narrowly, excluding only children of hostile enemy aliens and children of diplomats.\textsuperscript{186} Justice Gray affirmatively asserted, “The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States.”\textsuperscript{187} Furthermore, Justice Gray rejected the theory of consensual citizenship, stressing that merely because Congress had refused to extend naturalization to the Chinese does not exclude them from receiving the full protections of the Fourteenth Amendment’s Citizenship Clause.\textsuperscript{188} The Court held,

\textit{[A] child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States.}\textsuperscript{189}

Unsurprisingly, contemporary opponents of birthright citizenship cite this case as the source of the mistaken interpretation of the Citizenship Clause, and attempt to limit it by emphasizing the fact that Wong Kim Ark’s parents were lawful residents permanently domiciled

\textsuperscript{184} Compare \textit{id.} (stating that if he is a citizen, the Chinese Exclusion Acts “do not and cannot apply to him”), with \textit{Chae Chan Ping}, 130 U.S. at 609 (upholding Congress’ plenary power over the exclusion of foreigners at any time).

\textsuperscript{185} \textit{Wong Kim Ark}, 169 U.S. at 654–58.

\textsuperscript{186} \textit{Id.} at 682, 693.

\textsuperscript{187} \textit{Id.} at 693 (emphasis added). Justice Gray further reasoned,

To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens in the United States.

\textit{Id.} at 694.

\textsuperscript{188} See \textit{id.} at 694, 703–04.

\textsuperscript{189} \textit{Id.} at 705 (emphasis added).
in the United States, unlike illegal immigrants today. However, these critics fail to recognize the broader principle of this landmark decision: the Court refused to allow racist accusations and xenophobia to subvert the Fourteenth Amendment’s goal of eliminating a caste system of citizenship in America.

B. Resistance to the Birthright Citizenship of Native Americans

Just as with Chinese laborers, Native Americans were excluded from birthright citizenship based on claims of racial inferiority and fears over the degradation of white America. As early as the founding of the nation, Native Americans were considered “savages” — “the antithesis of civilization.” Consequently, early American policy regarding Native American peoples centered on maintaining separation by forcing tribes to move westward. Somewhat ironically, one of the incentives offered to particular groups of Native Americans in exchange for their relocation was the grant of American citizenship. This was because, unlike the American delusion that the Chinese laborers were only temporary residents, Native Americans were seen as a permanent “problem” in need of fixing, and forced assimilation was considered a less burdensome solution than others. However, many Native Americans had no desire to become incorporated into white America, or to be subject to its laws.

Although some desire to “civilize” the Native Americans existed among Americans at the time, the framers of the Civil Rights Act of 1866 and the Fourteenth Amendment emphasized the need to exclude

---

190 See Testimony, supra note 11, at 11, 15; Wood, supra note 7, at 513.
191 See Wong Kim Ark, 169 U.S. at 676; Testimony, supra note 11, at 11, 15; Drimmer, supra note 36, at 689; Wood, supra note 7, at 513.
192 See ALEJNIKOFF ET AL., supra note 158, at 171; Maltz, supra note 152, at 556.
194 See id. at 111.
195 See id. at 111 n.22.
196 McClain, supra note 152, at 532; Porter, supra note 193, at 108, 111. Other solutions that had been attempted included massacring Native Americans as needed for westward expansion, or taking their land and forcibly herding them onto “reservations.” See Porter, supra note 193, at 108.
197 Maltz, supra note 152, at 556.
Native Americans from birthright citizenship. Whereas the Chinese laborers’ allegiance was questioned on account of their presumed intent to return to China, that of the Native Americans was questioned on account of their allegiance to “quasi-foreign nations.” Several senators stressed their belief that Native Americans had “no competency for citizenship” because they were “outlaws” who refused to recognize the authority of the United States. The senators deemed the Native Americans’ “partial allegiance” to the United States government insufficient. Moreover, the senators reasoned that Native Americans “are not regarded as part of our people” because “[they are] not counted in our enumeration of the people of the United States.” Near the end of the Civil Rights Bill debates, Missouri Senator John Henderson concluded, “We are deciding to-day that [this Government] was made for the white man and the black man, but that the red man shall have no interest in it.” Consequently, Native Americans were specifically carved out of the Civil Rights Act of 1866, and implicitly written out of the Fourteenth Amendment.

When confronted with the applicability of the Citizenship Clause to Native Americans, courts became similarly determined not to dilute citizenship with classes of people who were considered “inferior.” Courts relied on the pretext that Native Americans were “distinct and independent political communities,” that were “not a portion of the political community called the ‘People of the United States.’” Finally,

198 See Cong. Globe, 39th Cong., 1st Sess. 2896 (1866); Porter, supra note 193, at 108 (noting the American desire to “kill the Indian and save the man”).
200 See id. at 526–27.
201 See id. at 2893.
202 See id. at 572 (emphasis added).
203 Id. at 574.
204 See Civil Rights Act, 14 Stat. 27 (1866) (codified in U.S. Const. amend. XIV, § 1). The Civil Rights Act of 1866 explicitly excluded Native Americans, reading, “[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States . . . .” Id. (emphasis added). The Fourteenth Amendment’s Citizenship Clause implicitly does the same by stating, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof . . . .” U.S. Const. amend. XIV, § 1 (emphasis added).
205 Vine Deloria, Jr. & David E. Wilkins, Tribes, Treaties, and Constitutional Tribulations 145 (1999); Román, supra note 11, at 582; see, e.g., Goodell v. Jackson, 20 Johns. 693, 712 (N.Y. Sup. Ct. 1822) (holding the purchase of property from a Native American was not valid without congressional consent).
206 U.S. v. Osborn, 2 F. 58, 59 (1880) (holding it a crime to give Native Americans liquor because “Indians are not a portion of the political community called the ‘People of the United States’”); see also Goodell, 20 Johns. at 712 (“Though born within our territorial limits,
in 1884, the Supreme Court faced the issue in *Elk v. Wilkins*, when a Native American, John Elk, sought to vote based on his Fourteenth Amendment right.\(^{207}\) He argued that not only had he been born in the United States, but he had also deliberately demonstrated his intention to become a citizen by leaving his tribe, moving to Omaha, buying a home, becoming a member of the state militia, and paying taxes.\(^{208}\) The Court ruled against Elk, unequivocally adopting a consensual theory of citizenship.\(^{209}\) Ultimately, the Court held that although he had been born within the geographic limits of the United States, Elk was not subject to the jurisdiction of the United States, as provided in the Fourteenth Amendment; he could not “at will be alternatively a citizen of the United States and a member of the tribe.”\(^{210}\)

The *Elk* Court confirmed that there were no means by which a Native American could affirmatively choose to become a citizen but, by 1924, it was clear that Congress could unilaterally confer citizenship on Native Americans at its convenience.\(^{211}\) For example, Native Americans could become citizens through treaty provisions, grants of an allotment, issuance of a patent in fee simple, and pursuant to specific acts of Congress.\(^{212}\) Consequently, when the Indian Citizenship Act of 1924 was passed, most Native Americans already were citizens.\(^{213}\) Notwith-

---

\(^{207}\) *Elk*, 112 U.S. 94, 103 (1884).

\(^{208}\) *Id.* at 95; Deloria & Wilkins, *supra* note 205, at 145.

\(^{209}\) *Elk*, 112 U.S. at 100. The Court stated, “[M]embers of the Indian tribes could not be put off at their own will without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect . . . .” *Id.* This meant that although Congress had specifically made citizens out of some Indians, it had not done so with respect to Elk or Elk’s tribe; therefore, he was not a citizen and could not vote. *See id.* at 103–07; Porter, *supra* note 193, at 133–34.

\(^{210}\) *Elk*, 112 U.S. at 103 (emphasis added). Justice John Harlan dissented on the grounds that only “Indians not taxed” were intended to be excluded, whereas Elk was subject to taxation and should have, therefore, become a citizen. *See id.* at 111–12 (Harlan, J., dissenting).

\(^{211}\) *See* Porter, *supra* note 193, at 123–24 & nn.90–94.

\(^{212}\) *See id.*

\(^{213}\) Act of June 2, 1924, ch. 233, 43 Stat. 253 (current version codified at 8 U.S.C. § 1401(b) (2000)); Porter, *supra* note 193, at 124. Only 125,000 Native Americans, or one third of the total Native American population, were not citizens when the Act was ratified. Porter, *supra* note 193, at 124. The Act stated that all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided,* That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.
standing lingering racist rhetoric among American society, Congress passed the legislation without much debate.\textsuperscript{214} Scholars have noted, however, that the motivation for supporting the Act was mainly regulatory because it prevented the Interior Department from otherwise acquiring complete discretionary power over each Native American’s potential access to citizenship.\textsuperscript{215}

Despite the resistance of many Native Americans to Congressional efforts to confer citizenship upon them, their experience represents a broader principle consistent with the primary goal of the Citizenship Clause.\textsuperscript{216} Native Americans were explicitly excluded by the framers of the Fourteenth Amendment and the Supreme Court because of their partial allegiance to a foreign government.\textsuperscript{217} History has shown that this rationale was nothing more than a pretext for racist perceptions of inferiority.\textsuperscript{218} Requirements of exclusive allegiance were conveniently used to separate Native Americans from white Americans.\textsuperscript{219} However, excluding generation upon generation from legal protection or recognition, unless granted status on an ad hoc basis, proved so obviously unjust that there was no meaningful opposition to the passage of the Indian Citizenship Act of 1924.\textsuperscript{220}

C. Resistance to Birthright Citizenship of Illegal Immigrants: The Revival of Historically Failed Arguments

When seeking to exclude others, the American community repeatedly asserts that whoever comprises the group of “others” was never intended to comprise “We the people.”\textsuperscript{221} Each time this argument is employed, it initially receives support from American community members who simultaneously seek to justify both their own inclusion

\textsuperscript{214} See Porter, supra note 193, at 124–25. The American Indian Defense Association’s Herbert J. Spinden voiced opposition to the legislation, because a Native American “has not developed politically sufficiently to justify his being . . . turned loose as an American citizen . . . . The bulk of the Indians . . . would form [a] dangerous mass of alien stock in our political system if they were given privileges of citizenship.” Id. at 125 n.105.

\textsuperscript{215} See id. at 124–25. Prior drafts of legislation regarding Native American citizenship would have allowed the Secretary to grant certificates of citizenship to individual Native Americans or groups. See id.

\textsuperscript{216} See id. at 126.

\textsuperscript{217} CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866).

\textsuperscript{218} See Román, supra note 11, at 582–83.

\textsuperscript{219} See Elk, 112 U.S. at 109; CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866).

\textsuperscript{220} See Porter, supra note 193, at 125.

\textsuperscript{221} See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 528 (1866) (remarks by Sen. Davis) (“[T]his is a white man’s Government. It was made so at the beginning.”).
and the exclusion of the “other.” Yet, the Fourteenth Amendment cannot be reconciled with this exclusive view of citizenship. If the United States were meant to be “a close white corporation,” then the Citizenship Clause would have been written to ensure a *jus sanguinis* rule of citizenship, whereby only those whose ancestors were citizens at the formation of the Republic could inherit citizenship at birth.

Therefore, when contemporary opponents to birthright citizenship argue that illegal immigrants are not a part of “We the people” and should consequently be barred as a group from ascertaining the protections of citizenship, we should be skeptical. Historically, this rationale has been plagued by racist perceptions of superiority and fears that inclusion of the “other” will “infest society,” degrading the Anglo-Saxon character of the American community. This type of blatant racism is a deplorable and shameful feature of American history, and it is abhorrent that it remains a major motivation driving national policy today.

Nevertheless, U.S. history has not deterred opponents of birthright citizenship from claiming that the presence of illegal immigrants and the inclusion of their children in American society dilutes “traditional American values,” eroding the voting power, political representation, public benefits, and entitlements owed to current citizens. Just as the American community created the legal fiction of “partial allegiance” to exclude Native Americans, we should be reminded that the “illegality” of an immigrant is entirely a social and legal construct, which “is neither inherent nor natural, but rather legal and political.” The construct serves only to categorize different groups of entrants, but illegality is not a defining characteristic of those entrants at all times.

---

223 See U.S. Const. amend. XIV, § 1.
225 See Wood, supra note 7, at 468–69.
227 See Shulman, supra note 1, at 685, 719.
228 See Wood, supra note 7, at 495–97.
230 See Thronson, supra note 98, at 50.
To bolster their exclusionary policies, though, opponents of birthright citizenship assert that illegal immigrants are temporary residents, who were never intended to be included by the framers of the Citizenship Clause.\textsuperscript{231} However, illegal immigrants are no more temporary than the Chinese laborers who Americans deluded themselves into believing sought only to make a quick fortune and return to China.\textsuperscript{232} Opponents refuse to acknowledge the reality that vast numbers of children born to illegal immigrants in the United States will remain here for substantial periods of time, or forever, because the government is simply incapable of enforcing timely deportation.\textsuperscript{233} Instead, they hold onto nativist notions that “[t]he national interest would be better served if the entire family returned to their homeland,” and that with better enforcement and fewer social benefits, illegal immigrants actually would return to their homeland voluntarily.\textsuperscript{234} Evidence proves otherwise—“virtually all of the undocumented persons who come into this country seek employment opportunities,” not social benefits.\textsuperscript{235}

Arguments that children of illegal immigrants were not born with the requisite allegiance, refuse to assimilate because they eventually intend to return to their homeland, or degrade the American polity with their crime and drugs are not new.\textsuperscript{236} They are exact replicas of claims

\begin{itemize}
\item \textsuperscript{231} See Abrahms, \textit{supra} note 8, at 480.
\item \textsuperscript{232} See Neuman, \textit{supra} note 8, at 184; McClain, \textit{supra} note 152, at 532; Abrahms, \textit{supra} note 8, at 480.
\item \textsuperscript{233} See Neuman, \textit{supra} note 8, at 184. In \textit{Plyler v. Doe}, the Court recognized that “sheer incapability or lax enforcement of the laws barring entry into this country, coupled with failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial “shadow population” of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor . . . .
\item \textsuperscript{234} See Plyler, 457 U.S. at 228 n.24 (citation omitted); Shulman, \textit{supra} note 1, at 721 & n.389.
\item \textsuperscript{235} See Pettit, \textit{supra} note 16, at 272–74.
\end{itemize}
made against freed slaves, Chinese laborers, and Native Americans—all of whom are entitled to citizenship through birth within the territory of the United States.\textsuperscript{237} Although these assertions arguably have a historical basis and have gained support among Americans continuously in fear of the “other,” they remain inconsistent with the primary goal of the Fourteenth Amendment: to eliminate a hereditary system of racial caste in America.\textsuperscript{238} The Citizenship Clause was never meant to be a narrowly construed scheme designed merely to give status to freed African Americans, but rather a broadly written affirmation of ascriptive rights.\textsuperscript{239} It was constructed to eliminate the system that mandated a permanent subclass of peoples, who would inherit paltry legal rights and protections with each generation.\textsuperscript{240}

The Supreme Court’s interpretation of the Citizenship Clause in \textit{Wong Kim Ark} was not a mistake; basing citizenship entirely on parentage necessarily leads down the path of injustice suffered by Dred Scott.\textsuperscript{241} Guaranteeing birthright citizenship to the population of children born to illegal immigrants in the United States today is consistent with this primary goal of the Fourteenth Amendment, preventing such fundamental injustice from occurring.\textsuperscript{242} Therefore, the term “subject to the jurisdiction thereof” should not be reinterpreted, and the children of illegal immigrants should not be specifically carved out of birthright citizenship though a new constitutional amendment.\textsuperscript{243} These proposals are reactionary, and, as we have seen in the past, only result in the subversion of the original purpose of the Fourteenth Amendment by creating a permanent class of “subordinate and inferior” beings.\textsuperscript{244}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Cong. Globe}, 39th Cong., 1st Sess. 2896 (1866) (remarks by Sen. Howard); \textit{Karst}, \textit{supra} note 1, at 50.
\item \textit{Neuman}, \textit{supra} note 8, at 170.
\item See \textit{Karst}, \textit{supra} note 1, at 50; \textit{Neuman}, \textit{supra} note 8, at 170.
\item See 169 U.S. 649, 693–94 (1898); \textit{Karst}, \textit{supra} note 1, at 44; Drimmer, \textit{supra} note 36, at 693.
\item See \textit{Ho}, \textit{supra} note 104, at 378.
\item See \textit{id}.
\item See \textit{Dred Scott}, 60 U.S. at 404–05. Shulman notes that “the purpose of nearly every amendment to date has been to define procedures or to increase or protect the rights and privileges of citizens, not to narrow or deprive rights as would be the case with the proposed denial of citizenship to domestically born children of illegal aliens.” Shulman, \textit{supra} note 1, at 711.
\end{enumerate}
\end{footnotesize}
IV. Resolving the Real Misreading: The INA

Opponents of conferring birthright citizenship to the children of illegal immigrants call the issue a “loophole” in the INA.245 They insist that gaps in the INA provide perverse incentives that reward illegal immigrant parents with unwarranted benefits.246 Opponents claim that undocumented immigrants exploit the INA “loophole” in two ways, which allow millions of illegal immigrants to have an easy alternative to the lengthy and difficult processes of legal immigration.247 First, undocumented parents use their citizen child as a conduit to gaining their own permanent resident status, and ultimately citizenship; and, second, undocumented parents with a citizen child are less likely to be deported, especially if they manage to stay undetected for several years.248 These misleading claims are false in almost all circumstances.249 Taking the time to understand pertinent portions of the INA will quickly dispel both of these myths, including that of the “anchor baby” itself.250 The INA does not create a loophole in need of closure; it properly balances the need to restrict immigration against the creation of a permanent class people who inherit oppression.251

A. Relevant INA Structure and Terminology

Because the INA gives particular definitions to terms commonly considered interchangeable among Americans, this section gives a brief overview of the statute’s basic starting points. “Immigrants” are noncitizens who intend to reside permanently in the United States.252 The INA presumes that anyone seeking admission into the United States intend to stay permanently unless he or she can prove otherwise.253 Those who

---

245 See Abrahms, supra note 8, at 469.
246 See Hsieh, supra note 12, at 512.
247 See id. at 512–13; Wood, supra note 7, at 497–98, 522; Abrahms, supra note 8, at 471.
248 See Hsieh, supra note 12, at 512–13; Wood, supra note 7, at 497–98, 522; Abrahms, supra note 8, at 471. Another assertion frequently made is that a child citizen allows the whole family to benefit from public assistance and welfare. See Wood, supra note 7, at 498. For a discussion of the limitations on undocumented immigrants’ eligibility for benefits and services, see Thronson, supra note 98, at 70–71.
250 See id.
251 See Neuman, supra note 8, at 166.
252 INA § 101(a)(15), 8 U.S.C.A. § 1101(a)(15). Actually, the statute only defines the term “immigrant” in the negative; every alien who does not fall within one of the listed classes of “nonimmigrants” is considered an “immigrant.” See id.
253 Id.
can prove that they intend only to enter the United States for a specific purpose, to be accomplished during a temporary stay, are called “nonimmigrants.”

To be classified as a nonimmigrant an individual must fit into one of the enumerated groups described in INA § 101(a)(15). The INA provides for four preference categories of immigrants: (1) family-sponsored, (2) employment-based, (3) diversity, and (4) refugees. Applicants in each of these categories are subject to very long waitlists depending on the date that they filed their petition, called the “priority date,” and the quotas for each category. The only type of applicant who does not have to wait is an “immediate relative” of a U.S. citizen. Immediate relatives are defined as “the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least twenty-one years of age.” This age requirement is the first and most obvious impediment to the chain migration theory.

Noncitizens in either group, immigrants or nonimmigrants, must show that they qualify for admission by proving that none of the multiple grounds of inadmissibility, codified in INA § 212(a), render them ineligible upon inspection. Once admitted, immigrants are generally referred to as lawful permanent residents, or LPRs. After admission, cer-

---

254 Id.
255 Id. Nonimmigrants bear the burden of proving that they are, in fact, temporary residents. See id.; ALEINIKOFF ET AL., supra note 158, at 292.
257 Id. For a detailed introduction to the workings of these preference categories and the effect of priority dates, see ALEINIKOFF ET AL., supra note 158, at 279–90.
259 INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). The statute further defines these terms; a “child” is an unmarried person under twenty-one who was either born in wedlock or, under certain conditions, was born out of wedlock, is a stepchild, or is adopted. INA § 101(b)(1), 8 U.S.C. § 1101(b)(1) (West 2007). A child who is married or over twenty-one is thus referred to as a “son or daughter,” not a “child.” Id. Likewise, the terms “parent,” “father,” or “mother” are only used where a relationship actually exists; “the term ‘parent’ does not include the natural father of the child if the father has disappeared or abandoned or deserted the child . . . .” INA § 101(b)(2), 8 U.S.C. § 1101(b)(2).
260 INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). Most opponents of birthright citizenship have recognized this provision, but claim that it has no limiting effect on chain migration. See, e.g., Wood, supra note 7, at 494 n.82.
262 INA § 101(a)(20), 8 U.S.C. § 1101(a)(20); see ALEINIKOFF ET AL., supra note 158, at 265.
tain categories of nonimmigrants may apply for an *adjustment of status* from nonimmigrant to LPR.\textsuperscript{263} LPRs can stay indefinitely, so long as they do not commit crimes or other acts that would render them deportable under INA § 237.\textsuperscript{264} Typically, after five years, an LPR may choose to apply for naturalization to become a citizen, but there is no requirement to do so.\textsuperscript{265}

In addition, it is important to note that the INA is riddled with provisions allowing the Attorney General to make ultimate and interpretive discretionary decisions for waivers, relief from removal, and adjustments to LPR status.\textsuperscript{266} Consequently, many decisions are barred from judicial review.\textsuperscript{267}

The INA not only defines who is a legal immigrant, but also who is an illegal or undocumented immigrant.\textsuperscript{268} In order to immigrate legally, an applicant must first be *admissible*.\textsuperscript{269} To be admissible, an applicant must not fall under any of the INA § 212 *grounds of inadmissibility*, otherwise he or she will be denied admission and will be ineligible for a visa.\textsuperscript{270} For the purposes of this note, the two most significant grounds of inadmissibility are INA § 212(a)(6), which prohibits illegal entrants and immigration violators, and INA § 212(a)(9)(B), which addresses the penalties for aliens unlawfully present in the United States.\textsuperscript{271}

Section 212(a)(6) specifies that “an alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney

\textsuperscript{263} INA § 245, 8 U.S.C.A. § 1255. For a list of the categories of nonimmigrants who were “admitted,” but who are nevertheless ineligible for an adjustment of status, see Austin T. Fragomen, Jr. et al., Immigration Procedures Handbook § 20:5 (Thompson/West ed., 2007).


\textsuperscript{265} Aleinikoff et al., supra note 158, at 265.

\textsuperscript{266} Id. at 261.

\textsuperscript{267} INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (Supp. 2005); Aleinikoff et al., supra note 158, at 265. Administrative review is possible for noncitizens who have been found removable through the Board of Immigration Appeals (BIA), which is a multi-member review board appointed by the Attorney General. Aleinikoff et al., supra note 158, at 251.

\textsuperscript{268} Thronson, supra note 98, at 50 (quoting Lenni B. Benson, The Invisible Worker, 27 N.C. J. Int’l L. & Com. Reg. 483, 484 (2002)).

\textsuperscript{269} Fragomen et al., supra note 263, § 19:6. Because this note only specifically addresses the case of immigrants who unlawfully cross the border, there is no question that they are subject to these grounds of inadmissibility; however, under certain conditions LPRs are subject to the grounds upon reentry. See INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C).


\textsuperscript{271} INA § 212(a)(6), (a)(9)(B), 8 U.S.C.A. § 1182(a)(6), (a)(9)(B).
General, is *inadmissible.*" At first this may seem strange: an alien is deemed “inadmissible” after he or she has already managed to evade border patrol by sneaking into the country. However, this provision is extremely significant because that violation essentially follows that person wherever he or she may go within the country, forever. Thus, no matter how long illegal immigrants are able to remain undocumented, they will face the possibility of deportation for their unlawful entry.

Moreover, if an illegal immigrant enters without inspection and admission and then leaves voluntarily, INA § 212(a)(9)(B) creates penalties for that unlawful presence. Depending on the duration of the unlawful presence, the illegal immigrant may be barred from entry for three or ten years.

**B. Dispelling the Myth of the Anchor Baby Loophole**

Opponents of providing birthright citizenship to the children of illegal immigrants claim that undocumented parents with citizen children can use their child as a conduit to becoming an LPR, and eventually a citizen if they so choose. This assertion is flatly contradicted by INA § 245, which provides for the adjustment of status from nonimmigrant to LPR. The statute demands that when a nonimmigrant applies for an adjustment of status, he or she must have been admitted, must not have engaged in unlawful employment while here, must have maintained lawful status at all times, must be eligible for immigration, must be admissible, and must merit a favorable exercise of discretion. An illegal immigrant necessarily violates at least three of those requirements, and likely violates them all. By entering the country without inspection at the border, the immigrant was not “admitted.”

---

272 § 1182(a)(6) (emphasis added).
273 Id.
274 See INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A) (2000) (“Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.”) (emphasis added).
275 Id.
277 Id. If an alien was unlawfully present for more than 180 days, but less than a year, he or she will be barred from entry for three years from the date of his or her departure. Id. If an alien was unlawfully present for a year or more, he or she will be barred for ten years from the date of departure. Id.
279 INA § 245(a), 8 U.S.C.A. § 1255(a).
281 INA § 245(a), 8 U.S.C.A. § 1255(a).
By never having any lawful status, such as a valid nonimmigrant visa, the immigrant necessarily failed to maintain lawful status at all.\footnote{INA § 245(a), 8 U.S.C.A. § 1255(a) (West 2007); FRA\textsc{gomen et al.}, supra note 263, § 20:7.} And, as an illegal entrant who is unlawfully present, the immigrant is inadmissible.\footnote{INA §§ 212(a)(6), (a)(9)(B), 245(a), 8 U.S.C.A. §§ 1182(a)(6), (a)(9)(B), 1255(a).} Clearly, at no time can undocumented parents “bootstrap permanent residency onto [themselves]” through citizen children.\footnote{INA §§ 212(a)(6), (a)(9)(B), 245(a), 8 U.S.C.A. §§ 1182(a)(6), (a)(9)(B), 1255(a); see Hsieh, supra note 12, at 512. There are two extremely narrow exceptions to this general rule. First, INA § 212(a)(6)(A)(ii) provides that certain battered women and children will be exempted from a violation of illegal entry if they have been “battered or subjected to extreme cruelty” and “there was a substantial connection” between the battery and the unlawful entry. 8 U.S.C.A. § 1182(a)(6)(A)(ii). Second, in 1994, the adjustment procedure was expanded to cover many previously ineligible aliens, under INA § 245(i), which provided a “special adjustment provision.” 8 U.S.C. § 1255(i) (2000). That provision permitted aliens who entered without inspection to be eligible for status so long as they paid a substantial fee of $1,000, they were otherwise qualified for admission under the INA § 212(a), and the Attorney General chose to allow it. Id.; INA § 212(a), 8 U.S.C.A. § 1182(a). However, since the 2000 LIFE Act, only beneficiaries of immigrant visa petitions and labor certificates filed by April 30, 2001 may adjust their status under this provision. See Legal Immigration Family Equity (LIFE) Act, Pub. L. No. 106–553, 114 Stat. 2762 (codified as amended in scattered sections of 8 U.S.C.); A\textsc{leinikoff et al.}, supra note 158, at 520. This is highly unlikely to apply to pregnant mothers sneaking across the border. See INA § 245(i)(1)(B)(i)–(ii); FRA\textsc{gomen et al.}, supra note 263, § 19:13.} Basically, the only way that an undocumented mother could gain citizenship status for her child and not seriously harm her future chances of obtaining LPR status is by proving that she had her child within the territory, but stayed fewer than 180 days.\footnote{INA § 212(a)(9)(B), 8 U.S.C.A. § 1182(a)(9)(B).} This option does not resemble the bootstrapping claims of opponents to birthright citizenship.\footnote{See Hsieh, supra note 12, at 512; Abrahms, supra note 8, at 471.} If an undocumented mother chooses to stay after giving birth to her citizen child, she simply cannot adjust her status to legal permanency while she remains within the territory.\footnote{INA § 245, 8 U.S.C.A. § 1255.} Moreover, if she leaves after staying 180 days, she will be barred from entry for three or ten years, depending on the length of her unlawful presence.\footnote{INA § 212(a)(9)(B), 8 U.S.C.A. § 1182(a)(9)(B).} If undocumented parents choose to stay, their only real hope of gaining legal status through their citizen child is a legislative change in the INA or a grant of amnesty.\footnote{See James C. Ho, Op–Ed., Citizenship by Birth—Can It Be Outlawed?, L.A. TIMES, Mar. 10, 2007, at A21 (noting new proposals by conservative activists to provide amnesty for illegal immigrants with relatives here now, but no birthright citizenship in the future).}
Second, opponents claim that undocumented parents are less likely to be deported if they have a citizen child, especially once they have been in the country for seven years. This assertion makes light of INA § 240A, which allows for the cancellation of removal and adjustment of status, providing separate qualifications first for LPRs, and then for non-LPRs. If the undocumented parent of a citizen child is apprehended, and placed in removal proceedings, INA § 240A(b) only applies in very narrow situations. There are five mandatory requirements for an otherwise inadmissible or deportable immigrant to be granted a cancellation of removal or adjustment of status: (1) the Attorney General must determine the case warrants favorable discretion; (2) the immigrant must have been physically present for a continuous period of at least ten years; (3) the immigrant must have been a person of good moral character while present; (4) the immigrant must not have been convicted of any offense listed in the grounds of inadmissibility or grounds of deportation; (5) the immigrant must establish that removal would result in exceptional and extremely unusual hardship to the immigrant’s spouse, parent, or child, who is a citizen or LPR. Opponents who make this claim rarely discuss the first four requirements, if at all, and severely downplay the difficulty in meeting the fifth requirement.

In fact, each of the requirements is a real barrier to most claims, especially the last requirement. First, the provision begins with the phrase, “the Attorney General may cancel removal,” meaning that even if an undocumented immigrant is able to meet all of the other requirements, his or her claim may be denied under the ultimate discretion of the Attorney General. Second, “physical presence” ends any time the immigrant has committed one of the specified crimes, or if the immigrant has departed the country “for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.” Over a period of ten years, it is not unlikely that a person with family and friends abroad will take a three month trip or travel a total exceeding 180

292 INA § 240A, 8 U.S.C.A. § 1229b (West 2007). This note is limited to the discussion of undocumented parents, so the requirement of seven years of continuous residence does not apply, as it would to an LPR. INA § 240A(a) (2), 8 U.S.C. § 1229b(a) (2) (2000).
293 INA § 240A(b), 8 U.S.C.A. § 1229b(b).
294 INA § 240A(b) (1), 8 U.S.C.A. § 1229b(b) (1).
295 See, e.g., Hsieh, supra note 12, at 512–13; Wood, supra note 7, at 497–98.
296 INA § 240A(b) (1), 8 U.S.C.A. § 1229b(b) (1).
297 Id. (emphasis added).
298 INA § 240A(d) (1)–(2), 8 U.S.C. § 1229b(d) (1)–(2) (2000).
days. Third, although a person of “good moral character” might seem to be a subjective category, the INA lists eight non-exclusive violations, one of which includes having ever been “a habitual drunkard, for example.” Fourth, “conviction” of an offense listed in INA § 212(a)(2) or § 237(a), includes very minor crimes and does not, in fact, require a conviction. The crimes listed by the statute include any drug offense, even the most minor crimes involving marijuana. Especially ambiguous are the crimes involving “moral turpitude,” which include any crime involving fraud, forgery, crimes against property, or crimes against a person.

Lastly, however, is the burden on the undocumented parent to show that his or her removal would result in exceptional and extremely unusual hardship to his or her citizen child. This means a great deal more than merely having a citizen child who would be left behind without care if the undocumented parent were removed. Opponents’ assertions otherwise conflict with years of case law, where courts have consistently refused to find exceptional and extremely unusual hardship due to the de facto deportation of the citizen child. The standard for relief is very high. Undocumented parents may not simply claim that their children will suffer hardship because of lower levels of education, health care, and economic opportunities than they would have here. Courts generally disregard the de facto deportation they
order for citizen children when denying a cancellation of removal for an undocumented parent; they focus instead on the choice of the family to have the children stay behind, and the choice of the child to return as a U.S. citizen later in life. In fact, one court suggested that removal from the United States made the mother “unfit.”

There can be no doubt that the myth of easy chain migration has been greatly exaggerated by opponents to birthright citizenship. When undocumented parents face removal, the fact that they have a citizen child only makes the decision more tragic. It does not, however, make it more likely that they will avoid removal and become an LPR.

The truth is that the “anchor baby” is just a myth, nothing more. Whether or not undocumented pregnant mothers actually are “touring the parking lot [of American hospitals] waiting for their pains to start so they can go in and deliver,” they are never handed an easy route to legal status because of it. The Citizenship Clause of the Fourteenth Amendment merely serves as a backstop, preventing the creation of a permanent subclass of people and children who would have no other route to legalized status. Therefore, birthright citizenship, as effectively limited by the INA, should not be eliminated as opponents insist.

children with citizen parents who face no threat of removal and family separation. Id. (citing Jimenez v. INS, 16 F.3d 1485 (9th Cir. 1997)).

See Acosta v. Gaffney, 558 F.2d 1153, 1158 (3d Cir. 1977) (viewing de facto deportation of citizen child as a parental choice rather than a governmental decision); Thronson, supra note 305, at 1193–94.


See Thronson, supra note 305, at 1197.

See id. at 1195 nn.151, 152 (listing uniform rejection of cases in virtually every circuit, where children’s immigration and citizenship rights are asserted to defeat parents’ removal).

See Pettit, supra note 16, at 277.


See NEUMAN, supra note 8, at 166.

See Abrahms, supra note 8, at 469.
Conclusion

Although the United States may be in a constant state of fear, Americans must not revert back to entrenched fears of the “other” to justify the recreation of racial castes. The original purpose of the Fourteenth Amendment was not only to grant citizenship status to freed slaves, but to uproot and destroy the entire system of hereditary, exploitable laborers. Even if, as opponents to birthright citizenship suggest, children of illegal immigrants could be carved out of their entitlement to birthright citizenship through statute, they should not be. National policies driven by nativism, racism, and xenophobia only result in the undermining of the nation’s traditional, fundamental values. The current interpretation of the Citizenship Clause is not a century-old mistake; its original purpose remains legitimate and necessary today. Amending the INA or the Constitution to deny certain U.S.-born children citizenship because of their parentage would only recreate the type of society that excluded Dred Scott.
RECOGNIZING WOMEN’S WORTH: THE HUMAN RIGHTS ARGUMENT FOR ENDING PROSTITUTION IN INDIA

Nicole J. Karlebach*


Abstract: In Indian Feminisms: Law, Patriarchies and Violence in India, Geetanjali Gangoli recounts how the Indian feminist movement, identifiable for its uniquely Indian concepts of womanhood and equal rights, has been effective in promoting equality for women. Gangoli attributes this success to the fact that Indian feminists have influenced legislation and dialogue within the country, while also recognizing the reality of intense divides among castes and religions. This book review examines the vague nature of Indian law in regard to prostitution, a topic that has been the source of extensive feminist debate. India should fully outlaw the practice of prostitution in order to protect the fundamental human rights of women. This ban must phase out prostitution and its related activities by providing education and commensurable profit-earning alternatives to women.

Introduction

All men feel hungry for sex. Prostitutes prevent women from good families from getting raped. If prostitutes were not there, women would not be able to walk on the road. Unmarried young men would attack any woman on the road. In fact in my opinion, prostitutes are social workers, next only to mothers and should be treated with respect.

—Khairati Ram Bhola


1 Geetanjali Gangoli, Indian Feminisms: Law, Patriarchies and Violence in India 67 (2007). This is an excerpt from an August 1998 interview with Khairati Ram Bhola of the New Delhi Non-Governmental Organization, Bhartiya Patita Udhar Samiti, New Delhi. Id. at 67 n.10. This organization was founded in 1984 as a feminist-based social work organization to advocate for the right of prostitutes to practice legally. See Prabha Kotiswaran, Preparing for Civil Disobedience: Indian Sex Workers and the Law, 21 B.C. Third World L.J. 161, 178 (2001). This group and others like it have adopted an agenda to legalize, license, and levy taxes on prostitutes in order to monitor health and prevent the spread of disease. Id. at 179. These organizations further aim to reduce harassment by police; to abolish forced prostitution and child prostitution; and to help women become
Arguments against outlawing prostitution and its related activities in India come from two ends of a wide spectrum. Geetanjali Gangoli explains the divergent strains of thought inherent in Indian feminism in her book, *Indian Feminisms: Law, Patriarchies and Violence in India.* Some feminist commentators feel that an Indian man’s carnal desire for sex is insatiable and subscribe to the view that legalization of prostitution protects society. Alternatively, other Indian feminists believe the decision to enter prostitution represents a personal choice by a woman asserting her independence in a normally male-dominated society. Both arguments for legalizing prostitution fail because they do not take into account the degraded role of women in Indian society or the flagrant human rights abuses that characterize the practice of prostitution in India.

Legalization is not a panacea to the problems plaguing India as a result of its prostitution industry. Neither, however, is stricter enforcement of India’s existing statutes which are vaguely permissive of the practice. As Gangoli demonstrates in her book, unclear laws on prostitution coupled with negative social attitudes toward women have made for arbitrary enforcement, unequal punishments, and a lack of transparency. Given the inherent link between modern-day Indian prostitution, human sex trafficking, and sex slavery, ending the practice of prostitution is the only way to protect fundamental human rights. In order to adhere to international conventions on human more economically independent. *Id.* See generally Jean D’Cunha, *The Legalization of Prostitution: A Sociological Inquiry into the Laws Relating to Prostitution in India and the West* 110–16 (1991) (opposing the legalization of prostitution and questioning the legitimacy of these groups). Concerns have been raised that the membership of groups like Bhartiya Patita Udhar Samiti consist primarily of brothel-keepers and pimps who are connected to political parties and do not address the fundamental needs of prostitutes, including standard of living concerns and wages. See D’Cunha, supra, at 113–14; Kotiwaran, supra, at 178–79.


3 See generally Gangoli, supra note 1.

4 See id. at 67.

5 See Gangoli, supra note 2, at 17.


8 See Gangoli, supra note 1, at 67.

9 See id.

10 See Kristof, supra note 7.
rights and combat human trafficking, India must pass new legislation outlawing prostitution entirely while simultaneously creating an implementation plan to phase out the practice.\textsuperscript{11}

India heralds itself as a model for developing nations; it is the world’s most populous democracy with technological industry and plants for nuclear energy.\textsuperscript{12} Prime Minister Manmohan Singh embraced this sentiment in his Independence Day address on August, 15, 2007, saying, “India cannot become a nation with islands of high growth and vast areas untouched by development, where the benefits of growth accrue only to a few.”\textsuperscript{13} Despite new jobs and economic opportunities, well over two million women and girls in India remain employed in the world’s “oldest profession”—prostitution.\textsuperscript{14} The kingpins of the international sex trafficking industry are able to transport women and girls into India, exploit and enslave them, all without much fear of consequence.\textsuperscript{15} Abuse is rampant in large part because current legislation turns a blind eye to the realities of the practice of prostitution in India, making this area of law ripe for change.\textsuperscript{16}

The Immoral Traffic (Prevention) Act (PITA), India’s legislation governing sex work, defines prostitution as the sexual exploitation or abuse of persons for commercial purposes.\textsuperscript{17} The substance of the law straddles the line between fully eradicating prostitution and passively condoning the practice.\textsuperscript{18} The language of PITA is vague, criminalizing activities associated with prostitution such as brothel keeping and soliciting in public places, while falling short of outlawing the practice itself.\textsuperscript{19} As a result, prostitution is difficult, but not impossible, to conduct, and its practitioners possess few rights.\textsuperscript{20}


\textsuperscript{15} See Kotiswaran, \textit{supra} note 1, at 169.

\textsuperscript{16} See \textit{Gangoli}, \textit{supra} note 1, at 67.


\textsuperscript{18} See \textit{Gangoli}, \textit{supra} note 1, at 67.

\textsuperscript{19} See id.

If India’s goal is to embrace globalization and equitably spread the benefits to the Indian population, lawmakers in India must give careful consideration to women, who constitute nearly half of the population.\textsuperscript{21} Protecting and advocating for women’s rights is a noble and important aspiration in a country where social and economic segregation thrives.\textsuperscript{22} India is known for its deeply entrenched caste system, which is one of the longest surviving forms of social stratification in the world, dividing Indian society by class and profession.\textsuperscript{23} Although the Indian Constitution theoretically guarantees equal protection to women, deep-seated gender discrimination is enmeshed at every level of Indian society, including in current law, policy, and social practice.\textsuperscript{24}

\begin{footnotesize}
\begin{enumerate}
\item See Gangoli, \textit{supra} note 1, at 67; Human Rights Watch, \textit{Attacks on Dalit Women: A Pattern of Impunity} (1999), \texttt{http://www.hrw.org/reports/1999/india/India994-11.htm}.
\item See id. According to Hindu legend, groupings, or \textit{varnas}, emerged from a primordial being. O’Neill, \textit{supra} note 12, at 8–9. From the mouth of the being came the Brahmans, teachers and priests; from the arms came the Kshatrivas, rulers and soldiers; from the thighs, the merchants and traders, and from the feet, the Sudras or laborers. \textit{Id.} A fifth group, the Untouchables, or Dalits, did not come from the being and were considered outcasts. \textit{Id.} Untouchability is passed down by generation and today there are estimated to be 165 million Indian Dalits. See Human Rights Watch, \textit{supra} note 22. While India’s Constitution forbids caste discrimination, Hinduism is followed by almost eighty percent of India’s population and encourages rigid social codes. O’Neill, \textit{supra} note 12, at 9. Untouchables perform society’s unclean jobs, including sewage work, cremating the dead, cleaning latrines, and removing dead animals from the road. \textit{See id.} at 13. Untouchables are often denied access to temples, village water resources, and schools, and are discriminated against for jobs and housing. \textit{See id.} at 14. If a Dalit is perceived to be defiant to those of higher castes, common revenge includes beating, burning, or parading women naked through towns. See Human Rights Watch, \textit{supra} note 22. Caste-motivated killings and rapes are daily occurrences in India. \textit{See id.} A 2005 government report states that a crime occurred against a Dalit every twenty minutes. \textit{Id.} See generally \textit{Asian Ctr. for Human Rights, India Human Rights Report} (Suhas Chakma, ed.) (2005), \textit{available at} \texttt{http://www.achrweb.org/reports/india/AR05/INDIA-AR2005.pdf} (describing the inadequate state of human rights in India). While these numbers are staggering, a majority of crimes against Dalits go unreported for fear of retaliation. See Human Rights Watch, \textit{supra} note 22. Out of the crimes that were brought to trial between 1999 and 2001, eighty-nine percent resulted in acquittals. \textit{Id.} The United Nations Committee on the Elimination of Discrimination Against Women stated in January 2007 that Dalit women in India suffer from “deeply rooted structural discrimination” resulting in abuses including sexual abuse, forced prostitution, and discrimination in employment and wages. Press Release, General Assembly, Anti-Discrimination Committee Urges India to Lift Convention Reservations, Takes Steps on Behalf of Sexual Violence Victims, Most-Marginalized Women, U.N. Doc. WOM/1594 (Jan. 18, 2007), \textit{available at} \texttt{http://www.un.org/News/Press/docs/2007/wom1594.doc.htm}.
\item See \textit{Human Rights Watch, supra} note 21; Luisa Cabal, Letter to the Editor, \textit{Abortion and Second-Class Citizenship in India}, \textit{N.Y. Times}, July 16, 2007, at A18. Dalit women make up a majority of the landless laborers and scavengers in India. See \textit{Human Rights Watch},
\end{enumerate}
\end{footnotesize}
ernment welcomes a more westernized economy and industrial development, it must make strides toward implementing true gender equality at the national level. Irrespective of the difficulties of achieving full equality for women in practice, the provision of basic human rights for all is essential and should be the minimum goal of India’s government. Incorporating even rudimentary human rights standards into law addressing prostitution would be a significant step toward reaching the extremely marginalized sex workers in India.

The lack of gender equity in India is made evident in Indian Feminisms: Law, Patriarchies and Violence in India, which explores women’s status in Indian society by examining the progress and discourse of the many feminist organizations that have developed in India since the 1970s. Gangoli presents the general critique by Indian feminists that the country’s law and judicial practice serve to legitimize women’s subordination. Support for this viewpoint is found in religious-based civil laws that continue to control marriage, divorce, and inheritance, as well as criminal laws that do not provide enforcement mechanisms to prosecute those guilty of rape, sexual assault, or domestic violence against women.

In order to remedy the status of women, some Indian feminists argue that women must be recognized as full and equal citizens in soci-

---

*supra* note 21. These women are often forced into prostitution in rural areas or sold to urban brothels. See *id.*


26 See *id.*

27 See *id.*

28 See Gangoli, *supra* note 1, at 1. Gangoli examines the feminist movement’s role in influencing policy and legislation on a national level in India. See *id.* at 38–39. She argues that despite strong resistance from right-wing elements in the Indian government, feminist thought and theory has been able to affect the development of new legislation from the 1970s to the present. See *id.* at 38–42. Gangoli makes clear that traditional views of women as the source of reproduction and as symbolically representative of family and community often relegate women to secluded, sexually controlled, and marginalized positions in Indian society. See *id.* at 48.

29 See *id.* at 8.

30 See *id.* Gangoli details the major social and religious divisions in Indian society, noting how they are reflected in the Indian feminist movement. See *id.* at 10–11. She chronicles the emergence of divergent minority feminist groups geared toward representing the interests of women of the lower castes and minority religions and explains the niche that they fill in addressing the unique concerns of women in the many sub-classes of Indian society. See *id.* at 27.
Gangoli notes that when women are viewed as equal citizens, they gain the otherwise unavailable opportunity to formally demand rights from the national government, thereby establishing an entry point into Indian politics and creating an avenue for advancement. She admittedly fails to delve deeply into the consequences of this narrow focus for the most vulnerable within India’s borders—“non-citizens,” including those brought to India through the sex trade who may not qualify for Indian citizenship, and “shadow citizens,” minority women who possess rights in the Constitution but have difficulty asserting them in daily life. These women, especially those who are the victims of sex trafficking, are living in dire conditions and are entitled to be rescued from a far more immediate injustice: the deprivation of fundamental human rights.

This book review argues that Indian law and practice keep women in a subordinate position, which conflicts with the equality guaranteed by the Indian Constitution and basic tenets of international human rights law. India’s law governing prostitution must be revised if it is to

---

31 See id. at 55. Other Indian feminists fear that limiting the debate on women’s rights to issues of citizenship will fail to address those women brought to India by sex traffickers. See id. Feminists concerned with implications for non-citizen women argue that there should be explicit provisions of equal protection for all people within India’s borders. Id. The flesh trade, consisting of the trafficking of humans from one country to another for purposes of exploitation, has brought many Nepalese women across the porous border with India to work in urban brothels. Human Rights Watch, Rape for Profit (1995), available at www.hrw.org/reports/pdfs/c/crd/india957.pdf. The trafficking of women from Nepal into India began during the Rana oligarchy in Nepal which lasted from 1846 to 1951. Id. at 8. Girls were recruited to serve as concubines for the royal family, which was considered a sign of social status. Id. In the last days of the Rana regime, Nepal and India agreed to open borders for travel and trade, thereby allowing the trafficking practice to continue without much regulation. Id. Today the manifestation of this practice is that women and girls from remote hill villages and poor Nepalese border towns are kidnapped, drugged, or lured to Indian brothels by recruiters, relatives, and neighbors who promise jobs and marriage, and forced to remain there under threat of torture or severe beatings. Id. at 1. Although there is legislation in both Nepal and India to curb this practice, neither government has taken a strong stand on the trafficking issue. See Gangoli, supra note 1, at 52; Human Rights Watch, supra, at 6.

32 Gangoli, supra note 1, at 123.

33 Id. at 55, 123–24.

34 See id. at 123–24.

respect the dignity of women and fundamental human rights, including the right to life, liberty, and security of person; the right to be free from torture, cruel, inhuman, or degrading treatment; and the right to fair working conditions. Because prostitution is tied to the sex trade in India, the passage of new legislation would allow the state to play a critical global role in helping to phase out the practice of sex trafficking. Furthermore, India stands to benefit domestically by steering women away from careers in prostitution and into its growing industrial economy. In addition to implementing legal reforms to end prostitution in its entirety, the Indian government must simultaneously develop policy aimed at community outreach, empowerment of women, and rehabilitation for former prostitutes. India is at a critical juncture.

follow this mold in that they apply religious law to individuals. See generally Gangoli, supra note 1, at 57–78 (detailing the practical outcomes for women of the application of personal laws to matters of rape, marriage and divorce). Each religious community in India controls matters of marriage, divorce, birth, death, and inheritance through its own civil laws. Incorporating Sharia into Legal Systems, supra. Muslim personal law, much of which is not codified, is applied by the regular court system to Indian Muslims. See Emory Law, Republic of India, http://www.law.emory.edu/ifl/legal/india.htm (last visited Apr. 16, 2008). The Muslim Personal Law Application Act of 1937 directs the application of religious law to issues including family disputes and inheritance. See id. Article 44 of the Indian Constitution states that its goal is to establish legal uniformity and do away with these different laws based on religious following. India Const. art. 44, available at http://india.gov.in/govt/constitutions_india.php. At present, however, there is no uniform civil law in India. See MacNeil/Lehrer Productions: Marginal No More? (PBS television broadcast Mar. 20, 1998), available at http://www.pbs.org/newshour/forum/march98/india2.html. Often, the push toward developing a uniform civil code is met with staunch resistance by those who wish to be governed by their own traditional religious law. See id.


37 See Sengupta, supra note 13.
As the state develops into a world political and economic leader, it has a responsibility to respect the tenets of international human rights law.\textsuperscript{41}

Part I will analyze the current laws that apply to gender equality and sex work in India. Part II will provide a historical look at the practice of prostitution in India, followed by a description of modern problems that must be considered. Part III will argue that India’s laws regarding prostitution must be made consistent with the numerous international commitments India has made to human rights. In particular, it will be asserted that in light of the slave-like conditions women in India’s sex industry face, efforts to legalize prostitution in India are irreconcilable with human rights. New legislation, unlike present law, must ban prostitution in no uncertain terms and provide mechanisms for enforcement and rehabilitation.\textsuperscript{42}

I. IS SEX WORK ILLEGAL IN INDIA? IT REMAINS UNCLEAR

A. Equality: The Indian Conception

The Indian Constitution is focused on achieving a qualified equality for all people through the elimination of systematic hierarchies, including gender-based hierarchies.\textsuperscript{43} Article 14 of the Indian Constitution lays out the fundamental, but nonjusticiable, right that all women have to equality.\textsuperscript{44} In practice, this right is difficult to enforce and merely provides a foundation on which future legislation may rely.\textsuperscript{45} Various other provisions lay out the Indian Constitution’s receptive attitude toward women, including the Article 15(1) prohibition against discrimination based on sex.\textsuperscript{46} Article 16 requires equality of opportunity for all in matters of public employment and forbids discrimination based on sex.\textsuperscript{47} These substantive rights are buttressed by Article 15(3), which posits that the State is empowered to take positive action to make “special provision[s] for women.”\textsuperscript{48} Article 23,


\textsuperscript{42} See Gangoli, supra note 1, at 67.

\textsuperscript{43} See India Const. art. 14; Nussbaum, supra note 35, at 25.

\textsuperscript{44} Art. 14.

\textsuperscript{45} See Nussbaum, supra note 35, at 24.

\textsuperscript{46} See India Const. art. 15, § 1. “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them.” Id.

\textsuperscript{47} Art. 16, §§ 1–2.

\textsuperscript{48} Art. 15, § 3.
especially pertinent to the sex industry, prohibits traffic in human beings and all forms of forced labor.\textsuperscript{49}

Beyond its basic articulation of rights, the Constitution contains Directive Principles of State Policy that impose obligations on the State to secure equality and eliminate discrimination.\textsuperscript{50} The Principles are not enforceable in court but provide direction for state policy.\textsuperscript{51} Particularly relevant is Article 39, which says that the State should secure an adequate means of livelihood for both men and women alike, ensure equal pay for equal work, promote health for workers, and prevent citizens from being forced, through economic necessity, to take on vocations inappropriate to age and strength.\textsuperscript{52} Article 42 requires the State to secure just and humane working conditions and to provide maternity benefits.\textsuperscript{53} Finally, the Constitution states that each citizen of India has a fundamental duty to renounce practices derogatory to the dignity of women.\textsuperscript{54} These provisions encourage an emphasis on human rights and gender equality, and should guide future national legislation.\textsuperscript{55}

India has passed various laws regarding equal protection and the treatment of women.\textsuperscript{56} The 1976 Equal Remuneration Act guarantees equal rights.\textsuperscript{57} The Indian Penal Code criminalizes physical and mental cruelty to a married woman by her husband or his relatives, and under the Hindu Succession Act, Hindu women have equal succession rights as compared to men.\textsuperscript{58} In principle, India has made many commitments to afford women rights and privileges; in practice, these

\textsuperscript{49} Art. 23, §§ 1–2.
\textsuperscript{50} See generally arts. 36–51.
\textsuperscript{51} See INDIA CONST. arts 36–51; Kotiswaran, supra note 1, at 167.
\textsuperscript{52} Art. 39.
\textsuperscript{53} See art. 42; Kotiswaran, supra note 1, at 167. “Provision for the just and humane conditions of work and maternity relief.—The State shall make provision for securing just and humane conditions of work and for maternity relief.” Art. 42.
\textsuperscript{54} See art. 51A, § (e).
\textsuperscript{55} See generally INDIA CONST.
\textsuperscript{56} Gangoli, supra note 11, at 115–16.
guarantees are often not enforced and caste oppression, poverty, and tradition impede women from realizing the benefits of equality.\(^{59}\)

B. The Immoral Traffic in Women and Children (Prevention) Act

The Immoral Traffic in Women and Children (Prevention) Act (PITA), governing sex work and trafficking, was amended to its current form in 1986.\(^{60}\) PITA’s origins can be traced back to India’s signatory status in the 1950 United Nations International Convention for the Suppression of Traffic in Persons and of the Exploitation of Women.\(^{61}\) After signing the Convention, India enacted the Suppression of Immoral Traffic in Women and Girls Act of 1956 (SITA), which tolerated prostitution, recognizing its necessity despite its evil.\(^{62}\) The underlying aim of SITA was “to inhibit or abolish commercialized vice namely, the traffic in women and girls for the purpose of prostitution as an organized means of living.”\(^{63}\) The reference to “organized” in the statute es-

\(^{59}\) Gangoli, supra note 11, at 117.

\(^{60}\) The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44. The Indian Penal Code also contains provisions against the slavery of women and children, as do state-level statutes controlling health, public order, and the police. See IN- DIA PEN. CODE, §§ 366A, 367; Kotiswaran, supra note 1, at 167. The Code prohibits procurement of minor girls for illicit intercourse. § 366 cl. A. Additionally, it bans the importation of minors from another country for the purpose of intercourse. § 366 cl. B. Police Acts in the different states attempt to control indecent behavior and public nuisance. Kotiswaran, supra note 1, at 167. These Acts allow women to be put under arrest for obscenity. See id. PITA goes further, allowing state governments to frame rules for licensing and running protective homes for the victims of trafficking. See 27 INDIA A.I.R MANUAL 496; Kotiswaran, supra note 1, at 167. Ultimately these laws, PITA, the Indian Penal Code, and Police Acts, attempt to control prostitution and create provisions for finding adult women guilty of the offense. § 373; Kotiswaran, supra note 1, at 167.


\(^{62}\) See The Suppression of Immoral Traffic in Women and Girls Bill, 1956, No. 58A; Kotiswaran, supra note 1, at 168. Under SITA, prostitution is defined as: “the act of a female who offers her body for promiscuous sexual intercourse for hire, whether in money or in kind and whether offered immediately or otherwise.” § 2(f). Sections 7(i) and 8(b) of the 1956 Act penalize the practice of prostitution in or near a public place, including soliciting or seducing for prostitution. §§ 7(i), 8(b); Gangoli, supra note 11, at 118. SITA penalizes brothel owners for living off the earnings of a prostitute and for procuring, inducing or trafficking for prostitution. §§ 4, 5; Gangoli, supra note 11, at 119. Further, section 10 provides for the release of offenders on probation or after admonition. § 10.

\(^{63}\) The Suppression of Immoral Traffic in Women and Girls Bill, 1956, No. 58A at pmbl.; Kotiswaran, supra note 1, at 168.
sentially allows a woman to carry out prostitution privately without facing criminal penalties.\textsuperscript{64}

In 1986, SITA was amended without fundamental difference to become PITA.\textsuperscript{65} The stated objectives of the new Act were to move from suppression to prevention of prostitution.\textsuperscript{66} Minor changes to the legislation did not alter its basic penal provisions or gender-biased outcomes.\textsuperscript{67} Prohibitions against soliciting, seducing, procuring, detaining, brothel keeping, abetment to brothel keeping, renting premises for the purposes of prostitution, living off the earnings of a prostitute, and conducting activity in the vicinity of public places remained, although harsher penalties were introduced.\textsuperscript{68} Substantively, the burden of proof for finding that a brothel—defined in the Act as “any place where sexual abuse occurs”—does not exist shifted to the owner or landlord.\textsuperscript{69} Additionally, criminal provisions regarding child prostitution were added and male prostitution was recognized.\textsuperscript{70} Furthermore, police power was expanded to enable trafficking officers to search any premises without a warrant.\textsuperscript{71}

Even with these adjustments, PITA remains a vague and gender-biased law that condones the practice of prostitution, yet reviles its participants.\textsuperscript{72} While PITA’s current form imposes more severe punishments and has a wider scope than the original legislation, it maintains SITA’s gender imbalances and overall tolerationist philosophy toward prostitution.\textsuperscript{73} For example, adult women arrested for prostitution-

\textsuperscript{64} The Suppression of Immoral Traffic in Women and Girls Bill, 1956, No. 58A at pmbl. In colonial India prostitution was viewed as a “necessary evil.” Gangoli, \textit{supra} note 11, at 119. The implementation of SITA did not dramatically alter this attitude, maintaining India’s toleration of the practice. See \textit{id}.

\textsuperscript{65} Gangoli, \textit{supra} note 11, at 119.

\textsuperscript{66} The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44; Gangoli, \textit{supra} note 11, at 119.

\textsuperscript{67} See Gangoli, \textit{supra} note 11, at 119–20.

\textsuperscript{68} \textit{Id}.

\textsuperscript{69} \textit{Id.} at 120.

\textsuperscript{70} \textit{Id.} at 121.

\textsuperscript{71} \textit{Id.} at 120–21.

\textsuperscript{72} \textit{Gangoli, supra} note 1, at 67; Gangoli, \textit{supra} note 11, at 120–21.

\textsuperscript{73} \textit{Gangoli, supra} note 1, at 67. SITA and its later revision, PITA, adhere to the “tolerationist” approach to prostitution which acknowledges the practice as a necessary social evil. See \textit{id}. India’s tolerationist system was adopted under SITA, which embodied a mix of policies including the suppression of promiscuity contrasted by the toleration of prostitution. See Gangoli, \textit{supra} note 11, at 118; Kotiswaran, \textit{supra} note 1, at 169. The tolerationist approach, reflected in current Indian law regulating prostitution, criminalizes all acts leading to prostitution, but retains the legality of the sexual act itself. See Kotiswaran, \textit{supra} note 1, at 214. In so doing, existing law is criticized as failing to address the violence that accompanies prostitution or to provide avenues for redress. See Gangoli, \textit{supra} note 11, at 117.
related offenses under PITA have the burden of proving their innocence, an obligation contrary to international law and Indian criminal law. Additionally, the Act is enforced discriminatorily against female prostitutes, who are arrested more frequently than are pimps, brothel-keepers, and procurers. Women face a penalty of up to six months in jail for offenses that men may receive only seven days to three months imprisonment for committing. Perhaps the most detrimental aspect of the law, however, is its lack of clarity on the act of prostitution itself. According to PITA, the act of soliciting money for sexual intercourse is not per se illegal, although all acts necessary to conduct prostitution on an organized scale are made criminal. By failing to outlaw prostitution in its entirety, the door is left open for the practice to continue as long as it is done in private. As a result, avenues for exploitation are preserved.

There is growing consensus among aid workers and prostitutes alike that the existing laws are not effective, and there have been some efforts on the part of Indian legislators to improve the laws. In 2006,

---

74 Gangoli, supra note 11, at 121.
75 See Kotiswaran, supra note 1, at 169. Disproportionate enforcement of the law is attributable to a variety of factors, including a lack of national coordination of enforcement strategies, a lack of clarity in national law, corruption among police, the desire of Indian politicians to use red-light districts as areas for drumming up votes, and the difficulty in getting Indian women to speak about their life in the brothels. Id. Many times these women are threatened and told to say that the brothel management personnel are relatives, specifically aunts with whom they are staying. Dilnaz Boga, To Hell and Back, TIMES INDIA, May 8, 2002, available at http://timesofindia.indiatimes.com/articleshow/9082479.cms. The brothel inmates fear serious reprisal if they admit the truth and implicate the brothel in illegal activities. See id. The psychological trauma that these girls face is enormous and no systematized rehabilitation is in place for those rescued in police raids from the brothels. See id. Many former prostitutes may take months or years to fully recount their experience in the brothels, making it difficult for human rights organizations and others to conduct fact-finding missions. See id.
76 Gangoli, supra note 11, at 120. PITA section 20 says that a magistrate can order the removal of a prostitute from any place within his jurisdiction if he deems it necessary in the interest of the general public. The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44 § 20; see Kotiswaran, supra note 1, at 167. In addition, the Act provides for the establishment of corrective institutions in which female offenders are detained and reformed, and envisages the appointment of Special Police Officers to enforce provisions. § 19, see Kotiswaran, supra note 1, at 167. In all of these sections, there is no punishment for the client. See generally The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44.
77 See Kotiswaran, supra note 1, at 168.
78 See id.
79 See id.
80 See generally The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44.
81 See Gangoli, supra note 11, at 131.
the Immoral Traffic (Prevention) Amendment Bill (ITPA) was introduced to the Lok Shaba (Indian Parliament) as an amendment to PITA.\textsuperscript{82} This legislation has been reviewed by a parliamentary committee, but is still pending.\textsuperscript{83} If passed, it would strengthen India’s stance against sex trafficking by providing for the return of persons trafficked into India to their country of origin.\textsuperscript{84} The Bill also deletes provisions that punish prostitutes for soliciting clients, instead penalizing the clients who visit brothels for the purpose of the sexual exploitation of trafficking victims.\textsuperscript{85} This proposed amendment is a positive first step toward cutting off the supply of women and girls to brothels, but an explicit ban on prostitution with respect to human rights principles must still be implemented.\textsuperscript{86} India’s anti-trafficking stance is developing through these initiatives, but by failing to outlaw prostitution entirely, India allows traffickers an opportunity to profit and permits human rights abuses.\textsuperscript{87} Current legislation and proposals do not account for the disproportionate treatment of women in Indian society at large, or in the sex industry.\textsuperscript{88} Nor do they provide remedies to counter the eco-


\textsuperscript{84} Action Plan to Combat Trafficking, supra note 82. The international community has expressed concern over sending trafficked victims back to their home country without proper protection for fear that they will again be targeted by traffickers. See Convention on Action Against Trafficking in Human Beings, Feb. 1, 2008, CETS no. 197, available at http://www.coe.int/t/dg2/trafficking/campaign/Source/PDF_Conv_197_Trafficking_E.pdf.

\textsuperscript{85} The Immoral Traffic (Prevention) Amendment Bill, 2006, No. 47 § 5(c). ITPA provides greater protection for sex trafficked victims and more stringent penalties for traffickers and clients of prostitutes. U.S. DEP’T OF STATE, supra note 83, at 118. Prescribed penalties under ITPA range from seven years imprisonment to life, penalties which are commensurate with those for other grave crimes. See id.


\textsuperscript{87} See Gangoli, supra note 11, at 120–31.

\textsuperscript{88} See id. at 118–21.
nomic incentives for sex trafficking; until legislation confronts these issues, human rights concerns will remain.\textsuperscript{89}

II. PROSTITUTION IN INDIA: ORIGINS AND REALITIES

A. History of Prostitution in India

The evolution of India’s nuanced legal stance on prostitution can be traced back to the Brahmical period of 1500 B.C. when prostitution was an integral part of Indian society.\textsuperscript{90} Beginning in the 1850s,

89 See id. at 121.

90 See Kotiswaran, supra note 1, at 197. One form of prostitution that developed during this time was the religious Devadasi system. See Gangoli, supra note 11, at 115. Devadasi means God’s female servant and is a term used to describe the ancient Indian practice of marrying off pre-pubescent girls to God or religious officials. See Zoya Zaidi, Devadasi System in Indian Temples, Sikh Spectrum, http://www.sikhspectrum.com/052007/devadasi.htm (last visited Apr. 10, 2008). This practice was carried on by devotees to the goddess Yellamma who turned their daughters over to a temple god. See Dean Owen, Former Religious Prostitutes Help Those Still Trapped, World Vision ENEWS, http://www.worldvision.org/about_us.nsf/child/eNews_india_051606 (last visited Apr. 10, 2008). The girls were then deemed unsuitable for marriage as they were married to God. See Sabin Russell, The Role of Prostitution in South Asia’s Epidemic, S.F. CHRON., July 5, 2005, at A1. Devadasi were trained as sexual servants and served members of the community by giving sexual satisfaction. See id. The devadasi system is a form of prostitution that has been institutionalized over time in India. See A.K. Prasad, Devadasi System in Ancient India: A Study of Temple Dancing Girls of South India 46 (1991). What was once a socially honorable position in the sixth century has today devolved to pure prostitution. Owen, supra. Today, devadasi women are often sold into urban brothels. See id. This practice was outlawed in India in 1947, but due to the financial incentive involved, cases still emerge of young girls being forcibly married away to serve as devadasi. See id.; Minor Forced to Become Devadasi, TIMES INDIA, Dec. 18, 2006, available at http://timesofindia.indiatimes.com/CITIES/Bangalore/Minor_forced_to_become_Devadasi/articleshow/843185.cms. Humanitarian organizations estimate that up to 5000 girls become devadasi each year with ritual “weddings” occurring in private homes in the middle of the night to ward off detection. Owen, supra.

An alternate form of prostitution during the Brahmical period was the tawaif system, characterized by hierarchical levels of prostitutes who, at the highest end, were schooled in classical dance and music. See Gangoli, supra note 11, at 115. Prostitutes at this time were grouped into three types: Kumbhadasi, Rupajiva, and Ganika. See Kotiswaran, supra note 1, at 197. The Kumbhadasis were the lowest class, usually a servant who gave sexual services to the head of household. Id. The Rupajivas were usually very aesthetically pleasing and skilled in dance and the arts. See Karuna Sharma, The Social World of Prostitutes and Devadasis: A Study of the Social Structure and Its Politics in Early Modern India, 9 J. OF INT’L WOMEN’S STUDIES 297, 300 (2007). While some Rupajivas were born into prostitution, many entered voluntarily to seek riches or escape unhappy married life. Id. The most highly respected were the Ganikas for whom prostitution was an occupation and whose practice was regulated by state law. See Kotiswaran, supra note 1, at 197. Ganikas were very talented and accomplished and were considered a source of good luck, sometimes providing blessings over brides at weddings. Id. Ganika rates were fixed by the government and
perceptions regarding the morality of prostitution changed, leading to an increased criminalization of the practice. Simultaneously, the British saw prostitution as an evil necessary to satiate the “natural sexual desire” of their troops and sought to control the practice by ordering that Indian women be available in the cantonments for soldiers, thus giving birth to the brothel system and red-light districts that exist in urban India today.

In order to protect soldiers, the British administration regulated the health of prostitutes through medical inspections resulting in arrest and confinement for those who were found to be infected with disease. Later requirements included registration of all prostitutes with the Superintendent of Police, mandatory weekly health check-ups, and the issuance of identity cards to all prostitutes. These measures, passed under the guise of public health necessities, were driven not by an interest in maintaining the health and welfare of prostitutes, but rather were meant to protect clients. Such edicts laid the foundation for the prostitution system that exists in India today and shed light on the discrepancies that underlie current legislation.

they received government salaries. Id. They retained the right to organize and voice concerns and were taken care of when sick. Id. at 199. Prostitutes from this hierarchy eventually formed guilds, held meetings, and demanded civic and domestic rights. See id. at 197.

91 Kotiswaran, supra note 1, at 202.
92 Id. at 204–05. When the British arrived in India, they were shocked by India’s tolerance toward prostitution and the way in which the practice was treated like any other occupation. Gangoli, supra note 11, at 115; Kotiswaran, supra note 1, at 203. Under British rule, however, conditions changed. See Kotiswaran, supra note 1, at 203. The Indian economy took a turn for the worse and many women were forced to leave traditional occupations to go to urban areas, ultimately finding themselves engaged in prostitution to make a living. See id. Increasingly madams would seek out women, often through deception, to service British soldiers. See id. at 205. These women then found themselves in government-run brothels, known as chaklas, with high walls and barred windows that limited possibility of escape. Id. at 205–06. Prostitutes in these brothels were subject to physical and sexual abuse by soldiers, as well as starvation. Id.

93 Kotiswaran, supra note 1, at 206.
94 See id. at 207.
95 Id. at 208.
96 Id.
B. Prostitution in India Today: A Dangerous Business

While the law intended to prevent commercial exploitation of sex, what actually resulted is corruption in the enforcement machinery and wider exploitation in more surreptitious ways often with the protection of the so-called law enforcement apparatus! The problem now is with the law and the manner of its enforcement, [rather] than with prostitution and its related vices. At the same time, manifestations of prostitution in contemporary times are posing serious threats to human dignity, public health and morality and to women’s rights.

—Professor N.R. Madhava Menon

Sex work continues to be viewed by many in India as a profession that protects society from the uncontrollable sexual urges of men. While prostitution is not a category that the Indian government reports as part of its labor statistics or in its review of formal economy occupations, this industry is the source of income for over two million women and countless others who profit from the jobs the industry spawns. This reliance is highly problematic as the world of prostitution in India is linked with sex trafficking, sex slavery, child prostitution, and myriad health and economic inequities. AIDS and cyclical poverty are social ills which, given a legal regime that inadvertently permits prostitution, are difficult, if not impossible, for women in sex work to avoid or overcome.

97 Gangoli, supra note 11, at 126. Professor Menon is the Director of the National Judicial Academy, an institute for training judges, and Coordinator for the Law Reform Project. Id.

98 See id. at 67; Meena Menon, A Twilight Zone for Women Red-Light Workers Along Indian Highways, Hindu, Mar. 9, 1999, available at http://www.hartford-hwp.com/archives/52a/061.html. Some legislative proposals over the last two decades have taken the approach that sex work is a profession. See Gangoli, supra note 11, at 129. Nonetheless, such approaches have retained moral undertones, defining “sex worker” as a woman who has taken to prostitution voluntarily and is practicing it as an occupation. See id. While this definition can be seen as empowering women, it can also be critiqued as further stigmatizing prostitutes by showing them to have voluntarily given up their morality. See id. Further, it fails to address the millions of women who are forced into the profession. See id.

99 See Report on Conditions, supra note 25, at 86. It is important to note that most women engaged in prostitution earn minimal amounts of money and many never see their earnings as they are in debt to their brothels. See id.

100 See generally Gangoli, supra note 11, at 115–21.

101 See id. Even if one considers prostitution to be historically sanctioned in India, the effects of sex trafficking, internally regulated brothels, and the remnants of the devadasi system prove that its women participants are no longer viewed with the same respect. See id. at 115–16. See generally Universal Declaration of Human Rights, supra note 36 (standing for the proposition that all people are entitled to certain universal human rights which include the right to be free from cruel, inhuman or degrading treatment).
The highly-skilled, government-protected prostitutes of the pre-colonial era are now non-existent; the majority of sex workers are women and girls from lower castes or rural villages who are illiterate and unskilled. The average age of a sex worker in India today is fourteen and many are brought to the trade pre-menstruation. Globalization, the concentration of poverty among women in India, and poorly regulated borders in South Asia, have each contributed to an increase in human trafficking in the last decade. It is estimated that at least 150,000 women and girls are trafficked yearly from South Asian countries to work as prostitutes in India. Trafficking from Nepalese border towns into India is especially prevalent throughout the “hungry months” of July and August, during which time people wait for the harvest and experience exceptionally high levels of poverty. Nepalese families are forced to seek employment and income elsewhere and the situation leads to a noticeable rise in girls who disappear to India. The victims of trafficking who end up working as prostitutes find themselves in this situation as a result of trickery, deceit, desperation, a lack of alternatives, or compulsion—they almost never affirmatively choose or aspire to become prostitutes.

While cross-border trafficking represents a major concern, it is estimated that ninety percent of trafficking for sexual exploitation occurs within India itself. Societal factors play a significant role in pushing women into the sex trade. Earning potential for women is generally low in India. Women are highly controlled by family and commu-
In 2006, only one in three women reported being able to go to the market alone and only one in four could visit relatives without being accompanied. Overall, women are less educated than men. Women generally enter marriage earlier than men, and one in five women in India reports having experienced domestic violence by age fifteen. Women have little choice over their own healthcare and reproductive decisions. Additionally, dowry demands take a significant economic toll on families, often driving them to sacrifice daughters to the sex industry.

Women and girls are sold by friends, relatives, and neighbors to brokers for as little as $4.00, with higher prices paid for younger girls and virgins. They are then resold for a profit to brothel owners for up to $1300 and forced to work indefinitely to pay off their “debt.” The women are able to charge between $2.00 and $10.00 per client, depending on the service provided and amount of time spent. Generally, the brothels provide prostitutes with two meals a day and allow them to keep only the tips they earn (typically five to fifteen cents per customer) to pay for any personal expenses. Medical care and other items such as clothing are occasionally provided by the brothel owners, or control over their earnings, since traditionally women are expected to devote their time, energy, and earnings to the family. Id.

See Gangoli, supra note 11, at 116.

See id. In 1991, only thirty-nine percent of Indian women and sixty-four percent of Indian men were literate and the majority of those who were literate had only a primary education, or less. See Dunlop & Velkoff, supra note 111, at 5. For men, higher levels of education translate into a greater share of the workforce, whereas for women, higher education does not necessarily mean more job opportunities until they earn a post-high school education. See id. Even then, only twenty-eight percent of women with undergraduate degrees are employed. See id. Not until women specialize during their post-secondary education do they see significant improvements in employment opportunities. See id.

See Gangoli, supra note 11, at 116–17.

See id. at 116.

See id. at 117.


See id. The prostitute’s “debt” is the price paid by the brothel owner for her purchase plus approximately ten percent interest. Id. The process of paying off debt can go on indefinitely. Id.

See Russell, supra note 90. In contrast, women working outside brothels are often able to get only $1.00 for their services. See id.

See Human Rights Watch, supra note 31, at 18–19. These tips are the only way that prostitutes can buy food, clothing, and other provisions. Id.
but the costs of such provisions are added to an inmate’s debt with interest.\textsuperscript{122}

The client base for sex workers in India has also changed over time.\textsuperscript{123} Today, those seeking the services of prostitutes in India’s informal brothels are overwhelmingly migrant laborers, cab and rickshaw drivers, or truckers who may not be educated on HIV/AIDS and who travel great distances, potentially liaising with many prostitutes, thereby spreading disease around the population.\textsuperscript{124} Women may service anywhere from four to fifteen or more of these clients per day, resulting in extensive damage to their physical and mental well-being.\textsuperscript{125}

The venereal diseases of the colonial period that threatened those who socialized with prostitutes have now given way to a far more threatening epidemic: AIDS.\textsuperscript{126} Prostitution is deeply connected with

\begin{footnotesize}
\begin{enumerate}
\item See id. Inhabitants of the brothels are sometimes referred to as inmates to highlight their slave-like condition. See id. at 2, 18.
\item See id. \textit{Prostitution is booming in India’s urban commercial centers which are the temporary home to millions of migrant workers who provide the primary client base for brothels. Frontline World: Interview with Raney Aronson: Red-Light Reporting?}, (PBS television broadcast June 2004), \textit{available at} http://www.pbs.org/frontlineworld/stories/india304/aronson.html (last visited Apr. 10, 2008) [hereinafter Raney Aronson].
\item Prabha S. Chandra et al., \textit{A Cry from the Darkness: Women with Severe Mental Illness in India Reveal Their Experiences with Sexual Coercion}, \textit{66 Psychiatry} 323, 328–31 (2003). Sexual coercion is linked to many severe mental disorders found in women in India. \textit{Id}. A former prostitute from one of India’s red-light districts recalled her personal experience of being sold into prostitution at age twelve and explained that a woman’s dignity is shattered in these circumstances. See Asma, \textit{The Basic Difference Is Dignity, Red Light Despatch} (Jan. 2, 2007), at 1, 2, \textit{available at} http://www.euroquality.se/pdf/redlight_vol4.pdf. From a medical perspective, many of those forced into prostitution are young girls who have immature genital tracks. See Silverman et al., \textit{supra} note 105, at 540. Repeated sexual trauma at such a young age can cause increased biological vulnerability to HIV infection and other sexually transmitted diseases. See id.
\item Russell, \textit{supra} note 90. By 2016, India is expected to have more than sixteen million people living with HIV/AIDS, a number which, beyond the human tragedy involved, is potentially damaging to economic growth. See Menon, \textit{supra} note 98. Infection rates this high may discourage the $235 million in investment that the country needs to continue on its development track. See id. The extra spending needed for healthcare as a result of the epidemic will decrease national savings. See id. At present, the HIV/AIDS epidemic is one of the most serious and deadly consequences of sex work in India. See id. On the one hand, the onslaught of AIDS has caused international aid organizations such as the Bill and Melinda Gates Foundation and, even more recently, the Indian government to intervene in some of the red-light districts to promote condom use and safe sex training, including teaching women how to refuse a client who will not wear a condom. See id. On the other hand, India has some of the highest rates of the spread of AIDS in the world and the numbers do not appear to be decreasing. See id.; Kotiswaran, \textit{supra} note 1, at 177. Prostitutes who are found to be HIV positive are thrown out of brothels, forced to fend for them-
\end{enumerate}
\end{footnotesize}
the rapid rise in rates of HIV/AIDS in India, as well as other venereal diseases. In 2004, over fifty-four percent of prostitutes in Bombay tested positive for the disease. These high numbers have resulted in increased screening for the virus to the point where women and girls in brothels exhibiting symptoms may be tested without their consent or knowledge. Those who test positive are often dismissed to the streets, where some are too sick or weak to take care of themselves. Due to social stigma, many hospitals are unwilling to treat prostitutes, specifically those suspected of having HIV/AIDS.

Contemporary motivations for entering sex work and the consequences of a life of prostitution in India are completely different than they were in earlier periods. Ancient commercial sex and its religiously sanctioned counterparts which were enmeshed in Indian social

selves, and commonly have difficulty seeking medical treatment. See Human Rights Watch, supra note 31, at 78. The HIV/AIDS epidemic, while destroying the lives of those engaged in prostitution, has also spurred an increase in the demand for fresh, “clean” girls and virgins, thus causing a flurry of new girls to be brought into the brothels. Id. at 80. Aid organizations have set up shelters for women rescued from brothels or expelled by them due to their HIV positive status. See Russell, supra note 90.

127 See id. As of 2004, India’s government estimated that at least 5,134,000 people in India were living with AIDS. Id. Sex workers are considered one of the highest risk categories. Id. India’s HIV/AIDS epidemic, measured by the number of people infected with the virus, is overshadowed only by South Africa and Nigeria. Silverman et al., supra note 105, at 536. Adding to the problem, AIDS patients are often denied access to healthcare and education due to social stigma. See New Bill to Protect AIDS Patients, Times India, Nov. 28, 2006, available at http://timesofindia.indiatimes.com/NEWS/India/New_Bill_to_protect_AIDS_patients/articleshow/609085.cms. India’s government is considering legislation to reduce this discrimination but reports of abuse continue. See id.

128 See Russell, supra note 90.

129 See id. Compulsory testing for diseases such as HIV requires the removal of bodily fluids, which, according to the World Health Organization (WHO) guidelines, is illegal. See generally Stuart Rennie & Frieda Behets, Desperately Seeking Targets: The Ethics of Routine HIV Testing in Low-Income Countries, 84 Bull. World Health Org. 52 (2006), available at http://www.who.int/bulletin/volumes/84/1/52.pdf; Geetanjali Gangoli, Unmet Needs: Sex Workers & Healthcare, Soc. Scientist, May–June 2002, at 79, 85. The WHO advocates that HIV testing should be confidential because there is no public health rationale for routine testing of specific risk groups. See Gangoli, supra, at 85–86; Rennie & Behers, supra, at 53. Isolating sex workers and labeling them as “carriers” of disease is unethical and counterproductive in the fight against AIDS. Gangoli, supra, at 96. This stigmatization only serves to increase violence against women found to be infected, decrease women’s ability to assert themselves, limit women’s ability to demand safe sex, and create a false sense of security. See generally Gangoli, supra.


131 See Gangoli, supra note 129, at 95, 97.

132 See id.
and religious traditions have evolved to become abusive and dangerous manifestations of sex slavery. The intense poverty and trickery that characterizes entry into prostitution today does not resemble the social acceptance and reverence that attached to motivations for participation in the past. Instead, today’s prostitutes are trapped in an endless cycle of poverty, stigmatization, and disease. Even when women are able to escape prostitution, they have difficulty rejoining society because of the stigma attached to them.

These changed circumstances have rendered obsolete any argument sanctioning contemporary prostitution as a legitimate practice necessary to satisfy the uncontrollable desire for sex of Indian men. Those who argue that in order to control men’s sexual desires it is necessary to allow prostitution cannot rationally contend that such an objective is more worthwhile than protecting fundamental human rights. The practice of prostitution in India traps women in perpetual poverty and puts them at risk for contracting deadly diseases. Condoning and enabling prostitution as a profession ignores the reality that women have the opportunity, capacity, and capability to become better educated, participate in the growing workforce, and help further India’s blossoming economy in alternative ways.

III. Choosing Human Rights

The prostitution that is carried out in India today is born out of intense poverty and thrives on deception, force, and plain cruelty to women. Since its independence, India has made repeated commitments to international human rights law, which conflicts sharply with the abusive trafficking and prostitution system being carried on within its borders. India has the power to effect change and to stand as a model for South Asia in the fight against trafficking and exploitation of

133 See Kevin Bales, Ending Slavery: How We Free Today’s Slaves 11 (2007); Russell, supra note 90.
134 See Russell, supra note 90.
136 See id.
137 See Kristof, supra note 7.
138 See id.
139 See Human Rights Watch, supra note 31, at 25, 80.
140 See generally Nussbaum, supra note 35, at 70–86 (discussing why the cultural relativist argument may fall short when fundamental human rights are at issue).
141 See Russell, supra note 90.
women and children. Legislation must focus on protecting human rights and ending the tolerationist approach to prostitution found in current law. Concurrently, legislators must develop a phase out policy with the two-pronged goal of helping existing prostitutes leave the profession, while simultaneously preventing young girls from being forced into the trade.

A. Human Rights and Prostitution: Irreconcilable Differences

[In India, we are not talking of sex workers who have voluntarily opted for prostitution, but of poverty-stricken, kidnapped and battered women who are made to perform for Rs. 15 [.38 US] an encounter. Legalisation will only make the trade immensely convenient and more profitable for the pimps and enable them to expand their operations.]

—Neelam Gorhe

The protection of human rights and the practice of prostitution in India cannot be reconciled. Forced prostitution and sex slavery de-

---

143 Global Initiative, supra note 38. On February 1, 2008, the Council of Europe Convention on Action against Trafficking in Human Beings entered into force. See Council of Europe, 1st February 2008: The Council of Europe Convention on Action Against Trafficking in Human Beings, [CETS no. 197] Entered into Force, available at http://www.coe.int/t/dg2/trafficking/campaign/Docs/NewArtFeb08_en.asp. The Convention takes a human rights approach to ending the practice of human trafficking, which it states often results in slavery for victims. Convention on Action against Trafficking in Human Beings, supra note 84, at 7. While this Convention currently has only Council of Europe members, it is open to non-member states as well and recognizes that human trafficking is a global problem in need of solutions that extend beyond the geographical scope of Europe. Maud de Boer-Buquicchio, Deputy Sec’t General of the Council of Europe, Address at UNODC Panel, Vienna, The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation, (Feb. 15, 2008), available at http://www.coe.int/t/dg2/trafficking/campaign/Docs/News/DSGVien2_en.asp. India, being a country of high origin, transit, and destination for human trafficking, specifically for sexual exploitation, should be targeted as an important partner in international conventions on trafficking, and should be helped to meet the requirements of accession. See Global Initiative, supra note 38.

144 See The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986, No. 44; Gangoli, supra note 11, at 127–32. Progress was made when the Indian Supreme Court ruled in July 2006 that the Maharashtra government could proceed with a plan to seal brothels under the Immoral Traffic Prevention Act (ITPA). See The Immoral Traffic (Prevention) Amendment Bill, 2006, No. 47; U.S. Dep’t of State, supra note 83, at 118.


146 Gangoli, supra note 2, at 12 (citing interview with Neelam Gorhe, President of the State Adhar Kendra in the state of Maharashtra, a group that opposes the legalization of prostitution).

147 See Kristof, supra note 7.
fine the industry such that nothing short of ending the practice will adequately protect the human rights of women.\textsuperscript{148} Two main arguments exist against outlawing prostitution and its related activities.\textsuperscript{149} First, a number of feminists argue that prostitution should be viewed as an active choice made by Indian women in order to earn a living instead of being destitute, begging, or working in the poorly paid informal sector.\textsuperscript{150} This argument is bolstered by the fact that married women in India are not afforded many rights and must defer to their husbands.\textsuperscript{151} Feminists contend that women who reject this normative lifestyle should be seen as taking control over their own lives.\textsuperscript{152} The second argument in favor of legalizing prostitution assumes a cultural relativist position stating that male sexuality is uncontrollable, and prostitution is an evil necessary to protect society.\textsuperscript{153} Many prostitutes themselves adhere to this latter position, arguing that they work hard and serve men just as social workers serve the needy and nurses help those who are infirm.\textsuperscript{154}

Both of these arguments fail in light of the reality that fundamental human rights are being denied to women and children in India as a result of the laws on prostitution.\textsuperscript{155} The free choice inherent in the feminist argument is an elusive concept when one considers that the majority of women entering prostitution are seeking to escape poverty.\textsuperscript{156} The freedom to choose seems dubious when those entering prostitution have had limited educational opportunities, little exposure to other work opportunities, and have few female role models to emulate in positions of power in society or in professional capacities.\textsuperscript{157} Finally, the rates of trafficking, deception, and forced servitude that characterize this industry indicate that a vast number of India’s prostitutes did not come to the profession of their own volition.\textsuperscript{158}

\textsuperscript{148} See id.
\textsuperscript{149} See Gangoli, supra note 2, at 12–15.
\textsuperscript{150} See id. at 13. Often it is hard to persuade devadasi to seek alternate employment because some can earn 5000 rupees ($120.00 US) per day. See Owen, supra note 90.
\textsuperscript{151} Gangoli, supra note 2, at 17.
\textsuperscript{152} Id.
\textsuperscript{153} See Gangoli, supra note 1, at 67.
\textsuperscript{154} Gangoli, supra note 2, at 19.
\textsuperscript{155} Jaishankar & Haldar, supra note 6.
\textsuperscript{156} See id.; Human Rights Watch, supra note 31, at 11.
\textsuperscript{157} Nussbaum, supra note 35, at 63.
\textsuperscript{158} Human Rights Watch, supra note 31, at 1 n.1, 36, 38. Modes of entry into the profession have implications for the level of respect prostitutes receive. See Raney Aronson, supra note 124. The example of Mumbai’s sex workers reveals that many are sold into prostitution as young girls and do not enter the trade by choice. See id. This fact affects the
It is difficult to fully embrace the notion that prostitutes are akin to social workers. While social workers may bear emotional and psychological burdens as a result of their work, it is hard to fathom someone in this profession being forced day after day under threat of abuse to service clients at the risk of contracting disease. While some may feel that prostitutes are doing men a service, this attitude relies on the acceptance of the manufactured norm that men must be provided with sexual satisfaction or else all of society is at risk. It is no longer acceptable, particularly in an age when upwards of sixty percent of all prostitutes in some Indian cities are infected with HIV/AIDS, to allow the sacrifice of the life of one human being for the pleasure of another.

Supporting the argument against legalization is the fact that, thus far, legislation introduced to legalize and control prostitution has only protected the trade of prostitution, not the prostitutes themselves, and thereby has failed to address human rights concerns. To date, legislative proposals in favor of legalization have been driven by morality concerns, a desire to control vice, and a concern for the safety of the client and the client’s family. Although these legislative schemes claim to address public health problems, it is clear that they are for the benefit of the male clients, not the female prostitutes. For example, in 1994, the Protection of Commercial Sex Workers Bill was presented to the Maharashtra Legislature. The Bill would have recognized commercial sex work as a legitimate commercial activity but would have man-

Mumbai sex worker’s ability to demand that clients use condoms, as these women often garner very little respect. Id. The situation is slightly different in Calcutta, where most female prostitutes are born into the practice, leaving them no choice but to be sex workers, while at the same time granting them slightly more respect and the ability to demand safe sex practices. Id.  

159 Gangoli, supra note 2, at 19.  
160 See id.; Kristof, supra note 7.  
161 Gangoli, supra note 2, at 19.  
162 Gangoli, supra note 129, at 83.  
163 See Gangoli, supra note 11, at 123–24. A 1988 bill before the Maharashtra Legislative Assembly attempted to curb the spread of AIDS and venereal diseases by compulsive registration of all prostitutes, a requirement that brothel owners display the age of prostitutes, and a minimum age for prostitution of twenty-one years. See id. at 123–24. Additionally, every registered woman was to be medically examined once every three months. See id. at 124. No provisions were laid out for who would cover the expense of procedures, what would happen to those who were found to have contracted disease, or what types of procedures were legal to conduct on prostitute women. See id.  
164 See id. at 125.  
165 See id.  
166 See id. at 124–25.
dated prostitutes to register with the government; failure to register would carry a punishment of seven years imprisonment.\(^\text{167}\) Registered prostitutes were to be tested periodically for sexually transmitted diseases and, if found positive, were to be branded, quarantined, and fined.\(^\text{168}\) Instead of valuing their professional choice, the Bill, if passed, would have stigmatized women and failed to provide them with vital protections.\(^\text{169}\) Legislation that regulates prostitutes through compulsory medical testing represents a clear violation of widely held notions of human rights.\(^\text{170}\)

Another impediment to legalization is the Indian government’s inability to enforce existing laws governing prostitution.\(^\text{171}\) Enforcement of PITA has always been a challenge due to a lack of resources and political will, along with high levels of poverty-fueled corruption.\(^\text{172}\) Increased regulations and monitoring provisions that would necessarily accompany a plan to legalize prostitution would be similarly doomed to fail.\(^\text{173}\)

Apart from the shortcomings of legislation, the practical limitations of legalization are already evident.\(^\text{174}\) Preliminary attempts to unionize prostitutes in the red-light district of Shonagachi, Calcutta have proven that legalization is not an effective strategy.\(^\text{175}\) Shonagachi prostitutes were provided with condoms and were educated on HIV/AIDS in order to empower them to take protective measures against disease.\(^\text{176}\) Rates of HIV/AIDS have only increased in Shonagachi since the union was formed however, and some prostitutes contend that it is merely a front for brothel owners to gain protection from law enforcement raids.\(^\text{177}\)

\(^{167}\) See id. Registration would qualify sex workers for welfare benefits. See id.

\(^{168}\) See Gangoli, supra note 11, at 124–25.

\(^{169}\) See id. at 125.

\(^{170}\) See id.

\(^{171}\) U.S. Dep’t of State, supra note 83, at 118–19. India’s lack of national coordination in addressing trafficking and prostitution problems, accompanied by high levels of corruption fueled by poverty, make enforcement of any laws on the issue extremely difficult. See id.

\(^{172}\) Id.

\(^{173}\) See Kristof, supra note 7.

\(^{174}\) See id.

\(^{175}\) See id.

\(^{176}\) See id.

\(^{177}\) See id. Similarly, in Mumbai, many of the brothels are run by local Indian mafia who deny advocacy groups the opportunity to work with prostitutes to prevent HIV/AIDS. See Raney Aronson, supra note 124.
Conversely, when India has focused on reigning in abusive prostitution, rather than on legalization, some progress has been achieved. In 2007, the United Nations Office on Drugs and Crime, Regional Office for South Asia in partnership with the Ministry of Home Affairs, Government of India, established Anti Human Trafficking Units (AHTUs) across several states in the country. The AHTUs combine representatives from police departments, state government, and civil society in the fight against human trafficking. They have significantly increased the number of trafficking crimes registered, victims rescued, and clients and traffickers arrested, thereby reducing the supply and demand for India’s brothels. Similarly, as a result of increased raids by police, the city of Mumbai has seen a noticeable decline in the number of operating brothels.

Combining this anti-trafficking work with national legislation outlawing prostitution is the most effective way to address the human rights problems faced by prostitutes in India. Forced prostitution is so ingrained in India’s sex industry that an argument for legalization

---

178 See Kristof, supra note 7. In March 2008, New Dehli Police, with the help of the NGO Stop Trafficking, Oppression and Prostitution (STOP), rescued seven girls, including five minors, and caught six persons involved in a sex racket being run out of a restaurant in south Dehli. See S. Dehli Sex Racket Busted, Seven Girls Rescued, TIMES INDIA, Mar. 21, 2008, at 5. The racket provided foreign clients with minor girls, primarily trafficked to Dehli from rural areas in Orissa and West Bengal. Id. After receiving information regarding illegal trafficking, STOP contacted the crime branch of the local Dehli Police, who set up a trap to arrest the pimps and rescue the girls. Id. Two women were arrested as well for luring teenage girls into the racket by promising good money and jobs. Id. This example is part of a developing movement in India, which reportedly conducted forty-three rescue operations, releasing 275 victims of commercial sex trafficking in 2007. U.S. Dep’t of State, supra note 83, at 119. Additionally, the government has provided funds to increase awareness among police and prosecutors in Maharashtra, Goa, West Bengal, and Andhra Pradesh states. Id. Despite these rescues, prosecution and conviction rates remain very low. Id.


180 See id.

181 See U.N. Office on Drugs & Crime, Achievement of Anti Human Trafficking Units, http://www.gifasia.in/iahtu_achivement.php/ (last visited May 12, 2008). In 2007, 592 trafficking crimes were registered and 419 customers and 1295 traffickers were arrested, four of whom were convicted of criminal offenses. Id. The initiative has helped rescue victims of sex trafficking and takes a human rights approach to ending trafficking by treating victims as victims, rather than as offenders or solicitors. Id. It has also begun to reduce demand for the victims of trafficking. Id.

182 See Kristof, supra note 7. A positive association has been observed between duration of brothel servitude and HIV status, indicating that intervention to release sex-trafficked women and girls and others caught in forced prostitution with a focus on preventing them from being caught up in the trafficking system again, can be an effective HIV prevention strategy. Silverman et al., supra note 105, at 540.

183 See Kristof, supra note 7; Raney Aronson, supra note 124.
only condones trafficking and abuse of women without solving the problems that plague female prostitutes. By passing national legislation to uniformly outlaw the practice of prostitution in its entirety however, state-level governments and local police authorities will have more clear direction in regard to enforcement plans and the Ministry of Home Affairs could be better equipped to coordinate national prevention strategies across state lines, both in regard to trafficking and prostitution.

B. Human Rights Are Universal

Given the dire circumstances of women and girls forced into the sex industry in India, legalization is not the answer. Prostitution in India cannot continue to be tolerated by society and law, nor can it be condoned through cultural relativist arguments that would permit it to continue. The cultural relativist stance loses credibility when one considers that the ideas of political liberty, sex equality, and non-discrimination were, despite sharp political and caste divides that existed at independence, included by overwhelming consensus in the Indian Constitution. While cultural diversity should not be trivialized, some traditional practices are harmful to the well-being of individuals and therefore must be scrutinized with respect to fundamental rights.

India’s formal stance on human rights is evidenced by its participation in numerous treaties and international agreements related to human rights. The International Convention for the Suppression of the Traffic in Persons, to which India is a signatory, provided the impetus for the introduction of the original Immoral Traffic Prevention Act in 1956. India is also a signatory to the International Covenant on Civil and Political Rights and the Abolition of Forced Labor Con-
vention. Moreover, the government has ratified the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, which obligate member states to protect against discrimination and to suppress all forms of trafficking in women and children.

India was a primary contributor to the creation of the United Nations Declaration of Human Rights. Hansa Mehta, a woman, served as India’s delegate to the Human Rights Commission and helped draft the Declaration. This document lays out the fundamental human rights that should be afforded to every person, including the right to life, liberty and security of person; the right to be free from torture and cruel, inhuman or degrading treatment; and the right to fair working conditions. These provisions reflect India’s input and stance on human rights. It is appropriate to demand that these aspirations be translated into anti-prostitution legislation with justiciable commitments to the human rights of women generally.

Conclusion

Prostitution in India today is essentially sexual slavery fueled by intense poverty. Trafficking victims are tricked, drugged, or betrayed by friends, family, or strangers hoping to turn a profit. Those who enter prostitution of their own volition are often impoverished, controlled or abused in marital or family life, uneducated, or without access to alternative opportunities. For these reasons, the push to legalize prostitution fails to address the structural inequalities that plague women and children.

---


195 See id. Ms. Mehta, a member of the Brahmin caste, was dedicated to women’s rights and national self-determination. See id. at 38. She and her husband were both imprisoned for civil disobedience in India. See id.

196 See Universal Declaration of Human Rights, supra note 36, at arts. 3, 5, 23.

197 See Glendon, supra note 195, at 40.

198 See generally Universal Declaration of Human Rights, supra note 36 (establishing that all individuals are entitled to certain fundamental human rights).
girls in Indian society and thereby does women a disservice. As India develops and becomes a viable global economic power, it must recognize the international commitments it has made to its women and to human rights. India must pass new legislation that protects women’s rights by outlawing prostitution and trafficking entirely. Such legislation should be accompanied by a phase-out plan to combat poverty, rescue, rehabilitate, educate, and train India’s women and girls to become active and full members of their society.
FOLLOWING LOZANO V. HAZLETON: KEEP STATES AND CITIES OUT OF THE IMMIGRATION BUSINESS

Rachel E. Morse*


Abstract: In Immigrants: Your Country Needs Them, Phillipe Legrain makes an economic argument for open borders. While he describes an ideal, the reality is that the United States will not implement an open border policy anytime soon. In recent years, Congress has been unable to reach a consensus regarding immigration policy reform. While Congress is stalled on the issue, there are twelve million undocumented immigrants living in the United States and that number is increasing. In response to the lack of a federal movement on the issue, many states, cities, and towns have begun passing their own laws regulating the rights of illegal immigrants. This book review examines the legality of these laws in light of recent challenges brought in federal courts and concludes that during this period of federal legislative transition, it is the responsibility of the courts to invalidate those local laws that violate the preemption doctrine. Immigration and naturalization are exclusively federal legal territory, and laws passed on the local level must not be permitted to thwart federal progress in creating and enforcing a uniform national policy.

Introduction

In the United States, the debate over immigration policy is an especially contentious one.1 Much of the debate currently centers on how to best reform what most agree is an extraordinarily flawed system.2 In the summer of 2007, the U.S. Congress debated and failed to pass a comprehensive immigration reform bill, leading some commentators to doubt that any agreement regarding immigration reform can be

1 See Alan L. Button, Transcript & Commentary, Panel Discussion and Commentary: What to Expect with Immigration Reform in the 110th Congress and the Implications for the Legal Community, 29 Campbell L. Rev. 263, 263 (2007).
2 See id. at 265–69.
reached before the 2008 presidential election. At the heart of the immigration debate is the question: “how do we fix a ‘broken’ system?” How Congress answers this question will determine the fate of an estimated twelve million undocumented immigrants currently residing within our borders.

In his book, *Immigrants: Your Country Needs Them*, British journalist Philippe Legrain makes an economic argument for open borders. Concentrating on current immigration policies around the developed world, including the United States, Canada, Australia, Britain, and the European Union, Legrain makes the argument that the influx of migrants—skilled and unskilled alike—into a society ultimately benefits everyone. Legrain discusses the history of immigration policies in several developed nations and points out instances where open borders have made positive contributions to society and where strict or closed-door policies led to stagnation. In the United States alone, immigration policy has gone through many incarnations. Legrain compares the effects of periods of relatively free migration into the United States with times of harsher laws and concludes that it is during the periods of greater immigration that society makes the most progress.

Legrain asserts that low or unskilled immigrants do the jobs natives do not want to do. The mere presence of additional people stimulates the economy; not only do immigrants make money, but they spend money, and they create additional jobs. For every family living in a given community, someone has to collect their trash, build their house, and sell them groceries. Rather than displacing native workers, unskilled workers do menial jobs that create more jobs overall and free native workers to go after loftier pursuits.

Legrain also contends that while many immigrants come to developed countries to make a better life for themselves and their children,

---

4 See Button, * supra* note 1, at 271.
5 See id.
7 See id.
8 See id. at 19.
9 See id.
10 See id.
11 See Legrain, * supra* note 6, at 72.
12 See id. at 66–67.
13 See id.
14 See id. at 72.
migration also benefits those left behind.\textsuperscript{15} Remittances—the money immigrants send home—are far more likely to reach those who genuinely need it, and for whom it is intended, than money channeled through government aid packages, which often gets misappropriated or embezzled by corrupt governments, especially in poorer countries.\textsuperscript{16} Using the influx of foreign engineers and business people during the boom days of Silicon Valley as an example, Legrain emphasizes that diversity fosters innovation while homogeneity stalls progress.\textsuperscript{17} Legrain contends that allowing for freer migration will ultimately result in economic benefits for everyone.\textsuperscript{18}

While open borders may be an economic ideal, the reality is that this approach will not become U.S. policy anytime soon.\textsuperscript{19} Guarding against terrorism, for one thing, is too high a priority, and U.S. immigration policy has changed to reflect post-9/11 security concerns.\textsuperscript{20} Yet, while the rules have become harsher, inconsistencies in enforcement at the U.S. borders and staggering backlogs at visa application processing centers across the country have left the national immigration policy in

\textsuperscript{15} See id. at 20–21.

\textsuperscript{16} See Legrain, supra note 6, at 20–21. In 2006, migrants from poor countries wired home $300 billion, an amount nearly triple the combined foreign aid budgets of the world. See Jason DeParle, A Western Union Empire Moves Migrant Cash Home, N.Y. Times, Nov. 22, 2007, at A1 (detailing the resurrection of Western Union, “a fixture of American lore that went bankrupt selling telegrams at the dawn of the internet age but now earns nearly $1 billion a year helping poor migrants across the globe send money home”).

\textsuperscript{17} See Legrain, supra note 6, at 100–07. Legrain cites the foreign-born founders of several “Silicon Valley success stories,” including ebay, Google, Yahoo!, Intel, Hotmail, and Sun Microsystems. Id. The $100,000 check that started Google was written by a founding member of The Indus Entrepreneur (TiE), a world-wide network of technology professionals that was begun in California by an Indian immigrant. Id. Legrain credits Silicon Valley’s position as “the hub of the global technology industry” to immigrants with international connections and novel ways of thinking. See id. at 101.

\textsuperscript{18} See id. at 19.

\textsuperscript{19} See Button, supra note 1, at 271 (discussing recent increases in spending on border patrol and enforcement).

disarray. Critics and lawmakers alike have called for reform, but there is little consensus on the most appropriate way to effect it. As Congress debates, the number of undocumented immigrants in the United States increases; by some estimates the illegal population grows by almost half a million a year. Although immigration and naturalization are historically federal legal territory, states and cities have begun taking matters into their own hands and attempting to regulate illegal immigrants, with varying degrees of success. These local laws yield wildly disparate results, ranging from the harshest of anti-immigrant measures to the lenient “don’t ask, don’t tell” policies of the nation’s so-called “sanctuary cities.”

This book review will explore the tension in the immigration debate and assess the range of state and local responses emerging in the absence of comprehensive federal reform. Part I will examine the different sides of the debate and analyze the interests of their respective proponents: those who would reform the current laws in response to shifting needs and demographics, and those who contend the only course of action is to remove illegal immigrants entirely through deportation and enhanced border security. Part II will discuss recent federal efforts to pass a comprehensive immigration reform bill and the obstacles that must be overcome in order to reach that goal. Part III will examine state and local legislation enacted in response to the lack of congressional progress in addressing a variety of immigration issues. Much has been written about whether various municipalities are overstepping their constitutional bounds in enacting their own

21 See Button, supra note 1, at 271 (referencing “extensive backlogs” in the family-based petition system). It can take seven to ten years to bring in an approved relative. Id. Information for visa waiting times can be found on the State Department’s Visa Bulletin, accessible at http://travel.state.gov/visa/frvi/bulletin/bulletin_2924.html (last visited Mar. 21, 2008). At one extreme, the waiting time for approved siblings from the Philippines is currently approximately forty years. See Button, supra note 1, at 284.


23 See Legrain, supra note 6, at 9.


laws regulating the rights and treatment of illegal immigrants. With emphasis on the recent district court decision in *Lozano v. Hazleton*, which struck down local anti-immigrant ordinances in the city of Hazleton, Pennsylvania, and an evaluation of similar anti-immigrant laws recently enacted in Oklahoma, this book review concludes that the states must not be permitted to thwart federal progress by creating their own individual bodies of immigration law. As exemplified in *Lozano*, it is the role of the courts to continue to protect constitutional law and human rights during this period of legislative transition. Until the federal government is able to establish and consistently enforce a uniform policy to satisfy the interests of all sides of the debate, it is the responsibility of the courts to prevent runaway legislation at the state and local levels and to send signals to Congress about the most appropriate way to reform immigration policy.

I. Defining the Problem

There are an estimated twelve million undocumented persons currently living inside the United States. While approximately 400,000 immigrants cease to be illegal every year—the government deports a relatively modest 40,000, others adjust to lawful permanent resident status and receive green cards, and still others choose to leave on their own—another 900,000 enter illegally or fall out of status to replace those who are gone. In this way, the United States’ illegal immigrant population continues to grow. Congress has made efforts to pass new legislation, but has been unable to reach a workable solution. Much of the tension in the debate comes from the fact that how a legislator proposes to solve the problem is based on how she defines it.

---


32 See Button, *supra* note 1, at 271.

33 See *supra* note 1, at 273 (citing statistics from Mark Krikorian, executive director of the Center for Immigration Studies in Washington, D.C.).

34 See *supra* note 1, at 265.
Some argue that the problem is the presence of twelve million people living illegally in the country.\textsuperscript{35} These people are here in violation of federal law and must be removed, so the argument goes, either by physical deportation or through “attrition by enforcement,” causing self-deportation through incentive.\textsuperscript{36} This is the argument utilized by supporters of municipal ordinances like those struck down in \textit{Lozano}, denying employment or residential rentals without a government-issued permit.\textsuperscript{37} The logic is that no one will voluntarily remain in a place where they cannot work or rent a home.\textsuperscript{38}

The other side of the debate contends that the problem starts with the classification of undocumented immigrants as “illegal.”\textsuperscript{39} In \textit{Lozano}, the court references several of the plaintiffs as “lack[ing] legal authorization to reside in the United States.”\textsuperscript{40} Beyond living here without permission, most “illegal” immigrants have committed no crimes.\textsuperscript{41} Not all, so-called, illegal immigrants necessarily entered the United States unlawfully.\textsuperscript{42} Individuals who are here because they have overstayed entrance visas, are waiting for adjustment applications to be processed by a backlog elimination center, or who have otherwise fallen out of status since their initial arrival are all technically illegal and thus would be subject to prohibitions like those put forth in the City of Hazleton’s ordinances.\textsuperscript{43}

Legal status, in the immigration context, has been defined differently throughout U.S. history.\textsuperscript{44} Until 1929, there was no mention what-

\textsuperscript{35} See id.
\textsuperscript{36} See Alex Kotlowitz, \textit{Our Town}, N. Y. TIMES, Aug. 5, 2007, § 6 (Magazine), at 30. “More than forty local and state governments have passed ordinances and legislation aimed at making life miserable for illegal immigrants in the hope that they’ll have no choice but to return to their countries of origin. Deportation by attrition, some call it.” Id.
\textsuperscript{38} See Button, \textit{supra} note 1, at 273.
\textsuperscript{39} See id. at 274.
\textsuperscript{40} \textit{Lozano}, 496 F. Supp. 2d at 494.
\textsuperscript{41} See id.
\textsuperscript{42} See id. at 531.
\textsuperscript{43} Hazleton Ordinance 2006-18, \textit{supra} note 37; \textit{see Lozano}, 496 F. Supp. 2d at 531.
\textsuperscript{44} See \textit{Lozano}, 496 F. Supp. 2d at 557–62 (providing a history of federal regulation of immigration, charting the move from an “open system” of immigration to “one where federal rules govern nearly every aspect of the immigrant experience”).
soever of unauthorized entry as a crime in any federal statute. As the laws have changed, people with identical circumstance have been characterized differently. Proponents of comprehensive reform argue the problem is not the presence of so-called illegal immigrants, but rather a “broken” system that forces people to live outside the law. As the current law stands, there is no realistic way for unskilled workers to come into the United States legally without some alternate grounds for admission. The paradox is that their presence is required by certain sectors of the economy; the law prohibits the entry of unskilled immigrants without family in the United States, but the agricultural industry depends on the labor of the immigrant workforce. Jeanne Butterfield, Executive Director of the American Immigration Lawyers Association has called today’s immigration policies “out of sync” with today’s world. She likens the current body of American immigration law to a twenty-five mile per hour speed limit in place in the twenty-first century, pointing out that the system “simply does not provide worker visas, either temporary or permanent, for those sectors of our economy where our labor force needs are the greatest.” Butterfield cites “extensive backlogs in [the] family immigration system where people with green cards” are made to wait seven to ten years before they can unite with immediate family members and suggests that this fact, “in itself, is fueling some of the illegal immigration.” Butterfield concludes it is the

45 See id. at 515 n.37.
46 See id. In 1855, immigrant women were automatically granted citizenship upon marriage to a citizen in the event that their immigrant husband naturalized. See Chomsky, supra note 20, at 199. Today, an immigrant spouse of a U.S. citizen must wait three years before being eligible for permanent resident status and then must wait another three years after adjusting to be eligible for citizenship. 8 U.S.C.A. § 1430 (West 2007) (amended by Pub. L. No. 110-181, § 674, 122 Stat. 3 (2008)). Until 1924, immigration was restricted along racial lines, and there were no quotas for European immigrants. See Chomsky, supra note 20, at 54. Beginning in 1924, the laws required all immigrants to obtain visas before immigrating and those who once would have been able to buy a ticket and sail to the United States might no longer be eligible for admission. See id.
47 See Button, supra note 1, at 265 (“[I]s the system ‘broken’ because twelve million . . . are ‘undocumented’ rather than documented? Are they ‘undocumented’ or ‘illegal’? Are these millions just ‘people,’ or are they ‘immigrants’ or ‘aliens’ or ‘criminals?’”).
48 See id. at 278–79. Unskilled workers can come in through family petitions but the waits are extremely long, especially for certain countries on which there is an annual cap, and applications are expensive. See id.
49 See id. at 271. While the economy is growing, the available work force in the United States is declining at a rate of approximate one million workers per year. See id. at 272.
50 See id. at 275.
51 See id. at 272, 276.
52 See Button, supra note 1, at 271.
system that needs to change to reflect reality, as opposed to the issue being the need to better enforce the existing laws.  

II. COMPREHENSIVE IMMIGRATION REFORM AT THE FEDERAL LEVEL

In June 2007, “broad overhauls” of the federal immigration statutes failed in Congress. The Senate split over the desire to avoid granting amnesty to unlawful immigrants already in the United States and the push to secure civil rights and due process protection for all persons in the country, as well as providing greater access to public benefits such as healthcare and education. A major question was whether immigrants living here illegally should have the right to earn legal status, and to whom and how far that privilege should extend. The proposed bill contained provisions including additional funding for border security; conversion of the visa application process from a petition-based system to a merit-based system where applicants gain points based on education, skill levels, and individual qualifications; a guest worker program; and new employee verification methods. The bill would have provided a way for millions of immigrants to gain legal status, coaxing them “out of the shadows” and legitimating them in the American social system. The bill’s failure has been attributed to a lack of faith by many that the government can actually accomplish the various goals outlined in the proposal, but such legalization would have benefited both the individual immigrant and society at large. It would have allowed for full access to social benefits while providing a more complete picture of the American population for purposes as varied as taxation, the criminal justice system, and the census.

Since this latest bill for comprehensive reform died, the federal government continues to work to find an effective and realistic plan to improve enforcement, both at the border and in the workplace.  

53 See id. at 272.
54 See S. 1639, 110th Cong. (2007).
56 See id.
57 See S. 1639.
59 See id.; Pear & Hulse, supra note 22.
60 See Lee, supra note 58, at 277; Pear & Hulse, supra note 22.
61 See Comprehensive Immigration Reform, Improving Border Security and Immigration, http://www.whitehouse.gov/infocus/immigration/ (last visited Mar. 21, 2008) [herein-
forts in these two areas serve the same purpose, as the majority of those who enter the United States illegally do so to work. Preventing illegal border crossings will reduce the need for workplace raids and will lessen the potential liability of employers. Security along the 2000 mile border between the United States and Mexico is inconsistent and largely ineffective, preventing the unlawful entrance of only a fraction of those who attempt to cross. Current border policy actually facilitates crime and violence, driving would-be entrants away from the more heavily patrolled metropolitan areas and into the desert where conditions are often deadly. While the exact number of people who die try-

after Comprehensive Immigration Reform] (announcing details of a plan to enact reforms within the confines of the current law, specifically targeting border security, worksite enforcement, streamlining existing guest-worker programs, and improving existing immigration and assimilation into American culture). It is estimated that between fifty and seventy-five percent of the agricultural labor force in the United States is made up of laborers who do not have legal authorization to work here. See Larry Craig, U.S. Senator for Idaho, Putting Our Immigration Policies to Work, The Need for AGJOBS Legislation—Now, http://craig.senate.gov/i_agjobs.cfm (last visited Mar. 21, 2008) [hereinafter AGJOBS Briefing].

62 See Button, supra note 1, at 272.

63 See id.; Pam Belluck, Lawyers Say U.S. Acted in Bad Faith After Immigrant Raid in Massachusetts, N.Y. TIMES, Mar. 22, 2007, at A22 (describing a 2007 workplace raid in New Bedford, Massachusetts, in which over 350 immigrants were arrested, many of them separated from their children and sent to detention centers in Texas); Minnesota; Immigrants Mistreated in Raid, Suit Claims, N.Y. TIMES, Sept. 5, 2007, at A22 (detailing claims that “federal agents who raided a meatpacking plant in Worthington [in December 2006] detained Hispanic workers, hurled racial epithets at them and forced the women to take off their clothes”); Julia Preston, U.S. Raids 6 Meat Plants in ID Case, N.Y. TIMES, Dec. 13, 2006, at A24. Six Swift & Company meatpacking plants were raided in six states in one day in raids that “round[ed] up hundreds of immigrant workers.” Preston, supra. A meatpackers union spokeswoman asserted that, “Worksite raids are not an effective form of immigration reform. They terrorize workers and destroy families.” Id.

64 See Legrain, supra note 6, at 32–41. The wide range of estimates puts illegal border crossings into the United States at anywhere between 30,000 and one million per year. See id. at 32. In 2005, Border Patrol in the El Paso, Texas area caught a mere twelve percent of illegal crossers. See id.

65 See id. Border patrol operations in the American southwest are deliberately designed to shift illegal border crossings away from heavily populated areas and into the desert. See id. at 31. In El Paso, Texas, “Operation Hold the Line” makes use of a seven-mile reinforced chain link fence to prevent migrants from crossing within the city limits. See id. Those who would cross in relative safety are forced instead into the New Mexico desert where they risk drowning in the Rio Grande River, dying of exposure or dehydration, or falling victim to violent criminals. See id. at 33. Similarly, Operation Gatekeeper in San Diego, California forces people out of the city and into the Arizona desert to cross at extreme peril. See id. “As Border Patrol agents point out, it is physically impossible to carry enough water [to walk for five days in the Arizona desert heat], and the smugglers who guide the groups are all too willing to leave the weak to die.” Id. In May 2001, fourteen Mexican migrants were found dead in a part of southern Arizona known as the Devil’s Path. Id. An emergency doctor at the scene described the bodies as “shriveled up,” as though they had “been in the desert for a month. . . . Have you ever seen a mummy from
ing to cross the U.S.-Mexico border every year is not known, one report
from Border Patrol put the death toll at 464 for the period from Sep-
tember 2004 to September 2005, and another estimates over 2000 lives
lost in just a five year period.\(^{66}\) Legrain claims the record shows more
than ten times as many migrant deaths on the U.S. border than at the
Berlin Wall in the twenty-eight years the wall stood.\(^{67}\) The small per-
centage of people who succeed in crossing the border illegally only to
be caught are held only long enough to have their biometric data cap-
tured; they are fingerprinted and photographed and then returned to
Mexico where they are free to attempt another crossing.\(^{68}\) Many of
them do return and it is not unusual for Border Patrol agents to arrest
the same individual again and again.\(^{69}\)

A. Guest Worker Programs

One potential solution to the problem of illegal border crossing is
the implementation of a new guest-worker program.\(^{70}\) President
George W. Bush has pushed for a plan that will allow temporary sea-
sonal workers, such as migrant farm laborers, to enter the United States
legally on three-year visas that can be renewed once, provided the em-
ployer has been unable to find a U.S. citizen to fill the position.\(^{71}\)

ancient Egypt? Well that gives you an idea.” Id. Rather than risk crossing alone, many mi-
grians hire smugglers, known as coyotes or polleros, to bring them across the border for
$1500 to $2000 per person. Id. Enlisting a smuggler can be as dangerous as crossing un-
aided; there are many incidents where bodies of migrants are found suffocated in trailers,
abandoned by paid smugglers, and the market for criminal smugglers who exploit mi-
grants and extort money from them is growing. Id. at 33–35; see, e.g., Kate Zernike & Gin-
ger Thompson, Deaths of Immigrants Uncover Makeshift World of Smuggling, N.Y. Times, June
29, 2003, at A1. In 2005, the governor of New Mexico went so far as to declare a state of
emergency at the Mexican border, pointing to “the ravages and terror of human smug-
gling, drug smuggling, kidnapping, murder, destruction or property and the death of live-
stock.” See Lee, supra note 58, at 273.

Legrain contends that “far from protecting society from the perceived threat of immi-
gration, our border controls help undermine the fabric of law and order.” See LEGRAIN, 
supra note 6, at 35. The more difficult it is to cross the border safely, the greater the de-
mand becomes for smuggler aid, thus driving up prices and leaving more newly arrived
illegal immigrants in debt to smugglers who are often associated with criminal gangs. See
id. Legrain analogizes current U.S. border policy to Prohibition; inadequate enforcement
merely encourages more people to break the law. See id. at 38. He states: the “callous but
leaky immigration controls undermine the rule of law [and] bolster criminality.” Id.

\(^{66}\) See LEGRAIN, supra note 6, at 34; Button, supra note 1, at 271.

\(^{67}\) See LEGRAIN, supra note 6, at 326.

\(^{68}\) See id. at 31.

\(^{69}\) See id.

\(^{70}\) See Lee, supra note 58, at 275–76; AgJOBS Briefing, supra note 61.

\(^{71}\) See Comprehensive Immigration Reform, supra note 61.
such a guest worker plan would address a serious labor shortage among growers, benefiting the economy and allowing the Department of Homeland Security to redirect their focus from illegal migrant worker crossings to preventing potential acts of terrorism, the plan has critics on both sides of the political spectrum.  

Many conservatives who oppose the program maintain it rewards illegal behavior and takes jobs away from citizens.  

Liberals are divided on the issue.  

Some see the program as a positive step towards embracing the reality of the immigration situation in that it would allow some form of legal employment and thus reduce the risks of extortion and abuse currently prevalent amongst many employers of illegal migrant workers.  

Others contend the temporary legal status granted to these workers does not adequately address the long-term problems.  

The president’s proposed program does not provide any ways for temporary workers to gain permanent resident status, nor does it address the fact that many migrant workers have already put down substantial roots in the United States, settling their families and having children here.  

For these workers, permission to stay in the country for six years and then a mandatory return home is almost as problematic as not permitting them to work at all.

B. The DREAM Act

The other glaring question regarding illegal immigration is what to do with the millions of undocumented people already settled and

---

72 See AgJOBS Briefing, supra note 61; Comprehensive Immigration Reform, supra note 61 (stating that some farms are going out of business for lack of workers). President Bush’s enthusiasm for a guest worker program has also been linked to the possibility of a new oil trade with Mexico. See DAVID FRUM, THE RIGHT MAN: AN INSIDE ACCOUNT OF THE BUSH WHITE HOUSE 84–85 (2003). Since Mexico outlawed foreign investment and privatized its energy industry in 1938, the country’s oil production has been regulated by the national monopoly, Pemex. See id. If Mexico were to allow American investors to develop its oil potential, Mexico could one day replace the Middle East as the U.S. market supplier. See id. Therefore, it has been suggested that Bush’s proposals favoring Mexican workers are motivated by a desire to win favor with the Mexican government in order to increase the likelihood of access to its oil. See id.

73 See Numbers USA, Facts You Should Know Before You Vote on AgJOBS (S. 359), http://www.numbersusa.com (follow hyperlink to “Immigration Bills”; then follow hyperlink for “Bills in 109th Congress”; then follow link to “Facts to Know About AgJOBS”) (last visited Mar. 21, 2008).

74 See id.

75 See AgJOBS Briefing, supra note 61.

76 See Lee, supra note 58, at 278.

77 See id.; Comprehensive Immigration Reform, supra note 61.

78 See Lee, supra note 58, at 278.
living in the United States. The impossibility of deporting twelve million people is widely accepted. The Immigration and Nationality Act mandates that almost everyone who is put in removal proceedings is entitled to a hearing prior to final determination, and the Immigration and Customs Enforcement (ICE) chief has estimated it would cost an unrealistic $94 billion to deport them all. How best to legalize the illegal is thus a tremendously difficult question. Lawmakers are wary of a broad grant of amnesty, like the one issued with the Immigration Reform Control Act of 1986. The illegal immigrant population in the United States today vastly exceeds the numbers present in 1986 and many voters would balk at any policy perceived to forgive complete circumvention of the legal immigration process.

While a broad grant of amnesty is likely out of the question, some smaller proposed bills would allow certain sections of the undocumented population to qualify for legal status, provided they satisfy prescribed requirements. One such bill, the Development, Relief, and Education for Alien Minors (DREAM) Act would allow undocumented high school graduates who have been in the United States for at least five years and who entered the country before they turned sixteen to adjust to permanent legal status and receive their green cards, as long as they either go to college or serve for two years in the military. The DREAM Act has been proposed in Congress several times, but it has yet to pass. The Act was defeated twice in the fall of 2007 alone.

---

79 See id. at 276.
80 See id.
82 See generally Button, supra note 1; Lee, supra note 58.
83 8 U.S.C. § 1101 (1986) (the Immigration Reform and Control Act of 1986 (IRCA) granted legal status to approximately 2.8 million illegal immigrants); see Isadore, supra note 26, at 339. The 1986 IRCA amnesty was a solution provided at a time when there were far fewer illegal immigrants present in the United States than there are two decades later, and the act ultimately did nothing to stem the tide off illegal immigration into the United States. See id.
84 See Button, supra note 6, at 271; Isadore, supra note 26, at 339.
85 See S. 1348, 110th Cong. (2007); Gaouette, supra note 55.
86 See S. 774, 110th Cong. (2007).
The DREAM Act stalemate epitomizes the legislative paralysis in Congress on the issue of immigration reform.\textsuperscript{89} Advocates of the bill argue that if anyone deserves amnesty, it is the faultless children of immigrants who were brought into the United States without choice, and who, by virtue of their having completed high school and being on the road either to attend college or serve in the military are poised to become successful, productive members of society.\textsuperscript{90} These are individuals who have grown up in the United States, and who know no other country as their home.\textsuperscript{91} Many of them speak only English.\textsuperscript{92} To leave these young people in the shadows of society without any path to legal status is as unwise as it is cruel.\textsuperscript{93} Opponents of the bill contend that piecemeal legislation is a mistake and Congress ought to hold out for a comprehensive reform plan in order to pool the necessary support to get such an overhaul bill passed when the time comes.\textsuperscript{94} It appears increasingly unlikely that the DREAM Act will provide any interim measure of relief, or that there will be any congressional action before the 2008 election.\textsuperscript{95}

III. State & Local Approaches to Immigration Reform

The U.S. Supreme Court has held that the states are precluded from regulating immigration by the supremacy clause of the Constitution.\textsuperscript{96} In \textit{DeCanas v. Bica}, the Court established a three-prong test for preemption; failure of any one of the three prongs will invalidate a lo-

\textsuperscript{88} See Preston, \textit{Measure for Students Blocked}, supra note 87; Preston, \textit{Bill for Students Fails Test}, supra note 87.


\textsuperscript{90} See id.

\textsuperscript{91} See id.

\textsuperscript{92} See id.

\textsuperscript{93} See id.


\textsuperscript{96} See DeCanas v. Bica, 424 U.S. 351, 354 (1976) (holding that the power to regulate immigration “is unquestionably exclusively a federal power”).
cal law.\textsuperscript{97} Under this test, states are not entirely prohibited from passing laws pertaining to immigration; they simply cannot go outside of federal law by framing their own classification system for immigrants or altering the national enforcement policies.\textsuperscript{98}

Despite this holding, many states, cities, and towns have responded to Congress’s repeated failure to enact a comprehensive overhaul of the immigration system by enacting ordinances of their own.\textsuperscript{99} According to an August 2007 report released by the National Conference of State Legislatures, states enacted 170 immigration laws in 2007, more than double the number of laws passed in 2006.\textsuperscript{100} Across all fifty states, more than one thousand bills relating to immigration were introduced in 2007, far surpassing the number of bills introduced in any prior year.\textsuperscript{101} As of July 2007, there were nearly one hundred employment-related bills pending in twenty states.\textsuperscript{102} For example, an Oklahoma law designed to terminate welfare benefits and financial aid for college went into effect on November 1, 2007.\textsuperscript{103} Prior to its going into effect, the bill was already having what its sponsor, State Representative Randy Terrill, stated was its desired effect—immigrants had begun moving away.\textsuperscript{104} He explained that “[i]t would be just fine with me if we ex-

\textsuperscript{97} See id. at 358. Under DeCanas, a state or local law is preempted constitutionally if it attempts to regulate immigration. See id. at 356. A law can also be preempted if Congress intended to occupy the field and oust state or local power, or if it conflicts directly with federal law so that compliance with both is not possible. See id. at 356–58.

\textsuperscript{98} See Chy Lung v. Freeman, 92 U.S. 275, 280 (1876) (finding California statute allowing a state official to classify newly arrived immigrants unconstitutional where it interfered with Congress’ exclusive right to regulate foreigners); League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 771 (C.D. Cal. 1995) (striking down Proposition 187, a California law which imposed immigration status verification and reporting requirements on state officials and required that officials deny public benefits to immigrants determined to be out of status, on the grounds that it was a direct regulation of immigration).

\textsuperscript{99} See Emily Bazar, Illegal Immigrants Moving Out, USA TODAY, Sept. 27, 2007, at 3A.

\textsuperscript{100} Julia Preston, Surge in Immigration Laws Around U.S., N.Y. Times, Aug. 6, 2007, at A2 (noting there were eighty-four state laws passed regarding immigration issues in 2006); National Conference of State Legislatures, 2007 Enacted State Legislation Related to Immigrants and Immigration, http://www.ncsl.org/programs/immig/2007ImmigrationUpdate.htm [hereinafter NCLS, 2007 Enacted State Legislation]. While the bills address a range of issues including healthcare, access to public and educational benefits, residential rental permits, and drivers’ licenses, a majority of the new laws focus on employment and are specifically designed to prevent employers from hiring illegal immigrants. See NCLS, 2007 Enacted State Legislation, supra.

\textsuperscript{101} NCLS, 2007 Enacted State Legislation, supra note 100.

\textsuperscript{102} See Bazar, supra note 99.


\textsuperscript{104} See Bazar, supra note 99.
ported all illegal aliens to the surrounding states.”

Expressing a similar sentiment, Colorado State Senator David Schultheis stated a desire “to make Colorado the least friendly state to people who are here illegally.”

Beyond the broad issue of federal preemption, these local laws are problematic because they redistribute the population in a disproportionate manner. When states pass anti-immigrant laws, immigrants do not return to their countries of origin. Rather, they flood into the relatively few states where pro-immigrant laws provide sanctuary, causing people who would otherwise be spread throughout many states to be concentrated in small areas.

Some states and towns have attempted to regulate immigration by delegating its enforcement duties to local police. This delegation results in a conflict of interest for the police whose job it is to serve the community—when an officer receives a call from an undocumented immigrant in distress, he must decide whether to help them or call ICE. Some officials are concerned that fear of deportation prevents illegal immigrants from reporting robberies or other crimes that are committed in their communities, particularly in cases of domestic violence. Prior to a court-issued injunction, New Hampshire state police were arresting undocumented immigrants for trespassing during traffic stops. In an order dismissing the charges against eight separate de-

\[\text{References}\]

105 Id.
106 See id.
107 See Faiola, supra note 24.
109 See Matthews, supra note 108.
110 See id. In 2005, Arkansas became the third state, after Alabama and Florida, to allow its police officers and state troopers to undergo training to become deputized immigration enforcement officials as well as acting as local law enforcement. Id.
112 See Okla. Immigration Law Sparks Concern, supra note 108.
fendants, the district judge held that the “criminal trespass charges . . . [were] unconstitutional attempts to regulate in the area of enforcement of immigration violations, an area where Congress must be deemed to have regulated with such civil sanctions and criminal penalties as it feels are sufficient.”¹¹⁴

As localized anti-immigrant laws are enacted across the country, immigrants’ rights and legal advocacy groups are bringing suits to challenge the constitutionality of these laws.¹¹⁵ These suits are an important tool in keeping the way clear for what should be a uniform national system.¹¹⁶ In a recent speech in Lancaster, Pennsylvania, President Bush remarked that “one of the reasons [he is] strongly in favor of comprehensive immigration reform is . . . that [it] would preempt local governments from taking a variety of actions which would create a confusing mosaic around the country.”¹¹⁷ By allowing states and cities to create their own rules regarding the rights and treatment of illegal immigrants, the United States is developing an unworkable patchwork of fragmented policy and uneven enforcement that will interfere with Congress’ ability to legislate effectively.¹¹⁸ It is the role of the courts at this time to stay vigilant and keep the path clear for eventual federal legislation.¹¹⁹ In a recent decision, Lozano v. City of Hazleton, the federal district court for the Middle District of Pennsylvania struck down a set of anti-immigrant ordinances passed by the city.¹²⁰ In finding the laws unconstitutional, the court sent a message to numerous states and cities poised to enact similar laws, causing some of them to rescind copycat bills enacted and not yet enforced.¹²¹

¹¹⁴ See Barros-Batistele, No. 05-CR-1474, 1475.
¹¹⁶ See DeCanas, 424 U.S. at 354 (holding the power to regulate immigration “is unquestionably exclusively a federal power”).
¹¹⁹ See id.
²²⁰ See 496 F. Supp. 2d at 518.
A. Hazleton, Pennsylvania: When Cities Regulate Immigration

The genius of our Constitution is that it provides rights even to those who evoke the least sympathy from the general public.

—Lozano v. Hazleton\textsuperscript{122}

The City of Hazleton, Pennsylvania is located in Luzerne County, eighty miles northwest of Philadelphia.\textsuperscript{123} Hazleton experienced a population boom in the wake of 9/11, when many immigrants—legal and illegal—moved out of New York to settle where there were more jobs and opportunities.\textsuperscript{124} These immigrants opened businesses, sent their children to school, and arguably changed the color of the community, to some locals’ apparent displeasure.\textsuperscript{125} A surge in crime in Hazleton was linked to the presence of illegal immigrants, although studies suggest there is no actual correlation between the presence of illegal immigrants and increases in criminal activity.\textsuperscript{126} After a murder thought to have been committed by illegal immigrants, the Hazleton city council chose to enact anti-illegal immigrant ordinances aimed at driving out the unwelcome residents of Hazleton.\textsuperscript{127} Mayor Louis J. Barletta broadcast his intent to make Hazleton “one of the toughest
places in the United State for illegal immigrants.”

In 2006, the city enacted a set of ordinances that addressed employment and housing for illegal immigrants. Under the Illegal Immigration Relief Act (IIRA), which prohibited the employment or harboring of undocumented persons, employers who hire illegal immigrants could face a fine and a five-year revocation of their business license. An accompanying Tenant Registration Ordinance (TRO) prohibited property owners from leasing any residence to an undocumented immigrant. The TRO mandated that anyone seeking a residential lease had to first obtain a $10 residency permit from the local government by showing proof of legal status in the United States. The law imposed a fine of $1000 per day on any landlord found to be in violation. The ordinances also made English the official language of the city.

The ACLU and the Puerto Rican Legal Defense and Education Fund (PRLDEF), along with several anonymous immigrant plaintiffs, filed suit challenging the constitutionality of the laws. In a 206-page opinion issued in July 2006, U.S. District Judge James F. Munley struck down the ordinances as unconstitutional under the Supremacy Clause and the Due Process Clause of the Fourteenth Amendment. Under federal law, an individual’s immigration status can only be determined by a federal immigration judge. In assuming that an immigrant’s illegal status for purposes of employment or residency can be determined without an official removal hearing, the Hazleton ordinances directly conflicted with federal law. The federal government has the discretion to allow people who are here illegally to stay in the country, and the ordinances “burden aliens more than federal law by prohibiting them from residing in the city although they may be permitted to remain in the United States.” The court further held that the ordinances denied employees and tenants the procedural due process

---

128 See Preston, supra note 121.
130 Hazleton Ordinance 2006-18, supra note 37.
131 Hazleton Ordinance 2006-13, supra note 37.
132 Id.
133 Id.
134 Id.
136 See Lozano, 496 F. Supp. 2d at 485–86.
138 See Lozano, 496 F. Supp. 2d at 530.
139 See id. at 531–32.
guaranteed them by the Fourteenth Amendment. The laws did not ensure that employees and tenants would have adequate notice of challenges to their immigration status, nor did it provide them with the opportunity to be heard or to defend against a false determination of illegality.

In response to the city’s argument that illegal immigrants “should not have any legal recourse when rights due them under the federal Constitution . . . are violated,” the court stated, “we cannot say clearly enough that persons who enter this country without legal authorization are not stripped immediately of all their rights because of this single illegal act.” The court also found that the ordinances violated § 1981 of the Civil Rights Act which grants “all persons” the same right to enter into contracts as white citizens. In this context, the term “person” has been found to include illegal immigrants, and thus the ordinance prohibiting illegal immigrants from entering into rental contracts was held in direct violation of the Civil Rights Act. On this analysis, the court issued a permanent injunction against the city’s ordinances.

B. Oklahoma: When States Regulate Immigration

Much of the importance of Lozano lies in the fact that it was the first decision by a federal court regarding the constitutionality of a local anti-immigrant law. While Hazleton was the first city in the country to pass a law of this kind, a number of other states and local governments have passed similar laws that restrict the availability of public benefits to

140 See id. at 538.
141 See id.
142 See id. at 498 (citing Plyler v. Doe, 457 U.S. 202, 210 (1982) which held that “an alien is surely a ‘person’ in any ordinary sense of that term”).
144 See Lozano, 496 F. Supp. 2d at 548.
145 See id. at 555. In an interesting twist on Legrain’s argument that opening borders to immigrants will benefit a society economically, passage of the IIRA and the ensuing litigation had a major negative economic impact on the city of Hazelton. See Legrain, supra note 6, at 329; Powell, supra note 113, (claiming “business is down” in Hazleton after the passage of the ordinances); Anti-Immigrant Ordinances: Hazleton, Pa., supra note 126 (stating Hispanic-owned businesses in Hazleton were forced to close due to the “hostile environment” they and their customers faced).

The city’s legal costs were astronomical; it spent over $200,000 on its own defense and the ACLU has recently filed a motion for attorney’s fees in the amount of $2.4 million. See Wade Malcolm, Hazleton Slapped with $2.4 M Bill, Wilkes-Barre Citizens’ Voice (Pa.), Sept. 1, 2007, at 5 (plaintiffs who win federal civil rights suits can request the judge require the defendant to pay their attorneys’ fees). With a yearly budget of $7.9 million, the City of Hazleton could end up paying over a third of its annual budget in costs. Id.

146 See Preston, supra note 121.
undocumented residents, prevent them from renting apartments, or require employers to verify their status before offering them jobs.\textsuperscript{147} Where courts are traditionally more reluctant to invalidate state laws than they are those of cities and towns, challenges to state-wide immigration regulations must be monitored and met with the same scrutiny as those laws passed by city councils.\textsuperscript{148} A challenge to one such state law was brought in an Oklahoma federal court in October 2007.\textsuperscript{149}

Oklahoma is home to an estimated 100,000 illegal immigrants.\textsuperscript{150} The state legislature enacted the Taxpayer and Citizen Protection Act of 2007, which denies state identification cards and access to public benefits to all illegal immigrants, and makes it a felony to harbor or transport any undocumented person.\textsuperscript{151} The Act also requires employers to verify that all employees are legal residents by checking social security numbers against a federally managed database.\textsuperscript{152} The database is part of E-Verify, a program implemented by the federal government for employers’ use in verifying the status and eligibility of job applicants.\textsuperscript{153} While E-Verify is optional under federal law, the Oklahoma Act makes it mandatory for employers in the state.\textsuperscript{154} E-Verify has been widely criticized; the database of social security numbers contains an estimated seventeen million errors that could result in the wrongful firings or denials of employment to many lawful residents.\textsuperscript{155} Requiring employers to go to extra lengths to verify the immigration status of applicants is also likely to cause discrimination against applicants on the

\begin{itemize}
\item \textsuperscript{147} See, e.g., \textit{Oklahoma Immigration Law Threatened}, supra note 121 (describing Oklahoma’s Taxpayer and Citizen Protection Act of 2007, characterizing it as “the nation’s toughest immigration reform bill to deal with a statewide illegal alien crisis”).
\item \textsuperscript{150} See \textit{Governor Signs Sweeping Immigration Reform Bill}, \textit{DURANT DEMOCRAT} (Okla.), Nov. 1, 2007, at 1.
\item \textsuperscript{151} Oklahoma Taxpayer and Citizen Protection Act of 2007, 2007 Okla. Sess. Law Serv. Ch. 112 (West) (codified in part, as amended, in scattered sections of \textit{OKLA. STAT. tit.} 21, 22, 25, 56, 68, 70, 64).
\item \textsuperscript{152} Id.
\item \textsuperscript{154} 2007 Okla. Sess. Law Serv. Ch. 112 (public agencies are required to comply with the employment ordinance by November 1, 2007, and private companies are expected to comply by July 1, 2007).
\item \textsuperscript{155} See Editorial, \textit{Chaos Coming}, \textit{WASH. POST}, Oct. 4, 2007, at A24. According to the social security administration’s database, the errors inherent within it include “mistakes, misspellings, hyphenated names wrongly entered,” and other errors that could affect 17.8 million records. \textit{See id.}
basis of race or appearance, with employers refusing to hire lawful minority residents rather than taking the time to determine whether every individual applicant is eligible for employment.\footnote{See Doug Thompson, \textit{Group Opposes \textquotedblleft Punitive\textquotedblright Laws}, \textit{Morning News of Northwest Ark.}, Oct. 29, 2007, at 9A. ACLU Executive Director Rita Sklar suggests employers could \textquotedblleft easily [be] dissuade[d] . . . from wanting to bother with the whole thing, and [the employer may] not want to hire anybody with dark skin who could come from Malaysia or some other place. Everybody gets lumped in together.	extquotedblright \textit{Id.}}

Voicing concerns that the law will be invalidated on federal pre-emption grounds and will cost the state of Oklahoma more than it can afford in legal fees, the Governor signed off on the bill only after it passed in the state Legislature by overwhelming margins.\footnote{See Governor Signs Sweeping Immigration Reform Bill, supra note 150. The Oklahoma Taxpayer and Citizen Protection Act of 2007 passed 84–14 in the House and 41–6 in the Senate. \textit{Id.}} The governor stated that “while some might applaud this bill, the truth of the matter is we will not effectively address immigration reform until the federal government acts.”\footnote{See \textit{id}.}

Farmers and business groups have also registered concerns with the bill, arguing that immigrant workers are essential to Oklahoma’s economy.\footnote{See Okla. Immigration Law Sparks Concern, supra note 108.} State anti-immigrant ordinances create unfair competition in business, causing labor shortages and allowing neighboring states with more lenient laws to pay lower wages and thus attract greater numbers of workers.\footnote{See Faiola, supra note 24; Okla. Immigration Law Sparks Concern, supra note 108.} Mike Means, the executive director of the Oklahoma State Home Builders Association, cites “builders who are being forced to slow down jobs because they don’t have the crews.”\footnote{See Faiola, supra note 24.} As immigrants are driven out of Oklahoma, they go to “Texas, New Mexico, Kansas, Arkansas, anywhere the laws aren’t against them.”\footnote{See \textit{id}.} As wages increase in order to attract native workers to do the jobs immigrants are now prevented from doing, there is a resulting “net loss of jobs as some businesses are forced to close, particularly if other states allow less stringent hiring practices.”\footnote{See \textit{id}.} Means argues that “this is what happens when you don’t have a national policy. If I’m an Oklahoma builder on the border with Texas, you’re [sic] going to face unfair competition because they don’t have the laws we do. This needs to be standardized.”\footnote{See \textit{id}.} Additional critics point out that according to the plain
language of the statute, school bus drivers and church pastors could be penalized as felons for transporting or harboring illegal immigrants.\(^{165}\)

Comparing the law to the Jim Crow laws of the pre-civil rights movement south, the League of United Latin American Citizens filed a suit in federal court challenging the law as unconstitutional.\(^ {166}\) The suit was dismissed \textit{sua sponte} for lack of standing, but the court pointed out that its decision was not on the merits, stating “the court’s holding today does not close the courthouse door to those wishing to challenge the constitutional soundness of HB 1804.”\(^ {167}\) It is important that when a challenge is properly brought, the Oklahoma federal courts follow the reasoning in \textit{Lozano} and invalidate the unconstitutional and harmful law.\(^ {168}\)

\textbf{IV. The Role of Courts}

In some instances, \textit{Lozano} has already had a deterrent effect.\(^ {169}\) After the opinion was issued, the town of Riverside, New Jersey opted to rescind its Illegal Immigration Relief Act rather than face costly litigation.\(^ {170}\) Having already spent $82,000 defending the law, the township committee decided to withdraw it.\(^ {171}\) Riverside’s deputy mayor attributed the committee’s decision to the result in \textit{Lozano}, stating, “when you have residents looking for better parks and better streets, and in the meantime you have these legal fees rising, you have to conclude that this is a situation that should be handled by the federal government, not local towns.”\(^ {172}\)

Other localities have attempted to enforce their anti-immigrant ordinances, pending litigation notwithstanding.\(^ {173}\) In language strikingly similar to that of the Hazleton law, the Dallas suburb of Farmers Branch, Texas passed a housing ordinance that prohibits renting to il-
legal immigrants. The law requires landlords to verify the immigration status of all of their tenants or face a fine of $500 a day and misdemeanor charges. It was adopted by the city council in January of 2007, but challenges by MALDEF and the ACLU led to a preliminary injunction blocking the ordinance from going into effect until final resolution of the lawsuit. The ACLU claims the law “illegally puts landlords in the untenable position of serving as federal law enforcement agents” and “violate[s] the fundamental rights of both landlord and tenants.” Critics of the law also suggest that it interferes with the First Amendment right to free association for citizens who are barred from living in apartments with family members who are not legal residents. Similar restraining orders and preliminary injunctions have been issued in a number of cases; laws are on hold in Valley Park, Missouri; Escondido, California; and Cherokee County, Georgia.

Courts, in their current watchdog capacity, are playing a role similar to that played in the years preceding the civil rights movement of the 1960s which preceded significant federal legislation. From the end of the Civil War to the mid-1960s, Jim Crow laws regulating racial segregation pervaded southern and border states. These laws, passed at the state and local level, mandated separate but equal facilities for educational and public accommodations.

---

174 Farmer’s Branch, Tex., Ordinance 2903 (Jan. 22, 2007); see Dianne Solis & Stephanie Sandoval, Pennsylvania Ruling May Jeopardize FB Rental Ban, DALLAS MORNING NEWS, July 27, 2007, at 1A.
175 Farmer’s Branch, Tex., Ordinance 2903.
black and white Americans.\textsuperscript{182} The laws varied in detail from state to state, but the general trend was that they facilitated racism by calling for segregation in buses, restaurants, schools, and other places of public accommodation.\textsuperscript{183} It was the Jim Crow laws of the south that caused the Great Migration in which large numbers of black citizens moved north in search of better opportunities and better lives.\textsuperscript{184} One of the practical effects of discriminatory state immigration laws today is similar to that of the Jim Crow laws of the past; they both cause redistribution of unwelcome populations to areas where the laws are less oppressive, thus creating a ripple effect that reaches the local economies of both the cities left behind and the migrants’ new homes.\textsuperscript{185}

While the “separate but equal” standard was outlawed entirely by the Civil Rights Act of 1964 and the Voting Rights Act of 1965, these legislative acts were preceded by a number of court decisions striking down individual aspects of the discriminatory policy.\textsuperscript{186} As early as 1917, the Supreme Court held that a Kentucky law could not require residential

\textsuperscript{182} See, e.g., Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (upholding the constitutionality of the “separate but equal” doctrine to justify racial segregation); King & Osborne, supra note 181, at 7–9; Martin Luther King, Jr., Nat’l Historic Site, “Jim Crow” Laws, http://www.nps.gov/archive/malu/documents/jim_crow_laws.htm (last visited Mar. 21, 2008) (detailing various Jim Crow laws as they existed in the southern states).

\textsuperscript{183} See Charles George, Life Under the Jim Crow Laws 24–31 (2000); Martin Luther King, Jr., Nat’l Historic Site, supra note 182. Alabama required separate ticket windows and waiting areas for train stations. Martin Luther King, Jr., Nat’l Historic Site, supra note 182. Arkansas prohibited marriage or sexual relations between whites and blacks, and required that all trains, busses, streetcars, gambling forums and schools were segregated by race. Id. Florida forbade mixed race marriages or cohabitation. Id. Georgia required restaurateurs to serve either blacks or whites, but forbade service to both in one establishment. Id. The state also had a law prohibiting amateur baseball teams from playing within two blocks of a playground devoted to another race. Id. Louisiana made it a misdemeanor punishable by fine or prison for anyone to rent an apartment to persons of one race if persons of another race were already living in the building. Id. South Carolina made it a crime to give white children into the permanent custody or control of a black person. Id. Virginia required separate theatres and train cars, and vested train conductors with the power to be the “sole judges of . . . race” in the event that a passenger refused to disclose their race. Id.


\textsuperscript{185} See Faiola, supra note 24; The African American Great Migration, North By South, supra note 184.

segregation.\textsuperscript{187} In 1946, the Court held that segregation in interstate transportation was unconstitutional under the Commerce Clause.\textsuperscript{188} A year later, a federal court in California prohibited the segregation of Mexican-American schoolchildren.\textsuperscript{189} In 1954, the Court ruled unanimously in the landmark case of \textit{Brown v. Board of Education} that “separate but equal” was inherently unconstitutional in schools and as such, school segregation was impermissible.\textsuperscript{190} \textit{Brown} was instrumental in influencing Congress to overrule the remaining Jim Crow laws, leading it to prohibit segregation in all places of public accommodation under the Civil Rights Act, and then to outlaw racial discrimination with regard to all federal, state, and local elections under the Voting Rights Act.\textsuperscript{191} The push for racial equality through legislation was not an accident; President Lyndon B. Johnson, in his first State of the Union address, called for Congress to “let this session . . . be known as the session which did more for civil rights than the last hundred sessions combined.”\textsuperscript{192}

Just as courts were at the frontline of the effort to invalidate state and local segregation laws, courts today must be leaders in combating discriminatory anti-immigrant legislation at the local level.\textsuperscript{193} Where Congress had to invoke the commerce power in order to enact civil rights reforms, it is directly authorized by the Constitution to regulate immigration and naturalization, and as such, the courts have an even greater obligation to ensure this exclusive power is retained by the federal legislature.\textsuperscript{194} As the Civil Rights Act of 1964 was preceded by courts monitoring the social climate and protecting those subject to unfair and discriminatory laws, an effective and just immigration policy may only be achieved in Congress if courts continue to set the proper example at the local level.\textsuperscript{195}

\textsuperscript{187} See \textit{Buchanan}, 245 U.S. at 81.
\textsuperscript{188} See \textit{Morgan}, 328 U.S. at 386.
\textsuperscript{189} See \textit{Mendez}, 161 F.2d at 781.
\textsuperscript{192} President Lyndon B. Johnson, State of the Union Address (Jan. 4, 1965), \textit{available} at http://www.infoplease.com/ipa/A0900149.html.
\textsuperscript{194} See \textit{U.S. Const. arts. I, § 8, cl. 4 & VI, cl. 2} (granting Congress the “power to establish a uniform rule of naturalization”); \textit{Civil Rights Act}, 42 U.S.C. 21 § 2000a (1964).
Conclusion

The City of Hazleton plans to file an appeal, and newspaper editorials in surrounding towns have called for solidarity, suggesting that if enough towns implement laws similar to those invalidated in Lozano, it will send a message to Congress that these anti-immigrant ordinances should be mirrored by federal policy.196 In the meantime, the ACLU, PRLDEF, and MALDEF, along with other immigrants’ rights and advocacy groups are bringing suits to challenge new local anti-immigrant ordinances as they are enacted.197 The claims everywhere are the same; these new ordinances deny procedural due process, interfere with federally granted civil rights, and conflict with federal immigration law.198 The importance of the Lozano ruling is thus evident.199 Every decision that follows Lozano will build a stronger chain of precedent, deterring other towns from passing similar laws, and preserving space for the federal government to implement a uniform national policy.200

In Immigrants: Your Country Needs Them, Phillipe Legrain makes the point that freer migration is good for the economy.201 Allowing piecemeal immigration policy to take shape amongst the states frustrates the advantages of a uniform national policy, and creates unfair competition between the states.202 Where local ordinances promote racism, interrupt the functioning of the economy, and intrude into territory reserved exclusively for Congress, they are harmful to the local communities and to the country at large.203 The courts must stay vigilant and continue to strike down these laws in order to protect the people—both citizens and non-citizens—until a consensus is reached in Congress.204

197 See, e.g., Press Release, Mexican Am. Legal Def. and Educ. Fund, supra note 177 (referencing a preliminary injunction won in a suit challenging an anti-immigrant ordinance in Farmers Branch, Texas).
200 See id.
201 See generally Legrain, supra note 6.
202 See Faiola, supra note 24.
203 See id.
204 See Lozano, 496 F. Supp. 2d at 554–55; Pear & Hulse, supra note 22.
LEGISLATING BEYOND AN EDUCATED GUESS: THE GROWING CONSENSUS TOWARD A RIGHT TO EDUCATION

STEPHEN E. SPAULDING*


Abstract: In Retained by the People, Daniel A. Farber argues for a robust renaissance of Ninth Amendment jurisprudence in analyses of fundamental rights, because this amendment and its history most clearly encompass the Framers’ belief that certain rights are retained by the people. Farber argues that fundamental rights are at their most vulnerable when rooted in the inherently procedural structure of the Due Process Clause of the Fourteenth Amendment. This book review criticizes the factors Farber uses to determine whether a given right is fundamental and argues that legislation must be the most important factor in discerning fundamental rights that are so-retained, particularly when the Court has explicitly denied the existence of a disputed right. When applied to the right to education, the overwhelmingly bipartisan passage of the No Child Left Behind Act indicates that this right is indeed retained by the people.

INTRODUCTION

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

—The Ninth Amendment

The U.S. Supreme Court does not recognize a fundamental right to education. Meanwhile, the unequal distribution of educational re-

1 U.S. Const. amend IX.
2 See Plyer v. Doe, 457 U.S. 202, 223 (1982); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–34, 35 (1973) (“[T]he key to discovering whether education is ‘fundamental’ is not to be found in comparisons of the relative societal significance of education . . . . Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. . . . Education, of course, is not among the
sources and gradual slouch toward resegregation threaten to widen and maintain the achievement gap for perpetuity. As academics, journalists, students, civic leaders, and citizens wrestle with the disparities in academic achievement between students from different ethnic and socioeconomic backgrounds, a growing national and international community is reaching the necessary consensus that education is indispensable to a free society and should be recognized as a fundamental right retained by the people.

Organized efforts to overcome an uneven educational playing field cross racial, class, and geographic lines. Parents of schoolchildren throughout the country are relegated to creative maneuvering to ensure equal educational opportunity for their children. One recent effort in Tuscaloosa, Alabama relies upon provisions of the No Child Left Behind Act (NCLB)—a development that is particularly striking in light of the public’s general antipathy toward NCLB. Tuscaloosa school board officials redrew the school assignment plans after complaints, predominantly from white parents, of unfavorable school conditions for their children. Citing overcrowding as a primary reason, the school board reorganized the boundaries of school attendance

---


4 See Daniel A. Farber, Retained by the People: The “Silent” Ninth Amendment and the Constitutional Rights Americans Don’t Know They Have 153 (2007).

5 See Sam Dillon, Alabama Plan Brings Out Cry of Resegregation, N.Y. Times, Sept. 17, 2007, at Al; see also Anemona Hartocollis, Parents Want High Schoolers Closer to Home, N.Y. Times, Oct. 11, 2000, at Al (reporting on efforts by wealthy urban parents in New York City to re-district). The struggles described in these two articles are by no means exhaustive, but provide an illustrative glimpse into grassroots mobilization that contributes to the realized consensus that education is a plainly exercised fundamental right retained by the people and worthy of constitutional protection. See Dillon, supra; Hartocollis, supra.

6 See Dillon, supra note 5; Hartocollis, supra note 5.

7 See Lowell C. Rose & Alec M. Gallup, The 39th Annual Phi Delta Kappa/Gallup Poll of the Public’s Attitudes Toward the Public Schools 34 (Sept. 2007) available at http://www.pdkmembers.org/members_online/publications/e-GALLUP/kpoll_pdf/pdkpol139_2007.pdf. Forty percent of Americans have an unfavorable view of NCLB, while only thirty-one percent have a favorable view. Id. This is the first time more Americans disapproved of the legislation than approved of it since Phi Delta Kappa/Gallup began polling on the issue in 2003. Id. See generally No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (Supp. IV 2004).

8 See Dillon, supra note 5.
zones, which forced many students to change schools. The new assignment plan shuttles these students—the vast majority of them black—to predominantly low-performing schools. To ameliorate the effects of these newly redrawn districts, some parents are taking advantage of the student transfer provision of NCLB, which grants students in low-performing schools the right to transfer to high-performing schools.

The underlying inequality of the plight of the children of Tuscaloosa is neither an isolated nor anachronistic occurrence. In June 2007, the Supreme Court struck down school desegregation plans in Parents Involved in Community Schools v. Seattle School District No. 1. The Court ruled that the school district in this case failed to narrowly tailor its plans to achieve a compelling state interest; in effect, the Court held that race may not serve as the decisive factor in ensuring that schools are desegregated. The implications of this case may support the Tuscaloosa parents’ novel remedy of using the student transfer provision of NCLB to ensure an equal education for their children uninterrupted by further school reassignment. This tactic is “sending the district into uncharted territory over whether a reassignment plan can trump the law’s prohibition on moving students into low-performing schools.”

In light of the challenges faced by parents such as those in Tuscaloosa, this book review argues that education should be a fundamental right retained by the people that may not be infringed by the state or federal government. The transfer provisions of NCLB should trump any reassignment plans that require the movement of students into low-performing schools because the invocation of these provisions constitutes an exercise of the fundamental right to education, which requires equal opportunity of access.

---

9 See id.

10 See id. The city of Tuscaloosa is fifty-four percent white, although the public school system is seventy-five percent black. Id. Dillon notes that the superintendent of schools and the board president admitted that one goal of the program was to attract whites back into the public school system, as 1500 children are currently enrolled in private schools that sprung up after court-ordered desegregation began. Id.

11 See § 6316(b)(1)(E); Dillon, supra note 5.

12 See Kozol, supra note 3, at 280–83; Dillon, supra note 5.


14 See id.

15 See 20 U.S.C. § 6316(b)(1)(E) (Supp. IV 2004); Dillon, supra note 5.

16 See Dillon, supra note 5. Nationwide, fewer than two percent of eligible students have used the transfer provision of NCLB. Id.

17 See U.S. Const. amend IX; § 6316(b)(1)(E).
Informing this analysis are the factors and arguments detailed in Daniel A. Farber’s book *Retained by the People: The “Silent” Ninth Amendment and the Constitutional Rights Americans Don’t Know They Have*, in which Farber advocates resuscitation of the Ninth Amendment in the analysis of fundamental rights and laments the Amendment’s current status on the brink of irrelevancy.\(^{18}\) Part I of this book review provides a historical analysis of the Ninth Amendment’s recognition of fundamental rights and examines its relegation by the judiciary to rather obscure status in favor of Fifth and Fourteenth Amendment theories of substantive due process. Part II describes Farber’s suggested factors for determining whether or not a right is fundamental and then proceeds to apply these factors to the right to education. Finally, Part III critiques Farber’s factors and concludes that the Ninth Amendment requires that societal consensus be accorded significant deliberative weight in a determination of what rights are “retained by the people” in comparison to Supreme Court precedent. In the case of education, legislation like NCLB—passed by overwhelming bipartisan majorities—demonstrates a significant step towards societal consensus in favor of its recognition as a fundamental right.

I. **The Ninth Amendment and Fundamental Rights**

The Ninth Amendment establishes that there are certain fundamental, albeit unenumerated, rights that are retained by the people which may not be infringed by either federal or state government.\(^{19}\) This proposition is not without controversy, particularly because the Ninth Amendment’s language is quite broad.\(^{20}\) The lack of a substantial body of scholarship or law that engages directly with the Ninth Amendment prompted John Hart Ely to write that “[o]ccasionally a commentator will express a willingness to read it for what it seems to say, but this has been, and remains, a distinctly minority impulse. In sophisticated legal circles mentioning the Ninth Amendment is a sure-fire way to get a laugh.”\(^{21}\)

Farber notes that many conservatives, excluding libertarians, intentionally omit the Ninth Amendment altogether from legal analysis in order to “impose” their morality on fellow citizens.\(^{22}\) While Farber’s

\(^{18}\) See generally Farber, *supra* note 4.

\(^{19}\) See U.S. Const. amend IX.

\(^{20}\) See Farber, *supra* note 4, at 4.


\(^{22}\) See Farber, *supra* note 4, at 3.
broad and simplistic critique of conservative jurisprudence may alienate conservative readers seeking a more nuanced analysis, he includes an effective anecdote to illustrate his assertions. During his hearings for a seat on the Supreme Court that ultimately resulted in the Senate’s rejection of his nomination, controversial Judge Robert Bork analogized the Ninth Amendment to an “ink blot” and asserted that he did “not think the court can make up what might be under the ink blot if you cannot read it.” Farber quite correctly explains that reading this so-called inkblot out of the Constitution runs counter to its plain meaning and consequently advocates a new embrace of the Ninth Amendment.

A. A Brief Theoretical History

The historical context of the Bill of Rights, which includes the Ninth Amendment, is a necessary element in conceptualizing how certain fundamental rights, though unenumerated, are retained by the people. Although the Bill of Rights was not included in the original Constitution, its presence soon became a pivotal element of the debate over the founding of the national government. The lack of centralized authority under the Articles of Confederation resulted in difficulties arising from a lack of national unity, including fragmentation over taxes, problems in commerce because of the lack of a national currency, and fierce rivalries between states. These problems eventually coalesced to instigate a new proposal, this time for a strong national government.

The Bill of Rights was proposed to ensure that this newly organized federal government would not encroach on the fundamental rights of citizens. There was little disagreement over this goal, but there was substantial disagreement over whether inclusion of an enumerated list of rights was a worthwhile task or whether it instead carried a dangerous suggestion that the rights listed (and, a fortiori, any rights

---

23 See id. at 4.
24 See id. (quoting Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court: Hearing Before S. Comm. on the Judiciary, 100th Cong. 249 (1989)).
25 See id.
26 See id. at 30.
27 See Farber, supra note 4, at 30.
29 See id. at 294.
30 See id. at 295.
left unmentioned) were never retained by the people in the first place.\textsuperscript{31} The *exclusio* argument against including an explicit list of rights reasoned that such a specific enumeration of fundamental rights could only be partial at best, never fully complete, and might support an inference that the central government had unlimited power to invade fundamental rights not listed.\textsuperscript{32} In other words, an enumerated list of rights brought with it the danger that the central government would assume any unenumerated rights were no longer retained by the people, but instead delegated to the central government—a scheme that would usurp all fundamental rights.\textsuperscript{33}

Farber explains that at the root of this discussion was the Framers’ belief, derived from fundamental moral principles, in inalienable rights.\textsuperscript{34} For the Framers, these natural rights melded seamlessly with the system of common law inherited from England.\textsuperscript{35} In their conception, rights were not the creation of man-made law, but of God.\textsuperscript{36} Natural rights were “in the air.”\textsuperscript{37} The Constitution existed not to grant rights and liberties to citizens, but rather to specify the powers granted, by the people, to the government.\textsuperscript{38} Farber reasons that the most apt comparison of these natural rights to modern-day jurisprudence is found in international human rights law.\textsuperscript{39} Such natural rights are also imbedded in the Declaration of Independence, most particularly in the moral imperatives of life, liberty, and the pursuit of happiness.\textsuperscript{40}

The eighteenth-century notion of the “law of nations” provided the Framers with an even broader perspective on rights than those inherited from England.\textsuperscript{41} Farber convincingly argues that the Framers looked toward international and commercial law that encompassed a respect for reason, right, and justice in the affairs of the State with

\begin{itemize}
\item \textsuperscript{31} See Farber, *supra* note 4, at 33.
\item \textsuperscript{32} See id.
\item \textsuperscript{33} See Massey, *supra* note 28, at 295. Another example of this *exclusio* reasoning is provided by Farber, whereby “if a law says that ‘the police can carry weapons but not grenades and machetes,’ the implication is that all other weapons are allowed.” Farber, *supra* note 4, at 33.
\item \textsuperscript{34} See Farber, *supra* note 4, at 22.
\item \textsuperscript{35} See id. at 23.
\item \textsuperscript{36} See id. at 22.
\item \textsuperscript{37} See id. at 27.
\item \textsuperscript{38} See Bennett B. Patterson, *The Forgotten Ninth Amendment* 19 (1955). Patterson explains that “[i]t might be said that the theory of individual inherent rights is a part of our unwritten Constitution, in the same manner in which portions of the unwritten English Constitution are recognized and enforced.” Id. at 20.
\item \textsuperscript{39} See Farber, *supra* note 4, at 23.
\item \textsuperscript{40} See id. at 22, 23.
\item \textsuperscript{41} See id. at 24.
\end{itemize}
other nations. From this came the notion that common law applied not to one state or nation, but instead reflected the universality of common principles. On a practical level, then, the relationship between universality and nationalism would permit courts to act on “international norms.”

The law of nations and concept of natural rights illuminate the idea that fundamental rights are not ordained by the Constitution but instead are already retained by the people. Nevertheless, the Anti-Federalists steadfastly held that an enumeration of rights was necessary to restrain any oppressive tendencies of the national government. James Madison took the lead in responding to the Anti-Federalists when he introduced what later became the Ninth Amendment. The Amendment’s adoption reflects the Framers’ vision of natural rights and the free exercise of liberty unencumbered by government invasion. In some of the only Supreme Court commentary to incorporate an analysis of the Ninth Amendment into its reasoning, Justice Goldberg explained in his *Griswold v. Connecticut* concurrence that the “Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.”

In essence, the Framers understood that fundamental rights are inherent and should be considered pre-Constitutional. That the Ninth Amendment itself states “the enumeration in the Constitution, of certain rights” is significant from a textual perspective because “enumeration” implies drafting a list, not creating a right. A plain reading of the Ninth Amendment strikes a balance between incorporating an enumeration of rights while recognizing that such a non-exhaustive list

---

42 See id. at 25.
43 See id.
44 See Farber, supra note 4, at 26. Farber quotes from a 2004 decision that states that judges do not “lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.” See Sosa v. Alvarez-Machain, 542 U.S. 692, 730 (2004). This historic precedent encompasses and appeals to international norms and informs this book review’s (and Farber’s) inclusion of international opinion as a factor in determining the proper contours of a fundamental rights analysis. See id.
45 See Farber, supra note 4, at 25, 33; Patterson, supra note 38, at 19.
46 See Farber, supra note 4, at 30.
47 See Massey, supra note 28, at 295, 296.
48 See Farber, supra note 4, at 44.
49 381 U.S. 479, 490 (1965) (Goldberg, J., concurring).
50 See Patterson, supra note 38, at 20.
51 U.S. Const. amend. IX; see Farber, supra note 4, at 43.
does nothing to impair the exercise of fundamental rights that are un-
enumerated and retained by the people. The Court, however, would
soon ground fundamental rights in a different constitutional provision:
the Due Process Clause of the Fourteenth Amendment.

B. Subsumed by Due Process

The Ninth Amendment’s protective sheen on fundamental indi-
vidual rights faded from view throughout the nineteenth century. The
Amendment did not enter political or judicial discourse primarily be-
cause Congress did not pass regulatory legislation that threatened to
impinge on any unenumerated personal liberties. After the Civil War
and the passage of the Fourteenth Amendment, however, courts began
to ground their fundamental rights jurisprudence in the Due Process
Clause. With rapid industrialization, businesses challenged labor and
economic regulations as unconstitutional restrictions on liberty; in
Lochner v. New York, for example, the Court struck down a New York
statute capping bakers’ hours as a violation of a constitutional liberty
interest in the freedom to contract.

To compensate for its remarkably narrow construction of the Privi-
leges or Immunities Clause, the Supreme Court eventually came to pro-
tect non-economic interests and incorporate most of the protections of
the Bill of Rights through the Fourteenth Amendment’s Due Process

---

52 See Farber, supra note 4, at 4.
53 See id. at 76.
54 See id. at 46.
55 See id.
56 See id. at 76. The Court foreclosed the opportunity to ground fundamental rights in
the Privileges or Immunities Clause of the Fourteenth Amendment in The Slaughter House
Cases. See 83 U.S. 36, 78–79 (1873). The Court narrowly interpreted the Privileges or Im-
munities Clause to protect only those privileges that flow from the federal government
such as the privilege to the writ of habeas corpus or the right to use navigable waters. See
id. at 79. Those privileges and immunities of a fundamental nature were deemed privileges
of state citizenship to which the Privileges or Immunities Clause of the Fourteenth Amend-
dment does not speak. See id. at 76. But see Saenz v. Roe, 526 U.S. 489, 502–04 (1999) (hold-
ing that the right to travel between states is protected by one’s status as a citizen of the
United States and includes the right of newly arrived citizens to “the same privileges and
immunities enjoyed by other citizens of the same State”). While some scholars cite Saenz as
an indication that the Court may seek to ground fundamental rights in the Privileges or Im-
munities Clause of the Fourteenth Amendment in addition to the Due Process Clause,
others believe such an interpretation attaches too much significance to this case. See Laure-
unce H. Tribe, Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Fu-
ture—or Reveal the Structure of the Present?, 113 Harv. L. Rev. 110, 197–98 (1999).
57 198 U.S. 45, 64 (1905); see Farber, supra note 4, at 77.
The Due Process Clause, which may well have been intended to safeguard only procedural guarantees, became the repository of fundamental substantive rights through the importance of stability and precedent and what Farber considers “an accident of history.” The Due Process Clause thus came to bear a tremendous amount of authority in the protection of liberty interests and fundamental rights.

One premise of Farber’s book is that the Ninth Amendment is a more appropriate place to ground fundamental rights because it was written to protect the notion of inherent rights, while the Due Process Clause instead rings of procedure. Courts must take care to ensure that the designation of a right as “fundamental” is not used to impose their own policy preferences under the guise of constitutional law.

Both the absence of a substantial body of scholarship on the Ninth Amendment and the open-textured language of the Amendment itself contribute to concerns that the Ninth Amendment may permit judicial overreaching. The Ninth Amendment, however, plainly exists within the Constitution to recognize and affirm the existence of inherent fundamental rights retained by the people.

II. Farber’s Factors Ascertain the Right

To guide the determination of whether a right is fundamental, Farber presents a fluid structural framework in which to ground the analysis. While the factors are listed in an order that roughly correlates to their authoritative weight, Farber does not require that any factor be considered dispositive. However, after an application of the factors to the concept of education, it will become readily apparent that societal consensus, most concretely manifested in sweeping legislation, should be considered an important factor.
Farber’s first factor requires consideration of whether there is Supreme Court precedent establishing the right.68 The second related factor entails an analysis of the connections between the right and specific constitutional guarantees.69 Sometimes, however, a right will have no Supreme Court precedent upon which to rely, or, as in the case of the right to education, has been held by the Supreme Court not to be a fundamental right.70 But even where precedent seems to overrule a claim to a particular right or connections to specific constitutional guarantees are attenuated, some opportunity remains to maneuver within the realm of reasoning by analogy.71

Where education is concerned, two Supreme Court cases are especially relevant in the evaluation of Farber’s factors of Supreme Court precedent and connections to specific constitutional guarantees: Brown v. Board of Education and San Antonio Independent School District v. Rodriguez.72 First, Brown provides rich insight into the importance of education both to the American cultural fabric and in the realization of citizenship.73 Before Brown, the separate-but-equal doctrine of Plessy v. Ferguson sanctioned decades of government-sanctioned segregation.74 In Brown, the Court ignored assertions that segregated elementary and secondary schools in the South were “being equalized” with respect to facilities and other “tangible” factors.75 Instead, the Brown Court boldly declared that “‘separate but equal’ has no place in American society, and that separate educational facilities are inherently unequal.”76 While this commentary affirms the necessity of equality in education, the Court stopped just shy of an explicit endorsement of a fundamental right to education:

68 Id.
69 Farber, supra note 4, at 108.
71 See Farber, supra note 4, at 107–08. Farber indicates that “[t]he more something resembles an already established fundamental right, the more likely it is to qualify as fundamental itself.” Id. at 107.
72 See generally Rodriguez, 411 U.S. 1 (holding that a school funding scheme based on property taxes could not violate a fundamental right to education because no such fundamental right exists); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (overruling the separate-but-equal doctrine and holding that segregated public schools violate the Equal Protection Clause of the Fourteenth Amendment).
74 See 163 U.S. 537, 551 (1896).
75 See 347 U.S. at 492.
76 Id. at 495.
Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.\textsuperscript{77}

This language supports the assertion that education is a fundamental right inherent in the American concept of citizenship.\textsuperscript{78}

However, in \textit{Rodriguez}, decided two decades after \textit{Brown}, the Court’s reasoning failed to embrace education as a fundamental right.\textsuperscript{79} In \textit{Rodriguez}, parents challenged a complex school financing scheme that required local school districts to, in part, finance their schools from funds obtained through local property taxes.\textsuperscript{80} One poor, predominantly Mexican-American school district charged a tax rate substantially higher than an affluent, predominantly white school district in San Antonio.\textsuperscript{81} The wealthier district was able to spend more per student than the poorer district given its higher property values.\textsuperscript{82} The parents claimed that funding schools through property taxes disadvantaged a suspect class and interfered with the exercise of a funda-

\textsuperscript{77} \textit{Id.} at 493. Due to “problems of considerable complexity” and “the wide applicability of [its] decision,” the Court did not specify the methods by which the schools should desegregate. \textit{Id.} at 495. However, it ruled one year later in \textit{Brown v. Board of Education (Brown II)} that lower courts should “admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.” See 349 U.S. 294, 301 (1955).

\textsuperscript{78} See 347 U.S. at 493.

\textsuperscript{79} See 411 U.S. at 33–35.

\textsuperscript{80} \textit{Id.} at 10.

\textsuperscript{81} See \textit{id.} at 12–13. The poor district’s equalized tax rate was $1.05 per $100 of assessed property, while the wealthier district’s tax rate was $0.85 per $100. \textit{Id.}

\textsuperscript{82} See \textit{id.} The poorer district had $356 to spend per student and the wealthier district had $594. \textit{Id.}
mental right to education, and therefore implicated strict scrutiny of the school funding scheme.\textsuperscript{83}

After ruling that students living in the poorer districts were not members of a suspect class and on that basis could not avail themselves of a strict scrutiny standard of review, the Court took up the argument that the inequalities in school funding violated a fundamental right to education.\textsuperscript{84} Justice Powell’s stark language provides a grim contrast to the sweeping opinion of Chief Justice Warren in \textit{Brown} for those who would seek to place a heavy emphasis on Supreme Court precedent in a fundamental rights analysis.\textsuperscript{85} “Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”\textsuperscript{86}

In his dissent, Justice Marshall’s reasoning drew substantially from \textit{Brown} and resembled Farber’s factors in a fundamental rights analysis.\textsuperscript{87} He stated that

\begin{quote}
the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values. The special concern of this Court with the educational process of our country is a matter of common knowledge.

\ldots
\end{quote}


The factors just considered, including the relationship between education and the social and political interests enshrined within the Constitution, compel us to recognize the fundamentality of education.\textsuperscript{88}

While the Court’s explicit rejection of education as a fundamental right carries with it significant authority, Justice Marshall’s vigorous dissent reminds Americans that a fundamental right’s existence may be grounded more broadly in societal consensus and connections to other constitutional rights.\textsuperscript{89} The Ninth Amendment’s recognition of funda-

\textsuperscript{83} See id. at 28–29.
\textsuperscript{84} See id. at 29, 33–34, 35.
\textsuperscript{85} See Rodriguez, 411 U.S. at 35; \textit{Brown}, 347 U.S. at 493; \textit{Farber}, supra note 4, at 108.
\textsuperscript{86} Rodriguez, 411 U.S. at 35.
\textsuperscript{87} See id. at 110–11 (Marshall, J., dissenting); \textit{Farber}, supra note 4, at 108.
\textsuperscript{88} Id. at 111, 116 (Marshall, J., dissenting).
\textsuperscript{89} See id.
mental, yet unenumerated, rights provides ample constitutional author-
ity for this reasoning.90

After this weighty factor of Supreme Court precedent, Farber next posits the importance of “long-standing, specific traditions upholding the right.”91 He warns against placing too much emphasis on this third factor in order to avoid “legal petrification.”92 That it constitutes only part of the analysis distinguishes it from other theories of fundamental rights, such as those grounded in Originalism.93 Farber endorses tradition as evolutionary in nature; his concept does not fix particular concepts or rights in any one historical period of time.94 Indeed, Farber displays his contempt for Originalists and those who would treat tradition as a “living fossil” when he compares such a rigid concept of tradition to a “cockroach that has survived for a long time without change.”95

Applying this factor of long-standing specific traditions to a right to education, Farber’s analysis is notably brief and is largely centered on nineteenth-century legislation that was intended to establish a national school system but was never passed in the House or Senate.96 While Congress eventually established a federal education department in 1867 and tasked it with monitoring the general state of educational affairs throughout the country, the department was soon relegated to a more limited status as a bureau within the Department of the Interior.97 The Department of Education did not gain full status as an independent executive department until 1980, and many conservatives still vehemently challenge its existence.98 Overall, while bureaucratic in-

---

90 See Farber, supra note 4, at 101.
91 Id. at 108.
92 See id. at 105 (citing Washington v. Glucksberg, 521 U.S. 702, 770 (1997) (Souter, J., concurring)).
93 See id. Originalism is an approach to constitutional interpretation that attempts to establish the meaning of the Constitution as it was understood in 1789. See Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 851–52 (1989). “It is, in short, a task sometimes better suited to the historian than the lawyer.” Id. at 857. This is because in addition to using the text of the Constitution itself, Originalism requires the judge to consider records of ratifying debates, while simultaneously evaluating the records’ reliability. See id. at 856. Originalism demands that judges assume “beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.” Id. at 856–57.
94 See Farber, supra note 4, at 105.
95 See id.
96 See id. at 148–50.
98 See 20 U.S.C. § 3411 (2000); William H. Honan, Department of Education Spared, Again, N.Y. Times, July 15, 1995, § 1, at 15; Veronique de Rugy & Marie Gryphon, Elimina-
volvement in education varies in influence, it must be understood to be part of a tradition recognizing the importance of education.\textsuperscript{99}

After his expanded concept of tradition, Farber next lists the three factors that are the most malleable in their application to the process of discerning rights retained by the people.\textsuperscript{100} Farber advocates considering “contemporary societal consensus about the validity of the right,” followed by an analysis of “decisions by American lawmakers and judges recognizing the right,” and finally a consideration of “broader or more recent American traditions consistent with the right.”\textsuperscript{101} While all three are important, Farber’s delineations overlap and seem to stem from a common source of authority in discerning a right, namely societal consensus.\textsuperscript{102} There are many indicia to ascertain whether such a societal consensus exists.\textsuperscript{103}

First, every state constitution includes a provision that is “supportive of state-provided education.”\textsuperscript{104} This comports with the longstanding tradition of state-provided public education and suggests a societal consensus that recognizes a fundamental right to education.\textsuperscript{105} These state constitutional provisions are complemented by state court decisions that explicitly recognize the right to education as a fundamental right or a fundamental interest.\textsuperscript{106} While these judicial decisions and state constitutions are both laudable and helpful to the societal consensus elements of Farber’s factors, legislation provides another avenue with which to gauge consensus towards recognition of a fundamental right to education.\textsuperscript{107} However, because legislation is subject to the influence of special interest groups (which is not necessarily an evil in itself), electoral cycles, and other external pressures, Farber cautions that legislation may not accurately reflect societal consensus.\textsuperscript{108} In any event, the most recent and far reaching federal legisla-

\textsuperscript{99} See Farber, supra note 4, at 146–50.
\textsuperscript{100} See id. at 108.
\textsuperscript{101} See id.
\textsuperscript{102} See id. at 107.
\textsuperscript{103} See id. at 106–07.
\textsuperscript{105} See id.
\textsuperscript{106} See, e.g., Rose v. Council for Better Educ., 790 S.W.2d 186, 206 (Ky. 1989); Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976); see Farber, supra note 4, at 147.
\textsuperscript{107} See Farber, supra note 4, at 107.
\textsuperscript{108} See id.
tion in this area, NCLB, must necessarily weigh heavily in favor of recognizing a fundamental right to education.109

Farber’s final factor is a consideration of “decisions by international lawmakers and judges recognizing the right.”110 Incorporating an analysis of international decision-making in a fundamental rights analysis is entirely consistent with the Framers’ reliance on the law of nations.111 Indeed, Farber writes that “we should not assume that we have a monopoly on wisdom in the United States.”112 Recent Supreme Court decisions explicitly have referenced foreign judicial decisions in an active effort to engage in this broader international consensus.113 The values and opinions of international judicial bodies and legislatures are a necessary component of fundamental rights analysis, even though they may ultimately constitute only persuasive authority.114

The explicit recognition of a right to education by international lawmakers should be incorporated in our domestic fundamental rights analysis.115 For example, the Universal Declaration of Human Rights plainly recognizes that “everyone has the right to education.”116 This is reiterated by the International Covenant on Economic, Social and Cultural Rights and the European Convention on Human Rights.117 Given the increasing legitimacy of citing to international judicial bodies, such

110 See Farber, supra note 4, at 108.
111 See id. at 90.
112 Id. at 107.
113 See id. at 90, 184. Overruling Bowers v. Hardwick and striking down a Texas anti-sodomy statute, Justice Kennedy wrote for the Court in Lawrence v. Texas that that the Court’s reasoning in Bowers was rejected by the European Court of Human Rights and did not reflect values held by “wider civilization.” See Lawrence v. Tex., 539 U.S. 558, 576–77 (2003); Bowers v. Hardwick, 478 U.S. 186, 187–96 (1986); see also Roper v. Simmons 543 U.S. 551, 578 (2005) (applying an analysis of international capital punishment policies to the holding that executing juveniles violates the Eighth and Fourteenth Amendments, reasoning that “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom”).
114 See Farber, supra note 4, at 184, 195.
foreign pronouncements on the right to education properly inform the ultimate conclusion that education is no less a fundamental right in the United States.118

III. RETAINED BY THE PEOPLE

The Ninth Amendment is plainly a meaningful component of the Constitution, and “[i]t is emphatically the province and duty of the judicial department to say what the law is.”119 Thus, courts must engage Farber’s factors to review the rights embedded within the Ninth Amendment to determine that a requisite consensus exists to recognize a fundamental right to education.120 Though at first glance some of Farber’s factors may seem redundant, each factor provides a unique angle from which to approach a fundamental rights analysis.121 The judicial inquiry requires judges to bring themselves in accordance with the Constitution’s “explicit demand, that, in interpreting and applying the Constitution, judges search for the values underlying the document.”122 The authority afforded to a judge in the discharge of this duty draws upon skills not unlike those used in the formulation of the common law.123 Analogy, reason, and the use of “‘enumerated’ rights as points of departure” are sufficient tools to distinguish rights that are not specifically enumerated.124 Ultimately, this will result in a “systematic corpus of the law and equity of human rights, under our Constitution.”125 For practical purposes, this rational process will empower parents and students in communities like Tuscaloosa to continue their ascent up Brown’s well-worn path of educational opportunity.126

While Farber places the most deliberative weight on U.S. Supreme Court precedent concerning the right at issue, this is a circui-

118 See Farber, supra note 4, at 151.
119 See U.S. Const. amend. IX; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
120 See Farber, supra note 4, at 108.
121 See id. at 108.
122 See Shaw, supra note 63, at 178. Shaw writes that Alexander Bickel indicated that “the task of the judge in carrying out the job of interpreting the Constitution is to recognize the values which are considered fundamental to our society, values which may be derived analogically from the text of the Constitution or our reading of the framers’ intent, but values that go deeper than that or are considered to be enduring.” Id. at 177 (citing Alexander M. Bickel, The Least Dangerous Branch 24 (1962)).
124 Id.
125 Id.
126 See Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); Dillon, supra note 5.
This narrow focus might negate a fresh consideration of dubiously overlooked fundamental rights such as the right to education. If the parents and children left behind in Tuscaloosa rely on Supreme Court precedent to prove, exercise, and advance their unenumerated fundamental right to education, a judicial inquiry could prematurely cease at the invocation of *Rodriguez*. Furthermore, grounding fundamental rights within the Due Process Clause of the Fourteenth Amendment, as recent Supreme Court precedent does, ignores the explicit text of the Ninth Amendment that references rights “retained by the people,” while simultaneously providing an unnecessarily weak basis for recognition of fundamental rights such as the right to education. This weakness emanates from the distinctly procedural tone of the Due Process Clause—for the open-textured guarantee is one of liberty or due process, the latter of which can palliate certain abbreviations of liberty. The clearest and most obvious explication of rights exists in the first eight amendments. The Ninth Amendment provides the strongest basis upon which to ground unenumerated fundamental rights “retained by the people” because it follows the enumerated rights of the first eight amendments and expressly authorizes a sturdy and judicially cognizable foundation to ground unenumerated rights such as the right to education.

---

127 See *Farber*, supra note 4, at 108; see also Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. Balt. L. Rev. 169, 182 (2003) (arguing that “the Court need not, and should not, follow a judicially crafted yellow brick road to recognize an unenumerated right”).

128 See *Rodriguez*, 411 U.S. at 33–34, 35.

129 See *id.*

130 U.S. Const. amend IX; see *Farber*, supra note 4, at 76–77. *Griswold v. Connecticut* most clearly demonstrates the length to which the Court was willing to go in locating an unenumerated right to “marital privacy” without grounding it specifically in the Ninth Amendment. See 381 U.S. 479, 484 (1965). Justice Douglas, writing for the majority, concluded that such a right was located within penumbras of the Bill of Rights. *Id.* In his concurrence, Justice Goldberg emphasized that the recognition of a fundamental right to privacy is “retained by the people within the meaning of the Ninth Amendment.” *Id.* at 499 (Goldberg, J., concurring). Furthermore, he explained that “[t]he Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold.” *Id.* at 491.

131 See *Ely*, supra note 21, at 18; *Farber*, supra note 4, at 76.

132 See U.S. Const. amend. I–VIII.

133 See U.S. Const. amend. IX; *Farber*, supra note 4, at 145–53. One scholar argues that “the Court’s reliance on the due process clauses of the Fifth and Fourteenth Amendments has been misplaced, if not mistaken. The Ninth Amendment is the true home for substantive, unenumerated rights.” See John Choon Yo, *Our Declaratory Ninth Amendment*, 42 Emory L.J. 967, 1035–36 (1993). Furthermore, while it is widely accepted that the Consti-
Supreme Court precedent should not be completely discounted as a factor, it should give way to the text of the Ninth Amendment and the interpretation that rights “retained by the people” could more accurately be discerned through the affirmative acts of the people themselves, expressed through their legislatures.\footnote{134}{U.S. Const. amend. IX; see Farber, supra note 4, at 108.}

Ultimately, a determination of rights “retained by the people” must rely heavily on actions that the people themselves take, most distinctly through legislation.\footnote{135}{U.S. Const. amend. IX; see Farber, supra note 4, at 107.} Though its implementation continues to be exceedingly controversial, the overwhelmingly bipartisan passage of NCLB provides the strongest legislative indication yet that education is a fundamental right retained by societal consensus.\footnote{136}{See 20 U.S.C. § 6301 (Supp. IV 2004).} While legislation may be subject to the dangers of majoritarian tyranny when it operates to curtail a right, this does not prevent it from serving as the most conspicuous platform for the people to affirm a fundamental right they retain.\footnote{137}{See The Federalist No. 10 (James Madison); Farber, supra note 4, at 107. Indeed, “we may grant until we’re blue in the face that legislatures aren’t wholly democratic, but that isn’t going to make courts more democratic than legislatures.” Ely, supra note 21, at 67. Another scholar explains that the nature of representation and the political process allows “an expression of popular voice that is superior to majority preference” because the process of electing representatives requires citizens to “express their priorities.” See Sherman J. Clark, A Populist Critique of Direct Democracy, 112 Harv. L. Rev. 434, 477, 478 (1998).} The legislative process may be laborious and riddled with internal procedural rules, but in the case of landmark legislation such as NCLB, it nonetheless serves as the best place in which the judiciary might ascertain a societal consensus favoring recognition of a fundamental right.\footnote{138}{See U.S. Const. art. I, § 5; Farber, supra note 4, at 107.} Thus, a process of discerning education as a fundamental, unenumerated right that begins with an analysis of Supreme Court precedent is misguided; rather, it is imperative that it begin with the people and their most representative branch.\footnote{139}{See U.S. Const. art. I; see also Clark, supra note 137, at 477 (arguing that representation both identifies and effectuates popular will by balancing competing interests and modifies and improves popular input through deliberation).}
NCLB is uniquely appropriate legislation from which to springboard to a fundamental rights analysis, given its breadth of bipartisan support in Congress.\textsuperscript{140} It overwhelmingly passed the House of Representatives by a vote of 381 to 41 and the Senate by a vote of 87 to 10.\textsuperscript{141} It is not dispositive that state governments and the public are extremely critical of Congress’s inability to fund the Act and are loathe to accept its strict standardized testing approach to school evaluation.\textsuperscript{142} Rather, from a broader perspective, the Act’s initial bipartisan passage indicates the importance the people place on a continuing tradition of education as a right “retained by the people.”\textsuperscript{143} Irrespective of the technical minutia in the implementation provisions that are the subject of so much rancor, the legislative task of passing NCLB should weigh heavily in a judicial analysis of the fundamental right to education.\textsuperscript{144}

Legislation “translate[s] current optimistic rhetoric—replete with images of the land of equal opportunity—into a day-to-day reality for all school children.”\textsuperscript{145} Of course, legislation alone, even when passed by overwhelming majorities, must not be understood to immediately confer fundamental status on a contested right; however, legislation, when passed by a substantial majority, must be accorded the most deliberative weight.\textsuperscript{146} Court precedent remains a vital element in the discernment of a fundamental right, and courts are certainly necessary for engaging in reasoning that begins, and arises most prominently, from “political society.”\textsuperscript{147} The legislature, however, allows more direct access for the people to “shape the right to education and how the right should evolve over time.”\textsuperscript{148} The provision of NCLB that grants parents the right to transfer their children out of failing schools aptly reflects the retention (and exercise) of the right to education by the people.\textsuperscript{149} The parents in Tuscaloosa must assert the rights of their own school chil-

\textsuperscript{140} See § 6301.


\textsuperscript{143} See U.S. Const. amend. IX; Dillon, \textit{supra} note 141.

\textsuperscript{144} See 20 U.S.C. § 6301 (Supp. IV 2004); Farber, \textit{supra} note 4, at 107.


\textsuperscript{146} See Ely, \textit{supra} note 21, at 67–68; Farber, \textit{supra} note 4, at 108.

\textsuperscript{147} Black, \textit{supra} note 123, at 194; see Farber, \textit{supra} note 4, at 108.

\textsuperscript{148} See Robinson, \textit{supra} note 3, at 1730.

\textsuperscript{149} See § 6316(b) (1) (E).
dren in accordance with the spirit of Brown, armed with the impact of the passage of NCLB and the act’s practical tools, including its student transfer provision.\footnote{See id.; Dillon, supra note 5.}

**Conclusion**

The Ninth Amendment must no longer be overlooked in the judicial recognition of fundamental rights. The Ninth Amendment does not demand majority rule, but rather affirms the retained power of the people to define the fundamental rights that are inherent in American citizenship. While Supreme Court precedent remains a necessary component to the recognition of an unenumerated right, it must not be given the most deliberative weight. The promise of Brown and the blight of Rodriguez are important to the right to education, but precedent alone is not enough to settle that which is retained by the people. Rather, legislation must be accorded due consideration as an instrument through which the people define their retained rights.

Education is such a right. The fundamental right to education, retained by the people, is not necessarily rooted solely within abstract conceptions of liberty manifested by the Due Process Clause. The more accurate measure is that which can be deduced from actions of the people themselves in the exercise of their democratic responsibilities. This requisite and rational societal consensus for the retained right to education is evident in the broad bipartisan support for passage of NCLB. For the parents of Tuscaloosa, this discernment of a fundamental right to education gives them the opportunity to preempt oppressive actions that threaten to deny their children the equality of opportunity they deserve.
THE MEDICAL LEGAL PARTNERSHIP FOR CHILDREN: POLICY STRATEGIES FOR EXPANDING A GATEWAY PROGRAM

Arianna Tunsky-Brashich*


Abstract: The authors featured in Ending Poverty in America propose progressive strategies for combating poverty, including the creation of gateway programs through which the poor can obtain comprehensive services. One of these programs, the Medical Legal Partnership for Children, has effectively implemented a new kind of preventative medical care by placing lawyers alongside pediatricians to address health issues with a related legal dimension. This book review analyzes MLPC and suggests that revising the Medicaid statute and earmarking a portion of the State Children’s Health Insurance Program block grant will help ensure the long-term viability of this important program.

Introduction

A staggering thirty-six million people in the United States live in poverty.1 Almost thirteen million of these individuals are children under the age of eighteen.2 These numbers find their origin in a daunting confluence of economic and social forces.3 They are a reflection of the moral failure of government and society, a failure that is often the result of complexity rather than inaction.4 Despite obstacles to implementation, however, there are strong progressive proposals and existing programs that can address the complex societal problems that result in the culture of poverty in America today.5


2 See id.
3 See generally Ending Poverty in America, How to Restore the American Dream (John Edwards et al. eds., 2007) (discussing the causes and impacts, as well as possible solutions, to poverty in America).
4 See generally id.
5 See generally id.
Many of the most promising strategies are sketched out in *Ending Poverty in America: How to Restore the American Dream.* Published in conjunction with the Center on Poverty, Work and Opportunity, the essays provide an interdisciplinary approach to issues facing the working poor. The policies described in the book are tied together by the common ideals of hard work, equal opportunity, thrift, and strong families. A belief in the existence of the “American Dream” serves as the foundation for these essays, and underscores former Senator John Edwards’ challenge to his readers and to his country not to be satisfied with modest improvement, but to set the goal of ending poverty in the United States in the next thirty years.

The essays’ authors advocate for diverse programs offering creative ideas and practical solutions to the problem of poverty in America. These programs cannot be expected to alleviate poverty in any meaningful way, however, if they are not integrated into comprehensive federal or state efforts. Any viable solution must be designed to address the reality that the problems burdening impoverished Americans are complex and never mutually exclusive. In his essay “Connecting the Dots,” Pulitzer Prize-winning author David K. Shipler illustrates how poverty results from a combination of structural and cultural forces. Shipler, in recognizing the need for systemic solutions, suggests broadening schools, medical clinics, and other institutions frequently used by the poor into gateways through which they can obtain multiple services that address all of their needs.

An example of a gateway model is the Medical Legal Partnership for Children (MLPC). Originally established as the Family Advocacy Program in 1993 and housed at the Boston Medical Center in Boston, Massachusetts, it was the brainchild of the hospital’s Chief of Pediatrics, Dr. Barry Zuckerman. Dr. Zuckerman recognized the effects that liv-

---

6 See generally id.
7 See id. at ix.
8 See John Edwards, *Conclusion* to *Ending Poverty in America*, supra note 3, at 256, 259.
9 See id. at 266. See generally *Ending Poverty in America*, supra note 3.
10 See Edwards, supra note 8, at 257.
11 See generally *Ending Poverty in America*, supra note 3.
13 See id. at 13.
14 See id. at 20.
15 See id. at 16.
ing in poverty had on the health of his patients and their families.\textsuperscript{17} He realized that successful medical interventions addressed environmental risk factors—such as stress, inadequate social support, and maternal depression—and created appropriate protective mechanisms.\textsuperscript{18}

Dr. Zuckerman’s experience led him to believe that legal assistance could be an effective tool for ameliorating the effects that living in poverty has on pediatric health.\textsuperscript{19} As a result, MLPC introduced preventative law into the clinical setting by offering on-site civil legal services for children and their families.\textsuperscript{20} Because pediatricians are in a position to develop long-term relationships with the families they serve, they are uniquely situated to identify potential legal issues and refer families for attorney counseling.\textsuperscript{21} Attorneys and other staff members can assist families in obtaining government benefits, securing safe and affordable housing, and resolving family disputes to ensure that children’s basic needs are met.\textsuperscript{22} The success of the model has led to its replication in over fifty clinical sites.\textsuperscript{23}

MLPC provides integrated, preventative services that reflect the importance of treating the whole patient.\textsuperscript{24} This holistic approach, blending medical treatment with the treatment of poverty, is supported by the essays in \textit{Ending Poverty in America}, which argue that the cost of health care and resultant medical debt has reached the level of national crisis.\textsuperscript{25} In order to begin addressing the connections between poverty


\textsuperscript{18} Parker et al., \textit{supra} note 17, at 1235–36.

\textsuperscript{19} See MLPC Mission & History, \textit{supra} note 16.

\textsuperscript{20} Id.


\textsuperscript{22} See MLPC Mission & History, \textit{supra} note 16.

\textsuperscript{23} See Lawton, \textit{supra} note 21, at 38.

\textsuperscript{24} See id. at 37–39.

\textsuperscript{25} See, e.g., Elizabeth Warren, \textit{The Vanishing Middle Class}, in \textit{Ending Poverty in America}, \textit{supra} note 3, at 38, 43–44, 45, 47 (discussing how increases in fixed costs such as health care and housing have made it nearly impossible for the typical two-income family to afford basic expenses); ABC News/Kaiser Family Found./USA TODAY, \textit{Health Care In America 2006} \textit{Survey} 3 (2006), \textit{available at} http://www.kff.org/kaiserpolls/upload/7572.pdf (finding that of those Americans having trouble paying medical bills, over two-thirds had health insurance); Michelle M. Doty et al., \textit{Commonwealth Fund, Seeing Red: Americans Driven into Debt by Medical Bills} 2 (2005), \textit{available at} http://www.
and incomplete, inadequate health care, Congress must increase funding for public benefits programs and implement reasonable and workable guidelines to encourage MLPC and similar gateway programs.\(^{26}\)

This book review argues for the continued implementation of the MLPC model in the pediatrics departments of hospitals and health centers across the country. Part I looks at the mission of MLPC and how the program addresses legal problems that would otherwise undermine the health of pediatrics patients. Part II discusses how Medicaid and the State Children’s Health Insurance Program (SCHIP) provide health care for children most benefited by the MLPC model. Part III considers how revising the guidelines for Medicaid and earmarking block grants can encourage health care providers to implement the MLPC model in their facilities. Providing adequate reimbursement for MLPC services will ensure that pediatric health care providers can implement this type of collaborative effort to bring preventative health-related legal services to children.

I. THE MEDICAL LEGAL PARTNERSHIP FOR CHILDREN

Each year approximately half of all low- and middle-income households are confronted with circumstances that raise a civil legal issue.\(^{27}\) Among these issues, those least likely to be brought to the civil justice system are health-related matters, including children’s health problems that are exacerbated by poverty.\(^{28}\) Traditionally, indigent families had access through community programs to social and legal services that could provide assistance with health-related legal issues, but federal budget cuts have reduced access to these resources.\(^{29}\) While there are

illinoiscovered.com/assets/cover_837_Doty_seeing_red_medical_debt.pdf (finding nearly one in three adults had problems paying their medical bills within the previous year); David E. Himmelstein et al., Illness and Injury as Contributors to Bankruptcy, W5 HEALTH AFFAIRS 71–72 (2005), available at http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.63v1 (concluding that “illness often leads to financial catastrophe through loss of income, as well as high medical bills”).

\(^{26}\) See Edwards, supra note 8, at 257–58.

\(^{27}\) See CONSORTIUM ON LEGAL SERVS. AND THE PUBLIC, AMERICAN BAR ASSOCIATION, LEGAL NEEDS AND CIVIL JUSTICE, A SURVEY OF AMERICANS, MAJOR FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 23 (1994). “Legal issues” refers both to situations that were brought to the attention of the civil justice system and events or difficulties that low- and moderate-income households attempted to handle on their own. See id. at 2. The study found that the most common legal needs mentioned by participants were personal finance, consumer issues, and housing related matters. See id. at 5–6, 24.

\(^{28}\) Id. at 24.

A. The Mission

The doctors and staff attorneys at MLPC are trained to recognize social stresses and barriers affecting the health of their child patients that have possible legal solutions. Seen as the legal equivalent of preventative care, the program, according to Dr. Laura A. Smith, a pediatrician and medical director of MLPC, uses “the skills of lawyers to address the non-biological factors that contribute to and exacerbate health problems.” The MLPC model involves three core principles: (1) providing direct legal services and ongoing advocacy to low-income children and their families to prevent some health problems and to ensure long-term improvements; (2) training for healthcare professionals to identify social and economic origins of their patient’s ill health and the appropriate legal resources to help them; and (3) systemic advocacy to bring about change in local, state, and national policy and programs that can help improve child health.

---

30 See Barry Zuckerman et al., Why Pediatricians Need Lawyers to Keep Children Healthy 114 PEDIATRICS 224, 224 (2004). Many eligible individuals do not receive benefits due to language barriers or the complexity of the application process. Katherine S. Newman, Up and Out: When the Working Poor are Poor No More, in ENDING POVERTY IN AMERICA, supra note 3, at 101, 111. Programs like MLPC and SeedCo, a nonprofit based in New York, recognize that for policies to be successful, their benefits must be accessible to targeted families. See id. at 111–12. SeedCo has implemented a web-based tool that allows case managers to determine their clients’ eligibility for multiple kinds of benefits and to complete applications for those benefits online, without having to navigate each bureaucratic structure individually. See id.

31 See Lawton, supra note 29, at 12.
32 See id. at 12–13.
33 See id. at 13.
34 Id.
At the Boston MLPC site, six in-house attorneys work with physicians and patients’ families to identify legal needs that may undermine the children’s health. The pediatricians at the hospital are trained to view patients as part of a family unit shaped by complex social and economic factors. As families establish long-term relationships with their pediatricians, they begin to view them as trustworthy and concerned professionals to whom families can safely reveal private information without fear of judgment. Providing a continuity of care over a long period of time gives pediatricians the ability to gauge the effectiveness of interventions and modify them accordingly.

For these reasons, the clinicians who started MLPC recognized that pediatricians are in a unique position to spot legal health risks before they become full-blown crises. The clinicians noted, however, that treating physicians are frequently reluctant to ask broad questions about legal issues affecting a family’s well-being. This is either because the physicians find the law intimidating or they do not have the background or resources to engage in legal advocacy for their patients. The partnership with attorneys recognizes that pediatricians are prepared to identify, but not necessarily address, the social origins of child health, and that lawyers are often in the best position to interpret agency guidelines and to counsel parents on their rights and legal remedies.

Armed with the knowledge that they are supported by attorneys, doctors are comfortable asking questions that can lead to disclosure of information related to an issue that might be addressed by MLPC attorneys. In the clinical setting, where there are significant time and informational constraints, these attorneys are available whenever a doc-

38 See Lawton, supra note 29, at 12. Lawton also references focus group findings that families considered their pediatrician the most trustworthy source of information about their eligibility for government benefits and services. See id.
39 See Tames et al., supra note 37, at 506.
40 See Lawton, supra note 29, at 13.
41 See id.
42 See id. Lawton states “that the reasons physicians do not assess a patient’s unmet needs include: 1) insufficient knowledge of how to screen for the problems; 2) lack of confidence; 3) a deficiency in knowledge of available resources; 4) difficulty in setting the referral process in motion; and 5) lack of time.” Id. at 15.
43 See Press Release, Boston Univ., supra note 35.
44 See Zuckerman et al., supra note 30, at 224–25.
tor needs them to provide immediate consultations.\textsuperscript{45} While social workers and case managers remain integral to the success of the program, lawyers are better trained in the art of advocacy and can better determine and pursue the appropriate legal recourse for issues affecting patients’ health.\textsuperscript{46}

**B. Success Stories**

Dr. Zuckermann described an example of the partnership in action in an opinion piece he wrote for the *Boston Globe* in 2002.\textsuperscript{47} The story he tells exemplifies a theme in *Ending Poverty in America*; small barriers imposed by poverty, such as lack of bargaining power with a landlord, combine to exacerbate health and social problems.\textsuperscript{48} A mother of a six-year-old boy with severe asthma risked losing her job as a result of his many absences from school.\textsuperscript{49} A nurse was sent to the family’s home in an effort to locate possible environmental triggers for his asthma.\textsuperscript{50} She found that mold due to a leaky pipe and dust mites in wall-to-wall carpeting were exacerbating the boy’s asthma.\textsuperscript{51} After several unsuccessful requests by the mother that the landlord fix the problems, the mother was referred to an attorney at MLPC, who researched the local and state health and housing code regulations.\textsuperscript{52} Finding that the landlord was legally responsible for fixing the pipe and removing the carpeting because they severely impacted the boy’s health, the attorney called the landlord.\textsuperscript{53} Faced with the threat of court action, the landlord fixed the problems and the boy’s health improved, allowing him to return to

\textsuperscript{45} See Lawton, supra note 29, at 13–14. To be effective in a clinical setting, lawyers must understand how doctors are trained and provide digestible advocacy information that can easily be incorporated into a patient’s overall treatment plan. See id.

\textsuperscript{46} Id. at 13; Zuckerman et al., supra note 30, at 225.


\textsuperscript{48} See, e.g., Shipler, supra note 12, at 16–17 (recounting how a single mother with medical insurance was plunged into debt after her son’s asthma attack); William Julius Wilson, *New Agenda for America’s Working Poor*, in *ENDING POVERTY IN AMERICA*, supra note 3, at 88, 92–94 (discussing how urban sprawl and economic stagnation have resulted in high unemployment and deteriorating neighborhoods in America’s inner-cities); Carol Mendez Cassell, *A Hopeful Future: The Pathway to Helping Teens Avoid Pregnancy and Too-Soon Parenthood*, in *ENDING POVERTY IN AMERICA*, supra note 3, at 205, 208–211 (highlighting how teen pregnancy is linked to a lack of social and economic opportunities).

\textsuperscript{49} Zuckerman & Lawton, supra note 47.

\textsuperscript{50} Id.

\textsuperscript{51} Id.

\textsuperscript{52} Id.

\textsuperscript{53} Id.
and regularly attend school. In this case, a small amount of help from medical and legal professionals yielded many benefits.

Another goal of MLPC, “systemic advocacy,” is illustrated by an attorney who in 1999 saw that multiple families that should have been eligible for welfare-to-work exemptions because of chronically ill children were repeatedly being denied. Research by the attorney revealed that the Massachusetts Department of Transitional Assistance had made it more difficult for families to meet the standards to qualify for these work exemptions. MLPC partnered with local legal services organizations to bring a class action suit that resulted in an injunction against the application of the higher standard. Additional systemic advocacy activities include organizing a Child Health Impact Assessment working group to evaluate the impact of policy, regulations, and legislation on children’s overall health; so far, the group has looked at the Massachusetts Rental Voucher Program and high energy costs.

Overall, since 1993, MLPC has assisted over 5000 families and its interdisciplinary effort has been met with praise from the medical and legal communities. In 2006, MLPC announced that it had secured $2.7

54 Zuckerman & Lawton, supra note 47.
55 See Zuckerman et al., supra note 30, at 226.
56 See id. By applying stricter standards not intended for this use, the Massachusetts Department of Transitional Assistance effectively raised the bar for eligibility. Id.
57 See id.
59 See Press Release, Boston Univ., supra note 35. Initially, there was some worry that the American Bar Association (ABA) would voice concern over this multidisciplinary model. See Tames et al., supra note 37, at 508; MLPC Mission & History, supra note 16. In 1998, the president of the ABA convened a Commission on Multidisciplinary Practice to determine if the model professional rules should be modified to accommodate these organizations. John Gibeaut, It’s a Done Deal: House of Delegates Vote Crushes Chances for MDP, 86 A.B.A. J. 92, 93 (Sept. 2000). One year later, the Commission issued its findings and suggested that the model rules be amended to allow for lawyers and other professions to join in certain commercial partnerships. See id. at 92. Before the recommendations could be voted on, they were rejected by a 3-to-1 margin by the House of Delegates. See id. Despite this record indicating its disapproval for a multidisciplinary approach to legal problems, in August 2007, the ABA passed a resolution encouraging its members to engage in medical-
million over five years in foundation grants to provide technical training, resources, and seed money for similar programs nationwide.\textsuperscript{60} While much of the funding came from large foundations, including the W.K. Kellogg Foundation and the Robert Wood Johnson Foundation, law firms committed to pro bono work have also committed significant financial resources and manpower to the effort.\textsuperscript{61} For the attorneys involved, the collaboration is an effective and efficient means of providing pro bono legal services because the medical team essentially screens clients and refers them based on legal and economic qualifications.\textsuperscript{62}

These grants for implementation of the model and necessary training, however, will run out before these programs have a chance to fully establish themselves in hospitals and clinics.\textsuperscript{63} Given the dire financial condition of most hospitals today, it is unlikely that they will be able to fund and maintain MLPC programs without external support.\textsuperscript{64} For these reasons, the long-term viability of MLPC and similar programs will depend largely on securing adequate public funding through reimbursement and block grants that favor preventative interdisciplinary approaches to children’s health.\textsuperscript{65}

\begin{flushright}
\textsuperscript{60} See Sacha Pfeiffer, \textit{BMC to Go National with Legal Aid Program}, \textit{Boston Globe}, Apr. 10, 2006, at A1; Press Release, Boston Univ., \textit{supra} note 35.

\textsuperscript{61} See Press Release, Boston Univ., \textit{supra} note 35.

\textsuperscript{62} See Matthew Hersh, \textit{Legal Prescription, Lawyer Treats Kids for Legal Maladies}, \textit{Recorder} (San Francisco), July 26, 2006, at 1.

\textsuperscript{63} See Press Release, Boston Univ., \textit{supra} note 35.


II. Medicaid and SCHIP: Complementary Goals, Different Designs

For every ten uninsured children who qualify for Medicaid or SCHIP nationwide, six are not enrolled.66 Both programs provide necessary medical care for children living in poverty.67 Increased funding for Medicaid and SCHIP will create more access to public benefits for eligible children and families, thus raising revenues for already strapped local clinics and hospitals.68 In addition, increased funding for these programs will ensure the long-term viability of the MLPC model by providing reimbursement for legal services.69

A. Medicaid

Medicaid and SCHIP are the two crucial sources of coverage for low-income families who would otherwise be unable to purchase health insurance.70 Together, Medicaid and SCHIP cover more than thirty million low-income children, approximately one in four children in the United States.71 It is estimated that there were almost nine million uninsured children in 2006.72 Of these, two-thirds were eligible for Medicaid or SCHIP but were not enrolled, evidence that many parents of eligible children are either not aware of the funding available to them or are discouraged by the administrative hurdles they face in signing up for the programs.73

---


67 See Dorn, supra note 66, at 1.


69 See New England Regional Medical-Legal Network, supra note 65, at 6–11; Lawton, supra note 21, at 41. Medicaid and SCHIP reimbursement for MLPC legal aid services is warranted because these programs reimburse for similar case management services. See New England Regional Medical-Legal Network, supra note 65, at 6–11; Lawton, supra note 21, at 41.


71 See id.

72 Id.

Enacted in 1965 as Title XIX of the Social Security Act, Medicaid is a means-tested entitlement program that represents the largest single source of health insurance for Americans.\textsuperscript{74} The program provides federal funding to the states, which in turn provide medical assistance programs to low-income individuals who meet certain statutory requirements.\textsuperscript{75} Medicaid is the primary source of federal financing assistance to the states, with the federal government setting broad guidelines and the states having substantial flexibility to structure eligibility and benefits and administer their own programs.\textsuperscript{76} While participation is voluntary, a state’s agreement to participate in the program has the force and effect of federal law and the consenting state must comply with the controlling federal regulations and statutes.\textsuperscript{77}

Medicaid’s policy priorities are reflected in the categories of low-income individuals—children, the elderly, the disabled, and pregnant women—for whom the federal government will provide states with matching funds.\textsuperscript{78} There are some categories that states must cover if they participate in the Medicaid programs, and other categories for which federal matching funds are available should a state choose to extend eligibility.\textsuperscript{79} If federal matching funds are not available for a population that a state wants to make eligible, the state has to fund

\textsuperscript{74} See Grants to States for Medical Assistance Programs, 42 U.S.C. §§ 1396a–1396v (2000); Sara Rosenbaum et al., Public Health Insurance Design for Children: the Evolution from Medicaid to SCHIP, 1 J. HEALTH & BIOMEDICAL L. 1, 7 (2004).

\textsuperscript{75} See §§ 1396–1396v; Rosenbaum et al., supra note 74, at 7.


\textsuperscript{77} See Westside Mothers v. Haveman, 289 F.3d 852, 858–59 (6th Cir. 2002).

\textsuperscript{78} See David Rousseau et al., Kaiser Comm’n on Medicaid & the Uninsured, Medicaid Enrollment and Spending by “Mandatory” and “Optional” Eligibility and Benefit Categories 1–2 (2002); Schneider et al., supra note 76, at 4, 5. Children eligible for Medicaid on a mandatory basis include those six and under who live in families with family incomes at 133% of the federal poverty level. See Schneider et al., supra note 76, at 11. For children ages six through eighteen, eligibility is at 100% of the federal poverty level. Id. Childless, nondisabled adults under age sixty-five are not generally covered unless through a state waiver. See id. at 10–11. There are five requirements relating to eligibility, two of which are financial, that vary on a state by state basis: categorical, income, resource, immigration status, and residency. See id. at 6.

\textsuperscript{79} See Schneider et al., supra note 76, at 5.
services to that population itself, making it less likely that states will take the initiative and expand coverage on their own.\(^{80}\)

Medicaid provides more expansive coverage than most private insurance.\(^{81}\) The Social Security Act does not define health care services that are “medically necessary.”\(^{82}\) Rather, the federal government requires that services provided by Medicaid be consistent with the goals of the program and that they be just.\(^{83}\) In keeping with this intent, judicial rulings and agency interpretations have reinforced the preventative goals of the program and generally do not allow for limits on coverage that could interfere with the need for treatment.\(^{84}\) This standard ensures coverage for far more treatments than private insurance, which traditionally relies on a model that seeks to limit coverage to treatment that will restore functioning and does not take prospective measures or a long-term perspective on health care.\(^{85}\)

Medicaid is more generous in its provision of benefits and services to children than to adults, as children are eligible for more benefits and states are mandated to provide more preventative programs to them.\(^{86}\) One of these programs is the Early and Periodic Screening Diagnostic and Treatment (EPSDT) services.\(^{87}\) Enacted in 1967, the pro-

\(^{80}\) See id.

\(^{81}\) See Sara Rosenbaum et al., Commonwealth Fund, Room to Grow: Promoting Child Development Through Medicaid and SCHIP 17 (2001).


\(^{83}\) See Dickson, 391 F.3d at 589–593; 42 C.F.R. § 441.50–.56; Rosenbaum et al., supra note 74, at 13.

\(^{84}\) See Dickson, 391 F.3d at 589–593, 597; Rosenbaum et al., supra note 74, at 13.

\(^{85}\) See Rosenbaum et al., supra note 81, at 17. EPSDT standards result in a form of “third party financing,” which is not matched by any private insurer, especially when considered alongside “[m]edicaid’s general prohibition against discrimination in the provision of mandatory treatments and services based on an individual’s diagnosis or condition.” Rosenbaum et al., supra note 74, at 14.

\(^{86}\) See Rosenbaum et al., supra note 74, at 11–13; see also § 1396(d)(r). Children under eighteen cannot be charged co-payments for covered benefits and services. Rosenbaum et al., supra note 74, at 13. As a result of a provision added in 1988, Medicaid’s financial eligibility options for children allows states to extend Medicaid through the use of more lenient income and asset “disregards” used to calculate financial eligibility for Medicaid. Id. at 10. Medicaid is also retroactive in nature, eligibility can begin up to three months prior to the date of application if the individual would have previously satisfied program eligibility. Id.

\(^{87}\) See 42 U.S.C. § 1396(d)(r) (2000). EPSDT include screening services—such as physical exams, immunizations, vision and dental check-ups—either at regular intervals or at those which are medically necessary “to determine the existence of certain physical or mental illnesses or conditions.” See id. EPSDT must also provide “[s]uch other necessary health care, diagnostic services, treatment, and other measures to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.” See § 1396(d)(r)(5).
gram sets a treatment baseline that mandates that any medically necessary health care service be provided to treat a child’s mental or physical illness when first diagnosed. The mandated services include scheduled “as needed” health exams, age-appropriate immunizations, and screening for vision, dental, and hearing care.

In 1989, amendments to EPSDT expanded the diagnosis and treatment authorization mandate to include all forms of medical assistance for children, including preventative and prospective care. This means that as soon as a clinical need for medical treatment is identified, treatment for the long-term effects of the illness can be covered under the program. In this way, this standard gives great deference to the opinions of treating physicians. Due to its inclusive and progressive nature, the EPSDT program has been politically unpopular and states have asked for its mandate to be narrowed in scope. Yet it is clear that the comprehensive nature of the program has been successful in improving the health care of children living in poverty. The objective of EPSDT—to provide preventative treatment—suggests that EPSDT benefits could be appropriately extended to fund legal services that address the health-related legal problems facing poor children and their families.

B. SCHIP

In contrast to Medicaid, SCHIP is a relatively new program authorized by Congress for a ten-year term as part of the Balanced

---

88 See Rosenbaum et al., supra note 74, at 14. The Centers for Medicare and Medicaid Services (CMS) overview of the program highlights the standard of preventative care and the program’s goal of diagnosing and treating health problems early on, before they become more complex and treatment more costly. See Ctrs. for Medicare & Medicaid Servs., EPSDT Overview, http://www.cms.hhs.gov/MedicaidEarlyPeriodicScrn/ (last visited Mar. 25, 2008). According to CMS, “[t]he EPSDT program consist [sic] of two mutually supportive, operational components: (1) assuring the availability and accessibility of required health care resources; and (2) helping Medicaid recipients and their parents or guardians effectively use these resources.” Id. The two components enable state agencies to manage a comprehensive program of prevention and treatment, determine those children that might be eligible for the program, and to inform their families of the health services and assistance available and how they can use these most efficiently. Id.

89 See § 1396(d)(r).
90 Rosenbaum et al., supra note 74, at 13–14.
91 See id. at 14.
92 See id. at 13–14.
93 See id. at 15.
94 See HEALTH COVERAGE OF CHILDREN, supra note 68, at 1–2.
Budget Act of 1997. SCHIP is a federally-funded block grant program that allows states flexibility in determining how they want to extend coverage to families with income levels above those eligible for Medicaid. For example, in 2007, fifty percent of states covered families with incomes at or below two hundred percent of the federal poverty level. All SCHIP funding is capped so that states can only receive matching federal grants up to their annual allotment.

The decision to enact SCHIP was a result of a confluence of factors: a healthy economy, a revenue surplus, and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. However, SCHIP represents a policy compromise in that it is not an expansion of the Medicaid program, but rather allows states to choose SCHIP as an alternative to Medicaid. Under this statutory structure, states can either provide coverage to uninsured children through existing Medicaid programs, through a state’s own SCHIP program, or by some combination of the two. SCHIP subsidizes the enrollment of participants into

---

96 See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4901, 111 Stat. 251 (1997); Robert F. Rich et al., The State Children’s Health Insurance: An Administrative Experiment in Federalism, U. Ill. L. R. 107, 107 (2004). The purpose of the Act is to “provide funds to States to enable them to initiate and expand the provision of child health assistance to uninsured, low-income children in an effective and efficient manner that is coordinated with other sources of health benefits coverage for children.” 42 U.S.C. § 1397aa(a).


98 CHIPRA, supra note 73, at 1. The report found that nine states cover children at less than 200% of the federal poverty level (FPL), twenty-three states at 200% FPL, eight states at 201–250% FPL, and eleven states, and the District of Columbia, at 250% FPL. Id. The federal poverty guidelines are updated each year by the U.S. Department of Health and Human Services and are used to set eligibility criteria for a number of administrative programs. U.S. Dep’t of Health & Human Servs., Frequently Asked Questions Related to the Poverty Guidelines and Poverty, http://aspe.hhs.gov/poverty/faq.shtml#differences (last visited Apr. 2, 2008). The federal poverty guidelines “are a series of income levels, with different values for family units of different sizes, below which the family units are considered poor for statistical or administrative purposes.” Gordon M. Fisher, Poverty Guidelines for 1992, 55 Soc. Security Bull. 43, 43 (1992).

99 CHIPRA, supra note 73, at 2.


101 See Rosenbaum et al., supra note 74, at 17.

102 See Grogan & Patashnik, supra note 100, at 848. As of 2002, nineteen states had combination programs, sixteen used their SCHIP funds for separate programs, and sixteen used their federal matching funds to expand their currently existing Medicaid programs. Cindy Mann et al., Kaiser Family Found., Reaching Uninsured Children Through Medicaid: If You Build It Right, They Will Come 4 (2002). States generally chose to create their own programs for two reasons: it allows them to cut costs by offering reduced benefits and, in the wake of welfare reform, it was thought that working families would refuse to
approved state health plans. There are no statutory standards for determining the acceptability of available plans and the program’s definition of medical assistance only discusses what services and benefits the states may finance, not those that are required. States have enormous discretion in the kinds of basic and additional services that they choose to cover; there are no federal standards of reasonableness, medical necessity, or non-discrimination.

Medicaid and EPSDT reflect a congressional intent to provide a prospective entitlement to children. SCHIP, on the other hand, can be seen as a more conservative program that affords the states considerably more flexibility in determining their scope of coverage. Because of this heightened discretion, standards are not uniform across states and generally do not reflect the preventative mentality that underpins the EPSDT guidelines. Although there are shortcomings, SCHIP is credited with the huge decrease over the last decade in the rate of low-income uninsured children by providing free or affordable coverage options for children whose families earned too much to be eligible under Medicaid but could not afford the high costs associated with private insurance plans.

Despite the benefits of health care programs for children, and the well-established effects of poverty on children’s health, a debate over the funding of programs like SCHIP remains. In the fall of 2007, a debate between President George W. Bush and Congress over the reauthorization and expansion of SCHIP highlighted a larger ideological battle over health care. In October 2007, the President vetoed the
bipartisan Children’s Health Insurance Program Reauthorization Act of 2007 (CHIPRA) that proposed providing an additional $35 billion to fund SCHIP over five years.\textsuperscript{112} The bill would have provided coverage to the more than 6.6 million children already enrolled in SCHIP, plus expanded coverage to an additional 4 million children.\textsuperscript{113} President Bush likened the expansion of the program to a move by Congress towards universal health care, and stated that he favored moving children with no health insurance onto private insurance plans.\textsuperscript{114} The Bush Administration’s plan would increase SCHIP expenditures by less than twenty percent, relying instead on changes in the federal tax code to provide for additional families.\textsuperscript{115} This lack of adequate funding indicates a re-

\begin{itemize}
\item \textsuperscript{112} CHIPRA, supra note 73, at 4. CHIPRA’s benefits would have been funded by a sixty percent increase in the tobacco excise tax. See H.R. 976, 110th Cong. (2007); SCHIP Bill Seen Better than Bush Plan for Reducing Number of Uninsured Children, BNA Health Care Daily Rep., Oct. 15, 2007.
\item \textsuperscript{113} See H.R. 976; SCHIP Bill Seen Better than Bush Plan for Reducing Number of Uninsured Children, supra note 112.
\item \textsuperscript{115} Office of Mgmt. & Budget, Executive Office of the President, Budget of the United States Government, Fiscal Year 2008, at 68 (2007). The President’s proposal would increase funding for the program by a modest $5 billion over five years. See id. Each family would be able to deduct the first $15,000 from their income towards their health care spending ($7500 for an individual). See Linda J. Blumberg, Urban Inst., Can the President’s Health Care Tax Proposal Serve as an Effective Substitute for SCHIP Expansion? 1 (2007), available at http://www.urban.org/UploadedPDF/411557_schip_expansion.pdf. According to a recent study by the Urban Institute, however, the financial burden of obtaining health insurance for families between 150% and 300% of the federal poverty level would be much higher under the President’s proposal and the potential to decrease the number of uninsured children in the country would be reduced. Id. A problem with President Bush’s proposal is that because it was not specifically designed to subsidize the purchase of insurance for children, but was part of a broader plan to subsidize the purchase of health insurance, it requires that adults also purchase insurance, thereby decreasing the likelihood of enrollment for poorer families. See id. The study found that while a two-parent family with two children earning $32,000 a year could obtain child health care through SCHIP at no cost, under the President’s plan, despite receiving
jection of the policy goal, inherent in Medicaid and SCHIP, of providing comprehensive, preventative care for children in order to ensure their long-term well-being.\footnote{See Parker et al., supra note 17, at 1235–36.}

III. WRITING BETTER STANDARDS FOR PREVENTATIVE CARE

A. Medicaid

In a country that has largely turned to the private sector to provide health care services, the persistence of an entitlement program as large as Medicaid, with its progressive EPSDT benefits, seems counterintuitive.\footnote{See Timothy S. Jost, Disentitlement?: The Threats Facing Our Public Health Care System 65 (2003). One reason why Medicare and Social Security Disability Insurance have maintained their legitimacy is the perception that it is a quid pro quo arrangement in which individuals contribute to the social insurance trust funds that they are eventually paid out of. Id. at 64–65. Although Medicaid is a means-tested program and lacks this quid pro quo element, courts have recognized a property right in this social entitlement which has helped to entrench this means-tested program. See id. at 64–66. Means-tested entitlement programs that lack the contractual relationship of a program like Medicare, however, are much more politically tenuous. See id. at 65–66.} Although there is concern that Medicaid faces an uphill battle at the state and federal levels due to tax cuts and balanced budget requirements, cutting an entitlement program like Medicaid is politically difficult, especially given the vocal support that the EPSDT program has received from child health advocates over the years.\footnote{See Newman, supra note 30, at 101, 109; Frank Pasquele, The Three Faces of Retainer Care: Crafting a Tailored Regulatory Response, 7 Yale J. Health Pol’y, Law & Ethics 39, 46 (2007); Jane Perkins, Medicaid: Past Successes and Future Challenges, 12 Health Matrix 8, 26–27 (2002); Joint Press Release, March of Dimes, Am. Acad. of Pediatrics, Nat’l Ass’n of Children’s Hospitals, Nat’l Child Health Advocates Urge Congress to Reject Harmful Cuts to Medicaid in Administration’s Budget Proposal (Feb. 7, 2005), available at http://www.marchofdimes.com/aboutus/14817_15056.asp; Commonwealth Fund, EPSDT: An Overview (Sept. 2005), available at http://www.commonwealthfund.org/publications/publications_show.htm?doc_id=35831; see also Alice Sardell & Kay Johnson, The Politics of EPSDT Policy in the 1990s: Policy Entrepreneurs, Political Streams, and Children’s Health Benefits, 76 Milbank Q. 175, 182–83, 190 (1998) (discussing how a dedicated group of child advocates worked to “put some teeth” into the EPSDT program as part of the Omnibus Reconciliation and Budget Act of 1989 and, later, as part of the child health formulation for the Clinton Health Security Plan).} Reimbursement for procedures made possible by EPSDT provides hospitals and clinics with the revenue necessary to provide basic pediatric services to patients.\footnote{See John K. Inglehart, The Dilemma of Medicaid, 348 New Eng. J. Med. 2140, 2141 (2003); Newman, supra note 30, at 109. Many doctors have refused to see Medicaid pa-}
also essential to a program like MLPC because it provides financial support for the fundamental resources, including staffing and office space, which make the services offered by MLPC possible. Additionally, MLPC is an important program that helps fill in the gaps between treating immediate health concerns and ensuring long-term improvement for complications that are often the result of systemic poverty.

Since the EPSDT guidelines were first enacted in 1967, they have been amended, administered, and judicially interpreted in a progressive manner that extends additional protections to children. This notion of applying a comprehensive and prospective approach to treating children in poverty correlates with the theory underpinning the MLPC approach and is representative of the progressive proposals for policy reform that are described throughout Ending Poverty in America. The most direct way to promote the MLPC model would be to revise the EPSDT guidelines to establish that social services, such as the legal services provided by the MLPC model, are within the statute’s notion of preventative care. EPSDT guidelines could be expanded to define “other necessary health care, diagnostic services, and treatment” that are needed to “correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services” as including legal intervention that can help improve the overall physical health of patients due to what they deem to be economically unfeasible reimbursement rates. See Pasquele, supra note 118, at 46. It is estimated that twenty-five percent of American doctors do not treat patients on Medicaid and that two-thirds of those who do, limit the number of Medicaid insured patients they will treat due to inadequate reimbursement rates. See Sidney D. Watson, Medicaid Physician Participation: Patients, Poverty, and Physician Self-Interest, 21 Am. J. of L. & Med. 191, 193 (2005); see also Ceci Connolly, Proportion of Doctors Giving Charity Care Declines, Wash. Post, Mar. 23, 2006, at A9 (discussing how busy schedules, reduced reimbursement rates, and medical-school debt have caused many physicians to reduce the charity care they provide to needy patients).

See Inglehart, supra note 119, at 2141; New England Regional Medical-Legal Network, supra note 65, at 6–11.

See Lawton, supra note 29, at 13.

See Rosenbaum et al., supra note 74, at 13–14.

See Parker et al., supra note 17, at 1235–36. See generally Ending Poverty in America, supra note 3 (advocating for policy reform that provides opportunities and expanded protections to at-risk individuals).

See 42 U.S.C. § 1396(d)(r) (2000); Eleanor D. Kinney, Rule and Policymaking for the Medicaid Program: A Challenge to Federalism, 51 Ohio St. L. J. 855, 875–881 (1990). Kinney’s article discusses at length the congressionally mandated changes that were made to the Medicaid program during the 1980s. See id. Although Kinney argues that use of limited statutory amendments has led to a complex program that is difficult to administer, this does not negate the fact that guidelines are frequently revised and that with proper guidance from the Centers for Medicare and Medicaid Services, the agency that administers Medicaid, changes to EPSDT are a feasible option. See id. at 865–66.
and mental well-being of the child. Under this model, the diagnosis of, and action to correct, potential legal problems that either directly or indirectly affect a child’s health would be reimbursable.\footnote{See § 1396(d) (r) (5); supra notes 33–58, 82 and accompanying text.}

Linking the need for social services to the mandate for preventative medical care reflects the understanding that legal and medical issues are rarely mutually exclusive for children living in poverty.\footnote{See § 1396(d) (r) (5).} MLPC has proven that legal services are in many ways medically necessary to achieve prevention and treatment.\footnote{See supra note 12, at 21 (advocating for gateway programs that allow the poor to access multiple services for their multiple problems); Zuckerman & Lawton, supra note 47.} Take, for example, how the non-biological factors of the six-year-old boy’s asthma had to be addressed and corrected by a lawyer before he could be healthy enough to return to school.\footnote{See Lawton, supra note 21, at 18.} For children, legal problems and poor health that intersect in the context of poverty can be most effectively solved in tandem through gateway programs like MLPC.\footnote{See Shipler, supra note 12, at 21; Zuckerman & Lawton, supra note 47.}

Another solution, one currently being explored by MLPC, is making medical-legal collaborative services reimbursable through the case management provisions of the Medicaid statute.\footnote{See 42 U.S.C.A § 1396n(g)(1)–(2) (Supp. 2007); New England Regional Medical-Legal Network, supra note 65, at 6–11. A concern with this approach is that merely changing the case management definition would open up the potential for additional eligible populations, not merely children, to be served by MLPC. See § 1396n(g)(1)–(2). Since MLPC is still a relatively young program, making its services reimbursable for all Medicaid recipients might be an uphill battle until further studies are done, which could discourage some states from reimbursing for pediatric legal services. See New England Regional Medical-Legal Network, supra note 65, at 6–11. The state analyses in the white paper indicate that several states have taken the initiative to include a broad definition of case management within their EPSDT requirements. See id. However, this approach does not give states the clear guidance and federal mandate that might be necessary to encourage states to proactively consider the importance of these preventative programs. See id.} As case management is currently defined,
the services offered by the MLPC model could be construed as fitting within the specifications of the statute. Congress must choose to further define what it means by case management and include language that highlights legal services as those for which a state may seek reimbursement.

B. SCHIP

If revising the EPSDT and case management standards proves too politically difficult, the federal government must instead change the SCHIP grant structure to create incentives to incorporate the MLPC model. The Bush Administration’s opposition to an expansion of SCHIP in the fall of 2007 indicates that providing any additional coverage will be challenging. Nevertheless, Congress should set aside a portion of the block grant given to states specifically for MLPC services to be used only for preventative screening and treatment. This will ensure that a certain amount of the grant is designated for financing legal and other social services that serve the purpose of improving children’s overall well-being. Congress should also define “child health assis-

the eligible individual.” See § 1396n(g) (2) (A) (ii) (II). Case management is also defined to include “referral and related activities . . . that help link eligible individuals with medical, social, educational providers or other programs and services that are capable of providing needed services.” See § 1396n(g) (2) (A) (ii) (III). Monitoring and follow-up to “ensure the care plan is effectively implemented and adequately addressing the needs of the eligible individual” must also be provided. See § 1396n(g) (2) (A) (ii) (IV).

133 See § 1396n(g) (2) (A) (ii); New England Regional Medical-Legal Network, supra note 65, at 6.
134 See § 1396n(g) (2) (A) (ii). For example, the guidelines could be revised so that subsection III reads: “Referral and [complementary] activities to help an individual obtain needed services, including activities that help link eligible individuals with medical, legal, social, educational providers or other programs and services that are capable of providing needed services.” See id. This revision will make reimbursement for MLPC services a possibility for health care providers and encourage them to consider the model. See id. Additionally, this approach maintains an element of choice for health care providers since offering the services is merely encouraged, and is not made mandatory. See id.
136 See supra notes 110–116 and accompanying text.
137 See Misleading Spin on Children’s Health, supra note 111; Pear, supra note 111; SCHIP for Everyone, supra note 111.
138 See 42 U.S.C.A. § 1396n(g) (2) (A) (ii) (Supp. 2007); see also Advisory Comm’n on Intergovernmental Relations, Block Grants: A Comparative Analysis 6 (1977) (discussing how one distinctive trait of a block grant is that the “[f]ederal aid is authorized for a wide range of activities within a broadly defined functional area”).
tance” in the SCHIP grant as including the services provided by MLPC, thereby alerting states to this option and encouraging spending for holistic programs like MLPC that offer comprehensive treatment for the whole child.\textsuperscript{139} The mere presence of the option to receive additional funding will make preventative programs like MLPC an economically attractive option for states and will force states to at least consider these programs.\textsuperscript{140} States should be encouraged to implement MLPC programs, especially if future research proves that the model is a cost-effective means of both improving children’s overall health and increasing enrollment in public benefits, including Medicaid.\textsuperscript{141}

Rewriting legislation so that additional services are reimbursable and grant money is set aside will undoubtedly increase government spending at a time when the economy is in serious trouble and President Bush has outlined major cuts to social services in his budget.\textsuperscript{142} However, as concerns over the economy and the deficit heighten, it is essential to recognize that any economic downturn will likely result in an increase in the number of families without private health insurance.\textsuperscript{143} Even more children will become eligible for Medicaid and SCHIP and will need to rely heavily on the kinds of services provided by MLPC.\textsuperscript{144}

\textbf{Conclusion}

Gateway programs like MLPC recognize that poverty in the United States results from a confluence of factors and that a solution must be comprehensive. The potential for the MLPC approach to combat the

\textsuperscript{139} See 42 U.S.C. § 1397jj(a) (2000). The statute already defines children’s health insurance to include case management services and any other preventative service that is recognized by state law and furnished by a physician. See § 1397jj(a) (20), (24).

\textsuperscript{140} See 42 U.S.C.A. § 1396n(g)(2)(A)(ii) (Supp. 2007); Zuckerman et al., supra note 30, at 224–25, 226.

\textsuperscript{141} See Lawton, supra note 21, at 41; Press Release, LegalHealth, Legal Care Good for Patients, Good for Hospitals’ Bottom Line (Feb. 26, 2007), available at http://legalhealth.org/docs/pr_goodhosp.pdf (finding that over a two–year study period, the services of a program similar to MLPC resulted in $345,222 in collections and $1.3 million in billings for two hospitals); cf. Eckholm, supra note 64 (discussing how preventative care can reduce costs for hospitals).


\textsuperscript{143} See Lame Duck Budget, supra note 142 (criticizing President Bush’s budget cuts as “exactly the wrong direction to go in tough economic times, when low-income workers who lose their jobs need Medicaid coverage and states have fewer funds to supply it”).

\textsuperscript{144} See Lawton, supra note 21, at 37–38; Lame Duck Budget, supra note 142.
The cyclical nature of poverty should not be underestimated. Although it is a young program, MLPC is gaining broad support in the legal and medical communities as a way to treat medical issues and improve public health by simultaneously remedying corresponding legal concerns. The federal government must support the program in an effort to provide tangible benefits for the poorest of our nation’s children and address the structural nature of poverty in the United States. Congress should do this either by revising the Medicaid statute to make MLPC services reimbursable or through the use of a block grant. Both alternatives match congressional intent, track the history of the programs, and are a concrete step towards promoting preventative health care services.

If these measures prove successful, Congress should experiment with ways of creating incentives for hospitals to extend the MLPC model into other departments, such as emergency rooms, in order to realize the full potential of this interdisciplinary model. Medicaid and SCHIP were intended to do more than merely provide limited health care treatment options, and by changing these programs to better encourage MLPC services, comprehensive preventative health care can be used as a tool to help break the cycle of poverty. As the authors in *Ending Poverty in America* argue, any solution to the intertwined health care and poverty crises in America today must be prospective, preventative, and holistic.