

# The Modern American

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Volume 6, Issue 1

# THE MODERN AMERICAN™

A Publication Dedicated to Diversity and the Law

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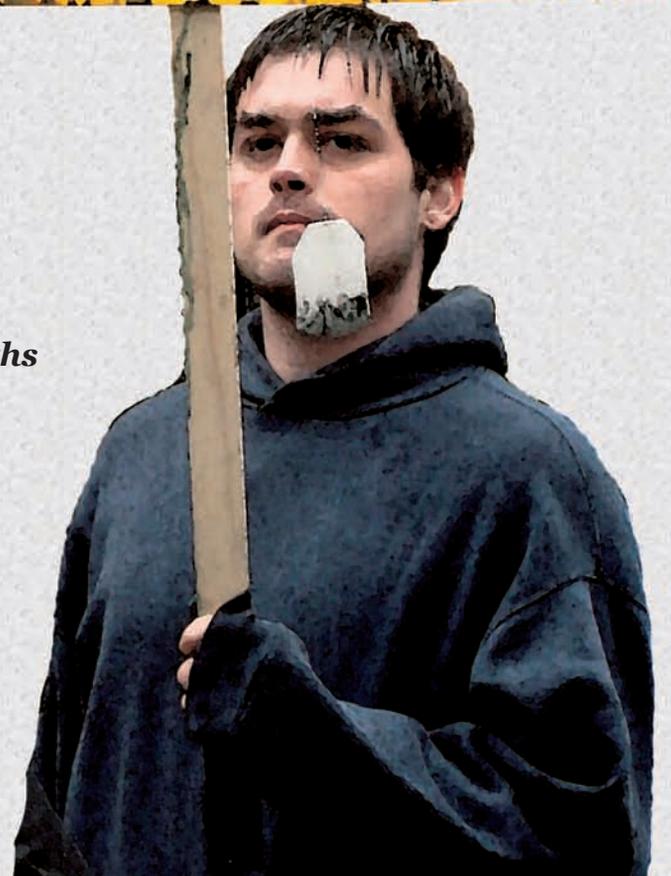
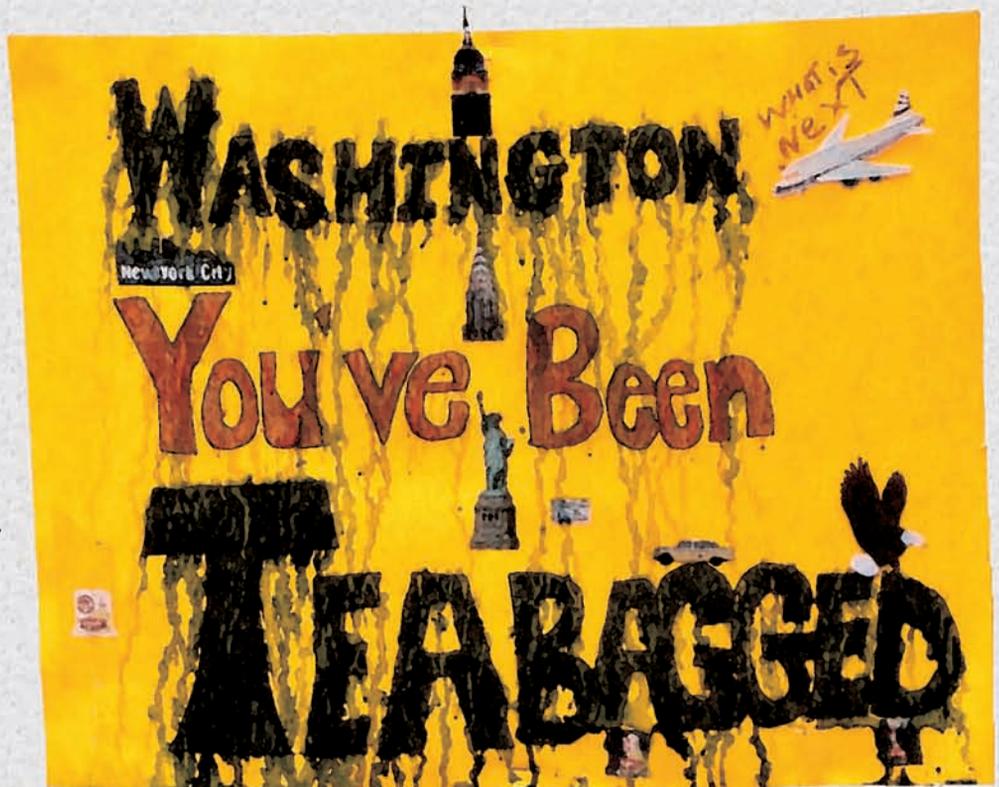
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# THE MODERN AMERICAN

## Letter from the Executive Board

Since President Barack Obama was sworn into office a little over a year ago, “change” is one of many words to describe the current political climate. Is America more divided after the tortuous healthcare wrangle? Or is America more effusively expressing its diverse political views? Whether it is the conspicuous rise of the Birther Movement or outraged citizens storming the Capitol armed with epithets, it is nearly impossible to tell which conditions make up today’s political landscape other than just plain mad. Change is hard, and apparently, change is angry.

That is not to say that Americans do not have good reason to be angry. Congress seems to be unable to solve urgent problems as individuals, communities, and other levels of government suffer from joblessness, rising costs, and fewer resources. Anger is only at the surface of America’s deep fear and anxiety over an uncertain future.

But this is change in its rawest form—the good, the bad, and the ugly. This spring volume features contributions on healthcare reform’s underbelly and potential homeownership opportunity roll-backs; however, it also features essays on LGBT advocates’ success in joining the Supreme Court bar, preparation of a new generation of problem-solving lawyers, and creative solutions that bring attention to the broken criminal justice system. If the current political landscape demonstrates any lesson, it is that change does not equate progress. Sometimes even, as Bridgette Baldwin convincingly argues about welfare stigmatization, things can be more of the same. It depends from which vantage point one looks.

*The Modern American* is “modernizing” during our sixth year, yet our commitment to offering robust dialogue on diverse issues remains as firm as ever. Evocative dialogue can contain a lot of value—it can be more than irate slurs hurled at elected officials. Real decisions affect real people in real ways which is essential to acknowledge in a discussion about political change. Still, we must be fair-minded as we engage with one another.

*The Modern American* continues to bring incisiveness out from political storms on pressing issues within this volume and those to come. We encourage *The Modern American* readers to help us in our mission to provide a constructive platform for these conversations by offering us feedback during our Strategic Plan comment period (open until May 31). More information about the Strategic Plan can be found on the publication back cover. Here, at *The Modern American*, we believe, “Yes, we still can.”

*Sincerely Yours,*

The Executive Board  
*The Modern American*

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# STRATIFICATION OF THE WELFARE POOR: INTERSECTIONS OF GENDER, RACE, & “WORTHINESS” IN POVERTY DISCOURSE AND POLICY

By: Bridgette Baldwin <sup>1</sup>

On average, we black women have bigger, better problems than any other women alive. We bear the burden of being seen as pretenders to the thrones of both femininity and masculinity, endlessly mocked by the ambiguously gendered crown-of-thorns imagery of ‘queen’ Madame Queen, snap queen, welfare queen, quota queen, Queenie Queen, Queen Queen Queen. We black women are figured more as stand-ins for men, sort of like reverse drag queens: women pretending to be women but more male than men—bare-breasted, sweat-glistened, plow-pulling, sole supporters of their families.

- Patricia Williams <sup>2</sup>

## INTRODUCTION

Welfare policy in theory aims to compensate those in need, usually those existing at or below a fluctuating poverty line. The policy behind welfare has always been devised. However, who is designated as poor and when that poverty is deserving of compensation has never been fully determined by economic conditions, but most crucially by subjective interpretation of “worthiness.” As a perfect example, in the 1980s, black women across the country were exposed, uplifted and appreciated as the “queens” of American poverty. At the behest of this black “queen’s” inauguration was the future 40<sup>th</sup> President and then Governor of California, Ronald Reagan.<sup>3</sup> In his highlighting of welfare programs, Reagan hailed black women as the ultimate “welfare queens.”<sup>4</sup> You have heard the story, with minute details which differ from region to region: the Black “welfare queen”<sup>5</sup> had a generally lavish lifestyle driving around in her nice new Cadillac never really going anywhere in particular, unless off to pick up her welfare checks (which by the way she had gotten rich on) or to dine on steak and lobster. However, she usually stayed at home watching soap operas like “Days of our Lives,” generating more income by producing baby after baby. She was cunning yet shiftless, clever in her manipulation of the system yet uneducated, and active in her endeavor to con the system yet lazy in her work ethic. All hail the “welfare queen.”

This representation of black women permeated the discourse of welfare reform in the 1980s and later served as an important propaganda image in the social policy switch from welfare to workfare.<sup>6</sup> We needed a reason to reduce resources to the poor and what better way than to use the notoriously lazy black woman as a scapegoat. She was the personal manifestation of a lazy well-fed government that had produced no profits and was the reason for the country’s economic decline. Despite the containment of many black women within the economic status of the *working* poor, black women were painted as the picture of the “welfare queen,”

designated as undeserving and unworthy of any social welfare benefits and as the poster child for the neo-conservative small government, big business movement.

If we move backward to the 1880s at the start of welfare policies in the post Reconstruction Era, we see a completely different standard of compensatory worthiness, but one with almost the exact same policy outcome. Again black women’s identity was not purely defined by a standard of economic poverty but predicated on notions of moral fitness and even conceptions of employability. In this era, for almost the opposite reason, black women were central to the discussion and marginalized from the help of social welfare.<sup>7</sup> However, instead of being heralded as the lazy “welfare queen,” they were marked as despicable, *employable* workers because of their consistent labor during slavery.<sup>8</sup> Unlike white women, who were part of a rising white middle-class that fostered female respectability by relegating women to the domestic sphere and protecting them from public labor, black women were seen as perfect for work and for this reason not eligible for compensation for the very real poverty they faced while working.<sup>9</sup> Under the patriarchal domestic code, “proper” women stayed home and took care of their husbands and children, and if the husband died the state would step in to fill “his” void.<sup>10</sup> Hard-working husbands could earn sufficient money to support their families.<sup>11</sup> Fittingly, this allowed society to deny black mothers the same protection as “proper” mothers who worked in their own homes. Because black women were required to work outside the home, they were excluded from poverty compensation. Moreover, because black women usually worked in white women’s homes they provided the labor to ensure white female respectability.

This history of economic “worthiness,” this revelation, is significant for welfare policy discourse. When black people were stolen from Africa and sold into slavery, the plantation system rarely discriminated between man, woman, old, young, weak or poor.<sup>12</sup> So in that sense the post-slavery argument is consistent; working-class black women have continually been “working mothers” without the protected status of respectable motherhood. Black women have been expected to work. Yet the image of black women has been distorted over the 100 years since the Reconstruction to reinforce normative conclusions that they are unworthy of welfare. During the formative stages of welfare policy-making in the 1880s, black women were thought undeserving of welfare because they were considered inherently employable. By the 1980s, black women were uniformly deemed unworthy of welfare because they were “welfare queens,” lazy by nature and unwilling participants in the labor force. What we rarely think about is the permanent centrality of black female images to welfare

discourse. “She” is consistently deemed to be the negation, the opposite of compensatory worthiness within the poor for contradictory reasons. Importantly, charting the changes in the meaning of black women’s relationship to worthiness and poverty compensation is not a history of their poverty but diagrams the evolution of the rapid transformation and decline of social welfare programs in the United States through a misrepresentation of the black female image.

A social and historical examination of black women’s representation within welfare policy and discourse reveals that social constructions of race and gender have consistently informed welfare reform policies that rationalize inequitable distributions and unrealistic visions of the social world. This paper analyzes the historical, cultural and legal treatments and representations of poor black women from Progressive Era philanthropic aid to early “work-to-welfare” reform protocol. When black women serve as the case study for a larger examination of social policy issues we see that welfare was rarely meant to remedy the structural crunch of poverty. Working class black women have been at the center of the construction of the poor and serve as the designation to determine which people deserve to be compensated for being poor.<sup>13</sup> This paper discusses both the ramifications and rationale of why the government never designated black women as “deserving” poor and the implications of constructed images in the post-reconstruction period, the New Deal Era, the 1960s AFDC agenda, and 1980s welfare to work reform.

## PROGRESSIVE ERA

The Progressive Era historically has been popularly understood as a movement of positive social reform and the rise of the feminist movement.<sup>14</sup> However, the changing socio-economic landscape of turn of the century depression, post-slave economy, and rapid urban-industrialization left many people exposed to the underside of capitalist progress.<sup>15</sup> From this reality emerged a collection of middle class reformers concerned with conceptualizing a more humane relationship between industry and the increasingly poor and largely (im)migrant communities.

The rise of Progressive Era women reformers stood at the center of this formation. These reformers concentrated on improving the conditions of women who were being pushed into the industrial labor force because of poverty resulting from death, divorce or insufficient employment of their male providers. The major thrust of politics and policy urged by these reformers was the protection of women from the travails of a rapidly changing world and the brutal labor market. Progressive Era women reformers stressed reorganization of the family and were instrumental in the establishment of the first social welfare program for women: the “Mothers’ Pensions.”<sup>16</sup> However, if we place black women at the center

of the discussion in this era, the Progressive Movement’s image of “mother,” which relegated her to the domestic sphere, was solely dependent on the labor of black women in the homes of white “mothers.” The construction of social welfare policy that required women to work in their own home excluded black women and exposed the foundations of public welfare policy as inherently racialized and white.<sup>17</sup> The advocates for Mother’s Pension constructed the family along white middle class standards and norms. Entitlement to certain social benefits was predicated on losing a male provider and offered protections only to women who labored in the home. These constructions ran counter to the reality of black family life and the labor demands placed on black women in particular.

The political, economic and social opportunities provided by industrial capitalism during the Progressive Era were stratified along racial lines. The clarion call for progress during this period seemed ironic at best

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*. . . welfare was rarely meant  
to remedy the structural  
crunch of poverty.*

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when considering that this period was also the ostensible nadir of race relations. Black men and women suffered due to persistent acts of racial violence and discrimination at the hands of poor whites, particularly in the South.<sup>18</sup> Further, social welfare reform efforts subjected private relationships within black families to public scrutiny as a pre-condition for alleviating poverty conditions.<sup>19</sup> This is not to suggest that sexual and racial equalities were not part of the Progressive agenda; they just were just secondary concerns. Structural dynamics and changes to the meanings of gender identity made it difficult for black women to meet ideas of what it meant to be a respectable or a decent mother.<sup>20</sup> White women tried to improve their lives and the lives of their families but created and endorsed policies that ignored the particular role black women played as the matriarch of their particular familial experiences. As historian Eileen Boris argues, “though reformers defined motherhood as a positively valued nurturing activity...women of color... had to labor for others and could not fulfill the dictates of ‘true womanhood.’”<sup>21</sup>

A woman’s eligibility for Mother’s Pensions was determined by her moral standing in the community.<sup>22</sup> Progressive reformers were dedicated to serving those who they deemed to have proper morals and worthy character and who deserved assistance due to temporary hardship.<sup>23</sup> Poor *working* mothers were deemed undeserving poor. While many European immigrants could also be excluded by these general guidelines, black women were haunted by images of their slave past. Black women had always been part of the labor market and never protected by the laws of marriage and hence were branded as inherently undeserving and suspected of vice, immorality and intemperance in ways that working class white ethical women were not.<sup>24</sup> Mothers had to be fit and proper and this definition was left to the discretion of local overseers of the relief. Initial Mother’s Pensions regulations required in many states that a woman be a widow and enforced strict yet

ambiguous behavioral standards.<sup>25</sup> What really came out of the Mothers' Pensions was that those white women deemed deserving were helped. Black women were encouraged to organize for their pensions separately, but this was an unrealistic request considering the lack of political and economic power in the hands of the black community.<sup>26</sup> Nonetheless, the National Association of Colored Women (NACW) organized to create better social conditions for black women. Unlike the platforms that endorsed Mothers' Pensions for white women, this organization encouraged women to work to improve the economic conditions of the family and the national reputation of black womanhood.<sup>27</sup>

Lack of economic and political strength was not the only shortcoming black women faced; they also had to deal with the legalized conditions of racism. The highly celebrated achievements of the Progressive Movement co-existed with the Jim Crow Era in the South and its more covert operation in northern cities. In fact, Jim Crow Laws were on the books as early as the 1890s and the policies ran the gamut from more benign legal sanctions on public housing, employment and recreation to the more pernicious forms of racial violence including rapes and lynchings.<sup>28</sup> The *Plessy v. Ferguson*<sup>29</sup> doctrine of "separate but equal" became the formalized manifestation of longstanding white anxieties about black progress. Even in the more liberal North, the segregation of settlement houses and social programs along the lines of race denied that white supremacy was the "peculiar institution" of the South. The most public and spectacular exhibitions of how former slaves were not treated as citizens were the charred bodies and punctured souls that lynching parties left on display. According to historian Jacqueline A. Rouse, the legalized sanctioning of lynching during the Jim Crow Era promoted white supremacy and maintained subordination and intimidation of black people.<sup>30</sup> Under the specter of Jim Crow, most turn of the century social reform was born. This is not to deny the sympathetic supporters and charitable settlement houses set up to assist poor black families in the North, but in the larger scheme of things these supporters were far and few between, specifically in southern communities. Most of the policy-makers were, after all, faithful to a racist ideology that supported racial violence, unequal political and legal systems, and inferior social services. Out of the bondage of slavery most black families were relegated to agricultural and, for women, domestic labor to survive. Racism further hindered the advancement of black people and kept them working in menial jobs.<sup>31</sup> Social welfare policies in particular ignored the role of the black mother and the stratification of labor in the black family.

Black families lived in a world with considerably restricted opportunities and blatant discrimination. During this time period black women were not protected by the Mothers' Pensions and the social welfare benefits because they were considered employable women and they had to support their

families. Most black family members worked as agricultural wage laborers and sharecroppers in the south and low skilled craft workers or domestics in the north. In addition, black men who were hired out into positions which were considered more professional, were not hired for long and therefore black women had to make consistent and substantial contributions to their families.<sup>32</sup> Here, the "undeserving" angle showed its face quite often in the domestic work performed by black women. With the strong expectation of female domesticity, black women were summarily excluded from the benefits of the Mothers' Pensions because they had always worked and were seen as able to work.<sup>33</sup> As an example, the Sheppard-Towner Act,<sup>34</sup> also known as the maternity bill, provided federal funds to states for health and welfare of mothers and infants during maternity.<sup>35</sup>

States were given unfettered discretion as to how they distributed funds.<sup>36</sup> Since racialized notions of motherhood heavily informed this discretion, black women did not receive the same funds as their white counterparts.<sup>37</sup> Hence, the umbrella protections afforded to white women were not afforded to black women. So-called "progress" in this era was stratified along racial lines. While the ensuing Great Depression could have instigated an egalitarian level of compensation because everyone was poor, we find that the distribution of federal money still continued along racial lines.

## NEW DEAL OR RAW DEAL

With the worst stock market crash in history and the Great Depression descending upon the states, thousands of people flooded soup kitchens in urban and rural communities across the nation. Black people, who were already living in poverty, suffered even greater losses from the economic depression. The agricultural collapse in the southern states led to the near destruction of the tenant farming system and severe unemployment for many black families that still toiled on southern land as others had made decisions to leave the South a few years prior. At the same time, black women in the North also began to lose their jobs in exorbitant numbers and were replaced by white women domestics as they were left unshielded by the plight of the Great Depression.<sup>38</sup> In 1932, President Franklin D. Roosevelt promised to provide economic security for all Americans with the "New Deal."<sup>39</sup> The unprecedented economic policy decisions during Roosevelt's "First 100 Days" brought about new agencies and programs. President Roosevelt's New Deal projected to implement ideas from the Progressive Era and consolidate them into a federally sponsored program. Still, the new American welfare state intentionally excluded black families, particularly black women, from access to social welfare benefits under New Deal legislation.<sup>40</sup>

With the rise in the immigrant population, the political controllers were all too delighted to bypass the economic and

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*The new American welfare state intentionally excluded black families, particularly black women, from access to social welfare benefits*

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racial problems of black families. According to historian Michael Brown, there was no need to deal with the “Negro problem” because it was presumed that the New Deal politics would lessen racism by raising the standard of living for all people through social reform.<sup>41</sup> However, under the New Deal administration, social welfare organizations did little to change the quality of life for black people.<sup>42</sup> Although Roosevelt is credited with changing the economic prosperity of the country with various acts and disbursements of money to state politics, it comes at no surprise that there was an increasing and detrimental pattern of inequitable distribution of funds to the black poor.<sup>43</sup> Roosevelt extended social benefits to whites, while discriminatory practices implemented by state agents constructively denied those same benefits to blacks.<sup>44</sup> Unfortunately, black families continued to suffer and were not equally included in Roosevelt’s New Deal for *all* Americans.<sup>45</sup>

Ironically, programs under New Deal legislation began to systematically push black men into unemployment.<sup>46</sup> For example, the National Recovery Administration (NRA)<sup>47</sup> and the Agricultural Adjustment Act (AAA) of 1933<sup>48</sup> were considered to be pivotal in the early stages of “New Deal” policy making.<sup>49</sup> One of the NRA’s major “color-blind” policies was to implement equitable wage standards across all races.<sup>50</sup> However, there was a significant disparity in racialized wage earnings for black workers especially in southern regions.<sup>51</sup> The NRA and the federal government endorsed longstanding regional practices by refusing to enforce national standards of industry and labor. There was little done to control state-to-state disparities and deviations of salaries to black workers. In addition, some southern employers refused to pay black workers as much as white workers on the view that black labor was significantly less efficient than white labor.<sup>52</sup> Further, when employers in southern states were forced to pay whites and blacks equally, they threatened to fire all black employees and replace them with more efficient white employees.<sup>53</sup> Obviously still offended by the government appropriation of their commodified labor,<sup>54</sup> southerners were determined to keep black labor cheap.<sup>55</sup>

Black women fared no better. Although many black women already labored in the market, an increasing number of black women became the sole breadwinners for their families. Because of the scarcity of jobs during the Great Depression, black women were exploited by their domestic employers and were paid very little per week to support their families.<sup>56</sup> In many states, black women were paid the lowest salaries outside of and below NRA’s federal standards.<sup>57</sup> In addition, the NRA refused to include domestic work, agricultural work or common laborers among those who should receive the minimum wage.<sup>58</sup> In the South in particular, black women represented 60 %<sup>59</sup> of the domestic workers corps, and roughly 40 %<sup>60</sup> of the agricultural labor was Black. Refusal to include occupations that were dominated by black labor under NRA precluded

black families from earning wages at any significant rate above poverty.<sup>61</sup>

State-subsidized machinery benefited white landowners by increasing productivity while eliminating the need for black tenant farmers.<sup>62</sup> Thus, agricultural innovations caused the displacement of more black families. Even where black workers remained on white farms, lax enforcement of AAA policies requiring landowners to channel a portion of government crop reduction pay to tenants guaranteed that black tenants were deprived of their share.

The Social Security Act (SSA), which included both old age insurance and public relief, was another example of race-based policy implementation.<sup>63</sup> Seemingly color-blind policies continued to intentionally deny black families access to benefits.<sup>64</sup> The SSA specifically excluded domestic and agricultural workers from receiving benefits upon the loss of a breadwinner.<sup>65</sup> As mentioned previously, these areas of employment were predominately occupied by black workers.<sup>66</sup> The Works Progress Administration (WPA), which concentrated on employment rather than relief, also instituted color-blind policies. However, without the enforcement by the federal government of non-discriminatory practices, black workers were intentionally excluded from access to public jobs in everyday practices.<sup>67</sup> Between 1936 and 1942, black workers were hired for roughly only 15 % of the jobs offered under the WPA.<sup>68</sup> Due to the intentional exclusion of black men from the labor market, black families began to lose their male breadwinners. Most black women were in the labor market, but women who had never worked were also being forced to earn the family wage or apply for public relief. Although New Deal policies endorsed giving welfare benefits to women who headed households, most public relief, which was controlled by local governments, was also predicated on the former domesticity of the women. Because of the legacy of racism and the concentration of black families below the poverty line, many black women had always been in the labor market

well before the New Deal. Therefore, black women continued to be excluded from public relief, social benefits, social security and other forms of welfare because their status as “employable” made them again, undeserving of government help.

The program that could have had the most impact on public relief for black women was the Aid to Dependent Children Act (ADC). ADC was merely an extension of Mother’s Pensions<sup>69</sup> and similarly guided by ideas of the so-called deserving poor. Access to the program was still determined by an ambiguous “suitable home” standard which excluded most needy black families.<sup>70</sup> Further, federal agencies under political pressure from southern states allowed local governments to determine the specific criteria for eligibility. Most southern states were dependent on cheap black labor and very reluctant to create policies that gave black workers access to federal relief.<sup>71</sup> Although later ruled unconstitutional,<sup>72</sup>

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*Access to the program was still determined by an ambiguous “suitable home” standard which excluded most needy black families.*

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minimum residency requirements mandated by local governments also excluded most black migrant workers.<sup>73</sup> Further, many southern states conditioned access to public relief to mothers who had never worked in the labor market, which would exclude most black mothers. Southern states reasoned that black mothers had always worked and asked why anything should change because of this new program.<sup>74</sup> Such restrictive measures left families, and particularly black mothers, in a state of significant poverty and despair.<sup>75</sup>

Access to benefits under new nationalized welfare policies was structurally distinguished by race and gender, attaching welfare benefits to socially constructed notions of what qualifies as a traditional family organization. Family (dis)organization determined what relationship, if any, a family could have to the American welfare state.<sup>76</sup> Because of various acts that caused displacement among black families during the Great Depression, there was a high proportion of female-headed households.<sup>77</sup> In the North, a reported 30 % of black families were headed by single, divorced or widowed women.<sup>78</sup> The ease with which New Deal policies excluded much of the black male labor force from social insurance created a legal barrier that was greater for black women than for similarly-situated white women. For instance, rising out of poverty was more difficult for black women than their white counterparts because New Deal policies extended to similarly-situated white women where the husband was unemployed or dead. This is especially true where black men suffered from unemployability. Welfare policies distinguished among households based on how they became female-headed—whether by death, divorce, abandonment, or single motherhood, for example—so black families and images of black womanhood became the focus of public scrutiny and outcry.<sup>79</sup> New Deal programs therefore failed to protect black women in two ways: as capable mothers and as capable workers.<sup>80</sup>

As black communities were further consolidated into urban ghettos after World War II, black female-headed households would finally come under the umbrella of state aid. However, these very inclusions were predicated on the fortifications of false theories about black family deviance and dependency in female-headed homes in particular.<sup>81</sup> Ideas derived from the infamous *Moynihan Report*<sup>82</sup> and the urban application of the “culture of poverty” theory would hide an entire history of white working class social mobility that had been predicated on state and private aid. The misrepresentation of black deviance and the masking of white dependency signaled the beginning of the end for welfare in America.

#### AID TO SOME FAMILIES WITH DEPENDENT CHILDREN

The postwar 1950s and 60s witnessed racial clashes and increasing ghetto unrest. State and local government-

assisted programs under-served the black community and solidified the place of black families at the bottom of a racist regime. Black families continued to be moved to substandard housing complexes and were relegated to the worst health care facilities in the country. The result of the end of World War II led to immense poverty due in large part to displacement

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deemed inherently undeserving, they  
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of women and black workers when white soldiers returned. Changes in the structure of the so-called nuclear family became evident particularly in poorer communities. For example, in 1950 approximately a quarter of the population of black mothers were separated, divorced or widowed.<sup>83</sup> Children living

in one-parent households in the black community rose from roughly 22 % to 32 % in ten years.<sup>84</sup> Although the rise in single parent income could represent the increase in the number of black mothers on AFDC, this rationalization ignores the reality of the social, economic and political plight of black families. Several presidential administrations have tampered with the American welfare state. Unfortunately, the impact of this haphazard effort at reform has been very detrimental to single-parent households headed by black women. In particular, the expansion of the American welfare state to include single black mothers created a cultural backlash motivated by racism and sexism and opened the door to what President Clinton called “the end of welfare as we know it.”<sup>85</sup>

The previously mentioned Aid to Dependent Children Act (ADC)<sup>86</sup> originated in the Social Security Act of 1935 but has its historic foundation in the Progressive Era as a remnant of Mothers’ Pensions.<sup>87</sup> Similar to Mothers’ Pensions, ADC was originally intended to continue to allow *deserving* mothers to stay at home with their children while receiving public assistance. Most ADC programs provided benefits to families who lost a male breadwinner due to death, abandonment or unemployment. Conceptually, the structural problem with the early foundations for this program was the continual role of an ambiguously defined notion of worthiness. Because black women were deemed inherently *undeserving*, they were subjected to benign neglect by state and national governments.<sup>88</sup>

In 1950, a series of changes to ADC occurred, including a name change to Aid to Families with Dependent Children (AFDC).<sup>89</sup> Like its predecessor, AFDC continued to offer cash assistance to the *deserving poor*. State and local governments controlled the administration and eligibility requirements for relief. Particularly in southern states, restrictive eligibility requirements continued to exclude black mothers from relief. For example, the infamous “man in the house” rule allowed states to remove benefits from black mothers who had a male (not son) living in the home.<sup>90</sup> Likewise, the “employable” standard required all black mothers to work unless they were handicapped or sick.<sup>91</sup>

After a series of liberal amendments in the 1960s, the number of AFDC beneficiaries began to increase dramatically and more poor single black mothers gained access

to the program's benefits.<sup>92</sup> From 1960 to 1970 there were approximately 5 million people receiving public assistance, five times more people than were on the welfare rolls between 1950 and 1960.<sup>93</sup> With increasing caseloads and changes in the racial composition of recipients, AFDC came under severe political attack followed by a profound resentment of this program and the poor.<sup>94</sup> The many reasons for this backlash include the simple fact of the increased legions of poor citizens receiving public relief from taxpayers.<sup>95</sup>

Another reason for the immense backlash, particularly against black mothers, was the notorious report authored by the Assistant Labor Secretary (and future Senator) Daniel Moynihan. Moynihan suggested that the economic conditions of the black family resulted from their deviation from American family norms.<sup>96</sup> The reason for the terrible plight of the black family was that most black males had a significantly high rate of unemployment and therefore could not be adequate breadwinners for their families.<sup>97</sup> This in turn produced a significant surge in unsupported illegitimate children among black families, an increase in female-headed households and a cultural dependency on welfare by black women and children.<sup>98</sup> So, not only was the taxpayer's money being used to support a huge population, it was being used to support a huge "Negro" population. Moynihan's report grossly mischaracterized black families in general and black mothers in particular. All demographic metrics upon which Moynihan relied ignored the historical legacy of systemic and intergenerational racism that produced the high unemployment rates observed today. State and societal discrimination, not inherent deficiencies, is a driving contributor to black poverty. Thus, Moynihan justifies state indifference to poverty by ignoring historical context and places blame squarely upon the poor for their poverty.

Lastly, the emerging "culture of poverty" theory, combined with the pre-existing *Moynihan Report*, explicitly racialized and gendered the category of poverty as black and female. The "culture of poverty" theory posited that economic inequality was not an issue of larger social forces but a product of deviant cultural behaviors antithetical to delayed gratification, economic modesty and productive labor; while the characteristics of economic dependency would be passed on through the generations.<sup>99</sup> Unfortunately, this theory became largely associated with black female-headed households. This in turn reinforced a pre-existing suspicion of the black community. Welfare, once associated with deserving white women, became despised as a relief program for allegedly lazy, poor black women.

As a product of these political and academic investigations, voices shouted to dismantle the American welfare state and *lynch* the "welfare queen."<sup>100</sup> Simultaneously, state aid was beginning to be stripped away from black communities and redistributed to white suburban communities. Industrial factories were encouraged to leave urban centers for

lower property taxes. This pulled the rug out from under the socio-economic infrastructure of central cities and instigated the rise of what we now call "the ghetto." Mythical binary oppositions of group dependence versus individual will and suburbanization versus ghettoization obscured the history of state funding for other immigrant and regional communities in their transition from ethnic European to white.<sup>101</sup>

The commitment to engage in the "War on Poverty" during the Johnson administration had lost its zeal by the time California's Hollywood screen star turned governor took office. The Reagan Administration's use of the "welfare queen" image fabricated and reinforced images of criminal and sexually promiscuous black women.<sup>102</sup> This successful misinformation campaign framed the national welfare conversation, and the public began to oppose welfare programs, fearing that high assistance payments reinforced the cycle of poverty and ensured long-term dependency. The Reagan Administration promulgated policies based on these welfare fabrications by significantly cutting benefits, under-funding childcare and job-training facilities, and creating legal barriers for poor women to gain access to public assistance.<sup>103</sup> Unfortunately, the effects of these policies outlasted the Reagan era. Reagan simply paved the path for the decadent decline of federal cash assistance for the poor and the push of under-skilled and under-supported black women into a labor market that did not even exist (no jobs or benefits).

## A WOMAN'S WORK IS NEVER DONE

Although Reagan succeeded in creating a negative image of welfare and limited the coverage for both working and non-working poor, some cash assistance was still available before the 1990s welfare reform agenda. By 1987, Congress was ready to take up the issue of welfare reform and passed the Family Support Act (FSA) the next year. The FSA aimed to assist middle-class white mothers with young children

who were entering the labor force. This focus gave states the flexibility to require those poor mothers who were receiving benefits to also work.<sup>104</sup> Despite the Reagan Administration's significant cuts and stringent guidelines, the number of poor people on AFDC climbed 30 % between 1989 and

1994, with a significant rise in the single black household demographic.<sup>105</sup> Ironically, it was during the ostensibly more liberal Clinton Administration that policies of welfare would be central to discussions about governmental reforms and cutbacks. Despite images of a hip saxophone-playing Clinton, the so-called "first black president," Clinton's policies proved that he was no stranger to welfare reform<sup>106</sup> and no friend to poor black women. Clinton put welfare back on the agenda by deploying slogans such as "ending welfare as we know it" and "making work pay."<sup>107</sup> The focus of these debates, pulled from the *Moynihan Report* discourse, quickly turned to eliminating

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*the emerging "culture of poverty" theory . . . explicitly racialized and gendered the category of poverty as black and female*

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welfare and stopping the reported cycle of dependency among the poor that was fueled by illegitimate births. At the same time, the birth rate for unwed black mothers was 70%.<sup>108</sup> False images of single black female-headed households galvanized a political backlash, and black women became the symbol for eliminating public assistance and “ending welfare as we know it.”

Following Reagan’s lead, media images continued to condemn black mothers as lazy “welfare queens” when they stayed home with their children, while simultaneously praising white mothers as good “soccer moms” for staying home with their children.<sup>109</sup> As political scientist Holloway Sparks correctly notes, “[t]he portrayal of poor women of color—and particularly African American women—as abusers of the system, immoral... and [dependent] essentially destroyed their ability to appear as legitimate and authoritative participants in the democratic deliberations about welfare.”<sup>110</sup> By portraying public assistance as solely benefiting undeserving black mothers, this scrutiny reinforced public policies relating to welfare reform, emphasized race and class-based stereotypes related to women and work, and maintained traditional black-white dichotomies.<sup>111</sup>

Public policy makers stressed eliminating welfare because it reportedly promoted inter-generational dependency.<sup>112</sup> This policy painted a picture of welfare recipients who were poor, black, and female. Strikingly, lack of employment opportunities, racism, or any other form of social inequity did not enter into the discourse as possible variables for poor, black women’s place on welfare.<sup>113</sup> But laziness, irresponsibility, and lack of a “strong work ethic” were assigned as reasons that kept black women on the roll.<sup>114</sup> Recall that, a little over 100 years earlier, the image of poor black women was not one of laziness but of women who had always worked and therefore could always work. But, when faced with the idea that the once lily white face of welfare was becoming black, the discourse to eliminate welfare quickly turned to negative images of black mothers as lazy and dependent. Missing from the discourse is any acknowledgement of the fact that, when they decided to enter the workforce, white women were well-equipped for a society that had progressed from a primarily industrial era to an information technology era. Business management, computer literacy, administrative assistance, and other types of skills and education were available to white women. Such training was unattainable by the working black poor during the industrial era but was needed as economic relations began to transform. Lacking transitional skills, black families were forced onto welfare and were seen as resistant to work, as opposed to unable to attain work or qualifying skills.<sup>115</sup>

Against this backdrop, the Clinton Administration signed the Personal Responsibility and Work Opportunity Act (welfare reform), which abolished the federal guarantee of welfare cash to poor families with dependent children in 1996.<sup>116</sup> The federal government also created the Temporary Assistance for Needy Families Act (TANF),<sup>117</sup> which placed

deadlines on how long a family could receive public assistance.<sup>118</sup> This program came out of the need for the government to reduce the amount of cash assistance to black poor mothers and, according to political scientist Richard Fording, it “represent[ed] a more punitive and restrictive approach to public assistance.”<sup>119</sup> However, the agenda under Clinton was more covert in its target of black women than was Reagan’s “welfare queen” agenda, by focusing on studies and reported “statistical” data that showed that black children lived in more single-headed households and by using color-blind terms such as illegitimacy instead of “black welfare queen” images.<sup>120</sup> At the same time, senators and representatives further portrayed images of the undeserving welfare mothers as cheaters of the system, robbing taxpayers of their money, child abusers, drug addicts and the cause of poverty.<sup>121</sup> Welfare mothers were also seen as amoral characters because they refused to get married and be supported by the male breadwinner.<sup>122</sup> It is under these images that the welfare debate galvanized a hostile environment aimed at poor black mothers. These policies were shaped by views of black women because, at this point, when the term “welfare recipient” was discussed, a caricatured image of deviant black womanhood was firmly etched in the national imagination.<sup>123</sup> Therefore, welfare policy reflected a sentiment that black mothers needed “tough love” and that eliminating welfare was the only way to discipline and instruct their behavior because they would continue to depend on welfare if left to themselves. Welfare reform, and TANF in particular, paternalistically imposed discipline and accountability that came in the form of state-imposed time limits, which eliminated benefits to black mothers after a certain date.<sup>124</sup>

## CONCLUSION

It would be inconceivable to believe that a society that stratifies basic living conditions along racial lines would not stratify access to public assistance along those very lines. Indeed, from Progressive Era philanthropic aid to early work-to-welfare reform, misrepresentations of black women have resulted in their disparate treatment. During the Progressive Era, poor black women were undeserving because entitlement to certain social benefits was predicated on losing a male provider and offered protections only to women who labored in the home. Further, only mothers who were considered of a “worthy” character, were suffering from temporary hardship, and were “deserving” mothers would be eligible for aid.<sup>125</sup> Progressive reformers deemed poor black *working* mothers as undeserving poor, thus denying them aid. During the New Deal era, black women continued to be excluded from benefits. Access to benefits under the new American welfare state depended on how society defined the traditional family organization, and these definitions were structurally distinguished by race and gender. The idea that the American family included the breadwinning father, the stay home mother, and numerous children guided most welfare policy designs.<sup>126</sup> This social construction of

the family ran counter to the realities of black families and the labor demands on black women in particular. During the transformation of ADC to AFDC, the number of poor single black mothers on welfare increased. Significant shifts in policy suggested that black women were now undeserving because of a distinct deviant cultural behavior that encouraged immediate gratification, irresponsible financial management, and a refusal to engage in productive labor. Simply put, black women are constructed as lazy, dependent “welfare queens.” Based on these representations from the welfare reform agenda of the 1880s to the 1990s, a political backlash galvanized against black women, who became the symbol for eliminating public assistance and “ending welfare as we know it.” Scholars have predicted that policies adopted by states under TANF with regard to poor, black mothers will continue to be tough and result in punitive rules and conditions.<sup>127</sup> Finally, we cannot continue to construct welfare policy that focuses more on the misrepresentations of black women than on the structural inequalities that affect everyone. If we continue in this manner, there will forever be an unbreachable chasm between the socio-economic realities of all Americans and the terms on which we decide to further marginalize those very Americans for being poor.

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## Endnotes

<sup>1</sup> Bridgette Baldwin is an Associate Professor of Law at Western New England College School of Law. I would like to thank Martha Davis for her insightful comments and helpful criticism on earlier drafts of this essay. I greatly appreciate helpful insights from my colleagues, Erin Buzuvis, Jennifer Levi and Sudha Setty. Additionally, I would like to thank Dean Gaudio for the generous grant he provided so that I could conduct research. Finally, a very special “thank you” to Davarian Baldwin for numerous draft readings.

<sup>2</sup> Patricia J. Williams, *My Best White Friend: Cinderella Revisited*, 19 CALLALOO 809, 812 (1996).

<sup>3</sup> See Otis B. Grant, *President Ronald Reagan and the African-American Community: Harmful Stereotyping and Games of Choice in Market-Oriented Policy Reform*, 25 T.M. COOLEY L. REV. 57, 86 (2008).

<sup>4</sup> See *Welfare Queen Becomes Issue in Reagan Campaign*, N.Y. TIMES, Feb. 15, 1976, at 51 (Ronald Reagan used the story of Linda Taylor of Chicago, who was indicted for using four different aliases and collecting approximately \$8,000 as a platform for the welfare queen caricature. In Reagan’s version, she used 80 aliases, had 30 addresses and 12 social security numbers.).

<sup>5</sup> Nancy J. Hirschmann, *A Question of Freedom, A Question of Rights? Women and Welfare*, WOMEN AND WELFARE: THEORY AND PRACTICE IN THE UNITED STATES AND EUROPE 89, 97 (Nancy J. Hirschmann and Ulrike Liebert eds., 2001).

<sup>6</sup> See Otis B. Grant, *President Ronald Reagan and the African-American Community: Harmful Stereotyping and Games of Choice in Market-Oriented Policy Reform*, 25 T.M. COOLEY L. REV. 57, 76 (2008); Rosalee A. Clawson & Rakuya Trice, *Poverty As We Know It: Media Portrayals of the Poor*, 64 PUB. OP. Q. 53, 53-64 (2000); Franklin D. Gilliam, *The “Welfare Queen” Experiment*, 53 NIEMAN REP. 49, 49-52 (Summer 1999); Wahneema

Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative*, in RACE-ING JUSTICE, EN-GENDERING POWER 323, 323-63 (Toni Morrison ed., 1992); see generally ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* (2000) (Entman and Rojecki argue that white Americans learn about black Americans through how they are portrayed by the media which subtly suggest that there is a racial hierarchy with white Americans at the top.); MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* (1999) (Gilens argues that white Americans oppose welfare because this program has predominately portrayed the recipients as lazy, shiftless and black. Ultimately what he concludes lies at the root of this opposition is media portrayed racial stereotypes.); ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* (2004); Kenneth J. Neubeck & Noel A. Cazenave, *Welfare Racism: Playing the Race Card Against America’s Poor* (2001) (Neubeck and Cazenave offer an examination of the ways in which racist attitudes have intersected with administrative policies and practices to undermine how public assistance programs have been instituted); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* (1997) (Roberts offers an examination of the history of how the government has controlled the reproductive rights of African American women.).

<sup>7</sup> See JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* 20 - 21 (1994).

<sup>8</sup> JOANNE L. GOODWIN, *GENDER AND THE POLITICS OF WELFARE REFORM: MOTHER’S PENSIONS IN CHICAGO, 1911 – 1929*, at 8, 23 (1997).

<sup>9</sup> Kathleen M. Keller, *Federalizing Social Welfare in a World of Gender Difference: A History of Women’s Work in New Deal Policy*, 8 S. CAL. REV. L. & WOMEN’S STUD. 145, 168 – 169 (1999).

<sup>10</sup> JOEL F. HANDLER & YEHESKEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY, AND WELFARE* 27 (1997).

<sup>11</sup> *Id.*

<sup>12</sup> See HORTENSE J. SPILLERS, *Mama’s Baby, Papa’s Maybe: An American Grammar Book*, Angelyn Mitchell, Ed. WITHIN THE CIRCLE: AN ANTHOLOGY OF AFRICAN AMERICAN LITERARY CRITICISM FROM HARLEM RENAISSANCE TO THE PRESENT 454 - 481 (1994).

<sup>13</sup> Gwendolyn Mink, *Violating Women: Rights Abuses in the Welfare Police State*, 577 ANNALS AM. ACAD. POL. & SOC. SCI. 79, 82, 2001.

<sup>14</sup> See *Progressivism and the Negro: New York 1900 – 1915*, AMERICAN QUART. 16.2, 153 – 168 (1964).

<sup>15</sup> David E. Bernstein & Thomas C. Leonard, *Show me the Money: Making Markets in Forbidden Exchange: Excluding Unfit Workers: Social Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 LAW & CONTEMP. PROBS. 177, 177 (Summer 2009) (arguing that the legislation developed during this time period was designed to exclude not only African Americans, but also women and immigrants).

<sup>16</sup> Eileen Boris, *Reconstructing the “Family”: Women, Progressive Reform, and the Problem of Social Control*, in GENDER, CLASS, RACE, AND REFORM IN THE PROGRESSIVE ERA 73, 73, 78 (Noralee Frankel & Nancy S. Dye eds., 1991); See also Theda Skocpol, *African Americans in US Social Policy*, in CLASSIFYING BY RACE 129, 131-32 (Paul Peterson ed., 1995).

<sup>17</sup> See SKOCPOL, *supra* note 15, at 139 (arguing that black mothers were excluded from “mother’s pension” benefits because there wasn’t enough money to support the program and not simply because of racism).

<sup>18</sup> JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK AND THE FAMILY FROM SLAVERY TO THE PRESENT* 147 – 151 (1986).

<sup>19</sup> Boris, in GENDER, CLASS, RACE, AND REFORM IN THE PROGRESSIVE ERA, *supra* note 15, at 73, 73.

<sup>20</sup> EVELYN BROOKS HIGGINBOTHAM, *RIGHTEOUS DISCONTENT: THE WOMEN'S MOVEMENT IN THE BLACK BAPTIST CHURCH, 1880 – 1920*, at 189 – 190 (1993) (noting that negative images of black women as compared to white women were more glaring than negative images of black men compared to white men. “Black womanhood and white womanhood were represented with diametrically opposed sexualities... ‘Negro women evidence more nearly the popular idea of total depravity than the men do...When a man’s mother, wife and daughters are all immoral women, there is no room in his fallen nature for the aspiration of honor and virtue...I cannot imagine such a creation as a virtuous black woman’”).

<sup>21</sup> Boris, in GENDER, CLASS, RACE, AND REFORM IN THE PROGRESSIVE ERA, *supra* note 15, at 73, 81.

<sup>22</sup> GOODWIN, *supra* note 7, at 7; *see* MOTHERS OF A NEW WORLD: MATERNALIST POLITICS AND THE ORIGINS OF WELFARE STATES 2 (Seth Koven & Sonya Michel eds., 1993); MOLLY LADD-TAYLOR, *MOTHER- WORK: WOMEN, CHILD WELFARE, AND THE STATE, 1890 – 1930* (1994); D. E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER SOC. POL’Y & L. 1 (1993) (Roberts article explores how racism and patriarchy interact to socially construct images of motherhood.).

<sup>23</sup> HANDLER & HASENFELD, *supra* note 9, at 28.

<sup>24</sup> *Id.* at 27; *see also*, HIGGINBOTHAM, *supra* note 19, at 190 - 191.

<sup>25</sup> MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA*, Tenth Edition, (New York: Basic Books, 1996), 133.

<sup>26</sup> GOODWIN, *supra* note 7, at 31.

<sup>27</sup> *Id.* at 31–36; On the NACW and the larger “politics of respectability” *see*, HIGGINBOTHAM, *supra* note 19, at 206-07; VICTORIA WOLCOTT, *REMAKING RESPECTABILITY: AFRICAN AMERICAN WOMEN IN INTERWAR DETROIT* 207 - 240 (2000); GLENDA GILMORE, *GENDER and JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896 – 1920* (1996) (Gilmore discusses the successful attempt of African American women in the Jim Crow South to forge ties with white women and engage in political activism.).

<sup>28</sup> *See* Jacqueline A. Rouse, *Atlanta’s African-American Women’s Attack on Segregation 1900-1920*, in GENDER, CLASS, RACE, AND REFORM IN THE PROGRESSIVE ERA, *supra* note 15, at 10, 10 (explaining that Atlanta had instituted Jim Crow laws as early as 1890 which separated the city into distinct white and black areas).

<sup>29</sup> 163 U.S. 537 (1896).

<sup>30</sup> *See*, Rouse, 12.

<sup>31</sup> *See* Bernstein & Leonard, *supra* note 14, at 191 - 194 (explaining the example of the Davis-Bacon Act of 1931, a seemingly neutral law that essentially banned African Americans from working on federal construction projects by requiring preference for white workers and characterizing black labor as “cheap bootleg labor”).

<sup>32</sup> *See* DEBORAH GRAY WHITE, *AR’N’T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH* 163 (1985).

<sup>33</sup> *See* GOODWIN, *supra* note 7, at 8, 23 (leading to the inference that they had proven their employability during slavery).

<sup>34</sup> Stanley J. Lemons, *The Sheppard-Towner Act: Progressivism in the 1920s*, 55 J. AM. HIST. 776 (1969).

<sup>35</sup> *See* SKOCPOL, *supra* note 15, at 131.

<sup>36</sup> DOROTHY MCBRIDE STETSON, *WOMEN’S RIGHTS IN THE U.S.A.: POLICY DEBATES AND GENDER ROLES* 262 (2d ed. 1997).

<sup>37</sup> *See* Louis L. Athey, *Florence Kelley and the Quest for Negro Equality*, LVI J. OF NEGRO HIST. 249, 255 (1971).

<sup>38</sup> MICHAEL K. BROWN, *RACE, MONEY, AND THE AMERICAN WELFARE STATE* 69 (1999).

<sup>39</sup> *See* SKOCPOL, *supra* note 15, at 132-3.

<sup>40</sup> *See* QUADAGNO, *supra* note 6.

<sup>41</sup> BROWN, *supra* note 37, at 64.

<sup>42</sup> *Id.*; *See also* QUADAGNO, *supra* note 6.

<sup>43</sup> Athey, *supra* note 36, at 253.

<sup>44</sup> BROWN, *supra* note 37, at 64.

<sup>45</sup> JACQUELINE JONES, *THE DISPOSSESSED: AMERICA’S UNDERCLASSES FROM THE CIVIL WAR TO THE PRESENT* 188 (1992); Walter I. Trattner, *FROM POOR LAWS TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 257 (1989)..

<sup>46</sup> *See generally* BROWN, *supra* note 37.

<sup>47</sup> In *Schechter Poultry Corp v. United States*, the Supreme Court held that the NRA was unconstitutional because it delegated impermissible legislative powers, which violated the separation of powers under the United States Constitution. 295 U.S. 495 (1935).

<sup>48</sup> Pub. L. 73 – 10, enacted May 12, 1933. In *United States v. Butler*, this act was held unconstitutional because the tax provision violated the Tenth Amendment. 297 U.S. 1 (1936). Subsequently, Congress enacted the Agricultural Adjustment Act of 1938 to remedy the unconstitutional provision.

<sup>49</sup> Theda Skocpol & Kenneth Finegold, *State Capacity and Economic Intervention in Early New Deal*, 97 POL. SCI. Q. 255, 255-56 (1982).

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

<sup>51</sup> Bernstein & Leonard, *supra* note 14, at 196-200.

<sup>52</sup> *See* Bernstein & Leonard, *supra* note 14, at 195 - 196.

<sup>53</sup> *See*, JONES, *supra* note 17, at 210 – 211.

<sup>54</sup> Slave labor of course.

<sup>55</sup> Bernstein & Leonard, *supra* note 14, at 197, 199 (noting that southern states objected to the minimum wage requirement of the Fair Labor Standards Act. Within two weeks of its ratification, African Americans were systematically terminated and replaced by white workers).

<sup>56</sup> *AFRICAN AMERICANS IN THE INDUSTRIAL AGE: A DOCUMENTARY HISTORY 1915–1945* 170-71 (Joe W. Trotter and Earl Lewis eds., 1996)..

<sup>57</sup> *See* PATRICIA SULLIVAN, *DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA* 50 (1996) (including the example that at the Maid-Well Garment Company in Arkansas, approximately 50% of the women employed were black. The company was required to pay wages of \$12 a week under the cotton code but black women received wages of \$6.16. When the black women complained, Maid-Well fired all of its black employees).

<sup>58</sup> *AFRICAN AMERICANS IN THE INDUSTRIAL AGE: A DOCUMENTARY HISTORY 1915–1945*, *supra* note 55, at 172.

<sup>59</sup> Jessie Carney Smith and Carrell Peterson Horton, Eds, “Occupations of Person Employed by Gender 1940, 1960, 1970,” Table 1299. *Historical Statistics of Black America: Agriculture to Labor and Employment, Vol. 1*, (New York: Gale Research Inc. 1995), 1089.

<sup>60</sup> Smith and Horton, “Number/Percent: Employment in Agriculture in the United States and the South 1940 – 1950,” Table 143: 115.

<sup>61</sup> Bernstein & Leonard, *supra* note 14, at 197 (noting that approximately 500,000 African Americans lost employment during the brief implementation of the NRA).

<sup>62</sup> JONES, *supra* note 44, at 217; *See also* Bernstein & Leonard, *supra* note 14, at 198 - 199.

<sup>63</sup> Gareth Davies & Martha Derthick, *Race and Social Welfare Policy: The Social Security Act of 1935*, 112 POL. SCI. Q. 217 (1997).

<sup>64</sup> ROBERT C. LIEBERMAN, *Race and the Organization of Welfare Policy*, in

CLASSIFYING BY RACE *supra* note 15, at 169 -176.

<sup>65</sup> JONES, *supra* note 44, at 171; LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890 – 1935 5 (1994); *see* MARY POOLE, THE SEGREGATED ORIGINS OF SOCIAL SECURITY: AFRICAN AMERICANS AND THE WELFARE STATE 20 (2006).

<sup>66</sup> U.S. BUREAU OF CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: 1789 – 1945 25, 63 (1949) (indicating that approximately 20% of African Americans were employed as agricultural workers while representing about 10% of the population); *see* SKOCPOL, *supra* note 15, at 142 (noting that within the field of domestic work and agricultural employment, African Americans made up two-thirds of the employees).

<sup>67</sup> AFRICAN AMERICANS IN THE INDUSTRIAL AGE: A DOCUMENTARY HISTORY 1915–1945, *supra* note 55, at 173.

<sup>68</sup> Smith and Horton, “WPA 1936 – 1942,” Table 1260: 1046. By way of example, the 1931 Urban League report claimed that African Americans constituted about 17% of the population but provided 34% of the people on relief. Similar rates were also reported for Akron, Des Moines, Houston and St. Louis. *See* IRVING BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER 1920 – 1933 318 (1960).

<sup>69</sup> GORDON, *supra* note 64, at 267.

<sup>70</sup> GORDON, *supra* note 64, at 275-76; *see generally* JENNIFER MITTELSTADT, FROM WELFARE TO WORKFARE: THE UNINTENDED CONSEQUENCES OF LIBERAL REFORM 1945–1965 (2005) (Mittelstadt argues that gendered and racialized assumptions about the poor moved the welfare program from an income support program for the poor to a paternalistic system of moral reform.)

<sup>71</sup> GORDON, *supra* note 64, at 275.

<sup>72</sup> *See*, Shapiro v. Thompson, 394 U.S. 618 (1969); King v. Smith, 392 U.S. 309 (1968).

<sup>73</sup> GORDON, *supra* note 64, at 275.

<sup>74</sup> *See* GORDON, *supra* note 64, at 276.

<sup>75</sup> Until they were struck down in 1960s.

<sup>76</sup> BROWN, *supra* note 37, at 92.

<sup>77</sup> JONES, *supra* note 44, at 218.

<sup>78</sup> E. Franklin Frazier, *Some Effects of The Depression on the Negro in Northern Cities*, 2 SCIENCE AND SOCIETY 489, 494 (1938).

<sup>79</sup> BROWN, *supra* note 37, at 90–91.

<sup>80</sup> BROWN, *supra* note 37, at 325.

<sup>81</sup> Linda Gordon, *Black and White Visions of Welfare: Women Welfare Activism, 1890 – 1945*, 78 J. AM. HIST. 559 (1991).

<sup>82</sup> Mink, *supra* note 12, at 83.

<sup>83</sup> JONES, *supra* note 17, at 263.

<sup>84</sup> R. KENT WEAVER, ENDING WELFARE AS WE KNOW IT 55 (2000).

<sup>85</sup> *See* SKOCPOL, *supra* note 15, at 147.

<sup>86</sup> STETSON, *supra* note 35, at 340.

<sup>87</sup> *See* SKOCPOL, *supra* note 15, at 148-49.

<sup>88</sup> *See* Michael K. Brown, *Ghettos, Fiscal Federalism, and Welfare Reform*, in RACE AND THE POLITICS OF WELFARE REFORM 47, 48-49 (Sanford F. Schram et al. eds., 2003).

<sup>89</sup> JONES, *supra* note 17, at 263; STETSON, *supra* note 35, at 340.

<sup>90</sup> *King v. Smith*, 392 U.S. 309 (1968); JONES, *supra* note 17, at 263; STETSON, *supra* note 35, at 341.

<sup>91</sup> JONES, *supra* note 17, at 263.

<sup>92</sup> GORDON, *supra* note 64, at 5.

<sup>93</sup> Trattner, *supra* note 44, at 286.

<sup>94</sup> Trattner, *supra* note 44, at 264; *see also* SKOCPOL, *supra* note 15, at 147.

<sup>95</sup> *See* SKOCPOL, *supra* note 15, at 148.

<sup>96</sup> US Department of Labor, Office of Policy Planning and Research, *The Negro Family: The Case for National Action* 29 (1965), reprinted in LEE RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 75 (1967).

<sup>97</sup> *Id.* at 65.

<sup>98</sup> *Id.* at 58-59; *See also* BROWN, *supra* note 37, at 93.

<sup>99</sup> *See generally* OSCAR LEWIS, FIVE FAMILIES: MEXICAN CASE STUDIES IN THE CULTURE OF POVERTY (1959) (expounding for the first time on the culture of poverty theory); THE UNDERCLASS QUESTION (Bill E. Lawson ed., Temple University Press 1992) (including a survey of the larger debates and their racialized implications).

<sup>100</sup> *See* STETSON, *supra* note 35, at 343.

<sup>101</sup> *See* BROWN, *supra* note 37, at 335; *see also* ARNOLD HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940 – 1960 259 - 275 (1998); THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 199 - 207 (2005); ROBERT SELF, AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND 215 - 327 (2005). On the whiteness of public policy and metropolitan development, *see* IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN 20<sup>TH</sup> CENTURY AMERICAN (2006) (Katznelson argues that social programs of the New Deal discriminated against African Americans and created an even bigger disparity in wages, housing, employment opportunities and education along racial lines); LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT 12 - 17 (2001); GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS (1998) (Lipsitz argues that race neutral policies, such as the Federal Housing Act, steered money towards “white only” communities and away from communities of color.).

<sup>102</sup> John O’Connor, *US Social Welfare Policy: The Reagan Record and Legacy*, 27 J. SOC. POL’Y 37, 56 (1998).

<sup>103</sup> WEAVER, *supra* note 84, at 66.

<sup>104</sup> WEAVER, *supra* note 84, at 68, 75.

<sup>105</sup> WEAVER, *supra* note 84, at 103.

<sup>106</sup> He co-chaired the National Governor’s Association Task Force, which had originally advocated for welfare reform in the FSA in 1988.

<sup>107</sup> WEAVER, *supra* note 84, at 127; STETSON, *supra* note 35, at 345.

<sup>108</sup> WEAVER, *supra* note 84, at 103.

<sup>109</sup> *See* Jacqueline Jones, *Race and Gender in Modern America*, 26. 1 REV. IN AM. HIST. 220, 234 (1998).

<sup>110</sup> Holloway Sparks, *Queens, Teens, and Model Mothers*, in RACE AND THE POLITICS OF WELFARE REFORM, 171, 172.

<sup>111</sup> Jones, *supra* note 109.

<sup>112</sup> Holloway Sparks, *Queens, Teens, and Model Mothers*, in RACE AND THE POLITICS OF WELFARE REFORM, *supra* note 110, at 171, 178; *see also* MARY JO BANE & DAVID T. ELLWOOD, WELFARE REALITIES: FROM RHETORIC TO REFORM 67 - 123 (1994).

<sup>113</sup> Brown, *supra* note 88, at 47-71.

<sup>114</sup> Holloway Sparks, *Queens, Teens, and Model Mothers*, in RACE AND THE POLITICS OF WELFARE REFORM, *supra* note 110, at 171, 178; Richard C. Fording, “Laboratories of Democracy” or *Symbolic Politics* in RACE AND THE POLITICS OF WELFARE REFORM 72, 78.

<sup>115</sup> *See* Brown, *supra* note 88, at 61.

<sup>116</sup> Signed into law by President Bill Clinton on 8/22/96. U.S. Public Law 104–193. (104<sup>th</sup> Congress) 22 Aug. 1996. Personal Responsibility and Work Opportunity Reconciliation Act.

<sup>117</sup> Public Law (104 – 193) Title I, sec. 408(a)(2).

<sup>118</sup> Joe Soss, Sanford F. Schram, Thomas P. Vartanian & Erin O’Brien,

*The Hardline and the Color Line: Race, Welfare, and the Roots of Get-Tough Reform*, in RACE AND THE POLITICS OF WELFARE REFORM 225 (Sanford F. Schram, Joe Soss & Richard Fording eds., 2003).

<sup>119</sup> Richard C. Fording, "Laboratories of Democracy" or Symbolic Politics in RACE AND THE POLITICS OF WELFARE REFORM 72 (Sanford F. Schram, Joe Soss & Richard Fording eds., 2003); see also, Mink, *supra* note 12, at 80.

<sup>120</sup> See Mink, *supra* note 12, at 84-86; see also GWENDOLYN MINK, WELFARE'S END (1998) (Mink argues that racism, sexism and class bias fuels the fire on welfare reform which pulls the safety net from under poor single mothers by requiring them to work outside the home.).

<sup>121</sup> See Soss et al., *The Hardline and the Color Line: Race, Welfare, and the Roots of Get-Tough Reform*, in RACE AND THE POLITICS OF WELFARE REFORM 225 (describing the story of the "Chicago 19" where several black welfare mothers were reportedly arrested during a drug raid and accused among other things of neglect of 19 children in their care.)

<sup>122</sup> See BANE & ELLWOOD, *supra* note 112 (discussing the problems associated with an administrative culture which seeks an interest in rule enforcement as opposed to social services, thus creating a culture which makes the welfare bureaucracy and administration appear adversarial.)

<sup>123</sup> See Lee A. Harris, *From Vermont to Mississippi: Race and Cash Welfare*, 38 COLUM. HUM. RTS. L. REV. 1 (2006) (noting that empirical research suggests that there is a correlation between the population of African Americans within the state and the amount of cash assistance distributed within the state).

<sup>124</sup> To begin a discussion about race, gender and welfare reform see Mary Jo Bane, Race, poverty and public policy (2005) Villanova University, KSG Faculty Research Working Paper Series RWP05-030, available at <http://web.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=2921>; Brown, *supra* note 88, at 47 – 71; see also Lisa D. Brush *Impacts of Welfare Reform*, 10 RACE, GENDER & CLASS 173, 175, 179, 183, 185 (2003); Linda Burnham, *Racism in U.S. welfare policy: A human rights issue*, in FROM POVERTY TO PUNISHMENT: HOW WELFARE REFORM PUNISHES THE POOR 121 - 138 (George Delgado ed., 2002); Martin Gilens, *How the Poor Became Black: The Racialization of American Poverty*, in RACE AND THE POLITICS OF WELFARE REFORM, *supra* note 88, at 101; HANCOCK, *supra* note 5; NEUBECK AND CAZENAVE, *supra* note 5; Frances Fox Piven, *Why Welfare is Racist*, in RACE AND THE POLITICS OF WELFARE REFORM, *supra* note 88, at 323; Sanford Schram, *Race and state welfare reform choices: A cause for concern*, in FROM POVERTY TO PUNISHMENT: HOW WELFARE REFORM PUNISHES THE POOR 89 - 107 (George Delgado ed., 2003); Sanford F. Schram, *Putting a Black Face on Welfare: The Good and the Bad*, in RACE AND THE POLITICS OF WELFARE REFORM, *supra* note 88, at 196; see also VANESSA SHEARED, RACE, GENDER, AND WELFARE REFORM: THE ELUSIVE QUEST FOR SELF-DETERMINATION (1998) (Sheared discusses the impact of welfare reform on African American women.).

<sup>125</sup> HANDLER & HASENFELD, *supra* note 9, at 28.

<sup>126</sup> GORDON, *supra* note 64, at 7.

<sup>127</sup> Soss et al., *The Hardline and the Color Line: Race, Welfare, and the Roots of Get-Tough Reform*, in RACE AND THE POLITICS OF WELFARE REFORM, *supra* note 88, at 225, 230.

# ACHIEVING JUSTICE THROUGH REBELLIOUS LAWYERING: RESTRUCTURING SYSTEMS OF LAW AND POWER FOR SOCIAL CHANGE

By: Ashly Hinmon<sup>1</sup>

A dynamic equilibrium of power exists between law and social movements. Our role in social-change lawyering is not only to focus on the law itself, but also to understand and transform the frameworks that create and maintain balanced systems of law in our society. Lani Gunier, the first woman of color to be appointed to a tenured professorship at Harvard Law School, and Gerald Torres, a leading figure in critical race theory and professor of law at the University of Texas, gave a joint keynote address on restructuring systems of law and power for social change at the Rebellious Lawyering Conference (RebLaw), held at Yale Law School in February 2010. Under the broad rubric of social change, Gunier and Torres examined the transformation of deeply entrenched traditions that perpetuate injustice in our society. Racism, for example, impacts the legal system on many identifiable levels but is nonetheless difficult to eradicate because it is bound up within society's mechanisms of power.

Gunier likens the interaction between society's traditions and the law to a game, and asserts that within every game there are three dimensions of power. The first dimension is visible conflict—the players manipulate rules in order to win. The second dimension involves the identity of the game's designers, or the ability of those in power, to shape the rules in a way that benefits the rule-makers. The third dimension involves an examination of the meta-narrative—the story we, as a society, tell to explain why winners deserve to win and why losers deserve to lose.

Gunier and Torres argue that social-change attorneys often focus on the second dimension of power and seek to rewrite the rules in a way that yields more just results. The law, as a societal institution, both allocates power and disciplines power-holders. Gunier and Torres, however, advocate for an increased awareness of and engagement with the third dimension of power—the meta-narrative of law and justice, which functions both to justify the outcomes of the law and to keep the design of our system hidden. According to Gunier and Torres, social-change lawyering can most readily transform the hidden roots of injustice not only by shifting the rules, but also by shifting cultural understandings of justice.

To do this, we must engage on the micro-level. After identifying sources of power, we must increase the democratic potential of specific marginalized groups, in order to enhance their capacity to take control of their own identity and power. Gunier and Torres also emphasize the importance of horizontal relationships and developing “constituencies of accountability” across group lines.

At the conference, these themes were developed

through twenty-four panels and workshops on rebellious lawyering. Some sessions focused specifically on changing the rules of the game through litigation or legislation. For example, one panel, “Domestic Remedies for Human Rights Violations Abroad: The Future of Alien Tort Statute Legislation,” brought together leading Alien Tort Statute (ATS) litigators to discuss how human rights advocates utilize the ATS as a domestic remedy for international human rights violations. The panelists discussed a recent victory in which Nigerian activists were awarded \$15.5 million in compensation in a suit charging Shell Oil with complicity in torture and killings, as well as a current case in which eleven Indonesian citizens are suing ExxonMobil in D.C. Circuit Court for kidnapping, torture, and murder. The panelists discussed the challenges and benefits of the ATS approach in promoting accountability for human rights violators.

Later at the RebLaw Conference, Karen Goodrow, the Director of the Connecticut Innocence Project, led a workshop titled “The Unreliability of Forensics: Detecting Errors in Evidence.” Goodrow works to overturn wrongful convictions through the use of post-conviction DNA testing. In 2006, the Innocence Project secured the release of James Calvin Tillman, who served 18 ½ years in prison for crimes he did not commit. As a result of his case, the Connecticut Legislature passed a new statute in 2008 providing for compensation for the wrongfully convicted. Goodrow is a strong advocate for the abolition of “junk science” in forensic gathering, including such methods as dog tracking, bite mark analysis, and “pour patterns,” a type of arson evidence that frequently leads to false-positive identifications.

Melissa Sontag Broudo, a Consulting Attorney with the Sex Workers Project in New York City, led a lunch workshop entitled “Legislative Advocacy for Sex Workers: Vacating Prior Prostitution Convictions & No Condoms as Evidence.” The Sex Workers Project uses human rights and harm-reduction approaches to protect and promote the rights of individuals who engage in sex work, regardless of whether they do so by choice, circumstance, or coercion. Broudo discussed two crucial pieces of legislation and how they can be used to help disadvantaged groups. Namely, Broudo focused on New York State Assembly Bill A03856, a bill to stop police and prosecutors from using possession of condoms as evidence that people are engaged or intending to engage in prostitution, and New York State Assembly Bill A07670, a bill to vacate prostitution convictions for trafficked people, which passed the assembly and is now awaiting action in the New York Senate.

Other sessions at the conference focused on the meta-

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*Racism is nonetheless difficult to eradicate because it is bound up within society's mechanisms of power.*

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narrative process of rewriting the stories that society tells itself about what is “just.” For example, a panel titled “Identity Construction and the Law: How Civic, Racial, Gender and Sexual Identity Operate and Converge in the Legal Arena” explored the interaction of these four identities, among each

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*Identities achieve dominance within a particular setting, group, or circumstance illuminating the courts’ and society’s treatment of these identities.*

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other and with the law. Each panelist analyzed how people formulate these identities, how some identities achieve dominance within a particular setting, group, or circumstance, and which legal theory illuminates the courts’, and by extension society’s, treatment of these identities. Imani Perry, a professor at Princeton University’s Center for African American studies, examined racism as a cultural practice transmitted through language, symbols, media, and other mechanisms of cultural construction. She emphasized the importance of seeing each marginalized group in a more complex and nuanced way and encouraged a reading of identity that allows each category to be embedded with distinctions. For example, she noted that the construction of patriarchy is not simply a category that divides men from women; patriarchy also constructs the category of “the man” in a way that disadvantages many men who are not acting to reinforce the dominant paradigm of masculinity. Professor Perry argued that, while many forms of discrimination are deeply entrenched in the legal system, a paradigm shift to allow a holistic analysis of oppressed groups would permit a more functional understanding of how oppressed groups encounter the law and how the system can be restructured to produce more just and equitable results.

Tony Varona, another “Identity Construction” panelist and a professor at the American University Washington College of Law, discussed recent losses by the lesbian, gay, bisexual, and transgender (LGBT) community in individual states

and identified ways to make the gay rights community more encompassing and effective. He focused on the importance of restructuring the movement’s leadership to be more racially and culturally diverse and argued that the LGBT movement must create alliances with faith communities and religious institutions. Professor Varona also encouraged more LGBT people of color to come out of the closet and challenge prevailing stereotypes within their communities—stereotypes, for example, that might label homosexuality as completely external to that community. In light of some states’ use of ballot initiatives to target gay rights, Professor Varona argued that it is even more important for the LGBT community to find effective ways of engaging and transforming the dialogue to become as inclusive and encompassing as possible. Only then would direct democracy systems be unable to manipulate the biases of dominant groups in order to stall the progress of gay rights.

The RebLaw Conference advanced the transformation of our society by bringing together exemplary public-service

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*The Conference urged lawyers to be rebellious and to dismantle those social structures that reinforce hierarchy and injustice.*

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lawyers and activists focused on a range of social justice issues and by pushing participants toward greater engagement with exigent issues of injustice and inequality. It challenged participants to think locally and on specific issues, as well as to ask how to transform broad social structures that perpetuate injustice yet go unnoticed. It rejected the notion that social change equals taking a few people from a marginalized group and inserting them into the top tiers of society’s hierarchy. Instead, the Conference urged lawyers to be rebellious and to dismantle those social structures that reinforce hierarchy and injustice.

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## Endnotes

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# SPECIALIZATION HAS THE POTENTIAL TO LEAD TO UNEVEN JUSTICE: DOMESTIC VIOLENCE CASES IN THE JUVENILE & DOMESTIC VIOLENCE COURTS

By: Allison Cleveland<sup>1</sup>

Rather than focus on process and precedent, problem-solving justice focuses on the outcome. Problem solving courts are “specialized courts that seek to respond to persistent social, human, and legal problems, such as addiction, family dysfunction, domestic violence, mental illness, and quality-of-life crime.” These courts adapt their processes to suit the sources of the problems, which are driving the actions that bring the wrongdoer to court in the first place. The focus is on the individual, and the courts provide particularized responses designed to change that specific offender’s future behavior.

- Kathryn C. Sammons<sup>2</sup>

## I. Introduction

In October of this year, I observed an initial hearing at the Boston Juvenile Court for a care and protection case involving four children, all less than five years of age.<sup>3</sup> The Massachusetts Department of Children and Families (“DCF”) presented evidence that the mother used cocaine during her pregnancy with the youngest of the four children—a newborn. This was the entirety of the DCF case. The other three children were present at the hearing and appeared to be very happy, energetic, and well-cared for. Though the children’s mother and father did not live together, they still saw each other socially and coordinated child care. Counsel for the mother argued that the DCF presented no nexus between the mother’s drug use and her ability to care for her older children. The older children, reasoned the mother’s counsel, should therefore remain in her care. The judge reviewed documents submitted into evidence and came to the father’s criminal record. Noting multiple restraining orders against the father for domestic abuse, the judge voiced concern about the mother’s failure to separate herself from a man with such an extensive history of domestic abuse. Accordingly, the judge ordered DCF to take custody of all four children.

Following the hearing, I spoke with another juvenile court judge. I admitted my surprise that all four children were removed from their mother’s home based on their father’s violent history against women. The judge was not surprised by the outcome and voiced his strong feeling that the outcome was correct. He noted that, based on the firm language used by the Supreme Judicial Court in *Custody of Vaughn*,<sup>4</sup> juvenile court judges take no risks in situations involving domestic abuse. The court would rather remove a child from his or her

family than run the risk of abuse. As here, evidence of intimate partner violence is enough to remove children from the home. He underscored the harm that he believes can be done to a child by simply observing abuse and his belief that mothers are not likely to escape the cycle of intimate partner violence.

In the ensuing weeks, I observed more cases in which children were removed from their families and placed into DCF custody based largely on the mother’s status as a domestic violence victim. These decisions continued to strike me. Would the outcome be different in other courts? Would the outcome differ, specifically, in courts that specialize in domestic violence cases?

This paper examines the ways in which judges in the juvenile and domestic violence courts have dealt with, and are likely to deal with, cases of intimate partner violence where children live in the household. Specifically, this paper suggests that the divergent goals of these two specialty courts likely result in uneven justice. In juvenile courts, a judge’s focus is on the welfare of the child. Consequently, children are more likely to be removed from an abused parent’s custody to protect the child’s physical safety. In domestic violence courts, on the other hand, judges are likely to adopt a more favorable position toward domestic violence survivors, in that the abused party is seen less as a victim and more as a capable caretaker. This is especially true in jurisdictions where more services exist to help victims become self-sustaining, as custody in those jurisdictions appears more likely to be awarded to the non-abusive parent as part of the rehabilitation process.

## II. Specialization: The Domestic Violence and Juvenile and Courts

### *Domestic Violence Courts*

“Domestic violence courts,” as the name implies, are specialized courts that adjudicate cases involving domestic violence. The Violence Against Women Act (“VAWA”) (Title IV of the Violent Crime Control and Law Enforcement Act of 1994)<sup>5</sup> routed substantial funds into the nation’s court systems and other areas of criminal justice to demand more accountability from domestic violence perpetrators and to provide help and safety to victims.<sup>6</sup> Beginning in the 1990s, courts nationwide began to allocate special court sessions and other procedural resources for domestic violence cases.<sup>7</sup> These “domestic violence courts” were deemed necessary, in part, to handle the growing number of domestic violence cases as arrests for partner abuse became mandatory and as district attorneys faced increasing pressure to prosecute such crimes.<sup>8</sup> There are currently more than 300 courts

with special procedures in place to handle domestic violence matters.<sup>9</sup> The goals of specialized domestic violence courts around the country have been relatively uniform and include protecting and empowering domestic violence survivors<sup>10</sup> in addition to holding perpetrators accountable.<sup>11</sup> Improving case management efficiency is also often cited as a goal.<sup>12</sup>

Domestic violence courts vary greatly in structure.<sup>13</sup> Some domestic violence courts may hear only requests for civil restraining orders, while others may adjudicate all issues—such as restraining orders, criminal charges, and divorce and custody issues—for a single family when domestic violence is involved. The term “domestic violence court” can encompass anything from specialized intake processes to an actual separate court system dedicated to domestic violence cases.<sup>14</sup> For example, in 1987, the Quincy District Court in Quincy, Massachusetts began its Domestic Violence Prevention Program, a procedural system designed to efficiently address domestic violence cases. Although not a separate court, the program integrated a network of judges, clerks, police officers, prosecutors, perpetrator’s intervention programs, and other agencies to streamline the system in which victims and perpetrators of domestic violence would have their problems addressed.<sup>15</sup> In 2001, Massachusetts instituted its first (and only) domestic violence court in Dorchester.<sup>16</sup>

Generally, domestic violence courts will, at a minimum, hold specialized sessions for restraining orders and other civil matters involving intimate partner violence. Special attention will also be afforded to victims. Elena Salzman describes what a victim can expect in the Quincy District Court:

When a woman comes to the Quincy District Court seeking a restraining order, her first contact will likely be with a domestic abuse clerk in the Restraining Orders Office. The Quincy Program innovators felt that the establishment of a separate restraining orders office would be more conducive to providing the one-on-one assistance women need to fill out the proper paperwork. . . . A woman entering the court is often confused, scared, and uncertain. The clerks help provide the security a woman needs to embark on the intimidating process of requesting a restraining order.

Many of the domestic abuse clerks in Quincy are volunteer interns from law schools and social work programs at local universities. Their duties include disseminating: a sheet listing the critical information the woman should provide to the assisting clerk;

a sheet detailing procedures on how to file a drug/alcohol petition; and an informational brochure entitled “Help and Protection for Families Experiencing Violence in the Home,” which includes a list of emergency resources.

After the initial intake procedure, domestic abuse clerks refer the woman to the daily briefing sessions hosted by the District Attorney’s Office. During these sessions, women not only receive information about referral services and their legal rights, but they also receive emotional support. After the briefing, a clerk accompanies a woman to the courtroom for her emergency hearing, which is usually conducted *ex parte*, without the batterer or his counsel present. Often the clerk will stand with the woman before the bench to provide moral support.<sup>17</sup>

Domestic violence courts have received widespread praise for reducing case filings related to violence between intimate partners.<sup>18</sup> Victims also appear to be generally satisfied with their court experiences and the adjudication process.<sup>19</sup> However, specialized domestic violence courts are not without critics. Some argue that such courts are victim-oriented and focus so heavily on holding perpetrators accountable that there is a bias in favor of alleged victims.<sup>20</sup> The criminal defense bar has been especially concerned, complaining that “judicial education about family abuse and extended tenure on a calendar devoted to such cases creates a pro-victim, anti-defense bias.”<sup>21</sup>

I interviewed a local Boston defense attorney who represents alleged abusers. She strongly echoed the sentiment that Dorchester Domestic Violence Court judges are “much harder” on defendants than their district court counterparts, often denying bail or setting bail much higher than defendants can afford. In her opinion, this placed an unreasonable burden on defendants and resulted in differential treatment across courts.<sup>22</sup> It is perhaps unsurprising that a local prosecutor in the Suffolk County Domestic Violence Unit held a different opinion. Domestic violence courts, she reasoned, appropriately recognize the danger that perpetrators of domestic violence pose to victims and to society-at-large. In her view, the seriousness with which domestic violence crimes have been treated in these specialized courts is a model for the district courts to follow.<sup>23</sup>

Internal criticism also exists. Domestic violence judges themselves have cited increased workloads and emotional burnout as disadvantages of specialization.<sup>24</sup> Externally, some have expressed concern that domestic violence courts usurp

the power of the legislature by enforcing court-made domestic violence policy.<sup>25</sup>

Finally, confusion sometimes arises where district court domestic violence programs lack jurisdiction over certain matters, resulting in conflicting orders between courts. Massachusetts, for example, solved this problem by giving the Dorchester Domestic Violence Court jurisdiction over criminal and civil matters in domestic violence cases.<sup>26</sup>

### *Juvenile Courts*

Juvenile courts are not new to the judicial system. Special courts to adjudicate child neglect and delinquency cases originated more than one hundred years ago, in Cook County, Illinois, and all states now have a juvenile court system.<sup>27</sup> Juvenile courts have broad jurisdiction over matters involving children. The special subject matter jurisdiction of any particular state's juvenile court system is proscribed by state statute,<sup>28</sup> and usually includes adjudicating child welfare cases (regarding child care and protection), delinquency cases, and issues involving children in need of services.<sup>29</sup> In all contexts, the mandate of the juvenile court is to protect the best interests of the subject child.<sup>30</sup>

The juvenile court system is grounded in the philosophy that "when parents are unable to care for or discipline a child, it becomes the state's duty to intervene on the child's behalf. This is the [concept] called *parens patriae*."<sup>31</sup> The ultimate goal of the juvenile courts, therefore, is to protect the interests of the child, even when the child's interests conflict with the fundamental liberty interest of parents in the care, custody and control of their children.<sup>32</sup> This emphasis on the child's interest in remaining safe from harm is especially important in the context of intimate partner violence, where one parent, though "fit" in other ways, may be viewed as unable to protect the child.<sup>33</sup>

### *The Importance of Specialized Knowledge in Domestic Violence Cases*

Domestic violence cases can present special problems to judges.<sup>34</sup> Because domestic violence is common and likely to be relevant to many legal actions,<sup>35</sup> it is advisable that judges and court staff receive specialized training.<sup>36</sup> Because decisions about custody are among the most important decisions made in the judicial system,<sup>37</sup> and there is a strong probability that domestic violence will be considered as a factor in those decisions, training in domestic violence is especially important for judges<sup>38</sup> who make decisions regarding custody and visitation.<sup>39</sup> Most states require the court to consider domestic violence issues when awarding custody and visitation rights.<sup>40</sup> Without knowledge of the particular dynamics of each situation involving intimate partner violence, judges may be misled by information received in court. Victims of domestic violence often make poor witnesses.<sup>41</sup> The trauma experienced by victims may manifest itself as nervousness, timidity, and body language that may be perceived as suspect

or deceptive by the judge.<sup>42</sup> In addition "[w]ithout . . . understanding of the dynamics of intimate partner violence, a judge may question the ability of an individual to tolerate such severe acts of violence. . . . As a result, a judge may question the actual level of violence or the victim's motives if she remained in the abusive relationship. . . ."<sup>43</sup> Abusers, on the other hand, are often confident and self-controlled, giving an appearance of reliability and truthfulness in court.<sup>44</sup> Despite appearances, abusers can be, and often are, "master manipulators."<sup>45</sup> Domestic violence includes "tactics [that] are more than physical violence and include a penumbra of threats and actions to induce fear, humiliation, social isolation and resource deprivation. Batterers cast aspersions on the moral character, parenting and mental health of battered women to discredit them with those who might intervene."<sup>46</sup> Moreover, although a batterer may appear calm and trustworthy on the stand, he likely still presents a danger to his victim, even when they no longer reside in the same home. Indeed, the most dangerous period for an abused woman<sup>47</sup> is immediately after separation, when her abuser may—in a panic—take desperate measures to regain control.<sup>48</sup>

Victims may also not be seen in a favorable light when a judge evaluates the best interests of the child for custody purposes.<sup>49</sup> Best interest factors focus on the stability and security of the child's environment, putting domestic violence victims at a disadvantage.<sup>50</sup> Victims are often dependent on their abusers for housing, income and other forms of support.<sup>51</sup> Consequently, separation from her batterer may leave a mother without immediate access to a job and financial resources. As noted by Betsy McAlister Groves:

When a mother decides to leave her partner, the children's situation may actually worsen. Mothers (and children) are at continued or increased risk of being harmed after they make the decision to leave the relationship. The batterer often reacts with anger, disbelief, and increased attempts to control the woman's relationship. Many women we have seen in the Child Witness to Violence Project described escalating danger as their partners attempted, sometimes through desperate means, to find them and persuade them to return home.<sup>52</sup>

Taken together, these patterns are not intuitive. Special knowledge on the part of judges and others in the criminal justice system is therefore needed to effectively address the special problems of families affected by domestic violence.

### III. The Domestic Violence Courts

As noted above, the domestic violence courts are victim-oriented. These courts protect and empower victims and hold abusers accountable for their violent behavior.<sup>53</sup> In

addition, because judges in domestic violence courts have specialized knowledge regarding domestic violence, they are much more likely to grasp the patterns and complexities involved where violence occurs in the home.<sup>54</sup> This is not only because judges and other court officers hear domestic violence cases so frequently, but also because judges often receive specialized training and tend to engage in frequent dialogue regarding the functioning of the courts, how parties are being served, and how the court system could do better.<sup>55</sup>

As a result of specialized knowledge, judges in domestic violence courts are likely to perceive victims as logical and capable people, rather than as “battered women” trapped in a “cycle of violence.” While the learned helplessness concept of Battered Women’s Syndrome<sup>56</sup> still pervades the general court system, judges in the domestic violence courts have greater exposure to the currently recognized variation in survivor personalities, capabilities, and resources. They are less likely to become caught up in the mental trap described by two legal scholars below:

Lawyers and judges subscribing to the ‘Why doesn’t she just leave?’ theory too often ignore the battered woman’s experience-based determination that leaving may be more dangerous to her and the child than staying. As a result, battered women seeking justice in a family law context may well face two unnerving consequences: more abuse from the batterer and state coercive authority to remove her children against her will on grounds that a ‘traumatized’ person is less fit to care for her children than the parent who is responsible for the abuse. The critical family law assumption clouds the legal system’s capacity to see that the victimized parent’s decision may have a secure foundation – that the victimized parent is indeed capable of complex thinking and acting, including performing subtle acts of compliance, resistance, and direct action to further her own and her children’s safety and autonomy in the world in which she lives.<sup>57</sup>

In practice, it is certainly much easier to allow custody to remain with the logical, capable mother described above than with a helpless victim. In this light, survivors are more likely to

be seen as capable caretakers. Domestic violence courts tend to adopt the “criminal law facet of domestic violence,” which “recognizes that one intimate partner is a perpetrator and one is a victim . . . and seeks to hold the perpetrator accountable.”<sup>58</sup> In contrast, family law views conflict in terms of two intimate partners who must find ways to cooperatively regulate their relationship and their family affairs. Because the juvenile court focuses so intently on the child, it is reasonable to believe that juvenile court judges are more inclined toward the “family law” perspective.

### IV. The Juvenile Courts

As noted above, the goal of any case in the juvenile court is to protect the best interests of the child. As one Boston juvenile court judge indicated,<sup>59</sup> he and his fellow judges make the physical and emotional safety of the child paramount. They act on the demands articulated in Vaughn,<sup>60</sup> removing the child where it is possible that the child may suffer physical or emotional harm as a result of domestic violence in the home.<sup>61</sup>

Given the ways in which the juvenile court typically functions, it is not surprising that children would be removed from homes in which domestic violence occurs. First, the juvenile court relies strongly on department of social services expertise.<sup>62</sup> The department is invariably a party in abuse and neglect cases, and will take a position on whether it believes the child should be removed from the home. As one commentator notes, child welfare departments often have a checkered history in terms of domestic violence cases,<sup>63</sup> at least from the point of view of domestic violence victims.<sup>64</sup> She describes these views as follows:<sup>65</sup>

[O]pponents claim that child protective involvement in cases of childhood exposure to domestic violence typically has not served the best interests of children or their abused caregivers. Opponents argue that such intervention traditionally has been ineffective, discriminatory, and destructive, endangering the safety of adult victims and their children, blaming battered women for their children’s exposure, and reflexively removing children from their abused parent’s custody. Finally, opponents argue that not all children exposed to domestic violence are harmed by their exposure, and thus intrusive government intervention and its negative concomitants will be extended to many families where such intervention is unnecessary.

My own conversations with local attorneys support this view. One victim advocate opined that the Massachusetts Department of Children and Families (“DCF”) is extremely quick to take custody of children whose mothers are abused following a report of a domestic disturbance.<sup>66</sup> A local defense attorney vigorously agreed, saying that “DCF seems to show up as soon as an incident is reported to the police. Before a victim can even get a restraining order, her kids are in DCF custody.”<sup>67</sup> Whether or not these accounts exaggerate, it is

logical to assume that child welfare agencies, like the courts, err on the side of caution to prevent physical harm to the child. It is not unlikely that judges are heavily influenced by child welfare departments in court, particularly when the alternative is to risk putting a child in a dangerous environment. Courts and child welfare agencies have a shared policy goal to protect the child,<sup>68</sup> suggesting that judges defer to agency expertise where the legitimacy of a child removal action is considered. It is reasonable to assume that this would be particularly true where the alternative to removal is to leave a child at risk in a dangerous environment.

Scholar Lois Weithorn<sup>69</sup> argues that courts have generally deferred to child welfare agency removal actions and have historically

“blame[d] these women for any negative ramifications of their abuse for their children; remove[d] children from their mothers’ custody when doing so [was] not necessary for the child’s protection; fail[ed] to hold the abuser accountable for his conduct; and fail[ed] to provide any services that contribute to the short-or long-term well-being of the child or the nonabusive parent.”<sup>70</sup>

However, juvenile court judge concerns for the safety of the child are based in fact. For example, children in homes in which intimate partner violence occurs are at increased risk for physical harm.<sup>71</sup> Between 30 % and 60 % of children whose mothers are abused are likely to suffer abuse themselves.<sup>72</sup> It is also true that children who witness domestic violence are more likely to develop emotional and psychological problems, show aggressive behavior, and are more likely to exhibit signs of post-traumatic stress disorder and depression.<sup>73</sup> It is unclear whether these effects occur as a result of the child witnessing violence, from the abuser’s dysfunctional parenting patterns in general, or from a combination of both.<sup>74</sup> However, social science studies seem to support the proposition that these problems can be counteracted to a great extent by a stable and loving relationship with the non-abusive parent.<sup>75</sup> If the goal is to secure the best possible situation for each child, a pattern of removing children from both parents, rather than just the abuser, seems counterproductive.<sup>76</sup>

## V. Conclusion

Domestic violence courts and juvenile courts, while both “specialty courts,” approach issues of child custody and domestic violence from very different perspectives. Juvenile courts, charged with protecting the child’s best interests, are likely to err on the side of caution by removing children from homes in which domestic violence is evident. These orders are based largely on social science data showing the emotional and psychological harm to children who witness violence in the home, and on a desire to safeguard the child from physical harm. Domestic violence courts, on the other hand, are strongly victim-oriented and are more likely to provide services meant to facilitate continued custody with the non-offending parent. This approach more accurately reflects the social science understanding of domestic violence phenomena, the strength and resilience of survivors, and their competence as caregivers. More broadly, since the divergent perspectives of these two specialty courts are likely to result in very different decisions regarding child custody in domestic violence situations, family integrity very much depends on the court in which each family finds itself.

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## Endnotes

<sup>1</sup> Allison Cleveland is a third-year law student from Boston College Law School.

<sup>2</sup> *Therapeutic Jurisprudence: An Examination of Problem-Solving Justice in New York*, 23 ST. JOHN’S J. LEGAL COMMENT, 923-25 (2008) (citations omitted).

<sup>3</sup> The hearing took place in the Suffolk Juvenile Court, Boston.

<sup>4</sup> *Custody of Vaughn*, 422 Mass. 590, 595-96, 600 (1996) (holding that the Probate Court erred in failing to make detailed findings about domestic violence in a custody case); *Id.* at 595 (“Quite simply, abuse by a family member inflicted on those who are weaker and less able to defend themselves—almost invariably a child or a woman—is a violation of the most basic human right, the most basic condition of civilized society: the right to live in physical security, free from the fear that brute force will determine the conditions of one’s daily life.”).

<sup>5</sup> Violence Against Women Act (V. A. W. A.) of 1994, 18 U.S.C. §1902.

<sup>6</sup> See Anat Maytal, *Specialized Domestic Violence Courts: Are They Worth the Trouble in Massachusetts?*, 18 B.U. PUB. INT. L.J. 197, 200 (2008) (explaining that Special Training Officers and Prosecutors (“STOP”) grants were administered to state for the purposes of strengthening domestic violence intervention programs and policies).

<sup>7</sup> See Robyn Mazur & Liberty Aldrich, *What Makes a Domestic Violence Court Work? Lessons from New York*, JUDGES’ J., Spring 2003, at 5-6 (observing that domestic violence was historically perceived as a private matter that did not warrant court invention, which is why courts did not address domestic violence in any serious way until the 1990s). See also Amy Karan, Susan Keilitz, & Sharon Denaro, *Domestic Violence Courts: What Are They and How Should We Manage Them*, JUV. & FAM. CT. J., Spring 1999, at 71 (noting that as domestic violence cases substantially increased to be the fastest domestic relations caseload that courts implemented special procedures, such as mandatory arrests and victimless prosecution policies, to help survivors).

<sup>8</sup> Between 1989 and 1998, domestic violence filings in state courts increased 178 percent. Maytal, *supra* note 5, at 207.

<sup>9</sup> *Id.* at 209. The first specialized domestic violence court was located in Brooklyn and heard felony-level domestic violence cases, beginning in 1996.

<sup>10</sup> *Id.* at 214 (explaining that one major goal of the Quincy Program in Massachusetts, for example, is to “empower victims” of domestic violence). *See also id.* (reporting that the Quincy Program strongly enforces its orders on abusers to ensure compliance); Sammonds, *supra* note 1, at 961 (arguing that a primary difference between domestic violence courts and other courts is the former’s intense focus on victims); JUDICIAL COUNCIL OF CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, DOMESTIC VIOLENCE COURTS: A DESCRIPTIVE STUDY 15 (2000), available at <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/dvreport.pdf> (reporting that California domestic violence courts often refer domestic violence victims to support services including victim advocates, children’s services, substance abuse services and services for immigrants, among others).

<sup>11</sup> *See, e.g.,* Sammonds, *supra* note 1, at 958-59 (asserting that New York domestic violence courts’ commitment to enhance victim safety and hold perpetrators accountable). *See also* Maytal, *supra* note 5, at 214 (describing the first dedicated domestic violence court in Brooklyn to incorporate defendant monitoring technology to ensure court order compliance); JUDICIAL COUNCIL OF CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, *supra* note 9, at 15-16 (nothing that in the California court system, 36 of the 39 domestic violence courts regularly ordered abusers to participate in batterer’s intervention programs and 24 of the 39 courts had regularly scheduled judicial review calendars to monitor the abusers’ progress in these programs).

<sup>12</sup> *See* JUDICIAL COUNCIL OF CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, *supra* note 9, at 18-19 (finding that representatives of the domestic violence courts in California, for example, placed greatest emphasis on (in the following order): victim and child safety, providing services to victims, holding perpetrators accountable, and improving case management). *See also* Elena Salzman, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention* (Note), 74 B.U. L. REV. 329, 342 (1994) (noting that the Quincy Program established “fast track” procedures to expedite domestic violence hearings).

<sup>13</sup> *See* Maytal, *supra* note 5, at 214 (claiming that a domestic violence court classification is difficult due to significant specialization differences among domestic violence courts across jurisdictions).

<sup>14</sup> *See* JUDICIAL COUNCIL OF CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, *supra* note 9, at 3 (explaining that in the study that “domestic violence court” referred to “those courts that assign judicial officers to hear a special domestic violence calendar, regardless of whether the judicial officers hear those cases exclusively or as part of a mixed assignment” in which 39 court locations in 31 counties met the definition within the study); *Id.* at 11 (stating that of the 39 courts with dedicated domestic violence calendars, 17 always referred custody cases with an associated protective order or open domestic violence case in the criminal courts to the domestic violence court, while the remaining 22 courts never did so; fifteen courts always referred divorce cases to domestic violence sessions when a restraining order or criminal case was involved, while 24 never did); *Id.* (concluding that domestic violence misdemeanors were more likely to be referred to special domestic violence sessions than were felonies; in misdemeanor cases, 19 courts always referred, 4 sometimes referred, and 9 never referred; in felony domestic violence cases, 9 always referred, 4 sometimes referred, and 26 never referred); *Id.* at 12 (concluding that more than half of the 23 courts with special screening departments reported screening for domestic violence in family law cases; courts were least likely to screen criminal cases and child abuse and neglect cases; only 5 out of 23 courts reporting screening for domestic violence in abuse and neglect cases).

<sup>15</sup> *See* Maytal, *supra* note 5, at 209.

<sup>16</sup> *See id.* at 217.

<sup>17</sup> Salzman, *supra* note 11, at 340-41.

<sup>18</sup> Recently in Idaho, for example, the sharpest decline in domestic violence case filings occurred in the judicial districts with domestic violence courts. *See* Fred G. Zundel & Patrick D. Costello, *Domestic Violence Trends and Topics*, 52 THE ADVOCATE: THE OFFICIAL PUBLICATION OF THE IDAHO STATE BAR 1 (Jan. 2009) <http://isb.idaho.gov/pdf/advocate/adv09jan.pdf>. But see EVE BUZAWA, GERALD HOTALING, JAMES BYRNE & ANDREW KLEIN, RESPONSES TO DOMESTIC VIOLENCE IN A PRO-ACTIVE COURT SETTING 31, available at <http://www.ncjrs.org/pdffiles1/nij/grants/181427.pdf> (finding that between 1995 to 1996 at the Quincy Court, 86 of 353 accused abusers were ordered into batterer treatment programs, however, successful completion of these programs was not associated with significantly lower re-offense rates after one year compared to offenders who did not complete batterer’s intervention). *See also id.* at 18 (noting that recidivism rates remained high despite the aggressive system to address domestic violence in the Quincy District Court).

<sup>19</sup> *See* BUZAWA ET AL., *supra* note 17 (indicating that 81% of victims were satisfied with their contacts with victim advocates). *See also id.* at 15 (arguing that victims also perceived the court experience as increasing their personal safety, felt that the court experience motivated them to no longer tolerate a violent relationship, and felt that the court provided them a sense of control in the relationship).

<sup>20</sup> *See, e.g.,* Maytal, *supra* note 5, at 226 (explaining that some domestic violence court critics claim that court impartiality is compromised by specialization).

<sup>21</sup> *Id.*

<sup>22</sup> Interview with Boston-area defense attorney (anonymous by request), Boston College Law School (October, 2009).

<sup>23</sup> Interview with Boston-area prosecutor (anonymous by request), Boston College Law School (November, 2009). *See also* Maytal, *supra* note 5, at 229 (“Prior to specialization, the criminal court system arguably was biased against victims, denying them the complete justice they deserved. Victims often could not afford proper counsel, and the fear of retribution loomed very large when seeking help from the courts.”).

<sup>24</sup> Maytal, *supra* note 5, at 220.

<sup>25</sup> *See id.* at 224-25.

<sup>26</sup> *Id.* at 218.

<sup>27</sup> *See* Ira M. Schwartz, Neil Alan Weiner, & Guy Enosh, *Nine Lives and Then Some: Why the Juvenile Court Does Not Roll Over and Die*, 33 WAKE FOREST L. REV. 533, 535 (1998).

<sup>28</sup> Paul M. Coltoff, John R. Kennel, Anne E. Melley, Carmela Pellegrino & Wendy Schack, Annotation, Infants, II. Protection and Control, A. In General, 3. Courts and Their Jurisdiction, 43 C.J.S. INFANTS § 11 (2009). Although several federal statutes impact the procedures of the juvenile court, there is no unified statute that has been considered to influence the workings of the juvenile courts as V.A.W.A. has for domestic violence. *See, e.g.,* the Child Abuse and Prevention Act, 42 U.S.C. §§ 5101 et seq. (1974) (requiring appointment of guardians ad litem in dependency and neglect cases). *See also* the Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§ 5601 et seq. (1974) (requiring, among other things, that incarcerated juvenile offenders be separated from adults).

<sup>29</sup> *See, e.g., id.* Children in need of services cases are referred to as “CHINS” cases in Massachusetts. These are also known as truancy cases, or may take on other names, depending on the state.

<sup>30</sup> *See, e.g.,* Schwartz et al., *supra* note 26, at 535-36.

<sup>31</sup> *Id.* at 535.

<sup>32</sup> *Id.* See also *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (noting that the right to raise one's children has been repeatedly held a fundamental due process right).

<sup>33</sup> See, e.g., *N.J. DYFS v. S.S.*, 855 A.2d 8 (2004); *D.D. v. Dep't. of Children and Families*, 773 So. 2d 615, 618 (Fla. App. 5 Dist. 2000).

<sup>34</sup> See, e.g., *Sammonds*, *supra* note 1, at 959 (arguing that domestic violence cases are among the most "demanding" and "heart-wrenching" cases for judges because many victims are reluctant to seek legal intervention due to love, fear or economic dependence on the offender).

<sup>35</sup> Twenty to thirty percent of all women are assaulted by a partner or ex-partner during their lifetime. See Betsy McAlister Groves, *Children without Refuge: Young Witnesses to Domestic Violence*, 16 ZERO TO THREE 11, 11 (1996). Moreover, in many cases, children witness the violence. Based on restraining order forms filled out by women seeking protection from the courts in 1994, 43,000 Massachusetts children were exposed to domestic violence in that year. Of these, 65% were 8 years old or younger. *Id.* at 11. Also, in a survey of 115 mothers with a child under the age of six, one study found that one in ten children had witnessed a knifing or shooting and another eighteen percent had seen pushing, hitting or shoving. Half of these incidents occurred in the home. See *id.* at 11-12.

<sup>36</sup> The American Bar Association supports special education for the judiciary in the area of domestic violence. See generally THE AMERICAN BAR ASSOCIATION COMM'N ON DOMESTIC VIOLENCE, REPORT NO. 2 (1996). See also Dana Harrington Connor, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. GENDER SOC. POL'Y & L. 163, 165-66 (2009) (arguing that many legal remedies involving violence against women, including custody decisions, require special knowledge and do not lend themselves to unrestricted discretion of a trial judge).

<sup>37</sup> See Connor, *supra* note 36, at 165.

<sup>38</sup> See, e.g., Maria L. La Ganga, *Nevada Judges Must Attend Domestic Violence Forum*, L.A. TIMES, September 9, 1993, available at [http://articles.latimes.com/1993-09-09/news/mn-33232\\_1\\_domestic-violence](http://articles.latimes.com/1993-09-09/news/mn-33232_1_domestic-violence) (last visited April 9, 2009).

<sup>39</sup> In Massachusetts, for example, "[i]n determining whether temporary shared legal custody is or is not in the child's best interests, the Court must consider all relevant facts including but not limited to whether any family member has been the perpetrator of domestic violence, or abuses alcohol or drugs, or has deserted the child and whether the parties have a history of cooperating in matters concerning the child." MASS. GEN. LAWS ch. 208, § 31 (2010).

<sup>40</sup> See, e.g., Harrington Connor, *supra* note 35, at 189. See also AMERICAN BAR ASSOCIATION COMM'N ON DOMESTIC VIOLENCE, CHILD CUSTODY AND DOMESTIC VIOLENCE BY STATE (2008), available at <http://www.abanet.org/domviol/docs/Custody.pdf> (showing all the states that consider domestic violence as a factor influencing the child's best interests).

<sup>41</sup> See Chet K. W. Pager, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLIAMETTE L. REV. 373, 383 (2005).

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

<sup>43</sup> Connor, *supra* note 36, at 177.

<sup>44</sup> See Linda E. Neilson, *Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases*, 42 FAM. CT. REV. 411, 420 (2004) (noting that perpetrators purposefully present public images); Joan S. Meier, *Domestic Violence Child Custody and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 690 (2003) (stating that custody judges tend to find abusers more credible than those their victims).

<sup>45</sup> See LUNDY BANCROFT AND JAY G. SILVERMAN, *THE BATTERER AS PARENT* 15-16 (2002).

<sup>46</sup> Andrea C. Farney & Roberta L. Valente, *Creating Justice Through Balance: Integrating Domestic Violence Law into Family Court Practice*, 54 JUV. FAM. CT. J. 35 (2003).

<sup>47</sup> This particular law article only addresses abused women, although men are be abuse victims who may seek legal intervention.

<sup>48</sup> See Tina Hotton, *Spousal Violence After Marital Separation*, 21 JURISTAT 1 (June 2001) (documenting increased risk of violence immediately after separation). Domestic violence after separation may sometimes result in homicide. Women in the US and Canada at greatest risk for homicide are those with partners who have a history of domestic abuse. See Neil Websdale, H. Moss & B. Johnson, *Domestic Violence Fatality Reviews: Implications for Law Enforcement Community*, THE POLICE CHIEF 65, 65-74 (July 2001). See also Tracee Parker, Kellie Rogers, Meghan Collins, & Jeffrey L. Edelson, *Danger Zone: Battered Mothers and Their Families in Supervised Visitation*, VIOLENCE AGAINST WOMEN, November 2008, at 1313, 1318-1320 (describing how abusers continue to attempt to manipulate and control survivors at supervised visitation centers, by using children to convey messages, by sending gifts with children, by attempting to gain information about the survivor from support staff, and by creating difficulties with appointment times).

<sup>49</sup> In custody and visitation cases, the best interest standard is applied nationally. See, e.g., *Harrington Connor*, *supra* note 35, at 195.

<sup>50</sup> See Jennifer L. Woolard & Sarah L. Cook, *Common Goals, Competing Interests: Preventing Violence Against Spouses and Children*, 69 U.M.K.C. L. REV. 197, 212 (2000) (explaining that abused women are likely to lack financial resources, may have trouble procuring housing, and are more likely to remove the child from the marital community).

<sup>51</sup> See BUZAMA ET AL., *supra* note 17, at 31.

<sup>52</sup> See McAlister Groves, *supra* note 34, at 13.

<sup>53</sup> See *supra* notes 7 and 8.

<sup>54</sup> See Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L. J. 1667, 1671 (2009) (arguing that judicial specialization may improve judge decision-making because specialists fare better than generalists).

<sup>55</sup> See, e.g., Maytal, *supra* note 5, at 219-220 (stating that the Dorchester Court Roundtable allowed judges to come together to share ideas and deliberate about relevant issues).

<sup>56</sup> See Lenore Walker, *Who Are Battered Women?*, 2 FRONTIERS: A JOURNAL OF WOMEN STUDIES 52 (1977) (describing the learned helplessness exhibited by many "battered" women).

<sup>57</sup> Farney & Valente, *supra* note 45, at 39. See also BUZAMA ET AL., *supra* note 17, at 16 (explaining that victims in Quincy Court cases were accurate in predicting future offenses by their abusers, and victims who feared serious injury were almost three times more likely to be re-victimized).

<sup>57</sup> Farney & Valente, *supra* note 45, at 39.

<sup>58</sup> Interview with Judge of the Juvenile Court (anonymous), Suffolk Juvenile Court, Boston (October, 2009).

<sup>59</sup> See Vaughn, 422 Mass. at 595-96, 600.

<sup>60</sup> Interview with Judge of the Juvenile Court (anonymous), Suffolk Juvenile Court, Boston (October, 2009).

<sup>58</sup> "Department of social services" is used here as a generic term to refer to state child welfare agencies. Names of the department vary by state.

<sup>59</sup> See Lois A. Weithorn, *Protecting Children From Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 32-33 (2001) (arguing that protection system authorities often

remove children from the custody of both the abusive and non-abusive parent, citing the non-abusive parent's "failure to protect" the child from either direct abuse by her batterer, or from exposure to the domestic violence).

<sup>60</sup> See *id.* at 27.

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

<sup>62</sup> Interview with Boston-area prosecutor (anonymous by request), Boston College Law School (November, 2009).

<sup>63</sup> *Id.*

<sup>64</sup> See, e.g., Schwartz et al., *supra* note 26, at 535-36.

<sup>65</sup> See Weithorn, *supra* note 59, at 29.

<sup>66</sup> Many of these concerns are exactly, in fact, what prompted the creation of special domestic violence courts.

<sup>67</sup> See EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSON LIFE 42 (2007) (stating that domestic violence is the most common context for child abuse and neglect).

<sup>68</sup> See Jeffrey L. Edelson, *The Overlap Between Child Maltreatment and Woman Battering*, VIOLENCE AGAINST WOMEN, February 1999 at 134, 134-54.

<sup>69</sup> See Katherine M. Kitzmann, Noni K. Gaylord, Aimee R. Holt & Erin D. Kenny, *Child Witnesses to Domestic Violence: A Meta-analytic Review*, 71 J. CONSULTING CLIN. PSYCH. 339 (2003); Wanda Mohr, Megan J. Noone Lutz, John W. Fantuzzo & Marlo A. Perry, *Children Exposed to Family Violence: A Review of Empirical Research from a Developmental-Ecological Perspective*, 1 TRAUMA, VIOLENCE, AND ABUSE 264 (2000). Children are at risk for the same problems when a divorce occurs. See Judith S. Wallerstein and Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 309-310 (1996) (explain that in general, after divorce, many children and adolescents exhibit depression, aggressive behavior, decreased self-esteem, and a sense of loss associated with the break-up of their families, whether or not they have access to both parents); Judith S. Wallerstein and Joan B. Kelly, *The Effects of Parental Divorce: Experiences of the Child in Later Latency*, 46 AMER. J. ORTHOPSYCH. 256 (1976); Judith S. Wallerstein and Joan B. Kelly, *The Effects of Parental Divorce: Experiences of the Preschool Child*, 14 J. AMER. ACAD. CHILD PSYCH. 600 (1975); Judith S. Wallerstein and Joan B. Kelly, *The Effects*

*of Parental Divorce: The Adolescent Experience*, 3 THE CHILD IN HIS FAMILY: CHILDREN AT PSYCHIATRIC RISK 479 (1974).

<sup>70</sup> See Emily J. Salisbury, Kris Henning & Robert Holdford, *Fathering by Partner-Abusive Men: Attitudes on Children's Exposure to Interparental Conflict and Risk Factors for Child Abuse*, CHILD MALTREATMENT, August 2009 at 232, 236, 240 (concluding that among a large sample of more than 3,800 convicted abusers surveyed in Tennessee, 84.6% had some type of parenting role. It is known that children in intimate partner violence (IPV) environments show maladjustment, but little research has examined how this effect might be attributable to the parenting style of the abuser). See also Emily F. Rothman, David G. Mandel & Jay G. Silverman, *Abusers' Perceptions of the Effect of Their Intimate Partner Violence on Children*, VIOLENCE AGAINST WOMEN, November 2007 at 1179, 1184-1187 (concluding that abusers seem relatively oblivious to harm they might cause their children, in which even among men who had completed a significant portion of a batterers' intervention program, only 73% believed their violence negatively impacted the parent-child relationship, and only 53% worried about the long-term impact of intimate partner violence on their children).

<sup>71</sup> See Wallerstein & Tanke, *supra* note 73, at 310-311 (stating that research at the Center for the Family in Transition on children following divorce has revealed several factors predictive of positive outcomes for children in divorced families and that these are particularly striking for domestic violence cases with the first and paramount factor being a close, sensitive relationship with a stable parent; other factors include reasonable cooperation with parents and whether the child has pre-existing psychological difficulties; importantly, the minimization of conflict between parents is vital to the child's well-being as the potential for future parental conduct can threaten a child's sense of security and undermine his feelings of trust).

<sup>72</sup> See Maureen Collins, *Nicholson v. Williams: Who is Failing to Protect Whom? Collaborating the Agendas of Child Welfare Agencies and Domestic Violence Services to Better Protect and Support Battered Mothers and Their Children*, 38 NEW ENG. L. REV. 725, 750 (2004) (noting that children removed from the non-abusive parent suffer psychological harm).

# WILL THE CURRENT ECONOMIC CRISIS FUEL A RETURN TO RACIAL POLICIES THAT DENY HOMEOWNERSHIP OPPORTUNITY AND WEALTH?

By: Marcia Johnson<sup>1</sup>

## Introduction

Property ownership in America has traditionally been linked to power and wealth.<sup>2</sup> French political historian Alexis de Tocqueville observed, “[T]he love of property is keener in the United States than it is anywhere else, and Americans therefore display less inclination toward doctrines that threaten, in any way, the way property is owned.”<sup>3</sup> Property-related wealth comes in many forms, including the right to control tangible assets such as land and buildings.<sup>4</sup> Homeownership today remains the single greatest source of wealth and symbol of well-being for most Americans.<sup>5</sup>

Owning a home facilitates access to numerous privileges and opportunities borne from government law and policy, including tax credits, increased credit options, and increased worth and wealth. Homeownership also increases the value of communities, neighborhoods, and the homes themselves. It allows for better educational opportunities, social mobility, and community stability.<sup>6</sup> Therefore, it is particularly significant that government housing policies and practices have historically stifled the opportunity of African Americans to own and retain real property. The consequences of these discriminatory policies continue to be dire.

The ultimate aspiration of nearly every American family is to own a home.<sup>7</sup> For many African American families this was still a near unattainable goal for more than one hundred years after the Emancipation Proclamation was signed.<sup>8</sup> Government policies that excluded many African Americans from access to homeownership in the 1930s began changing in the late 1970s, leading many to anticipate an increase in African American homeownership.<sup>9</sup> However, in the years between the Community Reinvestment Act (CRA) of 1977 and 1995, the rate actually dropped 2.6%.<sup>10</sup> Still, the CRA likely opened the door for

post-1995 programs that provided easier access to credit, down payment assistance, and deferred mortgage payments. Indeed, more aggressive policies begun under Presidents Clinton’s administration provided greater opportunities, resulting in a rate increase in African American homeownership from 42% in 1995 to 47.4% by 2008.<sup>11</sup>

Perhaps the greatest threat to the continued realization of the American dream is the latest economic crisis rooted in the sub-prime mortgage collapse.<sup>12</sup> Some blame the CRA of 1977 for creating a market that they claim provided housing loans to non-creditworthy borrowers – particularly African American families – in the low and moderate income range.<sup>13</sup> However, this charge is without direct factual support as the post-CRA period saw a decline in homeownership for African Americans but a mild increase for White homeowners.<sup>14</sup> Illegal and fraudulent practices in property appraisals and income reporting directed program benefits away from those the program was meant to aid.

Nevertheless, of the more than 3.6 million mortgage foreclosures projected to occur during the January 2007 - December 2009 period, up to 39% are sub-prime mortgages.<sup>15</sup> Sub-prime mortgages were far more popular with African American homebuyers than any other group, particularly from 1995-to-2005.<sup>16</sup> Although mortgage failures certainly pose an economic problem, it is not enough to have caused the collapse of 2008 or to support a return to housing policies that effectively deny homeownership opportunities to African American buyers.

Even recent government action to stunt such a return suggests that there were other sources of the collapse, beside African American homeownership, or other sub-prime mortgages. For example, in 2008, the United States government approved a \$750,000,000,000 bail-

out of financial institutions ostensibly due to the collapse in the sub-prime markets.<sup>17</sup> Had the government instead paid every mortgagee the full amount of their initial mortgage loan, assuming a \$200,000 loan average, the government could have purchased all bad mortgage debt for \$720,000,000,000.<sup>18</sup> 100% of foreclosures from 2007 to 2008 would be paid. If only sub-prime mortgages were covered, the government could have paid all such foreclosures from 2006 through 2008.<sup>19</sup>

It is common for markets to rise into bubbles, for the bubbles to burst, and for industries profiting from the bubbles to fail. However, it is not common for the burst to lead to the collapse of the entire global market. In the 1980s, savings and loans fell at a cost of about \$152.9 billion with taxpayers paying 82% or \$126 billion. In the early 2000s, the technology industry bubble burst.<sup>20</sup> Still, none of these industry failures caused the world market to crater.

This paper is written to examine the potential effect of the market collapse on our nation’s homeownership policies. Part I reviews America’s historical housing and homeownership policies. Part II considers the expansion of homeownership opportunities to historically non-participating communities, particularly the African American community. Part III reviews the culprits of the economic crash of 2008 and explains why sub-prime borrowers often get blamed. Part IV examines solutions to maintain America’s pro-homeownership policy, and Part V concludes that America’s homeownership policy should continue to be vigorously pursued with a goal of including African Americans who have long been excluded by government policies and sanctions from building wealth and thereby stabilizing their communities.

## Part I: The History of America's Housing Policy

The American government has historically attended to the housing needs of citizens who are unable to purchase homes. Since the 1700s, the housing needs of the poor have been addressed through formal systems including the provision of "outdoor relief," "boarding out," almshouses and asylums. As people began moving away from small seaport towns<sup>21</sup> and farms to cities in the 1900s,<sup>22</sup> increased housing demand<sup>23</sup> caused a 20-year building boom in urban areas.<sup>24</sup> This boom turned bust during the late 1930s largely as a result of the Great Depression when many Americans could afford neither to rent nor purchase a home.<sup>25</sup> It was the Industrial Revolution that rejuvenated the development of American cities.<sup>26</sup>

The late nineteenth and early twentieth centuries marked the beginning of housing development within residential subdivisions.<sup>27</sup> To assure both peaceful enjoyment of one's property and to maintain property value, developers and home buyers purportedly sought legal control mechanisms that would aid in protecting and preserving their property interests.<sup>28</sup> Developers of these subdivisions relied on restrictive covenants, equitable servitudes, negative easements and zoning ordinances to ensure separation within residential, commercial, and industrial areas.<sup>29</sup> The more sinister goal of these devices was to divide people based on economic, social, and racial lines.<sup>30</sup> Still, these new communities represented an expanded housing market driven by the growing need for homes.

The federal government sought to address the expanding need for low-cost homes through the Housing Division of the Public Works Administration (PWA), which constructed public-owned housing units.<sup>31</sup> Through the PWA, the government took control of privately owned land for the public purpose of providing housing to those who could not otherwise afford it. The seizure of land during this period was later found to be a wrongful exercise of the federal

government's eminent domain power.<sup>32</sup> As a consequence, construction under this program ended, but the government's ability to create housing opportunities flourished.<sup>33</sup>

The United States Housing Act of 1937 (USHA)<sup>34</sup> was the first national housing program and its goal was "to provide 'a decent home in a suitable environment for every American Family...'"<sup>35</sup> In the 1940s, the federal government began providing low-interest financing through both the Federal Housing (FHA) and Veterans' Administrations (VA) in keeping with this federal housing goal. When American soldiers returned home from World War II, the nation's policy of homeownership continued to expand.<sup>36</sup> Homeownership rates increased from about 45% to 65% after World War II due to government policies that increased access to credit and introduced innovative lending products, like the thirty-year fixed mortgage to the middle class.<sup>37</sup>

USHA was controversial at the time and was challenged as an unconstitutional intrusion by the government in the private market.<sup>38</sup> The United States Supreme Court found the Act within Congress' power to provide for the public's general welfare.<sup>39</sup> This decision would have a compelling impact on housing opportunities in America, as USHA authorized the federal government to pay the principal and interest on tax-exempt bonds, enabling the construction of public housing developments for low-income individuals.<sup>40</sup> However, USHA was not an equal housing program, and assistance within the program operated on a racially-segregated basis.<sup>41</sup>

Between 1937 and 1949, middle-income Americans began moving outside the central cities and into suburban areas, resulting in diminished homeownership opportunities in urban areas. Many of these urban areas became infested with slums and public housing. Congress reacted to this growing problem by passing the United States Housing Act of 1949,<sup>42</sup> which is often touted as being the nation's first official housing policy.<sup>43</sup> The policy was designed to remedy housing shortages, eliminate substandard

housing, and provide a reasonable living environment for every American.<sup>44</sup> The policy had three major objectives: (1) to encourage private development in the housing market; (2) to provide governmental assistance to enable private enterprise; and (3) to fuel local governments in developing programs to help improve cities and housing.<sup>45</sup> The Housing Act of 1949 authorized urban redevelopment and provided for the construction of 810,000 new housing units in six years.<sup>46</sup>

This Act had a decidedly negative impact on African Americans because it forced them to move from their homes as construction began, only to be placed on long waiting lists for public rental housing.<sup>47</sup> In addition, although the federal government's original plan was to revive urban communities, the government's interest in the program, as well as the available funding, decreased rapidly.<sup>48</sup> Consequently, many of the completed units were substandard, meeting only basic housing necessities.<sup>49</sup> The fact that African Americans were not permitted to benefit from government-provided low-interest loans only exacerbated the plan's negative impact. For example, racially disparate application of the FHA/VA loan programs, meant to encourage national homeownership, magnified and enforced economic and racial separation.<sup>50</sup> As a result, the government created a two-tiered system of affordable housing: the upper tier consisted of FHA and VA home acquisition loans while the lower tier was comprised of public housing rental programs.<sup>51</sup>

Under this two-tier system, minority and low-income families were placed in public housing rental programs, while Whites and other preferred classes were given FHA or VA home loans for homeownership.<sup>52</sup> Even African Americans that met the qualifying criteria for loans were generally unsuccessful because the homes they could afford were located in neighborhoods that were predominately comprised of minorities and thus considered risky investments.<sup>53</sup> As urbanization continued to rise, fear, ignorance, and

hatred propelled political groups toward considering race and class as factors when constructing planning devices and promulgating new housing laws.<sup>54</sup> Deliberate policies favoring segregation successfully divided classes and races.<sup>55</sup> Even after laws prohibited segregation, significant racial transition within White neighborhoods often caused Whites to vacate these once segregated white areas, resulting in segregated African American neighborhoods.<sup>56</sup>

In 1968, the United States Congress committed “to meet all of the nation’s housing needs and eliminate all of its substandard housing.”<sup>57</sup> Congress acknowledged that not only had Americans failed to live up to the national commitment, but that the burden of that failure was borne primarily by the poor.<sup>58</sup> This new housing policy made clear that it was designed to address the needs of all Americans, including the poor. The Housing Act states: “It is hereby declared to be the policy of the United States to promote the general welfare of the nation . . . to . . . remedy the unsafe and unsanitary housing conditions and the acute shortage of safe, decent and sanitary dwellings for families of low-income . . .”<sup>59</sup> This national policy laid the foundation for the government’s role in providing housing and housing opportunities for low-income people.<sup>60</sup>

More than one hundred years after the Emancipation Proclamation freed slaves in America, Congress banned racial discrimination in housing practices. Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act (FHA),<sup>61</sup> the Equal Credit Opportunities Act (ECOA), the Home Mortgage Disclosure Act (HMDA), and the Community Reinvestment Act (CRA), were all measures designed to ensure equal housing opportunities to all Americans. The FHA was a more comprehensive law addressing housing<sup>62</sup> and prohibits discrimination on the basis of race, national origin, religion, sex, disability, and family status in real estate transactions.<sup>63</sup> Similarly, the 1974 ECOA prohibits discriminatory lending practices based on sex, marital status, race, religion, national origin, age, and receipt

of public assistance.<sup>64</sup> Discrimination is further prohibited in consumer credit transactions under the Consumer Credit Protection Act and the Federal Deposit Insurance Corporation Improvement Act.<sup>65</sup> Later, the HMDA was enacted to require lending institutions to publicly disclose loan information to ensure racial equality in home mortgage lending.<sup>66</sup>

Despite all these legislative efforts to ensure equal housing opportunities, Congress found it necessary to take additional steps to encourage financial institutions to meet the credit needs of traditionally neglected communities by enacting the Community Reinvestment Act of 1977 (CRA).<sup>67</sup> Banks historically took consumer deposits but failed to provide access to credit, particularly for minority and low-income communities. The goal of the CRA was to ensure that financial institutions would reinvest deposits back into these communities. Under CRA, supervisory agencies were given the authority to deny banks the opportunity to merge, relocate, open a new office or close a particular branch if they failed to comply with CRA demands.<sup>68</sup>

In 1989, the Financial Institution Reform and Recovery Enforcement Act (FIRREA) was enacted to strengthen CRA enforcement by requiring publication of CRA ratings. Banks were obligated to meet the credit needs of the communities they served but were also obligated to disclose their performance record by making available the written evaluations prepared by regulatory agencies.<sup>69</sup> This disclosure requirement gave community organizations the leverage to ensure that financial institutions were FIRREA compliant.

In 1994, in an effort to improve both community development and the accessibility of capital within deteriorating communities, Congress passed the Community Development Banking and Financial Institutions Act (CDBFIA).<sup>70</sup> This legislation established a “fund” that would aid in providing economic support to new and existing Community Development Financial Institutions (CDFIs).<sup>71</sup> A CDFI is an institution whose primary purpose is to

promote economic development, equity investments, and loans to persons within a specified target area.<sup>72</sup> CDFIs are important to increasing homeownership because they are specialized financial institutions that work in communities or markets that traditional financial institutions have not adequately served.<sup>73</sup> CDFIs include community development banks, credit unions, loan funds, venture capital funds, and micro-entrepreneurial loan funds. CDFIs provide numerous services including mortgage financing for first time home buyers, financing for needed community facilities, commercial loans and investments to start or expand small businesses, loans to rehabilitate rental housing, and financial services needed by low income households and local businesses. These institutions also provide services to ensure that credit is used effectively, such as technical assistance to small businesses and credit counseling to consumers.<sup>74</sup>

The Home Ownership for People Everywhere (“HOPE”) programs of the 1980s and 1990s added another dimension to the federal housing policy, which previously focused on rental units. HOPE reoriented American housing policy towards homeownership.<sup>75</sup> Reaffirmed by Presidents Bill Clinton and George W. Bush, this expanded policy embodied the belief that enhanced homeownership serves the public interest, and justifies the use of public dollars to achieve this goal.<sup>76</sup>

## **Part II: Expanding Homeownership Opportunities to African Americans and Other Historically Disenfranchised Populations**

Some theorists suggest that the American policy of increasing homeownership to poorer populations and expanding mortgages was the single biggest contributor to the destruction of the global market economy.<sup>77</sup> Due, in part, to America’s renewed focus on homeownership, the share of Americans who owned homes rose from 64% in 1994 to 69% in 2005. These new homeowners were largely low- and moderate-income families and minorities. Over that same

time period, the homeownership rate in the lowest tenth of the income scale rose 4 %, the second lowest rose 4 %, and the rates for African Americans and Latinos rose 7 and 8 %, respectively. About 12 million new homeowners emerged, roughly half of them African Americans, Latinos, and others of mixed race. By 2005, the United States occupied the top rung in world homeownership rates.<sup>78</sup>

### *Poverty, Income and Homeownership*

A large part of the population remains beyond the reach of traditional finance vehicles. Almost 20 % of all children in the U.S. live in poverty.<sup>79</sup> Poverty has a substantial impact on the quality of education to which children have access. Although numerous programs and policies exist to ensure that all children—regardless of race or economic background—have equal educational opportunities, a substantial number of children living in poverty endure inferior student services and substandard facilities. These conditions help create a cycle of poorly housed renters who contribute less overall to the good of society than do better trained citizens. Poor families often face barriers that restrict their ability to improve their socio-economic status. For example, the ability to move to communities with better educational opportunities is not an option for many poor families. A majority of these families are renters and cannot afford rent or purchase prices in suburban or well-to-do urban neighborhoods. Statistics support this observation. According to the U.S. Census Bureau (Bureau), in 2002, about 56% of American families (owners and renter combined) could afford to purchase a modestly priced<sup>80</sup> home in the area in which they lived.<sup>81</sup> Among families that were current homeowners approximately 75% could afford to purchase a modestly priced home while only 10% of those families who rented could afford to purchase such a home.<sup>82</sup>

Since the late 1940s, the Bureau has surveyed and reported on the distribution of income among U.S. citizens.<sup>83</sup> According to the Bureau's

studies, family income inequality decreased by 7.4 % from 1947 to 1968,<sup>84</sup> But income inequality increased by 24.4 % between 1968 and 1998.<sup>85</sup> The income difference between households in the 95<sup>th</sup> percentile and those in the 20<sup>th</sup> percentile increased from approximately \$96,000 in 1994 to over \$127,000 in 2000.<sup>86</sup>

From 1999 to 2000, the median household income held at \$42,100,<sup>87</sup> the poverty rate in fell to the lowest it had been since 1979,<sup>88</sup> and the number of poor persons fell.<sup>89</sup> African American and Latino incomes rose as poverty<sup>90</sup> rates for these two groups fell,<sup>91</sup> but their income still lagged far behind that of Whites.<sup>92</sup> Further, poverty rates for African American and female-headed households reached their lowest recorded level in 2000.<sup>93</sup> Nevertheless a 1989 National Research Council study reported that the standard of living for African Americans lagged far behind that of Whites<sup>94</sup> and showed that African American unemployment rates were more than two times that of Whites.<sup>95</sup> Even in 2008, the African American unemployment rate was still more than two times that of Whites.<sup>96</sup>

All this demonstrates that while the standard of living for African Americans has improved, a substantial number of African American, Latino, and female-headed households continue to live in poverty at disturbing rates today. While the income gap between African Americans and Whites decreased in 2006, by 2007 the gap returned and, a 2007 Bureau report found that over 22% of all African American families still have incomes below the official poverty line.<sup>97</sup>

### *The Impact of Poverty on Homeownership*

Statistics show that a thriving home mortgage market needs to rely on untapped—increasingly poor and minority—borrowers. In 1991, the Bureau reported that 57 % of American families could not afford a median priced home in the area in which they lived.<sup>98</sup> African Americans and Latinos made up three-quarters of these families.<sup>99</sup> Four years later, the Bureau reported that 80

% of African American and Latino non-homeowner families, almost double that of White families,<sup>100</sup> could not afford a median-priced home in the area in which they lived.<sup>101</sup> By 2004, Bureau reports indicate homeownership rates for Whites was 76.2 % while African Americans and Latinos had homeownership rates of 49.1 and 48.7 %, respectively.<sup>102</sup> Overall homeownership rates in 2009 were at 67.6%.<sup>103</sup>

True comparisons of racial and ethnic disparity in homeownership rates are more difficult because the Census Bureau changed the way it reported race in 2003.<sup>104</sup> Using current race and ethnic standards, however, we can compare 2006 to 2009 rates of homeownership. The homeownership rates for Whites (non-Latinos) were about 76 % in 2006 and about 75 % in 2009. For African Americans, the rates were about 48 % in 2006 and about 46 % in 2009, and for Latinos (of any race), the rates were about 49.5 % in 2006 and 48.7 % in 2009.<sup>105</sup>

In 2002, the Pew Institute reported that the median net worth was \$88,651 for White households, \$7,932 for Latino households, and \$5,988 for African American households,<sup>106</sup> and that home equity was the key component of household wealth, accounting for two-thirds of mean net worth.<sup>107</sup> Public policy tends to support reaching out to these latter two 'untapped' communities of potential homebuyers for a number of reasons. In addition to strengthening community development, homeownership is one of the principal means by which low-income families acquire wealth. Traditionally, home purchases were thought to be good investments because they allowed homeowners to build long term assets,<sup>108</sup> while also resulting in assets that homeowners could borrow against in the short term. Policy considerations also include the recognition that neighborhood environment affects the general welfare of the nation and that homeownership has the potential to catalyze community growth, development, and stabilization.<sup>109</sup> Community stability in turn tends to

increase property values.<sup>110</sup>

Moreover, racial and ethnic homeownership disparity has disturbing implications for a nation that is increasingly diverse, and this disparity played an important role in the decision to increase homeownership opportunities for these communities.<sup>111</sup> The Bush White House initiative of 2000 included a goal to increase the number of minority homeowners by at least 5.5 million by 2010.<sup>112</sup> The initiative also included an identification of the barriers that many minorities faced when seeking to purchase a home as well as strategies to overcome the barriers. One of the most significant barriers to implementing this initiative proved to be financial.<sup>113</sup>

#### *Identifying the Financial Barriers*<sup>114</sup>

The White House identified numerous financial barriers to homeownership, including inability to make down payments, limited access to credit, poor credit histories, limited mortgage products, regulatory burdens, and lack of access to financing in general. The federal government then launched efforts to help targeted borrowers overcome these barriers.<sup>115</sup> It was apparent that home loans were not unavailable per se but were unattainable for many Americans. This lack of access can be attributed to a number of things, including racial barriers that remain rooted in society.

#### *Denying Access*

“Redlining” is one method of denying people access to financing and refers to the practice of outlining in red those areas on a map to which financial institutions are unwilling to extend their credit services. These areas tend to include primarily minority and low-income borrowers. Although inequality and housing discrimination has existed for centuries in our nation,<sup>116</sup> banks initiated the practice of redlining in the 1960s<sup>117</sup> after race riots brought inequality to the forefront of national concern.<sup>118</sup> The federal government began to pay more attention to America’s legally-sanctioned

discriminatory housing practices. The Community Reinvestment Act (CRA) is often hailed as an act against redlining.<sup>119</sup> Although redlining is no longer a blatant practice, lenders continued to issue loans on a discriminatory basis by using marketing strategies that targeted borrowers based on race and adopting inequitable institutional policies.<sup>120</sup> Many lenders who offered prime loans neither marketed nor solicited applications from minority or low-income applicants,<sup>121</sup> with the exception of sub-prime alternatives offered in compliance with CRA requirements.

One scholar has identified racial redlining as a barrier to African Americans’ ability to accumulate wealth because it restricts their participation in the marketplace as home sellers and buyers. Banks use racial redlining to deny access to credit so that a prospective buyer would not qualify for a home mortgage, in fact, “in a study conducted by the Federal Reserve Board, [it was reported that] ‘banks reject African Americans ‘for home loans 80% more often than equally qualified Whites.’ This rampant discrimination disadvantages Blacks and contributes to the poverty cycle.”<sup>122</sup> Moreover, African-Americans who reside within identifiably African American neighborhoods were historically redlined out of the mainstream mortgage market and forced to rely instead on sub prime loans and predatory lending practices. The effect of securing loans through these more expensive markets also impacts the homebuyer’s ability to purchase homeowner’s insurance.<sup>123</sup> The FHA created two housing markets between the early 1930s and the 1960s by systematically excluding African Americans from lower priced, conventional mortgages.<sup>124</sup> The FHA rated loan applicants from most desirable “A” to least desirable “D”. “A” neighborhoods were principally or exclusively white, native-born professionals and “D” neighborhoods were not.<sup>125</sup> In 1950, the FHA only granted 5% of conventional loans to non-Whites thereby limiting low-cost mortgages to Whites. FHA-redlined neighborhoods encouraged racial

segregation and their monopoly on the mortgage market meant that any exclusion from the program constituted exclusion from the housing market.<sup>126</sup> The CRA is to some extent responsible for the decreased disparity between loans awarded to Whites and those awarded to minorities.<sup>127</sup> Although there has been some decrease, minorities are increasingly and disproportionately serviced by sub-prime lenders.<sup>128</sup> Even affluent African Americans are twice as likely to refinance in the sub-prime market as low-income Whites.<sup>129</sup> With the skyrocketing rate of immigration, home ownership in immigrant communities has risen on the priority list of many lending and governmental institutions. As immigrants buy homes at an ever-increasing rate, unscrupulous lenders will frequently target them, because they often lack a sophisticated understanding of the American mortgage system. This is especially true for non-fluent English speakers who fall prey to predatory lenders who impose exploitative loan terms and conditions.<sup>130</sup>

Sub-prime lenders tend to target minorities, low- to moderate-income borrowers, and borrowers who live in certain communities that are considered high risk. These communities are also most likely to be affected by the hardships associated with predatory lending, such as high interest rates, unreasonable fee scales,<sup>131</sup> loss of home equity, and even social and psychological problems.<sup>132</sup> In some cases, these lenders take advantage of borrowers with excellent credit histories who may not realize their eligibility to obtain a prime market loan<sup>133</sup> and direct them instead to sub-prime loans.<sup>134</sup>

According to current Home Mortgage Disclosure Act (HMDA) data, African Americans and Latinos are still consistently denied credit when applying for home loans and when refinancing at rates disproportional to those of Whites.<sup>135</sup> Discriminatory lending practices in the conventional lending market continue to expand the sub-prime mortgage market.

The road to a national policy of homeownership has been a long one

from that time in our nation's history when some were denied the opportunity because of their race. During the last decade, attempts were made to open the door of the American dream of homeownership to all people. One potential by-product of the 2008 economic crash is the reversal of homeownership encouraging policies, but such a reversal would ignore the underlying problems of the crash by placing blame on the wrong culprit. Placing the sole blame upon the homeownership policy or minority home buyers would be unfair and inaccurate.

### **Part III: Homeownership and the Economic Crash of 2008: Is the sub-prime borrower to blame?**

#### *The sub-prime mortgage*

The sub-prime mortgage is traditionally described as a type of loan granted to individuals who have poor credit score histories (often below 600) that disqualify them from conventional mortgages.<sup>136</sup> Because sub-prime borrowers present a high risk for lenders, sub-prime mortgages charge interest rates above the prime lending rate.<sup>137</sup> Borrowers with credit scores above 650 are generally charged a significantly lower rate of interest on their loans than are charged on sub-prime loans.<sup>138</sup>

Lower interest rates and high capital liquidity encouraged lenders to grant sub-prime loans from 2004 to 2006. More importantly, lenders sought additional profits through these higher risk loans, charging interest rates above prime to balance against heightened default risks. More than the government homeownership policy, it was the perceived potential for large profits that motivated lenders to increasingly give out sub-prime mortgage loans.

Sub-prime mortgage lending can be described as predatory.<sup>139</sup> Borrowers who are either financially unsophisticated or financially desperate for credit may agree to unjustified high interest rates, payments that they cannot afford, frequent refinancing arrangements, high and unfair prepayment penalties, excessively high points or origination

fees, and high broker fees. Predatory lending also involves abusive lending practices in which the terms of the loan are inadequately correlated to the riskiness of the loan.<sup>140</sup> In essence, buyers least able to afford their homes were charged more than those who are better able to – the poor paid more for their houses than the rich. Moreover, statistics show that minority buyers who qualified for conventional mortgages with better terms were often steered toward sub-prime mortgages.<sup>141</sup> Research has shown that approximately half of sub-prime borrowers qualify for conventional loans but are led to accept sub-prime loans instead. These borrowers are unaware that they qualify for lower interest rates because the lenders withhold the information in order to swindle minority borrowers into accepting higher interest rates, insurance payments, and other fees associated with the process.<sup>142</sup> These buyers were also more likely to face “creative” financing options that included adjustable rate mortgages (ARMs), interest only loans, and other products that induced the buyer into the transaction only to get a substantial increase in mortgage payments or balloon payments within a period of a few years.<sup>143</sup> These so-called “teaser mortgage products” provided short term success and often produced long term failure.

The interest rates tied to loans traditionally given to minorities also demonstrate the existence of discrimination. African Americans typically pay interest rates one-third of a percent higher than Whites. This amounts to approximately \$11,756 over the life of a thirty-year \$145,000 loan, and is evidence of predatory lending. If poorer African American families are paying a higher monthly mortgage than wealthier White families for equal or poorer facilities, then African Americans are at a disadvantage and will have less disposable income than their White counterparts. Additionally, African Americans in low-income communities typically live in older, more dilapidated housing. This discrimination further serves to foster

an African American underclass.<sup>144</sup>

#### *A deeper look into foreclosures*

In 2007, home foreclosures reached 2.2 million, a 75 % increase from the previous year.<sup>145</sup> Many who lost or were at risk of losing their homes to foreclosures were unexpected victims. For example, foreclosures in military towns and their surrounding towns and cities are outpacing the national average four times over.<sup>146</sup> Working Americans with secure employment lost their homes to foreclosures because they were unable to make their mortgage payments, suggesting that much of these defaults were due to the structure of the mortgage—many involved adjustable rates frontloaded with teaser rates that escalated to amounts that working families could not manage.

Significantly, as bad as the mortgage crisis has been, an estimated 94% to 99% of mortgages are performing.<sup>147</sup> Moreover, it is estimated that more than 75% of sub-prime mortgages will perform.<sup>148</sup> By 2012, however, 13% of all American residential loans are projected to end in foreclosure.<sup>149</sup> This would mean that 87% of mortgage loans would be performing, but it is the profile of the 13% that compels further review.

Sub-prime lending accounts for the greatest percentage of home mortgage foreclosures.<sup>150</sup> While sub-prime mortgages represent only 14 % of the mortgage loans, they represent almost 50 % of the foreclosures. The general consensus is that low-income and minority homeowners have suffered disproportionately because they have participated in the sub-prime lending market at greater rates than White and Asian borrowers. In 2006, African American and Latino communities accounted for more than 53 and 46 % of the sub-prime home loans, respectively.<sup>151</sup> By 2007, African Americans carried 34% of high priced mortgages compared with 10.6% for Whites.<sup>152</sup> According to an analysis of loans reported under the federal Home Mortgage Disclosure Act, African Americans were 2.3 times more

likely to take out sub-prime mortgages and Latinos twice as likely.<sup>153</sup> In 2007, 59 % of all sub-prime loans were in tracts that were less than 30 % minority and only 17% were in tracts that were more than 70 % minority.<sup>154</sup>

While creditworthiness may be one reason for the high number of sub-prime loans in minority communities, a greater reason appears to be race.<sup>155</sup> Despite the CRA's intent to address redlining by requiring banks to make loans in lower income neighborhoods, it did not require banks to actually be located in those communities. As a result, banks typically maintain offices and branches in White communities while lending institutions offering sub-prime loans are strongly visible in minority communities.<sup>156</sup> This helps to explain why minority borrowers eligible for lower cost loans obtain higher cost products instead.

A *Wall Street Journal* study found that as many as 61 % of all sub-prime borrowers in 2006 could have qualified for more conventional products based on their credit scores.<sup>157</sup> Various firms record the states and cities hardest hit by foreclosures,<sup>158</sup> and most of these states and cities are overwhelmingly White.<sup>159</sup> In other words, while a higher percentage of people of color than of Whites assume sub-prime mortgages, most sub-prime loans overall do not go to people of color.<sup>160</sup> This suggests that even though sub-prime mortgages made to minority buyers has affected the overall foreclosure numbers, something other than sub-prime lending may be responsible for the national downturn.

#### *How sub-prime mortgages fueled the economic crisis of 2008*

Since World War II, the nation's housing policy has sought to expand housing opportunities. More recently, housing policies also aimed to make mortgages available to poorer Americans.<sup>161</sup> In theory, this policy recognizes that national wealth is dependent on the wealth of each of the nation's citizens, and it also sought to address the history of racial and ethnic

discrimination that affected property lending and insurance practices, such as redlining.<sup>162</sup> The policy was steeped in good intention, but many argue that it forced lenders to abandon sound business practice in order to lend to the poor and to minorities, resulting in the housing bubble burst that brought the global economy to its knees.<sup>163</sup>

As discussed earlier, sub-prime mortgages are characterized as risky, which means lenders are more likely to see defaults on sub-prime loans than on conventional or prime loans. However, in relation to the economic crisis of 2008, the sub-prime mortgage was merely an essential element in the ultimate collapse. In the early 1990s, a collapse of the sub-prime market may have been inconsequential as it accounted for less than 1% of all mortgage lending.<sup>164</sup> By 2005, sub-prime lending grew to 20% of all mortgage lending.<sup>165</sup>

Demand for sub-prime loans increased after the dot-com bubble burst in 2001. To boost confidence in the market, the federal government lowered interest rates, encouraging people to borrow. For most Americans, homes represent their largest investment, so the credit market sought to attract more home loans. Capital flowed into the hands of borrowers who in turn bought more homes. Property values increased, but some of these values were based on aggressively unreliable appraisals that artificially inflated housing valuation and increased loan amounts. People whose homes were already mortgaged were enticed to secure second and even third liens against their home equity, relying on these escalating home valuations. In many instances, borrowers ultimately owed more than their houses were worth.

Much of this activity was fueled by an unquenchable thirst for wealth. Mortgage brokers and sub-prime lenders sought out people who would borrow at exorbitant rates and fees. Theoretically, these loans would not put brokers and lenders in grave jeopardy because risk supposedly goes down as it is spread out. Instead of the bank holding all of the risk, the government would share a

significant portion of that risk through FNMA, FHA, and others. At first, this risk-sharing plan appeared to work well, and securitization emerged as a way to increase profit while addressing growing market demands.

#### *Securitization*<sup>166</sup>

Responding to the increasing interest of the non-depository mortgage lenders to find a source of liquidity for conventional loans, government sponsored entities (GSE) began issuing mortgage-backed securities (MSB) that passed interest to investors.<sup>167</sup> The investors, in turn, found these securities to be easily transferable on the market because the GSEs guaranteed the principal and interest income of the securities even if the mortgagors defaulted.<sup>168</sup> Private institutions soon recognized the profitability of these investments and began pooling home mortgages but specifically excluded home equity loans and sub-prime mortgages.<sup>169</sup> This created a market niche for private pooling that basically began in 1977 with Bank of America and Salomon Brothers.<sup>170</sup> Unfortunately, this securitized mortgage vehicle was based on a highly unreliable risk assessment model.<sup>171</sup>

Beginning in the 1990s, mortgage financing found creative ways to reach otherwise unqualified borrowers. Numerous mortgage products aimed at attracting 'untapped' borrowers included balloon mortgages, adjustable rate mortgages, interest only loans, and others. Initially, these loan products were made to prime borrowers who carried a low risk of default. However, extending securitization to higher risk sub-prime borrowers became increasingly attractive for investment banks seeking higher fees and greater profits.<sup>172</sup> Wall Street analysts produced computer models supposedly demonstrating that risks associated with pooling sub-prime debt were comparable to risks of prime backed securities.

Initially, the models seemed accurate. Between 2001 and 2005, sub-prime defaults dropped from 10 % to 5 %. Many borrowers, however, were

warding off default by getting new housing equity loans to pay off the original debt. This created the illusion that the loans were performing and were therefore low risk. In actuality, the borrower's situation typically worsened, as new debt was generally higher than the original high-cost debt. Instead of avoiding default, the borrower was simply deferring an increased liability. Moreover, because securitized sub-prime mortgages were a relatively new phenomenon, there was little data with which to test the computer models. In other words, the combination of easy capital and an abundance of available money far exceeded the underlying goal of increasing American homeownership. The new goal was to target as many new buyers as possible to fuel the unregulated greed that was consuming Wall and Main Streets. Based, in large part on the optimistic models, ninety percent of securitized sub-prime loans received the highest rating available: AAA. Reality ultimately struck and about 50 % of AAA-rated sub-prime securities defaulted. During this same period of mirage, collateralized debt obligations (CDO) were revived as a way to diversify the mortgage pool by mixing sub-prime mortgages with asset-backed securities and credit derivatives. When the smoke cleared, almost 100% of all AAA CDOs had at least partially defaulted.<sup>173</sup>

CDOs and ABSs are secured by underlying real estate. When the note defaults, the holder of the CDO or ABS should be able to sell the underlying property to recover any financial loss. However, in this new market, the property is likely to be worth far less than the debt it secures. Moreover, the housing market has been stalled by the collapse of the credit market. The credit market stall should have been temporary and should have been reversed with the infusion of government TARP funds, but it was neither temporary nor reversed, thus exacerbating the decline of the housing market. Inaccessibility to credit has less to do with housing policy or sub-prime mortgages and more to do with another Wall Street invention designed to make more money for investors. Coupled

with failing sub-prime market securities, the failure and potential failure of credit default swaps would send the global markets reeling.

### *Credit Default Swaps and Their Role in the Credit Collapse*

American billionaire Warren Buffett described speculatively-bought derivatives as financial weapons of mass destruction.<sup>174</sup> A credit default swap (CDS) is a credit derivative where one party makes periodic payments to the other and gets promise of a payoff if a third party defaults.<sup>175</sup> The first party gets credit protection and is called a buyer. The second party gives credit protection and is called the seller. The third party is known as the reference entity. The CDS is an insurance policy written in favor of the insured who is not the owner of the product that is actually being insured. An investor, also known as the buyer, can gamble that a company will likely default and purchase an insurance policy that pays the investor-buyer money if the reference entity defaults.<sup>176</sup>

The underlying theory for the CDS probably comes from the 1958 Modigliani-Miller theorem,<sup>177</sup> which finds that the value of a firm can be independent of the firm's ratio of debt to equity,<sup>178</sup> and that swaps and derivatives ensure the safety of the financial system.<sup>179</sup> However, it is a mathematical computerized financial model created by David Li that is at the core of the financial collapse of 2008.<sup>180</sup> Li's model, which catapulted the Modigliani-Miller theorem into the huge derivatives market, was designed to calculate default correlations by predicting risk.<sup>181</sup> Notwithstanding Li's own warnings about important flaws in his model, investment bankers, beginning with those at Banker's Trust and J P Morgan Chase, relied on the model.<sup>182</sup>

An estimated \$58 trillion in outstanding CDS liability exists. If this CDS market collapses, it will produce consequences far greater than sub-prime mortgage defaults.<sup>183</sup> There will not be enough money to pay all the claims, which is why the federal government

is attempting to shore up banks and insurance companies with cash infusion and why the cash is not being used to extend credit. The cash infusions are being hoarded to pay off the CDS claims of savvy billionaire investors, not of sub-prime borrowers. These buyers who have cashed out (and will cash out in the future) by insuring products they didn't even own have made out like bandits. Yet, because the CDS market is completely unregulated,<sup>184</sup> it will be far more difficult to identify these winners than it was to identify the hedge fund winners.

### *Selling Short (Short sales)*

Out of the CDS market grew "the short sale," another tool investors used to make unimaginable sums of money.<sup>185</sup> Unlike the traditional "long sale" where the investor bets that the company in which she is investing will prosper, the short seller bets that the company will fail.<sup>186</sup> The short sale has existed since the seventeenth century and has remained controversial throughout its lifetime. Short trading is legal,<sup>187</sup> but the government sought to regulate the practice, which one congressman called "the greatest evil that has been permitted or sanctioned by the Government," after the stock market crashed in 1929.<sup>188</sup>

Until recently, the Securities and Exchange Commission (SEC) regulated short selling.<sup>189</sup> The regulation prohibited the short sale of an exchange-traded security in a falling market. The prohibition applied to every transaction effected on a national securities exchange and to transactions in certain exchange-traded securities affected in the over-the-counter market.<sup>190</sup> On the other side of the debate, de-regulators suggested that the short seller is a valuable town crier in the economic marketplace. Arguing that the short seller does not cause the company to fail, but merely identifies which companies are struggling due to poor management and overvaluation, the SEC deregulated the industry on July 2, 2007.

At issue in this article is how significant a role short sales played in the

current economic crisis. Some investors viewed mortgage trading as a bubble that would eventually burst and shorted the companies—principally banks, insurance companies, and mortgage companies—that were investing in this debt. As debtors began to default and credit schemes began to unravel, short sellers profited—some in huge amounts. If the short sale represents a peculiar industry of buying and selling borrowed stock, the credit default swap, which gives investors unregulated power to insure companies that they do not own, makes the short sale seem less menacing.

### *Credit*

A weak American credit market substantially affects the overall health of international economies. The American consumer uses credit to pay for homes and education in the U.S., but also for goods imported from abroad. American businesses rely on credit to conduct, maintain, and expand operations both domestically and abroad. When lenders fail or refuse to lend, people around the globe suffer.

One of the reasons banks are unwilling to lend is because they fear that toxic debt, otherwise described as potential CDSs and short sale liability, is yet to be fully identified or assessed. Banks are hoarding money in reserve to defray potential losses in debt. Generally, a bank's equity-to-debt ratio is about one dollar in equity to support every twenty dollars in debt. The SEC permitted investment banks to have a 1:30 equity-to-debt ratio.<sup>191</sup> To assess the accuracy of the ratio and therefore the risk, banks rely on rating agencies. When the rating agencies incorrectly rate high risk ABSs, CDOs, and sub-prime MBSs as AAA, thereby severely discounting the risk, lenders are left seriously undercapitalized.<sup>192</sup> The government's infusion of capital into these banks, while bolstering the reserves needed to ward off potential liability, has not adequately contributed to re-opening the credit markets.<sup>193</sup>

In other words, if the banks did not have to provide reserve funds

for so-called toxic debt, they would be able to make more loans to companies, consumers, and home buyers. The current economic catastrophe is rooted in the failure of these myriad investment vehicles' inability to expand the sale of single family homes to Americans. That said, a healthy economy cannot survive purely on credit and consumerism. Nor can opening the credit markets alone restore the economy. Credit should be governed by sensible business principles that include re-opening mortgage markets even to higher risk borrowers.

### **Part IV: Looking for Solutions**

You got Wall Street firms, Bear Stearns, Lehman Brothers. You got insurance companies like AIG. Merrill lost a ton of money on this... Everybody's lost a ton of money. They're supposed to be the smartest investors in the world. And they did it to themselves. They blew themselves up.<sup>194</sup>

Numerous factors contributed to the economic collapse of 2008. The sub-prime mortgage market was one factor but was not the only culprit. Indeed, losses related to high risk mortgages are dwarfed by those related to derivatives and securitization. According to Frank Partnoy, "we wouldn't be in any trouble right now if we had just had underlying investments in mortgages. We wouldn't be in any trouble right now."<sup>195</sup> In fact, even though foreclosure rates on sub-prime mortgages are much higher than foreclosure rates on prime mortgages, some 80 % of sub-prime loans are still performing, and sub-prime loans continue to enable borrowers to own homes, increase wealth, and convert their sub-prime loans to conventional ones.<sup>196</sup>

If Partnoy is correct (and the numbers reflect that he is),<sup>197</sup> it would be foolhardy to abandon the goal of

increasing homeownership opportunities in America. Instead, government policy should continue to recognize the value of homeownership to individual and national wealth. This would require the nation to continue to address the barriers to homeownership, particularly the financial barriers, in a comprehensive and rational way. That said, not every American needs or is able to own a home. Financial prudence and good sense must work in concert with any program designed to expand homeownership opportunities.

### *Addressing the absence of Credit*

The government has tried to stimulate the financial markets and reinvigorate lending, but the credit market remains closed. Instead, banks are putting money received from the government into reserves in anticipation of CDS claims. While estimates of potential CDS claims continue to rise, it is likely they are in the hundreds of billions of dollars. Chase Bank alone is involved in over 4 trillion dollars in CDS investments.<sup>198</sup> At these rates, there will never be enough money to stimulate the financial markets back into lending again. This leaves the government as the major source of loans, and there are a number of government-backed programs in place to provide the funding necessary to support homeownership.

In order to stop the market's financial bleeding, regulators should put a halt to CDSs. There should also be a time-specific requirement that all holders of CDS instruments must report their holdings. In this way, potential liability can be calculated and the proper amount of reserves needed to compensate can be set aside. Since CDSs terminate after time, the markets will also know how long the potential loss exists. In the event the CDS continues as an investment vehicle, the law prohibiting regulation should be overturned so that the CDS market will be at least as transparent as the overall investment market.<sup>199</sup>

*Specific Financial Remedies: No need to re-invent the wheel*

Various existing government programs provide financial fixes through subsidies that fill the gap between funds needed to close sales and funds potential buyers have to purchase homes.<sup>200</sup> These programs provide down payment assistance, tax credits,<sup>201</sup> expanded funds to the secondary mortgage market<sup>202</sup> and various financial incentives to private homebuilding and financing entities.<sup>203</sup> There is significant value in these programs, but additional government money to support these programs where few alternatives exist could serve as a much needed ‘TARP’ for ordinary citizens.

*The Land Trust*

Land trusts are used to protect natural resources.<sup>204</sup> While the land trust movement has grown tremendously since its inception more than one hundred years ago, it remains principally a conservation and environmental protection tool.<sup>205</sup> The land trust concept can easily be expanded to include the goal of protecting affordable housing stock and homeownership opportunities.<sup>206</sup>

Land trust corporations<sup>207</sup> may acquire land in fee simple for the charitable or public purpose of providing affordable homeownership opportunities.<sup>208</sup> Technically, the trust would acquire the land and retain ownership of it,<sup>209</sup> and the homeowner would purchase the house itself but not the underlying land. This option could be particularly helpful in gentrified communities where land values, property taxes, and insurance costs are so high that homeownership can become unaffordable.<sup>210</sup>

Under this option, homeowners would pay the taxes assessed solely on the house value, while property taxes assessed on the land value would be exempt or paid by the trust.<sup>211</sup> Similarly, homeowner insurance would be based on the cost of replacing the house and not on the price of the land. The

homeowner could acquire the land over time at a low purchase price (pre-escalated or modified escalation value) and even share profits from the sale of the property with the trust.<sup>212</sup> The financial gain to the homeowner at the sale of the property would be based on the number of years the property would be held as affordable. A homeowner could sell the property to another qualified buyer without penalty allowing the land use restrictions to transfer to the new owner. On the other hand, a homeowner who sold the property to a fair market purchaser could share some profit from the sale with the trust. The amount of profit realized would be related to the number of years the homeowner owned the property under the affordability restriction.<sup>213</sup> Moreover, an incentive to participate in such a transaction could be to permit the initial buyer to share in some of the appreciated land value as well as the value of the house itself.

The sales agreement between the trust and the homeowner can provide for an affordable housing payment to the trust. Rather than securing a sub-prime mortgage, the qualified buyer would contract for a loan that would be affordable. Not only might this affordable housing program help improve the buyer’s financial condition, but the homeowner will pay a return to the public upon sale.

*Tax Abatement and Exemption Programs*

Property taxes are calculated based on the assessed value of the property and are commonly described as ad valorem taxes. Affordable housing developments are often constructed on land with low valuation. Low value appraisals are essential for ensuring low or affordable sales prices. Pre-development residents generally pay lower taxes than do residents who move in post-development, when property values for the area have risen. Affordable housing developments tend to address blighted conditions, upgrade the community, and generally increase the value of new residences as well as existing ones.<sup>214</sup> As more housing is developed and a more

stable community is established, values continue to increase. The double-edged sword of development is that it could tax existing residents as well as newcomers out of their homes.<sup>215</sup> This is especially true of development near downtown locations where land values may increase dramatically and quickly.<sup>216</sup>

Effectively addressing the property tax problem is challenging. One option is for the owner to sell at higher value, enjoying the windfall of equity build up in the land since it was purchased. This is not necessarily averse to the public interest of building wealth in historically impoverished communities.<sup>217</sup> However, the drawback to electing the windfall option is the potential reduction in economic and racial diversity in the community and the displacement and replacement of longtime community residents. This is commonly referred to as gentrification—the replacement of lower income residents with higher income residents through increased property taxes and sale prices.

A second option tempers the first option’s market-driven approach. A municipality or developer can impose restrictive affordability covenants that run with land purchased under the affordable housing program. Presuming that the program is designed to increase affordable housing stock and expand homeownership opportunities to historical renters, the covenant would be designed to retain affordability for an express term and could be written in a way to permit the homeowner to recover a share of the equity that would be less than the windfall of option one. Under this second option, the homeowner may sell the property at a price higher than was paid based on the higher valuation but may keep only a percentage of the profit based on the length of time he or she owned the property. This meets two goals: increasing homeowner wealth and retaining an affordable housing fund even if the specific housing stock is no longer affordable.

A third option is tax abatement. Commonly used by municipalities to attract business enterprises, it could also be used to encourage economically

diverse communities and reduce the displacement of residents who have no viable relocation alternatives. Tax abatement and tax exemption programs are legislatively-established measures for shifting the burden of property taxes away from a target taxpayer population.<sup>218</sup> The general purpose of the tax exemption is to encourage publicly desired objectives.<sup>219</sup> A cost-benefit analysis should be done to determine which groups will be impacted positively, which groups will be affected negatively, and whether a complete or partial exemption is or should be available.<sup>220</sup> Tax abatements are also financing tools that may be used to revitalize economically-depressed areas.<sup>221</sup> Abatements commonly forgive all or a portion of property taxes for a specified period of time. Tax abatements are often used to attract business communities with the goal of creating jobs and encouraging community vitality.<sup>222</sup> It is unclear how beneficial such business abatements have actually been in the past, but as part of a comprehensive redevelopment program, they could increase the level and speed of a community's revitalization.<sup>223</sup>

#### *Tax Credits*

Tax credit programs provide incentives for tax-burdened entities to participate in low-income housing programs. The Tax Reform Act of 1986 established the low income housing tax credit and was designed to increase the number of affordable housing rental units in the United States.<sup>224</sup> It is often criticized,<sup>225</sup> but there is also a growing movement to expand the program to include low-income homeownership tax credits.<sup>226</sup> Among the proposals is a low-income second mortgage tax credit that would encourage homeownership by lowering down payment and closing costs and by reducing housing costs in general.<sup>227</sup>

#### *Tax Increment Financing (TIF)*

Tax increment financing (TIF) is a mechanism by which local government provides homeownership opportunities.

TIF allows local governments to finance improvements, in infrastructure for example, in an effort to attract business redevelopment in a target area.<sup>228</sup> TIF relies on property value increases and property tax revenue to pay for community revitalization that could include redeveloping or rehabilitating deteriorated areas of a city, facilitating the construction of low-to-moderate income housing, promoting economic development, and providing employment opportunities.<sup>229</sup>

#### *Addressing Creditworthiness*

Some potential buyers who have adequate income to pay the house note and costs are still not creditworthy under traditional lending criteria.<sup>230</sup> Though helpful, programs designed to clean buyers' credit histories are not designed to monitor buyers' future credit habits. A three-part program that allows the purchaser to buy the home during the pending credit "cleanup" will likely yield better results. Under this option, the buyer would qualify for the program based on income and evidence of financial stability. Those with less than stellar credit ratings will have to participate in a credit counseling and cleaning program during the first year of homeownership as a condition of the mortgage subsidy or other assistance. Finally, the buyer will agree to a wage garnishment plan that hedges against the risk posed by the buyer's limited credit worthiness.

It may also be possible to divert attention from the traditional house to a less expensive form of housing like the modular housing that was popular in places like Levittown during the post war era.<sup>231</sup> Other forms of construction could also be made available, as well as smaller cottages and bungalows that support lower construction and sales prices.

Standard financing programs need to address the cost of constructing homes and its effect on affordability.<sup>232</sup> In markets where housing prices fall below the average, demand tends to be very high.<sup>233</sup> These markets consist of

the working poor who do not qualify for public housing but do not make enough money to purchase a home. While no person should be pressured into homeownership, the opportunity could be made available for those Americans who desire to be homeowners. Often, construction costs limit the accessibility of this market in several ways. Contractors who build in the affordable market already realize limited profit margins that discourage entrepreneurial interest. They are not equipped to reduce the sales prices of homes to meet the needs of this forgotten market.<sup>234</sup> The working poor generally do pay for housing and its amenities in the form of rent and utility payments, but they often do not qualify for homeownership opportunities at rates comparable to rent.

#### *Foreclosure*

Access to credit does not always portend success as a homeowner. Some will lose their home to foreclosure. There are three sources of risk that commonly lead to mortgage payment terminations:<sup>235</sup> interest-rate related refinancing, default, and moving.<sup>236</sup> For various reasons, higher risk loans are more likely to be affected by mortgage payment factors. Market conditions may reduce the homebuyer's ability to maintain mortgage payments. For example, a slow market may affect the owner's ability to resell the home and move unless the seller is willing to accept a loss. Clearly, selling at a loss undermines the home purchase as a tool for building wealth.<sup>237</sup> On the other hand, high risk homeowners in a fast market are commonly impacted by the rising costs, including increased property taxes, associated with the house, but such costs can be offset by the sale of the property at its enhanced value. Here, the homebuyer is forced from her home as a "victim" of a gentrified community. While such displacement does not necessarily mean financial detriment to the homeowner, it could significantly affect the maintenance and availability of affordable housing.<sup>238</sup> Foreclosure then looms as a potential threat to the

affordable homebuyer.

*Addressing the Roots of Barriers to  
Homeownership Comprehensively*

Capital and access to capital significantly impact a family's ability to purchase a home. As short term remedies, down payment assistance, mortgage buy downs, and other subsidies are very helpful but should be employed as part of a long-term plan. Education is internationally recognized as the single most powerful tool against poverty,<sup>239</sup> yet illiteracy in America is believed to be at least 20 %.<sup>240</sup> Since the United States provides access to public education, it seems infeasible that so many Americans are uneducated or undereducated.<sup>242</sup> Studies show that when poor people are relocated from depressed communities to more mainstream communities, they tend to develop and maintain a new culture supportive of upward mobility and education.<sup>243</sup> Thus, concentrated communities of poor people limit homeownership, and any potential solution should address racial, cultural, and economic diversity as part of its design.

### **Conclusion**

There is substantial reason to maintain a strong policy of homeownership in America. Homeownership is the primary means of developing wealth for most American families. When whole groups of people, defined often by their race, are denied access to this source of wealth, it sustains an economic division that retards national growth and development. As the American population is increasingly dominated by this group of have-nots, the impact of poverty on the United States and world economy is clear.

For over six decades, the United States has promoted a policy favoring safe, decent, and sanitary housing for its citizens. For much of that time, however, homeownership was reserved for Whites, while significant barriers existed for African Americans who wanted to own their own homes. These barriers

often closed the door to homeownership altogether for African Americans. In other cases, the cost was so high as to have a deleterious impact on wealth, even for those African Americans who owned homes. During the last decade, the policy has shifted to encourage homeownership, particularly for African Americans. Regardless of whether this shift occurred because the nation finally recognized that African Americans were being denied an important vehicle to prosperity, because of a desire for racial equality, or because of investor greed, the shift did produce an increase in African American homeownership. At any rate, recognition of the goal of homeownership is meaningless without an assault on the remaining barriers to reaching that goal. If the goal is to be achieved, solutions must be aggressively pursued.

The current world economic state has multiplied the challenges America faces. Many of the last decade's financial practices have failed in catastrophic ways, and recovery is expected to be very slow. Nevertheless, the role of the mortgage market and of the sub-prime loan in this calamity is infinitely small, so the American policy of homeownership should not be reversed. We should ensure that all Americans will share in the economic recovery and that the history of disparity will be reversed. An important part of that recovery is the revival of the housing market and the development of strategies making housing more affordable. Our efforts will be maximized if we pursue a comprehensive program that meets short-term needs but also addresses long-term cures.

The government must employ meaningful regulation to help identify the extent of the continuing CDS liability. Every buyer, holder, broker or seller of a CDS should be given a limited period of time to report its existence and its potential liability. Companies or individuals who fail to self report within the time period should be subjected to specified penalties. The fledgling private lending marketplace should be supplemented with direct government mortgages,

and the government should work with the private marketplace to ensure that lending practices are sound. Mortgage lending programs should be developed that permit higher risk borrowers to buy non-traditional, and affordable, homes under more traditional financing structures. Public and private policies must be in place to maintain reasonable and realistic property valuations. Programs that include features like wage garnishment or mortgage escrow agreements to help ensure loan repayment should be considered. The costs of affordable housing can be reduced in various ways, one of which is through waivers of income generating municipal and regulatory fees. Also, historically un- and underserved communities can be targeted for capital improvements, particularly in infrastructure. Lower cost building product alternatives, such as prefabricated or modular homes, can be used. Land banks and/or land trusts can also reduce the cost of housing. The sources of low-cost loans (investments), such as pension funds, should be identified. Mixed-use and mixed-income residential developments should be encouraged, programs that provide down payment assistance should be continued, and predatory lending should be reduced while shoring up fair sub-prime products. Finally, homeownership illiteracy should be reduced via, for example, continued education components as part of loan requirements or community-based campaigns to inform target populations of the various programs available. In the long term, we must bridge the income gap between Asian Americans, Anglo Americans, African Americans, and Latinos, especially in those situations where the gap can only be explained by race. We must reverse the trend of school drop outs and public education failure toward a trend of achievement and productivity. Finally, we must enact inclusive zoning laws and eliminate the myth of the inherently substandard African American residential community.

The impact of a wealthier nation will be felt by all Americans. The fact that government policies denied

access to wealth to its citizens because of their race makes it important not

only to retain its policy of expanded homeownership opportunities, but to

couple it with specific strategies to reach a fair and equitable result.

## Endnotes

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<sup>2</sup> See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 23 (2000), quoted in Ann M. Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 HOUS. L. REV. 211, 239 n.270 (2003) (explaining that property ownership was a prerequisite for suffrage in nearly every state during the Revolutionary Era); see also JOHN PHILLIP REID, *THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION* 128 (1989), quoted in James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 459 n.62 (1999) (explaining that “even in the most representative colonial legislatures, suffrage only was extended to one-sixth of the population. Women, children, servants, and those without property all were ineligible to vote”).

<sup>3</sup> ALEXIS DE TOCQUEVILLE, *Democracy in America* (1835), in *DEMOCRACY IN AMERICA: AND TWO ESSAYS ON AMERICA* 73 (Gerald Bevan trans., Penguin Books 2003) (“[T]he strength of free nations resides in the townships. Town institutions are to freedom what primary schools are to knowledge: they bring it within people’s reach and give me the enjoyment and habit of using it for peaceful ends.”); see also DONALD G. HAGMAN & JULIAN C. JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW*, § 2.9 (2d ed. 1986); Patrick J. Skelley, *Public Participation In Brownfield Remediation Systems: Putting Community Back on the (Zoning) Map*, 8 FORDHAM ENVTL. L. J. 389, 395-98 (1997) (discussing the challenges to cleaning hazardous waste, a presumably positive modification of land use, if surrounding landowners are not brought into project as participants. Among the other things landowners may be concerned with the affect on the nature of the surrounding

community. It alters traffic patterns and density, increases noise, and changes the balance of uses in a particular area).

<sup>4</sup> See Olufunmilayo B. Arewa, *Measuring and Representing the Knowledge Economy: Accounting for Economic Reality under the Intangibles Paradigm*, 54 BUFF. L. REV. 1, 1-2 (2006) (recognizing the historical measure of wealth by tangible assets but suggesting that the technological age may increase the importance of intangible assets); Jeanne Goldie Gura, *Preserving Affordable Homeownership Opportunities in Rapidly Escalating Real Estate Markets*, 11 J. AFFORDABLE HOUS. & CMY. DEV. L. 78, 79 (2001) (explaining that home ownership has traditionally been considered an integral step toward building wealth and achieving the American Dream; Michael A. Stegman, Roberto G. Quercia, & George McCarthy, *The Center for Housing Policy, Housing America’s Working Families*, 1 New Century Housing Issue 1 (June 2000) available at [http://www.ccc.unc.edu/abstracts/0600\\_Housing.php](http://www.ccc.unc.edu/abstracts/0600_Housing.php) (last visited November 30, 2009).

<sup>5</sup> See Brian Gilmore et al., *The Nightmare on Main Street for African-Americans: A Call for a New National Policy Focus on Homeownership*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 262, 264-66 (2008) (tracing the history of homeownership among African-Americans since emancipation in 1865); Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 618-19 (1999) (tracing the history of mortgage-based discrimination in the housing market).

<sup>6</sup> *Id.* See also Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1054 (2008) (listing many reasons why homeownership is valued in American households). Cf. Dearborn, *supra* note 77, at 40, 44, where the author acknowledges that research supports these purported benefits of homeownership, however she argues “homeownership advocates fail to recognize that most of the evidence supporting these claims comes from studies of middle- to upper-income White populations. The premise that homeownership has absolute benefits has rarely been tested among low- to moderate- income and minority populations. As a result, few of the putative benefits of homeownership can be expressly substantiated for traditionally underrepresented groups.”

<sup>7</sup> See Melissa B. Jacoby, *Home Ownership*

*Risk Beyond A Subprime Crisis: The Role Of Delinquency Management*, 76 FORDHAM L. REV. 2261, 2276 (2008) (explaining that home ownership is key to wealth-building); John K. McIlwain, *Show Me the Money: A Proposed Federal Response to Urban Sprawl*, 11 J. AFFORDABLE HOUS. & CMY. DEV. L. 26, 27 (2001) (citing home ownership as the American dream for millions of Americans); Rick Santorum, *Wealth Creation in the New Millennium: Transforming Poverty in America*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 383, 391 (2002) (explaining that most Americans consider home ownership the signal that they have reached the “economic mainstream”).

<sup>8</sup> See Charles Lewis Nier, III, *The Shadow Of Credit: The Historical Origins of Racial Predatory Lending and its Impact upon African American Wealth Accumulation*, 11 U. PA. J. L. & SOC. CHANGE 131 (2007) (attributing the homeownership gap between African-Americans and Whites to the nation’s history of racial discrimination in the housing market and blaming lack of available and fair credit as a source of this problem).

<sup>9</sup> *Id.* at 133 n.12 (citing the 2005 report which conveyed President Clinton’s goal of increasing minority home ownership); see also Lorna Fox, *Re-Possessing “Home: A Re-Analysis of Gender, Homeownership and Debtor Default for Feminist Legal Theory*, 14 WM. & MARY J. WOMEN & L. 423, 470-71 n. 327 (2008) (citing the specific agenda of the William Clinton administration to expand homeownership opportunities to minorities); Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186, 189, 216-220 (2005) (describing how the intent of banking regulations during the Kennedy administration were designed, in part, to eliminate the segregation patterns fostered by the Roosevelt legislation, but failed to do so); George Steven Swan, *The Law and Economics of Affirmative Action in Housing: The Diversity Impulse*, 15 U. MIAMI BUS. L. REV. 133, 135 (2006) (describing the exclusionary effect of the homeownership regulations implemented during the Franklin D Roosevelt presidency).

<sup>10</sup> KERWIN CHARLES AND ERIK HURST, *The Transition to Homeownership and the Black-White Wealth Gap*, in 84(2) THE REVIEW OF ECONOMICS AND STATISTICS 281-297 (MIT Press, 2002).

<sup>11</sup> U.S. CENSUS BUREAU, HOUSING VACANCIES AND HOMEOWNERSHIP, ANNUAL STATISTICS: 2007, TABLE 20: HOMEOWNERSHIP RATES BY RACE AND ETHNICITY OF HOUSEHOLDER, 1994 TO 2007, available at <http://www.census.gov/hhes/www/housing/hvs/annual07/ann07t20.html> [hereinafter U.S. CENSUS HOMEOWNERSHIP RATES]. Gilmore et al., *supra* note 4, at 266-67. (highlighting Clinton's housing programs' specific targeting of low-income and underserved populations).

<sup>12</sup> Matthew Nielsen and Kara Altenbaumer-Price, *The Civil, Regulatory and Criminal Responses to the Subprime Mortgage Meltdown*, 14 ANDREWS SEC. LITIG. & REG. REP. 1, 1 (2008) (tracing the efforts of the SEC to search out those responsible for creating the sub-prime mortgage crisis); see also Rachel Carlton, *Mortgage Forgiveness Debt Relief Act Of 2007*, 45 HARV. J. ON LEGIS. 601, 601-03 (2008) (describing the Mortgage Forgiveness Debt Relief Act).

<sup>13</sup> See Scott C. Matasar, (Commentary) *Defenses In Subprime Litigation*, ANDREWS BANK AND LENDER LIABILITY LITIG. REP. (2008) (stating that the role of the Community Reinvestment Act is a large part of the mortgage and mortgage backed securities collapse); but see Richard D. Marsico, *Subprime Lending, Predatory Lending, And The Community Reinvestment Act Obligations Of Banks*, 46 N.Y.L. SCH. L. REV. 735 (2002) (discussing the Community Reinvestment Act and its antipathy toward bad debt including predatory and some sub-prime lending).

<sup>14</sup> See U.S. CENSUS HOMEOWNERSHIP RATES, Historical Census of Housing Tables Ownership Rates, available at <http://www.census.gov/hhes/www/housing/census/historic/ownrate.html> (The 1970 report shows African American homeownership rates at 41.6 %, increasing by 1980 to 44.4% but decreasing by 1990 to 43.4%; the rates for Latinos were 43.7% in 1970 but by 1980 had dropped to 43.4 % and by 1990 to 42.4%. By 2000 the rates for African Americans had increased to 46.3% and for Latinos had increased to 45.7% suggesting that it was post 1990 initiatives rather than the enactment of the CRA that was responsible for the highest rates of homeownership for this population); see also Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53, 65 (2006) (stating that in 1995, 42.2 % of African-American families owned homes, increasing to a historic high of 49.5 % in 2004); JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING: 2005 at 15-19, in Shapiro, *supra* note 13, at 65 (The 1995 homeownership rate for African Americans was lower than the 1980 and 1990 census reported rates and only .6% higher than the 1970 rate).

<sup>15</sup> Michael Aleo and Pablo Svirsky, *Foreclosure*

*Fallout: The Banking Industry's Attack on Disparate Impact Race Discrimination Claims under The Fair Housing Act and The Equal Credit Opportunity Act*, 18 B.U. PUB. INT. L.J. 1, 16-17 (2008); see Al Yoon, *Foreclosures to Affect 6.5 Mln Loans by 2012-Report*, REUTERS, April 22, 2008, available at <http://www.reuters.com/article/bondsNews/idUSN2233380820080422> (explaining that falling home prices and lack of available credit may result in foreclosures); CENTER FOR RESPONSIBLE LENDING, UPDATED PROJECTIONS OF SUBPRIME FORECLOSURES IN THE UNITED STATES AND THEIR IMPACT ON HOME VALUES AND COMMUNITIES (2008), <http://www.responsiblelending.org/mortgage-lending/research-analysis/updated-foreclosure-and-spillover-brief-8-18.pdf> (providing statistics of foreclosures).

<sup>16</sup> WILLIAM C. APGAR & ALLEGRA CALDER, THE DUAL MORTGAGE MARKET: THE PERSISTENCE OF DISCRIMINATION IN MORTGAGE LENDING, JOINT CENTER FOR HOUSING STUDIES, HARVARD UNIV., Dec. 2005, <http://www.jchs.harvard.edu/publications/finance/w05-11/pdf>, at 12-14; see Darnellena Christie Burnett, *Justice in Housing: Predatory Lending*, 15 APR NBA Nat'l B.A. Mag. 14.

<sup>17</sup> See Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201, 5211 (2008) (establishing the Troubled Asset Relief Program to "restore liquidity and stability to the financial system of the United States").

<sup>18</sup> Press Release, *Federal Housing Finance Agency, and Federal Housing Finance Agency Reports Mortgage Interest Rates* (January 27, 2009), available at [http://www.fhfa.gov/webfiles/420/FHFA\\_Reports\\_Mortgage\\_Interest\\_Rates.pdf](http://www.fhfa.gov/webfiles/420/FHFA_Reports_Mortgage_Interest_Rates.pdf) (reporting that the average loan amount in December 2008 was \$218,000); Mortgage Data Web.com, *Mortgage Industry Data and Statistics: Average FHA Mortgage Loan Amount Surges Higher and Higher!* (Sept. 4, 2008), available at <http://mortgagedataweb.blogspot.com/2008/09/average-fha-mortgage-loan-amount-surges.html> (stating that the average FHA mortgage loan is reported at slightly lower than \$200,000 around \$184,282).

<sup>19</sup> See *US Foreclosures Rise in December; Reach 2.2 mln in 2007, up 75 pct from 2006*, FORBES, Jan. 2008, <http://www.forbes.com/feeds/afx/2008/01/29/afx4584956.html> (Realty Trac Foreclosure count statistics by state, 2008 totals at 3.16 million foreclosures in 2006 were reported at 1.26 million for three years total of 6.62 million. If half of that number is attributable to sub-prime foreclosures that would be 3.32 million. The average subprime loan amount for 2006 was about \$201,000. The average loan amount for subprime loans in the second half of 2006 was \$202,295, only 1 percent higher than the average loan amount for subprime loans of \$200,167 in the first half of 2006 as reported by Mortgage Bankers Association,

7/3/07).

<sup>20</sup> See generally Justin Ak Amoah, *Chicago technology riding its first wave since bubble burst*, MEDILL REPORTS CHICAGO, April 6, 2010, <http://news.medill.northwestern.edu/chicago/news.aspx?id=83835> (referencing the 2002 technology bubble burst before discussing Chicago's growth in the technology field).

<sup>21</sup> William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35, 41 (1996) (explaining that immigrants began their life in America in seaport towns).

<sup>22</sup> Nicole Stelle Garnett, *Suburbs As Exit, Suburbs As Entrance*, 106 MICH. L. REV. 277 (2007).

<sup>23</sup> *Federal Assistance In Financing Middle-Income Cooperative Apartments*, 68 YALE L.J. 542, 543 (1959) (By the 1900's, a world housing shortage existed, chiefly because of the population increase and the concentration of the population in urban areas. The expansion of industry, a shortage of construction workers, and a lack of money for new housing also helped cause the housing shortage).

<sup>24</sup> William E. Nelson and Norman R. Williams, *Suburbanization and Market Failure: An Analysis Of Government Policies Promoting Suburban Growth And Ethnic Assimilation*, 27 FORDHAM URB. L.J. 197 (1999) (referring to census reports of homebuilding in Nassau County).

<sup>25</sup> See James C. Smith, *The Dynamics Of Landlord-Tenant Law And Residential Finance: The Comparative Economics Of Home Ownership*, 44 WASH. U. J. URB. & CONTEMP. L. 3, 62 (1993) (stating that "Economic slumps compel more families to rent, as some families lose their homes by foreclosure, and others, who hoped to purchase, postpone that decision. The lowest rate of owner occupation reflected by the decennial censuses was forty-four percent in 1940, after the country had spent a decade struggling with the Great Depression."); see also Nier, *supra* note 8 (discussing the government's shift from a pre-depression laissez-faire role in housing to an active post-depression role).

<sup>26</sup> Richard C. Schragger, *Cities, Economic Development, And The Free Trade Constitution*, 94 VA. L. REV. 1091, 1103 (2008) (finding that urbanization is the chief agent of demographic and economic change in the United States, as it has been in all developed countries since the Industrial Revolution because of the "externalities" that are borne from a diverse population of creators and thinkers in a diverse industrial and now, technological market; and further stating that "the twentieth century has witnessed monumental shifts in Americans' work and living patterns, including the great migration to the cities, a later (and smaller) movement out of the cities into the suburbs, and the

development of increasingly large and dense metropolitan areas. In 1860, less than twenty percent of the population lived in urban areas; in 2000, close to eighty percent did.”)

<sup>27</sup> Timothy Jost, *The Defeasible Fee and the Birth of the Modern Residential Subdivision*, 49 MO. L. REV. 695, 698 (1984).

<sup>28</sup> *Id.* at 701.

<sup>29</sup> *Id.* at 702-06.

<sup>30</sup> *Id.* at 724-25.

<sup>31</sup> Michelle Adams, *Separate and [Un]Equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 433-35 (1996).

<sup>32</sup> *United States v. Certain Lands in City of Detroit*, 12 F. Supp. 345, 348 (1935) (where the court opined that the fundamental law of both the United States and the state of Michigan prohibits the taking of private property except for public use) (*cited in* Adams, *supra* note 32, at 434 n.77).

<sup>33</sup> *Id.*

<sup>34</sup> 50 Stat. 888 (1937), 42 U.S.C. § 1401 (Supp. 1939).

<sup>35</sup> Alfred M. Clark, III., *Can America Afford to Abandon A National Housing Policy?*, 6 AFFORDABLE HOUS. & COMMUNITY DEV. L. 185, 185 (1997).

<sup>36</sup> Yale Law Journal, *No Room For Singles: A Gap In The Housing Law*, 80 YALE L.J. 395, 420 (1970). (discussing the post war programs enacted to spur homeownership opportunities).

<sup>37</sup> Edward Gramlich, *America's Second Housing Boom 1*, THE URBAN INSTITUTE (2007), [http://www.urban.org/UploadedPDF/311418\\_Second\\_Housing\\_Boom.pdf](http://www.urban.org/UploadedPDF/311418_Second_Housing_Boom.pdf).

<sup>38</sup> *City of Cleveland v. United States*, 323 U.S. 329 (1945).

<sup>39</sup> *Id.*; *see also* Housing Act of 1937, §§ 1,30, 42 U.S.C. §§1401-1440.

<sup>40</sup> Deborah Kenn, *Fighting The Housing Crisis With Underachieving Programs: The Problem With Section 8*, 44 WASH. U. J. URB. & CONTEMP. L. 77, 77 n.2 (1993).

<sup>41</sup> Jon C. Dubin, *From Junkyards To Gentrification: Explicating A Right To Protective Zoning In Low-Income Communities Of Color*, 77 MINN. L. REV. 739, 752-53 (1993) (stating that “while the federal homeownership assistance programs promoted the creation of homogenous [W]hite suburbs, the federal public housing program for low-income families with children facilitated the development of segregated and locationally deficient [African American] inner city neighborhoods. From the public housing program’s inception in 1937, tenants were assigned to projects on a segregated basis, with many [African American] projects located in slums. When the program’s production goals were greatly expanded in the United States Housing Act of 1949, Congress virtually guaranteed that all new housing would continue to be constructed on a discriminatory basis when

it rejected anti-discrimination amendments to the Act”).

<sup>42</sup> Housing Act of 1949 § 2, 42 USC § 1441a.

<sup>43</sup> Peter W. Salsich, Jr., *A Place to Call Home? Affordable Housing Issues in America Toward A Policy Of Heterogeneity: Overcoming A Long History Of Socioeconomic Segregation In Housing*, 42 WAKE FOREST L. REV. 459, 480-81 (2007) (stating that “The [Housing] Act [of 1949] articulated a goal of construction of 810,000 new public housing units in six years, one that required twenty years to meet, in part because of continuing controversies about the program. That same Act committed the United States to an ambitious goal of ‘the realization as soon as feasible of the goal of a decent home and suitable living environment for every American family’”); *see also* Robert F. Drinan, *Untying the Noose*, 94 YALE L.J. 435, 436, n.5 (1984) (stating that the Housing Act of 1949 “was the first time the federal government set a national housing objective”).

<sup>44</sup> *See* *Judicial Review of Displacee Relocation in Urban Renewal*, 77 YALE L. J. 966, 968 n.12 (1968) (providing the language from the Housing Act of 1949 and how it should be read).

<sup>45</sup> Shelby D. Green, *The Search for a National Land Use Policy: For the Cities Sake*, 26 FORDHAM URB. L. J. 69, n. 120 (1998)

<sup>46</sup> Salsich, *supra* note 44, at 480.

<sup>47</sup> Adams, *supra* note 32, at 438-49.

<sup>48</sup> *Id.* at 439.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 436-38.

<sup>51</sup> *See* CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 229 (Associate Faculty Press, Inc.) (1955) (likening FHA’s protection of the White neighborhood to the Nuremburg laws due to FHA’s focus on racial and social homogeneity in all housing projects), quoted in Florence Wagman Roisman, *Teaching Important Property Concepts: Teaching About Inequality, Race and Property*, 46 ST. LOUIS U. L. J. 665, 678 (2002); *see also* GAIL RADFORD, MODERN HOUSING FOR AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA 48, 188-89 (Univ. of Chicago Press 1996), *cited in* Roisman, *supra* note 52, at 673 n.28; GAIL RADFORD, The Federal Government and Housing During the Era of the Great Depression, in FROM TENEMENTS TO THE TAYLOR HOMES 102-03, 110-18 (John I. Bauman et al. eds. 2000), *cited in* Roisman, *supra* note 52, at 676 n.44.

<sup>52</sup> *Id.* at 676.

<sup>53</sup> *Id.* at 670.

<sup>54</sup> *Id.*

<sup>55</sup> *See* Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND

USE & ENVTL. L. 89, 92 (1998) (providing the “black ghetto” as an example of the result of deliberate housing policies).

<sup>56</sup> *Id.* at 95; *see also* Adams, *supra* note 32, at 437.

<sup>57</sup> Elizabeth Sammann, *The Reality of Family Preservation under Norman v. Johnson*, 42 DEPAUL L. REV. 675, 688 (1992).

<sup>58</sup> *Id.* (stating that while the number of substandard housing decreased after the 1968 Act, the numbers of affordable units became a much larger problem).

<sup>59</sup> 42 U.S.C. §1437.

<sup>60</sup> *Id.* §§12701 (1990); 1441 (1965); 1425 (1940) (repealed 1990).

<sup>61</sup> *Id.* §§ 804-806, 3404-06.

<sup>62</sup> *See* Deborah Kemp, *The 1968 Fair Housing Act: Have its Goals been Accomplished?*, 14 REAL EST. L.J. 327, 328-332(1986) (discussing the broad purpose of the Fair Housing Act to cure urban problems of racially segregated urban ghettos); *see also* Dennis M. Teravainen (Note) *Federal Law’s Indifference To Housing Discrimination Based On Sexual Orientation*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 11, 22 (2002) (discussing the broad breadth of the Fair Housing Act as a statutory tool to prohibit discrimination in housing, to promote integration and to eliminate segregated housing).

<sup>63</sup> 42 U.S.C. §§ 3601-3619 (1994 & Supp. IV 1999); *see also* Kemp, *supra* note 63, at 329 (identifying the exemptions from the act).

<sup>64</sup> 15 U.S.C. § 1691(a)(1) (1994); *see* Joseph J. Norton, *Fair Lending Requirements: The Intervention of a Governmental Social Agenda into Bank Supervision and Regulation*, 49 CONSUMER FIN. L. Q. REP 17, 21-25 (1995) (stating that the ECOA, the FHA, the CRA, and the HMDA are the main fair lending laws. Although they impose different requirements, these requirements are sometimes interconnected. As a whole, they are the tools the federal government has used in its efforts to achieve its objectives in the fair lending area).

<sup>65</sup> 15 U.S.C. § 1691(a)(1).

<sup>66</sup> 12 U.S.C. §§ 2801-2810 (1994 & Supp. 1999). *See also* Ronald K. Schuster, *Lending Discrimination: Is The Secondary Market Helping To Make The “American Dream” A Reality*, 36 GONZ. L. REV. 153, 161 (2000) (“The HMDA requires ‘depository institutions’ to submit annual reports detailing home purchase and home improvement loans they have originated or purchased during the covered period, as well as applications received for the loans... The required HMDA disclosures encompass not only the location of the property and type of loan, but the borrower’s race, ethnicity, national origin, gender, and income as well.”).

<sup>67</sup> *Id.* at 162.

<sup>68</sup> *Id.*

<sup>69</sup> E.L. Baldinucci, *The Community Reinvestment Act: New Standards Provide*

New Hope, 23 FORDHAM URB. L.J. 831, 838-39 (1996).

<sup>70</sup> 12 U.S.C. §§ 4702-4713 (1994).

<sup>71</sup> Norton, *supra* note 65, at 20.

<sup>72</sup> David E. Runck, *An Analysis Of The Community Development Banking And Financial Institutions Act And The Problem Of "Rational Redlining" Facing Low-Income Communities*, 15 ANN. REV. BANKING L. 517, 531-33 (1996) (citing 12 U.S.C. § 4702(5)(A) (1994)).

<sup>73</sup> *Id.* at 532.

<sup>74</sup> Jeffrey S. Lesk and Richard M. Price, *An Introduction to the Community Development Bank Network*, 4 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 267, 269 (1995) (describing the Community Development Financial Institute Fund as having been created to expand the availability of credit, investment capital and financial services in distressed urban and rural communities).

<sup>75</sup> See BARRY G. JACOBS, *History of Federal Housing and Community Development Law*, in HDR HANDBOOK OF HOUSING AND DEVELOPMENT LAW, §1:56 (2009) (stating the HOPE programs were designed to encourage the use of government-owned or government financed housing for low-income home ownership); see also Danielle Pelfrey Duryea, *Gendering The Gentrification Of Public Housing: Hope VI's Disparate Impact On Lowest-Income African American Women*, 13 GEO. J. ON POVERTY L. & POL'Y 567 n.1, (chronicling the various HOPE programs and showing the focus change from rental to homeownership).

<sup>76</sup> Lynne Dearborn, *Homeownership: The Problematics Of Ideals And Realities*, 16 J. AFFORDABLE HOUS. & CMTY. DEV. L. 40 (2006) (explaining that some previous and still existing remedial actions taken by the federal government include insurance programs for those financial institutions that lend within low-income communities as well as the promotion and sponsorship by the federal government of community development programs and financial institutions).

<sup>77</sup> Matasar, *supra* note 12 (discussing the feasibility of banks reliance on the Community Reinvestment Act and its mandates as defenses to subprime litigation brought by minority and low-income borrowers).

<sup>78</sup> See Jo Carrillo, *In Translation For The Latino Market Today: Acknowledging The Rights Of Consumers In A Multilingual Housing Market*, 11 HARV. LATINO L. REV. 1, 5 (2008) (discussing the relative homeownership rates between Latinos and Whites and concluding that the rates for Latinos is low); Kenya Covington and Rodney Harrell, *From Renting To Homeownership: Using Tax Incentives To Encourage Homeownership Among Renters*, 44 HARV. J. ON LEGIS. 97, 100-103(2007) (comparing homeowner rates between African-Americans and Whites).

<sup>79</sup> Carmen DeNavas-Walt et al., *Poverty Status*

*of People by Age, Race, and Hispanic Origin: 1959 to 2007*, U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007 52 (Aug. 2008), <http://www.census.gov/prod/2008pubs/p60-235.pdf> (showing poverty status of persons by age, race, and Hispanic origin from 1959-2007); but see NAT'L ASS'N OF CHILD CARE RES. AND REFERRAL AGENCIES, *SCHOOL-AGE CHILDREN 5-17 LIVING IN POVERTY 1* (2007), [www.naccrra.org/randd/docs/School-Age\\_Children\\_in\\_pverty.pdf](http://www.naccrra.org/randd/docs/School-Age_Children_in_pverty.pdf) (reporting that the number rises to about one-third for all school-aged children living in poverty).

<sup>80</sup> Howard A. Savage, *Who Could Afford to Buy a Home in 2002?* BUREAU OF THE CENSUS STATISTICAL BRIEF (2007), [www.census.gov/prod/2007pubs/h121-07-1.pdf](http://www.census.gov/prod/2007pubs/h121-07-1.pdf) (stating that the 2002 number was unchanged from 1995. According to the report, "[h]ouse prices were determined for areas defined by the nine census geographic divisions and by whether a house was inside or outside a metropolitan area or in or out of a central city in a metropolitan area. A modestly priced house is one priced so that twenty-five percent of all owner-occupied houses in the area in which the survey respondents live are below this value and seventy-five percent above. A low priced house is priced so that ten percent of all owner-occupied houses in that areas are below this value and ninety percent are above.").

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> EDWARD N. WOLFF, *DOES EDUCATION REALLY HELP? SKILL, WORK AND INEQUALITY* (Oxford Univ. P. 2006); see Daniel H. Weinberg, *A Brief Look at Postwar U.S. Income Inequality*, U.S. CENSUS BUREAU 191 (1996), <http://www.census.gov/hhes/www/p60191.html> (discussing poverty and income trends overall, for regions, by race and ethnicity and by differences in age).

<sup>84</sup> *Id.*

<sup>85</sup> See *id.* (finding that income inequality increased from 16.1 percent between 1968 and 1994 to 22.4 percent).

<sup>86</sup> *Id.* (reporting that the income of households within the 95<sup>th</sup> percentile was more than 8 times that of those households in the 20<sup>th</sup> percentile. In 1968, the household at the 95<sup>th</sup> percentile had 6 times the income of the household at the 20<sup>th</sup> percentile).

<sup>87</sup> Press Brief by Daniel H. Weinberg, *Press Briefing on 2000 Income and Poverty Estimates*, U.S. CENSUS BUREAU, *available at* <http://www.census.gov/hhes/www/income/income00/prs01asc.html> (stating that the median household income held at \$42,100 meaning that half of all households had incomes above \$42,100 and half below).

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

<sup>89</sup> *Id.*; see also Bernadette Proctor & Joseph Dalaker, *Poverty In The United States: 1999*, U.S. CENSUS BUREAU (2000) 1, <http://www.census.gov/prod/2000pubs/p60-210.pdf> (stating that in 1999, 32.3 million people were poor, down from 34.5 million in 1998); see Bernadette Proctor & Joseph Dalaker, *Poverty In The United States: 2000*, U.S. CENSUS BUREAU (2001) v, <http://www.census.gov/prod/2001pubs/p60-214.pdf> at 1 (stating that about 31.1 million people were poor in 2000, 1.1 million fewer than in 1999).

<sup>90</sup> *Id.*; see also Bernadette Proctor and Joseph Dalaker, *Poverty in the United States: 1999 and 2000*, U.S. CENSUS BUREAU (reporting statistics showing the level of income).

<sup>91</sup> *Id.* (reporting the poverty rate for African Americans fell from 23.6 percent in 1999 to 22.1 percent in 2000. For Latinos, the poverty rate fell from 22.8 percent in 1999 to 21.2 percent in 2000).

<sup>92</sup> *Id.* (reporting in 2005 that African American households had the lowest median income at \$30,134, Latino household income was \$34,241, for non-Latino Whites income was \$48,977 and for Asian was \$57,518).

<sup>93</sup> *Id.*

<sup>94</sup> See generally A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 3-11 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989) (discussing the conditions of African Americans relative to white America and determining that the disparities that exist are stark and long standing).

<sup>95</sup> See Current Population Survey, Table 24, BUREAU OF LABOR STATISTICS, April 6, 2010, <ftp://bls.gov/pub/special.requests/lf/aa2003/pdf/cpsaat24.pdf> (2002 and 2003 statistics); Current Population Survey, Table 24, BUREAU OF LABOR STATISTICS, Aug. 7, 2009, <http://www.bls.gov/cps/cpsaat24.pdf> (showing unemployment rates by race from 2007 to 2008).

<sup>96</sup> *Id.*

<sup>97</sup> *Poverty: 2007 Highlights*, U.S. CENSUS BUREAU, April 6, 2010, <http://www.census.gov/hhes/www/poverty/poverty07/pov07hi.html> (reporting that poverty rates in 2007 were statistically unchanged for non-Hispanic Whites (8.2 percent), Blacks (24.5 percent), and Asians (10.2 percent) from 2006. The poverty rate increased for Hispanics (21.5 percent in 2007, up from 20.6 percent in 2006)); see also Household Income Rises, Poverty Rate Unchanged Number of Uninsured Down, U.S. CENSUS BUREAU, April 6, 2010, [http://www.census.gov/Press-release/www/releases/archives/income\\_wealth/012528.html](http://www.census.gov/Press-release/www/releases/archives/income_wealth/012528.html) (reporting that real median income (adjusted for inflation) for black and non-Hispanic white households rose between 2006 and 2007, representing the first measured real increase in annual household income for each group since 1999. Real median household income

remained statistically unchanged for Asians and Hispanics. Among the race groups and Hispanics, black households had the lowest median income in 2007 (\$33,916). This compares to the median of \$54,920 for non-Hispanic white households. Asian households had the highest median income (\$66,103). The median income for Hispanic households was \$38,679).

<sup>98</sup> Howard A. Savage, Who Could Afford to buy a Home in 1991?, U.S. CENSUS BUREAU, April 6, 2010, [http://www.census.gov/apspd/statbrief/sb93\\_16.pdf](http://www.census.gov/apspd/statbrief/sb93_16.pdf).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* (showing that the rate of White families not of Latino origin that could not afford a home in the area in which they resided was forty three percent).

<sup>101</sup> U.S. CENSUS BUREAU, Housing Vacancies and Homeownership, Annual Statistics: 2006, Table 20: Homeownership Rates by Race and Ethnicity of Householder 1994 to 2006 (2006), <http://www.census.gov/hhes/www/housing/hvs/annual06/ann06t20.html>.

<sup>102</sup> U.S. CENSUS BUREAU, Reports on residential Vacancies and Homeownership, Table 7, April 6, 2010, <http://www.census.gov/hhes/www/housing/hvs/qtr107/q107press.pdf>.

<sup>103</sup> U.S. CENSUS BUREAU, Housing Vacancies and Homeownership, Historical Tables, Table 14, April 6, 2010, <http://www.census.gov/hhes/www/housing/hvs/historic/index.html>.

<sup>104</sup> U.S. CENSUS BUREAU, Housing Vacancies and Homeownership, Annual Statistics, Table 20, (2000), <http://www.census.gov/hhes/www/housing/hvs/annual00/ann00t20.html>. In Census 2000, homeownership among White householders was 71 percent, higher than the national rate of 66 percent. In contrast, householders who were African American (47.2 percent) and those who were Native Hawaiian and Other Pacific Islander (53.5 percent) had homeownership rates less than the national rate. Latino householders had a 46.3 percent homeownership rate, compared with 73.8 percent for non-Latino White. Those householders with rates higher than 50 percent but less than the national rate were American Indians and Alaska Natives (56.2 percent) and Asians (52.8 percent).

<sup>105</sup> U.S. CENSUS BUREAU, Housing Vacancies and Homeownership Rates, 1994-2005, Table 20: Homeownership Rates by Race and Ethnicity of Householder, 1994-2005 (2005), <http://www.census.gov/hhes/www/housing/hvs/annual05/ann05t20.html>.

<sup>106</sup> Rakesh Kochhar, *The Wealth of Latino Households: 1996 to 2002*, PEW HISPANIC INSTITUTE 4 (2004), <http://pewhispanic.org/files/reports/34.pdf>.

<sup>107</sup> *Id.* at 2; see also *id.* at 16 (reporting that the only exceptions arose in the case of White

households who owned homes, interest earning assets and unsecured liabilities at rates in excess of 50 percent).

<sup>108</sup> *Id.*

<sup>109</sup> See Sean Zielenbach, *A Critical Analysis Of Low-Income Homeownership Strategies*, 13 J. AFFORDABLE HOUS. & CMTY DEV. L. 446, 452 (2004) (discussing the advantages and disadvantages of homeownership generally and states, "Both policy makers and practitioners often view homeownership as a central component of community development strategies. Since owners tend to remain in their homes for longer than renters (because of their financial investment, among other things), homeownership contributes to a neighborhood's residential stability. That stability can lead to both the development of greater social capital in the community as well as an appreciation of local property values.").

<sup>110</sup> *Id.* at 453-54.

<sup>111</sup> See Fox, *supra* note 8, at 470-71 (stating that "one study published by the Department of Housing and Urban Development (HUD) in 2005 indicated that while homeownership rates were currently at historically high levels for all sections of the U.S. population, 'dramatic gaps in homeownership rates have been stubbornly present over the last several decades, and even increased somewhat during the decade of the 1990s.' This study identified several factors accounting for the homeownership gap, including not only race and ethnicity, but also differences due to income, wealth, marital status, and age of household. Yet, while concerns about homeownership rates have triggered major policy initiatives under both the Clinton and Bush Administrations to increase access to homeownership, it is also important to note that it is not only access, but the sustainability of homeownership that will have a significant impact on national homeownership rates over the medium and long term.").

<sup>112</sup> Remarks by President George Bush, President Calls for Expanding Opportunities to Home Ownership, <http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020617-2.html>

<sup>113</sup> *Id.* (stating, "First, the single greatest barrier to first time homeownership is a high down payment. It is really hard for many, many, low income families to make the high down payment. And so that's why I propose and urge Congress to fully fund the American Dream Down payment Fund. This will use money, taxpayers' money to help a qualified, low income buyer make a down payment. And that's important. One of the barriers to homeownership is the inability to make a down payment. And if one of the goals is to increase homeownership, it makes sense to help people pay that down payment. We believe that the amount of money in our

budget, fully approved by Congress, will help 40,000 families every year realize the dream of owning a home.").

<sup>114</sup> See Press Release, *Barriers to Minority Homeownership*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, June 17, 2002, available at <http://www.hud.gov/news/releasedocs/barriers.cfm> (describing the multiple barriers that prevent minority families from becoming homeowners).

<sup>115</sup> See Leonard S. Rubinowitz and Ismail Alsheik, *A Missing Piece: Fair Housing And The 1964 Civil Rights Act*, 48 HOW. L.J. 841 (2005) (chronicling the federal government's efforts to help minorities overcome barriers to homeownership).

<sup>116</sup> David J. Garrow, *The Federal Courts and School Desegregation in the 1970's*, 21 LAW & SOC'Y REV. 879, 881 (1988).

<sup>117</sup> Frank Lopez, *Using the Fair Housing Act to Combat Predatory Lending*, 6 GEO. J. ON POVERTY L. & POL'Y 73, 75 (1999).

<sup>118</sup> ALEXANDER VON HOFFMAN, JOINT CENTER FOR HOUSING STUDIES, HARVARD UNIVERSITY, LIKE FLEAS ON A TIGER? A BRIEF HISTORY OF THE OPEN HOUSING MOVEMENT 29-31 (2010) [http://www.jchs.harvard.edu/publications/communitydevelopment/von\\_hoffman\\_W98-3.pdf](http://www.jchs.harvard.edu/publications/communitydevelopment/von_hoffman_W98-3.pdf), 1998 (where author shows that various historical events including the race riots of the 1960s sparked changes in American civil rights including housing policy).

<sup>119</sup> See Gilmore, *supra* note 4, at 635 (explaining that the CRA, along with the Fair Housing Act and the Home Mortgage Disclosure Act, were enacted to respond to the ills associated with redlining).

<sup>120</sup> *Id.*

<sup>121</sup> See *id.* at 637 (recognizing that "the continuing prevalence of redlining was directly related to the effects of the policies and practices adopted by lenders").

<sup>122</sup> Andrene Smith, (Note) *A Different World: Financial Determinants Of Well-Being In New Orleans In Black And White*, 14 GEO. J. ON POVERTY L. & POL'Y 179, 189 (2007).

<sup>123</sup> Leland Ware, *Race And Urban Space: Hypersegregated Housing Patterns And The Failure Of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 67 (2002).

<sup>124</sup> Smith, *supra* note 123, at 189.

<sup>125</sup> *Id.* at 189-90.

<sup>126</sup> *Id.* at 190.

<sup>127</sup> Lopez, *supra* note 118, at 75 n.9 (citing Mark Anderson, Subprime Lending to Minority Groups Rises, Study Finds, WALL ST. J., Nov. 25, 1998, at B11).

<sup>128</sup> *Id.* at 75.

<sup>129</sup> See Darnellena Christie Burnett, *Justice in Housing: Curbing Predatory Lending*, NBA NAT'L B. ASS'N MAG., Mar./Apr. 2001, at 14 (explaining that high-income African-American neighborhoods were twice as likely to have sub-prime mortgages as otherwise

similar low-income White neighborhoods).

<sup>130</sup> Eric C. Bartley (Comment) *And Regulation for All: Federally Regulating the Mortgage Banking Industry*, 2006 MICH. ST. L. REV. 477, 485 (2006).

<sup>131</sup> Lopez, *supra* note 118, at 77.

<sup>132</sup> *Id.* at 79 (positing that “the loss of a home can be financially and psychologically devastating. Financially, a homeowner may lose all equity in his home, and ultimately may end up homeless. Psychologically, homeowners facing the loss of their homes are more likely to suffer from mental illnesses, commit suicide, or engage in criminal behavior. Therefore, the problem of predatory lending in minority communities is a grave concern.”).

<sup>133</sup> *Id.* at 77-78.

<sup>134</sup> Cecil J. Hunt, II, In the Racial Crosshairs. Reconsidering Racially Targeted Predatory Lending Under A New Theory of Economic Hate Crime, 35 U. TOL. L. REV. 211, 213 (2003) (stating that the recent explosive growth in the predatory subprime market has “created a crisis of epidemic proportions for communities of color, elderly homeowners, and low-income neighborhoods [because of] the plague of predatory mortgage lending.”).

<sup>135</sup> FORMAN CTR. FOR REAL ESTATE & URBAN POLICY, DECLINING CREDIT & GROWING DISPARITIES: KEY FINDINGS FROM HMDA 2007 1 (2008), <http://www.furmancenter.org/files/KeyFindingsfromHMDA2007FurmanCenterReport.pdf>.

<sup>136</sup> Holden Lewis, *What Exactly is a Subprime Mortgage?*, BankRate.com, April 18, 2007, [http://www.bankrate.com/brm/news/mortgages/20070418\\_subprime\\_mortgage\\_definition\\_a1.asp](http://www.bankrate.com/brm/news/mortgages/20070418_subprime_mortgage_definition_a1.asp) (“There are conflicting accounts of the size of the subprime market. Depending on whom you talk to, it accounts for 20 percent of all mortgage loans, 15 percent or 13.5 percent. Estimating the size of the subprime market is tricky for a number of reasons. For one, it’s sometimes hard to distinguish between a subprime mortgage and an Alt-A loan -- a grade of mortgage between prime and subprime. For another, there are two ways to count them: by the number of loans or by total dollar value. Then there’s the question of whether you’re talking about all loans originated in a certain year or all outstanding mortgages. Standard & Poors says subprime originations totaled \$421 billion in 2006. The Mortgage Bankers Association says all originations totaled \$2.5 trillion. If both data sources are accurate, that means 16.8 percent of mortgage volume consisted of subprime loans last year. That’s dollar volume, not the number of mortgages. Subprime mortgage balances are probably smaller than average, so more than 16.8 percent of borrowers got subprime loans. These statistics rely on lenders to define

what they mean by subprime, and different lenders have different definitions. As a rule of thumb, a subprime mortgage is a home loan to someone with a credit score below 620. But some lenders count loans as subprime even if the borrowers have credit scores of 660 or higher, if the borrower makes a down payment of less than 5 percent or does not document income or assets. Other lenders might count those loans as Alt-A. There isn’t a definition of subprime that everyone agrees on. That’s partly what makes it difficult to judge the size of the subprime market.”) (emphasis added).

<sup>137</sup> Heather M. Tashman, *The Subprime Lending Industry: An Industry in Crisis*, 124 BANKING L.J. 407, 408 (2007) (explaining the nature of a subprime mortgage).

<sup>138</sup> Lewis, *supra* note 140, (stating that an industry of subprime mortgage lenders has sprung up to serve the vast number of Americans who have credit problems).

<sup>139</sup> See Cassandra Jones Havard, *To Lend or Not to Lend: What the CRA Ought to Say About Sub-Prime and Predatory Lending*, 7 FLA. COASTAL L. REV. 1, 2 (2005) (explaining the predatory nature of subprime mortgaging).

<sup>140</sup> Cathy Lesser Mansfield, *The Road to Subprime “HEL” Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C. L. REV. 473, 540-41 (2000).

<sup>141</sup> Bartley, *supra* note 131, at 484 (stating that affluent blacks are twice as likely to refinance in the sub-prime market as low-income whites).

<sup>142</sup> Smith, *supra* note 123, at 191.

<sup>143</sup> PRACTISING LAW INSTITUTE, SUBPRIME INSTITUTE 2008, RICARDO GUERRA AND ERIC OCHOA V. GMAC LLC, GMAC MORTGAGE, LLC ET. AL., UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA 748 (2008).

<sup>144</sup> Smith, *supra* note 123, at 180.

<sup>145</sup> Allison D. Matthews, *To Stop a Predator: Is a Complete Ban on For-Profit Foreclosure Rescue Operations the Best Way to Prevent Equity Stripping?*, 20 LOY. CONSUMER L. REV. 477, 478 n.4 (2008).

<sup>146</sup> Kathleen M. Howley, *Foreclosures in Military Towns Surge at Four Times US Rate*, BLOOMBERG.COM, May 7, 2008, <http://www.bloomberg.com/apps/news?pid=20601109&refer=home&sid=awj2TMDLnwU> (referencing RealtyTrac, Inc., research).

<sup>147</sup> See 60 Minutes, A Look at Wall Street’s Shadow Market (CBS News broadcast October 5, 2008) (transcript available at <http://www.cbsnews.com/stories/2008/10/05/60minutes/main4502454.shtml?tag=contentMain;contentBody>). Howley, *supra* note 150 (the rate of affected mortgage loans was 1% in 2007, up from .58% in 2006). See, e.g., CBS Evening News, American Dream Slipping Away, (CBS television broadcast

Mar. 6, 2008) (media report stating that up to 6% of homeowners are months away from foreclosure).

<sup>148</sup> Tashman, *supra* note 141, at 411 (stating that one out of five sub-prime mortgages will go into foreclosure); see Aleo, *supra* note 14, at 16-17 (“Not surprisingly, borrowers default on subprime loans at far higher rates than typical loans and lead to foreclosure far too often. In 2008, the Mortgage Bankers Association (MBA) found that the rates of delinquency, foreclosure initiations, and loans in the process of foreclosure continue at record levels. In the first quarter of 2008, seasonally adjusted delinquency rates were 3.71% for prime loans and 18.79% for subprime loans, while in 2007 the delinquency rates were 2.58% for prime loans and 13.77% for subprime loans. Foreclosures follow similar trends; the foreclosure inventory rate in 2008 is 1.22% for prime loans and 10.74% for subprime loans, as compared to 0.54% and 5.10% in the first quarter of 2007. Alarming, “while subprime . . . [adjustable rate mortgages] represent[ed] only 6 % of all loans outstanding,” they accounted for a whopping 39 % of foreclosures. Fixed rate mortgage foreclosures for subprime loans are six times higher than prime loans, while mortgage foreclosures for adjustable rate mortgages are over four times more likely for subprime than for prime loans. Unfortunately, the situation continues to worsen. Two million adjustable-rate mortgages will reset to higher interest rates in 2008 alone, and these loans will continue to adjust in 2009 and beyond.” Homeowner vacancy rates grew from 1.5 percent in the first quarter of 1995 to 2.8 percent in the second quarter 2008, including a climb from 1.5 percent to 2.8 percent from 1995 to 2005 and a 2.0 percent to 2.8 percent climb from 2005 to 2008.); see also ROBERT R. CALLIS AND LINDA B. CAVANAUGH, CENSUS BUREAU REPORTS ON RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, U.S. CENSUS BUREAU NEWS (2009), <http://www.census.gov/hhes/www/housing/hvs/qtr209/files/q209press.pdf> (the latest census report on residential vacancies shows that the homeowner vacancy rate for the second quarter of 2008 was statistically insignificant when compared to the homeowner vacancy rates for the prior quarter and the entire 2007).

<sup>149</sup> See Al Yoon, *Foreclosures to affect 6.5 million by 2012*, REUTERS, April 22, 2008, <http://www.reuters.com/article/bondsNews/idUSN2233380820080422> (“Falling home prices have made an increasing number of U.S. homeowners more vulnerable to default”).

<sup>150</sup> Mansfield, *supra* note 144, at 553-54 (“[S]ubprime loans still generally default earlier than non-subprime home equity loans, and high interest rate loans-- most of which are subprime--end up in foreclosure at

a higher rate than non-subprime loans.” Also stating that by 1999 subprime mortgage loans had very high delinquency rates, especially when one looks at more serious delinquencies and foreclosures.); see also Ben S. Bernanke, Chairman, Speech at the Columbia Business School’s 32nd Annual Dinner (May 5, 2008) (transcript available at <http://www.federalreserve.gov/newsevents/speech/Bernanke20080505a.htm>) (May 5, 2008) (“The sharpest increases have been among subprime mortgages, particularly those with adjustable interest rates: About one quarter of subprime adjustable-rate mortgages are currently 90 days or more delinquent or in foreclosure. Delinquency rates also have increased in the prime and near-prime segments of the mortgage market, although not nearly so much as in the subprime sector.”).

<sup>151</sup> See NAT’L URBAN LEAGUE POL’Y INST., 2007 HOME MORTGAGE DISCLOSURE ACT DATA 1 (2008), <http://www.nul.org/sites/default/files/2007%20HMDA%20Data.pdf> (reporting the race-based disparity in higher priced lending markets).

<sup>152</sup> *Id.*

<sup>153</sup> Vikas Bajaj & Ford Fessenden, *What’s Behind the Race Gap?*, THE NATION, November 4, 2007, reprinted in N.Y. TIMES, <http://www.nytimes.com/2007/11/04/weekinreview/04bajaj.html>.

<sup>154</sup> NAT’L URBAN LEAGUE, *supra* note 155, at 2.

<sup>155</sup> See ALGERNON AUSTIN, ECONOMIC POLICY INSTITUTE, SUBPRIME MORTGAGES ARE NEARLY DOUBLE FOR LATINOS AND AFRICAN AMERICANS (June 11, 2008) [http://www.epi.org/economic\\_snapshots/entry/webfeatures\\_snapshots\\_20080611/](http://www.epi.org/economic_snapshots/entry/webfeatures_snapshots_20080611/) (stating that “[r]ecent studies suggest that creditworthiness—alone or in combination with factors other than race—cannot account for race based subprime disparities. When researchers from the Federal Reserve and the Wharton School of Business conducted an analysis that took into account the percent of adults in a neighborhood who were a very high credit risk, they still found a positive relationship between the prevalence of subprime loans and the share of minorities in a neighborhood.”); see also Aleo, *supra* note 14, at 20 (stating that “[a]ccording to the CRL study, the racial disparity in subprime lending has not been strictly based on borrowers’ income-levels or risk-related credit factors. The study breaks down its data by LTV, FICO credit score range, and race. In the highest-risk borrower category—featuring an LTV of above 90% and FICO score below 620—African Americans were only 6% more likely than white borrowers to receive a subprime loan for a home purchase and 5% more likely to receive a subprime loan for refinancing. For borrowers with the

best credit histories and thus the lowest risk categories—LTV below 80% and FICO score of above 680—African Americans were 65% more likely to receive subprime loans than their similarly situated white counterparts for a home purchase and 124% more likely when refinancing. Beyond the clear racial disparities in lending, the increased disparity in refinancing is particularly unsettling as minorities who refinance with subprime loans are at risk of losing the equity that they have invested in their homes, often comprising their life savings.”).

<sup>156</sup> See Bajaj, *supra* note 157 (stating that the biggest home lenders in minority neighborhoods are subprime lenders).

<sup>157</sup> See NAT’L URBAN LEAGUE, *supra* note 155, at 2 (citing Rick Brooks and Ruth Simon, Subprime Debacle Traps Even Very Creditworthy, WALL ST. J., December 3, 2007, <http://online.wsj.com/article/SB119662974358911035.html>).

<sup>158</sup> See REALTYTRAC, AS SOME TOP METRO FORECLOSURE ACTIVITY RATES DECREASE, NEW FORECLOSURE HOT SPOTS EMERGE IN Q3 2009, (Oct.28, 2009) <http://www.realtytrac.com/contentmanagement/pressrelease.aspx?channelid=9&itemid=7733> (showing the top cities hit by foreclosures); see also Nick Timiraos, Move Over Merced: Foreclosures Intensify in New Crop of Western Cities, <http://blogs.wsj.com/developments/2009/10/28/move-over-merced-foreclosures-intensify-in-new-crop-of-western-cities/>. (Oct. 28, 2009, 12:53 PM ET) (“foreclosure activity increased most sharply in several mid-size Western markets”).

<sup>159</sup> See State and County Quick Facts, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/index.html> (citing to the index page: select state and city to view demographics).

<sup>160</sup> Austin, *supra* note 159; see also WILHELMINA A. LEIGH and DANIELLE HUFF, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, AFRICAN AMERICANS AND HOMEOWNERSHIP: THE SUBPRIME LENDING EXPERIENCE 1995-2007 6 (2007), <http://www.scribd.com/doc/24189487/African-Americans-and-Homeownership-The-Subprime-Lending-Experience-1995-to-2007-November-2007-Brief-2> (reporting on the disparity in incidence of subprime mortgages among African American and Latino populations showing that large percentages of minorities who receive mortgage and home improvement loans get subprime loans).

<sup>161</sup> ROBERTA K. MCINERNEY, PRACTISING LAW INSTITUTE, SUBPRIME INSTITUTE 2008, RECENT FDIC SPEECHES, TESTIMONY 311 (2008) (reporting on the FDIC announcement that it will sponsor a Forum aimed at encouraging Mortgage Lending for Low- and Moderate-Income (LMI) Households on July 8, 2008). “The purpose of the LMI Mortgage

Forum is to explore a framework for LMI mortgage lending in the future, including identifying market and regulatory incentives for encouraging responsible LMI mortgage lending. The Census Bureau reports that the national homeownership rate was about 68 percent as of the first quarter 2008. However, the homeownership rate is only about 51 percent for those households with below median incomes. Moreover, data from the Federal Reserve’s 2004 Survey of Consumer Finances, the latest income stratification information available, show that for households with incomes in the bottom fifth of all earners, homeownership rates are far lower - about 40 percent. ‘I remain deeply concerned that disruptions in mortgage credit availability and in the secondary market will make it even more difficult for households of modest means to realize the benefits of owning their own homes,’ said FDIC Chairman Sheila C Bair. ‘Particularly in this environment of tightening lending standards, government must remain focused on the right incentives to promote responsible and sustainable mortgage lending. I look forward to a wide-ranging and constructive dialogue on the issues facing LMI borrowers and identifying recommendations on strategies that will benefit consumers, lenders, investors, and the economy.’”.

<sup>162</sup> Gilmore et al., *supra* note 4, at 266 (stating “Former President Bill Clinton attempted to address homeownership during his time in office through a homeownership policy initiative. At the time of drafting the initiative later labeled Urban Policy Brief #2, the homeownership rate for White Americans was approximately 70% while the rate for African Americans was 43%. By any measure, this was a significant gap between the races with respect to homeownership. It existed well after most of the nation’s segregation laws had been repealed, which suggests that the difference in homeownership rates between whites and blacks was a complex issue that lacked an easy solution. The Clinton initiative, while directed at all Americans, did have a positive effect on the homeownership rates of African Americans and Latinos. One study from the Brookings Institution shaped the homeownership landscape during the Clinton years, and provided evidence that homeownership rates among African Americans and Latinos were improving significantly: Over the past decade, the gap between rates of homeownership has narrowed, due in part to an increasing number of mortgage loans to low-income, minority households. According to a recent report from the Brookings Institution, mortgage lending increased by 98 percent for African American homebuyers and by 125 percent for Hispanic homebuyers during

the 1990s. Rising rates of homeownership among minorities represent a positive step toward closing the wealth gap between whites and other groups.”)

<sup>163</sup> See Aleo, *supra* note 14, at 11 (“Villain Phil writing on behalf of the editors at the National Review, in a more measured tone, claimed that “bankers cannot blame CRA entirely; they made a lot of bad bets on rising home prices. But the CRA did influence lending standards across the banking industry, even in those institutions that are not strictly liable to its jurisdiction. The subprime debacle is in no trivial part the result of lending decisions in which political extortion trumped businesses’ normal bottom-line concerns.” The conservative critiques of the CRA were met with stern rebukes from liberal commentators. The President of the National Urban League called on Treasury Secretary Henry Paulson “to refute statements by conservative politicians and pundits that subprime mortgages provided to minorities led to the financial crisis and a \$700 billion federal rescue of Wall Street,” calling such allegations a “big lie.” Daniel Gross responded, “Let me get this straight. Investment banks and insurance companies run by centimillionaires blow up, and it’s the fault of Jimmy Carter, Bill Clinton, and poor minorities?” Gross blamed the crisis on “stupid, reckless lending, of which Fannie Mae and Freddie Mac and the subprime lenders were an integral part.” As he saw it, “Investment banks created a demand for subprime loans because they saw it as a new asset class that they could dominate. They made subprime loans for the same reason they made other loans: They could get paid for making the loans, for turning them into securities, and for trading them—frequently using borrowed capital.”)

<sup>164</sup> Leigh, *supra* note 164, at 3.

<sup>165</sup> *Id.*

<sup>166</sup> See Claire A. Hill, *Securitization: A Low-Cost Sweetener For Lemons*, 74 WASH U L Q 1061, 1062 (1996) (stating that securitization has existed since the 1970s). Kathleen C. Engel & Patricia A. McCoy, *Turning A Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039, 2046-47 (2007) (explaining that securitization is a method of bundling a group of loans that are sliced into pieces called tranches. Each slice is rated by the rating agencies. Tranches are securities that are backed by a pool of cash-producing assets).

<sup>167</sup> Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2198 (2007) (describing GSE as including Federal National Mortgage Association (FNMA, commonly referred to as Fannie Mae), Government National Mortgage Association (GNMA commonly referred to as Ginnie Mae), and Federal Home Loan

Mortgage Corporation (commonly referred to as Freddie Mac)).

<sup>168</sup> *Id.* at 2199.

<sup>169</sup> *Id.* at 2200.

<sup>170</sup> *Id.*

<sup>171</sup> Nomi Prins, *The Risk Fallacy*, FORTUNE, Oct. 27, 2008, available at [http://money.cnn.com/2008/10/27/magazines/fortune/riskfallacy\\_prins.fortune/index.htm](http://money.cnn.com/2008/10/27/magazines/fortune/riskfallacy_prins.fortune/index.htm).

<sup>172</sup> Thomas O. Porter, II, *The Federal Reserve’s Catch-22: A Legal Analysis of the Federal Reserve’s Emergency Powers*, 13 N.C. BANKING INST. 483, 486-89 (2009) (where author generally contextualizes the housing collapse by chronicling the dual role of the market to make money and to do by exercising some prudence).

<sup>173</sup> *Id.*

<sup>174</sup> See, e.g., Frank Partnoy & David A. Skeel, Jr., *The Promise and Perils of Credit Derivatives*, 75 U. CIN. L. REV. 1019, 1021 n.1 (2007) (citing Warren Buffett, Letter to Berkshire Hathaway Shareholders, and explaining that derivative are either highly praised or darkly critiqued by commentators).

<sup>175</sup> Brian J.M. Quinn, *The Failure of Private Ordering and the Financial Crisis of 2008*, 5 N. Y. U. J. L. & BUS. 549, 583 (2009).

<sup>176</sup> *Id.* (“[T]he default swap transfers the risk of default of a reference entity . . . from one party to another. The buyer of the default swap makes periodic payments to the seller of the contract. In the event of a default by the reference entity bond, the seller of the swap is obliged to stand in the shoes of the reference entity and make payment of the notional principal to the buyer of the swap.”)

<sup>177</sup> See José Gabilondo, *Leveraged Liquidity: Bear Raids and Junk Loans in the New Credit Market*, 34 J. CORP. L. 447, 506 (2009) (in 1990, three U.S. Economists shared the Nobel prize for their work on the theory of financial economics; Merton Miller, Harry Markowitz and William Sharpe); see also *Americans Win Nobel for Economics*, BBCNEWS, Oct. 15, 2007, <http://news.bbc.co.uk/2/hi/business/7045067.stm> (noting that the theory the three 2007 prize winners developed “allows us to distinguish situations in which markets work well from those in which they do not.”)

<sup>178</sup> See Merton Miller & Franco Modigliani, *Corporate Income Taxes and the Cost of Capital*, 53 AM. ECON. REV. 433 (1963). Merton Miller and Franco Modigliani, *The Cost of Capital, Corporation Finance and the Theory of Investment*, 53 AM. ECON. REV. 261 (1958) (The theorem is called the capital structure irrelevance principle because it holds that, in the absence of taxes, bankruptcy costs, and asymmetric information and in an efficient market, the value of a company is unaffected by how that company is financed. The theory finds that whether the company is financed

by equity or debt is irrelevant as is its policy of profit distribution.)

<sup>179</sup> See MERTON H. MILLER, UNIV. OF CHICAGO GRADUATE SCHOOL OF BUSINESS, *DO WE REALLY NEED MORE REGULATION OF FINANCIAL DERIVATIVES?* 10 available at <https://www.chicagogsb.edu/faculty/selectedpapers/sp75.pdf> (stating that a bank’s swaps and derivatives book is managed to control interest-rate risk).

<sup>180</sup> See Mark Whitehouse, *How a Formula Ignited Market that Burned Some Big Investors*, WALL ST. J., Sept. 12, 2005, available at <http://math.bu.edu/people/murad/MarkWhitehouseSlicesofRisk.txt> (noting that the model “helped to estimate what return investors in certain credit derivatives should demand, how much they have at risk and what strategies they should employ to minimize that risk.”).

<sup>181</sup> Robert Block & Nir Kossovsky, *IP Transfer And Pricing Considerations For Financial Service Firms*, PAT. STRATEGY & MGMT., Feb. 2006, at 1 (“A credit default swap (“CDS”) is a credit derivative that provides a buyer (often the owner of underlying bonds) protection against specific risks. Common risks include bankruptcy, failure to pay, debt restructuring, acceleration or repudiation. Building blocks of the product include complex risk pooling techniques and risk correlation calculations. The cornerstone insight is said to be the application of the Gaussian Copula to correlation calculations, but each major player in the market refines this method with its own proprietary systems.”).

<sup>182</sup> *Id.* (“[S]pecialists now believe that CDS markets process new market information more efficiently than bond markets and thus set superior pricing signals. Impending credit downgrades will be reflected in CDS price movements before they are reflected in the underlying assets. It is the industry consensus that innovation leadership in CDS products and proprietary modeling is squarely centered in London.”).

<sup>183</sup> INT’L MONETARY FUND, *GLOBAL FINANCIAL STABILITY REPORT: CONTAINING SYSTEMIC RISKS AND RESTORING FINANCIAL SOUNDNESS* 37 (2008), <http://www.imf.org/external/pubs/ft/gfsr/2008/01/pdf/text.pdf> (explaining the difficulty of developing a clear picture of which institutions ultimately hold the credit risk transferred and quantifying the amount of risk transferred).

<sup>184</sup> *Commodity Futures Modernization Act of 2000*, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (passed by the House and Senate without debate and signed by President William Clinton less than a week later); see Andrew M. Kulpa, *Minimal Deterrence: The Market Impact, Legal Fallout, and Impending Regulation of Credit Default Swaps*, 5 J. L. ECON. & POL’Y 293, 297 (2009) (“The CFMA specifically prevents state and local laws from regulating gaming contracts

and bucket shops in the context of CDS agreements.” “[C]ongress also expressly excluded CDS agreements from regulation under the Securities Act of 1933 and the Securities Exchange Act of 1934. This was another specific carve out by the CFMA that actually expanded the definition of a “security” under the 1933 and 1934 Acts but explicitly excluded CDS agreements.”)

<sup>185</sup> 17 C.F.R. § 242.200 (2007) (The short sale refers to “any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.”).

<sup>186</sup> James W. Christian, Robert Shapiro & John-Paul Whalen, *Naked Short Selling: How Exposed are Investors?*, 43 HOUS. L. REV. 1033,1041-42 (2006) (describing a traditional short sale).

<sup>187</sup> SEC v. Lyon, 529 F. Supp. 2d 444, 457 (S.D.N.Y. 2008); *Occupational Urgent Care Health Sys. v. Sutro & Co.*, 711 F. Supp. 1016, 1025 (E.D. Cal. 1989).

<sup>188</sup> Jonathan R. Macey, Mark Mitchell & Jeffrey Netter, *Restrictions on Short Sales: An Analysis of the Uptick Rule and its Role in View of the October 1987 Stock Market Crash*, 74 CORNELL L. REV. 799, 799 (1989).

<sup>189</sup> 15 U.S.C. § 78j(a)(1) (2000).

<sup>190</sup> David C. Worley, *The Regulation of Short Sales: The Long and Short of it*, 55 BROOK. L. REV. 1255, 1256 (1990).

<sup>191</sup> Michael Sloan, *Investment Bank Regulation and the Credit Crisis*, 28 REV. BANKING & FIN. L. 52, 59 (2008) (comparing the standard equity to debt ratios with the SEC allowed for investment banks);

Bethany McLean, *Ratings Agencies Under Fire*, CNN MONEY.COM, Aug. 21, 2007, [http://money.cnn.com/2007/08/20/magazines/fortune/ratings\\_agencies.fortune/index.htm](http://money.cnn.com/2007/08/20/magazines/fortune/ratings_agencies.fortune/index.htm) (attributing the boom to out-of-date regulations, lax federal oversight, and the complicity of the three rating agencies). See, e.g., *Credit Rating Agencies Come Under Fire*, FOX BUSINESS, Oct. 22, 2008, <http://www.foxbusiness.com/story/markets/credit-rating-agencies-come/#> (stating that “inflated rating awarded to securities backed subprime loans led investors to buy them in enormous numbers. But now, most of these securities have been downgraded and the market for them has largely evaporated, contributing to the current crisis.”).

<sup>192</sup> Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (creating the Troubled Assets Relief Program (TARP) and signed into law by President George W. Bush on October 3, 2008).

<sup>201</sup> Professor Frank Partnoy, University of San Diego College of Law, former derivatives broker and corporate securities attorney and Steve Kroft Oct. 5, 2008, 60 Minutes, A Look At Wall Street’s Shadow Market,

[http://www.cbsnews.com/stories/2008/10/05/60minutes/main4502454\\_page4.shtml?tag=contentMain;contentBody](http://www.cbsnews.com/stories/2008/10/05/60minutes/main4502454_page4.shtml?tag=contentMain;contentBody).

<sup>193</sup> See 60 Minutes, *supra* note 151 (discussing the failures in judgment and otherwise that led to the collapse of the world financial markets).

<sup>194</sup> Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1, 12 (2009).

<sup>195</sup> See Jonathan R. Macey, *Wall Street Versus Main Street: How Ignorance, Hyperbole, and Fear Lead to Regulation*, 65 U. CHI. L. REV. 1487, 1508 (1998) (labeling Partnoy’s positions on derivatives as foolhardy).

<sup>196</sup> See Bank Credit Default Swaps (CDS), iBANKNET, Notional Amounts, [www.ibanknet.com/scripts/callreports/fiList.aspx?type=bankcbs](http://www.ibanknet.com/scripts/callreports/fiList.aspx?type=bankcbs) (reporting that Chase is burdened with a \$1 billion dollar CDS exposure in the failure of the Chicago Tribune).

<sup>197</sup> Government Widens Support for Home Loans, Credit (PBS television broadcast Nov. 25, 2008) (transcript available at [http://www.pbs.org/newshour/bb/business/july-dec08/fedrole\\_25.html](http://www.pbs.org/newshour/bb/business/july-dec08/fedrole_25.html)) (reporting that the \$800 billion federal funds are aimed at jump-starting mortgage lending, continuing housing correction, and increasing consumer spending by buying up \$600 billion in debt).

<sup>198</sup> See Kulpa, *supra* note 192, at 297 (referring to the law prohibiting regulation of CDSs).

<sup>199</sup> See, e.g., Abby Cooper, Note, *\$1 Per Lot for Affordable Housing in Detroit: Non-Monetary Benefits Can Constitute Fair Value in the Sale of City-Owned Surplus Property to Community Development Corporations*, 48 WAYNE L. REV. 1191, 1220 (2002) (providing a proposal for addressing housing affordability by using a Detroit, Michigan case model).

<sup>200</sup> Dan Nnamdi Mbulu, *Affordable Housing: How Effective are Existing Federal Laws in Addressing the Housing Needs of Lower Income Families*, 8 AM. U.J. GENDER SOC. POL’Y & L. 387, 410 (2000) (explaining the LIHTC program).

<sup>201</sup> Clark, *supra* note 36, at 186-87.

<sup>202</sup> *Id.*

<sup>203</sup> Jean Hocker, *Land Trusts: Key Elements in the Struggle Against Sprawl*, 15 NAT. RESOURCES & ENV’T 244, 244 (2001).

<sup>204</sup> *Id.* at 245.

<sup>205</sup> Jeanne Goldie Gura, *Preserving Affordable Homeownership Opportunities in Rapidly Escalating Real Estate Markets*, 11 J. AFFORDABLE HOUS. & CMTY. DEV. L. 78, 83(2001).

<sup>206</sup> Hocker, *supra* note 212, at 246-47 (noting land trusts are commonly private non-profit corporations but can also be established as public non-profit corporations).

<sup>207</sup> Gura, *supra* note 214, at 83; see Itzchak E. Kornfeld, *Conserving Natural Resources and Open Spaces: A Primer on Individual Giving Options*, 23 ENVTL. L. 185, 206-07 (1993) (stating that

a land trust may be organized to preserve “unique natural lands and the diversity of wildlife” in fee simple).

<sup>208</sup> Duncan M. Greene, *Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation*, 28 SEATTLE U. L. REV. 883, 886-87 (2005).

<sup>209</sup> Julie Farrell Curtin & Lance Bocarsly, CLTS: *A Growing Trend in Affordable Home Ownership*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 367, 377 (2008) (discussing for example, retaining housing affordability by minimizing exposure to property tax increases by virtue of the ground lease. The author states “A CLT maintains the affordability of the housing on its land through its ground lease.”).

<sup>210</sup> Benjamin W. Lund, *Payment of Taxes and Available Exceptions*, NATIONAL BUSINESS INSTITUTE, 02V7511 NBI-CLE 167 (2004).

<sup>211</sup> See Curtin, *supra* note 218, at 377 (noting that A CLT can balance the competing goals of affordability and wealth building in its resale formula).

<sup>212</sup> See generally *id.* (stating the different resale formulas one can use, which favors affordability).

<sup>213</sup> John A. Powell & Marguerite L. Spencer, *Giving Them the Old “One-Two”: Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433, 464 (2003) (providing examples of development that has had a profound impact on the valuation of existing homes. “Traditional working class communities close to the city center (for example, Lake View, Wicker Park) are experiencing rapid gentrification. Census tracts which have had a high percentage of vacant housing, high poverty rates, and high percentages of black or Hispanic households, experienced higher home appreciation than other locations in the 1990s. ‘New, expensive housing is being built’ and ‘concentrations of poverty [are] going farther west, southwest and to the inner ring of suburbs.’” And concluding that when viewed through the lenses of race, class, space and time, the benefits of gentrification appear to outweigh the costs as increased values results in pushing out lower income people).

<sup>214</sup> Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 FORDHAM URB. L.J. 507, 512 (1991) (“[A]s a neighborhood gentrifies, real estate speculation may increase the value of all units, thereby driving up property taxes, a cost likely to be passed on to existing tenants.”).

<sup>215</sup> Powell, *supra* note 222, at 447.

<sup>216</sup> J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 426 (2003) (“Low-income homeowners can be more easily protected against being forced to sell prematurely by devices that do not distort the basic functioning of the market. Such homeowners

may both be harassed by rising costs and enjoy the benefit of a rapidly appreciating asset—their home. To some extent, their problem is not poverty, but the illiquidity of assets.”)

<sup>217</sup> Melvyn R. Durchslag, *Property Tax Abatement for Low Income Housing: An Idea Whose Time May Never Arrive*, 30 HARV. J. ON LEGIS. 367, 377 (1993) (citing Stanley S. Surrey, Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, 83 HARV. L. REV. 705 (1970)).

<sup>218</sup> David Burke, *The Stop Tax-Exempt Arena Debt Issuance Act*, 23 J. LEGIS. 149, 150 (1997) (noting that “[i]n 1968, Congress restricted the tax subsidy to capital facilities which benefit the general public.”).

<sup>219</sup> *Id.* (reporting that partial tax exemptions would include fixed dollar exemptions that would exempt a specific amount of the value of a residence from taxation. An example is an exemption for the first \$20,000 of value. Such an exemption grants proportionately more relief to property assessed at a lower value while encouraging residency by higher income families to the area. Another form of this exemption is a percentage-based exemption where a percentage of the property value is exempt from taxation).

<sup>220</sup> Seth B. Cohen, *Teaching an Old Policy New Tricks: The 421-A Tax Program and the Flaws of Trickle-Down Housing*, 16 J.L. & POL’Y 757, 766 (2008) (finding that “tax abatements encourage housing production by ‘providing a declining exemption on the new value that is created’ by the development.”).

<sup>221</sup> *Id.*

<sup>222</sup> See Durchslag, *supra* note 226, at 373-74 (challenging the success of tax abatement programs for housing redevelopment because it lacks economic incentive and explaining that encouraging adequate investment in the affordable housing industry is a problem on both the private and public levels, because of the low profit margins).

<sup>223</sup> See David Philip Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J.L. & POL’Y 537, 537 (1998) (recognizing that the purpose of the Tax Reform Act was to enable the development of affordable housing).

<sup>224</sup> See, e.g., Megan J. Ballard, *Profiting from*

*Poverty: The Competition Between For-Profit and Non-Profit Developers for Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211, 212 (2003) (arguing in effect that the Tax Reform Act creates an unfair advantage to for-profit entities to benefit from government subsidy to the detriment of nonprofit entities).

<sup>225</sup> See Allison D. Christians, *Breaking the Subsidy Cycle: A Proposal for Affordable Housing*, 32 COLUM. J.L. & SOC. PROBS. 131, 147 (1999) (stating that the purpose of the tax credit is to “encourage the development of affordable housing.”). Kenya Covington & Rodney Harrell, *supra* note 79, at 108 (2007); see also Peter W. Salsich Jr., *Expanding the Low-Income Housing Tax Credit: Raising the Cap and Targeting Homeownership*, 9 J. AFFORDABLE HOUS. & CMTY. DEV. L. 28, 28 (1999) (“[E]xpansion of the LIHTC is the main hope for increasing rental and homeownership opportunities for low-income families.”).

<sup>226</sup> Salsich, *supra* note 234, at 30.

<sup>227</sup> George Lefcoe, *Finding the Blight That’s Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 1001 (2001).

<sup>228</sup> Gary P. Winter, *Tax Increment Financing: A Potential Redevelopment Financing Mechanism For New York Municipalities*, 18 FORDHAM URB.L.J. 655, 658 (1991).

<sup>229</sup> Fred Galves, *The Discriminatory Impact of Traditional Lending Criteria: An Economic and Moral Critique*, 29 SETON HALL L. REV. 1467, 1475-76 (1999).

<sup>230</sup> Christians, *supra* note 234, at 136.

<sup>231</sup> *Id.* at 136-37.

<sup>232</sup> *Id.* at 136.

<sup>233</sup> JOE MATTEY & NANCY WALLACE, FEDERAL RESERVE BANK OF SAN FRANCISCO, HOUSING PRICES AND THE INSTABILITY OF MORTGAGE PREPAYMENT MODELS: EVIDENCE FROM CALIFORNIA 1 (1998), <http://www.sf.frb.org/econsrch/workingp/wp98-05.pdf>.

<sup>234</sup> *Id.*

<sup>235</sup> William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need For Mortgage Rules Consonant with the Economic and Physiological Dynamics of the Home Sale Loan Transaction*, 70 VA. L. REV. 1083, 1156 (1984); see also Margalynne Armstrong, *Race and Property Values Entrenched in Segregation*, 52 U. MIAMI L. REV. 1051, 1059 (1998) (considering the effect of segregation on the marketability of property in African American neighborhoods

and its effect on wealth building.)

<sup>236</sup> See Christians, *supra* note 234, at 139.

<sup>237</sup> Steven R. Berg, *Observations from a Legal Services Lawyer*, 1 GEO. J. ON FIGHTING POVERTY 67, 68 (1993).

<sup>238</sup> NATIONAL CENTER FOR EDUCATION STATISTICS, STATE & COUNTY ESTIMATES OF LOW LITERACY, <http://nces.ed.gov/naal/estimates/Approach.aspx> 1 (2003) (finding that 14 percent of American adults scored “below basic” literacy, meaning that they could not perform simple, everyday tasks that required reading or writing. The report projected that an estimated 30 million American adults possessed no more than the most rudimentary literacy skills); see Pierre Thomas, Jack Date, Clayton Sandell & Theresa Cook, *Living in the Shadows: Illiteracy in America*, ABC NEWS, Feb. 25, 2008, <http://abcnews.go.com/WN/LegalCenter/story?id=4336421&page=1> (reporting that one 2008 study found that 7 million Americans are illiterate, 27 million are unable to read well enough to complete a job application and 30 million cannot read a simple sentence).

<sup>239</sup> James A. Gross, *A Human Rights Perspective on U.S. Education: Only Some Children Matter*, 50 CATH. U. L. REV. 919, 920-21 (2001), (citing ELI GINZBERG & DOUGLAS BRAY, THE UNEDUCATED 12 (1953)). Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL. 483, 496 (1998) (stating that “[f]ocusing on illiteracy as mere access to education arguably is not only simplistic, it is misleading. Minimal education – i.e., mere access – passes constitutional muster as enough to combat illiteracy. However, minimal education is not enough in today’s world. Instead, contemporary societal effort must assure all children of an adequate education; the effort must be to provide the resources necessary to achieve functional literacy.”).

<sup>240</sup> See Greg J. Duncan & Anita Zuberi, *Mobility Lessons from Gautreaux and Moving to Opportunity*, 1 NW. J.L. & SOC. POL’Y 110, 111-112 (2006) (comparing the dramatic results of the early Gautreaux family studies with less attractive later results and discussing various reasons for the different results).

# FUTILE ARGUMENTS: LAWRENCE V. TEXAS AND THE SUPREME COURT BAR

By: Heron Greensmith<sup>1</sup>

## I. Introduction

I am a third year law student, gearing up to face a bleak legal job market, a bleaker economy, and almost two hundred thousand dollars in student debt.<sup>2</sup> I entered law school from the Peace Corps with a clear goal: to be an advocate for gender and sexual minorities through public policy, legislative drafting, or appellate litigation.<sup>3</sup> Now to make that dream come true. Passion? Check. Knowledge? Check. Partnership in a D.C. law firm specializing in appellate and Supreme Court litigation? Not yet.

Last semester, my penultimate, I took a seminar on the Supreme Court taught by long time Supreme Court journalist Stephen Wermiel. The course broadly covered several controversial aspects of the Supreme Court, one of which was the rise of the professional, specialized Supreme Court bar. Our class discussions led me to wonder how appellate attorney Paul Smith, an appellate attorney at Jenner and Block, got the privilege of arguing *Lawrence v. Texas*<sup>4</sup> in the Supreme Court instead of the lawyers at Lambda Legal. Mr. Smith seemed to be a very kind, passionate individual when he visited our class, but Mitchell Katine, along with Lambda Legal lawyers Ruth Harlow and Suzanne Goldberg, had carried the case from trial. I was sure that there was a story behind Mr. Smith getting to argue in the Supreme Court rather than Mr. Katine, Ms. Harlow, or Ms. Goldberg, and I wanted to hear it. Would the theme of the story be the rise of the Supreme Court bar: D.C.'s repeat players who have over ten arguments under each of their belts and whose names Supreme Court buffs whisper in reverence?

The elite Supreme Court bar rises as another hurdle, another inequity standing between me (and by proxy all passionate advocates) and the chance to argue a case before the Supreme Court. As a future public

interest lawyer, it is hard to describe my feelings: a mixture of jealousy, respect, frustration, resignation. As an advocate for a particular community, I know that I do not want to work in general appellate litigation, waiting around for the case of my dreams to come to me. I am also aware that dozens of years often pass before appellate litigators and successful advocates are offered the chance to argue in the Supreme Court. I hope to spend those years of my life as Ruth Harlow and Suzanne Goldberg from Lambda Legal spent theirs, working on a cause about which they were passionate, creating legal strategies, building reputations, writing, researching, arguing, being cool. But if after all that, Paul Smith was given the opportunity to argue *Lawrence v. Texas* in the Supreme Court instead of Ruth Harlow, what chance have I? This paper explores the impact that the elite Supreme Court bar may have on the chance that non-specialized lawyers will be given the opportunity to advocate for their clients and causes in the Supreme Court.

## II. The Supreme Court Bar

The current consensus in the literature and among Supreme Court litigators themselves is that hiring specialized appellate counsel is generally a good thing. Michelle Lore wrote an excellent article for *The Minnesota Lawyer* in 2007, detailing all the reasons a trial lawyer should hand off an appeal to an appellate specialist.<sup>5</sup> Among other advantages, she points out the specialized skill set, familiarity with appellate judges, and the objectivity that new appellate counsel can bring to a case.<sup>6</sup> She also notes the prestige that attaches to specialized counsel, recognizing that clients view appellate work as “a distinct service.”<sup>7</sup>

These clients may be correct in their view. According to Kevin McGuire and Joseph Swanson, specialized

appellate counsel achieve much higher rates of being granted certiorari (also known as “cert,” or review on appeal) in the Supreme Court and possibly reach higher rates of winning cases. In his article, *Repeat Players*, Mr. McGuire examined the lawyers in all Supreme Court cases between 1977 to 1982 to determine that “lawyers who litigate in the high court more frequently than their opponents will prevail substantially more often.”<sup>8</sup> Kevin McGuire proposes that the more an attorney appears before the Court, the higher the likelihood of his<sup>9</sup> success.<sup>10</sup> Joseph Swanson takes a micro look at the certiorari process by examining three particular members of the Supreme Court bar in three particular cases, but arrives at a conclusion similar to Mr. McGuire’s: “One can only conclude that hiring experienced Supreme Court counsel to petition the Justices for review may improve one’s chances considerably.”<sup>11</sup>

One consequence of the rise of the elite Supreme Court bar is that judges may expect something different, if not better, of the parties appearing before them than they have in the past. According to Jennifer S. Carroll, appellate judges expect a different level of legal argumentation than trial judges.<sup>12</sup> The “emotional pleas” considered the norm at the trial level, she says, would be “inappropriate at the appellate level.”<sup>13</sup> In fact, she argues that “[a]ppellate practice has evolved into a specialized area of the law, and justifiably so. The fundamentals of appellate advocacy—writing a simple persuasive brief, making an effective oral argument, and having a command of the appellate procedure—necessarily reflect effort, skill, and at the highest level, art.”<sup>14</sup>

Even the Supreme Court agrees. The *American Bar Association Journal* interviewed<sup>15</sup> Justice Antonin Scalia and Bryan A. Garner about their co-authored book *Making Your Case: The Art of Persuading Judges*.<sup>16</sup> The book instructs

appellate lawyers of at all levels on how best to write briefs, argue cases, and, ultimately, convince judges. When the *Journal* asked Justice Scalia his thoughts on the rise of the Supreme Court bar, the Justice said:

I think that there are a significantly larger number of lawyers who appear at least once a term and sometimes several times a term than when I first came on the court . . . . I think I can say that those who do it with great frequency and are paid a lot of money to do it because they are good at it are obviously going to be better—other things being equal—than a novice.<sup>17</sup>

A litigator approaching her first argument in the Supreme Court may rightfully worry that this presumed level of competence creates an ethical duty to hire specialized appellate counsel. Christine Macey compares the benefits of increased chances of being granted certiorari, more effective oral arguments, and the affordability of appellate specialists to the “novice lawyer’s” obligations to educate her client and provide competent representation.<sup>18</sup> Ms. Macey concludes that “although statistics show that experience matters at the High Court,” inexperienced attorneys may fulfill their ethical duties by comprehensively educating their clients and preparing adequately for trial.<sup>19</sup> Moot courts, Supreme Court clinics, brief writing assistance, and online and print resources (including those co-authored by Justices themselves) are all resources attorneys may use to help them prepare.<sup>20</sup>

Ms. Macey also discusses reasons that attorneys may prefer to not pass on their cases to appellate attorneys.

“A lawyer may want to keep [a] case for legitimate reasons, such as client trust or superior knowledge of the facts. Alternatively, a lawyer may wish to keep [a] case for self-interested reasons. A Supreme Court argument is a once-in-a-lifetime opportunity

for most attorneys. It could lead to television or newspaper coverage, as well as future business. Supreme Court advocacy is associated with prestige. . . . Legal fees may also motivate to keep the case to herself.”<sup>21</sup>

Some of these reasons may also be related to a lawyer’s connection with and passion for the particular cause implicated in the case. The lawyers involved in *Lawrence v. Texas* exemplify the way in which the rise of the Supreme Court bar can affect who argues which cases. To explore the rise of the Supreme Court bar, and specifically the role of *Lawrence v. Texas* and impact litigation, in the lesbian, gay, bisexual, and transgender (LGBT) movement, I interviewed Paul Smith and Mitchell Katine and corresponded briefly with Suzanne Goldberg over email.

### III. Interview with Mitchell Katine

Mitchell Katine is a founding partner at Katine and Nechman, LLP, a general practice firm in Houston, Texas that advertises its connection to the LGBT community. The main goal of my interview was to pinpoint Mr. Katine’s role in *Lawrence* and his feelings about his role and the oral arguments.<sup>22</sup>

Mr. Katine provided some context by describing the time preceding the case and how he and Lambda Legal got involved. He graduated from law school in 1985, a year before the Supreme Court’s decision in *Bowers v. Hardwick*,<sup>23</sup> upholding the constitutionality of the Georgia law that criminalized homosexual sodomy. When Mr. Katine started practicing law in Houston, he was one of few openly gay lawyers in a state hostile to the gay community. When LGBT people called him with problems related to their sexual orientation, there was not much he could legally do since Texas had a statute criminalizing sodomy. Mr. Katine instead focused his practice on fighting HIV/AIDS, particularly since the Americans with Disabilities Act was being refined to prevent discrimination on the basis of HIV status. Mr. Katine

developed his reputation as an activist through his work with HIV/AIDS, and it is through this work that he met Suzanne Goldberg of Lambda Legal.

Soon after John Lawrence and Tyrone Garner were arrested, their case was “leaked” to gay and lesbian activists who knew Mr. Katine through his work with the HIV/AIDS community. Mr. Katine agreed to help with the initial criminal hearings. At the time, he specialized in employment law, real estate, and HIV discrimination but had never handled a criminal or constitutional law case. Still, he realized that this was a crucial case and that he did not have the knowledge or experience to handle it. He contacted Suzanne Goldberg at Lambda Legal for assistance and asked about the possibility of Lambda’s involvement. Fortunately enough, Lambda was meeting that day to talk about new cases, so Ms. Goldberg asked him to fax her the papers.

Ms. Goldberg agreed to help. She first explained how the relationship between Lambda and Mr. Katine would function: because none of Lambda’s constitutional lawyers were licensed in Texas, Mr. Katine would play the crucial role of local counsel. At a fundamental level, Mr. Katine was lead counsel and Lambda constituted co-counsel. Mr. Katine handled the local lawyers, the media, and the defendants, Lawrence and Garner. When the case landed on front pages around the country, many lawyers wanted to be involved. Lambda, Mr. Katine, and these other lawyers worked together. Lambda would call Mr. Katine with local procedural questions, he would call one of these lawyers who knew criminal law or local procedure to ask them the question, and then Mr. Katine would forward the answer to Lambda so that it could properly draft the response or brief and proceed with the case.

Mr. Katine often found himself in awe of the brilliant lawyers at Lambda, and, even though he always considered *Lawrence* his case, Mr. Katine says he has never thought that he could or should have handled that case by himself. He was not qualified to, but he appreciated Lambda’s inclusion of him throughout

the case. Mr. Katine understood that his role was local while Lambda's role was more national, and he believes that he never behaved in a way that showed he felt threatened or wanted to challenge Lambda's leadership, even though Lambda pretty much took over the case immediately.<sup>24</sup>

I asked Mr. Katine about Paul Smith. Mr. Katine's first thought was that Mr. Smith was a gracious, kind person, and he knows that Mr. Smith appreciated him.<sup>25</sup> Lambda made the decision to have Mr. Smith argue the case because of his experience—he knew the Court, and the Court knew that he was an openly gay lawyer—but Mr. Katine hopes that people who are in more influential positions can emulate Mr. Smith's appreciation of the people on the ground. Mr. Smith could have said "this is my case to get to the Supreme Court" and could have mishandled it, but he did not do that. Mr. Katine hopes that lawyers will keep their feet on the ground and recognize that their reputation depends upon their relationships with other lawyers who do not have the opportunity to argue the cases on which they work. Mitchell Katine, Paul Smith, and Lambda Legal continue to help each other when they can, and those ties benefit everyone.

#### IV. Interview with Paul Smith

I asked for Paul Smith's opinion, as a repeat player, on being asked to argue *Lawrence* after so many lawyers had worked so hard to bring the case to the Supreme Court.<sup>26</sup> Mr. Smith emphasized that Jenner and Block did not take over this case. First, Lambda made the decision to take on specialized counsel when *Lawrence* reached the Supreme Court. Mr. Smith acknowledged that Lambda's decision was probably partly based on the elite Supreme Court bar's 25-year effort to emphasize the need for specialized counsel and partly based on the significance of this case. Lambda was worried about it even being safe to bring *Lawrence* to the Court in the first place since the Court did (and does) not have a record of being pro-LGBT

rights. Lambda chose Jenner because of its connections and because of the large number of LGBT lawyers working at the firm. Mr. Smith was not the sole reason that Jenner was retained as counsel.

A second example Mr. Smith used to demonstrate that Jenner and Block did not take over the case was that Ruth Harlow wrote half of the brief and helped enormously in getting *amici* to sign on. Going into oral arguments, it was actually still assumed that Ms. Harlow would speak to the Court. When the Supreme Court granted cert, the question of who would argue finally arose, and Ms. Harlow decided not to make her rookie Supreme Court argument in this case. She had to talk Lambda into agreeing with her. The compromise was that she and Lambda would get as much billing in the case as Jenner and Block—Ms. Harlow would stand with Mr. Smith in all conferences and give as many quotes as he would. She does not have any regrets about this decision, and Mr. Smith has tried to repay Lambda for allowing him to do the arguments by securing recognition for Lambda's efforts and serving as co-chair on its board of directors.

I asked Mr. Smith about the accuracy of Mr. Katine's assumption that Lambda hired Mr. Smith because he is gay and because the Court knew at the time that he is gay. Mr. Smith said that the Court was not then aware of his sexual orientation. It was more important that the LGBT community knew he was gay and wanted someone from the community to do the arguments. In contrast, during the arguments in *Bowers v. Hardwick*, Laurence Tribe made a slightly distasteful comment about the "embarrassing details" of homosexuality.<sup>27</sup> The statement may have been a deliberate acknowledgement of the Justices' discomfort with homosexuality, but it did not sit well with those in the LGBT community for whom he was advocating. Lambda was aware that the LGBT community would not want a repeat of that situation. As a gay man, Mr. Smith felt the direct import of the case, but he also says that he would feel the same even if he were not

gay.

Mr. Smith believes that the rise of the elite Supreme Court bar has largely helped more than hindered advocacy groups. The quality of oral arguments has improved substantially since he was a clerk at the Court in 1980, partly because of the rise of this specialized bar, but also because of mooted sessions, better preparation, and the Supreme Court Clinic at Georgetown University, for example. Mr. Smith thinks that specialists are necessary, and are especially valuable because they are able to put a case in the context of the Court's jurisprudence.

Still, Mr. Smith thinks that Ms. Harlow could have won the argument as well. Mr. Smith and Lambda felt they won the case as soon as the Court granted cert, and he could not think of any particular element of his argument that won it for him. It was less about convincing the Court and more about a presence. There was a "sense of history in the room."

Mr. Smith also notes that there was a deliberate effort to keep Mr. Katine involved, and Mr. Katine did receive a lot of credit in Houston for the case. There are always lawyers who litigate cases before appellate lawyers argue them. Attorneys at all stages of the litigation have to get used to it. There is a certain awkwardness that comes from adding lawyers to cases at the last minute, but new and old attorneys must be integrated.

#### V. Suzanne Goldberg and Ruth Harlow

I asked for Ms. Goldberg's view of Mr. Katine's role in the litigation, as well as her own feelings about the Supreme Court arguments.<sup>28</sup> Ms. Goldberg agreed with Mr. Katine that his role relative to Lambda's was very delineated. Mr. Katine was local liaison, and Lambda contributed the constitutional and LGBT law expertise. Ms. Goldberg found it "terrific to have Mitchell as a colleague on the case as he provided important insight into the local environment as well as many colleagues through his law firm who had criminal

law and related expertise that was very useful for the litigation.” Ms. Goldberg does not regret leaving Lambda in the midst of *Lawrence*. Indeed, she is “very, very happy with the ultimate outcome.” Regarding her feelings about the decision to let Paul Smith give the oral arguments, as opposed to Ruth Harlow or herself, she recognizes that “[t]he decision was made by Lambda’s lawyers . . . on the view that Paul Smith would be the ideal advocate for the issues raised by the case, and he did a terrific job!”

## VI. Analysis

The interviews reveal a contradiction. Mr. Smith, Mr. Katine, and Ms. Goldberg all agree that Lambda’s decision to hire Jenner and Block, and Paul Smith in particular, was strategic. At the same time, Mr. Smith concedes that the case appeared to be won when the Court granted cert and that Ms. Harlow could probably have argued the case without fear of losing. Ms. Harlow may have had many reasons for choosing not to argue *Lawrence*, but what are the longer-term impacts of having Mr. Smith argue the case? Several implications come to mind.

First, a favorable Supreme Court ruling in such a high-profile case as *Lawrence* solidifies Paul Smith’s excellent reputation as a member of the Supreme Court bar and lifts Jenner and Block’s reputation as a whole. Second, *Lawrence* only serves to further convince novice lawyers, advocacy groups, and clients that it might be risky to enter the Supreme Court without specialized counsel. As Mr. Smith said, “There had been a 25-year conscious effort made on the part of the ‘Supreme Court bar’ to convince people that they needed special counsel. Lambda’s decision was particularly natural because of the importance of this case.”

Finally, *Lawrence*, and other cases like it, may scare novice lawyers<sup>29</sup> from ever arguing in the Supreme Court at all, especially if they do not work at firms that specialize in Supreme Court practice. “Refusing to allow first-time advocates to argue before the Court,” warns Ms.

Macey, “would be counterproductive in the long run; even the most experienced Supreme Court advocates had a first Supreme Court case.”<sup>30</sup>

So, is the rise of the Supreme Court bar good or bad for appellate advocates? Does it help win cases or does the hype exceed the value and prevent the truly passionate from arguing cases? Is the Supreme Court itself cultivating the growth of the specialized bar to the detriment of the advocate?

Ruth Harlow is not Kevin McGuire’s “typical Supreme Court lawyer.” Paul Smith, perhaps aside from his sexuality, is. Mr. Smith’s qualifications to argue *Lawrence* arise from his appellate work at Jenner and Block. Ms. Harlow’s qualifications arise from being the legal director of an organization with incredibly extensive appellate work on the exact issue that was argued in the Court. So was Paul Smith’s comparatively narrow skill-set worth the decision to have him argue the case? If so, how do advocates like Ms. Harlow ever reach the Supreme Court? Litigation strategy certainly must take into consideration the abilities and experience of the attorneys involved, but it must also take into consideration the needs and desires of the interest group. The *Lawrence* team made considerable sacrifices to ensure that the LGBT movement was best served by the outcome of the case, and their decisions were informed by the presence and importance of the elite Supreme Court bar.

One may extend the analogy in *Lawrence* by arguing that Supreme Court specialists should control impact litigation from the trial level upward. Although most appellate lawyers are not also trial lawyers, a few exceptions exist. Indeed, two such lawyers recently brought an action in a Federal District Court, challenging California’s ban on same-sex marriage.

## VII. Looking forward to

*Perry v. Schwarzenegger*<sup>31</sup>

The litigation strategy of the LGBT movement recently came under close scrutiny when veteran appellate

lawyers David Boies and Ted Olson decided to initiate a federal suit against California’s ban on same-sex marriage in *Perry v. Schwarzenegger*.

Litigation strategy involves calculation and compromise. Mr. Katine, Ms. Goldberg, Ms. Harlow, and Lambda Legal all made sacrifices by deciding to ask Mr. Smith to argue *Lawrence v. Texas* to the Supreme Court. Mr. Boies and Mr. Olson, by bringing the case at the trial level, are effectively preempting those difficult decisions. Because they are accomplished appellate lawyers who have argued multiple cases in the Supreme Court, they have the luxury of being able to follow the case through every step of the appeals process. But many prominent LGBT groups fear that Mr. Boies and Mr. Olson do not value the needs and desires of the LGBT community as much as the *Lawrence* team took such pains to. When Mr. Boies and Mr. Olson first filed the challenge to “Proposition 8,” these groups protested the move, worrying that a potential loss in the Supreme Court would prove more detrimental to LGBT rights than no ruling at all.

[N]ot everyone is thrilled with the decision of Boies and Olson to pretty much go it alone right now on a federal suit -- and that includes the ACLU, the National Center for Lesbian Rights and Lambda Legal. The Boies-Olson team has been jostling with attorneys of these and other groups that have been pursuing LGBT rights litigation for many years, on a piecemeal basis in the states. They wonder how committed the two are to the victory and note that Boies and Olson have next to nothing to lose - - except some bragging rights - - if they fail. Gays and lesbians, however, have everything to lose if the Supreme Court rules against marriage equality.<sup>32</sup>

After their initial reluctance, the American Civil Liberties Union, the National Center for Lesbian Rights, and Lambda

Legal all filed to intervene in the case. Mr. Boies and Mr. Olson refused to let them intervene, and the judge agreed. Chad Griffin, the president of the American Foundation for Equal Rights (“AFER”),<sup>33</sup> wrote a letter to the groups detailing the decision to prevent them from intervening: “You have unrelentingly and unequivocally acted to undermine this case even before it was filed. In light of this, it is inconceivable that you would zealously and effectively litigate this case if you were successful in intervening. Therefore, we will vigorously oppose any motion to intervene.”<sup>34</sup> This overt decision to shut-out the participation of the major LGBT groups was a strong statement that AFER believes that it can win the case through the strength of its lawyers and legal argument, not through the strength of coalition or movement building.

Perhaps AFER’s decision was based purely on Mr. Olson’s and Mr. Boies’ success as members of the Supreme Court bar. Or perhaps it was an informed, accurate decision, calculated to bring the lawyers’ skills and influence to a case likely to face both liberal and conservative judges. But no matter what the outcome of the case, AFER’s independent work may undermine the litigation strategies that the LGBT groups have spent so much time cultivating. By reinforcing the importance of the Supreme Court bar in impact litigation, *Perry* could unnecessarily deter inexperienced lawyers, such as Ruth Harlow, from risking their inaugural arguments on a case of such importance.

Perhaps it is not a surprise that Mr. Boies and Mr. Olson embody Kevin McGuire’s “typical Supreme Court lawyer.” As this type of lawyer continues to be successful in the Supreme Court in a wide variety of cases, clients will continue to turn towards the specialized bar. What does that say to an ever diversifying pool of upcoming lawyers? What does it say to the lawyers who are not that “typical” lawyer? Is it a signal to give up hope of arguing in front of our nation’s highest court? What does it say to advocacy groups? Is it a sign that the

groups need lawyers like Mr. Boies, Mr. Olson, and Mr. Smith in order to win? Or is it a signal that the system needs to change?

## VIII. Conclusion

Creating a successful strategy for impact litigation requires considerable sacrifice and selfless assessment of all factors. As the relative importance of the Supreme Court bar grows, advocacy groups will continue to rely on outside counsel to argue in front of the Supreme Court. *Lawrence v. Texas* and *Perry v. Schwarzenegger* represent two manifestations of this reliance. In *Lawrence*, Lambda made the difficult decision to ask Paul Smith, someone invested in the LGBT community as well as experienced in the Court, to make the arguments. In *Perry*, the elite lawyers have had control of the case from the beginning. In our conversation, Mr. Katine expressed his hope “that through [the] interview, people who are in the more influential positions can emulate Paul Smith by appreciating the people on the ground.” In *Lawrence*, this appreciation was shown through including Mr. Katine in all levels of the litigation and in the decisions to give Lambda equal booking with Mr. Smith at the Supreme Court level. By bringing a case themselves and by preventing the advocacy groups from signing on, the lawyers at the American Foundation for Equal Rights are precluding collaboration and appreciation.

The outcome *Perry* and its subsequent impact on LGBT advocacy groups remain to be seen. I sincerely hope that *Perry v. Schwarzenegger* does not herald an era in which elite lawyers gain control of advocacy groups’ litigation strategies. As always in impact litigation, a balance must be struck between the individual clients’ needs, the needs of the movement, the needs of the advocacy organizations, and the needs of the lawyers. I hope that the balance is found and maintained.

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## Endnotes

<sup>1</sup> Heron Greenesmith, J.D. American University, 2010, would like to thank Professor Stephen Wermiel for his encouragement, guidance, and substantive edits. She would also like to thank Mitchell Katine and Paul Smith for taking time out of their busy days to speak with a lowly law student, and Suzanne Goldberg for answering her emails. Heron hopes to one day make them proud by arguing in the Supreme Court as a rather nontraditional member of the elite Supreme Court bar.

<sup>2</sup> Don’t worry about the debt. I’m relying on Income Based Repayment and the new College Cost Reduction and Access Act to pay my loans off for me. At least, I think that is what happens.

<sup>3</sup> For an excellent overview of early LGBT civil rights litigation strategy and the role of Lambda Legal, see ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* (University of Michigan Press 2006).

<sup>4</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>5</sup> Michelle Lore, *Should You Hand off Your Appeal?*, *THE MINNESOTA LAWYER*, Mar. 12, 2007.

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

<sup>7</sup> *Id.* at 1 (quoting Minneapolis attorney David T. Schultz).

<sup>8</sup> Kevin McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 188 (1995).

<sup>9</sup> Please note that I do not use “his” lightly—Mr. McGuire also finds that the “typical Supreme Court lawyer is a forty-five-year-old, Harvard-educated, private practitioner, based in New York, Washington, or Chicago . . . [who] specializes in appellate litigation . . . has at last half a dozen Supreme Court cases to his credit . . . [and] is a liberal white Protestant, with strong attachment to the Democratic party.” KEVIN MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* (University Press of Virginia 1993). “He” is also male.

<sup>10</sup> McGuire, *supra* note 8, at 187.

<sup>11</sup> Joseph W. Swanson, *Experience Matters: the rise of the Supreme Court bar and its effect on certiorari*, 9 J. APP. PRAC. PROCESS 175 (2007).

<sup>12</sup> Jennifer S. Carroll, *Appellate Specialization and the Art of Appellate Advocacy*, *FL. BAR J.* 107 (2000).

<sup>13</sup> *Id.* at 107.

<sup>14</sup> *Id.* at 109.

<sup>15</sup> Richard Brust, *A Voice for the Write: Tips on Making Your Case from a Supremely Reliable Source*, 94 A.B.A.J. 36 (2008).

<sup>16</sup> ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (Thomson West 2008).

<sup>17</sup> Burst, *supra* note 15, at 4.

<sup>18</sup> Christine M. Macey, *Referral is Not Required: How Inexperienced Supreme Court Advocates Can Fulfill Their Ethical Obligations* (Note), 22 GEO. J. LEGAL ETHICS 979 (2009).

<sup>19</sup> *Id.* at 994.

<sup>20</sup> *Id.* at 990-91.

<sup>21</sup> *Id.* at 982.

<sup>22</sup> Telephone Interview with Mitchell Katine, Senior Partner, Katine and Nechman (Nov. 19, 2009). Mr. Katine is an experienced attorney who has served as an adjunct professor at the University of Houston Law Center and South Texas College of Law and as a partner at Williams, Birnberg & Andersen, LLP.

<sup>23</sup> 478 U.S. 186 (1986).

<sup>24</sup> There were certain times with tension: for example, the *New York Times* ran an article with a picture of Mr. Katine with Lawrence and Garner and did not mention Lambda. The *L.A. Times* had a similar picture from Houston Gay Pride.

<sup>25</sup> Mr. Katine gave a story about their relationship: at the Supreme Court, Mr. Katine sat behind the counsel table where Paul Smith and Ruth Harlow would sit. Paul Smith arrived at the counsel table and picked up the quilled white pen that the Court provides counsel and handed it to Mr. Katine and said he appreciated him. Mr. Katine remembers that moment vividly. Mr. Katine reemphasized that Mr. Smith was very gracious. To this day, whenever Mr. Katine is at an event with Lambda or Paul Smith and talking about the case and the significance, which is far greater than he ever imagined, Lambda and Paul Smith always acknowledge and appreciate him publicly and make him feel part of the decision; he always does the same. Mr. Katine always acknowledges their brilliance—and the sheer number of hours put in: all the research and historical knowledge that Lambda brought.

<sup>26</sup> Interview with Paul Smith, Partner, Jenner and Block, in Wash., D.C. (Nov. 24, 2009).

<sup>27</sup> Transcript of Oral Argument, *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>28</sup> Email from Suzanne Goldberg to author (Nov. 25, 2009, 1:57PM) (on file with author).

<sup>29</sup> Here and throughout, the term “novice”

refers to lawyers who have yet to practice in a particular court—the Supreme Court for example. It does not refer to the skill level or length of time a particular lawyer has been practicing.

<sup>30</sup> Macey, *supra* note 21, at 994.

<sup>31</sup> No C 09-2292 VRW (N.D. Cal. 2010).

<sup>32</sup> Democracy for New Mexico, *David Boies Eloquenty Defends Marriage Equality; Some LGBT Legal Groups Grumble*, [http://www.democracyfornewmexico.com/democracy\\_4\\_new\\_mexico/2009/07/david-boies-elloquenty-defends-marriage-equality-some-lgbt-legal-groups-grumble.html](http://www.democracyfornewmexico.com/democracy_4_new_mexico/2009/07/david-boies-elloquenty-defends-marriage-equality-some-lgbt-legal-groups-grumble.html) (July 20, 2009, 14:48 PST).

<sup>33</sup> American Foundation for Equal Rights, <http://www.equalrightsfoundation.org/>. Formed by Mr. Boies and Mr. Olson.

<sup>34</sup> Letter from Chad H. Griffin, Board President, American Foundation for Equal Rights, to Kate Kendall, Executive Director, National Center for Lesbian Rights, Jenifer Pizer, Senior Counsel for Lambda Legal West Regional Office, and Mark Rosenbaum Legal Director of the American Civil Liberties Union of Southern California (July 8, 2009), available at [http://www.scribd.com/full/17233138?ccess\\_key=key-kxoaf0habwd4otk776u](http://www.scribd.com/full/17233138?ccess_key=key-kxoaf0habwd4otk776u).

## BOOK REVIEW & ESSAY: LET'S GET FREE

By: Camille Jones<sup>1</sup>

### INTRODUCTION

Paul Butler's recent book, *Let's Get Free: A Hip-Hop Theory of Justice*,<sup>2</sup> is a powerful exploration into the conditions surrounding today's criminal justice system. Butler, a law professor, former prosecutor, and black man who has personally encountered the criminal system, offers a unique perspective about American crime and punishment. He has seen the good, the bad, and the ugly of the criminal system, and he provides valuable insight into its flaws. *Let's Get Free* is inspired by the burgeoning hip hop political movement—a movement fed by hip hop music's criminal justice critiques and reality-driven perspectives on the legal system as a whole. The book provides a refreshing narrative that critically explores America's obsession with extreme punishments for its most disadvantaged people.

### A RUN-IN WITH INJUSTICE

Butler begins by explaining his personal encounter with the criminal system which resulted from an escalated dispute with a neighbor. He found himself an accused criminal after a volatile neighbor, who claimed to have legal ownership over his parking space, called the police during a heated argument. This experience demonstrates why Butler is the ideal person to de-construct the state of the so-called criminal justice system because he has personally witnessed multiple sides of the system. He has represented the State when attempting to prove a person's guilt and he has also had his own freedom imperiled by the State. Combining Butler's explanation of how he carried himself at trial as a black prosecutor with his description of how he felt in the police cruiser as another anonymous (alleged) black criminal, creates a fascinating tension and contributes to the nuanced tone that is carried throughout the book.

*Let's Get Free* is essentially divided into two sections. The first part contains his interpretation of some of the major issues within the criminal justice system. In the second part, he offers recommendations on how to fix these problems. Butler discusses several important issues, including mass incarceration, harsh criminalization of drug offenders, juror and prosecutor ethics, controversies surrounding government informants or "snitches," and finally the influence of hip-hop on society's impression of convicts. Butler then explores the ways in which the criminal system can become more productive and contribute to a safer country.

One major issue Butler examines is the effect of mass incarceration on society. America's "lock em up" mentality has put 7.3 million Americans on probation, in jail, in prison, or on parole as of 2008.<sup>3</sup> Incarceration is such a pervasive phenomenon that there is mass overcrowding in prisons, which

leads to more traumatized, formerly incarcerated people once they are released.<sup>4</sup> The "lock 'em up" mentality thrusts people who commit non-violent crimes into prison, leaves them with fewer options once released, and thus increases the likelihood of recidivism. This is just one of Butler's many examples of how the current system is counter-productive.

Another major issue Butler discusses is the impact of draconian drug laws on marginalized communities. He argues that non-violent drug penalties are disproportionate to the crimes committed and that they do not achieve the goals for which they were created. This chapter, generally speaking, debunks myths about the criminalization of certain drugs. Particularly, he argues for less harsh penalties for non-violent drug offenses involving personal drug use. Although this line of argument is familiar to criminal justice advocates, its importance to a hip-hop theory of justice is indispensable, and strikes at the heart of the contradictions within our criminal system.

The book's final chapters examine certain groups' influence on America's justice outlook. Butler looks at a wide range of actors from government informants, sometimes called "snitches," to celebrities. Butler discusses the impact of these actors on trials, sentencing, and the overall opinion society forms of people who serve time. Butler's contribution, perhaps, is the hip-hop theory of justice, which is a critical legal analysis of how hip hop's critiques of the criminal justice system are instructive for society at-large. Butler delves into how rappers have supported those currently in jail and challenged the view that those who have been to jail are "bad" people. This analysis explores how the justice system could change in the future based on an evolved perception of criminals and how they should be treated by society once released to the outside.

The second part of *Let's Get Free* offers solutions to the book's critiques. Butler discusses how alternative sentencing would help rehabilitate people within the criminal system and ultimately, create safer communities. He examines the use of monitoring technology for certain non-violent convicts to allow them to return to their homes and communities. Such a reform would reduce recidivism for certain crimes, especially non-violent drug crimes. Most significantly, however, Butler proposes seven specific ways in which justice can better be served within the United States from cradle to grave: reducing the amount of lead ingested by poor communities, paying students to complete high school, ending racial profiling, sending convicts to their communities rather than jail for certain crimes, imposing punishments that are more proportional to crimes (especially non-violent crimes), encouraging citizens' involvement in local justice reform, and reducing the prison population by half a million people. Butler contends that if these changes are made in the United States, they will ultimately

lead to a safer and more productive society.

## CONSTITUTIONAL CIVIL DISOBEDIENCE

Jury nullification, for which Butler is a long-time advocate, is one issue that warrants discussion in greater detail. Jury nullification provides citizens with the opportunity to tell a prosecutor and the federal government that they are opposed to a criminal statute with which the defendant is charged. Motivations vary from a person's disapproval of the particular law at issue to a disagreement with the punishment that will be handed down to the defendant. Butler argues that jury nullification should be exercised in cases involving non-violent drug crimes because the punishment does not serve any of the parties involved. While the State is successful at locking up more drug users, society does not benefit more people from going to jail. Incapacitation does not prevent recidivism. However, if the defendant were acquitted despite the evidence Butler suggests that it is likely that the experience of being on trial would be enough to keep them from committing the same crime again. In this way, jury nullification may be an effective recidivism deterrent. However, for jurors to exercise their right to jury nullification they must be aware of it.

Many people view jury duty as a nuisance that forces them to be away from work, loved ones, or other things that they feel are more important. However, many of these people do not realize the power that they possess when serving on a jury. Even though lawyers argue to the best of their ability to prove a person's guilt or non-guilt, in the end, the power lies in the hands of the jury. Each juror must examine the evidence and instructions provided on one hand. On the other, each juror also reserves the constitutional right to decide acquit despite the evidence. This is the essence of jury nullification. Jury nullification is:

a jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law to the jury's sense of justice, morality, or fairness.<sup>5</sup>

Butler argues that citizens should exercise this constitutional right more often. The greatest obstacle to jury nullification is that the public is generally unaware of it. In some situations, juries exercise this power without being aware that they have actually done so. Popular television shows have given this issue visibility with story lines centered on an underdog who wins a case purely because the jury reached a decision outside the scope of the legal definition of the alleged crime. Though viewers cheer for the underdog, they remain unaware of the power that they hold to do exactly what they are seeing—they have the right to choose not to convict despite the evidence if they disagree with the law.

Jury nullification is rooted in the Sixth Amendment right for an accused person to be judged by a jury of peers<sup>6</sup> and has a long history in America. It was supported by many of the Founding Fathers as falling within their democratic vision of justice, though in recent times it has reached somewhat of an impasse.<sup>7</sup> John Adams stated that “it is not only his (juror's) right, but his duty . . . to find the verdict according to his own best understanding, judgment and conscience, though in direct opposition to the direction of the court.”<sup>8</sup> However, this right is not always communicated to citizens. Although courts have ruled that jury nullification is allowed, judges do not have to tell juries about it.<sup>9</sup>

General verdict standards support jury nullification, this is because jurors are not required to explain how a verdict was reached, and they can decide guilt based on any reason.<sup>10</sup> Jury nullification is strongly polarizing, with a small number who see both its pros and cons.<sup>11</sup> Supporters view jury nullification as a safety valve—a way in which citizens may express their opinion about a law particularly if they feel estranged from the law-making process.<sup>12</sup> Critics see it as a means by which a jury takes on the role of the judge and legislature.<sup>13</sup> Although Butler promotes increased use of jury nullification, his position best falls into this middle category. Those in this category see jury nullification as a practice that should be used only in extreme situations and recognize that it can create efficiency and justice problems within a fundamentally fair system if used too often.<sup>14</sup> Butler, therefore, supports jury nullification in very limited circumstances.

Butler supports jury nullification in criminal cases that involve non-violent drug offenses because neither the State nor defendant benefit from mass incarceration. John Jay, the first Chief Justice of the Supreme Court, found great importance in the public's right to judge laws. In *Georgia v. Brailsford*, he wrote, “juries have the right to take upon themselves to judge both the law as well as the facts.”<sup>15</sup> If society agrees with Butler's opinion that non-violent drug crimes do not deserve jail time, then jury nullification would be in direct agreement with both John Adams and John Jay who are influential figures in the formation of the American legal system.

Jury nullification has met court opposition throughout history. A number of rulings have upheld the jury's right to nullify a decision. However, none of these rulings obligate courts to instruct jurors about nullification. In an 1895 Supreme Court case, *Sparf v. United States*, the Court held that judges are not required to inform jurors of their de facto right of juror nullification, although jurors' inherent right to judge the law remains undisturbed.<sup>16</sup> This standard was recently upheld in *United States v. Moylan* (1971)<sup>17</sup> and *United States v. Dougherty* (1972).<sup>18</sup> In *Moylan*, the Court clearly states its belief that a jury may acquit despite evidence proving guilt:

We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge, and

contrary to the evidence. This is a power that must exist as long as we adhere to the general verdict in criminal cases, for the courts cannot search the minds of the jurors to find the basis upon which they judge. If the jury feels that the law under which the defendant is accused, is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.<sup>19</sup>



Today, jury nullification is also an issue that polarizes judges. Some judges have elected to explicitly instruct juries that they may convict if the evidence supports that decision, not that they must convict.<sup>20</sup> However, in other instances, judges have refused to include information that informs jurors about jury nullification.<sup>21</sup> While the rhetoric seems minimal, it delivers a very different call to action for jurors. Judges should at least more clearly inform jurors about their constitutional right to nullify.

## CONCLUSION

An educated citizenry is an integral part of a successful democracy and legal system. Defendants need to be aware of their rights. However, jurors must also be aware of their right to determine the validity of the law and the manner in which it is applied. Jury nullification is one example of how an educated citizenry may stand in opposition to the government and send a message to law-makers that the people do not support the current laws. By accessing information about jury nullification, individuals put themselves in powerful positions. This is very important in minority communities because it delivers the message to law-makers that laws that are unfairly applied to certain racial or class groups will not be tolerated. In a letter to Thomas Paine, Thomas Jefferson said, “I consider trial by jury as the only anchor ever yet imagined by man, by which a Government can be held to the principles of its constitution.”<sup>22</sup> Jury nullification is a perfect example of how people can hold law-makers to the Constitution.

*Let's Get Free* is a thought-provoking book that forces the reader to examine controversial, and sometimes little-known issues in the criminal system. Jury nullification is only one issue that is examined in Butler's book but it is among the more eye opening ones. *Let's Get Free* should be read by any person involved in the criminal system. Regardless of whether or not the reader agrees with Butler's positions, *Let's Get Free* will force readers to critically examine the system's current state. This book provides vital information for people as informed citizens, too. To hold the legislature accountable for protecting the Peoples' constitutional rights, the People must know what their rights are in the first place.

## Endnotes

<sup>1</sup> Camille Jones is a second-year student at American University Washington College of Law.

<sup>2</sup> PAUL BUTLER, *LET'S GET FREE* (2009).

<sup>3</sup> Office of Justice, Bureau of Justice Statistics, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=11> (last visited April 7, 2010).

<sup>4</sup> COMM'N ON SAFETY AND ABUSE IN AMERICA'S PRISONS, PUBLIC HEARING ON OVERCROWDING IN PRISONS (2005) available at [http://www.prisoncommission.org/statements/haney\\_craig.pdf](http://www.prisoncommission.org/statements/haney_craig.pdf) (citing written testimony of Craig Haney, Professor of Psychology at California University Santa Cruz).

<sup>5</sup> BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>6</sup> Case Comment, Jury Nullification – Federal Court Dismisses Juror Refusing to Apply Law as Instructed: *United States v. Luisi*, 122 HARV. L. REV. 990, 996 (2009).

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

<sup>8</sup> John Adams' Diary Entry (Feb. 12, 1771) re-printed in THE WORKS OF JOHN ADAMS at 2, 3, 255 (Charles Francis Adams ed., AMS Press 1971) (1850).

<sup>9</sup> *Sparf v. United States*, 156 U.S. 51 (1895).

<sup>10</sup> Richard Myers, *Requiring a Jury Vote of Censure to Convict*, 88 N.C. L. REV. 137, 165 (2009).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Myers, *supra* note 9, at 165.

<sup>15</sup> 3 U.S. 1, 4 (1794).

<sup>16</sup> 156 U.S. at 51.

<sup>17</sup> 417 F. 2d 1002 (4th Cir. 1969).-

<sup>18</sup> 473 F. 2d 1113 (D.C. Cir. 1972).

<sup>19</sup> Moylan, 417 F. 2d at 1006.

<sup>20</sup> See BUTLER, *supra* note 2 at 65-66.

<sup>21</sup> Fully Informed Jury Association, A One Hour/Week Project to Preserve Liberty, [fija.org/download/116/](http://fija.org/download/116/) (last visited March 13, 2010) (documenting instances when jurors were denied jury nullification materials).

<sup>22</sup> Letter from Thomas Jefferson to Thomas Paine (July 11, 1789) available at <http://etext.virginia.edu/jefferson/quotations/jeff1520.htm>.

# Fifth Annual Modern American Symposium

## The Legal Profession: An Elite Factory?

### Evaluating Proposals to Address Disparities in Legal Representation



**Top Left Corner:** Tianna Terry, Staff Attorney & Liman Fellow, Family Law Unit of the Legal Aid Society of D.C.  
**Top Center:** Marianne Engleman Lado, General Counsel, New York Lawyers for the Public Interest  
**Top Right Corner:** Robert Dinerstein, Professor of Law and Director of Clinical Program, American University Washington College of Law



**Center - Left :** Heron Green-smith poses question to panelist  
**Center:** Panelist Tianna Terry, Marianne Engleman Lado, & Prof. Robert Dinerstein  
**Center-Right:** Kathleen Kelly poses her question to the panelists  
**Bottom Center:** Audience members of the Fifth Annual Modern American Diversity Symposium

# “The Elite Factory”

## Online Symposium Issue

### Call for Papers

The “Elite Factory” is a self-reflective political critique of the legal profession’s inability to create genuine access to the greater public with legal needs. This critique argues that the insular school-to-practice pipeline reinforces elitist values that rationalize unequal access, and that these values are systemically embedded in legal education and existing delivery models.

The American Bar Association reports that the average amount borrowed for a private law school education increased from \$83,181 in 2005 to \$91,506 in 2008. Some of the Modern American Executive Board members will spend up to \$177,000 for a three-year Juris Doctor degree. This type of debt proves debilitating to most students, and forces graduates to make tremendously hard personal choices about their professional lives.

Law is a \$300 billion per year industry. Although 45 million Americans qualify for civil legal aid, there are only 4,000 lawyers in this field. Among the population that qualifies for legal aid, half will have a legal need each year, which goes largely unmet. An estimated 90% of lawyers serve 10% of the total population. This means that lawyers are available but because of the profession’s service delivery structure, America’s most well-off are saturated with legal access, while most of us strain to afford an attorney if we can do so at all.

Why? There are a number of reasons, including wealth inequities that allow a small number of people to finance legal education without monstrous debt, an education funnel effect which reserves admissions to America’s best educated, a homogenous legal community, perverse economic incentives based on a skewed delivery system, and systemic class and racial inequality that perpetuate self-important rationalizations about why the system is the way it is.

How do we transform the elite factory system? Is this professional model sustainable for a twenty-first century environment that demands transparency, accountability, fairness, and justice? Should we turn away from legal solutions altogether?

As a follow-up to our successful spring 2010 symposium, *TMA* is seeking short essays (12 single-spaced pages or fewer) and legal commentary about the ways in which lawyers are creating access and dismantling barriers to access. We invite creative and non-traditional pieces from practitioners, scholars, and students who are critically thinking and addressing this issue.

TMA will accept papers on a rolling-basis with a **September 15, 2010**. Submissions should be single-spaced in Garamond font typeface with one-inch margins and endnote citations. Only e-mail submissions will be accepted at [tma@wcl.american.edu](mailto:tma@wcl.american.edu).

## CONFLATING HEALTH CARE REFORM WITH TORT REFORM

By: Steven M. Pavsner<sup>1</sup>

*The recent health care reform act encourages the States to develop alternatives to the traditional tort system for health claims to control health costs. Many alternatives have already been tried in the States, but none have succeeded, except in impairing access to the courts to redress medical negligence, particularly among disadvantaged groups.*

On March 23, 2010, President Obama signed the “Patient Protection and Affordable Care Act” into law.<sup>2</sup> Turning aside years of effort to blame rising health care costs on “lawsuit abuse” and to impose federal restrictions on state-law tort claims as the solution, the Act instead calls on the States to seek alternatives to the traditional tort system for health care claims. This commentary looks at alternatives the States already have tried. It finds that none these alternatives have achieved their stated objectives, and all of them have had a disparate impact on the most vulnerable among us.

Specifically, the Act encourages the States to “develop and test alternatives to the existing civil litigation system as a way of improving patient safety, reducing medical errors, encouraging the efficient resolution of disputes, increasing the availability of prompt and fair resolution of disputes, and improving access to liability insurance, *while preserving an individual’s right to seek redress in court....*”<sup>3</sup> Toward that end, the Act authorizes the Secretary of the Department of Health and Human Services to award “demonstration grants” to States “for the development, implementation, and evaluation of alternatives to current tort litigation for resolving disputes over injuries allegedly caused by health care providers or health care organizations.”<sup>4</sup>

The nexus between health care and tort reform is the alleged relationship between health care costs and a supposed increase in the incidence or size of health claim verdicts. The presumed mechanism for health care cost reduction (thus limiting medical negligence lawsuits) is the lowering medical liability damage payments. This would supposedly allow insurers to lower medical liability insurance premiums, which would reduce physicians’ costs of doing business, and allow them to reduce their service fees.

Unfortunately overlooked is the fact that no convincing evidence exists to support the alleged relationship between health care costs and health care claims. Studies can be found to support the relationship, but the better-reasoned and methodologically superior studies are to the contrary. In the “crisis” atmosphere created by tort reform proponents, it is easier to decry outsize verdicts than to review the studies. But anecdotal reports of outsize verdicts are irrelevant, in part because they are so rare and in part because they are rarely paid. The traditional tort system has numerous safeguards against outlying verdicts,

including *remittitur*, new trial, and appeal, which are commonly invoked to reduce outsize awards to appropriate levels. It is therefore not surprising that numerous studies have shown that neither the incidence of medical negligence suits, nor the size of plaintiffs’ verdicts, has significantly increased during the “insurance crisis,” much less at the pace with which liability premiums have risen.

Nor have premiums decreased in States that have adopted “tort reform,” as compared to States that have not. To the contrary, insurers in States with tort reform have raised rates higher and faster than insurers in States without tort reform. The simple reason is that factors other than medical negligence verdicts drive premiums. Numerous studies demonstrate that liability insurance premiums are driven by insurers’ returns on the premium dollars they invest in the market, not by losses on the premium dollars they pay in claims. But it’s easier for insurers to blame “litigious plaintiffs” and “greedy lawyers” than their own portfolio managers. And why not take the easy path? If some members of the public believe that their doctors are being driven out of business by “lawsuit abuse,” they will carry that bias into the jury room and return defendants’ verdicts. If some legislators rely on the misinformation and enact limits on medical negligence claims, the insurance industry wins again.

More than half the States have experimented with a wide variety of alternatives to the traditional tort system, relying on the presumed relationship between health costs and health claims. Existing alternatives include changes to when claimants may sue, hoops they must jump through before they may sue, what they may recover when they sue, from whom they may recover if they win their suit, and what they pay for the chance to sue.

Restrictions on when health claims may be brought include shortening limitations in general, limiting the “discovery rule,” or requiring minors’ claims to be brought before they reach majority. Hurdles to filing in court include requiring prior notice to the defendant, submission of the claim to mediation or arbitration before filing, or preparation of certificates and reports from doctors willing to testify against their peers as a precondition to filing in court.

Once in court, some States restrict the amount of forensic work expert witnesses may perform, but the most popular alternatives to traditional tort law are limits on the amount or type of damages that the injured party can recover. These include a cap on all damages, or a cap on non-economic damages (sometimes indexed to inflation or time and sometimes not), a bar to punitive damages (usually by raising the standard of proof to “actual malice”), requiring that amounts awarded

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for future damages be paid out over time as the future damages are incurred, and precluding proof of economic losses paid by a collateral source, such as a health insurance policy. Juries generally are not told of these limits, which are imposed in post-trial proceedings and can decimate the amount the jury intended the victim to receive. States also have experimented with abolition of the common law concept of joint and several liability, and have instead required juries to apportion damages according to fault. In such States, when substantial fault is assigned to an impecunious or under-insured defendant, the injured party recovers less than the full jury-awarded damages.

Other changes have been made to the traditional tort system that affect an injured party's ability to bring a lawsuit in the first place, such as the reduction of the contingent fee claimants' counsel may charge for their services or the requirement that the injured party to pay defense fees if the suit is lost. Reducing plaintiff's counsel's fees reduces access to the courts because as the reward for winning decreases, willingness to incur the risk of loss also decreases, especially in health claims cases, which are particularly expensive and time-consuming to pursue. The abrogation of the "American Rule," which does not require losing plaintiffs to pay defendants' attorneys' fees, in favor of "offer of judgment" rules, which impose the winner's attorneys' fees on the loser, deter plaintiffs from filing meritorious claims and raise the stakes much higher for prospective plaintiffs. Insurers are far more able to bear this risk than individual plaintiffs, for whom loss of the claim can mean financial ruin.

Of course, many States employ different combinations of these individual strategies to create their own unique variety of "tort reform," so there is no shortage of "alternatives to current tort litigation for resolving disputes over injuries allegedly caused by health care providers or health care organizations." What is lacking, and what the demonstration projects authorized by the Act should focus on finding, is any alternative to the traditional tort system that reduces liability insurance premiums while preserving an individual's access to the courts and spreading the burden of tort reform equally among all litigants.

None of the many changes enacted in the States have reduced liability insurance premiums, except at the cost of *also* impairing the individual's right to seek redress in court. This is particularly true of children, seniors, racial and ethnic minorities, the economically underprivileged, and women. These already disadvantaged groups are disproportionately impacted by tort reform for a number of reasons, including their lower earnings and the nature of the injuries they suffer.

Lost earnings can be a significant component of a claimant's economic damages, and under virtually all of the existing changes they are fully compensated. Victims whose losses do not include earnings, or include them at a lesser level, may be equally compensated by juries, but their awards will have a greater non-economic component, which will then be

reduced to the cap level. As a result, groups with no earnings, such as seniors, or historically lower earnings, such as racial and ethnic minorities and women, receive less of their jury awards than others. The disparity is only exacerbated by reliance on historical race- and gender-based statistics to measure the loss.

The nature of the injuries suffered by these same groups also contributes to the disproportionate impact of tort reform upon them. Injuries resulting from obstetric or gynecologic care are common in medical negligence litigation, but the resulting verdicts for undiagnosed breast cancer or infertility or other peculiarly "female" damages are often expressed in larger non-economic than economic awards, and thus are not fully recovered in "cap" States. The same is true of a child who has to go through life scarred or maimed or of a senior who is abused in a nursing home. Infertility, disfigurement, scarring, blindness, burns, loss of a limb and chronic pain are some of the many devastating injuries that cause enormous pain and suffering are properly recognized by an award of non-economic damages, and thus are not fully compensated under most tort reform regimes. Indeed, in many such

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. . . it's far better than any of the alternatives yet devised.

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cases, the prospect of receiving a lower percentage of a reduced award obtained in a more expensive process has led victims and their attorneys to conclude that otherwise meritorious claims are not

economically viable. Wherever the economic component of the loss is relatively small, but the non-economic component is great, current tort reform measures heap injustice on top of injury.

When victims are not fairly compensated, and vulnerable groups are disproportionately impacted, the whole system of justice suffers. A vibrant tort system is a founding principle of our democracy, a deterrent to negligence, and an early warning of recurring problems in our society. The traditional tort system has its flaws, but, to paraphrase Winston Churchill, it's far better than any of the alternatives yet devised.

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## Endnotes

<sup>1</sup> Steven Pavsner is an Adjunct Professor at Washington College of Law, American University, and Shareholder, Joseph, Greenwald & Laake, P.A., Greenbelt, MD 20770.

<sup>2</sup> Sheryl Gay Stolberg and Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES, Mar. 23, 2010.

<sup>3</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6801 (emphasis added).

<sup>4</sup> *Id.* at § 10607.

## LEGISLATIVE UPDATES

By: Cheryl Chado

### **S. 1102: “Domestic Partnership Benefits and Obligations Act of 2009”**

The Domestic Partnership Benefits and Obligations Act of 2009 (“DPBO”) provides that federal employees and their domestic partners will be entitled to the same benefits and obligations as married federal employees and their spouses, regardless of the gender of the parties.<sup>1</sup> The Act defines a domestic partner as “an adult unmarried person living with another adult unmarried person of the same sex in a committed, intimate relationship,” and requires employees to file a certificate of eligibility as to their relationship.<sup>2</sup> Through this Act, domestic partners will be able to receive health insurance, retirement and disability benefits and plans, emergency and medical leave, and any other benefit provided by the federal government to any employee.<sup>3</sup>

The DPBO reflects the sentiments of many Americans who support the inclusion of same sex couples in health insurance coverage benefits.<sup>4</sup> This opinion is also felt by over fifty percent of Fortune 500 companies who also provide benefits to domestic partners of their employees.<sup>5</sup> As Joe Solmonese, president of the Human Rights Campaign, said, “This legislation would allow the federal government to keep pace with other top employers.”<sup>6</sup> By allowing the same benefits as private employers, the federal government will be able to continue to have “access to the top talent on the same basis as the nation’s leading corporations.”<sup>7</sup>

However, not everyone is a fan of the Act’s goals. The Family Research Council points out the increased cost to taxpayers, estimating nearly a billion dollars required for funding.<sup>8</sup>

Further, critics in favor of lesbian and gay equality point out the Act’s failure to address “Don’t Ask Don’t Tell,” by excluding military service members from those federal employees eligible for coverage.<sup>9</sup>

Senator Joseph Lieberman (I-CT) introduced the Act in the Senate on May 20, 2009 with twenty-seven co-sponsors. The Act was discussed in a hearing of the Senate Committee on Homeland Security and Governmental Affairs on October 15, 2009. It was ordered to be reported with an amendment in the nature of a substitute favorably in December, 2009. Representative Tammy Baldwin (D-WI) introduces H.R. 2517 in the House on May 20, 2009 with one hundred and forty co-sponsors. As of January 29, 2010, the Act was placed on the Union Calendar, No. 239, in the House.

### **H.Res. 194: “Supporting the Goals of International Women’s Day”**

International Women’s Day (“IWD”) is a day of

global celebration that falls on March 8 of every year. The first Women’s Day was first celebrated in 1911 in Austria, Denmark, Germany, and Switzerland, and was attended by more than one million people advocating for women’s rights and an end to employment discrimination.<sup>10</sup> IWD has greatly expanded in prominence over the past century. It is now recognized as an official holiday in approximately fifteen countries.<sup>11</sup>

International Women’s Day has achieved the same popularity and status as Mother’s Day in a number of countries,<sup>12</sup> but it has not yet reached that level of recognition in the United States. Representative Janice Schakowsky (D-IL) and forty-six co-sponsors have introduced this Resolution to the House in an effort to support IWD, citing staggering statistics of gender disparity across the world.<sup>13</sup> The Resolution explains that, although there are now many more women in powerful leadership positions across the world, “women still face political and economic obstacles, struggles for basic rights, face the threat of discrimination, and are targets of violence all over the world.”<sup>14</sup> Other disparities include the fact that women account for a majority of people affected by poverty, illiteracy, HIV/AIDS, domestic violence and abuse.<sup>15</sup>

This Resolution is a solid effort by the House of Representatives not only to support and recognize the goals of International Women’s Day but also to “issue a proclamation calling upon the people of the United States to observe International Women’s Day with appropriate programs and activities.”<sup>16</sup>

### **S. 752: “Fair Election Now Act”**

The Fair Election Now Act outlines a public funding system for Senate elections and establishes provisions for contribution requirements and joint fundraising committees.<sup>17</sup> The Act would amend the Federal Election Campaign Act of 1971 (FECA) by creating a Fair Elections Fund and a Fair Elections Oversight Board.<sup>18</sup> The Act would set additional requirements for campaign financing, including a public debate requirement, political advertising vouchers, and the prohibition of joint fundraising committees outside of the candidate’s official committee.<sup>19</sup> Essentially, the Act would “allow federal candidates to choose to run for office without relying on large contributions, big money bundlers, or donations from lobbyists.”<sup>20</sup> Candidates would then “be freed from the constant fundraising” and better able to focus on what their communities want.<sup>21</sup>

Supporters of the Act have described it as promoting “a Congress that is more responsive to the voters, less busy chasing dollars and less reliant on special interests.”<sup>22</sup> Commentators have also said that publicly financed political

campaigns “are the answer,” and that they will open doors for a greater number of candidates and allow for “more competitive races and ... campaigns focusing on the concerns of individual voters, not special interests.”<sup>23</sup>

The Fair Election Now Act was introduced by Senator Richard Durbin (D-IL) on March 31, 2009 and referred to the Committee on Rules and Administration.<sup>24</sup> An act of the same name was introduced in the House by Representative John Larson (D-CT) on the same day and was discussed in the House Energy and Commerce Committee in July 2009.<sup>25</sup>

### “Don’t Ask Don’t Tell”

The National Defense Authorization Act of 1994 contains a section entitled, “Policy concerning homosexuality in the Armed Forces.”<sup>26</sup> The “Don’t Ask Don’t Tell” policy, as it is more commonly known, has been the widely discussed subject of debate since its enactment. The Act begins by stating that there is no constitutional right to serve in the military, and it is up to the discretion of Congress to determine who may or may not serve.<sup>27</sup> The Act briefly discusses the requirements for members to achieve success as a military unit, including “high morale, good order and discipline, and unit cohesion.”<sup>28</sup> The Act further states that, since the “presence ... in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk,” those individuals must be excluded from the military service.<sup>29</sup>

Since the Act was passed, numerous retired generals and military personnel have come forward to argue that “Don’t Ask Don’t Tell” should be repealed.<sup>30</sup> Senator Carl Levin (D-MI), chair of the Armed Services Committee, has said that this issue is not a priority for many lawmakers.<sup>31</sup>

The argument has also been made that, with troops fighting wars in Afghanistan and Iraq, perhaps now is not the time to reintroduce this highly controversial debate.<sup>32</sup> Representative Ellen Tauscher (D-CA) has supported the repeal for the past few years and has sponsored legislation in the House, but also acknowledges that a change of this nature will inevitably take time.<sup>33</sup>

Senator Roland Burris (D-IL) has compared “Don’t Ask Don’t Tell” to racial integration of the military under President Truman’s administration, saying, “At one time ... members of my race couldn’t even serve in the military. And we moved to this point where they’re some of the best and brightest that we’ve had ... We must have everyone who is capable, willing and able to volunteer to defend this country ... regardless [of] their sexual orientation.”<sup>34</sup> Echoing Senator Burris’ statements, Representative Tauscher has described “Don’t Ask Don’t Tell” as “the last big piece of civil rights legislation left.”<sup>35</sup>

In February, 2010, Defense Secretary Robert Gates announced that the Pentagon would be undertaking a year-long study to assess the attitudes of military service members and potential consequences of repealing “Don’t Ask Don’t Tell.”<sup>36</sup> Anticipated factors of analysis include the effects on unit cohesion and service member bonding, as well as other issues such as military communities and family housing.<sup>37</sup> Gates said, “We will enter this examination with no preconceived views but a recognition that this will represent a fundamental change in personnel policy...”<sup>38</sup>

Indeed, a repeal of “Don’t Ask Don’t Tell” would represent a fundamental change. While progress has not been made as swiftly as some may have hoped, there is a large contingent of supportive lawmakers and military personnel who hope to resolve this issue soon.

### Endnotes

<sup>1</sup> Domestic Partnership Benefits and Obligations Act of 2009, S. 1102, 111th Cong. (2009).

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

<sup>3</sup> *Id.*

<sup>4</sup> The Domestic Partnership Benefits and Obligations Act: Support Equal Treatment in Benefits for Federal Employees, Human Rights Campaign, February 26, 2010, *available at* <http://www.hrc.org/issues/marriage/5662.htm>.

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

<sup>6</sup> Human Rights Campaign Statement on Introduction of the Domestic Partnership Benefits and Obligations Act, Human Rights Campaign, December 20, 2007, *available at* <http://www.hrc/8542.htm>.

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

<sup>8</sup> Government Should Play It Straight on New Spending, Family Research Council, Washington Watch Daily Radio Commentary, *available at* <http://www.frc.org/get.cfm?i=CM10A13>.

<sup>9</sup> See § (3)(b): “The term ‘employee’ – shall not include a member of the uniformed services,” Domestic Partnership Benefits and Obligations Act of 2009, S. 1102, 111th Cong. (2009).

<sup>10</sup> International Women’s Day: Investing in Women and Girls, United Nations, *available at* <http://www.un.org/events/women/>

[iwd/2008/history.shtml](http://www.un.org/events/women/iwd/2008/history.shtml).

<sup>11</sup> About International Women’s Day (8 March), International Women’s Day 2010, *available at* <http://www.internationalwomensday.asp>. (“IWD is now an official holiday in China, Armenia, Russia, Azerbaijan, Belarus, Bulgaria, Kazakhstan, Kyrgyzstan, Macedonia, Moldova, Mongolia, Tajikistan, Ukraine, Uzbekistan and Vietnam. The tradition sees men honouring their mothers, wives, girlfriends, colleagues, etc with flowers and small gifts.”)

<sup>12</sup> *Id.*

<sup>13</sup> Supporting the goals of International Women’s Day, H. Res. 194, 111th Cong. (2009).

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

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

<sup>16</sup> *Id.*

<sup>17</sup> Fair Elections Now Act, S. 752, 111th Cong. (2009).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> 2010 Fair Elections Now Act Bill Summary, PUBLIC CAMPAIGN, April 1, 2010, <http://www.publiccampaign.org/fair-elections-now-summary>.

<sup>21</sup> *Id.*

<sup>22</sup> Quotes from Newspapers, PUBLIC CAMPAIGN, <http://www>.

publiccampaign.org/node/39243.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Fair Elections Now Act, H.R. 1826, 111th Cong. (2009).

<sup>26</sup> National Defense Authorization Act of 1994, Pub. L. No. 103-160, 10 U.S.C. § 654 (1994).

<sup>27</sup> *Id.* at § 654(a)(2)-(3).

<sup>28</sup> *Id.* at § 654(a)(6).

<sup>29</sup> *Id.* at § 654(a)(13)-(15).

<sup>30</sup> Mary Louise Kelly, Congress In No Rush To Lift ‘Don’t Ask Don’t Tell’, NATIONAL PUBLIC RADIO, February 24, 2009, <http://www.npr.org/templates/story/story.php?storyId=101071006>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Luis Martinez, Don’t Ask Don’t Tell Hearing – Mullen Strong on Repeal – UPDATED, ABC NEWS, February 2, 2010, <http://blogs.abcnews.com/politicalpunch/2010/02/dont-ask-dont-tell-hearing--mullen-strong-on-repeal.html>.

<sup>35</sup> Mary Louise Kelly, Congress In No Rush To Lift ‘Don’t Ask Don’t Tell’, NATIONAL PUBLIC RADIO, February 24, 2009, <http://www.npr.org/templates/story/story.php?storyId=101071006>.

<sup>36</sup> The Future of Don’t Ask Don’t Tell, NATIONAL PUBLIC RADIO, February 8, 2010, <http://www.npr.org/templates/story/story.php?storyId=123497641>.

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

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

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

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## 2010 Strategic Plan – We Want Your Feedback

It is time for *The Modern American* to evaluate its achievements and future after six thriving years as American University's legal publication on diversity. Legal scholarship is a fast-paced intellectual environment to which *The Modern American* has significantly and uniquely contributed; however, we have begun a Strategic Plan process to examine big-picture elements of the publication and to make honest suggestions for improvement and growth.

This spring issue reflects some changes under consideration, including a magazine aesthetic and inclusion of more legal commentary and special features, such as an interview and book essay. We want to know – what do you think? Thank you for your readership and support.

Please e-mail your comments to us at [tma@wcl.american.edu](mailto:tma@wcl.american.edu) by May 31, 2010.

