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EDITOR'S NOTE: STUDENT-WRITTEN NOTES AND COMMENTS—WHAT VALUE?

This is second in a series of editorial notes that discuss the value of law reviews, law review membership, student-written articles and symposiums. Modelled after editorials published by Lowell Noteboom during the 1966-67 academic year, the editorials are one of several special features in the 1993 Centennial Volume.

Regarding my position on law review, an old friend called me "Lou Grant" (head of the fictional newsroom). "Hardly!" I responded, "An average law review article contains over one hundred footnotes. And a good one is cited in other footnotes just as often." Although she looked at me with sympathy, much is to be gained from student research, writing, rewriting and editing experiences. However, despite the outstanding research skills one inevitably obtains during the mere undertaking, putting together those valuable footnotes in a student-written note or comment is the worst part of publishing in a law review. Seeing your article in print is probably the best of it. But it takes hours, days, weeks, months, sometimes years, to get an article to that point. A law student hoping to publish an article in a law review has a lot to learn on the way.

By writing a "note," a student surveys a specific area of the law and often learns more about the legal field of their choice than in any law school classroom. The student also becomes familiar with well-known scholars in the field and may even criticize existing theories or suggest novel ones. In a case "comment," the student analyzes a case of first impression, which may present emerging legal issues and theories. Because case comments often present detailed debates regarding a court's rationale, a student's case analysis may become an appellant's argument or be used by an attorney seeking to overturn an adverse ruling.

We introduce, in each issue of the *Review*, a sampling of student scholarship among that of the prominent judges, attorneys and professors that grace our pages. Thus, the *Review* is a showcase for new voices as well as a vehicle for scholarly discussion and social change.

What else does all this research, writing, rewriting, editing and more editing beget?

Good student writers make good student editors. Good student editors attract better authors. Better authors spawn better student editors. Therefore, the scholarship published in the *Notes and Comments* section of a law review often indicates the quality of the editors, and hence, the quality of the review itself. In short, a law review may be only as good as its law student writers, researchers and editors. In any event, today as in 1967, the *Review* endures as a dynamic and integral part of a law student's legal research and writing education.

Colloquy: Racism in the Wake of the Los Angeles Riots

FOREWORD

The video of the police beating Rodney King brought racism into our living rooms much as the nightly news brought war and death into our homes during the Vietnam War. But an ocean divided us from Vietnam. This racist attack happened on *our* streets and it forced us to face the brutal hatred amongst us and within ourselves. What Americans saw made every one of us uncomfortable for different reasons. It compelled us to look inward to see the racism, however slight it may be, most of us harbor in our hearts and minds. While few condoned such an outward and cruel expression of racism, many Americans felt pangs of guilt. Guilt for our own hidden racism. Guilt for telling or laughing at racist remarks and jokes. Guilt for tolerating societal racism. Guilt for seeing the racism we are confronted with every day and calling each incident an "aberration."

Some call what followed in Los Angeles a riot. Others declared that it was a revolution. I believe that it was a combination of both. Frustrated by these events, I saw no legal solutions to the myriad of problems that the riots/revolution presented. This was especially frustrating for me because I am an idealist, one who believes the law can solve problems. I sensed a similar frustration and a feeling of powerlessness from my fellow classmates. What began as a quest for answers grew into a critique of racism in America.

The video of the beating forced the world to witness the fact that racism is alive and thriving in the United States. The acquittal told many of us that the American society condones racism. The acquittal proved to some that our judicial system is inherently racist. The riots told the world that blacks were fed up with the societal racism. The riots showed us that the Kerner Riot Commission's Report is still valid today, twenty-five years after it was released, and only months before the "follow-up" study is to be issued by The Milton S. Eisenhower Institute.

Today the world realizes that all of the rhetoric following the riots was only talk, for today the new President and the resurgence of discord in the Persian Gulf are the top stories in the news. Even the ethnic cleansing in Bosnia and Herzegovina has taken a "back page" to these stories. While the beating of Rodney King obliged us to acknowledge that racism still exists in America, other racial incidents seem to escape our consciousness because they do not make national television or the front pages of the newspapers. If they do, it is only for a single fleeting moment.

In 1991, six Japanese youths were beaten with baseball bats by four

young white men in Denver.[1] In Oneonta, New York at the State University of New York at Oneonta, the University vice president released a list of the names of all black and hispanic males to the state police after a seventy-seven-year-old woman was attacked by a "dark skinned" male.[2] During the Denver celebration of Dr. Martin Luther King's birthday in January of 1992, the Ku Klux Klan held a rally on the steps of the State Capital Building.[3] Cross burnings are still prevalent as evidenced by the recent Supreme Court case, *R.A.V. v. City of St. Paul, Minnesota*.[4]

Pregnant women are discriminated against based on the fact that they are pregnant.[5] Institutional discrimination still exists in housing, both in the inner cities and in the suburbs. This racism is often disguised in a shroud of "legitimate" rationalizations, the most common being the fear that property values will decrease if blacks or hispanics move into the neighborhood. Gays and lesbians are being discriminated on a systemic level with the passing of Colorado's Amendment Two which prohibits local communities from including "sexual orientation" in their anti-discrimination statutes.[6]

Even the conduct of police officers was curbed only temporarily, as exhibited by the behavior of officers in other cities. Since the riots in Los Angeles, Detroit police officers beat a black man to death (there was no video).[7] White Nashville police officers stopped a black undercover fellow officer for an expired license plate, dragged him from his car and beat him.[8] It appears that when the all-white jury acquitted the officers that beat Rodney King, the lesson to be learned from the beating and public outrage were lost on some law enforcement officers.

The list appears endless. While the readers will recognize most of these incidents, it is unlikely that they will look at them as a whole and recognize a pattern of societal racism. If all of these events occurred in one city and in a short period of time, we would be forced to view them as a whole, and we would see the societal racism involved. But since they are interspersed throughout the country, we are able to disaggregate them, look at them one at a time and say that each was an isolated incident.

This Colloquy strives to show the reader that these events, Los Angeles in particular, are not isolated aberrations in our societal consciousness, but part of a whole that must be confronted. How many more

1. Patt Morrison, *Race Relations; Cultures Clash In Denver As 6 Students are Mugged*, L.A. TIMES, Dec. 18, 1990, at A5.

2. Diana Jean Schemo, *College Town in Uproar Over 'Black List' Search*, N.Y. TIMES, Sept. 27, 1992, at 33, 40.

3. Ann Rovin, *Klan Rally Sparks Violence at Denver King Celebration*, L.A. TIMES, Jan. 21, 1992, at A14.

4. 112 S. Ct. 2538 (1992).

5. Barbara Presley Noble, *An Increase in Bias Is Seen Against Pregnant Workers*, N.Y. TIMES, Jan. 2, 1993, § 1, at 1.

6. COLO. CONST. art. II, § 306.

7. *7 Officers Suspended in Fatal Detroit Beating*, WASH. POST, Nov. 7, 1992, at A2.

8. *Two White Nashville Police Used Unnecessary Force*, REUTERS, Dec. 16, 1992, *available in* LEXIS, Nexis Library, Reuter File.

Rodney Kings are out there who did not have an amateur video photographer present? For every incident involving racism we hear about, dozens more go undocumented and unnoticed—especially in the "white" communities where covert racism is often the rule rather than the exception.

While these articles focus on the racism of whites against blacks, many of the arguments and observations presented are equally applicable to women, Native Americans, Gays and Lesbians or other racial and religious minorities. As I read and re-read these articles, I noticed that in many instances any racial or religious minority could be substituted for the word "black." All minorities have experienced the humiliation, the sense of powerlessness and the rage that the residents of South Central Los Angeles felt on April 29, 1992. As the federal civil rights trial of the four police officers begins, America once again must confront the horror of Los Angeles.

Laird Blue

LOOKING FOR GOD AND RACISM IN ALL THE WRONG PLACES

THE HONORABLE A. LEON HIGGINBOTHAM, JR.*
AND
ADERSON BELLEGARDE FRANCOIS**

In his legendary novel *One Hundred Years of Solitude*, Gabriel Garcia Marquez writes of a mythical town called Macondo and its mythical founding family, the Buendias. Built by the side of a river in the middle of a jungle, Macondo remained isolated for many years—its only contact with the rest of the world: a band of travelling gypsies who would visit the town once a year and bring with them the wonderful inventions of science and civilization. One day the gypsies arrive in Macondo with a daguerreotype camera and laboratory. Jose Arcadio Buendia, the founder of the town and a man of extravagant imagination, becomes fascinated by the new invention and resolves to use it to obtain scientific proof of the existence of God. He sets up the camera in different parts of his house during different times of the day, convinced that through a complicated process of multiple and superimposed exposures he will finally capture a scientific representation of the image of God. Why he wants proof of God and what he intends to do with that proof should he find it, we do not know. In any event, his experiment fails, he does not find proof of God and, in his frustration, he goes mad and ends up spending the rest of his life tied by the waist to the trunk of a tree, speaking in tongues which only he understood.

In 1991 and 1992, America—mostly white America—watched the videotape of the beating of Rodney King, searching its darkly-lit images for proof of the persistence of racism and race hatred in this country, with the same sort of mad intensity and pointless dedication that Jose Arcadio Buendia used to search for the existence of God in the silvery images of daguerreotype photographs. And, just as Jose Arcadio Buendia could not find an image of God no matter how many daguerreotype photographs he took and no matter how many exposures he devised, many white Americans, no matter how many times or how many different ways they watched the videotape, could not seem to see that the five white policemen beat the black motorist simply because he was black.

In fact, the more some white Americans watched the videotape the less they were willing to believe that the beating was the product of race-hatred. During the first few weeks of news coverage of the beating, as

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Rodney King's injuries were paraded on television, the popular consensus was: "My god! How could something like this have happened in America?" In the months that followed, after the tape was dissected on endless talk shows and after the details of Rodney King's criminal past began to surface, the popular response was downgraded to: "Well, maybe we do not really know why this happened." Until finally, after the tape was reconstructed frame by frame by frame in a courtroom in Simi Valley California, and after the jury was told that Rodney King grunted like a bear as he was being beaten, the perhaps not uncommon reaction became: "You know, those policemen may have had a good reason to use force after all."

One wonders about the moral cowardice—to say nothing of the intellectual incoherence—it must have taken to make the journey from: "My God! How could something like this have happened?" to: "You know, these policemen may have a good reason to use force after all." But it is a journey many white Americans took; and a very short journey at that. For the original cri-de-coeur: "My God! How could something like this have happened in America?" was not so much an expression of outrage against an act of clear injustice as it was a fatuous reaction of near disbelief in response to a seemingly inexplicable event. In the eyes of many white Americans, the beating of Rodney King became an aberration, rendered all the more unreal for being replayed nightly on television. They were unable or unwilling to look at the beating through the corridor of American history, to place it in the context of present-day American society or to relate it to their daily American lives. In other words, for many white Americans, the beating of Rodney King was not a haunting sequel to the widespread lynching of blacks in the south during the first half of this century, it was not a vivid parallel to the imprisonment of a third of the young black male population in America in 1992 and it was not even a cruel magnification of the brutalization of millions of black children in inadequate schools in almost every city in this country. Instead, it was a single, isolated, disconnected and ultimately irrelevant event.

Derrick Bell, a law professor who brings to legal discourse the same magical realism that Gabriel Garcia Marquez brings to Latin American fiction, writes in *Faces at the Bottom of the Well*, that in America "racism lies at the center, not the periphery; in the permanent, not in the fleeting; in the real lives of black and white people, not in the sentimental caverns of the mind." The beating of Rodney King could and should have led Americans to grapple with the racism that lies at the center, in the permanent and in the real lives of black and white people. It did not. Instead, we saw the beating of Rodney King as peripheral, fleeting and unreal. Like Jose Arcadio Buendia searching for evidence of God in daguerreotype photographs and finding none, we searched for evidence of racism in the Rodney King beating and also found none.

Of course, Jose Arcadio Buendia did not have to look for God in the images of daguerreotype photographs. One supposes that he could

have found some evidence of God in the miracle of Macondo, that magical town by the side of the river in the middle of the jungle, or he could have found evidence of God in the love of his family, who after all, took care of him in his madness with a devotion his extravagant search for God had not earned him. In short, he could have found evidence of God in the reality of his own life. Similarly, Americans did not have to look for evidence of racism in the videotape images of the beating of Rodney King. In the words of Derrick Bell, white Americans could have found such evidence at the center, in the permanent, and in their real lives; for example: in the still segregated neighborhoods in which many they live, in the still segregated schools to which many send their children, in the still race-based manner in which many vote and in the still racially-unbalanced places where many work, meet and worship.

That we are somehow unwilling to look for evidence of racism in our real lives means simply this: we, as a people, are still imprisoned by the myths we manufactured in order to evade the moral and political dilemma we engendered when, in August 1619, John Rolfe made that prophetic entry into the journal of Jamestown, Virginia: "about the last of August, there came to Virginia a Dutchman of Warre that sold us twenty negers." From that moment on, most everything white Americans claimed to believe about black Americans represented myths to justify their enslavement, their segregation, their repression or their inequality. We justified slavery with the myth of "the less than human negro." We justified segregation with the myth of "the happy and contented negro." We justified the repression of the civil rights movement with the myth of "the violent and communist negro." Now we justify the built-in injustices of American society with the myth of the "equal negro." But, of course, the myths we create never quite managed to completely suspend reality, and judging from the acquittal of the policemen who beat Rodney King and the ensuing civil unrest in Los Angeles, the current myth of the "equal negro" is proving equally lame.

"We are capable of bearing a great burden," James Baldwin used to say, "once we discover that the burden is reality and arrive where reality is." The reality of which he spoke is the reality of racism in America. And, the burden he seemed convinced we are capable of bearing is the burden of facing and eradicating that racism. But, if the beating of Rodney King proved anything, it is that we have not yet truly discovered the reality of racism in this country. The question then becomes how are we to bear the burden of facing and eradicating it. This question is posed—and this essay is offered—without bitterness and without despair, if only because one realizes after all that as a people we have always managed to eventually arrive where reality is. Granted, sometimes we have been dragged to that place while kicking and screaming, and sometimes we have merely blundered into it. But sooner or later, one way or another, we have gotten there. So there is no reason now to suppose that we cannot get there again.

The essays included in this collection represent in some way the

beginning of discovering the reality of the beating of Rodney King. Remembering the premonitory chants of the Los Angeles civil unrest: "No Justice! No Peace!," it is a reality which we can no longer afford to ignore.

INTRODUCTION

HONORABLE NATHANIEL R. JONES*

George Santayana declared that those who fail to learn the lessons of history will be condemned to relive them. This truism was again proven in the violence and ugliness seen in the events surrounding the arrest of Rodney King in Los Angeles. Unfortunately, the Rodney King tragedy clearly illustrates that Americans have not learned some very important lessons.

A review of history is necessary to place contemporary events in a historical context. The parallels between the racial tensions of today and those of the past are worthy to note. During the Era of Reconstruction, with the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, Congress undertook a serious effort to remedy the effects of slavery; effects that demeaned not only the slaves and their descendants, but the nation as a whole. The Freedmen's Bureau was created to implement all remedial measures necessary to assist the freed black slaves in their adaptation to their newly found freedom. Due to the Bureau's activities and the protection afforded by the Civil Rights Act of 1866 as well as the Thirteenth, Fourteenth and Fifteenth Amendments, blacks began to assume, on an increasing scale, the attributes of United States citizenship.

After measurable gains were achieved, a "take back" occurred, culminating in the Supreme Court's pronouncement in *Plessy v. Ferguson* that the Fourteenth Amendment could abide racial discrimination against black Americans, thus validating the separate-but-equal doctrine. Justice John Marshall Harlan wrote a ringing dissent:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

Regrettably, Justice Harlan's words are inappropriately quoted today by those who argue against race-based solutions to remedy past discrimination. Had the Court's majority adopted Harlan's view in 1896, there would be no present need for remedies to eradicate the present day effects of the doctrine of separate-but-equal. The nation has not reactivated any of the racist laws that existed prior to *Brown v. Board of Education* in 1954, but the attitudes behind those laws are now gaining respectability anew. This is evidenced by what I call the "David Duke phenomenon." This phenomenon transcends David Duke, the individ-

* Circuit Judge, United States Court of Appeals for the Sixth Circuit, Cincinnati, Ohio.

ual. It is, in my view, the driving force behind the motives of some of those who attack remedies designed to eliminate race discrimination.

To the victims of race discrimination, it does not matter whether words of hate come from the lips of Duke himself or from the coded phrases uttered by others. The message and the pain are the same. What is heard in the newspapers by African Americans, Hispanic Americans, Native Americans, women and other minorities is "turn back the clock." Demagogic appeals to the worst instincts in Americans seem to be the order of the day. Unbecoming racially divisive codes abound. No wonder that some minorities act with seeming license to wreak harm upon others.

In 1968, the National Advisory Commission of Civil Disorders (the Kerner Commission), appointed by President Lyndon B. Johnson in the wake of a series of tragic urban riots in the mid-1960s (including Los Angeles, Detroit and Newark), addressed the underlying causes of those riots. The historic report that grew out of the Commission's work declared that each disturbance was precipitated by an encounter between the police and the minority community. Each catalytic event was followed by an insurrection that saw bottled-up frustration, unredressed grievances and unmet needs explode into mindless, senseless acts of destruction. The report specifically recognized that the situation was precipitated by a breakdown of the legal system.

Now, some twenty-four years later, in response to what is widely viewed as a miscarriage of justice, another series of social disruptions occurred. The violent seizure of Rodney King and the jury's exoneration of the police officers involved, led an overwhelming number of Americans to believe that our legal system failed miserably.

The Constitution's protections against "unreasonable seizure" and being "deprived of life and liberty without due process of law" extend to every American—no matter how ugly that person's conduct may have been. Nothing that preceded what we saw on the infamous video tape entitled the police officers to suspend Rodney King's constitutional rights and summarily administer corporal punishment.

Duly constituted authorities must respect individual rights. When authorities violate one's constitutional guarantees, the legal system must provide redress. When this system breaks down and no redress is afforded, the likely result is an unleashing of collective rage. Since that rage is incendiary in nature, it ignites the social dynamite stacked in the urban areas where racial minorities are warehoused. Simply put, this is what occurred in Los Angeles. It will be repeated elsewhere unless some fundamental problems in our society are addressed and solved.

In 1968, the Kerner Commission, in facing the issue of rage, race and social dynamite, found: "What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it and white society condones it."

One of the final witnesses appearing before the Kerner Commission

was the distinguished social scientist, Dr. Kenneth B. Clark. In expressing his concern that the Commission's recommendations would be ignored, as previous warnings had been, Dr. Clark testified:

> I read that report . . . of the 1919 riot in Chicago, and it is as if I were reading the report of the investigating committee on the Harlem riot of 1935, the report of the investigating committee on the Harlem riot of 1943, the report of the McCone Commission on the (1965) Watts riot. . . . [I]t is a kind of Alice in Wonderland with the same moving picture reshown over and over again, the same analysis, the same recommendations, and the same inaction.

Unfortunately, too many Americans, including some duly constituted authorities, continue to ignore the Commission's findings and recommendations. This nation has endured more than a decade of rhetoric and demagoguery on the question of race and remedies for racial discrimination. Courts have been castigated and lawyers who have tried to deal with the problems have been targeted for derision by occupants of the highest offices of the land. Moreover, ideological litmus tests have been crafted to reduce the likelihood that persons who believe in protecting individual rights ascend to the federal bench. It now appears that the Department of Justice is about to move away from the policies of polarization and to again seriously enhance the system's respect for individual rights.

Moreover, the Kerner Report is not obsolete; it can help Americans understand how to ensure that the guarantees of equal justice under law are extended to Americans who many consider society's "unwashed."

This beloved nation remains sorely troubled. At the core of these troubles is the historical difficulty Americans have in dealing with the issue of race and the absolute need to end the divisions born of race. The Kerner Commission's challenge—yet to be meaningfully confronted, is set out in these words:

> Discrimination and segregation have long permeated much of American life; now they threaten the future of every American. . . . The destruction and the bitterness of racial disorder, the harsh polemics of black revolt and white repression have been seen and heard before in this country. . . . It is time now to end the destruction and the violence, not only in the streets of the ghetto but in the lives of people.

Only by extending equality of opportunity and respecting the rule of law can we save ourselves and the soul of the nation. Law schools and lawyers must lead the way.

NOTES FROM CALIFORNIA: RODNEY KING AND THE RACE QUESTION

JEROME MCCRISTAL CULP, JR.*

> Race doesn't matter in California. I don't mean that people do not have a race, but that it is not an important determinant of people's lives.[1]

California is our future. Residents of California make up more than ten percent of our country's population and it includes the largest segment of the people who help to structure our dreams and ambitions. California is the liberal vision of nirvana and meritocracy where family connections and eastern elitism have been eliminated in the caldron of American possibilities. California's role as creator of images in the movies and television makes the culture created there a part of the future only loosely and imperfectly connected to the past.[2] This is particularly true of changing social norms including those connected to race and gender. Race has been deconstructed by the call of the West. California has called so many people from other places to its shores that it is possible for it to permit people to reinvent themselves free of their past. If in California no person is limited by one's past cultural or individual situation, it should not surprise us that California has been able to decouple race from its Black-White divide and to broaden the notion of race to include brown, yellow and red people. In the rest of America, people may use concepts like "people of color" or "racial minorities" and mean black, but in California they have indeed become terms that include more than black people.

California seems to hold the promise of racial justice for all. During the 1980's while the relative incomes for most regions remained constant, the western region dominated by California experienced the only sustained relative income growth. Blacks and other racial minorities came closer to income parity with whites in the West than at any other time for which we have statistics. However, if California is our future with respect to racial relations and racial justice, it has failed. The most

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1. Statement of a former student as part of a larger conversation she had with me about race and Duke Law School. I was about to write that this student was black, but of course there is a certain problematic quality associated with that description in conjunction with this quotation.

2. California has played this role for a long time. *See* JOSEPH BOSKIN, SAMBO: THE RISE & DEMISE OF AN AMERICAN JESTER (1986) and DONALD BOGLE, TOMS, COONS, MULATTOES, MAMMIES & BUCKS (1973).

recent example of this failure is the riots associated with the verdict of "not guilty" on most of the charges against the four police officers who beat Rodney King. What we ought to learn from the "Rodney King" riots is that we cannot all get along without dealing with the race question, i.e., how we should alter the legal and social world because of race.[3] Even though our legal and political systems deal with the race question all the time, they consistently deny the importance of answering it.

I. RULES OF ENGAGEMENT FOR BLACK MALES: BLACK ANGER

The Navy provides each ship commander with a set of rules defining appropriate conduct with respect to potential adversaries.[4] These rules, called "rules of engagement," are a blueprint for ship commanders. Every black male above the age of five is taught directly or indirectly the rules of engagement of black malehood. As a black male, I learned these rules early from the concern in my mother's eyes and my father's impatience.[5] These rules require that, at all times, we make no quick moves, remove any possibility of danger and never ever give offense to official power. Any black male who violates any part of these elaborate rules is subject to an immediate penalty. The penalty may be

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3. Rodney King, in the aftermath of the Los Angeles riots asked the famous question, "You know, can we all get along? Can we get along? Can we stop making it, making it horrible for the older people and the kids?" *See* Clarence Page, *Rodney King's Poignant Plea*, CHI. TRIB., May 6, 1992, at C29.

4. These military rules of engagement have been the focus of attention in recent months. The first involved the shooting down of an Iranian airliner by the U.S.S. Vincennes. *See NEWSWEEK Responds*, NEWSWEEK, Aug. 3, 1992, at 12.

> First, was there an official cover-up of the fact, now acknowledged, that the Vincennes was in Iranian territorial waters when it shot down the plane? In the classified version of the official report on the incident that was delivered in August 1988, the Pentagon did notify key members of Congress that the Vincennes had been in territorial waters. But in the version released to the public, the single sentence acknowledging this was deleted. And at briefings on Sept. 8-9, 1988—*after* delivery of the classified report—the [N]avy showed Congress a map that made a point of locating the Vincennes in international waters. The *NEWSWEEK* article displayed this map, and dated it. Crowe's former spokesman says that this was because the Navy did not want Iran to know that its rules of engagement in the Gulf permitted such an incursion. But it is reasonable to suppose that Iran had already inferred the rules of engagement from its knowledge of the Vincennes's position at the time the plane was downed.

Id. The second was in connection with the scope of activity of UN peacekeeping troops in what used to be Yugoslavia. Paul Holmes, *Plan Drawn Up for Bosnia Peace-Keepers*, REUTERS, Sept. 19, 1992 ("Their rules of engagement under the Security Council resolution allow them not only to shoot in self-defence but also to open fire if any of the combatants — Serbs and their Moslem and Croat foes — prevent the peace-keepers from carrying out their mandate.").

5. For black males of my generation, the death of Emmett Till in 1955 symbolized the real threat to black men if they got out of line. *See* STEPHEN J. WHITFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL (1988) (Emmett Till, a thirteen year old black boy from Chicago, was killed after an incident in a store while visiting Mississippi. Emmett Till claimed that he had a white girlfriend in Chicago and said, "Hello, Baby" to a white woman. Her husband and friends killed Emmett Till and were subsequently found not guilty by an all white jury.). This murder occurred in Mississippi, but all black men of my generation knew that similar or at least less drastic things could happen to you if you were perceived as being out of place.

simply embarrassment or discomfort, but it can also be our lives. About five years ago, a large black male law student who looked uncomfortably like myself was stopped by campus police on my campus at Duke University and arrested for being a large black male. He was stopped for being a black male who looked "too black" at the wrong place on campus. He was ultimately arrested for his anger at being stopped and for his threat to walk to the campus police station to make a complaint. He was arrested despite the fact that he presented a valid university identification card and despite the fact that he was simply walking across campus to go home. The officer subsequently contended that he did not look like a student because he was too old, he was walking at night in a dark area of the campus, and his identification card did not have a red sticker. I know that I am subject to these same rules of engagement on this campus despite my status as a tenured member of the law faculty. I, too, am a large black male who may appear inappropriately aged for my status.[6] I know that, as one of my white male colleagues in another department suggested, such intrusions are thought to be the price that black males have to pay to ensure the safety of women on campus.[7] I know, too, that many would believe the police officer who shot me and attempted to confirm my dangerousness by placing a gun in my hand afterwards. "Gee, I didn't know Jerome carried a gun," some of my colleagues would say as they shook their heads acknowledging the nature and power of race. My colleagues are not able to separate out my blackness from who I am. Race is only social construction, but as others have noted, such social construction has important power.

This past spring, I had the pleasure of spending part of my sabbati-

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6. This summer, one of the black guards at the university gym where I work-out regularly asked me to inform the white guard, who was new to the job, that indeed I was a law professor (and have been teaching for more than ten years as a law professor). She later informed me that, not surprisingly, he had questioned her statement that I taught at the law school.

7. The University's dilemma is that it must choose which set of victims gets priority consideration: those directly assaulted by criminal intruders or our black students whose skin color is used as camouflage by the large majority of those intruders.

. . .

In the end, the situation calls for forbearance from and toward all parties involved in it. Through a terribly unfortunate but unavoidable ethical choice, our campus police have to increase the burden on one set of victims (our black students) in order to reduce the burden on another set, the victims of criminal assault.

Victor Strandberg, *Checking Student IDs a Necessary Evil*, DUKE CHRON., Feb. 17, 1987, at p. 9.

The problem I have with this formulation is that it is hard to find what sacrifice whites make in response to these problems. What are they willing to put up with in the interest of Black students? For my white colleague, these rules of engagement are fair. This is the problem with the law in general: whenever the interest of Blacks are weighed against the concerns of the majority, Black interests lose. To see this point with respect to my colleague Victor Strandberg, read his letter on affirmative action in the DUKE DIALOGUE/FACULTY NEWSLETTER, Sept. 1992, at p. 1, col. 2, in which he argues that we should not pay market wages to "affirmative action" assistant professors because their salaries are higher than his. I question whether the latter is really true. But, assuming that it is true, why can't the white faculty bear that burden if Black students and faculty have to bear other burdens?

cal at Boalt Hall at the University of California, Berkeley. During my visit, in addition to the obligatory earthquake, I got the full California experience when a non-black jury returned a verdict in the police misconduct trial of the four police officers who were accused of beating Rodney King. The hotel where I stayed was a staging area for the Berkeley police when the post-Los Angeles riots spread to Northern California, and a number of shops were destroyed two blocks away. About a week after these riots I had dinner at a former student and friend's house. He is Jewish and married to a Asian-American woman. Their marriage symbolizes all that California represents in terms of racial progress and justice. He asked me what I thought about the riots. I heard an implicit question,[8] one I had heard repeated in different ways over and over about the anger in the black community resulting in the riots. That question was, "Why were blacks so angry?" It was clear that I could not explain the anger. I had a hard time even expressing it when Berkeley law students asked me to speak at a town meeting about the aftermath of the Los Angeles riots. I tried to tell my friend that he perceived being black the same as being white, except for an occasional moment of discomfort when some insensitive bigots forget and revert to momentary and isolated racism.[9] However, for black people, particularly black men, we can never stop being seen as potential violators of a whole system of racial oppression. Being black, unlike being white, always means facing up to issues of race. White men may only think of their race when someone questions them about it; black men and women do not have that luxury. These rules of engagement do not influence simply one or two moments, but the entire lives of black men.

I see that these rules of engagement go beyond simply the non-black people I endure. After I returned to North Carolina from California, I pulled into my credit union one evening to withdraw money from my neighborhood money machine. I entered the parking lot behind a late model foreign car driven by a young black woman who, upon seeing my black face, (and perhaps my ancient American-made automobile) refused to get out to use the money machine until I drove off. Racism is so deeply embedded in our society that black cab drivers in Washington and New York will not even pick me up when I am dressed in a suit, and black women can find me inordinately and intolerably dangerous. In

8. My friend posed a second implicit question about the state of Black and Asian relations in the wake of apparent targeting of some stores by mostly black rioters. I deplored such targeting and suggested to my friend that we have to figure out how to improve relations between those communities, but I am sure that was not a satisfactory answer to a difficult question. It is easy to point out that much of the problem stemmed from the failure of the police to adequately protect the property of Korean store owners. Such an answer, however, ignores the real differences between the Black and Asian communities, particularly the Black and Korean communities. These issues are the subject of the inaugural issue of the Asian Law Review that is being published by students at Boalt Hall.

9. I am sure that my friend's concern was heightened by the Californization of the riots to include not just Black-White conflicts, but Black-Asian conflicts, particularly Black-Korean conflicts, proving how much race indeed has and has not been transformed by California's expansion of race concepts.

such a world it is not possible to simply deny the importance of race. Many of my white colleagues, however, seem to think that race is always irrelevant to the discussion. They think that if we leave it out, race as an important concern will go away. It is this thinking that has led us to Rodney King. Only by denying the importance of the race question is it possible to create a police force that would beat a black man before a camera and despite the video record, call it justice.[10] Only by denying the race question is it possible for twelve non-black jurors to conclude that no crime was committed by those four officers despite the neutral uninvolved video record.

One night several years ago, I parked in front of Duke Law School at about 2:00 A.M. to get something from my office. I was tired and it was late so I ran from the front door to my 1981 blue Escort and jumped in and drove off hoping to get to bed as soon as possible. As I turned near the law school I noticed that a campus police car was following me. This police car sped up and followed as closely as it could as I approached the next light. After stopping at the last stoplight on this part of campus, I proceeded through the next intersection and the policeman turned on his overhead police lights and pulled me over. I got out of the car and came back to the officer. I asked him why he had pulled me over, and I showed him my driver's license. He stopped me, he said, because I had crossed the double lines at the intersection. I pointed out to him that that argument was just silly because the nature of the interchange made it virtually impossible to cross the yellow lines. He glanced at my driver's license and simply got back into his car and drove off. I never knew if he noticed that my driver's license lists me as a white male which, despite what his eyes told him, may have immunized me, or whether— as I have always contended—the campus police are required to remember the faces of all 35 black faculty members.[11] I have no doubt, however, why I was stopped. It was the interaction of the color of my skin, my apparent age in the dim light, and my gender that created a mythical possible—robber, rapist or intruder who needed to be controlled by our local constabulary. The problem for those of us trying to

10. *But see* Roger Parloff, *Maybe the Jury Was Right*, AM. LAW., June 1992, at 5 (White liberal attorney makes a case that the jury's verdict was rational and based upon the whole facts before them. He says he watched much of the trial and would have come to the same conclusion that the jury did because criminal intent had not been proven.). I also watched much of the trial and I thought that the jury could have failed to convict two of the police officers, but that the evidence of racism and culpability in both Koon's and Powell's testimony was substantial. It was the failure to convict anyone that led to the riots and my own anger. That part of the verdict was, in my view, deeply infected with racism. *See also* Steven Brill, *In Praise of Justice in Simi Valley*, AM. LAW., June 1992, at 7 (Brill praises Parloff's article and argues that the not guilty verdicts for these officers, despite the videotape evidence, is proof of the strength of our criminal justice system.). Not only is this view of that case tautological, it ultimately means that we can never criticize a system of justice because every action is within a plausible range. Such a view requires black people to live inside an unfair system without complaint.

11. This driver's license containing my black picture and listing me as a white male is in my wallet. (I know that the characterization was a mistake. I do not know, however, whether it was due to some attitude of mine, or simply the vagaries of bureaucratic efficiency.).

deconstruct race is that the view of me as that mythical black person is a reflection of how society sees me, not just the police. If we are to change the way in which race is interpreted by the police, we cannot hope to change just the actions of police officers. When the Los Angeles police beat Rodney King, they acted appropriately with respect to white demands that dangerous "black men" be controlled. Compare our reaction to the pictures of the police officers beating Rodney King within an inch of his life with society's reaction to the police complaint that Rodney King was dangerous, black and out on parole.

The question I wanted to pose to my friend in return was why most white people, even many of the most sensitive and socially conscious white people, have such a hard time understanding these rules of engagement and the anger that results. I cannot be sure, but I believe that there are two reasons why they cannot fathom the black anger that results. They see this incident as an isolated case, a random event. Therefore, like all chance events, these incidents simply become part of the risks imposed on all of us, like being struck by some form of "social lightning." In addition, many do not say, but believe, that Rodney King, twice since arrested for other things, "was dangerous" in exactly the way the police suggest. For them, there has been no violation of the rules of engagement. These rules have simply been enforced as both black and white people demand them to be. Such reactions miss the point. The problem with race is not that campus police should not be able to hassle an enrolled black student or a tenured black professor. The real problem with race is that it can be a marker for injustice. What is ultimately wrong is the injustice to the non-student who wanders onto campus and is treated as a criminal, and the non-professor who happens to be on campus and is scrutinized and injured by the deep racism of our society. The problem is our refusal to deal with the race question, and all the while demanding that black males adhere to rules of engagement that are tantamount to specialized oppression.

In a talk at the Frontiers of Legal Thought conference at Duke University in January, 1992, I predicted that the police officers who beat Rodney King would be acquitted, but until it happened, I did not understand how I would feel about the reality of those verdicts by twelve non-black jurors.[12] What I had trouble describing to my white friend was the nature of this injustice. There comes a point when the excuses made by Los Angeles police or campus police become too much. It does not surprise any black male that any police officer will be believed when he describes our actions as threatening or inappropriate. The rules of

12. The one hispanic juror subsequently broke down and described the tremendous pressure she felt to agree with the other jurors and how racism infected part of their deliberations. *See* Nina Bernstein, *Bitter Division in Jury Room: How 12 Ordinary Citizens Met for 7 days to Produce Verdict that Shook L.A.*, NEWSDAY, May 14, 1992, at 5 (Richard Kossow, husband of one of the jurors, said, "They brainwashed the whole world with that little bit of video. The whole country, they're just looking for something to boil over about." He continued, "We have to have authority. What are police for? My wife has said many times, she's sorry for Mr. King. But how about the police officers? Their lives were completely ruined because Mr. King wanted to go out and have a good time.").

engagement are that we black males have no credibility. What the videotaped beating of Rodney King demonstrated was that there is no neutral way of describing that racial situation, and therefore, the search for neutrality is futile. A thousand white nuns testifying to our innocence will not prevent a police officer from successfully claiming that he is simply enforcing that thin blue line between black males and white civilization.[13] No neutral independent observer is a check on the racism deeply embedded in the fiber of American society. There is nothing that can be neutral about the racism that exists in such a society. All black men are Rodney King and all of us are subject to injustices that none deserve, even the non-innocent Rodney Kings, who are black, on parole, and therefore dangerous. If neutral rules will not protect even in that situation, the rules of engagement of black manhood become too onerous. It is that truth that fuels black anger.

This unfortunately seems a truth too powerful for law and the black community. If there is no justice, how can we belong to such a society. Certainly, burning down Los Angeles or Berkeley is not a solution. Likewise, burning down Simi Valley or the jurors' homes (a solution suggested by my sweet, gray-haired, god-fearing, mother), even if effective in the short run in making any particular juror more careful, is likely to produce a white response that limits and eventually prevents such retribution. However, relying on the current system and its rules is not satisfactory either. The truth is that we have not been able to deal with the issue of race because we have been willing to accept the failure to pose the race question. Race will not be eliminated from its pernicious

13. *See e.g.*, Rob, *Lawyers Seek an Advantage With Trial Consultants*, BUSINESS RECORD, June 29, 1992, at 1 (Trial consultants used mock juries to suggest that defense attorneys should use the thin blue line defense.); Richard A. Serrano & Jim Newton, *3 King Case Defendants Notified of U.S. Inquiry*, LOS ANGELES TIMES, July 31, 1992, at A1 ("Barry Tarlow, a criminal defense lawyer in Los Angeles [said the reason for the unwillingness of juries to convict is] . . . that police argue that they form the "thin blue line" protecting society and therefore should be given wide latitude in carrying out their duties."). President Bush vacillating between wanting to deal with the issue of race and wanting to exploit the issue for reelection purposes went to see the riot scarred neighborhoods of Los Angeles and promise aid, but he could not help pointing out to an audience of police that they represent the thin blue line between criminals and the body politic. *See also* John W. Mashek, *Bush in Pennsylvania Hears Plea for Social Programs*, THE BOSTON GLOBE, May 16, 1992, at 8 (describing President Bush's speech at a memorial in Washington).

> Bush praised law enforcement officers at a memorial in Washington honoring those slain in the line of duty. "Yours is the priceless task of upholding good against evil," Bush told the families of 139 police officers killed during the last year across the country.
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> "All of us saw the sickening sights in Los Angeles of criminals breaking windows and burning buildings and looting businesses," Bush continued. "But even worse was the looting of something harder to replace than merchandise, the stealing of something precious - stealing hope, promise, the future. This we cannot allow."
>
> Standing coatless in a light rain, Bush paid tribute to what he called the "THIN BLUE LINE THAT SEPARATES GOOD PEOPLE FROM THE WORST INSTINCTS IN OUR SOCIETY."

Id. (emphasis added).

It may be no accident that Bush, severely behind in the polls in California, transferred some of the aid scheduled to go to the riot scarred neighborhoods of Los Angeles to the hurricane impacted areas of Florida.

place in the justice system until we are able to look the rules of engagement of black manhood in the face and call them what they are—racial oppression—and to know that oppression will only be lessened by dealing with the racism involved in their implementation.

One of my friends who is black and is in charge of one of the largest metropolitan police departments responded to an earlier version of this article by saying, "So, what do I tell the police officer who stops you late at night?" His real question was, "How does the race question help me implement practical police policy?" Race is important. In a world so involved with race and gender it is not possible to ask the police officers to be totally blind to the race of particular offenders. My response is that the police have to be required to not end up increasing the racial oppression of black people by their actions. To me it is the distinction between the Boston Police Department collecting every black male between the ages of 18 and 35 after the Stuart murder and a police department that would have looked for a person who was black and fitted the appropriate height, weight and other descriptive characteristics.[14] Race is not irrelevant, but the police and citizens have to figure out ways to allow me to have rights as a black male too. Every time there is a conflict between the rights of the majority and my rights as a stereotypical black male, my rights cannot always be subordinate, or else I have no rights at all.

II. How to Pose the Race Question

It is more difficult to face the question of race than it might appear on the surface. All of us are influenced by the racism that exists in society so that all of us, in our day to day lives, help to replicate the racial oppression represented by the trial of the four officers who beat Rodney King. We see the difficulty in the legal system's response to Rodney King's beating. The defense attorneys successfully convinced the non-black jurors that race was not an issue. After all, officer Powell, the officer who executed most of the blows and who joked on police tapes about "gorillas in the mist," came from a household that worked with children of color and has a sexual relationship with a person of color.[15] Rodney King was beaten because he refused to stop moving and he was always in control of the situation.[16] The defense was able to put police experts on the stand who testified that the officers' actions were within

14. Charles Stuart is the white man who apparently murdered his pregnant wife and blamed it on a black robber. The Boston police spent a considerable amount of time rousting the black neighborhoods near the incident for this fictional robber. This police activity included convincing some people to implicate a black man for this crime. After Mr. Stuart was discovered to have killed his wife and wounded himself, he committed suicide. The mayor has never apologized for the racial nature of the investigation. Some people still seem more horrified by the prospect that a stranger, particularly a black stranger, might have committed this crime than that a man would kill his wife and future child.

15. *Policeman Who Beat Rodney King Apologizes for Injuries*, Reuters, May 20, 1992 ("I want you to know that I never harbored any personal malice toward Mr. King, nor do I to this date.").

16. *See generally* Parloff, *supra* note 10.

the neutral standards of the Los Angeles police.[17] When these four police officers were indicted by the district attorney's office, one of the attorneys, who is black, was willing to accept an all white jury in Simi Valley because he thought the videotaped evidence would be sufficient to convince any jury of the defendants' guilt. Race was not an issue. When the verdict came back and a number of Los Angeles' citizens (black, white, and brown) rioted, the only reaction of the legislature and governor was to enact into law an emergency bill to allow the legal authorities to keep people in custody without being arraigned within the statutory forty-eight hour time period.[18] Some of those arrested were in custody simply for sitting on their porches in violation of the curfew. That a disproportionate number of those so arrested on these flimsy charges were black did not make this a racial issue for the California legislature. Race was not involved in the exclusion of the only black judge from hearing the case involving the beating of a white motorist by a number of black participants during the riots that followed the verdict. The black judge was removed at the instigation of the prosecution because he was erratic and possibly overworked.[19]

I found my own reaction to the Los Angeles riots and their aftermath in Northern California also problematic. The night before the largest amount of property destruction in Berkeley, I was standing in the lobby of my hotel when a young black male walked in the door. I had come in from the streets a short time before and I had a feeling of anticipation that I had never felt before as young teenagers milled around. When I saw that young black man come in the door, I started to enforce the rules of engagement of black manhood against him by asking him why he was there and whether I could help him. Fortunately, I stopped myself, but I have in the past enforced such rules. Despite teaching and writing about aspects of these issues, I am not, and was not, free of the impact of race and gender in such a situation.

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17. *Id.*

18. The state legislature subsequently passed SB 1427 that changed the criteria governing the rules for changing venue in criminal trials to include questions of the extent to which the new venue was similar in terms of race, age, ethnicity and income. *See* Editorial, LOS ANGELES TIMES, Sept. 5, 1992. As of the date of this article, the bill has remained unsigned on governor's desk.

19. *See* Danelia Wild, *White Judge Appointed to hear Denny Trial*, UNITED PRESS INTERNATIONAL, Aug. 31, 1992.

> Superior Court Judge Roosevelt Dorn, the only black jurist assigned to hear criminal cases in the Central District of the Superior Court, was the first judge assigned to the Denny case. He was removed in a preemptory challenge filed by District Attorney Ira Reiner.
>
> . . .
>
> The removal of Dorn was a controversial move, with prosecutors initially saying the judge did not have room on his calendar for the extended trial and was lacking a security courtroom.
>
> But Reiner later said the real reason was that Dorn lacked the temperament to hear such a highly charged case.
>
> . . .
>
> Mills [supervising judge] said the initial choice of Dorn was influenced by the fact he is a black judge and that assigning the case to him "would have some calming effect on the community."

Id.

I am willing to concede that there may be circumstances in which race does not matter. However, it cannot be that race is not important and does not need to be addressed in any of these circumstances. How does race influence the circumstances of this situation? This question has to be addressed at some point. The law's refusal to recognize it is a kind of color blindness that destroys black lives and makes Black Americans people without the support of law.

I came to realize the difficulty of dealing with the race question when my Black Legal Scholarship class this fall was discussing the case of *Colorcraft Corp. v. Jandrucko*.[20] This case grew out of a workmen's compensation claim by Ruth Jandrucko.[21] Ms. Jandrucko, a 65 year old white woman, was attacked and had a vertebra in her back broken by a assailant while working as a troubleshooter for a film processor five years ago. She was attacked from behind and, therefore, was not able to see her attacker's face. However, she saw his arms and concluded that he was dark skinned and black.[22] She presented evidence that the attack has left her with an uncontrollable fear of "big" black men, and since she cannot be in a situation free of such men she is unable to work.[23] Since the injury happened while she was at work and her disability arose from her injury, the court concluded that she was entitled to workmen's compensation. The court accepted her evidence that she was a Mennonite, had harbored no racial prejudice before this attack, and that the racial antipathy was not the result of some preexisting condition.[24] Supported by the ACLU, the company contended that such an award based upon her fear of black men would amount to support for racial discrimination, and, therefore, would violate the Fourteenth

20. 576 So. 2d 1320 (Fla. Dist. Ct. App. 1991), *cert. denied sub nom.* Fuqua Indus., Inc. v. Jandrucko, 111 S.Ct. 2893 (1991). There is, however, no reported opinion stating the facts of this case. The Florida citation simply affirms a lower court opinion that also is not reported in substance. The subsequent effort in the district court challenging the decision on constitutional grounds is not reported.

21. *See* Don Williamson, *Humanity, Like Stupidity, Can be Recycled*, SEATTLE TIMES, Sept. 3, 1992, at A18.

22. Lynne Duke, *Color Me Stressed; What If We All Sought Compensation for Our Race-Based Problems?*, WASH. POST, Aug. 16, 1992, at C5 ("Jandrucko did not see her mugger's face, but she says she knows he was black because she saw parts of his neck and arms. As a result, black people in general—with a few exceptions (her manicurist, and CNN's Bernard Shaw)— freak her out.").

23. Despite my argument below about this case, I want to emphasize that courts should be extremely careful about accepting evidence of such fears. I cannot be sure that the psychiatrist who testified to this disability was not applying a non-neutral standard infected with issues involving the race-gender intersection. Other evidence suggests that legal actors and social participants are infected with racist reactions. *See e.g.*, Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (explaining how black car buyers appear to experience different treatment from car dealers than white car buyers). In a slightly different area, death penalty cases, see Michael Radelet and Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587 (1985) (differentiating between the police classification of a case and the prosecution classification connected to the race of victim and race of defendant. Blacks killing whites are most likely to have their case upgraded and least likely to have their case downgraded). We, therefore, have to make sure that this is not a situation where psychiatry is infected with racism.

24. Williamson, *supra* note 21, at A18.

Amendment.[25]

We were discussing how to do Black Legal Scholarship, and I contended to the class that we had to force the courts to ask the race question, much as feminists have required courts to ask the woman question. I asked my class, "How do we ask that question in the context of this case?"

Several of my students contended that this was an easy case and that this woman should not be able to collect for such fear. They seemed to be saying that too many black people suffer injuries, big and small, that are bigger than this injury for which they receive no compensation. Therefore, she should not be entitled to recovery for such fear. Descriptions of her as a sweet little old lady previously free of racial animus were ridiculed by my knowing students. They concluded that racial bigotry was at the heart of this woman's concern and it must be stopped. When I asked my class whether this case could be seen as a catalyst for protecting the injuries suffered by black people from the attacks of white people on the job, my students contended that we could never expect the existing judges and the law to protect black interests in that way. The law will never give real protection to black interests and, therefore, we have to prevent them from giving protection to what amounts to racial stereotypes by this white woman.

I remain convinced that my student's response to how to raise the race question was wrong. Unfortunately, the error that I found in their analysis seems to me to be common to most analyses of race and the law. They would have the law ultimately adopt a form of racial blindness in this case. The ACLU and my students would require that the law ought to be blind to the real injury suffered by a woman who cannot work because it is connected to race. This seems to me to be a different version of liberal color blindness. There are three things that militate in this particular case in favor of this woman being able to collect her workmen's compensation. She admits her response is irrational and ought to be aberrational. She has proven, at least to the satisfaction of a workmen's compensation judge that she had no prior racial animus. This means that she does not predicate her claim on some right to dislike or oppress black men. She is also not making a claim that she has a right to work in an environment that is totally free of black males, and accordingly she is not claiming the right to have the world changed to make it safe for her whiteness. Forcing white plaintiffs in such cases to prove these elements works against racial subordination.[26] Is this woman's response "colored" by the racism in the world? The answer to that question has to almost certainly be yes. But, we cannot punish such actions

25. *See* Lynne Duke, *supra* note 22, at C5.

26. Those who have read some of my previous work might be surprised that I am defending this old white woman. *See* Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991) (I discuss whether I should be able to say "boo" to an old white woman who is apparently infected with racism. However, if I can say "boo," she ought to be able to stay at home with a provable disability.).

effectively in the long run unless we limit that punishment to situations where vindication of the racism will not increase racial stereotypes and or racial oppression. Ms. Jandrucko is not entitled to oppress black people, but she does not have to live in some mythical world free of racism. Such a world does not exist. Would we deny Ms. Jandrucko a disability claim from a private insurer because her injury is infected with racial stereotypes and concerns at some level? Workman's compensation is supposed to be the public version of this private insurance situation. The employer owes this to her through workmen's compensation, and to his black employees and customers he owes the enforcement of rules that reduce racial subordination.

The same company arguing that the Fourteenth Amendment prevents this action would argue, perhaps successfully, that black men could not do certain jobs because of "business necessity," (i.e., having black males around in certain situations is a danger to others and economic pressures require that they be excluded) just as similar employers have argued that it is alright to impose a rule that would exclude black women who are pregnant from such jobs because of their status as role models.[27] I suspect my students are right. Most courts will not be willing to extend these arguments to protect black people from the kind of injuries suffered by them due to racial hostility. I have seen black students and black employees driven literally mad by the racism they had to face, and it is difficult to get those real injuries considered by the courts. This Supreme Court is very likely to treat such claims in the way that it treated the claims of black people in *McCleskey v. Kemp*.[28] The Court will acknowledge their existence, but contend that they are so pervasive that any effort to ameliorate them would destroy other interests or the public

27. Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987) (Employer contended that its role model policy that prohibited the employment of unmarried pregnant women was a Bona Fide Occupational Qualification. Therefore, the subsequent firing of a pregnant black woman was consistent with Title VII because she worked with teenage girls and served as a role model.). *See also* Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 372-76.

28. 481 U.S. 279 (1987) (McCleskey was sentenced to death for killing a white police officer during an armed robbery. In his habeas corpus action, McCleskey claimed that his race and the race of the victim unconstitutionally tainted the sentencing.). The Court held that:

> [I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys or judges. . . . As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey. The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.

Id. at 314-19 (footnotes omitted). This argument ignores the history of race relations in this country. *See also* Jerome McCristal Culp, Jr., *Toward A Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 85-87.

fisc. The courts are always denying the race question, but it does not help us to join them. To support the company's position in this case is ultimately to conclude that race should not be used when it will cost them resources. Such a rule not only does not eliminate racial subordination, it is likely to increase the income and class subordination that exists in our society.

If my students have such a difficult time appropriately asking the race question, how can we expect mainly white male judges to figure out how to pose the question in their deliberations. The answer is ultimately that the legal participants have to be forced to look racial subordination in the face and to discuss how that subordination will increase or decrease with how we treat race.

If I could adopt a general rule, it would be that not looking at issues of race, claiming to be racially blind, is likely to increase racial subordination, and therefore should not be adopted. If the courts had been willing to look at the racial facts of Rodney King's experience, they would not have permitted the case to be moved to a jurisdiction where the racial circumstances were so unfair to his interests. If the racial facts were examined, then the black prosecuting attorney would have permitted Rodney King to testify about his experiences with these four police officers before a jury that had some number of jurors who could understand them. The truth is that we have to reorient our approach to race and the law and appreciate how important it is to take account of the racial truth that exists. If we fail to do so, we ultimately fail justice.

III. SINGIN' THE BLUES IS A POLITICAL ACT: BEING WISE AND SAYING SOMETHING

> In my schoolboy days I had no aversion to slavery. I was not aware that there was anything wrong about it. No one arraigned it in my hearing; the local papers said nothing against it; the local pulpit taught us that God approved it, that it was a holy thing, and that the doubter need only look in the Bible if he wished to settle his mind—and then the texts were read aloud to us to make the matter sure; if the slaves themselves had an aversion to slavery, *they were wise and said nothing.*[29]

I want to be a realist about the racial circumstances that Rodney King leaves us in the law. Much of the legal response to race is to deny the importance of race and to seek a form of racial blindness that ultimately reinforces racial oppression. Black people do not have the power to unilaterally alter this situation. It is not likely that any short run political change will alter this fact.[30] Black people and those who would join

29. SAMUEL CLEMENS, MARK TWAIN'S AUTOBIOGRAPHY 101 (1924) (emphasis added).

30. Some might argue that simply electing a president who is opposed, at least in some situations to racial oppression, would be enough, or that we might ally ourselves with a progressive coalition who could pass legislation. Unfortunately, unless the administrators appointed by such a president and the judges and lawyers who enforce these laws understand how to deal with the race question, the interpretation of any new legislation or regulation will not be sufficient to eliminate important aspects of these concerns. This of

us in fighting racial oppression have to understand that we have power, but limited power. Derrick Bell has asked all of us to rethink the potential for law to be redemptive; in his book, *And We Are Not Saved*,[31] he repeatedly makes the point that law has not "saved" black people and is unlikely to do so. In more recent work, Bell fleshed out this point by contending that there can be no salvation, i.e., that race and racism are so deeply embedded in the fiber of our society that it cannot be eradicated by law, or other simple means; and that all we can do, in the words of one of Bell's former black Mississippi clients, is to "harass the white folks."[32] I interpret that argument to be a different way of saying that if we are not harassing the white folks we are acquiescing in the racism that exists in our society; or, as my colleague put it, "We may not be able to change the world, but we do not have to take it." The point is that either we harass by our actions, or we are wise like the free blacks and black slaves in Mark Twain's time and we acquiesce in the racism. Part of this harassment is our requirement that judges, lawyers and law students face the race question. Such efforts will not be magical. Simply posing the race question will not make all white (or black) judges see the truth of our racial present, but it is a start on the road to change in California and the rest of America.

There is a potential for change nascent in that failure to acquiesce and part of the change in our status as black people is that we are no longer wise by continuing to be silent. Certainly, as my colleague Jim Coleman points out, the status of black people in the 80's was at least partially impacted by the acquiescence of the black community in some of the actions of the Reagan Administration and the Supreme Court that helped to increase the power of white supremacy. Black art (jazz and the blues), black literature (slave narratives, novels, and autobiographies), and black religion have all been about ways around the required silencing of black voices. Black Legal Scholarship and Critical Race Theory have to be about altering that history by adding our voices to the singin', writing and arguing of other black voices.

course does not mean that we can stop trying to make such efforts, but that they are unlikely to prevail in the long or short run when the enforcers and interpreters of those laws do not know how to deal with the race question.

31. DERRICK BELL, AND WE ARE NOT SAVED (1987).

32. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 379 (1992).

THE INTERNATIONAL IMPLICATIONS OF THE LOS ANGELES RIOTS

HENRY J. RICHARDSON, III*

I. INTRODUCTION

By now much has been written, preached, propagandized, analyzed and moralized about the Los Angeles riots. We need not rehearse here either the facts of the trial and acquittal of the police officers who beat Rodney King, the subsequent fire and destruction or the resulting federal and state trials of the officers and riot participants. This Article will discuss the international reactions to the acquittals and the riot while exploring several crucial issues with implications for United States policy, international law and Afro-America in the world community. The Article will also explore comparative claims regarding causation for the riots and the responses of the Vatican and the southern tier of the world community to these claims. Some initial consideration will be given to recent United States. policy trends in order to place the international community's response to Los Angeles in context. Finally, the author will offer some reflections on the patterns of reactions from overseas, the policy and international legal issues they raise, and the divergent expectations about, for example, American racism they may represent.

II. BACKGROUND

The Los Angeles riots necessarily raise value considerations in the American and international communities concerning power, wealth, human rights, loyalty patterns, intellectual skills, patterns of knowledge, well being and control in these communities of decisions about assigning labels of "right" and "wrong."[1] Through these value considerations we can project in a provisional way the implications of future international reactions. This is particularly important regarding divergent expectations about race and the multi-cultural group and class dominance realities of the United States. International reactions to the Los Angeles riots arose not in a vacuum, but in the presence of pertinent principles - law goals and objectives already part of the constitutive structure of the world community and its tightly knit fabric of global interdependence.[2] The rising authority of international human rights

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1. These value considerations are integral to the "New Haven school" jurisprudence of Myres McDougal, Harold Lasswell and Associates. *See, e.g.*, MYRES S. MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 3-93 (1980).

2. Articles 1 & 2 of Chapter I, Purposes and Principles of the United Nations Charter set forth the pertinent principles and goals.

law has been driven by a global pattern of demands for representative government plus a recent consistent focus on the protection of personal rights against abuse, such as torture.[3] To this must be added a continuing focus on second-generation human rights found in Somalia and other disaster situations, e.g., the right to food.[4]

Since the demise of the Soviet Union and the rise of the other two legs of the "triad" (the European Economic Community and Japan) the "rules-of-the-game" evaluation of the current status of the United States as the sole great power has energetically begun. Whatever conclusions

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The purposes of the United Nations are:

(1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

(2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

(3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

(4) To be a center for harmonizing the actions of nations in the attainment of these common ends.

U.N. CHARTER art. 1.

Article 2. The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

(1) The Organization is based on the principle of the sovereign equality of all its Members.

(2) All Members, in order to ensure to all of them the rights, and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

(3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

(5) All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charters and shall refrain from giving assistance to any state against which the United Nations is taking preventive of enforcement action.

(6) The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

(7) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application or enforcement measures under Chapter VII.

U.N. CHARTER art. 2.

3. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); *see also* U.N. DRAFT CONVENTION AGAINST TORTURE AND THEIR CRUEL INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, G.A. Res. 39/46 Annex, 39 U.N. GSOR, Supp. (No. 51) 197, U.N. Doc. E/CN.4/1984/72, Annex (1984), *reprinted in* 23 I.L.M. 1027 (1984).

4. *See* Philip Alston, *The International Monetary Fund and the Right to Food*, 30 How. L.J. 473 (1987); Henry J. Richardson, *The International Human Rights Response*, 30 How. L.J. 233 (1987). *See generally* Symposium, *1986 World Food Day Food and Law Conference: The Legal Faces of the Hunger Problem*, 30 How. L.J. 193 (1987).

are drawn from this question throughout the international community will have both public order and constitutive implications with global effects.[5] This is particularly the case since the United Nations' enforcement action in the Gulf in early 1991 was accompanied by the proclamation—perhaps premature in the form stated, and clearly an unformed concept at the moment—by George Bush of a "new world order."[6] What the President failed to include in the scope of the proclamation were questions of equitable and non-discriminatory treatment of Afro-Americans and our empowerment in America—long an international issue.[7] Also not included was the question of the political will to break the destructive cycle of America's inner cities and the relation of that cycle to Afro-America's youth and the future of both Afro-America and the country as a whole. Yet these questions are integral elements of any understanding of world order, new or old. American policy objectives concerning these questions, whether negative or positive, containment-driven or remedy-driven, coercion-driven or equity-driven, have their ready analogies regarding dozens of *favelas*, *bidonvilles*, *barrios*, districts and ghettos around the world. These questions likewise connect directly to those of welcome, empowerment and equity for recent immigrants to a national community. For instance, the maltreatment of immigrants is increasingly considered to be a new malicious form of racism on an international basis.[8]

One cannot be aware of the demographics of the Los Angeles area without realizing that it comprises interlocking frontiers among several crucial political, economic, racial and cultural goals and categories of human policymaking. Los Angeles features frontiers between the First and Third Worlds, development and underdevelopment, economic aspirations and institutionalized economic achievement, poverty and fantasies of material success, powerlessness and expected comfortable empowerment, Black, Hispanic and Asian persons and communities and white Anglos or other persons, immigrants and citizens.[9] But these demographics do not accurately describe the patterns of authority and empowerment governing these issues among those peoples. Power, especially economic power, and authority remain white-dominated in ways little touched by existing racial integration. The Los Angeles police department and its chief were notorious for harshly prejudicial treatment of citizens and non-citizens of color.[10] The control of jobs for persons

5. Jacques Attali has written a provocative future projection of the international community, raising issues which will be further considered. *See* JACQUES ATTALI, MILLENNIUM: WINNERS AND LOSERS IN THE COMING WORLD ORDER (1991).

6. George Bush, Bush:'Out of These Troubled Times . . . a New World Order,' Speech Before Joint Session Congress (Sept. 11, 1990), *in* WASH. POST, Sept. 12, 1990, at A34.

7. *See infra* notes 9-18 accompanying text.

8. *Germany Looks at Itself, and Winces*, ECONOMIST, Nov. 28-Dec. 4, 1992, at 55.

9. DAVID REIFF, LOS ANGLES: CAPITAL OF THE THIRD WORLD 31 (1991).

10. *See* Jane R. Fitsch & Frederick M. Muir, COUNCIL MAJORITY BACKS POLICE PANEL REFORM PACKAGE; COMMISSION: THEY SEEK FULL IMPLEMENTATION OF CHRISTOPHER REPORT, INCLUDING ITS CALL FOR A NEW CHIEF. FORMER CHIEF DAVIS ALSO URGES GATES TO STEP ASIDE, L.A. TIMES, July 11, 1991 at A1.

of color never lay in their home neighborhoods and the situs of those jobs increasingly fled the same neighborhoods.[11] South Central Los Angeles offers little systemic hope of escape from poverty or from a constant struggle among its youth and their families for non-gang-related sources of personal dignity and respect.

In such a context, crime, "disturbances," racial and other riots, looting and other even momentary public order breakdowns cannot escape evaluation along a range of comparative international questions. These significantly include judicious considerations of histories, parallels and trends in various colonial territories prior to the formal dissolution of the former European empires. For our purposes here, a convenient benchmark for such comparisons is the year 1955: the year of the Bandung Conference that gave the third world its first infusion of global self-consciousness.[12] The general history of colonial territories is one of dominating European minority groups with cultures influential on but separate from those of majority indigenous populations. Yet this minority controlled the legal, military, economic, administrative, transport and financial resources and systems in the territories.[13] Nevertheless, ideas about self determination, freedom, an equitable share of the territory's economic resources and control of their own lives for their own ends was long discussed by, made coherent in and increasingly served as the focus of committed organization among active groups of these indigenous peoples.[14]

From the purview of the colonial elite an accurate understanding of any breakdown in public order along the axis of "disturbance" to "crime" to "insurrection" to "revolution" was crucial to maintaining their rule. Although understanding the facts of such incidents and drafting the press-release-public-reactions to them were sometimes different for colony and metropolitan capital consumption, they were most often part of the domination of the majority by the ruling minority.[15] The most frequent colonial-elite response was to resolutely drain such incidents of all political content or pleas for economic empowerment. These responses asserted the criminality of the acts, their lack of local roots and their aberrational character and contrasted that to the allegedly known contentment of the "natives" with the *status quo* political arrangements, i.e., minimal local governmental positions under co-optive and watchful metropolitan eyes.

Wrapped in an envelope of racism, this response stemmed from various combinations of sheer ignorance of "native politics" and willful blindness to clear signs that self-determination, nationhood and ridding

11. *Id.* at 64-78.

12. *See, e.g.*, 1 GUNNAR MYRDAL, ASIAN DRAMA - AN INQUIRY INTO THE POVERTY OF NATIONS 124, 210 (1968).

13. For example see, BASIL DAVIDSON, THE BLACK MAN'S BURDEN—AFRICA AND THE CURSE OF THE NATION-STATE 118-91 (1992).

14. *Id.* at 162-96.

15. *See id.* at 68-85. No colonial perception of changes towards independence in the colonies; no planning done, e.g. for handover at an upcoming independence.

the territory of foreign occupiers in the search for a better life were ideas of concrete and intensifying currency.[16] A further basis was the colonial elite's fear of being removed from comfortable lifestyles. Thus any substantial change in dignity, wealth and power relations between colonizers and the colonized was an anathema and demands for the same were beyond the pale of rationality. If such demands became too strident more suppressing military force was applied and the perpetrators' actions were further scrubbed of political, economic or racial meaning. This was done in substantial part through law and legal characterization by labeling, prosecuting, convicting, imprisoning, exiling and sometimes executing the violators as "criminals." Such persons were seen as wrongdoers who were detrimental to good society and their actions required a restoration of the *status quo* social fabric, certainly not a radical remaking or a replacement of it.

Los Angeles cannot escape the issues raised by this history, even though the outcomes will differ in important ways from colonial/liberation precedents. It is beyond this article to pronounce on the final resolution of such questions. But those decision makers with authority to shape, assess and enforce legal and community policy responses to the Los Angeles riots now face the validity of those issues.

III. Brief Reflections on Past Trends

Notwithstanding other important contributing factors to the Los Angeles riots, race and the consequences of racism are critical for any understanding of what occurred. Racism against Afro-Americans in the United States has been an international question in varying postures since before the American Revolution.[17] While the United States prior to the Civil war struggled to retain the profits and benefits of the slave trade, the growing international illegality of slavery intensified the moral and legal questions regarding the personhood of, and equity towards, Afro-Americans.[18] The actions of dominant American white classes and decision-makers were measured not only by emerging global anti-slavery norms, themselves inconsistent in those historical circumstances, but equally by American ideals of liberty, equality and justice. These ideals in turn further influenced the rise of analogous international legal principles.[19]

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16. *Id.*

17. *See generally* John H. Franklin & Alfred A. Moss, Jr., From Slavery To Freedom—A History Of Negro Americans (6th ed. 1988).

18. *See generally* A. Leon Higginbotham, In The Matter Of Color, Race, & The American Legal Process: The Colonial Period (1978).

19. For example, Article 1 of the Universal Declaration of Human Rights proclaims, "All human beings are born free and equal in dignity and rights." The Universal Declaration grants two categories of rights; civil and political rights, 1st generation rights; and economic, social and cultural rights, 2nd generation rights.

The first generation rights include the right to life, liberty and security of person; the right not to be subject to arbitrary arrest, detention or exile; right to presumption of innocence. *See* The Universal Declaration of Human Rights, G.A. Res. 2 1 7 A (III), U.N. Doc. A/810, at 71 (1948).

A century later one outcome of this clash of expectations was the confirmed international and national criminality of slavery evidenced by the strong leadership of the United States in drafting into the United Nations Charter clear legal prohibitions against racism.[20] Despite the hope and advocacy of Afro-America, however, the United States subsequently moved to downgrade these provisions to no more than "moral principles," ensuring that they were not construed within federal law as *legal* rights.[21] Despite executive foreign policy pronouncements and some desegregation of American armed forces during World War II that had created a body of non-discrimination policy for oversees consumption, there was no federal civil rights law in the immediate postwar period.[22]

Nevertheless, one issue raised in both federal and state courts during this period was whether such policy pronouncements could be given some weight by United States' courts in considering claims by Afro-Americans, and other persons of color, of a right to be free of racial discrimination.[23] In other words, did United States propaganda intended as either boilerplate or for overseas consumption, though not dispositive *in se* on the existence of legal rights, have legal consequences that courts were bound to take notice of as "federal public policy?" In *Oyama v. California*[24] the Supreme Court said "yes" in strong dicta.[25] A

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20. The Purposes of the United Nations are:

> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

U.N CHARTER art. 1, ¶ 2.

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> (a) higher standards of living, full employment, and conditions of economic and social progress and development;
>
> (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
>
> (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

U.N CHARTER art. 55.

"All members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." U.N. CHARTER art. 56.

21. President Harry S. Truman, United Nations Conference on International Organization, Address During Final Plenary Session (June 26, 1945), *in* 13 DEP'T ST. BULL. 3 (1945).

22. The first Civil Rights Act passed after World War II was not passed until 1957. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1958).

23. *See generally* RICHARD B. LILLICH & FRANK C. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY ch. 2 (1979).

24. 332 U.S. 633 (1948).

25. *Id.* at 649-50 (Black, J., concurring).

> There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

few other courts followed, but the most either denied the right[26] or found (or invented) safe domestic constitutional grounds to grant it.[27] This points to the long-existing tension between the international legal rights of Afro-Americans and other minorities, plus international expectations opposing that particular form of racism and the generally more limited Afro-American rights stated in American law. It is also a necessary element for understanding the international reactions to the Los Angeles riots.

Since the formation of the United Nations, the United States, as a matter of unadmitted executive policy, has labored to prevent United Nations consideration of any racial conflict arising within America.[28] For instance, periodically during the years of South African "grand apartheid" black (and other) members of the United States' United Nation's delegations were ordered to aver both how well American race relations were being played out and how little concrete action was needed by the United Nations against South Africa.[29] The hypocrisy was notable, unforgettable and bitter for the Black persons involved. It also illustrated simultaneously the racist elements in United States foreign policy and the co-optive strategies of American racism.

In this connection, we must consider the rise of the United States as a great power since the end of World War II. Considerable international expectations were generated across the entire value spectrum by United States power globally projected during both the Cold War rivalry with the Soviet Union and in this still-young post-Cold War period. A pertinent slice of such expectations of a great power is that the maintenance of public order within the United States is presumed to be more effective, efficient and stable overall than is generally the case in developing countries. Its Constitution is the world's most long-lived; its governmental institutions are influential and much imitated; its legal system has exported thousands of lawyers to carry the message of constitutionalism, separation of powers and individual rights; and its economy is the world's richest. Equally, its corporations have helped spread consumerism around the world during the 20th century.[30] Thus it is expected that American streets will generally be safe (although the statistics of American crime, and its cowboy traditions are globally known); its governmental institutions and ministers will be stable under the Constitu-

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Id.

26. *See, e.g.*, Sei Fujii v. State, 242 P.2d 617 (Cal. 1952).

27. *See, e.g.*, Lareau v. Manson, 651 F.2d 96 (2d Cir. 1981).

28. From this author's knowledge, all Afro-American human rights petitions to the U.N. Human Rights Commission have been barred from that body's agenda. In 1978 there was consternation in the White House and executive branch when it was learned that an Afro-American member of a United Nations Human Rights Working Group had voted that a group of petitions from the United States presented sufficient claim of a national pattern of gross violations of the human rights of Afro-Americans through police brutality to qualify such claim being forwarded to the United Nations Sub-Commission for the prevention of Racial and Religious Discrimination. Immediate steps were taken to block such claim.

29. *See* J.C. MILLER, THE BLACK PRESENCE IN FOREIGN AFFAIRS (1978).

30. ATTALI, *supra* note 5, at 92-113.

tion; its political leaders will act lawfully without trying to seize military power; and the visible economy will actually determine the movement of prices, goods and services.

Certainly part of such expectations is that the United States cannot be a country where traveling foreign tourists must be warned by their home governments to be either vigilant or to stay away entirely because of riots in the streets. Nor would it be expected that such tourists would need to be warned of the ineffectiveness of the police and the absence of restraints on official racism. Yet, this is basically what happened in Los Angeles.

IV. THE REACTION TO THE RIOTS: ISSUES AND PROJECTIONS - FRANCE AND JAPAN

The reactions to the Los Angeles riots were emblematic of a globally-interdependent post-Cold War world community. They were also emblematic of the virtual disappearance of the insulation historically provided the United States by two large oceans, especially when its government wished to invoke it, and the additional insulation provided by the expectations of public order stability. Further, part of the dominance of the United States as a great power has included the capacity to control to its liking, the allocation of doctrine, decision-making and world community scrutiny under international law concerning the "proper" definition of "domestic jurisdiction" under Article 2(7) of the United Nations Charter.[31] Expectations that this dominance will continue have taken a beating. The United States has made stringent attempts to bar from official international scrutiny, especially deliberation by any United Nations organ, questions concerning racial justice and the enforcement of rights of Afro-Americans and other minorities.[32] Such attempts have been more noteworthy given the openness of the American press and public opinion to global view; racism in the lives of Afro-Americans has been globally perceived in fact for many years. The question arises whether one consequence of the Los Angeles riots will be successful official investigations of police brutality and other detailed actions sustaining racism through the United Nations Human Rights Commission, the General Assembly and other organs notwithstanding Washington's opposition.

The actual reactions to the riots have far reaching implications for international law and its meaning to Afro-America and otherwise. It can first be noted that the United States, relative to the Los Angeles riots,

31. The Organization and its members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. CHARTER art. 2, ¶ 7.

32. *See supra* notes 20-30 and accompanying text.

was treated like its State Department often treats developing countries, i.e., public warnings to Americans abroad against traveling to specific countries or particular parts therein because of "civil unrest," "hostile attitudes towards foreigners or Americans" or even "bodies lying in the streets." For example, there was an official expression of concern by the Japanese Foreign Ministry for the safety of Japanese tourists in Los Angeles.[33] There were similar expressions of concern by the Korean government.[34]

The Japanese response must be measured against previously expressed official Japanese racially defamatory attitudes toward Afro-Americans, which included alleging their detriment to the American economy.[35] In making this public expression of concern, the Japanese government determined that the Los Angeles riot situation was, for whatever reasons, not one which fell within the domestic jurisdiction of the United States. Thus, it was not barred from international scrutiny. Japan would have also necessarily determined (or assumed) that such official statements did not constitute an illegal intervention by Japan into the internal affairs of the United States. The Korean government apparently made identical determinations before doing even more far-reaching acts, namely, asking *domestic* American television to *regulate* (suppress) scenes of Black/Korean violence connected with the riots, supposedly for the safety of the Koreans involved.[36]

A second category of responses revolved around assigning causality for the riots. Some national leaders, such as President Mitterand of France, ascribed to Washington the responsibility and drew a cause-and-effect relationship between Reagan-Bush policies oppressing Afro-Americans and Los Angeles.[37] Other spokespersons warned that the same potential for insurrection or civil breakdown existed in European cities.[38] They pointed to the increasingly well known facts regarding racism in London against Africans and South Asian immigrants, and in several German cities against several classes of immigrants.[39] Not counting Paris' 20th century history of being a principal haven of a permanent expatriate/exile Afro-American community,[40] the ascription of causality by Mitterand is noteworthy for several reasons. Racism is currently closer to the political surface in France, particularly against North Africans, and, anti-semitism, driven in part by the fulminations of the French political right.[41] Mitterand, now weathering visible challenges to

33. *World Reacts with Shock and Criticism to Los Angeles Riots*, L.A. TIMES, May 2, 1992, at A8.

34. *Id.*

35. Hobart Rowen, *Thanks (?), Mr. Nakasone*, WASH. POST, Oct. 5, 1986, at F1.

36. *World Reacts with Shock and Criticism to Los Angeles Riots*, *supra* note 20.

37. *Id.* at A8.

38. Arthur Brice, *America Reacts: A Plea for Calm Aghast, the World Watches S. Korean President Urges Protection of Korean-Americans as U.S. Race Relations Are Examined Overseas in Light of Riots*, ATLANTA J. & CONSTITUTION, May 2, 1992, at A10.

39. *Id.*; *see also Germany Looks at Itself*, *supra* note 8, at 550.

40. For example, Chester Himes, James Baldwin and Memphis Slim.

41. Especially the fulminations of Jean-Marie LePen. *See* L'EFFET LE PEN: DOSSIER (Edwy Plenel & Alain Rollat eds., 1984. For further discussion of the French right see

his presidency, may have used such a statement to strengthen French opinion against the rightists, while revealing his own commitment to equity and attacking a convenient target. But it is abnormal diplomatic practice to draw such stark causal conclusions, particularly by direct pronouncement by the Head of State (as opposed to a more junior official) regarding a major ally. Normally, events such as the Los Angeles riots would be merely commented on by an Ambassador expressing regret for their occurrence, with perhaps obliquely-expressed hopes that matters will move in the just and equitable direction, of course under the wise guidance of the national capital. For whatever reasons, President Mitterand, a ranking intellectual and Resistance hero in his own right, felt that racism against Afro-America was not only a fit subject for international scrutiny, but that the causes of the riots were sufficiently clear to assign *policy* responsibility to the conservative Washington regime.

I emphasize this because of the freedom Mitterand apparently felt in moving from the particulars of Los Angeles to the more general objectives and consequences of federal policies. Perhaps he had in mind cuts in those categories of aid to cities that most benefit poor Afro-Americans,[42] the establishing of public images of mean-spiritedness, encouragement of racial stereotypes[43] and the fostering of racially co-optive strategies.[44] Such freedom is generally lacking in the American news and intellectual media, in part because it is blocked by the concept of an "issue" needing to rest on nothing more substantive than an opposing public contention, irrespective of the content, plausibility or truth of the contention. To the media it is the existence of the contention that governs, not the accuracy of the depiction. Over time this can lead to a silent assumption in American public discourse that no plausible broad generalities exist. Such an assumption can especially arise concerning the appraisal of important national policies, particularly concerning the presence and causal responsibility for the existence of racism and actions with racist consequences. In this respect, if Mitterand's observations were taken seriously enough to be incorporated into the national public discourse[45] they would have at least momentarily raised the tone of such discourse about race in America, whether he was right (as this author believes, in the main) or wrong.

From the 1920's through recent years many Europeans, including the French, often had stark, direct and harsh images of how the United

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MAXIM SILVERMAN, DECONSTRUCTING THE NATION: EMIGRATION, RACISM AND CITIZENSHIP IN MODERN FRANCE (1992).

42. For example, cuts in food stamps, and arguing in support of the tax exempt status of Bob Jones University. *See* A COMMON DESTINY - BLACKS AND AMERICAN SOCIETY ch. 6 (Gerald D. Jaynes & Robin M. Williams, Jr. eds. 1989).

43. For example, the use of Willie Horton during the 1988 Presidential campaign.

44. For example, the Clarence Thomas confirmation hearings.

45. Not only does there appear to be no evidence that his observations were taken seriously, but in apparent reaction to the least suspicion of administration responsibilities, the Bush administration assigned the blame for Los Angeles to the 1960's programs of the war on poverty presumably fostered by Democrats. *See* Ann Devroy, *White House Blames Liberal Programs for Unrest; 'Great Society' Initiatives Started in 1960s are at Root of Many Problems, Fitzwater Says*, WASH. POST, May 5, 1992, at A8.

States treated Black people. The directness of those images, from personal experience, was sometimes a jolt even to Afro-Americans traveling or living in Europe at the time. A generalized pattern of national racism was freely drawn, including for example, the confirmations of lynchings and chaingangs in the South and race riots and widely-deprived political and economic rights in the North. The jolt was not that such conclusions were false—they were, upon reflection, often more true than not. Rather the jolt came because they were pulled together and drawn on that scale *and national official responsibility assigned*, rather than being moderated in the soup of myriads of softening issues such as private discretion versus official action.

One can argue that those conclusions rested in part on the comparative absence of racism in Europe, confirmed by both expatriate Afro-American literature and exiles voting with their feet (even though some, after suitable recuperation, did return to the United States).[46] It might also be observed that contributing to such conclusions were French academic tendencies to view racism in a psychological framework, with some focus on blacks' reaction to oppression and exclusion and the structures contained in culture that support racism.[47] The sharpness of views about American life had its points of accuracy and points of omis-

46. *See supra* note 40 and accompanying text. The references to racism in this Article are to the racism of color, the racism that is directed toward peoples of African heritage. Clearly, the comparative (to the United States) strains—both historically and in the 20th century—of anti-semitism in France, Nazi Germany and elsewhere in Europe. A discussion of anti-semitism as racism is beyond the scope of this article. However, *cf. infra* note 47.

47. JACQUES LACAN, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS (Norton Paper 1981). Lacan rejects an explanation rooted in history to account for the rise of Nazism and the holocaust. He instead would find a psychoanalytic explanation in (1) the difficulty of even confronting ("turning a courageous gaze toward the phenomenon") the subject, and (2) such difficulty being rooted in the reluctance to move beyond "the fascination of the sacrifice in itself" that Nazism and the holocaust represent and the attempt to ascribe our own desires in this regard to the presence of an Other whom Lacan calls "the dark God." *Id.* at 274-75.

Similarly, Henri Lefebvre finds an explanation for the "Hitlerian mystique" in "the rejection of everyday life - of work, of happiness - a mass phenomenon, a malady of the decaying middle classes, a collective neurosis (where in France it was merely an individual phenomenon) . . . ." See Henri Lefebvre, *Critique of Everyday Life* 130-31, 242, 245 (Moore trans., 1992). He finds the struggle for the meaning of Auschwitz to rest on the efforts of its survivors "to go back in time, back to . . . the suffering which killed their feelings and their power to remember, in order to recapture the things the 'objective' reports have been unable to grasp." *Id.* at 242. Lefebvre, in arguing that the meaning of everyday life is found in the dialectic between reason and absurdity, concludes by then extracting, from a host of other possible meanings, including that of Hitler's sadism, a "dominant, essential meaning" for those concentration camps: "if racism represents the most extreme form of capitalism, the concentration camp is the most extreme and paroxysmal form of a modern housing estate, or of an industrial town." *Id.* at 245.

Further, in a rich interpretation of Derrida, Geoffrey Bennington cites Derrida as showing a synthesis between Freud and Moses in their both being lawgivers and both needing the other to be fully understood. Bennington finds these perceptions applicable to the work of Martin Bernal in the United States as Bernal argues against "the systematic repression of the Afroasiatic and more especially Egyptian roots of Ancient Greece." He finds an identity between Bernal's work and Bernal's uncertainty as to whether he may be "an academic outsider," and links that uncertainty to the creative substance of Bernal's work. *See Mosaic Fragment: if Derrida were an Egyptian . . . , in* DERRIDA: A CRITICAL READER, 97-119, 114-15 (David Wood, ed., 1992).

sion and distortion (e.g., Capone gangsterism in Chicago). These views were perhaps somewhat moderated over the years when the news of the successes of the civil rights movement and the consequent federal legislation was digested in French public attitudes. However, again from personal experience, such digestion occurred in the early 1960's in the context of racism against Algerians by large sections of conservative French people concerning the Algerian war.

It is in this context that President Mitterand offered his conclusions of the causal responsibility of national American policy for the racism at the heart of the civil breakdown in Los Angeles. In so doing, he directly connected Los Angeles to the question of whether there is a general national American condition of widespread oppression of Afro-Americans (and implicitly other peoples of color) by whites and the white-dominated official establishment. It is a valuable, bracing and invigorating question with an obvious answer to most Afro-Americans. Unfortunately, its reception in American public discourse would feature massive resources deployed to attack the validity of the question to escape answering it on its own terms. In fact, the Bush Administration's substantive response was to blame Los Angeles on the Democrats' social programs of the 1960's![48] Mitterand's action represents a valuable public policy opportunity for the United States created from the ashes of Los Angeles; it is rapidly being lost.

But Mitterand's, and the more general historical French, conclusions also represent a strongly implied conclusion of legitimacy and morality, and thus of international law. The determination that Afro-Americans have internationally perceptible human rights permits outside scrutiny for protection of those rights. That protection implies at least drawing conclusions of legally-cognizable wrongdoing and assigning public responsibility to the United States government and other elites as the violators.[49] This is important because Afro-America is a completely encapsulated group within the only remaining great power, with the presumed competence to regulate its own internal affairs as an incidence of its great power status. Absent perhaps Holocaust-like genocide, or organized racial slavery, traditional international law tends to screen from international view the treatment by the United States government (and theoretically, any government) of its constituent peoples. Minorities are assigned only such international standing as the national government consents to allow them[50]. Mitterand's statement is thus yet another harbinger of the continuing erosion of the traditional Westphalian model of international law. It is a harbinger of evolution toward some future model where constituent peoples have international rights against maltreatment by their national governments, rights that foreign actors have some obligation to help protect and enforce.

48. *See supra* note 45.

49. *Cf.* AMNESTY INTERNATIONAL REPORT—A COMPREHENSIVE REPORT ON HUMAN RIGHTS VIOLATIONS AROUND THE WORLD 268-71 (1992).

50. *See generally* James Crawford, *The Rights of Peoples: 'Peoples' or 'Governments'?*, *in* THE RIGHTS OF PEOPLES at 60-61 (James Crawford ed., 1988).

V. COMPARATIVE CLAIMS AND CAUSALITY - SOUTH KOREA

The President of South Korea expressed his country's concern on somewhat different grounds than President Mitterand. He officially conveyed his concern to the United States government for (1) attacks by Afro-Americans on Korean citizens and immigrants; (2) the inability of the Los Angeles police to protect Koreans in those circumstances; (3) the assertion of a legal duty of the United States to protect the South Korean Consulate from attack, and implied fault for its inability to do so; and (4) the lack of effective state remedies for Koreans harmed or damaged in these circumstances.[51]

Those claims by the Korean government raise two questions of possible United States responsibility under international law. The first is whether the United States might be liable for a denial of justice to Korea or its citizens or kinfolk. The second is whether the United States might be liable through some other breach under the doctrine of state responsibility. Both of these delicts can only be made out by a close examination of the facts surrounding any lack of protection in the riot regarding any or all Koreans. A charge of denial of justice would generally be founded on either the lack or the inadequacy of judicial or other remedies at law to compensate the victims, provided their harm was of a sort perceptible under international law.[52] Otherwise a violation of United States' obligations towards Korea could be based on the lack or inadequacy of police protection available to Koreans either in reasonable anticipation of the riot or during its course.[53]

The United States thus faces potential liability under international law from at least two directions. It faces possible liability to Korea and is also potentially liable to the majority of residents of South Central Los Angeles, and to Rodney King, for continuing violations of a list of their international human rights. The latter include rights to due process, to be treated fairly during an arrest and to be free of state-administered arbitrary physical abuse.[54] Residents of the barrios and ghettos of Los Angeles can well argue that their rights to equal protection, to work, to an education, to adequate food and health care, to adequate housing, to essential social services and other rights under both international customary and treaty law were, and are, violated on a continuing basis.[55] However, the application and enforcement of United States liability and the benefits of these rights to their holders may present different issues.

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51. *World Reacts with Shock and Criticism to Los Angeles Riots*, *supra* note 33, at A8.

52. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (4th ed. 1990); D. P. O'CONNELL, 2 INTERNATIONAL LAW, 1025-29 (1965).

53. O'CONNELL, *supra* note 52, at 1028.

54. These and other first generation rights have passed into customary law and can therefore be argued as binding on the United States. They are codified in the CONVENTION AGAINST TORTURE AND OTHER CRUEL INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, *supra* note 3.

55. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368 (1967); *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 360 (1967).

The President of South Korea stopped short of a full invocation of United States' liability under doctrines of state responsibility regarding harm to South Korean persons or property during the riots.[56] In so doing he practiced what was, relative to his country's interests, probably wise diplomacy. Additionally he at least implicitly accepted the premise that under international law the riots (as they produced harm to South Koreans) were beyond the immediate control of any reasonable action by Washington (or pertinent local California government). He also implicitly accepted the premise that during the riots, the police in Los Angeles at crucial moments were overwhelmed rather than derelict in their duties. Thus, South Korea did not invoke Mitterand's internal policy causal responsibility between Washington and aggrieved American citizens. Rather, South Korea laid the basis for the legal responsibility of the United States as a nation vis-a-vis Korea and other states whose nationals in Los Angeles were harmed during the riots. The latter is the more traditional claim under both diplomatic practice and international law.[57] But again, that claim is one which historically has been made against events and public order breakdowns in non-industrialized developing countries by the United States or European governments.

In President Bush's speech of May 1, 1992, his first after the riot, there was no reference to any international concerns, consequences or expectations about the events in Los Angeles.[58] However, at about the same time, a British newspaper article directly linked Los Angeles to an American "conspiracy of silence" on race, and the use of "codewords" about Afro-Americans,[59] concepts not touched by the great majority of American media. The article coupled a discussion of the notion of a "conspiracy of silence" with an open judgment that the remedies suggested by President Bush for Los Angeles were "characteristically useless."[60] Similar vocabulary is not often used by the American press about any president. The article closed with a discussion of the ingrained nature of racism in American politics. The latter is to be contrasted with President Bush's limited acknowledgment in the same speech that some racial discrimination just might exist in the United States.[61] The British article, like President Mitterand, was inclined to assess the entire American process and to draw conclusions of general applicability, specifically on matters of race. The article went further, however, to analyze part of America's causal responsibility for Los Angeles as being fostered by a national silence in public discourse (read, among white elites) about any meaningful discussion about racism.

56. *World Reacts with Shock and Criticism to Los Angeles Riots*, *supra* note 33, at A8.
57. O'CONNELL, *supra* note 52, at 1024-41.
58. *Text of Bush Speech on the Los Angeles Riots*, Reuters, May 1, 1992, *available in* LEXIS, Nexis Library, WIRES file.
59. *USA: Andrew Stephens America - Bush Plays The Prince of Wails - Reaction to Los Angeles Riots*, THE LONDON OBSERVER, May 10, 1992, at 13.
60. *Id.*
61. *Id.*

VI. The Vatican

The Vatican also responded to the Los Angeles riots. Pope John Paul II issued a statement wherein he called for civil harmony, and for sympathy and prayers for those hurt during the disturbances.[62] However, within the past several years, the Pope through papal letters and encyclicals has apparently sought to bring pervasive global economic, social and political problems and allocations of resources under the scrutiny of moral criteria. This has included the defining of injustice and assigning blame to particular states.[63]

In light of this demonstrated asserted competence to analyze and exercise moral authority, the Pope's response to Los Angeles is intensely interesting when compared with that of President Mitterand. By calling only for civil harmony, the Pope gave authority to United States political officials to resolve the situation under current American law and policy. He provided neither moral criteria for doing so nor for any normative assessment of United States law and policy. Unlike that of Mitterand, the statement comprised a *de facto* refusal to look into the details of the riots or their policy context. It also refused to identify and raise questions about domination and exploitation of peoples of color as a contributing factor, or to assess any questions of injustice raised by such details and patterns. One must ask whether such reticence stemmed from simply the low priority assigned by the Vatican to Los Angeles, a fearful respect for the possible retaliatory power of the United States or a subtle conclusion that more central discipline by national governments is needed to confront social problems irrespective of issues of domination and exploitation. The conclusion that, in response to Los Angeles, President Mitterand exercised greater moral international leadership than did the Pope is difficult to escape.

VII. Reaction From the Southern Tier[64]

A. Iraq

In light of Iraq's defeat by a United States-led coalition operating under United Nations authority in 1991, and its subsequent testing of the limits under both international law and practical competence of Security Council enforcement options under Chapter VII of the United Nations Charter, Baghdad's response to Los Angeles deserves some exploration. Iraq's strategy was to characterize Los Angeles as a massive violation of international human rights by the United States which threatened international peace and security. In this regard it sought an emergency meeting of the United Nations Security Council. Acting

62. *Pope, Saddened by L.A. Riots, Urges Halt*, Reuters, May 1, 1992, *available in* LEXIS, Nexis Library, WIRES file.

63. *See, e.g.*, Centesimus Annus, Chapter 4, May 2, 1991, *reprinted in* 21 Origins, May 16, 1991, at 1.

64. The Southern Tier refers to the fact that the majority of developing countries lie in the Southern Hemispheres of the global community. *See, e.g.*, Barbara Ward, The Rich Nations and the Poor Nations 40 (1962); *see also* Attali, *supra* note 5, at 12-17.

through an informal but known consensus among the five Permanent Members plus others, the Council refused to call such a meeting.[65] The consensus was so sweeping that the President of the Council did not feel obliged, in response to inquiries, to state reasons for the Council's refusal to meet.[66] Thus whether the decision rested on a belief that under these circumstances Los Angeles lay too deeply within the domestic jurisdiction of the United States to be within the competence of the Council, that Los Angeles produced insufficiently concrete international consequences to attract the Council's jurisdiction or was insufficient in some other way that cannot be ascertained. In any case, the width and strength of the informal Council consensus obviated any Council vote to even decide against such an emergency meeting.[67]

The Bush administration cannot have been displeased about one immediate *de facto* consequence of this effective bar to Security Council consideration: it upheld the previously-noted United States unstated policy objective of shielding racial discrimination involving Black Americans and Black America by official or private agencies from official United Nations scrutiny and action.[68] Mobilizing the power to bar such questions from the agenda of key international organizations is one of the signatures of a "superpower."

But in light of other parallels with "third world" countries to the emerging global posture of the United States, one wonders how long this superpower perquisite can remain effective. Furthermore, conditions of massive human despair and deprivation with clear and substantial human rights violations exist not only in Los Angeles but in many cities around the world. It would indeed be desirable policy for the national governments of those cities to be the continuing subject of official international scrutiny in the United Nations, the International Monetary Fund and other organizations that promise effective leverage and lawmaking authority to remedy such human deprivation.

It must be noted that it was easier for the United States to protect its exclusionary interests in the Security Council simply because Iraq was the adversary. Iraq was a current wrongdoer under international law, particularly under Security Council resolutions enacted under Chapter VII of the United Nations Charter.[69] Further, regarding the aftermath

65. Anthony Goodman, *U.N. Spurns Iraqi Bid for Meeting on L.A. Riots*, Reuters, May 5, 1992, *available in* LEXIS, Nexis Library, WIRES file.

66. *Id.*

67. *Id.*

68. *See supra* text accompanying footnotes 20 to 30.

69. U.N. S.C. Res. 664, 35th Sess., 2937th mtg., (Aug. 18, 1990) (requires Iraq to permit third country nationals to depart from Iraq and Kuwait and to rescind orders requiring closure of diplomatic and consular missions in Kuwait); U.N. S.C. Res. 665, 35th Sess., 2938th mtg., (Aug. 25, 1990) (endorses naval blockade of Iraq and Kuwait); U.N. S.C. Res. 666, 35th Sess., 2939th mtg., (Sep. 13, 1990) (asks Secretary General to obtain information regarding humanitarian needs created by sanctions); U.N. S.C. Res. 667, 35th Sess., 2940th mtg., (Sep. 16, 1990) (condemns aggressive acts by Iraq against diplomatic premises and personnel in Kuwait; demands release of foreign nationals); U.N. S.C. Res. 674, 35th Sess., 2951st mtg., (Oct. 29, 1990) (deals with hostage protection); U.N. S.C. Res. 677, 35th Sess., 2962d mtg., (Nov. 28, 1990) (condemns Iraq for attempting to

of its military defeat, Iraq was waging an open campaign counterattacking the United States, the United Nations and the imposition of United Nations' sanctions through the Security Council.[70] In its request for a Security Council meeting, Iraq arguably did not sufficiently connect Los Angeles, as a United States violation of international human rights, to a particular threat such violation posed to international peace and security. The United Nations Charter only provides for Security Council action when such threat exists.[71] Moreover, Iraq obviously did not come to the table with clean hands in light of its documented and often egregious human rights violations against the Kurds in the northern part of its territory and the Sh'ites in the south.[72] Another factor was the increased influence enjoyed by the United States in the Security Council since the demise of the Soviet Union and the success of Desert Storm built around United States military resources and leadership.

On the other hand, deprivations of Afro-Americans, as grounds for legal claims against the United States by Iraq and others previously would not have been remotely credible. Now, however, such claims are based on a wellspring of international expectations that Afro-Americans do have internationally-protectable rights that are appropriate subjects of international scrutiny.[73] As such these rights should be protected as against the United States government and even against private discriminatory action.[74] These expectations are widespread notwithstanding Iraq's invocation for propaganda use. In this connection, it is interesting that Iraq inverted the conventional wisdom that over time the foreign policy of a state generally mirrors that state's domestic policy. Baghdad asserted that America's *aggressive foreign* policy *caused* the Los Angeles riots.[75] That assertion was clearly made for propaganda purposes. But its availability, even for those purposes, is yet another indication of the rapidly intensifying global interdependence of the international community and the dissolution of traditional distinctions

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change demographic composition of Kuwait and to destroy civil sector); U.N. S.C. Res. 678, 35th Sess., 2963rd mtg., (Nov. 29, 1990) (sets out allied coalition terms for lifting economic sanctions).

70. For example, the Iraqi government purposely slowed down nuclear inspections which U.N. officials were attempting to conduct in Iraq following the end of the war.

71. *See* Article 39 of the U.N. Charter, which states:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

U.N. CHARTER art. 39.

72. *AFTER THE WAR; Unrest in Iraq Reported to Have Spread From Basra to Three Other Cities*, N.Y. TIMES, Mar. 5, 1991, at A1.

73. *See* YUSSUF KLY, INTERNATIONAL LAW AND THE BLACK MINORITY IN THE U.S. (1985); Henry Richardson, *The Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. —, at n.3 (forthcoming 1993); *see also*, the International Convention on the Elimination of all Forms of Racial Discrimination, Jan. 19, 1966, art. 2, 4, 5, 660 U.N.T.S. 195, *reprinted in*, 5 I.L.M. 352 (1966).

74. International Convention on the Elimination of all Forms of Racial Discrimination, Jan. 19, 1966, art. 2,4,5, 660 U.N.T.S. 195, *reprinted in*, 5 I.L.M. 352 (1966).

75. *Iraq asks Security Council to Meet on Los Angeles Riots*, XINHUA GENERAL NEWS SERVICE, May 5, 1992, *available in* LEXIS, Nexis Library.

between domestic and foreign policymaking in *any* state. Further, this idea is not a new one regarding the relationship of peoples of color to the United States. It recalls the claim by Afro-Americans in World War I that United States imperialism in the Spanish-American War, the Philippines and other American outreaches in Haiti and Europe helped produce the "scientization" of American racism by importing, codifying and justifying racist ideas and support from colonial experiences and alliances abroad.[76]

B. Libya

Libya, another consistent and public third world opponent of the United States, also issued a public statement on Los Angeles, though somewhat different in content than those from Iraq. Libya analogized the actions of Afro-Americans in the riots to the Palestinian liberation struggle against Israel and characterized them as the "black intifada."[77] This translates into the claim under international law that Afro-America comprises a "people," as do the Palestinians. That status serves as the basis for international legal rights of self determination and protection from official national reprisal for actions connected to their struggle for liberation.[78] Note that Libya also made this claim with less than clean hands regarding its mixed record of aiding liberation movements and supporting groups whose aims and activities can only be called terrorist. Also recall that in the recent past it has been the subject of military reprisals by the United States. Thus Khaddafi's objectives here were undoubtedly propagandistic.

This understood, we note that Libya's characterization of Afro-America as a people under international law with a right of self determination strikes a resonant chord in Afro-American history. Some of its leaders and their followers have made identical claims through the present day.[79] Simultaneously, such a characterization would be taken by numbers of Afro-Americans as expressing a greater degree of alienation from dominant American society than is comfortable, and they would not push Afro-American identity so far in that direction.[80] This division

76. Francis M. Beal & Ty dePass, *African-American Opposition to War - Past and Present*, CROSSROADS, Feb. 19, 1991, at 5-6.

77. *World Reacts with Shock and Criticism to Los Angeles Riots*, *supra* note 33, at A8.

78. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. 2, at 188, U.N. Doc. A/4494 (1960) (contains the Declaration on Granting of Independence to Colonial Countries and Peoples which encompasses the principle of self-determination through the free and genuine expression of the will of the people as a territory).

79. *See generally*, MALCOLM X SPEAKS (George Breitman, ed., 1965); E. U. ESSIEN-UDOM, BLACK NATIONALISM, A SEARCH FOR IDENTITY IN AMERICA (1962); PAUL ROBESON, HERE I STAND (1958). The current resurgence of admiration for Malcolm X in the Black community can be safely taken as some evidence of admiration for his ideas in this regard. *See also* MALCOLM X: SPEECHES AT HARVARD 161-82, (Archie Epps ed., 1968); MALCOLM X: THE LAST SPEECHES 111-81, (Bruce Perry ed., 1989).

80. Afro-American peoplehood implies that black Americans may in their authentic decisions about their own political destiny, where necessary, depart from or at least severely question basic principles of United States' foreign policy and domestic policy. Where U.S. policy principles diverge from Afro-America's sense of its own welfare, there have long been competing views in the black community around such questions. An im-

of interpretation in the Afro-American international tradition is an integral part of Black History.[81]

Neither the Libyan nor the Iraqi reactions to Los Angeles, nor that from European commentators, can be *solely* understood through the notion that America must be held under international expectations to the obligation of living up to its own principles and ideals. Under another body of expectations, the justice involved, constitutionally and otherwise, in the economic, political and cultural representation of the peoples of each country vis-a-vis its central government must be assessed by the international community for the continuation of that government's authority. There has also appeared in international law a right to representative government,[82] which right, like any other, may be invoked by any international actor in a position to do so for a range of purposes, desirable or otherwise. Clearly this new right claims part of its legal provenance from American ideals and constitutionalism as they have spread globally. This right is now being invoked by peoples beyond Eastern Europe and the Soviet Union.[83] It places a burden on those who would deny its application to encapsulated peoples within established states, such as Afro-Americans and other peoples of color within the United States. They must explain why it remains supremely important that such expectations continue to be barred by territorial borders as a matter of law, notwithstanding an intensifying global interdependence that percolates through all national states across the full value spectrum of human aims and resources. In response to Los Angeles, one Spanish commentator crystallized at least part of this burden by stating that Los Angeles is a frank recognition of a *global* trend where "white minorities are getting richer and masses of dark and yellow skin peoples every day are worse off, poorer and pushed toward despair."[84]

C. Africa

It was left to African commentators to explicitly hold America up to the obligation to obey its own ideals of justice, and to strongly characterize Los Angeles as having violated that obligation. This was the view in Cameroon.[85] It was also the view in Benin,[86] but in a wider context of

portant competing viewpoint is that Afro-American liberation will occur through their supporting U.S. foreign and military policy and even the broad outline of domestic policy in order to perfect claims for the maximum enforcement of their civil rights under the United States Constitution.

Personal decisions by individual Afro-Americans in the American political process bear on their comfort-level regarding both challenges and loyalties to either of these interpretations. *See* Richardson, *supra* note 73.

81. *Id.*

82. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

83. *Military Resists Political Change in Togo*, CHRISTIAN SCI. MONITOR, Mar. 26, 1992, at 4; *Pope Urges Leader to Uphold Rights*, N.Y. TIMES, Aug. 11, 1985, § 1, at 13.

84. *World Reacts with Shock and Criticism to Los Angeles Riots*, *supra* note 33, at A8.

85. Tsheko Lopala, *Injustice Américaine*, JEUNE AFRIQUE, May 28-June 3, 1992, at 61.

86. Nassirou Malam Issa, *Los Angeles: Et si la Victime Avait Ete un Blanc. . . ?*, JEUNE AFRIQUE, May 28 - June 3, 1992, at 61.

criticizing the United States for doing so by adopting inconsistent standards for judging and punishing Libya and Iraq while refusing to act against Israel for violating Resolution 242.[87] The Benin reaction further found these inconsistencies all of a piece with the racism in the Los Angeles acquittals.[88] This reaction represents the assertion of a further obligation on the United States, and perhaps on other, or perhaps only on other *major* states as well: that domestic and foreign policy must be conducted with consistency under principles of justice.

Such an obligation would be particularly applied to the United States for holding itself out (especially during the last two Presidential administrations) to be the global repository of standards of democracy and justice. Throughout most of the 20th century, this American claim has been one strategy through which it projected influence and postures of moral grace around the world, particularly regarding the character of national governments in countries where identified United States interests came to the fore. During the Cold War, the Soviet Union was the convenient foil for this strategy. Now that foil has disappeared, and it remains to be seen whether the United States as the sole purported great power may successfully project the same claims as keeper of the standards of justice, when the international community is now free to more closely examine their content free from comparative Cold War baggage. The new international legal right to representative government may well be defined by the democracy of the international community and not the democracy of the United States.

But just as the black slaves, cooks, maids and handymen have always had special insights about the politics of the "big house" of the plantation owner, one may expect African peoples and peoples of African descent to have special insights into and relationships to American claims about projecting global standards of justice, particularly as those standards are applied to themselves. Thus a Nigerian commentator noted starkly that Los Angeles demonstrates that decades of civil rights activity by the black community in the United States have yielded little fruit.[89]

A second Nigerian commentator put Los Angeles within a spectrum of legal events in the United States from the Noriega trial through the Mike Tyson trial and the Clarence Thomas hearings. He concluded that "American justice is being replaced by legal gymnastics."[90] He also noted that the United States used to be the model and refuge of those escaping injustice, but the treatment of Rodney King was just another example in a global phenomenon of denying the humanity of black men.[91] The appearance of European racism, he continued, represents not a new phenomenon but merely a lowering of barriers to enable the

87. S.C. Res. 242, U.N. SCOR, 1382d mtg., at 42, U.N. Doc. S/8289 (1967) (sets out principles for a peaceful settlement of the Arab-israeli conflict).

88. Issa, *supra* note 86, at 61.

89. Obie Chukwumba, *March of Fury*, AFRICAN CONCORD, May 11, 1992, at 42.

90. Obi Lewis, *The Blind Jurors of L.A.*, AFRICAN CONCORD, May 18, 1992, at 54.

91. *Id.*

world to see the underlying truth.[92] The comment then ended with an approximation—though wider in reference—of the Iraq claim before the United Nations Security Council: "the injustice being dispensed through racial prejudice is dangerous for world peace."[93] One thread of linkage and commonality may be noted: W.E.B. DuBois' prediction that the global problem of the 20th century will be the color line, provides at least part—a necessary part—of understanding the intellectual and policy structure of international reactions to Los Angeles.[94]

VIII. PROJECTION OF TRENDS INTO THE FUTURE

We have seen that international reactions to Los Angeles ranged from ascribing direct policy causality to Washington for the riots to more ambiguous calls for undefined civil harmony on some unspecified foundation of American power, wealth and other value and legal arrangements. They include attempted enforcement of the American obligation to follow its own principles of justice and a designation of Los Angeles as part of a global phenomenon of racism threatening world peace. It should also be recalled that Los Angeles and its progeny are happening during a decade of resurgent conservative political aggression, *inter alia*, pushing business and financial ideology, supporting language usage, legal protection, social privileges and respectability and the devolution of social responsibility from government to corporate decisionmakers under the guise of "individual responsibility."[95] This has occurred not only in the United States but throughout much of the international community under heavy Euro-influence, including the decisionmaking of key international financial institutions such as the World Bank and the International Monetary Fund.[96] The impact can be registered, for example, in a clear decade-long trend of many developing countries, under international inducement or economic coercion, revising their investment codes to make them more hospitable to incoming multinational corporations as a primary development strategy.[97] When this is added to similar trends in Britain, Japan and Ger-

92. *Id.*

93. *Id.*

94. *See* II THE SEVENTH SON: THE THOUGHTS AND WRITINGS OF W.E.B. DUBOIS 72 (J. Leslor ed., 1971).

95. The insertion of the "bottom line" and "sole responsibility" for the problems of the third world countries' concepts are examples. No "bottom line" as a wide analytical concept translates into business and commercial terms which cause damage to many third world countries. The "sole responsibility" concept places the blame for the distress of the third world countries on their own governments. This concept is inaccurate but borrows the American ideals of the frontier individual and translates it into an international system in order to give Western developed countries more leverage in aid negotiations and debt relief negotiations.

96. ANTHONY SAMPSON, THE MONEY LENDERS 126-32 (1981).

97. *See, e.g., Algeria Taking Steps to Attract Foreign Money*, AM. BANKER-BOND BUYER, Sept. 23, 1991, at 3; Jeff Hawkins, *Cameroon Puts Out Welcome Mat for Foreign Investment with New Code*, U.S. GOV'T PRINTING OFFICE, March 11, 1991, *available in* LEXIS, Nexis Library, MAGS file; David Housego, *India May Ease Investment Laws*, FIN. TIMES, June 26, 1991, at 4; Greg Hutchison, *Philippines Moves to Attract Foreign Investors*, FIN. TIMES, April 26, 1991, at 36; Kelly S. Nelson, *Resume Normal Relations with Vietnam*, THE CHRISTIAN SCI. MONITOR,

many and to the rise of notions of free enterprise economies as the sole route and condition for protecting basic human rights, the responsibility of corporate-oriented public policy and its decisionmakers for Los Angeles becomes more apparent. Shrill assertions of individual criminal or other personal responsibility as *sole* explanations for destruction of property, rebellion against existing authority and loss of life acquire more than a taint of fraud.

Thus the question arises of how to understand the Los Angeles riots in the context of the mighty struggle by international capitalism. This struggle is not only to externalize the profits and expansive arrangements of international capital through international legal and national policy systems, but also to internalize within the human mind its privileges through a push to, *inter alia*, modify the moral imperatives pertinent to peoples of color. Such peoples are thus to be made the ungrateful aggressors against a beneficent national and international system, which in its beneficence can assume no responsibility for their systemic or individual oppression. The "kind and gentle" system seeks to enforce false premises by not only attempting to subvert notions of justice, but through equal subversion of usages of language and regulation of standards of legitimate reasoning and knowledge.

The question for Afro-Americans and other peoples of color encapsulated in the United States may be the nature of the signal Los Angeles sends about, in the formulation of Jacques Attali,[98] America's role in the emerging Japanese-America-European Economic Community triad: whether these globally influential core societies will emerge as equal partners or even viable economies without resolving fundamental questions of racism and sexism towards their encapsulated peoples, injustice towards outsiders and other systemic oppression in each of their communities. This question cannot be separated from the relationship in the international community of these core states to their peripheries: Latin America for the United States, Africa for Europe and South Asia for Japan. The question is whether Attali's depressing Hobbesian vision of this relationship as nasty, brutish in its exploitation (except for favored and nomadic elites in periphery countries), and without much hope that the peoples of the periphery can equitably share, or be allowed to share in global development and resources equal to those of the core states, will accurately explain the transition to the 21st century.

But the periphery is not merely something "foreign, out there." Global interdependence brings periphery demands, resources, imperatives and moral and legal expectations into the triad, not least the United States. Los Angeles, notwithstanding its territorial location, *is* the periphery. Its demand for a massive reallocation of economic opportunities, infrastructure, respect for peoples of color, new approaches

May 14, 1992, at 18; *see also* Paul Peters, *Investment Risk and Trust: The Role of International Law, reprinted in* INTERNATIONAL LAW AND DEVELOPMENT 131-54 (Paul De Waart et al. eds., 1988).

98. *See* ATTALI, *supra* note 5, ch. 3.

to knowledge and reasoning and supporting rights and legal principles, comprise a demand from the periphery only slightly removed.[99] If the American response to Los Angeles decisively moves towards such reallocations and perceives that America has become a truly plural society, whether its elites so wish it or not, then a beacon might be lit in Attali's sea of gloom for justice in triad policies towards the peripheries.

The more immediate issue concerns the international legal system's current struggle to accommodate the push of international capital,[100] and still address with justice the political, economic, developmental, equitable and environmental needs of *all* peoples in the international community. Can law play a role in relieving Attali's pessimism about the slim chances for the equitable development of peoples in the periphery states? The issue, regarding law and the constitutive structure of the international community in the emergence of any new world order, may revolve in part around the current wave of proposed revisions of the United Nations Charter and reforms of the United Nations system. These proposals tend towards more stable funding and provision of military forces available for peacekeeping, enlargement of the Security Council to add more Permanent Members, reform of the Secretariat for economy and efficiency, a United Nations Development Security Council to address with higher priority international development needs and reexamination of the authority of the Secretary-General.[101]

Will such reforms, to the extent they are authoritatively enacted into law, create or help create rights and obligations to serve in relieving the plight of inner city residents in Los Angeles, London, Rio de Janeiro, Lagos or Mexico City, to name but a few? Will new foundations be laid for enforcing the full range of these peoples' international human rights as against their national governments, for attracting jobs and investment into those communities, for providing better safeguards against racist and other discriminatory law enforcement and national governmental resource allocation? Or will Charter reforms be blocked from such "domestic" application by the fearful Westphalian response of governments still reluctant to attain the competence to fairly represent *all* the peoples within their territorial boundaries? So far, there is little reason to believe that international corporate culture is equipped to realize how profoundly it must change to avoid a perpetual series of wars and attacks, of which Los Angeles was only one.

99. *See, e.g.*, DAVID RIEFF, *supra* note 7, at 31.

100. *See* Walter Russell Mead, *Bushism, Found A Second-Term Agenda Hidden In Trade Agreements*, HARPER'S, Sept. 1992, at 37 (presents a recent projection of trade related issues).

101. Paul Lewis, *U.N. Set to Debate Peacemaking Role*, N.Y. TIMES, Sept. 6, 1992 (Int'l), at 7.

RACE, RIOTS AND THE RULE OF LAW

DEBORAH WAIRE POST*

I cried when I heard the decision in the Rodney King case.[1] I cried because I am the mother of a black youth who is on the threshold of manhood. Christopher, my son, recently experienced a surge of testosterone. He grew several inches and developed a thin dark line of hair above his lip. His voice startles me because it is so unfamiliar, so unlike the sweet voice of the little boy I have lived with for fourteen years.

I cried when I heard the verdict in the Rodney King case because I am a lawyer and I know the power of presumptions.[2] This particular

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1. People v. Powell, No. BA-035498 (Cal. Sup. Ct. 1992).

2. See generally the discussion of presumptions as legal fictions in LON FULLER, LEGAL FICTIONS (1967). Presumptions are legal fictions, generalizations drawn from real life that are applied in situations where the state of facts assumed in the generalization does not exist. *Id.* at 41. In the case of Rodney King, the presumption that black men are dangerous was imbedded in the defense's arguments that: the police were justified in believing that (1) Rodney King was guilty of some crime because they had to engage in a high speed chase to apprehend him and (2) Rodney King was on PCP, a drug which would have endowed him with super-strength and made him oblivious to pain. Both assumptions proved to be false. Yet the jury used them to justify the response of the police.

Fuller distinguishes between expository and emotive legal fictions. *Id.* at 53-56. Emotive fictions are persuasive because they make us feel that a particular result is "just and proper." *Id.* at 54. It is an epistomological freeway. By-passing reason and self-conscious consideration, emotive fictions are directly knowable. They attach themselves to ideas which are a matter of faith; values and beliefs to which we are committed emotionally. An older woman from the town where I live with my son expressed the presumption the following way: "I think we see a black man as a destructive thing. That's my opinion as a white person. They're the ones that are usually apprehended as criminals." Alvin E. Bessent, *L.I.'s Great Divide: Poll on Race Relations Finds Pessimism, and a Chasm*, NEWSDAY, May 17, 1992, at 51.

We could treat this idea that black men are dangerous as a rebuttable presumption and arguably, that is what the jury did in the Rodney King case. As Fuller points out, the acceptance of someone else's inference without putting that person to the task of proving the facts has an effect on the administration of justice. Procedure can affect the outcome; the result in the case is often determined by the assignment of the burden of proof to one side or the other. *Id.* at 45.

We could test the basic premise of the presumption, examining the data or facts which are the basis for the generalization. Certainly, there is a perception that Blacks commit more crimes than whites and that Blacks are disproportionately represented in the criminal justice system and the prisons in this country. The reasonableness of a fear based on this data can be questioned if there is evidence, which is unrelated to their predisposition toward violence, to explain the disproportionate representation of Blacks in the criminal justice system. *See generally* Candace Kruttschnitt, *Criminal Justice System: Social Determinants, in* 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 470-76 (Sanford H. Kadish ed., 1983); Charles V. Willie & Ozzie L. Edwards, *Race and Crime in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1347-50 (Sanford H. Kadish ed., 1983) (a bibliography and summary discussion of the

presumption puts my son's life at risk, even more than before. This jury

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sociological work done in the area of criminal law, the relationship between race and class and the effect of both at various points in the criminal justice system). See also the following articles that deal with racial bias and the effect it has on the criminal justice system: Dwight L. Greene, *Abusive Prosecutors: Gender, Race and Class Discretion and the Prosecution of Drug Addicted Mothers*, 39 BUFF. L. REV. 737 (1991); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983); Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749 (1992) ("gang profiling" as a means of identifying and labeling dangerous men and the impact on Black, Latino and Asian men).

The statistical data on the number of black men who are arrested, prosecuted and convicted of crimes is suspect because racism is pervasive throughout the criminal justice system. The presence and effect of racism makes the use of "neutral" statistics misleading and makes the efficacy of any presumption questionable. Even if the data were conclusive, it would not justify the use of a presumption, which operates as an excuse in any confrontation between a white police officer and a black man, placing the burden on the black man to show that the presumption did not apply in a particular case. For an example of such a presumption in operation, see a discussion of the experiences of black men on the campus of Duke University in Jerome McCristal Culp, Jr., *Notes from California: Rodney King and the Race Question*, 70 DENV. U. L. REV. 199 (1993). *See also* Diana Jean Schemo, *Singling Out Blacks Where Few Are To Be Found*, N.Y. TIMES, Oct. 20, 1992, at B1 (describing the incident at Oneonta College where college officials gave the names of 125 black male students to police investigating an attempted rape).

It is important to consider why we use presumptions. Concerns with efficiency, stability and superior access to proof underlie presumptions. MCCORMICK ON EVIDENCE § 343 (John William Strong ed., 4th ed. 1992). At the heart of each rationale is some calculation of the effect on or cost to society and the injustices which might result because of the use of a presumption. In a criminal case, concerns with due process protect the defendant from presumptions which might lower the state's standard of proof. Defendants can offer an affirmative defense; but, I know of no instance where a presumption, a fact inferred from the existence of other facts, operates to exonerate a defendant from a crime. *See generally* MCCORMICK §§ 346-48. Arguably, any presumption supported by these particular facts, for example the ugly empirically verifiable reality of racism, would serve to perpetuate the advantage and the power, including the power of life and death, that police already have. The existence of such a presumption would invite physical abuse of any subordinated group.

Guido Calabresi has discussed the relationship between the reasonable person standard and racism in tort law. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW (1985). He concludes that the pull of Constitutional norms leads us to protect those beliefs which would usually seem idiosyncratic and that such norms are a significant factor in determining what is reasonable. *Id.* at 60. In an earlier section of the book that discusses insurance rates, Calabresi cites surrogate classifications for race (in the criminal law, these surrogates might focus on clothing or age or geographic location). Calabresi points out that:

> [W]e are unwilling to admit openly that some groups in our flawed society may have attributes which are *undesirable and even dangerous*. However, because *we* are in a deep sense responsible for the existence of these attitudes, we would like both to deny their existence and to avoid hindering or excluding further those who have such attitudes. We would like to do this without in any way suggesting that the attitudes themselves are to be tolerated, let alone encouraged. It is this ambivalence that so often pushes us into subterfuges and wishful thinking.

Id. at 42-43.

I think that the problem in criminal law is similar. The law makes discrimination illegal and racism unconstitutional. If the law has no effect, the resentment, hostility and maybe even violence of black groups, may be both unreasonable and predictable. Black men are no more dangerous than any other human being. Some feel the problem stems from deprivation and anger. The black community, in particular, black men, currently bear the burden of racism, even though the illegal and immoral behavior of the white community is responsible for breeding the violence. It is a burden that is imposed through the use of presumptions like the one that labels all black men dangerous. Even if more black men than white men commit crimes; even if the proportion of black men com-

verdict, this acquittal, legitimizes the presumption that black men are dangerous.

When Christopher was in sixth grade, I had a parent/teacher conference with his homeroom/social studies teacher. I remember how surprised he was at what he called Chris' emotional development. In his words, Chris had "a very good sense of the human condition." He elaborated further, "Chris knows that people are not perfect; that the world is not perfect. He has great sympathy and understanding for people." It was not long after that meeting that Christopher came home from school, sat down at our kitchen table and confessed to me that he had thrown a classmate up against a locker. He did this when he heard his white classmate call a black girl, who was also in their class, a "nigger." The student did not understand Christopher's violent reaction. "Why are you angry?" he asked, "I didn't call you nigger?"

Chris had taken matters into his own hands. He administered a punishment that he thought appropriate; one that was likely to deter future transgressions. Chris never considered approaching the school authorities to report the incident that made him angry. Most children adhere to an unwritten code that discourages reporting such incidents to adults. As a parent, though, I felt I should have been able to say, "You should have reported it to the principal. There was no need to take matters into your own hands." I honestly could not tell him that. We both knew that students get detention for running in the halls, or for throwing food in the cafeteria, but there is no detention for engaging in hate speech.[3] We both knew that the response of the principal would have been similar to that of the student. Arguably, my son experienced no harm. However, if his assault on his classmate had been reported to the principal, Chris would have had no defense.[4]

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mitting crimes is greater than the proportion of white men committing crimes; even if black men are more dangerous than white men, young black men should be able to walk the streets and drive through neighborhoods without fear of the police. It is part of their right to what Calabresi calls the "unfettered participation" in the activities which are "essential to being a part of our society." *Id.* at 34.

3. The middle school in my school district has several kinds of sanctions available: (1) detention, which is the punishment imposed for the least serious delicts and (2) in-house suspension, a punishment, which is reserved for major transgressions. Detention occurs before or after school. In house suspension means the student spends the day in the "time out" room. Detention is used for relatively minor transgressions like food fights in the cafeteria or rude or disrespectful behavior (usually towards attendants and teachers' aides). Sometimes teachers and administrators are creative in making detention unpleasant. *See, e.g., Frank Sinatra: He's Still Crooning, But 90's Teens Sure Don't Swoon*, NEWSDAY, Sept. 22, 1992, 519 (teacher plays Frank Sinatra records during detention).

4. After I heard about an incident at an adjacent school district with a much more ethnically diverse student body, where a student was suspended for calling an Asian classmate a derogatory name, I felt it was only fair to test my assumption. I called the principal at my son's middle school, Mr. Nadler, and interviewed him. I told him what had happened to Chris and asked what he would have done. He said that the student who used the racial epithet would have been placed in the "time out" room. This would be viewed as an opportunity to re-educate the student, give him an opportunity to grow from the experience and talk about the impact of his actions on other people and the alternative choices available to him. Chris would have received the same punishment for the inappropriate use of force. I am not sure what effect my status as a law professor had on Mr. Nadler, but

Around commencement time last year, Chris and I listened to the remarks of President Bush in which he dismissed the need for regulations which would give us a remedy for racist remarks like the one uttered by Chris' white classmate. George Bush explained to us, and to all America, that the norms of civility are sufficient to control such behavior. People with "good breeding" do not call other people names.[5] The President, the man who would defend America and the ideal of patriotism from political dissidents who burn the American flag, condemned hate speech regulations and reminded us that free speech is what democracy is all about.[6]

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he commented that he would treat the behavior of the student who used the word "nigger" as a violation of the law. I did not correct him.

5. I found President Bush's remarks on free speech confusing and contradictory. He managed somehow to acknowledge, and then deny, the danger of racism in the same speech.

> Ironically, on the 200th anniversary of our Bill of Rights, we find free speech under assault throughout the United States, including on some college campuses. . . . What began as a crusade for civility has soured into a cause of conflict and even censorship. . . . [P]olitical extremists roam the land, abusing the privilege of free speech. . . . Such bullying is outrageous. It's not worthy of a great nation grounded in the values of tolerance and respect. So, let us fight back against the boring politics of division and derision. Let's trust our friends and colleagues to respond to reason. As Americans we must use our persuasive powers to conquer bigotry once and for all. We must conquer the temptation to assign bad motives to people who disagree with us.

Remarks at the University of Michigan Commencement Ceremony in Ann Arbor, May 4, 1991, 27 WEEKLY COMP. PRES. DOC. 563, 565 (May 13, 1991).

6. President Bush was reacting to Texas v. Johnson, 491 U.S. 397 (1989), a Supreme Court decision which classified flag-burning as protected speech. A political brouhaha followed, punctuated by calls for a Constitutional Amendment to prevent such unpatriotic acts. There are other policies that I think reflect the ambivalence (or hypocrisy) of the past administration on speech-related matters. The Bush Administration supported the gag order that would deny federal funding to family planning centers that offer abortion counseling. The regulations adopted by the Health and Human Resources Administration, 42 C.F.R. § 59 (1991), withstood a constitutional challenge based on the First Amendment in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) and also a Congressional attempt to overturn them that President Bush vetoed. A concern for free speech (of doctors) was offered as a rationale for a memorandum issued by the President to the Secretary of Health and Human Services, which proposed four principles to govern the implementation of the regulations. Ultimately, these four principles, which were adopted by HHS, were the basis for declaratory relief from the gag order granted in a recent federal court decision. National Family Planning and Reproductive Health Ass'n v. Sullivan, 979 F.2d 227 (D.C. Cir. 1992) (failure to comply with the notice and comment procedures of the Administrative Procedure Act). Vice President Quayle was not concerned that his support for the police organizations advocating a boycott of Warner Records might chill the free speech of rappers like Ice-T, whose heavy metal band performs the song "Cop Killer." ICE-T AND BODY COUNT, *Cop Killer, on* BODY COUNT (Time-Warner Bros. 1992). *See generally* John Leland, *Rap and Race*, NEWSWEEK, June 29, 1992, at 47 (discussing the controversy).

I do not pretend to have expertise in the First Amendment arena. Certainly, I cannot engage in the kind of critique that has been offered by others who are much more knowledgeable on the subject. *See, e.g.*, State v. Mitchell, 485 N.W.2d 807, 810 n.5 (Wis.), *cert. granted*, 61 U.S.L.W. 3435 (U.S. Dec. 12, 1992) (No. 92-515) (citing articles on the First Amendment); Jack M. Battaglia, *Regulation of Hate Speech by Educational Institutions: A Proposed Policy*, 31 SANTA CLARA L. REV. 345 (1991) (summarizing the literature on the subject); Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CIN. L. REV. 1 (1991); *see also* Leslie Epstein, *Civility and Its Discontents: Offensive Speech on Campus*, AM. PROSPECT, Summer 1991, at 23; Franklyn S. Haiman, *The Remedy is More Speech*, AM. PROSPECT, Summer 1991, at 30; Cass R. Sunstein, *Ideas, Yes; Assaults, No*, AM. PROSPECT, Summer 1991, at 35 (debate among and between these three authors concerning the First Amendment).

I have observed the debate with a certain fascination, wondering why lawyers and law

If a balance must be struck between the competing values of equality and liberty, I personally think we ought to err in the direction of equality.[7] But then, I think of prejudice as an infectious disease. There

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professors never feel comfortable unless they have a classificatory system on which to rely to explain the choices that are made with respect to the government control over forms of speech. Why must we try to fit speech that we find pathological and socially dangerous within some pre-existing category devised by a court which may or may not choose to discuss the social values the categories are meant to promote or preserve. "In a sense, the entire jurisprudence of free speech reflects a general categorization, composed of assumptions about which kinds of communicative acts are inside the first amendment and which are outside." LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 940 (2d ed. 1988) (citing Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981)). Obviously, the attempt to tailor a statute to fit within a doctrine does not guarantee success. *See, e.g.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (city ordinance drafted with the assistance of Catherine MacKinnon to fit hate speech within the 'fighting words' category violated the Constitution).

First Amendment doctrine reveals much about the value choices we make as a nation and the commitment to traditional concepts of what is good and what is bad for the body politic. I have noted with some amazement the willingness of the Court to contemplate the possibility of valuelessness when speech involves human sexuality. The Court takes a two-track approach to obscenity—one that involves it in a discussion of the value of the speech and the harm that the speech can cause, while the other appears neutral, but is not. Even speech that might be protected can be regulated with zoning ordinances designed to protect the moral sensibilities of the community. TRIBE, *supra* at 934. The government need not tolerate speech that one might assume is political, and protected, if the Court chooses to focus on where the speech occurs, rather than what is being said or if it invokes the false dichotomy between speech and conduct. *Compare* Young v. New York City Transit Auth., 903 F.2d 146 (2d Cir.), *cert. denied*, 111 S. Ct. 516 (1990) (municipality could regulate beggars to protect the public from the threatening and annoying conduct of the beggars, since begging was not protected speech) *with* Loper v. New York City Police Department, 802 F. Supp. 1029 (S.D.N.Y. 1992) (loitering ordinance unconstitutional because beggars were using the public streets. The court explicitly discusses the message communicated by the act of begging).

Courts almost universally reject the need for hate speech regulations even when they acknowledge the fact that such speech was traditionally or historically intended to intimidate and threaten particular communities within our society. *R.A.V.*, 112 S. Ct. at 2539-50; UMW Post, Inc. v. Board of Regents of the Univ. of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). Hate speech will never be unprotected as long as the Supreme Court thinks that the harm caused by the speech is offset by some positive value it places on that speech. Hate speech will continue to have value as long as it is considered "political" speech.

I suppose my disagreement with First Amendment absolutists is born of cynicism. Not all "political" dissidents deserve the protection of the First Amendment. True political dissidents seldom receive the protection they deserve. If exceptions exist, and clearly they do under a variety of doctrines, why not adopt an approach which brings the discussion of values out into the open. Antipathy towards the ideas contained in speech may be appropriate. President Bush supported a constitutional amendment which would have silenced one form of expression of dissatisfaction with the government. He, and others like him, believed unpatriotic behavior should be punished because it is more harmful than the speech of extremists who advocate genocide. Perhaps we should debate the values reflected in this choice.

7. Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). Judge Cohn noted in his introduction that "[i]t is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict." *Id.* at 853.

If constitutional lawyers are unable to see equality as the more compelling interest in these cases, at the very least there should be a recognition that the hatred contained in such speech poses a significant danger to the survival of our nation. Hatred is the solvent that dissolves the bonds of a community; it causes death and destruction. Anyone who has any doubts on this subject need only to look at the tragedy that continues in what used to be Yugoslavia.

Justice Robert H. Jackson, perhaps because of the role he played in the Nuremberg

is no reasoning with hate. It is irrational. Racism and prejudice of every kind are forms of psychosis; flaws in the human psyche, which make those who suffer from them dangerous.

From my perspective as a member of a group threatened by the resurgence and growing violence of white supremacy groups, the threat to my liberty and my safety justifies a minor limitation on the freedom of a Skinhead or member of the Aryan Brotherhood to engage in hate speech. I would like to prevent, not avenge, the death of my son at the hands of some adolescent misfit who could be recruited and then persuaded to kick my son to death.[8]

The Republican administrations of Reagan and Bush, as well as the Justice Department and the judiciary they have transformed with their appointments, do not share my views. The invalidation of hate speech regulations is justified by denying the reality of my experience and the reality of racism. There is no official recognition of either the immediate harm done by such speech or the direct connection between such speech and violence against Blacks, Jews, women or homosexuals, to name others who are the object of hate speech and bias crimes.

It is hardly surprising that those who are at risk resort to self-help. After exhausting every legal argument available to block the march through Skokie, Illinois, the survivors of the holocaust resorted to self-help. They threw rocks at the Nazis whose free speech rights had been defended by the American Civil Liberties Union and vindicated by the federal courts.[9] In 1992, the peaceful march in Denver on Martin Lu-

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Trials, understood better than most the danger of hatred and the power of speech. He did not focus on the harm to the individual; rather he was concerned that if such speech went unchecked it would harm democratic institutions. Dissenting in Terminiello v. Chicago, 337 U.S. 1 (1948), he wrote:

> [W]e must bear in mind also that no serious outbreak of mob violence, race rioting, lynching or public disorder is likely to get going without help of some speech-making to some mass of people. A street may be filled with men and women and the crowd still not be a mob. Unity of purpose, passion and hatred, which merges the many minds of a crowd into the mindlessness of a mob, almost invariably is supplied by speeches. It is naive, or worse, to teach that oratory with this object or effect is a service to liberty. No mob has ever protected any liberty, even its own, but if not put down it always winds up in an orgy of lawlessness which respects no liberties.

Id. at 32. Justice Jackson alluded to the misuse of liberty by those, like Goebbels, who had only disdain for the democracy, and continued:

> In the long run, maintenance of free speech will be more endangered if the population can have no protection from the abuses which lead to violence. No liberty is made more secure by holding that its abuses are inseparable from its enjoyment. . . . The choice is not between order and liberty. It is between liberty with order and anarchy without either.

Id. at 37.

8. The two most celebrated civil suits against white supremecists were brought after a young black man, Michael Donald, was lynched in Alabama, and an Ethiopian student, Mulugeta Seraw, was kicked to death in Portland, Washington. In both cases, Morris Dees, of the Southern Poverty Law Center, sought damages which were designed to "compensate" the victims' parents and to drive the hate groups involved out of business. *See, e.g.*, Don Duncan, *$12 Million Bill for Metzger—White Supremacist Must Pay Murder Victim's Family*, SEATTLE TIMES, Oct. 23, 1990, at B1; Frank Judge, *Slaying the Dragon*, AM. LAW., Sept. 1987, at 83; Jesse Kornbluth, *The Woman Who Beat the Klan*, N.Y. TIMES MAG., Nov. 1, 1987, at 23; Richard E. Meyer, *The Long Crusade*, L.A. TIMES MAG., Dec. 3, 1989, at 14.

9. *See* ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE AND

ther King's Birthday erupted into violence as young people reacted to the presence of the Klan.[10] Most recently, on the eve of the verdict in the Rodney King case, street gangs in Los Angeles shouted, "No justice, no peace."[11] Two years before the riots, my son threw a classmate up

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THE RISKS OF FREEDOM (1979) (describing the lawsuit and the events leading up to the day when the march occurred). When the march was eventually held, members of the National Socialist Party in America, led by Frank Collin, were pelted with rocks and eggs.

10. On a day when more than 15,000 people turned out to honor the memory of Martin Luther King, the Klan planned a rally which was attended by 125 Klan members. The speeches by Klan leaders were heard by the faithful, the news media and counter-demonstrators who were on hand to protest the Klan rally. The leaders were spirited away, the Klan faithful fled through sub-basement tunnels under city buildings to a waiting bus. They were protected by the police as they entered the van and the protestors began throwing bottles and snowballs. Twenty-one of the protestors, six of whom were juveniles, were arrested by the police. It was reported that one protestor made the following comment about the racism of the police: "Those (expletive deleted) don't protect black people in their own neighborhood," but "[t]hey come out in record numbers to protect the KKK." John C. Ensslin & Mark Brown, *King Day Observance Explodes into a Riot, Confrontation is Worst in U.S. as Nation Honors Civil Rights Leader Who Preached Non-violence*, ROCKY MOUNTAIN NEWS, Jan. 21, 1991, at 6, 20 (the author of this article did not delete the expletive nor did the editors of the *Denver University Law Review*. It was deleted from the newspaper account of the disturbance). The newspaper report also described the protesters as "a ragtag collection of several hundred gang members, drunks and thugs" that went after the Klan and then the police. *Id.* at 6. Other reports referred to them as young people who did not understand Martin Luther King's message. Brian Weber, *King's Legacy Lost on Youth, Webb Says*, ROCKY MOUNTAIN NEWS, Jan. 22, 1992, at 8. Many of the "activists" blamed federal judge, U.S. District Court Judge Richard P. Matsch, for granting a permit to the Klan. Robert Jackson, *Violence Came as 'No Surprise'*, ROCKY MOUNTAIN NEWS, Jan. 22, 1992, at 23.

11. The phrase, "No Justice, No Peace," was chanted by many of the residents of South Central Los Angeles. Arguably, the looting, burning and destruction of property was attributable to both the lack of justice in the trial and the absence of "economic justice" within the community. Jonathan Peterson & Hector Tobar, *South L.A. Burns and Grieves*, L.A. TIMES, May 1, 1992, at A1.

When I first saw the films of the riot and heard the chant, "No Justice, No Peace," it seemed appropriate. I never stopped to think about the source of the phrase. "No Justice, No Peace" has been labeled the "activist mantra." Jonathan Rieder, *Crown of Thorns: The Roots of the Black Jewish Feud*, NEW REPUBLIC, Oct. 14, 1991, at 26. I was surprised, I suppose, by the level of political consciousness it revealed. Somehow I did not expect that from young people living in poverty. I expected passivity, lethargy, hedonism and hopelessness; I expected something that looked like the "culture of poverty" academics and politicians decry. *See, e.g.*, FRANK LEVY, DOLLARS AND DREAMS: THE CHANGING AMERICAN INCOME DISTRIBUTION (1987) (Discussing the culture of poverty and the attributes associated with this "culture," as lifted from the preface to Oscar Lewis', LA VIDA). Levy also explores the intergenerational transmission of poverty; a theory which has currency in the 1990s and which relies heavily on the rhetoric of pop psychology, exhorting the welfare system for creating dependency. *See also* LEE RAINWATER & WILLIAM L. YANCY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY (1987) (discussing the work of Daniel Patrick Moynihan). I saw John Singleton's BOYZ IN THE HOOD (Columbia Pictures 1991), but I too should have been listening to rap music. *See, e.g.*, Havelock Nelson, *Hip-Hop Offered Tip-Off on Urban Unrest*, BILLBOARD, May 23, 1992, at 22 ("[R]ap acts like Public Enemy, X-Clan, Too Short, 2Pac, N.W.A., Intelligent Hoodlum, Sister Souljah, Ice-T, and Ice Cube have been pairing the pain and frustrations of black life with bleak, bristling soundscapes that scream 'No justice, no peace!'—aural visions of burning buildings and smashed glass, boiling protests and 'smoked pork' (violence against the police).").

I tried to trace the phrase, "No Justice, No Peace" back to its origins. It was in use when Gavin Cato died in Crown Heights and was written on a sign at the sidewalk shrine to him. There are reports that the mob that killed Yenkel Rosenbaum shouted both "Kill the Jew " and "No Justice, No Peace." This disturbs me. There is no real understanding of oppression if the phrase is used so inappropriately; one oppressed group shouting racial epithets at another. *See* David Evanier, *Invisible Man: The Lynching of Yankel Rosenbaum*,

against a locker for calling someone a nigger.

Each of these responses to prejudice varies in terms of the violence involved and in the damage done to other human beings, but each was a violation of the law. I am a lawyer, charged with the responsibility of defending and upholding the rule of law. Yet I cannot, in good conscience, commend my son, or any member of those groups affected by the virulent message of the hate epidemic in our society, to the protection of the ethic of "civility." Civility means nothing more or less than unequal justice. Civility means you have no legal recourse. Civility is just another way of saying that justice in America is not only not color blind, it is color conscious in the worst possible way.[12]

NEW REPUBLIC, Oct. 14, 1991, at 21. If the reports of the behavior of the Hassidic community in Crown Heights are true; if their patrols assumed the role of the white police; if, as it is alleged, the Hassidic patrols interrogated "[B]lacks they deem[ed] out of place;" if "they detained a black youth merely because he was racing for the subway;" or beat another black youth "to a pulp" because he "allegedly grabbed a man's yarmulke," then the hostility and the use of the phrase makes more sense. Jonathan Rieder, *supra* at 30.

Before the Crown Heights incident, there was the incident in Bensonhurst where Yusef Hawkins was murdered. The banner "No Justice, No Peace" was carried by a crowd of demonstrators after Keith Modello was acquitted of the murder. It was part of the litany the crowd chanted after the trial. *See* Lorrin Anderson, *Cracks in the Mosaic*, NAT'L REV., June 25, 1990, at 36 (An absurd article on "black racism." The "racism" the writer decries is the hatred of whites. To call that hatred racism is a perversion of the meaning of the term.). Perhaps the phrase began here at Bensonhurst, an invention of activist Al Sharpton.

12. It is our consciousness of color that makes us pretend that color does not matter. Lawyers often play a significant role in challenging this assumption. The summation in a famous case, the prosecution of eleven Blacks for the murder of a white man serves as an example. The *Sweet* trial, as it came to be called, took place in Detroit in 1926. The prosecutor argued that race and color had nothing to do with the trial although the man killed had been part of a mob of white men outside the Sweet home. Clarence Darrow insisted that race had everything to do with it, and brought that point home over and over again in his summation. Darrow asked:

> Suppose you were colored. Did any of you ever dream that you were colored? Did you ever wake up out of a nightmare when you dreamed that you were colored? Would you be willing to have my clients' skin? Why? Just because somebody is prejudiced! Imagine yourselves colored, gentlemen. Imagine yourselves back in the Sweet house on that fatal night.

Clarence Darrow, *Summation in the Sweet Case, in* LAW AS LITERATURE 346, 358 (Ephraim London ed., 1960). He returns to the theme again:

> Here were eleven colored men, penned up in the house. Put yourselves in their place. Make yourself colored for a while. It won't hurt, you can wash it off. They can't, but you can; just make yourself black for a little while; long enough, gentlemen, to judge them and before any of you would want to be judged, you would want your juror to put himself in your place. That is all I ask in this case. They were black, they knew the history of the black.

Id. at 366. Once again, Darrow reiterates:

> I should imagine that the only thing that two or three colored people talk of when they get together is race. I imagine that they can't rub color off their faces or rub it out of their minds. I imagine that it is with them always. I imagine that stories of lynching, the stories of murders, the stories of oppression are a topic of constant conversation. . . . Suppose you were black. Do you think you would forget it even in your dreams? Or would you have black dreams?

Id.

When we avoid the issue of color, it is because we know racism is dangerous and wrong. But ignoring the prejudice that exists in society is one way of insuring its continued vitality. For that reason, neutral principles are insidious and dangerous. When the doctrines or legal rules applied are "neutral," the result in a case seems legitimate and, even more importantly, it seems "principled," a characteristic which is highly valued in our

Sometime after his confrontation with this classmate, Chris began having nightmares. In one, he recognized a building as his school, but there were gurneys in the hallways. The patient on the nearest gurney had no head. A big schoolbus was parked outside the building and it had a sign across the front which read "DETENTION." Christopher told me that he was frightened. He was afraid that the bus was there to take him away.

I never taught my son to be afraid. When he experienced racism, he learned to be afraid. Racism is experienced as fear. The touch and the taste of it, manifested in the sweat on your palms, the dry feeling in your mouth, the apprehension that makes your stomach go sour, is fear.[13] These sensations are grounded in a visceral understanding of the nature of racism. Racism is expressed through violence, or in its less extreme forms, in actions which are designed to humiliate.[14] One escapes from

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legal system. Most of us think that equal justice under the law means that those who have wealth and privilege are not immune from attack. In reality, inequality is embedded in the law, and the only result achieved by neutrality in the application of the law, is the preservation of that inequality. *See, e.g.*, J. Skelly Wright, *The Courts Have Failed the Poor*, N.Y. TIMES MAG., Mar. 9, 1969, at 26. One of the themes which can be found in Critical Race Theory is the criticism of the idea of a 'colorblind' or neutral law. *See, e.g.*, Anthony E. Cook, *The Temptation and Fall of Original Understanding*, 1990 DUKE L. J. 1163 (1990) (reviewing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1989)); Kimberle W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). For an interesting discussion of race as culture and the unwillingness of the courts to confront that issue see Neil Gotanda, *A Critique of Our Constitution is Color-Blind*, 44 STAN. L. REV. 1 (1991-92) and Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L. J. 365 (1991) (white aesthetics are involved in employer regulation of hair styles, and a decision which found this rule to be neutral overlooked the physical and cultural differences between men and women, Blacks and Whites, and the intersection of two forms of hegemony in the treatment of black women).

The myth of neutrality is particularly dangerous in areas of the law where the effects of racism are not immediately apparent. I teach partnership law and I have always been bothered by the absence of race in cases. I can find cases which reveal attitudes about class and gender, but I cannot find cases which mention race. I could speculate that courts would not classify a black person as a partner, but without a case in which a court discussed the race of the participants in a business, how could I prove it? Then I found Butler v. State, 111 S.W. 146 (Ct. Crim. App. 1908), a criminal case involving a charge of embezzlement. The defendant offered partnership as a defense. He lost this argument because neither the court nor the defendant himself was willing to say that a white man and a black man could be partners. I would never have known the reason for the holding in the case; I would never have understood the failure by the court to follow a line of precedent which would have dictated a different result, if not for a dissent which adopted verbatim the brief of defense counsel, James H. Hart, which discussed honestly and openly the effect of race and racism on everyone involved in the case, including the defendant. *Butler*, 111 S.W. at 148 (Davidson, P. J. dissenting).

13. The same physical sensations are described in Charles R. Lawrence, III, *A Dream: On Discovering the Significance of Fear*, 10 NOVA L. REV. 627 (1986). Professor Lawrence, through his response to a question by a character in his dream, discovers that the fear black people learned in slavery and have carried with them since emancipation is a fear of physical violence or deprivation, as well as a fear of humiliation, which he calls the fear of rejection. The fear of the oppressor (mythical and real), created through the act of oppression, is both rational and irrational.

14. Racism has as its basic premise the right of one people to dominate another—predicated on the assumption that the dominant group is superior to the subordinate group. So racism is always about putting black people in their place, teaching them not to be "uppity." This is often accomplished through humiliation. I remember how humiliated I felt, how incredibly angry I was, to pick up the *New York Times* and see black men in

the fear only to discover the meaning of anger.

A few years ago while I was collecting oral histories in Houston, an elderly black woman described her memories of Jim Crow to me: "Our parents never told us not to ride in the front of the bus. They didn't tell us to stay away from the water fountains that were marked 'White.' We just knew."[15] Black children sensed the presence of danger; they knew enough to be afraid. She also described the "riot" by the black soldiers from Fort Logan in the summer of 1917.[16] She remembered black soldiers marching through the streets of the Fourth Ward in disciplined fashion—in military formation. She told me that the riot began when a bus driver insisted that one of the soldiers sit in the back of the bus.[17]

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their shorts with their hands up against a wall, their clothing apparently in a pile off to one side. The photographers and the news media had been invited to a raid of three Black Panther centers by the Philadelphia police. If the purpose had been to show that the Panthers were dangerous; if the search for concealed weapons was prudent, why did it all take place in the street and in full view of the cameras? Police Commissioner Frank Rizzo wanted to humiliate these men and he succeeded. Donald Janson, *Panthers Raided in Philadelphia*, N.Y. TIMES , 25 Sept. 1, 1970, at A1, A25.

When I try to make people understand what racism is all about, I often resort to a speech which was given by Ms. Edith King, President of the Coalition of 100 Black Women, in Houston, Texas at the opening of the Women of Courage Exhibit. Ms. King introduced Rosa Parks, the guest of honor at the opening. The photographs from the Exhibit can be found in ARTHUR AND ELIZABETH SCHLESSINGER LIBRARY ON THE HISTORY OF WOMEN IN AMERICA, RADCLIFFE COLLEGE, WOMEN OF COURAGE: A CATALOG OF AN EXHIBITION OF PHOTOGRAPHS, (Radcliffe College 1984) (based on the Black Women Oral History Project sponsored by the Arthur and Elizabeth Schlessinger Library on the History of Women in America, Radcliffe College. The exhibit was of photographs of Judith Sedwick). Ms. King had this to say about Mrs. Rosa Parks:

> Perhaps now her act seems a small thing. But to those of us who rode in the back of the bus, who stood silently while others sat; to those of us who remember the indignation of no public restrooms and other facilities; to those of us who remember carrying just a little fear with us always; for all the missed carnivals, plays, concerts and trips to the library and all the other small things that demeaned us daily—this act was and is the height of courage. For Mrs. Rosa Parks quietly did what each of us wished we had the courage to do.

Edith King, Sept. 5, 1985, given at Julia Ideson Public Library, Houston, Texas. (on file with author).

Humiliation was institutionalized in the South. However, the absence of segregation in the North did not mean that we who were raised in the North were free from the effects of racism or the techniques of racists.

15. In connection with the Women of Courage Project, I interviewed several black women and prepared their biographies for the opening night ceremonies honoring their contributions to the community. Among them was Mrs. Martha Countee White, the granddaughter of Jack Yates, founder of the Antioch Baptist Church and community leader before and after Emancipation. I cannot be sure that Ms. White told me this story; it could have been any of the number of women or men I interviewed for the project.

16. There are many parallels which can be drawn between the riots in Los Angeles and the riots in Houston. *See generally* ROBERT V. HAYNES, A NIGHT OF VIOLENCE: THE HOUSTON RIOT OF 1917 (1976); JOHN M. LINDLEY, A SOLDIER IS ALSO A CITIZEN: THE CONTROVERSY OVER MILITARY JUSTICE 1917-1920 (1990) (an account of the effect of the court martials which followed on military justice). *Camp Logan* is also a play by Celeste Bedford Walker which has been presented at Wellesley College and at the Terrace Theatre in Washington, D.C. *See* Matthew Gilbert, *Camp Logan Filled with Ensemble Power*, THE BOSTON GLOBE, Oct. 9, 1991, at 75 (reviewing the production); Pamela Sommers, *The Character of Racism*, WASH. POST, June 21, 1991, at B2. After the "riot" in Houston, 156 black soldiers were tried for mutiny, murder and riot. JOHN M. LINDLEY, *supra* at 8.

17. *See* HAYNES, *supra* note 16, at 90-114; LINDLEY, *supra* note 16, at 13-15 (describing the events of the day of the riot). Most Whites and Blacks would be surprised to learn that long before the bus boycott in Montgomery, Alabama, Blacks had engaged in boycotts to

History reports other reasons for the riot. Some say that it began when a black soldier was beaten by a white police officer.[18]

It does not really matter to me which of the two incidents precipitated the incident. What does matter is the reaction of the young black men to the injustice of Jim Crow; and the reaction of the white community to the rebellion of those young black men.[19] Seventeen whites were killed, four of them police officers. Twenty-three young black men were executed, thirteen of them hung and buried in secret, unmarked graves and many more were imprisoned.[20]

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protest the segregated seating on street cars. *See* HAYNES, *supra* note 16, at 28 & n.43 (citing August Meier & Elliot Rudwick, *The Boycott Movement Against Jim Crow Street Cars in the South, 1900-1906*, J. AM. HISTORY, Mar. 1969, LX & 756-75).

18. *See generally* HAYNES, *supra* note 16, at 30-31 (discussing the use of force by police and the disparate treatment accorded black citizens in a moral crusade designed to rid Houston of prostitutes and bootleggers). The account which appears in the official reports issued after the investigation of the events that day describe not one, but two occasions when two Houston policemen beat, and then arrested, black soldiers. The first was an unarmed solder, Private Edwards. The police later detained Corporal Baltimore. A great many of the police apparently made it a practice to call the black soldiers "nigger." LINDLEY, *supra* note 16, at 13. The reports were unanimous in assigning much blame to the police for what happened that day. *See id.* at 7-36, discussing the three reports on the Houston riots: COL. GEORGE O. CRESS, INVESTIGATION OF THE TROUBLE AT HOUSTON, TEXAS BETWEEN THIRD BATTALION, 24TH INFANTRY AND CITIZENS OF HOUSTON, AUG. 23, 1917 (1917) (available at Old Military Records Division, Records of United States Army Continental Commands, 1821-1920, Record Group 393, File 370.61, National Archives Building, Washington, D.C.); NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE REPORT OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *in* CRISIS 15 (Nov. 15, 1917); MAJ. KNEELAND S. SNOW, REPORT ON THE CIRCUMSTANCES ATTENDING THE MUTINY (1917).

Sixty years later, in 1977, the Houston police murdered a Mexican-American, Joe Campos Torres. In the words of one of the police, they beat him up and threw him into Buffalo Bayou "to see if the wetback could swim." Bill Curry, *4 Ex-Policemen Indicted in Death of Tex. Prisoner*, WASH. POST, Oct. 20, 1977, at A13. When the state trial resulted in a one-year sentence and a $2000 fine for each of the defendants, the Carter administration reversed a ban on federal prosecutions for civil rights violations on which state action had been taken, a policy that had existed from the time of the Eisenhower Administration. *Id.* The federal prosecutors did not fare much better. The defendants in the federal trial were convicted, but Judge Ross Sterling gave them a ten-year suspended sentence for depriving Torres of his civil rights and a one-year jail term for a separate misdemeanor. Jerrold K. Footlick, *Houston Justice*, NEWSWEEK, Apr. 17, 1978, at 122. In 1985, the predominantly white police force in Houston vowed to embarrass and humiliate Police Chief Lee Brown, who is black, at a meeting of the International Association of Police Chiefs in Houston. Wayne King, *Police Union Vows to "Humiliate" Houston's Chief at World Meeting*, N.Y. TIMES, Aug. 6, 1985, at A13.

19. Six months after the riot, Ted Koppel interviewed the people who live in South Central Los Angeles. Once again, I was surprised at the level of political awareness among the general population, young and old, women and men. This awareness manifested itself in young men who characterized the events of April 26, 1992, as a rebellion, not a riot. All agreed that they would like to rebuild their community, but they could not rebuild without resources; they could not survive without jobs; and the inaction on the part of the government (which is a stand-in for the white majority) would result, ultimately, in even more violence. *Nightline* (ABC television broadcast, Oct. 21, 1992). *See also After the Riots: The Search for Answers; Tucker Says the Status Quo Must Change*, L.A. TIMES, May 8, 1992, at A6 (Assemblyman from Los Angeles issues prediction that if the status quo remained the same, "we'll burn this state down.").

20. The army separated the soldiers who were to be tried into three groups. The first group consisted of 63 men. Thirteen were tried and hung; only five were acquitted. Forty-

Things have not changed much since 1917.[21] A fear of black men still dwells in the collective unconscious of America. The verdict in the Rodney King case legitimized that fear. The videotape of the violent attack on a white truck driver will, no doubt, lead to the conviction of the young gang members who are alleged to have participated in that attack.[22] The swiftness with which justice will be meted out in their case is also an expression of that fear. In a way, this fear, the very vehemence of the condemnation of the riots, is an admission that young black men have reason to be angry. The condemnation is a warning that rebellion will not be tolerated.

My son was willing to take responsibility for defending his dignity and the dignity of the only other black student in his class. He knew without my telling him, that his actions, which we both considered justified, would put him at risk of punishment. The decision in the Rodney King case, and the events that followed, only confirmed what we both knew: penalties are exacted for acts of defiance, when pride makes submission impossible. The soldiers from Camp Logan were hung, and Rodney King was beaten because he refused to submit. I would wager that the gang members will receive harsh prison sentences. In his dream, Chris was afraid of the punishment for the crime that he felt he committed. After all, someone lay headless and mute. Who but Christopher could be responsible for this? But what would his dream have been if he had done otherwise; if he stood by without defending himself or others from racist attacks?

Last summer, a friend told me about a young black child, a ten year-old, who struggled with his own passivity in a situation where a black classmate was beaten by white boys in their class. The image of all of

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one received life sentences, and four received shorter terms of imprisonment. LINDLEY, *supra* note 16, at 18.

Eventually, the life sentences were commuted after public outcry over the secrecy surrounding the first court martial and the lack of appeal from the sentences. A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 1910-1932 332 (Herbert Aptheker, ed., 1990). The NAACP worked to obtain the parole of those men who were sentenced to prison; and finally in 1938, the last of them was released. One account of the struggle of the NAACP on their behalf describes the events of September 28, 1921 when James Weldon Johnson, then Secretary of the NAACP, had an audience with President Harding and presented a petition signed by 50,000 persons asking for the pardon of 61 soldiers confined in Levinworth as a result of the 1917 riot. *Id.* at 334.

21. *See*, Nathaniel Jones, *Introduction*, 70 DENV. U. L. REV. 195 (1993).

22. *The Messenger*, a monthly magazine published by A. Philip Randolph and Chandler Owen published an editorial in January, 1918 concerning the administration of justice in the case of the black soldiers from Camp Logan. APTHEKER, *supra* note 20, at 195. The editorial in *The Messenger* compared the treatment received by white soldiers who shot and wounded Blacks in East St. Louis to the treatment given the men of the 24th Regiment in Houston. In the former case, no soldiers were apprehended or tried; in the latter, thirteen of the black soldiers were tried, denied the right of appeal, executed in secret and buried in unmarked graves. *Id.* at 196-97.

It seems that vengeance and justice are the right of only the white majority. We shall see whether justice tempers the punishment in the case of the young black men in Los Angeles, or whether, in the words of James Weldon Johnson, their trials bear the "aspect of visitation upon their color rather than upon their crime." James Weldon Johnson, Speech Delivered to President Harding (1921), *reprinted in* APTHEKER, *supra* note 20, at 334. The occasion for the speech is discussed *supra* note 20.

these young white boys in a circle around a black youngster on the ground, kicking him and yelling racial epithets, made my blood run cold. I found it incredibly sad that a young black boy could find himself standing on the periphery, witnessing a brutal attack, unsure of how he should respond. There was a punishment imposed in that case after the parents of the black child called the police and had them investigate the incident. The school suspended two or three of the white boys who were thought to have goaded the mob of boys into violence. It also suspended the black student who had been beaten. It all began, you see, because he pushed another boy on the playground.[23]

Both Chris, who chose to act, and his young friend, who chose not to act, understood intuitively that defending who they were would put them at risk. The risk exists because racism distorts the perception of right and wrong; it realigns responsibility and blame, shifting both from those who hate to those who are hated.[24] In the Rodney King case, specious arguments about control shifted responsibility from the mob that attacked the man to the man who was attacked.[25] Actually, the shift was

23. I heard of the incident from a child and from several parents whose children attended an elementary school in Rolling Hills, California, a suburb of Los Angeles. In an unrelated incident that same month, the older child in this same family described a flier shown to him by a "friend" which compared the head of an ape to the head of a black man and in pseudo-scientific form presented statistics which proved the biological connection between the two.

24. Defense attorney John Barnett explained that the strategy in the Rodney King case was to make the jury "feel" something, to "put the jury in the shoes of the police officer and make them feel what they felt, what it's like to be an officer at 11:45 p.m. on Foothill Avenue." John Riley, *Inside the King Case, Part I: What the Jury Heard That the Public Didn't*, NEWSDAY, May 13, 1992, at 17. For another startling example of misplaced, but natural, empathy, see THE TIMES OF HARVEY MILK (Pacific Arts Video 1986) (copy on file with author). A voice-over describes the reaction of the jury that watched the videotaped confession of the man who killed Mayor George Moscone and Harvey Milk, a gay rights activist and city official. The jury cried as Dan White broke down and explained that he had been under pressure. He killed Harvey Milk after killing the Mayor because Harvey Milk "smirked" when Dan White showed up at his office.

25. *See* Kimberle Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 DENV. U. L. REV. 283 (1993) (discussing disaggregated narrative). It is hard to say which was more pernicious, the strong pull of the identity between the defendant and the jury, or willingness to assign fault to the victim. The defense emphasized the fact that Rodney King rose after the first attack and lunged toward one of the police officers. A juror on *The Today Show* (NBC television broadcast, Apr. 31, 1992) stated that Rodney King was "directing the action." According to the juror, "even during the handcuffing, he was still fighting. During the process he was laughing and uttering sounds. No, he was in complete control." Lee A. Daniels, *Riots in Los Angeles: The Jury; Some Identified as Jurors Aren't in Accord on TV*, N.Y. TIMES, May 1, 1992, at A23. Retta Kossow, a juror who was interviewed on *CBS News* (CBS television broadcast, Apr. 30, 1992) repeated that argument: "I am thoroughly convinced, as were the others, I believe, that Mr. King was in full control of the whole situation at all times. He was not writhing in pain. He was moving to get away from the officers and he gave every indication he was on PCP." Nina Bernstein, *Bitter Dispute in Jury Room; How 12 Ordinary Citizens Met For 7 Days to Produce the Verdict that Shook L.A.*, NEWSDAY, May 14, 1992, at 5. Her husband added in another interview that his wife felt sorry for Mr. King, "[b]ut how about the police officers? Their lives were completely ruined because Mr. King wanted to go out and have a good time." *Id.* Despite Ms. Kossow's protestations, not all the jurors agreed. *See, e.g.*, Bernstein, *supra* (report of juror who called the Donahue show sobbing).

The control theory offered by the defense was about as preposterous as the theory used by the defense in the Milk case: Dan White had been suffering from a depression brought on by eating junk food. In the King case, the defense sought to make the victim

more subtle than that. It was a shift to the idea of what Rodney King represents, the potential for violence which lies dormant in all who are oppressed. Do not expect symmetry in the law where gang members are concerned. There will be no shift of guilt from the mob we witnessed attacking a white victim to the idea that white victims represented, the group that discriminates against Blacks and refused to convict even the police officer who rained fifty-six blows on Rodney King.[26]

The morning after the riots began, there was a picture of a black minister on the morning news.[27] It showed him as the verdict was announced. A single tear rolled down his face. He epitomized the disillusionment that Blacks feel. The Civil Rights Movement and the legal strategies devised by Charles Hamilton Houston,[28] pursued by Justice Thurgood Marshall and Judge Constance Baker Motley, and legal victories like *Brown v. Board of Educ. of Topeka*[29] and the Civil Rights Act of 1964,[30] led us to believe that the law could be the instrument of reform; a means of achieving real equality, or at least freedom from discrimination. Now, we know better. We hear the voice of racism in the decisions of a Supreme Court that refuse to provide a remedy when defendants say "We are not racist," even when their conduct can reasonably be

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responsible for what happened to him. In the Milk case, the defense succeeded in convincing the jury that sugar was responsible for what happened. Sugar was the official culprit, but Dan White's confession blamed Harvey Milk for his own death. Perhaps they were persuaded that Harvey Milk was the source of Dan White's fall from political grace and that he was so arrogant that he literally asked (with that now infamous smirk) for his own death.

The strategy employed so successfully in both cases is part of a larger phenomenon, which is the criticism of the "victim" mentality or ideology. *See, e.g.*, SHELBY STEELE, CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1990). Professor Steele seems to have the corner on the market when it comes to articles on race that appear in *Harpers Magazine*. His most recent effort, written after the riots in Los Angeles, is a further attack on what he calls the orthodoxy of the diversity movement. He dismisses those who continue to fight injustice in this society as the work of those who are interested in self-aggrandizement; as "the narcissism of victims," power purchased at the "exorbitant price of continued victimhood." Shelby Steele, *The New Sovereignty: Grievance Groups Have Become Nations Unto Themselves*, HARPERS, July 1992, at 47-54. See generally the discussion of the use of the "rhetoric of poverty," the persistence over time of the practice of blaming the victims of poverty for their condition, particularly the use of this rhetoric in Supreme Court decisions in Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991).

26. I think it was probably a Freudian slip by the black prosecutor when he described the jurors as people who "believe there is a thin blue line separating law-abiding citizens from the jungle—the criminal element." Nina Bernstein, *supra* note 25, at 31. Although the District Attorney did not call the jurors racist, his metaphor certainly calls up the language of racism: the classification of Blacks as animals, one step removed from their simian relatives. Perhaps he was still thinking about Officer Powell's description of a domestic dispute as "something right out of Gorillas in the Mist." Riley, *supra* note 24, at 17.

27. *The Today Show* (NBC television broadcast, Apr. 29, 1992).

28. Judge Leon Higginbotham refers to Charles Hamilton Houston as "the chief engineer and the first major architect on the twentieth century civil rights legal scene." Judge A. Leon Higginbotham, Jr., *Foreword*, in GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS at XV (1983). Judge Higginbotham turns the jungle metaphor on its head when he refers to the "jungle of racism tolerated by the American Legal Process." *Id.*

29. 347 U.S. 483 (1954).

30. 42 U.S.C.A. § 2000e (1981 & Supp. 1992).

viewed as racist;[31] which is philosophically opposed to remedial legislation based on race;[32] whose neutrality protects those who threaten to

31. *See generally* TRIBE, *supra* note 6, §§ 16-20 (discussing the discriminatory purpose requirement). Professor Tribe has entitled one section "The Problem of Discriminatory Purpose: When Reservations About Remedies Masquerade as Questions About the Existence of Constitutional Violations." *Id.* at 1502. While I would not presume to dispute the point with Professor Tribe, I have to confess that I would not be so charitable in ascribing motive. When now Chief Justice Rehnquist first described his judicial philosophy as "majoritarian," I read that as a statement of his political philosophy; a description of his allegiance and his commitment to hold the line in a political struggle. John A. Jenkins, *The Partisan*, N.Y. TIMES, Mar. 3, 1986, § 6 (magazine), at 28, 32.

The rejection of a "disparate impact" test for one which looks for fault on the part of the state, the "perpetrator perspective," is another example of the aversion to the idea of collective guilt. *See* TRIBE, *supra* note 6, at 1509 (citing Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Laws: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-54 (1978). See also the discussion of collective guilt *infra* note 50 and accompanying text.

The Supreme Court has interpreted the Equal Protection Clause so that it is a deterrent not to racism, but to the overt expression of that racism. In a society where people have learned that it is important to deny their racism it is virtually impossible to prove discriminatory intent.

Although the Court has held that discriminatory intent can be shown by circumstantial evidence, that burden is very difficult to meet. *See* Crenshaw & Peller, *supra* note 25. *Compare* Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) (no discriminatory purpose in zoning ordinance) *with* Hunter v. Underwood, 471 U.S. 222 (1985) (provision in Alabama Constitution which disenfranchised those convicted of crimes of moral turpitude was unconstitutional). As my colleague Professor Martin A. Schwartz pointed out, if the Court really wanted to find discriminatory intent based on circumstantial evidence, it could have done so in death penalty cases. *See* Susan Waite Crump, *Lockhart v. McCree: The "Biased but Unbiased Juror," What Are the States' Legitimate Interests*, 65 DENV. U. L. REV. 1 (1988); Regina M. Harris, Note, *McCleskey v. Kemp: The Shadow of Racism on the Capital Sentencing Process*, 8 N. ILL. U. L. REV. 173 (1987); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty*, 43 FLA. L. REV. 1 (1991); Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing*, 18 N.Y.U. REV. L. & SOC. CHANGE 777 (1990-91); Mary Elizabeth Holland, Note, *McCleskey v. Kemp: Racism and the Death Penalty*, 20 CONN. L. REV. 1029 (1988);

The more recent cases distinguish between private and public discrimination; which relieves the state of responsibility for segregation when it reflects the "natural" preference of private individuals. *See* Freeman v. Pitts, 112 S. Ct. 1430 (1992). Racism becomes a part of our human condition, a cultural artifact which is indistinguishable from other less harmful preferences—for example, the preference of living in a brownstone or rowhouse or co-op, or in a Georgian, ranch style or tudor home, or living in a neighborhood with Blacks or without Blacks. Racism is something which we cannot remedy as a society because the state cannot be blamed for the preferences of individuals. The state is not a person, it is a collection of institutions acting through people for the benefit of people, it is the means of expressing and implementing our collective will. Properly viewed, it should be seen as an appropriate resting place for our collective guilt. The burden then falls on the state, as the representative of our entire community to discourage prejudice and to act affirmatively to remedy the harm which has been caused in the aggregate by individual actions.

32. The use of the shibboleth "Our Constitution is Color Blind," has been used to attack minority set-aside programs and other affirmative action programs. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (limiting the scope of federal civil rights legislation, the Court found no remedy under § 1981 for discrimination which was alleged to have occurred after the contract was formed); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (minority set-aside program for Richmond, Virginia was unconstitutional).

There may be a different standard applied when Congress specifically endorses a policy of affirmative action. *See* Metromedia Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990) (Congress responded to an executive decision to curtail the affirmative action policy of the FCC by adding a provision to an appropriation bill which prevented the change in policy). For a discussion of the ideological divide between the majority and the dissent see Patricia

harm us;[33] and that has a Black man who has so identified with the oppressor that he would allow a white prison guard to beat someone who is the image of himself.[34] The minister's tears and mine were a measure of the depth of our mutual despair; our grief when we both realized, he, the layman and me, the lawyer, that the law has no power against racism.

I cried when I heard the decision in the Rodney King case. I was angry at the perversion of the rule of law; at the immoral shifting of responsibility and realignment of right and wrong. The jury was asked to determine whether the police used "excessive force."[35] Ultimately, that determination involved some assessment of whether the police behaved reasonably.[36] The "reasonable person" test is an article of faith among lawyers and lay people. "Reasonableness" is an idea that is at

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Williams, Comment, *Metro Broadcasting, Inc. v. FCC: Regrouping the Singular Times*, 104 HARV. L. REV. 525 (1990).

33. *See, e.g.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (invalidating ordinance which criminalized behavior that threatened minorities).

34. Hudson v. McMillan, 112 S. Ct. 995 (1992). *See* Linda Greenhouse, *High Court Defines New Limit on Force By a Prison Guard*, N.Y. TIMES, Feb. 26, 1992, at A1; Ruth Marcus, *High Court Extends Curb Against Beating Prisoners; Ruling Represents a Rare Victory for Inmates*, WASH. POST, Feb. 26, 1992, at A4; Ira Mickenberg, *Court Clarifies Indefinite Issues In Criminal Law Cases*, NAT'L L.J., Aug. 31, 1992, at S6 (discussing the incongruity between Thomas' dissent in Hudson v. McMillan, 112 S. Ct. 995 (1992) (Thomas, J., dissenting) and his testimony at confirmation hearings at which he noted his identification with the prisoners who passed by his office in the court of appeals); Martin A. Schwartz, *The Prisoner Beating Case*, N.Y. L.J., Apr. 21, 1992, at 3. *See also* Dale E. Butler, Comment, *Cruel and Unusual Punishment Takes One Step Forward, Two Steps Back*, 70 DENV. U. L. REV. 393 (1993).

35. The jury instructions in People v. Powell are seventeen pages long. *See* People v. Powell, *Jury Instructions*, *available in* LEXIS, California Library, L.A.P.D. File. The four counts on which the defendants were tried were explained in some detail. Count I charged Officers Powell, Wind and Briseno (who argued that his use of force was in defense of another, namely, Rodney King) with violation of California Penal Code § 245(A)(1). CAL. CODE § 245(a)(1) (West 1988 & Supp 1993) (Assault with deadly weapon or force likely to produce great bodily injury; punishment). Count II alleged a violation of California Penal Code § 149, CAL. CODE § 149 (West 1988) (Officer unnecessarily assaulting or beating any person) making it unlawful for any public officer who, under cover of authority and without lawful necessity, to assault or beat any person. Count III charged Powell with filing a false police report. CAL. CODE § 118.1 (West Supp. 1993) (Peace officer's false report). Count IV charged Officer Stacey C. Koon with filing a false police report. CAL. CODE § 118.1. Count V charged Officer Koon with being an accessory in the commission of a felony in violation of California Penal Code § 32. CAL. CODE § 32 (West 1988) (Accessories defined). The indictment is available in LEXIS, Cal. Library, LAPD file.

36. With respect Count II (officer unnecessarily assaulting or beating another person), the judge stated:

> In making an arrest the officer may subject the person being arrested to such restraint as is reasonable for the arrest and detention. A peace officer who is making an arrest may use reasonable force to make such arrest or to prevent escape or to overcome resistance.
>
> Where a peace officer is making an arrest, the person being arrested—and the person being arrested has knowledge, or by the exercise of reasonable care, should have knowledge that he is being arrested by a peace officer and such peace officer is making an arrest, it is the duty of the person to refrain from using force or other means to resist such arrest unless unreasonable or excessive force is being used to make the arrest.
>
> However, a peace officer is not permitted to use unreasonable or excessive force in making an otherwise lawful arrest. If an officer does use unreasonable or

the heart of our legal system.[37] It is central to the belief in the morality of the law itself.[38] The verdict is immoral because racism has been legit-

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excessive force in making or attempting to make an arrest, the person being arrested may use reasonable force to protect himself against such excessive force.

As I have stated, a peace officer who is making a lawful arrest may use reasonable force to make such arrest or to prevent escape or to overcome resistance.

It is lawful for a peace officer to use force in the arrest if a reasonable peace officer in the same or similar circumstances would believe that such force is necessary to make the arrest or to prevent escape or to overcome resistance. In doing so, such peace officer may use that force and means that a reasonable peace officer, in the same or similar circumstances, would believe to be necessary to make such arrest or to prevent escape or to overcome resistance.

The right of a peace officer to use reasonable force exists only so long as it would appear to a reasonable peace officer, in the same or similar circumstances, that that force is necessary to make such arrest or to prevent escape or to overcome resistance.

When that force would no longer appear to a reasonable peace officer, in the same or similar circumstances, to be necessary, the right to use reasonable force no longer exists and the use of such force is not reasonable. The use of force that is not reasonable is unlawful and without lawful necessity.

The people have the burden to prove that the force used was not lawful and without lawful necessity. If you have a reasonable doubt that the use of force was unlawful and without lawful necessity, you must find the defendant not guilty.

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer under the same or similar circumstances. The test of reasonableness is not capable of precise definition or mechanical application. It is — its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others and whether he is actively resisting or attempting to evade arrest by flight. The question is whether the totality of the circumstances justifies a particular sort of force.

People v. Powell, Jury Instructions, supra note 35.

37. The notion of reasonableness, and its use as a standard, cuts across the legal boundary lines. In contract law, we interpret behavior, including words and expressions, to determine whether a reasonable person would perceive a communication as an offer: "[T]he 'objective' test affords the courts an opportunity to control or regulate individual exchange behavior through the use of that great 'collectivist,' the 'reasonable' person." EDWARD J. MURPHY & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW 261 (4th ed. 1991) . The Uniform Commercial Code fills the gaps in contracts with reasonable terms: a reasonable price, § 2-305; delivery is due within a reasonable time, § 2-309; and the parties, if they are merchants, have a duty to act with commercial reasonableness, § 2-104, cmt. 2. AMERICAN LAW INST., NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, SELECTED COMMERCIAL STATUES (12th ed. 1991). Reasonableness is also a benchmark for corporate directors; the officer or director has to behave in a way which he or she "reasonably" believes to be in the best interests of the corporation and make the appropriate inquiries in any situation which would alert a "reasonable" director. AMERICAN LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, PROPOSED FINAL DRAFT § 4.01(a) (1992). We have seen how often reasonableness was invoked in the People v. Powell jury instructions on only one of the many counts. *See People v. Powell, Jury Instructions, supra* note 35. And, of course, the judge did instruct the jury on the standard of proof, beyond a reasonable doubt. *Id.*

38. *See generally* LON FULLER, THE MORALITY OF LAW (revised ed. 1969) (discussing "[t]he morality that makes law possible"). He also argues that the law must be clear. *Id.* at 63. I am sure that the reasonable person standard would satisfy his requirements, because it is, to use his own words, one of a species of "common sense standards of judgment that have grown up in the ordinary life outside legislative halls." *Id.* at 64. This great collectivist, the reasonable person, is the standard which dispenses with difference and assumes assimilation into the dominant culture. *See* CALABRESI, *supra* note 2, at 28 (discussing the reasonable person standard and the effect on diversity). It is unfair and dishonest to ask people to abide by your rules and then to change the rules because they do not work to your advantage. I discussed this problem of manipulable standards in an earlier article. *See* Deborah Post, *Reflections on Identity, Diversity and Morality*, 6 BERKELEY WOMEN'S L.J. 136

imated as reasonable, rational human behavior.

I have read about the protests of the jurors who are hurt by the allegations that they are racist. They claim that the evidence was not so clear cut. The defense offered an explanation of the beating which was credible: the police were justified in continuing to use force as long as Rodney King resisted. His shouts of obscenities, his continued attempts to stand, his struggle, proved that he was "in control of the action."[39] I have trouble explaining this reasoning to my son. It does not accord with my understanding of American values: Americans believe that human beings are rational and should behave accordingly; Americans have great faith in science and in empirical evidence; and Americans believe in the efficacy of the law in discerning the truth.

The reasonable person is the connecting tissue that links these visions. It is one way in which we translate our aspirations for humankind into a system of ethics. This objective standard, I learned as a law student, is a moral yardstick by which we measure our fellow citizens. The reasonable person is a standard which determines the scope of our responsibilities to one another. You don't have to be a lawyer to understand the idea that we are responsible for what we know and what we should know. Purposeful ignorance is no defense. Even Christopher knows the futility of the "I didn't mean it" defense. Invariably that defense elicits the "You should have known better" judgment.

The jurors could have asked whether the police officers should have known better. The answer would have been that no reasonable person in the position of those police officers could have believed that Rodney King was in control of the situation. For that matter, no reasonable person in the position of those jurors could have exonerated the police after viewing that videotape. No rational human being could have disregarded the evidence that jury had before it. Some new and unusual meaning must have been assigned to the images which were captured on that videotape.[40]

(1990-91). Fuller indicated that the most difficult questions arise when the law involves questions of interpretation. He was discussing the interpretation of the law by courts, but what he said is equally true when promotion and tenure committees in legal institutions interpret what "quality" means, or when a jury decides what is "reasonable." When one interprets behavior or conduct in a way that is contrary to the ordinary understanding of that behavior, it is a lie. Call that cheating, or a shell game. It is fraud and it is immoral. Perhaps I should offer you Fuller's version which is more elegant and certainly more polite. He stated that there must be congruence between official action and declared rule, and noted that one of the dangers to that congruence was the effect of prejudice. FULLER, *supra*, at 81.

39. *See* Bernstein, *supra* note 25 (discussing the jurors' comments after the verdict).

40. The jury received the following instructions with respect to the expert testimony which was offered in the case:

> [I]n rendering an opinion as to the use of force in this case, one or more expert witnesses expressed an opinion on what physical acts are shown on exhibit 2, the so called Holliday videotape. Such experts have no more skill than a lay person in viewing the videotape and determining what it shows in this regard. To the extent that you find that the videotape is important to you in your deliberations and decision in this case, you are the sole judges of what physical acts are shown on this tape.

Jury Instructions, *supra* note 35. I would say that the judge went pretty far in telling the jury

In fact, the interpretation the defense offered and the jury embraced was based on a novel use of the term "reasonable." It was a standard of reasonableness that takes race into account unilaterally. The standard of reasonableness they employed was one which does not acknowledge the reasonableness of the attempt by a black man to escape the police when they give chase,[41] but does acknowledge the justifiability of the fear that white cops have of black men. The reasonableness of the police was measured by something which approaches a subjective standard; one which attempts to understand and place the actions of the police in context and to understand the emotions they experienced.[42] It is a standard of reasonableness that ignores the relative positions of the two parties, or the superior force, numerical and technological, that the police enjoyed.[43] It is a standard which presents the police as victims.

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to take the expert testimony with a grain of salt. To the extent that the jury (or the eight people who dominated the jury) interpreted the pictures they saw in a new way, I would conclude that they wanted to see what was described to them. This is not a case where a group of people was manipulated by a narrative which grabbed their emotions; a technique which can be used effectively to create empathy and communicate information about a reality which is unknown to the person who hears the narrative. This is an example of people seizing on an explanation which allowed them to reach the result they wanted. *But see* Crenshaw & Peller, *supra* note 25.

41. *See* Culp, *supra* note 2 (discussing how to address the "race question" in the courtroom and the "rules of engagement").

42. See a discussion of the defense strategy *supra* note 24. Most recently, a call was made for sympathy and understanding in another case of police misconduct. Mr. Rudolph Giuliani, former and future mayoral candidate in the City of New York, accused Mayor Dinkins of a double standard when he did not forgive and forget the rampage of police officers in front of City Hall, police officers who carried signs which referred to Mayor David Dinkins as a "washroom attendant." Again, this is racism as degradation and humiliation. *See* George James, *Police Dept. Report Assails Officers in New York Rally: Disciplining of 42 Is Sought for 'Unruly' Protest*, N.Y. TIMES, Sept. 29, 1992, at A1. Mr. Giuliani contrasted Mayor Dinkins' behavior towards the police officers as unwarranted in light of his lack of "zealousness" with regard to "rioting, looting and murder". Some say it was Mr. Guiliani's intemperate remarks which provoked the lawless behavior by the police. As described in one report, Mr. Giuliani "listed a number of Dinkin's policies and after each one, used a profanity to dismiss them." Todd S. Purdum, *Slurs from Police Are Not New to Dinkins*, N.Y. TIMES, Sept. 19, 1992, at 22. Others attribute the "washroom attendant" signs to Bob Grant, a talk show host whose venomous attacks on Blacks and gays is legendary. *See, e.g.*, Paul Vitello, *What Did He Do To Deserve This? Just Ask Him, Pal*, NEWSDAY, May 24, 1992, at 6 (one columnist's comments on the Bob Grant show, sentiments which I share).

43. Police do not need sympathy. They have power over people's lives. The power of the police cannot be overstated. Certainly minorities and the mayors of Los Angeles and New York City, in particular, have learned that lesson from former Los Angeles Police Chief Daryl F. Gates and the head of the Police Benevolent Association, Phil Caruso. It is akin to having the power of the armed forces in the hands of someone hostile to the chief executive. Two solutions have been suggested. One is the recruitment of more of the groups who have often been the victims of police brutality, Blacks or gays for instance. The other is the establishment of civilian review boards. Neither avenue is a panacea. *See, e.g.*, Lindsey Gruson, *Syracuse Grapples with Debate Over Civilian Review of Police*, N.Y. TIMES, Aug. 3, 1992, at B1 (information about the renewed popularity of the civilian review board, an idea that has been in existence for more than a generation).

The sympathy for police and the affinity of the residents of Simi Valley was discussed extensively after the verdict. The sympathy is rooted in the perception that the police have a dangerous job, an idea that is communicated daily in one or more of the endless list of police shows on prime-time television: *Cops* (Fox television broadcast), *Law and Order* (NBC television broadcast), *Commish* (ABC television broadcast) and *Secret Service* (NBC television broadcast). The list seems endless. I guess we could even count the seemingly

But the police were not the victims in this case.

The approach to reasonableness used by the defense is one which should only be used to understand the harm which is experienced by a victim. It serves an important function in creating empathy, an understanding of the harm that is experienced by victims. The defense took a test which was relevant to the harm experienced by Rodney King, and turned it into something which could be used to exonerate the police officers.[44]

Race should have been considered in this case. The jury should have considered the fact that we live in a society in which racism is pervasive; where there are myths and stereotypes which perpetuate racism; where symbols and symbolic action announce the superiority of one group and the inferiority of another as a claim of power and a demand for submission. The "control" theory that the defense offered and the jury accepted is as much a legalization of racial hatred as the Jim Crow laws of the prior generation. It commands black men to submit.[45] All my son will have to do to avoid a beating like the one Rodney King received is to remain prostrate at the feet of any white man with a badge of authority who stuns him with an electric prod and then beats him with

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innocuous shows, like *Picket Fences* (CBS television broadcast) which has police officers as its main protagonists, although the show attempts to introduce issues of prejudice and individual rights as something more than an inconvenience that prevents the police from locking up heinous criminals.

44. There is a great deal of confusion about the need for empathy and understanding. Most of it arises from the unwillingness to use terms like oppressor or oppressed. It makes us seem too Marxist, too far to the left. The fact is that majority group members may be victims of particular crimes, but they are not victims of systematic discrimination or disadvantagement. A police officer's job may be dangerous. A black, homosexual or woman's life is dangerous, not because of what they have chosen to do for a living, but because of who they are.

I have a very good, and extremely well intentioned friend, Louise Harmon, whose confusion is illustrative of the problem. The other day she asked me whether I thought she had been insensitive in a class when she described the market targeted by a developer for Sun Valley, a retirement community. "What did you say?" I asked. She said she remarked on the ingenuity of those who brought "elderly, arthritic, sinus suffering, middle class white people into the middle of the desert." I was confused. Was it the reference to age that was insensitive, or the fact that she described the old people as arthritic and sinus suffering that concerned her? No, she was concerned about the fact that she used the term "white" to describe them. My immediate response was, "When has the term white been used to someone's disadvantage?" She continued to explain what it was that bothered her about the class: Would minority students be upset because she left them out? She didn't leave them out, I reminded her—the developer did; a point which she made when she described the group to whom these homes were offered. The real question here was whether she needed to tell these students that the exclusion of people of color was wrong, something which might not occur to them on their own.

One of the best attempts I have seen to parse through the problem of providing a remedy which explicitly recognizes the illegitimacy of a claim by those who are part of the dominant culture can be found in Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (May 1989). *See also* Randall Kennedy, *The Political Correctness Scare, The Sixth Annual Brendan Brown Lecture, April 15, 1991*, 37 LOY. L. REV. 231 (1991) (discussing the use of rhetoric by a conservative faculty member "inappropriately" describing as rape, the public criticism he received for alleged racially insensitive comments; see also the discussion of Clarence Thomas confirmation hearings and the use of "lynching" symbols, *infra* note 57.

45. *See supra* note 25 for a discussion of the "control" theory.

a club. Any resistance on his part will not be seen as heroic. The attempt to stay on his feet while being beaten will not be perceived as an example of his indomitable spirit. The reality we face, he and I, is one where black men who resist are not heroes. They are something to be feared.[46]

I cried as I watched the violence erupt on the streets of Los Angeles. I cried as I watched and cringed as the foot of one young black man hit the head of a man we now know by name, Reginald Denny, who was lying prone on the street. The rioting was condemned. The violence and the brutality, the property damage, the arson and random destruction, the anarchy and lawlessness appalled millions of Americans and our President.[47]

I cried because I recognized the rage of the rioters.[48] I have felt that anger. I know how deep it runs, how hot it burns and I am afraid. The last time I felt that anger, I was at home in the town where I grew up; in the town where my father was born and raised; where my grandmother was born; and where my great grandfather settled after he escaped from slavery. I brought my son home to see the town where I was born, to learn something about his family and his history.

One rainy day, I took my son and three young cousins, two boys and a girl, to the new art museum. Our first stop was the museum shop. My son, Chris, and my cousin, Marcus, were disappointed at the lack of selection. The museum shop in Auburn, New York suffered in comparison to the shops in the Metropolitan Museum of Art which we had visited just days earlier. As we turned to leave, Marcus was stopped by the attendant who had been hovering in the background while we ex-

46. One of the police officers referred to the "hulk-like" strength of King and the fact that after he had been forced to his knees, King rose to his full height of 6' 3"; even with one arm behind him about to be cuffed, and a foot on his neck, the "expert" witness called by the defense argued that there was subtle aggressive body language on King's part. Riley, *supra* note 24, at 17. See also discussion of the impression that he had abnormal strength, *supra* note 2.

47. "The wanton destruction of life and property is not a legitimate expression of outrage with injustice. It is itself injustice. And no rationalization, no matter how heartfelt, no matter how eloquent, can make it otherwise." *President Bush's Reaction to L.A. Riots*, CNN, Apr. 30, 1992, *available in* LEXIS, Nexis Library, Script file. Bruno Bettleheim discusses what it means to be civilized, an idea which he finds in the Oresteia by Aeschylus. That part of what we call "civilized" behavior is our willingness to give up violence as a means of enforcing a moral code. We accept as a replacement a process which involves communal justice. What happens if the communal process fails, if a part of the community feels that it is excluded from the process? It may be that with a break-down in communal justice, societies revert to the more basic methods of obtaining justice. Even if we cannot prove such a grand theory, there is support for the idea that individuals who are deprived of alternative means of achieving their aspirations will resort to violence. *See* BRUNO BETTELHEIM, SURVIVING AND OTHER ESSAYS 186, 193 (1980).

48. In the Milk documentary, there is a point where one man relates his experience walking in the candlelight march that took place after Milk and Mayor Moscone were murdered. The narrator describes a black man he saw standing at the curb, shaking his fist at the marchers and asking the crowd, "Where is your anger?" The city saw that anger when a jury rejected a murder verdict and convicted White of voluntary manslaughter. The scenes of the riot in San Francisco, a city where gay men had been brutalized by the police, showed violent confrontations between the police and the rioters, the destruction of property and arson. *See* THE TIMES OF HARVEY MILK, *supra* note 24.

amined postcards and trinkets. She accused him of stealing some small toy. Marcus looked bewildered. She didn't ask for anything; she merely accused him. He didn't know what to do.

Finally, I asked him to take his hands out of his pockets and show her that he did not have anything in them. Meekly he emptied his pockets. I am not sure that would have been enough if I hadn't looked around and located the toy. It was in plain view although it might not have been returned to the position it had occupied before we entered the shop. I assured the attendant in the my most professional tone of voice that if they wanted something, I would buy it for them. Of course, that wasn't true. What parent would buy her child anything he wanted? I just wanted to make it clear that they did not need to steal.

Kasha, the only girl among all those boys, followed me as I entered the museum. We moved directly into the room where the work of female artists was displayed. The boys went to the room with the sculptures. Kasha and I had about five minutes peace before Chris was back at my side. "Mom," he whispered, "that guard is following us everywhere we go." My first reaction was annoyance. I snapped at him, and told him and the other boys to sit down on some chairs that were set up before a television and VCR. It was irrelevant that the screen was blank. They would only have to sit a moment or two while I read the display that explained a Judy Chicago exhibit. I turned around to read and before I finished a sentence, Chris was at my elbow. The attendant had yelled at them for moving the chairs (which were on casters). I gave up all hope of seeing the exhibit and told the children to go out to the car.

I complained to the museum director's assistant because the director was not there. I was so angry; I had to work to keep my voice steady. In a virtual whisper, I explained my anger and disappointment. My children and I had been humiliated. We had been accused of theft and treated like potential vandals. It was intolerable. It was racist. In the background I saw another mother with two blond daughters in tow wandering around the museum. No one was bothering her or her children. The Assistant to the Director murmured a response. Her words were meant to soothe me. She explained that the attendant who had been hounding us was not concerned with race, she was concerned with age. Teenagers had caused problems in the museum in the past. Of course, it was all a misunderstanding. Apparently both the vigilant attendant and the guard had not been sufficiently discriminating. They should be concerned only when the teenagers are unaccompanied. She assured me that she would talk to them both about their failure to distinguish between the two situations.

Her words did not soothe me; they made me angrier. Chris was hovering in the background, watching how I handled this situation. There were tears in my eyes—tears of anger and frustration. I was not handling it well. As we left the museum, Chris muttered under his breath, "I would like to punch that lady in the mouth." Even as I told him no, that violence is not the right response, my whole being ached to

do the same. I was no different than the gang members rioting in Los Angeles. I wanted to cause that woman some pain. I wanted her to hurt as much as I hurt, as much as those children hurt. I was in pain and it was a pain that equaled or exceeded any physical pain I have ever experienced. I was angry at myself because I knew that my father would have caused a scene. He would have yelled and screamed at the injustice of the situation, and made so much noise that everyone in the museum would have known what was happening. My problem is my commitment to civility.

Most Americans were shocked by the brutal attack on innocent motorists during the most recent riots in Los Angeles; attacks on individuals who blundered into the wrong intersection at the wrong time.[49] White Americans are always shocked at the idea of collective guilt. It is an anathema to them.[50]

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49. The whites who were killed in Houston in 1917 were also people who blundered into a black neighborhood, the Fourth Ward, as the soldiers marched down San Felipe Street from Camp Logan. See Program from the Exhibit, *The Houston Riots and Courts-Martial of 1917*, Carver Community Cultural Center, San Antonio, at 3 (on file with author). Although the soldiers marched with the intention of avenging the deaths of their comrades caused by the Houston police, they also fired on a number of persons who inadvertently surprised them. Perhaps because they were soldiers and they did, in fact, engage the enemy, the police and armed deputies, this is the one racial "riot" in U.S. history that resulted in more Whites dead than Blacks. *Id.*

50. *See generally* Jude P. Dougherty, *Collective Guilt*, 35 AM. J. JURIS. 1 (1990) (critique of collective guilt and a discussion of the history of the idea of collective guilt). The criticism is often leveled specifically at laws which are designed to remedy past discrimination. *See, e.g.*, Mike Barnicle, *Justice Now Topsy-turvy*, BOSTON GLOBE, Aug. 23, 1990, at 33 (scathing indictment of the criminal justice system and lack of regard for issues of law and order which the author attributes to the abandonment of the principle of individual responsibility for something called "collective guilt."); Charles Bremner, *The Thought Police Closing Off the American Mind*, THE TIMES, Dec. 19, 1990, *available in* LEXIS, Nexis library, Major Newspapers File (an indictment of the diversity movement and reference to George Will's theory that the movement as a "function of the collective guilt generated in the 1960s and from which Americans still suffer, despite a decade of Reagonism"); *Reparations for African-Americans*, L.A. TIMES, Nov. 7, 1990, at B6 ("we had all better think carefully if we want to abandon the principle of individual responsibility in favor of collective guilt"); Edwin Yoder Jr., *Reynolds Deserves to Be Heard*, WASH. POST, May 17, 1983, at A19 ("The preferential theory of law carries the dubious corollary of hereditary or collective guilt.").

Justice Scalia takes the position that "ethnic whites" were not here during the period of slavery. He uses this historical fact to support his conclusion that "ethnic whites" are not responsible for the harm Blacks experienced as victims of slavery. Antonin Scalia, *Commentary: The Disease As Cure: In Order to Get Beyond Racism, We Must First Take Account of Race*, 1979 WASH. U. L.Q. 147, 151-52. He completely ignores the reality of assimilation; the fact that all immigrants quickly learn the lessons of their new homeland. Racism is a lesson learned along with the Pledge of Allegiance and the Bill of Rights. *See* Dwight Green et al., *Judicial Pluralistic Ignorance and the Myths of Colorless Individualism in* Bostick v. Florida, 67 TUL. L. REV. (forthcoming 1993).

When I was a teenager, I accompanied my half-sister when she went to look for apartments. We visited one house where an elderly woman who, if I was any judge of accents, had recently immigrated from Italy, showed us an apartment. She let us look, but she quickly advised us that she could not rent the apartment to us. "I only rent to Americans" she told us. I found it ironic that someone who had just arrived in this nation would question my right to be called an American. I had been born in that town; so had my father and my grandmother. This idea that somehow I was not a "real" American was something that just wouldn't go away. It happened to me again when I was an exchange student in Panama. I visited that country shortly after the riots in the Canal Zone in the 1960's. As we discussed who had a right to possess and control the Canal Zone, I sided with the Panamanian family (I was not sympathetic to a Southern command that forced

What is the idea of collective guilt if it is not a generalization? Here we find one more example of the logic that is peculiar to prejudice. Prejudice is supported by axioms; generalizations about the moral character and intellectual ability of groups of people who are different. Americans have no problem with generalizations which sustain inequality, only with the generalizations which assign blame for it. White-Americans do not want to believe that the result in the Rodney King decision was the result of racism.[51] This is an example of the politics of denial. Denial is essential to the perpetuation of the myth of innocence. The politics of denial facilitate the use of terror and oppression by those who are overtly racist, anti-Semitic, sexist or homophobic.[52] If you are the victim of prejudice and racism, some claims of innocence are incredible. I, for one, would not consider the police officers who watched the beating of Rodney King innocent. In fact, I believe that those who deny the reality of racism are as culpable as those who put it into practice.

The idea of collective guilt is not one which was invented by Blacks to justify the riots in Houston in 1917, Watts in 1965 or Los Angeles in 1992. The idea is one which is recurrent in the history of Western Europe. Those who profess a high regard for the literary canon might consider the lessons that can be learned there. In an effort to wean Chris from his addiction to the literary genre commonly known as fantasy sci-

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Panamanians to comply with the Jim Crow laws they carried with them to the Zone). The other American who lived with the same family discredited my opinion by telling the family members that I was not a "real American."

The Daughters of the American Revolution and the descendants of the Southern planters are not the sole heirs of the legacy of slavery. We all share responsibility for the problem of racism. Though it might have its roots in the past, it is nourished and sustained in the present. Those who live with it, who fail to expose its ugliness and reveal the harm it causes and who tolerate its continued existence, are all guilty. *See, e.g.*, Charles Krauthammer, *Collective Guilt, Collective Responsibility*, WASH. POST, May 3, 1985, at A5 (distinguishing the ideas of collective guilt and collective responsibility).

51. In Long Island, many Blacks blamed the verdict on racism, while whites blamed it on poor prosecution. Bessent, *supra* note 2, at 51.

52. Bruno Bettelheim has explored the phenomenon of denial in connection with the Holocaust and the behavior of both survivors of the camps and the German citizens who claimed not to have known about the concentration camps.

> Denial is the earliest, most primitive, most inappropriate and ineffective of all psychological defenses used by man. When the event is potentially destructive, it is the most pernicious psychological defense, because it does not permit taking appropriate action which might safeguard against the real dangers. Denial therefore leaves the individual most vulnerable to the perils against which he has tried to defend himself.

BETTELHEIM, *supra* note 47, at 84.

Racism is dangerous to our society, and the response of both Blacks and Whites is often denial. Shelby Steele is a study in black denial. *See generally* STEELE, CONTENT OF OUR CHARACTER, *supra* note 25. The vitality and the persistence of racism is becoming harder and harder to deny. On my most recent visit to my home town, I learned that chapters of white extremist organizations had chosen that town as the location for their headquarters. Things had gotten so bad that a local newspaper editorial announced that they would no longer print the messages of hate contained in letters to the editor written by the most rabid member of one of these groups. *See No Hatred Allowed*, CITIZEN ADVERTISER, Oct. 11, 1992, at A4 ("We simply won't turn over our page to people who fail to express basic respect."). Bruno Bettelheim's point warned us that it is when the message is the strongest, when the threat is the most obvious, when the danger is the greatest that we chose to deny its very existence.

ence fiction, I asked him to read *A Tale of Two Cities*.[53] The second book on my list was the *Autobiography of Malcolm X*.[54] My choices might have been fortuitous, or there might have been some unconscious recognition on my part of the extent to which these same stories were being played out once again. As it turns out, the decision in the Rodney King case and the reaction in South Central Los Angeles made their relevance clear.

As Chris mentioned to me, the members of the street gangs in Los Angeles might have been called "Jacques" during the French Revolution. What Dickens described, we have witnessed first hand. We have seen the anger of people who have nothing to lose, people who have been so degraded and so dehumanized that they no longer value human life, their own or anyone else's. If Dickens were alive today, how would he regard the riots in Los Angeles and the reaction to them? Perhaps he would have recognized a similarity between the failure of the English to acknowledge that the seeds of the revolution were sewn by the French aristocracy and the assertion here that the abject poverty experienced in the inner cities does not justify the riots.[55] This is not a matter of justification. What is being offered is an explanation. It is a case of cause and effect. Or, in the words of Malcolm X, it is a case of chickens coming home to roost.[56]

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53. CHARLES DICKENS, A TALE OF TWO CITIES (Bantam 1984) (1842). In his interpretive afterword, Stephen Koch analyzes Dickens' attitude towards revolution and the "lucid blindness that sees nothing but the oppression they need to sustain their rage—and their new found omnipotence." Stephen Koch, *Afterword* to CHARLES DICKENS, A TALE OF TWO CITIES 359 (Bantam 1984) (1842). In his opinion, "The dominating political innovation of our time has been Terror's fully organized expression of totalitarianism, whose primary moral innovation has been to fully institutionalize Terror's rationale: collective guilt." *Id.* at 360.

I find it difficult to accept his premise that the collective guilt argument which has been applied to Germany since World War II and any version of "collective guilt" that might have been used by the Nazis to justify the program of genocide as one in the same. In my opinion that the idea of collective guilt is appropriate in the former case and not in the latter. While collective guilt may provide a rationale for purges and putsches by "revolutionary" regimes in Russia and China, including the "cultural" revolution in China. If oppression sustains rage, then it seems clear to me that an end to oppression would mean an end to the "dreams of vengeance" that sustain revolutionaries.

54. MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X (Ballentine 1983) (1964) (with the assistance of Alex Haley).

55. I have always liked Dickens, perhaps because he evidences class consciousness that appeals to me as a daughter of the working class. Only recently I learned that he was also a critic of slavery. Charles Dickens, AMERICAN NOTES (St. Martin's Press 1985) (1842). My research assistant, Caroline Green, who must receive credit for finding this book for me, was excited by the technique Dickens used to criticize the institution of slavery. He printed advertisements that appeared in public papers offering rewards for news of runaway slaves. Dickens used these ads to ridicule the institution of slavery and to destroy the myths that supported it. *Id.* at 273. The ads described men, women and children marked with iron collars, scars from lashings, marks from a hot iron on a face, a piece cut out of an ear or a brand marking him or her as property. *Id.* at 274-76. It is interesting to note that while we no longer suffer the mark of a brand that might be found on cattle rather than humans, we might still be stunned by 50,000-volt stun guns. *See* Riley, *supra* note 24, at 16.

56. Malcolm X later explained the statement which caused so much controversy: "I said what I honestly felt—that it was, as I saw it, a case of 'the chickens coming home to roost.' I said that the hate in white men had not stopped with the killing of defenseless

I could not have done what the gang members in Los Angeles did. I am a lawyer, and I respect the law. I have been taught to act with civility and human decency. That is the way I try to live my life. That is what I try to teach Chris. I have not acted on my anger because, unlike the young people in Los Angeles, I have something to lose. Human life means something to me because my life has meaning. The policies of the Great Society provided me with a good place to live, at one point in public housing, and a means of acquiring an education. I have a profession which I might not have but for the interest in diversity and the assignment of a positive value to race, in other words, affirmative action. I am raising my son in a radically different environment. Affirmative action is under attack, not by those truly committed to some concept of a meritocracy but by those who employ a system of political patronage.[57] The political ideology of the right panders to racial fears. Much of the progress I witnessed has been reversed during the Reagan/Bush years. In my short lifetime, I have witnessed the best and the worst of the human spirit respectively in the attempts to eliminate, and later to preserve, social and economic inequality.

There is a chill in the air, and I pull my blanket of optimism closer around me. I continue to believe that most human beings are decent and kind and that they can change. I believe that most people are capable of generosity of spirit and a genuine concern for those who are less fortunate, and that these are values which are part of the fabric of our society. I know that there are people who are actively working to change the world and eliminate unfairness, injustice and inequality. Yet it is harder and harder to keep out the cold wind that has begun to blow, and in moments of reverie, my mind turns to Madam Defarge. I have begun to understand this most unsympathetic and unappealing character. I understand the source of her bitterness and her anger. I almost begin to understand her insatiable desire for revenge.[58] I wonder whether ultimately the fear of young black men is misplaced. Perhaps the person to

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black people, but that hate, allowed to spread unchecked, finally had struck down this country's Chief of State." MALCOLM X, *supra* note 54, at 301.

57. Anyone who thought that this was a fight about meritocracy learned otherwise when Clarence Thomas was nominated for the Supreme Court. President Bush described Thomas as the best qualified candidate for the job. Most of us suspected that the qualifications to which he referred were something other than the credentials as a jurist or as a scholar in the field of constitutional law. If for no other reason, the Senate should have had some reservations about confirming a man who could not keep up with the developments in an area of law enforced by an agency which he headed. How knowledgeable could he be if he delegated all responsibility for reading federal court decisions in the area of civil rights, including a circuit court decision discussing sexual harassment, to a subordinate? *See* Reuters, *The Supreme Court: Excerpts From News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991, at A14.

58. Dickens' feminization of the guillotine reinforced his image of woman as a vengeful spirit and animates his creation, Madam DeFarge. Stephen Koch, *supra* note 53, at 360-61. Lucie Manet is a stereotype of the Victorian concept of womanhood, all gentility and perfect loyalty to father, husband and children. Madam DeFarge may be a stereotype as well, but by the time Dickens finishes telling us about the atrocities which occurred at the hands of the French aristocracy, of the horrible death of the members of Madam DeFarge's family, her strength seems all the more admirable, and her desire for retribution is understandable.

fear is the mother of the young black man.[59]

59. I would like to point out, for those who might not have thought about this possibility, that some of the mothers of young black men are white women. My anger at the treatment Marcus received at the museum gift shop was shared by my cousin through marriage, M'Lynn Kenny, who is white.

ONE YEAR LATER: THE LOS ANGELES RIOTS AND A NEW NATIONAL POLICY

DR. LYNN A. CURTIS*

I. INTRODUCTION

After the Rodney King beating and the subsequent riots in Los Angeles last summer, a leading Spanish newspaper warned that the American experience—of the rich getting richer and the poor getting poorer—is common across many established democracies of Europe.[1] In the United States over the last decade taxes were increased on the poor and decreased on the rich,[2] (Figure 1) resulting in a ten percent income decline for the poor and over a 120 percent income increase for the richest one percent of the American population.[3] (Figure 2). This disparity between the rich and the poor evidences the failure of trickle-down economics, as does the continuing recession.

In the late 1960's, after major American urban riots, the Kerner Riot Commission predicted that America would become two societies, increasingly separate and less equal.[4] That prophecy has come to pass. As Robert Reich of Harvard wrote, the American professional class communicates far more easily, by facsimile and fiber optics, with its counterparts in Europe and Japan than with the poor in south central Los

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From 1977 to 1981, Dr. Curtis was Urban Policy Advisor to the Secretary of Housing and Urban Development, Executive Director of the President's Urban and Regional policy Group and Administrator of the forty-three million dollars federal Urban Initiatives Anti-Crime Program targeted at public housing. Earlier, he was Co-Director of the Crimes of Violence Task Force of the National Violence Commission. Ph.D. in Urban Studies and Criminology, University of Pennsylvania; M.Sc. in Economics, University of London; A.B. in Economics, Harvard University. Special thanks to Eisenhower Foundation Director Vesta Kimble for her assistance with this Article.

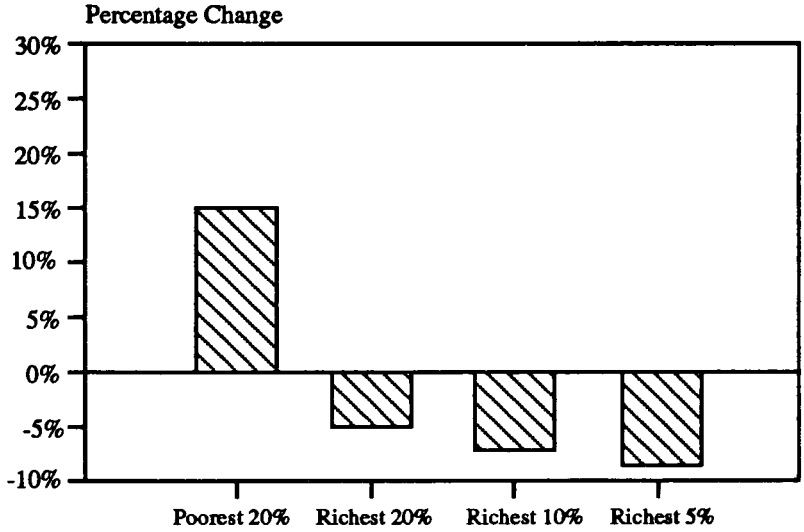
1. Glen Frankel, *Foreign Officials, Press Criticize U.S. Over Rioting: Mitterand Blames Reagan-Bush Social Policies; Protection for Korean Americans Urged*, WASH. POST, May 2, 1991, at A11.

2. *Enterprise Zones: Hearings on H.R. 11 & 3 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 102d Cong., 1st Sess., 254 (1991) (statement of Dr. Lynn A. Curtis, President, The Milton S. Eisenhower Foundation) (referring to KEVIN PHILLIPS, THE POLITICS OF RICH AND POOR (1990)) [hereinafter *Enterprise Zones*: statement of Curtis]. *See also* ISAAC SHAPIRO & ROBERT GREENSTEIN, SELECTIVE PROSPERITY: INCREASING ECONOMIC DISPARITIES SINCE 1977 (1977).

3. *Enterprise Zones*: statement of Curtis, *supra* note 2, at 2 (quoting PHILLIPS, *supra* note 2).

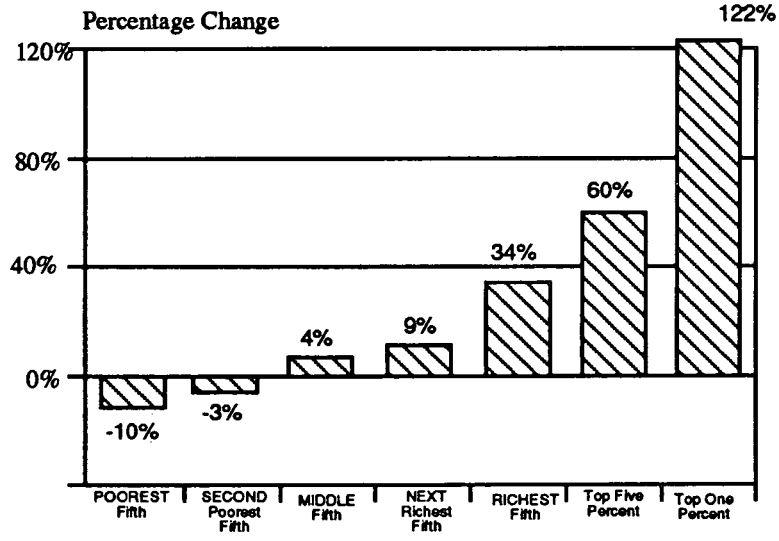
4. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

FIGURE 1
Changes in Tax Rates
Between 1980 and 1990



Source: Congressional Budget Office

FIGURE 2
Average After-Tax Income Gains
and
Losses Between 1977 and 1988,
By Various Household Income Groups



Source:
Center on Budget and Policy Priorities and Congressional Budget Office

Angeles or the south Bronx.[5] According to sociolinguist William Labov, the English spoken by the inner-city African-Americans is becoming increasingly different than that spoken by white Americans.[6]

One exception to the federal government's disinvestment in the poor over the last decade has been prison building. The United States doubled the number of prison cells over the 1980's.[7] (Figure 3). At the same time, the federal government cut by more than half its spending on housing for the poor.[8] In some ways, then, prison building became America's national low income housing policy.[9] It is now the case that, at any one point in time, one out of every four young African-American males between the age of twenty and twenty-nine would be in prison, on probation or on parole.[10] This is an astounding statistic. In addition, violent crime increased substantially over the time when we were adding so many minority youth to the prison population.[11] Internationally, the United States has the highest rates of incarceration in the industrialized world, along with the highest rates of violence.[12] (Figures 4 and 5).

Building prisons, and keeping young people in them, is extremely expensive. It costs more to go to jail than to Yale.[13] And the continuing high violent crime rates suggest that the policy of putting young people in prison was not cost effective for the middle class taxpayer seeking security for her or his family. Still, one need not necessarily despair about the noble experiment in democracy that de Tocqueville described so eloquently.[14] We already know which policies work in the American inner-city—policies that are cheaper and far more productive investments, both economically and in terms of human capital, than trickle-down economics and prison building. The policy that works can be characterized as child and youth investment and community reconstruction.

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5. Robert Reich, *Secession of the Successful*, N.Y. TIMES, Jan 20, 1991, § 6 (Magazine), at 16.

6. Malcolm Gladwell, *Some Hear Black and White in Divergence of Spoken Word; Reversing a Trend, Dialects Are Taking On Greater Racial Dimension*, WASH. POST, Apr. 29, 1991, at A3.

7. LYNN A. CURTIS, LORD, HOW DARE WE CELEBRATE? PRACTICAL POLICY REFORM IN DELINQUENCY PREVENTION AND YOUTH INVESTMENT 4 (1992) (edited version of *Reauthorization Hearings for The Office of Juvenile Justice and Delinquency Prevention Before the Subcomm. on Human Resources of the House Comm. of Education and Labor*, 102d Cong., 2d Sess. (1992) (statement of Dr. Lynn A. Curtis, President of The Milton S. Eisenhower Foundation)).

8. CURTIS, *supra* note 7, at 4.

9. CURTIS, *supra* note 7, at 4.

10. Bill McAllister, *Study: 1 in 4 Young Black Men Is in Jail or Court-supervised; Author Warns of Risk of Losing 'Entire Generation'*, WASH. POST, Feb. 27, 1990, at A3. Compare this to one in ten Latino men and one in sixteen Caucasion men in the same age group. *Id.*

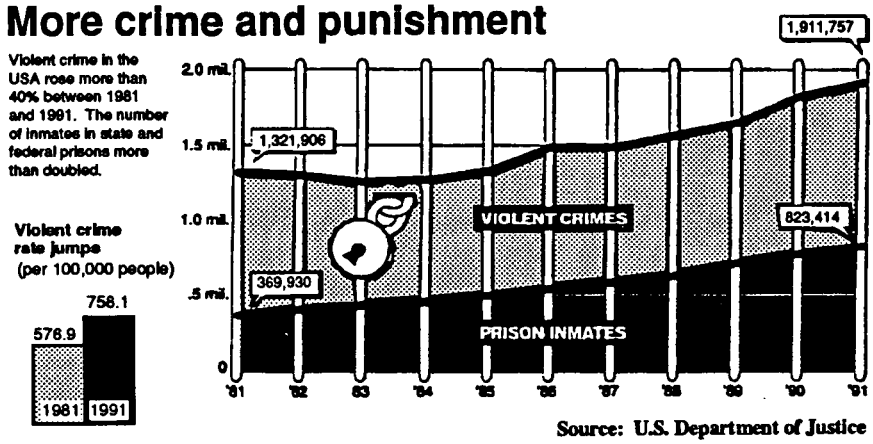
11. THE MILTON S. EISENHOWER FOUNDATION, YOUTH INVESTMENT AND COMMUNITY RECONSTRUCTION: STREET LESSONS ON DRUGS AND CRIME FOR THE NINETIES 9 (1990) [hereinafter YOUTH INVESTMENT].

12. *See* JAN VAN DIJK, ET AL., EXPERIENCES OF CRIME ACROSS THE WORK: KEY FINDINGS OF THE 1989 INTERNATIONAL CRIME SURVEY (2d ed. 1991).

13. THE MILTON S. EISENHOWER FOUNDATION, *No Quick Fix*, NEWS CONFERENCE - UNITED STATES SENATE, May 19, 1992, at 4.

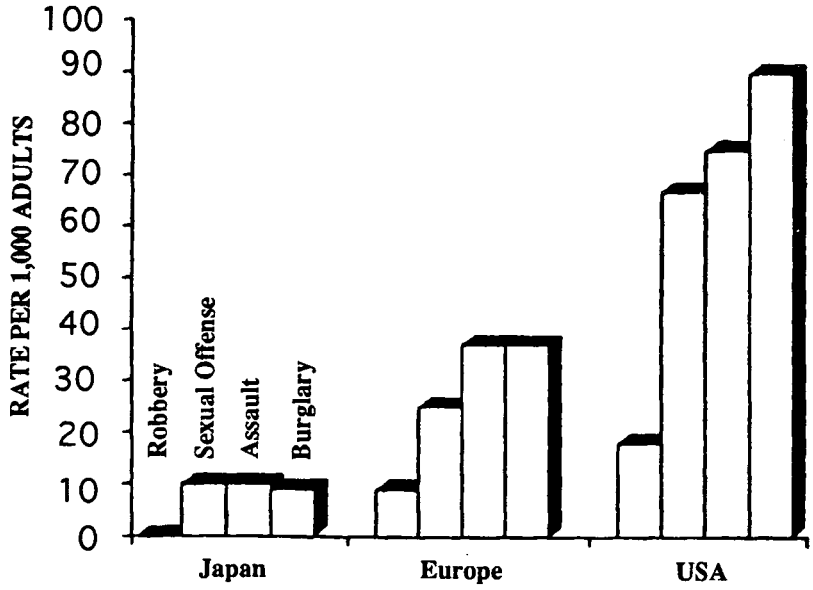
14. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Henry Reeve trans., 1969) (1900).

FIGURE 3
Trends in Violent Crime and Incarceration
1981 - 1991



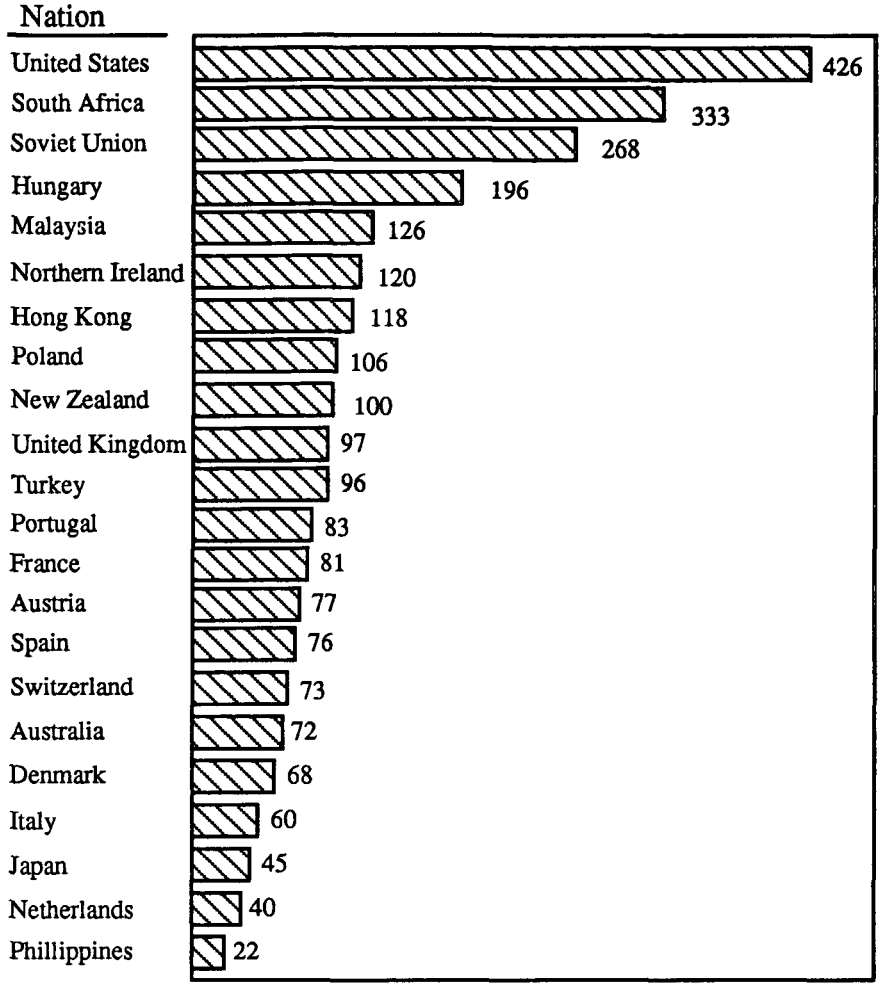
Source: U.S. Department of Justice

FIGURE 4
International Rates of Violent Crime Victimization
1988



Source: Van Dijk, et al., Experiences of Crime Across the World, Boston: Kluwer, 1990

FIGURE 5
Rates of Incarceration per 100,000 Population



Source: The Sentencing Project and Penal Reform International, 1989

II. CHILD AND YOUTH INVESTMENT

A. *Head Start*

France possesses the world's most comprehensive system of preschool education and child care for high-risk populations.[15] So it is no surprise to the French that Head Start preschool for inner-city children is the most successful across-the-board American prevention program ever created.[16] As the conservative corporate presidents, who are mem-

15. Jill Smolowe, *Where Children Come First*, TIME, Nov. 9, 1992, at 58.
16. *Id.*

bers of the Committee for Economic Development in New York City, concluded, every dollar invested in inner-city preschool in the United States, creates five dollars in benefits—in terms of less crime, less drugs, less school dropouts, less welfare dependency and less unemployment.[17]

B. *Job Corps*[18]

When it comes to high-risk inner-city youth, Head Start preschool is at one end of the age spectrum. At the other end is Job Corps, also begun in the late 1960's. The Job Corps may rank as the second most successful across-the-board American prevention program ever created. Job Corps, an *intensive* program, takes seriously the need to provide a supportive, structured environment for the youth it seeks to assist. Job Corps features classroom courses, which can lead to high school equivalency degrees, counseling and hands-on job training for very high-risk youth. Corps programs are located in rural and urban settings.[19] Some of the urban settings are campus-like.[20] Others essentially are "on the street."[21] In the original design, a residential setting provided sanctuary away from one's home.[22] Today, nonresidential variations are being tried, and it will be important to compare their cost-effectiveness to the live-in design. Yet, even for the non-residential programs, the notion of an extended-family environment has been maintained.[23]

According to United States Department of Labor statistics, during the first year after the experience, Job Corps members are one-third less likely to be arrested than nonparticipants.[24] Every dollar spent the on Job Corps resulted in one dollar and forty-five cents in benefits—including reduced crime and substance abuse (which account for forty-two cents in benefits alone), reduced welfare dependency, increased job productivity and higher income.[25] Evaluations conducted during the Reagan Administration (which tried to eliminate Job Corps)[26] found that seventy-five percent of Job Corps enrollees move on to a job or to full-time study.[27] Graduates retain jobs longer and earn about fifteen per-

17. *See* COMM. FOR ECONOMIC DEV. CHILDREN IN NEED, INVESTMENT STRATEGIES FOR THE EDUCATIONAL DISADVANTAGED (1987).

18. For more information on job corps programs see, Steven Greenhouse, *Lessons Across Six Decades As Clinton Tries to Make Jobs*, N.Y. TIMES, Nov. 24, 1992, at A1; Spencer Rich, *Job-Training Program Is Paying Off—for Some*, WASH. POST, May 23, 1992, at A11; Morton B. Sklar, *Proposed JTPA Reforms Miss the Mark*, 11/7 YOUTH POLICY 36 (Sept./Oct. 1989).

19. YOUTH INVESTMENT, *supra* note 11, at 12.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 13.

25. *Id.*

26. *Id.*

27. YOUTH INVESTMENT, *supra* note 11, at 13.

cent more than if they had not participated in the program.[28] Along the same lines, a United States General Accounting Office study concluded that Job Corps members are far more likely to receive a high school diploma or equivalency degree than comparison group members and that the positive impact on their earnings continues after training.[29] Robert Taggart, a strong supporter of Job Corps, asserts that those who doubt that labor market problems are real and serious, that social interventions can make a difference or that the effectiveness of public programs can be improved will find little to support their preconceptions in the experience of programs like Job Corps.[30] In contrast to Job Corps, the present federal job training system, the Job Training Partnership Act, has failed for high-risk youth. Evaluations have shown that youth in the program actually did worse than comparable youths not in the program.[31]

C. *Kids In-between*

In-between the very young children who need to receive Head Start and older teens and young adults who can benefit from Job Corps-type remedial education, training and placement, there already exist successfully evaluated, model inner-city programs for high-risk children and youth aged roughly seven to fifteen.[32] The Argus Community in the Bronx and Centro Sister Isolina Ferre, in Puerto Rico, illustrate these positively evaluated, indigenous, community-based initiatives.

The Argus Community: The Argus Community, on East 160th Street in the Bronx, was founded in 1968, by Elizabeth Sturz, a poet and former probation officer.[33] Argus is a community-based center for high-risk youth, mainly African-American and Puerto Rican. It provides "an alternative life program for adolescents and adults who have been on the treadmill of unemployment, under-employment, street hustling, welfare, substance abuse, crime and prison who saw no way out for themselves."[34]

Through residential and nonresidential programs, Argus seeks to offer some fundamentals too often lacking in the families and communities from which these youths come.[35] The goal is to create an extended family of responsible adults and peers that offer "warmth, nurturance, communication, and structure," and that model and teach productive values.[36] Within that "extended family" setting, the program offers pre-

28. *Id.*
29. Rich, *supra* note 18, at A11.
30. *See* ROBERT TAGGART, A FISHERMAN'S GUIDE: AN ASSESSMENT OF TRAINING AND REMEDIATION STRATEGIES (The W.E. Upjohn Institute for Employment Research ed., 1981).
31. Rich, *supra* note 18, at All.
32. *See, e.g.*, YOUTH INVESTMENT, *supra* note 11, at 15.
33. *Id.* at 15. For a more in-depth account of The Argus Community, see ELIZABETH LYTTLETON STURZ, WIDENING CIRCLES (1983).
34. YOUTH INVESTMENT, *supra* note 11, at 15.
35. *Id.*
36. *Id.*

vocational, vocational and academic training, and works to link those who have been trained with employers in the city.[37]

Over time, Argus added day care, family planning, health care and early education, which not only provided parenting assistance for the children of teen mothers in the program but also sought to "teach the young mothers—and fathers—how to be good parents."[38] Founders of Argus believed that "angry, alienated teenagers can be pulled in, can be brought to the point where they not only do not steal and assault, but have something to give to the society."[39]

The nonresidential program, the Learning for Living Center, is mostly for teenagers who are at risk but not yet in serious trouble. It is designed to provide alternative life training to prevent the youth from ending up in the residential program, which is for those somewhat older with more serious problems—today, especially drugs.[40] So a full range of intervention has evolved, from early prevention to treatment.[41]

Some clients are referred to Argus from throughout New York City, but most come from the neighborhood. Argus youth are at higher risk than the clients of most other community-based youth agencies in New York City.[42] Despite this extremely troubled clientele, the program has had encouraging successes.[43]

The Eisenhower Foundation evaluated a cycle of the Argus day time, nonresidential Learning for Living Center. Youth were assessed over twenty weeks of training and then over a follow-up period. Measures were taken before and after, nine months apart, with one-hundred high-risk Argus youth and one-hundred comparable youth who did not receive training. Argus youth had higher salaries, and received more job benefits than the comparison youth.[44] To complement these findings, federal studies show that sixty-seven percent of the Argus Community's enrollees attained non-subsidized job placement in nineteen eighty.[45] This is a much higher job-placement rate than for similar high-risk youth who are not involved in the program.[46] These studies also demonstrated lower crime recidivism rates for Argus graduates than for graduates from almost any other program in New York City that works with such high-risk youth.[47]

An evaluation was conducted of Argus' Job Training Partnership Act (JTPA)[48] program for high-risk inner-city youths by Professor LaRue Jones under the auspices of the Milton S. Eisenhower Foundation in

37. *Id.*
38. *Id.* at 16.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. Job Training Partnership Act, 29 U.S.C.A. §§ 1501-1791 (1985 & Supp. 1992).

1987.[49] The study concluded that Argus enrollees (1) showed increased scores on conduct and morality, (2) received higher salaries, (3) paid more taxes and (4) received more job benefits than a comparable group of trainees who did not receive the support services offered by the Argus Community.[50]

Centro Sister Isolina Ferre: Centro Sister Isolina Ferre, in the La Playa neighborhood of Ponce, Puerto Rico, was started in 1968 by a Catholic nun, Sister Isolina Ferre, who had spent the past several years working on New York City's toughest streets.[51] Playa de Ponce was a community "where 16,000 people lived neglected by government and private agencies" with delinquency rates more than twice that of the rest of the city of Ponce, high unemployment, poor health conditions, no basic health care services, and "few, if any, resources."[52] Centro began on the premise, "If family and community could be strengthened, and meaningful employment made available," it might be possible to "make substantial progress in the struggle against neighborhood crime and violence."[53]

With this vision, Sister Isolina, began to put into place several programs designed to develop the competence of community youth.[54] One example stands out especially: the system of youth advocates or "intercessors." These were young, streetwise community people who became all-around advocates and mentors for young people brought before the juvenile court.[55] The advocates would "get to know the youth and his or her peers and family, and would look into the schoolwork, family situation, and day-to-day behavior of the youth."[56] They would involve the youth in a range of developmental programs Centro created, including job training, recreation and tutoring.[57] Their role went well beyond simple individual counseling; the advocate was to "become familiar with the whole living experience of the youth," to work with "the family, the peers, the school, the staff, the police and the court." In short, "to help the community become aware of the resources it had that should help the youth develop into a healthy adult."[58] After some initial mistrust, the police began to work closely with the intercessors, often calling them first before taking a youth to court.[59]

Centro also developed innovative educational alternatives for youth at risk of dropping out of school, and a program of family supports through "advocate families" who took the lead in helping their neigh-

49. Larue Jones, *Minority Inner-City Youth Employment Crime Reduction Evaluation*, final report grad # 0091403 (Milton S. Eisenhower Foundation ed., 1987).
50. *Id.*
51. YOUTH INVESTMENT, *supra* note 11, at 13.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 13-14.
59. *Id.* at 14.

bors with family problems.[60] They created an extensive job-training program, on the premise that "building a community without jobs for youth is like trying to build a brick wall without cement."[61]

Charles Silberman called Centro "the best example of youth and community regeneration I found anywhere in the United States."[62] La Playa is considered the toughest neighborhood in Ponce. Yet over the period of initial operations of Centro, from 1970 to 1977, the rate of reported juvenile offenses was fairly constant in Ponce, while it showed a decline of eighty-five percent in La Playa.[63]

Centro and the Eisenhower Foundation now replicate and evaluate the program in San Juan. The replication embraces all the original education, mediation and employment initiatives begun in Ponce, but adds community-based policing. A police mini-station was built at the entrance to the "campus" where the other initiatives are located. A police officer lives with his wife and three children above the mini-station. For the most part, the officer does not make arrests. He works on prevention, accompanied by other officers not in residence. Preliminary assessments show the number of crimes reported decreased in the Centro precinct as compared to other San Juan precincts.[64]

D. *Multiple Solutions to Multiple Problems*

Such programs for children and youth of middle ages seem to have some common underlying principles. There is always some kind of sanctuary—a place to go off the streets. The sanctuary provides an extended-family-like setting where both social support and discipline exist. Adult role models and mentors act as big brothers and big sisters. This extended family environment encourages young people to stay in school or begin innovative community-based remedial education, sometimes using novel computer-based software.[65] In the successful programs, remedial education is linked to specific job training or to college education.[66] In turn, job training is linked to job placement.[67] This is important, because the JTPA, which is the failed American federal youth job training program, unlike the excellent German system,[68] does not link training to placement.[69]

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60. *Id.*
61. *Id.*
62. CHARLES SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 434-35 (1978).
63. *Id.*
64. *See* THE MILTON S. EISENHOWER FOUNDATION, JUNTA DE COLABORACION POLICIA Y COMMUNIDAD (unpublished evaluation reports, on file with The Milton S. Eisenhower Foundation).
65. These are computer-assisted learning programs that allow youth to progress at their own speed unhindered by the stigma or embarrassment of being "behind" other students in the classroom situation. An example of such a program is a program developed by USA Basics. *See generally* TAGGART, *supra* note 30.
66. YOUTH INVESTMENT, *supra* note 11, at 55.
67. *Id.*
68. Marc Fisher, *German Job Training: A Model for America? U.S. Experts Examining Government-Industry Apprenticeship Program*, WASH. POST, Oct. 18, 1992, at A1.
69. Rich, *supra* note 18, at A11.

In spite of the inadequacies of the JTPA, some local community organizations supplement it with better training placement operations.[70] Job placements can economically develop the neighborhood. One example is in the rehabilitation of housing.[71] In some of these successfully evaluated programs, community-based and problem-oriented policing assists the economic development process, as is the case with the Centro San Juan mini-station.[72] Such community policing does not usually reduce crime in inner city neighborhoods, based on careful evaluations, but it can reduce fear in urban middle class neighborhoods.[73] The fear reduction can help encourage businesses and the public sector to build in the inner city. If this economic development is planned correctly, it provides jobs for high-risk youth. The youth qualify for the jobs by possessing adequate job training and then completing high school, which is made possible by the mentoring, social support and discipline created in extended family sanctuaries.

Accordingly, the most successful programs seem to provide multiple solutions to multiple problems in the American inner city. The implication is that we do not necessarily need more experiments or more demonstrations. We need to replicate to scale what already works—for preschoolers, for middle school children and for youth who require job training and placement. This means (1) Head Start for three years for all poor children; (2) a new job training and placement system with a more Job Corps-type investment for all who qualify; and (3) a National Corporation for Youth Investment in the private, non-profit sector that replicates the principles underlying successful inner city community based initiatives, like Argus and Centro. In the words of David Hamburg, President of the Carnegie Corporation in New York, *"We know enough to act, and we can't afford not to act."*[74]

II. COMMUNITY RECONSTRUCTION

Part One described the child and youth investment side of a pragmatic new policy, but what about the community reconstruction side? Again, there already exist several models of success. Over more than a decade, the Local Initiatives Support Corporation[75] and the Enterprise Foundation, have financed and built over 35,000 units of low-income housing for the poor and millions of square feet of commercial space

70. YOUTH INVESTMENT, *supra* note 11, at 71.

71. *Id.* at 74.

72. The Centro San Juan mini-station is a nonresidential program that prepares high-risk teenagers and young adults from the neighborhood for grammar school and high school equivalency examinations. In addition to the focus on education, the program attempts to develop supportive social skills and values that will mitigate against delinquency, drug abuse and unemployment. *Id.* at 57.

73. *Id.* at 42.

74. David A. Hamburg, *Fundamental Building Blocks of Early Life, in* THE CARNEGIE CORPORATION OF NEW YORK, ANNUAL REPORT (1987).

75. The Local Initiatives Support Corporation is a private-sector corporation created in the early 1970's by the Ford Foundation. Its purpose is to generate neighborhood-based economic development in the private sector—operating through nonprofit community development organizations. YOUTH INVESTMENT, *supra* note 11, at 67.

through community development corporations ("CDC"s). The CDCs are now the biggest developers of low-income housing in the United States, larger than the American federal government.[76] These organizations make loans and grants directly to local community-based, inner-city non-profit organizations.[77]

The number of such local non-profit organizations, which can provide "bubble up" economic development, rather than trickle down development that has failed, needs to be greatly expanded in the United States. To better facilitate this development, the federal government needs to capitalize inner-city, minority-owned banks, like the model South Shore Bank in Chicago, which made investments in its neighborhood to revive economically depressed black neighborhoods and reverse the process of urban decay.[78] Beyond housing rehabilitation, inner-city non-profit development corporations need to lead the way in the repair of the urban infrastructure, including new roads, highways and rapid rail systems. The generated employment needs to be for high-risk youth, as well as for lower, working and middle class Americans—as part of an urban reinvestment agenda that moves the country from recession.

III. ANALYSIS

A. *Doing What Works*

This policy of child investment, youth investment and community reconstruction is simply common sense. It takes those programs already working in the public sector and combines them with those programs that have already worked in the private sector. It builds on the experience that private sector human and economic development, is, for the most part, better led by *non-profits* than by for-profits in the inner city because non-profits are better able to bubble up ideas from indigenous leaders in inner-city communities. The idea, based on careful evaluations, is to replicate to scale those public and private non-profit programs that already have succeeded, based on careful evaluations.

Such a policy needs to be funded for a minimum period of ten years, at a level of ten billion dollars per year in new spending on child and youth investment and twenty billion dollars per year in new budget authority on community reconstruction.[79] The cost of the community reconstruction would simply bring some federal housing and urban de-

76. *Private Cures for Public Ills*, N.Y. TIMES, Feb. 28, 1991, at A24.

77. *Id.*

78. Michael Quint, *This Bank Can Turn a Profit And Follow a Social Agenda*, N.Y. TIMES, May 24, 1992, at A1.

79. THE MILTON S. EISENHOWER FOUNDATION, INVESTING IN CHILDREN AND YOUTH, RECONSTRUCTING OUR CITIES: DOING WHAT WORKS TO REVERSE THE BETRAYAL OF AMERICAN DEMOCRACY (forthcoming 1993) (document published in commemoration of the twenty-fifth anniversary of the National Advisory Commission on Civil Disorders (The Kerner Riot Commission) of which the Eisenhower Foundation is the continuation thereof) (on file with the Milton S. Eisenhower Foundation) [hereinafter INVESTING IN CHILDREN].

velopment budget authority up to where it was before 1980.[80]

B. *Beware of Fool's Gold*

It is equally important to advocate *against* what *does not* work, based on scientific evaluations and years of experience. A recent theater in London revived the play, "The Alchemist,"[81] about people duped by the promise of fool's gold. Over the last ten years, the American federal government tried to sell a lot of fool's gold to the American public, including the false promises of enterprise zones, volunteerism, self-sufficiency, partnerships and employment.

1. Enterprise Zones

Enterprise zones, currently the most fashionable false promise among many Republicans and Democrats,[82] represent still more failed trickle-down economics. The basic notion is that, through tax incentives to entrepreneurs, we can create new businesses in the inner city. Over the last decade enterprise zones have been tried in nearly forty states. Yet, evaluations have not found significant employment or economic development benefits.[83] For example, in Louisville, Kentucky, there was little evidence that tax breaks induced anyone to invest in an enterprise zone who would not otherwise have done so.[84] Only fourteen percent of the jobs created in the zone went to persons unemployed or on welfare who lived in the zone.[85] And the United States General Accounting Office's evaluation concluded that the Maryland enterprise zone program "did not stimulate economic growth as measured by employment or strongly influence most employers' decisions about business location."[86]

Enterprise zone-like tax breaks and related benefits have also led to scandals in the inner-city, such as the money misspent by the Wedtech Corporation in the Bronx.[87] As recent studies in the United States and in Great Britain show, the hidden costs of enterprise zone strategies in lost tax revenues actually render them prohibitively expensive, in terms of costs per job created.[88] The conservative economist concluded that enterprise zones are often wasteful and tend to displace rather than cre-

80. *Id.*

81. Ben Johnson, *The Alchemist, in* PLAYS AND POEMS 9 (London, George Routlegde and Son, 2d ed. 1886).

82. *Not so EZ*, ECONOMIST, Jan. 28, 1989, at 16.

83. *Enterprise Zones: Hearings on J.R. 11 & 23 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 102d Cong., 1st Sess., 247 (1991) (Statement of William J. Cunningham, Legislative Representative, American Federation of Labor and Congress of Industrial Organizations) [hereinafter *Enterprise Zones*: statement of Cunningham]. *See also Enterprise Zones:* statement of Curtis, *supra* note 2, at 261-62.

84. *Enterprise Zones*: statement of Curtis, *supra* note 2, at 262.

85. *Id.*

86. *Enterprise Zones*: statement of Cunningham, *supra* note 83, at 247.

87. *Enterprise Zones*: statement of Curtis, *supra* note 2, at 262.

88. *Not so EZ, supra* note 82, at 16. A recent study in Great Britain found that the one-time cost for each extra job created was approximately fifty thousand dollars. *Id.*

ate business activity.[89]

Regardless of what enterprise zone experiment one chooses from among the many proposed, it is hard to find any plan that recognizes that the formula for success is multiple solutions to multiple problems, and that social development must be integrated with economic development in a very comprehensive way.[90] For example, if entrepreneurs were given trickle-down benefits in the inner-city, what provision is there for them to hire high-risk youths and ex-offenders given that their business already is, by definition, risky? What provision is there for remedial education, linked to Jobs Corps-type training and continued counselling via mentors during job placement by the ex-offenders in the businesses created by the entrepreneurs?[91] Few schemes show clearly how there will be sufficient educational and employment investments in high-risk youth over a sustained period of time with sufficient mentoring.[92] Nor, typically, in enterprise zone experiments are indigenous community leaders given true leadership roles.[93] For example, corporate and business leaders are given a stake in running Private Industry Councils as part of the present ineffective job training program for high-risk youth.[94]

What we need instead is bubble-up social and economic development that creates real infrastructure in devastated communities. For-profits can help in the development of that infrastructure, as long as the process is led by non-profits.[95] Once the infrastructure is in place, more for-profit institutions will find it more attractive to invest in these communities. It is at this stage of development of the inner-city, and not before, that we should return to the potential role of for-profit enterprise zones.

2. Volunteerism

We have been told that vast sums are needed for paid professionals in the military,[96] but that volunteerism is one of the answers to inner-city dilemmas. However, neighborhood block watches, composed of volunteers, do not work to reduce crime in the inner-city.[97] Mentoring as a form of volunteerism has even more potential. But, based on available evaluations, even mentoring fails unless the volunteers possess the right motivation, have appropriate experience and sufficient re-

89. *Enterprise Zones*: statement of Curtis, *supra* note 2, at 262; *see also Not so EZ*, *supra* note 82, at 16.

90. *Enterprise Zones*: statement of Curtis, *supra* note 2, at 262.

91. *Id.*

92. *Id.*

93. *Id.*

94. Rich, *supra* note 18, at A11.

95. YOUTH INVESTMENT, *supra* note 11, at 36 & 75.

96. Patrick E. Tyler, *Halving Defense Budget in Decade Suggested*, WASH. POST, Nov. 21, 1989, at A1; *Where To Find It: $ 150 Billion a Year*, N.Y. TIMES, Mar. 8, 1990, at A24.

97. YOUTH INVESTMENT, *supra* note 11 at 44-50.

sources.[98] So let us be a bit cautious about those thousand points of light.

3. Self-Sufficiency

Grantees often are told by funders that, after a two- or three-year federal government grant, an inner-city program should become self-sufficient.[99] In some instances we *are* able to create for-profit businesses that allow federal programs to continue.[100] But, when it comes to utterly devastated communities like south central Los Angeles, the south side of Chicago, the south Bronx or southeast Washington, D.C., where there is little infrastructure in place,[101] it is naive to assume that programs will become self-sufficient.[102] We need long-term commitments with comprehensive solutions.

4. Partnerships

The federal government sometimes uses the word partnership as fool's gold as well, encouraging coalitions of programs and organizations, with the promise that there is strength in numbers.[103] But if, for example, one coordinates an unsuccessful inner-city program like block watches with an unsuccessful inner-city program like enterprise zones, the result will be a coordinated but still unsuccessful partnership. We must be sure, then, that individual interventions are partnered with other programs that actually work.

5. Empowerment

Finally, beware of the word empowerment, often used in the context of public housing in the United States.[104] Public housing tenants are encouraged to empower themselves by managing their own estates. But this is done in only a very few places, where, of course, visiting dignitaries are taken.[105] These are nonetheless, the exception. Most housing projects in the United States are not managed by residents, and the federal government has neglected to provide funding to train residents or for physical maintenance of their buildings.[106] Similarly, there is rhetoric about home ownership for the poor, but little follow through on the promises.[107] There is not much talk about empowerment through education and employment, which are the real answers. As a result, American psychologists invented a new term "post-empower-

98. *See generally* MARC FREEDMAN, THE KINDNESS OF STRANGERS: REFLECTIONS ON THE MENTORING MOVEMENT (1992).
99. *See* YOUTH INVESTMENT, *supra* note 11, at 38-39.
100. *Id.* at 75.
101. INVESTING IN CHILDREN, *supra* note 79.
102. *Id.*
103. *Id.*
104. YOUTH INVESTMENT, *supra* note 11, at 77.
105. Even the Queen of England was taken to one such housing estate when visiting Washington, D.C.
106. YOUTH INVESTMENT, *supra* note 11, at 77.
107. *Id.*

ment syndrome."[108] This refers to programs for the poor, that are funded for a few years, then encouraged to become self-sufficient. When the program fails, participants realize they are not empowered, the poor become even more frustrated and angry.[109]

6. Resources

Enterprise zones, volunteerism, self-sufficiency, partnerships and empowerment. Fool's gold has been for sale because the federal government has been unable and unwilling to invest the substantial resources needed to replicate enough programs sufficient to make a national impact. Europe and Japan have been more responsible, morally and economically, than the United States over the last decade in investing in children, youth and urban infrastructure. Only the federal government has enough resources to generate change that will have a significant national impact to leverage the additional private and local public funds needed.

Long-term comprehensive policy should be financed through a number of well discussed, bi-partisan plans—like breaking down the budgetary "Berlin Wall" that now proscribes reallocating defense and foreign aid funds into domestic investment, increasing taxes on the richest one percent (who had their taxes reduced and incomes increased by 120 percent over the 1960's)[110] and redirecting some pension fund investments in ways that benefit our children, youth and cities. America found the money to fight the Persian Gulf War and it found the hundreds of billions of dollars needed to bail out the failed, deregulated savings and loan industry. The United States *can* find the money for a true strategy of child and youth investment and community reconstruction. All we need is the leadership at the very top. We now have that leadership.

IV. CONCLUSION

If we are to reverse the betrayal of the American democracy, wise national leaders also need to embrace wise citizens. In the words of William Greider, "Rehabilitating democracy will require citizens to devote themselves first to challenging the status quo, disrupting the existing contours of power and opening the way to renewal."[111] Common people must engage their surrounding reality and "question the conflict between what they are told and what they see and experience."[112] In the United States, this means old fashion grassroots political lobbying to gain full funding for preschools modeled after the French experience and job training modeled after the German experience. It means mas-

108. INVESTING IN CHILDREN, *supra* note 79.
109. *Id.*
110. *See supra* note 2 and accompanying text.
111. WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 410 (1992).
112. *Id.*

sive voter registration of the poor. It means tight controls on special interest group lobbyists in Washington, D.C., the people who walk down K Street in thousand dollar suits and alligator shoes. It means public financing of elections, elimination of contribution loopholes and far shorter campaigns that limit both the use of money and the use of television, as is the case in the United Kingdom.

We need not continue pushing the rock up-hill. There is hope. We know what works. We no longer need to defer the American dream for substantial portions of the American population.

"What happens to a dream deferred," asked the honored African-American poet, Langston Hughes:

> Does it dry up
> like a raisin in the sun?
> Or fester like sore—
> And then run?
> Does it stink like rotten meat?
> Or crust and sugar over—
> like a syrupy sweet?
>
> Maybe it just sags
> like a heavy load.
>
> *Or does it explode?*[113]

113. LANGSTON HUGHES, *Lennox Avenue Mural: Harlem*, *in* MONTAGE OF A DREAM DEFERRED 71, 71 (1951).

REEL TIME/REAL JUSTICE

KIMBERLE CRENSHAW* AND GARY PELLER**

Like the Anita Hill/Clarence Thomas hearings a few months before, the Rodney King beating, the acquittal of the Los Angeles police officers who "restrained" him and the subsequent civil unrest in Los Angeles flashed Race across the national consciousness and the gaze of American culture momentarily froze there. Pieces of everyday racial dynamics briefly seemed clear, then faded from view, replaced by presidential politics and natural disasters.

This Essay examines in more depth what was exposed during the momentary national focus on Rodney King. Two main events—the acquittal of the police officers who beat King and the civil unrest in Los Angeles following the verdict—serve as starting points for an analysis of the ideological and symbolic intertwining of race and power in American culture. This Essay explicates the outlines of a *critical race theory*,[1] focusing not solely on the Rodney King incident, but considering more broadly how racial power generally is produced, mediated and legitimated—an approach that seeks to connect developments in diverse arenas in which race and power are contested.

A deep connection between the various ideological conflicts became apparent in the way the Rodney King events played in national consciousness. The techniques utilized to convince the Simi Valley jury of the reasonableness of the force used on Rodney King are linked to the struggle—in a quite different legal arena— over whether to permit race-conscious affirmative action programs. Both arenas in turn relate to the conflict over whether to see the events in South Central L.A. as an "insurrection," as Representative Maxine Waters characterized it, or as a "riot" of the "mob," the official version presented in dominant media and by the President of the United States. At stake at each axis of conflict is a contest over which narrative structure will prevail in the interpretation of events in the social world. Exposed in each conflict is the inability of concepts, like "the rule of law," or "reason," or even the technology of video, to mediate these conflicts in a neutral aracial way.

The realm of interpretation, ideology and narrative is a critical site

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1. "Critical Race Theorists" is the name of an informally organized group of scholars writing in the area of race law and theory. The group held its first conference in Madison, Wisconsin in July, 1989. For a brief overview of the group's goals and perspectives, see Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, *in* THE POLITICS OF LAW 195 (D. Kairys 2d ed. 1990).

in the production of American racial domination. The Rodney King episode is particularly challenging for our approach because it seems so easily assimilable to more conventional models of the way that power works. Rather than imagine racial power being produced in the soft space of ideological "superstructure," the world saw it exercised at another point of production—at the material "base" where the nightstick met the skull. Unlike the 1980s and 1990s racial controversies over affirmative action, ethnocentrism and multiculturalism, the Rodney King beating bore the familiar markings of the 1950s and 1960s—rather than being carefully encased in definitions of merit and neutrality. Instead, old-time white supremacy was boldly and crudely inscribed on the body of King. No fancy theory is needed to figure out what went on between the Los Angeles police and Rodney King. But the Rodney King events are also particularly illuminating for an approach that focuses on the ideological. Part of what was revealed in the Rodney King saga was the need for an account of how racial power *continues* to work, decades after outlawed as a matter of formal decree, cultural convention and elite preference.

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To get a picture of how various structures of interpretation played out after the verdict, first remember the reaction in most sectors of American culture when the famous videotape of Los Angeles police officers beating King was initially broadcast on network television. Broad national outrage shared by African Americans and most whites and minorities followed, with the only visible exception being the fringe (but becoming stronger) white proto-fascists of the Patrick Buchanan/David Duke camps. An easy event for the entire mainstream of American culture to abhor, it did not present any of the hard questions of nineties' controversies over race—like the so-called "dilemma" of affirmative action, for example. The videotape lent objectivity to the charge of police brutality. There was no question of interpretation and subjective bias clouding the issue.

This initial wide consensus was actually based on the congruence of various ideological positions around the use of the videotape as "proof." Most people, including most political conservatives, had no difficulty seeing what the tape represented: old-style, garden-variety racist power exemplified by the Bull Connor/Pretoria-like images of heavily armed white security officers beating a defenseless black man senseless. Part of the progress African Americans achieved in formal legal equality and its cultural analogues manifested itself in the fact that, unlike the fifties and sixties, no voice anywhere near the mainstream of American life called this kind of police practice legitimate. In the nineties, the moderate white Right defines itself in terms of the repudiation of the backward doctrines of white supremacy. Within the broad social consensus, how one understood the King videotape was not linked to how one understood the so-called "murkier" issues of contemporary racial conflict. In political terms, the King videotape gave the moderate

Right the opportunity to oppose clear-cut racism and thus to demonstrate that its opposition to affirmative action is not linked to interests in racial supremacy.

But this broad consensus was misleading to the extent that the video appeared to mean the same thing to everyone. Subsequent events would reveal the deep cleavages in how the tape was understood. The differentiation underlaying the consensus around the King tape—between supposedly "old" ideologies of racial supremacy and contemporary "dilemmas" of race—was too quick. It obscured the ways the acquittal of the Los Angeles police officers were intertwined with narrative structures that prevail in debates about affirmative action. Part of understanding the failure of the formal legal equality achieved by African Americans to protect Rodney King means understanding how formal prohibitions, like those against police brutality and racial discrimination, are necessarily mediated through narrative structures. The Simi Valley jury's verdict is a particularly striking example of such a structure, but not different in kind from the more rarified ideologies of "moderate" Supreme Court justices. When the cultural consensus over the meaning of the videotape blew apart in the violence of South Central L.A., the limits of formal legal equality also became apparent.

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Pause here to consider how the initial, common sense consensus about what the King video showed was confronted by defense attorneys in the courtroom. Frame-by-frame stills of the video were mounted on clean white illustration boards and then used as the basis for questions to "experts" on prisoner restraint. Each micro-moment of the beating of King was broken down into a series of frozen images. As to each one, the defense attorneys asked the experts whether King assumed a compliant posture, or might a police officer reasonably conclude that King still posed a threat to resist. Once the defense broke the video into frames, each still could then be re-weaved into a different narrative about the restraint of King. Each blow to King represented, not beating one of the "gorillas in the mist," but a police approved technique of restraint complete with technical names for each baton strike (or "stroke"). The videotape images were *physically* mediated by the illustration boards upon which the still pictures were mounted, and in the same moment of *disaggregation*[2] they were *symbolically* mediated by the new narrative back-

2. We borrow the term "disaggregation" from Justice Marshall's dissent in *Richmond v. Croson*, 488 U.S. 469 (1989).

> [T]he majority's critique [of the evidence of racial exclusion] shows an unwillingness to come to grips with why construction-contracting in Richmond is essentially a whites-only enterprise. The majority . . . takes the disingenuous approach of disagreggating Richmond's local evidence, attacking it piecemeal, and thereby concluding that no single piece of evidence adduced by the city, 'standing alone,'. . . suffices to prove past discrimination. But items of evidence do not, of course, 'stand alone,' or exist in alien juxtaposition . . . .

Id. at 542 (Marshall, J., dissenting).

For a more extended discussion of the manner in which the Court disaggregated causal factors in *Croson*, see Michel Rosenfeld, *Decoding* Richmond: *Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1761-66 (1989).

drops of institutional security's technical discourse and the reframing of King as a threat rather than as a victim.

The eighty-one second video was, in short, broken into scores of individual still pictures, each of which were then subject to endless reinterpretation. Since no single picture taken by itself could constitute excessive force, the video tape as a whole said something different—not incredibly clear evidence of racist police brutality, but instead ambiguous slices of time in a tense moment that Rodney King created for the police.

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There are many explanations for the King verdict. Most center around the image of jury lawlessness—the idea that the jury's result was corrupted because they ignored the clear evidence of brutality to acquit the police. Along these lines, some claimed to have expected the verdict, because justice cannot be reached in a "system" controlled by "them." Others located the pivotal turning point as the granting of the defense motion for a change of venue—resulting in a trial location dominated by law-and-order white conservatives, and, ironically, an area disproportionately the home of L.A.P.D. officers and retirees. Others placed responsibility on an inept (or worse) prosecution that failed to humanize Rodney King to counter the defense continually objectifying him.

There is some truth in each of these explanations. The problem, however, is that each view binds its explanation of the King verdict too tightly to one or another sites for the production and exercise of American racial power. One view suggests that, but for these quirks of the case and the irrationality of the jurors, the legal system could neutrally respond to an event like the beating of Rodney King. At the opposite pole, the particular manner by which the King judgment was reached is too quickly linked to an overly instrumental view of how law and other mediating ideologies serve power.

Law in general and the courtroom in particular are arenas where narratives are contested and the power of interpretation exercised. In that sense the legal realm is a political realm. But it would be a mistake to see narratives simply as some after-the-fact stories about events concocted after the *real* power has already been exercised. The story lines developed in law *mediate* power in the sense that power is translated to appear as non-power—the beating of King becomes the "reasonable exercise of force necessary to restrain a prisoner." The story lines also *constitute* power in the sense that the narrative lines shape what and how events are perceived in the first place. Understanding these relationships between law, power and ideology is necessary to comprehend how, in many ways, the King verdict was *typical*, not extraordinary.

To develop this idea, it is helpful to turn from the King verdict to a very different legal arena, the issuance of Supreme Court opinions. The point is to draw connections between the narrative structure presented by the defense attorneys in the police brutality trial—breaking the video-

tape up into scores of single, still images—and the narrative structure utilized in the more academic and "rational" atmosphere of the Supreme Court.

In *Richmond v. Croson*[3], a Supreme Court majority struck down as unconstitutional Richmond's municipal policy of awarding construction contracts on a race conscious, affirmative action basis. Under Richmond's program, prime contractors were required to set-aside thirty percent of their work to be performed by minority subcontractors.[4] As matter of legal doctrine, *Croson* is an important refinement of the meaning of "equal protection" in the Fourteenth Amendment because the majority applied the "strict scrutiny" standard,[5] the traditional test for "malign" racial classifications burdening Blacks, to a "benign" affirmative-action plan burdening whites. This doctrinal development presented a symbolic message that the problem of racism is a symmetrical one—both Blacks and whites can suffer when racial classifications are utilized, and therefore the same level of scrutiny is warranted whether a racial classification benefits Blacks or whites. From this vantage point, racism consists of the failure to treat people on an individual basis according to terms that are neutral to race. In the *Croson* context, this embrace of "colorblindness" in equal protection meant the Court could plausibly equate the legal significance of the City of Richmond, which benefitted white contractors through a contracting system that excluded blacks, with the legal consequences of a decision to benefit black contractors by requiring set-asides.[6]

In this doctrinal setting, the legal issue in *Croson* was whether the Richmond affirmative action policy was constitutional as a policy that served the compelling aim of remedying past discrimination against blacks. According to the Court, such an aim was in fact compelling, but only as the remedy for *particular* discrimination, lest the remedy constitute a new instance of racial discrimination.[7] The problem in *Croson*—no "proof" of significant racial discrimination in the Richmond construction industry that required a remedy—allowed the Court to hold against the set-asides.[8]

The analog to the videotape of Rodney King's beating that failed to

3. 488 U.S. 469 (1989).

4. *Id.* at 477-48.

5. *Id.* at 493. Loosely, "strict scrutiny" heightens the requirements of a policy's importance and fit.

6. The critique of this general norm of colorblindness has been one of the central projects of "Critical Race Theory" scholars, a group of writers informally organized in 1989 to pursue progressive-oriented studies of race, culture and law. For a description of the group's aims, see Crenshaw, *supra* note 1, at 195. For citations to the group's work to date, see Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 78 VA. L. REV. (forthcoming 1992). For examples of criticisms of colorblindness from within the critical race theory genre, see Neil Gotanda, *A Critique of 'Our Constitution is Color-Blind'*, 44 STAN. L. REV. 1 (1991); Gary Peller, *Race Consciousness*, 1990 DUKE L. REV. 758; Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Legal Equality*, 87 MICH. L. REV. 2128 (1989).

7. *Crosen*, 488 U.S. at 505-06.

8. *Id.* at 506.

"prove" unreasonable and excessive force was the formal record before the Supreme Court in *Croson*, which expressed the familiar picture of black economic exclusion. The record included (1) Congressional findings of massive discrimination in the construction industry across the country, (2) a fifty percent black population in Richmond, (3) less than one percent of the Richmond's prime contracting dollars went to minority-owned businesses, and (4) the testimony of the mayor, the city manager and two councilmen as to Richmond's long and thorough history of racial discrimination, officially sanctioned and practiced in education, voting and housing.[9]

Like the Simi Valley jury, the Supreme Court was confronted with a picture—the near-total dominance of white firms in the contracting business of Richmond, Virginia—and asked to determine if illegitimate power had been exercised. And like the attorneys for the Los Angeles police officers, the Court utilized the process of *disaggregation* to conclude that racial discrimination was the proven cause of the huge disparity between the racial composition of Richmond's population and the racial composition of recipients of prime construction contracts.[10] Just as the defense attorneys directed the jury's consideration from the reel-time of the video to the disaggregated stills of the L.A. police and Rodney King, the Court freeze-framed each element of the Richmond setting and isolated them from their meaning-giving context—the history of racial subordination in Richmond, Virginia, the former capital of the Confederacy and one of the central sites of "massive resistance" to desegregation orders in the 1960s. The Court's opinion considered each piece of evidence individually, determining that by itself each was not sufficient to conclude there had been discrimination, and therefore ruling that there was no "proof" the Richmond construction industry was the site of racial discrimination which could now legally be remedied by affirmative action set asides.[11]

Once the Court *disaggregated* each factor from its context in the full picture of the racial history of Richmond, it was still left with the glaring statistical evidence that blacks had been shut out of the construction contracting business. And, like the Los Angeles policemen's defense at trial, once meaning was divorced from context, it was possible to weave the disaggregated images together with new, alternative narratives. In the Rodney King brutality case, the stills were reconnected through a story of King's power and agency—his body could become "cocked" and could appear "in a trigger position." In the *Croson* affirmative action case, a new narrative was also created, one which implicitly explained the lack of minority contractors in terms of the (lack of) skill, initiative and choice blacks rather than the exclusionary power exercised by whites.

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9. *Id.* at 484-85
10. *Id.* at 542 (Marshall, J., dissenting).
11. *Id.* at 506.

Part of the great appeal of what has been earlier termed "formal legal equality"—the blanket legal prohibitions against racial discrimination that were achieved in the 1960s—is the belief that the identification of the grossest forms of racial discrimination is straightforward and objective. Rather than leave protection to the whim of politics or the discretion of power, the imagery of the "rule of law" suggests that the prohibition against racial discrimination is clear and determinate. It does not depend on subjective evaluation. hat is so enraging about the King verdict is it seems to show that even such clear, objective prohibitions can be subverted by racial power, like that embodied in the all-white Simi Valley jury.

Our first point in drawing out the structural similarities between the construction of narratives in the Rodney King trial and the Supreme Court's *Croson* opinion is to question this kind of thinking about the protections of "formal equality." We are not saying that the Supreme Court is like the Rodney King jury, acting lawlessly or corruptly by violating some objectively identifiable "reality" about race in America, or in Richmond. Rather, our point is to examine critically how ideological narratives work as a form of social power, to show how a belief in formal legal equality—in the objectivity of "the rule of law"—can help obscure the everyday character of racial power.

An important image underlying the initial consensus in American culture about the videotape and ultimate acquittal of the Los Angeles police officers who beat Rodney King was that the videotape exemplified an old-style mode of racial domination which, today, virtually the entire American culture opposes. The videotape reverberated with the skeletons of American apartheid. On issues of *basic* civil rights, a wide spectrum has embraced the morality of 1960s race reforms ensuring formal equality "regardless of race." On the other hand, the perceived "disagreements" over affirmative action or multiculturalism seem less clearly focused, less objective and more political.

But this way of perceiving these two arenas of race is already a product of a particular narrative, a particular way of articulating the meaning of race. The granting of legal rights to formal equality—to be treated the same as everyone else regardless of race—is taken as an intrinsically meaningful and comprehensible goal separate from the murkiness that's supposed to be involved in the morally "tougher" race issues of the 1990s. The prohibition of explicit racial discrimination is seen as a formally realizable goal, in the sense that it can be applied without any more elaboration of controversial value choices. That is why we can be so sure the Simi Valley jury acted "lawlessly," or "fraudulently," in a way that seems at first so different from the careful, reasoned, philosophical arguments of Supreme Court opinions. There appears a qualitative difference between what the Simi Valley jury did and what the Supreme Court does. In the cultural imagination, it's like the difference between rednecks and the gentry.

This contrast between arenas of racial controversy is ideologically

constructed. From the perspective of "narrative" and "disaggregation," the sharp difference between issues of "formal equality" as opposed to "special treatment" fades as the identification of each is seen to ultimately depend upon which pictures of the world are believed, and which are disbelieved. The sharp distinction usually drawn between them suggests that equality can be achieved outside the realm of power and interpretation because it can be objectively identified by law. But what the King verdict represents is not the corrupt subversion of the rule of law's values, but rather the ideological power of belief in rule of law itself.

Through the description of "disaggregation," features of the dominant form of contemporary race ideology appear, linking the Simi Valley jury's acquittal of the police with the race narratives of moderate, mainstream legal culture. Through the typical process of "disaggregation," a narrative is created within which racial power has been *mediated* out, like the anesthetic effect of mounting stills on clinically-white illustration board. In both the Simi Valley police brutality trial and the *Croson* case, a narrative mediates the representation of the world by divorcing the effects of racial power—the number of black contractors in Richmond, the curled body of Rodney King—from their social context and from their historic meaning. In the compulsive legal search for the clearly-defined, objectively verifiable, perpetrating act of illegitimate power—the single, particular offending blow in the frame-by-frame presentation of the Los Angeles police; the particular acts of discrimination that directly caused white economic hegemony in Richmond, Virginia—social events are de-contextualized in both *space*—where things happened, and between whom—and *time*—what larger forces operated to give events their meaning.

Hence the symmetry of the idea of "racism" in mainstream American culture appears. Once race is divorced from its social meaning in schools, work places, streets, homes, prisons and paychecks and from its historic meaning in terms of the repeated American embrace of white privilege, then all that is left, really, is a hollow, analytic norm of "color-blind"—an image of racial power as embodied in abstract classifications by race that could run either way, against whites as easily as against blacks. Finally, this kind of disaggregation, oddly, seems like the very definition of what is neutral and objective—a narrative that does not depend on point of view, that is a tape of the social world with the images so enlarged and slowed down that it could say anything.

Rather than see the jury acquittal as an aberration by some low-down Simi Valley redneck consciousness, consider it the reigning ideological paradigm of how to identify illegitimate racial power. The paradigm is vivid precisely because of the extremity of the conclusion that only "reasonable force" had been used on Rodney King. The virtue of "formal equality" is that there is something important in the fact that power wielders can no longer justify conditions in the social world based on the supposed natural inferiority of Blacks. But the problem of formal equality is that it is appealing precisely because it seems to be able to do

what it cannot do—resolve issues of social power, racial power, once and for all, according to some sort of neutral and objective rules.

Rodney King did, in a sense, get the fruits of formal equality. But the terms that guarantee the rule of law—terms like "reasonable force" or "equal protection"—are necessarily indeterminate. Their meaning must be socially constructed through narratives of place and time for there to be any meaning to them at all. The Simi Valley jury's deliberations are not so different from those of the Supreme Court. In neither realm is the rule of law subverted. The "law" and the "facts" of the social world do not exist in any objective, ready-made form. They must always be interpreted according to politics, ideology and power.

The belief in what we have called "formal equality" resulted in one particularly intense set of reactions to the verdict. Many (particularly integrationist-oriented) blacks who invested more than symbolic meaning in the guarantees of objectivity presented by law in particular and the wider cultural rhetoric in general felt extreme disillusionment. Like the white cultural mainstream, many Blacks believed that the baton against the Rodney King's skull would speak for itself, just as many believed that principles of colorblindness and other varieties of formal equality provide a clear, almost self-generating protection against racial discrimination. What many people did not comprehend was that police brutality, just like discrimination, does not speak for itself. This very struggle over meaning is precisely what the intense contestations about race in the law are really about. Rather than providing some kind of firm ground to challenge racist institutional practices, notions of "formal equality," "objectivity," "neutrality" and the like tend to obscure the way that race is experienced by the vast majority of African Americans in this society.

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We have described "disaggregation" as a narrative technique that narrows the perception of the range of illegitimate racial power by divorcing particular episodes from their larger social context. Implicitly this kind of distortion is contrasted with "real" time. Considering things as they "are" is contrasted with freeze-framing space and time into isolated stills that can be reinterpreted through a benign narrative of justification. The identification of "disaggregation" as part of conservative ideology is made easier by the image we all share of Rodney King being beaten, and the confident sense we have that we see the *meaning* of the videotape. By implicit reference to this "real" time, the disaggregation technique looks like a distortion.

But the concept of "real" time, which up to this point has been assumed, should also be questioned in order to consider the implications of thinking that we can identify the corruption of the Simi Valley jury by contrasting its verdict with the reality depicted on the videotape. Consider the possibilities that even the videotape itself has no special, objective status. What we progressives "see" in the images is the product of mediating narratives in much the same way as what the Simi Valley jury

"saw" depended on the technique of disaggregation previously discussed.

People invested very different meanings in the Rodney King videotape. For many, the existence of the videotape was a source of excitement that technology was finally utilized in service of the masses, so that "they" (the authorities) could not say that people were just making up charges of police brutality. The underlying assumption for many people was that such conduct is a more or less regular feature of many police encounters with blacks, particularly in Los Angeles. The underlying frustration has been the inability to stop these practices through creation of formal legal prohibitions because of the inability to "prove" what happened. When the tape was first broadcast, in addition to the pain of seeing such brutality, there was also exhilaration that the videotape would solve the problem of "proof" so that the police would finally be disciplined. Simply put, the significance of the video was not that it proved to masses of Blacks and others that the Los Angeles police are brutally racist, but rather that it was projected as what would satisfy "the law" that brutality against blacks occurred.

But also within the initial national outrage at the King videotape were many who saw the brutality depicted in the videotape as awful but exceptional, part of another era exposed occasionally and rarely caught on videotape. The videotape "proved" brutality, but the brutality and the fortuity that was recorded were viewed as equally random partners. In short, a gulf of comprehension existed underneath the broad American consensus that the videotape depicted outrageous police behavior. For some, the existence of the videotape was critical to comprehending that this kind of racist brutality *still* occurs in American society, because the videotape presented "objective" proof. In other words, without the videotape, they would have had no outrage, indeed no consciousness of the conditions of police and community relations in Los Angeles. For others, the videotape didn't serve to *establish* this kind of police behavior, but rather simply to document it and thus hopefully satisfy the powers that be.

Questioning the centrality that the videotape had for so many people exposes is a deep connection between the ideological need for "objective" proof and the more general ways race is understood in American culture. The special status accorded the King videotape as "objective proof" was a social construct, just as the particular interpretation of the tape embraced by the Simi Valley jury was constructed. *Both* the perception of the tape as showing a "reasonable exercise of force" *and* the perception of the tape as showing "racist brutality" depend, not simply on the physiology of visual perception, but rather on *interpretation*, on the mediation of perception with background narratives that give visual images meaning.

Valorizing the so-called "objective proof" of the videotape is problematic, because, to the extent that the videotape was understood to "prove" the racist brutality of the L.A.P.D., such a conclusion implicitly

rested on the idea that, but for the tape, no "objective" proof was available. Yet an important piece of the background context to the Rodney King events was the availability of witnesses and the testimony of hundreds of thousands of victims of police brutality. They can attest to the practices of the Los Angeles police, as well as those of many other departments. Typically, such victims are arrested for "disorderly conduct" after they have been beaten. So deep is the street-level understanding of the uselessness of the processes of the "rule of law" that, in the overwhelming run of cases, no complaint is ever made. The emphasis on the video tape's "objective proof," in short, marginalizes as merely subjective. All those whose reality is devalued because there was no tape, only their word and the longstanding community's experience of the L.A.P.D.

Underlying the elevation of the videotape as "objective proof" of the racist brutality of the L.A.P.D. is a hierarchy of evidence and meaning. This hierarchy distinguishes between objective proof and subjective assertion, fact and opinion, disinterest and bias. These categories are neither natural nor independent criteria with which to evaluate various narratives about the world. They, themselves, form the vocabulary for a particular narrative, one that assumes the possibility of a vantage point of "objectivity" that could exist outside of any particular vision or interpretation. This vantage point is seductive because it seems to transcend the partialities of history and geography, of time and space. But the images of objectivity and impersonality, like the allied distinctions between fact and opinion, between colorblindness and discrimination—and between law and politics—are, in our social context, the terms of a particular discourse of power. Here that power is manifest in the inability of L.A.'s Black people to get redress when the police beat them unless they have what will satisfy others as "proof."

To see how the hierarchies of objectivity and subjectivity work as a discourse of power to marginalize the victims of these racist police practices, consider that it is not the videotape—the disinterestedness of technology—that makes us "see" what happened to Rodney King. The videotape images of the Los Angeles police officers and Rodney King do not mean what they mean for us as a matter of objectivity, but rather as a matter of social construction. We must, necessarily, weave narratives into the images to give them a life in some time and space. Just as the legal concepts of "formal equality" are indeterminate and only acquire meaning in a social struggle over describing the world, as *Croson* revealed, so the video images are clear to us because we bring our own narratives to them. We see in them the images of Bull Connor and Soweto and various episodes of the long story of racial apartheid being brutally enforced, images and narrative lines that we carry around in our collective memory. In this sense, our judgment, like that of the Simi Valley jury and the Supreme Court in *Croson*, is mediated by background narratives that tie together what otherwise would be a random set of images.

* * *

The different images underlying peoples' first impressions of the King videotape help make sense of the various reactions to the verdict. Of course, the sharpest contrast was between those who responded to the verdict by taking to the streets in Pico and South Central and, at the opposite pole, the police department personnel who cheered the news. But most across the spectrum of mainstream culture who deplored the "rioting" did not do so because they agreed with the verdict or with the cheering police. To the contrary, for the most part they sought to preserve the very value they thought the Simi Valley jury had impugned—the value of the "rule of law." The public discourse of the "L.A. riots" quickly became articulated as an opposition between those urging restraint and advocating respect for the "rule of law" and those articulating an alternative first principle of "no justice, no peace." The contrast between the rhetoric of "rule of law" and "no justice, no peace" was soon translated by the dominant culture into a contest between an objective, reasoned, responsible reaction and an emotional, passionate, irresponsible one. These strands of narrative culminated in the symbolic conflict between whether the people out in the streets should be seen as a "mob" "rioting" or as part of an "insurrection."

It did not seem ironic that many people who deplored the Simi Valley verdict also deplored the "rioting." In fact, from within the discourse of objectivity and respect for "the rule of law," it seemed obvious that there was a deep link between the jurors who acquitted the police who "restrained" Rodney King and the rioters on the street. In the dominant cultural narrative, both embodied a form of irrationality, of emotion-driven distortion. In the case of the jurors, their irrationality with respect to the videotape was seen in terms of white racism and fear of black crime. The people on the streets looked simply like a chaotic, emotional reaction, one without "reason" in the burning of neighborhoods, stores and the like.

The language of an "insurrection" suggests, however, a counter-narrative, one which implicitly rejects the various rhetorical clusters that came to define the way the Rodney King events were incorporated in mainstream discourse—including the reference points of objectivity, rationality, colorblindness and legalism. The narrative of "insurrection" suggests a competing view of the whole Rodney King episode. Rather than view the beating of King as an aberration from a legal norm of the "reasonable" use of force, the "insurrection" narrative implies a focus on the power relations and dynamics existing between the "rioters" and the police. While the image of the "riot" suggests a kind of instantaneous, emotional reaction to the verdict, the image of an "insurrection" directs attention from the shock of the verdict to the day-to-day subordination of the Los Angeles African American community. Rather than seeing King's beating as an outrageous deviation from the norm of police objectivity, the image of community subordination comprehends a systematic set of social dynamics—including a geographic context in

which a largely Anglo police force with enforcement responsibility for the sprawling metropolis of Los Angeles speeds through Black neighborhoods in fortified, heavily armed, cruisers dispatched from some remote location, and a historical context in which police brutality to Blacks has been common and repeatedly the subject of investigation, expert commission report and inaction. In contrast to the image of the uprising as an explosive reaction to a disappointing verdict, the language of "insurrection" conceives the uprising as a communal response to a much larger set of social power issues. The image of "insurrection," in short, is part of a narrative that sees the relations of police and Blacks in Los Angeles, not as the disaggregated diad of state officials and private citizens, mediated by neutral legal norms of reasonableness and nondiscrimination, but instead in terms of the power-laden relationship of communities defined by race, within which whites, through the police, exercise a kind of occupying power and within which Black neighborhoods appear as something like colonies. In these terms, an "insurrection" is not the blindly irrational acts of "rioters" (who, in the dominant narrative, should be expected to peacefully protest), but the concerted action of a community determined to raise the cost of peace to the colonizers, and thereby to increase its leverage on the continuing power relations.

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Following the widespread urban unrest of the 1960s, the Kerner Commission concluded that the "riots" expressed an angry frustration with the slow pace of racial integration.[12] The dominant reaction to the recent disorder in L.A. evidences the same kind of ideological framing of the issue. But the narrative of "insurrection" challenges the vision of race and racial power implicit in the conventional idea that racial justice means the end of "discrimination" and the achievement of formal equality and integration into the dominant community. Instead, the imagery of occupation and subordination points to a wholly different comprehension of race relations, one which looks to the power relations between historically defined racial communities, rather than away from race and towards colorblindness. Accordingly, rather than see justice in terms of achieving police colorblindness, a race-conscious focus on power between communities focuses attention on the legitimacy of the dominant community administering the "colony" in the first place. Most who deplored the L.A. riots assumed a legalist model of racial justice in which the norms of objectivity and neutrality are central to the achievement of racial integration. From within that kind of ideology, there is simply no place for ideas like community control over police, education and other public services, because the Black community is no longer even perceived as separate or unique. There are just people who "happen to be black." *Power* as the constituting factor of inter-commu-

12. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 205-238 (Bantam ed. 1968).

nity relations becomes invisible as it is imagined that law, objectivity and neutrality have some transcendent ground.

Rejecting the proposed "grounds" for determining the "real" in "objective" and "impartial" fashion, relations between communities cannot be mediated in a neutral fashion through the recognition of formal legal rights. Accordingly, the problem in the Simi Valley verdict acquitting the L.A. police was not that it corruptly deviated from some objective norm of legality or objectivity. Instead, those "norms" themselves constitute a narrative, an ideology for understanding race that excludes from its vision the political and power-laden terms of race relations.

But believing that issues—like the meaning of the Rodney King videotape or the racial composition of Richmond's construction contractors—are necessarily and always subject to interpretation rather than "objective" proof does not mean that we are any less outraged by the verdict. The identification and enforcement of legal rights requires acts of meaning-attribution—of narration—as does comprehending the "meaning" of a videotape. But such a conclusion does not mean that everything is therefore relative, or that anything goes since it is all power anyway. To the contrary, once the narratives become so disparate between a community and the police or the legal system, we realize that it is time to recognize that, in a deep sense, Blacks in Los Angeles live in a different world from whites—something like a different nation. The police and the people are like foreigners to each other. Understanding this distance means comprehending relations, not according to norms of universal equality and equal treatment, but as the rule of one community over another.

From this counter-narrative, what is needed is not colorblindness on the part of the police force, but the redistribution of power so that the police force is not an outside occupier, but rather a part of the community itself, subject to regulation by the Black community in Los Angeles. The community does not need formal equality from the police, but actual control *over* the police—as well as other public institutions.

CULTURAL RACISM AND THE LIMITS OF RATIONALITY IN THE SAGA OF RODNEY KING

ANTHONY COOK*

This Essay develops a multidimensional understanding of racism necessitated by Rodney King's beating, the trial of his assailants and the acquittal of the defendants by an all-white Simi Valley jury. Many saw the episode as a blatant act of racism akin to the dark period of American history in which public mobs routinely lynched blacks. It also provided a birds-eye view of the complex development and intricate configuration of American racism.

This Essay argues that racism results from a complex process of acculturation in which individuals come to see and interpret the world through lenses carefully crafted by a history of racism. Racism manifests itself on three interrelated levels of human interaction: individual, institutional and cultural. All three of these levels of racism were present in the Rodney King saga. This Essay examines this multi-faceted understanding of racism and offers an explanation of how a jury could look at the tape of such a vicious beating and convince themselves that the defendants did not use excessive force.

I. BACKGROUND: THE RATIONALIST CONCEPT OF RACISM

As racism moves from the individual to the cultural level, it is more difficult to establish that a perceived racist effect, such as the acquittal, can be attributed to an individual or group. The problem lies principally in the rationalist conception of racism, an understanding largely embraced by our judicial system's race jurisprudence.[1] A rationalist understanding of racism links racism to deviant consciousness, bad intentions and mental culpability. Since minds cannot be read, however, the difficulty lies in identifying racism. The rationalist answer evinces a dependence on certain signs or outward manifestations, representative of the subject's conscious state. The rationalist depends largely, though not exclusively, on language as representative of consciousness. Thus, intentions are discovered through the words used to describe those intentions. Explicit racial classifications are reviewed with strict scrutiny, since it is presumed that they reflect an illicit purpose and unacceptable state of mind. While in the area of race jurisprudence our legal system

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1. *See* Washington v. Davis, 426 U.S. 229 (1976) (requiring a showing of discriminatory purpose under equal protection analysis); *see also* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (inferring a discriminatory purpose from discriminatory effects). For the groundbreaking work on the importance of unconscious racism see Charles Lawrence, *The Id, and The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

will sometimes infer a state of consciousness from the subject's behavior, under the rationalist model, discriminatory impact is but the flipside of discriminatory purpose. Both are part of a rationalist model that vascilates between what it considers the appropriate measure of mental state or consciousness.

The correspondence between language and thought is troubling. First, racist beliefs are not always conveyed through verbal expression. The rationalist model, therefore, punishes only those racists who are careless and do not attend to the proper window dressing required in a day where racism is publicly condemned. Second, it is often possible to interpret the expression of racist consciousness in a non-racist way. Thus, the expressions used by the Los Angeles police officers in reference to the beating of Rodney King like "gorillas in the midst," "raging bull" and "thin blue line separating us from the jungle," are given referents that diminish the possibilities of racist motivation. Finally, the link between words and consciousness is problematic because it is the conscious and not the subconscious that is important to the rationalist model. When focused on the conscious, words of intentionality imply the subject's culpability. When focused on the subconscious, on the other hand, the histories that shaped the subconsciousness and the behavior that proceeds from it became of paramount importance.

II. Individual Racism and the Model of Rationality

Individual racism is a consciously held belief in the genetic, intellectual and/or anatomical inferiority of another group. While its manifestation is both overt and covert, it is solidly within the rationalist model described above. The individual or group is conscious of its racist beliefs and is prepared to act on those beliefs. This article illustrates how the public discourse on race shifted over time, altering the ways in which conscious racism might express itself in public. Realizing this shift, the jurors' racism need not be proved by reference to a framework of racist expression no longer tolerated in public life. Instead, evidence of racism must be gathered from a different framework that acknowledges the role and influence of institutional consciousness and cultural history.

Overt individual racism is the most easily discerned and vehemently condemned form of racism. It occurs when individuals publicize and/or act out their racist beliefs in an effort to dominate a group deemed inferior. Overt individual racists consist of such diverse figures as Thomas Jefferson, Abraham Lincoln, Senator Bo Bilbo, Dr. Shockley and Al Campanis.[2] Both Jefferson and Lincoln present interesting cases because in the prevailing folklore, they are seldom thought of as racists.

While Jefferson authored the Declaration of Independence proclaiming all men equal and endowed with inalienable rights of life, liberty and the pursuit of happiness, and, while he championed an antislavery clause that was ultimately negotiated out of the document by

2. *See infra* notes 3 - 7 and accompanying text.

Southern slaveholding interests, his views of Blacks were those of an overt racist.[3] In his comparison of blacks and whites, Jefferson noted that:

> The first difference which strikes us is that of colour. Whether the black of the negro resides in the reticular membrane between the skin and scarf-skin, or in the scarf-skin itself; whether it proceeds from the colour of the blood, the colour of the bile, or from that of some other secretion, the difference is fixed in nature, and is as real as if its seat and cause were better known to us. And is this difference of no importance? Is it not the foundation of a greater or less share of beauty in the two races? Are not the fine mixtures of red and white, the expressions of every passion by greater or less suffusions of colour in the one, preferable to that eternal monotony, which reigns in the countenances, that immoveable veil of black which covers all the emotions of the other race? Add to these, flowing hair, a more elegant symmetry of form, their own judgment in favour of the whites, declared by their preference of them, as uniformly as is the preference of the Oran-ootan for the black women over those of his own species. The circumstance of superior beauty, is thought worthy attention in the propagation of our horses, dogs, and other domestic animals; why not in that of man?[4]

Similarly, Lincoln is warmly remembered in history as the Great Emancipator of black people, as if his decision to free black slaves during the Civil War in 1863 indicated his willingness to see them as equals. Lincoln made it clear that he did not.

> I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races . . . I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office . . . I will say in addition to this that there is a physical difference between the white and black races which will ever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together, there must be the position of superior and inferior, and I, as much as any other man, am in favor of having the superior position assigned to the white race.[5]

It is almost inconceivable that individuals of the stature of Jefferson or Lincoln could get away with such overt racism today. This is not to say that such beliefs are not widely held. To the contrary, covert racists hold similar beliefs about the natural inferiority of blacks, but simply respond in ways that elicit greater approbation than overt racists.

Covert individual racism is an aversion to members of a group deemed inferior that manifests itself in efforts to avoid contact with the

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3. *See generally* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (William Peden ed., 1972).

4. *Id.* at 138.

5. 1 ABRAHAM LINCOLN, COMPLETE WORKS 457 (John G. Nicolay & John Hay eds., 1907).

group in employment, residential and educational arrangements.[6] Domination of the group results from the use of non-racial criteria. Covert racists are not likely to base their unwillingness to live in the same neighborhood as blacks on a belief that blacks are inferior. They veil their racism with an ostensibly race-neutral justification such as the fear of declining property values. Similarly, it is not that whites attain greater positions of authority and status because blacks are intellectually inferior, as suggested by Al Campanis,[7] but rather that blacks are simply not qualified by some ostensibly objective and race-neutral criterion. While invisible to many, this form of racism is often visible to the dominated group that, in order to survive, learns to interpret the meaning of the complicated maze of unspoken but clearly communicated language.

Mental culpability is common to both overt and covert racism. Both the overt and covert racist predicate their behavior on the assumption that race makes their victims inferior and justifies the racist actions. Covert racists refuse to take responsibility for their racism and thus carefully manufacture alibis that deflect any attempts to blame them for the consequences of their actions. In this sense, individual overt and covert racism both involve forms of intentional racism and fall squarely within the rationalist model. Since there is little correspondence between the language and thought of the covert racist, however, the latter provides a more difficult case for legal prosecution and moral condemnation.

III. INSTITUTIONAL RACISM

Perhaps the verdict of the Simi Valley jury was not racist in the traditional rationalist sense. The jurors were not, it seems, consciously predicating their decisions on the supposed inferiority of blacks. The decision, however, may have been racist in an institutional sense. Institutions, like individuals, engage in both overt and covert racism. This is a part of our history, as the institutions of slavery and de jure segregation testify. Here the term is intended to characterize something different from this history. The term institutions reaches the problem of bureaucratic group think, the ways in which institutions develop their own sense of identity, consciousness, rules of operation and expectations, and their own normative universe that requires the loyalty of its constituent members in a way that supersedes their own personal loyalties. The Skolnick Report to the National Commission on the Causes and Prevention of Violence summarized the problem in this way:

> Because of the influence of historical circumstances, it is theoretically possible to have a racist society in which most of the individual members of that society do not express racist atti-

6. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (black applicants for positions as Washington, D.C. police officers brought suit alleging a disproportionate racial impact of the police department testing procedure); Shelley v. Kramer, 334 U.S. 1 (1948) (white homeowners sued to enforce a racially restrictive covenant prohibiting blacks from occupying homes in their neighborhood); Brown v. Bd. of Education, 347 U.S. 483 (1954).

7. Sam McManis, *Campanis Says He Apologizes for Comments; Aaron and Dodger Players are Among Those Angered*, L.A. TIMES, Apr. 8, 1987, part 3, at 1.

> tudes. A society in which most of the good jobs are held by one race, and the dirty jobs by people of another color, is a society in which racism is institutionalized, no matter what the beliefs of its members are.[8]

Institutional racism occurs by defining an individual's actions according to institutional norms. These norms are not always racist on their face nor necessarily administered by individuals with racist motives, but they may have racist effects nevertheless.[9] For example, a prevailing norm in American institutional life is the norm of meritocracy, the assumption that membership and mobility within institutions are contingent on individual qualification and merit. Membership or mobility even partially contingent on race is deemed an undesirable deviation from this central norm. While liberals justify the affirmative action deviation given the history of institutional exclusion of blacks, conservatives tolerate deviations only in the most egregious and unmistakable instances of intentional exclusion.[10] Both groups view the remedial inclusion of blacks as a deviation from an unquestionably acceptable norm.

Institutional racism never questions the legitimacy of the norm itself. This is the central problem of cultural racism. Institutional racism denies the relationship between the exclusion of certain groups by the institutional norm and the history of overt institutional racism and deprivation that resulted in the absence of qualities now deemed fundamental to meritocratic consideration. It is in this manner that institutions willingly participate in the perpetuation of racist perceptions and domination that find their genesis in forms of conscious racism.

From the perspective of the institution, however, concerns of so-called societal discrimination stand beyond the pale of institutional consideration. Institutional administrators cannot redress every social imbalance and inequity supported by history and social science. They owe their fiduciary duties to the institutions they govern. The institution is best served by hiring and promoting the most qualified individuals to do the job.

The problem necessitating a theory of institutional racism is twofold. First, the institutional norms may be the by-product of covert racists who subordinated the disfavored group by ostensibly neutral criteria and deflected criticism of the consequences resulting from the norm's application. Second, even if the institutional norms are developed and applied in good faith, institutional racism recognizes the interrelationship among various spheres of social organization. It appreciates the

8. JEROME H. SKOLNICK, THE POLITICS OF PROTEST 180 (1969).

9. "Racist effect" means that the effect of applying the institutional norm is to perpetuate an existing distribution of benefits and burdens that sustains perceptions of racial inferiority and realities of racial domination.

10. *See* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (describing the psychodynamics of integrationist philosophy); *see also* Richmond v. J. A. Croson, Co., 488 U.S. 469 (1989) (race-based affirmative action plans are subject to strict scrutiny and must be necessary to achieve a compelling interest).

ways and extent to which a history of individual and institutional overt racism reinforces and perpetuates itself by ostensibly neutral norms that build on the uneven playing field created by that history.

Both the difficulty of assessing present state of mind and/or historical intent, as well as an awareness of the role ostensibly neutral norms play in a context of past and present racism, necessitates a way of thinking about racism that avoids the dilemma of feeling bad about the past while denying responsibility for the present. The concept of institutional racism responds to this dilemma by focusing on the effects as well as the intent of institutional practices.

IV. CULTURAL RACISM

Cultural racism is a process of social comparison that results in the subordination of an "out group" by an "in group" that uses its own group as the positive point of reference to measure the worth or merit of out group members. Cultural racism is the true foundation of racism in our society. On it rest the histories of institutional and individual racism, and because of it, the pervasive problems of black subordination remain intractable. Cultural racism socializes and conditions the individuals comprising the institutions whose norms, though neutral on their face, contain the countless assumptions of white superiority that countenance an insensitivity to the plight of the oppressed.

The following is an account of how a racist discourse of white supremacy infuses a culture's thinking and transmits from one generation to the next. After centuries of life predicated on the assumptions of white supremacy, society finally reaches a point at which the assumptions no longer need stating. They provide the backdrop for conversations, interactions and encounters that never utter a racist word, but yet reproduce the imagery of supremacy and inferiority that perpetuates the subordination of blacks in the society.

A. *Historical Cultural Racism — English Explorers*

The problem of cultural racism in American race relations finds its genesis in the earliest contacts between English explorers and the African peoples they encountered on their voyages.[11] The values that emerged were conditioned by a European cultural orientation that glorified whiteness, the Greco-Roman aesthetic and the life styles and behavior of the familiar. As long as it remained quartered within the mental constructs of prejudicial reflection, it was guilty of no more than an extreme ethnocentricism.

When extreme ethnocentricism linked itself to the domination of African peoples through the slave trade, it became cultural racism—the support system for institutional and individual racism. The English ac-

11. English explorers did not first land on the African west coast until after 1550. WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 3 (1969). *See Id.* at 3-43, for further discussion of English exploration of Africa.

counted for a number of differences and assured superiority for their people and culture in all such social encounters and comparisons.[12] These accounts of difference provided the basis for what Winthrop Jordan perspicaciously called the history of white over black.[13]

The impact of African color on the English mind cannot be understated. Before the first substantive contacts by England with West Africa in the middle of the 16th century, there was little actual knowledge of the people that inhabited these lands. By contrast, both the Spanish and Portuguese made contact with North Africa centuries earlier. Indeed, both countries experienced invasion by "people both darker and more highly civilized than themselves."[14] Thus, the voyages of British ships to West Africa brought some of the palest and darkest shades of the human color spectrum face to face. Given the limited nature of prior English contact with people of color, the shock was probably greater for the English. "Travelers rarely failed to comment upon it; indeed when describing Negroes they frequently began with complexion and then moved on to dress . . . and manners."[15]

Initial shock does not account, however, for the contempt and disdain accompanying the reality of difference. Jordan noted the importance that the "English discovery of black Africans came at a time when the accepted standard of ideal beauty was a fair complexion of rose and white. Negroes not only failed to fit this ideal but seemed the very picture of perverse negation."[16] The general disdain for the appearance of Africans was not limited to pigmentation but encompassed the entire African physiology. In contrast to the white ideal, blacks were deemed inferior by reason of their "color . . . [their] 'horrid Curles' and 'disfigured' lips and nose[s]."[17]

African sexuality was another source of English fascination and ultimate disdain, further proof of African inferiority. Jordan observed that

12. These differences consisted of a physiological and cultural differences that related to the size of nose, lip and texture of hair as well as forms of political, cultural and familial organizations.

13. JORDAN, *supra* note 11.

14. *Id.* at 6.

15. *Id.* at 4.

16. *Id.* at 9. Jordan explores the meaning and significance of the English encounter with Black people in greater detail.

> In England perhaps more than in southern Europe, the concept of blackness was loaded with intense meaning. Long before they found that some men were black, Englishmen found in the idea of blackness a way of expressing some of their most ingrained values. No other color except white conveyed so much emotional impact. As described by the *Oxford English Dictionary*, the meaning of *black* before the sixteenth century included, "Deeply stained with dirt; soiled, dirty, foul. . . . Having dark or deadly purposes, malignant; pertaining to or involving death, deadly; baneful, disastrous, sinister. . . . Indicating disgrace, censure, liability to punishment, etc." Black was an emotionally partisan color, the handmaid and symbol of baseness and evil, a sign of danger and repulsion.

Id. at 7.

17. *Id.* at 8 (quoting ROBERT R. CAWLEY, THE VOYAGERS AND ELIZABETHAN DRAMA 86 (1938)). *See* WALTER CLYDE CURRY, THE MIDDLE ENGLISH IDEAL OF PERSONAL BEAUTY; AS FOUND IN THE METRICAL ROMANCES, CHRONICLES, AND LEGENDS OF THE XIII, XIV, AND XV CENTURIES 64-67 & 310 (Baltimore 1916) (indirectly makes clear how very far African women were from matching prevalent English ideals of beautiful noses and lips).

"[d]epiction of the Negro as a lustful creature was not radically new . . . when Englishmen first met Negroes face to face. Seizing upon and reconfirming . . . long-standing and apparently common notions about Africa, Elizabethan travelers and literati spoke very explicitly of Negroes as being especially sexual."[18] As early as 1566, Jean Bodin studied the writings of the ancients on Africa and concluded that "heat and lust went hand in hand and that 'in Ethiopia . . . the race of men is very keen and lustful.' "[19] The obsession over male African genitalia provided a constant source of condescension. African men, reported a seventeenth-century traveler, "sported 'large Propagators' "[20] and the "Mandingo men were 'furnisht with such members as are after a sort burthensome unto them.' "[21]

It was common in the commentary of the day to compare African sexuality to that of apes and thus to always perceive the African male as a beastly threat to the *norms* of white purity and chastity.[22] During the same period, however, African women were cast as " 'hot constitution'd Ladies'[23] possessed of a 'temper hot and lascivious, making no scruple to prostitute themselves to the *Europeans* for a very slender profit, so great [was] their inclination to white men.' "[24] Even in these early encounters, the sexual jealousies and obsessions that manifested themselves and resulted in the domination of black males and the subjugation of black females.

In addition to reckoning with the differences of black physiology and sexuality, the entire cultural ethos of West Africa around the middle of the 16th century was strikingly different from Elizabethan England. James Jones catalogued many of these differences in an attempt to illustrate the many points on which the English felt compelled to assert their cultural superiority and thereby justify their domination of Africans.[25] According to Jones, African culture differed significantly from English culture on matters of religion, social organization, the role of property, education, the sense of time, nature of music and view of the world.[26]

The meaning attributed to these cultural differences by white

18. *Id.* at 34.

19. *Id.* (quoting JEAN BODIN, METHOD FOR EASY COMPREHENSION OF HISTORY 103-06, 143 (Beatrice Reynolds trans., 1945)).

20. *Id.* (quoting JOHN OGILBY, AFRICA: BEING AN ACCURATE DESCRIPTION OF THE REGIONS OF AEGYPT, BARBARY, LYBIA, AND BILLEDULGERID, THE LAND OF NEGROES, GUINEE, AETHIOPIA, AND THE ABYSSINES . . . COLLECTED AND TRANSLATED FROM MOST AUTHENTICK AUTHORS, AND AUGMENTED WITH LATER OBSERVATIONS 451 (London, 1670)).

21. *Id.* (citing RICHARD JOBSON, GOLDEN TRADE: OR, A DISCOVERY OF THE RIVER GAMBRA, AND THE GOLDEN TRADE OF THE AETHIOPIANS 65-67 (Charles G. Kingsley ed., 1904)).

22. *See Id.* at 29 (citing H. W. JANSON, APES AND APE LORE IN THE MIDDLE AGES AND THE RENAISSANCE chap. 11 (1952); ROBERT M. & EDA W. YERKES, THE GREAT APES: A STUDY OF ANTHROPOID LIFE 1-26 (1929)).

23. *Id.* at 35 (quoting WILLIAM SMITH, A NEW VOYAGE TO GUINEA . . . 146 (London, 1744)).

24. *Id.* (quoting John Barbot, *A Description of the Coasts of North and South-Guinea*, *in* V A COLLECTION OF VOYAGES AND TRAVELS 100 (John & Awsham Churchill compilers, London, 1704-32)).

25. JAMES M. JONES, PREJUDICE AND RACISM (1972).

26. *Id.* at 150.

Europeans and the high value associated with Eurocentric norms, left no doubt about the superiority of white culture. Few saw the question of biological and cultural difference between Africans and Europeans as did Captain Thomas Phillips, a master of a 1694 slave vessel. He wrote of the difference of color:

> 'I can't think there is any intrinsick value in one colour more than another, nor that white is better than black, only we think it so because we are so, and are prone to judge favourably in our own case, as well as the blacks, who in odium of the colour, say, the devil is white, and so paint him.'[27]

As is clear from the subsequent history of slavery and racism, most rejected Phillips' biological relativism and were quite prepared to hold, as they were in the sphere of cultural differences generally, that the difference was profoundly important. Religious, scientific and quasi-scientific justifications were marshalled in support of their prejudices and racism.

B. *Religious and Scientific Influences on Cultural Racism*

The religious and scientific discourses help legitimize practices of racial domination. Common sense is no more than the way a given culture organizes its understanding of the world. That organization is profoundly shaped, among other things, by religious and scientific stories that give its members a sense of identity and purpose. Thus, when life and the realities of domination are explained and tacitly sanctioned by religion and science, socially constructed oppression takes on a mystique of naturalness and inevitability, an appearance that things were always meant to be just so. The transformation of the socially constructed into the naturally constituted is facilitated, then, by religious and scientific discourses that tap into the common sense notions of those expected to acquiesce in the practices of racist domination. Many sought to explain the inferiority of Africans and their culture in terms of religious and scientific discourses.

1. Religious Influences

The Judeo-Christian account of Black inferiority begins with the Old Testament story of Noah, who in his drunkenness, unclothed himself and fell asleep in his tent.[28] One son, Ham, looked upon his father's nakedness, while the other sons, Shem and Japheth, covered their father without looking.[29] Noah later awoke and cursed one of Ham's sons, Canaan, denouncing him as a "servant of servants" unto his brothers.[30] Distorted scriptural exegesis over the years somehow managed to turn

27. JORDAN, *supra* note 11, at 11 (quoting Thomas Phillips, *A Journal of a Voyage Made in the Hannibal of London, Ann. 1693, 1694, from England to Cape Monseradoe, in Africa; and Thence Along the Coast of Guiney to Whidaw, the Island of St. Thomas, and So Forward to Barbadoes. With a Cursory Account of the Country, the People, Their Manners, Forts, Trade, etc.*, *in* VI A COLLECTION OF VOYAGES AND TRAVELS, *supra* note 24, at 219).

28. *Genesis* 9:21.

29. *Genesis* 9:22-23.

30. *Genesis* 9:24-25.

this curse into an explanation of African skin color and a justification for their domination by the supposed progeny of Shem and Japheth.

One could see the old testament story as motivated by the same concerns that have motivated many of the myths of Christianity, the need to show that one's power and status comes from God, thus authorized by one higher than those who threaten to take it away.[31] In this case, God approved of the Hebrew conquest of Canaan, a land predestined for conquest by a 'convenient' curse upon its inhabitants. That this story survived so many centuries as a plausible account of why black people have been subjected to such oppression is a testimony of the power of religious ideology. While the curse quite clearly envisions the servitude of Canaan, there is no mention of skin color. Thus, the curse may have just as logically or illogically condemned the nation of Canaan to a skin color lighter than the already dark Noah. Only social convention and European ethnocentrism assumed the curse involved color and that darkness rather than paleness constituted the distortion of purity. Second, the curse was put on only one of Ham's children, Canaan. If one follows biblical genealogy and geography, most of Africa and all of West Africa were peopled by Ham's remaining children on whom no curse befell.[32]

Much of the tolerance of inconsistency may be attributed to the willingness of racists to rely on inconsistent and speculative accounts to justify their practices. A good deal of the tolerance may also be attributed to an oral and written tradition that explicitly altered scriptural text and meaning. For instance, Talmudic and Midrashic sources suggested that " 'Ham was smitten in his skin,' that Noah told Ham 'your seed will be ugly and dark-skinned,' and that Ham was father 'of Canaan who brought curses into the world, of Canaan who was cursed, of Canaan who darkened the faces of mankind,' of Canaan 'the notorious world-darkener.' "[33] The authority of historic Hebrew sources provided a veneer of authenticity to subsequent Christian interpretations in the 17th century that the enslavement and subjugation of Africans was scripturally predestined. Christian nations combined this with the New Testament's seeming approval of slavery and concluded that the Black people of the earth were predestined to serve the superior white race through the institution of slavery.

The story of Ham played a dual role in the subjugation of Africans. Not only did it explain the quandary of color in a way that privileged the status of whiteness, but it also explained the strange sexuality of African peoples. The infraction that resulted in the curse was one of sexual impropriety. Black men were thus accursed or 'burdened' with large penis', and, because of their size, could not, as Adam did in the Garden of

31. *See* EUGENE GENOVESE, ROLL JORDAN ROLL: THE WORLD THE SLAVES MADE (1972) (discussing the legitimation and delegitimation function of Christianity in the era of American slavery).

32. *Genesis* 10:6-20.

33. JORDAN, *supra* note 11, at 18 (quoting THE BABYLONIAN TALMUD (I. Epstein et al. trans., 1935-60) (The TALMUD consists of 35 volumes)).

Eden, conceal their shame.[34] The curse eternally subjected black men to the invasion of privacy inflicted upon Noah. In addition, African men and women were cursed with an animal-like, lascivious and promiscuous sexuality, lacking the capacity for shame and constraint, qualities found among the more civilized races. Taken together, the myths manifested themselves throughout history in countless acts of white sexual jealousy, insecurity and aggressiveness that often resulted in the aversion to and punishment by castration of black males and the desire for and exploitation of "hot constitution'd" black females.[35]

2. Scientific Influences

If religious discourse played an important role in the transmission of cultural racism, the discourse of science figured prominently as well. Although anthropology and psychology are younger disciplines than theology and history, their impact on the study of race has been monumental. Both disciplines developed on the coattails of a sweeping European cultural secularization that heralded the powers of Man and Reason and embraced an ever growing skepticism toward religious and theological accounts of natural phenomena. Newtonian science and the Enlightenment nurtured an insatiable appetite for exploration, explanation and the domination of mind over matter. The study of man and the consternation over physiological and cultural human diversity provided an irresistible forum for empirical research, measurement and classification of natural phenomena. It was anthropology that first directed its Enlightenment-inspired energies toward the study of race and the perpetuation of mythologies of racial inferiority.

While Johann Friedrich Blumenbach is credited as the founder of anthropology,[36] Carolus Linnaeus, the 18th century Swedish Botanist, was the first to attempt a comprehensive classification of humans according to physiognomy, temperament and culture. Thus, Linnaeus' *Systema Naturae*[37] provided an imprimatur of objectivity and truth to the casual comparisons and speculations that were by that time commonplace in European and American cultures. Blumenbach advanced the work of Linnaeus and purported to prove that the original type of man was

34. According to the Old Testament account of Genesis, when Adam and Eve disobeyed God's commandment and became aware of their nakedness and sexuality, they covered themselves with the leaves of fig trees. *Genesis* 3:7.

35. Jordan notes that castration was a legislated punishment in many colonies, and in some, the punishment applied to both free and slave Black men.

> Castration of Negroes clearly indicated a desperate, generalized need in white men to persuade themselves that they were really masters and in all ways masterful, and it illustrated dramatically the ease with which white men slipped over into treating their Negroes like their bulls and stallions whose "spirit" could be subdued by emasculation. In some colonies, moreover, the specifically sexual aspect of castration was so obvious as to underline how much of the white man's insecurity vis-a-vis the Negro was fundamentally sexual.

JORDAN, *supra* note 11, at 156.

36. JORDAN, *supra* note 11, at 222.

37. *Carolus Linnnaeus, Systema Naturae, reprinted in Thomas Bendyshe, The History of Anthropology, in* ANTHROPOLOGICAL SOCIETY OF LONDON, 1 MEMOIRS (1863-64)).

Caucasian.[38]

The studies implied the supposed superiority of white Europeans, even though neither system of classification explicitly ranked humans in terms of superior and inferior races.[39] For instance, while Linnaeus described the European as gentle, acute, inventive, covered with vestments and governed by customs, he described the African as crafty, indolent, negligent, covered with grease and governed by caprice.[40] Similarly, Blumenbach situated the Caucasian type at the center of his horizontal scale of comparison and situated the Ethiopian and Mongolian types at opposite ends of the spectrum.[41] The clear implication was that value, beauty and worth were a function of ones' proximity to the white norm, thought to represent the point of perfection.

The implicit hierarchy of supposedly value-free scientific observation and classification developed into explicit hierarchical rankings by race. These scientific studies always situated whites at the very top of the Chain of Being and blacks at the very bottom. Physiognomy, Craniology, Cultural Anthropology and Evolutionary Biology were all used between the 18th and 19th centuries intentionally and unintentionally to justify the increasing pillage and domination of Africa, its people and descendants.

In 1883, Francis Galton, Charles Darwin's cousin, founded the science of eugenics as " 'the study of the agencies under social control that may improve or impair the racial qualities of future generations either physically or mentally.' "[42] Galton suggested that " 'it would be quite practical to produce a highly gifted race of men by judicious marriages during several consecutive generations.' "[43] The science of eugenics received a devastating blow during WWII when used by Hitler and the Nazi regime to justify the barbaric treatment and extermination of Jews in death camps. It proved resilient, however, as the more recent work of William Shockley, suggesting the genetic inferiority of blacks, attests.[44]

Psychology gained acceptance as a field of science in 1883, around the same time as eugenics appeared on the scene. The former immediately charted a course purporting to measure mental processes or intelligence. It was not long before tests purporting to measure a so-called

38. *Id.* at 223.

39. JORDAN, *supra* note 11, at 220-21 (citing *Carolus Linnnaeus, Systema Naturae, reprinted in Thomas Bendyshe, The History of Anthropology, in* ANTHROPOLOGICAL SOCIETY OF LONDON, 1 MEMOIRS 424-26 (1863-64)).

40. *Id.*

41. JORDAN, *supra* note 11, at 223 (citing to ANTHROPOLOGICAL TREATISES OF JOHANN FRIEDERICH BLUMENBACH 265-65 (THOMAS BENDYSHE TRANS. & ED., LONDON 1865)).

42. ROBERT V. GUTHRIE, EVEN THE RAT WAS WHITE: A HISTORICAL VIEW OF PSYCHOLOGY 78 (1976) (quoting A. H. Hersh, *Eugenics, in* 10 THE ENCYCLOPEDIA AMERICANA 567 (1969)).

43. *Id.* (quoting FRANCIS GALTON, HEREDITARY GENIUS: ITS LAWS AND CONSEQUENCES (1869).

44. *See, e.g.*, Joseph Berger, *Professors' Theories on Race Stir Turmoil at City College*, N.Y. TIMES, Apr. 20, 1990, at B1; *Milestones*, TIME, Aug. 28, 1989, at 61; *Missing Circuits*, DAILY TELEGRAPH, Aug. 24, 1989, at 17; *see also* Charlotte Allen, *Gray Matter, Black-and-White*, WASH. TIMES, Jan. 13, 1992, at 4.

intelligence quotient provided its contribution to the science of racism, conclusive proof that, as had been conjectured for centuries, blacks were mentally inferior to whites.

V. ANALYSIS: RODNEY KING

Institutional and cultural racism provide ways of breaking out of the narrowly constructed understanding of the rationalist model. The jurors in Simi Valley may have consciously desired to acquit the white police officers because they believed the race of the latter entitled them to absolution for beating a black man. Such an explanation, however, appears too simplistic. Although it is unlikely that the jurors consciously held racist beliefs as individuals or a group, their common sense frame for viewing the tape, hearing the arguments and understanding the world was shaped by racist forces. If the jurors were covert racists in the Rodney King trial, society will never know. Institutional ideology often provides a convenient window dressing for covert racists, but its difficulties are even more profound for it often serves to diminish the responsibility of non-racist individuals for what might be called racist effects.

The jurors in Simi Valley operated within an institutional and legal culture that urged them to put aside all personal biases and feelings in order to render an objective and fair verdict. Defense lawyers showed a film over and over again so that it urged the separation of law from morality and passion. Cloaked in a dispassionate and quasi-scientific detailing of frame by frame blows, accounting for and justifying each by reference to police department policies and the "threat" of King type scenarios, the jurors were desensitized and eventually internalized the positivist dichotomies that separated their consideration of "the law" from their "visceral feeling" of injustice and inhumanity.

Institutional racism is difficult because it requires individuals to discard personal subjectivity and cloak themselves with institutional objectivity. Through this process, the jurors believe that their institutional duty requires a verdict very different from their own subjective feelings and beliefs. Thus, by diminishing individual responsibility for the decision, the institutional process might, ironically, encourage the very racism its impartiality was designed to overcome. The racist beliefs delve further into the subconscious because one has a task to complete, governed by procedural guidelines which provide that if such procedures are followed, no one can call you racist or challenge your personal integrity. Excessive force was not found because the defense attorneys succeeded in convincing the jurors that the visual images of abuse were other than they appeared. The attorneys referenced the minds of white defendants that were not consciously racist, hateful or inhumane, but minds that believed they were reasonably endangered by King's behavior.

Deeply socialized into the myths of white supremacy, the Simi Valley jurors were predisposed to embrace their institutional role and to view the officers' brutality as a reasonable response to the threat posed

by King. Neither the change of venue nor the detailed instructions on the institutional role and duty of jurors could neutralize this process of acculturation. Even in the absence of conscious racist beliefs, this socialization provided a common sense frame through which discrete facts like the frame by frame analysis of the film took on new meaning and the language comparing King to "a raging bull" and the police to "the thin blue line standing between us and the jungle" was decoded and acted upon.

Both the theological and scientific paradigms embrace a process of social comparison resulting in the subordination of an "out group" by an "in group" using its own group as the positive point of reference in measuring the worth or merit of out group members. In the story of Ham, therefore, blackness represents a curse and deviation from the unquestionable purity of whiteness. In science, the curse and norm are disguised by the detailed descriptions of natural phenomena that pass as objective study. Cultural racism is the unreflective acceptance of the norm and its consequential curse on black people. It is a failure to understand that norms and curses are socially constructed meanings, and that in a social context characterized by pervasive racism, they are likely to perpetuate the domination of blacks.

In many ways the Simi Valley jurors inherited this cultural tradition. History conditioned them as it conditions us all. The way they view the world is unquestionably influenced by the way racism shaped the world. When an officer testified that King appeared as a "raging bull," the imagery of animal-like appearance and behavior connected with a long history supported by religious and scientific doctrine that black men were more like animals than men. The dehumanization of King diminished the empathy that one human being feels for another suffering unjustifiably. Viewed not as human but as standing somewhere between human and beast, Rodney King was a threat and deserved his suffering. If he could not hear and heed the call of human reason to "not move" and "stay down," perhaps he could not feel the human pain inflicted by over ninety blows of the club and shoe heels stomped forcefully into his neck and head.

The defense attorneys' plea to the jury that policemen must receive the benefit of the doubt because they constituted the "thin blue line separating us from the jungle," connected with centuries of racist imagery that pictured black life as mysterious, uncivilized and ghastly. The defense attorneys' plea connected with a place where reason succumbs to passion and, if unleashed, destroys life as we know it. These influences had to be contained, at all costs, lest they infiltrated the pristine suburbs of Simi Valley in which many, perhaps like the jurors, seek refuge from the evils of the inner-city jungle. The thin blue line transformed in this imagery to both hero and victim. How could a criminal justice system victimize these heroes who daily put their lives on the line to make the community safe from the forces of darkness that lurked in the asphalt jungles of the inner city?

American culture teaches these lessons in countless ways and the morals are neatly tucked away into the subconscious and retrieved when needed. They vent themselves in a myriad of ways that span the gamut between conscious overt racism and unconscious subtle covert racism, convincing the mind of the juror that its eyes see something other than a prone, unarmed man, writhing in pain as he is beaten unmercifully by three police officers while twelve other officers looked on and did nothing.[45] The socialized and acculturated mind convinces the juror, instead, that the eyes view a threat, one that justifies this reasonable use of force by heroes now victimized by a criminal justice system that does not appreciate what is really at stake.

VI. SUMMARY AND CONCLUSION

The rationalist understanding of racism views it as deviant consciousness. It fails to realize that racism manifests itself on three interrelated levels, and may be neither deviant nor conscious in its operation. Both institutional and cultural racism operate at the unconscious level, and given the pervasiveness of cultural racism and its influence on how society views and understands the world, racism is as American as cherry pie.

The implications of such a view of racism fall beyond the scope of this article. Needless to say, however, it calls for a far reaching plan geared toward the transformation of a society whose educational, economic and political systems all perpetuate the reproduction of sociopsychological frameworks that continue to produce the kind of brutality, inhumanity and injustice depicted in the saga of Rodney King.

45. William Raspberry, *L.A. Cops*, WASH. POST, Mar. 11, 1991, at A11.

SAVING THE PEREMPTORY CHALLENGE: THE CASE FOR A NARROW INTERPRETATION OF *McCOLLUM*

DEBORAH ZALESNE* AND KINNEY ZALESNE**

Since the Supreme Court's decision in *Batson v. Kentucky*,[1] peremptory challenges have received a flurry of scholarly attention.[2] This response is understandable. Peremptory challenges, a method by which litigants strike jurors from the jury venire for any reason or for no reason at all,[3] were used for centuries without restriction in the Anglo-American criminal justice system.[4] In *Batson*, however, the Court held that the requirements of the Equal Protection Clause[5] could limit the prosecution's exercise of peremptory challenges. Thus, two seemingly mutually exclusive concepts were merged. Peremptory challenges, designed to give unfettered expression to parties' subjective impressions, were now reviewable under the Equal Protection Clause, which required the parties to exercise those challenges in a non-discriminatory way. This marriage spawned a persistent conflict.

Since *Batson*, scholars and judges have struggled to reconcile the rationality of equal protection with the subjectivity of peremptory challenges. Emphasizing litigants' use of race in their exercise of the peremptory challenge, commentators have argued over whether and how parties might retain their privilege to exercise peremptory challenges, in light of the race-neutral principles of the Fourteenth Amendment.

The Court's current balance, which preserves peremptory chal-

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1. 476 U.S. 79 (1986).

2. *See, e.g.*, Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMPLE L. REV. 369 (1992); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725 (1992).

3. A peremptory challenge is defined as:

> [t]he right to challenge a juror without assigning, or being required to assign, a reason for the challenge. In most jurisdictions, each party to an action, both civil and criminal, has a specified number of such challenges and after using all his peremptory challenges he is required to furnish a reason for subsequent challenges.

BLACK'S LAW DICTIONARY 136 (6th ed. 1990). The use of a peremptory challenge to exclude a juror is often called "striking" a juror.

4. *See infra* text accompanying notes 43-63.

5. The Equal Protection Clause provides:

> No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1, cl. 2.

lenges but regulates them to eliminate the most extreme violations of equal protection, is well-struck. The Court's latest peremptory challenge decision, however, *Georgia v. McCollum*,[6] which subjects a criminal defendant's exercise of the peremptory challenge to Equal Protection review, may be susceptible to overbroad interpretation. Although the holding of the case technically applies only to situations where white criminal defendants strike black jurors, the decision might be read as applying to the obverse situation, where black criminal defendants challenge white jurors. We believe such a reading of *McCollum* would be unwise.

This Article analyzes the historical, doctrinal and philosophical reasons for preserving but regulating the peremptory challenge, and argues for a narrow reading of *McCollum*. Part I traces the history and development of peremptory challenges in the Anglo-American jury system, pointing out the advantages peremptory challenges were intended to give both criminal defendants and the justice system generally. Our survey of the history of peremptory challenges shows that many of the original justifications for the peremptory challenge still apply.

Part II examines the major Supreme Court cases on peremptory challenges since 1965, presenting the spectrum of solutions proposed by Supreme Court Justices for resolving the tension between equal protection values and the subjective peremptory challenge. A majority of the Court endorses a compromise regulating the use of peremptory challenges. To justify and extend this solution, the Court has shifted its focus from the equal protection rights of criminal defendants to the equal protection rights of potential jurors. This change in focus reflects a philosophical shift from liberalism, which emphasizes the rights of the opposing parties, to communitarianism, which focuses on the public interest and extends beyond any parties' immediate dispute. Since the Court's emerging priority has been to legitimate the criminal justice system in the eyes of the community, legitimation, rather than mechanical application of the rules adopted in *Batson* and its progeny, should govern the Court's decisions in future cases.

In part III we urge a narrow interpretation of *McCollum*. This argument is based on the three principal concerns expressed in these Supreme Court cases: preserving the peremptory challenge, securing equal protection and promoting community respect for and compliance with the criminal justice system. In the near future, courts may be called upon to decide whether the rules announced in the Supreme Court's post-*Batson* line of cases apply in the situation where white jurors are the subject of the peremptory challenge. An extension of the jurors' rights expressed in *McCollum* to excluded white jurors would undermine these principal concerns. If every peremptory challenge with a racial component is subject to equal protection review, the peremptory challenge will lose its power. This might well lead to the abolition of peremptory challenges, undermining the purposes the peremptory challenge has tradi-

6. 112 S. Ct. 2348 (1992).

tionally served. Extension of equal protection rights to white jurors is also doctrinally unnecessary. As long as challenges of black jurors create all-white juries, but challenges of white jurors do not create the reverse, the exclusion of white jurors will not violate the Equal Protection Clause.

Finally, the Court's philosophical shift from liberalism to communitarianism, evidenced by its increasing concern for public perception of court justice, also calls for a narrow reading of *McCollum*: if black defendants are unable to strike white jurors they "know in their hearts" to be racist, their regard for the system, arguably more precarious than that of whites, will only diminish.

I. THE ORIGIN AND HISTORY OF PEREMPTORY CHALLENGES

A. *Origins and Development of the Peremptory Challenge in England*

Peremptory challenges originated early in the life of the jury system in England.[7] Historians have not precisely identified the extent to which

7. Commentators and courts, in discussing the peremptory challenge, generally focus on its treatment by later commentators rather than on its actual origins. *See, e.g.*, Holland v. Illinois, 493 U.S. 474, 481-82(1990)(relying on nineteenth century commentator); Swain v. Alabama, 380 U.S. 202, 212-14 (1965)(relying on commentators' analyses from the eighteenth and nineteenth centuries); Broderick, *supra* note 2, at 371-74 (analyzing development of prosecutorial right to peremptory challenge beginning in the fourteenth century rather than on actual origins of the peremptory challenge).

The ancient English system administered law through the "popular courts," relying on the parties themselves to bring forward knowledgeable witnesses and to resolve disputes without input from community members. *See* James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 251 (1892). The practice of trying cases by jury replaced the "popular courts." The history of juries, amply detailed elsewhere, is beyond the scope of this article. *See, e.g.*, 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 614-31 (2d ed. 1911) (discussing origins and development of the jury system).

The Crown gradually began to rely on an inquisition system wherein jurors, knowledgeable about the events that were the subject matter of dispute, were selected by the Crown. *See id.* at 250-54 (detailing the rise of trial by inquisition as the forerunner of the modern jury system). In the criminal system, these jurors functioned in a manner akin to today's grand jury. *See* Charles L. Wells, *Early Opposition to Petty Juries in Criminal Cases*, 30 LAW Q. REV. 97, 102 (1914). They accused defendants of crimes, and then, through a variety of measures that changed over time, the royal courts decided the truth of the inquisition's accusation. The methods for determining whether an accusation made by the inquisition in a criminal case was true were primitive by today's standards. Primarily, there were two methods. The first, trial by battle, involved an actual physical battle between litigants to determine who was being truthful. The second, trial by ordeal, required a criminal defendant to suffer a series of ordeals, such as submission to heated irons, to determine the truth of his story. *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 3 (1977). Henry II moved to institutionalize this evolving practice of bringing criminal suits by inquisition in the Assize of Clarendon in 1166, which mandated that:

> inquiry shall be made in every county in every hundred by the twelve most lawful men of the hundred and by the four most lawful men of the vill, upon oath that they shall speak the truth, whether in their hundred or vill there be any man who is accused or believed to be a robber, murderer, thief, or a receiver of robbers, murderers, or thieves since the King's accession.

Reprinted in THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 112-13 (1956). Henry had begun the process of institutionalizing the inquisition system. The Constitution of Clarendon in 1164 created jury trials in certain cases and provided: "The sheriff shall cause 12 legal men of the neighborhood, or of the fill, to take an oath in the

defendants enjoyed a right to peremptory challenge during the twelfth and early thirteenth centuries, although most state that criminal defendants enjoyed such a right "at common law."[8] Rather than serving as a device to protect criminal defendants, however, the challenge appears to have originated as a mechanism for the Crown to maintain control over the jury. Because the early juries served the Crown's purposes — by indicting and subjecting to ordeal those individuals who violated England's laws — the Crown wished to ensure that its jury members would be sympathetic to the Crown's interests.[9] Hence, the Crown gave itself the right to challenge an unlimited number of potential jurors peremptorily.[10] Jurors whom the Crown perceived as uncooperative would be promptly removed. The Crown also accorded criminal defendants the right to challenge jurors peremptorily in capital cases, although the rationale for doing so at that time is not clear from the historical record.[11]

The structure of and rationalizations for the jury continued to evolve throughout the fourteenth century. The primary development of this period was that the jury changed from serving merely as accuser to serving as the mechanism for determining whether the Crown's accusations were true. Initially, members of the accusing jury served on the fact finding jury as well, but by the 1340's the two functions had clearly separated.[12] Hence, the jury increasingly became the body which decided whether a defendant had actually committed a crime; its legitimacy derived in part from its role as the arbiter of truth and falsity.[13]

As the jury became more impartial and less a tool of the Crown, Parliament grew increasingly uncomfortable with the Crown's right to challenge jurors peremptorily without limit. Fearing that the practice of peremptory challenge made verdicts appear engineered by the Crown, in 1305 Parliament eliminated the Crown's right to challenge jurors peremptorily.[14] It preserved, however, the right of the criminal defendant

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presence of the bishop that they will declare the truth about [the case]." *See* LLOYD E. MOORE, THE JURY, TOOL OF KINGS, PALADIUM OF LIBERTY 35-36 (1973).

Throughout the twelfth and early thirteenth centuries, the jury continued to serve an accusatorial function rather than acting as the arbiter of the truth. MOORE, *supra*, at 35-36; *see also* Wells, *infra* note 12, at 102.

8. *See, e.g.*, MOORE, *supra* note 7, at 55 ("At common law . . . the defendant was permitted to challenge 35 jurors."); CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY 155 (1962).

9. *See* VAN DYKE, *supra* note 7, at 147.

10. *Id.*

11. *Id.* Numerous commentators have stated that criminal defendants enjoyed the right to challenge thirty-five jurors peremptorily in criminal cases, a number that is supported by the fact that Parliament later granted criminal defendants in capital the right to thirty-five challenges. *See* MOORE, *supra* note 7, at 55; *See also* SIR WILLIAM HOLDSWORTH, 1 A HISTORY OF ENGLISH LAW 325-26 (1903).

12. See Charles L. Wells, *The Origin of the Petty Jury*, 27 LAW Q. REV. 347, 351 (1911).

13. This development was certainly not complete in the fourteenth century, as the jury still was largely bound to follow the instructions of the Court in reaching its judgment. Nevertheless, the process that would ultimately separate the grand and petit jury (and the court and the jury) were set in motion in the fourteenth century. *See* MOORE, *supra* note 7, at 49-63.

14. An Ordinance for Inquests, 33 Edw. 1 Stat. 4 (1305) provided:

> He that challenges a Jury or Juror for the King shall shew his cause . . . .[B]ut if they that sue for the King will challenge any of those Jurors, they shall assign of

to do so.

Although the jury continued to develop in its role as neutral factfinder,[15] the English courts' treatment of the peremptory challenge remained for centuries as Parliament had fashioned it in 1305. Only criminal defendants could challenge without cause, although the number of such challenges afforded to defendants decreased over the years.[16] Thus, as the jury system underwent numerous changes from the fourteenth through the eighteenth centuries, the criminal defendant retained the right to the peremptory challenge.

B. *Historical Reasons for the Survival of the Peremptory Challenge in England*

The retention of the peremptory challenge throughout these developments appears, at first, anomalous. After all, the practice originated as a device for allowing the Crown to control the makeup of the jury. Why then did the English system preserve the right of defendants to challenge jurors long after the Crown had lost its right? Apparently the defendant's right survived because English courts and commentators rationalized the practice subsequently and infused it with new meaning. Two general rationales developed for preserving the criminal defendant's right to strike jurors without cause.

First, commentators recognized the Crown's inherent advantages in criminal proceedings and saw the peremptory challenge as a way to equalize the defendant's position. Most notable among the Crown's advantages was that its agents still controlled the selection of the larger panel from which a petit jury was chosen.[17] Therefore, as a matter of

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their Challenge a Cause Certain, and the truth of same Challenge shall be enquired of according to the Custom of the Court . . . .

15. Not until the late seventeenth century were juries generally free to arrive at verdicts without instruction from or outright coercion by the courts. *See* MOORE, *supra* note 7, at 67-89.

The single most important development in the establishment of the jury as a neutral factfinder was the decision of the appeals judges of the Court of Common Pleas in *Bushell's Case* (1670), V *State Trials* 999 (T.B. Howell, ed. 1810), where the court considered the habeas petition of jurors who had been imprisoned for finding defendants not guilty despite the insistence of the trying magistrate that the defendants were guilty. After being imprisoned, the jurors filed a habeas petition, which the Court of Common Pleas granted because, it reasoned, the purpose of the jury was to evaluate the evidence itself and reach its own conclusion. *See* VAN DYKE, *supra* note 7, at 5.

16. Parliament initially provided defendants with the right to challenge thirty-five jurors peremptorily. *See* MOORE, *supra* note 7, at 67-89. The number was decreased to twenty by 1530, and eventually to three in modern times. *See* James Gobert, *The Peremptory Challenge — An Obituary*, 1989 CRIM. L. REV. 528, 529. In 1988, Parliament abolished the criminal defendant's right to peremptory challenge. *See id.* Some commentators have made much of Parliament's ultimate decision to abolish peremptories completely. *See, e.g.*, Broderick, *supra* note 2, at 372-73. The claims of these commentators that the peremptory challenge is merely a historical anomaly are overstated, however, for they fail to account for the challenge's survival through a host of changes in English legal system for more than seven centuries. Rather than treating the peremptory challenge as anomalous, the better approach is to understand why the challenge survived for such a long period and what purposes its users believed it served.

17. *See* Holdsworth, *supra* note 11, at 325 ("In spite of the statute of 1351-52 the crown still retained means of influencing the petty jury which it only gradually relinquished. The jury was selected by [the Crown's] officers").

fairness, English courts thought it proper to allow defendants to eliminate at least some of the members of the Crown-selected panel without explanation.[18] In an oft-quoted but seldom analyzed comment, Blackstone opined that allowance of the peremptory challenge for defendants was "a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous."[19]

Blackstone was referring, at least in part, to the English system's effort to conduct proceedings that *appeared* fair. Since the Crown's selection of the larger jury panel might make the trial appear hopelessly biased, and certain to end in conviction, the defendant's right to eliminate jurors whom he suspected of bias helped assuage public concerns. Hence the English system encouraged the general impression that its trials were fair, and that they merited community trust.

The second rationale for preserving the defendant's peremptory challenge was that a jury verdict appeared more legitimate and worthy of respect if both sides had implicitly consented to it.[20] If the criminal defendant could not strike jurors without cause, he would undoubtedly confront a jury comprised of some individuals whom he felt were biased against him.[21] Allowing the defendant to strike potential jurors without cause became a mechanism for ensuring that the process of trial by jury *appeared* fair, so that both litigants and the observing community would accept jury verdicts more readily.

By the time the peremptory challenge was adopted as a privilege of criminal defendants in America, therefore, it had already been justified on grounds quite different from its original roots. Nevertheless, it had become an important part of the jury system, both because it enhanced the truth-seeking character of trials and because it legitimated the jury system in the eyes of both the litigants and the community.

C. *The Peremptory Challenge in America*

The American colonies retained the defendant's right to peremptorily challenge jurors as part of the inherited common law,[22] and after independence, Congress codified the defendant's right to challenge ju-

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18. *See id.* at 324.

19. 4 WILLIAM BLACKSTONE, COMMENTARIES, * 353 (1859).

20. *Id.* ("[A] prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.").

21. *See* Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 552 (1975) (noting that, in many cases, defendants want to strike jurors that they feel are biased against them but against whom they cannot demonstrate cause to strike). Blackstone noted that the voir dire itself might bias a juror against a criminal defendant

> [U]pon challenges for cause shown, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

BLACKSTONE, *supra* note 19, at * 353.

22. *See* VAN DYKE, *supra* note 7, at 148.

rors peremptorily in federal court.[23] During the nineteenth century, American prosecutors also acquired the right to exercise such challenges, and by the beginning of the twentieth century, the prosecution's right to challenge peremptorily was well established.[24]

Two aspects of the use of the peremptory challenge in America merit special mention. First, for much of the twentieth century, the use of the peremptory challenge, particularly by the prosecution, served to manifest racial discrimination and irrational prejudice rather than to balance the scales between the state and the accused. Literature detailing the use of the peremptory challenge in a racially discriminatory manner is legion.[25] Because the number of potential black jurors on any particular venire was generally small, the prosecution typically had enough peremptory challenges to strike all the eligible blacks from the jury.[26] Thus, with its peremptory challenges, the state could often guarantee an all-white jury, which it believed was more favorable to the prosecution than one which was racially-mixed. In cases involving black criminal defendants, the peremptory challenge thus became an instrument of the very evil it was designed to protect against: the state could engineer the selection of a jury which was, on balance, thought to favor the state.

Second, although the use of the peremptory challenge was commonplace, the Supreme Court held that criminal defendants did not have a constitutional right to exercise the peremptory challenge.[27] Hence, the doctrinal rationale for the peremptory challenge in the criminal system was precarious. Nevertheless, the peremptory challenge, as a matter of history and philosophy, was well entrenched. The practice not only survived in the Anglo-American system of justice for more than seven centuries, but it continued to serve a legitimating function in the criminal justice system by sustaining the appearance that both the prosecution and defense accepted a given jury as fair and impartial.

Ultimately, abuse of the peremptory challenge to exclude black jurors led to the questioning of the philosophical premises that justified its existence. In recent years, courts and commentators have tried to find new doctrinal and philosophical explanations for preserving, abolishing or regulating the use of the peremptory challenge.

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23. *See* 1 Stats. 119, ch. 9 (1790).

24. *See* VAN DYKE, *supra* note 7, at 150 (tracing the development of the prosecutorial right to peremptory challenge in various American jurisdictions throughout the nineteenth century).

25. *See, e.g.*, Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 206-09 (1978); Toni M. Massaro, *Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C.L. REV. 501, 509 (1986).

26. *See* Colbert, *supra* note 2, at 88-93.

27. *See* Stilson v. United States, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.").

II. MODERN APPROACHES TO PEREMPTORY CHALLENGES

A. *Supreme Court Case Law Since 1965*

The Supreme Court first considered the application of the Equal Protection Clause to peremptory challenges in *Swain v. Alabama*.[28] In *Swain*, a black defendant was accused and subsequently convicted of raping a white woman. Following voir dire, the prosecution used its peremptory challenges to strike all six eligible black venire members.[29] Swain argued that this violated his right to equal protection of the laws. The Supreme Court disagreed, finding that Swain had failed to prove the prosecution struck those venire members solely on the basis of race. The Court held that in order to demonstrate an equal protection violation based on the state's racially discriminatory use of peremptory challenges, a petitioner must show that the prosecutor systematically used race discrimination over a significant period of time.[30] Because Swain had, at best, merely demonstrated that such racially motivated challenges occurred in his case, he had not demonstrated an equal protection violation. Although the *Swain* Court technically applied the Equal Protection Clause to peremptory challenges, the evidentiary requirement for demonstrating an equal protection violation was so high that *Swain* effectively precluded equal protection challenges to peremptory challenges.

Despite much criticism,[31] *Swain*'s framework for evaluating equal protection claims in a peremptory challenge context remained the law for twenty years. In 1986, however, the Supreme Court overruled *Swain*. In *Batson v. Kentucky*[32], a black defendant challenged the prosecution's use of its peremptory challenges to strike all the potential black jurors as violative of equal protection principles. The Court agreed, holding that purposeful race discrimination in violation of the Equal Protection Clause could be established in a particular case provided that the defendant demonstrate that: 1) he is a member of a cognizable racial group; 2) the prosecutor struck venire members of that group; and 3) the facts or other circumstances in the case raise an inference of the prosecutor's intent to exclude those members on the basis of race.[33]

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28. 380 U.S. 202 (1965).

29. *Id.* at 205.

30. The Court reasoned:

> Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system, and indeed generally have a far greater role than any officers of the State. It is for this reason that a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State. . . . [T]he defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time.

Id. at 227.

31. *See, e.g.*, Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966); *Constitutional Law, The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 135 (1965); Comment, *Fair Jury Selection Procedures*, 75 YALE L.J. 322 (1965).

32. 476 U.S. 79 (1986).

33. *Id.*

Upon the defense meeting these requirements, the burden shifts to the state to come forward with a race-neutral explanation for its exercise of the peremptory challenge.[34] The Court's decision made clear that it was equal protection, and not concerns about a defendant's Sixth Amendment rights to a fair trial and impartial jury, that required regulation and limitation of the state's right to peremptory challenges.[35]

Batson, however, left unanswered the question of how far the Equal Protection Clause extended its prohibition of racially discriminatory peremptory challenges. In *Powers v. Ohio*,[36] the Court began to define the extent of the Equal Protection Clause's prohibition of racially biased peremptory challenges. In *Powers*, a white criminal defendant objected to the prosecution's exclusion of black jurors from the venire. Powers did not claim that his own Sixth Amendment rights had been infringed by the peremptory challenges, but rather that the Equal Protection rights of the excluded jurors had been violated.[37] Powers further argued that he had third-party standing to assert the juror's rights.[38] The Court agreed and held that under *Batson*, a white defendant can object to the prosecutor's use of peremptory challenges to exclude non-white jurors. The Court interpreted *Batson* as finding an equal protection violation of both the excluded jurors' rights and those of the criminal defendant. Therefore, the Court concluded that regardless of the race of the criminal defendant, racially motivated peremptory challenges violate the Equal Protection Clause. The Court reasoned that, in addition to the harm to the defendant, racially discriminatory peremptory challenges also harm the excluded jurors and society.[39] *Powers* thus opened

34. *Id.* at 95.

35. Nevertheless, the Court soon confronted a challenge to the prosecution's exercise of peremptory challenges rooted in the Sixth Amendment. The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

U.S. CONST. amend. VI, cl. 1.

In *Holland v. Illinois*, 493 U.S. 474 (1990), a white criminal defendant challenged the state's exclusion of the only two black jurors from the venire as violative of the Sixth Amendment's mandate that he be tried by an impartial jury representing a fair cross-section of the community. The Court held that while the Equal Protection clause forbids the use of peremptory challenges in a racially discriminatory manner, the Sixth Amendment does not prohibit the state from using peremptory challenges in any manner that it sees fit. This includes a racially discriminatory use. Writing for the Court, Justice Scalia reasoned that the Sixth Amendment guarantees an impartial jury, not a representative one. The Supreme Court's decision foreclosed any chance of grounding constitutional challenges to racially discriminatory peremptory challenges in the Sixth Amendment. *Id.* at 480. The Court did hold, however, that under the Sixth Amendment a white defendant has standing to object to the exclusion of black jurors. *Id.*

36. 111 S. Ct. 1364 (1991).

37. *Id.* at 1366-67.

38. *Id.* at 1370.

39. Writing for the Court, Justice Kennedy reasoned:

> In *Batson*, we spoke of the harm caused when a defendant is tried by a tribunal from which members of his own race have been excluded. But we did not limit our discussion in *Batson* to that one aspect of the harm caused by the violation. . . . *Batson* recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large.

111 S. Ct. at 1368 (citation omitted).

the door to application of the Equal Protection Clause based on the identity of the excluded jurors rather than solely on the identity of the defendant.

The Court extended the rule prohibiting racially-biased peremptory challenges to both plaintiffs and defendants in *civil* cases in *Edmonson v. Leesville Concrete Co.*,[40] largely relying on its analysis in *Powers*. In a final extension of *Powers*, in *Georgia v. McCollum*[41] the Court held that a white criminal *defendant's* use of peremptory challenges to strike black jurors on the basis of race violates the Equal Protection Clause. In both *Edmonson* and *Powers*, the Court emphasized that the equal protection rights of the jurors could be asserted by the litigants, and that it was the deprivation of those jurors' rights which was the basis for regulating peremptory challenges.

Throughout each of these cases, distinct voices have emerged proposing how to reconcile the seemingly arbitrary and capricious[42] peremptory challenge with the rational demands of equal protection. These different voices articulate divergent doctrinal and philosophical theories in dealing with the peremptory challenge.

B. *Solutions to the Peremptory Challenge - Equal Protection Conflict*

1. Justice Marshall and the Argument for Elimination of Peremptory Challenges

The opinions in *Batson* set forth the range of possible solutions to the peremptory challenge-equal protection dichotomy. On one end of the spectrum is Justice Marshall, who concurred in the judgment in *Batson*, but argued that the majority did not go far enough towards ensuring the vindication of equal protection values. He claimed that peremptory challenges must be abolished altogether.[43] Merely permitting judicial scrutiny of prosecutors' peremptory challenges does not, according to Justice Marshall, end the racial discrimination which peremptory challenges inject into the jury-selection process.[44] Therefore, in order to redeem the "right of the defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment,"[45] the prosecution's peremptory challenge right should be abolished altogether.[46] Justice Marshall concluded that because "between [the defendant] and the state the scales are to be evenly held,"[47] the right of defendants to exercise peremptory challenges must be abolished as well.[48]

40. 111 S. Ct. 2077, 2088 (1991).
41. 112 S. Ct. 2348, 2359 (1992).
42. *See* Lewis v. United States, 146 U.S. 370, 378 (1892).
43. Batson v. Kentucky, 476 U.S. 79, 102 (1986) (Marshall, J., concurring).
44. *Id.*
45. *Id.* at 107 (citation omitted).
46. *Id.* 102-03.
47. *Id.* at 107 (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)).
48. Of course, such formal equality had not been required for the five centuries or so between 1305 and the 1800's, when prosecutors re-acquired the right to exercise peremptory challenges in this country. See *supra* notes 12-24 and accompanying text.

2. Chief Justice Burger and the Argument for Unfettered Peremptory Challenges

At the other end of the spectrum, Chief Justice Burger, dissenting in *Batson*, argued that peremptory challenges should be preserved with all their prejudices, racial and otherwise, intact.[49] Chief Justice Burger emphasized that prosecutors often use peremptory challenges not to exploit prejudice but to eliminate it. He asserted that the peremptory challenge carefully permits "the covert expression of what we dare not say but know is true more often than not."[50] The dissent further emphasized the inapplicability of equal protection doctrine to the peremptory challenge because of the inherently unaccountable nature of the peremptory challenge.[51]

Justice Thomas, concurring in *McCollum*,[52] would later echo Justice Burger's reluctance to apply equal protection doctrine to peremptory challenges. Justice Thomas argued that the early equal protection cases were *premised* on the recognition that racism plagues juries and that the racial composition of juries can affect case results.[53] He stated that because racial composition continues to makes a difference in a jury's decision, some defendants exercise race-based peremptory challenges solely to counterbalance *jurors'* covert but pernicious biases.[54] Subjecting defendants' peremptory challenges to the Court's review, he argued, with the lofty goal of eliminating racism from the courtroom, may actually deprive defendants of their only tool to strike racist jurors from the jury panels.[55] In any event, Justice Thomas argued, as Chief Justice Burger had, that the advantages of subjective, unexplained peremptory challenges to the defendant outweigh "the community's" nebulous interest in aspirational statements from the Court about racial equality.[56]

Chief Justice Burger and Justice Marshall, at opposite ends of the spectrum agreed that the Court's solution of regulating the peremptory

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49. *Batson*, 476 U.S. at 112 (Burger, C.J., dissenting).

50. *Id.* at 121 (quoting Babcock, *supra* note 21, at 553-54).

51. Chief Justice Burger wrote:

> [I]n making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch. The process cannot be indicted on the sole basis that such decisions are made on the basis of "assumption" or "intuitive judgment." As a result, unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum "rationality" in government actions has no application to "an arbitrary and capricious right."

Id. at 123 (citations omitted).

52. 112 S. Ct. 2348, 2359 (1992) (Thomas, J., concurring).

53. Justice Thomas quoted Strauder v. West Virginia, 100 U.S. 303 (1879), the first case to hold that de jure exclusion of blacks from jury venires violated a black defendant's right to equal protection:

> It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of the protection which others enjoy.

McCollum, 112 S. Ct. at 2360 (quoting *Strauder*, 100 U.S. at 309).

54. *McCollum*, 112 S. Ct. at 2360.

55. *Id.*

56. *Id.*

challenge in light of the Equal Protection Clause would not solve the problem. And, interestingly, both argued that their solutions would strengthen the public's faith in the jury system — Justice Marshall's by eliminating the irreparably racist practice of peremptory challenges, and Chief Justice Burger's by preserving the one device designed to maximize public trust in jury verdicts.[57] The majority of the Court chose a middle ground, however.

3. Justices Kennedy and Blackmun and A Regulatory Compromise

The majority of the *Batson* Court adopted a regulatory compromise, initially in the name of the criminal defendant. The Court's solution in *Batson*, which rejected both Justice Marshall's and Chief Justice Burger's more extreme proposals, was to review the peremptory challenges of prosecutors to eliminate the worst excesses of racial discrimination. Initially, this compromise was seen as a means of protecting the rights of the criminal defendant. Only subsequently would the Court see the compromise as a means of protecting the "public interest" or public concern for the jury system.

a. *Preserving Peremptory Challenges*

The Court rejected Justice Marshall's proposal, to eliminate all peremptory challenges in the goal of racial equality, because of the peremtory's historical and actual benefits. Summarizing the Court's cumulative respect for the peremptory challenge in *Holland*, Justice Scalia stated that the peremptory challenge plays an important and necessary role in a jury trial by striking out the partiality on both sides, thus eliminating bias from the jury.[58] Nevertheless, however, the Court has reiterated that the peremptory challenge is not constitutionally guaranteed.[59] Yet its resistance to the proposal to abolish all peremptory challenges survives, for many of the same reasons that have prompted English-speaking courts to preserve peremptory challenges since the fourteenth century. Peremptory challenges both make juries fairer and give the *appearance* of making juries fairer.[60] Only abuse of peremptory challenges subverts the intent to make juries more fair. As a result, the Court concluded peremptory challenges need to be regulated. Total elimination of peremptory challenges would leave open the risk of losing their original advantages. Without any peremptory challenges, de-

57. *See supra* notes 43-51 and accompanying text.

58. Justice Scalia stated:

> We have acknowledged that [the peremptory challenge] occupies "an important position in our trial procedures," and has indeed been considered "a necessary part of trial by jury." Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of "eliminat[ing] extremes of partiality on both sides," thereby "assuring the selection of a qualified and unbiased jury.

Holland v. Illinois, 493 U.S. 474, 484 (1990) (citations omitted).

59. *Batson*, 476 U.S. 79, 108 (Marshall, J., concurring); Frazier v. United States, 335 U.S. 497, 505 n.11 (1948); Stilson v. United States, 250 U.S. 583, 586 (1919).

60. *See supra* text accompanying notes 17-21.

fendants may well be judged by jurors they believe are biased against them.[61] In addition, public knowledge that an individual litigant has the right to strike a juror bolsters the public's confidence in the justice system.[62]

Finally, if the proposal that peremptory challenges be eliminated is made in the name of racial equality, it must also be recognized that even though elimination of peremptories may raise the number of minority jurors, it may do so at the expense of minority defendants. Defendants who suspect racism among potential jurors, but who cannot strike them without cause, may suffer the effects of discrimination in a far more devastating and final way than do jurors who are not allowed to serve on a jury.

b. *Securing Equal Protection*

While insisting on preserving the peremptory challenge, the Court since *Batson* has resisted with equal resolve proposals to retreat from its equal protection rationale for regulating these challenges. Arguments that equal protection analysis cannot be applied to peremptory challenges because of the inherently unaccountable nature of peremptory challenges are flawed. For many years, before equal protection regulation of peremptory challenges, prosecutors often rampantly abused the peremptory challenge by exploiting and perpetuating racial stereotypes and discrimination.[63] It is true that peremptory challenges are meant to be unaccountable and subjective. On the other hand, they are not meant to accommodate every hateful and prejudiced thought a litigant may have. Thus, the Court had reasoned, regulation of peremptory challenges is necessary to secure equal protection for everyone involved with the trial.

c. *The Majority's Solution*

Finding a middle ground between the abolition of peremptory challenges and complete, laissez-faire indifference to their application, a majority of the Supreme Court in *Batson* accepted a regulatory solution. This regulation is necessary to preserve the right of peremptory challenges, but to prevent that right from being exercised in a way which violates the Equal Protection Clause. The Court has endorsed this solution in each subsequent peremptory challenge case, extending the reach of restrictions—from the prosecution trying a black defendant in *Batson*, a white defendant in *Powers*, to all civil litigants in *Edmonson*, to all criminal defendants in *McCollum*.

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61. *See* VALERIE HANS & NEIL VIDMAR, JUDGING THE JURY 72-73 (1986) ("Suppose that you are involved in a legal case and you are convinced that a particular prospective juror is biased against you, even though the judge doesn't share your insight. The option of eliminating that person through a peremptory challenge may help you to accept the verdict as reasonable even if it should not be in your favor.").

62. Georgia v. McCollum, 112 S.Ct. 2348, 2354 (1992); *see also* BLACKSTONE, *supra* note 19, at * 353.

63. *See* sources cited *supra* note 2.

An important change took place in the Court's doctrinal analysis from *Batson* to the most recent decision in *McCollum*. While in *Batson* the Court alluded to concerns about public confidence in the judicial system, the focus of its holding was entirely on the equal protection rights of the defendant. Slowly, however, the Court began to focus not on the parties' rights but on the equal protection rights of the *jurors*. This shift in focus from parties to jurors, who sit as a proxy for the public generally, reflects a willingness by the Court to effectuate two goals: first, to honor communitarian or "public interest" ideals even in criminal procedure; and second, and even more striking, to honor these public interest ideals to the *detriment* of a criminal defendant.

C. *The Court's Underlying Doctrinal Shift*

The Court's change in focus from criminal defendant to juror evolved slowly. Both *Swain* and *Batson* based their holdings on the equal protection rights of the defendant. In dicta, the *Batson* Court referred to concerns about excluded jurors[64] and cited the need to preserve public confidence in the judicial system.[65] Its holding, however, emphasized that a defendant's equal protection right is denied when he is tried by a jury from which all eligible members of his race have been purposefully excluded.[66]

The juror-centered approach did not reach full fruition until later cases. Concurring in *Holland*, in which the Court to bolster the result in *Batson* with the Sixth Amendment, Justice Kennedy cited *Batson*'s "established rule" — that "exclusion of a juror on the basis of race, whether or not by use of a peremptory challenge, is a violation of the juror's constitutional rights."[67] Subsequently, the Court reaffirmed and expanded this interpretation of *Batson*. Writing for the majority in *Powers* the following year, Justice Kennedy acknowledged that a juror struck on a basis of a discriminatory peremptory challenge suffered harm. As a result the community was harmed as well.[68] The Court held that a juror has a

64. Batson v. Kentucky, 476 U.S. 79, 87 (1986). ("As long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror." (citations omitted)).

65. *Id.*

66. Even Justice Marshall, whose proposal to eliminate peremptory challenges took into consideration the general, societal interest in racial equality, did not take the dispute in *Batson* outside the rights of the parties. He wrote: "Justice Goldberg, dissenting in *Swain*, emphasized that '[w]ere it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.' I believe that this case presents just such a choice." 476 U.S. at 107 (Marshall, J., concurring) (quoting Swain v. Alabama, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting).

67. Holland v. Illinois, 493 U.S. 474, 488 (1990) (Kennedy, J., concurring)(citation omitted).

68. Justice Kennedy wrote:

> *Batson* was designed to serve multiple ends, only one of which was to protect individual defendants from discrimination in the selection of jurors. *Batson* recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large (internal citations omitted).

right not to be excluded from juror service because of the juror's race. As a result, a prosecutor cannot exclude a qualified juror solely because of the juror's race.[69]

Justice Kennedy emphasized both the importance of civic contributions and the value of jury participation, stating that allowing citizens to participate in the justice system was a main reason for the jury system.[70] Quoting *Balzac v. Puerto Rico*,[71] he noted that by participating in a jury, a juror can prevent abuse of the judicial system,[72] and that a juror can influence judicial decisions and the direction of society.[73] He concluded with the observation that jury service safeguarded the law's democratic component by protecting the litigants' rights and insuring the public's tolerance of the law.[74] *Powers*, therefore, fully focused the Court on the rights of jurors rather than on the rights of defendants.[75]

Thus, by the time the Court considered the issues raised in *Edmonson*, the majority of the Court was comfortable with Kennedy's assertion that it was the jurors' equal protection rights that were at issue. Justice Kennedy now moved those jurors to the core of his holding, stating that racial bias was improper in the courtroom, "race-based exclusion violates the equal protection rights of the challenged jurors."[76] *Edmonson* considered the rights of litigants to use race in peremptory challenges in *civil* cases, which made the centrality of jurors much easier to accept. In

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Powers v. Ohio, 111 S. Ct. 1364, 1368 (1991) (citations omitted).

69. The Court stated:

> We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.

Id. at 1370.

70. Justice Kennedy wrote:

> The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.

Id. at 1368 (citations omitted).

71. 258 U.S. 298 (1922).

72. Kennedy stated:

> The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.

Powers, 111 S.Ct. at 1368 (quoting *Balzac*, 258 U.S. at 310).

73. Justice Kennedy wrote:

> The institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority and invests the people, or that class of citizens, with the direction of society.

Id. (quoting 1 DEMOCRACY IN AMERICA 334-337 (Schocker, 1st ed. 1461)).

74. Jury service preserves the democratic element of the law, as it guards the rights of the parties and insures continued acceptance of the laws by all of the people.

Id. at 1369 (citations omitted).

75. The Court's concern for minorities' participation in civic life echoes its reasoning in Voting Rights Act cases. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986). Moreover, it continues the trend of giving constitutional protection to practices which help involve historically excluded groups in civic life.

76. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2080 (1991).

the civil context, the rights of non-parties have always been more readily considered,[77] and the notion that litigants' rights must accommodate jurors' rights is palatable, if not universally accepted. But in *McCollum*, which subjected the *criminal defendant's* exercise of peremptory challenges to review for violations of the Equal Protection Clause, the Court seemingly transferred the language of jurors' rights from the civil context to the criminal.[78] In *McCollum*, the Court began its reasoning by explaining that regardless of whether a defendant or prosecutor excluded a juror because of race, the juror was exposed to racial discrimination.[79] The Court further couched jurors' rights explicitly in the need for public confidence in the judicial system.[80] The Court noted that this was especially true in race-related cases.[81]

Thus the Court's focus underwent a complete transformation. From the holding in *Batson*, that a black defendant's right to equal protection may be violated when all eligible black jurors are systematically excluded, the Court has come to hold that the rights of jurors — indeed, the rights of the whole community — are violated when a juror is struck on the basis of race.

The Court's shift in focus from defendant to jurors in its equal protection analysis prompted a caustic response from Justices who disapproved. Dissenting in *Powers*, which was the first case in which a majority of the Court cited *Batson* as holding that a prosecutor's discriminatory use of peremptory challenges harmed the excluded jurors and the community at large, Justice Scalia charged the majority with abandoning the purposes of both *Strauder* and the Fourteenth Amendment.[82] He argued that the Fourteenth Amendment was designed to guarantee blacks protection of the laws equal to that of whites. The Court's new shift to protect black *jurors*, Justice Scalia argued, gave *white* defendants the use of a doctrine created to balance *blacks'* chances in a racist society. He lamented the distortion of equal protection jurisprudence and predicted the Court's "self-satisfying," supposed "blow against racism"[83] would jeopardize peremptory challenges and equal protection analysis

77. *See infra* text accompanying notes 101-03.

78. Georgia v. McCollum, 112 S. Ct. 2348, 2354-57 (1992).

79. *Id.* at 2353.

80. Citing *Powers*, Justice Blackmun wrote:

> One of the goals of our jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.

Id. at 2353-54 (citations omitted).

81. The need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes.

> Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice — our citizens' confidence in it.

Id. at 2353-54 (citations omitted).

82. Powers v. Ohio, 111 S. Ct. 1364, 1374-75 (1991)(Scalia, J., dissenting).

83. *Id.* at 1382.

altogether.[84]

Concurring in *McCollum*, Justice Thomas echoed Justice Scalia's concern and called the Court's shift in emphasis from the criminal defendant's rights to the rights of jurors "a serious misordering of our priorities."[85] Justice Thomas argued this shift elevated juror's rights at the expense of the defendant's.[86] Nonetheless, a majority of Justices have approved the shift in the focus of the equal protection analysis. As Justices Scalia and Thomas suggested, however, the implications of "exalt[ing] the right of citizens to sit on juries over the rights of the criminal defendant"[87] may signal significant changes in the law of criminal procedure.

D. *The Ideological Significance of the Shift*

The Court's change in focus from the defendant's rights to the jurors' reflects its willingness to import communitarian principles to the law of criminal procedure, an area traditionally reserved for liberal or individualist principles of law.[88] Scholars have traced the developments of both liberalism and communitarianism from the earliest of the Constitutional Framers' writings[89] through recent Supreme Court decisions.[90] For our purposes, however, we need only recognize the trademark principles of liberalism and communitarianism (or republicanism[91]), in order to place the Court's shift in equal protection analysis in philosophical perspective.

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84. In particular, Justice Scalia predicted the standing problems the Court's decision was likely to create. "While [*Batson*] refers to 'the harm' that 'discriminatory jury selection' inflicts upon 'the excluded juror,' that is not a clear recognition, even in dictum, that the excluded juror has his own cause of action—any more than its accompanying reference to the harm inflicted upon 'the entire community,' suggests that the entire community has a cause of action." *Id.* at 1379 (citations omitted).

85. Georgia v. McCollum, 112 S. Ct. 2348, 2360 (1992)(Thomas, J., concurring).

86. Justice Thomas wrote:

> In *Strauder*, we put the rights of defendants foremost. Today's decision, while protecting jurors, leaves defendants with less means of protecting themselves. Unless jurors actually admit prejudice during voir dire, defendants generally must allow them to sit and run the risk that racial animus will affect the verdict. . . . In effect, we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death.

Id.

87. *Id.*

88. *See generally* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); JOHN P. DIGGINS, THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST AND THE FOUNDATIONS OF LIBERALISM (1980); JOHN GREVILLE AGARD POCOCK, THE MACHIAVELLIAN MOMENT (1975); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); Frank I. Michelman, *The Supreme Court, 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

89. *See* Wood, *supra* note 88.

90. *See, e.g.*, Frank I. Michelman, *The Republican Civic Tradition: Law's Republic*, 97 YALE L.J. 1493 (1988) (arguing traditional civic republican theory supports protection of individual rights, in context of Bowers v. Hardwick, 478 U.S. 186 (1986)).

91. We call the public-centered philosophy "communitarianism," which encompasses several community-minded critiques of liberalism, including republicanism. For an excellent discussion of the recurrence of communitarian critiques, see Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6 (1990).

Professor Morton Horwitz has contrasted[92] the two philosophies concisely:

> Liberalism has stood for a subjective theory of value, a conception of individual self-interest as the only legitimate animating force in society, a night-watchman state, and denial of any conception of an autonomous public interest independent of the sum of individual interests. Republicanism has stood for the primacy of politics and the relative independence of ideals of the good life from economic forces. It has emphasized the growth and development of human personality in active political life. It has proceeded from some objective conception of the public interest and conceived of a state that could legitimately promote virtue.[93]

Stated in these terms, the Supreme Court's shift regarding peremptory challenges reflects a profound change in philosophical emphasis. The change in emphasis from *Batson*, stressing the inviolable rights of the criminal defendant, to *Powers*, stressing the jurors' interests in not being excluded from a "significant opportunity to participate in civic life,"[94] to *McCollum*, which highlighted society's interest in not "undermin[ing] the very foundation of our system of justice—our citizens' confidence in it"[95] reflects an emergence of communitarian priorities in the Court's treatment of peremptory challenges.

The Court's initial emphasis in *Swain* and *Batson* on the criminal defendant's rights reflects the liberalist tradition. In the liberal model of criminal justice, the state battles the accused, each armed to fight fairly in its own self-interest. The state may prosecute zealously so long as it respects the bounds of the defendant's inviolable rights.[96] The Court, as night-watchman, monitors the prosecution to be sure these bounds are respected. The criminal trial, therefore, gives each party the opportunity to vigorously argue its self-interest, that "legitimate animating force"[97] from which the truth of the criminal charges is determined. It is this contest between interested parties, ostensibly made fairer by the exercise of peremptory challenges, from which justice will result.

Communitarian priorities, however, emphasize what Horwitz calls the public interest, which includes the needs of people affected indirectly, although perhaps profoundly, by any particular case before the court. The opinions in *Powers*, *Edmonson* and *McCollum* speak the language of communitarianism. These majority opinions emphasize the

92. Liberalism and republicanism are widely thought to be at odds with each other. However, for a suggestion that "liberal republicanism" comprises both, see Cass R. Sunstein, *The Republican Civic Tradition: Beyond the Republican Revival*, 97 YALE L.J. 1539, 1567-1571 (1988).

93. Morton J. Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1832 (1987).

94. Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991).

95. Georgia v. McCollum 112 S. Ct. 2348, 2354 (1992).

96. The defendant's shields are guaranteed by the Constitution. They include the right against unreasonable searches and seizures, U.S. CONST. amend. IV; the right against double jeopardy, U.S. CONST. amend. V; and the right to a "speedy and public trial, by an impartial jury," U.S. CONST. amend. VI.

97. Horwitz, *supra* note 93, at 1832.

"growth and development of [the excluded jurors'] human personality in active political life," beginning from an "objective conception of the public interest."[98] That interest includes, at least for Justice Blackmun in *McCollum*, the promotion of racial harmony in communities which have suffered racially-motivated crime.[99]

The emergence of communitarian principles in the law of peremptory challenges has uncertain significance. On the one hand, it reflects those historical justification which valued the peremptory challenge contributions to the public perception that jury trials were fair.[100] On the other hand, however, considerations of public confidence and the appearance of impartiality had never before been used to diminish, rather than augment, the rights of criminal defendants. Whereas the defendant's right to the peremptory challenge was preserved after the Crown had lost that right, the defendant's right was preserved because it helped sustain public faith in juries' determinations. *McCollum*, in contrast, represents a willingness to nurture public confidence at the *expense* of the defendant. This use of communitarian principles is a new and dramatic shift, indeed.

In one sense, the preference for "public interest" considerations at all in criminal procedure is unusual. Several areas of civil law explicitly take non-parties' interests into account. For example, tort law often expressly considers long-range, communal good in determining optimal tort liability schemes.[101] Domestic relations law considers the interests of children in divorce proceedings between parents.[102] More generally, the provisions for third party practice, class actions, and intervention provide for complex civil litigation in which many parties with an interest in a dispute can be included.[103]

Moreover, the substance of criminal law also regards some "objective conception of the public interest."[104] Statutory prohibitions against murder, rape and robbery reflect a societal desire to outlaw and prevent these acts. But criminal procedure has been a traditionally *liberal* field of law. Perhaps because its strictures are set out in relative detail in the Bill of Rights, the law of criminal investigation and prosecution reflects the individualist model of state versus accused. It might be said that in criminal *punishment*, general (as opposed to specific) deterrence projects the "public interest," or that punishment's retributive goals satisfy the need for communal perception that justice is being served. But for the most

98. *McCollum*, 112 S. Ct. at 2348.

99. *Id.* at 2354.

100. *See supra* notes 17-21 and accompanying text.

101. *See, e.g.*, G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 221 (1980) (discussing trend in tort law to minimize overall social costs by imposing liability on the "cheaper cost-avoider").

102. For example, courts are said to have inherent power to protect children, which allows them to shape domestic remedies regardless of the desires of the parties. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, 238 (1987) (collecting cases).

103. *See* FED. R. CIV. P. 19-24.

104. Horwitz, *supra* note 93, at 1832.

part, throughout investigation and trial, any person's interests which might compromise the defendant's are given little consideration.

Therefore, the implications of the Court's willingness in *McCollum* to consider the public interest at the expense of the criminal defendant may be profound. On the one hand, it is unlikely that the Court will move toward a communitarian jurisprudence at every level of criminal prosecution. While the Court did apply communitarian principles to the peremptory challenge, that practice, unlike the shields guaranteed by the Fourth, Fifth and Sixth Amendments, is not constitutionally guaranteed.[105] It is therefore more susceptible to manipulation or change based on policy- or community-oriented considerations. On the other hand, however, the Court's eager defense of jurors' rights at the expense of defendants' rights signals a vision into criminal jurisprudence which may inadequately protect defendants. The crucial next step must be to interpret *McCollum* very narrowly.

III. THE FUTURE OF THE *BATSON* LINE OF CASES

The Supreme Court has charted a course for regulating peremptory challenges to protect the equal protection rights of jurors. The question remains, however, how to define the scope of these rights. Under the Court's current holdings, the rights of black prospective jurors can be asserted by black criminal defendants (*Batson*), white criminal defendants (*Powers*), civil litigants (*Edmonson*) and criminal prosecutors (*McCollum*). What remains to be decided, however, is whether, as Justice Thomas predicted in his *McCollum* concurrence, the same result must ensue when the criminal defendants are black (or members of other minority groups) and the challenged jurors are white. Must the rights of minority jurors not to be challenged peremptorily on the basis of race, as so far defined by the Supreme Court, extend equally to whites?[106] An analysis of the doctrinal and ideological concerns surrounding peremptory challenges leads to the conclusion that the rules of the post-*Batson* line of cases should not apply when the challenged jurors are white.

A. *Doctrinal Analysis*

There are two potential doctrinal arguments that reason against applying the *Batson* line of cases to challenges of white jurors. First, as a matter of basic equal protection doctrine, differential treatment of white jurors is arguably subject to a lower level of scrutiny than differential treatment of blacks, or members of other suspect classes.[107] If the terminology of levels of scrutiny were applied in peremptory challenge

105. *See supra* note 27.

106. The Supreme Court has rigorously applied strict race neutrality in other equal protection contexts. *See* City of Richmond v. Croson, 488 U.S. 469 (1989) (striking down local ordinance designed to guarantee a certain percentage of work projects for minority-owned businesses).

107. *See* Hunter v. Erickson, 393 U.S. 385, 391-92 (1969) ("Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified distinctions based on race, racial classifications are 'constitutionally suspect, subject to the 'most rigid scru-

cases, a party asserting the interests of white jurors not to be struck from a jury on the basis of race would be required to prove that those jurors' exclusion is not rationally related to a legitimate state interest.[108] Black jurors, on the other hand, speaking through any of the above-named parties, would only have to show that those jurors' exclusion is not narrowly tailored to further a compelling governmental interest.

The terminology of levels of scrutiny has never been used in the peremptory challenge cases, however, because "purposeful racial discrimination," rather than racial classification, is involved in a prosecutor's racially motivated use of peremptory challenges.[109] The argument that classification of whites is treated differently for equal protection purposes is likely irrelevant, since the exclusion of white jurors could still involve purposeful racial discrimination. Given that any purposeful racial discrimination is presumptively prohibited by the *Batson* line of cases, the question becomes whether a black defendant's striking of white jurors constitutes "purposeful racial discrimination."

The second doctrinal reason for not applying *McCollum* in cases involving white jurors involves the reality surrounding a black defendant's challenge of white jurors, which strongly suggests that no such "purposeful racial discrimination" is involved.[110] In every significant peremptory challenge case that the Supreme Court has confronted to date, *all* black members of the venire eligible to sit on the jury were struck. White parties successfully sought all-white juries, believing that their chances of acquittal (or conviction, in the case of the government) before a jury of their racial peers were better.[111] Therefore, the striking of black jurors led to a jury of a particular racial composition.

Because blacks frequently constitute only a tiny percentage of the venire,[112] black defendants striking white jurors often have a different purpose in mind. Since they can seldom use peremptory challenges to create juries made up entirely of their own race, black defendants may strike white jurors in order to keep *some* representation of members of their own race on the jury. They are trying to assure, rather than prevent, racially mixed juries. The Supreme Court's equal protection rule, designed to prevent exclusion of a certain race from a jury, does not also bar the exclusion of jurors whose race is not in danger of full exclusion. In other words, while a black criminal defendant might strike a white juror on the basis of race, as Justice Thomas hypothesized in *McCollum*,

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tiny.' They 'bear a far heavier burden of justification' than other classifications." (citations omitted)).

108. *See id.*

109. *See* Batson v. Kentucky, 476 U.S. 79, 86 (1986).

110. Indeed, as a practical matter, prosecutors arguing for a wooden application of *McCollum* could often make out a prima facie case of racial discrimination when a black defendant uses his peremptories to strike only white jurors (or, indeed, when *any* litigant uses his peremptories to strike only white jurors). Such a broad application of the rule would not advance the purposes of equal protection because the jury would likely retain a high degree of white representation.

111. Obviously in *Powers*, the white defendant from whose jury the prosecutor had struck all eligible blacks, fared poorly anyway.

112. *See* Colbert, *supra* note 2, at 88-93.

the *Batson* line of cases would not require the review of those peremptory challenges that *McCollum* describes. The Court's equal protection doctrine forbids not all court-approved, race-conscious jury selection, but only that race-conscious jury selection *designed to perpetuate total exclusion of one race.*

McCollum held that a defense attorney's use of peremptory challenges to exclude *all* the black members of the venire violated those jurors' equal protection rights.[113] Given twenty peremptory challenges,[114] the attorney could remove all 18 blacks from the jury venire.[115] But such would not be the case were the scenario reversed.

Consider Chief Justice Burger's hypothetical scenario in his dissent in *Batson*.[116] There he predicted the holding of *McCollum* (that once prosecutors were denied race-based peremptory challenges, defendants would be as well), and declared that peremptory challenges would shortly disappear altogether. He predicted dire consequences for all criminal defendants:

> Assume an Asian defendant, on trial for the capital murder of a white victim, asks prospective jury members, most of whom are white, whether they harbor racial prejudice against Asians. The basis for such a question is to flush out any "juror who believes that [Asians] are violence-prone or morally inferior . . . ." Assume further that all white jurors deny harboring racial prejudice but that the defendant, on trial for his life, remains unconvinced by these protestations. Instead, he continues to harbor a hunch, an "assumption," or "intuitive judgment," that these white jurors will be prejudiced against him, presumably based in part on race.[117]

Chief Justice Burger postulated that the Asian defendant would not be able to strike these white, prejudiced jurors, and a racially biased verdict would result.[118]

Doctrinally, however, Chief Justice Burger's *in terrorem* argument is simply incorrect. The rights of those white jurors, asserted by the prosecutor on their behalf, do not pose the same equal protection problem as that in either *Batson* or *McCollum* because the Asian defendant cannot strike *all* the white venire members and design for himself a fully Asian jury. Whereas white defendants can exclude minority jurors to effect a minority-free jury, minority jurors can generally only exclude whites to effect a jury with some non-whites on it. This difference, rooted in mathematical proportions and the parties' underlying motives, has constitutional significance.

Justice Thomas also alluded to the question of whether black de-

113. Georgia v. McCollum, 112 S. Ct. 2348, 2356-57 (1992).

114. Under Georgia law, a defendant gets 20 peremptory challenges when indicted for an offense carrying a penalty of four or more years. GA. CODE ANN. § 15-12-165 (1990).

115. *McCollum*, 112 S. Ct. at 2351.

116. *Batson*, 476 U.S. at 112 (Burger, C.J., dissenting).

117. *Id.* at 128 (Burger, C.J., dissenting)(citations omitted).

118. *Id.*

fendants could strike white jurors in his concurrence in *McCollum*.[119] The NAACP, as amicus curiae in *McCollum*, urged that "whether white defendants can use peremptory challenges to purge minority jurors presents quite different issues from whether a minority defendant can strike majority group jurors."[120] Justice Thomas opined that the difference was illusory, and that while the issue "technically remains open, in his opinion, the result would be the same if black defendants struck white jurors.[121] For the reasons we have identified, we believe that issue does remain open, and that nothing in the prior case law compels the conclusion Justice Thomas's concurrence might suggest. The Court's focus on jurors' rights needs a careful definition of those rights, not a wooden application of *McCollum* to jurors of every race, even in the name of race-blind, even-handed application of the law.

B. *Ideological Considerations*

Not only does a doctrinal analysis lead to the conclusion that the *Batson* line of cases should not extend to the challenge of white jurors, but ideological concerns also compel that conclusion. The communitarian principles that drove the Court's shift from the rights of the defendant to the equal protection rights of jurors call for a consideration of the likely effects of the Court's decisions on public confidence and trust in the judicial system generally.

Justice Blackmun noted that when white defendants on trial for "white on black" crime strike every black juror, the public recognizes not only that the jurors have suffered an injustice, but also that the court has sanctioned it. As mentioned previously, black defendants strike white jurors either to ensure that some black jurors sit on the jury or to eliminate those suspected of racial bias who cannot be identified during the cause portion of the voir dire.[122] When a court permits challenges for either of those reasons, the public is less likely to perceive the same injustice.

First, the white jurors struck are not members of a group which has been historically excluded from jury service either de jure or de facto.[123] The exclusion of white jurors from the trial of a black defendant, therefore, does not recall the historical exclusion of one particular group based on an earlier, pernicious system of discrimination. Second, because of their historical institutional dominance, white citizens' faith in the judicial system is not as precarious as that of black citizens, at least with respect to service on juries, on which whites have always participated.[124] Whites excused from a jury venire are not as likely to suspect that the trial will go forward with utter disregard for them as a class,

119. 112 S. Ct. at 2360 (Thomas, J., concurring).

120. 112 S. Ct. at 2360 n.2 (quoting Brief for NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* at 3-4).

121. 112 S. Ct. 2360 n.2 (Thomas, J., concurring).

122. *See supra* note 112 and accompanying text.

123. *See* Colbert, *supra* note 2, at 88-93.

124. *See* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611,

since their exclusion from the jury will not likely result in an all non-white jury.

Finally, minority defendants who are rendered unable to strike white jurors whom they suspect to be racially prejudiced are the most likely to lose faith in the system. The purpose of the peremptory challenge—to protect defendants against prejudice favoring the state and to encourage public confidence in jury verdicts—will be undermined just as Chief Justice Burger warned in his dissent in *Batson*. Widespread distrust of the legal system among large minority communities hardly ensures the kind of united, law-abiding society the Court purportedly wants.

IV. CONCLUSION

The Supreme Court has shown a consistent resolve to confront the peremptory challenge-equal protection conflict by endorsing a compromise solution: preserve peremptory challenges, but cabin them within the bounds of equal protection. Doctrinally, the Court has altered its focus from defendant to jurors in articulating the equal protection rights at stake. It has underscored those jurors'—as a proxy for all of society's—trust and confidence in the judicial system.[125]

In deciding how far to extend the rules it adopted in the *Batson* line of cases, the Court should closely examine the doctrinal and ideological considerations that have motivated it thus far. The Court's commitment to preserving peremptory challenges, while advancing the communitarian concerns underlying jury service, argues for a narrow definition of those jurors' rights. While *McCollum* subjected the peremptory challenges of black jurors by white criminal defendants to review, it would be inconsistent with the Court's concerns both for the peremptory challenge and for the public's faith in the system to apply this rule mechanically to the reverse situation. Race-conscious peremptory challenges are not the inherent stain on the system. What offends equal protection and the public's regard for that system are vestiges of white exclusion of minorities from meaningful participation in civic life. To the extent peremptory challenges serve other purposes, they should be scrupulously protected.

1613 (1985). *See also* Hagan & Albonetti, *Race, Class, and the Perception of Criminal Injustice in America*, 88 AM. J. SOC. 329 (1982).

125. This compromise has still not clarified how courts should weigh defendants' and jurors rights in every circumstance, however. *Compare* Ramseur v. Beyer, No. 90-5333, slip op. at 22-23 (3d Cir. Dec. 31, 1992) (holding a judge's singling out of black grand jurors does not violate the Equal Protection Clause where no juror was actually excluded, and where the judge did not countenance racial prejudice against jurors so much as seek to create a racially-balanced jury) *with id.* at 56-57 (Alito, J., concurring) (emphasizing the equal protection rights of criminal defendants whose cases are presented to cross-section grand juries as opposed to randomly selected grand juries).

CONSTITUTIONAL CHALLENGES TO THE CRIMINALIZATION OF SAME-SEX SEXUAL ACTIVITIES: STATE INTEREST IN HIV-AIDS ISSUES

J. KELLY STRADER*

INTRODUCTION

As the most-litigated disease in our nation's history,[1] Human Immunodeficiency Virus-Acquired Immune Deficiency Syndrome (HIV-AIDS) frequently challenges the courts to separate reasoned arguments from arguments based on misinformation, prejudice and hysteria. A major national study recently concluded that society subjects people affected by HIV-AIDS to discrimination in employment,[2] health care,[3] insurance[4] and criminal law.[5] The stigma of HIV disease[6] has particularly

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1. *See* Larry O. Gostin, *AIDS Litigation Project II: A National Survey of Federal, State, & Local Cases Before the Courts and Human Rights Commissions* (1991) (available from the Department of Health and Human Services, Public Health Service, National AIDS Program Office). The AIDS Litigation Project (ALP) tallied 444 AIDS-related cases by June 1, 1989. Eighteen months later, in January, 1991, the ALP recorded 372 cases (the vast majority were not included in the earlier study). The ALP report provides expansive detail of both discrimination against persons with HIV-AIDS and ignorance of scientific evidence concerning the disease.

2. *See, e.g.*, Cain v. Hyatt, 734 F. Supp. 671 (E.D. Pa. 1990) (awarding plaintiff $157,888.18 in damages against employer who discharged plaintiff after learning he contracted AIDS).

3. *See, e.g.*, Weaver v. Reagen, 886 F.2d 194 (8th Cir. 1989) (plaintiffs brought suit against Missouri Medicaid officials who denied Medicaid coverage for the anti-viral drug AZT to AIDS patients eligible for Medicaid).

4. *See, e.g.*, William Penn Life Ins. v. Sands, 912 F.2d 1359 (11th Cir. 1990) (insurer refused to pay coverage on life insurance of deceased, who died of AIDS, and sought to rescind life insurance policy of deceased's beneficiary, who also had AIDS, although neither applicant misstated his health status at time of application).

5. *See, e.g.*, Wiggins v. State, 602 A.2d 212 (Md. App. 1989) (homosexual defendant of unknown HIV status was, under order of the trial judge, escorted to and from court by guards wearing rubber gloves).

6. Many health care professionals now view the term AIDS as arbitrary and outmoded. Of broader application are the terms HIV illness and HIV infection, which encompass the effects of HIV on those who have tested positive for antibodies to the virus, not just those who fall within the prevailing definition of AIDS. *See* Michael Closen & Scott

harsh consequences when criminal penalties are at stake. Controversial results abound in criminal prosecutions of HIV-positive defendants. One state court reinstated a conviction for attempted murder based upon the defendant's spitting and throwing of blood.[7] A federal appeals court held that the bite of an HIV positive person constituted use of a "deadly and dangerous" weapon in an assault prosecution.[8] In other cases, criminal defendants diagnosed or merely perceived as HIV-positive were subject to irrational and humiliating courtroom treatment.[9]

Constitutional challenges to criminal sodomy laws provide a valuable setting for assessing the rationality of judicial response to HIV-AIDS issues. In particular, homosexuals' legal challenges to these laws' proscriptions of private, noncommercial, consensual, same-sex sexual activities raise two of the most provocative issues of our time: preventing the spread of HIV-AIDS and protecting the right to privacy in intimate acts. Courts face difficulty in resolving these challenges when supporters and opponents of same-sex sodomy statutes raise emotionally charged HIV-AIDS issues linked to a variety of complex medical, social and psychological concerns.

The effect of these arguments on courts and on legislatures is profound. As one commentator noted: "The trend towards decriminalization of gay sex has been halted by AIDS . . . ."[10] Now that the AIDS hysteria has abated somewhat, courts may again be willing to view the sodomy issue rationally. In *Commonwealth v. Wasson*,[11] the Kentucky Supreme Court struck down the Kentucky same-sex sodomy law on state constitutional grounds. The decision provided a ringing affirmation of personal privacy rights and rejected irrational arguments based on HIV-AIDS concerns. It remains an open question whether other courts will take a similar view or will bend to popular pressures.

Part I of this Article places constitutional challenges to sodomy laws in their legal context by surveying major state and federal cases con-

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Isaacman, *HIV-AIDS and Governmental Control of Information: International Denial of Human Rights*, 4 ST. THOMAS L. REV. 107, 111-14 (1992).

7. State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989) (reversing trial court decision and reinstating attempted murder conviction).

8. United States v. Moore, 846 F.2d 1163 (8th Cir. 1988). For a critical view of the decision in *Moore*, *see* Carlton D. Stansbury, Comment, *Deadly and Dangerous Weapons and AIDS: The Moore Analysis is Likely to be Dangerous*, 74 IOWA L. REV. 951 (1989) (concluding that, although the court did not expressly rely on the defendant's HIV status to uphold the conviction, the issue very likely influenced the outcome).

9. *See, e.g.*, *Wiggins*, 602 A.2d at 212 (trial judge ordered guards to wear rubber gloves and ordered jury not to touch trial exhibits, even though it was unknown whether Wiggins was HIV-positive); Beason v. Harcleroad, 805 P.2d 700 (Or. App. 1991) (prosecutors discover that suspect is homosexual and fabricated a story to news media that he was gay, had AIDS and induced others to have unprotected sex while concealing illness); State v. Hudson, 1989 Tenn. Crim. App. Lexis 773 (Nov. 8, 1989) (leaving sacks marked "CAUTION, AIDS" within sight of jury is not reversible error, even though the sacks were filled with evidence from another trial).

10. Arthur Leonard, *Report from the Legal Front: Gay/Lesbian Rights*, THE NATION, July 2, 1990, at 12.

11. Commonwealth v. Wasson, No. 90-SC-558-TG, 1992 WL 235412 (Ky. Sept. 24, 1992), *aff'g* No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990).

fronting the issue. Part II examines how challenges to state sodomy laws frame HIV-AIDS issues. The Article also evaluates the merits of arguments based on HIV-AIDS with particular focus on state sodomy laws. In conclusion, the Article proposes a reasoned basis for the courts' responses to those arguments.

I. CRIMINAL PROSCRIPTIONS AGAINST CONSENSUAL SAME-SEX SEXUAL ACTIVITIES

In 1986 the United States Supreme Court in *Bowers v. Hardwick*[12] held that there is no federal constitutional right to privacy in consensual, same-sex sexual activities. Thus, in the years since *Hardwick*, challengers to sodomy laws have shifted their efforts from federal to state courts. These efforts produced substantial recent success, most notably the 1992 Kentucky Supreme Court decision *Commonwealth v. Wasson*.[13] As in other areas of the law, litigants now find state courts far more receptive than federal courts to claims based upon individual constitutional liberties.[14]

To uphold the criminalization of consensual, same-sex sexual activities against constitutional challenge, the courts must find sufficient government justification for the challenged statutes.[15] In this context supporters of the same-sex sodomy statutes raise the AIDS specter by arguing that these statues effectively deter the spread of HIV-AIDS.

A. *State "Sodomy" Statutes*

In 1986 the Supreme Court upheld a Georgia sodomy law in *Hardwick*,[16] a case involving oral sex between two men in a private dwelling. Today, criminal statutes in about twenty-one states continue to forbid private, consensual, same-sex sexual activities.[17] Contrary to common

12. 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).

13. *Wasson*, No. 90-SC-558-TG; *see also* State v. Morales, 826 S.W.2d 201 (Tex. Ct. App. 1992), No. D-2393 (Tex. argued Jan. 5, 1993); Michigan Organization for Human Rights v. Kelly, No. 88-815820 (Mich. Cir. Ct. July 9, 1990). Even before *Hardwick*, courts in Pennsylvania and New York had invalidated sodomy laws on constitutional grounds. *See* Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980) (invalid exercise of police power and violation of equal protection); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981) (violation of equal protection and right to privacy).

14. This trend has been the subject of substantial recent commentary. *See, e.g.*, Kevin Cullen, *Scales Tip to State Courts: Rights Lawyers Avoiding Federal Route*, BOSTON GLOBE, Dec. 28, 1991, at 1; W. John Moore, *In Whose Court?*, 23 NATIONAL J. 2396 (1991). The trend is particularly notable in privacy and Fourth Amendment cases. *See, e.g.*, Moe v. Secretary of Admin., 417 N.E.2d 382 (Mass. 1981) (rejecting holding in Harris v. McRae, 448 U.S. 297 (1980), and upholding the right to public funding of abortions under the state constitutional right to privacy); People v. Scott, 593 N.E.2d 1328 (N.Y. 1992) (rejecting holding in Oliver v. United States, 466 U.S. 170 (1984) and finding a legitimate expectation of privacy in land based on the Fourth Amendment).

15. The particular level of governmental justification required depends upon the constitutional basis for challenging the statute. *See infra* notes 34-68 and accompanying text.

16. 478 U.S. 186 (1986).

17. SEXUAL ORIENTATION AND THE LAW at 9-10 (Harv. L. Rev. eds., 1989) [hereinafter SEXUAL ORIENTATION]. The study lists twenty-four statutes, three of which have since been invalidated by courts. *See infra* note 19 and accompanying text. The proscribed acts generally, but not uniformly, involve anal and/or oral sex. Some of these statutes also prohibit

belief, the states continue to invoke and enforce these criminal sodomy statutes, albeit with less frequency. In the last six years, several state challenges have been raised in connection with arrests and/or prosecutions under these statutes. The Supreme Court of Missouri upheld the state statute,[18] while the highest state court in Kentucky and lower state courts in Michigan and Texas invalidated the statutes.[19]

The underlying facts of *Commonwealth v. Wasson* illustrate the role of state sodomy statutes. During 1985 the Lexington, Kentucky police department engaged in an undercover operation designed to generate prosecutions under Kentucky's sodomy law.[20] Over a period of roughly two months undercover police officers drove to an area they believed to be frequented by homosexuals. The officers parked their cars and engaged in conversations to determine if their targets would invite them to engage in illegal sexual conduct. The police officers secretly recorded the conversations, including a conversation with Mr. Wasson.[21] After talking with an undercover officer for twenty to twenty-five minutes, Mr. Wasson invited the officer to his home.[22] Before agreeing, the officer asked about the activities involved. At the officer's prodding, Mr. Wasson mentioned acts that were criminal under the Kentucky statute.[23] The officer departed at that point.[24] Mr. Wasson was arrested and subsequently charged him with soliciting a criminal act. Both Mr. Wasson and the officer were over twenty-one years old. The state did not allege that there was any offer or exchange of money, or that any public or private sexual activities occurred. The court postponed the trials of four other people arrested under similar circumstances pending the outcome of Mr. Wasson's constitutional challenge to the Kentucky sodomy law.[25]

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certain private consensual sexual activities between persons of the opposite sex. Prosecutions for heterosexual sodomy sometimes occur in connection with other crimes, such as rape, but rarely are brought when sodomy is the only crime charged. For an example of one such case, *see, e.g.*, State v. Bateman, 540 P.2d 732 (Ariz. App. 1975), *vacated*, 547 P.2d 6 (Ariz. 1976) (reinstating conviction), *cert. denied*, 429 U.S. 864 (1976).

For ease of reference, this Article refers to all laws criminalizing consensual private sexual activities as *sodomy* laws. For an overview of the specifics of these laws, *see* SEXUAL ORIENTATION at 9-10 nn.1-6.

18. State v. Walsh, 713 S.W.2d 508 (Mo. 1986).

19. Commonwealth v. Wasson, No. 90-SC-558-TG, 1992 WL 235412 (Ky. Sept. 24, 1992), *aff'g* No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990); Michigan Organization for Human Rights v. Kelly, No. 88-815820 (Mich. Cir. Ct. July 9, 1990); State v. Morales, 826 S.W.2d 201 (Tex. Ct. App. 1992).

20. Ky. Rev. Stat. Ann. § 510.100 criminalizes "deviate sexual intercourse" between persons of the same sex. Ky. Rev. Stat. Ann. § 510.010(1) defines "deviate sexual intercourse" as "any act of sexual gratification involving the sex organs of one (1) person and the mouth or anus of another."

21. *Wasson*, No 90-SC-558-TG, slip op. at 3.

22. *Id.*

23. *Id.*

24. This description of the events, presented to the court by defense counsel, was not contested by the state. Commonwealth v. Wasson, No. 90-SC-558-TG, slip op. at 3 (Ky. Sept. 24, 1992), *aff'g* No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990).

25. *See infra* notes 34-68 and accompanying text.

B. *The* Hardwick *Decision*

Considering the views of the current United States Supreme Court, state court challenges will rest primarily on state rather than federal constitutional grounds.[26] In *Bowers v. Hardwick* the Supreme Court rejected a federal constitutional right to privacy challenge to Georgia's sodomy law.[27] Justice Lewis Powell cast the deciding vote for the majority in a five-to-four decision. Powell later repudiated the Court's decision.[28] In *Hardwick*, the Court framed the issue as whether the constitution provides a fundamental right to engage in homosexual sodomy. With the issue so framed, the Court found no fundamental right at stake and rejected the challenge.[29] The Court sustained the law merely by finding a rational relationship between the challenged law and a legitimate governmental justification.[30] This legitimate governmental justification was the state's interest in regulating morality.[31]

Justice Blackmun wrote the dissent. Justices Brennan, Marshall and Stevens joined Justice Blackmun in rejecting the majority's characterization of the issue. The dissenters found the right involved to be " 'the most comprehensive of rights and the right most valued by civilized men', namely, 'the right to be let alone.' "[32] The dissent argued there was no distinction between the sodomy statute and other privacy invasions struck down by the Court, including the right to buy and use con-

26. *See* Juli A. Morris, Note, *Challenging Sodomy Statutes: State Constitutional Protections for Sexual Privacy*, 66 IND. L.J. 609 (1991) (contending that federal due process challenges to sodomy laws are futile after *Hardwick*).

27. Bowers v. Hardwick, 478 U.S. 186, 196 (1986). Michael Hardwick was arrested in his bedroom by a police officer who was present to serve papers on Mr. Hardwick in an unrelated matter and who saw him having sex with another adult male. The charges were not pursued, but Hardwick and a married couple brought a federal action seeking a declaration that the Georgia statute, which criminalizes both homosexual and heterosexual sodomy, is unconstitutional. Finding that Hardwick, but not the married couple, had standing to challenge the statute, the Eleventh Circuit went on to hold that the statute implicated a fundamental right to privacy, and remanded for a determination of a compelling state interest. Hardwick v. Bowers, 760 F.2d 1202, 1204-07, 1211 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).

Much has been written on state sodomy laws; the vast of majority of these writings are critical of *Hardwick* and support the invalidation or repeal of sodomy laws. *See, e.g.*, John C. Sims, *Moving Towards Equal Treatment of Homosexuals*, 23 PAC. L.J. 1543 (1992); Norman Vieira, *Hardwick and the Right of Privacy*, 55 U. CHI. L. REV. 1181 (1988); SEXUAL ORIENTATION, *supra* note 17, at 9-27.

28. Anand Agneshwar, *Powell Concedes Error in Key Privacy Ruling; Vote to Sustain Sodomy Law At High Court Called Mistake*, N.Y. L.J., Oct. 26, 1990 at 1, col. 3. A majority of the justices who decided the *Hardwick* decision would therefore hold that same-sex sodomy statutes violate the right to privacy under the federal constitution. But, given that Justice Powell, in addition to two of the *Hardwick* dissenters, Justice Brenna and the late Justice Marshall, are no longer on the Court, *Hardwick* is not likely to be overturned in the near future.

29. The Court held that the Constitution does not "extend a fundamental right to homosexuals to engage in acts of consensual sodomy." *Hardwick*, 478 U.S. at 192.

30. Had the Court found that a fundamental right was at stake, then it would have had to find that the statute was supported by a *compelling* state interest—a much more difficult burden for the state to meet. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1454-65 (2d. ed. 1988).

31. *Hardwick*, 478 U.S. at 195-96.

32. *Id.* at 199 (Blackmun, J., dissenting) (citation omitted).

traceptives and the right to obtain an abortion.[33] The dissent also rejected the majority's state-interest analysis and found the state's interest in enforcing morality ambiguous at best, thus that interest could not alone sustain the statute.[34] The *Hardwick* majority did not explicitly address HIV-AIDS issues, but the dissent noted that the litigants and *amici curiae* presented those issues to the Court.[35]

C. *Post*-Hardwick *Challenges to State Sodomy Laws*

After *Hardwick*, litigants have primarily resorted to state courts in their fights against same-sex sodomy laws.[36] As *Hardwick* noted, states remain free to derive from their state constitutions higher levels of protection for individual rights than those provided by the federal Constitution.[37] In contrast to the implicit right to privacy found in the United States Constitution, some eleven state constitutions explicitly provide for such rights.[38] Courts in a number of other states have held that their state constitutions contain various implied rights to privacy.[39] Equal protection provisions—as distinct from right to privacy provisions—of both the federal and state constitutions may provide an additional basis for successful challenges to sodomy laws.[40]

1. Right to Privacy Challenges to State Sodomy Laws

While state constitutions need not recognize any right to privacy, those constitutions may provide rights above and beyond those guaran-

33. *Id.* at 199-214.

34. Bowers v. Hardwick, 478 U.S. 186, 211-13 (1986) (Blackmun, J., dissenting). It thus appears that under Roe v. Wade, 410 U.S. 113, 153-56 (1973), the dissent would have required the state to show both a compelling state interest in the statute and the absence of less burdensome alternatives. *See* Allan Ides, Bowers v. Hardwick: *The Enigmatic Fifth Vote and the Reasonableness of Moral Certitude*, 49 WASH. & LEE L. REV. 93, 95 (1992).

35. *Hardwick*, 478 U.S. at 208.

36. *See supra* notes 18-19 and accompanying text. The Missouri Supreme Court upheld such a statute in State v. Walsh, 713 S.W.2d 508 (Mo. 1986), while the highest state court in Kentucky and lower courts in Michigan and Texas have invalidated the statutes on privacy grounds. Commonwealth v. Wasson, No. 90-SC-558-TG (Ky. Sept. 24, 1992), *aff'g* No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990); State v. Morales, 826 S.W.2d 201 (Tex. Ct. App. 1992); Michigan Org. for Human Rights v. Kelly, No. 88-815820 (Mich. Cir. Ct. July 9, 1990).

37. *Hardwick*, 478 U.S. at 190.

38. ALA. CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § l; FLA. CONST. art. I, § 12; HAW. CONST. art. I, §§ 6,7; ILL. CONST. art. I, § 6; LA. CONST. *art. I, § 5;* MISS. CONST. art. III, § 23; MONT. CONST. art. II, §§ 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, 7.

39. *See, e.g.*, Davidson v. Dill, 503 P.2d 157 (Colo. 1972) (right to privacy barred retention of non-conviction arrest records); State v. Baker, 405 A.2d 368 (N.J. 1979) (right to privacy invalidated restrictive zoning ordinance banning alternative families); Jacobs v. Benedict, 301 N.E.2d 723, 725 (Ohio Misc. 1973), *aff'd*, 316 N.E.2d 898 (Ohio Ct. App. 1973) (right to privacy invalidated school limitations on hair length); In re B., 394 A.2d 419 (Pa. 1978) (right to privacy in psychiatric records); Texas State Employees Union v. Texas Department of Mental Health & Mental Retardation, 746 S.W.2d 203 (Tex. 1987) (right to privacy in confidential personal information violated by policy of requiring employees to take polygraph test). Implied rights to privacy do not necessarily extend to the right to engage in consensual sexual activity; as discussed herein, those issues remain to be litigated on a case-by-case basis

40. *See infra* notes 71-77 and accompanying text.

teed by the federal Constitution. Thus the notable federal right to privacy cases provide an important context for state constitutional challenges to sodomy laws in that they provide a basis for state rights to privacy and act as points of departure for creating higher levels of rights than exist at the federal level.

The Supreme Court's 1965 decision in *Griswold v. Connecticut*[41] set forth the constitutionally based "right to privacy" as a matter of substantive due process. The Court based the right on the "penumbras" of various provisions of the Bill of Rights.[42] In *Griswold* the Court invalidated a state statute prohibiting the use of contraceptives by married couples.[43] The majority found that the statute violated a "fundamental" right to privacy that is inherent in marriage and that no compelling state interest supported the violation.[44]

The *Griswold* decision provided the impetus for an initially rapid expansion of the newly articulated right to privacy. Later cases invoked the right to privacy to overturn a statute prohibiting a person's viewing of pornography in the home,[45] a statute prohibiting the distribution of contraceptives to an unmarried couple[46] and a statute prohibiting a woman from obtaining an abortion.[47] The Court in *Hardwick*, however, declined to extend the constitutional right to privacy to private, consensual, same-sex sexual activities.[48]

For this analysis the important point about *Hardwick* is its state interest discussion. For a statute to survive a right to privacy challenge the court must find a state interest that is sufficiently compelling to override the particular privacy interest.[49] How the court chooses to define the privacy interest at stake is crucial. The *Hardwick* court found no *fundamental* right at stake by casting the issue as whether there is a *right* to *engage* in homosexual sodomy[50] rather than whether there is a *right* to be left alone in the privacy of one's bedroom. The sole state interest identified by the Court, "majority sentiments about the morality of homosexuality," outweighed whatever privacy interest upon which the Georgia statute infringed.[51]

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41. 381 U.S. 479 (1965).

42. *Id.* at 484.

43. *Id.* at 485-86.

44. *Id.* at 485-86.

45. Stanley v. Georgia, 394 U.S. 557, 568 (1969).

46. Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972). This decision determined that unmarried couples have the same right to privacy, under the equal protection clause, that married couples have to use contraceptives. The court narrowly limited its consideration of privacy rights to control over matters of procreation.

47. Roe v. Wade, 410 U.S. 113, 154, 162-66 (1973).

48. Commentators across the political spectrum have criticized the Court's interpretation of its privacy cases in *Hardwick*. *See, e.g.*, RICHARD A. POSNER, SEX AND REASON 346 (Harv. Univ. Pres., 1992) ("the majority and concurring opinions in *Hardwick* betray a lack of knowledge about the history and character of the regulation of sexuality"); TRIBE, *supra* note 30, at 1422-35.

49. For a general discussion of the state interest analysis in the context of state sodomy law, see Ides, *supra* note 34, at 95.

50. *Hardwick*, 478 U.S. at 190.

51. *Id.* at 196. Critics have questioned this analysis. Judge Posner, for example, ar-

Because it did not find a fundamental right to privacy in consensual, same-sex sexual activities among adults, the Court was able to apply a rational basis test for the challenged statute. The Court thus avoided the more serious analysis necessary to support the finding of a compelling state interest.[52] The Court's majoritarian view of the morality analysis has been rejected by most state courts[53] and commentators[54] as not being sufficient state interest to sustain sodomy laws.

Despite the *Hardwick* outcome, some state courts have found state constitutional privacy rights in consensual, same-sex sexual activities, as shown by the *Wasson* decision.[55] *Wasson* traced the philosophical and historical bases of individual liberties and relied on an implied state right to privacy to strike down the statute.[56] The court rejected majoritarian morality as a basis for the statute[57] concluding that "immorality in private which does 'not operate to the detriment of others' is placed beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution."[58]

Other courts refuse to accept the United States Supreme Court's framing of the issue as a right to engage in homosexual sodomy.[59] The state interest analysis in these cases has been and will be much more extensive than that in *Hardwick* because such decisions identify privacy interests that are more than minimally significant.[60]

Although the Court in *Hardwick* did not explicitly discuss HIV-AIDS issues, a number of briefs submitted to the Court did raise these concerns.[61] State courts considering challenges to sodomy laws have directly addressed these issues when both upholding and invalidating state statutes.[62] It is highly likely that state court challenges to same-sex

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gues that the Court's state interest analysis more likely reflected unarticulated religious principles than society's views of homosexuality. POSNER, *supra* note 48, at 345-46. For a similar criticism, see Ides, *supra* note 31, at 104 ("Faith may well be a sufficient basis for regulating one's own life; it does not, however, provide an adequate basis for regulating the life of another through the iron fist of the state.").

52. *Cf.* Texas State Employees Union v. Department of Mental Health & Mental Retardation, 746 S.W.2d 203, 205 (Tex. 1987) (the implied right of privacy in the Texas constitution "should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means").

53. *See, e.g.*, Commonwealth v. Wasson, No. 90-SC-558-TG (Ky. Sept. 24, 1992), *aff'g* No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990); People v. Onofre, 415 N.E. 2d 936, 940 n.3 (N.Y. 1980), *cert denied*, 451 U.S. 987 (1981); Commonwealth v. Bonadio, 415 A.2d 47, 50 (Pa. 1980); State v. Morales, 826 S.W.2d 201 (Tex. Ct. App. 1992). *But see* State v. Walsh, 713 S.W.2d 508 (Mo. 1986).

54. *See* POSNER, *supra* note 48, at 344-46; Ides, *supra* note 34, at 104.

55. Commonwealth v. Wasson, No. 90-SC-558-TG (Ky. Sept. 24, 1992), *aff'g* No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990).

56. *Id.* at 9-25.

57. *Wasson*, No. 90-SC-558-TG, slip op. at 31-33 (citation omitted).

58. *Id.* at 20.

59. *See supra* note 53 and accompanying text.

60. *See Wasson*, No. 90-SC-558-TG, slip op. at 31-33 (finding no rational basis for denying homosexuals equal protection of the law).

61. *See infra* notes 90-91 and accompanying text.

62. *See infra* notes 93-106 and accompanying text.

sodomy statutes will increase in frequency and that those challenges will almost certainly implicate HIV-AIDS issues with a state interest analysis.

2. Equal Protection Challenges to State Sodomy Laws

The defendant in *Hardwick* did not present an equal protection challenge to the state sodomy statute, under the Fifth and Fourteenth Amendments to the United States Constitution.[63] Thus the nation's highest court has not resolved the validity of a federal equal protection challenge to sodomy laws.[64] State courts remain free to find rights under state constitutional equal protection provisions even if the federal Constitution does not provide such rights.[65]

An equal protection challenge to a law may fall into one of three categories on a sliding scale of required governmental interests. First, courts strictly scrutinize laws based upon a suspect classification—a category that so far encompasses only race, national origin, alienage and religion. To sustain such a law, the court must find that the law is necessary to achieve a compelling state interest and that there are no less discriminatory alternatives.[66] Second, laws based on a quasi-suspect classification, such as gender and illegitimacy, must be substantially related to an important state interest.[67] Third, for other classifications not affecting fundamental interests, the court need only find a rational basis for the law that meets a legitimate state interest.[68]

Commentators argue that laws that classify on the basis of sexual orientation should be subject to strict scrutiny because of the history of

63. The Georgia statute at issue in *Hardwick* applied to both homosexual and heterosexual sodomy, thereby apparently precluding a facial challenge to the statute on the grounds that it discriminated against homosexuals. As noted *supra* in note 27, the *Hardwick* majority only considered the statute as applied to homosexual activities because the heterosexual challengers to the statute had been denied standing.

64. In the context of military service, a California federal district court applied the federal Equal Protection Clause to homosexuals. Meinhold v. Department of Defense, CV 92-6044 TJH (JRx) (C.D. Cal. Jan 29, 1993). Analyzing the asserted bases for excluding gay men and lesbians from the military, the court found the military's policy not to be rationally related to permissable governmental goals. Meinhold v. Dep't of Defense, CV 92-6044, slip op. at 3 (C.D. Cal. Jan. 29, 1993) (citing Pruitt v. Cheney, 963 F.2d 1160, 1166-67, *cert. den.*, 113 S. Ct. (1992). Commentators have long argued that equal protection analysis should apply to homosexuality. *See, e.g.*, Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988) (arguing that *Hardwick* left the door open for an equal protection analysis applicable to homosexuality); Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984). *Cf.* Sims, *supra* note 27, at 1562, 1565 (arguing that *Hardwick* likely forecloses successful application of federal equal protection analysis to homosexuality).

65. *See*, JAMES KUSHNER, GOVERNMENT DISCRIMINATION § 1.07 (1992).

66. *See, eg.*, City of Richmond v. J. A. Croson Company, 488 U.S. 469 (1989); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).

67. Craig v. Boren, 429 U.S. 190, 197 (1976). *See, e.g.* City of Cleburne, 473 U.S. at 441 (illegitimacy-based classifications); Michael M. v. Superior Ct. of Sonoma County, 450 U.S. 464 (1981) (gender-based classifications).

68. *See generally* TRIBE, *supra* note 27, at 1440-41; SEXUAL ORIENTATION, *supra* note 17, at 15-16. The *Meinhold* court found that the military proscription against service by homosexuals failed to meet even the rational basis test. Meinhold v. Dep't of Defense, CV 92-6044 TJH (JRx) (C.C. Cal. Jan. 29, 1993).

discrimination against gay men and lesbians.[69] So far, however, the courts have subjected claims based upon sexual orientation classifications to the rational basis test.[70] The *Wasson* court found that the challenged state sodomy statute failed even that test.[71] The court rejected the argument that morality provides a rational basis for the statute in language that goes beyond equal protection analysis of earlier gay and lesbian' rights cases.[72]

> The question is whether a society that no longer criminalizes adultery, fornication, or deviate sexual intercourse between heterosexuals, has a rational basis to single out homosexual acts for different treatment. Is there a rational basis for declaring this one type of sexual immorality so destructive of family values as to merit criminal punishment whereas other acts of sexual immorality which were likewise forbidden by the same religious and traditional heritage of Western civilization are now decriminalized? If there is a rational basis for different treatment it has yet to be demonstrated in this case. We need not sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice.[73]

Wasson demonstrates a sound basis substantiating a state constitutional right to privacy or a federal or state constitutional right to equal

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69. *See, e.g.*, Sunstein, *supra* note 64, at 1166. The view that sexual orientation is an immutable characteristic is now generally accepted among psychiatrists and psychologists. *See generally* A. BELL, ET AL., SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN (1981). In his recent book on law and sexuality, Judge Posner engages in an extensive review of the social and empirical evidence on the issues of the origin of homosexuality and the possibilities either that a more tolerant society will produce greater numbers of homosexuals or that the young are susceptible to homosexual *conversion*. Judge Posner concludes, "When we consider how difficult—how well-nigh impossible—it appears to be to convert a homosexual into a heterosexual, despite all the personal and social advantages to being a heterosexual in this and perhaps any society, the issue of homosexual seduction, recruitment, or propaganda is placed in perspective. How *much* more difficult it must be for homosexuals to convert a heterosexual into one of themselves!" POSNER, *supra* note 48, at 298-99. It is perhaps only a matter of time before some courts begin to recognize that sexual orientation is a category worthy of a high level of constitutional protection.

Although it is beyond the scope of this article to establish that sexual orientation is a *suspect* or *quasi-suspect* classification deserving of strict or intermediate scrutiny for equal protection purposes, it is important to note that should courts adopt such scrutiny, the state same-sex sodomy statutes will be far more difficult to justify.

70. *See* KUSHNER, *supra* note 65, at § 5.12; Meinhold v. Dep't of Defense, CV 92-6044 TJH (JRx) (C.D. Cal. Jan. 29, 1993).

71. Commonwealth v. Wasson, No. 90-SC-558-TG, slip op. at 28-34 (Ky. Sept. 24, 1992) *aff'g* No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990). *See also* Citizens for Responsible Behavior v. Superior Ct., 2 Cal. Rptr. 2d 648, 654-56 (Ct. App. 1991) (finding homosexuals to be entitled to equal protection of the laws under the United States and California constitutions, and applying a rational basis test to strike down an initiative that would have banned anti-discrimination measures protecting homosexuals and those with HIV-AIDS).

72. Courts in New York and Pennsylvania relied upon the right of unmarried persons to equal protection of the laws to invalidate state sodomy laws that applied to all unmarried persons, including both heterosexuals and homosexuals. People v. Onofre, 415 N.E.2d 936 (N.Y. 1980), *cert denied*, 451 U.S. 987 (1981) (violation of equal protection and right to privacy); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980) (invalid exercise of police power and violation of equal protection).

73. *Wasson*, No. 90-SC-558-TG, slip op. at 32-33 (Ky. Sept. 24, 1992).

protection of the laws. At a minimum the government must prove that a law forbidding consensual, same-sex sexual activities bears a rational relationship to a legitimate governmental interest.[74] It is in this context that litigants and courts will raise HIV-AIDS policy issues with even greater frequency in the years ahead.

II. HIV-AIDS Issues as a Basis for Arguing State Interests in Same-Sex Sodomy Laws

In cases from *Hardwick* to *Wasson*, litigants and *amici curiae* barraged the courts with arguments on the impact that state sodomy laws have on transmission of HIV-AIDS. Supporters of sodomy statutes argue that the laws act both as a legal deterrent against high-risk activities and as a moral condemnation of a *life-style* fostering health risks.[75] These arguments have a surface appeal to courts. Even when not explicitly relied upon, the arguments may be implicit in decisions upholding these laws. Such arguments supporting same-sex sodomy statutes have the potential to feed into the bias that pervades the legal system in connection with HIV-AIDS issues. These arguments deserve close scrutiny from a rational viewpoint to eliminate prejudice and hysteria-based arguments.

A. *The Transmission of HIV*

Reports of the first cases of HIV-AIDS illness appeared in 1981.[76] The Human Immunodeficiency Virus (HIV), the etiologic agent of HIV-AIDS illness, can infect and destroy the body's immune system.[77] Cases of documented HIV transmission include sexual contact which involves the exchange of bodily fluids, infection with contaminated blood or blood products and perinatal infection from mother to child.[78]

Health care experts consider HIV-AIDS illness a global pandemic affecting every country in the world. The illness has a particularly devastating impact on African countries.[79] As of April, 1991, reports show 171,865 cases of AIDS in the United States.[80] Approximately fifty-nine percent of these reported cases were homosexual or bisexual men who did not use intravenous drugs.[81] Twenty-nine percent of the cases were intravenous drug users, seven percent of whom were gay or bisexual males. Six percent were heterosexuals who had sex with either an infected person or someone in a high-risk group.[82] In urban areas that have high rates of intravenous drug use, intravenous drug users account

74. Tribe, *supra* note 30, at 1440-41.

75. *See infra* notes 90-91 and accompanying text.

76. Abe M. Macher, *HIV Disease/AIDS: Medical Background*, *in* AIDS and the Law 1 (Wiley L. Publications eds., 2d ed. 1992).

77. Anthony S. Fauci, *The Human Immunodeficiency Virus: Infectivity and Mechanisms of Pathogenesis*, 239 Science 617-22 (1988).

78. *Id.* at 617; Macher, *supra* note 76, at 4-5.

79. Macher, *supra* note 76, at 4; Fauci, *supra* note 77, at 617.

80. Macher, *supra* note 76, at 5.

81. *Id.*

82. *Id.* The remainder of the cases included hemophiliacs and recipients of infected blood, blood products or tissue.

for a higher rate of new AIDS cases than do gay men.[83] The Centers for Disease Control estimates that, by the end of 1993, there would be a total of 390,000-480,000 cases of AIDS reported in the United States.[84]

B. *HIV-AIDS Issues in Challenges to Sodomy Laws*

1. Background

Since AIDS became a matter of public concern in the early 1980s, litigants have raised HIV-AIDS issues in challenges to sodomy laws. In *Baker v. Wade*,[85] a pre-*Hardwick* decision, opponents of a federal challenge to the Texas sodomy law argued "the public health and safety of all citizens of Texas will be harmed if the spread of AIDS is not stopped," and that the sodomy law was essential "to combat the AIDS menace."[86] The District Court rejected that argument and held the statute invalid.[87] The Fifth Circuit reversed, upholding the statute on grounds similar to those used in *Hardwick*.[88] While not explicit in the Fifth Circuit's opinion, HIV-AIDS issues probably had some impact on the court's decision.[89]

In *Hardwick*, the state argued in its brief on appeal that the compelling state interest in preventing the spread of HIV-AIDS favored Georgia's sodomy statute.[90] An *amicus* brief supporting the state's position argued that the statute was necessary to deter "potentially lethal behavior," that is, homosexual activities leading to the transmission of HIV.[91] Although the majority opinion did not directly address HIV-AIDS, the *Hardwick* dissent criticized the briefs submitted in favor of the law for making groundless arguments that the statute supported public policy goals.[92]

Efforts to use HIV-AIDS issues as an explicit basis for upholding sodomy laws came to fruition in *State v. Walsh*, a 1986 Missouri Supreme

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83. *Id.*

84. *Id.* at 17. The recent change in the definition of AIDS means that these numbers are dramatically understated. The United States Center for Disease Control and Prevention ("CDC") has included three additional diseases the appearance of which in an HIV-positive person will result in an AIDS diagnosis, and has also added to the AIDS definition a drop in the number of CD4 cells, or T-cells, to 200 per cubic millimeter of blood. The CDC estimates that the new definition will produce an increase in the number of the country's new AIDS patients by seventy-five percent in 1993. Sheryl Stolberg, *New AIDS Definition to Increase Tally*, L.A. TIMES, Dec. 31, 1992, at 1.

85. 106 F.R.D. 526, 528-29 (N.D. Tex. 1985), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986). For a fuller analysis of the *Baker* decision, *see* Charles Spiegel, *Privacy, Sodomy, AIDS & Schools: Case Studies in Equal Protection*, 1986 ANN. SURV. AM. L. 221, 241-47.

86. *Baker*, 106 F.R.D. at 528-29.

87. *Id.* at 534-35.

88. 769 F.2d 289, 292 (5th Cir. 1985). *See* Spiegel, *supra* note 85, at 246; Susan McGuigan, *The AIDS Dilemma: Public Health v. Criminal Law*, 4 J. L. & INEQUALITY 545, 567-68 (1986).

89. *See* McGuigan, *supra* note 88, at 568.

90. Brief for Petitioner at 37, Bowers v. Hardwick, 478 U.S. 186 (1985). *See* Bowers v. Hardwick, 478 U.S. 186, 290 n.3 (1985).

91. Brief for David Robinson, Jr., as Amicus Curiae at 5, Bowers v. Hardwick, 478 U.S. 186 (1985).

92. 478 U.S. at 208 & n.3 (Blackmun, J., dissenting).

Court decision.[93] The *Walsh* court upheld the state's sodomy statute by relying on the state's interests in morality and in deterring activities leading to the spread of HIV-AIDS:

> We further find that [the challenged statute] is rationally related to the State's concededly legitimate interest in protecting the public health. The State has argued that forbidding homosexual activity will inhibit the spread of [AIDS].[94]

Thus, with *Walsh*, the HIV-AIDS rational for upholding same-sex sodomy statutes became explicit.

2. The *Wasson* Decision

Supporters of laws prohibiting same-sex sexual activities continue to forcefully make arguments like those relied upon by the *Walsh* court. Recently, litigants have also used these arguments to try to roll back state courts' recognition of the right to privacy. In *Commonwealth v. Wasson*,[95] the litigants squarely addressed HIV-AIDS as a justification for sodomy laws.

In *Wasson*, the trial court conducted an extensive hearing on the defendant's motion to dismiss the charges. The court heard testimony from defense experts in cultural anthropology, theology, social history, psychology and medicine.[96] The state offered no evidence. Initially, the court found the Kentucky constitution's explicit right to privacy broader than the implied federal constitutional right to privacy.[97] The court then invalidated the statute on the ground that it "clearly seeks to regulate the most profoundly private conduct and in so doing impermissably [sic] invades the privacy of the citizens of this state."[98] On appeal, the intermediate court affirmed the trial court's action striking down the statute on privacy grounds.[99] In addition, the appellate court found the law violated Kentucky's constitutional guarantee to equal protection of the laws by criminalizing certain conduct with a person of the same sex but not the same conduct with persons of the other sex.[100]

The state appealed to the Kentucky Supreme Court. In its brief on appeal the state raised the AIDS-HIV specter in stark language:

> The record before this Court contains undisputed testimony that homosexuals are more promiscuous than heterosexuals,

93. 713 S.W.2d 508 (Mo. 1986).

94. *Id.* at 512.

95. No. 86M859 (Ky. Dist. Ct. Oct. 31, 1986). The defendant was charged with soliciting sodomy in the fourth degree, and challenged the underlying sodomy statute rather than the solicitation statute. The Kentucky statute criminalizes "deviate sexual intercourse" between persons of the same sex. KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1990). Section 510.010(1) defines "deviate sexual intercourse" as "any act of sexual gratification involving the sex organs of one (1) person and the mouth or anus of another." KY. REV. STAT. ANN. § 510.010 (Michie/Bobbs-Merrill 1990). This statute is typical in defining sodomy as oral or anal sex between persons of the same gender.

96. Commonwealth v. Wasson, No 90-SC-558-TG, slip op. at 3-5 (Ky. Sept. 24, 1992).

97. *Wasson*, No. 86M859, slip op. at 2-3 (Ky. Dist. Ct. Oct. 31, 1986).

98. *Id.*

99. Commonwealth v. Wasson, No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990).

100. *Id.* at 13-14.

> that infectious diseases are more readily transmitted by anal sodomy than by any other form of sexual copulation, that homosexuals account for 73% of all AIDS cases in the United States, that homosexuals enjoy the company of children, and that homosexuals are more prone to engage in sex acts in public than are heterosexuals.[101]

In one stroke the state argued that homosexuals are promiscuous, are child-molesters and are responsible for the spread of HIV.[102] The state concluded that public health considerations alone justified the sodomy statute.[103]

The four-justice majority of the Kentucky Supreme Court explicitly rejected this argument. The court found that the sodomy statute did not fit the State's alleged public health goal.[104] Three justices dissented in two separate opinions strongly arguing that HIV-AIDS provided a legitimate basis for upholding the statute.[105] The dissenters adopted the standard argument of supporters of same-sex sodomy laws: 1) same-sex sexual activities account for a disproportionate percentage of the transmission of HIV; 2) sodomy laws deter such activities and 3) this provides a rational basis for upholding these laws.[106] It is important to analyze these points carefully given judicial receptiveness to this argument.

C. *HIV-AIDS as a Basis for Upholding Sodomy Statutes*

If upholding a crime of consensual, same-sex sexual activity requires only a rational basis, the lowest level of governmental justification, then the goal of promoting the public health provides supporters of sodomy statutes with a facially powerful argument.[107] The Supreme Court has long held that states may exercise their police power by passing laws designed to promote public health and safety, such as laws requiring immunizations.[108] Supporters of sodomy statutes argue that the statutes are reasonably related to the legitimate governmental goal of inhibiting the spread of HIV without being arbitrary and capricious in so

101. Brief of the State of Kentucky at 22, Commonwealth v. Wasson, No. 90-SC-558-TG, 1992 WL 235412 (Ky. Sept. 24, 1992). The 73% figure was outdated at the time this brief was submitted. *See supra* note 84 and accompanying text.

102. In rejecting the state's state interest analysis, the Kentucky Supreme Court termed the quoted passage as "simply outrageous." *Wasson*, No. 90-SC-558-TG, slip op. at 31.

103. Brief of the State of Kentucky at 22, 42-43, *Wasson*, No. 90-SC-558-TG.

104. *Wasson*, No. 90-SC-558-TG, slip op. at 32. *Accord*, State v. Morales, 826 S.W.2d 201, 205 (Tex. Ct. App. 1992).

105. *Wasson*, No. 90-SC-558-TG, slip op. at 15 (Lambert, J., dissenting); *id.* at 19 (Wintersheimer, J., dissenting).

106. *Id.* at 15-16 (Lambert, J., dissenting); *id.* at 5-6, 19, 22-23 (Wintersheimer, J., dissenting).

107. At least one court has required the government to show a compelling state interest to justify a state sodomy law. *Morales*, 826 S.W.2d at 205 (finding no compelling state interest in same-sex sodomy statute).

108. Jacobson v. Massachusetts, 197 U.S. 11 (1905) (finding that law requiring smallpox immunizations does not violate due process because threat to public health outweighs burden on individual rights). *See generally* Chris D. Nichols, Note, *AIDS—A New Reason to Regulate Homosexuality*, 11 J. CONTEMP. L. 315, 332-38 (1984) (pre-*Hardwick* discussion of state interest in regulating same-sex sexual activities).

doing.[109] Because the government has a legitimate goal in inhibiting the spread of HIV, the question becomes whether the law reasonably relates to that goal.

1. HIV-AIDS Issues in Other Contexts

The *Wasson* decision explicitly rejected public health arguments, based on HIV-AIDS, made in support of the Kentucky sodomy law. Perhaps other courts will now review those arguments in a more rational light. Courts, legislatures and regulators show some willingness to reject arguments based primarily upon HIV-AIDS hysteria in non-criminal areas of public policy. Perhaps the most significant shift in this respect has occurred with respect to access to educational facilities. In the early days of the epidemic well-publicized efforts were made to keep students with HIV disease out of the schools.[110] Irrational and ill-informed beliefs about the methods of HIV transmission formed the basis of such efforts.[111]

Some courts have come to reject efforts to prevent access to educational facilities as groundless and discriminatory. For example, in *Board of Education v. Cooperman*,[112] the New Jersey Supreme Court in 1987 rejected attempts to exclude students with HIV illness from classrooms. Two years earlier the New Jersey Commissioners of Health and Education jointly issued guidelines for admitting HIV infected children to the schools. The Commissioners based the policy upon "epidemiological studies indicating 'that AIDS is not transmitted through casual contact as would be present in the school environment.' "[113] Local school boards challenged the policy, and sought to bar such students from schools even though the boards had medical opinions concluding a ban was not medically-supportable.[114] Citing regulations granting local boards some discretion to exclude students with contagious diseases, the school boards argued they had the power to bar students from public schools on health grounds.[115] The New Jersey Supreme Court upheld the Commissioners' power to issue regulations binding on the local boards.[116] The court conceded that the local boards had some power to exclude students for health reasons.[117] The majority, however, went on to state:

[T]hat power must be exercised reasonably. Like other government

109. A true reasonableness analysis is missing from the majority opinion in *Hardwick*. *See, e.g.*, Ides, *supra* note 34, at 101-05.

110. The most publicized case involved Ryan White, a young AIDS patient initially denied access to public schools. *See Indiana Judge Allows AIDS Victim Back in School*, N.Y. TIMES, Apr. 11, 1986, at 14, col. 16. *See also* Gene Schultz, *AIDS: Public Health and the Criminal Law*, 7 ST. LOUIS U. PUB. L. REV. 65, n.122 (1988).

111. *See* Larry Gostin, *A Decade of a Maturing Epidemic: An Assessment and Directions for Future Public Policy*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7 (1990).

112. 523 A.2d 655 (N.J. 1987).

113. *Id.* at 657.

114. *Id.*

115. *Id.* at 659.

116. *Id.* at 660.

117. *Id.*

> actors, the school board cannot act in an arbitrary fashion, especially when a child's right to an education is at stake. *Reasonableness in the present context clearly involves appropriate deference to medical expertise* . . . . [A]ll the medical experts and medical authorities agreed that the presence of the AIDS virus in the children did not by itself pose any danger to other children or to the child the board wished to exclude.[118]

The court upheld the Commissioners' policies and found them binding on the local boards.[119]

Mandatory testing for HIV and disclosure of HIV infection provide the courts with another context for examining the rationality of public health arguments based on HIV-AIDS. In *New York State Society of Surgeons v. Axelrod*,[120] the New York Court of Appeals considered whether the New York Public Health Law must list HIV infection as a communicable and sexually transmittable disease. When the Commissioner of Health would not designate the disease as such, four New York medical societies sued to require the designation.[121] The effect of the requested designation would have been to authorize mandatory testing and contact tracing in appropriate cases.[122] The Court of Appeals rejected the medical societies' claim by finding that the Commissioner's decision was not arbitrary and capricious. Specifically, the court found that voluntary testing would foster cooperation with public health officials and maintain confidentiality.[123] The court showed a strong deference to medical and psychological evidence presented by the Commissioner concerning public health and HIV-AIDS.[124]

In civil and regulatory contexts courts have increasingly shown a sensitivity to medical evidence about HIV-AIDS in evaluating the rationality of laws, regulations and policies. Courts in these civil cases have generally not been confined by federal constitutional analysis in reaching these results. Nonetheless, in cases where the stigma of criminal conviction and the loss of liberty are at stake, courts should be at least as careful when examining the rationality of arguments based upon HIV-AIDS issues.

2. HIV-AIDS Issues in the Context of Sodomy Laws

Supporters of same-sex sodomy proscriptions invoke HIV-AIDS concerns as a legitimate basis for upholding the statutes. Because of the potential for irrational analysis in this context, courts should question and evaluate the arguments carefully.

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118. *Id.* (emphasis added).

119. *Id.* at 662. For a similar result, based upon equal protection analysis, *see* District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325 (Sup. Ct. 1986).

120. 572 N.E.2d 605 (N.Y. 1991).

121. *Id.* at 606.

122. *Id.* at 608.

123. *Id.* at 609.

124. *Id.* at 610.

a. *Do same-sex sodomy statutes correlate with the stated public health goals?*

Statutes criminalizing same-sex sexual activities generally outlaw all oral and anal sex between persons of the same sex.[125] At least one court went further to uphold a state sodomy statute criminalizing contact between the genitals of one person and the hand of another person of the same sex.[126] These statutes thus criminalize a broad range of sexual activities between consenting adults.

Upon close analysis such statutes bear no rational relationship to the goal of reducing the rate of transmission of HIV. The highest rate of HIV sexual transmission occurs during anal-genital or vaginal-genital contact.[127] Given this scientific fact, these statutes are both under-inclusive and over-inclusive. The statutes are under-inclusive because they do not proscribe extremely high-risk activities among heterosexuals, such as the risk of male-to-female transmission during anal or vaginal intercourse.[128] At least two courts have acknowledged the disparity between the stated public health goal and the statutes' coverage when striking down same-sex sodomy laws.[129]

When compared to the asserted public health goal, these statutes are also blatantly over-inclusive. First, some statutes criminalize hand-genital contact among persons of the same sex. Such activity does not involve an exchange of bodily fluids and therefore carries minimal risk of HIV transmission. Second, the risk of HIV transmission during anal-genital contact depends to a substantial degree upon whether a condom is used.[130] The same is true for oral-genital contact, which entails a far lower degree of risk than anal intercourse.[131] Third, lesbians as a group historically run an extremely low risk of HIV transmission.[132] In light of current transmission patterns, outlawing sex between women does not further any substantial public health goal.[133] Therefore a significant

125. *See, e.g.*, GA. CODE ANN. § 16-6-2 (Michie 1992) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.")

126. State v. Walsh, 713 S.W.2d 508 (Mo. 1986). The defendant in *Walsh* allegedly felt a police officer's genitals through the officer's pants. This activity obviously bears no relationship with the stated public health goal.

127. Nancy Meuller, *The Epidemiology of the Human Immunodeficiency Virus Infection*, 14 LAW, MED. & HEALTH CARE 250 (1986).

128. Mary E. Guinan & Ann Hardy, *Epidemiology of AIDS in Women in the United States*, 257 JAMA 2039 (1987); Meuller, *supra* note 127.

129. After acknowledging the "superficial appeal" of the state's argument based on HIV-AIDS, the *Wasson* court noted, "The only medical evidence in the record before us rules out any distinction between male-male and male-female anal intercourse as a method of preventing AIDS." Commonwealth v. Wasson, No. 90-SC-558-TG, slip op. at 32 (Ky. Sept. 24, 1992). *Accord*, State v. Morales, 826 S.W.2d 201, 205 (Tex. Ct. App. 1992) ("We note that [the challenged sodomy statute] does not prohibit similar heterosexual conduct that may carry a high risk of transmitting sexual diseases").

130. *Surgeon General's Report on Acquired Immune Deficiency Syndrome* 17 (1986). *See generally* Warren Winkelstein, Jr., et al., *Reduction in Human Immunodeficiency Virus Transmission Among Homosexual/Bisexual Men, 1982-1986*, 77 AM. J. PUB. HEALTH 685 (1987).

131. Winkelstein, *supra* note 130.

132. Mueller, *supra* note 127, at 256.

133. *Id.*

percentage of prohibited activity bears little or no relationship to the stated public health goal, while unprohibited activity involves far greater risks of HIV transmission.

In historical terms, the public health argument in support of same-sex sodomy laws is even more dubious. As one Texas court noted, legislatures enacted these laws before the onset of the AIDS epidemic and could not have intended that the statutes prevent transmission of HIV.[134] Instead of relying on sodomy laws ill-suited to preventing the spread of HIV-AIDS, some legislatures have considered and enacted laws specifically criminalizing conduct that threatens the transmission of HIV.[135] Whether such laws reflect sound public policy or not, those legislatures did not find sodomy laws an effective deterrent mechanism. The lawmakers more properly sought to enact measures relating specifically to the HIV-AIDS issue.[136]

Even assuming, contrary to the available evidence, that the sodomy statutes only proscribe activities that constitute a public health threat, the question remains whether same-sex sodomy laws actually deter the criminalized activity. The premise of the deterrence rationale is that criminal law has the inherent capacity to discourage people from acting upon their basic sexual desires. Not surprisingly, the available evidence shows otherwise.[137] Moreover, as authorities enforce sodomy laws sporadically, it is doubtful that the laws have any real deterrent effect.[138] The criminalized activity is largely undetectable and wide spread prosecution is extremely unlikely as the prohibited activity generally occurs in the privacy of the home.[139]

A careful analysis of the scientific and medical evidence shows that same-sex sodomy statutes ill-fit the stated public health goal of preventing the spread of HIV-AIDS.[140] The statutes by design do not fulfill those goals and are ineffective in deterring the proscribed activities.

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134. The district court in Baker v. Wade thus rejected the argument that the Texas sodomy law was designed to inhibit the spread of HIV. Baker v. Wade, 106 F.R.D. 526, 534-35 (N.D. Tex. 1985), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986). However, the *Walsh* court upheld the Missouri sodomy law on public health grounds, even though the legislative history reveals that the Missouri legislature did not consider public health issues when enacting the state sodomy laws. State v. Walsh, 713 S.W.2d 508, 511-13 (Mo. 1986) *See* Schultz, *supra* note 110, at 73 n.43 (1988).

135. Donald Hermann, *Criminalizing Conduct Related to HIV Transmission*, 9 ST. LOUIS U. L. REV. 351 (1990).

136. For a listing of legislatures that, as of 1990, had enacted or were considering such statutes, *see* Hermann, *supra* note 135, at 370 n.106.

137. MARTIN S. WEINBERG & COLIN J. WILLIAMS, MALE HOMOSEXUALS: THEIR PROBLEMS AND ADAPTATIONS (1974); Gilbert Geis, *Reported Consequences of Decriminalization of Consensual Adult Homosexuality in Seven States*, 1 J. HOMOSEXUALITY 419 (1976).

138. *See* Hermann, *supra* note 135, at 355.

139. *See* Schultz, *supra* note 110, at 76.

140. *Cf.* District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325 (Sup. Ct. 1986) (finding no rational relationship between policy of excluding HIV-positive children from public school and goal of inhibiting spread of HIV).

b. *What likely effects do same-sex sodomy statutes have on HIV-AIDS prevention and health care concerns?*

There are powerful arguments that same-sex sodomy laws do not promote, but rather undermine, public health efforts to prevent HIV-AIDS transmission and to ensure better health care among those with HIV-AIDS illness.[141] The arguments point to the statutes' effects on education and treatment efforts, and on the psychological health of those at risk for HIV-AIDS.

There are powerful arguments that same-sex sodomy laws interfere with efforts to educate the public about safer sex practices. Such interference is an explicit goal of at least some supporters of laws.[142] This interference can occur in several ways. For example, closeted gay or bisexual men most in need of education have limited contacts within the gay community and little access to educational materials. For such people, the stigma of acknowledging their practice of illegal activities deters them from seeking out the information they may need to protect their health.[143] Another deterrence is the fear of identification and prosecution. Criminal sodomy laws could particularly deter any gay or bisexual man living in an area without an organized gay community. Such an individual would not likely come forward and seek information about HIV-AIDS.

In states with criminal prohibitions of same-sex sexual activities public health officials face a hard choice. The officials can either inform the public about safer-sex activities that are illegal or allow ignorance and the heightened risk of HIV transmission to prevail. The statutes

141. Many of these arguments were made to the Kentucky Supreme Court in *Wasson* by amici curiae American Psychological Association, et al. Brief for American Psychological Association, et al., as Amicus Curiae, Commonwealth v. Wasson, No. 90-SC-558-TG (Ky. Sept. 24, 1992).

142. A group of amici curiae argued in *Wasson* that efforts to overturn same-sex state sodomy laws are part of a "widely publicized homosexual agenda" which also includes "[u]se [of] tax dollars to fund homoerotic AIDS/sex-education in all grades." Brief of Citizens for Decency Through Law, Inc., et al., as Amici Curiae, at ii, *Wasson*, 90-SC-558-TG.

> The alleged agenda consisted of:
>
> 1) Legalize lesbian/gay marriages; 2) Give lesbians/gays parental and adoptive rights; 3) Classify HIV-positive/AIDS carriers as disabled; 4) Enact "hate crimes" laws to include sexual orientation; 5) Use tax dollars to fund homoerotic AIDS/sex-education in all grades; 6) Amend laws to prohibit discrimination in employment, housing, public accommodations and public services; 7) Prohibit the military from excluding anyone because of sexual preference; 8) Repeal all state sodomy laws; 9) Repeal laws controlling the age of sexual consent.

Id. (citing Concerned Women for America, *Concerned Women*, Washington, D.C., March 1991).

143. *See* UNITED STATES CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, HOW EFFECTIVE IS AIDS EDUCATION? 12 (1988) (showing substantial reductions in unprotected high-risk activities from 1985 to 1987). Recent studies have likewise reported dramatic efforts to engage in safer-sex and reduce the risk of HIV transmission in places where there have been effective public education efforts. *See, e.g.*, Maria L. Ekstrand & Thomas J. Coates, *Maintenance of Safer Sexual Behaviors and Predictors of Risky Sex: The San Francisco Men's Health Study*, 80 AM. J. PUB. HEALTH 973 (1990); Marshall H. Becker & Jill G. Joseph, *AIDS and Behavioral Change to Reduce Risk: A Review*, 78 AM. J. PUB. HEALTH 394 (1988).

appear more likely to lead to an increase rather than a decrease in rates of HIV transmission.

Besides chilling education efforts, the criminalization of same-sex sexual activities could actually foster unsafe sex.[144] Criminal law in states with same-sex sodomy statutes condemns homosexual expression of affection and sexuality and casts homosexuals as social deviants. Social stigmatization leads to prejudice and homophobia. Those gay people who are unable to cope with this prejudice may internalize it and become, in clinical terms, troubled and dysfunctional.[145] The resulting loss of self-esteem and development of self-hatred could lead to behavior that is both psychologically and physically self-destructive.[146]

Finally, prevention and treatment of HIV-AIDS depends upon continuing research and treatment. Same-sex sodomy laws deter gay men, as a high risk group, from providing information to health officials and researchers. The laws discourage homosexuals from seeking prompt and adequate testing, counseling and medical care. Thus these laws undermine the very public health goals upon which states rely in seeking to sustain the laws.

Upon careful analysis the criminalization of consensual, private, same-sex sexual activities between adults does far more harm than good. The statutes deter those at risk from seeking essential information and prevent public health educators from disseminating needed information to the public to the fullest possible extent. The psychological data show that criminalizing and stigmatizing sexual acts in which a large portion of the population engages may promote rather than deter dangerous activities while preventing education and treatment efforts.

III. CONCLUSION

Challenges to same-sex sodomy laws remain controversial. The Kentucky Supreme Court in *Wasson* invoked an individual's right to privacy and equal protection of the laws when overturning a sodomy statute. It is, however, unclear whether *Wasson* signals a trend or is an aberration in the age of HIV-AIDS. It does appear certain that state courts will be the primary avenue of challenge so long as the United States Supreme Court maintains its present ideological course.

As the *Wasson* and *Morales* decisions show, courts presented with challenges to same-sex sodomy laws also appear increasingly aware of and sensitive to the medical and scientific realities of HIV-AIDS. Cases that deal directly or, as with challenges to sodomy laws, indirectly with HIV-AIDS issues present several challenges to the courts. One important challenge is to allow reason to prevail in an area fraught with the

144. *See generally* John Gonsiorek, *Psychotherapeutic Issues with Gay and Lesbian Clients, in* INNOVATIONS IN CLINICAL PRACTICE: A SOURCEBOOK (Peter A. Keller & Lawrence C. Ritt, eds., 1984).

145. *E.g.*, John Gonsiorek & James Rudolph, *Homosexual Identity, in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 161-76 (John C. Gonsiorek ed., 1991).

146. *Id.*

potential for irrational responses. Courts have increasingly managed to come forward with reasoned responses in areas such as public education, mandatory HIV testing and confidentiality.

When viewed carefully, the overwhelming weight of the evidence now available shows that same-sex sodomy statutes do not promote public health goals but rather are counter-productive. The issue needs more study to determine the extent to which state sodomy laws in fact have a detrimental effect on HIV-AIDS health care concerns. At a minimum, it is certain that the "state interest" in these laws is much more complex than the laws' supporters have acknowledged and that assertions of such interest deserve careful scrutiny by the courts.

EMPLOYMENT SUITS AGAINST INDIAN TRIBES: BALANCING SOVEREIGN RIGHTS AND CIVIL RIGHTS

VICKI J. LIMAS*

I. INTRODUCTION

The proliferation of employment suits in state and federal courts is mirrored in the courts of Indian tribes[1] that employ people in tribal government and commercial enterprises. The employment relationship provides a fertile source of litigation in federal and state courts; not only is it heavily regulated by statute, but numerous common law theories have developed in response to specific adverse employment actions. As sovereign governments, Indian tribes are exempt from most federal and state employment laws.[2] However, employment actions are frequently

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1. Because this article concerns the impact of the Indian Civil Rights Act, 25 U.S.C. § 1301-03 (1988 & Supp. II. 1990), on tribal employment, the definition of "Indian tribe" contained in § 1301 of that Act will be used:

> (1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
>
> (2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices,bodies, and tribunals by and through which they are executed.

Indian Civil Rights Act § 1301. I have also chosen the term "Indian" rather than "Native American" to differentiate between native peoples affected by the statutes and cases discussed here and those who are not, such as Native Hawaiians, who are currently pressing for federal recognition of their sovereign status. The Hawaiian Senate has recently proposed "A Bill for an Act Relating to Hawaiian Sovereignty," S.B. No. 3486, 16th Legis. (1992), a purpose of which is to "call upon the President and the Congress of the United States . . . to re-recognize and assist the re-establishment of a sovereign indigenous Hawaiian government . . . ." "As an initial step," the bill continues, "redress requires recognition of indigenous Hawaiian rights of self-determination to a degree at least equal to those exercised by Indian and Alaskan tribes or nations." S.B. No 3486, at § 3.

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988) ("Title VII"), expressly excludes Indian tribes from the definition of "employers" who may not discriminate on the basis of race, color, religion, sex and national origin. Title VII § 2000e(b); *see also* Morton v. Mancari, 417 U.S. 535, 547-48 (1974); Wardle v. Ute Indian Tribe, 623 F.2d 670 (10th Cir. 1980). The Americans with Disabilities Act, 42 U.S.C.A. § 12101-12213 (Supp. 1992) ("ADA") also excludes Indian tribes from its definition of "employer." ADA § 12111(5)(B). Although the Age Discrimination in Employment Act, 29 U.S.C. § 621-34 (1988) ("ADEA"), contains no such exclusion, *see* ADEA § 630(b), that Act's definition of "employer" has been construed, on the basis of tribal sovereignty, to exclude Indian tribes as well. EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989). *But see* Myrick v. Devils Lake Sioux Mfg. Corp., 718 F. Supp. 753 (D. N.D. 1989), which reached a different conclusion as to the amenability of tribes to suits alleging violations of Title VII and the ADEA by *nonmember* employees. In addition, the Labor Management Relations Act, 29 U.S.C. § 141-88 (1988), has been held not to apply to Indian tribes. Roberson v. Confederated Tribes,

brought against Indian tribes under the Indian Civil Rights Act ("ICRA"),[3] which requires tribes, *inter alia,* to afford equal protection and due process rights to people in their employ.[4] In the context of employment, such rights may arise from personnel practices, policies or procedures. Lawsuits against tribes alleging ICRA violations in employment actions are becoming more commonplace.[5]

However, many ICRA suits are dismissed by tribal courts. While this is an effective strategy for eliminating tribal liability, it creates other problems for tribes. With the exception of *habeas corpus* actions, which can be heard in federal courts,[6] tribal courts are generally the only forums available for ICRA claims.[7] In response to ICRA suits against them in tribal courts, some tribes assert the defense of sovereign immunity. Ironically, use of the sovereign immunity defense raises a number of potential threats to tribal sovereignty. Aggrieved tribal employees either find themselves with no forum or one they perceive as biased.[8] Tribal judges criticize the use of the sovereign immunity defense by

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103 L.R.R.M. (BNA) 2749 (1980); Ft. Apache Timber Co., 221 N.L.R.B. Dec. (CCH) 28,872 (1976). The minimum wage and hour laws mandated by the Fair Labor Standards Act, 29 U.S.C. § 201 (1988), were held not to apply to Indian tribes in Martin v. Great Lakes Fish & Wildlife Comm., 61 U.S.L.W. 2262 (D. Wis. Nov. 3, 1992) (application of the law to tribes "would be a significant intrusion into the internal affairs of the tribes and their tribal organization and would impinge upon the tribes' rights of self-governance"). However, courts are divided as to whether the Occupational Safety and Health Act, 29 U.S.C. § 651 (1988) ("OSHA"), applies to tribes. *Compare* Donovan v. Navajo Forest Products Indus., 692 F.2d 709 (10th Cir. 1982) (application of OSHA to tribe would infringe upon tribal sovereignty and right to self-government) *with* U.S. Dept. of Labor v. Occupational Safety & Health Review Comm'n, 935 F.2d 182 (9th Cir. 1991) (tribe's treaty right to exclude non-Indians from reservation did not bar application of OSHA to tribe) and Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) (self-government exception to federal regulation only applies to intramural matters; therefore OSHA applies to tribal farm). The Employee Retirement Income Security Act, 29 U.S.C. § 1001 (1988), has also been held applicable to tribes. Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683 (9th Cir. 1991); Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989).

Tribal courts are, of course, free to adopt state statutory or common law into their jurisprudence. For example, in a wrongful termination case, the Standing Rock Sioux Tribal Court applied the doctrine of "employment at will," as defined by a North Dakota statute, as well as North Dakota common law, to determine whether a personnel manual creates a contract in Defender v. Bear King, 17 Indian L. Rep. 6078 (Standing Rock Sioux Tribal Ct. 1989). Similarly, the Court of Appeals of the Navajo Nation reasoned that the "American rule" of employment at will governed a wrongful termination action in Davis v. Navajo Tribe, 4 Nav. Rep. 50 (Ct. App. 1983).

3. 25 U.S.C. §§ 1301-03 (1988 & Supp. 1992).

4. *Id.*

5. This article concerns employment suits brought under the ICRA against *tribes* as employers. It does not address suits arising under other federal, state or tribal laws against private, federal or state employers of tribal members; nor does it discuss Indian preference laws. For a discussion of general rights of Indian employees, see Craig Becker & Darlene Thomas, *Labor Law and the Native American,* 8 INDIAN LAW SUPPORT CENTER REP. 1 (1985). The Supreme Court addressed Indian preference laws in Morton v. Mancari, 417 U.S. 535 (1974). *See also* Kevin N. Anderson, *Indian Employment Preference: Legal Foundations and Limitations,* 15 TULSA L.J. 733 (1980).

6. Santa Clara Pueblo v. Martinez, 436 U.S. 56, 70 (1978).

7. *Id.* at 65 ("[t]ribal forums are available to vindicate rights created by the ICRA"). *But see infra* text accompanying notes 171-194.

8. One commentator views this problem not only as a problem of inability to vindicate individual rights, but one of legitimacy of the tribal legal system itself:

tribes.[9] In addition, the failure of tribes to address ICRA issues generally has provoked repeated efforts by Congress to pass legislation granting control over tribal courts and review of tribal ICRA decisions by federal courts;[10] such federal oversight would further erode tribal sovereignty. An additional problem arises from the fact that aggrieved employees may be treated differently by courts analyzing their ICRA rights, depending on whether the employees are Indians or non-Indians.[11]

The focus of this Article is on Indian tribes' treatment of sovereign immunity, both in their own laws and under the ICRA, and on tribal court interpretations of these laws. Because employment suits alleging violations of the ICRA are increasingly appearing on tribal court dockets, the discussion will focus on employment claims.[12] After first

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> The legitimacy of the system is particularly enhanced if it provides for the protection of rights and the advancement of justice for individuals or groups who are unable to protect their basic rights and interests through majoritarian politics.
>
> This dilemma involving individual and group rights is particularly acute when considering the nature of the rights sought to be recognized within tribal systems. The controversy over the . . . ICRA . . . is particularly instructive. In that controversy, the notion of strong individual rights that could be enforced against the majority government was alien to the tradition and custom of many tribes where the group, not the individual, is primary.
>
> [T]he United States Supreme Court . . . made it clear that tribal courts were the appropriate forums for adjudication of individual claims concerning such ICRA individual guarantees as due process and equal protection.
>
> Many tribal courts have not yet arrived at an accommodation of these dictates and continue to . . . use the shield of sovereign immunity. This legal device prevents any resolution of claims involving individual rights on their merits and further inhibits the growth of legitimacy. The matter is not easily resolvable . . . .

Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49, 65 (1988).

9. One judge called it a "dinosaur of injustice." O'Brien v. Fort Mojave Tribal Ct., 11 Indian L. Rep. 6001, 6002 (Ft. Mojave Tribal Ct. 1983). *See infra* text accompanying notes 160, 202-11. At Sovereignty Symposium IV, sponsored by the Oklahoma Supreme Court, the Oklahoma Indian Affairs Commission and The Sovereignty Symposium, Inc. and held in Oklahoma City June 10-12, 1991, a session focused on "Indian Civil Rights in Tribal Courts." The Honorable Arvo Q. Mikkanen, a judge for the Court of Indian Appeals for the Anadarko Area Tribes and for the Sac & Fox Nation-Kickapoo Tribes, expressed dissatisfaction with tribes' assertion of the sovereign immunity defense in ICRA claims. Arvo Q. Mikkanen, *Civil Rights in Tribal Courts*, Sovereignty Symposium IV 599 (1991). Judge Mikkanen is the author of Executive Comm. of the Wichita Tribe v. Bell, 18 Indian L. Rep. 6041 (Ct. Ind. App., Wichita. 1990), which held the tribe to be immune from a suit alleging due process violations in a termination from employment. Ken Bellmard, a practitioner, stated in his written remarks that:

> The practical effect of the ICRA was to restrict tribal sovereignty just as did the seven major crimes act. It is inconceivable that the Congress which enacted the ICRA for the protection of individual liberties would allow the denial of access to tribal forums and remedies to individuals asserting ICRA protections. Although a tribal official may in his official capacity for example, fire a tribal employee for a discriminatory purpose and in violation of the ICRA, does such a firing by an official acting in an official capacity preclude the aggrieved former employee from bringing a suit under the ICRA because of the doctrine of tribal sovereign immunity? The answer to this query must be no!

Ken Bellmard, *The Doctrine of Tribal Immunity and Application of the Indian Civil Rights Act to Causes of Action in Tribal Courts: Tribal Sovereign Immunity, Sword or Shield?*, Sovereignty Symposium IV 605, 611 (1991).

10. *See infra* text accompanying notes 222-31.

11. *See infra* text accompanying notes 98-105.

12. However, issues raised here may be pertinent to other issues arising in tribal courts under the ICRA as well.

describing the growth of tribal employment, the Article will discuss generally how the concepts of tribal sovereignty and the ability to assert the sovereign immunity defense have been shaped by United States law. It will then describe how tribes have treated sovereign immunity in their own laws. Next, the Article will explain the applicability of the ICRA to tribal employment and focus on tribal courts' treatment of the sovereign immunity defense in employment claims brought under the ICRA. The Article will then discuss how the assertion of the sovereign immunity defense in ICRA claims may lead to further erosion of tribal sovereignty by the United States Congress.

To prevent such erosion of sovereignty through federal oversight, tribal governing bodies can address employment disputes in a way that would satisfy ICRA requirements and ensure equal treatment of all employees. Fairness in tribal employment actions, in turn, will actually reinforce sovereignty by strengthening tribal workforces and hence tribal economies. First, tribes should implement personnel policies containing grievance procedures that afford employees equal protection and due process under tribal law and custom. Economically stronger tribes can waive sovereign immunity in the limited context of employment, allowing tribal courts to hear employment claims arising under the ICRA. In order that these claims not prove too onerous, tribes can limit remedies in employment cases to "make-whole" relief such as injunctions, reinstatement and back pay. As part of the employment agreement, all employees can be required to agree to utilize tribal forums for the resolution of any employment disputes. Finally, less expensive means of dispute resolution can be explored.

II. TRIBES AS EMPLOYERS

While there are no statistics on the number of people employed in tribal government and businesses[13] nor on the number of tribally-owned businesses throughout the country, a number of sources indirectly indicate the extent of tribal employment. A 1985 directory lists approximately 5,186 Indian-owned businesses in all fifty states, the District of Columbia and Puerto Rico, many of which are identified as tribally or inter-tribally owned.[14] These businesses provide products and services in a sweeping range of industries: agriculture, forestry, fishing, mining, construction, manufacturing, transportation, public utilities, wholesale and retail trade, finance, insurance, real estate, lodging, recreation and amusement, personal and business services, entertainment, education, health, legal and social services and public administration.[15]

13. The Bureau of Indian Affairs publishes estimates of the Indian labor force residing on or near reservations; the latest report is dated January 1991 (although individual reports within the compilation are dated December 1991). U.S. Department of the Interior, Bureau of Indian Affairs, *Indian Service Population and Labor Force Estimates* (January 1991).

14. LACOURSE COMMUNICATIONS CORP., THE RED PAGES: BUSINESSES ACROSS INDIAN AMERICA (1985). This directory has not been updated.

15. *Id.* at 2-18.

Another source is a recent study of tribal economic development focusing on the business activities of four groups during the late 1980's.[16] This study describes various businesses developed and operated by the Passamaquoddies, the Mississippi Band of Choctaws, the Ak-Chin Indian Community and the Confederated Tribes of the Warm Springs Reservation. These relatively small tribes[17] generate a significant number of jobs. For example, in 1988, the Confederated Tribes of the Warm Springs Reservation, inhabited by 2,300 members of the Wasco, Warm Springs and Paiute tribes,[18] employed 1,200 people, with approximately half in tribal government.[19] The 5,000-member Mississippi Choctaw tribe also employed approximately 1,200 people in 1987,[20] making it the fifteenth largest employer in Mississippi.[21] The study also mentions the business activities of other tribes, including the Cherokee Nation of Oklahoma, sixty-percent of whose income is derived from tribal businesses;[22] the Eastern Band of Cherokees in North Carolina, which owns the world's largest mirror manufacturing facility;[23] and various other tribes that operate resort and tourist industries and joint venture agreements with United States manufacturers.[24]

A recent article on tribal economic development cites other examples "of Indian political power successfully evolving into economic power."[25] The Mescalaro Apache, the Conchiti Pueblo and White Mountain Apache "have dramatically wrested power over their land and resources from the federal bureaucracy and moved diligently to generate employment and tribal wealth from their resources."[26] The Quinault, Lummi, Swinomish and other tribes own and operate fish canneries in the Northwest and Alaska.[27] The Blackfeet are "a major player in the market for writing instruments."[28] The Oneidas, Gilas and other tribes own and operate office and industrial parks serving major metropolitan areas.[29] The Warm Springs Reservation "owns and operates a major sawmill and a large tourist resort."[30] Also, there are over 100 tribes "which operate bingo casinos with seating capacities often in the

16. ROBERT H. WHITE, TRIBAL ASSETS (1990). Another recent book, SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS (1989), describes, to a lesser extent, governmental and economic activities of the Seneca Nation, the Muscogee (Creek) Nation of Oklahoma, the Cheyenne River Sioux, the Isleta Pueblo and the Yakimas.

17. WHITE, *supra* note 16, at 272. The tribes contain between 500 to 5,000 reservation inhabitants as compared to as many as 140,000 inhabitants of some tribes.

18. *Id.* at 189.

19. *Id.* at 211.

20. *Id.* at 75.

21. *Id.* at 57.

22. *Id.* at 271.

23. *Id.*

24. *Id.* at 271-72.

25. John C. Mohawk, *Indian Economic Development: An Evolving Concept of Sovereignty*, 39 BUFF. L. REV. 495, 499 (1991).

26. *Id.*

27. *Id.* at 500.

28. *Id.*

29. *Id.*

30. *Id.*

thousands and jackpots approaching the millions."[31]

As tribal nations develop economically, they will continue to create more employment opportunities and thus more opportunities for employment disputes. But economic development is enhanced by a cohesive and loyal workforce. Employee loyalty is earned through use of personnel policies and practices that employees perceive as fair and necessary to the conduct of the business. Use of such policies will better enable tribes to diffuse and resolve disputes with their employees while maintaining good employee relations. Tribes with strong workforces and sound labor policies will be best equipped to exercise their sovereign powers to manage their government and business affairs.

III. TRIBES AS SOVEREIGN NATIONS

Despite the United States' fluctuating policies toward treatment of individual Indians and tribes,[32] it has continually recognized Indian tribes as politically distinct nations possessing inherent sovereign powers. Tribal sovereignty derives from tribes' status as self-governing nations whose existence predates that of the United States.[33] From the time of contact, first the European nations, then the colonies and then the United States government, recognized Indian tribes as nations and interacted with them through intergovernmental treaties.[34] The United States Constitution acknowledges the sovereignty of Indian tribes as well, and recognizes them on a par with foreign nations and the states as entities with which Congress may regulate commercial dealings.[35] Also, the Constitution excludes Indians from population counts for represen-

31. *Id.*

32. Since its inception, the United States government's policy toward individual Indians and tribal governments has shifted from government-to-government recognition, to antagonism and removal from tribal homelands, to self-determination, to assimilation into mainstream culture and termination of tribal-federal relations and back to self-determination. Throughout these shifts, tribal sovereignty has continually been eroded. This article does not discuss overall policies of the United States government toward Indian tribes, although these shifting policies influenced the development of the tribal sovereignty doctrine. For discussions of the sources of federal power over Indian tribes and various policies assumed in effecting this power, see Russel Lawrence Barsh & James Youngblood Henderson, The Road: Indian Tribes and Political Liberty 31-134 (1980); Robert N. Clinton et al., American Indian Law 181-310 (1983); Felix S. Cohen, Handbook of Federal Indian Law 47-228 (1982); VINE DELORIA, JR. & CLIFFORD LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY (1984); O'BRIEN, *supra* note 16, at 197-275.

Pending legislation "provid[ing] for the development, enhancement, and recognition of Indian tribal courts" declares that "[t]he Federal Government has a government-to-government relationship with each federally recognized tribal government." S. 1752, 102nd Cong., 1st Sess. (1991). *See infra* text accompanying notes 233-39.

33. "Before the coming of the Europeans, the tribes were self-governing sovereign political communities." United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

34. The United States government signed the first treaty with the Delaware tribe in 1778. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 549 (1832). In 1871, Congress ended future treaty-making with Indian tribes. Act of Mar. 3, 1871, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71 (1988)).

35. U.S. CONST. art I, § 8, cl. 3, provides: "The Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

tation and taxation purposes.[36]

However, Indian tribal nations are "strange sovereigns."[37] They are "unique in the world in that they represent the only aboriginal peoples still practicing a form of self-government in the midst of a wholly new and modern civilization that has been transported to their lands."[38] One commentator refers to the process by which tribes have become "sovereigns within a sovereign" as "involuntary annexation."[39] As a result of such "annexation," the extent of tribal nations' sovereignty has been limited by acts of the United States Congress and decisions of federal courts. Another commentator summarized the tribal nations' situation as follows:

> Unlike foreign countries, dealt with at arms length by the federal government, Indian tribes are subject to the ultimate sovereignty of the federal government: they govern within the territorial borders of the United States, and their members are United States citizens. Yet, Indian tribes are "domestic dependent nations," and not states of the Union able to claim rights against the central government through the traditions and constitutional structures supporting federalism.[40]

The United States Supreme Court, in three early cases known as the Marshall trilogy, established the legal framework for the United States government's recognition of Indian tribal sovereignty. In the first case, *Johnson v. M'Intosh*,[41] the Court relied on the "discovery doctrine" in refusing to recognize a tribe's ability to convey lands.[42] It reasoned that a tribe's "rights to complete sovereignty, as independent nations," were "necessarily diminished" through acquisition of their land by European nations through "discovery"[43] and those nations' subsequent land grants to the United States.[44] Therefore, the Court concluded, only the United States government could convey title to land occupied by Indian tribes.[45]

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36. U.S. CONST. art. I, § 2, cl. 3. The Fourteenth Amendment repeats the reference to Indians in its provision concerning apportionment. U.S. CONST. amend. XIV, § 2.

37. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 197 (1984).

38. DELORIA & LYTLE, *supra* note 32, at 2.

39. "One of the legacies of the colonization process is the fact that Indian tribes, which began their interaction with the federal government as largely sovereign entities *outside* the republic, were increasingly absorbed into the republic, eventually becoming internal sovereigns of a *limited kind*." Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 417 (emphasis in original). Professor Pommersheim further argues that there is no basis in the United States Constitution for the notion of limited tribal sovereignty developed by the Supreme Court. On the latter point, see Newton, *supra* note 37, at 199 ("The mystique of plenary power has pervaded federal regulation of Indian affairs from the beginning.").

40. Newton, *supra* note 37, at 197.

41. 21 U.S. (8 Wheat.) 543 (1823).

42. *Id.* at 574.

43. *Id.* This is, as one commentator has pointed out, a polite way of describing acquisition by conquest, a word freely used in subsequent cases. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. CHI. L. REV. 671, 692 (1989).

44. *M'Intosh*, 21 U.S. (8 Wheat.) at 584-87.

45. *Id.* at 586.

Subsequently, when the Cherokees sued for an injunction to prevent the state of Georgia from enforcing its laws within Cherokee territory, the Court held that Indian tribes were not foreign states entitled to sue in federal courts under Article III of the United States Constitution.[46] Rather, tribes were "domestic dependent nations . . . completely under the sovereignty and dominion of the United States."[47] Nevertheless, the Court recognized the Cherokee tribe as a "distinct political society, separated from others, capable of managing its own affairs and governing itself."[48]

One year later, in the concluding case of the Marshall trilogy, *Worcester v. Georgia*,[49] the Court established a limit on state power over tribal nations. The Court heard the petition of whites who had been prosecuted by the state of Georgia for violating those Georgia laws on Cherokee land.[50] In striking down statutes extending Georgia's powers into the Cherokee Nation, the Court stressed the independence of tribal governments from those of the states. It described Indian nations as "distinct, independent political communities,"[51] that had placed themselves "under the protection of one more powerful, without stripping [themselves] of the right of government, and ceasing to be a state."[52] The Court held that Georgia's laws interfered with the relationship between the federal government and the Cherokee Nation, "a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress."[53] Thus, early on the United States Supreme Court recognized the status of Indian tribes as self-governing, sovereign nations subject only to limitations on their powers imposed by treaties or laws of the United States government.

The principles of tribal sovereignty enunciated in the Cherokee cases continue to govern Indian law today, despite subsequent federal limitations on the tribes' ability to govern themselves.[54] Federal diminution of tribal sovereignty has focused primarily on tribal authority

46. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
47. *Id.* at 17.
48. *Id.* at 16.
49. 31 U.S. (6 Pet.) 515 (1832).
50. *Id.* at 520.
51. *Id.* at 559.
52. *Id.* at 561.
53. *Id.*
54. *See, e.g.*, United States v. Wheeler, 435 U.S. 313 (1978).

> [O]ur cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.

Id. at 323 (citations omitted). For a comprehensive discussion of the Cherokee cases and subsequent Supreme Court decisions involving tribal sovereignty and the relationship between tribes and the federal and state governments, see Robert G. McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests*, 13 HARV. C.R.-C.L. L. REV. 357 (1978). *See also* Resnick, *supra* note 43.

over nonmembers' activities in Indian country.[55] For example, Congress and the Supreme Court have diminished tribal sovereignty by imposing federal and state criminal laws within Indian country and granting federal or state jurisdiction over certain criminal acts committed there.[56] Jurisdiction over non-Indians' criminal activities in Indian country is thus vested exclusively in federal or state courts;[57] nevertheless, tribes have retained authority over criminal activities of Indians in Indian country.[58] Likewise, in the context of taxation, even though the Court has validated a state's ability to "reach into" Indian country to tax nonmembers, it recognizes tribal sovereign authority to tax activities and businesses in Indian country.[59]

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55. The term "Indian country" is defined as land " 'set apart for the use of Indians as such, under the superintendence of the Government.' " Oklahoma Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe of Okla., 111 S. Ct. 905, 910 (1991), (quoting United States v. John, 437 U.S. 634, 648-49 (1978)). "Indian country" is also defined at 18 U.S.C. § 1151 (1988) as follows:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id. This definition, even though it appears in a federal criminal statute, has been applied generally to civil matters. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975); *see also* Sandra Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 AM. INDIAN L. REV. 319, 324-25 (1991).

56. In 1881, the Supreme Court cut back on *Worcester* when it held in United States v. McBratney, 104 U.S. 621 (1881), that the state could prosecute a non-Indian who murdered another non-Indian in Indian country. The General Crimes Act, 18 U.S.C. § 1152 (1988) and the Assimilative Crimes Act, 18 U.S.C. § 13 (1988) extend federal and state criminal laws into Indian country. In 1885, Congress passed the Major Crimes Act, 18 U.S.C. § 1153 (1988), giving federal courts jurisdiction over thirteen "major" crimes committed in Indian country, by Indians or non-Indians. The Supreme Court justified the Major Crimes Act in United States v. Kagama, 118 U.S. 375 (1886), on the basis of the "protectorate" relation between tribes and the federal government.

57. Again, relying on the protectorate doctrine, the Court eroded tribal criminal jurisdiction further in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), when it took away jurisdiction from tribes to prosecute non-Indians for commission of "non-major" crimes within a tribe's jurisdictional boundaries.

58. In Duro v. Reina, 495 U.S. 676 (1990), the Court held that tribes could not exercise criminal jurisdiction over Indians who were nonmembers of the tribe. *Duro* was subsequently nullified when Congress restored tribal jurisdiction over non-member Indians. Act of Oct. 28, 1991, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301 (1988 & Supp. II 1990)). For an account of Congressional correction of *Duro*, see Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109 (1992).

59. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) and Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), upheld tribal power to tax non-Indians doing business or performing services on Indian land; in each case, the Supreme Court held that such power derives solely from a tribe's sovereignty. The Court characterized the power to tax as "a necessary instrument of self-government and territorial management" that derives from its "general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services." *Merrion*, 455 U.S. at 137.

However, in Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976), and *Washington*, the Court held that states can require individual Indian sellers and tribes, respectively, to collect tax on sales of tobacco products to nonmembers. Most recently, in Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 111 S. Ct. 905, 909 (1991), the Court reached the same conclusion despite the

Although the Supreme Court has been somewhat more protective of tribal sovereignty in other kinds of civil cases,[60] the imposition of federal civil laws such as the ICRA on tribal activities has at the same time diminished tribal sovereignty.[61] The ICRA is generally referred to as the "Indian Bill of Rights," as it vests rights in individuals and concomitant obligations, or limitations, on the part of tribal governments similar to those enumerated in the Bill of Rights of the United States Constitution.[62] The mere imposition of the ICRA's limitations on tribes, essentially framed in terms developed in Anglo-American jurisprudence, conflicts with notions of tribal sovereign authority to fashion their own governing rules.[63]

The devastating effects of continued erosion of tribal sovereignty

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assertion that Oklahoma is not a Public Law 280 state as were those in *Moe* and *Washington*. In recognition of the principle that tribes possess "sovereign authority over their members and territories," *id.* at 910 (citing Cherokee v. Georgia, 5 Pet. 1 (1831)), the Court reasoned that the state's interest in collecting the tax justified the "minimal burden" on the tribe to collect it and did not interfere with tribal sovereignty. *Citizen Band Potawatomi*, 111 S. Ct. at 911.

60. Tribal courts generally retain civil jurisdiction over suits resulting from acts of nonmembers occurring within their jurisdictional boundaries. For example, in Williams v. Lee, 358 U.S. 217, 223 (1959), the Court held that an Arizona state court lacked jurisdiction over a collection action against Navajos by a non-Indian doing business on the Navajo reservation; rather, jurisdiction was proper only in a Navajo tribal court. The Court reasoned that allowing state jurisdiction "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* Furthermore, in Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985), the Court held that whether jurisdiction exists in tribal courts must be determined first in the tribal courts, even though the question of tribal jurisdiction is a "federal question" under 28 U.S.C. § 1331. This determination is reviewable by the federal district courts. The Court differentiated between criminal cases, where Congress had expressly conferred jurisdiction on federal courts, and civil cases, where it had not. *Id.* at 854-55. Shortly afterward, the Court held in Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987), that primary jurisdiction in tribal courts could not be defeated by alleging diversity jurisdiction. *Id.* at 19-20; *see also* Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 329-32 (1989), for a thorough analysis of *National Farmers Union* and *Iowa Mutual*.

61. The Supreme Court acknowledged this fact in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. . . . Title I of the ICRA . . . represents an exercise of that authority." *Id.* at 56-57.

62. Because of tribes' sovereign status, the United States Constitution does not apply to them. Talton v. Mayes, 163 U.S. 376, 382-84 (1896) (Fifth Amendment does not apply to actions of tribal governments); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). As the Court stated in *Santa Clara Pueblo*, rights accorded by the ICRA, however, are "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Id.* at 57. The ICRA requires tribes to afford rights of free exercise of religion, speech, press, assembly, due process and equal protection; rights against unreasonable searches and seizures, double jeopardy and self-incrimination; rights against taking without just compensation; and in criminal cases, rights to a speedy trial, confrontation and securing of witnesses, and to counsel at defendant's expense and trial by a jury of six. The ICRA also prohibits excessive bail and fines, cruel and unusual punishment, imprisonment over one year per offense, fines in excess of $5,000, bills of attainder and ex post facto laws. 25 U.S.C. § 1302 (1992 Supp.) An account of the legislative history of the ICRA appears in DELORIA & LYTLE, *supra* note 32, at 200-14.

63. *See, e.g.*, Pommersheim, *supra* note 39, at 438 n.104 (citing Robert T. Coulter, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights*, 3 COLUM. HUM. RTS. L. REV. 49 (1971)). *See also* Robert Laurence, *A Quincentennial Essay on* Martinez v. Santa Clara Pueblo, 28 IDAHO L. REV. 307, 314-15 (1991-92); Robert A. Wil-

under United States law is poignantly described by the Northern Plains Intertribal Court of Appeals in a recent employment case brought under the ICRA against the Sisseton-Wahpeton Sioux Tribe.[64] After recounting the history of treaty abrogation and the diminution of tribal sovereignty through federal legislation and court decisions, which the court described as "the worst-case scenarios in Indian law,"[65] it exhorted tribes and tribal courts to resist challenges to tribal sovereignty:

> Is then tribal sovereignty to be sacrificed on the alter of sacrificial word play—impliedly diminished by sue and be sued clauses predicated on doubtful intent, the result of boilerplate draftmen legalese? Should the courts foster the continuation of this process of sovereign erosion?
>
> Sovereignty refers to the inherent right and power to govern. It cannot be argued that a sovereign, using a political and economic definition can be a sovereign if it has anything less than total sovereignty. A political entity cannot exist if it has not the power to protect nor preserve its very existence. It appears then that much more than Wynde versus the college is at issue. The necessary political and economic viability of a tribe must retaliate against the subtle erosion of Native American institutions.
>
> Tribal sovereignty is the tribe. Its very existence as a political entity rests upon the foundation of sovereignty. No less certainly, than the Anglo system. . . .
>
> If this court is to preserve the tribe as a political, social, economic entity, a recognition of that corollary must begin with a careful studied analysis of the impact of the erosion of tribal sovereignty however minuscule. Erosion of tribal sovereignty by implication is no less than actual erosion of the tribe itself. What is the essence of a tribe? Tribal sovereignty![66]

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liams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 276-78 (1989).

Professor Pommersheim discusses the need for American jurisprudence to recognize and accommodate differences in rules of culturally distinct sovereigns. He defines "sovereignty" as consisting of two components: "the recognition of a government's proper zones of authority free from intrusion by other sovereigns within the society, and the understanding that within these zones the sovereign may enact substantive rules that are potentially divergent or 'different' from that of other—even dominant—sovereigns within the system." Pommersheim, *supra* note 39, at 421. Pommersheim also discusses the potential for disrupting societies such as Indian tribes that may be held together by "family, community and cultur[al]" relationships as a result of members asserting their individual rights against the society. *Id.* at 438; *See also* Pommersheim, *supra* note 8, at 65.

See also THE INDIAN CIVIL RIGHTS ACT, U.S. COMM'N ON CIVIL RIGHTS REPORT 71 (1991):

> The Commission finds that in passing the Indian Civil Rights Act of 1968 the United States Congress did not fully take into account the practical application of many of the ICRA's provisions to a broad and diverse spectrum of tribal governments, and that it required these procedural protections of tribal governments without providing the means and resources for their implementation.

Id.

64. Bd. of Trustees of the Sisseton-Wahpeton Community College v. Wynde, 18 INDIAN L. REP. 6033 (N. Plains Intertribal Ct. App. 1990).

65. *Id.* at 6034-35.

66. *Id.* at 6035.

Significantly, in *Santa Clara Pueblo v. Martinez*,[67] the Supreme Court checked the ICRA's potential erosive effect on tribal sovereignty by holding that the ICRA did not confer jurisdiction in federal courts except in *habeas corpus* actions.[68] In that case Ms. Martinez, a member of the Santa Clara Pueblo, and her daughter sued the Pueblo and its governor in federal court alleging a tribal ordinance violated their equal protection rights under the ICRA.[69] The ordinance extended membership in the Pueblo to children of male members who marry nonmembers but denied membership to children of female members who marry nonmembers; Ms. Martinez had married a Navajo.[70] First, the Court held that the Pueblo, but not its governor, was immune from suit under the ICRA.[71] It then held that the federal courts lacked subject matter jurisdiction over the Martinez' ICRA claim.[72] In so holding, the Court reiterated *Worcester*'s language that "Indian tribes 'are distinct, independent political communities, retaining their original natural rights' in matters of local self-government"[73] and reinforced the principle of sovereignty that allows tribes to retain legislative powers over their internal affairs and the necessary power to enforce those laws.[74] It cited the dual goals of the ICRA as "strengthening the position of individual tribal members vis-a-vis the tribe" and "the well-established federal 'policy of furthering Indian self-government.' "[75] In balancing those goals, the Court took into account the Act's silence with respect to jurisdiction for other than *habeas corpus* actions and concluded that "[c]reation of a federal cause of action for the enforcement of rights created in [the ICRA] . . . plainly would be at odds with the congressional goal of protecting tribal self-government."[76] Furthermore, the Court reasoned, the tribes themselves could be counted on to assure rights guaranteed by the ICRA: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. Nonjudicial tribal institutions have also been recognized as competent law-applying bodies."[77]

Thus, while the United States created new rights for tribal members and imposed new obligations on the tribes, it left the enforcement of those rights and obligations to the tribes themselves. But despite *Santa Clara Pueblo*'s assurance that tribal forums would be available to vindi-

67. 436 U.S. 49 (1978). *Santa Clara Pueblo* is the only Supreme Court case interpreting the ICRA.

68. *Id.* at 59.

69. *Id.* at 51.

70. *Id.* at 52.

71. *Id.* at 59. *See infra* text accompanying notes 91-97.

72. *Santa Clara Pueblo*, 436 U.S. at 59.

73. *Id.* at 55 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)).

74. *Id.* at 55-56.

75. *Id.* at 62 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

76. *Id.* at 64. *Santa Clara Pueblo* has been widely discussed as an example of the tension between societal values of two different governments; the debate over the validity of the decision is summarized in Laurence, *supra* note 63, at 305.

77. *Santa Clara Pueblo*, 436 U.S. at 65-66.

cate ICRA rights,[78] such suits actually have been foreclosed in many tribal forums under authority of that part of *Santa Clara Pueblo* upholding tribal sovereign immunity.

IV. TRIBAL SOVEREIGN IMMUNITY

One of the attributes of sovereignty is the sovereign's immunity from lawsuits for damages filed against it without its consent.[79] Unless the government has waived its immunity, it is absolutely immune from suit for its actions. However, officers and agents of the government enjoy limited immunity for actions taken within the scope of their authority or official duties; they are not immune from acts taken in their capacity as individuals or in their official capacity if such acts were outside the scope of their constitutional or statutory authority.[80]

Commentators cite the following rationales in support of the doctrine of sovereign immunity: there can be no legal right against the authority that establishes rights; the sovereign itself "can do no wrong;" allowing one branch of government to impose a judgment against another would violate separation of powers; lawsuits against a government would interfere with the government's ability to carry out its official duties and enforcement of judgments would cause economic losses that could impair or destroy government functions.[81] The applicability of the latter rationales to Indian tribes was articulated by a tribal court weighing the sovereign immunity question:

> [C]ritically important community interests are being protected by this immunity: Suits against the tribe seeking damages attack the community treasury. This money belongs to all the people of the Sauk-Suiattle nation. It must be guarded against the attacks of individuals so that it can be used for the good of all in the tribal community. Secondly, any suit against the tribe forces the tribe to expend community monies in legal fees. The possible amounts that can be expended on this effort would be great if suits of this nature are not limited. Finally, the entire community stands to suffer irreparable harm if their leaders, foreseeing possible liabilities at every action, are unable to fulfill the responsibility of their offices.[82]

The United States Supreme Court has long recognized and upheld tribal sovereign immunity from nonconsensual lawsuits in federal and

78. *Id.* at 65.

79. For a history of the development of the doctrine of sovereign immunity, see, for example, James Fleming, Jr., *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 611-15 (1955). The Supreme Court's latest discussion of sovereign immunity appears in Blatchford v. Native Village of Noatak, 111 S. Ct. 2578 (1991), in which it held that states are immune from suit by Indian tribes.

80. *See, e.g.*, Ponca Tribal Election Bd. v. Snake, 17 Indian L. Rep. 6085, 6091 (Ct. Ind. App., Ponca 1988); Miller v. Adams, 10 Indian L. Rep. 6034, 6036 (Intertribal Ct. App. 1982). This article focuses generally on immunity of tribes and tribal entities, not on immunity of tribal officials.

81. *See, e.g.*, Ralph W. Johnson & James M. Madden, *Sovereign Immunity in Indian Tribal Law*, 12 AM. INDIAN L. REV. 153, 170-71 (1984).

82. Moses v. Joseph, 2 Tribal Ct. Rep. A-51, A-54 (Sauk-Suiattle Tribal Ct. 1980).

state courts.[83] Its first clear acknowledgement appeared in *United States v. United States Fidelity & Guar. Co.*,[84] where the Court dismissed a cross-claim against the United States, which had sued on behalf of the Choctaw and Chickasaw Nations, stating, "Indian Nations are exempt from suit without Congressional authorization," and that tribal immunity "passed to the United States for their benefit."[85] Subsequently, in *Puyallup Tribe, Inc. v. Dep't. of Game of Wash.*,[86] vacating the state court's judgment against the tribe, the Court deemed it "settled" that "[a]bsent an effective waiver or consent, . . . a state court may not exercise jurisdiction over a recognized Indian tribe."[87] The Court's most cited discussion of sovereign immunity, however, appears in its interpretation of the ICRA in *Santa Clara Pueblo v. Martinez*,[88] which, in addition to determining that there is no federal jurisdiction for a non-*habeas corpus* claim,[89] held tribes to be immune from federal suits arising under the ICRA.[90]

As stated previously, *Santa Clara Pueblo* involved a suit in federal court against the Pueblo tribe and its governor alleging that the Pueblo's membership ordinance violated equal protection rights guaranteed by the ICRA.[91] The Pueblo asserted its sovereign immunity in defense.[92] The Court first discussed its long-standing recognition that tribes, as sovereigns, are immune from suit unless Congress waived tribal immunity.[93] Any such waiver must be express and unequivocal.[94] It then found no explicit waiver in the text of ICRA.[95] Moreover, the Act's provision for federal *habeas corpus* relief could not be deemed a general waiver of tribal immunity because the respondent in a *habeas* suit would be an individual, not a tribe.[96] Therefore, the Court concluded, because the Act contained no explicit and unequivocal waiver of immunity, "suits against the tribe under the ICRA are barred by its sovereign immunity from suit."[97]

Although *Santa Clara Pueblo* should have foreclosed subsequent ICRA suits in federal and state courts, the Tenth Circuit denied a tribal defense of sovereign immunity and extended federal jurisdiction over an

83. A comprehensive catalog of federal and state court decisions recognizing tribal sovereign immunity appears in Justice Rice's concurring opinion in Sulcer v. Barrett, 17 Indian L. Rep. 6138, 6139-40 (Sup. Ct. Citizen Band Potawatomi 1990) (Rice, Chief J., concurring).

84. 309 U.S. 506 (1940). For discussions of the Supreme Court's development of the doctrine of tribal sovereign immunity, see Frank Pommersheim & Terry Pechota, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D. L. REV. 553 (1986); Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058 (1982).

85. *U.S. Fidelity & Guar. Co.*, 309 U.S. at 512.

86. 433 U.S. 165 (1977).

87. *Id.* at 172.

88. 436 U.S. 49 (1978).

89. *See supra* text accompanying notes 67-77.

90. *Santa Clara Pueblo*, 436 U.S. at 72.

91. *See supra* text accompanying notes 67-77.

92. *Santa Clara Pueblo*, 436 U.S. at 53.

93. *Id.* at 55-59.

94. *Id.* at 58.

95. *Id.*

96. *Id.* at 68.

97. *Id.* at 59.

ICRA claim in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes.*[98] The claim, alleging deprivation of due process rights, was brought against the tribes by a non-Indian-owned corporation. The plaintiff corporation had built a lodge on land owned by non-Indians within the reservation, but the access road crossed an Indian allotment.[99] The tribes' Joint Business Council directed that the access road be closed.[100] The plaintiff filed suit in the tribal court, which declined jurisdiction because the council would not consent to the suit.[101] The suit ended up in federal court, where the district court held the tribes to be immune from suit under *Santa Clara Pueblo.*[102] The Tenth Circuit reversed, distinguishing *Santa Clara Pueblo* as "entirely an internal matter concerning tribal members . . . [who] had access to their own elected officials and their tribal machinery to settle the problem."[103] The court was concerned not only with the unavailability of any remedy for the plaintiffs, but with the fact that the plaintiffs seeking the remedy were not Indians.[104] Citing no authority, it held that *Santa Clara Pueblo's* rule that tribes were immune from suit in federal court under the ICRA did not apply "when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian."[105]

Dry Creek Lodge has been criticized by commentators[106] and other circuits have refused to follow it.[107] Nevertheless, in the context of employment, it looms as a potential source for access to federal courts for non-Indian tribal employees who sue tribal employers under the ICRA.

98. 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981).
99. *Id.* at 684.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 685.
104. *Id.*
105. *Id.*
106. *See, e.g.*, Pommersheim & Pechota, *supra*, note 84, at 566-67; Kevin Gover & Robert Laurence, *Avoiding* Santa Clara Pueblo v. Martinez*: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 HAMLINE L. REV. 497, 499-503 (1985); Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231, 265 (1987).
107. R. J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985); Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984); ShortBull v. Looking Elk, 677 F.2d 645 (8th Cir. 1982), *cert. denied*, 459 U.S. 907 (1982). The Tenth Circuit limited *Dry Creek Lodge* in Nero v. Cherokee Nation of Okla., 892 F.2d 1457, 1460 nn.4-5 (10th Cir. 1989) ("the *Dry Creek Lodge* exception is to be narrowly construed and thus must involve only egregious circumstances that do not involve internal tribal affairs and is applicable only where no tribal remedy is available"); White v. Pueblo of San Juan, 728 F.2d 1307 (10th Cir. 1984); Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982); Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982). These cases (except *Nero*) and others are cited and discussed in Gover & Laurence, *supra* note 106, at 512-15.

In an employment case, the court for the Western District of Oklahoma, relying on *Santa Clara Pueblo*, held that it did not have jurisdiction over an ICRA claim for a non-Indian tribal employee because of tribal sovereign immunity. Sulcer v. Citizen Band Potawatomi Indian Tribe, 19 Indian L. Rep. 3071, 3071 (W.D. Okla. 1992). The court cited *Nero* and Williams v. Pyramid Lake Paiute Tribe, 625 F. Supp. 1457, 1458 (D. Nev. 1986) which stated, "*Dry Creek Lodge* is not the law of this circuit, nor is it the law of the United States." *Sulcer*, 19 Indian L. Rep. at 3071.

Some federal and state courts attempt to distinguish between tribes' "governmental" and "corporate" (or "proprietary") functions for the purpose of ascertaining immunity. Such distinction could conceivably open tribes to suits by tribal corporation employees. Most cases arose in the context of whether a tribal corporation chartered under § 17 of the 1934 Indian Reorganization Act[108] waived sovereign immunity by virtue of a standard "sue and be sued" clause. Although some courts held that such clauses waived sovereign immunity,[109] others concluded that immunity must be determined on a case-by-case basis.[110] Because § 17 corporations are usually administered by the tribal council or some other tribal governmental body, the primary inquiry regarding the extent of waiver under a "sue and be sued" clause must be whether the tribe acted through the corporation in its governmental or corporate capacity.[111] Other courts have looked merely to the fact that a tribe acted through a corporation and held that the tribe had waived immunity on that basis.[112] Absent any express waiver, whether a tribe is acting in a governmental or proprietary capacity should make no difference in determining its immunity.[113]

In 1991, the United States Supreme Court explicitly refused to abrogate the doctrine of tribal sovereign immunity or to distinguish between governmental and proprietary functions for the purpose of determining immunity. In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*,[114] the State of Oklahoma urged the Court to "abandon entirely" tribal sovereign immunity.[115] Alternatively it argued that immunity should not attach to tribal businesses, but rather "should be limited to the tribal courts and the internal affairs of tribal government, because no purpose is served by insulating tribal businesses from the authority of the States to administer their laws."[116] The Court responded that it would neither abandon the doctrine of tribal

108. 25 U.S.C. § 477 (1988). The Indian Reorganization Act sets up two mechanisms by which tribes could organize politically and economically. Section 16 allows tribes to adopt constitutions and by-laws, 25 U.S.C. § 476 (1988). Section 17 allows them to set up corporations, 25 U.S.C. § 477. All documents have to be approved by the Secretary of the Interior. 25 U.S.C. § 476. Section 17 charters are standardized and most contain "sue and be sued" clauses. Pommersheim & Pechota, *supra* note 84, at 556.

109. Pommersheim & Pechota, *supra* note 84, at 558.

110. *Id.*

111. *See id.* at 558-61 (discussing Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977)); Parker Drilling v. Metlakatla Indian Community, 451 F. Supp. 1127 (D. Alaska 1978). Section 17 corporate charters generally limit the extent of judgments against corporations to "income or chattels specifically pledged or assigned," and immunity has generally been waived only to that extent. Pommersheim & Pechota, *supra* note 84, at 560-61.

112. Dixon v. Picopa Constr. Co., 772 P.2d 1104 (Ariz. 1989); Steve E. Dietrich, Comment, *Tribal Businesses and the Uncertain Reach of Tribal Sovereign Immunity: A Statutory Solution*, 67 WASH. L. REV. 113, 124-25 (1992). The Comment also discusses Padilla v. Pueblo of Acoma, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989), which held the Pueblo amenable to suit for its off-reservation activity.

113. Pawnee Tribe of Okla. v. Franseen, 19 Indian L. Rep. 6006, 6008 (Ct. Ind. App. Pawnee 1991).

114. 111 S. Ct. 905 (1991).

115. *Id.* at 909.

116. *Id.* at 909-10. The state was attempting to force the tribe to assess and collect tax on sales of cigarettes at a tribally owned convenience store on trust land.

immunity nor limit it to apply only to governmental activity.[117] It justified this determination by observing that Congress had "consistently reiterated its approval of the immunity doctrine" developed in *Santa Clara Pueblo* and earlier cases[118] by passing acts such as the Indian Financing Act of 1974[119] and the Indian Self-Determination and Education Assistance Act,[120] which "reflect Congress' desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.' "[121] Wholesale elimination of the immunity defense for tribal businesses, the Court reasoned, would thwart these goals.

Sovereign tribes may waive immunity and thereby consent to a lawsuit. It has been debated whether a tribe may waive immunity without congressional approval.[122] Despite the Court's statement in *United States v. United States Fidelity & Guaranty Company*[123] that tribes are "exempt from suit without congressional authorization,"[124] courts and commentators conclude that tribes can waive sovereign immunity without congressional approval.[125] Language in *Citizen Band Potawatomi* buttresses this conclusion. Citing *Santa Clara Pueblo*, the Court stated, "[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe *or* congressional abrogation."[126] *Santa Clara Pueblo* had not discussed whether a tribe could waive its immunity and made no general statements to that effect; it only looked to whether Congress had waived tribal immunity from suit in ICRA claims. Nevertheless, the insertion of an "or" in *Citizen Band Potawatomi*'s statement indicates the Court's recognition that, even though Congress can waive tribal immunity, Indian tribes, as sovereigns, possess the ability to waive their immunity from suit as they see fit.

V. TREATMENT OF SOVEREIGN IMMUNITY IN TRIBAL LAWS

Tribes have addressed their sovereign immunity in myriad ways.[127]

117. *Id.* at 910.
118. *Id.*
119. 25 U.S.C. §§ 1451-1543 (1988).
120. 25 U.S.C. §§ 450-450n (1988).
121. *Citizens Band Potawatomi*, 111 S. Ct. at 910 (quoting California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987)).
122. *See* Pommersheim & Pechota, *supra* note 84, at 558-64.
123. 309 U.S. 506 (1940).
124. *Id.* at 512.
125. Sulcer v. Barrett, 17 Indian L. Rep. 6138, 6140 (Citizen Band Potawatomi Sup. Ct. 1990) (Rice, Chief J., concurring); Gonzales v. Allen, 17 Indian L. Rep. 6121, 6122 (Shoshone-Bannock Tr. Ct. 1990) (dictum); *see also*, Dietrich, *supra* note 112, at 122; Johnson & Madden, *supra* note 81, at 161; Alvin J. Ziontz, *After* Martinez: *Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1, 26 (1979). The exception to tribal ability to waive sovereign immunity is with respect to property held in trust by the federal government. *See* Hansen, *supra* note 55, at 328; Johnson & Madden, *supra* note 81, at 159.
126. *Citizens Band Potawatomi*, 111 S. Ct. at 909 (emphasis added).
127. Unless otherwise indicated, tribal constitutions and codes cited here were examined from INDIAN TRIBAL CODES (R. Johnson, ed. 1988) (microfiche collection) and the files of the National Indian Law Library (NILL) in Boulder, Colorado, during July 1992. All documents in INDIAN TRIBAL CODES (1988) were examined. At NILL, documents were selected from a computer search of the words "sovereign," "immunity" and "jurisdic-

Many state in their tribal codes that immunity is not waived except in accordance with federal or tribal law and when the waiver is made in specific language by a resolution of the tribal governing body.[128] Other tribes include language under a jurisdiction provision stating that tribal courts have no jurisdiction over suits against the tribe, its officers or employees unless the tribal governing body has consented.[129] The Spokane Tribe requires consent to waiver by both the tribe and the United States.[130] The Navajo Nation's Sovereign Immunity Act[131] codifies the principle of sovereign immunity and specifies the circumstances under which the Nation waives its immunity from suit.[132] Those circumstances include, *inter alia*, when suit is explicitly authorized by federal law or a

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tion," as the tables of contents of 143 constitutions and codes in its collection are "online." NILL is in the process of obtaining up-to-date versions from tribes across the country, but the librarians indicated that this has been difficult. Consequently, some of the codes and constitutions referred to here may not be current.

Additional citation will refer to the work of Johnson & Madden, *supra* note 81, at 161-63 n.35-40, who conducted a similar study of tribal treatment of sovereign immunity using forty tribal codes selected at random from INDIAN TRIBAL CODES (R. Johnson, ed. 1981) (microfiche collection). I reiterate their warning:

> Anyone involved in a sovereign immunity issue on a particular reservation would do well to make a careful study of the tribal code, constitution, tribal resolutions, regulations of different committees, corporate charter, corporate minutes, insurance contracts, and other sources . . . [and] should examine carefully the entire official copy . . . and all amendments.

Johnson & Madden, *supra* note 81, at 162 n.36.

128. *E.g.*, TRIBAL LAWS OF THE BURNS PAIUTE INDIAN RESERVATION ch. V(B) (1979); LAW AND ORDER CODE OF THE CHEYENNE RIVER SIOUX ch. VIII, § 1-8-4 (1978); LAW AND ORDER CODE OF THE CHIPPEWA-CREE TRIBE OF THE ROCKY BOY'S RESERVATION ch. 3, § 3.3 (1987); CHOCTAW TRIBAL CODE ch. 5, § 1-5-4 (1981); LAW AND ORDER CODE OF THE COEUR D'ALENE TRIBE OF INDIANS ch. 1, § 1-5.01 (1985); LAW AND ORDER CODE OF THE DELAWARE TRIBE OF BARTLESVILLE, § 1-1-2 (1984); NOOKSACK TRIB. CODE OF LAWS tit. 10, § 10.01.110 (1982); TRIB. CODE OF THE NORTHERN CHEYENNE RESERVATION ch. 3, § 1-3-2 (1987); LAW AND ORDER CODE OF THE ROSEBUD SIOUX TRIBE ch. 2, § 4-2-1 (1985); LAW AND ORDER CODE OF THE UTE INDIAN TRIBE OF THE UNITAH AND OURAY RESERVATION UTAH § 1-8-5 (no date); WARM SPRINGS TRIB. CODE 205.001ff (1988), *cited in* Gould v. Confederated Tribes of the Warm Springs Indians, 17 Indian L. Rep. 6052, 6053 (Warm Springs Tribal Ct. 1990).

129. *E.g.*, LAW AND ORDER CODE OF THE COLORADO RIVER INDIAN TRIBES ch. A, § 101 (no date); CROW LAW AND ORDER CODE ch. 1, § 1-160 (1977); FORT BELKNAP INDIAN LAW & ORDER § XII(12.2) (no date); SAULTE STE. MARIE TRIBE OF CHIPPEWA INDIANS LAW AND ORDER ch. 7, § 7.2 (1980); TRIB. CODE OF THE SISSETON-WAHPETON SIOUX TRIBE ch. 33, § 33-02-01 (no date), *cited in* Bd. of Trustees of the Sisseton-Wahpeton Community College v. Wynde, 18 Indian L. Rep. 6033, 6036 (N. Plains Intertribal Ct. 1990); STANDING ROCK SIOUX CODE OF JUSTICE § 1-108 (no date); ZUNI TRIB. CODE ch. 2, § 1-2-6(2); *see also* Johnson & Madden, *supra* note 81, at 162 n.36-38.

130. LAW AND ORDER CODE OF THE SPOKANE TRIBE OF INDIANS-SPOKANE RESERVATION § 1-13 (1987).

131. The purpose statement reads as follows:

> The purpose and intent of the Navajo Sovereign Immunity Act is to balance the interests of individual parties in obtaining the benefits and just redress to which they are entitled, under the law and in accordance with the orderly processes of the Navajo nation government, while at the same time protecting the legitimate public interest in securing the purposes and benefits of their public funds and assets, and the ability of their government to function without due interference in furtherance of the general welfare and the greatest good of all the people.

NAVAJO TRIB. CODE tit. 1, §§ 351-55 (1988).

132. "The Sovereign Immunity Act is nothing more than a reinforcement of the common law immunity from suit of the Navajo Nation as an independent sovereign." MacDonald v. Navajo Nation, 18 Indian L. Rep. 6003, 6006 (Nav. Sup. Ct. 1990).

resolution of the Tribal Council, when the claim is expressly covered by liability insurance or when the claim arises under the Bill of Rights of the Navajo Nation.[133]

Some tribes include an immunity provision in specific ordinances or chapters. For example, the Muckleshoot Tribe includes a sovereign immunity provision in its zoning,[134] licensing and revenue,[135] gaming[136], housing,[137] traffic,[138] fireworks,[139] tobacco[140] and liquor[141] ordinances. The Chehalis juvenile ordinance contains an immunity statement.[142] Other tribal codes simply acknowledge tribal immunity in a general statement.[143]

Waivers may also be specific to tribal civil rights laws. The Colville Tribal Civil Rights Act[144] waives sovereign immunity of the Colville Tribes in tribal courts for suits alleging deprivation of rights enumerated in that Act;[145] those rights basically parallel the rights afforded by the ICRA.[146] The only remedies available are declaratory and injunctive,[147] unless the claim is covered by insurance, in which case damages may be awarded for the amount of coverage in accordance with the terms of the policy.[148] The Law and Order Code of the Fort McDermitt Paiute-Shoshone Tribe of Oregon and Nevada states that the Tribal Council may waive immunity in civil contempt proceedings in tribal courts to enforce equal protection and procedural due process rights.[149] The Navajo Sovereign Immunity Act waives immunity for lawsuits alleging violations of civil rights guaranteed by the Navajo Nation Bill of Rights.[150]

Tribes also address sovereign immunity in their constitutions. Some provide for waiver of immunity for actions arising under the tribal constitution and laws, as well as under the ICRA. For example, the Menominee constitution provides that the tribal legislature generally can-

133. NAVAJO TRIB. CODE tit. 1, § 354 (1988).
134. CONST. AND BYLAWS FOR THE MUCKLESHOOT INDIAN TRIBE tit. 7, § 7.01.100 (1977).
135. *Id.* tit. 8, § 8.09.040.
136. *Id.* tit. 11, § 11.13.02.
137. *Id.* tit. 13, § 13.13.030.
138. *Id.* tit. 15, § 15.09.010.
139. *Id.* tit. 16, § 16.01.130.
140. *Id.* tit. 17, § 17.01.070.
141. *Id.* tit. 18, § 18.01.080.
142. CONST. AND BYLAWS OF THE CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION tit. 12, § 12.10.010 (no date).
143. *E.g.*, GILA RIVER INDIAN COMMUNITY CODE tit. I, § 1.327 (no date); PORT GAMBLE KLALLAM LAW AND ORDER CODE, preamble (1984).
144. LAW AND ORDER CODE FOR THE COLVILLE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION tit. 56, §§ 56.01-56.08 (1988).
145. *Id.* § 56.06.
146. *Id.* § 56.02.
147. *Id.*
148. *Id.* § 56.08.
149. LAW & ORDER CODE OF THE FORT MCDERMITT PAIUTE-SHOSHONE TRIBE OF OR. AND NEV. ch. 1, §§ 1, 3 (1988).
150. NAVAJO TRIBAL CODE tit. 1, § 354 (1988). The Navajo Nation Bill of Rights appears at NAVAJO TRIBAL CODE tit. 1, §§ 1-9 (1988).

not waive the tribe's immunity,[151] but it does allow suit against the tribe in tribal courts "for the purpose of enforcing rights and duties established by this Constitution and Bylaws, by the ordinances of the Tribe, and by the Indian Civil Rights Act . . . ."[152] The constitution of the Jamestown Klallam Tribe empowers the tribal courts "to review and overturn tribal legislation and executive actions for violations of this Constitution or of the [ICRA]."[153] Similar language in the Standing Rock Sioux tribal constitution extending the power of tribal courts "to all cases in law and equity arising under the constitution or laws of the tribe" was held to have waived the immunity of the tribal election commission in a suit protesting the commission's hearings on an election contest.[154]

Tribal agencies and corporations may be granted limited waivers of immunity by their respective tribes.[155] A Muckleshoot ordinance extends the immunity of the tribe to the Muckleshoot Tribal Enterprise, a governmental agency,[156] but the manager of the Tribal Enterprise, with the consent of the director of business development and the tribal council, can waive immunity in "contract, agreements, or leases . . . with regard to certain specific assets of any type or kind in courts with jurisdiction over such assets."[157] The Articles of Incorporation of the Cheyenne-Arapaho Tribal Development Corporation[158] provide that the corporation cannot waive or limit the tribal council or business committee's immunity, but it can consent to be sued in tribal courts by indicating the terms and conditions of the consent in an agreement, contract or other instrument.[159] Recovery is limited to the amount of the assets

151. CONST. AND BYLAWS OF THE MENOMINEE INDIAN TRIBE OF WIS. art. XVIII, § 1 (1977).

152. *Id.* art. XVIII, § 2. *See* Johnson & Madden, *supra* note 78, at 163.

153. CONST. OF THE JAMESTOWN KLALLAM TRIBE OF INDIANS art. VIII (1983).

154. Murphy v. Standing Rock Sioux Election Comm'n, 17 Indian L. Rep. 6069, 6070 (Standing Rock Sioux Tribal Ct. 1990).

155. Tribal corporate charters may be of two types. First, those adopted under § 17, 1934 Indian Reorganization Act, 25 U.S.C. § 477 (1988); (*see supra* notes 108 & 111). Second, those adopted under a tribes' own authority. *See, e.g.*, Bd. Trustees of the Sisseton-Wahpeton Community College v. Wynde, 18 Indian L. Rep. 6033, 6037 (N. Plains Intertribal Ct. App. 1990) (Gillette, J., concurring) ("a tribe can charter an entity upon such terms as the tribe sees fit"). As indicated in the text, most corporate charters drafted by the tribes themselves carefully designate the extent of waiver.

156. CONST. AND BYLAWS FOR THE MUCKLESHOOT INDIAN TRIBE tit. 19, § 19.01.010 (1977):

> Muckleshoot Tribal Enterprises evolved as a branch of the tribal government serving as a mechanism for the tribal government to increase opportunities for members to obtain business training, experience, and employment on the Reservation and on off-Reservation tribal lands, to encourage the continued production of Muckleshoot and other Native American crafts, and to establish on-going, revenue sources which would provide funds for basic tribal government services and improve the economic, social, educational, health and overall living conditions of Muckleshoot people.

Id.

157. *Id.* § 19.01.100.

158. ART. OF INCORPORATION OF THE CHEYENNE-ARAPAHO TRIB. DEV. CORP. art. XIII (1988).

159. *Id.* art. XIII(D).

described in the instrument.[160] The Charter of the Chehalis Indian Tribal Enterprises Construction Company waives the immunity of the company and its assets but not of the tribe and its assets.[161]

When no constitutional or code provision exists, tribal courts have looked to other tribal documents to determine the extent of tribal immunity. For instance, one tribal court found a waiver of immunity in an insurance policy.[162] In employment cases, courts have examined personnel manuals.[163] The Turtle Mountain Court of Appeals found that the tribe's personnel policies, by requiring due process in termination proceedings, waived the immunity of the tribe in a lawsuit alleging violation of the manual's termination procedures.[164] On the other hand, the Sauk-Suiattle Tribal Court held, in the absence of any other statement in the tribe's law concerning sovereign immunity, that termination provisions of the tribal personnel manual did not waive sovereign immunity based on the fact that the manual stated that it "shall not, in any way, waive the sovereign immunity of the . . . Tribe."[165] The court reached this conclusion despite a provision in the tribal constitution ensuring civil rights to tribal members.[166] Similarly, the Grand Ronde Tribal Court held that the provisions of a personnel manual permitting an employee to appeal his termination of employment to the tribal court did not waive the tribe's sovereign immunity from a claim for back wages even though the employee had been found to have been wrongfully terminated and had been reinstated.[167]

If no constitutional or code provision or other document speaks to sovereign immunity, a tribal court may look to its tribe's common law to determine the existence or extent of immunity. For example, in an employment termination case, the Fort Mojave Tribal Court rejected the tribe's defense of sovereign immunity under tribal common law.[168] After noting that it was "unaware of any provisions in the Mojave tribal custom and tradition which would approximate sovereign immunity" and recounting the history of the defense and the exceptions that had arisen to it in Anglo-American law, the court termed the defense "a dinosaur of injustice" and declined to adopt it into tribal law.[169] However, other tribal courts have held that sovereign immunity exists as part

160. *Id.*

161. CHARTER OF THE CHEHALIS INDIAN TRIBE ENTERS. CONSTR. CO. ORDINANCE NO. 1980-1 art. I, § 1.05.

162. Johnson & Madden, *supra* note 81, at 167 (citing Mitchell v. Confederated Salish & Kootenai Tribes (Flathead Tribal Ct. 1982)).

163. That statements in personnel manuals may bind a tribe has analogues in federal and state law, under which personnel manuals may create due process and contract rights in employment. *See, e.g.*, Vinyard v. King, 728 F.2d 428 (10th Cir. 1984).

164. Turtle Mountain Band of Chippewa Indians v. Parisien, 1 Tribal Ct. Rep. A-95 (Turtle Mountain Ct. App. 1979).

165. Moses v. Joseph, 2 Tribal Ct. Rep. A-51, A-53 (Sauk-Suittle Tribal Ct. 1980).

166. *Id.* at A-54.

167. Guardipee v. Confederated Tribes of the Grand Ronde Comm'n of Ore., 19 Indian L. Rep. 6111 (Grand Ronde Tribal Ct. 1992).

168. *Id.* at 6002.

169. O'Brien v. Fort Mojave Tribal Ct., 11 Indian L. Rep. 6001, 6002 (Ft. Mojave Tribal Ct. 1983).

of tribal law solely by virtue of their tribes' sovereign status.[170]

Tribal courts disagree on whether the ICRA itself waives sovereign immunity of tribes in tribal courts for actions alleging violations of that Act.[171] The arguments on both sides rest on the seemingly inconsistent language supporting the two holdings of *Santa Clara Pueblo v. Martinez*.[172] Those courts holding that the ICRA waives immunity of tribes in tribal courts focus on *Santa Clara Pueblo's dicta* that the ICRA is an exercise of Congressional "plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess"[173] and that "[t]ribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply."[174] The Cheyenne River Sioux Court of Appeals reasoned that "[i]t is hard to conceive that this language means anything else but that tribal courts must entertain causes of action based on the ICRA"[175] and denied the tribe's immunity defense. Similarly, the Turtle Mountain Tribal Court found this language an "express, unequivocal expression of congressional intent to provide jurisdiction to the tribal court based upon alleged violations of an individual's civil rights protected by the ICRA."[176]

However, courts holding that the ICRA does not waive tribal immunity in tribal courts rely on *Santa Clara Pueblo*'s unequivocal holding that the ICRA contains no express or implied waiver of immunity whatsoever; if the ICRA does not waive a tribes' immunity, the courts reason, a suit cannot be brought against the tribe under the ICRA in any court unless Congress or the tribe itself has expressly waived immunity.[177]

170. *See, e.g.*, Satiacum v. Sterud, 10 Indian L. Rep. 6013, 6015 (Puyallup Tribal Ct. 1982); Grant v. Grievance Comm. of the Sac and Fox Tribe of Indians of Okla., 2 Tribal Ct. Rep. A-39, A-41 (Ct. Indian Offenses for the Sac and Fox Tribe 1981); *Cf.* MacDonald v. Navajo Nation, 18 Indian L. Rep. 6003, 6006 (1990) ("The Sovereign Immunity Act is nothing more than a reinforcement of the common law immunity from suit of the Navajo Nation as an independent sovereign.").

171. *Compare* Gonzales v. Allen, 17 Indian L. Rep. 6121, 6122 (Shoshone-Bannock Tribal Ct. 1990) ("[t]he vast majority of both federal and tribal court cases have held that the Indian Civil Rights Act is not a waiver of tribal sovereign immunity"); *with* Davis v. Keplin, 18 Indian L. Rep. 6148, 6149 (Turtle Mountain Tribal Ct. 1991) ("the majority of tribal courts have held that they have jurisdiction to enforce provision of tribal constitutions and the Indian Civil Rights Act").

172. *See supra* text accompanying notes 67-77 & 91-97.

173. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

174. *Id.* at 65.

175. DuPree v. Cheyenne River Hous. Auth., 16 Indian L. Rep. 6106, 6108 (Cheyenne River Sioux Tribal Ct. App. 1988).

176. Davis v. Keplin, 18 Indian L. Rep. 6148, 6149 (Turtle Mountain Tribal Ct. 1991).

177. The reluctance of tribal governments to waive sovereign immunity was acknowledged by the United States Civil Rights Commission's findings in its report on the Indian Civil Rights Act:

> The vindication of rights guaranteed by the Indian Civil Rights Act within tribal forums is contingent upon the extent to which the tribal government has waived its immunity from suit; concern about the potential effects of law suits, even for declaratory or injunctive relief, on the viability of tribal government has made some tribes reluctant to waive sovereign immunity to any extent, with the result that plaintiffs' efforts to adjudicate ICRA claims are frustrated.

THE INDIAN CIVIL RIGHTS ACT, U.S. CIVIL RIGHTS COMM'N, *supra* note 63, at 72.

For example, in a contract action against the tribe, the Court of Indian Appeals for the Pawnee Tribe responded to the plaintiff's argument that the ICRA impliedly waived the tribes' immunity:

> As the U.S. Supreme Court held in *Santa Clara Pueblo v. Martinez*, the Indian Civil Rights Act did not constitute a general waiver of a tribe's sovereign immunity. Rather, it permitted only habeas corpus relief in federal court for certain actions taken by a tribal government. It did not explicitly waive a tribe's immunity *in tribal court actions*. Furthermore, we will not imply such a waiver where none is specifically made in the federal statutes.[178]

As commentators have pointed out, *Santa Clara Pueblo*'s holding that the ICRA does not waive tribal immunity was reached "independently of, and prior to" its statement that tribal courts are available to hear ICRA claims.[179] Although the Court's statements about tribal courts appear inconsistent with its holding that the ICRA does not waive immunity, the statements did not seem to factor into the court's reasoning in reaching that holding.

Examination of reported tribal court cases indicates that most courts have held, in the absence of specific tribal laws addressing the question, that the ICRA does not waive their tribal immunity.[180] Some tribes' courts have overruled the sovereign immunity defense and assumed jurisdiction over ICRA actions: Cheyenne River Sioux,[181] Oglala Sioux,[182] and the Turtle Mountain Band of Chippewas.[183] However, the following tribal courts have held (or indicated in *dictum*) that the ICRA does not waive sovereign immunity: Colville Confederated Tribes,[184] Confederated Tribes of the Warm Springs Reservation,[185]

178. Pawnee Tribe of Okla. v. Franseen, 19 Indian L. Rep. 6006, 6008 (Ct. Ind. App.-Pawnee 1991) (emphasis added); *see also* Bd. of Trustees of the Sisseton-Wahpeton Community College v. Wynde, 18 Indian L. Rep. 6033, 6036 (N. Plains Intertribal Ct. App. 1990) (Gillette, J., concurring); Garman v. Fort Belknap Community Council, 11 Indian L. Rep. 6017 (Ft. Belknap Tribal Ct. 1984) ("tribal self-government must surely embody the concept that Indian tribes decide for themselves how to implement laws forced upon them by Congress"); Satiacum v. Sterud, 10 Indian L. Rep. 6014, 6015 ("plaintiff argues that the *Martinez* decision represents an explicit waiver of the tribe's immunity where a violation is alleged under the [ICRA]. This court rejects that argument and holds that a waiver of the tribe's immunity must be unequivocally expressed.")

179. Gover & Laurence, *supra* note 106, at 504. *See also* Pommersheim & Pechota, *supra* note 84, at 565 (Supreme Court's statement regarding tribal forums "pushes the camel through the eye of the needle . . . . The Court does not say and it seems clear that it did not consider the implications of what it was saying.").

180. *Contra* Hansen, *supra* note 55, at 329; Taylor, *supra* note 106, at 254-55.

181. Dupree v. Cheyenne River Hous. Auth., 16 Indian L. Rep. 6106, 6106 (Cheyenne River Sioux Ct. App. 1988) (employment).

182. Oglala Sioux Tribal Personnel Bd. v. Red Shirt, 16 Indian L. Rep. 6052 (Oglala Sioux Tribal Ct. App. 1983) (employment).

183. Davis v. Keplin, 18 Indian L. Rep. 6148 (Turtle Mountain Tribal Ct. 1991); Turtle Mountain Band of Chippewa Indians v. Parisien, 1 Tribal Ct. Rep. A-95 (Turtle Mountain Ct. App. 1979) (employment).

184. Stone v. Somday, 10 Indian L. Rep. 6039 (Colville Tribal Ct. 1983). In this employment suit against a tribal official, the court held that the ICRA, as interpreted by *Santa Clara Pueblo*, "does not affect the plain language of the tribe's sovereign immunity as a matter of tribal law." *Id.* at 6041.

Fort Belknap Community,[186] Navajo,[187] Southern Ute Tribe,[188] Shoshone-Bannock Tribes,[189] Pawnee,[190] Puyallup,[191] Sac and Fox,[192] Sisseton-Wahpeton Sioux,[193] and Standing Rock Sioux.[194]

VI. ICRA RIGHTS OF DUE PROCESS AND EQUAL PROTECTION IN TRIBAL EMPLOYMENT

Pertinent to tribal employment issues is the ICRA's requirement that an Indian tribe, "in exercising powers of self-government" accord due process and equal protection rights to "any person within its jurisdiction."[195] It should be noted, however, that the ICRA is not the exclusive source of such rights and obligations. Many tribal constitutions[196] contain bills of rights[197] and, as indicated in the preced-

185. Smith v. Confederated Tribes of the Warm Springs Reservation, 17 Indian L. Rep. 6055 (Warm Springs Tribal Ct. 1990) (employment).

186. Garman v. Fort Belknap Community Council, 11 Indian L. Rep. 6017 (Ft. Belknap Tribal Ct. 1984).

187. TBI Contractors, Inc. v. Navajo Tribe, 16 Indian L. Rep. 6017, 6018 (Navaho Sup. Ct. 1988) (breach of contract) (ICRA does not waive sovereign immunity under the "federal laws or regulations exception" to the Navajo Sovereign Immunity Act); Nez v. Bradley, 3 Navajo Reptr. 126 (Ct. App. 1982) (employment).

188. Pinnecoose v. Bd. Comm'rs of the S. Ute Pub. Hous. Auth., 19 Indian L. Rep. 6072 (S.W. Intertribal Ct. App. 1992) (employment).

189. Gonzales v. Allen, 17 Indian L. Rep. 6121 (Shoshone-Bannock Tribal Ct. 1990). In rejecting plaintiff's wrongful termination claim for back pay, the court reasoned that:

> [t]he vast majority of both federal and tribal court cases have held that . . . tribes *may* waive sovereign immunity in tribal courts without congressional approval, but have not held that Congress waived the immunity on behalf of the tribes [in the ICRA]. . . . Clearly the tribal council could waive sovereign immunity in this case, but they haven't.

Id. at 6122 (emphasis in original).

190. Pawnee Tribe of Okla. v. Franseen, 19 Indian L. Rep. 6006 (Ct. Indian App. Pawnee 1991) (breach of contract).

191. Satiacum v. Sterud, 10 Indian L. Rep. 6013, 6015 (Puyallup Tribal Ct. 1982) (election).

192. Grant v. Grievance Comm. of the Sac and Fox Tribe of Indians of Okla., 2 Tribal Ct. Rep. A-39 (1981) (employment).

193. Bd. of Trustees of the Sisseton-Wahpeton Community College v. Wynde, 18 Indian L. Rep. 6033 (employment) (distinguishing Miller v. Adams, 10 Indian L. Rep. 6034 (Intertribal Ct. App. 1982)).

194. Defender v. Bear King, 17 Indian L. Rep. 6078, 6079 (Standing Rock Sioux Tribal Ct. 1989) (dictum) (employment).

195. 25 U.S.C. § 1302(8) (1992 Supp.).

196. The origins of tribal constitutions are discussed in Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393 (1991-92). Many tribal constitutions originated under § 16 of the Indian Reorganization Act, 25 U.S.C. § 476 (1988), which provided that a tribe could "organize for its common welfare, and may adopt an appropriate constitution and bylaws," to be ratified by tribal election and approved by the Secretary of the Interior. Tribes adopting § 16 constitutions merely accepted the boilerplate language of the Secretary's model. Pommersheim, *supra*, at 395. The model did not contain bills of rights or separation of powers provisions (including provisions for an independent judiciary), however. Nevertheless, a number of tribes did amend their constitutions to add bills of rights prior to the enactment of the ICRA. *Id.* at 397. For examples of modern tribal constitution-making, see CLINTON ET AL., *supra* note 32, at 378-79.

In Thorstenson v. Cudmore, 18 Indian L. Rep. 6051 (Cheyenne River Sioux Ct. App. 1991), a breach of contract and fraud suit against a tribal member by non-Indians, the Cheyenne River Sioux Court of Appeals discussed the inconsistency between the jurisdiction provision of the tribe's § 16 constitution and the tribe's traditional notions of due

ing section, a number of tribes have codified civil rights laws that grant tribal members due process and equal protection rights.[198]

"Due process" and "equal protection" are not foreign to Indian tribes as these concepts preexisted exposure to Anglo-American law. The Ponca Court of Indian Appeals explained that notions of due process, in the context of tribal law, necessarily arise from traditions, customs and development of law within the tribe itself:

> When analyzing due process claims, it is important to note that the Indian nations have formulated their own notions of due process and equal protection in compliance with both aboriginal and modern tribal law. Indian tribes, whose legal traditions are rooted in more informal traditions and customs, are markedly different from English common law countries, upon which the United States' notions of due process are founded . . . . When entering the arena of due process in the context of an Indian tribe, courts should not simply rely upon ideas of due

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process. The constitution extended jurisdiction in tribal courts over disputes between Indians and non-Indians only upon stipulation by both parties. *Id.* at 6052. The court first considered the historical context of § 16 constitutions, observing:

> The conventional wisdom about constitutions, at least in the American context, is that they reflect the will of the people and that they were adopted by the democratic choice of the people or their elected representatives pursuant to wide-ranging public discussion. Whatever the general truth of this proposition in national and state history, it has little historical validity in the American Indian tribal context, particularly for those tribes who adopted constitutions and bylaws pursuant to the authorization set forth in the Indian Reorganization Act. . . . It is well established that these IRA constitutions were prepared in advance by the Bureau of Indian Affairs—almost in boilerplate fashion without any meaningful input or discussion at the local tribal level. Therefore it is clear that this "oddity" in Cheyenne River Sioux Tribal law—which has no comparable analogue in the United States or any state constitution—does *not* have its roots in any considered decision of the Cheyenne River Sioux people, but rather in some gross BIA oversight or self-imposed (legal) concern to tread cautiously when potential non-Indian interests were involved. Neither of these concerns were authorized by federal statute and ought *not* be given the force or respect of law.

Id. at 6053 (emphasis in original). The court then discussed public policy and legal concerns with jurisdiction by stipulation and concluded that the constitutional provision was not only "extremely hazardous to the jurisdictional health and integrity of the Cheyenne River Sioux Tribe," but "contravenes fundamental Lakota cultural notions of fair play that allow people the opportunity to be heard, which includes the right to have 'their day in court'." *Id.* at 6054.

197. Tribal constitutions containing bills of rights that include due process and equal protection provisions include: CONST. AND BY-LAWS OF THE CHIPPEWA-CREE TRIBE OF THE ROCKY BOY RESERVATION art. XI; CONST. AND BY-LAWS OF THE COLO. INDIAN RIVER TRIBES OF THE COLO. INDIAN RESERVATION OF ARIZ. AND CAL. art. III, § 3; DEL. CONST. art. III; CONST. OF THE HOH TRIBE art. IX; REVISED CONST. OF THE JICARILLA APACHE TRIBE art. IV; THE KIOWA INDIAN TRIBE OF OKLA. CONST. AND BY-LAWS art. VIII; CONST. FOR THE PUEBLO OF ISLETA, N.M. art. III; CONST. OF THE STANDING ROCK SIOUX TRIBE art. XI. Some tribes' constitutions incorporate ICRA rights by reference. *E.g.*, CONST. AND BY-LAWS OF THE FORT MOJAVE INDIAN TRIBE art. V; LUMMI CODE OF LAWS art. VIII.

198. *See supra* text accompanying notes 144-50. For example, the Navajo Nation Bill of Rights provides as follows:

> Life, liberty and the pursuit of happiness are recognized as fundamental individual rights of all human beings. Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex nor shall any person within its jurisdiction be denied equal protection in accordance with the laws of the Navajo Nation, nor be deprived of life, liberty or property, without due process of law.

Navajo Tribal Code tit. 1, Sec. 3 (1988).

> process rooted in the Anglo-American system and then attempt to apply these concepts to tribal governments as if they were states or the federal government . . . . One should tread lightly when analyzing the scope and nature of tribal sovereignty and not make assumptions based upon a history and legal tradition that might be entirely foreign to an Indian nation.[199]

Indeed, United States courts recognize that it is inappropriate to ascribe the same meaning to "due process" and "equal protection" as applied to actions of Indian tribes as when applied to actions of entities covered by the federal or state constitutions.[200]

Tribal courts have articulated the meaning of due process in their traditional laws. For example, the Supreme Court of the Oglala Sioux Tribe, in holding that persons are entitled to a hearing before being removed from the Pine Ridge reservation, pointed out that the tribe need not be told by the United States "when to give due process":

> Due process is a concept that has always been with us. Although it is a legal phrase and has legal meaning, due process means nothing more than being fair and honest in our dealings with each other. We are allowed to disagree . . . . What must be remembered is that we must allow the other side the opportunity to be heard.[201]

The Citizen Band Potawatomi Supreme Court articulated a similar definition of due process under its tribal law in a case involving removal of an elected official from office: "The concept of due process entails fair treatment under the law, a right to notice and some opportunity to be heard."[202]

While there is no absolute "right" to tribal employment, tribes create rights to employment by implementing procedures governing terms of employment, including procedures for promotions or dismissals. Such procedures create "property" interests subject to due process.[203] For example, the Cherokee Nation of Oklahoma grants such property rights in employment in its constitution, which provides that anyone employed by the Nation for one year or more may not be removed from employment "except for cause" and is entitled to a hearing on such removal.[204] Other tribes have instituted personnel policies and proce-

199. Ponca Tribal Election Bd. v. Snake, 17 Indian L. Rep. 6085, 6088 (Ct. Indian App., Ponca 1988).

200. *See, e.g.*, Smith v. Confederated Tribes of the Warm Springs Reservation of Or., 783 F.2d 1409 (9th Cir.), *cert. denied*, 479 U.S. 964 (1986); Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976); *see also* Taylor, *supra* note 106, at 256 and cases cited therein.

201. Thorstenson v. Cudmore, 18 Indian L. Rep. 6051, 6054 (Cheyenne River Sioux Ct. App. 1991), *discussed in* Pommersheim, *supra* note 39, at 456.

202. Kinslow v. Business Comm. of the Citizen Band Potawatomi Indian Tribe of Okla., 15 Indian L. Rep. 6007, 6009 (Citizen Band Potawatomi Sup. Ct. 1988).

203. *See, e.g.*, Davis v. Keplin, 18 Indian L. Rep. 6148, 6151 (Turtle Mountain Tribal Ct. 1991); Executive Comm. of the Wichita Tribe v. Bell, 18 Indian L. Rep. 6041, 6042 (Ct. Indian App., Wichita 1990). These interpretations of due process under tribal law are consistent with the United States Supreme Court's interpretation of due process under the United States Constitution in Bd. of Regents v. Roth, 408 U.S. 564 (1972) and subsequent cases.

204. CONST. OF THE CHEROKEE NATION OF OKLA. art. XII (1986).

dures in tribal codes or personnel manuals that state appropriate standards to which employees will be held, define behavior that will warrant discipline and set out a procedure under which employees can grieve adverse decisions.[205]

No tribal court cases have dealt directly with equal protection issues in employment cases. Indian tribes may grant preferences in employment to tribal members,[206] and many have enacted tribal employment rights ordinances asserting the right to prefer tribal members in tribal employment.[207] But as to employment of tribal members, many tribes have incorporated equal protection into their constitutions and tribal codes.[208] One tribe has characterized its equal protection obligation to its members as follows:

> The Oglala Sioux Tribe is not bound by the Civil Rights Act of 1964, but is bound by the Indian Civil Rights Act of 1968. We exclude non-members of the Tribe, but we cannot discriminate among or between our Tribal members. No person in the service of the Oglala Sioux Tribe or person seeking admission into the service shall be appointed, promoted, demoted, removed, or in any way discriminated against because of his race, creed, color, sex or because of his political or religious opinions or affiliations.[209]

However, ICRA due process and equal protection rights in employment may not be enforceable against a tribe that raises the sovereign immunity defense to the ICRA claim.

VII. TREATMENT OF THE SOVEREIGN IMMUNITY DEFENSE IN TRIBAL EMPLOYMENT CASES

As discussed earlier, in most of the employment suits brought against tribes under the ICRA, tribal courts sustained the tribes' immunity defense.[210] Recent tribal court cases illustrate the dilemma faced by tribal employees who allege violations of employment policies by the tribe or its agencies and are confronted by the defense of sovereign immunity. In *Executive Comm. of the Wichita Tribe v. Bell*,[211] the plaintiff sued

205. *See, e.g.*, JICARILLA APACHE TRIB. CODE tit. 19, §§ 5-6 (1987); NAVAJO TRIB. CODE tit. 2, app. (1977); CONST. AND BY-LAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION OF SOUTH DAKOTA art. XIV-XVI (no date).

206. *See generally* Anderson, *supra* note 5, at 742-52. In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court upheld the extension of hiring preferences to Indians in the Bureau of Indian Affairs under Title VII and the Fifth Amendment Equal Protection Clause. The Court held that Indian preferences did not constitute racial discrimination; rather, such preferences were based on political affiliation. It cited the goals of the preferences to include "giv[ing] Indians a greater participation in their own self-government" and "reduc[ing] the negative effect of having non-Indians administer matters that affect Indian tribal life." *Id.* at 541-42.

207. *See, e.g.*, Res. No. 86-21 of the Lummi Indian Business Council (Feb. 4, 1986); NAVAJO TRIB. CODE tit. 15, ch. 7 (1984-85).

208. *See supra* text accompanying notes 197-98.

209. CONST. AND BY-LAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION OF SOUTH DAKOTA art. XVII, § 81.

210. *See supra* text accompanying notes 180-94.

211. 18 Indian L. Rep. 6041 (Ct. Ind. App., Wichita 1990).

the tribal executive committee for terminating her employment in violation of the tribe's personnel policy. Although the reported decision does not mention the ICRA, the court found that the personnel policy granted "substantive rights" to the plaintiff.[212] Nevertheless, because the policy contained no explicit waiver of immunity, the court dismissed the suit, stating that without such a waiver "remedies may be unavailable for violations which are properly proven and shown."[213]

The existence of an incomplete remedy for a due process violation was similarly found in *Guardipee v. Confederated Tribes of the Grand Ronde Community of Oregon*.[214] There, a personnel policy that granted employees the right to appeal their discharges to the tribal court was held not to have waived the tribe's immunity from suit for back wages even when the employee was found to have been denied due process and had been reinstated.[215] The court stated that, even though "[a]ppellant will undoubtedly assert that the effect of this decision is to deprive him of an effective remedy to address his improper discharge," it was "not persuaded that the lack of certain enforcement remedies against the tribe, such as an award of money damages, can override the tribe's sovereign immunity from suit."[216]

The plaintiff in a wrongful termination suit under the ICRA was likewise denied a remedy in *Pinnecoose v. Board of Commissioners of the Southern Ute Public Housing Authority.*,[217] in which a tribal housing authority was held to be immune from a wrongful termination suit. The plaintiff alleged violation of due process and equal protection rights in the agency's failure to follow its written grievance procedure when terminating her employment.[218] Even though the tribal ordinance establishing the agency contained a "sue and be sued clause," the court held that the grievance procedure did not constitute a contract between the plaintiff and the agency that waived the agency's immunity from suit.[219] The court concluded its opinion with the following observation:

> It is totally unfortunate that litigants such as the appellant are met with what seems to be an insurmountable obstacle as that of 'tribal sovereign immunity.' However, the doctrine of tribal sovereign immunity has long been recognized and upheld by tribal, state and the federal court systems. If, however, there is a feeling by any party involved that any inequities exist as a result of this ruling, then the best place to resolve the issue is with the legislative body of the tribe.[220]

Indeed, tribal members can take up the issue of tribal immunity

212. *Id.* at 6042. The case does not quote the language of the personnel policy on which plaintiff relied.
213. *Id.*
214. 19 Indian L. Rep. 6111 (Grand Ronde Tribal Ct. 1992).
215. *Id.*
216. *Id.* at 6112.
217. 19 Indian L. Rep. 6072 (S.W. Intertribal Ct. App. 1992).
218. *Id.*
219. *Id.*
220. *Id.*

from ICRA actions through the tribal legislative process. This would avoid the risk, as some have predicted, that it will be taken up for them by the United States Congress, which continually threatens to further diminish tribal powers by eliminating the sovereign immunity defense and providing federal review of tribal court decisions.[221]

VIII. CONGRESSIONAL ATTEMPTS TO ENSURE ICRA ENFORCEMENT

In 1988 and 1989, Senator Orrin Hatch introduced bills to amend the ICRA to provide for review of tribal court decisions in federal courts.[222] The 1989 version would have reversed *Santa Clara Pueblo* by granting jurisdiction to federal district courts over ICRA claims for declaratory and equitable relief once the claimant[223] has exhausted "timely and reasonable" tribal court remedies.[224] The bill would have expressly waived tribal sovereign immunity for such claims.[225] It further would have directed the federal court to adopt the tribal court's findings, if made, unless the federal court determined that the tribal court: 1) was not "fully independent" from the tribal legislative or executive body; 2) acted without authorization; 3) allowed the tribe or its official to assert the sovereign immunity defense on claims for equitable relief; 4) did not resolve the factual dispute, or "adequately develop material facts"; 5) made findings not "fairly supported by the record" or 6) "failed to provide a full, fair, and adequate hearing."[226] If any of these determinations were made, the federal court would conduct a *de novo* trial.[227] In making such findings on issues of tribal law, the federal court was to "accord due deference" to the tribal court's interpretation "of tribal laws and customs."[228]

Senator Hatch's motivation for proposing these bills was "to check the tribal court power and to protect against civil rights abuses, especially when non-Indians were involved."[229] He apparently believed that tribal courts were little more than extensions of tribal councils, which, in his opinion, could not adjudicate fairly. He quoted extensively and approvingly from a federal court opinion describing the Crow Tribal Court as " 'a sort of "kangaroo court" [that] has made no pretense of due process or judicial integrity.' "[230] The concern of Hatch and other critics of

221. *See, e.g.*, Pommersheim & Pechota, *supra* note 84, at 576; Ziontz, *supra* note 125, at 26; C. L. Stetson, Note, *Tribal Sovereignty:* Santa Clara Pueblo v. Martinez: *Tribal Sovereignty 146 Years Later*, 8 AM. IND. L. REV. 139 (1980).

222. S. 517, 101st Cong., 1st Sess. (1989), and S. 2747, 100th Cong., 2nd Sess. (1988), respectively.

223. The claimant could be either an individual or "the Attorney General on behalf of the United States." S. 517 § 204(b).

224. S. 517 § 204(a)-(b).

225. *Id.*

226. S. 517 § 204(c).

227. *Id.*

228. S. 517 § 204(d).

229. Resnick, *supra* note 43, at 739 (citing 134 CONG. REC. S11654 (August 11, 1988)); Little Horn State Bank v. Crow Tribal Court, 690 F. Supp. 919, 923 (D. Mont. 1988), *vacated*, 708 F. Supp. 1561 (D. Mont. 1989).

230. Resnick, *supra* note 43, at 740. Professor Resnick describes Senator Hatch's ex-

tribal courts is that those tribal courts do not operate in the same manner as the federal and state courts of the United States. Hatch's bills would have required the tribes' judicial process to "mirror" the federal one in order to gain validity.[231]

Although the Hatch bill has died,[232] a bill sponsored in the 102nd Congress by Senators Daniel Inouye and John McCain recognized the problem of enforcement of ICRA rights but addresses it through federal assistance to enhance tribal courts.[233] The Indian Tribal Court Act would assist tribes in developing and strengthening their judicial systems.[234] The bill's "Federal policy" statements reflect a view of tribal governments and their court systems as independent of and equal to their federal and state counterparts.[235] It expressly recognizes "tribal sovereignty and tribal court authority" and the need to "avoid[ ] encroaching on tribal traditions that may be manifested in tribal justice systems."[236] The bill also states that the act is not to be construed to "encroach upon or diminish in any way the inherent sovereign authority of tribal governments to enact and enforce tribal laws" nor to "imply that a tribal court is an instrumentality of the United States."[237]

Nevertheless, as stated in its declarations and findings, a primary

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tensive reference to *Little Horn State Bank*. That case involved a suit by the bank to obtain collateral (a forklift) from a defaulting Indian debtor.

231. *Id.* at 741.

232. The press for federal court review of tribal court decisions is by no means dead. Professor Newton reports that during the Congressional debates over the correction of *Duro v. Reina*, discussed *supra*, note 58, Senator Slade Gorton resisted, arguing that *Duro* was based on constitutional principles and could not be overruled. Senator Gorton also pressed "his belief that tribal court judgments should be reviewable in federal courts." Newton, *supra* note 58, at 115. In order to avoid a filibuster on the *Duro* legislation, the conference committee promised Senator Gorton it would hold hearings on federal review of tribal court decisions. *Id.* at 116. Those hearings were held on November 20, 1991. *Id.* (citing *Federal Court Review of Tribal Court Rulings in Actions Arising Under the ICRA and Draft Bill to Grant Jurisdiction to Federal Courts to Hear Final Actions from Indian Tribal Courts, Before the Select Comm. for Indian Affairs*, 102d Cong., 1st Sess. 14 (1991)).

233. The Indian Tribal Court Act, S. 1752, 102nd Cong., 2nd Sess. (1991).

234. These efforts are lauded by the United States Civil Rights Commission. U.S. CIVIL RIGHTS COMM'N, *supra* note 63, at 72.

235. *Id.*

236. Indian Tribal Court Act, § 3. The bill's "Purposes" section states the following:

> (1) The Federal Government shall assist tribal governments by strengthening tribal court systems and by promoting the recognition of tribal sovereignty and tribal court authority.
>
> (2) The Federal Government shall fund tribal courts at a level equivalent to State courts of general jurisdiction performing similar functions in the same or comparable geographic region.
>
> (3) Federal funding to tribal courts shall be administered in a manner that encourages flexibility and innovation by tribal justice systems and avoids encroaching on tribal traditions that may be manifested in tribal justice systems.
>
> (4) Federal funding shall be available to provide support to intertribal appellate court systems.
>
> (5) The United States shall provide funding for tribal justice systems in a manner that will minimize Federal and administrative costs.
>
> (6) As a matter of comity, full faith and credit shall be extended to the public acts, records, and proceedings of tribal courts, and tribal courts shall extend full faith and credit to the public acts, records, and proceedings of Federal and State courts.

Indian Tribal Court Act § 3.

237. Indian Tribal Court Act § 5.

motivation behind the bill is to enable individuals to vindicate ICRA rights.[238] To that end, the bill specifies that funds may be used:

> [T]o support studies of court rules and procedures, discovery devices, and evidentiary standards, to identify problems with the operation of such rules, procedures, devices, and standards, *to devise alternative approaches to better reconcile the requirements of due process under title II of . . . the Indian Civil Rights Act of 1968 . . . with the need for swift and certain justice*, and to test the utility of those alternative approaches.[239]

Implicit in this statement, of course, is that there are current deficiencies in tribal handling of ICRA claims, either through the tribal courts or administrative forums. Although the proposed bill does not address the use of the sovereign immunity defense directly, the above language implies that its sponsors intend tribal courts to assume jurisdiction over ICRA claims. This characterization of the bill's intent is not inconsistent with the bill's other references to tribal sovereignty. Tribal councils and courts that have not done so already must therefore face the question of whether they will continue to assert and uphold the sovereign immunity defense in ICRA actions.

IX. EMPLOYMENT PRACTICES THAT ARE COMPATIBLE WITH TRIBES' SELF-GOVERNANCE RIGHTS AND EMPLOYEES' ICRA RIGHTS

Economic development is fundamental to the ability of tribal nations to strengthen and maintain tribal sovereignty:

> Economic development in the Indian country has been a by-product of an Indian movement toward sovereignty, and sovereignty has meant being able to do what the Indian government decides to do and thus rendering the decisions of the federal courts, which had largely ignored the idea of Indian sovereignty as providing the Indians with any real political power, as close to irrelevant in the real world as possible.[240]

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238. The bill's "Declarations and Findings" section states:

> (1) The Federal Government has a government-to-government relationship with each federally recognized tribal government.
> (2) Tribal governments exercise powers of self-government, requiring the enactment of laws and the enforcement of such laws through tribal court forums.
> (3) The vindication of rights guaranteed by the Indian Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.), and other Acts of Congress, within tribal forums can only by [sic] guaranteed by the provision of adequate resources to carry out the purposes and intent of that Act.
> (4) Such resources are needed to update tribal legal codes, to support probation and detention needs, to assure a right to counsel, and to increase tribal court access to legal authorities through computerized and other means, to train tribal court and tribal governmental personnel on court procedures and on the requirements of the Indian Civil Rights Act of 1968, to increase salaries of tribal court justices and other court personnel, and to retain law clerks.

Indian Tribal Court Act § 2.

239. Indian Tribal Court Act § 204(c)(10) (emphasis added).

240. Mohawk, *supra* note 25, at 499. *See also* WHITE, *supra* note 16, at 275-76 ("Communities . . . which secure a foothold in a real economy, have greater potential for true sovereignty now than at any time since their encounter with European immigrants. When they succeed economically, tribes repossess some of their original power and become sovereign in reality, not only by decree or legal definition."); Donald Wharton, *Tribal Considerations in*

A stable and cohesive tribal workforce is, in turn, key to tribal economic development.[241] It is not in tribes' best economic interests as sovereigns to subject their employees to employment practices and policies that are perceived by employees as unfair or arbitrary. Employees who perceive they or others have been treated unfairly are not likely to participate productively in the workforce or, for that matter, in tribal government as a whole.[242] Unfair treatment of tribal employees will deter outsiders from dealing with the tribe, for fear they will be treated no better.[243]

The due process and equal protection provisions of the ICRA, as interpreted under tribal law and applied to tribal employment, demand no more than fair treatment of employees by tribal governments.[244] A starting point is to fashion personnel policies that clearly enunciate standards of performance and behavior required of employees and include a procedure by which employees can grieve adverse personnel actions that comports with tribal due process. In most cases, proper administration of such a procedure should satisfy tribal due process obligations.[245] The Shoshone-Bannock Tribal Court explained the advantages of using a grievance procedure to resolve employment disputes:

> There are a number of valid policy reasons why a grievance process is beneficial to the Fort Hall community. An effective administrative process should be able to resolve personnel disputes in a timely, inexpensive, and informal manner. The development of such expertise within the community would become a valuable asset in the future for the whole of the tribe.[246]

Fair treatment also requires a forum for complaints of equal protection violations and failure to properly administer the grievance procedures, as well as a remedy for rights that have been violated.[247] The Shoshone-Bannock Tribal Court also explained the role of tribal courts in reviewing employee grievances as being limited "to ensur[ing] that

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Preparing for Financial Borrowing for Economic and Business Development, 199 (1991) *in* AMERICAN INDIAN RESOURCES INSTITUTE, SELECTED READINGS ON RESERVATION ECONOMIES ("The cultural and political survival of America's first nations is increasingly dependent upon their ability to redevelop the economies long ago destroyed by the invading europeans.").

241. WHITE, *supra* note 16, at 77 ("The Mississippi band avoided these problems [of managing federal funds] with clear and consistent financial, personnel and election policies.").

242. Pommersheim & Pechota, *supra* note 84, at 577. ("Tribal members who know that they have a certain remedy if they are not treated within the law will be more apt to participate in and be less critical of their own tribal government.") *See also* Mohawk, *supra* note 25, at 501 (opportunistic behavior of tribal officials "can go a long way to discouraging Indians from investing their resources in their own businesses and has historically discouraged people from supporting the Indian governments.").

243. Mohawk, *supra* note 25, at 501; Pommersheim & Pechota, *supra* note 84, at 577; Wharton, *supra* note 240, at 201.

244. *See supra* text accompanying notes 98-105.

245. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 (1978) ("Non-judicial tribal institutions have also been recognized as competent law-applying bodies.").

246. Gonzalez v. Allen, 16 Indian L. Rep. 6048, 6050 (Shoshone-Bannock Tribal Ct. 1989).

247. *Id.*

the process was fairly conducted and that the reviewing board had sufficient evidence to support its decision."[248] In order to assure forums and remedies for such claims, however, tribes must waive sovereign immunity in tribal courts. As discussed previously,[249] tribes may tailor waivers of immunity to specific contexts and specific forums; accordingly, tribes can waive immunity narrowly in their courts to accommodate ICRA employment disputes.[250]

There are a number of safeguards tribes can employ to assure that such disputes do not overburden them. First, they can require, as a condition of employment, that all employees submit to tribal procedures and forums for the resolution of employment disputes. Some tribal codes contain a consent to jurisdiction clause that is triggered by employment with the tribe.[251] Such a condition to the employment contract would obviate the situation that arose in *Dry Creek Lodge*, where, because of a lack of a tribal forum, the Tenth Circuit allowed non-Indians to sue the tribe in federal court.[252] Thus, tribes would be assured of retaining jurisdiction over employment claims against their governments regardless of whether the employee is a tribal member. Second, tribes can require that employees exhaust administrative remedies through grievance procedures as a prerequisite to suit in tribal court. Again, a number of tribal codes currently require exhaustion as a prerequisite to jurisdiction in their courts.[253] Third, tribes could limit the remedy available for ICRA violations; in the employment context, such remedies could be limited to "make-whole" relief in the form declaratory judgments, injunctions and back pay for a limited period.[254] The Cheyenne River Sioux Court of Appeals suggested, in a wrongful termination case brought under the ICRA, that even though tribes are bound by the ICRA, tribal councils would not be prevented from devising "modest" remedies "that do not threaten to bankrupt or grind tribal government to a halt."[255] Finally, the proposed Indian Tribal Courts Act would allow tribes to satisfy ICRA obligations through use of alter-

248. *Id.*

249. *See supra* text accompanying notes 127-61.

250. *See* Ziontz, *supra* note 125, at 26, for a discussion of use of limited waivers to meet the ICRA obligations.

251. *See, e.g.*, STATUTES OF THE NON-REMOVABLE MILLE LACS BAND OF CHIPPEWA INDIANS ch.3, preamble, § 3; CONST. AND BYLAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION ch. 1, § 1.1(a).

252. Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980).

253. *See, e.g.*, CONST. AND BYLAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION ch. 2, § 20.1(a).

254. Prior to the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C.A. § 1981 (West Supp. 1992)), relief in federal employment discrimination cases under Title VII was limited to declaratory, injunctive and limited back pay relief.

255. Dupree v. Cheyenne River Hous. Auth., 16 Indian L. Rep. 6106, 6108-09 (Cheyenne River Sioux Ct. App. 1988). *See also* Pommersheim & Pechota, *supra* note 84, at 578 ("there might be a very modest ceiling on money judgments and cautious injunctive guidelines which limit the ability to interfere with important governmental functions"); Pommersheim, *supra* note 8, at 66.

native dispute resolution.[256] Such techniques may be more compatible than litigation considering tribes' traditional methods of handling disputes.[257] Alternative dispute resolution would be particularly appropriate for handling employment disputes that occur during an on-going employment relationship and that do not involve discharges.[258]

Accommodation by tribal nations of their employees' due process and equal protection rights in employment will gain them much more than it will cost in terms of sovereignty. For the price of developing fair personnel policies and procedures and opening their courts to ensure ICRA rights, tribes will strengthen their sovereign rights in two important ways. First, they will have taken an affirmative step to prevent further congressional erosion of sovereignty through oversight of ICRA matters, and, second, they will have gained a more committed and loyal workforce that will provide a solid foundation for tribal government and commerce. Tribal nations with strong governments and economies will be best able to protect their sovereignty.

256. S. 1752, 102nd Cong., 1st Sess. § 204(c)(3), (13) (1991).

257. *See, e.g.*, Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989); James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983).

258. Alternative dispute resolution has been used successfully in handling employment disputes in United States government and industry. *See, e.g.*, ALAN F. WESTIN & ALFRED G. FELIU, RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION (1988).

HUDSON V. MCMILLIAN: CRUEL AND UNUSUAL PUNISHMENT TAKES ONE STEP FORWARD, TWO STEPS BACK

I. INTRODUCTION

From 1960 to 1989, the prison population in federal and state institutions grew from almost 213,000 to over 675,000 inmates.[1] Along with the growth in numbers, this time period saw significant changes in Eighth Amendment jurisprudence which affected the ability of these prisoners to file claims alleging Eighth Amendment violations.[2] Historically, the Supreme Court took the view that the Eighth Amendment applied only in the context of reviewing the sentencing of prisoners, not the treatment they received after incarceration.[3] Beginning in 1976 with *Estelle v. Gamble*,[4] the Court applied the Eighth Amendment to claims arising from treatment received by incarcerated prisoners.[5] Since *Estelle*, prisoners have directed Eighth Amendment claims at three specific areas—medical needs, prison conditions and excessive physical force. Prior to *Estelle*, no express intent to inflict pain was required for the Eighth Amendment to be violated.[6] More recently, the Court developed a two prong test in determining whether a prisoner's Eighth Amendment rights have been violated which requires both an objective and subjective analysis. The objective analysis asks whether officials inflicted sufficient harm, and the subjective analysis asks whether officials acted with a sufficiently culpable mind.[7]

In 1990, the Fifth Circuit Court of Appeals determined that serious injury was necessary to satisfy the objective component in any claim by a prisoner alleging excessive force.[8] In *Hudson v. McMillian*,[9] the Supreme Court addressed the issue of whether the use of excessive physical force against a prisoner constitutes cruel and unusual punishment under the Eighth Amendment when the prisoner does not suffer serious physical injury.[10] *Hudson* defines the standard for all Eighth Amendment claims of excessive physical force.[11] The Court held that serious injury is not required to satisfy the objective component of the

1. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1991, at 193 (111th ed. 1991).

2. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

3. *See* Hudson v. McMillian, 112 S. Ct. 995, 1005 (1992) (Thomas, J., dissenting).

4. 429 U.S. 97 (1976).

5. *Hudson*, 112 S. Ct. at 1006 (Thomas, J., dissenting); Wilson v. Seiter, 111 S. Ct. 2321, 2323 (1991).

6. *See* Whitley v. Albers, 475 U.S. 312, 319, 328-29 (1986).

7. *See Wilson*, 111 S. Ct. at 2324.

8. Huguet v. Barnett, 900 F.2d 838, 841 (5th Cir. 1990).

9. 112 S. Ct. 995 (1992).

10. *Id.* at 997.

11. *Id.*

Eighth Amendment analysis.[12] The Court further held the subjective component requires a determination that prison officials acted maliciously and sadistically rather than in a good faith effort to control the prisoner.[13] This Comment examines the precedent created by *Hudson* and its likely future impact against the background of Eighth Amendment analysis and the evolution of the subjective element. In conclusion, this comment specifically and critically analyzes the heightened subjective standard established by the Court.

II. BACKGROUND

The drafters of the Eighth Amendment penned its words with the intent to outlaw torture and other cruel punishments.[14] In *Trop v. Dulles*,[15] the Court stated that the basic concept underlying the Eighth Amendment is the dignity of man.[16] The Court in *Trop* said that the words of the amendment are imprecise and their scope not static; that instead the words must draw their meaning "from the evolving standards of decency that mark the progress of a maturing society."[17] In *Gregg v. Georgia*,[18] the Court further directed that measuring punishments against the standard of public decency is not the end of an inquiry into Eighth Amendment claims; the punishment also cannot be excessive.[19] The *Gregg* Court defined excessive punishment as that which involves the unnecessary and wanton infliction of pain or punishment grossly disproportionate to the severity of the crime.[20]

In *Estelle v. Gamble*[21] the Court first addressed the question of

12. *Id.* at 999.

13. *Id.*

14. Estelle v. Gamble, 429 U.S. 97, 102 (1976). For further background on the Eighth Amendment, see Gregg v. Georgia, 428 U.S. 153, 171 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.); Furman v. Georgia, 408 U.S. 238, 316-22 (1972); Trop v. Dulles, 356 U.S. 86, 99-103 (1958); Weems v. United States, 217 U.S. 349, 368-80 (1910); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969) (detailed analysis of the development of the Eighth Amendment); Ira P. Robbins, *Federalism, State Prison Reform, and Evolving Standards of Human Decency On Guessing, Stressing, and Redressing Constitutional Rights*, 26 KAN. L. REV. 551, 552-55 (1978) (historical perspective of the Eighth Amendment); Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972) (examining treatment of the amendment by the United States Supreme Court and the rationale for limiting punishments); Note, *Constitutional Law—The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 637 (1966) (historical perspective of cruel methods of punishment and cruelly excessive punishments); Andre Sansoucy, Note, *Applying The Eighth Amendment To The Use Of Force Against Prison Inmates*, 60 B.U. L. REV. 332, 332-35 (1980) (development of Eighth Amendment jurisprudence); Recent Case, *Constitutional Law—Cruel and Unusual Punishment Provision of Eighth Amendment as Restriction Upon State Action Through the Due Process Clause*, 34 MINN. L. REV. 134, 135-37 (1949) (development of the amendment in American history); Recent Development, *Constitutional Law—Cruel and Unusual Punishments—Eighth Amendment Prohibits Excessively Long Sentences*, 44 FORDHAM L. REV. 637, 638 (1975) (historical perspective of the Eighth Amendment).

15. 356 U.S. 86 (1958).

16. *Id.* at 100 (plurality opinion).

17. *Id.* at 100-01.

18. 428 U.S. 153 (1976).

19. *Id.* at 173.

20. *Id.*

21. 429 U.S. 97 (1976).

whether the Eighth Amendment applied to prisoners' claims when the punishment was not part of the sentence.[22] The prisoner in *Estelle* brought a § 1983[23] action claiming that prison officials violated his Eighth Amendment rights by refusing him proper medical care.[24] The *Estelle* Court stated that punishments "incompatible with the evolving standards of decency that mark the progress of a maturing society" and punishments involving "the unnecessary and wanton infliction of pain" are repugnant to the Eighth Amendment.[25] In *Estelle*, the Court not only questioned whether prison officials inflicted pain (the objective test), it also questioned the mind set of the persons inflicting the pain, thus introducing a subjective test.[26] *Estelle* stands for the proposition that the deliberate indifference to the serious medical needs of prisoners is incompatible with the standards of decency in society and constitutes the unnecessary and wanton infliction of pain, thus violating the Eighth Amendment.[27] Further, the Court in *Estelle* held that the negligent in-

22. *See* Hudson v. McMillian, 112 S. Ct. 995, 1006 (1992) (Thomas, J., dissenting); Wilson v. Seiter, 111 S. Ct. 2321, 2323 (1991).

23. 42 U.S.C. § 1983 (1988) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Robinson v. California, 370 U.S. 660 (1962), made the Eighth Amendment applicable to the States through the Fourteenth Amendment. *Estelle*, 429 U.S. at 101-02. Cooper v. Pate, 378 U.S. 546 (1964), was the first time the Court recognized that a cause of action under 42 U.S.C. § 1983 could be brought against prison officials. The district court had dismissed the suit and Cooper appealed in forma pauperis. The Supreme Court reversed and recognized the cause of action as valid. *Cooper* was not an Eighth Amendment action, which is why *Estelle* is still the first case to address § 1983 actions in the Eighth Amendment context. A detailed discussion of the relationship between § 1983 actions and the Eighth Amendment is beyond the scope of this comment. For more information, see MARTIN A. SCHWARTZ AND JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES §§ 3.8-3.9 (2nd ed., vol. 1, Supp. 1992); Project, *Twenty-First Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1989 - 1990*, 80 GEO. L.J. 939, 1710 (1992); Note, *A Review of Prisoners' Rights Litigation Under 42 U.S.C. § 1983*, 11 U. RICH. L. REV. 803, 858-80 (1977).

24. *Estelle*, 429 U.S. at 98. The prisoner in *Estelle* claimed that he injured his back while working in the prison and received improper medical treatment. *Id.*

25. *Estelle*, 429 U.S. at 102-03 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958); Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

26. *Estelle*, 429 U.S. at 104.

27. *Id.* at 104. The Court ruled that the prisoner's complaint failed to state a claim against the treating physician and medical director. The Court remanded for a determination of whether other prison officials displayed deliberate indifference to Gamble's medical needs. *Id.* at 108. For more information on prison medical conditions, see Phil Gunby, *Health Care Reforms Still Needed in the Nation's Prisons*, 245 JAMA 211 (1981); Wendy Lynn Adams, Comment, *Inadequate Medical Treatment of State Prisoners: Cruel and Unusual Punishment?*, 27 AM. U. L. REV. 92 (1977) (addressing the federal courts interpretation of the Eighth Amendment and the standard applied to prisoner's claims of inadequate medical treatment); Michael Cameron Friedman, Note, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921 (1992) (examination of the standard applied to prisoner's claims under the Eighth Amendment); Robert Dvorchak, *Medicine Behind Bars: Quality Care Is Elusive, Despite Lawsuits; Hostile Public, Shortage of Good Doctors and Nurses Worsen Problem*, L.A. TIMES, June 18, 1989, at 2 (discussion of problems in providing adequate medical care in prisons); Elizabeth Levitan

fliction of unnecessary and wanton pain provided no cause of action unless the prisoner can prove that officials acted with deliberate indifference.[28] The subjective standard, that deliberate indifference constitutes the "unnecessary and wanton infliction of pain," was applied specifically in the context of medical needs.[29]

In *Hutto v. Finney*[30] the Court addressed the question of whether prison deprivation claims under § 1983 were valid as Eighth Amendment actions and declared confinement in prison a form of punishment subject to scrutiny under the amendment.[31] In *Hutto*, the prison conditions were so severe, the district court declared them cruel and unusual and characterized that particular prison as "a dark and evil world completely alien to the free world."[32] Because neither party disputed the district court's finding that the conditions constituted cruel and unusual punishment, the Court did not address whether the subjective test applied in the context of deprivation in prison.[33]

In *Rhodes v. Chapman*,[34] the Court held that placing pairs of prisoners in cells measuring sixty-three square feet was not cruel and unusual punishment.[35] The Court's analysis focused on the objective test of whether the deprivations were sufficiently serious to constitute the un-

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Spaid, *Advocates Urge Better Conditions for Women Inmates*, CHRISTIAN SCIENCE MONITOR, May 29, 1991, at 9.

28. *Estelle*, 429 U.S. at 105-06.

29. *Id.* at 104. *See also Hudson*, 112 S. Ct. at 1000. The introduction of the subjective element probably resulted because *Estelle* addressed for the first time whether the Eighth Amendment applied in the context of the treatment of a prisoner after sentencing. *Hudson*, 112 S. Ct. at 1006 (Thomas, J., dissenting); Wilson v. Seiter, 111 S. Ct. 2321, 2323 (1991).

30. 437 U.S. 678 (1978).

31. *Id.* at 685. For further discussion of prison condition claims, see James E. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights Of Protective Custody Inmates*, 56 U. CIN. L. REV. 91 (1987); Deborah A. Montick, Comment, *Challenging Cruel and Unusual Conditions of Prison Confinement: Refining the Totality of Conditions Approach*, 26 HOW. L.J. 227 (1983).

32. *Hutto*, 437 U.S. at 681. The prison housed convicts in hundred-man barracks. Armed convicts known as "creepers" crawled along the floor at night stalking their victims. Seventeen stabbings occurred in one 18-month period. Homosexual rape was so common that some prisoners spent the night clinging to the bars nearest one of the guard stations. Officials allowed prisoners in isolation only 1000 calories of food per day, although the National Academy of Sciences recommended daily allowance was 2700. Isolated prisoners' meals consisted primarily of 4-inch squares of "grue," a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs and seasoning into a paste and baking the mixture in a pan. Most of the guards were simply inmates who had been issued guns. It was "within the power of a trusty guard to murder another inmate with practical impunity," because trusties with weapons were authorized to use deadly force against escapees. One trustee fired his shotgun into a crowded barracks because the inmates would not turn off their TV. The main issues addressed by the Supreme Court were whether prisoners could be kept in isolation for more than 30 days and whether the State of Arkansas was responsible for the attorney's fees of the petitioners. *Id.* at 681-89. For more information on the duty to protect inmates from violence, see James E. Robertson, *Surviving Incarceration: Constitutional Protection from Inmate Violence*, 35 DRAKE L. REV. 101 (1985-1986); Catherine A. Greene, Comment, *Rape: The Unstated Sentence*, 15 PAC. L.J. 899 (1984).

33. *Hutto*, 437 U.S. at 685.

34. 452 U.S. 337 (1981).

35. *Id.* at 352.

necessary and wanton infliction of pain.[36] Although the conditions in *Rhodes* inflicted pain on the prisoners, the pain was not sufficient for an Eighth Amendment violation.[37] The Court declared that absent serious deprivation, restrictive and harsh conditions are often part of the penalty that criminal offenders pay for their offenses against society.[38] In both *Hutto* and *Rhodes*, the decisions were based on the "objective" analysis of whether the deprivations were serious enough to constitute cruel and unusual punishment,[39] and no consideration was given to whether the officials acted with a culpable state of mind.[40]

The subjective element of the *Estelle* decision was not lost, however, because the Court specifically addressed the subjective element in its next major Eighth Amendment case: *Whitley v. Albers*.[41] In *Whitley*, prisoners rioted and took a guard hostage.[42] While trying to free the guard, prison officials shot the plaintiff in the leg as he attempted to get back to his cell.[43] *Whitley* addressed the issue of what standard governs a prisoner's § 1983 claim that prison officials subjected him to cruel and unusual punishment by shooting him during the course of quelling a prison riot.[44] The *Whitley* Court reaffirmed that the unnecessary and wanton infliction of pain upon prisoners is a violation of the Eighth Amendment.[45] However, the Court went on to say that what is unnecessary and wanton must vary according to the context in which the Eighth Amendment violation is charged.[46] The context in *Whitley* was the use of physical force during an effort to quash a prison riot.[47] In *Estelle*, the context was the refusal of medical care.[48] Because of the contextual differences, the *Whitley* Court refused to apply the subjective standard of deliberate indifference established by the *Estelle* Court in determining

36. *Id.* at 347.

37. *Id.* at 348-49. For further discussion of prison overcrowding, see Debra Borenstein, *Double-Celling at Pontiac: Are Inmates Being Subjected to Cruel and Unusual Punishment Arising Out of Overcrowded Conditions?*, 60 CHI.-KENT L. REV. 291 (1984); Robert G. Leger, *Perception of Crowding, Racial Antagonism and Aggression in a Custodial Prison*, 16 J. CRIM. JUST. 167 (1988).

38. *Hutto*, 452 U.S. at 347.

39. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991).

40. *Id.*

41. 475 U.S. 312 (1986). For a more detailed analysis of *Whitley*, see Elizabeth A. Blackburn, Note, *Prisoners' Rights: Will They Remain Protected After Whitley?*, 16 STETSON L. REV. 385 (1986); Melissa Whish Coan, Comment, Whitely [sic] v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155 (1988); Robert A. West, Comment, *Constitutional Law: Quelling a Prison Riot: Cruel and Unusual Punishment or a Necessary Infliction of Pain?*, 26 WASHBURN L.J. 208 (1986).

42. *Whitley*, 475 U.S. at 314-15.

43. *Id.* at 316.

44. *Whitley*, 475 U.S. at 314. *See* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security Under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173 (1987).

45. *Whitley*, 475 U.S. at 319.

46. *Id.* at 320.

47. *Id.*

48. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

whether the infliction of pain was unnecessary and wanton.[49]

In its attempt to establish a standard to apply in the context of a prison riot, the *Whitley* Court looked to a Second Circuit Court of Appeals decision: *Johnson v. Glick*.[50] In *Johnson*, a prison guard at the Manhattan House of Detention for Men beat a prisoner being held on a felony charge.[51] The court of appeals addressed Johnson's excessive force claim under the due process clause of the Fourteenth Amendment rather than as an Eighth Amendment action.[52] The Second Circuit emphasized that constitutional protection is not as extensive as common law battery claims and that not every push or shove by a guard constitutes excessive force, even if it later seems unnecessary.[53] *Johnson* established a test for determining whether excessive force had been used that involved four factors: (1) the need for the application of force; (2) the relationship between the need and the amount of force used; (3) the extent of the injury inflicted; and (4) whether the force applied was in a good faith effort to maintain or restore discipline or done maliciously and sadistically for the very purpose of causing harm.[54]

The Supreme Court in *Whitley* adopted the fourth element of the Second Circuit's *Johnson* test[55] and held that determining whether officials inflicted unnecessary and wanton pain in the context of controlling a prison riot turns on whether they applied force in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[56] Because it found that the prison officials shot Whitley in a good faith effort to quell the prison riot, the Court held that the shooting did not meet the standard of malicious and sadistic behavior and therefore did not violate the Eighth Amendment under the new test.[57]

In establishing the higher subjective threshold, the Court recognized the pressures facing prison officials in an emergency situation.[58] The new subjective threshold in the context of a prison riot allowed the Court to ensure that prison officials would have wide-ranging boundaries in which to carry out their responsibilities.[59] The practical effect of

49. *Whitley*, 475 U.S. at 320.

50. 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). For further discussion of *Johnson*, see Andre Sansoucy, Note, *Applying the Eighth Amendment to the Use of Force Against Prison Inmates*, 60 B.U. L. REV. 332, 335-36 (1980).

51. *Johnson*, 481 F.2d at 1029.

52. *Id.* at 1031-32. There appear to be two reasons the *Johnson* court did not address the Eighth Amendment issue: 1) the court felt that the Eighth Amendment only applied to the deliberate infliction of punishment by judicial sentences or legislative acts, and 2) the beating of the prisoner took place before conviction and sentencing, and the court felt that the Eighth Amendment only applied to claims arising after sentencing and conviction. The court in *Johnson* found that the claim was valid because the prisoner had been denied due process as guaranteed by the Fourteenth Amendment. *Id.*

53. *Id.* at 1033.

54. *Id.*

55. *Whitley*, 475 U.S. at 320-21.

56. *Id.*

57. *Id.* at 326.

58. *Id.* at 320.

59. *Id.* at 321-22. Justice Marshall dissented and filed an opinion in which Justices

Whitley was to establish a subjective standard of "malicious and sadistic" infliction of pain as the test for claims of Eighth Amendment violations in the context of a prison riot. When adopting the fourth element of the *Johnson* test (that is, whether officials applied the force in a good faith effort to maintain or restore discipline), the *Whitley* Court suggested that the first three elements of the test *related* to the ultimate determination of the whether the force was malicious and sadistic.[60] However, the vast majority of lower federal courts began to use all four elements of the *Johnson* test to determine all excessive force claims, including Eighth Amendment claims.[61]

The next major case to address the Eighth Amendment rights of prisoners was *Wilson v. Seiter*.[62] *Wilson* was another case brought under section 1983 charging prison officials with cruel and unusual punishment because of deprivations in prison.[63] The prisoners in *Wilson* brought general complaints of overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate rest rooms and unsanitary dining facilities and food preparation.[64] The *Wilson* Court followed the precedents of *Hutto* and *Rhodes* and described the objective test as a determination of whether the deprivation was sufficiently serious to constitute the infliction of unnecessary and wanton pain.[65] However, *Wilson* went beyond the precedents of *Hutto* and *Rhodes*, firmly establishing the subjective test as a necessary part of an Eighth Amendment analysis when applied to prisoners' claims about the treatment they receive after incarceration.[66] In establishing the importance of the subjective test, the *Wilson* Court broadened *Estelle* and *Whitley* by holding that whether a case was one of conditions of confinement, supplying medical needs or of restoring official control over a prison riot, courts should inquire into the prison official's state of mind when it is claimed that the official inflicted cruel and unusual punishment.[67] The Court went on to state that if the inflicted pain is not formally administered as punishment ordered by a statute or sentencing judge, some mental element must be attributed to the inflicting officer before the punishment can qualify as cruel

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Brennan, Blackmun and Stevens joined because they felt the malicious and sadistic standard would make it too difficult for prisoners injured in riots to successfully bring Eighth Amendment actions. *Id.* at 328.

60. *Id.* at 321. *See also* Graham v. Connor, 490 U.S. 386, 398 n.11 (1989).

61. *See Graham*, 490 U.S. at 393.

62. 111 S. Ct. 2321 (1991). For a more detailed discussion of *Wilson*, see Arthur B. Berger, Note, Wilson v. Seiter: *An Unsatisfying Attempt at Resolving the Imbroglio of Eighth Amendment Prisoners' Rights Standards*, 1992 UTAH L. REV. 565; Russell W. Gray, Note, Wilson v. Seiter: *Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339 (1992); Amanda Rubin, Note, *Before And After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207 (1992).

63. *Wilson*, 111 S. Ct. at 2322.

64. *Id.*

65. *Id.* at 2324.

66. *Id.*

67. *Id.*

and unusual.[68] *Wilson* affirmed the context-specific approach to questions of whether officials inflicted unnecessary and wanton pain[69] and adopted the deliberate indifference standard from *Estelle* as the subjective standard in the context of prison confinement claims.[70] *Wilson* also left intact the objective test articulated in *Hutto* and *Rhodes*.[71]

In *Huguet v. Barnett*,[72] the Fifth Circuit Court of Appeals combined the objective and subjective elements of an Eighth Amendment analysis into a four part test. Under this analysis a prisoner was required to prove four elements to prevail in an Eighth Amendment claim: (1) a significant injury[73] which; (2) resulted directly and solely from the use of force which was clearly excessive; (3) objectively unreasonable; and (4) an unnecessary and wanton infliction of pain.[74] Proof of all four elements was mandatory for a successful claim.[75] The court said that the first three elements of the test embodied the objective part of an Eighth Amendment analysis and the fourth element embodied the subjective test.[76] This evolution of the objective and subjective tests of the Eighth Amendment provides the setting for *Hudson v. McMillian*.[77]

III. *HUDSON V. MCMILLIAN*

In *Hudson*, the United States Supreme Court held that serious injury is not required in order to satisfy the Eighth Amendment's objective test.[78] The Court further established that the subjective test in all Eighth Amendment excessive force claims requires a determination of whether the prison official acted in good faith or maliciously and sadistically in inflicting the harm.[79]

A. *Facts and Procedural History*

The petitioner, Keith Hudson, was an inmate at the state penitentiary in Angola, Louisiana.[80] The respondents, Jack McMillian, Marvin

68. *Id.* at 2325.
69. *Id.* at 2326.
70. *Id.* at 2327.
71. *Id.* at 2324. *See also* Hudson v. McMillian, 112 S. Ct. 995, 1001 (1992).
72. 900 F.2d 838, 841 (5th Cir. 1990).
73. The serious injury requirement of the *Huguet* court's test may follow from looking at the objective elements of *Wilson* and *Estelle*, which required serious deprivations and serious medical needs respectively. *See* Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991); Estelle v. Gamble, 429 U.S. 97, 104 (1976). The *Johnson* court's language in stating that not every common law battery rises to the level of a constitutional violation may have been another factor in requiring serious injury. *See* Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). For a discussion of constitutional torts, see Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987).
74. *Huguet*, 900 F.2d at 841.
75. *Id.*
76. *Id.*
77. 112 S. Ct. 995 (1992). *See also* Martin A. Schwartz, *The Prisoner Beating Case*, N.Y. L.J., Apr. 21, 1992, at 3.
78. *Hudson*, 112 S. Ct. at 997.
79. *Id.* at 999.
80. *Id.* at 997.

Woods and Arthur Mezo, served as corrections security officers at the Angola facility.[81] On October 30, 1983, Hudson and McMillian argued, so McMillian and Woods placed Hudson in handcuffs and shackles, took him out of his cell, and walked him toward the penitentiary's "administrative lockdown" area.[82] On the way there, McMillian punched Hudson in the mouth, eyes, chest and stomach while Woods held Hudson in place and kicked and punched him from behind.[83] Mezo, the supervisor on duty, watched the beating but merely told the officers "not to have too much fun."[84] As a result of the beating, Hudson suffered minor bruises and swelling of his face, mouth and lip.[85] The blows also loosened Hudson's teeth and cracked his partial dental plate, rendering it unusable for several months.[86]

Hudson brought a claim under section 1983[87] alleging that the beating administered by prison guards violated the Eighth Amendment's prohibition of cruel and unusual punishment.[88] The parties consented to the case being tried before a magistrate,[89] who found: (1) that Hudson's injuries were minor; (2) that McMillian and Woods used force when there was no need to do so; and (3) that Mezo expressly condoned their actions.[90] The magistrate awarded Hudson damages of $800.[91] The Fifth Circuit Court of Appeals reversed.[92] The circuit court applied the test it laid down in *Huguet*[93] and held that inmates alleging the use of excessive force in violation of the Eighth Amendment must prove: (1) significant injury, (2) resulting directly and only from the use of force clearly excessive to the need, (3) the excessiveness of which was objectively unreasonable, and (4) that the action constituted an unnecessary and wanton infliction of pain.[94] The court's test required that all elements be met before there could be an Eighth Amendment violation,[95] and the court determined that the force used by McMillian and Woods met all of the elements except for the significant injury element.[96] The United States Supreme Court granted certiorari to determine if the use of excessive physical force against a prisoner constitutes cruel and unusual punishment when the inmate does not suffer serious injury.[97]

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81. *Id.*

82. *Id.* Neither the Fifth Circuit Court of Appeals nor the Supreme Court gave a definition of the "administrative lockdown" area or its purpose.

83. *Hudson*, 112 S. Ct. at 997.

84. *Id.*

85. *Id.*

86. *Id.*

87. Civil Rights Act, 42 U.S.C. § 1983 (1988). *See supra* note 23 for full text of the statute.

88. *Hudson*, 112 S. Ct. at 997-98.

89. *See* 28 U.S.C. § 636(c) (1988).

90. *Hudson*, 112 S. Ct. at 998.

91. *Id.*

92. Hudson v. McMillian, 929 F.2d 1014 (5th Cir. 1990), *rev'd*, 112 S. Ct. 995 (1992).

93. Huguet v. Barnett, 900 F.2d 838, 841 (5th Cir. 1990). For background, see *supra* notes 72-77 and accompanying text.

94. *Hudson*, 929 F.2d at 1015 (citing *Huguet*, 900 F.2d at 841).

95. *Id.*

96. *Hudson*, 929 F.2d at 1015.

97. *Hudson*, 112 S. Ct. at 997, 1004.

B. *Holding*

1. Majority Opinion

Justice O'Connor's majority opinion revisited *Whitley* and affirmed the underlying principle that the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment.[98] Justice O'Connor noted, however, that the standard for "unnecessary and wanton infliction of pain" varies according to the context of the alleged constitutional violation,[99] pointing to *Estelle* and citing the deliberate indifference standard in medical needs cases as an example of the variance.[100] The deliberate indifference standard in *Estelle* was termed appropriate because the majority felt that the State's responsibility to provide inmates with medical care did not ordinarily conflict with competing administrative concerns.[101]

In reviewing *Whitley*, the Court stated that in the context of a prison riot, different concerns arise than in the medical needs context.[102] In the riot context, prison officials are concerned with the threat unrest poses to the inmates, prison workers, administrators and visitors.[103] Prison officials must balance these concerns against the harm that inmates may suffer if guards use force and then make a decision in haste, under pressure and often without the opportunity of a second chance.[104] Because of the different concerns in *Whitley's* prison riot context, the deliberate indifference standard was rejected and replaced by a malicious and sadistic standard.[105]

In a major expansion of the *Whitley* doctrine, the Court concluded that the same underlying concerns arise any time a guard must use force to maintain order, whether in a riot situation or not.[106] Whether the prison disturbance is a riot or lesser disturbance (such as the one that involved Hudson) prison officials must still balance the need to maintain order through force against the risk of injury to inmates.[107] Both situations, a riot or lesser disturbance, require officials to act quickly and decisively, therefore, both situations trigger the principle that prison administrators should be given wide-ranging deference in carrying out the responsibility of maintaining order in the prison.[108] Because of the

98. *Id.* at 998 (citing Whitley v. Albers, 475 U.S. 312, 319 (1986)).
99. *Id.* (citing *Whitley*, 475 U.S. at 320).
100. *Id.* (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)).
101. *Id.* (citing *Whitley*, 475 U.S. at 320).
102. *Id.*
103. *Id.*
104. *Id.* (citing *Whitley*, 475 U.S. at 320).
105. *Id.* (citing *Whitley*, 475 U.S. at 320-21).
106. *Id.* at 998.
107. *Id.* at 998-99.
108. *Id.* at 999 (citing *Whitley*, 475 U.S. at 321-22). *See also* Rhodes v. Chapman, 452 U.S. 337, 349 n.14 (1981) ("a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators"); Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."). For further discussion of judicial deference, see Emily Calhoun, *The Supreme Court and The Constitutional Rights*

similarities between riots and lesser disturbances, the Court held that the new standard by which to judge all claims of excessive force is the test set forth in *Whitley*: whether the force is applied in a good-faith effort to maintain or restore discipline, or applied maliciously and sadistically to cause harm.[109] Citing appellate decisions from the Second, Fourth, Sixth, Eighth, and Eleventh Circuits, the Court reasoned that extending the *Whitley* standard to all claims of excessive force established nothing new for most circuits.[110] After establishing the new standard for an excessive force claim, the Court determined the role that the extent of injury plays in the standard.

Under the *Whitley* test, the extent of injury was simply one factor that suggests whether prison officials thought force was necessary or whether the force evidenced an unnecessary and malicious infliction of pain.[111] The *Hudson* Court suggested several other factors appropriate in evaluating whether the force was unnecessary and malicious: (1) the need for application of the force; (2) the relationship between the need and the amount of force used; (3) the threat reasonably perceived by the responsible officials; and (4) any efforts made to temper the severity of a forceful response.[112] Based on these relevant factors, the Court concluded that the absence of a serious injury is relevant to the Eighth Amendment inquiry, but does not end the analysis.[113] Addressing the respondent's claim that the objective analysis requires a serious injury, the Court said that the objective element of an Eighth Amendment claim requires asking if the alleged wrongdoing was "harmful enough" to establish a constitutional violation.[114] The subjective analysis determines whether the officials acted with a "sufficiently culpable state of mind."[115]

In addressing the objective standard, the Court said that what is necessary to show harm for purposes of the Eighth Amendment depends on the claim at issue for two reasons.[116] First, the Eighth Amendment should be applied with due regard for differences in the kind of

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of Prisoners: A Reappraisal, 4 HASTINGS CONST. L.Q. 219 (1977); Peter Keenan, *Constitutional Law: The Supreme Court's Recent Battle Against Judicial Oversight of Prison Affairs*, 1989 ANN. SURV. AM. L. 507 (1990); Irene Lambrou, Comment, *AIDS Behind Bars: Prison Responses and Judicial Deference*, 62 TEMP. L. REV. 327 (1989).

109. *Hudson*, 112 S. Ct. at 999.

110. *Id. See* Stenzel v. Ellis, 916 F.2d 423, 427 (8th Cir. 1990); Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir. 1990); Haynes v. Marshall, 887 F.2d 700, 703 (6th Cir. 1989); Corselli v. Coughlin, 842 F.2d 23, 26 (2d Cir. 1988); Brown v. Smith, 813 F.2d 1187, 1188 (11th Cir. 1987). *But see* Unwin v. Campbell, 863 F.2d 124, 130 (1st Cir. 1988) (rejecting application of *Whitley* standard absent "an actual disturbance"); Wyatt v. Delaney, 818 F.2d 21, 23 (8th Cir. 1987) (absent matters involving institutional security a deliberate indifference standard should be used).

111. *Hudson*, 112 S. Ct. at 999 (citing *Whitley*, 475 U.S. at 321).

112. *Id.* The Court did not clearly state the role these elements play in determining whether force was malicious and sadistic. One commentator suggests that these elements are the proper basis for making that determination. Martin A. Schwartz, *The Prisoner Beating Case*, N.Y. L.J., Apr. 21, 1992, at 3.

113. *Hudson*, 112 S. Ct. at 999.

114. *Id.* (citing Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991)).

115. *Id.* (citing *Wilson*, 111 S. Ct. at 2329).

116. *Hudson*, 112 S. Ct. at 1000.

conduct against which the objection is lodged (i.e., physical force, prison deprivation or medical needs).[117] Second, the prohibition of cruel and unusual punishment draws its meaning from the evolving standards of decency that mark the progress of a maturing society.[118] These two concerns result in an objective element of an Eighth Amendment claim that is contextual and responsive to contemporary standards of decency.[119] By way of illustration, the Court first reviewed claims directed at conditions of confinement.[120] Noting that routine discomfort is part of the penalty that offenders pay for their offenses, only deprivations which deny the minimal civilized measure of life's necessities do not fit with contemporary standards of decency.[121] Second, the Court made a similar analysis of medical needs claims.[122] It reasoned that society does not expect prisoners to have unqualified access to health care, therefore only deliberate indifference to medical needs does not fit with contemporary standards of decency.[123]

In an excessive force context, society's expectations are different.[124] Whenever prison officials maliciously and sadistically use force to cause harm, they violate contemporary standards of decency.[125] If only *serious* injury violated contemporary standards of decency, the Eighth Amendment would permit any physical punishment, no matter how cruel and inhumane, as long as it resulted in minor injuries.[126] The Court emphasized that doing away with the serious injury requirement did not make every touch or shove by a prison guard an actionable Eighth Amendment claim.[127] The Eighth Amendment excludes from constitutional recognition the de minimis use of force, provided that the force is not repugnant to the conscience of mankind.[128] Since Hudson's injuries were found to be more than de minimis, there was no basis for the dismissal of his claim.[129]

The majority then addressed the dissent's argument that by not requiring serious injury, the holding in *Wilson* was misapplied.[130] The majority distinguished *Wilson* in two ways: (1) it was not an excessive force claim, and (2) it did not address the objective analysis of the Eighth

117. *Id.* (citing *Whitley*, 475 U.S. at 320).
118. *Hudson*, 112 S. Ct. at 1000 (citing Rhodes v. Chapman, 452 U.S. 337, 346 (1981)).
119. *Id.* at 1000.
120. *Id.*
121. *Id.* (citing *Rhodes*, 452 U.S. at 347).
122. *Id.* at 1000 (citing *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (only deliberate indifference to medical needs did not fit with contemporary standards of decency)).
123. *Id. See* Estelle v. Gamble, 429 U.S. 97, 103-04 (1976).
124. *Hudson*, 112 S. Ct. at 999.
125. *Id. See* Whitley v. Albers, 475 U.S. 312, 327 (1986).
126. *Hudson*, 112 S. Ct. at 999. *See Estelle*, 429 U.S. at 102. In *Hudson*, Justice O'Connor stated that allowing physical punishments that only resulted in minor injuries "would have been as unacceptable to the drafters of the Eighth Amendment as it is today." *Hudson*, 112 S. Ct. at 1000 (citing *Estelle*, 429 U.S. at 102).
127. *Hudson*, 112 S. Ct. at 999 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).
128. *Id.* (citing *Whitley*, 475 U.S. at 327).
129. *Id.* at 1001.
130. *Id.* at 1001. *See* Wilson v. Seiter, 111 S. Ct. 2321 (1991).

Amendment inquiry.[131] Next, the difference in analyzing conditions of confinement claims and excessive force claims was reemphasized.[132] Justice O'Connor asked:

> How could it be otherwise when the constitutional touchstone is whether punishment is cruel and unusual? To deny, as the dissent does, the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the " 'concepts of dignity, civilized standards, humanity, and decency' " that animate the Eighth Amendment.[133]

The opinion concluded with a refusal to address the respondent's claim that an isolated and unauthorized act of violence was not "punishment" under the Eighth Amendment.[134] This refusal was based on the court of appeals having left intact the Magistrate's decision that the beating was not an isolated assault, as there was testimony that McMillian and Woods had beat another inmate shortly thereafter.[135] The Court reversed the court of appeals and reinstated the judgment of the Magistrate.[136]

2. Concurring Opinions

Justice Stevens filed an opinion concurring in part and concurring in the judgment.[137] He argued that the justification for the higher standard of malicious and sadistic in *Whitley* is that emergency situations, such as prison riots, necessitate quick decisions and reactions.[138] Absent an emergency situation, however, Justice Stevens felt that the less demanding standard of unnecessary and wanton should be applied.[139] The rationale was that the unnecessary and wanton standard was more consistent with the principle that courts give due regard to the differences in the kind of conduct against which an Eighth Amendment violation is charged.[140]

Justice Blackmun filed an opinion concurring in the judgment.[141] He disagreed with the majority's extension of the malicious and sadistic

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131. *Hudson*, 112 S. Ct. at 1001.
132. *Id.*
133. *Id.* (quoting *Estelle*, 429 U.S. at 102).
134. *Hudson*, 112 S. Ct. at 1001. The Court did recognize that other courts have addressed the issue. *See* George v. Evans, 633 F.2d 413, 416 (5th Cir. 1980) ("a single, unauthorized assault by a guard does not constitute cruel and unusual punishment"); Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir.) *cert. denied*, 414 U.S. 1033 (1973) ("although a spontaneous attack by a guard is 'cruel' and, we hope 'unusual,' it does not fit any ordinary concept of 'punishment' "). *But see* Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) *cert. denied*, 479 U.S. 816 (1986) ("If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment . . . .").
135. *Hudson*, 112 S. Ct. at 1001-02.
136. *Id.* at 1002.
137. *Id.*
138. *Id.*
139. *Id.* (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)). Justice Stevens also dissented in *Whitley* to the establishment of the malicious and sadistic standard. Whitley v. Albers, 475 U.S. 312, 328 (1986) (Stevens, J., dissenting).
140. *Hudson*, 112 S. Ct. at 1002.
141. *Id.*

standard to all allegations of excessive force.[142] Justice Blackmun addressed the respondents' claim that not requiring excessive injury would cause the courts to be overburdened with prisoners' suits.[143] He reasoned that the floodgates would not be opened for several reasons: (1) prisoners are required to exhaust administrative remedies under section 1983; (2) officials may raise a qualified immunity defense and (3) district courts may dismiss any complaint found to be frivolous or malicious.[144] He stated that the burden on the courts is worth bearing when a prisoner's suit has merit and that the right to file for legal redress in the courts is probably more valuable to a prisoner than to any other citizen.[145] Justice Blackmun expressed his opinion that the Eighth Amendment prohibits "pain," not "injury," and that pain, in its ordinary meaning, surely includes a notion of psychological harm.[146] The Justice concluded by stating that psychological pain that is above de minimis would surely be actionable in an Eighth Amendment setting.[147]

3. Dissenting Opinion

Justice Thomas filed a dissenting opinion, his first writing for the court, in which Justice Scalia joined.[148] Justice Thomas disagreed with the majority's decision that a prisoner is not required to prove serious injury to have an actionable claim under the Eighth Amendment.[149] He stated that allowing any tortious conduct to rise to the level of a constitutional claim goes far beyond the precedents of the Court.[150]

Justice Thomas would have affirmed the Fifth Circuit's judgment. Emphasizing that the magistrate who found the facts in the case considered Hudson's injuries minor, Justice Thomas appeared shocked that

142. *Id.* at 1003. Justice Blackmun also dissented in *Whitley* to the establishment of the malicious and sadistic standard. *Whitley*, 475 U.S. at 328.

143. *Hudson*, 112 S. Ct. at 1003.

144. *Id.* at 1003-04.

145. *Id.* Prisoners have a constitutional right to adequate, effective and meaningful access to courts to challenge violations of constitutional rights. Bounds v. Smith, 430 U.S. 817, 824, 828 (1977). *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 355 (1987) (Brennan, J. dissenting):

> When prisoners emerge from the shadows to press a constitutional claim, they invoke no alien set of principles drawn from a distant culture. Rather, they speak the language of the charter upon which all of us rely to hold official power accountable. They ask us to acknowledge that power exercised in the shadows must be restrained at least as diligently as power that acts in the sunlight. In reviewing a prisoner's claim of the infringement of a constitutional right, we must therefore begin from the premise that, as members of this society, prisoners retain constitutional rights that limit the exercise of official authority against them.

See also Cruz v. Beto, 405 U.S. 319, 321 (1972) ("[P]ersons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes 'access to the courts for the purpose of presenting their complaints' ") (citing Johnson v. Avery, 393 U.S. 483, 485 (1969)); JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS §§ 11.5-11.6 (4th ed. 1991).

146. *Hudson*, 112 S. Ct. at 1003.

147. *Id.*

148. *Id.* at 1004. For a scathing critique of Justice Thomas's dissenting opinion see Stuart Taylor, Jr., *Justice Thomas Strikes Cruel and Unusual Pose*, N.J. L.J., March 16, 1992, at 16.

149. *Hudson*, 112 S. Ct. at 1005.

150. *Id.*

the majority would broadly assert "that *any* 'unnecessary and wanton' use of physical force against a prisoner *automatically* amounts to 'cruel and unusual' punishment."[151] In Justice Thomas's view: "a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not 'cruel and unusual punishment.' "[152]

Emulating the jurisprudential style favored by Justice Scalia, Thomas began his analysis with an historical overview of the Eighth Amendment.[153] Relying heavily on *Weems v. United States*,[154] Thomas stated that the original intent of the framers was that the Eighth Amendment apply only to statutorily created punishments and criminal sentencing.[155] There is nothing in 185 years of Eighth Amendment jurisprudence—from the adoption of the Amendment in 1791 until the decision in *Estelle*—indicating that the Eighth Amendment applied to deprivations suffered in prison.[156] Thomas rationalized that:

> Surely prison was not a more congenial place in the early years of the republic than it is today; nor were our judges and commentators so naive as to be unaware of the often harsh conditions of prison life. Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment. Thus, historically, the lower courts routinely rejected prisoner grievances by explaining that the courts had no role in regulating prison life.[157]

He concluded that the Eighth Amendment was originally intended to apply only to sentences given by judges, not to hardships endured by prisoners after incarceration.[158]

Thomas proceeded to discuss the standards established by the Court for medical needs claims in *Estelle* and prison deprivation claims in *Rhodes*.[159] Justice Thomas stated that *Estelle* required a prisoner to show deliberate indifference to serious medical needs and that *Rhodes* required a prisoner to show serious deprivation to be successful with the claim.[160] Justice Thomas reasoned that these two cases show that the Eighth Amendment only applies to a narrow class of conduct resulting in serious injury.[161] He said that the majority turned the Eighth Amendment inquiry into a strictly subjective test resulting in an unwarranted and unfortunate break with the Court's Eighth Amendment

151. *Id.* at 1005.
152. *Id.*
153. *Id.* For an example of Justice Scalia's historical jurisprudential approach, see Burnham v. Superior Court, 495 U.S. 604, 605 (1990).
154. 217 U.S. 349 (1910).
155. *Hudson*, 112 S. Ct. at 1005.
156. *Id.* at 1005-06.
157. *Id.* at 1005.
158. *Id.*
159. *Id.*
160. *Id. See* Estelle v. Gamble, 429 U.S. 97, 106 (1976); Rhodes v. Chapman, 452 U.S. 337, 347 (1981).
161. *Hudson*, 112 S. Ct. at 1006.

jurisprudence.[162]

Justice Thomas also disagreed with the higher standard of malicious and sadistic established by the Court for the subjective test.[163] He noted that most excessive force cases are not situations of prisoner unrest that require a prison guard to keep order.[164] Justice Thomas stated that because so many excessive force claims are not prisoner unrest cases, the use of the force will seldom be accompanied by a malicious and sadistic mindset.[165] Before concluding, Justice Thomas addressed whether an Eighth Amendment injury always has to be a physical injury.[166] He stated that forms of punishment that inflict psychological harm, as opposed to physical harm, are also actionable under the Eighth Amendment.[167]

IV. ANALYSIS

The United States Supreme Court's decision in *Hudson*, which does not require serious injury for Eighth Amendment claims, provides prisoners with more access to the courts because any infliction of pain, above de minimis, will be the basis for an action. The respondents in *Hudson* felt that it would be detrimental to allow prisoners more access to file constitutionally-based claims because it would overburden the courts.[168] While the Court's decision may increase case-loads, the potential deterrent effect of closer scrutiny on prisons could cause less unnecessary force, and actually lead to fewer prisoner suits. Prison administrators, officials and guards will now have notice that excessive force suits are easier to file. This should provide motivation for better supervision and alternative methods of control besides beating prisoners. The Court's decision may decrease the amount of unnecessary pain inflicted on prisoners because any unnecessary pain will be actionable.

The Court's decision also recognizes that rights still exist for prisoners. The goal of incarceration in the criminal justice system should be rehabilitating prisoners and returning to society people who are productive citizens. The Court previously recognized this goal in *Rhodes v. Chapman*, stating that the function of the criminal justice system is "to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens."[169] In *Pell v. Procunier*, the Court acknowledged that incarceration

162. *Id.* at 1007.
163. *Id.* at 1008.
164. *Id.*
165. *Id.*
166. *Id.* at 1008-10.
167. *Id.* at 1009.
168. *Id.* at 1003-04.
169. 452 U.S. 337, 352 (1981). *See also* Ex Parte Lee, 171 P. 958, 959 (Cal. 1918) ("Instead of trying to break the will of the offender and make him submissive, the purpose is to strengthen his will to do right and lessen his temptation to do wrong."); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 36-58 (1968); SOL RUBIN, THE LAW OF CRIMINAL CORRECTION 755-64 (2d ed. 1973); 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 4 (1978); Kathleen Engel & Stanley Rothman, *The Paradox of Prison Reform: Rehabilita-*

serves a protective function by quarantining criminal offenders for a given period of time.[170] However, *Pell* emphasized that most offenders will return to society, therefore, a paramount objective of the corrections system is the rehabilitation of prisoners.[171] While society punishes prisoners by incarcerating and stripping them of certain individual rights,[172] prison officers should not force prisoners to also endure unnecessary, dehumanizing and humiliating pain.[173] Rehabilitation will not be achieved unless prison officials respect prisoners individual rights and inherent worth as humans.

> It is obvious that, other things being equal, reformative efforts have the best chance of being successful—without too much frustration of the interests of retribution and deterrence—if the conditions of imprisonment are such that the offender not only knows that he is being "punished" (i.e., he is being deprived of his liberty and of certain creature comforts), but also knows that, because his dignity as a man is respected, efforts directed toward his reformation are genuine and sincere.[174]

The Court correctly concluded that any time prison officials inflict unnecessary harm on prisoners, society's standards of decency are violated.[175] The Court's recognition of prisoners' rights, by holding serious injury is not necessary to bring an Eighth Amendment claim, is a step in the right direction. Unfortunately, the Court's establishment of malicious and sadistic as the subjective test for all excessive force claims moves Eighth Amendment jurisprudence backwards. In *Rhodes*, the Court warned itself to proceed cautiously in making an Eighth Amendment judgment because, "unless we reverse it, '[a] decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment,' and thus '[r]evisions cannot be made in light of further experience.' "[176] The Court should have heeded its own warning and proceeded with care and caution in establishing malicious and sadistic as the subjective standard for all excessive

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tion, Prisoners' Rights, and Violence, 7 HARV. J.L. & PUB. POL'Y 413 (1984); Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1264-69, 1318-19 (1937); Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701 (1937).

170. 417 U.S. 817, 822-23 (1974).

171. *Id.*

172. *See* Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 215 (8th Cir. 1974) ("[S]egregation from society and loss of one's liberty are the only punishment the law allows."); *see also* RUBIN, *supra* note 169, at 697-734; 1 TORCIA, *supra* note 169, § 21 nn.51-53.

173. *See* DeShaney v. Winnebago County Dep't. of Social Services, 489 U.S. 189, 199-200 (1989) ("when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."). For further discussion, see Project, *Prisoners' Rights*, 80 GEO. L.J. 1677 (1992); Project, *Prisoners' Rights*, 79 GEO. L.J. 1253 (1991); Project, *Prisoners' Rights*, 78 GEO. L.J. 1429 (1990).

174. 1 TORCIA, *supra* note 169, § 4. *See also* Michael & Wechsler, *Homicide II*, *supra* note 169 at 1322.

175. Hudson, 112 S. Ct. at 1000.

176. Rhodes v. Chapman, 452 U.S. 337, 351 (1981) (citing Gregg v. Georgia, 428 U.S. 153, 176 (1976)).

force claims. Malicious and sadistic is too high of a threshold to require prisoners to prove in all excessive force claims.

The Court justifies the decision by somehow arriving at the conclusion that a prison riot does not differ much from a lesser disturbance.[177] The Court's reasoning is difficult to understand. The basis of *Whitley's* malicious and sadistic standard was the existence of a disturbance that *indisputably posed significant risks* to the safety of inmates and prison staff.[178] Unfortunately, crisis situations inherently involve quick decisions that may prove irresponsible or reckless when reviewed once the emergency has passed. When an immediate threat to the lives of prison staff and inmates presents itself officials should be able to make quick decisions without incurring liability for conduct short of malicious and sadistic. The situation in *Whitley*, where prisoners riot and take a prison guard hostage, provides an appropriate context for the malicious and sadistic standard to govern.[179] However, situations such as the one in *Hudson* do not present the same concerns. Hudson was a handcuffed prisoner who argued with a guard—he posed no significant risks.[180] There were no administrative concerns requiring quick decisions in order to protect the lives of the prison staff and inmates. Absent an emergency situation, prison officials should not be allowed latitude to administer unnecessary pain of any kind. Furthermore, the malicious and sadistic standard leaves the Eighth Amendment open to abuse by prison officials. Any testimony from a prison official, whether honest or fabricated, that a prisoner was menacing or threatening in any way provides a defense that pain was not inflicted maliciously and sadistically. The standard will be difficult for a fact finder to apply because the Court gave no solid guidelines about how to distinguish malicious and sadistic from a "good faith effort."[181] The majority should have acquiesced to the opinions of Justice Stevens and Justice Blackmun and left the standard at unnecessary and wanton.[182]

Justice Thomas' dissenting opinion leaves one to wonder exactly what position he takes on applying the Eighth Amendment to prisoner's claims after incarceration.[183] Applying a strict, historical precedent based approach, Justice Thomas initially suggests that he believes the Eighth Amendment should apply only to punishments meted out by statutes or sentencing judges.[184] Next, Justice Thomas hints of a willingness to abide by the Court's decision to apply the Eighth Amendment to prisoner's claims if the serious injury requirement is kept.[185] The reader is left to wonder which position Justice Thomas prefers. He de-

177. *Hudson*, 112 S. Ct. at 998-99.
178. *Whitley*, 475 U.S. at 320.
179. *See supra* notes 41-61 and accompanying text.
180. *Hudson*, 112 S. Ct. at 997. *See supra* notes 78-97 and accompanying text.
181. *See supra* note 112 and accompanying text.
182. *Hudson*, 112 S. Ct. at 1002-04. For further discussion of Justice Stevens's and Justice Blackmun's opinions, see *supra* notes 136-46 and accompanying text.
183. *Hudson*, 112 S. Ct. at 1005-10. *See also* Taylor, *supra* note 148 at 16.
184. *Hudson*, 112 S. Ct. at 1005-06.
185. *Id.* at 1006-10.

fends both positions by holding forth the precedents of the Court and insisting that precedent unconditionally govern,[186] however, the Constitution must be applied, not with an eye toward yesterday, but with the vision of the present.[187] Justice Thomas fails to do this by demonstrating insensitivity to a prisoner's right to be constitutionally protected from the deliberate infliction of unnecessary pain. However, his analysis of Eighth Amendment claims brought by prisoners in medical needs and prison condition contexts does support his assertion that the Court's precedents have required a serious element in those cases to meet the objective test.[188] This raises the question of whether the "serious" requirement in medical needs and prison condition cases is open for challenge.

Thomas's main disagreement with the majority hinged on the definition of "serious injury." In Thomas's view, by *definition* any punishment that is "diabolic and inhuman" inflicts serious injury.[189] He concluded that the majority opinion requires injuries be physical to be considered injuries at all, and that there are many types of injury that leave no physical manifestations.[190] However, this line of analysis seems to contradict Thomas's critique of the majority for allegedly abandoning the "objective standard." Thomas insists that some objective form of injury is required, but then insists that psychological forms of injury—which are by definition subjective—need also be included in the category of Eighth Amendment violative injuries. It becomes quite unclear exactly what standard he advocates.

Thomas appears to lose focus of the basic facts of this case: three prison guards, acting in concert, inflicted a humiliating beating on a shackled prisoner. This beating was the result of a minor altercation between prisoner and guard. Although Thomas champions the significance of non-physical, psychological injuries as a potential source of Eighth Amendment transgressions, he failed to consider the potential psychological impact of the punishment meted out to Hudson. While the majority may have reached its decision through a rather circuitous

186. *Id.* at 1005-11.

187. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934):

> It is no answer . . . to insist that what the provision of the Constitution meant to the vision of [the framers'] day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.

188. *Hudson*, 112 S. Ct. at 1006 (citing *Estelle*, 429 U.S. at 106 ("acts or omissions sufficiently harmful to evidence *deliberate indifference* to *serious* medical needs")) (citing *Wilson*, 111 S. Ct. at 2324) ("was the deprivation sufficiently serious?")).

189. *Id.* at 1009.

190. *Id.* at 1009. "Many things—beating with a rubber truncheon, water torture, electric shock, incessant noise, reruns of 'Space 1999'—may cause agony as they occur yet leave no inflicting injury. The state is not free to inflict such pains without cause just so long as it is careful to leave no marks" *Id.* (citing Williams v. Boles, 841 F.2d 181, 183 (7th Cir. 1988)).

and unsatisfying path, clearly its result is preferable to the harsh result which Thomas's opinion would dictate.

The Court's refusal to address whether an isolated incident of violence against a prisoner is punishment under the Eighth Amendment leaves doubt as to whether this decision will stand or be extremely narrowed in the future. The Court should have addressed the issue and left no doubt.[191] If, at a later date, the Court determines that isolated beatings are not within the Eighth Amendment's definition of punishment, prisoners will be in a worse position then they were before *Hudson*. At that point, their access to the courts will be extremely narrow and the subjective threshold they will have to prove to be successful in their claims will likely remain at malicious and sadistic.

V. CONCLUSION

The Eighth Amendment analysis after *Hudson* still includes both an objective and a subjective test. *Hudson* makes it easier for prisoners to meet the objective test, thus making it easier for them to file suits. Yet *Hudson* also makes it harder for prisoners to meet the subjective test, meaning fewer prisoner's claims will be successful. If the threat of lawsuits has a deterrent effect on prison officials, the decision will provide a positive change in the criminal justice system. However, the higher subjective threshold of malicious and sadistic will cause fewer claims to be successful, which means changing the conditions of the current prison system will be a slow process. The next major issue in Eighth Amendment claims brought by prisoners after incarceration is determining whether isolated beatings are "punishment" under the Amendment. Prisoners have had a difficult enough time of proving that prison officials inflicted unnecessary and wanton pain. Proving the infliction of malicious and sadistic pain may prove nearly impossible. Eighth Amendment jurisprudence may have taken one step forward and two steps back.

Dale E. Butler

191. The Court granted certiorari specifically on the objective issue of whether the Eighth Amendment is violated by anything less than serious injury. *Hudson*, 112 S. Ct. at 1004 (Thomas, J., dissenting). Since the Court decided to go beyond this issue and establish a new subjective standard, it should have further clarified whether "isolated beatings" constituted Eighth Amendment violations.

HOLMES V. SECURITIES INVESTOR PROTECTION CORP.: A DISAPPOINTING ATTEMPT TO LIMIT RICO ACTIONS FOR SECURITIES FRAUD

I. INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act (RICO)[1] has emerged as a prominent force in the legal community.[2] *Holmes v. Securities Investor Protection Corp.*[3] was supposed to be the turning point in RICO litigation—the solution for the questions concerning the scope of RICO in civil litigation, especially securities fraud.[4] Many lawyers hoped that the United States Supreme Court would use the case to resolve the much-disputed issue of whether a plaintiff had to be a purchaser or seller of securities in order to maintain a RICO action for securities fraud. In a surprising decision the Court avoided the purchaser-seller question, and instead held that the RICO violation must constitute a direct, or proximate, cause of the plaintiff's injuries.[5]

Holmes's immediate impact on the RICO statute and securities law appears equivocal. This Comment discusses the ambiguities of the RICO/securities fraud issue, speculates how the lower courts will interpret *Holmes* and draws the conclusion that courts should apply the purchaser-seller standing requirements of the federal securities laws when resolving a case involving RICO and securities fraud.

II. BACKGROUND

A. *RICO*

Congress initially enacted Title IX of the Organized Crime Control Act of 1970,[6] better known as the Racketeer Influenced and Corrupt Organizations Act (RICO), to assist law enforcement in fighting organized crime,[7] but the legislature also included explicit language allowing

1. 18 U.S.C. §§ 1961-1968 (1988 & Supp. II 1990).

2. Susan Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time for Congress to Act*, 43 VAND. L. REV. 673, 674 (1990).

3. 112 S. Ct. 1311 (1992).

4. *See* David Tobenkin, *Supreme Court Ruling May Rewrite Securities Law*, LOS ANGELES BUS. J., Nov. 11, 1991, § 1, at 5; *High Court To Weigh Limits Of Securities-Linked RICO Claims*, WALL ST. LETTER, Nov. 11, 1991, at 2 (predicting that the "fate of applicability of the securities seller/purchaser test under RICO . . . will certainly be determined").

5. *Holmes*, 112 S. Ct. at 1322.

6. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1988 & Supp. II 1990)).

7. In the introduction to the Act, the legislature stated:

> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Id. See also Michael N. Glanz, Note, *RICO and Securities Fraud: A Workable Limitation*, 83 COLUM. L. REV. 1513 (1983).

for civil actions by persons injured "by reason of" a RICO violation.[8] To constitute a violation, a person involved in an "enterprise"[9] must participate in a "pattern of racketeering activity."[10] RICO specifies a number of predicate offenses that constitute racketeering activity, including "fraud in the sale of securities."[11] Civil remedies for a RICO violation include treble damages and reasonable attorney's fees.[12]

Since the enactment of RICO, commentators have debated the scope of the predicate offense concerning securities fraud.[13] Legislative history provides inadequate support for a plausible interpretation.[14] Congress did not include securities fraud as a predicate offense in the early drafts of RICO, but added it later before enacting the statute.[15] The current debate centers around whether Congress intended to include the purchaser-seller standing requirement of Rule 10b-5,[16] or any of the guidelines of the federal laws, in adding securities fraud to RICO.[17]

B. *Securities Fraud*

Section 10(b) of the Securities Exchange Act of 1934[18] and Rule 10b-5[19] are the statutory means by which the Securities and Exchange

8. 18 U.S.C. § 1964(c).

9. *Id.* § 1961(4). The term "enterprise" encompasses "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.*

10. *Id.* § 1961(5). The statute describes a "pattern of racketeering activity" as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." *Id.*

11. *Id.* § 1961(1)(D).

12. *Id.* § 1964(c).

13. *See, e.g.*, Arthur F. Mathews, *Shifting the Burden of Losses in the Securities Markets: The Role of Civil RICO in Securities Litigation*, 65 NOTRE DAME L. REV. 896, 944-45 (1990); Glanz, *supra* note 7, at 1516-17.

14. Thomas W. Alvey, III, Note, *Puncturing The RICO Balloon: The Judicial Imposition Of The 10b-5 Purchaser-Seller Requirement*, 41 WASH. U. J. URB. & CONTEMP. L. 193, 200 (1992). *See also* Andrew P. Bridges, *Private RICO Litigation Based Upon "Fraud In The Sale Of Securities"*, 18 GA. L. REV. 43, 58 (1983) (recognizing four potential interpretations of "fraud in the sale of securities").

15. Bridges, *supra* note 14, at 58-59.

16. *See* Harvey L. Pitt et al., *Once Again, the Court Fails to Rein in RICO*, LEGAL TIMES, Apr. 27, 1992, at 31 (stating that the "genesis" of the debate is the purchaser-seller requirement).

17. Mathews, *supra* note 13, at 944.

18. Securities Exchange Act of 1934, 15 U.S.C. § 78(b) (1988 & Supp. II 1990).

19. 17 C.F.R. § 240.10b-5 (1991). Rule 10b-5 states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Recently, the Supreme Court limited actions filed under Rule 10b-5 by adopting "the 'one year from discovery, three years from the event' statute of limitations, derived from other sections of the 1934 Act." Joseph Cachey, Lampf v. Gilbertson: *Rule 10b-5's Time*

Commission (SEC) enforces federal laws governing securities fraud. The important case history of the purchaser-seller requirement began with *Birnbaum v. Newport Steel Corp.*[20] In *Birnbaum*, a group of stockholders sued Newport Steel, its president and the directors of the corporation for alleged securities fraud.[21] The defendants shunned a potentially profitable merger for the plaintiff-stockholders and instead sold their own shares to a third company at a substantial premium to the current market price.[22] In affirming the lower court's dismissal for failure to state a cause of action, the United States Court of Appeals for the Second Circuit decided that Congress constructed Rule 10b-5 specifically for fraud involving the purchase or sale of securities, not for management's fraudulent supervision of corporate matters.[23] The court held that a person who fails to qualify as a purchaser or a seller of securities may not sustain a securities fraud claim based on Rule 10b-5.[24]

Twenty-three years later, the Supreme Court upheld the *Birnbaum* rule in *Blue Chip Stamps v. Manor Drug Stores*,[25] a significant decision for securities fraud. The case involved an offering of securities by a newly formed corporation, Blue Chip Stamps, to customers of the old Blue Chip Stamp Co. The plaintiffs, customers who did not purchase stock, claimed that the prospectus issued prior to the offering discouraged them from buying shares so that the company could reoffer the stock to the public at a higher price.[26] The plaintiffs brought a class action suit for profits lost in not buying the stock, the price of which increased subsequent to the public offering.[27] The Supreme Court applied the *Birnbaum* rule and held that only purchasers and sellers of securities have standing to sue for a violation of Rule 10b-5.[28] The Court grounded its opinion on legislative history, precedential developments since *Birnbaum* and several public policy considerations.[29] The policy factors looked at by the Court included the consequences that lawsuits would have on the defendant's daily business activities, the ability of plaintiffs to use groundless claims to enhance the settlement value of their case and fact issues that hinged on oral testimony, further reducing the chances of settlement.[30] The Court expressed deep concern about the potential for "vexatious litigation"[31] and perceived that the benefit of preventing frivolous suits outweighed the undesirable effects of excluding those

Has Come, 69 DENV. U. L. REV. 135 (analyzing the split in the circuits regarding the proper statute of limitations and the Court's resolution of the earlier uncertainties).

20. 193 F.2d 461 (2d Cir. 1952), *cert. denied*, 343 U.S. 956 (1952).

21. *Id.* at 462.

22. *Id.*

23. *Id.* at 464.

24. *Id.* at 463. This holding became known as the *Birnbaum* rule. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730-31 (1975).

25. 421 U.S. 723 (1975).

26. *Id.* at 726.

27. *Id.* at 727.

28. *Id.* at 754-55.

29. Glen E. Mercer, Note, *Violation of Rule 10b-5 As a Predicate Act Under Civil RICO*, 51 LA. L. REV. 1111, 1112-14 (1991).

30. *Id.* at 1114.

31. *Blue Chip Stamps*, 421 U.S. at 739-45.

persons actually damaged by a Rule 10b-5 violation.[32]

The number of securities fraud cases involving RICO soared in the mid-1980's[33] as frustrated investors who failed to meet the purchaser-seller requirement in Rule 10b-5 began using RICO as a tool to avoid the standing limitation. The broad language used in the statute[34] and the liberal interpretation that the courts exercised[35] contributed significantly to the move to RICO. As plaintiffs began combining RICO with securities fraud actions, the judicial system experienced difficulties sorting out the differences in the securities laws and RICO. The privilege to bring suit under Rule 10b-5 arises from an implied cause of action developed by the courts.[36] *Birnbaum* further limited the implied right to purchasers and sellers of securities.[37] Yet, the provisions of the above securities laws did not appear in the language of RICO,[38] although the SEC had initiated federal laws governing securities fraud long before Congress ever considered RICO.[39] Confusion determining the standing requirement needed to bring a RICO claim in a securities action results from this omission.

C. *Standing*

A plaintiff suing under RICO has standing to sue only if an injury has occurred as a result of conduct prohibited by the statute.[40] The confusion over whether the standing requirements of the securities laws apply to a RICO action based on securities fraud resulted in divided courts and ambiguous law.[41] In *International Data Bank, Ltd. v. Zepkin*,[42] a corporation sued the two individuals who initially started the business, claiming that the two falsified information in a prospectus and caused the corporation to suffer losses.[43] The Fourth Circuit asserted that the

32. *Id.* at 743. Much of the disagreement concerning the purchaser-seller issue results from excluded plaintiffs, such as an owner of a security who does not sell because of the fraudulent behavior. Thus, even if a distressed investor exists, he is unable to sue because of the purchaser-seller limitation. Linda Greenhouse, *Court Limits Agency on Stock-Fraud Suits*, N.Y. TIMES, Mar. 25, 1992, at C2.

33. Alvey, *supra* note 14, at 194-95.

34. 18 U.S.C. §§ 1961-68 (1988 & Supp. II 1990) (RICO "shall be liberally construed to effectuate its remedial purposes.").

35. *See* United States v. Turkette, 452 U.S. 576, 587 (1981) (asserting that the language of RICO should not be limited); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985) ("RICO is to be read broadly.").

36. Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) (investors convinced to sell stock for much less than actual value sustained a cause of action under the securities laws because "the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies.").

37. Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952), *cert. denied*, 343 U.S. 956 (1952).

38. Alvey, *supra* note 14, at 204.

39. Congress enacted the securities laws in 1933 and 1934 and RICO in 1970.

40. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985).

41. Mathews, *supra* note 13, at 947; Mercer, *supra* note 29, at 1121 (asserting that it is "equally plausible that Congress meant to retain the *Birnbaum* rule [in RICO] as it is that Congress meant to overturn it").

42. 812 F.2d 149 (4th Cir. 1987).

43. *Id.* at 150.

purchaser-seller standing requirement applies to RICO claims based on securities fraud.[44] The court held that because the corporation and its officers and directors were not purchasers or sellers of stock, all lacked standing to sue.[45] Because Congress did not explicitly state any limitation, the court followed the precedent established in securities fraud actions,[46] the *Birnbaum* rule.[47]

The Eleventh Circuit's ruling in *Warner v. Alexander Grant & Co.*[48] lies in direct contrast to the holding in *International Data Bank*. Warner was a customer of ESM Government Securities and a principal in two banks that were also ESM customers. He sued the company's auditors, claiming they filed false and misleading reports regarding the financial condition of ESM.[49] Although Warner could not maintain an action under the federal securities laws, the court stated that he need not meet the purchaser-seller requirement to sustain a RICO claim based on securities fraud.[50] The court simply stated that a plaintiff "need only allege injuries personally sustained as a result of conduct violative of the federal RICO statute."[51] The Ninth Circuit added to the disarray among the circuits by omitting the purchaser-seller limitation in *Securities Investor Protection Corp. v. Vigman*,[52] the precursor to the instant case.[53]

III. INSTANT CASE

A. *Facts*

Congress established the Securities Investor Protection Corporation (SIPC), a nonprofit private corporation,[54] following the Securities Investor Protection Act of 1970.[55] The SIPC is comprised of broker-dealers required to become members upon registration with the Securities and Exchange Commission.[56] In establishing the SIPC, Congress provided the agency, inter alia, with the authority to seek the liquidation of a broker-dealer's business to meet customers' obligations when the level of its assets indicated a failure or a threat of failure.[57]

In 1981, the SIPC began liquidation proceedings against two broker-dealers. The SIPC claimed that the broker-dealers had insufficient assets to meet the obligations of their customers and that it disbursed over $13 million to cover the shortage.[58] Subsequently, the SIPC filed

44. *Id.* at 151.
45. *Id.* at 151-53.
46. *Id.* at 152.
47. *See supra* text accompanying notes 20-24.
48. 828 F.2d 1528 (11th Cir. 1987).
49. *Id.* at 1529.
50. *Id.* at 1530.
51. *Id.*
52. 908 F.2d 1461 (9th Cir. 1990).
53. *Id.* at 1467.
54. 15 U.S.C. § 78ccc(a)(1) (1988).
55. *Id.* §§ 78aaa-78lll.
56. *Id.* § 78ccc(a)(2)(A).
57. *Id.* § 78eee.
58. Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1315 (1992).

suit against Holmes and 75 other defendants, claiming that they employed the broker-dealers in a scheme to inflate the price of the shares of several companies and create the misconception that a stable market existed for the stocks.[59] The discovery of the scheme caused a dramatic decline in the price of the shares of these companies, and the stock owned in the proprietary accounts of the two broker-dealers sustained huge losses.[60] The SIPC claimed that the defendants violated Section 10b of the Securities Exchange Act of 1934, Rule 10b-5, the mail and wire fraud statutes[61] and the federal RICO laws.[62]

B. *Lower Courts*

The SIPC filed the original lawsuit in 1983 in district court in California.[63] The first two appellate court decisions involving these parties concerned different procedural matters.[64] In the third decision, the district court held the SIPC did not have proper standing to bring a RICO claim and defendant's actions were not the proximate cause of the losses sustained, so the SIPC appealed.[65] The United States Court of Appeals for the Ninth Circuit reversed and remanded on the ground that the purchaser-seller limitation in Rule 10b-5 does not apply to RICO claims based on securities fraud.[66] The court of appeals decided that the lower court erred in granting summary judgment on the proximate cause issue because a fact question remained as to whether a causal connection existed between the defendant's actions and the broker-dealers' losses.[67]

C. *Majority Opinion*

The Supreme Court granted certiorari on only one issue: whether the SIPC has the right to bring a securities fraud action under RICO.[68] In an opinion by Justice Souter, the Court reversed and remanded the decision of the court of appeals. The Court held the SIPC failed to state a claim because the alleged actions by the defendant were not a proximate cause of the SIPC's losses.[69] The majority refused to address the question of whether RICO required a party to be a purchaser or seller in order to bring a claim based on securities fraud.[70] Instead, it found

59. *Id.*
60. *Id.*
61. 18 U.S.C. §§ 1341, 1343 (1988 & Supp. II 1990).
62. *Holmes*, 112 S. Ct. at 1315.
63. Securities Investor Protection Corp. v. Vigman, 587 F. Supp. 1358 (C.D. Cal. 1984).
64. Securities Investor Protection Corp. v. Vigman, 803 F.2d 1513 (9th Cir. 1986) (reversing lower court decision to dismiss SIPC's 10b-5 claim); Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309 (9th Cir. 1985) (reversing the district court's decision to dismiss four defendants for lack of personal jurisdiction and improper venue).
65. Securities Investor Protection Corp. v. Vigman, 908 F.2d 1461, 1465 (9th Cir. 1990).
66. *Id.* at 1467.
67. *Id.* at 1468-69.
68. Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1316 (1992).
69. *Id.* at 1322.
70. *Id.*

a discussion of the problem unnecessary and not relevant to the decision.[71]

In determining that RICO requires proximate cause to sustain an action, the majority focused on specific language in the RICO statute: "[a]ny person injured in his business or property by reason of a violation"[72] may bring an action. Relying on statutory history,[73] Souter concluded that Congress fashioned § 1964(c) of RICO after Section 4 of the Clayton Act,[74] which itself imitated language from Section 7 of the Sherman Act.[75] Souter stated that courts repeatedly interpreted the Sherman Act as requiring proximate causation and the Supreme Court previously held that the Clayton Act required proof of proximate cause.[76] The Court therefore found by analogy that RICO also requires proximate cause.[77]

Souter relied on several policy initiatives to justify his use of proximate cause. First, the further removed an injury is from the violation, the harder to trace particular damages back to the infraction.[78] Second, to avoid multiple recoveries, courts would be forced to develop intricate rules for the apportionment of damages among differently injured plaintiffs.[79] Third, plaintiffs injured directly will bring private lawsuits and avoid those problems faced by remotely injured parties, thus reducing the societal demand for deterrence of the violations.[80]

The Court refused to address the purchaser-seller issue despite urging by appellant Holmes and dissension among the lower courts.[81] Souter found the instant case untimely for a settlement of the issue[82] because the lower courts could have used proximate cause to decide the conflicting cases.[83] Furthermore, none of the cases involved parties who failed to qualify as a purchaser or seller because of reliance on a broker's advice, as occurred in *Blue Chip Stamps*.[84]

D. *Justice O'Connor's Concurring Opinion*

Justice O'Connor, joined by Justices White and Stevens, addressed

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71. *Id.*
72. *Id.* at 1316 (citing 18 U.S.C § 1964(c) (1988 & Supp. II 1990)).
73. *Holmes*, 112 S. Ct. at 1317 (citing Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143 (1987); Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)).
74. Clayton Act, 15 U.S.C. § 18 (1988 & Supp. II 1990).
75. Sherman Act, 15 U.S.C. § 1 (1988 & Supp. II 1990).
76. For a discussion of the enactment of § 4 of the Clayton Act based on language from § 7 of the Sherman Act, see Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983).
77. *Holmes*, 112 S. Ct. at 1317-18.
78. *Id.* at 1318.
79. *Id.*
80. *Id.*
81. *See supra* text accompanying notes 40-52.
82. *Holmes*, 112 S. Ct. at 1322. "[O]ur discussion of the issue would be unnecessary to the resolution of this case. Nor do we think that leaving this question unanswered will deprive the courts of much-needed guidance." *Id.*
83. *Id.*
84. *Id.*

the question on which the Court granted certiorari. The Justices concluded that a plaintiff can sustain a RICO action based on securities fraud without meeting the purchaser-seller requirement.[85] O'Connor argued for a strict reading of the statement in the RICO statute authorizing "any person" to sue and determined that courts should not impose the purchaser-seller requirement of Rule 10b-5 in a RICO action.[86] In her opinion, Congress chose to institute a private right of action for plaintiffs without requiring a purchase or sale of securities and the Court should not impede the intentions of Congress.[87]

As to the majority's use of causation to decide the case, O'Connor seemed satisfied with the assertion that proximate cause emerged as an element of the question before the Court.[88] In her opinion, however, the requirement of a proximate connection between the injury or harm and the defendant's conduct should not prevent one who lacks purchaser-seller standing from bringing a civil RICO action.[89]

E. *Justice Scalia's Concurring Opinion*

Justice Scalia agreed with Justice O'Connor that the purchaser-seller requirement should not apply to civil RICO actions based on securities fraud, but he surmised that "[t]he ultimate question here is statutory standing . . . ."[90] Courts must first determine if the "nexus" between the plaintiff's harm and the defendant's conduct supports a RICO cause of action.[91] The question of proximate cause only factors into the standing equation because, without express directions otherwise from a legislature, courts always consider proximate cause in deciding questions of recovery.[92]

In Justice Scalia's opinion, the purchaser-seller requirement falls under another element of statutory standing, the "zone-of-interest" test.[93] This test ascertains if the plaintiff falls within the category of persons served by the particular rule.[94] Courts should apply this test, along with the proximate cause test, in determining whether a plaintiff has standing to sue.[95] Similar to Justice O'Connor, Justice Scalia theorized that the Court should not imply any limitation into RICO because Congress created the statute and elected not to limit the rights of civil RICO plaintiffs.[96]

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85. *Holmes*, 112 S. Ct. at 1322 (O'Connor, J., concurring).

86. *Id.* at 1323. "Insofar as 'any' encompasses 'all', the words 'any person' cannot reasonably be read to mean only purchasers and sellers of securities." *Id.* (citation ommitted).

87. *Id.* at 1327.

88. *Id.* at 1322.

89. *Id.* at 1324.

90. *Holmes*, 112 S. Ct. at 1327 (Scalia, J., concurring).

91. *Id.*

92. *Id.* "Life is too short to pursue every human act to its most remote consequences." *Id.* (Scalia, J., concurring).

93. *Id.* at 1328.

94. *Id.*

95. *Id.*

96. *Id.* at 1329.

IV. ANALYSIS

Aside from the fact that the Court sidestepped the most important issue—standing—it made an appropriate decision in denying the SIPC relief because of a lack of causation. As Justice Souter noted, courts generally utilize proximate cause "to limit a person's responsibility for the consequences of that person's own acts."[97] Assuming Holmes actually committed the alleged acts, the broker-dealers' collapse could be attributed to many other possible factors, making it impossible to impute full responsibility to Holmes.[98] Other possible causes included the failure of the broker-dealers to diversify assets, poor supervision of the business and weak market conditions.[99]

By requiring that a proximate relationship exist between a defendant's violation and the plaintiff's injuries, the Court tightened a fixture of RICO.[100] For the first time, the Court restricted the breadth of RICO,[101] despite contrary language in both the statute[102] and prior Supreme Court cases.[103] However, because the Court dodged the question upon which it granted certiorari, two approaches to interpreting *Holmes* emerged. A lower court may adopt either approach, depending on its Circuit's rule on the purchaser-seller issue prior to the decision.

A. *The Purchaser-Seller Limitation Does Not Apply To RICO Actions Based On Securities Fraud*

Courts may interpret the concurring opinions in *Holmes* as the future of the law,[104] given the 5-4 split on the purchaser-seller issue.[105] Courts could choose not to apply the purchaser-seller requirement and instead follow Souter's lead by using proximate cause as the sole basis for deciding RICO actions. This interpretation supports the argument that, while courts have implied a cause of action under Rule 10b-5,[106]

97. *Holmes*, 112 S. Ct. at 1318.

98. *Id.* at 1320.

99. *Id.*

100. *See* Pitt, *supra* note 16, at 31 (stating that the Court "pronounced a black-letter legal requirement that had, prior to the grant of certiorari, already been thought to have been well-established in RICO jurisprudence.").

101. Edward Brodsky, *RICO - Limitation And Expansion*, N.Y. L. J., Apr. 8, 1992, at 3.

102. *See* 18 U.S.C. § 1961-68 (1988 & Supp. II 1990) (RICO "shall be liberally construed to effectuate its remedial purposes.").

103. *See* United States v. Turkette, 452 U.S. 576, 587 (1981) (asserting that the language of RICO should not be limited); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985) ("RICO is to be read broadly.").

104. Brodsky, *supra* note 101, at 3. *See also* Greenhouse, *supra*, note 32, at C2 ("With four Justices already on record, it is likely the Court will resolve the issue in favor of investors.").

105. Andrew Leigh, *Supreme Court Ruling Has Weakened RICO—Maybe*, INVESTOR'S BUS. DAILY, Mar. 27, 1992, at 8.

106. The first case to find an implied private right of action under Rule 10b-5 was Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) (Investors convinced to sell stock for much less than actual value sustained a cause of action under the securities laws because "the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies."). The Supreme Court later endorsed the holding in *Kardom*. *See* Superintendent of Insurance of N.Y. v. Bankers Life & Cas. Co., 404

Congress expressly provided for a private cause of action under RICO and courts are compelled to abide by the legislature's explicit directions.[107] Thus, the onus stays with Congress, and not the courts, to impose a purchaser-seller limitation for RICO actions,[108] a situation favored by both O'Connor[109] and Scalia.[110]

Based on their earlier rulings favoring the liberal approach to RICO,[111] the Ninth and Eleventh Circuits will likely favor the concurrences' approach to the purchaser-seller issue. Both courts relied heavily on the textual argument that RICO, on its face, does not contain any standing requirement as provided for by Rule 10b-5.[112] Thus, until Congress explicitly adds a standing clause specifically for securities fraud actions, these courts are apt to hold on to their prior convictions until expressly directed otherwise.

Such an interpretation implies substantial consequences, opening the door to a multitude of plaintiffs kept out of the courts by the purchaser-seller limitation.[113] Permitting indirectly injured plaintiffs to sue would create "massive and complex damages litigation [which] not only burdens the courts, but also undermines the effectiveness of treble-damages suits."[114] Disastrous effects on the securities industry could materialize, as persons and businesses involved in proxy matters and other nontrading activities suddenly become subject to tremendous liability.[115] For instance, a person who refrained from buying stock due to fraudulent negative information currently does not have a claim under the securities laws for failure to meet the standing requirement.[116] However, under the broad interpretation of RICO, a multitude of suits

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U.S. 6, 13 (1971); Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 150-54 (1972).

107. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 748 (1975). The Court stated:

> [I]f Congress had legislated the elements of a private cause of action for damages, the duty of the Judicial Branch would be to administer the law which Congress enacted; the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability.

Id.

108. Pitt, *supra* note 16, at 31.

109. Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1322 (1992) (O'Connor, J., concurring).

110. *Id.* at 1327 (Scalia, J., concurring).

111. Securities Investor Protection Corp. v. Vigman, 908 F.2d 1461 (9th Cir. 1990); Warner v. Alexander Grant & Co., 828 F.2d 1528 (11th Cir. 1987).

112. *Vigman*, 908 F.2d at 1466; *Warner*, 828 F.2d at 1530.

113. Tobenkin, *supra* note 4, at 5 (quoting Jack Samet, Holmes' attorney) ("The whole idea that a person must be a purchaser of a stock to sue would be moot.").

114. Associated General Contractors of Ca., Inc. v. California State Council of Carpenters, 459 U.S. 519, 545 (1983). Apportionment raises the overall costs of recovery by creating complex issues in determining each plaintiff's damages. In addition, dividing the damages among a larger number of plaintiffs diminishes the benefits to each plaintiff, possibly reducing the incentive to sue. Illinois Brick Co. v. Illinois, 431 U.S. 720, 745 (1977).

115. Geoffrey A. Campbell, *Justices Say Investor Protection Agency Can't Win Triple Damages Under RICO*, THE BOND BUYER, Mar. 25, 1992, at 5.

116. *Id.*

would appear featuring plaintiffs who claim they would have bought securities but abstained.[117] In addition, from a public policy standpoint, this approach appears "somewhat out of kilter with the current mood in Washington,"[118] which favors legal reform designed to reduce frivolous litigation.[119]

The courts' endorsement of this approach should come as no surprise to persons who followed the development of the RICO statute. Beginning in the early 1980's, people speculated that RICO would eventually work in favor of the securities fraud plaintiff.[120] Those favoring this view of *Holmes* would argue Congress could easily see RICO has emerged as a well-used tool in securities fraud actions and would have made changes in the law if necessary.[121] Therefore, claim the advocates of RICO, Congress inherently favors the liberal approach and the courts should not attempt to restrict RICO in favor of a narrow approach.[122]

B. *Proximate Cause Is Required In Addition To The Purchaser-Seller Limitation*

The lower courts may interpret the Court's decision to mean that a person who was not a purchaser or seller of securities cannot fulfill the proximate cause requirement.[123] Thus, until Congress explicitly states otherwise, the standing requirements firmly established for securities fraud actions under Section 10b of the Securities Exchange Act of 1934 and Rule 10b-5 continue to apply to RICO cases as well. Even though the majority did not specifically address the purchaser-seller issue, they "strongly hinted their commitment" to the rule,[124] asserting that problems with allowing indirectly injured plaintiffs to bring causes of action would burden the judicial system.[125] The Fourth Circuit will probably favor this approach, based on its 1987 opinion in *International Data Bank v. Zepkin*,[126] in which it interpreted Congress's actions (or lack thereof) relating to the purchaser-seller issue to mean the approval of

117. *Id.*

118. Pitt, *supra* note 16, at 31.

119. *Id.* The authors added, "This approach eschews uniformity and predictability under the law and runs counter to the growing consensus of the American public and its leaders that efforts should be made to control litigation, not to encourage the filing of even more suits." *Id.* at 33.

120. *See* Bridges, *supra* note 14, at 45 ("Private RICO may be for the eighties what rule 10b-5 was for the seventies."); Jeffrey G. MacIntosh, *Racketeer Influenced And Corrupt Organizations Act: Powerful New Tool Of The Defrauded Securities Plaintiff*, 31 KAN. L. REV. 7, 12 (1982) ("there is some support that RICO may relax at least one of the substantive limitations to an action under rule 10b-5—that the plaintiff must be either a purchaser or seller of securities.").

121. Brodsky, *supra* note 101, at 3.

122. In her concurring opinion, Justice O'Connor claimed that Congress expressly created the right for nonpurchasers and nonsellers to sue. Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1327 (1992) (O'Connor, J., concurring) (citing United States v. Turkette, 452 U.S. 576, 587 (1981)).

123. Leigh, *supra* note 105, at 8 (referring to comments by Jack Samet, attorney for Holmes).

124. Campbell, *supra* note 115, at 5.

125. *Holmes* 112 S. Ct. at 1321 (1992).

126. 812 F.2d 149 (4th Cir. 1987).

the retention of Rule 10b-5's requirements.[127] The court stated that Congress "did not write the RICO statute in a vacuum."[128] By not taking explicit action, the court found that the legislature indicated a willingness to retain the requirements of the federal securities laws in RICO.[129]

This interpretation of *Holmes* agrees with the legal community's view of RICO and securities fraud[130] and constitutes the most sensible approach to a confusing situation for several reasons. First, an adoption of this narrow ruling by the lower courts would certainly reduce the fears of "vexatious litigation" that cause so much anxiety.[131] A narrow interpretation of the statute prevents securities plaintiffs from alleging non-securities fraud RICO offenses to secure a place in the courtroom. Second, placing limits on which persons can bring a RICO securities fraud action would help define the securities industry's potential liability[132] and redirect conventional securities fraud actions away from RICO to the appropriate controlling securities laws. In fact, a movement exists to eliminate securities fraud completely as a cause of action under RICO.[133] Finally, Congress designed RICO as "an aggressive initiative to supplement old remedies and develop new methods for fighting crime,"[134] not as an unrestricted panacea for plaintiffs and a means for skirting federal securities laws.

The jury is still out in terms of how this case will influence the legal community.[135] No clear answer exists as to which parties this decision will affect the most.[136] On one hand, the Court narrowed RICO by firmly establishing proximate cause as a requirement, while on the other hand it conceivably broadened the rule by not enforcing the purchaser-seller limitation for securities fraud actions.[137] If future decisions eliminate the purchaser-seller requirement as a result of *Holmes*, the net effect

127. *Id.* at 152.

128. *Id.*

129. *Id.*

130. *See, e.g.*, Edward F. Brodsky, *RICO And The Securities Laws*, N.Y. L. J., June 12, 1991, at 7 (purchaser-seller requirement should not be eliminated); Pitt, *supra* note 16, at 33 (controlling litigation is the consensus in America).

131. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739-45 (1975).

132. Campbell, *supra* note 115, at 5.

133. Getzendanner, *supra* note 2, at 684 (arguing that "there is simply no general need to encourage litigation for securities fraud."). The Securities and Exchange Commission proposed that Congress revise RICO to eliminate lawsuits based on violations of securities fraud. *See* Pitt, *supra* note 16, at 31.

134. Sedima, S.P.R.L. v. Imrex, Co., 473 U.S. 479, 498 (1985). However, the dissent argues that RICO essentially eradicated the precedent that developed over time. Justice Marshall claimed that the securities law precedent "is now an endangered species because plaintiffs can avoid the limitations of the securities laws merely by alleging violations of other predicate acts." *Id.* at 505 (Marshall, J., dissenting).

135. Jed S. Rakoff, *The Supreme Court's Scolding Of RICO*, N.Y. L. J., Apr. 2, 1992, at 29 (explaining that the decision will simply "muddy the waters" and create uncertainty in the interpretation of proximate cause).

136. Leigh, *supra* note 105, at 8 (claiming that interpretations of the ruling depend on one's allegiance).

137. Pitt, *supra* note 16, at 33.

will be a limitation on plaintiffs' chances of recovery but an increase in the number of persons entitled to bring a cause of action.

C. *Standing Under the Purchaser-Seller Limitation*

When the Supreme Court announced that it granted certiorari in *Holmes*, the financial and legal communities believed the case would finally resolve the RICO issue.[138] The potential implications arising out of the decision created substantial interest among followers of securities law. Prior to the Court's decision, one commentator surmised that an affirmance of the court of appeals would set an alarming precedent for averting the standing limitations needed to bring RICO actions based on other violations,[139] resulting in an increase in the number of frivolous lawsuits filed by plaintiffs far removed from the actual transaction.[140] Proponents of the statute looked forward to a broad interpretation enabling those with no claims under the securities laws to access RICO.[141]

Instead, neither party came away satisfied with the outcome, for the Court dodged the question that people most wanted answered. Even Souter himself recognized the lower courts demanded "much-needed guidance."[142] Unless the lower courts can discover a way to use this opinion to develop a compromise solution, the judicial system must wait for another RICO/securities fraud case to appear and hope the Court does not again drop the ball.

V. CONCLUSION

In enacting the RICO statute, Congress included "fraud in the sale of securities" as a predicate offense with a meager amount of support and reasoning. Thus, courts interpreting RICO in securities fraud actions had little guidance as to whether the purchaser-seller standing limitation previously implied by the courts in a Rule 10b-5 action also applied to RICO. The ensuing confusion resulted in conflicting decisions among the federal circuits.

In *Holmes*, the SIPC attempted to recover monies paid to customers of two failed brokerage firms by bringing RICO charges against the defendant. Rather than decide the issue of whether the SIPC had standing to allege a RICO action, the Court held the actions by the defendant were not the proximate cause of the losses of the SIPC. The question of whether the purchaser-seller requirement applies to RICO remains unanswered. Thus, the federal courts may continue to interpret the issue

138. *See supra* text accompanying note 4.

139. Brodsky, *RICO And The Securities Laws*, *supra* note 130, at 7. The author summarized the arguments on both sides and concluded that the purchaser-seller requirement should not be eliminated.

140. Tobenkin, *supra* note 4, at 5 (referring to Holmes's attorney, who said that "lawyers may increasingly use the RICO law in securities violation cases far removed from the organized crime activities RICO was designed to fight against").

141. Brodsky, *RICO And The Securities Laws*, *supra* note 130, at 7.

142. Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1322 (1992).

in the same manner as they did prior to *Holmes*, with some applying the purchaser-seller standing requirement to RICO cases, and others ignoring the standing requirement required by the securities laws.

In order to remain in harmony with Section 10b of the Securities Exchange Act of 1934 and Rule 10b-5, RICO needs to adopt the purchaser-seller requirement used by the federal securities laws in fraud actions. Limiting the number of potential plaintiffs will prevent frivolous RICO lawsuits and will constrain securities fraud actions to those that meet the criteria of the securities laws. By not addressing the purchaser-seller requirement, the Supreme Court avoided the most important issue in *Holmes*, and provided no direction for the divided lower courts. If potential defendants hoped for *Holmes* to clarify the liability picture, their wishes went unfulfilled, and they must wait for the next RICO case for another opportunity.