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Audrey Daniel

THE INTENT DOCTRINE AND CERD: How the United States Fails to Meet its International Obligations in Racial Discrimination Jurisprudence

By Audrey Daniel[1]

Introduction

Although the United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination, (hereinafter "CERD" or "the Convention"), it does not further its human rights objectives. Specifically it fails to address the Intent Doctrine, which requires that a plaintiff prove a perpetrator's *intent* to discriminate to win an equal protection claim. This doctrine violates CERD's very definition of discrimination. Utilizing a disparate impact standard of discrimination, CERD offers broad protections against modern forms of discrimination such as implicit bias and structural racism. The Intent Doctrine, in comparison, is unequipped to combat these latent, yet incredibly pervasive types of racial discrimination. Because of this substantial disconnect between Supreme Court precedent and the United Nations treaty, the United States is in violation of its commitment to the Convention and to the ideals set forth therein. While other party states maintain progressive standards similar to those laid out by CERD, the United States refuses to modify its laws to comply with the Convention. It continues to implement a doctrine that is ill-equipped to remediate contem-

[1] This article was written in conjunction with Equal Justice Society, an organization founded to overturn *Washington v. Davis*. Special thanks to my family, Damien Jovel, Sara Jackson, Brando Starkey, Fabian Renteria, Reggie Shuford and Eva Paterson for their outstanding input and support.

porary manifestations of race-based discrimination. This article will explore how the Intent Doctrine violates the very fundamentals of CERD's human rights objectives, and provide suggestions for how civil and human rights advocates can leverage CERD's language and international mandate to advance anti-discrimination law in the United States.

Central to this article is the distinction between an "intent"-based standard and a disparate impact standard. With respect to race-based discrimination claims, the United States' "Intent Doctrine" requires that a plaintiff prove that the alleged discriminatory action was done with the *specific intention* to discriminate based on race.[2] This standard is almost impossible to prove in contemporary race-discrimination claims.[3] Modern discrimination is less likely to be overt or based on explicit racial animus, and is more often subtle, indirect or even unconscious.[4] The Intent doctrine is incapable of addressing this type of discrimination and has impeded the development of United States discrimination jurisprudence since its inception. On the other hand, the disparate impact analysis utilized in CERD focuses on the *effect* of an alleged discriminatory act. This broader standard, (referred to herein as "disparate impact," "effects-based," and "indirect discrimination") refocuses the inquiry towards whether an action actually resulted in discrimination, instead of whether an actor intended to discriminate. Modern social science illustrates that most discrimination functions at a subconscious and structural level. This creates discriminatory effects even absent any "intent" to discriminate. Consequently, an effects-based standard is better equipped than the Intent Doctrine to address contemporary discrimination. The international community has embraced a disparate impact standard, in large part to take an effective and proactive stance against racial discrimination. The United States, however, refuses to comply with its

[2] *See* Washington v. Davis, 426 U.S. 229 (1976).

[3] *See e.g.*, Mcleskey v. Kemp, 481 U.S. 279 (1987).

[4] *See infra* Part II.B.

obligation as a CERD party to declare a similarly firm stance. Consequently, the United States fails to effectively address contemporary racial discrimination.

Part I of this article describes CERD in depth, concluding that the United States' commitment to CERD was and remains largely symbolic. With specific attention to the disparate impact standard and how it operates, the article discusses the history and structure of the Convention, as well as the limiting stipulations the United States attached at ratification. In Part II, the article argues that the Intent Doctrine is not only inadequate to remedy modern discrimination, but also violates the provisions of CERD. It explores *Washington v. Davis*, the 1976 Supreme Court case that established the Intent Doctrine precedent, and discusses two types of modern discrimination—implicit bias and structural racism—to demonstrate how the Intent Doctrine fails to effectively address racial discrimination in the United States. The article then focuses on the conflict between the intent and disparate impact standards, discussing the interaction between CERD's Enforcement Committee and the United States bodies charged with effectuating the Convention. Part III highlights the domestic discrimination standards of other CERD party states with a focus on the United Kingdom, Canada and South Africa.[5] This section shows that other party states not only comply with CERD's anti-discrimination obligations, but that they have explicitly rejected the Intent Doctrine in favor of broader, more effective discrimination protections. Finally, Part IV discusses actions that the legal community and the public can take to enforce CERD's disparate impact standard within the United States. Specifically, it explores working towards either overturning *Washington v. Davis*, or calling for legislation to effectively implement the provisions of CERD. Overall, this article will

[5] These countries were chosen because they are all party states to CERD, and have considered the intent requirement in their discrimination jurisprudence but rejected it for the more effective disparate impact standard of CERD.

demonstrate that through the Intent Doctrine, the United States does not take its international obligations against racial discrimination seriously, as opposed to other party states that maintain far more progressive and effective standards that *do* comply with CERD.

PART I: CERD

The International Convention on the Elimination of All Forms of Racial Discrimination is one of the most celebrated and embraced international human rights treaties. Originally drafted in 1965, this treaty is described as "the most comprehensive and unambiguous codification in treaty form of the idea of the equality of the races."[6] This section will discuss the history of CERD, the structure of its language with special attention to its standard for discrimination and its corresponding enforcement mechanisms, and the outpouring of support for CERD from the international community. It will then analyze the limitations set forth by the United States upon ratification, concluding that they are so broad that the United States' commitment to CERD and its purpose was largely a symbolic gesture to the international community.

A. History of CERD

In the winter of 1959 to 1960, a sudden surge of anti-Semitic incidents worldwide created demand for an international convention aimed at eliminating discrimination.[7] In response, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter "the Sub-Commission") adopted a resolution declaring that such events violated the Universal Declaration of Human Rights and recom-

[6] Egon Schwelb, *The International Convention on the Elimination of all Forms of Racial Discrimination*, 15 INT'L & COMP. L. Q. 996, 1057 (1966).
[7] NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 1 (Sijthoff & Noordhoff 1980).

mending specific actions to combat these and similar occurrences.[8] After the General Assembly approved the resolution, it undertook to create an instrument by which signatory states would be required to affirmatively impose measures to alleviate, and eventually eliminate, discriminatory acts and practices within the state.[9] The resolution, "Manifestation of Racial Prejudice and National and Religious Intolerance," became the precursor to CERD.[10]

The General Assembly's Third Committee concluded that two separate conventions would be prepared: one dealing with the epidemic of religious intolerance and the other with racial prejudice.[11] Because various delegations asserted that issues of race were more urgent than religious intolerance, the General Assembly agreed to prioritize the instrument dealing with racial discrimination.[12]

In 1964, the Sub-Commission formulated the language of the Convention, which "embodied the world community's declaration of an international standard against racial discrimination and 'drew its primary impetus from the desire of the United Nations to put an immediate end to discrimination against black

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8 Schwelb, *supra* note 6, at 997-98.

9 *Id.*

10 Michael B. de Leeuw et al., *The Current State of Residential Segregation and Housing Discrimination: The United States' Obligations Under the International Convention on the Elimination of all Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337, 341 (2008).

11 Schwelb, *supra* note 6, at 999.

12 *Id.* The "decision to separate the problem of 'religious intolerance' from that of 'racial discrimination' had been brought about by political undercurrents which had very little to do with the merits of the problem. The opposition to coverage of religious as well as racial discrimination had come from some of the Arab delegations; it reflected the Arab-Israeli conflict. In addition, many delegations, particularly those from Eastern Europe, did not consider questions of religion to be as important and urgent as questions of race." *Id.*

and other nonwhite persons.'"[13] Reflecting the urgency to create a convention prohibiting racial discrimination, the General Assembly quickly and unanimously adopted CERD on December 21, 1965.[14] The final version was later depicted as "the international community's only tool for combating racial discrimination which is at one and the same time universal in reach, comprehensive in scope, legally binding in character, and equipped with built-in measures of implementation."[15] As a mechanism to promote international human rights, the United Nations created CERD to promote and enforce broad racial discrimination protections within each signatory state.

Once the language of CERD was finalized, it gained instant support. Upon opening for signature in March of 1966, there were already twenty-two signatories by the end of June 1966.[16] By signing the Convention, signatory states indicated their intention to take steps towards ratification. Signatory states are prohibited from acting in any way that would defeat CERD's purpose.[17] Today, out of the 192 United Nation Member States, 173 are parties to the Convention.[18] Each party state has ratified the Convention, consenting to be bound by its terms.[19] In addition, there are currently five states that have signed but not yet ratified CERD.[20] CERD receives broad support for its human

13 Leeuw, *supra* note 10, at 342, (quoting Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283, 284 (1985)).
14 *Id.*
15 Meron, *supra* note 13, at 283.
16 Schwelb, *supra* note 6, at 997.
17 *Glossary*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml (Last visited Aug. 1, 2010).
18 *United Nations Member States*, UN.ORG, http://www.un.org/en/members/index.shtml (last visited Aug. 1, 2010). *Status: International Convention on the Elimination of All Forms of Racial Discrimination*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (last visited Aug. 1, 2010).
19 *Glossary*, *supra* note 17.
20 *Status*, *supra* note 18.

rights objectives, as evidenced by the fact that the vast majority of the United Nations Member States have become parties and undertaken to implement its anti-discrimination provisions.

B. Structure of CERD

The Convention is composed of a Preamble and twenty-five articles. The Preamble sets out the international concerns and ideals that led to its formation.[21] Articles 1 through 7 define racial discrimination and affirmatively impose an obligation on states to take steps towards the elimination of all forms of such discrimination within their jurisdiction.[22] Next, Articles 8 through 16 establish a reporting and monitoring scheme designed to ensure states' compliance with CERD.[23] Lastly, Articles 17 through 25 govern the manner by which CERD is ratified, entered into force, and amended.[24] The main focus of inquiry here will be Article 1, specifically CERD's definition of "racial discrimination." In addition, CERD's established enforcement mechanisms will be explored and analyzed with respect to the United States' compliance.

i. "Racial Discrimination" Defined

The very first sentence of Article 1 of CERD defines "racial discrimination" as,

> [A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, eco-

21 International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].
22 *Id.* at art. 1-7.
23 *Id.* at art. 8-16.
24 *Id.* at art. 17-25.

> nomic, social, cultural or any other field of public life.[25]

Especially relevant in this definition for purposes of this article is the *explicit inclusion* of a disparate impact standard, signified by the phrase "or effect."[26] This standard focuses not on the discriminatory motives of a state actor, but rather on the discriminatory *effects* of a law or policy without regard to the purposes behind it. In other words, if a state maintains a law or policy that was enacted for an entirely non-discriminatory purpose, it still may be in violation of CERD if it creates a racially disparate impact.

Article 1's drafting history demonstrates that the inclusion of an effects-based standard was intentional and generally unopposed.[27] In the initial drafting phase, three versions of Article 1 were submitted to and considered by the Sub-Commission.[28] Only one definition explicitly specified that discriminatory effects would also constitute violations of the Convention; the other two were silent on the issue.[29] These latter two definitions could very well have been construed to include such an analysis, as they substituted the language "purpose or effect" with the more ambiguous "based on."[30] A working group produced a version that included the discriminatory impact standard. It was almost identical to the definition eventually adopted by CERD.[31] The proposed text made its way through the Sub-Commission, the Commission and the Third Committee before

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25 *Id.* at art. 1 (emphasis added).
26 *Id.*
27 Lerner, *supra* note 7, at 25-6.
28 *Id.* at 25.
29 *Id.* at 26.
30 *Id.* at 25-6. "The text proposed by Mr. Abram included in the term 'racial discrimination' any 'distinction, exclusion or preference made on the basis of race, colour or ethnic origin, and in the case of States composed of different nationalities or persons of different national origin, discrimination based on such differences.' The text proposed by Mr. Calvocoressi added to the words, 'distinction', 'exclusion' or 'preference' the word 'limitation.'" *Id.*
31 *Id.* at 26.

finally receiving unanimous approval.[32] During that process, "purpose or effect" remained unchanged while other aspects of the definition were debated.[33] The intent of the drafters is made clear by the explicit inclusion of an effects-based inquiry in the language, and strengthened by the lack of debate on the issue. Thus, from its inception, CERD was broadly designed to protect against racially discriminatory acts and impacts.

After defining racial discrimination, CERD discusses the obligations imposed upon states with regard to that definition.[34] Not only do states have a fundamental obligation to refrain from supporting or participating in acts of discrimination, they also have affirmative duties to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."[35] States must also "prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization."[36] In this manner, CERD requires the party states to take measures to review its policies in light of the disparate impact definition, as well as affirmatively take steps to eradicate racial discrimination within the state.[37]

ii. Enforcement Mechanisms

In addition to laying out anti-discrimination obligations that party states must strive to achieve, the Convention establishes

[32] *Id.* at 25-7.

[33] *Id.* at 25-8. For instance, a highly contested element of the definition was the inclusion of protections based on national origin. Members pointed out that different translations of national origin signified citizenship while many did not, so this was clarified in the text. *See* CERD, *supra* note 21, at art. 1.

[34] CERD, *supra* note 21, at art. 2.

[35] *Id.*

[36] *Id.*

[37] *Id. See also, Id.* at art. 5. (listing specific rights that should be guaranteed to all without distinction).

four enforcement mechanisms designed to ensure that signatory states comply with these obligations. First, Article 8 creates a Committee on the Elimination of Racial Discrimination (hereinafter "the Committee"), made up of human rights experts who are tasked with monitoring CERD's implementation.[38] The Committee ensures compliance through mandatory reporting procedures, and provides states with feedback on how to further CERD's goals.[39] Also, Articles 11 through 13 establish a dispute-resolution mechanism, in cases where one party feels that another party is not in compliance with CERD's obligations.[40] In addition, Article 14 allows parties to recognize the competence of the Committee to hear complaints from individuals or groups within the jurisdiction.[41] Finally, Article 22 permits parties to recognize the jurisdiction of the International Court of Justice to hear disputes between parties over the interpretation or application of CERD.[42] The main procedures utilized in practice to implement CERD's obligations are the reporting procedures outlined in Article 8, discussed in detail below, and the individual complaint mechanism of Article 14.[43] While signing and ratifying the Convention implies a commitment to fulfilling its obligations, many states decline from enforcement through failing to recognize the competence of the Committee to hear complaints, and instead submitting only to the mandatory re-

38 *Id.* at art. 8.

39 *Id.*

40 *Id.* at art. 11-13.

41 *Id.* at art. 14.

42 *Id.* at art. 22.

43 *See* Cindy Galway Buys, *Application of The International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), 103 AM. J. INT'L L. 294 (2009) (discussing the first ever decision in which the International Court of Justice interpreted and applied CERD in 2008); *Human Rights Bodies – Complaints Procedures*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www2.ohchr.org/english/bodies/petitions/index.htm (last visited Nov. 1, 2010) (describing various inter-state complaint procedures, including that established by Articles 11-13 of CERD, and noting that none of those described have ever been used).

porting procedures. Those states that do allow for strong enforcement of CERD are reinforcing their commitment to its goals within their jurisdictions and, in doing so, are promoting human rights and anti-discrimination ideals more broadly. Much to its detriment, the United States has resisted recognizing or implementing many of CERD's established enforcement mechanisms.

C. United States' Reservations, Declarations and Understandings

In signing and ratifying CERD, the United States attached numerous stipulations and declarations to limit the ability to bring discrimination claims based on the anti-discrimination standards set forth in CERD. This section will discuss each in turn. Collectively, these restrictions lead the enforcement mechanisms set forth in CERD to have little to no effect in the United States, and its non-self-executing status disallows enforcing it as domestic law.[44] Thus, should a United States policy violate CERD, there are few, if any, avenues for remediation due to the extensive U.S restrictions.

In 1966, President Johnson signed CERD, but the official ratification process did not begin until 1978.[45] At that point, President Carter submitted CERD to the Senate for review, and included a list of reservations, understandings, and declarations to accompany it.[46] Even then, the limitations proposed would serve to undermine CERD because they essentially exempted the United States from any requirement that did not already

[44] The interstate complaint procedures outlined in Articles 11-13 have never been utilized, and thus will not be discussed in detail here. *See Complaints Procedures*, *supra* note 43.

[45] Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Rights of Elderly People Under International Law*, 25 GA. ST. U. L. REV. 527, 569 (2009).

[46] *Id.*

conform to United States law.[47] The Senate did not ratify CERD, and it was not again proposed until the Clinton Administration.[48] Finally, in 1994, President Clinton presented CERD to the Senate, along with limitations similar to President Carter's, and it was ratified.[49] The political atmosphere in both the Carter and Clinton administrations was such that both Presidents assured the Senate that ratifying any human rights treaty would not have a restrictive effect on domestic laws.[50] Thus, the limitations set forth in CERD ensured that there could be no effective enforcement of its provisions. It took almost three decades for the United States to ratify one of the leading human rights treaties. The United States did so only by including broad limitations that essentially exempt it from requirements of any proactive efforts to eliminate racial discrimination. The United States ensured that its citizens do not have an avenue to challenge discrimination, or inadequate standards such as the Intent Doctrine, through the application of international human rights law.

i. Non-Self-Execution

A key declaration accompanying CERD's ratification and limiting its impact from the outset was "[t]hat the provisions of

47 *Id.* (citing Terry D. Johnson, *Unbridled Discretion and Color Consciousness: Violating International Human Rights in the United States Criminal Justice System*, 56 RUTGERS L. REV. 231, 244 (2003)).

48 *Id.*

49 *Id.*

50 David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 174-5 (1999)("[W]hen President Carter did finally advocate U.S. adherence to several major human rights treaties, he felt that it was a political necessity to assure the Senate that the treaty power would not be used to change domestic law. No subsequent administration has challenged the inherited political wisdom that such an assurance is the price that must be paid to obtain Senate consent to ratification of human rights treaties." (citation omitted)).

the Convention are not self-executing."[51] This limitation means that unless the United States creates implementing legislation, the provisions of the Convention do not allow for a private right of action in domestic courts.[52] Because Congress has not created any implementing legislation, no individual or organization may bring a claim in a domestic court to enforce the provisions of CERD.[53] Despite Article VI of the U.S. Constitution, which states that treaties are the supreme law of the land, by ratifying CERD as non-self-executing the Senate stripped it of any domestic legal effect.[54] In essence, the United States may effectively opt out of CERD entirely.[55]

During the CERD ratification process at the Senate Foreign Relations Committee, a number of human rights organizations spoke out against ratifying a non-self executing Convention.[56] Many found that this declaration essentially nullified CERD's purpose as applied to the United States, that it undermined Article VI of the United States Constitution, and that it sent a message that the United States is not committed to CERD's objectives.[57] First, the NAACP urged the Senate not to include the declaration, stating, "[T]his device if accepted will deny large sections of the American people 'the protection of interna-

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51 *U.S., CERD, Reservations, Declarations, and Understandings*, BAYEFSKY.COM, http://www.bayefsky.com/html/usa_t2_cerd.php (last visited Nov. 1, 2010).

52 Robin H. Gise, *Rethinking* McCleskey v. Kemp*: How U.S. Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination Provides a Remedy for Claims of Racial Disparity in Death Penalty Cases*, 22 FORDHAM INT'L L.J. 2270, 2298 (1999).

53 *See* Johnson v. Quander, 370 F.Supp.2d 79, 101 (D. DC 2005) (discussing other Courts' findings that CERD is not self executing).

54 U.S. CONST. art. VI, § 2.

55 Nkechi Taifa, *Codification or Castration?: The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 How. L.J. 641, 655 (1997).

56 *See International Convention on the Elimination of All Forms of Racial Discrimination: Hearing Before the Comm. on Foreign Rel.*, 103d Cong., 2d Sess. (1994).

57 *See Id.*

tional human rights law as a supplement and backstop to constitutional protections.'"[58] Similarly, Amnesty International USA compared the declaration to a shield preventing United States citizens from fully enjoying those rights guaranteed in the international human rights treaty.[59] It also stated that non-self-execution is unnecessary if United States law is in fact consistent with CERD, and that it gives the impression that the United States is unwilling to give its citizens all available avenues to challenge discrimination in domestic courts.[60] In opposition to non-self execution, the ACLU argued that the Convention's protections should be immediately enforceable in United States courts in order to not undermine Article VI of the U.S. Constitution.[61] The Lawyers Committee for Human Rights agreed that "it would undermine one of the principal reasons why the Constitution made treaties the law of the land . . . Incorporation of this declaration will unnecessarily delay U.S. compliance with some provisions and set up unnecessary political obstacles to U.S. compliance generally."[62]

The International Human Rights Group pointed out that the United States generally urges the enforceability of international human rights standards in domestic courts in order to strengthen democracy, and yet, this declaration suggests that the United States is "afraid to practice what it preaches."[63] Similarly, The World Federalist Association opposed the declaration, arguing that the United States should take a lead in emphasizing rule of law as a means of peaceful dispute resolution.[64] Finally, the Mi-

58 *Id.* at 51 (statement of Wade Henderson, Director, Washington Bureau of the NAACP).
59 *Id.* at 65 (statement of the ACLU).
60 *Id.* (statement of the ACLU).
61 *Id.* at 62 (statement of the ACLU).
62 *Id.* at 69, 72 (letter to Senator Pell from Lawyers Committee for Human Rights).
63 *Id.* at 52 (statement of William T. Lake, partner, Wilmer, Cutler & Pickering).
64 *Id.* at 80 (statement of William L. Robinson, Dean, District of Columbia School of Law).

nority Rights Group stated, "[t]he effect would be to dilute the force of the Convention as ratified by the Senate and to call into question, on an international level, the commitment of the United States to the elimination of racial discrimination within its own borders."[65] Despite the urging of these and other human rights groups, the Senate included this declaration so that the provisions of CERD are not enforceable in United States courts. Consequently, claims of racially disparate impact that do not meet the high-level Intent Doctrine standard, unless other specific statutes apply, will not be heard in the courts of the United States.[66]

ii. Individual Complaint Mechanism

Another broad limitation set out in the United States' ratification was the refusal to recognize the competence of the Committee to receive and consider individual or organization complaints. The victims' complaints assert CERD violations by the United States.[67] Thus, an individual or organization in the United States is not only precluded from bringing a CERD claim within the U.S. court system, but is also prevented from bringing that claim to the Committee. While recognizing the Committee is voluntary, committing entirely to the Convention, including all of its enforcement procedures, manifests a state's willingness to fully address any violation. The Office of the United Nations High Commissioner for Human Rights declared that "[t]he ability of individuals to complain about the violation of their rights in an international arena brings real meaning to

[65] *Id.* at 76 (statement of the Minnesota Advocates for Human Rights and the Minneapolis Commission on Civil Rights).

[66] Certain statutes provide for a disparate impact standard and therefore claims based on these statutes would be heard in domestic courts. However, these claims must fall within certain areas of the law such as voting rights, leaving other types of racial discrimination to satisfy the requirements of the Intent Doctrine.

[67] *Status*, *supra* note 18 (listing those nations that recognize the Committee's competence, which does not include the United States).

the rights contained in the human rights treaties."[68] Fifty-three states are fully dedicated to addressing any internal violations of CERD by recognizing the competence of the Committee to hear complaints.[69] The United States, however, has declined to recognize its competence. Thus the Committee cannot hear claims from individuals or organizations in the United States alleging a disparate impact, or any other, violation of CERD.[70]

iii. Competence of the International Court of Justice

Another limiting effect of the United States' CERD ratification is its failure to consent to the International Court of Justice's jurisdiction. Consenting to the court's jurisdiction is necessary in order to be party to any claim arising before the International Court of Justice under CERD.[71] Article 22 allows for disputes between state parties to be heard by the International Court of Justice if they are not resolved by negotiation or by the Committee.[72] Thus, while states may bring claims against the United States to the Committee, a practice which has never been used, it can only be finally resolved by the International Court of Justice should the United States consent.[73] In the Senate Foreign Relations Committee Hearing, the Legal Advisor of the U.S. Department of State explained that this reservation was necessary to protect the United States from claims brought for frivolous or political reasons.[74] The Minority Rights Group addressed that concern in the Hearing record, asserting:

> Threats or fear of frivolous complaints should not subvert the United States' greater interests in sup-

68 *Complaints Procedures*, *supra* note 43.
69 *Id.*
70 *Id.*
71 *U.S. Reservations*, *supra* note 51.
72 CERD, *supra* note 21, at art. 22.
73 *See U.S. Reservations*, *supra* note 51.
74 *Hearing*, *supra* note 56, at 13 (statement of Conrad K. Harper, Legal Advisor, U.S. Department of State).

> porting and encouraging international human rights standards and enforcement mechanisms. A reservation to Article 22 will raise international concern regarding the United States' commitment to the Race Convention, suggesting to parties already having ratified the Convention that the United States will not take its obligation to enforce the Convention's provisions seriously. In making a reservation to Article 22, the U.S. puts itself in the company of states such as Libya, Syria, Cuba, and China, who also have reservations to Article 22 currently in force. Support has been shown both at home and abroad for international dispute resolution through the ICJ.[75]

Similar to the arguments against ratifying the Convention as non-self-executing, organizations voiced that this reservation would undermine the commitment to eliminating racial discrimination. It sends the message to the international community that the United States does not consider this a serious obligation. However, these arguments have not deterred the United States from insisting on its limitations. The result is that while the United States considers itself at the forefront of progressive civil rights policy, there are very few avenues for victims to enforce CERD's anti-discrimination obligations against the United States.

iv. Symbolic Nature of Unites States' Ratification

Through its broad limitations of the established enforcement procedures, the United States has made clear that discrimination claims, as defined by CERD, will not be enforced within its borders. The Senate ratified on the condition that no U.S. law would be amended based on the Convention. The U.S. definition of discrimination demonstrates how the United States con-

[75] *Id.* at 75 (statement of Minority Rights Group).

tinually violates the Convention.[76] Thus, these restrictive provisions were put into place so that no individual, group or state could compel the United States to comply with CERD.[77] After waiting almost 30 years to ratify the Convention, combined with the lack of commitment to its enforcement and goals, reveals to the international community and to its own inhabitants that the United States' commitment to CERD was largely a symbolic gesture.

By ratifying CERD, the United States did not intend to amend any of its policies to conform to CERD's obligations. Through its limiting reservations, declarations and understandings, it ensured that no domestic policy would be scrutinized by the international community, nor enforced through domestic courts. While Article 2 of the Convention requires that each state party proactively takes steps to combat racial discrimination within its jurisdiction, the United States has refused to address a basic difference in the very definitions of racial discrimination.[78] The enforcement mechanisms, the reporting procedures, the competence of the Committee to hear individual and organization's complaints, the interstate complaint process, and the International Court of Justice demonstrate that there is little possibility that the United States will address the troublesome Intent Doctrine.

The United States even prohibits its own citizens from bringing complaints to the Committee. The international community will not hear or know of legitimate CERD claims from individuals within the United States.[79] While the interstate complaint process is permitted, in which one state may allege a CERD violation taking place within another state, it has never been utilized.[80] If a dispute were not resolved through that process it

76 Sloss, *supra* note 50, at 174.

77 *Id.*

78 CERD, *supra* note 21, at art. 22. *See infra* Part II.C.

79 *See supra* Part II.B.ii.

80 *See Complaints Procedures*, *supra* note 43.

would be brought before the International Court of Justice.[81] Given its unwillingness to submit to other enforcement procedures, and its allegation that claims against the United States would be brought for frivolous or political reasons, it is assumed that the United States would rarely, if ever, consent to the International Court's jurisdiction.[82] Thus, the United States has ensured that the international community will not hear claims from within the United States, nor from other states. To further reduce the binding effect of CERD provisions, the U.S. domestic courts also lack jurisdiction to hear CERD-based claims.[83] Thus, not only is pressure from the international community to amend the restrictive Intent Doctrine ineffective, but CERD also has no legal effect within U.S. courts to address this discrepancy. The United States has unmistakably ratified CERD with no intention of honoring its obligations or goals and this is especially true with respect to the Intent Doctrine.

The United States ratification of CERD is a symbolic gesture. The evidence for this is based on the Senate's conditional ratification of the CERD that ratification would in no way affect domestic policy, and the Senate's use of limiting language to blunt available recourses for violations. The United States did not intend to actually comply with CERD's obligations and only ratified the Convention as a hollow attempt to assert its human rights commitment. The United States' dedication to CERD's central purpose is lacking, as the Intent Doctrine continues to limit the United States' ability to address racial discrimination claims in accordance with the basic objectives of CERD.

PART II: THE INTENT DOCTRINE

The United States maintains a basic understanding of the nature of racial discrimination that is anachronistic and far nar-

81 *See Id.*
82 *See supra* Part II.B.iii.
83 *See supra* Part II.B.i.

rower than CERD's definition. As discussed above, the definition of racial discrimination adopted by the Convention allows for a broad, effects-based disparate impact inquiry as a basis to assert a claim. In order to succeed in a constitutional claim of racial discrimination the United States requires that a party prove either that a law or policy was enacted with the *intent* to discriminate, or that an individual's action was motivated by explicit racial animus.[84] This latter method, established pursuant to the Intent Doctrine, not only closes the courthouse doors to numerous claims of racial discrimination, but also disregards the character of modern discrimination. The following section will discuss the history of the Intent Doctrine, exploring reasons and examples of why it is incapable of addressing modern discrimination in the United States. It will then address the CERD Committee's alarming reaction to the Intent Doctrine, as well as the United States' refusal to recognize its inadequacies in addressing racial discrimination.

A. Washington v. Davis

The Supreme Court of the United States created and applied the Intent Doctrine in 1976, in the landmark case *Washington v. Davis*.[85] There, a group of black applicants aspiring to become Washington D.C. police officers alleged that certain recruitment procedures were racially discriminatory.[86] The applicants alleged that these procedures violated the Fifth Amendment's Due Process Clause.[87] Specifically, the applicants offered evidence that a written personnel test designed to measure verbal skills dispro-

84 *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

85 *See Id.*

86 *Id.* at 232.

87 *Id.* at 233 (because the action took place in Washington D.C., the respondents sued based on a Fifth Amendment claim and not the Fourteenth Amendment's Equal Protection Clause, which applied only to the states. However, this did not change the equal protection analysis as applied to the Fifth Amendment and the ruling applies to Fourteenth Amendment claims).

portionately excluded black applicants, and that it bore no relationship to job performance.[88] Thus, the issue before the Court was whether the racially disproportionate *effect* of the test, without regard to the police department's intent, constituted a violation of equal protection.[89]

The D.C. Circuit Court of Appeals invalidated the test.[90] The personnel test at issue evaluated whether an applicant to the police force had acquired a specified level of verbal skills.[91] The evidence showed that 57% of black applicants to the police force failed the test, barring them from the force, whereas only 13% of white applicants failed.[92] Challenging the rationale behind the test, which resulted in whites passing at four times the rate of blacks, the court explained that "absent evidence revealing some other reason for the lopsided failure rates appearing here, it is difficult to imagine how disproportionate effect could ever be better demonstrated."[93] The appellate court also noted that the disproportionate impact of generalized intelligence tests is "the result of the long history of educational deprivation, primarily due to segregated schools, for blacks."[94] After a finding of disparate impact, the burden shifted, requiring the police department to show that the test bore a demonstrable relationship to successful performance in the department.[95] The court deemed any effort of the department to recruit black officers irrelevant as an explanation for the lopsided figures, and thus held that the benevolent intent of the department was an insufficient response to the discriminatory effects of the test.[96] Because the police department could not adequately prove the

88 *Id.*
89 *Id.* at 229.
90 Davis v. Washington, 512 F.2d 956, 965 (D.C. Cir. 1975).
91 *Id.* at 958.
92 *Id.* at 958-59.
93 *Id.* at 960.
94 *Id.* at 961.
95 *Id.* (basing the burden-shifting analysis on the "Griggs Standard" annunciated in Griggs v. Duke Power Co., 401 U.S. 424 (1971)).
96 *Id.* at 960.

test's job-relatedness, the Court of Appeals invalidated the test based on its clear discriminatory impact.[97]

After granting certiorari, the Supreme Court refocused the analysis from the test's job-relatedness to the intent of the department with respect to the creation and administration of the test.[98] The Court of Appeals borrowed the effects-based standard from Title VII of the Civil Rights Act of 1964. The Supreme Court argued that the standard does not extend to the Constitution.[99] Despite the fact that the Court had previously established a disparate impact standard to assess Title VII claims of employment discrimination, it now refused to extend those standards to equal protection claims identical in nature.[100] Rather, the Court created a new framework for evaluating constitutional claims of racial discrimination: the Intent Doctrine.

The Court of Appeals noted that this case perfectly exemplified a policy yielding racially disproportionate effects in violation of the Constitution.[101] However, the Supreme Court added a requirement that is virtually impossible to prove and resulted in a loss for the black applicants. The Supreme Court did not focus on the fact that the result of administering this test was that more white applicants were hired to the police force than black applicants.[102] If the effects-based inquiry were employed, the Court argued, it could invalidate an entire range of statutes that are burdensome to black people and not to whites.[103] Instead, the Court shifted its analysis to the state actor's subjective frame of mind, imposing the additional requirement that the test be administered with the *purpose of discriminating* against black applicants.[104] Because the black applicants could not prove that

97 *Id.* at 965.
98 Washington v. Davis, 426 U.S. 229, 238-39 (1976).
99 *Id.* at 239.
100 *See Id.*; Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
101 *Davis*, 512 F.2d at 960.
102 *Washington*, 426 U.S. at 245.
103 *Id.* at 248.
104 *Id.* at 238.

the test was designed and administered with the specific intent to discriminate against them based on their race, the Court found in favor of the police department.[105] This became the first application of the Intent Doctrine that barred a claim of discrimination that would have otherwise been held valid under a discriminatory impact framework. It also marked the beginning of a new era: the regression of anti-discrimination law in the United States.

B. Perils of the Intent Doctrine

Thus far, this article has examined both the disparate impact standard utilized by the international community in CERD, and the Intent Doctrine employed by the United States, as established in *Washington v. Davis*. The former, effects-based inquiry is better suited to remedy the types of present-day discrimination prevalent in the United States. Specifically, the Intent Doctrine is unequipped to combat either implicit bias or structural racism, both of which social scientists have found contribute to vast disparities based on race. These latent forms of discrimination are deeply rooted in the United States' long history of race-based discrimination. The element of intent is absent from the operation of both implicit bias and structural racism. Thus, despite their pervasiveness, neither form of modern discrimination is subject to claims of unconstitutional racism in the United States.

i. Implicit Bias

Implicit bias exists in nearly every aspect of society and yet is largely unintentional. Social science research shows that people categorize others based on certain biases and stereotypes.[106]

[105] *Id.* at 250.

[106] Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 337 (1987).

This mental process is a means to efficiently interpret ones' surroundings without having to take the time to deliberate.[107] Thus, people are completely unaware that this "categorization" process is even taking place.[108]

In a social context, social scientists refer to the process of an individual learning to categorize others based on embedded societal opinions as "assimilation."[109] Children at a very early age perceive the dominant cultural attitudes towards specific races but are too young to separate their own beliefs from those of the people around them.[110] Children not only pick up on attitudes that may be implicit and manifested only through subtle action, but are also too young to disconnect these feelings from facts.[111] Thus, the child inherits strong attitudes and beliefs about racial categories without the conscious participation of the child or anyone else. Throughout life, every experience that supports these learned, implicit beliefs will only serve to strengthen them. At the same time, a person's unconscious will resist interpreting situations that challenge their ingrained categories unless forced to do so.[112] Thus, in order to interpret their surroundings, people generally make quick judgments by categorizing people based on race, attaching everything they have learned about that specific race, while remaining largely unaware that this cognitive process is taking place.

The study of implicit bias has gained prominence as the United States has moved towards rejecting explicit manifestations of racism, despite continuing to be plagued with its effects. While many allege that the United States is now "post-racial," clear racial distinctions persist in almost every measure of social welfare, including education, housing, employment, criminal jus-

107 *Id.*
108 *Id.* at 339.
109 *Id.* at 337.
110 *Id.* at 338.
111 *Id.*
112 *Id.*

tice, health care, and transportation.[113] In order to understand how and whether our subconscious beliefs and behaviors could perpetuate such discrepancies, social scientists have developed numerous tests to measure the extent and nature of implicit bias. The Implicit Association Test (hereinafter "IAT"), hosted by Project Implicit at Harvard University, measures positive and negative associations with specific races based on response time.[114] For instance, the subject will be asked to connect certain positive notions, such as laughter or peace, with white people, and negative concepts, such as evil or agony, with black people.[115] While most respond quickly to this relatively simple task, response time is almost always increased when the subject is asked to then connect the positive concepts with black people and the negative ones with white people.[116] This slower response time reflects people's unconscious reluctance to challenge implicit biases about race.[117] Available online since 1998, the IAT has compiled extensive data about racial preferences, all indicating that implicit bias is very much prevalent in today's society.[118] In fact, more than two-thirds of test takers register bias towards stigmatized groups.[119] Of whites and Asians who take the test, 75-80% demonstrate an implicit preference for whites over blacks.[120]

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113 *See* Reginald Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 CAMPBELL L. REV. 503 (2009); Eva Paterson, Kimberly Thomas-Rapp, & Sara Jackson, *Id, the Ego and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175 (2008).

114 *Project Implicit*, IMPLICIT.HARVARD.EDU, https://implicit.harvard.edu/implicit (last visited August 16, 2010).

115 *General Information*, PROJECT IMPLICIT.NET, http://www.projectimplicit.net/generalinfo.php (last visited August 16, 2010).

116 Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundation*, 94 CAL. L. REV. 945, 952-53 (2006).

117 *Id.*

118 *General Information*, *supra* note 115.

119 Greenwald & Krieger, *supra* note 116, at 957-58.

120 *General Information*, *supra* note 115.

A 2004 study regarding implicit bias in hiring processes illustrates the practical effects of these findings.[121] In this study, fictitious resumes were sent in response to help-wanted ads in Boston and Chicago, and each was randomly assigned a stereotypical white or black name.[122] Across industry, occupation and employer size, the white-sounding names received 50% more callbacks despite otherwise identical resumes.[123] It is fair to assume that most, if not all, of those employers did not consciously make the decision to respond to white applicants and not black applicants.[124] Rather, their implicit negative biases towards the black applicants guided their actions.

It is clear from the IAT that implicit bias is powerful, widespread, guides people's actions, and perpetuates the racial disparities present in the United States today. In fact, the IAT demonstrates that implicit bias measures are significantly *better* at predicting people's actual behavior than explicit bias measures (*i.e.*, whether or not someone considers themselves to be prejudiced towards particular groups).[125] However, because people are not making intentional decisions based on explicit racial animus, but rather based on learned, unconscious stereotypes, the Intent Doctrine is powerless to combat implicit bias.

ii. Structural Racism

Structural racism is yet another framework for understanding modern racism and examining how racism is woven into the very fabric of our society. Studies on structural racism examine how entire systems can function to discriminate through institutionalized practices and procedures, often built in over genera-

121 *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 Am. Econ. Rev. 991 (2004).
122 *Id.* at 991.
123 *Id.* at 992.
124 Greenwald & Krieger, *supra note* 116, at 966.
125 *Id.*

tions.[126] Here, a discriminatory effect is not traced back to a single, specific action but rather is understood to result from the *cumulative impact* of interactions within a discriminatory system or set of systems.[127] For instance, housing discrimination, itself a product of deeply embedded structural racism, is not an isolated phenomenon of residential segregation, but is also connected to discrimination in other systems, such as education and criminal justice.[128] A child who is geographically isolated from a decent school system may not only receive a sub par education, but is also more likely to get arrested and become part of the criminal justice system.[129] These interactions between systems perpetuate a vicious cycle of discrimination, though they do not depend on a single, intentional act to initiate the injustice.[130] Because this type of embedded racism does not focus on direct causation, but rather results from circumstances that cumulatively cause racial disparities, the remedy cannot rely on a finding of fault.[131]

> A systems approach changes the focus from assigning culpability to solving a problem and redressing a harm. Parties may be called upon to address harms they may not have directly caused or intended to cause. In many cases, these harms were predictable or foreseeable, even if they were unforeseen in fact.[132]

Addressing the causes and effects of racial disparities is a preferable approach to the Intent Doctrine, as discrimination results in an appreciable harm whether intended or not. The D.C. Court of Appeals in *Washington v. Davis* alluded to this concept when it discussed how the history of educational segregation

126 John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. Rev. 791, 796 (2008).
127 *Id.* at 796.
128 *Id.* at 796-97.
129 *Id.*
130 *Id.* at 797.
131 *Id.* at 798.
132 *Id.*

was affecting the test scores, and in turn affecting employment.[133] While invalidating the written personnel test alone would not have alleviated the entrenched cycle of racial disparity, ruling that the disparate impacts of the test constituted discrimination could have impeded the cycle and contributed to an overall less racially imbalanced system. The police department would have been tasked with creating a fairer test, which would ultimately have contributed to a more diverse system of employment opportunity. In turn, this outcome would hinder a cycle of structural exclusion by resulting in greater opportunity for members of historically marginalized groups. Thus, utilizing an effects-based inquiry would enable the courts to address systemic racial disparities closer to their root, whereas focusing on the intent of the actor leaves the discriminatory system fully intact.

iii. *McCleskey v. Kemp*

Perhaps most illustrative of the devastating effects of the Intent Doctrine is the Supreme Court case *McCleskey v. Kemp.*[134] In this case, the Court held that despite clear evidence of racial disparities in capital sentencing, suggesting both implicit bias and structural racism, a death row inmate must demonstrate that his or her sentence was issued with the intent to discriminate based on race.[135]

Warren McCleskey, a black, death row inmate, alleged that his Equal Protection rights were violated during sentencing.[136] In support of his claim, McCleskey presented a study on the link between race and capital sentencing, which incorporated two statistical inquiries based on over 2,000 murder cases in Georgia

133 Davis v. Washington, 512 F.2d 956, 961 (D.C. Cir. 1975).
134 *See* Mcleskey v. Kemp, 481 U.S. 279 (1987).
135 *Id.* at 297.
136 *Id.* at 286. McCleskey had been found guilty of two counts of armed robbery and one count of murder of a white police officer in 1978. He was then sentenced to death based on the murder charge. In addition to his 14th Amendment claim, he also brought an 8th Amendment claim. *Id.* at 283-86.

during the 1970s.[137] Among other findings, the study demonstrated that the death penalty was assessed in 22% of cases involving black defendants and white victims, and just 1% of those involving black defendants and black victims.[138] It also found that defendants charged with killing white victims were 4.3 times more likely to receive the death penalty than those charged with killing black victims.[139] The Court, however, stated that in order to prevail on his Equal Protection claim, McCleskey must prove that during his own sentencing, the decision-makers intended to discriminate against him based on his race.[140] Also, in response to McCleskey's claim that the state violated the Equal Protection Clause by enacting and implementing this capital punishment scheme, the Court declared that "[f]or this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect."[141] Requiring McCleskey to prove that those involved in the legislative process sentenced him to death *because of* his race effectively created an insurmountable barrier to his claim. Furthermore, the court defended its ruling by arguing that McCleskey's claim to proceed would open a floodgate of Equal Protection claims based on discriminatory impact in the criminal justice system.[142] Ultimately, McCleskey was not able to prove that the state created or implemented its death penalty statute with the purpose of racially discriminating against him, and his claim was denied.[143]

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137 *Id.* at 286-87. The Baldus study, named after Professor David Baldus, took into account 230 nonracial variables that could otherwise explain the disparities. The Court accepted the validity of the study. *Id.*

138 *Id.* at 286.

139 *Id.* at 287.

140 *Id.* at 292.

141 *Id.* at 298.

142 *Id.* at 315-16.

143 *Id.* at 320.

McCleskey demonstrates the disconnect between the United States' approach to evaluating discrimination and the manner by which discrimination actually operates. The study relied upon in *McCleskey* was a disturbing evaluation of the death penalty in 1970s Georgia. The study relied on disparate impact evidence to demonstrate the clear existence of implicit bias and structural racism within Georgia's criminal justice system. The stark disparities in the capital system reflected the implicit biases of the juries, prosecutors, lawmakers, and the ingrained institutional racism in 1970s Georgia. Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, dissented:

> [I]t would be unrealistic to ignore the influence of history in assessing the plausible implications of McCleskey's evidence. '[A]mericans share a historical experience that has resulted in individuals within the culture ubiquitously attaching a significance to race that is irrational and often outside their awareness.'. . . The Georgia sentencing system. . . provides considerable opportunity for racial considerations, however subtle and unconscious, to influence charging and sentencing decisions. History and its continuing legacy thus buttress the probative force of McCleskey's statistics. Formal dual criminal laws may no longer be in effect, and intentional discrimination may no longer be prominent. Nonetheless, as we acknowledged in Turner, "subtle, less consciously held racial attitudes" continue to be of concern, and the Georgia system gives such attitudes considerable room to operate. The conclusions drawn from McCleskey's statistical evidence are therefore consistent with the lessons of social experience.[144]

144 *Id.* at 332-34 (citing Lawrence III, *supra* note 106 and Turner v. Murray, 46 U.S. 28, 35 (1986)).

Despite the repercussions of Georgia's historical discrimination, the Court challenged McCleskey to find some type of "smoking gun" evidence demonstrating the state's intent to discriminate against him. In all likelihood, this evidence never existed.

Through *McCleskey*, the Supreme Court reinforced the Intent Doctrine. The Supreme Court did not allow for broad constitutional discrimination protections and denied McCleskey's claim, effectively denying any similar claim regarding the discriminatory implementation of criminal justice.[145] The consensus of the international community is that evidence of disparate impact, such as in *McCleskey*, should trigger a violation of equal protection. The Intent Doctrine alone does not offer broad enough protections against more subtle, yet incredibly pervasive forms of contemporary racial discrimination.[146]

C. The Conflict Between CERD and the Intent Doctrine

As discussed previously, the international community has embraced a broad, effects-based standard for evaluating discrimination claims, while the United States continues to implement a narrower, intent-focused standard. Despite being a party state to CERD, the United States does not recognize this conflict.[147] Nor has it fulfilled its obligation to address this discrepancy, even after the Committee recommended that it do so.[148] Instead, the United States claims that the Intent Doctrine is virtually the same as the disparate impact standard used in CERD, essentially refusing to respond to the Committee's concern.[149]

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145 Gise, *supra* note 52, at 2287 (referring to Davis v. Greer, 13 F.3d 1134 (7th Cir.) and Fuller v. Georgia State Bd. of Pardons and Paroles, 851 F.2d 1307 (11th Cir. 1988), both of which relied on *McCleskey*).

146 See *infra* Part II.B.

147 See *infra* Part I.C.

148 See *infra* Part I.C.

149 See *infra* Part I.C.

The United States first acknowledged the potential conflict between CERD's disparate impact standard and the Intent Doctrine upon ratification.[150] On May 11, 1994, the Senate Committee on Foreign Relations held a hearing to discuss the potential ratification of CERD.[151] There, the Acting Secretary of the Department of State inserted into the record an official analysis of CERD in support of ratification, much of which was later adopted in reporting to the CERD Committee.[152] In this lengthy memorandum, the Secretary recognized the obligation in Article 2 that requires state parties to "amend, rescind or nullify any laws and regulations" that have the *effect* of "creating or perpetuating racial discrimination."[153] In response, he discussed certain federal civil rights statutes that have broader protections than those offered by the Intent Doctrine.[154] However, the statutes mentioned only deal with discrimination in specific situations, such as voting. Thus, the statutes do not offer the broad disparate impact protections in all instance of discrimination as laid out in CERD. He then discussed the Intent Doctrine, citing *Washington v. Davis* and noted that only intentional discrimination is prohibited under the Fifth and Fourteenth Amendments, as well as 42 U.S.C. §§1981 and 1982.[155] In order to reconcile CERD's obligations with the United States' existing discrimination standards, the Secretary simply stated that disparate impact is taken into consideration when evaluating intent.[156] However,

150 *See Hearing*, *supra* note 56.

151 *Id.*

152 *Id.* at 22-35 (statement of Strobe Talbott, Acting Secretary, Department of State).

153 *Id.* at 33 (referring to CERD, *supra* note 21, art. 2).

154 *Id.* (mentioning, specifically, the disparate impact standard in the Voting Rights Act, Title VII of the Civil Rights Act of 1964, the Federal Regulations Implementing Title VI of the Civil Rights Act of 1964, and the Fair Housing Act).

155 *Id.*

156 *Id.* "Determining whether invidious discriminatory purpose exists demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). Disparate impact may provide

he conceded that in most cases adverse effect is not determinative, but rather the court will consider statistical disparities along with other evidence that may collectively demonstrate intent.[157] He proceeded to essentially equate the Intent Doctrine with CERD's effects-based standard.[158] In short, he reasoned that the U.S. was actually in compliance with CERD based on the interpretation that actions having an "unjustifiable disparate impact" included unnecessary actions that caused significant statistical disparities.[159] The Secretary concluded that the Intent Doctrine encompassed all of those types of actions, implying that they were necessarily intentional.[160] In making this determination, the Secretary cited to an excerpt from the Committee's General Recommendations, saying "[i]n seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or ethnic origin."[161] The Secretary interpreted this to mean that prohibited discrimination, as applied to race-neutral practices, is that which creates statistically significant racial disparities and is also unnecessary.[162] He then concluded that given such an expla-

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an important starting point for that inquiry. *Id.* Indeed, where racial disparities arising out of a seemingly race-neutral practice are especially stark, and there is no credible justification for the imbalance, discriminatory intent may be inferred. *See* Casteneda v. Partida, 430 U.S. 482 (1977). In most cases, however, adverse effect alone is not determinative, and courts will analyze statistical disparities in conjunction with other evidence that may be probative of discriminatory intent. *Arlington Heights,* 429 U.S. at 266-67. If the totality of the evidence suggests that discriminatory intent underpins the race-neutral practice, the burden shifts to the defendant to justify that practice. *Id.* at 271 n.21 (citing Mt. Healthy City School Bd. of Ed. v. Doyle. 429 U.S. 274 (1977)).

157 *Hearing*, *supra* note 56, at 33 (statement of Strobe Talbott, Acting Secretary, Department of State).

158 *Id.*

159 *Id.*

160 *Id.* at 34.

161 *Id.* at 33.

162 *Id.*

nation for CERD's definition of discrimination, CERD does not impose any obligations on the United States that are contrary to existing law.[163] Essentially, this leap of logic alleges that showings of disparate impact are only unjustifiable if they are intentional. While not entirely sound, the United States later used this same reasoning in response to the Committee's recommendations to eliminate the Intent Doctrine.

According to protocol, each state party must submit regular reports to the Committee regarding its compliance. The Committee then issues observations based on these reports. In its initial report submitted in 2000, the United States discussed the history of the Fifth and Fourteenth Amendment, focusing on the Equal Protection Clause.[164] In over a page, the report discussed the Equal Protection Clause from its inception through present day, cited a total of twelve decisive cases but failed to mention *Washington v. Davis* or the Intent Doctrine.[165] The majority of the cited cases demonstrate strong protections against racial discrimination, and yet one of the most damaging rulings to those protections is noticeably absent.[166] Later in the report, however, the Intent Doctrine is addressed, and the United States offered almost an identical response to the Secretary's reasoning discussed above.[167] Similar to the Secretary's analysis, this initial report concluded that the Intent Doctrine is consistent with the obligations imposed by CERD.[168]

Despite these assurances made by the United States, in the Committee's response to the initial report it declared its concern with the Intent Doctrine:

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163 *Id.* at 33-34.

164 Reports Submitted by States Parties Under Article 9 of the Convention: United States of America, Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/351/Add.1, at 23-4 (Sep. 21, 2000), *available at* http://www.state.gov/documents/organization/100294.pdf.

165 *Id.*

166 *Id.*

167 *Id.* at 58.

168 *Id.*

> The Committee draws the attention of the State party to its obligations under the Convention and, in particular, to article 1, paragraph 1, and general recommendation XIV, to undertake to prohibit and to eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect. The Committee recommends that the State party take all appropriate measures to review existing legislation and federal, State and local policies to ensure effective protection against any form of racial discrimination and any unjustifiably disparate impact.[169]

Here, the Committee is essentially rejecting the United States' argument that it is in compliance with the obligations relating to CERD's definition of racial discrimination. The Committee explicitly recommends that the United States take action towards prohibiting and eliminating not only intentional racial discrimination, but also discrimination based on an unjustifiably disparate impact.[170] In order to do so, the Committee recommends that the United States eliminate the requirement of showing intent to prove discrimination under the Equal Protection Clause so that disparate impact claims may be addressed.[171] Thus, to be in compliance with the obligations imposed by CERD, the Intent Doctrine must be overruled.

In its next report in 2007, the United States again argued that based on the "unjustifiable disparate impact" language of General Recommendation 14, the Intent Doctrine is in compliance

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[169] Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, U.N. Doc A/56/18, 376 (Aug. 14, 2001), *available at* http://www.law.arizona.edu/depts/iplp/international/shoshone/documents/36CERDConcObs.pdf. This document also alludes to the existence of implicit bias and structural racism as residual effects of United States' history. *See Id.* at 374.

[170] *Id.* at 376.

[171] *Id.*

with the obligations imposed by CERD's definition of racial discrimination.[172] This report stated that the United States would address the Committee's concerns about the initial report, yet it essentially presented, verbatim, the same reasoning as the initial report.[173] This report also noted that General Recommendation 14, elaborating on CERD's definition of discrimination, is merely recommendatory in nature.[174] While this may be true, Recommendation 14 does not relieve the obligations imposed on the United States as a party state to the Convention. The General Recommendations are a guide to specific aspects of CERD's language and implementation, and the fact that they are not mandatory in nature is inconsequential to the obligations set forth in the language of CERD itself. Thus, the 2007 report in no way furthers the argument that the Intent Doctrine is consistent with the obligations set forth in CERD.

Not surprisingly, the Committee's response, the most recent to date, emphasized the very same concern over the Intent Doctrine. However, this time the Committee was even more explicit than before and listed intent as its first concern:

> The Committee reiterates the concern expressed in paragraph 393 of its previous concluding observations of 2001 that the definition of racial discrimination used in the federal and state legislation and in court practice is not always in line with that contained in article 1, paragraph 1, of the Convention, which requires States parties to prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in ef-

172 Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc CERD/C/USA/6, 106 (2007), *available at* http://www.state.gov/documents/organization/83517.pdf.

173 *Id.* at 121.

174 *Id.* at 106.

> fect. In this regard, the Committee notes that indirect - or de facto– discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a particular racial, ethnic or national origin at a disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (art.1 (1)).
>
> The Committee recommends that the State party review the definition of racial discrimination used in the federal and state legislation and in court practice, so as to ensure - in light of the definition of racial discrimination provided for in article 1, paragraph 1, of the Convention – that it prohibits racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.[175]

Here, it is clear that the Committee again rejected the United States' argument that it is in compliance with CERD. Not only did the Committee reiterate its concern regarding the Intent Doctrine, but it also went into even greater detail explaining specifically how CERD's definitions of discrimination differ from those applied by U.S. courts. By characterizing *de facto* discrimination specifically, the Committee emphasizes that the United States is failing to meet its obligation to prohibit such discrimination. Again, the Committee is explicitly calling attention to the insufficiencies of the Intent Doctrine, both as it applies to the United States' party state obligations, and to its protections against discrimination, generally.

This reporting process demonstrates not only that the international human rights community has grave concerns over the

[175] Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, U.N. Doc CERD/C/USA/CO/6, 2 (2008).

United States' implementation of the Intent Doctrine, but also that the United States does not take those concerns seriously. The fact that the Committee raised this issue multiple times shows that the Intent Doctrine poses a severe threat to the implementation of CERD in the United States. However, the United States repeatedly offered the same erroneous argument that the Intent Doctrine complies with CERD, as opposed to taking steps to actually be in compliance. This demonstrates a conscious unwillingness on the part of the United States to meet its treaty obligations. In order to reconcile this conflict, the United States must recognize that the Intent Doctrine can not and does not comply with the internationally accepted definition of racial discrimination set forth in CERD.

PART III: THE INTERNATIONAL COMMUNITY

At this point, this article has discussed how the United States has not taken its obligations as a party state to CERD seriously, specifically with respect to the Intent Doctrine. While other party states are by no means free from racial discrimination, their broad discrimination standards resemble the disparate impact standard espoused by CERD and therefore provide broader protections against discrimination. In contrast, the Intent Doctrine not only fails to live up to the international CERD standard, but also fails to provide the broad discrimination protections that other states grant through their own domestic laws.[176] This section will explore the disparate impact standards of the United Kingdom, Canada, and South Africa, focusing particularly on how they relate to and offer broader protections than the United State's Intent Doctrine.

[176] *See infra* Part III.A-C.

A. The United Kingdom

As a member of the European Union, the United Kingdom is required to comply with its Racial Equality Directive, which applies a disparate impact standard broadly to the areas of employment, education, social protection including social security and healthcare, and access to the supply of goods and services, including housing.[177] The language in this directive reads:

> For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin. . .indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[178]

The Directive mandates that each European Union member, including the United Kingdom, implement a discrimination standard that explicitly includes indirect discrimination.[179] The United Kingdom has complied with this obligation through its Race Relations Act.[180]

The United Kingdom's Race Relations Act sets out a broad disparate impact standard, pursuant to the European Unions Racial Equality Directive.[181] Enacted in the same year that the U.S. Supreme Court decided *Washington v. Davis*, the Act protects from indirect discrimination in areas such as employment,

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177 *See* Council Directive 2000/43/EC, 2000 O.J. (L 180) 22 (EC).

178 *Id.*

179 Maxine Sleeper, *Anti-discrimination Laws in Eastern Europe: Toward Effective Implementation*, 40 COLUM. J. TRANSNAT'L L. 177, 186 (2001).

180 *See* Race Relations Act, 1976, c. 74 (U.K.).

181 *Id.*

the provision of goods and services, education and public functions.[182] These areas are interpreted broadly, so that the CERD's mandate of implementing a uniform disparate impact standard is met.[183] Regarding the relative competance of these standards, one scholar argues, "Britain has developed a new approach that incorporates theories of unconscious and institutional discrimination. American policymakers should recognize the wisdom of the British example and authorize courts to adjudicate claims of discrimination employing the insights provided by these theories."[184]

Thus, the United Kingdom has met the requirements of both CERD and the Racial Equality Directive with respect to its disparate impact standard. The United Kingdom is therefore better equipped than the United States to combat contemporary forms of racial discrimination.

The Race Relations Act also applies a model of anti-subordination aimed at eliminating racial discrimination in general, as opposed to the United States' anti-discrimination model that seeks to only remedy specific instances of discrimination.[185] This progressive shift is evidenced by the Act's mandate that certain public bodies monitor their own discriminatory impact even before any claim has been brought.[186] Public bodies are required to regularly self-evaluate their racial impacts, and if statistically

182 *Id.*

183 *See* Concluding Observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CERD/A/58/18 (2003). The Committee's most recent Concluding Observations did not make any mention that it was dissatisfied with the disparate impact standard as it is applied there. Thus, it can be inferred that the broad application of the standard is in compliance with the obligations of CERD.

184 Leland Ware, *A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain*, 36 GA. J. INT'L & COMP. L. 89, 156 (2007).

185 *Id.* at 150.

186 *Id.*

significant imbalances are found, they must be addressed.[187] This self-evaluation was put into place to ensure that latent discrimination, such as implicit bias and structural racism, does not continue simply because a victim has failed to file suit.[188] This approach, aimed at preventing discrimination within the system, is far better equipped to impede and eventually eliminate racism than is the Intent Doctrine.

Given the United Kingdom's disparate impact standard, combined with the self-evaluation requirement, the United Kingdom is far more dedicated to CERD's goal of eliminating racism than the United States. In the United Kingdom, public bodies monitor themselves to ensure there is no racially disparate impact of their actions, and address them if they exist. In the United States, however, a victim must not only allege discrimination, but also must meet a far higher burden that does not account for implicit or structural forms of bias and discrimination. This creates difficulty because many victims of discrimination do not have the means to bring suit, but in most cases even if they did the standard bars them from an adequate remedy. The United Kingdom, on the other hand, has exceeded its European and international obligations by instituting this self-evaluation in furtherance of its anti-subordination goals. Thus, the United States should take guidance from these broad discrimination protections offered by the United Kingdom.

B. Canada

Canada has also passed a number of anti-discrimination measures, including section 15 of the Canadian Charter of Rights and Freedoms, the section of the Constitution dealing with equality rights in the application and operation of federal law.[189]

187 *Id.*

188 *Id.*

189 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, s. 15(1) (UK).

To protect against private discrimination, Canada also passed a Human Rights Act that applies to all federally regulated industries, such as airlines and banks.[190] Also, each province has passed its own legislation to protect against discrimination in order to supplement the federal acts that cover only the federal government and federally regulated industries.[191] The Supreme Court of Canada has imposed a broad, disparate impact standard for all discrimination jurisprudence, thus applying the effects-based standard to both private and governmental discrimination.[192]

The Canadian Constitution guarantees equality rights in the application or operation of the law, and was interpreted by the Supreme Court of Canada to evaluate discrimination using a disparate impact standard.[193] Section 15 of the Canadian Charter of Rights and Freedoms' that deals with equality rights, states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[194]

Tasked with interpreting how discrimination under this provision of the Canadian Constitution should be defined, the Supreme Court of Canada explicitly rejected the Intent Doctrine standard for the more inclusive effects-based standard.[195]

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190 *See* Canadian Human Rights Act, c. 33, s. 1 (1976).

191 CATERINA VENTURA, FROM OUTLAWING DISCRIMINATION TO PROMOTING EQUALITY: CANADA'S EXPERIENCE WITH ANTI-DISCRIMINATION LEGISLATION 4 (1995), *available at* http://www.ilo.org/public/english/protection/migrant/download/imp/imp06.pdf.

192 *See* Andrews v. Law Society of British Columbia, [1989] S.C.R. 143 (Can.).

193 *See Id.*

194 Canadian Charter, *supra* note 179, at Sec. 15.

195 *See Andrews*, [1989] S.C.R. 143 (Can.).

The Supreme Court of Canada contemplated the definition of discrimination in *Andrews v. Law Society of British Columbia.*[196] Andrews, a British citizen, permanently residing in Canada with a law degree from Oxford, was prohibited from practicing law because he was not a Canadian citizen.[197] The issue before the Court was whether this restriction violated the Canadian Charter of Rights and Freedoms.[198] The Court looked to its own interpretation of the federal and provincial human rights acts and explained that intent is not required because anti-discrimination jurisprudence should focus on providing relief for victims, and not on punishing the discriminator.[199] The Court explained that intent is not required because anti-discrimination jurisprudence should focus on providing relief for victims, and not on punishing the discriminator.[200] Further justifying the use of the effects-based standard, the Court went on to discuss the need to remedy systemic discrimination.[201] Therefore, the inquiry focused on the effects of the law prohibiting non-citizens from practicing law.[202] The Court found that despite the lack of evidence that this restriction was imposed intentionally to discriminate, the effect alone violated the equality rights of Andrews under the Canadian Constitution.[203] Thus, the Supreme Court of Canada applied a disparate impact analysis to the governmental discrimination section of its Constitution. The Court borrowed from its analysis of the federal and provincial human rights acts.[204] The disparate impact analysis is well-established law as evidenced by

196 *See Id.*

197 *Id.* at para. 2.

198 *Id.*

199 *Id.* at para. 19.

200 *Id.* (citing Ont. Human Rights Comm. v. Simpsons-Sears Ltd., [1985] S.C.R. 536, 551).

201 *See* Andrews v. Law Society of British Columbia, [1989] S.C.R. 143 (Can.).

202 *See Id.*

203 *See Id.*

204 *See Id.*

its widespread application to both the Constitution and the human rights acts.

Through the disparate impact standard imposed on its various governing bodies, Canada has substantial protections that comply with its CERD anti-discrimination obligations.[205] Likewise, in its analysis of an ideal definition of discrimination, Canada explicitly discusses the shortfalls of the Intent Doctrine, arguing that it is inappropriately aimed at punishing the discriminator instead of making the discriminated victim whole again.[206] Drawing on the more progressive aims of addressing structural racism and remedying victims, Canada's discrimination definition is better equipped than the U.S. Intent Doctrine to further the goals of CERD.

C. South Africa

Following its oppressive apartheid era, South Africa adopted a new Constitution in 1996.[207] The Bill of Rights of this new Constitution reads:

> The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. . .No person may un-

205 *See* Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada, U.N. Doc. CERD/C/CAN/CO/18 (2007). The Committee's most recent Concluding Observations did not make any mention that it was dissatisfied with the disparate impact standard as it is applied there. Thus, it can be inferred that the broad application of the standard is in compliance with the obligations of CERD.

206 *See* Andrews v. Law Society of British Columbia, [1989] S.C.R. 143 (Can.).

207 S. AFR. CONST. 1996.

> fairly discriminate directly or indirectly against anyone on one or more grounds [above].[208]

This broad equality standard includes language prohibiting indirect discrimination. Indirect discrimination is demonstrated through disparate impact evidence and does not require evidence of intent.[209] As it transitioned from a system of legally enforced racial exclusion to a constitutional democracy with an express equal protection mandate, South Africa sought to take every precaution against racial discrimination and thus included the effects-based standard to ensure that all discrimination would be addressed.[210] This broader standard not only provides far more protection from discrimination than does the Intent Doctrine, but is also in compliance with the definition of discrimination set out by CERD.[211]

The Chief Justice of the Supreme Court of South Africa has discussed the deliberate use of this more protective standard, and why it is better equipped to combat discrimination than is the Intent Doctrine.[212] He stated that similar to the enactment of 14th Amendment of the U.S. Constitution as a response to slavery, the equality provision, quoted in part above, was enacted as a response to apartheid.[213] However, unlike the drafters of the 14th Amendment, the South African Constitutional Court had the benefit of evaluating international law as well as other nations' domestic laws when drafting this provision.[214] The lan-

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208 *Id.* at ch. 2, art. IX, § 3, 4.

209 *See* Chief Justice Arthur Chaskalson, *Brown v. Board of Education: Fifty Years Later*, 36 COLUM. HUM. RTS. L. REV. 503, 510-11 (2004).

210 *See Id.* at 509.

211 *See* Concluding Observations of the Committee on the Elimination of Racial Discrimination: South Africa, U.N. Doc. CERD/C/ZAF/CO/3 (2006). The Committee's most recent Concluding Observations did not make any mention that it was dissatisfied with the disparate impact standard as it is applied there. Thus, it can be inferred that the broad application of the standard is in compliance with the obligations of CERD.

212 *See* Chaskalson, *supra* note 209, at 511.

213 *Id.* at 508.

214 *Id.* at 509-10.

guage of the 14th Amendment does not indicate whether it requires proof of intent for a claim of discrimination.[215] The South African Constitutional Court explicitly made indirect discrimination a violation.[216] In drafting this provision, the Constitutional Court specifically considered the Intent Doctrine, compared it to other standards, and decided to model their Constitution after other countries' examples.[217] In making this decision, the Chief Justice stated: "It did so because it regarded the purpose of the prohibition against indirect discrimination to be the protection of vulnerable groups and not the punishment of those responsible for the discrimination."[218]

The Chief Justice discussed the failures of the United States in the half century following the decision in *Brown v. Board of Ed.*, saying that "[d]espite the decision in Brown, neither the legislature nor the courts have provided effective responses to issues of race-based poverty and the segregation and discrimination associated with it, which remain part of life in the U.S."[219] Further expanding on such failures, the Chief Justice explained how unintentional, structural racism persists in the United States as a result of past discrimination, because it does not take the remedial approach that other nations take.[220] The Constitutional Court decided to follow that remedial approach to addressing discrimination, which it found necessary because "[a]bsent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law, and its equal protection and benefit

215 *See* U.S. CONST. amend. XIV.

216 Chaskalson, *supra* note 209. at 510-11.

217 *Id.* at 511.

218 *Id.*

219 *Id.* at 505 (referring to Brown v. Board of Ed. of Topeka, 347 U.S. 483 (1954)).

220 *Id.* at 507.

must, in the context of our country, ring hollow."[221] So, after considering numerous versions of discrimination standards, including the Intent Doctrine, South Africa enacted a progressive disparate impact standard in order to fully address the lasting effects of discrimination. This explicit inclusion of indirect discrimination into the South African Constitution not only furthers the purposes of CERD, but is also a direct response to the failures of the Intent Doctrine.

PART IV: PRACTICAL APPLICATIONS

In order to advance the human rights ideals of CERD, advocates in the United States should take action promoting a disparate impact standard for racial discrimination claims. While the U.S. ratification of CERD was designed to limit its impact on domestic policy, there are a variety of ways that it can be utilized to advocate for eliminating this anachronistic and ineffective policy. This section will briefly explore methods of using the United States' commitment to CERD, however symbolic, to advocate for the elimination of the Intent Doctrine.

First, attorneys could refer to CERD's disparate impact standard in their pleadings, urging that it be implemented. While the precedent of the Intent Doctrine must be followed, citing the international example would contribute to the movement to overturn *Washington v. Davis* through the education of the legal community. This persuasive authority would call attention to the United States' deficiencies in discrimination law, so that the legal community is fully educated on this issue. Once attorneys, judges, and the legal community as a whole thoroughly grasp that United States discrimination law is not only ineffective, but also that it does not live up to our international obligations, it will be far more open to overruling *Washington v. Davis*.

221 Minister of Fin. v. Van Heerden, 2004 (6) SA 121 (CC), at 141 para. 31 (S. Afr.).

The United States Supreme Court Justices have relied on international law as persuasive authority, demonstrating that citing CERD in pleadings could contribute to the elimination of the Intent Doctrine.[222] In discussing the impact of international law in U.S. Supreme Court decisions, Justice Ginsburg noted:

> Comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world.[223]

If enough of the legal community is invigorated by the idea that we should honor our international human rights obligations, the Intent Doctrine could reach the Supreme Court and be overturned.

Legislators could also pursue action to implement a disparate impact standard in place of the Intent Doctrine. If the U.S. Congress were pressured to keep pace with the international community on this issue, it could effectively overrule the precedent through legislative means. This could be accomplished simply by passing legislation setting the constitutional discrimination standard as disparate impact, or indirectly through legislation that implements CERD. The latter option, as described above, would mean that the provisions of CERD would be enforceable as domestic law, and thus individuals would be able to bring claims of CERD violations based on its disparate impact stan-

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222 *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (citing throughout to international law and foreign sources to explain why the imposition of the death penalty on juveniles was unconstitutional under the 8th Amendment's evolving standards of decency).

223 Stephen Breyer, Associate Justice, Supreme Court of the United States, Remarks at The American Society of International Law 97th Annual Meeting: The Supreme Court and the New International Law (2003) quoting, *available at* http://www.aclu.org/hrc/JudgesPlenary.pdf.

dard. President Clinton declared through an Executive Order that:

> It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including . . .CERD.[224]

The public should enforce this "policy and practice" by urging for legislation that enforces CERD. Through legislative means, Congress should establish a cause of action for racial discrimination that can be proved through evidence of racially disparate statistics. In order to achieve this goal, the legal community, and the public as a whole, must pressure representatives to make this a priority.[225] This would require a major public education effort, so that the people of the United States understand the dire need to address the Intent Doctrine. Should this become a grave enough concern for its constituents, the issue will become one that Congress will feel compelled to address. Creating such legislation is a viable alternative to overturning *Washington v. Davis* through the judiciary, but requires the public to urge Congress to address the deficiencies of the Intent Doctrine, and to act to redress them.

Although CERD's ratification was designed to limit its implementation in the United States, there are still methods to compel CERD's disparate impact standard through judicial or legislative means. The legal community, as well as the general

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224 Exec. Order No. 13107, 3 C.F.R. 234 (1998).

225 An example of this is the effort made by U.S. Human Rights Network, which has urged the Senate Judiciary Committee to effectively implement the provisions of CERD. *See The Law of the Land: U.S. Implementation of Human Rights Treaties: Hearing before the S. Judiciary Subcomm. on Human Rights and the Law* 111th Cong,. 1st Sess. (2009) (statement of CERD Task Force, U.S. Human Rights Network).

public, must be made aware of the threat the Intent Doctrine poses to international human rights ideals, and take action to address this issue. Without such action, the United States will fall further behind the rest of the world by not living up to its CERD obligations or providing adequate discrimination remedies for its residents.

Conclusion

The United States' narrow Intent Doctrine is incapable of combating modern discrimination and is also well out of compliance with CERD's definition of discrimination. The international convention offers broad protections aimed at eventually eliminating racial discrimination worldwide, and yet the United States refuses to comply with its very definition. Instead, the United States ratified the convention as a symbolic gesture to the international community with no intention of amending the Intent Doctrine through CERD's established enforcement mechanisms. Thus, the United States is currently a party state to the Convention but fails to further its human rights mission.

Until the Intent Doctrine is eliminated, United States anti-discrimination law will be increasingly outdated and incapable of addressing the racial discrimination epidemic. The international community no longer looks to the United States for guidance on discrimination jurisprudence, as it fails to live up to its human rights obligations to effectively combat racial discrimination. Given its sordid history of discrimination and exclusion based on race, the United States should carefully reconsider its ongoing application of the Intent Doctrine—particularly in light of its incapacity to address contemporary racial discrimination, its inadequacy to promote the human rights ideals promoted in CERD, and its continuing blight on the United States' reputation as a nation of equal protection under the law.