

THE MODERN AMERICAN

A Publication Dedicated to Diversity and the Law



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LETTER FROM THE EXECUTIVE BOARD

We would like to thank everyone who made our inaugural issue a huge success. In the short time since our inception, we have grown a great deal. Our distribution for this issue has tripled and our staff has grown. Our reputation outside of the American University Washington College of Law community has also grown. Recently, we were invited to George Mason University's Civil Rights Law Journal Symposium. We are also regularly receiving outside submissions from students attending other law schools. Indeed, we have proven that a discourse on diversity and the law was not only necessary but also desired by many in the legal field. We have always been confident that we would be a success and are happy that after our first issue, our fellow law students, professors, and practitioners are taking part in the unique voice of *The Modern American*.

Our inaugural issue focused on "The State of Our Union," thus it is only appropriate that this issue focuses on "The Union's Response." Today, the United States government, more than any other entity, plays the unique role of "protector" and "persecutor" of underrepresented peoples. The focus of this issue is on the government's role in responding to the problems of minorities or in creating problems for minorities. *The Mod-*

ern American seeks to analyze both the positive and negative effects of the government's response to national security, sovereignty, and repairing past wrongs.

Again we would like to thank our advisers Professors Vincent Eng, Brenda Smith, Pamela Bridgewater, Jamin Raskin, and the Director of Diversity Services, Ms. Sherry Weaver. It is with great pleasure that we once again can say: Enjoy this issue of *The Modern American*.

Sincerely,

Lydia Edwards
LeeAnn O'Neill
Chris McChesney
Preeti Vijayakumaran

Co-Editor-in-Chief
Co-Editor-in-Chief
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Senior Articles Editor

The Modern American is American University Washington College of Law's student-run publication dedicated to diversity and the law. This publication analyzes the legal system's treatment of racial, sexual, ethnic, and other underrepresented people. We intend to present an analysis of the current social and legal remedies for minority issues. Our philosophy is to present a balanced perspective and encourage all viewpoints regardless of political or social leaning.

The Modern American is not just limited to legal issues, therefore we include other relevant information to educate the interested reader, such as an examination of upcoming legislation, upcoming books or movies relevant to the minority community, and/or a spotlight on interesting people who are heading legal and social change in the United States.

If you are interested in submitting an article to be considered for publication in *The Modern American*, submitting topic ideas, or would like to obtain more information please visit our website at <http://wcl.american.edu/modernamerican/> or email us at tma@wcl.american.edu.

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THE RETURN OF J. EDGAR HOOVER: THE FBI'S REVERSION TO POLITICAL INTELLIGENCE GATHERING

By Zehra Naqvi*

Q: Which method(s) are you comfortable with the FBI employing to shore up our domestic security?

- a) Active investigation of a Quaker-affiliated organization¹
- b) Recording the license plate numbers of peaceful environmentalist protestors²
- c) Monitoring anti-war demonstrations³
- d) Intercepting emails by political activists⁴
- e) All of the above.

If you answered “e,” you’re in luck. You’re on board with the FBI’s current efforts to make us safer. If, on the other hand, you don’t recall authorizing such tactics to enhance your security and feel that they are vaguely reminiscent of McCarthyism-era tactics, join the club. Our tax dollars are being wasted on collecting more useless information instead of analyzing the useful information we already have.

After the domestic spying outrage that occurred in the 1950s and 1960s, we had safeguards put into effect to prevent exactly these kinds of activity from occurring again, but they were dismantled by this Administration; the Administration played on our fears about a repeat of 9/11 and claimed that our security was at risk by the restrictive nature of the guidelines. In fact, the guidelines were protecting us from ourselves or the FBI manifestation of us. Watering them down is an attempt to hoodwink the American population into sanctioning the removal of the safeguards and allowing the FBI to break the bargain made in the 1970s to refrain from engaging in such political intelligence gathering. The American Civil Liberties Union (ACLU) is beating its drums to warn the public and hoping that we, the courts, and Congress hear the call and respond.

THE BARGAIN: A HISTORY OF THE GUIDELINES

“Knowledge is the key to control. Secrecy should no longer be allowed to shield the existence of constitutional, legal and moral problems from the scrutiny of all three branches of government or from the American people themselves.”⁵

Church Committee Report

The FBI’s chief focus in the 1950s and 1960s was rooting out Communism, and to that end, the civil liberties of many individuals and groups were violated as the FBI pursued them without any evidence or reasonable suspicion that any of them had actually committed any crimes.⁶ The political impetus to quash Communism rallied the agency into conducting heightened domestic surveillance based on political ideology, stifling dissent, and political opposition.⁷ The FBI, under the auspices of Direc-

tor J. Edgar Hoover, ran a counterintelligence program, “COINTELPRO,” which investigated prominent activists and groups such as the National Organization for Women and the American Indian Movement.⁸ Ward Churchill’s book, *The COINTELPRO Papers: Documents from the FBI’s Secret Wars Against Dissent in the United States*, documents some of the strategies employed by the FBI in its domestic “war against dissent.”⁹ As revelations of the FBI’s investigatory abuses surfaced, Congress held hearings and in 1975, the Senate initiated an investigation into the abuses.¹⁰

The Church Committee found that “the FBI had infiltrated civil rights and peace groups, had burglarized political groups to gain information about their members and activities, and had ‘swept in vast amounts of information about the personal lives, views, and associations of American citizens.’”¹¹ The Committee Report declared that there was “a consistent pattern in which programs initiated with limited goals, such as preventing criminal violence or identifying foreign spies, were expanded to what witnesses characterized as ‘vacuum cleaners,’ sweeping in information about lawful activities of American citizens.”¹² The FBI had created files on over one million Americans, investigated the NAACP for 25 years, compiled information on student groups for use in future applications to government jobs, and had a plan “to summarily arrest thousands of Americans in case of a national emergency.”¹³

The Committee’s final report noted that “too often intelligence has lost its focus and domestic intelligence activities have invaded individual privacy and violated the rights of lawful assembly and political expression. Unless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature.”¹⁴ The report stated that a rise in Executive power, secrecy, and avoidance of the rule of law were the conditions that facilitated the abusive practices.¹⁵ The report concluded “the ultimate goal is a statutory mandate for the federal government’s domestic security function that will ensure that the FBI, as the primary domestic security investigative agency, concentrates upon criminal conduct as opposed to political rhetoric or association.”¹⁶

The Committee recommended prohibitions on the FBI, forbidding the agency from continuing its tactics of discrediting political opposition, media manipulation, distorting data to influence government policy and public perceptions, and preventing the free exchange of ideas.¹⁷ The Committee sought to achieve these ends by recommending that the FBI refrain from: 1) collecting or disseminating information for a federal official for a political purpose; 2) interfering with constitutionally protected advocacy activities; 3) harassing individuals or physically intimi-

dating them through obvious surveillance and interviews; and 4) maintaining dossiers on the political inclinations and private lives of Americans unless the demands of national security warrant such activities.¹⁸

Attorney General Edward Levi issued new guidelines for FBI investigations in response to these findings, setting a higher standard for domestic surveillance by the FBI.¹⁹ Since the guidelines were adopted with legislative “consultation and oversight” through the Church Committee’s investigation and report, the guidelines have a “quasi-legislative status,” but did not have the force of actual legislation.²⁰ Because the FBI adopted new guidelines for itself, the legislative effort to develop an FBI charter was abandoned.²¹ Until Attorney General Ashcroft’s unilateral changes to the guidelines in 2002, all revisions of the guidelines were made with Congressional consultation and oversight.²²

Attorney General Levi’s guidelines “specified that investigations should be limited to exposing criminal conduct and should not involve simple monitoring of unpopular political views.”²³ The FBI could only initiate investigations “where ‘specific and articulable facts’ indicated criminal activity.”²⁴ Unpopular ideologies or political dissent were not considered sufficient reasons to justify an investigation or restraint on someone’s free practice of their First Amendment rights.²⁵ The guidelines were somewhat diluted in the 1980s, but remained largely intact until Attorney General John Ashcroft changed them in 2002.²⁶

BREAKING THE BARGAIN: ASHCROFT’S REVISION OF THE GUIDELINES

Eight months after the September 11th attacks, Attorney General Ashcroft unilaterally revised the guidelines without consulting with Congress, claiming that the FBI’s hands were tied on its terrorism investigations as a result of the old guidelines.²⁷ The revised guidelines allowed the FBI to “freely infiltrate mosques, churches, and synagogues and other houses of worship, listen in on online chat rooms and read message boards” without any indication of criminal activity, substantially lowering the barriers to civil liberty violations and increasing the likelihood that the FBI will be inundated with more information.²⁸ This essentially reversed the work of the Church Committee and marked the return of practices that were sanctioned under Hoover’s FBI reign, when the FBI engaged in “political intelligence” gathering, stealing membership lists of suspect organizations, and gathering vast amounts of information on innocent constitutionally protected activities.²⁹ This is especially disturbing because the Attorney General Levi’s adoption of the guidelines is what prevented Congress from enacting legislation to ensure that the FBI observe the rule of law and adhere to strict guidelines on opening and maintaining investigations.³⁰

Arguably, the changes are further unwarranted because international terrorism investigations have generally been conducted under a separate body of foreign intelligence guidelines that have traditionally been more lax than those governing do-

mestic surveillance. It is therefore highly unlikely that the roll-back of the domestic guidelines was meant to facilitate catching terrorists abroad.³¹ In effect, the revised rules blur the lines between international and domestic surveillance guidelines, denying American citizens the protections they have thus far enjoyed by subjecting them to greater invasions of privacy.³²

The three basic results of the changed guidelines are that without any “scintilla of suspicion”³³ or guidance as to what information must be recorded or how long a group can be monitored, the FBI can: 1) attend domestic public group meetings; 2) mine various commercial databases and share the information; and 3) cut down on internal review procedures, essentially eliminating a level of scrutiny.³⁴

In addition to threatening the civil liberties of groups and individuals and risking a return to gathering political intelligence on groups, the changed guidelines also pose the serious risk of undermining efficient intelligence gathering since the “vacuum cleaner” approach will be reinstalled in place of targeted intelligence-gathering efforts; more information might undermine the agency’s ability to sift through and analyze its usefulness, and thereby actually hamper the fight against terrorism.³⁵ The guidelines adopted by Attorney General Levi “were intended to make the FBI’s security operations more efficient by tying FBI inquiries and investigations to some modest showing that they were focused on suspected criminal or terrorist activity for security reasons.”³⁶ The recent revisions detract from this goal and reverse the positive trend of the past half century.³⁷

THE AFTERMATH: BAD HABITS DIE HARD

News articles over the past two years demonstrate that recent surveillance activities of political demonstrations are raising public concerns that the FBI is once again engaging in questionable practices.³⁸ Some of these activities are conducted through the new domestic surveillance program, made up of Joint Terrorism Task Forces (JTTFs), which partners local law enforcement with federal agents and other officers to combat terrorism.³⁹ The Associated Press reported that “[t]here are terrorism task forces in 100 cities and with more than 3,700 members, including at least 2,000 FBI agents, state and local police, and other federal law enforcement officials. More than half of the task forces were formed after the terror attacks of Sept. 11, 2001.”⁴⁰ In total, there are 66 JTTFs.⁴¹

The amended guidelines opened the door for JTTFs to engage in many forms of domestic spying, specifically by allowing law enforcement to have free reign on monitoring online activities, private sector databases, and religious houses of worship, and once again being able to monitor innocuous First Amendment activities without indication of any criminal activity, as the old guidelines required.

The public should be concerned that current spying efforts are too broad, that these efforts have not only constituted an inefficient use of resources, but have also had a chilling effect on First Amendment freedoms.⁴² The public does not want their tax dollars spent for spying on groups that merely engage in

civil disobedience nor do they want to “return to the days when peaceful critics become the subject of government investigations”⁴³ The ACLU asserts that the FBI has been compiling license plate numbers from environmental and other group protests, monitoring peaceful demonstrations, intercepting emails, and trading political intelligence information with other law enforcement agencies.⁴⁴ A New York Times article cited an FBI memo about monitoring demonstrations as proof, stating that there is “a coordinated nationwide effort to collect intelligence regarding demonstrations.”⁴⁵ This article also cited a recent suit against the government, brought by critics of the current administration that found themselves on the “no-fly” lists after September 11th, as signaling “a return to the abuses of the 1960s and 1970s, when J. Edgar Hoover was the FBI director and agents routinely spied on political protestors like the Rev. Dr. Martin Luther King Jr.”⁴⁶ The article quoted the executive director of the ACLU as saying, “[t]he FBI is dangerously targeting Americans who are engaged in nothing more than lawful protest and dissent...[t]he line between terrorism and legitimate civil disobedience is blurred.”⁴⁷

THE LAWSUIT: THE ACLU BEATING ITS DRUMS

Perhaps the biggest concern of all is the widespread ignorance as to how the JTTFs operates and the extent of collaboration between state legal enforcement entities and the FBI.⁴⁸ In an effort to get a better understanding of the procedures and rules of operation behind the JTTFs, the ACLU recently filed a lawsuit to seek expedited processing of its Freedom of Information Act (FOIA) requests regarding general JTTF procedures and any information it might have collected on specific environmental, religious, and civil liberty groups. To enhance the lawsuit, the ACLU partnered with the American-Arab Anti-Discrimination Committee, Greenpeace, People for the Ethical Treatment of Animals, and United for Peace and Justice, in filing its lawsuit against the FBI Joint Terrorism Task Force (JTTF) and Department of Justice in DC.⁴⁹ The lawsuit requests injunctive relief to intervene in the expedited processing of the FOIA requests regarding the composition and procedures of the taskforce and the criteria that JTTFs use to select who to investigate.⁵⁰

The Freedom of Information Act (1966) is significant as it established a federal law that recognized the right of the public to request information from federal government agencies.⁵¹ There are exceptions as to what information can be requested, and some information may be redacted for security, confidentiality, or other reasons.⁵² The national security exception may be used to block a FOIA request such as this one, because it asks for information regarding the inner workings of the JTTFs.⁵³

According to 28 C.F.R. § 16.5(d)(1)(iv), requestors who want the government to expedite their requests by processing these requests out of sequence seek expedited treatment and must demonstrate:

- (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an im-

minent threat to the life or physical safety of an individual;

- (ii) *An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information;*
- (iii) The loss of substantial due process rights; or
- (iv) *A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence* (emphasis added).

The ACLU filed this lawsuit after the FBI failed to respond to their request for expedited processing of their FOIA requests.⁵⁴ The ACLU argues that it is entitled to expedite processing on the grounds of the second and fourth conditions.⁵⁵ Specifically, because the fear of “increased surveillance of political, religious, and community organizations by the FBI” might chill public participation in political activity, the ACLU, by virtue of its activities in defense of civil rights and civil liberties, is an entity “primarily engaged in disseminating information,”⁵⁶ and thus has standing to seek such processing:

There has been growing public concern about the FBI’s monitoring, surveillance, and infiltration of organizations on the basis of national origin, racial and/or ethnic background, religious affiliation, organizational membership, political views or affiliation, or participation in protest activities or demonstrations . . . [there has also been] cooperation between the FBI and local law enforcement to monitor peaceful political demonstrations . . . [and] numerous published reports of FBI agents questioning or spying on peace activists, anti-war activists, and person of Arab or Muslim background.⁵⁷

As a result, the ACLU asked the FBI to turn over all records regarding any of the plaintiffs in this action.⁵⁸ Additionally, they requested all “records relating to the purpose, mission, and activities of JTTFs,” particularly those pertaining to domestic surveillance on the basis of political views. The ACLU argues that the FBI has 1) failed to disclose any responsive records, and 2) is improperly withholding the requested records.⁵⁹

The defendants responded on July 5, 2005 by arguing that: 1) the ACLU has not met its burden for showing that expedited processing is appropriate; 2) “compelling need” is a narrow standard that is not met here; and 3) denial of such processing is subject to judicial review under a deferential standard.⁶⁰ They also averred that the ACLU’s two FOIA requests encompassed 93 subject matters and the FBI was going through its findings in a “methodical, organized approach.”⁶¹

The defendants concluded that based on the articles cited by the ACLU, there is no current “exceptional media interest” or “urgency to inform the public,” since the media reports date back to 2004 and many of them do not directly mention the JTTFs or the plaintiffs.⁶² It also argues that the ACLU is not an entity “*primarily* engaged in disseminating information,” but

rather a “litigation organization.”⁶³ The overall case of the defendants seems to be that the ACLU is merely citing its own concerns and that there is no real media interest or urgency to inform the public.⁶⁴ They also caution that to allow this request to be expedited would open the floodgates to the ACLU and other organizations who want their requests fulfilled ahead of others on matters that are not sufficiently pressing.⁶⁵ The defendants, therefore, requested that the Court “(i) deny plaintiff’s motion for a preliminary injunction; (ii) grant defendants’ cross-motion for partial summary judgment on plaintiff’s claim for expedited FOIA processing; and (iii) grant a stay of proceedings to permit further processing of the FOIA requests at issue.”⁶⁶

The ACLU, in its reply on July 19, 2005, countered that there is, in fact, a widespread media interest in the subject, and that their record of articles was merely exemplary, not all-inclusive.⁶⁷ Furthermore, the ACLU argued that the articles date back to 2004 because the FOIA requests were filed in 2004 and the FBI’s own delays in responding are to blame for the articles being outdated.⁶⁸ The ACLU also argues that the FBI is making a “circular argument,” whereby the ACLU must demonstrate that files were maintained on it and the other plaintiffs in order to get the files about them, it is asking the ACLU to prove what it is trying to find out.⁶⁹ The articles suggest that there has been “targeted monitoring and surveillance of Muslim and Arab Americans” and the problem is pervasive, urgent, and ongoing and thus merits close scrutiny by examination of the records.⁷⁰ Additionally, though the ACLU works to defend civil rights and civil liberties and uses litigation as one strategy to accomplish its work, it engages in the dissemination of information by publishing reports and newsletters, issuing email alerts, and uploading such content on its website to further raise awareness about important issues.⁷¹

The ACLU further points out that the one document the FBI has handed over “confirms the relevance of [the] articles to the subject of plaintiff’s requests” by showing that the FBI closely monitored United for Peace and Justice’s website and peaceful protests leading up to the Republican and Democratic national conventions and the 2004 election, noting its anti-war rhetoric and incorrectly describing it an “anarchist group.”⁷² The general public, the media, and legislators themselves have demonstrated a strong interest in the FBI’s activities and want to ensure that civil liberties are not being unjustly infringed in the name of national security.⁷³ The Court should not grant a stay in proceedings, but rather grant the motion for a preliminary injunction, entitling the ACLU to expedited processing of its requests, or at least set up a reasonable schedule for the FBI to comply with the ACLU’s request.⁷⁴

SEEKING RECORDS, SEEKING CHANGE

Whether or not the ACLU and its fellow plaintiffs succeed in getting the records they seek, it is unlikely that they will get all the information they want. The lawsuit and the overall campaign against increasingly intrusive FBI surveillance may, however, meet other types of success. The ACLU’s campaign and

lawsuit raises awareness about the FBI’s activities and might pressure Congress to conduct an investigation and issue binding guidelines on the agency. It is important to ensure that the amended guidelines do not enable the agency to return to its pre-1976 era practices. Since Ashcroft unilaterally changed the guidelines, dismantling the bargain struck years ago when the creation of a FBI charter was abandoned, Congress should once again look closely at what the FBI is doing and how it is carrying out domestic surveillance. Political intelligence gathering is reprehensible and a misuse of resources at a critical time for national security.

The public deserves to know how its state and federal resources are being allocated for investigations and whether needless investigations are wasting resources. The lack of information and heightened secrecy of FBI procedures signal that we are regressing to old patterns and using domestic surveillance as a weapon against innocent Americans, thereby wasting resources and inundating our intelligence personnel with too much useless information. When the FBI wastes resources in this way, the remaining resources dedicated to analysis of the helpful information fall short. Furthermore, such publicity and any information that is released might also compel states to reevaluate their level of participation on JTTF activities and strengthen their resolve to balance the need to combat terrorism with cost-effective, targeted, and reasonable investigations, instead of overarching strategies to keep ongoing terror investigations.

The lack of Congressional oversight on the 2002 guideline changes and the increased threat they pose to civil liberties should compel Congress to take a more active stance on the FBI’s activities. Some recommendations for how Congress might place a check on the FBI’s activities are requiring: (1) “prior notice and meaningful consultation before future guideline changes can take effect;” (2) “the adoption, following Congressional consultation and comment, of Guidelines for collection, use, disclosure and retention of public event information and data mining;” (3) reports on the impact of the guidelines on open society, free speech, and privacy, costs, and benefits; and (4) public reporting of statistical information regarding the number, duration, and cost of investigative inquiries.⁷⁵

Domestic surveillance is not a means to peek into the homes and lives of our neighbors to discover whether they hold unpopular political or religious views, but is instead a means of getting critical information about domestic threats. It should be executed through targeted investigations without unnecessarily compromising the civil liberties of American citizens who are merely protesting government policies on different subject matters. The FBI’s focus has not remained on one group. First it was Communists, but gradually, the scope broadened to include people who opposed the political administration. The spotlight is currently turned onto Muslims and Arabs, but it will inevitably continue to enlarge in scope to peer into the activities and opinions of environmental, political advocacy groups, and other organizations and individuals, simply because the machinery is in place to do so, and there is no red light to stop the FBI. The

articles mentioned earlier in this article and in the lawsuit suggest that the scope has already enlarged. At this moment, the Court has the power to signal a clear red light allowing expedited processing of the requests. Otherwise, the FBI will take it as a green light to continue its activities and fail in its responsibility to comply with the request. If the Court grants a stay, Congress should be on alert that it has the final opportunity and responsibility to ask the necessary and vital questions about

JTTF procedures, protocols, and findings. Increasingly, the domestic surveillance vehicle meant to protect us from domestic threats poses one of the most serious threats to our civil liberties and while the power of change rests with Congress, the responsibility to push for it rests with us.

ENDNOTES

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¹ See Curt Anderson, *ACLU Seeking FBI Files on Activist Probes*, ASSOCIATED PRESS, Dec. 2, 2004 (listing the Quaker-affiliated American Friends Service Committee as a group monitored by police and investigated by a “local terrorism task force”).

² See Karen Abbott, *ACLU Accuses FBI of Spying: Police Say They’re Complying With Law, Battling Terrorism*, ROCKY MOUNTAIN NEWS, Dec. 3, 2004 (detailing lists of vehicles, license plate numbers, and the names of people associated with those vehicles were investigated by Colorado Springs police during an environmental protest); see also Alicia Caldwell, *FBI Spying Allegations Supported By Records*, DENVER POST, Dec. 3, 2004.

³ See Dan Eggen, *Coalition Seeks FBI’s Files on Protest Groups*, WASH. POST, Dec. 3, 2004 (citing an FBI bulletin that “urged local police to monitor antiwar protests”).

⁴ See Abbott *supra* note 2 (summarizing information sent by local law enforcement to the FBI to facilitate the creation of “spy files” for peaceful protest participants).

⁵ Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 94th Congress (Senate), S. Rep. No. 94-755 (2d Sess. 1976), available at <http://www.icdc.com/~paulwolf/cointelpro/cointel.htm>.

⁶ See Electronic Privacy Information Center (EPIC), *The Attorney General’s Guidelines* [hereinafter *Attorney General Guidelines*], at <http://www.epic.org/privacy/fbi/> (last visited Oct. 15, 2005) (discussing the FBI’s wrongful arrests and investigations for the purpose of disrupting political groups).

⁷ See Associated Press, *FBI Tried for Years to Stifle Dissent, Records Show*, WASH. POST, June 9, 2002, at A12 (discussing how the FBI cited the goals of protecting civil order and national security, during the Vietnam war, to mount “a ‘psychological warfare campaign’ against subversives” in California, filing tax evasion charges or gathering confidential information on them).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *ACLU et al. v. FBI*, No. 1:05-CV-1004, Pl. [’s] Compl. at ¶ 7 (D.D.C. May 18, 2005), available at http://www.aclu.org/spyfiles/spyfiles_complaint.pdf (last visited Oct. 15, 2005).

¹² S. REP. NO. 94-755, at I, 3 (1976).

¹³ See *Attorney General’s Guidelines*, *supra* note 6, at 2.

¹⁴ S. REP. NO. 94-755, at I, 2 (1976).

¹⁵ *Id.* at IV, 4-5.

¹⁶ *Id.* at IV, 25.

¹⁷ *Id.* at IV, 26.

¹⁸ *Id.* at I, 2.

¹⁹ See *ACLU et al. v. FBI*, No. 1:05-CV-1004, Pl. [’s] Compl. at ¶ 7 (D.D.C. May 18, 2005).

²⁰ See Jerry Berman & James X. Dempsey, *CDT’s Guide to the FBI Guidelines: Impact on Civil Liberties and Security – the Need for Congressional Oversight*, June 26, 2002, at <http://www.cdt.org/wiretap/020626guidelines.shtml> (last visited Oct. 16, 2005).

²¹ *Id.*

²² *Id.*

²³ *Attorney General’s Guidelines*, *supra* note 6, at 2.

²⁴ *ACLU et al. v. FBI*, No. 1:05-CV-1004, Pl. [’s] Compl. at ¶ 7 (D.D.C. May 18, 2005), available at http://www.aclu.org/spyfiles/spyfiles_complaint.pdf (last visited Oct. 15, 2005).

²⁵ *Id.*

²⁶ See *Attorney General’s Guidelines*, *supra* note 6, at 3 (addressing Attorney General William French Smith’s 1983 amendment of the guidelines to create a preliminary inquiry investigation and to allow full investigations “where information received points to a ‘reasonable indication’ of criminal activity” and Attorney General Dick Thornburgh’s 1989 amendment of the guidelines regarding racketeering investigations).

²⁷ Marvin Johnson, *Interested Persons Memo: Analysis of Changes to Attorney General Guidelines*, June 6, 2002, at <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=10428&c=111> (last visited Oct. 17, 2005).

²⁸ See *ACLU et al. v. FBI*, No. 1:05-CV-1004, Pl. [’s] Compl. at ¶ 8.

²⁹ See Johnson, *supra* note 27, at 2-3.

³⁰ See *id.* at 1-4.

³¹ See Berman, *supra* note 20, at 2 (discussing the misleading claims in the guideline revisions that claim the guidelines were not preventative and only applied to international groups).

³² *Id.*

³³ *Id.*

³⁴ See *id.* (listing three major concerns with the “significant policy shift” in the guidelines).

³⁵ *Id.* at 2-4.

³⁶ Berman, *supra* note 20, at 4.

³⁷ See *id.* at 2 (stating that the “guidelines are likely to compound” FBI intelligence failures to “use information they already” have and ultimately produce “no improvement in security”).

³⁸ See *ACLU et al. v. FBI*, No. 1:05-CV-1004, Pl. [’s] Compl. at ¶ 8 (listing numerous articles regarding FBI agents questioning and monitoring protestors, peace activists, Arabs, and Muslims).

³⁹ *Id.* at ¶ 9.

⁴⁰ Anderson, *supra* note 1.

⁴¹ See *ACLU et al. v. FBI*, No. 1:05-CV-1004, Pl. [’s] Compl. at ¶ 9.

⁴² See Eggen, *supra* note 3 (summarizing the adverse sentiment of activist groups wrongly identified and investigated as potential terrorist threats by local law enforcement and the FBI).

⁴³ *ACLU Says FBI Spying on Religious, Protest Groups*, REUTERS, Dec. 2, 2004, available at <http://www.rense.com/general60/relg.htm> (last visited Oct. 17, 2005).

⁴⁴ See Abbott, *supra* note 2.

⁴⁵ Eric Lichtblau, *FBI Scrutinizes Antiwar Rallies*, NY TIMES, Nov. 23, 2003, at A1.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See Tom Rybarczyk, *ACLU Says FBI Spied on Activists, Muslims: Groups Seek Files From Government on Surveillance*, CHI. TRIB., Dec. 3, 2004 (illustrating ACLU’s demands and concerns for obtaining information from the FBI in regards to how they conduct surveillance on potential terrorists).

⁴⁹ *Id.*

⁵⁰ *Id.*

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⁵³ *Id.*

⁵⁴ *ACLU et al. v. FBI*, No. 1:05-CV-1004, Pl. [’s] Compl. at ¶ 12 (D.D.C. May 18, 2005).

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⁵⁶ *Id.*

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IT'S ALL ABOUT THE BENJAMINS: ECONOMIC OBSTACLES PLUGGING THE DIVERSITY PIPELINE INTO THE PRACTICE OF LAW

By Vanessa Johnson*

Full and equal participation of minorities in the legal profession has been a concern for the American Bar Association (ABA) for decades.¹ Even though the overall representation of minorities in the United States is approximately 30%, the ABA Presidential Advisory Council on Diversity (ACD) in the Profession reports that, “[n]early 90% of the legal profession is white, with racial and ethnic minorities making up the remaining 10 or 11%.”² However, “law firms, corporate legal departments, government, and the judiciary cannot recruit attorneys of color . . . as long as there remain too few people who decide to enter the profession in the first place.”³ Consequently, it is imperative to examine the roots of educational obstacles to the legal profession and how they impact the diversity pipeline into the legal profession.

Studies indicate that socio-economic status has “the most significant influence on educational attainment.”⁴ Regardless of “pre-college aspirations, self-image, and college grades [. . .] upper-class students are more successful in getting professional credentials than their less advantaged counterparts.”⁵ Asians and Caucasians have the highest median incomes and advanced degree percentages, ranging from 9.5% to 17.4%. Meanwhile, Hispanics and African Americans have the lowest median incomes and advanced degree percentages ranging from 3.8% to 4.8% respectively.⁶ Furthermore, a disproportionate percentage of minorities come from a disadvantaged background.⁷ The absence of any significant exploration of the link between socio-economic status and the under-representation of minorities in the legal profession is surprising.

Legal scholars and practicing attorneys have offered various hypotheses to explain the obstacles that minorities face when entering legal education and practice. They often attack affirmative action, over-reliance on LSAT scores in admissions criteria, and the absence of racially and ethnically diverse role models to provide information about the legal profession.⁸ Additionally, authorities advocate specific ways to solve these issues.⁹ They support initiatives, including seminars to assist disadvantaged minorities with LSAT preparation, pre-enrollment institutes to prepare students for the rigors of law school, and special recruitment programs to raise the interest of minorities in the profession.¹⁰

Despite these initiatives, diversity in the legal profession will likely remain low because education attainment issues facing minorities may bar entry into the legal profession. This essay asserts that financial obstacles are significant barriers preventing qualified, under-represented minorities from pursuing careers in the legal profession. First, this article examines how federal financial aid policy creates excessive educational debt burdens for minority college graduates. Second, it discusses the

effect of the anti-affirmative action movement on minority-targeted scholarships, which in turn creates another financial barrier for minorities interested in attending law school. Third, it examines how the financial costs of law school, when compared to other graduate programs, discourage minority students. Finally, this article proposes private funding of minority scholarships as a possible solution to help resolve these diversity pipeline obstacles.

THE LOAN-BASED FEDERAL FINANCIAL AID POLICY DISPROPORTIONATELY BURDENS MINORITY GRADUATES WITH EXCESSIVE DEBT

Almost four decades ago, Congress enacted the Higher Education Act of 1965 (HEA), which “institutionalized federal support for higher education as a national interest and pledged that no student would be denied opportunities in higher education due to financial barriers.”¹¹ Every five years, Congress reauthorizes the HEA, often adding amendments that change the scope of funding for student financial aid, state-federal partnerships, and institutional support.¹² However, federal student aid policy steadily transformed from a grant-based system into a loan-based system beginning in the 1980s.¹³ At the same time, public college tuition costs accelerated.¹⁴ Specifically, tuition at public four-year colleges increased by 166% and at public two-year colleges by 112%.¹⁵ Therefore, despite financial aid benefits, this combination of tuition increases and “reliance on student loans” has continually limited under-represented minorities.¹⁶

Given this increased reliance on student loans to finance higher education, the debt graduates will accrue necessarily shapes the decision-making process occurring before and after the completion of undergraduate studies: whether to attend college, where to attend college, what to study, whether to continue to graduate school, and what kinds of careers to pursue.¹⁷ The decisions students make, especially after college, are more limited for borrowers than for non-borrowers. Although this negative consequence of educational debt affects all borrowers, “African American, Hispanic, and lower-income students are disproportionately represented among students whose decisions are limited as a result of borrowing for college.”¹⁸ Since patterns of student borrowing are affected by race, gender, and class characteristics, the reality of higher education for African Americans, Hispanics, and students from lower-income families is the necessary accumulation of educational debt.¹⁹ Students with higher debt burdens are less likely to apply to graduate or professional school.²⁰

THE EFFECTS OF THE ANTI-AFFIRMATIVE ACTION MOVEMENT

The Supreme Court addressed affirmative action in undergraduate admissions in the 1978 decision *Regents of the University of California v. Bakke*.²¹ The outcome invalidated the school's special admissions program and prohibited the school from taking race into account as a factor in its future admissions decisions.²² More recently, in *Grutter v. Bollinger*, the Supreme Court held in a 5-4 vote that the Equal Protection Clause does not prohibit a law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining educational benefits from a diverse student body.²³ However, in *Gratz v. Bollinger*, the Court found by a 6-3 vote "that the manner in which the University considers the race of applicants in its undergraduate admissions guidelines violates" the Fourteenth Amendment.²⁴ Although the later two decisions found that diversity may constitute a compelling state interest, the split judgments demonstrate the difficulty of precisely tailoring measures that serve permissible diversity goals in higher education.

Although the Supreme Court has held that affirmative action measures may be permitted, a few states have made any form of affirmative action unlawful. For example, in 1996, California banned affirmative action and amended the State Constitution to provide that the "state shall not discriminate against, or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."²⁵ In 1998, the state of Washington adopted a similar initiative banning affirmative action.²⁶ In 1999, Florida also prohibited affirmative action in government employment, state contracting, and higher education. In short, a distinct anti-affirmative action sentiment is alive and well, continuing to challenge minorities' ability to gain access to education in the future.

Following *Podberesky v. Kirwin*, where the Court did not find enough evidence of historical discrimination to justify a merit-based scholarship program for African Americans at the University of Maryland,²⁷ the future of race-based scholarships continues to be in doubt. During the Clinton Administration and following the Supreme Court's determination not to review *Hopwood v. Texas*,²⁸ the Fifth Circuit case which banned affirmative action in state university admissions, Judith Winston, General Counsel of the United States Department of Education (DOE), issued a letter to college and university counsel,²⁹ which in part read:

I am writing to reaffirm the Department of Education's position that, under the Constitution and Title VII of the Civil Rights Act of 1964, it is permissible in appropriate circumstances for colleges and universities to consider race in making admissions decisions and granting financial aid. They may do so to promote diversity of their student body, consistent with Justice Powell's landmark

opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-315 (1978). See also *Wygant v. Jackson Bd. Of Education*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring). They also may do so to remedy the continuing effects of discrimination by the institution itself or within the state or local educational system as a whole.³⁰

During a Democratic Administration in the White House, a party historically known to support affirmative action, this letter likely eased university administrators' fears of action by the Office of Civil Rights. However, given the present Bush Administration's official anti-affirmative action stance that race-neutral alternatives will achieve diversity,³¹ there is low probability that the DOE will continue to allow minority-targeted scholarships that are not in strict compliance with stringent DOE guidelines. Consequently, although school officials believe that minority-targeted scholarships play "an important role in the recruitment, retention, and graduation of racial and ethnic minority students"³² and an elimination of these scholarships will "attenuate their ability to recruit and retain minority students,"³³ some schools have cut raced-based scholarships and revised minority scholarship programs to make them race-neutral in fear of litigation.³⁴ In summary, the anti-affirmative action movement has essentially led to the elimination of many university funded and administered minority-targeted scholarship programs. Therefore, in addition to excessive undergraduate debt obstacles discussed earlier, reduced availability of funds for minority students to finance law school costs may also discourage many qualified minority candidates from pursuing a legal education.

LAW SCHOOLS ARE POORLY POSITIONED FOR COMPETITION WITH OTHER PROFESSIONAL PROGRAMS

With tuition growing at an alarming rate for the last twenty years, outpacing even the rate of inflation, law schools have been pressing toward the point where significant numbers of college graduates may decide that law school is not worth the economic opportunity cost and risk. Instead, they decide it makes good economic sense to seek less expensive forms of graduate education or forgo additional credentials altogether.³⁵

Average law school tuition increased dramatically with private tuition rates increasing by 86% through public resident tuition increases of 141% in 2000.³⁶ Unsurprisingly, the annual amount of borrowing by law students also dramatically increased during this period.³⁷ Furthermore, using loan volume, enrollment data, and the estimate that about 80% of law graduates borrow to finance their education, consultants calculate "an average total law school debt of \$51,400 for each graduate of the class of 2000."³⁸ Therefore, even excluding the opportunity costs of lost income during the three years of law school, the cost of a legal education is a substantial investment.

"The National Association for Law Placement (NALP) reports that the median starting salary for all law school graduates in the class of 2000 was \$51,900."³⁹ However, individual

starting salaries are heavily influenced by employer type or firm size, and therefore, vary widely from starting salaries of \$34,000 for public interest positions to \$125,000 for large law firm positions.⁴⁰ Furthermore, since the largest law firms predominantly recruit from national and top-tier regional law schools, graduates' salaries are also heavily influenced by the type of school they attended.⁴¹

The average costs of a legal education are generally about the same for all students.⁴² However, the initial expected returns for minority students are generally lower because minority graduates "are more likely than whites to enter government, public interest, and business, and less likely to enter private practice."⁴³ Furthermore, even if minority graduates enter private practice, they are more likely to work at a smaller firm.⁴⁴ In fact, NALP surveys report that almost 25% of minority graduates working in private practice are employed by firms with two to ten attorneys.⁴⁵ Therefore, the average, initial return on investment for minority law school graduates is comparatively low.

A multitude of options exist for students interested in pursuing a graduate or professional degree. For example, law schools are most likely to compete directly with Master of Business Administration (MBA) programs for students. A comparison of J.D. and MBA programs demonstrates that law schools are likely losing qualified minority applicants to other graduate and professional programs.

First, most full-time MBA programs only require two years of study,⁴⁶ compared to the full-time, three-year commitment of law school. Therefore, both the actual and opportunity costs of pursuing an MBA are generally lower. Second, since 1966, the Consortium for Graduate Study in Management (the Consortium) has offered full-tuition fellowships to African American, Hispanic American, and Native American college graduates admitted to one of the organization's member schools for business.⁴⁷ On the contrary, no comparable minority scholarship program exists for minority law school students. Third, the average salary for graduates of these schools, recruited by many of the top investment banks, consulting firms, and corporations is \$85,000.⁴⁸ Furthermore, the cap by most accredited law schools on the number of hours a student can work (15 hours per week during the first year and 20 hours per week during the second and third years) negatively impacts the return on investment calculation.⁴⁹ Conversely, a recent DOE study showed that "75% of MBA students overall and 61% of full-time MBA students work more than 35 hours a week." Consequently, law schools are at a disadvantage when competing for financially sensitive, but highly qualified minority applicants.

Not all potential law school applicants are interested in attending business school, and other graduate programs have lower returns on investment. However, considering the high undergraduate debt burdens that many minority students face and the fact that most educational institutions are no longer le-

gally allowed to offer minority-targeted scholarships, it follows that the mere existence of such an attractive alternative is convincing some minority college graduates to apply and attend business school instead of law school.

A PROPOSED SOLUTION

One of the main obstacles for minorities in pursuing a legal career is the low number of minorities that attain bachelor's degrees. To increase the flow of minority students into the legal profession, a great deal of progress can be made by boosting the percentage of minorities with undergraduate degrees. According to U.S. Census data, only 14.3% of African Americans have attained a college degree at age 25 or older and the percentage decreases to 10.4% for Hispanics and Latinos.⁵⁰ Minorities cannot possibly consider law school without first earning a college degree.⁵¹ However, as this article argues, even those that clear this initial hurdle often face economic obstacles, which prevent them from pursuing a legal education.

Title VII of the Civil Rights Act of 1964 prohibits programs where the university completely funds the program and selects the recipient, programs where the university selects the recipient with funding provided by a private donor, or programs where the university partially funds the scholarship and a private donor selects the recipient and provides partial funding. The only type of minority scholarship not prohibited is where a *private* organization selects the recipients and completely funds the scholarships.⁵²

Other professions have been more proactive in addressing diversity pipeline issues, and consequently, have been more successful in diversifying their professions. The Consortium has produced over 5,000 alumni during the past three decades. Instead of creating diversity programs, the legal profession should try to duplicate the Consortium's success by creating a similar program. The economic obstacles discussed in this article should be addressed with an economic solution; a scholarship program to attract minority students into the legal profession by helping finance their legal educations.

CONCLUSION

In summary, one way to help clear the diversity pipeline into the practice of law is for the legal community to establish an organization, funded by private donors, to offer minority students full-tuition scholarships to attend law school. Not only would this solution allow minorities burdened with excessive, undergraduate debt to consider the option of applying to law school, but it would also circumvent hurdles like the unconstitutionality of university-sponsored minority scholarships and the slow death of affirmative action. Additionally, this solution can place law schools in a better position to compete with other graduate and professional programs for the most qualified minority students.

ENDNOTES

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AMERICAN INDIAN AND ALASKAN NATIVE HEALTH CARE TODAY: THE UNITED STATES GOVERNMENT'S DISPARATE TREATMENT LEAVES TRIBAL PEOPLE TRAILING

*By Deborah Broken Rope, Esq.**

In the United States today, the Tribal Nations' history is hardly known by the general public. Sadly, history textbooks largely overlook the contributions that Tribal Nations have made in the formation of this country, as well as their role and status growing out of their unique legal stature today. Their unique status, that of a "dependent nation,"¹ has distinguished the legal governmental foundations between the United States and the tribes, which results in dual citizenship status for tribe members (as a United States citizen and as a tribal citizen). This political citizenship status also distinguishes Indian relations and services as politically derived, rather than racially based.²

Today, there are 335 Tribal Nations recognized by the federal government as having unique sovereign status³ and to whom the United States has a trust obligation. This trust obligation has two prongs: (1) there is a United States fiduciary duty to protect tribes and their resources, and (2) that determining what is in a tribe's best interest has been held to be vested principally with the Congress in exercise of its plenary power over tribal affairs.⁴ The combination of the unique political citizenship, trust obligation, and stature of dependent nations has created a complicated legal quagmire. This article addresses how this legal framework has left many Tribal Nations without appropriate medical care. This article also addresses common misconceptions about American Indian and Alaskan Native peoples that often lead to the mishandling of the health needs on the federal and state levels.

BACKGROUND: HOW AMERICAN INDIAN HEALTH BECAME A FEDERAL CONCERN

In its pre-Constitution era, the United States' relations with the Tribal Nations consisted of European colonial agreements or treaties with various eastern and other coastal Tribal Nations. European and tribal parties both benefited by utilizing international law principles that provided rights recognized by other European powers, such as safe trading routes, specific point of entries, and land for the base of such operations. These colonial agreements with Tribal Nations, with the recognition and permission to enter into such arrangements, were advanced during the United States' formation⁵ and in subsequently adopted treaties with specific tribes.⁶

The content of these treaties evolved over time, both in scope and nature. The earliest treaties were often made to promote peace, cement military alliances against other colonial powers, and protect trading rights and routes. In order to accomplish this, these agreements would define specific tribal lands and require traders and others to secure federal approval, includ-

ing payment of fees, before hunting and trading could occur within such delineated territories. Later, treaties were established to ensure that traditional tribal lands used for hunting or other activities, such as animal and habitat harvesting, or farming, would be protected while permanently securing some portion of the land for federal ownership and later sale. These tribal land cessions became the core feature of all treaties in the late eighteenth century.

In return for these peaceful land cessions and the conveyance of hunting or other rights, Tribal Nations were to receive federal assistance in lieu of lost resources. Federal promises of aid were expected to compensate tribes for their diminished area of authority and territory that had made them self-sufficient in the provision of food, housing material, medicinal plants, etc.

In the last part of the Indian treaty era, when Indian lands previously recognized as inviolate were invaded for gold or homesteading purposes, agreements were entered into to mark the end of military conflict between the Tribal Nations and the United States. Once again, these treaties became the vehicle for identifying the respective rights and territories belonging to the affected Tribal Nations and the United States, and these were made in exchange for promises of future federal aid.

Treaty making with the Tribal Nations was abolished in 1871⁷ under pressure by the House of Representatives because Members wanted a voice in determining future tribal agreements. Future Tribal-United States agreements were accomplished through legislative means, with or without tribal consent. This legislative method has remained the primary federal mechanism for resolving tribal concerns to this date, whether for tribal-specific matters or national policy questions, such as health care services.

AMERICAN INDIAN HEALTH CARE

Several statutes have been enacted for addressing Indian health and related needs. These congressional actions were undertaken in fulfillment of the United States' responsibilities to the tribes. These responsibilities derive from the Federal Indian law principles drawn collectively from the Constitution, treaties, statutes, executive orders, and case law that have been enacted over the past three centuries.

There are two important facts to recall in identifying federal American Indian policy and rights. The first is the dual citizenship status that many American Indians have. This means that such Indian person carries the rights of any United States citizen to federal aid and protection, as well as those to benefits owed to their tribe under such separate legal agreements and standards.

The second is that federal Indian benefits have changed as contemporary circumstances have grown. Today, federal assistance is structured to try to fulfill the original intent of the treaties in context of current standards of care, expertise, and technology. Federal goals are designed to ameliorate health and economic disadvantages and disparities as compared to the rest of the country.

Previously, treaties differed as to what was proper medical care. Where one tribe's treaty would specifically require that a doctor be available to help treat injuries, another treaty or statute may indicate that the federal government is obligated to provide for the well-being of and public health prevention services to another community. These two provisions, taken together, have evolved to mean that the United States has a federal health responsibility beyond the mere provision of one doctor or what the 1800s' perception of adequate health care was deemed to be.

FEDERAL AND STATE HEALTH CARE ISSUES

Given the limited knowledge of American Indian and Alaskan Native political, legal, and cultural attributes, the general public cannot fully comprehend "Indian"-related news stories. Such stories include articles highlighting tribal gaming, the socio-economic substandard conditions prevailing among many tribes, and tribal land and its federal "trust" protection status. Additionally, misperceptions are caused by the way tribal people participate in federal or state assistance programs, especially health care services, through specifically established federal Indian programs. The lack of informed policy leaders and federal health advocates results in inadequate direction and resources to address tribal health needs, as well as their exclusion or lack of access to public health care and related services.

Today, there exists a separate federal health care delivery system serving federally recognized Tribal Nations - the Indian Health Service (IHS). IHS was originally established as a function of the Indian Affairs agency. The Indian Affairs agency was first created in the War Department. Later, Congress reorganized the Indian Affairs agency and established it within the Interior Department. The federal health responsibilities were later transferred out of the Interior Department's Bureau of Indian Affairs (BIA) to the then Department of Health, Education and Welfare (HEW) in 1955.⁸ This action was initiated, in large part, as a federal assimilation policy to encourage tribal people to view their health care rights no differently than those owed to non-Indian persons. This Indian health function transfer was also seen as a step towards eliminating separate Indian rights.

The IHS health care delivery system has established 50 hospitals, approximately 250 outpatient clinics, and 200 health stations in tribal communities from Alaska to the east coast.⁹ In addition to these federal facilities, tribes are also operating many of their own health facilities, whether hospitals or clinics. The growth in tribally controlled health services is supported by both specific Indian health legislation¹⁰ and the Indian Self Determination Act, whose goals were to strengthen tribal governing capabilities.

Due to the nature of this federal health care system, the IHS program is viewed as the principal and sometimes sole health care avenue to be utilized by tribes. This misperception is enhanced during difficult fiscal years, when states are trying to limit costs for those health entitlements and other programs that require them to serve persons who fit a certain low-income profile, or who fall into some category of defined care (e.g., 65 years of age, end stage renal disease, etc.).

Many states carry a co-pay or matching fund requirement on receipt of federal health care funds for state residents who qualify for such care. States are reluctant to ensure that tribal members fully access this care because it is perceived as an added drain on their state funds. Many mistakenly believe that tribal members do not contribute to the state tax scheme. Generally, tribes are exempt from paying a state tax as it is unconstitutional for one sovereign to tax another. Consequently, many tribal members living within their tribal lands or "reservation" are exempt from state employee taxes when they work for their tribe or federal agency office located on tribal lands. However, many tribal members are employed outside their reservation and do pay employee taxes as would any other state resident.

The perception that tribal persons do not pay state taxes and should be discouraged from using state funded services is only slowly being addressed through federal channels, whose funds often make up the nucleus of state health care assistance.

FEDERAL AND STATE HEALTH CARE ACCESS

Although there are several federal health policies, they are not always accessible for tribal members. The federal health policy makers in the Executive Branch have often found it easier not to address the dual citizenship rights of tribal people in their budget formulation and policy initiatives. However, such conduct is irresponsible, as there are many individuals who have dual health or other entitlement and assistance status. These individuals are eligible to utilize multiple federal benefits that complement or overlap one another. The option of having multiple benefits received, such as Veterans Affairs, Medicaid, Children's Medicaid, or Substance Abuse Prevention, can be no more difficult to administratively manage than the incorporation of Indian health care rights. While the Congress and the Administration may work to address overlapping or duplicative benefits, complementary services will remain.

The federal government has also found it easier to support strictly state block grants rather than state-tribal block grants. The Administration cites that working with 335 tribes in addition to working with 50 states would be too burdensome for the affected federal agencies. States are, however, permitted to count tribal members for inclusion in their federal application for funds, yet often do not provide the proportionate share of funds to tribal communities for assisting their members. This action means that tribal people have to either seek state or county facilities to receive such federal or federal-state aid, or lobby the State for a tribal "piece of the pie." When a State legislature has few to no Indian representatives, a plea for tribal

provisions is unheard. Tribal members are not often perceived as integral members of such constituencies, due to low political voter turnout, as well as the lack of economic and political clout of many tribes. Conversely, tribal members find it difficult to receive assistance in non-tribal settings due to discriminatory treatment in the lack of patient-consumer education and outreach, as well as the simple requirement of being welcomed to receive such assistance.

Members of Congress view news stories on Indian gaming and wonder why tribes are unable to assume greater financial responsibility. Lack of information concerning tribal economic disadvantages has resulted in an inadequate foundation to sufficiently grasp the gaping holes in such news coverage. Unfortunately, tribal economic circumstances in their entirety are not mainstream news. This includes low tribal employment rates, which in turn means low tax revenues. Tribes are unable to promote economic industry beyond gaming without their own investment or contributions, which is difficult to accomplish without an existing revenue base. For example, the tribal gaming market, contrary to high profile stories, is not very lucrative for many tribes because of their geographic isolation. Members are reluctant and handicapped in efforts to provide effective policies when comprehensive information and education is sparse and not readily available.

The congressional committees having an interest in Indian health matters have increased over the years. In the House, four committees can influence the debate on Indian health legislation. These committees are the House Resources Committee from its Indian jurisdiction, the House Energy and Commerce from its public health jurisdiction, the House Governmental Affairs for agency organization and functions issues, and the House Ways and Means Committee over Medicaid and Medicare revenue collection and expenditure matters. Unlike the House, the Senate has a separate committee to handle Indian legislation, the Senate Committee on Indian Affairs. Here too, however, the chamber is moving towards multiple-committee review on pending legislative proposals by using the Senate Finance, Health, Education, Labor, and Pension committees. The result of this dispersed governance is that Indian health legislation designed to strengthen health care services and tribal control has become mired in bureaucracy.

Tribal health status has been documented to reflect morbidity and mortality levels that far exceed the national average.¹¹ Yet this data has not produced the necessary support for correcting such obvious health disparities through federal legislative and funding action.

Navigating this maze in Congress, while placating special interest groups and states, and negotiating with the Administration for significant investment, has proven to be a cumbersome and difficult task. Tribal advocates have been attempting to pass the reauthorization of the Indian Health Care Improvement Act for the past five years to no avail. Lack of legislative action is due to the cost and size of the bill, the need to allay committee questions over certain new program provisions, and the need to respond to the Administration and Members' questions over the long-term benefits of this unique federal health care system.

CONCLUSION

As the United States advances into the twenty-first century of emergency preparedness, continued Middle East military conflicts, rising federal deficit, and trade imbalances, the federal government's inclination will be to push tribal health needs to the side or to expect that tribal needs are met within the confines of state-structured systems. Such inaction will undermine effective Indian health care services on two levels. The first level is in the outreach to Indian patients and also in strengthening tribal governments who have the greatest interest in protecting their future. Second, the deferral or hands-off approach is inconsistent with the United States treaties and other legal agreements with the tribes.

Tribal Nations are resourceful and American Indian/Alaskan Native people have adapted without assimilating and losing their political and cultural identity over the past three centuries. The new century will test both tribal resolve and the United States' integrity to fulfill its obligations. Such federal fiduciary fulfillment would be easier to obtain were the citizens of this country properly informed on who the First Nations are and what their roles and rights are in this great country.

ENDNOTES

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¹ See generally *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (distinguishing Indian tribes from foreign nations given their occupancy in U.S. territories to which the U.S. "assert title, independent of their will").

² See *Morton v. Mancari*, 417 U.S. 535, 553-554 (1974) (holding that Indians are not members of a "discrete racial group," but are members of a sovereign entity whose "lives and activities" are governed by the Bureau of Indian Affairs).

³ List of Federally Recognized Tribes, 67 FED. REG. 134 (July 12, 2002).

⁴ See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 562 (holding that Congress' power over the Kiowa, Comanche, and Apache Indians is not precluded by provisions of any treaties).

⁵ U.S. CONST. Art. I, § 8, cl. 3.

⁶ Francis Paul Pucha, *The History of a Political Anomaly* (University of California Press 1997) (stating that the Treaty Era between 1778-1868 resulted in 370 ratified treaties).

⁷ Indian Appropriation Act, 16 U.S.C. § 566 (1871).

⁸ 1955 Transfer Act.

⁹ *FY 2006 Budget Justifications*, U.S. Department of Health and Human Services Indian Health Service, available at http://www.ihs.gov/AdminMngrResources/Budget/FY_2006_Budget_Justification.asp.

¹⁰ E.g., Indian Sanitation Facilities Act, PL 86-121; Indian Health Care Improvement Act, 25 U.S.C. 1601; Indian Alcohol And Substance Abuse Prevention And Treatment, 25 U.S.C. 26; Special Diabetes Program for Indians, 42 U.S.C. 254c-3(c)(2).

¹¹ *Trends in Indian Health, 2000-2001*, Division of Program Statistics, Indian Health Service (IHS), U.S. Department of Health and Human Services (DHHS), available at http://www.ihs.gov/NonMedicalPrograms/IHS_Stats/IHS_HQ_Publications.asp.

BOOK REVIEW

THE PRESUMED ALLIANCE: THE UNSPOKEN CONFLICT BETWEEN LATINOS AND BLACKS AND WHAT IT MEANS FOR AMERICA

BY NICOLÁS VACA. RAYO (2004). ISBN 0060522054.

Reviewed By LeeAnn O'Neill*

Chicano Attorney Nicolás Vaca's fascination with the exponential growth of the Latino population in the United States compelled him to conduct a daring study of past tensions and future problems between the African American community and the Latino community in *The Presumed Alliance: The unspoken conflict between Latinos and blacks and what it means for America*. Vaca begins with the proposition that there is an idealized, assumed alliance between the African American and Latino communities, an assumption often made by Latinos and the liberal White community. Vaca deconstructs the myth of a "brown-black" coalition, identifying prejudice, zero-sum employment competition, and political competition as factors driving the two communities apart.

Vaca's identification and definition of each group is problematic. By favoring the terms Latinos and Blacks, "black" and "white" Latinos are lost within the scope of these terms. In a recent interview, Vaca acknowledged that African Americans are aware of the problem with the term Latino. Furthermore, he explained that African Americans often deconstruct the term Latino to show that if Latinos were identified by country, then African Americans would still be the largest minority despite the ambiguous nature of being "African" American.¹ Also particularly relevant, but conspicuously missing, is a discussion of the Latino construct and the assumption that all Latinos can be lumped together as a cultural and political group. A discussion of the tensions and divisions among Latino groups would add to Vaca's analysis. Further complicating the Latino construct, Vaca overwhelmingly focuses on Mexicans and their history. Although Mexicans do comprise about 58% of the total Latino population, he glosses over the other 32 countries and 11 dependent political units that comprise Latin America. Even though Vaca intends on representing all Latinos in his analysis, it often seems he uses the label Latino and the label Mexican interchangeably.

Vaca does an admirable job of attempting to balance his analysis of "brown-black" politics. He cites the failure of African Americans to vote for Cuban candidate Antonio Villaraigosa in Los Angeles to balance the Latinos' failure to vote for African American candidate Lee Brown in Houston. In addition,

he contrasts the African American community's control in Compton with the Cuban dominance in Miami. There are also examples of racial stereotyping and antipathy on both sides. Despite these seemingly objective examples, however, there is an underlying disapproving message to the African American community. In his interview, Vaca affirmed this message: "I have repeatedly stated that my book is far more significant for African Americans than it is for Latinos. The release of every new survey by the U.S. Census reveals a Latino growth trajectory that continues to exceed that of the African American population. The refusal of the African American notables to address the conflict between the two groups is done at their own peril and that of the larger African American community."² He supported this statement by revealing that none of the prominent African American scholars who received his manuscript responded or showed any interest in giving input.³

Yet while Vaca chastises the African American community for their lack of support, he glazes over several important problems. Vaca discusses briefly the comparative lack of civic participation by those in the Latino community who can vote. He does not discuss the impact of undocumented immigrants on the civic participation statistics, specifically that a great number of Latinos in the United States are unable to legally vote. Although the growth of the Latino community is noteworthy, the population statistics only become pivotal when they translate into votes. Notably, Vaca admits that when Latino candidates lost by a small margin, the loss was caused by a lack of Latino voter participation, not necessarily the lack of support from the African American community. Perhaps before focusing on Latino population growth patterns, there should be a discussion of the growth of political participation by Latinos.

The book's shortcomings do not erase the fact that the dynamics between African Americans and Latinos are a growing force that must be addressed. Vaca does not mince words and he states what many people are afraid to say in these days of political correctness. Readers will either immediately agree or immediately disagree with his conclusions, but either way, Vaca's book performs an important role as a catalyst for the discussion of the political reality of "brown" versus "black."

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¹ Email interview between LeeAnn O'Neill and Nicolás Vaca on July 26, 2005.

² Id.

³ Id.

SPOTLIGHT ON KEVIN JENNINGS: EXECUTIVE DIRECTOR AND CO-FOUNDER OF THE GAY, LESBIAN, AND STRAIGHT EDUCATION NETWORK (GLSEN)

By Lydia Edwards*



We chose Kevin Jennings for the spotlight in this issue because of his dedication to creating a discourse that empowers all people gay and straight to do something to protect our youth. As co-founder of GLSEN, Mr. Jennings has helped create a movement that all people

can rally around: protecting and educating America's children. Recently, *The Modern American* was able to interview him to give us his thoughts on a variety of topics within the movement including: being "locked in;" keeping your head up; the generation gap; race and diversity; gay high schools; and starting a discourse.

LOCKED IN

In a recent talk at Holland and Knight's Boston Office, you quoted Virginia Woolf's reaction to being locked out of a library: "I thought how unpleasant it is to be locked out; and I thought how it is worse, perhaps, to be locked in." How does homophobia "lock in" American teens?

Jennings: Susan Pharr wrote a book called *Homophobia: A Weapon of Sexism* and in it she notes that sexism is about gender role constraints and homophobia is the weapon we hit people over the head with when they break out of those constraints. We call boys who express their emotions "fairies" and girls who are assertive a "bitch" or "dyke." This is particularly constraining for men. There is such a taboo about exploring a part of their nature that cries because you are called a faggot and that's the worst. Also powerful women are also seen as lesbians. For example look at newest book about Hillary Clinton, *The Truth About Hillary: What She Knew, When She Knew It, and How Far She'll Go to Become President* by Edward Klein. These labels are used to constrain people in roles that are unnatural. Women are assertive and men are sensitive.

KEEPING YOUR HEAD UP

With all the focus on marriage rights and the current reaction from state governments to change their Constitutions, do you think protecting gay children has a chance?

Jennings: As progressives we have a tendency to look at the glass as half empty. My mom used to say, "the only person who likes change is a baby with a wet diaper." The intense backlash we experience today is due to developments in the past two years. Sodomy laws were struck down by the Supreme Court

and the Massachusetts Supreme Court granted equal marriage rights.

Movements for social justice follow patterns. The more visible you are, the more progress you make, the more you are attacked. The more you are attacked the more people will take a stand. The backlash is hateful but then people will stand up. I don't think history is linear. For every two steps forward you take one step back. Some people will be very adamant to this change. People were getting blown up in churches when the civil rights movement was most successful. Compare the world we live in now to the world I was born into 1963, where segregation was prevalent and homosexuality was "treated" with electric shock therapy. So I don't find it a depressing thought, *What did you think was going to happen?* We should not be discouraged because our success is inevitable.

COMPARING THE MOVEMENTS

You mentioned the civil rights movement, how is the LGBT equality movement and the civil rights movement comparable? Are they the same? What about the role of young people?

Jennings: First, as a history teacher I am often bothered by people that say that the black experience and the gay experience are exactly the same. I think the experience of gay people is most like that of the deaf. Like sexuality, deafness is not immediately seen. Both are born into families that cannot "communicate" with them. Black children are most likely born in black families with a preexisting dialogue.

Second, despite our differences, Americans believe that all children deserve protection and education. Those are areas around which people who feel very different can come together. GLSEN was the first gay rights

organization to put "straight" into our title and 33% of our executive board are straight. We bring people around a common title, like white and black parents united around wanting education for children.

Third, the children are pushing us. For example, in the South young people like Jon Lewis were only 18 or 19 at the time of the civil rights movement and Martin Luther King Jr. was only 26 when he led the Montgomery Bus Boycott. Young people were willing to take risks that their elders weren't willing to or able to take. In our case, young people came up with the day of silence, in which today half a million people take part.² Young people push elders and demand more. They say, "hey movement get your act together." There has never been a successful movement in America that didn't have young people front and center. It was the influence of the young at a critical point that lead the civil rights movement to victory. That is why I don't get worried about setbacks. Because it is inevitable we are

Movements for social justice follow patterns. The more visible you are, the more progress you make, the more you are attacked.

going to win; there is no doubt in my mind.

GENERATION GAP

A recent Times magazine article about young gay people noted that they seem to see themselves as not really “gay” but just wanting to fit in. It’s as if many don’t see themselves as part of a movement.

Jennings: I think the article oversimplified the situation. There is a generation gap in every community. It’s a huge factor and it makes a big difference. For example, there is a huge difference between the African American youth and the LGBT youth because African Americans are raised by black people and whatever generational issues that may exist there is still a dialogue. There is no venue for LGBT youth because they are not raised by gay people, so they don’t have much contact with older gay people. Young people are excluded from many of the venues designed for gay people like bars. So a 45 year old gay man and 15 year old gay student don’t really talk a lot.

Today’s youth is the first generation who are coming out while still in adolescence and demanding for the same adolescence as their straight counterparts. You were biding your time in my generation, waiting to start your life. I am 42 and today kids at 17 are saying, “I want my life now.” “I am not willing to wait for a means of escape.” It’s very exciting, because why should they have to wait to start their life. They want to go to prom, have dates and tell their friends about the crushes they have.

DIVERSITY WITHIN THE LGBT MOVEMENT

Essentially where is it? Many people of the LGBT community of color often criticize mainstream LGBT organizations for leaving them out.

Jennings: That is a legitimate criticism; the gay rights movement is no different than any other. It would be nice to think that if you are a gay white person you could liken your struggle to a straight black person. But you can be racist, and straight black people can be just as homophobic. How you experience oppression is not how someone else experiences theirs. At GLSEN’s national student leadership program we made a goal that at least 50% of our leaders have to be students of color, transgendered, or straight allies. At least 60% of our leaders are that. In order to reach diversity you have to practice it from the very onset.

Well if diversity is so great what do you think of schools like Harvey Milk, an all gay high school in New York?

Jennings: I think that at this juncture it is a tragic necessity. The students otherwise wouldn’t get a high school diploma because they dropped out of other schools because they were tired of being beaten up. It’s a tragedy; every child should feel free to go to school get an education without fear. That we even have to

consider this to make sure some kids get a diploma is a tragedy. The Harvey Milk people say the same thing. They look for the day they can close their doors because a school like theirs is no longer necessary.

No one is asking what’s wrong with mainstream schools where these students can’t get an education. These students have already been segregated out of that system. If mainstream schools were doing their job we wouldn’t need this. At GLSEN we believe in bringing people together. If you take all of the gay kids out of the schools, how do you expect to teach people about getting along with others who are different.

STARTING A DISCOURSE

So then is GLSEN targeting the youth who are not quite political or have no intention of becoming political but need a voice?

Jennings: Eleanor Roosevelt once said that “Where do universal human rights begin? In small places close to home.” Many get involved in politics when they see injustice and wrongs in their lives. They then see that it is connected to a system and then they begin to get involved at a larger scale. They get involved because of name calling and bullying. They start to understand that it’s because elected officials don’t make policies that protect young people. To solve problems in their lives they have to attack systems that cause them. It’s about inequitable systems that perpetuate injustices on groups of people.

So we are inspired now, but how do we start a discourse when all I hear about is sin and sex acts?

Jennings: First ask what is the point in America we are trying to create? There is an obvious huge gap between what it seeks to be and what it is. We seek to be a country where people are not the same. I may not like it, but you have a constitutional right to think I am going to hell. But you don’t have a right to stop me from exercising my constitutional rights.

What lowers the blood pressure is that we are not saying there is one way to think. We say regardless of what you think you have to treat people with respect. You don’t have to like, approve, or think I’m moral. Religion is clearly a choice yet we protect people from religious persecution. You have to respect people even if you think they are wrong. We have Christians, Jews, and Hindus in this country and we recognize they have the right to be, despite some beliefs that a particular person is going to hell. We have somehow managed to figure that out for religion. We need that for sexual orientation.

People need to understand that is what we are trying to do and that it is American.

Kevin Jennings received his MBA from New York University; MS from Columbia; and BA at Harvard University. He also the author of five books and his sixth book is due out in the Fall of 2006 on Beacon Press. If you have any questions

ENDNOTES

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** Photo used courtesy of www.glsen.org.

¹ Virginia Woolf, *A Room of One’s Own*.

² See Dayofsilence.org (explaining The Day of Silence, a project of the

Gay, Lesbian and Straight Education Network (GLSEN) in collaboration with the United States Student Association (USSA), is a student-led day of action where those who support making anti-LGBT bias unacceptable in schools take a day-long vow of silence to recognize and protest the discrimination and harassment -- in effect, the silencing -- experienced by LGBT students and their allies).

PREPARING FOR AMERICA'S FUTURE: LATINOS IN EDUCATION

By Roopa Nemi*

Latinos represent the largest minority in the United States and their educational success directly impacts the achievements of the nation as a whole.¹ However, a recent report noted Latinos generally lag behind in education when compared to other racial or ethnic groups. This article will analyze reports on Latinos in education and will conclude with the federal government's response to the issue.

LATINOS IN EDUCATION

According to a recent Pew Hispanic Center report, Latinos are experiencing an increase in the proportion of school-aged youths in their population.² In the next twenty-five years, this population is expected to grow by 82%. Furthermore, Latino enrollment in higher education institutions has been growing.³ Higher education includes the traditional method of attending college full time after graduating high school and the nontraditional approach of working for some time before attending college or enrolling at a community college.⁴ The report shows that in general, a majority of Latino youths adopt the nontraditional approach.⁵ While there is an increasing number of Latinos attaining an undergraduate degree, only 9% earn an associate's and 6% earn a bachelor's degrees. These numbers fall behind other ethnic groups, such as African Americans, of whom 11% and 9% earn associate and bachelor's degrees, respectively.⁶

The Latino parents surveyed in the report identify several reasons as to why Latino students are not performing as well as their peers: (1) the schools are too quick to label Latino kids as having learning problems; (2) too many non-Latino teachers may not know how to address cultural differences; (3) many Latino students may have weaker English language skills; (4) stereotypes may have perpetuated teachers' lower expectation of them; and (5) parents may not push their children to work harder.⁷ Interestingly, the majority of whites and African Americans surveyed attributed Latino students' performance to weak English skills.⁸

Latinos know that higher education is very important to success.⁹ Similar to other ethnic groups, Latinos point to money as the main reason why many students either do not attend college or fail to finish.¹⁰ In addition, they also point to discrimination and the desire to stay close to family as other reasons for not attending college.¹¹ Such beliefs may help explain why many Latino students choose the nontraditional path of attending a community college nearby or working to support the family.¹²

FEDERAL LEGISLATION AND JUDICIAL ACTION

Federal legislation should strive to increase access to education for Latinos.¹³ The Higher Education Act (HEA) authorizes federal programs to support access to higher education.¹⁴ In terms of institutional support, there are two programs directly serving Latino students, the Developing Hispanic Serving Institutions (HSIs) and the Minority Science and Engineering Improvement Program (MSEIP).¹⁵ Both programs operate similarly to provide grants to institutions that either have large Latino populations or try to attract more Latinos into specific fields.¹⁶ The grants provide funds for institutional development through initiatives to improve the quality of education and faculty development.¹⁷ These types of programs have been quite successful as evidenced by the fact that 45% of Latinos in higher education are enrolled in an HSI.¹⁸

Another way the HEA attempts to increase access to higher education for Latinos is through preparatory programs such as the Gaining Early Awareness and Readiness for Undergraduate Program (GEAR-UP).¹⁹ This program seeks to prepare middle school students in low-income neighborhoods for higher education.²⁰ The program works with the students through high schools to establish partnerships with postsecondary institutions, which may result in college scholarships for the students.²¹ While this program does not aim directly at Latino students, studies have shown that many Latinos have benefited from GEAR-UP.²²

The most significant way the HEA seeks to help minorities is through grant and loan programs.²³ This aspect is extremely important considering that Latino parents identified money as the main obstacle to their children's enrollment in college.²⁴ Such

grants include Pell grants, federal supplemental educational opportunity grants, and additional programs for students that have families involved in seasonal farm work.²⁵ While the federal government offers a variety of funding, Latinos tend to receive the lowest average amount compared to other ethnic groups²⁶ regardless of the

form of aid.²⁷ As a result, these programs have not fully addressed a need that, according to Latinos, is the main reason their children do not attain higher education.²⁸ Future education reform needs to address the deficiency of funding to remedy the larger problem.

Undocumented immigrants create special issues when evaluating the needs of Latinos and education.²⁹ While not all illegal aliens are Latinos and vice versa, a sizable population of foreign-

Latinos tend to receive the lowest amount of federal aid.

born Latinos remains undocumented.³⁰ Proponents of the reform measures addressing the needs of illegal aliens, specifically their children's needs, point to the United States Supreme Court decision in *Plyler v. Doe*³¹ as a significant step forward. The Supreme Court invalidated a Texas statute that prevented illegal alien children from attaining a free public education.³² The Court reasoned that children could "affect neither their parents' decisions nor their own status."³³ Additionally, the Court noted the value of education while stressing that, as a nation, it is important not to discriminate against the children since most of them will remain in the United States.³⁴

With this in mind, Senator Orrin Hatch (R-Utah) drafted the DREAM Act and introduced it to the 108th Congress.³⁵ This legislation sought to address the hardships faced by undocumented youths brought to the United States by their parents who have since grown up in the United States, continued their education in the United States, and have otherwise been model citizens.³⁶ Specifically, the DREAM Act would grant legal residence to certain youths for up to six years in which the student must graduate from a two-year college and complete two years at a four-year institution or serve in the military for at least two years.³⁷ Gaining legal status has significant implications, the most important of which for education is the opportunity to receive in-state tuition.³⁸ Generally, states are strongly discouraged from providing such tuition to illegal aliens, but the DREAM Act strives to restore this capability.³⁹

Opponents have dubbed the bill as a hidden amnesty program under the guise of education.⁴⁰ They fear that the DREAM Act will cause increased competition with scarce opportunities to attend college to the detriment of United States citizens.⁴¹ Kathy McKee, State Director for Protect Arizona Now and opponent of the DREAM Act, articulates her opposition to this Act by stating "it is placing a burden on the American taxpayers that is not fair... Most colleges are raising tuition now, limiting enrollment more and more. I don't think we need to add to the problem of having more people wanting higher education when there's really no money for it."⁴²

Members of the Latino community have also voiced their opposition to the DREAM Act.⁴³ They question the feasibility of attending college when compared with the option of serving in the military.⁴⁴ As discussed earlier, Latinos tend to bear the responsibility of supporting their families, and therefore, may not have sufficient time or monetary resources to perform the educational requirements the DREAM Act requires in lieu of military service.⁴⁵ More importantly, many Latino students are reluctant to assume debt in the face of rising tuition costs, which

also diminishes the possibility of attending college.⁴⁶ Consequently, some members of the Latino community see military service as the only viable option.⁴⁷ They support their opinions by highlighting the Pentagon's publicly stated goal of doubling the number of Latinos in the armed forces by 2007.⁴⁸ In addition, the army has new recruitment tactics including campaigns in public schools and colleges where Latinos feel that their students would be most vulnerable to recruitment.⁴⁹ While many Latinos support the educational provisions of the DREAM Act, they worry that a majority of the Latino youth will inevitably have to choose military service. As an opponent stated "[d]oes

our desire to protect undocumented children by securing their legal residency override the likelihood that many of these children will fill the lowest ranks of the U.S. military? Is getting a green card worth the risk of young Latinos and Latinas losing their lives on foreign soil?"⁵⁰

Senator Feinstein, co-sponsor of the DREAM Act, argues "[t]he DREAM Act would benefit young people who have earned the privilege to remain in the United States... it does not offer amnesty, nor is it an entitlement."⁵¹ Some members of the Latino community have expressed their support for the bill.⁵²

Latino students have participated in protests and mock graduation ceremonies where they recount their personal experiences and success stories.⁵³ As one student declared, reinforcing what the Supreme Court has already held, "[w]e are not criminals... we only want better lives... we want to give to society."⁵⁴ Despite the opposition, the proposed legislation received a favorable response in the Senate.⁵⁵ Sponsors plan to reintroduce the bill in 2005 and expect as much support as it received in 2004.⁵⁶

CONCLUSION

Ultimately, the main problem facing Latinos in accessing education is a lack of money.⁵⁷ Latinos, whether native- or foreign-born, state that rising costs prevent their children from obtaining a higher education.⁵⁸ While the federal legislature has implemented programs trying to deal with this very issue, it has fallen short in addressing the specific needs of the Latino community.⁵⁹ This is evident from statistics showing that Latinos receive the least amount of all the various type of financial aid.⁶⁰ While legislation like the DREAM Act seeks to improve the situation for undocumented Latinos and illegal aliens in general, the government still needs to focus directly on the Latino community as a whole.⁶¹ Overall, the Latino community is improving in the field of education, an improvement from which the nation as a whole will benefit.

"Does our desire to protect undocumented children by securing their legal residency override the likelihood that many of these children will fill the lowest ranks of the U.S. military? Is getting a green card worth the risk of young Latinos and Latinas losing their lives on foreign soil?"

ENDNOTES

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¹ Richard Fry, *Latino Youth Finishing College: The Role of Selective Pathways*, The Pew Hispanic Center Report 1, 5 (2004), at <http://pewhispanic.org/files/reports/30.pdf>.

² *National Survey of Latinos: Education*, The Pew Hispanic Center/ Kaiser Family Foundation Summary and Chartpack 1, 1 (2004) [hereinafter *National Survey of Latinos: Education*], at <http://pewhispanic.org/files/reports/25.pdf>.

³ Santiago & Brown, *Federal Policy and Latinos in Higher Education*, The Pew Hispanic Center Report 1, 3 (2004) [hereinafter Santiago & Brown], at <http://pewhispanic.org/files/reports/32.pdf>.

⁴ *Id.* at 2.

⁵ *Id.*

⁶ *Id.* at 4.

⁷ *National Survey of Latinos: Education*, *supra* note 2, at 8-9.

⁸ *Id.* at 9.

⁹ *Id.*

¹⁰ *Id.* at 10.

¹¹ *Id.*

¹² Santiago & Brown, *supra* note 3, at 2.

¹³ *Id.* at 1.

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 7.

¹⁶ *Id.*

¹⁷ Santiago & Brown, *supra* note 3, at 7.

¹⁸ *Id.*

¹⁹ *Id.* at 9-10.

²⁰ *Id.*

²¹ *Id.*

²² Santiago & Brown, *supra* note 3, at 10.

²³ *Id.* at 8.

²⁴ *National Survey of Latinos: Education*, *supra* note 2, at 10.

²⁵ Santiago & Brown, *supra* note 3, at 8.

²⁶ *Id.* at 8-9.

²⁷ *Id.*

²⁸ *National Survey of Latinos: Education*, *supra* note 2, at 10.

²⁹ Lowell & Suro, *The Improving Educational Profile of Latino Immigrants*, The Pew Hispanic Center Report 1, 15(2004), at <http://pewhispanic.org/files/reports/32.pdf>.

³⁰ *Id.*

³¹ *Dream Act*, Executive Council Actions, 1, 1 (2003), at <http://www.aflcio.org/aboutaflcio/ecouncil/ec02262003a.cfm>.

³² *Plyler v. Doe*, 457 U.S. 202, (1982).

³³ *Id.* at 220.

³⁴ *Id.* at 221.

³⁵ *Dream Act*, National Council of La Raza: Policies, 1, 1 (2005), at <http://www.nclr.org/content/policy/detail/1331>.

³⁶ *Dream Act: Basic Information*, National Immigration Law Center (2005) at 1, at http://www.nilc.org/immlawpolicy/DREAM/DREAM_Basic_Info_0205.pdf.

³⁷ *Id.*

³⁸ *Dream Act*, National Council of La Raza: Policies, *supra* note 35, at 1.

³⁹ *Dream Act: Basic Information*, *supra* note 36, at 1.

⁴⁰ *The "Dream Act": Hatch-ing Expensive New Amnesty for Illegal Aliens*, Federation for American Immigration Reform, 1, 2 (2003), at <http://www.fairus.org/Media/Media.cfm?ID=2194&c=34>.

⁴¹ *Id.* at 1.

⁴² *Horizonte Arizona Issues Through A Hispanic Lens*, Transcript with Emilia Manuelos and Kathy McKee, (2004), at http://www.kaet.asu.edu/horizonte/transcripts/2004/july/july8_2004.html.

⁴³ Jorge Mariscal, *Interpreting 'Dreams': Green Card Bill Has Hidden Dangers*, (2004) [hereinafter Mariscal], at http://news.pacificnews.org/news/view_article.html?article_id=6936db82e841a6bed03af81cc5c0602f.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Mariscal, *supra* note 43.

⁵⁰ *Id.*

⁵¹ *Senator Feinstein Co-Sponsors "The Dream Act"*, U.S. Senator Dianne Feinstein, 1, 2 (2003), at <http://www.senate.gov/~feinstein/03Releases/r-dreamact.htm>.

⁵² Shaun Bishop and Charles Proctor, *Dream Act Rally Held*, (2004), at <http://www.dailybruin.ucla.edu/news/articles.asp?ID=29400>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Dream Act: Basic Information*, *supra* note 36, at 1.

⁵⁶ *Id.*

⁵⁷ *National Survey of Latinos: Education*, *supra* note 2 at 10.

⁵⁸ *Id.*

⁵⁹ Santiago & Brown, *supra* note 3, at 9-10.

⁶⁰ *Id.*

⁶¹ *Dream Act: Basic Information*, *supra* note 36, at 1.

SURVIVING RACISM AND SEXUAL ASSAULT: AMERICAN INDIAN WOMEN LEFT UNPROTECTED

By Talib Ellison*

In 1829, President Andrew Jackson promised that American Indians would have sovereignty “as long as grass grows or water runs.”¹ Nearly 175 years later, President Jackson’s promise still maintains the hollow sentiments that it embodied then.² Sovereignty, in the sense of legal autonomy,³ does not exist in “Indian Country.”⁴ Rather, tribal courts and governments lack the authority to implement and enforce laws regulating criminal offenses when non-tribal members commit offenses on tribal land.⁵ One of the most alarming displays of this problematic scheme is the incredible rate of sexual assault against American Indian females by non-Indian males.

The inconsistent governing statutes and judicial interpretations of state and federal laws concerning both tribal sovereignty and criminal jurisdiction in Indian Country are responsible for the staggering rate of sexual assaults occurring on tribal lands between non-tribal assailants and American Indian female victims.⁶ Despite facially maintaining concurrent jurisdiction with both the state and the federal governments,⁷ Indian Country is a ward of the United States, with the federal government shaping and limiting tribal sovereignty within the frame of Congressional and judicial discretion.⁸ As such, the concurrent jurisdictional scheme prevents tribal governments and courts from having the complete autonomy to create and enforce their own governing laws.⁹

This essay evaluates how the complicated maintenance of concurrent jurisdiction, coupled with the doctrines of limited sovereignty in Indian Country and federal trust responsibility, is effectively responsible for American Indian victims of sexual assault frequently lacking a judicial remedy. Specifically, American Indian women face elaborate hurdles in their pursuit of justice when the assailant is a non-Indian and the assault occurs on tribal land. This essay first introduces the historical context of sexual assault on tribal land, tribal sovereignty doctrine, tribal court authority, and the federal trust responsibility. Second, it argues that an unclear Congressional delegation of tribal sovereignty, facilitated by the lack of adherence to the trust responsibility, creates a high level of sexual assault in Indian Country. Third, it also argues that this unconstitutional jurisdictional scheme simultaneously denies American Indian women equal protection of the law, violates the federal trust responsibility to protect the best interest of American Indians, inhibits tribal self-governance, and results in the high level of sexual assault in Indian Country. Finally, this essay suggests that a decline in sexual assault rates in Indian Country will occur if the United States adheres to the true nature of the federal trust responsibility by sincerely re-evaluating the dependent sovereignty status of Indian nations as related to concurrent jurisdiction.

SEXUAL ASSAULT IN INDIAN COUNTRY

One out of every three American Indian women is a victim of rape at least once in her lifetime.¹⁰ Approximately 7.2 out of 1,000 American Indian women fall victim to sexual assault, compared to 1.9 out of 1,000 of all other races in the United States.¹¹ Some American Indians and national researchers believe that even though statistics reflect an alarming rate of sexual violence in Indian Country, the rate of sexual assault is not truly representative of the problem due to underreporting.¹²

The symptoms facilitating sexual assault are similar for women of all races, such as general negative social attitudes toward women, the relative lack of power held by women in society in contrast to men, and the traditional sexual subjugation of women.¹³ American Indian women, however, experience unique socio-economic disadvantages as they not only endure sexism by male-dominated tribal councils, but also struggle to overcome common social problems that accompanied the imposition of the white patriarchal paradigm during colonialism.¹⁴ Furthermore, as victims of sexual assault, there are specific cultural impediments that obstruct their access to helpful resources.¹⁵ The consequences of these barriers are often uniquely worse than those of their female counterparts of other ethnicities.¹⁶ The established disenfranchisement of American Indians, and particularly the treatment of American Indian women by colonizers, is the root of this disadvantage.¹⁷ This past oppression has led to severe present day repercussions for American Indians, and specifically for American Indian women.

In March 2004, responding to reports of sexual assault in Indian Country, Senators Tom Daschle and Tim Johnson called for legal reform to increase funding for tribes as part of an aggressive effort to combat the rates of sexual assault in Indian Country.¹⁸ The senators criticized cuts in tribal programs funding, and challenged President Bush to re-evaluate the needs of Indian Country. The federal government, however, has yet made an effort to correct the problems that the Senators’ addressed in their letter.

THE FEDERAL TRUST RESPONSIBILITY

In practice, the federal trust responsibility requires Congress to allocate tribal funds directly to protect tribal lands, to enhance tribal resources and self-government, to ensure the welfare of the tribes and people, and to guarantee American Indian use and enjoyment of tribal lands.¹⁹ The trust principles governing private fiduciaries equally apply to the federal government’s trust duty to the tribes.²⁰ Courts maintain that a “fiduciary relationship necessarily arises when the Government assumes elaborate control over resources . . . and property belonging to Indians”

and the elements of the common-law trust exist.²¹ Essentially, as a trustee to tribal land and money, the federal government is bound to a strict duty of undivided loyalty under the tenets of trust principles.²²

Nonetheless, no single explicit statutory definition of the federal trust responsibility exists.²³ Rather, the central body of contemporary federal trust policy derives from a composite of the Constitution, legislative enactments, tribal treaties with the American government, and most importantly, judicial decisions.²⁴ The courts utilize all of these sources of law in determining the parameters of the federal government's duties.

TRIBAL SOVEREIGNTY

The foundational framework for the interpretation of Indian law and tribal sovereignty is in *Johnson v McIntosh*,²⁵ the first of three opinions written by Chief Justice Marshall in the nineteenth century.²⁶ The Court in *Johnson* approved of the federal government's claim of title to American Indian land, despite the absence of agreement or consent from American Indians.²⁷ Chief Justice Marshall determined that rather than being absolute sovereign entities empowered with inherent rights such as the right to transfer title to land, tribes were "dependent, diminished sovereigns."²⁸ Marshall echoed this interpretation of tribal sovereignty in his second opinion written in *Cherokee Nation v. Georgia*.²⁹

Finally, in *Worcester v. Georgia*, the Court slightly broke with precedent by elaborating that Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government.³⁰ Essential to the Court's holding is the narrow construction of tribal independence as limited to "local self-government."³¹ In the aftermath of the Marshall trilogy, Indian tribes maintain sovereignty only over affairs that occur within their tribal communities, and only over affairs among American Indians.

CONCURRENT CRIMINAL JURISDICTION SCHEME IN INDIAN COUNTRY

In general, tribal courts retain concurrent jurisdiction with both federal and state courts to enforce laws in Indian Country, with the federal courts reserving jurisdiction to enforce all federal criminal laws.³² However, tribal courts traditionally have criminal jurisdiction only over offenses that Indians commit in Indian Country. In 1834, Congress enacted the General Crimes Act, extending federal criminal jurisdiction to crimes between Indians and non-Indians.³³ The Act generally reinforces the fundamental concept of tribal self-government by asserting that crimes between Indians fall within the exclusive jurisdiction of tribal governments. Additionally, the Act upholds the notion of tribal sovereignty by explicitly excluding federal criminal jurisdiction over Indian offenders tried and punished by the tribal courts.³⁴

Congress further expanded its jurisdiction and enacted the Major Crimes Act, creating federal criminal jurisdiction over

more serious felonies that Indians commit in Indian Country.³⁵ The Major Crimes Act also only permits tribal courts to impose punishments of a maximum of one year imprisonment and a fine of five thousand dollars.³⁶ Perceiving a lack of proficient law enforcement in Indian Country, Congress subsequently passed Public Law 280.³⁷ This legislation requires six states to assume criminal and civil jurisdiction over all or part of Indian Country within their borders, and provides that both the General Crimes Act and the Major Crimes Act are not applicable in these six states. According to Public Law 280, these states retain authority over non-Indians in Indian country, including crimes that non-Indians commit against Indians on tribal lands. A lack of clarity in the law, however, results in an interpretation of the General Crimes Act that preempts state criminal jurisdiction over non-Indians committing crimes against Indians, thereby preserving federal criminal jurisdiction over these cases.³⁸

THE TRUST RESPONSIBILITY DYNAMIC IN INDIAN COUNTRY

There are two overlapping factors predominantly responsible for the lack of protection of American Indian women. First, Congress' consistent violation of its trust responsibility constricts the level of sovereignty afforded to tribal governments and courts and simultaneously increases the need for tribal dependence on the federal government.³⁹ Second, jurisdictional confusions and enforcement flaws due to the changing roles of the federal and state governments, result in the hindrance of tribal justice system development, deny American Indian women equal protection of the laws, and further exacerbate Indian Country struggles to achieve sovereignty.⁴⁰ Consequently, the everyday social experiences of American Indians, and specifically American Indian women, reveals a continued plight, which exists on the periphery of American consciousness.

THE FEDERAL GOVERNMENT HABITUALLY ABANDONS ITS TRUST RESPONSIBILITIES

The President and Congress seem to regard their duties under the trust agreement as an optional, rather than as a mandatory legal obligation. The federal government must either begin fulfilling its trust duties or take specific measures to divest tribal funds by returning what belongs to American Indians. In other words, the federal government would have to make appropriate reparations for damages caused as a result of its fiduciary breach.⁴¹ As the trustee and the possessor of title to Indian lands and monies, the federal government has the obligation of protecting the interests of Indian Country.⁴² However, past governmental actions reflect an abandonment of its obligations to the trust beneficiaries, i.e., to American Indians.⁴³ In having a "dependent nation" within its borders, undoubtedly the federal government's ancillary motivation is to maintain maximum control of Indian Country.⁴⁴ To effectuate this goal, the federal government entered into a trust, whereby it ascertains physical control of tribal lands, then asserts its constitutionally-vested

authority to restrict tribal sovereignty and self-governance.⁴⁵

Regardless of the federal government's motives and constitutionally-vested authority, the law recognizes that when a trustee fails to administer a trust pursuant to the terms of the agreement, a breach results, subjecting the trustee to liability for damages as well as other available remedies.⁴⁶ In *Seminole Nation v. United States*, the U.S. Supreme Court determined that the federal government disbursed tribal funds to the local tribal government, completely aware that the government was not allocating funds according to its appropriate, intended purposes.⁴⁷ The Court reasoned that the trust requires the federal government to strictly adhere to its obligations as Indian Country's fiduciary agent, utilizing tribal money and land to advance social development and promote tribal self-governance.⁴⁸ The federal government's behavior in Indian Country demonstrates its continued failure to provide trust funding necessary to raise the standard of living and social well-being of American Indians. In addition, misallocation of money, as well as insufficient or declining levels of funding, force impoverished female victims of sexual assault to struggle with limited options and resources for help.⁴⁹

In a similar vein, Congress passed the Violence Against Women Act (VAWA) to provide federal protection to women as victims of violent crimes.⁵⁰ Although some provisions in VAWA addressed American Indian women specifically, these sections did not offer decisive solutions to the serious problem of sexual assault faced by American Indian women.⁵¹ Therefore, during VAWA's reauthorization in 2000, there was an initiative to create a discretionary grant program to support non-profit tribal coalitions that provide services for victims of sexual assault and domestic violence in Indian Country.⁵² In determining that only tribal governments could receive federal funding, the Department of Justice's (DOJ) Office on Violence Against Women informed the tribal coalitions that they were ineligible to apply for funding.⁵³ The tribal governments, however, did not receive direct funding from the DOJ. Therefore, these tribal coalitions will likely dissolve because tribal governments lack sufficient funding to allocate money to these programs.

Congress acknowledged that funding shortfalls are likely the biggest impediment to tribal self-determination.⁵⁴ If tribal self-determination and self-governance truly are goals that the federal government shares with Indian Country, then the government should not simply recognize that adequate funding makes independence possible, but actually allocate money to these programs.⁵⁵ In violation of trust responsibilities, however, the President and Congress continue to fall short of providing "resources necessary to effectively address or remedy [such] longstanding problems in Indian Country" as disproportionate rates of sexual assault.⁵⁶

THE FEDERAL TRUST AS A JUSTIFICATION FOR CONCURRENT JURISDICTION

These cyclic arguments about how concurrent jurisdiction preserves tribal autonomy, and how the United States' policy of

recognizing tribal sovereignty and self-government demands the existence of concurrent jurisdiction, does no justice to the true nature of the situation.⁵⁷ The U.S. Supreme Court in *Mitchell v. United States* offered the rationalization that, by virtue of the trust agreement, tribal governments relegate some relative control to Congress in exchange for its protections and support.⁵⁸ The fiduciary arrangement of the federal trust agreement does not implicate a legally cognizable justification for limiting the ability of either a tribal government or a court to regulate internal affairs.⁵⁹

Although the initial framing of the relationship between the government and tribes is like a guardian to its ward, the more fitting paradigm is created under the laws of trust.⁶⁰ Under the guardian and ward paradigm, there is an assumption that the ward is incapable of managing its own affairs, or actually has no say in those affairs.⁶¹ In contrast, the purpose of the trust agreement is to empower tribes and to fortify the development of political and legal systems capable of assuming the role of managing tribal affairs.⁶² Again, common-law trust doctrine prohibits trustees from taking actions that result in a personal advantage or gain if that action harms its beneficiary.⁶³ In implementing the concurrent jurisdiction scheme, Congress perpetuated its dominion over Indian country to the detriment of tribal self-government.

CONCURRENT JURISDICTION DENIES AMERICAN INDIAN WOMEN EQUAL PROTECTION OF THE LAW

American Indian women have neither equivalent levels of protection nor equitable avenues of legal reprisal in Indian Country because the U.S. federal government makes the arbitrary jurisdictional distinction between tribal members and non-tribal members.⁶⁴ The laws as they exist in Indian Country, as well as the scope of enforcement of these laws, differ arbitrarily in contrast to the laws that govern non-tribal members.⁶⁵ It would be difficult for the federal government to devise a basis for permitting a lack of equity in legal protection such as what currently exists in Indian Country.⁶⁶ Because the federal government marks jurisdictional boundaries along the status of tribal membership, sexual violence against American Indian women persists at higher rates than for women in other parts of the country.⁶⁷

Statistics estimate that 70% of the American Indian victims of rape or sexual assault reported to an offender of a different race indicates an inherent flaw in Congress' denial of tribal authority to prosecute non-Indian assailants.⁶⁸ The number of American Indian women who suffer from sexual assaults is dramatic to the extent that there is likely a deeper systemic catalyst than just the social and economic differences that these women face. Socio-economic distinctions between American Indian women and women of other races provide no discernable, complete explanation for the staggering disparity in incidents of sexual assault among Indian women compared to incidents involving victims of other races.⁶⁹

The only evident justification for this arbitrary racial classification is the United States' interest in protecting non-Indians, because there is no substantiation of Indian protection reflected in these laws.⁷⁰ Rather, in advancing this interest, it seems that the measures this statute takes severely undermine the protection of the true victims in these crimes, with no inclination of a compelling governmental interest.⁷¹ This is particularly true with a crime like sexual assault because there is an indefinite extent of mental injury accompanying the physical pain and torment.⁷² It seems senseless to limit what crimes can be enforced, and then bind the scope of enforcement almost arbitrarily to the point of rendering the punishment ineffective in deterring the crime.⁷³

THE FEDERAL GOVERNMENT SHOULD ABANDON ITS CONCURRENT JURISDICTION POLICY AND EMPOWER TRIBES TO REGULATE ALL AFFAIRS ON TRIBAL LANDS

In *Duro v. Reina*, the Supreme Court expressly stated that the notion of non-Indian implied consent to tribal criminal jurisdiction is invalid, but there was no clear explanation for the Court's decision.⁷⁴ The Court simply dismissed the possibility of implied consent by stating "nonmembers who share relevant jurisdictional characteristics of non-Indians, should share the same jurisdictional status."⁷⁵ This vague statement seems to mean that non-members are only subjected to laws outside of the sphere of local tribal governments. Unsurprisingly, the Court did not consider the potentially negative implications resulting from its logically defunct interpretations of tribal sovereignty.⁷⁶

The authority to oversee sexual assault claims when the victim is a member of the tribe is necessary to protect internal relations,⁷⁷ especially when considering the clashing cultural dynamics of Indian Country.⁷⁸ For example, American Indian women may be hesitant to report assaults because law enforcement and sexual assault specialists generally are outsiders, much like the criminals that assault them.⁷⁹ About 70 % of the reported crimes in Indian Country are reported to non-Indians.⁸⁰

The other likely cause of underreporting is that even when acknowledged, there is no heavy pursuit of sexual assault assailants, mainly because the criminals are non-Indian and thus able to escape through the perforated holes in the confusing concurrent jurisdiction scheme.⁸¹ As a result of this aspect of the judicial system, the general sentiment among American Indian women is that not only will response to reports take an unduly long time, but that no semblance of justice will result because American Indians see non-Indians as a privileged class on tribal lands.⁸² In considering cultural implications, concurrent jurisdiction reinforces the subjugated mentality ingrained in the consciousness of American Indians for centuries, which makes it more difficult to create a bridge of trust between American Indians and non-tribal members,⁸³ and ultimately weakens community ties within tribes.⁸⁴

Sexual assault directly affects internal relations in small American Indian communities where the strength and continuity of the community is dependent upon the individual's sense of connectedness.⁸⁵ American Indian tribes subscribe to communal

values as the guiding principles for the laws that govern an individual's conduct.⁸⁶ This preference does not mean that the group ignores individual interests. Rather, American Indian laws strive to protect individuals, while at the same time, preserving the cultural beliefs and practices of the collective framework.⁸⁷ Thus, tribes build their society based on community and relational functions.⁸⁸ In the context of this social structure, it is impractical to have an outside force dictating which rights and values should exist in Indian Country.⁸⁹ The impracticality of such a relationship is especially apparent when the imposing force is foreign to the established relationships within the community and the shared common historical experience that contextualizes the existing values and norms of that society.⁹⁰

In the abstract, American jurisprudence is a reflection of socially intrinsic values, based upon our historically bound experiences and common motivations.⁹¹ The commonality of values and perceptions among most American Indian tribes stands in stark contrast from those values and views historically imposed by the majority culture in the United States.⁹² Therefore, preservation of the sanctity of the American Indian community is only possible when the laws reflect the communal values of Indian Country and not the values of a foreign society or mainstream America.⁹³ Ultimately, court interpretations of tribal sovereignty frequently limit the reach of tribal authority, opting instead to grant deference to the plenary powers of Congress, which facially remain insensitive to the true needs of tribal communities.

CONCLUSION

The disproportionate rate of sexual assault in Indian Country is a product of the federal government abandoning its trust responsibilities and implementing its arbitrary and confusing concurrent jurisdiction policies. Pursuant to its trust responsibility, the federal government and its agencies must not adopt or promulgate practices or regulations that compromise their fiduciary duties.⁹⁴ The trustee must always act in the interests of the beneficiaries.⁹⁵ Indian Country needs a firmer adherence by the federal government to the true nature of its trust responsibility. This would entail an abandonment of the current jurisdiction scheme in which tribal courts are powerless to effectuate the laws of their own land and equal protection eludes victims of sexual assault.

With the power to perpetuate and enforce the laws, tribal dependence on the federal government will diminish. Although it is apparent that this is exactly what the federal government does not want, with the demise of concurrent jurisdiction, undoubtedly a decline in the existing problems in Indian Country, such as the rampant episodes of sexual assault, will ensue. Although this phenomenon probably comes as no surprise to the victims,⁹⁶ it is difficult to find adequate justification for its perpetuation.

The federal government's jurisdiction prior to Public Law 280 and the states' jurisdiction following its passage are too broad and conflict with the concept of tribal self-government as

well as the historically acknowledged characterization of Indian Country as a sovereign nation.⁹⁷ If Indian sovereignty predates that of the United States, then it inherently follows that many actions of the United States, however justifiable within the relative historical, social, or legal context, serve as limitations on Indian sovereignty.⁹⁸ Consequently, any claims of preserving the inherent powers of Indian self-government⁹⁹ are fundamentally flawed in that the federal government only protects those powers of self-government it creates and grants.¹⁰⁰ True sovereignty, and thus true self-government, cannot exist where another entity dictates and maintains the authority to interpret and redefine its scope.¹⁰¹ Ultimately, tribal courts and tribal law

enforcement are essential institutions of tribal self-government.¹⁰² Tribal self-government falters when these institutions are not exclusively within the dominion of the tribe.¹⁰³

The existence of concurrent jurisdiction through Public Law 280 also violates the federal trust agreement by exacerbating tribal rights to self-government.¹⁰⁴ Concurrent jurisdiction only preserves the interests of the federal government.¹⁰⁵ Unfortunately, as a result of repeated subjugation, a constant denial of the assertion of its rights, and the federal government's inability and reluctance to legitimize tribal self-government,¹⁰⁶ Indian Country is deficient in its ability to hold the federal government accountable.¹⁰⁷

ENDNOTES

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¹ See HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES*, 134 (1997) (quoting President Jackson's promise to grant sovereignty to Indians if they abandon their territories).

² See *id.* at 125-148 (describing the federal government's pattern of steadily stripping away land given to American Indians by breaking treaties, employing deception, and waging war).

³ See Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461, 1462 (1991) (asserting that the plenary powers of Congress over Indian relationships and commerce are extremely broad).

⁴ See 18 U.S.C. § 1151 (2004) (expressing that Indian Country includes all areas within a reservation, trust allotments, and dependent Indian communities).

⁵ See, e.g., *United States v. McBratney*, 104 U.S. 621, 633 (1882) (holding that States have exclusive criminal jurisdiction over its citizens).

⁶ See LAWRENCE A. GREENFIELD & STEVEN K. SMITH, *AMERICAN INDIANS AND CRIME*, 38 (1999) [hereinafter *BJS*] (estimating that the rate of rape and sexual assault of American Indian women is 3.5 times higher than for any other race in the U.S.), available at <http://ojp.usdoj.gov/bjs/pub/pdf/aic.pdf> (last visited Sept. 15, 2005).

⁷ See NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, *SEXUAL ASSAULT IN INDIAN COUNTRY: CONFRONTING SEXUAL VIOLENCE* (2000) [hereinafter *NSVRC*] (depicting the criminal law enforcement process in Indian country as consisting of jurisdictional battles between Tribal police, Bureau of Indian Affairs (BIA) police, city or county sheriffs, state troopers, and federal law enforcement personnel), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic.pdf> (last visited Sept. 14, 2005).

⁸ See, e.g., *Merrión v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982) (concluding that tribal sovereignty can only be changed through congressional delegation).

⁹ See DEPARTMENT OF HEALTH AND HUMAN SERVICES, *TRIBAL SELF-GOVERNANCE STUDIES, FREQUENTLY ASKED QUESTIONS CONCERNING AMERICAN INDIANS AND ALASKAN NATIVES* (2003) (illuminating that tribes powers are subject to Congress and the Supreme Court), available at <http://aspe.hhs.gov/SelfGovernance/faqs.htm> (last visited Sept. 14, 2005).

¹⁰ See PATRICIA TJADEN & NANCY THEONNES, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *FULL REPORT OF THE PREVALENCE, INCIDENTS, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN* (2000) (indicating that the rate of rape for American Indian women is four times greater than other women in the United States), available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf> (last visited Sept. 14, 2005).

¹¹ See *BJS*, *supra* note 6 (detailing sexual assault rates among other U.S. women).

¹² See *id.* (calculating that less than 40% of American Indian victims of violent crime reported the offense to the police).

¹³ See Christopher Shu-Bin Woo, *Familial Violence and the American Criminal Justice System*, 20 U. HAW. L. REV. 375, 380 (1998) (considering sexual assault and domestic violence as occurring in all economic, cultural, religious, geographic, educational and vocational spheres).

¹⁴ See Melissa A. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123, 126-27 (2002) (distinguishing American Indian women's causes of sexual assault by expressing relevant cultural factors shaped by the history of American Indian maltreatment by non-Indians); see also *id.* at 128 (factoring in historical and cultural events which create a uniquely devastating social tapestry for American Indian women).

¹⁵ See PAULA GUNN ALLEN, *THE SACRED HOOP: RECOVERING THE FEMININE IN AMERICAN INDIAN TRADITIONS* 255-60 (1995) (conveying the tribal view that confidentiality creates an overwhelming pressure on Indian women to keep sexual assault problems to themselves).

¹⁶ See, e.g., Donna Coker, *Enhancing Autonomy For Battered Women: Lessons From*

Navajo Peacemaking, 47 UCLA L. REV. 1, 16-32 (1999) (reporting findings that demonstrate American Indian women consistently rate at the bottom of all statistical indicators of well-being).

¹⁷ See Suzanne H. Jackson, *To Honor and Obey: Trafficking in "Mail Order Brides,"* 70 GEO. WASH. L. REV. 475, 483 (2001) (recounting how Spanish soldiers in California sexually assaulted American Indian women and girls in the 1700s, then white settlers raped and murdered women, enslaved daughters and forced them into prostitution or sold them off).

¹⁸ See Letter from Tim Johnson & Tom Daschle, Sens., to Judd Gregg, Chairman of the Subcomm. on Commerce, Justice, State, and the Judiciary, and Ernest Hollings, the ranking member of the Comm. on Appropriations, (Mar. 24, 2004) [hereinafter *Daschle Letter*] (calling attention to the atrocities occurring in Indian Country), available at <http://www.indianz.com/News/archive/000840.asp> (last visited Sept. 14, 2005).

¹⁹ See *Assiniboine and Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 794 (9th Cir. 1986) (encapsulating the essential obligation of the federal government under the trust agreement to provide services that ultimately protect and serve Indian communities).

²⁰ See *Covelo Indian Comty. v. F.E.R.C.*, 895 F.2d 581, 586 (9th Cir. 1990) (applying the principles of trust law to federal agencies because they maintain the same trust obligations as the government).

²¹ See *U.S. v. Mitchell*, 463 U.S. 206, 225 (1981) (remarking that the elements of common law trust are a trustee (the United States), a beneficiary (the Indian allottees), and a *trust corpus* (Indian timber, lands, or funds)).

²² See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (declaring a breach of the federal government's fiduciary duty when it disbursed funds to known disloyal tribal representatives).

²³ See generally GILBERT L. HALL, *INST. FOR THE DEVELOPMENT OF INDIAN LAW, THE FEDERAL-INDIAN TRUST RELATIONSHIP: LEGAL CURRICULUM AND TRAINING PROGRAM* (1981) (conceding that no single source or text of law cleanly defines tribal sovereignty).

²⁴ See *id.* (generating a list of legal sources used to exemplify the dynamics of the federal government's trust responsibility).

²⁵ See generally 21 U.S. 543 (1 Wheat) (1823) (holding that the United States maintains absolute title to tribal lands based on the doctrine of discovery).

²⁶ See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 392 (1993) (signifying the importance of the Marshall Trilogy in establishing the framework under which courts interpret Indian law in the United States).

²⁷ See 21 U.S. at 587 (addressing competing claims for tribe-acquired land and government-acquired land).

²⁸ See *id.* at 587-88 (implementing the doctrine of discovery to justify vesting absolute title of Indian lands in the federal government).

²⁹ See 30 U.S. 1, 17 (1 Pet.) (1831) (declining to offer tribes independent sovereign status and classifying them as "domestic dependent nations" and wards of the United States).

³⁰ See 31 U.S. 515, 559 (1832) (limiting a tribal court's authority to only those matters exclusively within the borders of the tribal lands and among tribal members).

³¹ See Frickey *supra* note 26, at 381 (constructing the Supreme Court's language to limit tribal authority to internal affairs).

³² See U.S. CONST. art I, § 8.

³³ See General Crimes at § 1152(1) (functioning as protection for non-Indians by not permitting their prosecution in tribal courts).

³⁴ See *United States v. Wheeler*, 435 U.S. 313, 325 (1978) (holding that because the Navajo Tribe and the federal government are separate entities, the double jeopardy clause does not apply for the defendant when he was already prosecuted by the federal court).

³⁵ See Major Crimes Act, 18 U.S.C. § 1153 (1885) [hereinafter *Major Crimes*]

ENDNOTES CONTINUED

(reserving federal criminal jurisdiction in all cases involving murder, manslaughter, kidnapping, maiming, felony sexual assault, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against an individual under sixteen years old, arson, burglary, robbery, and felony theft).

³⁶ See 25 U.S.C. § 1302(7) (1968) (disallowing tribal courts the authority to levy penalties for criminal conduct that state and federal courts usually have).

³⁷ See generally Pub. L. No. 280, § 1162 (conferring to states criminal jurisdiction over crimes in Indian Country).

³⁸ Sen. Comm. On Interior and Insular Affairs, 94th Cong., Background Report on Pub. L. 280, 29-30 (Comm. Print 1975) (recognizing that tribes in Pub. L. 280 states constantly struggle to maintain their jurisdiction and concurrent authority with the states because states have not distinguished their authority under Pub. L. 280 from tribal and federal authority under the General and Major Crimes Act); see also NSVRC, *supra* note 7 (blaming general confusion about which jurisdictional laws take precedence in Indian Country for the reason why crimes in Indian Country can be subject to investigation by local law enforcement, consisting of Tribal and/or BIA police, or state troopers, and federal law enforcement personnel from the BIA or FBI).

³⁹ See generally Phillip J. Prygoski, *From Marshall To Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty*, Am. Bar Assoc. (2003) (proposing that from the beginning, the Supreme Court never attempted to create a canon of authority that would outline the court's stance on tribal authority), at <http://www.abanet.org/genpractice/compleat/f95marshall.html> (last visited Sept. 14, 2005).

⁴⁰ See B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 472 (1998) (referencing state authority under Pub. L. 280 as an example of why tribal justice systems are vulnerable to state challenges of legitimacy); see also Goldberg-Ambrose & Champagne, *supra* note 36, at 51 (blaming imbalanced bargaining power of that permit states to challenge the authority of tribal courts for deterring tribal justice systems from attempting to exercise jurisdiction and develop more adequate justice systems).

⁴¹ See generally *United States v. Mitchell*, 463 U.S. 207 (1983) (determining that money damages are available for Indian tribes for the United States's violations of trust obligations regarding management of trust property and money).

⁴² See Lynn H. Slade, *The Federal Trust Responsibility in a Self Determination Era*, 42 ROCKY MTN. MIN. L. INST. 11, 16 (1999) (explaining that trust resources are those financial resources allocated by the federal government for the purpose of establishing programs and funds for varying Indian affairs).

⁴³ See U.S. COMM'N ON CIVIL RIGHTS, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* [hereinafter *USCCR*] (evaluating the devolved state of federally controlled tribal funds) available at <http://www.usccr.gov/pubs/na0703/na0731.pdf> (last visited Sept. 14, 2005).

⁴⁴ See, e.g., *U.S. v. Kagama*, 118 U.S. 375, 381 (1886) (combining the notion of tribal sovereignty with the understanding that in relation to the United States, Indian Country is still dependent).

⁴⁵ See Slade, *supra* note 42, at 12 (adding meaning to Marshall's phrase from *Cherokee Nation* stating that the relationship between the federal government is "unlike that of any other two people in existence," by saying that the key motivation of the federal government in its "guardian" relationship with tribes is to control tribal and individual Indian's transactions regarding tribal land).

⁴⁶ See *Thornbrook Int'l v. Rivercross Found.*, Case No. 03 C 1113, 2004 U.S. Dist. LEXIS 12431 (N.D. Ill. July 6, 2004) (reciting the principles of trust law, specifically that a trustee has a duty to use care and diligence in protecting and investing trust property).

⁴⁷ See generally *Seminole Nation v. United States*, 316 U.S. 286 (1994) (applying trust law doctrine to impose a heightened burden of fair dealing with American Indian tribes).

⁴⁸ See *id.* at 297 (insisting that the federal government must abide by the "most exacting fiduciary standards" when dealing with issues related to its trust responsibility).

⁴⁹ See Gunn Allen *supra* note 15, at 260-61 (alleging that because many women residing on reservations live in such poverty that they do not have access to telephones, transportation, or child care, and that some women do not speak English so their ability to seek help for sexual assault is severely impaired).

⁵⁰ See Violence Against Women Act, 18 U.S.C. § 2261 (1994) [hereinafter *VAWA*] (responding to the rising threat of violence against women through a federal statute that employs various methods to offer additional protections and resources to prevent violence and assist women victims of violent crimes).

⁵¹ See generally Testimony of Patrick F. Fagan on the Violence Against Women Act Reauthorization before the Subcomm. on Crime Judiciary Committee, U.S. House of Representatives (Sept. 29, 1999) (appearing before the subcommittee to criticize the apparent lack of consideration for American Indian women victims of sexual assault and domestic violence).

⁵² See *id.* (stating that American Indian women deserve as much protection under VAWA as other women in the United States and would benefit immensely from the inclusion of provisions in VAWA's reauthorization that address funding of sexual assault and domestic violence programs in Indian Country).

⁵³ See National Congress of American Indians, *National Policy Workgroup on Contract Support Costs, Final Report* (July 1999) [hereinafter *NCAI*] (demanding support against the General Counsel for the Office on Violence Against Women's interpreta-

tion that the VAWA reauthorization only applied to tribal governments, therefore rendering non-profit tribal coalitions ineligible to apply for new tribal grants), available at <http://www.indian.senate.gov/1999hrgs/csc9.15/allen.pdf> (last visited Sept. 14, 2005).

⁵⁴ See NCAI *supra* note 53 (advancing the argument that the federal government promotes a policy of advancing tribal self-governance and that the best means to this end is concerted funding for tribal programs).

⁵⁵ See ERIC HENSON & JONATHAN B. TAYLOR, ET AL., *NATIVE AMERICA AT THE NEW MILLENIUM 8-9* (2002) (claiming that the federal government wants to work with American Indians to fortify tribal sovereignty).

⁵⁶ See *id.* at 121 (inferring that President Bush's budget request for Indian programs was grossly inadequate and not a good-faith gesture towards actualizing a solution to Indian Country economic troubles).

⁵⁷ See, e.g., Prygoski *supra* note 39 (arguing that, "since the only jurisdiction that the United States has is concurrent with the tribe, that part of its concurrent jurisdiction is all that it could transfer to the states, and that it could not transfer more than what it had, that is, could not transfer tribal jurisdiction to the states").

⁵⁸ See generally *Mitchell*, 463 U.S. at 206 need full cite here (formulating the argument that because of the general trust agreements and the political relationships evolved from interactions involving implementation of the federal government's fiduciary duty, Indian Country is essentially subjugated to being a dependent of the United States).

⁵⁹ *But see, cf.* Prygoski, *supra* note 39 (accrediting the Marshall trilogy, in which the Courts established that the construction of tribal sovereignty is Congress' right, with setting the foundation for the federal trust responsibility).

⁶⁰ See FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (2nd Ed. 1982) 221-24 (putting forth the suggestion that Indian Law is best understood when viewing the scope of the federal government's duty through the lens of the American trust law principles).

⁶¹ See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (recognizing at the height of the plenary power theory of Indian relations, that the relationship between many tribes and the U.S. government resembled one of ward to guardian).

⁶² See generally Slade *supra* note 42, at 16 (explaining that trust resources are those financial resources the federal government allocates for the purpose of establishing programs and funds to promulgate and develop varying Indian affairs).

⁶³ See *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (stating the general duties of the federal government and its agencies in the federal trust responsibility).

⁶⁴ See AMERICAN INDIAN POLICY CENTER, *THREATS TO TRIBAL SOVEREIGNTY* [hereinafter *AIPC*] (continuing with the analysis of problems with the current legal and jurisdictional problems with sexual assault in Indian Country by asserting that jurisdiction confusion not only diminishes the ability for most agencies to create, obtain, and maintain consistent records, but it also serves to provide a justification for investigative and prosecuting officials to ignore sexual assaults), at <http://www.airpi.org/research/st98fund.html> (last visited Sept. 14, 2005).

⁶⁵ *Cf.* AIPC *supra* note 64 (justifying the Court's deference to Congress regarding its supervision in Indian Country by categorizing congressional legislation as political judgments and therefore outside the scope of judicial review).

⁶⁶ See *Personnel Administrator v. Feeney*, 442 U.S. 256, 272 (1979), quoted in *Washington v. Seattle School Dist.*, 458 U.S. 457, 485 (1982) (determining that despite lower standards of scrutiny for less offensive classifications, "a racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification").

⁶⁷ See Daschle Letter *supra* note 27 (informing Congress that sexual assault in Indian Country has reached staggering proportions and will continue unless Congress takes action).

⁶⁸ See WOMEN VICTIM RIGHTS COALITION, *INDIAN COUNTRY STATISTICS* (2003) (conveying the idea that even to this day, American Indians fall victim to the literal and metaphorical rape of their culture and ways of life at the hands of non-Indians), available at <http://www.vday.org/contents/vcampaigins/indiancountry/stats> (last visited Sept. 14, 2005).

⁶⁹ See BJS *supra* note 6, at 40 (drawing from U.S. census Bureau population estimates of July 1, 1998, to conclude that American Indians account for just under 1% of the U.S. population).

⁷⁰ *Cf.* FRANCIS PAUL PRUCHA, *DOCUMENTS OF UNITED STATES INDIAN POLICY*, 262 (1990) (connecting the passage of the Major Crimes Act to Congress's desire to prevent a recurrence of cases like *Ex Parte Crow Dog* where a murderer was freed because the federal courts had no jurisdiction); see also *Ex Parte Crow Dog*, 109 U.S. 556 (1883) (upholding a suit for release filed by an Indian convicted of murder on the grounds that the federal courts had no jurisdiction over crimes committed in Indian country by one Indian against another); see also *id.* (explaining that by treaty, the United States had allowed the tribe to retain its sovereignty and that any new criminal jurisdiction policy on the part of the U.S. government would require a clear expression of Congress).

⁷¹ See *Adarand*, 515 U.S. at 225 need full cite (requiring that justifications of federal race-based classifications must effectuate compelling governmental interests).

⁷² See, e.g., VERNELLIA R. RANDALL, *DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING PREVENTION AND INTERVENTION IN RURAL AMERICAN INDIAN COMMUNITIES 1*, 107 (1998) (recounting reports of most women who experience crying spells, nausea, depression, moodiness, nightmares and flashbacks or insomnia, "startle re-

ENDNOTES CONTINUED

sponses”, a fear of being alone, of men, of crowds of darkness); *see also id.* (expressing further that a victim may feel as if she has changed irrevocably both physically and emotionally, she may be suicidal, absent-minded or describe a general feeling of numbness, develop an obsessive/compulsive disorder as a result of shame and anguish expressed as self-hatred, or guilt and self-contempt for not having been smart or strong enough to stop the assault).

⁷³ *See Montana v. United States*, 450 U.S. 544, 566 (1981) (exemplifying the seemingly arbitrary nature of tribal jurisdiction when the court states that “a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians . . . when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health of or welfare of the tribe”).

⁷⁴ *See Duro v. Reina*, 495 U.S. 676 (1990) (involving an Indian accused of murdering a tribal member, but denying the tribal court jurisdiction because the accused was not a member of the particular tribe seeking to assert jurisdiction).

⁷⁵ *See id.* at 686-92 (using the fact that the accused was not a member of the tribe to justify not permitting the tribal court to prosecute him).

⁷⁶ *See Feds Urge More Cops on Reservations*, SALT LAKE TRIB., Dec. 19, 1997, at A24 (noting that American Indians receive less than half the police protection provided to the other rural communities and discussing a proposal for the Department of Justice’s takeover of B.I.A. law enforcement responsibilities because the B.I.A. has failed).

⁷⁷ *See NSVRC supra* note 7 (critiquing the ability of tribal courts to appropriately punish criminals because most tribes lack adequate jail facilities and often must utilize non-tribal or state facilities at high costs, and can also require distant trips for law enforcement and family members).

⁷⁸ *See, e.g., Richard Heiz, Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691, 699 (1987) (identifying the American Indian perspective of social beings born into a network of group relations, which reflect the values of the society).

⁷⁹ *See Joyce Gonzales, Non-Stranger Sexual Assault In Indian Country*, National Non-Stranger Sexual Assault Symposium: Proceedings Rep., Estes Park, CO (Sept. 14-17, 1999) 1, 12 (indicating that due to generations of internalized social and personal oppression, reporting a sexual assault can be difficult for American Indian women who have high levels of distrust for white agencies and helpers).

⁸⁰ *See BJS, supra* note 6, at 40 (concluding that this figure is a substantially higher rate of interracial violence than experienced by white or black victims).

⁸¹ *See NSVRC, supra* note 7 (asserting that jurisdiction confusion provides incentive for investigative and prosecuting officials to ignore sexual assaults).

⁸² *See Rinku Sen, Between a Rock And a Hard Place: Domestic Violence in Communities of Color*, COLORLINES MAGAZINE, Spring 1999, at 27 (chronicling the observations of activist Maggie Escovita Steel of the Chiricahua Apache tribe as she explains the mentality of most Native women considering reporting their assaults).

⁸³ *See supra* notes 6, 7 and accompanying text (observing that American Indian women have extreme mistrust of non-Indian service providers and other outsiders).

⁸⁴ *See generally* ROBERT ALUN JONES, EMILE DURKHEIM: AN INTRODUCTION TO FOUR MAJOR WORKS 82-114 (1986) (expounding upon Emile Durkheim’s theory regarding the process of social *anomie* (social suicide) that an individual undergoes when he no longer feels a connection to his surrounding environment, and how that feeling of disconnectedness inevitably has a rippling affect on the community).

⁸⁵ *See, e.g., MIDVALLEY WOMEN’S CRISIS CENTER, SEXUAL ASSAULT: HEALING FROM SEXUAL ASSAULT* (generalizing that, choosing to deal with the assault on their own, many sexual assault survivors feel that keeping the assault quiet is their only way to regain control of their lives, and therefore they develop a sense of isolation and close themselves off to the world), at <http://www.mvwc.com/recoveringrape.html> (last visited on Sept. 15, 2004); *see also, e.g., BARBARA PARRY, FROM ETHNOCID TO ETHNOVIOLENCE: LAYERS OF AMERICAN INDIAN VICTIMIZATION* 231-45 (2002) (treating the process by which American Indian women isolate themselves from their community and after being sexually assaulted as a reflection of their inability to obtain adequate avenues of healing, inhibited by embarrassment).

⁸⁶ *See Heiz, supra* note 78, at 698 (elaborating upon the general communal values embodied in American Indian culture).

⁸⁷ *See James W. Zion, Harmony Among The People: Torts and Indian Courts*, 45 MONT. L. REV. 265, 413 (1984) (deconstructing the process by which Navajo cultural values serve a fundamental role in Navajo peacemaker courts and highlighting how the legal systems of Indian peoples were based upon the idea of maintaining harmony in the family, the camp, and the community).

⁸⁸ *See MARTHA MINOW, MAKING ALL THE DIFFERENCE* 149-52, 311, 382-83 (1990) (contextualizing how relational structures guide the proper treatment of individuals in American Indian cultures).

⁸⁹ *See, e.g., JOHN LOCKE, SECOND TREATISE OF GOVERNMENT* 58 (1690) (hinging a nation’s survival and power of self-governance upon its ability to maintain law and order and ensure “comfortable, safe and peaceable living” among its citizens).

⁹⁰ *See Gunn Allen supra* note 15, at 192 (cycling through the reasons why rates of violence against American Indians are so high and indicating various sociological

factors such as oppression, racism, hopelessness, emasculation of men, industrialization, etc.).

⁹¹ *Cf. Felix S. Cohen, The Erosion of Indian Rights*, 62 YALE L. J. 378-379 (1953) (posing the argument that the Indian Reorganization Act’s construction of a tribal government is a model of government based on democratic and corporate structures that is antithetical to the original forms of organization among indigenous nations).

⁹² *See Prygoski supra* note 39 (analyzing the cultural incongruities between American Indians and mainstream America).

⁹³ *Cf. Wheeler*, 435 U.S. at 322-23 (affirming the idea that criminal jurisdiction is a major component of inherent tribal powers of self-government, but recognizing that Congress supplants these inherent powers with its plenary power to legislate on behalf of federally recognized tribes).

⁹⁴ *See Nance*, 645 F.2d at 711 need full cite (stipulating that “any federal government action is subject to the U.S.’s fiduciary responsibility toward the Indian tribes); *see also Covelo*, 895 F.2d at 581 (ruling that all government agencies have fiduciary responsibilities to tribes).

⁹⁵ *See Covelo*, 895 F.2d at 586 need full cite (deciding that the Environmental Protection Agency fulfilled its fiduciary duties to petitioner tribe by ensuring that business dealings with a neighboring tribe would not adversely affect the petitioner).

⁹⁶ *See Dario F. Robertson, Time To Abolish The Bureau? Part 2* (indicating that much of Indian Country’s apathy is a result of an internalized sense that they deserve their condition) available at <http://www.cherokeeoobserver.org/Issues/abolishbiapart2.html> (last visited Sept. 14, 2005).

⁹⁷ *See generally* Brief for the United States as Amicus Curiae in Support of Petitioner, *Kiowa Tribe v. Manufacturing Techs.*, 118 S. Ct. 333 (1997) (No. 96-1037)

(construing Indian tribes as self-governing political communities whose original sovereignty predates that of the United States, and therefore federal law did not create tribal sovereignty).

⁹⁸ *See id.* (identifying the importance of tribal self-government for the promotion of policies reflexive of tribal needs).

⁹⁹ *See, e.g., Kagama*, 118 U.S. at 381-82 (attempting to preserve the powers of Indian self-government by claiming that Indian tribes still possess the ability to regulate internal issues based on its original natural rights as a sovereign entity).

¹⁰⁰ *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (year) (protecting federal government authority in Indian Country).

¹⁰¹ *See id.* at 56-57 (ruling that Congress had plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess); *see also Winton v. Amos*, 255 U.S. 373, 391 (1921) (asserting that Congress has plenary power to legislate issues of tribal property because of the dependent relationship the Indians have with the U.S. government); *see also Talton v. Mayes*, 163 U.S. 376, 384 (1896) (subjecting tribal sovereignty to the supreme legislative authority of the United States).

¹⁰² *See* Daschle Letter *supra* note 27 (declaring that tribal courts are crucial for tribal self-dependence and that the President should allocate funds appropriately to promote the further development of tribal judicial systems).

¹⁰³ *See* Phillip Brasher, *Reservation Crime Booming: U.S. Attorneys to Meet with Leaders of Indian Country to Seek Solutions*, ANCHORAGE DAILY NEWS, Aug. 29, 1997, at A3 (confronting the idea that uneven political, legal, and financial support impedes the ability of many tribal justice systems to function in full parity with state and federal systems).

¹⁰⁴ *See generally* CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* (1997) (deeming that P.L. 280 is an impetus in the continued breakdown in the administration of justice to such a degree that Indians are being denied due process and equal protection of the law).

¹⁰⁵ *See* Carol Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 537-38 (1975) (noting that with the enactment of Pub. L. 280, legislators withdrew a significant aspect of the federal government’s responsibility for law enforcement in Indian Country and took their financial support as well); *see id.* at 538 (ridiculing Congress for not ensuring that the mandatory states could adequately fund their new responsibilities under P.L. 280); *see also Bryan v. Itasca County*, 426 U.S. 373, 381-82 (observing the lack of any congressional intent to grant states any financial assistance for P.L. 280 responsibilities).

¹⁰⁶ *See, e.g., Lewis Lamb, Bush’s Comment On Tribal Sovereignty Creates A Buzz*, SEATTLE POST INTELLIGENCER, at C3 (Aug. 13, 2004) (reporting upon President George W. Bush’s inability to articulate the federal government’s position on tribal sovereignty when prompted, and quoting the president as stating simply, “Tribal sovereignty means just that; it’s sovereign. You’re a – you’ve been given sovereignty, and you’re viewed as a sovereign entity”).

¹⁰⁷ *See* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility*, 27 STAN L. REV. 1213, 1215 (1975) (highlighting tribes’ repeated failure in invoking the trust responsibility as a judicially cognizable barrier to congressional or other federal actions that would appear to breach the trust responsibility).

A DIRECT APPROACH TO REPARATIONS: MUNICIPAL EFFORTS TO ENSURE SOCIAL JUSTICE

By Samuel Emiliano Brown*

On April 12, 2005, Oakland City Council Member Larry Reid introduced a measure (the Oakland Ordinance)¹ that would require all corporations doing business with the City of Oakland to divulge information regarding past connections to African American slavery in the United States. The Chicago City Council approved a similar measure² in October 2002, followed by the Los Angeles City Council in June 2003. In the same manner, city governments across the nation passed resolutions calling for the federal government to apologize for the institution of slavery or to provide specific remedies to combat the lasting effects felt by the legacy of slavery.³ The primary purpose of these municipal actions is to facilitate the accumulation of information that could buttress future claims for redress from descendants of African slaves in the United States. An important auxiliary purpose is to obtain financial contributions for college scholarships and economic development programs for the communities in which the descendants of slaves comprise the majority of the residents.

Other municipal efforts include debates in the city councils of Chicago and Detroit over proposed bills that would give African Americans a large tax credit. The rationale for this credit is that it will serve as a partial compensation for the forty acres and a mule, promised to newly freed slaves immediately after the Civil War.⁴

This article first examines the history of reparations in the United States, specifically looking at the legal system and legislative attempts at the state and local levels. Second, it will address legal and practical concerns about reparations generally. The article will then analyze the recent Oakland ordinance specifically. Finally, it will look towards the future and analyze the direction of the modern slave reparations movement and what reparations could mean for African Americans and the entire nation. This article also incorporates insight on the issue of reparations from Council Member Desley Brooks of the Oakland City Council.⁵

HISTORY OF REPARATIONS

Reparations are not a new concept. Indeed, many groups have received reparations for past wrongs. For example, Holocaust survivors, American Indians, Alaskan Natives, and Japanese Americans have received compensation for gross atrocities. Admittedly, African American slavery in the United States ended eighty years before the Holocaust ended and both existed under somewhat different circumstances. Many American Indians and Alaskan Natives can point to prior treaties and legally binding agreements which arguably makes their current claims more for fulfilling contract obligations than reparations for past wrongs. However, the basic concept of reparations, “to make whole,” is

the same for all. Georgetown professor Richard America noted, “Slavery produced benefits and enriched whites as a class at the expense of [b]lacks as a class...reparations is not about making up the past, but dealing with current problems.”⁶

The call for African American reparations is most like the case for Japanese Americans. During World War II, the United States detained Japanese Americans in internment camps throughout the western states to allay fears of their involvement in espionage or other activities detrimental to national security. Many lost their property, jobs, and sense of security as their lives disintegrated before their eyes. In order to recompense this group for the harm caused by the federal government, Congress passed the Civil Liberties Act of 1988.⁷ To avoid, or curtail, questions of government discrimination in fashioning a remedy that would serve to aid Japanese Americans as a specific racial group, the authors of the bill identified class members as “surviving detainees” and their children.⁸ The text of the bill also indicates that money from the fund would go towards sponsoring research and public education activities, especially to illuminate and understand the events surrounding the evacuation goals.⁹

THE CASE FOR REPARATIONS

African American slavery in the United States helped facilitate the beginning of the greatest accumulation of wealth in our nation’s history.¹⁰ Many examples exist of the tremendous amount of wealth attained from African American slavery-related profits, which built some of modern America’s largest fortunes. Many institutions such as Exxon (formerly Standard Oil), the *Hartford Courant*, J.P. Morgan, Fleet Bank (formerly Providence Bank), and Brown University obtained their initial capital from money acquired either directly or indirectly from African American slavery in the United States.¹¹ In 1781, Robert Morris founded Wachovia Bank, the nation’s fourth-largest, from slave trade profits.¹² As a result of information obtained through the Chicago ordinance, J. P. Morgan acknowledged that banks it had once owned had taken possession of over 1,200 slaves who were being held as collateral.¹³ In response, the bank apologized and established a scholarship fund for African Americans.

Why would J.P. Morgan donate \$5 million for a crime committed over a century ago? The answer may lie in a contract theory known as *unjust enrichment*:

1. The retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected.
2. A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary

must make restitution or recompense.¹⁴

Few could successfully argue that 400 years of forced labor and discrimination in the United States, resulting in massive amounts of wealth for some groups, and poverty and oppression for another, did not constitute unjust enrichment. American business owners and shareholders “retained the benefit” of enormous profits, and capital, with which to invest and foster more wealth. This wealth was “conferred by another,” African slaves, in the form of labor under “circumstances where compensation is reasonably expected.” In such situations, the law says “the beneficiary must make restitution or recompense.”

Examples such as these hold little sway due to the myriad of obstacles that hinder any attempt to gain reparations through the courts. Some of the largest of these include overcoming the statute of limitations,¹⁵ identifying the class, concerns about offsets, and the overwhelming dearth of information on actual statistics and figures for African American slavery in the United States.¹⁶ Those with standing to make a claim for restitution, slaves themselves, were essentially shut out of the United States legal system for a century following their so-called “emancipation.” African Americans did not obtain full rights as United States citizens until the 1960s. The first generation of people to grow up with full citizen rights made claims against the government for its part in African American slavery, and the lasting effects thereof.

In 1995, Jewel Cato attempted to sue the federal government for an apology and damages arising from the enslavement of and subsequent discrimination against African Americans.¹⁷ The Ninth Circuit dismissed the case, citing sovereign immunity, jurisdictional hurdles, generalized class-based claims, and lack of standing.¹⁸ After the Ninth Circuit, the most liberal in the nation, dismissed *Cato*, many reparations organizations and activists had to rethink their strategies. This led to efforts to involve legislatures at the state and local levels.

REPARATIONS LEGISLATION

Council Member Brooks discussed her feelings on the difference in attitudes towards the Maafa¹⁹ and the Holocaust. She explained that when people speak of Africa or African Americans, there seems to be devaluation for black lives and accomplishments versus white ones, citing recent genocides in Rwanda and Sudan as examples.

Americans have a history of exhibiting a general reluctance in acknowledging and honoring contributions of Africans and African Americans. In 1968, Michigan Congressman John Conyers introduced a bill to create a federal holiday to honor Dr. Martin Luther King, Jr.²⁰ Many in Congress considered his idea “radical” and it took 15 years for Congress to acquiesce to its passage. In January 1989, Conyers introduced H.R. 40, “Commission to Study Reparation Proposals for African Americans Act”, which many have also deemed a radical measure. Despite the criticism, Conyers has introduced the bill every year since, and plans to do so until Congress passes it into law. He chose the number forty as a symbol of the original promise of

forty acres and a mule to freed slaves. H.R. 40 seeks to accomplish four major goals:

- 1) Acknowledge the fundamental injustice and inhumanity of African American slavery;
- 2) Establish a commission to study slavery, its subsequent racial and economic discrimination against freed slaves;
- 3) Discover the impact of those forces on today's living African Americans;
- 4) Create a commission which would then make recommendations to Congress on appropriate remedies to redress the harm inflicted on living African Americans.²¹

In 2004, the Democratic Party endorsed H.R. 40 in its platform, recognizing the importance of acknowledging and addressing the issue of reparations for African American slavery.²² Despite these attempts, the federal government has been slow to answer the call for a full accounting of the history and impact of African American slavery in the United States. This situation has led to renewed efforts by state and local legislatures to study and respond to the impacts felt from the lasting legacy of African American slavery.

STATE EFFORTS

In 2000, California signed into law SB 2199, the Slaveholder Insurance Policies Bill.²³ This made California the first state to require companies believed to have profited from insuring slaves to gather and report relevant history.²⁴ SB 2199 is now part of the California Insurance Code and outlines a request for information on records of slaveholder insurance policies and a full-disclosure requirement to the descendants of slaves.²⁵ To date, California has collected a list of slaveholders who held insurance policies on over 600 slaves.²⁶ Iowa and Illinois have passed similar bills, resulting in a partial accounting of slaveholder policies from companies and/or their predecessors, such as Aetna, AIG, and New York Life Insurance.²⁷

A similar bill has been proposed in North Carolina as well, state House Bill 1006, short-titled “State Contracts/Slavery Profits.” According to House Bill 1006, North Carolina would be able to terminate a contract entered into with a vendor if the vendor fails to fully and accurately complete a required affidavit regarding any past connection to African American slavery.²⁸ Critics of these state efforts say lawmakers have too much time on their hands. Many of the arguments against such legislation are not without merit.

Is it fair to hold modern corporations accountable for business transactions from the 18th and 19th centuries? First, records from that era are difficult to come by, making research into this area close to impossible. Second, many of these modern-day companies have only a weak connection to the parent companies that may have profited from the slave trade. Finally, some argue that slave reparations are simply unconstitutional.

OPPOSING ARGUMENTS AND CONCERNS

Many Americans of all colors question the validity of reparations and have valid legal and practical concerns. The first

question many people ask is whether reparations rise to the level of a compelling state interest. In determining whether a state or federal government can consider race through legislative efforts, courts require that it be for a compelling state interest.²⁹

Another concern is the fact that African American slavery was legal in the United States. How can African Americans make a claim for African American slavery-based reparations when those who committed the “crime” were not committing a crime at the time? The Constitution prohibits *ex post facto* laws that identify certain conduct as criminal even though it was legal at the time. Finally, how can the government fashion a remedy to redress policies and customs of racism without some form of discrimination?

Proponents of reparations note that they do not seek reparations solely from “white” people; they seek redress from an entire society whose wealth was built on free slave labor. Council Member Brooks commented, “as a local official I take pride in the fact that we can effect change and that we can focus on these issues. What would cities be like if all we did was collect taxes and write budgets?”³⁰ Alluding to the previous comments about the change in attitude when slave reparations is at issue, it is curious that critics are not so fervently against reparations to Native Americans for their stolen land, a series of injustices which also occurred over 150 years ago. African American slavery, like the settling of the western United States, was a state-sanctioned operation, given weight and authority through the most sacred of all American documents, the United States Constitution itself. Fortunately, for some, the Constitution has not been a bar to attaining restitution from the federal government for discriminatory policies and practices.

In assessing how to fashion a non-discriminatory remedy, many proponents point to the Civil Liberties Act of 1988. As noted above, this act does not define its beneficiaries racially, but instead defines them as “surviving detainees” and “their children.” Legislators in the case for African American reparations also redefined the class of people. Rather than directing benefits of reparations to “African Americans” or “blacks,” the prospective class members are identified as “descendants of slaves.” This is an important distinction that, like the Civil Liberties Act, identifies group membership based on a shared experience rather than a racial characteristic. In this way, information gathered to more accurately reflect the history of African American slavery will impress upon future generations that slave reparations were meant to redress 400 years of free labor and discrimination, not simply given to one group because of their race. More importantly, it eliminates an important constitutional obstacle; the equal protection doctrine prohibits state-sanctioned discrimination based on race. By changing the characterization of the victims, programs aimed at redressing injustice to slave-descendants cannot be shot down as violating equal protection because they are based on their relation to African American slavery, not their racial background.

As for the issue of compelling interests, Council Member Brooks, although opposed to the Oakland ordinance, agrees that

in the case of reparations, state and local governments might have a compelling interest upon which to base such legislation. She contends, “from a policy standpoint, the legacy of slavery continues to cost extra tax money to everyone. Remedying the lasting problems specific to African American communities would be economically beneficial and efficient for every citizen, not just African Americans.”³¹ Legislation that is economically beneficial for all citizens and narrowly tailored to remedy problems specific to African American communities as a result of past discrimination has a fair chance of passing the strict scrutiny standard set by the Supreme Court.³²

With regards to the concern about compensation for a prior legal act, many proponents would note that reparations legislation does not seek to “punish” taxpayers by holding them accountable for the actions of long-dead slaveholders. What these laws seek to accomplish is to hold accountable corporations that transferred wealth from the free labor of slaves into their coffers, and for an official recognition that many Americans were, and still are, unjustly enriched from the legacy of African American slavery and discrimination.

In Alaska, indigenous tribes receive a percentage of the revenue from oil sales because the government acknowledged that oil companies are, and have been, profiting from the loss of lands suffered by these groups.³³ Alaskan taxpayers do not oppose these laws because they recognize that much of the wealth created by the oil industry filters down through Alaskan economies and benefits everyone. In the same vein, the wealth made from African American slavery has been a major component in building wealth in the United States. From tobacco to cotton to sugar production, free slave labor played a major part in building the wealth that would facilitate the post-Civil War industrial revolution.

Americans have benefited from the labor of slaves and from the legacy of discriminatory practices in other ways as well. After the Civil War, four million African Americans were set free with disillusion of receiving a promised forty acres and a mule. Rather than allowing them to work on the East Coast, the United States allowed hundreds of thousands of eastern and southern Europeans to immigrate to the United States to serve as laborers in the factories of the north.³⁴ Many argue that since their great-grandparents or grandparents arrived here after African American slavery and the Civil War, they have never benefited from African American slavery or discrimination. To the contrary, many Europeans who immigrated to the United States were able to find work because it was the general custom in the United States to deny those jobs to African Americans based on the legacy of African American slavery and discrimination.³⁵ While Americans often subscribe to the dominant settler ideology that we are a nation of immigrants, it is often overlooked that the majority of African Americans did not voluntarily immigrate, but were brought here against their will.

As descendants of immigrants bought homes and land, descendants of slaves were restricted from a fundamental Constitutional right, the right to own property. This continued in various

forms through the 1950's, when the federal government promoted a policy known as "red-lining" which denied affordable housing to African Americans. Whether a non-African American citizen supported this policy or not, many inevitably benefited by the increase in available housing due to discriminatory practices such as this.

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Reparations can come in many forms, including cash payments, land, economic development, and repatriation resources for slave descendants. Other forms of reparations for slave descendants may come through the creation of honest depictions of African American history: funds for scholarships and community development, building of historical museums and monuments, the return of stolen artifacts and art to their respective peoples and institutions, exoneration of political prisoners, and the elimination of laws and practices that maintain dual systems in the criminal justice, health, education, and the financial and economic systems.

Council Member Brooks did take issue with some of the ways reparations legislation, particularly Oakland's, would redress past grievances. She believes that the ordinance does not go far enough in specifically redressing past discrimination and explains why she abstained from the vote of the recent Oakland ordinance:

In Oakland, the 580 freeway is like a Mason-Dixie line where one side is whites and the other side is African Americans and Hispanics. There is a large separation in Oakland between the haves and have-nots based in large part on race, how does it happen that it plays out like that? Is it coincidence? No, it represents a vestige of policies that were put in place a long time ago. The ordinance could be useful, so I didn't cast a "no" vote. But I couldn't, in good conscience, forget my past and allow (the ordinance) to be watered down by those who don't come from the same place. The fund does not address individual compensation, but is set up to benefit 'historically Black areas', like East and West Oakland. The Oakland ordinance is a farce because it will not go directly to those it is aimed at, specifically, African Americans in Oakland who have historically suffered economically at the hands of racism. The 2 areas targeted: East/West Oakland are *traditionally* African American neighborhoods, but due to the effects of gentrification, they are quickly losing their African American dominance. This means money meant to compensate descendants of slaves will go to historical black neighborhoods that are currently only about 50% black. In four to five years these neighborhoods might have very little black population but because of the way the ordinance is written, money will still go to these areas. The ordinance should direct funds recovered to

black community groups and black schools, not necessarily historically black neighborhoods that won't even be black in the near future. The same goes for schools, if money goes to schools in historically black neighborhoods but all the black people are moved out and Asians and whites move in then the same thing that happened with segregation in the 1950's will happen here: the majority that doesn't need assistance will benefit more from the ordinance than those the ordinance sought to assist.

Using historically black neighborhoods was a bad measuring criterion because it doesn't address the impacts of the legacy of slavery. Anyone in a particular area would benefit, not necessarily African Americans. West Oakland is the lowest income area in the city, the average income is less than \$26,000 but it is the neighborhood closest to the last BART station in Oakland (prime real estate). It is now being gentrified and if money pours into those schools in the next 4-5 years from the ordinance's fund, most of it will benefit the yuppie families who move in, not the poor African American families who live there now and who need better schools.

I want to do things that have real impact. I don't think anything substantive has been done here and I couldn't support that. On the issue of reparations, it is important that African Americans seek out justice but we must also 'watch what you ask for' and be sure that the remedy being fashioned will actually be to your benefit before you throw your support behind it.³⁶

In light of Council Member Brooks' response, it is clear that creating sustainable legislation that properly addresses this issue will be problematic.

CONCLUSION

The reparations issue forces us to ask many tough questions. Should the government compensate the great-great grandchildren of slaves, whose foremothers and forefathers worked for free and were deprived of an education? If the slaves and their direct descendants were denied the right to sue for compensation, do we allow the statute of limitations to control the issue and say "tough luck" to slave descendants who now have the rights their forefathers did not have? Is it fair to require taxpayers who never owned slaves to pay for the sins of long-dead Americans? How should the government determine who is a descendant?

This initial round of reparations legislation is not aimed at producing clear-cut answers to these questions. Some lawmakers are simply asking that their government devote some resources into researching the issue. Isn't it about time the government starts accepting the equally truthful reality that the United States might not exist as we know it without the free labor and sacrifice of Africans and African Americans?

ENDNOTES

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¹ OAKLAND, CA., MUN. CODE ch. 9.60 (2005); see also Jason B. Johnson, *Firms that profited from slavery reviewed: City of Richmond, Oakland consider early step to seeking reparations*, S. F. CHRON., Mar. 12, 2005, at B1.

² CHICAGO, IL., MUN. CODE § 292-585 (2002),

³ *Id.*

⁴ RAYMOND WINBUSH, SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS 166 [hereinafter WINBUSH](Amistad/HarperCollins 2003).

⁵ Interview with Desley Brooks, Council Member, Oakland City Council (July 22, 2005) [hereinafter *Brooks Interview*].

⁶ WINBUSH, *supra* note 4 at 18.

⁷ Japanese Internment, WIKIPEDIA (2005), at http://en.wikipedia.org/wiki/Japanese_internment.

⁸ 50 App. U.S.C.A. § 1989b (West Supp. 1994)

⁹ *Id.*

¹⁰ WINBUSH, *supra* note 4, at 84-85.

¹¹ *Id.*

¹² Fran Spielman, *Alderman May Punish Firm for Concealing Slavery Ties*, CHI. SUN-TIMES, June 5, 2005, available at <http://www.chicagosuntimes.com/output/news/cst-nws-slave05.html>.

¹³ Associated Press, *J.P. Morgan Discloses Past Links to Slavery*, WASH. POST, Jan. 21, 2005, at E2, available at <http://www.washingtonpost.com/wp-dyn/articles/A25284-2005Jan20.html>.

¹⁴ BLACK'S LAW DICTIONARY 1536 (7th ed. 2004).

¹⁵ WINBUSH, *supra* note 4, at 83-84.

¹⁶ STEPHEN KERSHAR, JUSTICE FOR THE PAST 70 (State University of New York Press 2004).

¹⁷ *Cato v. United States*, 70 F.3d 1103-11 (9th Cir. 1995).

¹⁸ *Id.*

¹⁹ MAAFA is a Kiswahili term for "Disaster" or "Terrible Occurrence", describes more than 500 years of suffering of people of African descent through Slavery,

Imperialism, Colonialism, Invasions and Exploitation. The Afrocentric Experience; The MAAFA, available at <http://www.swagga.com/maafa.htm>.

²⁰ Statement from John Conyers, *Statements from April 6, 2005 briefing: The Impact of Slavery on African Americans Today* (Apr. 6, 2005), available at http://www.house.gov/conyers/news_reparations.htm.

²¹ *Id.*

²² Democratic Party Platform 2000, available at <http://cwx.prenhall.com/bookbind/pubbooks/berman4/medialib/Election/dplat2000.htm>.

²³ Tom Hayden Official Website: Legislation, at <http://tomhayden.com/legislation2000.htm>.

²⁴ *Id.*

²⁵ CA. INS. CODE §§ 13810-13813 (2001).

²⁶ Jason B. Johnson, *Californians to Get Look Back at Slavery; Reparations Advocates, Genealogists Eager to See Insurers' Lists*, S. F. CHRON., available at <http://www.insurance.ca.gov/SEIR/NamesofSlaves.htm>.

²⁷ Iowa Insurance Division Report on Slavery Era Insurance, available at http://www.iid.state.ia.us/educational_materials/slavery.asp.

²⁸ This proposal is working its way through the State House and, if ratified and signed by the governor, would apply to contracts entered into on or after October 1, 2005, available at <http://www.ncleg.net/sessions/2005/bills/house/html/h1006v1.html>.

²⁹ See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

³⁰ Brooks Interview.

³¹ *Id.*

³² *Id.*

³³ Norman Chance, *Alaska Natives and the Land Claims Settlement Act of 1971*, Alaska Native Claims Settlement Act Resource Center, available at <http://arcticcircle.uconn.edu/SEEJ/Landclaims/ancsa1.html>.

³⁴ WINBUSH, *supra* note 4, at 177 (Recognizing that even the most impoverished immigrants were able to join trade unions and police departments, from which African Americans were excluded).

³⁵ *Id.*

Brooks Interview.

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