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Articles

Strict Scrutiny & a New Class of Plaintiffs: Legal Strategies in *King v. Smith* — Sarah DiMagno

The Gacaca Courts: A Victory for Transitional Justice — Julian Bava

Conscious Court Policy & Public-Private Partnerships: Alternatives to Civil Gideon — Fatema Ghasletwala

Why and How the Legal System Should Be Used to Fight Climate Change — Adam Scheps

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Letter from the Editor

Dear Reader,

On behalf of our executive and editorial boards, I am proud to present the Spring 2016 issue of the Columbia Undergraduate Law Review. This semester our board had the difficult task of choosing to publish just four papers from the many high-quality submissions we received. This issue includes the following papers:

The first article in our issue is Sarah DiMagno's "Strict Scrutiny & a New Class of Plaintiffs: Legal Strategies in *King v. Smith*" Her paper explores the legal strategy that set precedent in creating a new protected class under strict scrutiny for impoverished and vulnerable people.

Julian Bava's "The Gacaca Courts: A Victory for Transitional Justice" critically analyzes how the Rwandan social context negatively influenced the efficacy of the Gacaca Courts following the genocide in Rwanda, while also evaluating the shortcomings of its legal design.

"Conscious Court Policy & Public-Private Partnerships: Alternatives to Civil Gideon," written by Fatema Ghasletwala, examines the growing national movement called "civil Gideon" that aims to extend the right to counsel to civil litigants.

Lastly, Adam Scheps explains how the courts can be used in place of politics in order to help fight climate change, particularly in regards to the threat of rising sea levels in his piece, "Why and How the Legal System Should Be Used to Fight Climate Change."

With each continued publication, the Columbia Undergraduate Law Review strives to increase intellectual discourse on legal issues in our undergraduate community. If you are interested in learning more, we highly recommend exploring our online journal, which can be found on blogs.cuit.columbia.edu/culr/ or reaching out to our executive board at culreboard@columbia.edu. Thank you for taking the time to read our journal, and we hope that you enjoy.

Sincerely,

Jordana Fremed, Editor-in-Chief

Mission Statement

The goal of the Columbia Undergraduate Law Review is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

i) Provide the necesssary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.

ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all membesr to explore the fullest extent of their ideas in writing.

iii) Encourage submission os of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology,, economics, philosophy, history and political science will also be considered.

iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

Submissions

The submission of articles must adhere to the following guidelines:

i) All work must be original.

ii) We will consider submissions of any length. Quantity is never a substitute for quality.

iii) All work must include a title and author biography (including name, college, year of graduation, and major).

iv) We accept articles on a continuing basis

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Strict Scrutiny & a New Class of Plaintiffs: Legal Strategies in King v. Smith

Sarah DiMagno | Yale University

Abstract

In the fall of 1966, Mrs. Sylvester Smith, a resident of Selma, Alabama who was receiving Aid to Families with Dependent Children, was informed that her welfare was being cut off. When Mrs. Smith asked why she and her four children would no longer receive the AFDC grant, she was told that a third party had reported that she was having an affair. Her lover was considered "substitute father" to Mrs. Smith's children, and despite the fact that he was in no way legally obligated to provide for them, they were disqualified from aid. Mrs. Smith's story spurred the 1968 Supreme Court case *King v. Smith*, in which Martin Garbus and Columbia's Center for Social Welfare Policy and Law would use strict scrutiny to strike down the "substitute father" regulation across the nation. In addition, they set a legal precedent by creating a new protected class under strict scrutiny and the Fourteenth Amendment; impoverished and vulnerable people. This paper explores Mr. Garbus and the Center's legal strategy and argues that such strategy was and remains crucial in effecting social change.

In the fall of 1966, Mrs. Sylvester Smith, a resident of Selma, Alabama who was receiving Aid to Families with Dependent Children, was informed by her caseworker, Jacqueline Stancil, that her welfare was being cut off. When Mrs. Smith asked why she and her four children would no longer receive the AFDC grant, she was told that an unnamed third party had reported that she was having an affair with William E. Williams, a married man with nine children of his own. Because of this relationship, Mr. Williams was considered a "substitute father" to Mrs. Smith's children, and despite the fact that he was in no way legally obligated to provide for them, they were disqualified from aid.[1]

Later, Mrs. Smith would say, "She didn't have no right to cut my kids off. Sitting down there in that air-conditioned place and saying my kids can't get aid. She never came round to my house and found anybody there. I told her: 'As long as I'm not having no more kids for you to support, why should you bother me?'"[2]

Mrs. Smith was a venerable character in her own right; when Miss Stancil tried to convince Smith to discontinue her affair, Smith responded, "If God had intended for me to be a nun, I'd be a nun."[3] But in the 1960s, there was little that a woman receiving AFDC could do if her grant was revoked. Welfare recipients had no right to a fair hearing and no avenue for recourse. But that was about to change. Mrs. Smith could not have known it at the time, but she was about to become the centerpiece of a lawsuit that, using new legal scholarship and strategy, would change the entire legal conception of welfare rights.

* * *

Mrs. Smith's case was the first in which strict scrutiny was applied to a class of people based on poverty, instead of race. In addition, it was the first of several key Supreme Court cases that challenged existing welfare law and its limitations, notably *Shapiro v. Thompson* in 1969 and *Goldberg v. Kelly* in 1970. However, the role of this legal

1 Walter Goodman, "The Case of Mrs. Sylvester Smith," *The New York Times*, Aug. 25, 1968.

2 Ibid.

3 Ibid.

strategy has often been neglected in histories of welfare rights. Many histories of the evolution of welfare rights are social histories, which analyze the shift in welfare policy from the perspective of grassroots movements like the National Welfare Rights Organization. In her book The Battle for Welfare Rights, Felicia Kornbluh links shifts in legal thinking to the rise of welfare movements in the 1960s and 1970s.[4] However, she downplays the significance of Supreme Court cases in bringing about actual change, while I argue that this case and others like it were crucial turning points in the fight for expanded welfare rights.

Some historians write about the fight for welfare rights in the context of President Lyndon B. Johnson's War on Poverty. Michael B. Katz takes a policy-oriented view in The Undeserving Poor: America's Enduring Confrontation with Poverty. He examines the war on poverty through policy and the writings of intellectuals and social scientists. His analysis of the intellectual foundations of welfare rights, however, focuses mostly on theorists like Charles Reich and William Simon, and says very little about their interaction with Supreme Court case law.[5]

Martha F. Davis's Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973, provides a legal context for the first welfare rights Supreme Court cases.[6] But the focus of Davis's history is the lawyers, not the legal strategy. Although she writes a brilliant account of the evolution of legal services clinics and their role in litigating poverty law, she focuses less on the legal scholarship and strategy that allowed such litigation to take place. This paper will analyze how new legal scholarship and strategy characterized welfare rights as civil rights in the first welfare case to reach the Supreme Court, *King v.*

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4 Felicia Kornbluh, *The Battle for Welfare Rights*. (Philadelphia, Pennsylvania: University of Pennsylvania Press, 2007).

5 Michael B. Katz, *The Undeserving Poor: America's Enduring Confrontation with Poverty*. (New York, New York: Oxford University Press, 2013).

6 Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement*, 1960-1973 (New Haven, Connecticut: Yale University Press, 1993).

Smith. By using a new legal scholarship and re-employing strict scrutiny in a new way, Martin Garbus and the Center for Social Welfare Policy and Law created a constitutional precedent that welfare rights were subject to the same protections as civil rights, and in doing so, allowed welfare recipients to be treated as full citizens.

In his article Rethinking Constitutional Welfare Rights, Goodwin Liu advances a narrative similar to this one, tracing the development of constitutional welfare scholarship back to a 1969 article by Harvard law professor Frank Michelman.[7] However, he focuses on Michelman's model, which is based on the philosopher John Rawls' "justice as fairness" principle, and neglects previous scholarship on welfare rights. I argue that such scholarship began a few years earlier, with a pair of articles by Charles Reich and the founding of Columbia's Center for Social Welfare Policy and Law.

In April 1964, the Yale Law Journal published an article called The New Property, written by Yale professor Charles A. Reich. Reich laid out one of the first arguments that brought Constitutional law to welfare policy by arguing that "government largess" constitutes a form of property, and therefore cannot be revoked or denied without the same due process accorded to other forms of property.[8] He proposed a new system for governing welfare rights, based closely on that which regulates property, a "system of regulation plus civil or criminal sanctions, rather than a system based upon denial, suspension, and revocation."[9]

This was not Reich's first foray into welfare law. In a previous article, published in 1963 and entitled "Midnight Welfare Searches and the Social Security Act," he had argued that under the Fourth Amendment, searches of welfare recipients' homes were unconstitutional without a warrant, and were not compatible with the Social Security

7 Goodwin Liu, "Rethinking Constitutional Welfare Rights," *Stanford Law Review* 61, no. 2 (2008): 203-269.

8 Charles A. Reich, "The New Property," *The Yale Law Journal* 73, no. 5 (1964): 733-787.

9 Ibid, 785.

Act.[10] In that article, he also made one of the first arguments for treating poverty as a classification that required "strict scrutiny."

Strict scrutiny is a level of judicial review that had been established in a footnote to the 1938 Supreme Court case United States vs. Carolene Products Co. After discussing that commercial legislation is to be presumed constitutional until proven otherwise, Justice Stone made the following note: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth…prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[11]

This seemingly innocuous footnote established a new level of judicial review, which has been used powerfully in several landmark Supreme Court cases, including *Loving v. Virginia* and *Brown v. Board of Education*.[12] Strict scrutiny developed into a two-pronged test for laws that had been challenged on constitutional grounds for discriminating against certain classes of people. The defense must first prove that the law serves some compelling governmental end. If this can be proven, the defense then has the additional burden of showing that the law is narrowly tailored enough so that, in achieving said end, it does not cause any unnecessary or discriminatory harms.[13]

Reich suggested, in his "Midnight Welfare Searches" article, that such strict judicial review should not be limited to cases involving racial discrimination, as it had

10 Charles A. Reich, "Midnight Welfare Searches and the Social Security Act," *The Yale Law Journal* 72, no. 7 (1963): 1347-1360.

11 *United States v. Carolene Products Co* 304 U.S. 144 (1938).

12 Adam Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts," *Vanderbilt Law Review* 59 (2006): 793-871.

13 Ibid, 800.

been up to that point. When summarizing the duty of the Secretary of the Department of Health, Education, and Welfare to strike down unconstitutional state programs, he writes that, "Here, as in the case of racial discrimination, there is evidence of the increasing need for government to intervene affirmatively if rights guaranteed by the Constitution are to be secured in fact."[14] This, in combination with Reich's claim that government benefits had evolved to become a new form of property, created a strong foundation for welfare litigation, because it phrased welfare rights in the language of Constitutional rights and provided a strategy for how to litigate them.

Buoyed by legal scholarship like Reich's, a group of academics at Columbia started the Center for Social Welfare Policy and Law in 1965 for the express purpose of reforming welfare law.[15] It was headed by Edward Sparer, a New York lawyer who had also founded Mobilization for Youth's Legal Unit. Although dedicated to his work at MFY, Sparer wanted to work on strategic litigation that would challenge existing welfare law, instead of just mitigating its harmful effects.[16] To that end, the Center would have a dual role; it functioned as a typical legal services clinic for welfare recipients, but also identified litigation that its founders hoped would address the fundamental problems with the welfare system.[17]

But employees of the Center were also creating the academic and intellectual basis for their own future litigation. Robert M. Cover, whose work would be vital to the *King v. Smith* litigation, walked into the Center on Social Welfare Policy and Law in 1966 looking for a job as an intern. Cover was a talented first-year law student at Columbia who

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14 Charles A. Reich, "Midnight Welfare Searches and the Social Security Act," *The Yale Law Journal* 72, no. 7 (1963), 1359.

15 Earl Johnson, *Justice and Reform; the Formative Years of the OEO Legal Services Program*. (New York: Russell Sage Foundation, 1974).

16 Sylvia A. Law, "Edward V. Sparer ," *University of Pennsylvania Law Review* 132, no. 3 (1984): 425-429.

17 Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement*, 1960-1973 (New Haven, Connecticut: Yale University Press, 1993), 35.

was already familiar with civil rights law; as a Princeton undergraduate, he had worked for the Student Nonviolent Coordinating Committee in Georgia during the Freedom Summer.[18]

Cover was assigned by the Center to write a memo establishing a legal theory that would allow lawyers to challenge actions by state or local welfare departments in federal court.[19] This was no simple task; only a few months later, a federal district court would rule that state courts should decide any problems with state welfare systems.[20] Nevertheless, Cover returned only a week later with an article entitled, "Federal Judicial Review of State Welfare Practices," which his supervisor Stephen Wizner called "an intellectual tour de force."[21] In it, Cover lays out many components of what would become the Center's legal strategy in *King v. Smith*. He points out that many welfare regulations, such as the one that required able-bodied mothers to work if "suitable employment" was available, were applied unevenly and used to discriminate against African-Americans in the South.[22] This observation helped form the basis for one of the Center's first cases, *Anderson v. Schaefer*, which influenced the *King v. Smith* legal strategy enormously.

Mrs. Virginia Anderson, an African-American welfare recipient in Georgia, had her welfare benefits revoked in May of 1966. The Center's investigation would find that this was not an isolated incident: "The practice in Georgia was to cut all Negro ADC women off welfare about May, suspiciously close to the beginning of the okra harvest, thereby creating a large employment pool. The Southern rationale was that jobs might

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18 Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement*, 1960-1973 (New Haven, Connecticut: Yale University Press, 1993), 59.

19 Stephen Wizner et. al., "Tributes to Robert M. Cover," *The Yale Law Journal* 96, no. 8 (1987): 1699-1724.

20 *Smith v. Board of Commissioners* 259 F. Supp. 423 (D.D.C. 1966).

21 *Smith v. Board of Commissioners* 259 F. Supp. 423 (D.D.C. 1966), 1708.

22 Robert M. Cover, "Federal Judicial Review of State Welfare Practices," *Faculty Scholarship Series*, Paper 2697 (1967): 84-129.

be available, so the women should be penalized for not working."[23] However, Mrs. Anderson had been receiving $120 each month from ADC to support herself and her six children, and working forty hours a week harvesting okra, she would only earn about $10 each week.[24]

In their complaint on Mrs. Anderson's behalf, the Center's lawyers had framed the case as a class-action lawsuit on behalf of "needy Negro mothers and dependent Negro children."[25] They claimed that the "employable mother" regulations were being used to discriminate against African-American women and their children. By showing that such regulations disproportionately affected certain recipients, Center lawyers hoped to persuade the federal district court to examine the case under strict scrutiny. In doing so, they invoked some of the logic of Cover's memo, written only six months prior: "It may be argued that in defining suitable work by reference to community standards the provision invidiously discriminates against Negroes, contrary to the equal protection clause of the Fourteenth Amendment. In many areas of the South, community mores sharply distinguish the work which is proper and suitable for whites from that which will do for Negroes."[26] *Anderson v. Schaefer* was therefore a race discrimination case, but it was the first case to tie welfare rights to civil rights by using the discriminatory enforcement of welfare restrictions to gain access to the stricter judicial review process reserved for race. Mrs. Smith's lawyers used the same legal logic to argue against the "substitute father" regulation.

* * *

Martin Garbus was a former trial attorney who served as the lead attorney in

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23 Martin Garbus, *Ready for the Defense* (New York: Farrar, Straus and Giroux, 1971), 154-155.

24 Ibid, 155.

25 Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement*, 1960-1973 (New Haven, Connecticut: Yale University Press, 1993), 62.

26 Robert M. Cover, "Federal Judicial Review of State Welfare Practices," *Faculty Scholarship Series*, Paper 2697 (1967), 89.

King v. Smith, and in 1967, he was a co-director of the Center. Prior to his tenure there, he had worked as a criminal and civil lawyer at prestigious firms in New York City, and as *King v. Smith* was being argued in Alabama federal court, he left the Center to work as the director of the American Civil Liberty Union's newly formed Roger Baldwin Foundation.[27] Garbus was a brilliant lawyer who cared deeply about his cases and the social injustices that had caused them. In his memoir, he writes scathingly about the barely-concealed racism in Alabama's welfare law and shows clear admiration for the plaintiff, Mrs. Smith.[28] But he was also headstrong and ambitious, and he was determined to both help his plaintiff and create sweeping constitutional changes.[29]

To that end, Garbus modeled much of his argument to both the federal district court in Alabama and the Supreme Court on the Anderson case. In the complaint, he alleged that the application of the substitute father regulation was discriminatory and used to disproportionately disqualify African-American women.[30] This was consistent with what he would find when he cross-examined the all women county welfare workers in seven different counties in Alabama. According to Garbus, "every one of the more than six hundred recipients cut off in the seven counties during June 1966 was Negro."[31]

But before they could file the case in Alabama, Garbus and the Center were confronted with a new hurdle. A group of legal services lawyers in Washington, D.C. filed their own case challenging the District of Columbia's "substitute father" provision. Garbus thought very little of their chances of winning and tried to persuade the lawyers

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27 Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990), 313.

28 Martin Garbus, *Ready for the Defense* (New York: Farrar, Straus and Giroux, 1971), 148-149.

29 Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement*, 1960-1973 (New Haven, Connecticut: Yale University Press, 1993), 66.

30 *Smith v. King* 277 F. Supp. 31 (N.D. Alabama 1967).

31 Martin Garbus, *Ready for the Defense* (New York: Farrar, Straus and Giroux, 1971), 160.

to drop the case and wait for *King v. Smith*, which he considered much more promising.[32] He was unsuccessful, and the D.C. case was brought before Judge Alexander Holtzoff, who Garbus described as a "small, peppy, caustic man…noted for his marked distaste for what he termed dilatory practices by civil-liberties lawyers carefully building a constitutional record."[33] Holtzoff decided against the plaintiff, coincidentally also named Smith, and thereby established a precedent that made the Center's case all the more difficult. In his decision, he stated that welfare was charity, not legal obligation, and as such, the state could impose any regulations it wanted on recipients and was free to revoke benefits at any time. Furthermore, Holtzoff decided that the job of reviewing welfare systems ought to be left to the state courts.[34]

This created an enormous obstacle for the Smithcase. Not only did the Center's lawyers now have to overcome precedent and show that the substitute father law was unconstitutional, but they also had to show that the federal government actually had a role to play in the arbitration of welfare disputes. Despite these odds, Garbus and the Center were still hopeful about their chances of changing the Alabama law. They subscribed to what Garbus called the "'erosion theory of litigation'; take the worst example of a practice or rule, the gross or excessive form in the most highly suspect social setting, and challenge it."[35] Alabama's law was far harsher than Washington, D.C.'s. Caseworkers did not even need evidence that an AFDC recipient was having a relationship with someone who could be considered a "substitute father." Nor did the law require proof that the man was giving any sort of support or income to the family. In order to disqualify a recipient from AFDC, caseworkers only needed a suspicion, and the recipient had no right to a hearing before

32 Ibid, 153.

33 Ibid, 153.

34 Smith v. Board of Commissioners 259 F. Supp. 423 (D.D.C. 1966).

35 Martin Garbus, Ready for the Defense (New York: Farrar, Straus and Giroux, 1971), 151.

their welfare was revoked.[36] Furthermore, the client was an African-American woman in a state that was notorious for racism and civil rights violations. If any case could defeat the *Smith v. Board of Commissioners* precedent, it was this one. As Garbus later told The New York Times, "Having Alabama as your opponent is half the battle."[37]

Indeed, it was no accident that the Center had taken Mrs. Sylvester Smith's case. The Center had been on the lookout for a Southern plaintiff since its inception, asking friends and colleagues in the South to refer plaintiffs to them (Mrs. Smith had been referred by a lawyer who had gone to Selma during the Freedom Summer and stayed to litigate civil rights and poverty issues). The Center had been working on several other "substitute father" cases in 1966, but because Mrs. Smith's case was so strong and the Alabama law was so harsh, the lawyers decided that hers was the suit with the best chance of creating a favorable legal precedent.[38] This kind of selective litigation was a legitimate strategy, and one that yielded results for the Center (later, under the direction of Martin Garbus himself, this strategy would become the ACLU's signature tactic).[39]

Garbus's strategy in the Alabama district court relied heavily on the framework of the Anderson case, claiming that the substitute father regulation "was conceived to deny aid to blacks, and that it had had that effect."[40] Luckily for Mrs. Smith and her lawyers, the case was assigned to a judge likely to be sympathetic to such a complaint. Frank J. Johnson, Jr. was a federal judge who had been a thorn in the side of Alabama governor George Wallace for years before the Smith case. He had the reputation of using federal power liberally, most notably to desegregate schools, protect Montgomery's bus

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36 Ibid,151-152.

37 Walter Goodman, "The Case of Mrs. Sylvester Smith," *The New York Times*, Aug. 25, 1968.

38 Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement*, 1960-1973 (New Haven, Connecticut: Yale University Press, 1993), 61.

39 Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990), 313 and Martin Garbus, *Ready for the Defense* (New York: Farrar, Straus and Giroux, 1971), 166.

40 Martin Garbus, *Ready for the Defense* (New York: Farrar, Straus and Giroux, 1971), 155.

boycotters, and order reviews of voter registration records.[41]

But Garbus also had plenty of evidence of wrongdoing by the state. As previously discussed, he found, in the course of cross-examining the welfare caseworkers, that the substitute father regulation overwhelmingly targeted African-American women and removed them from the welfare rolls. He could only hope that the three-judge federal court headed by Judge Johnson would be convinced that the new class of "needy Negro mothers and dependent Negro children" – taken from the Anderson case – was worthy of strict scrutiny. In a rare move, Garbus and the lawyer for the state, Mary Lee Stapp, agreed to submit all their evidence to the three-judge panel without a trial.[42]

On November 8th, 1967, exactly six months after submitting his evidence to the panel, Garbus received the verdict. The three judges decided unanimously in favor of Mrs. Smith and declared that the substitute father law was in violation of the Fourteenth Amendment. In commenting on the racial discrimination arguments that Garbus had put forward, the judges went even further than Garbus had hoped:

> While the plaintiffs placed considerable emphasis upon facts strongly indicating that the "substitute father" regulation was designed to discriminate and has the effect of discriminating against Negroes, by reason of the facts presented, this case does not rest upon racial considerations and therefore the decision should not rest upon such considerations. On the contrary, this decision should be and will be designed to enure to the benefit of all needy children regardless of their race or color. The Equal Protection Clause is not restricted in its application to the protection of the rights of Negroes. It is more

41 Ibid, 156.

42 Ibid, 166.

far-reaching, protecting the rights of any identifiable class.[43]

By deciding that the Fourteenth Amendment protected not only racial minorities but also any class that could be shown to have been subject to discrimination, the judges gave Garbus everything he had wanted and more. And by demonstrating, with the tool of strict scrutiny, that the law was overly broad and discriminatory, Garbus had convinced the court to create a new class, stating for the first time that the equal protection clause was not limited to racial discrimination.[44]

The State of Alabama appealed the decision to the Supreme Court, much to Garbus's delight.[45] He set about assembling a brief that presented a laundry list of new constitutional issues with the substitute father law, while still maintaining his core arguments from the lower court decision. The different portions of Garbus's Supreme Court brief are thinly veiled references to the different requirements of strict scrutiny; on page 14, he characterizes the law as overly broad and lacking specific criteria, while on page 23, he discusses the discriminatory applications of the law.[46] By characterizing the law in this way, Garbus provided the framework for the Supreme Court to apply the strict scrutiny standard, and set up the Alabama law to fail it.

But in his eagerness to create sweeping constitutional reform, Garbus under-utilized his strongest argument in the brief: the simple but compelling statutory argument that the substitute father regulation violated the Social Security Act. When Garbus left the Center to head the ACLU Foundation, he took the responsibility for *King v. Smith* with him, so by the time the case reached the Supreme Court, the Center was somewhat

43 *Smith v. King* 277 F. Supp. 31 (N.D. Alabama 1967).

44 Martin Garbus, *Ready for the Defense* (New York: Farrar, Straus and Giroux, 1971), 169.

45 Martin Garbus, *Ready for the Defense* (New York: Farrar, Straus and Giroux, 1971), 170.

46 *King v. Smith*, 1968 WL 112516 (U.S.) (Appellate Brief), 14, 23.

powerless to influence his litigation.[47] Seeing this, the Center filed an amicus brief with the Court, seeing it as their best chance to insert the statutory argument that Garbus had underemphasized in his brief.[48]

The Center's argument was simple: according to the Social Security Act, children were entitled to aid if their supporting parent was dead, absent, or incapacitated. Since a man who is in a relationship with the mother of the children has no legal obligation to support them, aid was definitively still owed to these children under the Act. As Sparer and Center attorneys Paul Dodyk and Brian Glick wrote in the brief, "…Congress intended the term "parent" to mean only a natural or adoptive father, or a stepfather who is under a legal duty to support the children. Not only is such a definition the one clearly intended by Congress; any other definition frustrates the purpose of the ADC program and, as shown in Point III, results in an unjustifiable classification excluding from ADC benefits needy children who in fact are deprived of their fathers' support."[49]

The Center's lawyers also attempted to influence Garbus's oral argument by holding a "moot court" session, in which they fired questions at him and discussed issues that were likely to arise in the course of the oral argument. Garbus seemed to think that the questioning was helpful, and it certainly swayed his oral argumentation.[50] Garbus's argument in front of the Court was primarily based on the statutory problems with Alabama's substitute father law. He began by explaining the Social Security Act regulations and the ways in which the Alabama law – and similar laws in other states – violates the definition of a parent as described in the Act.[51] More than seven minutes into his argument, Potter

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47 Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990), 313.

48 Chicago-Kent College of Law at Illinois Tech. "King v. Smith." Oyez.

49 *King v. Smith*, 1968 WL 112515 (U.S.) (Appellate Brief), 5.

50 Martin Garbus, *Ready for the Defense* (New York: Farrar, Straus and Giroux, 1971), 185-186, and Chicago-Kent College of Law at Illinois Tech. "King v. Smith." Oyez.

51 Israel Shenker, "New Breed of Lawyer Serving Poor," *The New York Times*, Aug. 30 1969. The other states

Stewart interrupted Garbus to ask, “Do I understand you, Mr. Garbus, to say that you think this case can be decided in your favor purely on the basis of statutory construction rather than on any constitutional ground, is that right?” Garbus answered, “Yes.”[52]

However, Garbus argued for more than just a statutory decision. The statutory arguments were, in some ways, a backup plan; he wanted to make sure that even if he could not achieve a sweeping constitutional victory, the Alabama law and others like it would still be struck down. This became evident about halfway through his oral argument, when he addressed possible equal protection arguments and strict scrutiny.

> *“Now if the Court does get involved in an Equal Protection argument, and the Court finds it necessary to determine which standard one it’s going to use, then I submit that the standard that should be used in this case is one of strict scrutiny. That the right involved - the right to eligible assistance, the right to life, the right to shelter, the right to food, the right to clothing - is the kind of a right that demands in this Court to closely and carefully analyze the kind of regulations that are being passed against them. Secondly, the nature of the group that’s involved in this case: the most helpless, the impoverished, and the destitute. Those people who are unable, these needy children are unable to come into Court and clarify the kinds of regulations that we’re faced here with today.”*[53]

This strategy was decisive in the plaintiffs’ victory in *King v. Smith*. When the

were Arkansas, Arizona, Connecticut, Indiana, Louisiana, Maine, Michigan, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Vermont, Virginia, and the District of Columbia. From Shenker article.

52 Chicago-Kent College of Law at Illinois Tech. “King v. Smith.” Oyez, 27:14 to 27:30.

53 Ibid, 33:54 to 34:35.

Supreme Court handed down their decision on June 17th, 1968, it was a 9-0 victory for Garbus and Mrs. Smith. The opinion, written by Chief Justice Earl Warren, held the decision of the lower court. It is here that the brilliance of Garbus's strategy, moderated by the Center, can be seen. Knowing that even a statutory victory could set constitutional precedent by upholding the lower court's decision, Garbus aimed squarely for the statutory arguments. And in the decision, Chief Justice Warren made it clear that this strategy had worked: "A properly convened three-judge District Court correctly adjudicated the merits of the controversy…We noted probable jurisdiction, and, for reasons which will appear, we affirm without reaching the constitutional issue."[54] In other words, the Supreme Court let stand the lower court's ruling that the law violated the Fourteenth Amendment, but did not rule on it themselves.

Garbus still considered the decision to be "beyond his wildest dreams."[55] When interviewed by The New York Times, he was optimistic that the case would have an influential legacy: "With the Smith case, the courts have established that the Federal Government has the final say as to the purpose of Federal welfare programs. This is the beginning of a new welfare bill of rights."[56] Implicit in this kind of language, and in the decision that the substitute father provision violated the Fourteenth Amendment, is the idea that once the government decides to provide welfare, it must be treated as a right, not a privilege or a form of charity. The Supreme Court decision reflects this evolution of legal thinking around welfare: "Alabama's argument based on its interests in discouraging immorality and illegitimacy would have been quite relevant at one time in the history of the AFDC program. However, subsequent developments clearly establish that these state interests are not presently legitimate justifications for AFDC disqualification."[57]

54 *King v. Smith*, 392 US 309 (1968).

55 Martin Garbus, *Ready for the Defense* (New York: Farrar, Straus and Giroux, 1971), 201-203.

56 Walter Goodman, "The Case of Mrs. Sylvester Smith," *The New York Times*, Aug. 25, 1968.

57 *King v. Smith*, 392 US 309 (1968).

This passage provides interesting insight into the court's ruling. The Social Security Act had not changed with regard to the definition of the word "parent," so why would "interests in discouraging immorality and illegitimacy" have been relevant at some point prior to 1968? It seems that the Court recognized the changing role of welfare in society and its development in legal scholarship from a privilege to a right. In doing so, and in allowing the constitutional challenges to Alabama's law to stand, they opened the doors for a host of new welfare rights challenges. Less than a year later, *Shapiro v. Thompson* would establish the right to movement between states without suspension of welfare benefits, using the argument that poverty constituted a class of people who deserved strict scrutiny.[58] In *Goldberg v. Kelly* in 1970, the Supreme Court ruled that due process required access to a fair hearing before welfare was revoked.[59] Without the precedent of *King v. Smith* and the recognition that welfare rights were subject to constitutional scrutiny, such cases would never have made it to the Court. The Center's victory also inspired a "new class" of lawyers to take their talents into legal services and poverty law. Now that the Supreme Court appeared to be accepting equal protection cases on poverty, young law students saw a chance to both make a name for themselves and create real social change.[60] By reframing welfare rights and showing that there were avenues of recourse for disenfranchised classes, Garbus and the Center inspired a generation of lawyers and legal scholars to use the courts to create social policy change.

But the victories of the 1960s welfare lawsuits are a distant memory in light of the changes to federal welfare policy. In 1996, the Clinton administration replaced AFDC with Temporary Assistance to Needy Families, the stated aims of which include promoting marriage, reducing out-of-wedlock pregnancies, and ending dependence on

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58 *Shapiro v. Thompson*, 394 U.S. 618 (1969).

59 *Goldberg v. Kelly*, 397 U.S. 254 (1970).

60 Israel Shenker, "New Breed of Lawyer Serving Poor," *The New York Times*, Aug. 30 1969.

the government.[61] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the act that established TANF, also forces welfare recipients into job training and established a lifetime maximum grant, and the deep cuts in Legal Services budgets during the Reagan era left the poor with little recourse.[62] Again, we as a society have to ask ourselves; what does it mean to be a citizen? What does a government owe to its people, and what parts of private life should the government be permitted to regulate? Perhaps it is time for a new generation of poverty lawyers to reformulate welfare rights as we know them.

61 *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* Pub. L. No. 104-193, 64 Stat. 47 (1996).

62 National Legal Aid & Defender Association, "History of Civil Legal Aid" NLADA: About NLADA - History of Civil Legal Aid. 2011.

The Gacaca Courts: A Victory for Transitional Justice?

Julian Bava | Standford University

Abstract

Following the genocide in Rwanda, both the international community and the Rwandan people demanded that those responsible be brought to justice. The Gacaca Courts were developed in order to reconcile competing definitions of justice, with the aim of satisfying calls to both end impunity and heal a traumatized population. The International Criminal Tribunal for Rwanda (ICTR) was tasked with prosecuting only the primary orchestrators of the genocide while the understaffed national judicial system was quickly overwhelmed. Thus, the Rwandan government designed a local system to handle a large number of cases that would have otherwise been ignored by the ICTR and the national courts. However, what Gacaca provided in efficiency, it lacked in both representativeness and fairness. This paper explores how the Rwandan social context negatively influenced the efficacy of the Gacaca Courts, in addition to evaluating the shortcomings of its legal design. Because Gacaca inadequately guaranteed a host of due process rights, it failed in its goals to end impunity and bring together a divided nation.

The gravity of the genocide undertaken by adherents of the Hutu Power ideology against the Tutsi minority of Rwanda cannot be overstated. The sheer brutality of the acts committed against hundreds of thousands of civilians is enough to leave wounds that may never fully heal. Most estimates place the death toll between 500,000 and 1,000,000, with even more individuals affected by the broader aftermath of the atrocity.[1] In all, almost three-quarters of the country's Tutsis were slaughtered, leaving Rwanda a deeply scarred nation. These statistics cannot begin to fully illustrate the horrors that took place during the 100-day period between April and July 1994, but they do serve as a tangible reminder of the need for transitional justice, a fluid process of accountability whereby a nation may overcome its former state of conflict through trials, advocacy, and inter-communal reconciliation.

With such a vast number of victims and perpetrators, Rwanda was sorely in need of a system that could both punish and heal. It quickly became apparent that the ideals of reconciliation and justice would be placed at the forefront of the national debate over how to move forward. Though seemingly complementary, the tension between the two ideals quickly became evident. On one hand, legal solutions to social divides might not achieve true national unity. Punishing génocidaires might in fact aggravate racial tensions and stifle dialogue that would otherwise address the origins of the conflict. Alternatively, transitional justice provides a unique opportunity for establishing legal norms and, moreover, providing victims the opportunity to seek judicial redress.

After World War II, the Allied Powers established the Nuremburg Trials, one of the most iconic transitional justice mechanisms of the 20th century. Adopting the retributive approach, these courts prosecuted crimes against the peace, crimes of aggression, war crimes, and crimes against humanity, laying the foundations of modern international humanitarian and criminal law. The Nuremberg Trials present a useful example of both

1 Phil Clark. *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda* (New York: Cambridge UP, 2010), 1.

the benefits and drawbacks of post-atrocity criminal proceedings. They were successful in bringing an end to the culture of impunity surrounding war crimes and signaled the beginning of an international commitment to upholding human rights. Nevertheless, many view the trials as a classic example of victors' justice that did little to alleviate the plights of victims or reintegrate offenders into larger society.[2]

Three judicial remedies emerged from the complex debate over how to best address Rwanda's need for transitional justice. First, the International Criminal Tribunal for Rwanda (ICTR) was established via United Nations Security Council Resolution 955 for the purpose of prosecuting the highest-ranking criminals. Second, the Rwandan national judicial system assumed responsibility for prosecuting lower-level offenders who were charged with serious criminal violations relating to the Genocide. Third, the Rwandan legislature enacted a law establishing the Gacaca Jurisdictions, an indigenous solution to a Rwandan problem.

The historical approach to transitional justice focuses largely on the role of states and international organizations in promoting accountability. Gacaca represents the first attempt to adjudicate international crimes in a decentralized fashion. The process emerged, in large part, as a result of the national courts being overwhelmed by defendants. Rwandan prisons were ill-equipped to take on the masses of inmates who suddenly flooded the system. Further, Gacaca offered a unique opportunity for the truth to come to light in an open setting by allowing both community-elected judges and members of the public to cross-examine witnesses and defendants. The sentences doled out by judges could be significantly reduced if the defendant confessed to crimes. This would, in theory, contribute to broader reconciliation among victims and perpetrators.[3] The focus of this analysis will be on the successes and shortcomings of the Gacaca system in light of other available

2 Rachel Kerr and Eirin Mobekk. *Peace and Justice: Seeking Accountability after War* (Cambridge: Polity, 2007), 18-22.

3 Salomé Van Billoen. *Les Juridictions Gacaca Au Rwanda: Une Analyse De La Complexité Des Représentations*. (Brussels: Établissements Émile Bruylant, 2008), 9-10.

judicial mechanisms. Ultimately, the Gacaca system fell short of fulfilling its restorative goals, because it attempted to emulate a true judicial organ more closely than was feasible at the time. First, however, it is necessary to examine the historical roots of the Rwandan Genocide and the traditional Gacaca system.

I. The Historical Context of the Rwandan Genocide

The groundwork for the ethnic conflict that fueled the Rwandan Genocide was laid once the first German colonists arrived. The Germans immediately supported King Musinga, a Tutsi, in an effort to counteract the Belgian presence in the region.[4] Once the Belgians consolidated control over Rwanda in 1916, control which was reinforced by an official mandate from the League of Nations in 1924, they, too, decided to capitalize on the region's pre-existing racial structures and support Tutsi rule. The Belgians then launched a campaign to justify Tutsi dominance in order to implement a convenient system of indirect rule.[5]

Hutu frustration with this system manifested during the 1959 massacre of hundreds of Tutsis. This sparked a period of violence that would culminate in the country's independence on July 1, 1962. Thousands of Tutsis had fled the country by this time into neighboring Uganda, laying the foundations of the violent Tutsi organizations that would play a key role in the violence that was to come. Once independence was declared, however, Rwanda became a Hutu-led country governed by the ideals of the Bahutu Manifesto. The Parti du Mouvement de l'Emancipation Hutu quickly emerged as the primary voice of what would come to be known as Hutu Power, the ideology of Hutu superiority.[6] In 1974, Juvénal Habyarimana led a successful coup d'état that established the control of the Mouvement Révolutionaire National pour le Développement (MRND). By the 1980s

4 Valentina Codeluppia. *Le Cicatrici Del Ruanda: Una Faticosa Riconciliazione* (Bologna: EMI, 2012), 18.

5 Ibid.

6 Ibid., 22.

Habyarimana and his party would be responsible for the flight of approximately 600,000 refugees.

These exiles constituted the founding members of the Rwandan Patriotic Front (RPF). The RPF invaded Rwanda from Uganda on October 1, 1990, and waged war with the Rwandan government for the following three years. During this period, both French and Zairian forces supported the Rwandan government while countries such as Egypt, Saudi Arabia, and China provided arms to aid RPF advances. On the political spectrum, new parties based on hate ideology such as the Mouvement Démocratique Républicain and the Coalition pour la Défense de la République began to emerge. Most significantly, the Interahamwe, a paramilitary offshoot of the MRND, took form. After three years, the two factions agreed to peace and signed the Arusha Accords.

These accords consisted of five separate agreements that established a broad set of institutions charged with the task of rebuilding Rwanda's political, administrative, and judicial infrastructure. The aptly named Broad-Based Transitional Government (BBTG), established under the auspices of the Arusha Accords, carried the burden of building a coalition government, establishing the rule of law, organizing refugee repatriation, merging government and rebel armed forces, and divvying ministerial positions among competing political forces.[7] However, post-civil war Rwanda did not possess the resources necessary to implement this strategy of reconstruction, a failure which greatly contributed to the Genocide.

At very few points during this timeline were the Rwandan people truly responsible for their own destiny. The Rwandan government began to remedy this consistent lack of representation through the Gacaca Jurisdictions, which allowed each Rwandan citizen to have a hand in the post-Genocide reconciliation process. The history and structure of Gacaca demonstrate the populist intent behind the system, but they also begin to explain many sources of its failure. Gacaca's highly democratic roots undermined its

7 Ibid., 36.

judicial integrity by dramatically increasing citizen participation at the expense of the rule of law.

II. The Structure of the Gacaca Jurisdictions

The creation of the Gacaca Jurisdictions by the Parliament of Rwanda represented a monumental shift in the focus of transitional justice regimes. Previous mechanisms aimed at eliminating impunity for atrocities consisted of imposing internationalized courts with little domestic, non-governmental consultation. Such was the case of the Allied powers during the Nuremberg Trials, or of the ICTY in the Balkans. At best, transitional regimes established truth commissions that would expose the gravity of the atrocities in question but refrain from making formal accusations against individuals. Gacaca, on the other hand, was dubbed "an African solution to African problems" by President Paul Kagame.[8]

An indigenous instrument of transitional justice is likely preferable to a foreign one because victims would be better-equipped to take possession of the process. Such a sense of ownership is crucial to restoring peace because it fosters structural, rather than superficial reforms that will prevent future conflict.[9] Nevertheless, Gacaca must be meticulously scrutinized to determine whether it truly served an effective restorative role for the Rwandan people. Though well intentioned, the Gacaca Courts failed to inspire sufficient confidence in the local population and simultaneously infringed upon Rwandans' civil and political rights. An analysis of the successes and shortcomings of Gacaca is therefore relevant to the future of transitional justice if the international community is to conceive of a durable model.

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8 Paul Kagame, "President Kagame addresses the International Peace Institute" (speech, New York, September 21, 2009), http://paulkagame.com/index.php/speeches/93-president-kagame-addresses-the-international-peace-institute-new-york-21-september-2009.

9 Phil Clark. *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda* (New York: Cambridge UP, 2010), 52-53.

The Origins of Gacaca

The term "gacaca" is derived from the Kinyarwandan word for "grass" or "lawn," in reference to the location of the majority of these meetings. During the pre-colonial era, Gacaca was Rwanda's most widely utilized judicial dispute settlement apparatus. This was largely because Gacaca hearings were straightforward to convene and swift in handing down rulings. Such efficiency was accomplished by the informal nature of Gacaca: proceedings were organized almost exclusively on an ad hoc basis and judges were usually the heads of the families involved in the dispute. In other cases, judgments were arrived at by respected but independent community members.[10]

It may appear imprudent to devise a dispute resolution system in which impartiality is only a secondary issue. Nevertheless, such concerns ignore the purpose of Gacaca in its original conception and the cultural needs of Rwandan society. Because traditional Gacaca was not intended to be retributive in nature, due process concerns that might arise from the informal structure of the courts were diminished. Though due process is important to restorative justice, it does not take center stage because community healing may best be achieved given the broadest possible amount of public participation. This will inherently undermine the fairness of the proceedings themselves, though this can be compensated for by focusing on reintegration. In fact, Gacaca judges were typically unwilling to issue prison terms at all. If an individual was found to be guilty of a crime, they were normally required to pay restitution and host a banquet for the victims at the offender's expense. At its most severe, a traditional Gacaca ruling might entail temporary banishment from the community. Even then, all offenders were highly encouraged to eventually reintegrate themselves into their respective villages.[11]

The Belgian colonial power recognized the utility of the Gacaca system and

10 Ibid.

11 Ibid., 52.

decided to capitalize on its efficiency. Although both Rwandans and Belgians could resort to the official courts established by Belgium, Rwandans were provided the opportunity to "forum shop" and present a case via Gacaca instead. Cases heard by Gacaca courts usually dealt with matters such as "land use, livestock, [property damage], marriage, or inheritance."[12] More intricate cases, on the other hand, were typically sent to the official courts.

Though the traditional Gacaca system never enjoyed official status alongside its Belgian counterpart, the colonial government recognized it on an administrative level in 1943. It was only after this official sanction that Gacaca began to take a problematic form. The Belgian government decided to appoint (usually Tutsi) judges who were specifically charged with carrying out Gacaca proceedings. Rather than being informal gatherings, Gacaca hearings became official events that more closely resembled judicial proceedings.[13] Nevertheless, Gacaca's structural makeup did not adapt to its new judicial nature. It offered few rights to the defendants and operated under ill-defined standards of evidence. This presented serious due process concerns which were not adequately addressed. Unfortunately, when Rwanda re-introduced this system post-genocide, it failed to resolve the inherent conflict between the dual goals of achieving reconciliation among Rwanda's ethnic groups and prosecuting those guilty of genocide.

The Rise of Post-Genocide Gacaca

Though discussion of the possibility of introducing Gacaca as a means of prosecuting génocidaires emerged soon after the Genocide in 1994, serious negotiations concerning its implementation were not undertaken until June 1998. At that time, President Pasteur Bizimungu sponsored "reflection meetings" in which many provincial prefects—the prime supporters of alternative reconciliatory methods—proposed Gacaca as a means

12 Ibid.

13 Ibid., 53-54.

to achieve both justice and reconciliation at a reduced cost to the national judiciary. Eventually, on October 17 of that same year, President Bizimungu established an investigatory commission charged with identifying the best way to restructure Gacaca such that it might be utilized to prosecute perpetrators of Genocide.[14]

The debates surrounding Gacaca often proved intense. After analyzing various statements made by Rwandan officials and community leaders, Phil Clark, a research fellow in at the University of Oxford, identified several divisions among Rwandans concerning the nature of Gacaca. Firstly, lawyers emphasized the need for adequately trained jurists to carry out the proceedings. They stressed the importance of the rule of law and regarded the preservation of fair trial standards as paramount. Non-lawyers, on the other hand, believed that formal judicial proceedings would be inadequate instruments of reconciliation and would yield increased divisiveness rather than peace among Rwandans.[15]

Additionally, rural and urban elites disagreed on the logistics of the courts because each hoped to structure Gacaca in a manner that best served their private interests. The urban elites tended to favor delegating the prosecution of génocidaires to the national courts because this would center an enormous amount of bureaucratic activity within Kigali. Rural players, however, were keen on affording greater weight to community voices. This would not only bolster Rwanda's national cohesion, they argued, but it would also afford these lower-level administrators a larger role in determining Rwanda's political future.[16] This division in goals plagued Gacaca from the outset and continued to influence its proceedings even once a system was formalized. The subpar centralization of the Gacaca system made it difficult to standardize its structure.

Lacking this foresight, the two systems were deemed not mutually exclusive. The Organic Law N0 40/2000 of 26/01/2001 formally established the Gacaca Jurisdic-

14 Ibid., 57.

15 Ibid., 59-60.

16 Ibid.

tions alongside the national apparatus. Known as the Gacaca Law of 2001, this bill laid the framework for this novel approach to transitional justice, though it would later be modified in five subsequent instances. Before 2002, Rwanda entered into what was considered a "pilot phase" for Gacaca. Instead of communities selecting local figures as their judges, the Rwandan government assigned this role to numerous procureurs. Later that year, local inyangamugayo—the term used for Gacaca judges meaning "wise or respected elder"—were chosen by the Rwandan people and the Gacaca Jurisdictions were officially inaugurated on June 18, 2002.[17]

The Structure of Post-Genocide Gacaca

In terms of its jurisdiction and categorization of indictees, Gacaca operated in the same manner as the national courts. Initially, each individual who appeared before a Gacaca court was placed in one of three categories.[18] Generally speaking, defendants placed in the First Category must have been a primary orchestrator of genocidal acts, used a government position to direct genocidal acts, incited or supervised genocidal acts, or have employed rape in the commission of genocidal acts. Second Category suspects were notorious génocidaires who demonstrated particular cruelty and zeal while committing acts of genocide such as murder and torture. Those relegated to the Third Category were accused of property crimes in relation to genocide.[19]

Most First Category suspects were automatically transferred to the national court system, whereas the rest fell under the purview of Gacaca. In theory, First Category suspects were accused of particularly heinous crimes that deserved formal adjudication

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17 These categories were later reduced to three.

18 Ibid., 67-68.

19 Parliament of Rwanda, *Organic Law n° 13/2008 of 19/05/2008 modifying and complementing Organic Law n° 16/2004 of 19/06/2004 establishing the organisation, jurisdiction and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of Genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994*, Article 9.

within the higher courts. Once the Gacaca Law was modified again in 2008, however, most category one cases were transferred to Gacaca, including those involving individuals who were accused of orchestrating genocidal acts on the sub-prefecture and commune levels.[20] Suspects accused of organizing such acts on the prefecture or national levels were, however, still subject to the jurisdiction of the national courts and/or the ICTR.[21]

Roughly 11,000 Gacaca Jurisdictions divided between two administrative levels were charged with hearing cases. Although the cell-level jurisdictions only accepted cases pertaining to property crimes, the cells were tasked with an important investigatory role. They compiled lists of "those who lived in the cell before [October 1, 1990]," "those who were killed in the cell during the specified period," "the damage to individuals or property inflicted during this time," and "suspects and their category of alleged crimes."[22] Sectors, on the other hand, asserted original jurisdiction over cases involving category one and two suspects. Additionally, the sector-level Gacaca courts served an appellate function for cases that originated at the cell level. Because verdicts stemming from Gacaca could not be appealed, the sector level courts acted as the final arbiter of most cases.

Each cell jurisdiction maintained a General Assembly which consisted of every resident of that particular cell over the age of eighteen. These individuals were tasked with electing their cell's nineteen inyangamugayo. The General Assembly also nominated five individuals to serve on the sector-level General Assembly. Both administrative levels consisted of a president and a coordinating committee whose mandates involved carrying out the daily functioning of the Gacaca courts.[23] This system involved the participation of

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20 Before 2002, Rwanda's administrative boundaries were divided, from largest to smallest, into prefectures, sub-prefectures, communes, sectors, and cells.

21 Parliament of Rwanda, *Organic Law n° 13/2008 of 19/05/2008 modifying and complementing Organic Law n° 16/2004 of 19/06/2004 establishing the organisation, jurisdiction and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of Genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994*, Article 9.

22 Ibid., 74-75.

23 Ibid., 76-77.

an unprecedented portion of the Rwandan population since attendance was required by law, recorded by the government, and enforced through the imposition of fines.[24] Despite this threat of sanction, Gacaca instilled some sense of civic duty that allowed this novel process of reconciliation to carry on for ten years.

The Gacaca Judges

The highly decentralized nature of Gacaca made it difficult to select adequate judges and train them to apply the law in a uniform manner. The only prerequisites for becoming a judge were honesty, a clean criminal record, and an outstanding reputation within the community. Though the judges needed to exemplify certain core virtues while being "free from the spirit of sectarianism," in practice, most Gacaca judges tended to be Tutsi elders and community leaders.[25]

Gacaca judges enjoyed various powers that enabled them to exercise broad authority over the Rwandan population. They could, for example, summon witnesses to testify at the hearings over which they presided. This allowed the judges to shift the terms of discussion in whichever direction they chose, which sometimes led to a preponderance of witnesses testifying on a plaintiff's behalf while the defense was left with little access to witnesses of his or her own.[26] Because all Rwandan citizens of age were obligated to participate in the Gacaca process, subpoenaed witnesses had no choice but to testify. In many cases, witnesses felt they had to testify against the defendants lest they be ostracized from their communities.

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24 In practice, attendance did not meet official standards. One survey found that only 45% of Rwandans attend Gacaca every week.--Max Rettig, "Gacaca: Truth, Justice, and Reconciliation in Post-Conflict Rwanda?" *African Studies Review* 51, no. 3 (2008): 36.

25 Parliament of Rwanda, *Organic Law n° 13/2008 of 19/05/2008 modifying and complementing Organic Law n° 16/2004 of 19/06/2004 establishing the organisation, jurisdiction and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of Genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994*, Article 9.

26 Ibid., 76.

Despite the judges' ability to issue search warrants to gather evidence, many simply relied on witness testimony. This proved to be problematic as judges often did not adequately identify witness bias and regularly relied on hearsay. Though Rwanda's national courts do accept hearsay, most jurisdictions recognize that it is a "secondary form of evidence which must be probed for its reliability."[27] Gacaca courts often violated this standard by neglecting to scrutinize testimony based on hearsay. Using this faulty evidence, judges could then impose unfitting punishments at the conclusion of the proceedings. Moreover, judges were never provided a consistent sentencing standard that could be applied fairly, as Article 25 of the 2004 Gacaca Law merely states that judgments "must be motivated." Because the Law does not clarify what must motivate the judgments, these community leaders who often had no legal background were left to devise an entire standard of proof and sentencing for themselves.

III. The Legal Weaknesses of Gacaca

Many of Gacaca's attributes—both positive and negative—have already become apparent through the discussion of its internal mechanisms. Particular attention should be focused on this system's shortcomings in order to evaluate whether it truly serves as a model for the future of transitional justice. Though, in many respects, it has succeeded in creating a climate in which a future genocide seems unlikely, the cost has been the civil and political rights of thousands of Rwandan citizens. Gacaca should not be viewed with the same legal lens as conventional judicial mechanisms in Western societies. Rwanda is, however, a member of the same international community that almost universally ratified the International Covenant on Civil and Political Rights. As a state party to this treaty, Rwanda is thus bound by an obligation to guarantee that Gacaca conform to the judicial standards outlined therein, such as the right to due process and the

27 Human Rights Watch, *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts* (New York: Human Rights Watch, 2011), 72.

presumption of innocence.[28]

Proximity of Gacaca

Because the Gacaca Jurisdictions involved a community-oriented process, Rwandan and international observers initially hailed it as a productive instrument of reconciliation. It was thought that the "proximity" of Gacaca to individual Rwandans would counter the perception that the ICTR was too removed from the situation (physically and otherwise) to adequately address the country's needs. Nevertheless, this structural decision gave rise to its own difficulties. Because each individual involved in Gacaca was, by design, intimately involved with the cases he or she heard, it often became difficult to safeguard professionalism amid the inevitable emotion surrounding the trials.

In addition to the emotive nature of their testimony, witnesses often felt indirectly compelled to color their narrative a certain way. In some cases, judges were openly ¬hostile to witnesses for the defense, so many Rwandans believed it was more prudent to give the testimony they thought would be better received.[29] In some instances, witnesses felt that their safety would be threatened if they testified in favor of either the plaintiff or the defendant. Either might react in a retaliatory manner against the witness or his or her family.[30] To function as an effective community-based program, needed to provide adequate protections for the witnesses who were called to testify—something it was unable to accomplish.

Fair Trial Standards

The Gacaca Jurisdictions have been heavily criticized for their lack of respect

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28 For a complete account of the fair trial rights guaranteed by the ICCPR, see articles 9 and 14-17 of the treaty.

29 Salomé Van Billoen. *Les Juridictions Gacaca Au Rwanda: Une Analyse De La Complexité Des Représentations.* (Brussels: Établissements Émile Bruylant, 2008), 96.

30 Ibid., 91-92.

for universally recognized fair trial standards. The non-governmental organization Human Rights Watch (HRW), dedicated to reporting human rights abuses worldwide, has been one of Gacaca's leading detractors. In their report, "Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts," HRW outlines in detail exactly how the Gacaca system has failed to guarantee Rwandans' civil and political rights under both Rwandan and international law. An analysis of this report thus sheds light on the overall efficacy of Gacaca.

The Right to Counsel and Presumption of Innocence

Given the sheer number of those who appeared before the Gacaca Jurisdictions, it stands to reason that the Rwandan government would be reluctant to guarantee counsel to each of these individuals. This is especially true given that the number of qualified lawyers dropped significantly after the Genocide in a country that was not brimming with them to begin with. Though none of the Gacaca laws specifically prohibited the presence of counsel during the proceedings, it nonetheless became tacitly understood that lawyers were not particularly welcome.[31] In the face of a potentially hostile panel of judges and general assembly, the right to council was particularly important. To remedy this, Rwanda could have requested the aid of NGOs such as Lawyers without Borders, as well as the help of national governments, to provide at least a limited form of legal aid to the Gacaca defendants, which would bring Rwanda into compliance with both domestic and international law.

The gravity of this situation is compounded by the fact that the presumption of innocence guaranteed by the Rwandan constitution was often disregarded during the Gacaca trials. For example, HRW documented an instance in which a Gacaca judge, after asking whether the defendant wished to plead guilty—and receiving a "no" in response—

31 Human Rights Watch, *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts* (New York: Human Rights Watch, 2011), 28.

remarked, “You are not innocent because you are being prosecuted for crimes of genocide committed in this prefecture.”[32] This statement appeared to represent a trend within Gacaca, especially among high-profile cases involving political adversaries of the Rwandan government. Though this was no direct fault of Gacaca, the media played an important role in fomenting the notion that being accused of genocide automatically implied guilt.

What the Gacaca system may be blamed for, however, was the superfluous use of charges such as “divisionism,” “revisionism,” “negationism,” and “genocide ideology,” as well as “gross minimization of genocide.” These crimes were created in the hopes of fostering a new, racially sensitive society within Rwanda. However, they were more often used to silence political opponents and make charges stick on individuals who otherwise might not have been convicted.[33] Naturally, these counts have negative implications for the right to free and open speech within Rwanda as well. It is problematic that the Gacaca system, under the guise of reconciliation, was in fact used to maintain power within Rwanda’s political elite.

An additional attack on the presumption of innocence within Gacaca is the fact that all Rwandan citizens have an obligation to testify if subpoenaed. This directly contravenes the ICCPR’s provision against self-incrimination, and it undermines Rwanda’s constitutionally protected right to presumption of innocence.[34] Because defendants were not afforded the right to remain silent during their prosecutions, they were placed in situations in which they were forced to present some form of defense. This suggests that the defendants must prove their innocence in order to evade official sanction. The lack of public prosecutors, as well as defense lawyers, only aggravates the situation.

The Right to Prepare a Defense

32 Ibid., 33.

33 Ibid., 31-32

34 Ibid., 45-46.

The rights to be informed of the accusations against oneself and to be afforded adequate time to organize a defense are both enshrined in Article 18 of the Rwandan Constitution. Originally, individuals might have learned about their impending indictment via a public meeting, word-of-mouth, or even a text message.[35] These often did not represent a formal notice that was certain to reach the defendant. After 2005, the situation was only aggravated when the rules of procedure governing this information-gathering changed. Rather than hosting public announcements, "local officials" would instead travel door-to-door to collect evidence.[36] The more private nature of this method meant that indictees would only hear of their investigation by word of mouth, or simply not at all.

Per the Gacaca laws, a formal summons was to be delivered to the accused before he or she was to stand trial. Nevertheless, the defendant officially had only seven days between the issuing of this summons and the beginning of the trial. Even more disturbing is that HRW has documented cases in which these summons were delivered late, or simply not at all. Furthermore, some judges delivered these summons not to the individuals accused of genocide-related crimes, but rather to their friends or relatives in the assumption that the message would be relayed. Many of these instances may be attributable to "simple error," but it is possible that this feature of Gacaca was utilized in order to secure convictions more easily. Because Gacaca made significant use of trials in absentia, judges were not constrained by a defendant's absence.[37]

Even though both the Rwandan penal code and the ICCPR include provisions that safeguard individuals against double jeopardy, it became difficult to uphold this principle within the Gacaca Jurisdictions. Firstly, the single crime of genocide may be proven via the commission of multiple acts. Because "intent to destroy" is an element of this

35 Ibid., 34-37.

36 Ibid., 35.

37 Ibid., 55-56.

crime, there usually is a pattern of behavior—spanning a relatively broad period of time—that can be attributed to the indictee in question. Thus, when separate charges were levied against an individual, it became difficult to determine if they were being tried multiple times for the commission of the same crime.[38]

Secondly, when the Gacaca Law was amended in 2004, the Rwandan Parliament included a provision that stipulated the Gacaca courts would have jurisdiction over cases that were already tried in the national courts.[39] This was presumably intended to facilitate the transfer of cases from the national system to the Gacaca Jurisdictions in order to alleviate the pressure the former was facing. Nevertheless, as this article was poorly drafted, it led to instances in which Rwandans were subjected to trials for crimes that had already been adjudicated. Since the Gacaca Jurisdictions often adopted a de facto lower standard of evidence than the conventional courts, individuals who were previously acquitted suddenly faced prison sentences. Because these individuals were sometimes acquitted by the conventional courts beforehand, they likely thought they had less of an incentive to plead guilty in Gacaca. The result was that, if convicted, they were subjected to much harsher punishment than would otherwise have been the case.

Community Service

One sentencing provision championed by the Rwandan government constituted obligatory community service. Originally, a Category 2 offender would serve half of his or her sentence in prison, while the remainder could be served performing various types of community service.[40] The 2004 Gacaca Law made this arrangement mandatory and it was further amended in 2008 such that a convict would perform community service for the first half of his or her sentence, “with the possibility of having the remainder of

38 Ibid., 48.

39 Ibid., 48-49.

40 Ibid., 77.

the sentence suspended if the person satisfactorily completed the…TIG program."[41] This measure was likely adopted in order to relieve the pressure that was placed on the Rwandan government as a result.

Two forms of community service characterized this sentencing scheme. On the one hand, offenders could work three times per week within their respective villages and cities on projects such as the "construction and repair of roads, schools, and housing settlements for genocide survivors."[42] This program was ostensibly created to encourage the reintegration of génocidaires into Rwandan society, as well as aid the country's post-genocide reconstruction. Nevertheless, genocide survivors complained that community service was too light a sentence for the crime of genocide. They expressed further concern that perpetrators of genocide living among victims created a sense of uneasiness.

On the other hand, Rwanda introduced the Travaux d'Intérêt Général (TIG) to bolster the community service program. Participants spent six days a week working as manual laborers but completed this portion of their sentences in half the time it would take if they served in their individual communities. This system nevertheless became highly problematic from a human rights perspective. Many so-called tigistes, workers in the TIG system, complained that they were not adequately fed and that they were being detained longer than the duration of their sentences. In some cases, these setups more closely resembled labor camps than reintegration centers. Though this program has succeeded in reducing Rwanda's prison population, thousands of convicts have yet to begin their TIG sentences because they have already exceeded their limited capacity.[43]

Compensation and Reparations

Much to the dismay of many Rwandans, an adequate compensatory arrange-

41 Ibid., 78.

42 Ibid.

43 Ibid., 78-79.

ment has not yet been established in order to aid the victims of genocide. Though Category 3 offenders were obligated to pay restitution to the victims of the property crimes they committed, Category 1 and 2 offenders were never required to compensate either the victims they injured or their families.[44] The Rwandan government has so far failed to create a concrete plan to compensate victims. Though this represented a great disappointment, there are several explanations for this failure.

Firstly, many perpetrators are themselves very poor and would not be able to provide much compensation to begin with. Secondly, Rwanda would face a classic dilemma associated with compensation. Because the government mainly comprises representatives of the Tutsi population, any official program would essentially ask victims to pay their own compensation. One counter to this argument is that the Rwandan population is over 80% Hutu and, thus, the majority of the funds for such a program could emanate from the taxes they pay. Nevertheless, in this situation Tutsi victims would still pay into the same system, thus funding their own compensation.

The Rwandan government has been able to institute various reparations programs, though some have seen more success than others. The Ingando system, much like Gacaca, selected aspects of traditional Rwandan culture in order to create a hybrid mechanism of healing and reconciliation. Ingando involves periodic meetings open to the public, in which community members are encouraged to share their perspectives on Rwanda's past while emphasizing its prospects for the future. Participants are able to attend workshops where they gain knowledge of the Rwandan government, economy, history, culture and society. Nevertheless, it has been criticized by some as a mere propaganda tool for the RPF-dominated government.[45]

The Rwandan government has also attempted to create a fund dedicated to

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44 Ibid., 80.

45 Chi Mgbako. Ingando Solidarity Camps: Reconciliation and Political Indoctrination in Post-Genocide Rwanda, *Harvard Human Rights Journal* 18 (2005): 208.

providing various forms of reparations to victims of the Genocide. The Fonds d'Assistance aux Rescapés du Génocide was founded to provide assistance to survivors "in the form of children's school fees, medical assistance, building of houses, and support for income-generating activities."[46] Though they may not take the form of pure compensation, these reparations constitute a concrete attempt to repair the tangible damage inflicted by the genocide. However, the program has been plagued by corruption and criticized for its definition of a "survivor." Tutsis associated with Hutus through familial ties, and Hutus overall, were generally excluded from these reparations, regardless of the roles they played in the Genocide.[47]

IV. Conclusion

It is perhaps too soon to definitively comment on the true legacy of the Gacaca Jurisdictions. Nevertheless, it is undeniable that this novel approach to transitional justice created a lasting impact on both Rwandan society and the international community at large. In Rwanda, Gacaca played both a divisive and unifying role: it engendered fierce debate and touched nearly all Rwandans in one fashion or another. No system whose reach was so broad can be described as inconsequential, at the very least.

It still remains to be determined, however, what exactly its consequences will be. The challenge of prosecuting thousands of génocidaires—while repudiating impunity and upholding fair trial standards—would be daunting even for states with robust judicial systems. Hence, it is understandable that Rwanda encountered bumps on the road to transitional justice. Nevertheless, it is the international community's moral duty to evaluate whether or not this system adequately served the victims of Rwanda's genocide and could be used as a model in future cases. It appears that this is not the case.

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46 Human Rights Watch, *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts* (New York: Human Rights Watch, 2011), 81.

47 Ibid., 81-82.

Generally speaking, Gacaca attempted to play more roles than it was prepared to handle. Its goal of achieving truth and reconciliation was laudable but irreconcilable with the additional aim of seeking justice and accountability so long as internationally recognized political rights were to be defended as well. The communal nature of Gacaca, which made it a particularly apt healing mechanism, whittled away at its legitimacy as a juridical institution. Because Gacaca judges were empowered to issue legal sanctions just as their conventional counterparts could, it was necessary that the legal protections enshrined in the Rwandan Constitution and Penal Code be reflected in the process. The Rwandan Parliament, in its numerous amendments to the Gacaca Laws, failed to accomplish this.

The concept of integrating traditional models into transitional justice processes should not be altogether discarded. The best examples of transitional justice mechanisms have incorporated active engagement with local communities. It is thus imperative that policymakers evaluate how they might preserve this characteristic without infringing upon their constituents' civil rights. It is possible that if Gacaca were simply separated into two distinct branches—one focused on promoting reconciliation and another dedicated to fighting impunity—the result would have been more productive to society at large. Nevertheless, considering the gravity of the Rwandan Genocide and the limited resources available to the government post facto, the global community should be prepared to commend the country for the impressive strides it has made in the realm of international justice.

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CONSCIOUS COURT POLICY & PUBLIC-PRIVATE PARTNERSHIPS: ALTERNATIVES TO CIVIL GIDEON

Fatema Ghasletwala | George Washington University

Abstract

In the US, there is no right to counsel in civil litigation. Though *Gideon v. Wainwright* established a right to counsel in criminal cases, the same ruling does not protect civil litigants. This issue is problematic because income inequality is the US is at an all-time high. Indigent civil litigants are automatically disadvantaged because it is becoming harder and harder to afford private counsel. Without a right to representation, indigent civil litigants unable to afford counsel must represent themselves in legal matters as pro se litigants. The number of pro se litigants has grown exponentially in recent years. A growing national movement called "civil Gideon" aims to extend the right to counsel to civil litigants. Many groups have come out in support of this movement, most prominently the National Coalition for a Civil Right to Counsel. On the other hand, many lawyers and legal scholars have expressed disdain at the idea of a civil right to counsel, citing the current public defender crisis. This paper will examine the merits of the "civil Gideon" movement, the case against expanding the right to counsel, and alternatives that exist in order to serve the same function, specifically pro se focused court reform.

INTRODUCTION

Americans are jingoistic when it comes to matters of freedom and justice abroad, but are blind to domestic inequalities. The Center on Budget and Policy Priorities reports that from 1979 to 2007, average after-tax income for the top 1% of the income distribution quadrupled.[1] This trend will continue as the Congressional Budget Office's baseline assumptions predict income to grow faster for high-income earners than any other group in the next ten years.[2] While the disparities of income inequality are evident in social contexts, they are exacerbated in the legal context. Ideally, all citizens are equal before the law. However, indigent civil litigants are automatically disadvantaged as it is hard to afford private counsel. While indigent criminal defendants have a right to counsel per *Gideon v. Wainwright*, civil litigants are not guaranteed the same right. Without a right to representation, indigent civil litigants unable to afford counsel must represent themselves in legal matters as pro se. "Civil *Gideon*" is the colloquial term for the movement that demands a categorical, publicly funded right to civil counsel. In order to solve the indigent defense crisis, this paper will argue that conscious court policy and public-private partnerships are the best method to achieve civil *Gideon* as opposed to establishing a formal and publicly funded right to civil counsel as advocated by the current civil *Gideon* movement. This is because *Gideon* itself is flawed by resource constraints and a blind transfer of its stipulations will further hinder access to justice.

Part I of this paper discusses the relevant case law in the right to counsel movement from *Gideon* to *Lassiter v. Department of Social Services*. Part II presents the arguments made in support of civil *Gideon*, and Part III argues that extending the right to counsel in the form of civil *Gideon* is an inefficacious strategy. Part IV provides alterna-

1 Chad Stone, *A Guide to Statistics on Historical Trends in Income Inequality,* The Center on Budget and Policy Priorities (Oct. 26, 2015), http://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality.

2 *An Update to the Budget and Economic Outlook: 2015 to 2025*, Congressional Budget Office (Aug. 25, 2015), https://www.cbo.gov/publication/50724.

tive solutions in conscious policymaking and public-private partnerships, specifically pro se court reform and law school-community initiatives.

PART I: THE EVOLUTION OF A RIGHT TO COUNSEL IN THE LAW

Beginning in the 1960s, the Supreme Court began a "due process revolution in criminal procedure," extending rights to criminal defendants.[3] This section examines the relevant pre- and post- *Gideon* case law establishing a right to counsel.

A. PRE-*GIDEON*: *JOHNSON V. ZERBST* & *Betts V. BRADY*

Though there are previous Supreme Court decisions denying the right to counsel, the 1938 *Johnson v. Zerbst* and 1942 *Betts v. Brady* cases are the most pertinent to the ruling in *Gideon*. In 1938, the Supreme Court noted in the majority opinion for *Johnson v. Zerbst* that the Sixth Amendment, which sets forth the right to a speedy and public trial by an impartial jury, among other rights related to criminal prosecutions, "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."[4] As such, the Court in Zerbst held for the first time that the Sixth Amendment guarantees appointed counsel in federal courts.

However, four years later in *Betts v. Brady*, the Court held that the Sixth Amendment strictly applies only to trials in federal courts and that no allowance could be made for trials in state courts.[5] Furthermore, *Betts* held that the due process clause of the Fourteenth Amendment does not incorporate against the states such that "the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or

3 Benjamin H. Barton, *Against Civil Gideon (And for Pro Se Court Reform)*, 62 Fla. L. Rev. 1227, 1234 (2010).

4 *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938)

5 *Betts v. Brady*, 316 U.S. 455 (1942)

privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth."[6] While Zerbst was a step forward, the Court refused to incorporate the Sixth Amendment into the Due Process Clause during *Betts*, curtailing any possible progress for defendants in state trials. The holding in *Betts* is the antithesis of *Gideon*.

B. *GIDEON*

In the 1963 decision of *Gideon v. Wainwright*, the Supreme Court overruled *Betts* in felony cases.[7] The Court unanimously ruled that the Fourteenth Amendment incorporates the Sixth Amendment, which guarantees a right to counsel for criminal defendants.[8] With *Gideon*, the right to counsel for criminal defendants is applicable in both state and federal cases. State and federal judiciaries must appoint counsel to indigent criminal defendants at public expense. Moreover, the crux of the *Gideon* decision invokes the fundamental fairness guaranteed by Due Process in both the Fifth Amendment (federal) and Fourteenth Amendment (state). Writing for the majority, Justice Black asserts that the right of an individual charged with a crime to counsel is fundamental and essential to fair trial in the U.S.[9] Achieving that fundamental fairness is only possible through Due Process, by which "state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."[10] Without Due Process

6 Ibid., 462.

7 *Gideon v. Wainwright*, 372 U.S. 335 (1963)

8 Ibid.

9 Ibid., 342.

10 Ibid., 344.

for the lawyer-less indigent criminal, “the noble ideal cannot be realized.”[11]

C. POST-*GIDEON*: INCHING TOWARD CIVIL *GIDEON*

In the period following *Gideon*, many cases regarding a civil right to counsel petitioned for certiorari, but were denied by the Court. Although a formal right to civil counsel was never established, *Gideon* itself was extended to cases that were not strictly criminal per the Sixth Amendment.

Four years after *Gideon*, the Court once again overruled *Betts* when deciding *In re Gault*. In *Gault*, the Court extending the right to counsel under the Due Process Clause of the Fourteenth Amendment to juveniles facing criminal charges in delinquency proceedings.[12] Next, In *Argersinger v. Hamlin*, it was ruled that an indigent criminal defendant’s right to counsel, guaranteed by the Sixth Amendment and incorporated by the Fourteenth Amendment, “is not governed by the classification of the offense or by whether or not a jury trial is required.”[13]

Whether an offense is a felony or a misdemeanor does not dictate the application of a defendant’s right to counsel. However, the slow progress toward a potential expansion of the right to civil counsel hit a roadblock in the 1979 decision of *Scott v. Illinois*. The Court held in *Scott* that the central premise of *Argersinger* is that the threat of imprisonment to an indigent criminal defendant triggers the liberty interest which, in turn, triggers the right to counsel. Because Scott was not sentenced to imprisonment, the liberty interest was not triggered and he had no right to counsel.[14] The holding in *Scott* sets back the slow progress made toward an expansion of the right to counsel in the non-criminal context.

11 Ibid.

12 *In re Gault*, 387 U.S. 1 (1967)

13 *Argersinger v. Hamlin*, 407 U.S. 25, 26 (1972)

14 *Scott v. Illinois*, 440 US 367 (1979)

However, the 1980 case of *Vitek v. Jones* extended the right to counsel for indigent prisoners who were involuntarily transferred from prison to a state mental hospital.[15] *Vitek* held that a prisoner's Due Process right to a hearing and appointed lawyer is not diminished even though the proceedings are civil and not criminal.[16] Here, the liberty interest is not triggered by imprisonment, as in *Argersinger*, but by a potential diagnosis of mental illness. The decisions in *Gault* and *Vitek* show that it is possible for the liberty interest to be triggered in a right to counsel case without a necessarily criminal component. Advocates of civil *Gideon* hoped to ride the Court's wave of expanding the right to counsel with one definitive civil case to finally create a Constitutional right.

D. *LASSITER*

The 1981 case of *Lassiter v. Department of Social Services* was a perfect opportunity for civil *Gideon* to become a reality. This case regarded the termination of an indigent mother's parental rights to her infant son. Lassiter, the mother, represented herself in the civil proceedings as she was unable to afford counsel. Under a Due Process analysis, one would expect the liberty interest of a mother to her child to be quite strong. Indeed, the *Lassiter* decision asserts a parent's ability to manage care and custody of her child "undeniably warrants deference and, absent a powerful countervailing interest, protection."[17] Furthermore, this case required the government to terminate Lassiter's parental rights to her child in a formal legal proceeding. Barton argues this structure is identical to *Gideon*, in that "the State sought to deprive the petitioner of a critical liberty interest in a formal proceeding brought by the state's lawyers."[18] Therefore, *Lassiter* was the perfect vehicle to bring about a civil right to counsel. Arguments could be made that Lassiter's

15 *Vitek v. Jones*, 445 U.S. 480 (1980)

16 Ibid.

17 *Lassiter v. Department of Social Services*, 452 U.S. 18, 27.

18 Barton, *supra*, at 1242.

liberty interest to her child is just as weighted as the liberty interests at stake in *Gault* and *Vitek*, which were both non-imprisonment liberty interests.

However, the facts of the case present Lassiter as a disinterested parent with a disturbing criminal history. Lassiter was cited as an unfit parent by the Department of Social Services when her son presented with injuries at Duke Pediatric Clinic.[19] She was also accused of first-degree murder in 1976. While the criminal case should have no bearing on Lassiter's Due Process rights in the parental case, the Court painted Lassiter as a categorically unsuitable parent, regardless of whether or not legal counsel presented her case. Though, the Court addressed the Due Process claim not solely based on parental fitness, but by precedent. As the decision states, "the pre-eminent generalization that emerges from this Court's precedents on an indigent person's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation."[20] Because imprisonment, an infringement of physical liberty, is not at issue, the liberty interest is not automatically triggered.

Having resolved the liberty issue, the Court then applied a balancing test from *Matthews v. Eldridge* in order to determine whether or not the presumption of an indigent's right to counsel when personal freedom is at stake holds true. The test consists of three parts: (1) "the private interests at stake," (2) "the government's interest," and (3) "the risk that the procedures used will lead to erroneous decisions."[21] After applying the test, the Court determined Lassiter was not unfairly deprived of her Due Process rights, because she was able to present her parental rights case, which did not involve any complicated legal issues, and she had the opportunity to cross-examine witnesses.[22]

This ruling allows states to apply the balancing test and determine whether there

19 *Lassiter*, 452 U.S. at 22.

20 Ibid., 23.

21 Ibid. (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

22 Ibid., 23.

is a right to counsel in similar cases rather than creating a precedential categorical right to appointed counsel in civil cases. For the civil *Gideon* movement, *Lassiter* represents a missed opportunity. If the question of parental rights is not enough to push the Court to create a right to counsel in civil cases, then it is likely nothing else will match the magnitude of a parental right liberty interest. As Barton concisely claims, "if the presumption against appointed counsel in non-imprisonment cases is strong enough to defeat a due process claim dealing with the state taking a citizen's children, it is hard to imagine a different scenario where appointment would be required."[23]

PART II: RESURRECTING CIVIL *GIDEON* AFTER THE FAILURE OF *LASSITER*

For the decade following *Lassiter*, the civil *Gideon* movement was quiet and understandingly defeated. In 1997, a speech by Federal District Court Judge Robert Sweet discussing a concept termed "civil *Gideon*" was published in the *Yale Law and Policy Review*.[24] Since the publication of the speech, civil *Gideon* has been brought back into legal circles and advocates of the movement have multiplied tenfold. For one, major power-players in the legal community fully support a right to civil counsel. The American Bar Association, one of the many heavyweight advocates, defines the current civil *Gideon* movement as "a growing national movement that has developed to explore strategies to provide legal counsel, as a matter of right and at public expense, to low-income persons in civil legal proceedings where basic human needs are at stake, such as those involving shelter and child custody."[25] The present iteration of the movement stresses appointed counsel for only those cases in which true liberty interests are at stake, such as cases cen-

23 Barton, *supra*, at 1246.

24 Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503, 505 (1998).

25 *Civil Gideon Corner,* Philadelphia Bar Association, http://www.philadelphiabar.org/page/CivilGideon (last visited Dec. 7, 2015).

tered on basic human needs. The movement does not support representation for litigants in frivolous lawsuits, as it is still taxpayer money funding the salaries of the public defenders assigned to indigent litigants. This distinction also helps make civil *Gideon* more palatable in light of the present public defender crisis, which is further discussed below.

A. WHY A RIGHT TO CIVIL COUNSEL?

The civil *Gideon* movement is built on an ideal of equal access to justice. Income inequality directly affects legal inequalities. Hiring representation for civil cases is cost-prohibitive for indigent litigants. This phenomenon is known as the "justice gap." The justice gap is defined by the Legal Services Corporation as "the difference between the level of civil legal assistance available and the level that is necessary to meet the legal needs of low-income individuals and families."[26] Indigent criminal defendants are appointed a public defender, but indigent civil litigants must either compete with a long list of others for Legal Aid, or represent themselves in legal matters before the Court as pro se. The number of lawyers dedicated to indigent legal services is dismal, as evidenced by the fact that in the U.S. there is one lawyer for every 6,415 low-income persons but one lawyer for every 525 people in the general population.[27] With numbers like these, most indigent civil litigants choose to proceed pro se. More often than not, pro se litigants are not well versed in court procedure or substantive legal issues. Pro se litigants are more likely to "neglect time limits, miss court deadlines, and have problems understanding and applying the procedural and substantive law pertaining to their claim."[28] Such incompetency issues are a major roadblock preventing pro se litigants from advancing even past the initial stages of filing a case or submitting an appeal. A categorical, Constitutional civil

26 *Documenting the Justice Gap in America*, Legal Services Corporation (September 30, 2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

27 Ibid.

28 Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 Case W. Res. J. Int'l L. 103, 114 (2002).

right to counsel will ensure that every indigent litigant is represented by a lawyer, not just the ones whose cases win out over another's for Legal Aid. Proper legal representation overcomes any issues of the litigant's personal legal incompetency. Therefore, its advocates think of the civil *Gideon* movement as a panacea to the justice gap.

PART III: THE PROBLEMS WITH CIVIL *GIDEON*

Advocates of civil *Gideon* believe a categorical civil right to counsel is the ideal solution. However, the implementation of *Gideon* itself has brought about serious problems in indigent defense, such as the public defender crisis. Specifically, the argument is that *Gideon* fails to provide mechanisms for funding indigent criminal defense and also fails to define comprehensively what constitutes ineffective assistance of counsel. By blindly replicating *Gideon* in the civil context, courts will become doubly inefficient.

A. LACK OF FUNDING

The U.S. spends a great deal on criminal defense. However, only 2-3% of the approximately $100 billion budget goes toward indigent defense.[29] Even on a state level, spending on indigent defense is scant, meaning that the ability to hire a staff of public defenders proportionate to the caseload of criminal indigent defense cases is nearly impossible. In fact, most public defenders have caseloads that are double the ABA's recommended 150 felony cases per year.[30] Public defenders are already overburdened and overworked, unable to devote proper time and expertise to a single case. Such exorbitant caseloads reduce the likelihood a criminal defendant will receive a thoughtful and vigorous defense. In turn, this leads to overworked public defenders urging their clients to take guilty pleas even if they are not guilty to ease the caseload. Instead of truly having their "day in court," many indigent criminal defendants end up engaging in plea bargaining, ac-

29 Deborah L. Rhode, *Access to Justice*, 7-10, 14-16 (2004).

30 *The Issue*, Gideon at 50, http://gideonat50.org/the-issue/ (last visited Dec. 7, 2015).

cepting false pleas despite their innocence. For stressed public defenders, "efficient docket control" becomes a priority over delivering justice.[31] Extending the right to counsel to civil litigants by simply transferring *Gideon* to the civil context will further exacerbate the heavy caseloads public defenders already carry. If funding remains constant but the number of cases increases, retaining current public defenders and hiring new ones will be out of the question. Attracting top-notch talent will be difficult because salaries will be even less competitive than they are now. Should this scenario come to fruition, both indigent criminal and civil litigants will suffer.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Furthermore, there is not much recourse for defendants who have accepted a false guilty plea at the accosting of their overburdened public defender. This is because *Strickland v. Washington*[32] "makes proving ineffective assistance of counsel quite difficult and guarantees that only the most serious and obvious cases of incompetence will result in relief."[33] *Strickland* gave a two-part test for determining ineffective assistance of counsel. The first part of the test requires the defendant to "show that counsel's performance was deficient…showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[34] The second part of the test requires the defendant to show that "deficient performance prejudiced the defense…showing counsel's errors were so serious so as to deprive the defendant of a fair trial, a trial whose result is reliable."[35] Clearly, the *Strickland* test places a higher burden on the indigent litigant than on the counsel of record in question. The burden is especially

31 Barton, *supra*, at 1254.

32 *Strickland v. Washington*, 466 U.S. 668 (1984).

33 Barton, *supra*, at 1255.

34 *Strickland*, 466 U.S. at 687.

35 Ibid.

higher on an indigent litigant because these people do not possess legal knowledge, nor are they capable of hiring attorneys to assess their appointed counsel's deficient actions. In *Strickland*, the Court is deferential to lawyers at the cost of justice. From an efficiency standpoint, it is easier for courts to presume lawyers are competent and effective because investigating a lawyer's performance further backlogs busy courts.

C. WHY CIVIL *GIDEON* WILL BE INEFFICACIOUS

In the best case scenario where civil *Gideon* is instated, indigent civil litigants will receive a public defender who will be doubly burdened and unable to perform as expertly as an appointed counsel should. However, when the counselor makes a mistake in his overburdened and overworked state, the civil litigant will have the entire burden of the *Strickland* test in order to prove ineffective counsel. Evidently, in the best-case scenario, civil *Gideon* will only do more harm for indigent civil litigants than good.

Yet this scenario is nearly impossible to reach considering current resource constraints on state judiciaries. According to the National Legal Aid and Defender Association, state governments are required to spend equally on prosecution and defense, but "governments commonly spend three times as much on prosecution as on public defense."[36] Simply put, expanding the right to counsel will require significant increases in funding to public defense. More public defenders will need to be hired along with support staff. However, resource constraints are a reality. It is unlikely state and federal legislatures will ever vote to increase spending on public defense with other domestic and foreign policy priorities on the agenda. In light of the budget problem, the political will does not exist to create a categorical civil right to counsel at public expense.

PART IV: ALTERNATIVE SOLUTIONS TO CIVIL *GIDEON*

Nevertheless, achieving the "noble ideal" of *Gideon* does not end with formal

36 *Five Problems Facing Public Defense on the 40th Anniversary of Gideon v. Wainwright*, National Legal Aid & Defender Association, http://www.nlada.org/Defender/Defender_Gideon/Defender_Gideon_5_Problems (last visited Dec. 7, 2015).

legal mechanisms. Though the creation of a Constitutional civil right to counsel is righteous and honorable, creating a public defense infrastructure to support an influx of new civil cases is impracticable. Still, it is possible to provide indigent civil litigants with quality legal assistance through conscious court policy and public-private partnerships. Instead of fighting for a categorical and publicly funded right to civil counsel, advocates of civil *Gideon* should instead support and empower pro se litigants by promoting conscious court policy and public-private partnerships as solutions to the indigent civil defense crisis.

A. CONSCIOUS COURT POLICY: PRO SE COURT REFORM

The first step in empowering pro se litigants is making courts more accessible. To do so, judiciaries must create conscious policy, meaning, courts must be aware of the fact that pro se litigants exist and do not have technical legal knowledge to navigate complicated procedures and forms. Moreover, courts must create policy bearing in mind the different demographics of their judiciaries. Specifically, pro se court reform can accomplish these conscious policy goals. In this context, pro se court reform refers to the adoption of new practices in courts that deal with primarily pro se litigants in order to make navigating the judiciary easier for those pro se litigants. Such courts that stand to benefit from pro se court reform include family courts, trial courts, and appellate courts.

The most basic level is regarding court processes and forms. Initiating an appeal or submitting a brief should not be a difficult task. Requirements for all submissions should be clearly stated and easily accessible. Forms should not be written in legalistic jargon and should also be available in multiple languages depending on the demographic makeup of the district. U.S. Federal Courts already provide interpreters for individuals who primarily speak a foreign language.[37] State judiciaries should not only follow the ex-

37 *Federal Court Interpreters*, United States Courts, http://www.uscourts.gov/services-forms/federal-court-interpreters, (last visited Dec. 7, 2015).

ample of providing in-person foreign language support, but also adapt written documents to the primary foreign language in the judiciary's jurisdiction.

Next, court staff can be trained in how to work with pro se litigants and not just lawyers, while still being careful not to dispense legal advice. Judges should also work to ensure court staff is providing patient and helpful service to pro se litigants. According to a 2011 report by the Federal Judicial Center (FJC), 84% of federal district courts provide direct assistance to pro se litigants in the form of procedural help by the clerk's office staff as part of their regular duties.[38] Again, the federal judiciary provides a valuable model for state judiciaries to emulate when initiating pro se court reform.

Similarly, judges themselves play an important role in pro se court reform. A 2005 report by the American Judicature Society (AJS) provides judges with a list of things that can be done in order to ensure a fair trial for a pro se litigant.[39] The report asserts judicial impartiality cannot be questioned if a judge "makes procedural accommodations that will provide a self-represented litigant acting in good faith the opportunity to have his or her case fairly heard."[40] As such, judges should be courteous to pro se litigants, avoid legal jargon, explain how proceedings will be conducted, ask questions in order to clarify testimony and develop facts, and generally make reasonable accommodations for pro se litigants.[41]

By the same token, clerks of the court can also make a difference in supporting pro se litigants. Clerks are not only responsible for the day-to-day operations of courts, but are also the first instance of a litigant's interaction with the court. The clerk's office

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38 *Donna Stienstra, Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges*, Federal Judicial Center (2011), http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/$file/proseusdc.pdf.

39 Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, American Judicature Society (2005), http://www.courts.ca.gov/partners/documents/ReachingOutOverreaching.pdf.

40 Ibid., 1.

41 Ibid., 1-2.

is the hub of information on court policies and procedures. As such, clerks should make all efforts to aggregate and disseminate information as clearly and concisely as possible. Specifically, clerks of the court should create better and more comprehensive online resources for pro se litigants in order to reduce information asymmetries. For example, the California Courts website has an extensive "Online Self-Help Center" targeted toward pro se litigants. The self-help website is divided by fourteen major categories, which are then divided into various subcategories. Topics range from finding legal help to criminal law and the appeals process. Additionally, visitors to the California Courts website are able to live web chat with a Law Librarian and access an online glossary of both simple and complex legal terms. Also available are links to various legal aid clinics and court resources. In sum, the California Courts website is a highly navigable website which acts as a vital and functional tool for pro se litigants initiating an appeal or other legal action. This website presents a model that should be emulated by all state judiciaries on their own websites, as this is usually where pro se litigants first turn for court-specific information.

B. PUBLIC-PRIVATE PARTNERSHIPS: LAW & THE COMMUNITY

Furthermore, the legal community should play a role in empowering pro se litigants. In 1974, Congress created the Legal Services Corporation (LSC) to "provide high quality civil legal assistance to low-income persons."[42] LSC focuses on the litigation areas the civil *Gideon* movement supports for on-right counsel: housing law, domestic violence/family law, public benefits law, and consumer law.[43] Increasing funding for LSC will help regional Legal Aid offices hire more attorneys and provide assistance to a greater number of indigent civil litigants. However, assistance from Legal Aid attorneys is not on right for indigent civil litigants and thus exists competition between litigants to have their

42 *What We Do*. Legal Services Corporation, http://www.lsc.gov/about-lsc/what-we-do (last visited Dec. 7, 2015).

43 *Who We Serve*. Legal Aid Society of the District of Columbia, http://www.legalaiddc.org/get-help/ (last visited Dec. 7, 2015).

cases selected for assistance.

To provide an amount of legal assistance proportionate to the existing caseload, community legal clinics should expand their practice areas to civil litigation. Nearly every law school in the U.S. provides a community legal clinic as means to provide their students firsthand legal experience. However, most legal clinics tend to focus on criminal law and therefore serve a niche clientele. Expanding the role of community-law school legal clinics to human needs civil cases is vital to solving the indigent defense crisis. Likewise, incentivizing public defense work by law schools is equally important to increasing support for pro se litigants.

For example, the Clinical Law Program of the University of Maryland Francis King Carey School of Law provides over 140,000 hours of free legal services per year by 250 law students.[44] In 2015, UMD Law teamed with University of Baltimore School of Law to create a Legal Practice Incubator.[45] Developed in conjunction with the Maryland Bar Association, the Legal Practice Incubator aims to provide legal services to indigent litigants while also benefiting new lawyers. This pilot program is meant to help recent law graduates launch their own practices while still gaining valuable experience by serving indigent clients. The universities will provide office space, technological equipment, malpractice insurance, and bar dues. Participating lawyers are allowed to attain their own clients but must donate at least 10% of their billable hours to indigent clients. They must also take at least one pro bono case.[46]

Similarly, Boston College Law School, Boston University School of Law, and Northeastern University School of Law, in conjunction with the American Bar Associa-

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44 *The Cardin Requirement*, University of Maryland Francis King Carey School of Law, http://www.law.umaryland.edu/publicservice/cardin.html (last visited Dec. 7, 2015).

45 Karen Sloan, *Schools Collaborate on Baltimore Legal Practice Incubator*, The National Law Journal (Jul, 27, 2015) http://www.nationallawjournal.com/id=1202733203721/Schools-Collaborate-on-Baltimore-Legal-Practice-Incubator?slreturn=20151107170950.

46 Ibid.

tion, have announced plans for a joint incubator in 2016.[47] This is perhaps the best model of a dynamic community law clinic. By forging partnerships across schools and legal associations, and incentivizing experience for attorneys, everyone benefits.

C. WHY ALTERNATIVES TO CIVIL *GIDEON* WILL WORK

Undoubtedly, civil *Gideon* lost its chance to become part of case law precedent with the failure of *Lassiter*. Whether it is luck or the nature of the battle, it is unlikely for the Court to ever create a categorical right to civil counsel considering the current social and economic landscape. On the other hand, pro se court reform vis-à-vis conscious court policymaking and public-private partnerships is a very achievable solution that is not nearly as resource-constrained as creating a new public defense infrastructure to enforce a new Constitutional right. As such, advocates of civil *Gideon* should focus their energies on the aforementioned alternatives. In particular, pro se court reform and civil *Gideon* as a categorical right are not in competition. Rather, by first ensuring a sound structure in the courts, one that already provides the best possible support to indigent litigants, a categorical right to counsel will only prove to be more effective, if and when it is created. Beginning with pro se court reform is a win-win for any advocate of civil *Gideon*.

CONCLUSION

Pro se court reform will only become a reality if advocates for a civil right to counsel embrace a new understanding of the true motivation driving the civil *Gideon* movement. To that end, civil *Gideon* as a Constitutional right to civil counsel ought to be reimagined as a scheme to empower pro se litigants. *Gideon* itself has failed and its application to the civil context will make the indigent defense crisis worse. It is incumbent upon judiciaries to redesign policies and procedures with new realities in mind: the exponentially growing number of pro se litigants in the U.S. It is also incumbent upon the

47 Ibid.

legal community to contribute their expertise to solving the indigent defense crisis. While there is certainly a conflict of interest — more pro se litigants means less lawyers hired — the most successful change can only be effected from within the legal system itself. All actors ought to be held equally responsible in reaching *Gideon*'s "noble ideal" of justice and fundamental fairness for all.

Why and How the Legal System Should Be Used to Fight Climate Change

Adam Scheps | University of Oxford

Abstract

This paper explains how the courts can help fight climate change, particularly in regards to the threat of rising sea levels. Politicians, as referred to in this paper, include members of the executive and legislative branches. Judges and juries will commonly be referred to as "the courts" or "the legal system." The advantages and limitations of the political approach to long-term environmental, social, and economic policy issues will be discussed, followed by the advantages and limitations of the legal system with regards to similar problems. This paper will then explore the current use of the courts in seeking environmental justice in different parts of the world will. According to the United States Environmental Protection Agency, environmental justice is defined as "the fair treatment and meaningful involvement of all people… with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies," so that every human being has the right to participate in the process of their own environmental protection.[1] This comparative study will lead to the conclusion that the American courts, rather than the country's politicians, can and should be the primary vehicle by which man-made climate change is fought. This paper will further conclude that the successful use of the courts to mitigate environmental degradation will put pressure on politicians to take more immediate action on climate change, thereby creating a domino effect.

1 U.S. Environmental Protection Agency. "Environmental Justice." *U.S. EPA*. Environmental Protection Agency, 10 June 2015. Web. 14 July 2015.

Why and How the Legal System Should Be Used to Fight Climate Change

As sea levels continue to rise and man-made climate change becomes more evident in the everyday lives of people around the world, the traditional approach to this environmental disaster, including vague international agreements and minimal legislation, must be re-evaluated in favor of swifter and more effective means of stopping climate change. Rising sea levels can be attributed to an atmosphere increasingly filled with carbon dioxide and other greenhouse gasses, which are heating the Earth and causing glacial ice to melt into the oceans. In 2013, total U.S. greenhouse gas emissions were at 6,673,000,000 metric tons (Appendix A), which marks a 5.9 percent increase in greenhouse gas emissions between 1990 and 2013.[1] These rising emissions have put many people in danger of losing their homes. In Florida, for example, more than one million residents live within one meter of the mean sea level averages (Appendix B), which suggests that only a small change in the level of water around the world can and will displace millions. From 1901 to 2010, the global sea level has risen about 20 centimeters.[2] The real question is not whether climate change is a problem, but rather, what the most efficient and effective policy solution will be.

The debate over environmental regulation has long divided politicians in the United States. The Democratic Party tends to favor both recognition of and action on climate change while the Republican Party has a more mixed, yet distinctly less accepting approach to this man-made problem. Despite these differences on climate policy, the politicization of the environment is not straightforward. Both parties must take into account the effect of eco-friendly regulations on the U.S. economy. Consequently, environmentalists and other advocacy groups in favor of a transition to clean energy inevitably clash with large oil companies, which have powerful lobbies in Washington D.C. Politicians

1 U.S. Environmental Protection Agency, comp. "Trends in Greenhouse Gas Emissions." U.S. GHG Inventory (2015): 1-35. Print.

2 Union of Concerned Scientists. "Causes of Sea Level Rise: What the Science Tells Us (2013)." *Union of Concerned Scientists*. N.p., 2008. Web. 21 July 2015.

can find themselves swayed by these two types of special interest groups. The political perspective also includes the views of the general population, with each American politician looking to their constituents for approval every election cycle. If one representative's district is composed largely of coal mining families, for example, he or she will feel pressure to protect the coal mining industry regardless of the environmental costs. This cost-benefit analysis calculated by politicians and the groups pulling them in multiple directions is key for understanding the US political system, as it allows insight into the advantages and disadvantages of using the political system to fight climate change.

The American legal system is another powerful vehicle for change. In the past, the judiciary has functioned as an engine for social, economic, and political progress. Like politicians, the courts have both advantages and limitations when it comes to addressing long-term policy issues. As such, the courts have made critical decisions that continue to shape the political and social landscape of the United States, such as *Brown v. Board of Education of Topeka, Kansas* (1954), hereafter referred to as "*Brown v. Board I*."[3] This example will be analyzed in detail in order to arrive at a conclusion as to the strengths and weaknesses of using the courts to solve long-term issues.

From a global perspective, the legal system is being used in Netherlands, India, and elsewhere to expedite the process of protecting the Earth. Tired of waiting for politicians to act on climate change, the peoples of these nations have taken to the courts to make a change. In fact, a recent poll showed that Americans hold similar levels of concern as citizens of other nations when it comes to the dangers of climate change.[4] These kinds of lawsuits are grounded in the idea of environmental justice, as the public increasingly uses court systems to uphold the ideals of environmental justice.[5] This paper will show

3 Brown v. Board of Education, 347 U.S. 483 (1954)

4 Stokes, Bruce, Richard Wike, and Jill Carle. "Global Concern about Climate Change, Broad Support for Limiting Emissions." Pew Research Center. Pew Research Center, 5 Nov. 2015. Web. 17 Mar. 2016.

5 Seley, Peter, and Richard Dudley. "Emerging Trends In Climate Change Litigation - *Law360*." Law 360. Portfolio Media, Inc., 7 Mar. 2016. Web. 17 Mar. 2016.

how environmental justice, through the legal system rather than the political sphere, can and should take hold in the United States if man-made climate change is to be curbed effectively by one of its main contributors.

The Political Approach to Long-term Issues

Environmental politics has become increasingly important especially as the public has taken hold of the concept of environmental degradation and its impact. Recently, President Barack Obama has made efforts to shift environmental policy from a secondary issue to a central topic of discussion and has spoken about a world in which the United States leads the fight against climate change. In a speech given in Florida on Earth Day this past year, the President argued that because action with respect to climate change can no longer be delayed, he has "committed the United States to lead the world in combatting this threat."[6] Most recently, President Obama attended the climate talks in Paris in December of 2015 and pledged to reduce US CO2 emissions from coal-fired power plants through the Clean Power Plan, which is currently stalled due to the Supreme Court's issuance of a stay.[7] In order to better understand how politicians, such as President Obama, can actually implement solutions to combat climate change, it is important to analyze previous cases in which politicians sought to tackle similar long-term issues. These types of problems can be defined by upfront costs incurred early on, benefits being large but delayed, and the public struggling to see the benefits they will receive for their economic sacrifices.

A Case Study of the Political Approach to Long-term Issues

A significant example of a political success in a long-term issue is the New

6 Obama, Barack. "Remarks by the President on the Impacts of Climate Change." Earth Day. The Everglades, Florida. *The White House*. Web. 14 July 2015.

7 Liptak, Adam, and Coral Davenport. "Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions." The New York Times. The New York Times, 09 Feb. 2016. Web. 31 Mar. 2016.

Deal. The onset of the Great Depression in the United States marked the beginning of the worst economic disaster in the country's history. The U.S. Gross Domestic Product (GDP) dropped from around $103.6 million in 1929 to almost half of that, at $56.4 million in 1933.[8] The unemployment rate rose from 3.2% in 1929 to almost a quarter of the labor force, 24.9%, in 1933.[9] Despite these bleak conditions, upon swift action by the newly sworn-in President Franklin Delano Roosevelt, the U.S. economy saw rapid improvement. As Roosevelt's first term came to a close, the U.S. GDP was back up to $91.9 million and unemployment was down to 14.3%. This huge economic success was due in large part to the expeditious political action of the U.S. executive and legislative branches, and herein lie the advantages of using the political system to solve long-term problems.

Advantages of the Political Approach to Long-term Issues

The New Deal was implemented with remarkable speed. On March 9, 1933, Roosevelt called Congress into a special session in what came to be known as "The Hundred Days." During this period, the president pushed fifteen pieces of legislation through both houses of Congress, all aimed at fixing the country's economic problems. The power of cooperation between the executive and legislative branches was never more obvious than during this one hundred day term, showcasing how quickly politicians can solve long-term issues if they are willing to work together. Policy was introduced and decided upon in a matter of hours, because almost everyone in Congress was able to reach an agreement with President Roosevelt about the nature of the economic problem and how it should be solved. The speed with which policy can be changed in the legislative process is a clear advantage, but it requires that the policy at hand be uniformly agreed upon.

Another advantage that the political system enjoys in long-term policy situa-

8 Shmoop Editorial Team. "The Great Depression Statistics." *Shmoop.com.* Shmoop University, Inc., 11 Nov. 2008. Web. 14 July 2015.

9 Shmoop Editorial Team. "The Great Depression Statistics." *Shmoop.com*. Shmoop University, Inc., 11 Nov. 2008. Web. 14 July 2015.

tions is the direct nature of the executive and legislative branches' actions. Because Congress is directly responsible for changing the law, if enough members of Congress agree on an issue and its solution, the law can be quickly changed. The speed of change dramatically increases when the president is also in support of the legislation because he or she can then sign and implement the bill with deliberate speed. In the case of environmental issues, if Congress and the president agree that carbon emissions should be reduced, legislative action will be taken much more quickly than if the Supreme Court has to wait to hear a case and rule that current carbon emission rates are violating the right to life. One can see how uniform action by lawmakers and the chief executive is much more suited for making quick, direct changes than deliberation by the judiciary.

American democracy was founded on the principle that the people should have a say in selecting their leaders and, by extension, what actions their leaders take in office. If representatives are not satisfying their constituents, they may be removed from office in the next election cycle. In a similar manner, the American president must appeal to the whole country if he or she hopes to win re-election or, at least, keep up approval ratings so that he or she may influence policy decisions. For example, when President Roosevelt pushed for the New Deal so that U.S. citizens could gain employment and begin to recover from the economic crisis, he was awarded with another term, and, subsequently, two additional terms. President Franklin Roosevelt was the only U.S. president to be elected more than twice, and his popularity was due in large part to his success in handling the Great Depression. As such, if the American people desire a solution to the long-term problem of climate change, U.S. congressmen and the President have the incentive of reelection or public appeal to give the people what they want in order to secure re-election and public support.

Limitations of the Political Approach to Long-term Issues

There are, however, problems that arise in the U.S. political system when addressing long-term issues. The New Deal would not have been implemented with the same speed if the executive and legislative branches had not worked together. However, one of the key characteristics of the American political system today is its sharp polarization. In today's political landscape, politicians in Congress are dramatically divided along party lines (Appendix C).[10] This was not the case in the era of the New Deal, from 1929 to 1931. When much of the legislation was passed through Congress, the Republicans controlled both houses while a Democrat, President Roosevelt, sat in the Oval Office.[11] Based on the degree of polarization between the two major parties in the current era, such a compromise appears much less realistic. Accordingly, while the political system of the late 1920s and early 1930s may have enjoyed the advantage of quick passage of laws with a relatively high degree of compromise, such a trait cannot be assigned to the current U.S. political system, and thus cannot be counted as one of its modern-day strengths.

Secondly, while popular elections of the chief executive and legislators may lend an opportunity for the people to influence the direction of the country on a long-term issue, the people can only base their decision of whether or not to re-elect a politician on their own knowledge, which may not be in line with the reality of politicians' actions. As a result, the public can be exposed to only sound bites of their representative's stance on climate change, which may influence their decision to reelect that politician. The flaw of the political structure's reward or punishment system is that the rewards or punishments are not always given by the people in a way that will further their own aims.

Finally, while the Great Depression itself was a long-term issue, its short-term effects were sufficiently widespread and devastating to exert a high degree of pressure on the political system to solve the problem. The fact that additional pressure was necessary

10 McCarty, Nolan M., Keith T. Poole, and Howard Rosenthal. "Political Polarization and Income Inequality." *Russell Sage Foundation* (2003): 1-42. Print.

11 Office of the Historian. "Congress Profiles | US House of Representatives: History, Art & Archives." *Congressional Profiles*. Office of the Historian, n.d. Web. 21 July 2015.

reveals that politicians must be subject to a good deal of political pressure in order to solve long-term issues. While the effects of and solutions to the Great Depression were long-term, the pressure from constituents was equally enduring, widespread, and forceful. This is not the case for climate change, where the effects of the problem and its solutions are certainly long-term, but political pressure only comes from those most affected, such as people living in low elevation areas. The whole country does not feel the immediate danger of climate change equally, and politicians, unlike in the case of the Great Depression, are therefore less likely to act swiftly on this long-term issue.

Why the Political Approach Is Less Effective

All things considered, the political system can be effective, but only when there is enough political cohesion to pass legislation quickly and subsequently enforce it. Additionally, politicians must be honest in delivering on promises, and political pressure must be forceful across the country, giving politicians a clear and uniform message. None of these three conditions can be met in the current political climate to act on climate change, and therefore, the political system is not equipped to deal with the impending environmental crisis. But to whom, then, can the American people turn for help when climate change becomes untenable?

The Legal Approach to Long-term Issues

The United States Judicial branch of government has a long history of approaching long-term issues. Courts on all levels have mediated a wide range of disputes arising from economic, social, and political differences between groups. Indeed, the role of the courts is to resolve debates, which gives the judicial branch substantial power when it comes to environmental justice, However, the courts also suffer from weaknesses that make swift and direct changes following court decisions more difficult to come by.

A Case Study of the Legal Approach to Long-term Issues

In order to properly analyze the effects of the legal system on long-term issues, it is best to look back to how the courts have handled similar problems in the past. One prominent example of a long-term issue settled in the courts is racial segregation in schools. Although the end of the Civil War brought a close to the nation's era of slavery, racial minorities were not yet afforded total equality. Up until the 1950s, African Americans had to drink from different water fountains, sit in different places in movie theaters, and even attend different schools. All of these situations were founded on the principle of "separate but equal" facilities, meaning that while those of different races were not learning next to one another, schools were still considered equal. It was not until the United States Supreme Court addressed this issue in 1954 that the "separate but equal" doctrine was ruled unconstitutional in the landmark case, *Brown v. Board of Education I.*

Advantages of the Legal Approach to Long-term Issues

This example highlights some clear advantages enjoyed by the legal system when addressing long-term challenges. Polarization in the executive and legislative branches is a major issue, as polarity between those two branches can, and often does, lead to gridlock. Courts, in contrast, are uniquely configured to avoid gridlock, among other negative effects of polarization. The United States Supreme Court is composed of nine justices, meaning that even if the court is split between five conservatives and four liberals, a decision will be reached by the end of the term, just as would be the case if the court was composed of all conservative judges. The Supreme Court cannot be tied up for years if two sides cannot agree on an issue. This aspect of the Supreme Court can be applied to courts of all levels around the country. Whether or not a judicial panel is split, a final decision can always be made. Additionally, when analyzing *Brown v. Board of Education I*, it is apparent that political polarization does not always play a role in the court's final ruling. Despite the variety of political ideology held by the members of the Warren

Court, the Supreme Court's ruling in *Brown v. Board of Education I* was unanimous. The legal system does not suffer from the negative effects of polarization, such as gridlock and partisan voting, which impact the American political system.

In conjunction with their freedom from gridlock, courts in the U.S. will act on long-term issues even if a majority of citizens is not concerned with or involved in the matter. In other words, the widespread and unified popular sentiment required for political action on a long-term issue is not necessary for a legal action on the same issue. In the mid-twentieth century, during the era of school segregation, roughly two-thirds of white Americans supported segregation in public schools.[12] Politicians were not incentivized to desegregate schools, so no action was taken. Regardless, when the plaintiffs took the Board of Education of Topeka to court for having segregated schools, the Supreme Court took the case, despite the lack of popular support for the plaintiffs' cause.

Along the same lines as the immunity from gridlock and need for large-scale support, the judicial branch is uniquely insulated from outside political pressure, whether it be from special interest groups, political parties, or other forces. Many judges in this country are appointed, and sometimes serve for life. While not all judges hold power in this way, there is legislation in place to ensure that judges, even if elected, are not swayed by politics in the way that lawmakers and executives may be.[13] Jury selection is similarly structured to prevent ideological or political pressures from influencing the final decision. In essence, the judicial branch is the closest the United States can get to an independent, unbiased trier of facts. Because of this independence, the courts are in a favorable position to solve challenging, long-term issues based on merits rather than political affiliation or a desire to please powerful individuals, corporations, or special interest groups.

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12 Lee, Taeku. "Polling Prejudice." *The American Prospect.* The American Prospect, 9 Mar. 2011. Web. 21 July 2015.

13 "Appellate and General Jurisdiction Courts." *Judicial Selection in the States*. Comp. American Judicature Society. Lexington, KY: Council of State Governments, 2010. 1-10. Print.

Limitations of the Legal Approach to Long-term Issues

The compelling strengths of the legal approach to long-term issues must be met with the reality that the courts do face certain limitations. To begin, courts do not enjoy the same enforcement powers that politicians, such as the president, enjoy, which can lead to slow or improper implementation of rulings, or even a refusal to enforce court rulings. During the New Deal, President Roosevelt held the executive power necessary to see to it that his policies were carried out. In contrast, in the case of school segregation, after making their ruling in *Brown v. Board of Education I* in 1954, the Supreme Court made another the following year in *Brown v. Board of Education of Topeka, Kansas II* (1955). This decision clarified their previous ruling and ensured that it was carried out appropriately (*Brown v. Board of Education of Topeka, Kansas II,* 1955). Additionally, courts are often criticized for not representing the wishes of the people on long-term issues. For example, in the recent marriage equality case, *Obergefell v. Hodges*, Justice Antonin Scalia said of the Supreme Court decision to legalize gay marriage, "Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court."[14] Justice Scalia highlights the fact that the decision was not made by the people, or even a representative body, but rather by a court (*Obergefell v. Hodges*, 2015). Some Americans, like Justice Scalia, are opposed to taking power from the people or their representatives and giving it to the courts. Lastly, the legal system can often take just as long to solve an issue as politicians might. In the case of "separate but equal" facilities, it took the Supreme Court almost sixty years to overturn *Plessy v. Ferguson*, which upheld the creation of separate but equal railcars (*Plessy v. Ferguson*, 1896).[15] Indeed, although the Court can take swift action to correct a flawed decision, this does not mean the Court will take swift action. The legal system is still dependent on the whims of the social and political landscape of the country, so the judiciary's ability to act quickly is

14 Obergefell v. Hodges. The United States Supreme Court. 26 June 2015.

15 Plessy v. Ferguson. The United States Supreme Court. 18 May 1896.

limited by the speed at which society adapts to changing times.

Why the Legal Approach Works

The legal system certainly has its limitations, but when addressing long-term issues, it is undoubtedly more suited for working on a solution to climate change due to its insulation from polarization and gridlock. This immunity will allow the court to more quickly and decisively act to curb carbon emissions, among other environmental hazards. Perhaps most importantly for the problem of climate change, the courts can act without the need for widespread and sweeping calls to action from a majority of the people. If only some people's homes are being flooded due to rising sea levels, politicians around the country will lack incentives to act because of the smaller base of constituents calling for a fix to their problem. However, the legal system does not require a large base of support in order to take action. Even in the absence of strong, uniform support from the public, minority groups, such as those bearing the brunt of human-caused damage to the Earth, can have their interests protected by the United States legal system.

A Comparative Analysis of Environmental Justice

Around the world, countries at low-elevation are becoming more and more concerned with rising sea levels due to man-made climate change. The Netherlands and India are two countries that have fought to hold their respective governments responsible for inaction on this time sensitive issue. Both countries have won significant environmental victories by using their legal systems rather than their political systems. While politicians are motivated by political pressure from ordinary citizens, the judiciary may deliver environmental justice by capping carbon emissions, limiting hazardous material production, and guarding natural resources against unrestrained pollution.

In April 2015, 886 Dutch plaintiffs took their government to court after their homes were threatened by rising sea levels caused by carbon emissions, which the gov-

ernment was doing little to curb. Plaintiffs asked the court "to declare that the Dutch government must implement policies to reduce its emissions between 25 percent and 40 percent below 1990 levels by 2020," which would mark a major success not only for the Netherlands but also the global community as well.[16] The core idea behind this movement is that the political system is not moving quickly or effectively enough to exact real change. Proponents of using the Dutch legal system as a vehicle for long-term change argued that, "governments have already broken existing human rights, environmental and tort laws, regardless of agreements brokered at the international level," which suggests that lawmaking bodies are not capable of cutting environmental damage to a sustainable level. As of June 24, 2015, the lawsuit was a success for the plaintiffs and the environment, with a final decision dictating that, "The Netherlands has to cut emissions by at least a quarter on 1990 levels by 2020."[17]

Similarly, the Indian Supreme Court—the highest judicial body in that country—has been used as an outlet for Indian citizens to hold their government responsible for political inaction. Known as Public Interest Litigation, or PIL, this relatively new legal concept has only become stronger with time in India, where the trend is beginning to include environmental justice. As such, the judiciary has essentially teamed up with the public to take on the political system regarding environmental issues. For example, the Indian Supreme Court has held that the right to life and liberty, which is protected by the Constitution of India, includes the right to a healthy environment.[18] This ruling has opened the door for a wide variety of PIL where, "an individual can approach [the judiciary] directly when the public interest is at stake due to environmental harm."[19]

16 Howard, Emma. "Dutch Government Facing Legal Action over Failure to Reduce Carbon Emissions." *The Guardian.* The Guardian, 14 Apr. 2015. Web. 12 July 2015.

17 Briggs, Helen. "Climate Change: Is the Dutch Court Ruling 'a Game Changer'?" *British Broadcasting Corporation* 24 June 2015.

18 Constitution of India Art. XXI

19 Jain, Romi. "The Indian Supreme Court as Environmental Activist." *The Diplomat* 24 Jan. 2014: n. pag. Print.

Conclusion

The concept of using a legal system to combat climate change when the political system seems ineffective on the issue is not without support. If the people of the Netherlands are able to sue their government while the people of India can circumvent their national political system, the people of the United States, along with other developed nations, can and should use their judicial systems to solve the long-term issue of climate change.

Translating Comparative Studies to the United States Legal System

To examine how the U.S. legal system would be suited to deal with mass tort environmental litigation, it is helpful to apply the previously discussed strengths of the American courts to the issue of climate change. Some politicians deny the science behind man-made global warming, thus delaying the policymaking process of Congress to pass helpful solutions. Courts do not have this problem. The most obvious benefit of environmental litigation is the lack of public support for action. Conversely, the 886 Dutch citizens were able to make their voices heard out of the country's population of over 16 million.[20] In theory, only one American citizen has to bring a suit for it to be heard by the Supreme Court, so the issue of apathy by those not directly impacted by rising sea levels is easily overcome. The ultimate advantage of the U.S. legal system, as showcased in the instance of India's environmentally active judiciary, is the insulation from outside political pressure. Like the Supreme Court of India, the highest court in the U.S. has substantial protection from the influence of lawmakers and executive branch bureaucrats. This independence will allow American courts to make significant gains in the fight for climate change regulation where politicians fail. Politicians, especially those in the United States,

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20 Amsterdam.info. "Population and Languages of the Netherlands." *Population and Languages of the Netherlands*. Amsterdam.info, 21 July 2015. Web. 21 July 2015.

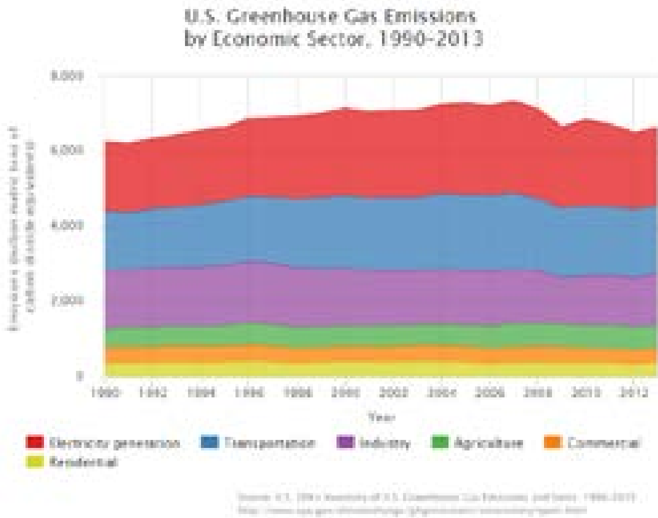
are too dependent on the whims of powerful special interest groups and corporations, such as those in favor of using coal, oil, and other fossil fuels.

Putting Pressure on Politicians

Although the political system clearly lacks some aspects crucial to tackling long-term issues, there is reason to believe that politicians may join onto the environmental justice movement as the tide turns in its favor. As discussed, politicians are only motivated to take action when enough of their constituents are passionate and unified on an issue. Accordingly, when environmental litigation becomes more popular, the public will start galvanizing around the issue, and individuals will increasingly explore the possibility of suing their government for various damages caused by preventable environmental degradation. Not only will popular opinion sway politicians, but money will as well. If and when environmental litigation gains traction in the U.S., federal, state, and local governments may begin to lose massive sums of money to citizens for incurred damages due to government inaction. In response, politicians will feel pressure from not only environmentalists but also economically concerned citizens and groups whose tax money is going towards environmental damages arising from mass tort cases. Therefore, a shift to the use of the courts to fight climate change will inevitably lead to increased pressure on the political system to adapt to the growing prominence of long-term environmental issues on the political stage. Consequently, the people of the United States can create a domino effect when it comes to climate change. Other potential effects of a domino chain should be the subject of future discussion and research. The American legal system can emulate the actions of judiciaries around the world, and in doing so, can take a lead role in protecting its citizens, as well as people around the world, from rising sea levels and other environmental dangers as a result of a changing climate.

Appendix A

Greenhouse Gas Emissions in the United States



Appendix B

Coastal States At Risk from Global Sea Level Rise

People in states with low-lying coastlines have been subject to severe flooding and damage from coastal storms in recent years. Although all coastal states are vulnerable, Florida, Louisiana, New York, and California have the most residents living on land less than 3.3 feet above high tide. Depending on our future emissions—and the resulting ocean warming and land ice loss—global average sea level could rise to the 3.3-foot mark within this century.

Appendix C

Ideological Polarization in the U.S. Congress