COLUMBIA UNDERGRADUATE LAW REVIEW

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ARTICLES

COLUMBIA UNDERGRADUATE LAW REVIEW

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LETTER FROM THE EDITORS-IN-CHIEF

Dear Reader,

The Editors-in-Chief are proud to present the Fall 2018 issue of the Columbia Undergraduate Law Review. These insightful selections represent the dedication of our print team, authors, and executive board. Along with preparing the four pieces bound here, our print team edited and prepared two additional pieces available in the inaugural e-book on our website.

The Columbia Undergraduate Law Review is one of the world's leading undergraduate forums for legal scholarship and journalism—aiming to provide an opportunity for Columbia University and the wider public to write, engage, and discuss law-related issues. Our primary focus this term was to expand our readership and increase accessibility to our work.

This semester, as our reach grew, our staff followed. Through expanding both teams, we now boast 70 staff members, increasing the Online Team two-fold and adding a second Online Executive Editor. We also created new positions for online engagement to increase our digital presence across platforms such as Twitter, Facebook, and now, a podcast. Within the organization, we aimed to honor the Columbia Undergraduate Law Review's rich history and camaraderie by creating a new Internal Affairs position. Alongside maintaining a legal news listserv to promote online articles, we launched an internal newsletter with highlights from each week's meeting, law-related events on campus, and recent articles by our staff writers.

As co-Editors-in-Chief, we had the privilege of advancing a rapidly expanding and evolving journal, and we are grateful for our staff's support, enthusiasm, and innovation. For the Columbia Undergraduate Law Review, the new year will bring exciting opportunities and challenges. We are confident that the incoming Executive Board and staff will build upon our efforts while implementing their own vision. We wish them the best of luck and look forward to seeing all that they achieve.

We hope you enjoy reading both our print and online articles.

Sincerely,
Nikita Datta and Giselle Valdez
Editors-in-Chief

LETTER FROM THE EXECUTIVE EDITOR

Dear Reader,

On behalf of the Executive Board, I am proud to present the Fall 2018 issue of the *Columbia Undergraduate Law Review*'s e-book print journal. This semester, we had the difficult task of publishing only six articles out of the many high-quality submissions. We are proud to offer the following.

In his article "There is No Medicine That Can Cure This: The Right to Housing in France and South Africa," Ryan Burgess discusses a perceived right to housing in two nations with different legal and social systems: France and South Africa. Specifically, the article argues that both nations have failed to live up to the standards set for them both domestically and internationally.

"Racially Discriminatory Admissions to New York's Elite Public Schools: Avenues of Litigation and Reform," by Quentin Dupouy, analyzes the effect of the Specialized High School Admissions Test (SHSAT) on New York City's secondary school admissions process. He argues that this SHSAT admissions process is racially discriminatory, but could be reformed through legal or political means.

"Mark" Min Seong Kim's "Revolution Unrealized: How *Brown* Failed but why the Promise of School Desegregation Must Continue," explores the various Supreme Court decisions concerning school desegregation and asserts that the goal of desegregation has still not been achieved.

"Native Americans and the New Jim Crow," an article by Nicolas Runnels, expands upon Michelle Alexander's book *The New Jim Crow* and argues that the American legal system and mass incarceration disproportionately affect Native Americans.

In "The Prima Facie Right to Privacy in the United Kingdom," Amika Singh highlights technology's effects on the UK's right to privacy. She argues that, because this right to privacy was developed as part of the EU's Human Rights Act (HRA) of 1998 and because Information and Communication Technology (ICT) poses an increasing threat to privacy, the UK should incorporate the right to privacy into its domestic legal system before the UK officially leaves the EU.

Finally, Robert Watson, in his article "The Other Side of Title IX: The Legal Case Against Public Single-Sex Schooling," investigates the ongoing practice of gender-based segregation of students in American public schools. He contends that single-sex schooling unfairly effects those students who do not identify with the gender designated by the school they are to attend.

With each continuing publication, the *Columbia Undergraduate Law Review* strives to foster intellectual debate and discussion of legal issues, especially among undergraduates. We hope that you enjoy reading our journal.

Sincerely,
Lucas B. Drill
Executive Editor, Print

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 necessary 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 members to explore the fullest extent of their ideas in writing.

iii) Encourage submissions 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 submissions 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.

Please send inquiries to culreboard@columbia.edu and visit our website at www.culawreview.org.

"There is No Medicine That Can Cure This": The Right to Housing in France and South Africa

Ryan Burgess | The University of Chicago

Edited By: Caroline Zupan, Erin Bronner, Max Kwass-Mason, Kaleigh McCormick

Abstract

This paper examines the right to housing as presented in the legal regimes of France and South Africa. It examines the different routes by which the right to housing is codified or established and the extent to which the right is truly actionable in the lived experience of the denizens of their respective countries. The primary claim is that, while in theory, residents of both France and South Africa have a right to housing that is both provided for by the respective legal regimes and judiciable, many individuals are excluded from access to this right. This includes such groups as immigrants (lawful permanent residents as well as naturalized citizens), people of color, and other marginalized groups, with respect to the different political histories of the countries under consideration. This reveals that both France and South Africa have failed to meet the standards set for them by international law, as well as under their own domestic legislatures and/or courts. Both countries have failed to provide housing and enable a route towards stable, actualized housing, *i.e.*, the actualization of this right via legal enforcement for their denizens. Those who lack housing in both countries often live in degrading, dehumanizing conditions, which in itself constitutes an unlawful affront to the inherent dignity of the human person is correlated with myriad detrimental effects on the individual.

I. Scope and Methodology of the Comparison[1]

In this essay, I focus on the concept of an actionable right to housing, which is provided – in theory, at least – by both France and South Africa. In particular, I will analyze the factors that led to the promulgation of such a right as well as the system meant to benefit claimants. In addition, the jurisprudence, case law, and subsequent legislative developments concerning the right to housing are examined *vis-à-vis* the empirical outcomes of its promulgation, *i.e.*, whether or not the promulgation of such a right has been an effective policy prescription.

My central claim is that neither France nor South Africa have met the standards they have set for themselves in declaring denizens to have an actionable right to housing. Furthermore, I argue that this is not necessarily due to a lack of available resources and that this failure is intimately connected to the fact that those in both countries who are most likely to demand that the state meet their established right to housing are precisely those who are least likely to have their entitlements acknowledged under the law.

Prior to analysis, the notions of "a right to housing" and "decent housing" must be defined. General Comment Four to the International Covenant on Economic, Social, and Cultural Rights (ICESCR), signed and ratified by both France and South Africa, states that:

> The right to housing should not be interpreted in a narrow or restrictive sense which equates it with [...] shelter provided by merely having a roof over one's head or [which] views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. [... This] must be read as referring not just to housing but to adequate housing.[2]

This concept of "adequate housing" is clarified in Chapter IV(B)(1) of "The Habitat Agenda," a document created by the Second UN Conference on Human Settlements (Habitat II), as encompassing such factors as adequate space, security, structural stability, physical security, basic infrastructure, security of tenure, heating, cooling, and ventilation.[3] South Africa's conception of adequate housing is modeled upon this international agreement.[4] The European Committee of Social Rights, and France by proxy, similarly define adequate housing as:

> A dwelling which is safe from a sanitary and health point of view, that is, [a dwelling which] possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities and electricity; is structurally secure; not overcrowded; and with secure tenure supported by the law.[5]

There are a number of limitations regarding this analysis. Courts do not play the same role in France as they do in South Africa. France is a civil law jurisdiction, whereas South Africa employs a 'hybrid' legal system that weaves together Roman-Dutch civil law, English common law, and African customary law. France is party to European law, whereas South Africa is a member of the African Union. However, the idea I advance – that the successful implementation of an actionable right to housing has not been universalized in either country because both states estrange the very populations that are in greatest need of accessing this right – gains in conceptual strength if it is found to hold in two countries with dissimilar legal institutions, legal histories, financial capabilities, and modes of political organization.

II. Analysis: History and Status of the Right to Housing in France

In official government documents, the recognition of a right to housing in France first appears in the Quillot Act in 1982.[6] [7] This piece of legislation was not a statute guaranteeing accommodation to all who needed it. Rather, this law was the first declaration of regulations concerning private tenancy law in the Fifth Republic. It was a symbolic piece of legislation regarding the right to housing, and the mere inclusion of language referring to housing as a "fundamental right" did little to affect substantive change that would encourage the realization of this purported right.[8]

The Quillot Act was abrogated by the passage of the Méhaignerie Act at the behest of the conservative government that came into power in 1986.[9] While the primary purpose of the latter statute was to abolish the regime of rent control, it also removed the language that referred to housing as a right of the French people.[10] The Méhaignerie Act was itself replaced in 1989 by the Mermaz Act during Mitterrand's second term as President of the French Republic.[11] The Mermaz Act, which has remained in place – though amended slightly in 1994 and 1998 – uses the language of §7 of the Preamble to the French Constitution of 1946, which established the Fourth Republic, in asserting that "the right to housing (*logement*) is a fundamental right; it is to be exercised within the framework of the laws that govern it."[12]

The Mermaz Act was followed by the Besson Act of May 31 1990, which opened with the exposition that "guaranteeing the right to housing is a duty of solidarity incumbent upon the whole nation."[13] The Mermaz Act mandated that individual *départements* provide housing for the poorest members of society, guided by *département*-specific plans funded through a Solidarity Fund for Housing (*Fonds de solidarité pour le logement, i.e., FSL*). In so doing, this law created a vehicle to provide housing for the most

vulnerable members of society.[14] In May of the following year, the *Conseil constitutionnel* declared that "the housing of disadvantaged persons answers [meets, responds to] a demand of national interest."[15] As with the Quillot Act, however, the mention of a right to housing was only in the preamble of the document codifying this act, and its inclusion in the *Conseil's* decision did little to affect concrete policy change.

This state of affairs began to improve in 1995 with the explicit recognition by the *Conseil constitutionnel* that "the possibility for each person to have decent housing is an object [objective] of constitutional value."[16] In this decision, the *Conseil* relied upon the inclusion of the Preamble of the Constitution of 1946 (per the 1971 decision n° 71-44 DC) in the so-called "Constitutional block," to the effect that "safeguarding […] the dignity of [each] person from all forms of degradation is an object of constitutional value;" insofar that the lack of decent housing constitutes a form of degradation, and is an obstacle to proper human development, it follows that the state must be concerned with the provision of decent housing to all its denizens.[17]

As a result, the state was given the end of universal housing provision as an objective in accord with constitutional values. This decision of the *Conseil constitutionnel* did not, however, provide for the establishment of an enforceable right to housing. While the Government had a duty to "provide assistance to those who [met] the statutory criteria," it had no obligation to provide permanent housing to the qualified applicants who demanded it.[18] Moreover, denizens who met the necessary criteria could not rely on the courts for the enforcement of this right. Per the Besson Act, the state had an 'obligation of effort' (*obligation de moyen*), but this obligation was limited in scope to the indigent, and the very nature of this obligation prevented citizens from seeking judicial redress.[19]

If the state could demonstrate that it had made a reasonable effort to house a given individual, even if these efforts failed, then

the state was discharged from its obligations under the law. Along similar lines, a 1995 ruling of the *Conseil constitutionnel* established that:

> It is incumbent upon both the legislator and the Government to determine, in conformity with their respective powers [competencies], the ways in which this constitutional objective may be achieved; that to this end the legislator may modify, amend or repeal previously-promulgated [enacted] statutes [...].[20]

This gives no incentive to the citizen to address what they may perceive as a failure on behalf of the state to address an objective, supposedly of constitutional importance, directly pertaining to their supposed right to adequate housing.

The notion that denizens should have a direct avenue for redress via the courts first appeared in French civil society in 2002. In the context of increasing public concern regarding homelessness and rising housing prices, the High Committee on Housing for the Disadvantaged (*Haut Comité pour le Logement des Personnes Défavorisées, HCLPD*), a governmental organization that issues yearly reports on best housing practices for the most disadvantaged members of society, issued a report entitled "Towards an Enforceable Right to Housing." This report proposed replacing the state's 'best effort' obligation (*obligation de moyen*) under the Besson Act with a results-based or performance obligation (*obligation de résultat*), on the basis of which the state could be held responsible for failing to meet individual denizens' rights to decent housing by means of the judiciary.[21]

The following years brought increasing acceptance of an enforceable right to housing in French politics and society. In 2004, Prime Minister Jean-Pierre Raffarin publicly called for the implementation of an enforceable, judiciable right to housing, *i.e.*, *un*

droit au logement opposable.[22] Later that year, the French Economic, Social and Environmental Council (*Conseil Économique Social et Environnemental*), a "constitutional consultative assembly,"[23] recommended that such a right be promulgated by the legislature.[24]

The 11th report of the *HCLPD* declared in 2005 that, *vis-à-vis* the purported entitlements established by the Besson Act, "the right to housing is stalled, and will remain so until an effective shield has been raised against exclusion […]. Enforceability is that shield, and it is important to implement it as soon as possible."[25] However, in 2002, the *Conseil d'Etat* had established the status of housing to be an "objective of constitutional value" – *i.e.*, that it was neither a fundamental right nor a fundamental freedom – and thus failed to render this objective justiciable in the absence of explicit legislation to the contrary.[26] While under the current law, the state was obligated to devise and execute a comprehensive housing policy for the purposes of meeting this objective, insofar as the law did not allow denizens to make positive claims against the state to enforce their right to housing, they had no standing against the Government to realize their purported right to adequate housing. In other words, the *Conseil d'Etat* had disallowed the possibility "for an individual to claim a service which is not [positively or definitively] established by the law."[27]

The concerns of the High Committee on Housing for the Disadvantaged, however, gained in visibility and influence over the ensuing years. The European Committee of Social Rights (ECSR) ruled on no less than two occasions that the Government of France was in violation of provisions of the (Revised) European Social Charter. In the first Collective Complaint, *International Movement ATD Fourth World v. France* (No. 33/2006), the plaintiffs alleged violations of Articles 30 and 31.[28] [29] In the second Collective Complaint, *European Federation of National Organisations* [sic] *Working with the Homeless (FEANTSA) v. France* (No. 39/2006), the plaintiffs requested that the Committee to the following:

> [We] find a violation by France of Article 31 […] on the ground that France does not ensure an effective right to housing for its residents. In particular, [the plaintiffs consider] that the measures in place in France to reduce the number of homeless people are insufficient, that the construction of social housing is also insufficient […, and] that there is discrimination in access to housing with regard to immigrants.[30]

In the both cases, the Committee found France to be in violation of Article 31 of the (Revised) European Social Charter. Additionally, France was found in violation of Article 30 of the Charter in *International Movement ATD Fourth World v. France*.[31] In this latter decision, the European Committee on Social Rights noted that:

> [I]n 2005, the stock of social housing in France was manifestly inadequate. Since then the government has taken a number of steps to improve the situation. However, even if all the planned measures were achieved, that is, if 591,000 new social housing units were built by 2009, there would still be a considerable shortfall compared to the amount of applications made for social housing. […Furthermore,] the allocation procedure [for social housing] does not ensure sufficient fairness and transparency, since social housing is not reserved for the poorest households.[32]

Against this background of a clear shortage of affordable housing and the 2005 *Paris Opéra Hôtel* tragedy, which was declared to be one of Paris's "most painful catastrophes" by then-President Jacques Chiracin because twenty-four immigrants died in a fire in

low-standard housing, the DALO *(Droit Au Logement Opposable)* Act was introduced on the floor of the French National Assembly on September 28th 2005.[33] However, the DALO Act was ultimately rejected by the legislative body during that session.[34] Several other events transpired during this time that motivated the government to implement this legislative proposal, including the creation of a camp of approximately 100 tents in the heart of Paris by the *Enfants du Don Quichotte* [sic], a homelessness advocacy organization.[35] [36] The *Enfants* aimed to create a scandal and raise awareness of the homelessness crisis referred to by the ECSR, which was then sweeping across France. They were successful in their endeavor, as the DALO Act passed unanimously in an emergency session of the legislature in March of 2007.[37] [38]

The DALO Act not only provides a justiciable claim to housing but also enshrines in statutory law "the right to decent, independent housing to all persons legally residing on French territory […] who [are] not able to obtain [it] by their own means and resources."[39] Should one belong to any of the groups specified in the Act, including: (1) the homeless, (2) tenants facing the imminent threat of eviction with no plausible prospect for rehousing, (3) those residing in substandard housing, (4) those with a disability or a disabled dependent, or (5) those who qualify for social housing but have waited for an "abnormally long" period of time for provision of housing, one can contact the Mediation Committee of their *département* of residence.[40] Then, if the committee finds the applicant to meet one or more of the aforementioned criteria, they will be declared a priority case for whom officials are required to provide housing. However, since the provided housing need not be permanent, one criticism levelled against the DALO Act is that it may turn "the right to housing" into "the right to short-term housing."[41]

Regardless, if the departmental committee fails to act upon the case within three months (six months in larger *départements*), the applicant may appeal to an administrative tribunal for relief.[42]

These courts have the ability to order the state to provide housing for the applicant. In addition, the tribunals are required by the DALO statute to levy a fine (paid into a regional fund for social housing) against the state, should they determine that the state has failed in its duty to provide the applicant with housing within the required timeframe.

Furthermore, the responsibility for housing the claimant(s) falls upon the Prefect of the *département,* as opposed to the Mediation Committee with which the appeal is first lodged. The Prefect, however, lacks enforcement powers, which are left in the hands of local authorities. Since these include the issuance of building permits and the allocation of social housing units, a claimant may not be placed in a permanent home even if a court order to that general effect has been issued, *i.e.* they may find themselves placed in temporary shelter even after a successful claim against their *département*.[43]

The DALO Act was first upheld in court by a tribunal in Paris in May of 2008.[44] In this decision, the plaintiff's application for housing to her respective Mediation Committee had been denied on the grounds that it was not urgent, as she already had a place to live. However, her housing was only temporary because she would have been forced to leave her place of residence after 21 months' time, and was, therefore, facing homelessness in the imminent future. On this basis, the plaintiff, Namizata Fofana, appealed the committee's decision, which the tribunal later overturned on the basis of the *DALO Act*.

In 2015, the European Court of Human Rights (ECtHR) found France in violation of Article 6, §1 of the European Convention of Human Rights (ECHR), to which France is a party, which guarantees the right to a fair trial.[45] This decision was the result of a case, *Tchokontio Happi v. France* (2015) in which the plaintiff, Ms. Happi, a Cameroonian national who had been living in France for over a decade, was found to be living in indecent conditions. On this

basis, the Paris Mediation Commission marked her case as a priority for rehousing. Six months later, rehousing had not occurred, and the plaintiff filed a complaint with the Paris Administrative Court under the DALO Act to demand the actualization of her right to housing under French statutory law. On December 28, 2010, the Court ruled in Ms. Happi's favor. The Court's ruling instructed the Prefect of *Île-de-France* to re-house Ms. Happi and her family with the added penalty of a fine levelled against the *département*, should the authorities fail to comply by February 1, 2011.

The plaintiff had not been rehoused over three and a half years later when the ECtHR issued its ruling. Per the Court's prior decisions, the state could not plead lack of funds as a valid reason for failing to meet its obligations. Furthermore, given the years-long delay between the Administrative Court's decision and the rehousing (or lack thereof) of the plaintiff, the ECtHR ruled that French authorities had drained Article 6 §1 of all value or practical import. This sufficed to constitute a violation of that provision of the ECHR. Ms. Happi, however, was not the only one to face such a predicament; many others have failed to be rehoused despite the French State's obligation under the law.[46] Therefore, even since the passage of the DALO Act, the French state has failed to meet its own requirements concerning the right to housing.

III. Analysis: History and Status of the Right to Housing in South Africa

The history of housing in South Africa cannot be separated from the legacy of apartheid, a systematic policy of racial discrimination that lasted from 1948 to 1994. One of the many legacies of segregationist administration against people of color, the housing crisis facing contemporary South African society can be directly traced to the policies pursued by the government

of the National Party.[47] The South African government designed and enforced policies which included zoning restrictions based on segregation of denizens by means of arbitrarily-defined racial categories. Although reforms have been undertaken to reverse the policies enacted by the National Party, non-white groups continue to be disfavored as a result of this history of *de jure* segregation. Indeed, in 1996, of the 1,049,686 households living in low-standard, informal settlements, 1,013,343 were "Black [African]," and 31,103 were "Coloured;" only 1,083 were "Indian," and just 912 were "White."[48]

Unlike the French Constitution, the South African Constitution, adopted in 1996, explicitly enshrines a right to housing. This Constitution was meant to form the basis of the establishment of an entirely new social, legal, and political order. As such, those drafting the document considered it essential that positive rights should be explicitly extended to all segments of the population, in a sharp break from the racialized policies of the apartheid regime.[49] Section 26 of the Constitution states that:

> (1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve progressive realization of this right.
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.[50]

While the inclusion of positive rights in the South African Constitution is modelled after the ICESCR, the phrasing of §26(1) of the South African Constitution differs from its international

analogue. The ICESCR states that "[t]he States Parties to the present Covenant recognize the right of everyone to […] adequate food, clothing and housing, and to the continuous improvement of living conditions."[51] The South African Constitution, on the other hand, enshrines the "right to […] access to adequate housing," which includes far more than adequate housing itself. In order to have access to housing, one must have access to land, sanitation, public infrastructure, etc.[52] Therefore, the wording of the right to housing in the South African Constitution extends far beyond the scope of the international agreement upon which it was originally modelled.

Furthermore, the socioeconomic rights enumerated in the South African Constitution are justiciable.[53] [54] This can be seen through the landmark case regarding the right to housing in South Africa: *Republic of South Africa v. Grootboom* (2000).[55] In this case, the Constitutional Court of South Africa "ventured into the question of when the right [to housing could] be positively enforced."[56] The plaintiffs were members of a group of approximately 900 people, Irene Grootboom among them, who were living in appalling conditions on public land in Wallacedene and waiting to be allocated social housing by the government. In their desperation, they moved onto a nearby parcel of private land which, ironically, had been slated to be developed into affordable rental housing sometime in the future.[57]

The members of this group were subsequently evicted in a manner described as reminiscent of the forced evictions which occurred during the period of Grand apartheid.[58] Following their eviction, the constituents of this group could not return to their former place of accommodation, since that land had been subsequently occupied by others in similar conditions of destitution. The members of this group were now homeless. While their names languished on the waitlist for government-built housing, "they would have simply nowhere they could lawfully live."[59] Thus, they decided to sue the Government for its failure to realize their right to housing that was

clearly stated in the Constitution.

The Court considered a number of factors in making its judgment. First, it noted that individual rights, including the right to housing, cannot be considered in isolation. In its proclamation that "[s]ocio-economic rights must all be read together in the setting of the Constitution as a whole," the Constitutional Court established a principle of the interdependency of rights. By this means, actors would be held to fulfill a right – for example, the right to housing – not just if they managed to put a roof over someone's head, but rather if and only if they provided the attendant necessities for this right to be discharged, such as sanitation and security of tenure.[60] [61] Fulfillment of a right therefore requires meeting the conditions laid out by other substantive rights such that the first right may be discharged.

Furthermore, in South African jurisprudence, rights must be understood, interpreted, and applied in light of the relevant social and historical context. The Constitutional Court, in *Grootboom*, quoted the decision of *Soobramoney v. Minister of Health (KwaZulu-Natal)*, in which it was recognized that

> [W]e live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. […] These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.[62]

On the grounds established in *Grootboom,* the Court found that the state has a positive obligation "to meet the needs of

those living in extreme […] poverty, homelessness or intolerable housing."[63] The threshold for determining the level of obligation, however, is not uniform. It was determined to vary according to the individual's situation with regard to such factors as income, land tenure, and (un)employment.[64] To further complicate the situation, individuals in different situations may require different forms of assistance. On this basis, the Court determined that the core question of value in the *Grootboom* decision was "whether the measures taken by the state to realise [*sic*] the right afforded by section 26 [were] reasonable."[65]

Importantly, the Court rejected the "minimum core" concept by which the state would be required to provide a minimum level of housing *vis-à-vis* the given rights and entitlements in order to meet the requirements assigned to it by the Constitution.[66] In other words, noting that §26(2) imposed a qualified – as opposed to an absolute – duty upon the state, the Court expanded upon the three elements that functioned to determine the extent of the state's responsibility: "(an) obligation to 'take reasonable legislative and other measures'; (b) an obligation 'to achieve the progressive realisation [*sic*]' of the right; and (c) [to act] 'within available resources.'"[67]

The first measure requires the state to implement a comprehensive housing program, coordinated between the different spheres of government, and equipped with appropriate levels of human and financial resources.[68] This program must have the ability to fulfill the right to housing. In turn, this requires continued intervention on behalf of the state in recognition of the socioeconomic and historical context with regard to which this right was originally promulgated. Furthermore, this task mandates that the state act in accordance with the basic concept of dignity underlying the South African Constitution.[69]

The second criterion mandates "that accessibility [to housing] be progressively facilitated;" insofar as the goal of providing housing to all denizens simply cannot be met immediately, the government

has a duty to work toward this end over time, with concrete evidence of its success being evident upon each instance of evaluation.[70] The third and final criterion recognizes that the provision of social services is dependent upon and constrained by the resources available to the state. The Court therefore requires no more than that the state act to achieve what is reasonable with its given resources.[71] The Constitutional Court ultimately conceded that, although:

> Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand [, …] section 26 does oblige the state to devise and implement a coherent, coordinated programme [*sic*] designed to meet its section 26 obligations. […] This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.[72]

Furthermore, *Grootboom* established that the state can be held accountable by the courts for failing to fulfill its positive obligations – even in situations of constrained resources, financial or otherwise.

Other cases have come before the court system in the years following *Grootboom*. In 2005, the Constitutional Court ruled in *President of the Republic of South Africa v. Modderklip Boerdery* that a group of people occupying private land out of desperation could not be evicted until they had been provided alternative housing by the relevant government authorities.[73] Furthermore, in *City of Johannesburg v. Rand Properties* (2007), the High Court in Johannesburg utilized *Grootboom* as precedent, declaring that Johannesburg's housing program was not in compliance with its obligations under constitutional or statutory law.[74] [75] The presiding judge noted the "importance of security of tenure in our new constitutional democracy," and concluded that "the lack of alternative adequate accommodation provided by the [city

…] has given birth to the Respondents' predicament to use their own resources to find the accommodation which they presently occupy. The applicant now seeks to take this away from them."[76] The city of Johannesburg was thence ordered to cease and desist from the eviction proceedings against the Respondents "pending the implementation of [this] programme [*sic*][, … or] alternatively, until such time as suitable […] accommodation [is] provided" to them by the authorities ostensibly responsible for housing in this jurisdiction.[77] The proclamation of the Court in *Jaftha v. Schoeman*, however, perhaps best encapsulates the enduring importance of *Grootboom* regarding Section 26 in South African jurisprudence:

> Section 26 […] emphasizes the importance of adequate housing [….] The indignity suffered as a result of evictions from homes, forced removals and the relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the state must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people to be removed unless it can be justified.[78]

IV. Analysis: Criticism of France and South Africa

In South Africa, while the Emergency Housing Programme [*sic*] was launched in 2004 in response to the *Grootboom* order, and additional programs have been adopted to upgrade the existing informal settlements,[79] the situation for many South Africans remains bleak.[80] South Africa faces an acute housing crisis in which millions of people either lack access to housing or live without necessities like running water or electricity.[81] Even though government spending on public housing construction has increased markedly in recent years, the level of expenditure is still insufficient to meet its constitutional

obligations.[82] Moreover, the progress that has occurred in widening housing accessibility to bring about an integrated society has largely been limited to those who live in urban areas with higher levels of investment, disfavoring rural, poor populations.[83]

In *Grootboom*, the Constitutional Court neither introduced a mechanism of governmental accountability, nor did it promulgate a standard regarding the set of conditions that satisfy the claim of the right to access to housing. While socioeconomic rights are justiciable under South African law, individuals are not entitled to fulfillment of these rights should they demand them.[84] Regarding the *Grootboom* decision, Sunstein stated that "[w]hat the South African Constitutional Court has […] done is to adopt an administrative law model of socioeconomic rights."[85] In other words, the Court has merely required the South African government to develop a program to fulfill the rights assigned to denizens under the South African constitution, as opposed to specifying any specifics of this policy program. Administrative law, being the law that governs the operations of government bodies, lacks the jurisdiction or competence to adjudicate substantive rights claims. Thus, Sunstein claims that the Court has created a legal framework intended to realize the right to housing without the necessary abilities to actualize this right.

Along a similar vein of reasoning, David Bilchitz argues that the notion of "reasonable effort" adopted by the court in *Grootboom,* and applied to other cases concerning adjudication of socioeconomic rights claims, simply cannot provide the necessary content to make the decisions which are demanded by the court system, for "it is questionable how [features of state policy] can be derived from the concept of reasonableness *itself*."[86] This is because the nature of the "reasonableness" criterion requires a minimum standard against which one may evaluate the object of investigation. It follows that, contrary to the reasoning of the Constitutional Court in *Grootboom* and other similar cases, the very notion of progressive realization, if it is to be coherent with respect to the "reasonableness" standard,

requires the inclusion of a baseline. This baseline must specify the minimum levels of provision to satisfy the basic discharge of the duties associated with a given right.[87] Bilchitz proposes that the Constitutional Court first examine the content of the right(s) under dispute in a given case, and then decide whether or not the state's policies have failed at securing progressive realization of this right. Wertman goes further in her criticism, stating that "the Court's unwillingness to create this baseline lets the government off the hook."[88] She suggests that the Court's refusal to endorse specific actions to address the South African housing crisis has contributed to the current state of affairs, in which millions of South Africans live in squalor and destitution with little hope of improvement.[89]

In particular, this crisis is centered around the historically-marginalized "Black" population.[90] The legacy of forced evictions and removals, maldistribution of land and property rights, and substandard construction of housing during the apartheid era remains to this day.[91] As of 2007, "Black" households were 28 times less likely than "White" households to have access to formal housing.[92] While the equity gap for access to services, including housing, electricity, sanitation, and running water has narrowed since the ANC came into power at the midpoint of the 1990s, the disparity is still unacceptably high. Access to housing, and life outcomes strongly correlated with it, largely remain determined by race.[93] The legacies of the 1913 Land Act remain in force. This law, which marked the beginning of a legal regime of explicit racial segregation by ordering Black South Africans to live in so-called "Bantustans," *etc*., has evolved into the current geographical segregation of South Africans. The homes and livelihoods of South Africans are, even today, segregated by "color." This "separateness" is affiliated with corresponding segregation in areas of demographic health and life achievement; being born in the geographic boundaries of a former "Bantustan" is sufficient to statistically determine the life course of the average South African individual. Such an individual is more

likely to be impoverished, less likely to have a job, and less likely to own (or even have access to) a home than a South African national born in a historically "White" neighborhood.

Given the sheer size of the housing shortage in South Africa and the Court's insistence that its own decisions take social, economic, and historical context into account, by failing to acknowledge the substandard conditions that characterize a substantial percentage of the present housing stock, the South African state has failed at operationalizing the right to housing as explicitly stated in the Constitution. Jacoob J., in writing the *Grootboom* decision, noted that "we must also remember that the respondents [*i.e.*, Irene Grootboom, *et al*.] are not alone in their desperation; hundreds of thousands (possibly millions) of South Africans live in appalling conditions throughout [the] country."[94] The situation has not changed substantially since then; the backlog for affordable housing has even increased since *Grootboom*.[95] It has been estimated that this figure, 2.1 million units as of 2014, increases by approximately 200,000 each year due to the rapid informal urbanization affecting South Africa's cities.[96]

The main cause of the South African housing crisis is the government's failure to build enough housing to keep up with the demand.[97] This is due to a number of factors, one of which is the government's preoccupation with building low-density homes, an approach that decreases the amount of housing that can be built on available land with available funds. The process of allocating affordable housing is both inefficient and rife with corruption.[98] NIMBYism - *i.e.,* localized opposition to development[99] - and racial prejudice are common mobilizing factors behind opposition to housing projects.[100] [101] [102] The Preamble to the Constitution of 1996 states that "[w]e, the people of South Africa, recognize the injustices of the past [, … and pledge to] heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights."[103] As long as South Africa remains a

"grossly unequal society in which the (overwhelmingly Black) poor majority population is disproportionately denied adequate housing opportunities and basic amenities," the aspirations of the Preamble cannot and will not be met.[104]

As in South Africa, there is a long history of residential segregation in France. This is tied to the systemic exclusion of disenfranchised groups, namely migrants and their families, from quality housing.[105] There is increasing worry that "the poorest part of the population, particularly some immigrants and their descendants, are becoming increasingly concentrated in public housing suburbs."[106] These segregated complexes of public housing (*cités*) in outlying, isolated suburban areas (*banlieues*) have been referred to as "the other France" in the literature.[107] Diversity is not an official goal of public policy in France – a legacy of the ideology of Republicanism – and social integration is largely dependent upon renunciation of one's ethnic identity and assimilation into French culture.[108] [109]

France also appears to fail in its obligation to provide housing to its population, even with the legal protections afforded by the DALO. As of 2010, only 30,000 of the 144,000 households whose claims had been approved by the mediation committees had been rehoused.[110] Furthermore, it had been estimated that the state would need to finance the construction of half a million new units of affordable housing every year for the effective implementation of the law, given the expected volume of applications.[111] The French state has consistently delivered affordable housing units below this threshold, with a quarter of social housing occupants being assigned to housing each year.[112] [113] [114]

Yet, the number of applications was far below the expected volume; ten months after the DALO entered into force, only 50,000 applications had been lodged, as opposed to the expected 80,000-100,000.[115] This suggests that the target population, *i.e.* those living in appalling conditions (the homeless, the impoverished,

etc.), experience difficulty with availing themselves of the formal protection afforded by the law. This should come as no surprise, as the procedure for lodging an appeal for the relief provided by the *DALO* is complex, requiring resources often unavailable to those who are impoverished, homeless or living in substandard housing.[116]

Furthermore, additional restrictions for application of the DALO Act are based on immigration status.[117] Those who lack either (1) citizenship, (2) status as a lawful permanent resident, or (3) a valid temporary residence permit are barred from applying for protection under this law.[118] The ability of the French people to meet these conditions has been imperiled by an increasingly restrictive naturalization regime combined with progressively draconian policies regarding immigration and asylum.[119] Furthermore, migration status is strongly correlated with homelessness or housing in substandard housing stock; much of the target population living in substandard housing (or without any housing) cannot appeal because they are excluded by virtue of their status of not being (at least) lawful permanent immigrants in the Republic of France.[120] In addition, immigrants and ethnic minorities (even if they are French nationals) often experience longer wait times for social housing. Even when they are eventually housed, their accommodations are, by and large, of lesser quality, *i.e.* with fewer amenities, in a less valuable location, older and smaller, etc.[121]

A universalized right to housing is crucial because access to housing is frequently denied to immigrants and French denizens of ethnic minority. This is exemplified by the fact that, while foreigners make up only 13.54% of the French population, they compose one-half of *DALO* claimants.[122] [123] As iterated before, however, this very population is least likely to be able to access the protection of the law. Immigrants and their families are more likely to be homeless or live in conditions of squalor, yet a substantial percentage of this population is unable to apply for substantiation of their rights as

afforded under French law.[124] Therefore, *immigrés* are far more likely to live in situations which call for relief under the DALO. The injustice of this discrimination aside, a substantial proportion of this population is unable to apply for this relief because of they lack the standing to do so under conditions set out by the *DALO* law.

V. Conclusion

In this paper, I have outlined the extent to which South Africa and France, respectively, conceive of housing as a right. Although the structure of the two nations' legal systems and legislative organs is different, in relevant cases, however, both nations' courts have ruled against their respective governments on the grounds that they have failed to address the plight of their most desperate residents.

The ICESCR proclaims that "the right of everyone to an adequate standard of living […] include[es the right to] adequate […] housing," and the South African Constitution explicitly states that "[e]veryone has the right to have access to adequate housing." [125] [126] The ICESCR also binds the States Parties to "guarantee that the rights enunciated in the […] Covenant will be exercised without discrimination of any kind as to race, colour [*sic*], […,] national or social origin."[127] The rights enumerated in the ICESCR are, *inter alia*, derived from "the inherent dignity of the human person," without regard to race or status of citizenship.[128] In the jurisprudential literature, personhood is contrasted with citizenship; the former has its roots in personhood *qua* personhood, irrespective of national status, whereas the latter is at its root an exclusionary concept based upon the legal rules governing the notion of citizenship as such.[129] In the realm of European law, the Charter of Fundamental Rights of the European Union (the European Charter), which applies to France, covers the entirety of natural persons; §31 of the (Revised) European Social Charter, to which France is a party, also refers to

"everyone," *i.e.*, every one person, *i.e.*, every natural person without a view to their national origin.[130]

Therefore, both France and South Africa fail to satisfy the demands placed upon the respective state apparatuses by these documents. The differences between the housing regimes of the two countries *vis-à-vis* social factors, however, must be noted. The DALO explicitly places restrictions on citizenship, whereas the South African Bill of Rights does not. Contrary to South Africa, France does allow denizens to demand housing by means of the executive organs of the state apparatus.[131] Notably, neither nation is obligated to place applicants in long-term housing. Regardless of these differences, the legal regimes developed in both France and South Africa to provide for the realization of a right to housing have, for various reasons, failed to actualize this purported right for the much of their respective eligible populations.

There is a clear gap between the law and the reality. Although neither state could be expected to solve its respective housing problems overnight, both France and South Africa have failed to implement a legal regime that truly provides for "progressive realization" of the right to housing. Therefore, on a normative level, both countries have shirked their commitments under law.

In both France and South Africa, thousands of people are homeless or are living in destitute conditions.[132] [133] Modern states "face the positive challenge of providing […] services for poor people […,] of positively discriminating on a territorial, group or 'rights' basis in favour of the poor, […] the deprived, the coloured [*sic*], the homeless, and the social casualties of […] society."[134] Neither France nor South Africa succeeds in this endeavor: both polities ostensibly provide a right to housing, yet fail to provide it for their most vulnerable denizens. This fact, and this fact alone, constitutes a violation of the laws to which these countries have bound themselves. Moreover, it is a state of affairs in which, to paraphrase the Preamble

of the UDHR, disregard and contempt for basic human rights has resulted in the establishment of conditions that should outrage the conscience of humankind.[135] As the *Grootboom* proceedings were taking place at the Constitutional Court in Johannesburg, one resident of Wallacedene glumly portrayed the possibility of any improvement in their standard of living:

> Because of the filth here people are constantly sick. And government thinks it is all just AIDS, but it is also due to our living conditions… all the stench and squalor [*sic*] that is here… and there is no medicine that can cure this.[136]

For these two countries to fail to remedy the problem of inaccessible housing through inaction and maintenance of the status quo is both a dereliction of duty to the law as well as a failure to fulfill their obligation to recognize the dignity of human beings.

[1] Disclaimer regarding racial terminology. Although the South African Constitution of 1996 collectively refers to the historically-disenfranchised groups of the population – "Africans," "Coloureds," and "Indians" – as "Black," for historical clarity, this essay utilizes the Apartheid-era racial categories of "Black" [African], "Coloured," and "Indian." That being said, this methodology of racial categorization is categorically rejected by the author as ethically unsound and scientifically untenable.

[2] Office of the High Commissioner for Human Rights, "CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)," §7.

[3] "The Habitat Agenda: Chapter IV: B. Adequate Shelter for All (1) Introduction," §60.

[4] "The South Africa Housing Programme," (www.un.org/ga/Istanbul+5/1-southafrica.doc).

[5] European Committee of Social Rights (ECSR), "Decision on the Merits: *European Federation of National Organisations working with the Homeless (FEANTSA) v. France,* Collective Complaint No. 39/2006," §76.

[6] *Loi n° 82-526 du 22 juin 1982 relative aux droits et obligations des locataires et des bailleurs.*

[7] Lévy-Vroelant, "The Right to Housing in France: Still a Long Way to Go from Intention to Implementation," 92.

[8] Boccadoro, et al., EUI Tenancy Law Project Final Report, "France," 2.

[9] *Loi n° 86-1290 du 23 décembre 1986 tendant à favoriser l'investissement locatif, l'accession à la propriété de logements sociaux et le développement de l'offre foncière.*

[10] Lonegrass, "A Second Chance for Innovation – Foreign Inspiration for the Revised Uniform Residential Landlord and Tenant Act," 919.

[11] *Loi n° 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986.* Translation mine.

[12] « Le droit au logement est un droit fondamental ; il s'exerce dans le cadre des lois qui le régissent, » Article 1 du *loi n° 89-482 du 6 juillet 1989*. Translation mine. *Cf.* §7 of the *Préambule de la Constitution du 27 octobre 1946* : « Le droit de grève s'exerce dans le cadre des lois qui le réglementent, » *i.e.*, "The right to strike shall be exercised within the framework of the laws governing it." Translation provided by the *Conseil constitutionnel*.

[13] « Garantir le droit au logement constitue un devoir de solidarité pour l'ensemble de la nation, » Article 1 du *loi n° 90-449 du 31 mai 1990 visant à la mise en œuvre du droit au logement.* Translation mine.

[14] *Fondation Abbé Pierre*, "The *Besson* Law Concerning the Right to Housing."

[15] « […] le logement des personnes défavorisées qui répond à une exigence

d'intérêt national […,] » §13, Décision n° 90-274 DC du 29 mai 1990 du *Conseil constitutionnel*. Translation mine.

[16] « […] la possibilité pour toute personne de disposer d'un logement décent est un objectif de valeur constitutionnelle […,] » §7, Décision n° 94-359 DC du janvier 1995 du *Conseil constitutionnel*. Translation mine.

[17] Décision n° 94-359 DC du janvier 1995 du *Conseil constitutionnel* §6. Translation mine.

[18] Loison, "The Implementation of an Enforceable Right to Housing in France," 186.

[19] Houard, et al., "The (Enforceable) Right to Housing: A Paradoxical French Passion," 204.

[20] « […] qu'il incombe tant au législateur qu'au Gouvernement de déterminer, conformément à leurs compétences respectives, les modalités de mise en œuvre de cet objectif à valeur constitionnel ; que le législateur peut à cette fin modifier, compléter ou abroger des dispositions législatives antérieurement promulguées […], » §8, Décision n° 94-359 DC du janvier 1995 du *Conseil constitutionnel*. Translation mine.

[21] *Haut Comité pour le Logement des Personnes Défavorisées* (*HCLPD*), « Vers un droit au logement opposable : 8ème rapport du Haut comité pour le logement des personnes défavorisées, » October 2002.

[22] Houard, et al., "The (Enforceable) Right to Housing: A Paradoxical French Passion," 205.

[23] https://www.lecese.fr/en

[24] Houard, et al., "The (Enforceable) Right to Housing: A Paradoxical French Passion," 187.

[25] *Haut Comité pour le Logement des Personnes Défavorisées* (*HCLPD*), « Face à la crise : une obligation de résultat : 11ème rapport du Haut comité pour le logement des personnes défavorisées, » décembre 2005.

[26] *Conseil d'Etat (CE)*, [Juge des référés : M. Boyon], ord., *Association de réinsertion social du Limousin et autres*, n° 245697.

[27] Gay, "The Right to Housing in France and South Africa," 127.

[28] European Committee of Social Rights (ESCR), "Decision on the Merits: *International Movement ATD Fourth World v. France,* Collective Complaint No. 33/2006, §17.

[29] The 30th Article of the (Revised) European Social Charter proclaims that "[everyone] has the right to protection against poverty and social exclusion," and the 31st provides that "[everyone] has a right to housing;" *cf.*, European Social Charter, Revised, Article 30.

[30] European Committee of Social Rights (ECSR), "Decision on the Merits:

European Federation of National Organisations working with the Homeless (FEANTSA) v. France, Collective Complaint No. 39/2006," §17.

[31] European Committee of Social Rights (ECSR), "Assessment of the Follow-Up: *European Federation of Organisations working with the Homeless (FEANTSA) v. France*, Collective Complaint N° 39/2006."

[32] European Committee of Social Rights, "Resolution CM/ResChS(2008)7: Collective Complaint N° 33/2006 by the International Movement ATD Fourth World against France."

[33] BBC, "Paris Hotel Blaze Leaves 20 Dead."

[34] « Proposition de loi instituant un droit au logement opposable, » N° 2541, 28 septembre 2005.

[35] Loison, "The Implementation of an Enforceable Right to Housing in France," 188.

[36]Houard, et al., "The (Enforceable) Right to Housing: A Paradoxical French Passion," 208.

[37] *Id.*, 209.

[38] *Loi n° 2007-290 du 5 mars 2007 instituant le droit au logement opposable et portant diverses mesures en faveur de la cohésion sociale*.

[39] Humbert, et al., *Social Exclusion : Perspectives from France and Japan*, 140.

[40] Brouant, "Implementation of the Enforceable Right to Housing (DALO) Confronted by the French Regions," 279.

[41] Loison, et al., "Increasing the Right to Housing: Implementing the Right to Housing in England and France," 88.

[42] Houard, et al., "The (Enforceable) Right to Housing: A Paradoxical French Passion," 210.

[43] *Ibid.*

[44] Olds, "The Role of Courts in Making the Right to Housing a Reality Throughout Europe: Lessons from France and the Netherlands," 170.

[45] European Court of Human Rights (*Cour européenne des droits de l'homme*), *Tchokontio Happi v. France*, ECHR 116 (2015).

[46] Council of Europe, "Living in Dignity in the 21st Century: Poverty and Inequality in Societies of Human Rights," 74.

[47] Wolf, "Participation in the Right of Access to Adequate Housing," 271.

[48] Statistics South Africa (Stats SA), "Census 2001: Primary Tables South Africa, Census '96 and 2001 Compared," Report No. 03-02-04, 79.

[49] Gay, "The Right to Housing in France and South Africa," 121.

[50] Constitutional Assembly, "The Constitution of the Republic of South Africa," §26.

[51] "International Covenant on Economic, Social and Cultural Rights (ICESCR),"

Article 10, §1.
[52] Chenwi, "Implementation of Housing Rights in South Africa: Approaches and Strategies," 71.
[53] Wolf, "Participation in the Right of Access to Adequate Housing," 280.
[54] Gay, "The Right to Housing in France and South Africa,"122.
[55] *Government of the Republic of South Africa and Others v. Grootboom and Others,* 2000 (11) BCLR 1169 [CCT 11/00].
[56] Budlender, "Justiciability of the Right to Housing – The South African Experience," 10.
[57] *Government of the Republic of South Africa and Others v. Grootboom and Others,* 2000 (11) BCLR 1169 [CCT 11/00], §§3, 4.
[58] Wertman, "There's No Place Like Home: Access to Housing for All South Africans," 730-1.
[59] Budlender, "Justiciability of the Right to Housing – The South African Experience," 11.
[60] Wolf, "Participation in the Right of Access to Adequate Housing," §§23-4.
[61] Chenwi, "Implementation of Housing Rights in South Africa: Approaches and Strategies," 71.
[62] *Soobramoney v. Minister of Health (KwaZulu Natal),* 1997 (32) BCLR 1696 [CCT 32/97], §8.
[63] *Government of the Republic of South Africa and Others v. Grootboom and Others,* 2000 (11) BCLR 1169 [CCT 11/00], §24.
[64] *Government of the Republic of South Africa and Others v. Grootboom and Others,* 2000 (11) BCLR 1169 [CCT 11/00], §32.
[65] *Government of the Republic of South Africa and Others v. Grootboom and Others,* 2000 (11) BCLR 1169 [CCT 11/00], §33.
[66] Kende, "The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective," 144.
[67] *Government of the Republic of South Africa and Others v. Grootboom and Others,* 2000 (11) BCLR 1169 [CCT 11/00], §38.
[68] *Government of the Republic of South Africa and Others v. Grootboom and Others,* 2000 (11) BCLR 1169 [CCT 11/00], §§39-40.
[69] *Government of the Republic of South Africa and Others v. Grootboom and Others,* 2000 (11) BCLR 1169 [CCT 11/00], §§41-44.
[70] *Id.,* §45.
[71] *Government of the Republic of South Africa and Others v. Grootboom and Others,* 2000 (11) BCLR 1169 [CCT 11/00],, §46.
[72] *Government of the Republic of South Africa and Others v. Grootboom and Others,* 2000 (11) BCLR 1169 [CCT 11/00],, §§95-6.

[73] *President of the Republic of South Africa and Another v. Modderklip Boerdery and Others* 2005 (20) BCLR 586 (CC) [CCT 20/04], §68(3)(c).
[74] *City of Johannesburg v. Rand Properties and Others* 2006 (6) BCLR 728 (W), §§27, 42, 51.
[75] *Id.*, §§66-7.
[76] *City of Johannesburg v. Rand Properties and Others* 2006 (6) BCLR 728 (W), §§30, 60.
[77] *Id.,* "Order," §1.
[78] *Jafta v. Schoeman and Others, Van Rooyen v. Stoltz and Others*, 2005 (2) BCLR 78 (CC) [CCT 74/03], §29.
[79] As per the definition proposed at HABITAT III, informal housing is clustered in settlements where "1) inhabitants have no security of tenure *vis-à-vis* the land or dwellings they inhabit, […] 2) the neighborhoods usually lack, or are cut off from, basic services and city infrastructure and 3) the housing may not comply with current planning and building regulations and is often situated in geographically and environmentally hazardous areas."
[80] Chenwi, "Implementation of Housing Rights in South Africa: Approaches and Strategies," 82-3.
[81] Wertman, "There's No Place Like Home: Access to Housing for All South Africans," 723.
[82] *Id.,* 729.
[83] Nattras, *et al.,* ""Two Nations"? Race and Income Inequality in South Africa Today," 59.
[84] Gay, "The Right to Housing in France and South Africa," 124.
[85] Sunstein, *Designing Democracy: What Constitutions Do,* 234; *Cf.* Kende, 145.
[86] Bilchitz, "Towards a Reasonable Approach to the Minimum Core," 9. Emphasis mine.
[87] *Ibid*.
[88] Wertman, "There's No Place Like Home: Access to Housing for All South Africans," 723.
[89] *Id.,* 746-7.
[90] Napier, "The Housing Problem in South Africa: Ideological Perspectives," 22.
[91] Williams, "The Right to Housing in South Africa: An Evolving Jurisprudence," 820.
[92] Nnadozie, "Access to Basic Services in Post-Apartheid South Africa: What Has Changed? Measuring on a Relative Basis," 98.
[93] Leibbrandt, et al., "Employment and Inequality Outcomes in South Africa," 9, 11, 17.
[94] *Government of the Republic of South Africa and Others v. Grootboom and*

Others, 2000 (11) BCLR 1169 [CCT 11/00], §80; *cf.*, §93.
[95] Nnadozie, "Access to Basic Services in Post-Apartheid South Africa: What Has Changed? Measuring on a Relative Basis,", 90.
[96] The Fuller Centre for Housing, "Draft Report: Housing Delivery in South Africa," 3.
[97] Centre for Affordable Housing Finance in Africa, "South Africa: Housing Supply."
[98] Dugard, et al., "The Right to Housing in South Africa," 31.
[99] *Ibid*.
[100] Williams, "The *Grootboom* Case and the Constitutional Right to Housing: The Politics of Planning in Post-Apartheid South Africa," 230.
[101] "In Search of Land and Housing in the New South Africa: The Case of Ethembalethu," 16.
[102] *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Others* 2001 (19) BCLR 652 (CC) [CCT 55/00], §§10-12.
[103] Constitutional Assembly, "The Constitution of the Republic of South Africa," Preamble.
[104] Clark, "Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government," 3.
[105] Popon, et al., "Social Exclusion of Immigrants in France," 7.
[106] Verdugo, "Public Housing and Residential Segregation of Immigrants in France, 1968-1999," 3.
[107] Williams, "The *Grootboom* Case and the Constitutional Right to Housing: The Politics of Planning in Post-Apartheid South Africa,", 202.
[108] Escafré-Dublet, et al., "Urban Policies on Diversity in Paris, France," 4.
[109] Ware, "Color-blind Racism in France: Bias Against Ethnic Minority Immigrants," 185.
[110] Byrne, et al., "The Right to Housing: An Effective Means for Addressing Homelessness?" 385.
[111] Byrne, et al., "The Right to Housing: An Effective Means for Addressing Homelessness?" 385.
[112] Driant, "Why isn't there enough housing in France?"
[113] Paris Urbanism Agency (*Atelier Parisien d'Urbanisme, APUR*), "Social Housing Statistics in Paris in 2015."
[114] "In Numbers: The Growing French Homeless Crisis."
[115] Loison, et al., "Increasing Access to Housing: Implementing the Right to Housing in England and France," 91.
[116] *Id.,* 92.
[117] In France, the term "immigrant" (*immigré*) is used to refer to members of

ethnic minority populations (even if they are French nationals or have never migrated to France) as well as actual immigrants. Despite its uncommon usage in French political discourse, and the French aversion to notions of ethnic difference, the term "ethnic minority" most accurately reflects the composition of this sphere of contemporary French society.

[118] Lévy-Vroelant, "The Right to Housing in France: Still a Long Way to Go from Intention to Implementation," 88.

[119] *Id.,* 105.

[120] Dietrich-Ragon, "On the Sidelines of French Society: Homelessness among Migrants and their Descendants," §2.

[121] Lévy-Vroelant, "The Right to Housing in France: Still a Long Way to Go from Intention to Implementation," 97.

[122] Olds, "The Role of Courts in Making the Right to Housing a Reality Throughout Europe: Lessons from France and the Netherlands," 177.

[123] Brouant, "Implementation of DALO Confronted by the French Regions, 189.

[124] Edgar, "Policy Measures to Ensure Access to Decent Housing for Migrants and Ethnic Minorities," 19.

[125] "International Covenant on Economic, Social and Cultural Rights (ICESCR)," Article 10, §1.

[126] Constitutional Assembly, "The Constitution of the Republic of South Africa," §26(1).

[127] "International Covenant on Economic, Social and Cultural Rights (ICESCR)," Article 2, §2.

[128] *Id.,* Preamble.

[129] Bosniak, "Persons and Citizens in Constitutional Thought," 9.

[130] McGoldrick, "The Charter and United Nations Human Rights Treaties," 108.

[131] *City of Johannesburg v. Rand Properties and Others* 2006 (6) BCLR 728 (W), §52; *cf.*, *Grootboom,* §95.

[132] Lévy-Vroelant, "The Right to Housing in France: Still a Long Way to Go from Intention to Implementation," 102.

[133] Turok, et al., "Backyard Shacks, Informality and the Urban Housing Crisis in South Africa: Stopgap or Prototype Solution," 384.

[134] Titmuss, "Universalism versus Selection," 43-4.

[135] "Universal Declaration of Human Rights," Preamble.

[136] Williams, "The *Grootboom* Case and the Constitutional Right to Housing: The Politics of Planning in Post-Apartheid South Africa," 224.

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Racially Discriminatory Admissions to New York's Elite Public Schools: Avenues of Litigation and Reform

Quentin Dupouy | University of Chicago

Edited By: Sarah Brody-Bizar, Nicki Franks, Danielle Mikaelian

Abstract

Admission to eight of New York City's most prestigious public schools is based solely on a multiple-choice exam known as the Specialized High School Admissions Test (SHSAT). There is evidence to suggest that the SHSAT admissions process has a strong racially discriminatory effect. Black and Latino students are admitted at respective rates of 3.3 and 5.0 percent in comparison to White and Asian students who are admitted at rates of 28.1 and 31.9 percent. Together, Black and Latino students constitute over 65 percent of New York City's public student body but receive only 10 percent of SHSAT-school offers. The racial disparities are present at every stage of the admissions process, with fewer Black and Latino students choosing to apply, receiving offers, and deciding to enroll. Given that the SHSAT admissions process has a severe racially disparate effect, is not justified by educational necessity, and could be replaced by equally effective, less-discriminatory alternatives, there are legal grounds to bring a federal lawsuit against the NYCDOE and NYSDOE for violating Title VI of the Civil Rights Act of 1964. A federal lawsuit could compel action—including in the state legislature—to end the SHSAT admissions policy and to expand access for Black and Latino students to the specialized high schools. Reforms could also be affected through the political process. Policy-makers and researchers have identified many effective alternatives for identifying high achieving students while also increasing racial diversity.

I. Introduction

New York City's specialized high schools are often referred to as the "gems" of the city's public school system and are commonly recognized as some of the best high schools in the country.[1] The specialized high schools' students have remarkably high scores on the SAT and state standardized tests, as well as near-universal rates of graduation and college matriculation.[2] There are nine specialized high schools in New York City, commonly referred to as "SHSAT-schools." Admission to eight of the nine schools is based solely on students' rank-order on a single multiple-choice exam.[3] The exam, known as the Specialized High School Admissions Test ("SHSAT"), is administered once a year to eighth and ninth graders seeking entry to one or more of the SHSAT-schools.[4]

In the words of New York City's former comptroller, "[a] dmittance to these schools is a ticket to success. They bring an almost certain guarantee of high school graduation, in a city where the graduation rate is 65 percent, and an almost certain guarantee of college acceptance," with over 25 percent of students going to an Ivy League or other top-tier college.[5] The schools' reputation for quality and success is substantial enough that they draw many children from families who can afford an elite private school education. In fact, 20 percent of admitted students previously attended private or parochial middle schools.[6] However, the stakes of admission are often highest for families of limited means, for whom rejection from the SHSAT-schools will likely result in the child attending a non-specialized public school, many of which have fewer resources, worse reputations, and lower student outcomes on measures such as graduation, college matriculation, and test scores.[7]

Although it is not clear to what extent SHSAT-schools are causally responsible for producing positive outcomes for already high-achieving students, many students and parents believe that admittance will make an important difference, which is a belief that

fosters fierce competition for admission.[8] In 2017, as in most years, nearly 28,000 students sat for the SHSAT in the hopes of securing a seat at one of New York's finest public schools.[9] Less than one in five applicants, however, were offered a place. For Black and Latino applicants, specifically, the acceptance rates were even lower: compared to White and Asian students, who were admitted at respective rates of 28.1 and 31.9 percent, the respective admission rates for Black and Latino students were just 3.3 and 5.0 percent.[10] Despite comprising over 65 percent of NYC public school students, Black and Latino students received just 10 percent of SHSAT-school offers. By comparison, White and Asian students received 28 and 53 percent of offers, respectively.[11]

Systemic inequalities and the poor quality of schools in low-income, majority-minority districts likely play an important role in depressing the overall number of well-prepared, "high-achieving" Black and Latino students; however, even among high-achieving students, there are racial disparities in admissions.[12] A 2016 study by the Center for New York City Affairs found that Black and Latino middle-schoolers who attained the highest possible standardized test score for either English Language Arts (ELA) or Mathematics were significantly less likely to attend a SHSAT-school than their White and Asian counterparts.[13] Only 14 percent, each, of Black and Latino high-achievers went on to attend a SHSAT-school, as compared to 28 and 55 percent, respectively, of White and Asian high-achievers.[14] A 2015 study by the Research Alliance for New York City Schools ("Research Alliance") found similar disparities while performing a related analysis on all NYC seventh-graders, grouped into academically comparable groups on the basis of standardized test scores. Even when comparing students to comparable achievers, the Research Alliance found that there were racial disparities at all three stages of the SHSAT admission process: choosing to apply, receiving an offer, and accepting an offer.[15] Asians were overrepresented by 17 percentage points among

those who chose to apply (*i.e.,* take the SHSAT) while Latinos were underrepresented by three percentage points.[16] Black and Latino students were also substantially less likely to be offered admission (7 and 6 percentage points, respectively).[17] Lastly, Asian students were significantly more likely (by 20 percentage points) to accept an offer of admission.[18]

Therefore, while larger issues and inequalities certainly play a role in SHSAT disparities, overarching societal disparities do not encompass the entire issue. Evidence suggests that specific policy problems, rooted in the SHSAT admissions policy, have severe racially discriminatory effects on Black and Latino students. This paper will explore the policy's racially discriminatory impact and consider legal and legislative solutions. Part A will outline the SHSAT admissions process, describe the policy's historical development, and explore its policy intentions. Part B will examine the discriminatory impact of an admissions process that relies solely a single, high-stakes exam. It will also consider the merits of pursuing a federal race discrimination lawsuit to reform or dismantle the SHSAT admissions policy. Finally, Part C will consider the racial disparities at each stage of the admissions process and suggest possible policy solutions that could be implemented through litigation or legislative action.

II. Policy Background and History of the SHSAT Admission Process

SHSAT Admissions Process

Any student who applies to one or more of the specialized high schools (other than LaGuardia) must take the SHSAT. The SHSAT is a three-hour-long exam with two parts: English Language Arts (ELA) and Mathematics. Every question is multiple choice except for five math questions that require test-takers to fill in their

answers.[19]

The SHSAT is available to every current eighth-grader and first-time ninth-grader that is eligible to apply for a New York City high school.[20] Students must register for the SHSAT through their school counselors between early September and early October.[21] School counselors then provide each student with a "Test Ticket" that indicates the date, time, and location of the student's test. The Test Ticket must be signed by the student as well as by their parent or guardian. The student must also list, in rank order, the school or schools to which he or she is interested in applying. Students may list all eight schools if they desire.[22] The test is administered in late October, and students find out whether they have been admitted to one of the SHSAT-schools in March.[23]

For each part of the exam, a raw score is determined based on the number of correct answers. The raw scores are then scaled and combined into a final score.[24] Once all the tests have been scored, the test-takers are ranked in descending order. The students, beginning with the highest scorer, are then admitted to the school ranked highest in their preference order. If all of the seats in a student's first-choice school have already been offered to higher scorers, then a student is offered a place at their second-choice school, or at whichever school is highest on their list and not yet filled.[25] The NYCDOE continues this rank-order admissions process down the list of students until every seat at the eight SHSAT-schools has been filled.[26]

Thus, students are admitted to the SHSAT-schools on the basis of their rank-order, not on their capacity to exceed a certain numerical cutoff or academic standard. As discussed below in Part B, this rank-order admissions process—which makes offers contingent on the performance and preferences of thousands of students—adds randomness and uncertainty to an already arbitrary process based on a single exam.[27]

History of SHSAT Admissions Process

The SHSAT admissions process is mandated by New York State Law, which states that admission to the specialized high schools "shall be solely and exclusively [determined] by taking a competitive, objective and scholastic achievement examination."[28] These words were enshrined in state law by the Hecht-Calandra Act of 1971.

However, the high-stakes exam actually preceded the law by several decades; Stuyvesant, Bronx Science, and Brooklyn Tech have administered exams for admission to their schools since the 1930s.[29] Significant public criticism of the exams began to emerge in 1969, when student protesters demanded that Bronx Science amend its admission process to admit more Black and Puerto Rican students.[30] Then, in January 1971, a Manhattan community school board filed a complaint with the NYC Board of Education (BOE) against Bronx Science's racially discriminatory admissions policy. The community board alleged that "culturally oriented examinations worked to screen out Black and Puerto Rican students who could succeed at the school." Because of its admissions exam, the community board alleged that the school was a "privileged educational center for children of the White middle class."[31] The community board claimed that 90 percent of Bronx Science's 3,200 students were White.[32] Two days after the complaint was filed, the Chancellor of the NYCDOE opened an investigation to decide whether or not the specialized high school admissions process was racially discriminatory.[33] However, before the NYCDOE could even complete its investigation or reform the admissions process, the New York State Legislature quickly passed the Hecht-Calandra Act, which codified the single-test, rank-order admissions policy in state law.[34]

The stated intent of the Hecht-Calandra Act was to "protect the current status and quality of specialized academic high schools

in New York City," or to prevent the "lowering of standards."[35] However, given the circumstances, it appears probable that the law was an attempt to sustain low enrollment numbers for Black and Latino students. The rush to pass the Hecht-Calandra Act was a direct response to the Chancellor's civil rights investigation as well as growing efforts to diversify the schools. The co-sponsors of the bill themselves said at the time that the Chancellor's "attempt to destroy these schools must be stopped immediately."[36] A contemporary *New York Times* article reported:

> Many city parents look upon these schools as islands of educational excellence and opportunity in the problem-racked public school system....Some parents—particularly, but not exclusively, White parents—also view them as a last resort (some say 'refuge'), the alternative to sending their children to private schools, if they could afford them, or moving out of the city.[37]

Today, the specialized high schools are still governed by the same piece of legislation that was passed in 1971. Since the passage of the law, the NYCDOE has also designated five additional schools as specialized high schools.[38] All eight of these schools therefore employ the single-test, rank-order admissions process that was incorporated into state law to prevent the diversification of the SHSAT-schools. The SHSAT admissions process has just as much of a racially discriminatory effect today as it did in the 1970s. Although intent is not the primary focus of this paper, it does appear that a deeper examination of the legislative history and contemporaneous accounts surrounding its passage could be used to establish that the Hecht-Calandra Act had, and has, a discriminatory intent.[39]

III. Discriminatory-Impact Litigation

Regardless of whether or not the SHSAT admissions process was designed with a discriminatory intent, it clearly has a severe discriminatory impact. In 2012, the NAACP Legal Defense and Education Fund filed a complaint with the U.S. Department of Education's Office of Civil Rights, alleging that the NYCDOE was using a discriminatory admissions process that violated Title VI of the Civil Rights Act of 1964 and its implementing regulations ("LDF complaint").[40]

Title VI provides that a person shall not be excluded on the basis of their race, color, or national origin from participating in a federally-funded program or activity.[41] The U.S. Department of Education has promulgated a regulation for implementing Title VI that states that a recipient of federal funds shall not "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."[42] Because the regulation bans policies with a discriminatory *effect,* the OCR has jurisdiction to investigate the disparate-impact claim against the SHSAT schools.[43]

Three-Pronged Test for Title VI Discriminatory-Impact

The LDF complaint outlines a three-pronged test for a disparate-impact claim. First, "a *prima facie* case of a Title VI disparate-impact violation is established if a recipient of federal funds uses selection criteria that have the effect of disproportionately excluding students of a particular racial or ethnic group."[44] Second, if a *prima facie* case is established, "then the respondent must demonstrate that the selection criteria are 'required by educational necessity.'"[45] The complaint says that to meet this burden, the respondent "must show that the challenged practice bears a manifest relationship to an objective that is 'legitimate, important, and integral

to [its] educational mission.'"[46] Third, "even when a recipient of federal funds can show that its selection criteria are justified by educational necessity, the recipient can still be held liable under Title VI if there are alternative practices available that would be equally effective in serving the recipient's educational mission while having less of a racially disparate impact."[47]

The SHSAT Admissions Policy Violates Title VI

The LDF complaint is solely focused on the disparate impact of the SHSAT admissions policy on Black and Latino students who take the test. In other words, it is only concerned with the discrimination that occurs at the offer of admission stage. Given that the widest disparity exists at the admission stage (*i.e.,* the SHSAT) and that it is the most promising issue for successful litigation, this paper focuses on the admission stage, but the same discriminatory-impact test could be applied to other stages of admission.

The SHSAT Has a Severe Disparate Impact

As described earlier, the SHSAT admissions policy disproportionately excludes Black and Latino students from receiving admission offers. In 2017, only 3.3 and 5.0 percent of the 12,461 Black and Latino test-takers, respectively, were admitted, as compared to 28.1 and 31.9 percent of the 13,415 White and Asian students, respectively.[48]

Black and Latino students were about 84 percent less likely to receive an offer of admission than White and Asian students. This massive gap in admissions is repeated year after year and is far beyond the realm of random fluctuation, as determined by conventional statistical analyses.[49] This significant disparity constitutes a *prima facie* case of racial discrimination against Black and Latino test-takers, who are disproportionately excluded from admission to the

SHSAT-school's premier educational programs.

The massive racial disparity in admissions does not include the even larger disparities in enrollment, which are also the result of disparities in the number of Black and Latino students who choose to apply and who accept their admissions offers (see Part C for further discussion of the discriminatory effects at these other stages).

The Disparate Impact of the SHSAT is not Justified by Educational Necessity

Given that there is a *prima facie* case of discriminatory impact, the NYCDOE has the burden of proving that its discriminatory policy is "required by educational necessity." The LDF complaint argues that, in order to demonstrate the educational necessity of the SHSAT admissions policy:

> The NYCDOE and the NYSDOE must show that basing admissions to the Specialized High Schools exclusively on rank-order SHSAT scores (while ignoring grades and other sources of academic and other merit) validly and reliably identifies those students with the knowledge, skills, and abilities essential to satisfactory participation in the programs offered by the Specialized High Schools.[50]

The Standards for Educational and Psychological Testing ("Joint Standards"*)* are the well-recognized standards for educational testing. The *Joint Standards* were prepared by a joint committee of the three leading organizations in the educational testing field (the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education).[51] They state:

> When test scores are intended to be used as part of the process for making decisions for educational placement....empirical evidence documenting the relationship among particular scores, the instructional programs, and desired student outcomes should be provided.[52]

A predictive validity test is critical to proving that the SHSAT is actually able to identify the students who are most likely to succeed in the intense academic environment of a specialized high school.[53] Joshua Feinman, a senior Deutsche Bank economist, says that, "[a]bsent predictive validity studies, there's no way to know if any test is providing useful information; and without well-specified objectives, it's not even clear what the test is supposed to do or predict."[54]

Disregarding the legal standard and educational expert consensus, the NYCDOE has repeatedly refused to perform a predictive validity study of the SHSAT, to state specific and measurable objectives or to even release data that would enable other researchers to perform more comprehensive analyses.[55] The NYCDOE has conceded for decades that "no predictive ability study of the SHSAT exists in the custody and control of the New York City Department of Education." A recent *New York Times* article reports, however, that City education officials claim a private consulting firm, Metis Associates, was hired in 2013 to conduct a validity study as a response to the LDF complaint.[56] The officials declined to release the study's results, citing legal concerns over the pending LDF complaint.[57]

The lack of a validity study, or at least a public one, is particularly concerning because the SHSAT appears to have obvious problems. One is that its material is not aligned to the public middle school curriculum, making it a poor predictor of academic success

and even more discriminatory against low-income and minority students.[58] Tests that measure mastery of public school curriculums reward excellence and diligence in the classroom, while tests that are unaligned to curricula measure a student's preparation for the exam. This severely disadvantages students who lack the means to access costly test prep services and tutors or to attend elite middle schools that cover extracurricular material in advanced classes.[59]

In response to some of these criticisms, the NYCDOE did announce in 2017 that the SHSAT was (1) eliminating the scrambled paragraph and logical reasoning questions, which were unlike anything a student would encounter in a classroom or outside of test preparation; (2) adding some editing questions that resembled Common Core writing standards; and (3) introducing experimental questions that would be used to test and study the exam's discriminatory effects.[60] The NYCDOE also amended the Specialized High Schools Student Handbook to include a sentence that said the questions were aligned to the Common Core Learning Standards for Mathematics and Language.[61] These changes indicate that the NYCDOE is interested in moving the test towards greater validity (and insulating itself from litigation by showing it has aligned the test), but the changes still remain vague and untested. It is unclear, for instance, how the experimental questions will be designed, analyzed, or used to amend the SHSAT.

Even after these changes, the New York City Schools Chancellor, Richard A. Carranza, admits that the SHSAT is "not necessarily valid or reliable in terms of identifying student competencies to be successful in the specialized high school environment . . . It's just an obstacle. It's something you have to endure to be able to go to one of the specialized schools. It's not aligned to state standards. It's not necessarily aligned to anything, except it's just a tough test that you have to prep for."[62]

The unfair advantages enjoyed by those who receive test preparation are compounded by a scoring oddity that

disproportionately rewards students for getting near-perfect scores on either the Math or ELA section.[63] In effect, the raw scores for each section are scaled separately and according to a scale that assigns more points for each correctly-answered question that brings a student's score closer to a perfect score in that section. The scaled scores are then summed into a final scaled score. As a result of this scoring model, Feinman found that a student who achieved a near-perfect score on one section (99th percentile) only needed to score in the 57th percentile on the other in order to be admitted to Stuyvesant, the most selective school, while a student who did well on both parts of the exam (85th and 86th percentile) would be rejected.[64] This scoring quirk is not publicized by the NYCDOE, but it is well-known by professional test prep services, which places students with professional test preparation at a key advantage since they are advised to spend more time perfecting their score on either the math or ELA section (whichever they are stronger in), instead of splitting their time evenly between the two.[65] Therefore, this scoring model is not only an untested method for identifying high-achievers but it also puts students whose parents do not pay to send them to test prep courses at a severe disadvantage.[66]

The high cost of test prep courses (which can cost up to $3,600) poses a severe economic barrier to low-income families, many of whom are people of color, but it does not appear that the SHSAT's discriminatory impact is merely a matter of income.[67] In fact, three of the twenty zip codes with the highest SHSAT admissions rate have a median household income between $35,000 and $40,000.[68] Similarly, the percentage of specialized high school students receiving a free and reduced lunch is around 52 percent.[69]

If the explanation is not solely based on income, then perhaps one can account for the disparity by considering the geographic distribution of test preparation centers, most of which are concentrated in Manhattan and Queens. Meanwhile, just three programs offer a handful of group classes in the Bronx.[70] Since

most people find out about test preparation and the SHSAT-schools through word of mouth, the communities with less information or experience with the SHSAT may be less likely to attend prep courses in high numbers or to even sit for the SHSAT.[71]

However, regardless of the cultural, geographic, racial, or cultural reason, it is clear that Black and Latino students attend prep programs and sit for the SHSAT at significantly lower rates than White and Asian students. In the words of one Asian parent whose two children attend a specialized high school, "even the lowest paid immigrants scrape up enough money for tutoring because those high schools are seen as the ticket to a better life."[72] Even the Specialized High School Institute, which is a free, city-run prep program, significantly underrepresents Black and Latino students (together, they are just 47 percent of the program) and overrepresents Asian students (45 percent of the program).[73]

In response to these criticisms, defenders of the SHSAT are likely to concede that the SHSAT may have its problems, but will maintain that it is nevertheless an effective means of identifying high-achieving students who perform well at the SHSAT-schools and beyond.[74] Some of these defenders worry that altering the admissions process might diminish the school's academic standards. However, the truth of the matter is that we do not have evidence to prove the predictive validity of the SHSAT, specifically, nor does general research suggest that a single, high-stakes exam could possibly be an accurate or reliable means of predicting academic success.[75]

These problems are true of any exam, but the SHSAT has an unusually high level of arbitrariness and uncertainty, in part because its rank-order method renders a school's cutoff score dependent on the performance and rankings of thousands of students. Feinman's analysis found that in 2005 and 2006, 4,800 to 5,100 students (or 18 to 20 percent of test-takers) fell within the bounds of statistical uncertainty, meaning that there was no statistical difference between

the estimated ability of those who were admitted from those who were rejected.[76] Feinman's findings are deeply troubling, as they suggest that thousands of high-stakes SHSAT admission decisions are being made without a rational basis.

Jonathan James Taylor, a research analyst at Hunter College, also found that the highest SHSAT scorers tended to achieve excellent high school grades but that scorers below the very top had much more mixed results, with a weak relationship between their SHSAT scores and high school grades.[77] Taylor found that middle school grades were a much better predictor of high school success for all students. The top SHSAT scorers, for whom the test did effectively predict high performance, also had excellent middle school grades and would thus be admitted under alternative criteria as well.[78]

For all these reasons, it is unclear that the SHSAT admissions policy can be justified as an educational necessity, especially given its severe discriminatory impact. The SHSAT has never been validated, has specific problems that threaten its validity, and is part of a single-criterion admissions policy.

Effective Alternatives Exist

Even if the SHSAT was deemed an educational necessity, the SHSAT admissions policy clearly violates Title VI, since there are many alternative admission policies that will produce an equally high-achieving, if not more high-achieving, student body that is far more racially diverse.

As suggested above, if middle school grades were used for admissions alone, they would be a stronger predictor of achievement and fairer to low-income students and students of color than the SHSAT. However, any single admissions criteria, including grades, will present problems with identifying high-achievers and distinguishing between candidates, which is why educational experts and admissions standards caution against single-criterion admissions

policies.[79] Overwhelmingly, studies show that multiple imperfect criteria are much better at predicting academic performance than a single imperfect criterion.[80] It is unsurprising, therefore, that almost every selective educational institution in the United States, other than the SHSAT schools, uses multiple admissions criteria.[81]

IV. Admissions Policy Alternatives

It is important to reform the SHSAT admissions process because doing so will protect minority students from discrimination and isolation, increase the diversity and richness of every student's educational experience, and likely raise the academic caliber of admitted students. While the legal imperative to protect students from racially discriminatory admissions has been formally recognized since the Civil Rights Act of 1964 was passed, it was not until 2003, with *Grutter v. Bollinger,* that the Supreme Court recognized the compelling state interest of increasing schools' racial diversity. The majority reasoned that racial diversity was a compelling interest because of the educational benefits that diversity can impart to every student.[82] In 2007, P*arents Involved in Cmty. Sch. v. Seattle Sch. District No.* went further to explicitly recognize a compelling state interest to increase racial diversity and decrease racial isolation in *K-12 schools*.[83] In the words of Justice Kennedy, who penned the plurality opinion, "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society.'"[84]

While this paper is not the platform for an extensive discussion of policy, the following section will aim to introduce some promising solutions that have been put forward by education experts, political activists, and advocacy organizations.

Alternatives to the SHSAT as the Sole Means of Offering Admissions

Mayor Bill de Blasio and Chancellor Carranza are largely responsible for igniting the most recent debate over the SHSAT. On June 3, 2018 they proposed eliminating the SHSAT over the course of three years and admitting students on the basis of middle school grades. Their plan proposes to admit each middle school's top seven percent of students and to fill the remaining five or ten percent of seats by a lottery for students who attended non-public middle schools, recently moved to the City, or had a grade point average below the seven percent cutoff but above a certain minimum.[85] According to the City's model of current offer patterns, it estimates that the percentage plan, or *top-performer policy,* will result in 45 percent of offers going to Black and Latino students, as compared to the nine percent today.[86]

The de Blasio proposal is promising because, as previously mentioned, research shows that middle school grades are both some of the most effective predictors of academic success *and* the most effective means of increasing racial diversity.[87] Indeed, Taylor finds that seventh grade GPA is more than twice as predictive of freshman GPA than the SHSAT. Taylor also found that admitting students on the basis of GPA, even if it were combined with the SHSAT, would boost the number of Black and Latino students being admitted by about 20 and 33 percent, respectively.[88] Interestingly, the predictive capacity of middle school GPA holds true regardless of middle school quality, which ought to assuage fears that accepting more top students from low-performing schools could lower academic standards; in fact, the research suggests that middle school GPA is predictive for *all* students and if a student is behind in academic material, they can be brought up to the same level as other students, especially in the high-quality teaching environment of a SHSAT school.[89] That being said, it is worth mentioning that the Research Alliance found that admitting the top ten percent of each public school (with performance measured by grades and state test scores) could result in a slight, though nearly negligible, drop in admitted

students' average state test scores (the Research Alliance calculated that average math score would fall by 0.122 and average ELA would fall by 0.027). It also found that policy would be the strongest means of diversifying the SHSAT schools (increasing the percentage of Black students by 12.8 points and the percentage of Latino students by 12.4 points).[90]

The de Blasio percentage plan is not the only possible alternative, but it is an example of how policy-makers must consider legal constraints and challenges. Policy-makers ought to consider Justice Kennedy's words in *Parents Involved in Cmty. Sch. v. Seattle Sch. District No. 1* (2007): schools are "[f]ree to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[91] The Department of Justice (DOJ) outlined the race-conscious measures that schools could adopt while acting consistently with the law in "Guidance on the Voluntary Use of Race to Achieve Diversity and Racial Isolation in Elementary and Secondary Schools" ("Guidance"*)*. On July 3, 2018, the Trump Administration's DOJ retracted the Guidance. However, this retraction does not invalidate the statutes, laws, and regulations that the Guidance originally cited, but it could suggest that this paper's recommendations will be subject to greater legal opposition or scrutiny. The original Guidance suggested, pursuant to federal statutory law and case law surrounding the Fourteenth Amendment's equal protection clause, that schools can voluntarily use race-neutral admission criteria on an individual level, such as income or geographic district, in order to increase racial diversity.[92] Selecting on the basis of where a student lives or the middle school they attend seems like a powerful, race-neutral, way of increasing diversity.[93] The top-performers admissions policy admits students on the basis of their middle school of origin, but another alternative would be to incorporate geography or middle school of origin into a multiple-measure policy; for instance, the SHSAT-schools

could consider grades and test scores but add additional points for applicants from underrepresented areas/schools or require that a proportional number of offers go to each borough, community school district, or middle school.[94]

Another alternative is to drop the consideration of geography or middle school of origin altogether and to simply consider a combination of criteria, such as grades, state test scores, attendance records, teacher recommendations, interviews, and personal essays. Having multiple criteria would increase the validity and reliability of the admissions policy while also reducing the discriminatory impact of the SHSAT.[95] While the diversification impact of multiple-measures approaches is much smaller than the percentage plan, it could have a significant impact, as demonstrated by the selective NYC public schools that use a multiple-measures approach instead of the SHSAT-schools' single-test approach.[96] These non-specialized schools are highly selective and are some of the best schools in the city. They have also attained a nine percent enrollment of Black students (compared to six percent at the SHSAT-schools) and an 18 percent enrollment of Latino students (compared to seven percent at the SHSAT-schools).[97]

Occasionally, these multiple-measures schools are criticized for being "wealthier and whiter" than the SHSAT-schools because they tend to have larger, more affluent White populations and smaller Asian populations (who constitute 31 percent of the multiple-measures schools, which is double overall Asian enrollment in NYC public schools (16 percent) but lower than in the SHSAT-schools).[98] This criticism is worth considering, especially since much of the controversy surrounding the SHSAT-schools has framed the issue as a zero-sum game between Black and Latino students on the one side and Asian students on the other.[99] Yet, despite the vocal opposition of some members of the Asian-American community to reforming the SHSAT-admissions process, it is worth noting that several Asian-American advocacy organizations filed letters

of support for the LDF complaint, including the Asian American Legal Defense and Education Fund, Coalition for Asian American Children and Families, and National Asian American Coalition. These letters included messages such as, "Compared to the current, single high stakes test approach, multiple measures are likely to favor accomplished, high achieving students (including some Asian Americans) who work hard and have strong track records of academic success. The multiple measures approach also captures students who happen not to perform well on a particular test, despite being academically qualified."[100]

Despite these letters of support, a promising policy approach that might be able to garner political support from a broad array of communities while also meeting sound educational standards could be to establish multiple tracks to the SHSAT-schools. For instance, the specialized high schools could fill half of their seats by offering admissions to the top three percent of every public middle school, as measured by grades, while filling the other half with those who attain the highest scores on an improved, validity-tested SHSAT. The United Federation of Teachers made a similar proposal, which included a top-performer admission track and a "power-score admissions path" that would combine the SHSAT with other measures, such as GPA, state test scores, and attendance record.[101] One other proposal promotes using the SHSAT (in a revised and validity-tested form), but only as a means of establishing that students are above a certain baseline, above which applicants could be selected on the basis of other measures.[102]

Alternatives for Reducing Disparities at the Stages of Choosing to Apply and Accepting Offers

In 2017, Black and Latino students respectively made up 26.5 and 40.4 percent of NYC public school students but only 21.0 and 23.7 percent of SHSAT test-takers. By contrast, White students

made up 14.9 percent of the student body and 18.2 percent of test-takers while Asian students made up 15.8 percent of the student body and 30.0 percent of test-takers.[103] [104]

According to the UFT's taskforce on specialized high schools, many teachers see racial disparities as stemming from the "DOE's reluctance to properly promote the elite high schools to the vast majority of the city's 7th- and 8th-graders . . . Students often find out about the test in an ad hoc fashion."[105] The unequal distribution of information about the SHSAT and the uneven levels of encouragement to take it are likely both causes and symptoms of the current disparities; with so few students from certain communities or schools attending the SHSAT-schools, it is even less likely that other students will learn about them or think to apply. Between 2005 and 2013, five percent of middle schools accounted for over half of the SHS admissions offers. Meanwhile, many middle schools had no applicants and received no offers at all.

The underrepresentation of Black and Latino students among test-takers likely results from a lack of information about the SHSAT as well as a lack of interest in attending the SHSAT-schools, feeling underqualified for the schools, or sensing that the chances of admission are too low to outweigh the costs of registering for and taking the SHSAT. There are a couple simple, low-cost policies that could counteract these problems.

First, the NYCDOE could increase the number of high school fairs in order to promote the SHSAT-schools and discuss the admissions process and also encourage 6th- and 7th-graders to attend the fairs. Every middle school counselor should receive information about the SHSAT-schools and should be encouraged or required to discuss the admissions process with students, make announcements, or even run in-school workshops. Second, all 8th-grade students in NYC public schools should be automatically registered for the SHSAT, with an easy opt-out option for students who do not want to apply. An automatic registration policy would be a simple way

to ensure all students receive information about the SHSAT-schools and to nudge more students to apply who otherwise would not have gone out of their way to apply.

Both policies will likely increase the level of interest and the distribution of information, but other efforts should also aim to encourage more students to apply and to view themselves as qualified candidates. If these policies were combined with a policy to reform the admissions stage, as discussed in Section I of Part C, then there would likely be a greater diversity of race, geography, and origin school in the applicants, admitted students, and enrolled students. This increased diversity would, in itself, help to promote a greater distribution of information and to empower minority applicants to see themselves as qualified candidates by witnessing the success of other minority applicants. It would even potentially increase interest in applying, since minority students would be less concerned with racial isolation if they attended.[106]

Black and Latino students may accept their offers of admission at lower rates than other groups for many of the same reasons that they tend to apply in lower numbers. The Research Alliance found that even among students with comparable achievement levels, Black and Latino students were 20 percentage points less likely to accept offers of admission than Asian students.[107] Further promoting and informing underrepresented communities about the SHSAT and SHSAT-schools though guidance counselors, high school fairs, and word-of-mouth from diversified enrollment will likely help to increase the number of students who accept their offers. As mentioned above, students may also choose not to accept because they are concerned about racial isolation or even hostility, given the long history of the SHSAT-schools' racially discriminatory admissions policy. Therefore, reducing discrimination overall may yield compounding gains, since increased diversity could be an effective way to increase the number of Black and Latino students who choose to apply and attend.

Clearly, there are many sound and effective alternatives for both identifying high-achieving students and increasing racial diversity. Future research ought to determine which policies have the highest predictive validity, the least discriminatory impact, and the greatest potential to appeal to a variety of stakeholders. Researchers also ought to study why the sole reliance on a high-stakes, multiple-choice exam – and specifically the SHSAT – has such a discriminatory impact. Understanding the cause of the discriminatory effect will increase the ability of litigants or political organizers to persuade decision-makers about the need to reform the SHSAT admissions policy, and it will also strengthen the ability of policy-makers to design effective, non-discriminatory alternatives.

V. Conclusion

The massive racial disparity of the SHSAT admissions policy must reach its end. This paper has aimed to demonstrate that there are legal grounds with which to bring forward a federal lawsuit against the NYCDOE and NYSDOE for violating Title VI with a discriminatory single-test admissions policy. A federal lawsuit could compel action—including in the state legislature, whose laws are preempted by Title VI—to end the SHSAT admissions policy and to expand access for Black and Latino students to the specialized high schools.[108]

The state legislature could possibly move on its own to take up Mayor De Blasio's proposed percentage plan or to devise another alternative but, as of now, there has been little action.[109] In fact, it is not even clear that Mayor De Blasio is genuinely motivated to reform the system, seeing as he has not even attempted to unilaterally alter the admissions process in the five SHSAT-schools that the statute does not name by re-designating them as non-specialized schools.[110] A spokesperson for the NYCDOE claimed that state law does

not outline a procedure for how the City would alter the schools' designations and that any effort to do so "would be challenged."[111]

Therefore, a federal lawsuit may be the only means of generating actual action or reform. Unfortunately, the LDF complaint with the USDOE's OCR remains under review and has not yet resulted in an administrative ruling or settlement.[112] The inaction is, perhaps, due to the regulatory procedures and limits of the OCR's administrative process.[113] Given these limitations, litigating the issue in federal court may be a more effective strategy for garnering public attention and for producing a ruling or settlement that genuinely alters the admissions process.

Appendix A:

2017	Native American	Asian	Black	Latino	White	Multi-racial	Unknown	Total
Testers Summary								
Total Testers	28	8,241	3,847	6,631	5,070	287	1,027	27,850
Distribution of Testers, by Ethnicity	0.1%	29.6%	13.8%	23.7%	18.2%	1.0%	3.7%	100.0%
Offer Summary								
Bronx High School of Science (10X445)	7	558	71	55	258	16	76	941
Brooklyn Technical High School (13K430)	6	569	90	142	991	34	175	1,929
HS for Mathematics, Science, and Engineering at City College (05M692)	1	64	14	12	71	6	11	159
High School of American Studies at Lehman College (10X696)	1	24	7	14	71	1	28	146
Queens High School for the Sciences at York College (28Q687)	1	123	11	10	21	0	13	179
Staten Island Technical High School (31R605)	2	156	3	8	148	1	22	339
Stuyvesant High School (02M475)	8	598	13	28	264	10	67	928
The Brooklyn Latin School (14K478)	1	242	37	41	103	7	16	425
Total Offers, by Ethnicity	25	2,664	194	310	1,429	65	378	5,078
Distribution of Offers, by Ethnicity	0.5%	52.5%	3.8%	6.1%	28.1%	1.3%	7.4%	100.0%
Percent of Testers who Received an Offer, by Ethnicity	9.5%	31.9%	5.1%	5.0%	28.1%	34.8%	34.6%	18.2%

Source: Data from N.Y.C. Dep't of Education, as reported in Monica Disare, *Only 10 percent of offers at New York specialized high schools went to Black and Hispanic students*, Chalkbeat (March 8, 2017), https://www.chalkbeat.org/posts/ny/2017/03/08/only-10-percent-of-offers-at-new-york-citys-specialized-high-schools-went-to-black-and-hispanic-students/.

[1] All eight of the SHSAT-schools are recognized as being among the top 11 schools in New York State and among the top 69 in the United State in the most recent U.S. News Best High Schools rankings. See *Best U.S. High Schools (2018)*, U.S. News and World Report, https://www.usnews.com/education/best-high-schools/national-rankings (last visited July 26, 2018). Two of the SHSAT-schools were also among the top 15 schools in Newsweek's most recent national rankings (Stuyvesant and Staten Island Tech) and four were among the top ten "Beating the Odds" schools (Stuyvesant, Brooklyn Tech, Staten Island Tech, and HS for Math, Science, and Engineering). The "Beating the Odds" ranking was prepared by comparing schools to schools with similar percentages of students eligible for free or reduced lunch. See *America's Top High Schools 2016*, Newsweek, https://www.newsweek.com/high-schools/americas-top-high-schools-2016 (last visited July 26, 2018).

[2] Will Dobbie and Roland G. Fryer Jr., *The Impact of Attending a School with High-Achieving Peers: Evidence from the New York City Exam Schools,* Am. Econ. J: Applied Econ., July 2013, at 1, 4-8.

[3] Admission to the ninth specialized high school, Fiorello H. LaGuardia High School of Music & Art & Performing Arts, is based on competitive auditions, grades, and attendance. Because of its differing admissions procedure, LaGuardia will not be discussed in the remainder of this paper. The following eight schools are

the focus of this paper: Brooklyn Technical High School; Stuyvesant High School; Bronx High School of Science; Staten Island Technical High School; Queens High School for the Sciences at York College; High School for Mathematics, Science, and Engineering at City College; High School for American Studies at Lehman College; and Brooklyn Latin School. These eight schools will be referred to as the SHSAT-schools. *See* N.Y.C. Dep't of Educ., 2018-2019 Specialized High Schools Student Handbook 4 (2018) https://www.schools.nyc.gov/docs/default-source/default-document-library/2019-shsat-student-handbook-english ["Shsat Handbook"].

[4] *Id.* at 11, 17.

[5] Nicole Tortoriello, *Dismantling Disparities: An Analysis of Potential Solutions to Racial Disparities in New York City's Specialized High Schools Admission Process,* 49 Colum. J.L. & Soc. Probs. 417, 421-2 (2016) (citing John C. Liu, Bringing Diversity to New York City's Specialized High Schools, Huffington Post (Mar. 30, 2012)).

[6] Comm. Serv. Soc. of N.Y. & L.D.F., The Meaning of Merit: Alternatives for Determining Admission to N.Y.C.'s Specialized High Schools 13 (October 2013).

[7] Dobbie and Fryer, *supra* note 2, at 1-8, 10.

[8] *Id.* at 10-15. It is unclear whether selective schools' strong outcomes are the result of selecting students who perform well regardless of their school or whether the schools are actually responsible for improving the outcomes of their students. For a study that found no causal effect of attending the SHSAT-schools, *see* Atila Abdulkadiroglu, Joshua Angrist & Parag Pathak, *The Elite Illusion: Achievement Effects at Boston and New York Exam Schools,* Econometrica: J. Econometric Soc'y, 137, 178-9 (2014).

[9] Data from N.Y.C. Dep't of Education, as reported in Monica Disare, *Only 10 percent of offers at New York specialized high schools went to black and Hispanic students*, Chalkbeat (March 8, 2017), https://www.chalkbeat.org/posts/ny/2017/03/08/only-10-percent-of-offers-at-new-york-citys-specialized-high-schools-went-to-black-and-hispanic-students/ (App. A)

[10] *Id.*

[11] *Id.* For statistics about citywide data, *see* N.Y.C. Dep't of Educ., 2013 - 2018 Demographic Snapshot School (May 2, 2018), https://data.cityofnewyork.us/Education/2013-2018-Demographic-Snapshot-School/s52a-8aq6 (last visited July 26, 2018).

[12] Sean P. Corcoran & Christine Baker-Smith, Res. Alliance for N.Y.C. Sch., Pathways to an Elite Education: Exploring Strategies to Diversify NYC's Specialized High Schools 4-6 (2015) ["Pathways"]. It is worth noting that there are even racial disparities among the students who participate in Specialized High

School Institute (SHSI), which offers free test preparation to a small group of low-income students. Black and Latino students who participated in SHSI are likelier to secure an offer to a specialized high school than black and Latino students who do not participate, but the racial disparity in admission rates between black and Latino students and their white and Asian peers is still high. COMM. SERV. SOC. OF N.Y., *supra* note 6, at 15.

[13] Bruce Cory & Nicole Mader, ***Tough Test Ahead:*** *Bringing Racial Diversity To New York's Specialized High Schools*, CENTER FOR N.Y.C. AFFAIRS (June 15, 2016), http://www.centernyc.org/high-school-diversity.

[14] *Id.*

[15] CORCORAN & BAKER-SMITH, *supra* note 12, at 4-5.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] HANDBOOK, *supra* note 3, at 21.

[20] The vast majority of applicants sit for the SHSAT in eighth grade, but there is an alternate, more advanced version of the exam available to first-time ninth graders who want to apply for the few seats available to incoming tenth-graders. *Id.*

[21] *Id.*, at 11.

[22] *Id.,* at 17.

[23] *Id.*

[24] *Id.*, 25.

[25] *Id.,* 13.

[26] *Id.*

[27] Joshua Feinman, *High Stakes, but Low Validity? A Case Study of Standardized Tests and Admissions into New York City Specialized High Schools* 1-3 (2008) (policy brief for Education and the Public Interest Center & Education Policy Research Unit), http://epicpolicy.org/publication/high-stakes-but-low-validityEPRU.

[28] N.Y. Educ. Law § 2590-h(1)(b); N.Y. Educ. Law § 2590-g(12) (1996).

[29] Tortoriello, *supra* note 5, at 422-3.

[30] *Id. See also* Andrew H. Malcolm, *Bronx Science School Undaunted by Radicals' Moves*, N.Y. TIMES, Apr. 29, 1969, at 47, 90.

[31] M.S. Handler, *Bronx High School of Science Accused of Bias in Admissions*, N. Y. TIMES, Jan. 22, 1971, at 44.

[32] Tortoriello, *supra* note 5, at 424. *See also id.*, at 44. It is likely that the 90 percent number was arrived at by subtracting the estimated number of black and Puerto Rican students from 100. However, as noted by the principal of Bronx Science, there was a substantial number of Chinese students. Therefore, the white

enrollment was likely below 90 percent, seeing as black and Puerto Rican students were not the only non-white students. The principal also claims that black and Puerto Rican student made up 14, not 10 percent, as claimed in the earlier *NY Times* article.

[33] Tortoriello, *supra* note 5, at 424. *See also* Heather MacDonald, *How Gotham's Elite High School Escaped the Leveler's Ax,* City Journal, September 1999, https://www.city-journal.org/html/how-gotham's-elite-high-schools-escaped-leveller's-ax-12276.html.

[34] MacDonald, *supra* note 33.

[35] Eliza Shapiro, *De Blasio has means, if not will, to reform specialized school admissions*, Politico, Mar. 15, 2018. https://www.politico.com/states/new-york/albany/story/2018/03/15/de-blasio-has-means-if-not-will-to-reform-specialized-school-admissions-317675. Tortoriello, *supra* note 5, at 424.

[36] Shapiro, *supra* note 35.

[37] *Id.*

[38] *Id.*

[39] For a guide to various theories and standards of discriminatory intent, *see* Aziz Z. Huq, *Judging Discriminatory Intent*, 103 Cornell L. Rev. (U. of Chicago, Public Law Working Paper No. 650, 2017), https://ssrn.com/abstract=3033169. It is also worth considering this passage from the LDF complaint: "A finding of intentional discrimination is not necessary for OCR to conclude that the NYSDOE and the NYCDOE have violated Title VI, but there is sound basis for a finding of disparate-treatment liability due to the stark empirical evidence of disparate impact over an extensive period of time, the long-standing official and public recognition of these racially disparate outcomes, the NYCDOE's persistent failure to conduct any validity study of the SHSAT, and its failure to adopt other readily available and equally effective, less discriminatory admissions policies. "The foreseeability of a segregative effect, or '[a]dherence to a particular policy or practice, "with full knowledge of the predictable effects of such adherence upon racial imbalance,"' is a factor that may be taken into account in determining whether acts were undertaken with segregative intent." United States v. Yonkers Bd. of Educ. 837 F.2d 1181, 1227 (2d Cir. 1987) (quoting Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 (1979) (quoting district court opinion therein, 429 F. Supp. 229, 255 (S.D. Ohio 1977)); accord United States v. City of New York, 683 F. Supp. 2d 225, 249, 262-64 (E.D.N.Y. 2010). Rather than respond to calls to broaden admissions criteria for the Specialized High Schools, the NYCDOE has taken steps to increase racial isolation—insofar as it has made little use of the Discovery Program generally and discontinued it at Stuyvesant and Bronx Science in the 1990s. *See* Megan Finnegan & Stephon Johnson, Stuyvesant's

Minority Admissions Under Attack, Our Town, May 18, 2011."

[40] The LDF complaint was jointly filed by the LDF, LatinoJustice PRLDEF, and The Center for Law and Social Justice at Medgar Evers College. The complaint was filed on behalf of Alliance for Quality Education, Black New Yorkers for Educational Excellence, the Brooklyn Movement Center, Community Service Society of New York, DRUM -- Desis Rising Up and Moving, Garifuna Coalition USA Inc., La Fuente, Make the Road New York, New York Communities for Change, NYC Coalition for Educational Justice, and UPROSE. Nineteen individuals and organizations have also published letters in support of the complaint and a thorough investigation by the Office of Civil Rights. *See* NAACP Legal Def. & Educ. Fund, N.Y.C. Specialized High School Complaint (Sept. 27, 2012), at 3-4, http://www.naacpldf.org/files/case_issue/Specialized%20High%20Schools%20Complaint.pdf [https://perma.cc/KYD7-SVUY] ["Complaint"].

[41] 42 U.S.C. § 2000d.

[42] 34 C.F.R. § 100.3(b)(2).

[43] Complaint, *supra* note 40, at 14.

[44] *Id.*, 14. Citing See Larry P. ex rel. Lucille P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1984); U.S. Dep't of Justice, Title VI Legal Manual 49-50 (2001).

[45] *Id.* Citing Larry P., 793 F.2d at 982 & nn.9-10 (internal quotation marks omitted).

[46] *Id.* Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1413 (11th Cir. 1993); U.S. Dep't of Justice, Title VI Legal Manual 50-53 (2001). 997 F.2d 1394, 1413 (11th Cir. 1993); U.S. Dep't of Justice, Title VI Legal Manual 50-53 (2001).

[47] *Id.* See Young ex rel. Young v. Elston, 997 F.2d at 1407; Montgomery County Bd. of Educ., 922 F. Supp 544, 550 (M.D. Ala.\1996); U.S. Dep't of Justice, Title VI Legal Manual 53 (2001); OCR, Use of Tests, at 57.

[48] *See* Disare, *supra* note 9 (App. A).

[49] Complaint, *supra* note 40, at 16.

[50] Complaint, *supra* note 40, at 14. Citing Cf. 34 C.F.R. pt. 100, app. B.

[51] *Id.* The joint committee published more recent standards in 2014 but the author was unable to access them.

[52] *Id.*, at 18.

[53] Winnie Hu, *Does Admissions Exam for Elite High Schools Measure Up? No One Knows,* N.Y. Times, July 18, 2018, *https://www.nytimes.com/2018/07/18/nyregion/shsat-new-york-city-schools.html.*

[54] Feinman, *supra* note 27, at 2.

[55] *Id.,* 2-3.

[56] Complaint, *supra* note 40, at 16-7. Hu, *supra* note 52.

[57] Hu, *supra* note 52.

[58] Tortoriello, *supra* note 5, at 450-1.

[59] Complaint, *supra* note 40, at 21.
[60] Press Release, Mayor de Blasio and Chancellor Carranza Announce Plan to Improve Diversity at Specialized High Schools, City of N.Y., June 3, 2018, https://www1.nyc.gov/office-of-the-mayor/news/281-18/mayor-de-blasio-chancellor-carranza-plan-improve-diversity-specialized-high/#/0.
[61] Handbook, *supra* note 3, at 30, 39.
[62] Hu, *supra* note 52.
[63] Feinman, *supra* note 27, at 2.
[64] *Id.*, 12.
[65] *Id.*, 17-8.
[66] *Id.*
[67] Office of the Bronx Borough President Ruben Diaz Jr., An Action Plan for Fixing the Specialized High School Admissions Process (May 2012) http://bronxboropres.nyc.gov/old-site/pdf/bxbp-action-plan-shsat.pdf.
[68] Tortoriello, *supra* note 5, at 429.
[69] *Id.*
[70] Diaz, *supra* note 67., at 11.
[71] *Id.*, 10.
[72] Tortoriello, *supra* note 5, at 429.
[73] Diaz, *supra* note 67., at 17.
[74] Elizabeth Harris & Winnie Hu, Asian Groups See Bias in Plan to Diversify New York's Elite Schools, N.Y. Times (June 5, 2018) https://www.nytimes.com/2018/06/05/nyregion/carranza-specialized-schools-admission-asians.html.
[75] Feinman, *supra* note 27, at 2.
[76] *Id.*, at 18-20.
[77] Jonathan James Taylor, Policy Implications of a Predictive Validity Study of the SHSAT at Three Elite New York City High Schools (September 2015) (Ph.D. dissertation, CUNY), 85, https://academicworks.cuny.edu/gc_etds/1154.
[78] *Id.*, 77.
[79] Feinman, *supra* note 27, at 2, 27.
[80] *Id.*
[81] *Id. See also* Comm. Serv. Soc. of N.Y., *supra* note 6, at 14, 17-20.
[82] *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).
[83] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 783, 788-89 (2007) (Kennedy, J., concurring in part and concurring in the judgment), *id*. at 838-42 (Breyer, J., dissenting).
[84] *Grutter v. Bollinger*, 539 U.S. 330 (2003) (citing Brief for American Educational Research Association et al. as *Amici Curiae* 3; see, *e. g.,* W. Bowen & D. Bok, The Shape of the River (1998); Diversity Challenged: Evidence on the Impact of

Affirmative Action (G. Orfield & M. Kurlaender eds. 2001); Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities (M. Chang, D. Witt, J. Jones, & K. Hakuta eds. 2003)).

[85] CITY OF N.Y., *supra* note 59,

[86] *Id.* The City also estimates that four times as many offers will go to Bronx residents and estimates that 62 percent of offers would go to female students, as compared to 44 percent currently.

[87] PATHWAYS, *supra* note 12, at 8, 11.

[88] For all the students who took the SHSAT, regardless of whether they attended a specialized high school or not, 7th grade GPA predicted (or was associated with) 43.8% of the variance in freshman GPA. By comparison, the SHSAT predicted only 20.0% of variance in freshman GPA. Taylor, 19-20.

[89] COMPLAINT, *supra* note 40, at 23. *See also* MICHAEL KURLEANDER, MIDDLE SCHOOL PREDICTORS OF HIGH SCHOOL ACHIEVEMENT IN THREE CALIFORNIA DISTRICTS (June 2008) (Policy Brief, No. 13, California Dropout Research Project).

[90] *Id.*, 11.

[91] *Id.*

[92] U.S. Dep't of Justice & U.S. Dep't of Educ., *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools* 5-6 (2011), http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf. The DOJ and DOJ's analysis for this part of the guidance was primarily based on *Parents Involved,* 551 U.S. 701*, Grutter* 539 U.S. 306, *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

[93] PATHWAYS, *supra* note 12, at 7.

[94] *Id.*

[95] COMM. SERV. SOC. OF N.Y., *supra* note 6, at 2, 11, 17-20 (October 2013). *See* Feinman, *supra* note 27, at 5-6.

[96] Tortoriello, *supra* note 5, at 427.

[97] *Id.*

[98] *Id.*

[99] Elizabeth Harris & Winnie Hu, Asian Groups See Bias in Plan to Diversify New York's Elite Schools, N.Y. TIMES, June 5, 2018, https://www.nytimes.com/2018/06/05/nyregion/carranza-specialized-schools-admission-asians.html. *See also* David W. Chen, 'A Huge Blind Spot': Why New York Asians Feel Overlooked, N.Y. TIMES, July 4, 2018, https://www.nytimes.com/2018/07/04/nyregion/asians-overlooked-specialized-schools.html.

[100] Asian American Legal Defense and Education Fund, *Statement On U.S. Department of Education Office Of Civil Rights Complaint of the NYC Coalition*

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[101] United Federation of Teachers Specialized High Schools Task Force, *Redefining High Performance for Entrance into Specialized High Schools* 8 (March 2014), http://www.uft.org/files/attachments/specialized-high-school-task-force-report-2014.pdf.

[102] Complaint, *supra* note 40, at 25. *See also* Comm. Serv. Soc. of N.Y., *supra* note 6, at 14.

[103] *See* N.Y.C. Dep't of Educ., *supra* note 11. *See* Disare, *supra* note 9 (App. A).

[104] Pathways, *supra* note 12, at 4-5.

[105] United Federation of Teachers, *supra* note 99, at 6.

[106] *Bakke,* 438 U.S. 265, 323-24. *Parents Involved,* 551 U.S. 783, 797.

[107] Pathways, *supra* note 12, at 5.

[108] Tortoriello, *supra* note 5, at 434-40.

[109] In 2014 and 2015, state lawmakers introduced a bill to require the specialized high schools to use multiple measures for admission, including grades, attendance, and state test scores. Both bills died in committee. Press Release, CoalitionEDU, *SHSAT Reform Bill Defeated in NYS Senate Education Committee* (Apr. 28, 2015). *See also id.,* at 3.

[110] Shapiro, *supra* note 35.

[111] *Id.*

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[113] Tortoriello, *supra* note 5, at 447-457.

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Revolution Unrealized: How Brown Failed But Why the Promise of School Desegregation Must Continue

"Mark" Min Seong Kim | University of Pennsylvania

Edited By: Arianna Scott, Sebastian Torero, Isabelle Zaslavsky

Abstract

This paper examines how the jurisprudence on school desegregation has developed from *Brown v. Board* to *Parents Involved v. Seattle School District* (2007). While *Brown* served as a foundational precedent for future racial equality cases, its weak language and lack of clear enforcement mechanisms ensured that the decision would be ill- equipped to create actual remedies to end school segregation. It took another fourteen years following the *Brown* decision for the Supreme Court to affirm its sincerity in enforcing desegregation in *Green v. County School Board of New Kent County* (1968) and *Alexander v. Holmes County Board of Education* (1969). However, a following landmark case, *Swann v. Charlotte-Mecklenburg Board of Education* (1971), was puzzling because it offered a confusing mixture of progressive and conservative language on desegregation. With the help of carefully selected language from *Swann*, the new conservative Justices struck a huge blow to school desegregation efforts in *Milliken*. School desegregation would become a lost cause, virtually abandoned by all three branches of the federal government.

I. Introduction

Brown v. Board of Education of Topeka (I) (1954), arguably the most consequential civil rights victory in the 20th century, holds a special place in American history and constitutional law. However, more than sixty years after the landmark decision, a growing number of scholarly works criticize the legal foundations and limitations of *Brown*. Indeed, while relatively few people doubt *Brown*'s seminal influence on initiating public discourse on racial equality, various forms of racial disparities and segregation persist in the United States today. Although racial minority groups have been afforded more equality than six decades ago, they are far from having full equality with their white counterparts. More alarming is the evidence of school re-segregation, a trend clearly antithetical to the purpose of *Brown*.

Upon close examination of four landmark cases on school desegregation, it is evident that the Court has maintained a rather conservative and measured stance on school desegregation from *Brown* onwards. Furthermore, school segregation jurisprudence not only suffers from various legal and logical shortcomings, but also illustrates the Court's extremely shallow understanding of primary causes of school segregation and racial inequality. No longer a reliable supporter of civil rights advocates, the Supreme Court is today an institution complicit in condoning re-segregation. Because desegregation jurisprudence evinces various shortcomings, it is imperative that the Supreme Court and the other two branches of the government unite once again to immediately fulfill a neglected constitutional obligation: to protect minority students from school segregation.

II. Keystones

In the early civil rights movement, segregation in schools and other institutions was justified under precedent set by *Plessy*

v. Ferguson (1896), a well-documented case that established the principle of "separate but equal." The key legal precedent that Justice Brown evoked to write the famous opinion in *Plessy* was *Roberts v. City of Boston* (1850), a case in which the Massachusetts Supreme Court affirmed school segregation and barred a five-year old African American girl from being admitted to a white school. *Roberts* was certainly a convenient case to cite, particularly because it had originated from Massachusetts, a "[state] where the political rights of the colored race have been the longest and most earnestly enforced."[1] Yet the use of *Roberts* was grossly erroneous because the Massachusetts state legislature had rejected its earlier policy and voted to prohibit school segregation in 1855, forty-one years before *Plessy* was decided.[2] Thus, Justice Brown deliberately utilized *Roberts* as one of the few legal precedents central to the logic of his opinion even though he was aware that the decision upheld a policy that had been fully repudiated. The fact that the principle of "separate but equal" largely depended on *Roberts*' affirmation of separate schools for minority children served as a harbinger for the critical role that school segregation cases would play in the development of civil rights for all.

Despite its various shortcomings, *Plessy* came as a historic blow to civil rights leaders who hoped to invoke the Equal Protection Clause to combat racial discrimination in courts. However, under the capable leadership of Charles Houston and young Thurgood Marshall, the National Association for the Advancement of Colored People (NAACP) was able to win small victories and look for strategies to effectively remedy racial disparities within such constraints. The NAACP soon adopted the Margold Plan, a new strategy of challenging practices of segregation rather than the principle of "separate but equal" itself.[3] This plan shaped how the NAACP approached and argued civil rights cases for decades. Based on the principles of incrementalism, the focus of desegregation cases shifted from challenging the seemingly ironclad logic of *Plessy* to

filing lawsuits to equalize unequal facilities in black schools. This incremental approach and renewed focus on school desegregation, rather than issuing any conclusive blows to *Plessy*, worked to pierce significant holes in its logic, and helped improve facilities in black schools.

The NAACP's subsequent victories in the fight for equality and graduate school admissions laid critical legal foundations for *Brown*. In *Gaines v. Canada* (1938) and *Sweatt v. Painter* (1950), the Supreme Court ordered that African American students be admitted to the law schools of the University of Missouri and University of Texas, respectively. At issue in *Gaines* was the path that public universities took to avoid desegregation by hastily creating cursory and inept schools exclusively for black students and arguing that the new segregated schools were commensurate to those of white students. Such schemes were hardly sufficient to persuade the Justices, and the Supreme Court found that the black law schools failed to provide equal education and facilities.[4] In *Sweatt*, the Court took a step further and ruled that the law school for black students lacked intangible qualities, such as faculty, alumni, and school reputation, that the white students in University of Texas Law School enjoyed.[5] Although the two cases were major victories for the NAACP, the Court deliberately limited the *Sweatt* decision by rejecting the NAACP's "contention that *Plessy v. Ferguson* should be reexamined."[6]

In sum, the equalization strategy was a double-edged sword. While more schools were desegregated and equalized, the Court effectively closed the possibility of these cases weakening the "separate but equal" principle of *Plessy*.

III. The *Brown* Revolution

Brown, in a sense, was the culmination of decades of legal battles by the NAACP. Multiple cases in which the Supreme Court

sided with African American students forced the Court to see that it was unusual for separate black schools to be equal to their white counterparts. Such precedents played instrumental roles in the NAACP's attempts to prove that "separate but equal" was no longer a tenable doctrine. It thus comes as little surprise that the *Sweatt* and *Gaines* decisions are cited in the final *Brown* decision. In particular, *Sweatt* was a powerful precedent for *Brown* since the language that the Court had used to describe the "intangible qualities" that the black law schools lacked was used to understand the psychological damages that school segregation inflicted on black students. Yet *Brown* is hardly the sole product of careful and meticulous incrementalism. Marshall and the NAACP came to understand the limitations of the equalization strategy, which resulted in gains for individual schools but failed to result in systemic changes to the national pattern of racial segregation.[7] But as direct words from Marshall suggest, *Brown* was a gamble, since a negative decision from the Court would have nullified the legal progress made thus far and may have even entirely closed doors to addressing segregation in the future.[8]

Regardless of the NAACP's intent, *Brown* was a landmark decision that dethroned the *Plessy* doctrine from the law. The Court used strong language that explicitly found that "in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[9] While it was a revolutionary victory for minority groups, a close reading of *Brown* shows that the decision suffers from a wide array of shortcomings. One of the strongest criticisms is that the language of *Brown* did not provide a clear definition as to what degree the Court was willing to pursue remedial action to address segregation. This ambiguity was sufficient for both proponents and opponents of active desegregation to cite *Brown* to uphold their own claims; proponents argued that *Brown* gave courts and local governments a sweeping power to combat all forms of racial inequalities, while

the opponents argued that the promise of *Brown* ends at creating a color-blind society that can be achieved without comprehensive remedial actions. This ambiguity in *Brown* gave future Courts an enormous amount of discretion. With rather unclear language and reasoning, one cannot help but conclude that the "*Brown* decision would have been stronger if it had simply addressed that the U.S. Constitution demands equality before the law."[10]

Brown was also virtually ineffectual and failed to bring substantial changes to school segregation patterns. This pattern is best exemplified in *Brown v. Board of Education of Topeka (II)* (1955), the ensuing decision that intended to give schools, especially those in the South, adequate time to comply and ensure that the remedies consider various local conditions. As former NAACP attorney Derrick Bell explains, *Brown II,* which ordered remedies to be implemented with "all deliberate speed," resulted in converting the meaning of *Brown I* from real to symbolic.[11] Indeed, the courts and school boards across the country construed the vague language in *Brown II* as a sign that that the Supreme Court did not require immediate action and that district courts had little power or obligation to enforce desegregation. Indeed, *Brown I* and *Brown II* were ultimately futile, and as a result, no more than 0.2% of blacks in the South attended schools with whites by 1959-1960.[12] *Brown* thus failed to materialize tangible changes to the intended beneficiaries and allowed egregious constitutional violations to continue just as they had before.

While the exact meaning of the decision is subject to debate, a more holistic reading of *Brown* suggests that the decision was intended to achieve more than merely declaring school desegregation to be unconstitutional. The ruling does not articulate any specific goals, such as integration, desegregation, a color-blind society, or full racial equality. Yet the fact that the Court did not stop at ending segregated schools after *Brown* demands attention. The decision immediately became a springboard for the Justices to order desegregation in

other public accommodations, suggesting that the Court embraced a progressive understanding of desegregation and racial equality.[13] The Court's sincerity in pursuing school desegregation is also well illustrated in *Green* and *Swann*, in which the Court unanimously made aggressive orders to implement immediate, practical solutions. On that note, when declaring the *Brown* opinion, the Justices were fully cognizant that they were striking down the very legal footing on which various Jim Crow laws stood. As they intended, the Supreme Court fulfilled perhaps its most important goal through *Brown* – to force the American government and society to finally open their eyes and recognize racial inequality as one of the biggest challenges of their time.

IV. The *Charlotte* Promise

After fourteen years of extreme reluctance by the South to address school segregation, the Court felt the need to revisit the issue and make more specific guidelines. In *Green v. County School Board*, the Court struck down freedom of choice plans (which allowed students to choose what schools they wanted to attend and was what a majority of Southern schools had adopted after *Brown)* that failed to transform the racially homogenous structure of schools the state had established. The plans were most often used as vehicles to circumvent desegregation and usually had little, if any, effect on the racial composition of students. Justice Brennan's unanimous opinion strongly conveyed the firmness of the Court's stance, declaring the freedom of choice system under review a "perpetuation of the unconstitutional dual system" and that the school board now has the burden to create a plan that "promises realistically to work."[14] Under the new Chief Justice, the Burger Court further sharpened the affirmative duty for schools to desegregate in *Alexander v. Holmes*. The decision specifically found that the "all deliberate speed" standard from *Brown II* was no longer permissible and issued orders

for schools to "desegregate at once."[15]

The next landmark case, *Swann v. Charlotte*, was a culmination of a series of school desegregation cases in which the Court sought more impactful remedial authorities. The Court held that it was permissible for Charlotte, one of the most segregated cities in the South, to institute a wide array of remedial desegregation policies, including city-wide busing, wedge-shaped school attendance zones, and changes in the student transfer system. While the decision itself surprised few, it is noteworthy that *Swann* was framed as a "busing" decision by the time that the case reached the Supreme Court. The case received national attention for its possible implications and helped consolidate white resistance to busing across the country. Fervor against desegregation culminated in controversies and zealous protests in Charlotte that were spearheaded by the white Concerned Parents Association. The degree of disdain for the new desegregation case was fierce; in the first half of February alone, Charlotte residents sent more than 50,000 correspondences to President Nixon pleading for an end to busing.[16] Public animosity in Charlotte was hard to ignore and resulted in President Nixon issuing an address in which he criticized school integration and demanded a return to neighborhood schools.[17] That the decision was made in such a hostile context made *Swann* all the more critical a triumph for the liberals.

It is noteworthy that every word in the *Swann* opinion is a product of arduous compromises between conservative and liberal Justices. Breaking with longstanding tradition, Chief Justice Burger decided to write the opinion in Swann himself, even though he was with the minority siding against Charlotte's plan.[18] The first drafts that Burger wrote were insulting to other Justices, as they ordered a remand instead of the majority's call for affirmation of Charlotte's plan.[19]

It took Burger six drafts, each time conceding to the other justices' suggestions and opinions, for the Court to reach a

unanimous decision in 1971. Some traces of the compromise are still evident in the final decision. The opinion stated that the "nature of the violation determines the scope of the remedy" and that the use of mathematical ratios of races in school assignment cannot be required.[20] This tone stands in contrast to progressive language, such as that the "district court has broad power to fashion a remedy" as well as the final decision that ultimately affirmed all of the desegregation tools employed in Charlotte.[21] It thus comes as no surprise that a Circuit Court judge concluded that "there is a lot of conflicting language here. It's almost as if there were two sets of views, laid side by side".[22]

Such close reading suggests that the rhetoric which glorifies *Swann* as a classic victory for advocates of desegregation is too simplistic. *Swann*'s drafting process established the new Chief Justice as significantly more conservative on desegregation than his predecessor. The final opinion was a mix of the Warren Court's traditional support for desegregation and Burger's careful qualifications, and can be seen as an omen of the Court's deteriorating will to pursue desegregation. The case also played an instrumental role in shaping and crystallizing white resistance to busing, which became one of the most contentious issues in the country. The public's strong opposition to integration after *Swann* was shared in the Oval Office. President Nixon stipulated that, in selecting a new Supreme Court nominee, "I don't care if he's a Democrat or a Republican... within the definition of conservative, he must be against busing, and against forced housing integration."[23] Just as the President hoped, Justices Rehnquist and Powell played decisive roles in modifying the judiciary's stance on school segregation and racial equality.

Despite its muddled language and ensuing backlash, *Swann* was far more effective at achieving desegregation than *Brown* and helped expand desegregation in Southern schools. One year after the decision, the South was the least segregated area in the country. Furthermore, from 1960 to 1972, the percentage of black

students in the South attending 90-100% nonwhite schools saw a staggering drop from 100% to 24.7%.[24] Such positive changes can be attributed to a synergy between the Supreme Court decisions that had consistently championed desegregation efforts and policies of other branches of the federal government, such as the 1964 Civil Rights Act and Elementary and Secondary Education Act. Despite such efficacy, *Swann* marks the end of sustaining major federal government efforts to desegregate schools to this date.

V. The *Milliken* Setback

Before examining *Milliken v. Bradley* (1974), the next landmark school segregation case, the Court's decision in *Keyes v. School District No. 1* (1973) deserves special attention. *Keyes* was the first case in which the Court found that Northern schools were obligated to desegregate, just as those in the South, but would have major ramifications because of its important qualification-- that only *de jure* segregation can be found to be unconstitutional.[25] The *de jure* (legally sanctioned), *de facto* (actually occurring) distinction, developed by lower courts and embraced by the Supreme Court in *Keyes*, would be a major setback because of the nature of Northern segregation. Various forms of *de facto* segregation were prevalent in the North, which contrasted deeply from the significantly more obvious *de jure* segregation in the South. This distinction therefore served as a major impediment to the NAACP Legal Defense Fund because it was substantially harder to prove the existence of informal patterns of segregation than those that blatantly operated under the law.

In *Milliken*, the Court overturned Detroit's sweeping metropolitan desegregation plan that ordered cross-district busing between 53 out of 85 suburban districts. The key reasoning behind the ruling rests on Burger's own conservative language in *Swann* – that "the scope of remedy is determined by the nature and extent of

constitutional violation."[26] Although the lower court found evidence of *de jure* segregation in Detroit, the Court argued that, "with no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect, the court went beyond the original theory of the case."[27] The central reasoning in the decision was simply that the remedy should only fall on Detroit where explicit, unconstitutional segregation was found and should not extend to the surrounding school districts where such violations were not as blatant. While the logic of *Milliken* may seem impregnable, the dissenters made a compelling case that, since state officials were ultimately responsible for creating the school districting system, it follows that they too were complicit in creating segregated districts and thus an interdistrict metropolitan solution should be permissible. Furthermore, like the Burger opinion, Justice White's dissent also invoked specific language from *Swann* and wrote that the decision established "broad remedial powers" for desegregation purposes.[28] Regardless of the conflicting views, the *Milliken* decision made a singular impact in terminating the prospect of desegregation reaching the suburbs.

What is fundamentally problematic about the *Milliken* decision is the Court's application of the *de facto-de jure* distinction from *Keyes* that failed to consider Detroit's long history of racial discrimination. Detroit was a paradigm of a Northern city tainted by government-sponsored and initiated segregation. As was in the case in urban centers across the nation, the federal government's Home Owners' Loan Corporation and Federal Housing Administration program encouraged racial homogeneity of communities, spurring already prevalent housing segregation. In Detroit "much of the city's federal funding was devoted to urban renewal and highway projects, programs that destroyed black neighborhoods and displaced black residents."[29] Thus, by the time that *Milliken* reached the Supreme Court, Detroit's black population had long been the victim of extensive state-maintained housing segregation patterns in forms of

urban renewal, highway razed communities, restrictive covenants, blockbusting, and FHA as well as HOLC rating systems. *Milliken*'s application of the *de facto-de jure* standard, therefore, was woefully inadequate because segregated schools were no more than a symptom of Detroit's large systemic housing segregation patterns. To borrow language from *Swann*, it is difficult to understand how in any way, "the scope of remedy" – a single district remedial plan – is commensurate with the "nature and extent of constitutional violation" – centuries of *de jure* and *de facto* housing discrimination that in turn led to school segregation.

As such evidence strongly suggests, the *de facto-de jure* distinction is no more than the Court's arbitrary creation based not on an objective standard, but rather a politically convenient one. The distinction is no more than a product of the Court deliberately ignoring a mix of complex factors that collectively manifested into large school segregation patterns. While the Court has traditionally been unwilling to consider other systemic racial inequality issues, *Milliken* was the first case in which the government was explicitly absolved from its culpability in maintaining and creating segregation patterns in the North. More importantly, *Milliken* and *Keyes* collectively implied that *de facto* segregation is the result of individual choice, not state action, and thus cannot be remedied by the Court. That *de facto* segregation had virtually the same effect as *de jure* segregation should have been self-evident from the Court opinion that noted "unitary school systems have been required for more than a century by the Michigan Constitution as implemented by state law" but still found evidence of school segregation in Detroit.[30] The hollowness of this distinction is also well exemplified by the fact that, while Detroit achieved school integration in 1871 by law, schools saw major re-segregation from 1930s as a "result of changing housing patterns, largely because of restrictive covenants and real estate practices."[31] The private-public choice distinction is therefore out of touch with history and fails to account for the

obvious truth that "segregated urban school systems are built on a base of housing segregation."[32]

In fact, the context of *Milliken* suggests that *de facto* segregation could be more pernicious than *de jure* segregation in a post-*Brown* society. Since *de facto* segregation is constitutional, the distinction propagates a false belief that segregation takes place not only lawfully but also naturally. According to this logic, it follows that the patterns of residential segregation in the North were results of private choices that would have occurred regardless of the existence of discrimination by law. The decisions closely parallel white parents' rhetoric that stressed neighborhood control and suburban innocence, and "natural" white homogeneity in communities. Thus, *Milliken* and *Keyes* evaded the fact that housing and school choices for minority families are not products of mere individual preferences in an equal market but of deliberate private and public constraints. It is clear that the "private choice" to decide where one could live and attend school was a privilege reserved for whites in the North. Such choice did not extend to non-whites who were confined to heavily segregated parts of a city. By arguing that de facto segregation was constitutional, the Court effectively applied a recreated "separate but equal" principle, declaring that the whites could continue to maintain a system of housing segregation based on overwhelmingly self-serving "private choice." As it was under *Plessy*, the non-whites would be entitled to equal "private choices" via law but would continue to be subject to racially discriminatory practices. It seems needless to say that underlying philosophy behind the two decisions was antithetical to that of *Brown*.

As Orfield notes, *Milliken* "rendered Brown meaningless for most of the metropolitan North" because the ruling made it impossible for cities to seek inter-district desegregation remedies.[33] With that possibility eviscerated, there was hardly any solution that Detroit could implement to desegregate its majority-minority school district. The city's declining tax revenue and education funding

also served as major constraints to implementing an effective desegregation plan. As Justice White correctly predicted, "a remedy confined to the district could achieve no more desegregation" and "the most promising proposal…would leave many of its schools 75 to 90 percent Black."[34] Furthermore, the decision virtually destroyed the prospect of inter-district desegregation strategies in all major Northern cities that suffered from similar issues, including tax base decline, white flight, and increasing proportion of minority students. *Milliken* also gave legitimacy to white parents who participated in white flight to escape desegregation orders and hoped to maintain racial homogeneity in the suburbs. Since a city's desegregation plans was restricted to its municipal boundaries, the key beneficiaries of *Milliken* were not minority students, but white suburban families who took refuge from the courts' busing and integration orders.

An equally troubling aspect of the decision is that it condoned increasing racial segregation in the North. *Milliken* played a decisive role in ensuring that the Northeast would remain the single most segregated region in the nation to this day.[35] More surprising is the consistency in the differences of the proportion of segregated schools between the Northeast and the South. In 1976, 51.4% of Northeast schools and 22.4% of Southern schools were highly segregated (signifying a school's student population was comprised of 90-100% non-whites). This gap between the two regions remained largely consistent for decades; in 2000, the Northeast and South saw 51.2% and 30.9% of their schools highly segregated, respectively.[36] Thus, *Keyes*' *de facto-de jure* distinction and *Milliken*'s ban on interdistrict remedies worked hand in hand to ensure that the North, which saw more school segregation than the South by 1972, had little obligation to desegregate its own schools. Thus, the two decisions created and perpetuated a double standard for the two regions; sacrifices that the South made to implement sweeping desegregation plans are hardly matched by those of the North, which hid behind the *de facto* segregation distinction to justify taking little, if any action. *Milliken*,

therefore, was an astounding defeat that reinforced the hypocrisy and unfounded moral superiority of the Northerners that the Southern legislators had vehemently criticized before in the Civil Rights Act debate.

VI. Retrenchment and *Parents Involved*

Milliken marked the end of the Supreme Court's efforts to grant additional authority to district courts for them to pursue desegregation. The White House and Congress had also followed suit and moved away from busing and school integration efforts by the time the *Milliken* decision was released.[37] With white support for school segregation declining from 25% to 5% from 1964 to 1978, school desegregation efforts faced mounting public outcry and controversy.[38] Strong opposition to desegregation reached the House of Representatives where a constitutional amendment to ban school busing received 216-209 votes.[39] In the Executive Branch, President Reagan succeeded Nixon as one of the most vocal critics of school busing and asserted to voters in Charlotte that court-ordered busing "takes innocent children out of the neighborhood schools and makes them pawns in a social experiment that nobody wants."[40] It seemed that district courts were the last bastions of desegregation efforts, struggling to continue the legacy of *Brown*.

In the 1990s, the Supreme Court played an instrumental role in heralding an era of re-segregation with the *Missouri v. Jenkins* (1990), *Board of Education of Oklahoma* v. *Dowell* (1991), and *Freeman v. Pitts* (1992) decisions. The rulings established that the school districts would not be under court supervision once they were deemed unitary and offered a puzzling argument that the purpose of desegregation orders should not be to achieve desegregation. In fact, in *Freeman* the Court explicitly wrote that the "the ultimate objective" of desegregation was "to return school districts to the control of local authorities."[41] In *Jenkins*, the Court struck down the

desegregation order on the grounds that "our cases recognize that local autonomy of school districts is a vital national tradition and that a district court must strive to restore state and local authorities to the control of a school system."[42] In addition to granting great deference to local school boards, the *Jenkins* decision dismissed the district court's factual evidence that "showed that segregation had made white families retreat to the suburbs."[43] The Court therefore once again granted legitimacy to the *de facto-de jure* distinction and ignored court-produced evidence that documented a clear effect of *de facto* segregation. Further attenuation of desegregation mandates naturally followed as the Court left little ambiguity in its message that the district courts must strive to end desegregation orders. These decisions showed that the goal of desegregation transitioned from effectiveness in achieving racial balance to "[returning] school districts to control of local authorities."[44]

The Supreme Court had not granted a certiorari on a school desegregation case until *Parents Involved,* the most significant school desegregation case after *Milliken*. In a 5-4 decision, the Supreme Court found voluntary integration programs adopted in Louisville and Seattle to be unconstitutional. The case was particularly significant because the municipal government adopted student assignment plans in the two cities on a voluntary basis, not as the result of court intervention. More importantly, *Parents Involved* was the first case in which the Supreme Court applied the strict scrutiny test to school desegregation. Previously, the test had been reserved for affirmative action in college admissions. It was virtually impossible for the desegregation plans challenged in *Parents Involved* to survive the strict scrutiny test, which places a large legal burden on any form of race-based assignment. The decision also received attention because it was by far the most conservative Supreme Court school desegregation case to date, one that downplayed race as a factor in school assignments. By invoking language from *Swann* and *Milliken*, the Court wrote that "even

in the context of mandatory desegregation, we have stressed that racial proportionality is not required" and cited *Grutter v. Bollinger* (2003) to illustrate that, while race assignment can be a component of student diversity, racial balance is "patently unconstitutional."[45]

Parents Involved is also critical because it represents a retreat from one of the most historic principles in the past school desegregation orders: local control. It was with this factor in mind that *Brown II* noted that "full implementation of these constitutional principles may require solution of varied local school problems" in issuing the first court-ordered intervention orders.[46] Following *Brown II*, pro-desegregation decisions also found that the local judges should be entrusted with finding remedies that can best consider conditions specific to the district. In the following 1990 re-segregation cases, conservative Justices exploited the importance of local control of schools, which they deemed "national tradition," and argued that the Court must entirely refrain from intervening in local school decisions. In contrast to the previous desegregation cases, the Seattle and Louisville school districts that were challenged in *Parents Involved* were voluntarily adopted by local governments. Thus, the decision overturned an autonomous school policy made by the municipal government and issued a seemingly unnecessary court-ordered federal intervention. The ruling, which included no "notion that local and state officials should be in charge of school assignments," serves as a rejection of the importance of local choices that both conservative and progressive Justices have upheld since *Brown*.[47] Should they have been as dedicated to supporting local control of schools as they had wanted, conservative Justices would have sided with the school boards in *Parents Involved* since "local autonomy of school districts is a vital national tradition."[48]

Parents Involved was by far the largest betrayal to the school desegregation mandates established by *Brown* and *Swann*. In the opinion, the Court offered the most conservative reading of *Brown*, limiting the ultimate purpose of the 1954 decision to "stop assigning

students on a racial basis." Based on this understanding of *Brown*, the decision concluded that the "way to stop discrimination on the basis of race is to stop discrimination on the basis of race."[49] Thus, *Parents Involved* absorbed *Brown* as a precedent that substantiates its vision despite the irreconcilable differences between the two. *Brown* was on its face intended to outlaw segregation of schools based on race and strike down the "separate but equal" principle, not to establish a color-blind society by terminating all forms of racial classifications. Since the decision's goal was to terminate school segregation based on race, the *Brown* decision had to take racial compositions of students into account. In contrast, *Parents Involved* ruled that school boards cannot use race as a primary factor in their desegregation plans and ruled students' race to be one of many student diversity factors subject to strict scrutiny.

In many ways, the decision was a radical departure from not only *Swann* and *Brown* but also *Milliken*. Justice Stevens captured this well, writing that "it is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision" in his dissent.[50] The decision marked the culmination of large increases in segregated schools from 1991 to 2007, which was, to quote Gary Orfield, "a period deeply influenced by major Supreme Court decisions that limited desegregation policy."[51]

VII. Revolution Unrealized

In short, the Court has come almost full circle. While *Brown I* found that "separate educational facilities are inherently unequal," *Brown II* severely undercut the effectiveness of its former decision with the "all deliberate speed" language that was too vague.[52] In contrast, *Green* and *Alexander* issued stricter calls for remedies and culminated in *Swann*, a largely progressive decision that was a product of extensive compromises between the justices. In *Milliken*, the Court abandoned the trend of granting sweeping

school desegregation measures and ended the prospect of ending school desegregation in major northern cities and suburbs. Even more importantly, *Milliken* and *Keyes* collectively affirmed the *de facto-de jure* distinction, setting an important boundary that would severely limit future desegregation efforts. A period of re-segregation followed as the Supreme Court developed more intricate and conservative standards on race classifications.

It is difficult to accurately assess the exact vision that the Warren Court Justices hoped to imbue in *Brown* today. However, if the Justices wanted to achieve substantial racial equality, the decision was too atrociously inept to result in a fully integrated and desegregated society. *Brown* lacked serious introspection on the complicated nature of race issues and therefore was ill-equipped to offer solutions when significantly more complex issues, such as the *de jure-de facto* distinction, government culpability in housing segregation, metropolitan busing, or voluntary integration, reached the highest court. Furthermore, *Brown*'s reluctance to set a clear definition of segregation under the renewed legal understanding of the Equal Protection Clause ultimately resulted in a spectacular backfire once conservative Justices took their seats.

Like all revolutions, *Brown* was hardly perfect or utopian. It cannot be denied that desegregation cases collectively succeeded in spearheading progress in tackling racial segregation for a time. However, *Brown*'s ambiguity ensured that desegregation would be a short-lived goal, leaving it vulnerable to attempts of all three branches of the federal government to severely cripple its goal without ever overturning the decision. Indeed, weak language in *Brown*, *Swann, Green*, and *Alexander* allowed the decisions to be distorted in ways that were unequivocally antithetical to their original intentions. This trend is exemplified in *Milliken*, which meticulously selected language from *Swann* to reinforce the de facto-de jure distinction and reject cross-district busing. *Parents Involved* followed suit and read *Brown* to be a decision that had been designed to create

a colorblind society. One cannot help but wonder how differently American schools would look if *Brown* had asserted its vision of racial equality with more meticulousness and force.

VIII. Lessons from *Brown*

This essay has attempted to show that *Brown* is a severely flawed decision. Limitations found in desegregation jurisprudence invited a wide array of conclusions about the future of school integration policies. Perhaps re-segregation shows that the Court cannot overcome public resistance alone. On the other hand, it may be that school integration is a fundamentally flawed goal and pursuing alternatives, such as school equalization, school choice, and additional funding towards improving highly segregated schools, would be more effective. Regardless, it is important to question whether school desegregation was a futile policy that was never intended to succeed.

Should the United States government and society abandon desegregation as a whole? The simple answer is no. The shortcomings of the desegregation rulings must not eschew the fact that Supreme Court still has an obligation to protect American students' constitutional right to attend desegregated schools. The fact remains that, despite the increasing cases of segregation across the nation, the judiciary neglected its Constitutional duty and did extremely little to provide remedies from *Milliken*. As long as the principle that "in the field of public education, the doctrine of "separate but equal" has no place" continues to survive in law, the Court still has a duty to combat any form of school re-segregation patterns. Legal standards, such as the strict scrutiny test or *de jure-de facto* distinction, that the Court has established after *Brown* ultimately have little relevance; the one and only goal of *Brown* has always remained the same – to strike down school segregation on the ground that "separate educational facilities are inherently unequal."[53]

As long as *Brown* is a lawful precedent, the Court has a constitutional duty to order solutions to school re-segregation. However, from *Milliken*, the Court merely perpetuated a double standard in which it pretended to uphold *Brown* but crippled its mandate in reality. Intricate interpretations and legal standards that the conservative Justices adopted after *Swann* are no more than pretenses that allow the Court to escape fulfilling its constitutional obligation.

What is equally needed is for the Court to recognize that its own perception of diversity and racial inequalities has been too shallow. All major school desegregation cases suffer from a lack of sufficient introspection into the roots of racial discrimination. As this paper began to explore, an argument can be made that it is difficult to separate school segregation from housing segregation. These two forms represent a tiny fraction of inextricably entangled systems of underlying discrimination, segregation, and inequalities that have collectively victimized nonwhites since the nation's founding. Should it desire to return to finally upholding the mission of *Brown*, the Court must adopt a holistic view on racial inequalities that embraces the complexity and interconnectedness of segregation issues. More importantly, the Court must abandon concepts such as *de jure–de facto* segregation that have been utilized as vehicles to undermine desegregation orders and ultimately propagate a misguided belief that education segregation can be isolated from other manifestations of racial inequalities. While school desegregation cannot be a singular solution to cure all forms of racial disparities that plague the United States today, the Court's renewed approach to fulfilling its constitutional duty based on a more sophisticated understanding of segregation patterns will signal a movement away from the federal government's complacency to protecting minority population's civil rights once again.

As the critics of integration point out, desegregation may be a fundamentally flawed, failed, and unattainable goal. But until the

day that *Brown* is struck down, all branches of federal government, especially the judiciary, still have legal obligations to pursue desegregation. Whether the federal government can bring back school desegregation as a policy priority will serve as a crucial test for American society. Furthermore, whether school desegregation is an attainable goal in 2018 will show if American democracy has matured to finally embrace the Equal Protection Clause and true message of *Brown*. However, should desegregation receive virulent public criticisms as it once did, it will serve as somber evidence that racial boundaries in the classroom remain deep.

[1] *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).
[2] Richard Kluger, Simple Justice: The History of Brown V. Board of Education and Black America's Struggle for Equality (New York: Vintage Books, 2004), 76.
[3] Ibid, 76.
[4] *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938)
[5] *Sweatt* v. *Painter*, 339 U.S. 629 (1950)
[6] Ibid.
[7] Kluger, *Simple Justice*, 290-294.
[8] Ibid, 291.
[9] *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954)
[10] "Brown and Its Impact on Schools and American Life," *American Bar Association Focus on Law Studies* 19 (2004): 3.
[11] Bell, Derrick A. *Silent Covenants: Brown V. Board of Education and the Unfulfilled Hopes for Racial Reform*. Oxford: Oxford University Press, 2006, 19.
[12] Charles T. Clotfelter, *After "Brown": The Rise and Retreat of School Desegregation* (Princeton: Princeton University Press, 2011), 24.
[13] "Brown and Its Impact," 5.
[14] *Green* v. *County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968).
[15] *Alexander* v. *Holmes County Bd. of Ed.*, 396 U.S. 19 (1969).
[16] Matthew Lassiter, "The Suburban Origins of 'Color-Blind' Conservatism: Middle-Class Consciousness in the Charlotte Busing Crisis," *Journal of Urban History*, May 2004, 567.
[17] Ibid, 568.
[18] Bernard Schwartz, *Swann's Way: The School Busing Case and the Supreme Court* (New York: Oxford University Press, 1986), 111.
[19] Ibid, 113
[20] *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).
[21] Ibid.
[22] Bernard Schwartz, *Decision: How the Supreme Court Decides Cases* (New York: Oxford University Press, 1997), 8.
[23] Clotfelter, *After "Brown,"* 31.
[24] Ibid, 57.
[25] *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973).
[26] *Milliken* v. *Bradley*, 418 U.S. 717 (1974).
[27] Ibid.
[28] Ibid.
[29] Joyce A. Baugh, *The Detroit School Busing Case: Milliken V. Bradley and the Controversy over Desegregation* (Lawrence, Kan.: Univ. Press of Kansas, 2011),

40.
[30] *Milliken* v. *Bradley*, 418 U.S. 717 (1974).
[31] Baugh, *The Detroit*, 60.
[32] Gary Orfield, "Housing and the Justification of School Segregation," University of Pennsylvania Law Review 143, no. 5 (May 1995), 1398,
[33] Baugh, *The Detroit*, 194.
[34] *Milliken* v. *Bradley*, 418 U.S. 717 (1974).
[35] Clotfelter, *After "Brown,"* 56.
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[40] Lassiter, *The Suburban Origins*, 567.
[41] *Freeman* v. *Pitts*, 503 U.S. 467 (1992).
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[48] *Missouri* v. *Jenkins*, 495 U.S. 33 (1990).
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Native Americans and the New Jim Crow

Nicolas Runnels | New York University

Edited By: Rachel Dichter, Nathan Canadas, Olivia Nelson

Abstract

Extending Michelle Alexander's *The New Jim Crow*, this article argues that criminal sentencing disproportionately burdens Native Americans, furthering a racial caste system. By first tracing several Supreme Court cases that distilled a federal policy of paternalism into black letter law, this work asserts that federal policies rooted in explicitly racist beliefs had a lasting impact on the federal government's treatment of Native Americans. This work then analyzes how Native Americans' particular legal status, stemming from these court decisions, has been used to create a biased methodology for criminal conviction today. It considers this legalized bias from three distinct perspectives: those of the Native victim, the Native defendant, and the federal jury trying Native crimes. Pivoting on the legal implications of the Major Crimes Act, which granted exclusive jurisdiction to the federal government for criminal acts committed on reservations, this work stresses that curbing tribal courts' judicial power has had negative, quantifiable effects on Native American sentencing.

> *[T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.*[1]
>
> *Cherokee Nation v. State of Georgia*
> (1831)

I. Introduction

An old Apsáalooke proverb states that man's law changes with his understanding of man. In their extension of protection to specific minority demographic groups, the Thirteenth and Nineteenth Amendments to the U.S. Constitution, the Civil Rights Act, and *Obergefell v. Hodges* illustrate the proverb. However, some groups remain on the sidelines. Although Native Americans and Alaskan Natives comprise the descendants of the first American peoples, they are consistently amongst the last to be included in legal progress.

In *The New Jim Crow: Mass Incarceration in the Age of Colorblindness,* Michelle Alexander unmasks what she calls "the role of the criminal justice system in creating and perpetuating racial hierarchy in the United States."[2] Alexander focuses her analysis on the singular experience of African American men, denoting the ways in which mass incarceration and the supposedly non-biased sentencing have served as largely unseen actors of racialized social control. In particular, her book argues that the carceral state locks stigmatized groups into socio-economic inferiority "by law and custom."[3]

In this paper, I will analyze how the guise of non-biased sentencing in federal criminal trials and land rights legislation has been used against the descendants of the first Americans. In doing so, I take up Alexander's call for other scholars to continue her line of work. This article focuses on the unjust legislation surrounding Native American reservations in order to extend Alexander's argument that "[t]he nature of the criminal justice system... is no longer primarily concerned with the prevention and punishment of crime, but rather with the management and control of the dispossessed."[4] In the first section, I will offer a historical account of several discriminatory legal and political structures that bear on Native Americans. Then, I will contend in the second section that these structures have had long-term negative effects on Native American populaces. In the third section, I will suggest two possible solutions to the problems that I lay out in the first two sections. Finally, I will conclude with a discussion of why the U.S. criminal justice system should improve its protection of Native American rights.

II. Creating the Reservation

As Alexander notes, the U.S. government has historically treated Native American reservations as a holding ground for an under-caste.[5] Similarly, historian Terry Anderson argues that tribal reservations were largely borne out of federal paternalism and racism. In his book, *Unlocking the Wealth of Indian Nations,* Anderson describes how Indian reservations grew out of Andrew Jackson's Indian Removal Act of 1830 and developed under the Indian Appropriations Acts to confine indigenous tribes to isolated tracts of land removed from the urban centers of the nation.[6] The Indian Reorganization Act of 1934 and adjoining Supreme Court rulings continued the legalized economic and geographic restriction of Native Americans. Today, the Department of the Interior "oversees"

reservations, regulating Native American land use and leasing. This paternalistic oversight arguably curbs Native Americans' Fifth and Fourteenth Amendment rights.[7]

The Supreme Court ruling in *Cherokee Nation v. Georgia* (1831) set the fundamental legal precedent for this current lopsided political dynamic between Native Americans and the U.S. government. In *Cherokee Nation,* Chief Justice Marshall's opinion of the Court deemed Natives neither autonomous foreigners nor equal American citizens. He wrote that that Native Americans are instead "in a state of pupilage" to the government, likening the relationship between Native and Americans and the U.S. government to that between "a ward [and] his guardian." Marshall's opinion draws a direct comparison between legal dependents and Native American groups, and advocates for the treatment of Native Americans as legal dependents of the state. In its allegation of the complicity of Native Americans in this dynamic, Marshall's statement that "[Native Americans] look to our government for protection; rely upon its kindness and its power; [and] appeal to it for relief to their wants" also justifies the establishment of a paternalistic legal relationship between the U.S. government and Native American citizens.[8]

The ruling in *Tee-Hit-Ton Indians v. United States* (1955) further solidified the paternalistic principles of federal "oversight" over Native Americans that remain in existence. In *Tee-Hit-Ton*, the Court ruled that Native Americans living on reservations did not have constitutionally protected property rights under the Fifth Amendment and affirmed that the government could take away reservation lands or natural resources without compensation, barring legal treaties declaring otherwise.[9] Today, Native Americans continue to face government restrictions on their private property. For instance, Native Americans must seek permission from the government to develop their own privately held natural resources or allow non-Native economic development ventures to operate on their lands.

Therefore, several landmark Supreme Court decisions established legal paternalism and a "duty of protection" as the U.S. government's *modus operandi* in its dealings with Native American citizens. However, Native Americans do not hold a similar unique status in all legal domains. By the Major Crimes Act of 1885, Native Americans are subject to the same federal jurisdiction for criminal offenses as American citizens who commit federal crimes.[10]

III. Criminalizing the Reservation

Background

Since the 18th century, the three hundred and twenty-six Native American reservations in the United States have been allocated to three distinct jurisdictions: (i) individual tribes, (ii) their states of residence, and (iii) the United States, generally. In this section, I argue that because past decisions have written the government's failure to recognize Native Americans as autonomous entities into law, Native Americans continue to be a disenfranchised by a discriminatory legal system.

Seminal cases such as *Cherokee Nation v. Georgia* (1831) underscored the deep-rooted flaws in the Supreme Court's judgments, stretching back to the 19th century. In *Cherokee Nation*, the plaintiff sought a federal injunction against laws passed by Georgia depriving the Cherokee tribe of any of sovereign rights within its boundaries. The manipulation of the Treaty of Cherokee Agency, which was intended to encourage Native Americans to relocate west and establish reservations for those who chose not to, in this case legitimized Justice Marshall's denouncement of Native autonomy. As discussed in the previous section, Marshall placed Native Americans in a "state of pupilage" under federal control. His legal definition of Native American tribes as "domestic dependent

nation[s]" allowed the Court to rule that Cherokees could not sue as a foreign nation (31 U.S. (6 Pet.) 515 (1832)). Nevertheless, by ruling that Native Americans could be viewed as "unique entities" under the law, U.S. courts set a legal precedent for processing Native Americans as outsiders in future cases. The treatment of Native Americans as "unique entities" thus aimed to not only reduce Native American opposition to American expansion, but also to legalize an imbalanced judicial structure.[11]

The Native Victim and the New Jim Crow

Today, structural injustices mean that Native American victims of crime who live on reservations cannot access the same degree of protection granted to Americans who do not live on reservations. Although Native Americans are more likely than people of any other race to experience violent crime at the hands of someone of a different race, tribal courts have no criminal jurisdiction over crimes committed on Native American reservations by non-Native Americans.[12] While *Cherokee Nation v. Georgia* brings to the forefront the central issue of Natives lacking legal agency, additional land ownership cases further highlight the fundamental legal problems with considering Native Americans "unique entities" under the law. This legal concept of a "unique" status has been used to process Native Americans under a "unique" system of criminalization, epitomized in the aforementioned *Tee-Hit-Ton Indians v. United States* (2016). When the Tee-Hit-Ton sought compensation from Congress for lumber taken from tribal-owned lands, essentially the same verdict as that decided in *Cherokee Nation v. Georgia* was reached. Despite the opposing opinion of the Secretary of Agriculture, the federal government continued to argue that the Tee-Hit-Ton tribe was a "unique entity." The tribe's status under the "unique" category thus enabled the federal government to refuse the tribe permanent rights to its occupied lands in Alaska.

President Andrew Jackson's remarks from his Fifth Annual Message to Congress in 1833 reflect the tradition out of which the legal entitlements of the Tee-Hit-Ton arose. This message highlights the nature of the federal system:

> [T]ribes cannot exist surrounded by our settlements and in continual contact with our citizens is certain. They have neither the intelligence, the industry, the moral habits, nor the desire of improvement which are essential to any favorable change in their condition. Established in the midst of another and *a superior race*, and without appreciating the causes of their inferiority or seeking to control them, they must necessarily yield to the force of circumstances and ere long disappear.[13]

The belief that White Americans comprise a "superior race" continues to contribute to an outdated justification for policy making and judicial decisions. In the vein of *The New Jim Crow*, the above quoted legal basis for discrimination against Native Americans reveals one way in which American courts developed out of a federal system that rests on an explicitly racist foundation.

Federal neglect of Native Americans, however, goes far beyond the issue of land rights. While tribes can exercise jurisdiction over minor crimes, the federal court controls what are considered major crimes: murder, kidnapping, child sexual abuse, child neglect, robbery, or assault cases committed by or against Native American people.[14] Rather than being tried in state courts, as is standard when victims and perpetrators of such crimes are Non-Native American U.S. citizens, these kinds of criminal cases go directly to federal courts when Native Americans are involved.

Dollar General Corp. v. Mississippi Band of Choctaw Indians (2016) represents a recent failure of the federal government to

provide equal legal protection to Native Americans in federal courts. When John Doe brought charges against Dollar General Corp. after allegations of sexual assault, the Choctaw tribe quoted *Montana v. the United States* (1981), where the Crow tribe was granted the right to exercise civil, if not criminal, jurisdiction over non-Indian civilians who had forged a voluntary relationship with the tribe. The Choctaw people firmly believed that they held inherent tribal sovereignty until Congress explicitly denied them this authority. Dollar General Corp. disputed this claim, continuing the debate over whether Native Americans were "unique entities" and could be tried as such. The result of the Court's per curiam opinion, that the tribal court could have jurisdiction, raises the question of whether Native Americans hold criminal jurisdiction over non-Native Americans.[15] Although the 2016 decision was 4-4, *Dollar General Corp.* was an unusually close case involving the kind of criminal activity that would typically go unpursued by federal prosecutors.

Native Americans also face another challenge that stands in the way of their equal treatment in the domain of criminal law: federal prosecution. In 2011, it was calculated that federal prosecutors declined 52 percent of severe criminal cases involving Native American victims that fell under their jurisdiction by the Major Crimes Act.[16] This figure included federal prosecutors declining to pursue 65 percent of rape charges and 61 percent of charges involving alleged sexual abuse of Native American children.[17] Data concerning federal prosecutorial discretion suggests that bias can influence which criminal cases involving Native Americans are tried.

The American government fails in their intended "duty of protection" over Native Americans because of federal prosecutors' unwillingness to take on cases involving Native Americans. However, the federal government reserves an exclusive authority to try such cases, often letting non-Native perpetrators go untried as a result. Tribal courts are therefore largely unable to punish criminal

activity that non-Native defendants know will go unprosecuted in federal courts. This could be one reason why violent crime rates against Native Americans are three times greater than the national average.

The Native Defendant and the New Jim Crow

When cases are tried by federal prosecutors, usually hundreds of miles from where they took place, their decisions are often biased. Today, Native Americans are more likely than any other racial group to be sentenced for their crimes, with the number of incarcerated Native Americans having doubled in the last fifteen years.[18] In South Dakota, Native offenders make up 60% of the federal criminal caseload for the state, but only 8.5% of the total state population.[19] The following analysis will examine how this state of affairs prejudices the criminal justice paradigm. Native Americans accused of crimes that fall under the Major Crimes Act are usually tried in federal courts by juries that are not representative of the communities in which the crimes took place. Furthermore, Native Americans may be completely unaccustomed to criminal trial processes that are external to tribal court law. Therefore, competent public defense is critical for many Native Americans, who must navigate a seemingly foreign criminal justice system when they are tried in American courts.

Like Michelle Alexander, legal scholar Stephen Bright has noted the biased effects race and poverty have on criminal justice processes.[20] He stresses the immense complexity of the legal system, which "contains so many procedural traps that a layperson accused of a crime can no more navigate it alone than a passenger arriving at an airport can fly a plane across the country in the absence of the pilot."[21] For Native Americans, who may or may not be familiar with the American legal system, this complexity is often much more prominent. Bright has stressed that:

> The most fundamental element of fairness in an adversary system of justice is a representation of the accused by competent counsel... but the scope of indigent representation is left for tribes to determine [and] when funding is limited, as is often the case on reservations nationwide, public defense regularly gets cut.[22]

As Bright notes, Native defendants are often granted the right to a public defender—unlike U.S. citizens from all other demographic groups. In fact, Native Americans have no right to appointed counsel unless their tribe provides it for them. However, tribes often fail to provide appointed counsel for accused Native American defendants.

The immense discretion of the prosecution and lack of public defense are not the only facets of the present federal justice paradigm that systematically disadvantage Native Americans; jury compositions also have immense implications. In *Batson v. Kentucky, 1986,* the Supreme Court deemed that "the very idea of a jury is that it is a body composed of the peers or equals of the person whose rights it is selected or summoned to determine…his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."[23] However, due to the Major Crimes Act, the Native defendant tried for major crimes is under federal jurisdiction and in a federal court, meaning that the "cross section" of people in the courtroom will likely differ from those on the reservation. Legal scholar Jordan Gross has remarked on this discrepancy:

> When jury pool boundaries in federal districts with Indian country jurisdiction extend beyond a reservation on which a crime was committed and include non-reservation communities, the representation of Native Americans in that pool

> is naturally and inevitably diluted. In an Indian country prosecution with concurrent federal/tribal jurisdiction, this means the reference jury selection 'community' for the same defendant (by definition, an Indian) will be radically different depending on whether he is tried in federal or tribal court. In federal court, this Indian defendant will face a jury drawn from a pool with a significantly smaller concentration of his ethnic and cultural peers than that found on the reservation on which the crime was committed.[24]

Additionally, most federal district courts rely on state voter registration records in compiling jury pool lists (and not tribal voter registration records). Native American citizens are more likely to be invested and active in their local tribal governments than in state governments, and hence are less likely to vote in state elections.[25] As a result, Native Americans tend to have lower representation in potential jury pools even before *voir dire*. For this reason, Native defendants are often tried for crimes committed in Indian Country by a jury comprised of individuals who may never have been to Indian Country.

The fact that the jury pool is likely to comprise a significantly smaller concentration of a Native American's ethnic and cultural peers means that jury members are less likely to be able to make unbiased decisions, as legal scholar Kim Taylor-Thompson argues that "race and gender inform the processes by which individuals make decisions, especially about social justice."[26] Moreover, because federal law determines jurisdiction to prosecute criminal acts committed on Native American reservations based on the races of the parties, the routine selection of unrepresentative juries in cases with Native American defendants not only produces biased results but is also arguably racist. In an era of colorblindness, as Alexander ironically dubs recent efforts to subdue racism in courtrooms, Native

Americans are treated differently than other citizens within the legal system because of their race.

Essentially, the federal government systematically discriminates against Native Americans by not affording them a trial by a jury of true peers. Additionally, per Bright, in failing to provide public defenders for Natives, the federal government denies them "the most fundamental element of fairness" in the criminal justice system.[27] In *United States v. Antelope* (1977), the Supreme Court stated that "the law and courts have treated American Indians as unique entities" and that this unique treatment has been "upheld against claims of racial discrimination."[28] It is evident from my arguments that this "unique" status is often veiled parlance for legalized discrimination.

IV. Decriminalizing the Reservation

In this section, I argue in favor of two possible solutions to the problems I laid out earlier in this article. First, spreading awareness about the legal injustices perpetrated against Native Americans, and second, legitimizing the authority of tribal courts. Implemented together, these solutions would offer a valuable avenue toward necessary reform within the American legal system.

Spreading awareness about the discriminatory basis of the Supreme Court's treatment of Native Americans is one avenue towards future reform. Recognizing the true role race played in the development of this country and in creating racial injustice today is the first step toward being able to resolve it. In most American educational establishments, Native American history is told from one side: one that belittles national complicity in producing inequality and injustice. As American history scholar Michael Dorris has observed:

> For most people, serious learning about Native American culture and history is different from acquiring knowledge in other fields, for it requires an initial, abrupt, and wrenching demythologizing. One does not start from point zero, but from minus ten, and is often required to abandon cherished childhood fantasies of super-heroes and larger-than-life villains.[29]

The epic narrative that is taught as American history often minimizes the role that the federal government played in creating the inequality we see on reservations today. Legal scholar and expert in federal Indian law Joseph William Singer has noted that "although it's uncomfortable to admit…the United States engaged in imperialism and conquest."[30] This attempted conquest is usually neither taught in typical high school history classes nor cited as a basis for modern racial inequality in high school history texts. Thus, American history syllabi in high schools nationwide should be modified to reflect the government's history of legal discrimination against Native Americans.

More concretely, granting tribal courts more authority might help reduce crime on reservations by ameliorating the endemic biased sentencing of Native Americans in federal courts. Under the current system, the federal government assumes a self-professed "duty of protection," of Native peoples. However, the fact that Native Americans are more likely than people of any other race to experience violent crime at the hands of someone of a different race indicates that the federal government has failed to actually protect Native American populations. As I discussed in the previous section, statistics on the willingness of federal prosecutors to take on cases that involve Native Americans suggest that racial bias is one possible explanation for the failure of the federal government to protect Native Americans. Re-appropriating criminal jurisdiction

for tribes, then, might give Native Americans fairer sentencings and foster necessary trust between tribal governments and the federal government.[31] Giving tribal courts back the jurisdiction to protect themselves would mean a gradual rolling back of the Major Crimes Act and a gradual stepping-back of federal oversight.

Granting Native Americans increased autonomy to govern their own lands and peoples would mean fairer criminal trials, representative juries, and unbiased prosecutors and judges. Such re-appropriation of criminal jurisdiction into tribal courts would also result in an incredible impetus for Native American legal empowerment and education. The result could be cultural symbiosis rather than racial suppression. The Anglo-American criminal justice system and the tribal paradigms might able to supplement and learn from one another if such changes to the current system are made.

To implement these solutions, the federal government would have to view Native American tribal courts with equal power. Perhaps ideas about how to improve the "New Jim Crow" for Native Americans can be found in Native American conceptions of criminal justice. Judge Abby Abinanti of the Yurok Tribal Court is a Native American judge whose tribe sees "jail as banishment," or "the last resort."[32] The Yurok Tribal Court stresses restorative justice over punitive justice and takes issue with the U.S. having only 5 percent of the world's population, and yet 25 percent of its incarcerated peoples.[33] Judge Abby Abinanti envisions a very different criminal justice system for the country. And she herself—a judge who opts for jeans over a robe and a small wooden desk over a dais—sees peacemaking as means to combat American mass disenfranchisement.

V. Conclusion

This work has considered the processes and impacts of the Anglo-American criminal justice system on Native American

people. It has asserted that federal legislation has created a biased trial process: first for Native victims; then for Native defendants; and finally, for juries. In doing so, this work has sought to contribute insight into questions about deeply troubling statistics relating to Native Americans in the U.S. criminal justice system, chief among which are: Why are violent crime rates three times higher than the national average on Native American land? Why are Native American men incarcerated at four times the rate of white men? Why are Native American women incarcerated at six times the rate of white women?[34] Nevertheless, some questions are not neatly answered by the argument that the U.S. criminal justice system is biased against Native Americans. It remains unclear, for example, why a Native American woman is ten times more likely to be murdered than any other American citizen or why Native youths have the highest rate of suicide among subgroups.[35] Hopefully, this work will inspire others to seek answers to those questions and to propose other solutions for combatting Native inequality.

In an attempt to explain the present bias against Native Americans in the American criminal justice system, this work looked back to the early Supreme Court cases that established an endemic attitude of paternalism in the federal government, one that was justified by beliefs, written in the majority opinion, that Native Americans were racially inferior.[36] This work wishes to stress that this country has neither fully freed itself from such racism nor rejected the legal doctrines established on racist grounds. Native Americans tried under the Major Crimes Act are often deprived of their rights to trial by a representative jury and public defense. The unequal treatment before the law is intolerable and unacceptable. It is time we make our law reflect that fact.

[1] *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[2] *See* Michelle Alexander, *The New Jim Crow* 16 (2012).

[3] *Ibid.,* 12.

[4] *Ibid.,* 11.

[5] *See* Kasey Keeler, *Putting People Where They Belong: American Indian Housing Policy in the Mid-Twentieth Century,* 72 (2016).

[6] Keeler (1963) at 94.

[7] *See* Terry Anderson, *Unlocking the Wealth of Indian Nations* (2016) at 7.

[8] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)

[9] *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955); and Joseph William Singer, 567 Nations: The History of Federal Indian Law (2014).

[10] *See, e.g.,* U.S. Statutes at Large, 23:385; *Cherokee Nation v. Georgia* 30 U.S. (5 Pet.) 1 (1831) at 30; *United States v. Kagama, 118 U.S. 375 (1886)* at 118; and Anderson (2016) at 4.

[11] Alexander (2012) at 23.

[12] Pew Research Center, "2012 American Community Survey."

[13] Andrew Jackson. "Fifth Annual Message to Congress" Delivered 3 Dec. 1883.

[14] Major Crimes Act, 18 USC § 1153 (1948).

[15] See also Oliphant v. Suquamish Indian Tribe (1978)

[16] *See* figures compiled by Syracuse University's Transactional Records Access Clearinghouse from federal data.

[17] Williams (2012).

[18] *See* Bureau of Justice Statistics, American Indian and Alaskan Natives in Local Jails, 1999-2014.

[19] Flanigan, Jake. "Native Americans are the Unseen Victims of a Broken US Justice System." Quartz. April 27, 2015.

[20] *See* Stephen Bright, The failure to achieve fairness: Race and poverty continue to influence who dies, 11 Univ. Penn. Journal of Constitutional Law 23-38 (2008).

[21] *Ibid.,* 32.

[22] *Ibid.*

[23] *Batson v. Kentucky*, 476 U.S. 79 (1986) at 476.

[24] Jordan Gross, "Let the Jury Fit the Crime: Increasing Native American Jury Pool Representation in Federal Judicial Districts with Indian Country Criminal Jurisdiction," 77 *Montana Law Review* 281, 282 (2016).

[25] *See* Kevin K. Washburn, American Indians, Crime, and the Law, *Mich. L.R.*

709, 748 (2006).

[26] *See* Kim Taylor-Thompson, Empty Votes in Jury Deliberations. *Harv. L.R.* 1264 (2000).

[27] Bright (2008) at 32.

[28] Gross (2016) at 282.

[29] Michael Dorris, *The American Indian and the Problem of History*, "Indians on the Shelf" at {page #} (Oxford University Press 1st ed 1987).

[30] Joseph Singer, "567 Nations: The History of Federal Indian Law", Diversity and U.S. Legal 1 History Lecture Series (Harvard Law School 2017), online at www.youtube.com/watch?v=HqkMmJ_dkBQ (visited 11/21/19).

[31] Pew Research Center, "2012 American Community Survey."

[32] *See* Rebecca Clarren, Native American Peacemaking Courts Offer a Model for Reform (2017).

[33] Sentencing Project. *Trends in U.S. Corrections* (2017).

[34] *See* Timothy Williams, Higher Crime, Fewer Charges on Indian Land (2012).

[35] *See* United States Sentencing Commission, Native Americans in the Federal Offender Population (2013).

[36] *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

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The Prima Facie Right to Privacy in the United Kingdom

Amika Singh | Northeastern University

Edited By: Helen Liu, Emily Dolgin, Grace Protasiewicz, Nora Salitan

Abstract

This article will explain how advancements in technology have fundamentally changed the boundaries of the private sphere and the resulting shift in the theories of privacy. Once a philosophical basis for the right to privacy is established, it can be applied to three major issue areas: the private sphere, the press, and government surveillance. The laws of the European Union (EU), particularly the 1998 Human Rights Act (HRA), have had a profound effect on the right to privacy of citizens in the United Kingdom (UK). When the UK leaves the EU, they will no longer be under any obligation to maintain the regulations of the HRA. Furthermore, with the growing threat of infringements on privacy that result from developments in Information and Communications Technology (ICT), the UK citizen's right to privacy is more threatened than ever before. As such, the UK ought to transfer the HRA into British Common Law in order to maintain the integrity of the right to privacy.

I. Introduction

The right to privacy in the United Kingdom (UK) today is protected by the European Convention of Human Rights (ECHR), which will lose its stature in UK law once the UK leaves the EU. The right to privacy is currently being threatened by advances in Information and Communications Technologies (ICT) because they affect the press, surveillance, and recording of interactions that previously would not have been preserved. Therefore, it is increasingly crucial that the UK retain the right to privacy as established by the EU. Three main issue areas are in conflict with the right to privacy: the private sphere, the freedom of the press, and national security interests.

This article will demonstrate how advancements in technology have fundamentally changed the boundaries of the private sphere thereby shifting the theories of privacy that are relevant to today's challenges. First, this article will discuss the philosophical basis for a right to privacy and four theoretical categories of the right to privacy, as well as their validity in the twenty-first century. Then, it will outline the legal framework of the right to privacy in the UK. Finally, this article will examine the legal history of privacy in the UK as it relates to three relevant issue areas outlined above: the private sphere, the press, and government surveillance. Finally, this article will explore the rapid advancements in ICT and the implications of such advancements on the right to privacy. More information is being collected and stored than ever, with greater ease than ever before.

It is clear that the 1998 Human Rights Act (HRA), with its incorporation of a legal right to privacy, made a significant difference in the way claims to privacy were treated in UK law. Moreover, advancements in information and communications continue to provide new channels through which an individual's right to privacy can be violated. For these reasons, it is imperative that the UK retain

the privacy provisions of the ECHR and clearly define the right to privacy in UK law in the interest of protecting its citizens.

II. Background

In order to explore the ramifications of unprecedented advances in ICT for the right to privacy in the UK, the legal history and institutions that relate to key constructs of privacy rights, which include the press, surveillance, and the private sphere, as well as the application of the core privacy theories of non-intrusion, seclusion, limitation, and control, must be discussed.

Connotations of Privacy

John Stuart Mill, himself a Member of Parliament, was thought to be the most influential English philosopher of the nineteenth century.[1] In his 1859 *On Liberty,* Mill writes that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." Mill established two major principles: that there is a sphere of privacy separate from the government and other citizens, and that a person is a better judge of his or her own welfare than anyone else.[2] Under these principles, Mill argued that one's privacy cannot be invaded except to prevent harm to another. *On Liberty*, became the philosophical basis for a "private sphere" in the UK.

Privacy in the UK is an ill-defined and inconsistently applied right. Philosophical ideas of privacy have been debated since the 1700s, and there are many different ways to enumerate different theories of privacy. This essay will use the divisions listed by Herman Tavani, Professor of Philosophy at Rivier College and former President of the International Society for Ethics and Information Technology.[3] According to Tavani, most ideas of

privacy can be categorized into four major theories: non-intrusion, seclusion, limitation, and control.[4]

The non-intrusion theory defines privacy as being left alone, equating privacy with liberty, or the ability of an individual to be free to act as they please. The seclusion theory of privacy is being alone, inaccessible to others. This equates privacy with solitude, which is problematic today, in a society that is increasingly interconnected and reliant on technology and other forms of constant communication. Alan Westin, a former Professor of Public Law at Columbia University, writes in *Privacy and Freedom* that privacy provides the members of a society with a preservation of autonomy.[5] These two theories of privacy relate to access to physical or personal privacy: privacy of one's person or one's belongings. By contrast, the control and limitation views of privacy are more related to informational privacy.[6]

In the limitation theory, privacy exists when access to information is limited in certain contexts — in other words, the right to privacy is the right to place limits on access to information, establishing distinct public and private spheres. In the limitation theory, a person has perfect privacy when nobody has information on them. This is an incomplete view, as it may not be an infringement on privacy to willingly give someone access to information.

Finally, the control theory of privacy says that one has privacy only if they are in full control of personal information. This theory, again, separates privacy from liberty and solitude, while emphasizing choice and consent. However, it may not be reasonable expectation. For instance, if a person is seen by their neighbor entering their house, they cannot bar their neighbor from knowing that they live there. Controlling all information about oneself would be impossible; only a person who lives in total seclusion could reasonably expect to possess this right.[7]

These four theories have distinctive traits, but such a categorization of the right to privacy is no longer an effective

method of determining whether or not privacy has been breached in a particular situation. Now, as developments in ICT have changed the nature of communication, data, and surveillance, the boundaries of the private sphere are no longer clear. Technological innovations have changed the scale and scope of media, created a new context for security concerns, and blurred the lines of the private sphere. A combination of non-intrusion, seclusion, limitation, and control theories of privacy are necessary to address the increased complexity surrounding the right to privacy. One might turn to a utilitarian approach to determine where the boundaries of the right to privacy should lie, weighing the harm caused by an infringement of privacy and the gain earned by the person who violates it.

Legal Institutions for Privacy

The first legal recognition of the right to privacy in the UK came from the HRA, which incorporated the ECHR into UK common law.[8] Article 8 of the ECHR outlines a right to privacy previously nonexistent in the UK. Before 1998, privacy had been protected to a degree under rules of trespass, defamation, or nuisance, which were not *prima facie*, or at first look, protections of privacy. Though the ECHR brought the right to privacy into UK law, its scope is limited and invasions into privacy are still permitted in cases related to criminal investigation, national security, and interference with the freedom of the media.[9] Article 8 reads as follows:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic

> well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others.[10]

The HRA has been successful in changing how the courts decide cases on privacy. However, the current version of the European Union Withdrawal Bill, which details the legal processes the UK will undergo when they leave the EU, will incorporate all EU laws and case history into the British Common Law.[11] This means that the protection of privacy as established by Article 8 of the ECHR can be overturned by Parliament, and that the UK will no longer be held accountable to any standards set forth by the ECHR. Though it is possible that the HRA will not be overturned and the right to privacy will remain as it is now, UK citizens are no longer guaranteed privacy protections.

Further, the right to privacy as defined by the ECHR is a vague, insufficient protection. The ECHR states that there shall be no interference with privacy "except as in accordance with the law," allowing a government to enact laws which limit privacy protections. Moreover, the acceptable reasons for infringing on privacy are overreaching. In particular, the government can breach privacy for the protection of "health or morals," which is broad and highly subjective. Moreover, Article 8 of the ECHR may not be equipped to handle the threats to privacy that result from rapidly changing ICT.

The Supreme Court acts as the court of last resort in the UK and has the power to limit the actions of the House of Commons.[12] The Supreme Court began to hear cases in 2009, well after the HRA went into effect. Prior to the Supreme Court's establishment, the final judicial powers were held by the House of Lords. The Court has the ability to make a Declaration of Incompatibility, which may be issued if the judges believe that a statute or act of public

authority is incompatible with the HRA of 1998, and, correlatively, the ECHR. This power is granted by Section 3(1) of the HRA, which reads: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."[13]

III. Three Major Concerns

Private Sphere

One of the earliest cases considering the right to privacy in the UK was the Report of the Departmental Committee on Homosexual Offences and Prostitution, colloquially known as the Wolfenden Report after the committee chair, Lord Wolfenden. The report was published in 1957, after a number of influential men were convicted of homosexual offences, which were illegal under the 1885 Criminal Amendment Act.[14] Considering the evidence presented in the Wolfenden Report, the committee decided to decriminalize homosexual acts. Notably, the Wolfenden Report also concluded that homosexuality was not consistent with other types of mental illnesses and therefore could not be considered one. These conclusions were contrary to both general public opinion and the psychiatric professional consensus of the time. The report concluded, "It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour."[15]

The Wolfenden Report was the most significant establishment of the right to privacy in the UK to date. The committee also recommended that "unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[16] The Wolfenden Report established that the law ought to

grant priority to the freedom of the individual in matters of private morality; it did not decide that homosexuality was moral or amoral, but rather that its morality was irrelevant to its legality because of its private nature. This decision aligns with Tavani's limitation view of privacy, as it is dependent on the idea that there are separate public and private spheres.[17]

The publication of this report was controversial and was most notably countered by legal philosopher and High Court judge Lord Devlin in *The Enforcement of Morals.*[18] Devlin maintained that a complete separation between crime and sin would be detrimental to the moral law because the criminal law would be unable to justify its claims. According to Devlin, popular morality *should* influence law, and private acts should not be exempt from such scrutiny. Devlin introduced the idea of the 'reasonable man,' a man whose beliefs reflect those that are commonly held, but not necessarily based on reason. If the 'reasonable man' were to find something to be immoral, even if it were a private act, it should be found criminal. To Devlin, a shared morality was crucial to the integrity of the fabric of a society. This public morality would have to override the right to privacy in order to preserve a society.[19]

In 1963, legal philosopher and Professor of Jurisprudence at Oxford University, H.L.A. Hart, published *Law, Liberty, and Morality* in opposition to Devlin.[20] Hart warns of the populism Devlin promotes in allowing the law to be decided by the morals of the majority. He argues that the opinions of the people should not be grounds for preventing people's actions. Predicated on Mill's harm principle, Hart concludes that private matters are not within the jurisdiction of the government— highlights the UK's relationship with the private sphere.[21] The landmark decision to decriminalize homosexuality on the basis of privacy is relatively recent, and case law following this precedent leaned towards denying the right to privacy until the HRA.

Press Coverage

There was no privacy tort in the UK before the HRA in 1998; instead, courts often used other rights to protect privacy. Much of the legal precedent on privacy in the UK relates to the private information of public figures being published by the press.

The lack of a right to privacy before the HRA is exemplified by *Kaye v. Robertson* in 1991, when television actor Gorden Kaye suffered severe head injuries when a plank smashed through the windshield of his car after which he required brain surgery. While Kaye was recovering in the hospital, two journalists posed as doctors and took pictures without his authorization. Kaye sued the newspaper that the journalists worked for to obtain an order preventing the use of those photographs. In the first trial, an injunction was granted to prevent the use of the photographs, but this ruling was overturned. In the appeal, Lord Justice Glidewell stated, "it is well known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy."[22] While the court was sympathetic to Kaye's situation, there was no preexisting tort of privacy on which to base the decision. As the court was unable to rule that the magazine had violated the law by invading Kaye's privacy, they decided that the magazine should issue an apology to their readers because they had implied that the photographs were taken with Kaye's permission.[23]

In the 1995 case *Hellewell v. Chief Constable of Derbyshire,* a shoplifter was photographed while in police custody, and the photographs were distributed to local shopkeepers. The shoplifter then sued the police for distributing the photographs without consent, arguing that there was a duty of confidence owed to him because the photographs were taken while in police custody. However, it was held that the police acted in the interest of the public good by seeking to prevent crime in distributing the photographs, and thereby did not violate the shoplifter's right to privacy. In this case, the critical

factors were the public position of the police officers who took the picture and their interest in preserving the public good by attempting to prevent shoplifting.[24]

These two cases, *Kaye* and *Hellewell,* illustrate both the insufficiency of British Common Law before the incorporation of the ECHR and the need for a utilitarian approach in defining the limits of a right to privacy. In *Kaye,* it was a public figure who thought his privacy was violated. There is a degree to which public figures must forfeit their right to privacy, but this forfeiture does not negate privacy as a right. Here, the control theory of privacy is especially well-suited, because while Kaye may have consented to the publicization of some parts of his private life by the nature of his profession, he did not consent to the publication of those pictures. There is no overriding interest in this case; the pictures did not benefit the public good in any way. In contrast, Hellewell was a private citizen, but it could be argued that he, too, chose a profession that forfeited his right to privacy. By choosing to shoplift and thereby harming the public good, Hellewell turned his own likeness into a public issue. It is likely that Hellewell would have seen the same outcome had his case been heard after the HRA, as the deterrence of crime remained a goal that could override privacy. Kaye, however, may have seen a different outcome, as seen in the outcomes of complaints by Naomi Campbell and Max Mosley, which will be detailed later.

The practices of broadcasters are overseen by the Office of Communications, or Ofcom, the government-approved regulatory body which was established in 2003. Though Ofcom is an independent body, they are subject to a number of Acts of Parliament. Ofcom oversees television, radio, telephones, mobile phones, postal services, and the airwaves on which wireless devices operate. One of their duties is to ensure that "people are protected from being treated unfairly in television and radio programmes, and from having their privacy invaded."[25] Ofcom's privacy standards

originate from their Broadcasting Code, which provides rules that broadcast companies must follow in order to avoid invasions of privacy. However, it affords broadcasters a 'public interest' defense, where issues of public interest can justify an infringement on privacy. Issues of public interest under Ofcom include detecting crime, protecting health or safety, and exposing misleading claims or incompetence that could affect the public.

According to Ofcom, a legitimate expectation of privacy depends on "the place and nature of the information, activity or condition in question, the extent to which it is in the public domain (if at all), and whether the individual concerned is already in the public eye."[26] The Broadcast Code also lists consent as a sufficient condition for preventing infringements of privacy. Even if a private matter occurs in a private place, it is not an infringement if a person's consent is given to share or record it.[27]

News International, a conglomerate of British newspapers owned by Rupert Murdoch, has a history of being sued for privacy breaches. Employees of News International were found to have hacked the phones of celebrities, politicians, and civilians to uncover news stories. One high-profile case arose just one year after Ofcom was established when, in 2004, the House of Lords heard the case *Campbell v. Mirror Group Newspapers Limited (MGN)*. In this case, supermodel Naomi Campbell was photographed as she left a rehabilitation clinic where she had been recovering from a drug addiction that she had publicly denied. These photographs were published by MGN without prior consent from Campbell. Campbell sued MGN on grounds of breach of confidence, under the HRA's requirement that the UK act in accordance with the ECHR. Specifically, she claimed that MGN had breached the ECHR clause detailing the right to maintain a private life. In order for this claim to hold, the court had to recognize the inherently private nature of the information that MGN had published. Campbell challenged the photographs, not on the grounds that they disclosed her drug

addiction, but on the grounds that they disclosed the name and location of her rehabilitation center. In the first trial, MGN was found liable and appealed the decision. In the Court of Appeals, MGN was not held liable because the photographs were peripheral to the article in question. Campbell appealed this decision, and the House of Lords found that MGN was indeed liable for a breach of privacy, with three members finding that the pictures were significant to the article. The Lords first determined that Campbell did have a reasonable expectation to privacy. Then, they determined that her expectation of privacy and its subsequent breach was greater than the loss of freedom of expression for the newspaper. The decision was not a consensus; Lords Hoffman and Nicholls dissented, saying that the information contained in the pictures was no different from the information in the article, which was not contested;[28] yet, nonetheless, this represented a victory for enforcement of ECHR privacy laws in the UK.

News International's struggles did not end there. In 2008, the English High Court heard *Mosley v. News Group Newspapers Ltd.* Plaintiff Max Mosley, a prominent public figure, was recorded taking part in sexual intercourse with five prostitutes. The details of the act were then published by *News of the World* in an article titled "F1 Boss Has Sick Nazi Orgy with Five Hookers" and a subtitle reading "Son of Hitler-loving fascist in sex shame." Mosley claimed that there was a breach of confidence in the unconsented disclosure of personal information. This case differed from past cases, which had generally claimed defamation. Mosley argued that the acts were inherently private and that there was a preexisting duty of confidence between the participants. Therefore, publishing the information was a breach of privacy. As this case took place after the HRA was implemented, Justice David Eady said, "The law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of

confidence."[29]

Security and Surveillance

The debate between the right to privacy and the government's duty to preserve national security is one that has been in the forefront of public discourse in the UK. The UK collects both metadata through the Government Communications Headquarters (GCHQ), which was established after the First World War.[30] The legal framework of the GCHQ is based on the Intelligence Services Act (ISA) of 1994, which allows the GCHQ to "monitor or interfere with electromagnetic, acoustic and other emissions and any equipment producing such emissions and to obtain and provide information derived from or related to such emissions or equipment and from encrypted material…"[31] Then, the ISA limits the use of those functions only:

> (1) In the interests of national security, with particular reference to the defense and foreign policies of Her Majesty's Government in the United Kingdom; or
> (2) In the interests of the economic well-being of the United Kingdom in relation to the actions or intentions of persons outside the British Islands; or
> (3) In support of the prevention or detection of serious crime.[32]

The GCHQ is overseen by the Intelligence and Security Committee in the House of Commons, and its actions are subject to the Investigatory Powers Tribunal (IPT). In 2014, whistleblower Edward Snowden revealed that the GCHQ's TEMPORA program was intercepting communications using underwater fiber optic cables.[33] The IPT then

decided that, while the UK legal framework does not permit mass surveillance, the actions of the GCHQ were not mass surveillance.[34] In 2017, the GCHQ was taken to court by Privacy International, a UK-based nonprofit that promotes the right to privacy globally, in a case pertaining to the GCHQ's use of non-specific warrants to authorize the bulk hacking of smartphones and computer networks. Privacy International claimed that the actions of the GCHQ violate human rights.[35]

Mass surveillance is illegal in the UK, but it is unclear what exactly constitutes mass surveillance. Yet, the UK still uses mass surveillance techniques, justified by stretching the definitions of mass surveillance and what is necessary to support national security. Because of recent terror attacks and propaganda, the government has been able to justify increased data collection by pointing to a need to protect national security. The UK government mandates that every website collect and store information on each visitor for twelve months, which the government can access without warrant. It is not the collection of this data that is problematic, since this is necessary to the functioning of most websites, but the retention of it for a year; previously, the data was disposed of immediately, which made it not accessible to the government or to third parties.[36]

The ECHR is crucial in determining what constitutes a violation of the right to privacy when it conflicts with security concerns. In November 2017, the ECHR heard legal complaints about the government's surveillance powers. One of the applicants in the case, the Bureau of Investigative Journalism, argued that surveillance would have a detrimental effect on their ability to report, as they work with whistleblowers, lawyers, and journalists. No decision has been made yet, but even if it is decided that the UK government was overstepping the bounds of privacy, such a decision would only affect the UK while it remains a part of the EU, until March 2019, at which point it could easily be overruled.

In both the US and the UK, mass surveillance is considered crucial to counter-terrorism efforts. However, mass surveillance is not necessary; the kinds of phone and communications data that are collected on a large scale are ineffective at identifying possible terrorist activity.[37] If the mass collection of such data does not protect national security, then there is no justification for such an infringement on the right to privacy. Alan Westin attributes the increase in surveillance to the low cost of obtaining data and the ease of surveilling electronic devices. The UK currently has what Edward Snowden called the most intrusive surveillance regime in the West, but there is little backlash from the public. However, as legal philosopher Ronald Dworkin argued, public opinion is not a sufficient condition to determine legality.[38] Citizens' lack of consideration for their right to privacy does not make an infringement upon it any less significant.[39]

IV. Threats and Their Mitigation

The need for a right to privacy is growing because technology, especially social media and mobile devices, are playing an increasing role in people's lives. ICT enables pervasive surveillance at incredibly fast speeds unbounded by physical distances. With increased use of smartphones and increased personal storage of images and conversations, more information can be targeted and published without consent. This is exemplified by the growing number of personal attacks on privacy, such as revenge pornography: the dissemination of explicit photographs or videos without consent from the people in them. In October 2014, the UK Ministry of Justice introduced an amendment to the Criminal Justice and Courts Act of 2015, outlining a specific offense for the distribution of sexually explicit materials without consent; a maximum custodial sentence of two years accompanies such an offense.[40] The necessity for such a law is indicative of both the need for a right to privacy

and how technological changes have significantly altered the right to privacy. Before the conventionality of smartphones, potentially private information was not as easily obtainable or distributed. Moreover, revenge porn demonstrates the importance of a continued right to privacy: to ensure that such actions can be criminalized and punishable. The Criminal Justice and Courts Act relied on a combination of the control and limitation theories of privacy, as the revenge porn provision considers both the consent of the victim and the nature of the information.[41]

The pervasiveness of social media brought on by technological advances created a multitude of new issues. Social media blurs the distinction between what is private and what is public. Finally, increased technology simply proliferates the channels by which information can be gathered, stored, and spread.[42] Infringement on the private sphere due to new technology is not a new phenomenon. Before the camera was invented, photographs could not be shared and therefore there was no legal precedent upon which to decide whether photographs are private, or whether the subject of the photograph consented.[43]

The nature of information is crucial to the debate on the right to privacy, as it is different from issues of trespass or other issues in the realm of tort law. Private information made public cannot be unlearned or revoked entirely from the public psyche. For example, after a tabloid revealed the extent of Naomi Campbell's drug addiction and the location of her rehabilitation facility, she argued that those who became privy to that information would continue to hold that information, regardless of the outcome of a court case against the publisher. This is distinct from aspects of tort law where a harm can be remedied by a monetary transfer.[44] Consider a farmer whose crop is harmed by the runoff from a nearby factory: the harm incurred by the farmer is monetary in nature and the farmer does not incur psychological harm or reputational damage. Therefore, the appropriate remedy is monetary and, after restitution is made,

the farmer is, in principle, no worse off than a farmer whose crop was untouched. Violations of the private sphere are categorically different: they cannot be corrected, making it imperative that such violations are enjoined before they take place.

V. Protecting Privacy in the Modern World

A clear and defined right to privacy is necessary in the UK and a utilitarian approach can be assumed to define the limits of such rights. Whereas some limitations on the collection or publication of private information are necessary in all contexts, issues of national security have a more legitimate claim to such information than advertising companies or tabloids, since the consequences of disabling surveillance are far greater than disallowing information on celebrities. This is not to say that the UK government should be able to surveil with free reign, or that the right to privacy is entirely secondary to the issues of national security. In fact, it is vital that the UK immediately establishes a clear right to privacy before increased data—as a result of new technology—infringes too far on those rights.

Due to the outcomes of court cases before and after the HRA and its incorporation of the ECHR, the protection of privacy outlined by Article 8 of the ECHR increased the right to privacy in the UK and increased courts' recognition of the importance of the right to privacy. While a more robust and detailed right would be preferable, it is crucial that the UK retains the foundational provisions of the ECHR that protect privacy.

While the press has always pushed the line of privacy—and in many cases breached it—the very nature of media has changed. Today, there are more ways for the press to gather private information and more channels through which to disseminate information. The media is increasingly central to our society, and there is no reason to believe that these trends will reverse. Additionally, technology

has changed the very nature of national security. Monitoring communications now involves tapping into phone and internet networks, monitoring internet activity, tracking the locations of individuals, and storing that information. National security is now being threatened in the cyber realm, leading to further governmental awareness of computer-based activities.

VI. Conclusion

Information and communications technology has fundamentally changed the nature of the private sphere. The content of information alone can no longer constitute a private matter. Many people choose to share information that others would consider deeply private, such as images of their homes, information about their friends and families, or sexually explicit material. As a result, policymakers and judges must turn to consent or how information is shared to determine if a breach of privacy has occurred. Since physical or digital isolation is virtually impossible in the twenty-first century, the seclusion and non-intrusion theories of privacy are becoming increasingly irrelevant. Instead, there is a shift toward a combination of the limitation and control theories of privacy in UK law. For instance, in *Campbell vs. MGN*, the nature of the information was critical but the lack of consent to having the images published was also a significant factor to consider.

In order to protect the individual's right to privacy in an increasingly public society, the UK must maintain the ECHR's right to privacy, even after the UK leaves the EU. Further, the UK ought to introduce a clearer and more robust definition of the right to privacy in their own law and draw explicit boundaries around the private sphere.

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The Other Side of Title IX: The Legal Case Against Public Single-Sex Schooling

Robert Watson | University of California, Los Angeles

Edited By: Julia Udell, Jess Cuadro, Sarah Rosenberg, Matthew Sidler

Abstract

Public schools in the United States lawfully segregate students on the basis of gender and have done so for decades. This paper questions the legality of public single-sex schools in the context of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Title IX of the Education Amendments of 1972. This discussion is rooted in precedent-setting court decisions such as *Brown v Topeka Board of Education* (1954), which first applied the Equal Protection jurisprudence to public education, and *United States v Virginia* (1996) and *Grove City College v Bell* (1984), cases which have maintained that public single-sex environments are subject to the Equal Protection Clause. This paper first argues that public K-12 single-sex schools cannot legally claim to offer educational experiences "tailored" to a specific sex while complying with the doctrine of "substantially equal" treatment of the excluded sex. Furthermore, if the judiciary is to begin including transgender and non-binary peoples' interests in legal discussions on education, they will have to challenge gender binary-based legal doctrines. In order to formulate a fair and inclusive education system, it is critical to consider how the American legal system should respond to students who may be forced to attend schools that do not coincide with their own gender identifications.

I. Introduction

In 2016, a prestigious academy for middle and high school students known as the "Girls Academic Leadership Academy," or GALA, celebrated its grand opening in Los Angeles, California. The school is Los Angeles' first publicly-funded all-girls school in over twenty years.[1] Audrey Clap of *The Atlantic* writes that GALA is one of many new public institutions that offers "tailored learning programs" just for girls.[2] While this case of single-sex schooling appears isolated amidst an almost unanimously co-educational public school district, it is far from distinctive among the United States' public schools. According to the National Association for Single-Sex Public Education (NASSPE), an organization that provides online and conference-based resources for schools and parents interested in single-sex schooling, the United States has roughly 116 schools like GALA that are public, K-12, and single-sex.[3]

Public single-sex schools have existed in the United States since before the nineteenth century, and their existence has spurred many debates.[4] The history of these schools is characterized by gender conflict and suppression—thereby contradicting the progress made in legislative and constitutional protections for equality. Supporters of these schools outline the necessity of "gender-tailored" environments that conform to stereotypes of gendered "learning styles." While the term "tailored schooling" has not been used in many legal contexts, it is often used when school systems attempt to offer "unique" environments for students on the basis of sex-linked gender assignments. According to Rebecca Bigler, professor of Gender Studies at the University of Texas at Austin, "tailored," in the context of single-sex education, implies the fitting of "instructional activities to the participatory styles of male and female students."[5] This term grows more important when contrasted with the idea of a "substantially equal" learning environment which has been the legal precedent for many education-based court cases.

With the increase in self-proclaimed "tailored" schooling comes the need to examine the reality of how these schools educate their students.

This paper argues that, as mandated by Title IX of the Education Amendments of 1972 and the Equal Protection Clause of the Fourteenth Amendment, single-sex schools that claim to offer "tailored educations" do not constitute substantially equal learning environments. The opportunities offered at the separate schools are often unequal and entrench sexist notions about education. Furthermore, the schools fail to grapple with the distinctions between "gender" and "sex," excluding transgender and non-binary individuals.

According to the World Health Organization (WHO), gender is defined as "the socially constructed characteristics of women and men." The WHO furthers that "it is important to be sensitive to different identities that do not necessarily fit into the binary male or female sex categories."[6] This definition emphasizes the socially constructed nature of gender, in contrast with "sex," which the Oxford English Dictionary summarizes as the two male-female categorizations that are formulated simply "on the basis of their reproductive functions."[7] Yet, in various courts, these distinctions have been blurred. The question of gender is further complicated by the U.S. Supreme Court refusing to hear cases on issues relating to transgender and non-binary individuals.[8] This problem is also evident in the language of Title IX, which only refers to "sex." As students who fall outside of the traditional "male-female" binary continue to garner legal protections in other spheres, such as new ways of identifying themselves on identification cards, there must be challenges to the binary-based structure of single-sex schools. This problem, compounded with the broader inequity fostered by the structure of these schools, suggests that they are outdated and perhaps unconstitutional.

II. A Specified Judicial Scope

Title IX stipulates that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[9] However, numerous court cases mentioned below have expanded this scope to include "every public school."[10] These cases set a precedent to prohibit the existence of public single-sex schools that discriminate against students on the basis of gender for the purpose of "tailoring" education, or teaching students differently solely on the basis of their gender identifications. Public single-sex schools advertise "unique (and) tailored" educational opportunities, but such tailored environments are only available for students who fit the sex-based gender binary that has long reflected how the federal government classifies gender.[11]

In analyzing the legality of public single-sex schooling, it is necessary to examine the impact that institutional schooling practices have on transgender and non-binary students. It is important to note that the judiciary, and specifically the Supreme Court itself, has a history of protecting rights that may not be easily secured through normalized political processes.[12] In contrast with Congress, the judiciary is designed to be independent of the whims of the general populace, and to be held accountable to the law, rather than to majoritarian political demands. For this reason, transgender and non-binary students might find more hope in the courts than in other areas of government.

III. Establishing Skeptical Scrutiny in Cases of Gender Segregation

The legal questions surrounding public single-sex schools are rooted in the "separate but equal" doctrine that was used through-

out the first half of the twentieth century. This phrase was first mentioned in a Louisiana law of 1890, but the doctrine was famously confirmed in the *Plessy v Ferguson* decision of 1896.[13] The Supreme Court decision in this case reinforced segregation in Louisiana trains on the basis that "there was not a meaningful difference in quality between whites-only and African-American railway cars"[14]—the doctrine which allowed segregation on the basis of race, if treatment was considered "equal."[15] In 1954, the *Plessy v Ferguson* decision was overturned in *Brown v Board of Education of Topeka, Kansas*, which marked the Court's first notable effort to end identity-based discrimination.[16] Although over half a century has passed since the 1954 *Brown v Topeka Board of Education* decision, many of the underlying principles of inequality the case sought to overturn still exist today. One example is public single-sex schools that treat students differently on the basis of gender. Despite the focus of *Brown* on race-based discrimination, Justice Warren famously wrote in the majority's decision that "segregation of any kind deprived Americans of their liberties."[17]

Title IX was formulated nearly two decades after *Brown*, and secured further protections for vulnerable people by generally prohibiting sex discrimination in schools subsidized by federal subsidies, grants, and any other forms of aid.[18] While Title IX legislatively bars sex discrimination in public educational institutions, it allows for the existence of public single-sex schools if there is "a substantially equal single-sex or coeducational school to students of the excluded sex."[19] The phrase "substantially equal" was first derived from Title 34 of the United States Code of Federal Regulations (34 C.F.R.) and is the basis of the "substantially equal" test. This test mandates that single-sex learning environments have a substantially equal, or essentially identical, environment for the excluded gender.[20] Title IX does not specifically reference this "substantially equal" terminology. However, certain courts have used the "substantially equal" test to determine whether or

not a school has violated the Constitution under the Fourteenth Amendment's Equal Protection Clause (even if the institution was previously exempt under Title IX). It is important to note that while the Supreme Court's duty is to uphold the Constitution, not federal directives like Title IX, the Supreme Court does reaffirm, redefine, or negate the constitutionality and scope of legislation through its decisions. In the case of Title IX, the Supreme Court has not only reaffirmed its constitutionality, but has also established skeptical judicial scrutiny—a term that will be more specifically defined later in this paper— through creating the burden of "substantial comparability" tests for schools aiming to practice sex-based segregation.[21]

Almost immediately after Title IX, court battles arose over the perceived attack on single-sex educational institutions. Five years after its creation, the Supreme Court released a notable decision favoring single-sex schools' interests, establishing a standard for the conditions under which a single-sex school could operate while being supported by federal aid. In the 1977 case of *Vorchheimer v School District of Philadelphia*, a female student wished to attend a public high school that was all-male. The Supreme Court, in a 4-4 tie, allowed the Third Circuit Court's opinion to stand, affirming that the School District of Philadelphia offered an "equal educational opportunity" and thus could deny the student's admission to the all-male school.[22] While this initially appeared to be a win for single-sex schools, multiple justices on the Supreme Court, along with the District Court that initially decided against the School District of Philadelphia, saw the *Vorchheimer* decision as contradicting the precedent established in the *Brown v Board of Education* decision that overturned "separate but equal." *Vorchheimer* was later used to establish a distinction between single-sex schools that offer a "substantially equal" alternative for the excluded sex and those that do not offer such an alternative.

In the *Grove City College v Bell* decision of 1984, the

Supreme Court established a new precedent against an educational institution seeking to avoid Title IX. Here, Grove City College, a private liberal arts college, argued that the Title IX prohibition of sex discrimination violated its First Amendment rights. In a 7-2 decision, the Court protected Title IX's applications to private institutions.[23] The court extended jurisdiction into a private school's educational policies because many of the school's students received federal grant money. This federal funding of students' finances allowed the court to extend the Title IX mandate into the school's financial aid program, and was later broadened to apply to all parts of educational institutions through the Civil Rights Restoration Act of 1987.[24] The broad application of Title IX, paired with the previous court decisions requiring equal educational alternatives, set the precedent for the Court's next major decision: a decision which would create an even higher standard for educational institutions wishing to segregate on the basis of sex.

This decision was the 1996 landmark case of *United States v Virginia*, a notable court battle over single-sex schooling, in which the United States filed suit against the state of Virginia and the male-only Virginia Military Institute (VMI). Justice Ruth Bader Ginsburg argued that VMI was noncompliant with the Equal Protection Clause of the Fourteenth Amendment. This opinion was largely derived from the fact that there was virtually no "substantive comparability" between VMI and its all-female counterpart, the Virginia Women's Institute for Leadership.[25] Essentially, the opportunities at VMI were superior to those at its counterpart designed for women. Justice Ginsburg, therefore, articulated a new constitutional standard called "skeptical scrutiny." As author Daniel Horowitz writes, scrutiny is generally applied "to a particular claim [that] is of critical legal importance and usually determines whether the claim will succeed."[26] In other words, scrutiny is a tool of judicial review that establishes a set of burdens to determine if a practice is constitutional. Skeptical scrutiny specifically applies to gender classifications and ensures that

single-sex schools exist only if there is a substantially comparable alternative for the excluded sex. Moreover, it requires that schools provide proof of "exceedingly persuasive justification" for gendered discrimination.[27] Writing for the majority in *United States v Virginia,* Justice Ginsburg established skeptical scrutiny, arguing:

> Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive."The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives."' The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.[28]

District and circuit court decisions, like that of the *Wood County Board of Education v Doe* in 2012, continue to reaffirm the skeptical scrutiny standard applied to single-sex educational institutions, challenging schools and districts that do not provide a substantially comparable alternative for students of the excluded gender.[29]

IV. Equalizing and Tailoring: an Irreconcilable Conflict

School districts segregate schools by gender in part because of perceived benefits of educations that are tailored to males and females.[30] Self-proclaimed advocates for single-sex schooling consistently cite tailored educations as one of the primary benefits.[31] [32]

In *Mississippi University for Women v Hogan* (1982), the 'tailored' rhetoric was defined as "fixed notions concerning the roles and abilities of males and females."[33] In this particular case, the Court found that Mississippi University for Women violated the Equal Protection Clause by denying an applicant from the university because of outdated gender stereotypes that nursing is an exclusively-female profession. Ideally, school districts and the courts will reaffirm the sentiment originally promoted by Justice Ginsburg in *United States v Virginia* that "'inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[34]

The words of Justice Ginsburg have resulted in substantial changes in certain school districts. In 2012, for example, *Wood County Board of Education v Doe* grappled with differences in teaching found across single-sex schools in the Wood County School District of West Virginia.[35] In the aftermath of this case, the Wood County Board of Education agreed to remove its K-12 single-sex schools from the district, conceding blatant issues with teaching differences in supposedly "equal" sex-segregated schools. Despite these promising results brought by the courts, administrators and representatives from single-sex schools across the country continue to "tailor" their schools to exacerbate sex-assigned gender segregation.

Since the *Wood County Board of Education* decision, numerous public institutions have continued to promote "tailored" educational benefits through single-sex schools.[36] In 2013, the American Civil Liberties Union (ACLU) found that in Louisiana's sex-segregated public schools, boys "read 'Where the Red Fern Grows' while girls read 'The Witch of Blackbird Pond,' because boys apparently like 'hunting' and 'dogs,' but girls prefer 'love stories.'"[37] Moreover, the National Association for Single Sex Public Education (NASSPE), which assists over 500 schools that

offer single-sex educational programs in the United States, writes that single-sex schools provide "custom-tailored learning and instruction" for students.[38] Organizations like NASSPE justify this through Title IX 1681.a.1 which states that only "institutions of vocational education, professional education, and graduate higher education, and... public institutions of undergraduate higher education" are subject to prohibition. The Supreme Court, however, has generally disagreed with this narrow scope argued by proponents of public single-sex education. Notably, in the *Grove City College* decision, the Supreme Court expanded the scope of Title IX, via Ginsburg's skeptical scrutiny rule and the Equal Protection Clause.[39] Historically, when Title IX legislation has failed to prevent discrimination by sex in schools, the judiciary has broadened the scope and scrutiny of the Fourteenth Amendment. Therefore, these recent examples of "tailoring" likely violate Title IX regulations and the numerous Court decisions mentioned previously in this paper.

V. Disrupting the Gender-Binary in Educational Law

As stated in the introduction, it is important to differentiate between the fluid notion of gender and the binary-based concept of sex that is rooted in male and female reproductive organs. These distinctions are often conflated by the courts and have yet to be resolved by the Supreme Court. The Supreme Court has never included genders outside of the traditional male-female sex binary in its decisions; however, legislation and lower court decisions in states such as California, Oregon, and Washington have begun to grapple with this phenomenon. The first legal alteration of the declared gender on any state-issued identification card was affirmed in Oregon, by the Jackson County Circuit Court, in June of 2016.[40] While this state-based precedent is still rather weakly established both socially and legally, it demonstrates that conceptions of gender are becoming broader in the context of the law.[41]

While various states have introduced legislation that accounts for individuals who might not identify within the sex-based gender binary, the federal government has failed to do so. Title IX, initially drafted nearly fifty years ago, is exclusionary in that it only refers to "sex." Title IX stands in stark contrast to various state codes that define gender as more fluid. In California, Senate Bill (SB) 179 has now enabled individuals to receive a third gender classification, marked by an "X," on almost all state-issued documentation.[42] This same bill has created opportunities for transgender citizens to receive state identification cards that accurately reflect their genders.[43] These various laws, decisions, and policies make a compelling case that legal discussions surrounding single-sex schools must grapple with the schools' effects on non-binary students. If all individuals are to have equal access to education systems across the United States, it is necessary for the federal government to introduce reforms to Title IX that will prevent not only sex-based discrimination, but also gender-based discrimination, even for those who do not identify as "male" or "female." Moreover, the judiciary should use its role as an advocate for non-majoritarian communities to establish precedent that will prevent discrimination against those who identify outside of the traditional sex-based gender binary.

VI. Conclusion

By examining numerous precedents established by the Supreme Court, legislation such as Title IX, and movements for gender equity, this paper challenges public single-sex schools that claim to "tailor" their opportunities toward either "male" or "female" students. It is difficult to imagine a situation in which single-sex schools that have any public association could legally practice "tailored" instruction while also meeting the "substantially equal" test so clearly established in the court decisions described previously. Tailoring education to conform to broad and largely

outdated stereotypes about how groups of people learn reinforces often-sexist misconceptions about the intellectual abilities of men and women. The aforementioned Louisiana schools serve as prime examples of how public single-sex schools, although claiming to provide substantially equal learning environments, continue to reinforce sexist attitudes that hurt students and hinder their educations. Even if the courts were to continue ignoring the identities of non-binary and transgender students, they should still grapple with the practically non-existent legal justifications for gender-based "tailored" educational tactics.

If the Court's "substantially equal" jurisprudence eventually includes gender as a multifaceted, fluid, and self-described identity rather than the male-female sex-assigned binary, a legal controversy is destined to arise. If a "substantially equal" test is applied to such schools, classrooms, or any sex-segregated educational institutions, the legal recognition of gender identities beyond the male-female binary would require the establishment of a "substantially equal" alternative for the excluded gender(s). What is the legal system to do with single-sex educational institutions that exclude students who do not identify within the binary? In other words, where do non-binary and transgender students fall in an educational system that never included them in the first place? The crux of the decision in *Brown* was based on the "psychological knowledge" and intangible effects of segregation, especially for students who have already been marginalized.[44] The Court, whether it be through the *Virginia* decision that raised the standard by which a single-sex institution can exist, or the *Grove City College* decision that broadened the scope of Title IX, has endowed itself with the responsibility of requiring equal protection in education for non-binary and transgender students. The Court should thus set a precedent to provide all students with equal and welcoming educational environments that accept their identities, rather than forcing them to be categorized on the basis of sex.

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