AFRICAN AMERICAN CIVIL RIGHTS IN THE AGE OF OBAMA: A HISTORY AND A HANDBOOK

SECOND EDITION

Prof. Harold McDougall
Howard University School of Law

ISBN 978-0-557-24832-2

Preface

Barack Obama's election as the first President clearly of African descent is a reminder that the social movement for minority rights and opportunities is a full-court press on all branches of government. If the civil rights battles of the fifties were in the courts, the battles of the1960s were on the ground. Part of that strategy was to challenge segregation in the face of Southern intransigence, but another part was to get people to register to vote, with an eye toward Congressional representation.

Barack Obama's election as the first President clearly of African descent makes the Presidency part of the struggle for civil rights, just as *Brown v. Board Of Education* made the courts part of the fight and Mississippi Freedom Summer brought the fight to the legislature.

Today we recognize that *every* branch of government is essential to the struggle for minority rights and opportunities. We also recognize that the African American struggle for civil rights is not just a battle at the highest levels. The struggle does not always occur in the courts, or even in lawmaking bodies such as Congress and the various state legislatures. While important precedents and cultural changes emerge at these highest levels, the ultimate battles to implement changes made at the top take place in the lives of everyday people.

My book AFRICAN AMERICAN CIVIL RIGHTS IN THE AGE OF OBAMA: A HISTORY AND A HANDBOOK, records the high-level decisions that establish rights, but focuses as much as possible on practical means for African Americans to realize those rights in their own lives. That often does not mean litigation, or even lobbying for new law, though those are extremely important.

Instead, African Americans seeking to protect their rights will often go to a federal, state, or local agency set up specifically to enforce civil rights, rather than going to court themselves. These agencies often have complex procedures for filing and pursuing claims. This book gives some general advice on how to approach them.

In other cases, African Americans must petition authorities directly to remind them of their responsibilities, sometimes with the help of a local branch of a large organization such as the National Association for the Advancement of Colored People (NAACP). This means working with others to affect the decisions made by employers, housing providers, voting officials, shopkeepers and hotel owners, school authorities, the police, and local government entities such as school boards, local councils, and zoning and planning commissions.

The book is divided into four parts: an introduction, scenarios dealing with harassment, scenarios dealing with inequality, and scenarios dealing with active citizenship. The book works through each of these scenarios, chapter by chapter, starting with hate crimes, the most extreme case, working through topics such as employment and housing, and ending with citizen action.

Each chapter begins with a *History* section giving an overview of the background and present shape of the featured issue, asking, first, "What's the problem?" The section continues to describe current law and explain how it actually works, and then details changes needed to make civil rights for African Americans more stable and secure. The second section, the *Handbook*, gives victims "first aid" tips on what to do when confronted with discrimination and identifies government agencies and nonprofits that offer help. Each handbook section finishes with tips on how to organize as a community to tackle the problem.

The struggle for African American civil rights is not yet over. But it *has* entered a new phase, where ordinary citizens must assert the rights won, often without much direction. How many people faced with hate crimes, police racial profiling, or discrimination as they shop or drive or fly have the presence of mind to report the matter to the authorities, or the resources to hire an attorney? My book is for them.

Acknowledgments

AFRICAN AMERICAN CIVIL RIGHTS IN THE AGE OF OBAMA: A HISTORY AND A HANDBOOK, emerged from several seminars in civil rights taught at Howard University School of Law, my own experiences as an advocate for the NAACP and for my own family, and from a great deal of insight, research, and editorial suggestions from students as well as colleagues. I have recorded their contributions in the following Acknowledgements.

Introduction: My thanks to Prof. Lisa Crooms of Howard Law School, for reviewing this chapter and making helpful suggestions. Thanks also to my research assistants Valerie Johnson and Caren Short.

Hate Crimes: My thanks to Prof. Andrew Taslitz of Howard University School of Law, and author of CRIMINAL LAW: CONCEPTS AND PRACTICE (Carolina Academic Press 2005) for reviewing this chapter and making helpful suggestions. Thanks also to my students Maiysha Rashad, Melissa Alves, Melissa Pryce, Brittainy McCants and Clarion Johnson

Racial Profiling: My thanks again to Prof. Andrew Taslitz for reviewing this chapter and making helpful suggestions. Thanks also to my students Alyssa Gowens, Shayla Settlers, Larry Stewart, Will Jacobs, Olajumoke Akingboye, Yaa Acquaah, Izukanne Emeagwali and Geovanny Martinez.

Discrimination Against Consumers: My thanks to Atty. Dennis Hayes, former General Counsel of the NAACP, for reviewing this chapter and making helpful suggestions. (Mr. Hayes declined to comment on any cases in which the NAACP was still involved in litigation.) My thanks as well to Atty. Donald Temple, originator of the term "consumer racism," and lead counsel on the *Eddie Bauer* case discussed in the chapter. Thanks also to my students Kenla Hearne-Hjorten, Jeannine Henderson, Marguerite Lanaux, Rosalyn Roberson, Karen Todd, Tegra Watkins, Letoria House, Richard Evans and Tiffany Finley

Employment Discrimination: My thanks to Prof. Leroy Clark of Catholic University Law School, and author of EMPLOYMENT DISCRIMINATION LAW -- CASES AND MATERIALS (Michie 1997), for reviewing this chapter and making helpful suggestions. Thanks also to my students Yitzhak Hussein, Nicole Smith, Jason King, Brooke Howell, Oyebisi Olatoye, Quincy McRae, Ebony Ross and Yonne Bellamy.

Housing Discrimination: My thanks to Prof. Florence Roisman of Indiana University School of Law and author of *Legal Strategies for Protecting Low Income Housing*, in AMERICA'S HOUSING CRISIS: WHAT IS TO BE DONE? (Chester Hartman ed. 1983), for

reviewing this chapter and making helpful suggestions. Thanks also to my students Samuel Anyan, Kellee Baker, Heather Kenney, Danielle Webb, Fareed Hyatt, Adrienne DeCuire, Anita Cochran, George Williams, Asia Johnson, and Yasmin Gabriel.

Public Education: My thanks to Prof. Bill Kaplin of Catholic University Law School, and author of THE LAW OF HIGHER EDUCATION (Jossey Bass 2007) for reviewing this chapter and making helpful suggestions. Thanks also to my students Hillary Evans (nee Brown), Danielle Robinson, Jaron Shipp, Rasheedah West, Courtney Beasley, Tai Dixon, Nathalie Laureano, Labriah Lee, Emily Rutledge, Julian Jackson, and Ebony Wheaton.

Voting Rights: My thanks to Prof. Spencer Overton, of George Washington University and author of STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION (Norton 2006) for reviewing this chapter and making helpful suggestions. Thanks also to my students Omolola Campbell, Olivea Moore, Algernon Pitre, Christopher Espy, Ronald Smith, and Louis Brown

Citizen Action: My thanks to Matt Leighninger, Executive Director of the Deliberative Democracy Consortium, and author of THE NEXT FORM OF DEMOCRACY (Vanderbilt University Press 2006) for reviewing this chapter and making helpful suggestions. Thanks also to my students Joseph Gasper II, Rukia Lumumba, Bryan MacAvoy, Princess Wiggins, Ernest Lyles, Dana Mitchell, Vanessa Jordan, Lanasha Houze, Nicole Hauge, Chinedu Enekwe, Oluseyi Iwarere, Marcel Logan, Courtney Chaplin, Raymond Chow and Jaymes Sanford.

Table of Contents

Part I: Introduction

Chapter One

Overview

No person can be treated differently by the courts, or by the state, local, or federal government because of their race.
SYNOPSIS, THE FOURTEENTH AMENDMENT, "EQUAL PROTECTION" CLAUSE

THE HISTORY

§1.1: Introduction

Racism in the United States begins as an idea developed to explain why human beings could enslave others. The *Dred Scott* case, which we first consider, gives us an insight of what racism looked like during that period of American history.

As the social relations between white Americans and African Americans changed, racism altered its shape and dimension to reflect the new realities. After slavery ended, "biological" racism—the idea that Africans were not human-- gave ground to a new ideology, white supremacy. White supremacy conceded that Africans were human, but assigned them an inferior status. White supremacy explained segregation-- separating African Americans from whites in all walks of life. The second case we consider, *Plessy v. Ferguson*, provides a window into that period, which lasted almost one hundred years, broken only by the Civil Rights Movement of the 1960s.

The third case, *Brown v. Board of Education*, emerged from an NAACP litigation strategy developed over several decades. *Brown* declared an end to white supremacy, but it took another decade of protracted struggle, often in the streets, at the cost of many lives, before segregation by law officially ended.

Unfortunately, *Brown* and the Civil Rights Movement have not ended the race problem in the United States. Significant gaps still exist between whites and African Americans in health, wealth, education, employment, and political power. African Americans face harassment from private citizens, shopkeepers, and the police.

Today there is a new ideology-- since the law no longer officially subordinates African Americans, whatever imbalances still exist must be the result of African American cultural deficiencies and practices. The social conservative's struggle against affirmative

action brings these issues into sharp focus. The last cases we look at, challenging affirmative action at the University of Michigan and in student assignment to public schools in Seattle complete this overview of racism and its ideological underpinnings.[1]

§1.2: Slavery

Sam Scott, an African-American, was born a slave in 1795 in Southampton, Virginia. Scott worked for his master Peter Blow as a farmhand, handyman, and stevedore. He moved with Blow to Huntsville, Alabama and in 1830 to St. Louis, Missouri. When Blow died in 1831, the executors of his estate sold Scott to Dr. John Emerson, an army surgeon, for $500. Emerson later took Scott to the free state of Illinois. In the spring of 1836, after a stay of two and a half years, Emerson moved to Fort Snelling in the Wisconsin Territory, taking Scott along with him. While there, Scott met Harriet Robinson, a slave owned by a local justice of the peace. Emerson bought Harriet, and she married Sam. They had two daughters, Eliza and Lizzie.

The army later transferred Emerson to the south: first to St Louis, then to Louisiana, and he left Sam and his family in Wisconsin. A little over a year later, Emerson himself got married, and instructed Sam and his family to come to Louisiana. Sam, his wife and their children traveled over a thousand miles, apparently unaccompanied, down the Mississippi River to meet their master. Only after Emerson's death in 1843, after Emerson's widow hired Scott out to army captain John Sandford, did Scott seek freedom for himself and his wife. First, he offered to buy his freedom from Mrs. Emerson -- then living in St. Louis -- for $300. She refused. He also tried to escape several times, but did not succeed.

In 1846, Scott filed suit for his freedom in the Missouri state courts, arguing that he had lived in free territory and was therefore free. His case, *Scott v. Sanford,* eventually reached the US Supreme Court. In 1848, Sam changed his name to “Dred” Scott.

The Court decided that all people of African ancestry -- free persons as well as slaves -- could never become citizens of the United States and therefore could not sue in federal court.[2] The court also ruled that the federal government did not have the power to prohibit slavery in its territories.[3] Pro-slavery presidents from the South had appointed seven of the nine justices deciding the case; of these seven, five were from slave-holding families. Scott, needless to say, remained a slave.

Chief Justice Roger B. Taney, a staunch slavery supporter, wrote for the majority and read the Court’s decision in March of 1857.[4] According to Taney, the framers of the Constitution believed that African Americans “had no rights which the white man was bound

to respect;" and that "the negro might justly and lawfully be reduced to slavery…."[5] He could be "bought, sold, and treated as an ordinary article of merchandise and traffic, whenever profit could be made by it."

Referring to the language in the Declaration of Independence that includes the phrase, "all men are created equal," … " Taney begged to differ: "It is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration. . . ."[6]

Peter Blow's sons, Scott's childhood friends, helped pay Scott's legal fees through the entire litigation. On May 26, 1857, a few months after the Supreme Court's decision, the former master's sons purchased Scott and his wife and set them free. Scott lived out the rest of his life in St. Louis.

Though a number of African-Americans enjoyed relative equality with whites in the 17th century English colonies, by the 18th century most had been thoroughly subordinated, even the free African Americans of the Northern colonies. The Declaration of Independence and the American Revolution generated tremendous sentiments for freedom and equality for "all mankind," but the revolutionary leadership drafting the United States Constitution recognized the slave trade and allowed it to continue. They required fugitive slaves to return to their masters. They counted slaves as "three fifths" of a person and added them to a slave state's free population, giving the slave states more than their fair share of Congressional representatives and disproportionate power in Congress.

We can trace differences in treatment back even further, to the Jamestown Colony in early seventeenth-century Virginia, where colonists used the terms "black" and "white" to distinguish between African slaves and European indentured servants. The colonists allowed the servants freedom of movement, but not the slaves. Physical appearance was an easy way to distinguish between those with rights from those who had none.

The slavery laws, or "slave codes"[7] of the early 17th century treated slaves as property and not as human beings, and controlled their behavior closely. A slave could not testify for or against a white person in court, for example. They could not make contracts or own property. Even if attacked, they could not strike a white person. They could not transmit or possess "inflammatory" literature; they could not marry without their owners' approval. No one, including his or her master, could teach a slave to read or write without severe punishment.

The control of the slaves was especially important to the success of the southern agricultural economy.[8] Ninety-five percent of black people lived in the south, comprising one-third of the population there, as opposed to two percent of the population of slaves who lived in the north.[9]

§1.3: The Civil War Amendments

While the *Dred Scott* decision gladdened Southern slaveholders, it infuriated abolitionists and their supporters, creating the conditions for Abraham Lincoln's nomination to the Presidency, his subsequent election, and for the South to secede from the Union. Civil War abolitionists fought to overturn *Dred Scott*, but as soon as the war was over, Southern elites reasserted their dominion and control over African-Americans within their states.

Post-war Southern states enacted "Black Codes" based on the slave codes.[10] Through these codes, the whites attempted to control the labor, movements, and activities of African Americans. [11]

The Codes closely controlled African Americans' employment, housing, consumer's rights, and citizen's rights.[12] They forbade African Americans to sit on juries, limited their right to testify against white people, and prohibited them from voting, carrying weapons in public places, or working in certain occupations.[13] An African American faced heavy fines for walking inside a city's limits without a white person's permission, congregating with other African Americans, bartering or selling personal items without permission from a white person, or failing to have a permanent residence. The typical punishment for any infraction was forced labor, either for the local government, or for any white person who posted bail or otherwise arranged for the offender's release from jail or prison.[14]

However, Congress passed three important constitutional amendments during and immediately after the Civil War to secure emancipation, citizenship, and voting rights to the former slaves.

The **13th Amendment** provides in section 1,"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, nor any place subject to their jurisdiction."*

The **14th Amendment** provides in section 1, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In the *Slaughterhouse Cases*[15] (1873), the Supreme Court held that the Fourteenth Amendment provided freed slaves only with the rights related to national citizenship, not those related to citizenship as defined by the states.

The **15th Amendment** provides in section 1, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

§1.4: Reconstruction

A Republican Congress sponsored "Reconstruction" of the post-war South partly to overturn the Black Codes and the reactionary southern governments that enacted them. Reconstruction laws, policies, and federal troops protected African Americans' right to vote, resulting in majority-African American Reconstruction governments.[16]

The Wartime Amendments gave Congress the power to pass legislation to protect the freed slaves. Congress then passed the Civil Rights Acts of 1866, 1870, 1871, and 1875.

The Civil Rights Act of 1866 confirmed African American citizenship, their right to sue in court, to engage in contracts, and to hold and deal in property (real and personal). The 1866 Act is still good law, and is presently codified in the United States Code as 42 U.S.C. § 1981 and § 1982. In addition, since the Thirteenth Amendment rather than the Fourteenth

---

* The Supreme Court in 1883 held that Congress can use the Thirteenth Amendment not only to end slavery but also to "pass all laws necessary and proper for abolishing all badges and incidents of slavery." The Civil Rights Cases, 109 U.S. 3, 20 (1883). Today, many minority communities still face the "badges" (symbols) of racism, and even some of the incidents (legal relations) of slavery as well. A plaintiff alleging a Thirteenth Amendment violation does not have to prove intentional discrimination (*Memphis v. Greene*, 451 U.S. 100 (1981) or state action (*Runyon v. McCrary*, 427 U.S. 160, 179 (1976). Further discussion is beyond the scope of this book, *but see, e.g.*, Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 50 HARV. C.R.L. REV. 1, 2 (1995) and William M.Carter Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1313 (2007)

Amendment is its foundation, the 1866 Act reaches the discriminatory conduct of private as well as state actors.

Section 1981 provides

> all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and no other.[17]

Responding to terrorist attacks upon freed slaves by organizations such as the Ku Klux Klan, Congress passed a series of laws called "**Enforcement Acts**" to prevent violence and intimidation against individuals attempting to exercise their constitutional rights. One of these Acts was passed in 1870 (now codified as 42 U.S.C. § 1971) and two in 1871 (one has since been repealed; the other is presently codified at 42 U.S.C.A. § 1983).

A key focal point of the 1870 Act was the right to vote, and the misuse of one's position as an election officer to inhibit the right to vote. The Supreme Court eviscerated the Enforcement Acts' voter protection in *U.S. v Reese*[18] (1875). *Reese* dismissed an indictment against election inspectors that refused to *count* the votes of African Americans, because the statute, and the Fifteenth Amendment, only spoke to *preventing* African Americans from voting![19] Though direct voter intimidation by public officials was unconstitutional and illegal, election fraud was not.

In *US v. Cruikshank*[20] (1875), the US Supreme Court dismissed an indictment brought under the 1871 Act against a mob of whites who murdered more than one hundred African Americans, because the Fourteenth Amendment gave Congress power only over state action, and not the acts of individuals, per the *Civil Rights Cases.*[21] Thus, federal authorities could not use the Enforcement Acts, passed to stem Ku Klux Klan activity, to indict members of the Klan.

The 1875 Act secured equal access to public accommodations, and prohibited exclusion of African Americans from jury duty.

§1.5: The End of Reconstruction

While Congress promoted Reconstruction, the other branches of the federal government moved to undermine it.

The White House ended its support in 1876. In the context of a tied national election, Republican Presidential Candidate Rutherford Hayes agreed to withdraw Union troops from

the South in exchange for Democratic Presidential Candidate Samuel Tilden's electoral votes. This "Compromise of 1877" ended Reconstruction and returned the South to its pre-war civilian leadership. [22]

The Supreme Court resisted Reconstruction in many instances as well. Until the late twentieth century, the courts barely mentioned the Thirteenth and Fifteenth Amendments, much less enforced them.

For example, in the *Civil Rights* Cases (1883) defendants challenged the Civil Rights Act of 1875, which prohibited innkeepers, proprietors of public establishments, and owners of public conveyances from discriminating against African Americans in public accommodations. [23]

The Supreme Court upheld the law insofar as it prohibited discrimination that was the product of governmental action. The Court held, however, that the equal protection clause of the 14th Amendment did not prohibit private acts of discrimination.[24] Although Congress expressed its authority in broad and sweeping language, the Supreme Court interpreted that power as limited by the "no state shall" language of the Amendment's first section. Simply put, Congress was powerless to remedy discrimination by one individual against another individual. Congress could only prevent state actions that deprived their citizens of constitutionally granted rights.

Justice John Marshall Harlan, in a vigorous dissent, argued that the Court's action revived the odious *Dred Scott* opinion's disregard for the rights of African-Americans.[25]

Harlan also dissented in *Plessy v. Ferguson*, decided some thirteen years after the *Civil Rights Cases*.

Homer Adolph Plessy was born in New Orleans, Louisiana. Plessy was an "octoroon" (seven-eighths white and one-eighths African-American). Census takers classified his parents as free people of color—"Creoles," of mixed African, French and Spanish ancestry.[26] Plessy seems to have led a rather ordinary life until he became vice-president of the Justice, Protective, Educational, and Social Club in 1887- a group dedicated to reforming public education in New Orleans.

Plessy believed he had the right to travel in a "whites only" railroad car in Louisiana, perhaps on business for his club.[27] He sat in the white section of the train, but "was forcibly ejected with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the [segregation laws]," after refusing to sit in the "colored" section.

Because of his African ancestry, the authorities tried and convicted Plessy for violating Louisiana's racial segregation laws. He appealed to the Supreme Court, which rejected his claim, upholding "the right of a state to pass a statute providing for separate railway carriages for the white and colored races." The Supreme Court in *Plessy v. Ferguson* (1896) held that this state action enforcing racial segregation of private or public facilities did not violate the U.S. Constitution as long as the separate facilities were "equal." [28]

The Court said that the Fourteenth Amendment's purpose was to equalize the treatment of African Americans and whites, but that "it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[29] Justice Harlan, in dissent argued, "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[30]

The "separate-but-equal" segregation laws the Court upheld severely limited civil rights for African Americans well into the mid-twentieth century. The regime of "separate but equal," nicknamed "Jim Crow" after a hapless slave character in a minstrel show, [31] separated whites from African Americans in their access to municipal services of all kinds, schools most importantly.

Jim Crow laws suppressed African Americans through segregation, denying them equal right to the use of public and private accommodations, such as transportation, housing, restaurants, theaters, doctors' offices, barber, and beauty shops. [32] De jure ("legal") segregation prevented African Americans from exercising their citizenship and voting rights for nearly one hundred years, as well as limiting their access to education, medical care, and other goods and services to which most white Americans enjoyed full access.

The purpose of Jim Crow was to insure that blacks accepted their inferiority to whites and demonstrated it by actions, words, and manners.[33] White violence, public and private, policed the color line as well as the Jim Crow customs that supported it, creating a system of state terrorism in the South.[34]

§1.6: The Civil Rights Movement

A New Mood

In 1905, the Niagara Movement formed to fight Jim Crow. The NAACP, founded in 1909, continued the Movement with an anti-lynching campaign in Congress and eventual litigation struggles against segregation.

African Americans began using demonstrations to advance their rights and promote social change during World War II. African American soldiers returning from World War I faced savage beatings and sometimes death when they asserted a sense of manhood and accomplishment. By World War II, however, President Franklin Roosevelt had come to depend on African American votes in the urban North; as a result, Northern African Americans began to feel a certain sense of entitlement.

In this climate, African American soldiers were no longer willing to accept the level of segregation and discrimination they faced during the previous war. Northern African American soldiers sent to the South for training overstepped the bounds of segregation and got into fights with local white citizens. African American-owned newspapers protested any mistreatment the soldiers faced. Labor leader A. Philip Randolph threatened a march on Washington, D.C. by hundreds of thousands of African Americans in 1941 to protest job discrimination in defense industries and the military. To avoid this protest, President Roosevelt issued Executive Order 8802, reaffirming the "policy of full participation in the defense program by all persons, regardless of race, creed, color, or national origin."[35]

Schools Remain Segregated

During the century before *Brown v. Board of Education,*[36] all African American children in the South (and many in the North) attended segregated schools.

Plessy specifically approved separate "but equal" schools for African American children.[37] However, the African-American schools were inferior in virtually every respect to those white children attended. Poorly maintained, crumbling, often with no indoor plumbing and located far away from their homes, Jim Crow segregated schools hardly provided African American children an "equal" education.

Harlan's *Plessy* dissent echoed in the Supreme Court's *Brown v. Board of Education* opinion (1954), which ruled that segregated pubic schools violated the Fourteenth Amendment.[38]

Charles Hamilton Houston, James Nabrit, and Thurgood Marshall – NAACP Attorneys and Howard University Law Professors--engineered the legal strategy for overcoming school segregation in the courts.

They started at the graduate level, figuring it would not be cost-effective for states to provide separate but equal facilities for adults. Almost twenty years before *Brown*, in *Missouri ex rel. Gaines v. Canada,*[39] Houston argued that the state of Missouri denied African-American students an equal legal education.

The University of Missouri School of Law did not admit African-American students, who had to study law in a bordering state. The Court said that this system was unconstitutional, and that if separate accommodations were not available within the state of Missouri, the African-American student must attend to the white school. Similar cases followed.[40]

The Houston team worked their way down to the public schools, eventually winning the landmark *Brown* decision in 1954. Oliver L. Brown, the named plaintiff in *Brown v. Bd. of Education*, worked as a welder for the Santa Fe Railroad and was a divinity student.[41] Brown's daughter Linda, a third grader in Topeka, Kansas public schools, had to walk six blocks to her school bus stop to ride to Monroe Elementary, her segregated African American school. Sumner Elementary, a white school, was only seven blocks from her house. She daily passed several other white-only schools en route.

Oliver Brown initially contacted a Topeka attorney about his concerns, who referred him to the local NAACP chapter. He then joined the NAACP lawsuit already in progress. The NAACP leadership directed each of the parents to attempt to enroll their children in the closest neighborhood school in the fall of 1951. School authorities refused to enroll the children, directing them instead to segregated schools.

Linda Brown Thompson later recalled the experience in a 2004 PBS documentary:

> ... Well, like I say we lived in an integrated neighborhood and I had all of these playmates of different nationalities. And so when I found out that day that I might be able to go to their school, I was just thrilled, you know. And I remember walking over to Sumner school with my dad that day and going up the steps of the school and the school looked so big to a smaller child. And I remember going inside and my dad spoke with someone and then he went into the inner office with the principal and they left me out ... to sit outside with the secretary. And while he was in the inner office, I could hear voices and hear his voice raised, you know, as the conversation went on. And then he immediately came out of the office, took me by the hand and we walked home from the school. I just couldn't understand what was happening because I was so sure that I was going to go to school with Mona and Guinevere, Wanda, and all of my playmates.

Plaintiffs' lawyers argued that forcing children to attend segregated schools caused them psychological damage, and urged the Court to recognize that separate schools were "inherently" unequal. On May 17, 1954, a unanimous Supreme Court decision found for the African American parents, requiring state governments to end school segregation.

In the *Brown* decision, the Supreme Court acknowledged that education was such an essential component of child development that it was doubtful that a person could succeed in America without it. Refusing to apply *Plessy v. Ferguson*, *Brown* ruled that formal segregation was inherently unequal, laying the moral groundwork for the civil rights movement that followed.

The Civil Rights Movement Takes to the Streets

After *Brown*, African-American resistance to second-class citizenship, racial segregation, and discrimination reached unprecedented levels.[42] African-Americans challenged racial inequality with strategies such as civil disobedience, nonviolent resistance, marches, protests, boycotts, "freedom rides," and rallies, which often received national media attention.[43]

Brown opened a pathway for the civil rights movement to mobilize the black community to eliminate discrimination in public accommodations, employment, and voting rights, creating the broad-based grass roots movement of the 1960s. The struggle to expand civil rights for African Americans involved, among others, the Congress of Racial Equality (CORE), the National Association for the Advancement of Colored People (NAACP), the Student Nonviolent Coordinating Committee (SNCC), the Southern Christian Leadership Conference (SCLC), and the Urban League.

President John F. Kennedy issued executive orders in 1961 and 1962 to protect minority rights in voting, employment, housing, transportation, and education. These set the stage for further federal initiatives.

In the spring of 1963, American TV stations broadcast worldwide images of Birmingham, Alabama police beating peaceful demonstrators, attacking them with police dogs, spraying them with water hoses, then arresting them and throwing them in jail.[44] Concerned about the country's international reputation during the Cold War, President Kennedy sent a major piece of civil rights legislation to Congress on June 19, 1963. The bill faced fierce opposition in both the House and Senate.

The Civil Rights Movement's "March on Washington for Jobs and Freedom" took place a few months later, in August 1963; Kennedy's assassination came only a few months after that, in November. Vice-President Johnson, who succeeded him, became a strong supporter of civil rights and pushed several landmark bills through Congress.

The most important of these are the **Civil Rights Act of 1964,** the **Voting Rights Act of 1965,** and the **Fair Housing Act of 1968**. Some viewed the Civil Rights Act of 1964,

signed into law by President Johnson July 2nd, 1964, as a tribute to the slain President. The Civil Rights Act of 1964 addressed discrimination, chiefly in public accommodations and employment.

Importantly, Congress based the Civil Rights Act of 1964 on the Commerce clause of the Constitution rather than the Fourteenth Amendment. As such, the "state action" limitations of the Fourteenth Amendment (per the Court's ruling in the *Civil Rights Cases*) do not apply, and the actions of private citizens are covered. It does mean, however, that the activities regulated must have some effect upon interstate commerce. Congress strengthened its reach in this regard by making the Act applicable to any person, program, or entity that received federal funds (**Title VI**).

Title II of the 1964 Act (public accommodations) makes it illegal for the provider of any public accommodation (restaurants, hotels, public transportation) to discriminate against a potential customer or client because of race. The government agency with primary jurisdiction over Title II is the Civil Rights Division of the U.S. Department of Justice. (Title II reaches essentially the same conduct as the Civil Rights Act of 1875 provisions that the Supreme Court struck down in the *Civil Rights Cases*.)

Title VI of the 1964 Act (nondiscrimination in federally assisted or sponsored programs), makes it illegal for the provider or sponsor of any federally assisted program to discriminate against a potential customer or client because of race. The government agency with primary jurisdiction over Title VI is the Civil Rights Division of the U.S. Department of Justice.[45]

Title VII of the 1964 Act (employment discrimination) prevents an employer from discriminating against any person because of race, color, religion, sex, or national origin. This applies to hiring, firing, promotions, pay, training, or other workplace conditions. The government agency with primary jurisdiction over Title VII is the Equal Employment Opportunity Commission (EEOC).

The Voting Rights Act of 1965 declares that everyone's vote is equal. The Act takes specific steps to keep local authorities from shutting voters out of the political process because of their race or other suspect criteria. The government agency with primary jurisdiction over The Voting Rights Act is the Civil Rights Division of the U.S. Department of Justice.

The Fair Housing Act of 1968 holds that a person cannot refuse to sell a house or rent an apartment because of the buyer or renter's race, color, national origin, religion, or sex,

(family status and disability were added as new "protected categories" when the Act was amended in 1988). In addition, no one can refuse to make a mortgage loan because of the borrower's race, color, national origin, religion, or sex (and, as of 1988, because of the borrower's family status or disability.) The government agency with primary jurisdiction over The Fair Housing Act is the Department of Housing and Urban Development (HUD) and, in particular, its Office of Fair Housing Equal Opportunity (OFHEO)

§1.7: Backlash: The End of the Civil Rights Era

After 1968 and the assassination of Dr. Martin Luther King, Jr., the Civil Rights Movement began to lose momentum. In addition, *Brown v. Board*'s use of the "color blind" approach to civil rights (from Justice Harlan's dissent in *Plessy*), while politic in 1954, had a serious flaw. The law and the Constitution had oppressed and disfranchised African-Americans by seeing color. It is by seeing color, not with "color blindness," that those wrongs needed righting. The problem with the more abstract (though more politically palatable) color-blind approach is that it gives special protection to classes of people, including whites, who were never enslaved, never even subjected to segregation.

Thus, today's Supreme Court will not permit a remedy for historic African American oppression if they feel it infringes on white people's Fourteenth Amendment rights. This has proven an ultimate "Achilles heel" in the doctrine of *Brown v. Board of Education*, which relies heavily upon the Harlan approach. Ultraconservatives have exploited this weakness, arguing that remedies for African American oppression constitute "racism in reverse." [46]

The ultraconservative movement, set back by Barry Goldwater's landslide loss to Lyndon Johnson in the1964 President Election, gained strength under President Richard Nixon. President Nixon launched a right-wing campaign to control the White House, and to change the composition of the Court. He called that campaign the "Southern Strategy."

The "Southern Strategy" consisted of subtle and not so subtle appeals to American racism,[47] in order to capture the votes won by segregationist Alabama Governor George Wallace as an Independent candidate in 1968.[48] Wallace took 13.9% of the popular vote, higher than any other independent Presidential candidate since Teddy Roosevelt in 1912 and not surpassed by another until Ross Perot in 1992.

The Southern Strategy gave Republicans the White House in seven out of the ten elections between 1968 and 2008, when Barack Obama was elected. Controlling the White House, ultraconservatives in the Republican Party gained a virtual monopoly on the

nomination of US Supreme Court Justices. During that time, Republican Presidents put twelve justices on the Supreme Court; the Democrats, only two.

The result is a Supreme Court much less friendly toward minority rights than the Court that gave us *Brown* in 1954. Ultraconservatives during this period have been able to change the constitutional law of the United States with regard to civil rights without amending the constitution itself.[49]

The Southern Strategy placed the Republican Party, the "party of Lincoln," on a firm anti-civil rights course. The Party also gained control of the House and Senate after 1994, and regained the White House in 2000, achieving a dominance of the Federal Government that continued until 2006. Even after the Democrats recaptured Congress, ultraconservative Republican ideologues still dominated the national discourse.

1968- 2008
PRESIDENTIAL ADMINISTRATIONS: 7/3
SUPREME COURT JUSTICES: 12/2

JUSTICE	TERM	PARTY	APPOINTED BY
Warren Earl Burger	1969-1995	Republican	Nixon
Harry Andrew Blackmun	1970-1995	REPUBLICAN	Nixon
Lewis Franklin Powell, Jr.	1971-1998	REPUBLICAN	Nixon
William Hubbs Rehnquist	1971-2005	REPUBLICAN	Nixon
John Paul Stevens	1975-present	REPUBLICAN	Ford
Sandra Day O'Connor	1981-present	REPUBLICAN	Reagan
Antonin Scalia	1986-present	REPUBLICAN	Reagan
Anthony McLeod Kennedy	1988-present	REPUBLICAN	Reagan
David Hackett Souter[50]	1990-2009	REPUBLICAN	George H.W. Bush
Clarence Thomas	1991-present	REPUBLICAN	George H.W. Bush
Ruth Bader Ginsburg	1993-present	DEMOCRAT	Clinton
Stephen Gerald Breyer	1994-present	DEMOCRAT	Clinton
John Glover Roberts, Jr.	2005-present	REPUBLICAN	George W. Bush
Samuel A. Alito, Jr.	2006-present	REPUBLICAN	George W. Bush

Washington v. Davis[51] (1976), decided under Nixon's new Chief Justice Warren Berger, was the first to case after *Brown* to limit rather than expand African American rights under the Fourteenth Amendment's Equal Protection Clause. In *Davis*, the plaintiffs were

African American applicants for officer's positions on the District of Columbia police force. Police recruitment procedures included a screening test that more African American applicants failed than white.[52]

The Burger Court held that discrimination does not violate the Equal Protection Clause unless the plaintiff can prove it was *intentional*, a much more stringent standard than the one the Warren Court applied. Direct evidence of intent, like "eyewitness testimony" of a defendant's mental process, is rarely available.[53]

According to the Court, the disparate impact on different races resulting from a test does *not* establish discrimination under the Fourteenth Amendment. The plaintiff must prove a racially discriminatory *purpose* to show a Fourteenth Amendment violation. The Court found that the test reasonably related to the requirements of the police-training program, and that plaintiffs failed to prove discriminatory intent. In other words, the police department was "color blind."

Anti-Affirmative Action

EMPLOYMENT

President Lyndon Johnson launched affirmative action programs to increase the representation of minorities in areas of employment from which they had been historically excluded.[54] His Executive Order 11246 (1964) required affirmative action provisions in all Federal government contracts.[55]

By 1989, an increasingly ultraconservative Supreme Court ruled against affirmative action programs in employment in *Richmond v. J.A. Croson Co*. It imposed the "strict scrutiny" standard of constitutional review to determine if an affirmative action program had gone "too far," and discriminated in reverse, against members of the majority group.[56] A similar ruling in *Adarand v Pena (*1995) followed *Croson*.

Ultraconservatives argue that America is a "post-racial" society, not needing affirmative action, or even civil rights laws (to protect African Americans) at all; and yet at the same time argue that whatever problems African Americans face are based on race. Here is a sample from Roger Clegg, writing in the *National Review*, attacking affirmative action.

> For those who support racial preferences, the deep-down justification for them remains a sense that they are needed to "make up" for past discrimination against certain groups. But this justification won't wash, as the days of Jim Crow recede further into the past, and as it becomes obvious that the remaining social problems — whomever they afflict — have little, and

> less and less, to do with discrimination [and more to do with dysfunctional African American families and African American's disrespect for learning].[57]

In *Ricci v. DeStefano,* 129 S.Ct. 2658 (2009) white firefighters filed a reverse discrimination lawsuit stemming from a City of New Haven firefighter's promotion test. In a 5-4 decision, the Court's ultraconservative majority ruled that the city of New Haven violated Title VII by discarding the results of a firefighter promotion test where white applicants did disproportionately better than Black applicants did.

The Court also signaled it would support New Haven if the African American firefighters sued. This is the most explicit "go ahead" the Court, encouraging employers to feel free to use tests that disproportionately affect racial minorities.

At the same time, the Court has significantly empowered white employees claiming not only discrimination in reverse, but also primary discrimination charges against black employers.

In *Hague v. Thompson Distribution Co,* five white employees sued their black employer for racial employment discrimination because he terminated and replaced them with black employees.[58] The Court of Appeals held that sufficient background circumstances existed to allow terminated white employees to create an inference that their black supervisor had reason or inclination to discriminate invidiously against them; however, the employees failed to establish that the employer's proffered reason for termination was pretext. In *EEOC v. Great Atlantic & Pacific Tea Co.* a white male worker prevailed in his Title VII claim against his Black supervisor for unlawful termination due to race, winning compensatory damages.[59]

EDUCATION

In their 2004 case against the University of Michigan, ultraconservatives hit at both the law school and the undergraduate school, winning at the undergraduate level. The undergraduate school plaintiff was Jennifer Gratz, a white female and resident of the state of Michigan. Gratz applied to the University of Michigan as an undergraduate, but she was waitlisted and finally denied admission the following April.

In 1997, after working with a professor at the University of Michigan, she discovered that the University was using affirmative action in admissions. In 1997, Gratz filed suit against the University. On June 23, 2003, the U.S. Supreme Court struck down the

University's preference programs but, in a companion case, allowed the University's Law School to continue using race in admissions.

Gratz now leads the Michigan "Civil Rights Initiative," an organization working to end affirmative action not only in academic admissions, but in government contracts as well. The name of the organization evokes the moral authority of the 1950s Civil Rights movement, but "in reverse."

On Monday, December 4, 2006, civil rights activists from across the nation marched and rallied at the U.S. Supreme Court when it heard oral arguments in *Parents Involved in Community Schools v. Seattle School District No. 1*.[60]

The panel deciding these cases had become if anything, even more conservative than the Court that heard the *Grutter* case. The new Chief Justice, John Roberts, is at least as conservative as Chief Justice Rehnquist who he replaced. Justice Samuel Alito is considerably more conservative than Sandra Day O'Connor (author of the *Grutter* majority opinion) who he replaced.[61]

Seattle School District No. 1 had an open choice system for school attendance. When a particular school received more requests for attendance than it had space, the District used four tiebreakers to determine student admission to the oversubscribed school[62].

First, District officials gave a preference to students with siblings already attending the school. Second, the officials considered the race of the student applicant, and attempted to promote racial balance as they assigned students. Third, officials considered the distance from the student's home to the school in question. Authorities first admitted those that lived closest to the school. Fourth, officials used a random lottery for any students not placed in the first three steps.[63] (Rarely reached)

White parents in the Seattle schools challenged the school system's policy of considering race when allocating students. The purpose of the school policy was to attempt to create racial balance. However, the white parent petitioners in the Seattle case interpreted *Grutter v. Bollinger* and *Gratz v. Bollinger* to condemn racial balancing.[64] The Supreme Court sided with the white parent petitioners.[65]

Meredith v. Jefferson County Board of Education, the companion case to *Seattle Schools*, involved a school policy that was more explicitly "affirmative action."[66] Jefferson County was a *de jure* segregation school district, under a desegregation decree since 1975.

Housing in Jefferson County is largely segregated along racial lines, so assigning students to their neighborhood school results in a substantial number of racially segregated

schools. However, though white and African American neighborhoods are separate and distinct, they are physically close enough to one another that with some tweaking of pupil assignment, racial integration could be achieved.

The Board of Education's "Student Assignment Plan" used "managed choice" to create a system in which no school was less than 15% or more than 50% African American. The plan involved multiple strategies for achieving racially integrated schools including majority-minority transfer requests, grouping schools into clusters, and adjusting school attendance areas.

White parents petitioning to overturn the Assignment Plan argued that the policy was "race-conscious" and not narrowly tailored. [67] They contended that the use of race in school assignment can only be justified if the Court approves the idea that African American students in "their own environment"[68] are worse off socially and educationally.[69] Here again, the Supreme Court sided with the white parent petitioners.[70]

The Court vote in the consolidated decisions was 5 to 4.

Justices Roberts, Scalia, Thomas, and Alito joined in an opinion banning the use of race in school pupil assignment plans in the absence of prior proven, intentional discrimination. Roberts' opinion would permit school districts to use such assignment plans to pursue diversity, but only in a very narrowly tailored fashion. The majority claimed the school districts in this case had strayed too far from *Grutter,* focusing too heavily on racial diversity.[71] Justice Kennedy concurred, but would not have so tightly restricted school districts' discretion to use race-conscious pupil assignment. [72]

The four dissenting Justices --Breyer, Stevens, Souter and Ginsburg joined in an opinion charging that using race to desegregate schools is not the same as using race to segregate them. "[I]t is a cruel distortion of history to compare Topeka, Kansas, in the 1950s to Louisville and Seattle in the modern day," they said. [73]

Restricting Other Civil Rights Remedies

Most civil rights law today distinguishes between injuries suffered by an individual and injuries suffered by a group of people. Under the regime of today's ultraconservative Supreme Court majority, a person complaining of the first, "disparate treatment," can only do so by proving the aggressor *intentionally* singled him or her out because of race. As you can imagine, that is not easy to prove in court.[74]

A person complaining of the second, "disparate impact," does not have to show the aggressor singled him or her out with the intent to do harm. Instead, the victim need only

show the aggressor embarked on a course of conduct that any reasonable person should have known would injure members of a group of people protected by the law, such as African Americans. Today's ultraconservative Supreme Court majority permits disparate impact cases to go forward only where the government, usually the Department of Justice, brings the case, or an individual brings a case under a civil rights statute with a special provision permitting them to do so.[75]

Disparate Treatment

A person who engages in disparate treatment intentionally denies civil rights to a member of a "protected class." Such "protected classes" include race, color, religion, sex, or national origin. The defendant must intend to deny the right because of the person's race, for example. An employer does not commit illegal discrimination if he denies an employee a promotion because that person does not have the requisite experience or training. However, an employer who refuses to promote an otherwise qualified employee solely because she is African-American breaks the law. If the same employer refuses to promote an African American woman to supervisor, stating that he does not believe white workers will respect her authority, the employer breaks the law.

Direct evidence of discriminatory motive is difficult to obtain, so courts will on occasion infer discriminatory motives from the facts of the case. This is a bit like circumstantial evidence. First, the plaintiff shows that he or she is a member of a protected class, a formality in most cases.

Then, the plaintiff must allege facts, which, if proved, constitute illegal discrimination. Disparate treatment plaintiffs usually allege they suffered harassment or unreasonable inconvenience when requesting a consumer good or seeking to rent an apartment when they had the money to pay, or suffered ill treatment when applying for a job for which they were qualified.

Finally, the plaintiff usually needs to show that the goods, services, or position remained available to other seekers who were not members of a protected class. This circumstantial evidence raises a presumption, called a *prima facie* case, that the defendant treated the plaintiff differently from members of the majority group and did so with intent to discriminate.

Disparate Impact

The second theory of discrimination that a victim may assert is disparate impact. Discrimination occurs by "disparate impact" when seemingly neutral practices and policies

have a disproportionate, adverse effect on members of a protected class. Plaintiffs normally prove disparate impact with statistical evidence that creates a presumption, a *prima facie* case, suggesting that the defendant intended to discriminate.

The pattern should be such that the only reasonable explanation for the outcome is that the defendant had a hidden practice of discrimination---– all the employees in a company are white, or all the tenants in an apartment building are white. While the plaintiff cannot prove defendant's subjective intent, disparate impact raises that presumption.

Then, the defendant can offer rebuttal evidence, primarily by offering a different, plausible explanation for the disparity. The burden of proof then shifts back to the plaintiff to demonstrate that the reason offered by the defendant is a "pretext," or phony excuse for the disparity when, in fact, the reason was discrimination.

It is hard to prove that the defendant is lying, because few people today will admit to overt racism. Rather, the plaintiff has to poke holes in the defendant's explanation. They can do this, for example, by showing that the policy's discriminatory effects were foreseeable and other, nondiscriminatory alternative approaches were available.

In the employment arena, height requirements typically screen out members of certain protected classes whose ethnic background includes short stature. The plaintiff would need to show that there is no reasonable relation between the policy adopted and its stated objective. Height is necessary for some jobs, but not for others. A plaintiff might also show that the defendant's application of the policy was inconsistent, that defendant gave certain people waivers on height and those individuals were members of the majority group.

Ultraconservatism and Racism

Today, significant social, economic, and political disparities between African-Americans and European-Americans remain. African Americans no longer live as slaves, nor does law segregate them, but there is still much work needed to reduce and eventually eradicate the vestiges of slavery and segregation. Equality is still a good ways off, and as long as racial inequality persists, racist beliefs and stereotypes will persist, to explain the inequality.[76]

Parents or other authority figures transmit racial stereotypes to children when they are very young, such as how a "typical" member of a given racial group behaves.[77] Children then internalize these discriminatory beliefs deeply, and act upon them unconsciously throughout their lives.[78] Research indicates these beliefs continue even in the face of conflicting evidence. Events debunking racist stereotypes that affect parents while their

children are still with them might have a greater impact—such as the affect of the civil rights movement on the parents of the Baby Boom generation.

In addition to childhood lessons, the American media reinforces racist stereotypes.[79] TV news broadcasts bombard the public with images of African Americans being arrested, living in poor and dangerous neighborhoods, homeless or destitute.[80] Movies and television present African Americans as dangerous or ridiculous, or both.[81] These pervasive images bedevil even middle class African Americans, typed by race rather than class. [82]

Racism thus helps perpetuate and reinforce popular, lingering, and dangerous stereotypes and negative misconceptions of African Americans.

Over the nearly one hundred fifty years since the end of slavery, conditions for African-Americans have gradually improved. However, African-Americans as a group still lag behind in almost every index of social well-being and development.[83] Large gaps remain in employment, housing, and educational opportunity; in health, wealth,[84] and income; and in political representation. A system of *de facto* segregation confines African-Americans to neighborhoods with poorly funded schools, deteriorating housing, declining municipal services, and limited employment opportunities.

Under ultraconservative policies, not only did segregation increased in public elementary and secondary schools, but racial profiling and hate crimes increased as well. Ultraconservative hegemony in our political discourse brought a general atmosphere of permissiveness, if not encouragement, toward racist impulses.

Racial Profiling

Police racial profiling gained a measure of legitimacy after the "9/11" terrorist attack, but it was applied so consistently before that time against African American motorists, in particular, that arrestees often said they had been charged with "driving while black." Today, African-Americans face ill-treatment, harassment, or worse by law enforcement officials as they drive, walk, and fly. African-American Professor Henry Louis Gates of Harvard was arrested and handcuffed for "disorderly conduct" in his own home.[85]

Ironically, the Civil War era Enforcements Acts designed to counter the influence of the Ku Klux Klan are available today to address racial profiling The Klan is a shadow of its former self (though new hate groups have arisen, see Chapter Two). Police misconduct such as racial profiling and police brutality, however, has given a "state action" face to racist violence.

The Enforcement Acts stand for the proposition that a government agent cannot treat a person as a suspect of illegal or criminal behavior because of the person's race, ethnicity, or national origin. Police may treat a person as a suspect only because of their behavior or because of independent information that the officer receives. The government agency with primary jurisdiction over racial profiling is the Civil Rights Division of the U.S. Department of Justice.

Hate Crimes

African-Americans are also the special target of hate crimes. Klan Internet hate sites and similar sites from a host of imitators promote hate crimes far more extensively and effectively than the KKK rallies of yesteryear. Hate crimes against African-Americans have spiked since President Obama's election.[86]

A "hate crime" is a crime in which the offender's conduct was motivated by hatred, bias, or prejudice, because of the victim's race, color, religion, national origin, ethnicity, gender, or sexual orientation. Because of the Supreme Court's post-Civil War ruling in *U.S. v. Reese*, the federal government has no power to pursue private perpetrators of hate crimes under the Fourteenth Amendment. The Amendment thus leaves punishment of hate crimes to the states. In 1993, the Supreme Court held these statutes generally constitutional, providing that they regulate actions rather than speech.[87] The government agencies with primary jurisdiction over hate crimes are state human rights agencies and local police departments.

§1.8: Minority Rights in the Age of Obama

President Obama's 2008 victory means many things to many people. He won 53% of the popular vote, leading by about the same 7 percentage points at the finish as he did for most of the race. He won 365 electoral votes to McCain's 173, and took 29 states to McCain's 22.

Many people saw the election to the nation's highest office of a person of African descent, Barack Obama, as a sign that America's long struggle with racism was over. Indeed, Obama's election gave the world hope that America might be able to set aside some of her old ways and move into a "new era of change." Nearly a year after Obama's election, the Senate passed a resolution apologizing for slavery and Jim Crow.[88] (However, the Senate's states that this apology cannot, in any way, be used as standing to justify reparations.[89])

Author Tim Wise believes Obama's election gave solace to whites looking for an excuse to declare America's racial problems over and done with.[90] Their rush to judgment

may well mask the seriousness of the country's continuing racial inequality.[91] Obama himself catered to these beliefs by presenting himself as a post-racial candidate to gain white support.[92] Ironically, Obama's election, by reinforcing whites' belief that the United States is some kind of color-blind meritocracy, may potentially make it harder to address ongoing institutional racism in our society.[93]

Obama's election did not create a post-racial society in America. Despite his individual success, African Americans still face white privilege and discrimination in virtually every aspect of social life, as this book demonstrates. As indicated earlier, racist hatred and violence actually escalated during and after the Obama's election, rather than diminishing.

Further, African-Americans continue to face discrimination at the hands of police and other law enforcement agencies despite Obama's election.[94] Many African-Americans feel that the police endanger their constitutional rights rather than protecting them.[95]

The most glaring example was the case of Obama's friend, Prof. Henry L. Gates of Harvard, arrested and handcuffed in his own home (for disorderly conduct) seven months after Obama took office. Obama's response was to invite Gates and the arresting officer to the White House for a beer![96] The officer issued a statement that "there will be no apology."[97]

Obama's Attorney General, Eric Holder, has emerged as a much stronger voice against racism than the President himself. Holder called America a "nation of cowards" when it came to race relations,[98] a remark from which President Obama quickly distanced himself.

Early in 2009, Attorney General Eric Holder commented, "on Saturdays and Sundays America in the year 2009 does not, in some ways, differ significantly from the country that existed some fifty years ago."[99]

Holder has promised that "[t]hrough its work and through its example this Department of Justice, as long as I am here, must - and will - lead the nation to the "new birth of freedom" so long ago promised by our greatest President. This is our duty and our solemn obligation." [100] In later Congressional testimony, Holder stated that he was committed to protecting civil rights by emphasizing the traditional enforcement policies, as well as making the Civil Rights Division of the DOJ "stronger and better equipped to address today's civil rights challenges."[101] Further, on October 6, 2009, the Attorney General stated that his priority was to ensure that the Civil Rights Division "continue[s] to advance the interests of justice and equal protection for all Americans."[102]

The test of Holder's mettle may well be in his approach to Title VI. Title VI covers federally funded or subsidized programs and activities carried on by federal agencies, state and local agencies, and even private companies and individuals. The Supreme Court in Alexander *v. Sandoval* sharply restricted individual access to Title VI,[103] but the Justice Department has full power under the statute. The DOJ can sue any recipient of federal funds using those funds in any program or activity for disparate treatment.[104]

During a conference celebrating the 45th Anniversary of Title VI of the Civil Rights Act of 1964 in July 2009, Loretta King, Acting Secretary Attorney General for the Civil Rights Division for Holder's Department of Justice, called Title VI "a vital tool in the struggle to end discrimination of our time," and called upon all federal agencies providing federal financial assistance to be "vigilant" and "ensure public funds are not used in programs that engage in discrimination."[105] King stated that nothing in the *Sandoval* case prevents federal agencies from pursing disparate impact or intentional discrimination (disparate treatment) claims. King had already circulated an internal memo to this effect a week earlier.[106]

This is a very promising development, and signals the Holder Justice Department's willingness to step into the breach in civil rights enforcement created by the ultraconservative Supreme Court's ruling in *Alexander v. Sandoval*. [107] While the decision prevents drastically limits private lawsuits to enforce the Civil Rights Act, it leaves the door wide open for the Justice Department to do so. Attorneys General appointed by ultraconservative Republican Presidents have neglected this power, but Holder looks like a different story.

The federal courts, densely populated with ultraconservative judges by "Sothern Strategy" Republican Presidents, remain an obstacle to progress on civil rights for African Americans in the age of Obama. Obama himself managed to appoint a liberal Justice, Sonia Sotomayor, to the Court, albeit merely replacing another.[108] (The Court's ultraconservative majority remains intact.)

One possible response is the Federal Judgeship Act of 2009, a bill proposed by Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) which would add 9 permanent circuit court and 38 district court judgeships.[109] This would giver the Obama Administration an opportunity to balance some of the ultraconservative appointments to these lower courts made during past Republican presidencies.[110] The overwhelming majority of federal cases do not reach the Supreme Court (because of the need for certiorari), so the courts of appeals are in fact the courts of last resort. This bill could have a significant impact.[111]

THE HANDBOOK

§1.9: First Aid

If you feel you are a victim of discrimination, there are certain things to do at right away, and other things to follow up.

1. *Keep cool.*

Should the case proceed to trial, the court will scrutinize your behavior just as much as the behavior of the discriminating party. Approach the discriminator in a calm, non-combative manner and assert your rights respectfully. If you become upset and raise your voice, it is possible that witnesses will recall your belligerence rather than the discrimination. The burden of proof is typically on you. A hostile reaction to a "social violation" like housing or employment discrimination will not help you. With a more "physical" violation like racial profiling or hate crimes, responding with anger can escalate the situation and may cause someone serious injury.

2. *Locate witnesses.*

It is important to find witnesses to the incident of discrimination. Rather than asking onlookers if they would be willing witnesses, it may be more sensible to simply get their contact information, and turn that over to the lawyer, agency, or organization investigating the case. If you are unable to locate any witnesses, call the police.

3. *Tell someone what happened to you.*

Ensuring that other people know your story will add credibility to it. You can record the discrimination as it is happening, using your cell phone to call a friend or attorney and ask them to listen or allow the information to be recorded on voicemail. If this is not possible, then tell someone else about the incident as soon as possible after the incident occurs, so that you have witnesses who can confirm your story later.

4. *Put it in writing*.

Write down every detail that you can recall about the event as soon as possible. Include the date and time of the incident, names and physical descriptions, and the specifics of the discriminatory conduct itself. Documentation of various conversations or interactions is extremely useful in proving that the discrimination did in fact occur. Your attorney can use it later at trial to prompt you if you forget details.

5. *Report the incident*

After suffering discrimination, many people are so shocked and humiliated they simply leave the scene. If you are physically injured, call the police immediately and make a

report, using a cell phone if you have one. Be sure to tell them the complete story, as soon as possible. Even if the police tell you there is nothing they can do at that moment, they will at least have to make note of the complaint in their daybook, which your attorney can subpoena later. A police report documents all parties involved.

You should also make a non-emergency call to the police after you have left the scene. The fact that you made a police report is important evidence that you took the discrimination seriously. It is sometimes not easy for African Americans to involve the police in any aspect of their lives. For good reason, members of the African-American community have long been suspicious of the police and their methods. (See Chapter Three on Racial Profiling). That said, it remains the job of the police to respond to breaches in the law, and citizens should hold them to their responsibilities.

6. *Seek treatment*.

You should seek professional medical attention for any injuries sustained, making sure you document your injuries with pictures and medical reports. Again, cell phone technology—in this case, cameras—can help here if more sophisticated equipment is not available.

7. *Get help*

Once the incident itself is over, contact a federal, state, or local agency, civil rights organization, or private attorney. Be observant and alert, and get as much detailed information as possible. The more information you can provide to a private attorney, civil rights organization, or government civil rights agency, the more likely you will prove your case.

§1.10: Who Can Help?

Beyond the "first aid" described above, a person who has suffered discrimination has several choices in terms of legal representation, and can press a claim in court, or ask a government agency to intervene.

Government Civil Rights Agencies

First, a victim of discrimination may go to a variety of agencies set up by federal, state, and/or local government to protect citizens against civil rights violations. These include specialized agencies in the employment and housing areas and "human" or "civil rights" commissions to cover broader categories. State or local "human rights" commissions typically have even broader jurisdiction, and can respond to almost any kind of discrimination claim. On the federal level, the U.S. Department of Justice's Civil Right

Division and a variety of agencies and programs have similarly broad jurisdiction. You can contact the U.S Department of Justice, Civil Rights Division at 950 Pennsylvania Avenue, NW, Washington, D.C. 20530 or call 1-800-253-3931.

State and federal governments charter civil rights agencies such as the U.S. Equal Employment Opportunity Commission ("EEOC"), the Civil Rights Division of the U.S. Department of Justice ("DOJ"), the Office of Federal Housing Enterprise Oversight ("OFHEO"), or state human rights agencies to assist in case discrimination occurs. They have staff attorneys who deal with cases specific to their jurisdiction, such as housing, employment, public accommodations, or education. You can make a complaint to such an agency in person, by mail, and often over the telephone or online.

These agencies often do not seek money damages, but rather attempt to stop the conduct complained of and make sure it does not happen to someone else. Civil rights organizations usually follow the same strategy, though there are some exceptions. Therefore, if you are interested in financial compensation, you will probably need to see a private attorney.

Government lawyers are required to review your claim to be sure it is valid. If they do not think your claim has merit, you can still pursue the claim independently, with your own lawyer. The agency will usually give you a "right to sue" letter or something like it. This lets the court know that you have gone as far as you can with the agency and that you have exhausted your administrative remedies. Therefore, it is proper for you to appear in court.

If a government agency finds your claim *does* have merit, they will first attempt to conciliate or mediate the dispute. If that fails, they can bring an administrative charge against the offender, pursue arbitration, bring a lawsuit, or issue a right to sue letter.

Civil Rights Organizations

Next are civil rights organizations and other nonprofit civic groups. These large national civil rights organizations have highly trained civil rights lawyers. Some have developed specialties, such as the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), which focuses on voting rights. The American Civil Liberties Union ("ACLU"), though not strictly a civil rights organization, takes a number of civil rights cases as well, and specializes in racial profiling. Others, such as the National Association for the Advancement of Colored People ("NAACP"), the NAACP Legal Defense and Educational Fund ("LDF"), and the Leadership Conference on Civil Rights, have much broader agendas.

Like government agencies, these organizations receive many complaints and cannot handle them all. While there are no deadlines such as those imposed by the government agencies, a large national civil rights organization will not litigate your case unless it promises to change the law, benefiting a large number of people by "setting a precedent." Further, these organizations are usually tax-exempt under the Internal Revenue Code, and have certain restrictions on their activities. For one, they may jeopardize their tax exemption if it appears they are taking business away from members of the private bar. So, if you are looking for financial compensation for your problem, civil rights organizations, like government agencies, are probably not the places to look.

Membership civil rights organizations such as the NAACP have branches in many cities and counties across the country, and there will usually be one near you. (The NAACP's website, *www.naacp.org*, has information about local chapters.) These local branches receive many complaints as well, often not of the precedent-setting variety. They can help you find a private attorney or exert pressure directly on your behalf.

Private Attorneys

Finally, victims of racial discrimination or other civil rights violations can turn to a private attorney. In areas of the law that provide for financial compensation in the form of money damage awards, such as housing and employment, private attorneys will often represent you on a contingency basis, taking a percentage of the award for their fee. If the case is not successful, they may not charge you at all. In other instances, statutes specifically provide attorney's fees.

Other areas of the law, however, only provide injunctive relief—requiring the perpetrator to stop the offensive conduct or changing patterns of behavior that have led to violations. In these cases, unless the statute provides for attorney's fees, a private lawyer will require that you pay his or her regular rate, which can be very expensive.

§1.11: Getting Organized

The struggle for African American civil rights is not yet over. However, it *has* entered a new phase, where ordinary citizens must assert the rights won, often without much direction.

There are a number of ways a citizen can be "pro-active," initiate policy changes and prepare, along with fellow citizens, to be more effective citizen advocates. The burden is on us to learn and cultivate the science and the art of "public" citizenship—how to influence government from inside and out.

Public citizenship means using our citizenship rights to protect our communities and advance the cause of social justice, moving beyond the self-interest and individual action of "private" citizenship. One need not be a scholar or a political organizer to do be a public citizen, but you can enhance your effectiveness with a little training. Prime areas of focus include **public speaking**, **public writing**, **networking**, **community organizing**, and **coalition building.**

We learn, build, and exercise our **public speaking** skills best through oral presentation and debate. **Public writing** involves learning basic grammar and composition skills as well developing a persuasive writing style. This makes it more likely that when you write a letter to the editor of your local newspaper, the paper will not only publish your letter, but many people will also read it. The same holds true for blogging.

Community organizing is a skill that we can and must learn, develop, and refine. There are very few "natural" community organizers. For training, look to seasoned professionals from the civil rights movement, the labor movement, and from political campaigns. **Networking** links individuals, **coalition building** links organizations. Both are skills we can learn and enhance with repeated practice as well as instruction.

An effective civil rights campaign requires simultaneous litigation, lobbying, and community-based work, distributing resources strategically among the three approaches.[112] Community-based work involves building relationships and social capital so community members can identify their goals and choose among these three principal strategies to implement their goals. Community organizing, for example, ensures that a community will have the political leverage to persuade lawmakers to pass legislation, appoint fair jurists, and create a political environment in which jurists can make progressive legal decisions.

.

Part II: Harassment

Chapter Two

Hate Crimes

A "hate crime" is a crime in which hatred, bias, or prejudice, motivated the offender
SYNOPSIS, ENFORCEMENT ACT OF 1870

THE HISTORY

§2.1: What's the Problem?

On August 24, 1955, Emmett Louis Till, a 14-year old African American boy from Chicago, Illinois, was visiting relatives in Leflore County, Mississippi. He entered the Bryant Grocery & Meat Market in the town of Money, Mississippi and left the store shortly before the storeowner's wife, a white woman, also left. When Till saw her come out of the store, he whistled at her. Till's relatives thought there might be trouble, and they quickly took him home.

On August 28, 1955, at approximately 2:30 a.m., Roy Bryant (the storeowner) and J.W. Milam and at least one other person came to Till's great uncle's house and took Till away. That was the last time any of his relatives saw him alive.

The boy's naked body floated in the Tallahatchie River for three days before two fishermen discovered and retrieved it.There was a seventy-five pound cotton gin fan tied to his neck with barbed wire. His attackers had gouged out one eye and severely beaten his head and upper body. Till's mother insisted on a public funeral service, with an open casket to show the world the brutality of the killing.[1]

In September 1955, prosecutors tried Roy Bryant and J.W. Milam for Till's murder in a local court. The all-white, all-male jury acquitted them both.[2] Deliberations took just 67 minutes; one juror said, "If we hadn't stopped to drink pop, it wouldn't have taken that long."[3] Milam and Bryant later told a *Look* magazine reporter that they killed Emmett Till. Emmett Till was the victim of an atrocity that occurred only a year after the Supreme Court's landmark decision in *Brown v Bd. of Education*. (May 17, 1954)

Background

Hate crimes run through the fabric of American history. Law enforcement authorities have historically been lax in the face of hate crimes, at times even encouraging them. In some cases, government officials directly participated in hate crimes. The Ku Klux Klan, experiencing a resurgence in the 1960s South, forged alliances with local sheriffs' offices. The sheriffs, in turn, recruited low-income whites who loitered around the sheriff's office to carry out "unofficial" law enforcement activity, usually against African Americans.[4]

Throughout the 1900s, particularly during times of opposition to immigration and the emerging civil rights movement, organized hate groups grew in size and popularity. Klansmen were hostile to foreigners, especially if they were Jews, Roman Catholics, or suspected of being socialists or communists. The FBI began investigating hate crimes in the 1920s, opening its first Ku Klux Klan case.

Northern and Southern hate practices differ, rooted as they are in the employment and residential patterns unique to each region. In the South, group terrorism kept a large, physically proximate African American population "in their place." Klan organizations experienced a revival in the 1950s and 1960s during the Civil Rights Movement, with very little resistance from local government officials, or even from federal law enforcement.

In the North, African Americans were not physically proximate to whites and hate crimes usually occurred only when an African American was in the wrong place at the wrong time. There were some spectacular breakdowns of law and order in the early Twentieth-Century North, however, when gangs of whites bent on exacting retribution for some slight, real or imagined, invaded African American communities.

Northern unions barred African American workers, but admitted European immigrants. Northern employers often used these excluded black workers as 'scabs' during union strikes, willing to cross picket lines to get the jobs from which they had been excluded. Such practices inflamed European immigrants' racist sentiments. Cities like Chicago, New York, and Philadelphia, with enclaves of European immigrants who maintained a strong cultural identity, were rife with tense race relations.

Hate crimes today keep racist history alive[5] and strengthen racist culture.[6]

It was not until the early 1990s that the federal government began to collect data on how many and what kind of hate crimes are being committed, and who is committing them.[7] Although the Klan is the first and most notorious American hate group, other hate groups have appeared over the course of American history. The Aryan Nation, Neo-Nazi Skinheads,

the Euro-American Alliance, and the White Aryan Resistance (WAR) are just a few of the approximately 700 reported hate groups that have sprung up in America.

Hate Crimes Today

Hate criminals typically target individuals or groups because of their racial, religious, or ethnic background. Generally, hate criminals use written or spoken slurs, display hate group symbols, and launch conspiracies to harm, injure, or intimidate a particular racial, ethnic, or religious group.[8]

Hate crimes can happen anywhere and at anytime -- at nightclubs, restaurants, on public transportation, at outdoor events, on shopping trips. Hate crimes can happen while the victim is at home as well as in a public place. They can be a part of a campaign of continued harassment and victimization by neighbors and shopkeepers as easily as by extremist groups. Hate crimes can occur on the one hand because the perpetrator seeks a particular victim, or on the other, because the perpetrator seeks the first victim available.[9]

Victims of hate crimes face double stress, not only from physical injury or property damage, but from psychological damage as well.[10] Many feel isolated. Some become afraid to go out or even fear to stay at home. They may become quiet, withdrawn, and suspicious. Their physical health may also suffer. Young people can suffer lasting damage to their emerging self-esteem and, without significant support, may blame themselves, their race, or religious group. Some have succumbed to suicide. At the same time, members of the society may view the target group as inferior or as having invited the attack.[11] Today, racial profiling by police, shopkeepers, and others sends the message that African Americans are legitimate targets.[12]

Today, hate groups continue to reach wider and younger audiences through hate group websites and hate-affiliated online businesses. The number of hate and violence websites has grown by nearly 300% since 2000, and their growth is accelerating. Today, they cater to the fascist fringe of the ultraconservative social movement in the United States by preying on white fear of losing social and economic status in an increasingly diverse America.

The Intelligence Project concluded that hate groups rose from 762 in 2004 to 803 in 2005, and increased by 33% since the year 2000. Reasons for the proliferation of hate groups include anger over Jews' support of the war with Iraq, Hispanic immigration, and hate groups' easy access to young people through a growing Internet presence. Mark Potok, Director of the Intelligence Project at the Southern Poverty Law Center, feels the "statistics

vastly understate the reality of hate crimes on the street." Joe Roy, chief investigator for the Intelligence Project, reports, "Despite a large number of arrests and the collapse of several leading neo-Nazi groups, the [hate] movement continues to grow."[13]

The Southern Poverty Law Center also reports that U.S. military recruiters permit significant numbers of neo-Nazis and skinheads to join the military.[14] Furthermore, reports link graffiti appearing throughout Baghdad to the Aryan Nation. The National Alliance, a white supremacist group, produced the video game Ethnic Cleansing whose object is to kill non-whites. In such a context, it is not surprising that otherwise law-abiding young people commit a significant number of hate crimes.

The statistics on hate crimes are meager, but African Americans report more violent hate crime than any other racial or ethnic minority. [15] According to the Federal Bureau of Investigation (FBI), there were 7,780 reported hate crimes in 2008. Racial discrimination accounted for 51.3 percent of reported hate crimes, a slight increase over the 50.8 percent reported in 2007.[16]

According to the FBI, about a third of all hate crimes are crimes against property—robbery; vandalism; destroying, stealing, or setting fire to vehicles, homes, and stores; marking property with hate symbols and racial slurs. The Montgomery County Maryland police investigated five major hate crimes in 2006, for example. Hate criminals spray painted swastikas and the words "White Power" on two historically African American churches and three historically African American schools. They painted the words "WAR" on two racially mixed schools.

Hate crimes can also take the form of trespass, public disturbance, or more serious, deadly violence. In 1992, Maryland state prosecutors convicted 22-year-old John Randolph Ayers of such a crime.[17] In the early morning hours of March 3, 1992, Ayers and his 20-year-old friend Sean Riley drove around in search of African Americans to beat up.[18] The two white males came upon two African American women, Johnnie Mae McCrae and Myrtle Guillory, walking along Georgia Avenue in Montgomery County, Maryland. Riley's victim got away shortly after he grabbed her, but Ayers inflicted serious head injuries on his victim.[19]

In 2002, two men burned down the home of the Doster family in Detroit, MI. According to an indictment handed down on January 11, 2006, four years after the crime occurred, the men's motive in the arson case was to frighten the family and keep them from moving into their new home. (See Chapter Six) Authorities charged the men with arson,

violating the Dosters' civil and housing rights because of their race, and lying to investigators about their role in a hate crime.[20]

Organized groups commit hate crimes as well as individuals. In 1981, in Mobile, Alabama, two members of the United Klans of America ("UKA") lynched Michael Donald, an African American teenager.[21] In 1987, a jury found the individual killers and the UKA liable for Donald's death, and awarded Donald's mother $7 million dollars. Civil rights attorney Morris Dees proved that top leaders in the UKA's chain of command ordered UKA members Henry Hays and James Knowles to commit the murder.[22]

In January 2006, Montgomery County, Maryland Police began investigating whether the White Aryan Resistance ("WAR"), a California-based white supremacist group, was responsible for the hate graffiti that appeared on racially mixed schools. Police Chief Thomas Manger observed that the spray-painted swastikas and racial epithets are "just the type of tactic [WAR] uses."[23]

The Rev. Timothy Warner of St. Mark's United Methodist church in Montgomery County, commenting on the swastikas on his church said, "When you see a symbol like this in 2006, it just reminds you how far you haven't come." At Seneca Community Church, chairperson of the church board of trustees Carolyn Henderson said, "We've never had an incident like this before. This is a shock to the entire community." The 11 o'clock broadcast of ABC news, on January 12, 2006, showed church members holding a meeting outside the church door that displayed the swastika. The members wanted to call the media and public's attention to the hate crime incident. On Sunday, they held a special church service during which they removed the offensive marks.

More than fifty years after the murder of Emmett Till, our major news media report that not only has the election of President Obama not created a post-racial America, in which hate crimes have ceased to exist, but also rather hate crimes spiked the day after Obama's election. [24] According to the Associated Press, one White supremacy Web site attracted 2,000 new members the day after the election.

Even before the campaign was over, assassination conspiracies and chatter cropped up:[25] In late August, 2008, three men near the Democratic National Convention in Denver were arrested with high-powered, scoped rifles and camouflage clothing. Police reported that the three had discussed plans to assassinate Obama from a "high vantage point" as he delivered his presidential nomination acceptance speech. [26]

Agents of the Bureau of Alcohol, Tobacco, Firearms arrested two skinheads in Tennessee and charged them for plotting to murder scores of black Americans, including school children, and then to assassinate Obama himself. The ATF agents charged them with possessing unregistered firearms, conspiring to steal firearms from a federally licensed gun dealer, and threatening the life of a presidential nominee.

Angry supporters of John McCain and Sarah Palin shouted "Kill him!" at a campaign rally. In a Maine convenience store, an Associated Press reporter saw a sign inviting customers to participate in a pool guessing what day Obama would be assassinated, "the Osama Obama Shotgun Pool." "Stabbing, shooting, roadside bombs, they all count," the sign said.

Hundreds of racially charged incidents related to Obama's campaign and ultimate victory occurred from one end of the country to the other. Many involved students — from grade school through college. Parents in Rexburg, Idaho contacted police after onlookers heard second and third graders on a school bus chanting, "Assassinate Obama." School authorities expelled five students after they hung a dark-skinned doll labeled "Obama" in a high-school stairwell east of Tacoma, Wash.

Nooses, racist graffiti, and assassination threats appeared at North Carolina State University Baylor University in Texas and at the University of Alabama in Tuscaloosa. A life-sized likeness of Obama was found hanging from a noose in a tree at the University of Kentucky.

Vandalism and arson aimed at houses and cars displaying Obama campaign signs and bumper stickers broke out in Milwaukee, California, Pennsylvania, and Massachusetts. In December 2008, a Barack Obama campaign volunteer driving an SUV displaying Obama bumper stickers was hospitalized after a beating by three white men shouting racist epithets against the president-elect.

By April 17, 2009, the Department of Homeland Security had issued a report, "Rightwing Extremism: Current Economic and Political Climate Fueling Resurgence in Radicalization and Recruitment." That same month, a US Marine from Camp Lejeune, N.C., was indicted for a plan to assassinate the President.

In June of this year, Attorney General Eric Holder called for tougher US hate crimes law to stop “violence masquerading as political activism.” He asked Congress to pass hate crimes legislation making it easier to prosecute those “who commit violent attacks based on race gender disability, or sexual orientation.” A civil rights coalition at the Attorney

General's press conference reported that the United States now experiences a hate crime nearly every hour of the day.[27]

§2.2: What's the Law?

Federal law

There is no one Federal statute or Federal agency that exclusively deals with hate crimes. Federal law addresses hate crimes primarily through civil rights statutes making it illegal to intimidate persons attempting to exercise their civil rights and prohibiting conspiracies against civil rights.

The Enforcement Acts of 1870 (Title 18 of the U.S. Code) generally prohibit the intentional interference, by force or threat of force, with the enjoyment of a Federal right or benefit. Section 245 is difficult to enforce because the Supreme Court requires the government to prove the perpetrator committed the crime not only because of the victim's race, but also because the victim was exercising a federally protected right or benefit. Section 241 make it illegal for two or more people to conspire to injure, threaten or intimidate someone in the exercise of any right provided by the U.S. Constitution, but will not support a case against a single individual.

The **1964 Civil Rights Act** prohibits interference by force or thereat of force with any person's exercise of their civil rights because of race, color, religion, or national origin. In 1990, Congress passed the **Hate Crime Statistics Act,** which commands federal agencies to gather data to determine the extent and frequency of hate violence in America.[28]

In 1994, Congress passed the **Hate Crimes Sentencing Enhancement Act** (HCSEA) that requires the United States Sentencing Commission to increase sentences by no less than three offense levels for hate crimes.[29] When a hate crime results in bodily injury or fire is used, the crime is a felony. However, like the Enforcement Acts, the Supreme Court requires the government to prove HCSEA defendants selected their victims *because* of race, color, religion, national origin, or ethnicity. Similarly, the government must prove HCSEA defendants selected their victims *because* they were exercising a federally protected right or benefit.

Members of Congress have introduced two important pieces of legislation to counter the heavy burdens of proof the Supreme Court has imposed. The **Hate Crime Prevention Act** (HCPA) would amend current federal hate crime legislation by eliminating the "federally protected activities" requirement. The **Local Law Enforcement Enhancement Act**

(LLEEA) is designed to make it easier for federal authorities to investigate and prosecute hate crimes.[30] So far, neither piece of legislation has gathered enough votes to pass.

On October 28, 2009, President Obama signed the Matthew Shepard and James Byrd Act into law.[31] Before this new statute, federal law only punished hate criminals who victimized people engaged in one of six narrowly defined federally protected activities:[32]

1. A student at or applicant for admission to a public school or public college
2. A participant in a benefit, service, privilege, program, facility or activity provided or administered by a state or local government
3. An applicant for private or state employment; a private or state employee; a member or applicant for membership in a labor organization or hiring hall; or an applicant for employment through an employment agency, labor organization or hiring hall
4. A juror or prospective juror in state court
5. A traveler or user of a facility of interstate commerce or common carrier
6. A patron of a public accommodation or place of exhibition or entertainment, including hotels, motels, restaurants, lunchrooms, bars, gas stations, theaters, concert halls, sports arenas or stadiums.

The new law protects victims of hate crimes even though they are not engaged in a federally protected activity.[33] Obama also paid tribute to Senator Kennedy, who worked tirelessly work to get hate crimes legislation passed, seeing hates crimes as a form of domestic terrorism.[34]

State Laws

Because federal statutes typically concern themselves with conspiracies, state laws are often more effective than federal where the perpetrator is a single individual. State hate crime laws are usually penalty enhancement statutes, increasing the penalty for a crimes motivated by racial, religious, or ethnic hatred increases.[35] Forty-one States and the District of Columbia have passed hate crime legislation, but seven states have no hate crime laws at all.[36] Michigan recently passed a law against "ethnic intimidation."[37]

In *Wisconsin v. Mitchell*,[38] the U.S. Supreme Court declared penalty enhancement statutes constitutional. The Wisconsin hate crime law tested imposed increased penalties for any crime in the Wisconsin Criminal Code where the perpetrator selected his victim based on a belief that he or she belonged to a protected class.[39]The Court reasoned that Wisconsin's

penalty enhancement statute punished bias-motivated conduct, not speech. [40] The Court noted that judges have traditionally considered motive when deciding the severity of punishment.[41]

In *Virginia v. Black*, the Court held that a Virginia statute penalizing cross-burning with the intent to intimidate was a constitutionally permissible, content-based way to regulate free speech.[42] The First Amendment does not protect threats, the Court said.[43] Because cross burning is "intimidation speech," Virginia could regulate it.[44]

There has been some backlash against hate crime legislation in general and against penalty enhancing statutes in particular. Opponents of such legislation, usually ultraconservatives, argue that the legislation goes too far, and infringes upon the civil liberties of the offenders.

The more reasonable of these opponents argue that some measure of penalty enhancement lies in the discretion of the trial judge and penalty enhancing statutes are thus unnecessary.[45] Such discretionary power is no substitute for the explicit message penalty enhancement statutes send, however. Penalty enhancement is a public message against hate crime, unlike the discretionary choices of individual judges that are hidden from the public.

Police Response

Hate crimes require additional investigation to prove the criminal's hate-based motive.[46] Law enforcement officials are sometimes reluctant to spend their resources in this way. Moreover, local officials do not always want to admit that bias-motivated crime is a problem in their communities.[47] Some police officers even report that they dislike trying to determine whether hate motivated a criminal.[48]

Unfortunately, federal law typically provides no remedy for individuals who do not receive adequate attention when they call the local police for help.[49] State law varies.

District of Columbia courts have determined that calling the police does not create a special relationship obligation to the caller. This is true whether you call 911 to request police aid,[50] or for a medical emergency.[51] If something goes wrong in the process, sovereign immunity protects government agents and bars civil suits for damages.[52]

On the other hand, New York state law is imposes a higher level of responsibility on police. New York's highest court held that if an individual reasonably relies on the government's assurance of help, the local government is liable for negligent response.[53]

§2.3: How Does the Law Work?

Restraining Orders

If you know the perpetrator‘s identity, is, you can ask a court to issue a restraining order.[54] Restraining orders seek to prevent *further injury* after a hate crime occurs. Human rights agencies, city attorney’s offices, and the state attorney general’s office will petition a court for a restraining order on your behalf, free of charge. Private attorneys can usually obtain the restraining order faster, but will charge a fee.

The order requires the perpetrator to stop harming the victim; if the perpetrator violates the order, he or she will have to pay a fine or serve prison time. Because the threat of punishment may deter a perpetrator, restraining orders give victims some relief. However, the victim must know the perpetrator’s identity in order to obtain the restraining order. Moreover, the threat of a fine or jail sentence may not be a sufficient deterrent.

Lawsuits

Lawsuits that ask for monetary compensation seek to *repair the harm done* to a victim after a hate crime occurs. If you win a lawsuit against a person who committed a hate crime against you, you might win money damages, attorney’s fees, and various other costs of the lawsuit. In some cases, the judge may order restitution, punitive damages, or damages for pain and suffering.

A person ordered to make restitution must pay for any damages or losses you suffered because of their actions. For example, your compensation could include lost wages or medical bills if you have injuries resulting directly from the crime. If you had to repaint your garage because someone wrote racist epithets on it, the convicted person must pay your expenses. If the perpetrator is a minor who injures someone with a gun, the child's parent or guardian must make restitution if the child obtained the gun with the parent or guardian's permission or if the parent or guardian left the gun in an accessible place.

Lawsuits can be expensive and time-consuming. While they are effective when brought against defendants who have valuable assets, they are not as effective against poorer defendants. Most hate criminals are young and poor and many of them do not directly belong to any organized hate group.[55] These people tend to have meager resources to compensate victims they have injured.

Lawsuits have served as an effective weapon in the fight against organized hate groups, however. Tort litigation inflicted heavy damage on the White Aryan Resistance (“WAR”), the United Klans of America (“UKA”) and the South Carolina-based Christian Knights of the Ku Klux Klan. [56]

In 1990, a jury found that WAR engaged in a conspiracy that led to the fatal beating of a young Ethiopian student. The jury awarded the student's family a multi-million dollar judgment; WAR leader Tom Metzger had to sell his home and personal property to satisfy it. Metzger also had to abandon his leadership role because authorities had special powers to monitor his behavior until the debt was paid.

The UKA had to sell its national headquarters in order to satisfy multi-million dollar judgments. The Christian Knights of the Ku Klux Klan had to sell their property under a deed covenant prohibiting hate activities on the property.[57]

Criminal Prosecutions

Once a victim reports a crime to the police, they investigate it and turn the evidence over to the local prosecutor's office, which faces the problem of gathering evidence.[58] Simply showing a previous pattern of racist activity is not sufficient to prove that the defendant committed a particular racially motivated crime.[59] In Wisconsin, for example, evidence of prior acts must be material to the case, and not unduly prejudice the defendant.[60] Some state courts allow prosecutors to present evidence of a defendant's prior racist statements, use of racist paraphernalia and prior hate offenses.

Juries find racist statements that occur shortly before, during, or after a hate crime especially persuasive. At John Randolph Ayers' 1993 trial, the jury learned that a few days before he assaulted his African American female victim, Ayers knocked down an African American teenager outside a 7-Eleven store, shouting "what did you say to me nigger?" and chased an African American teenaged girl while calling her "black bitch" and "nigger."[61] The prosecution believed that Ayers' anger expressed during the 7-Eleven incident motivated him to go "nigger hunting" days later.[62]

Likewise, during Douglas Nitz' 1996 hate crimes trial in Milan, Illinois,[63] the jury heard evidence that he yelled, "If it wasn't for the nigger moving in the neighborhood, we wouldn't have all these problems…Niggers is nothing but problems. What they need to do is go back to Africa." Nitz assaulted his victim and her family with racial slurs on many occasions. In 1995, the Milan police department responded to 65 calls and incidents stemming from Nitz's harassment.

Even when local law enforcement has gathered enough evidence to prosecute a hate crime, they still have to prove that the defendant had a hate motive.[64] In *Apprendi v. New Jersey*, the U.S. Supreme Court held that the jury must find beyond a reasonable doubt that hate motivated the defendant before a judge can use penalty enhancement.[65]

Anti-Terrorism Legislation

How different are the foot soldiers of the American hate movements from the foot soldiers of Islamic terror groups? Many of the participants in suicide bombings, hijackings and the like are young, eager, directionless people who feel they have nothing to lose and are looking for a cause with which to identify. One new way to fight hate criminals is to prosecute them as domestic terrorists. The FBI defines domestic terrorism as follows: "the unlawful use, or threatened use, of violence by a group or individual that is based and operating entirely within the United States or its territories without foreign direction and which is committed against persons or property with the intent of intimidating or coercing a government or its population in furtherance of political or social objectives." [66]

The FBI reports that right-wing extremist groups such as World Church of the Creator (WCOTC) and the Aryan Nation pose a domestic terror threat to the U.S. It reported, "two out of seven planned acts of terrorism that were prevented in 1999 were large-scale, high casualty attacks being planned by organized right wing extremists." [67]

§2.4. What Needs to Change?

Despite traditional legal remedies like restraining orders, civil suits, and criminal prosecutions, hate crime continues to be a problem.

Federal law provides only limited relief, and needs improvement, especially by expanding the authority of federal officials to address hate crimes. Federal penalty enhancement statutes could send a message to extremists that their crimes carry serious consequences, deterring hate crimes by making it clear that the government will not accept them.

There have been relatively few convictions under state hate crime statutes, creating some concern that these statutes have little deterrent effect. Although most state laws provide personal causes of action for hate crimes, it is very difficult to prove the perpetrator's guilt. Too many hate crimes go unpunished. Lobbyists should push local and state lawmakers to pass laws requiring states to assist the FBI's statistical information-gathering effort.

Local government's response should be strengthened as well, with increased police protection, assistance, and training. Law enforcement officers trained in hate crime investigation are more efficient in classifying and investigating hate crime. Prosecutors can use the evidence these officers gather to obtain higher conviction rates and longer prison terms.

Given the difficulties inherent in prosecuting hate crimes, however, conviction rates will not rise unless law enforcement and community members work together. Witnesses and neighbors provide much of the evidence that prosecutors use to convince perpetrators to plead guilty and to convict those who go to trial. The more frequently "hate criminals" face prosecution and swift justice, the greater the deterrent against new outbreaks of hate crime.

Criminal prosecutions alone cannot effectively deter crime because their primary purpose is to punish rather than to prevent hate crimes.[68] Community involvement can not only help solve hate crime, but deter it as well. It is thus imperative that the public become more aware of hate crime laws and the threat they address.

We need to be alert to any effort to mobilize racists through hate speech, hate organizations, or hate websites. The Anti-defamation League of B'nai Brith keeps a database of hate groups and tracks their movements. Jewish leaders, seeing their community as a minority in the United States, are very vigilant in their struggle against such groups. Their excellent book "Blood in the Face" is one of the few sources of information about these groups. The African American community would do well to follow their example.

THE HANDBOOK

§2.5: First Aid[69]

How you react to a hate crime is very important. Criminal law allows you to strike back in self-defense if you are in your own home or on your own property. However, if you are out in public when the event occurs you cannot use deadly force to respond to harassment or even physical attack. The law requires you first to retreat. Only if your attacker pursues can you fight back in self-defense.

Remember to preserve all evidence related to the crime; you may want to destroy it, but resist the impulse to do so. Keep all letters and voice mail records. Do not clean up any vandalism before the police arrive.

Hate crimes are one of the most underreported crimes in America. Victims do not want to relive the incident nor have their privates lives exposed. Some fear retaliation.[70] After suffering a hate crime, many African Americans also have concerns about contacting the police because of the troubled history of police-community relations (see Chapter Three). Moreover, hate crime reports mean more work for police officers and damage to the city’s reputation, so the police may be slow and ineffective at best, hostile and adversarial at worst.[71]

If you have been the victim of a hate crime, however, you should report the incident to local law enforcement officials immediately. Many, if not all, localities provide direct telephone numbers to area police stations, most often listed in local telephone books. Some localities also have Internet-based systems that allow people to contact police via e-mail.[72]

Tell the police officers the complete story, as soon as possible. Explain why you believe that a hate crime was committed and why you believe the crime occurred because of your race. Inform them immediately of any injuries. These steps are important because law enforcement agencies are trying to gather statistics and other information that may be useful in dealing with hate crimes and hate groups.[73] Even if the police tell you there is nothing that they can do about the hate crime at that moment, they will at least have to make note of the complaint in their daybook, which your attorney can subpoena later, if necessary.

People can also protect themselves from hate crime by working with informal citizens' groups, and human rights agencies that work to reduce hate crime. People should also contact civic groups and civil rights organizations to get information and programmatic suggestions. The Southern Poverty Law Center established Tolerance.org, an online website to help people combat bigotry and promote diversity in their communities.[74] In addition to civic groups, human rights agencies, and civil rights organizations, many state bar associations also publish information on hate crime laws and remedies. This information is available on the Internet and in public libraries. Community action that involves speak-outs, organizing, and lobbying can create an environment which discourages crimes, and improve government effectiveness in enforcing hate crime laws.

§2.6: Who Can Help?

Victims of hate crimes can go to the local police, other local government authorities, the federal government, a private attorney, or a civil rights organization. The local police have original jurisdiction over any crime committed within their boundaries. In addition, you can file a complaint with a state or local human rights agency or with your local district attorney or the state attorney general. At the federal level, several divisions of the Justice Department respond to complaints about hate crimes. These include the Federal Bureau of Investigation and the Community Relations Service.[75] In addition, the Federal Office of Victims of Crime, the Department of Education, and the Department of Housing and Urban Development provide assistance as well.

The Local Police

If the crime involved is a misdemeanor, authorities may refer you to the Private

Criminal Complaint Unit of the District Attorney's office. The police will not arrest anyone on a misdemeanor charge unless a police officer personally witnessed the crime.

If an officer observes a felony in progress, he or she can make an immediate arrest. If an officer was not present, the department assigns the case to a detective for investigation, or issues an arrest warrant. An organization like the ACLU or the NAACP can help you with police procedures.

Local Human Rights Agencies

In some states, you may be able to file a complaint with a state or local human rights agency. You can do this on your own; you do not need a lawyer. In any case, you should not delay. There are usually strict time limits for filing a complaint.

The department may not proceed in all instances. If it does, it will summon the accused to a hearing before the agency. You will not have to pay the costs of the hearing.

State or Local Attorney General

If you do not know who committed the crime and the police refuse to investigate, call your City or County prosecutor or the state or local Attorney General. In some cases, prosecutors are more sensitive to the damage that hate crimes can do to a community and will investigate even if the police do not. Many prosecutors now receive special training regarding hate crimes.[76] The prosecutor's office can also advise you about criminal restitution to compensate for your injuries.

The Department Of Justice

FEDERAL BUREAU OF INVESTIGATION

The Hate Crimes Statistics Act requires the FBI to train state and local law enforcement officials who request it. Soon after the Act passed, the FBI received nearly 100 requests for hate crime training from across the nation. The Federal Law Enforcement Training Center ("FLETC") in conjunction with the Southern Poverty Law Center offers an in-person Hate Bias Crime Training Program as well an online course. Police officers enrolled in the program receive academic and continuing education credit.[77] FLETC trains employees from more than 75 federal law enforcement agencies and provides similar services for many state, local, and international agencies.[78]

COMMUNITY RELATIONS SERVICE

The DOJ's Community Relations Service (CRS) is the only Federal agency created specifically to help resolve community disputes. CRS professionals work closely with police officers and civil rights organizations and have often helped reduce community tensions. For

example, CRS professionals frequently provide technical assistance to law enforcement officials and community groups facing the impact of a Klan rally or a demonstration by organized hate groups.

THE OFFICE OF VICTIMS OF CRIME

In 1992, Congress directed the DOJ's Office of Victims of Crime (OVC) to develop a training curriculum to improve law enforcement and victim assistance professional responses to hate crimes. The training curriculum encourages coordinated activity between law enforcement officials and victim assistance professionals in the investigation and prosecution of hate crimes.

The Department of Education

In 1992, Congress added anti-prejudice initiatives to the Elementary and Secondary Education Act ("ESEA"), the primary Federal funding program for public schools. Title IV of the Act also includes a specific hate crime prevention initiative. This initiative promotes curriculum development and professional training for teachers and administrators on hate crime causes, effects, and prevention.

The Department of Housing and Urban Development

HUD, in conjunction with the National Council of Churches and the Congress of Churches, sponsors a series of informational seminars on rebuilding religious sites damaged by hate crimes, arson in particular. Representatives from other Federal agencies such as the Department of Justice also attend to brief the audience on their efforts to prevent hate crimes and arson. HUD also has a ten million dollar loan guarantee rebuilding fund and can bring in architects, lawyers, and construction specialists to offer information and assistance.

Civil Rights Organizations

The NAACP works to bring attention to hate crimes and to support individuals, families and communities victimized by hate crime.[79] The Center for Democratic Renewal and the Southern Poverty Law Center assists victims and their families. The Center for Democratic Renewal, originally the Anti-Klan Network, is a multiracial organization that educates communities by publishing literature about the nature of hate crimes and what individuals can do to protect themselves.

The Southern Poverty Law Center, based in Atlanta, Georgia, is a civil rights law firm that specializes in hate crimes. It is internationally known for its tolerance education programs and legal victories against white supremacists. It tracks hate groups in its quarterly magazine, *The Intelligence Report*,[80] which it circulates to law enforcement agencies, human

rights groups, legislators, and the public.[81] The Center has also shut down some of the nation's largest white supremacist organizations with large lawsuit damage awards.[82]

The Alliance Against Hate Crimes is a partnership joining more than 50 federal, state, and local law enforcement agencies, civil rights organizations, community groups, educators, and anti-violence advocates in coordinated statewide efforts against hate crimes. Participants established the Alliance in 1998, after President Clinton and Attorney General Janet Reno directed United States Attorneys to set up statewide working groups to coordinate hate crime prevention and punishment.[83]

§2.7: Getting Organized

Not In Our Town, a national movement that helps communities respond to hate crimes, uses PBS broadcasts to spotlight community responses to hate crime.[84] *Not In Our Town I: The Original Story* featured Billings, Montana, a town struck by an alarming number of hate crimes in 1993.[85] The first hate-related incident occurred when residents returning from a Martin Luther King birthday celebration found KKK flyers on their cars.

Then, hate criminals overturned tombstones in a Jewish cemetery. Next, racist skinheads assumed threatening postures while standing in the back of an African American church. The problem began to escalate; racists pitched a bottle through a local Jewish man's front door, sprayed swastikas and racist graffiti on a Native American woman's home, and heaved a piece of cinder block through a local Jewish man's window, knocking over the menorah he had displayed in celebration of Hanukkah.

The residents of Billings came together to oppose the hate crimes, and the police chief encouraged residents to respond to each incident quickly. Religious groups from every denomination marched and held candlelight vigils at the Jewish cemetery, and in front of the Jewish man's door. The local labor council passed an anti-hate proclamation, and held a rally to garner the community's support. The Billings Human Rights Coalition got a hardware store to donate paint, and volunteers from the local Painters Union painted over the graffiti on the Native American woman's home. People of different races and religious backgrounds began attending African American church services.

The Billings Gazette ran a front-page story on the damage to the Jewish man's menorah and printed a full-page menorah for readers to display in *their* windows. As vandals threw more bricks at windows that displayed the newspaper menorah, more people placed them in their windows. By the end of the year, more than 10,000 people had menorahs in their windows. There have been no serious incidents in Billings since.

Two days after vandals struck the St. Mark's United Methodist Church, the Seneca Community Church, and the historic Boyds Negro School in Montgomery County, Maryland, county council representatives joined church and civic leaders at a press conference in front of St. Mark's. [86] County Executive Douglas Duncan promised "We will not stand idly by as hatemongers try to divide our community." [87]

The following Sunday, Rev. Timothy Warner of St. Mark's preached against racial hatred to a large crowd. After the church service, he led a march to the Boyds Negro School to involve young children in painting over the hateful graffiti. Though some church members wanted to remove the graffiti as soon as it was discovered, the Reverend believed "[t]he community needs to see this…If we cover it up, we just help the purpose of evil. It is always done undercover. This gives us an opportunity for the youth to clean up the evil." [88]

The community assisted in efforts to solve the school and church crimes. A local council member planned to meet with the local NAACP chapter. The county police's Hate Crime Tipster Fund funded a $2,000 reward. Later, a local business leader, who preferred to remain anonymous, donated $10,000; the Christian Life Center pledged $2,000; and one of the victimized churches contributed $1,000. By March 2006, the reward in the case reached $15,000.[89]

Chapter Three

Racial Profiling

A criminal law enforcement officer cannot treat a person as a suspect merely because of the person's race, ethnicity, or national origin.

SYNOPSIS, DEPARTMENT OF JUSTICE WEBSITE

THE HISTORY

§3.1: What's the Problem?

In 1976, Los Angeles City police stopped Adolph Lyons at two a.m. because of a burned out taillight, drew their revolvers, and ordered him to get out of his car.[1] They ordered him to face his car, spread his legs, clasp his hands, and put them on top of his head. He complied. After one of the officers patted him down, Lyons dropped his hands; the officer grabbed Lyons hands and slammed them onto his head, injuring Lyons with a pair of keys the officer had in his hand.

When Lyons complained about the pain, the officer began to choke Lyons, pressing his forearm against Lyons' throat. As Lyons struggled for air, the officer handcuffed him, but continued to apply the chokehold until Lyons blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. The officers issued him a traffic citation and released him.

Experts at trial testified that a chokehold victim experiences extreme pain. His face turns blue from lack of oxygen, he goes into spasmodic convulsions, his eyes roll back, his body wriggles, and his feet kick up and down; his arms move about wildly. LAPD officers at the trial described victims' reactions to the chokehold as "do[ing] the chicken," i.e., like a chicken when someone wrings its neck. The US Supreme Court turned aside Lyons' suit for an injunction against the chokehold because they did not believe Lyons was likely to have another such encounter with the police.[2]

Background

Racial profiling emerged officially in the 1950's as behavioral scientists became involved in criminal investigations.[3] Traditionally, racial profiling referred to actual written

profiles of suspects likely to commit certain crimes. The profiles described behavior and appearance --age, clothing, and often race.

As early as 1639, the Jamestown colony passed laws restricting African American slaves to their owner's premises. They could not appear in public without their master's permission.[4] The first slave patrols appeared in South Carolina in 1704, manned by white men picked from local militias,[5] dispersing slave gatherings and "safeguarding the community" by patrolling the roads[6] and hunting down fugitive slaves.[7]

The slave patrols soon spread throughout the South. By the 1750s, every Southern colony had a slave patrol,[8] and by 1850s, every slave state outside of Delaware financed its own slave patrol.[9] They had authority to stop, search, whip, maim, or kill any slave traveling outside of their home plantation without a pass.[10] The laws also required every white male to participate, similar to required service in the military or state militia.[11] The patrols' were the first truly American police system.[12] Their specific purpose was to physically intimidate and thus control the black community.[13]

Slave patrol activity tapered off toward the end of the Civil War, with white males busy fighting Union troops.[14] After the War, the Black Codes picked up where the slave codes and patrols left off, continuing the tradition of monitoring and restricting African-American freedom of movement.[15] When the Reconstruction Congress overturned the Black Codes, vigilante groups like the Ku Klux Klan emerged to keep newly freed slaves in line.

This strategy was largely unnecessary in the North where housing discrimination herded African Americans into ghettoes. There the entire population could be controlled and contained by an occupying army of police. Routine stops and searches of African American motorists and even pedestrians became a way of maintaining order in African American neighborhoods, and, incidentally, reminding African Americans of their place.

For years, African Americans, Latinos, and other minorities in urban areas complained about police harassment as they walked or drove but authorities and the majority-white public largely ignored their complaints. After the 1968 Fair Housing Act, economically successful African Americans moved to the suburbs, into or close to white neighborhoods and schools. Police routinely stopped the new black suburbanites on one pretext or another.

In the 1980s, during the Reagan Administration's "War on Drugs," racial profiling dramatically escalated nationwide.

Racial Profiling Today

For many years, white citizens denied that police action placed minorities in special danger. For example, an all-white jury acquitted police officers *videotaped* beating Rodney King in Los Angeles as recently as 1991.[16] According to the Department of Justice, "52 percent of African-American males believe they have been victims of racial profiling, while a Gallop poll indicates that about 60 percent of Americans believe racial profiling exists."[17]

Today, racial profiling is more widely acknowledged, but the races still see the matter quite differently. On the one hand, ultraconservative pundits argue that racial profiling does not exist.[18] On the other, so sure that everyone will be quick to believe "the black guy did it," white perpetrators easily send police on wild goose chases looking for phantom African American male suspects.[19]

The media continues to bombard the public with images of African-American men as uncivilized and violent, reinforcing historical stereotypes.[20] Police, as members of the community, too often respond to these images when they enforce the law.[21] Racial profiling at its most extreme appears in the disproportionate number of African Americans executed when the victim of the crime is white.[22]

The most common police racial profiling begins with law enforcement targeting minorities for traffic stops.[23] "Driving while black", ("DWB") is the term given to racially motivated traffic stops of African Americans by law enforcement officers.[24] DWB describes police targeting African Americans for traffic stops, expecting to find them engaged in criminal activity. Police officers "profile" African Americans who are male, wear baseball or "skull" caps, drive a luxury car or SUV, play loud music, or simply drive in the wrong neighborhood.

The officer uses a minor traffic violation to justify the stop: poorly inflated tires, a broken tail light, failure to use a signal light before switching lanes, speeding less than 10 miles above the speed limit, an illegible license plate. One African American police officer attempting to stop motorists for their infractions, rather than their race, faced sanctions from his superiors, who told him "you need to quit looking at what the cars are doing and look at the people in the vehicles."[25]

In 2001, the police initiated traffic stops on about 21 percent of the population 16 years old or older (about 20 million people).[26] Police issued tickets to only about half these people, indicating that the reason for a traffic stop is often *not* a traffic violation. Two-thirds of the people subjected to body and vehicle searches incident to these traffic stops were African American or Hispanic. Ninety percent of the time, the police found no evidence of

criminal wrongdoing.[27] Since 9/11, law enforcement racial profiling has increased, even outside anti-terrorism contexts, precipitating more traffic stops, pedestrian stops, and most notably, airport stops.[28]

It is still possible to guess the race of a motorist suburban police have stopped based on the number of squad cars called for "back up." Like the slave "patrollers," racially profiling police intimidate African Americans and discourage them from traveling in certain areas. Arguably, racial profiling is a badge of slavery within the meaning of the Thirteenth Amendment. [29] It is certainly possible to trace the practice back that far, and forward through Klan terrorism, lynch mobs, Birmingham water hoses, all-white juries, Los Angeles choke holds, the beating of Rodney King, discriminatory administration of the death penalty, to the present "driving while black.")[30]

Two NYPD officers accosted Leonardo Blair, a middle-aged African-American male who writes freelance for the New York Post, as he attempted to exit his own car near his own house. Blair wrote an article detailing his experience.[31] One officer frisked him. The other searched his bag. They handcuffed him, arrested him, hauled him to a police precinct, and shoved him into a cell. They later released Blair without charge, who counts himself "lucky to be alive."

An African-American police officer from a large Midwestern city told one of my students that white officers often racially profile because they are generally insecure and are especially frightened of African American males.[32] The officer informed my student that many white officers have never interacted with African-Americans or people of other races in an environment in which the officers are not in complete control. These officers tend to overreact, automatically calling for backup whenever they pull over an African-American male driver, for example.[33]

The officer also noted that department heads reinforce this behavior. In the officer's department, there is a requirement to gather personal information, such as social security number and employment, when police pulled over minority drivers. However, the same information is not required of white drivers when stopped.

Secondary Consequences of Racial Profiling

With approximately 2.3 million people in prison or jail, the United States incarcerates more people than any other country in the world.[34] African-Americans are 13 percent of the general population, but over 50 percent of the prison population. Blacks are incarcerated at a rate eight times higher than that of whites.

Studies show that African Americans with a criminal record have almost no chance of obtaining a job.[35] In fact, white job seekers, fresh out of prison, have a better chance at getting a job than blacks with no criminal record.

Another results of increasing, and widespread criminalization of black people, is the increase in the number who are barred from voting by so-called "felony disfranchisement" laws. Since jurors are selected from voter registration lists, felon disfranchisement also has the effect of reducing the numbers of blacks on juries, undercutting the constitutional guarantee of a "jury of one's peers."

Many "felony disfranchisement" laws have racist origins. Southerners rewriting their constitutions after the Civil War adopted a wide range of voting barriers, designed to disenfranchise as many blacks as possible without explicitly violating the Fifteenth Amendment. Techniques emerging from these sessions included “note denied” strategies such as the poll tax, literacy tests, grandfather clauses[36], and felony disfranchisement.[37] Along with outright intimidation and violence, they disfranchised most Southern blacks.

Instead, felony disfranchisement punished “furtive” crimes, such as thievery, adultery, arson, wife-beating, and housebreaking, because the drafters felt blacks were more likely to commit, or at least be convicted of such crimes.[38] John Fielding Burns, the author of the Alabama constitutional provision disenfranchising criminals, claimed “the crime of wife-beating alone would disqualify sixty percent of the Negroes."[39]

A century after the South’s disfranchising conventions, felony disfranchisement is the only primary technique for denying the vote the Fifteenth Amendment still permits. Currently, many states deny the right to vote to incarcerated prisoners and a slightly smaller number bar non-incarcerated offenders who are on probation and parole. Only fourteen states disfranchise ex-offenders for life, however, and these are predominantly the states of the old Confederacy. As a consequence, millions of African-Americans still cannot vote.

Approximately 5.3 million Americans have lost their right to vote because of they are ex-felons.[40] Today forty-eight states have some form of criminal disenfranchisement, and only Maine and Vermont allow incarcerated prisoners to vote. The typical felon disfranchisement statute disqualifies persons convicted of an “infamous crime.”

These laws do not on their face distinguish between African-Americans and whites, but in 2003, the Justice Policy Institute (JPI) uncovered significant racial disparities in the laws’ application.[41] While African Americans make up only 28% of Maryland’s population for example, 68% of the people arrested for drugs are black and 90% of people incarcerated

for drug offenses are black. With such a high black arrest and correction rate, Maryland's felony disfranchisement law prevents a significant number of African-American from voting. The JPI found such patterns in many other states as well.

§3.2: What's the Law?

The key laws protecting citizens against racial profiling prohibit false imprisonment and false arrest, prohibit unreasonable search or seizure, and promote equal protection of the laws.

An officer falsely imprisons when the officer uses a show of authority or a threat of force to completely restraint a person's freedom of movement without making a formal arrest. False arrest takes place when an officer makes a formal arrest but does so without legal authority--misreading the facts or misinterpreting the law. Plaintiffs typically pursue false arrest and false imprisonment claims under state law.

The **Fourth Amendment** forbids the police from conducting unreasonable body searches or searches of people's homes and vehicles unless the officers had probable cause or a warrant. However, the Supreme Court in *Terry v. Ohio*[42] permits police to stop a car if they have a "reasonable suspicion" that at least one occupant has committed a crime.[43] In practice, this ruling gives the police enormous discretion to stop motorists, leaving ample room for officers to engage in discriminatory conduct.

During the stop, officers may frisk any person they perceive presents a danger. The appearance of danger is in the officer's discretion, even if an officer thinks the person stopped is dangerous because of what he or she has seen on TV or because of police culture itself. *Terry* greatly expanded police discretion to stop and frisk, and minorities-especially African-American males, have been their special targets.[44]

The notion that race might be one of the reasons police stop a motorist did not seem to overly disturb the Supreme Court in *Terry v. Ohio*, interpreting the Fourth Amendment. However, race discrimination in a car stop might be unconstitutional under the **Fourteenth Amendment** even if it does not violate the Fourth.

Considering this possibility, the Supreme Court in *Whren v. U.S.*[45] held that a plaintiff in such cases would have to prove that the discrimination was intentional, i.e., that race was the officer's *primary* reason for the stop. Even if it was intentional (nearly impossible to prove) the court would still uphold the officer's conduct if there was any other reasonable pretext for the stop even minor ones —a broken taillight, failure to use a turn signal, etc.[46]

Whren and *Terry* together put the Supreme Court squarely behind racial profiling.[47]

As we saw in Chapter One, **42 U.S.C. §1983** provides a right of action to plaintiffs when their constitutional or statutory rights are violated by persons acting under color of law (typically, state and local government officials). The requirement that the defendant act under color of law may mean that officers who act without legal justification are considered individuals, rather than representatives of the government, and would have to be sued in a private tort action, rather than under 1983.

Again, as we saw in Chapter One, **Title VI** of the Civil Rights Act of 1964 prohibits organizations that receive federal funds from discriminating because of race, color, or national origin. If a local law enforcement agency engages in racial profiling, the federal government can terminate its funds under Title VI. The plaintiff cannot succeed without providing intentional discrimination however, according to the *Sandoval* case.[48]

The **Omnibus Crime Control and Safe Streets Act of 1968** similarly prohibits state and local governments from discriminating in programs or activities funded by the federal government. Unlike Title VI, however the Crime Control Act does not authorize private lawsuits. Only the United States Attorney General can sue under this law.

The Attorney General can bring a civil action in federal district court against any state or local government entity, agency, or official to halt any pattern or practice that violates the Act. Persons with complaints under the Crime Control Act file them with the Civil Rights Division of the U.S. Department of Justice or directly with the Law Enforcement Assistance Administration, which disburses Crime Control Act funds. **The Violent Crime Control and Law Enforcement Act of 1994** (42 U.S.C. § 14141) gives the Attorney General similar authority, with special focus on juvenile justice.

Victims of racial profiling may also pursue claims under **42 U.S.C. §§1981, 1985, and 1986,** but usually only if they have not started a claim under §1983. *42 U.S.C. §1981* protects citizens not only in their rights to real property, as we shall see in Chapter Six, and their right to contract, as we shall see in Chapter Four, but also their right to be "secure" in their persons and property. *42 U.S.C. §1985* provides a money damage remedy against two or more persons who conspire to deprive someone's civil rights. *42 U.S.C. §1986* provides an action against government supervisory personnel who know about a conspiracy within their ranks to violate a person's civil rights, had power to prevent it, and neglected or refused to do so.

Twenty-seven states have passed legislation explicitly banning racial profiling, requiring state and local enforcement agencies to develop programs to address this problem.[49] Some times such legislation comes only after storms of media attention and public controversy.[50]

The **Maryland Transportation Code Ann. § 25-113**, enacted in 2002, requires officers to record the date, location, time and duration of the stop, traffic violation(s) alleged, whether a search was conducted along with the reason for the search, contraband seized, gender and race of the driver. [51] The law enforcement agency must turn this data over to the Maryland Justice Analysis Center,[52] which reports it findings to the Governor, the General Assembly, and each law enforcement agency before September 1 of each year.[53]

New Jersey adopted the **Law Enforcement Professional Standards Act** in 2009.[54]The Act creates an internal police agency at the state level to monitor police performance, investigate claims of abuse, and provide training oversight. The agency reports to the New Jersey State Attorney General.[55] Illinois adopted a similar law.[56]

§3.3: How Does the Law Work?

Racial profiling occurs both as disparate treatment and as disparate impact.

Disparate Treatment

Courts apply the **Fourth Amendment** to determine if an officer is justified in stopping an individual motorist. In many instances, officers will use traffic laws enforcement as a pretext, and so it is very difficult to convince a court that race was the only reason for the stop. Terms like "probable cause" and "reasonable suspicion" provide racially prejudiced officers all the discretion they need to act on their beliefs.

When plaintiffs Orton Bellamy and Shawn Merke entered the Ashley Stewart Store in the Cheltenham Mall of Cheltenham Township, Pennsylvania, and a sales clerk called mall security.[57] "Two black guys" had robbed an Ashley Stewart Store in Philadelphia,[58] and the clerk feared Bellamy and Merke were the robbers.[59] However, the clerk admitted to police officers upon their arrival that the two men were only shopping.

When the officers asked Bellamy and Merke for identification, Bellamy gave them a badge that identified him as the Chairman of the South Carolina Probation, Parole, and Pardon Board, but the officer refused to accept it.[60] Instead, they escorted the two men out of the store.[61] Several police officers then surrounded them and ordered them to remain stationary and quiet. When Bellamy and Merke asked the officers why they were holding them, the officers told them "there was a robbery or something." [62]

After the police finished their investigation, they did not tell the men they could leave. It was not until Bellamy and Merke asked to leave that police allowed them to do so. The court determined the officers had no reasonable suspicion for detaining Bellamy and Merke and found the officers violated the men's fourth amendment rights.[63] Because the officers acted unreasonably, qualified immunity did not protect them, and Bellamy and Merke were entitled to sue.[64] However, the court issued a backhanded final judgment, award nominal damages of only one dollar.[65]

Cheryl von Herbert had better luck. Officers in St. Clair Shores responded to a bank teller who called to report a woman, Connie Floyd, attempting to cash a fraudulent check made out to Elnora Pack with Ms. Pack's driver's license.[66] After the officers arrived, the teller notified them that a woman who "sounded black" had just called the bank inquiring about Floyd.[67] Assuming an accomplice matching Pack's picture was in the area, the officers approached von Herbert in the mall, asking for her name, why she was at the mall, and for identification. Herbert answered the questions and produced a Michigan state identification. The officers then ran a warrant/lien check on her. When it came back negative, they allowed Herbert to leave.

While Herbert was standing at the bus stop, another officer, Chester, approached her wanting to compare the picture on the Pack license to Herbert's face. As Chester was examining Herbert's license, a bus came, and Chester waived it on. Herbert then screamed loudly and demonstratively asking onlookers for help. Officers then arrested Herbert for disorderly conduct and took her to the police station. The trial judge dismissed the charges because the police lacked "an articulable reasonable suspicion to stop Herbert."

Herbert then filed Fourth Amendment and equal protection violation claims against the officers and the city. The court considered the T*erry* stop unlawful, as the police inquiry should have been satisfied once Herbert produced identification.[68] Since it was unreasonable for the officers to continue to investigate Herbert once she supplied her identification, they were not entitled to qualified immunity and she could sue them personally.[69]

Making out a racial profiling claim under the **Fourteenth Amendment** is difficult. Under the *Whren* test, articulated in the majority opinion of ultraconservative Supreme Court Justice Antonin Scalia, racial profiling victims must prove that the officer who performed the traffic stop did so because of race, and did so intentionally. To prevail, a plaintiff would need a confession from the officer involved or evidence that the department adopted a racial profiling policy.

In *People v. Muhammad*, a 1988 case in Michigan, the deputy sheriff heard on police radio that two African American males robbed a bank. The deputy then proceeded to stop the first car he saw with African American male occupants--though the car did not match the car description radioed in. The court only overturned one of the convictions.

In *Brown v. City of Oneonta*, (1999) a post-*Whren* case, the federal Court of Appeals for the Second Circuit held that in an area with few minority residents, a police description composed only of race and gender does not equal a "racial profile." Therefore, when an elderly white robbery victim claimed a "black male" robbed her the police could search every African American male in town.[70]

In 2003, Stacy Nesby was driving with her passenger, John Saucer in Oakland when police officer Anderson made a u-turn, got behind her vehicle and turned on his overhead lights.[71] Nesby was driving her 2002 Dodge Intrepid, which she had purchased 20 days before the stop. When Anderson approached Nesby's vehicle and asked for her license and registration, Nesby complied, and informed him that San Francisco authorities recently arrested her on warrant but released her because she was not the wanted person.[72]

Saucer asked the reason for the stop; Anderson replied that Nesby's registration was expired.[73] Saucer then pointed to a temporary registration permit in the front windshield of the vehicle.[74] Nesby then explained to Anderson that another woman had stolen her identity, used her name, and that was why San Francisco authorities released her from jail.[75]

Anderson then told Nesby to step out of the vehicle, but according to Nesby, Anderson did not wait and tried to pull her out.[76] Two other White male officers came to assist and grabbed Nesby by her blouse, ripping it, and pushed her against the vehicle and over the hood.[77] They raised her blouse above her chest and lifted her skirt above her waist exposing her underwear. According to Saucer, the officers then ran their hands over Nesby's body and one squeezed the cheek of her buttocks. Nesby told the officers they had her arms raised so high behind her back that they were hurting her; but they did not respond.[78] Nesby persisted that she was not the woman in connection with the warrant, did not struggle with the officers, nor did she yell at them.[79] Saucer then saw one of the additional officers open the trunk of the vehicle, search it, and throw the keys in it, shutting it.[80]

Nesby then sued the City of Oakland and Officer Anderson under the Fourteenth Amendment.[81] The court granted the defendants motion for summary judgment stating "while the circumstance underlying this case were indeed unfortunate, plaintiff fails to

establish a genuine issue of material fact in dispute sufficient to take these defendants to trial on these claims."[82]

Airport security officials regularly subjected African American women through New Jersey's Newark International Airport to invasive searches that ranged from groping pat-downs to cavity searches. Sometimes officials forced these women to stand naked in rooms and refused calls to their families and lawyers. One of the women decided to contact a friend who worked for a local news station. The story eventually ended up on NBC nightly news and Dateline NBC. In 2004, civil rights attorney Edward Fox began organizing a class action lawsuit, aiming to reach 1,300 women across the country.[83]

Ninety African-American women brought an equal protection suit against Chicago O'Hare International Airport custom's managers claiming security officials chose them for non-routine searches (pat-downs, strip searches, x-ray inspections, or body-cavity searches) because of their race and sex.[84] All of the women were searched between March 1996 and August 1999.

However, the court denied the women relief,[85] primarily because their statistical evidence was not sufficient to prove disparate treatment; they had not shown to the court's satisfaction that race and sex had any influence on the type of search conducted![86] Additionally, the court determined that the plaintiffs presented no admissible evidence that the managers knew their inspectors were engaging in racial or sex discrimination.[87]

Title VI claims face similar obstacles. In 2003, Tacoma, Washington police searched for an armed robber in a green Cadillac with a specific license tag number.[88] Tacoma Police Officer R. Baker stopped Michael Hankins, though Hankins' Cadillac was black, not green and the tag number did not match the one identified in the robbery. Baker pulled Hankins over in front of his father-in-laws home.[89] When Hankins got out of his vehicle, Baker swore at him, ordering him to get back into the vehicle. Baker then reached into the car and grabbed Hankins by his throat.[90] Another officer approached Hankins with a pepper spray, and another tasered Hankins in the chest. When Hankins' father-in-law, Michael Ward, approached the officers pleading for them to stop their assault on Hankins, they pepper-sprayed and tasered him as well.[91] Police charged Hankins with driving with cancelled license plates and obstructing a police officer; however, a court dismissed these charges.[92] Police charged Ward with assault, but a jury found him not guilty.

Hankins and Ward brought a Title VI claim alleging discrimination under a program or activity receiving Federal financial assistance.[93] The court ruled they had to prove the

officers in question acted in a discriminatory manner and that the discrimination was intentional.[94] Hankins and Ward used a Tacoma city statistical study to establish their racial profiling claim; however, the court determined that the study showed disparate impact and not disparate treatment.[95] The court granted the defendant's motion for summary judgment on the Title VI claims, finding Hankins and Ward had not produced evidence establishing a nexus between a federally-funded program and alleged racial profiling.[96]

The Violent Crime Control and Law Enforcement Act of 1994 empowers the Department of Justice to sue local law enforcement agencies for violations of Constitutional rights. The DOJ can investigate management practices as well as individual police officer's actions. The Bush Justice Department filed very few lawsuits under the Act;[97] perhaps the Attorney General Holder will do better.

Disparate impact

Disparate impact appears not just in the greater numbers of African Americans stopped than whites but, ultimately, in higher rates of arrest, conviction, denial of bail, lengthy prison terms, and denial of probation. Few racial profiling cases alleging disparate impact actually reach the courts, however. Only the Justice Department can bring these cases, and they may decide to withhold funds from problem police departments instead, or simply investigate them.

Claims under **42 U.S.C. §1983** have not been broadly effective either.[98] Plaintiffs must first overcome the barrier of qualified sovereign immunity. An officer who invokes the defense of qualified immunity typically argues his actions were reasonable under the circumstances, placing a heavy burden on the plaintiff to prove that the police consistently stopped people solely because of race. Further, municipalities or unions usually indemnify defendant officers. None of the civil remedies addresses flawed management, policies, or patterns of abuse. When officers lose a civil suit, they rarely have to go into their own pockets to pay.[99]

When a pattern or practice of racial profiling stops, it is usually because of political or social action, some development that does *not* take place in court. In New Jersey, for example, Governor Whitman made a public statement conceding that racial profiling was official state policy, on the Jersey turnpike in particular. In Maryland, statistical evidence presented by the ACLU convinced the Court, but the racial profiling stop of a Harvard-educated African American lawyer provided the context.[100]

Consent decrees

Authorities often settle these cases out of court, and a consent decree issues rather than an award of money damages. In the Maryland case, the ACLU found a published memo during discovery, asking police officers to be on the lookout for drug couriers, who would be "predominantly black males and black females."[101] The state of Maryland settled shortly after,[102] agreeing to record the gender and race of drivers stopped[103] and requiring Maryland police officers to file extensive data reports on the conduct of each stop.[104] These reports help identify racial profiling incidents.[105]

Attorney Johnnie Cochran got the LAPD to abolish the chokehold, discussed at the beginning of this chapter, after winning a case against the Department in state court. The chokehold alone caused fifteen deaths between 1975 and 1982.

"I represented a guy named James Thomas Mincey, and they had put a choke hold on him, and they did it in front of his mother," Cochran says. "His mother was pleading with the police, 'Please don't kill my boy.' Mincey lived only a few days and then died. But that was the case that was used to get the Los Angeles Police Commission to issue a moratorium on the use of chokeholds. Police Commissioner Darrell Gates complained then, and he complained when the Rodney King case came up. He said 'If only we could have choked him out, then we wouldn't have had to use the baton.' I said, 'Are you crazy! We would much prefer that he have a couple of broken bones.' That's when we got the moratorium on the choke hold, and that stopped the death of more youngsters. I take pride in that."[106]

The chokehold ban Cochran won still stands.[107] The state of California as a whole is required to collect data similar to required in Maryland, because of a settlement from a racial profiling case.[108]

Pursuant to a consent decree, the police department agrees to take steps to alleviate the problem, perhaps by establishing a new policy against profiling, or requiring officers to undergo sensitivity training. Some decrees require police officers to issue a preprinted card whenever making a stop. The cards provide motorists with instructions and give a hot line number for lodging complaints. In some cases, officers must hand the motorist a written consent form to fill out before they can conduct a search during a traffic stop. [109]

Other decrees require traffic citation forms to record the motorists' apparent race, and require the department to assemble a database of every stop or frisk conducted, specifying particulars such as the race of persons stopped, whether the arresting officer searched them, and whether they gave their consent. New techniques include installing video cameras in

police cars, [110] and revoking repeat offender's police certificates (preventing them from serving on any police force in the state). [111]

Consent decrees can also require community outreach or require the department to set up a citizens' advisory board. Advisory boards can analyze data generated under consent decrees and make recommendations to police department supervisory personnel. They can issue warnings when they see spikes in racial arrests. They can also help identify repeat offenders among the officer corps for counseling, retraining, or dismissal. The advisory board's most important advantage is publicity, which is the best way to keep Department Heads focused on the problem.

Attorneys who practice in this area can help prepare the ground for future consent decrees by cooperating with organizations that conduct empirical studies on racial profiling. Collecting this data will buttress their client's allegations, providing attorneys and civil rights organizations leverage to negotiate for change. Every consent decree sets a precedent, eroding the ability of law enforcement to stall on this issue. In addition, as always, community action and media attention help bring patterns and practices of police misconduct to the light of day.

§3.4: What Needs to Change?

Police sometimes beat or brutalize "profiled" suspects. Beyond ordinary brutality, police also have access to powerful semi-automatic weapons; their training and supervision in the use of these weapons is often inadequate. Unlike traditional guns, these weapons fire many rounds in rapid succession, increasing unjustified shootings and deaths from multiple police gunfire.[112] Police need training not only in the handling of these weapons but also in broader tactics to minimize the need to use such "weapons of mass destruction."

Victims of racial profiling and other police abuse experience deep psychological and emotional trauma, and may become antagonistic toward the criminal justice system and society as a whole. Racial profiling legitimizes years of feelings of injustice, distrust, and cynicism by African-Americans about police and the criminal justice system as a whole. Furthermore, when the police treat law-abiding citizens like criminals, they will not trust the police to protect their rights or interests when they need help. This lack of trust discourages citizens from assisting in the prevention of crime, and the gulf between law enforcement and the minority public widens further.

In 1999, President Clinton called racial profiling morally indefensible and directed federal law enforcement agencies to collect and report data on the race, ethnicity, and gender

of individuals stopped, questioned, and searched.[113] In 2003, the Bush Administration released a set of guidelines promulgated by the Civil Rights Division of the Department of Justice entitled, *Regarding the Use of Race by Federal Law Enforcement.* These guidelines concede that racial profiling is a civil rights violation, but permit racial profiling in special cases including but not limited to national security. Unfortunately, the 2003 guidelines provided no enforcement or even monitoring mechanisms to ensure federal law enforcement agencies comply.

Attorney General Eric Holder, himself a victim of racial profiling as a young man, [114] has stated that ending racial profiling is a priority for the Obama administration. [115] He has ordered an internal review of DOJ law enforcement data, and vowed racial profiling will not be acceptable under his watch.[116]

Individual bills introduced in Congress to address the racial profiling problem, such as the "Traffic Stops Statistics Act (1997, and the Racial Profiling Education and Awareness Act of 2002 failed to pass.[117] A newer bill, The **End Racial Profiling Act,** calls for every federal, state, and local law enforcement agency to ban racial profiling and subjects offending departments to private citizen lawsuits. [118] It also recommends these agencies take disciplinary action against offending officers, adopt civilian complaint procedures, and start a database. [119] The Act would bind all federal law enforcement agencies as well as state and local agencies receiving federal funds.

The ACLU introduced the End Racial Profiling Act (ERPA) in 2001, and re-introduced it in 2004, without success. [120] Hoping for better luck in the Age of Obama, the ACLU and the NAACP began lobbying to pass the bill in 2009.[121]

THE HANDBOOK

§3.5: First Aid

A police stop can happen to anyone at any time. Police can use any traffic violation they have the discretion to pursue as a pretext, even a broken taillight or inoperable direction signal. In the event a police officer stops you, there are certain things you need to do at that moment, and other things you need to do as a follow-up.

The normal reaction for most victims of racial profiling is to do nothing and obey every request the police officer makes. This is a good survival technique. Keep your hands on the steering wheel, in plain sight. Always have your driver's license, car registration, and insurance card easily available.

Once the officer stops you, he can order you or your passengers to get out of your car if he believes you pose a threat. The officer needs no objective evidence. His perception is what counts.

The officer can question you without giving *Miranda* warnings. Officers have the right to frisk any individual who they perceive as posing a danger or threat, so choose your words carefully, and be conscious of your movements, body language, and emotional state.

You are *not* required to give a police officer permission to search your car however.[122] You can deny the request, but do so politely. The police may try to intimidate you by prolonging the stop, ordering you to stand in a particular place, and failing to inform you when you are free to leave.[123] Under these circumstances, many motorists will give consent, feeling that they have no choice or that the officer will continue to harass them until consent is given. However, if you consent, the officer can conduct a full-scale search of the vehicle, including your personal effects in plain sight and the contents of any compartments.[124]

Do not be confrontational, provoke an argument, or allow yourself to be provoked. These situations can escalate very quickly. Do not contradict the officer, complain on the scene, or threaten to file a complaint. Your demeanor during the incident can be introduced in court should you wish to pursue your legal rights.

Above all, wait until the officer releases you from custody before following any of the next steps listed below. If arrested, ask to speak to an attorney. Preserve your right to counsel.

Call a friend, relative, or attorney on your cell phone immediately after police release you. Ask for help, tell them your story. You can also use your cell phone's voicemail to record the incident immediately after the police release you. If you do not have your phone, tell someone else about the incident as soon as possible after it occurs, so that they can testify that you spoke to them, and can describe your demeanor even though hearsay rules prevent them from testifying as to what you actually said.

Try to recall the names of the officers, their badge numbers, squad car number, or license plate number. Also, make a note of the location and time of day, because police records will show who was on duty at that time and location.

Call the police department and tell them the complete story as soon as possible. This is particularly important if you have suffered injuries. Even if they tell you there is nothing that they can do at that moment, they will at least have to make note of the complaint in their

daybook, which your attorney can subpoena later if necessary. After suffering police misconduct, many people are so frightened they consider themselves lucky just to be able to leave the scene. However, by making a police report, you create important documentation for your case. Your evidence can also corroborate complaints made before or after yours.

Next, file a compliant with the local police precinct using their complaint forms and dealing with the specific staff members who handle citizen complaints. You should also write a letter or file a complaint with a citizen review board if one exists. If the matter is not satisfactorily resolved, proceed to the Chief of Police and from there to your local city council member. You must exhaust that process before you sue, but you also must not wait too long, because your right to bring a case may expire under the relevant statute of limitations

§3.6: Who Can Help?

Victims of racial profiling, false arrest, excessive force during interrogations, and other police misconduct can look for assistance in several places. At the federal level, you can make a complaint to the Criminal subsection of the US Department of Justice's Civil Rights Division. You can also file a complaint with a state or local human rights agency. In most cases, these agencies will expect you to lodge an official complaint with the local police department. You can also make a complaint to a civil rights organization such as the ACLU or the NAACP. Finally, you can hire a private attorney to bring a suit for damages against the police department.

Local Police Department

If you believe the police stopped you for no good reason and suspect that race motivated the officer involved, file a complaint in writing with the police department's Division of Internal Affairs. File a copy of the complaint with another agency, such as the district attorney's office, or with a civil rights organization, because department personnel may try to talk you out of filing a complaint, or misinform you about proper procedure for filing. Once filed, complaints might get "lost."

Department of Justice

The DOJ has the authority to bring a civil action against a police department that has engaged in racial profiling. 42 U.S.C. §14141 gives the DOJ authority to move against law enforcement officials engaged in any pattern or practice which jeopardizes constitutional rights. In addition, the Violent Crime Control and Law Enforcement Act of 1994 authorizes the U.S. Attorney General to bring a civil action for declaratory or equitable relief against

police departments engaged in a pattern or practice of racial profiling. The Department also has authority under Title VI of the Civil Rights Act and the Omnibus Crime Control and Safe Streets Act of 1968 to proceed with litigation to combat racial profiling. Finally, the DOJ can use 18 U.S.C. §§ 241 and 242 to bring criminal actions against police officers who abuse their authority. [125] Such prosecutions are exceedingly rare, however, because of the need to prove intentional abuse.[126]

The Justice Department's Civil Rights Division has established a police misconduct initiative to coordinate enforcement. When they discover possible violations through media reports or their own investigations, they move to address them. These investigations sometimes go on for years.

The Department's authority under 42 U.S.C. § 14141 enables it to engage in private settlements as well as seeking consent decrees though the courts. Information generated under a consent decree helps the Civil Rights Division keep close tabs on department activity and ensure compliance. Typically, the DOJ will lay out a specific objective that the department has to reach before the courts lift the decree. (Public, court-ordered consent decrees enable civic groups such as the ACLU to monitor the results as well.)

The DOJ does not use its lawyers as front line troops to combat police abuse,[127] partly because the Criminal Section of its Civil Rights Division does not have adequate funding or staff.[128] Less than 1 percent of complaints referred to the Justice Department actually lead to federal indictments.[129]

Civil Rights Organization

The NAACP has been very successful in pursuing private agreements with police departments, convincingly arguing that it is better for the department to be on top of the situation when the inevitable outrageous case hits the news, rather than having to call the NAACP in to cool things down in the community after it explodes. Contact your local NAACP branch office for more information. Community oversight groups such as Cop Watch have also had some success.[130]

The ACLU uses litigation more, pursuing a number of cases in federal court to secure settlements or large monetary awards. The ACLU does not litigate every complaint brought before them, but rather keeps a record of complaints they receive to identify discriminatory patterns and problem police departments. You can call a local ACLU office or file a complaint on the ACLU website at www.aclu.org.

The ACLU's weapon of choice, like the Civil Rights Division, is the consent decree.[131] Before entering into a consent decree, however, civil rights attorneys will ordinarily demand an independent investigation of the offending police department's policies and practices, to establish a baseline for measuring improvement. Such an investigation typically includes interviews with police supervisory personnel, evaluation of education and training programs, and a review of written policies and practices. Investigations review the department's procedures for monitoring officer activity as well as the agency's formal procedures for responding to citizen complaints.

§3.7: Getting Organized

The police officially protect and serve the entire community, not just members of the majority racial group. Ultimately, then, it is the community that must "determine the scope of police power, and communicate what the limits are."[132]

Human Rights Watch recommends the following steps: [133]

(1) Urge your city government to provide full funding for citizen review of police officers accused of human rights violations;

(2) Urge your city government to require your police department to create and utilize early warning or "at risk" systems to identify problem officers;

(3) Urge your state legislators and governor to create a special prosecutor's office to investigate police officers accused of brutality or corruption; and

(4) Urge your U.S. Representative or Senators to condition police departments' federal funding on their reporting incidents when their officers use excessive force.

Some states, such as New Jersey and Maryland, have already passed legislation establishing monitoring and early warning systems, and the Obama Administration's Attorney General, Eric Holder, seems poised to use federal funding as both carrot and stick.

That leaves civilian police review boards, which are not uncommon. Special state prosecutors independent of the police, however, are extremely rare.

Civilian Review Boards[134]

Because government at all levels has failed to properly deal with police misconduct, many communities are turning to independent civilian review boards and independent auditors to investigate allegations of abuse.[135] The mayor or other senior government officials from outside the department appoint the board. The board generally reviews complaints and makes disciplinary recommendations after the police department has completed its own investigation.

In localities establishing civilian review boards, citizens can file administrative complaints to the board. Some of these boards even have subpoena power, and can require officers to appear at hearings as well as review personnel files. The board can also provide important information to police administrators about management problems that might otherwise go unnoticed.[136]

Other tasks the board may undertake include data collection,[137] and establishing a website to publish their findings and permit victims to tell their stories.[138] It is also very important for the board to zero in on police sergeants as the "line officers" who have the greatest impact on police functions that directly affect the public: arrest, search and seizure, conflict management, use of force, and interrogation techniques.[139]

Police-community dialogue

Civilian review boards often grow out of police-community dialogue rebuilds a measure of trust or creates one where none existed.[140] The ACLU of West Virginia launched a Campaign to End Racial Profiling in June 2009,[141] including a series of "Know Your Rights" public education seminars around the state open to members of the community and law enforcement alike. [142] Because of this community-based campaign, the Charleston Police Department announced in October 2009 that it would incorporate training geared towards the unacceptable practice of racial profiling for all officers in the city.[143]

Everyday Democracy is also a good source of information on how to organize such a campaign, along with your local ACLU or NAACP branch.[144] According to their website,

> *Poor relations between community members and police can lead to feelings of distrust, anger, and fear. Citizens may think the police are prejudiced and have unfair policies. Police may feel blame for all kinds of social problems, and think they don't get credit for doing their jobs.*

They offer a five-session "discussion guide" designed to help communities bring police and residents together to build trust and respect, develop better policies, and make changes for safer communities.[145]

Chapter Four
Discrimination Against Consumers

***Public Accommodations*:**

It is illegal for the provider of any public accommodation (restaurants, hotels, public transportation) to discriminate against a potential customer or client because of race.
SYNOPSIS, THE CIVIL RIGHTS ACT OF 1964, TITLE II

***Private Accommodations*:**

It is illegal for the seller of any good or service to discriminate against a potential customer because of race.
SYNOPSIS, THE CIVIL RIGHTS ACT OF 1866

THE HISTORY

§4.1: What's the Problem?

In the 1960s, African American students staged "sit-ins" to break Jim Crow segregation in Southern restaurants. Cases reaching the U.S. Supreme Court between 1964 and 1966 included *Bell V. Maryland*,[1] and *Bouie v. City of Columbia, S.C.*[2] Local authorities charged the students with criminal trespass. The Supreme Court generally reversed their convictions, creating a moral victory every bit as important as *Brown v Board of Education*. This struggle, like the struggle for a fair and equal education, continues forty years later.

Today, covert discrimination against African American consumers replaces the overt discrimination of Jim Crow (See Chapter One). Anyone with the least semblance of authority can inconvenience or even threaten an African American person who must move about in public, in a kind of "private" racial profiling (See Chapter Three).

In 1995, Robert Sheehan, a white security guard for the Eddie Bauer Warehouse store in Fort Washington, Maryland, accused Alonzo Jackson, a sixteen-year-old African American boy, of stealing the Eddie Bauer shirt he was wearing in the store.[3]Jackson actually purchased the shirt at the store a day earlier, and wore when he came back to shop the next day with friends, Rasheed Plummer, 18, and Marco Cunningham, 20.

Sheehan followed the boys around the store and blocked their path when they tried to leave. Sheehan, a Prince George's County police officer, worked as a guard at the store

during his off-hours, but wore his police badge and carried his police revolver. Another off-duty officer detained Jackson's friends, Plummer and Cunningham, while Sheehan questioned Jackson.

Sheehan demanded Jackson show a receipt for the shirt he was wearing and when he could not, ordered him to remove it. Jackson, wearing only an undershirt, left the store with his friends. Jackson returned home, and found his receipt after a long search. The store returned his shirt that evening when he came back with the receipt.

Civil rights attorney Donald Temple represented the boys in an action charging the store with falsely imprisoning all three of them, negligently supervising store security guards, and defaming the boys' character. The court awarded Jackson $850,000 in compensatory and punitive damages, and awarded co-plaintiffs Plummer and Cunningham $85,000 each.[4]

Background

Discrimination against African Americans in search of goods and services is deeply rooted in American racial subordination. During slavery, plantation masters allowed only house slaves to enter their homes and kept field hands at a distance, forty feet away from the master's home at all times.[5] As soon as slavery ended, Southern states passed Black Codes denying African Americans access to public accommodations such as trains, hotels, and restaurants. Barred from private clubs and groups, African Americans eventually formed their own, such as the Prince Hall Masons and, in the 20th century, various Greek letter organizations.

Congress launched Reconstruction after the South made its defiance manifest with the Black Codes. However, as soon as Reconstruction ended, the "Jim Crow" system emerged (named after a minstrel show character from the 1830s, an old, crippled, slave who embodied negative African American stereotypes). Jim Crow laws separated the races in every sphere of life reinforcing white "supremacy." *Plessey v. Ferguson* declared Jim Crow constitutional in 1896. Well into the mid-twentieth century, Jim Crow segregated transportation facilities, schools, housing, libraries, restrooms, drinking fountains, the offices of physicians and lawyers, barber and beauty shops, hospitals, and even cemeteries.

African Americans and whites lived very near one another in the rural South. In the North, in contrast, the extremes of formal segregation were rarely necessary because African Americans and whites lived farther apart. Northern African Americans traveled long distances from their segregated neighborhoods to the menial jobs they worked downtown and in white neighborhoods. Informal codes required African Americans to enter through the

back door of white people's homes and to address white people by title and last name, while white people addressed African Americans, no matter their age, by their first name or nickname.

If African Americans attempted to enter restaurants informally reserved for whites, staff might simply refuse to admit them. If allowed to enter, staff might signal that they were unwelcome by subjecting them to long waits or no service at all, poor service when it came, and generally rude and brusque treatment.

Consumer Discrimination Today

There are no more legally segregated hotels, restaurants, or travel facilities in the Southern mold; however, the Northern strategy of informal and *defacto* segregation has spread throughout the country. Attorney Donald Temple, who litigated the Eddie Bauer case, calls this type of treatment "consumer racism." Consumer racism today threatens all African Americans rich and poor, young and old.[6]

Consumer racism describes not only the shopkeeper who harasses African American customers by following them around his store,[7] but also the restaurant waiter who insists on seating African American customers, no matter how well dressed or well mannered, at the rear of the restaurant, near the bathroom or the kitchen. Consumer racism arises in cases involving complaints against bars and nightclubs that charge higher admission fees to African American customers than to white customers.[8]

African Americans have also sued hotels, motels, and inns for giving them inferior rooms, or attempting to screen out African American patrons who inquired about a room when they "sounded black" over the telephone.[9]

This kind of discrimination (as well as outright refusal of service) limits African Americans' access to vital goods and services. Barriers exist in accessing *public* accommodations such as restaurants, hotels, and public transportation. They also obstruct access to *private* accommodations such as clubs and retail stores.[10]

Public Accommodations

RESTAURANTS

Before Congress passed the 1964 Civil Rights Act, the name of the *Denny's*, the nation's fourth largest restaurant chain, was *Sambo's.* Its advertising celebrated negative African American stereotypes, and its logo featured a large caricature of a young African American boy's face.

In 1993, the Justice Department filed a complaint against the Denny's Corporation, alleging that *Denny's* employees required African American patrons to prepay for their meals, pay a cover charge, and show identification before receiving service.[11] The complaint also alleged that *Denny's* employees forced African American customers to wait unreasonable amounts of time, and that employees discouraged African American customers or simply refused them service. The chain denied free "birthday meals" to African American customers and forcibly removed African Americans from restaurants.

The large number of complaints against *Denny's* included one from two African American members of President Clinton's Secret Service detail. In 1993 a group of 21 U.S. Secret Service officers, 7 African American and 14 white, all in uniform, stopped at a *Denny's* restaurant in Annapolis, Maryland. Restaurant staff failed to serve any of the six African American officers, who were sitting together, during the 55 minutes they sat in the restaurant.

In San Diego, California, a group of eleven African Americans had to prepay for their meals while several witnesses observed white patrons pay at the register after eating. In another incident, restaurant staff told a group of 18 African American high school and college students that they would not serve them unless they paid for their food in advance or paid a $2.00 minimum. At the same time, there was a group of white students in the restaurant; no staff member asked them to prepay or pay a minimum. Even though the African American students offered to break into several smaller groups, the restaurant staff still denied them service.

In San Jose, California, *Denny's* restaurant staff required a group of seven to ten African American students to prepay for their meals, and another group of fifteen to twenty African American high school students waited for over an hour to have their orders taken. When the waitress finally came over, she told the students they would have to prepay for their meals. After half of the group left the restaurant, restaurant staff called the police, who escorted out the other half. At this same restaurant, the police at the request of the restaurant removed four female students, three African American and one East Indian. Restaurant staff did not permit the students to finish their meals because there were "too many of you people here."

Restaurant staff at a *Denny's* in Vallejo, California denied a free birthday meal to one of the children in an African American family party of two parents and three children. Staff subjected the family to lengthy waits for service and treated them poorly. In Mojave,

California, an African American family eventually left the restaurant without staff ever offering them a seat, while they promptly seated numerous white patrons who arrived at the restaurant. Staff in a Shreveport, Louisiana restaurant seated an African American man and a white woman but never served them, instead serving tables all around them.

Denny's officials instructed restaurant managers in San Jose, California to limit African American patronage by ignoring African American customers, telling them that tables were not available, requiring prepayment, and closing down the restaurant when too many African American customers attempted to visit. Company officials instructed managers in Los Angeles to seat African American customers in certain areas, require prepayment, deny separate checks to groups, charge a 15% gratuity to the checks of African American customers, and discourage African American customers by denying seating or requiring a prolonged waiting period.

Denny's denied all the above allegations, but it settled the Justice Department case and signed a consent decree promising to instruct restaurant managers and staff not to discriminate against any patron because of race. It promised to instruct them to cease asking for prepayment, cover charges, or identification as a condition of service. It promised to instruct them not to discourage any person by their statements or by denying or offering less favorable service. It promised not to retaliate against any employee reporting such discrimination.

The decree also implemented a non-discrimination training program and required each Denny's restaurant to post a sign indicating that it is open to all persons without regard to race or color. All advertisements must contain no less than 30% of identifiably non-white persons and at least 25% of identifiably African American persons. The court awarded the class $28,000,000 in damages. The named plaintiffs received $25,000 each and the remaining money went to the class "Reserve Fund" for any future class members.

In 1999, an African American couple, the Pilsons, visited a *Cracker Barrel* restaurant in Suwannee, Georgia with four friends. After waiting approximately forty-five minutes for service, they noticed that white customers who entered after them had already received their meals. Mr. Pilson complained to the manager. A white server then took the Pilson party's orders, but their food did not arrive for an additional forty-five minutes.

When one of the Pilson's guests requested extra napkins from the waitress, she put the napkins on the table without speaking in response. Then the same waitress, walking by the table, spilled water all over Ms. Pilson from a tray. The waitress refused to apologize, or

even acknowledge the incident. The Pilson party sued *Cracker Barrel* for racial discrimination.

Although Cracker Barrel denied the charges, 310 current and former *Cracker Barrel* employees testified that discrimination regularly occurred in *Cracker Barrel* restaurants in 31 states. They testified that the restaurant mangers directed servers to seat patrons separately based upon race. [12]

In 2000, a customer lodged a complaint with the Justice Department's Civil Rights Division against a *Domino's Pizza* in North Carolina, charging the store refused to deliver to African American neighborhoods. The DOJ investigated, found the claims supported, and ordered Domino's stores to define their definitions of "unsafe areas" without regard to race and to submit such determinations to annual review.

Also in 2000, Terrance Taylor placed a to-go order at the *Waffle House* restaurant in Stockbridge, Georgia. Staff required him to prepay. [13] A white couple arrived after Taylor, sat at the bar, placed their order, and received their food before him. When Taylor asked the cook what was taking so long, the cook ignored him. He then noticed a tray of food next to the grill, which turned out to be his order; it had been sitting there for 10 minutes. When Taylor finally received his food, it was too cold to eat.

In July, 2001, Brenda French, along with her daughter and three young grandchildren entered the Waffle House in Conyers, Georgia to place a to-go order.[14] The restaurant was not busy. About fifteen minutes later, a white man came in and sat on the bar placing an order. After the man received his order, French asked the cook how long hers would be. The cook replied saying "he was busy and he'd get to it when he could." [15] A white couple entered and placed a to-go order. A white man came in, sat at a booth, and placed his order. Both sets of customers received their food before French.

French's daughter, Nicole French, who had been waiting in the car, entered the restaurant to inquire about what was taking so long. The cook overheard the comment and said, "I'm doing the best I can." Nicole French responded that her mother had been waiting for at least thirty minutes. The cook then responded, "I don't have to serve you, and you all can get out," and threatened to call the police. Upon exiting the restaurant a few minutes later, the police pulled up informing the Frenches that the management had called for help with "unruly customers." The court refused to admit evidence from Waffle House employees about training they received instructing them to limit services provided to African Americans.[16]

In January, 2003, at the same Waffle House, an African American male placed a to-go order.[17] The staff instructed him to prepay despite the visibly posted written policy stating that staff should not ask customers to prepay for their food.[18]

In May 2003, Hakeem Mack and his party waited over an hour at their table before they could waive down a server.[19] The waitress did not apologize or take their order, but told them she would send another waitress. The party then waited an additional fifteen minutes before a second waitress came and took their order, without apologizing. After 45 minutes, the party inquired about the status of their food. The manger informed them that the server had understood their order to be a to-go order and it had been sent to another Waffle House location. Additionally, he told them if they wanted their food, they would have to go to that Waffle House. During Mack's two hours at the location, restaurant staff seated a number of white customers, and served them within a short time after seating them.[20]

HOTELS

Hotels may give African American patrons less desirable rooms, ask them for more proof of identification to secure a room, or burden them with surcharges for services normally provided for hotel guests free of charge.[21]

In *United States v. Satyam, LLC d/b/a Selma Comfort Inn, et al.* (S.D. Ala.), customers reported that the hotel owner steered African American guests to back rooms, charged them higher prices than they charged white guests, and denied them equal access to hotel facilities and services.

In another case, Marcus Sherman stayed at a Baltimore hotel while attending a professional conference in 2003. After a workout at the hotel gym, his card failed to operate when he attempted to re-enter his room. When he went to the front desk for a replacement, the staff asked for identification, in accordance with hotel policy, but Sherman's was locked inside the room. In such cases, hotel protocols directed security staff to escort guests to their rooms to retrieve their identification in order to bring it back to the front desk for verification. However, Sherman waited for almost twenty minutes before a security guard arrived. During that time, the front desk receptionist told Sherman he "could have come in off the street."[22] An African American security guard then escorted Sherman back to his room and let him remain in his room while he took the identification up to the front desk.

Sherman learned that a white female colleague locked her card in her room the day before.[23] She received a new key without having to show identification. Sherman went to

the hotel manager, who apologized, and provided him with two hundred dollars in gift certificates.

Private accommodations

The law considers discrimination in clubs, organizations, and retail stores *private* discrimination. Such accommodations are generally exempt from Title II's regulations governing public accommodations.

PRIVATE CLUBS

Private clubs include social clubs, golf and country clubs, swimming pool groups and recreational complexes, as well as organizations and associations like the YMCA and the Boys Scouts of America. African Americans who face discrimination in these contexts usually have to look beyond Title II for relief. Members of clubs and organizations develop relationships and bonds based on similar family and cultural backgrounds, educational experiences and personal recreational interests. Once these relationships form and the membership solidifies, clubs often refuse to accept others. Yet clubs and other voluntary associations, and the networks they create, play a crucial role in social and career development. Parent leaders in suburban public schools often emerge from such groups, for example.

RETAIL STORES

Shopping has become a pervasive American social activity, bringing people together in central locations on a daily basis.[24] It is arguably one of the last surviving forms of public community association in the United States, yet sixty percent of African Americans feel they face discrimination while shopping.[25] Facing discrimination in such a common part of life creates daily stress.[26]

The discrimination African American shoppers experience has been described as a kind of "consumer" racial profiling (see Chapter Three) sardonically called "shopping while black."[27] Consumer racial profiling occurs when merchants treat shoppers differently because of their race or when they degrade or deny the shopper the product or service they seek. Many shopkeepers apply different protocols to African American customers, disproportionately accusing African American shoppers of stealing, subjecting them to verbal harassment and in extreme cases, humiliating public strip searches.[28]

Some store managers order their employees as well as follow African American customers in the store, and refuse to provide them with large shopping bags, sure African American customers are shoplifters.[29] At the same time, managers require security personnel

to apprehend a minimum number of shoplifters in a given period, and security zeroes in on African American shoppers as "likely suspects" and easy to accuse. [30]Large department stores use undercover detectives, specifically instructed to shadow African Americans in their store.[31] There have been numerous confrontations between shoppers and security guards at *Dillards* department stores, for example, some of them quite serious. Lawsuits against them continue to this day. [32]

In July 2004, Samaad Bishop went to purchase a doll set for his daughter at the Bronx *Toys "R" Us* store.[33] While trying to exit, the security guard demanded Bishop's receipt as proof of payment before he could exit the store. When Bishop declined, the security guard blocked his exit, physically forcing him back into the store. Bishop was detained until the police arrived. Bishop asked the security guard for permission to leave on several occasions and each time the guard refused.

The security guard told Bishop that checking for receipts was a "store policy" because "this is the Bronx, not the suburbs and black people steal more than whites."[34] Additionally, Bishop observed two white women walk past the security guard without being asked to show a receipt. When the police arrived, Bishop showed them his receipt. They then allowed him to leave.

Discrimination often masquerades as legitimate business practice,[35] so it is sometimes hard to prove that discrimination actually occurred. Most consumer transactions are transitory, leaving few opportunities to see if African American customers encounter different treatment from white customers.[36] Is a single incident racial discrimination or is the sales clerk simply incompetent or having a bad day?[37]

Mr. Pitts, an African American employee of G.A.F Materials Corporation went to the *Wal-Mart* in Brandon, Florida to purchase 520 gift cards he had ordered for the company to hand out during Christmas. [38] He had G.A.F Accounting issue a check for the cards, and then went to the customer service desk at *Wal-Mart* to pick them up. For years, G.A.F. had sent a white female administrator to buy the cards without incident. This time, the store manager stalled for two hours before accepting the check. Mr. Pitts had already presented his G.A.F. business card, driver's license, and the toll free number to G.A.F.'s bank. Two African American clerks watching the scene told Mr. Pitts that several similar transactions took place that day without any delays whatsoever.

Pitts finally got upset and asked for the check back but the two store managers refused to return it.[39] Later, two deputies arrived from the Hillsborough sheriff and asked

about the forged check Mr. Pitts brought in. One deputy explained that Wal-Mart staff had called and reported that Mr. Pitts had committed a felony. Within minutes, the deputies cleared Mr. Pitts and determined that there was no reason for a criminal charge. *Wal-Mart* has since opened its own investigation of the matter. Four Wal-Mart officials called Pitts apologizing for the incident, but none explained what happened.

Jesse Williams visited a *Staples* office supply and photocopying store in Virginia to purchase an ink cartridge in the summer of 2001.[40] When he reached the cash register, he presented a personal check as payment to the clerk. The check was pre-printed with his name and Maryland address. The clerk refused the check, informing Williams that *Staples* "did not accept out-of-state checks."[41] Williams then offered to show the clerk his state driver's license and student identification card, but the clerk repeated that *Staples* did not accept out-of-state checks. Williams left the store without purchasing his ink cartridge.

Williams learned that store clerks allowed one of his acquaintances, a white woman, to use an out-of-state check the very same day they denied him the privilege.[42] In response, Williams called the *Staples* manager and explained his story. The manager told him that the decision to accept out-of-state checks was a "judgment call" that was decided on a "case by case basis."[43]

At this time, *Staples* had a nationwide policy of accepting all checks clearing a third-party check verification system. The procedure included running the check through a device on the cash register. Williams reported his incident to a civil rights advocacy agency.

In April 2006, Jacqueline Brown, an African American woman attempted to purchase a thousand dollars worth of merchandise at a Panama City, Florida jewelry store.[44] The sales clerk not only asked for her driver's license, but also a fingerprint, for identification. Brown refused to provide her fingerprint, claiming racial discrimination, demanded and received a refund. Later, a white "tester" went to the store to purchase the same merchandise. The clerk did not ask the tester for any proof of identification whatsoever.

OTHER RETAIL CONTEXTS

Automobile dealers, appliance vendors, and others who deal in durable goods often charge African Americans higher interest rates for long-term credit.[45] For example, African American customers seeking to finance their automobile purchases complain that the Nissan automobile franchise charges them higher interest rates than they charge whites with the same credit rating.[46]

Auto dealers may also be more likely to renege on warranty claims when the customers are African American. Tyrone Causey took his 2000 Chevrolet Corvette into *Sewell Cadillac-Chevrolet, Inc*. for servicing covered under warranty.[47] Initially, upon inspection, employees told Causey his car needed repairs. However, once the technician learned a warranty still covered the vehicle, he informed Causey that the vehicle required no repairs.

Causey then complained to the serviceman's superiors both in person and over the phone, to no avail. Causey received a receipt on which a Sewell employee wrote "not happy."[48] This same person also stated "niggers always want something for nothing," and had Causey escorted off the premises by a security guard. Additionally, he told Causey not to return "ever again" to *Sewell*.

§4.2: What's the Law?

Public accommodations

Even though the landmark *Brown* decision sought to desegregate public schools, it was the grass-roots struggle to open public accommodations that caught the nation's attention, beginning with the Montgomery bus boycott, and continuing with the Freedom Rides and Sit-Ins. While litigation remained the weapon of choice in the education arena (See Chapter Seven), direct action, boycott, and massive demonstrations drove the fight against discrimination in public services and accommodations. Title II focused on public accommodations to "remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." [49] The bill passed after one of the longest debates in Senate history.[50]

Congress grounded the expansive coverage of the Civil Rights Act of 1964 in its power under the Commerce Clause rather than the Fourteenth Amendment's equal protection clause, to avoid the U.S. Supreme Court's post-Civil War precedents limiting the Fourteenth Amendment's power to "state action," exempting the activities of private individuals. To meet the requirements of the Commerce Clause, however, Congress had to focus on establishments that affect interstate commerce—businesses that sold goods moving between the states and businesses that offered services to customers traveling between the states.

Title II of the Civil Rights Act lists four types of goods and service providers as "public accommodations" affecting interstate commerce. First are places of lodging--hotels and motels, but excluding small establishments with five rooms or less, in which the proprietor actually lives. Small bed and breakfasts are exempt.

Second are eating-places, such as restaurants and lunch counters, including facilities located on the premises of any retail establishment, or any gasoline station. Third are places of entertainment--movie theaters, concert halls, sports arenas, stadiums, and the like. Fourth is a catchall category, covering any provider physically located on the premises of any of the establishments described in categories one through three. This category would cover a concession stand inside a movie theater, for example.

Southern businesses immediately challenged Title II as unconstitutional. In *Heart of Atlanta Motel, Inc. v. United States*, (1964) the owners of a motel in Atlanta, Georgia claimed they had the constitutional right to discriminate against African Americans when they attempted to rent motel rooms.[51] The owners claimed that the Civil Rights Act of 1964 violated the Fifth Amendment because it overly restricted their property rights, and brazenly argued that compliance with Title II subjected them to involuntary servitude in contravention of the Thirteenth Amendment! They lost.[52]

The second case was *Katzenbach v. McClung*, (1964) [53] brought against a barbeque restaurant that refused to serve a young African American man because of his race. The Supreme Court ruled against the restaurant after the Justices extensively debated whether restaurants were part of interstate commerce. Importantly, the court concluded that Congress' power under the Commerce Clause extended to activities carried on wholly inside of states that nonetheless "affected" interstate commerce.

The courts applied the law aggressively at first. In *Daniel v. Paul*, (1969) African American plaintiffs sued a club owner who denied them admission. [54] The Court agreed that the club's snack bar made the entire facility a place of public accommodation and that the club's operations affected interstate commerce. [55] In *Fazzio Real Estate Co. v. Adams*, the Fifth Circuit held that if a covered establishment is located on the premises of a business not covered by the Act, both businesses become subject to the Act's requirements.[56] Similarly, in *Olzman v. Lake Hills Swim Club, Inc.*, the Second Circuit held that the presence of a place of entertainment (a swimming pool) within a club brought the entire club within the meaning of a "public accommodation."[57]

In *Rousseve v. Shape Spa for Health and Beauty Inc.*, the Fifth Circuit considered curative rehabilitative treatments, diets, physical exercise, baths, and sauna treatments coupled with facilities that included gymnasium equipment, thermal baths, whirlpool baths, inhalation rooms, solaria, and swimming pools recreational activities, bringing them under the category three definition of entertainment.[58] However, in *Halton v. Great Clips, Inc.*, the

court found that service establishments such as hair salons where not intended to fall within the "entertainment" meaning of public accommodations, and rejected broader application of the statute to encompass such establishments.[59]

Private Accommodations

Title II of the Civil Rights Act of 1964 covers private clubs only if they are located on the premises of a public accommodation such as a hotel or restaurant.[60] This omission enables private clubs to exclude non-members from important professional, business, social, and recreational opportunities (unless they hold a public liquor license in which case regulation under the statute is possible.) However, Title II will cover a club if it is not actually "private." To be private, clubs must be truly selective, and a club seeking exemption bears the burden of proof. For example, does membership require any qualification other than race?

Title II also exempts most retail services, but **the Civil Rights Act of 1866 (Section 1981)** [61] protects the right to contract for goods and services without racial discrimination in private as well as public contexts. In *Jones v. Alfred H. Mayor Co.*[62], the United State Supreme court held that the Reconstruction Congress which passed the 1866 Act meant to ensure that a "dollar in the hand of a Negro will purchase the same thing as a dollar in the hands of a white man."[63] Section 1981 guarantees all persons the same right to "make and enforce contracts" as white citizens.[64]

Prior to the Civil Rights Act of 1991, the Supreme Court limited the 1866 Act to contract formation and enforcement. The Court considered racially motivated interference in contracts covered only if it occurred when the consumer tried to purchase a good or service, not before or after.[65] For example, plaintiffs in *Robinson v. Town of Colonie* were not at the point of making a purchase when *T.J. Maxx* employees falsely accused them of stealing and evicted them, so the court dismissed plaintiffs' case. The Civil Rights Act of 1991 expanded the reach of the 1866 Act to include all benefits, privileges, terms, and conditions of the contractual relationship.[66]

Successful under the 1866 Act usually involve stark or blatant discrimination. In *Allen v. U.S. Bancorp*,[67] a bank teller refused to serve an African American customer until the customer removed his sunglasses. By imposing additional restrictions for the customer to receive service, the bank offered the customer a different contract because of his race. The bank enforced no dress code upon white customers. In fact, the plaintiff directed two of his white employees to enter the bank wearing the same type of sunglasses that the bank had

asked him to remove. The white employees made deposits at the same bank branch and no one asked them to remove their sunglasses.

Other examples of 1866 Act violations include denying plaintiffs entrance to a restaurant based on the plaintiff's race,[68] requiring pre-payment before service because of plaintiff's race,[69] requiring plaintiffs to satisfy requirements not required for white applicants before obtaining a loan,[70] and requiring plaintiffs to show identification before allowing them to shop without subjecting white customers to similar conditions.[71]

§4.3: How Does the Law Work?

Under Title II, an individual who has suffered discrimination or racial harassment can sue for disparate treatment, but not disparate impact. Disparate impact actions remain the exclusive province of the Justice Department, as indicated in Chapter One.

Further, an individual cannot seek monetary damages. The only relief available on the federal level is an injunction-- a court order commanding or preventing an action. [72] To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the court grants the injunction. The Civil Rights Act of 1866 permits punitive and compensatory damage awards, however.[73]

There are also a number of states with their own public accommodations laws, and most states recognize a claim for false imprisonment, which may well be available for anyone detained in a "shopping while black" incident.

Disparate Treatment

A Title II plaintiff charging disparate treatment first has to prove that the offending establishment is a public accommodation.[74] Next, the plaintiff must prove that the establishment restricted access to its facility because of race. [75] If there is no direct evidence (say, a company memo encouraging employees to discriminate), the plaintiff has to prove discrimination indirectly.[76]

Once the plaintiff makes a credible showing that discrimination took place, the burden of proof then shifts to the defendant to offer a legitimate, non-discriminatory reason for the challenged action. If the defendant produces such an explanation, the burden shifts back to the plaintiff, who must now demonstrate that the defendant's explanation is a pretext, insufficient to rebut the plaintiff's original showing.[77] If the reason provided is false, the implication is that the real reason is discrimination.

Testing, developed initially to indirectly prove discrimination in housing (see Chapter Six), is also a way to prove disparate treatment in public accommodations[78], as the G.A.F.

case in this chapter indicates. Testing can reveal discrimination in everyday commercial transactions, such as higher prices (car buying and TV repair), and denied or degraded services (hailing a taxi, being served in a restaurant).[79]

Testers proved disparate treatment in *United States v. Black Wolf, Inc*., a case that involved a restaurant in Chester, West Virginia that refused to serve African Americans. As part of its investigation, the Civil Rights Division sent two different African American employees to the restaurant to see if staff would serve them. Restaurant staff refused to serve either of them. White employees sent soon after received service without incident. The restaurant settled the case, and the court issued a consent decree.

Public Accommodation Harassment Law

Title II prohibits any person from using force or threats of force to injure, intimidate, or interfere with a person's use of a public accommodation because of race, but these protections are limited to areas that the Act covers (exempting, for example, threats occurring in retail stores such as grocery or clothing stores). [80] In addition, plaintiffs alleging verbal harassment have to show that the defendant made racially or ethnically derogatory statements in the course of interfering with plaintiff's Title II rights. Otherwise, the court considers the statement a "stray remark."[81] Additional statutes such as 18 U.S.C. § 245 protect consumers from violence, however.

Plaintiffs may also seek relief under comparable state statutes.[82] Some states, like Pennsylvania, explicitly prohibit public accommodations harassment. South Dakota prohibits "racist or sexist statements displayed in a public accommodation which affect a person's ability to use and enjoy those accommodations."[83] Some states protect minority consumers from racist harassment by other patrons as well as by the owner.[84]

*Section 1981(*The Civil Rights Act of 1866*)*

A §1981 plaintiff must prove the defendants *intentionally* discriminated because of race, and that the discrimination interfered with a protected activity, such as making and enforcing contracts. [85] Intentional discrimination is easier to prove if there is an extraordinary level of hostility toward African American customers, such that any reasonable person would see that discrimination was at work.[86] Many plaintiff's find it hard to prove discriminatory intent and/or interference with their right to contract by the defendant. [87] Direct evidence of discriminatory intent may under §1981 using testers, however.[88]

Further, the discrimination must cause "actual loss" of contractual interest.[89] If the plaintiff is not deprived of the right to make and enforce a contract, then there is no §1981

violation. For example, if plaintiff alleges a longer wait than white patrons do for service, but eventually received service, there is no claim.[90] Some courts go so far as to maintain that, a Section 1981 plaintiff must show that that they were actually prevented, and not merely deterred, from making a purchase.[91] Surveillance alone is not sufficient, unless it crosses the line into harassment or impairs the shopper's ability to contract.[92]

However, outright denial is not necessary, either.[93] If a store security guard searches a customer's bags and deters the customer from using a store coupon, that is a 1981 violation.[94] Where store employees curse African American shoppers and use racial epithets, and the shoppers demand a refund for their previous purchases, some courts will find a 1981 interference with contractual relations.[95]

State Public Accommodations Laws

Forty-five states have their own public accommodations laws.[96] They are broader than federal law Title II, however, in that they typically do not exempt retail stores from coverage.[97] They also set up agencies specifically designated to enforce the law,[98] much like the EEOC enforces federal employment law. Like the EEOC, these state and local consumer antidiscrimination agencies have rulemaking and enforcement powers.[99]

False Imprisonment

An individual detained because of discrimination may also have a cause of action for false imprisonment. Detention is an objective fact, easier to prove than proving that racial prejudice subjectively motivated a sales clerk or waiter. For similar reasons, an attorney should explore claims for negligence, defamation, and misrepresentation as well.

§4.4: What Needs to Change?

Title II of the Civil Rights Act gave African Americans entry to places from which segregation previously excluded them. Some large settlements have discouraged some very blatant informal segregation in public accommodations, but as discriminatory become more subtle practices they are harder to document and harder to prove. As a result, the Department of Justice has brought fewer and fewer lawsuits against business establishments for racial discrimination, though that may change with Attorney General Eric Holder.

The NAACP estimates that African American consumers spend nearly $700 billion dollars in U.S. consumer markets,[100] about the size of one of the Obama Administration's stimulus packages.

If "consumer racism" is to truly end, African American consumers need to inform themselves about these new discriminatory practices, and practitioners need to keep up with

rapidly changing and developing law. Consumers and lawyers will have to work together closely to ensure that African Americans can freely enter any establishment without fear of harassment, humiliation, or harm.

Finally, African Americans need to "get smart" about the use of small claims courts to resolve disputes over racial discrimination. The small claims court is often referred to as the "People's Court." Today, when African Americans appear in small claims court they are usually defendants rather than plaintiffs. Landlords and collection agencies often use small claims court against poor tenants and consumers, and many of their targets are African American.

African Americans have little knowledge about the types of cases small claims courts can hear, or the procedures for using these courts. That needs to change. Civil rights lawyers should encourage African American citizens to use the small claims systems to handle their civil disputes. Civil rights organizations should lobby state legislatures to raise small claims dollar awards from the $2,000 or so that is now typical. Small claims courts could also be more effective in combating discrimination if they had the power to issue injunctions. Expanded dispute resolution programs would help as well. Such reforms could make small claims courts a promising means to empower ordinary African Americans to take the initiative against discrimination.

THE HANDBOOK

§4.5: First Aid

You can build your case of discrimination by informally polling other customers to see how service providers have treated them. You can also do your own version of testing--enlist trustworthy friends of different races to patronize the place where the discrimination occurred, and observe how they are treated compared to the treatment you received.

If a shop owner confiscates something of yours, falsely accusing you of stealing it, call the police. This creates a record. Many people are so shocked and humiliated when service providers mistreat them that they immediately leave the premises. However, your complaint is stronger if a law enforcement officer can prove you were there at the time.

Sometimes you have to go to the higher-ups in the company. In 2008 three young professional African American wrongfully detained for an hour and a half while shopping in an Old Navy store wrote Glen Murphy, the CEO. Old Navy launched an investigation, which fired the store manager, and issued a formal apology.[101]

In addition to formal complaints to federal, state, or local authorities, private lawsuits, and civil rights group action, you can also pursue tort actions for injuries and breach of contract actions for inferior goods or services without a lawyer in small claims court.

§4.6: Who Can Help?

Department Of Justice

The Justice Department's Civil Rights Division takes action when incidents of discrimination surface in newspapers and other news sources, and also when it receives complaints from individuals or their attorneys. Justice also processes complaints received from the FBI, from local United States Attorney's Offices, and from members of Congress on behalf of their constituents. Sometimes complaints come to the Civil Rights Division from other divisions within the Department of Justice itself.

The Department of Justice expects complainants to address their problems at the local level first. Not only may they be resolved more quickly at that level, but broader relief may be available as well. State and local laws may provide for money damages where federal law does not, for example. In addition, local agencies may have records of previous complaints, making it easier for them to spot patterns and histories of discrimination.

Once a complaint reaches the Justice Department, the Civil Rights Division conducts a preliminary investigation. Sometimes the Division sends testers to suspected establishments, to see what actually happens. If the preliminary investigation indicates discrimination probably is taking place, the Division opens a more formal investigation with a letter to the company notifying them that an investigation is under way. The Division then interviews present and former employees, customers, and others with knowledge of the matter; they also examine documents.

The Department of Justice has only limited time and resources to spend on each case, so they are careful and cautious about the cases they select. A staff attorney must file a detailed justification memo with their section chief outlining the merits of the case before the process of review can begin. The memo then moves up the chain of command from the section chief to the Deputy Assistant Attorney General for the Division, and then to the Assistant Attorney General for Civil Rights where the final decision is made.

Ordinarily, the Department will try to enter into a settlement agreement or consent decree with the offending party rather than pursue the case through a costly trial. Most defendants choose one of these options. Defending a case against the Justice Department can

cost millions. Instituting reforms such as training, posting signage, and rewriting or revamping practice and procedures may be much less expensive by comparison.

Such agreements can be especially attractive because the defendants do not have to admit wrongdoing. Instead, most consent decrees and settlement agreements state only that the defendant adopts the required changes for the "good of the company." The Department usually monitors the defendant's activities for noncompliance with the help of community organizations and individual consumers.

The NAACP

The NAACP is an important resource for these types of claims. A local advocacy group such as the NAACP often has strong relationships with local enforcement agencies. They can also bring direct pressure with pickets, boycotts, and public information campaigns.

For example, in June 2009, the Philadelphia NAACP brought media attention when the Valley Swim club canceled a contract with an African American children's' camp because of reactions from their white patrons.[102] The Pennsylvania Human Relations Commission followed up by launching a formal investigation.[103] In 2003, the NAACP filed suit against the City of Myrtle Beach, South Carolina for discriminating against African American tourists during "Black Bike Week," as contrasted with the treatment afforded white tourists during "Harley Weekend" (a predominantly white tourist event).[104]

Other Civic Organizations

The Equal Rights Center is a non-profit organization in the District of Columbia focused on antidiscrimination in public accommodations.[105] They maintain an extensive database of previous complaints and deploy testers, known as "secret shoppers," to help root out discrimination.[106] They have confronted internet providers and taxicab companies that refuse to serve minority neighborhoods, as well as stores that refuse to accept personal checks in minority neighborhoods.[107] Theirs is an example for civic organizations in other jurisdictions to follow.

Small Claims Court

If an attorney will not accept your case because the monetary damages are low, for example, small claims court provides a low-cost alternative. The American Bar Association reports that millions of citizens needing legal help cannot access the civil justice system because of the high costs of civil litigation, the complexity of legal proceedings, and the system's resistance to small claims. States developed small claims court to reduce cost and

delay.[108] All states and the District of Columbia have established some form of small claims court system.[109]

To use the court, first contact your local civil court division for instructions. Unlike the very formal filing requirements of other courts, small claims courts only require that the person wishing to sue fill out a simple form. Most states only allow individuals to sue.

Generally, small claims courts hear causes of actions arising out of breach of contract, tort actions (i.e., negligence involving property damage or personal injury), bounced checks, rent and security deposit disputes and other miscellaneous disputes. Small claims courts do not handle domestic relations cases. Moreover, cases brought in small claims court are limited to relatively low money damages. In Maryland, for example, the jurisdictional limit is $2000.

Most states allow attorneys to represent litigants, though some states place limitations on attorney representation, or do not allow attorney representation at all. If you meet all the small claims court's requirements, and believe court officials have unfairly denied you access, contact an attorney immediately.

§4.7: Getting Organized

One of my students suggested a *Just Say No to Harassment* campaign to educate minorities about their rights under federal and state public accommodation laws, and direct them to local government agencies and civil rights organizations for relief.

She would set up a (501(c) (3) non-profit organization to manage the campaign and start with a simple commercial, probably on local access cable television, depicting a minority shopper being followed around a department store, detained, and searched. The commercial could end with the following question: "Have you ever been the victim of consumer discrimination? If so call 1-800-HARRASS." The campaign's website would run along the bottom of the screen. Posting the commercial on free websites such as Youtube.com would increase viewership.

Individuals calling 1-800-HARRASS could report incidents of consumer discrimination, receive advice regarding their claims, and receive contact information for local agencies able to help. The non-profit organization would pay salaries for the hotline employees and fund the commercial.

The campaign's website would use "distance learning" techniques to teach rights, remedies, and legal "first aid" for consumer discrimination victims. Visitors could access a database of all relevant state and federal legislation, and link to web pages from federal, state,

and local enforcement agencies as well as civil rights groups, emphasizing filing and enforcement deadlines. Visitors would also be able to enhance the site, blogging their unpleasant experiences with various establishments and what steps they have taken.

Part III: Inequality

Chapter Five

Employment Discrimination

An employer may not discriminate against any person because of race, color, religion, sex, or national origin. This applies to hiring, firing, promotions, pay, training, or other workplace conditions.
SYNOPSIS, EQUAL EMPLOYMENT OPPORTUNITY ACT

THE HISTORY

§5.1: What's the Problem?

Until 1965, The Duke Power Company in Draper, North Carolina openly discriminated because of race when hiring workers at its Dan River plant. Duke Power traditionally confined African American employees to the "Labor" Department—the most menial, least desirable, and lowest-paid jobs in the company. The other Departments (Operations, Maintenance, and Laboratory) remained lily white.

The highest paying jobs in the Labor Department paid less than the lowest paying jobs in the other three departments. [1]

Duke Power ceased its official segregation policy on July 2, 1965, (the effective date of the Civil Rights Act of 1964), but simultaneously began requiring a high school education for any employee who wished to enter the Operations, Maintenance, or Laboratory Departments.[2] (North Carolina census statistics showed that, while 34% of white males had completed high school, only 12% of African American males had done so).[3] Duke Power also required satisfactory scores on two aptitude tests. However, white employees already in those Departments continued there without a high school diploma and without taking the test.[4]

Background

Concerns about unfair employment date back to the Black Codes. Immediately after the Civil War, Southern white political leadership adopted the Black Codes to re-establish control over the recently freed slaves, and to maintain a supply of cheap, forced labor. The Codes punished violators with forced labor ranging from a few days to an entire year.[5]

Congress passed the Civil Rights Act of 1866 to break the Black Codes. In response, Southerners turned to sharecropping, tying freedmen to the land as if they were serfs in

feudal Europe. Sharecroppers worked the land independently but shared the crop with the landlord as their rent. To pay for essentials (seeds, fertilizer, and so forth) sharecroppers borrowed against their crops. Due to over-priced essentials and unscrupulous merchants (sometimes the stores were on the plantation itself and owned by the landlord), sharecroppers found themselves trapped in debt and therefore tied to the land.[6]

In 1886, African American farmers in Texas created the Colored Farmer's Alliance, the largest African-American organization in the 19th century.[7] The Alliance aimed to improve the farmer's condition by promoting home ownership, better farming methods, and education. The Alliance joined white farmers in the Populist political movement to empower themselves further.

Tom Watson, a Georgia Congressman, championed Populist ideas.[8] Watson's crossing color lines threatened the "Southern way of life" and infuriated Southern Democrats. They used race-baiting tactics to turn white farmers against black ones, destroy the Populist movement, and defeat Watson's re-election bid in 1892. [9]

For another generation, African Americans remained mostly a Southern, uneducated, rural peasantry. After World War I, African Americans traveled north in large numbers, looking for industrial work. Once arrived, they lived in substandard ghettos, had to accept the dirtiest and most dangerous jobs, and worked long hours for minimal wages. But they had been transformed from serfs to industrial workers.

A. Phillip Randolph organized the first African American union, the Brotherhood of Sleeping Car Porters. [10] Randolph's porters spread the union gospel on their travels, but lily-white AFL unions still would not admit African Americans.

By mid-twentieth century, African Americans were about evenly divided between a barely-educated, rural, Southern peasantry and an under-employed, Northern, urban proletariat. There was a very small middle class, shopkeepers and professionals, both North and South, with a few Southern African Americans in larger businesses such as life insurance. Those in the South faced the separate *and* unequal system of segregation, while those in the North attended under funded *de facto* segregated schools. As early as the 1950's, urban segregated schools in the North began breeding gang activity among young urban African American males who had little hope of economic or social advancement.[11]

Southern whites clung to the picture of the uneducated black peasant; Northern whites began to view African American males as unemployable and dangerous.[12] Both tended to see successful blacks who did not fit the prevailing stereotype as "uppity." These

feelings intensified as colleges and universities admitted African American veterans returning from World War II, and their children received advanced education as well. After the Civil Rights Movement, many young African American college students led anti-racist demonstrations on campus, further challenging prevailing stereotypes and leaving a great deal of resentment in their wake.

President Lyndon Johnson introduced affirmative action in 1965 as a temporary remedy that would end once there was a "level playing field" for all Americans. By the 1970's, many whites cried "reverse discrimination," apparently feeling that uppity African Americans were taking opportunities from more deserving whites.

Employment Discrimination Today

When seeking employment today, African-Americans face all the stereotypes of the past[13]-- lazy, unemployable, and dangerous when they fail and uppity or know-it-all when they succeed.[14] Negative film and television images reinforce these stereotypes.[15]

The effects of a century and a half of discrimination resonate powerfully in the African American community today. Census data since the 1930s show a large, persistent racial employment gap, close to 50% nationwide, between African-Americans and whites. [16] Discrimination in salary and promotion rates disadvantages those African-Americans worker who actually found jobs.[17]

By 2002, one in four African American males not incarcerated or homeless was jobless for the entire year. The black male unemployment rate was twice as high as for white and Hispanic males.[18] Among African American male dropouts, 44 percent were jobless for the whole year. In every economic downturn, African Americans 'get laid off more frequently.[19] Once laid off, they have a very difficult time getting another job.[20]

Certainly, a variety of factors other than race contribute to the high levels of African American unemployment. Change from an industrial to a service economy has reduced the number of jobs available to the less educated. [21] The few remaining blue collar and manufacturing jobs have moved from the inner cities where many blacks still live, to the suburbs which are still largely white--or out of the country altogether. Black workers face stiff competition from an influx of immigrants for semi-skilled and unskilled jobs that remain.

Racism in the job market as well as in other areas of life makes African American males, especially young African American males, even more vulnerable to these trends, however.[22] For example, employers often screen applicants based on their credit history.[23]

African Americans are three times as likely as whites to have an adverse credit history due to poor credit education, lack of family wealth and predatory lending.[24] (See Chapter Six)

African-American male unemployment causes serious social breakdowns. Jobless men are handicapped as husbands and fathers. They cannot make consistent child support payments. Further, unemployed people also consume public and social services. Unfortunately, some inevitably engage in criminal activity, further undermining community infrastructure.[25]

African Americans who have jobs often have to accept employment below their educational level. Employers continue to wield a large amount of arbitrary discretion in hiring decisions, disfavoring African American job applicants even when their qualifications are superior to those of white applicants.[26]

Job entrance tests reflect white majority views about the world; minorities often see things differently. Increasingly, this type of "high stakes" testing regulates access to education itself, from scholastic and professional aptitude tests, down to primary school.

Even when an African American overcomes these obstacles and qualifies for a job, the informal networks that govern the success of an interview, placement on the job, and promotion and advancement come into play.[27] Like a long set of hurdles on a track, they eliminate all but the most gifted and determined African Americans by the end of the race. Some of the hurdles African American employees face, particularly males, include less desirable duties,[28] more frequent accusation of sexual harassment,[29] more closely monitored job performance,[30] and lower performance evaluations.[31] They often face hostility in the workplace as well.[32]

Even for those hardy souls who prevail and advance, there are few trophies. The so-called "glass ceiling" makes it hard for even super-accomplished people to sit on corporate boards or ascend to the highest levels of management.[33] African Americans at the pinnacle of economic success become media targets. News analysts scrutinize their every move, public and private; the media descends into a feeding frenzy should anything go awry.[34]

Former Secretary of Education, Bill Bennett argued that Barack Obama's election as President of the United States proves that racial discrimination no longer hinders African American advancement in this country, calling for en end to "excuses."[35] Yet since the 2007 economic recession began, African American unemployment rates dramatically increased,[36] with African Americans in general 80% more likely to lose their jobs during the economic downturn.[37] The Equal Employment Opportunity Commission reported significantly more

race-based employment discrimination complaints since the recession began: [38] 33,973 charges in 2008, an 11 percent jump from 2007.[39] Considerable evidence shows that blacks are the first fired as the business cycle weakens.[40]Finally, African Americans work disproportionately in vulnerable industries.[41]

§5.2: What's the Law?

In 1941, President Franklin Roosevelt issued an executive order prohibiting companies receiving federal defense contracts from discriminating in hiring or segregating in employment. FDR's Executive Order created new jobs for African Americans in the defense industry and spurred a second wave of black outmigration from the South, this time to the Southwest and Far West, which got the lion's share of defense contracts. Roosevelt's order came after pressure from A. Phillip Randolph.[42]

President Harry Truman followed Roosevelt's lead, and formed a Committee on Government Contract Compliance in 1953 to insure that no government contractor discriminated because of race.

In addition, in 1941, the US Supreme Court held in *Steele v. Louisville and Ashville Railroad Co.* that federal labor laws prohibited unions from discriminating because of race.[43] In *Steele*, an all-white union sided with a railroad to terminate African American firefighters, and the African American workers brought a lawsuit in protest.

Title VII of the Civil Rights Act of 1964

Title VII is the principal statute banning racial discrimination in employment. Title VII prohibits employers, employment agencies, and labor organizations from discriminating based on race, color, sex, pregnancy, religion, or national origin. It also forbids them from retaliating against employees or individuals who exercise their rights under the Act.

Title VII established the Equal Employment Opportunity Commission (EEOC), a five member bi-partisan commission charged with enforcing the Act. The President appoints the Commissioners to five-year terms with the advice and consent of the Senate. No more than three Commissioners may be from the same political party.

At first, the EEOC could not bring its own lawsuits. Only aggrieved individuals or the Justice Department could appear in court under Title VII. The EEOC could only refer claims based on extensive patterns and practices of discrimination to the Department of Justice for possible court action.[2] Individuals had to file a charge with the EEOC before they could sue. If they did not file the charge within 90 days of the discrimination incident, the

EEOC dismissed the charge. If they did not sue in court within 30 days after the EEOC processed a properly and timely filed charge, the judge dismissed the lawsuit.

Griggs v. Duke Power Co. (1965)

Though they could not initiate litigation on their own, the EEOC could submit *amicus* briefs. They submitted their first *amicus* brief in *Griggs v. Duke Power Co.*,[44] a case which arose out of the facts set forth at the beginning of this chapter, in the *History* section. The EEOC argued for the first time that **disparate impact** was sufficient to prove employment discrimination. Thus, the EEOC urged the Court to accept "circumstantial evidence" to prove discrimination, without having to show a "smoking gun" – evidence that the discrimination was intentional.

Thirteen of the fourteen African American employees at the Dan River Station sued to challenge the high school and aptitude test requirements. The U.S. Supreme Court ruled for the workers, determining that the Equal Employment Opportunity Act outlawed not only overt discrimination, but also practices that are "fair in form, but discriminatory in operation."[45]

The Supreme Court held that Title VII prohibited the use of any practice that froze a *status quo* created by prior discriminatory employment practices.[46] Consequently, Duke Power could not require prospective employees (or transferees from one department to another) to have a high school education. Nor could it require them to pass a standardized general intelligence test as a condition of employment or transfer.

The Court found that:

(1) the company could not prove that either standard significantly related to successful job performance;

(2) both requirements operated to disqualify African-Americans at a substantially higher rate than white applicants; and

(3) as part of long-standing preferences for whites, only white employees had the jobs in question.[47]

The Equal Employment Opportunity Act of 1972

In 1972, Congress amended Title VII and gave the EEOC authority to bring its own cases in court, once attempts to secure an acceptable conciliation agreement fail. The Amendment also removed the exemptions originally granted to educational institutions and to federal, state, and local government agencies, and broadened the EEOC's original jurisdiction over private companies to include firms with as few as fifteen employees. Parties

now have more time file their charges with the EEOC. Moving parties employing attorneys to file lawsuits on their behalf now have ninety days after the EEOC stops working on their charge to file in court, rather than the original thirty.

McDonnell Douglas Corp. v. Green[48] (1973)

While *Griggs* laid out the evidentiary framework for proving disparate impact, *McDonnell Douglas Corp. v Green* established a framework for proving **disparate treatment** under Title VII (the "smoking gun" of intentional discrimination. The court held that a plaintiff could prove intentional discrimination *indirectly* in a hiring case by showing that:

(1) the plaintiff is a member of a Title VII protected group;

(2) the plaintiff applied and was qualified for a position sought;

(3) the employer rejected the plaintiff for the job; and

(4) the employer continued to seek applicants with similar qualifications after the rejection.

A plaintiff showing all four of these facts successfully makes out a *prima facie* case of intentional discrimination. This means that to avoid liability an employer has to meet the prima facie case with a prima facie *defense*–alleging that there was a legitimate, nondiscriminatory reason for failing to hire the person in question. The burden then shifts back to the plaintiff, who must then show that the employer's excuse is in fact "pretextual"—a sham (in this case, by showing that the employer retained or hired whites engaging in similar behavior.)

This *McDonnell Douglas* analytical framework sets up an opportunity to use "testers"—white applicants with the same qualifications as the rejected African American applicant. The tester seeks the job after the employer denies it to an African American applicant, to determine whether the employer discriminated based on race. Lawyers in housing discrimination cases frequently use testers as well. (See Chapter Six).

Employment Law Today

Title VII prohibits discrimination based on race/color, national origin, and other categories such as sex and religion. Individuals included in these groups and protected under this Act constitute members of a *protected class*. [49]

Race is a protected class, and an employer cannot discriminate against a person as an applicant or employee because of the person's race or color. An employer cannot discriminate against an employee or applicant because of marriage to or association with a

person of a different race; membership in or association with ethnic based organization or groups; or attendance or participation in schools or places of worship generally associated with certain minority groups.

The Act prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of members of any racial group. It also prohibits racial harassment, such as ethnic jokes, offensive or derogatory comments, and verbal or physical threats. These protections cover hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment.

The Act provides financial compensation for various forms of employment discrimination. If a case goes to trial, the employer may be responsible for attorneys' fees, expert witness fees, and court costs. The statute authorizes money damages in cases involving intentional discrimination, though damages may be limited even then. Punitive damages are also available if the employer acted recklessly or with malice. Punitive damages are never available against the federal, state, or local governments, or in disparate impact cases. [50]

The EEOC has fifty field offices throughout the country and receives between 57,000 and 80,000 complaints. Discrimination is the fastest growing area of employment law. These claims typically fall into two broad categories: claims that the employer discriminated because of race by refusing to hire a prospective employee or by discharging a present employee and claims that an employer refused to promote someone or treated his minority employees differently than his white ones.[51]

Employers who single out clearly race-related characteristics also engage in discrimination. For example, employers cannot discriminate because of skin color, hair texture, certain facial features, or even because of illnesses that predominantly affect one race. For example, refusing to hire an African American because of sickle cell trait would violate the law.

Employers who segregate and classify employees violate the law. This means employers cannot physically isolate employees from other employees or from contacts with customers because of race. In addition, employers may not assign employees to specific jobs, duties, or departments according to race or color.

On April 19, 2006, the EEOC added "Section 15: Race and Color Discrimination" to its compliance manual to clarify matters. The chapter identifies what practices may constitute racial discrimination in hiring, promotion, recruitment and other employment practices.[52]

First, the manual defines race discrimination and specifies that Title VII prohibit racial discrimination in ancestry, physical characteristics, race-linked illness, cultural characteristics, perception, association, or sub-group. Secondly, the manual requires employers to examine hiring practices for both disparate treatment and for disparate impact. The manual gives examples showing that employers face liability for racial discrimination even if their policies or practices appear neutral. The manual helps employers with measures they can use in order to avoid racial discrimination charges.

Racial stereotypes and biases continue to block many job applicants and promotion seekers,[53] so it should be no surprise that race continues to "lead the pack" in discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) against employers.[54] Between June 2005 and Sept. 2005, for example, the Atlanta Bread Co., and ARO Enterprises, also known as Acra Enterprises, fired African American employees and segregated them by race at the South Florida restaurant. "It is shocking in the 21st century to see a work force segregated by race and the systematic termination of virtually all African American employees," said the commission's regional attorney, Delner Franklin-Thomas. "All these workers wanted was an opportunity to provide for themselves and their families; they were denied that because of the color of their skin."[55]

Andre Mendenhall's duties at Mueller Streamline Co. consisted of picking orders, loading trucks, putting away stock, and cleaning. A number of incidents at his workplace made Mendenhall, an African-American male, feel subjected to discrimination and to a hostile work environment. Mendenhall brought these incidents to the attention of his supervisor, a white woman, but she ignored his complaints.

Mendenhall claimed that two Hispanic co-workers continually harassed him by making insulting references to his mother and calling him names in Spanish such as "black monkey" and "dog." In another incident, someone smeared feces across his locker. Although Mendenhall complained to his supervisor about these incidents on numerous occasions, she told him that she was "sick and tired of this discrimination bullshit of [his]." In April 2001, the word "NIGA" appeared written in graffiti in approximately seventeen locations throughout Mueller's warehouse. However when Mendenhall and two other employees complained to the supervisor about this, she did not investigate the matter. She did not discipline anyone for these actions. She did not even have the offensive graffiti removed.

The Mueller Company eventually fired Mendenhall, and he filed a race discrimination complaint with the EEOC against them. Subsequently he received a right-to-

sue letter and filed suit in district court in 2001, alleging that Mueller subjected him to a hostile work environment, race discrimination, and retaliation.

Mendenhall prevailed on the hostile work environment claim.

§5.3: How Does the Law Work?

Disparate Treatment

Disparate treatment occurs when an employer intentionally denies an employee or potential employee an opportunity because of their race. The law covers unions as well as employees. Unions cannot refuse membership based on race, for example.

In order to proceed on a theory of disparate treatment, an individual must show that the employer or union did so intending to discriminate. There are three ways to establish the requisite intent: direct evidence, comparative evidence, and statistical evidence.

Direct evidence might consist of racist statements the defendant made in front of a person who is willing to testify in court. Since plaintiffs cannot easily obtain direct evidence of intent to discriminate, other forms of evidence are usually necessary.[56]

McDonnell Douglas permits a plaintiff to raise an inference of discrimination with **comparative evidence**, showing that the employer treats similarly situated employees of one race differently from those of another. If the employee cannot show a basis for the differentiation other than race, the plaintiff wins the case.

Direct evidence and comparative evidence are useful in cases where there is a single plaintiff, but when a large group or class of plaintiffs brings a lawsuit **statistics** are often necessary.[57] For example, statistical evidence may suggest that absent discrimination it is highly unlikely that there would be so few African-Americans in the workforce of a company located in or near an African American area. An employer may reply that there was a legitimate business reason for the disparity. In that case, the burden would shift back to the plaintiff to show that the reason advanced was a pretext for discrimination.

The Court has limited *McDonnell*, however. *Wards Cove Packing Co., Inc. v. Atonio* (1989)[58] held that a racial imbalance in the employer's work force was not sufficient to make out a *prima facie* case of disparate treatment. Instead, the plaintiff had to identify the specific employment practice that caused the disparity.[59]

Disparate Impact

If the plaintiff establishes a *prima facie* case of disparate impact, the employer must rebut by attempting to prove that the subject practice is job-related and consistent with business necessity. A practice will pass muster if it reasonably relates to job performance,

even if it hinders a disproportionate number of people from the protected class.

Consider, for example, tests that evaluate personal characteristics essential to job performance (a "construct-related" validation). Construct related tests are inherently suspect and rarely accepted. Employers typically administer such tests to people applying for sales or service positions. To take an example from another country, ads for bank clerks in Brazil sometimes call for someone with *boa apariencia* (nice appearance) a code word for a person who looks white. Such "qualifications" would be illegal in the United States.

There was a close parallel in the U.S., however involving major clothing retailer, Abercrombie & Fitch. Minority plaintiffs sued Abercrombie & Fitch for discrimination because of its "preserve appearances" policy (the company wanted its employees to maintain a "classic" or "All-American" look).[60] The plaintiffs alleged that the policies discriminated against African American and Latino hires and employees in order to maintain a white image. The company assigned minorities seeking sales positions to stockrooms or late night shifts. Others they did not hire at all. The attorney for the plaintiffs claimed to have evidence that managers simply threw away some minority applications. The parties settled the case out of court in 2004.[61]

Seniority is another way to segregate workers that typically has a disparate impact because the older workers got their jobs when the law permitted or at least condoned discrimination. [62] Nevertheless, Title VII specifically allows seniority systems if the employers did not adopt them with intent to discriminate and do not apply them with intent to discriminate. [63]

Other Protections

Besides disparate treatment and disparate impact, Title VII also protects employees from intimidation, insult, or harassment based on race. An employee may complain if such conditions create a hostile work environment, intimidate the employee, or unreasonably interfere with the employee's job performance.

George McGinest sued GTE Service Corporation (GTE) under Title VII for creating a racially hostile work environment.[64] One of McGinest's supervisors, Jim Noson, forced McGinest to work under dangerous condition without proper equipment or an adequately sized crew, subjected him to obscene and demeaning language, and threatened to fire McGinest on several occasions.

On one occasion, McGinest requested staff to change a tire on his company vehicle because it looked bald, but the garage mechanic told him there was nothing wrong with the

tire.[65] However, McGinest presented evidence that a white employee who asked for tires around the same time received replacements. A few weeks after being denied the replacement, McGinest's tire blew out and he was injured when his vehicle crashed into a wall. Another employee called McGinest a "stupid n----r" to his face.[66] McGinest then filed a complaint with the EEOC.

Under Title VII, a person has the "right to work in an environment free from discriminatory intimidation, ridicule, and insult."[67] According to the Supreme Court of the United States, abuse means conduct that "pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position."[68] The test is objective, so the court looks at whether the average member of the protected class would find the conduct hostile.[69] In order to prove a hostile work environment claim, McGinest had to show that a "reasonable" African-American man would find the workplace so racially hostile as to create an abusive working environment and that GTE failed to take adequate remedial and disciplinary action.

Is the conduct physically threatening or humiliating or just a mere offensive utterance? Does the conduct unreasonably interfere with the employee's work performance? The court determined that McGinest's proof met the test. Because employees refused to service his tires, he suffered physical injuries in an automobile accident. He faced a workplace filled with insubordination, unsafe conditions, and extreme racial insults.[70]

Title VII also protects all workers from retaliation for protesting an employer's discriminatory practices. Retaliation includes discharge from employment, demotion, transfer, harassment, and unfavorable recommendations to another employer. For instance, a U.S. District Court in San Francisco awarded Federal Express employee Pernell Evans $950,000 in damages when he sued for race discrimination and retaliation.[71] Evans received employee evaluations placing him in the top 25 percent of all employees, yet after he filed discrimination complaints with company managers, the company removed him from his position and separated him from his co-workers.

EEOC law calls a protest like Evans' an "opposition."[72] The "opposition" rubric protects employees who refuse to participate in or who directly oppose discriminatory practices at work. Thus, an employer cannot retaliate against a person who has reported discrimination to a supervisor or circulated a petition among the employees, advising them of discriminatory practices the employer carries on. The law also protects public opposition, such as making statements to the news media or to a civil rights organization.

In 1986, Roderick Jolivette began working at the Albany, Georgia Fire Department.[73] In 1992, he achieved the rank of captain, and in 1999 was named firefighter of the year. Jolivette only had one negative employment action during his employment, a reprimand for not having an ID.[74]

In 2002, Jolivette filed a written complaint with his department and the Equal Employment Opportunity Commission. He alleged that the department, and specifically Captain James Sanders, treated white captains and firefighters more favorably than African American captains or firefighters.[75] The company took no action against Sanders, but took Jolivette off Sanders' shift.[76]

They then denied Jolivette the opportunity to attend certain schools white employees attended.[77] They denied Jolivette a promotion to the position of acting battalion chief when he was the only captain who met the required qualifications. Instead, they placed a less qualified white employee in the position.[78]

Next, the company moved Jolivette to another station, working under an African American supervisor.[79] After the move, Jolivette received a written reprimand for damaging a locker at his old station. A white employee actually caused the damage two years earlier, but received no punishment.[80] However, the company fired Jolivette because of the damage.[81]

Jolivette filed a Title VII claim against the city of Albany and his supervisors.[82] The court upheld his claim.[83]

It is important to distinguish between such "opposition" to discriminatory practices and "participation" in administrative or judicial proceedings. The law's "participation" rubric protects employees who appear as witnesses or who press claims in a hearing or an EEOC investigation into discrimination. One of the most important aspects of the distinction is that while an employer can sue a person engaged in "opposition" for false claims, this is not true of "participation." For example, an employer cannot sue an employee for filing a charge with the EEOC even if the employee loses the case.[84]

Federal employees receive special protections against retaliation. The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 ("NO FEAR ACT") encourages Federal agencies to be model employers by prohibiting discrimination and/or retaliation in the workplace. The NO FEAR Act applies to past and present federal employees, employers, and applicants and holds federal agencies accountable for violating antidiscrimination and whistleblower protection laws. The Act imposes broad requirements upon federal agencies in the areas of reporting, training, and reimbursements. Employers

must give employees annual written notice of the Act; create and execute a written plan to educate employees about antidiscrimination and whistleblower laws; and reimburse the federal judgment fund for any awards granted to plaintiffs in suits under the Act.

Hostility in the Courts

As we saw in Chapter One, succeeding Republican administrations since 1968 have filled the federal courts with ultraconservative judges. Many of these new judges have been hostile towards civil rights litigation in general; employment discrimination is no exception.

For example, federal courts often grant summary judgment under Title VII to employers who offer the flimsiest explanations to answer a plaintiff's prima facie case.[85] Willie Tate began working at the Shelby County Road Department as a laborer in 1977,[86] and was promoted to foreman a year later. In 1987, Tate applied for a supervisor position with the county, but they decided to hire Keith Daniels, a white male who held a bachelor's degree in agriculture and had three years managerial experience in the field.[87] Daniels resigned from the position only a year later, but when Tate applied again, the county rejected his application, claiming he did not have enough experience. The county then hired another white male who did not have a bachelor's degree. When that person resigned, the county hired another white male who had an eighth grade education and no supervisory experience.[88]

Tate then filed an employment discrimination suit against the county with the EEOC based on race discrimination and filed a civil action against Shelby County in 1992.[89] He argued that the county's qualifications policies were inconsistent–they sometimes required a bachelor's degree and in others accepted work experience in lieu of education, always favoring white applicants.[90]

The court's decision in 2000 rejected Tate's claim because the judges determined he had not shown that the department refused his promotion because of race, and he failed the "pretext" criteria.[91] The court determined that Tate had not met the three-part McDonnell test, requiring him to showing that: "(1) the proffered reason has no basis in fact; (2) that the proffered reason did not actually motivate the employment decision, or (3) that the proffered reason was insufficient to motivate the employment decision, thus the court dismissed Tate's claims.[92]

The Courts also frustrate Title VII because they rarely find that use of racial stereotypes and biases constitute employment discrimination.[93] African-American employees Jeffrey Johnson and John Goodwin sued UPS for employment discrimination under Title VII.[94] Johnson began working in 1984 as a package driver, and Goodwin began working in

1988 on a part-time basis. In 1993, Goodwin applied for a driver position in the "north center," but manager Mike Clements rejected his application. Clements commented to another driver that he would transfer Goodwin to the 'Alton Park' location "with his own kind."[95]

Johnson and Goodwin also testified to an incident that occurred in 1999, when a white employee made racist comments and assaulted an African American employee but received only a one-day suspension. Goodwin also testified to close monitoring by a supervisor who subjected him to a number of supervised rides, while not subjecting his white co-workers to similar monitoring. Goodwin presented evidence showing that UPS gave white employees more freedom to interact during employee meetings than they gave African-American employees. On another occasion Johnson overheard one supervisor use the word N----r.[96]

In order to move forward under *McDonnell Douglas*, the court held, Johnson and Goodwin had to demonstrate that they suffered an adverse employment action because of the discrimination.[97] Johnson complained because his managers threatened to suspend him, but because they never did, the court found no adverse employment action. Similarly, Johnson received a written reprimand threatening to terminate him but he remained employed.

The courts are also hostile to class actions in employment discrimination cases. In Saginaw, Michigan, in 2006, three African-American employees commenced a class-action suit for illegal race discrimination against their employer, SBC Communications, Inc and against their union, Local 4108.[98] The plaintiffs alleged SBC paid African American employees lower wages than whites, harassed them, demoted them, and retaliated against any who complained.[99] One of the plaintiffs overheard an SBC manager call an African American employee "Mr. Bo Jangles".[100] On another occasion, SBC employees passed out flyers to a "whites only party."[101] The most serious incident involved a white union steward hanging a noose in a public area, above his desk.[102] SBC management claimed none of the incidents occurred because of race, but conceded their employees should attend diversity training.[103] Though the plaintiffs established their Title VII claim, the court denied their motion for class certification.[104]

§5.4: What Needs to Change?

Congress passed the Equal Employment Opportunity Act at a time when Jim Crow laws and race riots rocked the country. The new law attempted to redress discriminatory practices common in this country since the colonial period. Unfortunately, racial

discrimination charges in employment have increased every decade since. Racial discrimination charges increased 484 percent between 1980 and 2000,[105] and 35.9% of the 75,768 charges of discrimination filed with the EEOC in fiscal year 2006—27200-- alleged racial discrimination.[106]

At the same time, court hostility to employment discrimination claims seems to be increasing as well. Employment discrimination plaintiffs have an even lower success rate today than prisoners seeking to have their convictions reversed![107] The combination of low damage awards and low success rates discourage private attorneys.

Corporate Culture

In some cases, progressive employers lead by example. Employers interested in change should ask themselves the following questions.[108]

- How do people in this organization accomplish their work? What, if anything, gets in the way?
- Who succeeds in this organization? Who does not?
- How and when do staff members interact with one another? Who participates and who does not?
- What kind of work and work styles are valued in this organization?
- What does the company expect of its leaders?
- What aspects of individual performance do company leaders consider most important when making evaluations?

Employers control not only hiring and promotion, but also corporate culture.[109] Employers who truly seek reform must look closely at all their choices.

Government action

Pursuant to the American Recovery and Reinvestment Act of 2009 (ARRA), also known as the Stimulus Package, the new administration has extended unemployment benefits[110] and lobbied colleges to extend financial aid to the unemployed without counting their unemployment benefits as income.[111] Unemployed African Americans without a college degree will have an opportunity to advance themselves and improve their job prospects. These measures have not significantly reduced joblessness, however. [112] The Administration's job creation initiatives have fared better among the general population, but African American unemployment is still increasing. [113]

The EEOC recently launched the E-RACE Initiative (Eradicating Racism and Colorism from Employment[114]), to enhance public awareness of race discrimination in employment and better process and litigate race discrimination claims. Pursuant to the program, EEOC's Field Offices will collect demographic to help identify race discrimination patterns and trends, and increase their outreach to local organizations, experts, and scholars and to the minority media. The EEOC has also begun a series of public meetings and conferences on hiring discrimination, "covert" bias in employment, and employer best practices on diversity and inclusion.[115]

The program has several other features. The EEOC's Office of Federal Operations (OFO) will address existing barriers to minority employment in the federal government by auditing federal agencies with unusually low numbers of minority workers. The EEOC will also develop materials on new issues such as credit-based discrimination and cultural competency, promoting public awareness and training EEOC employees, Administrative Judges and private attorneys.

The EEOC's Youth at Work Initiative helps young workers navigating the world of full-time employment, educating them about the different types of job discrimination they may face and ways to respond. The program's interactive website, especially designed for young visitors, allows them to strategize around different job discrimination scenarios. The EEOC Field Offices also plan free outreach events for high school students, youth organizations, and small businesses that employ young workers.

The *National Urban League* has proposed a six-point jobs plan to the Obama Administration.[116] Specifically, they suggest $150 billion in financial support to cities, counties, states, universities, community colleges, and non-profit community based organizations, creating 3 million jobs while also providing critical services in communities across the nation. The Urban League cites the 1935 Works Progress Administration and the Emergency Jobs and Unemployment Assistance Act of 1974 as historical precedents.

They also ask the Administration to invest an additional $5-7 billion to expand the Youth Summer Jobs Program, making a dent in the 40 percent unemployment rate for African-American youth. One hundred National Urban League jobs academies would supplement and expand the program, providing African American youth with training to complement and enhance their work experience.

THE HANDBOOK

§5.5: First Aid

Filing a lawsuit is not always the first thing to do in an employment discrimination case.[117] Lawsuits are time consuming and expensive, and many are unsuccessful. Filing a complaint with the employee's human resources department (if it has one) may yield quicker and better results, particularly if you have a good relationship with the employer or with one of the supervisory personnel. Making this kind of choice requires careful consideration, evaluating an employer and its practices, and examining all your available options.

Read and understand your employers hiring, firing, and promotion policies.[118] Ask questions if there are any policies you don't understand; get answers in writing, if possible. Record your start date, any promotions, raises, performance evaluations, departmental changes, or any other changes they experience during their time of work.

When you decide to complain to your company, first record your reflections on the discriminatory incident with a diary, noting dates, times, and witnesses. Keep copies of anything relevant—letters, memos, voice messages, or e-mails. Use the diary to prepare a summary of what occurred. List ways you think the matter might be resolved.

Follow your employer's procedures for lodging complaints, such as going to the designated company representative. If you are part of a union, request their assistance—this can help speed resolution and reduce some of your stress. Typically, you will wind up going to your company's human resources department. HR staff members have extensive training and clear responsibilities in these areas. They are required to give an official response, often in writing.

If your union or HR Department refuses to respond, you will probably have to go to the EEOC or to your local FEPA. Even if the union or HR Department proceed as they should, the employer may refuse to investigate your complaint further, may fail to resolve the situation, or may ignore your complaint altogether. This puts you in pre-litigation mode. If EEOC or FEPA conciliation or mediation fails, your next stop is federal district court.

At the EEOC, FEPA, or court, documentation is all-important. Here is where your diary and document file will come in handy, especially documents describing the company's hiring and firing policies. For example, in the Abercrombie and Fitch case, the attorney for the plaintiffs had a copy of the company's employee handbook, which contained an image that discriminated against minorities.

§5.6: Who Can Help?

There are three ways to bring a claim under Title VII. The most common method is by filing a complaint at one of the EEOC's regional offices.[119] Some states have their own anti-discrimination laws and their own agencies that are responsible for enforcing those laws as well. The EEOC refers to these agencies as "Fair Employment Practices Agencies" ("FEPA"s).

Local Agency (FEPA)

In order to bring a successful discrimination claim against an employer, an individual typically must be an employee or a rejected job applicant who is a member of a protected class. Organizations acting on an individuals' behalf, such as unions or civil rights organizations, and the Equal Employment Opportunity Commission may initiate claims as well.

The "charging party" is Title VII's term for the any person or organization initiating an employment discrimination claim with the EEOC or a local FEPA. Charging parties should bring a local matter to local authorities first. If the claim arises in a jurisdiction that has its own FEPA, such as the California Fair Employment Practices Commission or the New York Division of Human Rights, an employee should lodge a complaint with that agency. If federal law covers the alleged infraction as well, the FEPA files a duplicate charge with the EEOC to protect the individual's federal rights. Title VII refers to this as "dual filing."

The EEOC

Once the local agency closes its case, the party must file a new charge with the EEOC. However, because local agencies are not always prompt in their handling of cases, victims may file their charges with the EEOC sixty days after they do so with the FEPA, even if the local unit has not yet closed the case. If a charging party bypasses the local agency, going straight to the EEOC, the EEOC will usually "dual" file the charge with the local agency during the sixty day time period and then accept the charge on its own.

A party can file a charge by mail or in person at the nearest EEOC office, which can be located on the EEOC website at *www.eeoc.gov*. You can also reach EEOC representatives by telephone at 1-800-669-4000 between 7:00 a.m. and 8:00 p.m. Eastern Time. An automated system answers "frequently asked questions" on a 24-hour basis.

The charging party must file the complaint within 180 days of the discriminatory act. The complaint should include: [120]

- the full name, address, and telephone number of the individual making the complaint;
- the full name and address of the person, company, union or employment agency against which the complaint is made;
- a clear statement with a brief explanation of the alleged unlawful employment practice, including the date or dates upon which the practices occurred; and
    - the filing date of any complaint with a state or local agency regarding the alleged unlawful employment practice.

The EEOC must notify the employer of the allegations within ten (10) days after receiving the complaint.

If the EEOC determines there is insufficient information to prove a Title VII violation, then the agency may *dismiss* the complaint. The EEOC usually dismisses a case if it determines the facts alleged in the charge were false, or, if the facts were true, they do not constitute a legal violation. The EEOC then sends a letter to the charging party closing the case and advising them of their right to bring a private lawsuit within 90 days of receiving the letter. The EEOC calls this a "right to sue" letter. Federal courts will not consider an employment discrimination complaint if the EEOC has not processed it first and issued the charging party a "right to sue" letter. Once you receive your letter, you only have 90 days to go to court, so consult an attorney immediately.

On the other hand, if the initial facts show a violation, then the EEOC *investigates*, sometimes doing a follow up investigation to secure additional evidence. If the EEOC finds reasonable cause to believe a violation occurred, it informs the employer and charging party with a letter explaining its determination. The EEOC then attempts to resolve the dispute through conciliation proceedings.

If *conciliation* succeeds, the respondent, charging party and the EEOC sign an agreement and do not take the matter to court. The respondent agrees to cease any discriminatory acts and grant relief to the victim, while the victim agrees not to sue unless the discriminatory acts continue. If the conciliation does not succeed, the EEOC usually issues a right to sue letter to the complaining party or the EEOC will file its own lawsuit.

The EEOC's caseload and backlog are enormous, so they rarely litigate individual cases. They usually file suit only on behalf of large numbers of people complaining against a single employer. Remember, the EEOC is handling the discrimination complaints of everyone in all the protected classes— gender, handicap, national origin, and more. It can take years for the EEOC to review a case. Due to this backlog, if the EEOC does not close your case within 180 days from the date you filed it, you may request a right to sue letter. When you do so, the EEOC will usually close the case immediately and issue the letter. If you wish to go to court, remember you have only 90 days after you get the letter.

Office of Federal Contract Compliance

The Office of Federal Contract Compliance Programs (OFCCP) enforces Federal antidiscrimination and affirmative action laws in contract with the Federal government.[121] Pursuant to Executive Order 11246, federal contractors and federally assisted construction contractors and subcontractors, who do over $10,000 in Government business in one year, must abide by these laws.[122] No other Government agency has comparable authority.[123]

During its thousands of federal contract compliance reviews, OFCCP has uncovered many examples of discrimination. The office records hostile working environments replete with racial slurs, graffiti on bathroom walls, offensive drawings in the workplace, and racial jokes.[124] In new case, OFCCP discovered African-American professionals assigned to scrub toilets.[125] If you work for a company that does any business with the federal government, you are entitled to OFCCP's special protection. Visit their website at http://www.dol.gov/ofccp/regs/compliance/aa.htm or call and speak with a representative at 1-888-37OFCCP.[126]

Civil Rights Organizations

The NAACP Legal Defense and Educational Fund ("LDF"), a separate organization from the NAACP, has been involved in a number of landmark Title VII cases, including *Griggs v. Duke Power*. The two organizations coordinate today, and a person complaining of employment discrimination can go to a local NAACP chapter to have their case referred to LDF. LDF has limited resources, however, and will take only cases that promise to create a useful precedent. Most civil rights organizations, consequently, will often refer employment discrimination complaints directly to the EEOC.

The Congressional Black Caucus Foundation

The Congressional Black Caucus Foundation, Inc. (CBCF), established in 1976 as a nonpartisan, non-profit, public policy, research and educational institute, recently launched

the Economic Empowerment Forum Series to inform the African American community about debt management, poor credit, saving and investment, and creating wealth.

§5.7: Getting Organized

A number of nonprofit, civic organizations work to strengthen job seekers' personal contacts, interviewing skills and networking skills. Most employers are concerned about soft skills not reflected on a resume. Even a brief meeting can provide them with this kind of information. EEOC studies show that employers are 4 to 6 times more likely to extend a job offer to applicants with whom they have had personal contact.[127]

INROADS[128] mentors minority youth. They focus on business, engineering, computer and information sciences, sales, marketing, allied health care, healthcare management and retail management. INROADS places students in two-to-four-year internships with corporate sponsors and helps students with resume development and interview preparation.[129]

100 Black Men of America[130] works with African American boys aged 8-18. Their extensive mentoring program includes workshops on positive self-identity and personal vision, life skills, social and emotional skills, moral character, work ethic, and lifelong learning.

Chapter Six
Housing Discrimination

A person cannot refuse to sell a house or rent an apartment because of the buyer or renter's race, color, national origin, religion, sex, family status, or disability. In addition, no one can refuse to make a mortgage loan because of the borrower's race, color, national origin, religion, sex, family status, or disability.
SYNOPSIS, THE FAIR HOUSING ACT

THE HISTORY

§6.1: What's the Problem?

Ernest and Kemlyn Stringer, an African-American couple, decided to purchase a new home in the Detroit suburb of Harper Woods.[1] They found a home with the assistance of a real estate agent already working with the seller. After an inspector examined the property with the Stringers, the real estate agents remained on the property to lock up and congratulate each other on the sale. The seller's next-door neighbors walked over and confronted the agents in the driveway, telling them the seller had ruined their lives by selling to an African-American family.[2]

Then the neighbor across the street, a Mr. Vartanian, ran over and began yelling at the agents.[3] He said that he would not have spent $10,000 on a new swimming pool had he known African-Americans could move into the neighborhood. He physically intimidated one of the agents, backing her into her car. He also told the agents he had a friend who was a police officer who could get the agents' addresses from their license plates, and that he would find the agents "destroy their cars, chop them into little pieces, and bury them in the backyard where nobody would ever find them."[4] The first set of neighbors witnessed the entire scene.[5] The agents left the area but filed a report at the local police station later that evening.[6]

The agents offered the Stringers their money back but the Stringers decided to go ahead with their home purchase. A jury convicted Mr. Vartanian of interfering with the civil housing rights of the real estate agents and the Stringers and sentenced him to five months in prison, 180 days of home confinement, one year's supervised release and a $50 fine.[7]

Background

The story of African-American housing began with slaves not able to own real estate at all; indeed considered property themselves. In the South, they lived in shacks they built with their own hands.[8] In the North, free African Americans at first lived in cities more so

than in rural areas, in close proximity to low-income immigrant whites, all living in run-down alley housing and shacks near places of employment.

By the beginning of the 20th century, a small African-American propertied class emerged. City governments responded by passing racial zoning ordinances that excluded African Americans from white neighborhoods. The Supreme Court struck these laws down as unconstitutional in 1916. Landowners responded by creating racially restrictive covenants that were contracts between white landowners agreeing not to sell to African Americans. The Court eventually ruled against these as well. Still, African-Americans typically lived crowded into urban ghettoes, rife with substandard housing and unsafe living conditions.[9]

Inner-city housing segregation deepened as local governments segregated public housing and banks refused to lend African American owners money for home improvement. Real estate brokers discouraged African Americans from moving into white neighborhoods and encouraged them to select African American neighborhoods instead in a process called *steering*.

Local governments also imposed minimum lot and building sizes, and restricted the number of occupants per house, to insure that all new dwellings were large, on big lots, with very few residents, engaging in "exclusionary zoning." Exclusionary zoning screens out not only prospective homeowners who cannot afford to buy large houses, but prohibits multifamily dwellings and apartments, screening out renters as well. As renters, African Americans are limited not only by discrimination but by income as well. Lower-income African Americans and other minorities who mostly reside in multi-family dwellings have limited access to suburban communities because of exclusionary zoning.[10]

Exclusionary zoning is an important legal barrier to achieving racial residential integration.[11] Many state and local governments still practice housing discrimination and segregation through exclusionary zoning and urban renewal. For example, the population of Garden City, New York, located in Nassau County, is 95% white and 1% African-American. Only twenty-three African American families live in the city,[12] though it is bordered on three sides by towns with majority minority populations.[13] Garden City keeps out affordable housing, which could increase the minority population.[14] In 1989, the city rejected a plan to develop an eighteen-acre tract that would have included fifty-one units of affordable housing. The city accepted a plan for luxury condominiums during the same year.[15]

In 2002, Nassau County began evaluating over 2,500 County-owed properties for consolidation and sale, [16] including a twenty-five acre tract in Garden City.[17] An independent

firm the County hired recommended single-family homes, townhouses, and apartments for the tract.[18] Garden City residents turned out en masse against the plans at public hearings, forcing the county to restrict the tract to luxury housing.[19] Garden City then adopted a new zoning plan that included the twenty-five acre tract of land, making affordable housing economically unfeasible.[20]

Housing Discrimination Today

In its most basic form, housing discrimination consists of any act or omission that impairs the housing choices of any individual who is a member of a class protected by the fair housing law, such as African-Americans. Even though housing discrimination is against the law, it persists.[21]

Housing discrimination not only denies African-Americans the opportunity to choose where and how they will live. It also denies them equal access to quality education and jobs. Finally, housing segregation creates ghettoes that are target neighborhoods for law enforcement officials who view African Americans as dangerous people they need to keep in check.

The road to decent housing is an obstacle course that trips many African Americans. Buying a house is a very sophisticated piece of business, and real estate markets function through influence networks to which most African Americans have no access. In a variation of the game Lucy plays with Charlie Brown in the "Peanuts" cartoon series, African Americans keep thinking they have the house of our dreams, only to find the ball taken way just as they try to kick it. The basement has radon gas, the walls have asbestos, the neighbors are undesirable, the roof leaks, the schools are terrible.

As homebuyers, African Americans face discrimination not only in home purchase but also when they seek mortgage loans. In some cases, the loans have very unfavorable terms—high interest rates and Draconian default procedures—a practice known as “predatory” lending. Financial institutions are more likely to offer African-Americans “subprime” home loans with high fixed interest rates or adjustable rates that rise quickly as interest rates increase. Many of these lenders are not deposit taking financial institutions and fall outside of the scope of federal lending discrimination regulation. African-Americans with high income are twice as likely to hold a subprime loan as *lower-income* whites. Some mortgage lenders target borrowers in low-income neighborhoods, giving loans at high rates to force homeowners into foreclosure.[22] The company then resells the property at a profit.

Some bankers refuse to help African-Americans buy or improve homes regardless of the neighborhood in which the home is located. The banking industry gives individual African-Americans lower credit scores than whites and values African American communities lower than white ones. Lenders justify higher interest rates for African Americans by stating that African Americans pose an additional risk and have lower-valued homes. Lack of home ownership excludes African-Americans from one of the most basic forms of wealth accumulation.

In 2008, the city of Baltimore, Maryland, filed suit against Wells Fargo in federal court for a decade of systematically singling out blacks in Baltimore and suburban Maryland for high-interest subprime mortgages. Beth Jacobson, top loan officer at Wells Fargo, said in an interview, that Wells Fargo saw the black community as fertile ground for subprime mortgages, as working-class blacks were hungry to be a part of the nation's home-owning mania. "We just went right after them," said Ms. Jacobson, who is white. "Wells Fargo mortgage had an emerging-markets unit that specifically targeted black churches, because it figured church leaders had a lot of influence and could convince congregants to take out subprime loans."[23]

When Prof. Patricia Williams changed her race from "white" to "African American" during a mortgage application over the telephone, her entire experience changed. "The bank wanted more money as a down payment, they wanted me to pay more points, and they wanted to raise the rate of interest. Suddenly I found myself facing great resistance and much more debt," she writes.[24]

Williams said that the bankers did not cite race as the reason for their change in attitude, "No, the reason they gave was that property values in the neighborhood were suddenly falling. They wanted more money to cover the increased risk."[25] Although Williams' research indicated that prices in the neighborhood had been increasing steadily since World War II, her real estate agent informed her that, "this is what they always do.[26]" Williams soon realized, "I was the reason the prices were in peril."[27]

Being a professor of law at Columbia University and author of The Nation's "Diary of a Mad Lawyer" column, Williams did what most lawyers would do – she threatened to sue the bank and got the original terms of her loan agreement reinstated.

Williams discovered how race affected her mortgage application by chance. Many African-Americans never know how much race affects their housing choices. They may not

understand their rights, and fail to complain or even understand that they have been mistreated.

Homelessness and lack of affordable hosing are outside the scope of this book. We should note, however, that these problems disproportionately affect African Americans, particularly those with the least power to defend themselves. The 2001 United States Census demonstrates that those who cannot afford adequate housing, or any housing at all, are disproportionately members of minority groups.[28] Further, according to the Census, nearly three-quarters of the homeless population is comprised of minorities, consisting of 50% African-Americans, 12% Hispanics, 2% Native Americans, and 1% Asian.[29]

§6.2: What's the Law?

The Civil Rights Act of 1866

The Civil Rights Act of 1866, (42 US Code § 1982) passed during Reconstruction, guarantees property rights to all citizens, regardless of race and protects their right to inherit, purchase, and sell property. Based on the Thirteenth Amendment, it reaches the conduct of private citizens.

The Fourteenth Amendment

Between 1866 and 1968, only a few cases protesting racial discrimination in housing reached the courts, argued under the Fourteenth Amendment. Because of its ruling in the *Civil Rights Cases*, The Supreme Court refused to hear any complaint that did not allege "state action" facilitating discrimination. Only two cases meeting these criteria reached the Court, one in 1917, the other in 1948.

In the 1917 case, *Buchanan v. Warley*,[30] the Supreme Court ruled that the Fourteenth Amendment "qualifies and entitles" African Americans to acquire property without state legislation discriminating against them because of race.[31] *Buchanan* struck down a Louisville, Kentucky zoning ordinance that prohibited African Americans from residing in areas inhabited by a white majority, and placed similar bans on whites in majority-African American areas.[32] Prof. Boris Bittker called this a "checkerboard" ordinance.[33]

In 1948, the Supreme Court in *Shelley v. Kramer*[34] said state courts enforcing racially restrictive covenants in deeds of real property become parties to the discrimination themselves. As long as property owners adhered to the covenants voluntarily and did not resort to the courts, there was no Fourteenth Amendment violation. (If courts enforced such covenants however, they violated the law.[35]) After *Shelley*, no state or federal court could

hear a lawsuit to enforce a racially restrictive covenant without violating the Fourteenth Amendment.

The Civil Rights Movement

Private discrimination in housing has always been a "hot button" issue. It was not until the mid-1960s, in the face of widespread social unrest, that the political will to confront private housing discrimination finally developed. In 1965, the Watts riots in Los Angeles focused national attention on racism in the North. Dr. Martin Luther King and other civil rights leaders began coordinating marches to protest housing segregation, including Northern cities such as Chicago.

A 1959 U.S. Civil Rights Commission report identified Chicago as the most residentially segregated large city in the nation. Soon, civil rights activists in Chicago turned their attention to fair housing. In 1966, Dr. King went to Chicago to lead rallies and protests.[36] Civil rights demonstrators began marching into the city's all- white working class suburbs, and in July 1966, four thousand white rioters attacked three hundred marchers in the suburb of Cicero, throwing stones and bottles. By the end of August, city leaders capitulated, and met with Dr. King and agreed to a fair housing program.

When racists assassinated Dr. King in 1968, African American ghettoes nationwide erupted in violence and arson. President Johnson appointed the Kerner Commission to study the causes of the riots. They surveyed fifteen cities and four suburbs and identified segregated housing as a critical issue in each.[37] "Our nation is moving toward two societies, one black, one white, separate and unequal," the Report declared.[38]

In the same year, the Supreme Court in *Jones v. Mayer*[39] held that the Civil Rights Act of 1866 bars all racial discrimination, public and private in the sale or rental of property. [40] In September 1965, Joseph Lee Jones filed a complaint in the District Court for the Eastern District of Missouri, alleging that Mr. and Mrs. Alfred Mayer refused to sell him a home in St. Louis County because he was African-American. The Supreme Court also held the Civil Rights Act of 1866 a valid exercise of Congressional power under the Thirteenth Amendment.[41]

The Fair Housing Act (1968)

The Kerner Commission Report, *Jones* and Dr. King's assassination combined to create the momentum for the Fair Housing Act, passed as Title VIII of the Civil Rights Act. Title VIII bans discrimination because of race, color, religion and national origin in all housing transactions, private as well as public (including house sale, finance, or rental). The

Act provides a variety of remedies, including complaints to the Department of Housing and Urban Development (HUD), private lawsuits, and Justice Department action. Several important cases decided after 1968 both limited and expanded the reach of the Housing Act.

In 1972, the Supreme Court ruled in *Trafficante v. Metropolitan Life Insurance Co.*[42] that white residents were entitled to sue under the Fair Housing Act if they witnessed discrimination against minority groups, because they had a legitimate interest in fair housing.[43] In *Havens Realty v. Coleman* (1982), the Supreme Court permitted housing organizations and "testers" to sue under the Act.[44] A lower federal court ruled in 1984 that individuals violated fair housing law whenever they used standards to evaluate African American applicants that were different from the ones they used to evaluate white applicants, expanding the Act's reach to discrimination in apartment rentals and condominium and co-op sales, discriminatory appraisal practices, and discrimination in the mortgage and insurance industries.)[45]

Amendments passed in 1988 made the Fair Housing Act even stronger. The Amendments made it easier to bring private lawsuits in the courts. They also created speedier and less expensive relief by giving administrative law judges at HUD power to adjudicate cases of housing discrimination.

New types of cases emerged after the 1988 amendments. In *Ragin v. New York Times Co*. [46](1991) for example, a federal circuit ruled that a realtor using only white models in its advertising published a racial preference and violated the Fair Housing Act.[47]

The Act also provides for remedies against private individuals who harass or threaten people exercising their fair housing rights. Mr. Vartanian's actions against the Stringers, described at the beginning of the chapter, fell under this remedy.

Public Housing

In *Gautreaux v. Chicago Housing Authority* (1967*)*, a federal district court found the Chicago Housing Authority (CHA) violated the Equal Protection Clause of the Fourteenth Amendment by racially discriminating in site public housing site selection and tenant assignment procedures, and that those choices perpetuated Chicago housing segregation patterns. [48] For example, the housing authority imposed quotas at four predominantly white public housing projects to keep the number of African American families there to a minimum.[49]

The court directed CHA to select sites for public housing projects without regard to the racial composition of the surrounding neighborhood or of the project itself.[50] The court

imposed a broad remedial plan that required CHA to construct three public housing units in majority- white areas for every unit built in a minority-concentrated area. The city of Chicago did not comply with the court's order, however, leading to enforcement lawsuits that continue to this day.

Section 8[51]

Section 8 housing vouchers, introduced by the Housing and Community Development Act of 1974, were supposed to give low-income people housing choices outside inner city, segregated public housing projects.[52] Section 8 tenants could choose privately owned rental housing anywhere in the metropolitan area and sign a lease with the landlord. They were to pay their landlords with vouchers issued by the local public housing authority. The local public housing authority is then supposed to pay the landlord the difference between the contract rent and thirty percent of the tenant family's income.

Applicants for the Section 8 program originally had to have incomes that did not exceed 50% of the median income for the metropolitan area where the housing was located. By the late 1990s, rents were so high that low-income tenants could use only a small number of the vouchers.[53] Congress overhauled the program in 1998, attempting to bring new landlords into the program by authorizing higher subsidies, up to 110% of the median fair market rent. At the same time, it limited participation to the poorest households, those whose incomes did not exceed $15,600.

The new regulations worked. By 2005, approximately 2.1 million tenants used vouchers, compared to about 1.6 million in 1998. The program's costs also dramatically increased, leading to an ongoing struggle between low-income housing advocates and public housing authorities, on the one hand, and budget-cutters on the other.[54]

Discrimination continues in the relations between landlords and tenants, however, despite Section 8's guarantees to the contrary. Michele Campbell, a white female, attempted to rent a home owned by Robert and Martha Robb, also white, with a Section 8 voucher.[55] When Michelle visited the property, Mr. Robb welcomed her, noticed she had a cat, and told Michelle there were many wild cats in the area and that a certain black cat was "his nigger in the haystack."[56]

Hearing this statement, Michelle became concerned about how Mr. Robb would react to her African-American fiancée, so she asked him. Upon hearing this, Mr. Robb told her that he did not have any problems with African Americans but did not want a lot of them hanging

out in his parking lot. He then thanked Michelle "for not moving in and springing it on him."[57]

When the Section 8 inspector came to look at the home, Mr. Robb made further remarks about African Americans to him as well. The inspector informed Mr. Robb the unit needed several repairs before it could qualify for Section 8. Mr. Robb then asked the inspector what would happen if he did not make the repairs. The inspector responded saying he could not allow Michelle to move in. Mr. Robb then said that he would not make any of the repairs. Consequently, Michelle could not move in. Michelle then filed a discrimination suit against the Robbs.[58]

§6.3: How Does the Law Work?

Owners of single-family houses are exempt from the requirements of the Fair Housing Act if they *own* no more than three single-family houses, or if they *rent* units in their own homes and their homes house no more than four families. Owners exempt under these provisions are nonetheless subject to the jurisdiction of the Act if they use the services of a real estate broker or if they express racial preferences in any publication, posting, mailing, advertisement, or written notice.

Disparate Treatment

The **Fair Housing Act** defines disparate treatment as an overt discriminatory act against a member of a protected class (for example, African Americans), a disparity in the price or terms offered, or steering. Steering occurs when a real estate broker or other real estate professional directs members of a protected group to live with "their own kind," creating segregated neighborhoods.[59]

Other prohibited activities include blockbusting and redlining. Blockbusting occurs when a real estate broker or other real estate professional tries to persuade a homeowner to sell their property quickly, often at a loss, to escape a projected influx of a protected group. Redlining occurs when a financial institution unlawfully discriminates by refusing to make loans on properties in neighborhoods predominantly occupied by members of a protected group.

A prima facie case showing disparate treatment typically requires a showing that (a) the defendant refused to sell, rent, or otherwise make housing available to (b) a member of a protected class who (c) was qualified to buy or rent the housing and (d) the opportunity to buy or rent the housing remained open after the plaintiff was rejected.[60] The defendant can rebut by showing he rejected the plaintiff's application for a reason other than

discrimination.[61] The burden of proof then falls on the plaintiff to show that the reason the defendant offered for the rejection was a *pretext*, a cover for an unexpressed, discriminatory purpose.[62]

Rental housing accounts for the largest number of discrimination complaints.[63] Many people find it hard to prove discrimination, so the courts permit fair housing groups to use "testing" to expose sellers and landlords who discriminate.

A common test is the "paired test." Two individuals—one minority and the other white—pose as otherwise identical home or apartment seekers. They visit real estate or rental agents separately to inquire about the availability of advertised housing units.[64] The testers record how the subjects treat them and report any discrepancies to the fair housing group. Civil rights lawyers sometimes use paired testing even if no victim comes forward to complain.

The National Fair Housing Alliance (NFHA) found evidence of discriminatory practices at the Caldwell Gold Coast realtor's office in Chicago, Illinois,[65] using white and African-American testers posing as potential condominium buyers. The testers asked to see specific properties in majority-white north side Chicago neighborhoods such as Lincoln Park, the Gold Coast and Lakeview. Realtors showed the white testers thirty-six properties, but showed the African-American testers only seven. Additionally, one real estate agent suggested an African-American tester rent rather than buy.

In response to several complaints received about racial steering at Lowder Realty Co., the Central Alabama Fair Housing Center sent two teams of its employees as testers to investigate.[66] Each team consisted of two whites and two African Americans. The Center sent them to Lowder realtors Juliette Stuckey and Debra Whitehouse.

When the white testers met with Ms. Stuckey, they asked to see specific properties in racially mixed or African-American neighborhoods. Ms. Stuckey initially showed them a house, not on their list, in a predominantly white area. When Ms. Stuckey showed the testers the first house on their list she remarked how the neighborhood was "not a good area" and the testers would not want to live there because the neighborhood contained "too many of the other kind."[67] Ms. Stuckey also pointed to an apartment complex nearby saying, "that's nothing but black people over there in all those apartments."[68] On the drive back to the office, Ms Stuckey drove the testers through predominantly white neighborhoods, remarking how nice they were.

Next, the African American testers met with Stuckey. They told Stuckey how much they were willing to spend on a home and Stuckey discouraged them from spending that amount. Stuckey did not take the African-American testers to any new homes, and only showed them older houses in mixed or predominantly African-American neighborhoods. She did not comment on the quality of the neighborhoods, and did not drive the African-American testers through any white neighborhoods.

The Center sent individual testers to meet with Ms. Whitehouse, one white and one African American. Each told Ms. Whitehouse they were interested in a specific house in a predominantly African-American neighborhood and wanted to spend about $75,000. When Ms. Whitehouse showed the white tester a house, she commented that the storm windows provided "an extra layer of security" and suggested that he look at houses in areas that were predominantly white.[69]

In a second meeting between the white tester and Ms. Whitehouse, she showed several homes in predominantly white neighborhoods which she described as "easy to resell," "a good place to raise a family," or "a very nice area."[70] Ms. Whitehouse showed the African-American tester houses in predominantly African-American neighborhoods. She only showed him one house in a predominantly white area, and that was above his price range.

Anna Harris was the only African American tenant at the Shenandoah Apartments complex located in Los Angeles, California.[71] Rafael and Edna Itzhaki owned the apartments; Leah Waldman served as building manager.[72] Ms. Harris overheard a conversation one day between Ms. Waldman and a repairman, during which Ms. Waldman said "the owners don't want to rent to black people."[73] Ms. Harris immediately told Ms. Waldman that what she said was "illegal and racist."[74]

Ms. Harris then contacted the Westside Fair Housing Council who, in response, conducted testing for racial discrimination. The owner told the white tester who called that the rent was $700 per month, but did not ask about her marital status. However, when the African-American tester called, the owner inquired about her marital status, which meant an additional $50 per month. He additionally pointed out that there was only one parking space and she would need two. He then asked where she was moving from, and told her that was a much better area and she would not want the unit because it was small.

The next day the African American tester visited the building first. When she told Ms. Waldman that she like the unit and asked about the rental price, Ms. Waldman responded by referring her back to the owner as she "didn't know anything."[75] Twenty minutes later, the

white tester viewed the apartment.[76] When she told Ms. Waldman she liked the unit, she was informed the rent was $700 per month with a $700 security deposit. Furthermore, Ms. Waldman invited the tester into the apartment to sit while Ms. Waldman called the owners to encourage them to rent to her describing her as "a beautiful girl."[77]

The **Civil Rights Act of 1866**, like the Fair Housing Act, reaches private as well as public discrimination. The Civil Rights Act of 1866 is narrower than the Fair Housing Act in that it reaches only racial discrimination, but broader because it has no exemptions (such as owner-occupied homes). The Civil Rights Act statute of limitations also gives victims a longer time to sue. However, the Fair Housing Act covers the "circumstantial evidence" of disparate impact, while the Civil Rights Act responds only to disparate treatment.

Disparate Impact

A prima facie case showing disparate impact typically requires a showing that a policy's effect is discriminatory, whether or not the defendant meant it. The plaintiff shows (a) the discriminatory impact and (b) that a reasonable person in the defendant's position would realize that the housing practice or policy in question would deny members of a protected class a benefit enjoyed by members of the majority group.

In order to rebut a disparate impact claim, the defendant must present a valid business reason to justify the practice or policy. To rebut the defendant's business reason, as in the case of disparate treatment, the plaintiff must show that the reason offered was a pretext.

Disparate impact is the "weapon of choice" against **exclusionary zoning.** The Supreme Court had its first opportunity to address exclusionary zoning practices based on race and class in *Warth v. Seldin*,[78] but dismissed the lawsuit because the plaintiff lacked standing.

The seminal example of a disparate impact lawsuit against exclusionary zoning is a New Jersey case, *Southern Burlington County N.A.A.C.P. v. Mount Laure*l,[79] brought under the New Jersey state constitution rather than federal law. The state Supreme Court concluded that the poor are a protected class in New Jersey and that housing is a fundamental right.[80] Accordingly, exclusionary zoning's disparate impact on the poor, denying them equal access to housing, violated New Jersey's State constitution, even though these practices did not violate the Fair Housing Act or the Fourteenth Amendment of the U.S. Constitution.[81]

§6.4: What Needs to Change?

The 1968 Fair Housing Act was a significant step towards curbing the elaborate, multilayered system of residential racial segregation that prevailed in mid-twentieth century

America. Fair Housing enforcement today remains a challenge, however.[82] First, housing discrimination can be so arcane and sophisticated that victims often fail to recognize it when it occurs. Even when they realize what has happened to them, they may not know where to go for help, or may be too embarrassed or hurt to pursue a claim. Consequently, victims report only a small fraction of fair housing law violations to local or federal fair housing agencies.[83] When citizens actually do complain, they often must turn to overburdened agencies for relief. The victims themselves typically do not have the resources to pursue private litigation.

The Reagan Administration, from 1980 to 1984, placed little emphasis on enforcing existing fair housing law and even less on developing the law into an effective means of change. HUD's enforcement activities dramatically diminished, and the number of complaints filed dropped quickly. HUD took longer and longer to investigate cases.[84] In addition, the Reagan administration cut HUD funding; public housing starts declined and existing projects began to deteriorate.[85]

OHFEO had fewer staff members in 2000 than it had in 1989, and fewer managers as well, impairing the agency's day to day operation. With insufficient financial resources, it is harder to train staff, travel, educate the housing industry and the public, or fund contracts and new initiatives.[86] These present major obstacles to the struggle against housing discrimination. OHFEO needs reorganization, focus, and funding to enhance compliance and enforcement activities, strengthen management, and upgrade monitoring, training, and technical assistance.

THE HANDBOOK

§6.5: First Aid

When you report the incident to a government housing agency or a civil rights group, they will ask you to outline the specifics of your discrimination charge. They will want the name and address of the person you accuse (the respondent), where the housing involved is located, and the date(s) the alleged violation occurred.[87]

They will also want a short description of the event you believe violated your rights. Did you ask the offender or some other responsible person to fix the problem or make amends? Do you have any records of these requests? Do you have written correspondence, photographs, affidavits, or eyewitness testimony to support your claim? Did you take any action, such as refusing to pay rent? Based on the nature of your problem, the agency or

group will be able to assess whether you have grounds to make a formal complaint. If so, they should be able to help you decide where to file a complaint and help you file it.

There are deadlines for filing a complaint. You may think you have lots of time, but the time goes by quickly. File as soon as possible.

§6.6: Who Can Help?

A Fair Housing Act claim can begin in any one of four ways. First, a party can file a federal administrative complaint directly with the Office of Fair Housing and Equal Opportunity ("OFHEO") at the U.S Department of Housing and Urban Development ("HUD").[88] To find the nearest OFHEO local office, visit www.hud.gov.

Second, a party can begin an administrative proceeding with a state or local fair housing agency to which HUD has delegated its enforcement authority, and which operates in a manner "substantially equivalent" to HUD. (The law calls these "FHAPs" because they are recipients of federal enforcement funding under the Fair Housing Assistance Program.).[89] Third, the Department of Justice can sue fair housing violators in court on its own authority.[90]

Finally, a party may file a claim in court, bypassing HUD and any state agency completely,[91] something employment discrimination plaintiffs can *not* do (See Chapter Five). The plaintiff must file suit no later than two years after the violation occurs.[92]

Ordinarily, a party can use any of these approaches without losing the right to use another later, or even at the same time.[93] The principal exception is the HUD administrative complaint—a party who wins *or* loses in a HUD hearing may not proceed with a private suit.

Filing an Administrative Complaint Directly With OFHEO

Today, HUD and the courts receive more than two million housing discrimination complaints each year. These include complaints against landlords, sellers, brokers, lenders, insurance companies, and appraisers. A victim has one year from the time the discriminatory housing practice occurred to file an administrative complaint with HUD.[94] Victims can file online (see *http://www.hud.gov/complaints/housediscrim.cfm*) by telephone (call toll-free,1-800-669-9777.) by mail or in person, (using HUD Form 903). HUD will notify you when it receives your complaint.[95] HUD will also notify the person or firm you have accused in your complaint and permit them to submit an answer.

HUD refers most administrative complaints to local fair housing agencies. The periods for filing complaints with FHAP agencies are shorter than federal limits—sometimes as few as 180 days. Once a complaint is filed and "perfected," OFHEO (or the FHAP) has 100 days to investigate the complaint.[96]

If you need immediate help to stop a serious Fair Housing problem, HUD can accelerate the process. HUD can ask the United States Attorney General to file for an injunction if irreparable harm is likely to occur. For example, if a builder agrees to sell a house but fails to keep the agreement after learning the buyer is African-American, the Attorney General can ask a court to prevent a sale to any other buyer until HUD completes its investigation.

OFHEO first tries to reconcile the parties, much as the EEOC tries to conciliate employment discrimination complaints.[97] **Conciliation** is voluntary and either side may refuse to participate. However, many parties choose this route because it is quicker and less expensive than administrative hearings or litigation. HUD devotes an entire chapter of its intake manual to the conciliation remedy.

If conciliation fails, HUD (or the FHAP) continues its investigation and eventually determines whether there is **reasonable cause** to believe that discrimination has occurred.

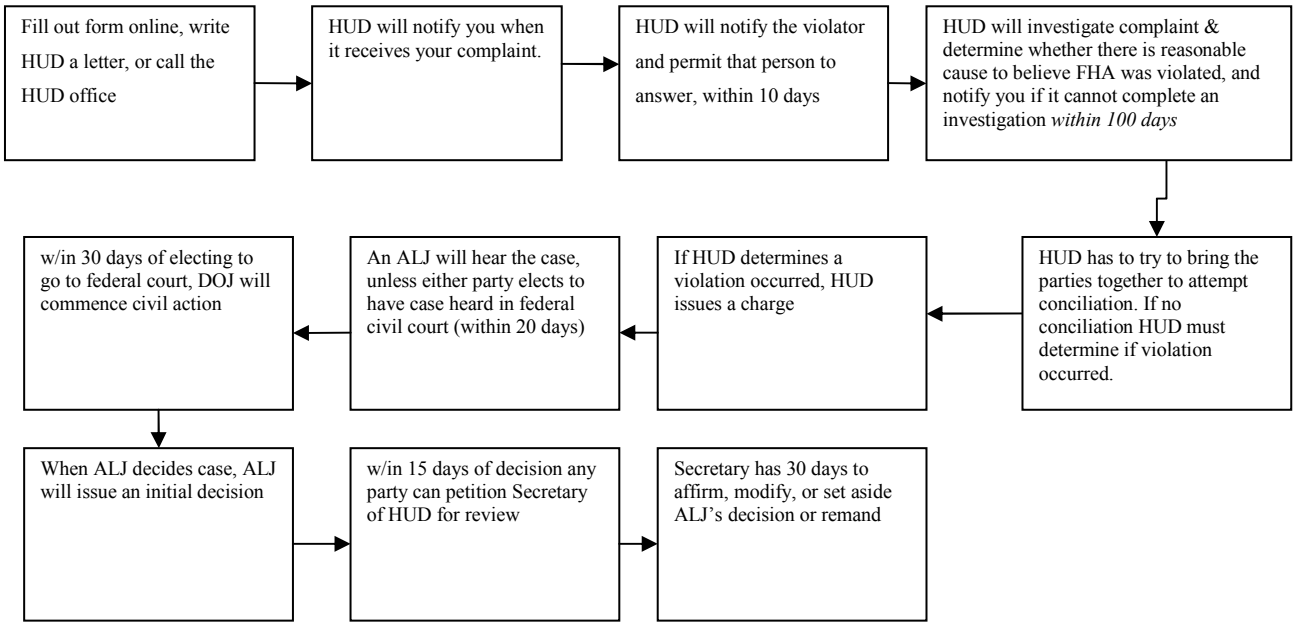
OFHEO staff interview witnesses, talk directly to the respondent and research and evaluate the respondent's past conduct. Since it is unlikely that the respondent will admit discrimination, OFHEO may use testers to find the underlying truth, as permitted by the *Havens Realty* case. After completing their investigation, the staff submits a report, suggesting that discrimination probably took place (or, in the alternative, that it did not, recommending that OFHEO dismiss the complaint).[98] Because of the same kind of backlog issues EEOC faces, HUD investigators can take a while, considerably longer than 100 days.[99]

The OFHEO Assistant Secretary makes the final determination. Where local land use laws are involved, HUD's Office of General Counsel assists in the determination. The Secretary promptly dismisses if staff investigators believe no discrimination occurred (a "no cause" case). If the Assistant Secretary finds reasonable cause based on the staff's investigation (a "cause" case), HUD issues a formal charge. [100] Then the complainant can have the matter resolved by an administrative law judge or by a federal court. Either party can bypass the administrative stage and go straight to court by notifying HUD within 20 days after they receive the charge.[101]

If the parties agree to administrative resolution, the case goes to the Office of Administrative Judges for a hearing. Both parties get a copy of the charge as well as notice of the date and time of the hearing. The Administrative Law Judge ("ALJ") is supposed to make his decision and serve it on the parties within 60 days,[102] but they rarely finish within that time.[103] The Secretary of HUD issues a final order in accordance with the ALJ's decision,

either dismissing the case, ordering respondent to stop illegal activity, or ordering respondent to pay compensatory damages (up to $130,000).[104]

HUD COMPLAINT PROCESS



SOURCE: http://www.hud.gov/offices/fheo/complaint-process.cfm

Lawsuit by the Department of Justice

If the victim's complaint suggests a larger pattern or practice, the Department of Justice may take the case directly to court, bypassing the ALJs. This may also happen when the matter requires immediate action (discussed above). The 1988 Amendments to the Fair Housing Act gave the Attorney General special authority to commence zoning or other land-use cases referred by HUD, to commence breach-of-conciliation cases referred by HUD, and to enforce subpoenas.

DOJ action is a very favorable option for individuals without the resources to combat a wealthy respondent such as a large realtor or multifamily housing provider, a lender, an insurance company, or a municipality. Even though the government brings the case, victims may receive money damages up to $110,000 if they can prove individual injury.[105]

Lawsuit by the Victim

A victim can ask for a federal appeals court to review an ALJ's decision if they think the ALJ should not have dismissed their case, or should have given them stronger relief.[106] An individual with a housing discrimination complaint can also choose to opt out of the HUD process altogether, and proceed with trial by jury if they think they can do better that way.

Many people bypass HUD completely, going to court with private counsel or seeking representation from civil rights organizations, sometimes because they hope to get a sizeable money award from a jury.[107] Money damages are available for financial loss, humiliation, embarrassment, and emotional distress.[108] In the case of "wanton and willful" discrimination, plaintiffs may receive punitive damages.[109]

There is also a special action for victims of force or threats of bodily harm, such as the real estate agents threatened in the Stringer case, discussed at the beginning of the chapter.[110] Title VIII complainants filing private actions in court must do so within two years of the time the fair housing violation took place.[111]

§6.7: Getting Organized

The National Organization of African Americans in Housing (NOAAH),[112] formed in 1998 by affordable housing advocates, managers and residents of public housing, is unique in that it addresses both affordable housing and fair housing issues. As such, the organization represents an alliance of low-income and middle-income African American interests, an increasingly rare combination today.

NOAH organizers wanted fair, affordable housing and set about building a national network of housing advocates to work in partnership with business and government to achieve these ends.

NOAAH's primary goals are to insure that all housing transactions and programs are free of illegal housing discrimination, promote healthy and vibrant communities, advocate for equitable budget authority for government sponsored housing programs, promote family self-sufficiency, and provide opportunities for professional skills enhancement, resident training, and economic development. They have set up four task forces to implement their program: Affordable Housing Finance Strategies, Fair Housing, Fund Development, and the Healthy Homes Initiative.

The Affordable Housing Finance Strategies Taskforce works to expand the housing stock and portfolios of public housing and state housing finance agencies through techniques such as tax credits, municipal and housing mortgage bonds and housing recovery funds.

The Fair Housing Taskforce works for toward nondiscrimination in all housing programs, especially federally funded and federally assisted programs. The also provides fair housing training and technical assistance to NOAAH'S membership and housing providers and lobbies Congress, the Department of Housing and Urban Development and the Department of Justice to aggressively investigate and resolve housing discrimination complaints.

The Fund Development Taskforce coordinates fundraising, marketing, communications and volunteer management to sustain the organization through the realization of its long-term mission and vision.

The Healthy Homes Initiatives Taskforce educates at-risk communities about the health and environmental hazards, chronic illnesses, diseases and other threats to families living in low-income housing. Taskforce members focus on lead poisoning, mold pests, hunger, and the skyrocketing cost of medications.

You can contact NOAAH at their national headquarters, located at 888 16th St., NW, Suite 800, Washington, DC 20006. Their telephone number is (202)544-1058, and their website is www.noaah.org.

The NAACP has also become very active in the struggle against credit discrimination. Inn 2006 they staged a a national 'Day of Action' against discriminatory mortgage lending[113] and in 2007 filed a class action lawsuit against 17 of the nation's largest lenders for discriminatory lending practices.[114]

There are also a number of local organizations (listed in the endnotes) dealing with fair housing,[115] affordable housing[116] and public housing,[117] as well as organizations focused on credit discrimination issues such as predatory lending, redlining and discrimination in mortgage foreclosures. [118]

Most of these community groups use educational tools, ranging from training tenants to informing stakeholders about the importance of providing affordable housing and adhering to the fair housing laws, including innovative programs training youth to conducting housing discrimination tours. These community efforts also seek to influence housing policy on a national, state, and local level.

Chapter Seven
Public Education

Public schools shall not separate students from one another because of their race.
SYNOPSIS, *BROWN V. BOARD OF EDUCATION*

THE HISTORY

§7.1: What's the Problem?

In 1955, the school board in Little Rock, Arkansas voted to comply with the Supreme Court's *Brown v. Bd. of Education* ruling. They planned to admit the first African American students to white schools in September of 1957. The local NAACP immediately registered nine students, selected because they had regular attendance.[1]

When it came time for the nine students to attend Little Rock's formerly all-white Central High School, segregationist groups blocked their path. Governor Orval Faubus called out the Arkansas National Guard to support the segregationists. The confrontation made national headlines and severely embarrassed the United States at a time when the country sought to persuade the rest of the "free world" that they should lead it.[2] The Justice Department sought and received an injunction commanding Faubus to stand down.

The Little Rock police then took over, and secretly lead the students into the school through a side door.[3] There were more than one thousand segregationists outside the school. When the mob discovered the African American students had gotten inside, they began to riot.[4] The police escorted the students back out of the school in a hail of bricks and bottles.[5]

At Mayor Woodrow Mann's request, President Dwight Eisenhower sent an army division to Little Rock and federalized the Arkansas National Guard.[6] The two units together successfully escorted the nine students into Central High school two days later, on September 25, 1957. White students at Central High subjected them to verbal and physical abuse for the entire year.[7] By the beginning of the next academic year, thousands of white students left the city or enrolled in all-white private schools. [8]

Background

Schools for African American children in the South were not only separate but also unequal—underfunded, poorly located, constructed, and maintained, with little or no transportation as African American children walked for miles, often passing white schools on

the way.[9] In the North, African American children attended public schools segregated by law at least until the Civil War.

In the South, slavery preceded segregation. In many Southern states, it was a crime to teach a slave to read.[10] After Emancipation African Americans tried to teach themselves, but the Black Codes prohibited them from assembling unless a white man was present.[11] Only one or two African Americans in a community could read and write at best, and the Black Codes prevented them from teaching what they knew to others.

After the Civil War, the Freedman's Bureau educated nearly 250,000 emancipated African Americans.[12] Southern whites vehemently opposed any schools for African American children, however, and quickly mobilized to counter Freedmen's Bureau efforts. Racists burned down schools, insulted and abused teachers, and stoned schoolchildren.[13]

During Reconstruction, African American communities built their own schools and paid their own teachers.[14] As soon as Reconstruction ended, however, local authorities asserted total control of the schools' administration and finances. Authorities increased African American student-teacher ratios and diminished African American teachers' pay and grades of certification. They lowered the salaries of African American teachers and administrators relative to their white counterparts. They shortened the school term for African American students to make them available to work in the cotton fields and banned African American children from public libraries. They segregated and de-funded the schools, creating a system *Plessy v. Ferguson*'s "separate but equal" doctrine quickly approved.[15]

William Bagwell, the Director of the American Friends Service Committee's School Program detailed ongoing school segregation in a 1962 address to leaders of the white community in Western North Carolina.[16] African American students in the city of Ashville attended segregated schools, and African American students living outside the city took a bus in to attend segregated schools. These students had to board their busses before sunrise in order to travel fifty miles to school, returning home after sunset. Some spent over twelve hours traveling to and from school, more time than they spent in the classroom.

At the end of the lengthy bus rides, students attended inferior schools. They had fewer teachers per student than the white schools, creating an environment in which students did not receive sufficient personal attention to succeed. Facilities at the white school were much larger and more comfortable than those at the African American school.[17]

School Discrimination Today

Today, African American schoolchildren in the United States face the legacy of more than a century of continuous racially segregated education. Most African American children today still attend schools that are separate and unequal.[18] Today, students of color comprise over 40% of all U.S. public school students, more than twice their share of students during the 1960s.[19] Almost 2.4 million students—including about one in six African American students—attend "hypersegregated schools" in which the student population is 99-100% of color. White students are just as segregated as their blacks and Latino counterparts:[20] for example, the average white public school student attends a school that is nearly 80% white.[21] As a result of school segregation, almost half (46%) of the nation's African American students attend low performing schools,[22] compared to only 11 percent of white students.[23]

Outside of school, minority students face disadvantages such as low levels of parent participation, low levels of reading to young children, excessive television watching, and limited parent availability. High rates of student mobility, low birth weight, lead poisoning, hunger, and malnutrition hamper their performance as well.[24]

Lack of nutrition and proper health care especially hinder learning. A Harvard University and Massachusetts General Hospital study of children in Philadelphia and Baltimore showed that children who regularly ate breakfast had better standardized test scores, better behavior, and showed less hyperactivity than children who skipped breakfast.[25] Improper eating habits can lead to fatigue, moodiness, and headaches. The ability to interact, think abstractly, and remain alert and attentive suffers immensely.

At school, minority students generally experience a less rigorous curriculum, insufficiently prepared and trained teachers, larger class sizes and a lack of safety and security. The schools have little, if any technology-assisted instruction. The resulting achievement gap between African American and white students remain one of the nation's most pressing social problems. Roslyn Mickelson, a sociologist at the University of North Carolina-Charlotte, surveyed 1,193 high school seniors in Los Angeles about their attitudes regarding education and their concrete plans to use their education. Her 1983 study which was reinforced by a similar study in 2001 found that black students did not make the same connection between hard work in school and upward mobility as their white counterparts did.[26]

Education is fundamental to success in today's world. Poor quality education limits opportunities for advancement and precludes a level playing field. Better education leads to employment, productive rather than antisocial lives, citizen participation, and a better quality

of life in terms of health as well as wealth. Educated people are a great asset to a community, and can help the community to improve itself and its position vis-à-vis other communities.

URBAN SCHOOLS

In segregated suburbs and cities, *de facto* segregation arises from the intersection of segregated residential patterns and the institution of the "neighborhood school." A hyper-segregated America yields a hyper-segregated American educational system.[27]

Many African American students attend school in segregated, inner-city neighborhoods, which find it hard to educate them because of scarce resources and a dwindling tax base.[28] Urban populations are very costly to sustain. Industrial and manufacturing operations once supported the population, providing income for working-class residents. Working-class income taxes, as well as property taxes on the industrial and manufacturing plants themselves, funded municipal services where needed. Today, most US cities have lost their industries to the suburbs or to the Third World, leaving unemployed and underemployed residents (and their families) with high levels of service need, and without the tax base to accommodate them.[29]

Nowhere is this more apparent than in urban public schools.[30] Students living in such low-wealth school districts face great educational disadvantages, including poorly qualified and trained teachers,[31] inadequate course offerings, low competition levels among students, unstable enrollment, and low graduation rates.[32] Urban *de facto* segregated public schools are thus typically under-funded and under-performing compared to those white suburban children attend.[33]

After spending five years visiting sixty inner-city schools in eleven states, noted education author Jonathan Kozol summed up the environment facing many African American students at schools, "They're not just segregated, they're antiquated buildings. They are dirty. They're depressing…Children in these schools are totally separate, brutally unequal." Kozol found one Bronx school holding its first of seven lunch periods at 9:20 am because of overcrowding.[34]

Only 48 % of public school students in Washington, D.C. even graduate from high school, and less than 10% of those that graduate actually go to college.[35] The gap between black and white math scores in DC public schools is the highest in the country, more than double the nationwide achievement gap.[36] The gap in reading is no better.[37] In our nation's capital, that is simply a disgrace.

A poor climate for learning also hinders academic success for urban minority students: high dropout rates, children passed through the system without learning, profanity, disrespect for teachers, and drug and alcohol abuse. Three in ten African American youngsters attend schools with considerable turmoil: 30% of African American students report that teachers spend more time trying to keep order than teaching.[38]

Lower rates of suspension and expulsions in majority-minority schools still produce large absolute number of students banned from school. Large numbers of these students are thus free to wander in crime-ridden urban neighborhoods where they can quickly get into trouble. Further, so-called "zero tolerance" policies in majority-minority schools regarding dangerous items or contraband students bring to school frequently engage student offenders with the police. School offenses thus become criminal offenses, creating yet another point of entry for minorities, particularly males, into the criminal justice system.[39]

More and more, inner-city minority schools are morphing into prison models, which include military style behavior-adjustment programs. One of my students who formerly taught in such a school left because violence, arrests, police, and drug-sniffing dogs made her job impossible. Every classroom had emergency buttons and teachers walked students in lines to the cafeteria to avoid gang violence. Many teachers fled these minority schools in favor of more orderly majority-white school districts.

Suburban Schools

For parents of African American students in inner-city schools, the educational issue is typically lack of resources, Quality of instruction and teacher/administration accountability. For affluent African American families that have managed to escape the ghetto for the suburbs, the issues are somewhat different.

Some families are steered to African American or minority neighborhoods, where their children attend suburban segregated schools. These families face a school resource question analogous, but not exactly the same as the problem in inner-city schools. In suburban municipalities and counties, racial steering has often created zones that are heavily African American and Hispanic. Schools located in these zones suffer from the same kind of limited resources and lack of teacher and administration accountability that inner-city schools face.

The problem of resources exists not because the tax base in these municipalities cannot support the services needed, however. Rather, school resources are diverted to the wealthier, whiter zones of the municipality, in a disparate distribution pattern that was ruled

unconstitutional by the Court of Appeals for the Fifth Circuit in 1971.[40] The increasingly conservative US Supreme Court overturned this ruling in a footnote in the 1976 case of *Washington v Davis*,[41] so there is currently no litigation remedy for this injustice.

Only the relatively few African American families that actually live in integrated neighborhoods are in a position actually realize the goal of school "integration."[42] These families, however, often face the problem of "re-segregation," as predominantly white administrators and teachers use tracking and special education designations to herd African American students into separate classrooms, or eject them from the schools altogether with probation, suspension, and expulsion.

In elementary schools, authorities may identify African American children as emotionally disturbed and take them out of their regular classroom for "special education."[43]

Sometimes teachers try to convince parents to give their children drugs. Ritalin is a medication that supposedly calms hyperactive children, permitting them to receive instruction in the classroom. This medication is widely used but with few if any controls. Teachers and administrators often push the drug as a "one size fits all" solution to any problem they have connecting with a child, without benefit of any medical expertise. [44]

In middle and high schools, authorities sometimes "track" African American students out of college preparatory classes that are reserved for white students. Affluent white schools with relatively small numbers of African American students also have some of the highest rates of suspension and expulsion for African American children in the nation.

THE ACHIEVEMENT GAP

Academics, practitioners, parents, and policymakers agree that an achievement gap exists between privileged and underprivileged students, with sharp variations based on race and class. There is evidence that the gap begins before students even reach kindergarten. Research shows that minority and lower-income students enter school without the skills they need for success.[45] Proven approaches such as Head Start seek to improve minority students' skills before they begin school.[46]

Education is a fundamental component to success in today's world. Without quality education for each student, opportunities for advancement are limited while the playing field remains unequal. Education leads to employment, productive rather than antisocial lives, citizen participation, and a better quality of life in terms of health as well as wealth. Educated people are also a great asset to the community and if they so choose can help the community at large to better itself. In addition, a diverse society is itself disadvantaged by segregated

educations, as children do not learn public life and democratic skills sufficient to carry their nation's trust forward into the future.[47]

A 2009 study by McKinsey & Company measured the costs of the achievement gap in terms of lower earnings, poorer health, and higher rates of incarceration. According to McKinsey, the achievement gap reduces the U.S. gross domestic product (GDP) by $1.3 trillion to $2.3 trillion higher per year, the economic equivalent of a permanent national recession.[48]

When given broader educational opportunity, African American students do quite well. African American males that graduate from desegregated high schools achieve higher incomes than do their counterparts from segregated schools.[49] Students who attend schools that are more diverse have a higher comfort level with members of other racial groups; they show a greater desire to live and work in multiracial settings than do their more segregated peers.[50] Moreover, white students in integrated settings exhibit more racial tolerance and less fear of their African American peers than do white students in segregated environments.[51]

Unfortunately, these opportunities are harder and harder to come by. The disparity in K-12 education between African American and white children manifests itself at the college and university levels, and fuels the affirmative action controversies which are the most visible forums in which debate over our nation's diversity takes place. These conditions make it highly unlikely that affirmative action in education "will no longer be necessary" by 2025, as Justice Sandra Day O'Connor hoped in her *Grutter* opinion.[52]

§7.2: What's the Law?

Background: Brown's Promise Unfulfilled

History has revealed serious shortcomings to the *Brown* decision. First, local school boards fiercely resisted it and in 1955, the Court had to direct them to desegregate with "all deliberate speed," rather than at their own pace.[53] (*Brown II*)

Brown II's "all deliberate speed" formula was still not strong enough. Even President Dwight D. Eisenhower, though he later dispatched federal troops to Little Rock, privately chastised the Justices of the Supreme Court when they issued the *Brown* judgment. He told Chief Justice Earl Warren "[Southern whites] are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes."[54]

While Eisenhower spoke privately, individual citizens and state governments, especially in the South, publicly rallied against *Brown*. Some school districts delayed almost

fifteen years before they made any significant changes to their dual-school systems. Other districts responded by simply closing all public schools. White parents arranged for private education for their own children, some times with local government funding.[55]

Ten years after the first *Brown* decision, segregationists continued their open defiance. Georgia Judge William Boothe had to specifically order the University of Georgia to admit African-American students Charlayne Hunter-Gault and Hamilton Holmes.[56] Student James Meredith needed an armed escort to attend the University of Mississippi.[57]

Southern segregationists faced a problem because African Americans and whites had lived in close proximity since slavery (with the caveat that the African Americans stayed "in their place").[58]School segregation without offending *Brown* was much easier in the North because of housing segregation.

First, Northern real estate brokers, landlords, and public housing authorities funneled massive African American migrations from the South during World Wars I and II into inner-city, ghetto neighborhoods. Since whites and African Americans lived in separate neighborhoods, their children attended separate neighborhood schools. Local property taxes funded neighborhood schools, so relatively powerless black neighborhoods got schools that were cash-poor as well as segregated.

Using similar techniques, the South since *Brown* has replicated the Northern model of de facto segregated schools, unequal in funding and resources. "White flight" in the 1950s and 1960s created predominantly African American cities both North and South, creating large numbers of under-funded, *de facto* segregated urban schools. With the element of state action now missing, *Brown* has proven powerless to redress most modern school segregation. *Brown* has had little or no impact on today's national system of de facto segregated schools.

Serious desegregation stalled until the l964 Civil Rights Act,[59] which gave the federal government new powers to sue recalcitrant school districts as well as denying such districts federal funds.[60] With this new ally, civil rights attorneys won a series of federal cases subjecting uncooperative school districts to detailed desegregation orders and extensive monitoring.

In *Green v. County School Board*, (1968) the school board's freedom of choice plan, in place for three years, still had not achieved effective integration. Parents claimed that better options were available that would integrate schools. The school board argued that the plan failed because African American families refused to cooperate.[61]

Green introduced six factors, now known as the *Green* Factors, used to determine whether a school was still "dual" (separated into racially identifiable white and minority schools) as opposed to "unitary (a thoroughly integrated school system). After *Green,* the lower courts began to require desegregation plans that addressed each of the *Green* factors: pupil assignments, faculty, staff, transportation, extracurricular activities, and physical facilities.[62]

In *Swann v. Charlotte-Mecklenburg*, the court reviewed the techniques of pairing and clustering to achieve unitary status. The *Swann* Court held that if a plan continued single race schools, school authorities had to show present or past *de jure* segregation was not the cause. *Swann* focused more on ratios, and less on broad sweeping improvements to address school inequality.[63]

In *Keyes v. Denver School District No. I* (1973),[64] the court ruled that:

1) Integrating Hispanic and African American students is not compliance, because the two groups suffer similar inequities,

2) proof of *de jure* segregation in a substantial portion of the school district is enough to assume that the entire district was similarly affected, and

3) the burden of proof should be on the school board to show that similar policies did not affect other portions of the city.[65]

The Court found that the school board engaged in deliberate racial segregation through a variety of policies: constructing a new elementary school in the middle of the African American community; gerrymandering student attendance zones, using so-called "optional zones," and over-using mobile classroom units. Most schools in the district were separate and unequal. The Supreme Court found that *de jure* segregation in a large section of the district was proof of segregation in the entire district.[66]

In response, the Denver Public School system created a structured system to integrate students by matching schools and then busing students to create a more racially diverse student body.[67]

The post-*Brown,* ultraconservative Supreme Court fashioned by the right wing of the Republican Party soon began to chip away at these victories, however. As early as the 1970s, Nixon-appointed Supreme Court Chief Justice Warren Burger handed down *Milliken v. Bradley,* drastically restricting desegregation remedies connecting suburban and urban schools. *Milliken* withdrew the Court from the fight against desegregation in the North and anywhere that white flight to the suburbs caused school segregation, particularly damaging

because 80% of schoolchildren live in metropolitan areas.[68] Justice Thurgood Marshall, architect of Brown, dissented, claiming the Court had turned its back on the struggle to remedy separate and unequal education.[69]

The newly-conservative Court's campaign to reverse the early, promising strides toward equal educational opportunity on the basis of race picked up momentum in the early 1990s with three decisions, *Dowell*, *Freeman* and *Jenkins*.[70]

In *Board of Education v. Dowell* (1991), the Court held that federal regulatory control over a public school system should not continue "beyond the time necessary to remedy the consequences of past intentional discrimination."[71] District courts should determine: (1) whether the board complied in good faith with the desegregation decree, and (2) whether the school board eliminated vestiges of past discrimination to the extent practicable."[72]

Elevating the "important values of local control of public school systems,"[73] the Court began permitting school boards to assign students even if they reinforced existing segregation, so long as plaintiffs could not prove discriminatory intent.[74]

In 1992, *Freeman v. Pitts* drastically limited aggressive desegregation methods such as busing and redrawing school zones. *Freeman* also gave supervising courts authority to release school districts in incremental stages, even before they achieved district-wide desegregation.[75] The *Freeman* Court reiterated *Dowell*'s objective--restoring control to local authorities as soon as possible.[76]

In *Missouri v. Jenkins*,[77] (1995) the Court held racial disparities in academic achievement--the "achievement gap"--beyond the authority of federal courts to address.[78]

The Court revisited *Keyes I* in 1995 and declared, "the vestiges of past discrimination by the defendants have been eliminated to the extent practicable,"[79] and ended mandated desegregation in the Denver Public Schools. With the *Keyes I* approach on the shelf, *about half the schools under federal court supervision began to re-segregate*.[80]

By 2001, four hundred school districts remained under federal court supervision, but the Supreme Court continued to narrow integration policies, slowing integration to a snail's pace.[81] Over time, the courts have come to accept schools as "unitary" based on a reasonable effort to desegregate, rather than actual results.

Parents Involved in Community Schools v. Seattle School District No. 1 (2007, discussed in Chapter One, solidified this trend, overturning any race-conscious desegregation efforts.[82] By holding that school districts could not take account of a student's race, the *Seattle Schools* Court "reversed nearly four decades of decisions and regulations which had

permitted, and even required, that race be taken into account because of the earlier failure of desegregation plans that did not do that."[83]

Where are we likely to go from here? The Supreme Court today encourages lower courts to terminate desegregation orders, even in communities that want to maintain them.[84] Local and state educators that actually want to foster integration will find it difficult to do so.[85] Resegregation accelerates all over the country, and African American students are more segregated than they have been since the l960s,[86] with correspondingly unequal educational opportunities."[87]

Poverty

Desegregation strategies fail where poverty is a central issue in addition to race.[88] The federal courts' primary focus has been on school districts where integration is possible, and, as discussed above, even those efforts have fallen by the wayside. Milliken eliminated the one possible desegregation remedy for urban schools, combining inner-city minority school districts with affluent white suburban ones.

Even "separate but equal" is no longer possible. The Supreme Court in *San Antonio Independent School District V. Rodriquez* (1973) held that school financing based on local property taxes, though causing gross disparities in educational opportunity for rich and poor children is constitutional. The Fourteenth Amendment provides no protection for the poor, and the U.S. Constitution leaves education to the states, so long as intentional racial discrimination is not involved.[89]

The No Child Left Behind Act

The No Child Left Behind Act ("NCLB") seeks to bridge the achievement gap between poorly funded and underperforming inner-city schools and affluent suburban schools by requiring all states to develop school-wide assessment tests in reading, math, and science, denying federal funding to failing schools.[90]

Unfortunately, the Act does not provide funding sufficient to meet its mandates.[91] Further, its "one-size-fits-all approach encourages instruction narrowly aimed towards the standardized tests themselves.[92] Finally, the Act provides no alternative schooling arrangements for children attending schools that fail.

Resegregation

Tracking and improper "special ed" classifications are more suburban than urban problems, and can rapidly resegregate even a nominally integrated school.

TRACKING

The "track" system, first introduced in the District of Columbia's public schools immediately following *Brown*, separated students based on I.Q. tests and teacher recommendations.[93]

There was one track for students with "limited ability," one for academically gifted students, and one each for "above-average," and "average" students. The lower tracks prepared a generally blue-collar student population for menial jobs as kitchen workers, stockroom clerks, janitors, or construction workers. The tracks for highly able students, on the other hand, typically from affluent homes, prepared them for white-collar occupations. The "dumbed-down" content of the lower tracks made it very difficult for students placed there to move out of their initial classifications.

The "track" system placed African American students disproportionately in the lower tracks, and whites in the higher tracks. The D.C. Circuit Court in *Hobson v. Hansen* found that school authorities were more likely to place African American students in lower tracked classes because of past discrimination in education, testing biased against African American and disadvantaged students, and low expectations resulting in poor performance.[94] Ultimately, the court concluded that the psychological effect of being labeled "dumb," being separated physically from the other students, and being taught basic skills by teachers with low expectations combined to limit the educational opportunity and life chances of the students.

In *Washington v. Davis*, the U.S. Supreme Court disapproved *Hobson* and a number of other circuit court cases that found Equal Protection violations without proof of discriminatory purpose.[95] Because of *Davis* it is very difficult to challenge tracking under federal constitutional law, not because there is no racial animus involved, but because racial animus is so difficult to prove. Tracking has since spread far beyond the District of Columbia.

A student of mine recounted how an English teacher at his junior high school taught all students the advanced curriculum regardless of the specified track. Although all the teacher's students produced comparable work, school authorities ignored the results and assigned the majority of the African American students to lower level tracks when they went to the next grade at a neighboring high school.

SPECIAL ED

"Special education," designed to assist children with a variety of learning disabilities, has become a new and sophisticated technique for maintaining racial segregation in our

nation's public schools. Unfortunately, some educators view "special ed" as a place to put students who they see as low achievers, disruptive, or simply behaving outside the parameters of majority cultural norms—often practical and attitudinal shorthand for African American students.[96]

School authorities identify African-American children, especially males, as mentally retarded, emotionally disturbed, and learning disabled at disproportionately high rates. These patterns very closely replicate the "tracking" patterns that first concerned the *Hobson* court. The "emotionally disturbed" category is especially problematic because of its highly subjective nature. In Georgia, one district had misclassified 80% of its black students as mildly disabled.[97]

School authorities may even segregate African American "special ed" students from white students with similar classifications. Lakewood, New Jersey School District officials sent white preschoolers with disabilities to highly acclaimed private special education programs without ever making a similar referral for African American and Latino children with virtually identical diagnosis and treatment plans. In addition, school authorities sent African American and Latino students to half-day programs while sending white students to full day programs. The state education department ordered Lakewood school authorities to correct the problem.[98]

Special Education is primarily governed by three major federal laws: (1) *The Individuals with Disabilities Education Act* (IDEA), (2) Section 504 of *The Rehabilitation Act* of 1973 (Section 504), and (3) *The Americans with Disabilities Act of 1990* (ADA).

One of the law's most important safeguards is to ensure that children are not improperly classified. School authorities sometimes identify minority children *without* disabilities as "disabled" to segregate them from white pupils. On the other hand, school authorities can also discriminate against minority children who *do* have special needs by refusing to classify them as such, and thus prevent them from receiving the services they deserve.

Both the IDEA and Section 504 require each local education agency to establish procedures to identify, locate, and evaluate children who need special education. School authorities must make these procedures public and open them to court review.

IDEA directs all school districts in the United States to provide children with special needs a "free appropriate public education" (FAPE), described in an Individualized Education Program (IEP).[99] The IEP details the special education services the student needs

and prescribes the least restrictive environment in which school authorities can provide the services.

The IEP contains procedural safeguards against misclassification and provides a broad range of remedies to challenge improper classification when it occurs. School authorities must consult parents before they make any placement. Further, the IEP must detail the reasons for the classification, and school authorities must review it with the child's parents at least once a year.

The FAPE's substantive guarantees reinforce the IEP's procedural safeguards, requiring schools to provide the services a child needs to make progress in the general curriculum, as well as develop the study skills set forth in the IEP. If a child fails to progress educationally, school authorities must review and possibly revise the IEP. According to *Board of Education of the Hendrick Hudson Central School District v. Rowley*, FAPE means a school system is obliged not only to comply with IDEA procedures, but also to create a substantive program "reasonably calculated to enable the child to receive educational benefits."[100]

The No Child Left Behind Act requires schools to meet the educational needs of all low-achieving students, including children with disabilities,[101] close the achievement gap between high and low performing children, and provide children with effective, scientifically based instructional strategies and challenging academic content. The *No Child Left Behind* legislation does not permit private lawsuits against a school, however.[102]

SUSPENSION AND EXPLUSION

Twice as many African American in grades 7 through 12 face suspension or expulsion as white students.[103] In one of Mississippi 's school district where blacks made up 34% of the district's student population, black's represented 79% of all out of school suspensions and 60% of all in school suspension. In a district in South Carolina, there were over 1200 incidents of suspension for a population of 200 black students.[104] In North Carolina, black males are nearly three times more likely to be suspended for at least 10 days than white male students are.[105]

School Boards

The Supreme Court has drastically limited the use of affirmative action to desegregate colleges and graduate schools. More and more, courts are turning those matters over to state and local authorities to improve minority schools and education without formal desegregation.[106] This makes improving the quality of primary and secondary education for

African American children at the local level even more important. That brings the focus of our attention to local school boards.

Parents have a fundamental constitutional right to participate in and direct their children's upbringing and education.[107] Parents may even remove their children from schools in order to educate them at home, so clearly parents can challenge any school decision that inappropriately affects their child. [108] School authorities must advise parents about official procedures to challenge decisions made by teachers or principals. Parents have the right to see their child's records[109] and the materials the child's teacher uses in class.[110] Principals must also consider any parent request to change a child's class or teacher.

Every state and locality has a procedure for appealing adverse decisions principals or teachers make to the school board.[111] The law refers to the board of directors of a local school district as a "board of education," a "school board" or a "school committee." This elected board determines educational policy in its jurisdiction, such as a city or county. It usually shares power with a larger agency, such as the state department of education.

Residents of the school district usually elect school board members, but in some jurisdictions, the chief executive of the city or county in which the school district is located appoints them. Most boards have between five and fifteen members. The governor generally appoints state boards of education, but in a few states, the voters elect the board.

State law determines the qualifications for holding school board office as well as the method for selecting school board members. Common eligibility requirements include residency, minimum education, and age.[112]

School board size and authority vary widely. In some districts, they have the authority to set and levy taxes; in others, they can only recommend tax rates to a legislative body or executive. In some small rural districts, the board supervises the hiring and firing of every teacher. Most boards simply set overall policies and procedures and leave the day-to-day operation of the district to a professional school superintendent.[113]

School boards may act formally and transact business only at a board meeting. Lawsuits that challenge school board action usually question the legality of a particular meeting. Several important elements of legitimate meetings include parliamentary rules of conduct, quorums, notice, and sunshine laws. [114] (Sunshine laws require that public agencies take all official action during open public meetings).

School board meetings must be public, and parents have a right to attend any meeting that does not deal with private matters such as personnel actions.[115] Parents denied access can sue in court.

The newly formed National Black Caucus of School Boards focuses on student literacy rates and academic achievement, standardized testing, professional development, and effective governance.[116] They are particularly interested in the unique challenges and opportunities African American school board members throughout the country face, and seek to facilitate communication between school board members, their local school boards, communities, and national and state school board associations to further that purpose.

§7.3: How Does the Law Work?

Disparate Treatment

Because of *Washington v. Davis*, it is currently very difficult to prove discriminatory intent in federal court. The US Supreme Court requires Fourteenth Amendment plaintiffs to prove international discrimination, for example. Federal courts reject disparate impact as a standard unless federal legislation commands them to do so.[117] Title VI does not facilitate private lawsuits, and under the *Sandoval* case,[118] even those allowed require a showing of disparate treatment. Disparate impact is not enough.[119]

Disparate Impact

Unfortunately, there is no "Fair Education Act," operating like Title VII or Title VIII of the Civil Rights Act to make it possible for plaintiffs to prove discrimination through disparate impact.

Procedural Rights

In many ways, that leaves concerned parents with administrative law and regulations, pursuing their procedural rights under these rather than challenging discrimination on the merits. For example, in *Robinson v. Kansas*[120] the court stated that there was no private right of action to enforce disparate impact claims under Title VI, but that *Sandoval* did not bar plaintiff's right to bring a disparate impact claim under section 504 of the Rehabilitation Act.[121]

These regulations have a surprising advantage. Congress did not draft them with racial discrimination in mind, but to provide general procedural safeguards. This is helpful because authorities too often ignore the procedural rights of racial minorities, and the victim of discrimination knowledgeable enough to pursue his or her procedural rights can make a difference.

Both Section 504 and the IDEA require every state education authority to provide an impartial hearing to resolve disputes arising from a student's FAPE. The Section 504 requirements lack detail, but the IDEA thoroughly outlines what is required. Compliance with IDEA due process requirements meets the Section 504 requirements.

Generally, courts can review school activities and programs to determine whether the school has substantively failed to provide a FAPE or has failed to comply with any of IDEA's procedural requirements.

FAPE failures typically occur when the school's program causes a child to repeat a grade, when the child fails to make reasonable academic progress, or when the program is "improperly and haphazardly executed." When the services a public school provides do not meet FAPE requirements, the school must provide the services necessary for the child's needs by alternative means. The most common remedies are tuition reimbursement,[122] compensatory educational services, attorneys' fees and costs, and monetary damages.[123]

Typical IEP violations include failure to review the IEP when the child is not making sufficient academic progress. In the event of such violations, the IDEA provides for administrative due process hearings with the right of appeal to a federal district court. At such administrative hearings, parents of the student have the right to counsel, the right to present evidence, the right to present witnesses, to confront them, and to compel their attendance. Students can assert these same rights themselves if they are of age.

The process begins with collaborative meetings of the IEP team-- both parents and school personnel are statutory members. Administrative hearings aim to resolve conflicts over what constitutes a FAPE in light of the special education service program recommended in the child's IEP. Possible outcomes include administrative resolution, mediation, or when administrative remedies are exhausted, litigation.

In an IDEA lawsuit, the court first receives the record of the administrative hearing, and may hear additional evidence. The court looks to see if the state has complied with IDEA's procedural requirements and if the IEP itself might reasonably enable the child to receive educational benefits.

The U.S. Supreme Court in *Scaffer v. Weast* considered which side has the burden of proof, the parents or the school district? [124] The Court placed the burden of proof on the parent petitioners, as possessing greater knowledge about their child's disability than the defendant school system.[125]

School Resource Equity Litigation

Because the US Supreme Court in *San Antonio v Rodriguez*[126] turned its back on school-based financial inequality, civil rights attorneys have turned to state and local strategies to equalize school district resources.[127] "School resource equity litigation" challenges fiscal inequities in the public school system by focusing on state constitutional education clauses.[128] This approach directly tackles the school funding problems that contribute to unequal educational opportunity for students of color.[129]

Resource equity arguments demand a meaningful opportunity for all students to benefit from whatever education a state constitution promises.[130] Most often, that means a basic "quality" education providing students with the essential skills they need to function as productively citizens in modern society.[131] In concentrating on the underlying sufficiency of school funding, resource equity advocates argue that more money is necessary to bring the worst school districts up to the minimum level mandated by state education clauses.[132] Resource equity decisions therefore challenge school finance systems by emphasizing differences in the quality of educational services provided in some districts and how these services fail to meet a constitutionally required minimum[133]

As economic, rather than race-conscious measures, resource equity strategies withstand ultraconservative political and legal challenges.[134] First, they concentrate on the relation between school funding and the quality of educational services provided[135] rather than on more abstract standards of equal protection.[136] Second, they do not call for a reduction in per-pupil spending in wealthy districts and so do not pose a direct and immediate threat to local control of schools.[137] Finally, resource equity strategies appeal to urban school districts strapped for cash.[138] All in all, school resource equity litigation has spurred an important dialogue among state courts, state legislatures responsible for funding the schools, and state education departments responsible for devising the standards.[139]

§7.4: What Needs to Change?

Getting an education has been a challenge for African-Americans since slavery. From the Black Codes to *de facto* discrimination, racism has hampered African Americans' search for educational equity.

Historically, African American parents have used the courts for relief, advocacy, and protection. However, 50 years after *Brown v. Board of Education*, litigation has fallen short of achieving its intended goals, as first the larger society and then the courts turned away from the cause.[140] Much work remains.

As *Brown*'s litigation strategy spends itself, African-American parents all over the country must take the fight to the schools. African Americans need new vehicles to promote their children's right to a quality education. Civil rights organizations such as the NAACP can assist, but they will also need a significant commitment from students, teachers, and parents, and across class lines within the African American community.

Under the American Recovery and Reinvestment Act of 2009, the Obama Administration has given the Secretary of Education Arne Duncan several billion dollars in funding for school reform.[141] Secretary Duncan is using the money to pilot a "Race to the Top" fund, encouraging schools and educators to conceptualize solutions from the "bottom up," based on what they see on the frontlines of education, particularly at the lowest-achieving schools.[142] The program emphasizes college and workplace preparation, global competiveness, data systems to measure student growth and success, and improved techniques to recruit, develop, and retaining effective teachers and principals. They might consider "Peace Corps" opportunity in inner-city schools for retired teachers to train younger teachers, giving them research and other backup support.

Obama appointees to the Department of Education see Title VI as an important weapon in the struggle against educational inequality. In integrated schools, the Department of Education's Office of Civil Rights ("OCR") should use Title VI to police discrimination against African American students in suspension and expulsion, improper assignment to special ed classes, failure to admit them into honors classes, and the like.[143] In suburban schools that are majority- minority, OCR should use Title VI to police disparate allocation of school services and resources within school districts.

Finally, OCR should hire "community liaison" officers to operate out of their ten District Offices, to identity and cultivate civic leadership in minority and majority communities and open lines of communication with parents in minority and low income communities. The community liaisons could train parents to advocate for their children and report discrimination when it occurs. OCR does not have the staff to investigate all the cases of discrimination against African American students. Parents, more numerous and closer to the facts, could be useful allies in getting the work done. In this way, OCR might bring the "movement" back to the struggle for equal educational opportunity.[144]

We need to solidify remedies and change beyond a single Presidential Administration, however. We need a "Fair Education" Act modeled after the Fair Housing Act, or an "Equal Educational Opportunity Act, modeled after the Equal Employment

Opportunity Act, or a combination of both. Unfortunately, the African-American community's ability to lobby the legislative and executive branches for all our children diminishes when it fragments along class lines. Bill Cosby's attacks on low-income African-Americans were the most public evidence of this schism.[145] With the community divided in this way, it has become more difficult to find remedies all African Americans can support. African Americans need to unite around quality education for every African American child, regardless of class or social background, as a community issue.

THE HANDBOOK

§7.5: First Aid

Parents must take charge of their children's education and train their children to do likewise. As a first step, parents should review their children's homework and communicate and form relationships with their children's teachers and children's school's administrators. In so doing, parents teach their children the importance of controlling and caring about their education while supporting their children's ability to do so.

Parents, along with their children, also should demand higher qualifications and experience from teachers at their children's schools by communicating such demands to school and district administrators, becoming actively involved in local parent-teacher associations, and attending school board meetings. Because teachers and students still may maintain racial and ethnic prejudice and histories of discrimination, this demand should include focused teacher training and professional development seminars that inform teachers on the development of successful race relations, encourage observation of effective teachers by their peers, and evaluates teachers based on their ability to maximize the benefits of integration.

Parents and students should determine what, if any, challenging courses exist at their schools, and if there are none, request them from school administration and/or the school district itself. This request should also concern a demand for school curricula to encompass a fair and accurate representation of the voices of different racial/ethnic groups, the roles they historically have played in society, and their experiences.

African Americans may assume that because they live in an "integrated" neighborhood that their children attending the neighborhood school will get the same education as a white child in the school. That is not necessarily the case. Even in nominally integrated environments African American children may still be segregated, and with such segregation comes not only disconnection from educational resources, but also disconnection

from society's mainstream. Too many minority children are reading below grade level, struggling in the areas of math and science, and dropping out of middle and high school. Many African American children are not learning the public life and democratic skills they need to participate in our nation's the future.

You might find your high-school child shut out of honors classes that are populated almost exclusively by white children. You may find that your child's teachers are the most inexperienced or the most overworked, or both. You may find your middle-school child improperly classified as "emotionally disturbed" and placed in a class that functions as a holding pen for minority children. You may find that school authorities somehow passed over your extremely bright elementary school child when they made "gifted and talented" designations.

Courts do not write the law of school desegregation; the schools do so themselves, day by day in nooks and crannies that even civil rights organizations are too large to fit in. Parents are better sized for these operations. The best way that African-American parents can protect their children's educational rights is to become actively involved in their schools.[146] Parents need to know whether their child is going to a school that has not met federal or state standards and how much money authorities are investing per pupil. Parents need to know their children's teachers and find out whether there is a system in place to evaluate teacher performance.

Parents have a right to know why school authorities have made any decision, from grades to suspension, regarding their child. They have the right to access all records concerning their child's evaluation and educational placement. To properly advocate for their children, parents must understand how their children learn, and how to measure their progress. If parents do not gather this understanding, they will be at the mercy of the school district's interpretation. Keep records of all meetings and communications with teachers, administrators, and staff at your child's school. Get copies of any official records, update them, and keep them straight.

In light of No Child Left Behind, many school districts use standardized test to show how well they are educating children. These test scores help parents evaluate the effectiveness of the educational services the school provides. Parents must not only read, understand, and track these test scores, they must also ask how authorities administered the test and how the test measures success. Review how your child compares with other children the same age, how your child compares with other children in the same grade, whether your

child's performance has improved since the last test, and how your child's progress compares with his peer group.

If your child has any difficulty performing in school, you should arrange for testing, by the school system (at their expense) for evidence of a disability, even a minor one. Modified IEPs, called "504" plans, are available to children with any type of handicap, including physical conditions such as asthma. If a child's disability is not serious enough for an IEP but still obstructs learning, parents should request a Section 504 Service Plan.

Many disputes proceed from oral representations, miscommunications, and conflicting assessments of what happened during meetings. Asking questions in writing, requesting answers in writing, saving emails and letters, documenting phone calls, and taping meetings are all ways that parents can help attorneys, investigating parties, or the court understand what really occurred between the school and the parent.

If you have a problem with any school employee, inform their supervisor. If the problem is with a teacher, speak to the principal. If the problem is with a principal, speak to the area school superintendent. . If the problem is with the area superintendent, speak to the school system superintendent, or to the school board. If the school board is uncooperative, speak to elected officials. Be sure to tell them the complete story, as soon as possible.

Even if the authorities tell you there is nothing they can do at that moment, they still have to make note of the complaint, which your lawyer can subpoena later, if necessary. Contacting higher-ups in the school system can help you to document the identities of all parties involved, so you can go higher up the food chain or to go to trial.

With this information and access, African American parents can interpose themselves directly between their children and every authority figure charged with obeying, and even enforcing the law. They must do this if they want fair treatment for their child. Moreover, they will have to do it again, and again, and again.

David Herron found himself in a dispute with his son's school after his son was not treated the same as white students when taking a standardized test. On the day school authorities administered a standardized geometry midterm, Herron's son was absent due to an illness. When the teacher gave him the make up exam, the teacher told him that he had 1 hour to take the test although the directions indicated 2 hours as the test time.[147]

Herron's son received a B on the exam though he had only one incorrect answer. Graders deducted seven additional points because his son had not written the date on the exam. The teacher did not penalize any white student who left the date off the exam. David

Herron, who is also president of the Montclair New Jersey chapter of the NAACP, filed a lawsuit in state superior court.

Families must put pressure on local school boards to receive assurance by all levels of government that violations will be monitored and prosecuted. Moreover, citizens must put pressure on their representatives to implement teacher training programs and to fund effective methods to prepare students and teachers for resegregating schools. When parents and children contact their officials, they must be prepared to clearly state the purpose of their communication and to be persistent in their efforts to communicate with such officials. Before doing so, however, families, of course, must learn who controls governance and the policy decisions of the district and schools in order to contact the appropriate leaders.

Parents and children must work to raise awareness about the poor quality and inequities of the local school system and to put pressure on school districts to make the necessary changes. They should promote their cause through local media sources. They should recruit business owners, politicians, religious leaders, as well as informal community leaders to assist them.

§7.6: Who Can Help?

Parents can take several approaches when they suspect educational discrimination against their children. They can contact federal agencies such as the U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section or the U.S. Department of Education, Office of Civil Rights ("OCR"). However, parents should probably look first for state and local advocacy agencies and civil rights organizations operating in their communities. Since money damages are rare, private attorneys will not work on a contingency basis. Attorney's fees added to court costs take private counsel out of most parents' reach.

Office of Civil Rights

In conjunction with the Department of Justice, OCR enforces laws against discrimination on the basis of race, color, and national origin (prohibited by Title VI of the Civil Rights Act of 1964), and discrimination on the basis of disability (prohibited by Title II of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973). OCR has the power to investigate tracking, special ed abuse, racially disparate suspension and expulsion, and racially disparate patterns of participation in honors and AP classes.[148]

OCR also has new powers under the No Child Left Behind Act ("NCLB," referred to as "Nickelby" by practitioners), which authorizes the Secretary of Education to withhold funding from any school failing to meet the Act's requirements.[149] For example, NCLB requires local educational agencies to develop a plan to help low-achieving students meet reading standards, and identify students who having difficulty reading.[150] Arguably, this provides grounds for OCR to proceed against any school with a record of miseducating or undereducating minority children.

OCR regulations require recipients of federal funds to file an assurance of compliance with applicable law. The law further requires that recipients take remedial action if violations are found, designate an employee to be responsible for compliance, and create and adopt grievance procedures.[151]

To file a complaint with OCR, submit a Complaint Verification Form ("CVF") specifying the dates, times and places improper school actions took place, the names of witnesses, and the names of those responsible for the improper actions. Filers may request that OCR keep their identity confidential, but this may make it more difficult for OCR to obtain evidence during an investigation. After receiving a CVF, OCR will determine whether the complaint has merit and whether OCR has jurisdiction to investigate.

You can file a complaint online at *http://www.ed.gov/about/offices/list/ocr/complaintintro.html.*

You can also find the telephone number for your OCR regional office by going to the OCR website at *http://www.ed.gov/about/offices/list/ocr/aboutocr.html* and clicking on "Office Contacts."

OCR's goal, both in conducting compliance reviews and in processing complaints is to reach voluntary compliance with the recipient agency so that funding may commence or continue. However, when an agency refuses to comply, OCR must suspend or terminate their funding. OCR investigates cases on a first-come, first-served basis, but has a substantial backlog of complaints.

A complaint against a school under NCLB should be addressed first to the local school district, and then to the state department of education before contacting OCR. Because local agencies have smaller caseloads, relief may actually come more quickly at the local level.

OCR's administrative complaint mechanisms allow aggrieved individuals and organizations to pursue claims related to disparate treatment, disparate impact, and disability.

OCR cannot order injunctive relief. It can only suspend or terminate federal funds. Nevertheless, OCR can leverage this power in settlement discussions to negotiate resolution agreements, granting complainants the equivalent of court-ordered injunctive and declaratory relief.

Department of Justice

The DOJ investigates civil rights violations brought to their attention by private citizens and civic organizations. Congress empowered the DOJ to enforce Title IV of the Civil Rights Act of 1964, the Equal Educational Opportunities Act of 1974, and Title II of the Americans with Disabilities Act. In addition, Congress empowered the DOJ to enforce any discrimination claim that OCR refers.[152] In general, approach OCR before approaching the Justice Department.

NAACP

The NAACP's Education Department aims to provide all students access to quality education. Their priorities are preventing racial discrimination in educational programs and services, advancing educational excellence, and promoting equal opportunity education.

In Ann Arundel County Maryland, the county chapter of the NAACP, along with 24 other individuals and organizations, filed a complaint after the outgoing county school superintendent set achievement goals that had a lower expectation for students of color. The matter did not make it to trial because school officials admitted that an achievement gap existed. The Department of Justice stepped in to negotiate an agreement that detailing how school authorities will close the achievement gap between majority and minority students. The agreement also requires the county to determine if authorities more frequently suspend African-American students or more frequently place them in special education classes.[153]

Teach for America[154]

Teach for America is a non-profit organization that recruits recent college graduates and professionals to teach for two years in a low-income community. The organization hopes to close the achievement gap by improving instruction and setting higher expectations for minority students. Studies show that Teach for America corps members have improved student learning in math, science, reading, and language arts.[155]

Teach for America hopes to develop young leaders in the struggle against educational inequality, who will not only teach during their two-year commitment but also build capacity in their assigned schools.[156] Activists in the community or within the school system itself should consider creating a “Peace Corps-type” opportunity for retired teachers

to mentor these promising younger teachers, getting the most out of their engagement.

They should also consider ways to encourage the corps members to stay in the classroom for more than two years, to provide greater continuity for students' educational experiences. The federal government has promised educational loan forgiveness as an incentive, but this still does not compare to salaries and incentives offered by other professions and private institutions. Additional funding for incentives from the Gates, Abell, and Casey Foundations has enabled low-income school district to attract and retain top-notch candidates.

Parent Support Programs

Baltimore public schools have an adult education programs to support parents in their children's current subjects, enhancing student learning after school.[157] These programs also give teachers an opportunity to building constructive relationships with the parents and with the community. As a result, more parents are coming to PTA meetings and their children behave better in their classrooms.

One parent approached a teacher for help preparing for a GED exam, finding it increasingly difficult to find work without a high school diploma. The teacher agreed, in exchange for the parent helping in the classroom for two hours a week. The teacher, now a student of mine, remarked,

> [The parent] became my greatest asset my second year. Her presence helped with behavior issue because my students' parents were her neighbors. It also motivated her son who was reading two years above grade level at the end of the year. She went on to pass her GED and decided to go into early childhood certification program to become a teaching aide and I believe that her experience in the classroom ignited her interests in a field that she may have overlooked.

Alternative Schools

Charter schools operate with freedom from many of the regulations that apply to traditional public schools,[158] though they remain ultimately accountable to the chartering authority (usually a state or local school board).[159] Charter schools do not aim for desegregation. Rather, they aim to improve the quality of education minority students actually receive, regardless of the racial composition of their classrooms.[160]Currently, there are approximately 3,000 charter schools in the United States, serving over 750,000 students.[161] The Obama Administration has expressed a special interest in Charter schools as a means of educational reform.[162]

The Founders of Gap, Inc set up the KIPP Foundation to finance charter schools in minority communities.[163] These "KIPP Academies" provide an extended school day, week, and year, giving students more time in the classrooms well as more opportunities to engage in extracurricular activities, experiential learning, field work, and character development. KIPP students generally outperform their peers in public school; more than 85 percent of them go to college.

New education leadership training programs have emerged to respond to these trends: running charter schools, directing turnarounds of troubled schools and founding nonprofits with creative answers to education challenges. Graduate programs have sprung up at Harvard, and Stanford, and in Minnesota, Michigan, and Canada.[164]

§7.7: Getting Organized

Especially in low-income communities, a child's home and community environment impacts school performance. Community schools partner municipal government and the community with the school system to integrate academics with health and social services, youth and community development, and civic engagement.[165]

The community school model grows out of early Progressive notions of the school as a social center.[166] Modern examples include the Mirabal Sister Campus in New York City and Sayre High School in Philadelphia, PA. Other community school experiments include the Chicago Community Schools Initiative, the Houston, Communities In Schools program, Schools Uniting Neighborhood Community Schools of Multnomah County in Portland, the Tulsa Area Community Schools Initiative, and the United Way of Greater Lehigh Valley's Community Partners for Student Success Initiative in Allentown, Bethlehem, and Easton, Pennsylvania. Chicago, IL.

Mirabal, a group of "sister" public schools serving sixth through eighth grade children supplement their academic program with a full-service school-based health center, after-school and summer programs (including athletics, performing and visual arts, technology, design and leadership training). They also offer parents and the community English as a Second Language, computer, GED, and vocational classes. Student achievement and literacy, levels of discipline and attendance, as well as parent involvement steadily increase. Dropout rates have dramatically decreased.

Sayre High School, located in a predominantly African-American Philadelphia community, collaborates with the Netter Center for Community Partnerships at the University of Pennsylvania.

Like Mirabal, Sayre has a health clinic and after-school programs. Sayre also has an extensive student service-learning program, using community issues such as lead-based paint, obesity, and hypertension to enrich the core curriculum as well as building awareness and capacity in the community at large. University of Pennsylvania students in medicine, nursing, social work, dentistry, and law serve as mentors and classroom aides at the Sayre School.[167]

Sayre experienced significant improvements in inter-student and general classroom behavior, improved academic performance, greater rates of homework completion, and student math scores exceeding the statewide average.[168] Sayre's "Family Fitness Nights" have also produced healthier eating habits among student families and increased their levels of exercise.[169]

Part IV: Active Citizenship

Chapter Eight:
Voting Rights

Everyone's vote is equal. No voter can be shut out of the political process because of race.
SYNOPSIS, THE VOTING RIGHTS ACT

THE HISTORY

§8.1: What's the Problem?

Civil rights bills passed in 1957, 1960 and 1964 hardly made a dent in the South's determination to deny African Americans the right to vote. In 1965, on "Bloody Sunday" Dr. Martin Luther King, Jr. and a host of other civil rights leaders marched from Selma to Montgomery, Alabama, protesting Southern intransigence. As they crossed the Edmund Pettis Bridge into Selma, the police viciously attacked with teargas, batons, and other weapons, demonstrating clearly that Southern authorities did not intend to comply with existing law. In the aftermath, Congress passed the present Voting Rights Act, and President Johnson signed the legislation on August 6, 1965.[1]

Thirty-five years later, the closely contested Year 2000 Presidential election witnessed African American voter disenfranchisement on a scale not seen since the 1950s.[2]

Before Election Day, mass mailings targeted minority communities, using letters returned as undeliverable to challenge voters as non-residents of their polling districts (this is called "voter caging"[3]). Mailings, signs, and phone calls blanketed minority communities with disinformation about voting requirements, falsely declaring that people who were not current on child support payments, or who had recently moved, could not vote.

In other cases, disinformation falsified the voting dates, or polling place locations, or claimed voters could not use mail-in ballots. Ultraconservative political operatives even tried to trick minority voters into turning over endorsed absentee ballots. These events were consistent and widespread.

On Election Day itself, state election boards, county and local clerks, and secretaries of state delivered shoddy voting equipment to minority precincts or failed to deliver any at

all. Signs, posters, telephone calls, and sound trucks at or near the polls broadcast false information about voter requirements, precinct locations, and eligibility.

Ultraconservative Republican field operatives disguised themselves as poll watchers in order to intimidate minority voters, question their eligibility, and spread misinformation about polling locations. Local law enforcement officers (or persons with official-looking badges) stationed themselves at polling places, took people's pictures, asked for their names and generally harassed and intimidated minority voters.

Officials in states like Ohio limited the number of registration books in minority polling places and in some cases deliberately sent unregistered voters to minority polling places to create confusion, delay, and long lines. In other cases, state officials changed minority community polling place locations right before Election Day, causing more upheaval. Voting machines that broke down in heavily populated minority communities remained broken until the elections were over.

Eight years later, Barack Obama was elected President of the United States, allowing some ultraconservatives to claim that Barack's election proved the Voting Rights Act was no longer needed. In fact, their lawyers recently challenging the Act began their brief with precisely that argument.[4]

There was indeed a widespread sense of euphoria after the election, a sense that a "post-racial" America was on the horizon. The hate-filled signs attacking the President during recent town hall meetings on health care reform showed the error of that way of thinking, however. Former President Jimmy Carter forthrightly sounded the alarm: racism is alive and well in America.[5]

But even during the election itself, the danger signs were there. Hate crimes spiked the day after Obama was elected, for example.[6] According to the Associated Press, one White supremacy Web site attracted 2,000 new members the day after the election.

There were fewer incidents of voter harassment, disinformation, discouragement and general dirty tricks in 2008, proportionately, than in 2000.[7] But that may very well be because the ultraconservatives saw that the election would not be close, and campaigns to deny the vote to African Americans and other minorities would not ultimately pay off.[8]

By fall 2009, President Obama was issuing warnings that the Republicans were gearing up for a major campaign to win back the House in 2010.[9] They managed to do it in 1994, two years after the inauguration of a "new, young President." Health care reform was

on the table then as well. Their disruptive tactics in health care town hall meetings and in the health care debate may have been just the beginning.[10]

If 2010 elections look close, we may see a reprise of Year 2000 vote suppression tactics. On November 3, 2008, the eve of Obama's election, the Republican Party petitioned to be released from a consent decree that prevents them from voter caging.[11] 2012 is just around the corner.

Background

America's Founding Fathers opposed universal suffrage as a threat to their ability to govern, and wanted to restrict suffrage to wealthy white property owners,[12] By the 19th century, more people had the right to vote but many African Americans still could not; African-Americans could vote in only five Northeastern states.[13] After the Civil War, the Reconstruction Congress required states to adopt constitutions with provisions granting African-American suffrage.[14] African-American political voter registration rose dramatically, with seventy percent of eligible African-Americans registered.[15]

Southern racist elites fought to reverse this trend. First the Black Codes denied African-Americans the right to vote outright.[16] The Reconstruction Congress struck down the Black Codes. Southern elites responded, creating barriers to disenfranchise African Americans without explicitly violating the Fifteenth Amendment, using techniques such as poll taxes, literacy tests and grandfather clauses.[17] By 1900, these techniques disenfranchised ninety percent of African American voters in Mississippi, Louisiana, and Alabama. [18]

The poll tax was only a few dollars per year, but authorities discriminated between blacks and whites whey they applied it. Prospective voters could only pay the tax two days out of the month (never on Election Day) and the times varied. Whites received informal notices of the payment dates while blacks were kept out of the loop.

Local authorities used various tests to shut out those African Americans who managed to pay the poll tax. Literacy tests and constitutional interpretation tests allowed examiners to select extremely difficult passages for African Americans to interpret, and simple ones for whites.[19]

Southerners had virtually eliminated African American suffrage by the 1890s. White landlords evicted their African American tenants who tried to vote. Mississippi published prospective voters' names in the newspaper for two weeks before they could actually register. During that time, existing voters could object to their "moral character." Some counties in the

Deep South jailed African Americans who tried to register. Klan terrorists bombed voter education sites.

Klan terrorism thus added an additional layer of "deterrence" to the wide variety of vote denial techniques described above.[20] African Americans who resisted, particularly in Southern rural areas, lived in constant fear--fear of their employers, who vowed to fire them; fear of white "citizens' councils," who used economic reprisal against demonstrators; and fear of white vigilante groups like the Ku Klux Klan. Lynching was common and rarely prosecuted.

In the North, vote denial was illegal. Vote dilution took its place.

At-large districts vary the *size* of a district for example by creating very large voting districts that drown minority votes in a sea of white ones. [21] Gerrymandering varies the *shape* of a distinct, drawing boundary lines to aggregate white voters or disaggregate minority ones. [22] Packing concentrated opposition voters into as few districts as possible in order to gain more seats for the majority in surrounding districts. [23]

Voting Rights Today

There are various forms of race-based voter discrimination. "Primary" acts of discrimination against voters are overt. They prevent individuals from casting their ballots. We call these "vote denial" tactics. "Secondary" acts are covert. They do not prevent anyone from voting, but rather reduce the importance or weight of the ballots that they cast. We call these "vote dilution" tactics. The older and cruder techniques, such as those originated in the South more than a century ago, are all "vote denial." Vote dilution is newer, and Northern in origin.

Recently adopted laws requiring voter identification, ostensibly to reduce fraud, have unfortunately created more opportunities for voter suppression. The Democrats' voting base includes many recent immigrants and other individuals who may not have standard forms of identification such as driver's licenses. Stringent voter i.d. requirements make it harder for such people to register.

§8.2: What's the Law?

The Voting Rights Act of 1965

Congress enacted the Voting Rights Act of 1965 not only to end the South's white-only electoral system but also to protect voters from racial discrimination throughout the United States.[24] According to Laughlin McDonald, Director of the ACLU Voting Rights

Project in Atlanta, Georgia "nothing hit the Jim Crow South harder than the Voting Rights Act of 1965."[25]

Section Two of the 1965 Voters Rights Act prohibits any State or political subdivision from denying or abridging the right of any citizen of the United States to vote because of race or color. Section Two focuses on voting qualifications and prerequisites to voting as well as any other standard, practice, or procedure used to deny or limit the vote.

Section Four banned the use of *literacy tests* and other suspect tests and devices. Section 4(b)'s **coverage formula** lists states and smaller jurisdictions subject to the Act's special remedies. Under this formula, jurisdictions are "covered" if they used a "test or device" for voting and less than half of the voting age residents were registered to vote in the 1964, 1968 or 1972 presidential elections. The covered jurisdictions include the entire states of Alabama, Alaska, Arizona, Florida, Georgia, Louisiana Mississippi, and South Carolina, as well as five counties in California, two towns in Michigan, ten towns in New Hampshire, three counties in New York, forty counties in North Carolina, and two counties in South Dakota.

Section Five authorizes action against voting laws that have a discriminatory purpose or effect. Covered jurisdictions cannot make any changes in their voting laws or procedures without the Justice Department's prior approval ("preclearance"). The covered jurisdiction has to prove they do not intend the proposed change to deny or abridge anyone's voting rights because of race, color, or membership in a language minority. They also have to prove the proposed change will not have that effect, whether intended or not.

Section Six authorizes federal officials to register African American voters where local registrars refuse to register them because of race.

Section Eight authorizes the Attorney General to appoint federal poll watchers to monitor polling places on Election Day, to make sure that no one tries to keep African Americans or other minorities from voting or interferes with the vote count.

Section 11 makes voter intimidation a criminal offense. Additionally, the Act makes it a crime for any individual, including an election official, to procure or submit fraudulent voter registration applications.

In *South Carolina v. Katzenbach* (1965),[26] the U.S. Supreme Court upheld the Voting Rights Act as constitutional. The Court ruled that the enforcement clause of the Fifteenth Amendment gives Congress "full remedial powers" to prevent racial discrimination in voting. It held further that the Act is a "legitimate response" to the "insidious and pervasive evil"

which denied African Americans their voting rights to vote despite the Fifteenth Amendment's adoption in 1870. Finally, the Court found that Section 5 of the Act was designed "to shift the advantage of time and inertia from the perpetrators of the evil to its victims."

Congress extended **Section Five** for five years in 1970 and for seven years in 1975. During the hearings preceding these extensions, Congress heard a great deal of evidence documenting new vote dilution tactics including gerrymandering, annexations, and at-large elections, designed to minimize the impact of votes cast by newly registered African American voters.

The 1982 Voting Rights Act Amendments[27]

In 1982, Congress revisited the Voting Rights Act once again, extending **Section Four's** "covered jurisdiction" formula and **Section Five**'s "preclearance" formula for twenty-five years (to 2007). Congress also extended provisions for federal registrars, examiners, and poll watchers to 2007 as well.

In light of extensive vote dilution testimony since 1970, Congress made an important change to **Section Two** in addition to extending it to 2007. The amendment empowered plaintiffs to establish a voting rights violation without having to prove discriminatory purpose. Not only did it ban obvious devices such as literacy tests, but also more subtle techniques such as gerrymandering, where a discriminatory purpose is harder to prove. The 1982 Amendments thus created a disparate impact test for Section Two, expanding its previous focus on discriminatory purpose to include policies that have a discriminatory effect as well.

Today, **Section Two** secures not only the opportunity for all qualified citizens to cast their ballot, but also guarantees that an individual's vote will not be "diluted." While the Act, by its own terms, does not guarantee a group "proportional" representation, it does guarantee the right to an "opportunity, equal to that of other classes," to obtain as much representation of its own group as it can. **Vote dilution** occurs when a given class of individuals is effectively denied this opportunity.

The National Voter Registration Act of 1993[28]

The National Voter Registration Act of 1993 (NVRA, or "**Motor Voter**") generally requires states to make voter registration opportunities available when people apply for or receive services at a variety of government agencies, such as local Department of Motor Vehicles offices (DMVs) and social services agencies. It also permits voter registration by

mail, and requires voting officials to give a "provisional ballot" to registered voters who cannot vote because of technical problems or other difficulties that occur at the polling place.

The NVRA also prohibits authorities from taking voters off registration lists without their consent. NVRA specifically prohibits eliminating a voter for not voting in a previous election. Voting officials can only take voters off the rolls because of criminal convictions, mental incapacity, death or leaving the jurisdiction.

Motor Voter applies to 44 states and the District of Columbia. The law exempts six states because they had Election Day registration at polling places the day the law passed (Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming).

The Justice Department enforces Motor Voter, working with state and local governments and advocacy groups, and bringing lawsuits when necessary.[29] Private citizens may file their own lawsuits under the law as well.[30] The Act also created a Federal Election Commission (FEC) to provide States with guidance on the Act, to develop a national voter registration form, and to compile reports on the Act's effectiveness.

The Help America Vote Act (2002)

On October 29, 2002, President Bush signed the "Help America Vote Act of 2002," (HAVA) into law. HAVA seeks to regularize federal state and local elections by establishing uniform standards for states to follow in election administration. HAVA provides funding to help states meet the new standards as well as replace outdated voting systems.

HAVA created the Election Assistance Commission (EAC) to research the process citizens undergo when registering to vote and voting. The EAC uses the data gathered to guide states in reforming their election procedures. However, the EAC's recommendations are advisory only. It has no authority to regulate state or federal elections, only to guide them. States face no sanctions for non-compliance with EAC guidelines.

The EAC has four White House-appointed members who serve four-year terms.[31] The incumbent President thus chooses the decision makers who determine how federal and state elections will operate for the next four years. Theoretically designed to be a non-partisan commission, guidelines created by the EAC have political overtones. So long as America has partisan election administration, the election laws will follow suit.[32]

HAVA authorizes the EAC to oversee federal electoral activity including political fundraising, advertising, and financial disclosure. HAVA also directs the EAC to serve as a clearinghouse for election administration information. HAVA has become extremely important in light of election administration irregularities in recent national elections.

The EAC has a budget of $325 million to improve election administration and another $325 million to replace outdated voting machines. HAVA also gave the EAC $3 billion over three years to implement the new law.

However, there is little accountability. Several states received EAC funds to replace punch card and lever voting machines but failed to do so within their allotted time; EAC waived their obligations if they could show "good cause" for the delay. [33] Twenty-four of the thirty states receiving funds to purchase new voting equipment sought such waivers.[34]

Voting equipment is at the center of today's electoral conflict because different methods of voting yield different results. Punch card ballots are outmoded, with special problems. Cards not punched completely through are hard to tally. Officials have to disqualify many of these. Despite providing funds to purchase new equipment, HAVA specifically permits states to use voting equipment used in November of 2000.[35]

Electronic voting machines are a concern because their software can be hacked to change election outcomes. Electronic machines that fail during elections also require considerable amounts of time to repair. Repair and maintenance costs and tampering have led some jurisdictions, like Florida, to abandon electronic voting machines altogether.[36]

Voter Identification

HAVA requires that states create a statewide electronic voter database that lists each registered voter in the state and provides each with a "unique identifier." [37] However, voter identification laws requiring voters to show special identification at the polls have created considerable controversy. In 2005, Georgia passed a law requiring residents to show a unique digital identification card at the polls. To get a card, voters had to go to the local DMV, show a birth certificate, and pay a twenty-dollar processing fee. Further, pursuant to a simultaneous reorganization program the DMV closed 100 of its 160 county offices. Atlanta, with the highest concentration of African American voters in the state, closed *all* its DMV offices. The closest DMV station for Atlanta residents was nine miles away. Evidence showed the law could have disqualified 150,000 citizens previously eligible to vote.[38]

The Department of Justice "pre-cleared" the changes as a necessary step to combat voter fraud. However, African American lawmakers rallied against the law and residents organized along with civil liberties groups to sue in court. Plaintiffs charged the Georgia law disenfranchised minority voters as part of a coordinated campaign to make it harder to vote. The federal district court found for the plaintiffs.[39]

Further extension of the Voting Rights Act (2006)

Since the Voting Rights Act first passed, over nine thousand African-American officials have been elected, and many other minority officials as well.[40] Though the Voting Rights Act's basic prohibition against discrimination in voting is permanent and will not expire, Congress renewed several significant enhancements of the law for only twenty-five years in 1982 and set them to expire on August 6, 2007. These were: (i), the **Section 4 coverage formula**, (ii) the **Section 5** preclearance provision, (iii) the assignment of **federal examiners and poll watchers** by the Attorney General and (iv) the **bilingual voting materials** requirement.

In March 2005, the American Civil Liberties Union, along with leaders from civil rights, women's rights, and labor organizations called for these provisions' renewal, forming the National Commission on Voting Rights. The NCVR coalition includes the **National Association for the Advancement of Colored People** (NAACP); the **American Civil Liberties Union** (ACLU); the **Lawyers Committee for Civil Rights Under Law; a**nd the **Leadership Conference on Civil Rights**. The NCVR immediately began an extensive litigation and lobbying campaign to address the issue, calling for President George W. Bush, Jr. to sign an extension of the Voting Rights Law before the sunset in 2007.

Democratic and moderate Republican Forces supported Section 5 "pre-clearance." Opponents mobilized to eliminate those provisions,[41] but Congress renewed the Voting Rights Act in 2006[42] over their objections.[43]

§8.3: How Does the Law Work?

Disparate Treatment

Courts typically require African American plaintiffs to show that the defendant *intended* to deny them the right to vote because of race in order prove disparate treatment. Direct evidence of such discriminatory motive is hard to come by.

Disparate Impact

Every ten years, after the new federal census, the federal government reallocates federal legislative districts among the states based on changes in their population. Each state's legislature then redraws Congressional district lines within its boundaries. Partisan majorities a state's legislature often draw new district lines to increase the chances that members of their own party will be elected, or re-elected. [44]

Currently, thirty-six states let politicians redraw their own district maps, rather than entrusting the process to an independent commission.[45] Most states require that at least two-

thirds of the state's legislators approve a new Congressional map. Still, none of them wants a redistricting plan to go to court because the outcome will be uncertain--judges might draw districts that are more competitive.[46]

Democratic legislators in California worked with Karl Rove and the Bush White House in 2001 to draw a new Congressional map for California. They took into account an extra seat California earned because of an increase in population, but adjusted the lines to protect almost all of the Republican as well as Democratic incumbents. Both sides benefited. Democrats sent an extra representative to Washington, while Republicans kept control of Congress.[47]

With such high political stakes in play, authorities often see minority rights as the variable most easily manipulated.[48] To make out a case of disparate impact under these circumstances, plaintiffs must show the states redrew district lines with a significant population deviation between districts, which also caused significant dilution of the minority vote.

Election Administration

The Year 2000 Presidential Election administration in the State of Florida provides a stark example of the kinds of problems that can arise when a system of "old boy's" networks administers national elections. [49] Leading up to the 2000 election, the NAACP made extensive efforts to register new voters throughout the country, and to encourage all its members to vote. In Florida, a battleground state, African American voter registration significantly increased. However, according to the complaint in *NAACP v. Harris*, Florida election administrators failed to process African American voter registration applications properly and purged large numbers of registered African American voters from their lists.[50]

The complaint further alleged that Florida election officials failed to provide a complete list of eligible voters at polling places in African American precincts. They established inadequate processes for verifying the registration of voters not appearing on precinct lists. They failed to offer voters who moved within the same county the opportunity to vote by affirmation or affidavit. There were also a disproportionate number of spoiled ballots in African American precincts, and a disproportionate number of ballots with no vote counted for the office of President of the United States.

Plaintiffs charged that Florida election authorities engaging in these practices, acting under the direction of Florida Secretary of State Karen Harris, violated the Fourteenth Amendment and Section 2 of the Voting Rights Act. Civil rights organizations representing

plaintiffs in the lawsuit included the Advancement Project, the American Civil Liberties Union (ACLU), the Lawyers' Committee for Civil Rights Under Law, the N.A.A.C.P., and the Legal Defense Fund. The defendants besides Secretary Harris included the Directors of the Division of Elections, seven Florida counties, and DBT/Choice Point, Inc., the contractor that screened Florida's voting rolls.

The State of Florida settled the case. The settlement requires the state and its agencies and contractors to take the following steps to improve the voting process, including:

- Rectify wrongful removal from the voter rolls and prevent similar occurrences in the future;
- Improve training for poll workers and staffing at polling places;
- Ensure that all voting precincts receive their fair share of equipment, resources, technology, and staffing at polling places; and
- Properly notify voters that they can register to vote and change registration information at DMV and Children's Services offices.

"We are very pleased with the settlement, but we recognize it will require monitoring and diligence on the part of local and national civil rights organizations," said LDF President and Director-Counsel Elaine R. Jones. "LDF is not prepared to walk away from the table on this - we will continue to make sure that the favorable terms negotiated actually benefit Florida voters."[51]

§8.4: What Needs to Change?

ACLU legislative counsel LaShawn Warren stated, “while progress has been made, violations of the Voting Rights Act are still a persistent feature of the American political landscape. The nation has yet to ensure that all Americans have an equal opportunity to participate in the political process – the ideal of ‘one person, one vote,’ is still just that – an ideal.”[52]

There are some very strong organizations engaged in voting rights defense, particularly the members of the Voting Rights Act Renewal Coalition. This is fortunate, because the pitched battles between Republicans and Democrats, particularly in recent national elections, have rekindled some of the worst impulses to suppress the minority vote.

Illinois Senator Barack Obama introduced a “Deceptive Practices and Voter Intimidation Prevention Act” in 2005.”[53] Senator Obama’s bill hit deceptive practices in elections with criminal penalties and empowered voters to bring their own lawsuits for civil relief. The bill set fines of up to $100,000 and authorizes up to a year’s imprisonment. The

bill also required the Department of Justice to counter deceptive election information. It authorizes the Attorney General, in collaboration with civil rights organizations, voter protection groups, state election officials, and other interested community organizations, to develop and disseminate corrective election information.

In addition, the bill directs the Attorney General to work with the Federal Communications Commission and the Election Assistance Commission. They are to use public service announcements, the emergency alert system and other forms of public broadcast, to disseminate correct election information and counter the kind of disinformation that troubled the 2000, 2004, and 2006 elections. After each federal election, the Attorney General would have to report on deceptive practices, actions taken to correct them and any prosecutions under way.[54]

As of fall 2009, legislation was moving through Congress to improve election protection and promote election reform. One of these is the Prevention of Deceptive Practices and Voter Intimidation in Federal Elections Act introduced by President Obama in 2005 when he was still in the Senate. It is now sponsored by Congressman Conyers in the House.[55]

Election reform is equally important, especially Voter Registration Modernization. During the 2008 election, voters across the country arrived at the polls to find that their registrations had never been processed, that their names had been purged from voter lists, or that they had missed the registration deadlines altogether.[56]

The Election Assistance Commission is also developing a very good brochure, *A Voter's Guide to Federal Elections* that is simple and easy to use.

In 2008, the Election Protection Coalition managed a large-scale, comprehensive program that provided voters with the information and support that they needed. Maintaining and staffing the 1-866-OUR VOTE hot-line was very expensive, but because the stakes were so high, and because of the historical nature of the election, the money was there.

Donors were very generous in providing the millions of dollars that were required to sustain that effort in 2008, but the downward turn in the economy might diminish the flow of donations in 2010. And some donors might still be taken in by the hype of a "post-racial" America.

In any case, we need to get the word out now to people on the ground, as to what to do, how to respond, if they run into trouble. Ii is extremely important for ordinary citizens to have some idea of how to defend themselves, as they register to vote, as they locate their

polling places (hopefully *before* Election Day) and as they actually go out and vote on Election Day itself.

THE HANDBOOK

§8.5: First Aid

It is useful to know something about the voting process before you get there. Things happen fast and some preparation may help head off incidents.

In most states, a prospective voter has to register well before the election, usually thirty days. The prospective voter has to prove citizenship of the United States of America, residence in the state in which they wish to vote, and that they will be at least eighteen years old by the date of the election.

A person with a felony conviction[57] cannot vote if still incarcerated, and in some states, that disqualification extends for some period after the prisoner's release.[58] In a few states, the disqualification is permanent.[59]

After registering, you will receive a Voter Registration Card in the mail, which should give you your precinct number and your polling place. These have official markings and are usually computer-printed. Report any suspicious-looking "voter information" documents to the authorities, or to your local NAACP branch.

You will have to vote at the polling place indicated on the Voter Registration Card. If you move to a new address, be sure to go to the Voting Registrar to make sure they change your voting precinct accordingly. Get a copy of any documents recording the change and bring them with you when you vote. This will help you avoid last-minute difficulties and misunderstandings at the polling place.

If you appear at the polling place by the closing hour, authorities must allow you to vote. No matter what time you arrive, as long as you are in line before the polls close, you are entitled to vote.

You may take any written or printed material into the polling place to assist you in voting. However, no one over the age of ten years may accompany you into the polling booth itself. You have the right to have someone instruct you on how to use the voting equipment. If you are disabled you have a right to an accessible polling place; if you are or over the age of 65, you have the right to have someone assist you with voting.

Every voter should take personal identification to the polls, because officials can challenge you at the polls on identity grounds. Officials can only make such a challenge *before* you receive your ballot, however. Once you receive the ballot, officials cannot

challenge you and must allow you to vote.

You are entitled to vote without harassment or intimidation.[60] Any person who tries it is guilty of a misdemeanor and can be fined up to $2500 or imprisoned up to five years, or both. You can also sue in civil court for an injunction or money damages.[61]

If someone challenges your right to vote without threatening you, even an election official, talk to an election judge. Each polling place is supposed to have one.

The judge must then require the challenger to state in writing, under penalty of perjury, the reasons for the challenge. They must also give their name and contact information. You can file a complaint against them later.

If the judge decides against you, the Help America Vote Act (HAVA) requires officials to permit you to cast a provisional ballot. Provisional ballots are typically used when:[62]

- the voter fails to produce proper identification;
- the voter's name does not appear on the electoral roll for the given precinct;
- the voter's registration contains inaccurate or out-dated information such as the wrong address or a misspelled name; [63]or
- the voter's ballot has already been recorded

If you have any problem with voting that the election judge cannot satisfactorily resolve, contact the local district office of your Member of Congress. Most Members have local field representatives who will meet with concerned constituents on such matters. The field representative may also be in a position to alert the U.S Department of Justice; Justice Attorneys may respond more quickly to them.

Looking at the bigger picture, try not to view yourself as the only victim of discrimination. If anyone interferes with your right to vote, others may be victims as well. Report your problem, but try to stop it from happening to other people as well. Work with your local civil rights organization to alert others to the danger.

If a problem arises on Election Day, contact the authorities and your local NAACP branch. They are there to help you, but they can’t be everywhere at once. You can do a great service by helping them identify problem precincts, so they can send poll-watchers and lawyers to sort things out.[64]

§8.6: Who Can Help?

Department of Justice

The Department of Justice plays a significant role in carrying out voting rights laws, especially under sections 2 and 5. Under section 2, the DOJ may sue in federal court to challenge racially discriminatory practices.[65] Under section 5 "preclearance," the DOJ reviews proposals to change voting procedures in states guilty of past voting rights abuses, preventing them from adapting new, and suspect procedures. DOJ staff study documents, interview people in the affected community and pass their findings on to the Attorney General, who makes the final determination.

Section 12(d) of the 1965 Voting Rights Act gives the Attorney General the right to initiate actions for "preventative relief," including an application for a temporary or permanent injunction, restraining order, or an order directing State or local election officials to permit persons listed under the Act to vote and/or to counter any voter intimidation. Section 12(c) authorizes fines up to $5,000 and prison terms as long as five years.

If you reside in a county the Attorney General supervises under Section 6 of the VRA, you may contact federal complaints examiners.[66] In states west of the Mississippi River, contact federal examiners by calling 1-866-885-4122. For states east of the River, call 1-888-496-9455. The Code of Federal Regulations, volume 45 Part 801 lists the AG's supervised counties. The DOJ accepts calls from citizens complaining of voter discrimination, and can provide further directions. Call 1-800-253-3931.

The Lawyers' Committee for Civil Rights Under Law

The Lawyers' Committee offers a helpline to voters, 1-866-OUR-VOTE, staffed with trained volunteers, including lawyers, paralegals, and law students. On Election Day, the Lawyers' Committee also has people at the polls ready to call back to the main office in case of trouble.[67]

§8.7: Getting Organized

After every election, we hear news reports about the obstacles and intimidation minority voters faced. To protect their rights, voters first have to know what they are. Then they need to get actively involved to protect their rights.

Lawyers have to do more than think of creative responses to voting rights violations. They have to educate the community to help citizens prevent such violations from occurring in the first place.

Our community leaders, lawyers, and activists need to embed themselves in the structures of election administration, developing relations with election officials, giving feedback, sitting on state oversight boards, and anticipating problems. . We need a network of people working at the state level, and in each city and county.[68]

Before the 2010 elections, we will have to monitor officials carefully when they seek to remove voters from registration lists. We will have to be prepared with a major campaign of voter education, get out the vote, and poll-watching to ensure that minority voters are not harassed, intimidated or misinformed.

On Election Day itself, we will have to watch the roads that lead to polling places, to ensure that roadblocks and police harassment do not reduce voter turnout. We will have to report any misconduct immediately.

Finally, for the long haul, we need to build community and coalitions, so that our efforts to enhance and focus the African American vote are not episodic, coming and going every election cycle, but rather part a continuing campaign.

Chapter Nine

Citizen Action

Power concedes nothing without a demand. It never has and it never will. Find out just what any people will quietly submit to and you have found the exact measure of injustice and wrong which will be imposed upon them, and those will continue until they are resisted, either with words or blows, or both. The limits of tyrants are prescribed by the endurance of those whom they oppress.
FREDERICK DOUGLASS

We must be organized.
STOKELY CARMICHAEL (KWAME TOURE)

THE HISTORY

§9.1: What's the Problem?

On September 6, 1966, Atlanta police tried to arrest Harold Prather pursuant to a warrant they had for his arrest. [1] Harold ran; the police chased him and shot him twice. Harold fell dead on his mother's porch in the Summerhill community of Atlanta. Many African American residents of Summerhill saw the shooting or quickly learned of it and gathered at Harold's mother's house.

Around 2:30 p.m., a reporter persuaded Stokely Carmichael, chairman of the Student Nonviolent Coordinating Committee (SNCC) to go and try to quiet the crowd. Carmichael went, but the people assembled asked him to join them and help with the protest. Carmichael agreed to return at 4 p.m. to assist them and returned to the SNCC office.

From the office, he called William Ware, another SNCC member, to get a sound truck with a loudspeaker for witnesses to use to tell people what happened. Ware took the truck to the site and two men from the crowd spoke. The police arrested the two men, arrested Ware for refusing to move the truck, and arrested Bobby Walton for attempting to continue the protest after the first three arrests. The crowd shook the police wagon that held the four men arrested. Fleeing the crowd, the police wagon struck an African American woman who was pregnant. The crowd grew violent, throwing rocks and bottles at the wagon and at the officers.[2]

Carmichael returned at 4 p.m. to the violent scene to find officers attempting to arrest people and thereby causing more violence. Carmichael stayed at the scene only 10 minutes,

and then returned to the SNCC office. Around 5 p.m., the Mayor of Atlanta stood on a police car to address the crowd, but the people rocked the car until he fell. When he regained his position atop the car, officers released tear gas and fired into the crowd.

On September 14, 1966, Atlanta authorities arrested four SNCC members for "circulating insurrectionary literature," and for acts illegal under the "Insurrection Statutes." Carmichael, held under $10,000 bond, sued Atlanta Mayor Ivan Allen and asked the court to declare the Insurrection Statutes unconstitutional because they allowed the city to convict people of insurrection for merely engaging in demonstrations protected by the First and Fourteenth Amendments. Members of SNCC and members of the Summerhill community also jailed joined the suit, alleging the Insurrection Statutes deprived them of freedom of speech, press, assembly association, and the right to assemble and petition for redress of grievances.[3]

The court found for Carmichael and held the Insurrection Statutes vague and overbroad. The court said the statutes violated citizen's rights under the First and Fourteenth Amendments and dismissed all charges.[4]

Background

State and local governments in the South designed the slave codes and Black Codes to keep Africans docile and willing workers, and to discourage them from exercising any type of power. Southern African Americans could not move freely or congregate, so their ability to generate political influence was generally quite limited. In the North, *de facto* segregation created a critical mass of African American voters that caught the attention of urban political machines, but no African American candidates rose through the ranks until after World War II.

Segregation was an intricate system of social oppression, deeply rooted in Southern society. Without a political insider's perspective, African Americans North and South began their struggle in the courts. But as we have seen in each chapter of the book, many civil rights court decisions have fallen short of what they were intended to achieve. In some cases, ultraconservative judges have undercut favorable rulings with numerous exceptions or by increasing plaintiff's burden of proof.

Citizen action created the climate for the major civil rights bills of the 1960s. They still stand, but citizen action has waned, leaving these legislative accomplishments vulnerable. The Voting Rights Act of 1965, almost sunset in 2007. Congress renewed it in July of 2006, but not without a struggle.

Despite all of the legal changes of the past half-century, the United States remains a largely segregated society. Studies confirm that most discrimination has become more covert and that the harder examples are to find, the harder they are to resolve.[5]

Citizenship Rights Today

Today, African Americans still face many obstacles as they exercise their citizenship rights.[6] African Americans' right to vote has been blocked both by direct and indirect means. (Chapter Six) The more contested an election, the more likely it seems that racists will attempt to suppress African American votes.

Citizenship rights also suffer when too much of a person's energy is spent fending off constant harassment by shopkeepers and other proprietors of private and public accommodation (Chapter Four), or even by the police themselves (Chapter Three). There also remains the specter of hate crimes (Chapter Two), originally perpetrated in this country to keep African Americans "in their place." Finally, during our country's long history of racial discrimination, African American citizenship rights have been compromised by limited access to employment, housing, and educational opportunities, as we saw in Chapters Five, Seven and Eight respectively.

Racism obstructs basic citizenship rights just as it obstructs employment opportunity, housing choice, voting rights, and freedom of movement and equal access to education. African Americans North and South have faced racist harassment when they looked for a job, tried to vote, entered retail and service establishments, or sought an education. Many African Americans to this day feel intimidated, if not by white people themselves, then certainly by white officialdom, institutions, and bureaucracies.

Judge Leon Higginbotham noted in 1975 that civil rights lawyers might need to reconsider their heavy federal law focus and litigate instead under the laws of progressive cities and states, as "major vehicles for change."[7] Yet even in these jurisdictions, the struggle for civil rights cannot be won by litigation alone. State and local bureaucracies actually have to implement new law for change to occur. Change can stall even if these bureaucracies are not opposed but simply sluggish, ineffective, or indifferent. [8] Lawyers learn to see litigation as the principal way to resolve disputes, but citizen action is often necessary to close the circle and ensure change actually occurs.

With the historic, broad-based, mass social movement for civil rights of the 1960s behind us, the challenge now is to devise smaller-scale techniques to ensure that citizens can

recognize when their rights have been violated, and protect themselves accordingly. African Americans today have not yet reached this point.

African Americans today often lack information about the laws and procedures that are the framework for citizen action: how government actually operates, the specific procedures one must follow in order to vote, testify, lobby, and more. That discussion forms the bulk of this chapter.

Further, African Americans have not yet developed an organizational form that actively and continuously engages the broad base of the African American population in efforts to affect government, particularly at the local level. On paper, the Fourteenth Amendment and various civil rights laws offer protection, but litigation to vindicate these civil rights is often a lengthy and time-consuming process with rewards hardly proportionate to the energy required. Citizen action is the missing component in the assertion and vindication of African American rights.

§9.2: What's the Law?

Local Government[9]

Today, particularly as federal courts have grown conservative on civil rights, African Americans must focus on local government as most accessible and because this arena provides citizens with a direct political contact.

When trying to make your voice heard at the local level, it is important to remember that the different local government units have different functions. You might want to petition the city council to change a budget allocation for public safety, a zoning board to protest the development of a shopping mall near your home, or the school board if you have concerns over funding for all-day kindergarten. Many citizens bring their claims before the city council when they should bring them before another branch of city government, e.g., the mayor's office or the school board.

An elected council is the most common type of legislative government in U.S. cities, towns, and counties. Councils consist of several elected members, depending on the size of the jurisdiction. The council proposes bills, votes, and passes laws to govern the jurisdiction.

In some jurisdictions, the chief executive (mayor, county executive) is a voting member of the council, serving as its chairperson. In other cases, the chief executive is independent, with veto power over council legislation. In large jurisdictions, the council may elect a council president who has authority separate and apart from the chief executive.

Procedures may differ from town to town and state to state regarding access to local legislative bodies. Scranton, Pennsylvania provides a good example of the procedures followed in a smaller town with a small African American community.

Pursuant to the Home Rule Charter of the city of Scranton, "[t]he City Council shall meet at such times and places as shall be designated in the Administrative Code."[10] The charter specifies that "[t]he Council shall meet once a week in regular sessions in regular council chambers."[11] Furthermore, "[a]t least twenty-four (24) hours before any regular meeting of Council, an agenda containing all items which are scheduled to come before it at the meeting shall be publicly posted."[12] Lastly, "[r]easonable opportunity shall be provided for citizens and taxpayers to address Council on agenda matters before a vote is taken."[13]

The City Council determines its own procedures for citizen participation, but the city charter does not spell out the specifics of how a citizen goes about addressing the Council. However, Pennsylvania law requires official actions and deliberation to take place at a meeting open to the public.[14] Local governments must provide a reasonable opportunity at each advertised regular meeting and advertised special meeting for residents to comment on matters of concern, official action, or deliberation that are or may be before the board or council prior to taking official action.[15] If a large number of people show up to comment, the city council may defer the comment period to the next regular meeting or to a special meeting occurring in advance of the next regular meeting.

Residents may find meetings and other official events postponed or rescheduled due to local holidays or festivities. As such, it is important for all citizens, but especially African-Americans and other minorities, to pay special attention to the announcements and postings about rescheduled activities.

Pennsylvania law requires local governments to give public notice regarding meetings.[16] The statutes define public notice in three ways:

1) by publicizing the place, date and time of a meeting in a newspaper of general circulation which is published and circulated in the political subdivision where the meeting will be held,[17]

2) by posting a notice of the place, date and time of a meeting prominently at the principal office of the agency holding the meeting or at the public building in which the meeting is to be held, or

3) by giving notice to interested parties.

If the city council reschedules a meeting, they have to give public notice of each rescheduled regular or special meeting at least 24 hours in advance of the time of the original meeting.[18]

If a citizen can prove that a city council failed to meet the state's notice requirements, she or he may be able to bring an action in court to nullify the council's decision. The burden is on the citizen to prove that authorities did not give adequate notice.

If African Americans in your community face discrimination when they try to access any local government agencies, litigation is one option. However, the Supreme Court will only hear racial discrimination cases alleging direct intentional discrimination, rather than the subtler patterns and practices that have become the norm today. A history of discrimination, especially in a small town, may make a difference. Public demonstrations may be the only way to call attention to the problem.

Demonstrations

The Supreme Court in *Cox v. State of La*. (1965)[19] considered the case of a defendant convicted of disturbing the peace and obstructing public passages. Students assembled peaceably at the state capitol building in Baton Rouge marched to the state courthouse where they sang, prayed, and listened to speeches. Police then arrested them. Cox led another group of students to protest the arrests, and to protest segregation and discrimination in Baton Rouge.[20] The police arrested him.

Cox appealed to the Supreme Court to overturn his conviction after the Louisiana Supreme Court upheld it.[21] Justice Goldberg reversed the state Supreme Court, holding that state law gave local officials too much discretion, allowing them to punish demonstrators merely for peacefully expressing unpopular views.[22]Thus, the state infringed Cox's rights of free speech and free assembly.[23]

In the same year, Judge Johnson of the United States District Court of Alabama, Northern Division authorized Dr. Martin Luther King's Southern Christian Leadership Conference (SCLC) and SNCC permission to march from Selma, Alabama, to Montgomery, Alabama.[24] They proposed to march to protest a multitude of civil rights violations occurring since Mississippi Freedom Summer in 1964, and to support passage of the Voting Rights Act of 1965.

When Alabama Governor George C. Wallace banned the March, SCLC and SNCC sued so the march could go forward. Judge Johnson ruled that the plaintiff's rights to free

speech and lawful assembly overrode Wallace's concerns that they would provoke violence from onlookers.

The Judge's decree contained strict conditions for the marchers, however. There could be no more than three hundred marchers, marching two abreast, and single file on the road shoulder. The march had to follow a specific route and cover a mandated distance each day. The marchers had to camp at certain sites, though they could sing songs and hear speeches while camped. Finally, only twenty people could enter the Governor's office when the March arrived in Montgomery.

In September 1960, DeKalb County, Georgia police stopped Dr. Martin Luther King, Jr. when he was driving and arrested him because he did not "have in his possession a correct driver's license as issued by the Department of Public Safety of said State."[25] He pleaded guilty. The court fined him and sentenced him to 12 months at hard labor in the Public Work Camp of the County, or, if he paid the fine, to 12 months probation. The judge said if Dr. King violated any Federal or State penal statutes or municipal ordinances, he would revoke King's probation and send him back to jail. That meant no sit-ins or demonstrations. Dr. King appealed and the state Court of Appeals reversed the sentence as excessive.[26]

In New York, a federal judge recently threatened to sanction police for videotaping demonstrators, stating political surveillance violates New York law. The judge held that investigating political activity exclusively for its own sake is prohibited. The judge said he would hold the city and the police department in contempt of court for future violations and would fine them if necessary.[27]

The judge referred to a consent decree issued in a 1971 Black Panther Party lawsuit alleging that New York City police spied on legitimate political activity and distributed the information to other law enforcement groups. Courts modified the 1971 decree after the Sept. 11, terrorist attacks to help the police department investigate terrorism or terrorism-related crimes, but the judge felt the police had gone too far in this case. Interestingly, the judge did not base his ruling on the First Amendment, but rather on New York law, which he said imposed greater limitations on the police.

Police today routinely violate the rights of demonstrators, increasingly since 9/11 but also as a function of ultraconservative power in government. Increasingly, authorities simply deny permits. Police have disrupted authorized demonstrations and arrested demonstrators for disorderly conduct and assault, even when the police themselves initiated the violence.[28]

The first Amendment provides, in part, that "Congress shall make no law...abridging the freedom of speech…or the right of the people peaceably to assemble." The First Amendment protects freedom of expression. Freedom of expression includes freedom of speech, freedom of the press, freedom of assembly, and freedom to petition the government to redress grievances. Additionally, there is a well-recognized "freedom of association," derived from the right to free speech.

Although the First Amendment protects freedom of expression, it does not protect *all* expression. Unprotected categories include obscenity, fraudulent misrepresentation, defamation, advocating imminent lawless behavior, and "fighting words."

The First Amendment protects any form of expression that does not fall into one of these exceptions. Nevertheless, the government has power to regulate even protected forms of expression, if their regulations are content-neutral or serve a compelling governmental objective; necessary; and drawn only as broadly as needed to achieve the stated objective ("narrowly tailored").

In addition to having the power to regulate protected speech in special circumstances, and to ban unprotected speech entirely, the government can also regulate the time, place, and manner of any expression that takes place in a public forum. The government can even regulate speech that is not public so long as it has a rational basis for doing so. Examples of public forums include streets, parks, and city hall while non-public forums include privately owned shopping centers and private property. If any of these circumstances, the government can require a citizen to secure a permit for public speech or other expression.

The government's discretion over granting permits is limited. Permit requirements are for maintaining public order, not for discriminating among ideas and opinions.[29] The government clearly cannot deny a permit because of the content or topic of the proposed expression, but neither can it deny a permit on grounds that are so broad that they could disguise a discriminatory motive.

Nonetheless, the police can limit or regulate public demonstration participants if they defame any person, use obscene expression, seek to provoke a fight, public disturbance, or otherwise behave in a lawless manner. They may also regulate assemblies on public property within reasonable limits. Government authorities should clearly state any objections they have to your planned demonstration at the time you ask for a permit, however.

Citizens carrying on demonstrations without a permit may have an uphill battle convincing a court after the fact that authorities should not have denied the permit, however.

Losing the suit means a criminal conviction. Filing a civil action to force the government to issue a permit in advance is a more judicious approach.

In order to organize a lawful demonstration organizers should:

- Contact their local city hall to apply for a permit;
- Inform the community about the demonstration through media and other publications;
- Provide security for demonstrators to protect them from violence committed by counter-demonstrators;
- Provide legal observers to ensure that no one's civil rights are violated;
- Distribute leaflets among demonstrators that spell out the dos and don'ts of demonstrating.
- Deploy demonstration "marshals" evenly throughout the crowd to relay last-minute instructions, to help control the crowd, and ensure that violence or a riot does not occur.

§9.3: What Needs to Change?

Twenty-first century fighters for civil rights must base their work on grass roots political action and dialogue, and legislative action at the state and local government levels. The information and power that is necessary to carry on a struggle for racial justice in this country can only come from engaging as many members of the African American community as possible.

An approach that depends solely on politicians, legislators – and lawyers—will not do the job. Although strong leadership is necessary, the community must participate in the fight for equality. Moreover, if the leaders carry all the weight, opponents can stop progress simply by discrediting or otherwise eliminating the movement's leadership. That is why the Civil Rights Movement of the 1960s ended so abruptly.

The Barack Obama Phenomenon

Important, principled, and progressive relationships have developed between African Americans and members of other races, including white Americans, despite contrary trends and developments in our increasingly edgy and mean-spirited national discourse. These relationships have the potential to ignite a multiracial, multiclass movement for social justice to succeed the Civil Rights Movement itself, reuniting the many factions that have fallen away from one another.

With the election of Barack Obama as the 44th President, the next chapter of the civil rights movement begins. We should not expect this to be any easier than the historic battles in Selma and Montgomery, Alabama, but we should also realize the possible gains in our country's race relations could be just as great.

How can we best use this moment in time to make a big step forward for racial understanding and racial justice? In particular, how does the racial aspect of the 2008 presidential campaign relate to the types of things that the many organizations, communities, and individuals working on racial equity in this country address?

In the summer of 2008, I heard Melissa Harris-Lacewell, from Princeton University, a Barack Obama supporter, say on the "Democracy Now" radio show that the state of race relations in the U.S. at this point in history is such that we should not expect to elect an African American president without having a wrenching debate about race. She added that we will have to go through it to get to the other side--we cannot go around it, over it, or under it.

It was then that I realized that we have an opportunity every bit as historic as that of Obama's election, and that is to use this moment as a chance to move to greater progress and understanding on race.

The important thing is that this is the first time since the Black Power movement that large numbers of African Americans and white people are working together. That's part of Barack's miracle. The other part is that it is multicultural as well as multiracial, and that is completely new.

As Attorney General Eric Holder observed in February, 2009:

> Our history has demonstrated that the vast majority of Americans are uncomfortable with, and would like to not have to deal with, racial matters and that is why those, black or white, elected or self-appointed, who promise relief in easy, quick solutions, no matter how divisive, are embraced. We are then free to retreat to our race protected cocoons where much is comfortable and where progress is not really made…[30]

We have a new opportunity to explore the meaning of "race" (it does not have a biological basis) and the meaning of "racism" (it is more than personal prejudice or bigotry—it is *social*). This historical period, as our country becomes more diverse and ethnic categories blur, could be the turning point. We can create a large-scale, multi-ethnic movement to close racial disparities and create racial justice.

What has not changed is that there is resistance from those who benefit by keeping us all divided. What also has not changed is that we cannot win a fight like this just over the airwaves or even on the Internet. If people want to see greater equity among all people and a stronger democracy, they will have to get personally involved. To do that requires mobilization and training, not just to get out the vote but also to carry on a conversation in our communities that competes with and eventually replaces the one on TV. Then, we must also work to take those conversations to the next step, to create communities that include and work for everyone, of every color.

I personally voted for and supported Barack Obama, but that is not my point. What is important now is that we have an opportunity to use Obama's election to turn off the TV--and yes, talk about race--but also to work together to make big gains toward greater racial equity, and not expect for President Obama, or his team, to do it for us.

In every area of life and of the law, African-Americans must learn how to be pro-active and engaged, creating a "bubble" of protection around one's self and one's family, to discourage civil rights violations before they occur, and minimizing their effect when they do. Whether navigating public space, finding a home, educating one's child, looking for a job, or exercising the right to vote, African Americans must create and recreate the bubble, time and again, by gesture, tone of voice, official complaint, organized protest, and formal legal action. It is stressful and tiring. But it must be done. Such individual or small-group action, asserting one's rights and dignity, builds capacity and actualizes African American citizenship.

THE HANDBOOK

§9.4: First Aid

Today, particularly as federal courts have grown conservative on civil rights, African Americans must focus on local government as most accessible and because this arena provides citizens with direct political contacts and opportunities.

We can advance the process by accessing local power centers such as town and municipal councils, school boards, zoning and planning boards, and local political party organizations. School boards are prime real estate for measures to initiate such dialogue. Zoning boards are another focal point, controlling the land use and development trends that refine and expand the communities in which we live. Local legislatures and the precinct organizations of national political parties round out the picture.[31]

Citizens have a right to access and hold accountable local government by testifying before school boards, zoning boards, and city or county councils. They can organize a demonstration or run for political office. It is important to recognize that while government can no longer interfere with our participation, it has no obligation to *encourage* us to exercise our rights either. Certainly, "politics as usual" will be disturbed if any previously inactive group suddenly and effectively makes its voice heard. Government does not teach us how to testify before a local zoning board or council, or how to petition a local school board.

We need to understand how to access local government to create to create positive change--new law, new social customs and new practices in our communities. If you are knowledgeable about local government, you can protect yourself against government injustice, petition for social change, and ultimately gain a sense of self-determination by actively participating in the political process. By knowing how to properly petition the city council, or to address concerns that may arise with a neighborhood school, you can empower yourself as well as the community at large. Far too many African Americans have been denied these most valuable rights.

§9.5: Who Can Help?

The NAACP focuses its legal efforts on class action lawsuits and other cases of broad significance, which further their goal of guarding political, educational, social, and economic rights and eliminating racial hatred and racial discrimination.[32] The NAACP does more than litigate or lobby, however. In 2007 for example they launched the "STOP" public information campaign to "stop" the negative images of Blacks in the media, responding to an onslaught of racist stereotypes.[33]

In 2006, the NAACP condemned white college students at the University of Texas, for hosting "Ghetto parties," where white students wore painted black faces and ridiculed African Americans. [34] The students "carried 40-ounce bottles of malt liquor and wore Afro wigs, necklaces with large medallions and name tags bearing historically black and Hispanic names."[35] Additionally, students posted pictures from this event on the social networking "Facebook."[36] As a result, the NAACP Youth and College Division launched an investigation and implemented a campaign to "End Campus Racism."[37]

Similarly, the NAACP publicly condemned *New York Magazine* for their July 21, 2008 issue's front cover which depicted presidential candidate Barack Obama as a Muslim wearing a turban and a caftan (similar to Osama Bin Laden who is pictured in the background).[38] The same picture portrayed Michelle Obama carrying an AK-47 assault rifle

and wearing camouflage and commando boots, while the American flag burned in the background.[39]

Membership in a civil rights organization such as the NAACP gives you access to a great deal of information about patterns and practices of discrimination or civil rights violations in your community. This can give you a clearer idea of exactly what you have experienced, how your injuries compared to those suffered by others, and what other people, individually or collectively, are doing about the problem. In some cases, you will find opportunities to be proactive about problems such as racial profiling, housing discrimination, or discrimination in the public schools. You may find yourself engaged in community action and lobbying that can improve your own situation as well as those of others.

§9.6: Getting Organized

You are probably not the only one in a community who has suffered a particular civil rights violation. When people fail to report these incidents, others suffering discrimination in the community may see their experiences as random, possibly not even discrimination at all, somehow their "own fault." Attorneys, organizations, and government agencies are in place to help you, but you can also help yourself by organizing within your community.

Community engagement and empowerment are necessary foundations for any legal attack on racism. Community action does not necessarily involve demonstrations, passive resistance, direct action, or boycotts, however. These are tactics, not strategies, and operate outside the mainstream of regular political process. Use them sparingly, when necessary, not for their own sake, because their power lies in their ability to rouse the public's consciousness. Overuse them, and you risk desensitizing the public. An effective civil rights campaign requires simultaneous litigation, lobbying, and community-based work, distributing resources strategically among the three approaches.[40]

Community-based work involves building relationships and social capital so community members can identify their goals and choose among these three principal strategies to implement their goals. Community organizing, for example, ensures that a community will have the political leverage to persuade lawmakers to pass legislation, appoint fair jurists, and create a political environment in which jurists can make progressive legal decisions.

Public schools, for example, long the focus of federal litigation, are also neighborhood centers for community activity. (See the "community school" concept in Chapter Seven) Their central location makes them logical places for election polling stations,

for example. They are also training grounds for democracy, and venues in which people of different races and classes can learn each other's ways and habits. Even if they are located in segregated neighborhoods, it is possible to link schools from one neighborhood to another by the internet, through exchanges, and with other approaches.

Civil rights organizations can help with the process, but you may also need to start a small, informal group of your own. A small group provides a network for people "in the trenches" to share information, strategy, and tactics.

When approaching a problem, follow these steps.

First, assess the needs of the community. Fair housing? School support? Relief from employment discrimination or racial profiling? Health issues?

Look for gaps between services needed and services already provided. Then, meet needs as much as possible by connecting people with existing service providers. For example, most local governments have human rights commissions and agencies.

Where the needed services are not being provided at all, figure out how to respond to remaining needs-- these are the "gaps." Approach local government, nonprofits, civic organizations and churches for help. Don't reinvent the wheel.

Sometimes people are being prevented from accessing services to which they are entitled. This calls for action, in courts, in local government, or through community action. To respond, *map*, *organize* and *reach out.*

Mapping- identifying the capacity of the community, including social capital as well as available financial resources. Social capital includes existing organizations and established leadership (business owners, politicians, religious leaders, civic leaders-- fraternities and sororities, other civic organizations). It also includes informal leaders such as "go-to people" (often older, who know the history of the community) and networkers (often younger "boundary crossers" and "code switchers," fluid and fluent in the problem-solving styles of several communities). These people make good organizers.

Organizing

Distinguish canvassing, mobilization, coalition building and organization. Organization is the only one of these that builds new capacity, new ("civic infrastructure" in a community. An excellent way to organize without creating top-heavy bureaucracies is by forming small groups.

"Study circles" can help the community focus its energy, create options, and pursue them. Study circles consist of 8-12 people who regularly meet in an informal setting for a few

hours at a time. You might hold these meetings once a week, twice a month, or once a month, depending upon the life situations of those who participate. The group meets to review information, compare alternative definitions of problems, and review action options to respond to problems thus defined.[41]

According to Matt Leighninger of EveryDay Democracy, one reason for the growth of study circles and other kinds of civic experiments is that people have become so adept at advocating for their individual rights. "Caught between different groups of right-seeking citizens, public officials and other kinds of local leaders (from mayors to superintendents to neighborhood activists) decide their only course of action is to get those different groups in the same room, in the same small groups, where they can learn, empathize, and plan rather than just yelling at each other. Maybe being able to protect your own rights is the first (and essential) step, and then finding ways to exercise those rights with others, even those who seem to have competing interests, is the second."

Leighninger feels that the challenge of taking the best methods of temporary organizing efforts, like study circle programs, and merging them with grassroots organizations, neighborhood councils or other permanent structures may be the biggest single project facing the civic field. These "Dialogue to Change" programs[42] invite participants to meet and examine the gaps among racial and ethnic groups in their communities, explore approaches to creating greater equity, and build alliances and coalitions to create lasting change.

Outreach: Using Technology

Personal contact builds social capital, but the logistics of arranging personal meetings may make it necessary to use virtual contact to supplement and enhance personal meetings, a strategy called the CAMEL approach.[43] This basically means setting up a digital network between the various partners but following this up by taking turns to host a face to face meeting. CAMEL, the Collaborative Approach to the Management of e-learning, suggests that virtual/technological connections must be supplemented with personal contact in order to ensure that cultural content as well as body language be exchanged, leading to a "know-how" that is richer that that which can be transferred through technology alone. Collaborative social face-to-face community activities must supplement and enhance those taking place on-line.

Informational websites we use to enhance our community work must contain accurate information, and must be user friendly, well organized and easily searchable.[44] Using social

networking websites such as Facebook, MySpace LinkedIn and Twitter, victims of civil rights violations can communicate with other, receive advice about their complaints and share their stories.[45] According to IBM estimates, approximately two-thirds of the world's Internet audience visit social networking sites each month.[46] By 2012, the number of monthly visitors to online social networking sites will surpass 800 million.[47] President Barack Obama's campaign used social media to connect, engage, and communicate with millions of Americans.[48]

With social networking sites, users can join and create interest groups, post messages, and start conversation logs. They can use these sites for individual messages as well as larger-scale broadcasts. They can also post links to web-based information they have found anywhere on the Internet. Youtube makes it possible to broadcast video recordings of community meetings and rallies, help inform people unable to physically attend.

Twitter has the added feature of cell phone access, making it possible to reach people who do not have computers or Internet access. This is a very important and powerful tool, particularly useful for broadcast notices about meetings, new information, or rally times and locations.

Skype, providing free online voice and video communication, is an ideal supplement to the study circle model. With Skype, study circles can involve people in remote locations, or supplement local face-to-face study circle meetings with online updates. Organizations sponsoring study circles can also advertise them using social networking sites.

Preparing the Youth

Another form of action is training our youth. During the Civil Rights Movement, the Southern Christian Leadership Conference (SCLC) sponsored "citizenship" schools, and the Student Nonviolent Coordinating Committee (SNCC) sponsored "Freedom" Schools, which became the prototype for the federal Head Start Program. Georgetown Law School conducts a "Street Law" program that brings the law to the streets of Washington, D.C. to help citizens stay informed of their constitutional rights.

Developing action- oriented public citizenship curricula for our young people, linked to their school's social studies program, can enhance our children's learning overall. It can give them a perspective that can push them to excel in other academic areas such as math, science, grammar, reading and writing, helping bridge the troublesome "achievement gap" between minority and majority students. (See Chapter Seven). These curricula and approaches should train young people to understand society, know their rights, take

principled positions, solve problems, implement solutions, consider the results, and plan for the future.

I have done some work in this area, founding a non-profit organization called the Invisible College, inspired by my own mentors during the Civil Rights Movement.

My story begins with my own experiences in the Civil Rights Movement as a very young person. At 19, I was about 5-10 years younger than most of the Movement's leaders. I did what I was told, showed up for demonstrations. I traveled to Alabama in the summer of 1965 as a college sophomore, to work for the Student Nonviolent Coordinating Committee (SNCC). I taught Freedom School in Boston during a school strike, and worked for the Northern Student Movement in Roxbury, Massachusetts and in New York City..

During this time, I found myself continually reinvented, reinforced, stretched and grown. I was passed from one mentor to another, brilliant, committed men and women who cared about me and who remain my friends to this day.

In many ways, the Civil Rights Movement was like an Invisible College, educating and training all of us who participated. At the same time, it gave us a chance to contribute to our community, by serving with one or more of the many organizations and groups that were its incarnation. It gave us energy and strength to go the distance, and keep at it.

As I became a law professor, I used the term "Invisible College" to describe my work supervising interns in law and public policy, where I farmed out young people to *today's* civil rights workers, the way I was farmed out at their age.

My students' assignment was to study the example of these people who worked for our community's welfare; to learn their skills and their styles and their stories, and to become part of their lives.

A few years ago, a friend of mine from Baltimore, Dr. Freeman Hrabowski, President of the University of Maryland at Baltimore County (UMBC) showed me a memento he had received from a Chinese scientific university, apparently their equivalent of the Massachusetts Institute of Technology. He remarked that the university had started a middle school and high school, to develop the students they needed for the university's advanced and challenging science program.

I think that's when I realized that the Invisible College, which had been focused on people in their 20s, needed a middle school and high school. We need to do that to prepare our children for the more advanced work of community development and citizenship that the community needs, now more than ever.

I began working on a project, which would first of all produce a curriculum in public citizenship for middle-school kids. Overall, we teach the youngsters to approach problem-solving by planning, doing, and reflecting, thinking about it this way:

- *What do I know about society?*
- *What are my rights?*
- *Do I know how to behave?*
- *How well do I solve problems?*
    - *What's the problem?*
    - *Where did it come from? What caused it?*
    - *What have I tried already? Why didn't that work?*
    - *What can I try that is new? Why do I think that will work?*
    - *What is my time frame for solution? What benchmarks can I use to measure success?*
- *How well do I work?*
- *How well do I learn from my mistakes?*
- *How well do I learn from my successes?*

BoysIIMen and *GirlsIIWomen* came out of this process. Through these programs, my law students now mentor middle-school children the way I was mentored as a teenager. I guess we'll create a high school curriculum when our first group of kids reaches that age.

Endnotes

CHAPTER ONE

[1] Paul Costello, *Racism as an Ideology*, THEORETICAL REVIEW (1984)
[2] *Dred Scott v. Sandford*, 60 U.S. 393, 427 (1856).
[3] *Id.* at 452.
[4] *Id.* at 393.
[5] *Id.* at 407.
[6] *Id.* at 410.
[7] Roger Davis and Wanda Neal-Davis, CHRONOLOGY: A HISTORICAL REVIEW, MAJOR EVENTS IN AFRICAN AMERICAN HISTORY (1492 THRU 1953)
[8] David Brown and Clive Webb, RACE IN THE AMERICAN SOUTH: FROM SLAVERY TO CIVIL RIGHTS 20-21 (University Press of Florida 2007) (1968).
[9] *Id.* at 22.
[10] Gloria J. Browne-Marshall, RACE, LAW, AND AMERICAN SOCIETY 1607 TO PRESENT 9.
[11] IPOO Magazine, http://www.ipoaa.com/black_codes_louisians_miss_ohio.htm (discussing Black Codes and their origins as well as provide examples of such) (last visited November 8, 2009).
[12] Page Smith, *Trial By Fire, A People's History of the Civil War and Reconstruction* www.civilwarhome.com/blackcodes.htm
[13] http://www.spartacus.schoolnet.co.uk/USASblackcodes.htm
[14] Abel A. Bartley, *The Fourteenth Amendment: The Great Equalizer of the American People*, 36 AKRON L. REV. 473, 480-81 (2003)
[15] 83 U.S. 36 (1872).
[16] These governments were much more socially progressive than their predecessors were. Before Reconstruction, only wealthy white families in the south could afford to educate their children, for example. Poor white children worked in the fields along with their parents. Majority-African American Reconstruction governments, however, introduced free public education for all. W. E. B. Du Bois, BLACK RECONSTRUCTION IN AMERICA, 1860–1880. (1935)
[17] 42 U.S.C. § 1981(a).
[18] 92 U.S. 214 (1875).
[19] *Id.* at 238.
[20] 92 U.S. 542 (1875).
[21] *Id.* at 559.
[22] Arthur Kinoy, *The Constitutional Right to Negro Freedom*. RUTGERS LAW REVIEW. 21 387, 396 (1967).
[23] 109 U.S. 3 (1883).
[24] *Id.* at 23-26.
[25] *Id.* at 26-62 (Harlan, J., dissenting).
[26] *Homer Adolph Plessy*, A DICTIONARY OF LOUISIANA BIOGRAPHY, Vol. 2 (1988), p. 655
[27] *Plessy v. Ferguson*, 163 U.S. at 542 (1896)
[28] *Id.* at 551-51.
[29] *Id* at 544.
[30] *Id.* at 552-64 (Harlan, J., dissenting).
[31] "The Origin of "Jim Crow," *http://www.africanamericans.com/JimCrow.htm.*
[32] Douglass Hurt, AFRICAN AMERICAN LIFE IN THE RURAL SOUTH 1900-1950 200 (2003).
[33] Jody Armour, *Negrophobia and Reasonable Racism: The Hidden Costs of Being Black in America* 3 (New York University Press 1997)
[34] Armour, supra n. 33; Hurt, supra n. 32.
[35] http://lcweb2.loc.gov/ammem/aaohtml/exhibit/aopart8.html.
[36] 347 U.S. 483 (1954).
[37] 163 U.S. at 544.
[38] 347 U.S. at 495.
[39] *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

[40] *Sweatt v. Painter*, 339 U.S. 629 (1950); *McClaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). Genna Rae McNeil, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1984)
[41] http://en.wikipedia.org/wiki/Oliver_Brown_%28civil_rights%29
[42] http://lcweb2.loc.gov/ammem/aaohtml/exhibit/aopart8.html.
[43] http://lcweb2.loc.gov/ammem/aaohtml/exhibit/aopart9.html.
[44] Patterson, GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974 (Oxford: 1997). pp. 486 ff
[45] 42 U.S.C.A. § 2000d, *et seq*.
[46] David Wellman, Color *Blindness as Color Consciousness*. http://www.equaljusticesociety.org/ejs_colorblind_david_wellman.pdf.
[47] Kenneth O'Reilly, NIXON'S PIANO: PRESIDENTS AND RACIAL POLITICS FROM WASHINGTON TO CLINTON (Simon & Schuster 1995)
[48] http://www.pbs.org/wgbh/amex/wallace/peopleevents/pande07.html
[49]Bruce A. Ackerman , *Transformative Appointments,* HARVARD LAW REVIEW, Vol. 101, No. 6 (Apr., 1988), pp. 1164-1184
[50] A liberal Republican Justice, whose views were not known to President Bush I at the time of his appointment.
[51] 426 U.S. 229
[52] *Id.* at 229.
[53] *Kim v. Nash Finch Co*., 123 F.3d 1046, 1059 (8th Cir. 1997).
[54] *Affirmative Action.* STANFORD ENCYCLOPEDIA OF PHILOSOPHY. 28 Dec. 2001. http://plato.stanford.edu/entries/affirmative-action/.
[55] Debra Millenson, History *of Executive Order and Employment Discrimination.* http://academic.udayton.edu/Race/03justice/justice12.htm.
[56] *Reverse Discrimination.* Wikipedia: The Free Encyclopedia. http://en.wikipedia.org/wiki/Reverse_discrimination; Fred Pincus, REVERSE DISCRIMINATION: DISMANTLING THE MYTH, (Lynne Rienner Press, Colorado, 2003).
[57] R.Clegg, *The O'Connor Project --Part Of The Problem,* http://www.nationalreview.com/clegg/clegg200401151004.asp
[58] 436 F.3d 816 (2006)
[59]735 F2d 69 (1984)
[60] *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007).
[61] Edward C. Thomas*, Racial Classification And The Flawed Pursuit Of Diversity: How Phantom Minorities Threaten "Critical Mass" Justification In Higher Education*, 2007 B.Y.U. L. Rev. 813, 826
[62] 127 S.Ct. at 2740-41.
[63] *Id.* at 2747.
[64] Petitioners Brief (2006 WL 2452374)
[65] Suzanne E. Eckes, *Public School Integration and The 'Cruel Irony' of The Decision In Parents Involved In Community Schools V. Seattle School District No. 1*, 229 ED. LAW REP. 1, (2008)
[66] *Meredith v. Jefferson County Board of Education* No. 05-915
[67] Petitioners Brief (2006 WL 3023029)
[68] Is this "separate but equal?"
[69] Pet. Brief at 8
[70] Eckes, *supra*, n. 65 at 1.
[71] *Id.* at 4-5.
[72] *Id.* at 5.
[73] *Id.* 5.
[74] *Alexander v. Sandoval*, 532 U.S. 275 (2001)
[75] *Id.*
[76] George Yancy, WHAT WHITE LOOKS LIKE: AFRICAN AMERICAN PHILOSOPHERS ON THE WHITENESS QUESTION 108-109 (2004); Eduardo Bonilla-Silva, WHITE SUPREMACY & RACISM IN THE POST-CIVIL RIGHTS ERA 65 (2001); Paula McClain & Joseph Stewart Jr., CAN WE ALL GET ALONG? RACIAL AND ETHNIC MINORITIES IN AMERICAN POLITICS 60 (1999).

[77] Erich Shiners, REMEDYING UNCONSCIOUS DISCRIMINATION: CHIN V. RUNNELS AND ALTERNATIVES TO THE INTENT DOCTRINE, 4 (2005) http://www.equaljusticesociety.org/ucla2005/Shiners_Essay_EJS_competition_winner_2005.pdf
[78] R.A. Lenhardt, *Understanding The Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 828 n. 23 (2004) (stating that "[b]y age three, many children have already learned to regard racial minorities as inferior to Whites, and studies suggest that we internalize negative attitudes and responses to racial minorities at an even earlier developmental stage").
[79] Dorothy E. Roberts, *Foreword: Race, Vagueness, and The Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 805 (1999); ROBERT C. WADMAN AND WILLIAMS THOMAS ALLISON, TO PROTECT AND TO SERVE: A HISTORY OF POLICE IN AMERICA 41, (Prentice Hall) (2004)
[80] Lawrence K. Grossman, *From Bad to Worse: Black Images on White news*, COLUMBIA JOURNALISM REVIEW, http://www.allbusiness.com/marketing-advertising/public-relations-media/794970-1.html; Robert M Entman & Andrew Rojecki, *The Black Image in the White Mind,*. http://www.press.uchicago.edu/Misc/Chicago/210758.html; Sarah Senegas, *Racial stereotypes in the Media*, http://www.associatedcontent.com/article/33262/racial_stereotypes_in_the_media.html?cat=9.
[81] Armour, supra n. 33
[82] Karyn R. Lacy, BLUE-CHIP BLACK: RACE, CLASS, AND STATUS IN THE NEW BLACK MIDDLE CLASS 92 (University of California Press 2007).
[83] U.S. Census Bureau, U.S. Dep't of Commerce, Statistical Abstract of the United States: 2000 at 89 (Table 125: Infant Mortality Rates by Race and State: 1980 to 1997) (demonstrating higher infant mortality rates than people of European descent); *id*. at 83-85 (Table 115: Average Lifetime in Years by Race by State: 1981 to 1991; Table 116: Expectation of Life at Birth, 1970 to 1998, and Projections, 1999 to 2010; Table 117: Selected Life Table Values: 1979 to 1998; and Table 118: Expectation of Life and Expected Deaths by Race, Sex and Age: 1997) (demonstrating shorter lifespans); *id*. at 58 (Table 69: Children Under 18 Years Old by Presence of Parents: 1980 to 1998) (demonstrating a higher rate of unwed motherhood and absent fathers); *id*. at 404 (Table 645: Employment Status of the Civilian Population: 1970 to 1999) (demonstrating a higher unemployment rate); *id*. at 97 (Table 136: Death Rates for Injury by Firearms, Sex, Race and Age: 1997) (demonstrating a higher death rate from injury by firearms); *id.* at 209-10 (Table 341: Victimization Rates by Type of Violent Crime and Characteristic of the Victim: 1998; Table 342: Victim/Offender Relationship in Crimes of Violence by Characteristics of the Criminal Incident: 1998; Table 343: Property Victimization Rates by Selected Household Characteristics: 1998) (demonstrating a higher criminal victimization rate); *id*. at 180-81 (Table 290: High School Dropouts by Race and Hispanic Origin: 1975 to 1998; Table 291: High School Dropouts by Age, Race, and Hispanic Origin: 1970 to 1998) (demonstrating a higher high school dropout rate); *id*. at 478 (Table 760: Families Below Poverty Level and Below 125 Percent of Poverty Level: 1970 to 1998) (demonstrating a higher rate of persons living below the poverty level); *id*. at 470 (Table 743: Money Income of Families; Percent Distribution by Income Level, Race, and Hispanic Origin in Constant (1998) Dollars: 1970 to 1998) (demonstrating a lower family income level); cf. *id*. at 283 Table 463: Members of Congress, Select Characteristics; *id*. at 16 (Table 15: Resident Population by Race).
[84] Melvin Oliver and Thomas Shapiro, WHITE WEALTH/ AFRICAN AMERICAN WEALTH.
[85] Tracy Jan, *Harvard Prof. Gates Arrested In His Own Home*, BOSTON GLOBE, July 20, 2009
[86] *Obama Win Sparks Rise In Hate Crimes, Violence*, http://www.npr.org/templates/story/story.php?storyId=97454237
[87] *Wisconsin v. Mitchell*, 508 U.S. 476
[88] *Senate Backs Apology for Slavery: Resolution States Specifies That It Cannot be Used in Reparation Cases*, http://www.washingtonpost.com/wp-dyn/content/article/2009/06/18/AR2009061803877.html; U.*S. House of Representative Apologizes for slavery, segregation,* http://www.thedailyvoice.com/voice/2008/07/us-house-of-representatives-to-000946.php
[89] *Id.*
[90] *Synopsis: Between Barack and a Hard Place: Racism and White Denial in the Age of Obama,* http://www.redroom.com/publishedwork/between-barack-and-a-hard-place-racism-and.
[91] Wellman, supra n. 46
[92] *Young Voters Respond to Obama's 'Color-Blind' Approach, Duke Expert Says*. Office of News and Communications. Duke University. http://www.dukenews.duke.edu/2008/01/obama.

[93] *Between Barack and a Hard Place, supra* n. 90
[94] Haider Rizvi, *ACLU: Racial Profiling "Widespread and Pervasive"*, IPS News (July 2, 2009, http://www.alternet.org/rights/141065/aclu:_racial_profiling_%22widespread_and_ pervasive %22/.
[95] Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. Pitt. L. Rev. 721, at 722.
[96] *After beers, professor, officer plan to meet again,* http://www.cnn.com/2009/POLITICS/07/30/harvard.arrest.beers/index.html
[97] *Officer Who Arrested Harvard Scholar Not Sorry*, ASSOCIATED PRESS, July 23, 2009, http://www.foxnews.com/story/0,2933,534436,00.html
[98] http://www.foxnews.com/politics/2009/02/18/holder-calls-nation-cowards-race-matters/
[99] Eric Holder, Attorney General, Dep't of Justice, *Remarks at the Dep't of Justice African American History Month Program* (Feb. 18, 2009).
[100] *Id.*
[101] Eric Holder, *Written Testimony by Attorney General Eric Holder to Senate Judiciary Committee*, http://www.justice.gov/ag/testimony/2009/ag-testimony-0911181.html (last visited Nov. 21, 2009)
[102] U.S. Dep't of Justice, http://www.justice.gov/opa/pr/2009/October/09-crt-1079.html (last visited Nov. 21, 2009)
[103] *Alexander v. Sandoval*, 532 U.S. 275 (2001 (private individuals may sue to enforce §601 only in cases of disparate treatment--intentional discrimination)
[104] Id. (§602 of Title VI proscribes activities that have a disparate *impact* on racial groups, but private individuals cannot sue under §602, only the Department of Justice. Note that at the time of the decision, the ultraconservative Bush II Administration, with little interest in civil rights enforcement, controlled the DOJ)
[105] Press Release, Office of Pub. Affairs, Dep't of Justice, *Justice Department Hosts Conference Celebrating the 45th Anniversary of Title VI of the Civil Rights Act of 1964* (Jul. 20, 2009).
[106] *Memorandum from Loretta King, Acting Assistant Attorney General, to Federal Agency Civil Rights Directors and General Counsels* (Jul. 10, 2009).
[107] *Alexander v. Sandoval*, 532 U.S. 275 (2001 (private individuals may sue to enforce §601 only in cases of disparate treatment--intentional discrimination)
[108] Damon Root, *Sonia Sotomayor and Affirmative Action*. http://reason.com/blog/2009/06/11/sonia-sotomayor-and-affirmativ; Hewlett, Sylvia A. *Sotomayor and the "Wise Latina" Vanguard.* HARVARD BUSINESS REVIEW. Harvard Business Publishing. 14 July 2009.
[109] Patrick Leahy, *Leahy Introduces Bill to Authorize Federal Judgeships*. http://leahy.senate.gov/press/200909/090809c.html. This is a statement from Senator Leahy explaining the Proposed Federal Judgeship Act of 2009.
[110] *Federal Judgeship Act of 2009: An Executive Summary*. American Center for Law and Justice. 25 Sept. 2009. http://www.aclj.org/media/pdf/Federal_Ju.
[111] Ralph W. Johnson, *The Federal Judgeship Act of 2009 and the Uncertain Future of the Federal Courts of Appeals.* http://www.rnla.org/uncertainfuture.pdf.
[112] Lani Guinier and Gerald Torres, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, AND TRANSFORMING DEMOCRACY, Harvard University Press, p. 55 (2002).

CHAPTER TWO

[1] Parker, Laura, *Justice pursued for Emmett Till*, USA TODAY, 2004-03-10. http://www.usatoday.com/news/nation/2004-03-10-till-usat_x.htm
[2] http://foia.fbi.gov/till/till.pdf
[3] A. Alschuler, *"Racial Quotas and the Jury,"* 44 DUKE LAW JOURNAL 704, 706 (1995)
[4] http://en.wikipedia.org/wiki/Ku_Klux_Klan
[5] http://www.civilrights.org /research_center/
[6] Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C.L. REV 739 (1999) (Hereinafter *Condemning the Racist Personality)*.
[7] http://www.apa.org/releases/hate.html)
[8] *HR 4797*(1992)

[9] Frederick M. Lawrence, *The Punishment of Hate: Toward a Narrative Theory of Bias Motivated Crimes*, 93 MICH. L. REV. 320, 376 (1994) (hereinafter *Punishment of Hate*).
[10] Commission for Racial Equality (CRE) *Guidance on Prosecution cases of Racist and Religious Crime* http: www.cre.gov.uk
[11] *Id.* at 14-16.
[12] Lu-in Wang, *Hate Crime and Every Day Discrimination: Influences of and on the Social Context*, 4 RUTGERS RACE & L. REV. 1, 30 (2002).
[13] Mark Potok, *The Year in Hate*, INTELLIGENCE REPORT, Spring 2006, http://www.splcenter.org/intel/intelreport/article.jsp?aid=627.
[14] *SPLC Urges Congress to Investigate Extremism in the Military*, http://www.splcenter.org/news/item.jsp?aid=384
[15] William B. Rubenstein, *The Real Story of U.S. Hate Crime Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213, 1229-30 (2004).
[16] *FBI report shows reported hate crimes in US up two percent,* http://jurist.law.pitt.edu/paperchase/2009/11/fbi-report-shows-reported-hate-crimes.php
[17] *Ayers v. Maryland*, 645 A.2d 22 at 25-26. (Md. 1994).(under Article 27 § 470A(b)(3)(i) of the Maryland Code)
[18] *Id.* at 25.
[19] *Id.* at 25.
[20] Southern Poverty Law Ctr, Legal Action: *Brown v. Invisible Empire, Knights of the Ku Klux Klan*, http://www.splcenter.org/legal/docket/files.jsp?cdrlD=12 (last visited Apr. 27, 2006).
[21] Southern Poverty Law Ctr, Legal Action: *Beulah Mae Donald v. United Klans of America* http://www.splcenter.org/legal/docket/files.jsp?cdrID=10 (last visited Apr. 30, 2006).
[22] Desire Edwards, *Decentralizing Hate: The Use of Tort Litigation in Combating Organized Crime*, 82 N.C.L. REV. 1132, 1139-40 (2004).
[23] *Id.*
[24] *Obama Win Sparks Rise In Hate Crimes, Violence*, http://www.npr.org/templates/story/story.php?storyId=97454237; *Obama election provokes rise in hate crimes* http://www.abc.net.au/news/stories/2008/11/25/2429228.html <Nov. 19, 2009 6:12 PM EST>
[25] *Assassination Conspiracies: Authorities Smash Alleged Obama Plots* http://www.splcenter.org/intel/intelreport/article.jsp?aid=986
[26] *Id*.
[27] http://msnbc.msn.com/id/31392054/ns/us_news-crime_and_courts (6/16/2009)
[28] *Hate Crimes Statistics Act of 1990*, 28 U.S.C. § 534 (West, WESTLAW through P.L. 109-169).
[29] Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 290003, 108 Stat. 1796, 2096 (1994).
[30] *Local Law Enforcement Enhancement Act of 2001*, S. 625, 107th Cong. (2001).
[31] *Obama Signs hate crimes bill into law* http://www.cnn.com/2009/POLITICS/10/28/hate.crimes/index.html <Nov. 5, 2009 (9:09 PM EST>
[32] http://www.justice.gov/crt/crim/245.php
[33] Tammye Nash , *Shepard and Byrd, who died months apart, linked forever,* DALLAS VOICE**,** Oct 2, 2008 http://www.dallasvoice.com/artman/publish/article_9880.php
[34] http://tedkennedy.org/ownwords/event/hate_crimes , <Nov 12. 2009 8:39 PM EST>
[35] Anti-Defamation League, http://www.adl.org
[36]Southern Poverty Law Ctr, Legal Action: *Vietnamese Fishermen's Association v. Knights of The Ku Klux Klan*, http://www.splcenter.org/legal/docket/files.jsp?cdrID=40
[37] MICH. COMP. LAW. ANN. § 750.174b
[38] 508 U.S. 476, 487-88 (1993)
[39] Evan M. Read, *Put to Proof: Evidentiary Considerations in Wisconsin Hate Crime Prosecutions*, 89 MARQ. L. REV. 453 (2005).at 455. 457.
[40] *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993).
[41] *Id.* at 485.
[42] *Virginia v. Black*, 538 U.S. 343 (2003).
[43] *Id.* at 361-62.
[44] *Id.* at 363.

[45] *Williams v. New York*, 337 U.S. 241 (1949)
[46] Jeannine Bell, POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME 12 (New York Univ. Press 2002).
[47] William B. Rubenstein, *The Real Story of U.S. Hate Crime Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213, 1221 (2004).
[48] Naftali Bendavid, *U.S. Seeks to Widen Fight on Hate Crimes: Justice Officials Cite Underreporting*, CHICAGO TRIBUNE, Jan. 9, 1998, at 4.
[49] *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005)
[50] *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981).
[51] *Wanzer v. District of Columbia*, 580 A.2d 127 (D.C. 1990).
[52] *Miller v. District of Columbia*, 841 A.2d 1244 (D.C. 2004)
[53] *De Long v. County of Erie*, 455 N.Y.S.2d 887 (N.Y. App. Div. 4th Dep't 1982).
[54] The State Bar Of California, *Hate Crimes: What Should I Know About Hate Crimes?* http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?sCategoryPath=/Home/Public%20Services/Consumer%20Information/Pamphlets&sImagePath=Hate_Crimes.gif&sCatHtmlPath=html/Pamphlets_Hate-Crimes.html&sFileType=HTML&sHeading=Hate%20Crimes
[55] *Hate Crimes Reported in NIBRS*, 1997-99, http://www.ojp.usdoj.gov/bjs/pub/pdf/hcrn99.pdf.
[56] Desire Edwards, *Decentralizing Hate: The Use of Tort Litigation in Combating Organized Crime*, 82 N.C.L. REV. 1132, 1133-34 (2004).
[57] *Id.* at 1135.
[58] *What Should I Know About Hate Crimes?* supra n. 54
[59] Evan M. Read, *Put to Proof: Evidentiary Considerations in Wisconsin Hate Crime Prosecutions*, 89 MARQ. L. REV. 453 (2005).at 469.
[60] *State v. Sullivan*, 576 N.W.2d 30 (Wis. 1998).
[61] *Ayers v. Maryland*, 645 A.2d 22, 25 (Md. 1994).
[62] *Id.* at 28.
[63] *People v. Nitz*, 285 Ill.App.3d 364 (Ill. App. Ct. 1996).
[64] Evan M. Read, *Put to Proof: Evidentiary Considerations in Wisconsin Hate Crime Prosecutions*, 89 MARQ. L. REV. 453 (2005).
[65] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
[66] http://www.fbi.gov/congress/congress01/freeh051001.htm
[67] *Id.*
[68] Desire Edwards, *Decentralizing Hate: The Use of Tort Litigation in Combating Organized Crime*, 82 N.C.L. REV. 1132, at 1148 (2004).
[69] *What Should I Know About Hate Crimes?* supra n. 54
[70] Richard Barry Ruback & Marie P. Thompson, Social and Psychological Consequences of Violent Victimization 70 (2001).
[71]Laura J. Moriarity & Robert A. Jerin, Current Issues in Victimology 17 (1999).
[72] www.mpdc.dc.gov
[73] *What is a Hate Crime?*, http://www.mdle.net/hcrc/.
[74] Southern Poverty Law Ctr, http://www.splcenter.org/center/about.jsp.
[75] http://www.fbi.gov/page2/june04/hale060904.htm
[76]H.R. 188, 105th Cong. 1(6) (1997).
[77] *Hate Bias Crime Training Program,* http://www.fletc.gov/osl/hbctp.htm.
[78] Southern Poverty Law Ctr, Intelligence Project: *Recognizing and Responding to Hate Crimes,* http://www.splcenter.org/intel/law.jsp.
[79] *http://www.texasnaacp.org/jasper.htm*).
[80] *http://www.splcenter.org/center/about.jsp*
[81] Southern Poverty Law Ctr, *About The Center: Advocates For Justice And Equality*, http://www.splcenter.org/center/about.jsp (last visited Apr. 27, 2006).
[82] Southern Poverty Law Center, *Intelligence Report: Tracking the Threat of Hate* (2006). At http://www.splcenter.org/intel/history.jsp
[83] Saul A. Green & Gary M. Felder, *Uniting Against Michigan's Aggressive Effort to End Hate Crime Violations Through Community Partnerships,* 80 MI BAR JNL. 58, 63-64 (2001).

[84] Public Broadcast Service, *Not In Our Town*, http://www.pbs.org/niot
[85] Id.
[86] Titus Ledbetter III, *Boyds community erases hate*, Jan. 18, 2006, http://www.gazette.net/stories/011806/montnew200852_31918.shtml.
[87] *Id.*
[88] *Id.*
[89] *Id.*

CHAPTER THREE

[1] 461 U.S. 95 (1983)
[2] *Los Angeles v Lyons* 461 U.S. 95 (1983), (audio and written opinion: http://www.oyez.org/cases/1980-1989/1982/1982_81_1064/)
[3] Chet KW Pager, *Lies, Damned Lies, Statistics and Racial Profiling,* 13 KAN. J.L. & PUB. POL'Y 515, 516 (2004).
[4] http://afroamhistory.about.com/od/slavery/a/colonialslavery.htm
[5] Jeffrey Bumgarner, PROFILING AND CRIMINAL JUSTICE IN AMERICA, 38 (ABC-CLIO 2004); Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. LJ 835 859 n.81(2008)
[6] Gloria J. Browne-Marshall, RACE, LAW AND AMERICAN SOCIETY 1607 TO PRESENT 3; Leslie G. Carr, "COLOR-BLIND" RACISM 17 (Sage Publications, Inc. 1997); *see also* George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1466 & n.70 (2005).
[7] *See* Dorothy E. Roberts, *Foreword: Race, Vagueness, and The Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 788 (1999); *see also* Sally E. Hadden, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 110 (2001).
[8] Pauline Thomas, *Modern Police Function Like Slave Patrols*, Communities United Against Police Brutality: Survivors of Police Brutality and Members of the Community Working Together and Fighting for Justice (Nov. 5, 2003), http://www.charityadvantage.com/CUAPB/11-7-03Newsletter.asp.
[9] Jeffrey Rogers Hummel, Book Review (reviewing Sally E. Hadden's SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS (2001)).
[10] Leslie G. Carr, "COLOR-BLIND" RACISM 17 (Sage Publications, Inc. 1997); *see also* George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1466 & n.70 (2005). William Carter, *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L.L. REV. 17, 17-20 (2004).
[11] Rogers, supra n. 9.
[12] Thomas, supra n. 8.
[13] Ron Goodwin, *Antebellum Slave Patrols: The Regional Control of Slaves* (Nov. 20, 2008), http://us-civil-war.suite101.com/article.cfm/antebellum_slave_patrols.
[14] Hadden, supra n. 7.
[15]Andrea J. Ritchie and Joey L. Mogul, *Police Misconduct Series: In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States*, 1 DEPAUL J. FOR SOC. JUST. 175,177 (2008).
[16] http://news.bbc.co.uk/onthisday/hi/dates/stories/april/29/newsid_2500000/2500471.stm; Robert C. Wadman and Williams Thomas Allison, TO PROTECT AND TO SERVE: A HISTORY OF POLICE IN AMERICA 156-57 (Prentice Hall) (2004).
[17] *See* Joyce McMahon, et al., U.S. Department of Justice: Office of Community Oriented Policing Services, *How to Correctly Collect and Analyze Profiling Data: Your Reputation Depends On It!*, July 5, 2006, http://www.cops.usdoj.gov/files/RIC/Publications/e06064106.pdf.
[18]Ultraconservative pundits like New York City lawyer Heather Macdonald argue that discriminatory law enforcement is a myth. Macdonald counters statistical findings that reveal grossly disproportionate traffic stops on the New Jersey Turnpike with the bald assertion that "African American drivers on the New Jersey Turnpike are twice as likely to speed as white drivers." Heather MacDonald, ARE COPS RACIST? 117 (Ivan Dee ed., Chicago Press 2003).

In her opinion, the New Jersey highway patrol's disproportionate stop rate is really the result of good police work. However, New Jersey courts actions have concluded that New Jersey State Troopers do

in fact racially profile drivers on the New Jersey turnpike, especially targeting African-Americans. *See Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety-Div.*, 411 F.3d 427, 431 (3d Cir. 2005).
[19]D. Marvin Jones, RACE, SEX, AND SUSPICION: THE MYTH OF THE BLACK MALE, (2005)
[20]Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REVV. 1489, 1495 (2005)
[21] Russell L. Jones, *A More Perfect Nation: Ending Racial Profiling*, 41 VAL. U. L. REV. 621, 622 (2006); Gross & Barnes, 101 MICH. L. REV. at 656.
[22]http://www.prospect.org/cs/articles?articleId=7882; http://www.amnesty.ca/usa/racism.php
[23] Albert J. Meehan and Michael C. Ponder, *Race and Place: The Ecology of Racial Profiling African American Motorists*, 19 JUST. Q. 399, 399-401 (2002). *See also* David A. Harris, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 30 (The New Press) (2002)
[24] Harris, supra n. 23
[25] *Bell v. Clackamas County*, 341 F.3d 858, 861 (9th Cir. 2003). at 862.
[26] *See Contacts between Police and the Public--Findings from the 2001 National Survey* at http://www.ojp.usdoj.gov/bjs/.
[27]*Id.*
[28] *Anderson v. Cornejo*, 355 F.3d 1021, 1023 (7th Cir. 2004). at 1023; *see also* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=547 (In 2002, among young male drivers stopped, blacks (22%) and Hispanics (17%) were searched at higher rates than whites (8%).)
[29] A "badge of slavery" is defined as:

1. A legal disability imposed on a slave, such as the inability to vote, own property, or enter into a contract.
2. Any visible trace of slavery, such as racial discrimination in public education.
3. Any public or private act of racial discrimination that Congress can prohibit under the Thirteenth Amendment to the United States Constitution.

YourDictionary.com, http://www.yourdictionary.com/law/badge-of-slavery.
[30] Albert W. Alschuler, *Rational Hunches and Policing: The Upside and Downside of Police Hunches and Expertise*, 4 J.L ECON. & POL'Y 115, 124 (2007
[31] Leonardo Blair, *My Crime? Fitting the Profile*, NEW YORK POST, Dec. 2, 2007, http://www.nypost.com/p/news/regional/item_cACxnUTWxnf8na4uqfosLK.
[32]Telephone Interview in Washington, D.C. (Nov. 21, 2009, 12 noon).
[33]Alschuler, supra n. 30
[34] David Cole, *Can Our Shameful Prisons be Reformed?* 56 The New York Review of Books 18 (November 2009).
35 Legal Action Center, White ex-cons get jobs faster than Blacks with no criminal record, study (July 2005).
[36] CRS Report, *The Voting Rights Act of 1965, As Amended: Its History and Current Issues*, pg. 3. Louisiana's version of the "grandfather clause" required that the permanent registration list be composed of only the names of all male persons whose fathers and grandfathers were qualified to vote on or before January 1, 1867
[37] John Franklin & Alfred Moss, Jr., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS, pg. 235-238 (New York: McGraw Hill, 1988).
[38] *Id*. at 266-67.
[39] Jimmie F. Gross, ALABAMA POLITICS AND THE NEGRO, 1874-1901, at 244 (1969); Malcolm C. McMillan, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798- 1901, at 275 n. 76 (1955).
[40]*Get Your Vote Back* http://www.acluga.org/voting.rights.html; Mark E. Thompson, *Don't Do the Crime If You Ever Intend to Vote Again: Challenging The Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 SETON HALL L. REV. 167, 168 (2002).
[41] Vincent Schiraldi & Jason Ziedenberg , *Race and Incarceration in Maryland*, JUSTICE POLICY INSTITUTE by, http://www.justicepolicy.org/images/upload/03-10_REP_MDRaceIncarceration_AC-MD-RD.pdf
[42] 392 U.S. 1 (1968).
[43] *Id.* at 22-23.
[44] Tracey Maclin, *Terry at Thirty: Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1272 (1998).
[45] 517 U.S. 806 (1996)

[46] *Id.* at 813-815; David Harris, *"Driving While Black" and Allowing Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 544 (1997).
[47] Steven R. Morrison *Will to Power, Will To Reality, And Racial Profiling: How the White Male Dominant Power Structure Creates Itself as Law Abiding Citizen Through the Creation of African American as Criminal*, 2 NW J. L. & SOC. POL'Y 63 (2007)
[48] *Alexander v. Sandoval*, 532 U.S. 275 (2001 (private individuals may sue to enforce §601 only in cases of disparate treatment--intentional discrimination)
[49] Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, at 738; Patricia Y. Warren and Amy Farrell, *Patterns: The Environmental Context of Racial Profiling*, 623 ANNALS 52, 54, and 55 (May 2009); Scott Moriarity, *Responding to the Issue of "Driving While Black": A Plan for Community Action Through Litigation and Legislation*, 27 WM. MITCHELL L. REV. 2031, 2033.
[50] Warren and Farrell, Patterns, supra n. 49
[51] 2001 Maryland House Bill No. 573 2001 Regular Session - 415th Session of the General Assembly. *Racial Profiling: The State of the Law*: http://www.ethicsinstitute.com/pdf/Racial%20Profiling%20State%20Laws.pdf; *Id.* § 25-113(d) (1)-(15).
[52] *Id.* § 25-113(a) (4).
[53] *Id.* § 25-113(f) (2).
[54] *Law Enforcement Professional Standards Act*, N.J.S.A. 52:17B-225, Oct. 1, 2009; *ACLU-NJ Celebrates New Chapter in Police Accountability*, Aug. 27, 2009, http://www.aclu-nj.org/news/aclunjcelebratesnewchapter.htm.
[55] Law Enforcement Professional Standards Act, N.J.S.A. 52:17B-225, Oct. 1, 2009.
[56] Ed Yohnka, *Anti-Profiling Measures Extended in Illinois*, Aug. 27, 2009, http://www.aclu.org/2009/08/27/anti-profiling-measure-extended-in-illinois/
[57] *Merke v. Cheltenham Twp.*, No. 04-132, 2004 U.S. Dist. LEXIS 22424, at 1 (E.D.P.A. Nov. 1, 2004
[58] *Id.* at 2.
[59] *Id.* at 8.
[60] *Id.* at 2.
[61] *Id.* at 1.
[62] *Id.* at 2
[63] *Id.* at 9-10.
[64] *Id.* at 13.
[65] *Id.* at 17.
[66] *Von Herbert v. City of St. Clair Shores*, 61 Fed. Appx. 133 (6th Cir. 2003).
[67] *Id.* at 135
[68] *Id.* at 136-37.
[69] *Id.* at 136.
[70] *Brown v. City of Oneonta,* 195 F.3d 111 (1999)
[71] *Nesby v. City of Oakland*, No. C 05-3555 JL, 2007 U.S. Dist. LEXIS 22574, at 7 (Mar. 19, 2007).
[72] *Id.* at 9, 11.
[73] *Id.* at 8, 10
[74] *Id.* at 10
[75] *Id.* at 11
[76] *Id.* at 11-12
[77] *Id.* at 14.
[78] *Id.* at 14-15.
[79] *Id.* at 15.
[80] *Id.* at 16.
[81] *Id.* at 2.
[82] *Id.* at 64.
[83] Jeffrey Bumgarner, *Profiling and Criminal Justice In America* 199 (ABC-CLIO 2004).
[84] *Anderson v. Cornejo*, 355 F.3d 1021, 1022 (7th Cir. 2004).
[85] *Id.* at 1021
[86] *Id.* at 1025
[87] *Id.* at 1026.

[88] *Hankins v. City of Tacoma*, No. C06-5099 FDB, 2007 U.S. Dist. Lexis 13071, at 2 (W.D.Wa. Feb. 26, 2007).
[89] *Id.* at 3
[90] *Id.* at 4
[91] *Id.* at 4-5.
[92] *Id.* at 5.
[93] *Id.* at 7-8.
[94] *Id.* at 9.
[95] *Id.* at 10.
[96] *Id.* at 12.
[97] Weatherspoon, supra n. 49, at 733;
[98] U.S. Commission on Civil Rights. *Revisiting Who Is Guarding The Guardians? A Report on Police Practices and Civil Rights in America,* November 2000, 3, http://www.usccr.gov/pubs/guard/ch5.htm.
[99] Human Rights Watch, http://www.hrw.org/reports98/police/uspo30.htm.
[100] Samuel Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 658 (2002); *See also* Maryland State Conference of NAACP Branches v. Maryland State Police Department, 72 F.Supp.2d 560 (D. Md. 1999); Maryland State Conference of NAACP Branches v. Maryland State Police Department 2003 Settlement Agreement, : http://www.aclu.org/files/pdfs/racialjustice/mdnaacp_v_mdstatepolice.pdf.
[101] David Cole, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 36 (1999).
[102] Lori Montgomery, *Racial Profiling in Maryland Defies Definition – or Solution*, WASH. POST, May 16, 2001; Page A01, http://www.washingtonpost.com/ac2/wp-dyn/A30866-2001May15.
[103] Gross & Barnes, supra n. 100
[104] Maryland State Police, General Order 01-9501, Jan. 1, 1995.
[105] Gross & Barnes, supra n. 100 at 682. Maura Dolan & John M. Glionna, *CHP Settles Lawsuit Over Claims of Racial Profiling: The Agency Promises Reforms. Officers Will No Longer Pull Over Drivers Based Only on Hunches*, L.A. TIMES, Feb. 28, 2003, at A1.
[106] http://findarticles.comlp/articles/mi_qa38 *12/is* I 99905/al n8850698
[107] http://www.geocities.com/CapitolHill/64I6/choke.html
[108]*See* Terms and Conditions of Settlement Agreement, *Rodriquez v. C.A. Highway Patrol*, 89 F. Supp. 2d 1131 (N.D. Cal. 2000); Dolan & Glionna, supra n. 105.
[109] *Arnold v. Ariz. Dep't of Pub. Safety*, No. CV-01-1463-PHX-LOA, 2006 U.S. Dist LEXIS 53315, at 3-4, 24 (D.Az. July 31, 2006).
[110] Telephone interview with Johnny Barnes, Executive Director of ACLU- DC (February 2006).
[111] Ronald L. Goldman and Steve Puro, *Revocation of Police Officer Certification: A Viable Remedy For Police Misconduct?*, 45 ST. LOUIS U. L.J. 541; Human Rights Watch, http://www.hrw.org/reports98/police/uspo28.htm.
[112]Amnesty International Report. USA: *Race, Rights And Police Brutality*, 9, http://www.amnesty.org/en/library/asset/AMR51/147/1999/en/dom-AMR511471999en.html
[113] Steven A. Holmes, *Clinton Orders Investigation on Possible Racial Profiling*, N.Y. TIMES, June 10, 1999, at A.22).
[114] *Eric Holder Says That He Has Been Racially Profiled*, THE WORLD NEWSER, THE WORLD NEWS' DAILY BLOG, July 29, 2009.
[115] *Attorney General Says Ending Racial Profiling Is Priority for Obama Administration*, May 7, 2009 http://www.aclu.org/racial-justice/attorney-general-says-ending-racial-profiling-priority-obama-administration
[116] Oralandar Brand-Williams, *Holder Targets Racial Profiling in Detroit Speech*, DETROIT NEWS, http://www.detnews.com/article/20091120/METRO01/911200372/Holder-targets-racial-profiling-in-Detroit-speech.
[117] Weatherspoon, supra n. 49, at 731.
[118] ACLU*: Take Action*: *End Racial Profiling Act*, http://www.aclupa.org/takeaction/actionalerts/endracialprofilingact.htm.
[119] ACLU report: *New Report From ACLU And RWG Finds Racial Profiling Still Pervasive*, http://www.aclu.org/human-rights/new-report-aclu-and-rwg-finds-racial-profiling-still-pervasive.

[120] Weatherspoon, supra n. 49, at 731
[121] Adam Lange, *New 'Face the Truth' Campaign Aims to Eliminate Racial and Religious Profiling* (Sept. 30, 2009), http://www.civilrights.org/criminal-justice/; and ACLU Announcement: *The Persistence of Racial and Ethnic Profiling* (July 2, 2009), http://naacpsfnm.blogspot.com/2009/07/announcement-persistence-of-racial-and.html
[122] Koriand'r Conyers, *Color Coded Crime: Driving While Black,* http://www.cse.emory.edu/sciencenet/undergrad/SURE/Articles/2003_art_conyers2.html*; see Ohio v. Robinette,* 519 U.S. 33, 39-40 (1996).
[123]Wesley MacNeil Oliver, *With An Evil Eye and Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling,* 74 TUL. L REV. 1409, 1462 (2000); David Rudovsky, *Breaking the Pattern of Racial Profiling,* 38 Aug. TRIAL 29, 36 (2003).
[124] Alberto B. Lopez, *Racial Profiling and Whren, Searching for Objective Evidence of the Fourth Amendment on the Nation's Roads,* 90 KY. L.J. 75, 111 (2001).
[125] *Who Is Guarding The Guardians?*, supra n. 98
[126] *United States v. Guest*, 383 U.S. 745 (1966);*Screws v. United States*, 325 U.S. 91 (1945)
[127] Human Rights Watch, http://www.hrw.org/reports98/police/uspo33.htm. (statement of John R. Dunne, Subcommittee on Civil ad Constitutional Rights, House of Representatives, Washington, D.C., March 20, 1991).
[128] Human Rights Watch, http://www.hrw.org/reports98/police/uspo33.htm.
[129] Human Rights Watch, http://www.hrw.org/reports98/police/uspo39.htm.
[130] *http://www.copwatch.com/* (Last visited, 9/18/06).
[131] Rudovsky, supra n. 123.
[132] Scott Moriarity, R*esponding to the Issue of "Driving While Black": A Plan for Community Action Through Litigation and Legislation*, 27 WM. MITCHELL L. REV. 2031, 2068. (2001)at
[133] Human Rights Watch, http://www.hrw.org/reports98/police/what.htm.
[134] *See* generally, Reenah L. Kim, *Legitimizing Community Consent*, 36 HARV. C.R.C.L.L. REV. 46 (2001).
[135] *Who Is Guarding The Guardians?*, supra n. 98
[136] Human Rights Watch, http://www.hrw.org/reports98/police/uspto22.htm.
[137] Deborah Ramirez, Jack McDevitt, Amy Farrell, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED 43 (2000).
[138] *Id.* at 56
[139] Lorie Fridal, et. al., *Racially Biased Policing: A Principled Response*, POLICE EXECUTIVE RESEARCH FORUM 37 (2001).
[140] *See* Moriarity, supra n. 132 at 2068
[141] *ACLU Relaunches Anti-Racial Profiling Efforts in WV*; June 18, 2009, http://www.whsv.com/westvirginiaap/headlines/48518322.html.
[142] *Campaign to End Racial Profiling Sees Signs of Progress*, Oct. 8, 2009, http://wvablue.com/showDiary.do?diaryId=5094.
[143] *See also*, Kathryn Gregory, *Focus on People, Not Tactics, Police Told*, CHARLESTON GAZETTE, Oct. 9, 2009, http://wvgazette.com/News/200910050887?page=1&build=cache.
[144] http://www.everyday-democracy.org/en/Issue.8.aspx
[145] *Protecting Communities, Serving the Public: Police and residents building relationships to work together,* available as a PDF download from http://www.everyday-democracy.org/en/Resource.26.aspx

CHAPTER FOUR

[1] 378 U.S. 226 (1964)
[2] 378 U.S. 347, 3481964)
[3] *Jury awards $1 million to young Black men in Eddie Bauer, Inc consumer racism case*, JET MAGAZINE, Oct 27, 1997
[4] *Jackson et al, v. Eddie Bauer Inc., et al*, 8:1996-cv-00054
[5]William J. Cooper, Jr. and Thomas E. Terrill, THE AMERICAN SOUTH: A HISTORY, 2nd edition 1996, 153.
[6] Soledad O'Brien, *Behind the Scenes: Black and Shopping in America*, http://www.cnn.com/2008/US/07/23/btsc.obrien/index.html

[7] Anne Marie Harris, G.R. Henderson, J.D. Williams, *Courting Customers: Assessing Consumer Racial Profiling and Other Marketplace Discrimination*, JOURNAL OF PUBLIC POLICY AND MARKETING, POLICY WATCH: COMMENTARIES AND VIEWPOINTS, Vol. 24 (1) 169 (2005)
[8].*United States v. Earl Walker d/b/a The Knights* (M.D. Ga.) (consent decree: http://www.usdoj.gov/crt/housing/documents/knightssettle.htm)
[9] *United States v. Fred Thomas d/b/a Best Western Scenic Motor Inn* (E.D. Ark.) (consent decree: http://www.usdoj.gov/crt/housing/documents/bwsettle.htm)
[10] *Dillard's Accused of Racial Profiling*, MEMPHIS BUSINESS JOURNAL, Oct. 21, 2005, http://memphis.bizjournals.com/memphis/stories/2005/10/17/daily42.html
[11] *United States v. Flagstar Corporation and Denny's* http://www.usdoj.gov/crt/housing/documents/dennysettle2.htm; *Denny v. Elizabeth Arden Salons, Inc*., 456 F.3d 427, 429-30 (4th Cir. 2006).
[12] *United States v. Cracker Barrel Old Country Store, Inc*. (N.D. Ga.), consent order at http://www.usdoj.gov/crt/housing/documents/cracker_consent.pdf
[13] *Jackson v. Waffle House, Inc.*, 413 F.Supp.2d 1338, 1348-49 (N.D. Ga. 2006).
[14] *Id.* at 1346.
[15] *Id.* at 1347.
[16] *Id.* at 1334-35.
[17] *Id.* at 1348.
[18] *Id.* at 1349.
[19] *Id. a*t 1351.
[20] *Id. a*t 1352.
[21] *United States v. HBE Corporation d/b/a Adam's Mark Hotels*, *http://www.usdoj.gov/crt/housing/documents/adamsmarkcomp.htm*
[22] *Sherman v. Marriott Hotel Services, Inc*., 317 F.Supp.2d 609, 612 (D. Md. 2004).
[23] *Id.* at 613
[24] A popular advertisement for a major credit card advised customers to "never leave home without it," confirming the notion that people engage in consumer activity on a daily basis
[25] Claudine Columbres, *Targeting Retail Discrimination With Parens Patriae*, 36 COLUM. J.L. & SOC. PROBS. 209, 213-214 (Spring/Summer, 2003).
[26]*Id.* at 213
[27] Harris, supra, n. 7. Note that one of Title II's principal sponsors, Senator Hubert Humphrey, believed it unnecessary to include retail stores in Title II's protection because he thought African Americans were always welcome in such stores. 110 Cong. Rec. 6533 (1954)
[28] *See* http://www.chevdesign.com/images/layout/courthouse.pdf at page 123. During the Jim Crow years, white owners of clothing stores would not allow blacks to try on clothing or shoes because they "feared that white customers would not buy clothes worn by African Americans." Ronald L. F. Davis, Ph. D., RACIAL ETIQUETTE: THE RACIAL CUSTOMS AND RULES OF RACIAL BEHAVIOR IN JIM CROW AMERICA, http://jimcrowhistory.org/resources/lessonplans/hs_es_etiquette.htm
[29] Harris, supra, n. 7 at 169.
[30] *Id.*
[31] *Id.* at 169 (describing the Macy's and Federated Department stores systematic discrimination against people of color).
[32] *http://memphis.bizjournals.com/memphis/stories/2005/10/17/daily42.html*.
[33] *Bishop v. Toys "R" US-NY Llc.*, 414 F.Supp.2d 385 (S.D.N.Y 2006).
[34] *Id.*
[35]Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1, 12 (Winter, 2003).
[36] *Id*. at 13.
[37] *Id*. at 3.
[38] Mark Albright, *Racial Profiling Feared at Wal-Mart*, ST. PETERSBURG TIMES ONLINE, Dec. 2, 2006, http://www.sptimes.com/2005/12/02/Tampabay/Racial_profiling_fear.shtml.
[39] *Id.*
[40] *Williams v. Staples, Inc.*, 372 F.3d 662 (4th Cir. 2004).
[41] *Id.*

[42] *Id.* 665-66.
[43] *Id.* at 666.
[44] *Brown v. Finlay Enterprises Inc.,* No. 3:06-cv-414/RV/EMT, slip op. at 1 (N.D.Fla.)
[45] *http://www.cbsnews.com/stories/2002/11/19/national/main529903.shtml*
[46] *http://www.cbsnews.com/stories/2002/11/19/national/main529903.shtml*
[47] *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 287 (5th Cir. 2004).
[48] *Id.*
[49] *Daniel v. Paul*, 395 U.S. 298, 307-308 (1969).
[50] *Backgrounder on the Civil Rights Act*, *at* http://usinfo.state.gov/usa/infousa/facts/democrac/39.htm.
[51] 379 U.S. 241 (1964)
[52] *Id*. at 261
[53] *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964).
[54] *Daniel v. Paul*, 395 U.S. 298, 307-308 (1969).
[55] *Id*. at 305.
[56] *Fazzio Real Estate Co. v. Adams*, 396 F.2d 146, 149 (5th Cir. 1968).
[57] *Olzman v. Lake Hills Swim Club, Inc.,* 495 F.2d 1333, 1340 (2d Cir. 1974).
[58] *Rousseve v. Shape Spa for Health and Beauty Inc.*, 516 F.2d 64 (5th cir. 1975).
[59] *Halton v. Great Clips Inc*., 94 F.Supp.2d 856 (2000).
[60] *See* generally, Donald T. Kramer, Annotation, *Construction and Application of § 201(e) of the Civil Rights Act of 1964 (42 USCA § 2000a(e)), Excluding From the Act's Coverage Private Clubs and Other Establishments Not in Fact Open to the Public*, 8 A.L.R. FED. 634, 4a (2001).
[61] 42 U.S.C. § 1981
[62] 392 U.S. 409 (1968).
[63] *Id.* at 443
[64] 42 U.S.C.§1981 (a) (2008).
[65] *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (declining to overrule *Runyon v. McCrary*, 427 U.S. 160 (1976)).
[66] *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298 (1994)
[67] *Allen v. Bancorp*, 264 F.Supp.2d 945 (D. Oreg.2003).
[68] *Joseph v. New York Yankees P'shp,* 2000 WL 1559019 (S.D.N.Y.2000).
[69] *Bobbitt v. Rage, Inc.,* 19 F.Supp.2d 512 (W.D.N.C.1998).
[70] *Kelly v. Bank Midwest*, 161 F.Supp.2d 1248 (D. Kan. 2001).
[71] *Washington v. Duty Free Shoppers, Ltd.,* 710 F.Supp. 1288 (N.D.Cal.1988).
[72] *Adickes v. S. H. Kress & Co*., 398 U.S. 144 (1970) at 150, n. 5.
[73] *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975).
[74] Kramer, supra n. 60.
[75] *United States v. DeRosier*, 473 F.2d 749, 752 (5th Cir. 1973; *Bridgeport Guardians, Inc. v. Delmonte*, 553 F.Supp. 601, 606 (D. Conn. 1983) (*citing Schwabenbauer v. Board of Educ*., 667 F.2d 305, 309 (2d Cir. 1981).
[76] *LaRoche v. Denny's Inc.*, 62 F.Supp.2d 1366, 1370 (S.D.Fla 1999) (citing United States v. Lansdowne Swim Club, 894 F.2d 83, 88 (3d Cir. 1990); *Bridgeport Guardians, supra*, n.75
[77] *See McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802-804 (1973); Texas *Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997).
[78] Stephen E. Haydon. *A Measure of Our Progress of Our Progress: Testing For Race Discrimination in Public Accommodations,* 44 UCLA L. REV. 1207 (1997).;*see* also http://blog.nola.com/bourbon/2005/04/race_bias_found_in_57_of_teste.html
[79] *Bridgeport Guardians, supra*, n.75 at 606
[80] 42 U.S.C. §2000a-2.
[81] *Vickers v. Federal Express Corp*., 132 F.Supp.2d 1371, 1378 (S.D.Fla. 2000) (*citing Wheatley v. Baptist Hosp. of Miami, Inc.*, 16 f.Supp.2d 1356, 1359-60 (S.D.Fla. 1998).
[82] MICH. COMP. LAWS ANN. § 37.2103(i) (West Supp. 1995).
[83] South Dakota Dep't of Commerce & Reg. Div'n of Human Rights, *Sexual Harassment* ;*see* Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective,* 1996 U CHICAGO LEGAL FORUM 377, 414-21.

[84] *Totem Taxi, Inc. v. New York State Human Rights Appeal Bd.*, 480 N.E.2d 1075 (1985).
[85] *Gregory v. Dillard's Inc.,* 494 F. 3d 694, 701 (8th Cir. 2007); *General Bldg. Contractors Ass'n. Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982)
[86] *LaRoche v. Denny's Inc.*, 62 F.Supp.2d 1366, 1370 (S.D.Fla 1999); *United States v. Lansdowne Swim Club*, 894 F.2d 83, 88 (3d Cir. 1990); *Hampton v. Dillard Dep't Stores, Inc*., 18 F.Supp.2d 1256, 1262 (D.Kan.1998)
[87] *Sherman v. Marriott Hotel Services*, supra n. 22.
[88] http//www.nola.com (last visited April 15, 2005) James Varney, *Race bias found in 57% of tested clubs: Black patrons paid more for drinks*, THE TIMES-PICAYUNE, April 14, 2005.
[89] *Morris v. Office Max, Inc*., 89 F.3d 411 C.A.7 (Ill.), 1996 at 414-415; *Phelps v. Wichita Eagle-Beacon,* 886 F.2d 1262 (10th Cir.1989).
[90] *Robertson v. Burger King, Inc.,* 848 F.Supp. 78, 81 (E.D.La.1994)
[91] *Arguello v. Conoco, Inc*., 330 F.3d 355, 358-59 (5th Cir. 2003).
[92] *Garrett v. Tandy Corporation*, 295 F.3d 94(2002) at 101.
[93] 42 U.S.C.A. § 1981.
[94] *Hampton v. Dillard Dep't Stores, Inc*., 18 F.Supp.2d 1256, 1262 (D.Kan.1998*)*.
[95] *Green v Dillards*, 483 F.3d 533, 535-39 (8th Cir. 2007).
[96] Anne-Marie Harris, *A Survey of Federal and State Public Accommodations Statutes: Evaluating their effectiveness in cases of retail discrimination*. VIRGINIA JOURNAL OF SOCIAL POLICY AND THE LAW, Vol. 13(2): 331-396, 340 (2006); *See also* http://www.consumerequality.org/pubs/06_a_survey.pdf.
[97] *Id.* at 341 n.41 (stating only Florida and Virginia exclude retail stores under their public accommodation statues).
[98] *Id.* at 342.
[99] *Id.* at 342-343.
[100] *NAACP Releases Annual Economic Reciprocity Report* (Jul. 16, 2008) http://www.naacp.org/news/press/2008-07-16/index.htm.
[101] Soledad O'Brien, supra, n. 6
[102] NAACP, NAACP *Responds to Racial Exclusion of Children at a Philadelphia Swimming Pool* (Jul. 9, 2009), http://www.naacp.org/news/press/2005-05-09/index.htm.
[103]Susan Candiotti and Jean Shin, *Swim club accused of Racial Discrimination against kids*, http://www.cnn.com/2009/US/07/09/philly.pool/index.html?iref=newssearch.
[104] NAACP, *Federal Court Order Equal Treatment For Black Tourists*, http://www.naacp.org/news/press/2005-05-09/index.htm; *NAACP, Myrtle Beach Restaurant Settles Discrimination Lawsuit: Restaurant agrees to welcome Black Bike Week visitors,* http://www.naacp.org/news/press/2005-04-26/index.htm.
[105] Equal Rights Center, http://www.equalrightscenter.org/about/
[106] Equal Rights Center, http://www.equalrightscenter.org/rights/public_accomodations.php.
[107] Equal Rights Center, http://www.equalrightscenter.org/about/cases.php; Jerome D. Williams, May O. Lewin, Anne-Marie G. Harris, and Velma A. Gooding, BRICK & MORTAR SHOPPING IN THE 21ST CENTURY, 174 (Tina M. Lowrey, ed. 2007); http://www.consumerequality.org/pubs/07_Developing_a_Power.pdf.
[108] Suzanne E. Elwell, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV 433 (1990).
[109] Bruce Zucjer and Monica Her, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System,* 37 U.S.F.L. REV. 315, 317 (2003); 70 A.L.R. 4th 1119 (2004).

CHAPTER FIVE

[1] *Griggs v. Duke Power Co*., 401 U.S. 424 (1971) at 427.
[2] *Id.* at 426-28.
[3] *Id.* at n.6.
[4] *Id.* at 427-28.
[5] *Black Codes*, http://www.spartacus.schoolnet.co.uk/USASblackcodes.htm.
[6] *Sharecropping*, http://en.wikipedia.org/wiki/Sharecropping
[7] Omar Ali*, Preliminary research for writing a history of the Colored Farmers Alliance in the Populist movement: 1886-1896*, DEPARTMENT OF HISTORY COLUMBIA UNIVERSITY, May 11, 1998, http://www.geocities.com/SoHo/Workshop/4275/part1.html

[8] Tom Watson Brown, *Thomas E. Watson*, *http*://www.hickory-hill.org/tom_watson.html; From Pearl Baker, A HANDBOOK OF HISTORY MCDUFFIE COUNTY GEORGIA 1870-1970 (Progress-News Publishing Co.).
[9] C. Vann Woodward, THE STRANGE CAREER OF JIM CROW, (Oxford, 1955)
[10] *10,000 Men Named George*," (2001:Robert Townsend, film director) http://www.imdb.com/title/tt0280377/
[11] *50 years of West Side Story: the real Gangs of New York,* http://www.telegraph.co.uk/culture/donotmigrate/3556888/50-years-of-West-Side-Story-the-real-Gangs-of-New-York.html; *Gangs of Chicago,* http://www.encyclopedia.chicagohistory.org/pages/497.html
[12] Aminifu R. Harvey, *The plight of the African American male in the United States: An Africentric human service provider analysis and intervention strategy*, JOURNAL OF AFRICAN AMERICAN STUDIES, Volume 8, Number 3 / December, 2004
[13] William H. Turner, *Myths and Stereotypes: The African Man in America*, in THE BLACK MALE IN AMERICA 122 (Doris Y. Wilkinson & Ronald L. Taylor eds., 1977).
[14] *See generally*, Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615 (1995); *see* Tom W. Smith, National Opinion Research Ctr., Univ. Of Chi., ETHNIC IMAGES 4-6, 9 (1990); John McWhorter, WINNING THE RACE: BEYOND THE CRISIS IN BLACK AMERICA (2005)
[15] *See* Ivory L. Toldson & Alfred B. Pasteur, *The African American Male Mystique: At Once Admired and Feared, an Exposition of What It Means to be African American and Male in America*, 1 J. AFR. AM. MALE STUD. 70, 71, 74-75 (1993).
[16] William A. Sundstrom, *Explaining the Racial Unemployment Gap: Race, Region, and the Employment Status of Men, 1940*, 50 INDUS. & LAB. REL. REV. 460, 461 (1997).
[17] *Id.*
[18] http://www.epinet.org/content.cfm/webfeatures_snapshots_20050406
[19] Bureau of Labor Statistics, Employment status of the civilian population by race, sex, and age. http://www.bls.gov/news.release/empsit.t02.htm
[20] Harry J. Holzer and Paul Offner, The Puzzle of Black Male Unemployment, THE PUBLIC INTEREST (2004).
[21] Jared Bernstein, *Where's the Payoff? The Gap Between African American Academic Progress & Economic Gains*, ECON. POL'Y INST., 3, 40 (1995).
[22] Alfred and Ruth Blumrosen, INTERNAL JOB DISCRIMINATION: NEW TOOLS FOR OUR OLDEST PROBLEM (Noting also that since slavery white people have felt that full participations by African Americans in the workforce threatens their own livelihood and chances at job opportunities)
[23] Michael L. Foreman, Deputy Director of Legal Programs, *Statement on Behalf of Barbara R. Arnwine Executive Director Lawyers' Committee for Civil Rights Under Law* at the U.S. EEOC Meeting on Race and Color Discrimination (April 19, 2006).
[24] 42 VAND. L. REV. 1017 (1989)
[25] Bob Herbert, *An Emerging Catastrophe*, N.Y. TIMES, July 19, 2004, http://query.nytimes.com/gst/fullpage.html?res=9404EEDD133AF93AA25754C0A9629C8B63
[26] Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 How. L.J. 237, 272 –273 (1994).
[27] Jill Schachner Chanen, *Early Exits*, 92, A.B.A. J., 33, 35-36 (2006)
[28] Sledge v. J.P. Stevens & Co., 16 FAIR EMPL. PRAC. CAS. 1652 (E.D.N.C. 1975), aff'd, 25 EMPL. PRAC. DEC. P 31,494 (1980)
[29] Equal Employment Opportunity Comm'n v. Mount Vernon Mills, Inc., Riegel Div., 58 FAIR EMPL. PRAC. CAS. 73 (N.D. Ga. 1992)
[30] *Webb v. Missouri Pac. R.R. Co*., 826 F. Supp. 1192 (E.D. Ark. 1993)
[31] *See* Jeffrey H. Greenhaus, *Effect of Race on Organizational Experiences, Job Performance Evaluations, and Career Outcomes*, 33 ACAD. MGMT. J. 64 (1990).
[32] *Weaver v. Casa Gallardo, Inc*., 922 F.2d 1515 (11th Cir. 1991).
[33] The term "glass ceiling" was first used by the Wall Street Journal. Carol Hymowitz & Timothy D. Schellhardt, *The Glass Ceiling: Why Women Can't Seem to Break the Invisible Barrier that Blocks Them*

from the Top Jobs, WALL ST. J., Mar. 24, 1986, at D1, D4-5. *See also*, U.S. Dep't of Labor, *A Report on the Glass Ceiling Initiative* 1 (1991)
[34]U.S. Office of Personnel Management, FINAL REPORT ON MINORITY/NON-MINORITY DISPARATE DISCHARGE RATES (1995)
[35] Andrew Grant-Thomas, *Does Barack Obama's Victory Herald a Post-Racial America?* http://www.racewire.org/archives/2008/12/does_barack_obamas_victory_her_1.html.
[36] *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS (2009). http://www.bls.gov/cps/
[37] Emerson Phillippe, African-*American Men During the Age of Obama: An Analysis of Where Black Men are Today*. 14 Oct. 2009. http://racism.suite101.com/article.cfm/african_americans_men_during_the_age_of_obama.
[38] Sam Hananel, *Job Discrimination Complaints Hit Record High*, THE HUFFINGTON POST (Mar. 2009).
[39] *Race Based Charges*, EEOC (2009). http://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm.
[40]Couch, Kenneth A. and Fairlie, Robert, *Last Hired, First Fired? Black-White Unemployment and the Business Cycle*, (2005). http://digitalcommons.uconn.edu/econ_wpapers/200550
[41] *Employed persons by detailed industry, sex, race, and Hispanic or Latino ethnicity*, BUREAU OF LABOR STATISTICS (2008). http://www.bls.gov/cps/cpsaat18.pdf
[42] President Franklin D. Roosevelt, A. Philip Randolph, and the Desegregation of the Defense Industries, http://www.whitehousehistory.org/04/subs/04_a03_d01.html
[43] 323 U. S. 192 (1944)
[44] 401 U.S. 424 (1971),
[45] *Id.* at 431.
[46] *Id.* at 429-30.
[47] *Id.* at 425-26.
[48] *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802-804 (1973);
[49] EEOC, *Race/Color Discrimination* (2005), http://www.eeoc.gov/types/race.html.
[50] Robert N. Covington & Kurt H. Decker, EMPLOYMENT LAW IN A NUTSHELL 2nd Ed., p. 242. (1995, 2002).
[51] 42 U.S.C. § 2000e-2(a) (2); Covington & Decker, supra n. 50 at 210-11.
[52] *EEOC Takes Action on Race and Color Discrimination, Class-wide Bias, and Age Claims*, May 18, 2006 http:// www.jacksonlewis.com/legalupdates/articleprint.cfm?aid=938.
[53] Covington & Decker, supra n. 50 at. 201
[54] Alexander Hamilton Institute Employment Law Resource Center, *Employment Law FAQs—Race Discrimination*, (2005), http://www.ahipubs.com.
[55] Laura Wides-Munoz, *EEOC Files Discrimination Lawsuits* (Associated Press, October 2, 2006
[56]*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989),
[57] *Hazelwood School District v. United States*, 433 U.S. 299 (1977
[58] 490 U.S. 642
[59] *Id.* at 651; 182 A.L.R. FED. 61; *Title VII Race Or National Origin Discrimination In Employment-Supreme Court Cases,* Ann K. Wooster, J.D.
[60] http://www.cbsnews.com/stories/2003/12/05/60minutes/main587099.shtml
[61] *http://www.naacpldf.org/landing.aspx?sub=10*. (PDF images of the corresponding court documents also available)
[62] Kenneth W. Biedzynski et al, *Layoffs based on "last hired, first fired" seniority system provisions*, AMERICAN JURISPRUDENCE SECOND EDITION Section 819 (May 2009).
[63] *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *White v. Colgan Elec. Co., Inc.*, 781 F.2d 1214 (6th Cir. 1986).
[64] *McGinest v. GTE Serv. Corp*., 360 F.3d 1103, 1107 (9th Cir. 2004).
[65] *Id.* at 1108.
[66] *Id.* at 1109.
[67] *Id.* at 1112.
[68] *Id.* at 1113.
[69] *Id.* at 1113.
[70] *Id.* at 1114-15.

[71] *Man Wins Discrimination Suit in San Francisco*, BAY CITY NEWS WIRE, http://www.cbs5.com.
[72] Comments, Professor Leroy Clark
[73] *Appell.Br. No. 05-15856-II*, 2006 WL 2787914, at pg. 2 (11th Cir. Feb. 15, 2006).
[74] *Id.* at 3.
[75] *Id.* at 6.
[76] *Id.* at 6-7.
[77] *Id.* at 14.
[78] *Id at* 6-7, 9.
[79] *Id.* at 9, 11-12.
[80] *Id.* at 9.
[81] *Id.* at 15.
[82] *Jolivette v. Arrowood,* 180 Fed. App. 883, 884 (11th Cir. 2006).
[83] *Id.* at 886.
[84] Mack A Player, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL at 271.
[85] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 536 (1993) (citing to *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577-578 (1978)).
[86] *Tate v. Shelby County Rd. Dep't*, No. 98-6207, 2000 U.S. App. LEXIS 11841, at 2 (6th Cir. May 22, 2000).
[87] *Id.* at 4.
[88] *Id.* at 4-5.
[89] *Id.* at 5.
[90] *Id.* at 11-12.
[91] *Id.* at 11.
[92] *Id.* at 11, 14.
[93] *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981); Edward T. Ellis, *Employment Discrimination Litigation in the Federal Courts of Appeals After St. Mary's Honor Center v. Hicks,* SC08 ALI-ABA 663, 674 (1997).; David J. Turek, *Affirming Ambiguity: Reeves v. Sanderson Plumbing Products, Inc. and the Burden-Shifting Framework of Disparate Treatment Cases*, 85 MARQ. L. REV. 283, 290 (2001); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).
[94] *Jeffrey Johnson and John Goodwin v. UPS*, US Court of Appeals, 6th Circuit, No. 03-5620 (File Name: 04a0190n.06; Filed December 21, 2004)
[95] *Id.*
[96] *Id.* at 3.
[97] *Id.* at 6.
[98] *Curry v. SBC Commc'ns., Inc*., No. 06-11728, 2008 U.S. Dist. LEXIS 48088, at 1 (E.D. Mi. June 23, 2008).
[99] *Id.* at 4-5.
[100] *Id.* at 8.
[101] *Id.*
[102] *Id.* at 10.
[103] *Id.* at 14-15.
[104] *Id.* at 43.
[105] Jennifer Hicks, *Number of Discrimination Suits Soar*, *www.imdiversity.com*
[106] http://www.workplaceanswers.com/News/EEOC-Targets-Unconscious-Bias252.aspx
[107] Eisenberg, *Employment discrimination and the problem of proof: Why are Employment Discrimination Cases so hard to win*? 61 LA. L. REV. 555
[108] Debra E. Meyeson & Jouye K Fletcher, A MODERN MANIFESTO FOR SHATTERING THE GLASS CEILING (2005).
[109] *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 982 (1988).
[110] Suzy Bohnert, *U.S. Department of Labor announces boost in weekly unemployment benefit amounts*, U.S. Department of Labor (Feb. 26, 2009). http://www.dol.gov/opa/media/press/eta/ETA20090196.htm.
[111] Jill Doherty, *Obama announces education help for unemployed*, CNN Politics (May 8, 2009). http://www.cnn.com/2009/POLITICS/05/08/obama.unemployment/index.html
[112] Mark Whittington, *10.2 Percent Unemployment and the Failure of the Stimulus Package, Associated Content* (November 7, 2009).

http://www.associatedcontent.com/article/2366210/102_percent_unemployment_and_the_failure.html?cat=62.
[113] *White House Unveils Stimulus Package Impact on Blacks*, The LOUISIANA WEEKLY (Feb. 2009).
[114] *The E-RACE Initiative (Eradicating Racism And Colorism from Employment), The U.S. Equal Employment Opportunity Commission,* http://archive.eeoc.gov/initiatives/e-race/index.html.
[115] *EEOC Performance and Accountability Report 2009*, http://www.eeoc.gov/eeoc/plan/upload/2009par.pdf; cf, EEOC, *Interim Report on Best Practices for the Employment of People with Disabilities in State Government* (Oct 29, 2004), http://www.eeoc.gov/initiatives/nfi/int_states_best_practices_ report.html.
[116] http://www.nul.org/content/national-urban-league-plan-putting-americans-back-work
[117]Barbara Kate Repa, YOUR RIGHTS IN THE WORKPLACE (Nolo Press 2007)
[118] *Questions and Answers about Race and Color Discrimination in Employment*, EEOC (2006). http://eeoc.gov/policy/docs/qanda_race_color.html Id.
[119] *See http://www.eeoc.gov/offices.html* for maps of EEOC office locations.
[120] EEOC, *EEOC's Charge Processing Procedures* (2005), ttp://www.eeoc.gov/charge/overview_charge_processing.html.
[121] UNITED STATES DEPARTMENT OF LABOR, OFCCP. *Facts on Executive Order 11246* http://www.dol.gov/ofccp/regs/compliance/aa.htm.
[122] *Id.* at Section A: *OFCCP Mission Description, and* at Section B: *Operation of the Executive Order Program: EEO*.
[123] *Id.*
[124] *Id.* at Section D: *Goals, Timetables, and Good Faith Efforts.*
[125] *Id.*
[126] *Id.* at Section A: *Facts on Executive Order 11246.*
[127] Janet Ginzberg, *Employment Discrimination Faced by Individuals with Arrest and Conviction Records*, EEOC, Nov. 20, 2008. http://www.eeoc.gov/eeoc/meetings/11-20-08/ginzberg.cfm.
[128] About INROADS, http://www.inroads.org/inroads/inroadsHome.jsp. (2009).
[129] *Online Talent Pool Training*, http://www.inroads.org/interns/talentpooltraining2.jsp. (2009).
[130] *Mentoring the 100 Way*, 100 Black Men of America (2009). http://www.100blackmen.org/mentoring.asp

CHAPTER SIX

[1] *United States v. Vartanian*, 245 F.3d 609, 611 (6th Cir. 2001).
[2] *Id*. at 611-12.
[3] *Id*. at 612.
[4] *Id*.
[5] *Id*.
[6] *Id*.
[7] *Id*. at 611, 612-13.
[8] http://en.wikipedia.org/wiki/African_American_neighborhood
[9] Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59, 60 (1993).
[10] Leland Ware, Louis L. Redding & Steven W. Peuquet, *Delaware Analysis of Impediments to Fair Housing Choice, Public Impediments: NIMBY and Land Use Control* (2004), http://www.udel.edu/ccrs/pdf/Fair%20Housing/Public%20Impediments.pdf.; Janai S. Nelson, *Residential Zoning Regulations and the Perpetuation of Apartheid*, 43 UCLA L. REV. 1689, 1701.
[11] Bernard K. Ham, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 SETON HALL CONST. L.J. 577, 588.
[12] *ACORN v. County of Nassau*, No. 05-CV-2301 (JFB) (WDW), 2006 U.S. Dist. Lexis 502177 (E.D.N.Y. July 21, 2006).
[13] *Id*. at 7-8
[14] *Id*. at 8.
[15] *Id*. at 9.
[16] *Id*. at 10.

[17] *Id*. at 10-11.
[18] *Id*. at 12.
[19] *Id*. at 13.
[20] *Id*. at 16.
[21] LEE & ORFIELD, THE CIVIL RIGHTS PROJECT AT UCLA, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 7, Aug. 29. 2007, http: //www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf., at 49.
[22] Vernon Loeb & Caroline E. Mayer, *Borrowing Troubles; Lender Challenged on Foreclosures; Capital City's Troubled Mortgages in D.C. Expose Homeowners to Property Loss*, WASH. POST, May 5, 1996, at A01.
[23] Michael Powell, "Bank Accused of Pushing Mortgage Deals on Blacks," NEW YORK TIMES, June 6, 2008.
[24] Patricia J. Williams, SEEING A COLOR BLIND FUTURE-THE PARADOX OF RACE, 39 (The Noonday Press 1997).
[25] *Id*. at 40.
[26] *Id*.
[27] *Id*.
[28] http://www.census.gov.
[29] *Id*.
[30] 245 U.S. 60 (1917).
[31] *Id.* at 79.
[32] *Id.* at 82.
[33] Boris I. Bittker, *The Case of The Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE LAW JOURNAL 1387-1423 (1962)
[34] 334 U.S. 1 (1948)
[35] *Id.* at 20-23.
[36] http://www.encyclopedia.chicagohistory.org/pages/1438.html
[37] Toonari, Kerner Report, *Africana Online*, http://www.africanaonline.com/reports_kerner.htm
[38] Report of the National Advisory Commission on Civil Disorders, 1978, p 1.
[39] *Jones v. Mayer*, 392 U.S. 409 (1968).
[40] *Id.* at 412.
[41] *Id.* at 437-43
[42] *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972)
[43] *Id.* at 208-12; *Housing Discrimination Litigation*, 28 AMJUR TRIALS 1 § 8 (2004)
[44] *Havens Realty v. Coleman*, 455 U.S. 363, 382 (1982).
[45] *Davis v. Mansards*, 597 F.Supp.334 (1984)
[46] *Ragin v. New York Times*. 923 F.2d 995 (2nd Circ. 1991; http://www.fairhousing.com/index.cfm?method=page.display&pagename=September-October_1993_Page1 (settlement)
[47] *See Saunders v. General Services Corp*, 652 F. Supp. 1042 (1987).
[48] *Gautreaux v. Chicago Housing Authority,* 296 F. Supp. 907 (N.D. Ill. 1969).
[49] *Id* at 908
[50] *Id.* at 913-14.
[51] Kevin M. Cremin, *The Transition To Section 8 Housing: Will The Elderly Be Left Behind?* 18 YALE L. & POL'Y REV. 405, 411; Amy R. Bowser, *One Strike And You're Out--Or Are You?: Rucker's Influence On Future Eviction Proceedings For Section 8 And Public Housing*, 108 PENN ST. L. REV. 611, 617-618.
[52] *The Housing and Community Development Act* 42 USCA 1437 (1974)
[53] Jason DeParle *AMERICAN DREAM: THREE WOMEN, TEN KIDS, AND A NATION'S DRIVE TO END WELFARE* (Viking, 2004).
[54] Plan NYC, *Federal Housing Policy***, http**://www.plannyc.org/taxonomy/term/1000; *Section 8 change leads to cuts in housing voucher subsidies*, ECONOMIC OPPORTUNITY REPORT. http://www.allbusiness.com/government/government-bodies-offices-us-federal-government/7364172-1.html
[55] *Campbell v. Robb*, 162 Fed. App. 460, 462 (6th Cir. 2006).
[56] *Id.* at 463.

[57] *Id*.
[58] *Id*. at 464, 465-472
[59] *Sherman Park Community Association v. Wauwatosa Realty Co.,* 486 F.Supp 838 (E.D.Wis., 1980)
[60] §§ 8, 9
[61] § 18- 20
[62] § 34
[63] http://www.ilusa.com/News/housing_bias.htm; *Housing Discrimination Complaints At An All-Time High: Over 10,000 complaints filed last year; most alleged race or disability discrimination*, HUD No. 07-032,
http://www.hud.gov/news/release.cfm?content=pr07-032.cfm
[64] The Urban Institute, Metropolitan Housing and Communities Policy Center, *Discrimination in Metropolitan Housing Markets: National Results form Phase I of HDS2000* 1, *http://www.hud.gov/fairhousing*.
[65] Kristyn Hartman, *Major Realty Firm Accused of Racial Discrimination*, CBS2, Aug. 22, 2006, http://CBS2Chicago.com/topstories/local_story_234114942.html.
[66] *Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co.*, 236 F.3d 629, 633 (11th Cir. 2000).
[67] *Id*.
[68] *Id*.
[69] *Id*. at 634.
[70] *Id*.
[71] *Harris v. Itzhaki*, 183 F.3d 1043, 1047-48 (9th Cir. 1999).
[72] *Id.* at 1048.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* at 1049.
[77] *Id.*
[78] *Warth v. Seldin,* 422 U.S. 490 (1975)
[79] *S. Burlington Count NAACP v. Township of Mount Laurel,* 336 A.2d 713, 718 (NJ 1975)
[80] *Id.* at 734; Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law* 22 Harv. C.R.-C.L. L. Rev. 623,630 (1987)
[81] *Surrick v. Zoning Hearing Board of Upper Providence,* 476 Pa. 182 (1978); *Appeal of M. A. Kravitz Co., Inc,* 501 Pa. 200 (1983)*; Fernley v. Board of Supervisors of Schuylkill Township,* 509 Pa. 413 (1985).
[82] Bell, RACE RACISM, AND AMERICAN LAW, at 292 ff.
[83] National Fair Housing Alliance (NFHA), *2005 Fair Housing Trends Report,* http://www.nationalfairhousing.org/Home/tabid/2510/Default.aspx at 7.
[84] http://www.city-journal.org/article01.php?aid=1410
[85] Cara Hendrickson, Racial Desegregation and Income Deconcentration in Public Housing, 9 Geo. J. Poverty L. & Pol'y 35, 63 (2002).
[86] NFHA, *2005 Fair Housing Trends Report, supra,* n. 83
[87]*See generally*, http://www.hud.gov/complaints/housediscrim.cfm; U.S. Department of Housing and Urban Development, *Fair Housing—Equal Opportunity for All*
[88] 42 U.S.C. §§ 3610-3612 (2008).
[89] The HUD local office will know about similar cases in your area. Some local offices have information online. *See, e.g*., *Housing Discrimination and Your Civil Rights, A Fair Housing Guide for Renters and Home Buyers, Fair Housing Partners of Washington State*, *http://www.metrokc.gov/dias/ocre/RHB-English.pdf* (Seattle Office for Civil Rights)
[90] 42 U.S.C. § 3614 (2008).
[91] 42 U.S.C. § 3613 (2008) (Note the difference from employment discrimination law—all complainants must begin administratively with the EEOC).
[92] 42 U.S.C. § 3613(a) (1) (A).
[93] Robert G. Schwemm. Housing Discrimination: Law and Litigation. § 23:1 (July 2005)
[94] 42 U.S.C. §3610(a) (1) (B) (iv). HUD may also file a complaint itself where it finds violations of the FHA
[95] http://portal.hud.gov/portal/page/portal/HUD/topics/housing_discrimination

[96] 42 U.S.C. §3610 (2008)
[97] 42 U.S.C. §3610(b)(2008)
[98] 24 C.F.R §103.400(a) (1), (2)
[99] Robert G. Schwemm. HOUSING DISCRIMINATION: LAW AND LITIGATION. § 24:14 (July 2005).
[100] 42 U.S.C. § 3610(g) (2) (A).
[101] 42 U.S.C. § 3610(h).
[102] 42 U.S.C. § 3612(g) (2).
[103] Brian Gilmore, Howard University School of Law Fair Housing Clinic Attorney, Interview Nov. 1, 2005.
[104] 24 C.F.R. §§ 180, 670.
[105] 42 U.S.C. § 3614(b).
[106] 42 U.S.C. § 3612(i).
[107] Gilmore, supra n. 103
[108] Wayne Raymond Barr, WESTLAW CAUSES OF ACTION FIRST SERIES, §§42- 44
[109] *Id*. at §45
[110] 42 U.S.C. § 3631: Interference with Housing Rights (see *United States v. Vartanian*, supra, note 1).
[111] 42 U.S.C. § 3613
[112] National Organization of African-Americans in Housing, http://www.noaah.org/home.php
[113] http://www.naacp.org/news/press/2008-07-02/index.htm. NAACP units across the country participated in a national 'Day of Action' against discriminatory mortgage lending by demanding that several of the nation's top lenders – including Citi, HSBC, WaMu, GMAC and JP Morgan – make amends for discriminating against African American borrowers and eliminate discriminatory polices and practices for good. The Day of Action was marked by nationwide events in 21 locations including New York, Chicago, Baltimore, St. Louis, Detroit, Las Vegas, suburban Atlanta, Salt Lake City, Colorado Springs, Reno, Memphis, Seattle and southern California.
[114] http://www.naacp.org/news/press/2008-07-02/index.htm The defendants are Washington Mutual, Inc., Citimortgage, Inc., HSBC Finance Corporation, GMAC Mortgage Group, LLC, GMAC Residential Capital, J.P. Morgan Chase & Co., Chase Bank USA NA, Fremont Investment & Loan, Option One Mortgage Corporation, WMC Mortgage Corporation, Accredited Home Lenders, Inc., Bear Stearns Residential Mortgage Corporation dba Encore Credit, First Franklin Financial Corporation, National City Corporation, First Tennessee Bank dba First Horizon National Corp., Long Beach Mortgage Company, and Suntrust Mortgage.
[115] *Local Fair Housing organizations include*:

- California's EDEN COUNCIL FOR HOPE & OPPORTUNITY (ECHO); http://www.echofairhousing.org/programs.html (serving southern Alameda County, Cupertino, Los Altos, Menlo Park, and Stanford in California)
- THE GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER (GNOFHAC), http://gnofairhousing.org/Archive/11-01-07-hanocontempt.htm (GNOFHAC is suing the Housing Authority of New Orleans (HANO), now under the receivership of the U.S. Department of Housing and Urban Development (HUD)
- THE FAIR HOUSING COUNCIL OF OREGON (FHCO); http://www.fhco.org/index.html (FCHO's website contains fair housing quizzes, videos, books, movies, plays, and speeches relating to fair housing and historic tours of discrimination in housing. These historic tours vary from audio accounts of personal stories of housing discrimination to photographs.)
- THE CHICAGO FAIR HOUSING PROJECT; http://www.clccrul.org/projects/the_fair_housing_project.html (Most recently, the Fair Housing Project has focused on discriminatory advertising and its impact on the housing market.)
- Philadelphia's FAIR HOUSING INSTITUTE (FHI); http://www.hadv.org/HADV%20WEBSITE/Fair%20Housing%20Page.htm (FHI distributes a newsletter,I has sponsored research on race, income, owner-occupied housing, receipt of public assistance, and the incidences of housing discrimination-, and is moving lenders towards a "Best Lending Practices Agreement.") and

- THE ERIE COUNTY FAIR HOUSING PARTNERSHIP, http://www.ecfhp.org/ which sponsors "DOTS- A Fair Housing Tale," a fair housing children's book with colorful illustrations and "Seuss like" rhymes. Gary Earl Ross, *DOTS- A Fair Housing Tale*, available at http://www.ecfhp.org/.

[116] Affordable Housing is defined as paying no more than 30 percent of one's annual income on housing. http://www.hud.gov/offices/cpd/affordablehousing/index.cfm

Local Affordable Housing organizations include:

- the SOUTH CAROLINA APPLESEED LEGAL JUSTICE CENTER, (See "SC Appleseed's Role in Housing Law and Policy", available at http://www.scjustice.org/Brochures%20for%20Web%202009/Housing/Housing%20Law%20and%20Policy.Final.pdf.)
- AFFORDABLE HOUSING ADVOCATES (AHA), located in San Diego, California http://www.affordablehousingadvocates.org/advocacy.htm (The Tenants' Right Project (TRP) provides legal services to tenants, nonprofit community organizers and their constituents, to advocate for affordable housing and tenants' rights.) and
- the AFFORDABLE HOUSING ADVOCATES OF CINCINNATI. (AHA Strategic Plan, available at http://www.ahacincy.org/downloads/AHAstrategicplan.pdf.)

There is also a national organization, the NATIONAL LOW INCOME HOUSING COALITION headquartered in Washington, DC. http://www.nlihc.org/template/page.cfm?id=31 (NLIHC has three primary objectives in advocating for affordable housing. Objective one is to Change Public Opinion by improving the understanding that the American people have of low income housing needs. Objective two is to Increase Capacity of Low Income Housing Advocates by improving and expanding the capacity of low income housing advocates. Objective three is to urge Federal policy makers to improve and expand actions to solve the housing problems of low-income people.)

[117]Public Housing was established to provide decent and safe rental housing for eligible low-income families, the elderly, and persons with disabilities. http://portal.hud.gov/portal/page/portal/HUD/topics/rental_assistance/phprog

Local Affordable Housing organizations include:

- Oakland's NATIONAL HOUSING LAW PROJECT (NHLP), http://www.nhlp.org/aboutnhlp (NHLP works to empower public housing residents to participate in the management of their homes through formally organized Resident Advisory Boards (RABs) and seeks to hold HUD and local Housing Authorities legally accountable for proposed sales or demolitions that fail to conform to regulations
- The SHRIVER CENTER in Illinois, http://www.povertylaw.org//advocacy/housing/the-shriver-center-s-housing-advocacy.html (The Shriver Center plays a pivotal role in overseeing and documenting the Chicago Housing Authority's (CHA's) Plan for Transformation, defending low-income renters through impact litigation, advancing innovating housing policies at the State and Local levels, and provide professional support to housing advocates nationwide. Shriver's Director of Housing Litigation, William Wilen, co-authored the Chicago Residential Landlord Tenant Ordinance (RLTO), which arms tenants across the city with an idea of their rights.) and
- Minnesota's HIGHLAND PARK ADVOCATES PROGRAM was developed to address critical health and quality-of-life concerns in public housing. The program provides leadership training to selected residents to strengthen the skills necessary to effect change in their community. They have published Marie Wolff, Staci Young, and Cheryl A. Maurana. "Community Advocates in Public Housing", available at http://ajph.aphapublications.org/cgi/reprint/91/12/1972.pdf.

[118]Today, discrimination in lending occurs primarily through the denial of credit to minority groups or approving minorities for *sub-prime loans*. http://www.prrac.org/projects/fair_housing_commission/atlanta/SubprimeMortgageForeclosure_and_Race_1014.pdf. *Redlining* is a place-based practice in which lenders denied mortgage credit to neighborhoods with substantial numbers of minorities – typically, African Americans and Latinos. *Id. Discrimination in Foreclosure* is caused by people of color being targeted for predatory loans and stripped of equity in their homes during the refinancing period. http://www.nationalfairhousing.org/Portals/33/2009%20Trends/Fair%20Housing%20Trends%20Report%20news%20release.pdf

The FAIR HOUSING COUNCIL OF RIVERSIDE COUNTY, California (FHC),[118] http://www.fairhousing.net/index.php?option=com_content&view=article&id=72&Itemid=76, is a local organization dealing with discrimination in lending and foreclosure.FHC focuses on providing education and resources to first time homebuyers. FHC's homebuyer education class provides an opportunity to learn about the home buying process in a neutral environment.[118] FHC prepare buyers to develop confidence when asking questions and making decisions about homeownership and loan products.[118] FHC's educational classes give buyers the tools they need to avoid predatory lending and possible foreclosure.[118] FHC minimizes the fear of the home buying process and provides a clear and consistent information and guidance for buying a home. [118]

CHAPTER SEVEN

[1] http://www.centralhigh57.org/1957-58.htm
[2] http://www.mysanantonio.com/news/MYSA092307_01A_LittleRockanniversary_352a293_html3803.html
[3] http://afroamhistory.about.com/cs/littlerockhigh/a/littlerocknine.htm
[4] http://afroamhistory.about.com/cs/littlerockhigh/a/littlerocknine.htm
[5] http://www.associatedcontent.com/article/146611/African American_history_month_looking_back_at.html
[6] http://www.eisenhower.archives.gov/dl/LittleRock/littlerockdocuments.html
[7] http://www.teachersdomain.org/resources/iml04/soc/ush/civil/beals/index.html
[8] http://www.centralhigh57.org/1957-58.htm
[9] http://www.vahistorical.org/civilrights/education.htm
[10] *Slave Codes of the State of Georgia*, *1848*, http://academic.udayton.edu/race/02rights/slavelaw.htm
[11] http://history-world.org/black_codes.htm
[12] http://www.teachersdomain.org/resource/osi04.soc.ush.civil.reconstruction/
[13] http://www.tshaonline.org/handbook/online/articles/FF/ncf1.html
[14] http://www.teachersdomain.org/resource/osi04.soc.ush.civil.reconstruction/
[15] *Cumming v. Richmond County [Ga.] Board of Education*. 175 U. S. 528 (1899)
[16] http://toto.lib.unca.edu/sr_papers/srhistory_2003/fryar,%20james.doc.
[17] http://toto.lib.unca.edu/findingaids/oralhistory/VOA/D_H/Greenlee_Tomes.html
[18] Lee & Orfield, *The Civil Rights Project at UCLA, Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies* 7, Aug. 29. 2007, http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf.
[19] NAACP Legal Defense & Educational Fund, Inc. & the Civil Rights Project, STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION, A MANUAL FOR PARENTS, EDUCATORS AND ADVOCATES 10 (2008)
[20] Lee & Orfield, supra n. 18
[21] STILL LOOKING TO THE FUTURE, supra n. 19 at 11.
[22] Lee & Orfield, supra n. 18 at 23.
[23] *Id*. at 38.
[24] *See* Gerald F. Kreyche *Public education's intractable problems* USA TODAY July, 1997
[25] Michael, et al, *Relationship Between Hunger and Psychosocial Functioning in Low-Income American Children*, JOURNAL OF THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY (February, 1998)
[26] Roslyn Mickelson, *The Attitude-Achievement Paradox Among Black Adolescents*, SOCIOLOGY OF EDUCATION 1990, Vol. 63 (January):44-61
[27] Ironically, when African-American families in the past tried to implement the neighborhood school concept by seeking control of their children's' education in their own communities, they met determined resistance from white teacher's unions. http://www.citylimits.org/content/articles/articleView.cfm?articlenumber=956
[28] *Beyond Shelter: Building Communities of Opportunity*, The United States Report for Habitat II (1996), U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT http://www.huduser.org/publications/txt/natlrprt.txt

[29] Michael A. Rebell & Jessica R. Wolff, THE CAMPAIGN FOR EDUCATIONAL EQUALITY, INC., POLICY PAPER NO. 1, LITIGATION & EDUCATION REFORM: THE HISTORY AND PROMISE OF THE EDUCATION ADEQUACY MOVEMENT (Mar. 2006) at 1.
[30] Erika Frankenberg & Chungmei Lee, THE CIVIL RIGHTS PROJECT AT UCLA, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS 1, Aug. 8, 2002, www.civilrightsproject.ucla.edu/research/deseg/Race_in_American_Public_Schools1.pdf. at 5; STILL LOOKING TO THE FUTURE, supra n. 19 at 14-15.
[31] Rebell & Wolff, supra n. 29.
[32] Lee & Orfield, supra n. 18 at 18-19.
[33] *Could an Adult Learn in a Place like This? African American and Hispanic Students Significantly More Likely to Report Poor Climate for Learning in their Schools*, REALITY CHECK 2006, Issue No. 2, May 31, 2006); Anurima Bhargava & Brian Deese, *Leaving Integration Behind*, Nov. 29, 2006, http://www.naacpldf.org/content.aspx?article=1123.; Lee & Orfield, supra n. 18 at 6.
[34] Jonathan Kozol, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID IN SCHOOLING IN AMERICA
[35] http://www.washingtonpost.com/wpdyn/content/article/2009/06/08/AR2009060803996.html
[36] The Nation's Report Card Mathematics (DC Public Schools) http://nces.ed.gov/nationsreportcard/pdf/stt2007/2007495DC4.pdf
[37] *Id.*
[38] *Could an Adult Learn in a Place like This*, supra n. 33
[39] *Racial Segregation in Georgia Public Schools, 1994-2001: Trends, Causes, and Impact on Teacher Quality* http://frc.gsu.edu/frpreports/Report_77/
[40] *Hawkins V. Town Of Shaw*, 437 F.2d 1286 1971 US App (5th); *See* Lois G. Forer, *The Wrong Side of the Tracks*, New York Times: April 13, 1986
[41] 426 U.S. 229, at 244-245, n. 12
[42] The educational challenges facing African American students are somewhat different from those facing other minority students. The latter generally come from cultural backgrounds that are more easily distinguishable from American "white" culture.

For parents of minority students who are not African American, "integration," in the sense of "assimilation" is not a priority, and in fact may be viewed as undesirable. Many parents of Chinese or Japanese students would not be disturbed at all if their children went to schools that were completely Chinese or Japanese, for example. Many Hispanic parents would be very happy to have their children attend schools with other Hispanic children. These parents would see a benefit to having their own culture reinforced.

[43] Daniel Losen, *New Research on Special Education and Minority Students with Implications for Federal Education Policy and Enforcement,* in RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM, 263, 263 (Dianne M. Piché, et. al., eds., 2002) < http://www.cccr.org/CCCRReport.pdf>
[44] School districts have also penalized parents for failing to use Ritalin if a child has been diagnosed with ADHD, http://www.breggin.com/ritalin.html
[45] Focus on Learning: Promising Strategies for Improving Student Achievement, http://www.ed.gov/pubs/turning/strategy.html
[46] Richard Rothstein, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE AFRICAN AMERICAN-WHITE ACHIEVEMENT GAP, New York: Teacher's College Press (2004).
[47] Harold McDougall, *School Desegregation or Affirmative Action?* 44 WASH. L.J. 1 (2004).
[48] McKinsey & Company, Social Sector Office, *The Economic Impact of the Achievement Gap* (April 2009); http://www.mckinsey.com/App_Media/Images/Page_Images/Offices/SocialSector/PDF/achievement_gap_report.pd**f;** Byron Auguste, Bryan Hancock & Matt Miller ,*America's Permanent Education Recession*, 2009 TEACHERS COLLEGE RECORD (November 03, 2009)
[49] Dawkins, M., AFRICAN AMERICAN STUDENT'S OCCUPATIONAL EXPECTATIONS: A NATIONAL STUDY OF THE IMPACT OF SCHOOL DESEGREGATION, URBAN EDUCATION, v. 18, 98 (1983).
[50] Yun, J., & Kurlaender, M., SCHOOL RACIAL COMPOSITION AND STUDENT EDUCATIONAL ASPIRATIONS: A QUESTION OF EQUITY IN A MULTI-RACIAL SOCIETY, JOURNAL OF EDUCATION FOR STUDENTS PLACED AT RISK, vol. 9, 143-68 (2004).

[51] Catherine L. Horn and Michal Kurlaender, *The End of Keyes—Resegregation Trends and Achievement in Denver Public Schools*, Cambridge, MA: The Civil Rights Project at Harvard University, (2006).
[52] *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).
[53] *Brown v. Board of Education*, 349 U.S. 294, 301 (1955).
[54] Kasey S. Pipes, IKE'S FINAL BATTLE: THE ROAD TO LITTLE ROCK AND THE CHALLENGE OF EQUALITY (2007)
[55] *See Griffin v. County. School Bd. of Prince Edward County*, 363 F.3d 206 (1966).
[56] *Holmes v. Danner*, 191 F.Supp. 394 (1961) (Order and Opinion Granting Permanent Injunction)
[57] *See Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962).
[58] Since their psychological and social place was created and reinforced by segregation and terror, there was no need to separate them physically.
[59] When Johnson asked Congress pass legislation prohibiting racial discrimination in all programs receiving federal aid (including schools), over 98% of Southern black students were still attending segregated schools. STILL LOOKING TO THE FUTURE, supra n. 19 at 5-6
[60] *Id.*
[61] 391 U.S. 430
[62] M. Yudof, et al, EDUCATIONAL POLICY AND THE LAW (West Publ. Co. 2002) at 381.
[63] 402 U.S. 1 (1971)
[64] *Keyes v. Denver School District No. I,* 413 U.S. 189 (1973) (hereinafter, *Keyes I*).
[65] *Id.* at 189-90
[66] *Keyes I,* 413 U.S. 189 (1973).
[67] Orfield, G., & Eaton, S., DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION*,* New York: New Press (1996).
[68] 418 U.S. 717 (1974); Lee & Orfield, supra n.18 at 8
[69] *Milliken*, 418 U.S. at 783 (J., Marshall, dissenting).
[70] Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1597 (2002).
[71] *Board of Ed. v. Dowell*, 498 U.S. 237, 248 (1991).
[72] 498 U.S. 237, 250 (1991)
[73] *Id.* at 243
[74] Lee & Orfield, supra n.18 at 7
[75] 503 US 467 (1992),
[76] *Id.*
[77] 515 U.S. 70 (1995).
[78] Chemerinsky, supra n. 70 at 1601 & n. 22
[79] *Keyes v. Congress of Hispanic Educators,* 902 F. Supp. 1274, 1281 (1995).
[80] *The End of Keyes*, supra n. 51 at 8
[81] *Id.*
[82] 551 U.S. 701, 710 (2007).
[83] Lee & Orfield, supra n.18 at 3.
[84] Frankenberg & Lee, supra n 30.
[85] Lee & Orfield, supra n.18 at 4.
[86] *Id.*
[87] Harvard University Civil Rights Project, *School Segregation on the Rise Despite Growing Diversity Among School-Aged Children,*
http://www.gse.harvard.edu/news_evets/features/2001/orfield07172001.html.
[88]Glynn Custred, *Academic rights: when public education fails, minorities with few other advantages are particularly hurt*, National Review, Sept. 15, 1997,
http://findarticles.com/p/articles/mi_m1282/is_n17_v49/ai_19751432/ (last visited Oct. 13, 2009)
[89] 411 U.S. 1 (1973).
[90] King, *Closing the Achievement Gap Through Expanded Access to Quality Education in Grades PK-3*, http://newamerica.net/publications/policy/closing_the_achievement_gap, July 25, 2006.
[91] Neill, *Don't Mourn, Organize! Making lemonade out of NCLB lemons*,
http://www.rethinkingschools.org/special_reports/bushplan/nclb181.shtml p. 1 (Fall 2003).
[92] *Id.*

[93] McDougall, *Brown at 60: The Case for Black Reparations*, 47 HOWARD L. J. 863 (2004)
[94] *Hobson v Hansen*, 269 F. Supp. 401 (D.D.C., 1967). Affirmed, *Smuck v Hobson*, 408 F. 2d 175 (D.C. Cir, 1969).
[95] *See* n. 41, supra, and accompanying text
[96] Janette Herrara, THE DISPROPORTIONATE PLACEMENT OF AFRICAN AMERICANS IN SPECIAL EDUCATION: AN ANALYSIS OF TEN CITIES. *(1998)*
[97] Editorial, *Child Placement Inequality*, Newark Star Ledger, June 10, 2006.
[98] *Id.*
[99] *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 176 (1982).
[100] *Id.* at 177.
[101] Pub.L. 89-10, Title I, § 1001, as added Pub.L. 107-110, Title I, § 101, Jan. 8, 2002, 115 Stat. 1439.)
[102] Amy M. Reichbach, *The Power Behind The Promise: Enforcing No Child Left Behind To Improve Education,*
http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bclawr/45_3/04_TXT.htm
[103] *Committee on School Health, American Academy of Pediatrics Out-of-School Suspension and Expulsion, PEDIATRICS Vol. 112 No. 5 November 2003, pp. 1206-1209; L*ost and Turned Out: Academic, Social, and Emotional Experiences of Students Excluded From School*, URBAN EDUCATION, September 1, 2007; 42(5): 432 - 455.*
[104] Comments by Julie Fernandes, deputy Assistant Attorney General, U.S. Department of Justice, Civil Rights Division November 12, 2009 at Conference, Howard University School of Law, *Reaffirming the role of school integration in K-12 Education*.
[105] John Newsom, *Suspension Rates Higher Among Minority Students*, NEWS & RECORD (Greensboro, NC), Jan. 5, 2001, at A1; STATE BD. OF EDUC. DEP'T OF PUB. INSTRUCTION, *Annual Study of Suspensions and Expulsions: 2000-2001*; N.C. JUST. AND CMTY DEV. CTR., *Exposing the Gap: Why Minority Students are Being Left Behind in North Carolina's Educational System* (2000)
http://www.ncjustice.org/media/library/67 gapstudy.pdf.
[106] David J. McCarthy & Laurie Reynolds, LOCAL GOVERNMENT LAW IN A NUTSHELL 64 (West Publishing 1995)
[107] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).
[108] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[109] TEX. EDUC. CODE § 26.004 (2005).
[110] *Id.* § 26.006.
[111] TEX. EDUC. CODE § 26.001(d) (2005), *Id.* § 26.011.
[112] 3 Sands & Libonati, LOCAL GOVERNMENT LAW § 20.10 (1981).
[113] *Id.* at § 20.10 - .11
[114] *Id*. at § 20.12 (1981).
[115] *Id.* § 26.007.
[116] http://www.nsba.org/site/page.asp?TRACKID=&CID=1903&DID=38976
[117] (This is the case for example, in the employment and housing areas—*See* Chapters Two and Three, respectively)
[118] *Alexander v. Sandoval*, 532 U.S. 275 (2001)
[119] *Bryant v. Independent School District No. I-38 of Garvin County,* 334 F.3d 928, 932 (10th Cir. 2003).
[120] 295 F.3d 1183 (10th Cir. 2002).
[121] *Id.* at 1186.
[122] *School Committee of the Town of Burlington v. Department of Education of Massachusetts* 471 U. S. 359 (1985)
[123] *Scaffer v. Weast*, 546 U.S. 49 (2005);
[124] *Id.*; Petitioner's Brief, page 2
[125] *Id.* at 62.
[126] 411 U.S. 1 (1973)
[127] *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257 (Mont. 2005); *Campaign for Fiscal Equality v. State*, 801 N.E.2d 326, 336 (N.Y. 2003); *Vincent v. Voight*, 614 N.W.2d 388, 396 (Wis. 2000); *Abbeville County. Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999) *Campbell Sch. Dist. v. State*, 907 P.2d 1238, 1259 (Wyo. 1995); *Robinson v. Cahill*, 303 A.2d 273 (1973).

[128] Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Resource equity*, 68 TEMP. L. REV. 1151, 1152; Goodwin Liu, *Education, Equality, and National Citizenship* 116 YALE LAW JOURNAL 471 (2004); Thomas B. Fordham Foundation & Institute, *Fund the Child: Tacking Inequity and Antiquity in School Finance*, http://www.edexcellence.net/template/index.cfm;
[129] Rebell & Wolff, supra n. 29 at 9
[130] Rebell & Wolff, supra n. 29 at 1176.
[131] *Id.*
[132] William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 603 (1994)).
[133] Rebell & Wolff, supra n. 29 at 1153
[134] *Id.* at 1176.
[135] *Id*. at 1175.
[136] *Id.* at 1153.
[137] *Id.*
[138] *Id.*
[139] Heise, supra n. 128 at 1153.
[140] Cose, E., BEYOND BROWN V. BOARD: THE FINAL BATTLE FOR EXCELLENCE IN AMERICAN EDUCATION (the Rockefeller Foundation 2004) p. 3.
[141] *American Recovery and Reinvestment Act of 2009*, Public Law 111-5 (H.R. 1), 123 Stat. 115 February 17, 2009
[142] Maria Glod, *With $5 Billion Fund, Duncan Seeks to Fuel Innovation in Schools***,** WASHINGTON POST Thursday, March 26, 2009
[143] Fernandes, supra, n 104.
[144] This would include "parents' councils" in minority communities, and "study circles" in majority and diverse communities. I organized Parents Councils for the NAACP in Montgomery County, MD, in 1994. Study Circles are promoted by Everyday Democracy (formerly the Study Circles Resource Center), and are now used in Montgomery County, MD public schools pursuant to an agreement between MCPS and Everyday Democracy.
[145] Ronald Roach*,* The Deepening Social Split Between Low-Income and Middle-Class Blacks DIVERSE: ISSUES IN HIGHER EDUCATION February 7, 2008, http://diverseeducation.com/article/10599/the-deepening-social-split-between-low-income-and-middle-class-blacks.html
[146] Sharon Chandler and Elizabeth Crane, SAY YES TO COLLEGE: A PRACTICAL AND INSPIRATIONAL GUIDE TO RAISING COLLEGE-BOUND KIDS, (Penguin Group 2005)
[147] http://njjustice.typepad.com/new_jersey_justice/2006/05/index.html
[148] Fernandes, supra, n 104.
[149] *See* 20 U.S.C. § 6311(g) (2005).
[150] *Id.* § 6312(b).
[151] *Assurance Of Compliance – Civil Rights Certificate*, http://www.ed.gov/about/offices/list/ocr/letters/boy-scouts-assurance-form.pdf*; Back to School on Civil Rights***,** WRIGHTSLAW, http://www.wrightslaw.com/law/reports/IDEA_Compliance_1.htm
[152] The DOJ website discusses how to file a complaint charging a violation of equal education opportunities. It also tells how to contact DOJ attorneys to discuss your problem. The web address is *http://www.usdoj.gov/civilliberties.htm* and the phone number is (202) 514-4092, and toll free at 1-877-292-3804.
[153] Ryan Bagwell, *School Board Signs Civil Rights Agreement*, THE CAPITAL, September 8, 2005 at B1.
[154] Teach for America, *About Us*, http://www.teachforamerica.org/about/index.htm.
[155] Teach for America, *Impact*, http://www.teachforamerica.org/mission/our_impact/corps_impact.htm.
[156] Teach for America, *Our Mission and Approach,* http://www.teachforamerica.org/mission/mission_and_approach.htm
[157] *Resource Centers for Families and Schools* http://www.bcps.org/offices/dpd/resource_ctrs.html
[158] ERICA FRANKENBERG & GENEVIEVE SIEGEL-HAWLEY, THE CIVIL RIGHTS PROJECT, THE FORGOTTEN CHOICE? RETHINKING MAGNET SCHOOLS IN A CHANGING LANDSCAPE 6 (Nov. 2008). note 76, at 6, 10, 41; *True Definition of School Choice in PA*, TRI-STATE OBSERVER, JULY 25, 2007, http://www.friedmanfoundation.org/newsroom/ShowNewsItem.do?id=80108
[159] US Charter Schools, *Overview*, http://www.uscharterschools.org/pub/uscs_docs/o/index.htm

[160] Frankenberg & Siegel-Hawley, supra n. 158, at 41-42; *Historic Reversals* supra n.11 at 38.
[161] Nat'l Alliance for Public Charter Schs., *Benefits and Successes*, http://www.publiccharters.org/aboutschools/benefits (last visited Nov 18, 2009).
[162] Diana Lambert , *A priority of Obama's education plan, charter schools gain traction*, SACRAMENTO BEE, December 19, 2009
http://www.sacbee.com/education/story/2357393.html
[163] KIPP, *About KIPP*, http://www.kipp.org/
[164] Laura Pappano, *Skills to Fix Failing Schools*, New York Times, December 29, 2009
http://www.nytimes.com/2010/01/03/education/edlife/03educ.html?emc=eta1
[165] *Community Schools across the Nation: a Sampling of Local Initiatives and National Models*, www.community schools.org.
[166] Hoyer, Steny and Randi Weingarten, *Re-Imagining What a School Can Be*, p. 1 (October 1, 2009).
[167] *Community Schools Across the Nation*, supra n. 164
[168] *Evaluation of University-Assisted School Programs*, www.upenn.edu/ccp/uacs/university-assisted-community-schools.html.
[169] *Id.*

CHAPTER EIGHT

[1] 42 U.S.C. § 1973.
[2] *Bush v Gore*, 531 U.S. 98 (2000)
[3] This is called "voter caging." John Greenbaum, Guest Lecture, Howard University Law School, September 18, 2009; *see* also http://en.wikipedia.org/wiki/Caging_(voter_suppression); http://www.pbs.org/now/shows/330/
[4] *Northwest Austin Municipal Utility District No. 1 (NAMUDNO) v. Gonzales*, No. 1:06-cv-01284-PLF (D.D.C. Aug. 4, 2006): *Northwest Austin Municipal Utility District No. 1 (NAMUDNO) v.* Holder, Docketed: September 10, 2008 United States Supreme Court (Case 08-322; Laughlin McDonald, Director of the ACLU Voting Rights Project: *The Voting Rights Act: Still Needed in Obama's America*
http://jurist.law.pitt.edu/forumy/2008/12/voting-rights-act-still-needed-in.php
[5] Patrik Jonsson, *Jimmy Carter racism charge triggers next US race debate*, THE CHRISTIAN SCIENCE MONITOR September 16, 2009, http://www.csmonitor.com/USA/Politics/2009/0916/jimmy-carter-racism-charge-triggers-next-us-race-debate
[6] *Obama Win Sparks Rise In Hate Crimes, Violence*,
http://www.npr.org/templates/story/story.php?storyId=97454237
[7] However, the ACLU and the Lawyer's Committee still received plenty of calls involving voter intimidation/harassment, robocalling, and electronic voting machine irregularities. http://www.866ourvote.org/real-stories/; http://www.aclu.org/votingrights/gen/37829res20081120.html. Jon Greenbaum indicated to my class that the hotline received 240,000 calls in Election Day 2008, 70,000 of which reported problems with voting. Greenbaum, September 18, 2009.
[8] "When elections are close, there is worse behavior. It's the difference between winning and losing." Greenbaum, September 18, 2009.
[9] http://www.cbsnews.com/blogs/2009/11/03/politics/politicalhotsheet/entry5508174.shtml
[10] Dan Eggen, Perry Bacon Jr*, Tea party conservatives gear up to affect 2010 elections with fundraising, PACs*, THE WASHINGTON POST Wednesday, December 9, http://www.washingtonpost.com/wp-dyn/content/article/2009/12/09/AR2009120904637.html
[11]
http://www.projectvote.org/images/publications/Voter%20Caging/DNC_v_RNC_1986_Consent_Decree_1.pdf
[12] Alexander Keyssar, THE RIGHT TO VOTE, THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES, at pg. 1.
[13] *Id.* at pg. 55.
[14] *Reconstruction,* http://en.wikipedia.org/wiki/Reconstruction_era_of_the_United_States.
[15] Congressional Research Service (CRS) Report, *The Voting Rights Act of 1965, As Amended: Its History and Current Issues*, pg. 2.

[16] http://memory.loc.gov/ammem/aaohtml/exhibit/aopart5.html
[17] John Franklin & Alfred Moss, Jr., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS, pg. 235-238 (1988).
[18] *Id.*; *Reading the Fine Print: The Grandfather Clause in Louisiana,* http://historymatters.gmu.edu/d/5352.
[19] *Id.*
[20] *Ratliff v. Beale*, 74 Miss. 247, 265-66 (1896)(holding that African Americans were more likely than whites to be "convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy").
[21] Allen Ides, CONSTITUTIONAL LAW INDIVIDUAL RIGHTS, at pg. 261.
[22]Gerrymandering originated in 1812, when Massachusetts' State Senate redrew its district lines. Governor Elbridge Gerry's political party designed new, oddly shaped district lines to improve their chances of re-election. When a local newspaper cartoonist saw the map of one of the districts, he remarked that it looked like a "salamander" and coined the term "gerrymander." Southern Poverty Law Center, *Drawing the Line*, at pg. 16-17; *Gerrymandering*, http://en.wikipedia.org/wiki/Gerrymandering.
[23] Southern Poverty Law Center, *Drawing the Line*, at pg. 16.
[24] Voting Rights Act Information, at *http://www.usdoj.gov/crt/voting/misc/faq.htm*
[25] Laughlin McDonald, *The Voting Rights Act: What It Has Meant and What Is at Stake, at* http*://www.aclu.org/votingrights/gen/13004res20050304.html* (March 4, 2005).
[26] *South Carolina v. Katzenbach*, 382 U.S. 898 (1965)
[27] Pub.L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § § 1971-1073ff-6 (1986 & Supp.1993)).
[28] National Voter Registration Act of 1993 (42 U.S.C. 1973gg to 1973gg-10), also known as the "motor voter" law,
[29] *About the National Voter Registration Act,* U.S. Department of Justice Civil Rights Division Voting Section Home Page, http://www.usdoj.gov/crt/voting/nvra/activ_nvra.htm.
[30] *Id.*
[31] Daniel P. Tokaji*, Early Returns On Election Reform: Discretion, Disenfranchisement, And The Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1218 (2005).
[32] Aliza Organick & Steven Ramirez, *Taking Voting Rights Seriously: Race And The Integrity Of Democracy In America*, 27 N. Ill. U. L. REV. 427, 439 (2007).
[33] Herbert E. Cihak, *The Help America Vote Act: Unmet Expectations?* 29 U. ARK. LITTLE ROCK L. REV. 679, 691 (2007).
[34] Tokaji*, supra*, n. 31.
[35] Organick & Ramirez, *supra* n. 32 at 436.
[36] Paper record requirements respond to some of these concerns, *see* Id at 437.
[37] Tokaji*, supra*, n. 31 at 1216
[38] David Fears, *Voter ID is Overturned*, WASHINGTON POST, October 28, 2005.
[39] *Common Cause v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).
[40] Theodore Shaw & Janai Nelson, *Reflection, Celebration and Renewal: The Voting Rights Act at 40*, The Crisis, pg. 21 (July/August 2005); http://findarticles.com/p/articles/mi_qa4081/is_200507/ai_n15665616
[41]*VRA battle heads into litigation,* THE HILL, Sept 5, 2006, David Mikhail, *http://www.hillnews.com/thehill/export/TheHill/News/Frontpage/090506/news4.html*). Opponents included Congressmen Rep. Lynn Westmoreland (R-Georgia), Rep. Joe Barton (R-Texas), and Rep. Charlie Norwood (R-Georgia).
[42] *Fannie Lou Hamer, Rosa Parks, & Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*, Pub. L. No. 109-246, §§ 4-5, 120 Stat. 577, 580-81 (codified as amended at 42 U.S.C.A. §§ 1973b-1973c (West 2003 & Supp. 2007).
[43] Hearing on H.R. 9 (the *Hamer, Parks, & King Act*) before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th CONG. 13-37 (2006) (statement of Roger Clegg, President & General Counsel, Center for Equal Opportunity, opposing renewal of Section 5); Id. at 14-17 (2005) (statement of Edward Blum, Visiting Fellow, American Enterprise Institute, opposing reauthorization bill as excessively race-based and outdated).
[44] Spencer Overton, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION 18 (W.W. Norton & Company 2006) at 18

[45] Fair Vote: The Center for Voting and Democracy, *Gerrymandering,* ¶5 (2006) (*http://www.fairvote.org/redistricting/gerrymandering.htm*
[46] Overton, supra, n. 44 at 20
[47] *Id.* at 21
[48] Linda Chavez, *The Coming Race War,*¶3-7 (2000) http://www.jewishworldreview.com/cols/chavez022801.asp
[49] Spencer Overton, comments, May 2007
[50] http://www.aclufl.org/legislature_courts/legal_department/briefs_complaints/naacp_v__harris.cfm
[51] *http://www.naacpldf.org/issues.aspx?subcontext=18*
[52] *ACLU Joins National Call for the Renewal of the Voting Rights Act; Stands with Civil Rights, Women's Rights and Labor Organizations, at* http://www.aclu.org/votingrights/gen/12997prs20050321. (March 21, 2005).
[53] http://obama.senate.gov/record/051108-s1975_deceptive_practices_and_voter_intimidation_prevention_act_of_2005/index.html, (text of Senator Obama's proposed legislation).
[54] *Id*; Lawyer's Committee for Civil Rights Under the Law, http://www.lawyerscomm.org/2005website/projects/votingrights/electoralreform/Summary.pdf.
[55]Senate Bill 453, http://cardin.senate.gov/news/record.cfm?id=275709&; House Bill H.R. 97), 111th Congress. *See* also the *Count Every Vote Act*, H.R. 105 (which strengthens HAVA)
[56] The Lawyers' Committee writes:

> More than one third of the problems reported to Election Protection in 2008 were a result of our antiquated voter registration system. Those obstacles disproportionately affect racial and ethnic minorities, low-income Americans, military service members, seniors, students, and Americans with disabilities - groups that are the first to fall through the cracks when our election resources are thin. As of 2006, more than 65 million Americans of voting age - roughly one third of the eligible population - were unregistered:

http://www.866ourvote.org/newsroom/news?id=0220
[57] "Conviction" means the defendant has received a court-imposed sentence, such as probation, parole, community service, restitutions and fines, as well as imprisonment.
[58]Three years in Maryland (Maryland Criminal Law, Article 14.101
[59] H.R. 329, 111th Congress, the *Civic Participation and Rehabilitation Act* would allow felons who are not incarcerated to vote in federal elections. (Barbra Lee, sponsor)
[60] *Voter Bill of Rights,* http://www.ucsa.org/toolkit/elections/Voter%20Bill%20of%20Rights.pdf.
[61] The grounds for the lawsuit may include: *The Civil Rights Act of 1957*; *the Voting Rights Act of 1965*; to the extent voters are being denied the right to vote at the polls based on change of address, *the National Voter Registration Act of 1993*; other civil statutes such as 42 U.S.C. § 1981, § 1983, and/or § 1985(3) and § 1986; and *the Help America Vote Act.*
[62] http://en.wikipedia.org/wiki/Provisional_ballot
[63] Note this can be caused by the Registrar's use of temporary workers to help out when there are surges in registration, such as those orchestrated by civil rights groups in 2000. Greenbaum, September 18, 2009.
[64] *http://www.pfaw.org/pfaw/general/default.aspx?oid=16399*
[65] Voting Rights Act Information, at http://www.usdoj.gov/crt/voting/misc/faq.htm
[66] *Id.*
[67] Interview with Jon Greenbaum, March 3, 2005.
[68] Spencer Overton, comments, May 2007

CHAPTER NINE

[1] *Carmichael v. Allen*, 267 F. Supp. 985, 987-88 (N.D. Ga. 1967).
[2] *Id.* at 989.
[3] *Id.* at 990
[4] *Id.* at 999.
[5] http://www.herald-dispatch.com/apps/pbcs.dll/article?AID=/20060220/NEWS01/602200320/1001/NEWS

[6] *See*, *e.g.*, Rebecca Kook, *The Shifting Status of African Americans in the American Collective Identity*, J. AFRICAN AMERICAN STUD. 154 (1998).
[7] A. Leon Higginbotham, Jr., *To the Scale and Standing of Men*, THE JOURNAL OF NEGRO HISTORY, Vol. 60, No. 3 (Jul. 1975), 347, 358.
[8] Victor M. Hwang, *In the Defense of Quotas: Proportional Representation and the Involuntary Minority*, 1 ASIAN AM. PAC. ISLANDS L.J. 1 (1993).
[9] 1 Sands & Libonati, LOCAL GOVERNMENT LAW § 1
[10] SCRANTON HOME RULE CHARTER § 310 (1976, as amended 2003).
[11] *Id.* § 401.
[12] *Id.* § 405.
[13] *Id.* § 407.
[14] *See* 65 PA. CONS. STAT. §§ 704.
[15] *Id.* § 710.1(a).
[16] *Id.* § 709.
[17] *Id.* § 703.
[18] *Id.* § 709.
[19] 156 So.2d 448 (U.S. La. 1963).
[20] *Id.* at 451-52.
[21] 376 U.S, 536 (1965).
[22] *Id*. at 551-53.
[23] *Id.* at 558.
[24] *Williams v. Wallace*, 240 F. Supp. 100, 110 (M.D. Ala. 1965)
[25] *King v. State*, 103 Ga. App. 272, 273 (Ga. App. 1961).
[26] *Id.* at 276-77.
[27] http://www.cbsnews.com/stories/2007/02/16/national/main2485260.shtml
[28]http://www.ruckus.org/article.php?list=type&type=109;
http://www.wsws.org/articles/2003/dec2003/miam-d16.shtml
[29] *Saia v. People of State of New York*, 334 U.S. 558 (1948)
[30] Eric Holder, Attorney General, Dep't of Justice, *Remarks at the Dep't of Justice African American History Month Program* (Feb. 18, 2009).
[31] A "Write Your Representative" directory online requests the state and the zip code of the area that the citizen lives in order to identify which representative is assigned to that area *Write Your Representative*, United States House of Representatives. https://writerep.house.gov/writerep/welcome.shtml
[32] NAACP, http://www.naacp.org/legal/history/index.htm
[33] NAACP: *NAACP Launches the STOP Campaign*, http://www.naacp.org/news/press/2007-04-25/index.htm
[34] NAACP, *NAACP Condemns Recent Acts of Racism on College Campuses*, http://www.naacp.org/news/press/2006-11-27-02/index.htm.
[35] Robert Jensen, *Seeing branches, and a root*, http://uts.cc.utexas.edu/~rjensen/freelance/ghettofabulous.htm (last visited Nov. 20, 2009)
[36] NAACP, supra, n. 33
[37] *Id.*
[38] NAACP, *NAACP Condemns New Yorker Magazine Cover, Urges Action*, http://www.naacp.org/news/press/2008-07-17/index.htm.
[39] *Id.*
[40] Lani Guinier and Gerald Torres, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, AND TRANSFORMING DEMOCRACY, Harvard University Press, p. 55 (2002).
[41] For more information on study circles, see www.everyday-democracy.org.
[42] *See* http://www.everyday-democracy.org/en/index.aspx for more information.
[43] The CAMEL (*Collaborative Approaches to Management of E-learning*) model for an e-learning community of practice was originally set up in 2005-06 as a project funded by the Higher Education Funding Council for England's Leadership, Governance and Management Program. http://www.jiscinfonet.ac.uk/publications/camel;
http://www.jisc.ac.uk/whatwedo/programmes/elearningcapital/camelbelt.aspx
[44] *See* National Racial Profiling website suggested in Chapter Three.

[45] Daniels Natheniel, What *is the Social Media?* ABOUT.COM. http://webtrends.about.com/od/web20/a/social-media.htm.
[46] Sarah Spencer, *IBM Urges Communication Providers to Embrace Social Networking*, Jan. 29, 2009 http://www-03.ibm.com/press/us/en/pressrelease/26555.wss
[47] *Id.*
[48] *Barack Obama's Social Media Lesson for Business: Barack 2.0*. http://www.barack20.com