Case Studies: Racial Disparities in Investigations

New Jersey State Police

In 1994, a group of African-American drivers who were stopped and arrested when they were driving on the New Jersey Turnpike moved to suppress evidence that the police had obtained after searching their vehicles, claiming that they were targeted for investigation because of their race.[225] Dr. John Lamberth, a professor at Temple University, conducted a study to determine whether the police officers disproportionately stopped, investigated, and arrested African-American drivers.[226] Dr. Lamberth determined that even though African-American and white drivers violated traffic laws at the same rate and African-Americans comprised only 14% of drivers, approximately 73% of the drivers that were stopped and arrested were African-American.[227]

Maryland State Police

Robert Wilkins, a Harvard Law School graduate and African-American, commenced a suit against the Maryland State Police Department, alleging that the police stopped him and searched his car because he was African-American.[228] After a memorandum that instructed troopers that drug couriers were predominantly African-American was disclosed during discovery, the police department settled the suit. As part of the settlement, the police department agreed to provide the court with data relating to every stop that resulted in a search.[229] Between January 1995 and December 1997, the police department found that while African-Americans comprised approximately 17% of drivers and speeders, 70% of the drivers that were stopped and whose cars were searched were African-American.[230]

United States Customs Service

During the 1997 and 1998 fiscal years, Customs Service officers subjected 102,000 arriving international passengers to some form of personal search.[231] Analyzing the characteristics of these passengers, the Customs Service found that African-American women who were U. S. citizens were nine times as likely as white women who were U. S. citizens to be x-rayed after they were frisked.[232] Significantly, African-American women who were x-rayed were less than half as likely to be found carrying contraband as white women.[233]

102. The arrest and investigation stage is a critically important stage in the criminal justice process. If police officers exclusively focus their investigative efforts upon African-Americans and other racial minorities, as an increasing body of evidence suggests has happened,[234] the racial composition of the individuals who are eventually charged, prosecuted, and sentenced is also skewed.[235] Furthermore, the fact that minorities are disproportionately the subject of criminal investigations reinforces the stereotype against minority group members. In addition, assumptions regarding the criminality of African-Americans, Hispanics, and other minorities place minorities in physical danger.[236] As a result of these assumptions, minorities have been the victims of excessive police force.[237]

Case Studies: Racial Violence by the Police

Rodney King

On March 3, 1991, Rodney King was driving along the Foothill Freeway near Los Angeles, California.[238] At about 12:30 A.M., two Los Angeles police officers reported that King's car approached their squad car at a speed of approximately 110 miles per hour.[239] The officers attempted to stop King.[240] Instead of stopping, King exited the Freeway and led the officers through a residential neighborhood.[241] Approximately fifteen minutes after the police officers attempted to stop King, he stopped along a four lane road in a residential neighborhood. Fifteen police officers immediately converged upon him.[242] What happened next is disputed. Police officers claim that King attempted to stand up while he was being handcuffed, that he reached into his pocket for a weapon, and that he charged at the officers.[243] What is certain is that the officers beat King with a nightstick, shocked him with a Tasar stun gun, and repeatedly hit and kicked him while he lay struggling on the ground.[244] The Los Angeles County District Attorney charged four of the officers with felony assault and other related charges.[245] On April 29, 1992, a jury acquitted the officers of all charges.[246]

Shortly thereafter, the residents of the city of Los Angeles began rioting, which continued for more than six days.[247] During the riots the U.S. Department of Justice announced that it would continue to investigate the officers to determine if they violated King's civil rights. In August of 1992, a federal grand jury returned a two-count indictment, charging the four officers with depriving King of his federally protected civil rights while acting under color of law.[248] The first count charged three of the officers with violating King's federal constitutional rights by willfully using unreasonable force against him.[249] The second count charged the sergeant of the Los Angeles Police Department with violating King's federal constitutional rights by permitting the three other officers to assault King.[250] A federal jury subsequently found two of the officers liable for violating King's civil rights and sentenced them to thirty months in prison.[251]

Amadou Diallo

On February 4, 1999, Amadou Diallo was standing beside the front steps of his apartment building in a predominantly minority neighborhood in New York City when four police officers approached him.[252] One of the officers, Sean Carroll, later claimed that the officers suspected Diallo because of the way "he was peering up and down the block" and because "[h]e stepped backward, back into the vestibule as [they] were trying to figure out what [was] going on."[253] Seeing the officers, Mr. Diallo reached into his pocket to produce his identification. The police officers thought that he was reaching for a weapon, drew their weapons and shot Mr. Diallo forty-one times. The officers were tried and acquitted for the killing.[254]

The public was outraged by the jury's verdict. One commentator described the public reaction to the officers' acquittal: "[P]rotests and public outrage were all-consuming, even for a city used to fracas and brouhaha. Law-and-order advocates squared off against civil rights activists; columnists sparred and ranted; members of the O.J. Simpson dream team did cameos. In a daily ritual as practiced as a tea ceremony, hundreds of demonstrators, including actress Susan

Sarandon and former mayor David Dinkins, got themselves arrested outside police headquarters."[255]

103. The federal government is in a strong position to regulate state and local police departments because virtually every police department in the United States receives federal aid to assist in carrying out law enforcement responsibilities and increase staffing and resources.

104. While the Government suggests in its Report that it is addressing the problem of racial profiling by investigating allegations of racial discrimination under the Omnibus Crime Control and Safe Streets Act[256] and Title VI of the Civil Rights Act of 1964,[257] it recognizes that it has conducted only fifteen investigations in the past six years.[258] Because racial profiling is so pervasive, the Government must dedicate more time and resources to conducting additional investigations and to training police officers to identify potential suspects without impermissibly considering a suspect's race.

105. The Government also noted that two of its investigations led to consent decrees that required the New Jersey state police and the Montgomery County, Maryland Police Department to improve their data collection, training, supervision, and monitoring, but it failed to acknowledge that these studies revealed that these police departments targeted minorities at an alarming rate and did not examine what these findings may reveal about the conduct of other law enforcement officials around the United States.

Prosecutorial Discretion

106. Prosecutors exercise a substantial amount of discretion that is virtually unchecked.[259] After the police have begun investigating a crime and/or arrested a suspect, the prosecutor must decide whether to prosecute that person.[260] Regardless of their intentions, studies have established that prosecutors exercise this discretion in a manner that disproportionately and negatively affects African-Americans.[261] The *San Jose Mercury News* evaluated 700,000 criminal cases in California between 1981 and 1990. The study's authors found that prosecutors dropped charges against 6% of whites in contrast to only 4% of African-Americans and that prosecutors offered 20% of white offenders, 14% of African-American offenders, and 11% of Hispanic offenders the opportunity to participate in diversion programs, which offer criminal suspects an alternative to traditional criminal justice proceedings and if the suspect successfully completes the program, result in a dismissal of all charges.[262] Diversion programs can differ markedly in design and are often developed on individual basis.[263]

107. In cases in which federal and state courts have concurrent jurisdiction, the prosecutor must also decide whether to charge the offender under federal or state law.[264] This decision often has significant consequences. First, federal statutes typically provide for lengthy, mandatory sentences. Second, Congress abolished parole in 1987.[265] The U.S. Sentencing Commission has reported that defendants who were convicted of a drug offense in federal court in 1990 were sentenced to an average of eighty-four months in

prison without the possibility of parole.[266] In contrast, defendants who were convicted of drug offenses in state courts were sentenced to an average maximum sentence of sixty-six months, but because they were eligible for parole, these defendants actually served an average of twenty months.[267]

Sentencing

108. Between 1985 and 1995, the number of individuals incarcerated in federal and state prisons increased dramatically. At the end of 1985, 1 in every 319 U.S. residents were incarcerated.[268] By 1995, this number had increased to 1 in every 163. To a large extent, this increase was a result of the federal government's so-called "war on drugs," which disproportionately affected minorities.[269] Between 1985 and 1995, the number of African-American drug offenders who were serving time in prison increased by 700% while the number of white drug offenders increased by 300%.[270]

109. African-Americans have been disproportionately affected by the war on drugs for two reasons. First, the police have focused their investigative efforts on inner city communities where drugs are used and sold in "open air" markets.[271] Second, under the United States Sentencing Guidelines, an individual who is convicted of selling one gram of crack cocaine is treated the same as an individual who is convicted of selling 100 grams of powder cocaine.[272] Recognizing this disparity, Congress enacted the Omnibus Violent Crime Control and Law Enforcement Act of 1994, directing the U.S. Sentencing Commission to evaluate federal sentencing policies relating to possession and distribution of cocaine. The Commission found that even though 52% of crack cocaine users were white, 88.3% of the individuals convicted of selling crack cocaine were African-American and 7.1% were Hispanic.[273] The Commission concluded that this sentencing disparity is the "primary cause of the growing disparity between the sentences for Black and white federal defendants."[274]

110. Minorities are also incarcerated at a rate that is disproportionate to their representation in society. At the end of 1999, African-Americans accounted for approximately 46% of inmates imprisoned in federal and state prison, Hispanics accounted for 18%, and whites accounted for 33%[275] even though whites comprise approximately 71% of the population, African-Americans comprised 12.1%, and Hispanics comprised 11.5%.[276]

111. The problem of sentencing disparity is not limited to cases in federal courts. The New York State Division of Criminal Justice studied the felony sentencing outcomes in New York courts between 1990 and 1992.[277] This study found that one-third of the minorities who received prison sentences would have received a shorter prison sentence or would not have been incarcerated if they had been treated in a manner that was comparable to similarly situated white defendants.[278] Additionally, the study concluded that if African-American defendants who were eligible for probation had been treated in a manner that was comparable to similarly situated white defendants, 8000 fewer African-Americans would have served time in prison.[279]

Immigration Detention

112. Significantly, not all of the individuals who are currently imprisoned in the United States have been convicted of a crime.[280] In 1996, Congress adopted the Illegal Immigration Reform and Immigrant Responsibility Act, which established a policy of mandatory detention for a broad class of immigrants, including immigrants who are seeking asylum. Because of shortages of detention facilities for immigrants, the U.S. Immigration and Naturalization Service ("INS") is currently housing 20,000 detainees, including immigrants seeking asylum, in local jails.[281] By the end of 2001, the INS anticipates that this number will increase to 24,000.[282] An extremely high percentage of those detained are non-whites.[283] Even though these detainees have not been convicted of a crime, the treatment that they receive in local jails is no different than the treatment that convicted inmates receive.[284] Some immigration detainees being held in jails even reported that they were subjected to physical mistreatment.[285] Recently, the INS adopted national standards for the treatment of detainees.[286] The thirty-six standards address visitation rights, grievance procedures, marriage requests, mail, religious services, medical care, access to a law library, personal property, recreation and food. While the issuance of these standards is an important first step, the Government must ensure that these standards are enforced.

Death Penalty

113. Statistical evidence demonstrates that a disproportionately high number of African-Americans and other minorities are sentenced to death.[287] A September 2000 study, released by the U.S. Department of Justice, reported that of the 183 cases for which U.S. Attorneys (federal government prosecutors) have sought the death penalty since 1995, approximately 26% of the defendants were white, 21% were Hispanic, and 44% were African-American.[288] While serving as U.S. Attorney General under the Clinton Administration, Janet Reno stated that she was "sorely troubled" by these statistics, but refused to seek a moratorium on the death penalty because the data raised no questions about the innocence of any specific defendants.[289]

114. The Government's position, however, ignored the fact that guilt is not the only factor used in determining sentencing in a death penalty case. Rather, the U.S. Supreme Court has held that factors such as the circumstances of the crime, the relative culpability of the defendant, and the severity of the crime must be considered by a jury in the separate penalty phase of a death penalty case.[290]

115. The exercise of discretion by the prosecutor in seeking the death penalty in the first instance is highly significant and, by necessity, affects in ways bearing no relation to guilt which defendants face the death penalty. For example, it is well-documented that individuals charged with killing white victims are significantly more likely to receive the death penalty than individuals charged with killing African-American,[291] and that this discrepancy "appears in large part to be based on the exercise of prosecutorial discretion."[292] The effect of the victim's race on the sentencing outcome appears to be "particularly pronounced" at the earlier stages of the judicial process, when, for example, the prosecutor first decides to charge the defendant with a capital offense.[293]

116. Additionally, poor defendants of color who have received substandard counsel at the trial level now face the prospect of limited federal appeals and few opportunities for assistance from competent counsel at the post-conviction stage. Congress's Anti-Terrorism and Effective Death Penalty Act of 1996 eliminated funding for death penalty resource centers and has contributed to a *de facto* process of racial discrimination.[294]

Access to DNA Evidence

117. A landmark study released in June 2000 demonstrated that between 1973 and 1995, the overall error-rate in the U.S. capital punishment system was 68%.[295] Since 1992 alone, at least 55 defendants have been exonerated by DNA identification evidence—most after serving years in prison.[296] The power of DNA to exonerate people who have been erroneously accused or convicted of crimes has come to the forefront in recent years with the advancement of DNA technology.[297] DNA evidence often can be a determining factor in many death penalty cases.

118. Notwithstanding its potential value, states do not make DNA testing routinely available in death penalty cases in which body fluid evidence is involved. In addition, 33 states employ statutes of limitations of six months or less of conviction on newly-discovered-evidence-of-innocence motions.[298] Thus, even if there is commanding evidence of innocence, such as DNA evidence, inmates are often prevented from raising such DNA evidence to exonerate themselves.[299]

Compliance with ICJ Ruling in *LaGrand Case*

119. In the *LaGrand Case (Germany v. United States)*, the ICJ rejected the U.S. argument that a domestic procedural default rule—which requires claims seeking individual remedies in criminal proceedings to be asserted at an early stage—could not violate the Convention.[300] The ICJ held that because the rule had interfered with the right of the foreign defendants to obtain the consular assistance which the Vienna Convention afforded them, it violated the Convention—this in spite of the fact that the procedural default rule is connected to the federal system in the United States. The ICJ further held that should the United States in the future fail in its obligation of consular notification to the detriment of German nationals, it would be incumbent upon the Government to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the Vienna Convention.[301]

120. Based on the ICJ ruling, which binds the United States and U.S. courts, the Government should immediately implement procedures to ensure that foreign nationals who are denied their rights under the Vienna Convention will have a meaningful and effective means of seeking review of failures to abide by the Vienna Convention.

121. In addition, the United States should intervene in any pending cases in which the Vienna Convention was violated to seek stays of execution, as per the provisional ICJ order in the *LaGrand Case*.

Recommendations

- The Government should require the states to keep statistics on all individuals passing through the criminal justice system. The statistics should be organized according to the categories of stop, arrest, charging, prosecution, and sentencing, and should focus on (i) the ethnicity/race of the defendant; (ii) the ethnicity/race of the victim; (iii) the income level of the defendant; (iv) the income level of the victim; and (v) the category of crime involved.

- The Government should also require data gathering for federal law enforcement agencies and should conduct periodic reviews of such information to determine the extent of racial profiling.

- The Government should exercise its authority under the Omnibus Crime Control and Safe Streets Act[302] and Title VI of the Civil Rights Act of 1964[303] to conduct additional investigations to determine whether federal, state, and local police officers are illegitimately using race as a factor in deciding whether to stop, investigate, or arrest a particular individual. The Government should increase funding to support these investigations.

- The Government should develop training programs to instruct police officers in the dangers of racial stereotyping and how to conduct investigations without impermissibly considering a suspect's race.

- The Government should develop a training program that instructs prosecutors in the dangers of racial stereotyping and how to exercise their discretion in a manner that does not consider a suspect's race.

- The Government should issue a federal moratorium on the death penalty until the apparent systemic bias can be addressed. The federal government should urge states to do the same.

- The Government should adopt as a part of federal law an exclusionary rule with respect to Vienna Convention violations similar to that of the Miranda Rule. The Vienna Convention requirements highlighted by the *LaGrand Case* are akin to the requirements of the Miranda Rule adopted by the U.S. Supreme Court. When state or federal law enforcement officials violate this rule, the result is the exclusion as evidence of the suspect's statement made during custodial interrogation.[304] This rule of exclusion has been imposed by the U.S. Supreme Court in order to effectuate the Constitutional protections embodied in the Miranda Rule.[305]

- The Government should conduct a study focused specifically on investigating the documented cases of innocent individuals who have been sentenced to death and then expand that study to uncover and analyze whether mistakes have been made.

- The Government should enact a statute that would entitle inmates to obtain confidential DNA testing if they believe the test will prove their innocence. If the person is unable to afford such a test, the Government should provide the necessary funds.

- In the U.S. Attorney's Manual, the U.S. Department of Justice sets forth procedures that a U.S. Attorney must follow when a defendant is charged with an offense punishable by death.[306] The Manual requires U.S. Attorneys to submit a report discussing the theory of liability, the facts and evidence, the defendant's background and criminal history, and the basis for federal prosecution.[307] The Government should add a provision in the Manual that requires a U.S. Attorney to submit a report when they charge an African-American or other minority with a capital offense. This report should compare the defendant's case to cases involving similarly situated white defendants and should explain the steps that the U.S. Attorney has taken to ensure that the defendant's race has not and will not be considered when determining what charges to file against the defendant and whether to seek the death penalty. The Government should also encourage state governments to adopt similar procedures.

- Congress should restore funding for Post-Conviction Defenders Organizations to ensure that capital defendants receive adequate post-conviction representation.

Indigenous Peoples

122. Socioeconomic statistics regarding Indigenous Peoples of the United States are grim. As concluded in the 1998 Report of President Clinton's Initiative on Race, *Changing America*: "On virtually every indicator of social or economic progress, the indigenous people of the United States continue to suffer disproportionately in relation to any other group. They have the lowest family incomes, the lowest percentage of people between the ages 25 and 34 who receive a college degree, the highest unemployment rates, the highest percentage of people living below the poverty level, the highest accidental death rate, and the highest suicide rate. . . . They have become America's most invisible minority."

123. Underlying these stark figures is the reality that Indigenous Peoples endure a broad range of racial discrimination in housing, lending, employment and environmental protection as well as disparate treatment within the criminal justice system. In addition, Indigenous Peoples suffer from the publicly sanctioned and widespread use of disparaging monikers (*e.g.*, Redskins) as mascots for professional and college sports teams.

124. Moreover, crime rates in Indian country strongly suggest that victimization of Indigenous Persons is more tolerated in the United States than crime against other groups. A recent study conducted by the U.S. Department of Justice concluded that American Indians are victims of violent crimes at a rate higher than that of any other racial group and that the rate of victimization was more than twice the national average. Even more alarming, unlike all other groups, a majority of the perpetrators of crimes against Indigenous Persons are persons of a different race.[308] It is clear that Indigenous Peoples of the United States suffer from individual racial discrimination that is equal to, if not greater than, all other groups.

125. Aside from these manifestations of racism, there is another type of racial discrimination suffered by Indigenous Peoples that is unique and is imbedded in the very laws of the United States. It is *de jure* discrimination based on laws or legal doctrines that operate to deny Indigenous Peoples their collective rights. This unique type of racial discrimination manifests itself in many forms, including the denial of the right of self-determination and the disparate treatment of the property rights of Indigenous Peoples.

Congressional Plenary Power and the Denial of the Right to Self-Determination

126. The denial of Indigenous Peoples' right of self-determination is rooted in the racist notion that Indians are inferior and unable to govern themselves. The U.S. Supreme Court cases on which federal Indian law is based openly proclaim these racist doctrines. In *Cherokee Nation v. Georgia*[309] the U.S. Supreme Court rejected the idea that tribes were foreign nations and instead ruled that "[t]hey may, more correctly, perhaps, be denominated domestic dependent nations. . . . [T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."[310] This discriminatory paternalism gave rise to what would later be denoted the guardian-ward relationship or guardianship. In *Beecher v. Wetherby*,[311] the Court explained that guardianship was

necessary and appropriate because it set suitable parameters for the "Christian people" of the United States "in their treatment of an ignorant and dependent race."[312] In *United States v. Kagama*,[313] the Court expressly identified guardianship and Indian inferiority as both a justification for and a source of Congress's authority to enact laws that usurp tribes' powers to govern their internal affairs. Specifically, the Court stated:

> These Indians are wards of the nation. They are communities dependent on the United States, dependent largely for their daily food, dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. . . . *From their very weakness and helplessness*, so largely due to the course of dealing of the federal government with them, and the treaties in which it has promised, *there arises the duty of protection, and with it the power.*[314]

More than 50 years before *Kagama*, the U.S. Supreme Court established the principle that the Government could exercise only those powers enumerated in the Constitution. Nonetheless, the *Kagama* court declared that the very inferiority of Indian people and their perceived "weakness and helplessness" gave Congress virtually unbridled authority, or "plenary power" over Indian tribes.

127. Despite its overtly racist and degrading roots, the plenary power doctrine is still the law. In the last twenty years, the U.S. Supreme Court has repeatedly recognized the continuing validity of congressional plenary authority over Indian affairs.[315] *Kagama* has never been overturned, and the government routinely relies on it today.[316] In recent times, courts have gone so far as to assert that the plenary power doctrine would allow the U.S. Congress, at its discretion, to completely terminate the political and social existence of an Indian tribe.[317]

128. The plenary power doctrine is inconsistent with Indigenous Peoples' right to self determination. Whether spoken or unspoken, the threat that the government could use its plenary powers to enforce its will inserts bias into every discussion and every decision involving indigenous lands, resources, and jurisdictions. As a legal matter, the Government can rectify this racial discrimination by taking affirmative steps to afford tribes the ability to fully exercise the right to self-determination. The Government must renounce the doctrine of plenary power. In cases involving Indian rights, the government should always urge the courts to declare unlawful all such discriminatory doctrines, only then will American Indian tribes and nations, like all other peoples, "freely determine their political status and freely pursue their economic, social and cultural development" as guaranteed by the International Covenants.

Aboriginal Title and the Extinguishment Doctrine

129. United States law distinguishes between fee title to land—the manner in which most Americans own their property—and what has been called "aboriginal title" or "Indian title." Indian title is the right of American Indian tribes to their traditional homelands, but

it affords the tribe only a "right of occupancy." Land held under Indian title is not protected by the Due Process Clause or Just Compensation Clause of the Fifth Amendment to the U.S. Constitution. Under the Fifth Amendment, the Government ordinarily may take property only for public purposes and must pay just compensation to the titleholder. It is well-settled under federal law, however, that Congress may extinguish Indian title at will without any compensation to the tribe[318] ("Extinguishment Doctrine"). The rationale for this rule is that Indian title is not constitutionally-protected, as articulated in shocking terms by the Supreme Court in *Tee-Hit-Ton Indians v. United States*:

> The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation. Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.[319]

130. Although the underpinnings of this discriminatory doctrine are overtly racist, *Tee-Hit-Ton* is still the law of the land. In *Karuk Tribe of California*,[320] for example, which was decided in April 2000, the Court of Appeals for the Federal Circuit held that the Karuk Tribe of Indians was not entitled to compensation for lands taken from them in 1988 by an act of Congress. The Extinguishment Doctrine was applied even though those lands had been reserved for the Karuk Tribe pursuant to a federal statute and executive orders and were repeatedly recognized as reservation lands in federal statutes passed thereafter. The holding in *Karuk* is thus an expansion of the holding in *Tee-Hit-Ton*, applying the principle that Indian land can be taken without compensation even when the land is part of a congressionally established Indian reservation. In a strong dissent, U.S. Court of Appeals Judge Pauline Newman observed, "It is not tenable, at this late date in the life of the Republic, to rule that Native Americans living on a Reservation are not entitled to the constitutional protections of the Fifth Amendment. . . . The argument, pressed by the panel majority, that reservations established by Act of Congress and implemented by executive order are somehow inferior in their property attributes, is without force or support."[321]

131. The real and present danger of extinguishment clouds all potential resolution of tribal land claims. Tribes and their attorneys must in all negotiations remain cognizant of the fact that the federal government can, with a stroke of a pen, eviscerate their property interests and thereby eliminate their claims. The *Tee-Hit-Ton* rule denying Indigenous Peoples the same basic property rights enjoyed by the rest of the U.S. population is a *de jure* manifestation of racial discrimination in contravention of the Convention.

Case Study: American Indian Land Claims

The Extinguishment Doctrine is frequently used to intimidate Indian nations whose lands have been taken unlawfully. In New York, for example, the Haudenosaunee (Six Nations Confederacy) and other tribes such as the Stockbridge Munsee have had their legitimate land claims threatened by those hostile to their claims with legislative extinguishment of the tribes' property rights. This would result in the effective termination of any potential judicial redress. In these cases—the first of which was filed over 25 years ago—the plaintiff Indian tribes and nations assert that they have continuing, valid Indian land treaty title to certain lands that are not currently in their possession.

In 1982, a bill was introduced in Congress, with the support of prominent politicians and the American Land Title Association, to terminate all of the Indian land claims by giving retroactive governmental approval to takings that were unlawful when made. After a lengthy legislative hearing, this effort failed, but it demonstrated how anti-indigenous rights forces can use the plenary power and extinguishment doctrines to attempt to deny Indigenous Peoples their day in court and their opportunity to recover their land rights.

Abrogation of Treaties

132. Another corollary to the plenary power doctrine the U.S. Congress's purported authority to unilaterally abrogate treaties with Indians. The U.S. Supreme Court has held that Congress's authority to abrogate is limitless and cannot be redressed in the courts.[322] As long as Congress's will is expressed, the U.S. Supreme Court has held that the issue of fairness is beyond judicial review and abrogation will not be questioned.[323]

133. Over the years, Indigenous Peoples entered into treaties with the United States in good faith, giving up vast land holdings in exchange for specific territories that they were promised would be protected from non-Indian encroachment and within which the Indians would control their own affairs. These treaties represent legally binding agreements entered into by distinct, sovereign peoples. Under the U.S. Constitution, these treaties should be part of the supreme law of the land.

134. Nevertheless, the U.S. Supreme Court ruled a century ago in *Lone Wolf v. Hitchcock*[324] that the doctrine of federal plenary power over Indigenous Peoples included the power to unilaterally abrogate treaties between Indigenous nations and the federal government. The Court explained:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.
>
> . . . The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in

> disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.[325]

History since *Lone Wolf* demonstrates quite conclusively that the unilateral abrogation of treaties by the Government is the rule, not the exception. As with the plenary power doctrine generally, treaty abrogation remains the rule of law today.[326]

Case Study: Western Shoshone

During the second half of the 20th century, the Government sanctioned a process by which Western Shoshone land claims were adjudicated without Western Shoshone consent. The Dann Band and others strenuously objected to these proceedings and argued that a treaty with the United States protected their land rights. The Indian Claims Commission ("Claims Commission"), a quasi-judicial body charged with reviewing the case, ruled that Western Shoshone land rights had been extinguished simply by the "gradual encroachment" of non-Indians onto Western Shoshone land. The Commission ordered the United States to compensate the tribe for a very small fraction of the value of the lands at issue. The Dann Band and other Western Shoshones refused to accept this compensation and have continued to use and occupy their ancestral lands.

In *United States v. Dann*,[327] the U.S. Supreme Court ruled that the Government's compensation payment—which still sits in a U.S. Treasury account in Washington, D.C.—barred the Western Shoshones from asserting their aboriginal land rights, regardless of whether they accepted the payment. In a later case, *Western Shoshone National Council v. Molini*,[328] the Ninth Circuit Court of Appeals extended the U.S. Supreme Court's decision by holding that Western Shoshone hunting and fishing rights are part of the aboriginal title that was extinguished.

Based on these decisions, Western Shoshone people are treated as trespassers on their ancestral lands and threatened with the impoundment and destruction of their cattle. State officials threaten to prosecute members of the Western Shoshone for hunting according to their traditions, and the Government has authorized mining and other activities on Western Shoshone lands that threaten the environment upon which the tribe's health and well being depend. The Dann Band has filed a petition with the Inter-American Commission on Human Rights and an urgent action request with the UN Commission on the Elimination of Racial Discrimination, asserting that attempts to extinguish Western Shoshone aboriginal and treaty-guaranteed lands without providing the tribe with an opportunity to be heard and with fair compensation violate the Danns' human rights under international law.

Recommendations

- Under the Convention, the Government must renounce the doctrines of plenary power, extinguishment, and treaty abrogation.

- The Government should promote and rapidly develop its laws and policies to ensure that autonomous, dignified, and culturally vital Indigenous tribes and nations will exist and be

provided with the opportunity to prosper within a principled legal framework. That new legal framework would guarantee racial equality, root out all notions of inferior and superior races, and strictly prohibit discrimination against Indigenous Peoples in the application of constitutional protections.

- The core principle of a just and non-discriminatory relationship between the Government and Indigenous Peoples would be agreement and consent, particularly as manifested in treaties and other agreements, to establish racial justice for Indigenous Peoples of the United States.

Article 5(c)

Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

Voting Rights

135. Under federal, state, and international law, the right of citizens to vote is one of the basic principles of electoral democracy. Nevertheless, racial discrimination and exclusion remain significant obstacles in the U.S. political system. Although advances have been made, equal and fair representation is far from reality. Discrimination against minority voters is evidenced by lawsuits complaining of, among other things, discriminatory apportionment plans, voter intimidation aimed at minority voters, and unconstitutional ex-felon disenfranchisement laws that disparately impact racial minorities.

136. The Government Report fails to acknowledge that more aggressive enforcement of the Voting Rights Act 1965 ("Voting Rights Act"), and other laws that protect the right to vote, is desperately needed. Although the Voting Rights Act[329] has provided a meaningful way to combat racial discrimination in the political system, enforcement efforts have proven inadequate. The U.S. Department of Justice is responsible for enforcing the Voting Rights Act and is authorized to bring proceedings on behalf of the Government to remedy racial discrimination in the electoral process.[330] While the Department of Justice's enforcement efforts are laudable, their response to widespread and serious racial discrimination has been insufficient. In effect, private individuals and organizations are forced to carry the heavy burden of bringing complex and expensive litigation to protect minority voting.

137. Minority voters in the United States do not have equal access to the ballot. In the November 2000 General Election, evidence of discrimination and inequalities demonstrate a pattern of disenfranchisement of large numbers of minority voters. Minorities in counties throughout the United States faced discriminatory treatment, exclusion, and irregularities. The November election also highlighted the inequitable distribution of resources in the electoral process, where jurisdictions with large minority populations were far more likely to employ old, error-prone, ineffective voting machines. As a result, thousands of minority votes were not counted. Voters in largely minority areas of certain states also complained of random police check points encountered en route to the polls on election day. In some precincts, poll workers required minority voters to show photo identification, while white voters were allowed to vote with only a registration card. Often in areas with large language minority populations, there was a lack of bilingual access to ballot materials.

Case Study: Florida General Election, November 2000

The egregious voting irregularities that occurred in the November 2000 General Election in Florida resulted in the disenfranchisement of thousands of minority voters. In response, a coalition of nonprofit organizations filed a lawsuit in federal district court against Florida state officials and the Supervisors of Elections in several Florida counties.[331] Brought on behalf of the NAACP and individual Black voters who were denied their right to vote or whose votes were less likely to be counted, the complaint alleges that the state of Florida violated Black voters' constitutional and statutory rights by using less reliable voting systems in areas with larger Black populations, by mishandling voter registrations and purges of voter rolls, and by placing voters on an inactive list that prevents those individuals from casting a ballot without telephone contact with the Supervisor of Elections office—a nearly impossible task because of jammed telephone lines on election day.

Plaintiffs seek the implementation of statewide uniform voting systems and standards, uniform polling place procedures, a Voters' Bill of Rights, which will be posted at all polling locations on election day, and a more accurate and reliable system for removing voters' names from registration rolls to ensure that all eligible voters have access to the ballot on election day.

Minority Voter Intimidation Programs

138. Ballot Security measures have the effect of intimidating and discouraging minority voters from exercising their constitutional right to vote. For example, in the final days of the 1990 U.S. Senate race in North Carolina, the state Republican Party mailed over 150,000 postcards to voters in heavily Black precincts in North Carolina that falsely informed voters about severe criminal penalties for voter fraud. In a 1993 election in New York City, off-duty police officers and firefighters were stationed at heavily minority precincts. And in some Hispanic neighborhoods, signs were posted that falsely stated that immigration officials would be at the polls and would deport voters who were improperly registered.

139. The Government Report fails to acknowledge the existence and serious impact of Ballot Security Programs, which were employed as recently as the November 2000 General Election in the heavily minority areas of Texas and Florida. Because minority citizens have endured a long and difficult struggle to gain the right to vote in the United States, the long-term effects of Ballot Security Programs can be devastating to entire minority communities by suppressing votes, especially when individuals may already feel intimidated or insecure about exercising their right to vote.

Felon Disenfranchisement

140. The Government Report highlights the progress that the Government has made in expanding suffrage to all sectors of the population. It refers to the right to vote as, "[a]mong the most fundamental rights in any democratic system[,]..." The Government Report, however, fails to acknowledge the issue of felon disenfranchisement and its

racially disparate impact on African-American males. 3.9 million U.S. citizens are disenfranchised by so-called felon disenfranchisement. Although literacy tests and poll taxes are an outlawed means of denying African-American citizens the ability to vote, felon disenfranchisement laws operate today in the same way by denying the ability of 1.4 million African-American men to vote.

141. In the United States, forty-six states and the District of Columbia deny all convicted adults in prison the ability to vote. Thirty-two states also disenfranchise felons on parole, and twenty-nine states disenfranchise those on probation. Furthermore, in fourteen states, ex-offenders who have fully and satisfactorily completed their sentences are denied the ability to vote for life.[332]

142. Approximately 3.9 million citizens, or 2% of the eligible voting population in the United States, are disenfranchised, including 1.4 million of whom have fully completed their sentences.[333] Six states exclude 4% of their adult population from voting, or more than one in twenty-five adult citizens.[334] Florida and Texas each disenfranchise more than 600,000 people.[335] Alabama, California, and Virginia each disenfranchise close to a quarter of a million people.[336]

143. The disparate impact of disenfranchisement laws on African-American men is especially severe. "Thirteen percent of African-American men—1.4 million—are disenfranchised, representing just over one-third (36%) of the total disenfranchisement population."[337] Although the impact varies by state, the rate of African-American felon disenfranchisement is seven times the national average.[338] In two states, almost one in three African-American men is disenfranchised,[339] and in eight states, one in four African-American men is disenfranchised.[340]

144. The political importance of African-American disenfranchisement is painfully clear: for example, in the 1996 General Election, 4.6 million African-American men voted, while approximately 1.4 million African-American men were disenfranchised.[341]

145. The racially disparate impact of felon disenfranchisement contradicts the principles contained in the Convention.[342] Specifically, Article 5(c) requires states parties to guarantee, without distinction as to race, color, or national or ethnic origin "[p]olitical rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage."[343] Under the Convention, states parties are required to eliminate laws or practices that may be race-neutral on their face but that have "the purpose or effect" of restricting rights on the basis of race.[344] United States felon disenfranchisement laws appear to be precisely the type of laws specifically condemned by the Convention, as they "unnecessarily and unjustifiably create significant racial disparities in the curtailment of an important right."[345]

Case Study: Disenfranchisement in California

Abran Ramirez was denied the ability to vote for life in California because of a twenty-year old robbery conviction, even though he had served only three months in jail and had successfully completed ten years of parole. In *Richardson v. Ramirez*,[346] the U.S. Supreme Court upheld the California ex-felon disenfranchisement law. The Court's ruling reversed the Supreme Court of California's decision entitling Ramirez to the restoration of his right to vote, on the basis of its finding that state disenfranchisement laws violate the equal protection clause of the 14th Amendment. In reversing the California Supreme Court's decision, the U.S. Supreme Court held that because the practice of disenfranchising felons was historically accepted, felons could be deprived of voting rights if such laws were applied equally to all felons.

Case Study: Challenging Felon Disenfranchisement in Florida

Under Florida law, any person convicted of a felony is permanently disenfranchised, unless executive clemency is granted to restore the individual's civil rights. While very few former felons successfully regain the right to vote through the clemency process, more than 647,000 Florida citizens, or 6% of the adult population, are permanently disenfranchised. The racial impact of Florida's disenfranchisement laws is especially severe: 204,600 disenfranchised felons, or 47%, are African-American men. 31% of the African-American adult male population in Florida cannot vote as a result of felon disenfranchisement.[347]

Challenging Florida's disenfranchisement laws in federal court is a class of Florida ex-offenders who have fully and satisfactorily completed their sentences. *Johnson v. Bush*.[348] The plaintiffs contend that the permanent disenfranchisement of felons in Florida was initially adopted to discriminate against African-American voters and continues to have a significant discriminatory impact, in violation of the U.S. Constitution and the Voting Rights Act.

Recommendations

- The Government should vigorously enforce the Voting Rights Act and other laws to protect and to preserve the right to vote for all citizens and carefully monitor state compliance with voting rights laws.

- The Government should commit more resources to enforcement of the Voting Rights Act's language assistance requirements by providing greater technical assistance. We recommend the employment of greater numbers of federal poll workers to provide the necessary technical assistance and enforcement of the Voting Rights Act.

- The Government should encourage private litigation against individuals and organizations threatening the rights of minority voters.

- The Government should commit more resources to ensure that every citizen's right to vote is protected and preserved.

- The Government should initiate lawsuits challenging state disenfranchisement laws that deny former felons the ability to vote in federal elections. The Government should also pass legislation restoring federal voting rights to ex-offenders who have completed their sentences.

- The Government should consider using its spending power to encourage states to repeal the most unfair aspects of felon disenfranchisement laws.

- The Government should encourage efforts to register citizens to vote, including outreach to immigrants to encourage them to begin the naturalization process.

- The Government is encouraged to comply with federal language assistance requirements by improving and investing in voting technology.

Article 5

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the state;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

Immigration and Migration

146. Throughout much of its history, the United States has, through its immigration laws, engaged in egregious discrimination on the basis of race and national origin. Persons of Asian descent, in particular, were systematically targeted until well into the 20th Century by laws governing the admission and removal of aliens.[349] The Immigration Act of 1924, which established quotas for admission based on national origin, resulted in disproportionate exclusion of Africans and Asians.[350] While *de jure* discriminatory policies in immigration law were slowly eliminated throughout the latter half of the 20th century,[351] to this day Congress and the Immigration and Naturalization Service (INS) retain nearly unbridled power to enact or enforce laws that are easily made subject to application in a racially discriminatory manner under the widely-criticized[352] but long-standing "plenary power" doctrine.

147. It is a well-established principle of international law that sovereign States may regulate their own borders. Such regulation, however, must otherwise be consistent with international law, including, for example, the Convention. Accordingly, the Government must ensure that its immigration laws are administered in a non-discriminatory manner. While the Government has made advances in eliminating certain forms of *de jure* discrimination,[353] anecdotal evidence strongly suggests that Government agencies and officials continue to implement U.S. immigration laws in a discriminatory manner.

Evidence of Discriminatory Practices

148. A recent study concluded that among immigrants detained pending an asylum hearing, the length of detention varied depending on the immigrant's nationality. For example, nationals of several African countries, including the Democratic Republic of the Congo, Algeria, Nigeria, and Guinea, were detained during the first two years of expedited removal for periods that were well above the average length of detention. Additionally, the study found that at JFK International Airport in New York City, which is the primary port of U.S. entry for African immigrants, the average length of detention for African asylum seekers in the first year of expedited removal was 149 days, compared to 115 days for other immigrants arriving at JFK International Airport.[354]

Case Studies: Discriminatory Implementation of U.S. Immigration Laws

January 1998, JFK Airport

Richard, a Jamaican citizen and a legal, permanent resident of the United States, was returning to the United States in January 1998 to take final examinations at a well-known American university when he was stopped by the INS at JFK International Airport. Even though his passport clearly identified him as a legal, permanent resident, and even though he had a letter from his attorney explaining his immigration status, INS officers shackled him and held him at the airport overnight. During that time, he was also strip-searched on two occasions and verbally abused. Richard reports that one INS officer stated that the only way Jamaicans could obtain green cards was if "they jerked chicken well" or "mopped the floor well." The officers also taunted him with their authority: "This is not America," they told him. "You're in Jamaica. We are your judge and jury." The next morning Richard was transported to the Wackenhut detention center in Queens, where he was finally able to call his attorney. He spent the remainder of that day and night at Wackenhut before his attorney arrived the following day, at which point Richard was released.[355]

June, 2000, JFK Airport

Sharon McKnight, a U.S. citizen, was deported to Jamaica on June 11, 2000 after INS inspectors at JFK International Airport wrongly questioned the authenticity of her U.S. passport and dismissed as fake the birth certificate presented by her waiting relatives. McKnight, who was 35 years old but had the mental capacity of a young child, was held overnight in shackles and handcuffs before being sent back to Jamaica, where there was no one to meet her. During her time at the airport, McKnight was not given anything to eat and was not allowed to use the restroom, forcing her to soil herself. A week later, she was allowed to return to the United States after the INS acknowledged that it had made a mistake. McKnight continues to have nightmares and has filed a lawsuit against INS officials.[356]

149. Disparities based on race and national origin are also evident in the admission of refugees. In the 1990s, 514,443 refugees, more than half of the total admitted to the United States during that decade, came from Eastern Europe, in spite of the fact that ethnic and religious strife in that region was generally easing. A third of the refugees came from Southeast Asia, primarily Vietnam and Laos. Only 64,294 refugees, or 6% of the total, were admitted from Africa during the same period even though ethnic and political crises in many African countries were escalating during this time period.[357]

150. An important goal of U.S. immigration policy is to maintain family unity. Nationals of other countries may apply for certain categories of immigrant visas based on their family relationship to a U.S. citizen or legal permanent resident. There are numerical limits placed on the amount of visas available in each category and additional limits placed on the number of visas allocated to any one country. Because of the per-country limits, the wait for nationals of some countries is significantly longer than for those of others causing families to remain separated for several years. For example, Mexican nationals must wait from one to seven years longer than nationals of other countries to be reunited with their

U.S. citizen or resident family members living in the U.S.[358] Visa caps should be increased to insure prompt processing of visa applications for all nationalities.

151. Evidence also suggests that the Government has actually encouraged U.S. consular officers to consider race when determining whether to grant a visa to an applicant. In *Olsen v. Albright*, a consular officer stationed in Brazil sued the State Department after he was fired for refusing to follow the consulate's racial visa eligibility policies. [359] The manual he refused to follow established fraud profiles that were based on factors such as race and national origin, instructed consular officers to scrutinize Korean and Chinese applicants for fraud, and declared anyone from certain predominately black cities to be "suspect unless older, well-traveled, etc."[360]

Language Discrimination

152. Anti-immigrant laws enacted in 1996 bar many immigrants lawfully present in the U.S. from receiving federal aid for health care or nutritional needs. As a result, immigrant children are three times as likely as children of natives to lack access to health care and twice as likely to be in fair to poor health. These immigration policies have significant consequences for racial minority groups regardless of immigration status. Although most immigrants are not eligible for federal aid programs, many have U.S. citizen children or spouses who are.[361]

153. Many eligible families have trouble securing public benefits to which they are entitled because of language barriers, and routinely face open hostility from case-workers because of their immigrant status or foreign appearance.[362] One half of Spanish speaking parents indicated that they did not complete their Medicaid application because it was not translated.[363] In one study, 84% of speakers of Asian languages reported that they needed translation to apply for public benefits and that no translation was available.[364] Latino parents indicated that language barriers were the number one problem in obtaining health care for children, leading to misdiagnoses and inappropriate medical care.[365] Fourteen percent of Latinos reported that a doctor or health-care provider treated them with disrespect because of language difficulties.[366]

154. It is recognized that Executive Order 13166, issued by former-President Clinton, encourages stronger adherence to Title VI of the Civil Rights Act of 1964. The Executive Order mandates federal agencies to issue policy Guidances to improve access to federal and federally funded programs by Limited English Proficient ("LEP") persons. The policy Guidances are similarly applicable to all recipients of federal funding. It is recognized that federal agencies that have complied with the Executive Order encourage stronger adherence to Title VI of the Civil Rights Act of 1964 and improve access to federal agencies by LEP persons.

Racial Profiling and Disparities in Immigration Enforcement

155. In one area of immigration enforcement—the questioning of suspected undocumented immigrants—the U.S. Supreme Court has suggested that the use of racial stereotyping may be permitted. The U.S. Supreme Court held that while Mexican ancestry cannot be used exclusively to justify stops and interrogations by U.S. Border Patrol officers, it did suggest that "the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor" and therefore may be considered as one of several factors.[367]

156. While two U.S. lower courts have more recently held that Latino appearance is not an appropriate factor or is "of little probative value" in determining whether a person is in the United States illegally,[368] racial profiling in immigration law enforcement continues. In 1999, for example, 83% of the people deported from the United States were Mexican, even though Mexicans comprised only 54% of the undocumented alien population within the United States.[369] Mexicans also accounted for 98% of the Border Patrol's 1.5 million arrests on the Southwest border in 1999.[370]

157. Even in areas far-removed from the U.S.-Mexico border, Hispanic immigrants are arrested by U.S. immigration authorities at a rate that is grossly disproportionate to their representation in the U.S. population. For example, a sampling of raid records from the New York District of the Immigration and Naturalization Service ("INS") demonstrates that 95% of the immigrants arrested between 1997 and 1999 were from Mexico, Central America, or South America[371]—even though illegal immigrants from those countries accounted for only approximately 35% of the undocumented population in that area.[372] In addition, minority business owners and their employees, particularly in the Asian and Latino communities, are routinely targeted for worksite-enforcement raids by the INS.

Case Study: Racial Profiling in Immigration Enforcement
Operation Restoration, Chandler, Arizona

The impact of racial profiling was profoundly felt in Chandler, Arizona during the last week of July 1997. The local police and Border Patrol agents had an "informal" work relationship that led to a five-day sweep as part of "Operation Restoration," an economic redevelopment plan for the downtown area.[373] In the end, 432 undocumented immigrants, all of whom were Latino, were arrested and deported. The sweep not only affected immigrants; it also had a profound effect upon U.S. citizens. During the operation, the INS entered numerous homes at night without a search warrant, including homes belonging to U.S. citizens and legal residents. One immigrant and his family were told by the officers that "[w]e can do whatever we want, we are the Chandler Police Department."[374] The family was questioned for 90 minutes even after the family presented proof of their legal status. Arizona's Attorney General found that Operation Restoration violated the constitutional rights of many residents and greatly harmed the trust relationship between the police and the community.[375]

Dallas, Texas

In the 1990s, INS supervisors in Dallas, Texas operated a program, commonly referred to as operation "Seek and Keep," that resulted in the indictment of more than thirty people. According to the INS supervisors who oversaw the operation, the INS photocopied phone book listings of Indian restaurants and Dunkin' Donuts franchises and ordered INS agents to check the identity of Indian and Pakistani workers. Supervisory Special Agent John W. Page and District Director Bill Harrington both testified that "they were acting on no specific investigative lead or probable cause when they ordered the identify checks."[376] Civil rights advocates, including the Texas American Civil Liberties Union, have stated that the investigation was "a flagrant case of racial profiling."[377]

San Antonio, Texas

On Thursday, Jan. 20, 2000, the Immigration and Naturalization Service (INS) conducted a morning raid at the Randolph Air Force base in San Antonio, Texas, targeting a building in which many Indian computer programmers were working. Even after producing original work visas and passports, many were taken to an INS detention facility. At the detention facility, they were denied food and clean water. Among those who were detained without food and water were two pregnant women. The target of the INS raids were employees of two Indian-owned companies. After twelve hours in INS custody, those programmers that did not work for either company were released. The remaining 23 were permitted to post bail of $5000 if they signed a document beginning deportation proceedings against them. Those that requested a lawyer were told that they wouldn't be able to meet a lawyer until the next morning and would have to spend the night in detention.

Santa Barbara, California

A February article in the World Journal described the plight of a Chinese restaurateur couple targeted for an INS raid in Santa Barbara, California. The couple, like many other employers seeking to draw workers from Los Angeles, provided housing to their employees. The couple's business was raided and they were charged with hiring and harboring undocumented immigrants. They are now serving a one-year sentence. Remarkably, two of the allegedly undocumented part-time employees involved in this case also worked full-time at a neighboring high-priced western restaurant — which continues to operate undisturbed by the INS.

Employer Sanctions

158. Furthermore, immigrants, and those suspected to be immigrants due to their race, continue to suffer from employment discrimination. Legislative provisions, such as the "sunset provision" of the Immigration Reform and Control Act ("IRCA"), written to safeguard workers who appear "foreign" from discrimination, remain inadequate and unenforced. Minority workers remain vulnerable to workplace abuse and exploitation, and often face greater challenges in attempting to fight for fair working conditions. Employers have repeatedly used immigration law enforcement to threaten workers attempting to organize

and unionize, often resulting in mass firings, penalization, and deportation of immigrant workers.

159. Current immigration policy places employers in a law enforcement role by requiring them to examine and authenticate immigration and other identification documents of all employees. The IRCA prohibits employers from hiring certain types of aliens and requires employers to verify the immigration status of each new employee. Employers who fail to do so face a series of employer sanctions including civil fines or criminal penalties. Soon after this law was enacted, the United States General Accounting Office ("GAO") documented a "wide-spread pattern of discrimination" that had arisen as a result of employer sanctions.[378] These discriminatory practices included employers requesting work authorization documents only from *foreign-looking* or *foreign-sounding* applicants, and refusing to hire non-citizens.[379] Employers continue to apply verification procedures selectively, and excessively scrutinize identification documents of racial minorities. Because these illegal discriminatory practices can affect the likelihood of securing employment they are particularly harmful to Hispanic and Asian applicants.[380]

Border Enforcement

160. Discrimination is also evident in the disproportionate enforcement strategies used along the U.S.-Canada border. In the four-year period between 1994 and 1998, the INS increased its workforce along the Mexican border by 3,842 armed agents.[381] By comparison, the workforce along the Canadian border during the same period did not increase and had a total staffing of only 140 agents for a border area twice as long.[382] U.S. border policy has created a militarized zone along he U.S.-Mexico border which contributes not only to deaths caused by hazardous natural conditions, but also hate crimes and vigilante activities against migrants and others who are perceived to be of Latin American ancestry. In 1994 there were 23 deaths at the border as a result of exposure, drowning and homicide. By the end of fiscal year 2000, annual migrant deaths had increased to 369.[383]

The over-enforcement of immigration laws at the Mexican border in comparison to the Canadian border is not solely a result of demographic differences between the two countries, but is fueled by anti-Mexican sentiments held by certain segments of the population. Incidents of vigilante activities by U.S. citizens have risen in the past several years. Local ranchers have joined forces with white-supremacists and anti-immigrant groups to stop Mexicans and other Latin-Americans from entering the U.S.[384] Unequal border enforcement policies continue to exacerbate theses problems.

Detention and Deportation of Immigrants with Criminal Convictions

161. While the laws regarding immigrants convicted of criminal offenses are racially neutral on their face, racial disparities in the criminal justice system *a priori* cause non-white immigrants to face deportation at a rate that is disproportionate to their representation in the U.S. population. Immigrants and refugees suffer unequal treatment within civil and

criminal justice systems due to their immigration status, have little access to protections guaranteed to citizens, and face standards of evidence and punishment unequal to those of citizens. Examples include the denial of due process rights and equal protection rights of immigrants and refugees, indefinite detention, as well as the use of "secret evidence" in legal proceedings against non-citizens. Immigrants and refugees are now the fastest growing incarcerated population in the U.S. One third of those currently languishing in indefinite INS detention are of Southeast Asian descent.

162. Under immigration law reforms enacted in 1996, most immigrants convicted of even minor or non-violent offenses are subject to mandatory, permanent deportation with no opportunity to even offer proof of rehabilitation, contributions to family and community, veteran status, or other extenuating circumstances.[385] In addition, any immigrant facing deportation proceedings due to the commission of a criminal offense must be taken into custody and remain in detention with no opportunity to post bail regardless of the nature of the offense or other equities, until the deportation order has been executed.[386]

Recommendations

- Based on the statistical evidence developed in the Center For Human Rights report, the Government should conduct a broader investigation to establish whether the immigration laws are being enforced in a discriminatory manner on a systematic basis. It should be a priority of the Government to gather more complete and accurate statistics relating to race and the administration of U.S. immigration laws.

- Based on the *Olsen* case, the Government should take steps to ensure that governmental officials exercise their discretion in a non-discriminatory manner. This would include the enactment of administrative regulations (i) prohibiting the practices outlined in *Olsen*; and (ii) mandating the reporting of any discriminatory activities like those described in *Olsen*.

- The Government should monitor the enforcement of immigration policies to ensure that such policies are not administered in a discriminatory manner. Statistics should be gathered and published on a regular basis so that the INS and other federal agencies can be monitored for compliance with the Convention.

- The Government should eliminate the harsh mandatory deportation and detention provisions enacted in 1996 to prevent the unfair effects of racial disparities in the criminal justice system from being repeated in the immigration context.

- The Government should make special efforts to remove barriers that prevent minority groups from accessing public services.

- The Government should aggressivly discourage the passage of English only legislatoin. The aforementioned legislation seeks to abrogate the efforts of Executive Order 13166 and would serve to further disenfranchise LEP persons.

- The Government should aggressively discourage the passage of language ordinance signs. The aforementioned legislation would serve to disenfranchise minority communities.

Racial Discrimination in Housing

163. Racial discrimination remains an unfortunate obstacle facing minority Americans seeking to purchase a home or to find adequate and affordable housing, either public or private. Although a home is "the single most-valuable asset owned by the typical American,"[387] discrimination prevents many minority Americans from gaining access to the American dream. Despite the passage of over thirty years since the enactment of the Fair Housing Act in 1968, the Government has acknowledged that "housing discrimination . . . remains with us"[388] and that "discrimination against home buyers of color is actually worsening in the United States."[389] Sadly, minority Americans are "far less likely than Whites to be homeowners and far more likely to live in deficient or overcrowded housing."[390] For those seeking rental opportunities, the picture does not improve. Discrimination against minorities in the private rental market and continuing segregation and discrimination in the public rental market continue to disadvantage minorities. Along with the increasing lack of affordable housing and inadequate public housing assistance, this housing discrimination and segregation in America renders the escape from historic patterns of poverty and segregation all the more difficult because minorities continue to be deprived of equal access to economic and educational opportunities.

164. The Government Report highlights certain statutes and lawsuits that have been used to combat racial discrimination in housing.[391] The Government Report also states that the U.S. Department of Housing and Urban Development ("HUD") is currently undertaking a study of trends in housing sales, rentals, and mortgage lending to isolate and address continuing problems of discrimination. While the Government Report highlights the sporadic and fairly limited enforcement efforts in the areas of fair lending and public housing, it fails to acknowledge that a more comprehensive approach is needed, especially in light of the discrimination in lending and extensive steering in both private and public housing, which ultimately helps maintain segregated neighborhoods.

165. Although enforcement actions initiated by HUD are laudable, they have clearly not been sufficient to combat racial discrimination in housing. Moreover, although HUD should be commended for its recently commenced study, it is the first study of its kind since 1989 and only the second study of its kind since 1977.[392] As poor oversight of federal housing programs and enforcement of fair housing laws are among the various problems that allow patterns of racism to persist, additional studies must be conducted. Moreover, while HUD and the U.S. Department of Justice recently filed and settled their first joint lawsuit against a lender for unfair lending practices, more such suits must be filed if anti-discrimination laws are to be more than words on paper.[393] As such, it must be recognized that the philosophy and priorities of the executive branch directly impact the enforcement of anti-

discrimination laws. It remains to be seen whether the Bush Administration will enforce these laws with the necessary zeal.

Inequality in the Private Housing Market

166. From the outset of the home-buying process, minorities face obstacles that whites do not, beginning with the number and quality of available homes from which to choose. African-Americans, for instance, are routinely shown or recommended 21% fewer potential properties than whites, and Hispanics are shown or recommended 13% fewer properties than whites.[394] Instead of asking African-Americans and Hispanics about their housing needs, real estate agents are typically more interested in their qualifications.[395] Once shown a home, real estate agents are more likely to provide information relating to financing opportunities to a white customer than to African-American or Hispanic customers.[396]

167. Minority home buyers also face the problem of racial or ethnic steering, whereby they are directed by real estate agents toward homes in neighborhoods with larger minority populations, which are generally less affluent than those shown to comparable white home buyers. In fact, "both blacks and Hispanics face a 21% probability of being shown or recommended neighborhoods that are either less affluent, lower value, or higher percent minority than those shown to their white Anglo counterparts."[397]

168. Even if minority home purchasers are able to view available properties, it is likely that they will confront even greater difficulties in obtaining financing to purchase a home. Across the country, a minority applicant for a loan is more than twice as likely to be rejected by a lender as a white applicant.[398] Although some of these rejections are the result of "differences in the financial characteristics of the borrowers and the neighborhood characteristics of the property,"[399] an equal number of rejections are the result of racial discrimination.[400] The results of unequal treatment are striking—73.7% of whites own homes, compared to only 47.2% of African-Americans and 45.4% of Hispanics.[401] Even more troubling is the fact that the rate of home ownership among African-Americans and Hispanics has risen by only 1.6% and 4.2%, respectively, since 1983,[402] suggesting that the progress in the area of minority home ownership is very slow indeed.

Case Study: Unfair Lending in America

Milwaukee, Wisconsin

Milwaukee, Wisconsin has been described as "the most segregated community in the nation."[403] Whereas 64% of the white households in the Milwaukee metropolitan area are located in the suburbs, only 2% of African-American and 23% of Hispanic households are located in the suburbs. This segregation results in inferior educational opportunities for minorities and isolates minorities from employment opportunities located outside the central city. Discrimination in lending practices has exacerbated this problem, denying minorities fair opportunities to buy and sell their homes. Such discrimination has denied minorities the chance to accumulate the same

housing wealth as whites. In the Milwaukee area alone, this loss has been estimated at $2.2 billion—$31,000 for each African-American household, and $26,000 for each Hispanic household.[404]

Oakland, California

Analyzing mortgage lending in Oakland, California, one study found that African-Americans and Hispanics had the lowest home loan approval rate. Whites in Oakland are approved for home loans at a rate that is 20.3% higher than the rate for African-Americans, and 11.1% higher than the rate for Hispanics.[405] The disparity in loan approval rates between whites in the highest income quartile and African-Americans in the highest income quartile was a disturbing 20.7 percentage points, an astounding rate that cannot be explained solely by differences in credit history, but can also be attributed to differential treatment based on race.[406]

169. Efforts by the federal government to combat discrimination in lending to minorities seeking to purchase a home are improving,[407] but have thus far yielded lackluster, and sometimes catastrophic results. The Federal Housing Administration ("FHA"), an agency within HUD, encourages lenders to lend to borrowers who might not otherwise qualify for a home loan by insuring such loans. Unfortunately, unscrupulous lenders and poor oversight by HUD has led to rampant abuse of the FHA programs. Lending institutions make risky loans without consequence. When defaults inevitably occur, HUD takes possession of the properties and attempts to resell them. Unfortunately, HUD often allows these homes to remain vacant for long periods of time, and they become havens for criminal activity and hinder efforts at community renewal, further impeding progress in primarily minority neighborhoods in the inner cities, where a disproportionate number of FHA foreclosures occur.[408] Although the Government has been successful in stopping some FHA-abuse schemes, its oversight efforts are minimal and have done little to stem fraud in the FHA program. The abuses drain large amounts of money that HUD might otherwise be able to use to fund other housing measures.

Case Study: Abuse of the FHA system

In 1978, HUD created the Section 203(k) program, whereby borrowers can finance the purchase of a home as well as home-improvement costs through one mortgage. HUD guarantees the loans. Designed to assist low-income borrowers purchase and renovate homes in need of rehabilitation, the program has instead been used by speculators and unscrupulous mortgage lenders as a get-rich-quick scheme.

In New York City's Harlem neighborhood, homes that were supposed to have been purchased, renovated, and made livable were instead sold to speculators who resold the properties without making any renovations or otherwise rehabilitating the properties. Or, when rehabilitation proved to be far more expensive than the purchaser anticipated, the purchaser simply defaulted. In all, 450 homes financed under Section 203(k) are in default.

Most of the homes whose owners are in default remain vacant, which attracts crime and depresses property values. Although the U. S. Attorney is investigating and is expected to seek indictments for fraud, it is HUD that may be largely responsible for the fiasco—in 1999, the General Accounting Office noted that HUD was "not adequately overseeing key aspects of the 203(k) program."[409]

170. For African-Americans, the barriers to purchasing family homes have been matched or exceeded by the obstacles to buying and keeping a family farm. Although there were 925,000 African-American farms in the United States in 1920, today there are fewer than 18,000.[410] A principal reason for this decline and for the difficulties of African-Americans in keeping family farms has been discrimination against African-Americans seeking credit from the U.S. Department of Agriculture ("USDA"). The USDA admitted that it had indeed discriminated against African-American applicants for farm loans, and in 1999 it settled a class action lawsuit brought by African-American farmers. Although such an admission of fault and settlement by the Government is commendable, the eventual payouts received or to be received by African-American farmers are insufficient to save their farms or allow them to purchase new ones.

Case Study: *Pigford v. Glickman*[411]

Although it has been called the "most organized, largest civil rights case in the history of the country,"[412] the settlement of *Pigford v. Glickman* falls far short of compensating most African-American farmers for the losses they have suffered. Although most farmers are entitled to a forgiveness of their outstanding USDA loans and a $50,000 tax-free cash payment, and others may receive more money if they have extensive documentation, many African-Americans do not consider this to be enough. After enduring many years of discrimination and the heartbreak of losing a family farm, such payments seem woefully inadequate to many. As one African-American farmer has stated: "$50,000 is nothing compared to the suffering that farmers go through. . . . [T]hat's just a slap in the face to me."[413]

171. When adequate financing to purchase a home cannot be found, many minority Americans must instead look for rental housing. This presents problems of its own. Despite the economic boom of the 1990s, the number of Americans with worst case housing needs (defined as Americans not receiving public assistance whose income is 50 percent lower than the average for their locality, who spend more than half of their income in rent, or live in substandard housing) has actually increased—from 1995 to 1999, the number grew by 5.4 million people.[414] Minority Americans have suffered worse than their white counterparts.[415] At the same time, affordable rental housing units have decreased 5%—or 370,000 units—since 1991.[416] Unfortunately, public housing alternatives are providing fewer and fewer options.

Public Housing

172. The discrimination minorities face in seeking private housing options is just as rampant, if not more so, with respect to public housing. This is troubling because it directly implicates government actions and policies and is not just a failure to successfully police private acts of discrimination. Long after open segregationist policies were abandoned, *de facto* segregation in public housing remains prevalent in the United States and is one of the leading factors inhibiting the progress of low income minorities. For many years, the Government constructed and planned public housing projects in a manner that HUD has admitted reinforced the pernicious effects of *de facto* segregation. As HUD has acknowledged, "For decades, public housing developments were built in predominantly low-income, minority neighborhoods. By design, this meant a community's most affordable, subsidized units were concentrated in areas that were more dilapidated, higher in poverty, lower in political power, and more poorly supported by necessary public services."[417]

173. Local Public Housing Authorities ("PHA"), which have discretion in how to assign residents to public housing developments, have used this discretion to assign minorities to older buildings in poor condition, while assigning elderly whites to comparatively newer buildings in better condition.[418] An African-American living in public housing typically lives in a project that on average is 81% African-American and where 75% of tenants live below the poverty level.[419] When compared to their neighbors who live near (but not in) public housing, the poverty rate among residents of public housing is more than twice that of their neighbors.[420] A typical white American living in public housing lives in a project that is 82% white and where 52% live below the poverty level.[421] An Hispanic living in public housing is likely to live in a project that is 52% Hispanic and where 61% of tenants live below the poverty level.[422]

174. For many years, public housing was constructed in African-American communities by design. One study found that "low-income projects were systematically targeted to African-American neighborhoods in a discriminatory fashion . . . . The institutional mechanism greatly exacerbated the degree of poverty concentration for one group in particular—African-Americans."[423]

Case Study: Pinellas County, Florida

In 1998, HUD reached a voluntary compliance agreement with the Pinellas County Housing Authority ("PCHA") for various practices that deprived minority residents of their civil rights. The Pinellas County Housing Authority had a practice of excluding African-Americans from housing developments that were predominantly white and required disabled residents to pay for their own access improvements. Additionally, since 1987, just four African-American elderly families have been placed in the PCHA's elderly housing developments, despite the fact that each development had 100 units or more. The PCHA agreed to assist African-Americans in moving to better-kept and predominantly white housing and to reimburse those disabled residents who had been forced to pay for their own wheelchair ramps.[424]

175. Despite the deficiencies in public housing in the United States, the demand for such housing remains strong. A 1999 study found that applicants desiring public housing were forced to wait nineteen months from the time they applied until they received it.[425] The majority of people applying for public housing are minorities.[426]

Spillover Effects: Unequal Opportunity and Violation of Civil Rights

176. Seeking to provide housing opportunities for minority Americans in predominantly white neighborhoods does not imply that white neighborhoods are inherently better than minority neighborhoods. Rather, it recognizes the destructive effects of racial separation, which "creates racially homogenous public institutions that are geographically defined, most importantly school districts. It limits the access of many minorities to employment opportunities, particularly in predominantly white areas . . . . It limits minorities' access to place based networks that provide access to jobs and economic opportunities, particularly for youth. It leads to a racial concentration of poverty in cities and to racial polarization in politics and in the distribution of resources. Because of strict segregation in cities and suburbs, African-Americans and Whites do not perceive their interests to be common."[427]

177. The result of this discrimination is that minorities are effectively shut out of "suburban ring" communities around virtually all major U.S. metropolitan areas. Minorities are thus denied services those communities provide, which is important because the corresponding services are often inferior in the neighborhoods where most minorities are thereby relegated.[428] For example, despite numerous court decisions and legislation, "school segregation between whites and non-whites—presumably ended by federal legislation and court rulings in the 1950s and 1960s—is making a noticeable comeback, primarily due to residential housing patterns and population shifts from urban to suburban school districts."[429] In fact, "although Black, Hispanic and Asian students comprised only 37 percent of the total enrollment in metropolitan areas in 1989, minority enrollment growth accounted for four-fifths of the total metro area enrollment growth between 1989–1995."[430] Clearly, segregation in residential housing is keeping minority youths in separate and unequal schools because funding for these schools falls far below what their white, suburban counterparts receive.

Recommendations

- The Government should reduce the rate of defaults in its home loan insurance programs by increasing oversight. Objectives of the increased oversight should include requiring applicants to meet stricter qualifications and monitoring of the lenders' practices to prevent discrimination, risky loans, and loans to speculators who do not intend to live in the houses.

- When borrowers default upon HUD-insured properties, HUD should ensure that such properties are quickly turned over, do not remain vacant for extended periods, and are secured and maintained during any necessary vacancies.

- The Government must commit more resources to studying problems in housing markets and should conduct frequent studies to address problems before they become impossible to correct.

- The Government should encourage private litigation against lenders and local housing authorities by providing more funding to fair housing organizations and educational outreach to ensure that persons with fair housing and lending complaints know their legal options.

- When the Government has admitted past housing discrimination and such discrimination has not effectively been remedied, the Government should employ targeted affirmative measures to remedy past discrimination.

- The Government should commit more resources toward the construction of more units of public housing and should direct that such housing not be concentrated in high-population density, low-income areas.

- The Government should conduct a study to determine whether selectively privatizing public housing projects would allow a greater percentage of minorities to attain the benefits of home ownership.

- The Government should provide greater support to community development corporations that understand the plights of the neighborhoods they serve and are able to provide immediate assistance to those in need.

- The Government should meaningfully sanction those who receive federal funds, such as public housing authorities and municipalities, and provide them with incentives to create integrated housing opportunities.

- The Government should provide funding to fair housing and other civil rights organizations to promote fair housing and address the tensions that often arise when individuals exercise their fair housing rights.

Article 5

5(e) Economic, social, and cultural rights, in particular;

(i) The right to work . . . .

Discrimination in Federal Employment

178. In general, racial discrimination in employment practices is reflected in racial disparities in median household income and unemployment rates. Between 1997 and 1999, Hispanic households earned on average 32.7% less, and African-American households 38.5% less than white households. The average income of American Indians and Alaskan natives between 1997–1999 was $30,784 and the 1999 median household income was $30,735 for Hispanics and $27,910 for African-Americans compared to $44,366 for whites.[431] In addition, unemployment rates are much higher for minorities. For example, as of October 2000, 5.0% of Hispanic men and women, and 5.6% and 7.0% of African-American women and men respectively were unemployed, compared with 2.9% of both white women and men.[432]

179. While the Government's labor force is more diverse than the public sector,[433] increased efforts need to be made to create a federal workforce that is representative of the U.S. population, particularly in positions of greater responsibility or that require policy-making capabilities where minorities are under-represented. This lack of diversity is particularly stark in the area of senior executive service where there is an overwhelming under-representation of Asian Pacific Americans who are chosen for career appointments. Between 1990–1999, not one Asian Pacific American was selected for service in the Department of Housing and Urban Development, the State Department, the Department of Labor, or the Office of Personnel Management.[434] In combination, these agencies had 266 appointed positions. The Government uses a system that categorizes job levels by using Grades 1 through 15 based upon increasing levels of pay and responsibility. Thus, a Grade 15 position offers the most responsibility and pay, while a Grade 1 position offers the least. As of 1999, 60% of African-American federal employees were Grade 9 or lower.[435] In addition, African-Americans comprise only 6.5 % of the Senior Executive Service, the job level category that provides the highest visibility and most power and prestige, compared to their 17.1% composition of the entire federal civilian workforce.[436] As a result, the average salary for African-American federal employees is $37,456 compared to $44,886 for all federal employees.[437] Further, African-American employees are terminated from federal service at three times the rate of white employees, suggesting that racially or culturally based stereotypes affect the disciplinary process.[438]

180. As a more drastic example of the need for further Government involvement in promoting diversity in the federal workplace, Hispanics still remain the only underrepresented minority group in the federal government.[439] Hispanic employees comprise only 6.4% of the federal civilian workforce, roughly half of their total representation in the civilian labor

force.[440] On October 16, 2000, President Clinton addressed this discrepancy when he issued an executive order creating guidelines to establish and maintain a program for the recruitment and career development of Hispanics in the federal government.[441] In the past, increased focus on recruitment and career development has improved the representation of Hispanics in the federal workforce.[442] Thus, for the federal government to serve as a positive role model to the private sector in employment hiring and practices, President Bush's new administration must remain committed to the policies established by the Clinton Administration.

181. Moreover, in recent years, six major federal agencies were involved in significant employment discrimination lawsuits in which the plaintiffs alleged that the Government is plagued by systemic discrimination and harassment against minority employees. The agencies involved include the U.S. Department of Agriculture, the U.S. Department of Education, the U.S. Social Security Administration, the U.S. Environmental Protection Agency, the Secret Service, which is part of the U.S. Treasury Department, and the Federal Bureau of Investigation, which is part of the U.S. Department of Justice.[443]

Case Study: Litigation Relating to the Harassment of Minority Employees

Environmental Protection Agency ("EPA")

In August 2000, an African-American manager at the EPA won a $600,000 verdict in a race and sex discrimination case against the agency. The verdict ignited a rally where a number of minority EPA employees who were planning to file a class action lawsuit against the agency, related personal stories of discrimination. Their claims included accounts that an African-American employee was singled out from a group of six non-African-American coworkers and ordered to clean a toilet; an African-American lawyer at the EPA earned $30,000 less annually than her white colleague with similar credentials; and a supervisor illegally used the Social Security number of an African-American employee to obtain information about her personal life. Other employees complained of arbitrary performance evaluations, retaliation from supervisors for speaking up about unfair working conditions, being passed over for promotions and having endured retaliation after complaining about environmental or other hazards on the job.[444]

Secret Service/Treasury Department

African-American Secret Service agents are involved in an ongoing lawsuit against the U.S. Department of Treasury, which covers 250 African-American agents and dates back to 1974. The lawsuit alleges unlawful discrimination by the agency in hiring and promotion. New charges in the lawsuit include accounts that white Secret Service agents participated in racist gatherings in the 1980s and 1990s where signs with racial slurs were displayed and a simulated lynching of an African-American person took place. In addition, a retired African-American Secret Service agent contended in court papers that two Nigerian postage stamps were left on his desk with a note reading, "Go back to Africa" and that he received a death threat containing a racial epithet on a home telephone line known only to Secret Service personnel. The court papers also allege

that another African-American agent, who was married to a white woman, found that someone had taped monkey faces over pictures of his children.[445]

Defense Contractor

The U.S. Equal Employment Opportunity Commission ("EEOC") intervened in two private lawsuits brought against defense contractor Lockheed Martin Corporation ("Lockheed") on behalf of hundreds of African-American employees. The cases charge that managers at Lockheed harassed African-American workers, deprived them of deserved promotions and wages, and retaliated against them for complaining about the discrimination. In particular, the alleged discriminatory conduct includes: directing racial slurs toward African-American workers; subjecting African-American workers to hangman's nooses at the work site; placing "Back to Africa" tickets at or near the work stations of African-American employees; leaving Klu Klux Klan materials and graffiti in Lockheed facilities; and subjecting employees, who complained about discriminatory practices, to physical threats and termination.[446]

182. The negative consequences of minority under-representation in the managerial hierarchy include: (i) fewer minorities who can serve as role models for minorities aspiring to advance their careers; (ii) less first-hand knowledge in the ranks of management concerning the problems and concerns of minorities; and (iii) less commitment (and resulting effort) by the management team towards the achievement of a diverse workforce.[447]

Recommendations

- The Office of Management and Budget should ensure that all federal agencies are working to eliminate racism and the remnants of past discrimination with consistent methodologies and principles in hiring and employment practices. The Government should design affirmative action programs to address minority employment in senior positions within the federal government.

- The Government should be committed as a matter of policy to hiring minorities in positions of authority and management that allow them to design and implement policy.

- The Government should recognize its role as the largest employer of African-Americans to pursue aggressive affirmative action programs aimed at retaining, promoting, and employing individuals. The Government should also enforce its policy of not doing business with contractors that discriminate on the basis of race. In addition, as a service-purchaser from many private sector employers it should strive to be a model employer who sets an example for private industry in terms of fairness and non-discrimination.

- The Government should recognize the need for increasing aggressive affirmative action efforts aimed at recruiting, retaining and promoting Hispanics who remain the only, under-represented group in federal government. The Government should also serve as a role

model for the private sector in employment practices that promote fairness and non-discrimination for Hispanics employees.

ENDNOTES

1. *Draft Medium Term Plan of the U.N. Statistics Division for the Period 2002-2005*, U.N. Statistics Division, U.N. Doc. E/CN.3/2000/CRP.1. (2000). A complete list of the U.N. statistical entities and other statistic gathering organizations is available at http://www.un.org./depts/unsd/sd_instat.htm (last visited June 5, 2001).

2. *See Report of the Expert Group on Statistical Information of the Recent U.N. Conferences*, Working Group on International Statistical Program, U.N. Doc. E/CN.3/AC.1/1996/R.4 (1996). For the schedule of meetings of the Sienna Group on Social Statistics, see http://www.un.org./Depts/citygrp/sienna.htm (last visited June 5, 2001).

3. *HURIDOCS International Conference on Human Rights Information, Impunity and Challenges of the Post-Conflict Healing Process*, Tunisia, Mar. 22–25, 1998, *available at* http://www.huridocs.org (last visited June 5, 2001); *IAOS (International Association for Official Statistics) Conference on Statistics, Development and Human Rights,* Monteux, Sept. 4–8, 2000, *at* http://www.statistik.admin.ch/about/international/30iaos.htm (last visited June 5, 2001).

4. Point 4 of the conclusions of the IASOS Conference on Statistics, Development, and Human Rights expressly recommends that the national statistical institutes focus on human rights statistics and provide support to non-governmental organizations. The IASOS Conference on Statistics, Development, and Human Rights is available at http://www.statistik.admin.ch/about/international/30iaos.htm (last visited June 5, 2001).

5. Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, art. 2.1, U.N.T.S. 14531, vol. 993, 3 (1976), *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm (last visited June 6, 2001). The International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, art. 2.2, 60 U.N.T.S. 195, states that "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them."

6. *Fundamental Principles of Official Statistics,* The Report of the Statistical Commission on its Special Sessions Held in New York April 11-14, 1994, U.N. ESCOR, Sup. 9, U.N. Doc. E/CN.3/1994/18 (1994), also *available at* http://www.un.org/Depts/unsd/statcom/1994docs/e1994.htm (last visited June 5, 2001).

7. 42 U.S.C. § 3789d (2000).

8. *Id.* § 2000d.

9. *See* U.S. DEP'T OF JUST., U.S. ATTORNEYS' MANUAL, tit. 9-10.040.

10. *See id.*

11. United States NGOs met with the Government as they prepared this report and advocated for inclusion of many important issues. Although the US NGOs interacted with the Government when they were preparing this report and attempted to influence the document, ultimately they were not successful in having many important issues addressed effectively in the Government Report.

12. The terms "civil rights" is meant to encompass civil rights, human rights, and women's rights.

13. *See* INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (Sept. 2000) [hereinafter GOVERNMENT REPORT].

14. *Id.* at 17.

15. *See id.* at 17–19.

16. U.S. CONST. art. I, § 8, cl. 18.

17. *Id.* at cl. 3.

18. *Id.* at cl. 1.

19. 17 U.S. 316 (1819).

20. *Id.*; *see also* Perez v. United States, 402 U.S. 146 (1971); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

21. *See Katzenbach*, 379 U.S. 294; *Heart of Atlanta Motel*, 379 U.S. 241.

22. *See* United States v. Morrison, 120 S. Ct. 1740 (2000); United States v. Lopez, 514 U.S. 549 (1995).

23. *See Morrison*, 120 S. Ct. 1740; *Lopez*, 514 U.S. 549.

24. U.S. CONST. art. I, § 8, cl. 1.

25. *See* South Dakota v. Dole, 483 U.S. 203 (1987); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); United States v. Butler, 297 U.S. 1 (1936).

26. *See* Lau v. Nichols, 414 U.S. 563 (1974).

27. *See* GOVERNMENT REPORT, *supra* note 13, at 23–30.

28. This obligation follows from the doctrine of *pacta sunt servanda*, "perhaps the most important principle of international law." RESTATEMENT (THIRD) OF THE FOREIGN

RELATIONS LAW OF THE UNITED STATES § 321 & cmt. a; *id.* § 111 & nn. 2, 7 (1987) [hereinafter RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW].

29. *See* International Convention on the Elimination of All Forms of Racual Discrimination, Article 20(3), Mar. 7, 1966, 660 U.S.T.S. 195 (entered into force Jan. 1969).

30. *See* United States v. Belmont, 301 U.S. 324, 331 (1937); The Paquete Habana, 175 U.S. 677, 700 (1900); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 111 & cmt. d & n.2; *id.* § 314 cmt. b.

31. *See* Reid v. Covert, 354 U.S. 1, 77 (1957); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 111 & cmts. a, d; *id.* § 115 cmt. e; *id.* § 302(2) & cmt. b & n.1.

32. *See* The Chinese Exclusion Case, 130 U.S. 581 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Head Money Cases, 112 U.S. 580, 599 (1884); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 115 & cmts. a, c & n.1.

33. *See* Weinberger v. Rossi, 456 U.S. 25, 33 (1982); Chew Heong v. United States, 112 U.S. 536, 539–40 (1884); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 114 & cmt. a.

34. This is the State Department's own paraphrasing of Article 7. *See* Letter from Strobe Talbott, Acting Secretary, U.S. Department of State, to Claiborne Pell, Chairman, U.S. Senate Committee on Foreign Relations 10 (Apr. 26, 1994) [hereinafter State Department Letter].

35. GOVERNMENT REPORT, *supra* note 13, at 36. Those protections are grounded primarily in the First and Fourteenth Amendments to the Constitution. While the First Amendment prevents only the federal government from abridging free speech ("Congress shall make no law . . . abridging the freedom of speech"), the Supreme Court has construed the due process clause of the Fourteenth Amendment ("nor shall any State deprive any person of . . . liberty . . . without due process of law") as placing state governments under an identical constraint. *See* Duncan v. Louisiana, 391 U.S. 145, 147 (1968).

36. GOVERNMENT REPORT, *supra* note 13, at 37.

37. *See, e.g.*, GOVERNMENT REPORT, Annex I.

38. Similarly overbroad is the Government's general "Understanding" to the Convention, which appears potentially to condition U.S. compliance to the limits of federal jurisdiction over state or local matters.

39. *See* Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 19(c), 1155 U.N.T.S. 331.

40. *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions*, 89 AM. J. INT'L L. 341, 343 (1995).

41. *See* LaGrand Case (Germany v. United States of America), Final Judgment of June 27, 2001, General List No. 104, <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>.

42. *See* Missouri v. Holland, 252 U.S. 416, 432–34 (1920).

43. *See* South Dakota v. Dole, 483 U.S. 203 (1987); United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950); Helvering v. Davis, 301 U.S. 619 (1937); Charles C. Steward Machine Co. v. Davis, 301 U.S. 548 (1937); United States v. Butler, 297 U.S. 1 (1936).

44. *See* GOVERNMENT REPORT, *supra* note 13, at annex 1, I-2.

45. *Id.* at II.B.3.

46. Vienna Convention on Consular Relations and Optional Protocol on Disputes, April 24, 1963, art. 36, 596 U.N.T.S. 261 [hereinafter Vienna Convention on Consular Relations].

Article 36(1)(b) provides:

> With a view to facilitating the exercise of consular functions relating to nationals of the sending State. . . . [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph* . . . .

Id. (emphasis added).

47. *See id.*

48. *See, e.g.*, LaGrand Case (Germany v. United States of America), 1999 I.C.J. 9, 10–12 (Order of Mar. 3).

49. State Department Letter, *supra* note 34, at 1. The State Department may have omitted domestic benefits as beyond its purview.

50. "By adhering to human rights conventions subject to these reservations, the United States, it is charged, is pretending to assume international obligations but in fact is undertaking nothing. It is seen as seeking the benefits of participation in the convention . . . without assuming any obligations or burdens." Henkin, *supra* note 39, at 344.

51. *See id.* at 343.

52. GOVERNMENT REPORT, *supra* note 13, at 84.

53. *See* Exec. Order No. 12898, 24 C.F.R.§ 58.5 (Feb. 11, 1994), *reprinted in* 42 U.S.C. § 4321 (2000).

54. BENJAMIN A. GOLDMAN & LAURA FITTON, TOXIC WASTES AND RACE REVISITED (1994).

55. *See id.*

56. *See id.*

57. *See* Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1 (1997).

58. *See id.* at 9.

59. *See id.* at 33.

60. *See id.*

61. *See id.* at 34.

62. Craig Flourney & Randy Lee Loftis, *Toxic Neighbors—Residents of Projects Find Common Problem: Pollution, Toxic Traps, Public Housing and Pollution*, DALLAS MORNING NEWS, Oct. 1, 2000, at A1.

63. *See id.*

64. ARK. CODE. ANN. § 8-6-1501(b) (Michie 1993).

65. *Id.* § 8-6-1504(b)(1) (Michie 1993).

66. *Id.* These incentives may include increased employment opportunities, reasonable host fees, contributions to the community infrastructure, compensation to any adjacent landowner, or the subsidization of local community service. *See id.* § 8-6-1504(b)(2)(A)–(E).

67. *See, e.g.*, FLA. STAT. ANN. § 760.85 (West 1994) (creating a commission to gather information on the distribution of environmental hazards in the state and to assess how the state can best deal with any environmental inequities found) (repealed 1999); LA. REV. STAT. ANN. § 30:2011(D)(5) (West 1994) (requiring the Secretary of the Louisiana Department of Environmental Quality to hold at least three public hearings to gather facts and obtain public comments regarding environmental equity).

68. *See* Chester Residents Concerned for Quality Living v. Seif, 944 F. Supp. 413, 414 (E.D. Pa. 1996), *rev'd*, 132 F.3d 925, 937 (3d Cir. 1997), *cert. granted*, 524 U.S. 915, *vacated as*

moot, 524 U.S. 974 (1998); *see also* 42 U.S.C. § 2000d (2000); 40 C.F.R. § 7.35(b) (1999) ("A recipient [of federal financial assistance] shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of race, national origin or sex . . . .").

69. *Chester Residents*, 944 F. Supp. at 417–18.

70. *Chester Residents*, 132 F.3d at 937.

71. *Chester Residents, cert. granted*, 524 U.S. at 915, *vacated as moot*, 524 U.S. 974 (1998).

72. R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd without opinion*, 977 F.2d 573 (4th Cir. 1992).

73. *See id.* at 1149–50. Unlike EPA's Title VI implementing regulations, which allow redress based on a showing of discriminatory effects, the Equal Protection Clause requires that plaintiffs establish discriminatory intent, *see R.I.S.E.*, 768 F. Supp. at 1149.

74. *See R.I.S.E.*, 768 F. Supp. at 1148.

75. *See id.*

76. *In re* Louisiana Energy Services, L.P., 45 N.R.C. 367, 412 (1997).

77. *See id.* at 392.

78. *See id.*

79. *See* Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S2.

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.*

84. *Id.* Other studies have found no evidence that the EPA discriminates against minorities in its enforcement actions. *See, e.g.*, MARK ATLAS, RUSH TO JUDGMENT: AN EMPIRICAL ANALYSIS OF ENVIRONMENTAL EQUITY IN U.S. ENVIRONMENTAL PROTECTION AGENCY ENFORCEMENT ACTIONS (1999) (finding that violations of environmental laws in areas that are predominantly minority or low income do not tend to be penalized less than violations elsewhere).

85. *See* Washington Park Lead Comm., Inc. v. United States Envtl. Protection Agency, Civ. A. No. 2-98-CV-421 (E.D. Va. 1998).

86. *See id.*

87. *See id.*

88. *See* GOVERNMENT REPORT, *supra* note 13, at 85–86. The Executive Order expressly provides that it does not create any substantive or procedural rights that might be enforced through litigation. *See* Exec. Order No. 12898, § 6-609, 24 C.F.R. §58.5 (Feb. 11, 1994), *reprinted in* 42 U.S.C.A. § 4321 (2000) ("This Order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order."); *In re* Louisiana Energy Servs., L.P., 45 N.R.C. 367, 376 (1997) ("Executive Order No. 12898 does impose duties on the NRC because the Commission has undertaken to carry out the President's directive, but no party to this proceeding has a remedy with regard to the manner in which the agency carries out its commitment to the President to implement Executive Order No. 12898."); *In re* Chemical Waste Mgmt. of Ind., Inc., RCRA Appeal Nos. 95-2, 95-3 (EAB June 29, 1995) (concluding that "section 6-609 precludes judicial review of [EPA's] efforts to comply with the Executive Order"). The Order by its express terms is to be implemented nein a manner that is consistent with existing law. *See* Exec. Order No. 12898, § 6-608, 59 Fed. Reg. 7629, 7632 (Feb. 11, 1994) ("Federal agencies shall implement this order consistent with, and to the extent permitted by, existing law."); *Chemical Waste*, RCRA Appeal Nos. 95-2, 95-3 (concluding that "[Executive Order No. 12898] does not purport to, and does not have the effect of, changing the substantive requirements for issuance of a permit under RCRA and its implementing regulations").

89. GOVERNMENT REPORT, *supra* note 13, at 85–86. Each year since 1994, the EPA has conferred small grants of up to $20,000 to local environmental justice organizations to assist those organizations' efforts. *See* Office of Enforcement & Compliance Assistance, *USEPA Environmental Justice Grants, at* //es.epa.gov/oeca/oej/ejgrantf.html (last visited Feb. 21, 2001).

90. *See* GOVERNMENT REPORT, *supra* note 13, at 85–86. Under 40 C.F.R. §6.400(a), "EPA shall make diligent efforts to involve the public in the environmental review process . . . ." *See also* Environmental Justice Strategy: Executive Order 12898, EPA/200-R-95-002, at 8 (Apr. 1995) (calling for "early and ongoing public participation in permitting and siting decisions").

91. 42 U.S.C. § 2000d (2000).

92. *See Status Summary Table of EPA Title VI Administrative Complaints* (Oct. 4, 2000), *available at* http://www.epa.gov/ocrpage1/docs/t6stnov2000.pdf.

93. *See id.* EPA has rejected nine complaints on the ground that they were filed more than 180 days after the alleged discriminatory act. *Id.*

94. Appropriations Act for Departments of Veteran Affairs and Housing and Urban Development and Independent Agencies for Fiscal Year Ending September 30, 1999, Pub. L. No. 105-276, tit. III, 112 Stat. 2461 (1998).

95. Complaint, *Select Steel Corp.* (No. 5R-98-R5).

96. *See id.*

97. *See* New York City Envtl. Just. Alliance v. Giuliani, 50 F. Supp. 2d 250, 253–54 (S.D.N.Y. 1999) (holding that a private right of action was not available to the plaintiffs to challenge the City's actions under EPA's Title VI implementing regulations), *aff'd on other grounds*, 214 F.3d 65 (2d Cir. 2000). The Supreme Court has recently granted certiorari review of an Eleventh Circuit decision in which the court held that a private right of action was available under Title VI implementing regulations issued by the Department of Transportation. *See* Sandoval v. Hagan, 197 F.3d 484, 507 (11th Cir. 1999), *cert. granted*, 121 S. Ct. 28 (2000).

98. *See* Alexander v. Sandoval, 121 S. Ct 1511 (2001); *see also* 42 U.S.C. § 1983.

99. GOVERNMENT REPORT, *supra* note 13, at 85.

100. *See* 42 U.S.C. § 4332(c) (2000); 40 C.F.R. §1508.14.

101. *Comprehensive Examination of the Thematic Issues Relating to Racial Discrimination,* U.N Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess., Provisional agenda item 3, ¶ 26, U.N. Doc. E/CN.4/Sub.2/ 2000/11 (2000).

102. GOVERNMENT REPORT, *supra* note 13, at 2–5, 17–18.

103. *See id.* at 18.

104. *See id.* at 57.

105. *See id.*

106. *See id.*

107. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 (1978).

108. U.S. CONST., amend. XIV, § 1.

109. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995).

110. *See id.*

111. *See id.*

112. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986).

113. *See* Ashwander v. TVA, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §114 (1986); *see also* Weinberger v. Rossi, 456 U.S. 25, 32 (1982).

114. GOVERNMENT REPORT, *supra* note 13, at 58–60.

115. *See* Harry Holzer & David Neumark, *Assessing Affirmative Action*, 38 J. ECON. LITERATURE 483, 490 n.17 (2000).

116. *See id.*

117. Exec. Order No. 11246, 3 C.F.R.§ 339 (1964–1965), *reprinted as amended in* 42 U.S.C. § 2000(e)(1988).

118. 41 C.F.R. § 60-1.5(a) (2000).

119. *See id.* § 60-1.1.

120. *See id.* §§ 60-2.11, 60-2.23.

121. *See id.* § 60-2.12.

122. *See id.* § 60-2.25.

123. *See id.* § 60-3.

124. U.S. DEP'T OF JUST., BRIEF DESCRIPTION OF THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES, *available at* http://www.usdoj.gov/crt/emp/ugespsummary.html (last visited Feb. 26, 2001); *see also* 41 C.F.R. § 60.3 (2000).

125. Exec. Order No. 11246, 3 C.F.R. § 339 (1964–1965), *reprinted as amended in* 42 U.S.C. § 2000(e)(1988).

126. Exec. Order No. 13171, 65 FED. REG. 61,249 (Oct. 16, 2000).

127. Election 2000 Presidential Debate with Republican Candidate Governor George W. Bush and Democratic Candidate Vice President Al Gore, Washington University St. Louis, Missouri, *at* http://cspan.org/campaign2000/transcript/debate_101700.asp (Oct. 17, 2000).

128. John Ashcroft's Senate Confirmation Hearing (Day One), *at* http://washingtonpost.com/wp-srv/onpolitics/elections/ashcroft_hearingtext011601.htm (Jan. 16, 2001).

129. Civil Rights Act of 1997, S. Res. 950, 952, 105th Cong. (1997).

130. McConnell Amendment No. 1708, 144 CONG. REC. S.1465 (1998), Amendments Submitted—The Intermodal Surface Transportation Efficiency Act of 1998 § 1111, S.1173, 105th Cong. (1998).

131. Adarand Constructors, Inc. v. Pena, 228 F.3d 1147 (10th Cir. 2000), *petition for cert. filed* (U.S. Nov. 3, 2000) (No. 00-730); Smith v. University of Wash., 233 F.3d 1188 (9th Cir. 2000); Johnson v. Board of Regents, 106 F. Supp. 2d 1362 (S.D. Ga. 2000); Graetz v. Bollinger, No. 97-CV-75231-DT (E.D. Mich. 2000).

132. Ground, Perspectives on Affirmative Action.

133. GOVERNMENT REPORT, *supra* note 13, at 46–47.

134. Phillip Kaufman, MPR Associates, *The National Dropout Data Collection System: Assessing Consistency*, at tbl. 2, *at* http://www.law.harvard.edu/civilrights/publications/dropout/kaufman.html (Jan. 13, 2001).

135. GOVERNMENT REPORT, *supra* note 13, at 46.

136. 347 U.S. 483 (1954).

137. Gary Orfield et al., *Deepening Segregation in American Public Schools: A Special Report from the Harvard Project on School Desegregation*, 30 EQUITY & EXCELLENCE IN EDUC. 2 (1997).

138. Sheff v. O'Neil, 678 A.2d 1267, 238 (Conn. 1996).

139. *Id.*; American Civil Liberties Union, *Connecticut Supreme Court Rules that Racial and Ethnic Segregation in Hartford Area Schools Violates State Constitution, at* http://www.aclu.org/news/n070996b.html (July 9, 1996).

140. *Id.*

141. *See* Complaint, Williams v. California (No. SCV-312236) (May 17, 2000), *available at* http://www.aclu-sc.org/docs/complainteducation.pdf; American Civil Liberties Union, *Landmark Lawsuit on Behalf of Public School Students Demands Basic Education Rights Promised in State Constitution, at* http://www.aclu.org/news/2000/n051700a.html (May 17, 2000).

142. *See* Complaint, *Williams* (No. SCV-312236).

143. *See id.*

144. American Civil Liberties Union, *In Class-Action Lawsuit, ACLU Says CA Students Are Denied Equal Access to Advanced Placement Courses, at* http://www.aclu.org/news/1999/n072799a.html (July 27, 1999).

145. *See id.*

146. The University of California encompasses 10 campuses throughout the state. *See* University of Cal., *Profile: 2000–2001, at* http://www.ucop.edu (Feb. 2, 2001).

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.*

151. Regents of the Univ. of Cal. v. Bakke, 488 U.S. 265, 311–12 (1978).

152. *See* Smith v. University of Wash., 233 F.3d 1188 (9th Cir. 2000); Johnson v. Board of Regents, 106 F. Supp. 2d 1362 (S.D. Ga 2000); Gratz v. Bollinger, No. 97-CV-75231-DT (E.D. Mich. 2000).

153. U.S. DEP'T OF EDUC., RACE AND NATIONAL ORIGIN DISCRIMINATION: OVERVIEW OF THE LAW (2001), *available at* http://www.ed.gov/ocr/raceoverview.html.

154. *See id.*

155. No. 97-CV-75231-DT.

156. *Id.* (citing study by Alexander Astin, Director of Higher Education Research Institute, University of California).

157. *Id.* (citing multi-institutional data, survey results from the University of Michigan, and data drawn from a specific classroom program at the University of Michigan).

158. *Id.*

159. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (1998).

160. *See id.*

161. CAL. CONST., art. 1, § 31(a).

162. *See* Laura Hamburg, *Students Take up Diversity Torch Ballot Issue Pushed Again at UC Berkeley*, SAN FRANCISCO CHRONICLE, Oct. 8, 1998.

163. Ronald Dworkin, *Affirming Affirmative Action*, N.Y. REV. OF BOOKS, Oct. 28, 1998.

164. *See id.*

165. *See* Ruth Schubert, *More Efforts Urged As Application Fall; Fewer Minorities Applying at WU as I-200 Kicks*, *in* SEATTLE POST-INTELLIGENCE, Mar. 17, 1999, at B1.

166. *UW Revises Factors for Admission Diversity*, COLUMBIAN, Feb. 21, 1999, at B2.

167. GOVERNMENT REPORT, *supra* note 13, at 82.

168. President William J. Clinton, State of the Union Address (Apr. 2, 1997).

169. The notion that some speech is dangerous and less worthy of protection than other speech dates as far back as the Alien and Sedition Acts of 1798.

170. Watchdog groups count sites differently. Some count only hard-core hate content while other count sites containing merely off-color jokes or insensitive material.

171. ABC News, *Festering Hate, The Number of Hate Groups Rise on the Internet, at* http://www.abcnews.go.com/sections/us/DailyNews/hate990223.html (Feb. 9, 1999).

172. Slashdot, *Yahoo! Given Reprieve in French Court Battle* (Aug. 11, 2000), *at* http://slashdot.org/yro/00/08/11/156230.shtml.

173. *See Where to Start: Parental Guides, Online Safety Handbooks, and Positive Examples Reviews of Blocking Software* (2000), *at* http://www.tispa.org/kinnaman/filtering.htm.

174. Jonathan D. Glater, *Hemming in the World Wide Web*, N.Y. TIMES, Jan. 7, 2001, at WK 5.

175. Sicangu Sun Times, Oct. 15, 1999; *see also* CONG. REC. S.13396 (daily ed. Oct. 28, 1999).

176. William L. Pierce, *Equality: Man's Most Dangerous Myth, at* http://www.stormfront. org.

177. White Camelia Knights of the Ku Klux Klan, *White Power, at* http://www.wckkkk.com/ frame.html (last visited Feb. 28, 2001).

178. *See* Michael J. Sniffen, *FBI: Hate Crimes Motivated by Race, at* http://dailynews. yahoo.com/h/ap/20010213/pl/hate_crimes_1.html (last visited Feb. 13, 2001).

179. *See id.*

180. *See id.*

181. *See id.*

182. Jordan T. Pine, *FBI Report: Racial Prejudice Fueled Half of all Hate Crimes in 1999*, *at* diversityinc.com/insidearticlepg.cfm?SubMenuID=330&ArticleID=2453&CFID=1088421&CFTOKEN=73087 2/20/01 (last visited Feb. 13, 2001).

183. NATIONAL ASIAN PACIFIC AMER. LEGAL CONSORTIUM, AUDIT OF VIOLENCE AGAINST ASIAN PACIFIC AMERICANS (1999) [hereinafter AUDIT OF VIOLENCE].

184. Associated Press, Cops Seize Paintball Assault Video, Feb. 25, 2001.

185. 18 U.S.C. § 245.

186. *See* GOVERNMENT REPORT, *supra* note 13, at 22–30.

187. The Hate Crimes Sentencing Enhancement Act was originally introduced as separate legislation by Rep. Charles Schumer (D-NY) and Sen. Dianne Feinstein (D-CA).

188. The Act defined a hate crime as "a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." *Id.*

189. 28 U.S.C. § 534 (2000).

190. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

191. 18 U.S.C. § 247 (2000).

192. *See* Anti-Defamation League, *Approach to Hate Crime Legislation*, *at* http://www.adl.org/99hatecrime/federal.html (1999).

193. *See* 18 U.S.C. § 247.

194. Arizona, Georgia, Hawaii, Indiana, Kansas, New Mexico, South Carolina, Texas, Utah, Wyoming.

195. Arkansas, New Mexico, New York, Wyoming, South Carolina, Georgia, and Kansas.

196. Alabama, Arkansas, Colorado, Hawaii, Idaho, Indiana, Kentucky, Maryland, Michigan, Mississippi, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia.

197. Alaska, Arkansas, Arizona, California, District of Columbia, Delaware, Illinois, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Rhode Island, Vermont, Washington, Wisconsin.

198. Arizona, California, Connecticut, District of Columbia, Delaware, Florida. Illinois, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, Oregon, Rhode Island, Vermont, Washington, Wisconsin.

199. Arkansas, Arizona, California, District of Columbia, Illinois, Iowa, Louisiana, Maine, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Rhode Island, Vermont, Washington, West Virginia.

200. Southern Voice, *Many Southern Hate Crimes Go Unreported*, Feb. 22, 2001, *at* http://www.datalounge.com/datalounge/news/record.html?record=13342

201. U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 1999, UNIFORM CRIME REPORTS 5 (2000).

202. Mark Fritz, *Hate Crimes Hard to Track as Some Areas Report None*, L.A. TIMES, Aug. 23, 1999, *available at* http://www.nz.com/NZ/Queer/OUT/news_199908/messages/918.html.

203. *See* CENTER FOR CRIM. JUST. POL'Y RES., IMPROVING THE QUALITY AND ACCURACY OF BIAS CRIME STATISTICS NATIONALLY: AN ASSESSMENT OF THE FIRST TEN YEARS OF BIAS CRIME DATA COLLECTION 4 (2000).

204. *Id.*

205. Fritz, *supra* note 202.

206. *See id.* at 5.

207. *See* Memorandum from President for the Attorney General on Improving Hate Crimes Reporting, Sept. 13, 2000, at 1.

208. *See Death Penalty News*, *at* http://venus.soci.niu.edu/~archives/ABOLISH/july98/0293.html (July 1998).

209. Fritz, *supra* note 202.

210. *See* AUDIT OF VIOLENCE, *supra* note 183, at 26.

211. *See id.* at 75 (1998) ("Racial disparities exist in both the realities and perceptions of crime and the administration of justice."); Press Release, International Human Rights Law Group, Civil Rights Leaders Decry Continued Delay of U.S. Racial Discrimination Report and Push for Commitments to Criminal Justice Reform 1 (stating that "racial profiling—the use of race as a presumption of guilt without evidence of criminal conduct—is routinely used against people of color, at numerous locations, such as international port of entry, on highways, in schools, and outside their homes, and subject them to arrests, police brutality, and even death").

212. *See* Council on Criminal Just., Association of the Bar of the City of N.Y., *Policing and the Community in the 21st Century: Searching for Common Ground*, 55 REC. 687, 703 (2000).

213. *See* LEADERSHIP CONF. ON CIVIL RIGHTS LEADERSHIP CONF. EDUC. FUND, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 1 (2000) [hereinafter JUSTICE ON TRIAL].

214. *Id.* at 76.

215. *See* GOVERNMENT REPORT, *supra* note 13, at 67 ("Nonetheless, the perception of unequal treatment in the criminal justice system is widespread among Blacks and Hispanics, and in many respects that perception is supported by data."); *id.* at 68 ("The incarceration rate for Blacks is 7.66 times that for Whites and approximately four times their proportion in society at large."); *id.* at 69 ("[T]he [Sentencing] Commission[] . . . concluded that a greater proportion of Black defendants received sentences at or above the indicated mandatory minimum (67 percent), followed by Hispanics (57.1 percent) and Whites (54.0 percent)."); *id.* at 71 ("Blacks are disproportionately more likely to be sentenced to death and executed than other racial or ethnic groups.").

216. *Id.* at 67.

217. *Id.* at 68.

218. *See id.* at 1 (stating that police tactics involve "the exercise of a substantial amount of discretion—the police decide who they consider suspicious, which cars to tail, what conduct warrants further investigation, and which neighborhoods are ripe for enforcement activity").

219. *See id.* (stating that police officers often exercise their discretion "through the prism of race").

220. Ellen Goodman, *Simpson Case Divides Us By Race*, BOSTON GLOBE, July 10, 1994, at 73. The United States Supreme Court has held that probable cause exists when "the facts and circumstances known to the officer warrant a prudent man in believing that an offense has been committed." Henry v. United States, 362 U.S. 98 (1959).

221. *See* State v. Soto, 734 A.2d 350 (N.J. Super. 1996).

222. Whren v. United States, 517 U.S. 806 (1996).

223. David Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 291 (1999).

224. *See* David Kocieniewski, *U.S. Wrote Outline for Race Profiling, New Jersey Argues*, N.Y. TIMES, Nov. 29, 2000, at A1.

225. *See Soto*, 734 A.2d at 350.

226. *See id.*

227. *See id.*

228. *See* Wilkins v. Maryland State Police (No. MJG-93-468) (D. Md. 1996).

229. *See* Harris, *supra* note 213, at 280.

230. *See id.* at 280–81.

231. *See* U.S. GEN. ACCOUT. OFF., PUB. NO. GAO/GGD-00-38, U.S. CUSTOMS SERVICE: BETTER TARGETING OF AIRLINE PASSENGERS FOR PERSONAL SEARCHES COULD PRODUCE BETTER RESULTS 1–2 (Mar. 2000).

232. *See id.* at 10.

233. *See id.*

234. *See, e.g.*, Angela J. Davis, *Race Cops and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); David A. Harris, *"Driving While Black" and all Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997).

235. *See* JUSTICE ON TRIAL, *supra* note 213, at 1 (stating that "police departments disproportionately target minorities as criminal suspects, skewing at the outset the racial composition of the population ultimately charged, convicted, and incarcerated").

236. Angie Cannon & James Morrow, *A Bruised Thin Blue Line: Cases of Minority Abuse Undermine Confidence in Police*, U.S. NEWS & WORLD REP., Mar. 29, 1999.

237. *See id.*; *see also* HUMAN RIGHTS WATCH, HRW WORLD REPORT 1999: UNITED STATES: HUMAN RIGHTS DEVELOPMENTS (1999), *available at* http://www.hrw.org/hrw/worldreport99/usa/.

238. *See* Koon v. United States, 518 U.S. 81 (1996); *see also* Human Rights Watch, *Shielded from Justice: Police Brutality and Accountability in the United States, at* http://www.igc.org/hrw/reports98/police/uspo72.htm (June 1998).

239. *See Koon*, 518 U.S. at 85.

240. *See id.*

241. *See id.*

242. *See id.*

243. *See id.*

244. *See id.*

245. *See* Robert Garcia, *Riots & Rebellion: Civil Rights, Police Reform and the Rodney King Beating, at* http://www.ldfla.org/introduction.htm (1997).

246. *See id.*

247. *See id.*

248. *See id.*

249. *See id.*

250. *See id.*

251. *See id.*

252. *See* Howard Chua-Eoan, *Black and Blue: The Four Caps Who Killed Amadou Diallo Are Acquitted, but the Case Will Go on Raising Questions About Race and Crime Fighting, Sending Tremors Right Through the November Elections*, TIME MAG., Mar. 6, 2000, at 28.

253. *See id.*

254. *See id.*

255. *Id.*; *see also* Ellis Cose, *The Long Shadow of Amadou Diallo: The New York cops on Trial for Murder Got Some Lucky Breaks—and Not Just from the Racially Mixed Jury that Acquitted Them*, NEWSWEEK, Mar. 13, 2000, *available at* http://newsweek.washingtonpost.com/nw-srv/printed/us/so/a17032-2000mar5.htm.

256. 42 U.S.C. § 3789d (2000).

257. *Id.* § 2000d (2000).

258. *See* GOVERNMENT REPORT, *supra* note 13, at 35.

259. *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 448 (1992).

260. *See, e.g.*, Christopher Schmitt, *Plea Bargaining Favors Whites, as Blacks, Hispanics Pay Price*, SAN HOSE MERCURY NEWS, Dec. 8, 1991, at A1.

261. *See id.*

262. *See id.*

263. *See* National Ass'n of Pretrial Servs. Agencies, *Pretrial Diversion Abstract, at* http://napsa.org/docs/divabst.htm.

264. *See* JUSTICE ON TRIAL, *supra* note 213, at 12.

265. *See id.*

266. *See id.*

267. U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 138 & nn.186–88 (1996) [hereinafter SPECIAL REPORT].

268. *See* U.S. DEP'T OF JUST. BUREAU OF JUST. STATISTICS, PRISONS IN 1996 (1997), *available at* htttp://www.ojp.usdog.gov/bjs/pub/ascii/p96.txt.

269. *See id.*

270. *See id.*

271. *See* Marc Mauer, *The Racial Dynamics of Imprisonment, reprinted in* IMPURE JUSTICE 48, 49.

272. *See* 21 U.S.C. § 841(b)(1)(B)(ii)–(iii).

273. *See* xiii (1995).

274. *Id.* at 56.

275. *See* U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS, PRISONERS IN 1999, at 9 (2000).

276. *See* Population Estimates Program, *Population Division, U.S. Census Bureau, at* http://www.census.gov/population/estimates/nation/intfile3-1.txt (July 1, 1999).

277. *See* OFFICE OF JUST. SYS. ANALYSIS, N.Y. STATE DIV. OF CRIM. JUSTICE SERVS., DISPARITIES IN PROCESSING FELONY ARRESTS IN NEW YORK STATE, 1990-92 (1995).

278. *See id.* at 43.

279. *See id.*

280. *See* Editorial, *The Immigrant Lock-up*, N.Y. TIMES, Dec. 31, 1998.

281. *See* Chris Hedges, *Policy to Protect Jailed Immigrants Is Adopted by U.S.*, N.Y. TIMES, Jan. 2, 2001.

282. *See* U.S. DEP'T OF JUST., FEDERAL DETENTION PLAN (1997).

283. *See* U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE 1 (1999) ("The leading countries of chargeability of the applicants [for asylum] were Bosnia-Herzegovina

with 31 of the applications, the former Soviet Union (29 percent), Vietnam (16), Cuba (7), and Somalia (5).").

284. *See id.*

285. *See id.* at 2.

286. *See* Hedges, *supra* note 281.

287. *See* JUSTICE ON TRIAL, *supra* note 213, at 17–19.

288. *See id.* at 11–12.

289. Marc Lacey & Raymond Bonner, *Reno Troubled by Death Penalty Statistics*, N.Y. TIMES, Sept. 13, 2000.

290. *See* Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982); Coker v. Georgia, 433 U.S. 584 (1977).

291. The Baldus Study, one of the most thorough death penalty studies (which focused on the State of Georgia), demonstrated that African-Americans who killed whites were sentenced to death 22 times more frequently than African-Americans who killed African-Americans, and seven times more frequently than whites who killed African-Americans. *See id.* at 18.

292. *Id.*

293. *Id.*

294. *See* World Organization Against Torture USA, *Racial and Ethnic Discrimination in the U.S.* 4.8 (2000).

295. *See* James Liebman et al, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850 (2000).

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