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Josiah Golson

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The University of Texas School of Law
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727 East Dean Keeton Street, 4.134A
Austin, TX 78705-3299
Telephone 512-232-1395
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Mr. Paul Goldman, Business Manager
Texas Hispanic Journal of Law & Policy
P.O. Box 8670
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Telephone: (512) 232-1149
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ARTICLE

RELITIGATING PLESSY IN THE 21st CENTURY: SEPARATE AND UNEQUAL EDUCATION IN CALIFORNIA

ARMEN H. MERJIAN*

SUMMARY

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* Member, New York and Connecticut Bars. B.A. Yale University 1986; J.D. Columbia University 1990. The author is a civil rights and poverty lawyer at Housing Works, Inc., the largest provider of HIV/AIDS services in the State of New York.

[O]ur two largest minority populations, Latinos and African Americans, are more segregated than they have been since the death of Martin Luther King more than forty years ago. Schools remain highly unequal, sometimes in terms of dollars and very frequently in terms of teachers, curriculum, peer groups, connections with colleges and jobs, and other key aspects of schooling. Segregated black and Latino schools have less prepared teachers and classmates, and lower achievement and graduation. Segregated nonwhite schools usually are segregated by poverty as well as race. . . . These are the schools that account for most of the nation's "dropout factories," where a frightfully large share of the students, especially young men, fail to graduate and too many end up virtually unemployable. These schools have the most students with chronic health and developmental problems, the most disruptive neighborhood conditions, and many other forms of inequality. . . . How could these schools possibly be equal under these conditions?

Gary Orfield, Civil Rights Project/Proyecto Derechos Civiles, Reviving the Goal of an Integrated Society: A 21st Century Challenge[1]

There is a deep-seated reverence for fair play in the United States, and in many areas of life we see the consequences in a genuine distaste for loaded dice; but this is not the case in education, health care, or inheritance of wealth. In these elemental areas we want the game to be unfair and we have made it so; and it will likely so remain.

Jonathan Kozol, Savage Inequalities. [2]

I. INTRODUCTION

At the end of the 19th Century, in *Plessy v. Ferguson*,[3] the United States Supreme Court established the infamous "separate but equal" doctrine: as long as African Americans were given substantially equal facilities, enforced segregation did not run afoul of the 14th Amendment's Equal Protection Clause.[4] In practice, however, segregated facilities were not remotely equal: among the myriad degradations attendant to this cruel system of subjugation, African Americans were forced to ride the back of buses;[5] to attend grossly inferior schools;[6] to visit woefully under-funded and

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1. GARY ORFIELD, CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE 6-7 (2009), http://www.civilrightsproject.ucla.edu/research/deseg/reviving_the_goal_mlk_2009.pdf [hereinafter ORFIELD].

2. JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 223 (1991).

3. 163 U.S. 537 (1896).

4. *Id.* at 551 ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

5. *See, e.g.*, HENRY HAMPTON & STEVEN FAYER, VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S, at 18 (1990) ("[B]y practice if not by law, an entire row of blacks would be asked to give up their seats if one white person was standing.").

under-stocked libraries;[7] and to stand at "Colored" restaurant windows, often at the back of the restaurants, rather than sit inside.[8] In truth, then, the *Plessy* era was the era of separate and starkly unequal.

In devising a plan of action to challenge this scheme, in the early 1930s, the NAACP decided to focus on education. Education was critical, the NAACP reasoned, to the advancement of African Americans. And it was critically deficient in African-American communities: "As late as 1931, Georgia and five other Southern states . . . spent less than one-third for each black child of what it spent for each white child, and 10 years later, this figure had risen to only 44 percent."[9] The strategy was to challenge segregation gradually by first contesting the failure to comply with the "equal" prong of the *Plessy* doctrine. Even if it was too early to successfully challenge state-enforced separation head on, many believed that the staggering expenditures required to equalize Black education would ultimately force the authorities to adopt a unitary system.[10] Meanwhile, litigation would expose the patent injustice of the "Jim Crow" system.

Case by case, lawyers from the NAACP Legal Defense Fund demonstrated that the facilities offered to African Americans were vastly inferior. In *Sweatt v. Painter*, for example, the University of Texas ("UT") denied Herman Marion Sweatt admission to its law school despite the fact that there was no law school at all for African-American students in Texas.[11] Faced with a lawsuit, Texas hastily made plans to establish a "law school for Negroes" that had no independent faculty or library, and no accreditation.[12] After trial, it created Texas State University for Negroes,[13] a school that the Supreme Court found unequal to UT in numerous respects: "In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior."[14] The Court ordered Sweatt admitted to UT.

In *Brown v. Board of Education*, the Supreme Court finally addressed the"separate" prong of *Plessy* head on, unanimously ruling that "[s]eparate educational facilities are inherently

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6. *See infra* note 9 and accompanying text.

7. *See, e.g.*, PATTERSON TOBY GRAHAM, A RIGHT TO READ: SEGREGATION AND CIVIL RIGHTS IN ALABAMA'S PUBLIC LIBRARIES, 1900-1965 (2002).

8. *See generally,* LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW (1998).

9. A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 184 (1996).

10. *See*, MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 66-68 (1992).

11. 339 U.S. 629, 631-632 (1950).

12. *Id.* at 633.

13. *Id.* Opposing Mr. Sweatt's lawsuit, the attorneys general of the 11 former Confederate states filed a "friend of the court" brief in which they asserted that White Southerners did not "want their women folk in intimate social contact with Negro men." PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 376 (1999).

14. Sweatt, 339 U.S. at 633-34.15. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

unequal."[15] As we have seen, the Court only arrived at this conclusion after firmly establishing that states could not force African-American students to endure unequal conditions. Noting that "education is perhaps the most important function of state and local governments," the Court reiterated that public education should be provided "to all on equal terms."[16]

II. THE NEXT FRONTIER: CHALLENGING EDUCATIONAL INEQUALITY BASED UPON WEALTH

Brown may have ended legal segregation, but it did not purport to address the country's glaring educational inequalities based upon wealth (so often inextricably bound with "race"). In 1973, almost two decades after *Brown*, the Supreme Court finally confronted this issue in *San Antonio Independent School District v. Rodriguez.*[17] Per pupil expenditures and the quality of education provided in the San Antonio, Texas school system varied widely, since expenditure was tied to property value. The ten richest districts, each of which had more than $100,000 in taxable property per pupil, raised an average of $610 per pupil in local taxes, whereas the four poorest districts, each of which had less than $10,000 in taxable property per pupil, could only raise an average of $63 per pupil.[18] The plaintiffs in *Rodriguez* lived in the poorest districts, in which 90% of the population were Mexican-American and over 6% were African-American.[19] The poverty of these districts affected not only the amount of funds available per pupil, but the amount of salary that could be offered to teachers. As a result, in 1968-1969, approximately 47% of the teachers in the poorest district were on emergency (i.e. not yet fully credentialed) teaching permits, compared with only 11% of the teachers in the richest district.[20]

Ruling that wealth, like race, is a "suspect" classification,[21] and that education is a "fundamental" interest, the lower court held that the school board's actions must be held to a higher level of scrutiny.[22] Whereas most state actions need only demonstrate a "rational" basis, the lower court held that Texas must demonstrate that its unequal funding scheme was premised upon a compelling state interest. On this issue, the court concluded that "[n]ot only are defendants unable to demonstrate compelling state interests . . . they fail even to establish a reasonable basis for these

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15. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

16. *Id.* at 493.

17. 411 U.S. 1 (1973).

18. *Id.* at 74 (Marshall, J., dissenting). This was the case despite the fact that the poorest districts actually had the highest tax rates. In a study proffered by the plaintiffs, the ten richest districts examined produced $585 per pupil on a tax rate of 31 cents per $100 of valuation, but the four poorest, with a rate of 70 cents per $100, produced only $60 per pupil. *Id.* at 75-76.

19. *Id.* at 12 (majority opinion).

20. *Id.* at 85 (Marshall, J., dissenting).

21. *Cf.* United States v. Carolene Products Co., 304 U.S. 144 (1938). Justice Harlan Fiske Stone, writing for the majority, suggested in his famous footnote four that laws directed at powerless or disfavored groups, such as religious, national, or "racial" minorities, may call for "more searching judicial scrutiny," i.e., that these may be "suspect" classifications warranting a more exacting review. *Id.* at 153 n.4.

22. Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280 (W.D. Tex. 1971).

classifications."[23]

A sharply divided Supreme Court reversed, refusing to add wealth to the limited group of "suspect" categories in need of more searching scrutiny from the Court:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class.[24]

Of course, it was the failure of the majoritarian political process that led the plaintiffs to court in the first place,[25] a fact the majority refused to acknowledge; in fact, the court suggested that this group of poor, Mexican-American and African-American plaintiffs was not particularly politically powerless at all.

In addition, the majority ruled that because education was not expressly named in the Constitution, it did not merit protection as a "fundamental" right: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[26] With an express nod to state's rights – ironically, the ideological centerpiece of the South's "massive resistance" campaign against desegregation, and the campaigns against abolition and lynching, for that matter – the majority refused to strike down Texas' blatantly unequal scheme: "We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures."[27] In *Brown*, a unanimous Court did precisely that: it ruled that, notwithstanding traditional notions of deference, state legislatures cannot deny students equal protection, and an equal education, based solely upon the color of their skin.[28] Education, the Court announced, "is a right which must be made available to all on equal terms."[29] In *Rodriguez*, the Court refused to follow this noble pronouncement, permitting grossly unequal public education based solely upon the wealth of the neighborhood in which a student was born.

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23. *Id.* at 284.

24. Rodriguez, 411 U.S. at 75 (Marshall, J., dissenting).

25. *See id.* at 72 n.2. Notably, the district court had postponed its decision for two years "in the hope that the Texas Legislature would remedy the gross disparities in treatment inherent in the Texas financing scheme." *Id.* The Legislature failed to do so.

26. *Id.* at 35 (majority opinion).

27. *Id.* at 40.

28. Brown, 347 U.S. 483.

29. *Id.* at 493.

In a thundering dissent, Justice Thurgood Marshall remarked:

> The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside. . . . [T]he majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels educational resources in accordance with the fortuity of the amount of taxable wealth within each district.[30]

Marshall sharply contested the notion "that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination."[31] Quoting *Brown*, a case he argued, Marshall added: "I, for one, am unsatisfied with the hope of an ultimate 'political' solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that 'may affect their hearts and minds in a way unlikely ever to be undone.'"[32]

III. ENDURING INEQUALITY

Judicial retreat from the principles of desegregation, combined with the sanctioned inequality of *Rodriguez*, has ushered in a return to the *Plessy* years in America.[33] Where once Jim Crow laws sanctioned segregated and unequal schools, geography and class now ensure the same. Government-sponsored "White flight" to the suburbs has left Black and Latino residents in crumbling inner-cities with grossly inferior tax bases and thus grossly inferior school systems.[34] In a cruel cycle of injustice, funding schemes based upon property value ensure that those with the greatest need for advancement through education will face the greatest hurdles in securing adequate

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30. Rodriguez, 411 U.S. at 70-71 (Marshall, J., dissenting).

31. *Id.* at 71.

32. *Id.* at 71-72 (quoting Brown, 347 U.S. at 494).

33. *See* ORFIELD, *supra* note 1, at 27 ("The combination of hostile courts and a hostile executive branch have pushed us backwards and left us with few tools to address the issue. There has not been a major initiative from the White House on these issues for forty years and the last significant positive step by Congress came 36 years ago.").

34. *See infra* note 37 and accompanying text; *see also, e.g.*, Mark A. Neubauer, *None Dare Call Year-Round Racist Schools: The Board's Plan To Ease Overcrowding Will Speed White Flight, Locking in the District's Two Educational Systems, One for the Well-to-do, the Other for Poor Minorities*, L.A. TIMES, Feb. 14, 1990, at B7 ("White flight is a major reason why Los Angeles public education is in a financial crunch. With their children securely enrolled in private schools, middle-class whites are joining with childless adults, especially the elderly, to make it more difficult for the public-school system to raise additional funds through bond issues or outright tax increases. Partly as a result, the educational needs of students who have no alternative but the public system are imperiled.").

instruction, and thus economic and geographical mobility.

There is no better window into the profound disparities that have resulted from this scheme than Jonathan Kozol's aptly entitled *Savage Inequalities*. "One would not have thought that children in America would ever have to choose between a teacher or a playground or sufficient toilet paper[,]" Kozol observed, with ample evidence to buttress his claim.[35] "Like grain in a time of famine, the immense resources which the nation does in fact possess go not to the child in the greatest need but to the child of the highest bidder – the child of parents who, more frequently than not, have also enjoyed the same abundance when they were schoolchildren."[36] Nearly a decade later, the United States' 2000 Report to the United Nations Committee on the Elimination of Racial Discrimination similarly observed:

> Largely because of the persistence of residential segregation and so-called "White flight" from the public school systems in many larger urban areas, minorities often attend comparatively under-funded (and thus lower-quality) primary and secondary schools. Thus minority children are often less prepared to compete for slots in competitive universities and jobs. While efforts to dismantle segregation in our nation's schools have enjoyed some success, segregation remains a problem both in and among our schools, especially given reductions in affirmative action programmes[.][37]

In fact, segregation is actually *increasing* in America, as a 2002 study by Harvard's Civil Rights Project concluded. "The racial trend in the school districts studied is substantial and clear: virtually all school districts analyzed are showing lower levels of inter-racial exposure since 1986, suggesting a trend towards resegregation, and in some districts, these declines are sharp."[38] In the City of Chicago, for example, 86% of all public schools are segregated, i.e., they have more than 50% students of color; 62% are "intensely segregated," with more than 90% students of color; and 42% have student bodies made up entirely of students of color.[39] Nationwide, the proportion of Black students attending schools in which no more than 10% of students are White increased from 34% in 1991-92 to 38% in 2003-04.[40]

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35. KOZOL, *supra* note 2, at 79.

36. *Id.* at 79-80.

37. U.S. Dep't of State, *Initial Report of the United States of America to the Committee on the Elimination of Racial Discrimination*, 20, U.N. Doc. CERD/C/351/Add.1 (Oct. 10, 2000), *available at* http://www.state.gov/documents/organization/100306.pdf.

38. ERICA FRANKENBERG & CHUNGMEI LEE, CIVIL RIGHTS PROJECT AT HARVARD UNIV., RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS 4 (2002), http://www.civilrightsproject.ucla.edu/research/deseg/Race_in_American_Public_Schools1.pdf.

39. Rebecca Gordon, *Education and Race* (Applied Research Center 1998), at 7, http://www.evaluationtoolsforracialequity.org/evaluation/resource/doc/RaceandEducation.pdf.

40. Sam Dillon, *Schools' Efforts Hinge on Justices' Ruling in Cases on Race and School Assignments*, N.Y. TIMES, June 24, 2004, at A11.

Putting aside the question whether integrated education is intrinsically necessary or preferable, there can be no doubt that, owing to the link between poverty and "race," segregation consigns students of color to grossly inferior school systems. Intensely segregated schools (over 90% Black or Latino) are *14 times* more likely to have a majority of poor students than schools that are over 90% White.[41] As the Harvard Civil Rights Project explains: "[M]inority schools are highly correlated with high-poverty schools and these schools are also associated with low parental involvement, lack of resources, less experienced and credentialed teachers, and higher teacher turnover – all of which combine to exacerbate inequality for minority students."[42]

The Civil Rights Project's 2009 report confirms that this trend continues to the present day: "Fifty-five years after the *Brown* decision, blacks and Latinos in American schools are more segregated than they have been in more than four decades."[43] These students face a "dual segregation by race and poverty,"[44] with millions "locked into 'dropout factory' high schools, where huge percentages do not graduate, have little future in the American economy, and almost none are well prepared for college."[45]

IV. THE CASE OF CALIFORNIA

Two years before *Rodriguez*, in *Serrano v. Priest*,[46] the California Supreme Court examined an analogous claim that disparities in California's public school financing system violated the equal protection clauses of both the United States and California Constitutions. In stark contrast to the majority in *Rodriguez*, the California Supreme Court determined that "discrimination on the basis of wealth is an inherently suspect classification," requiring a compelling state interest.[47] The court found no such justification for California's system:

> The commercial and industrial property which augments a district's tax base is distributed unevenly throughout the state. To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property is to make the quality of a child's education dependent upon the location of private commercial and industrial establishments. Surely, this is to rely on the most irrelevant of factors as the basis for educational financing.[48]

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41. Gordon, *supra* note 39, at 15.
42. ORFIELD, *supra* note 1, at 5.
43. ORFIELD, *supra* note 1, at 3.
44. *Id.* at 27.
45. *Id.* at 3.
46. 5 Cal. 3d 584 (1971).
47. *Id.* at 617.
48. *Id.* at 601.

In addition, the court declared education a fundamental right, for two reasons: "first, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life."[49] The court emphasized the critical role that education plays in helping poorer students to succeed:

> [E]ducation is essential in maintaining what several commentators have termed "free enterprise democracy" – that is, preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background. Accordingly, the public schools of this state are the bright hope for entry of the poor and oppressed into the mainstream of American society.[50]

The California system failed to provide that opportunity: "We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors."[51]

Although *Rodriguez* reversed *Serrano* insofar as it was based upon the U.S. Constitution, since *Serrano* was also based upon the Equal Protection clause of the California Constitution, it remained–and remains–the law of the state. In accordance with *Serrano*, in 1977, the California legislature passed (and Governor Jerry Brown signed) Assembly Bill 65 to equalize school funding, to take effect July 1, 1978.[52] A "taxpayer's revolt" ensued. In 1978, on the eve of implementation of Assembly Bill 65, California voters passed Proposition 13, which rolled back property taxes and placed strict limits on any increases.[53] Instead of leveling up California schools, the resulting shortage in funding ensured that schools would be leveled down.

As a consequence, at the turn of the 21st Century, California's public schools, which were once among the best in the country, were ranked among the worst in many critical categories. "For example, California is now 49th among states in the ratio of teachers to students."[54] Ironically, "the richest state in the country and the home of Silicon Valley was ranked dead last among states in the availability of computers for instructional purposes."[55] Despite *Serrano*'s mandate of equal

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49. *Id.* at 605.

50. *Id.* at 609.

51. *Id.* at 589. As in *Rodriguez*, these disparities persisted despite the fact that the poorest districts actually paid higher taxes. "[A]ffluent districts can have their cake and eat it too," the *Serrano* court explained; "they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all." *Id.* at 600.

52. 1977 Cal. Stat. 2675; *see generally* William A. Fischel, *How Serrano Caused Proposition 13*, 12 J.L. & POL. 607, 611 (1996).

53. *See*, Nordlinger v. Hahn, 505 U.S. 1 (1992) (describing and upholding Proposition 13); *see also* Fischel, *supra* note 52, at 612.

54. Gary Blasi, *Reforming Educational Accountability*, *in* CALIFORNIA POLICY OPTIONS 2002, at 53 (2002), http://www.spa.ucla.edu/calpolicy2002calpolicy02/Blasi.pdf.

55. *Id.*

education, moreover, it is disproportionately the state's poor Black and Latino students who suffer the shortcomings in the California school system. The case of *Williams v. California* made this abundantly clear.

A. Williams v. California

On May 17, 2000, the forty-sixth anniversary of the Supreme Court's decision in *Brown*, low-income students and students of color representing numerous schools and school districts throughout California filed a class action lawsuit against the state and its education officials. They alleged that the failure to provide them with educational opportunities equal to those received by the majority of California students violated the state's Equal Protection clause:

> Tens of thousands of children attending public schools located throughout the State of California are being deprived of basic educational opportunities available to more privileged children. . . . [These] [s]tudents . . . attempt to learn without books and sometimes without any teachers, and in schools that lack functioning heating or air conditioning systems, that lack sufficient numbers of functioning toilets, and that are infested with vermin, including rats, mice, and cockroaches. These appalling conditions in California public schools represent extreme departures from accepted educational standards and yet they have persisted for years and have worsened over time.[56]

The plaintiffs pointed out that the "schools at which these manifestly substandard conditions exist are overwhelmingly populated by low-income and nonwhite students and students who are still learning the English language."[57] Indeed, in a majority of the schools in question, more than half of the student body was eligible for free or reduced-price school meals.[58] In all but four of the schools, students of color represented more than half of the student body.[59] And in almost two-thirds of the schools, more than 30% of the students were still learning the English language.[60] While most schools in California provided adequate and appropriate education to their children, the plaintiffs asserted, the plaintiffs were relegated to "learning conditions that should shock the conscience of any reasonable person."[61]

Proposition 13 clearly impeded the ability of the California school system to provide all

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56. First Amended Complaint for Injunctive and Declaratory Relief at 6, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/courtdocs/01FirstAmendedComplaint.pdf [hereinafter Complaint].

57. *Id.*

58. *Id.* at 6-7.

59. *Id.* at 7.

60. *Id.*

61. *Id.*

students with an adequate education, and the *Williams* plaintiffs alleged that California officials had failed miserably to ensure that low-income communities and communities of color did not suffer the inadequacies disproportionately. The plaintiffs sought to compel "State officials charged with affording basic educational opportunity to recognize and to fulfill their obligation to all California public school children to ensure that each of these children has at least the minimal educational essentials."[62]

The plaintiffs sought preliminary and permanent injunctions ordering the state to provide the requisite educational materials, facilities, and qualified instructors to ensure equal educational opportunity to all California public school children. "This is the 'Mississippification' of California's schools," the ACLU's Mark Rosenbaum told the press, "a separate and unequal system for the have-nots. These are the schools the government would create if it didn't care about all [of] its children."[63] "This isn't education," Rosenbaum later commented. "It's California's twisted version of 'Survivor' for children."[64]

In the Complaint and in the motions and papers that followed, the plaintiffs focused upon three main areas of inequality: lack of sufficient instructional materials, lack of decent school facilities, and lack of qualified and appropriate instruction.

B. Lack of Sufficient Instructional Materials

In 1981, the California Supreme Court recognized the critical importance of textbooks in the educational process: "The authorities are virtually unanimous in characterizing textbooks as having a central place in the educational mission of a school."[65] The court noted that "they go to the very heart of education," and that they "are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit."[66] The California State Legislature later echoed this sentiment. In *Serrano*, the Legislature declared, the California Supreme Court:

> reaffirmed the principle that education is a fundamental interest which is secured by the state constitutional guarantee of equal protection under the law. . . . The Legislature further declare[d] that, to the extent that every

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62. Complaint, *supra* note 56, at 8.

63. Louis Sahagun & Duke Helfand, *ACLU Sues State overOver Conditions in Poor Schools*, L.A. TIMES, May 18, 2000, at A1, *available at* http://8.12.42.31/2000/may/18/news/mn-31352.

64. Linda Deutsch, *Expanded Suit Says Rat Infested, Substandard Schools Deny Education to Poor*, ASSOCIATED PRESS, Aug. 15, 2000, http://www.decentschools.org/articles/AP_Expanded_Suit_Says.pdf. The plaintiffs were represented by attorneys from several organizations, including the ACLU Foundations of Southern and Northern California, the Center for Law in the Public Interest, the Mexican American Legal Defense and Educational Fund, Public Advocates, Inc., the Asian Pacific American Legal Center, and the law firm of Morrison and Foerster.

65. Cal. Teachers Ass'n v. Riles, 29 Cal. 3d 794, 811 (1981) (citations and internal quotations omitted).

66. *Id.*

> pupil does not have access to textbooks or instructional materials in each subject, a pupil's right to educational opportunity is impaired.[67]

As the *Williams* plaintiffs asserted, however, several independent sources had demonstrated that, at least since 1994, "hundreds of thousands of students have lacked textbooks to use in class without sharing and at home for homework."[68] This deficiency continued up to and through the lawsuit. For example, a 2002 Harris poll of 1071 California public school teachers found that 11.8% of teachers did not have enough books for students to use in class, a figure that translated to approximately 725,000 students state-wide.[69] One in three teachers did not have enough textbooks to send home with students for homework, meaning that "there are 1.9 million California public school students who do not have books necessary to do their homework."[70] The survey also demonstrated that these deficiencies were far greater in schools with poor students and students of color: roughly double the number of teachers at these schools reported problems with textbooks and instructional materials.[71]

A follow-up survey of 1056 teachers released in May of 2004 found that 54% of science teachers did not have enough equipment and materials to do science lab work; 50% of social science teachers did not have enough maps, atlases, and reference materials for students to use and take home; and 32% of teachers did not have enough textbooks for students to take home.[72] Once again, the survey found that poor students and students of color suffered disproportionately. For example, teachers in schools with the highest concentrations of Black, Latino, and Native American students were 43% more likely to rate the textbooks and instructional materials as poor or only fair compared with teachers in schools with the lowest such concentrations; they were 69% more likely to rate the textbooks' coverage of the state content standards as poor or only fair; and they were 74% more likely to report insufficient textbooks for all students to take home.[73] Looking at this and several other critical categories (discussed below), the Harris report concluded:

> Fifty years ago, *Brown vs. the Board of Education* promised an equal education to all of America's children. This survey of California teachers reveals that this promise is being broken every day: far too many

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67. Pupil Textbook and Instructional Materials Incentive Program Act, § 1, 1994 Cal. Stat. 5391.

68. Memorandum of Points and Auths. in Support of Plaintiffs' Motion for Summary Adjudication of the State's Duty to Ensure Equal Access to Instructional Materials for All Cal.'s Pub. Sch. Students at 1, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/courtdocs/01GSMPABooks.pdf [hereinafter June 9, 2003 Brief].

69. LOUIS HARRIS, A SURVEY OF THE STATUS OF EQUALITY IN PUBLIC EDUCATION IN CALIFORNIA, at i (2002), *available at* http://edfordemocracy.org/TQI/Harris%20Poll%20-%20Equality%20in%20Schools.pdf [hereinafter HARRIS 2002].

70. *Id.*

71. *Id.* at 6.

72. LOUIS HARRIS, WILLIAM AND FLORA HEWLETT FOUND., REPORT ON THE STATUS OF PUBLIC SCHOOL EDUCATION IN CALIFORNIA 4 (2004), *available at* http://justschools.gseis.ucla.edu/research/publications/Harris.pdf [hereinafter HARRIS 2004].

73. *Id.* at 11-12.

> California children are not getting a quality education and African-American and Latino students, in particular, are not given a fair and equal opportunity to learn.[74]

C. Students and Teachers Weigh-In

The plaintiffs did not rely merely upon colorless, if important, surveys. They provided first-hand affidavits and testimony from students and teachers throughout the state attesting to the glaring insufficiencies and the hardships they wrought. Clive Aden, a sophomore at Fremont High School in Los Angeles, explained:

> In my Chemistry class we only have a class set of books and we don't have books to take home. I need a book to study from at home and in school because I want to go to college and I want to study science and become a doctor. I think that to go to college and study science I need to know the basics of science and the basics of Chemistry and I need a book at home for that. . . . From the beginning of July until the end of August there were no books in my Chemistry class. We didn't have a class set and we didn't have books to take home.[75]

In Magaly de Loza's algebra class, there were no books at all until December, and thus no homework.[76] And in her biology class, many of the students had to share one book, and many of these books were old and falling apart. There were not enough for students to take home.[77]

Anthony Wesley was unable to take any of his books home during his junior year at Balboa High School in San Francisco.[78] "Since we can't take books home the teacher gives us easy assignments that we can do without books, like ask our parents what color their eyes are in Spanish, but easy assignments don't really help me learn Spanish," Anthony explained.[79] In two of his classes, there weren't even enough books to go around in class. "We have to sit next to another student and look over their shoulder to be able to follow along in class."[80]

Mayeli Avalos, a sophomore at Fremont in Los Angeles, explained the hardships of not having a book to take home. Each day, class time is wasted while students carefully copy down

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74. *Id.* at 1.

75. Declaration of Clive Aden at 1, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/01DeclAden.pdf.

76. Declaration of Magaly de Loza at 1, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/01DeclDeLoza.pdf.

77. *Id.*

78. Declaration of Anthony Wesley at 1, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/01DeclWesley.pdf.

79. *Id.*

80. *Id.* at 1-2.

homework problems and instruction from the books. If the students make an error or fail to copy down every problem and every instruction, they will not be able to complete their assignment, or to study for tests.[81] "In fact I often stay in class during nutrition to check my notes with the information in the textbook," Mayeli explained.[82]

If you miss a day of school, you have no textbook at home to help catch up. "[Y]ou need to come to school early, or stay in class during nutrition or lunch to copy what you missed from the book – otherwise you can't study for tests."[83] In any event, students cannot copy the entire book, so they must rely upon their in-class notes to prepare for exams. "I just took the [Advanced Placement Spanish] test," Mayeli explained, "and I would have liked to have had a textbook at home to review everything for the test at my own pace."[84] With no internet access at home, and no Spanish dictionary, she was unable to review grammar or even vocabulary for the test.[85] All of this is frustrating and stressful for a young student with dreams of becoming the first in her family to graduate from college:

> Often all the information I need to study is in the book and I wish I had a copy at home to spend the weekend reviewing and studying. Not having a textbook is creating worries I don't need. I wish I could worry about doing my best instead of thinking about the things I didn't copy from the book.[86]

The teachers echoed these concerns, and added their own. Iris Contreras, a teacher at Foothill Elementary in Pittsburg, California, explained that four of the six third-grade teachers at her school shared one class set of books for science and one for social studies. As a result, the teachers were forced to coordinate their schedules to make sure they were not teaching science or social studies on the same day.[87] If a teacher failed to finish a lesson, moreover, she had to ask one of the other teachers for permission to use the same book the next day to finish.[88] In addition, there were no books for students to take home. "Without a book to take home[,] students are unable to review what they learn in class and do not retain as much information[,]" Ms. Contreras observed.[89] "Due to this, I spend more class time going over the same information and I am unable to cover as

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81. Declaration of Mayeli Avalos at 2, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/01DeclAvalos.pdf.

82. *Id.*

83. *Id.*

84. *Id.* at 1.

85. *Id.*

86. *Id.* at 2.

87. Declaration of Iris Contreras at 1, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/01DeclContreras.pdf.

88. *Id.* at 1-2.

89. *Id.* at 1.

much information."[90] Despite the dire need, school officials informed Ms. Contreras that the school would not be ordering any more books due to lack of funding.[91]

Numerous teachers testified that, without sufficient textbooks, they were forced to spend inordinate amounts of time at the photocopying machine to make copies of lessons and assignments for their students. Carlos Moreno, a teacher at Jurupa Valley High School in Mira Loma, California, was given a monthly limit of 2,000 copies, a limit he frequently reached before the month ended.[92] As a result, he was forced to travel to the district copy center after school to make additional copies.[93] Many teachers reported dipping into their own (paltry) salaries to buy books and materials for students, and to pay for copies at a copy center, either because the school's copy machine was broken, or because they had exceeded their monthly quota of copies.[94]

Finally, the plaintiffs cited innumerable school "action plans" and assessments conducted by the state that documented severe shortages in textbooks and instructional materials among the lowest performing schools in the state. For example, plaintiffs explained that a 1999-2000 compliance review for the Oakland Unified School District revealed the complaint by parents that some schools have operated for three to five years without books.[95]

While "the vast majority of California public school students do have access to sufficient numbers of instructional materials for use in class and at home for homework and study[,]"[96] the plaintiffs argued, those in poor communities and communities of color often did not.[97] This deprivation had "a real and appreciable – indeed, devastating – impact on students' fundamental right to educational equality."[98] As Plaintiffs' expert Michelle Fine explained, among other things: "Psychologically, the absence of books and materials, and the recognition that students in 'other schools' have access to such materials, produces a sense of despair about perceived social worth . . . ."[99]

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90. *Id.*

91. *Id.*

92. Declaration of Carlos Moreno at 1, Williams v. California, No. 312236 (Cal. Super. Ct., S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/01DeclMoreno.pdf.

93. *Id.*

94. *See, e.g.*, Declaration of Jacqueline Courtiol at 1, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/01DeclCourtiol.pdf.

95. June 9, 2003 Brief, *supra* note 68, at 16.

96. *Id.* at 19.

97. *Id.* at 1.

98. *Id.* at 4.

99. Expert Report of Michelle Fine at 37, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/expert_reports/fine_report.pdf.

D. Lack of Decent School Facilities

Decent school facilities are not merely a matter of aesthetics. "School facilities poorly maintained and just plain inadequate can depress the human spirit," former California Superintendent of Schools Delaine Eastin explained.[100] "Cleanliness and enough room are not frills; they enhance productivity."[101] A 2004 report by California's Education Data Partnership (a partnership that includes the California Department of Education) similarly observed:

> Research evidence and common sense indicate that there is a minimum level of quality for a school facility below which student and teacher effectiveness can be seriously compromised. Various studies show that students achieve less in school buildings that are situated on noisy streets, have too many students for their capacity, or cannot be adequately and safely maintained .... Schools need enough room to allow students to move around, areas designed for special activities such as science labs and library/media centers, and space in which to display and store student projects.[102]

Proffering a wealth of evidence, the *Williams* plaintiffs argued that California was failing miserably to provide them with the facilities necessary to foster proper learning. The conditions in their schools and classrooms were so poor, they argued, "as to deny fundamental equality of educational opportunity."[103] While most California students enjoyed adequate facilities, the plaintiffs – representing "the State's lowest income students and student populations comprised largely of students of color"[104] – were forced to endure "squalid conditions."[105] Among other things, these conditions included rampant overcrowding; rodent infestations; deteriorating and even crumbling buildings; leaky, falling ceilings; malfunctioning heating and air conditioning systems; appalling, unsanitary bathrooms; and carcinogenic mold in the classroom.[106]

Numerous reports, audits, and surveys supported the plaintiffs' claims. For example, a 2001 survey of officials responsible for pest control in 394 California school districts found that 31.9% of such officials considered mice or rats to be a serious problem in the schools, and 23.4%

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100. *Quoted in*, Memorandum of Points and Auths. in Support of Plaintiffs' Motion for Summary Adjudication of the State's Duty to Ensure Equal Access to Decent Sch. Facilities for All Cal.'s Pub. Sch. Students at 4, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000). http://www.decentschools.org/courtdocs/MPA_Decent_School_Facs.pdf [hereinafter July 18, 2003 Brief]..

101. *Id.*

102. EDUC. DATA P'SHIP, CAL. DEP'T OF EDUC., SCHOOL FACILITIES IN CA (2007), http://www.eddata.k12.ca.us/Navigation/fsTwoPanel.asp?bottom=%2FArticles%2FArticle.asp%3Ftitle%3DEducation%2520Issues.

103. July 18, 2003 Brief, *supra* note 100, at 1.

104. *Id.* at 41.

105. *Id.* at 2.

106. *See generally id.* (describing the inadequate conditions in California public schools).

considered cockroaches a serious problem.[107] In the aforementioned 2002 Harris survey, 27.6% of teachers (representing 1.7 million students) reported evidence of cockroaches, rats, or mice in the past year; 32.3% reported that their classroom was uncomfortably hot or cold; and 16.6% complained of student bathrooms not working or closed.[108]

Once again, the survey found "significant disparities" between the majority of schools in California and the 20% of schools with the highest number of "at-risk" students, namely poor students and students of color. For example, 22% of teachers at the "majority" schools viewed as negative the "adequacy of physical facilities," compared with more than double that number, or 46% of teachers, at the "highest-risk" schools.[109] Similarly, 16% of teachers in "majority" schools reported "poor working conditions for teachers," compared to 35% of teachers in the "highest-risk" schools.[110]

A 2003 report on environmental conditions in California classrooms commissioned by the California Legislature found that 17% of all classrooms had excess moisture in the walls, ceiling, or floor; 27% of portable classrooms and 17% of traditional classrooms experienced temperatures below national comfort standards for the heating season; 1% of all classrooms (serving tens of thousands of students) had visible mold inside the classroom; and 3% had visible mold on the exterior walls.[111] Finally, the 2004 Harris survey found that teachers in schools with the highest percentages of students of color were twice as likely to rate their working conditions as poor and 70% more likely to report seeing evidence of cockroaches, rats, or mice.[112] The survey concluded that "the conditions in the schools attended by high-risk children are so seriously inadequate that they do not provide an equal opportunity for a quality education."[113]

E. Students and Teachers

Once again, the plaintiffs provided first-hand testimony from students and teachers throughout the state chronicling the "squalid conditions" they were forced to endure, in numerous categories. Enrique Garcia, a second-grade teacher at Roosevelt Elementary School in the Lynwood Unified School District ("Roosevelt"), spent two years teaching in a building with asbestos, during which time "I was constantly sick," and "the students were also ill much more

107. *Id.* at 16.

108. HARRIS 2002, *supra* note 69, at i.

109. *Id.* at 3.

110. *Id.* at 5.

111. *Cited in*, July 18, 2003 Brief, *supra* note 100, at 14-15 (quoting CAL. AIR RES. BD. & CAL. DEP'T OF HEALTH SERV., REPORT TO THE CALIFORNIA LEGISLATURE 3 (2003)).

112. HARRIS 2004, *supra* note 72, at 3-4.

113. *Id.* at 2.

often than normal."[114] The upper campus of Roosevelt, known as "death row," consisted of decrepit, smelly, portable classrooms, housed in trailers. In 2002, OSHA closed down one of the trailers because of a problem with mildew.[115]

There were ventilation problems throughout the school. On warm days, Mr. Garcia told the court, the room temperatures would reach "at least 90 to 95 degrees."[116] "Students have difficulty staying awake when the room temperatures are high," he explained, and naturally the students found it difficult to concentrate on the studies at hand.[117] Mr. Garcia bought his own pesticides "to deal with the cockroaches, ants, spiders and other bugs that infest the campus."[118] He could do nothing, however, to address the profound overcrowding. According to the Lynwood Teachers Association, Roosevelt was designed to house a maximum of 650 to 700 students. In the 2002-2003 school year, "the enrolment[sic] was approximately 1,430 students," a figure that was expected to rise to over 1,600 students during the 2003-04 school year, with no plans for new construction.[119]

Because of the overcrowding, there was no library space at Roosevelt. Teachers routinely lacked sufficient desks or space for their students, and students lacked sufficient playground space because of all the trailers on what should have been their playground.[120] The remaining space was poorly maintained, causing the children to play "in dirt and dust."[121] As a result, they were "extraordinarily dirty, which I believe that along with breathing in dust and dirt contributes to students being ill and missing school," Mr. Garcia opined.[122]

Overcrowding, with a resulting lack of space and desks, was a ubiquitous theme in the witnesses' testimony. Geraldine Martinez, a junior at Thurgood Marshall High School in San Francisco, explained that there were twenty students in her study skills class, but only three desks. "Students sit on the bookcases to do their work. Some students ask permission to leave to go to the library to do their work because there is not enough room in the classroom."[123] In Isaac Medina's biology class at Roosevelt High School in Los Angeles, there were approximately 40 students in the class. "Most of the time, at least 5 students have to stand during the class because there are not

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114. Declaration of Enrique Garcia at 2, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000) (on file with author).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 3.

120. Declaration of Enrique Garcia, *supra* note 114, at 2-3.

121. *Id.*

122. *Id.*

123. Declaration of Geraldine Martinez at 1, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/DECL_G_MARTINEZ.pdf.

enough chairs or stools for everyone," Isaac reported.[124] "The teacher has a system where students rotate so that everyone at some point has to stand during the class."[125]

His history class expanded from 25 students to 40 during the school year, leading to terrible overcrowding. "I don't understand how they expect us to learn when we don't even have enough room to write things down or even to put our books on the table," Isaac complained.[126] The overcrowding had a marked effect on Isaac's grades. "The first two quarters, I got A's in my History class. Now, I am barely passing my History class. I think this is because before, when the class was smaller, I had more help from my teacher."[127]

Overcrowding affects not only the classrooms, but every other area of the schools, including the hallways, the bathrooms, and the cafeterias. At Magge Rodriguez's middle school in Watsonville, California, the hallways were so crowded that students could "hardly walk or use their lockers."[128] This made it difficult to get to class on time, and even more difficult to use the bathrooms. With the crowds, there was never enough time between periods, and the lines during lunch time were so long that Magge sometimes waited 15 minutes to use the bathroom.[129] Of course, there was a risk to waiting too long to use the bathrooms: because of the overcrowding, the cafeteria would run out of food. "When this happens, I have to either find friends to share their lunches with me or I go an entire school day without eating."[130] Danitza Nunez, a Junior at South Gate High School in South Gate, California explained that even when her school cafeteria doesn't run out of food, "[t]here are times when the lunch bell rings and there are still approximately 100-200 students in line who haven't had lunch."[131]

Problems with extreme cold or extreme heat were also ubiquitous. Stella Gloria Najera, a second-grade teacher at Jesse G. Sanchez Elementary School in the Alisal Union School District, explained that there was no air conditioning in her classroom. In September and early October, it would reach 90 degrees in the classroom, causing her students "difficulty paying attention."[132] At times, she was forced to change her lesson plan. "Instead of focusing on high conceptual subjects

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124. Declaration of Isaac Medina at 1, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/DECL_I_MEDINA.pdf.

125. *Id.*

126. *Id.*

127. *Id.*

128. Declaration of Magge Rodriguez at 2, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/DECL_M_RODRIGUEZ.pdf.

129. *Id.* at 2-3.

130. *Id.*

131. Declaration of Danitza Nunez at 2, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/01DeclNunez.pdf.

132. Declaration of Stella Gloria Najera at 1, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/DECL_SG_NAJERA.pdf.

such as Math or English which require more attention, I would switch over to work with manipulatives or art in an attempt to keep the students' attention and keep them engaged."[133] Magge Rodriguez had the opposite problem. Instead of giving off heat, the heaters in her classroom gave off cold air, in the winter. "Because students got so cold, some would wear gloves and hats in class."[134] This happened almost every day in winter, and in most of her classes. "Because my teachers knew the students were cold," Magge explained, "a lot of them would have us do stretches during class to help us warm up. This would help, but only for a little while and then we would get cold again."[135]

Vermin infestations like the one reported by San Francisco first-grade teacher Jeremiah Jeffries were common:

> The mice eat everything in sight. They ate holes in the leaves of my plant, and they ate through the plastic to get to the food in the earthquake preparedness kit in my classroom. The ledge on the bottom of the chalkboard is full of mice droppings every morning when I get to class. Any space that is partially enclosed winds up with mouse droppings in it. . . . There were mouse droppings mixed in with the beads in the kits that my first graders use for science. There are droppings in the boxes that my students dig around in for books. I don't like my kids to have to come into contact with the mice droppings but I feel like there is nothing I can do.[136]

Nearly all of the witnesses also complained of terrible conditions in the school bathrooms. Nathalie Granados' experiences at Thurgood Marshall high school in San Francisco were typical:

> The bathrooms at my school are disgusting. There is often no toilet paper, no soap, and no paper towels to dry your hands. . . .The bathroom on the second floor is the worst. There are about five stalls, and two or three of them don't have doors. The ones that do have doors don't lock, so there is no privacy. There is trash on the floor sometimes, and girls leave tampons on the floor and on the backs of toilet seats because there aren't any trash cans in the stalls to put them in. I can't stand using the bathrooms at school because they are so nasty, so I have tried to train myself to hold it in all day and wait until I leave school to use the bathroom, but that isn't healthy and sometimes I can't hold it all day.[137]

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133. *Id.*

134. Declaration of Magge Rodriguez at 1, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/DECL_M_RODRIGUEZ.pdf.

135. *Id.*

136. Declaration of Jeremiah Jeffries at 1, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/DECL_J_JEFFRIES.pdf.

137. Declaration of Nathalie Granados at 1, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/DECL_N_GRANADOS.pdf.

Many others complained of bathrooms so disgusting that they would attempt to hold it in all day. "I usually try to wait until I get home to use the bathroom," Geraldine Martinez explained.[138] "I get a stomachache when I don't go to the bathroom all day."[139]

The list of additional problems routinely reported by the students and teachers is far too long to mention, save in summary fashion: ceiling tiles falling in classrooms;[140] filthy, inoperative water fountains;[141] mold growing in classrooms without remediation;[142] broken ventilation systems, leading to inordinate sick leave;[143] lead paint;[144] broken floors and windows;[145] flooding, with water pouring into buckets on classroom floors;[146] and students and teachers forced to clean their classrooms and grounds for lack of custodial staff.[147]

Students, teachers, and experts alike explained the tremendous harm caused by these conditions, including not merely the threat to health and safety, but the "devastating psychological consequences,"[148] and the deleterious effect upon students' academic performances. "Researchers have repeatedly found a difference of between 5-17 percentile points between achievement of students in substandard buildings and those students in above-standard building, when the socioeconomic status of students is controlled," Glen I. Earthman, Professor Emeritus of Educational Administration at Virginia Polytechnic Institute, explained.[149] As one parent put it: "When the students walk into the school they feel helpless. I think the terrible shape the school is in really affects the students. The atmosphere at the school makes the kids feel like they can't

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138. Declaration of Geraldine Martinez at 2, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/DECL_G_MARTINEZ.pdf.

139. *Id.*

140. *See, e.g.* Declaration of Geraldine Martinez, *supra* note 123, at 1; Declaration of Trevor Gardner, at 3, Williams v. California, No. 312236 (Cal. Super. Ct. S. F. County filed May 17, 2000), http://www.decentschools.org/declarations/DECL_T_GARDNER.pdf; Declaration of Cheryl Lana at 3, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/DECL_C_LANA.pdf.

141. *See, e.g.*, Declaration of Magge Rodriguez, *supra* note 128, at 4; Declaration of Earlene Gray at 3, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/DECL_E_GRAY.pdf.

142. *See, e.g.*, Declaration of Jeremiah Jeffries, *supra* note 136, at1.

143. *See,e.g.*, Declaration of Enique Garcia, *supra* note 114, at 2; Declaration of Jeremiah Jeffires, *supra* note 136, at 2.

144. *See, e.g.*, Declaration of Jeremiah Jeffies, *supra* note 136, at 2.

145. *See, e.g.*, Declartion of Earlene Gray *supra* note at 141, at 1; Declaration of Enrique Garcia, *supra* note 114, at 2; Declaration of Geraldine Martinez, *supra* note 123, at 1.

146. *See, e.g.*, Declaration of Stella Gloria Najera, *supra* note 132, at 2; Declaration of Amanda Piercy at 1, Williams v. California, No. 312236 (Cal. Super. Ct. D.F. County filed May 17, 2000), http://www.decentschools.org/declarations/DECL_A_PIERCY.pdf.

147. *See, e.g.*, Declaration of Earlene Gray, *supra* note 141, at 1; Declaratrion of Magge Rodriguez, *supra* note 128, at 4.

148. July 18, 2003 Brief, *supra* note 100, at 10.

149. Expert Report of Glen I. Earthman at 3-4, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/expert_reports/earthman_report.pdf.

compete with students in other schools . . . go on to college and succeed."[150]

California's highest elected officials admitted as much. In a 2000 "Dear Fellow Democrat" letter, Governor Gray Davis announced: "Hundreds of our children are trying to learn in overcrowded, out-of-date, unsafe schoolrooms – or in temporary trailers stacked on what were once playgrounds. Our critical class-size-reduction program simply won't work if schools have no space."[151] In a 2002 press release, Lieutenant Governor Cruz Bustamante echoed this sentiment:

> California is the fifth-largest economy in the world, yet our children are learning in trailers and cafeterias. This is unacceptable! How can we expect students to be prepared for the challenges of tomorrow if we don't provide an appropriate environment in which they can learn today? Our children deserve safe, modern classrooms where they can reach their full potential.[152]

Unfortunately, as the *Williams* litigation revealed, the state had no system for preventing, discovering, or correcting the rampant inadequacies and inequalities in its facilities.

F. Lack of Qualified, Equal Instruction

The plaintiffs challenged two final areas of inequality: the grossly disproportionate lack of credentialed teachers in their schools, and the use of "Concept 6" schools, which operate year-round, dividing students into three disjointed "tracks" and robbing students of equal days of instruction.

A 2002 report of the Professional Development Task Force of the California Department of Education declared: "An impressive body of research shows that students achieve at significantly higher levels when they are taught by teachers who have a deep knowledge of subject matter and strong preparation for teaching and who understand how students learn . . . ."[153] The report noted, however, that there was significant inequality in the distribution of qualified teachers in California:

> Recent research paints a stark picture of inequities in the current system. In more than 20 percent of the state's schools, more than 20 percent of the teachers are under-qualified, and the schools are disproportionately in high-poverty communities with a large proportion of the students of color

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150. Declaration of Kim-Shree Maufas at 3, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/DECL_KS_MAUFAS.pdf.

151. *Letter to the Editor*, VENTURA COUNTY STAR, May 16, 2000, at B05.

152. Press Release, Office of the Cal. Lieutenant Governor, Lt. Governor Cruz Bustamante Praises Passage of School Bond Proposal AB 16 (Apr. 4, 2002) (on file with author).

153. CAL. DEP'T OF EDUC., LEARNING . . . TEACHING . . . LEADING . . .: REPORT OF THE PROFESSIONAL DEVELOPMENT TASK FORCE 2 (2002), *available at* http://www.cde.ca.gov/pd/ps/rp/documents/learnteachlead.pdf.

> and English language learners. These schools lack the human and material resources needed to create a productive learning environment. The unequal distribution of qualified teachers is a major source of the growing achievement gap in California.[154]

Indeed, the report found that students in "high-minority" schools were almost seven times as likely to have under-qualified teachers as those in "low-minority" schools.[155]

The *Williams* plaintiffs reflected these stark inequalities. Statistics proffered by the plaintiffs showed that in many of their schools, a staggering percentage of their teachers were not fully credentialed, including the following:

School	**District**	**% of Fully Credentialed Teachers**
Frances Willard Elementary	Compton Unified	13%
Lincoln Elementary	Compton Unified	17%
Washington Elementary	Compton Unified	19%
Longfellow Elementary	Compton Unified	23%
Bursch Elementary	Compton Unified	24%
Foster Elementary	Compton Unified	28%
Nubia Leadership Academy	San Diego City Unified	13%
Harriet Tubman Village	San Diego City Unified	30%
Cox Elementary School	Oakland Unified	18%
Vaughn Street Elementary	Los Angeles Unified	19%
Ann Street Elementary	Los Angeles Unified	36%[156]

Studies have shown a strong relationship between teacher qualifications and student achievement, "with teacher certification status and experience being among the strongest and most consistent predictors of student achievement, in addition to socioeconomic status. Certification status generally shows a larger effect size than experience."[157]

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154. *Id.* at 7 (footnote and citation omitted).

155. *Id.* at 17.

156. Complaint, *supra* note 56, at 58-59.

157. *See, e.g.*, LINDA DARLING-HAMMOND, UCLA'S INST. FOR DEMOCRACY, EDUC., & ACCESS, ACCESS TO QUALITY TEACHING: AN ANALYSIS OF INEQUALITY IN CALIFORNIA'S PUBLIC SCHOOLS 17 (2002), *available at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1009&context=idea.

G. Concept 6

For approximately 355,000 California public school students each year, all of the problems examined thus far were compounded by the state's use of the "Concept 6" system. This system, an emergency measure to deal with massive overcrowding, increases school capacity by 50% through a complicated rotation of three tracks (or groups) of teachers and students utilizing two sets of classrooms year round. Under this system, groups alternate using the classrooms, two tracks at a time, while a third is on vacation. The result is a disjointed and truncated calendar that deprives students of 17 days, or nearly four weeks of instruction each year compared with the traditional schedule.[158]

In addition, the tracks in Concept 6 schools are not equal. Students in the A and C Tracks attend school for four months, are off for two months, and are back for another four months. B Track students attend school for two months, are off for two months, are back for four months, are off for two months, and are back for a final two months. B Track students typically get but a few days off before starting the next school "year," with virtually no time to rest and to prepare for the new year. As teacher Gillian Russom explained:

> Not having transition time between school years is difficult and impacts my teaching. For example, it makes it hard to do the type of final projects that I want to do with my students because I also have to be concerned about starting the new classes. It also makes it difficult to begin the new year on a strong note because I have to complete final grades for students, correct their final projects and final exams, turn in textbooks and other materials and complete paperwork to close the previous year immediately before I have to begin the new year.[159]

The B Track is thus the least desirable for both teachers and students alike. A study of the Los Angeles County Unified School District, the plaintiffs noted, found the highest percentage of fully credentialed teachers in track A, and the lowest percentage in track B.[160] Throughout the district, track A offered 225 Advanced Placement courses, while track B offered 139. The lowest percentage of Latino students and English learners were found in track A, with the highest of both in track B.[161]

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158. Memorandum of Points and Auths. in Support of Plaintiffs' Motion for Summary Adjudication of the State's Duty to Ensure Equal Access to Instructional Days for All Cal.'s Pub. Sch. Students at 1, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/courtdocs/MPA_Support_Equal_Days.pdf [hereinafter September 23, 2003 Brief].

159. Declaration of Gillian Russom at 2, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/declarations/DECL_G_RUSSOM.pdf.

160. September 23, 2003 Brief, *supra* note 158, at 9.

161. September 23, 2003 Brief, *supra* note 158, at 9-10.

The vast majority of California public schools are not compelled to – and do not – utilize the Concept 6 system. As the plaintiffs demonstrated, the relatively few that do are schools in which the vast majority of students are low-income and Latino, the majority of whom are learning the English language. In 2001, for example, the median Latino enrollment in Concept 6 schools was 84%, compared to 34% statewide; the median White enrollment in such schools was 1%, compared to 36% statewide; and the median enrollment of students qualifying for the subsidized National School Lunch program was 99%, compared to 46% statewide.[162]

As the plaintiffs pointed out, the Concept 6 schools have numerous harmful consequences for its students, including segregating students into tracks with fewer high-level courses and credentialed teachers; providing 17 fewer days of instruction, a loss not compensated by the few minutes tacked onto the Concept 6 school days; disrupting and shortening instruction into unworkable semesters; eliminating the use of summer school to assist at-risk students; and preventing families with children on different tracks to take family vacations.[163] In addition, Concept 6 schools "are overwhelmingly staffed with the least experienced teachers in the State."[164] Not surprisingly, then, "[e]ven after controlling for background characteristics, Concept 6 schools are the most consistently low-performing, lagging one full rank behind the state's rankings."[165]

H. A Confluence of Factors

Because the plaintiffs moved separately for summary adjudication in each of the three areas of inequality reviewed above, it would be natural to view each as a separate and distinct problem. The reality, however, is that the majority of *Williams* plaintiffs were forced to wrestle with all of these problems: the student without a Spanish dictionary was also the student forced to stand in her classroom, a classroom taught by an uncredentialed teacher. The student who fell ill as a result of an unhealthful classroom was the same student who lacked a textbook with which to review lessons missed during the illness. This was also the case within categories: the student with rats in her classroom was likely to be the same student suffering 95-degree temperatures. And, as we have seen, the student stuck in track B was the student most likely to have an un-credentialed instructor.

All of these factors, then, conspired to disrupt the classroom and to hamper students' ability to perform academically. Of equal importance, these were students already wrestling with the burdens of poverty and all of its attendant hardships, and even, in many cases, the English language itself. In *Serrano*, the California Supreme Court recognized that a proper education is essential to "preserving an individual's opportunity to compete successfully in the economic marketplace,

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162. *Id.* at 4.
163. *Id.* at 2.
164. *Id.* at 24.
165. *Id.* at 3.

despite a disadvantaged background."[166] The *Williams* plaintiffs demonstrated that, more than three decades after *Serrano*, and a half-century after *Brown*, they were still being deprived of an equal opportunity to compete in the marketplace. Indeed, looking at the totality of circumstances summarized above, the 2004 Harris survey concluded:

> [T]hese findings cast serious doubt on a whole school of thought that is based on the assumption that African American or Latino students are incapable of learning as well as their white counterparts. Statistical studies purported to "prove" the inferior capabilities of at-risk children. But the poor performance outcome data in these studies did not take into account that the schools attended by these same students were largely incapable of giving them any semblance of a quality education, as documented in this survey.[167]

Plaintiffs' expert Jeannie Oakes, Presidential Professor at the UCLA Graduate School of Education and Information Studies, perhaps put it best: "It is reprehensible that those children most deprived educationally are also those who society neglects most in other ways."[168]

I. The Governor's Response

When the plaintiffs filed their lawsuit on May 17, 2000, they were careful not to name Democratic Governor Gray Davis as a defendant. Davis was a natural lead defendant: when it comes to state-wide inequalities and shortcomings in education, the buck stops with the governor. But the plaintiffs believed that they had a potential ally in Davis. Davis was, after all, the self-proclaimed education governor. On January 7, 1999, in his first State of the State speech, the newly-inaugurated Davis reaffirmed his campaign commitment to make education a top priority: "My first priority – in fact, my first, second and third priority – is education. And my goal is to set higher standards for everyone involved in our schools: students and parents, teachers and administrators." [169] Hector Villagra, an attorney with the Mexican

American Legal Defense and Educational Fund, explained the plaintiffs' reasoning: "He said his first three priorities were education, education, and education. By not implicating him personally, we gave him room to do the right thing, acknowledge our claims, and enter into a fair settlement."[170]

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166. Serrano, 5 Cal. 3d at 609.

167. HARRIS 2004, *supra* note 77, at 4.

168. Jeannie Oakes, Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for *Williams v. State of California* at 3, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/expert_reports/oakes_report.pdf [hereinafter Oakes Synthesis].

169. Dave Lesher, Budget Tight, Schools Come 1st, Davis Says, L.A. TIMES, Jan. 7, 1999.

170. Telephone Interview with Hector Villagra (May 30, 2006).

Davis did precisely the opposite. In a move that Davis' successor, Arnold Schwarzenegger, would call "crazy," Davis hired the law firm of O'Melveny & Meyers to defend the lawsuit, rather than the state's Attorney General. In a memo to the governor, Attorney General Bill Lockyer had advised against hiring an expensive private firm, estimating that the Attorney General's defense of the case would cost "up to $6 million" through trial.[171] Instead, signaling his intention to fight the lawsuit tooth and nail, Davis hired O'Melveny, which charged taxpayers a reported $325 an hour for lawyers, and $140 an hour for paralegals.[172] As the *San Francisco Chronicle* noted, when the O'Melveny lawyers traveled to San Francisco to conduct depositions in the lawsuit, they stayed at the Park Hyatt, a hotel that charged a minimum of $285 a night – the lowest corporate rate.[173] As we will see, the case never went to trial, but in three years of scorched-earth litigation, O'Melveny received $14,425,373 in legal fees. Together with other legal expenses, including those of the Attorney General, the case would end up costing California taxpayers over $18 million, enough money, the *Chronicle* reported, to pay 460 teachers for a year.[174]

In September 2000, the state defendants–through O'Melveny–filed a "demurrer," essentially a motion to dismiss the complaint for vagueness, on two grounds: (i) the complaint did not specifically delineate the areas of inequality for which the plaintiffs were seeking state enforcement, and (ii) adequate standards and regulations were already in place to address all of the plaintiffs' complaints.[175] If the plaintiffs wanted redress, the defendants argued, they should be required to undertake (myriad) individual administrative proceedings to enforce these rules on an incident-by-incident, school-by-school basis, and the *Williams* lawsuit should be stayed pending completion of all of these administrative challenges.[176] Characterizing some of the plaintiffs' complaints as "trivial,"[177] the defendants asserted that the problems set forth in the complaint could not be resolved by using a "magic wand."[178]

Contrary to the state's assertion, however, the plaintiffs had punctiliously delineated the areas of inequality for which they were seeking redress. The plaintiffs carefully described every category of inequality, explaining the harmful consequences of each of these inequalities. The local districts were mere agents of the state, moreover, and in the words of the California Supreme Court, the state "assumed specific responsibility for a statewide public education system open on equal

171. Nanette Asimov & Lance Williams, *Gov. Davis vs. Schoolkids: High-Priced Legal Team Browbeats Youths About Shoddy Schools*, S.F. CHRON., Sept. 2, 2001, at A1.

172. *Id.*

173. *Id.*

174. *Id.*

175. Demurrer of Defendant State of Cal. to Plaintiffs' First Amended Complaint, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/courtdocs/02DemurrerOfDefendant.pdf.

176. *Id.*

177. *Id.* at 3.

178. *Id.* at 4.

terms to all."[179] The state's attempt to shift responsibility to local districts, through piecemeal administrative proceedings, was thus inappropriate: "The State may not . . . seek spectator status for the workings of its common school system by attempting to transfer accountability to local districts for the denial of basic educational equality," the plaintiffs explained.[180] More importantly, local administrative proceedings were wholly inappropriate forums in which to litigate the plaintiffs' constitutional claims of inter-district, state-wide inequalities, claims brought against the state, and not the localities.

In November of 2000, Judge Peter Busch agreed with the plaintiffs on both of these points, denying the state's demurrer.[181] The state responded by filing suit against all 18 school districts named in the *Williams* lawsuit, seeking to force them into the case. In court, the state's lawyer argued, "If there's a dead rat in the gymnasium, broken windows, all these minor violations that the plaintiffs allege, the way to get them fixed is to have districts who are on the ground fix them."[182] Once again, the state sought to evade its responsibility to ensure access to equal education for all students by blaming the local districts, rather astoundingly portraying the plaintiffs' complaints as "minor."[183] In May 2001, Judge Busch ruled that the state's lawsuit must be separated from *Williams*, and that he would not decide that case until determining the state's responsibility for the failures alleged in *Williams*.[184]

J. A Take No Prisoners Defense

Eschewing any form of negotiation, the state's attorneys pursued the *Williams* plaintiffs with what Peter Schrag of the *Sacramento Bee* called a "scorched-earth strategy."[185] "We thought people's consciousness would be shocked if they knew what some students were dealing with," said attorney Villagra.[186] Instead, the defendants' lawyers utilized "any tactic they could to defend the case." "They were trying to badger the witnesses into dropping the case," Villagra explained, "just

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179. Butt v. California, 4 Cal. 4th 668, 680 (1992).

180. Plaintiffs' Memorandum of Points and Auths. in Opposition to Defendants' Demurrer at 19, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/courtdocs/04OppositionToDemurrer.pdf.

181. Order on State's Demurrer, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/courtdocs/08OrderOnStateDemurrer.pdf.

182. Bob Egelko, ***School Districts Sued by Governor over Problems*, S.F. CHRON., Dec. 13, 2000, at A17.**

183. The lawyer who uttered those words, "nicknamed Dr. **Delay** by legal eagles," was John Daum, also the lead defense attorney for Exxon in the *Valdez* disaster case. Gary Strauss, *10 Years Later, Case Is Hardly Closed*, U.S.A. TODAY, Mar. 4, 1999, at 1B.

184. Order on Motion to Sever and Stay Proceedings, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/courtdocs/20OrderMotionToSeverAndStay.pdf

185. Peter Schrag, Editorial, *Gov. Davis to Students: Let Them Eat Lawyers*, SACRAMENTO BEE, Dec. 20, 2000, at B7.

186. Villagra, *supra* note 170.

making it as painful as they could."[187] Villagra was not alone in his criticism. In a September 2001 front-page article entitled, "High-Priced Legal Team Browbeats Youths About Shoddy Schools," the *San Francisco Chronicle* reported that the state's lawyers "grilled" the 13 *Williams* witnesses for 24 days in an attempt to impeach their claims.[188] "Some witnesses cried. Others became frightened when the questioning took on the tone of an interrogation. And some were defiant, angry at suggestions that they had lied or exaggerated. The witnesses ranged in age from 8 to 17."[189]

Among other things, the state's lawyers refused the request of Richard and Carlos Ramirez, aged 8 and 11, to have an aunt testify in their place. Their mother had been killed in a drive-by shooting on the doorstep of their home just weeks earlier. They had lost their father to a car accident only a year before. Richard dropped out, but Carlos remained in the case, enduring four days of excruciating questioning by the state's attorney.[190] They used the depositions "to harass and intimidate these kids," said Mark Rosenbaum, lead attorney for the ACLU:

> to get them to pull out of the suit and send a message to kids throughout the state: If you complain about rats and no books, the price you have to pay is four days of deposition and humiliation from the very government entity that is supposed to be assuring you equal education.[191]

K. Disputing Every Claim

The plaintiffs' claims appeared unimpeachable, backed as they were by numerous studies, surveys, reports, district audits, expert testimony, and the testimony of myriad students and teachers throughout the state. That is the conclusion that Governor Schwarzenegger would reach in agreeing to settle the case. But Davis was unwilling to yield an inch. His lawyers secured affidavits from district and school officials who were naturally interested in contesting the picture of incompetence and gross inadequacy painted by the plaintiffs. And they secured their own team of expert witnesses to contest virtually every assertion, including, as we shall see, even the most basic premises. The state's opposition to the plaintiffs' demand for equal access to textbooks is illustrative.

First, the state claimed that it had no duty to ensure that the plaintiffs had access to textbooks. "No legal authority whatever says that the state has a constitutional duty to establish and maintain an oversight system to 'ensure equal access' to textbooks," their lawyers argued.[192] The

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187. *Id.*

188. Nanette Asimov & Lance Williams, *Gov. Davis vs. Schoolkids: High-Priced Legal Team Browbeats Youths About Shoddy Schools*, S.F. CHRON., Sept. 2, 2001, at A1.

189. *Id.*

190. *See id.*

191. *Id.*

192. Memorandum of Defendant State of Cal. in Opposition to Plaintiffs' Motion for Summary Adjudication Regarding

California Supreme Court established, however, that the state has a constitutional duty and "specific responsibility for a statewide public education system open on equal terms to all,"[193] and that "public schools shall make available to all children equally the abundant gifts of learning."[194] The Court further ruled that textbooks "go to the very heart of education," and that they "are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit."[195] Indeed, the California State Legislature declared that, "to the extent that every pupil does not have access to textbooks or instructional materials in each subject, a pupil's right to equal educational opportunity is impaired."[196] So much for "[n]o legal authority whatever."[197]

Second, the state denied that there was a shortage of textbooks at all, suggesting that the plaintiffs' "showing is *merely* that *some* students *supposedly* lack textbooks."[198] Never mind the 2002 Harris poll, for example, which found that approximately 725,000 students state-wide lacked sufficient textbooks in class. Similarly, the state argued that the evidence "shows *at most* that *some* schools and districts restrict students from taking textbooks home."[199] The Harris finding? "[T]here are 1.9 million California public school students who do not have books necessary to do their homework."[200] To put that figure in perspective, it is greater than the total respective public school enrollments of 42 states.[201] If this comprehensive survey was off by, say, *1,000,000 students*, moreover, the number of students without books for homework would stand at 900,000. The state disparaged these well-respected surveys entirely, however, upon the hyper-technical grounds that, for the purposes of summary adjudication, these studies must be "sworn to by the author," and they were not.[202]

In keeping with this Orwellian theme, the state also contended that, at most, "in a small number of isolated instances . . . textbooks have not been available to some students in some classes for short periods of time."[203] For plaintiff after plaintiff, these "short periods of time" typically ranged from one or two months to an entire semester.[204] It was estimated, moreover, that the "small

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Textbooks at 1, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/courtdocs/STATETBOPP.pdf [hereinafter State Opp. Brief].

193. Butt, 4 Cal. 4th at 680.

194. Serrano, 5 Cal. 3d at 619.

195. Cal. Teachers Ass'n v. Riles, 632 P.2d 953, 963 (Cal. 1981) (citations and internal quotations omitted).

196. Assem. B. 2600, 1994 Gen. Assem., Reg. Sess. (Cal. 1994).

197. State Opp. Brief, *supra* note 192, at 1.

198. *Id.* at 5 (emphasis added).

199. *Id.* at 33 (emphasis added).

200. HARRIS 2002, *supra* note 69, at i.

201. Oakes Synthesis, *supra* note 168, at 24.

202. State Opp. Brief, *supra* note 192, at 18.

203. *Id.* at 20.

204. *See, e.g., supra* notes 75,76,78, and 95, and accompanying text.

number of isolated instances" numbered in the hundreds of thousands state-wide. Indeed, the California Senate Committee on Education concluded in 1994 that "[a]t least one-third, and as many as two-thirds, of all public school students do not have adequate instructional materials."[205]

Finally, wielding expert reports, the state argued that students did not necessarily need textbooks for homework and study, suggesting that this was "a substantive disagreement between plaintiffs and the various school districts," a disputed "matter of educational theory."[206] Textbooks were just one of many educational "inputs," the state and its experts argued, and "[i]f students are getting an overall good education, there is no reason for courts to adjudicate whether all of the particular input resources are distributed equally."[207] In other words, the failure to provide textbooks was a pedagogical choice – not the obvious result of shortages – and textbooks were just another "input." It is a defense that harkens eerily to those erected in the pre-*Brown* era by segregationist officials seeking to establish that blatant inadequacies in textbooks, facilities, or instruction in the "Negro" schools did not preclude students' obtaining an equal education. The plaintiffs and their experts made short work of this outlandish argument:

> The fundamental and essential importance of instructional materials categorically means that their absence denies students basically equal educational programs in comparison with students who do not lack these tools. That is what the State Legislature plainly meant when it admitted that "to the extent that every pupil does not have access to textbooks or instructional materials in each subject, a pupil's right to equal educational opportunity is impaired."[208]

L. Davis Vetoes, and Schwarzenegger Settles

In 2003, California State Senator John Vasconcellos of San Jose introduced SB 495, a bill requiring the state to create an "opportunity to teach and learn index."[209] This index would be used to monitor the number of fully credentialed teachers in each school, the availability of books and

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205. Reply Memorandum in Support of Plaintiffs' Motion for Summary Adjudication of the State's Duty to Ensure Equal Access to Instructional Materials at 9, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/courtdocs/ReplySupportInstMats.pdf [hereinafter Sept. 8 Memo].

206. State Opp. Brief, *supra* note 192, at 28.

207. *Id.* at 32.

208. Sept. 8 Memo, *supra* note 205, at 11. Justice Thurgood Marshall eloquently addressed this precise argument in his *San Antonio School District* dissent:

That a child forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes, and a narrower range of courses than a school with substantially more funds -- and thus with greater choice in educational planning -- may nevertheless excel is to the credit of the child, not the State, cf. Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 349 (1938). Indeed, who can ever measure for such a child the opportunities lost and the talents wasted for want of a broader, more enriched education? Discrimination in the opportunity to learn that is afforded a child must be our standard.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 84 (1973) (Marshall, J., dissenting).

209. S.B. 495, 2003 Sen., Reg. Sess. (Cal. 2003).

materials, the condition of the buildings and other facilities, and the availability of counseling services. The Legislature passed the bill, which arrived on the desk of Governor Davis in October 2003, shortly after the California electorate had voted Davis out of office in a "recall." In one of his last acts in office, Davis vetoed the bill. It was "a perfect epitaph for the so-called education governor," said the ACLU's Peter Eliasberg.[210]

Ironically, ouster of the "education governor" augured well for the *Williams* plaintiffs. After assuming office, Governor Schwarzenegger invited the plaintiffs' attorneys to negotiate directly with his office, rather than through a mediator, a tactic that proved fruitless under Governor Davis. "From the start, the new administration approached settlement discussions as an opportunity to deal with problems in public education," attorneys for the plaintiffs later told the court.[211] Negotiations included senior officials from the Governor's Office, with active and direct supervision from Schwarzenegger himself. By August 2004, the parties had reached agreement on the terms of settlement.

The settlement, which was approved by the California Legislature and signed by Governor Schwarzenegger, included the following:

- The State agreed to establish a standard for "sufficient" instructional materials under which "Each pupil, including English Learners, has a textbook or instructional materials, or both, to use in class and to take home to complete required homework assignments."

- In addition to an appropriation of $363 million for instructional materials for all schools, the Legislature appropriated an additional $138 million for instructional materials for the neediest 20% of schools.

- The state agreed to enact a definition of "good repair" for public schools, and to conduct periodic inspections to ensure that facilities are in good repair. The neediest school districts would receive money for a one-time assessment of needs, and an Emergency Repair Account would provide up to $800 million for correcting problems that impair students' health and safety.

- The Concept 6 calendar would be phased out by 2012, and districts currently using the calendar would increase their capacity in anticipation of the change.

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210. Howard Blume, *Distractions of Class*, L.A. WKLY., Nov. 20, 2003, http://www.laweekly.com/2003-11-20/news/distractions-of-class/1.

211. Memorandum of Points and Auths. in Support of Motion for Final Approval of Settlement at 11, Williams v. California, No. 312236 (Cal. Super. Ct. S.F. County filed May 17, 2000), http://www.decentschools.org/settlement/MPAFinApprovSA.pdf.

- The State committed to meeting the federal No Child Left Behind Act standard of a "highly qualified" teacher in every core class by June 2006.
- A School Accountability Report Card would disclose information on each school's compliance with standards on instructional materials, teacher vacancies, and the conditions of facilities.
- Districts would provide complaint forms and implement procedures to enable parents, students, and teachers to obtain remedies for problems in each of these three main areas.[212]

Announcing the settlement, Governor Schwarzenegger declared: "Today is a landmark day for California's neglected students. I am here to tell you that they will be neglected no more."[213] Schwarzenegger had choice words for former Governor Davis' litigation posture, and his intransigence. "It's terrible. It should never have happened," he commented. "It was crazy for the state to go out and hire an outside firm to fight the lawsuit. Fight what? To say that this is not true what the ACLU is saying, that they actually got equal education? All anyone has to do is just go to those schools."[214] Schwarzenegger added, "I've seen how inner city schools are falling behind."[215]

Lead plaintiff Eliezer "Eli" Williams, aged 16, expressed his hope that other students would no longer experience the conditions he was forced to endure:

> I knew conditions at my school were a lot worse than the conditions at schools in wealthier areas. Knowing this made me feel like no one cared whether me and the other students at my school were getting a good education, that no one cared about our future. . . . I think it will make a real difference for the kids at my school and other schools like it.[216]

V. BACK TO THE FUTURE

Ironically, the campaign for desegregated, equal education began with a series of challenges to schools that were unequal in funding, facilities, and the quality of instruction offered. Those early decisions established that, even under *Plessy*, such deficiencies violate the Constitution.

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212. Decent Schools for Cal., Williams Settlement Highlights (Apr. 2005), http://www.decentschools.org/settlement/Williams_Highlights_April_2005.pdf.

213. Press Release, Office of the Governor, Governor Schwarzenegger Announces Settlement of Williams Case (Aug. 13, 2004).

214. Sigrid Bathen, *Leaving Kids Behind – The 'Mississippification' of California Schools*, STATENET CAL. J., Sept. 1, 2004, at 10.

215. Nanette Asimov, *School Suit Persists, May Wrap up Soon*, S.F. CHRON., July 1, 2004, at B3.

216. ACLU of S. Cal., Statement of Eliezer ("Eli") Williams, Named Plaintiff in Williams v. California (Aug. 13, 2004), http://www.aclu-sc.org/documents/view/91.

"[E]ven before this Court recognized its duty to tear down the barriers of state-enforced racial segregation in public education," Justice Thurgood Marshall observed, "it acknowledged that inequality in the educational facilities provided to students may be discriminatory state action as contemplated by the Equal Protection Clause."[217] The campaign peaked with the promise, in *Brown*, of education "on equal terms."[218] Less than twenty years later, the campaign hit a brick wall in *Rodriguez*, which ruled that gross inequality in public education is lawful provided that such inequality is based upon class rather than race.[219] But depriving any child of an equal education based solely on the wealth of his neighbors is no less invidious, and race and class remain inextricably intertwined in America, ensuring that children of color disproportionately bear the burden of this inequality. It is a recipe for enduring, intractable injustice.

Even in California, where the State Supreme Court rejected the federal Court's sanction of inequality based upon wealth, gross inequalities flourished as a result of a taxpayer "revolt" and the absence of systems to prevent such inequalities. A state that was once a leader in public education plummeted to the bottom of the rankings, with poor communities and communities of color the hardest hit. The *Williams* plaintiffs revealed "learning conditions that should shock the conscience of any reasonable person." Their government responded by unleashing corporate lawyers on the young plaintiffs, at a cost to taxpayers of over $18 million, in an attempt to evade their Constitutional responsibility for ensuring access to equal education for all of California's students. And so the *Williams* plaintiffs found themselves in the 21st Century re-litigating not *Brown*, but *Plessy*.

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217. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 84 (1973) (Marshall, J., dissenting).

218. Brown v. Board of Educ. 347 U.S. 483, 493 (1954).

219. *See, supra* notes 24-32.

ARTICLE

THE ESTABLISHMENT OF ALL-CITIZEN JURIES AS A KEY COMPONENT OF MEXICO'S JUDICIAL REFORM:

CROSS-NATIONAL ANALYSES OF LAY JUDGE PARTICIPATION AND THE SEARCH FOR MEXICO'S JUDICIAL SOVEREIGNTY*

HIROSHI FUKURAI, PH.D.**

RICHARD KROOTH, PH.D., J.D.***

SUMMARY

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** Professor, Sociology and Legal Studies at the University of California, Santa Cruz (email: hfukurai@ucsc.edu, phone: 831-459-2971, fax: 831-459-3518).

*** Visiting Scholar in the Department of Sociology at the University of California, Santa Cruz.

I. INTRODUCTION

The American anti-drug aid package to Mexico, termed the "Merida Initiative" (or "Plan Mexico" by its critics), has promised nearly $400 million worth of military and intelligence assistance to Mexico, becoming one of the key elements in the joint U.S.-Mexico strategy to combat the threat of drug trafficking in Mexico and across its borders.[1] Currently, approximately eighty municipalities are considered to be dominated by the drug cartels.[2] Equipping the Mexican military for the struggle against drug trafficking has nonetheless been viewed as a pretext to label and criminalize protesters, political dissenters, grassroots organizers, and social activists in Mexico.[3] The military involvement in the "drug war" has also increased corruption within governmental institutions,[4] leading to the commitment of unnumbered human rights violations and the failure to effectively deal with the trade in narcotics within Mexico's own borders.[5] This military solution has also distracted public attention and diverted governmental resources away from the long-term reforms that are necessary to eliminate corruption in the domestic police and law enforcement branches, in order to effectively deal with the inter-related problems of illicit drugs, crime, and violence in Mexico. Dependence on the military, meanwhile, has come at the expense of adopting much needed structural reforms to Mexico's judicial institutions in order to establish more effective court systems that are free from corruption and are able to identify, prosecute, and punish documented drug traffickers.

This paper proposes that the re-establishment of the jury system in Mexico could lead to important structural reforms to combat political and institutional corruption within the judicial branch of the government. We argue that a restructured jury system would constitute a major judicial reform, strengthening the rule of law and combating police and judicial corruption. Further, the re-introduction of a civic panel guiding legal institutions would strengthen Mexico's efforts to increase both accountability and transparency of the criminal justice process, and promote the civic oversight function of government institutions.

Mexico has had a long history of jury trials and a legacy of direct participatory democracy since the beginning of the 19th century. Yet, since the end of the Mexican Revolution in 1929, the practical use of citizens' panels in oral and adversarial jury trials has virtually disappeared in Mexico. Though Article 20, Section A(6) of the Mexican Constitution has a provision for a jury

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1. *US Firms Vie for Mexico Drug War Contracts,* BOSTON GLOBE, July 17, 2009, at 2.

2. Manuel Perez Rocha, *The Failed War on Drugs in Mexico*, TRANSNATIONAL INSTITUTE, April 2009, http://www.tni.org/article/failed-war-drugs-mexico.

3. *See U.S. Needs to Keep Eye on Mexico's Drug War*, FLINT J., July 1, 2008, at A9.

4. *A Mexican Army General is Screaming About Corruption, But Is Anyone Paying Attention?* NOW PUBLIC, April 30, 2008, available at http://www.nowpublic.com/world/mexican-army-general-screaming-about-corruption-anyone-paying-attention. For analyses of corruption within the Mexican military in the drug war, *see* S. Brian Willson, The Slippery Slope: U.S. Military Moves into Mexico (1997), 14, *available at* http://www.channelingreality.com/NAU/US_Military_in_Mexico_1997.pdf.

5. *See* Kristina Sherry, *Funds May be Delayed for Mexico's Anti-Drug Effort; It's 'Premature' to Declare that Conditions on Human Rights Have been Met, Senator Says*, L.A. TIMES, Aug. 6, 2009, at A27.

trial on press-related cases,[6] nearly all criminal cases are today adjudicated by judges, not juries.

Thus, two questions arise: Can these judges retain their independence from the outside influence of powerful political and criminal organizations? And, would randomly chosen juries drawn from the public escape such pressures and, without fear of reprisals, render more equitable decisions?

Recent federal initiatives in Mexico have attempted to transform the criminal justice process and introduce a jury trial in criminal cases.[7] The 2001 Federal Initiative Reform Code of Criminal Procedure proposed the broader application of jury trials in criminal cases.[8] While this initiative was not implemented, on March 6, 2008, Mexico's Senate gave final approval to a historic overhaul of its judicial system and introduced an oral trial and an adversarial process, which are similar to those held in U.S. courts.[9] The judicial reform also established a new legal standard, by which criminal defendants will now be presumed innocent until proven guilty.[10] This historic judicial overhaul, however, stopped short of introducing a jury trial in Mexico.

The switch from an *en camera,* closed, inquisitorial process to an open, oral, and more transparent trial promises to represent a paradigmatic shift in Mexican jurisprudence. Until 2008, judges deliberated in private and based their decisions exclusively on written affidavits prepared by prosecutors and police investigators. Now not only do lawyers and judges have to become accustomed to making oral statements in public, but also, for the first time, the media and public will have a full view of the evidence.

Nonetheless, not everyone supports such reforms. Prominent Mexican legal scholar, Dr. Paul Rivas, who strongly opposes the introduction of a jury trial in Mexico, recently argued that the introduction of oral arguments and the open presentation of evidence is equivalent to the introduction of a jury trial, and that "this is what I consider risky and critical, since we are not prepared in Mexico to have the jury or trial by jury."[11]

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6. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 20(A)(VI) (hereinafter, Constitución), *translation available at* http://historicaltextarchive.com/sections.php?op=viewarticle&artid=93. It states, "In all cases, crimes committed by means of the press against the public order, or the foreign or domestic security of the nation, [shall] be judged by a jury."

7. *Iniciativa de Decreto por el que Se Expide el Código Federal de Procedimientos Penales*, March 29, 2004 [hereinafter Iniciativa 2004]. For more detailed information on this initiative, *see* Robert Kossick, *The Rule of Law and Development in Mexico,* 21 ARIZ. J. INT'L & COMP. L. 715, 785 n.239 (2004); *see also, Iniciativa de Reforma al Código de Procedimientos Penales y a la Ley Orgánica del Poder Judicial de la Federacion*, Gaceta Parlamentaria, Nov. 22, 2001 [hereinafter Gaceta 2001].

8. Gaceta 2001, *supra* note 7.

9. James C. McKinley, *Mexico's Congress Passes Overhaul of Justice Laws*, N.Y. TIMES, March 7, 2008, *available at* http://www.nytimes.com/2008/03/07/world/americas/07mexico.html?_r=2&oref=slogin.

10. *Id.*

11. Raúl Carrancá y Rivas, *Algunos aspectos de la iniciativa que en materia penal envía el Presidente de la República al H. Congreso de la Unión,* TEMAS SELECTOS DE DERECHO PENAL (part of Proyecto PAPIME, La enseñanza de Derecho Penal a

The purpose of this paper is to review several approaches to reform and examine the possible re-establishment of the jury system in Mexico. Reform is definitely possible. By modeling after a popular jury system currently adopted in more than 60 countries around the world,[12] the future transformation of Mexico's classic jury system and criminal procedures may open a path to allow Mexican citizens to directly participate in criminal trials and make the criminal justice proceeding ever more transparent and resistant to political manipulation and corruption.[13] This may well require a deep reorganization of Mexico's socio-political and legal apparatus.

This paper is structured as follows: Part 1 of this article examines the historical and political importance of the institution of lay participation in the judicial system. This section also examines why many countries around the world, especially from early 1990s to the present, are embracing the introduction of the lay justice system in democratizing their own jurisprudence and legal apparatus. Part 2 then examines Mexico's attempt to introduce its own system of lay participation in law.

Part 3 examines opinions, attitudes, and perceptions about the lay justice system in six different nations: (1) Mexico, (2) Ireland, (3) Japan, (4) South Korea, (5) New Zealand, and (6) the United States. As part of the University of California-World Jury Projects (UCWJP), cross-national data were obtained from a select group of college students and researchers, i.e., representing the possible future intelligentsia in those respective countries. They have responded to a set of questions about the lay judge system; its social and political significance; a willingness to serve; confidence in jurors' abilities to make fair and just decisions; jurors' moral and ethical responsibilities; the fear of retaliatory violence from defendants and their families; views on confessionary documents and their believability; attitudes on the jury's diversity based on race, ethnicity, and gender; and perceptions of trial fairness and verdict legitimacy.

Part 4 examines the possible re-introduction of the jury system in Mexico and explores its potential socio-political impact on Mexico's criminal justice system. Part 5 finally offers conclusions about the socio-political significance of lay participation in the administration of justice in Mexico.

II. PART I. THE DEMOCRATIC FOUNDATION OF LAY PARTICIPATION IN LAW

The historic, political foundation for lay participation in criminal jury trials lies in equity that it offers as an important check on judicial and political power exercised exclusively by the government. The jury's role as a popular body for oversight of government becomes especially important when individual citizens or groups have been accused of committing serious crimes against their own government.

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través de las nuevas tecnologías and conference on the topic at the *Senado de la República, México,* Aug. 24, 2004), *available at* http://www.derecho.unam.mx/papime/TemasSelectosdeDerechoPenalVol.III/tema12-5.htm.

12. *See generally,* NEIL VIDMAR, WORLD JURY SYSTEMS (2000).

13. *Id.*

After 9/11 and the passage of the 2001 Patriot Act in the U.S. and similar anti-terrorism measures imposed in other nations in the world, serious terrorism charges have been brought against their citizens, political dissidents, and civic activists. Here, we offer a number of case examples.

In Australia, for instance, after the passage of the Anti-Terrorism Act in 2002, two separate juries examined charges of terrorism. In Australia's first-ever terrorism trial in 2005, an all-citizen jury acquitted Zeky Mallah, a 21 year-old supermarket worker, of terrorist charges for preparing to storm government offices and shoot officers in a supposed suicide mission.[14] In the second highly controversial trial, in which the government's only evidence was the defendant's confession extracted at a Pakistani military prison, the jury found Joseph Terrence Thomas guilty of charges for intentionally receiving funds from al-Qaeda.[15] However, soon after the verdict, the appeals court reversed all of his convictions because it determined his coerced confession at a foreign prison to be inadmissible.[16]

In Russia, where anti-Islamic political fever runs high and polemics point towards the nation's war on terrorism, many citizens have also been accused of terrorist acts against the government and their cases adjudicated by all-citizen juries. After the passage of the anti-terrorism act in 2004, following the Beslan school attack in which more than 330 child hostages died, the all-citizen jury acquitted three suspected terrorists of the charges of a gas pipeline explosion in the Republic of Tatarstan in September 2005.[17] Two of the defendants, who were among seven Russians released from the Guantanamo Bay prison in 2004, claimed that they were tortured while being transferred to and detained in Russia.[18] They criticized the government of false charges of extremism without offering any substantial evidence.[19] Another all-citizen jury acquitted four men of terrorist charges for the murder of the minister for national policy, in which the evidence used to implicate the defendants consisted solely of confessions extracted under torture.[20] In still other high profile "terrorism" cases, such as the 2001 bombing of an Astrakhan city market and a December 2004 attack on the headquarters of the anti-drug enforcement agency in Kabardino-Balkaria, all-citizen juries also acquitted all defendants of terrorist charges.[21]

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14. R v. Mallah (2005) NSWSC 317.

15. *See, Tougher Terrorism Laws Predicted After Thomas Ruling*, ABC NEWS ONLINE, Aug. 19, 2006, http://www.abc.net.au/news/newsitems/200608/s1718915.htm.

16. *Id.*

17. Otto Luchterhandt, *Russia Adopt New Counter-Terrorism Law,* 2 RUSSIAN ANALYTICAL DIGEST 2-4 (2006). *See also* Peter Finn, *Russian Homeland No Haven for Ex-detainees, Activists Say; Men Freed from Guantanamo Allegedly Face Campaign of Abuse,* WASH. POST, Sept. 3, 2006, at A14.

18. Finn, *supra* note 17.

19. *Id.*

20. *See* Alexei Trochev, *Fabricated Evidence and Fair Jury Trials,* RUSSIA ANALYTICAL DIGEST, June 20, 2006, at 8. *See also*, Nabi Abdullaev, *A Jury Is a Better Bet Than a Judge,* MOSCOW TIMES, June 1, 2006.

21. *See* Trochev, *supra* note 20, at 9.

In New Zealand, after the passage of the Suppression of Terrorism Act in 2002, the government also brought terrorism charges against their own citizens. In one of the most celebrated trials in 2006, an all-citizen jury acquitted the freelance journalist and political activist Timothy Selwyn of seditious conspiracy. The government evidence included a political pamphlet, in which the defendant called for "like minded New Zealanders to commit their own acts of civil disobedience [against governmental oppression]."[22] The jurors did not accept the government's arguments and returned a verdict of not guilty.[23]

In the United States, all-citizen juries have also tried suspected terrorists. In December 2005, a Florida jury acquitted former University of South Florida Professor Sami Al-Arian of providing political and economic support to terrorists and being part of a conspiracy to commit murder abroad, money laundering, and obstruction of justice.[24] In this highly celebrated trial, the government produced over 100 witnesses and 400 transcripts of phone conversations obtained through 10 years of investigation. In the post-verdict interviews, one juror expressed that "there was absolutely no evidence of any wrongdoing on the part of Al-Arian."[25] Similar views were also expressed by the defense counsel who concluded that the prosecution's case was so weak that there was no need to call defense evidence in the trial.[26] In February 2007, a grocer and a university professor were also acquitted by a Chicago jury of a terrorist conspiracy to finance the Palestinian political organization of Hamas.[27] In October 2007, another jury acquitted five defendants of nearly 200 combined terrorist charges in Dallas, Texas.[28] The five defendants were former officials of an Islamic charity and philanthropic organization that provided financial assistance to the poor in occupied Palestinian territories.[29]

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22. John Braddock, *An Attack on Democratic Rights: New Zealand Man Jailed for Sedition,* WORLD SOCIALIST WEB SITE, July 25, 2006, *available at* http://www.wsws.org/articles/2006/jul2006/sedi-j25.shtml.

23. *Id.* The jury, however, found Selwyn guilty of publishing a statement with seditious intent.

24. Judith Miller, *Traces of Terror: The Money Trail; A Professor's Activism Leads Investigators to Look into Possible Terrorism Links*, N.Y. TIMES, July 23, 2002, p.14. *See* also Alexandra Abboud, *Group Accused of Aiding Terrorists Acquitted in U.S. Court*, AMERICA.GOV (2005), *available at* http://www.america.gov/slt/washfile-english/2005/December/20051207144424maduobbA0.1730463.htm.

25. Joe Kay, *Palestinian Activist Sami Al-Arian Acquitted on Charges in Florida,* WORLD SOCIALIST WEB SITE, December 8, 2005, *available at* http://www.wsws.org/articles/2005/dec2005/aria-d08.shtml.

26. Neil Vidmar, *Trial by Jury Involving Persons Accused of Terrorism,* DUKE LAW SCHOOL WORKING PAPER SERIES (2006), 20. The jury, however, could not reach consensus on other lesser charges.

27. Andrew Stern, *U.S. Jury Acquits Two Men of Hamas Conspiracy*, REUTERS ALERT NET, February 1, 2007, *available at* http://www.alertnet.org/thenews/newsdesk/N01356156.htm.

28. Jason Trahan & Michael Grabell. *Judge Declares Mistrial in Holy Land Foundation Case,* DALLAS MORNING NEWS, October 22, 2007.

29. Greg Krikorian, *Mistrial in Holy Land Terrorism Financing Case,* L. A. TIMES, October 23 (2007), *available at* http://www.latimes.com/news/local/la-na-holyland23oct23,0,1540715.story?coll=la-home-center. In the second jury trial, however, the Holy Land Foundation and five of its former organizers were found guilty of 108 separate charges. *See* Jason Trahan & Tanya Eiserer, *Holy Land Foundation Defendants Guilty on All Counts,* DALLAS MORNING NEWS, November 25, 2008, *available at* http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/112508dnmetholylandverdicts.1e5022504.html.

Mexico, by contrast, no longer has the jury trial system to act as a shield against wrongful government criminal charges and abuses. It once had used jury trials to settle disputes in both civil and criminal cases during the 19th and early 20th centuries. The last jury trial involved Miss Mexico in 1928 as a defendant who allegedly murdered her bigamist husband and was later exonerated by the all-male jury.[30] But the Revolutionary Political Party PRI (Partido Revolucionario Institucional) abolished the jury system in 1929 and deprived people of their right to participate in making legal decisions in Mexico's courts until now.

In June 2008, the U.S. government passed the Merida Initiative and specified that $73.5 million of the $400 million in grants for Mexico be used to facilitate judicial reform and institution-building, and to promote human rights and the rule of law agendas. David T. Johnson, the Assistant Secretary of the Bureau of International Narcotics and Law Enforcement Affairs, stated that the program would also support Mexico's development of "new institutions designed to receive and act on citizen complaints."[31] While the Merida Initiative concentrates the majority of governmental funds to purchase intelligence equipment and military hardware, the aid package can be also earmarked for the Mexican Government to promote judicial reforms, including the accountability of federal police forces, facilitating regular consultations with human rights organizations, investigating federal police and armed forces suspected of human right abuses, and ensuring a prohibition on the legal use of testimony obtained through the use of torture.[32] Strengthening the judicial structure might also lead to the possible implementation of the jury system to help restore and guide programs for securing human rights and promoting civic participation in all aspects of Mexican society.

What lessons can we draw from these cases and measures taken in different nations? Trial by jury reveals its catalytic power — promoting the importance of lay participation in the community and strengthening the perception of trial fairness and verdict legitimacy. Trial by jury provides the citizen an important legal shield from governmental oppression and unreasonable prosecution.

III. PART II. JURY TRIALS IN MEXICO: HISTORICAL BACKGROUND AND REINSTATEMENT

It is thus no surprise that many nations in South and Central America have also adopted contemporary versions of representative all-citizen juries. Mexico's attempt to reinstate the system of all-citizen juries, as well as to introduce a more transparent and adversarial criminal procedural

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30. Paul J. Vanderwood, *What Historians Can and Cannot Learn from Crime Stories*, CONTRACORRIENTE 377, 377 (2009), *available at* http://www.ncsu.edu/acontracorriente/fall_09/pag_3.htm.

31. David T. Johnson, Assistance Sec'y, Bureau of Int'l Narcotics and Law Enforcement Affairs, The Merida Initiative, Address Before Subcomm. on State, Foreign Operations, Related Programs of House Comm. on Appropriations (March 10, 2009), *available at* http://www.state.gov/p/inl/rls/rm/120225.htm.

32. Adam Thompson, *Welcome for US Aid for Mexico's Drug War,* FIN. TIMES, June 21, 2008, *available at* http://www.ft.com/cms/s/0/2a951b20-3f37-11dd-8fd9-0000779fd2ac.html?nclick_check=1.

system may help improve the perception of the overall proficiency and equity in the administration of justice, increasing the level of confidence that Mexican citizens have in their own legal system. Increased confidence in the judicial system in Mexico will also likely be critically important in the eyes of international communities, because its weak judicial organization has been subject to significant criticisms of corruption in the past.

In fact, Mexico ranked 89th out of 180 countries in the Transparency International's Corruption Perceptions Index for 2009.[33] To reverse course in the 21st century, the judicial foundations for equitable relations must be shifted to past experience and towards decision-making by all-citizen juries.

Historical research indicates that Mexico extensively used jury trials between 1856 and 1929.[34] Historical records show that, prior to 1856, juries were also used in various provinces and small towns and cities.[35] Mexican juries played an important political role in the criminal justice system and deliberated on many prominent criminal cases, including the trial of José de León Toral, who murdered then President-elect Álbaro Obregón, as well as the already mentioned trial of Maria Teresa de Landa, the 1928 Miss Mexico, who allegedly killed her husband.[36] After the end of the Mexican Revolution and the creation of the National Revolutionary Party (a.k.a., PRI or Partido Revolucionario Institucional)) in 1929, however, jury trials began to gradually disappear.[37] Today, a jury trial is rarely used in Mexico, and judges are currently empowered to determine legal outcomes of nearly all criminal cases.

A. Jury Trials in the 19th Century Mexico

Mexican history from colonial times has been a contest between the forces of central dictatorship and revolutionary movements. Article 185 of the Constitution of 1825 first authorized the use of a jury trial in Mexico. The jury was responsible for determining whether or not there was a legal foundation for an accusation and was given the task of evaluating or assessing the nature of crimes or disputes. At the time, jurors were named by each city council.

The jury court located in Santiago de Querétaro (hereinafter Querétaro) in the State of Querétaro, México, provides an excellent example of popular participation in both civil and criminal cases. In this municipality, ministers and prosecutors of the Supreme Tribunal of Justice

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33. CORRUPTION PERCEPTIONS INDEX 2009, *available at* http://www.ti-bangladesh.org/CPI/CPI2009/CPI-2009-allDocs.pdf.

34. Kossick, *supra* note 7.

35. *See*, JUAN RICARDO JIMENEZ GOMEZ, EL SISTEMA JUDICIAL EN QUERÉTARO 1531-1872, 298-299, 415 (1999).

36. Vanderwood, *supra* note 30, at 384-85.

37. Elisa Speckman Guerra, EL JURADO POPULAR PARA DELITOS COMUNES: LEYES, IDEAS Y PRÁCTICAS (DISTRITO FEDERAL, 1869-1929), (Salvador Cárdenas, ed. 2005), *Historia de la justicia en México (siglos XIX y XX), México, Suprema Corte de Justicia de la Nación*, 743-744.

established the jury.[38] This jury generally consisted of twelve citizens chosen at random by the city parliament. Early records of Querétaro show that, on March 4, 1826, the city parliament first created a list of potential candidates to be summoned for jury duties. The city parliament created another list of jury candidates in 1827 and did so again in 1829. [39] To be qualified to be a jury member, potential candidates had to be at least thirty-five years old and not members of the clergy or their employees.[40] The list of candidates was prepared periodically so that a new group of eligible residents could serve in jury trials. The record also shows that jury trials in Querétaro were mostly used in criminal cases involving theft and robbery.[41]

On July 4, 1862, one criminal case by jury trial was held in the rural municipality of Querétaro when two men, Jose Perea and Francisco Salina, were charged with the crime of stealing cattle.[42] A group of local residents was summoned to decide this matter, and a judicial panel of nine male citizens was chosen at random from the list.[43] Once their names were identified and they were summoned, they were legally required to show up the following day for the trial. The record shows that if they failed to respond to the jury summonses and failed to appear in court, they would have been punished and fined.[44]

Early justice often did not prevail, however. Average citizens were not familiar with legal principles of criminal proceedings. Jury verdicts were often appealed and reversed by higher courts, as the appeals court often ruled that jurors in Querétaro failed to understand legal principles and thus made erroneous decisions.[45] Investigating the legal records at Querétaro, Mexican historian, Juan Ricardo Jimenez Gómez stated that it was extremely difficult to find detailed records about jury members or the procedural methods used during trials held there.[46] He suggested that it was because the jury system in Querétaro probably never "prospered" or gained wider public acceptance.[47] Nevertheless, he also indicated that people actively participated in jury trials in other municipalities including San Juan del Rio, the second largest municipality in the State of Querétaro, and made decisions based on their conception of justice and moral principles.[48]

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38. Jimenez Gomez, *supra* note 35, at 298.

39. *Id.* at 298.

40. *Id.* at 298.

41. *Id.* at 415.

42. *Id.* at *473.*

43. *Id.* The names of jury members included the following: Licenciado Rodriguez Altamirano, Vicente Ruiz, Vicente Leyva, Florencio Ramírez, Antonio Rodriguez, Dolores Trejo, Atilano Maldonado, José Reyes, and Zacarías Zúñiga.

44. *Id.* at 473.

45. *See id.* at 415.

46. *Id.* at 473 ("Pocos documentos se han localizado en los que se haya plasmado la actuación de estos jurados de ciudadanos" [Few documents have been found in which action has reflected these citizens' juries]).

47. *See id.* at 298 (In trying to search for additional jury-related mateirials, the author stated "No localice ningún expediente sobre esta materia, por lo que asumo que nunca funciono" [((I) do not locate any record on this subject; so I assume they [jury trials] never [properly] functioned)].

48. *See id.* at 415. There is another reason for juries' social insignificance in the 19th century Mexico. In the 1830s and

Like historian Jimenez, other experts raise questions about the past and contemporary failings or merits of using juries in criminal cases. The Spanish Constitution of Cádiz of 1812 supported the use of jury trials in Mexico, especially in crimes involving press offenses.[49] The Mexican constitution originally provided that each state was to be responsible for including a provision for individual rights in their respective jurisdictions. In our time, Federal Judge and legal scholar Manual González Oropeza argues that one of the most controversial amendments to the Mexican constitution has been the right to a jury trial.[50] According to Oropeza, Jose Maria Luis Mora, an attorney in the state of Texcoco, was a strong advocate for the institution of juries and wrote powerful essays in defense of jury trials in Mexico. He also helped draft jury rules that were later approved under Article 209 of the Mexican Constitution, which stated, "No tribunal of the state can pronounce a sentence in criminal matters for severe crimes without a grand jury and without certification of a petit jury to determine the motivation of the accusation."[51]

According to Oropeza, these remained major legal guarantees in Mexico that allowed jury trials to become an indispensable part of the adjudicative system between 1828 and 1883.[52] Jose Maria Luis Mora believed that legal knowledge was an unnecessary component of people's ability to serve as jurors. Nevertheless, Mora was not successful in moving his jury project forward. When a Congressional hearing was convened in 1856, Ignacio L. Vallarta, a strong opponent of the use of juries, insisted that the jury should be left for other nations that are more cultured and civically mature.[53] On November 27, 1856, the Mexican Congress finally voted against the implementation of jury trials, by 42 to 40 votes.[54]

On June 16, 1857, Benito Juárez, an indigenous Zapoteco Indian, who served as the leader of the reform movement, became the first Mexican leader without a military background. He put in place the Constitution of 1857, bringing back the jury in criminal matters for the federal district

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1840s, Mexico was torn between the rights of the Church to hold land, control the peasantry and dictate local affairs; the oligarchy owning the old silver mines, landed property employing *encomienda* labor to grow cotton, and weaving factories; and the military under Santa Ana who became President in 1833, undermining liberal reforms made by previous generations of urban middle-class leaders. The Church eventually won the battle; anticlerical decrees were largely repealed; and the *haciendados* themselves had the option to pay tithes or not to the Church. In this battle, the power oligarchy, the Church, and the militarized state wanted no citizen juries.

49. Manuel González Oropeza, *El Juicio Por Jurado En Las Constituciones De México*, 2 CUESTIÓNES CONSTITUCIONALES 73, 74 (1999).This Constitution of Cádiz was adopted by independent Spaniards in Spain while in refuge and served as a model for liberal constitutions of Mediterranean nations such as Italy and Latin American countries including Mexico.

50. *Id.* 73, 75-8.

51. *Id.* at 74 ("Ningún tribunal del Estado podrá pronunciar sentencia en material criminal sobre delitos graves sin previa declaración del jurado mayor (grand jury) de haber lugar a la formación de causa, y sin que certifique el jurado menor (petit jury) el hecho que ha motivado la acusación").

52. *Id.*

53. *Id.* at 75-78.

54. *Id.* at 78.

court. [55] The jury was then guaranteed protective status by a sequence of legal enactments: El Código Procesal Penal (hereinafter CPP) of 1880, the Law on Criminal Juries in 1891, the CPP in 1894, the Law on Judicial Organization in the Federal District and Territories in 1903, and the Organic Laws of the Ordinary Court in 1919 and 1928.[56] However, on October 4, 1929, the Code of Organization, Jurisdiction, and Procedure in Criminal Matters for the District and Federal Territories finally abolished the requirement for the popular jury in judgment of general criminal cases.[57]

Other Mexican juries were also destined to follow an uncertain path. The jury for press-related crimes was first introduced on October 22, 1820 to Mexico by the Spanish regulation. By the Rules for the Freedom of the Press on December 13, 1821, the regulatory code was then ratified in full force by the provincial government.[58]

The jury for the press-related crimes was later regulated by the Law of 1828, the Regulation of the Freedom of the Press of 1846, the Decree of 1861, and the Law of Freedom of Press of 1868.[59] The popular jury for official crimes was also introduced in 1917, as well as Laws of Responsibilities of 1939 and 1979, respectively. In the 1982 reform, however, the intervention of the popular jury in the judgment of these types of crimes was suppressed.[60] Today, Mexico only authorizes the jury at the federal level to intervene in criminal proceedings for press-related crimes against the public order or for internal or external security of the nation (Article 20, Section A (6)).[61]

B. Jury Trials in the Federal District

According to prominent jury historian, Elisa Speckman Guerra, jury trials in Mexico went through several significant transformations in the mid-19th century, continuing to the beginning of the 20th century. In the Federal District between 1869 and 1919, for example, the jury was given the responsibility to act as judges of fact, determine guilt or innocence, describe the nature of the crime, and resolve the presence of aggravating or extenuating circumstances.[62] The judge who presided

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55. ULICK RALPH BURKE, A LIFE OF BENITO JUAREZ: CONSTITUTIONAL PRESIDENT OF MEXICO (2009).

56. Gaceta 2001, *supra* note 7.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Constitución, *supra* note 6. *See also*, Gaceta 2001 , *supra* note 7. For detailed discussions of the federal judiciary and related discussions on the issues of human rights and constitutional laws, *see* Héctor Fix-Zamudio, *Estudio de la defensa de la Constitución en Ordenamiento Mexicano* [Study of the Defense of the Constitution in Mexican Legislation], *Porrúa-UNAM, Mexico* (2005).

62. Elisa Speckman Guerra, *Los jueces, el honor y la muerte. Un análisis de la justicia (ciudad de México, 1871-1931)*, 55 HISTORIA MEXICANA 1411, 1423 (2006); Stephen Zamora and José Ramón Cossio, *Mexican Constitutionalism After*

over the jury trial was appointed by popular vote through the system of direct elections, was required to be older than 30 years of age and to have a law degree with at least five years of judicial experience.[63] For major criminal offenses, the jury also determined whether there were sufficient elements to accuse the defendant, to summon witnesses, and to modify the punishment in proportion to the crime.[64] The ability to modify the punishment in proportion with the crime was limited to only those circumstances listed in the penal codes.[65]

The jury's verdict was determined by a majority vote, which was irrevocable. The popular base for jury selection indicated both potential fairness and restrictions. The method of jury selection was managed by the city council, which compiled a list of approximately 600 names of qualified males selected at random from local communities. Before each trial, the prosecution and the defense were allowed to challenge up to 12 jury candidates. After remaining juror names were numerically converted to numbers, one day before the trial, in the presence of the judge, a total of thirteen balls were extracted from a spinning wheel ("un globo diratorio"), containing corresponding numbers of eleven jurors and two alternates.[66] To serve as a juror, an individual had to be a born Mexican citizen, at least 25 years of age, and know how to read and write. In the early years, the jury typically consisted of eleven well-educated males.[67]

Interestingly, prior to 1869, foreigners had been allowed to serve as jurors for press-related offenses, as there were not enough Mexican born citizens who could satisfy all the qualifications for jury duty. The strict jury qualifications eliminated the vast majority of jurors in the Federal District. As a result, due to the significant shortage of qualified Mexican citizens for jury service, foreign jurors came to constitute five to seven percent of the popular jury.[68] Nevertheless, throughout most of the jury's existence between 1869 and 1929, foreigners were excluded from jury selection for common criminal offenses. The jury law for common criminal offenses also excluded convicted felons for crimes against the common order, deceiving tricksters, the blind, and anyone who was a government employee or had an occupation that prevented him from having the liberty of time-off affecting his pay or income necessary for subsistence.

Presidencialismo 4 INT'L J. CONST. L., 411 (2006) (discussing more recent fundamental changes and important legal reforms during the past decade related to Mexico's constitutionalism); Joel Carranco Zúñiga, *El juicio de amparo en material administrativa* (2008).

63. *Ley del 17 de enero de 1853* [Law of 17, January, 1853], in Blas Joseph Gutierrez, NUEVO CÓDIGO DE LA REFORMA: LEYES DE REFORMA, COLECCIÓN DE LAS DISPOSICIONES QUE SE CONOCEN CON ESTE NOMBRE [New Code of Reform: Reform Laws, Collection of the Previsions that are known by that name], published from 1855 to 1858, Mexico, Imprenta de El Constitutional, 107-126.

64. Speckman Guerra, *supra* note 37.

65. *Id.*

66. *Id.* at 752.

67. Elisa Speckman Guerra, Personal Interviews on March 18, 2009, at the National Autonomy University of Mexico (UNAM) (interview tapes on file with the first authors).

68. Speckman Guerra, *supra* note 37.

In actual trial proceedings, the judge provided instructions on the process and began with the first inquiries. At this point, jurors would listen to inquiries made by the judge, the ratifications, and the extensions made by the witnesses in their declarations, the testimony of new witnesses, the dialogue, and the arguments made by both parties.[69] By the end of the trial, the judge created a questionnaire that directed the jury to establish the guilt or innocence of the accused, to describe the nature of the crime, and to determine the presence of aggravating or extenuating circumstances. After receiving the questionnaire, the jurors were then instructed to leave for another room, and behind closed doors they filled out the questionnaire, either in the affirmative or in the negative. The jury's answers to the questionnaire then determined the verdict, which would then be used by the judge as the basis for sentencing.[70]

Between 1880 and 1903, the High Court of Justice of the Federal District [Tribunal Superior de Justicia del Distrito Federal] proposed that the city council should not be in charge of creating the list of jurors.[71] Although the proposal was denied, there were minor changes in jury selection. The potential jury list was expanded to include 800 individuals and reduced the number of persons chosen by each party.[72] The newly adopted change also introduced the new procedure, in which jurors were to be chosen in front of an audience in order to decrease the likelihood of pressuring or bribing the jurors.[73]

In 1891, however, the original proposal made in 1880 was also resubmitted and accepted. The governor of the Federal District, not the city council, was given the responsibility of creating the jury candidate list.[74] This proposal also changed the way the jurors were selected. One day before the process takes place, one hundred names would be introduced and of those hundred, they would select thirty; of the thirty, each party to the controversy was then allowed to choose six names.[75] The second part of the process took place a day before the trial, in which the thirty people who were initially chosen appeared in court and of them eleven names were chosen at random, constituting the body of the final jury members.[76]

During this time frame, the verdict had to be determined by eight or more votes to become

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69. *See* Cartilla de instrucción para jurado del fuero común en el Distrito Federal, México, 1905, Tipografía de los sucesores de Francisco Díaz de León [Primer of Instruction for Juries in the Ordinary Courts in Mexico City: Mexico, 1905, The Successors of Typography Francisco Diaz de Leon], cited in Speckman Guerra, *supra* note 37.

70. Speckman Guerra, *supra* note 37.

71. Propuestas del Tribunal Superior de Justicia del Distrito Federal, 27 de abril de 1880 [Proposals of the High Court of Justice of the Federal District, April 27, 1880], en Memoria que el Secretario de Justicia e Instrucción Publica, [accent]Lic. Ezequiel Montes... cit, Documento 42, pp. 37-38 [Memorial to the Secretary of Justice and Public Instruction, Ezequiel Montes, Document 42, pp. 37-38].

72. Speckman Guerra, *supra* note 37, at 754.

73. *Id.*

74. *Id.* at 754-755.

75. *Id.* at 755.

76. *Id.*

irrevocable. And yet, in 1891, the size of the jury was reduced from eleven to nine, making it increasingly difficult for the jury to render an irrevocable verdict.[77] Thereby, the power of the jury was restricted. This period also witnessed the imposition of an income requirement on potential jury candidates who had to earn a daily income of at least one peso.[78] This economic requirement made the city fearful that it might fail to gather enough people, so the city then decided to allow public employees and foreigners with at least five years of residency to participate in jury trials.[79] In 1891, the income requirement was raised to one hundred pesos per month and lowered the age requirement to 21 and three years of residency for foreigners.[80] The purpose of lowering the age and residency requirement once more was done in fear that the new economic restriction would eliminate many potential candidates for jury trials.[81]

From 1907 to 1919, the economic requirement was eliminated and foreigners were excluded from future jury participation. In 1907, the jury was called to serve only in cases where the penalty for the crime exceeded six years in prison.[82] By 1919, the city council once again took charge of creating a candidate list with the assistance of the agent of the Public Ministry.[83] In the same year, the final summary given by the judge at the end of the trial was taken away, as it was argued by legal scholars and newspaper editorials that the final summary given by the judge would give him the opportunity to influence the nature of the jury deliberation and verdict.[84] This year also brought a significant change in the jury's responsibilities. The jury was no longer allowed to describe the nature of the crime or determine any aggravating or extenuating circumstances in criminal cases.[85] Between 1922 and 1929, the government abolished the economic requirement, while it added an educational requirement and juror candidates had to have an education above elementary school.[86]

Over time, many other changes over the jury function emerged in the Federal District. From 1869 to 1907, for instance, the jury adjudicated in criminal cases, where the potential sentence could exceed two-and-half years of possible incarceration.[87] Between 1907 and 1919, the jury presided over criminal cases with potential penalties exceeding six and half years of incarceration;

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77. *Id.* at 760.

78. *Id.*

79. *Id.* at 783 (please see "Anexo I: Legislacion en torno al jurado popular (1869-1929)" [Appendix I: Legislation on the Jury (1869-1929)).

80. *Id.* at 760.

81. *Id.*

82. *Id.* at 758.

83. *Id.* at 755.

84. *Id.* at 766-757.

85. *Id.* at 757-758.

86. *Id.* at 784.

87. *Id.* at 785 (please see "Anexo II: Importancia y atribuciones de juez y jurados (1869-1929) [Appendix II: Importance and Functions of Judge and Jury (1869-1929)]).

between 1919 and 1922, the jury decided on cases exceeding two years of incarceration; and between 1922 and 1929, the jury presided over criminal cases with five years of incarceration.[88] Criminal cases available to jury adjudication also changed over time. For example, in 1903, juries were no longer allowed to adjudicate a criminal case that involved a breach of trust, fraud, embezzlement, extortion, or bigamy; and in 1928 adultery was added to the list.[89]

The function and selection of the judge also went through significant transformation. In 1880, the required age for judgeship was lowered from thirty to twenty five years of age and judicial experience from five to three years.[90] After 1904, the judge was no longer elected by popular vote, but was appointed by the executive branch of the government on the proposal of the High Court.[91] Central state controls were infringing on bench decisions made by the judges themselves.

Although the government did allow for jury trials between 1869 and 1928 for common crimes, the eligibility requirements for jury service were never aimed at ensuring a role for the majority of the Mexican citizenry. For example, approximately eighty-percent of the Mexican population did not know how to read or write, let alone at an educational level above elementary school.[92] Nonetheless, Historian Speckman Guerra says that popular arguments in favor of the jury system contended that it was an important institution to be representative of shared sentiments and opinions of the common people.[93] Even though an elemental contradiction remained between the jury's eligibility qualifications and the purpose of jury trials, the jury still represented an important social aspiration towards a democratized form of future legal discourse. The jury as a popular legal institution also represented the manifestation of popular sovereignty and embodied the right of the community to participate in the administration of justice.

Despite the long history of jury trials prior to the end of the Mexican revolution in 1929, however, the practical use of the popular jury in an open and adversarial court had all but disappeared.[94] Yet, the 2008 current reform laid an important foundation for the possible re-establishment of the popular jury system, with use of oral arguments in proceedings, the adversarial system, the presumed innocence of an accused until proven guilty, and the placing of the "burden of proof "on prosecutors."

Several states have already proposed and introduced oral and more transparent criminal

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88. *Id.*

89. *Id.*

90. Ley de organización de tribunales, 15 de septiembre de 1880 [Courts Organization Act, September 15, 1880].

91. Ley de organización de judicial, 9 de septiembre de 1903 [Judicial Organization Act, September 9, 1903].

92. Speckman Guerra, *supra* note 67.

93. *Id.*

94. *See* Kossick, *supra* note 7, at 785 ("Mexico used juries between 1856 and 1929").

proceedings. In 2004, the State of Nuevo Leon introduced the oral adversarial criminal procedure in cases of non-serious culpable felonies. In February 2005, in its first oral trial in the city of Montemorelos, 19 witnesses testified publicly, and documentary evidence was also filed within a period of five hours, showing great judicial speed and efficiency.[95] The government of Nuevo Leon also won approval of an "access to information" law that allowed public access to governmental records, not only in the executive branch, but also in legislative and judicial branches.[96]

Zacatecas and Chihuahua similarly introduced their own reform initiatives to introduce open and transparent criminal procedures.[97] Chihuahua courts also introduced plea bargains, mediation, suspended sentences, probation, and other legal tools to effectively process their criminal cases.[98] These legal changes have had a dramatic effect on the efficiency of criminal cases. Of 1,112 cases filed in the City of Chihuahua in 2008, only eight went all the way to an oral trial; and in Ciudad Juarez, six of 1,253 criminal cases were tried in an open and adversarial court.[99]

On May 16, 2006, the international forum on the relevance and feasibility of establishing Mexico's popular jury was held at the Siqueiros Polyforum in Mexico City.[100] Many scholars, civil employees, and citizens of diverse countries shared experiences on the challenges and potentialities of the restoration of Mexico's jury system and held debates on the road to improve the system of justice.[101] The international discussion on the re-establishment of the jury system in Mexico was extremely timely and symbolic, especially given the fact that many Central and South American nations have already introduced and democratized their criminal justice systems, including Nicaragua, Guyana, Belize, Panama, Brazil, Venezuela, Bolivia, and many Caribbean countries, including the British Virgin Islands, Montserrat, Tortola, Anguilla, Antigua, Barbuda, St. Lucia, St. Vincent, the Grenadines and Grenada, Turks and Caicos Islands, Jamaica, Trinidad, and Puerto Rico.[102]

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95. *See* Ringe Basham & S.C. Correa, *First Oral Trial,* HG.ORG, Feb. 23, 2005, *available at* http://www.hg.org/articles/article_989.html.

96. *See id.* The article also states that the federal attorney general's office objected to aspects of the "access to information" law and it is currently under review by the Supreme Court.

97. James Cooper, *Slow Road to Legal Reforms in Mexico,* SAN DIEGO UNION-TRIB., Nov. 26, 2006, *available at* http://www.signonsandiego.com/uniontrib/20061127/news_mz1e27cooper.html

98. Ken Ellingwood, *In a Mexico State, Openness is the New Order in the Courts* L. A. TIMES, Feb. 6, 2009 *available at* http://articles.latimes.com/2009/feb/06/world/fg-mexico-drugs-courtreform6.

99. *Id.*

100. Guillermo Zepeda, *Jury Trials in Mexico,* EL ECONOMISTA, May 16, 2006.

101. *Id.*

102. Vidmar, *supra* note 12, at 437-444; Stephen Thaman, *Latin America's First Modern System of Lay Participation,* in STRAFRECHT, STRAFPROZESSRECHT UND MENSCHENRECHTE: FESTSCHRIFT FUR STEFAN TRECHSEL 765-79 (Andreas Donatsch et al. ed., 2002).

IV. PART III. THE SYSTEM OF LAY PARTICIPATION IN LEGAL INSTITUTIONS IN THE U.S., JAPAN, KOREA, IRELAND, AND NEW ZEALAND

Mexico is not the only country in the world waging a significant debate on court and criminal justice reforms in order to democratize its judiciary. Many nations around the globe are currently contemplating the manifestation of popular sovereignty by introducing the system of lay participation in the administration of justice. Japan and South Korea, for example, after many years of political debates on judicial reforms, have finally decided to introduce the lay judge system in 2008 and 2009 respectively. Unlike the common law nations with the long history of lay participation in legal institutions, Japan and South Korea had been operating upon a civil law tradition just like Mexico. People's struggles to bring about the changes to install the lay justice system in those nations are of significant importance to Mexico and its effort to create effective government oversight to eradicate judicial corruptions that characterize today's Mexican courts and judiciary.

Court systems in many nations are as varied as the social and political pressures handed down by colonialism, central government rules, and local demands for reform. This section briefly examines the lay judge system of five nations of which citizens were asked to respond to a set of questions on the popular jury, with their opinions empirically analyzed. Not only do we review Japan and South Korea that successfully introduced the lay judge system in their judicial institutions, we also review several common law nations with a long history of jury trials. The countries examined thus include: (1) the U.S., (2) Ireland, (3) New Zealand, (4) Japan, and (5) South Korea. The U.S., Ireland, New Zealand, and South Korea have adopted an all-citizen jury system, in which people have been selected at random from local communities to make decisions in criminal trials.

The tradition of a jury trial in Ireland, the U.S., and New Zealand came from Britain through their colonial history, which has been rooted in part in Roman law. Britain transplanted both grand and petit criminal juries and civil jury trials to its colonies.[103] In recent years, however, the civil jury trial has all but vanished in many of the former British colonies. At home, England and Wales have also abolished a tort-related, civil jury trial. The Supreme Court Act of 1981 establishes a right to jury trial in only four types of civil cases: libel and slander, fraud, malicious prosecution, and false imprisonment.[104] As a result, less than one percent of all British civil trials are jury trials.[105] The U.S. and New Zealand, however, still retain general civil jury trials, as does Hong Kong, another former British colony in East Asia.

Japan first introduced the Sanza (bureaucratic) jury system in 1873. The bureaucratic jury

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103. *See generally* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT, 21-39 (2007).

104. Sally Lloyd-Bostock & Cheryl Thomas, *The Continuing Decline of the English Jury, in* WORLD JURY SYSTEMS, 53.

105. *See* C. ELLIOTT & F. QUINN, ENGLISH LEGAL SYSTEM 138 (Pearson Education Limited 2d ed. 1998) (1996).

became Japan's first adjudicative body composed of nine lay jurors selected from bureaucratic government officials of various ministries. The function of the Sanza jury was to make final determinations at the guilt phase of the trial, while the presiding and two assistant judges were to make decisions at the penalty phase of the trial.[106] The Japanese government also introduced all-citizen jury trials in 1928. The Jury Act to establish Japan's first system of all-citizen juries was promulgated on April 18, 1923. During the next five-year preparation, the Ministry of Justice, the Supreme Court, and local bar associations actively promoted the all-citizen juries.[107] However, the jury system was suspended by the Japanese military government in 1943, because only men thirty-years-old and over with property were allowed to serve, and no eligible jurors either survived or could afford to serve at the end of the war.[108] In May 2004, nearly six decades after the end of World War II, the Japanese Diet finally passed the Lay Assessor Act and set up two different civic participatory panels for criminal trials – the Lay Assessor (mixed tribunal) and the New Grand Jury (Kensatsu Shinsakai) systems.[109]

The fundamental difference between Japan's lay assessor (or mixed tribunal) system and the all-citizen jury system — like the one in the U.S. and Mexico prior to the end of the Mexican revolution — is that, while the all-citizen jury panel exclusively consists of local residents chosen at random from a nearby community, the mixed tribunal is composed of a judicial panel of both professional and lay judges. In other words, the mixed tribunal system is often seen as a judicial compromise lying somewhere between an all-citizen jury and professional bench trial systems, thereby requiring a joint collaboration of professional trial judges and a select group of local residents acting as assistant adjudicators.

In countries with mixed tribunal systems, lay judges are either politically chosen from local communities or summoned from registered rolls prepared by local governments. For example, in Germany's mixed tribunal system, prominent political party members in local communities first create a list of lay judges twice the size of what is actually needed.[110] After the initial list is prepared, it is further reviewed by a special board of political members who then determine the final official list.[111] German lay judges are then required to serve for a term of four years.[112]

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106. Osatake Takeki, *Osatake Takeki Kenkyu [Research by Takeki Osatake]*, (2007).

107. Takashi Maruta, *Baishin Saiban o Kangaeru [Considering the Jury Trial]* 135 (1990).

108. Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L. J. 315, 321 (2007).

109. *Id.*

110. For Germany's lay assessor selection, *see* Walter Perron, *Lay Participation in Germany* 71 INT'L REV. PENAL L. 181, 190-92 (1999); Nancy Travis Wolfe, *Lay Judges in German Criminal Courts: The Modification of an Institution*, 138 PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY 4, 495-515 (1994); C.C. Schweitzer, Detlev Karsten, Robert Spencer, R. Taylor Cole, Donald P. Kommers and Anthony J. Nicholls, *Politics and Government in Germany, 1944-1994: Basic Documents* (1995). Other nations with lay assessor systems or mixed tribunals include France, Italy, Portugal, Sweden, and Norway in Europe, China in East Asia, Nicaragua and Venezuela in Americas, and South Africa in Africa.

111. Perron, *supra* note 110. The board consists of one professional judge, one administrative officer, and ten confidants who were then designated by the public administration in each community.

For Japan's mixed tribunal system, local government prepares a list of lay judges from registered rolls, and candidates are chosen randomly from the list. Once chosen, they are required to serve only for the duration of a single trial.[113] Japan's mixed tribunal system requires two different panels in their adjudicative process. A panel of three professional and six lay judges is asked to make decisions in both conviction and penalty phases of a contested criminal case, whereas a panel of one professional and three lay judges is asked to make a decision in the penalty phase of an uncontested case where the facts and issues identified by pre-trial procedures are undisputed.[114]

Among nations that have recently introduced all-citizen juries, in 2007 the South Korean Parliament approved a judicial reform measure and set up the all-citizen jury system in criminal cases. While the decisions are not binding, judges use the jury verdict as an important directive for determining final trial outcomes.[115] South Korea's legal transformation has been quite remarkable because, unlike Japan, South Korea never had a history of jury trials. The introduction of the popular jury also impacted another branch of the South Korean government. In 2005, the Ministry of Defense announced that it would adopt a jury system in which officers, noncommissioned officers, and rank-and-file soldiers could participate as jurors in an effort to increase public trust in military tribunals.[116] Prior to the introduction of lay participation, South Korea also revised its election law in 2005 and granted the right to vote in local elections to permanent foreign residents living there for three years or more, including ethnic Japanese, Chinese, Americans, Latinos, including Mexicans, and other minority groups.[117] The laws in 2005 also lowered the voting age from 20 to 19, thereby expanding the voting population.[118] The first election under the new law took place on May 31, 2006.[119] Changes in the electoral system and the expanded political franchise are seen as another sign of South Korea's movement towards the development of a fairer and more balanced democracy in East Asia.

Convergence towards more equitable social relationships is clearly on the international horizon. In all those nations, jurors are selected at random from local electoral rolls. There is no specific requirement as to gender, race, ethnicity, education, or economic background to be eligible to serve. Thus, in theory, every citizen in these nations is treated equally and considered as an able,

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112. Schweitzer et al., *supra* note 110, at 279. After the four year period, the lay assessors can be re-elected a second term.

113. *See* Saiban-in no sanka suru keiji saiban ni kansuru horitsu, Law No. 63 of 2004 [hereinafter the Lay Assessor Act.] *See* Kent Anderson & Emma Saint, *Japan's Quasi-Jury Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials,* 6 ASIAN-PAC. L. & POL'Y J., 233, 253 (2004). See especially Article 26 (3) (Selection of Lay Assessor Candidates to be Summoned), indicating that "The District Court shall select by lottery the lay assessor candidates to be summoned in a number determined [for a given trial]").

114. *Id.* at 233-283.

115. Jon Herskovitz, *South Korea to Try Jury System for First Time,* REUTERS, May 3, 2007.

116. Joo Sang-min, *Military Seeks to Revise Martial Laws,* KOREA HERALD, July 20, 2005 (In 2012, the South Korean jury system will be reviewed and permanently implemented with or without major changes).

117. *See* Cho Chung-un, *Elections Expand Voting Rights for Foreigners, Younger Citizens* KOREA HERALD, May 25, 2006.

118. *See id.*

119. *Id.*

trusted member of society, capable of making fair and just decisions in criminal trials; thereby contributing to the judicial governance of the society in which he/she lives. Whether or not Mexico will be ready to follow the footstep of these nations is the question examined in the following section.

A. Methodology

Both survey and interview methods were used to solicit opinions and attitudes about the possible re-introduction of the jury system in Mexico in 2008 and 2009. Our respondents included law professors, college students, and a select group of citizens. In order to make effective comparisons with the views, attitudes, and opinions of respondents in nations that instituted the lay judge systems, this section also examines systematic comparisons of opinions and attitudes about lay participation.

For numerical comparisons, we examine survey responses collected from college students and university researchers, making up the possible future intelligentsia of six nations, who one day may be expected to lead their respective countries into the 21st century. Between 2005 and 2008, two thousand respondents from ten private, state, and/or national colleges and universities in six different nations were contacted and asked to provide their views and opinions on the need and potential operation of the popular jury. Both closed-ended and open-ended questions were used in the opinion surveys. The six nations examined include the following: (1) Mexico, (2) Japan, (3) the U.S., (4) Ireland, (5) South Korea, and (6) New Zealand.

B. Survey Questions

More than 70 questions were asked of our respondents. The questionnaire was translated into the following four languages to maximize the response rate from the college students and researchers: (1) Hangul for Korean respondents; (2) Spanish for Mexican students; (3) Japanese for respondents in Japan; and (4) English for the U.S., Ireland, and New Zealand respondents.

The questions were classified into the following eleven categories: (1) confidence in jurors' abilities; (2) willingness for legal participation; (3) perceived obstacles to jury service; (4) moral/ethical responsibilities; (5) confidence in the jury system; (6) procedural suggestions for jury trials; (7) fear of serving as jurors; (8) jury's oversight function of the government; (9) confessions and believability; (10) race, gender, diversity, and jury representation; and (11) fairness of court and the criminal process.

Respondents were asked to rate their agreement on a five-point Likert scale: (1) strongly agree, (2) somewhat agree, (3) uncertain/neutral, (4) somewhat disagree, and (5) strongly disagree. We also asked for narrative responses about their views and opinions on lay participation, including any suggestions to improve the system of popular legal participation in their country. A select

group of respondents was also contacted in a person-to-person and/or telephone interview. Finally their responses were transcribed, translated into English as necessary, and qualitatively analyzed.

C. Samples

1. Mexico

In December 2008, a group of students at the Instituto Tecnológico Superior de la Región de los Llanos in the State of Durango was asked to respond to a jury survey questionnaire.[120] Mexican students who responded to the survey questionnaire were enrolled in the following two seminar courses: (1) ethics and administration and (2) the development of human potential. A total of 278 students have filled out survey questionnaires. In March 2009, a group of law students at the National Autonomous University of Mexico (Universidad Nacional Autónoma de *México (UNAM)) was also asked to respond to the same questionnaires (n=34).*[121] Besides survey opinions, many interviews were conducted in Mexico City, Mexico with students from "Facultad de Derecho (Law Faculty)" at UNAM, students in other disciplines, and academic scholars in the area of law, including several prominent law professors at the "Instituto de Investigaciones Jurídicas (Institute of Juridical Investigations)" at UNAM. Other interviewees also included taxi drivers, people at the Zócalo de Coyoacan, and a select group of citizens in Mexico City. The responses to the interviews reflect the differing ideals and views toward a lay judge system in Mexico, by the Mexican citizenry, ranging from ordinary working class people, to those in the law profession. The structure of this analysis began with the type of questions that were asked to all those who participated in the interviews, followed by the major themes derived from the participants responses, and finally the implication of their responses and what it means for Mexico's future in the possible implementation of a lay justice system. The contents of their interview responses were carefully recorded, transcribed, and content-analyzed.

2. Japan

Between October and December 2005, undergraduate students at three private universities in a Tokyo metropolitan area filled out the same jury questionnaire in Japanese (n=607). Those universities included: (1) International Christian University (ICU), (2) Senshu University, and (3) Toyo University. The survey questionnaire was distributed to undergraduate students enrolled in lower division sociology and psychology courses during the time of survey.

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120. The institute offers the BS in computer science, and other degrees in industrial engineering, food engineering, and mechanical engineering.

121. A total of 7 UNAM students who filled out the questionnaire were enrolled in Professor John Ackerman's class prior to March 2009.

3. New Zealand

In July 2008, the jury questionnaire was distributed to both undergraduate and graduate students at the University of Otago in Dunedin, New Zealand.[122] The university has been the South Island's largest employer and demonstrated New Zealand's highest research excellence, only second to the University of Auckland.[123] A total of 90 students have responded to the jury survey questionnaire.

4. Ireland

In October 2006, the jury questionnaire was distributed to undergraduate and graduate students at the National University of Ireland, Galway. The university is one of the oldest educational institutions in Ireland. The university first opened for teaching in 1849, and currently it has approximately 16,000 students. [124] A total of 114 students responded to the jury survey questionnaire.[125]

5. South Korea

In April 2008, a group of undergraduate students at Chungbuk National University in the City of Cheongju was asked to participate in the survey. A group of students enrolled in an introductory psychology course provided their responses in Hangul. A total of 186 students responded to the jury survey questionnaire.

6. The U.S.

In the fall quarter of 2005 and the winter quarter of 2006, a group of undergraduate students at two University of California campuses in Santa Cruz and Davis participated in the opinion survey. A total of 623 students in undergraduate sociology and psychology courses provided their responses in the survey questionnaire.

D. Findings

Table 1 shows the results of the cross-national analysis, indicating both differences and

122. For university information, *see* http://www.otago.ac.nz. Ms. Madeline Munro assisted the 2008 jury survey in New Zealand.

123. *Id. See also* http://www.otago.ac.nz/research.

124. For university information, *see* http://www.nuigalway.ie/about-us/who-we-are/about-the-university.html.

125. The survey was assisted by Paul Gavin, a former undergraduate student at the National University of Ireland, Galway. At the time of survey, he was enrolled at Kings College London, studying Criminology and Criminal Justice for his master's degree.

similarities of the views on lay jury participation among the respondents of six nations. The first set of questions examined the respondents' confidence in jurors' overall abilities. One significant way in which Mexico stood out was the response to the questions on jurors' abilities to reach a fair, just, and equitable decision, as well as their capacity to separate facts and evidence from prejudicial publicity.

The overwhelming majority of Mexican respondents felt confident that they could make fair and just decisions as jurors (75.9%) and that they were more likely to base their decisions solely on facts and evidence presented in court (72.8%). The latter figure shows the highest confidence level among six nation respondents.[126] The majority of Mexican respondents also agreed that it is not difficult for ordinary people to determine a verdict (i.e., guilty/not-guilty) (46.6% of them felt that it is "extremely" difficult). The majority of Mexican respondents also did not agree that jurors are incapable of separating actual evidence from media coverage and prejudicial information in highly publicized criminal cases (48.1%). On the other hand, the majority of respondents in the other five nations felt that jurors would be unable to escape from prejudicial information on criminal cases. Those results show that Mexican respondents tend to hold greater faith and respect for the popular jury and people's abilities to engage in deliberation and determine a fair and equitable verdict based on factual evidence and information.

Mexico's high confidence in lay participation starkly contrasts with the confidence expressed by Japanese respondents, in which only 27% felt confident in making a fair and just decision. While Japan's lay justice system began in May 2009, many scholars and citizens have already expressed their concerns about the low confidence among potential jury candidates and the low overall quality of the deliberations and trial outcomes in Japan. Despite the fact that Mexicans today do not have the opportunity to participate in jury trials in general criminal cases, empirical results suggest that Mexicans are more willing to accept the jury system as an important form of adjudication; and they certainly expressed their willingness to participate in the trial process.

The great majority (70.4%) of Mexican respondents also indicated their willingness to serve on juries both voluntarily and even as required by law (71.9%). When they were asked whether or not the importance of jury duty and popular participation was espoused in their communities, almost half of Mexican students responded affirmatively (49.9%). The response is nearly 20% points higher than in Korea, which is second at 34.4% among the six nation respondents. The remaining countries were below 30%. Nearly sixty percent of Mexican students also indicated that if they could pick the date of jury service six months in advance, they could easily serve as jurors (56.5%).

1. Fear of Serving as Jurors, and the Credibility of Confessions and Believability

Another set of questions were posed about a potential fear of serving as jurors. The great

126. *See* [1] "Confidence in Jurors' Abilities" in Table 1.

majority of Mexican students indicated that in a gang-related trial where many gang supporters could appear, they believed they could make a fair judgment as jurors (60.7%). The Mexican response was the highest among the six nations. Japanese respondents had the lowest confidence, where only one in five expressed confidence in making a fair decision in a gang-related trial (21.3%).

With respect to socio-political ramifications of the popular jury, the majority of Mexican respondents felt that ordinary people's presence in a jury could serve to prevent future crimes in their local communities (55.5%). The Mexican response was the highest among the six nations. The great majority of Mexican respondents also felt that the popular jury could prevent possible overzealous prosecution or judges' unfair decisions (67.4%). Those results suggest that lay participation in Mexico will play an important watchdog function in local communities, as well as in the courtroom.

The next set of questions was asked about the views on the credibility of confessionary documents and their ability to stand as evidence in court. The overwhelming majority of Mexican respondents felt that they needed to understand how confessions were being extracted, especially in criminal trials where defendants later contested the content of such confessionary documents (83.6%). Over half of Mexican respondents also felt that defendants must have been coerced to make confessions in such situations (53.7%). South Korea is the only nation that showed a higher similar response than Mexico (61.3%). This is perhaps because, until recently, South Korea was run by a powerful, dictatorial government that used the military and the courts to control any political opposition. The South Korean government and its military agencies (including the Korean Central Intelligence Agency or KCIA), for instance, long relied on the illegal confinement and torture of many political dissenters and civic activists to extract coerced and falsified confessions to ensure their convictions.[127]

With respect to the fairness of the court and criminal process, the overwhelming majority of respondents in each of the six nations indicated that the judges in their respective nations are generally more biased than judges in other nations (ranging from 65.5% in New Zealand to 91.4% in Korea). The majority of international respondents also felt that the courts have not been sensitive about the concerns of average citizens (except Ireland (44.7%) and New Zealand (44.5%)). Similarly, the majority of Mexican respondents indicated that fair and equitable criminal procedures were not followed in rendering the final judgment of criminal cases in Mexico (56.6%).

127. *See generally*, CHALMERS JOHNSON, NEMESIS (2008).

Table 1: Cross-National Comparison of Attitudes and Opinions on Lay Participation in Legal Institutions[1]

Attitudes	Mexico	Ireland	Japan	Korea	New Zealand	U.S.
(1) Obstacles to Jury Service						
If I could pick the date of jury service 6 months in advance, I could easily serve.	56.5 (57.2)	74.5 (76.6)	69.8 (72.3)	61.8 (55.5)	67.8 (67.5)	64.6 (64.8)
The importance of jury duty is widely advocated in my community.	49.9 (54.7)	29.8 (34.0)	7.8 (11.4)	34.4 (37.8)	26.7 (27)	26.2 (31.3)
My employer would not be resentful of my jury duty.	39.4 (40.5)	53.6 (50.0)	27.4 (29.6)	43.8 (42.2)	51.1 (63.9)	41.1 (39.6)
(2) Jurors' Abilities & Competence						
In high profile cases, jurors are incapable of separating actual evidence from media coverage.	48.1 (49.4)	63.1 (59.6)	80.9 (77.1)	66.7 (72.2)	68.9 (72.9)	53.5 (57.7)
I am confident that, if I became a juror, I could make a fair and just judgment.	75.9 (72.9)	86.0 (93.6)	27.3 (35.2)	66.7 (64.4)	70.0 (72.9)	77.1 (79.0)
It is extremely difficult for ordinary people to determine the verdict (i.e., guilty/not-guilty).	46.6 (45.9)	51.8 (55.3)	55.9 (53.4)	70.5 (66.7)	48.9 (54.0)	36.5 (38.3)
It is difficult for ordinary citizens to determine an appropriate penalty in a criminal trial.	53.0 (53.4)	78.1 (83.0)	41.1 (40.3)	87.1 (83.1)	82.2 (83.7)	62.2 (65.7)
A jury has a potential risk of acquitting the guilty and convicting the innocent.	74.3 (72.3)	79.0 (72.3)	79.9 (77.3)	84.4 (80.0)	85.6 (86.4)	82.4 (84.8)
Jurors are most likely to make decisions based solely on facts and evidence.	72.8 (73.6)	64.9 (68.1)	70.8 (60.0)	49.5 (47.7)	55.6 (43.2)	44.8 (37.3)
Attitudes	**Mexico**	**Ireland**	**Japan**	**Korea**	**New Zealand**	**U.S.**
(3) Legal Participation						
I feel it is my duty to serve as a juror when needed.	71.9 (69.8)	85.1 (76.6)	74.3 (72.4)	71.4 (62.2)	73.3 (75.7)	64.0 (58.1)
I am willing to serve as a juror.	70.4 (69.8)	88.5 (91.3)	40.3 (44.6)	81.7 (75.5)	73.0 (64.8)	67.9 (67.6)
(4) Moral/Ethical Responsibilities						
I would feel overwhelmed if I had to make a judgment on	43.9 (41.8)	47.3 (40.4)	73.2 (61.5)	69.9 (68.9)	61.1 (59.4)	55.3 (43.8)

the defendant and his/her charges.						
It would be very difficult for me to never discuss my jury experience.	47.4 (51.6)	67.9 (71.8)	70.9 (66.5)	73.5 (76.6)	68.5 (72.9)	66.6 (67.1)
(5) Confidence in the Jury System If I became a defendant in a criminal case, I would prefer a jury trial to a judge trial.	62.2 (65.0)	73.7 (72.3)	32.3 (30.4)	51.6 (52.2)	60.0 (56.7)	61.2 (68.0)
A jury's decision reflects the community's values and judgments.	64.9 (67.3)	73.6 (70.2)	81.0 (76.9)	78.0 (75.6)	72.2 (73.0)	53.9 (51.9)
A jury trial is not the best way to determine a trial outcome.	39.0 (40.4)	29.0 (25.5)	43.0 (41.9)	59.2 (55.5)	35.5 (35.1)	26.9 (28.6)
I support other countries introducing the jury system like ours.	54.7 (53.8)	82.5 (87.2)	44.3 (47.8)	65.1 (62.2)	67.7 (70.2)	65.3 (64.6)
(6) Jury Trials In discussing a verdict, jurors should utilize the judge to clarify questions/concerns.	75.4 (73.4)	93.0 (95.7)	86.8 (84.6)	79.0 (82.2)	91.1 (94.6)	83.4 (81.9)
Recording (transcribing or videotaping) is important in all trial proceedings.	86.2 (84.9)	92.1 (93.6)	80.5 (79.4)	97.8 (98.9)	92.2 (94.6)	85.0 (88.1)
Citizens should be encouraged to serve on a civil jury (i.e., medical malpractice, drug poisoning, or negligence cases) .	68.2 (66.7)	64.0 (63.8)	52.5 (52.3)	77.3 (77.8)	62.9 (50.0)	68.2 (67.2)
The more diverse the jury's racial and gender background, the fairer the trial.	73.4 (68.7)	65.8 (63.8)	86.2 (82.4)	77.4 (74.4)	71.1 (67.5)	76.0 (70.5)
(7) Fear of Serving as Jurors In a trial where many gang supporters may appear, I believe I could make a fair judgment as a juror.	60.7 (60.1)	57.5 (59.6)	21.3 (24.4)	39.8 (40.0)	46.6 (54.0)	54.1 (57.0)
Attitudes	**Mexico**	**Ireland**	**Japan**	**Korea**	**New Zealand**	**U.S.**
If I became a juror, I would be concerned about potential retaliation from the defendant.	63.6 (67.3)	56.1 (57.4)	64.2 (62.8)	80.6 (77.8)	60.7 (51.3)	42.7 (41.6)
(8) Oversight Function of the Government Ordinary people's presence in a jury serves to prevent future crimes in the community.	55.5 (59.1)	31.6 (32.0)	44.9 (47.8)	52.8 (48.9)	32.3 (32.4)	32.7 (34.9)
Ordinary people in a jury can prevent possible overzealous prosecutions or judges' unfair decisions.	67.4	61.0	74.0	81.7	65.2	66.0

	(66.5)	(57.4)	(69.9)	(76.7)	(62.2)	(72.2)
(9) Confession and Believability						
Some defendants plead innocent, even if they already confessed. In such a case, I am curious to know how the confession was made.	83.6 (81.8)	91.3 (93.6)	91.3 (91.1)	93.0 (90.0)	85.6 (83.8)	89.2 (87.0)
For the above case, I believe that the defendant was forced to confess.	53.7 (50.9)	34.2 (38.3)	16.9 (18.4)	61.3 (60.0)	36.6 (37.8)	41.1 (41.8)
(10) Race, Gender, Diversity, and Democracy						
It is important to create programs to increase the number of female and minority lawyers.	63.8 (58.5)	73.7 (59.6)	19.5 (29.8)	83.3 (78.7)	62.2 (48.6)	79.9 (66.9)
Every taxpayer including permanent residents (non-citizens) should be allowed to serve on juries.	57.1 (54.8)	70.2 (74.4)	69.1 (64.6)	59.3 (57.3)	60.9 (52.8)	68.1 (64.9)
In criminal court, non-English speakers are more likely to be treated worse than English speakers.	43.4 (45.9)	47.4 (48.9)	54.2 (51.8)	67.8 (63.2)	44.5 (48.6)	71.1 (73.2)
An increase of lawyers will generally lead to a lower quality of legal services.	37.3 (43.4)	21.1 (25.5)	57.0 (55.5)	22.5 (26.7)	27.8 (32.4)	19.1 (23.4)
If a wife kills her partner who physically abused her, wives should be included in the jury.	43.6 (40.2)	57.9 (48.9)	58.5 (46.1)	54.3 (54.5)	57.3 (54)	63.8 (60)
(11) Fairness of Court & Criminal Process						
In the court process, all people are treated with respect and dignity.	29.7 (33.8)	36.8 (42.5)	22.0 (25.0)	35.5 (38.9)	55.6 (54.0)	27.2 (35.0)
I believe that my country's judges are generally less biased than judges in other countries.	16.7 (20.8)	14.1 (19.5)	13.7 (18.1)	8.6 (13.3)	34.5 (32.4)	15.0 (13.4)
Fair procedures are generally used to make the final judgment on a case.	43.4 (46.8)	67.6 (59.6)	42.6 (45.2)	55.9 (60.0)	66.7 (70.3)	47.8 (51.6)
Attitudes	**Mexico**	**Ireland**	**Japan**	**Korea**	**New Zealand**	**U.S.**
Courts are generally sensitive about the concerns of average citizens.	25.3 (25.8	55.3 (63.8)	20.2 (21.0)	30.9 (32.1)	55.5 (56.7)	35.9 (39.2)

Note: Figures show percentages of respondents who "strongly" or "somewhat" agreed with respective statements. The analysis relied on the use of a 5 point-Likert scale: (1) strongly agree, (2) somewhat agree, (3) not sure/uncertain, (4) somewhat disagree, and (5) strongly disagree.

1. The figure represents a percentage of male respondents who either "strongly" or "somewhat" agreed with

the statement

2. Respondents' Confidence in the Government and Criminal Justice Managers

Table 2 shows respondents' confidence in the justice administration, prosecutors, the police, jurors, and the media. Mexican respondents' confidence in the police was the lowest among the six nation respondents (15.9%), a large percentage-point below any figures of other countries. Not only did it show the lowest confidence among six countries by a large margin, but it also had the lowest confidence in the prosecutors (27.5%). South Korea is next by a significant margin (42.2%).

Confidence in the courts also failed to reach a majority in Mexico (45.2%). Mexico is the only nation where respondents' confidence in prosecutors, the police, and the courts failed to reach the majority. With respect to the confidence in defense attorneys, slightly more than half of Mexican respondents have shown confidence in them (57.8%). Consequently, the majority of Mexican respondents also showed confidence in juries (52.0%). Japan showed the lowest level of confidence in juries (44.4%), followed by South Korea (45.9%).

The 2008 judicial reform in Mexico guaranteed the legal representation of criminal defendants by public defenders, when defendants failed to appoint their own attorneys. Public defenders can play an important role in the administration of justice in Mexico because confidence in both defense attorneys and the jury is much higher than confidence in the police, prosecutors, or the court. It is also important to note that confidence in the jury in Mexico is relatively lower than in the U.S., New Zealand, or Ireland—the nations that have had a long history of common law tradition. In those nations, the use of jury trials has also been considered an integral part of the criminal justice system. Nevertheless, among countries with a long history of a civil law tradition and an inquisitorial and non-adversarial criminal justice system, such as in Japan and South Korea, Mexico showed the highest level of confidence in jurors.

Table 2 Cross-National Comparison of People's Confidence in Legal Institutions and the Media[1]

Criminal Justice Institutions	Mexico	Ireland	Japan	Korea	New Zealand	USA
Police Officers	15.9 (3.46)	53.1 (2.53)	60.7 (2.45)	31.8 (2.87)	77.9 (1.93)	54.4 (2.52)
Professional Judges (The Court)	45.2 (2.92)	88.2 (1.93)	87.3 (1.97)	55.4 (2.50)	87.8 (1.72)	68.4 (2.31)
Prosecutors	27.5 (3.26)	86.8 (2.02)	78.9 (2.16)	42.2 (2.65)	82.0 (2.00)	63.3 (2.36)
Jurors	52.0 (2.85)	75.9 (2.16)	44.4 (2.69)	45.9 (2.66)	63.3 (2.37)	65.1 (2.35)
Defense Attorneys	57.8 (2.60)	89.7 (2.02)	82.9 (2.03)	42.8 (2.71)	79.0 (2.09)	68.2 (2.35)
State (or Federal) Government	42.7 (2.84)	66.7 (2.31)	57.1 (2.52)	29.8 (2.90)	85.0 (2.04)	38.7 (2.76)
Media -- Television/Radio	45.4 (2.77)	46.2 (2.58)	48.3 (2.64)	22.6 (3.06)	41.9 (2.69)	23.0 (3.03)

Media -- Newspapers	52.0 (2.57)	53.3 (2.47)	75.8 (2.16)	32.6 (2.87)	52.3 (2.54)	54.6 (2.52)

Note: People's confidence is measured by using the following 4 point rating scale: (1) very confident, (2) some confidence, (3) little confidence, and (4) no confidence.

1. Figures show percentages of those who responded with "very confident" or "somewhat confident" on respective institutions. Figures in parentheses show the average of responses on a 4 point rating scale.

Table 3 shows the effect of specific attitudinal responses of Mexican students about their confidence in the government, courts, prosecutions, jurors and the mass media. Those who showed a greater fear of retaliation from the defendant tend to show less confidence in prosecutors (26.2%) than those with a less retaliatory fear (35.9%), though the majority of Mexican respondents failed to show much confidence in the prosecutors. With respect to the confidence in the institution of the jury, greater confidence was expressed by those who showed greater willingness to participate in jury service ($p<.05$) and jury's function as an important shield from overzealous prosecution and judges' unfair decisions ($p<.5$). It is also important to note that greater confidence on all-citizen juries are expressed by those who showed a greater concern about feared retaliation from a defendant (58.7%) than those who did not (52.2%). A similar pattern is found among Mexican respondents who showed greater jury support by those who expressed their confidence in fair minded-decision making in trials with gang member defendants (59.8%) than those with less confidence in making a fair decision in jury trials (50.7%). The majority of respondents [percentage?] expressed greater confidence in the institution of juries, and their expressed fear of retaliation from jury service also did not restrain support of the jury.

Table 3 Mexico's Confidence in the Government and Legal Institutions by Attitudinal Measurements[1]

Institutions & Attitudes[2]	Concern with[3] Retaliation	Judgment in[4] Gang Trial	Willing to Serve[5] as Juror	Preference of[6] Jury over Judge	Jury Against[7] Overzealous Prosecutors	Confessional[8] Evidence	Forced[9] Confession
Police Officers	15.1 (16.6)	16.9 (15.1)	15.9 (12.9)	16.0 (22.2)*	17.1 (14.7)	14.2 (27.8)*	11.8 (21.6)**
Professional Judges (The Court)	48.6 (47.1)	48.7 (45.9)	50.4 (40.0)*	44.1 (58.1)	49.5 (50.0)	47.0 (58.9)	44.6 (54.8)

Prosecutors	26.2 (35.9)	29.7 (28.1)	32.5 (23.3)	29.0 (36.2)	29.1 (33.3)	28.6 (40.0)	30.9 (33.8)
Jurors	58.7 (52.2)	59.8 (50.7)	60.7 (40.0)**	55.8 (61.9)	61.4 (48.4)**	56.9 (59.4)	57.7 (58.6)
Defense Attorneys	59.7 (61.6)***	61.5 (51.4)	62.3 (58.0)	57.8 (67.8)	62.7 (48.5)	60.3 (57.2)	57.4 (62.7)
National (Federal) Government	44.3 (41.3)	47.8 (33.8)*	47.7 (32.3)	44.0 (42.8)	43.4 (43.7)	42.6 (30.5)	43.4 (50.6)
Media -- Television/Radio	47.3 (39.1)	45.2 (41.1)	42.6 (50.0)	37.9 (61.9)***	43.9 (44.4)	44.7 (58.4)*	43.6 (40.5)
Media -- Newspapers	55.4 (54.3)	56.0 (50.0)	57.8 (46.6)	54.0 (52.3)**	56.8 (50.0)	56.7 (47.2)	53.6 (48.0)

Note: People's confidence is measured by using the following 4 point rating scale: (1) very confident, (2) some confidence, (3) little confidence, and (4) no confidence.

1: Figures show percentages of those who showed "very confident" or "somewhat confident" in respective institutions. Figures in parentheses show the average of responses on a 4 point rating scale.
2: Figures for Attitudinal measurements show percentages of respondents who either (1) "strongly agreed" or (2) "somewhat agreed" with respective statements. Figures in parentheses show percentages of those who either (3) "strongly disagreed" or (4) "somewhat disagreed" with respective statements.
3: "If I became a juror, I would be concerned about potential retaliation from the defendant."
4: "In a trial where many gang supporters may appear, I believe I could make a fair judgment as a juror."
5: "I am willing to serve as a juror."
6: "If I became a defendant in a criminal case, I would prefer a jury trial to a judge trial."
7: "Ordinary people in a jury can prevent possible overzealous prosecutions or judges' unfair decisions."
8: "Some defendants plead innocent, even if they already confessed. In such a case, I am curious to know how the confession was made."
9: "For the above case, I believe that the defendant was forced to confess."

Chi-square test statistic: * p<..10 ** p<..05 *** p<..01

V. PART IV. DISCUSSIONS: MEXICO AND DEMOCRACY IN NORTH AMERICA

Past research shows that Mexico once had a progressive history and long tradition of social and political efforts to advance the democratic ideals of equality and direct citizen participation in politics and law. Indeed, for the last two centuries, Mexico may have been one of the most important political advocates of democracy in North America.

The U.S. media proudly boasts that in 2009, newly-elected Barack Obama had become the first African President to lead the nation in the western hemisphere.[128] Of course, this assertion is

128. *Pan-African Scholar Ali Mazrui on the Election of Barack Obama as the First Black President in the Western World,*

clearly false. Nearly two hundred years ago, Mexico became the first nation in North America to choose an African as President, Vincente Ramón Guerrero Saldaña, who lived during a crucial period of Mexican history and became the second President of Mexico on April 1, 1829.[129] He was born in 1783 as a son of former African slaves in the town of Tixtla near Acapulco, became one of the main rebel leaders of the Mexican Revolution, and fought against Spain in the Mexican War of Independence.[130] He was an ardent defender of Indian rights and a harsh opponent of social and economic inequities.[131] While his tenure was cut short by political unrest and his untimely death in 1831, his accomplishments and historical legacy will never be forgotten.[132] President Guerrero Saldaña signed a decree on September 15, 1829 that abolished the system of slavery in Mexico and emancipated all slaves.[133] Guerrero Saldaña also helped write Mexico's constitution and took various steps to educate and elevate its poor and people of color. The Mexican state of Guerrero was dedicated in his honor.[134] The foundation for Mexico's expansion of human and political rights was thereby laid.

The jury became a very important political institution for Mexicans in the American Southwest, when the U.S. Government claimed its jurisdiction following the Mexican-American War. Mexican juries in the newly "occupied territory" served as powerful checks on the potentially prejudicial attitudes and behavior of European-American prosecutors and judges.

It all began in 1846, when the U.S. declared war against Mexico and occupied Mexico's northern territories, now called the American Southwest. From 1850, New Mexico then became a federal territory and continued its colonial status until 1912 when it became the 47th state.[135] In the politically "colonized" Southwest, Mexicans exerted significant political and judicial power over the territorial American government through their active participation in criminal proceedings. In Territorial New Mexico, Mexican women were not allowed to serve as jurors. Mexican women, however, were permitted to testify as witnesses in court. As Legal historian Laura Gomez documents: "Mexican women . . . testified quite regularly as general witnesses for either the prosecution or defense and in either grand jury proceedings or trials."[136]

Despite the fact that blacks and other racial and ethnic minorities were prohibited from

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DEMOCRACY NOW, February 16, 2009 *available at* http://www.indybay.org/newsitems/2009/02/16/18571196.php.

129. STACY LEE, MEXICO AND THE UNITED STATES, 384 (2002).

130. *Id.*

131. *See generally*, THEODORE G. VINCENT, THE LEGACY OF VINCENTE GUERRERO, MEXICO'S FIRST BLACK INDIAN PRESIDENT (Univ. Press of Florida 2001) (biography focusing on Guerrero's political career).

132. *Id.* at 204-07.

133. EUGENE C. BARKER, MEXICO AND TEXAS, 1821-1835, 77-79 (Russell & Russell, 1965) (1928).

134. *See id.*

135. *See generally*, HOWARD LAMAR, THE FAR SOUTHWEST, 1846-1912: A TERRITORIAL History (1966).

136. Laura E. Gomez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico,* 35 LAW & SOC'Y REV. 1129, 1172 (2000).

testifying against whites in criminal trials in other parts of the U.S.,[137] Mexican men and women in New Mexico routinely testified against European-American defendants.[138] In the politically "colonized" Southwest, Mexicans exerted significant political and judicial power over the territorial American government through their active participation in criminal proceedings. Historical records show that they dominated more than 80% of both grand and petit trial juries.[139] Since the majority of residents in the Southwest were Mexicans, the centrality of the Spanish language in trial proceedings also created a strong sense of rightful ownership of both legal and cultural space. Predominantly Mexican juries effectively functioned as significant overseers of white judges and other law enforcement officials.[140]

In the legal environment where judges, prosecutors, and law enforcement officials were almost exclusively selected from European-American communities, Mexican juries served as a powerful check on the potentially prejudicial attitudes and discriminatory behavior of white prosecutors and judges. Through their high degree of active participation in the popular jury, Mexicans in New Mexico successfully resisted European-American legal controls and political domination.

In fact, political power exercised by the popular jury is observed in many countries around the world, as they have recently tried to adopt the lay decision-making process and democratized their own jurisprudence and legal systems. These nations include Japan,[141] South Korea,[142] China,[143] and Thailand[144] in East Asia; Venezuela,[145] Bolivia,[146] and Argentina[147] in South America; Russia, Uzbekistan, Kajikistan, Latvia, and other former Soviet republics[148] in Central and Western

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137. For a detailed history of the relationship between race and the jury in the U.S., *see generally*, HIROSHI FUKURAI & RICHARD KROOTH, RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION (Austin T. Turk, ed., State University of New York Press 2003).

138. Gomez, *supra* note 136.

139. *Id.* at 1192

140. *Id.*

141. *See* Fukurai, *supra* note 108.

142. Jae-Hyup Lee, Getting Citizens Involved: Civil Participation in Judicial Decision-Making in Korea, 4 E. Asia L. Rev. 177 (2009).

143. Hiroshi Fukurai and Zhuoyu Wang, *Civic Participatory Systems in Law in Japan and China,* a paper presented in a session, IRC East Asian Legal Professionalism: Judiciary in Transition, at the Law and Society Association Meeting in Berlin, Germany, July 28, 2007.

144. Frank Munger, Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand, 40 Cornell Int'l L.R. 455 (2007).

145. On November 12, 2001, the Venezuelan legislature stopped the jury court. However, the mixed court system is still operating in Venezuela. *See* Thaman, *supra* note 102.

146. Diego Rijas, Ariel Morales and Mario Kempff, Latin Lawyer: Litigation Bolivia (2010), *available at* http://www.latinlawyer.com/reference/article/25524/litigation/.

147. María Ines Bergoglio, New Paths Toward Judicial Legitimacy: The Experience of Mixed Tribunals in Córdoba, 14 Sw. J.L. & Trade Am. 319 (2008).

148. Nikolai Kovalev, Trial by Jury and Mixed Court in Transitional Criminal Justice Systems of the Former Soviet Union:

Asia; and Spain[149] in Western Europe. In Thailand, with no history of jury trials prior to the September 2006 coup, the Thai government also considered and debated the possible introduction of popular participation in their legal system.[150]

In 1993, Russia successfully reinstated jury trials after a break of more than seven decades. Recent Russian studies showed that the acquittal rate by the all-citizen jury was much higher (18%) than by professional judges (3.6%).[151] The 2006 Russian national survey also indicated that 44% of citizens would encourage friends and relatives to opt for a jury trial in criminal cases, including the allegation of terrorism.[152] The higher acquittal rate by Russian juries is partly due to the fact that the bulk of evidence against defendants in Russia has mainly consisted of their confessions extracted under lengthy detention and torture; and juries have expressed their skepticism about the credibility of evidence.[153] The verdicts of all-citizen juries in Russia have thus demonstrated the application of higher evidentiary standards in evaluating the legal validity and reliability of confessionary documents.[154] On December 17, 2008, however, Russia's Parliament approved a bill to abolish the use of all-citizen jury trials to adjudicate criminal cases involving terrorist acts, treason, espionage, coup attempts, and other serious offenses against the government.[155] Now the Russian judge has the exclusive jurisdiction over terrorism cases, a grim reminder of past inequities.

The current wave of judicial reforms in world communities is so similar to the kind of political and judicial changes in the 19th century, triggered by the 1789 French Revolution and political unrest in Europe – progressive forces which, in turn, strengthened the petit trial jury in England. Trial by jury also became an integral part of the emerging judicial system of American society and of other nations on the European Continent.[156] France, for example, introduced trial by jury in 1789; and it became an important political tool in the hands of the insurgent bourgeoisie against the absolute French monarchy. Germany introduced trial by jury in 1848, Russia in 1864, Spain in 1872, Italy by the end of the 19th century, as was done in almost all other European

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In Search of Independent and Impartial Courts (manuscript accepted for publication by Mellen Press in 2011) (Manuscript on file with the first author). *See also* Stephen Thaman, The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond, 40 Cornell Int'l L.J. 355 (2007).

149. Stephen Thaman, Europe's New Jury Systems: The Cases of Spain and Russia, 62 Law & Contemp. Probs. 233 (Spring 1999).

150. Munger, *supra* note 144.

151. *See* Trochev, *supra* note 20, at 7.

152. Nabi Abdullaev, A Jury is a Better Bet Than a Judge, Moscow Times, June 1, 2006 ("Only 26 percent said they would advice against a jury.").

153. *Id.*

154. Trochev, *supra* note 20, at 7-8.

155. Nick Holdsworth, *Russia Scraps Right to Jury Trial,* TELEGRAPH, Dec. 12, 2008, *available at* http://www.telegraph.co.uk/news/worldnews/europe/russia/3725300/Russia-scraps-right-to-jury-trial.html. The law gave three judges, not the jury, the power to exercise the right to rule on terrorism cases.

156. Stephen Thaman, *Japan's new system of mixed courts: Some suggestions regarding their future form and procedure,* 2002 ST. LOUIS-WARSAW TRANSATLANTIC L. J. 89, 90 (2003).

nations.[157]

The recent institution and re-introduction of trial by jury in many countries around the globe has followed comparable dramatic shifts in the balance of political power and eroding social order–exemplified by the collapse of the Soviet Union in 1991. Since then, the U.S. has emerged as the lone global power and has begun to exert its military muscle and greater political influence in the rest of the world. After 9/11, the U.S. assumed world leadership against terrorism and began to engage in legally questionable intelligence operations and activities, including warrantless surveillance, extra-ordinary rendition of prisoners of war, lengthy detention of suspects in secret prisons, and torture of alleged terrorists, including foreign nationals.[158] As other foreign governments began to follow America's footsteps in the prosecution of suspected terrorists, advocates of trial by jury have appealed to the liberal thoughts of progressive citizens and insurgent intellectuals to prevent the government's abuse of power and authority. Indeed, citizens in these nations have begun to arm themselves with the democratic force to resist political oppression exercised by their own government. This has followed largely because political institutions of third world nations, as well as developed countries in Asia, have become increasingly vulnerable to the material force and military influence of the United States and other developed nations in Europe.

A. Is Mexico Ready for a Jury Trial?

As academic researchers and consultants, we believe that Mexico is ready to set up the jury system and promote active citizen participation in making judgments in general criminal cases. Lay participation in Mexico will also lead to civic oversight of activities of the Mexican government, including the judiciary.

The Mexican judiciary is already structured to be constitutionally independent and judges are appointed for life (unless dismissed for cause). However, serious allegations have recently been raised that judges are often partial to the government's executive branch or business elites; and low pay and high caseloads are said to contribute to susceptibility to corruption in the judicial system. As an example of such judicial corruption in 1993, the Mexican government issued an arrest warrant against a former Supreme Court Justice (Suprema Corte de Justicia de la Nación (SCJN)) for the obstruction of justice and bribery, and three federal judges were later dismissed for obstructing justice.[159] The dismissal of tenured federal judges was unprecedented in modern Mexico.[160]

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157. *Id.*

158. *See generally*, AMY GOODMAN AND DAVID GOODMAN, STATIC: GOVERNMENT LIARS, MEDIA CHEERLEADERS, AND THE PEOPLE WHO FIGHT BACK (2006).

159. U.S. Department of State, *1993 Human Right Report: Mexico Human Rights Practices*, (1994), *available at* http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_ara/Mexico.html.

160. *Id.*

The perception of judicial corruptions is widespread in Mexico, as the United Nations Special Rapporteur recently reported: "50%-70% of the federal judiciary is corrupt."[161] One scholar also has argued that low judicial salaries feed even greater corruptions because such salaries "left the best-trained and most capable young law graduates inclined to pursue careers in private practice.. . . [A]n average of 83.15% of Mexico's federal judges and magistrates graduate from what are generally considered to be inferior quality law programs."[162]

One significant concern about the introduction of jury trials in Mexico involves the socio-legal impact of unsubstantiated votes rendered by the jury. United States jurors, for example, are not required to provide the rationale or logical reasoning for the deliberative content of the final vote. The declaration of the final verdict in the form of either "guilty" or "not guilty" represents a sufficient deliberative condition in the U.S. In the case of Mexico, however, juror votes which are unsubstantiated or "unreasoned" may be seen to increase or even promote the notion of arbitrariness and corruption. Given the widespread corruption in the judiciary, unsubstantiated verdicts may even make it difficult for defendants to challenge the rulings because litigants or courts would not have any legal basis to make an appeal.

Unlike their counterparts in the U.S., then, the Mexican jury system should consider the possible implementation of the deliberative process similarly adopted in Spain and Russia, where all-citizen juries are instructed to respond to a pre-arranged question list for the deliberation of their final verdict. The Spanish jury, for instance, is required to fill out a verdict questionnaire in the form of a list of propositions that are restricted to facts presented by various parties and only related to basic elements of the crimes charged.[163] Russia's verdict questionnaire similarly requires the posing of three inquiries: (1) whether the body of crime (*corpus delicti*) has been proven; (2) whether the defendant as perpetrator of the crime has been proven; and (3) whether the defendant is guilty of having committed the crime.[164]

The Mexican jury system may also consider another important safeguard to eliminate jury arbitrariness in the eyes of the public and legal experts. Active participation by crime victims and their families in the trial process should be considered to make the jury trial and verdict transparent and even more responsive to public sentiments. In the U.S., the family-related parties, including victims, are not allowed to make an opening statement in the jury trial. In Spain's jury trial, however, victims and related parties are allowed to make an opening statement, including in their pleadings they may allege the facts that they believe will be proven, and likely verdicts or sentences

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161. U.N. ESCOR, 58th Sess., Provisional Agenda Item 11(d), at 25, U.N. Doc. E/CN.4/2002/72/Add.1 (2002) ("UNSR"), at 18.

162. Kossick, *supra* note 7, at 742.

163. Thaman, *supra* note 148, at 249.

164. *Id.* at 250.

that they believe will be appropriate and just.[165] They can also propose the hearing of new evidence.[166]

In Mexico, victims' active participation in the trial process and the use of verdict questionnaires in the form of a list of questions to be answered by the jury will increase the legitimacy of the jury trial and make the trial proceeding even more open and transparent in the eyes of the public. They also provide both professional judges and the public the opportunity to examine the jurors' reasoned judgment and possibly challenge it if deemed necessary.

B. Protecting Jurors and Judges

In the case of Mexico, many residents and legal practitioners have been intimidated by drug trafficking cartels linked to the deep collusions between influential members of the government and the drug traffickers. In April 2007, due to the extensive police corruption and their alleged ties to drug cartels, over 100 state police officers in the northern state of Nuevo León were suspended.[167] In June 2007, due to corruption concerns, President Felipe Calderón also dismissed 284 federal police commanders, including federal commanders of all 31 state and federal districts.[168] In August 2009, a Mexican judge decided to bring to trial eighteen municipal police chiefs and officers for their presumed links to the brutal enforcement arm of the gulf drug cartel.[169] They were arrested for their alleged links to the murders of a police coordinator and a civilian.[170] Given the extensive collusion between police and drug cartels, prosecutors and law enforcement agencies are faced with enormous difficulties in effectively securing the privacy and safety of judges and related parties in drug-related trials.

In the U.S., in order to protect jurors from a threat of possible retaliation by defendants and/or their families in high profile cases, the identity of jurors has been routinely hidden from the public in order to preserve the democratic insularity of jury trials. For example, after the 1995 bombing of the federal building in Oklahoma City, which resulted in the deaths of 168 people, jury selection in the trial of Timothy McVeigh began with the screening of jury candidates who were completely hidden from the press.[171] No cameras were even allowed in court. Presiding Judge Richard Matsch determined that the case be tried by an anonymous jury and sealed all records that

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165. *Id.* at 245.

166. *Id.*

167. *Mexico: Congress Summons Defense Minister,* LATIN AMERICAN WEEKLY REPORT, April 19, 2007.

168. *Mexico Shakes Up Federal Police,* EFE NEWS SERVICE, June 25, 2007; Sam Enriquez, *Mexico Purges Federal Police Chiefs,* FINANCIAL TIMES, June 26, 2007.

169. *18 Mexican Police Put on Trial for Drug Trafficking Links,* LATIN AMERICAN TRIB., Sept. 1, 2009, *available at* http://laht.com/article.asp?ArticleId=342597&CategoryId=14091.

170. *Id.*

171. Jane Kirtley, *Hiding the Identity of Potential Jurors,* AMERICAN JOURNALISM REVIEW, June 1997, *available at* http://www.ajr.org/article.asp?id=1778.

otherwise could reveal the identity of local residents summoned for jury selection.[172] As a result, jurors' identities were only known to the court and to the related parties in the case.

American judges are also not immune to violence due to their rulings and opinions. The 2005 murders of U.S. District Court Judge Joan Lefkow's husband and mother rekindled an ongoing debate on how to secure the privacy and safety of American judges. Judge Lefkow presided over the enforcement of a high profile trademark infringement case against an organization run by white supremacist leader Matthew F. Hale[173]. He later made a death threat and solicited Lefkow's murder after she ruled against him in a civil case.[174]

Despite Hale's death threat against her, it was later revealed that her family members were killed by another litigant whose medical malpractice suit was dismissed by Judge Lefkow.[175] Meanwhile she was closely guarded by a detail of the U.S. Marshals Service. In recent years, threats made to the judiciary have increased exponentially. In 2008, 1,278 threats were made against judges, and the number of threats was estimated to exceed 1,500 in 2009.[176]

In Mexico, similar security methods may be necessary to provide secure protection to jurors and judges. In order to protect jurors and create a democratic shield for the jury trial, improved security measures such as home intrusion security systems, coordinated intelligence among security agencies, and threat analysis may be necessary. The identity of jurors also needs to remain closely guarded during the jury selection process. Like the Timothy McVeigh trial, high profile defendants in Mexico may have to be tried by an anonymous jury, where the identity of individual jurors is kept secret from the public.

Once those mechanisms and precautionary measures are installed, the all-citizen jury can also serve as a political force and offer significant oversight of police, prosecutors, and other governmental officials. The potential ramification of the all-citizen jury in Mexico thus would be similar to the political leverage exerted by Mexican jury trials in the American Southwest in the late 19th century, in which Mexican residents who dominated the composition of both grand and petit juries exerted significant political power over the territorial U.S. government and public officials through their active participation in the criminal process.

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172. *Id.*

173. Jodi Wilgoren, White Supremacist is Held in Ordering Judge's Death, N.Y. Times, January 9, 2003, at 16.

174. *Id.* ("he (Matthew Hale) asked another person to 'forcibly assault and murder' Judge Lefkow."). *See also* Michael Higgins, *Internet Leaves an Open Window on Lives of Judges,* DAILY PRESS, March 3, 2005, http://www.dailypress.com/news/national/chi-0503030272mar03,0,2954630.story.

175. *Judge Lefkow Discusses Tragedy, Security,* Chicago Breaking News Center. Aug. 1, 2001, http://www.chicagobreakingnews.com/2009/08/judge-lefkow-discusses-tragedy-security.html. (He left a note, confessing to the crime and both DNA evidence and spent shells confirmed that he was the killer.)

176. Terry Frieden, *Marshals Honor Lefkow as Threats Against Federal Judges Climb,* CNN, March 24, 2009, *available at* http://www.cnn.com/2009/CRIME/03/24/judges.marshals/index.html.

C. Introduction of Jury Trials at State Levels

Any significant social and political changes rarely begin at a national level. Politically testy, yet innovative and transformative changes usually occur on a smaller territorial plane.

In other countries, the major political reforms such as an introduction of a jury trial, or major welfare initiatives, including a universal healthcare program, typically trace their transformative origins at sub-national levels. In Canada, for example, the so-called "single payer" or universal healthcare system was first introduced in the Providence of Saskatchewan in 1962.[177] This health care reform guaranteed hospital care for all provincial residents. The rest of the country soon followed province-by-province, as the new system gained popular support from the general public. The federal government then passed the medical legislation in 1966, enacted it in 1968, and thereafter by the end of 1971, all provinces in Canada introduced the universal health care system.

Russians also witnessed similar transformative changes in its step towards judicial reform. After the collapse of the Soviet Union in 1991, the jury system was reintroduced as a pilot project in nine regions of the Russian Federation in 1993. Russia is today comprised of a total of eighty-three federal subjects or regions, and each subject possesses equal federal rights, political representation, and judicial autonomy. Soon after the pilot project's introduction, the rest of Russia then followed republic-by-republic, and by 2004, trial by jury became available for criminal defendants in all regions, except Chechnya where Moscow militarily dominated. In 2006, the introduction of jury trials in Chechnya was finally approved by Russian lawmakers and the first jury trial is set to begin in Chechnya in 2010.[178]

In Córdoba, Argentina, a mixed tribunal, not an all-citizen jury, was first established in criminal cases in 1987.[179] As stated earlier, the criminal justice system in nearly all of Central and South American nations began with the inquisitorial, non-adversarial criminal process due to the civil law tradition of the Spanish and Portuguese Empires during their colonial periods. Thus, similar to Mexico's historical experience with jury trials, the first introduction of jury trials in Argentina was also found in the constitution, when drafts were first proposed in 1813, as well as in the Constitutions of 1819 and 1826.[180] Trial by jury was also a constitutional right guaranteed by the Constitution of 1853.[181] Ironically, however, the jury trial has never been established by the

177. MICHAEL RACHLIS, PRESCRIPTION FOR EXCELLENCE: HOW INNOVATION IS SAVING CANADA'S HEALTH CARE SYSTEM 29 (Chris Bucci, ed., HarperCollins) (2004).

178. *Introduction of Jury Trials in Chechnya Delayed*, Radio Free Europe Radio Liberty, Dec. 8, 2006, *available at* http://www.rferl.org/content/article/1073304.html. *See also*, Grigory Tumanov, Jurors Tried Their Way to Chechnya, RusData Dialine-Russian Press Digest, April 27, 2010.

179. Constitución de la Provincia de Córdoba, §3, ch.1, art. 162.

180. RICARDO CAVALLERO AND EDMUNDO HENDLER, JUSTICIA Y PARTICIPACIÓN -- EL JUICIO POR JURADO EN MATERIA PENAL (1988).

181. Edmundo Hendler, *Implementing Jury Trials in Argentina: Is it possible?* Paper presented at the annual meeting of the Law & Society in Denver, CO (2009) (the manuscript on file with the first author).

legislative body in Argentina.[182]

Córdoba, as one of twenty three provinces of Argentina, became the first to introduce the lay justice system in the country. The 1991 code of criminal procedure specified that a mixed judicial panel be composed of three professional judges and two lay citizens, called "escabinos," to adjudicate serious criminal cases, but only on request by the defendant, the public prosecutor, or the victim.[183]

While the national debate on the possible introduction of all-citizen juries continues in Argentina, other provinces and municipal governments have already begun examining the future introduction of the lay judge system. In 1991, a trial judge in the city of Buenos Aires granted a defendant's motion requesting trial by jury, annulled the criminal proceeding, and urged Congress to enact legislation implementing a constitutionally-guaranteed jury trial.[184] Another national debate was begun by a social movement whose leader has submitted a petition that included demands for trial by jury.[185] The people's movement is considered essential in continuing the national debate on judicial reforms at the national level.

In Mexico, recent judicial reforms at both national and state levels have created a sufficient and necessary legal foundation for the possible reintroduction of the jury system. In addition, more modern criminal procedures have already been adopted in a number of individual Mexican states; and some of them may even consider the introduction of popular legal systems such as mixed tribunals and/or all-citizen jury trials. As the Mexican student survey indicates, the younger generation is more inclined to accept lay justice proceeding which offers a promising alternative to the traditional bench trial system.

Like Argentina, Venezuela suffered under a central dictatorship and went through a similar transformative period, ultimately adopting two distinct forms of popular legal participation in recent years. The jury system was constitutionally guaranteed in Venezuela, and the right to trial by jury was included in the constitutions of 1811, 1819, 1821, 1830, and 1858; but the enactment of the

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182. Edmundo Hendler, *The Inquisitor: Latin America's Criminal Procedure Revolution: Lay Participation in Argentina: Old History, Recent Experience*, 15 SW. J. L. & TRADE AM. 1, 9 (2008).

183. María Inés Bergoglio, *Jury and Judge Decisions: The Severity of Punishments in Cordoba Mixed Tribunals,* presented at the 2009 Law & Society Meeting in Denver (2009) (the manuscript on file with the first author).

184. Proceso Penal, 44.542 CN Crim. y Correc., Sala I, 148 E.D. 589 (1991) (discussing the implementation of the penal process in Argentina).

185. The social movement was led by Juan Carlos Blumberg whose son was murdered by his kidnappers. On April 2004, he assembled in Buenos Aires along with over 150,000 people who marched to the Congressional building to submit a petition that contained a demand for harsher punishment for criminals. On April 22, he also submitted a list of other demands to the Department of Justice, which included an introduction of trial by jury. Many other cities and towns in Argentina, similar demands were submitted by movement supporters. For more detailed discussion of this social movement in Argentina, *see* Juan Pegaramo, *Resonancias y silencios sobre la inseguridad,* REVISTA ARGUMENTOS, No. 4, Oct (2004), *available at* http://argumentos.fsoc.uba.ar/n04/articulos4.htm.

jury system has never occurred.[186] Like Mexico, the legal system became so ineffective in the administration of justice that prominent South American lawyer Raúl Eugenio Zaffaroni once claimed that the situation "downgrades the country's judicial branch to the status of a mere accessory of the executive branch represented by the police."[187] Another report by the World Bank in early 1990s similarly found the judicial system of Venezuela to be in a state of "absolute crisis" at the hands of "politicization and bureaucratic incompetence."[188] Still another claim has been made by the United Nations, indicating that the Venezuelan judiciary was one of the least "credible" in the world.[189] Venezuelan people also shared similar views, in which a 1995 national survey concluded that 78% of respondents believed that the Supreme Court was "inefficient and untrustworthy."[190]

While recent judicial reforms in other nations of Central and South America are by no means identical, they primarily consist of the same shift from a closed and inquisitorial to an accusatorial, oral, and more transparent criminal procedure. In Venezuela, such a transition came with the publication of the Código Orgánico Procesal Penal in 1998 (hereinafter COPP).[191] With help from the German Adenauer Fund, the Max-Planck-Institute for Foreign and International Criminal Law and progressive North American jurists, the old criminal code was replaced with a system of contemporary legal processes more comparable to the systems of developed democracies.[192] No longer was a single judge responsible for the oversight of the police's investigative gathering of evidence, approving of encroachments of constitutional rights, setting the case for trial, and serving as presiding judge at the trial.[193] Although the two party adversarial system – that of the accuser and the accused – was present in previous procedural codes, the actual impartiality of the judge as a third party effectively was only ensured by the new adversarial system.

On July 1, 1999, the Venezuelan government enacted the COPP, finally replacing the old inquisitorial system with an adversarial procedure. The system also allowed the establishment of both mixed tribunal and all-citizen jury systems.[194] Venezuelan legislator Luis Enrique Oberto originally proposed the judicial reform in 1995 that established three types of trial courts dependent upon the severity of crimes:[195] (1) a single judge trial with crimes punishable by up to four years of

186. Thaman, *supra* note 102, at 766.

187. CODE OF CRIMINAL PROCEDURE, Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition," *Organization of American Studies* (2007), *available at* http://www.oas.org/juridico/MLA/en/ven/en_ven-int-des-codepenal.html.

188. JULIA BUXTON, THE FAILURE OF POLITICAL REFORM IN VENEZUELA 32 (Ashgate 2001).

189. *Id.*

190. *Id.*

191. Thaman, *supra* note 102, at 767.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

incarceration; (2) mixed tribunals with crimes punishable from four to sixteen years of imprisonment; and (3) a jury trial for crimes punishable by more than sixteen years of imprisonment.[196] The mixed tribunal court is composed of one professional judge and two lay assessors, while a jury panel consists of nine residents selected from voter registrations.[197]

Despite widespread corruption in police and public officials, Venezuela was able to successfully introduce two distinct forms of lay participatory systems. The dramatic shift in its criminal procedure in Venezuela can offer an important lesson for Mexico because of similar historical backgrounds impacting their legal traditions, social and political evolution, and persistent problems of political and judicial corruptions. Like Mexico, Venezuela had had jury trials and oral procedures until the beginning of the twentieth century.[198] However, the authoritarian regime of General Juan Vincente Gomez later unified the legal procedure and suppressed jury trials.[199] When Hugo Chavez became President in January 1999, he immediately called the Constituent Assembly and created a new constitution that recognized many of the principles of new criminal procedures, including the adoption of mixed tribunals and all-citizen juries. While an amendment of November 14, 2001 (Act No. 5558) suppressed the nine-member jury, the mixed tribunal continues to remain a viable form of lay participation in Venezuela and there has been an increase in the citizens' awareness and commitment to the process of popular decision-making.[200]

D. Strict Eligibility Standards

Lastly, we wish to make critical comments on the jury eligibility standards in Mexico. The 2001 federal initiative attempted to re-introduce the popular jury in criminal trials in Mexico. The proposal also suggested a strict standard on jury eligibilities, in which people with legal knowledge would be given an exclusive right to participate in criminal jury trials.[201] Specifically, this proposal requires that jury candidates consist of law graduates who are then nominated by municipal presidents before the Federal Judicial Council.[202]

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196. *Id.*

197. *Id.*

198. Pablo Han, Jesus Enrique Parraga, and Jorge Morales Manssur, *La participación ciudadana en la justicia penal Venezolana [The Civic Participation in the Venezuelan Penal Justice: Theoretical Formulation vs. Practical Reality]*, REVISTA CENIPEC, Jan.-Dec. 254-256 (2006) (hereinafter La participación), *available at* http://www.saber.ula.ve/handle/123456789/23576/.

199. ROGELIO PEREZ PERDOMO, LA JUSTICIA PENAL EN VENEZUELA AL FINAL DEL PERIODO COLONIAL: EL CASO DE GUAL Y ESPARA, 6 Anales de la Universidad Metropolitana 1, 175, 180-196 (2006).

200. *La participación supra* note *199 at 254-255.*

201. Gaceta 2001, *supra* note 7.

202. The jury candidacy to only individuals with legal education, however, creates another problem in terms of how much broader education they have received in their preparation to become a lawyer. *See* Héctor Fix-Fierro, *The Role of Lawyers in the Mexican Justice System*, in REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO 251-272 (Wayne A. Cornelius and David A. Shirk, eds., 2007) (discussing that Mexican lawyers need not obtain a graduate degree in order to practice law and that there is significant lack of oversight of students with legal knowledge).

Mexico's initiative to restrict the jury opportunity to those with privileged educational backgrounds is neither new nor an anomaly in other nations. In 2004, for instance, the Chinese government promulgated the law to set a strict eligibility standard for the lay assessor system.[203] Article 4 of the 2004 Chinese Lay Assessor Act indicated that assessors must have diplomas of college or a higher educational status.[204] According to the report of the National Population and Family Planning Commission of China in 2005, only 5.4% of the total population had a college education.[205] If Article 4 were to be strictly enforced, 94.6% of the total population would be ineligible to serve as lay assessors.

Such a representative disparity is in direct conflict with the spirit of the Subsection 2 of Article 33 of the Chinese Constitution, which states, "all citizens of the People's Republic of China are equal before law." Article 34 of the Constitution also provides that "all citizens of the People's Republic of China who have reached the age of 18 have the right to vote and to stand for election, regardless of ethnic status, race, gender, occupation, family background, religion, education, property status, or length of residence, except persons deprived of political right according to law."[206] In an egalitarian sense, "standing for election" herein should include all the rights of being elected to participate in the administration of national affairs, including the right to serve as assessors. The new provision thus creates a skewed representation of lay assessors, thereby clearly violating the essential democratic rights of citizens in China.

In Venezuela, the requirement for both lay assessors and jurors is much broader than that of the Chinese system. The candidates must be citizens of Venezuela, more specifically, residents of the jurisdiction where the trial is to be held; at least 25 years of age—though those 70 years of age or older may exonerate themselves if they so choose; without a criminal record; possess sound body and mind; and have an "average, diversified" education.[207] Individuals affiliated with law enforcement, the military, legal professions, and politicians are prohibited from serving.[208]

In the U.S., despite the fact that there is no educational requirement for jury duty, the jury tends to be dominated with people with higher education. For example, past research has shown that jury candidates with less education are less likely to respond to jury summonses.[209] Even when

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203. Fukurai & Wang, *supra* note 143.

204. *Id.* The translation of the act was the "Decision on the Perfection of People's Assessors Institution of the Standing Committee of the People's Congress (*Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Wanshan Renmin Peishenyuan Zhidu De Jueding*). Hereinafter it is referred as the "Chinese Lay Assessor Act." The act was designed to correct shortcomings of the lay assessor system that has been long criticized by lack of institutional support, insufficient funding, infrequent use of lay assessors, and people's resistance to participate.

205. *Id.*

206. *Id.*

207. Thaman, *supra* note 102, at 768.

208. *Id.*

209. *See generally,* HIROSHI FUKURAI, EDGAR W. BUTLER, & RICHARD KROOTH. RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE (1993).

they may appear at a courthouse, many are likely to request to be released from jury service due to economic hardship and personal excuses, resulting in their significant underrepresentation on final juries.[210] To ensure equitable jury representation from socially and economically disenfranchised segments of population, jury reform has been a contested political issue in the U.S., where racial and ethnic minorities such as African Americans and Hispanics have been systematically excluded from jury service.[211]

The U.S. Supreme Court has recognized minority populations as forming special and distinct groups that need judicial protection against discrimination in jury selection.[212] Since the large proportion of criminal defendants come from the same racial or ethnic backgrounds, active participation of their peers in the popular jury is likely to place greater pressures on the government to behave properly and equitably in the prosecution of criminal defendants with minority backgrounds. In trials "monitored" by minority jurors, credibility of evidence and strength of testimony – as well as race-neutral investigative preparation and trial presentation of such evidence – have become critical concerns of both police and prosecutors.[213] For in the minds of minority jurors, these matters may raise reasonable doubt that the accused may not be guilty.

E. Mexican Sovereignty and Judicial Independence

Throughout its existence in Mexico, the jury was considered an important political and legal institution and has had both supporters and detractors. In the early 19th century, Jose Maria Luis Mora unequivocally supported the introduction of the jury system, arguing that jurors were less likely to act on bribes and influence, which made them more independent of corruptive influence, thereby guaranteeing the autonomy of the judicial as a whole.[214] Another Mexican legal scholar, Laglois, also argued that the jury represented the people's court and "the most effective bulwark of civil liberties."[215]

However, there were those who equally contested those ideas. In 1856, Ignacio Vallarta once insisted that the jury was not inherent in democracy because in modern democracies, individuals participate through representatives, and judges are seen as a lawful representative of the

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210. *See id.*

211. *See id.*

212. *See id.*

213. *See generally*, FUKURAI & KROOTH, *supra* note 137.

214. JOSÉ MARÍA LUIS MORA, *Disertación ante el Supremo Tribunal de Justicia del Estado de México, para examinarse de abogado* [Lecture before the Supreme Court of the State of Mexico, to train as a lawyer], 1827, en Obras Sueltas, México at 528 (1963).

215. Discurso de Laglois en el Congreso Constituyente, sesión del 18 de agosto de 1856, en Zarco, Francisco [Laglois Speech at the Constitutional Convention meeting of 18 August, 1856, at Zarco, Francisco, Historia del Congreso Constituyente, México, 1987 [History of Constitutional Congress, Mexico, 1987], Inehrm " Gobrieno del Estado de Puebla [Puebla State Government], at.206-207.

judiciary; jurors are randomly chosen, not through a representative electoral process, thereby lacking democratic legitimacy.[216] He also argued that the jury needed a special type of societal milieu to flourish, especially in a society which is more open to diverse political ideas, conscious of their rights, keenly interested in public affairs, and with enough enlightenment and morality; however, he argued that those pre-requisite conditions neither existed nor were widely shared among the citizenry in Mexico.[217]

Such a skeptical view on the jury was similarly shared by prominent law professor and contemporary legal critic Sergio Garcia Ramirez at the Institute of Juridical Investigations at UNAM. Citing the deep public distrust in legal institutions and existent corruptions in the government, Dr. Garcia stated, "Mexico once stood as a prominent nation in Latin America. But we are no longer seen as a big brother [in the Western Hemisphere] and I say this with great pain."[218] He added that the people who study the justice system and those who practice law do not favor the jury system, arguing that "Mexico needs to make their decisions [on legal reforms] according to their [socio-political] circumstances, and I do not see [the possibility of re-introducing lay participation in legal institutions] at this time."[219] His view, however, was not shared by one of his students. Julia Trejo Martinez, a student at the Facultad de Derecho at UNAM stated, "[as] the educational system here in Mexico is not excellent . . . people [should] participate in [making] important decisions of community."[220] Nevertheless, of the 18 people we interviewed, most people felt that education was a necessary requirement for jury service. One exception came from Francisco, a taxi driver who insisted, "it is not necessary to have education, like a university education. The common people can intervene [and participate in jury trials]."[221]

Dr. Jorge Ulises Carmona Tinoco, the Coordinator of the Unit of the Planning and Institutional Relations in UNAM, also questioned the ability of jurors to engage in competent deliberative discussion. As the investigation of crimes is becoming more and more technical and scientific, Dr. Carmona asked whether or not technical and scientific questions can be adequately understood by the jury, and concluded that "technical or scientific . . . [discussions should not] be left to the decision of a jury."[222] He was even surprised to find out that the possible implementation

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216. Discurso de Ignacio Vallarta en el Congreso Constituyente, sesión del 19 de agosto de 1856, en Zarco, Francisco. [Ignacio Vallarta Speech at the Constitutional Convention meeting of 19 August, 1856, at Zarco, Francisco]. Historia del Congreso Constituyente, México, 1987 [History of Constitutional Congress, Mexico, 1987], Inehrm " Gobrieno del Estado de Puebla [Puebla State Government], at 200-210.

217. *Id.* at 217-224.

218. Interview with Dr. Sergio Garcia Ramirez at el Instituto de investigaciones jurídicas [Institution of Juridical Investigation], UNAM (March 18, 2009). The interview transcript is on file with the first author.

219. *Id.*

220. Interview with Julia Trejo Martinez, a student at Facultad de Derecho, UNAM (March 17, 2009). The interview transcript is on file with the first author.

221. Interview with Francisco, a taxi driver (March 19, 2005). The interview transcript is on file with the first author.

222. Interview with Dr. Jorge Ulises Carmona Tinoco, Coordinador de la Unidad de Planeación y Relaciones Institutocionales (March 18, 2009). The interview transcript is on file with the first author.

of jury trials was a subject considered to be progressing instead of digressing.[223]

Dr. Garcia also claimed that the lay judge system, not to mention oral and adversarial procedures, was perhaps too costly at this time, providing the following analogy. "Here is a big and beautiful bowl for some really good soup. You would say the bowl is very beautiful, but where is the soup? . . . [The introduction of jury trials] is too costly. We have to modify the structure of the tribunals, we have to modify the architecture of the tribunals, we have to modify the preparation and mentality of the judges, who are [even] less favorable of this type of justice system, of defense attorneys, [and] of the university and the public ministry."[224] Dr. Garcia's skepticism resonates with the political view expressed by another politician, Emilio A. Martinez, who, in 1897 stated, "For this institution [of the jury] to take root in the soil needs a politically independent country and [the citizenry who are] open to long term political ideas, knowing your rights, determine to hold and fortify [your rights], . . . always eager to distrust all institutions that could facilitate attacks against the freedom of citizens, keenly interested in public affairs, who can understand the value of the independence of judges."[225] He stated that in nearly one hundred years ago, such conditions were nowhere to be found in Mexico.

The introduction of the jury system is not seen as the effective strategy to combat the deep-rooted judicial or police corruption, while the corruption in the government was widely recognized, and the extent and enormity of corruption and impunity was keenly critiqued by all of our Mexican interviewees. Our interviews also revealed that one dominant theme was the amount of corruption that goes on in Mexico. Most of the people that participated in our interviews expressed in their response at least once if not more times, that corruption was, and continues to be, a major issue in Mexico. One interviewee stated, "unfortunately the juridical system. . . is really corrupt and that is why a lot of innocent people [are] in jail."[226] One of the gentlemen we briefly interviewed gave us a very short but memorable response as to his opinion to the corruption of the government, stating, "I don't have confidence in anyone, not even in my own shadow."[227]

Many UNAM students also shared the view that the implementation of a jury system as a method of combating corruptions and impunity is too foreign and abstract. For them, it was difficult to imagine the jury actually making a difference in the criminal justice system. Dr. Garcia also stated that "at this moment, sincerely I think that it [the introduction of the jury system] is not a topic of first priority for justice in Mexico. The system of first priority is how to ameliorate the police, how to better the public ministry, how to solve the problems with jails, how to combat

223. *Id.*

224. Garcia, *supra* note 218.

225. Emilio A. Martínez. *El jurado en materia criminales una forma de procedimiento inconveniente en el país,* El Foro, Año XVII, XLVIII (números 32-35), 21 a 25 de febrero de 1897, número 32, at 34.

226. Francisco, *supra* note 221.

227. Interview with Jorge, Centro de Coyoacan, (March 19, 2009). He stated, "No tengo confianza en nadie, ni en mi propia sombra." The interview transcript is on file with the first author.

impunity, how to find corruption, which is what is truly a gigantic problem."[228]

Despite the fact that establishing the jury system in Mexico was not seen to eradicate the on-going corruption in the government, many interviewees preferred to be adjudicated by the jury, rather than the judge. As nearly two thirds of our survey respondents, including the majority of our interviewees, preferred the jury trial over the bench trial (see Table 1).[229] One of our interviewees indicated that he would prefer to be tried by a jury of his peers rather than a judge "because it is a lot easier to pay a judge."[230] This view resonated with the opinions of prominent politicians, Jose Maria Luis Mora and Jose Maria Mata, of the early 19th century political activists. They argued that jurors are less likely to act on bribes and influence, which made them more independent, thereby guaranteeing the autonomy of the judiciary as a whole.[231] In 1880, politician Alberto Lambardo also postulated the view that the administration of justice should not be entrusted to professional judges because public jobs were not distributed or allocated on the basis of the ability and merit, but [due to favoritism of ministers]."[232] In 1934, another scholar Francisco Duarte Pochas reported that judges obtained the job by political influence and friends for his collaboration in the choice of who appoints them, and as a result, his decisions were always "subject to the whim of the person to whom they owe their appointment."[233]

The jury embodies the right of the community to participate in the administration of justice and thus firmly establishes the principle of popular sovereignty in Mexico. The institutional establishment of the jury thus reconstitutes a key feature of institutional building strategies designed to eliminate governmental corruption and combat against organized criminal activities in Mexico. The installation of the jury system in Mexico also fits the Merida Initiative requirement because the extra funding was made available to further promote judicial reforms, institutional building for anti-corruption, and the establishment of the rule of law activities. Specifically, the Economic Support Fund (ESF) of the Merida Initiative states that the funding be expedited to promote the rule of law and human rights by supporting "Mexico's justice sector reforms and respect for human rights."[234] The fund must also be used to expand the utilization of alternative case resolutions such as first

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228. *Id.*

229. 62.6% of Mexican students preferred a jury trial to a judge trial. For male respondents, the figure (65.0%) was even higher than woman (see Table 1, under Mexico and (5) Confidence in the jury system).

230. Interview with Angel, an older gentleman in a bus from Mexico City to Teotihuacan (March 16, 2009). The transcript is found in the report, Susan Lopez, *Person to Person Interview and Analysis: Mexico City, Mexico, March 16 2009-March 19, 2009*, (2009). The interview transcript is on file with the first author.

231. Discurso de José María Mata en el Congreso Constituyente, sesión del 19 de agosto de 1856, en Zarco, Francisco, Historia del Congreso Constituyente, México, 1856, Inehrm: Gobierno del Estado de Puebla, at 225.

232. Alberto Lombardo, "El jurado," in El Foro, Año VIII, VII (número 80), 29 de abril de 1880, at 1.

233. Francisco Duarte Pochas, *Jurado Popular. Sugestiones para restablecerlo en los delitos del Orden Común, México*, Tesis de licenciatura, UNAM, (1934), at 48.

234. Merida Initiative Funding, Government Accountability Office, Pub. GAO-10-253R 22 (December 3, 2009) *available at* http://www.gao.gov/new.items/d10253r.pdf.

offender's programs, mediation, and restorative justice.[235] The important legal foundation has already been introduced by the 2008 judicial reform, including the re-assertion of the principle criminal justice concepts, such as the presumption of innocence, the burden of proof for conviction upon the prosecution, not upon the suspect or criminal defendants to prove their innocence, and the guarantee for oral and adversarial legal proceeding in open court. The re-introduction of jury trial is thus the next logical step of Mexico's judicial reform. The installation of the jury system also represents an effective political strategy to eradicate the public reliance on the corrupt judiciary and promote the rule of law and human rights by democratizing its own judicial institutions.

VI. PART V. CONCLUSIONS

As the drug violence has spread in Mexico and along the U.S. border, the American Government has approved, in the first phase of the $1.4 billion Merida Initiative, $400 million for Mexico to provide funding for anti-drug operations, intelligence assistance, and police training. Additional governmental assistance has also been earmarked to further promote institution-building and structural reforms aimed at strengthening the rule of law and combating governmental corruption. We argue that governmental institutional reform is necessary to strengthen Mexico's efforts to increase the transparency, accountability, and professionalization of both its law enforcement agencies and judicial institutions.

On this foundation, this paper has examined the possible re-establishment of the jury system in Mexico as an important structural, judicial reform. We have examined whether or not the system of popular civic participation is effective in democratizing the criminal justice system, creating greater transparency and accountability in criminal proceedings, and building broader public confidence in the system of Mexican justice. While the 2001 federal proposals failed to re-introduce the popular jury in judging general criminal cases, the 2008 judicial reform introduced the legal principles of an oral argument during trials, the presumption of innocence, and the adversarial criminal process in Mexico.

The switch from a closed, inquisitorial process to an open, oral, and more transparent trial clearly represents a paradigmatic shift in Mexican jurisprudence. Until 2008, judges executed their deliberations in private and based their decisions exclusively on written affidavits prepared by prosecutors and police investigators. Reform requires something fundamental to equity in our time. Not only do lawyers and judges have to become accustomed to making oral statements in public, but also for the first time, the media and public will have a full view of the evidence.

A cross-national empirical analysis of views, attitudes, and sentiments regards lay participation reveals that, compared with citizens in other nations, Mexican respondents are more

235. *Id.*

willing to participate in jury trials and express greater confidence in, and respect for, jurors' abilities to make a fair and just decision. The great majority of Mexicans also support the broader application of lay participation in the administration of justice. Given such strong support for a popular jury, both federal and state governments might advantageously explore the potential establishment of the jury system in Mexico.

In the case of Mexico, several new features of lay participation should be considered. The use of a "verdict questionnaire" in the form of a list of propositions answered by the jury; various strategies to ensure the security and safety of professional and lay judges; possible introduction of lay participation at a state level; and implementation of a mixed tribunal that allows joint deliberations by professional and lay judges, besides the need for all-citizen juries – these together would provide important options for the possible establishment of the lay justice system in Mexico.

We also believe that it is imperative to open the national debate covering the introduction of the lay justice system, which has failed to receive the national attention it deserves. By modeling after a popular jury system currently adopted in more than 60 countries around the world,[236] the future transformation of Mexico's classic jury system and criminal procedures will allow Mexican citizens to directly participate in criminal trials, make criminal justice proceeding ever-more open and transparent, and help build a strong democratic foundation for supporting and extending civil society in Mexico.

236. Vidmar, *supra* note 12.

ARTICLE

TALKING THE TALK AND WALKING THE WALK OF RACIAL PROFILING: A STUDY OF AUTOMOBILE CHECKPOINT LAW IN THREE NATIONS*

ROBERT H. CHAIRES**

EMMANUEL BARTHE***

SUSAN A. LENTZ***

SUMMARY

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**Robert Chaires is assistant professor of Criminal Justice at the University of Nevada, Reno; JD, University of Denver; PhD, University of Colorado at Denver; former police officer, Denver Police Department.

***Emmanuel Barthe is assistant professor of Criminal Justice at the University of Nevada, Reno; MA, University of Quebec; PhD Rutgers University. Professor Barthe, a French national, also served as direct translator for French law.

****Susan Lentz is associate professor of Criminal Justice at the University of Nevada, Reno; JD, University of Denver, PhD, University of Wisconsin at Madison; former Deputy Attorney General, State of Nevada.

I. INTRODUCTION

In the classic Vietnam War movie *Full Metal Jacket,* one war weary Marine responds to the brutal language of a rear-echelon public relations Marine with the line that has become part of the American lexicon: "He can talk the talk, can he walk the walk?"[1] Today, that line is often used as a claim, especially in politics, that one can and will do what he says he will do. Following this point of changing a question to a declarative statement, it seems appropriate to ask about the difference between claiming one does not engage in or tolerate racial discrimination and actually not engaging in racial discrimination or tolerating it.

Simply, few, if any, public agents or officials would proclaim they are *for* discrimination based on race. Indeed, it is *de rigueur* to talk the talk of equality and non-discrimination as premiere societal values, ones to be expressly walked in the practice of government–most especially in law enforcement. This, of course, begs a couple of questions. The first is: Does any modern western nation not talk the talk of equality and non-discrimination? The second concerns what is actually practiced and tolerated: Are some nations better at walking the walk than others?

Substantial problems emerge in answering the latter question. At the very least, the literature on racial discrimination is so vast, and often contradictory, as to be overwhelming. Another part of the difficulty concerns the shifting meanings of equality and discrimination. For example, anti-discrimination law in America has given rise to the concept and law of reverse discrimination. Reverse discrimination is the idea that a privileged majority is discriminated against when attempts are made to equalize meaningful access to employment and education for traditionally excluded minority groups.[2]

For these reasons, and others to be explained within the text, this study focuses on a narrow area of criminal procedure: racial profiling at automobile checkpoint stops. This is not an attempt at an exhaustive review of checkpoint law. Rather, the authors build on their previous work on racial profiling and pretextual traffic stops to examine how the highest courts of three nations—the United States, Canada, and France— have talked the talk and walked the walk of controlling racial profiling in automobile checkpoints, a form of traffic stops.[3] These three nations were selected for practical and symbolic reasons. As a practical matter, the authors have some familiarity with the

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1. FULL METAL JACKET (STANLEY KUBRICK PRODUCTIONS 1987).

2. *See generally*, ALBERT MOSELY & NICHOLAS CAPALDI, AFFIRMATIVE ACTION: SOCIAL JUSTICE OR UNFAIR PREJUDICE (James P. Sterba & Rosemaria Tong, eds., Rowman & Littlefield 1996); RANDALL ROBONSON, THE DEBT: WHAT AMERICA OWES TO BLACKS (Dutton 2000)(discusses more critical politics review); RICHARD THOMPSON FORD, THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE (provides a 21st century Black law professor perspective).

3. *See, e.g.*, Robert Chaires & Susan Lentz, *Racial Profiling: 1619-2000, in* FILLING THE GAP: CRITICAL READINGS IN CRIMINAL JUSTICE (Mark E. Correia, et al, eds., 2nd ed., Simon & Schuster 2002); Susan Lentz & Robert Chaires, *Full Speed Ahead:* Illinois v. Lidster *and Suspicionless Vehicle Stops*, 43 CRIM. L. BULL. 177 (2007).

law of these nations; at the symbolic level, all these nations have written constitutions providing for some form of equal protection from arbitrary legal intrusions. The form of this study is to give an overview of the concepts and practical implications of traffic stop law and policy garnered from academic commentary and street experience. From there, the highest court decisions of three nations will be discussed in the context of talking the talk and walking the walk: Have the different highest courts interpreted their constitutions to protect or not protect their respective citizenry from Driving While Black or Brown (DWB)?

The purpose of this study is to present a question: Is race and ethnicity an inevitable part of the "exceptionally dangerous" to society crime equation, thus making racial profiling an expressly allowed or at least tacitly accepted part of the law enforcement practice arsenal? Or, and admittedly it is a very big and complex "or," can the heterogeneity of a society combined with its general focus on human rights vs. civil rights as a basis for law be a major determinant in what is acceptable law enforcement behavior in the stop context? To explore these issues, Part I will examine racial profiling using ideas of "freedom," rather than the overly-nuanced "balancing tests" so prevalent in jurisprudence. Part II will present a sample and analysis of two decades of U.S. Supreme Court decisions related to racial profiling, pretextual stops, and checkpoints. Parts III and IV will be a similar analysis of Canadian and French law and racial profiling policy, respectively.

II. PART I. WHAT IS RACIAL PROFILING?

This study takes a perhaps different track on examining racial profiling, one that examines conflicting concepts of freedom as aggravating police/citizen contact. Simply put, if one group of persons can move between two points reasonably confident they will not be stopped by "The Law" for capricious reasons and another group must take into consideration as a fact of life that their movements are always subject to extra scrutiny, then one group is less free than another. In this line of thought, if one group is defined by having a genetically observable difference like race/ethnicity from the other, then that group is subject to more or less freedom because of a physical fact beyond that group's control. Few that benefit from a genetic equation complain and it is historically axiomatic that those who suffer a detriment and complain have less voice in the equations of freedom.

Along similar lines, the very concept of racial profiling is fraught with dichotomies. If a black man is suspect by virtue of being black, then a white man is not suspect by virtue of being white. Other indicators, usually socio-economic, must be used to determine the susceptibility of whites. What begins to emerge is a multi-variant aspect to profiling: Race → Class → Location. Following this point, deniers of racial profiling can make simple statements about whom and why they stop, such as "the suspect was just out of place" or "that old car did not belong there." Forgetting for this study that the police are not by law generally charged to be economic class

enforcers, something else emerges.[4] Which comes first: race or class?

So much has been written about race/ethnicity and economic wealth that color *is* wealth in many dimensions of thought: a class-appropriately dressed white man in a Mercedes-Benz in a place where he belongs is not worthy of a glance by the police. A class-appropriately dressed black man in the same vehicle in a wealthy area is likely to get a few glances by police and a little thought about a stop. Similarly, the first thought about a black man displaying wealth while he is driving through a poor inner city community, might be might be that he is a rich, black criminal. Such examples may seem speculative to a white reader, but to a person of color, it is the quality of life. There are simply too many examples over too long a time of race being the first question in pretextual traffic stops, not an incidental one.[5]

That said, how can checkpoints, which are claimed by police to be examples of fairness in crime control, be examples of racial profiling? After all, everyone, or at least a race neutral statistical sample, is stopped at a checkpoint! To answer this question, one need only ask: "Where do checkpoints occur?" Considering the Race-Class-Location matrix, case law, social science literature, and as a simple point of police efficiency, it is not unreasonable to note such checkpoints are seldom in the wealthy, predominately white, areas of a city. One goes where the crime is!

A. An Incidental Placement of Checkpoints?

American checkpoints, arguably, are the highest manifestation of racial profiling; they are mechanisms by which a high probability of arrest stops can be made in efficient ways. DWB police behavior is capricious—it is subject to the whims of an individual officer. Checkpoints are the policy and practice of a department and when they are placed in venues where high minority presence exists, they can be DWB squared.

In his attempt to define racial profiling, Gumbhir cites MacDonald's observation that:

> What we call "hard profiling uses race as the only factor in assessing criminal suspiciousness: an officer sees a black person and, without more to go on, pulls him over for a pat-down on the chance that he may be carrying drugs or weapons. "Soft" racial profiling is using race as one factor among others in gauging criminal suspiciousness.[6]

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4. Randall G. Sheldon makes exactly the point that uniformed city police from their inception, attributed to Sir Robert Peel in London of 1828, were intended to control the lower economic class. RANDALL G. SHELDON, CONTROLLING THE DANGEROUS CLASSES (Allyn and Bacon 2001).

5. *See, e.g.*, DAVID HARRIS, PROFILES IN INJUSTICE (New Press, 2002).

6. VIKAS K. GUMBHIR, BUT IS IT RACIAL PROFILING 20 (LFB Scholarly Pub. LLC 2007) *quoting* Heather MacDonald, *The Myth of Racial Profiling*, 11 City Journal 14 (2001).

Gumbhir relates that MacDonald and others use differential offending theory to justify race as a variable in suspicion and the decision to stop.[7] Simply put, differential offending theory holds "that racial/ethnic minorities, more specifically blacks and Latinos, are more likely to commit certain crimes than whites."[8] This distinction among soft and hard profiling would seem at the core in understanding the overwhelming denial by police that they engage in discriminatory racial profiling. In the police mindset, soft profiling is a legitimate police strategy based on empirical knowledge, thus not discriminatory. Indeed, as Gumbhir states, several scholars "dismiss the notion of hard profiling as absurd and unrealistic."[9] However, if check points are predominately placed in areas where racial/ethnic minority travel is exceptionally high, yet not where white, especially wealthy whites, travel, "soft" profiling can become very "hard."

To understand this point, it might be helpful to appreciate a simple reality: Checkpoints are expensive for police agencies. Officers manning a check point are not patrolling a city and answering calls for service that reflect the human condition. Rather, officers manning a check point are often working overtime and being paid as such. Often they are being paid from federal grant money. There is a certain pressure to produce results; it would be stupid from a grant- performance standpoint to place a checkpoint where numbers could not be produced. If a checkpoint is being used as part of a seat-belt compliance grant, why not place the checkpoint where police can get double bang for the buck? After all, all arrests at that stop count toward showing the effectiveness of the grant. Indeed, showing that the seat-belt stops resulted in a good percentage of arrests for dangerous crimes like drugs might be a route to more grants and more overtime on the federal dollar. For a police agency, this is a win-win situation. In addition, it would be politically stupid to place a checkpoint amidst the wealthy. Arguably, the same proportion of wealthy are as likely to ignore seatbelts as the poor, but the wealthy have the power to effectively complain about being stopped. As a result, even if all the drinkers and druggies across class and racial lines are equally dangerous, the burden of arrest is not born by all—some are freer to violate the law than others. These points present the following question: What are the costs involved in the administration of checkpoints and who bears these costs?

B. An Economic Argument to Racial Profiling

Harcourt, in an intriguingly different study of racial profiling which bears on claims of empirical justification for soft profiling, presents an actuarial (economic choice/statistical prediction) foundation for the premise that racial profiling may actually increase crime.[10] As

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7. *Id.*

8. *Id.*

9. *Id.*

10. BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (University of Chicago Press 2007).

Harcourt relates:

> The use of actuarial methods in the criminal law may be counterproductive to the central law enforcement objective of reducing crime. Even on the very conservative assumptions entirely consistent with rational choice theory, the use of prediction tools may backfire: given the reasonable possibility that differentials in offending go hand in hand with different elasticities to policing, there is good reason to believe—again from a rational-action perspective—that actuarial methods will increase rather than decrease the overall amount of crime in society. In addition, the use of actuarial methods will aggravate social disparities and tend to distort our conceptions of just punishment. [11]

While Harcourt offers a theoretical structure which encompasses more than just traffic stops that result in arrests for drugs, he hits at an overarching issue:

> What the ratchet effect [focusing on one group more than others] does, for instance, is violate a core institution of just punishment— the idea that anyone who is committing the same crime should face the same likelihood of being punished regardless of their race, sex, class, wealth, social status, or other irrelevant categories. When prediction *works*— when it targets a higher-offending population [or what is perceived to be]—it likely violates this fundamental idea by distributing the costs of the penal system along troubling lines such as race, gender, class and the like.[12]

Embedded in Harcourt's last issue about when prediction works and the ill-distribution of costs, a seldom listed set of "costs" for racial profiling begins to appear. The first of these costs is the legitimacy costs to the judicial system when it gives legal deference to suspect police actions, a topic that is the subject of much of the law journal and review literature.[13] The second cost concerns philosophic and ethical issues: What are the legitimacy and ethic costs to the workability of a society when that society seeks to maintain a system predicated on a theory of justice that bases guiltiness on something other than legal probably cause, i.e. race/ethnicity?[14]

Finally, the hard core of science has little place for the perhaps most dangerous and embittering aspect of racial profiling. Profiling may work in a statistical sense: if an officer stops ten people on some pretext in order to conduct a search, that officer may get one arrest out of those ten pretextual stops. Harcourt largely deals with the issues of that "one." However, what of the nine

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11. *Id.* at 237.
12. *Id.*
13. *See id.*
14. *See id.*

who are set free? As Harris relates, "Racial profiling and high-discretion police tactics impose substantial costs on innocent citizens of color, who as a result must bear the burden of public humiliation and personal degradation at a level unimaginable to whites."[15] Following this point, it can be argued that those subjected to racial profiling, hard or soft, are "less free." Such a status of "less free" is particularly embittering because the freedom of minorities to travel unmolested by legal force is capriciously in the hands of individual law enforcement officers and, in the instance of checkpoints, public policy too often framed on budgetary/political expediency.

C. Racial Profiling and Freedom

Patterson, in a monumental study of ideas about freedom in western civilization, developed a useful typology, which while not directed at contemporary racial profiling, is useful for considering its costs and underlying meanings.[16] Patterson describes three forms of freedom that have evolved over millennia.[17] The first two, personal and civic freedom are overt and proclaimed; the last is hidden among the distortions and abuses of the first two.

**Personal Freedom* can be conceived of as the idea of self-fulfillment; that one ought to be able to pursue one's own interests, beliefs, values, and choices without interference by law or government.

**Civic Freedom* can best be explained within the Hobbesian Social Contract concept: survival of the community is paramount and often one must subordinate private interests to public good. In theory, court balancing tests operate here.

**Sovereignal Freedom* is the dark side of personal and/or civic freedom. A person may say his values and interests require he use others for his own ends and that some philosophic variation of the "law of the jungle" like Social Darwinism allows, or even demands he do so. Similarly, a community may hold that some people or interests so threaten the public good that participation of "those" may be limited or even denied. At the very least, some people may be subjected to extra control.[18]

It is this very last idea of freedom, Sovereignal Freedom, that best reflects the true import of racial profiling. Racial profiling is an exercise in the dark side of civic freedom. Beyond all the rhetoric of equality and freedom that might be written into law, racial profiling, whether an expressly or tacitly allowed practice, in effect states some are not really full members of the

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15. HARRIS, *supra* note 5, at 147.

16. ORLANDO PATTERSON, FREEDOM: FREEDOM IN THE MAKING OF WESTERN CULTURE, VOL. 1(Basic Books1992).

17. *See id.*

18. *Id.*

community. Perhaps more seriously, racial profiling remains the last, backed by potential of violent force, vestige of 19th century ideas about Personal Freedom.

Chaires and Lentz, in their study of the history of racial profiling from 1619 to 2000, present a perspective on racial profiling placing some outside the community and delegating enormous discretion to a few to determine who is free.[19] They state:

> To a degree, it has simply not mattered what the law said about the rights of people of color, for such law is subject to the interpretation and discretion of law enforcers who may do by commission or omission, what they will. Beyond all the 20th century rhetoric of reform and the endless "reports" on this or that, the conduct of the police remains the true expression, symbolically and practically, of a preferred social order. In this sense, racial profiling is a reflection of America's adherence to the concept of freedom, of equality—it is the story of continued inequality for some.[20]

Within this point, that the evolution of American law has largely vested American police with the discretion to exercise their ideas of personal freedom in sovereignal ways, Chaires and Lentz suggest two things. The first is that different ideas of freedom can coexist in negative or positive ways. The second concerns direction: When the law specifically anticipates abuses—that some will see their freedom as endowing them with a right to exercise it sovereignly— then it legally becomes the duty of both legislative and judicial lawmakers to ensure that action be taken before abuses occur. Simply put, it is not enough to ensure that sufficient due process exists to ensure that the guilty are not deprived of their rights, it is required that those nebulous nine not be deprived of their personal freedom to be unmolested by police acting under the color of law without real cause.

Different jurisdictions within nations have handled these dilemmas of balancing and controlling various views of freedom in different ways; some give virtually absolute deference to the police, while others attempt to meaningfully control some forms of discretion. Ultimately, though, such issues and process must arrive before a nation's highest court—the entity that is responsible for interpreting what the highest law of the land really says about freedom. A necessarily brief review of checkpoint law where the highest court of a land has directly referenced racial profiling shows that while the talk about freedom and equality among races might be similar, most definitely, walking the walk might be rare.

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19. *See* Robert Chaires & Susan Lentz, *Racial Profiling: 1619-2000*, *in* FILLING THE GAP: CRITICAL READINGS IN CRIMINAL JUSTICE (Mark E. Correia, et al, eds., 2nd ed., Simon & Schuster 2002).

20. *Id.* at 343.

III. PART II. UNITED STATES - TALKING THE TALK, BUT NOT WALKING THE WALK

The American law of checkpoint stops and seizures is a morass of 4th Amendment jurisprudence. Further convoluting the jurisprudence is a general denial by law enforcement entities that there is any real substance to the phenomena called racial profiling generally and DWB (Driving While Black or Brown) specifically. This denial alone confuses attempts to study the area because as the Supreme Court substantially stated in *Whren v. U.S.*, it will not explore the subjective intent of individual officers in traffic stops.[21] A simple point about traffic laws need be considered to understand the full import of *Whren*: Traffic and vehicle codes describe virtually every possible movement, safety issue, and vehicular compliance requirement in such detail and in such ways that it virtually impossible for anyone to travel more than a few blocks without violating some provision.[22] Obviously, few motorists are stopped for violations that the average person might deem "inconsequential." However, the DWB literature and case law is rife with instances where a stop started with something so inconsequential that the vast majority of average citizens would be enraged about being stopped for. This begs the question: Was the stop actually for the stated purpose, or for other reasons? In *Whren*, the petitioners specifically argued the point that in the unique context of civil traffic regulations any police officer(s) can virtually stop anyone.[23] Thus, the real constitutional question is whether racial animus, which is an unreasonable violation of the 4th Amendment can be predicated on the existence of technical probable cause for a stop.

In *Whren*, plain clothes drug officers in an unmarked vehicle observed two black youths stopped at a stop sign for an excessive (allegedly 20 seconds or so) period of time and observed one look at the lap of the other.[24] The officers followed until they observed a traffic violation (the occupants turned without signaling and sped-off at an "unreasonable" rate of speed).[25] Officers stated they approached the car because of the traffic violation and, upon identifying themselves and approaching closer, observed by plain sight what their experience indicated were illegal drugs.[26] Justice Scalia, writing for the Court, held that the temporary detention of a motorist upon probable cause to believe that he violated the traffic laws did not violate the Fourth Amendment's prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist

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21. Whren v. U.S., 517 U.S. 806,813 (1996).

22. For example, one author asks students in a criminal procedure class how many of them have a university parking pass hanging from their review mirror. Almost all do. The back of the pass specifically states that it should be removed if the vehicle is moving. No one removes the pass when the vehicle is moving. Technically, University police could stop students for "obstructing their vision" while moving on campus. No one has been stopped on campus, but several have been stopped off campus. Other students volunteer examples like: speech sticker on rear window; failing to use turn-signal (not failure to use) an adequate number of feet from turn or lane-change. Of those, a few relate they were just advised to correct their traffic defect and then asked: "Do you mind if I search your car?" Almost all felt intimidated by the situation and consented.

23. *Whren*, 517 U.S. at 810.

24. *Id.* at 808.

25. *Id.*

26. *Id.* at 809.

absent some additional law enforcement objective.[27]

An important aspect of *Whren* is the rejection of longstanding police concerns about plain clothes officers making traffic stops in unmarked police vehicles. The vast majority of police departments have strong prohibitions against traffic stops in unmarked vehicles. While television and the movies are filled with unmarked vehicles doing amazing things with a dash light and siren, the reality is different. Fully-marked cars with full emergency equipment generate crashes between police and civilian vehicles in things as simple as just traffic stops. Nationally, every year a dozen or more officers are killed when someone drives into a stopped police car with all lights running. Much larger numbers are injured and enormous medical costs (along with criminal convictions) result for public and private insurers to pay. Indeed, the Court specifically noted that the District of Columbia police regulations expressly state that unmarked units may enforce traffic laws only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others.[28]

As a matter of personal, civic, or sovereignal freedom, other implications emerge in *Whren*. The *Whren* Court stated, "[P]olice enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protection of the Fourth Amendment are so variable and can be made to turn on such trivialities."[29] Thus, in one fell swoop, the Court turns what it calls "a run-of- the- mine case" into a major vehicle for legitimizing pretextual stops and as such legitimized the police concept of sovereignal freedom. [30]

A. Checkpoints as the Ultimate Win for American Police Opportunists

Whren might be regarded by the Court as a nothing special case, but to American police it was much more. Simply put, given the comments by the court regarding "variability" and "place to place and time to time"[31] the Supreme Court essentially stated that states, counties, cities, and police departments could construct laws and rules intended to restrain such DWB-like conduct, but nothing that police officers actually do, even in violation of local laws, would limit the admissibility of such evidence. Of course, this is ironic given the Court's deference to state law and procedure in other arenas of criminal law and procedure, such as the death penalty. It is also a not-so-subtle statement about the Supreme Court's inclination to place the resolution of race-ethnicity-class

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27. *See id.* at 818.

28. *Id.* at 815. The Court specifically cites Metropolitan Department, Washington, D.C., General Order 303.1, pt. 1 Objectives and Policies (A)(2)(4) (April 30, 1992) which severely limits such plain clothes stops.

29. *Id.* at 815.

30. *Id* at 819. The court uses the term "pretextual stops" several times in its decision and while not denying its existence, dismisses its legal importance as a constitutional issue of freedom. *See id.*

31. *Id.* at 815.

criminal procedure issues in the hands of police at the very lowest levels.[32] Clearly, if the Supreme Court says something is constitutional, then it is so. Whether something is ethical is, in a positivist perspective of the law, irrelevant. There is little reason that police officers should consider complex issues of "freedom for whom," when the law allows them to argue that they are being ethical by following the supreme law, even if local law prohibits them from engaging in particular conduct.

Despite the Supreme Court's sanction of potentially discriminatory behavior by police, states and local political entities retain the option to administratively sanction an employee for the violation of local law and policy. However, for a political entity, administrative sanctions may be an economically dangerous enterprise to engage in. If an employee violates the personal freedoms guaranteed or promised by such an entity, than a civil rights law suit may ensue under the entity's laws. If the agency says the employee was acting outside his scope of employment in order to avoid liability, employee groups might also sue. It is simply less expensive for an agency to defend civilly what it knows will likely be upheld as a matter of criminal procedure.

B. Come Edmond

Facially, *Indianapolis v. Edmond* [33] resolved the plethora of often conflicting decisions by state and federal appeals courts regarding drug specific checkpoints following *Dep't of State Police v. Sitz*.[34] The qualified approval of sobriety checkpoints in *Sitz,* along with drug war hype, generated an expansion of specialized checkpoints including "high crime" checkpoints, vehicle

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32. Some perspective on this point can be gained by looking at the late Justice Thurgood Marshall's paper's relating to *McClesky v. Kemp* (1987), a death penalty case relating to racial discrimination in application. There, an inter-court memo from Justice Anton Scalia stated:

> I disagree with the argument that inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial are unique, or by the large number of variables at issue. And I do not share the view, implicit in [Powell's draft opinion], that an effect of racial factors upon sentencing, if it could be shown by sufficiently strong statistical evidence, would require reversal. Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and [hence] prosecutorial [ones] is real, acknowledged by the [cases] of this court and ineradicable, I cannot honestly say that all I need is more proof. I expect to write separately on these points, but not until I see the dissent.

Memorandum to the Conference from Justice Antonin Scalia in No. 84-6811—McCleskey v. Kemp of Jan. 6, 1987. McCleskey v. Kemp File, THURGOOD MARSHALL PAPERS, The Library of Congress, Washington, D.C. *quoted in* CHRISTOPER E. SMITH, CONSTITUTIONAL RIGHTS: MYTHS & REALITIES (Wadsworth 2004). Justice Scalia never did write on these points in that decades old decision; he did not need to.

33. Indianapolis v. Edmond, 531 U.S. 32 (2000).

34. Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

checks in targeted neighborhoods, stolen vehicle checkpoints, and drug interdiction checkpoints.[35] Most of the checkpoints paid very little sincere attention to the multi-factor balancing test established in *Brown v. Texas* two decades before.[36] Specifically, three general categories of drug checkpoints emerged: (1) checkpoints expressly identified to uncover drug trafficking; (2) drug checkpoints combined with "another purpose;" (3) checkpoints designated expressly as safety or regulatory checkpoints with an unstated purpose of drug interdiction.[37]

Edmond began as a class action to enjoin the Indianapolis police department and surrounding agencies from engaging in drug interdiction checkpoints with a disparate impact on blacks.[38] It ended in the Supreme Court in an arguably hollow victory. In the journey to the Supreme Court, the issues of racial animus generated by the location of the checkpoints were lost by neglect. In *Edmond*, the Court upheld the Seventh Circuit finding, with Judge Posner writing for the circuit,[39] that the Indianapolis checkpoints did not meet the "certain limited circumstance" which allows searches and seizures without individualized suspicion that the Court set forth in *Chandler v. Miller.*[40]

In the Supreme Court, Justice O'Connor, writing for the majority, stated that the Court did not and never had approved "of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. . ." [41] and went on to state "We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed a crime."[42] Thus, the Court found checkpoints predicated on a general suspicion of a crime where no immediate safety issues (like DUI) were present, unconstitutional. The Court, however, left the proverbial barn door open for the continuance of pretextual checkpoints. Indeed, *Edmond's* holding means that walking a drug dog by a vehicle at a checkpoint being conducted for an otherwise legitimate *Sitz* purpose is constitutional.[43] Thus, unlike Shakespeare's rose, a drug interdiction checkpoint by any other name is not a drug interdiction. The police remained free to determine the quantity and quality of

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35. *See id.*

36. *See* Brown v. Texas, 443 U.S. 47, 50. (1979). *See, e.g.* Rachel Watson, Comment, *When Individual Liberty and Police Procedure Collide: The Unconstitutionality of High-Crime Area Checkpoints*, 24 Dayton L. Rev. 95 (1998).

37. Susan Lentz & Robert Chaires, *Full Speed Ahead:* Illinois v. Lidster *and Suspicionless Vehicle Stops*, 43 CRIM. L. BULL. 177, 191 (2007).

38. Edmond v. Goldsmith, 38 F.Supp. 2d 1016, 1018 (S.D. Ind. 1998) *rev'd*, 183 F.3d 659 (7th Cir. 1999).

39. Edmond v. Goldsmith, 183 F.3d 659, 668 (7th Cir. 1999).

40. Chandler v. Miller, 520 U.S. 305, 307 (1997).).

41. Edmond, 531 U.S. at 38.

42. *Id.* at 44.

43. Edmond, 531 U.S. 32. The issue of walking drug dogs by vehicles stopped at checkpoints was addressed in the 7th Circuit opinion, but neglected by the high Court. It was several years before the Supreme Court specifically addressed and approved of such conduct in *Illinois v. Cabellas*, 543 U.S. 405 (2005). In those years the practice flourished, arguably because in police logic, failure to prohibit must be approval.

freedom.

C. Enter Lidster

Post-*Edmond* debates were about primary purpose analysis and tests. Facially, it appeared so-called crime control checkpoints waned. The police, however, are not usually deterred by ambiguous Supreme Court decisions which essentially tell them how they can do the same things legally. Since primary purpose is a flexible concept, an agency can simply construct drug interdiction checkpoints around an acceptable purpose – or an agency can creatively construct new purposes carved from creative interpretations of the case law. Friend, for example, tells the police in the trade publication *Police Chief*, "that as long as there is a lawful primary purpose, an agency need not articulate a secondary purpose at all." [44]

Illinois v. Lidster concerns a creative carving of the primary crime control limitation of *Edmond* –exigent circumstances. [45] In *Lidster,* the Lombard, Illinois police department used a road block of 10-12 police cars to investigate the death of a 70-year old bicyclist who was struck by a hit and run driver a week earlier. Motorists were stopped and given a flyer asking for help in investigating the crime. Lidster reportedly almost hit a detective, was moved out of line and ultimately arrested for DUI.

The importance of *Lidster* is that the Supreme Court created an investigative exception to *Edmond* and broadened that exception by ambiguously analogizing such information-gathering checkpoints to police citizen encounters outside the Fourth Amendment.[46] As the Court states in its four-page decision, "[I]t would seem anomalous were the law (1) ordinarily to allow police freely to seek the voluntary cooperation of pedestrians but (2) ordinarily to forbid the police to seek similar voluntary cooperation from motorists."[47]

Voluntary is, of course, an artful word. *Florida v. Bostick* involved bus sweeps, a form of checkpoints.[48] There, the police boarded buses and asked travelers about their identity and destinations, as well as for their cooperation in the interdiction of drugs and weapons.[49] In many instances, as in Bostick's, they were asked if their luggage could be searched.[50] Rejecting Justice

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44. Charles Friend, *Traffic Checkpoints: The Impact of* City of Indianapolis v. Edmond. THE POLICE CHIEF, Feb. 2001, at 10. *See also, Vehicle Stops – Roadblocks with Drug Interdiction as Secondary Programmatic Purpose*, Crim. L. Rep. (BNA) No. 72, at 266 (Jan. 8, 2003).

45. Illinois v. Lidster, 540 U.S. 419, 423 (2004).

46. *Id.* at 425-26.

47. *Id.* at 426.

48. Florida v. Bostick, 501 U.S. 429 (1991).

49. *Id.* at 431-32.

50. *Id.* at 431.

Marshall's concerns in his dissent about the sheer number of such contacts (in the thousands), the "inconvenient, intrusive, and intimidating"[51] nature of the contacts, and the vastly disproportionate involvement of race, the Supreme Court held such voluntary contacts and searches to be outside the Fourth Amendment.

D. A Circular History in Walking the Walk

Lidster can be seen as part of the Supreme Court's continual attempts to fashion a balanced law of checkpoints or as virtual surrender to drug war/checkpoint opportunists, as well as attempting a meaningful control of racial profiling. *Lidster* did not concern race or drugs, but it opened the door to abuse. Finding such contacts voluntary and outside the Fourth Amendment simply lends a blind eye to the creativity of opportunistic police to fashion dark ways through and around the law. It should not be forgotten that *Bostick* and its progeny largely gave legitimacy to a police cultural tradition of pretextual traffic stops based on racial profiling— traffic stops that resulted in the now infamous prevalence of "Do you mind if I search your car"? Arguably, the progeny of *Bostick* is the *Whren* and *Edmond*- type police behavior which has not been controlled.

As innocuous as *Lidster* may seem, it is actually an invitation to do with automobile checkpoints what *Bostick* did for bus and train sweeps, which is to legitimate the actions and thinking of pretextual opportunists. Pretextual opportunists are those police who see large numbers of arrests as validating their personal existence and agency budgets, as validating their sovereignal freedom to do what they will to whom they want. In this sense, the U.S. Supreme Court talks the talk of racial equality and freedom, but has refused to walk the walk.

IV. PART III. CANADA - TALKING THE TALK AND WALKING THE WALK

The Canadian Charter of Rights and Freedoms is historically recent; it was enacted in 1982.[52] In general, its contributors and writers had hundreds of years of examples— good and bad— to draw from other "free" nations. More immediate in perspective were two things: historical experience with indigenous peoples[53] and a substantial concern about the legal abuses of the Royal Canadian Mounted Police (RCMP). The RCMP were simultaneously a national police force, a national investigatory agency similar to the American FBI, and an intelligence agency with worldwide interests akin to the American CIA, which is prohibited by law from engaging in internal surveillance of citizens. While the general structure of a national police force worked unevenly in

51. *Id.* at 442.

52. Can. Const. (Constitution Act, 1982) (Canadian Charter of Rights and Freedoms).

53. Referred to as "First Nation," and not as "native" Canadians.

England with its national police under the Home Office, and MI5 (internal security) and MI6 (external security), it did not function well in Federalist Canada. Drawing extensively from the Universal Declaration of Human Rights[54] the Canadian Charter states *inter alia:*

> Section 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedom set out inFalse it subject only to such reasonable limits prescribed by law as can demonstrably justified in a free society.
>
> Section 8. Everyone has the right to be secure against unreasonable search and seizure.
>
> Section 9. Everyone has the right not to be arbitrarily detained or imprisoned.
>
> Section 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.[55]

At face, these rights and freedoms do not seem too different than those guaranteed to Americans. What is different is the constitutional codification of the exclusionary rule and procedural remedies like those found in 42 U.S.C. §1983.[56] From the beginning, it appears that Canadian lawmakers were aware that placing remedies for Charter violations in another statutory scheme would weaken the remedies for violations of the Charter. What is perhaps too similar is that the language is somewhat loose. Terms such as "may," "demonstrably justified," "arbitrarily," and "all circumstances" can be artful and beg the imposition of balancing tests. The real test is how close the practice of the law comes to the spirit. A brief examination of Canadian checkpoint law discloses that the Supreme Court of Canada has taken a different course than the United States Supreme Court, a course that emphasizes that all share equally in the benefits and costs of civic freedom.

Six years into the Charter, the Court decided *R. v. Hufsky.* [57] Hufsky was randomly stopped

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54. G.A. Res. 217A (III), U.N. GAOR, U.N. Doc. A/810 (1948).
55. Can. Const. *supra,* note 52.
56. *See generally,* 42 U.S.C. §1983 (2000).
57. R. v. Hufsky, [1988] 1 S.C.R. 62 (Can.).

by an officer specifically assigned the task of doing spot checks, which focused on operator license, insurance, vehicle mechanical condition, and driver sobriety. There were no administratively defined criterion as to whom and why the checks should be conducted, and Hufsky refused to comply with the officer's demands. In *Hufsky*, the Supreme Court of Canada reiterated its stance in *R. v. Cornell*[58] that just because a Province had not specifically adopted § 19.1 of the Highway Traffic Act,[59] which allowed random public safety stops, did not mean Canadian rights under § 8 of the Charter had been infringed at a level that required constitutional protection.[60] Indicative of this point is Justice Le Dain's expression of the Court's holding:

> If the stopping of motor vehicles for such purposes is not to be seriously inhibited, it should not, in my respectful opinion, be subjected to the kinds of conditions or restrictions reflected by American jurisprudence (cf. Delaware v. Prouse, 440 US. 648 (1979) and Little v. State, 479 A.2d 903 (Md. 1984)).[61]

There is, of course, a certain legal irony here. The criminal procedure of the American Burger Court is not the same criminal procedure of the Rehnquist Court of later times. In Canadian law there are no real issues of probable cause in traffic law. The RCMP can stop any motorist to check for regulatory compliance issues of the sort usually not discoverable in American law until after the probable cause of a safety violation. After *Hufsky*, Provincial and local police have the same ability as the RCMP to stop motorists absent specific provincial and local law to the contrary.[62] Arguably, the Canadian Supreme Court that made the *Hufsky* decision expected and anticipated law enforcement decisions at the street level to be for the express reasons set forth in the Highway Safety Act, not subterfuge justification for targeted stops based on racial profiles and hopes of finding illegal narcotics. Further, Canadian courts have recognized that the badge and uniform of a police officer who is making demands may have a real psychological effect on a person, even if a person is actually free to go on their way."[63] Later cases support this observation.

In *R. v. Mellenthin*, a motorist was stopped at a RCMP compliance and safety checkpoint.[64] The officer legitimately (for self-protection) shined a flashlight into the vehicle and noticed an open gym bag on the front seat.[65] In response to the officer's question as to the contents of the gym bag,

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58. R. v. Cornell, [1988] 1 S.C.R. 461 (Can.).

59. *See* Highway Traffic Act., R.S.A. 1980, c. H-7, s. 119 (repealed by R.S.A. 2000, c. T-6).

60. *Hufsky,* [1988] 1 S.C.R. 62 (Can.).

61. *Id.* at 20.

62. Notably, some American states, in interpreting their own constitutions, have for a variety of reasons limited or banned certain kinds of checkpoints. *See,* James C. English, *Sobriety Checkpoints Under State Constitutionas: What Happened to Sitz?*, 59 U. PITT. L. REV. 453 (1998).

63. *Id.*

64. R. v. Mellenthin, [1992] 3 S.C.R. 615 (Can.).

65. *Id* at 2.

the officer was told food and showed a bag with a sandwich wrapper in it.[66] The officer noticed there was also empty glass vials of the type associated with drugs. The vehicle was searched and drugs found.[67] The evidence was excluded at trial. [68] The Alberta Supreme Court reversed. [69] The Canadian Supreme Court reversed, upholding the trial court, stating *inter alia:*

> The unreasonable search carried out here is the very kind which the Court wished to make clear is unacceptable. A check stop does not and cannot constitute a general search warrant for searching every vehicle, driver and passenger that is pulled over. Unless there are reasonable and probable grounds for conducting the search, or drugs, alcohol or weapons in plain view in the interior of the vehicle, the evidence flowing from such a search should not be admitted . . . . Even absent bad faith on the part of the police, the breach was serious . . . . . It is the attempt to extend the random stop programs to include a right to search without warrant or without reasonable grounds that constitutes the serious *Charter* violation.[70]

While not a checkpoint case, a contemporary case, *R. v. Clayton* indicates that restraining police power and maintaining the rights of citizens under the Charter remains a Court priority. [71] In response to a 911 call that "10 black guys" were displaying weapons outside a strip club, officers responded and blocked a vehicle leaving the lot in which there were two black males.[72] The vehicle was not one of the four described by the 911 caller.[73] Those stopped gave evasive answers to questions and refused eye contact.[74] After being asked to leave the vehicle, one fled, was captured and searched, and a handgun was found.[75] The other party was searched, and a handgun was found.[76] At trial, the two black males were convicted, but the conviction was reversed on appeal to the Ontario Court on the grounds of Section 8 and 9 violations. [77] The Canadian Supreme Court reversed, reinstating the convictions.[78]

In an American context, the *Clayton* stop would be a permissible stop of a suspect. More

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66. *Id.*
67. *Id.*
68. *Id.*
69. R. v. Mellenthin, [1991] 80 Alta. L.R.2d 193.
70. R. v. Mellenthin, [1992] 3 S.C.R. 615 (Can.).
71. *See* R. v. Clayton [2007] SCC 32 (Can.).
72. *Id.* at 2.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 3.
78. *Id.* at 3.

particularly, the seriousness of the potential offense combined with the conduct of those stopped did give reasonable grounds for the search of the detainees for weapons. The race of the detainees does not appear to be relevant other than for identification purposes. Indeed, what might seem amazing to an American court or police officer would be that there was any legal issue in finding the handguns. However, while the trial court found the initial stop legal, it found the subsequent detention and search of the defendants violated Sections 8 and 9. The evidence was only admitted under Section 24(2) in view of the totality of the circumstances. The Ontario appeals court did not find those circumstances adequate enough and excluded the evidence.

In reversing the Ontario Supreme Court the Canadian Supreme Court made note that:

> In its s. 24(2) analysis, the Court of Appeal found the *Charter* breaches to be of such severity as to justify the exclusion of the evidence. The court concluded that, in stopping the car, the police did not turn their minds to the ancillary powers doctrine and consider the limits of their powers. This failure, the court concluded, was a result of the training they had received, which "left no room for a fact-specific assessment once a 'gun call' went out." The guns were therefore excluded to send an "emphatic" message to the police about their "institutional failure", which the court found "significantly aggravate[d]" the seriousness of the breach.[79]

The decision of the Canadian Supreme Court was long, detailed, and at points, very technical. It included a historical review of police powers back to ancient common law. Their conclusion was that the trial court's admission of the evidence under s. 24(c) was not in error. The importance of *Clayton* for this writing is not so much the conclusion, but that the facts gave rise to so much concern about the police abuse of their powers.

There can be little doubt that racial profiling exists in Canada. In Canada, though, racial profiling is approached in more systemic terms— as much more than just a police problem.[80]

In this view, police racial abuse is symbolic of the problem, not causal, thus entire society bears the burden of controlling abuse— including the courts. As Tator and Henry state as to Black Canadians in particular:

> The police and the media seem to have developed a common [negative] perception of African Canadians. Something very different apparently is taking place in courtrooms. Case law, public inquiries, and tribunal rulings have consistently applied a critical lens to police practices of racial profiling; they have named these practices directly and have indicated

79. S.C.J. No. 32 at 10.

80. *See* Charles TATOR & FRANCES HENRY, RACIAL PROFILING IN CANADA: CHALLENGING THE MYTH OF 'A FEW BAD APPLES', (Univ. of Toronto Press Inc. 2006).

> quite openly the impact these practices have, especially on African Canadians.[81]

Given these points of Tator and Henry, the jurisprudence of the Canadian Supreme Court takes on the added dimension of a direct willingness to address racial profiling in all forms, especially of the police.

The facts of *R v. Clayton* would almost be a "slam dunk" conviction for any American prosecutor in any American jurisdiction, as well as an unsuccessful appeal for the defendant. Not in Canada. In Canada, the sequence of events that might occur at a checkpoint, traffic stop, detention, or police search must meet demanding standards of police conduct— standards which would discourage pretextual opportunists. Following this point of what can be called "court realism about racial profiling," it seems that when a court perceives itself to be engaged in protecting the rights of all citizens— whatever their race, ethnicity, or social status— practical considerations of the limits of police power emerge precisely because there is an awareness of a police tendency to push the limits of the law, to exercise sovereignal freedom. Conversely, when a court sees itself as a protector of society in general, then it is inevitable that balancing tests will emerge that will almost always protect some interests at great costs to those least able to complain. In this vein, the Canadian Supreme Court appears to talk the talk and walk the walk of controlling racial profiling.

V. PART IV. FRANCE - TALKING THE TALK, BUT UNABLE TO WALK THE WALK

There is a popular French song about a world without borders, mixed cultural identities, and policies that reject foreigners called "L'iditenté."[82] Interestingly, this title is nothing more than a jumbled spelling of "l'identité" (the proper spelling of 'Identity'), creating a neologism that reflects a conflicted reality that continues to plague the immigration problem on French soil. The notions of cultural identity and ethnic background have a hard time finding a home in a country that refuses to officially recognize race as a social construct. This attempt to eradicate discrimination by ignoring race related content may be noble, but does this approach benefit or hinder humane criminal justice practices?

A. Summary of the French Legal System

France's legal system, predicated on a civil code rather than a common law tradition, is comprised of two trial levels and one Supreme Court. A matter can be judged at the trial level of first instance, then brought before an appeals courts, and ultimately be brought before the French

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81. *Id* at 87.

82. Têtes Raides, L'Iditente (Tot Ou Tard 2000).

Supreme Court, la Cour de Cassation. Cases that involve fundamental human rights and that have exhausted the national judicial avenues can also appeal to the European Court, which hears cases from across all of Europe. Interestingly, France recognizes reciprocal treaties and international agreements as prevailing over national laws and regulations.[83] This means that all agreements made with the European Convention on Human Rights (CEDH) or the United Nations on human rights and fundamental freedoms supersede all French legislation and must be adhered to across all French territories.

Minor infractions such as traffic tickets and noise violations are usually heard before police courts (tribunaux de police). Minor crimes and misdemeanors such as petty theft are heard before correctional courts (tribuneaux correctionnels) and major crimes such as robbery and murder are tried before a "Cour d'assises".

Prosecutors work for the Ministry of Justice and they ultimately decide what cases will be brought before a certain court's jurisdiction. Defendants are either sent to a "tribunal de police" or a "tribunal correctionnel." More serious cases require the selection of a "juge d'instruction" (the investigating judge) who oversees the investigation process once the prosecutor opens the case by calling for a formal "instruction." Cases that have little evidentiary or legal basis are abandoned and are labeled as "classement sans suite" (without cause). This practice of an investigating judge in serious criminal cases is a major difference between the American/Canadian system and French system. Conceptually and symbolically, such a judge is not a neutral party waiting for the prosecution to produce evidence of guilt as in an accusatorial system. In an inquisitorial system, the party comes before the court presumed to be guilty and depending on how much a particular judge perceives their role on a continuum of extension of the police to officer of a court of justice, what they ask for as evidence may vary greatly. At the least, though, such a role might exclude some of the common interplay among prosecution and defense which occurs in adversarial systems *before* a case gets to a judge. Thus, arguably, it may be much more difficult to bring-up racial concerns before court. Similarly, and equally only an argumentative point, this increases the power of police to impose sovereignal freedom.

A. The French Police

The police forces of France are separated into two categories. The Police Nationale is governed by the Ministry of the Interior, and the Gendarmerie is under the Ministry of Defense, much like the other armed forces (Navy, Air Force, Army). In terms of jurisdiction, the Police Nationale focuses on the larger cities and urban areas, whereas the Gendarmerie is more likely to be found patrolling highways and rural areas. The Police Nationale is further divided into specialized units such as the Police aux Frontieres (PAF), the Brigade Anticriminalité (BAC), and the

83. *See* 1958 Const. Art. 55.

Compagnies Republicaines de Securité (CRS).

The PAF patrols national borders and airports and handles immigration and custom issues. The BAC polices major cities with a special emphasis on inner cities and the "quartiers sensibles," marginalized neighborhoods or ghettos. Finally, the CRS is a special anti-riot unit designed to maintain and restore order during demonstrations and civil disturbances. The CRS are usually called as a measure of last resort and they are known for being heavy handed during confrontations.

B. Race in France

The Revolution of 1789 and the Declaration of the Rights of Man and Citizens were central to the French national ideals of liberty, equality, and fraternity. These notions were re-enforced in subsequent French Constitutions (1946 and 1958), with Article 1 stating that, "France shall be an indivisible, secular, democratic, and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race, or religion."[84]

World War II and the German occupation led to the Vichy government of the 1940s which strayed from these beliefs. The result was the official persecution of Jews that left a permanent scar in the minds of the French citizenry who vowed that defining and dividing people because of race or ethnic background should never be repeated. Subsequent experience with increasingly racial minority populations indicates that such a "neutral" position, however well-based in idealism, was a double- edged sword.

With the end of World War II, France welcomed immigrants from numerous countries onto its soil. While some came from Southern Europe, a significant number came from North-Africa, and sub-Saharan Africa. While these newcomers were initially considered temporary migrant workers, many have made France their permanent homes by acquiring citizenship, bringing over their families, and having children in France. "In 1999, no less than 23 percent of the French population claimed foreign origin . . . within this group 5 percent had their roots in the sub-Saharan Africa, 22 percent in the Maghreb, and 2.4 percent in Turkey." [85] This new wave of immigration has created a multi-ethnic social fabric, but many of these non-whites, regardless of residency status, remain "immigrants" regardless of where they were born.[86] It seems that while immigration was readily accepted, integration and acceptance by the "native" French proved a little more difficult. There are obvious similarities to the difficult integration of African-Americans into white society

84. 1958 Const. Art. 1.

85. Jonathan Laurence & Justin Vaisse, *Understanding Urban Riots in France*, Brookings Institution, *available at* http://brookings.edu/articles/2005/1201france_laurence.aspx (Dec. 1, 2005).

86. Erik Bleich, *Race Policy in France,* Brookings Institution, *available at* http://brookings.edu/articles/2001/05france_bleich.aspx (May 1, 2001).

after the end of segregation in the United States.

There is thus an unspoken tension between the immigrant French and the white "Gallic" French person. The law may not recognize any differences, but there are social consequences to this forced equality. As one commentator notes, "Race is a reality for everyone in France except the French state."[87] Immigrant populations routinely bring forth charges of non-acceptance and discrimination when it comes to employment, housing, and access to proper education.

Social segregation based on race or ethnic background is evident in the creation and maintenance of what are called "banlieues," "cites," and "quartiers sensibles." These are zones found on the outskirts of most major French cities, characterized by massive and clustered public housing buildings. These areas are plagued by massive unemployment (some estimates are as high as 30 percent), crime, and social disorder. The immigration waves of the 1950s and 1960s were not accompanied by adequate social planning, and these housing projects became the government's shortsighted way to house and handle these newly "welcomed" populations. Through the years, these communities became forgotten and social integration efforts were never considered important enough to provide the necessary social programs for integration. What occurred was a *de facto,* and perhaps *de jure* ghettoization.[88] These outlying suburbs have grown into the large social quagmires of today, forcing two French identities at odds with each other to co-exist, but not without social strife.

Many of the recent riots in major urban centers are often linked to this disenfranchised group of youths who see no hope of social mobility, and who claim repeated racial profiling practices by the French police forces. It appears that while the government continues to ignore race as a policy variable, its actions (or inactions) have led to the present situation where French social harmony remains a myth and animosity from and towards "immigrants" is hard to ignore.

C. The Law and Race in France

The legal history of a race-less France can be traced to several occurrences. Article 1 of the 1958 Constitution calls for France to be color-blind: "France shall be an indivisible, secular, democratic Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs."[89] In 1978, facing the specter of an information age, Article 31 of the law on computers and freedoms (affirmed by the Constitutional Council), banned the collection of data containing ethnic and racial categories.[90] The 1978 law, did

87. Mary Harvan Gorgette, *The Reality of Race in France*, NAT'L CATH. REP., (Nov. 25, 2005).

88. Laurence & Vaisse, *supra* note 85.

89. 1958 Const. Art. 1.

90. Data Processing, Data Files and Individual Liberties Act, No. 78-17 (1978).

however, allow for very limited and temporary collection of such data (requiring the express consent of the subjects) to help identify problems relative to Article 1 of the Constitution.[91] In 1990, the *Gayssot Law* imposed a ban on the denial of the Holocaust, increased penalties for "racist" crimes, and mandated an annual report on racism in France from the National Commission on Human Rights (CNSDH).[92]

In 2007, a law entitled "Immigration, Integration, and Asylum" designed to curb illegal immigration was passed with two controversial provisions.[93] The first included the collection of DNA samples for applicants demanding immigration status based on familial ties, and the second included the collection of ethnic statistics from all immigrants reaching French soil.[94] After some public demonstrations that stated that the collection of such data violated the Constitution and the Law of 1978, the Constitutional Council rejected the second provision as unconstitutional.[95] After significant debate on the provision concerning the collection of DNA samples, the government agreed to only use such methods when investigating mother-child relationships.[96]

In 2008, a proposal to collect private information on citizens "of interest" to police was met with severe opposition from the National Commission on Information Technology and Freedom (CNIL).[97] The argument against the proposal was that it would violate personal freedoms and allow the government to once again identify people by race or national origin. While the President cites national security concerns and supports the new data collection, the Edvige database currently remains embattled in lawsuits and faces strong public opposition. As a CNIL member states: "The Edvige database has no place in a democracy. . . [it is as if] the electronic Bastille is upon us."[98]

Interestingly, France appears to be caught in a no-win situation with regards to the race issue. While its efforts to eradicate discrimination are commendable, the policy of a race-blind society also prevents solutions when these can actually be helpful. For example, France will not entertain the idea of any type of affirmative action programs to help remediate past injustices because such programs would violate the equality clause of Article 1 of the constitution.[99] As such, Civic Freedom is enshrined in the law of France, but it seems to constantly have sovereignal

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91. *Id.*

92. Bleich,, *supra* note 86.

93. Tera Rica Murdock, "*Whose child is this? Genetic analysis and family reunification immigration in France,*" VAND. J. OF TRANSNAT'L L., Nov. 2008.

94. *Id.*

95. *Id.*

96. *Id.*

97. *See* Charles Bremmer, *French Revolt Over Edvige: Nicolas Sarkozy's Big Brother Spy Computer*, TIMES ONLINE, Sept. 9, 2008.

98. *Id.*

99. Christopher Caldwell, *The Crescent and the Tricolor*, ATLANTIC MONTHLY, Nov. 2000.

consequences.

D. Policing and Race in France

Even though France has no racial categories, there is some substantial evidence that "non-French" looking individuals attract more police attention than their "French" counter parts. The idea of racial profiling is one that is hard to define as there is no such term under French law, since there is no recognition of race. The closest term is what is called a "délit de faciés,"[100] a "crime of the face." A délit de faciés usually occurs when the police question someone for no other reason than the color of their skin, or their non-French national origin[101]. Of course, because government agencies (including the police) do not collect any information on race or ethnicity, there are no sound statistics on the frequency of this occurrence.[102] Technically, the act cannot even take place since there is no name for it and its commission involves a construct—race—that is not recognized on French soil. While there are no clear statistics on the number of police initiated stops based solely on race, minority groups in France report frequent problems. A recent report by the National Commission on Citizens, Police, and Justice listed over 50 cases that involved police misconduct and use of force.[103] Of these 200 cases, 60 percent involved foreign subjects, the majority of which had legal status in France. [104] The other 40 percent were French nationals with "names or physical appearances that would lead one to believe that they might be foreigners." [105] The report also found that the majority of victims of police violence were males (71 percent) with a mean age of 31.[106] The majority of cases involved police misconduct that resulted from altercations that originally began as a simple identity check.[107]

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100. Délit de faciés is an interesting term in itself. The term "faciés" refers to the face of a non-human being, usually attributed to an animal since the human face is referred to as a "visage." Therefore, a délit de faciés has inherent racist undertones, reducing the victim to a less than human status.

101. René Naba provides an interesting explanation for commonly used derogatory terms to denote minority groups in France, i.e., *Bicot*, *raton*, and *bougnoule*. He explains how these terms evolved to describe repressive police conduct such as "ratonnade" (severe police beating). René Naba, Translators for Linguistic Diversity, *Deconstructing the Founding Myths of France's Greatness* (Xavier Rabilloud, trans.) (Oct. 2006), http://tlaxcala.es/pp.asp?reference=2448&lg=en.

102. Several groups concerned about racial profiling practices have called for the collection of ethnic data where police stops are concerned. Such databases could then shed some light on the prevalence of racially biased police practices. Louis-George, L'Express, 25/10/2007.

103. *Id.*

104. *Id.*

105. Rapport d'activité de la Commission nationale Citoyens-Justice-Police, [Activity Report on the National Commision on Citizens, Police and Justice] (de juillet 2002 à juin 2004).

106. *Id.*

107. *Id.* Various NGO's and private groups routinely report racial profiling incidents in France. *Amnesty International. ÉFAI. Index AI: EUR 21/001/2005.* An extensive review of police misconduct is beyond the scope of this paper. Rather, this research seeks to illustrate how race-based identity checks reflect France's political and legal realities in motor vehicle and most especially, checkpoint stops.

E. Identity Checks and Vehicular Movement

The French police have the duty to enforce the laws of the land. Two main directives involve the problem of illegal immigration and public order. While police in France do respond to crime incidents and offer assistance, it appears that a significant portion of their patrol efforts involves questioning residents and keeping an eye for signs of disorder or potential disorder. As in Canada, the police have broad general authority to make regulatory and safety stops of vehicles. However, because race does not exist as a legal variable in police contacts, there is very little other than anecdotal information about racial profiling in routine traffic stops. Simply put, it would be extremely difficult in France to study the concept and practice of pretextual traffic stops based on racial profiling.

Clearly, though, any pedestrian or motor vehicle can be stopped, even if only a passenger might be "non-French," in order to determine the legality of person in France. In line with this, there is simply little in the law which would restrain police from setting-up checkpoints in which only those persons which appeared to be non-French would be stopped. Arguably, in this scenario, whites, whatever their nation of origin, would be far less likely to be stopped.

Over the past few years, the social problems of the cités and banlieues (housing projects) and tensions between youths and police have spilled out of these zones, resulting in demonstrations, riots, and looting.[108] These events have produced an anti-immigrant sentiment among some French residents, and municipalities have undertaken measures to deal with these "undesirables."

For example, the city of Orléans pushed creation of a special division of the Border Police force to deal with immigrants.[109] This unit's mission is to identify illegal residents for eventual deportation proceedings. Some large families may have one or more members without proper residency status making police attention less than desirable. Efforts to target "immigration," it is argued, help limit disorder since the undocumented will seek to avoid police attention. This has led to questionable practices and public resentment. In Orléans, police routinely board buses that primarily serve ethnic areas and carry out random identity checks.[110] The arbitrary reason for the checks (other than the destination of the passengers) evokes the inevitable "délit de faciés" by police. This, of course, reeks of the concerns stated by Marshall in his dissent about bus boardings

108. Two main riots come to mind. The 2005 Clichy-sous-Bois riot started after two youths died after being electrocuted when they hid from police in a transformer. Approximately 8,000 cars were burned across 300 French cities and the police made more than 2,800 arrests. The second occurred in 2007 in Villier le Bel when two youths died after a collision with a police car. While this riot was less dramatic than the one in 2005, authorities were concerned about a possible repeat scenario. Elaine Sciolino, *Paris suburb riots called 'a lot worse' than in 2005*, N.Y. TIMES, Nov. 27, 2007.

109. Hubert Prolongeau, *Orléans, championne des expulsions*, LE NOUVEL OBSERVATEUR, Jan. 19, 2006

110. *Id.*

in *Florida v. Bostick.*[111] Other police practices in Orléans involve police rounding up children at public parks only to have the parents' identity checked at the station when they come looking for their children.[112] While these acts appear to be blatant violations of French law (selecting people out solely based on their race), these have become commonplace in many urban centers.

The problem of racial profiling in France is nothing new to urban youths, especially those of North African descent, when it comes to police activity. There are many cases of police misconduct in these communities, but it appears that the French court system continues to ignore the problem. How can the French system justify or ratify such behavior? Is the problem of racial profiling even considered or does the country hide behind procedural codes designed to curb illegal immigration and disorder?

F. Racial Profiling and the Supreme Court

French citizens are required by law to be able to prove their identity when asked by the police.[113] These identity checks usually become pretextual stops to check for residency status and to engage in further police questioning. While simple identity checks are legal, the more complex residency status checks require some probable cause and police cannot simply ask for residency papers arbitrarily.[114] Article 8 of the November 2, 1945 Ordonnance states that police officials do *not* have to check identity papers before asking for residency papers when "foreigners are concerned."[115] In these cases, however, the police must state what led them to conclude that the concerned person was a foreigner since they did not carry out an initial identity check.[116] French courts have identified some of the elements police can rely on to identify the "foreign" nature of some individuals.[117] Interestingly, police can establish the "foreign" status of individuals if they are seen leaving a foreigner's residence or a cultural center.[118] This is a hotly contested issue as it connotes some elements of discrimination and because the courts have not clearly delineated what constitutes a residence, leaving some critics to state that the police can arbitrarily select anyone leaving or entering a housing project since these are considered residences. Most of the time, however, police choose to carry out an identity check as a precursor to the check of residency status.

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111. *See* Bostick, 501 U.S. at 442.

112. Hubert Prolongeau, *Orléans, championne des expulsions*, LE NOUVEL OBSERVATEUR, Jan. 19, 2006.

113. Code de Procedure Pénale, art. 78.2 (Fr.).

114. Ordonnance n° 45-2658 du 2 Novembre 1945.

115. *Id.*

116. Groupe D'Information et de Soutien des immigrés, Le Contrôle d'identité des étrangers, (May 2003).

117. Some items pointing to the "foreign" nature of an individual include: reading a newspaper or book written in a foreign language, driving a car with foreign license plates, and playing folkloric musical instruments on public streets. *Id.* However, ethnic or racial traits, and speaking a foreign language are not, technically, legal indicators of a "foreign" nature.

118. *Id.*

Routine identity checks are permitted by Article 78-2 of the Procedural Penal Code[119] but they can only be carried out if the police have a reason to believe that the person in question:

1) committed or attempted to commit an infraction

2) was preparing to commit a crime

3) has information relevant to a crime under investigation

4) fits the description of a suspect sought by authorities [120]

Of course, being in France illegally is a crime and these four conditions leave a lot of room for discretion and offer police numerous reasons to initiate an identity check. It appears as though police officers have "carte blanche" when it comes to approaching individuals they choose to investigate.

The French Supreme Court has also facilitated the second condition of Article 78-2 (giving police the right to "check" someone they believe was preparing to commit a crime) by not requiring the police to state what crime was about to be committed.[121] In 1998, a judgment ruled against an identity check because the court ruled that the officers had no "indice" or reasonable suspicion that a crime had been committed or was about to be committed.[122] In this case, police checked three men in a car parked near a train station after one of them quickly returned to the car after seeing the police walking in the station.[123] However in 2003, the court ruled that that a "person's suspicious attitude" suffices to provide sufficient grounds to carry out an identity check.[124] This raises the issue of the legality of identity checks of idling youths on subway platforms. The third condition—a person may have relevant information—is also often easily invoked in the "quartiers sensibles" (ghettos). The police can always use a previous crime as a pretext to approach and "question" individuals about what they may know. The law states that one of the conditions under which the police can carry this out is if the individuals were present during the infraction.[125]

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119. The March 18, 2003 law on Internal Security extended the Article 78-2 of the Procedural Penal Code to automobile stops on public roadways and in public parking facilities. The Constitutional Council also found that the extension of the Article 78-2 did not pose an excessive threat to individual liberties.

120. Serge Trassoudaine, « Jurisprudence de la deuxième chambre civile de la Cour de cassation relative aux articles 35 bis et 35 quater de l'ordonnance du 2 novembre 1945 ».

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

However, in 1998, a Supreme Court ruling appears to lend further support for random police identity checks.[126] Three immigrant men, Romanians with illegal resident status, were "controlled" and their identities checked by police officers who were investigating a report of a Romanian man committing a sexual assault at a hotel.[127] The three Romanians were eventually detained for lack of residency status and faced deportation proceedings.[128] They appealed to the Supreme Court stating the police had no legal reason to carry out identity checks since they were not part of, or present during the infraction.[129] However, the Supreme Court ruled the police check legal because the three men were in fact in the parking lot of a hotel known to house Romanians, and they were standing next to a car with foreign plates. [130] The Court ruled that the police had *enough reason* to believe that the individuals had relevant information to the case, making the identity check legal.[131] In short, the Court ruled that proximity to questionable activities render police checks legal.

Finally, the Supreme Court has ruled that corroborated anonymous tips can be used as a reason to check someone's legal status.[132] The idea of reporting someone anonymously has historical connotations that still make French residents uneasy. The memory of the German occupation, the denunciations, and the accompanying final deportations still haunt France and to this day, the police cannot act on any type of anonymous tip without solid evidence.

G. The Supreme Court Cases and "Délit de Faciés"

It appears that most cases brought before the Supreme Court seek judgments that clarify the context (where, when, how) of identity checks. There are no cases that examine the impact of these checks on specific populations (who), and the legal implications this may pose. This is clear evidence that the French Supreme Court has chosen to discuss identity checks in terms of how they are carried out, but not whom they may be targeted at. Once again, as far as the French government is concerned, these checks are directed to "French citizens" and cannot be discriminatory since the society is color-race-ethnically blind.

A thorough search of French Supreme Court cases involving "délit de faciés" issues yielded three interesting cases. Although not directly related to police traffic stops, they offer some interesting insights in the ability of the court to handle issues relating to this special crime type.

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126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. Cass. 1e civ., May 31, 2005, Bull. civ. I, No. 234, at 197.

The first case stems from an altercation between a woman and a police officer who was in the process of carrying out an identity check on a third party.[133] Witnessing the police action, the woman intervened by accusing the officer of racial discrimination; that this would not be happening if the person was a "blond woman with blue eyes."[134] The officer claimed that the woman accused him of a "délit de faciés," segregation, and racism.[135] After this claim, the woman was cited for "rebellion" and for "insulting a public official during the course of his duties ("outrage" in French).[136] The Supreme Court upheld the lower Court's decision by affirming that it was hard to prove exactly what was said, and that regardless, the law protected the woman's tirade[137] under Articles 10 and 11 of the Universal Declaration of Human Rights, which grants citizens freedom of expression.[138] Arguably, with this case, the Supreme Court demonstrated its stance that allegations of racism are hard to prove as it becomes difficult to prove who said what, once again refusing to address the problem of race based encounters as they relate to the law.

A second case involves the practice of "situation testing."[139] In this case, SOS Racisme, an anti-racism watch group, sent various couples to nightclubs to see which ones would be granted admission and which ones would be turned away.[140] A trial court found the bouncers and club owners guilty of discrimination, but the judgment was reversed on appeal as the court found that the practice of "situation testing" was biased and not carried out by an impartial party.[141] The Supreme Court did not agree and ruled that "situation testing" was admissible evidence of racist practices because "there is no legal provision to exclude evidence merely because it was obtained in an illicit or unfair manner."[142] This ruling is relevant to the broader discussion of "délits de faciés" as it seems to put the burden of proof on the victims themselves. It appears that the government will hear evidence of racism and questionable practices, but it falls upon the populace to bring this evidence to light.

The third and final case involves the publication of a 2001 manual aimed to educate citizens as to their rights when confronted by the police. The book, "Vos Papiers: Que faire face à la police"

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133. Cour de cassation, chambre criminelle, N° de pourvoi 95-85149

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* The woman later claimed that she did not direct her words directly at the officer, but that she was merely commenting on the situation and addressing her sister who was nearby.

138. *Id.*

139. Individuals seeking to prove the discriminatory practices of an establishment create scenarios as evidence of racism. Situation testing usually targets housing and employment discrimination by repeatedly sending couples with identical credentials, differing only in terms of their ethnic background (one being white, the other not), to see which couple benefits from the most favorable reception.

140. Chambre criminelle [Cass. Crim.], June 11 , 2002, No. 131, at 482.

141. *Id.*

142. Chambre criminelle [Cass. Crim.], Sept. 12 2000, No. 99-87251.

(loosely translated as 'Your papers please: A guide to police encounters'), was written by a judge and published by a left wing judge's union.[143] In the introduction of the book, the author wrote that, "Police identity controls based on race, although illegal, are not only commonplace, they are multiplying rapidly."[144] Upon publication of the book, the Minister of the Interior took offense to the introductory comments and the author was convicted of defamation of the national police.[145] The conviction was later upheld by an appeals court.[146] Concerned about this violation of the right to freedom of expression,[147] especially when it came to criticizing police practices and racial profiling, the author sought redress from the Supreme Court.[148] Ultimately, the Court agreed that the conviction violated the freedom of expression and that because the incendiary phrase was only part of a "discussion of ideas" and not based on solid facts, the authors were free to express their opinion.[149] In short, the court reversed the defamation conviction because the authors were unable to show (with numbers) that the problem of racial profiling was really occurring, much less increasing. As such, the problem of racial profiling remained in the realm of "thoughts" and these were not enough to warrant a defamation conviction.

H. Scarcity of Cases

While the problem of police misconduct towards minority groups abound in anecdotal fashion, few cases figure in official court records, and even fewer are legitimized by court rulings in their favor. The Supreme Court has only heard a handful of cases involving racial profiling or "délits de faciés" on the part of the police. A cursory glimpse of the procedures involved in bringing such cases to light indicates a systemic denial of the problem.

There are two ways to file a complaint against police misconduct. While a formal criminal complaint can be brought to a court of law, these usually end up being classified as "sans suite" and dismissed by the prosecutor due to lack of evidence or because the complainant is considered "unreliable." The second method involves seeking civil damages from the courts,[150] but these are usually procedurally tedious, expensive, and require the complainant to have some knowledge of the law for a proper complaint to be filed.[151] The civil route has the advantage of keeping the victim

143. Syndicat de la Magistrature, Vos papiers, Que faire face à la police?, (3rd ed. 2004).
The book cover also depicted a cartoon figure of a police officer with features similar to that of a pig.

144. *Id.*

145. Court of Cassation (Criminal Division), 11 June 2002, no. 01-85.559.

146. *Id.*

147. The author cited Article 30 of the Law on the Freedom of the Press dating back to July 29, 1881.

148. Court of Cassation (Criminal Division), 17 June 2008, no. 07-80.767.

149. *Id.*

150. Code de procédure pénale, art. 85 (Fr.).

151. In short, the "action en partie civile" is a legal document sent via registered return receipt mail to a magistrate asking

apprised of their case as it progresses through the courts, a transparency that sometimes disappears with the closed dossiers of the criminal complaint.[152] Most of the time, victims of police violence rely on civil cases to seek redress because they can follow details of the case to its finality.[153] While the courts do offer some remedies, the problem lies with proving that the violation occurred in the first place, and the French government has yet to introduce impartial, independent mechanisms to deal with police misconduct in an effective manner.[154] When complaints are lodged against police entities by criminal defendants, cases are routinely dismissed by prosecutors "without cause" because of the claim that the defendant cannot prove the charge of racism. Defendants reporting police misconduct usually find themselves facing additional charges, such as "insulting a person vested with public authority" and "resisting arrest."[155]

France, it seems, cannot admit to the problem because it would then warrant a solution. This solution would have to be quantitative in nature (showing a reduction in the problem), and would require data collection that is currently considered illegal and in violation of the Constitution. Systemic eradication of the problem appears difficult precisely because expanding law to investigate such criminal actions would expand police powers to investigate and charge themselves. Again, this begs the question—where the courts are concerned in criminal matters, are they part of the police? This question outlines the difficulty in answering if France is walking the walk since the court seems largely unable to fashion the question about talking the talk.

VI. CONCLUSION

In 2009, France is a nation of some 64 million on a continental land mass of 211,000 square miles, a little smaller than the State of Texas.[156] The United States has about 307 million people on 3.79 million square miles.[157] Canada has a population around 33 million on geography of 3,851

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for resolution in a specific matter. The document will usually cite the section of the penal code that was violated, the damages incurred, and the sought compensation. Because the letter is sent directly to the judge asking for an explanation, the prosecutor cannot file it away as "sans suite." This lends a greater probability that the case will be heard, the facts debated, and eventually resolved.

152. Approximately 80 percent of the civil complaints involving police misconduct are closed because there are no grounds for further proceedings (Amnesty International, 2005). *Amnesty International. ÉFAI. Index AI: EUR 21/001/2005.*

153. The European Court on Human Rights has criticized French authorities for forcing defendants to sue civilly just to be informed as to the status of their case. An immediate case involved a young man who died while in police custody and the family was not kept abreast of the details of the investigation. The CEDH stated that in cases of death, the victim's family should be kept closely informed of police and judicial procedures. *Amnesty International. ÉFAI. Index AI: EUR 21/001/2005.*

154. *Amnesty International. ÉFAI. Index AI: EUR 21/001/2005.*

155. *Id.*

156. Central Intelligence Agency Factbook, https://www.cia.gov/library/publications/the-world-factbook/ (last visited August 20, 2010)

157. *Id.*

million square miles—the second largest nation in the world in geographic area.[158] Perhaps sheer geographic size and population density has a lot to do with how police do things, but perhaps not. In all these, nations the populations are vastly urban and suburbanized. It might be tempting to leap to a generalization that policing is different in heterogeneous urban areas with high concentrations of poor (and wealthy) minorities living in ghettoized conditions and small homogenous communities, but such a leap does not meet the facts in practice.

France has a national police system, as does Canada. In Canada, the further north, the less the proportion of whites and the more probable the communities are approaching parity in being non-white and/or immigrant or even predominately non-white. In France, the further away from the urban areas, the more likely one is to encounter virtually all Gallic white communities. In the United States, vast portions of the country are overwhelmingly white. Sadly, some states even have reputations as havens from encroaching minority hoards.

The status of being non-white in nations that see themselves as being historically white, while forgetting that whites were at one time immigrants, is ambivalent. Canada, perhaps because of the recognition that it needs more population to economically advance its vast interior, actively seeks immigration regardless of color. Modern Canadian legal policies and court decisions reflect an awareness of past abuses and that inevitable conflicts will occur as demographics change. Canada recognizes that true equality under the law must be actively ensured by the ultimate arbiter of law—the courts. The United States, as always, remains historically ambivalent about freedom meaning practical equality. In this vein, the last 20 years of American court decisions seem to be a retreat from hard won legal protections of minority status. Indeed, arguably, the United States Supreme Court is moving more toward a French model of racial absolute equality—if we do not look, problems are not there.

Two 2009 cases in Canadian and United States constitutional law, however, give food for thought about the future of law and racial profiling as a tacitly approved or specifically controlled police conduct. *Arizona v. Gant*[159] and *R. v. Grant*[160] offer some perspective about jurisprudential analysis based on philosophic perspectives of freedom. While neither was a checkpoint case, there are implications for checkpoint conduct in the future. In *Gant,* the facts involved an almost typical home arrest drug case by plainclothes drug officers. Race was not mentioned in the case. In *Gant*, the Supreme Court severely restricted *New York v. Belton* warrantless vehicle searches for officer safety subsequent to an arrest.[161] In its analysis, the Court specifically cited retired Justice

158. *Id.*

159. Arizona v. Gant, 129 S.Ct. 1710 (2009). This case was a little amazing with some very "strange bedfellows."

160. [2009] S.C.R. 32 (Can.).

161. Gant, 129 S.Ct. 1710; *see* New York v. Belton, 453 U.S. 454 (1981).

O'Connor's statement in *Thornton v. United States*[162] discussing the Belton Rule, which had evolved to give police incredible discretion to conduct car searches to protect themselves. Justice O'Connor stated that the ability to search a vehicle incident to arrest of a recent occupant is not a police entitlement.[163]

In contrast, in *Grant*, the Canadian Supreme Court immediately and specifically rejected any racial profiling issues.[164] The Canadian Supreme Court went on to discuss public policy considerations for its reversing in part and upholding in part what was almost an equally obvious plainclothes, albeit with a uniformed participant, drug operation.[165] Perhaps most disturbing about *Grant* is that it relatively quickly disposed of individual rights issues and went into the kind of balancing arguments about general societal good and police reality that the United States Supreme Court for too long has engaged in. The general tone of *Grant* seemed "procedural" rather than "substantive" rights analysis. It sounded almost like a product of the U.S. Supreme Court.

What these new cases mean is problematic. It is the totality of cases over a period of time that better indicate where a court is going to or coming from. It is axiomatic that those who study legal decisions are looking for trends. In thinking about trends, this study attempts to expand on an idea well known in social science: before concluding something, first reject the "null hypothesis" that nothing really has occurred. In this vein, ignoring racial profiling while attempting to develop balancing tests as if the law were an abstraction concerned only with abstractions of legal rights is ultimately destructive of an equitable freedom for all.

162. 541 U.S. 615, 624 (2004) (O'Connor, J., concurring in part).

163. *See* Gant, 129 S.Ct. at 1718.

164. [2009] S.C.R. 32.

165. *Id.*

NOTE

ELL EDUCATION IN ARIZONA: UNCONSTITUTIONAL SEGREGATION OR JUST INAPPROPRIATE?

Jasmine Wightman*

SUMMARY

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* Jasmine Wightman is a JD candidate at The University of Texas School of Law.

I. INTRODUCTION

The fight against segregation is not over. Today, Arizona students are inappropriately segregated based on language skills. Even if the intent is not segregative, grouping students based on language skills is inappropriate for the educational and social development of children. School districts should opt out of the current English Language Learner program and education advocates should work to change the laws. These students require special instruction in school in order to accomplish two goals concurrently. The first goal is for the student to acquire English listening, speaking, writing, and reading skills—all of which are important for functioning in American society. The second goal is to obtain the same education as other students, guided by state standards in specific subjects and involving the general experience of attending a public school in the United States. States have tried to balance these two goals through numerous special programs with varied levels of effectiveness.

Arizona has tried several different programs including bilingual education and, more recently, Structured English Immersion (SEI).[1] In 2000, a federal district court held in *Flores v. Arizona* that the state was not doing enough to educate English Language Learners (ELL).[2] As a result of this holding, as well as changing ideas in ELL education, the Arizona state legislature passed HB 2064 in 2006.[3] HB 2064 modified the current SEI law to require schools to teach English Language Learners in a four- hour instructional block based on each student's language proficiency level.[4] Schools with many English Language Learners responded to this legislation by separating English Language Students into different classrooms from their native English-speaking counterparts.[5] The effect of this "ability grouping" was, in many cases, racial segregation.[6]

The racial segregation resulting from HB 2064 is likely constitutional, unless the legislature or schools intentionally segregated students by race.[7] The United States Supreme Court, however, has the power to hold that the segregation is unconstitutional as applied in schools. Alternatively, the Court could hold that the four-hour provision in HB 2064 violates the Equal Education Opportunities Act passed by Congress in 1974.[8] In 2008, an Arizona district court, with 9th Circuit Court of Appeals affirming, held in *Flores v. Arizona* that HB 2064 did not constitute "appropriate

1. *See generally*, Ariz. Dep't of Educ. Office of English Language Acquisition Serv., http://www.ade.state.az.us/oelas/.
2. Flores v. Arizona, 172 F.Supp.2d 1225, 1238-39 (D. Ariz. 2000).
3. H.R. 2064, 57th Leg., 2nd Spec. Sess. (Ariz. 2006).
4. *Id.*
5. George Sanchez, *Sahaurita Rebuffs ELL Law*, ARIZ. DAILY STAR, May 24, 2008, at A1.
6. *Id.*
7. *See* Washington v. Davis, 426 U.S. 229 (1976) (holding that the 14th Amendment Equal Protection Clause requires both disparate impact and discriminatory intent).
8. Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f) (2000).

action" under the test distinguished by the 5th Circuit Court of Appeals in *Castaneda v. Pickard.*[9] The United States Supreme Court, however, overruled and remanded for a different fact-finding because the lower courts focused exclusively on funding, and many other changes had been made that might possibly satisfy the *Castaneda* test.[10] While HB 2064 and Arizona's negative treatment of English Language Learners extends beyond funding, there is no final conclusion on the appropriateness of the current program. Although the segregation is not likely to be the issue litigated in the future *Flores* decision, ultimately the ineffectiveness of the new model mandated by HB 2064 could undermine itself under the Equal Educational Opportunities Act.

However, resolving educational policy through the courts may not be the most effective way to solve the problems created by HB 2064. Litigation in education can be quite costly if the courts are allowed to set precedents that potentially harm and limit education. For example, the Supreme Court's holding in *San Antonio Independent School District v. Rodriguez* that the Constitution does not include a right to education is a setback for public school proponents.[11] Alternatives to litigation could include pressuring lawmakers to change the current law, expanding bilingual education, enhancing teacher training and accountability, and structuring state and federal funding for English Language Learner education.

II. ARIZONA'S BACKGROUND

A. Flores: 18 Years of Litigation and Still No Closure

Horne v. Flores began in 1992 when a group of English Language Learner (ELL) students in the Nogales Unified School District and their parents filed a class action suit against the state of Arizona alleging violations of the Equal Educational Opportunities Act of 1974 (EEOA).[12] The EEOA requires a state to take "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[13] Seventeen years later, the Supreme Court remanded *Horne v. Flores* to the lower courts to determine if Arizona was meeting the standards of the Equal Educational Opportunities Act because the Court concluded the lower courts focused too much on the issue of funding.[14] Eighteen years after the first *Flores* filing, the controversy continues, and lower courts will again need to determine what constitutes appropriate

9. Flores v. Arizona, 516 F.3d 1140, 1179 (9th Cir. 2008); Flores v. Arizona, 172 F. Supp.2d at 1239; *see* Castaneda v. Pickard, 648 F. 2d 989, 1009 (5th Cir. 1981).

10. Horne v. Flores, 129 S. Ct. 2579, 2595-2600 (2009).

11. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35 (1973).

12. Flores v. Arizona, 172 F. Supp.2d at 1225.

13. Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f) (2000).

14. Horne v. Flores, 129 S. Ct. 2579, 2598 (2009).

education for English Language Learners. Although *Flores* remains undecided, several bills that were passed to satisfy the district court's requirement for improved ELL education in Arizona, including HB 2064, remain in effect.

In 2000, during the first *Flores* decision, the district court held that Arizona was not doing enough to adequately fund education for ELL students and thus was violating the Equal Educational Opportunities Act.[15] The court found that the state's funding formula provided only $150 to pay for the estimated $617 in extra costs that the state's own studies determined were needed to pay for its English-learning program.[16] The district court used the Equal Educational Opportunities Act test articulated in *Castaneda v. Pickard* to determine that the state had failed to provide the "practices, resources, and personnel" necessary to implement its ELL program.[17]

The state reacted by passing legislation intending to comply with the court orders and the subsequent consent decree.[18] Proposition 203 created the current SEI Program used to teach English Language Learners and disallowed for any Spanish to be spoken in the classroom except under very limited circumstances.[19] House Bill 2010 attempted to rectify the funding issue in *Flores* by increasing the amount from $179 per ELL student to $340 per student and included additional funding increases for other areas such as teacher training and another cost study.[20] The original plaintiffs in *Flores* again challenged HB 2010 on the basis that the funding was still "arbitrary."[21] In January 2005, in response to the plaintiff's motion, the district court ordered the state to comply with its order by the end of the legislative session of face sanctions.[22] In December 2005, the Court imposed those financial penalties on the state in the form of daily fines ranging from $500,000 to $2 million.[23]

On March 2, 2006 the Arizona legislature passed House Bill 2064, which included a provision that increased funding for ELL students contingent on HB 2064 satisfying the district court's order.[24] The district court held that the bill did not satisfy the order. However, the 9th Circuit Court of Appeals vacated the assessment of fines and the rejection of HB 2064, and remanded for an evidentiary hearing.[25] After the district court again held that HB 2064 did not

15. *See* Flores v. Arizona, 172 F. Supp. 2d at 1238-39.
16. *See id.* at 1229.
17. *Id* at 1238 (citing Castaneda v. Pickard, 648 F.2d 989, 1009-101 (5th Cir. 1981)).
18. Proposition 203, as codified in ARIZ. REV. STAT. ANN. § 15-751(5) (2009).
19. *Id.*
20. H.R. 2010, 45th Leg., 2nd Spec. Sess. (Ariz. 2001).
21. Flores v. Arizona, 405 F.Supp.2d 1112, 1113 (D. Ariz. 2005).
22. *Id.*
23. *Id.* at 1120-1121.
24. H.R. 2064, 57th Leg., 2nd Spec. Sess. (Ariz. 2006).
25. Flores v. Rzeslawski, 204 Fed. App'x. 580, 582 (9th Cir. 2006), *rev'd,* 129 S. Ct. 2579 (2009).

satisfy the order, the bill became law on September 21, 2006 without the ELL funding increases.[26] The district court held that the state and HB 2064 failed to rectify the resource problem and that all of the changed circumstances since 2000 were not sufficient to warrant setting aside the district court's judgment under Rule 60(b)(5) (relief from judicial oversight where the judgment has been satisfied and the violation cured).[27] The 9th Circuit Court of Appeals affirmed the district court's judgment, and subsequently the United States Supreme Court granted certiorari.[28]

The Supreme Court found various problems with the prior litigation in the string of *Flores* court decisions. First, the Court held that the district court erred in entering statewide relief for a case that arose in Nogales.[29] The records were specific to Nogales' failure to provide Equal Educational Opportunities.[30] Petitioners had argued in earlier cases that a remedy specific to Nogales violated Arizona's constitutional requirement of equal school funding.[31] The Court held that unless the district court, on remand, concluded that Arizona was violating the EEOA statewide, the injunction would not extend beyond Nogales.[32] In his dissent, Justice Breyer, found the majority's declaration that the injunction was not statewide lacked legal support because no one had asked for that modification during oral arguments. [33] Scalia, who signed on with the majority, had even called the issue "water over the dam."[34]

Justice Samuel Alito, writing for the majority in a 5-4 opinion, held that the lower courts also erred by focusing on funding and failing to consider the changed circumstances since *Flores* first filed the suit in Nogales in 1992.[35] The Court held that lower courts should have applied a flexible standard and inquired broadly into whether the changed circumstances still constituted a violation of the EEOA.[36] The Court demanded that the district court examine important factual and legal changes, including the state's new methodology for teaching ELL students, the enactment of No Child Left Behind (NCLB), structural and management reforms in the Nogales School District, and an overall increase in education funding available in the school district.[37] The reforms in the district, as well as the increased funding, were specific to the Nogales School District, but the rest of

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26. Flores v. Arizona, 480 F. Supp. 2d 1157, 1165 (D.Ariz. 2007), *rev'd,* 129 S. Ct. 2579 (2009). *See* ARIZ. REV. STAT. Ann. § 15-752 (2009).

27. *Id* at 1165.

28. Flores v. Arizona, 516 F. 3d 1140 (9th Cir. 2008), *cert. granted,* 129 S. Ct. 893 (2009).

29. Horne v. Flores, 129 S. Ct. 2579, 2606 (2009).

30. *Id.*

31. *Id* at 2607.

32. *Id.*

33. *Id.* at 2630 (Breyer, J., dissenting).

34. *Id.*

35. Flores, 129 S. Ct. at 2595-96.

36. *Id.* at 2594.

37. *Id.* at 2621.

the test was to be applied statewide.[38]

The Court discussed Arizona's new SEI program instituted by Proposition 203 and indicated that research showed that it was more effective than bilingual education, citing Arizona's own Department of Education study and an *amicus curiae* brief from the American Unity Legal Defense Fund, an anti-immigration lobby group.[39] In the discussion of No Child Left Behind, the Court pointed out that compliance with the Act would not necessarily constitute "appropriate action" under EEOA.[40] Nevertheless, the Court held that NCLB could be probative to the changed circumstances through its increased assessment and reporting of ELL student achievement and its increase in funding for ELL students.[41] The Court held that the EEOA did not require any particular level of funding or even that the funding must come from a particular source and therefore, the lower courts had erred in looking exclusively at funding to determine if Arizona was in compliance with the EEOA.[42]

The four dissenters disagreed that the lower courts had focused exclusively on funding. Justice Stephen G. Breyer wrote in the dissent, "The lower courts did 'fairly consider' every change in circumstances that the parties called to their attention."[43] The dissenters also noted that the test for the EEOA under *Castaneda v. Pickard* included "necessary" financial resources.[44] The dissent stated that funding had always been the issue in *Flores* and cited the Department of Education's own website to show that the costs of educating ELL students, even under the SEI program, were very high.[45] The dissent quoted the district court's sentiment that it would be premature to hold that the SEI program's changes to ELL education fixed the problem.[46] The dissenters found the Nogales reforms resulted from the careful planning of the Nogales superintendent around an overly-restrictive budget and were not enough of a reason to end the injunction.[47] While noting that the majority was correct in stating that funding is merely a tool to achieve the EEOA's objective, the dissent noted that the state can violate the statute by failing to provide the necessary resources and personnel made possible by funding.[48] Additionally, according to the dissent, increased overall

38. *Id.*

39. *Id.* at 2601; *but see*, Holly Cashman, *Who Wins in Research on Bilingualism in an Anti-bilingual State?*, 27 J. of Multilingual and Multicultural Development 42 (2006) (arguing that the research on effectiveness of the SEI model over the bilingual model is inconclusive and has shown that both can be effective of ineffective based on substantially different factors).

40. *Id.* at 2621.

41. Flores, 129 S. Ct. at 2624.

42. *Id.* at 2605-06.

43. *Id.* at 2608 (Breyer, J. dissenting).

44. *Id.* (Breyer, J. dissenting).

45. *See id.* at 2614 (Breyer, J. dissenting).

46. *Id.* at 2622 (Breyer, J. dissenting).

47. *See* Flores, 129 S. Ct. at 2625 (Breyer, J. dissenting).

48. *Id.* at 2615.

funding did not necessarily mean that ELL students would see this funding for their specific needs, especially because much of the funding was unavailable for ELL purposes after two years, while most students in Nogales were in the ELL program for four to five years.[49]

The majority scrutinized many of the state actors under a federalism lens, holding that certain state officials could not bypass legislative appropriations through use of the federal courts.[50] The dissenters disagreed as to the objective of the state officials (including the governor and several legislators) who supported *Flores* and chastised the majority for the remanding and for the unnecessary burden of deciding what had already been decided—mainly, that Arizona was still violating the EEOA by failing to provide Arizona schools with the necessary funding for its ELL programs.[51]

Because the Supreme Court remanded the issue of EEOA compliance, Arizona's ELL program is still subject to scrutiny by a federal court. The federal district court now has the opportunity to scrutinize Arizona's ELL program as a whole to determine if the EEOA violation applies to Nogales or the state as a whole. The district court has already examined evidence once before showing Arizona's ELL students are not making adequate progress and this evidence was presented and decided on in earlier *Flores* decisions.[52] The court will have to determine if the inadequate progress is a result of the state's violation of the EEOA three-prong test put forth in *Castaneda*. The court will likely look at the educational theory behind SEI and then determine if it is being monitored correctly. Many of the relevant facts were examined in the earlier *Flores* cases, but must now be reviewed again. The new review will give the court an opportunity to look at the effect of HB 2064 and Proposition 203 with more current data. Although data on the effectiveness of the program is mixed and increasingly divergent, many facts still point to the conclusion that the current program is failing Arizona's ELL students in both its goals for language attainment, as well as for an appropriate general education.

B. The ELL Program Under HB 2064

While the issue in *Flores v. Arizona* of whether the current program is "appropriate" under the EEOA continues to be litigated, the programs adopted under Proposition 203 and HB 2064 continue to control what occurs in the ELL classroom. Arizona classrooms are still required by state law to utilize Structured English Immersion.[53] All instruction and instructional materials must

49. *Id.* at 2627.
50. *See id.* at 2593-95.
51. *See id.* at 2618-21.
52. *See* Flores, 405 F.Supp.2d 1112, 1115 (D. Ariz. 2005).
53. ARIZ. REV. STAT. ANN. § 15-751-756 (2009).

be English.[54] Under the program, ELL students must take the AZELLA (Arizona English Language Learner Assessment) to enter into and to exit the program.[55] Once in the program, students spend four hours of their school day focusing on English-language instruction.[56] For these four hours, and often for the entire day, these students are separated by their proficiency into skill level classrooms.[57] The teachers are supposed to utilize Structured English Immersion (SEI), an English-only form of instruction involving various techniques. This program is not intended to exceed one year.[58] However, in the first year of implementation less than 40% of students exited the program.[59]

III. CONSTITUTIONAL SEGREGATION

When HB 2064 was first introduced into the classrooms, many teachers complained about segregation and some believed that what the state was doing was unconstitutional.[60] Arizona State Superintendent, Tom Horne, defended the bill against these allegations by citing *Castaneda v. Pickard*.[61] *Castaneda,* however, is a 5th Circuit Court of Appeals decision that is not binding on the state of Arizona.[62] The Supreme Court held in *Brown v. Board of Education* that segregating students in schools on the basis of race is unconstitutional.[63] Although subsequent opinions by the Supreme Court have upheld *de facto* segregation when the intention was not segregation, but a legitimate government goal, the Court has not yet explicitly ruled on the constitutionality of *de facto* segregation in schools.[64] Arizona has a legitimate governmental interest in creating a program that effectively teaches ELL students English in the shortest time possible, however, our country has an interest in equal educational opportunities for all students. Still, the court has the power to create

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54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. ARIZ. REV. STAT. ANN. §15-756.0 (2009).

59. *See* Press Release, Ariz. Dep't of Educ., Horne Announces Drastic Increase in Learning in Districts that Implemented ELL Models One Year Early (July 28, 2008), http://www.ade.state.az.us/pio/Press-Releases/2008/pr08-28-08.pdf. The number is likely considerably less than 40% since it was reported that even in the most successful district using this program, only 38% of students advanced to a different level of proficiency. Statewide numbers for exiting the program were not available at the time of publication.

60. Author's Personal Experience. Jasmine Wightman was a first grade teacher in an ELL segregated classroom in 2007-2008 in Glendale Elementary School District. Glendale Elementary was one of the first districts to implement the program prescribed by HB 2064.

61. Ariz. Dep't of Educ., Office of English Acquisition Serv., Administrator's Model Implementation Training (June 4, 2009), http://www.ade.state.az.us/oelas/.

62. *See* Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).

63. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

64. *De facto* segregation is segregation caused by the facts of the situation. *De jure* segregation is segregation created by law.

negative precedent and is not always the strongest protector of education.

A. Brown v. Board of Education

Brown v. Board of Education was a landmark decision that held *de jure* segregation of students in public schools violated their Fourteenth Amendment right to equal protection under the laws.[65] Previously, in 1896, the Supreme Court had held in *Plessy v. Ferguson* that "separate but equal" facilities were constitutionally permissible.[66] In Topeka, Kansas, under the protection of an 1897 law, school districts had maintained separate school facilities for black and white students.[67] When a black student and her family (along with lawyers from the NAACP) sued the school district, the district court held under *Plessy* that the schools were substantially equal and therefore, there was no violation of the law.[68] The Supreme Court granted certiorari for *Brown* and consolidated five different cases with similar protests against school segregation.[69] The Court held that segregation in public schools solely on the basis of race deprived black children of equal educational opportunities, which amounted to a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment.[70] The Court also held that the "separate but equal" doctrine was inadequate protection of a student's Fourteenth Amendment rights because "separate educational facilities are inherently unequal."[71] In the majority opinion, Chief Justice Earl Warren discussed the detrimental effect segregation had upon the minority students as it created a "feeling of inferiority as to their status . . . in a way unlikely ever to be undone."[72] In this unanimous opinion, Warren held that education "is a right which must be available to all on equal terms."[73]

Initially, *Brown* seems to compel the holding that the placement of ELL students into separate classrooms is "inherently unequal" and does not provide ELL students an education on equal terms, thus violating the Constitution. Even under the *Plessy* standard, the classrooms are unequal. In the non-ELL classroom, students are able to study a variety of subjects, including the state-mandated curriculum for science, social studies, fine arts, and physical education. In the ELL classroom, because of the four-hour mandate, there is little time left to study any of these subjects. Additionally, in many schools, the ELL teachers are not the most qualified teachers, but those who

65. Brown, 347 U.S. at 493.

66. Plessy v. Ferguson, 163 U.S. 537, 542 (1896).

67. Brown, 347 U.S. at 486 n.1.

68. *Id.*

69. *See id.* at 483. The Supreme Court consolidated Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951); Briggs v. Elliot, 342 U.S. 350 (1952). Davis v. County Sch. Bd. of Prince Edward County, 103 F. Supp. 337 (1952). Gebhart v. Belton, 91 A.2d 137 (Del. 1952), Bolling v. Sharpe, 347 U.S. 497 (1954).

70. *Id.* at 495.

71. *Id.*

72. *Id.* at 494.

73. *Id.* at 493.

ranked too low in their school to get their choice of regular classrooms.[74]

B. Legal Segregation

Brown and *Plessy,* however, are not dispositive of HB 2064 because subsequent litigation has held that the unconstitutionality of segregation is limited to laws with segregative intent.[75] *Washington v. Davis* was one of the first cases where the Supreme Court held that *de facto* segregation was constitutional if the government had a legitimate, nonsegregative intent.[76] In *Washington v. Davis*, the petitioners sued the police department after failing a test and being turned down for employment.[77] Although African Americans disproportionately failed the test, the petitioners failed to show that the police department had a discriminatory motive in implementing the test.[78] The Court held that "an official action will not be held unconstitutional solely because it has a racially disproportionate impact."[79] While disproportionate impact is relevant, it does not trigger the strict scrutiny standard of examination, and in this case, the positive relationship between the test and the officer's performance was sufficient to validate the test. [80]

The Supreme Court's holding in *Washington v. Davis* substantially affected subsequent litigation involving segregation claims. The Court has not held that disproportionate impact in schools where there is no segregative intent is constitutional, but it has come close in its dicta. In *Keyes v. School Dist. No. 1,* the Court held that the finding of intentionally segregative school board actions in one part of the district created a prima facie case against other portions of the district and shifted the burden to the school district to prove that the other segregated schools were not the result of intentional segregation by the state.[81] The Court held actions in any degree motivated by segregative intent with segregation resulting from those actions were intentional, regardless of how long ago that intent had been created, or as the Court referred to it, "fact of remoteness in time."[82] The Court's dicta about how the lower courts on remand might search for segregative intent when determining the constitutionality of the other parts of the district implies that *de facto* segregation in

74. Author's Personal Experience. The principal at the Arizona elementary school had a few strong teachers volunteer to teach the ELL students but the other ELL classrooms were assigned based on lack of seniority. For example, the most experienced teachers in the first grade at this school taught the non-ELL classes. These teachers were not ill- intentioned, but just wanted to teach a normal first grade schedule without the confines of the four-hour mandate and the additional challenges of having to obtain high test scores and achievement in all subjects, while only having time to teach English.

75. *See* Washington v. Davis, 426 U.S. 229 (1976).

76. Washington v. Davis, 426 U.S. 229, 247 (1976).

77. *Id.*at 232-34.

78. *Id.* at 245

79. *Id.* at 239.

80. *Id.* at 250-51.

81. Keyes v. School District No. 1, 413 U.S. 189, 208 (1973).

82. *Id.* at 210-11.

schools may be constitutionally permissible if the state and school actors held no segregative intent.[83] However, since segregative intent was found, the Court did not explicitly uphold *de facto* segregation in schools as constitutional. [84]

C. The Castaneda Effect

In *Castaneda,* Mexican-American children and their parents sued the Raymondville Independent School District (RISD) in Raymondville, Texas, alleging racial discrimination in the education of the English Language Learners through inadequate bilingual education and ability grouping.[85] The district court found that the school district did not violate the Fourteenth Amendment equal rights of the student, the Equal Educational Opportunities Act, or Title VI.[86] On appeal, the 5th Circuit Court of Appeals held that the district court failed to take into account RISD's past discrimination, including the fact that it had yet to become a unitary school system.[87] The court held that only a school which has achieved unitary status for a sufficient period of time is permitted to segregate students based on ability, even if the ability grouping has a disparate impact on the racial composition of the classrooms.[88]

Although the Court of Appeals remanded in *Castaneda* because the school district did not have unitary status, and therefore required much stricter scrutiny of the discrimination then the district court applied, the opinion set forth a rule that is currently being relied upon by Arizona to defend the constitutionality of HB 2064.[89] Arizona State Superintendent Tom Horne, in defense of HB 2064, quoted authority from *Castaneda* on both the Arizona Department of Education website and through press releases defending the law against critics.[90] *Castaneda*'s most useful holding is "as a general rule, school systems are free to employ ability grouping, even when such a policy has a segregative effect, so long, of course, as such practice is genuinely motivated by educational concerns and not discriminatory motives."[91] The Court of Appeals held that in order to assert a claim based on unconstitutional racial discrimination, a party must not only prove disparate impact,

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83. *Id.* at 232-33.

84. *See generally, id.*

85. Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).

86. *Id.*

87. *Id.* at 994-94.

88. *Id.* at 994. Unitary Status means the school system has eliminated the prior racially discriminated school system. RISD had previously operated a "Mexican School" and an "American School" before a court ordered the schools desegregated. *Id.* at 996 n.3.

89. *Id.* at 1015.

90. Administrator's Model Implementation Training, *supra* note 63. *See also* Tom Horne, *ELL costs are a matter of perspective*, ARIZ. CAPITOL TIMES, March 28, 2008, http://www.ade.state.az.us/administration/superintendent/articles/ELLCostsMatterofPerspective.pdf.

91. Castaneda, 648 F.2d at 996.

but also that the state actor intended to treat similarly situated persons differently on the basis of race.[92] However, a point of *Castaneda* not cited by Horne is that a program's segregation should be minimized to the greatest extent possible, should integrate the students into the regular classroom as soon as possible, and should not result in segregation that would "permeate all areas of the curriculum or all grade levels."[93] HB 2064 fails to meet all three of those requirements since students are in segregated classrooms for the entire day, many of the students do not exit the program for several years, and there are certainly ways to minimize the extent of the *de facto* segregation.

Although only a 5th Circuit Court of Appeals decision, in education, *Castaneda* is treated as the current precedent on the interpretation of the Equal Educational Opportunities Act, and many states use the test to evaluate ELL programs.[94] The Supreme Court in *Flores* relied on *Castaneda's* three-prong test to interpret Arizona's ELL program under the EEOA framework.[95] Whether or not *Castaneda's* language ability grouping standard of review will be adopted by the Supreme Court is still unclear, but other cases, including *Keyes* and *Washington v. Davis* suggest that the court will not find discrimination if it does not find discriminatory intent. If the Supreme Court adopted *Castaneda's* holding that the segregation should not permeate to all areas of the curriculum or all grade levels, the Court might also hold that Arizona's ELL program retains students for far too long and in a far too restrictive atmosphere. Additionally, as discussed in further detail below, the Supreme Court might hold that Arizona's current program fails *Castaneda's* three-prong test for appropriateness under the EEOA, even if it does not fail the standards set forth for segregation caused by ability grouping.

D. The Constitutionality of HB 2064

The Supreme Court, however, has not explicitly held that segregative intent is necessary to overturn a school's *de facto* segregation. Much of the dicta in *Brown* refers to specific differences in a school setting and the harm that segregation may bring to children through feelings of inferiority.[96] Because of the special needs of school children, the Court might hold that even *de facto* segregation in schools should be disallowed. Under the current makeup of the court, however, that holding is highly unlikely. In *Parents Involved in Community Schools v. Seattle School District No. 1,* the Supreme Court prohibited assigning students to public schools for the purpose of achieving racial integration.[97] Although the Seattle school district had assigned students to schools

92. *Id.*
93. *Id.* at 1000.
94. *E.g.,* Horne v. Flores, 129 S. Ct. at 2580.
95. *Id.*
96. Brown, 347 U.S. 494.
97. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747-48 (2007).

based on race, it was doing so to create a balance among the city's high schools, and therefore avoided any notion of segregated schools by *de facto* discrimination.[98] In a 5-4 opinion, the majority found that Seattle School District's use of race in school admissions was unconstitutional under the Fourteenth Amendment's Equal Protection Clause.[99] Although *Seattle School District* involves a state actor defending *de jure* segregation, the Court's holding reflects its potential hesitancy in protecting students from *de facto* segregation under protection of law.

More recently in *Ricci v. Destefano,* the Supreme Court concluded that the city of New Haven, Connecticut erred in throwing out a firefighter's management promotion test because it had a disparate impact on the minorities.[100] The Court held that the city intentionally discriminated against the white firefighters by throwing out the test and thus violated the Civil Rights Act of 1964, 42 USC 2000e.[101] *Ricci v. Destefano,* decided in June 2009, was a 5-4 decision exemplifying the division in the court between those who hold that facially neutral actions are not discriminatory (Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Kennedy) and those who would carefully scrutinize claims based on disparate impact (Justices Ginsberg, Souter, Stevens, and Bryer).[102] Although Stevens has since been replaced by Justice Sotomayer, her own decision when this case was presented before her in the Court of Appeals held for the city, which permits an assumption that she would hold disparate impact in its context to be discrimination even if facially neutral.[103] Her replacement of Justice Stevens seems to assure that the court will continue to be divided on the issue of *de facto* discrimination.

Education is a different context than employment and many valid arguments exist for not allowing *de facto* segregation in education while still allowing it in employment. *Brown* pointed out the susceptibility of students to feeling of inferiority, in Arizona ELL students are subject to those same feelings. Also, the educational opportunities are not equal between the different classes, and students in the ELL classrooms are missing out on significant portions of their general education while they work for several years just to exit the program.

But should we trust the Supreme Court to rectify this issue? The Court has already used *Castaneda* selectively in *Flores.* The same majority in *Flores* (Alito, Roberts, Scalia, Kennedy, and Thomas) is likely to be the majority that will maintain the *Castaneda* segregative intent standard. The dissenters will likely continue to argue for protection of minority groups, but with the Court's current makeup, the arguments for protecting ELL students will probably fail to persuade more than four Justices. If the majority explicitly ruled that segregation without segregative intent was

98. *Id.* at 712.
99. *Id.* at 748,
100. Ricci v. Destefano, 129 S.Ct. 2658 , 2673-74(2009).
101. *Id.*
102. *See generally, id.*
103. *See* Ricci v. Destefano, 530 F.3d 87 (2nd Cir. 2008), vacated by Ricci v. Destefano, 129 S.Ct. 2658 (2009).

permissible in schools, schools officials might feel some sort of protection from enacting programs that had a discriminatory effect even if a small part of their intent involved racism or animosity towards immigrants. Additionally, some officials might not enact programs that foster diversity or make diversity a priority for their school. Both possible side effects from a Supreme Court decision on this issue have a detrimental affect not just on ELL students, but on all children in public school systems.

V. HB 2064 AND THE EQUAL EDUCATIONAL OPPORTUNITIES ACT

The next round in the *Flores* litigation requires the federal district court to determine if Arizona is violating the Equal Education Opportunities Act on a statewide basis. The Supreme Court has remanded the issue with clear directions that the court may not focus solely on funding. Hopefully, this means that the court will fully evaluate the state-mandated program under *Castaneda's* three-prong test. If the court asseses the program as a whole, it should look at the Structured English Immersion model, including the requirement that all material is presented in English, the sufficiency of the AZELLA test for providing evidence of program success, the effectiveness of the four-hour block, and the effectiveness of the program as whole in exiting at least a majority of its students in under a year as the program prescribes. If the district court fully evaluates these factors under *Castaneda's* three-prong test, the current model will likely be held as a violation of the Equal Educational Opportunities Act. The current data on the program, however, may be insufficient to accurately judge the program since the research behind the program and its stated success rate are questionable. Nevertheless, it is clear that these students are being segregated and are not receiving the necessary education that other students of the same grade are receiving. Arizona's current ELL program hurts student learning through its inappropriateness and through the constitutional segregation, which for most students will undoubtedly last more than one year.

A. The Three-Prong Test

Although it is unlikely that a court following *Castaneda* would hold the segregative effect of HB 2064 unconstitutional, *Castaneda* possibly provides another framework for declaring Arizona's current program illegal. Currently, the petitioners in *Flores* seek to declare Arizona's current program illegal under the EEOA using *Castaneda's* three-prong test.[104] Because of recent changes enacted by HB 2064, the federal district court has not yet examined many of the changes that have been created by HB 2064 and, although it is not clear academic test scores will show results, it is clear that many in the education field consider the program inadequate.

104. *See* Brief for Plaintiffs-Appellees at 22, Flores v. Arizona, 557 F.3d 1014, (9th Circ. 2007) (Nos. 07-15603, 07-15605).

The *Castaneda* three-prong test is a data-driven test. The first prong of the *Castaneda* test requires the program to be based in sound educational theory.[105] The state can likely come up with some research that supports the program but may not be able to justify all of the components because so many education theories exist and yet conflict in ELL education. The second prong asks whether the programs and practices actually used by the school system are reasonably calculated to effectively implement the educational theory.[106] The third prong specifies that the program must produce results that students are overcoming language barriers.[107] Unfortunately for students, the third prong, the "effectiveness prong," requires data and such data may or may not be accurately recorded. It may take years to have enough data to prove a program is inadequate and does not constitute appropriation action under the EEOA. However, petitioners may be able to show that Arizona's Structured English Immersion program as implemented is not in tune with the sound educational theory, especially the four-hour instructional unit and the segregation elements. Additionally, emerging data does not show that the majority of students are exiting the program in one-year as the program specified would happen with increased student proficiency and this violates both the second and third prongs of the *Castaneda* test.

B. Assessment and Data

Arizona's current test for acquisition and proficiency of the English language is determined by a test called AZELLA.[108] The test consists of four main parts: speaking, listening, writing, and reading.[109] After taking the test, students are rated one of five different levels of proficiency: pre-emergent, emergent, basic, intermediate, and proficient.[110] According to AZELLA test scores from 2006-2007, 55% of English language students in Arizona remained at the same proficiency level and an additional 8% reduced their proficiency.[111] The validity of this assessment, however, has been called into question.[112] The Supreme Court dissenters in *Flores* discussed the validity of the test and challenged the optimistic improvement in the number of ELL students completing the program; the assessment was "significantly less 'rigorous'" than necessary to examine the systems effect on English proficiency.[113]

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105. Castaneda, 648 F.2d at 1009.

106. *Id.* at 2010.

107. *See id.*

108. ARIZ. DEP'T OF EDUC., AZELLA TECHNICAL MANUAL 5-6 (Harcourt Assessment, Inc. 2007).

109. *Id.* at vii.

110. *Id.* at 4.

111. STATE OF ARIZ. OFFICE OF AUDITOR GENERAL, BASELINE STUDY OF ENGLISH LANGUAGE LEARNER PROGRAMS AND DATA FISCAL YEAR 2007, at 17 (2008), *available at* http://www.auditorgen.state.az.us/Reports/School_Districts/Statewide/2008_April/ELL_Baseline_Report.pdf.

112. *Id.* at 24-25.

113. Horne 129 S. Ct. at 2623. (Breyer, J., dissenting).

Most recently the Department of Education adopted a new test, the AZELLA 2. Students will first take the test in 2010.[114] Interestingly, the new litigation, as mandated by the Supreme Court in *Flores*, will consider data provided by either a never before used exam or the previous flawed exam to determine whether or not ELL students are acquiring English. Understandably, a perfect test for the acquisition of English may not exist, but because the test determines student placement into segregated classes with four hours of instruction solely on English, the validity of the test is incredibly important.

C. General Education Opportunities

The four-hour schedule does not leave time to adequately study other subjects and thus, prevents the ELL students from obtaining the same general education as other students. Arizona state law mandates that students between the ages of six and sixteen should be instructed in reading, grammar, math, social studies, and science.[115] Schools should also include character education, physical education, and fine arts in their curriculum.[116] Additionally, schools may need to provide sexual education, stranger danger instruction, and alcohol and drug danger instruction.[117] The law also permits schools to make a variety of other electives available, making the total possibility for educational opportunities vast and immeasurable.[118]

All of these educational opportunities are supposed to fit in a school year, although obviously, they need not all be on the same day. Arizona school days generally last from 8:00 a.m. to 3:00 p.m. and are required to include at least 346 instructional hours, but these instructional hours may not include lunches, breaks, and recesses.[119] Estimating an hour and a half for lunches, breaks, and recesses, the teacher has five and half hours to accomplish instruction, of which four must be English language instruction, leaving only one and half hours for the rest of the curriculum including math, science, physical education, and fine arts.

The ELL model of HB 2064 and Proposition 203 fails to address the issues of ELL access to grade level equivalent academic content.[120] Under *Castaneda*, an ELL Program can take away from other subjects, but only if the program includes a plan for students to catch-up to other students on their grade level, either by implementing the learning program and a catch-up program sequentially or by implementing a program designed to keep the students on grade level in other

114. ARIZ. DEP'T OF EDUC., *supra* note 1, at 7.

115. ARIZ. REV. STAT. ANN. § 15-802 (2009).

116. ARIZ. REV. STAT. ANN. § 15-719 (2009); ARIZ. ADMIN. CODE §7-2-302 (2009).

117. ARIZ. REV. STAT. ANN. § 15-711-712 (2009).

118. ARIZ. REV. STAT. ANN. § 15-705 (2009).

119. ARIZ. REV. STAT. ANN. § 15-901 (2009).

120. Letter from Jill Kerpa Mora, Professor Emerita, San Diego State University, to AZBLE Listserv (2009), http://www.tucsontawl.org/Tucson%20TAWL/Arizona%20ELD%20critique.html.

content areas at the same time as they are learning English.[121] Arizona law currently provides neither of *Castaneda's* requirements for keeping the student on grade level.

HB 2064 mandates that ELL instruction include 60 minutes on each of four topics: vocabulary, reading, writing, and grammar.[122] At the elementary level, the students' writing time may be split between writing and conversation. [123] Tom Horne, State Superintendent and self-pronounced supporter of HB 2064, believes that teachers should be able to combine these topics with other curricular topics.[124] Although teachers could be creative in many lessons and could combine some of these topics (i.e. science and grammar), Horne is setting forth an unrealistic expectation of teachers without providing any support. The time and subject restrictions also drastically limit the type of lessons that teachers can do in science and social studies, such as hands on experiments and educational videos. Many teachers choose to ignore or modify the four-hour block to best fit the needs of the student by combining other academic content.[125] Under the new four-hour block, the statute forces teachers to either violate the non-ELL schedule or the other academic requirements set forth in Arizona's Revised Statutes and Arizona's Administrative Code. Additionally, the new program deprives ELL students of an "appropriate education" because they are not provided with an adequate amount of the non-ELL academic content to keep them on grade level.

D. Lack of a Research-Based Model

The four-hour block may also cause a problem under the *Castaneda's* first prong of the EEOA test because the four-hour block is not research-based.[126] While research exists on the validity of the SEI model, the Arizona Department of Education does not list a single resource that supports the four-hour model or even the 60-minute blocks.[127] Additionally, not all educational minutes are equal; a teacher may spend 60 minutes on a dynamic integrated-content vocabulary assignment, while another teacher might spend 60 minutes on rote memorization of vocabulary, but the former is more effective and requires significantly less time.[128] The statute does not provide for

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121. *See Castaneda,* 648 F.2d at 1011.

122. Ariz. Dep't of Educ., Office of English Acquisition Serv., *supra* note 63.

123. *Id.*

124. Press Release, Ariz. Dep't of Educ., *supra* note 61.

125. Personal Experience, *supra* note 62. *See also*, Rhonda Bodfield, *ELL Students' Class Time Isn't Great but It's Good Enough,* ARIZONA DAILY STAR, Aug. 30, 2008, at A1.

126. According to Deborah Short, researcher with the Center for Applied Linguistics, "The proposed four hours of instruction do not have a rigorous research basis. There are no experimental or quasi-experimental studies that show this type of instruction helps students learn." Mary Ann Zehr, *Arizona Still Grappling with Balance on Mandated ELL Instruction*, EDUC. WEEK, Sept. 3, 2008, at 14.

127. *See generally*, Arizona Department of Education, http://www.ade.state.az.us/.

128. Author's Personal Experience, *supra* 62. In addition to being a former teacher, Jasmine Wightman also holds a Masters Degree in Elementary Education.

effective time management, but instead sets a blanket time requirement. The four-hour block not only lacks educational research behind it, but it also lacks adequate guidance on best instructional practices.[129]

E. The One Year Requirement

The current ELL program fails both *Castaneda's* second prong for implementation and the third prong for program effectiveness if a majority of students fail to become proficient in one year. Expecting students to become proficient in English after completing one year of SEI without any further support is unreasonable by any standard. Even bill proponent, Arizona State Superintendent Tom Horne, questions whether English proficiency is achievable under the current ELL program. Horne, in an interview with a Tucson newspaper about when ELL student's standardized test scores would count under No Child Left Behind, said he was going to file suit in federal court against the federal government because it had agreed to give his students three years to learn English before their test scores would count.[130] Horne said that he believed it was possible for students to become proficient in English after their first year, but contradicted that statement when he told the reporter, "No person with common sense can believe a person can come here from Mexico and pass the AIMS test in three years."[131] Horne is either ignoring the fact that it is unlikely that a student is proficient in English if he cannot pass AIMS or admitting that it is likely that a student is not proficient in English after the first year of instruction.

Experts vary on how long it takes to acquire a language, but most believe that proficiency in language acquisition requires several years.[132] In a national study by Thomas and Collier of over 2,000 ELL students, the researchers found that children take four to ten years to acquire a language.[133] Children who first began ELL lessons between ages 8 and 11 generally took five to seven years and children younger than age 8 took seven to ten years to gain English proficiency.[134] The study hypothesized that the difference in years taken to acquire the language between the children older than 8 and the children younger than 8 was that the younger group did not receive

129. *Id.*

130. Jeff Commings, *Arizona disputes ELL test change: Feds give pupils only two years to learn English*, ARIZ. DAILY STAR, Aug. 30, 2006.

131. *Id.*

132. WAYNE THOMAS & VIRGINIA COLLIER, SCHOOL EFFECTIVENESS OF LANGUAGE MINORITY STUDENTS 32, 33 (National Clearinghouse for Bilingual Education)(2007). *See also* D. MITCHELL,T. DESTINO, & R. KARAM, EVALUATION OF ENGLISH LANGUAGE DEVELOPMENT PROGRAMS IN THE SANTA ANA UNIFIED SCHOOL DISTRICT (University of California, Riverside: California Educational Research Cooperative (1997); KENJI HAKUTA, HOW LONG DOES IT TAKE ENGLISH LEARNERS TO ATTAIN PROFICIENCY? (University of California Linguistic Minority Research Institute, UC Berkley) (2000).

133. WAYNE THOMAS & VIRGINIA COLLIER, SCHOOL EFFECTIVENESS OF LANGUAGE MINORITY STUDENTS 36 (National Clearinghouse for Bilingual Education)(2007).

134. *Id.* at 33.

schooling in their primary language prior to coming to the United States and learning English.[135]

The researchers also compared different types of ELL programs and their effect had on students. They found that in all English language development programs in the early grades, the students gained dramatically, regardless of what type of services they received. This dramatic gain misleads teachers and administrators into exiting students from their respective programs.[136] Once students exit the program and cease receiving additional help, schoolwork becomes more complex and the small gaps widen as these children start to fall behind.[137] The researchers ultimately concluded that academic and cognitive development in the students' primary language is a key predictor of their academic and cognitive success in their secondary language.[138] The study reported that while there is not necessarily a way to speed up the process of language acquisition, a well-implemented bilingual program allowed students to sustain their gains without the problem of the ever-growing achievement gap.[139] The study also reported that a bilingual program had no negative affect on a native English speaker's development of English since English was used in so many non-academic contexts.[140] In the bilingual programs, native English speakers also took four to years to acquire a second language. [141]

F. Funding

Early courts in *Flores* concluded that the necessary funding for ELL programs is not being made available to the schools.[142] The State Board of Education has computed how much funding is necessary, but that number is far more than the schools actually receive.[143] Even in a ranking of general student funding and a nationwide comparison of expenditures per pupil, at rank 50, Arizona falls far behind other states (almost $3000 less per pupil than the national average).[144] The result of this funding deficit is a lack of necessary resources to properly implement any ELL educational program.

Although funding is not the only measure of appropriate education of ELL students, a lack

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135. *Id.*

136. *Id.* at 34.

137. *Id.* The average ELL acquires 6-8 months learning for every 10 months of learning by a non ELL and this gap widens with each advancing year.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Flores v. Arizona, 172 F. Supp.2d 1225 (D. Ariz. 2000).

143. Flores v. Arizona, 172 F. Supp.2d 1255, 1229-30 (D. Ariz. 2000).

144. Hajime Mitani, *Per Pupil Expenditures Approaching $10,000,* EPE RESEARCH CENTER, January 21, 2009, http://www.edweek.org/rc/articles/2009/01/21/sow0121.h27.html.

of funding may show that the ELL program does not have the resources to be implemented as prescribed by the research and can decrease the effectiveness of the ELL program. Arizona State Superintendent Tom Horne estimates that HB 2064 will cost less than 20 million dollars.[145] School officials, however, contend that the separate classes will cost more than $270 million.[146] In 2008, the Arizona State Senate approved $40.6 million to fund the ELL instruction.[147] This discrepancy in funding estimates is further evidence of the shortage of research on what exactly constitutes adherence to the program. However, school officials are more likely to know what changes are necessary within each individual school in order to comply, and although their estimate may be drastically higher, it reflects the fact that school officials do not believe they are receiving enough funds to implement the program and are possibly not implementing the program as prescribed unless given adequate funding. Under *Castaneda's* second prong, that the implementation must be as the theory prescribed, the current status of the ELL methodology behind HB 2064 fails.

G. Other Effectiveness Factors

The Thomas and Collier study is careful to point out that many other factors contribute to a student's academic success besides the type of program, including effective, well-trained teachers; professional development focusing on effective teaching strategies (e.g., cooperative learning, thematic lessons, multiple intelligences); socio-cultural sensitivity; and *meaningful interaction with native English speaking-peers*.[148] Arizona's current ELL education program is missing many of these factors. While teachers are required to be trained in SEI for 90 hours, many teachers are in the classroom on an emergency certification, or have come from other states and are working towards their training as they teach.[149] Additionally, funding is required to implement many of the effective teaching strategies, as well as to properly train teachers, but the state continues to underfund the program.

One of the most striking differences between Arizona's current program and the program recommended by the Thomas and Collier language study is the state program's lack of long-term focus.[150] After one year, under the state's current system, there is no support for ELL students after they have tested out of the program and have been labeled "proficient." One of the problems with this label is the that accuracy of the test deeming the students proficient has been called into

145. George Sanchez, *Sahaurita Rebuffs ELL Law*, ARIZ. DAILY STAR, May 24, 2008, at A1.

146. *Id.*

147. *Id.*

148. WAYNE THOMAS & VIRGINIA COLLIER, *supra* note 137, at 34, 50-51.

149. *See* REBECCA GAU, LOUANN BIERLEIN PALMER, ROB MELNICK, RICK HEFFERNON, IS THERE A TEACHER SHORTAGE?, *11-12* (Arizona State University: Morrison Institute for Public Policy) (2003); Ariz. Dep't of Educ., Office of English Acquisition Serv., Structured English Immersion (SEI) Fast Facts, (October 2009), http://www.ade.state.az.us/certification/downloads/SEIFacts.pdf.

150. WAYNE THOMAS & VIRGINIA COLLIER, *supra* note 135, at 46.

question, and there is not yet enough evidence on the effectiveness of the current test, the AZELLA 2. A larger problem, however, is that most students will not test out of this program in one year.[151] Many of these students will be in the program for several years. Horne's best evidence of success is that in schools that have used the current model, 38% of the students move to another proficiency level.[152] But there are five levels of proficiency before a student becomes proficient.[153] Horne did not provide the figures of the students that had been moved to proficiency, and at the time of publication, these figures were still not released. But even assuming that all 38% of students moved to full proficiency (which is not possible since at least a small portion of those students are in their first year of school in the United States, and thus at the lowest level), that means 62% of students did not move forward in one year.

At Glendale Elementary School District, the district reported that the number of students labeled proficient under the new model increased from 9% to 21%.[154] In Glendale, however, many changes occurred at the same time as the implementation of the new ELL program including a new superintendent, increased ELL funding, and new curriculum textbooks for all students.[155] In the year cited as a successful implementation of the program (2007-2008), teachers were not monitored for compliance with the four-hour schedule and many did not actually follow the mandate.[156] As the Glendale Elementary School District example shows, "success" statistics should be heavily scrutinized.

Also, because of the ineffectiveness of the assessment instrument, many students are labeled proficient before they are ready. The student may benefit, however, from an early exit from this segregated program even if there is no long-term support since the student will return to a nonsegregated classroom. ELL students should be immersed in an English-speaking classroom with native English speakers. The Thomas and Collier study emphasized that ELL success was increased when students interacted with native English-speaking students.[157] The purpose of this

151. *See also* Michael Guerrero, *Acquiring Academic English in One Year: An Unlikely Proposition for English Language Learners*, 39 URBAN EDUCATION 172 (2004). Michael Guerrero discusses the lack of merit in the assumption that students can learn English in one year. The premise is based on faulty research that younger students can acquire language earlier but it takes no account for the differences in native language that might be a variable in the time required to learn the language (languages with more similar linguistic features are picked up faster). Studies have actually shown that older students acquire the language in a more fully developed useful manner. Also other factors might contribute to the learning such as students adjusting to a new setting, learning disabilities, problems at home, prior schooling experience, and student's own skills in their native language. Additionally, acquisition of academic English varies depending on school subject so reclassification as proficient may not be all at subjects at once.

152. Press Release, Ariz. Dep't of Educ., *supra* note 61.

153. AZELLA Technical Manual, *supra* note 110 at 41.

154. Pat Kossan, *New Course for English Learners Off to Good Start*, ARIZONA REPUBLIC, August 29, 2008.

155. Author's Personal Experience, *supra* note 62. Author was a teacher in the Glendale Elementary School district in an ELL segregated classroom in the year of the cited success.

156. *Id.*

157. WAYNE THOMAS & VIRGINIA COLLIER, *supra* note 137 at 51.

immersion is so native English-speaking students can be language role models for ELL students. Through their socialization in and out of the classroom, as well as through teacher-planned collaboration, the students' academic and nonacademic conversations serve as teaching moments. HB 2064 creates classes where the students are not only segregated between English Language Learners and non-English Language Learners, but they are also segregated based on their ability. At one school in Glendale, Arizona, the students were divided into a pre-emergent/basic classroom, an emergent/intermediate classroom with Special Education ELL students, and an emergent/intermediate classroom without special needs students.[158] The result of this division was that often times the students spoke more Spanish between each other than they did English, whereas in a class with non-ELL students, the ELL students would be forced to communicate with the non-ELL students in English, thus enhancing their practice of the language.[159] In the early grades, the students in the classroom also often determined friendships outside the classroom.[160] At the Glendale elementary school, the result was a divided school between ELL and non-ELL students.[161] Although the divide was for "educational" purposes, the result was racial and cultural segregation. The segregation, through lack of meaningful language interaction with peers, also affects the effectiveness prong under *Castaneda.*

VI. RECOMMENDATIONS

A. Litigation

1. On the Constitutional Issue

As discussed earlier, a suit on the constitutionality of HB 2064 is likely to fail because the state can claim they did not have segregative intent, but instead had the legitimate government purpose of educating its ELL students. Many opponents of Proposition 203 and HB 2064 argue that much of this legislation stems from anti-immigrant sentiment and racism towards the growing Latino population in the state of Arizona.[162] This argument, while holding merit, will not be sufficient in the United States Supreme Court for two reasons. First, because the results of the law

158. Author's Personal Experience, *supra* note 62.

159. *Id.*

160. *Id.*

161. *Id.*

162. *See, e.g.*, Stephen Lawton, 2007 Education Law Association Annual Conference, *Flores, Proposition 203, and English Language Learners in Arizona,* November 2007, at 5, http://educationlaw.org/2007%20Conference/Papers/E4Lawton.pdf (contending the passing of Proposition 203 by the voters tapped into the "nascent concerns about high level of illegal immigration into the state from Mexico, the cost of education immigrant children, including those born as U.S. citizens to illegal immigrants, and the political initiative referred to as 'reconquista'—the notion that immigrant Hispanics are in the process of reclaiming territory that is rightfully theirs").

have only disparate impact with no segregative intent, the Court will not employ strict scrutiny.[163] Second, a court cannot use what lies in the minds of Arizonans and their legislators as evidence since there is no way to actually prove what people believe and the legislative record appears clean.

The Supreme Court could declare that the segregative intent standard does not apply in the school setting. *Brown* discussed many of the exceptional circumstances of schools— particularly the "feelings of inferiority" caused by segregation.[164] *Brown* said that education is "perhaps the most important function of state and local governments" and that it should be provided "to all on equal terms."[165] The Court has also found in affirmative action cases that schools have a particularly legitimate interest in diversity.[166] However, if this subject were brought to the attention of the current Supreme Court, the justices could potentially— and even more explicitly than in *Keyes v. Davis*[167]— hold that the disparate impact standard does apply to schools. This holding would solidify *Castaneda's* permissible segregation rule at the Supreme Court level and would lend legitimacy to school policy with a segregative effect. It might even lend legitimacy to actions created from segregative intent, such as further ability grouping or even the gerrymandering of school lines found to be questionable in *Keyes*, if the school could purport legitimate education reasons.

One of the most damaging cases for educational litigation came through a case involving equal opportunities in education. In *San Antonio Independent School District v. Rodriguez,* the Edgewood Parent Association attempted to increase funding in their low-income high minority district to be more comparable with the higher income districts through litigation.[168] The majority of the Supreme Court held that there was no federal constitutional right to education.[169] The majority ruled that because education was not expressly named in the U.S. Constitution, it did not merit protection as a "fundamental" right.[170] The Court's holding affirmed the lawfulness of gross inequality in public education, provided that such inequality is based upon class, rather than race.

Fortunately, most states, including Arizona, do provide a right to education in their state constitution.[171] Additional federal protections, such as the EEOA, require states to not discriminate against minority groups such as ELL students, and several statutes afford protection to disabled

163. *See* Washington v. Davis, 426 U.S. 229, 242 (1976), Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 234 (1973).
164. Brown, 378 U.S. at 493.
165. *Id.*
166. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319 (1978), Grutter v. Bollinger, 539 U.S. 306, 328 (2003).
167. *See* Keyes v. School District No. 1, 413 U.S. 189, 208 (1973).
168. Rodriguez, 411 U.S. at 75.
169. *Id.* at 35.
170. *Id.*
171. Ariz. Const. art XI, §6.

students.[172] However, *Rodriguez* set harmful precedent that the Supreme Court would not equalize education for all students. The decision is shameful because impoverished students need a quality education more than their middle class peers to overcome poverty.

2. On the EEOA

Taking legal action on the EEOA violation is much more potentially successful than any action on the basis of segregation. In *Flores,* it appeared that the Supreme Court accepted *Castaneda's* three-prong approach for evaluating what constitutes appropriate ELL education. The first prong of the test that requires states adopt a research-based program can likely be satisfied by studies from the Arizona Department of Education. Although many studies also show that other methods are more successful, the courts will likely defer to the legislature on this issue. *Castaneda* does not appear to require strict scrutiny of the first prong because the 5th Court of Appeals held that states are free to decide which program to use.[173] But, as discussed earlier, there are many reasons Arizona will fail the second prong (requiring accurate implementation of the program) and the third prong (requiring program effectiveness). Any litigation regarding the EEOA will require a substantial amount of data about the implementation and success of the HB 2064 mandates, however, since the program has only been implemented statewide since 2008, the amount of data will likely be too small to be conclusive.

The state could wait for emerging data before showing that Arizona can meet *Castaneda's* third prong. This approach is problematic. First, data collection and accuracy are problematic in Arizona.[174] Second, the courts could misunderstand and incorrectly apply the data. For example, Horne can show success in the reclassification of ELL students under the new approach. But this success should be limited by the fact that Arizona has not met its goal of exiting students out of the program. If the program is only supposed to last one year, the statistics should be cited as illustrating failure since less than 62% of the students are exiting the program, and at least 62% of the students are not making enough progress to increase one proficiency level.[175]

The use of emerging data also presents another problem. Arizona's ELL program was already very troubled prior to the HB 2064— any intervention is bound to create some success given the past low ELL success rates. In 2007, more than half of all ELL students attended programs that mainstreamed them into regular classrooms, but provided no hours of English-

172. *See* Equal Educational Opportunities Act, *supra* note 15. *See also*, Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (2000).

173. Castaneda, 648 F.2d at 995.

174. Press Release, Ariz. Dep't of Educ., *supra* note 61.

175. Press Release, Ariz. Dep't of Educ., *supra* note 61.

language instruction in a SEI setting.[176] Although HB 2064 is inappropriate, it is at least commendable in that it requires teachers to actively teach English. However, better methods for teaching language exist and such methods may not be applied if the current method is seen as "successful."

Litigation is also problematic because in order to be properly litigated, the petitioners should collect at least a few years of data. Once collected and the litigation process begins, it could take many months, if not years, for the parties to battle it out in court. In the meantime, Arizona ELL students are suffering under the segregation of this program and are falling further behind in other academic subjects.

3. Litigation as a Last Resort

Litigation can be harmful in education because it creates divisiveness among parties that should be working together. Litigation often pits parent groups or education special interest groups against school districts. In *Flores*, state officials were divided with some state senators resisting increased funding on one side, and on the other side, the governor and the petitioners arguing ELL funding was inadequate under the EEOA.[177] The *Flores* litigation also cost the state of Arizona millions of dollars in litigation.[178] The state should save its money by abstaining from litigation and using that saved money to aid underfunded schools and programs.

Litigation should only be used as a last resort. A better solution might be for the parties to come together and work out a compromise. Ideally, this compromise would change the law itself, but if not, then the parties could create some system of making the program less harmful to students by increased funding or other alternatives suitable to all parties. Several options for change exist that would improve the current program and allow it to pass *Castaneda's* three-prong test.

B. Change the Law

1. Bilingual Education, Immersion Classrooms, and the Four-Hour Format

Several studies are currently available that evaluate different types of ELL programs and their varying levels of success. [179] Opponents of bilingual education often argue bilingual education

176. STATE OF ARIZ., OFFICE OF AUDITOR GENERAL, *supra* note 113, at ii.

177. Flores, 129 S. Ct. at 2579.

178. *Id.*

179. For a discussion on the mixed results of studies comparing SEI and Bilingual, *See* Letter from Jill Kerpa Mora, *supra* note 123. *See also* Guerrero, *supra* note 155, at 192 (concluding "the answer to the effectiveness debate eludes the field").

hurts native English speakers and encourages ELL students to not learn English quickly.[180] Most studies, however, find that bilingual education is more effective than English-only programs, such as SEI. [181] Linguistics professor Dr. Stephen Krashan, in reviewing comparison studies between SEI and bilingual education, could not find a single study that favored the Structured English Immersion approach adopted by Arizona.[182] One study reviewed by Dr. Krashen showed bilingual education is even more effective in Arizona's specific context.[183] His study reported that use of native language enriched ELL understanding while learning new content on academic subjects.[184] One study by Thomas and Collier found that schools with higher academic achievement had eliminated most forms of ability grouping and tracking, as opposed to Arizona's classrooms which are segregated by language ability.[185] Thomas and Collier found that the program with the highest long-term academic success was the two-way bilingual program, in which all students, ELL and native English, participated.[186] Thomas also discusses the cost effectiveness of this method because school districts did not have to add on services and hire extra staff, as is needed in separate ELL instruction.[187]

Bilingual education, however, is only effective when schools have all the necessary resources. Unfortunately, in Arizona and other states, one resource that falls short is bilingual teachers. In Arizona, many teachers do not speak Spanish at a proficiency level adequate for teaching in bilingual education.[188] In *Castaneda*, the Court of Appeals found that the 100 hours of bilingual training required for bilingual teachers was likely inadequate, and remanded for the lower courts to determine.[189] Adequate bilingual training for teachers would require a more time-intensive training than Structured English Immersion because the teacher would have to be trained in Spanish speaking, as well as Spanish teaching. Because many teachers in Arizona are on emergency certification or come from other states, even if Arizona schools of education had an adequate training program for bilingual education, it is likely that a deficiency in the number of adequately

180. *See* Stephen Lawton, *supra* at note 166.

181. Stephen Krashen, Kellie Rolstad & Jeff MacSwan, Review of "Research Summary and Bibliography for Structured English Immersion Program," (2007), www.asu.edu/educ/sceed/azell/review.doc.

182. *Id.*

183. *Id.*

184. *Id.* at 2.

185. WAYNE THOMAS & VIRGINIA COLLIER, *supra* note 137, at 52.

186. *Id.*

187. *Id.*

188. The Arizona Department of Education does not currently collect and maintain information about the number of qualified ELL teachers under a bilingual or SEI program. A report published in 1993 by the US Department of Education indicated the majority of teachers serving Spanish-speaking students are not proficient in Spanish. Richard Figueroa & Eugene Garcia, *Issues in Testing Students from Culturally and Linguistically Diverse Backgrounds*, Multicultural Education, 1994. *See also*, STATE OF ARIZ., OFFICE OF AUDITOR GENERAL, *supra* note 113.

189. Castaneda, 648 F.2d at 1009.

trained bilingual teachers would still exist.[190]

Because of this deficiency in adequately trained teachers, bilingual education may not be a feasible option for Arizona. Instead, Arizona could continue in many ways to maintain a Structured English Immersion program, but include successful components of bilingual education such as using key words in the student's native language and culture to help them make connections with the content in English. This would require modification to the English only provisions of Proposition 203. In addition to a modified Structured English Immersion program, ELL students should receive additional time outside of the regular curriculum to acquire English. This could be achieved through after or before school programs or during pull-out of non-academic content time.

The four-hours required for English learning is not based on research and includes more time than necessary for direct instruction.[191] Changing the four-hour format to some sort of standards-based instruction with measurable assessments might prove just as effective and less time consuming. The four-hours of exclusive instruction in the school day could instead be an hour or two of direct instruction while the rest of the day utilizes Structured English Immersion strategies to reinforce the direct instruction. While Proposition 203 and HB 2064 are inadequate ELL programs, some ELL programs must still be in place to provide direct instruction whether it is bilingual education or additional assistance to ELL students outside of the regular curriculum. These new programs should not only be research based but also based on feasibility in Arizona.

2. Enhanced Teacher Training and Accountability

Structured English Immersion strategies are good strategies for all students. These strategies include wait time for student response, use of visualization tools, and accessing prior knowledge.[192] When teachers are trained, they are more effective at utilizing these skills. However, as noted above, many teachers are on emergency certification and have not yet been trained in SEI before they are put in a classroom with all ELL students.[193]

Currently, no statewide data exists as to how many of the state's teachers are qualified to teach SEI. While the district might collect information about teacher ELL qualifications, the 2008 Baseline study found that the Arizona Department of Education does not collect this data.[194] This data is crucial for the state to determine the effectiveness of its ELL program since SEI is the basis

190. *See* STATE OF ARIZONA, ARIZONA HIGHLY QUALIFIED TEACHER'S EQUITY PLAN (2006), www.ed.gov/programs/teacherqual/hqtplans/azep.doc.

191. *See* Stephen Krashen, Kellie Rolstad & Jeff MacSwan, *supra* note 185, at 6.

192. Author's Personal Experience, *supra* at 62.

193. *Id.* At one Glendale Elementary School, eight out of ten of the first grade teachers were working on their SEI training as they were teaching including the author.

194. *See* STATE OF ARIZ., OFFICE OF AUDITOR GENERAL, *supra* note 113, at iv.

of the educational theory of the program. Teachers also should be accountable to their actual use of the strategies. Under the current system, Arizona law requires for the evaluation and performance of certified teachers.[195] Arizona could strengthen its implementation of the SEI program by having state mandated observation, particularly for its ELL programs, which includes observation of SEI strategies. Both the actual use and training of the teachers in SEI are components of *Castaneda's* second prong requiring implementation true to the instructional theory.

3. Structured Funding

Arizona is currently very focused on the adequate funding of ELL students because of the ongoing litigation in *Flores*. Although this paper does not delve too deeply into whether or not ELL programs are adequately funded in Arizona, funding does correlate to the lack of success of ELL programs in Arizona's past and will correlate to the lack of success of any new program under the existing budget structure. Any programs implemented in lieu of the current 4-hour segregated mandate must be properly funded under the EEOA. Funding, while not solely a conclusive factor for effectiveness, must be researched and accounted for in any alternatives that the state may create for ELL education. This funding should be structured to successfully implement any new program and not be arbitrary or in dispute between the schools and the state.

4. Proper Data Collection

ELL programs under the EEOA must be evaluated as to their effectiveness.[196] Arizona law requires the Auditor General to review compliance with the ELL program requirements and to report on the overall effectiveness of the state's ELL program.[197] The Auditor General has held that management of the ELL program requires three main types of information: the number of ELL students, achievement outcomes, and student's time spent in the program.[198] The study found that this information was inaccurate and incomplete in 2008.[199] For example, because of a processing error, in July 2007 over 20,000 ELL students were excluded from the year's funding counts; the result was an $8 million funding error.[200] Superintendent Tom Horne was responsive to the study and resolved to make improvements, but no current information could be found on the status of these improvements.[201] In order to better gauge the adequacy of Arizona's Department of Education data collection system, the Arizona Auditor should conduct a yearly study on the data

195. ARIZ. REV. STAT. ANN. § 15-537 (2009).
196. Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f) (2000).
197. ARIZ. REV. STAT. ANN. § 15-756 (2009).
198. STATE OF ARIZ., OFFICE OF AUDITOR GENERAL, *supra* note 113, at iii.
199. *Id.*
200. *Id.* at iv.
201. *Id.*

collection by the Arizona Department of Education. In 2009, no such study was completed.

Additionally, data on ELL proficiency is collected and monitored on the basis of the AZELLA 2. The AZELLA 2 test for English proficiency is in its first year of use. In dicta by the Supreme Court, the previous version of the AZELLA examination was found to be insufficient. Since the assessment of program effectiveness is based on this measure, it is crucial that the measure be accurate. While this paper does not go into detail about the adequacy of AZELLA 2, any solution to Arizona's current ELL problems must include making sure that the AZELLA 2 adequately tests and reports the proficiency and improvement of ELL students.

C. Opt-Out

Many education professionals disagree with the educational methods of the new program and are appalled by the *de facto* segregation, but are reticent to violate the new law. In the first year of the program, a local newspaper reported that Sahuarita Independent School District had decided to ignore state orders to place middle and high school students in four-hour segregated classes.[202] Barbara Smith, Sahuarita's director of student services received advice form the Office of Civil Rights in Washington, D.C. not to follow the mandate because it was "discriminatory" and violated students' equal access to other classes and subjects needed for graduation.[203] State Superintendent Tom Horne questioned the validity of the federal advice and additionally stated to the reporters that any district in open defiance would be subject to possible consequences.[204] The school has since become compliant. [205]

Under the State Board of Education's supervision, many Arizona schools are able to be compliant with the law without creating segregated classrooms. In 2008, The Arizona Department of Education allowed both Tucson Unified School District and Sunnyside Unified School District to "make a good faith effort" towards compliance.[206] Superintendent Horne approved of their incompliance because the schools lacked the funding and resources in their particular districts to implement the program.[207] Horne believed that eventually the schools would be fully compliant, but both districts were hoping to continue to make the case that their current program was effective and should be continued.[208]

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202. George Sanchez, *Sahaurita Rebuffs ELL Law*, ARIZ. DAILY STAR, May 24, 2008, at A1.

203. *Id.*

204. *Id.*

205. Rhonda Bodfield, *ELL Students' Class Time Isn't Great but It's Good Enough,* ARIZONA DAILY STAR, Aug. 30, 2008, at A1.

206. Mary Bustamonte, *State, Schools Cut Deal on English Learners,* TUCSON CITIZEN, August 14, 2008.

207. *Id.*

208. *Id.*

The state also has a task force that can allow Arizona school districts to use customized alternatives to the standard four-hour segregated model.[209] In a meeting in May 2009, the state task force held that the "four hour requirement is non-negotiable," but the task force has allowed some districts to opt out of the segregated skill-based classes.[210] However, in a state task force meeting in 2009, the panel allowed three districts to go ahead with their alternative model.[211] Because of the inappropriateness of the current model, school districts in opposition to the segregated four-hour model should submit alternative proposals as a temporary solution until the law can be reformed at a higher level.

VII. CONCLUSION

HB 2064 is an ineffective remedy to Arizona's longstanding problem of inadequate ELL education. Students will not become proficient in one year of four-hour English instruction, but instead, will be subjected to several years of language instruction while their skills in other important educational areas fall behind. These ELL students are not receiving an equal educational experience, and teachers and schools know it. While the legislature and state superintendent may not be violating student's constitutional rights, they are violating the Equal Educational Opportunities Act. Ideally, the next district court proceeding in the *Flores* procession will look holistically at Arizona's current program and determine that Arizona is still not meeting the EEOA. However, the court may be swayed by the superintendent's misleading statistics or choose to ignore the data altogether because of its inaccuracy or incompleteness. Court decisions in education are risky even when the law is clearly being violated, as it is here, and as it was when the most recent *Flores* litigation was presented before the Supreme Court.

The *de facto* segregation issue should not be brought to the Supreme Court. *De facto* segregation hurts ELL students, not just because they are missing out on opportunities to learn from their native English speaking peers, but because the segregation implies that these students are somehow inferior, that their Spanish speaking skills are not valued, and that they must learn English before they can be mixed in with the general school population. Under current Supreme Court precedent, this may not be a constitutional issue, but it should be an education issue.

Education advocates should not wait to take action nor should they keep thinking that litigation is the only avenue for change. Schools and districts should petition the ELL Task Force to opt out of the provisions by creating workable ELL plans specific to their school's needs and sensitive to the needs of the individual student population. All education advocates including

209. *Arizona Gives Cold Shoulder to ELL Alternatives,* ASSOCIATED PRESS, June 12, 2008.

210. ARIZONA ELL TASK FORCE, ARIZONA DEPARTMENT OF EDUCATION, MAY MEETING MINUTES (May 14, 2009).

211. *Id.*

parent organizations, teachers' unions, and public officials should petition to change the law in the interest of integrity in the schools and protection of ELL students. Often, immigrant communities do not have a voice. Education advocates must be the voice for these students.