Editor’s Note

With great pride and pleasure, the Editors and I present Issue 2 of the Interdisciplinary Undergraduate Law Journal. I would like to thank everyone involved in the production of this issue, including the Editors, the Amherst College Department of Law, Jurisprudence, and Social Thought, the college, and particularly the authors. Without all of your contributions and support, this issue would not have been possible. We received a very favorable response to our first issue and we hope this issue is equally thought provoking. The Editors and I hope you will continue to support us on the road ahead, and we expect the journal will continue to prosper and set a standard of excellence in the field. We look forward to receiving your feedback, suggestions, requests for subscriptions, support, and of course your submission of new articles.

Sincerely,

Adam Shniderman

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With the saturation of everyday life by modern science and technology, the increasingly global and unequal flow of culture, capital, commodities and populations across nation-state boundaries, the transformation and even crisis of human rights and the dismaying consistency of human rights abuses, and the constant depiction of law in diverse traditions of popular culture, literature, and film, we are faced with a host of new, troubling, and intriguing questions about law that cannot be fully posed, much less answered, within the narrow horizons of conventional legal training and/or the traditional social sciences.

As students of law and the humanities, it is our responsibility to pose these questions and to strive to answer them with the nuance, clarity, probity, and rigor that are the marks of the very best of the liberal arts tradition.
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Legislating Against Silence: An Examination of Violence and Criminal Law Reform in the United Kingdom from 1973 to 1994

Darren J. Pacione
Laurentian University – Class of 2009

Abstract:

On one hand, the right to silence and the right against self-incrimination are inherent within the Canadian and American justice systems. But, on the other hand, in many other countries, with very different legal regimes, these rights are far from the legal norms. However, take for instance the United Kingdom: a legal system woven from the same cloth as our own, rooted in common law, and developed by precedent. In the British legal regime, the right to silence is no longer absolute; adverse inferences are drawn from a failure to comply with police questioning. The objective of this paper is to explore why? I examine the discourse of violence in Northern Ireland and the climate of legal reform in England, and I explore the social, political, and legal contexts on reform and its implications on criminal law.

More specifically, this paper approaches these topics by asking "To what extent did violence play a role in the legislative change curtailing the right to silence?", looking in particular at the reality of violence and the judicial process in Northern Ireland throughout the 1970s and 80s. Furthermore, in regards to international law, it asks "How does British case law develop within the more rights-based and protective European Conventions?"

An Introduction: Restricting the Right to Silence in the United Kingdom

The Right to Silence in Context:

The concepts of the right to silence and the privilege against self-incrimination are as complex as Irish politics. A primary indicator of this complexity is the international discrepancy in the protection of the right to silence within criminal law practice. For example, in a 2007 Supreme Court of Canada decision in the case of R. v. Singh, the Court upheld that Mr. Singh’s right to silence was violated, and that “he was conscripted to provide evidence against himself . . . [and] the use of this evidence rendered the trial unfair.¹ In contrast, in early 1994, then British

Secretary of State Tom King commented on the United Kingdom’s Criminal Justice and Public Order Act, an act aimed at the curtailment of the right to silence; he stated: “we would be mad not to draw inference of guilt [from an accused’s silence].”

It becomes apparent that the underpinning values of the justice system and of political motivation differ to a great extent from nation to nation, even among those that have similar roots in law.

It is important to explain where the right to silence fits into the criminal justice process. The right to silence in Canada, in Northern Ireland (prior to 1988), and in Great Britain (1994), can be exercised at three stages in the criminal justice process. First, a person may exercise this right before any arrest. This means that people are not obliged to talk to police officers if they are stopped or questioned in public. Second, once arrested a person may exercise the right to silence, typically while in custody under police questioning. Third, this right applies at trial, as an accused may decline to answer any questions or give evidence. Legislative restrictions affect silence only at the arrest and trial stages, and not at the pre-arrest stage.

The origins of the right to silence are controversial. Some historians claim the roots of the right to silence concept date back centuries. Critics argue about the importance of the retention of the right to silence. However, legal historian Leonard Levy acknowledges that the further back the origins of this right and the privilege are traced, the stronger is the case for their retention.

Furthermore, if this right were to be suspended in general in the United States, for example, the justice system would be held in disrepute.

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4 Brown 2
It is central to differentiate between the right to silence and the privilege against self-incrimination. Essentially, the right to silence in the context of the justice system of the United Kingdom still exists, but it now has different implications. Instead of being a protective mechanism, it allows courts and other judicial actors to draw adverse inferences from silence.\(^5\)

The privilege against self-incrimination, however, is understood as a person’s freedom not to provide incriminating information against himself/herself. Flowing from this concept is that no ‘adverse,’ typically condemning, consequences should be drawn from exercising this privilege.\(^6\)

It is this privilege that has been altered by the criminal law reform in the United Kingdom. Now, under the new legislation, adverse inferences may be drawn from exercising this choice.

**An Examination of the Right to Silence:**

This paper examines the effect of the volatility of the politico-legal climate in Northern Ireland in the 1970s and 1980s on the initiation of major criminal law reform in the United Kingdom in Northern Ireland in 1988, and Great Britain in 1994. While the primary focus of this examination is Northern Ireland, Great Britain provides an interesting connection that allows a further exploration of the implications of criminal law reform. This paper takes a two-fold approach in examining this topic: a discussion of discourse and an analysis of the criminal law reform.

First, the abolition of the right to silence will be examined through the discourse of violence, specifically focusing on how violence and the threat of violence were used as tools to incite fear in politicians, judicial actors, and society at large in Northern Ireland. Through a condensed analysis of the history of violence in Northern Ireland, two major themes become


\(^6\) Levy 4
apparent and may be regarded as providing the impetus for an important change in legal
discourse and justice models in the United Kingdom.

Second, this paper raises the question ‘to what extent did violence play a role in the
legislative change curtailing the right to silence’ and seeks to answer it through an analysis of the
legal climate of Northern Ireland and Great Britain and a review of legislative measures.
Specifically, this section examines the formal criminal law reform commissions in the United
Kingdom and highlights the legal discussions and implications of legislating against the right to
silence. The controversial nature of the Irish legislation, the Police and Criminal Evidence Order
of 1988, and similarly contentious British legislation, the Criminal Justice and Public Order Act
of 1994, offer important evidence that the right to silence was not only discussed differently in
legal circles but was also treated differently in law.

A History of Violence - Examining the Discourse of Inciting Fear in Northern Ireland:

At the core of the Irish and British criminal law reforms are two pieces of legislation that
initiate a new form of legal language. The Irish Police and Criminal Evidence (Northern Ireland)
Order 1988 (PACE), and the British Criminal Justice and Public Order Act 1994 (CJPOA),
resonate with calls to foster a climate of social protection. Embedded within and behind that
language, however, is a deeply-rooted history of violence between the two countries. This
section examines the discourse of violence, and how a threat of violence was used to incite fear.
In particular, this section examines two overarching themes which contributed to the politico-
legal volatility in the United Kingdom, including jury intimidation and political coercion. The
goal of this section is to develop an understanding of the socio-legal and political effects,
implications, and power of violence.
Juror Intimidation:

In the Irish context, fear of violence, it seems, is a useful tool if it is used to disrupt the judicial process. Generally, action, language, or the mere presence of a threatening individual are often enough to instil a substantial amount of fear of violence in a person. Then, place that person in the role of juror, a role that places the fate of another human being in his/her hands: the role of juror makes one highly susceptible to influence, bias, and fear. In nineteenth century Ireland, for example, the *Irish World* newspaper published an article with a challenging headline, “I dare them to convict”. The words are shocking, but they illustrate the tenor of the time. In an attempt to eliminate the intimidation, judges, in some cases, suspended juries, or solicited only jurors of wealthy background and strong character as they were less likely to be intimidated.

The violence, however, continued into the twentieth century in Ireland. The Irish Republican Army (IRA) fought with the Irish unionists and other armed militants over many political issues. These ongoing campaigns of violence resulted in government intervention and initiated legislative reform. British politician Lord Diplock held that in an attempt to curtail perverse verdicts and jury intimidation, it was imperative to build public confidence in the legal system. This he concluded as the committee chair charged with establishing the 1973 Emergency Provisions (Northern Ireland) Act, which permanently suspended juries from terrorism-related cases.

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8 Donohue 1326
10 Donohue 1326
Interestingly, these juryless trials in terrorism-related cases, better known as the “Diplock Courts”, lasted until the reinstitution of juries in July of 2007.12

While juryless courts prevailed from 1973 until 2007, it seems that the fear of intimidation and jury tampering had become structural and embedded within the politico-legal institutions themselves. For example, a series of inquests between 1999 and 2000 examined the possibility of reinstituting jury trials for those charged with terrorism-related offences, however, the then Minister of State of the Northern Ireland Office, Adam Ingram, submitted that, “while the Government’s overall objective remains a return to jury trials for all offences . . . the time is not yet right for such a move.”13 This political hesitance demonstrates the extent to which a fear of violent repercussions and jury tampering was still present, as this inquest was conducted nearly thirty years after the Diplock Courts began.14 The fear or threat of violence seems timeless in the context of Northern Ireland and it seems that at many points, this fear permeated the foundation of the legal system and judicial processes.

**Political Coercion:**

To understand the implications of this structural fear of violence we have to ask why fear was such a powerful tool in Northern Ireland. Lord Diplock addressed this question in 1973, explaining that in regard to the Emergency Provisions Act, “people in Northern Ireland . . . live in close-knit communities . . . [some] are dominated by members of paramilitary organisations. This increases the risk of intimidation. It also creates a fear of intimidation that can be just as damaging.”15 Therefore, because of the proximity of potentially intimidating neighbours, the
people of Northern Ireland were especially susceptible to the threat of violence because they lived it as part of their daily existence.

Further, another theme at the core of the structural implications of the fear of violence is apparent in the political coercion of the government to act in a way that protects its citizens. Essentially, in the wake of increasingly violent IRA and other militant campaigns against the stability of the state\(^{16}\), the government was compelled to act, often aggressively, in an effort to protect society and secure the prosecution of offenders. First, government and political efforts produced in the Detention of Terrorist (Northern Ireland) Order of 1972, which gave officials special executive powers to arrest and detain, for an extended period of time, any person suspected of terror-related offences\(^{17}\). As well, and as mentioned before in the Emergency Provisions Act of 1973, there was a legislative response to the issue of jury tampering. This Act initiated the suspension of juries in terror-related cases. Some may argue that the government’s recourse to use legislation as a tool to fight the terrorists was a victory for the terrorists.

Moreover, nearly 15 years and many amendments later, as the transcripts of the 1988 Northern Ireland House of Commons final debates on the PACE Order attest, many members of parliament acknowledged their anxiety about the implementation of the legislation, out of grave concern about the resulting threat and risk for innocent people.\(^{18}\) A British Member of Parliament, Mr. Kevin McNamara, contested the claim of the then Secretary of State, Tom King, that, “innocent people have nothing to fear.”\(^{19}\) McNamara held that, “the innocent have much to fear . . . [as] they are the only people likely to be intimidated by their surroundings into making

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\(^{16}\) Donohue 44  
\(^{17}\) Hogand and Walker 86  
\(^{18}\) Northern Ireland Commons Sitting Transcript of November 8, 1988. Parliamentary Transcript.  
\(^{19}\) Commons Transcript 310
misleading concessions.”20 The ongoing discussion of fear, in the form of a threat of violence, was an extremely real factor during this contentious time in Northern Ireland.

**Adverse Inference Legislation - Exploring Criminal Law Reform and its Legal Implications:**

The previous sections developed an understanding of the effects of violence on politics, society, and the legal system. This section of the paper will explore that understanding and discuss what it means for criminal law reform. Is it sufficiently compelling to say that fear of violence motivates legislative change? Are there further reasons and rationales for such a transition in the criminal law system? The following sections examine the legal history of criminal law reform of the right to silence in Northern Ireland and Great Britain, and the legal implications of that reform as considered by the law-makers. First, the focus is on the evolution of British criminal law reform and on its resistance to change. Secondly, the focus is on the expedient reform in Northern Ireland and on the reasons for such pragmatic changes. Finally, this section will examine the implications of the criminal law reform legislation on the legal rights of an accused.

**Criminal Law Reform in Northern Ireland:**

To engage in the practice of criminal law is to consider the weight of the rights of all the parties involved. To engage in legislation is to understand the greater need of society, and the implications of any decisions that may have bearing on individual or group rights. Lawmakers must balance the rights of the accused with the welfare of society, while maintaining the search for the truth as paramount within the criminal law system. In Northern Ireland, however, the criminal law system in the 1970s was spiralling downwards into a state of disrepute. The threat

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20 Commons Transcript 310
of violence was largely intimidating to jurors, not to mention to witnesses; suspects in terrorism cases made prosecution difficult by regularly exercising their right to silence.\textsuperscript{21} Lord Diplock referred to these cases as perverse verdicts.\textsuperscript{22} In a British context, the Criminal Law Revision Committee held that criminals often take advantage of their right to silence and refuse to answer any questions. This can lead to the grinding halt of police investigation, and prevent a trial from even beginning.\textsuperscript{23} Therefore, when faced with this reality, British lawmakers seemed to lack any other choices but to reform the criminal law.

Criminal law reform in Northern Ireland was ripe with legislative activism in the late 1980s. Politicians and law-makers, who often responded to the adverse effects of the recurring violence, used the legislation as a mechanism of deterrence. From the Diplock Courts beginning in the early 1970s, which banned juries from terrorism-related trials, to the 1984 Irish Criminal Justice Act that allowed for an adverse inference from silence to be drawn in select specified circumstances in the pre-trial stage, criminal law reform has long been a response to academic discussion in Great Britain, while in Northern Ireland it is a response to the real likelihood of violence and social unrest.

In 1988, Tom King, in a House of Commons debate, outlined Northern Ireland’s reformative history and rationales, and the new reform legislation. He noted the 1984 legislative reforms, and explained how the Northern Ireland (Emergency Provisions) Act of 1987 provided for the rights of an accused in police custody.\textsuperscript{24} Finally, King drew upon the British-born report


\textsuperscript{22} Donohue 1326

\textsuperscript{23} Berger 401-2

\textsuperscript{24} Commons Transcript 187
of the CLRC, and conceded that, even though its recommendations were not implemented by British legislators, the situation in Northern Ireland was very different.\textsuperscript{25}

King further discusses the major reformative measures within the Police and Criminal Evidence Order of 1988, highlighting, in the House of Commons debate, articles two through six. The new legislation, as outlined by King, did not officially abolish the ability to maintain a right to silence, but now allowed courts, police officers, and juries to draw inferences from the choice of an accused to remain silent.\textsuperscript{26} It therefore changed the interpretation of the accused’s right to silence. The Irish legislation, PACE, states that inferences may be drawn from the failure of an accused

\ldots to mention any such fact \ldots [that they] could reasonably have been expected to mention when so questioned \ldots [and] on the basis of such inferences treat the failure as \ldots corroboration of any evidence given against the accused in relation to which the failure is material (Criminal Evidence (Northern Ireland) Order 1988 Article 3).

For Northern Ireland this was a proactive, yet controversial step. In order to secure public confidence and judicial integrity, the government had to maintain control and regulation over these provisions, especially when dealing with younger offenders and people with disabilities.\textsuperscript{27} The legislative area of most concern was the portion that addressed inferences being drawn during police questioning, and thus special care was taken in designing the interrogation process, and in crafting later legislation.

\textbf{Criminal Law Reform in Great Britain:}

In Britain, the debate on the right to silence began as a shift in jurisprudence and a change in political and legal philosophies. The shift was not immediately connected to a looming threat

\textsuperscript{25} Commons Transcript 187
\textsuperscript{26} Commons Transcript 187
of violence, as was the case in Northern Ireland, but as observers of the Irish conflict and its legal consequences, the British became increasingly aware of the implication and benefits of reform. In Britain in the 1960s a report was commissioned by the International Commission of Jurists to assess typical thoughts on transition.\textsuperscript{28} The report, known as JUSTICE, presented a variety of reform ideas for the criminal justice system in Britain. The reforms held that the police should remain at the investigative helm with the aid of magistrates, similar to, but not quite like, the inquisitorial system, and the police should have the pre-trial ability to conduct questioning, in which case a failure to respond to questioning could be used to draw adverse inference.\textsuperscript{29} However, JUSTICE did not make any recommendations for an at-trial abolishment of the right to silence.\textsuperscript{30}

The then Home Secretary, Henry Brooks, commissioned the Criminal Law Revision Committee (CLRC). The underlying objective of this committee was the fundamental search for the truth, and “to forbid it [the abolition of the right to silence] seems to us to be contrary to common sense.”\textsuperscript{31} The CLRC recommended an at-trial restriction of the right to silence and that the judicial actors be permitted to make any sort of inference from an accused’s silence or failure to disclose.\textsuperscript{32} The logic behind this recommendation holds that an accused should disclose all necessary information during an investigation to prevent the risk of having adverse conclusions drawn from “surprise” evidence, or efforts to remain silent. Finally, it seemed that the CLRC did not want to concede any ground to the accused, and their recommendations almost seemed to

\textsuperscript{28} Berger 389  
\textsuperscript{29} Berger 399  
\textsuperscript{30} Berger 399  
\textsuperscript{31} Berger 401  
\textsuperscript{32} Berger 402
serve as an indicator of bias, as they contended that present British law and practice were already much too sympathetic to the defence.33

The CLRC was seen as extreme by critics at the time and its recommendations were not implemented, yet they did lead to further review. In the latter half of the 1980s, criminal law reform committees in Britain recommended many changes to rules dealing with confessions and interrogations with the goal of making the pre-trial process a more efficient lead into a trial. It was not until the Irish reform of 1988 that Britain began initiating legislation against the right to silence, even though Britain held fast to its retention of this right until 1994, with the legislation of the British Criminal Justice and Public Order Act. Did the Irish legislation finally convince Great Britain that abolishing the right to silence was the route to follow, or did Great Britain finally appreciate the recommendations of the Criminal Law Revision Committee?

Finally, in 1994, the British Criminal Justice and Public Order Act passed through parliament accompanied by its own controversy. At the core of the Act were the reform provisions, sections 34 through 37, which included, “failure to mention facts when questioned or charged, failure to account for objects, substances or marks, failure to account for presence at a particular place, and [the rules surrounding] silence at trial.”34 What is interesting to note is that the government finally acknowledged many of the recommendations that had been previously outlined by the Criminal Law Reform Commission.

A Discussion of Legal Rights - Criticisms and Considerations:

Within the consideration of legal rights, we must remember to take into account both the rights of the offender and the rights of citizens. In order to frame this idea of balancing the rights, consider the argument of the nineteenth century British philosopher Jeremy Bentham. On the one

33 Berger 399
34 Brown 6-8
hand, Bentham, in his *Treatise on Judicial Evidence*, argues that the right to silence is a protection only for the guilty. 35 He then went on famously to write “innocence claims to the right of speaking, as guilt invokes the privilege of silence.” 36 In a search for the truth Bentham therefore, suggests, that the right to silence often holds the truth hostage; however, if there is no right to silence, and people are compelled to speak, they may be more inclined to give false stories or confess to the charges before them to simply end the process. Bentham, nevertheless, held that invoking silence excluded the most reliable evidence of the truth; he argued that these steps inevitably hindered courts from discovering the truth, and therefore formed no part of a rational legal system. 37

On the other hand, some questioned the laws asking how far the state can encroach upon the legal rights of criminal suspects and offenders charged with an offence. Lord Runciman, a twentieth century legal scholar and member of the British House of Lords, was unconvinced of Bentham’s reasoning, and argued that the curtailment of the right to silence within the new legislation would contribute further to wrongful convictions. 38 Furthermore, in the 1988 Northern Ireland House of Commons debate on the PACE, Mr. McNamara argued that the innocent were the most vulnerable, and there was great fear that innocent people would make false or damaging statements. 39 British scholar and advocate Ian Dennis furthers the argument about increasing the possibility of wrongful conviction, also discusses the weakening of the right

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37 Gordon 8
38 Greers 719
39 Commons Transcript 225
Overarching this domestic debate is a growing body of international law. The legal rights as outlined in international law are clear. The Universal Declaration of Human Rights (UDHR), the European Convention on Human Rights (ECHR), and the International Covenant on Civil and Political Rights (ICCPR) all contain what is interpreted as an implicit right to silence within the principle of a fair trial. Further, the Rome Statute, a document that governs international criminal court proceedings, similarly emphasizes that an accused is “not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence.” International law still protects this allegedly inherent legal right, but nevertheless provides room for the interpretation of the right.

Moreover, as British case law developed under the criminal law reforms many cases were appealed within the United Kingdom, and, to a further extent, at the European Court of Human Rights. For instance, *UK v Murray*43, is a case that began in the early 1990s in Northern Ireland; it was then appealed to no avail in the United Kingdom, and was finally appealed to the European Court of Human Rights in 1996. In *Murray*, at the trial level, the judge complied completely with the restrictive legislation and did so despite the fact that the accused was held and questioned for forty-eight hours without a lawyer. The case was in compliance with the

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43 Murray was interrogated and questioned 12 separate times and remained silent. Upon trial the judge drew adverse inferences from this silence, and coupled with the denial of a lawyer to the accused the case was challenged on constitutional and conventional grounds. The importance of this case is that, as a consequence, it was recognised that the right to remain silent was a priority to be considered in correspondence to Article 6 of the European Convention of Human Rights, the right to a fair trial. *UK v Murray* (1996) 22 *European Human Rights Review* 29 (ECHR).
British Emergency Provisions Act of 1987, and the inferences from his silence were admissible. On appeal to the European Court of Human Rights, Murray claimed a violation of Article 6, the right to a fair trial (European Convention for the Protection of Human Rights and Fundamental Freedoms). The Court held that there was no violation of Article 6; however, it did consider the legal implications of drawing inferences from silence. These considerations acknowledged that in cases which lower the burden of proof for establishing guilt and place a greater weight on adverse inferences, the Court would likely hold this increased power of adverse inferences incompatible with Article 6.

Arguably then, criminal law reforms have had dire legal implications for the burden of proof from the viewpoint of the offender. The reforms, as we see through the development of case law, have shifted the burden of proof needed by the state to convict. Further, some critics contend that the legislation is “a clear down of the prosecution’s burden of proof.” The concern about the infringement of legal rights is widespread, and is important because it provokes further scrutiny of the legal system. However, rulings by the European Court of Human Rights hold that proper discretion must be exercised to prevent violations of Article 6 of the Convention.

The initial criticisms by the European Courts were most fascinating, and spoke to the strength and stability of the existing body of international law. Notably, prominent English barrister, Anthony Scrivener, with reference to the British criminal law reform, remarked that, “the [then] Home Secretary [Michael Howard] seems to have forgotten that Britain is in Europe.”

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44 Cavanaugh 506
45 Cavanaugh 507
46 Gordon and Skinnider 20
47 Gordon and Skinnider 20
48 Cavanaugh 508
The right to silence will be upheld in Strasbourg, and once that happens, Mr. Howard will not have done much good for crime.49

Conclusion - Reflections on Reform:

Overall, within this rights-based discussion, for example, we see that legislative change and its underlying reasoning show the direction of both socio-legal and political philosophies at the time. Further, from within this contextual timeframe, the themes that emerge demonstrate that the politico-legal volatility in Northern Ireland was indeed the catalyst for legislative change in Northern Ireland in the late 1980s. Violence was effective as a political tool. The case in Britain, however, although less influenced by ongoing violence, still exemplified a reactive approach to criminal justice reform. On balance, the international community holds fast to its proactive right-asserting model, which provides a strong emphasis on due process and procedural rights.

At the end, what is most interesting is society’s tolerance of legislation that encroaches upon an arguably inherent human right. It would seem that, at least in Northern Ireland, and because of geographic proximity and shared concerns Great Britain, giving up individual legal rights to gain a stronger sense of collective social protection is seen as a fair trade. By contrast, if the 5th Amendment were to be suspended in the United States, social outrage, coupled with the media frenzy, would create chaos in the justice system.50 These international differences are remarkable considering the bedrock of both legal systems is British common law, however it is the internal and circumstantial differences, such as fear of violence and the resulting social


50 Levy 186
unrest, which ultimately lead a government into transitional phases and when this happens law and its legislative actors are at the core of reform.
Prejudice and Ethnic Bias in Momentous Political Trials of the 20th Century

Frank DeRienzo  
Montclair State University – Class of 2009

Abstract:

This project examines trials at significant moments in 20th century United States history that have been influenced by external forces such as immigrant status and national security concerns. The purpose is to show a correlation between attacks perpetrated by foreign or immigrant groups and a failure in the legal system due to external forces. An interdisciplinary methodology encompassing both history and law is necessary because of the scope of the topic. By examining the cases of Commonwealth v. Sacco, Korematsu v. United States and Hamdi v. Rumsfeld and the historical settings in which they took place, it is evident that a correlation does indeed exist between attacks perpetrated by foreigners or immigrants and failures in the justice system. Through the examination of these cases, a continuum becomes apparent in which the influence of external forces builds in Sacco, peaks in Korematsu and then recedes post 9/11 in Hamdi. The study concludes that the presence of external forces at a trial, namely prejudice towards immigrants and national security fears, at times of high tension in American history, indicate a probability that a miscarriage of justice will occur if these factors unduly influence the trial.

Introduction:

One of the most recent and significant events in American history, the terrorist attack of September 11, 2001, affected every American from coast to coast. The arrests, detentions and trials conducted post-9/11, when the nation craved vengeance, caused many to wonder whether external forces, such as public paranoia and insecurity, could affect the very core of the American legal system. This question requires a much broader look at the past one hundred years of our history. Utilizing an interdisciplinary, chronological-compare and contrast method, it becomes clear that trials at significant moments in 20th century United States history that have been unduly influenced by external forces and circumstances predate the post-9/11 climate, with regard to prejudice against immigrants and concerns about national security.
There have been multiple attacks similar to 9/11 in the United States, generally perpetrated by foreigners. Through the exploration of these attacks and their effects on the American people, and subsequent examination of trials conducted in the aftermath of these attacks, it will be clear that outside forces have played a role in the courtroom. The trials of Nicola Sacco and Bartolomeo Vanzetti\(^1\) in the 1920’s and Fred Korematsu during the 1940’s occurred in atmospheres very similar to that of the post-9/11 era. Sacco and Vanzetti, two Italian immigrants, were tried for murder and robbery just after the height of the Red Scare. The case, which took place over eighty years ago, is still highly debated subject. \textit{Korematsu v. United States}, 323 U.S. 214 (1944) was another controversial case that was heard under the cloud of World War II and in the shadow of the attack on Pearl Harbor. Finally, the post 9/11 case \textit{Hamdi v. Rumsfeld}, 542 U.S. 507 (2004)\(^2\), will be analyzed in order gain a comprehensive understanding of how outside forces have affected issues inside the courtroom over the past 100 years.

The complexity of this issue requires the use of an interdisciplinary approach because no single academic discipline can adequately explain it. The three touchstone cases will be investigated first from a historical perspective, taking into account the background of the time period, the ethnic groups involved, their past treatment and society’s feelings towards them at the time. Each case will be viewed in terms of its effect on confidence in national security. Then each case will be analyzed from a legal standpoint. The trials, appeals, and rulings in each case will be examined for inconsistencies and abnormalities, which will then be the correlated to


\(^2\) \textit{Hamdi} was a 2004 Untied States Supreme Court case that dealt with the indefinite detention of a American citizen captured in a military zone in Afghanistan.
external forces. All three cases will be compared and contrasted to illustrate that external forces can and have influenced the outcomes of trials in the past, as well as in the present.

**Political Trials and the Touchstone Cases:**

External forces, in particular, prejudice against immigrants and concerns about national security, can affect the atmosphere and outcome of legal proceedings which, arguably, should be immune from such pressures. The effects of external forces on the American legal system will be examined through the study of two cases: *Commonwealth v. Sacco*,3 *Korematsu v. United States*, and *Hamdi v. Rumsfeld*. These cases were selected for specific reasons. They all occurred during significant moments of 20th century United States history where national security was a major concern. Moreover, each case involved members of an ethnic immigrant group that, at the time, was disliked by the American public. Also, each cases had controversial outcomes.

**Political Trials:**

The *Sacco and Vanzetti, Korematsu* and *Hamdi* cases are classified as “political trials”, according to Ronald Christenson. Christenson, a Political Science professor at Gustavus Adolphus College, writes that political trials are hard to define but, “we can recognize political trials when we see them.”4 Political trials stand out because they simultaneously involve legal and political agendas ordinary criminal cases do not.5 In the average criminal case, the only issue at hand is legal *i.e.*, Did the defendant commit the crime? Was there intent? A political trial, on the other hand, also involves a political agenda, usually to punish or dominate the person or

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5 Ibid., 554.
group on trial. Political trials “proceed according to a fully political agenda, with only a façade of legality.”

Perhaps two of the most famous examples of political trials are those of Socrates and Jesus Christ. Socrates was put on trial and sentenced to death not because he had corrupted the youth of Athens, but because of his close association with the Thirty Tyrants and their leader Alcibiades. Similarly, Jesus was sentenced to be crucified because of the threat he posed to the religious establishment, not for blasphemy and sedition. In these cases and other political trials, the law is used by prosecutors and politicians as a tool to push political agendas.

In addition to having dual agendas, political trials share a number of other common characteristics. They usually involve a threat to authority, either legitimate or fictional. Political trials also tend to involve some type of hysteria, usually a product of the exaggerated claims made by the media, politicians or both. In most instances, hysteria is used to make the defendant or a group that the defendant belongs to, often their ethnic or religious group, a scapegoat for the catastrophic event that prompted the trial. Revenge is often the driving force behind many political trials, punishing defendant for the catastrophic event, regardless of whether they are guilty or innocent. Another characteristic of most political trials is that powerful

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9 Christenson, 26.
12 Christenson, 26.
figures will “weigh in” to lend support to the verdict, giving it more credibility. These figures can range from academics to judges, so long as they are influential and well respected.

Political trials can be classified into four categories based on the political questions they raise: trials of corruption, trials of dissenters, trials of nationalists and trials of regimes. Trials of dissenters and trials of nationalists are the two categories most relevant to this study. Trials of nationalists are cases in which, “the nature of representation is at stake.” In other words, does the government represent the ethnic group on trial or does it repress them? If the latter is the case, then it can be a step towards the domination or elimination of that particular ethnic group. The exploitation of ethnicity and immigration status to create public bias are two means of subjugating minority groups. Trials of dissenters involve challenges to the government, usually over controversial policies. Ironically, these cases the government’s policies are on trial just as much as the defendants. Frequently, the dissenters argue that the government’s policies are morally wrong, while the government, via the prosecution, attempt to justify themselves legally. Trials in this category are prosecuted with the purpose of eliminating opposition to the policy or policies in question.

These categories, along with the common characteristics of political trials create a guideline for analyzing, comparing and contrasting the trials involved in this inquiry. Categorizing each case as a trial of dissenters or trial of nationalists allows for a better

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13 Christenson, 26.
15 Christenson, 554.
16 Christenson 564.
19 Ibid.
20 Ibid.
understanding of what role history and past treatment of minorities played in the courtroom. It also provides the second hidden agenda in each political trial, which were already established above.

The Sacco and Vanzetti Case:

The trial of Fernando “Nicola” Sacco and Bartolomeo Vanzetti was a notorious case, the facts of which are still debated today. During their trial and subsequent appeals in the 1920s, the case divided the nation, and even the world. Many believed they were innocent men on trial for their anarchist beliefs, while others believed the trial to be fair and just. Sacco and Vanzetti were found guilty of first degree murder on July 14, 1921 and, after a lengthy appeals process, were executed by means of electrocution on August 23, 1927. The circumstances of the crime and evidence against them were vague at best. Many believe that the biggest pieces of evidence against them were their ethnicity and their political beliefs. The main legal issue in the case was that the conviction was based not on physical evidence linking Sacco and Vanzetti to the crime, but on circumstantial evidence and the unpersuasive, weak testimony of five eyewitnesses.

The period in history, following the First World War, was a time of fear and anxiety known as the Red Scare. Sparked after a number of bombings in 1919, the Red Scare was a national fear of Anarchists, Communists, Socialists or any other leftist groups. People feared these groups would undermine American society by inciting riots and strikes, eventually causing a “Bolshevik-style revolution” in the United States. A number of strikes did occur throughout

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21 Frankfurter, 8.
23 Frankfurter, 11.
25 Ibid.
the country in 1919, and while none were sparked by radical movements, the news media portrayed them as if they did. Newspapers created a frenzy about what the anarchists had done and what they were planning to do next, which caused a public hysteria, and gave credibility to the fears that America was under siege. Anyone involved with the strikes or a leftist organization was automatically labelled a “Red” and “red hunting became a national obsession.”

At the behest of United States Attorney General A. Mitchell Palmer, a division of the Bureau of Investigation was founded to expose radical conspiracies and arresting the conspirators. This group was responsible for the arrest and deportation of thousands of alleged radicals, based on little more than a suspicion. Many of these people were rounded up simply because of their ethnicity and associations, held in inhumane conditions, mistreated and denied their civil rights. “If the national press is any indicator of the predominant mood of the country, then the efforts of the Justice Department was overwhelmingly supported by the masses because the raids, deportations, and arrests were all championed on the front page of most every paper.”

Both Sacco and Vanzetti would have been considered “Reds” because they were known anarchists. In general terms, anarchism is a “political theory holding all forms of governmental authority to be unnecessary and undesirable and advocating a society based on voluntary cooperation and free association of individuals and groups.” Within these political groups there

26 Frankfurter, 44.
28 Ibid.
29 Ibid.
are many different sects, each of whom advocates the core ideals of anarchism in different ways. Some of these factions operated incognito, working within labor unions, while others were much more visible and radical. Sacco and Vanzetti were followers of Luigi Galleani, a radical Italian Anarcho-Communist who advocated terrorism and the violent overthrow of the government.\(^{31}\) An Italian immigrant, Galleani ran an anarchist newspaper, called *Cronica Sovversiva*, the *Subversive Chronicle*, and supported theft and robbery as long as it benefit the movement.\(^{32}\) Galleani also supported assassinations of government officials and distributed materials on bomb making.\(^{33}\)

The Galleanistas were primary targets of the government not only because of their radical views, but because of the violent and criminal means by which they hoped to achieve their goals. In all likelihood, Sacco and Vanzetti were on a list of dangerous enemies as well. Galleani was eventually arrested and deported in 1919, and the Galleanistas went underground.\(^{34}\) It was in this volatile social and political climate that Sacco and Vanzetti were arrested and tried for the South Braintree robbery.

The case of Sacco and Vanzetti fits the description of a political trial on many different levels. The dual agendas involved are obvious. There was the legal agenda of whether or not Sacco and Vanzetti were guilty of the double murder and robbery in South Braintree, Massachusetts. The political agenda rested on the fact that Sacco and Vanzetti were Italian immigrants involved in an anarchist group. This agenda may have been informed by the fact that group may have been linked to an assassination attempt on the attorney general, made up the


\(^{32}\) Ibid., 539.

\(^{33}\) Famous Trials. “Chronology.” Attorney General Palmer was actually the target of a botched assassination attempt, possibly by the Galleanistas, when an associate of Sacco and Vanzetti blew himself up outside of Palmer’s home.

\(^{34}\) Pernicone, 537.
political agenda of the case. Their involvement in a violent radical group also suffices as a threat to the government, and the hysteria requirement is more than met by the “Red Scare.” The idea of revenge as a motive is plausible considering the bombing and assassination attempts were all attributed to radical leftist movements. Finally, power figures did “weigh in” on the case late in the appeals process, offering their support for the guilty verdict.\textsuperscript{35} In terms of Christenson’s four categories, the Sacco and Vanzetti case was a Trial of Nationalists because of the role the defendants’ ethnicity and political views played in the trial.

**The Korematsu Case:**

The United States Supreme Court heard *Korematsu* in October 1945, with the attack on Pearl Harbor and World War II still looming over the nation. The central legal issue before the Court was whether the President and Congress acted beyond their constitutional powers by restricting the rights of Americans of Japanese descent and forcing them into internment camps. The Petitioner in the case, Fred Korematsu, was originally convicted for his failure to evacuate San Leandro California, which was deemed as part of a “military area.”\textsuperscript{36} This was a violation of Civilian Exclusion Order No. 34, which declared all people of Japanese ancestry were to be excluded from that zone.\textsuperscript{37} The also challenged the much broader Executive Order No. 9066, which ordered the internment of people of Japanese ancestry living on the west coast of the United States.\textsuperscript{38} The court ruled six to three against Mr. Korematsu, despite the fact that he was a loyal American citizen. Justice Hugo Black, in the opinion of the court, wrote that the need to protect national security justified restricting the rights of Americans of Japanese descent.\textsuperscript{39}

\textsuperscript{35} Christenson, “A Political Theory,” 550.
\textsuperscript{36} Ibid., 214.
\textsuperscript{37} Ibid.
\textsuperscript{38} As cited by Takahata, 119.
\textsuperscript{39} Ibid.
However, many feel the real reasons behind Japanese-American internment were prejudice and fear.

Asians have been victims of racial prejudice since they first began immigrating to the United States in the 19th century. Chinese immigrants were the first Asian group to be legally discriminated against in America. For example, the Chinese Exclusion Act of 1882 and the Geary Act of 1892 are two examples of discrimination against Asians by the Federal government.\(^40\) These acts prohibited the immigration of Chinese laborers to the United States, and also restricted the rights of those already in the country.\(^41\) These acts marked the first time federal law limited immigration on the basis of ethnicity. The Japanese were the second target of legal discrimination among Asian groups. Like the Chinese Exclusion and Geary Acts, the Immigration Act of 1924 severely limited the number of Japanese immigrants that could enter the country.\(^42\)

After the Japanese attack on Pearl Harbor, on December 7, 1941, discrimination against Japanese-Americans reached a new level. Immediately after the attack, national security was a primary concern. Many feared an invasion of the west coast inevitable and that the Empire of Japan already had spies and saboteurs planted in America, all “Japs” were seen at as spies and considered sneaky, treacherous, disloyal and untrustworthy.\(^43\) This cause for alarm was elevated to the level of hysteria by an irresponsible news media. Two mainstream newspapers on the west coast, *The Sacramento Bee* and *The San Francisco Chronicle*, had taken anti-Japanese stances.

\(^40\) Ibid.


\(^42\) Hane, 569.

\(^43\) Ibid, 570.
even before the war. The San Francisco Chronicle printed an editorial on January 7, 1942 telling people not to call Japanese-Americans “yellow” because that would associate them with the honorable Chinese. The newspaper suggested calling them “Japanazis” instead. Other editorials blamed Japanese-Americans for Pearl Harbor altogether, which only fanned the flames of prejudice and hate.

Newspapers were not the only source of anti Japanese-American sentiment. Many public figures, including Lieutenant General John L. DeWitt, Military Commander of the Western Defense Command, who was one of the most outspoken. DeWitt was quoted as saying “A Jap is a Jap,” meaning there was no difference between the Japanese in Japan and Japanese immigrants in America. He also said, “We will have to worry about the Japs until they are wiped off the face of the map.” Dewitt’s plan of action against the Japanese in America was similar to Hitler’s “final solution” in Germany. What is most troubling about the Lieutenant Generals statements is not their radical racist nature, but the fact that they came from a man whose proposals to the President became the basis for Executive Order No. 9066, and who was later put in charge of the evacuation and relocation of the Japanese on the west coast.

President Franklin D. Roosevelt issued Executive Order No. 9066 on January 19, 1942, which authorized the interment of all people of Japanese descent on the west coast, including

44 Inada, 11.
46 Ibid, 22.
48 Hane, 570.
49 Ibid.
50 Ibid.
51 Takahata, 119.
American citizens.\textsuperscript{52} Roosevelt wrote, “[t]he successful prosecution of the war requires every possible protection against espionage and against sabotage to nation-defense material, national-defense premises and national-defense utilities.”\textsuperscript{53} However, the government had already taken measures to protect the west coast by detaining all enemy aliens considered dangerous by the nation’s intelligence services through the Alien Enemy Act.\textsuperscript{54} For reasons that remain contested, the President, at the urging of DeWitt and the public, decided to go a step further and detain all people of Japanese ancestry.

The conditions in the internment camps were poor. The camps were located in deserts, and detainees had the bare minimum they needed to get by. United States Supreme Court Justice Frank Murphy, who was against the idea of internment, summed it up as having, “a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany.”\textsuperscript{55}

Internment came as a result of public hysteria and national security concerns. However, whether mass internment based on ethnicity was justified by the situation, as both the President and the Supreme Court claimed, remains open to debate. One thing that cannot be disputed, however, is that, of the 119,803 people who were interned, sixty-five percent of them were American citizens.\textsuperscript{56} Fred Korematsu was one of those American citizens. He is a perfect example of an individual who posed no threat to national security, but was detained as a result of racism and fear. Born in California, Fred Korematsu had never even left the Continental United States.\textsuperscript{57} Never, at anytime, had he renounced his citizenship or pledged allegiance to another

\textsuperscript{52} Hane, 571.
\textsuperscript{53} Takahata, 119.
\textsuperscript{54} Ibid, 117.
\textsuperscript{55} Hane, 572.
\textsuperscript{56} Inada, 191.
\textsuperscript{57} Takahata, 121.
country. In fact, Mr. Korematsu was actually a model citizen, a regular voter who was willing to serve his country in the war against Japan. Despite all of the evidence in his favor, the Supreme Court ruled against him because he was a Japanese-American at a time when the country was at war with Japan. The court’s decision to uphold such blatantly racist policies “remains as precedent for justifying restrictive government actions against an ethnic minority on the basis of military necessity.”

*Korematsu* fits the criteria of a political trial in many of the ways the Sacco and Vanzetti trial did, including a dual agenda. The legal agenda pertained to whether Civilian Exclusion Order No. 34 and Executive Order No. 9066 were beyond the scope of Presidential and Congressional powers, and therefore unconstitutional. Additionally, the agenda of the anti-Japanese sentiment and racism underscored not just this case, but this whole time period. Similar to the Sacco and Vanzetti case, there was a public hysteria caused by fear of a Japanese invasion of America that was only made more intense by newspapers like *The San Francisco Chronicle* and individuals like Lieutenant General DeWitt. Revenge was a very likely motive behind internment. The case also had many powerful figures involved, including the six Justices who upheld the ruling. *Korematsu* proceeded according to a fully political agenda of eliminating any opposition by Japanese-Americans to the policy of interment, while only maintaining a façade of legality. As Ronald Christenson described, this case should be considered a cross between Trials of Dissenters and Trials of Nationalists.

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58 Ibid.
59 Ibid.
60 Ibid, 115.
The Hamdi Case:

*Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), was born in the wake of the tragedies of September 11, 2001. Yaser Esam Hamdi, an American citizen, was being held at the Guantanamo Bay detention center indefinitely as an illegal enemy combatant. Through his father, Hamdi petitioned the United States Court of Appeals for the Fourth Circuit for a writ of habeas corpus. At issue in this case was whether the Executive Branch had the authority to hold American citizens indefinitely without granting them the protections guaranteed by U.S. Constitution. The Court ruled in a six to three decision that American citizens designated as enemy combatants have a right to contest their detainment before a neutral decision maker under the Due Process Clause.

Americans in the past have viewed certain minorities as “outside the traditional ‘American’ social circle.” Once again this seemed to be the case after 9/11, a minority group labeled guilty by association and being persecuted for the crimes of others simply because they looked alike or shared the same religion. A foreign enemy had viciously executed a surprise attack on the United States and people all over the nation were gripped by fear and insecurity. These feelings were now directed at Arab-Americans who were in the public’s cross-hairs because of the nationality and religion of the 9/11 hijackers.

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62 Ibid.

63 Ibid., 509.

The United States Congress acted quickly to pass the USA PATRIOT ACT on October 26, 2001, which was immediately signed into law by President George W. Bush.65 This act limited certain civil rights in the name of national security. Not only did this act allow the government to hold people designated as “enemy combatants” indefinitely but it also lessened restrictions on authorizations for wiretaps and search warrants.66

In the aftermath of 9/11, the American people heavily supported the USA PATRIOT Act and other similar government actions.67 People wanted to feel safe and reassured, and they were willing to give up almost anything to do so. Of course Muslim-Americans would suffer the most from the expansion of executive power, because nationality and religion associated them with the 9/11 hijackers in the public’s eye.

As time progressed, the effects of limited civil rights became apparent in the media’s coverage of Guantanamo Bay and other terrorist cases. More and more citizens began to speak out against Constitutional abuses such as the USA PATRIOT Act and public support quickly dried up. With the help of mass media, people became more aware of the liberties that they had and when they were being infringed upon.68 Americans began to realize that it was not necessary to trade civil liberties for security. It was in this setting that the Supreme Court heard Hamdi.

The petitioner in this case, Yasser Essam Hamdi, was born in Baton Rouge Louisiana in 1980 and moved to Saudi Arabia with his family as a child shortly thereafter.69 In 2001, Hamdi

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66 Ibid.
was apprehended in Afghanistan by the Northern Alliance and turned over to United States forces. Mr. Hamdi was then sent to Guantanamo Bay. 70 Mr. Hamdi was classified as an enemy combatant before authorities realized he was an American citizen. His classification remained unchanged even after it became clear that Hamdi was a U.S. citizen. In his petition to the court, Hamdi’s father claimed that his son was in Afghanistan doing relief work and had only been in the country for two month prior to 9/11.71 Regardless of the parties positions the fact remained that as an enemy combatant Yaser Esam Hamdi was not allowed any opportunity to contest his detention despite being an American citizen.

In his petition, Hamdi asserted that as a U.S. citizen he was entitled to the full protection of the Constitution. He also argued that the detention violated his Fifth and Fourteenth Amendment rights.72 The Supreme Court agreed, holding while Congress had authorized Hamdi’s detention through the PATRIOT Act, as a citizen he was still entitled to receive due process.73 The court reversed and remanded the case and ordered the lower court to balance Hamdi’s interest in liberty against the public’s interest in security.74

When deciding whether to characterize a case as a political trial, it is important to look at the elements of the proceedings and not simply the results. Looking at the outcome of Hamdi it is possible to be deceived and think it was not a political trial, when in fact it was. Hamdi meets several of Christenson’s criteria for identifying political trials. The case involved a threat to authority and public hysteria that was exaggerated by the both the media and the government.

70 Ibid.
71 Ibid.
72 Ibid.
74 Ibid.
Repeatedly showing clips of the two airplanes slamming into the World Trade Center, the media heightened the public’s outrage. The Department of Homeland Security also intensified fear across the nation with the use of their color-coded warning system, often raising and lowering the national threat level without explanation. High-ranking officials advocated the government’s position, including Michael Mobs, a special advisor to the Undersecretary of Defense, who testified for the defense. Most importantly however, Hamdi contained dual agendas, which is a key characteristic of a political trial. Operating under a veil of legality the defense in Hamdi attempted to block those detained as enemy combatants from receiving a fair hearing to dispute their detention, by allowing detainees only a severely limited form of discovery on this basis that many of the necessary documents were classified.75

This trial has elements of both a trial of ethnic nationals and a trial of dissent, much like Korematsu. Hamdi was a trial of ethnic nationalists because it involved an attempt by the government to dominate a particular ethnic group,76 in this case through indefinite detention. Hamdi also had a second characteristic of trials of ethnic nationalists: a belief that the laws of the country failed to protect him, evident in his claim of a failure to receive the due process he was entitled. At the same time, it was also a trial of dissenters because Hamdi was as much about the petitioner’s rights, as a United States citizen, as it was a trial of the Bush Administration’s policy on indefinite detention of enemy combatants. Christenson notes that the examination of government policy is a critical characteristic of a trial of dissent.77

Aside from being a political trial, Hamdi was also affected by external forces. When compared to another post 9/11 case of a United States citizen being detained as an enemy

75 Sekhon, 7.
76 Christenson, 555.
77 Christenson, 559.
combatant, *United States v. Lindh*, 227 F. Supp. 2d 565, (E.D. Va. 2002), the influence of ethnic bias becomes apparent. *Lindh* was very similar to *Hamdi*, both cases involved United States citizens seized in Afghanistan during United States military operations against the Taliban. However, unlike in *Hamdi*, Lindh was informed of the charges against him and was tried in a civilian criminal court with all of his constitutional rights. The major differences in these two cases were that Lindh lived his whole life in the United States, whereas Hamdi moved away as a child, and Lindh was a Caucasian who converted to Islam, while Hamdi was an Arab and born a Muslim. In the years, following these decisions, the government has offered no explanation for why Hamdi’s rights were different from Lindh’s. The length of each man’s residence within the United States is irrelevant considering that it is place of birth that makes a person a citizen. Furthermore there is no law, be it common law or statute that suggests that Constitutional rights somehow strengthen with the length of one’s residency in the United States or its territories. Thus eliminating one similarity, the only true distinguishing fact between these cases is the ethnicity of the parties involved.

*Commonwealth v. Sacco*, *Korematsu v. United States* and *Hamdi v. Rumsfeld* have more in common than being political trials. They share the common denominator of an unstable time period where prejudice and insecurity form a hysteria that cause a wanton disregard for the laws and principles that should make up the American legal system. Further analysis of the cases discussed in this chapter, with the help of theories and concepts from both history and law, will prove that it was this commonality of crisis that allowed anti-immigrant sentiment and national security fears to affect each touchstone case.

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79 Ibid.

80 Ibid.
Comparing, Contrasting and Common Ground:

In a legal system where Justice is thought of as blindfolded, the fact that citizens’ rights can differ because of skin color or ethnicity demonstrate how external forces, namely public fear and anti-immigrant or minority sentiment, can affect a trial. Looking at the previously examined cases, *Commonwealth v. Sacco* and *Korematsu v. United States* together with *Hamdi v. Rumsfeld* a pattern begins to emerge. During times of crisis, “other” racial groups are considered less deserving of Constitutional protections than traditional American racial groups.\(^81\) The two academic disciplines involved in this study, history and law, each offer their own theories which attempt to explain why external forces can affect the legal system and how they do so. Each of these theories is covered at length below, however first it is important to understand the relevant similarities and differences between the three touchstone cases.

Comparing and Contrasting Cases:

Each of the three touchstone cases was selected because they occurred during a period marked by public hysteria as a result of an attack by a foreign or immigrant group. The Federal government, more precisely the Executive Branch, responded to each case by using the fear and hysteria to their advantage. National emergencies require action by the government which must be large enough to match the threat and swift enough to contain it.\(^82\) However, the government often exaggerates dangers in order to impose stronger restrictions of liberties than necessary.\(^83\) The Executive errs naturally on the side of national security.\(^84\) The habit of the executive branch

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\(^{81}\) Sekhon, 6.

\(^{82}\) Kahan, 1291.

\(^{83}\) Ibid., 1312.

to err on the side of security rather than liberty is compounded because often the people who are being impacted are unable to speak out and gain public support due to their race or culture.  

Examples of exaggeration by the government can be found in each case. During the Red Scare, the Justice Department had a strong belief that the rash of bombing were in retaliation for the government’s policies regarding anarchism. However the Justice Department wanted to make the attacks look like the first step in a nationwide radical uprising. This approach would allow them and other law enforcement agencies the public support necessary to crackdown harshly on anyone suspected of being a radical. Similar examples of exaggeration can be found during World War II in the statements of politicians and military personnel like General DeWitt. The USA PATRIOT Act is also an example of both the executive and legislative branches capitalizing on public fear just after 9/11 and imposing harsher than necessary restrictions on liberties.

Another important similarity is the importance of race in each case. The ethnicity of the parties involved in all three touchstone cases seems to be the reason these individuals were denied basic Constitutional protections. Sacco and Vanzetti’s status as Italian immigrants combined with their poor ability to speak English was used against them by the prosecution to transfer an ethnic bias that already existed in the public into the courtroom. Evidence suggests that the trial of Sacco and Vanzetti was part of a collusive effort between the District Attorney of Massachusetts and the Department of Justice to rid the country of radical Italians. The Internment of Japanese-Americans seems purely race based. There was no commonality between

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85 Ibid.
89 Ibid., 68.
the detainees other than ethnicity. The fact that there was no mass removal of people in Hawaii, where the Japanese attack occurred suggests that the decision to intern Japanese-Americans on the west coast was based on racial and political reasons rather than safety or security. In the same respect, the difference between the rights afforded John Walker Lindh and Yasser Essam Hamdi is an example of the role race has played in the post 9/11 era.

These touchstone cases also have a number of important differences, one of which is the nature of the attack preceding each case. Sacco and Vanzetti and Hamdi both followed “terrorist” attacks. In both cases, individuals carried out violent attacks targeting civilians to make a political statement through violence. Publicity is the blood and oxygen of terrorists. The anarchists of the 1920s and the Islamic fundamentalists of the 21st century each used the media as a means to spread their message. In contrast, the event that led to Korematsu was Pearl Harbor, an actual attack by a foreign nation’s military against the United States’ Navy.

The difference between crime and an act of war seemed to matter little in both the eyes of the public, the courts and the government. The gravity of the threat and level of fear in the country was, in reality, proportional to the scale and violence of the attack. The more dramatic and bloody the event, the more likely it was be exaggerated in the media. Since the average member of the public experiences an event through reporting, and politicians use media as a tool to judge how to make or change policy, the importance of the media’s role in each case

90 Hane, 572.
91 Lichtenthal, 415.
94 Ibid., 431
95 Ibid., 432.
cannot be understated. Mass media plays a pivotal role for the public, the government and the terrorist or foreign aggressors.

The second major difference between the touchstone cases is the immigration status of the defendants in each of the cases. While Sacco, Vanzetti and Korematsu were arrested in the United States, Hamdi was seized in Afghanistan and brought back to the United States for detention. Arguably, the fact that all of these men were American citizens or residents makes this difference irrelevant.

**Historical Theories:**

Another commonality of the three touchstone cases is their complexity. Each trial cannot be understood without first knowing the social mood of the period. It is this complexity that requires the use of an interdisciplinary methodology, because no single discipline encompasses all of the factors involved in each case. The need for the use of law as a discipline is obvious considering that this is an examination of trials. The “history” discipline is necessary because it looks at the totality of an issue, that is the circumstances and occurrences that lead up to and affect an important historical event. The theory of cause and effect is ideal for determining how and why external forces affect trials at significant moments in U.S. history. Also, the theory that there has been a history of discrimination against non-white minority groups other than African-Americans in the United States is useful in unraveling this issue because it helps identify and explain why racial or ethnic biased occurs and where it comes from.

A cause and effect relationship clearly exists in all three touchstone cases. Cause and effect as a historical method however, is much more then just the occurrence of one event leading to another. According to historian Louis Gottschalk, understanding a cause and effect relationship requires knowing both the immediate cause and the remote cause of an event, as
well as the difference between the two.96 The immediate cause of an event is not the actual cause, but a breaking point in a chain of events.97 In other words the origin of an event is the actual cause, something that is much less obvious then the immediate cause. Applying this to the touchstone cases it is easily seen that the immediate causes in Commonwealth v. Sacco, Korematsu v. United States, Hamdi v. Rumsfeld, were the South Braintree robbery, the attack on Pearl Harbor, and the September 11th terrorist attacks respectively. However, each of these events was a mere breaking point in a longer chain of events leading up to each case.

The actual cause on the other hand is what initiated the chain of events to begin with.98 Finding the remote cause is harder than the immediate cause. It requires one look back further into history to determine where a particular chain of events began. Looking at the background of Commonwealth v. Sacco, the beginnings of anti-immigrant sentiment can be seen well before the Red Scare in the late 19th century.99 The real cause of the anti-immigrant sentiment and national security fear in Sacco was the anarchist bombings of 1919. These bombings, with the help of the media, turned the smouldering anti-immigrant sentiment into a wild fire so strong that it was able to affect the trial of Sacco and Vanzetti until their execution in 1927.

The real cause of the ethnic bias and security fears that affected Korematsu can also be traced to the late 19th century and the Chinese Exclusion act of 1888100 and later the Immigration Act of 1924.101 The media and the government once again used anti-immigrant sentiment

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97 Ibid.
98 Ibid., 34.
99 Hane, 569.
100 Ibid.
101 Ibid.
combined with national insecurity following Pearl Harbor as justification for the internment of almost all individuals of Japanese descent on the west coast.

The real cause of *Hamdi* and the Bush Administration’s policy of indefinite detention at Guantanamo Bay can be traced to the decision in *Korematsu*, as well the history of ethnic bias in America. The fact that *Korematsu* remains precedent for justifying restrictive government actions against an ethnic minority on the basis of national security substantiates the Bush administration’s claim. Building on past Executive’s actions, the Bush Administration has been able to institute policies similar to the Roosevelt Administration during World War II.

Applying the historical theory of cause and effect to the three touchstone cases yields an interesting conclusion. Looking past the more obvious immediate cause of each case, the remote cause becomes clear. The existence of a history of ethnic and racist bias, as seen in both law and media, combined with panic in the aftermath of an attack on the United States created a public outcry strong enough to influence the legal system at its highest levels. This caused waves of discrimination against the minorities blamed for each attack.

Another historical perspective on this issue focuses on the racial or ethnic aspect in each case. The theory, known as the “Other Non-White” theory, states that throughout American history “other non-whites” have been treated with a notion of foreignness when considering their racial identity and legal status. It should be noted that “other non-whites” means a minority other than African-Americans. Italian-Americans, Japanese-Americans and Muslim-Americans all fit into the “other non-white” category. The theory goes on to suggest that the thought of

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American born non-whites as foreign brought them an underserved stigma.\textsuperscript{104} This supports the notion that ethnic biased played a role in the trials of Sacco and Vanzetti, Korematsu and Hamdi. These men were born in the United States or legal immigrants; yet they were still looked at by mainstream America as foreigners. After Pearl Harbor, Japanese-Americans were seen as spies and saboteurs, likely to sympathize with Japan.\textsuperscript{105} The idea that Fred Korematsu, an American citizen who had never left the continental United States\textsuperscript{106} would side with a foreign nation simply because they looked like him is absurd. The “Other Non-White” theory explains that this illogical way of thinking occurs because of a racist tradition in America.\textsuperscript{107} This custom of racial and ethnic prejudice led to the idea that a person of Japanese descent would side with Japan because it was a part of their human nature.\textsuperscript{108} The same idea applies to Italian-Americans and Muslim-Americans in their respective cases. This theory demonstrates that the reason Sacco and Vanzetti, Korematsu and Hamdi were not granted their full Constitutional rights was because they belonged to minorities considered, outside the traditional American social circle. Ultimately it was this foreignness and not the facts in each case that lead to decisions in which two out of the three cases were decided against the minority party.

**Legal Theories:**

The “law” discipline has three theories that attempt to explain how and why ethnic bias and fear for national security affected the three touchstone cases. The first theory of political trials has been covered at length above. This theory views *Commonwealth v. Sacco*, *Korematsu v. United States*, *Hamdi v. Rumsfeld* as having dual agendas. The outer agenda provides a false

\textsuperscript{104} Ibid.
\textsuperscript{105} Hane, 570.
\textsuperscript{106} Takahata, 121
\textsuperscript{107} Gotanda, 1190
\textsuperscript{108} Ibid.
legality and legitimacy, while a secondary motive to punish, dominate or eliminate the minority group involved underlies the superficial rationale.\textsuperscript{109} All three cases were an attempt at domination of the individuals involved and the minority group they represent. The government succeeded in doing so in both \textit{Commonwealth v. Sacco} and \textit{Korematsu v. United States}.

The theory of Constitutional Stretch, Snap-Back and Sag is also useful for explaining the phenomenon in these touchstone cases. This theory states that in times of crisis the interpretation of what is constitutional is stretched to allow government to respond to the situation.\textsuperscript{110} After the stretch, the interpretation will either snap-back to its pre-crisis position or it will sag,\textsuperscript{111} creating a metaphorical loose space in which the crisis powers can be made permanent. While the actions of the executive and the legislative branches are important in the theory of Constitutional Stretch, Snap-Back and Sag, the judiciary who plays the pivotal role. In times of emergency judicial affirmation is key because it defines what expanded crisis powers are constitutional.\textsuperscript{112}

A constitutional stretch is visible in all three touchstone cases. In \textit{Commonwealth v. Sacco}, the stretch exists in the addition of a branch to the Bureau of Investigation whose sole purpose was investigating radical activity.\textsuperscript{113} The Court upheld the decision in \textit{Commonwealth v. Sacco} and the tactics used to obtain it when they refused to grant a \textit{writ of certiorari}. In \textit{Korematsu}, Executive Order No. 9066 was a constitutional stretch. The decision in \textit{Korematsu}, because it upheld the order, was the Court’s affirmation of the constitutionality of the Japanese

\textsuperscript{109} Christenson, 554.
\textsuperscript{110} Kahan, 1280.
\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid., 1290
internment. Lastly, in *Hamdi* the passages of the PATRIOT Act represented a constitutional stretch, which the Court has yet to be strike down.

The snap-back or sag that occurred in each of these cases varied. Following *Sacco* there was a sag. In the years after the trial and eventual execution of Sacco and Vanzetti, the Bureau of Investigation became the modern Federal Bureau of Investigation and was never condemned for their persecution of Italian-American radicals. However, there was a snap-back in constitutional interpretation following the decision in *Korematsu*. After the threat subsided, Americans realized that not even World War II justified detaining a whole class of people based on race. It is still too soon to tell whether the post 9/11 era will see a constitutional snap-back or sag. As of the time of this article, the War on Terror and the War in Iraq continue with no end in sight, as do terrorist threats to national security.

The third legal theory examines the three touchstone cases from the perspective of the Plenary Power Doctrine, which allows Congress and the Executive nearly complete control of immigration decisions and generally exempt from judicial review. The Plenary Power Doctrine was established in a Supreme Court ruling in the Chinese Exclusion Case, which states:

> If...the government of the United States, through its legislation department, considers the presence of foreigners of a different race in this country who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are not actual hostilities with the nation of which the foreigners are subjects.

This doctrine is considered constitutional because Congress’ power over the nationalization of immigrants and the Executive’s duty to enforce that power. This change to the law was abrupt,

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114 Kahan, 1301.
115 Lichtenthal, 403.
117 Ibid., 403.
as so often occurs in constitutional law. However it has gained strength over time. The Plenary Power Doctrine allows an issue involving immigrants or immigration law to be decided purely on race or ethnicity.

This perspective helps explain how external forces like racial or ethnic bias affect a trial because it shows that in cases involving immigrants the Supreme Court has deferred to the executive branch and has often ignored the Fifth and Fourteenth amendments.

The Court has often been cautions when holding U.S. citizens responsible for the action of others, except when those individuals are immigrants, which is apparent in the three touchstone cases. The Plenary Power Doctrine provided legal justification at the highest levels of government for the indefinite holding of Americans strictly on the basis of ethnicity. The doctrine is worded so as to apply only to “foreigners of a different race,” which Sacco, Vanzetti, Korematsu and Hamdi were. Perhaps this is why the facts differed so much in the United States v. Lindh and Hamdi v. Rumsfeld, or why no other group but Japanese-Americans were interned in the United States during World War II.

Integration:

While each of these disciplinary theories is able to explain a part of how and why anti-immigrant sentiment and fear for national security affect trials at significant moments in history, no single theory or discipline can explain it completely. However, integrating the relevant parts of all the theories allows for a better understanding of the issue and provides an opportunity to

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118 Kahan, 1291.
119 Lichtenthal, 399.
120 Ibid., 408.
121 Ibid., 408.
122 Hane, 572.
find a solution. The five theories from the disciplines of both history and law covered above are arranged in chart form to elucidate the integration process. (See Appendix)

The historical theories of Cause and Effect and the “Other Non-White” Theory illustrate where ethnic bias and anti-immigrant sentiment originate and why it appears so fervently during the eras of the touchstone cases. However, these theories fail to explain how external forces are able to penetrate the courtroom. Similarly, the legal theories illuminate only how the government and the law work during times of crisis as well as the certain prejudice tendencies they possess at times. These theories are also limited because they cannot explain where anti-immigrant sentiment and national security fears originated, and why they were widespread at the time. Yet, by combing these five theories the seemingly unrelated aspects of each case become relevant to one and other and provide a clearer picture of this issue.

The “Other Non-White” Theory demonstrates there has been a history of anti-immigrant discrimination towards ethnic minorities such as Italian-Americans, Asian-Americans and Muslim-Americans, that first appeared in the law in the Chinese Exclusion Act of 1888.123 This ethnic bias manifested itself in the legal system through the Constitutional Stretch Snap-Back and Sag theory. Cause and Effect caused the normal history of anti-immigrant discrimination to swell during times of crisis. It was during these times that the courts were most susceptible to being influenced by political issues and public opinion.124 The Plenary Power Doctrine was used as a way for the Judiciary to uphold legislative and executive actions that bordered on being unconstitutional such as Executive Order No. 9066 and the PATRIOT Act.125 All of this resulted

123 Ibid., 569.
124 Kahan, 1294.
125 Lichtenthal, 399.
in political trials in both *Commonwealth v. Sacco* and *Korematsu v. United States*, as well as a political trial in *Hamdi v. Rumsfeld*, which was decided in favor of the minority party, Hamdi.

From all of this, a continuum appears showing anti-immigrant sentiment and national security fears affecting a trial after a momentous event in history first appearing in *Commonwealth v. Sacco* in 1921, peaking in 1944 in *Korematsu v. United States* and receding in *Hamdi v. Rumsfeld* in 2004. The influence peaked in *Korematsu* as demonstrated by the fact that the sentiment was strong enough to cause an entire ethnic group, sixty-five percent of whom were American citizens,\(^{126}\) to be interned for the duration World War II. Soon after both the nation and members of the Judiciary realized the decision was wrong.\(^{127}\) The internment of a whole class of people based on ethnicity was found such violation of American Jurisprudence that a major Constitutional snap-back occurred.\(^{128}\)

In the forty years between *Korematsu* and *Hamdi*, minority rights improved tremendously through the Civil Rights Movement of the 1960s. During this time people became more aware of the rights they possessed. Mass media, and the way in which people received information also improved. These factors contributed to the recession of anti-immigrant sentiment and national security fears, because it is public awareness the affects how big or small limitations on liberties can be during times of crisis.\(^{129}\)

The public has vigorously fought against the constitutional stretch that occurred after September 11\(^{th}\) via the PATRIOT Act. While anti-immigrant sentiment continues to exist toward Muslim-Americans to a certain degree, it is far from the intensity that existed following the Red

\(^{126}\) Hane, 571.

\(^{127}\) Rosen, 151.

\(^{128}\) Kahan, 1301.

\(^{129}\) Ibid., 1295.
Scare or Pearl Harbor. Additionally, though insecurity about the nation’s security persists, advances in information technology and media no longer allow a few politicians or media outlets to foster the panic as in the earlier two touchstone cases. That the Supreme Court was able to avoid these influences after 9/11, an attack larger than any America had experienced before, and make a just decision in *Hamdi* demonstrates that Americans may have begun to realize that it is not necessary to trade liberty for security.

**Conclusion:**

Through the use of interdisciplinary methodology, along with historical background and case analysis, external forces such as anti-immigrant sentiment and national security fear clearly can and have influenced trials at significant moments in history. Integrating the history and law proves that ethnic bias has a long history in the United States, and was only intensified by immigrant or foreigner attacks on America. The approach also demonstrates that these feelings were able to affect the legal system because the atmosphere in which each trial took place: a post-crisis period. The courts were at their weakest following these crises because of the public’s pressure for action, which is felt by all branches of government.

In *Commonwealth v. Sacco* anti-immigrant sentiment was amplified by radical bombings during the Red Scare. These bombings were exaggerated by the press and government and caused a panic within the public. When Sacco and Vanzetti were brought to trial in 1921, fears of radical Italian immigrants and of a Bolshevik-style revolution in the United States were strong enough to influence the court. Ultimately, Sacco and Vanzetti were convicted and executed based on their ethnicity and political beliefs rather than the actual evidence against them.

Similarly, in *Korematsu* anti-foreign prejudice and security fears were cause by the Japanese attack on Pearl Harbor. The attack caused the existing anti-immigrant, especially anti-
Asian, sentiment to increase. This bias combined with fear of Japanese invasion of the West Coast led to the internment of almost 120,000 Japanese-Americans. These people, including Fred Korematsu, had their Constitutional rights violated. The Court’s decision in *Korematsu* heightened the problem, upholding those violations as just and necessary.

*Hamdi* began in the same manner as the previous two cases. An individual of an unpopular minority group, following a tragic attack on the United States, was wrongly deprived of constitutional protections. It seemed as if anti-immigrant sentiment and public security fears would once again lead to a miscarriage of justice. Fortunately, this did not occur. Advances in minorities’ rights, in addition to a better informed general public led to a decrease in anti-immigrant and national security fears in the years following the 9/11 attacks. This allowed the Court to make a just ruling in *Hamdi*, upholding the principles of the Constitution to protect citizens from unlawful arrest and imprisonment, and discrimination under the law.

Examinations and comparisons of the touchstone cases clearly indicate that the influence of external forces began in *Commonwealth v. Sacco* peaked in *Korematsu v. United States* and have receded in *Hamdi v. Rumsfeld*. Whether this change is permanent and will continue is impossible to tell. If another September 11th-like terrorist attack were to occur, it could produce a social and political atmosphere worse than any seen in history. This could nullify the positive advancements American society has made over the past sixty years and allow for an even more blatant disregard of the Constitution, as well as an even worse miscarriage of justice that was seen in any of the three touchstone cases. Whether external forces could again lead to injustices against minorities all depends on the future and the decisions made in the hearts and minds of the American people.
### Disciplinary Theories, Concepts and Perspectives

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**Law:**

Political Trials: This theory views the three touchstone cases as having dual agendas. The outer agenda provides a false cover of legality and legitimacy. Underneath that there is a secondary motive to punish, dominate or eliminate the minority group involved.
Constitutional Stretch, Snap-Back and Sag: This theory states that in the wake of all the crises involved in the three touchstone cases, the Constitution was stretched. After Korematsu, the Constitution snapped back tighter than before because of the dreadfulness of the decision. In the post 9/11 era this phenomenon has been realized and the stretch has been fought against inch by inch to prevent another discriminatory abuse of Constitutional power.

**History:**

Cause and effect: This theory proposes that waves of discrimination and prejudice against minorities were caused when members of these minorities caused, or where thought to have caused major attacks on the United States.

“Other Non-White” Theory: This theory suggests that “other non-white” minorities such as Asians, Muslims, and Italian/Hispanics have always been seen with a notion of foreignness. Therefore when a major attack or crime caused by the members of these minority groups occurs, they are not afforded the protection or rights guaranteed to “true” American citizens.

Plenary Power Doctrine: This doctrine provides legal for the indefinite holding of Americans on the basis of ethnicity. It allows an issue involving immigrants or immigration law to be decided purely on race or ethnicity. It has also allowed the United States
Supreme Court to ignore Fifth and Fourteenth Amendment rights in cases involving immigrants, and defer to the executive and legislative branches
From Guest Workers to Permanent Foreigners: German History, Citizenship Reform, and Germany’s Turkish Immigrant Population

Elaine McFarlane
Kenyon College – Class of 2009

Abstract:

This paper explores the history and policies of German citizenship. Historical definitions of German citizenship over time are of particular importance because they have influenced policy and informed society’s ideas of who belongs. These historical definitions will be traced from the Prussian era to today. A close examination of Germany’s laws including the 1999 Reform of the State Citizenship Law reveals a shift in the legal definition of the German citizen. Previously distinguished through blood, the reform now emphasizes cultural German-ness. The paper then examines Germany’s Turkish population, the nation’s largest minority population, and asks how the reform has affected the group’s naturalization and integration. In its findings, the paper argues that aspects of the reform largely disadvantage the Turkish population, placing preference on other foreign groups within Germany, and refusing the Turks of political and cultural rights. The reform’s additional requirements, including mandatory classroom time, invasive examining, and refusal to grant dual citizenship to Turks, leave Turks less eligible for naturalization and discourage Turkish integration into German society. Finally, the paper looks at Germany’s future and urges Germany to embrace its foreign population.

Introduction:

The idea of the true German has dictated the history of German citizenship from the Prussian era to today. For decades, bloodlines determined who could obtain German citizenship. As a result, German ethnicity became equated with citizenship. Long before and after Hitler’s extreme ideas of race and nationalism, Germans marginalized those with different blood, language, and culture. Access to German citizenship has served as a legal way to distinguish who has access to rights. The country’s history reveals discriminatory citizenship policies as well as a refusal to acknowledge foreign populations through policy. Today, Germany’s Turkish immigrant population is the latest in a long line of foreign groups struggling to gain access to political and cultural rights.
This paper asks how Germany’s 1999 citizenship reform affects Germany’s Turkish population, its naturalization, and its integration into German society. While most discourse focuses solely on either policy or history, this paper argues that the two must be looked at simultaneously: each influences the other and both mould public perceptions. The 1999 reform is important because it provides Germany’s most current stance on foreign populations and reflects the country’s modern ideals and values regarding immigration and German citizenship. Informed by past citizenship policies, Germany’s reformed citizenship law superficially liberalizes citizenship and ultimately maintains the Turks’ marginalized place within society, thus discouraging the naturalization and integration of Turkish immigrants.

The History of German Citizenship:

While countries like France and Britain worked towards the creation of modern democracies beginning in the late 18th century, the Prussian territories remained a “politically fragmented assortment of minor kingdoms, princedoms, and dukedoms” until 1871. The German language served as the common thread among the territories. Prussian officials identified and expelled foreigners and beggars by their inability to speak German. In the 1820s and 1830s, a wave of German thinkers including Hegel and Fichte attempted to unify the fragmented Prussian territories. German writer and philosopher Johann Gottlieb Fichte accused foreigners and foreign words as equally responsible for corrupting Germany and its citizens, and refused to use words of foreign origin in his Addresses to the German Nation. In the winter of 1807, Fichte announced that the German nation would extend only “as far as the German tongue

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was spoken,” making clear that the German language defined and unified Prussia’s fragmented territories.⁴

Fichte’s sense of the German state was “universal” and “arose organically from local communities.”⁵ Furthermore, Fichte’s writings and speeches “conveyed to the members of the nation the particular national personality and way of thinking (Denkweise) that was the […] essential basis of life.”⁶ In his works, Fichte planted “the seeds of future policies of ethnic exclusion” within Germany.⁷ Unconditional loyalty, unity, and the racial superiority of the Germans appear at the forefront of Fichte’s speeches. For instance, Fichte proclaimed the German nation as “the highest and greatest and most comprehensive human society.”⁸ The thinkers of the day also emphasized nature, commonly comparing the nation to a living organism made up of citizens working towards a common destiny.⁹ “The nation has an urge towards unity, and this urge is like the growth of a tree, the blowing of the wind,” said the German writer Johann Joseph von Görres.¹⁰ This romantic ideal united the Prussian people by urging them to believe in and work towards Fichte’s “comprehensive human society.”

The concept of the German people (das Deutsche Volk) also originates from the Romantic period.¹¹ Brubaker defines the spirit of the German people (Volksgeist) “by its

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⁴ Nathans 29.
⁵ Nathans 29.
⁶ Nathans 29.
⁷ Nathans 29.
⁹ Giesen 93-5.
¹⁰ qtd. in Giesen 94.
infinitely ramifying expression in language, custom, law, culture, and the state.\textsuperscript{12} According to Green, the German \textit{Volk} is “genetically distinct and biologically ‘alive,’ and its members formed a \textit{Schicksalsgemeinschaft}, literally a ‘community of common destiny.’”\textsuperscript{13} The belief that only ethnic Germans contributed to the German nation and could live the German lifestyle spread throughout Prussia as truth. These ideas of privilege and superiority served as the basis for marginalizing other groups within society, especially foreigners. German blood became “synonymous with the cultural community.”\textsuperscript{14} Even today, calling someone “Prussian” in Germany refers to a distinct lifestyle and set of traits, including diligence, organization, obedience, and punctuality.\textsuperscript{15}

Fichte’s notion of the German state and its people influenced Prussia and its citizenship practices. The Prussian government labelled ethnic Germans as desirable, moral, and hardworking and expelled beggars, criminals, and foreigners.\textsuperscript{16} From 1820 to the 1840s, Prussian states published journals describing “vagabonds” and “criminals” in hopes that these individuals would be caught and expelled.\textsuperscript{17} The Prussian government, weary of revolutionary ideas, excommunicated individuals who challenged current policies and the unity of the ethnic Germans.\textsuperscript{18} In the 1850s, Prussia attempted to rid the Prussian states of moral corruption by outlawing cohabitation by non-married adults.\textsuperscript{19} The motion was a thinly veiled attempt to rid


\textsuperscript{13} Green 2004 28.

\textsuperscript{14} Behr 468.


\textsuperscript{16} Nathans 21-3.

\textsuperscript{17} Nathans 21.

\textsuperscript{18} Nathans 83-4.

\textsuperscript{19} Nathans 84-9.
Prussia of foreigners. Foreign men could not legally marry in Prussia and young, poor immigrants often cohabitated, leaving foreigners the only group vulnerable to expulsion. This marked the first time policy equated “foreigner” with “moral corruption.”

After uniting Germany in 1871, Bismarck also expelled certain ethnic groups, including the Jews and the Poles. According to Nathans, Bismarck feared these two groups for several reasons. First, due to their increased immigration rates, Bismarck worried these particular foreign populations might gain too much power and cultural influence within Germany. Second, Bismarck categorized the Jews and the Poles as unresponsive to the Prussian attempts to “Germanize” them. Bismarck also noted that these two groups voted for political parties in opposition to the current government, which led him to conclude that the Jews and the Poles did not possess the German spirit.\textsuperscript{20} Carle distinguishes this time period in Prussian history as “an era of nation-building that marginalized non-German ethnic and national groups.”\textsuperscript{21} The emphasis on German blood within the German territories is older than the nation itself, and policies continued to reflect Bismarck’s fears by favoring ethnic Germans long after his death.

In 1904, Prussia’s Interior Ministry signed a treatise that singled out Jews, Poles, Czechs, and Danes for “discriminatory treatment” upon attempts to naturalize.\textsuperscript{22} The treatise was marked “secret” and urged local officials to discriminate against certain non-German groups.\textsuperscript{23} The treatise also assumed “unworthiness or potential disloyalty based on ethnicity (or perhaps ‘race’) outweighed all contrary evidence, even if the contrary evidence was overwhelming.”\textsuperscript{24} Since discriminated groups were not ethnically German, their race became synonymous with disloyalty.

\textsuperscript{20} Nathans 112.
\textsuperscript{22} Nathans 146.
\textsuperscript{23} Nathans 140.
\textsuperscript{24} Nathans 140.
to the German nation and served as a sound reason to deny them naturalization. The fear of betrayal became increasingly common and politically motivated. When one Austrian Jew, Hugo Agular, sought naturalization in 1913, the local government denied his application. The rejection stated that “his political conduct and party membership have given rise to questions, since one can assume that he – like most of those belonging to the Jewish religion – belongs to the Progressive Party.” This marked the beginning of anti-immigration parties having an interest in limiting the naturalization of certain minority groups. Since citizenship is coupled with the right to vote, these groups would presumably support pro-immigration political parties. Conservative parties also have had an interest in preserving and promoting the ideal, ethnic German citizen as a way to marginalize minority groups and refuse them of political rights. While liberal Germans responded with criticism to these measures, conservative politicians and the conservative public outnumbered them. The 1904 treatise also assumed that foreigners cannot “be assimilated into the German nation.” This assumption has persisted in both history and policy, reflecting the nation’s reactive approach towards immigrant integration.

The ideas of Fichte, Bismarck, and the German communities culminated in Germany’s 1913 Citizenship and Nationality Law. The law served eighty-six years, witnessing the rise and fall of Hitler and the Berlin Wall. The law employs the *ius sanguinis* principle (the law of blood). Under the law, German citizenship could be passed only through blood; “birth in the

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25 Nathans 147.
27 Nathans 147.
28 Appendix 1: 1913 Citizenship and Nationality Law
29 Brubaker 265; Carle 148; Green 2004 31.
territory, even coupled with prolonged residence, has no bearing on citizenship.”30 Second, third, and even fourth-generation foreigners gained citizenship only through naturalization. The emphasis on blood relations, Green argues, “bears evidence of the gradual rise of ethnonational ideology as the underlying definition of membership of the German people. If the Volk is a genetic, biological entity, then it is only logical that membership of it may transferred only via blood, the purity of which may best be maintained through ius sanguinis.”31 The Citizenship and Nationality Law intended to discourage naturalization and immigration. This objective aligned with the nation’s unwillingness to harbor immigrants: the Federal Naturalization Guidelines of 1977 explicitly declared that Germany was not a country of immigration.32 In similar fashion, the 1913 law attempted to prevent the permanent residence of “undesirable migrants,” and only “as a last resort,” prevented their naturalization.33

Additional restrictions within the 1913 Citizenship and Nationality Law included the inability to hold dual citizenship, the inability for German women to maintain German citizenship once married to a non-German citizen, and the inability of those women to pass their citizenship onto their German-born children.34 After marrying a non-German, many German women lost not only their citizenship, but also their employment because most professionals refused to employ non-citizens. By defining a woman’s citizenship through her relationship to a man, the law also reinforced a patriarchal society. The state controlled German women’s

30 Brubaker 82.
31 Green 2004 29.
33 Brubaker 235.
34 Nathans.
reproduction and encouraged Germans to procreate with each other to keep the German bloodline pure.

Under the law, foreigners residing and working in Germany for extended periods did not have legal claim to a German passport. According to one source, “naturalization was far from being a ‘right’ of long-term [residents], as naturalization was realized (and only rarely) purely at the discretion of authorities;” Germany was “an exclusive club.”\(^{35}\) During World War I, however, German officials introduced a more hospitable approach to minority naturalization due to army shortages. By extending naturalization to resident aliens living in Germany and foreign Jews, the nation bolstered its ranks in the army. Between 1914 and 1916, naturalizations increased by 3,000 per year.\(^{36}\) In October of 1916, a questionable study by the German army confirmed a widespread rumor that Jewish soldiers were “not adequately represented in the most dangerous positions.”\(^{37}\) As a result, the army placed even more Jews at the front lines as cannon fodder. The government’s system of ranking citizens illustrates the discrimination Jews faced and the way the state used power and citizenship to achieve their own ends.

Germany’s history of citizenship defined by blood influenced Hitler’s aim to create a pure racial state. In fact, Prussia’s 1904 naturalization treatise and the 1913 definition of the ethnic German citizen suited the Third Reich’s goals perfectly.\(^{38}\) After coming into power in 1933, Hitler attempted to prevent immigration and stopped naturalizations for all non-Aryans.\(^{39}\) Taking the 1904 treatise a step further, Hitler not only prohibited Jewish naturalization, but also

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\(^{35}\) Sezgin, Utku, “Going beyond Culture and Assimilating Immigrants: The Conversation that Germany Needs,” Political Science PhD Program, Graduate Center at City University of New York, Unpublished manuscript.

\(^{36}\) Nathans 185.

\(^{37}\) Nathans 186.

\(^{38}\) Green 2004 29-30; Nathans 217

\(^{39}\) Nathans 218.
expelled Jews already living in Germany’s borders, calling them “disloyal and culturally a menace.” Hitler also undid naturalizations granted by the previous regime. The 1933 Law on the Revocation of Naturalization and Denial of German Citizenship called to revoke any naturalization undesirable to the state. The denaturalizations affected German citizens without an ethnic German background. Officials labeled these citizens not “useful to German interests” or “harmful to State and Volk.” The Nazis denaturalized over a thousand citizens each year between 1933 and 1940. Hitler and the Nazis systematically murdered Jews, Slavs, Poles, Roma, homosexuals, religious and political opponents, the disabled, and other minority groups because they did not fit with Hitler’s vision of the ideal German race. By the end of the Nazi state in 1945, the regime claimed an estimated fifty million lives.

Following the demise of the Nazi regime, Germany attempted to recreate and rebuild itself as a nation. Citizenship laws and human rights were of immediate concern. The Basic Law of the Federal Republic of Germany in May of 1949 reacted to Germany’s past discrimination. The law proclaims all men “equal before the law” and that “no person shall be favored or disadvantaged on the basis of sex, parentage, race as a result of his gender, origin, race, language, homeland and origin, faith, or religious or political opinions.” The law also outlawed denaturalization and forced labor. Under the law, previous citizens forced out by the Nazis

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40 Nathans 218
41 Appendix 2: Law on the Revocation of Naturalization and Denial of German Citizenship
43 Nathans 219.
45 Appendix 3: The Basic Law of the Federal Republic of Germany
46 Göktürk et al. 156.
gained the right to reclaim their citizenship and homeland.47 While the Basic Law succeeds in stepping away from Germany’s Nazi past, scholars remain critical. Rubio-Marín’s close study of the German Basic Law points out that it still contains “a systematic demarcation” between the rights extended to German citizens and those extended to non-citizens.48 Carle calls the law a “curious mixture of ethno-national and post-national definitions of German citizenship.”49 The law also presupposes a male German citizen by presenting the paradox that “no one may be disadvantaged or privileged as a result of his gender.” The Basic Law benefited ethnic Germans by extending citizenship to those who previously held citizenship through the 1913 law, yet does not address foreigners or immigrants living in Germany in regard to citizenship or rights.

**Guest Workers - Overstaying Their Welcome:**

The end of World War II also brought the creation of Germany’s guest worker (Gastarbeiter) program. To keep Germany’s postwar economy afloat, the German government recruited temporary guest workers from other countries for unpopular and low-skill jobs.50 By the 1960s, in response to Turkey’s high unemployment at the time, the Turkish government allowed Germany to set up labor recruitment offices throughout Turkey.51 Both countries acknowledged the Turkish workers as temporary, entering and leaving the market as necessary, and ultimately returning to Turkey on a rotational basis.52 Soon enough it became clear that both workers and employers did not utilize the rotation schedule because all parties benefited

47 Carle 150;


49 Carle 149.


51 Carle 150.

financially from the workers staying for extended periods of time.\textsuperscript{53} German employers avoided having to train new workers, Turkey’s unemployment rate decreased, and formerly unemployed Turks received a steady paycheck. Triadafilopoulos and Schönwälder cite German employers’ refusal to use the rotational system as the reason for Germany’s large immigrant population. At this time, “nothing [was] more permanent than temporary workers.”\textsuperscript{54} As a result, in 1965 Germany passed a new Foreigner Law enabling guest workers to hold extended residency permits if the contract benefited Germany.\textsuperscript{55} According to Joppke, the 1965 law granted guest workers no rights and put their ability to remain in Germany “at the mercy of a benign state.”\textsuperscript{56}

Post-1965, Turkish nationals stayed in Germany for longer periods, yet all aspects of German society continued to believe that the guest workers would soon return home, making integration unnecessary. German television stations introduced programs and whole channels in Turkish. This illustrates the growing Turkish-speaking population, the demand for Turkish programming, and Germany’s goal to help “foreign workers retain ties with their homelands, to which they were supposed to eventually return.”\textsuperscript{57} Since the German language is the root of German culture, offering Turkish television illustrates Germany’s overall refusal to integrate the Turks into German society. In fact, keeping the workers nonintegrated was in the economic interest of the government. A nonintegrated guest worker cost the state around DM 30,000 (about $20,000) for necessities to live; infrastructural resources for an integrated worker cost

\begin{footnotesize}
\begin{enumerate}
\item Behr 469; Triadafilopoulos and Schönwälder 8.
\item Martin qtd. in Behr 469.
\item Carle150-1.
\end{enumerate}
\end{footnotesize}
between DM 150,000 and DM 200,000 ($100,000 and $130,000).\(^{58}\) No government funding went towards helping the workers integrate.

The workers’ living conditions reflected their ostracized status in Germany. Living in hostels or barracks, it was not uncommon for six Turkish guest workers to live in a fifteen square meter room with beds stacked two and three high.\(^{59}\) In February 1967, a police report described six Turkish guest workers’ barracks: “Trying to describe the toilet, you stand aghast. On the floor is a single filthy pool, the only fixture a limestone latrine without seat.”\(^{60}\) The workers’ temporary status allowed Germans to separate themselves from the disgusting images associated with guest workers and immigrants.

Eager to escape the barracks lifestyle, Turkish workers sent for their families and moved into individual apartments. Since landlords refused to rent to Turkish families, many bought their own flats.\(^{61}\) For many families, this finalized the permanent commitment to remain in Germany. By 1973, 73 percent of all foreigners who had been in Germany for ten or more years lived in their own apartment.\(^{62}\) Migration into separate homes, however, did not integrate Turkish guest workers into German society. Two trends solidified the Turks’ isolation. First, the workers lived in cheap housing near factories or in the inner city. Second, as foreigners moved into certain neighborhoods, the value of real estate in surrounding areas decreased and the ethnic German population moved away. Over time, German society neglected neighborhoods with large

\(^{58}\) Herbert.

\(^{59}\) Herbert.

\(^{60}\) qtd. in Herbert 219.


\(^{62}\) Herbert.
immigrant populations leading to ghettoization.\(^{63}\) One 1973 Der Spiegel article title illustrates this phenomenon: *Die Türken kommen: rette sich wer kann!*, or in English, *The Turks are Coming: Save Yourself If You Can!*

When the guest worker program stopped after the 1973 global oil crisis, no fewer than 2.6 million guest workers worked in Germany.\(^{64}\) At this time, one in every eight workers was foreign and the 605,000 Turks in Germany made up the largest group of guest workers.\(^{65}\) In 1981, 1.4 million Turks represented the only foreign population in Germany that was growing rather than shrinking.\(^{66}\) Eager to stem the growth of the Turkish population, the German government offered a bonus of up to $5,000 to departing families and social security refunds to departing guest workers.\(^{67}\) This offer lasted two years and only slightly reduced the foreign population. Scholars conclude that the only foreigners who benefited from the bonuses planned to leave Germany regardless.\(^{68}\) The remaining immigrants in Germany, regardless of the length of their residency or location of birth, assumed the title of foreigner. By 1986, only 8,166 of the almost 2 million Turks in Germany avoided the label by gaining German citizenship.\(^{69}\) As the Turkish population continued to grow in the late 1980s, the paradigm shifted from “the foreigner problem” to “the Turkish problem.”\(^{70}\)

\(^{63}\) Herbert.

\(^{64}\) Göktürk et al.

\(^{65}\) Behr 472; Göktürk et al.


\(^{68}\) Martin.

\(^{69}\) Sener Akturk, “Continuity and Change in the Regimes of Ethnicity in Austria, Germany, the USSR/Russia, and Turkey: Varieties of Ethnic Regimes and Hypotheses for Change,” *Nationalities Papers*, 2007, 23-49.

\(^{70}\) Joppke 1999 78.
The 1999 Reform of The State Citizenship Law:

After the Social Democratic Party of Germany (SPD) and the Greens won the 1998 election under Gerhard Schröder, the coalition attempted to address the long-term problem of immigrant families in Germany through citizenship reform. As originally presented, the reform proposed unlimited dual citizenship, reduced residential requirements leading up to naturalization, and suggested a form of *ius soli* (the law of soil) giving qualified children born in Germany the right to naturalization. Opposition from the public and other parties, mainly the Christian Democratic Union (CDU) and the center-right Free Democratic Party (FDP), forced the SPD-Greens to compromise on the issue of dual citizenship. The 1999 Reform of the State Citizenship Law, implemented on January 1, 2000, is the result of this compromise. The law of soil and reduced residency requirements leading up to naturalization remained as originally presented, while the country’s stance on dual citizenship did not change. The reform also added new requirements for naturalization applicants including expressing loyalty to the German constitution, supporting oneself and family without social services, and having command of the German language.

Integration into German society is also required under the reform. By equating the naturalization requirements with integration, only integrated foreigners are eligible for German

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71 Green et al. 2008.
72 Green et al. 2008.
74 Appendix 4: *The Reform of the State Citizenship Law*
75 Green et al. 2008; Anil 2005 463;
citizenship. In order to be politically and legally German, an immigrant must be culturally German. The eligibility requirements make this unspoken requirement clear: adequate command of the German language, the ability to support oneself and family, and the symbolic act of surrendering previous passports. Since Turks are less integrated into German society, they are less likely to be eligible for naturalization post-reform. In the 86 years between the 1913 Citizenship and National Law and the 1999 Reform of the State Citizenship Law, the legal definition of the German citizen shifted from ethnic German to cultural German.

The new emphasis on culture, rather than race or familial ties, presents citizenship as attainable, even a personal choice. Yet the institutional discrimination foreign groups face remains the same distinct and institutionalized categories: citizen and foreigner. By presenting a tight link between the political status of foreigners, their citizenship, and their cultural status, the reform works towards a slightly revised but still homogeneous German nation focusing on culture rather than ethnicity. Countless multicultural countries successfully differentiate between legal citizenship and culture. Germany is unable to do this because the ideas the Volk filter through to nearly every aspect of the national consciousness, including its policies.

In addition to the 1999 reform, the 2004 Immigration Law introduced free yet mandatory integration and language courses for naturalization applicants leading up to an examination to test language proficiency and cultural knowledge. Completion of the courses and exam represents an additional requirement proving an immigrant is integrated and eligible for naturalization. The classes include six hundred hours of language instruction and 30 hours of

77 Anil 2004.
Integration classes focusing on German history, culture, and law. Later, the paper will address the problems of the exam, particularly for Turkish applicants.

Although the reform appears to be a more liberal and welcoming version of the original 1913 law because it utilizes the *ius soli* concept, it is more limiting. Changes in naturalization policy, the lengthy required classes, the cost of the naturalization application, and the tedious, overwhelming process discourages and limits interested foreigners. The average duration of the naturalization process in 1989 was around nine months. While none of the consulted sources offered a similar statistic regarding length of naturalization post-reform, it is probably much longer and certainly more labor intensive today, considering the more than 600 in-class hours. Compared to other similar European countries, such as the Netherlands, France, Switzerland, and Britain, Germany’s naturalization process has “a notorious reputation” for the “bureaucratic complexity and long duration” as well as “informal barriers to naturalization in the form of uninvitingly long and complex procedures.”

Germany’s total foreign population, 7.3 million (8.9 percent of the total population) is very well settled: one-third have lived in Germany for over twenty years. As a result, the reform’s reduced residency requirements leading up to naturalization, from 15 years to 8 years, have had little impact on naturalization numbers. About 2.7 million Turks currently call Germany home and about 800,000 hold German citizenship. While politicians expected an

78 Green et al. 2008.
80 Koopmans et al. 38-9.
81 Akturk.
82 Anil 2004.
increase in all naturalizations post-reform, Turkish naturalizations peaked in 1999, with just over 100,000 naturalizations, the year before the reform went into effect, and continue to fall today. Conversely, all other foreign populations increased their naturalization practices after the reform went into effect on January 1, 2000.\(^8\)

Between 1999 and 2003, Turks also reported a sharp increase in discrimination, perhaps resulting from the terrorist attacks of September 11, 2001 paired with the rhetoric of the citizenship reform.\(^85\) While other foreigners became more likely to naturalize post-reform, Anil found all interested Turkish foreigners “less likely to apply and less likely to be eligible to apply for German citizenship than before” the 1999 reform.\(^86\) This paper asks why the reform has had a negative impact on the Turkish naturalizations.


\(^86\) Anil 2007 1366.
Preparing to Apply for Naturalization:

Before applying for naturalization, an applicant must denounce previous citizenship, complete the required classes, and secure the funds for the application fee. Simply gathering information about where and how to apply for citizenship can serve as a barrier to naturalization, especially for foreigners who cannot speak German. First, surrendering a previous passport is not a simple task. Horror stories include release fees amounting to as much as one month’s salary, inflexible deadlines, complicated paperwork, and an unhelpful Turkish consulate.87 Second, the monetary costs of naturalization keep many foreigners from citizenship. The average Turkish family of four living in Germany reported a yearly net income of €2,118 (about $2,700).88 Considering Germany’s naturalization fee of €255 (about $330) for an adult and €51 ($65) for each minor dependent naturalized with a parent, naturalization for the entire family can cost nearly one-third of the average family’s net income.89 Lastly, the need to take time off work or withdraw savings out of a bank to gain citizenship discourages a population plagued by low incomes and unemployment. Under the reform, people receiving unemployment benefits or social assistance are also ineligible for naturalization.90 The initial costs of naturalization discourage some foreigners while making others completely ineligible.

The Exceptions and The Law of Soil:

The 1999 reform aimed to ease naturalization and extend greater rights to more foreign groups living in Germany. It did for certain groups, namely foreigners hailing from the European Union. Foreigners from non-European Union countries, though, were less eligible to apply for

87 Green 2005 933 ; Anil 2004.
88 Şen 2002.
90 Koopmans et al.
German citizenship post-reform. Since Turkey is not a member of the EU, this partially explains the significant decrease in Turkish naturalizations and the immediate increase in naturalizations of all other groups in Germany after 1999.

EU-nationals and other foreigners residing in Germany also enjoy certain rights not extended to Turkish immigrants. Upon joining the European Union, Germany agreed to abide by the Union’s laws, including opening its borders to other EU citizens. According to EU law, “every citizen has the right to move freely and reside anywhere within the Union.” To include the EU-foreigners in the German and European political community, the 1993 Maastricht Treaty granted all EU citizens in Germany the right to participate in local elections where he or she resides regardless of citizenship. This right includes the ability to vote and run for office. Germany also grants ethnic German immigrants (Aussiedler) who return to Germany after living elsewhere these same political rights before regaining German citizenship. Only the SPD attempted to extend local voting rights to all foreigners living in Germany as an act of integration through political participation. This argument fell on silent ears. Turks and other non-EU foreigners still must obtain German citizenship before gaining the right to participate in their local government.

For a marginalized group like the Turks, gaining access to political participation is not enough incentive to go through the naturalization process. Since the German government extends social services and economic rights to non-citizens residing in Germany, foreigners only stand to

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91 Anil 2004.
92 Takle 182-3.
93 Takle; Koopmans et al.
94 Takle.
95 Takle.
gain political rights through naturalization. As one Turk told Anil, “I think becoming a German citizen would have no positive impact on my future. I will still be a ‘black head.’” Voting trends also reveal political reasons behind refusing Turks the right to vote while allowing other non-citizens this same right. Reminiscent of the Austrian Jew Hugo Agular, who Germany refused citizenship because of his liberal politics, Turks face similar albeit more subtle discrimination. In 2002, only 11 percent of voting Turks intended to vote for Germany’s conservative party, the CDU/CSU, while 62 percent intended to vote for the liberal SPD and 22 percent for the center-left Greens. On the other hand, 73 percent of ethnic Germans returning from the Soviet Union, who have local voting rights without naturalization, intended to vote for the CDU/CSU. Conservative politicians have no interest in granting the right to vote to populations who vote liberally, but have liberally offered this right to the ethnic Germans who tend to vote conservatively. Ultimately, political rights are essential to integration and lead to increased representation and power. Due to this exclusion, Turks are not represented in positions of power and will remain a marginalized group ineligible for naturalization.

Although it largely prohibits Turkish-German dual citizenship, Germany accepts dual citizenship in the case of naturalizing EU citizens and some asylum seekers. Since EU citizens are “to be treated equally with German citizens” German parliament found it “not necessary to have them renounce their former citizenship in order to gain access to citizenship rights.” German law, however, does not permit ethnic Germans to hold dual citizenship. As far as dual citizenship is concerned, EU citizens enjoy superiority rather than equality compared to other

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97 Anil 2004 15.
99 Wüst.
100 Takle 187.
German citizens. Naturalized asylum seekers are also occasionally permitted to take on dual citizenship. Nearly all refugee applicants from Afghanistan, Iran, Morocco, and Eritrea retained their previous nationalities when they gained German citizenship in 2003.\textsuperscript{101} While Turks made up 40 percent of all naturalizations in 2003, only 14 percent of those naturalizations allowed dual citizenship.\textsuperscript{102} Further, the four German states with the most Turkish naturalizations in 2003 also had “below average” dual citizenship toleration rates.\textsuperscript{103}

By 2004, the German government encouraged the naturalization of EU citizens and attempted to “ease the process” of their residence by excusing EU citizens from the required language and integration courses.\textsuperscript{104} The array of reform exceptions regarding dual citizenship, voting, and the integration classes flipped the paradigm of “the other” in Germany. EU citizens, once viewed as foreigners, now enjoy insider status while non-EU immigrants remain outsiders.\textsuperscript{105} While some of the exceptions result from EU ordinances and asylum seeker laws, which enforce restrictions on dual citizenship less strictly, the exceptions disadvantage the Turks because they do not fit the criteria for any of the exceptions.

The paradigm of “the other” in Germany also shifted with the introduction of ethnic German immigrants living within Germany’s borders, such as citizens from former East Germany (DDR) and Aussiedlers. Employment opportunities illustrate the hierarchy of all individuals living in Germany. One male Turk told Anil, “[…] after the reunification [of Berlin], it became very difficult to find a job. It is now much harder for Turks to find a job. Jobs go to native Germans, former DDR citizens, Aussiedlers, and EU nationals. If there are any jobs left,
and if the Turks are qualified, they may get one.” Turks are at the bottom of German society. Another respondent living in Berlin since 1999 said he found it increasingly harder to find work he is qualified for, “because they prefer ethnic Germans, Polish, or Bulgarian immigrants to Turks.” The 1999 reform undoubtedly heightened Germany’s status hierarchy, making it virtually impossible for Turks to integrate and naturalize, two necessary steppingstones to getting ahead in German society.

The reform’s use of *ius soli* is a symbolic first in German citizenship laws. Germany’s version of *ius soli*, however, is impartial and still does not grant citizenship based on birth in Germany. This version extends only to children with one parent who has resided in Germany for at least eight years and holds the equivalent permanent residence status. Around two thirds of foreigners fulfill the residential requirement but “far fewer meet the [permanent] residence status provision, which has meant that the new *ius soli* has applied to only about 40 percent of live births to non-national parents between 2000 and 2002.” Even when foreign parents meet the *ius soli* requirements, their baby receives only temporary German citizenship. By the child’s 23rd birthday, he or she must either naturalize as a German citizen (surrendering her parents’ nationalities and meeting the other requirements, too) or he or she will lose German citizenship. In the coming years it will be interesting to see if a large number of children born to foreigners do indeed naturalize and claim their German nationality. Regardless, before age 23, foreigners’ children must still complete the naturalization process. Like the guest workers before them, eligible children resume a temporary position within German society.

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107 Anil 2004 14.
108 Green 2005 926; Koopmans et al.
109 Green 2005 926.
The Dual Citizenship Debate:

“If today we give in to the demands for dual citizenship, we would soon have four, five, or six million Turks in Germany instead of three million,” said German Chancellor Helmut Kohl.¹¹⁰

Germany’s dual citizenship debate centers around the country’s fear of the Turkish population and its growth. Politicians direct arguments against dual citizenship directly at Turkish immigrants. Opponents argue that dual citizenship creates a “conflict of loyalty” and is a “hindrance to successful integration.”¹¹¹ Denouncing previous citizenship, Germans say, serves as a symbolic first step in transforming a foreigner into a loyal and cultural German. This requirement demonstrates that the Germans still expect loyalty and unity within their nation, a remnant of Fichte’s speeches.

Awakened by the reform, the dual citizenship debate dominated “the entire public and political agenda” between 1998 and 1999.¹¹² In a point counter-point article published in Die Zeit in early 1999, two writers debated the issue. According to Roger De Weck (1999), who argues in favor of dual citizenship, politicians fear the Turks: “Nothing against the French, the dual-citizenship foes will argue, but the issue here is the Turks. So what? What’s the problem?”¹¹³ Jan Ross arguing against dual citizenship, states, “One can certainly love two women. But one can be married only to one.”¹¹⁴ The restrictions on dual citizenship in the 1999 reform show the popularity of Ross’ position, but perhaps more revealing is De Weck’s argument suggesting that

¹¹¹ Green 2005 922.
¹¹² Green 2005 924.
¹¹³ qtd. in Göktürk et al. 174.
¹¹⁴ qtd. in Göktürk et al. 176.
the nation’s rejection of the Turks was an attempt to discourage Turkish naturalization and keep Turks a powerless group.

On the surface, Germany’s stance towards dual citizenship has not changed post-reform. While the previous 1913 German citizenship law also did not allow dual citizenship, it had loopholes. Scholarly and anecdotal evidence reveal “some degree of tolerance of dual citizenship in practice” before reform. In 1993, for instance, 40 percent of all naturalizations in Germany accepted dual citizenship, although those practices seem to be inconsistent and vary by each German state. Some estimate that at least two million Germans hold two or more passports, although no official records document this.

German officials now strictly enforce surrendering previous citizenship in the case of Turks. One forty-four year old male Turk living and working in Berlin confessed:

During the Kohl period, it was easier to be naturalized. Now, with the new law, we cannot be dual citizens. It was not unlikely that a Turk, after gaining German citizenship, would apply for Turkish citizenship he had to renounce prior to his application for naturalization. This was tolerated before. But, now, with the new law it is not anymore. I would like to become a German citizen, but I am not sure if it would solve the problems we are now facing.

The inability to hold dual citizenship serves as a major barrier to naturalization for Turks in Germany. Denouncing previous citizenship requires a long process that demands two separate applications: one to denounce previous citizenship, and the second to naturalize in Germany. Considering the many applicants allowed to keep their previous nationality, including EU citizens and asylum seekers, the second application exists almost exclusively for the Turks. One

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116 Anil 2006.
118 Anil 2004 13.
119 Anil 2004.
female Turk in Berlin told Anil that she was interested in becoming a German citizen, but because of the length of the process, she missed a few deadlines and never reapplled.\textsuperscript{120} Two second-generation Turks in Anil’s study experienced problems with the Turkish consulate. When they attempted to denounce their Turkish citizenship, the consulate suggested they wait until age eighteen, in which case they never reapplied because of the time commitment. Anil’s 2004 study is significant because she found that many Turks interested in becoming German citizens did not want to surrender Turkish citizenship or were discouraged by the process.

The inability to hold dual citizenship impacts Turkish women more than men, while Turkish women also tend to be less eligible for naturalization. Since the guest worker program recruited Turkish men who were isolated from the German population, the workers often sent home for brides, wives, and family members. Family migration from Turkey to Germany continues to be a main source of immigration: today, women represent 45.8\% of Germany’s Turks.\textsuperscript{121} Family members, mainly women, gain their residency status in Germany through their relationship to a man. Brides and family members must wait two years to become eligible for their own residency permit.\textsuperscript{122} Turkish women often arrive without German language skills and tend to stay in traditional roles that prevent them from integrating, making them less likely to be eligible for naturalization post-reform.\textsuperscript{123} Instead of assisting in their integration, Germany silences a large part of its Turkish population.

Dependence on social services and refusal to denounce previous passports also serve as a barrier to German citizenship for Turkish women. One community center for Turkish women in

\textsuperscript{120} Anil 2004 13.
\textsuperscript{121} Green et al. 2008; Şen.
\textsuperscript{123} Goddar.
Berlin reports that after having children, most Turkish women slip onto the welfare rolls indefinitely, never integrating or learning German. Battling the 23.2 percent unemployment rate among Turks in Berlin, 9 out of 10 Turkish women at the center receive social assistance. These women are ineligible for citizenship under the reform because receiving any form of government assistance at the time of the naturalization application automatically makes the applicant ineligible. Turkish women entitled to inheritance, usually land in Turkey passed down through the daughter, face other incentives against denouncing their Turkish passport. Without their Turkish passport, these women forfeit their inheritance rights. Even when an integrated Turkish woman knows German and is not on welfare, inheritance in Turkey may keep her from denouncing her previous citizenship. Saadet Oezulusal, an employee at the community center, says the reform is a “two-class law: only those who can afford it become a German.”

The Culmination of Integration – The Exam:

The required naturalization examination is an invasive aspect of the reform that favors some applicants over others. Although Chancellor Angela Merkel attempted in 2005 to make a uniform exam to “test immigrants’ loyalty to the values of the Federal Republic,” the government gave up on the goal after months of heated debate between the parties. Failure to create a uniform exam granted government officials the permission to continue discriminating against Muslims, mainly Turks, in the naturalization office. In a 2006 edition of Der Spiegel, an article uncovered the variation of requirements, specifically regarding the language and integration courses, to naturalize from state to state:

124 Goddar.
125 Goddar.
126 Goddar 173.
127 Carle 153.
“Conservative states” like Bavaria, Hesse, and Baden-Württemberg demand arcane knowledge that would trip up even most educated Germans. Questions include details on German mountain ranges, 19th century artwork, and discoveries by German scientists. Layered between questions on German geography, history, and music, are questions designed to weed out religious conservatives. Such questions, which are sometimes administered orally, grill applicants on attitudes towards gay relationships, women’s rights, arranged marriages, and Israel’s right to exist. “Imagine your adult son comes to you and explains that he is a homosexual and would like to live together with another man. How do you react?” reads one question. “In Germany swim classes are a part of the normal German school curriculum. Would you allow your daughter to participate?”

German officials cannot ask outright whether an applicant is Muslim, yet these questions distinguish Muslims from other applicants. Since Turks tend to be less educated and non-Christian, they are less likely than their immigrant peers to pass a test that measures obscure knowledge or to give the “correct” answer to questions relating to the private sphere and personal convictions. The exam’s questions illustrate that meeting all the naturalization requirements, attending the mandatory classes, and applying for a German passport does not guarantee naturalization for Turks. Muslims’ religious differences, which conservatives see as incompatible with German culture, present a roadblock to naturalization and are an acceptable rationalization to rejecting an applicant. Klusmeyer concludes that the CDU’s tendency to marginalize Muslims is “at best arbitrary” but nonetheless continues to “explicitly exclude adherents of the Muslim faith.”

Invasive and degrading questioning also discourages applicants from initiating the naturalization process. By purposely preventing Turks’ naturalization, the German government also purposely prevents their integration.

The 1999 reform removes integration responsibilities from the state by expecting the transformation from foreigner to German citizen to arise from internal desire and dedication.

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128 Spiegel Online, January 31, 2006 qtd. in Carle 153.
Naturalization requirements “tactfully” expect foreigners “to assimilate” and “choose” to be German.130 Alfred Dregger, a conservative politician, articulated an ultimatum for immigrants unwilling to make this choice: “ Whoever chooses not to or cannot become German also by language and inner conviction must live as a foreigner among us and subject himself to the appropriate rules and regulations.”131 Muslims are especially expected to assimilate, or risk living as permanent foreigners. Like Bismarck and Hitler before, Germans today fear that Muslims threaten German culture. The reform requires assimilation “to counteract any threat to German cultural identity from immigration, especially by Muslims,” the most numerous of which are Turkish nationals.132 The red tape of applying for naturalization, lack of resources, the inability to integrate, institutional discrimination, and disenchantment prevents Turks from naturalization regardless of their sincere inner conviction. The reform gives them little choice.

**Conclusion – Germany Needs its Immigrants:**

Germany’s 1999 reform, which the SPD-Greens intended to be more liberal than its predecessor, made more Turks less eligible for naturalization, decreased Turkish integration into German society, and discouraged eligible Turks from German citizenship. Working against the conservative parties and a conservative electorate forced the SPD-Greens to compromise their goals. Almost a decade post-reform, Turks have access to social and economic rights but still face political and cultural discrimination. Marginalization in German society results largely from the inability to access citizenship, or the inability to be German. Originally, blood and ethnicity defined the Germans. The reform shifted this definition by emphasizing integration into German culture. Since Turks tend to be less integrated, they are also less likely to be eligible for

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130 Green et al. 2008 101.
131 qtd. in Green 2005 935.
132 Green 2005 933.
naturalization post-reform. Beyond this shift in definition, Germany has undergone little change in its stance towards immigration and foreigners. Bismarck’s fears of foreign populations gaining too much power, voting for liberal political parties, and being essentially “un-Germanizable” echo throughout German law and keep foreigners marginalized today.

Germany faces one of the lowest birthrates in Western Europe. Demographic trends predict that by 2050 the German population will fall from 82 to 60 million. Sustaining the ethnic population is no longer a viable option. Germany is home to “the highest rate of childlessness in the world;” there are only 1.3 children per German woman. The German city Chemnitz has the lowest birthrate in the world. Due to increased life expectancies, increased pensioners, and a grim birthrate, Germany needs its immigrant population to sustain itself. To maintain its standard of living, Germany requires an annual immigration rate of 350,000. To maintain its working population, Germany requires 458,000 immigrants per year.

As the Germans have long expected of immigrants, perhaps it is Germany’s chance to turn inward in order to accept a new lifestyle and a new country. Accepting their foreign population will allow Germany to assume a proactive approach towards its Turkish immigrants, helping integrate the population. Allowing Turkish nationals the right to vote and run for office in local elections will also aid in integration and equality among all groups. Facilitating a country where immigrants and minorities are in positions of power will mobilize young foreigners, reduce the fear associated with minority populations, and produce future policies to help rather

133 Akturk.
134 Carle 154.
135 Carle 154
137 Carle 154.
than discourage minority populations. Although Fichte may not have predicted Germany’s current state, embracing the immigrant population, encouraging a multicultural society, and allowing all members to work towards sustaining the nation like a living, breathing organism appears in Germany’s best interest.
Appendix 1.

EMPIRE-AND STATE-CITIZENSHIP LAW (1913)

Translated by Tes Howell

Section 1. A German is someone who possesses state citizenship in a federal state or direct imperial citizenship. […]

Section 3. Citizenship in a federal state is acquired

1. By birth,
2. By legitimation,
3. By marriage,
4. For a German by acceptance,
5. For a foreigner by naturalization.

Section 4. Legitimate children of a German man acquire the citizenship of the father at birth; illegitimate children of a German women acquire the citizenship of the mother […]

Section 8. A foreigner who has settled in a federal state can be naturalized by the federal state per application when he

1. Is legally competent according to the laws of his previous homeland or who be according to German laws, […]
2. Has lived a morally upright life,
3. Has found his own dwelling or residence in the area of his settlement, and
4. Is able to care for himself and his family according to the circumstances prevalent in his chosen area.

Prior naturalization, requirements 2 to 4 must be discussed by the community of the area of settlement and, insofar as they do not also act as independent charity organizations, by the respective charity organizations.
Section 9. Naturalization into a federal state may occur only when the imperial chancellor has determined that none of the other federal states have objected to it; should a federal state object, then the Federal Council will decide. Objections can be based only on facts that justify concern that the candidate’s naturalization would endanger the welfare of the Reich or a federal state […]
Appendix 2.

LAW ON THE REVOCATION OF NATURALIZATIONS AND DENIAL OF GERMAN CITIZENSHIP (1933)

Translated by Tes Howell

Section 1. Naturalizations completed between November 9, 1918, and January 30, 1933, can be revoked if the naturalization is considered undesirable. Upon revocation, the naturalized individual loses not only his naturalized status but also German citizenship, which he would not have acquired without naturalization.

The revocation will take effect upon delivery of the revocation decree or at the time of its publication in the Imperial Index. […]

Implementation provisions for Section 1:

1. Whether or not a particular naturalization is considered desirable will be adjudicated according to national principles. In the foreground are those racial, civic, and cultural factors that promote an augmentation of the German population through naturalization, conducive to the interests for Reich and Volk. In addition to considering the facts from the period prior to naturalization, a decision must also take into account the circumstances that developed after naturalization. Hereafter, the following are considered for revocation of naturalization:

   a. Eastern Jews, unless they fought on the German front during the world war or have made themselves particularly useful to German interests,

   b. Persons who are guilty of a serious misdeed or a crime or have otherwise behaved in a manner harmful to State of Volk. […]
Appendix 3.

BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (MAY 1949)

Translated by Tes Howell

Conscious of their responsibility before God and man,

Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law. […]

Article 3 [Equality before the Law]

All persons shall be equal before the law.

Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate those disadvantages that now exist.

No person shall be favored or disadvantaged on the basis of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disadvantaged because of disability. […]

Article 12 [Occupational Freedom; Prohibition of Forced Labor]

All Germans shall have the right to freely choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to law.

No person may be required to perform work of a particular kind except within the framework of a traditional duty of community service that applies generally and equally to all.

Forced labor may be imposed only on persons deprived of their liberty by the judgment of a court. […]

Article 116
According to the Basic Law and subject to further legal regulations, a German is whoever possesses German citizenship or was accepted as a refugee or displaced person of German origin or as a said person’s spouse or descendant in the territory of the German Reich as it stood on December 31, 1937.

Former German citizens, whose citizenship was revoked on political, racial, or religious grounds between January 30, 1933, and May 8 1945, and their descendants can be naturalized again per application. They are not considered expatriated provided they took up residence in Germany after May 8, 1945, and did not express contrary will.
Appendix 4.

REFORM OF THE STATE CITIZENSHIP LAW (1999)

Translated by Tes Howell

Article 1: Alteration of the Empire-and State-Citizenship Law

1. [...] A child born to foreign parents in domestic territory shall acquire German citizenship when one parent:
   a. Has legally held permanent and consistent residence in the domestic territory for eight years and,
   b. Possesses a residence permit or has possessed for three years a residence permit for an unrestricted period

2. [...] Where the person undertaking the obligations stipulated in Article 1 states a desire to keep his foreign citizenship, German citizenship will be revoked when the statement is received by the relevant authorities. It will also be lost when no statement has been made prior to his twenty-third birthday.

3. When the person incurring the obligation stated in paragraph 1 states a desire to keep his German citizenship, he must prove that he has given up or lost his foreign citizenship. If such proof is not provided by his twenty-third birthday, German nationality shall be lost unless the German government has already received per application the written approval of the relevant authorities to retain German citizenship [...] 

Article 2: Alteration of the Foreign Law

1. [...] A foreigner who has legally had permanent and consistent residence in the domestic territory for eight years is eligible for naturalization per application when he:
   1. Acknowledges the liberal democratic order of the Federal Republic’s Basic Law and declares that he has not pursued or supported any actions that are directed against this liberal democratic basic order, that stability or security of the federation or a state; which are intended as an illegal encroachment on the government or on constitutional institutions of the federation or a state or their members; or which endanger the external interests of the Federal Republic of Germany by application of or preparations for violence;
   2. Possesses a residence permit or right of residence;
   3. Can prove he can provide for himself and any family members entitled to aid without resort to social or unemployment assistance;
   4. Gives up or loses his previous nationality; and
   5. Has not been convicted of a crime.
   The requirement in number 3 will be waived when the foreigner can show he is unable to provide without recourse to social or unemployment assistance for reasons beyond his control.
(2) The foreigner’s spouse and underage children can be naturalized according to article 1 even if they have not had permanent residence in the domestic territory for eight years[...]
Immigration Law in Japan

Ian Hurdle
United States Air Force Academy – Class of 2009

Abstract:
Economically devastated after the Second World War, Japan’s economic recovery was attained exclusively through the use of Japanese labor force. Japanese work ethic and the availability of the Japanese workforce, in addition to a homogeneous mentality, allowed Japan to weather post war economic turmoil and become a leading economic power. Currently, due to a critical reduction in its population and simultaneous lack of the effective post-war homogeneous mindset, Japan faces the possibility of an unprecedented recession. It is therefore necessary for Japan to move past its homogeneity and allow foreign workers to immigrate and integrate into the workforce. To address the projected workforce shortage through the inclusion of foreign immigrants, Japan must amend the Immigration Control and Refugee Recognition Act’s (ICRRA) status of residence section to include a provision recognizing ‘unskilled labor’ as a legal status. Said provision would control and set parameters enabling legal immigration of unskilled foreign workers into Japan, allowing Japan to surface above a projected workforce shrinkage and strengthen its economy.

Introduction:
Following the Second World War, Japan faced a disheartening reality: economically distraught, Japan sustained widespread food shortages lasting several years, the loss of all territories acquired since 1894, and with the exception of Kyoto, the destruction of all major cities’ main industries and transportation networks. Recuperating from such adverse conditions, Japan recovered from its economic devastation mainly through the use of Japanese labor forces.

The availability of a Japanese workforce, in combination with the Japanese work ethic, enabled Japan to become an economic world power. This success reinforced and perpetuated the century-long Japanese homogeneous mindset used to fuel its economic recovery. Presently, however, this mentality will lead the Japanese economy into recession as Japan, while maintaining the work ethic of the post World War II era, lacks the needed labor force the Japanese population once provided. Consequently, Japan must move past its homogeneous mindset and allow foreign

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workers to immigrate to Japan to help the country prevail over its projected workforce shortage.

To accomplish this Japan must amend the “Immigration Control and Refugee Recognition Act” (ICRRA)\(^2\) to include a provision in the “Status of Residence” section that legally recognizes ‘unskilled labor’ and use this provision to control the legal immigration of unskilled foreign workers into Japan.

History:

Throughout the nation’s history, the homogeneous mindset of the Japanese has been an integral part of the Japanese national character and pride. This mentality became engrained in the national identity during Japan’s periods of seclusion from the 1630s\(^3\) to the Meiji restoration.\(^4\)

Even though Japan allowed foreign immigration, stringent immigration standards remained in place. In 1951, Japan enacted Cabinet Order No. 319, known today as the “Immigration Control and Refugee Recognition Act” (ICRRA).\(^5\) This document details the parameters for the entry and exiting of Japan of all persons. This document also consolidates the procedures for the recognition of refugee status. As the ICRRA has changed over the past five decades, so has the Japanese economy. Japan experienced a period of steep growth from the 1950s through the 1980s;\(^6\) however, in the 1990s, the “bubble economy” phenomena collapsed, leading to the

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\(^2\) Ministry of Justice [MOJ], Immigration Control and Refugee Recognition Act (Cabinet Order No. 319 of 1951) (2006)

\(^3\) The 1630s also marked an important dividing line in foreign relations with the issuance of a series of directives enforcing a policy of national seclusion, later called sakoku, literally, “closed country”. This policy became manifest with the seclusion orders of the 1630s. Thus, in 1635, Japanese were forbidden from overseas voyages or to return to Japan from overseas, severely hurting Japan’s traders. ["Japan." Encyclopedia Britannica. 2008. Encyclopedia Britannica Online. 29 Oct. 2008 <http://www.britannica.com/EBchecked/topic/300531/Japan>.

\(^4\) In 1867-1968, the Tokugawa era ended in the Meiji Restoration. The emperor Meiji was moved from Kyoto to Tokyo, which became the new capital; his imperial power was restored. The actual political power was transferred from the Tokugawa Bakufu to the hands of a small group of nobles and former samurai. ["Meiji Period (1868 - 1912) " japan-guide.com, 9 June 2002. japan-guide. 28 Oct 2008 <http://www.japan-guide.com/e/e2124.html>.

\(^5\) Ministry of Justice [MOJ], Immigration Control and Refugee Recognition Act (Cabinet Order No. 319 of 1951) (2006)

\(^6\) Ministry of Foreign Affairs [MOFA], Japan Fact Sheet “Economy: Japan’s economy in an era of globalization”, (2006)
markets lowest point in 2002. Although the Japanese economy has shown signs of improvement since 2002, there is still much anxiety over the future of Japan’s economy as declining birthrate leads to workforce shortage in the near future.

The ICRRA’s roots are found in Japan’s pendulum-like history in which policies oscillated between acceptance of foreign cultures to a full rejection and cordonning off from foreign peoples and their cultures. The Tokugawa Shogunate’s policy of seclusion, sakoku, in place from 1639 to 1868, coupled with Japan’s geographic isolation, has led to contemporary Japanese notions of exclusiveness. Japan’s period of sakoku ended in 1853 with Commodore Mathew Perry’s “opening” of Japan. This entailed the insertion of a fleet of four heavily armed U.S. Navy "Black Ships" into Edo Bay, near present-day Tokyo. Similar to Japan’s pre-Tokugawa era, this event allowed Japanese intake of foreign goods and ideas and their assimilation into Japanese culture. Despite cultural exposure to foreign thought and products, Japan maintained its homogeneous position toward the immigration of foreign nationals.

7 Ministry of Foreign Affairs [MOFA], Japan Fact Sheet “Economy: Japan’s economy in an era of globalization”, (2006)
8 Ministry of Foreign Affairs [MOFA], Japan Fact Sheet “Economy: Japan’s economy in an era of globalization”, (2006)
10 Sakoku, instituted in the 1630s, was the Japanese policy of isolation in which Japan did not have any internal or foreign commercial interaction with other nations. [Toby, Ronald . "Reopening the Question of Sakoku: Diplomacy in the Legitimation of the Tokugawa Bakufu." Journal of Japanese Studies Vol. 3, No. 2(Summer, 1977) 323-363 . 29 Oct 2008 <http://www.jstor.org/stable/132115>]
After World War II, the United States officially occupied Japan until April 28, 1952. During this time the United States completed a US-style Constitution to be used in Japan; this constitution was ratified as an amendment to the old Anglo-German style Meiji Constitution. Under this new constitution, the Ministry of Justice assumed responsibility for controlling and regulating all issues concerning foreign nationals coming in and out of Japan.

The Immigration Control and Refuge Recognition Act:

Japan enacted Cabinet Order No. 319 of 1951, known as the Immigration Control and Refugee Recognition Act, and instituted it under the control of the Ministry of Justice. The act stipulates that the Minister of Justice shall establish a "Basic Plan for Immigration Control" to set forth immigration control guidelines and clarify the entry and residence of foreigners in Japan (Article 61-9 of the Immigration Control Act). The Basic Plan is designed to establish Japan's immigration control guidelines and to increase the transparency of administration by clearly


16 Before World War II the Ministry of Justice was known as the “Shihoshoo” and had jurisdiction over a wide range of legal and judicial work. After the new constitution was put into effect the government was reorganized and Ministry of Justice adopted a “seven bureau” system that included responsibility for Civil Affairs, Criminal Affairs, Correction, Rehabilitation, Litigation, Human Rights and Immigration. On January 6, 2001 the Central Government Reorganization Plan was put into effect and the Ministry abolished the Litigation Bureau and six divisions of other bureaus; as a result, the Ministry is now composed of six bureaus including Civil Affairs, Criminal Affairs, Correction, Rehabilitation, Human Rights and Immigration, and the Minister's Secretariat [Ministry of Justice [MOJ], Ministry of Justice 2008 , Public Information , 2008]

17 Ministry of Justice [MOJ], Immigration Control and Refugee Recognition Act (Cabinet Order No. 319 of 1951) 叶南町搞報柵亅蕉潦衣鸚灸^ 糠光偽喜占惑喜搶柵柵桝鶏鶏機喜側 incarcerated (2006)
presenting these guidelines at home and abroad and by implementing measures in line with the guidelines.  

Within ICRRA, the Ministry of Justice has held that “any alien who wishes to change his/her status of residence to that of ‘Permanent Resident’ shall apply to the Minister of Justice for permission for permanent residence in accordance with the procedures provided for by a Ministry of Justice ordinance.” The ICRRA states that when the application set forth in the preceding paragraph has been submitted, the Minister of Justice may grant permission only when he/she finds that the alien conforms to the following items and that his/her permanent residence will be in accordance with the interests of Japan. However, the following items do not have to be conformed to in cases of the spouse and children of Japanese nationals, of residents with permanent residence status or of special permanent residents.

(i) The alien's must be well behaved and conduct themselves appropriately.
(ii) The alien must have sufficient assets or skills to make an independent living.

This aspect of the ICRRA pertains only to permanent residence in Japan; however, to work in Japan using a certificate of authorization the ICRRA states that:

“When an application has been submitted by an alien residing in Japan, the Minister of Justice may issue a document which certifies the eligibility of the applicant for activities related to the management of business involving income or activities for which he/she receives reward pursuant to the provisions of a Ministry of Justice ordinance. No one shall discriminate in employing an alien for

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21 When the permission set forth in the preceding paragraph has been granted, if the alien has his/her passport in his/her possession, the Minister of Justice shall have an immigration inspector repeal the status of residence and period of stay entered in the alien's passport and affix a seal of verification for permanent residence in his/her passport, and if the alien does not have his/her passport in his/her possession shall have the immigration inspector issue to the alien a certificate of status of residence with permission for permanent residence. In this case, the permission will become effective as of the time of affixing of the seal of verification or issuance of the certificate. [弓倥！ableObject/!*叶南鶴臘壱職為穂鸚 теп diplomatic/!/吹短/!/橄榄陆：！裱槽味鬥叶短次偽僱穂—！→odus！→ ।।।।]
failure to show or submit the certificate set forth in the preceding paragraph, when it is evident that the person concerned is authorized to engage in activities related to the management of business involving income or activities for which he/she receives reward.”

This article begins to point to how the ICRRA can positively contribute to the Japanese economy by increasing its workforce. In order to do so, Japan must make it easier for unskilled foreign workers to immigrate to Japan. Unlike other parts of Japanese policy such as Article 9 of the Japanese Constitution, which has remained unchanged since its inception, the ICRRA has been amended and undergone changes over the past decades to address problems facing Japanese society. Thus, adapting the ICRRA to help address issues facing the Japanese economy would be in line with past changes in Japanese immigration policies in response to economic need. For example, in 1982, Japan amended the ICRRA to allow stateless Koreans in Japan, carrying the “Korea” designation, to obtain general permanent resident status. This provided them with a range of state benefits, including pensions and welfare benefits for children. In 1991, with Koreans conforming the largest foreign population in Japan, Korea and Japan passed an addendum granting permanent residence to Koreans of subsequent generations. In addition, Japan enacted a new law granting all resident Koreans special permanent residence.

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22 弓倥, 堤寴, 月南奵覬備好慄識覬亘占灸. 吹痘. 橋僕陆: 桐槽咪鬥叶痘次傷當時, → ← 0→ .


A second example is Japan’s response to the threat of terrorism. Japan responded to the increased concern of terrorism by amending its immigration procedures. The Ministry of Justice stated that the new immigration procedures, put in place on November 20, 2007, have the purpose of preventing terrorist attacks.26 The new procedures state that “all foreign nationals except special permanent residents and some specified others will be required to provide immigration inspectors with biometrics information, i.e., fingerprints and facial photographs, for the purpose of entry examination.”27 The Ministry of Justice stated that:

“By collecting personally identifying data such as fingerprints and facial photos of visitors to Japan, we will be able to identify persons considered to pose security risks, such as terrorists and persons traveling with passports that are not their own. This will help us in our measures to prevent terrorist attacks.”28

While there have been smaller, less significant modifications to the ICRRA, these examples demonstrate that Japanese are willing to use the ICRRA as a tool not only to protect their country but also to address problems facing their society.

**Current Economic Situation in Japan:**

Japan is currently in an economic slowdown as “companies are curbing hiring amid growing uncertainties for the economic outlook; with costs rising, it is getting harder for companies, especially small and mid-sized ones, to raise wages” says, Mamoru Yamazaki, chief economist at the Royal Bank of Scotland.29 As such, Japan is looking for ways to avert the current economic crisis it is facing. With a limited working population, Japan has multiple ideas

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proposed to solve its existing economic problem. While many of these proposals have the potential to help stem the current population problem, the base fact still remains that the current Japanese birth rate is dangerously low and threatens to hurt the economy. The decline in Japan's national birth rate is so severe, a new word has been invented for it: 'shoshika', meaning a society without children. Consequently, even if the core problem of the Japanese birthrate were to be immediately fixed, it would not begin to aid the Japanese economy for another 20 years as that generation would have to become old enough to work. Thus a more immediate fix is needed. As Japan currently has a limited work force to draw from, an urgent solution is required. The modification of the ICRRA is that fix. The foreign labor force is one that has been legally shunned by Japan due to its homogeneous cultural mindset and the fear of what foreigners could do to their homogeneous state. However, the current workforce crisis the country now faces calls for measures outside of past exclusive policies.

As the economic outlook in Japan is bleak considering current population projections for the next three decades, the usage of the ICRRA to help prevent this possible crisis should be viewed by the Japanese populace as just another tool to address a problem facing its society. The declining birthrate in Japan is the cause for the projected workforce shortage. During Japan’s period of economic growth in the 1980’s most Japanese moved into white collar jobs, creating a

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30 Japan currently has one of the lowest birth rates in the world. Discrimination in the workplace and poor government policies have been blamed for deterring many Japanese women from having children. But the government says that unless the trend is reversed quickly, the shortage of children risks doing damage to the economy. ["Japanese unemployment data points to economic slowdown." The International Herald Tribune 29 Jan 2008 http://www.iht.com/articles/2008/01/29/business/29japanjob.php].18 Oct2008


32 Id.

new demand for labor in the blue collar industries. Concurrent with this trend in the 1980’s Japan faced a unique situation as described by Keiko Yamanaka in the article “New Immigration and Unskilled Foreign Workers in Japan”

The sharp upward revaluation of the yen following the Plaza Agreement in 1985 had the effect of increasing wage differentials between Japan and neighboring Asian countries. It also triggered a recession among export-oriented industries; when the economy began to revive, small manufacturing subcontractors turned to foreign labor to meet demand. Construction companies also began to hire foreign workers as a construction boom got underway. Concurrently, China liberalized emigration rules since 1985, thereby adding to the pool of migrant workers in Japan.

These conditions created circumstances in which Japan had an unprecedented number of foreign workers in the country. Consequently the issue became a topic of national concern causing the cabinet to discuss the issue in May and June of 1988 and conclude that Japan should continue its existing immigration policy, limiting the employment of foreigners to specified areas that the Japanese could not fill. Thus an amendment to the ICRRA was passed in the Diet in December of 1989 and took effect in June of 1990. The new amendment maintained unskilled labor as a supplementary role while introducing new measures. These new measures added ten new residence categories (mostly professionals) to the ICRRA. This brought the total number of categories to twenty-eight under which foreigners could enter and remain in Japan legally (table 1) and instituted criminal penalties for the recruitment and hiring of illegal unskilled

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36 Id.
37 Id.
38 Id.
39 Id.
40 Id.
41 Id.
foreign workers including three years imprisonment or a maximum fine of two million yen\textsuperscript{42} among other things. The added residence categories reflect Japan’s mindset that is accepting of those in professional or technical positions, but not of foreign workers who do not fall into either one of those categories. Japan’s mindset towards unskilled foreign workers is also seen in that the amendment created criminal penalties for illegal unskilled foreign workers and those who aid them. Given these changes, it is quite apparent that the reform to the ICRRA sought to disallow unskilled foreign labor.\textsuperscript{43}

As these changes to the ICRRA are still in effect, Japan is facing a different problem than it previously faced during the 1980’s. During that period, the economy was the strongest it had ever been in modern Japanese history and consequently the expansion of the economy created more job opportunities than the workforce could support generating the need for more labor. The workforce problem faced by Japan at the time of the 1989 revision was simply hindering economic growth, the current problem is much more dire as it entails the evaporation of the general population of Japanese workers. This Japanese workforce has kept the economy from completely going under.

The Japanese economy has already started to feel the effects of the declining birthrate. As Japan is the first developed nation to register more annual deaths than births,\textsuperscript{44} the National Institute of Population and Social Security Research estimates that Japan’s workforce will shrink 20 percent to 67 million. In 2050, 40 percent of Japan's population will be older than 65,

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\textsuperscript{42} Id.
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doubling from 2005.\textsuperscript{45} With the demand for labor at its highest level in 16 years\textsuperscript{46} Japanese companies are attempting to hold on to existing employees to stem the work force shortage. Japan’s labor market is shrinking as aging employees retire.\textsuperscript{47} In response companies are giving contract workers permanent status to retain staff.\textsuperscript{48} Even if Japan is able to increase the retention of its current workforce the fact still remains that Japan is facing a shrinking labor market that must be dealt with.

Japan recognizes that it has an increasing problem concerning its working population. In the Immigration Bureau of the Ministry of Justice’s official booklet on immigration in 2008 it states that tackling the population decrease is one of the major issues the government is concentrating on in its basic plan for immigration control.\textsuperscript{49} While Japan recognizes that the work force shortage is a problem, their homogeneous cultural mindset towards unskilled foreigners continues to hinder needed changes to the ICRRA. Currently Japan’s mindset towards foreign workers appears to be twofold. On one hand they are very accepting and open to foreign workers in professional or technical fields. The Immigration Bureau stated that “As the productive population is decreasing substantially, it is important for Japan to further promote the acceptance of foreign workers in professional or technical fields.”\textsuperscript{50} The Immigration Bureau is attempting to promote acceptance of foreign workers in professional or technical fields\textsuperscript{51} by developing a status of residence and conditions for landing permission in accordance with social

\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id
\textsuperscript{48} Id.
\textsuperscript{49} Ministry of Justice [MOJ], Ministry of Justice 2008, Public Information, 2008
\textsuperscript{50} Id.
\textsuperscript{51} Id.
and economic changes. Consequently, since the Japanese economy is in an economic slump the Immigration Bureau is looking at the extension of the period of stay for highly-skilled foreign workers.

On the other hand, Japan is reluctant to accept those workers who do not fall into the professional or technical fields. While the acceptance of foreign workers in professional or technical fields is good for Japan’s economy, it is not the core problem Japan needs to deal with concerning its shrinking work force. Rather it is Japan’s acceptance of the workers who do not fall into the professional or technical field that must be changed. Within the Immigration Bureau’s basic plan for immigration control, with regard to tackling the population decrease the official stance is currently “Consideration of accepting foreign workers in fields of activities that are not evaluated as professional or technical at present, while verifying the advantages and disadvantages of such acceptance.” The mindset the Japanese have toward non professional or technical foreigners who occupy these fields of activities has kept the Japanese stance towards acceptance of these types of foreign workers at a mere consideration.

This stance of merely considering those unskilled foreign workers must be changed as the critical area of Japan’s shrinking population lies not in the professional or technical category but rather in its unskilled labor area. The Japanese government has begun to realize that its economic future lies in its ability to keep its unskilled workforce capable of supporting the future needs of the Japanese economy. In October 2008, a Foreign Ministry panel urged the

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52 Id.
53 Id.
54 Id.
government to accept more unskilled labor from abroad. Nonetheless the Japanese population is hesitant to accept an influx of unskilled foreign workers. A poll by the Keizai Koho Center in July 2004 found that 45% of respondents said employing foreign workers would be an acceptable solution to any labor shortfall - only if all other means of solving the problem had been exhausted. As the public’s feeling towards unskilled foreign workers has been reflected by the Japanese government, it has attempted to utilize other options instead of increasing the amount of unskilled foreign workers in the Japanese economy.

The female workforce has been a focus of the government in their attempt to solve the workforce problem. In 2006 Prime Minister Shinzo Abe looked to improve the Japanese economy through, among other things, better utilizing the female workforce. Japan has also looked to possibly enlist the services of its elderly population that has traditionally stopped working when they start receiving their pension. Even if these measures were to be implemented it would still face a labor shortfall, especially in unskilled workers. For example, the Japanese Business Federation has projected that the nation’s nurse and caregiver shortage will hit 1.8 million by 2055. Currently the total number of unemployed Japanese women is 1.03 million (Table 2). With the current projections for the Japanese population showing a decrease

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56 Id.
57 Id.
60 Id.
over the next forty years63 (table 3) the assumption that this untapped workforce is unlikely to grow is a reasonable assumption. Consequently if the government were to tap into and utilize every unemployed female it would not have enough people to fill the projected shortage in nurse and caregiver positions. That is just one area. There are many others that are predicting shortages in the near future meaning that even if the elderly workforce were to be utilized in combination with the female workforce, it would still not be enough people to fill the projected shortages in various fields. In addition to the numerical problem there is also the quandary of whether the female workforce and elderly would want to work in the unskilled labor field. According to Jamie Miyazaki of the Asia Times, “It is, after all, unlikely that many Japanese pensioners and women will be queuing up to work in the construction, low-end manufacturing and agricultural sectors even if given plenty of opportunities to do.”64 This mindset is reflected in the fact that the Keizai Koho Center poll found that 70% of respondents expressed support for relying on immigrants in the farm, construction and manufacturing sectors.65 As the current workforce is shrinking, and it appears that neither the untapped female workforce or elderly workforce have either the numbers or desire to work in the unskilled labor jobs; the remaining option, foreign labor, is the only viable alternative for Japan to successfully head off its economic crisis. Japan, however, has been facing a shortage of workers for some time but has been able to keep its economy relatively afloat. The reason can be seen in closely examining the ICRRA and how it has been applied.


65 Id.
Currently the ICRRA only allows foreigners who are children of those people with Japanese nationality and those who are first, second, and third generation descendents of Japanese to legally work in Japan. Those foreigners without the specified Japanese line of heritage must belong to one of the skilled categories to be able to work in Japan. There are four aspects of the ICRRA that have been used by Japanese companies as “back door” tactics that have allowed them to survive until now even with the shrinking workforce and stringent rules laid down by the ICRRA against the legal immigration of unskilled foreign workers.

The trainee activities designation is the first aspect of the ICRRA that has up until recently been able to keep companies afloat. That designation is not a new one for the Immigration Control and Refugee Recognition Act; Yamanaka writes that, “[s]ubsequent to passage of the 1989 reform, a government decree relaxed regulations about admitting company trainees from abroad to receive job training in Japan.”\(^{66}\) The current Immigration Control and Refugee Recognition Act (up to revisions of Act 30 of 2008) define the authorized activities of a person who has a status of residence as a trainee as one whose activities are to learn and acquire technology, skills or knowledge at a public or a private organization in Japan.\(^{67}\) To fall into the category of trainee status of residence there are a myriad of criteria that must be met. Some of the pertinent criteria are as follows:

2. “The technology, skills and/or knowledge that the applicant is to obtain in Japan must not be technology, skills and/or knowledge that could be obtained mostly through repetition of simple work”\(^{68}\)

3. “The applicant must be at least 18 years of age and is expected to engage


in services that require technology, skills and/or knowledge obtained in Japan after returning to his/her country of nationality or habitual residence."\(^{69}\)

4. “It must be impossible or difficult for the applicant to obtain the desired technology, skill and/or knowledge in the country where he/she resides.”\(^{70}\)

5. “the number of trainees being accepted by the accepting organization, including the applicant, is not to exceed the total number of full-time employees at the organization.”\(^{71}\)

6. “In cases where the accepting organization engages in agriculture, the number of trainees being accepted by the organization is not to exceed two, including the applicant.”\(^{72}\)

7. “In cases where the applicant is to participate in practical training, the period for that practical training must be two thirds of the total training program or less. . .however, this shall not apply to cases where the applicant falls under the cases designated by the Minister of Justice.”\(^{73}\)

The full list of criteria for the trainee status of residence can be found in Figure 1. The 1989 revision created new relaxed conditions in which:

Trainees were to engage in ‘activities to learn and acquire the technology, skills or knowledge at public or private organizations.’ In cases where trainees were to receive such training though ‘actual performance of job duties the period for that on-the-job training should be less than-thirds of the total training program’.\(^{74}\)

On the surface this policy is reasonable and serves a legal, productive purpose. However, it has been exploited by companies to help bring in unskilled labor to fill the positions being left open by the shrinking workforce. In fact, “[s]ince the early 1990’s, Japan has been admitting anywhere from 40,000 to 55,000 trainees per year. In 2000 36,199 trainees (22,163 of them from

\(^{69}\) Id.

\(^{70}\) Id.


\(^{72}\) MOFA, supra note 70.

\(^{73}\) MOJ supra note 73.

\(^{74}\) Yamanaka, Keiko. Supra note 68.
mainland China) were residing in Japan.”75 These high numbers of immigrants entering Japan through the use of the trainee designation came directly in response to the increase shortage of a workforce due to the shrinking Japanese workforce and also due to actions taken by the Ministry of Justice, which “modified by decree the traditional trainee program (formerly restricted to official agencies and large multinational corporations) to enable small and midsize companies suffering from labor shortages to accept trainees from abroad.”76 The trainee program has been officially justified as a form of overseas development assistance that enable trainees from developing countries to acquire technical skills at Japanese companies77 However, due to the fact that the program was opened to medium and small companies along with large international companies, and because it permits foreigners to engage in manual labor, the company trainee system has become a popular tactic to bring unskilled foreign labor into Japan.78

While Japan has maintained a hard line stance against unskilled labor, this trainee policy has created a situation that is inconsistent with the rule of no unskilled foreign labor in Japan.79 This inconsistency has resulted in the trainee program being widely abused as a source of inexpensive, unskilled foreign labor.80 In the current Japanese system, trainees perform jobs that require little or no training instead of participating in jobs that require the high level of specialized training that is discussed in the actual regulations.81 In addition, many of the

77 Id.
78 Id.
79 Id.
80 Id.
81 Id.
companies that take part in the trainee program are also too small to have the resources to provide any substantial on-the-job training or classroom instruction. The current state of the trainee program is not only contrary to the true intent laid out in the Immigration Control and Refugee Recognition Act, it is also detrimental to those foreigners that take part in the trainee program; the wages paid during trainee periods are an example. Cornelius points out that “Japanese employers have to pay these trainees only a “trainee allowance” since they are not classified as workers entitled to real wages” In addition to the minimum salary, there is not enough supervision to ensure the trainee program will be carried out as intended in the ICRRA. In 2006, the Ministry of Justice reported an estimate 93,000 foreigners had come to Japan as trainees. With that many foreigners entering Japan with little oversight, the system has deteriorated into such abuse that it has virtually become slave labor in some cases. For example, Le Thi Kim Lien left Vietnam in 2004 to learn job skills and earn money in a Japanese training program. She wound up toiling in a sweatshop supplying parts for Toyota and Nissan automobiles. While in Japan Lien

Sewed headrests and armrests at TMC, sometimes working from 8:30 a.m. until past midnight for a starting salary of ¥58,400, or $472, a month. Almost half was put into a bank account she could not access, her passport was taken and she was fined ¥15 a minute for bathroom breaks.

This situation has been exacerbated “by companies desperate for low-cost workers to compete with China“ writes Sachiko Sakamaki of the International Herald Tribune. The program has

82 Id.
83 Id.
85 Id.
86 Id.
87 Id.
become so abused that it showed up in the U.S. State Department 2007 June report on human trafficking, which wrote that “The government should make greater efforts to investigate the possible forced labor conditions of workers in the foreign trainee program.”

In response to countless reports of very low wages and unforgiving working conditions—and even reports of foreign trainees disappearing—the government decided to respond by introducing stricter review procedures and considering extending of some labor law protections to otherwise unprotected trainees. However, these proposed changes do not alter the fact that the trainee status of residence has been used to hire cheap, unskilled labor in the name of training. Due to the relaxed regulations put in place in 1989 the trainee status has been exploited to such lengths that it has been compared to human trafficking. Unfortunately, it is not the only aspect of the ICRRA that has been used to bring cheap labor into Japan through manipulation and abuse.

The Entertainment Status of Residence:

The entertainer status of residence designation is the second aspect of the Immigration Control and Refugee Recognition Act used to import cheap labor. A person who is considered to be under the entertainer status of residence is authorized to engage in “theatrical performances, musical performances, sports or any other form of show business.” Just as with the trainee aspect of the Immigration Control and Refugee Recognition Act the entertainment status of residence has been abused and used in a manner other than that which it was initially written to serve. The current Immigration Control and Refugee Recognition Act (up to revisions of Act 30 of 2008), in very specific detail, lays out the criteria for a person to be considered under an

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90MOJ supra, note 73.
entertainer status of residence. The complete list of criteria can be seen in Figure 2. The criteria state that “in cases where the applicant is to engage in public entertainment consisting of theatrical performances or musical performances, all of the following requirements are to be fulfilled.” Within the exhaustive list of requirements that must be met there are a few key points that should be noted:

4. “The applicant must have spent a minimum of 2 years at a foreign educational institution majoring in the subjects pertaining to the type of performance in which he/she is to engage”

5. “The applicant must have a minimum of 2 years experience outside Japan in the type of performance in which he/she is to engage”

6. “The applicant must engage in theatrical or musical performances based on a contract limited to one that clearly specifies that the organization concerned bears the obligation of making a payment of at least 200,000 yen per month to the applicant”

7. “The operator or the regular employees of the organization must not fall under any of the following categories: A person who has committed trafficking in persons or aided another to commit it”

8. “In cases where the applicant is to engage in public entertainment other than theatrical or musical performances, he/she must receive no less reward than a Japanese national would receive for comparable work.”

The usage of the entertainment status of residence has, for the most part, been abused. Compared to the trainee status of residence, however, its misuse started much earlier, and primarily affects women. Unfortunately, it was not until large numbers of male foreign workers began coming to Japan in search of work that the issue of foreign workers became an important policy concern. The number of Asian entertainers entering Japan rose rapidly between 1986 and 1991, from

91 Id.
92 Id.
93 Id.
94 Id.
95 Id.
96 Id.
30,000 to 64,100. Most (57,000) came from the Philippines, followed by fewer from Korea (2,700) and Taiwan (2,000). Under the ICRRA, these entertainers were allowed to be admitted into Japan as “professionals”. This however, is not the case; instead, these females were often being brought into Japan to take part in the leisure industry and work in various jobs including prostitution. This tactic of bringing in women under the guise of “entertainers” is a form of cheap labor which “provides workers for positions viewed as unattractive by Japanese women: dancers, bar hostesses, prostitutes.” These positions also are important sources of revenue for gang-affiliated employers.

Although recently the amount of foreigners entering Japan using the entertainer status has begun to taper off (43,847 in 2000), it is still prominent and continues to supply labor for less than reputable jobs and establishments. Cornelius states that “In addition to large numbers who overstay their visas (12,552 in 2000), many of them are undocumented female migrants (mainly from the Philippines and Thailand) who are deceived and exploited by labor brokers (often with ties to criminal syndicates) and forced to work as bar hostesses or prostitutes.” One account of what happens on a regular basis is told in Kevin Bales’ book “Ending Slavery” about a girl named Sri from Thailand:

Sri was approached by a woman she knew from her province, who…told her about a well-paid job opportunity in a Thai restaurant in Japan. Sri decided to take up the offer because her parents needed money for her younger brother’s schooling. Sri applied for a passport herself, but was called to an office to meet a “boss” who had many passports at hand and chose one for her. She had silicone

98 Id.
99 Id.
100 Id.
101 Id.
102 Id.
103 Cornelius and Tsuda, supra at note 77, page 457.
104 Id.
injections in her face to make her look more like the picture in the passport. However, she barely carried the passport herself, entering Japan with a man posing as her “Japanese boyfriend,” who took her passport after they passed through immigration. Man came to pick her up by car and took her to a bar, where she was told she had to repay a debt of 4.8 million yen to cover the costs involved in bringing her to Japan and that she would have to work as a prostitute. Sri could speak some English and eventually used her English to get a taxi and take her to the Thai embassy.\footnote{Bales, Kevin. \textit{Ending Slavery: How We Free Today's Slaves}. United States: University of California Press, 2007.}

This woman was able to escape due to her ability to speak English. Most women, however, are unfortunately not able to flee the industry so easily. Japan’s “entertainment trade” has become a very lucrative industry at an estimated 2.37 trillion yen in 2001.\footnote{“Japan's sex industry thriving on visa abuse.” \textit{Asian Tribune} 17 Nov 2003 25 Oct 2008 <http://www.asiantribune.com/oldsite/show_news.php?id=7890>.} As a result, those profiting from the abuse of the entertainment visas are doing all that they can to keep the industry going. In 2004 the Japanese government put forth “a provision recommending the number of entertainment visas be reduced, but this recommendation was met with sharp protests from the entertainment industry and the politicians backed off.”\footnote{Bales, Kevin. \textit{Ending Slavery: How We Free Today's Slaves}. United States: University of California Press, 2007.} This tactic is becoming increasingly difficult as the Japanese government is taking a hard look at the usage of the entertainment visas to bring cheap labor into Japan. In 2005, the Ministry of Justice amended the ICRRA in an attempt to significantly tighten the issuance of entertainer visas to women from the Philippines, a process used by traffickers to enslave thousands of Philippine women in Japan each year.\footnote{“Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report.” \textit{U.S. Department of State}. 2005. U.S. Department of State. 25 Oct 2008 <http://www.state.gov/g/tip/rls/tiprpt/2005/>.} The amendment deleted a stipulation under the criteria for an entertainment visa that stated that “The applicant meets the standards as set by a foreign national or local government agency or an equivalent public or private.”\footnote{MOJ, \textit{supra} 73} This amendment helped to decrease the issuance of visas for entertainers by more
than 70% from its peak in 2004 to roughly 40,000 in 2006. While this is a great stride by the
Japanese government to reign in an abuse of the ICRRA, the entertainment visa is still being
used by Japanese companies as a “back door” tactic to bring in unskilled foreign labor.

**The Pre-College Status of Residence:**

The third aspect of the ICRRA used to import cheap labor is the pre-college status of
residence designation. According to the ICRRA, a person who is considered to be under the pre-
college status of residence is authorized to engage in

Activities to receive education at an upper secondary school Student (including
the latter course of a secondary educational school(chutokyoikugakko), high
school course of a school for special needs education, higher or general course of
an advanced vocational school(senshugakko), or a vocational school
(kakushugakko) ( except for the educational institution prescribed in the "College
Student" section) or other educational institution which is equivalent to a
vocational school in facilities and curriculum. Since Prime Minister Yashiro Nakasone announced the plan to increase the number of foreign
students studying in Japan to one hundred thousand in the early 1980’s, the Japanese government
has encouraged foreign students to study in Japan. Currently the criteria laid out by the
ICRRA is very detailed and can be found in Figure 3. The key points are that:

6. The applicant must study at an upper secondary school, a school for special needs
education, a higher or general course of an advanced vocational school or any other
educational institution which is equivalent to a vocational school in its facilities and
curriculum, except for cases where the applicant studies at a night school or through
correspondence.

7. In cases where the applicant is to study at an upper secondary school, he/she must be 20
years of age or under and must have studied the Japanese language or have studied in the
Japanese language for at least 1 year at an educational institution, however, this shall not
apply to cases where he/she is accepted for study based on a student exchange program or

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110 “Entertainer visa issuance down over 70% in 2 years.” Nambu Foreign Workers Caucus. 30 Dec 2006. National
Union of General Workers Tokyo Nambu. 25 Oct 2008 <http://nambufwc.org/2006/12/30/entertainer-visa-issuance-
down-over-70-in-2-years/>.

111 MOJ, supra 73

112 Yamanaka, Keiko. "New Immigration Policy and Unskilled Foreign Workers in Japan." Pacific Affairs Vol. 66,

113 MOJ, supra 73
other equivalent international exchange program of the national government, a local government, incorporated administrative agency, educational foundation or non-profit.\textsuperscript{114}

The 1989 reform revised visa categories for students by adding a new category for pre-college students enrolled in Japanese language instructions, special education programs, and various kinds of vocational training.\textsuperscript{115} The changes to the ICRRA allow for foreign students at the college and pre-college (post-secondary) levels to work up to four hours per day to meet tuition and living expenses.\textsuperscript{116} The number of students coming to Japan doubled between 1986 and 1991. During that period the number of college students jumped from 5,400 to 9,600 and from 12,600 to 20,700 for pre-college students.\textsuperscript{117} In 2000 there were 37,781 pre-college students registered in Japan, a vast majority of whom (26,542) had come from China.\textsuperscript{118} Although initially permitted to work part-time for twenty hours a week to support themselves, in 1998 the government increased the number of hours these “students” can work per week from twenty to twenty-eight during the academic school year and forty during the summer and winter vacations.\textsuperscript{119} Even with the longer work hours, “most work illegally for longer hours, and many of them are becoming fulltime, unskilled foreign workers, most notably in the service sector.”\textsuperscript{120} Thus Japan has left another back door open to be used by Japanese companies in trying to recruit unskilled workers to fill the void created by Japan’s shrinking workforce. Just like with the entertainment and trainee status of residence categories, companies have realized this back door tactic and have started to exploit the pre-college student aspect of the ICRRA. This is seen in the

\textsuperscript{114} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Cornelius and Tsuda supra 77, page 456.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
fact that not only are many of the students overstaying their visas (11,359 in 2000) but a number of them are now entering Japan on false documentation and the “language schools” that accept them are sometimes nothing more than immigrant-smuggling firms.  

Although not the most obvious of ways to get unskilled foreign workers into Japan, the pre-college status has become an effective avenue to bring unskilled foreign labor into Japan using the ICRRA.

The Long-Term Status of Residence and the Nikkeijin:

The long-term status of residence designation is the fourth aspect of the ICRRA used to bring unskilled foreign labor into Japan. Currently long-term residents are authorized to reside in Japan with a designation of period of stay by the Minister of Justice in consideration of special circumstances. Although on paper this designation does not seem like much, it has become the method through which Japanese companies have been able to bring in the largest number of legal unskilled foreign workers to Japan. Yamanaka writes that:

To ameliorate the labor shortage faced by small employers, the 1989 reform (amendments to the Immigration Control and Refugee Recognition Act) created a new category of “long-term” residence for descendants of Japanese emigrants (Nikkeijin) up to the third generation. This change has permitted thousands of Japanese-Brazilians and Japanese-Peruvians to enter, work and live in Japan with few restrictions.

In addition to allowing third generation Japanese to immigrate back to Japan, the Japanese government also simplified the previously restrictive requirements and procedures for obtaining a Nihonjin no Haigusha (Japanese spouse) visa thus making it much easier for them to

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121 Id.
enter into Japan.\textsuperscript{124} While the effects of these new policies have been quite obvious in that they have brought in a large quantity of unskilled foreign workers to help alleviate the crippling labor shortage, the Japanese government insists that this was not its true intent, nor does the government officially recognize the nikkeijin as unskilled migrant workers.\textsuperscript{125} The Japanese government has justified the program as an opportunity provided by the benevolence of the Japanese government to those of Japanese descent born abroad to explore their ethnic heritage and visit their ancestral homeland.\textsuperscript{126} By doing this Japan was able to appeal to the continued belief in the “fundamental principle of Japanese immigration policy that no unskilled foreign workers will be accepted”\textsuperscript{127} as pointed out by Takeyuki Tsuda in his book “Strangers in the Ethnic Homeland: Japanese Brazilian Return Migration in Transnational Perspective”. The facts, however, tell a different story. By the late 1980’s the labor shortage in Japan looked as if it might cripple the country’s industrial base, specifically in the manufacturing sector.\textsuperscript{128} Tsuda explains, “according to statistics compiled by the Japanese Ministry of Labor, 48% of the companies in the manufacturing sector were labor deficient in 1989, and the proportion increased to 60% in 1990.”\textsuperscript{129}

This situation occurred due to many factors besides the declining birthrate. At the time the Japanese youth were becoming better educated and started to actively shun unskilled labor


\textsuperscript{126} Id.

\textsuperscript{127} Id.

\textsuperscript{128} Id.

\textsuperscript{129} Id.
jobs as they were designated as undesirable. Consequently they tried to obtain white-collar jobs even though the opportunities were more limited. In addition, during that time period the number of women in Japan’s labor force had already expanded considerably (especially among part-time workers) and Japanese female labor participation rates had become high, leaving little room for significant increase. The labor participation for people who were 60 years or older was already quite high, which made the possibility of a substantial increase in their numbers also unlikely. Given these facts it is obvious that Japan needed to devise some way to keep the undermanned economy from facing a crisis that would be difficult to recover from. Knowing these facts the Japanese government found an acceptable fix to labor shortage by turning to a source that would be tolerable to the Japanese population. The nikkeijin were considered tolerable as they were ancestrally descended from the Japanese. From a policy perspective it allowed for an easier acceptance of the nikkeijin since they did not blatantly break the homogeneous mindset that has restricted Japan from openly allowing unskilled foreign workers to immigrate to Japan. Tsuda writes that this is evident in the fact that the:

Proposed change in the immigration policy was generally supported by policy makers and did not cause any serious controversies or objections among the involved governmental ministries, in contrast to the conflicts that were occurring over the other proposed revisions to the immigration law. Nor did the nikkeijin policy raise any concerns among the Japanese public or mass media, despite the public debates at the time about whether Japan should open its doors to migrants from Asia and the Middle East.

This unopposed implementation of the amendments to the ICRRA allowed a substantial number of nikkeijin into Japan. The last census taken in 2005 showed there were roughly 210 thousand

\[^{130}\text{Id.}\]
\[^{131}\text{Id.}\]
\[^{132}\text{Id.}\]
\[^{133}\text{Id.}\]
Brazilian nationals living in Japan\textsuperscript{134} (table 4), with a large number of those nationals being nikkeijin. Thus, the long-term status of residence is the final legal aspect of the ICRRA used by companies in Japan to avert a crisis caused by the shrinking labor force.

The usage of the trainee, entertainment, pre-college, and long-term status of residence designations have allowed for Japanese companies to bring in unskilled foreign labor to help stem the problems they face concerning the shrinking labor force. These “back door” policies have been successful because the number of Japanese that could work in unskilled labor positions was enough to offset the number of foreigners immigrating to Japan to fill the excess unskilled labor positions. However, the Japanese population has been slowly decreasing since the 1970s\textsuperscript{135} (Table 5) and the projected population between now and 2050, even with a high estimate, is expected to be significantly lower than the current population\textsuperscript{136} (Table 3). With this prediction, if the Japanese economy were to stay exactly as it is, and the need for unskilled labor neither increased nor decreased, Japan would begin to run out of native Japanese to fill the unskilled labor positions. Those currently occupying these positions would eventually retire, resulting in fewer Japanese people than before filling those positions. Given that Japan is currently trying to improve its economy, if the need for unskilled labor were to decrease over the next few decades it would signal that Japan was not meeting its goal; the economy would be getting weaker instead of stronger. Consequently the only positive options for the Japanese economy in terms of its unskilled labor demand are for it to remain the same or to increase. As


both options require a need for laborers that the Japanese population is not projected to fill, the
need for more drastic measures on the part of the Japanese government in allowing unskilled
foreign workers into Japan is evident. Even if the Japanese populace were to have an
unprecedented boom in the birthrate, that source of labor would not be utilized for at least 20
years; that generation of babies would need time to reach working age. Waiting for a generation
to mature would cause the economy to suffer from labor shortages causing a further decline in
the Japanese economy, which could be almost impossible to recover from in the near future.

The Homogeneous Mindset:

Using the trainee, entertainment, and pre-college status of residence designations,
companies have brought immigrants to Japan. The loose regulation of these aspects of the
ICRRA has allowed immigrants to be subjected to inhumane labor conditions including low pay,
poor living conditions, and outright abuse.137 This is a result of the fact that this labor supply is
obtained through methods that are not entirely legal, and as such have little to no regulation. This
lack of regulation allows companies to abuse the system, creating work environments
detrimental to unskilled foreign workers and to the Japanese society as a whole (by allowing
such conditions to exist). The long-term status of residence designation is the only aspect of the
Immigration Control and Refugee Recognition Act that has allowed unskilled foreign labor to
enter Japan through primarily legitimate means. Even though Japan instituted a virtual ban on the
importation of unskilled foreign workers in 1990, it implemented a near open-door policy toward
the nikkeijin with its long-term status of residence designation.138 Allowing this open door

137 Tsuda, Takeyuki. "Local Citizenship and Foreign Workers in Japanv." The Asia Pacific Journal: Japan Focus 26
May 2008 26 Oct 2008 http://www.japanfocus.org/_Takeyuki_Tsuda-
policy towards the nikkeijin comes from the same mindset that is currently hindering the Japanese from changing their immigration policies to allow the needed unskilled foreign labor force into Japan to keep its economy from collapsing. Showing this mindset, Yamanaka points out that “official documents dating from before the 1989 Reform (amendments made to the Immigration Control and Refugee Recognition Act) suggest the maintenance of cultural and ‘racial’ homogeneity was a major concern of policy makers and the ruling Liberal Democratic Party. Such documents often refer to Japan’s possession of ‘one ethnic group, one language’ as a key contributing factor to its post-war miracle.”¹³⁹ The homogeneous mindset of the Japanese comes from a belief, as articulated in the documents from the Liberal Democratic Party, that it contributed to Japan’s past success. As such it can be inferred that the Japanese believe it will contribute to the future success of the nation. As Japan was faced with an economic crisis concerning its unskilled workforce, the Japanese government viewed the nikkeijin

“as an effective way to deal with the labor shortage without disrupting Japan's cherished ethnic homogeneity, which was viewed as responsible for the country's social harmony and prosperity. According to the chairman of the LDP policy committee on foreign workers, "It is true that the proposal to actively accept the nikkeijin as workers is an effective way to eliminate the labor shortage that confronts us and can be implemented quickly. If we accept Asians in large numbers, it would destroy the ethnic composition of Japan, which is close to an ethnically homogeneous nation-state. However, if it is our nikkeijin brethren, even if they can't speak Japanese adequately, we are not as concerned."¹⁴⁰

Though the ethnic composition of the nikkeijin enabled them be openly accepted into Japan and work in unskilled labor positions, Japan still faces a future labor shortage requiring the Japanese


to alter their current mindset towards unskilled foreign workers and their current restrictions on unskilled foreign labor in Japan. Those in the Ministry of Justice, however, are hesitant as they are worried about the repercussions of such actions in Japan. The chairman of the Liberal Democratic Party policy committee on foreign workers dealing with the nikkeijin issue stated, “One big argument for those who oppose opening the country to immigrant labor is that if we accept Asians with different cultures and customs, conflicts such as racial discrimination are likely to occur.” Although this is a valid problem to be concerned about it should not be an issue. The same chairmen stated, “Even those who oppose the acceptance of foreign workers will probably not have many complaints with the special treatment of the nikkeijin, who have properly internalized Japanese customs. [Therefore,] in the case of the nikkeijin even if their citizenship is of a different country, they should be easy to admit as our brethren” This, however, has already been proven to not be the case. As explained by Tsuda, “When the (nikkeijin) immigrate to Japan, they become a new ethnic minority of a completely different type. In contrast to their positive minority status in Brazil, they suddenly become a negative minority in Japan – a group that suffers from low social status, cultural disparagement, and discrimination.” This shows that even when the immigrants come from the same bloodline as the Japanese and look Japanese, there can still be discrimination within the Japanese society towards those not considered Japanese. This originates from the fact that the Japanese still hold to their homogeneous mindset, which precludes even nikkeijin from being accepted into the Japanese culture.

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141 Id.
142 Id.
Effects of Japan’s Homogeneous Mindset:

Japan’s homogeneous mindset has resulted in prejudices towards different cultures and peoples that have immigrated to Japan. Even if foreigners were allowed to immigrate to Japan, the social conditions caused by their homogeneous mindset are detrimental to the productivity needed to help the economy. Examples of these conditions can be seen in various aspects of life for foreigners. For example, foreign faculty members in Japan often found themselves subject to discrimination such as being denied equal pay or tenure and other benefits normally received by their Japanese counterparts.\(^{144}\) In one particular instance “Gwendolyn Gallagher, an American professor who [was] married to a Japanese and [had lived [there] for 14 years, was dismissed from Asahikawa University with the sole explanation that the school needed ‘fresh foreigners.’ To the shock of many foreign academics [there], the dismissal was upheld in court.”\(^{145}\) As bad as instances such as this are, the Japanese homogeneous stance has created a disdain that is most strongly directed toward Japan’s most logical source for future immigrant labor: other Asians.\(^{146}\) The trend seems to start early, before the Japanese are old enough to work. Masahisa Minato, teacher who recently wrote a study about the challenges of absorbing foreign students, discusses the situation

“If mixing is free and easy at the youngest ages, by the time immigrants reach the age to attend the high school next door, they find that their young Japanese classmates have frequently absorbed the hostility to foreigners that is characteristic of their elders and often express it cruelly. Korean immigrants to


\(^{145}\) Id.

Japan have long known the phenomenon of taunting and hazing by their school-aged Japanese peers.\textsuperscript{147}

In one particular instance, she “had one girl who was looked down upon by schoolmates. She was told, ‘You should go back to your home’, and ‘You are too black’. Through this experience, she lost her desire to study.”\textsuperscript{148} Unfortunately, these conditions exist all over Japan, even in the elementary schools\textsuperscript{149}. Seeing this type of discrimination present in the Japanese youth, it is not hard to believe that there is also substantial discrimination in the Japanese society. For example, it is very difficult to get an apartment in Japan as a foreigner. “Most Japanese landlords will not rent to a foreigner”\textsuperscript{150} writes David Kessel of the American Chronicle, “Japanese landlords do not normally hang out a “For Rent” sign at an apartment building. They go to a “fudosan”: a real estate agency to help them find tenants. However, signs near local “fudosan” usually say: “No Animals, No Prostitutes, No Foreigners.”\textsuperscript{151} Though this blatant discrimination should be illegal, it is not. Japan currently has no comprehensive national law against discrimination.\textsuperscript{152} Consequently discrimination in Japan has been described as “deep and profound”.\textsuperscript{153} This assessment came from Doudou Diene of Senegal, appointed by the U.N. Commission on Human Rights, after visiting Japan in 2005.

The reasons for discrimination can be found not only in the connotations that are carried with the homogeneous mindset held by the Japanese, but also in the societal stereotypes held

\textsuperscript{147}Id.
\textsuperscript{148}Id.
\textsuperscript{149}Id.
\textsuperscript{151}Id.
\textsuperscript{153}Id.
concerning foreigners in Japan. The idea of allowing in more foreigners is often described as a risk to Japan's relatively crime-free and homogeneous society.\footnote{Reynolds, Isabel. "Aging Japan gets serious about immigration." \textit{Reuters} 06 Aug 2008 27 Oct 2008 <http://www.reuters.com/article/lifestyleMolt/idUST858592008080807?pageNumber=1&virtualBrandChannel=0>}. This view of foreigners can be seen in the fact that lock companies appeal to racial fear in advertisements that bluntly link crime to foreigners.\footnote{French, Howard. "Still Wary of Outsiders, Japan Expects Immigration Boom." \textit{The New York Times} 14 Mar 2000 26 Oct 2008 <http://query.nytimes.com/gst/fullpage.html?res=9905E6DB103BF937A25750C0A9669C8B63&sec=&spn=&pagewanted=all>}. This fear of foreigners coming in and destroying the Japanese way of life is not confined to those people in the Japanese populace who do not know any better. Tokyo’s governor, Shintaro Ishihara, is one of Japan’s most prominent right-wing figures and seems to echo the view held that foreigners are directly linked to crime. In 2006 he was quoted as saying:

“Roppongi [Tokyo's most populous foreign section] is now virtually a foreign neighborhood. Africans - I don't mean African-Americans - who don't speak English are there doing who knows what. This is leading to new forms of crime such as car theft. We should be letting in people who are intelligent.”\footnote{Taberner, Peter. "An immigration conundrum in Japan." \textit{Asia Times online} 18 Jul 2008 27 Oct 2008 <http://www.atimes.com/atimes/Japan/JG16Dh01.html>}

There are countless stories of discrimination in Japan by foreigners living there. Nonetheless the fact remains that the current homogeneous mindset of the Japanese has led to, and will continue to lead to discrimination unless something is done to change it. "Japanese society still has fantasies about our pure blood, and about the ability of Japanese people to understand each other better than others," said Katsuo Yoshinari, head of the Asian People's Friendship Society\footnote{Id.}. “Even if the government or the business community accepts more foreigners, without much more effort on our side, these feelings of rejection toward foreigners will remain strong.”\footnote{Id.}
Although the homogeneous mindset of the Japanese is still prevalent in today’s society, Japan has shown signs that the workforce crisis has caused them to start rethinking their views on foreigners in Japan. Recently a Japanese court ruled that Japanese children of unmarried foreign mothers could now be granted citizenship for the protection of basic human rights.159 As population decline became a critical issue in early 2000, a panel was created by Prime Minister Keizo Obuchi to identify national priorities for the 21st century.160 In part due to the findings of the panel, the Ministry of Justice broke tradition and urged Japan to aggressively carry out the smooth acceptance of foreigners.161 This shift in thinking has begun to manifest itself in actual Japanese policies:

As part of a trade agreement with Indonesia, a deal was brokered to allow Indonesian nurses and health professionals to live and work in Japan. These arrangements could be viewed as pilot schemes for any attempt to infuse the population with more overseas workers. At the moment, however, they are no more than part of trade agreements.162

Even though this change in position is borne from the necessity for the Japanese government to counter the shrinking labor force, nonetheless, it is a grave departure from the view held for decades concerning foreigners in Japan.

**Recommendation:**

As the shrinking work force is projected to negatively impact the current economic situation in Japan, it is urgent that something be done immediately to keep the Japanese economy from being severely damaged. Japanese companies have felt the pinch of a shrinking workforce. Consequently, they have not had the leisure to wait for their government to realize the error of

159 *Id.*
160 *Id.*
161 *Id.*
162 *Id.*
maintaining its homogeneous mindset and clinging to policies meant to keep foreigners, specifically unskilled foreign workers, out of Japan. This has resulted in companies using “back door” tactics to fill the void created by the shrinking Japanese labor force. This current system has given rise to an economic environment that supports inhumane work conditions and, at times, organized crime syndicates such as the yakuza\(^{163}\) and others.

Japan needs to move past the restrictions it has placed on itself due to its homogeneous mindset and change the ICRRA so that it will readily allow the immigration of unskilled foreign workers into Japan. While the ICRRA currently has a skilled labor status of residence designation, there is no status of residence even addressing unskilled labor in Japan. As the Japanese economy has a dual industrial structure with a few large organizations on the top and many small firms at the bottom, the demand for unskilled labor is mostly concentrated in the small and medium sized companies involved in labor-intensive manufacturing, construction and services.\(^ {164}\) As these smaller companies are often short of capital and technology they suffer from low productivity. Their inferior working conditions do not make them attractive to Japanese workers, so they must turn to foreign labor for their survival.\(^ {165}\) For these companies to survive the next few decades, unskilled foreign labor must be openly allowed in Japan. Japan has already incorporated a large number of unskilled foreign workers into its labor pool\(^ {166}\) whether the Japanese government wants to admit it or not. The current policies in the ICRRA have created an

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\(^{163}\) The Yakuza are known for their striking full-body tattoos and severed fingertips, Japan’s gangsters comprise a criminal class eighty thousand strong—more than four times the size of the American Mafia. [Kaplan, David . \textit{Yakuza: Japan’s Criminal Underworld}. California : University of California Press, 2003.]


\(^{165}\) \textit{Id.}

\(^{166}\) \textit{Id.}
environment treating immigrant workers as second-class citizens, and therefore it must be changed to include a provision in the status of residence section recognizing unskilled labor as a legitimate legal status. This provision must outline rights to protect immigrants from being abused and mistreated in the work environment. It must also address any restrictions concerning the length of time an unskilled laborer is allowed to remain in Japan and what sort of legal activities unskilled foreign workers can engage in. By doing this, Japan can address the existing problems facing the population of unskilled foreign workers, helping to decrease the illegal actions taken with regards to that population. It will also allow for a plan managing future unskilled foreign workers who immigrate to Japan. This will allow a controlled immigration of unskilled foreign workers, which will dampen the effects of the projected shortage of a labor force in the Japanese economy.

Conclusion:

Japan’s recovery from its economic devastation after World War II was accomplished largely through the use of exclusively Japanese labor forces. The homogeneous mentality that allowed Japan to weather the post-war economic storm and become an economic power on the world stage succeeded due to the Japanese work ethic and availability of a Japanese workforce. As Japan now faces a critical reduction in its population and in that workforce, such a homogeneous mindset is no longer viable. It has the potential to cause the economy to enter into an unprecedented recession, forcing Japan to face almost insurmountable economic hardship. Consequently, it is necessary for Japan to move past its homogeneous mindset and allow foreign workers to immigrate to Japan, in order to help it weather its projected workforce shortage. To accomplish this, Japan must amend the Immigration Control and Refugee Recognition Act to

\[167\] Id.
include a provision in the status of residence section that recognizes unskilled labor as a legal status and use that provision to control the legal immigration of unskilled foreign workers into Japan. This will allow Japan to survive its projected shrinking workforce in the coming decades and improve its economy.
# Table 1

**New Immigration Policy in Japan**

<table>
<thead>
<tr>
<th>Status of Residence</th>
<th>Length of Residence</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Annexed Table I</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Residence Status I (Employable)</strong></td>
<td></td>
</tr>
<tr>
<td>Diplomat</td>
<td>The period of diplomatic appointment</td>
</tr>
<tr>
<td>Official</td>
<td>The period of official appointment</td>
</tr>
<tr>
<td>Professor</td>
<td>3 years, 1 year or 6 months</td>
</tr>
<tr>
<td>Artist</td>
<td>3 years, 1 year or 6 months</td>
</tr>
<tr>
<td>Religious Activist</td>
<td>3 years, 1 year or 6 months</td>
</tr>
<tr>
<td>Journalist</td>
<td>3 years, 1 year or 6 months</td>
</tr>
<tr>
<td><strong>Residence Status II (Employable)</strong></td>
<td></td>
</tr>
<tr>
<td>Investor/Business Manager</td>
<td>3 years, 1 year or 6 months</td>
</tr>
<tr>
<td>Legal/Accounting Services*</td>
<td>3 years, 1 year or 6 months</td>
</tr>
<tr>
<td>Medical Services*</td>
<td>1 year or 6 months</td>
</tr>
<tr>
<td>Researcher*</td>
<td>1 year or 6 months</td>
</tr>
<tr>
<td>Instructor*</td>
<td>1 year or 6 months</td>
</tr>
<tr>
<td>Engineer</td>
<td>1 year or 6 months</td>
</tr>
<tr>
<td>Specialist in Humanities/</td>
<td></td>
</tr>
<tr>
<td>International Relations*</td>
<td>1 year or 6 months</td>
</tr>
<tr>
<td>Intra-Company Transferee*</td>
<td>1 year or 6 months</td>
</tr>
<tr>
<td>Entertainer</td>
<td>1 year or 3 months</td>
</tr>
<tr>
<td>Skilled Labor</td>
<td>1 year or 6 months</td>
</tr>
<tr>
<td><strong>Residence Status III (Not Employable)</strong></td>
<td></td>
</tr>
<tr>
<td>Cultural Activities*</td>
<td>1 year or 6 months</td>
</tr>
<tr>
<td>Temporary Visitor</td>
<td>90 days or 15 days</td>
</tr>
<tr>
<td><strong>Residence Status IV (Not Employable)</strong></td>
<td></td>
</tr>
<tr>
<td>College Student</td>
<td>1 year or 6 months</td>
</tr>
<tr>
<td>Pre-College Student*</td>
<td>1 year, 6 months or 3 months</td>
</tr>
<tr>
<td>Trainee</td>
<td>1 year, 6 months or 3 months</td>
</tr>
<tr>
<td>Dependent</td>
<td>3 years, 1 year, 6 months or 3 months</td>
</tr>
<tr>
<td><strong>Residence Status V (Employment Status Depends on Specific Case)</strong></td>
<td></td>
</tr>
<tr>
<td>Designated Activities</td>
<td>3 years, 1 year or 6 months</td>
</tr>
<tr>
<td><strong>Annexed Table II (No Restrictions on Activities)</strong></td>
<td></td>
</tr>
<tr>
<td>Permanent Resident</td>
<td>Indefinite</td>
</tr>
<tr>
<td>Spouse or Child of Japanese National</td>
<td>3 years, 1 year or 6 months</td>
</tr>
<tr>
<td>Spouse or Child of Permanent Resident*</td>
<td>3 years, 1 year or 6 months</td>
</tr>
<tr>
<td>Long-Term Resident*</td>
<td>3 years, 1 year or 6 months</td>
</tr>
<tr>
<td>Child of Resident under Law no. 126 of 1952</td>
<td>3 years</td>
</tr>
</tbody>
</table>


Note: *Newly created in the 1989 Immigration Act.*
Table 2

Unemployed person by age groups, preference for employment as primary or secondary activity and reason for seeking a job [Females, of 15 years of age or more in ten thousand persons]

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Quitted a job voluntary</th>
<th>Mandatory retirement, or termination of employment contract</th>
<th>Circumstances of employer or business</th>
<th>Quitted a job voluntary</th>
<th>Graduated from school</th>
<th>Other</th>
<th>Necessary to earn revenue</th>
<th>Other (excluding necessary to earn revenue)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>103</td>
<td>26</td>
<td>7</td>
<td>18</td>
<td>42</td>
<td>5</td>
<td>30</td>
<td>18</td>
<td>11</td>
</tr>
<tr>
<td>2006</td>
<td>107</td>
<td>26</td>
<td>7</td>
<td>19</td>
<td>43</td>
<td>5</td>
<td>31</td>
<td>19</td>
<td>11</td>
</tr>
<tr>
<td>2005</td>
<td>116</td>
<td>29</td>
<td>8</td>
<td>21</td>
<td>47</td>
<td>6</td>
<td>33</td>
<td>22</td>
<td>11</td>
</tr>
<tr>
<td>2004</td>
<td>121</td>
<td>32</td>
<td>8</td>
<td>24</td>
<td>45</td>
<td>7</td>
<td>37</td>
<td>25</td>
<td>12</td>
</tr>
<tr>
<td>2003</td>
<td>135</td>
<td>40</td>
<td>9</td>
<td>31</td>
<td>49</td>
<td>7</td>
<td>38</td>
<td>25</td>
<td>13</td>
</tr>
<tr>
<td>2002</td>
<td>140</td>
<td>42</td>
<td>8</td>
<td>34</td>
<td>51</td>
<td>7</td>
<td>38</td>
<td>24</td>
<td>14</td>
</tr>
<tr>
<td>2001</td>
<td>131</td>
<td>31</td>
<td>***</td>
<td>***</td>
<td>55</td>
<td>6</td>
<td>33</td>
<td>***</td>
<td>***</td>
</tr>
<tr>
<td>2000</td>
<td>123</td>
<td>29</td>
<td>***</td>
<td>***</td>
<td>52</td>
<td>7</td>
<td>31</td>
<td>***</td>
<td>***</td>
</tr>
<tr>
<td>1999</td>
<td>123</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
</tr>
<tr>
<td>1998</td>
<td>111</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
</tr>
<tr>
<td>1997</td>
<td>95</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
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<tr>
<td>1996</td>
<td>91</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
</tr>
<tr>
<td>1995</td>
<td>87</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
<td>***</td>
</tr>
</tbody>
</table>

Table 3

Actual and projected population of Japan, 1950-2050

Table 11.3 Foreigners by Nationality and Age (3 Groups): 2005

<table>
<thead>
<tr>
<th>Nationality</th>
<th>Number (population)</th>
<th>Proportion (%)</th>
<th>Sex ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>0-14 years old</td>
<td>15-64</td>
</tr>
<tr>
<td>Total</td>
<td>1,555,505</td>
<td>146,805</td>
<td>1,302,603</td>
</tr>
<tr>
<td>Korea</td>
<td>466,637</td>
<td>44,196</td>
<td>351,580</td>
</tr>
<tr>
<td>China</td>
<td>346,877</td>
<td>24,044</td>
<td>314,397</td>
</tr>
<tr>
<td>Philippines</td>
<td>123,747</td>
<td>9,128</td>
<td>113,608</td>
</tr>
<tr>
<td>Thailand</td>
<td>26,429</td>
<td>1,569</td>
<td>24,728</td>
</tr>
<tr>
<td>Indonesia</td>
<td>18,041</td>
<td>1,003</td>
<td>16,569</td>
</tr>
<tr>
<td>Viet Nam</td>
<td>20,630</td>
<td>3,058</td>
<td>17,264</td>
</tr>
<tr>
<td>U.K.</td>
<td>9,605</td>
<td>734</td>
<td>8,890</td>
</tr>
<tr>
<td>U.S.A.</td>
<td>37,417</td>
<td>5,092</td>
<td>29,829</td>
</tr>
<tr>
<td>Brazil</td>
<td>214,049</td>
<td>35,589</td>
<td>176,199</td>
</tr>
<tr>
<td>Peru</td>
<td>40,091</td>
<td>8,069</td>
<td>31,904</td>
</tr>
<tr>
<td>Others(^1)</td>
<td>251,982</td>
<td>14,323</td>
<td>217,738</td>
</tr>
</tbody>
</table>

(Reference)

Japanese population (thousands) 125,730 17,574 108,156 25,586 100.0 13.8 62.8 20.3 95.2

\(^1\) Includes "statelessness and name of country not reported".
Figure 1

Source: 弓倥-！墉寴/！叶南.tick_東_億_緯_観_占_灸/！呎_疵 /！椹_儀-！櫻_脇_門_呎_疵_次_幟_暗_=-！→！1→。
Figure 2

Interdisciplinary Undergraduate Law Journal

Figure 2
Interdisciplinary Undergraduate Law Journal

Criteria provided for by the Ministry of Justice Ordinances

of drawing, has prepared a labor document or document, or has used, possessed, transfixed, or lent a forged or altered document or drawing, or has arranged the transfer or handing thereof with the intent of helping an alien illegally receive issuance of a certificate, a seal of certification for handing or official permission pursuant to the provisions of Chapter III, Section I or II of the Immigration Control Act, or to the provisions of the Immigration Control Act, or to the provisions of Section IV of the same chapter or permission pursuant to the provisions of Chapter IV, Section II or Chapter V, Section III of the Immigration Control Act, in connection with the business activities of the organization concerned, in the past 5 years.

vi. A person who has been punished for violation of the provisions of Articles 71 to 74-6 of the Immigration Control Act, or Article 6 or 13 of the Anti-Proliferation Act, or for which 3 years have not yet passed following completion of the sentence or since the date of remission of the execution of the sentence.

vii. A person who is a member of an organized crime group or for which 5 years have not yet passed since leaving an organized crime group.

(4) Where the applicant is to engage in theatrical or musical performances organized by the national government, a local government, or a corporation established directly pursuant to the provisions of Japanese law or a corporation established pursuant to the provisions of a special act or special acts of establishment, or in theatrical or musical performances conducted at a school, an advanced vocational school, or a vocational school provided for by the Schools Act (Act No. 24 of 1949).

(5) The applicant is to engage in theatrical or musical performances organized by a public or private organization in Japan which have been established with funds from the national government, a local government or an incorporated administrative agency for the purpose of cultural exchange between Japan and foreign countries.

(a) The applicant is to engage in theatrical or musical performances at a facility of 300,000 square meters or more where theatrical or musical performances by aliens are regularly shown in order to attract potential tourists with the flavor of foreign settings or culture.

(b) The applicant is to engage in theatrical or musical performances at a facility where food and drink are not served for profit to the seated audience and where serving customers does not take place limited to one managed by a public or private nonprofit organization in Japan or one with a seating capacity of 300 or more.

(c) The applicant is to receive reward of 30,000 yen or more a day for performances concerned in the case of a group performance, the total reward for the group and is to reside in Japan for a period not exceeding 90 days to engage in theatrical or musical performances.

(d) The applicant is to engage in public entertainment other than theatrical or musical performances, be the most receive no less reward than a Japanese national would receive for comparable work.

(e) In cases where the applicant is to engage in shows business other than public entertainment, he/she must engage in any of the following activities and must receive no less reward than a Japanese national would receive for comparable work.

(f) Activities pertaining to the advertisement of goods or services.

(g) Activities pertaining to the production of broadcast programs (including cable broadcast programs) or music.

(h) Activities pertaining to the making of commercial use photographs.

(i) Activities for recording sound or images on commercial use records, videos or other recording media.

Skilled Laborer

The applicant must fall under any of the following categories and must receive no less reward than a

Source: 弓倥-!垌寴!/!叶南魒毎毎魒億屄談恥占灸!/!呴痘!/!橄傞阹;!梍槽咪鬥叶痘次検検集中!→→!→→!
Figure 3