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# Is It Too Late For Title VI Enforcement?: Seeking Redemption of the Unequal United States‟ Long Term Care System Through International Means

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# IS IT TOO LATE FOR TITLE VI ENFORCEMENT? - SEEKING REDEMPTION OF THE UNEQUAL UNITED STATES' LONG TERM CARE SYSTEM THROUGH INTERNATIONAL MEANS

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*"Segregation is the adultery of an illicit intercourse between injustice and immorality."* Reverend Dr. Martin Luther King, Jr.

## I. INTRODUCTION

Permeating every facet of life including health care, racial segregation has been a part of the history of the United States since its creation. In fact, the history of African-Americans has been one of tragedy, laced with the hope of equality. This tragedy is a result of three hundred years of slavery, one hundred years of the limited freedom of segregation, three years of the promise of equality granted from the civil rights struggle, and thirty-seven years of resegregation through white flight and institutional racism. Hence, African-Americans have been fighting for the right to freedom, equality, and human dignity for the last four hundred and forty years. Initially most racism was intentional and expressed through *de jure* segregation, as evidenced by federal funding of the construction of racial segregated health care facilities.[2] Now most racism, expressed through *de facto* segregation, is subtly incorporated into the daily practices of institutions causing an adverse disparate impact on African-Americans.[3] This institutional

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[2] The Hill-Burton Act of 1946 allotted funding for the construction of racially segregated hospitals and nursing homes and granted states the authority to regulation this racially segregated construction. Pub. L. No. 109-80, 42 U.S.C. § 291 (1946).

[3] *See* Vernellia R. Randall, *Racial Discrimination in Health Care in the United States as a Violation of the International Convention on the Elimination of All Forms of Racial Discrimination*, 14 U. FLA. J.L. & PUB. POL'Y 45, 47-65 (2002). *See generally*

racism "establishes separate and independent barriers" through the neutral "denial of opportunities and equal rights to individuals and groups that results from the normal operations of the institutions in a society."[4] Once racism becomes institutionalized, the institution is racist whether or not the individuals maintaining those practices have racist intentions.[5]

For example, elderly African-Americans are disproportionately placed in substandard[6] nursing homes.[7] The reason for this placement is because most high quality nursing homes accept a high proportion of private pay patients.[8] These facilities limit the admission of Medicaid patients, which are customarily elderly African-American patients.[9] Consequently, elderly African-American patients are placed in nursing homes with a high proportion of Medicaid patients, which traditionally provide substandard care.[10] The disparate impact of placing elderly African-Americans in substandard quality nursing homes based on their payment status is overshadowed by the institutional racism that is the underlying reason for these practices. As some experts argue, the 'neutral' policies of denying elderly African-American Medicaid

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Thomas H. Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution in the Workforce and the Unfulfilled Promises That Remain,* 22 HOFSTRA LAB. & EMP. L.J. 627, 640 (2005); Robert M. Berdahl, *Policies of Opportunity: Fairness and Affirmative Action in the Twenty-First Century*, 51 CASE W. RES. L. REV. 115, 117 (2000); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 386-88 (1997); Sidney Watson, *Health Care in the Inner City: Asking the Right Question,* N.C. L. REV. 1647, 1668 (1993).

[4] Vernellia Randall, *Why Race Matters?*, *at*, http://academic.udayton.edu/health/03access/data.htm (last visited July 15, 2005).

[5] JAMES H. JONES, PREJUDICE AND RACISM 5-6 (1972).

[6] Substandard quality of care means that the nursing home has violated one of the Medicare regulations regarding resident behavior and facility practices, quality of life, or quality of care that caused actual or serious actual harm to one or more nursing home residents. *See* 42 C.F.R. § 488.301 (2004).

[7] Vincent Mor, et al., *Driven to Tiers: Socioeconomic and Racial Disparities in the Quality of Nursing Home Care*, 82 MILBANK Q. 227, 227, 235-37 (2004). "Nursing homes are the most segregated publicly licensed health care facilities in America." Watson, *supra* note 3, at 1667.

[8] Mor, *supra* note 7, at 227-28; Randall, *supra* note 3, at 58-9.

[9] Mor, *supra* note 7, at 227-28; Randall, *supra* note 3, at 58-9. *See* Linton v. Tennessee, 779 F.Supp. 925 (M.D. Tenn. 1990) (case challenging racial discrimination committed by the state of Tennessee through its policy of limiting the number of Medicaid beds in nursing homes).

[10] Mor, *supra* note 7, at 227, 235-7.

patients admission to quality nursing homes is not so neutral.[11] Professor Sidney Watson notes that nursing homes use Medicaid as a means to screen patients.[12] If a nursing home chooses "to accept a white Medicaid patient, another Medicaid bed can be certified; if a home does not wish to accept a black Medicaid patient, the home simply may refuse to certify another bed for Medicaid payment even though it has bed space available."[13] Thus, the 'neutral' denial of admissions of elderly African-Americans to quality nursing homes based on the normal operations of the nursing home to limit the number of Medicaid patients is a 'separate and independent barrier' that prevents African-Americans from equal access to quality nursing homes. This is institutional racism. The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") prohibits institutional racism funded by the United States.

The CERD directs member states, such as the United States, to "condemn racial discrimination and undertake to pursue by all appropriate means ... a policy of eliminating racial discrimination in all its forms."[14] Member states are in violation of the CERD when they fail to implement measures to eradicate intentional and unintentional forms of racial discrimination. Private parties have the right to file a complaint concerning a member state's violation of the CERD with the Committee on the Elimination of Racial Discrimination ("the Committee") when there is no meaningful way to address the issue domestically.[15] Once a complaint is found to be valid, not only does the member state have to change its policies and procedures, but also there is a right to seek reparations for damages suffered.[16] Although it took twenty-eight years for the United States to ratify the CERD, it is now in force. Nevertheless, as Professor Vernellia Randall has noted, the United States government has failed to abide by the mandates of the

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[11] Watson, *supra* note 3, at 1668 n.103; Steven Wallace, *The Political Economy of Health Care for Elderly Blacks*, 20 INT'L J. HEALTH SERVICES 665, 674-77 (1990); William Weissert & Cynthia Cready, *Determinants of Hospital-to-Nursing Home Placement Delays: A Pilot Study*, 23 HEALTH SERVICES RES. 619, 632, 642 (1988).

[12] Watson, *supra* note 3, at 1668 n.103. *See* Linton v. Tennessee, 779 F.Supp. 925 (M.D. Tenn. 1990) (case challenging racial discrimination committed by the state of Tennessee through its policy of limiting the number of Medicaid beds in nursing homes).

[13] *Id.*

[14] *International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 2106 (XX), United Nations High Commission for Human Rights, at Article 2(1), U.N. Doc. 660 (1969) [hereinafter U.N. Resolution].

[15] *Id.* at Article 6.

[16] *Id.*

CERD by continuing to fund the long term care systems[17] that use 'neutral' policies such as payment status in a discriminatory way.[18] The effects of institutionalized racism on the well being of elderly African-Americans is evidenced by their failure to access quality health care regardless of their gender, education, health insurance, or income-level.[19]

Among the most vulnerable members of society,[20] elderly African-Americans are less likely to receive breast cancer screening, eye examinations for patients with diabetes, beta blocker medication after a heart attack, and follow-up treatment after hospitalization for mental illness.[21] These disparities include not just actual care but a more general difficulty in accessing other services in nursing homes. Traditionally, African-Americans have been denied admission to quality nursing homes[22] and relegated to substandard nursing homes.[23] Some researchers have argued that these practices and racial disparities are a result of the neutral factors such as the low reimbursement rates of Medicaid, which pays for a majority of African-Americans' nursing homes stay.[24] However, many experts have noted that even when these

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[17] Long term care is the "regular assistance with medical care (nursing, medicating, physical therapy) or personal needs eating, bathing, moving around) provided by someone outside an older person's family." New York State Advisory Committee to the U.S. Commission on Civil Rights, Report on Minority Elderly Access to Health Care and Nursing Homes, 5 n.11 (1992). Throughout this article, the word long term care system is limited to a discussion concerning skilled nursing homes.

[18] Randall, *supra* note 3, at 58-59.

[19] Robin M. Weinick, et al., *Racial and Ethnic Differences in Access to and Use of Health Care Services, 1977 to 1996*, 57 MED. CARE RES. & REV. 36, 50 (2000).

[20] Transmittal letter, New York State Advisory Committee to the U.S. Commission on Civil Rights, Report on Minority Elderly Access to Health Care and Nursing Homes (1992).

[21] Eric Schneider, et al., *Racial Disparities in the Quality of Care for Enrollees in Medicare Managed Care*, 287 JAMA 1288, 1289 (2002).

[22] *Id. See also* David Barton Smith, *The Racial Integration of Health Facilities*, 18 J. HEALTH POL. POL'Y & L. 851, 862-63 (1993). Quality nursing homes are defined as those that are not substandard or have little to no health deficiencies. Mor, *supra* note 7, at 235-37.

[23] Mor, *supra* note 7, at 235-237; David Grabowski, *The Admission of Blacks to High-Deficiency Nursing Homes*, 42 MED. CARE 456, 460-62 (2004); Mary Fennell, et al., *Facility Effects in Racial Differences in Nursing Home Quality of Care*, 15 AM. J. MED. QUALITY 174, 174 (2000).

[24] Mor, *supra* note 7, at 235-38; Grabowski, *supra* note 23, at 460-62; Nadereh Pourat et al., *Postadmission Disparities in Nursing Home Stays of Whites and Minority Elderly*, 12 J. HEALTH CARE FOR THE POOR & UNDERSERVED 352, 352-53, 362-63 (2001); Jim Mitchell et al., *Difference by Race in Long-Term Care Plans*, 19 J. APPLIED GERONTOLOGY 424, 425 (2000).

factors are controlled, elderly African-Americans still suffer denial of admission to quality nursing homes and relegation to substandard nursing homes.[25] Thus, these seemingly neutral factors are 'separate and independent barriers' that serve as the means by which nursing homes discriminate against African-Americans through institutional racism. Unfortunately, the United States government has done little to put an end to these practices even though Title VI of the Civil Rights Act of 1964 expressly prohibits them.[26]

Title VI forbids nursing homes receiving Medicare and/or Medicaid from using racism to deny admission or quality care to African-Americans.[27] In its history of thirty-seven years, the Office of Civil Rights ("OCR"), a division of the U.S. Department of Health and Human Services ("HHS") responsible for enforcing Title VI in health care,[28] has never terminated a nursing home proven to have violated Title VI.[29] Moreover, OCR does not collect racial data or admission flow data, regulate nursing home's admission practices, or survey the racial makeup of nursing homes as required by Title VI.[30] Without collecting data or regulating admission practices, OCR cannot prevent the institutional racism in nursing homes causing a disparate impact on elderly African-Americans.[31] Consequently, the burden of solving this problem has been left to elderly African-Americans, who have sought to rectify these discriminatory practices by suing the perpetrators for violation of Title VI. Because there are no smoking guns, most cases have centered on the theory of disparate impact and have been

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[25] Based on the empirical data, researchers have argued that the actions of the nursing homes are blatantly and intentionally discriminatory. Mary Fennell, *supra* note 23, at 174; Smith, *supra* note 22, at 862-63, 866; David Falcone & Robert Broyles, *Access to Long Term Care: Race as a Barrier,* 19 J. HEALTH POL. POL'Y & L. 583, 588-92 (1994); Weissert & Cready, *supra* note 11, at 632, 642. Furthermore, Professor Sidney Watson notes the lack of any other reasonable explanation for the continued racial segregation and inequalities in care at nursing homes as evidence of intentional racial discrimination. Watson, *supra* note 3, 1668 n.103 (1993).

[26] Arthur O. Eve, New York State Assembly Deputy Speaker, New York State Advisory Committee to the U.S. Commission on Civil Rights, Report on Minority Elderly Access to Health Care and Nursing Homes, 2 (1992).

[27] 42 U.S.C. §§ 2000d, 2000d-1 (2004).

[28] 45 C.F.R. § 80.1 (2004). *See* U.S. Commission on Civil Rights, Funding Federal Civil Rights Enforcement, No. 005-902-0006 1-4, 14-15 (1995).

[29] U.S. Commission on Civil Rights, Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs, No. 005-910-00024-2, 220-221 (1996).

[30] *Id.* at 227-28. *See* 28 C.F.R. § 42.406 (2004); 45 C.F.R. § 80.6 (2004).

[31] U.S. Commission on Civil Rights, *supra* note 29, at 227-28.

unsuccessful.[32] The United States put an end to private Title VI claims asserting discrimination through disparate impact with its decision that Title VI only grants private individuals the right to sue for intentional racism.[33] The right to rectify disparate impact cases in health care was left to OCR, which to date, has never filed a lawsuit under Title VI to protect minorities from racial discrimination in health care.[34] Therefore, the Supreme Court's ruling that the federal government is responsible for the eradication of discrimination effectively eviscerated the protections of Title VI because OCR has failed to enforce the requirements of Title VI in the long-term care system.[35]

Left with no avenue to rectify this discrimination through the United States' courts or through regulatory action, the most effective means by which to address the continuation of institutional racism in the long term care system is internationally.[36] The failure of the United

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[32] All of the Title VI cases have been brought by those affected, including African-Americans. These cases have varied from challenging the relocation of hospitals from predominately minority areas to the substandard level of care in health care facilities whose patients are predominately minority. *See* Taylor v. White, 132 F.R.D. 636 (E.D. Pa. 1990) (case filed on behalf of nursing home residents challenging the poor quality of care provided African-Americans in Philadelphia nursing homes); *Linton*, 779 F. Supp. 925 (case challenging racial discrimination committed by the state of Tennessee through its policy of limiting the number of Medicaid beds in nursing homes); Mussington v. St. Luke's-Roosevelt Hospital Center, 824 F. Supp. 427 (S.D.N.Y. 1993) (Based on procedural deficiencies, the court dismissed the class action lawsuit challenging the relocation of infant health related services out of the Harlem area as proof of racial discrimination through disparate impact.); NAACP v. Medical Center, Inc., 657 F.2d 1322 (3rd Cir. 1981) (The court dismissed a case challenging the relocation of health services from a predominately African-American neighborhood as proof of racial discrimination through disparate impact. Because the Medical Center had a justifiably business reason for the move to a predominately white neighborhood, the court never addressed the disparate impact); Jackson v. Conway, 620 F.2d 680 (8th Cir. 1980) (Based on procedural deficiencies, the court dismissed class action suit challenging a hospital closure in Missouri as proof of racial discrimination through disparate impact).

[33] The case was based on a challenge to English only driver's license applications under Title VI. Alexander v. Sandoval, 532 U.S. 275, 275 (2001). Although the Supreme Court did not discuss the regulation of health care entities under Title VI, the Court's decision applied to the application of sections 601 and 602 that are used as the basis for cases regarding racial discrimination by federally funded health care facilities. *Id.*

[34] *See id.*

[35] U.S. Commission on Civil Rights, *supra* note 29, at 220-221.

[36] Another means to rectify this issue is for African-Americans to file a claim against Medicaid for failing to fulfill its duties to provide quality care in nursing homes. Medicaid recipients have brought several successful cases against the state for failure to provide the required services and regulation under the Medicaid Act. *See* In re

States to stop discrimination and enforce Title VI violates the CERD. To obtain the fulfillment of the promise of equality, elderly African-Americans need to submit a complaint to the Committee asserting that the United States is in violation of the CERD, and there are no means by which to address this issue under U.S. law. Due to the egregiousness of the United States' actions, the Committee should rule that the United States must change its policies and give elderly African-Americans reparations for the harms suffered. Although the resolution of the case by the Committee is nonbinding, the complaints can take the case to the International Court of Justice whose findings are binding. This is a better outcome than those available through the United States, which seeks to eradicate racism and racial segregation through voluntary observance and empty promises of compliance.[37]

This article examines the United States' disregard for elderly African-Americans right to equality. Evidenced by the federal government's failure to enforce the mandates of Title VI, this disregard has resulted in the relegation of elderly African-Americans to substandard quality nursing homes. Therefore, African-Americans need to seek redemption through international means, such as filing a claim for the violation of the CERD. A brief discussion of the history and contents of the CERD is in Part II. The government's solution to eradicate racial discrimination and segregation in the long-term care system is examined in Part III. One of the government's solutions was the enactment of Title VI prohibiting racial discrimination and segregation. Forty-one years after the enactment of Title VI, the government has neglected its duties to resolve this problem, and institutional racism is rampant. The current problems with the long term care system caused by the United States' violation of Title VI, a violation of the CERD, is discussed in Part IV. To stop the U.S. from continuing to ignore the racial segregation and discrimination present in the long term care system, elderly African-Americans must file a claim for the United States' violation of the CERD. Section V discusses how

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Estate of Smith v. Heckler, 747 F.2d 583, 588 (10th Cir. 1984); Memisovski v. Maram, No. 92 C 1982, 2004 WL 1878332 (N.D. Ill. Aug. 23, 2004). The author is currently working on a piece to discuss how a lawsuit might force the interests of the government to converge with those of elderly African-Americans.

[37] Numerous nursing homes have been found out of compliance with Title VI, but instead of initiating legal or administrative action OCR has only required statements of commitment to stop discriminating against African-Americans. U.S. Commission on Civil Rights, *supra* note 29, at 230. These commitments have been illusionary at best as African-Americans continue to reside in substandard quality nursing homes while whites reside in perfect nursing homes. Mor, *supra* note 7, at 238.

the United States is in violation of Title VI and the CERD and how to solve this violation by filing a claim.

## II. THE UNITED NATIONS' ANSWER TO RACIAL DISCRIMINATION: INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

### A. Brief History of the CERD

In the 1960s, the United Nations ("U.N.") drafted several Declarations addressing the issue of racial discrimination.[38] On December 14, 1960, the General Assembly of the U.N. passed the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, condemning the colonization of continents that served as a means to segregate and discriminate against people of color.[39] Three years later, the General Assembly of the U.N. passed the *Declaration on the Elimination of All Forms of Racial Discrimination* affirming "the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding and respect for the dignity of the human person."[40] Although the U.N.'s passage of these declarations was admirable, they were nonbinding, so the U.N. drafted the CERD. Like Title VI, the CERD is binding and prohibits government funded racial discrimination. Before the U.N. could adopt the CERD twenty countries that were members of the U.N., member states, had to ratify the CERD. The CERD was adopted by the U.N. on December 21, 1965 and entered into force on January 4, 1969.

Two years after enacting the Civil Rights Act, the United States became a signatory of the CERD in September 1966, making the United States one of the first member states to sign onto the CERD.[41] However, it took the United States twenty-eight years to ratify the CERD. The CERD was not ratified until the Clinton Administration submitted it to the Senate. The Senate ratified the CERD, with their advice and consent, with three reservations: limiting the regulation of

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[38] U.N. Resolution, *supra* note 14, at Preamble.

[39] *Id.*

[40] *Id.*

[41] 140 CONG. REC. S7634-02 (1994). By signing the CERD, the United States indicated its intention to be bound by the CERD and creating an obligation to refrain in good faith from acts that would defeat the object and purpose of the treaty. Although the CERD is not self-executing and thus arguably cannot be used in U.S. courts, this does not limit its use by the Committee or International Court of Justice.

free speech, restricting application of CERD to public institutions, and requiring consent before allowing review by the International Court of Justice.[42] In ratifying the CERD, the Untied States Senate noted that "the Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental conduct," but this authority did not reach to private conduct.[43] Thus, the United States authority over "*public institutions*" to prevent discrimination was limited to the regulation "*of public conduct that [is] customarily the subject of government regulation.*"[44]

Moreover, when ratifying the CERD, some members of the Senate finally admitted the nation's history of discrimination and segregation. In fact, Senator Pell noted that it was important for the United States to ratify the Convention because "[a]s a nation which has gone through its own struggle to overcome segregation and discrimination, we are in a unique position to lead the international effort."[45] Senator Pell further noted that the ratification of the CERD would allow the United States to work with the Committee on the Elimination of Racial Discrimination ("Committee") to monitor compliance. The Senator's comments acknowledged both the sordid legacy of racial discrimination in the United States and the Committee's authority to rectify issues of racial discrimination in the United States. The acknowledgement of the past harms of racial discrimination and the promise of eradication were provided not only by the Senator's comments, but also by the language of the CERD. The goals and language of the CERD are similar to those found in Title VI, which prohibit racial segregation and discrimination, offering the prospect of equality for elderly African-Americans relegated to poor quality and unequal nursing homes.

### B. Governing Goals and Language of the CERD

"Convinced that the existence of racial barriers is repugnant to the ideals of any human society" and "alarmed by manifestations of racial discrimination still evidenced in some areas of the world and by governmental policies based on racial superiority or hatred," the U.N. adopted the CERD, which prohibits all forms of discrimination.[46] The term "racial discrimination" is defined as:

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[42] 140 CONG. REC. S7634-02 (1994).
[43] *Id.*
[44] *Id.* (emphasis added).
[45] 140 CONG. REC. S7634-02 (1994).
[46] U.N. Resolution, *supra* note 14, at Preamble.

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[47]

Not only does this broad language encompass the laudable goals of human rights, but it also includes the legal principles of equality. The definition noted the significance that everyone regardless of "race, colour, descent or national or ethnic origin" deserves human dignity and equal access to the "fundamental freedoms in the political, economic, social, cultural or any other field of public life."[48] Moreover, the legal principles of equality are addressed by the prohibition against an action "which has the purpose or effect" of racial discrimination.[49] This language prohibits both intentional and unintentional forms of racial discrimination, such as institutional racism.

To comply with the CERD, member states must eradicate racial discrimination from disparate treatment, disparate impact, and institutional racism. To prevent this discrimination, Article 2(1) of the CERD mandates that member states condemn racial discrimination and "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms."[50] Furthermore, the CERD states that member states shall:

> engage in no act or practice of racial discrimination against persons, groups of persons or institutions and *to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation ... [and] undertakes not to sponsor, defend or support racial discrimination by any persons or organizations.*[51]

Hence, the CERD requires member states to put an end to all discrimination committed by public institutions. To ensure compliance

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[47] *Id.* at Article 1(1).
[48] U.N. Resolution, *supra* note 14, at Article 1(1).
[49] *Id.*
[50] *Id.* at Article 2(1).
[51] *Id.* (emphasis added).

by member states such as the United States, two mechanisms were put into place: procedures to file individual complaints and the creation of a Committee.

The procedure for filing a complaint is found in Article 14 of the CERD. It provides that individuals and groups "claiming to be the victim of racial discrimination to lodge a complaint with the Committee."[52] Article 8 of the CERD established a Committee to enforce the requirements of the CERD. The Committee, consisting of eighteen members, is charged with reviewing complaints of the continuation of racial discrimination because of a member state's violation of the CERD.[53] The Committee's method by which it rectifies complaints is discussed in further detail later, but, if the case is resolved in favor of the complaining party, remedies available are a change of the law and reparations for damages suffered. Before the Committee becomes involved, individuals must be able to assert a claim of racial discrimination by a member state in violation of the CERD that cannot be eliminated through domestic means.

An example of a country's violation of the CERD is the United States' failure to eliminate the racial discrimination committed by state and federally funded nursing homes participating in the long term care system. Initially, the United States acted in concert with entities to racially segregate and discriminate. In the 1960s, the United States gained a conscience and enacted several laws banning racial segregation and discrimination. Unfortunately, the promise never materialized, and now the government has returned to its position of funding nursing homes that actively discriminate against African-Americans. Thus, African-Americans are right back where they started, residing in segregated substandard nursing homes. One way to resolve this issue is by filing a complaint with the Committee for the United States violation of the CERD for failing to enforce Title VI.

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[52] The United Nations High Commission for Human Rights, *Convention on the Elimination of All Forms of Racial Discrimination,* Overview of procedure of Article 14 (1969), *available at* http://www.ohchr.org/english/bodies/cerd/procedure.htm (July 30, 2005).

[53] *See* U.N. Resolution, *supra* note 14, at Preamble & Article 8-18.

## III. THE PROMISE OF A DREAM: GOVERNMENT INTERVENTION IN RACIAL DISCRIMINATION AND SEGREGATION IN HEALTH CARE

Throughout the 1960s, African-Americans waged national and international battles to obtain the rights of full citizenship in the United States.[54] The civil rights movement focused on equality of rights in every area of life including the right to quality health care. The resolve of these American citizens was a catalyst for the intervention of the government to put an end to intentional *de jure* segregation. The government tried to eradicate racial discrimination and segregation with the passage of Title VI and the Medicare and Medicaid Acts.[55] The language of Title VI, almost identical to the language of the CERD, requires that nursing homes in receipt of federal funding do not discriminate. The Medicare and Medicaid Programs provided extra federal funding to make Title VI compliance attractive to nursing homes. Nevertheless, the funding was not enough to induce nursing home compliance with Title VI, and the dream of equality has been denied African-Americans once again.

### A. Title VI of the Civil Rights Act

Congress enacted the Civil Rights Act of 1964 banning racial discrimination in housing, employment, and health care. Before his untimely death, President Kennedy submitted the Civil Rights Act to Congress and stated:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.[56]

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[54] DAVID BARTON SMITH, HEALTH CARE DIVIDED: RACE AND HEALING A NATION 115-16 (1999).
[55] *Id.*
[56] U.S. Commission on Civil Rights, *supra* note 29, at 27.

To achieve racial integration in health care, Title VI of the Civil Rights Act required the Secretary of the U.S. Department of Health and Human Services ("HHS")[57] to promulgate regulations prohibiting federal funding of nursing home construction activities and requiring written assurances of nondiscrimination from nursing homes. The passage of Title VI was crucial because it "mandate[d] the exercise of existing authority to eliminate discrimination by Federal fund recipients and would furnish the procedure to support this purpose."[58] When enacted, compliance with the requirements was so important to Congress that one member noted that Title VI, "represented the moral sense of the Nation that there should be racial equality in Federal assistance programs."[59] Title VI provides both a private right of action and mandates of enforcement for government administrative agencies. The private right of action is found in Section 601, which reads:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[60]

This language, like the CERD, prohibits racial discrimination by health care facilities funded by the federal government.[61] Private parties have a right to sue health care facilities that violate section 601 based on intentional racism. However, the United States Supreme Court has ruled that private parties are banned from bringing actions for institutional racism and disparate impact. These actions can only be challenged by OCR, the agency in charge of ensuring nursing home compliance with Title VI, under Title VI and the corresponding

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[57] The U.S. Department of Health, Education, and Welfare was renamed the U.S. Department of Health and Human Services ("HHS") in 1980. *See* Department of Education Organization Act of 1979, Pub. L. No. 96-88, § 509(e), 93 Stat. 695 (1979) (codified as 20 U.S.C. § 3508 (2000)). For simplicity and continuity, this article refers to the agency only as HHS.

[58] U.S. Commission on Civil Rights, *supra* note 29, at 24.

[59] *Id.* at 25.

[60] 42 U.S.C. § 2000d (2004).

[61] Physicians receiving payments under Medicare Part B are exempted from compliance with Title VI because these payments are not defined as federal financial assistance. SMITH, *supra* note 55, at 161-63. Thus, physicians can continue to discriminate based on race. *Id.* Although not discussed in this article, the governmental funding of physicians that racially discriminate is a violation of the CERD. For a detailed discussion *see* Randall, *supra* note 3.

regulations.[62] The mandates of enforcement for OCR are found in section 602, which states:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.[63]

This section requires OCR to take all necessary measures to ensure that those health care entities receiving federal funding, such as nursing homes, do not discriminate on the basis of "race, color, or national origin."[64] With the enactment of Title VI of the Civil Rights Act of 1964, the right to equal enjoyment and access to nursing home care became customarily the subject of federal government regulation. Like the CERD, section 602 of Title VI required the federal government to take all the necessary measures to ensure that those health care entities receiving federal funding, such as nursing homes, do not discriminate on the basis of "race, color, or national origin."[65]

Furthermore, the enforcement regulations of Title VI also require OCR to prevent institutional racism. The regulations specifically prohibit nursing homes from:

> *utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing*

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[62] *See Sandoval*, 532 U.S. 275.

[63] 42 U.S.C. § 2000d-1 (2004).

[64] 42 U.S.C. § 2000d (2004).

[65] "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 42 U.S.C. § 2000d-1 (2004).

> *accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.*[66]

Thus, nursing homes are forbidden from using neutral policies that have the effect of subjecting elderly African-Americans to racial discrimination or impairing their ability to be admitted to federally funded nursing homes. To ensure that nursing homes are complying with these mandates, OCR is required to review compliance reports and "*racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs.*"[67]

Notwithstanding these strong enforcement mandates of the statutory and regulatory language of Title VI to eradicate institutional racism, the promise of Title VI is illusory. To enforce Title VI, section 602 provides the government with the right to terminate or refuse funding to a noncompliant nursing home, but:

> *no such action shall be taken until the department or agency concerned has advised the appropriate person or persons* of the failure to comply with the requirement *and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity* involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.[68]

Congress delegated the task of eradicating racial discrimination in health care to HHS. The failure of Congress to provide remedies or

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[66] 45 C.F.R. § 80.3(b)(2) (2004) (emphasis added).

[67] 45 C.F.R. § 80.6(b) (2004) (emphasis added).

[68] 42 U.S.C. § 2000d-1 (2004) (emphasis added). Additionally, the regulations state that OCR is to "*the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.*" 45 C.F.R. § 80.6(a) (2004) (emphasis added).

sanctions for the violation of Title VI has severely restricted the regulation of nursing homes under Title VI. Moreover, requiring HHS to first seek voluntary compliance after a proven violation makes Title VI little more than a guide to what should happen, not a law that one is required to fulfill. With limited enforcement mechanisms available under Title VI, Congress relied on the attractiveness of extra funding from participation in the Medicare and Medicaid programs to entice nursing homes to comply with civil rights requirements.

### B. Medicare and Medicaid Acts

In 1965, Congress enacted the Medicare[69] and Medicaid[70] Acts increasing federal funding to nursing homes, but deliberately chose not to include language that mandated nondiscrimination as a requirement for participation.[71] Nevertheless, the enactment of the Medicare and Medicaid Acts was Congress' last act on behalf of disenfranchised African-Americans in the attainment of equality in health care.[72] Nursing homes were eligible for both Medicare and Medicaid funding, but before receipt of this funding nursing homes had to assure that they no longer discriminated based on race.[73] As a tactic to make nursing homes end racial discrimination, the government coupled the requirements of Title VI with participation in Medicare and Medicaid. However, Medicare and Medicaid funding was not attractive to nursing homes and many chose to forgo participation in the programs.

During the 1960s and 1970s, the time and eligibility requirements of Medicare did not provide steady income for nursing homes and the low reimbursement rates of Medicaid caused many nursing homes to forgo participation in the programs.[74] By the 1980s, any integration based on the lure of federal funding was obliterated by government cutbacks in response to rising health care costs.[75] The government initiated cutbacks even though studies showed that to

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[69] Medicare is a federal entitlement program to pay for health insurance for the elderly and disabled. *See* Social Security Act, 42 U.S.C. § 1395 (2004).

[70] Medicaid is a state and federally funded program to pay for health insurance for the poor. The States administer this program. *See* Social Security Act, 42 U.S.C. § 1396 (2004).

[71] INSTITUTE OF MEDICINE, IMPROVING THE QUALITY OF CARE IN NURSING HOMES, 240 (1986).

[72] SMITH, *supra* note 55, at 236.

[73] *Id.*

[74] David Barton Smith, *Population Ecology and the Racial Integration of Hospitals and Nursing Homes in the United States*, 68 MILBANK Q. 561, 576 (1990).

[75] *Id.* at 577.

achieve racial integration of nursing homes reimbursement rates for Medicaid needed to be increased.[76] The inability of the government to induce nursing homes to integrate with the passage of the Medicare and Medicaid Acts was not the government's only failure. By the time nursing homes began participating in these programs, the issue of Title VI enforcement to achieve nondiscrimination was no longer a focal point of the government and African-Americans have henceforth been relegated to poor quality, segregated nursing homes.[77]

With the passage of Title VI, Medicare and Medicaid, many civil rights activists believed that the fight for equality had been won. Unfortunately, they were sorely mistaken. The dream of equality that so many civil rights activists worked for remains unfulfilled because of the government's lack of dedication to enforce the law. Without the commitment from the government to enforce Title VI, nursing homes have returned to business as usual, discriminating and segregating by race. Illustrated by a decade's worth of empirical studies, the continuation of racial discrimination and segregation violates Title VI and the CERD.

## IV. THE CONTINUATION OF RACIAL DISCRIMINATION IN NURSING HOMES

Sixteen years after the passage of Medicare and Medicaid, government studies showed that elderly African-Americans "use nursing homes 20 percent less than aged whites with the gap growing to 40 percent among those aged 85 and over."[78] This difference in nursing home use is a result of racial discrimination.[79] The discrimination is institutionalized and accomplished through the denial of admission of elderly African-Americans to quality nursing homes and their relegation to substandard nursing homes.

Quality nursing homes admit a high proportion of private pay patients.[80] Because a disproportionate amount of elderly African-Americans are Medicaid patients, African-Americans are denied admission to these quality nursing homes and admitted to nursing

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[76] *Id.*
[77] SMITH, *supra* note 55, at 239.
[78] Wallace, *supra* note 11, at 677. Empirical data shows that this disparity in care is not attributable to African-Americans desire for family care compared to whites. Mitchell, *supra* note 24, at 424.
[79] Smith, *supra* note 74, at 577.
[80] Mor, *supra* note 7, at 227-28.

homes with a high proportion of Medicaid patients, which are customarily of poor or substandard quality.[81] Nevertheless, researchers have found that even when payment status is controlled, there is a disparity in the number of African-Americans admitted to quality nursing homes compared to the number of whites admitted to the same nursing homes.[82] Once African-Americans gain admission to these substandard nursing homes their physical condition is further compromised by the poor quality of care provided.[83] These disparities in quality are found not only in the difference in quality of nursing homes African-Americans are admitted to but can also be found in the quality of care received when they reside in the same nursing home.[84] The number of Medicare deficiencies[85] was two times higher in predominately African-American nursing homes versus predominately white nursing homes.[86] National studies show that African-American "nursing home residents are less likely to receive medically appropriate treatments, ranging from cardiovascular disease medication to pain medication to antidiabetes drugs."[87] The continuation of these racial disparities in the quality of nursing home care shows that the government has reneged on its promise to end racism and discrimination in the long term care system. The failure of the United States to put an end to these practices is a violation of both Title VI and the CERD.

### A. The 'Neutral' Denial of Admission to Quality Nursing Homes

Nursing home administrators and States administering federal entitlement programs (Medicaid and Medicare) regulate the admission process of nursing homes.[88] In order for state regulators to regulate

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[81] *Id.*

[82] Wallace, *supra* note 11, at 677.

[83] Fennell, *supra* note 23, at 174, 176-77.

[84] *Id.*

[85] A deficiency or citation is a violation of the Medicare or Medicaid participation requirements found in the program regulations. For instance, under Medicare there are a total of 190 possible deficiencies divided into seventeen different categories, for which HHS can cite a nursing home. *See* Office of the Inspector General, *Nursing Home Deficiency Trends and Survey and Certification Process Consistency* 1, OEI-02-01-00600 (2004). Most deficiencies are categorized into three main areas: quality of care (42 C.F.R. § 483.25 (2004)); quality of life (42 C.F.R. § 483.15 (2004)); and resident behavior and facility practice (42 C.F.R. § 483.13 (2004)).

[86] Grabowski, *supra* note 23, at 458.

[87] Fennell, *supra* note 23, at 174.

[88] Smith, *supra* note 22, at 863.

admissions and increase racial integration, the costs of Medicaid would increase.[89] In an attempt to reduce Medicaid costs, States grant nursing homes great discretion in their admission practices and policies.[90] In reality, the admission decisions are left solely to the nursing home administrators.[91] Nursing homes have used this discretion to deny admission to African-American patients through 'neutral' policies. Quality nursing homes use the payment status of a patient to determine whether the patient will be admitted, which is a neutral way to prevent or limit the admissions of elderly African-Americans.[92]

Quality nursing homes use payment status to limit the admission of African-Americans in two ways. First, many nursing homes that provide good quality deny elderly African-Americans admission because they are certified as Medicaid patients.[93] These African-Americans are then customarily admitted to nursing homes with a high proportion of Medicaid residents.[94] These nursing homes are usually substandard.[95] The purported reason for this denial of admission is usually that the nursing home prefers to admit private pay patients.[96] However, even when the 'neutral' factor of payment status is considered, African-Americans are still disproportionately denied admission to these quality nursing homes and relegated to substandard nursing homes compared to whites. In particular, a New York study showed that the nursing homes providing quality health care were nearly all white, while half of the public nursing homes that traditionally were of poor quality had residents who were African-

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[89] Grabowski, *supra* note 23, at 458.

[90] States regulate the admission process by limiting the number of Medicaid patients admitted to nursing homes by restricting the number of Medicaid certified nursing home beds. Smith, *supra* note 22, at 863.

[91] Grabowski, *supra* note 23, at 462.

[92] Another neutral factor that is used to deny admission to elderly African-Americans is religious affiliation. *See* JEFFREY AMBER, EXECUTIVE DIRECTOR OF FRIENDS AND RELATIVES OF THE INSTITUTIONALIZED AGING, NEW YORK STATE ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, REPORT ON MINORITY ELDERLY ACCESS TO HEALTH CARE AND NURSING HOMES 37-38 (1992). Race remained the key factor even in nursing homes sponsored by religious organizations, which were more likely to admit those of a different religious background than those of a different race. *Id.* In fact, the most segregated nursing homes were voluntary religious facilities. *See* Smith, *supra* note 22, at 862.

[93] Mitchell, *supra* note 24, at 438.

[94] *Id.*

[95] Mor, *supra* note 7, at 235-237.

[96] Randall, *supra* note 3, at 58-59; Watson, *supra* note 3, at 1667.

American or other minority groups.[97] Although Medicaid was the main payment source for most of these low quality and substandard nursing homes, there was still a significant racial disparity in admission and quality of care.[98] Thus, the researchers attributed this difference to "a combination of [racial] discrimination by nursing homes and steering by hospital discharge planners."[99]

The second way nursing homes neutrally deny elderly African-Americans admission to nursing homes is by limiting the number of beds they certify for Medicaid patients.[100] The federal specifically limits the number of beds each nursing home may certify for Medicaid patients as a means to control costs.[101] According to Professor Vernellia Randall, this federal policy limiting the number of Medicaid certifiable beds "encourages these facilities to move existing patients who have depleted their assets and are now newly eligible for medicaid into medicaid beds as they become available."[102] Because "it is mostly White women who have the assets to afford long-term care without medicaid and who live long enough to deplete those assets," African Americans are systematically denied admission to these quality nursing homes. Additionally, most nursing homes do not certify all their allowable beds at once because the nursing home tries to admit mostly private pay patients. Therefore, as Professor Sidney Watson notes, nursing homes use Medicaid as a means to screen patients.[103] If a nursing home chooses "to accept a white Medicaid patient, another Medicaid bed can be certified; if a home does not wish to accept an African-American Medicaid patient, the home simply may refuse to

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[97] Wallace, *supra* note 11, at 677.
[98] *Id.*
[99] *Id.*
[100] Randall, *supra* note 3, at 58-9; Watson, *supra* note 3, at 1667.
[101] Vernellia R. Randall, *Racist Health Care: Reforming an Unjust Health Care System to Meet The Needs of African-Americans*, 3 HEALTH MATRIX 127, 156 (1993). "The effect of this policy is that fewer medicaid resources are spent on nursing for minority populations even though minorities represent a larger portion of the medicaid population and have more illness." Randall, *supra* note 3, at 59; Steven P. Wallace et al., *The Consequences of Color-blind Health Policy for Older Racial and Ethnic Minorities*, 9 STAN. L. & POL'Y REV. 329, 335 (1998). Furthermore, when comparing the amount of money spent on Medicaid recipients by race there is a "high variability in [Medicaid] expenditures by race and natural origin." Sara Rosenbaum, *U.S. Civil Rights Policy and Access to health Care by Minority Americans: Implications for a Changing Health Care System,* 57 MED. CARE RES. & REV. 236, 241 (2000).
[102] Randall, *supra* note 3, at 58.
[103] Watson, *supra* note 3, at 1668 n.103.

certify another bed for Medicaid payment though it has bed space available."[104]

Thus, this seemingly neutral factor of payment status is a 'separate and independent barrier' that serves as the means by which nursing homes discriminate against African-Americans through institutional racism. Barred admission from these quality nursing homes, African-Americans are admitted to predominately Medicaid nursing homes, which traditionally provide poor or substandard quality.[105]

### B. The 'Neutral' Racial Disparities in the Provision of Quality Care

The quality of nursing home care is defined by the health of the residents and by the nursing home's compliance with quality of care regulations under Medicare and Medicaid.[106] When comparing the quality of care African-Americans receive in nursing homes with the quality of care whites receive in that same nursing home, the disparities are significant.[107] Additionally, racial disparities in the quality of care provided in predominately African-American nursing homes compared to predominately white nursing homes are evidenced by a plethora of research studies over the last decade.[108]

A study of several states, including New York, Kansas, Mississippi, and Ohio, found that when whites and African-Americans reside in the same facility, they receive a different level of care.[109] African-Americans traditionally receive poor quality care. For example, the standardized admission resident assessment tool showed that late stage pressure sores are more common to African-Americans, while early stage pressure sores are more common to whites.[110] The higher rate of late-stage pressure sores in African-Americans is based on the fact that they are commonly under-diagnosed.[111] Researchers assert that the reason for this disparity is the failure for physicians and nurses to correctly diagnosis pressure in non-whites.[112] Nevertheless,

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[104] *Id.*
[105] Mor, *supra* note 7, at 235-37.
[106] 42 C.F.R. § 483.25 (2004).
[107] Fennell, *supra* note 23, at 174.
[108] *See* Mor, *supra* note 7, at 228; Grabowski, *supra* note 23, at 456; Smith, *supra* note 22, at 857, 862-63.
[109] Fennell, *supra* note 23, at 174-5.
[110] Fennell, *supra* note 23, at 175-76.
[111] *Id.* at 176.
[112] *Id.*

this 'neutral' practice has denied African-Americans necessary preventative and curative care. [113] While whites receive treatment before the pressure sore becomes too severe, African-Americans and other minorities suffer without treatment until the pressure sore becomes irreparable.

In addition to these racial disparities in care when residing in the same facility, there are significant disparities when the races reside in different nursing homes. According to national data complied from Medicare forms, African-Americans reside in nursing homes with "lower ratings of cleanliness/maintenance and lighting."[114] Moreover, the number of deficiencies is greater in nursing homes that house a majority of Medicaid patients. These Medicaid-only facilities are traditionally of poor quality and predominately house African-Americans. In fact, some researchers have called Medicaid-only facilities 'low-tiered facilities' because of their poor quality.[115] This is because 41% of predominately African-American nursing homes have Medicaid as the primary payer.[116] Moreover, being African-American meant that the patient was twice as likely to be admitted to a primarily Medicaid payer nursing home and increased the probability of the nursing home deficiencies by 24%.[117]

The national data shows that nine percent of whites reside in 'low-tiered facilities' compared to forty percent of African-Americans that reside in 'low-tiered facilities'.[118] The national average shows that African-Americans are three times more likely to be in 'low-tiered facilities' than whites.[119] The placement of a majority of African-Americans in 'low-tiered facilities' is significant because these nursing homes have higher incidences of pressure sores, use of physical restraints, inadequate pain control, and use of antipsychotic medications.[120] The admission of African-Americans to 'low-tiered facilities' based on 'neutral' admission policies has subjected them to substandard nursing home care.

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[113] *Id.*

[114] Grabowski, *supra* note 23, at 456.

[115] Mor, *supra* note 7, at 227, 235-37.

[116] Grabowski, *supra* note 23, at 460. This study also reviewed socioeconomic status and found that Medicaid and Medicare patients were admitted to poor quality facilities. *Id.*

[117] *Id.*

[118] Mor, *supra* note 7, at 237.

[119] *Id.* at 238 fig.2. This ratio varies by state from 0 to 9 and the only state where the ratio is 0 is Kentucky. *Id.*

[120] *Id.* at 239-41.

Although these findings of institutional racism have been presented to OCR, the federal agency mandated by Title VI to prevent racial discrimination and *de facto* segregation, nothing has been done.[121] This has left African-Americans with no regulatory avenue to put an end to this discrimination. Notwithstanding OCR's inability to enforce Title VI, the Supreme Court barred private parties from bringing cases to eradicate racial discrimination as a result of disparate impact and delegated the task to the ineffective OCR. OCR's lack of Title VI enforcement and the Supreme Court's ruling has left elderly African-Americans in substandard nursing homes as a result of racial discrimination without any means to rectify the problem. Thus, African-Americans must seek international remedies by filing a claim against the Untied States for violating Title VI, a violation of the CERD.

## V. INACTIVITY AND INSTITUTIONAL RACISM: THE GOVERNMENT'S VIOLATION OF TITLE VI

The United States promised to eradicate racial discrimination against African-Americans in all facets of public life with the passage of the Civil Rights Act of 1964. In particular, the enactment of Title VI was significant because it "mandate[d] the exercise of existing authority to eliminate discrimination by Federal fund recipients and would furnish the procedure to support this purpose."[122] Section 602 of Title VI requires that the United States government, federal and state, prevent institutional racism preventing African-Americans from being admitted to and provided quality care by nursing homes funded by the government. However, through inactivity and intentional actions, the United States has reneged on its promise, violating Title VI and the spirit and language of the CERD, as evidenced by the empirical data of the continuation of racial inequalities and discrimination in nursing homes. By under funding OCR, the division responsible for Title VI enforcement in health care, the government has intentionally failed to address this racial discrimination even though government funded research studies show that there are racial inequalities in the provision of nursing home care.

A 1987 report from the United States House of Representatives Committee on Government Operations showed "that OCR unnecessarily delayed case processing, allowed discrimination to

[121] U.S. Commission on Civil Rights, *supra* note 29, at 220-21.
[122] U.S. Commission on Civil Rights, *supra* note 29, at 24.

continue without federal intervention, routinely conducted superficial and inadequate investigations, failed to advise regional offices on policy and procedure for resolving cases, and abdicated its responsibility to ensure that HHS policies are consistent with civil rights law, among other things."[123] Furthermore, the House Committee on Government Operations "criticized OCR's reluctance to sanction noncompliant recipients and recommended that OCR pursue investigations of complaints as well as compliance reviews in more systematic ways."[124] The failure to resolve cases ensuring that nursing homes do not continue to racially discriminate is in direct contravention of the requirements of section 602, which requires OCR to prohibit racial discrimination.

Since this report and several reports from the U.S. Commission of Civil Rights[125] regarding the problems of OCR, OCR has not made a good faith effort to fulfill its duties. In the 1990s, when OCR received complaints from private parties, it still failed to fulfill its Title VI mandate of combating racial discrimination.[126] OCR has made numerous findings of noncompliance by nursing homes, but every case has been resolved through voluntary commitments to cease and desist their discriminatory practices.[127] In 1993, ten of the twenty-one complaints filed resulted in findings of noncompliance of the requirements of Title VI.[128] Every complaint was resolved through voluntary agreements. No cases were referred to the U.S. Department of Justice nor did HHS initiate any administrative proceedings.[129] Thus, the perpetrators of racial discrimination were given a slap on the hand, while the victims of the discrimination were left with no relief. In addition to handling complaints, OCR's internal policies to fulfill the dictates of Title VI require OCR to collect and review nursing home data such as the number of beds and racial and ethnic data on patient admissions.[130] OCR has not fulfilled this mandate of Title VI.

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[123] Marianne Engelman Lado, *Unfinished Agenda: The Need for Civil Rights Litigation to Address Race Discrimination and Inequalities in Health Care Delivery*, 6 TEX. F. C.L. & C.R. 1, 29 (2001).

[124] *Id.* at 29-30.

[125] *See* U.S. Commission on Civil Rights, *supra* note 29; U.S. Commission on Civil Rights, Funding Federal Civil Rights Enforcement, No. 005-902-0006 1-4 (1995).

[126] Lado, *supra* note 123, at 31-33; *see* U.S. Commission on Civil Rights, *supra* note 29, at 230.

[127] U.S. Commission on Civil Rights, *supra* note 29, at 230.

[128] U.S. Commission on Civil Rights, *supra* note 29, at 230-31.

[129] *Id.*

[130] *Id.* at 227-28.

In 1994, HHS decreed that it would not collect racial and ethnic data from nursing homes receiving federal funding.[131] OCR does not review any racial data of residents from the states[132] or collect any reports on services provided, so there is no opportunity to evaluate whether racial groups are treated disparately.[133] Without the collection of racial and ethnic data there is no means by which OCR can evaluate whether nursing homes are discriminating against African-Americans. Now that nursing homes have implemented "facially neutral" practices that have a disparate impact on African-Americans, it is impossible for OCR to evaluate these discriminatory practices without collection or review of this data. For instance, whether a nursing home decides not to admit a patient because he or she is African-American is difficult to ascertain because the OCR does not collect the data of those who apply for admission. Thus, there are no statistics indicating who is admitted versus who is denied.[134]

The failure of OCR to prevent racial discrimination and segregation in nursing home admissions and provision of care is a violation of Title VI. Section 602 of Title VI requires the federal government to prevent racial discrimination in access to care in government-funded entities.[135] OCR is the federal division responsible for the enforcement of Title VI in health care. OCR has not done its job in enforcing the dictates of Title VI in the long-term care system. It does not collect or review racial data from the States to determine whether nursing homes are discriminating against African-Americans. Moreover, when OCR receives private complaints concerning the racially discriminatory practices of nursing homes, it does little more than accept the offending nursing home's promise that the violations will cease. Private parties have tried to put an end to the discrimination by filing civil cases against nursing home violators, but the courts have barred these suits claiming that the authority to rectify the problems remains with the same government agencies notorious for not enforcing Title VI.

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[131] David Barton Smith, *Addressing Racial Inequities in Health Care: Civil Rights Monitoring and Report Cards,* 23 J. HEALTH POL. POL'Y & L. 75, 92 (1998).
[132] U.S. Commission on Civil Rights, *supra* note 29, at 234.
[133] *Id.*
[134] *Id.*
[135] 42 U.S.C. § 2000d-1 (2004).

## VI. FINDING AN INTERNATIONAL SOLUTION TO ERADICATE RACIAL DISCRIMINATION IN OBTAINING QUALITY NURSING HOME CARE

The United States, a member state, is not complying with the requirements of the CERD because nursing homes receiving federal funding continue to discriminate against African-Americans without any action by the government. The United States promised to eradicate racial discrimination against African-Americans in all facets of public life with the passage of the Civil Rights Act of 1964. The United States' failure to prohibit racial discrimination and segregation under Title VI has abrogated elderly African-Americans access to quality nursing home care. This is a clear violation of the CERD.

Even with two decades of empirical data showing the prevalence of institutional racism and the failure of the government to rectify this racism,[136] the Supreme Court decided that these cases were better resolved by OCR. Saddling OCR, the federal division responsible for Title VI enforcement of health care, with this responsibility is a brazen disregard of the right to equality of treatment of elderly African-Americans. Because there are few domestic means to address the continuation of implicit government sanctioned racial discrimination and segregation in nursing homes, elderly African-Americans should file a complaint with the Committee for the United States' violation of the CERD. However, the only drawback is that the findings of the Committee are not binding, but this is better that the voluntary compliance sought by OCR that never materializes. Furthermore, a biding decision can be obtained by filing a claim with the International Court of Justice, with the consent of the Untied States.

### A. The United States' Violation of Article 2(1)(a) and (b) the CERD: Engaging in Racial Discrimination Through Funding and Inactivity

The CERD specifically forbids member states from sponsoring racial discrimination by organizations.[137] Similar to the dictates of Title VI, to comply with the CERD, the United States must eradicate racial discrimination from institutional racism. To prevent this

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[136] *See* Mor, *supra* note 7, at 228; Grabowski, *supra* note 23, at 456; Fennell, *supra* note 23, at 174; Falcone & Broyles, *supra* note 25, at 591-593; Smith, *supra* note 22, at 857, 862-63; Wallace, *supra* note 11, at 677; Weissert & Cready, *supra* note 11, at 642, 645.

[137] U.N. Resolution, *supra* note 14, at Article 2(1).

discrimination, Article 2(1) of the CERD mandates that the United States condemn racial discrimination and "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms."[138] Furthermore, Article 2(1)(a) and (b) requires the United States to monitor compliance with the CERD and to *ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation ... [and] undertakes not to sponsor, defend or support racial discrimination by any persons or organizations.*"[139]

Hence, under the CERD, the United States is required to put an end to all discrimination committed by public institutions.[140] The broad goals of the CERD are to be implemented to protect the enjoyment of several rights such as equal access to health care.[141] Comparable to the mandates of the CERD, Title VI prohibits racial discrimination by public institutions that are funded and the subject of government regulation.[142] Moreover, Title VI and the CERD both govern an individual's right to enjoy numerous fundamental freedoms on equal footing such as the right to education and health care. The United States has violated Article 2(1)(a) and (b) the CERD by continuing to fund nursing homes that commit institutional racism. This is evidenced by the failure of the federal government to enforce Title VI.

Specifically, section 602 requires OCR to take all necessary measures to ensure that those health care entities receiving federal funding, such as nursing homes, do not discriminate on the basis of "race, color, or national origin." Since the passage of the Civil Rights Act of 1964, critics have noted the failure of HHS to prevent and eradicate racial discrimination in health care as mandated by section 602 Title VI of the Civil Rights Act of 1964. Critics of have noted that HHS "permitted formal assurances of compliance to substitute for verified changes in behavior, failed to collect comprehensive data or

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[138] *Id.*

[139] *Id.* (emphasis added).

[140] In ratifying the CERD, the Untied States Senate noted that "the Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental conduct," but this authority did not reach to private conduct. *See* 140 CONG. REC. S7634-02 (1994). Thus, the United States authority over "public institutions" to prevent discrimination was limited to the regulation "of public conduct that is customarily the subject of government regulation." *Id.*

[141] U.N. Resolution, *supra* note 14, at Article 5.

[142] 42 U.S.C. § 2000d (2004).

conduct affirmative compliance reviews, relied too heavily on complaints by victims of discrimination, inadequately investigated matters brought to the Department, and failed to sanction recipients for demonstrated violations."[143] In fact since the formation, OCR has failed to enforce Title VI.[144]

Decades' worth of research studies show that African-Americans are systematically denied access to quality nursing homes.[145] This evidence has been submitted to OCR in the form research findings[146] and in the form of complaints against the perpetrating nursing homes.[147] Nevertheless, the federal government continues to fund these facilities.[148] The Supreme Court's actions have negated private parties' opportunity to address this issue when the Court decided *Alexander v. Sandoval*, barring the private parties from bring cases to challenge the use of institutional racism to limit racial groups' access to government funded services.[149]

### B. No Meaningful Opportunity to Address Problem the United States' Violation of the CERD

No longer do nursing homes advertise or admit that their facilities are 'white only,' instead a plethora of research studies show that nursing homes simply deny admission and quality care to African-Americans based on race using 'neutral policies' such as payment status.[150] Consequently, private parties now use Title VI to combat these offspring, institutional racism and disparate impact, of the blatant racism and *de jure* segregation perpetrated until the 1960s.[151] The

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[143] Lado, *supra* note 123, at 28.

[144] Randall, *supra* note 3, at 67-74; Smith, *supra* note 131, at 87.

[145] *See* Mor, *supra* note 7, at 228; Grabowski, *supra* note 23, at 456; Fennell, *supra* note 23, at 174; Falcone & Broyles, *supra* note 25, at 591-93; Smith, *supra* note 22, at 857, 862-63; Wallace, *supra* note 11, at 677; Weissert & Cready, *supra* note 11, at 642, 645.

[146] *Id.*

[147] U.S. Commission on Civil Rights, *supra* note 29, at 230-31.

[148] *Id.*

[149] *Sandoval*, 532 U.S. at 292-93.

[150] *See* Mor, *supra* note 7, at 228; Grabowski, *supra* note 23, at 456; Fennell, *supra* note 23, at 174; Falcone & Broyles, *supra* note 25, at 591-93; Smith, *supra* note 22, at 857, 862-63; Wallace, *supra* note 11, at 677; Weissert & Cready, *supra* note 11, at 642, 645.

[151] *See Taylor*, 132 F.R.D. 636 (case filed on behalf of nursing home residents challenging the poor quality of care provided African-Americans in Philadelphia nursing homes); *Linton*, 779 F.Supp. 925 (case challenging racial discrimination

Supreme Court decisively ended private parties' right to challenge these cases when it decided *Alexander v. Sandoval.*[152]

In *Sandoval*, a non-English speaking American, Sandoval, filed a federal case challenging the failure of the Alabama Department of Public Safety ("Department") to provide driver's license exams in languages besides English.[153] Sandoval asserted that the use of English only exams excluded people on the basis of race, color, and national origin from obtaining a drivers license.[154] Section 601 of Title VI prohibits discrimination based on race, color, and national origin that prevent individuals from participating in any program receiving federal funding.[155] Because the Department received federal funding from the U.S. Department of Justice, Sandoval alleged that exclusion of people based on race, color, and national origin was in violation of Title VI.[156] The Department argued that its actions did not violate Title VI because the discrimination was not intentional.[157] The discrimination resulted from a neutral policy that English was the official language of Alabama, and thus, the discrimination was a result of disparate impact of 'neutral policies.'[158] The Supreme Court reviewed the case solely for the purpose of determining whether private parties had a right to sue under Title VI for discrimination as a result of disparate impact.[159]

The Supreme Court ruled that private parties do not have a right to sue for disparate impact discrimination.[160] The Court reasoned that because the language of section 601 of Title VI granting a private right of action prohibited all discrimination it could not pertain to disparate impact.[161] This is because the Court has ruled on several occasions that discrimination based on disparate impact is legal if there is a justifiable reason for the impact.[162] Thus, section 601 of Title VI's language prohibiting discrimination, without qualification, does not protect persons from discrimination perpetrated through 'neutral policies.' The

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committed by the state of Tennessee through its policy of limiting the number of Medicaid beds in nursing homes).

[152] *Sandoval*, 532 U.S. at 293.

[153] *Id.* at 275.

[154] *Id.*

[155] *Id.* at 278.

[156] *Sandoval*, 532 U.S. at 278.

[157] *Id.* at 278-79.

[158] *Id.* at 306-07.

[159] *Id.* at 279.

[160] *Id.* at 293.

[161] *Id.* at 292-93.

[162] *Id.* at 284-85.

Court found that disparate impact cases could only be addressed under section 602 of Title VI.[163] This section states:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.[164]

The Court reasoned that this language and the regulations promulgated under this section addressed 'neutral' policies that prevent the equal access of resources by racial groups.[165] According to the majority, the regulations directing the eradication of these polices not justified by business reasons refer to the measures the government must take to enforce Title VI, not the rights of private parties.[166] The Court made this decision even though when Title VI was passed in 1964 this artificial distinction made in 1971 between good and bad racial discrimination, i.e. disparate impact versus disparate treatment, had not been created by the courts.[167] In addition to this problem, the Court failed to acknowledge that to date most Title VI actions are brought through or as a result of private parties' complaint, especially in terms of health care.[168]

As in the civil rights era, African-Americans have been forced once again to take the matter in their own hands. African-Americans have filed several Title VI lawsuits to rectify these racial disparities in care due to racial discrimination.[169] These cases have languished in

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[163] *Id.* at 292-93.
[164] 42 U.S.C. § 2000d-1 (2004).
[165] *Sandoval*, 532 U.S. at 281-82.
[166] *Id.*
[167] This is one of Justice Stevens's major points in his dissent. *Id.* at 313-17. The distinction was made in a civil rights case involving Title VII and applied to all civil rights litigation. *See* Smith, *supra* note 131, at 90.
[168] U.S. Commission on Civil Rights, *supra* note 29, at 229.
[169] *See Taylor*, 132 F.R.D. 636 (case filed on behalf of nursing home residents challenging the poor quality of care provided African-Americans in Philadelphia nursing homes); *Linton*, 779 F.Supp. 925 (case challenging racial discrimination

federal court for a number of years and before the resolution of many of the cases the Supreme Court banned private Title VI claims based on the theory of disparate impact.[170] Based on archaic statutory construction, the Supreme Court delegated the task combating racism in the long-term care system to the OCR, an ineffectual agency, which the research studies show has done nothing to prevent or eradicate discrimination in health care. Unlike the Congressional 'separate but equal' language of the Hill Burton Act, the Supreme Court's decision does not explicitly mandate the continuation of racial discrimination against African-Americans. Instead, the decision implicitly authorizes federally funded and regulated nursing homes to continue their practices of racial discrimination and segregation that remains unchecked by the agency the Supreme Court directed to stop the problem. By barring African-Americans from obtaining judicial review and negating all agency review through under funding, the United States has left African-Americans without any means to domestically rectify the continuation of federally funded institutional racism in violation of Title VI. Thus, the only relief available to African-Americans seeking redemption of the United States long term care system is to file a claim for the United States violation of the CERD.

Armed with two decades of empirical data showing the prevalence of discrimination as a result of an adverse disparate impact

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committed by the state of Tennessee through its policy of limiting the number of Medicaid beds in nursing homes).

[170] All of the Title VI cases have been brought by those affected, including African-Americans. These cases have varied from challenging the relocation of hospitals from predominately minority areas to the substandard level of care in health care facilities whose patients are predominately minority. *See Taylor*, 132 F.R.D. 636 (case filed on behalf of nursing home residents challenging the poor quality of care provided African-Americans in Philadelphia nursing homes); *Linton*, 779 F.Supp. 925 (case challenging racial discrimination committed by the state of Tennessee through its policy of limiting the number of Medicaid beds in nursing homes); *Mussington*, 824 F. Supp. 427 (Based on procedural deficiencies, the court dismissed the class action lawsuit challenging the relocation of infant health related services out of the Harlem area as proof of racial discrimination through disparate impact.); *NAACP*, 657 F.2d 1322 (The court dismissed a case challenging the relocation of health services from a predominately African-American neighborhood as proof of racial discrimination through disparate impact. Because the Medical Center had a justifiably business reason for the move to a predominately white neighborhood, the court never addressed the disparate impact); *Jackson*, 620 F.2d 680 (Based on procedural deficiencies, the court dismissed class action suit challenging a hospital closure in Missouri as proof of racial discrimination through disparate impact).

and the failure of the government to rectify this discrimination,[171] African-Americans need to file a suit with the Committee for the United States violation of the CERD. Based on the evidence of the United States violation of the CERD, the Committee should make the United States acknowledge the problem of racism by codifying penalties for segregation, citing nursing homes for failing to integrate, and aggressively terminating facilities that fail to integrate.

### C. The Solution: Filing a Complaint

To ensure compliance by member states such as the United States, two mechanisms were put into place: the creation of a Committee to review complaints and procedures to file individual complaints. Article 8 of the CERD established a Committee to enforce the requirements of the CERD.[172] The Committee, consisting of eighteen members, is charged with reviewing complaints of the continuation of racial discrimination due to member state's violation of the CERD.[173] Before the Committee becomes involved, individuals must be able to assert a claim of racial discrimination by a member state in violation of the CERD that cannot be eliminated through domestic means. The procedure for filing a complaint is found in Article 14 of the CERD. It provides that individuals and groups, "claiming to be the victim of racial discrimination to lodge a complaint with the Committee."[174]

Individuals may file a complaint against member states for violation of the CERD by sending in a complaint that contains: identification of the alleged victim(s); identification of the alleged perpetrators of the violation; identification of the person(s) or organization(s) submitting the communication; date and place of incident; information regarding the measures taken by the authorities; and a detailed description of the circumstances of the incident in which the alleged violation occurred. Once the complaint is filed, the Committee will send a report to the member state accused of the

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[171] *See* Mor, *supra* note 7, at 228; Grabowski, *supra* note 23, at 456; Fennell, *supra* note 23, at 174; Falcone & Broyles, *supra* note 25, at 591-93; Smith, *supra* note 22, at 857, 862-63; Wallace, *supra* note 11, at 677; Weissert & Cready, *supra* note 11, at 642, 645.

[172] U.N. Resolution, *supra* note 14, at Article 8.

[173] *Id.* at Article 8-18.

[174] The United Nations High Commission for Human Rights, *Convention on the Elimination of All Forms of Racial Discrimination,* Overview of procedure of Article 14 (1969) *available at,* http://www.ohchr.org/english/bodies/cerd/procedure.htm (July 30, 2005).

violation, while keeping the name of the complainant confidential.[175] The state then has three months in which to provide a response clarifying its actions and including any remedial measures implemented to address the allegations of racial discrimination. The case may be amicably resolved at this point. Should the individual complainant not be satisfied with the result, the individual can refer the matter to the Committee again within six months of receiving the response.

If the matter is referred to the Committee the second time a Conciliation Commission ("Commission") is appointed.[176] This Commission will review the matter and issue a report detailing its findings and recommendations to settle the dispute.[177] If the Commission finds the State is in violation of the CERD, the State has three months to inform the Commission whether it accepts the report's recommendations. In the event of continued failures to comply with the mandates of the Commission and the CERD, the individual complainant can file a claim with the International Court of Justice for a resolution.[178] The remedies available if the case is resolved in favor of the complaining party are a change of the law and reparations for damages suffered.

## VII. CONCLUSION

*"We must learn to live together as brothers or perish together as fools."* Reverend Dr. Martin Luther King, Jr.

African-Americans have been struggling for equality for almost five hundred years. Illustrative of the never-ending struggles of African-Americans to obtain equality is the failure of African-Americans to access quality health care regardless of their gender, education, or income-level. The United States long-term care system has not only been plagued by racial discrimination, but also with significant failures in providing quality care to minority populations. The federal government intervened on behalf of African-Americans to rectify this injustice of inequality by enacting Title VI, but seemingly grew weary and returned to its sponsorship of racial discrimination and segregation. This sponsorship entails funding of nursing homes that discriminate through institutionalized racism, under funding of the agency

[175] U.N. Resolution, *supra* note 14, at Article 11.
[176] *Id.* at Article 12.
[177] *Id.* at Article 13.
[178] U.N. Resolution, *supra* note 14, at Article 22.

responsible for combating discrimination in nursing homes, and barring private parties from suing to prevent the discrimination allowed by the government.

Institutional racism is so entrenched in the long-term care system that two decades of empirical studies show that intuitional racism is the norm in nursing home admissions and provision of quality care. The failure of OCR, charged with enforcing Title VI, to prevent racial discrimination and segregation, has caused elderly African-Americans to be relegated to substandard nursing homes, which are under funded and ineffectual. The failure of OCR to enforce Title VI is in direct violation of the CERD that requires the United States to prevent racial discrimination by government-funded entities. Even when brought to the attention of nursing home administrators, state regulators, and federal regulators, there has been no change.[179]

Though losing the battle domestically to prevent racial discrimination and segregation, African-Americans cannot give up the fight. To solve this problem, African-Americans need to take the fight to the international community by filing a claim with the Committee on the Elimination of Racial Discrimination for the United States violation of the CERD. By filing a claim, African-Americans can force the federal government to fulfill the requirements of Title VI and the CERD. Hence, it is time to turn to the international community for support to induce the United States to comply with its own laws to provide elderly African-Americans with equal access to quality health care.

[179] Falcone & Broyles, *supra* note 25, at 592.