The Sanford Journal of Public Policy was created in 2009 as a forum for public policy students and professionals to contribute to the current policy discourse through insightful analysis and innovative solutions.

The Sanford Journal is run by the graduate students of the Sanford School of Public Policy at Duke University and is published online and in print twice annually. The Journal solicits articles across the spectrum of public policy in a variety of formats, including policy research and position papers, issue briefs, opinion pieces, reviews of recently published books, and interviews with policy professionals.

In addition to the Journal itself, the SJPP administers a blog that serves as a place where public policy students, academics, and practitioners can stay connected to current policy discussions and express their own views on today’s policy challenges.
Acknowledgments

We are excited to present this spring edition of the Sanford Journal of Public Policy.

This has been a great year for the Sanford Journal of Public Policy. For the first time in our five-year run, we have published two editions of the Journal. Our leadership team and staff editors handled the double workload admirably. Our blog writers continue to impress.

The success of the Journal would not be possible without support from faculty, administrators, and students of the Sanford School of Public Policy.

Our process relies on the expertise of faculty reviewers. We are grateful for the support of Professor Sandy Darity, Professor Anna Gassman-Pines, Professor Alex Pfaff, Professor John Ahearne, and Professor Lori Bennear for their support in this regard, in addition to all faculty members who expressed a willingness to help. We would like to extend a special thanks to Professor Robert Conrad, a frequent faculty reader.

The support of faculty advisor and Assistant Dean Michael Case was invaluable throughout the year. Helene McAdams, director of student services, provided advice and assistance that helped our cause immensely.

Publication would not have been possible without financial support from the Sanford Student Council. We are also grateful to Donna Dyer, director of career services, for providing essential financial support that allowed us to send four staff members to the National Journal Conference, an experience that greatly helped our efforts to develop the Journal.

We would like to extend our gratitude to all authors who submitted their pieces for consideration.

The most important part of the Journal is our all-volunteer staff of doctoral and master’s students at the Sanford School of Public Policy. We thank this year’s team for their amazing work producing this volume.

Finally, on behalf of the entire staff of the Sanford Journal, we would like to thank our readers for their continued support.
Contents

Why America Needs a Counterstory to “Choice as the Last Civil Right” 1

*Shelby Eden Dawkins-Law*

Risk Tradeoff Analysis, Public Opinion and Nuclear Safety: A Spanish Case Study 21

*Xiao Recio-Blanco*

Toward a Redefinition of the U.S. Sweatshop 39

*Jacqueline Hayes*
Why America Needs a Counterstory to “Choice as the Last Civil Right”

Shelby Eden Dawkins-Law

This paper uses critical race methodology to call into question researchers’ propensity to antagonize the “choice as a civil right” movement. By reconceptualizing black education from the common school movement through the modern era, this paper offers an alternative explanation for the increased numbers of black students enrolled in schools of choice. It questions whether all-black schools can have a positive influence on black education in an era in which segregation has become the norm. The researcher references the loss of thousands of black teachers and principals in the desegregation era as evidence for why all-black schools are not necessarily a surrender of principle. Using the specific example of initiatives led by the Black Alliance for Educational Options, this paper will argue that separate schools in which black children are instilled with self-worth by teachers who share their racial background could be the stop-gap necessary to provide them with a meaningful education.

“The Negro needs neither segregated nor mixed schools. What he needs is an Education”
William Edward Burghardt Du Bois, 1935

Today, many Americans have embraced school choice. According to the most recent iteration of Trends in the Use of School Choice (2010) published by the National Center for Education Statistics, the percentage of

Shelby Eden Dawkins-Law is a first year doctoral student in the Policy, Leadership and School Improvement program in the School of Education at the University of North Carolina at Chapel Hill. She earned her Bachelor of Arts in Psychology in 2011 and Master of Arts in Education, Culture, Curriculum and Change program in 2013 also at Carolina. Her research interests focus on school choice and resegregation with a specific emphasis on the evolving purpose of “public” education in contemporary society. In addition to her studies, Shelby was recently elected as the Graduate and Professional Student Federation President at UNC. In the fall she will be the inaugural Education Policy Fellow at the University of North Carolina General Administration.
students attending their assigned traditional public school decreased from 80 percent to 73 percent between 1993 and 2007 (Grady & Bielick, 2010). This trend emerged even before No Child Left Behind granted parents a federal right to choose a non-failing school for their children (NCLB, 2001) (Tice, 2006). Over the 14 years studied, researchers observed decreases in attendance to one’s school of assignment by white students; nonpoor students; students who live in two-parent households; students whose parents’ highest level of education was some college or graduate or professional education, students from all regions (East, West, Midwest, South) of the country; and black students (Grady & Bielick, 2010).

Scholarly critiques of school choice often lambast the rhetorical characterization of choice as a civil right because of its historical use to maintain segregation (Scott, 2011). The research situates black children as innocent victims of self-interested policymakers who make choices that govern their access to equitable educational options. Economists often explain these political decisions with public choice theory. Public choice theory equates the political man with the economic man, arguing that policymakers create laws as if they were competitors in an open market, choosing options that preserve their status over those which generate the most public good (Kelman, 1987). Kelman (1987) critiques this assumption, arguing that this is a “terrible caricature of reality” that leaves little room to believe that “public spirit”—political behavior that prioritizes public good—is a possibility. His argument however neglects to acknowledge the history of this theory, when and why it was developed, what it was used for and to what ends.

This paper will employ a critical race policy analysis (CRPA) framework to push current critical analyses of school choice beyond their antagonism of the movement’s segregated outcomes. It will argue for a re-contextualization of the debate with historical accounts of how school choice operated in K–12 black education since the advent of the common school. Largely based on Derrick Bell’s (1980) conceptualization of racial realism, the theorist of CRPA Kristen Buras (2013) calls for racial realism in this form of analysis, stating that

... understanding of policy formation and implementation does not account for dynamics of unequal power or the ways in which relations of supremacy and subordination influence education reform. Politics cannot be separated from policy—education policy
is the product of disparate and competing interests between differently and often unequally situated groups. It is a site of struggle generating intended as well as unintended consequences and contradictions. Race and racial power are part and parcel of the policymaking process. (p. 218)

This realist critical race policy analysis is employed by many critical race theorists, Gloria Ladson-Billings, David Stovall, and William Tate to name a few, but not by many of the scholars who have quantitatively demonstrated the prevalence of resegregation and the resultant inequality caused by school choice, particularly in North Carolina which serves as the exemplar for this paper (Bifulco & Ladd, 2007; Bifulco, Ladd, & Ross, 2009; Clotfelter, Ladd, & Vigdor, 2002, 2005, 2011).

The first tenet of Buras’ (2013) paradigm is history, distinct from the second tenet of legal mapping employed by CRPA’s predecessor, critical legal studies (CLS). Critical race theorists place racism at the center of their work in the same endemic fashion as racism is to the institutions they critique. This paper will follow Buras’ guide to use history and legal mapping to contextualize the “choice as a civil right” phenomenon. Following it will use the third and fourth tenets: critical race constructs (whiteness as property) and methodology (counterstorytelling) to articulate an argument for a specific form of critical race praxis that Buras calls for: a “dialectical relationship between theory and practice or the commitment not only to analyze racial dynamics but to challenge inequities by acting in alliance with racially oppressed groups.” The paper will culminate with a critique of scholars’ appraisal of the organizing done by one national black educational reform organization, the Black Alliance for Educational Options (BAEO). It will not argue that one can “dismantle the master’s house with the master’s tools” (Lorde, 1984). Instead it will offer that a subsistent economy built on schools founded for and by a community that is independent of dominant racist institutions can be the exact sort of critical race praxis Buras advocates in her groundbreaking theorization.

The Origins of School Choice
Modern school choice grew from segregationists’ explicit efforts to justify their desire for separate schools and discriminate against black schools by funding them unequally. Southern policymakers turned states’ burden to
desegregate schools into an individual burden that black and white parents would have to proactively implement. Though the courts held these tactics to be an insufficient means to desegregate unconstitutionally separate and unequal schools, litigation over the last forty years allowed the policies to remain legal, despite their socially stratifying effect (Alexander v. Holmes County Board of Education, 1969; Bowman v. County School Board of Charles City County, Va., 1967; Board of Education of Oklahoma City Public Schools v. Dowell, 1991; Eisenberg v. Montgomery County Public Schools, 1999; Freeman v. Pitts, 1992; Milliken v. Bradley, 1974; Missouri v. Jenkins, 1995; Parents Involved in Community Schools v. Seattle School District No. 1, 2007; Tuttle v. Arlington County School Board, 1999; Green v. County School Board of New Kent County, Va., 1968).

Given this history, how can black American parents possibly endorse these tactics? How can they ignore the legal history and pick up the “master’s tools?” How can they work to “increase access to high quality education options for black children by actively supporting transformational education reform initiatives and parental choice policies” that in practice actually severely segregate their students (Black Alliance for Educational Options, 2013)? This section answers these questions by digging deep into the history of black education in the United States. By tracing black education from the common school movement through our modern era of resegregation using the specific examples from North Carolina, this paper will present a historical rationale for why black American parents adopt a view of “education as a means of providing the economic expertise and technological skills for shaping a new industrial policy by investing in human capital,” or what John Martin Rich called black neoliberalism (Rich, 1986). This paper will argue that this interest convergence between white policymakers and black parents transcends time, allowing apparently contradictory motivations to conflate into a common goal that promotes the school choice as “the last civil right” rhetoric to which many black Americans implicitly or explicitly subscribe.

Black Education During in the Pre-Brown Era

Founding the “separate but equal” doctrine

Contrary to popular belief, the “separate but equal” doctrine was not introduced by the seminal Plessy v. Ferguson (1896) case. Ironically the language was first used in a school choice case almost fifty years earlier. Argued by
famed abolitionist Charles Sumner, *Roberts v. Boston* (1849) pled the case of Sarah Roberts, a five-year old free black student in Boston City Public Schools. Sarah's father attempted to enroll her in his *school of choice*, a white school near his home, to avoid the arduous walk to the inadequate education offered by the underfunded black school across town. Though Massachusetts would become the first state to ban segregated schools a year later, the Court ruled against Sarah, coining the separate but equal doctrine *Brown v. Board of Education* (1954) would eventually overturn.

The common school movement

Albeit segregated and underfunded, Sarah had a right that her enslaved contemporaries did not: the right to learn. Though the common school movement would began only 2 years later when Horace Mann became the first Secretary of the Massachusetts State Board of Education in 1937, by 1835 most confederate states would have already passed laws forbidding anyone from teaching slaves to read or write (Anderson, 1988). Although many states would establish free systems of public schooling and compulsory attendances laws, it was not until post-Civil War Reconstruction that most blacks would gain entry to any form of universal public education.

The politics of Reconstruction

After a lengthy battle between Republicans bent on punishing the South and a more lenient executive branch interested in preserving the Union, the legislature passed the Freedman's Bureau Act in 1866. Reconstruction legislation was hotly contested in the years following emancipation. Led by Senator Charles Sumner of the *Roberts v. Boston* case, the “Radical Republicans” continuously pushed for strong laws to punish the South and enfranchise the freedmen. During the war union troops considered freedmen contraband that could serve as a military resource. At that time the Freedmen's Bureau existed unofficially as a semi-coordinated effort by the American Missionary Association, Union military operations and the Department of the Treasury. Together they provided aid, confiscated land and offered employment to refugees spilling into military camps across the South and Border States (Du Bois, 1996).

The overwhelming needs of the hordes of freedmen fleeing the South demanded intervention by the Union government. Iterations of a bill to establish a Freedmen’s Bureau crossed over the legislative houses in the
1860s with the majority of the debate focusing on whether the Bureau would be under the Departments of Treasury or War, or exist as a separate entity entirely. Eventually passed after the impeachment of President Johnson for his efforts to circumvent the Bureau, the act placed the former confederacy under military rule and began a lengthy process of incorporating freedmen into American society. By giving the freedmen political power, the Bureau facilitated radical educational reform at the state level. New voters elected black representatives to office in historic numbers who quickly added the right to free public education to state constitutions across the South (Anderson, 1988). Having never had the right to an education, free blacks, young and old, clamored into schoolhouses for a chance to read and write. By the time of the Bureau’s demise in 1877, 571,506 black children had enrolled in schools across the country (Du Bois, 1910).

Reconstruction and black education in North Carolina

This surge in black political power and support of public education was no truer than in North Carolina. During the Freedmen’s Convention held in Raleigh, North Carolina in October of 1866, delegates from 86 counties established the Freedmen’s Educational Association of North Carolina. Its mission was “to aid in the establishment of schools, from which none shall be excluded on account of color or poverty and to encourage unsectarian education in this State especially among the freedmen” (“Minutes of the Freedmen’s Convention of 1866, Raleigh, NC,”). After coming under federal control in 1867, a 120-member delegation, fifteen of which were black, drafted the North Carolina Constitution of 1868 in order to be readmitted to the Union. After the 1868 election, Republicans gained a super-majority across all three branches of government, allowing them to easily ratify the new constitution (North Carolina’s Civil War Story: War’s End and Reconstruction). This unprecedented level of Republican control over all three branches of government would not repeat until the 2012 election in which Republicans gained control of the governorship when Governor Pat McCrory was elected.

The newly elected officials rewrote Article I, Section 2 of the North Carolina Constitution to grant the right to “free public schools” as opposed to the “low cost” schools afforded the 1776 iteration (McColl,
While many blacks’ rights would be rolled back after 1877, North Carolina progressively established free, though segregated, schools in an amendment to the constitution in 1875

...taxation and otherwise for a general and uniform system of Public Schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination made in favor of, or to the prejudice of, either race (McColl, 2010).

During the Reconstruction Era, 431 black schools were founded in North Carolina. Among them were six Historically Black Colleges and Universities (HBCUs) including Livingstone College, Bennett College for Women, Shaw University and Johnson C. Smith University, all still open today. However the primary and secondary schools did not endure in the same manner. Largely underfunded after President Grant withdrew troops as part of the Freedman’s Bureau Compromise of 1877, and the retreat forced schools to close. Black children in North Carolina did not receive the nondiscriminatory education the state constitution assured them (North Carolina’s Civil War Story: War’s End and Reconstruction). This precedent of federal encroachment on states’ rights in the name of equitable education (or lack thereof) would continue to attenuate blacks’ access to free public education in North Carolina and across the United States for the next 150 years.

Brown, Massive Resistance, and the Emergence of “Freedom of Choice”

The *Brown v. Board of Education* (1954; 1955) decisions involved five cases from Kansas, South Carolina, Virginia, Delaware, and the District of Columbia. Together they illustrated inconsistent implementation of the “separate but equal” doctrine and offered a compelling argument for how these inconsistencies gave rise to a need for integrated public schools. In the first case the Supreme Court found it “doubtful that any child may reasonably be expected to succeed in life if he is denied an opportunity for an education. ... [It] must be made available to all on equal terms” (*Brown v.
Board of Education, 1954). Following, Brown II held that the desegregation process must occur “with all deliberate speed” (Brown v. Board of Education, 1955). Though active in the decision to desegregate schools, the Supreme Court deferred to lower courts to maintain jurisdiction during the Brown implementation process in this historically brief four-page opinion. This hands-off approach would foreshadow the Supreme Court’s quiet retreat from desegregation beginning in the 1970s, as it would refine definitions of segregation, unitary status, and the standards for measuring each.

Though many regard Brown as a triumph in civil rights for the black community, an enduring literature highlights the value of segregated black schools before desegregation. “The all-Black school was the institution that reinforced community values and served as the community’s ultimate cultural symbol” (Tillman, 2004a). Black communities valued their schools and their leadership because it was one of the only professions available to them, and thus highly regarded (Siddle Walker, 2000). Some blacks endorsed segregation and local options to preserve these schools after Brown. In her review of literature on highly regarded black schools Vanessa Siddle Walker (2000) states

In their world, there was a clear ‘enemy’—racism. As such, the schools operated with a well-defined purpose for African American uplift that was shared by teachers, principal, and community members. . . . All the training and modeling by teachers and principal were aimed at helping themselves and their students overcome that enemy. In this world, all worked together to achieve the common goal of educating students to function and achieve in a world where the odds were stacked against them. (p. 276)

Separate schools were unequal, but the wealth of a community with highly respected school leaders, parents who invested deeply in their schools with money, time and care, and students who were instilled with high self esteem and courage in the face of adversity is unmatched. With the desegregation of public schools came the loss of thousands of black teachers and principals who had inculcated not only traditional knowledge, but also self worth in their communities (Tate, Ladson-Billings, & Grant, 1993; Tillman, 2004a, 2004b). Desegregation was implemented to the detriment of those who held the black community together and
encouraged resilience to withstand gross inequalities both in schools and outside of them: black teachers and principals.

The massive resistance strategy

Indifference and willful disobedience plagued the decades following Brown. Virginia school districts led the charge on the massive resistance strategy with Prince Edward County, one of the districts involved in the original Brown cases, by closing all public schools and giving vouchers to white parents for their children to attend segregated private schools (Griffin v. County School Board of Prince Edward County, 1968). Senator Harry Byrd of Virginia coined the term “Massive Resistance” when the Virginia state legislature adopted his campaign against desegregation, saying “If we can organize the Southern states for massive resistance to this order [of the Supreme Court], I think that in time the rest of the country will realize that racial integration is not going to be accepted in the South” (Lechner, 1998). Massive Resistance did not tolerate local options to attend desegregated schools and even punished Arlington County Schools when their superintendents attempted to phase in desegregation. Arlington’s high school would not integrate until 1971.

When policymakers in states like Virginia began to realize that their Massive Resistance strategy would be deemed unconstitutional, some braced themselves for the aftermath. Governor Lindsay Almond oversaw the most tumultuous time of school desegregation in Virginia. With the end in sight, Governor Almond staunchly supported the cause, repeating “seg’em” in several speeches and meetings with increasingly concerned politicians and businessmen (Lechner, 1998). Early on in the Resistance’s downfall Governor Almond admitted his strategy in a rare encounter saying he would “keep shoving segregation down their throats until the good people rise up and make [him] do the right thing” (Lechner, 1998). He followed through on his moment of candor when confronted by businessmen’s growing concern over a growing trend of national corporations passing over Virginia to invest their dollars in their progressive neighbor to the South, North Carolina, in order to avoid anti-education, pro-confrontation states (Lechner, 1998).

At the same time a new argument arose from scholars at the Virginia School of Economics and their contemporaries. Most infamous among
them was Leon Dure, a journalist and staunch opponent to integration. Dure argued in a manifesto for a constitutional basis for self-segregation. Basing his ideas on the first amendment right to freely assemble, Dure equated assembly to association, claiming that the South was ready to give up on its resistance to segregation by law but not willing to enforce integration by law; they would choose freedom (Dure, 1962). His analogy explaining the right to associate one’s children in a segregated school was “If it be legal and ‘moral’ for a man to choose one certain woman for wife, thus forsaking and discriminating against all other women, . . . how then can it be illegal and ‘immoral’ for him to prefer the company, as the normal thing, of his own cousins?” (p. 406-407). This freedom of association would evolve into a freedom of choice, which would then be expounded up on by the Virginia economists who founded public choice theory.

When put into action however the argument did not pass constitutional muster. In Griffin v. County School Board of Prince Edward County Virginia (1964) Justice Black wrote that shutting down all of the public schools in the district and providing vouchers for white students to attend racially discriminatory private schools violated black children’s equal protection under the law (Griffin v. County School Board of Prince Edward County Virginia, 1964). Three years later a Virginia school district’s policy was overturned again when Justice Brennan Supreme characterized Charles City County’s “freedom of choice” policy as one of many “ingenious and ingenuous schemes of southern states” to maintain segregated school systems (Bowman v. Charles City County School Board, 1967). Justice Brennan quoted himself the following year when the Court ruled for a second time that freedom of choice plans in Virginia were insufficient in the seminal Green v. Green vs. County School Board of New Kent County (1968) case:

“Freedom of choice” is . . . only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a “unitary, nonracial system. (Bowman v. Charles City City Sch. Board, 1967)
Though the case coined the *Green Factors*, six indicators that the courts should evaluate to determine if a district was unitary, it was not until 1969 that the Supreme Court would take an explicit stance against this resistant behavior ordering “districts operating dual school systems based on race or color [to desegregate] immediately” (*Alexander v. Holmes County School Board*, 1969).

**Massive resistance and choice in North Carolina**

When *Brown* outlawed legally imposed segregation, Governor Umstead commissioned the Special Advisory Committee on Education. Comprised of both black and white leaders, the committee recommended delaying desegregation because in their opinion full integration was neither possible or worth attempting. The committee recommended giving local governments control to assign students as they pleased, thus districts had the authority “to suspend or to authorize the suspension of the operation of one or more or all of the public schools in that unit” (“Pupil Assignment Act,” 1955)

The following year a new all-White committee commissioned by Governor Luther Hodges recommended another amendment to the state constitution in direct opposition to integration. Passed by voter referendum, the amendment provided “funds for the private education of any child . . . who is assigned against the wishes of his parents . . . to a public school attended by a child of another race” (Pearsall, 1956). Though much more tempered language appears in the new North Carolina voucher law, the effect in 2014 may be the same as the Pearsall Plan’s intent.

**North Carolina becomes the model for desegregation**

After the Supreme Court thwarted Massive Resistance in the late 1960s, districts scrambled to design effective plans to desegregate legally. North Carolina proved to be the exemplar of these efforts when *Swann v. Charlotte Mecklenburg County Schools* (1971) set a precedent for race-conscious student assignment policies for segregated school systems. This case considered four elements of Charlotte’s Finger Plan, among them the use of quotas to guide enrolment and transportation as a permissible tool to desegregate. These each would have a profound impact on crafting student assignment policies across the country, but especially in North Carolina. It
called for districts to take affirmative action to erase the vestiges of de jure segregation despite “administratively awkward, inconvenient, and even bizarre” circumstances (Swann v. Charlotte, 1971). The most important piece of this ruling deemed transportation of students (e.g.: busing) as a constitutionally valid solution. The Court determined that desegregation could not be limited to walk in neighborhood schools, although these schools were not necessarily illegal. Once Charlotte-Mecklenburg County implemented its new plan, the district became the model for desegregation for the nation. By 1980, North Carolina had become home to the most desegregated school system in the South (Orfield, 2012; Orfield & Frankenberg, 2013).

How Choice Became the Last Civil Right
Another Federal Retreat: How De Jure Became De Facto

Similar to the retreat of federal troops after the Freedman’s Bureau Compromise of 1877, the federal courts rolled back their robust interpretation of Brown only three years after Swann. Though Charlotte Mecklenburg Schools provided a robust model for race conscious student assignment, subsequent cases gave way to the swift unraveling of the interwoven fabric of law spun by Green (1968) and Swann (1971). The most significant case in this downward spiral was Milliken v. Bradley (1974), which ruled existing segregation not created by an explicit school district policy legal because it was segregation by fact, not imposed by law. This distinction between de facto and de jure segregation allowed the courts to loosen districts’ requirements for unitary status and districts to incrementally regain control in the 1990s.

Oklahoma City Public Schools v. Dowell (1991) coined the “good faith” doctrine, dictating that administrators who made an earnest effort to desegregate schools to “the greatest extent practicable” could incrementally regain control of their districts by earning “unitary status” rather than being ruled unitary as was required by the original green factors (Oklahoma City Public Schools v. Dowell, 1991). It held that desegregation orders were not intended to live on in perpetuity and that a district did not need to show it had committed a “greivous wrong” in the event of unforeseen circumstances. A year later, Freeman v. Pitts (1992) added a seventh green factor to the list, quality of education, and established that a district need
not have met all six green factors to be released from its order and could gain back control incrementally. Laslty, *Missouri v. Jenkins* (1995) found that a district acting in accord with the Constitution could regain its control because there was a level of intervention that could be “beyond the remedial scope of authority” for a district to take (*Missouri v. Jenkins*, 1995).

Once segregation and “unitary status” were redefined, *Eisenberg v. Montgomery County Public Schools* (1999) and *Tuttle v. Arlington County School Board* (1999) provided the precedent for *Capachionne v. Charlotte Mecklenburg County Schools* (2000) and *Belk v. Charlotte Mecklenburg County Schools* (2000), the state and Supreme Court cases that overturned Swann. Though *Eisenberg* and *Tuttle* were not North Carolina cases, Charlotte was bound by their findings because they originated in the Fourth Circuit Court of Appeals. They each involved white plaintiffs claiming race conscious student assignment policies violated their 14th Amendment right to equal protection under the law. The Court agreed that the policies were discriminatory and ruled that using race in student assignment was unconstitutional. Plaintiffs in *Capachionne* (2000) and *Belk* (2000) used the same tactic to reopen Swann, overturning Charlotte’s desegregation order when the court found Charlotte’s magnet program to be sufficient and that denying a child’s request to attend their school of choice simply because of their race violated the Equal Protection Clause (*Capachionne v. Charlotte Mecklenburg County Schools*, 2000; *Belk v. Charlotte Mecklenburg County Schools*, 2000). Charlotte’s famed busing plan ended in 2002.

**Black Parents’ Choices: The Black Alliance for Educational Options**

Often considered to be on the liberal end of the political spectrum, black parents’ participation in school choice has not been at the center of scholars’ critiques. While scholars often point to white flight to the suburbs when discussing resegregation, research shows that black parents also retreat from their children’s schools of assignment (Grady & Bielick, 2010; Orfield, 2012; *The resegregation of suburban schools: a hidden crisis in American education*, 2012; Siegel-Hawley, 2013; Tice, 2006). Today black enrollment in schools of choice, public and private, has grown. In some cases it has doubled. The percentage of black students attending their assigned school dropped from 77 percent to 69 percent. The amount of
black students attending a public chosen school grew by 5 percentage points to 24 percent. Though black students are 15 percent of the school attending population, and 14 percent of the public assigned population, they are 22 percent of the public chosen population. Three percent of black students attend charter schools compared to 1 percent of whites. Black enrollment in both sectarian and nonsectarian private schools has doubled, while white enrollment in each has held relatively constant (Grady & Bielick, 2010; Tice, 2006).

The data points from the Trends in the Use of School Choice series coincide with pivotal moments in the legal history of school choice: 1993, 1999, 2003, and 2007. The Dowell and Pitts decisions occurred just before 1993. They established that districts could incrementally regain control of their schools as they worked towards unitary status; 1999 coincides with the hearing of the Capachionne and Belk cases; 2003 is immediately after Tuttle and Eisenberg; and 2007 coincides with the Parents Involved decision.

Apple and Pedroni (2005) outline the growth of seemingly conservative opinions within minority communities, the most prominent example of which is the Black Alliance for Educational Options (BAEO). These sorts of organizations offer one solution to the problem of access by promoting the most “free” of the market reforms so that working class parents of color can have access to them (Apple & Pedroni, 2005). Apple and Pedroni (2005) call this phenomenon of historically oppressed minorities’ embrace of formerly oppressive policies as conservative modernization. A caveat to this approach is that it assumes poor working class black students will take advantage of charter and voucher options once implemented. Mead and Green’s (2012) policy brief offers their recommendation for how competing ideas of access and choice could be synthesized. Helping working class minority parents navigate policies that include specific requirements for diversity, transportation, lunch, exceptional children’s and language learning instruction, along with instruments by which to measure effectiveness of said programs, could allow formerly inert consumers to take advantage of the laws rather than being functionally excluded (Mead & Green, 2012).

The Black Alliance for Educational Options is a corporate funded advocacy coalition that works to expand choice options in states across
the country. BAEO works primarily in the southern and border states. It is also highly involved in Milwaukee, Wisconsin, as its founder, Howard Fuller, was the Superintendent of Milwaukee Public Schools. He was instrumental in the push to create the first voucher program in the United States for his district. While heavily critiqued for his organization’s neo-liberal orientation, Fuller has a long history as a radical civil rights activist. He has strong connections to the civil rights movement in Durham, North Carolina and is recognized as a key player in calming racial tensions in the city after the assassination of Martin Luther King, Jr. He is also the founder of the Malcolm X Liberation University, which provided and Afro-centric postsecondary education to black, working class youth. Fuller’s work represents the contradictions of the “choice as a civil right” movement.

BAEO does not operate in North Carolina, but conservative alliance building has occurred. This happened in 1997 when Democratic Senator Wib Gully and Republican Senator Steve Wood cosponsored the original charter school bill (McNiff & Hassel, 2002). It happened again in April 2014 when four freshmen representatives, two black Democrats and two White Republicans, introduced the American Legislative Exchange Council’s model “Opportunity Scholarship” school voucher bill in the house. Democratic Representative Ed Hanes of Forsyth County and Marcus Brandon of Guilford County endorsed the bill for its intent to target impoverished black children trapped in failing public schools in their districts (Huntsberry, 2013). Representative Brandon in particular represents the conservative modernization. The Black Alliance for Educational Options honored him as a champion of poor and working class black children at their annual symposium in 2013.

Why Do Scholars Think Choice as “the Last Civil Right” is a Problem?
Janelle Scott’s research points to members of the Black Alliance for Educational Options as some of the conservative political activists who “claim that justice and even morality are on their side . . . embrace linguistic signifiers of the civil rights movement, such as school choice’s role in enduring democracy, full citizenship, and equal educational opportunity” (Scott, 2011). This paper contends that Buras’ (2013) call for racial realism
dictates analysts to recognize that the education reform movement is not changing direction any time in the near future and critical race praxis requires “acting in alliance with communities affected by racially destructive policies” now (Buras, 2013; Scott, 2011). In North Carolina, a super majority ensures the movement’s persistence at least for a few election cycles. BAEO is continuing the history of white venture philanthropy in black education that has limited the scope of what, how, and to what extent students are taught. However the underlying argument for black-led education for black students is not only valid, but was first articulated by W.E.B. Du Bois, who many credit as the first critical race theorist, and again in 1980 by Derrick Bell in his seminal article “Brown v. Board and the Interest Convergence Dilemma” (Bell, 1980; Du Bois, 1935). In fact, that core value of for us by us education is supported by decades of work on the analyzing the manner by which the Brown v. Board of Education promise was not fulfilled (Ladson-Billings, 2009; Tillman, 2004a, 2004b; Rabaka, 2013).

The process of conservative modernization that Apple and Pedroni theorized is much more complicated than opportunity hoarding, simple abandonment of public schools out of self-interest (Rury & Saatcioglu, 2011). Desegregation destroyed the center of black communities in the pre-Brown era: schools. After the loss of teachers, principals, and schools, choice may be the key to rebuilding the communities. Though these schools resegregate students, the question to be asked is: to what degree are the schools that are segregated adopting the culturally relevant pedagogy and leadership to which Siddle Walker (2000) and Tillman (2004a; 2004b) referred? Du Bois gave two reasons for the black middle class’ low regard for all black schools: the fear that implying any endorsement of segregation is a “fatal surrender of principle” and “the utter lack of faith” by blacks that “their race can do anything well” (p. 330, Du Bois, 1935). Du Bois argues that segregation could be a “passing incident not a permanent evil” but without faith in the race’s capability, there is no faith in their institutions (p. 330).

There is truth embedded in the messages that the Black Alliance for Educational Options puts forth, no matter how much they come under fire for their tactics. Something must be done for the children of today. Endorsing choice and endorsing segregation can be mutually exclusive.
In either situation, the idea is not new. In his article Du Bois questions the merits of integration that the NAACP was fighting for in the courts. He interjected that if the public schools desegregated, “the education that colored children would get in them would be worse than pitiable. It would not be education” (p. 329). He critiqued parents who sought integrated schools for their children “where the white children, white teachers, and white parents despised and resented the dark child, made mock of it, neglected or bullied it, and literally made its life a living hell” (p. 330). He questioned the cost of these conditions saying the result may be “a complete ruin of character, gift, and ability and ingrained hatred of schools” (p. 331). Though choice schools did not exist in the same manner as today at that time, his essay’s argument was well before its time.

Though highly critiqued, BAEO’s mission “to increase access to high quality education options for Black children by actively supporting transformational education reform initiatives and parental choice policies that empower low-income and working-class Black families” is compatible with Du Bois’ thoughts (BAEO, 2013). Their call for black-led charter schools echoes his sentiment

...that a separate Negro school, where children are treated like human beings, trained by teachers of their own race, who know what it means to be black ... is infinitely better than making our boys and girls doormats to be spit and trampled upon and lied to by ignorant social climbers, whose sole claim to superiority is the ability to kick ‘n-ggers’ when they are down (p. 143).

Critical race policy analysis scholars must consider the history of the all black school in the arguments over school choice, its rhetoric, and the people who endorse it.

References


Board of Ed. of Oklahoma City Public Schools v. Dowell, 498 US 237, 111 S. Ct. 630, 112 L. Ed. 2d 715 (Supreme Court, 1991)

Bowman v. County Sch. Bd. of Charles City County, Va., 382 F.2d 326, 329 (4th Cir. 1967).


Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (Supreme Court, 1964).
Miliken v. Bradley, 418 U.S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (Supreme Court, 1974).
Missouri v. Jenkins, 515 U.S. 70, 115 S. Ct. 2038, 132 L. Ed. 2d 63 (Supreme Court, 1995).


Risk Tradeoff Analysis, Public Opinion and Nuclear Safety: A Spanish Case Study

Xiao Recio-Blanco

The 2011 nuclear accident at Fukushima-Daiichi nuclear power plant opened a heated worldwide debate over nuclear energy. Unfortunately, neither the previous nor current Spanish governments have publicized the evidence used to evaluate the merits of extending the lifespan of Spain’s own Garoña plant. This article uses the Garoña case for a twofold purpose. First, the article analyzes the accountability of Spain’s executive power decisions on potentially catastrophic industrial activities. The paper finds that the lack of appropriate information disclosure duties in Spain may allow the government to abuse its discretion on actions potentially damaging to human health and the environment. In addition, the paper uses risk tradeoff analysis to theorize how the Spanish government made its regulatory decision on Garoña. The analysis suggests that decisions made about Garoña involve a broad array of issues and interests that require a comprehensive, careful balancing of risks. The paper concludes that Spain needs urgent regulatory reform regarding transparency and access to information as well as the adoption of updated risk management theory for its regulation of technology.

Introduction: Fukushima and its Worldwide Reaction

Nuclear energy is generally considered a reliable and safe source of energy (OECD 2010:41). Nuclear power plants have been in operation for many years, and accidents are rare. However, a few catastrophic events in the last
fifty years have made governments and the world populace aware of the potentially devastating nature of nuclear technology. In each case, human knowledge about nuclear energy was challenged by unexpected events. The 1979 Three Mile Island accident revealed unnoticed operational challenges, the 1986 Chernobyl accident human error in the testing of safety mechanisms, and the 2011 Fukushima incident vulnerabilities to natural disasters.

The nuclear accident at Fukushima-Daiichi nuclear power plant opened a heated debate about nuclear energy. The earthquake and tsunami that hit much of the eastern Japanese coast on March 11, 2011 disabled the plant’s reactor cooling system, which triggered leaks of nuclear radiation (World Nuclear Association 2012). The population thirty kilometers around the plant was evacuated, creating approximately 340,000 “nuclear refugees” (Goodman 2014). Soon after the accident, the Japanese government decided to shut off all its nuclear power plants, sparking speculations about a permanent phasing out of nuclear energy in the country. A few weeks later, German Prime Minister Angela Merkel announced that the German government intended to phase out nuclear energy by 2022 (Dempsey 2012).

In Spain, the debate about the use of nuclear energy took the form of a specific political decision. In the midst of one of the worst financial crises the country has ever experienced, the current government of President Mariano Rajoy had to decide the future of one of Spain's nuclear facilities: the Garoña nuclear plant. The government had two options: confirm the closing of the 40-year-old Garoña nuclear plant as already determined by former Spanish President Jose Luis Rodriguez Zapatero, or keep the nuclear plant in operation beyond its projected 40-year lifetime, an unprecedented policy measure in Spain.

Zapatero’s decision to close the plant had proved an unpopular decision. In early 2012, unemployment rates in the Castilla y León autonomous area were near 20 percent (EUROSTAT 2014), and Garoña was a significant regional job provider (El Mundo 2014). Therefore, the Rajoy government’s decided to keep the plant open until late 2013, and allow the plant’s owner to apply for a renovation of the plant’s license of operation until 2019 (Boletín Oficial del Estado 2012:47,480). However, this governmental decision became inconsequential when the owner decided not to apply for a new permit, arguing that recent tax reforms had crippled
the plant’s profitability (Boletín Oficial del Estado 2013:51,384). The plant was disconnected from the grid on July 6, 2013. Still, the government has recently announced its intention to enact specifically tailored tax regulations that will allow the Garoña plant to reopen (El País 2013). Unfortunately, neither the previous nor current Spanish governments have made publicly available the information they used to assess Garoña nuclear plant’s future merit.

This article uses the Garoña case to discuss the uncertainties associated with regulatory measures taken on potentially catastrophic industrial activities. First, the paper describes two influential theoretical approaches to risk regulation. Second, the paper provides background on the Garoña nuclear plant and the recent policy decisions taken about its closing. Third, the paper analyzes these decisions following a general framework on Risk Tradeoff Analysis (RTA). The analysis suggests that there is an urgent need for transparency regarding risk-related public policy decisions in Spain. It also highlights the need for a careful balancing of risks on regulations that affect industrial activities with potentially catastrophic consequences.

The Concept of Disaster and Its Links to Regulation

Disaster research is a relatively new discipline. Its origin may be found in the post-World War II studies of social science and anthropology (Dynes 1970). However, disaster research has evolved swiftly, spurred by the ever increasing complexity of technology-related disasters. As the number of risks rises, layers between those risks become more intense, complex and difficult to measure, triggering unexpected and sometimes catastrophic effects. Take the example of the Chlorofluorocarbons (CFCs): the invention of CFCs improved quality of life by providing a safe way to keep our groceries refrigerated, but could destroy Earth’s ozone layer. In a similar example, toxic chemicals used against locust infestations in Africa in the early 21st century had serious negative health effects on humans (Quarantelli et al. 2006:16–17). Implicit in this line of thinking is the argument that technological innovations such as the use of chemicals, genetic engineering, or nuclear power will always have both benefits and drawbacks.

This point of view is consonant with Charles Perrow’s seminal theory of “normal accidents” in complex systems. Perrow’s theory is based on the following idea:
Catastrophes have always been with us. In the distant past, the natural ones easily exceeded the human-made ones. Human-made catastrophes appear to have increased with industrialization as we built devices that could crash, sink, burn, or explode (Perrow 1984:11).

The Chernobyl crisis is a good example of Perrow’s normal accidents theory. The plant’s meltdown occurred while the operators were testing safety protocols (Quarantelli et al. 2006:25). Perrow suggests that we should be cautious about these highly interactive technologies because tightly coupled and complex technologies will lead to failures with disastrous consequences.

From Normal Accidents Theory to Risk-Risk Balance

Avoiding potentially catastrophic technologies has an important caveat: regulations aimed at eliminating the risks associated with any dangerous activity such as nuclear energy can potentially and unexpectedly generate or increase other risks. For example, a global phasing out of nuclear energy could lead to greater reliance on carbon-based energy production, increasing the concentration of Greenhouse Gasses (GHGs) in the atmosphere. Hence, an assessment of the unintended negative consequences of actions taken to reduce risks must be conducted in order to evaluate the most convenient action.

Graham and Wiener developed the risk tradeoff analysis theory (RTA) in the mid-1990s. Instead of scrapping policies or banning the use of technological innovations, the authors proposed an in-depth analysis of each potentially risky regulation or policy (Graham & Wiener 1995:4–6). They identified several “key factors” necessary to evaluating risk-risk tradeoffs. These include: (1) magnitude (probability), (2) degree of population exposure (who or what is affected by the risk, levels of doses, and public perceptions of the risk), (3) certainty (including information sharing), (4) type of adverse outcome, (5) distribution, and (6) timing.

The authors conclude that risk assessment may be greatly improved by the development of “risk-superior . . . technologies and ways of organizing activities.” Graham and Wiener propose to enrich the work of the regulatory process at the bases of these decisions instead of just banning technologies or abandoning regulatory measures that may have positive
outcomes. In the following section, we will consider the analysis of a specific risk tradeoff, the decision of either closing or keeping in operation a Spanish nuclear facility that has reached its projected lifetime.

**Case Study: The Santa María de Garoña Nuclear Plant.**

Spain’s international isolation under General Franco’s regime (1939–1975) significantly limited Spain’s access to energy sources, and constituted a serious hurdle to the nation’s industrialization. This fact led the dictator to seriously consider nuclear energy as an energy alternative (RNE 2010). Thanks to Franco’s gradual alignment with U.S. foreign policy interests, Franco’s regime was invited to join President Eisenhower’s Atoms for Peace program, the first large-scale effort to expand civil use of U.S. nuclear technology (Puig 2005:215). Spain opened its first nuclear plant in 1968. Commissioned in 1971, Santa María de Garoña is currently the oldest and smallest of Spain’s nuclear plants (Segoviano-Monterrubio 2011:35).

Operation permits in Spain have a maximum validity of ten years, and Spanish regulations require that in order to renew a permit, all nuclear plants must conduct an in-depth Periodic Safety Review (Ministry of Energy 2009). Additional requirements are imposed in case the owners of a plant request a permit to continue operating the plan past its designed lifetime (Consejo de Seguridad Nuclear 2009).

A moratorium to the construction of new nuclear plants has been in place in Spain since 1984 (World-Nuclear 2012). In 2009, the owners of the Garoña nuclear plant requested a renewal of its permit of operation for ten more years. At the end of that proposed extension, Garoña would have been in operation for forty-eight years. Also in 2009, the Nuclear Security Council (Consejo de Seguridad Nuclear) issued a report stating that the plant met all necessary requirements and recommended issuing the permit for Garoña while imposing a series of necessary improvements. However, the government granted only a five-year permit, and approved a plan to close Garoña by 2014. After the November 2011 general elections, the new government revisited its decision. The new government decided to allow Garoña to operate until 2019 following the recommendation of the Nuclear Security Council, and is actively supporting the plant’s restart.

Garoña has been at the center of a heated energy policy debate. Interest groups opposed to nuclear energy highlight the potentially catastrophic
consequences of a nuclear accident, particularly after the events of the Fukushima nuclear plant (El Mundo 2011). They also stress health concerns related with the levels of radioactivity emitted to the atmosphere by the normal operation procedures of all nuclear plants as well as environmental concerns related to the treatment, transport, and storage of nuclear wastes. On the other hand, proponents of nuclear energy stress Spain’s dependence on foreign sources of energy, the reliability of nuclear energy compared with renewable sources of energy, and the need to fulfill Spain’s commitment to reduce its GHG emissions by 2020 (Segoviano-Monterrubio 2011:6).

Public opinion in Spain is against the use of nuclear energy (Centro de Investigaciones Sociologicas 2011:15). The anti-nuclear movement was particularly active during the seventies and eighties, forcing the government to cancel the operation of the already constructed Lemóniz nuclear facility (Angulo 1978; Mounfield 1985). A May 2011 poll by the Spanish Sociological Investigations Center (CIS) showed that 64 percent would oppose the construction of new nuclear plants, 52 percent thought that the potential costs of nuclear energy outweighed its benefits, and 1 out of 3 respondents believed that the risks of nuclear energy are underestimated (Centro de Investigaciones Sociologicas 2011:15).

The key factors of a Risk Tradeoff Analysis allow for a brief assessment of the decision to keep the Garoña plant in operation exceeding its projected lifetime, as well as its countervailing risk tradeoffs. Table 1 presents a summary of this assessment. The list is not exclusive, and is included here to help identify possible risk tradeoffs. The target risks column represents potential risks the government might try to avoid by keeping Garoña open. These range from the likelihood of increased unemployment rates in the short-term to the need to reduce GHG emissions. Each target risk is coupled with at least one countervailing risk. The countervailing risks represent the risks that may increase as consequences of taking the target risk-reducing measure.

1. The financial crisis in Spain may have the positive externality of helping Spain to reach its GHG emission reduction goals.
2. The conflict concerning the Lemóniz nuclear plant was much more than the opposition of the civil society to environmental or health risks. The conflict developed in the midst of the difficult Spanish transition to democracy after the death of General Franco, and was used by the Basque separatist movement to publicize their demands. The construction site suffered three terrorist attacks.
As stated previously, the key factors of a Risk Tradeoff Analysis include: (1) magnitude, (2) degree of population exposure, (3) certainty, (4) type of adverse outcome, (5) distribution and (6) timing.

**Magnitude**

Magnitude is the probability of an adverse outcome (Graham & Wiener 1995:30). Perception of magnitude highly depends on the way data are presented. Indeed, recent estimates suggest that, considering the total amount of years of operation of all active nuclear plants, a plant meltdown is only probable once every 20,000 years of reactor operation (Cohen 1990). However, if we just state that there have been three major nuclear accidents reported in the last thirty-five years and that some partial core meltdowns occurred before that (Fermi reactor in 1966, St. Laurent des Eaux A1 in 1969, Browns Ferry plant in 1974) the probability of a catastrophe seems higher.

---

**Table 1: Approval of a Permit for Long-Term Operation of a Nuclear Plant (exceeding 40 years of operation-designed lifetime)**

<table>
<thead>
<tr>
<th>Target Risks</th>
<th>Countervailing Risks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compliance with assumed international compromises on GHG emissions reduction.</td>
<td>Increased amount of nuclear waste, and increased spending for waste management infrastructure, security and transportation.</td>
</tr>
<tr>
<td>Higher probability of natural disasters induced by climate change. Higher spending in climate change adaptation.</td>
<td>Probability that active nuclear facilities may suffer nuclear catastrophes.</td>
</tr>
<tr>
<td>Ensuring of sufficient energy supply without being subject to changing climate conditions.</td>
<td>Fewer economic incentives for the renewable energy sector.</td>
</tr>
<tr>
<td>Avoidance of increasing unemployment rates.</td>
<td>Less job creation and scientific research in other sources of energy.</td>
</tr>
<tr>
<td>Political opposition. Increased spending in subsidizing substitute industries.</td>
<td>Political opposition. Increased spending in nuclear security measures.</td>
</tr>
<tr>
<td>Loss of highly trained personnel and scientific research.</td>
<td>Loss of leadership in renewable energy research and development.</td>
</tr>
<tr>
<td>Change in energy consumption patterns and national way-of-life.</td>
<td>Unsustainable patterns of consumption.</td>
</tr>
<tr>
<td>Decrease in the level of competitiveness of the national nuclear industry.</td>
<td>Highly disperse costs across the society and among other industrial sectors.</td>
</tr>
</tbody>
</table>
Size of Population
In case of a nuclear accident, the size of the population affected will greatly depend on the geographical situation of the nuclear plant. The affected population will also depend on the nature of the nuclear failure, the meteorological conditions at the time of the accident, and other factors. Target risks including lifestyle changes and GHG emissions have the potential to affect a much greater number of people, and will only gradually develop over time instead of being concentrated in a catastrophic event.

Certainty in Risk Estimates
The availability of the data necessary to assess completely different kinds of risks may greatly distort the execution of an accurate RTA. The FCC case is a clear example of this situation. At the time CFC’s started to be commercialized, they were considered a non-toxic, non-reactive compound that could be widely used as a household refrigerant. At that time, the damaging effects of CFC’s on the ozone layer were unresearched.

In the Garoña case, expert groups may be able to accurately assess the ageing of the structures and the security of the building that contains the nuclear reactor. Even when quantitative data are not available or very limited, subjective technical judgments may also be obtained from experts. However, these assessments usually fail to take into account all possible effects of a policy measure. The assessment of Spain’s nuclear facilities’ vulnerability to terrorist attacks exemplifies this problem. In Spain, the assessment of national security implications of nuclear energy is in the hands of the National Center for Critical Infrastructure Protection (Centro Nacional para la Protección de Infraestructuras Críticas) created in 2007. In 2011, the WikiLeaks affair revealed that although the Spanish Government had conducted security assessments of its nuclear facilities in the aftermath of the 2004 Madrid terrorist bombings, U.S. government officials were worried about the overall security of Spanish nuclear facilities (Wikileaks 2009). These fears were confirmed when Greenpeace activists managed to breach the perimeter of Spanish nuclear facilities in 2007 and again in 2011. Had these actions been taken by terrorist cells instead of peaceful protesters, the consequences for national security could have been tragic.
Type of Adverse Outcome
Countervailing risks will often be different in character from target risks. Building on the national security example, actions taken to reduce the risk of suffering a terrorist attack may increase the chances of suffering civil and human rights violations. In this regard, human perceptions of risk may greatly influence decision-making since “[S]ome risks are felt to be controllable and voluntarily assumed, while others seem uncontrollable by the individual” (Graham & Wiener 1995:32).

Distributional Considerations
Which sector of the population will suffer the effects of the risk? Are there any “environmental justice” concerns? In the case of nuclear facilities, it would be relevant to know what were or are the criteria used to determine the location of a nuclear plant. Given the dangers posed by the normal operation of a nuclear plant, there is common agreement that plants should be situated away from highly populated areas. However, nuclear crises always affect a considerable amount of people (Aoki 2012). In the case of Garoña, the plant is less than 100 km away from some medium-sized Spanish cities, such as Logroño, Vitoria, and Burgos and less than 200 km away from the wine regions of Rioja and Ribera del Duero, significant economic drivers of Spain’s agricultural sector.\(^3\)

Timing of risks
Improvements in technology and scientific knowledge may decrease overall risks. Using once again the CFCs example, the process of phasing out CFCs initiated by the Montreal Protocol in 1988 was initiated because—at that time—American chemical corporations were in an advantageous situation to commercialize CFC substitutes (Wiener 1999:687). Similarly, human ingenuity and scientific research might increase the safety of nuclear facilities, or even find alternative sources of energy that will make nuclear facilities unprofitable. The shale gas boom has changed

\(^3\) We must stress that nuclear crisis are extremely dependent on variable. Referring to the Chernobyl crisis, Perrow wrote: “but more important is the luck that the USSR had with the weather that night. The radioactive cloud rose slowly to several thousand feet in the still air before dispersing. Had a wind carried it over nearby Kiev, many more thousands could have died.” (Perrow 1999, 279).
the picture of energy generation in just a few years. Shale gas extraction technology provides availability to abundant sources of natural gas, cutting down the costs of building new gas-powered electricity plants relative to nuclear plants.

**Sources of Risk Tradeoffs**
The previous section has presented a set of topics that—under a Risk Tradeoff Analysis perspective—should be assessed to take into account both the target and the countervailing risks associated with a regulatory decision. The following paragraphs will in turn identify some sources of risk tradeoffs in the specific regulatory measure of keeping the Garoña nuclear plant in operation.

**Heuristics**
One of the largest problems is an imbalance of heuristics. Keeping Garoña operational may address the immediate problem of unemployment and energy security but may also increase the risk of a nuclear accident. Closing Garoña may immediately reduce nuclear insecurity but also increase unemployment, forcing Spain to default on its international GHG emission reduction target. Seeking increased political support, decision makers may take a short-term, reactive decision—namely keeping the plant in operation, thus avoiding the political cost of being seen as job-killers—instead of a long-term preventive decision such as closing the plant while subsidizing the creation of a renewable energy industry cluster in the region.

Focusing on immediate problems may also lead decision makers to procrastinate in making the necessary decisions to reduce risks. Human beings tend to pose a higher value on immediate gratification and under-value future benefits (Ariely & Wertenbroch 2002:219). The range of examples is broad, including both individual decisions like brushing your teeth, and collective public policy decisions such as incentivizing low-income jobs instead of high education and scientific research. In the present case, the immediate benefits of maintaining the status quo may seem more rewarding to the rule maker than engaging in a challenging, complex energy transition. Bipartisan collaboration is needed to avoid this kind of short-sighted approach.
Bounded Oversight Roles

Concentration of competences in one single agency or institution is a limitation to a thorough Risk Tradeoff Analysis evaluation because “there is no individual or agency capable of processing all information needed for making the decision” (Graham & Wiener 1995:235). In the case of Spain, this problem is worsened for at least two reasons. First, in order to obtain a permit of operation, Garoña only needs to meet all technical requirements determined by the Nuclear Security Council. This ensures Garoña can be restarted without the authorization of the National Center for Critical Infrastructure Protection, which oversees the project’s equally important national security implications. Second, the political system in Spain determines that the executive branch always holds control over the legislative branch. This lack of balance between both branches of power promotes a concentration of decision making in the hands of the executive. This situation—when added to the lack of a Freedom of Information Act in Spain—provides the executive branch with a powerful incentive to abuse its discretion.

New-Old Bias

Traditional stakeholders in most industries raise entry barriers to potential newcomers. For example, coal producers and nuclear energy companies fight subsidies on renewable energy technologies and describe renewable energy as unreliable and expensive. Additionally, from a consumer’s perspective, a good-old energy provider could be viewed as more reliable than taking a leap of faith towards a new kind of energy production.

To date, Spanish nuclear facilities have operated without major accidents, and both industry lobbyists and governmental institutions have praised their reliability (Boletín Oficial del Estado 2013). Thus, a decision to close this nuclear facility or phase out nuclear energy in Spain could be seen as an unfair penalty to a highly specialized industrial sector that has been operating under the most stringent levels of security while raising doubts about alternative energy sources.

Behavioral Responses

Behavioral response to nuclear energy by different affected stakeholders is subject to change, particularly when comparing divergent interests. In
the balance between environmental protection and job creation, the latter usually becomes a stronger argument, particularly in times of dire financial circumstances.

Behavioral responses are also influenced by ethical considerations and by the overall balance that a society makes of its own strengths and weaknesses. The wave of U.S. environmental laws enacted in the sixties and seventies reflected both the increased concern Americans developed about the need for a healthy environment and confidence in technological entrepreneurship that followed the success of the Apollo XI space mission (Salzman & Thompson 2010:56). A similar approach may be identified in the recent German decision to phase out nuclear energy. The report, issued in May 2011 by the German Ethics Commission for a Safe Energy Supply, establishes Germany’s future general principles for energy supply and consumption:

> Germany must follow the phase out path with new confidence in its own strengths and a consistent process of checks and controls. . . . Science in Germany is in an excellent position and can be expected to continue to provide innovative and efficient solutions for the energy transition. (German Ethics Commission for a Safe Energy Supply 2011:2–3).

Omitted Voices

A governmental public policy decision on a potentially catastrophic technology may leave some stakeholders out of the debate. The potential unheard voices are dispersed within societies and across national boundaries. The consequences of transboundary harm exemplify this issue. International law’s duties regarding potentially catastrophic consequences of nuclear industry are not stringent. States are obligated by the 1992 Rio Declaration (Principles 17 and 19) and 1991 Espoo Convention to communicate with neighboring states and follow an environmental impact assessment prior to the installation of any nuclear energy facility (UNECE 1991:310).

Notwithstanding this provision, States are not under obligation to repeat this process regularly. Thus, Garoña may be restarted without the need to inform Spain’s neighboring countries and without conducting a
new Environmental Impact Assessment (EIA). Needless to say, keeping
a nuclear plant in operation longer than it is designed for may easily be
defined as an activity that can significantly affect the environment, health,
and security of a nation and its neighboring states. Garoña’s nuclear reac-
tor has some relevant precedent that could strongly raise the regulators’
concerns. In 1996, one of the nuclear reactors that served as a model for
building Garoña, Dresden 2 in Illinois, suffered what Charles Perrow has
described as “the quintessential example of a system accident” because of
the large set of equipment failures, false signals, and unexpected inter-
actions the plant operators had to face (Perrow 1999:49). Moreover,
Garoña’s reactor is a boiling water reactor identical to the one that failed
at Fukushima’s power plant (Kanter 2011).

Another side of the “omitted voices” debate concentrates on the level
of information available to the public. As already mentioned, the lack of
a transparency law in Spain is a significant limitation. Additionally, pro-
tocols for providing information to the public concerning anomalies in
nuclear plants usually involve the need of several actors, and in the event
of a crisis established rules of operation usually fail.

Conclusions
Technological progress has led to some negative consequences, such as
chemical warfare, climate change, and nuclear fallout; however, human
society has nevertheless reached new levels of progress.

Technology can both avoid and cause catastrophes. At a highly sophis-
ticated level of human development, technological failures are inevitable.
Our contemporary global society must face the difficult task of discrim-
inating among new technologies in order to ensure that technological
innovation develops under acceptable safety levels. But how “safe” is safe
enough? The problem is that the adequate information needed to make
such a decision is usually not available. In a classic example, our car-
bon-based Industrial Revolution was initiated by a small group of nations
whose scientists managed to convert coal and oil into movement and elec-
tricity. These inventions carried the benefits of industrialization. However,
the intensive use of fossil fuels also created a climate change problem of
potentially catastrophic consequences that demands an extremely com-
plex global response.
When taking the decision to issue a permit that will allow Garoña to be in operation for more than forty years, the assessment of risks, benefits, and interests (the risk tradeoff) becomes particularly relevant. Germany justified its decision to phase out nuclear energy by citing Fukushima as an example of nuclear energy’s unpredictable dangers. Parallel concerns seem to have also arisen in Spanish society where polls show broad opposition to nuclear energy. Many neighboring European countries have similar opinions. A recent poll conducted by Reuters news agency showed that 57 percent of French nationals were against the use of nuclear energy (Thomson Reuters 2012).

An adequate balance of risks may be performed in order to provide decision makers with holistic and detailed information. This includes not only technical reports about the performance of the plant and its components but also security assessments including costs and a review of alternatives that takes into account related industries that may be directly affected like tourism, agriculture, and urban development.

Political pressure, agency capture, and subjective assessments may greatly influence the decision making process. Political pressure from labor and nuclear industry interests may lead the government to decide that Garoña should be maintained in operation indefinitely, thus forcing the society to accept higher risks of nuclear disaster. On the other hand, political pressure from environmental groups and starry-eyed renewable energy researchers may lead the same government to close Garoña, thereby increasing the risk of losing energy independence, business opportunities and improvements the Spanish nuclear energy sector could achieve both at home and abroad.

Nuclear energy generation may seem to be a beneficial activity in the short term, but in the long term, the increased costs may greatly outweigh the benefits. For example, costs of waste management will keep increasing, especially if the German decision is successful and other countries follow suit. National security risks should not be underestimated, since the costs of a terrorist attack on a nuclear facility would be unbearable. Moreover, damages to other economic activities could result in economic losses extremely difficult to assess. Building off the example of the wine industry, nuclear fallout from Garoña could destroy forever booming wine
industries like Rioja and Ribera del Duero. These industries generate more jobs than the Garoña plant.

What Risk Tradeoff Analysis indicates is that in order to make the best decision, the decision maker must gather as much information as she can and from as many different expert voices as possible. It is important never to lose sight of the specific benefit we are expecting to obtain from the use of nuclear technology. Since we use nuclear technology to generate electricity, the main benefit is ultimately making electrons flow. In a country like Spain, there are many options for following Faraday’s footsteps. Wind power has been a successful example, a clean technology that the Spanish energy sector has been developing for quite a long time. Short-term goals and governmental procrastination may suggest that keeping nuclear plants in operation is the most convenient decision, but in the meantime, Spain will probably be losing the opportunity to become a world leader in alternative energy technology, wasting business opportunities. Furthermore, Spain would also be keeping the door open to a national security threat of unprecedented consequences. The low probability of such an outcome should not be used as an excuse for inaction. On the contrary, a decision to phase out nuclear energy in Spain could increase national security and, contemporarily, act as an incentive to technological entrepreneurship and research.

Bibliography


Toward a Redefinition of the U.S. Sweatshop

Jacqueline Hayes

A significant amount of policy and research is based on a definition of the sweatshop that understands it as a worksite in violation of multiple labor and safety laws. Based on an extensive literature review of research on neoliberalism, sweatshops, immigrant labor and immigration law this position paper argues that contemporary changes to the global economy and U.S. immigration policy require a reconceptualization of the U.S. sweatshop. A redefinition would allow policymakers and researchers to consider undocumented workers, farm work, domestic work and workplaces not currently protected by contemporary labor laws to be considered as potential locations of a new kind of U.S. sweatshop. A broader conception of the sweatshop would allow for policy solutions more accurately tailored to the problem with the potential for a more extensive impact.

A legalistic definition of the sweatshop currently prevails in the realm of public policy, an understanding based on an anachronistic conception of how workers are sweated; the U.S. government, many researchers and lawyers define the sweatshop as a workplace that violates multiple wage and safety laws.¹ This definition is concise and allows for easy identification of sweatshops but ignores shifts in the global and domestic economy that

1. For example, both the Government Accountability Office and the Department of Labor define a sweatshop as “an employer that violates more than one federal or state labor law governing minimum wage and overtime, child labor, industrial homework, occupational safety and health, workers compensation or industry regulations.” (“Efforts to Address the Prevalence and Conditions of Sweatshops” U. S. General Accountability Office, November 2, 1994).

Jacqueline Hayes is a doctoral candidate in the Latin American, Caribbean and U.S. Latino Studies Department at the University at Albany. Her research focuses on undocumented workers, labor, and immigration. She is currently working on a dissertation focused on the working conditions of Latino immigrants in New York State. She has worked with United Students Against Sweatshops and currently volunteers for the New Sanctuary for Immigrants of the Capital District.
determine who is sweated and how. At present, prevailing understandings of the sweatshop are inadequate to meet the complicated needs of undocumented immigrants who are not legally allowed to work, or workers in areas with scant labor protections. A new, historically informed understanding of the sweatshop which is able to see the interrelated impacts of neoliberalism and immigration on labor conditions in the U.S. is necessary in order to make visible these unprotected workers and sectors. Broadly conceived, the two most significant processes that have coalesced to transform the U.S. sweatshop between 1980 and the present are the scaling back of social protections in the U.S., as a result of neoliberal policies, and the heightening of immigration enforcement efforts nationwide.

Based on an extensive literature review of research on neoliberalism, sweatshops, immigrant labor and immigration law this essay argues that the contemporary U.S. sweatshop would not be recognizable to policymakers of prior decades because the sweatshop has now become a flexible condition that allows for profound exploitation at the hands of domestic and local employers. For example, instead of being a fixed site of industrial production the sweatshop may appear for a few months at a New York farm where workers spend grueling hours picking apples or for a few years in a Long Island home where wage abuse is prevalent amongst domestic workers. In order to account for these new forms of exploitation and their novel spatial distribution, this paper argues that the sweatshop should now be defined as the condition of being beyond protection because it allows for the recognition of the sweatshop as it moves beyond particular industries or locations and beyond traditional definitions. This paper focuses specifically on Latino undocumented workers because, according to Pew Hispanic (2013), they constitute a majority of the U.S. undocumented population. This reconceptualization, while informed by interdisciplinary research and literature, has implications that extend outside the realm of research into public policy.

**Background**

Since the 1970s, neoliberalism has transformed economic conditions in both Latin America and the U.S. in different, but connected ways, creating economic and social pressures that impel immigrants across borders in search of wage-labor. The appearance of a growing number of primarily
undocumented workers laboring in low-wage sectors in the U.S. has signaled this underlying transformation, yet policymakers have tended to separate immigration from labor issues resulting in uneven and contradictory policies. David Harvey (2005) describes neoliberalism as “a theory of political economic practices” characterized by “deregulation, privatization, and withdrawal of the state from many areas of social provision” (2–3), which has led to increased economic and social inequality and intensified migration from Latin America to the U.S. As Juan Gonzalez (2000) points out, migratory patterns in the Western Hemisphere have tended to coincide with U.S. interventions in Latin America; broadly speaking, as the U.S. encouraged the spread of neoliberal policies in Latin American countries, migration from Latin America to the U.S. intensified. In the particular case of Mexico, the nation of origin of 55 percent of undocumented immigrants living in the U.S., John Judis (2008) estimates that 2.5 million small farmers and workers dependent on agricultural jobs were driven out of work between 1993 and 2005 primarily as a result of NAFTA-WTO trade policies during this time (Pew Hispanic 2013). These migrants, recently dispossessed of a means of subsistence, migrated to the U.S. in historically unprecedented numbers in search of wage-labor. Yet, their migration coincided with the simultaneous enactment of neoliberal policies in the U.S., as well as significant shifts in immigration policy.

As Lynn Stephen (2007) argues in *Transborder Lives*, “States have been reorganizing themselves significantly to meet the needs of late capitalism, particularly in relation to supplies of low-wage labor” (27–28). On the domestic level, neoliberalization in the U.S. included the deregulation of wage, safety and labor laws, as well as significant cuts to spending on social programs, confirming Stephen’s characterization. Based on U.S. Bureau of Labor statistics, *Public Citizen*, a nonprofit organization that monitors global trade policy, estimates that the United States lost over one million net jobs between 1994 and 2005. They also argue that NAFTA put a downward pressure on U.S. wages, doubled migration from Mexico to the U.S., and increased income inequality. Alongside the loss of net jobs, the U.S. has witnessed a profound restructuring of employment in general leading to lower rates of unionization, a decline in employer-provided health insurance and employer-sponsored retirement, and an increase in low-wage jobs. The *National Employment Law Project* points
out that over the last decade low-wage job growth has outpaced mid- and higher-wage job growth in the United States. Recognizing this broader economic context allows policymakers to better understand the situation in which undocumented workers labor and live, and indicates the very real tensions that arise in relation to the growth of undocumented immigrants laboring in low-wage sectors.

The “War on Terror” and the Transformation of U.S. Immigration Enforcement

Federal immigration policy developed in tandem with the economic and social restructuring that characterized the turn toward neoliberal policies, making increased enforcement a predictable, albeit problematic, political path in the wake of 9/11. As David Burnham, the co-director of Syracuse University’s Transactional Research Access Clearinghouse said “After 9/11, the Bush administration tried to see immigration enforcement as a way to fight terrorism” (Hesson 2012). Consequently, the federal government began to devote a significant amount of federal dollars to increasing enforcement efforts and making penalties for immigration violations more severe. In the context of the “War on Terror,” people of Middle Eastern descent experienced increased racial profiling and race-based violence (Harris 2002). Yet, a lesser known consequence of anti-terrorist provisions was its impact on all immigrants and in particular the Latino community, the disproportionate targets of immigration enforcement in the U.S.² The shift toward framing immigration as an issue of national security mirrored a material change in the structure and agency of immigration enforcement: in 2003, Immigration and Naturalization Services (INS) was eliminated and its functions were transferred to the Department of Homeland Security.

Within DHS, three agencies currently handle immigration law enforcement: U.S. Customs and Border Enforcement (CBE), U.S. Citizenship

---

² According to Pew Hispanic (2011), in 2010 ninety-seven percent of those deported were of Latino descent. Further, in the context of the U.S., racial profiling is legally protected for immigration enforcement efforts because U.S. jurisprudence has established that a “Mexican appearance” is adequate justification for an immigration stop, meaning that Latinos in the U.S. are currently not entitled to the same rights against discrimination as other Americans (Johnson 2000).
and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE). The trifurcation of INS into separate agencies signaled an increasing specialization and intensification of immigration law enforcement and monitoring. One of ICE’s major initiatives, the Secure Communities Program, works in conjunction with local law enforcement agencies to cross reference local arrest records with federal immigration databases. This seemingly insignificant development expanded ICE’s jurisdiction to every locale participating in the Secure Communities program extending enforcement into almost every aspect of public and private life.

The coalescence of neoliberalism and the “War on Terror” have created a condition where for most undocumented immigrants there are very few spaces that are safe from the threat of the enforcement of immigration law. Therefore an undocumented status is carried as an almost permanent identifier into places like the workplace, the school, the hospital, instead of being limited to a specific locality, such as the border, or temporality, such as the moment of crossing. The threat of enforcement and deportation directly impacts the job conditions someone will tolerate and their ability to access rights or protections.

The contemporary era is a unique period in the history of U.S. immigration: immigrants now labor under the persistent threat of deportation while the number of low-wage jobs has grown within the domestic economy. As a direct result of the adoption of neoliberal policies, federal and state governments, that previously had more tools to protect workers, have been transformed to an extent where national security is a primary objective. This is apparent in the current debate on immigration reform where national security takes precedence and is the precursor to any potential protections or pathways to citizenship (Slaven 2013). It is also apparent in Obama’s record on deportations: the New York Times reported that to date President Obama has deported about 1.9 million immigrants, more than any other President in U.S. history. As illustrated in Figure 1, the U.S. deported more immigrants than

---

3. The Department of Homeland Security characterizes removals as “compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal” and returns as “the confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal” (2011).
during the previous three decades; a record made possible by increases in federal funding for immigration enforcement efforts. According to Migration Policy Institute (2013), after the formation of the DHS, immigration enforcement spending rose rapidly from $6.2 billion in 2002 to $14.2 billion by 2012.

Immigration policy has profoundly shaped the working lives of non-citizens because of the intimate connection between rights and citizenship. Most labor rights in the U.S. require citizenship status; immigration statuses that lie somewhere between non-citizen and citizen, like agricultural (H-2A) work visas, correspond with limited and weak labor protections. Therefore, all immigration policy, by extension, is labor policy. One can glimpse the intersections of immigration and labor policy clearly in sectors heavily reliant on immigrant labor. For example, in agricultural, apparel and domestic work labor rights are frequently and systematically violated. Exclusion from labor rights, in many instances, is codified

4. Some rights articulated in the Fair Labor Standards Act (FLSA) do not require citizenship status. Also, varying immigration statuses like the H2A, H2B, or worker visas entail some labor rights, but these are often limited.

5. For example, a national survey conducted by Domestic Workers United (2012) found that sixty-seven percent of domestic workers are paid below the state minimum wage and eighty-five percent of undocumented immigrants who had issues with their working conditions “did not complain because they feared their immigration status would be used against them” (37).
in law, outlined in the terms of the work visa or as a result of undocumented status, making labor exploitation a legally protected endeavor. Depending on the location, exclusion resulting from immigration status may not be limited to rights; social exclusion may follow as a result of an anti-immigrant social climate and the rigorous enforcement of immigration law. Various forms of exclusion can lead to a precarious position in the public sphere and consequently popular politics making policy recommendations rather tenuous without reconceptualizing the meanings and contexts of the sweatshop.

Reconceptualizing the U.S. Sweatshop
Currently, immigration enforcement is the principal tool used to address a problem that is fundamentally a labor and human rights problem. Many scholars and policymakers have devoted significant attention to the issue of sweatshops, yet oftentimes the research and policy solutions are limited by the definition and conception of the term. Laura Hapke (2004) explains that in the U.S. imaginary the ‘traditional’ sweatshop draws up pictures of exploited immigrant workers packed into a crowded tenement building or warehouse, crouched over Singer sewing machines (3). Hapke notes that the vestiges of long standing associations continue to cling to contemporary conceptualizations of the sweatshop stating “however broadly it is defined—for it comes in all shapes and sizes—the sweatshop retains its late-nineteenth-century association with the seamstress and the tailor” (2). This is apparent in contemporary studies on the sweatshop that focus specifically on the apparel shop in major cities and view the sweatshop as an anachronism (Louie 2001; Rosen 2002; Bender et al. 2003). In their review of sweatshop literature, Collins et al. (2008) date the reemergence of an interest in sweatshop studies to the 1970s. This literature coincided with what some termed “the return of the sweatshop” or notable increases in sweatshops both inside and outside the U.S. (Bonacich 2000; Ross 2004). While this new sweatshop literature brought significant attention to globalization, export processing zones, and the feminization of labor—many of the old ‘associations’ remained intact. These studies tended to track apparel or manufacturing shops in the global South—nation-states located primarily in the Southern hemisphere and characterized by high rates of poverty—without seeing how the major transformations that
brought about the appearance of a ‘returned sweatshop’ were actually indicative of broad sweeping changes globally, including within the U.S.

Jennifer Gordon (2005) is one of the first researchers to move the focus of study on the sweatshop from the shop itself to a group of workers, in Gordon’s case to a group of primarily Latino immigrant workers laboring in various jobs in suburban New York. As Gordon rightly points out, “New kinds of sweatshops are emerging these days. . . . No barrier keeps sweatshop conditions—long hours, low wages, high rates of injury—in traditional sweatshop industries” (13). By focusing on a group of workers, Gordon is able to see the connection between multiple sectors like day labor, restaurant, and domestic work, and illustrate how forces outside the workplace shape conditions on the job. Following Gordon’s innovative approach, researchers and policymakers should attend to the social dynamics that contribute to placing immigrant workers beyond protection like international and domestic economic policies, migratory flows and local responses to these global shifts.

Broadly speaking, while the enforcement of labor laws has waned in the wake of neoliberal reforms, the enforcement of immigration laws has intensified, making accessing rights on the job a challenge, particularly for workers without citizenship or those perceived to be undocumented. In order to see the racial, economic and legal dynamics of the twenty-first century sweatshop, key historical developments like shifts in the global economy, changes in U.S. immigration policy, and conditions facing the most recent immigrant populations coming to work in the U.S. must be brought to the forefront of our understanding. In other words, a strictly legal definition would exclude the day laborers and construction workers at the heart of Gordon’s study from consideration because it does not cover working conditions that are excluded from the full coverage of wage and safety laws like subcontracted or temporary work. As is the case for many contemporary low-wage sectors, the violation of laws may not result in sweatshop conditions and sweatshop conditions may arise in workplaces that are compliant with laws. Similarly, anti-sweatshop action on the state level is shaped by the traditional notion of the sweatshop, a conception that is tied to a nineteenth century understanding of the world. For example, in New York State the majority of anti-sweatshop legislation is geared specifically to the apparel industry, a state industry rapidly dwindling in
the wake of neoliberal globalization, meaning that in the case of New York, the global economy is quickly outpacing any legislative attempts to bring even a shrinking sector into legal compliance, however limited.

While these policy tools may have been successful in responding to the nineteenth century sweatshop, they are ill-suited for contemporary conditions and do little to protect undocumented workers and workers in unprotected sectors or sectors characterized by precarious work. A reconceptualization would open the door to considering new and more appropriate policy solutions, including comprehensive ways to extend protections to a growing group of unprotected workers and sectors. It is important to note, however, that a reconceptualization alone will not reverse the impacts of over three decades of major economic and immigration policy shifts.

**Policy Recommendations**

*Recommendation 1: Rethink the sweatshop in a way that makes it visible as an enduring problem that now includes the undocumented and under protected workforce.*

Legalistic definitions limit policymakers and researchers to considering only those workplaces and workers that are currently regulated by the law. By adopting a more dynamic definition that makes worker protection central and that focuses on unprotected areas, it allows researchers and policymakers to respond to new conditions that initially evade the law and prior protections.

*Recommendation 2: Expand federal worker protections to cover previously excluded sectors.*

Currently the Fair Labor Standards Act (FLSA) and the National Labor Relations Act excludes particular sectors (e.g. farmwork, domestic service) and workers from basic work protections like minimum wage and overtime laws. These exclusions were based on historical circumstances that naturalized particular categories of work based on outdated notions of race and gender. As Perea (2011) argues, “the statutory exclusion of agricultural and domestic employees was well-understood as a race-neutral proxy for excluding blacks from statutory benefits and protections
made available to most whites” (96). They allowed for continued exploitation in excluded sectors therefore federal labor protections should include all sectors without exception.

**Recommendation 3: Extend all labor protections to all workers regardless of immigration status.**

In 2002, the Supreme Court decided that undocumented workers are not entitled to back wages if they are fired for forming a union, a right that citizen workers enjoy (*Hoffman Plastics v. NLRB*). Sugimori (2007) argues that the *Hoffman Plastics* decision has set a dangerous precedent; leading to employers challenging *all* labor and employment rights for undocumented workers (78). A significant variation in rights and protections among workers opens the door for exploitation; therefore labor protections should extend to all workers regardless of immigration status.

**Recommendation 4: Adopt an expansive set of social protections that cover un- or under-protected people.**

Lacking federal movement on immigration reform, immigrant and workers rights’ advocates have proposed a number of state and local level provisions that, while not comprehensive, would have a significant impact on the daily lives of workers. In 2013, New York City announced plans to pilot free legal representation for those facing deportation, other cities and states could offer similar programs. Similarly, state and local policymakers can offer local IDs, enact the Dream Act, opt out of the Secure Communities program, and legislate that the lack of a social security number cannot be used as criteria to bar someone from a homeless shelter. These seemingly disparate provisions would go a long way in making immigrant workers feel more incorporated into local communities, thus slightly ameliorating the impacts of anti-immigrant hostility and heightened immigration enforcement and paving the road toward increased equality.

**Conclusion**

Conceptualizing the sweatshop as the condition of being beyond protection allows us to consider undocumented workers, farmworkers or workers in export processing zones as working under similar conditions
and expands the study of the sweatshop out of the shop and into the social world in which Latino immigrant workers live. It allows for a textured, multidimensional understanding of the sweatshop that forefronts the workers own lived experiences over the State’s official, and often over simplistic or limited, discourses. Further, it encourages the consideration of a broader scope of forces conditioning the sweatshop (e.g. economic, political and social), so that our understanding of agency within those conditions is more precise.

References


