

## Still Drowning in Segregation: Limits of Law in Post-Civil Rights America

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*"The past is never dead. It's not even past."*

William Faulkner, *Requiem for a Nun*

*"You have to change your heart if you want to change."*

Bob Dylan<sup>1</sup>

### Introduction

In 2005, Hurricane Katrina became the deadliest storm to hit the United States since 1928.<sup>2</sup> Close to a thousand people died, and drowning was a major cause of death.<sup>3</sup> Blacks comprised fifty-one percent of all deaths.<sup>4</sup> Many of the black people who drowned during the storm were elderly and lived in the poorest neighborhoods.<sup>5</sup> They grew up in an era when black Americans had no, or limited, access to swimming facilities. They lived their lives in communities that did not allow them to practice their

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While *Law & Inequality*, as a matter of style, capitalizes the terms "black" and "white," whether or not to capitalize racial designations is a matter of dispute. I intentionally use lowercase letters in this Article because these terms are racial markers, not ethnic designations. They are used as descriptors of legally enforced racialized identities often divorced from any cultural or social meaning. To capitalize "black" reaffirms the artificiality of an imposed legal status used as a site of oppression, and to capitalize "white" reinforces the power of white hegemony. I thank the journal's editors for accommodating me on this point.

1. Mikal Gilmore, *Bob Dylan Unleashed: A Wild Ride on His New LP and Striking Back at Critics*, ROLLING STONE (Sept. 27, 2012), <http://www.rollingstone.com/music/news/bob-dylan-unleashed-a-wild-ride-on-his-new-lp-and-striking-back-at-critics-20120927>.

2. Joan Brunkard et al., *Hurricane Katrina Deaths, Louisiana, 2005*, 2 DISASTER MED. & PUB. HEALTH PREPAREDNESS 215, 215 (2008), available at [http://new.dhh.louisiana.gov/assets/docs/katrina/deceasedreports/KatrinaDeaths\\_082008.pdf](http://new.dhh.louisiana.gov/assets/docs/katrina/deceasedreports/KatrinaDeaths_082008.pdf).

3. *Id.*

4. *Id.* at 216.

5. *See id.* at 217.

swimming skills and engage in a life-long form of exercise.<sup>6</sup> Today blacks, and increasingly Latinos, in economically distressed inner-city neighborhoods live in swimming pool deserts.<sup>7</sup> They have no place to learn to swim or to practice swimming skills.

The absence of swimming pool access in many cities throughout the nation explains why in 2009 the Philadelphia-based Creative Steps Day Camp paid the Valley Swim Club, a private facility in Huntington Valley, Pennsylvania, a \$1,950 membership fee for weekly access for their campers to the club swimming pool.<sup>8</sup> According to newspaper reports, when some of the approximately sixty predominately black and Hispanic day campers “got in the pool[,] all of the Caucasian children immediately exited the pool.”<sup>9</sup> Some day campers reported overhearing “club members asking why so many black children were in the pool . . . [and] using racial slurs while they were swimming.”<sup>10</sup> The campers were asked to leave.<sup>11</sup> The day after the incident, the swim club’s president issued a statement saying: “[t]here was concern that a lot of kids would change the complexion . . . and the *atmosphere* of the club.”<sup>12</sup>

6. See *infra* notes 37–142 and accompanying text.

7. See *infra* notes 143–155 and accompanying text.

8. Phillip Lucas, *Kids Shunned from Swim Club Awarded \$1.1 Million Settlement*, PHILA. INQUIRER (Aug. 17, 2012), [http://articles.philly.com/2012-08-17/news/33249251\\_1\\_john-duesler-creative-steps-montgomery-county-club](http://articles.philly.com/2012-08-17/news/33249251_1_john-duesler-creative-steps-montgomery-county-club).

9. Karen Araiza, *Pool Boots Kids Who “Might Change the Complexion.” Campers Sent Packing After First Visit to Swim Club*, NBCPHILADELPHIA.COM (July 29, 2009), <http://www.nbcphiladelphia.com/news/local/Pool-Boots-Kids-Who-Might-Change-the-Complexion.html> (quoting an email account sent by Horace Gibson, parent of a day camp child).

10. Lucas, *supra* note 8. Three years later the Club settled with Creative Day Camp for 1.1 million dollars. *Id.*

11. Araiza, *supra* note 9.

12. *Id.* (emphasis added). After charges of racism arose, the club posted the following notice on its website:

The Valley Club is deeply troubled by the recent allegations of racism, which are completely untrue.

We had originally agreed to invite the camps to use our facility, knowing full well that the children from the camps were from multi-ethnic backgrounds. Unfortunately, we quickly learned that we underestimated the capacity of our facilities and realized that we could not accommodate the number of children from these camps. All funds were returned to the camps and we will re-evaluate the issue at a later date to determine whether it can be feasible in the future.

Our Valley Club deplors discrimination in any form, as is evidenced by our multi-ethnic and diverse membership. Whatever comments may or may not have been made by an individual member is an opinion not shared by The Valley Club Board.

Vince Lattanzio, *Swim Club Members: “Nothing to Do With Race,”* NBCPHILADELPHIA.COM (July 10, 2009), <http://www.nbcphiladelphia.com/news/local/Swim-Club-Members-Nothing-to-Do-With-Race.html>.

The Club's explanation reeked of race and class bias. The predominately non-white day campers came from less affluent urban neighborhoods, and the predominately white Valley Swim Club members lived in the more affluent suburbs. Subsequently, the Club voted to reinstate the membership of Creative Steps "if safety issues, times[,] and terms can be agreed upon,"<sup>13</sup> but the day camp opted to go elsewhere.<sup>14</sup>

The Valley Swim Club controversy is not an isolated incident. Blacks (and increasingly Latinos) in America have unequal access to swimming pools. Without access to swimming facilities, most urban blacks have few places to swim. Sometimes the consequences are stark. In 2010, the nation was shocked when six black teenagers died in the Louisiana Red River because they did not know how to swim.<sup>15</sup> While wading in waist-deep water, one of the teenagers fell off an underwater ledge.<sup>16</sup> As the teenager struggled to stay afloat, the five other teens went to his aid, but none knew how to swim, nor did their horrified family members watching from the shore.<sup>17</sup>

Drowning is a leading cause of unintentional injury or death among children and adolescents in the United States.<sup>18</sup> Whereas worldwide there is a correlation between gender, income, education, and limited swimming skills,<sup>19</sup> black children in the United States, without regard to age or income, are up to five times more likely to drown than white children.<sup>20</sup> Further, black youth between five and nineteen are 2.3 times more likely to

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13. *Pa. Swim Club Accused of Racism to Ask Kids Back*, FOXNEWS.COM (July 12, 2009), [http://www.foxnews.com/printer\\_friendly\\_wires/2009Jul12/0,4675,USswimClubMinorities,00.html](http://www.foxnews.com/printer_friendly_wires/2009Jul12/0,4675,USswimClubMinorities,00.html).

14. The campers were welcomed by Girard College, a private Philadelphia boarding school for children from low-income and single-parent families. Lattanzio, *supra* note 12.

15. Finlo Rohrer, *Why Don't Black Americans Swim?*, BBCNEWS (Sept. 3, 2010), <http://www.bbc.co.uk/news/world-us-canada-11172054>.

16. *Id.*

17. *Id.*

18. Gitanjali Saluja et al., *Swimming Pool Drownings Among US Residents Aged 5–24 Years: Understanding Racial / Ethnic Disparities*, 96 AM. J. PUB. HEALTH 728, 728 (2006); see also Karla A. Lawson et al., *Teaching Safety at a Summer Camp: Evaluation of a Water Safety Curriculum in an Urban Community Setting*, 13 HEALTH PROMOTION PRAC. 835, 835 (2012).

19. David Szpilman et al., *Drowning*, 366 N. ENG. J. MED. 2102, 2102 (2012).

20. Lynn Zinser, *Everyone into the Water*, N.Y. TIMES, June 19, 2006, at F1; see also Carol C. Irwin et al., *The Legacy of Fear: Is Fear Impacting Fatal and Non-Fatal Drowning of African American Children?*, 42 J. BLACK STUD. 561, 562 (2011); Saluja et al., *supra* note 18, at 730.

drown than white youth of the same age.<sup>21</sup> Almost seventy percent of black children have no or low swimming ability.<sup>22</sup> These statistics have not changed significantly over the past twenty years.<sup>23</sup> The Centers for Disease Control and Prevention (CDC) concludes that a major factor for the difference in black and white drowning rates is the lack of swimming facilities available to black youth.<sup>24</sup>

Swimming pools in America remain largely segregated social sites, and black Americans remain presumptively unwelcome in pools that cater to whites.<sup>25</sup> Before 1954, attempts to improve access to swimming facilities had limited success because of racial segregation laws and practices.<sup>26</sup> Immediately following *Brown v. Board of Education*,<sup>27</sup> the Supreme Court somewhat routinely ordered state- and municipally-owned recreational facilities desegregated.<sup>28</sup> Black litigants, buoyed by these decisions, began using *Brown* and its progeny to push for the desegregation of municipal- and county-operated swimming pools.<sup>29</sup> But many of these pools closed rather than open to black swimmers, and the United States Supreme Court in *Palmer v. Thompson*<sup>30</sup> permitted these closures, saying that all residents were equally affected by

21. Zinser, *supra* note 20; Orapin C. Laosee et al., Ctrs. for Disease Control & Prevention, *Drowning—United States, 2005–2009*, 61 MORBIDITY & MORTALITY WKLY REP. 344 (May 18, 2012), *available at* <http://www.cdc.gov/mmwr/PDF/wk/mm6119.pdf> (noting that the drowning death rate for blacks is significantly higher than for whites).

22. Rohrer, *supra* note 15. The statistics for Latinos also are troubling: 31% of Latino males and 57% of Latino females reported limited swimming ability. Julie Gilchrist, Jeffrey J. Sacks & Christine M. Branche, *Self-Reported Swimming Ability in U.S. Adults*, 115 PUB. HEALTH REPS. 110, 111 (2000).

23. See Ruth A. Brenner et al., *Where Children Drown, United States, 1995*, 108 PEDIATRICS 85, 88 (2001).

24. *Unintentional Drowning: Get the Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/homeandrecreationalafety/water-safety/waterinjuries-factsheet.html> (last visited May 30, 2012) (“Factors such as access to swimming pools, the desire or lack of desire to learn how to swim, and choosing water-related recreational activities may contribute to the racial differences in drowning rates.”).

25. VICTORIA W. WOLCOTT, RACE, RIOTS, AND ROLLER COASTERS 229–31 (2012).

26. *Id.* at 72–73.

27. 347 U.S. 483 (1954).

28. *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958) (public parks); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beaches); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (public golf courses); *Muir v. Louisville Park Theatrical Ass’n*, 347 U.S. 971 (1954) (municipally-owned theater). The *Brown* decision was also applied to city buses (*Gayle v. Browder*, 352 U.S. 903 (1956)) and courtrooms (*Johnson v. Virginia*, 373 U.S. 61 (1963)).

29. WOLCOTT, *supra* note 25, at 117.

30. 403 U.S. 217 (1971).

the closures and that local governments have no constitutional obligation to provide them.

The swimming pool at issue in the Valley Swim Club incident, however, was private. After *Brown* and the closing of government-operated pools, many whites fled to privately-run pools. Congress, through Title II of the Civil Rights Act of 1964, attempted to reach these pools with limited success.<sup>31</sup> Given the shockingly high drowning statistics for black children, the low level of swimming proficiency for black Americans, and the lack of adequate access to swimming facilities fifty years later, this Article argues that the civil rights approach to improving access to swimming facilities for black Americans proved ineffective.

More important for today, a major unexamined consequence of the failed civil rights approach in this area is the impact on the health of black Americans. Not only do blacks lack equal access to swimming pools, they lack equal access to safe recreational facilities in general.<sup>32</sup> Thus, given the lack of exercise options, it is not surprising that blacks have higher rates of obesity than other Americans.<sup>33</sup> In searching for ways to remediate this problem, it is important to examine the case law in the area to determine why the civil rights approach failed.

The first section of this Article sets out the history of public swimming pools in the United States. Then it briefly discusses attempts by black Americans prior to *Brown* to desegregate public pools outside the South. In this Article, I argue that these cases, decided a decade or more before the post-*Brown* swimming pool cases, better explain both the failure of the civil rights approach and why swimming pools remain racialized sites in America today.

To better illustrate the failure of a civil rights approach to improving black access to public swimming pools, Section II examines post-*Brown* efforts to desegregate public pools using the border city of Baltimore, Maryland, as a case study. It briefly discusses other desegregation efforts in southern states including the United States Supreme Court's 1971 decision in *Palmer v. Thompson* upholding the closing of Jackson, Mississippi, municipal pools in the face of an integration order. This section

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31. WOLCOTT, *supra* note 25, at 118–19.

32. David Scott, *Race, Ethnicity, and Leisure Services: Can We Hope to Escape the Past?*, in RACE, ETHNICITY, AND LEISURE: PERSPECTIVES ON RESEARCH, THEORY, AND PRACTICE 37, 46 (Monika Stodolska et al. eds., 2014).

33. L. Pan et al., Ctrs. for Disease Control & Prevention, *Differences in Prevalence of Obesity Among Black, White, and Hispanic Adults—United States, 2006–2008*, 58 MORBIDITY & MORTALITY WKLY. REP. 740 (June 17, 2009), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5827a2.htm>.

also explores post-*Brown* attempts to desegregate privately-owned pools.

Section III discusses the health impact that lack of swimming facilities has on black Americans. Black Americans, who are disproportionately at risk for drowning because they lack swimming skills,<sup>34</sup> also face an increased risk of obesity due, in part, to lack of exercise opportunities.<sup>35</sup> The health benefits of swimming as an exercise are well-documented.<sup>36</sup> Thus, the final section of this Article makes the case for increased swimming facilities and mandatory swimming programs in public schools as a way of improving public health and reducing swimming deaths.

## I. A Brief History of Public Swimming Pools in America

### A. Early Twentieth Century

In his book *Contested Waters*, historian Jeff Wiltse recounts how America's public swimming pools evolved from "swimming baths" where the unwashed masses—working-class blacks, immigrants, and native-born whites—swam together, to "leisure resorts" from which black Americans were excluded.<sup>37</sup> Most of these pools were located in large northern cities.<sup>38</sup> Although not formally segregated along racial lines, public swimming pools in large cities like New York and Chicago were built in poor, racially

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34. See *infra* notes 179–186 and accompanying text.

35. See *infra* notes 161–173 and accompanying text.

36. See *infra* notes 187–194 and accompanying text.

37. JEFF WILTSE, *CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA* 3 (2007). In the West, there is some evidence that segregation existed in some western states, notably California. A few municipal pools excluded blacks. See *Segregation in California Swimming Pool Wiped Out*, BALTIMORE AFRO-AMERICAN, Sept. 3, 1949, at 13. The Bimini Bathhouse, a commercial facility in Los Angeles, excluded blacks and Asians from their pools until a coalition of blacks, Japanese Americans, and whites picketed the facility for several months. *Pickets Break Down Jim Crow at Pool*, CHI. DEFENDER, July 31, 1948, at 4. Mexican Americans in Texas and California also were excluded from some commercial swimming pool facilities. See, e.g., *Terrell Wells Swimming Pool v. Rodriguez*, 182 S.W.2d 824 (Tex. Civ. App. 1944); *Lopez v. Seccombe*, 71 F. Supp. 769, 772 (S.D. Cal. 1944) (enjoining the city of San Bernadino from its practice of excluding "persons of Mexican and Latin descent" from city pools and other facilities); ROGER DANIELS, *ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850*, at 137 (1988) ("Municipal swimming pools . . . were closed to 'orientals' . . .").

38. WILTSE, *supra* note 37, at 90. There were fewer public baths in the South and West. MARILYN THORTON WILLIAMS, *WASHING 'THE GREAT UNWASHED': PUBLIC BATHS IN URBAN AMERICA, 1840–1920*, at 39 (1991). During this period there were relatively few public swimming pools in the Deep South, southwestern and western parts of the country. See WOLCOTT, *supra* note 25, at 17, 240 n.18; WILTSE, *supra* note 37, at 90.

homogeneous neighborhoods.<sup>39</sup> Blacks were discouraged, but not prevented, from entering “white” pools, although their presence was often met with threats and violence.<sup>40</sup>

Initially, women of all classes did not swim in public pools. Many affluent and middle-class white Americans swam at private resorts or clubs<sup>41</sup> because they believed that working-class whites, and all blacks, were unclean and bearers of diseases.<sup>42</sup> Middle-class white women were usually excluded from private swim clubs,<sup>43</sup> and working-class women seldom swam in public swimming pools because they lacked proper clothing.<sup>44</sup> In addition, black women were reluctant to swim, even in gender segregated settings, because of concerns about their hair.<sup>45</sup>

Clothing, however, was not a problem for males, primarily boys, who often swam nude.<sup>46</sup> Male nudity did not pose a problem

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39. WILTSE, *supra* note 37, at 123.

40. *Id.*

41. *Id.* at 29–30.

42. *Id.* at 151. For example, it was reported that whites “feared coming into contact with water that had touched black skin. . . . [T]hey viewed [blacks] as ‘dirty’ and ‘didn’t want to be polluted by their blackness.’” *Id.* In Pittsburgh, an amusement facility allowed blacks to swim “after the season for whites had closed” to give the management “sufficient time to properly cleanse and disinfect it after the Negroes have used it.” *Id.* Initially, black swimmers in Highland Park (Pittsburgh) had to provide health certificates, and when that requirement was dropped, black swimmers were threatened and beaten by white swimmers until they left. Interestingly, other pools in Pittsburgh did not have the same problems because they were single-sex pools. *Id.* at 125–32. Ironically, as the integrated single-sex pools became more racially integrated, many became single-race pools, suggesting a general aversion to close contact with blacks by both white men and women. *Id.* at 132.

43. *Id.* at 129.

44. *Id.*

45. Many black women and girls spend a lot of money “straightening” their hair, and chemically treated water undoes these hairstyles easily and quickly; these concerns can limit their participation in water-based activities. See, e.g., Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1115–16 n.180 (2010). Further, swimming with large numbers of strange men, white or black, might also be dangerous for women, especially black women, who were more susceptible to sexual assault. See Victoria C. Olive, *Sexual Assault Against Women of Color*, 1 J. STUDENT RES. 1, 2 (2012). While academic studies of sexual assaults against women in swimming settings are virtually non-existent, a Google search for “sexual assault swimming pool” brings up a multitude of news articles from various locations in the United States reporting sexual assaults of women at or near swimming pools. One study surveyed 1,557 case files of male sex offenders (both child and adult victims) to determine the locations that offenders first meet their victims. Two out of a total of fifty-four locations were water-related (lake and swimming pools), but only three total sex offenders first met their victims at these locations. See Nicole Colombino et al., *Preventing Sexual Violence: Can Examination of Offense Location Inform Sex Crime Policy?*, 34 INT’L J. L. & PSYCHIATRY 160, 163 tbl.1 (2011).

46. WILTSE, *supra* note 37, at 14.

during the 1920s, when public swimming pools were segregated along gender lines.<sup>47</sup> Thus, early twentieth century public swimming pools became overwhelmingly male domains.

As European immigrants became more assimilated and southern blacks migrated to the North, the social boundaries changed, and racial segregation outside the South increased.<sup>48</sup> By the 1920s, most public pools, like public beaches, were racially segregated<sup>49</sup> and remained that way as more public pools were constructed by municipalities throughout the decade and by the federal government during the 1930s.<sup>50</sup> Swimming pools evolved into park-like public spaces designed “to promote family and community sociability.”<sup>51</sup>

White women and men of all classes began to swim together. From the 1920s until the 1950s, “municipal pools served as centers of [white] community life and arenas for public discourse.”<sup>52</sup> Blacks throughout the country were generally excluded by law or custom from public and private recreational centers, especially if they contained swimming pools.<sup>53</sup>

Explaining white resistance to sharing the social space of swimming pools with blacks, Wiltse speculates that it was the “visual and physical intimacy” of swimming pools that made them

47. Cf. *Id.* at 14–17, 25–26. In Baltimore, for example, which had a segregated pool for black swimmers, there were separate hours for males and females, although “mixed” bathing was permitted on some days. The black pools seemed to have no separate days solely for men, but separate days for women. *Famous Hickory Limb Neglected as City's Swimming Pools Open*, BALT. SUN, June 8, 1924, at 18.

48. WILTSE, *supra* note 37, at 106–07. In a few places, like Pittsburgh prior to 1935, it was assumed that working class whites and blacks would be swimming together; issues of integrated swimming arose only where men and women swam together. *Id.* at 132. Although there were multiple causes for the exclusion of blacks from public pools, Wiltse concludes that “gender integration was the most direct and crucial cause of racial segregation at municipal swimming pools.” *Id.*

49. WOLCOTT, *supra* note 25, at 24.

50. *Id.* at 32. Consistent with the times, there was no requirement that public pools funded through the Works Progress Administration (WPA) program be racially integrated. See Marta Gutman, *Race, Place, and Play: Robert Moses and the WPA Swimming Pools in New York City*, 67 J. SOC. ARCHITECTURAL HISTORIANS 532, 532 (2008) (discussing Robert Moses’s handling of WPA pools in New York City in the 1930s). In addition, YMCAs and YWCAs built swimming pools, most of which were segregated. WOLCOTT, *supra* note 25, at 36.

51. WILTSE, *supra* note 37, at 4. The Great Migration of blacks to the North during the early twentieth century increased racial segregation in affected cities. WOLCOTT, *supra* note 25, at 23.

52. WILTSE, *supra* note 37, at 6.

53. Attempts by blacks to use public pool facilities were often met with violence. WOLCOTT, *supra* note 25, at 25 (citing black protests met by violence in Omaha, Nebraska; Los Angeles, California; and Chicago, Illinois).



"intensely contested civic spaces."<sup>54</sup> He argues that gender integration, and the eroticizing of spa-like pools, increased pressure to keep them racially segregated. According to Wiltse, "[r]acial segregation . . . enabled communities to restrict white women's social and sexual choices by limiting their opportunities to meet and form relationships with black men."<sup>55</sup> Thus, a desire of the dominant culture to control the sexuality of white women, as well as racial bias, explains the exclusion of black swimmers from public swimming pools.<sup>56</sup>

Many early efforts by blacks to gain access to public swimming pools focused on securing separate pools rather than integrating all-white pools because, under the separate but equal doctrine approved by the Supreme Court in *Plessy v. Ferguson*,<sup>57</sup> racial segregation in public places was legal.<sup>58</sup> For example, in 1926, Congress passed a bill to build two public swimming pools in Washington, D.C., mandating that these pools be racially segregated.<sup>59</sup> A protest developed, not because the pools were racially segregated, as most black residents were satisfied with that arrangement, but rather because both black and white residents were concerned that there was an insufficient number of pools for the population.<sup>60</sup>

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54. WILTSE, *supra* note 37, at 3.

55. *Id.* at 124.

56. Anti-miscegenation laws also are an example of an attempt to control the sexuality of white women. "W.E.B. Du Bois insisted that 'the race question is at bottom simply a matter of the ownership of women; white men want the right to own and use all women, colored or white, and they resent any intrusion of colored men into this domain.'" PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* 190 (2009).

57. 163 U.S. 537 (1896).

58. WILTSE, *supra* note 37, at 142–43. There were some exceptions. See *Jones v. Newlon*, 253 P. 386 (Colo. 1927) (holding the exclusion of black high school students from swimming classes unlawful under the state constitution); *Patterson v. Bd. of Educ.*, 164 A. 892 (N.J. Sup. Ct. 1933), *aff'd*, 169 A. 690 (N.J. 1934) (finding segregation of black students in swimming classes provided to white students in public high school unlawful); *No Swim Color Line*, *AFRO AM.*, Nov. 23, 1929, at A5 (attempt to segregate black high school students from school swim club at a Bayonne swimming pool challenged and classes moved to the Jewish Center on Staten Island).

59. WILTSE, *supra* note 37, at 143–46.

60. *Id.* at 143–45. Some prominent black "race" leaders like historian Carter G. Woodson and social activist Nannie Burroughs, along with the black newspaper *The Afro American*, objected to segregated pools and encouraged others to refuse to patronize them. *Id.* at 143. Ultimately, problems with this segregated arrangement arose after more blacks moved to the city and into areas far from the "black pools." In one instance, a neighborhood pool was closed until city officials could decide how to handle the problem. *Id.* at 145–46.

### B. 1940s Through 1954

With the end of World War II, many Americans outside the Deep South were increasingly uncomfortable with supporting formal racial segregation laws and policies. In 1948, a federal district judge in a West Virginia case, *Lawrence v. Hancock*,<sup>61</sup> ruled that a swimming pool built with public funds could not be leased to a white private club that refused to admit black residents. Looking at the facts, the court concluded that the private club "was a mere agent or instrumentality" of the City, and a city cannot "provide the ways and means for a private individual or corporation to discriminate against its own citizens."<sup>62</sup>

As Wiltse points out, the court in *Lawrence* did not mandate integrated swimming pools, but required only that blacks be afforded a pool if the City of Montgomery, West Virginia, provided them for whites (in other words, the City had to adhere to the separate but equal principle).<sup>63</sup> Instead, the City kept its one pool closed, not reopening it again until 1961.<sup>64</sup> Despite the limitation contained in the *Lawrence* opinion, the decision was seen as a turning point in efforts to desegregate public pools.<sup>65</sup> Following *Lawrence*, black litigants pressed for access to public pools throughout the northern and Border States.<sup>66</sup> In most of these cases, plaintiffs relied on the Equal Protection Clause of the Fourteenth Amendment to challenge their lack of access to public pools.<sup>67</sup> In the post-WWII, pre-*Brown* era, federal courts

61. 76 F. Supp. 1004 (S.D. W. Va. 1948).

62. *Id.* at 1008-09.

63. WILTSE, *supra* note 37, at 165.

64. *Id.*

65. *Id.*

66. See, e.g., *Valle v. Stengel*, 176 F.2d 697 (3d Cir. 1949) (challenging swimming pool segregation in New Jersey); *Lonesome v. Maxwell*, 123 F. Supp. 193 (D. Md. 1954); *Williams v. Kansas City*, 104 F. Supp. 848 (W.D. Mo. 1952); *Sweeney v. City of Louisville*, 102 F. Supp. 525 (W.D. Ky. 1951); *Draper v. City of St. Louis*, 92 F. Supp. 546 (E.D. Mo. 1950); *Everett v. Harron*, 110 A.2d 383 (Pa. 1955). Newspapers reported other efforts, not all of which relied on courts for relief. See, e.g., *Biased Pools Banned in Kansas City*, AFRO AM., April 19, 1952, at 5; *Pickets Break Down Jim Crow at Pool*, AFRO AM., July 31, 1948, at 4; *Segregation in California Swimming Pool Wiped Out*, AFRO AM., Sept. 3, 1949, at 13; but c.f., *Mayor's Order to Segregate Pools Again Called Setback to Democracy*, AFRO AM., July 2, 1949, at 3 (St. Louis, Missouri, Mayor rescinds plan to integrate public pools after mobs of white youths attack black swimmers); *Ministers Urge Swimming Pools Be Opened to All Citizens*, AFRO AM., Dec. 3, 1949 (York, Pennsylvania, pools closed rather than comply with state law mandating integration).

67. One notable exception was *Everett v. Harron*, where the Pennsylvania Supreme Court relied on a state law guaranteeing "full and equal accommodations" at places of public accommodation. *Everett*, 110 A.2d at 385.

consistently declared racially segregated public swimming pools unconstitutional.<sup>68</sup>

Nevertheless, progress was limited because municipalities with only one public pool, like Montgomery, West Virginia, closed<sup>69</sup> or leased their pool rather than desegregate the facility.<sup>70</sup> Even some larger cities with many pools closed their pools in the face of desegregation lawsuits, arguing that integrated pools could not be operated at a profit,<sup>71</sup> the same rationale later advanced by southern cities post-*Brown*. As a result, by the mid-1950s, the number of public pools in northern and Border States had decreased significantly.<sup>72</sup>

Even privately-owned pools were not entirely immune from lawsuits, since most were open to the general public for a fee, and thus considered places of public accommodation.<sup>73</sup> Post-WWII, many states and municipalities outside the Deep South enacted laws prohibiting discrimination based on race in places of public accommodation.<sup>74</sup> Despite these laws, whites in some states remained resistant to integration efforts. For example, after the passage of the Freeman Civil Rights Act in 1949, many

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68. See, e.g., *City of St. Petersburg v. Alsup*, 238 F.2d 830 (5th Cir. 1956) (affirming a federal district court injunction against municipal segregation of public pools and beaches); *Lagarde v. Recreation & Park Comm'n for Parish of East Baton Rouge*, 229 F. Supp. 379 (E.D. La. 1964) (granting summary judgment in favor of black citizens challenging municipality denial of access to public recreational facilities, including swimming pools); *Willie v. Harris County*, 202 F. Supp. 549 (S.D. Tex. 1962) (granting injunctive relief against County maintaining segregated recreational beach facilities).

69. *Tonkins v. Greensboro*, 175 F. Supp. 476 (M.D.N.C. 1959), *aff'd*, 276 F.2d 890 (4th Cir. 1960).

70. WILTSE, *supra* note 37, at 159.

71. *Alsup*, 238 F.2d at 832 ("It is no answer to say that the beach and pool cannot be operated at a profit on a nonsegregated basis . . ."); *Wood v. Vaughan*, 209 F. Supp. 106 (W.D. Va. 1962), *aff'd sub nom. Thaxton v. Vaughan*, 321 F.2d 474 (4th Cir. 1963) (ordering declaratory judgment that Lynchburg, Virginia, cannot segregate pools); *Gilmore v. Montgomery*, 176 F. Supp. 766 (M.D. Ala. 1959), *modified*, 277 F.2d 364 (5th Cir. 1960) (granting injunction to plaintiffs who sued over segregation of park).

72. WILTSE, *supra* note 37, at 180. Wiltse writes: "[b]eginning in the mid-1950s, northern cities generally stopped building large resort pools and let the ones already constructed fall into disrepair." *Id.*

73. *Smith v. YMCA of Montgomery, Inc.*, 316 F. Supp. 899 (M.D. Ala. 1970), *modified*, 462 F.2d 634 (5th Cir. 1972); *Nesmith v. YMCA of Raleigh*, 273 F. Supp. 502 (E.D.N.C. 1967), *rev'd*, 397 F.2d 96 (4th Cir. 1968) (Title II of the Civil Rights Act of 1964).

74. See STATES' LAWS ON RACE AND COLOR, at v-vii (Pauli Murray ed., 1951) (listing states with laws prohibiting discrimination on the basis of race in places of public accommodation, including California, Colorado, Connecticut, Indiana, Kansas, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Washington, and Wisconsin).

recreational facilities in New Jersey, to circumvent the law and keep blacks out, transformed from privately-operated swimming facilities open to the general public to private swim clubs requiring steep membership fees and checking identification.<sup>75</sup> Segregated privately-operated swimming facilities remained a problem in that state until the 1970s.<sup>76</sup>

A few places like Cincinnati, Ohio, made tentative steps toward integration. Until 1950, the compulsory swimming classes in the City's public high schools were segregated along racial lines when the classes became integrated and voluntary. In response, many white students withdrew from the classes rather than swim with blacks.<sup>77</sup>

Integration was mandated at the federal level. In 1943 and 1944, the War Department issued directives forbidding the assignment of any recreational facility based on race.<sup>78</sup> After the integration of the armed forces in 1948,<sup>79</sup> most military base swimming pools were integrated as well.<sup>80</sup> Other parts of the federal government followed suit. By the 1950s, swimming pools in the District of Columbia, a federal enclave, and pools operated by the National Park Service were also operated on an integrated basis.<sup>81</sup> But following the Supreme Court's decision in *Brown*, which effectively declared racial segregation laws

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75. WOLCOTT, *supra* note 25, at 72-73.

76. *Id.*

77. *Id.* at 96.

78. MORRIS J. MACGREGOR, JR., *INTEGRATION OF THE ARMED FORCES 1940-1965*, at 45 (1981).

79. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

80. In 1954, black-owned and oriented *Ebony Magazine* noted: "[i]n Georgia, some 116 miles from the office of white supremacist Gov. Herman Talmadge, Negroes and whites are eating at the same tables, swimming in the same pools and dancing in the same clubs . . ." *New Army Upsets South's Traditions*, *EBONY*, Sept. 1954, at 16-17. At least one author speculates that the lifestyle of the military made integration of these social sites easier. Service personnel were used to following orders, and once given the order to use the same facility, they followed with minimal incidents. See Charles C. Moskos, Jr., *Racial Integration in the Armed Forces*, 72 AM. J. SOC. 132, 141-42 (1966). Although some bases readily complied with desegregation orders, other resisted. See James L. Hicks, *Benning CO's Orders to Mix Are Ignored*, *AFRO AM.*, June 16, 1951, at 1; James L. Hicks, *Ft. Lee Ends Swimming Pool, Officer's Club J.C.*, *AFRO AM.*, Sept. 22, 1951, at 1; James L. Hicks, *Pope Field Air Base Model of Integration*, *AFRO AM.*, June 9, 1951, at 5 (reporting that bases in North Carolina and Texas were compliant, but South Carolina was not); *Army Maintains Two Pools for GI's at Shaw Air Force Base*, *AFRO AM.*, June 9, 1951, at 5; *Ban on Separate Use of Mich. Army Post Pool Asked*, *AFRO AM.*, Apr. 14, 1951, at 15.

81. *U.S. Parks, Pools for All, Krug Says*, *AFRO AM.*, Aug. 13, 1949, at 13 (reporting the statement of Secretary of the Interior Julius A. Krug to Roy Wilkins, then acting NAACP executive secretary).

unconstitutional, integration of public pools in other places did not proceed as smoothly.

## II. Efforts to Desegregate Swimming Pools Post-Brown

### A. Public Swimming Pools: Baltimore As a Case Study

The litigation to desegregate pools in Baltimore, Maryland illustrates the problem with a civil rights approach. Public pools in Baltimore, an urban and industrial mid-Atlantic city, date back to 1906 when the city opened the all-white Patterson Park swimming pool which looked like a lake with a sandy bottom and beach.<sup>82</sup> There was no swimming facility for black residents until 1919 when the drowning death of a black thirteen-year-old boy led to the construction of an all-black public pool.<sup>83</sup>

The pool, which opened in 1921, was not only separate, but unequal.<sup>84</sup> It was small and shallow with four showers and eight toilets to serve the daily crowds which ranged between 600 and 1,200 people.<sup>85</sup> Nevertheless, the public response was tremendous; sometimes the crowds grew so large that the pool, unable to accommodate demand, had to be closed.<sup>86</sup> As a result, the City's quarter of a million black residents were often forced to swim in shifts.<sup>87</sup> In contrast, Baltimore's approximately 750,000 white residents had six public swimming pools available for their use, whereas Baltimore's black residents only had one.<sup>88</sup>

In 1953, the highly publicized drowning of another black thirteen-year-old boy generated efforts within the black Baltimore community to press City officials to desegregate the public

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82. The swimmers, like in the northern pools, were segregated by sex, with girls and women relegated to swimming two days a week. Many swimmers also used the pool for their "weekly baths." Laura Wexler, *Swimming in the City*, BALT. STYLE MAG., July/Aug. 2008, at 80–81.

83. Letters to the Baltimore Mayor attributed the drowning of the teenager to the lack of swimming facilities for black boys, and the City moved to construct a pool for black Baltimoreans. *Do We Need Swimming Pools?*, AFRO AM., June 24, 1916, at 4; *Swimming Pool Now in Sight*, AFRO AM., Aug. 29, 1919, at 8. Prior to this incident, pleas for a public swimming facility went largely unheeded. *To Hold Meeting in Interest of Swimming Pools*, AFRO AM., Jan. 13, 1912, at 3.

84. Wexler, *supra* note 82, at 80–81. The pool for black swimmers at Druid Hill Park is reputed to be the first municipal pool for blacks in the nation. *Municipal Swimming Pools in City Parks Open Saturday*, BALT. SUN, June 8, 1921, at 22.

85. Wexler, *supra* note 82, at 80–81. Like the white pools, males and females swam on separate days. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

swimming pools.<sup>89</sup> The drowned boy had been swimming with another black boy, and two white friends, in the Patapsco River.<sup>90</sup> Although he lived near the white-only Clifton Park Pool, the four friends could not swim together there because of the racial restrictions.<sup>91</sup> Thus, they were consigned to the unguarded and treacherous river. Shortly thereafter, the local NAACP filed *Isaacs v. Mayor and City Council of Baltimore*, challenging the City's segregated public pools.<sup>92</sup>

Mirroring earlier swimming pool litigation, the City, in support of segregation, cited unspecified fears about "intimate" physical contact between blacks and whites and the potential for violence that integrated swimming poses.<sup>93</sup> The *Afro American*, a local black-owned newspaper, reported that an attorney for the City "argu[ed] that swimming involved physical contact [between whites and blacks,] and this was undesirable."<sup>94</sup> When the trial judge asked whether there was a "pressing need" for segregation, the City attorney replied: "[t]here must be segregation in the fields of intimate contact or there may be trouble."<sup>95</sup>

Subsequently, the Baltimore pool case was consolidated with two beach desegregation cases filed by the NAACP a few months after the Supreme Court decided *Brown*, but the federal district judge refused to order the facilities desegregated, reasoning that the *Brown* decision only applied to segregated public schools, and state law still mandated racial segregation.<sup>96</sup> The two beach cases, *Lonesome v. Maxwell* and *Dawson v. Mayor and City Council of Baltimore*, but not *Isaacs*, were appealed to the United States Court of Appeals for the Fourth Circuit, which reversed the

89. Buddy Lonesome, *Boy, 13, Drowns for Lack of Pool*, AFRO AM., Aug. 8, 1953, at 3. In addition, a letter sent two weeks before to the *Baltimore Afro American* sent by twenty-year-old black high school graduate Mamie Livingstone, who lived in the same area, complained about blacks' lack of access to the Clifton Park pool and "hastened" the lawsuit. *Her Letter Hastened Suit on City's Pools*, AFRO AM., April 2, 1955, at 8.

90. Lonesome, *supra* note 89, at 3.

91. Wexler, *supra* note 82, at 80-81.

92. Opinion re Plaintiff's Motion for Further Relief on Motion for Judgment on the Pleadings, *Isaacs v. Mayor of Baltimore*, Civil No. 6879 (D. Md. June 20, 1955) (National Archives, RG 21.22).

93. *Id.*

94. *Decision Awaited in Md. Pool Cases*, AFRO AM., July 3, 1954, at 8.

95. *Id.*

96. *Lonesome v. Maxwell*, 123 F. Supp. 193, 196-97, 205 (D. Md. 1954). There were no further proceedings until May 29, 1954, twelve days after the United States Supreme Court decision in *Brown*, when the plaintiffs moved for a judgment on the pleadings. Opinion re Plaintiff's Motion for Further Relief, *supra* note 92, at 1.

district court in a *per curiam* decision.<sup>97</sup> The United States Supreme Court affirmed in 1955 without an opinion,<sup>98</sup> and twelve days later the Baltimore Park Board announced that the City's public pools would be opened on an integrated basis.<sup>99</sup>

Southern reaction to the Supreme Court's affirmation of the beach cases in *Dawson* "was immediate and hostile."<sup>100</sup> Florida's Attorney General declared that "the idea of children of mixed races in swimming pools is against the public attitude."<sup>101</sup> His statement is reflective of what happened after the desegregation of Baltimore's pools. Although theoretically open to all races, the pools were never really integrated. With the exception of a few pools in overwhelmingly white neighborhoods, the Court's ruling merely transferred the use of the pools from white to black Baltimoreans.<sup>102</sup> White swimmers fled to private pools quickly organized by neighborhood civic groups.<sup>103</sup> Many of the neighboring commercially operated recreational parks with swimming facilities remained open but segregated into the 1960s.<sup>104</sup>

What happened in Baltimore mirrored what happened throughout the northern and Border States between 1945 and 1955 when blacks pushed to desegregate city swimming pools. Thus, pool closings in the face of racial integration were a national phenomenon. In this respect, blacks in Baltimore were luckier

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97. *Dawson v. Mayor of Baltimore*, 220 F.2d 386 (4th Cir. 1955) (*per curiam*). Unlike the parties in *Dawson* and *Lonesome*, the plaintiffs in *Isaacs* refused to stipulate that the challenged facilities were substantially equal for whites and blacks, and thus the district judge denied the motion for judgment on the pleadings because the issue of whether the facilities were unequal remained unresolved. Opinion re Plaintiff's Motion for Further Relief, *supra* note 92, at 2. The Fourth Circuit said that *Brown* effectively overruled the earlier Fourth Circuit cases upholding segregated public recreational facilities. *Dawson*, 220 F.2d at 387. Following the Fourth Circuit's ruling, and before the Supreme Court affirmed, the NAACP asked the federal district judge in the consolidated case who ruled against the plaintiffs to enter a judgment on behalf of the plaintiff in the *Isaacs* case. *NAACP Asks Court to Rule on City Pools*, *AFRO AM.*, June 4, 1955, at 22.

98. *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (mem.).

99. 'Swim Anywhere,' *Rules Park Board*, *AFRO AM.*, Nov. 26, 1955, at 1; see also WILTSE, *supra* note 37, at 156–57.

100. Darryl Paulson, *Stay Out, The Water's Fine: Desegregating Municipal Swimming Facilities in St. Petersburg, Florida*, *TAMPA BAY HIST.*, Fall/Winter 1982, at 6, 8, available at [http://scholarcommons.usf.edu/flstud\\_pub/2517](http://scholarcommons.usf.edu/flstud_pub/2517) (recounting the reactions of the Florida Governor and Attorney General, as well as Georgia's United States Senator Herman Talmadge, Georgia's governor, and Georgia's attorney general).

101. *Id.*

102. WILTSE, *supra* note 37, at 157.

103. *Id.* at 180.

104. *Id.* at 157–59.

than most blacks throughout the country—the city pools, although severely underfunded and susceptible to budget cuts, continue to operate to this day offering access to all swimmers.

After *Brown*, the focus of swimming pool litigation shifted to the Deep South. There was a flurry of cases decided between 1955 and 1962. The federal courts in these cases, as had the northern courts earlier, consistently declared racially segregated public pools unconstitutional, rejecting arguments that integrated pools could not be operated at a profit<sup>105</sup> or maintained without threats to the public peace.<sup>106</sup>

As the federal district judge in *Wood v. Vaughn*, a Virginia case, acknowledged, many southern cities, like their northern counterparts, tended to close their pools when threatened with integration.<sup>107</sup> Southern federal trial courts permitted, and even encouraged, these closures.<sup>108</sup> For example, the federal district judge in *Shuttlesworth v. Gaylord*, an Alabama case, in ordering desegregation, reminded the city defendant that it did not have to operate recreational facilities.<sup>109</sup> In a few cases, litigants, like those in Baltimore, were successful in forcing integration after protracted litigation, but the results were usually less than satisfactory. The few desegregated pools remained largely single-race because whites abandoned them rather than share the pools with blacks.<sup>110</sup>

### B. The Supreme Court and the Closing of Public Swimming Pools

Prior to 1971, the Supreme Court remained silent on the pool closure issue. Then the Court in *Palmer v. Thompson* directly addressed whether closing the Jackson, Mississippi municipal pools "in whole or in part to avoid desegregation . . . was a denial of equal protection of the laws."<sup>111</sup> Five members of the Court, no

105. See, e.g., *City of St. Petersburg v. Alsup*, 238 F.2d 830, 832 (5th Cir. 1956).

106. *Shuttlesworth v. Gaylord*, 202 F. Supp. 59, 63 (N.D. Ala. 1961), *aff'd sub nom.*; *Hanes v. Shuttlesworth*, 310 F.2d 303 (5th Cir. 1962).

107. *Wood v. Vaughan*, 209 F. Supp. 106, 112 (W.D. Va. 1962).

108. *Lagarde v. Recreation & Park Comm'n*, 229 F. Supp. 379, 383 (E.D. La. 1964).

109. See *Shuttlesworth*, 202 F. Supp. at 63.

110. In some instances, whites protested or rioted as a result of swimming pool desegregation. The 1949 integration of St. Louis pools led to a race riot that left twelve people injured. WILTSE, *supra* note 37, at 169–80; see also Edwin B. Henderson, *Swimming Pool Disturbances in Capital Laid at Door of Recreation Officials*, *AFRO-AM.*, Jul. 9, 1949, at C5.

111. *Palmer v. Thompson (Palmer III)*, 403 U.S. 217, 219 (1971).



doubt mindful of white sentiment throughout the nation, answered no.

Like the Baltimore case, litigation was protracted. It took almost a decade to resolve the *Palmer* case, which started in 1962 when, emboldened by the park desegregation decisions following *Brown*, black plaintiffs took the City of Jackson, Mississippi, to federal court for operating segregated recreational facilities, including five segregated public swimming pools: four for whites and one for blacks.<sup>112</sup> While the federal district judge, like other federal judges throughout the South, conceded that the city pools could not be operated on a racially segregated basis, he refused to order the City to keep the pools open and operating on an integrated basis.<sup>113</sup> City officials subsequently opened the zoo, parks, and other recreational facilities on an integrated basis, but closed the swimming pools, citing personal safety and the fear that the pools could not be operated at a profit on an integrated basis.<sup>114</sup> Government hostility to racial integration was apparent. Fear of social intimacy undoubtedly prompted the city to remove the benches from the city zoo and to close the public restrooms in the Municipal Court Building.<sup>115</sup>

The plaintiffs filed another lawsuit, this time to enjoin the City from closing the pools, but again the federal district judge dismissed their complaint, saying that there is no "constitutional right to swim in a public pool."<sup>116</sup> The judge reasoned that since the pools were closed to everyone, "any issue as to discrimination becomes moot."<sup>117</sup> The Court of Appeals for the Fifth Circuit sitting en banc affirmed, dividing 7-6.<sup>118</sup> The majority distinguished operating swimming pools from what it characterized as "essential" governmental functions like running elections or financing public schools.<sup>119</sup> This clarification was necessary to explain why Supreme Court precedents like *Griffin v.*

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112. Technically, only four of the pools were city-owned; the fifth pool in Leavell Woods Park was leased by the city. *Id.* at 251.

113. *Clark v. Thompson*, 206 F. Supp. 539, 542 (S.D. Miss. 1962), *aff'd*, 313 F.2d 637 (5th Cir. 1963).

114. *Palmer v. Thompson (Palmer II)*, 419 F.2d 1222, 1224-25 (5th Cir. 1969).

115. *Id.* at 1231 (Wisdom, J., dissenting).

116. *Palmer v. Thompson (Palmer I)*, 391 F.2d 324, 326 (5th Cir. 1967) (citing *Tonkins v. City of Greensboro*, 162 F. Supp. 549 (D.N.C. 1958)).

117. *Id.* (citing *Clark v. Flory*, 237 F.2d 597 (4th Cir. 1956)); *Wood v. Vaughan*, 209 F. Supp. 106 (W.D. Va. 1962); *Walker v. Shaw*, 209 F. Supp. 569 (W.D.S.C. 1962).

118. *See Palmer II*, 419 F.2d at 1228.

119. *Id.* at 1225.

*County School Board*,<sup>120</sup> prohibiting closing public schools in the face of an integration order did not apply to the City's action. With regard to the pool closing, Judge Rives, writing for the majority in language reminiscent of *Plessy v. Ferguson*, reasoned:

It cannot be disputed that were the badge of equality, here the ability to swim in an unsegregated pool, to be replaced by a badge implying inequality—segregated pools, the municipality's action could not be allowed. However, where the facilities around which revolve the status of equality are removed from the use and enjoyment of the entire community, we see no withdrawal of any badge of equality.<sup>121</sup>

Seeing the parallels between *Palmer* and *Plessy*, Judge John Minor Wisdom, a Republican and liberal member of the court, writing for the dissenters, responded: "[j]ust as certainly as did the Jim Crow law considered in *Plessy v. Ferguson*, the swimming pool closing proceeds on the ground that Negroes are 'so inferior and degraded that they cannot be allowed' to use public swimming pools with white people."<sup>122</sup> Judge Wisdom argued that there is ample precedent in support of the plaintiffs' claim that the mere equal application of the law does not necessarily result in equality under the law, citing the Court's striking down of miscegenation laws as well as laws that required that the race of candidates appear on all nomination papers and ballots in all elections despite the equal application of these laws to blacks and whites.<sup>123</sup> He opined that "[t]he City's action tends to separate the races, encourage private discrimination, and raise substantial obstacles for Negroes asserting the rights of national citizenship created by the Wartime Amendments."<sup>124</sup>

The United States Supreme Court in a 5–4 decision affirmed the Fifth Circuit's ruling.<sup>125</sup> The arguments advanced by the City generally followed the reasoning of the Fifth Circuit majority,<sup>126</sup>

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120. *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964).

121. See *Palmer II*, 419 F.2d at 1227. In *Plessy*, Justice Brown for the majority wrote:

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

*Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

122. See *Palmer II*, 419 F.2d at 1233.

123. *Id.* at 1232 (citing *Loving v. Virginia*, 388 U.S. 1 (1967) and *Anderson v. Martin*, 375 U.S. 399 (1963)).

124. *Id.* at 1236.

125. *Palmer III*, 403 U.S. 217 (1971).

126. *Id.* at 219–20. The City advanced five arguments. First, it reasserted the argument accepted by the Fifth Circuit that there was no constitutional issue

and the Supreme Court's response mirrored the Fifth Circuit's majority. Alabama-born Justice Hugo Black, in an opinion joined by Justices Stewart, Harlan, Burger, and Blackmun, wrote that the government does not have an affirmative duty to operate public swimming pools.<sup>127</sup> Reminiscent of *Plessy* in its denial of the social equality aspect of the equal protection guarantee, Justice Black said that since both blacks and whites were denied access to the pool, there was no equal protection violation.<sup>128</sup> Justice Blackmun in his concurring opinion added that public swimming pools were "nice-to-have but not essential."<sup>129</sup>

Like the dissenters on the Fifth Circuit, Justice White, joined by Justices Douglas, Brennan, and Marshall, took issue with the majority's reasoning, arguing that by closing, rather than integrating its pools, the City was "expressing its official view that Negroes are so inferior that they are unfit to share with whites this particular type of public facility[,] . . . long a feature of the [C]ity's segregated recreation program."<sup>130</sup> Echoing Judge

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under the Thirteenth or Fourteenth Amendments because there was no constitutional right to swim in a public pool. Second, the City argued that there was no equal protection violation because all residents were treated equally since the pools were closed to everyone. Third, the City argued that none of the Supreme Court's equal protection jurisprudence prohibited it from closing the pools to everyone. Fourth, the City denied that the effect of the pool closings were more harmful to black residents, saying that there was no evidence to support this claim. Lastly, the City denied petitioner's claim that the pool closings fostered private discrimination, saying that there was no evidence that more private pools were operating since the closures. Brief of Respondents, *Palmer III* (No. 107), 1970 WL 122624.

127. *Palmer III*, 403 U.S. at 220 ("It should be noted first that neither the Fourteenth Amendment nor any Act of Congress purports to impose an affirmative duty on a State to begin to operate or to continue to operate swimming pools.").

128. *Id.*

129. *Id.* at 229. According to legal scholar Deborah Malamud, Justice Blackmun did not even view *Palmer III* as a race case and was reluctant to punish the City for past segregation. Deborah C. Malamud, *Intuition and Science in the Race Jurisprudence of Justice Blackmun*, 26 HASTINGS CONST. L.Q. 73, 87 (1998). According to Malamud, *Palmer III* was a difficult case for him, as a newly elevated member of the Court. He even discussed with Justice Black whether the *Palmer III* decision was consistent with *Orleans Parish School Board v. Bush*, 365 U.S. 569 (1961). *Id.* at 86–87. See also Library of Congress, Thurgood Marshall Papers, Container 70 File 1, Black Memorandum to Justice Blackmun, Feb. 16, 1971. In *Bush*, the Court found that the State of Louisiana could not close all public schools before integration. Only after Black assured him that *Bush* permitted municipalities not to offer services at all for any reason, did Blackmun join the majority. Malamud at 86–87. He agreed with the other members of the majority that closing the pools for economic reasons did not signal black inferiority since whites were also affected. See *Palmer III*, 403 U.S. at 229.

130. *Palmer III*, 403 U.S. at 266 (White, J., dissenting). He also cites inflammatory statements by Jackson City officials, describing the pool closure strategy. *Id.* at 250. Justice Marshall, in a separate dissent, added that just

Wisdom's dissenting opinion in the court below, he wrote: "[j]ust as certainly as did the Jim Crow law considered in *Plessy v. Ferguson*, the swimming pool closing proceeds on the ground that Negroes are 'so inferior and degraded that they cannot be allowed' to use public swimming pools with white people."<sup>131</sup>

The majority opinion in *Palmer* reflected the post-WWII consensus of courts throughout the nation about integrated swimming pools. Equality for black Americans did not extend to social situations involving unconsented physical closeness. While racially segregated public swimming pools were unconscionable, the courts were unwilling to force whites to swim with blacks in public pools; and local governments had no constitutional duty to provide publicly-financed swimming facilities patronized only by blacks.

Tragically, as the dissenters in the Fifth Circuit opinion in *Palmer* opined, the push to desegregate public pools proved costly for black litigants; it often meant the loss of their *segregated* pools.<sup>132</sup> Whites, on the other hand, were more fortunate. Wiltse writes:

Although many whites abandoned desegregated municipal pools, most did not stop swimming. Instead, they built private pools, both club and residential, and swam in them instead. Racial integration was not the only cause of the dramatic proliferation of private swimming pools after the early 1950s, but it was a direct and immediate cause.<sup>133</sup>

### C. *The Attack on Privately-Owned Pools*

As public pools closed and white swimmers fled to privately-operated facilities, efforts by blacks to gain access to swimming facilities shifted to the privately-operated all-white swimming clubs. Litigants used a variety of legal theories including Title II, the public accommodation section of the Civil Rights Act of 1964, a comprehensive civil rights bill that covered, among other things, discrimination based on race, ethnicity, national origin, religion,

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because the action by the City appeared to have an equal effect on all citizens did not mean that the pool closing is not discriminatory. *Id.* at 271 (Marshall, J., dissenting). He drew a clear parallel between the *Brown* decision and *Palmer III*, arguing that swimming pools have the same protection under the Constitution as public schools. *Id.* at 272.

131. *Palmer II*, 419 F.2d 1222, 1233 (5th Cir. 1969) (Wisdom, J., dissenting).

132. In his dissent, Judge John Minor Wisdom wrote that closing the pools sent a bitter message to black Jacksonians: "the price of protest is high" and even includes the "risk [of] losing . . . *segregated* public facilities." *Id.* at 1236 (emphasis added).

133. WILTSE, *supra* note 37, at 180.

and sex in places of public accommodation.<sup>134</sup> The congressional record is clear that the national legislature intended the public accommodation provision to reach all-white privately operated swimming clubs.<sup>135</sup>

The courts in the Title II private club cases developed a fairly stringent standard.<sup>136</sup> The easiest cases involved sham clubs whose admission process was solely race-based,<sup>137</sup> or clubs whose membership was large and not selective.<sup>138</sup> The key factor

134. 42 U.S.C. § 2000a (a)-(e) (2006).

135. During the congressional hearings, for example, Representative Samuel Stratton (D-NY) cited as evidence that whites would willingly associate with blacks, even in swimming pools, and a contemporaneous *Harper's Magazine* article on the military's successful desegregation effort. 109 CONG. REC. 17, 315 (1963) (quoting Ruth Brecher & Edward Brecher, *The Military's Limited War Against Segregation*, HARPER'S MAG., Sept. 1963, at 79-92). Among the many problems discussed during these hearings was how Mexican immigrant laborers in Slaton, Texas, were given access to community swimming pools. 109 CONG. REC. 17, 564-66 (1963) (statement of Sen. Williams). There was discussion about how the proposed legislation would prohibit discrimination at "private swimming pools" where segregation or exclusion is "required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof." H.R. REP. NO. 88-914 (1964), reprinted in 1964 U.S.C.C.A.N. 2391, 2449. Congress also discussed how "[b]eaches, swimming pools, . . . and similar places of accommodation and amusement have . . . been closed to [non-white] foreign officials." *Id.* at 2493. Thus, some members of Congress thought that Title II, the public accommodation section of the Civil Rights Act of 1964, would reach many of the privately-operated all-white swimming clubs.

136. See *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203 (D. Conn. 1974) (synthesizing cases decided up to that point). According to that court, the factors in determining what constitutes a private club under Title II are:

(a) the selectiveness of the group in the admission of members, . . . (b) the existence of formal membership procedures, . . . (c) the degree of membership control over internal governance, particularly with regard to new members, . . . (d) the history of the organization, . . . (e) the use of club facilities by non-members, . . . (f) substantiality of dues, . . . (g) whether the organization advertises, . . . [and] (h) the predominance of profit motive.

*Id.* at 1203 (citing *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973)); see also *Daniel v. Paul*, 395 U.S. 298 (1969); *Nesmith v. YMCA of Raleigh*, 397 F.2d 96 (4th Cir. 1968); *Stout v. YMCA of Bessemer*, 404 F.2d 687 (5th Cir. 1968); *United States v. Jordan*, 302 F. Supp. 370 (E.D. La. 1969); *United States v. Jack Sabin's Private Club*, 265 F. Supp. 90 (E.D. La. 1967); *Williams v. Rescue Fire Co.*, 254 F. Supp. 556 (D. Md. 1966).

137. See, e.g., *Tillman*, 410 U.S. 431 (community swimming pools that only admitted whites); *United States v. Clarksdale King & Anderson Co.*, 288 F. Supp. 792, 795 (N.D. Miss. 1965) (citing 110 CONG. REC. 13, 697 (1964)).

138. *Nesmith*, 397 F.2d at 101 (4th Cir. 1968) (stating YMCA is not a private club; private clubs tend to have limited membership and admission standards); *Bradshaw v. Whigham*, 11 Race Rel. L. Rep. 934, 935-36 (S.D. Fla. 1966) (large membership and insubstantial dues); *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 YALE L.J. 1441 (1975) (exploring how a 1968 case used the Civil Rights Act of 1866 to spotlight the racial discrimination at private clubs). Associations whose members never met or made

considered by courts is "whether, without regard to race, the club's membership policies and practices manifest '[a] plan or purpose of exclusiveness.'" <sup>139</sup> Only rarely were private club claims sustained. <sup>140</sup> Nevertheless, few Title II suits challenging segregated swimming sites were filed. One reason advanced for the paucity of Title II pool cases is that, historically, most swimming pools and beaches open to the public were owned by municipal or county governments. In those cases, plaintiffs tended to rely almost exclusively on the Fourteenth Amendment for vindication of their civil rights. <sup>141</sup>

By the late twentieth century, public swimming pools, and many privately-operated pools, whether public accommodations or not, were *nominally* open to all races. But, as Wiltse opines: "[m]unicipal swimming pools are becoming endangered in the United States. . . . [S]uburban communities are generally choosing to build 'water theme parks' rather than traditional pools." <sup>142</sup> Most urban non-white families no longer have many opportunities to swim. This pleasure is reserved for the more affluent and mostly white families.

Today, private swim clubs are quite popular in the northern states. <sup>143</sup> There usually are categories of membership, such as summer membership or full membership, which includes voting

decisions about operations were also treated as sham clubs. *Wright v. Cork Club*, 315 F. Supp. 1143, 1155 (S.D. Tex. 1970).

139. *Wright v. Salisbury Club, Ltd.*, 479 F. Supp. 378, 381 (E.D. Va. 1979). Courts also looked at whether the membership controlled the use and operation of the club. *Cork Club*, 315 F. Supp. at 1153. The court also looked at the original intent behind the formation of the club. *United States v. Landsdowne Swim Club*, 713 F. Supp. 785, 802 (E.D. Pa. 1989); *United States v. Nw. La. Rest. Club*, 256 F. Supp. 151, 152-53 (W.D. La. 1966).

140. See *Evans v. Laurel Links, Inc.*, 261 F. Supp. 474, 477 (E.D. Va. 1966) (dictum; although the golf course must accept black players and spectators, the golf association with seventy-five members, not a party defendant, would be exempt); *Public Accommodations Laws and the Private Club*, 54 GEO. L.J. 915 (1966) (describing similar cases applying state laws); James P. Murphy, Jr., *Public Accommodations: What Is a Private Club?*, 30 MONT. L. REV. 47 (1968); *The Private Club Exemption to the Civil Rights Act of 1964: A Study in Judicial Confusion*, 44 N.Y.U. L. REV. 1112 (1969).

141. Donald T. Kramer, Annotation, *Validity, Construction, and Application of § 201(b)(3) and Related Provisions of the Civil Rights Act of 1964 (42 USC § 2000a(b)(3), Prohibiting Discrimination or Segregation in Motion-Picture Houses, Theaters, Concert Halls, Sports Arenas, Stadiums, or Other Places of Exhibition or Entertainment*, 7 A.L.R. Fed. 415, at § 8 (1971).

142. WILTSE, *supra* note 37, at 213.

143. "With the exception of a thin band of high participation along the Southeast coast of Florida, swimming is a predominantly Northern activity." Donald W. Hastings et al., *Drowning in Inequalities: Swimming and Social Justice*, 36 J. BLACK STUD. 894, 909 (2006).

rights and partial ownership, and categories depending on whether other facilities like tennis courts and golf courses are available.<sup>144</sup> Median income for participating members often falls between the top 20% to the top 5% of families in the United States.<sup>145</sup> Members are overwhelmingly white and highly educated.<sup>146</sup> These families “all believe that swimming ability [is] a parental obligation [and] . . . only a ‘foolish parent’ would not provide their child the opportunity to swim.”<sup>147</sup>

Participation in swimming, especially in the context of swim clubs, is seen as contributing to the attainment of a healthy lifestyle and a physically active body—“visible markers of more affluent, dominant groups in society.”<sup>148</sup> But these swim clubs, as the Valley Swim Club incident illustrates, are neither located in urban non-white areas nor welcoming to non-whites from lower socioeconomic communities.

More importantly, swimming inequality for blacks exists across class lines. Even when blacks gain access to these clubs, they may not be welcomed. A study of middle-class black Americans in major cities throughout the nation conducted between 1988 and 1990 to determine racial barriers that still exist reported a disturbing anecdote.<sup>149</sup> A black middle-class man who lived with his family in an “elite white [Southwest] suburb” took his ten-year-old daughter to the neighborhood swimming pool where over 200 children, all white, were swimming.<sup>150</sup> When the man’s ten-year-old black daughter entered the pool, a white boy immediately “called her a ‘nigger.’ Then . . . a ‘motherfucker’ and told her to ‘get out of the god-damn pool.’”<sup>151</sup> The father, after speaking with the boy, had to secure the assistance of the lifeguard to remove the offending child and protect his daughter from further assaults.<sup>152</sup> Standing alone, this incident might seem abhorrent. But as the Valley Swim Club incident twenty years later suggests, the boy was merely articulating attitudes some white Americans still model for their children. Despite decades of

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144. Jamie R. DeLuca, *Swim Club Membership and the Reproduction of Happy, Healthy Children*, 5 QUALITATIVE RES. IN SPORT, EXERCISE & HEALTH 58, 66 (2013).

145. *Id.* at 65.

146. *Id.*

147. *Id.* at 66.

148. *Id.* at 61.

149. Joe R. Feagin, *The Continuing Significance of Race: Antiracist Discrimination in Public Places*, 56 AM. SOC. REV. 101–08 (1991).

150. *Id.* at 107.

151. *Id.* at 107–08.

152. *Id.* at 108.

litigation, legislation and protest, black Americans are still drowning in segregation.

As the foregoing review of case law illustrates, anti-discrimination law has been of limited usefulness in securing equal access to publicly- and privately-operated swimming facilities. The civil rights approach to equal access to public swimming facilities failed because it was grounded in constitutional jurisprudence which required nominal adherence to formal rather than substantive equality and because the associational rights of white Americans were more valued by the courts than the rights of black Americans. Resistance to swimming with blacks remains strong among whites more than fifty years after *Brown*.

A lesson learned from the Civil Rights Era is that laws cannot force people to associate with one another at swimming pools. The civil rights approach, using the Equal Protection Clause of the Fourteenth Amendment to challenge *de jure* racial segregation, proved successful in securing rights deemed "fundamental," like the right to marry without regard to race, and others, like integrated public schools, deemed by the Supreme Court in *Brown* as "important."<sup>153</sup> Swimming, however, is seen as a leisure-time activity divorced from its health aspects like combating drowning and obesity.

A consequence of employing the civil rights approach to equalizing access to pools for blacks was the decline of municipal pools and the rise of private swim clubs for more affluent, overwhelmingly white Americans. Ironically, those groups for whom public swimming pools were initially created, working class and impoverished families in densely populated urban areas, are today the groups with the most limited access to swimming facilities,<sup>154</sup> although poor whites have slightly better access than blacks and Latinos.<sup>155</sup>

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153. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

154. Hastings et al., *supra* note 143, at 912.

155. See *id.* at 908 ("[B]eing Black reduces the odds of participation in swimming by approximately [sixty percent], even while adjusting for age, sex, and household income."); see also Lisa M. Powell et al., *Availability of Physical-Activity Related Facilities and Neighborhood Demographic and Socioeconomic Characteristics: A National Study*, 96 AM. J. PUB. HEALTH 1676, 1679 (2006) (showing that fewer physical-activity related facilities in general, including pools, exist in lower-income areas and in neighborhoods with high proportions of racial and ethnic minorities even when income is controlled for); Gail H. Ito, *Examining the Hidden Curriculum in Water Safety Education for African Americans* 56–61 (May 2008) (unpublished Ph.D. dissertation, Northern Illinois University).



While the long-term consequences of the *Plessy* decision on the lives and fortunes of black Americans are well-recognized,<sup>156</sup> the long-term consequences of the Court's somewhat analogous decision in *Palmer* are not as fully appreciated. Under the civil rights approach to swimming equality, black parents in urban areas are unable to fulfill their parental obligation to teach their children to swim for lack of facilities. As a consequence, they and their children are at greater risk of drowning, and lack of exercise opportunities generally contributes to childhood obesity and a lifetime of poor health. Thus, swimming pool inequality is a public health issue. The rest of this Article explores whether adopting a public health approach to the problem might result in greater access to swimming facilities for all Americans.

### III. Impact on the Health of Black and Brown Americans

Swimming pools evolved out of the public bath movement of the late nineteenth and early twentieth century.<sup>157</sup> The driving concern of the movement was the health of the public, especially the most impoverished sectors of the community.<sup>158</sup> The focus was on cleanliness and later on healthy exercise to help overcrowded urban communities cope on hot summer days.<sup>159</sup> Today these same communities, now primarily non-white, suffer from a lack of safe places to exercise. As a result, obesity and drowning rates are more prevalent.<sup>160</sup> This section briefly describes the health consequences of disparities in swimming pool access.

#### A. Obesity and Lack of Exercise in Racial Minority Communities

Although obesity is a nationwide problem among adults in the United States, non-Hispanic blacks, followed by Mexican-Americans, have significantly higher age-adjusted rates of obesity than non-Hispanic whites.<sup>161</sup> Some studies link higher body mass

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156. See, e.g., *Brown*, 347 U.S. at 494–95, n.11 (citing much authority, including court cases and studies, for the proposition that school segregation had negative effects on blacks as a group).

157. WILLIAMS, *supra* note 38, at 35; WILTSE, *supra* note 37, at 9.

158. WILLIAMS, *supra* note 38, at 35.

159. *Id.*

160. See Katherine M. Flegal et al., *Prevalence of Obesity and Trends in the Distribution of Body Mass Index Among US Adults, 1999–2010*, 307 JAMA 491, 493 tbl.2 (2012).

161. See *id.* The age-adjusted rate of obesity for black Americans is 49.5%, 40.4% for Mexican-Americans, and 39.1% for all Hispanics. *Id.* In contrast the obesity rate for whites is 34.3%. *Id.*

indices to food insecurity (living in hunger or fear of starvation)<sup>162</sup> and the consumption of unhealthy food caused by lack of access to fresh foods.<sup>163</sup> But for non-Hispanic black and Mexican-American men, the rates of obesity are proportional to amounts of income—in other words, higher income black and Mexican-American men are more likely to be obese.<sup>164</sup> Thus, factors other than fear of starvation and lack of access to fresh food contribute to obesity in these groups.

A contributing factor to obesity is lack of exercise.<sup>165</sup> The populations considered more vulnerable to obesity are likely to have inadequate access to city resources that promote exercise, like safe, walkable streets and public facilities like neighborhood parks.<sup>166</sup> This population also tends to live disproportionately in neighborhoods with higher crime rates.<sup>167</sup> Thus, a lack of exercise opportunity and physical activity which contributes to obesity may be a byproduct of unsafe neighborhoods that also lack adequate exercise facilities.

162. See, e.g., Stephanie B. Jilcott et al., *Associations Between Food Insecurity, Supplemental Nutrition Assistance Program (SNAP) Benefits, and Body Mass Index Among Adult Females*, 111 J. AM. DIETETIC ASS'N 1741, 1741 (2011) (finding that "[m]ean BMI was significantly greater among women receiving [less than] \$150 in SNAP benefits per household member vs those receiving [greater than or equal to] \$150 in benefits per household member" and that "provision of adequate SNAP benefits per household member might partially ameliorate the negative effects of food insecurity on BMI"). Rates of food insecurity are also higher in Hispanic and black Americans than for Americans of other races. Patrick H. Casey et al., *The Association of Child and Household Food Insecurity with Childhood Overweight Status*, 118 PEDIATRICS e1406, e1407 (2006), available at <http://www.pediatricsdigest.mobi/content/118/5/e1406.full.pdf+html>.

163. See *supra* note 162 and accompanying text.

164. Cynthia L. Ogden et al., *OBESITY AND SOCIOECONOMIC STATUS IN ADULTS: UNITED STATES, 2005–2008*, NAT'L CTR. FOR HEALTH STATISTICS 1 (2010), available at <http://www.cdc.gov/nchs/data/databriefs/db50.pdf>.

165. Divya Siddarth, *Risk Factors for Obesity in Children and Adults*, 61 J. INVESTIGATIVE MED. 1039, 1039 (2013).

166. See Bethany B. Cutts et al., *City Structure, Obesity, and Environmental Justice: An Integrated Analysis of Physical and Social Barriers to Walkable Streets and Park Access*, 69 SOC. SCI. & MED. 1314, 1314–15 (2009). A study of southern California recreational programs found that the majority of those programs are centered away from formal city parks. As a result, urban areas with low-income and minority residents with access to parks do not have access to these programs and are disadvantaged with regard to provision of recreational opportunities. See Nicholas Dahmann et al., *The Active City? Disparities in Provision of Urban Public Recreation Resources*, 16 HEALTH & PLACE 431, 431 (2010).

167. Cutts et al., *supra* note 166, at 1320. A survey of Chicago neighborhoods found a significant relation between lower physical activity in urban children and unsafe or disordered neighborhoods (i.e., lack of safe places to play outside). See Beth E. Molnar et al., *Unsafe to Play? Neighborhood Disorder and Lack of Safety Predict Reduced Physical Activity Among Urban Children and Adolescents*, 18 AM. J. HEALTH PROMOTION 378, 384 (2004).

Urban black and Latino children are especially at risk for lack of exercise opportunities. Inactivity starts at an early age. Studies indicate that public school minority kindergarteners and first graders have low levels of physical activity because their under-resourced schools lack adequate facilities and opportunities for physical education.<sup>168</sup> Yet access to recess opportunities is critical to a child's physical health and psychological well-being.<sup>169</sup> Further, a study of low-income children found that children who participate in after-school programs report higher levels of physical activity than children who do not participate in these programs.<sup>170</sup> Unfortunately, after-school programs, especially if they involve a fee, are not available to all low-income children in urban schools.

There also may be other factors that explain low rates of exercise among certain populations. For example, a focus group surveying black women's views on physical activity found that they may associate certain negative perceptions with being "too" fit, such as appearing too masculine.<sup>171</sup> This finding is consistent with another study finding that parental supports (active

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168. See Marina Reznik et al., *Physical Activity During School in Urban Minority Kindergarten and First-Grade Students*, 131 PEDIATRICS 1, 5–6 (2013). Rates of physical activity in school-age children also have been linked to the mode of transportation to and from school. Obviously, walkers have higher rates of physical activity than bus riders. See Tyler G. Johnson et al., *Step Counts of Non-White Minority Children and Youth by Gender, Grade Level, Race/Ethnicity, and Mode of School Transportation*, 7 J. PHYSICAL ACTIVITY & HEALTH 730, 730 (2010).

169. See Catherine L. Ramstetter et al., *The Crucial Role of Recess in Schools*, 80 J. SCH. HEALTH 517, 517 (2010).

170. See Andrea J. Romero, *Low-Income Neighborhood Barriers and Resources for Adolescents' Physical Activity*, 36 J. ADOLESCENT HEALTH 253, 253 (2003). One study of minority girls found that they had higher rates of physical activity and lower rates of sedentary behaviors when they participated in after-school programs, whereas the physical activity levels of white girls in this same study did not differ significantly with the after-school setting. In contrast, boys of all races were observed to have higher physical activity levels when participating in an after-school program. See S.E. Taverno Ross et al., *After-School Setting, Physical Activity, and Sedentary Behavior in 5th Grade Boys and Girls*, 18 HEALTH & PLACE 951, 951 (2012). One study of eight low- and eight high-income neighborhoods found that in lower-income areas, exercise opportunities correlate with faith-based and government-sponsored facilities, whereas higher-income area exercise opportunities are largely provided by for-profit, commercial entities, suggesting that the availability of exercise opportunities in low-income areas (including urban settings) depends upon tax and charitable contributions. See Richard Robert Suminski et al., *Youth Physical Activity Opportunities in Lower and Higher Income Neighborhoods*, 88 J. URBAN HEALTH 599, 599 (2011).

171. Sara Wilcox et al., *Perceptions of Physical Activity and Personal Barriers and Enablers in African-American Women*, 12 ETHNICITY & DISEASE 353, 353 (2002). These views may partially explain lower rates of physical activity in African American children, i.e., mothers discouraging "too much" physical activity, although this study does not so conclude.

encouragement of children to exercise), as well as neighborhood supports (having sufficient and safe places to exercise near the home), were positively correlated with higher levels of physical activity in black children.<sup>172</sup> This study emphasizes the role of parents as primary targets for future health and weight interventions for underserved black communities, because black parental perceptions of safety and access in their own neighborhoods affect physical activity levels in their children.<sup>173</sup>

*B. Increased Risk for Accidental Drowning Injury or Death*

As suggested at the beginning of this Article, one of the negative consequences of the swimming pool litigation of the 1950s and 1960s is the demise of publicly-operated swimming pools. A group of sociologists posit that current "racial and socioeconomic differentials in swimming participation are conditioned by the availability of swimming infrastructure and the principle of social exclusivity that limit access of lower status groups."<sup>174</sup> In addition, sociologist Donald Hastings and his co-authors speculate that low-income people, without regard to race, generally lack swimming skills.<sup>175</sup> These authors opine that no policies are in place "to counter the principle of social exclusivity that restricts [their] access . . . to swimming programs."<sup>176</sup>

Although accidental drowning deaths represent less than one percent of all deaths in the United States, "[p]ublic health officials insist that [these] deaths are preventable."<sup>177</sup> It is no accident that the two drowning deaths that triggered action in Baltimore involved black teenagers. While the risk of accidental drowning is highest for all children ages one to four, this risk actually increases for black male children on into adulthood.<sup>178</sup>

In a 1994 study of swimming ability by the CDC, self-identified "African American" respondents "reported the most limited ability."<sup>179</sup> Specifically, 44% of black men polled and 77% of black women, compared to 17% of white men and 45% of white

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172. See Dawn K. Wilson et al., *Neighborhood and Parental Supports for Physical Activity in Minority Adolescents*, 41 AM. J. PREVENTIVE MED. 399, 399 (2011).

173. *Id.* at 405.

174. Hastings et al., *supra* note 143, at 896.

175. *Id.* at 898.

176. *Id.*

177. *Id.* at 895. The authors believe the rate of accidental drowning in the United States is underreported. See *id.* at 915.

178. *Id.* at 895-96.

179. Gilchrist et al., *supra* note 22, at 110.

women, without regard to education and age, reported limited swimming ability.<sup>180</sup> The same study found that self-identified Hispanics had the next highest rate of limited swimming ability.<sup>181</sup> Thus, lack of adequate swimming skills is a problem with strong racial and ethnic dimensions.

Without public pools, blacks and Hispanics have few safe places to swim.<sup>182</sup> For example, a 1995 study found that blacks are more likely to drown in pools open to the public, especially motel/hotel pools, and Hispanics are more likely to drown in neighborhood and apartment pools.<sup>183</sup> The researchers speculate that pools where black (and Hispanic) male teens tend to swim “are inherently less safe, i.e., [have] more crowded conditions and/or poor supervision.”<sup>184</sup>

Further, the increased risk of accidental drowning also could be explained by racial differences in swimming ability. Black individuals have been found to have fewer opportunities to participate in swimming lessons.<sup>185</sup> Still another study suggests that black (and Latino) youth, as well as their parents, fear that drowning is *the consequence*, as opposed to a mere possible risk of swimming, and thus may discourage their children from learning to swim.<sup>186</sup> More likely, a variety of factors—race, socioeconomic, gender, access to swimming facilities and geography—contribute to racial swimming disparities.

#### IV. Swimming As a Healthy Source of Exercise

As proponents for greater participation by women in athletics have long argued, there is a strong connection between one’s health and well-being and participation in sports and recreational activities.<sup>187</sup> Arguably, then, lack of access to swimming facilities has a negative impact on the health and well-being of black and

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180. *Id.* at 111.

181. *Id.* Thirty-one percent of Hispanic males and fifty-seven percent of Hispanic females reported limited swimming ability. *Id.*

182. Ito, *supra* note 155, at 125–26 (noting that in the still segregated areas surrounding Chicago, even lower-income whites had more access to swimming facilities).

183. Saluja et al., *supra* note 18, at 730.

184. Brenner et al., *supra* note 23, at 88. This reasoning would also apply to anyone swimming in crowded public pools without adequate supervision or motel/hotel and apartment pools without *any* supervision.

185. *Id.* The authors cite 1977 and 1994 studies supporting this second explanation. *Id.* at 88–89.

186. Irwin et al., *supra* note 20, at 562–63.

187. See U.S. DEP’T OF HEALTH & HUMAN SERVS., PHYSICAL ACTIVITY AND HEALTH: A REPORT OF THE SURGEON GENERAL 13–14 (1996).

Latino Americans throughout the nation. Swimming offers unique health and physical fitness benefits, particularly because of the full-body, low-impact, high-resistance workout it provides.<sup>188</sup>

As mentioned previously, the CDC acknowledges the existence of racial health disparities and the relationship of poor health to lack of exercise opportunities. The CDC also recognizes the general health benefits of swimming.<sup>189</sup> There is ample evidence, for example, that swimming decreases the risk of chronic disease, such as diabetes and heart disease.<sup>190</sup> Swimming also improves the prognosis and quality of life of those with arthritis.<sup>191</sup> Swimming also improves one's overall psychological state afterwards, particularly with regard to moods in the areas of anger, confusion, tension, and depression.<sup>192</sup> Studies show that access to pools and swimming facilities decreases incidences of skin sores caused by renal failure and inner ear infections in impoverished communities.<sup>193</sup> Early enrollment of babies in swimming courses can improve certain motor skills, such as prehensility (the ability to grasp or hold an object) and balance, which has application to children with cognitive and motor disabilities.<sup>194</sup>

As noted at the outset of this Article, the CDC also recognizes the racial differences in drowning and swimming rates. These differences are related to lack of adequate access to exercise facilities, including swimming pools. As this Article has explained, these race-based differences are the lingering consequences of past

188. See *Benefits of Swimming/Aquatic Exercise*, INT'L SWIMMING HALL OF FAME, <http://www.ishof.org/safety/exercise.htm> (last visited Oct. 21, 2013).

189. See *Healthy Swimming/Recreational Water*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 6, 2013), [http://www.cdc.gov/healthywater/swimming/health\\_benefits\\_water\\_exercise.html](http://www.cdc.gov/healthywater/swimming/health_benefits_water_exercise.html).

190. See Nancy L. Chase et al., *Swimming and All-Cause Mortality Risk Compared with Running, Walking, and Sedentary Habits in Men*, 2 INT'L J. AQUATIC RES. & EDUC. 213, 217–20 (2008).

191. See Jane Hall et al., *A Randomized and Controlled Trial of Hydrotherapy in Rheumatoid Arthritis*, 9 ARTHRITIS & RHEUMATISM 206, 206 (1996); Marie Deanna Westby, *A Health Professional's Guide to Exercise Prescription for People with Arthritis: A Review of Aerobic Fitness Activities*, 45 ARTHRITIS CARE & RES. 501, 501 (2001).

192. See Bonnie G. Berger & David R. Owen, *Mood Alteration with Yoga and Swimming: Aerobic Exercise May Not Be Necessary*, 75 PERCEPTUAL & MOTOR SKILLS 1331, 1339 (1992).

193. See Deborah Lehmann et al., *Benefits of Swimming Pools in Two Remote Aboriginal Communities in Western Australia: Intervention Study*, 327 BMJ 415, 415–17 (2003).

194. See H. Sigmundsson & B. Hopkins, *Baby Swimming: Exploring the Effects of Early Intervention on Subsequent Motor Abilities*, 36 CHILD: CARE, HEALTH & DEV. 428, 429 (2009).

*de jure* racial discrimination. They also are related to nationwide health problems and require special focus.

An obvious solution to improve the health outcomes among blacks and Latinos is to mandate that all public school children ages six years and older be taught to swim. This recommendation is not revolutionary, or even new. "According to the Talmud, parents are obligated not only to teach their children a trade, but also to teach their children how to swim."<sup>195</sup> Additionally, as outlined below, other countries incorporate mandatory swimming instruction into their national education curricula.

#### A. Mandatory Swimming Programs Abroad

Other countries have long recognized the need to provide greater access to swimming facilities to their population. Today a few countries, notably the United Kingdom and Sweden, make swimming instruction a national priority. These programs are worth examining in determining how to address the health and safety problems in the United States outlined above.

##### 1. United Kingdom

The United Kingdom (UK) recognizes the health benefits of swimming,<sup>196</sup> and in 1988 the Education Reform Act (ERA) "mandate[d] that all children should be able to swim 25 meters by grade 6 (age 11)."<sup>197</sup> Unfortunately, the mandate accompanied the decentralization of educational support, giving some schools in England and Wales control over their finances and budgets as a way to link funding to enrollment numbers and encourage efficient use of existing resources without the central government having to increase funding.<sup>198</sup> Simultaneously, the ERA's swimming mandate increased curriculum costs without the financial backing of the central government.<sup>199</sup> Despite the obvious cost considerations that hampered this program, it is worth examining

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195. Ruth A. Brenner et al., *Swimming Lessons, Swimming Ability, and the Risk of Drowning*, 10 INJURY CONTROL & SAFETY PROMOTION 211, 213-14 (2003).

196. See *Swimming for Fitness*, NAT'L HEALTH SERV. (June 30, 2012), <http://www.nhs.uk/Livewell/getting-started/Pages/getting-started-swimming.aspx>.

197. Brenner et al., *supra* note 195, at 214. The authors note that "[five percent] of schools do not teach swimming and many local education agencies report cost and scheduling challenges that make implementing the program difficult." *Id.*

198. See STEPHEN MACHIN & ANNA VIGNOLES, EDUCATION POLICY IN THE UK, (Mar. 2006), available at [http://eprints.lse.ac.uk/19430/1/Education\\_Policy\\_in\\_the\\_UK.pdf](http://eprints.lse.ac.uk/19430/1/Education_Policy_in_the_UK.pdf).

199. See Di Bass & Colin A. Hardy, *That Sinking Feeling: Swimming in Primary Schools Post the 1988 Education Reform Act*, 2 EUR. J. PHYS. EDUC. 178, 179 (1997).

the UK's experience with mandatory school-based swimming programs.

Given the financial constraints, UK schools adopted different approaches to comply with the ERA's swimming mandate. Some schools ask parents to help subsidize costs, and in certain cases the majority of the funding for swimming programs at a given school is provided by parents.<sup>200</sup> However, many parents object, saying they should not have to give money for what is supposed to be a "free" education.<sup>201</sup> Other schools hire out their swimming facilities to community groups during non-school hours to help defray the cost of providing swimming opportunities for students.<sup>202</sup> This is not a popular option with some school administrators, who see the increased administrative fees needed to support the personnel required to run the facilities after school hours as an unnecessary hassle.<sup>203</sup> Still other schools use monies from their own budgets to rent existing off-site leisure centers (both public and private) to provide swimming lessons.<sup>204</sup> Some teachers believe that using other facilities is good because it encourages pupils' use of those facilities outside of school hours and helps to further their swimming abilities.<sup>205</sup>

Critics of the ERA, however, argue that implementation of the swimming mandate included increased pressures on financially strapped schools. Some scholars speculate that approximately five percent of schools do not teach swimming due to cost and scheduling challenges.<sup>206</sup> Other schools with limited budgets tend to reduce swimming opportunities due to a lack of time and resources.<sup>207</sup> As a result, children in lower socioeconomic communities, the very children with the greatest need, were disproportionately impacted. These critics also feared that given the drain on already limited school finances, the ERA's

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200. *See id.* at 191–92.

201. *Id.* at 192.

202. *Id.*

203. *Id.*

204. *Id.* at 187.

205. *Id.* at 187–88.

206. Brenner et al., *supra* note 195, at 214.

207. AMATEUR SWIMMING ASS'N., LEARNING THE LESSONS: THE FUTURE OF SCHOOL SWIMMING 34 (2013), available at [http://swimming.org/~widgets/ASA\\_Research\\_Library/School%20Swimming/SS2%20-%20Learning%20the%20Lessons%20-%20The%20Future%20of%20School%20Swimming%202013.pdf](http://swimming.org/~widgets/ASA_Research_Library/School%20Swimming/SS2%20-%20Learning%20the%20Lessons%20-%20The%20Future%20of%20School%20Swimming%202013.pdf) ("Despite swimming being on the National Curriculum in many schools it is simply not being delivered and where it is taught all too often... attainment targets are not being met or monitored... Schools are allowed to avoid swimming if they cannot afford the travel or if they are weak in other more high profile curriculum areas").



requirement that children must be able to swim twenty-five meters may result in fewer swimming opportunities once some primary children have attained that target.<sup>208</sup> More importantly, critics argue that ultimately the ERA will have a damaging effect on the quality of physical education in public schools, and that it may exacerbate social and educational divisions within the education system, making it very difficult for some teachers to provide a quality “PE for all.”<sup>209</sup>

Nevertheless, by 2011, the incidence of swimming pool drowning in the birth to nineteen-year-old age group had decreased steadily. Significantly, in 2011 there was no recorded instance of swimming pool drowning among fifteen to nineteen-year-old children.<sup>210</sup> This age cohort was one of the first subgroups of UK children to experience the ERA’s fully implemented swimming competency. So, mandatory school-based swimming programs seem to dramatically reduce drowning deaths among teenagers.

Free swimming programs also are helpful in bridging the access gap. For example, England, concerned about the increase in obesity, initiated a two-year free swimming program for children under sixteen and adults over sixty years of age, in recognition of “the link between lower social class, poorer health outcomes[,] and inequalities in the use of medical services.”<sup>211</sup> The program was canceled a year later due to budgetary constraints.<sup>212</sup> Nevertheless, researchers studying the program found people from all socioeconomic levels participated, but rates were lower for individuals who lived furthest from the pools.<sup>213</sup>

The Welsh government initiated a similar program in 2004.<sup>214</sup> After three years, studies showed a significant rate of participation by children and adolescents under sixteen years of age, especially in lower socioeconomic communities.<sup>215</sup> Thus, if

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208. Bass & Hardy, *supra* note 199, at 193.

209. John Evans et al., *Improving the Quality of Physical Education? The Education Reform Act, 1988, and Physical Education in England and Wales*, 45 QUEST 321 (1993).

210. See NAT’L WATER SAFETY FORUM, UK WATER RELATED FATALITIES 2011, at 10 (2012), available at [http://www.nationalwatersafety.org.uk/waid/info/waid\\_fatalincidentreport\\_2011.pdf](http://www.nationalwatersafety.org.uk/waid/info/waid_fatalincidentreport_2011.pdf).

211. S. Audrey et al., *Health Promotion and the Social Gradient: The Free Swimming Initiative for Children and Young People in Bristol*, 126 PUB. HEALTH 976, 976–77 (2012).

212. *Id.* at 977.

213. *Id.* at 979.

214. *Id.*

215. *Id.* at 979–80.

children from working-class urban neighborhoods have access to swimming pools for free or nominal costs, they will use them, along with other residents.

## 2. Sweden

Sweden's mandatory school-based swim training for children dates back to the 1950s.<sup>216</sup> The country's strong commitment to swimming education and safety is probably driven by its geography. Sweden has many lakes and bodies of water, and there is an increased risk of water-related injuries when those bodies of water freeze during winter.<sup>217</sup> Mandatory swimming instruction as part of public primary education has two primary objectives: (1) encouraging citizens to lead healthy, active lifestyles; and (2) decreasing the risk of water-related injuries.<sup>218</sup> The National Agency for Education in Sweden sets the goals, aims, and general requirements for all public schools in the country, and each individual municipality formulates its own school plans to show how the schools located in that jurisdiction will achieve the national requirements for resident children.<sup>219</sup>

The mandatory swimming program has been quite successful in reducing the drowning incidence from thirty-five children per year in 1950 to seven children per year in 2001.<sup>220</sup> In addition, essentially every municipality in Sweden built a public swimming pool, giving free swimming lessons to school children.<sup>221</sup> The government also provides for free rental of life jackets from municipal fire stations, and this policy has helped to reduce the socioeconomic differential in drowning rates.<sup>222</sup>

Unfortunately, there is virtually no reliable information on how the mandates in the UK and Sweden are enforced. However,

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216. Bjarne Jansson et al., *Why Does Sweden Have the Lowest Childhood Injury Mortality in the World? The Roles of Architecture and Public Pre-School Services*, 26 J. PUB. HEALTH POL'Y 146, 158–59 (2006).

217. See SWEDISH NAT'L AGENCY FOR EDUC., CURRICULUM FOR THE COMPULSORY SCHOOL, PRE-SCHOOL CLASS AND THE RECREATION CENTER 2011, at 53 (2011), available at [http://www.skolverket.se/om-skolverket/visa-enskild-publication?\\_xurl\\_=http%3A%2F%2Fwww5.skolverket.se%2Fwtpub%2Fws%2Fskolbok%2Fwpubext%2Ftrycksak%2FRecord%3Fk%3D2687](http://www.skolverket.se/om-skolverket/visa-enskild-publication?_xurl_=http%3A%2F%2Fwww5.skolverket.se%2Fwtpub%2Fws%2Fskolbok%2Fwpubext%2Ftrycksak%2FRecord%3Fk%3D2687) (requiring specific instruction of water safety during winter times).

218. See *id.* at 50–52.

219. See *What Rules Govern Compulsory School?*, SWEDISH NAT'L AGENCY FOR EDUCATION (Dec. 1, 2011), <http://www.skolverket.se/om-skolverket/andra-sprak-och-lattlast/in-english/the-swedish-education-system/compulsory-school/about-compulsory-school/what-rules-govern-compulsory-school-1.89724>.

220. Jansson et al., *supra* note 216, at 158.

221. *Id.*

222. *Id.*

the low drowning rates for children in both countries suggest that whatever enforcement mechanism being used is effective. Taken together, the experiences of Sweden and the UK suggest that mandatory school-based swimming programs can work. Nevertheless, a word of caution is warranted. Until recently, the UK and Sweden had been more racially homogenous and have had a less racialized history than the United States. Thus, there were fewer social obstacles to implementing mandatory school-based swimming programs designed to increase swimming ability among their populations. Keeping these differences in mind, the next section offers several suggestions for crafting a program to address the swimming inequalities in the more heterogeneous United States.

## V. Recommendations

Based on the experiences of Sweden and the UK, school-based public health swimming initiatives seem quite effective and democratic. I propose that as a public health initiative, the federal government should mandate school-based swimming programs as a pre-condition to accepting federal monies. Given that urban schools located in underserved communities are also under resourced, the federal government should subsidize swim programs targeting at-risk children without ready access to free public or low-cost swimming facilities. Since most urban schools are increasingly one race or non-white,<sup>223</sup> lingering resistance by whites to swimming with blacks would be minimal.

Given the current economic conditions, nationally and locally, my proposal seems costly, but as I explain in this section, the costs can be shared, and thus minimized. In the long run, these costs will seem minimal if the return is a dramatic drop in youth drowning deaths, and a substantial reduction in obesity and other conditions related to lack of exercise which threaten to deplete the public treasury. Finally, any programs targeting these communities must be structured to take into account, and combat, the cultural attitudes that may contribute to drowning rates and swimming ability disparities.

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223. Gary Orfield, John Kucsera & Genevieve Siegel-Hawley, *E Pluribus . . . Separation: Deepening Double Segregation for More Students*, THE CIVIL RIGHTS PROJECT 7 (2012), available at <http://civilrightsproject.ucla.edu/research> (discussing segregation of Latinos in western states); Genevieve Seigal-Hawley & Erica Frankenberg, *Southern Slippage: Growing School Segregation in the Most Desegregated Area of the Country*, THE CIVIL RIGHTS PROJECT 3 (2012), available at <http://civilrightsproject.ucla.edu/research>.

### A. *Mandatory School-Based Swimming Programs*

Given that some of the unhealthiest urban racial and ethnic populations in the United States are also the same communities with little or no swimming skills and few safe exercise options, the CDC must take stronger steps to address the related public health problems of youth drowning and obesity. It is not enough for the agency to announce that drowning and obesity are health problems. At the very minimum, the CDC, like Sweden and the UK, must strongly recommend that *all* children learn to swim before the age of eleven. In addition, that agency should promote swimming programs in urban swimming pool deserts—communities without free or low cost swimming facilities—to target populations most at risk for drowning and obesity. Ideally, a mandatory school-based swim program would be most comprehensive and democratic.

The program could be implemented on a gradual basis. A first step would be to develop policies designed to eliminate swimming deserts in urban areas where large numbers of children and adults have no or inadequate swimming skills. This goal should be advanced as a public health initiative tied to preventative health measures encouraged by the Affordable Care Act.<sup>224</sup> Section 254b-2 of that Act provides for increased funding to community health centers.<sup>225</sup> According to subsection (a), the stated purpose of increased funding is “to provide for expanded and sustained national investment in community health centers under [the Act] . . . and the National Health Service Corps.”<sup>226</sup> Moreover, subsection (c) of that section states that approximately 1.5 billion dollars will be available from the National Treasury from fiscal years 2011–2015 “for the construction and renovation of community health centers.”<sup>227</sup> A portion of this money could be used to construct community health center pools and staff them.

Rather than rely solely on the community health centers to operate swimming instruction programs, pools could be operated in conjunction with neighborhood schools, during the school hours, and usage limited during those hours to students, teachers, and staff. Thus, a portion of operating expenses could be underwritten by the school district. School-based programs would be the most

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224. See, e.g., Patient Protection and Affordable Care Act, 42 U.S.C. § 300u-13 (2010) (creating community transformation grants, which can be used to “develop[] and promot[e] programs . . . to increase . . . physical activity”).

225. *Id.* at § 254b-2.

226. *Id.* at § 254b-2(a).

227. *Id.* at § 254b-2(c).

effective vehicle to deliver swimming training because school instruction would be regularized, likely to reach more children, and instruction would not be limited to summer months. The swimming literature shows that practice improves one's swimming skills.<sup>228</sup> Public school systems could partner with public health officials, as they have in the past, to promote swimming classes.

Undoubtedly, given American notions of individualism and hostility to many mandatory government programs, school-based swimming instruction would be met with resistance, at least at the outset. Not everyone agrees about the value of school-based compulsory swimming lessons. Some researchers worry that swim programs actually increase the risk of drowning by exposing students to the hazard—water itself.<sup>229</sup> Thus, the argument goes, providing mandatory swimming lessons to achieve proficiency in swimming may not reduce drowning rates enough to offset the risk of the increased exposure in educational settings.<sup>230</sup> However, studies show that early exposure to swimming and water safety lessons can significantly reduce the risk of drowning.<sup>231</sup> Overall, providing water safety and swimming lessons, even to children of young ages, does not increase drowning risk. Thus, the protective effects of swimming lessons on drowning risk outweigh any increased exposure to the risk of drowning itself.<sup>232</sup>

Finally, the benefits of the community health center pools would not be limited to neighborhood schoolchildren. These community pools could be operated year-round, and during after-school hours as well. During the summer, and after-school hours, the swimming facilities would be open to the entire community. Swimming during these days and hours could be offered at low cost and monitored by the community health center staff. These modest fees would help defray operating costs. The entire

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228. See DAVID A. GROOTENHUIS, *SWIMMING FOR FITNESS* 8 (2002).

229. See Brenner et al., *supra* note 195, at 214.

230. *Id.*

231. In one study, an 88% reduction in the risk of drowning among children one to four years old who had received formal swimming lessons was observed. Brenner et al., *supra* note 195, at 209 (it should be noted, however, that the 95% confidence interval for this study ranged from a 3% to a 99% reduction in drowning risk). On the other hand, no significant reduction in drowning risk after exposure to formal swimming lessons was observed in children five to nineteen years old, or at any age after receiving informal swimming instruction. *Id.* Formal instruction for purposes of this study meant lessons paid for or provided by day care, after school, summer camp, and the like, while informal instruction meant pointers, tips, or water safety instructions when going swimming (presumably by parents/guardians). *Id.* at 205.

232. See *id.* at 209.

community would be encouraged to develop their swimming skills and engage in a healthy form of exercise.

There are several lessons about school-based swimming initiatives that can be learned from the UK's effort. First, governments, central and local, need to take strong measures to bridge the swimming pool access gap. Because these measures can be costly, they should not be borne solely by local authorities. Second, people from all socioeconomic backgrounds are more likely to take advantage of public swimming facilities when they are available without cost. Third, people are less likely to swim if pools are not located close to where they live. Given the centrality of public schools in most neighborhoods, situating pools in or near them ensures greater access. Fourth, the wide availability of swimming facilities offering swimming lessons can significantly reduce the rate of drowning among those most at risk, youth and children.

Although the start-up cost of implementing mandatory school-based swimming programs seems expensive since facilities would have to be constructed, the overall cost-benefit analysis is in favor of providing these facilities. Increased exercise opportunities will tend to decrease the incidence of chronic, expensive-to-treat diseases and conditions that disproportionately plague populations located in swimming deserts. Thus, the increased availability of swimming options will in the long-run tend to decrease overall health care costs. This is particularly relevant since cost containment and reduction is a primary goal of the Affordable Care Act.

In addition to monies available to construct and refurbish community health centers, increasing swimming opportunities and education without substantial expenditures of public monies could be accomplished in several ways. Governments at the federal and state level could subsidize swimming programs that target underserved communities operated by existing privately-operated swimming facilities. Arguably, teaching swimming skills is part of an adequate and equitable education. This is the reasoning behind the UK's mandatory school-based swim program.

The benefits of increased swimming opportunities and skill training not only reduce the risk of drowning, but also produces healthier children and adults. School districts could be encouraged to include year-round swimming pools in every new public school construction. The federal government might subsidize the cost for schools constructed in areas where there are no, or few, free or low-cost swimming facilities available for the

school's population. Schools in the UK were allowed to keep income derived from the use of their sports facilities after school hours, and similar measures could be put in place in the United States to encourage schools to offer more swimming opportunities.<sup>233</sup>

### B. Cultural Issues

Even if a vigorous program promoting swimming readiness was adopted, one group of researchers caution: "[d]espite the research highlighting the need for public health interventions in the area of water safety among low-income and minority youth, there is a paucity of evaluated programming available for this population."<sup>234</sup> Many black parents have a strong fear of the water.<sup>235</sup> However, based on historical accounts of slaves saving their masters from drowning, some scholars speculate that more blacks than whites could swim during the Antebellum Era.<sup>236</sup>

Wiltse acknowledges that prior to the late nineteenth century, middle-class and more affluent Americans seldom swam.<sup>237</sup> However, once the cultural paradigm of swimming shifted from an activity associated with lower classes to a leisure activity, blacks were eventually shunned from swimming facilities and lifeguarded beaches due to segregation. Thus, any communal fear of water is relatively recent, and likely tied to *de jure* segregation and lack of access to swimming facilities in the twentieth century.

Fear of water, coupled with lack of swimming skills, can perpetuate lower swimming ability among racial and ethnic minorities because parents are not likely to be involved in their children's swimming instruction. Thus, it is essential to get the support of all parents for swimming equity programs to work. At private swim clubs, mothers are more involved than fathers in promoting swimming participation of their children.<sup>238</sup> Yet, as

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233. See Dawn Penney, "No Change in a New Era?": *The Impact of the Education Reform Act (1988) on the Provision of Physical Education and Sport in State Schools*, 15–17 (Mar. 1994) (unpublished Ph.D. thesis, University of Southampton), available at <http://eprints.soton.ac.uk/194417/1.hasCoversheetVersion/94083637.pdf>.

234. Lawson et al., *supra* note 18, at 836.

235. See Jane E. Brody, *Swimming and the Fear Factor*, N.Y. TIMES, June 11, 2013, at D5.

236. *Id.*

237. WILTSE, *supra* note 37, at 14–15.

238. See KERRY J. DALY, *FAMILIES AND TIME: KEEPING PACE IN A HURRIED CULTURE* (1996); ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE AND FAMILY LIFE* (2003); Lyn Craig, *Does Father Care Mean Fathers Share?: A*

mentioned previously, seventy-seven percent of black women have no or little swimming skills.<sup>239</sup> Therefore, some researchers suggest that whatever programming is developed “should address possible cultural and economic circumstances that may put minority and low-income children at greater risk for drowning.”<sup>240</sup>

### Conclusion

Less than five months after it shunned the Creative Steps day campers, the Valley Swim Club, opened in 1954, filed for bankruptcy and closed its doors.<sup>241</sup> Its demise mirrored what happened to public swimming pools across the nation in the 1950s and 1960s. Throughout the mid-twentieth century, black Americans challenged their exclusion from swimming pools. When they finally prevailed, white swimmers fled the pools much as they had fled public schools for privately-operated institutions. Wiltse writes: “[b]y the 1970s and 1980s, tens of millions of mostly white middle-class Americans swam in their backyards or at suburban club pools, while mostly African and Latino Americans swam at inner-city municipal pools.”<sup>242</sup> Litigation against private pools in the North continued into the 1990s.<sup>243</sup>

There are many reasons to improve swimming skills and access to swimming facilities for all Americans. Having access to swimming and swimming facilities can help to shape personal attitudes essential to maintaining a healthy lifestyle and being active.<sup>244</sup> Swimming competency also can dramatically reduce drowning rates, especially for male adolescents who often engage in risky behaviors.

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*Comparison on How Mothers and Fathers in Intact Families Spend Time with Children*, 20 GENDER & SOC'Y 259 (2006); DeLuca, *supra* note 144, at 62 (citing SUSAN A. OSTRANDER, WOMEN OF THE UPPER CLASS (1984)); Annette Lareau, *My Wife Can Tell Me Who I Know: Methodological and Conceptual Problems in Study Fathers*, 43 QUALITATIVE SOCIOLOGY 407 (2000); Susan M. Shaw & Don Dawson, *Purposive Leisure: Examining Parental Discourse on Family Activities*, 23 LEISURE SCI. 217 (2001); Susan M. Shaw, *Dereifying Family Leisure: An Examination of Women's and Men's Everyday Experiences and Perceptions of Family Time*, 14 LEISURE SCI. 271 (1992).

239. Gilchrist et al., *supra* note 22, at 111.

240. Lawson et al., *supra* note 18, at 839.

241. Jesse Reilly, *The Valley Club Files for Bankruptcy*, MONTGOMERY NEWS (Nov. 24, 2009), [http://www.montgomerynews.com/articles/2009/11/24/glenside\\_news\\_globe\\_times\\_chronicle/news/doc4b047c08c9586516453569.txt](http://www.montgomerynews.com/articles/2009/11/24/glenside_news_globe_times_chronicle/news/doc4b047c08c9586516453569.txt).

242. WILTSE, *supra* note 37, at 2.

243. See, e.g., *United States v. Lansdowne Swim Club*, 713 F. Supp. 785 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990).

244. DeLuca, *supra* note 144, at 66–67.



When Cullen Jones won a spot on the 2008 U.S. Olympic swim team, he became only the third black American to achieve this feat.<sup>245</sup> A near fatal drowning victim as a young child, Jones is using his international notoriety to promote water safety, citing the high drowning statistics for non-whites,<sup>246</sup> but his efforts alone will not address the problem.

There has been no resurgence in the construction of public swimming pools. Without a more proactive approach by public health agencies at all levels, the statistical gap between blacks' and whites' drowning rates will not be bridged and may widen. Natural disasters like Hurricane Katrina in cities with large black and Latino populations may result in many more unnecessary drowning deaths.<sup>247</sup>

Finally, white hostility toward sharing pool space with blacks has not tempered, so the creation of other swimming venues is required to address the problem. Persistent swimming inequality not only reinforces the second-class citizenship of blacks and Latinos, it adversely impacts their health and well-being. In the end, the whole nation suffers because we are all connected to one another.

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245. Karen Crouse, *Shattering a Record, and also Some Myths*, N.Y. TIMES, July 5, 2008, at B9. The first was Anthony Ervin who earned a place on the 2000 Olympic team. *Id.*

246. *Id.*

247. Even before Hurricane Katrina there were prior instances of natural disasters occurring in larger cities with urban/minority populations which lead to drowning deaths. See David F. Zane et al., *Tracking Deaths Related to Hurricane Ike, Texas, 2008*, 5 DISASTER MED. PUB. HEALTH PREP. 23, 23–28 (2011). If those populations have low incidence of swimming proficiency, there is a further public health justification for providing compulsory swimming instruction.

