

VOLUME 3

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ISSUE 1

•

2018-2019

# HOWARD HUMAN & CIVIL RIGHTS LAW REVIEW

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**SUBSCRIPTIONS:** The *Howard Human & Civil Rights Law Review*, ISSN 2380-3459, is published annually each academic year. Each subscription is offered at a price of \$20. The *Law Review* is accessible through Westlaw and LexisNexis.

**SUBMISSIONS:** The Executive Board of the *Howard Human & Civil Rights Law Review* invites submission of articles, notes, comments, book reviews, and seminar papers from professors and attorneys in all fields. All submissions must be unpublished and between 15 and 55 (double-spaced) pages. Please e-mail your submissions, along with a current resume and cover letter, to: [hcsolicitationseditor@gmail.com](mailto:hcsolicitationseditor@gmail.com)

The *Law Review* assumes no responsibility for the return of any materials unless requested in writing upon submission.

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# HOWARD HUMAN & CIVIL RIGHTS LAW REVIEW

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## LETTER FROM THE EDITOR-IN-CHIEF

To the Reader:

*“If not us, then who? If not now, then when?” — John Lewis*

The *Howard Human & Civil Rights Law Review* (“HCR”) recognizes that the who is “us” and the time is “now.” As a journal of legal scholarship at Howard University School of Law, we are uniquely situated to address the human and civil rights issues that have plagued our society since its inception. Toward this aim, HCR annually hosts the C. Clyde Ferguson Jr. Lecture, in dedication to one of Howard Law’s most beloved Deans and social engineering pioneers. This year’s lecture, entitled “Triggered: The Power of Guns, Law & Politics,” examined the critical issue of gun violence and the right to bear arms in America.

Since its founding in 2015, HCR has been guided by the idea that lawyers are social engineers rather than parasites on society. It is with this esteem that HCR acts as the crucible for human and civil rights scholarship at Howard University School of Law. We pride ourselves on publishing “good writers and good activists,” regardless of creed, school or name-recognition. This approach has allowed HCR to earn the reputation as a foremost authority on human and civil rights issues. Through our scholarship, we recognize the rights that still need to be realized as well as emerging issues needing our attention. Thus, to give a voice to the voiceless is the precept on which we stand. Consequently, Volume III is the culmination of this work. We expect our readers to find the scholarship engaging, and it is our hope that our scholarship will be a muse for freedom fighters across the world to fight and never quit fighting.

We, the Editorial Board and Staff, strive to continue the fight Charles Hamilton Houston championed nearly 100 years ago at Howard University School of Law. In light of this, the HCR team has worked diligently to bring forth a volume that is not only timely but seeks to shape the discussion on issues that matter most to us as well as encourage reflection on the most relevant injustices from a legal perspective.

The foregoing is an expository of the Volume III Articles, Notes and Essays written by eminent scholars, practitioners, activists and fellow student leaders, all of whom are committed to human and civil rights. The inaugural Article in Volume III begins with “Solitary Survivors: The Unbreakable

Spirit of the Angola 3.” This Essay provides an introspective view on solitary confinement in the United States as UCLA Professor Bryonn Bain interviews Albert Woodfox and Robert King—individuals who served the longest solitary confinement sentences in U.S. history—as they discuss how they overcame inhumane conditions of solitary confinement in Angola Prison. Next, Khaair Morrison, former HCR Editor-in-Chief, plunges into the depth of privacy issues in the modern age and our duty to protect activists, specifically *Black Identity Extremist* in his Essay entitled “A Call to Expand Protections for Activists”. In addition Volume III continues internationally as human rights activist Merris Amos aims to resolve the debate in the United Kingdom on whether the Human Rights Act of 1998 should be replaced with an official Bill of Rights in her article entitled “A UK Bill of Rights Fit for Purpose.” Volume III continues with an Article entitled “Human Hierarchy & High School Shootings” as eminent scholar and professor Harold McDougall critically examines the relationship between social hierarchies, gun violence and high school shootings in his America. In closing, Gaby Wilson, a distinguished HCR alumnae and the winner of the prestigious Pauli Murray prize, provides our journal’s first discussion of LGBTQ rights as she challenges the gender status quo in her Note: “Does God Bless Your Transsexual Heart?”

We extend our deepest appreciation to the Howard University School of Law faculty: Dean Danielle Holley-Walker, Associate Dean Lisa Crooms-Robinson, our faculty advisers for this volume: Professor Darin Johnson, Professor Justin Hansford, and Thurgood Marshall Civil Rights Center Fellow Ndjouh Mehchu Esq., Law Review Manager Mrs. RaNeeka Witty, and the rest of the Howard University School of Law community. We also extend our profound appreciation to our predecessors: *The Human Rights & Globalization Law Review* and the *Howard Scroll: The Social Justice Review*. The work of these previous publications provided the foundation for our current mission and we are grateful to the previous members and editorial boards for their contributions. As outgoing Editor-in-Chief, I would be remiss to not highlight how hard all members of the *Howard Human & Civil Rights Law Review* have worked to produce Volume III of the *Howard Human & Civil Rights Law Review*. We have had a tremendously productive, enjoyable year, and I am extremely proud to have served on this editorial board.

In Truth & Service,

Elijah B. Porter II  
Editor-in-Chief  
Volume III, 2018-2019

## ESSAY

# Solitary Survivors: The Unbreakable Spirit of the Angola 3

*Interview with Albert Woodfox and Robert King*

BRYONN BAIN\*

Having served the longest solitary confinement sentences in U.S. history, Robert King and Albert Woodfox tell their story of surviving decades in the isolation of a six-by-nine-foot cell. Together with Herman Wallace—released just before passing in 2013—the Angola 3<sup>1</sup> collectively spent 114 years in solitary confinement. As organizers inside Louisiana State Penitentiary—an 18,000-acre former slave plantation known as “Angola”—they established the first prison chapter of the Black Panther Party, and led peaceful, non-violent protests against cruel and inhumane conditions.

The Angola Prison<sup>2</sup> was so named for the origin of the enslaved Africans brought there to work the land in chattel slavery. Bordered on three sides by the Mississippi River, the penitentiary was built on four connected plantations. At the end of the Civil War, the Angola Plantation was turned into the Angola Penitentiary. Today, it is the largest maximum-security prison in the United States with over 6,000 incarcerated men and nearly 2,000 overseers. With the highest incar-

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\* Director, Prison Education Program, *University of California – Los Angeles*, Associate Professor, *African American Studies and World Arts and Cultures*

1. NPR, *Albert Woodfox On Serving More Than 40 Years In Solitary Confinement*, NPR (Mar. 2, 2019, 8:23AM), <https://www.npr.org/2019/03/02/699663270/albert-woodfox-on-serving-more-than-40-years-in-solitary-confinement>.

2. Krissah Thompson, *From a slave house to a prison cell: The history of Angola Plantation*, WASH. POST (Sept. 21, 2016), [https://www.washingtonpost.com/entertainment/museums/from-a-slave-house-to-a-prison-cell-the-history-of-angola-plantation/2016/09/21/7712eeac-63ee-11e6-96c0-37533479f3f5\\_story.html?utm\\_term=.710a2e200aa2](https://www.washingtonpost.com/entertainment/museums/from-a-slave-house-to-a-prison-cell-the-history-of-angola-plantation/2016/09/21/7712eeac-63ee-11e6-96c0-37533479f3f5_story.html?utm_term=.710a2e200aa2).

ceration rate in the nation, one out of every 55 adults in Louisiana is behind bars, and over 75% are serving a life sentence.

Since being released in 2001 and 2016, respectively, King and Woodfox travel the globe campaigning for limits to solitary confinement and an end to the 13th amendment allowance for the enslavement of prisoners. These two unbreakable spirits shed light on the reality of the American criminal justice system and represent the struggle of everyone unjustly incarcerated. I spoke to the surviving members of the Angola 3 at the Library Foundation of Los Angeles in April 2018, with background research assistance from Joanna Itzel Navarro, Anthony James Williams and the UCLA Narratives of Freedom Research Collective.

*The United States, with 2.2 million people behind bars, imprisons more people than any other country in the world.<sup>3</sup>*

**Bryonn:** Good evening, peace family. How y'all feeling? Okay, we want to first start off by acknowledging that we are on native land. We are walking on land that the indigenous people, the Tongva nation, was on before any of us in this room and our ancestors arrived. So, I want to acknowledge them, their sacrifice, their struggle against conquest, genocide and slavery. We see their struggle as our struggle, and we acknowledge them and their energy and we call it forth into the room today.

It is an honor and a privilege to be here with you two brothers. I see you as our freedom fighters, our heroes and I know we have so much to learn from you #RealBlackPanthers and I want to start off by talking just a little bit about your roots. You know brother Malcolm said a tree without roots cannot grow. As one of the leading architects of what ultimately became the Black Panther Party, in terms of his views on freedom and self-determination, it would be great to have an opportunity to hear about your life even before Angola, don't get to Angola. To get to those roots before Angola, what are your earliest memories?

**Albert:** You know my earliest memories as a child was my stepdad was in the Navy and you know traveling a lot, wherever he would be

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3. SUSAN BURTON, BECOMING MS. BURTON: FROM PRISON TO RECOVERY TO LEADING THE FIGHT FOR INCARCERATED WOMEN (2017).



stationed, you know, the whole family would have to go and I remember those long car rides and I think there's so many memories, but I think that was the most impact[ful], traveling from one state to another.

**Robert:** Thank you and thank you all for coming and yes, getting into my earliest memory. Well I have a few, I have quite a few. When I was a youngster, I've remembered a lot of things. I think I started remembering when I was about three and a half, four years old. I think one of my earliest memor[ies] was I was living in Louisiana at the time with my grandmother. I hadn't moved to New Orleans at the time and I do remember I was living you know in area that was low. . .we just call it the airline highway at the time which probably turned into a I-10 at some point later in the future but we lived on the other side of highway which was the low side I think I mentioned in my book. We lived on the low side. I think some of the earliest memor[ies] that I had was living in that house which was unpainted, old, dilapidated and sometimes I was cold, we [were] cold and during the winter time there [was] a bit of coldness and even though, well Louisiana was a place that did not get frigid weather, you know, to any great degree being a young individual 35, 40 degree weather was cold when you didn't have heat. And we use wood, you know, as a means of fuel so those were the earliest years I remember, and I had quite a few days, but they shaped [me]. . .That's [the way] I like to look at it.

**Bryonn:** You write a lot in the book about formative experiences, key figures and I know that your time in Angola helped to transform you in ways that have impacted you ever since because of a number of incidents that happened, even before your arrival there who were the people in your life who meant the most to you? Who are the people that meant the most to you and what were experiences that stayed with you throughout your time inside?

**Albert:** With me I'm sure everybody's had this kind of experience. I had this love-hate relationship with my mom. Basically I grew into the wisdom and the knowledge that she was trying to give me and I once saw a desert but trying to control my life you know but I would have to say my mom was probably the greatest impact in my life and I'm fortunate enough, I grew into the wisdom that she had.

**Bryonn:** And brother Robert?

**Robert:** My grandmother was my mother, Alice King she was [my mother] and so it was she who, you know, kind of guided my thoughts. She was the person that raised me, and I did not meet my father until after my formative years. . . I think that was, not I think, I know I was 12 years old when I met my father for the first time, and we didn't have much of a relationship like Albert I imagine. It was my father who I had at one time a love-hate relationship with and it took me long to really love him when I was able to put him in. . . contextualize him and understood why he acted the way he did. It was then that I developed a sense of awareness as to why he was like that and I was able to sort of forgive him for some of the things that he did not do with regard to myself.

*Over 42 percent of African American children under the age of 6 live in poverty.<sup>4</sup>*

**Bryonn:** And so we talked a little bit earlier about experiences that transform you and we were talking about Sonia Sanchez, the poet, and how she said when she first heard Brother Malcolm speak, it was like you're sleeping in the bed and the sunlight came into the window and you can get up and close the blinds, but you've been woke, right? You're up. You can't go back to sleep in the same way. Was there a moment for you, and I know some of this can happen incrementally, but was there a particular moment or moments for you that opened your consciousness and helped you to realize that the condition you were in was something linked to a broader systems and structures and histories of oppression that you understand now in a way that you didn't before?

**Albert:** Well for me, sadly, as I got older and I began to read and self-educate myself and develop a little insight and a little wisdom and I realized that I was a petty criminal. I was a predator for my own community, and I brought so much pain and suffering to the people that I should have been trying to uplift and protect. And you know, I escaped. I was in prison. I escaped and I went to New York and while I had a peripheral awareness of the Black Panther Party, I got a chance to see the Black Panther Party up and close in Harlem, New York, and got a chance to talk, to look at the sisters in the party.

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4. *Id.*

*One in five inmates in California is behind bars for a low-level crime, such as simple drug possession or petty theft. Annually, this is forty thousand offenders punished in the same way the state punishes those who commit violent and heinous crimes.<sup>5</sup>*

**Bryonn:** It was a different Harlem then.

**Albert:** Yeah, it was very different. You have to be African-American to understand what I'm about to say. You know, I have always detected a fear in African American people because I didn't understand why, but it was there. And I can remember times. . . once in particular, my mom and I was standing at the bus stop I was about 12, 13 years old and pulled these crews coming out and as they got closer she kind of took me and pushed me behind her as if she saw this threat you know and she was trying to take her body and shield me and protect me. But seeing the Black Panther Party for the first time in my life, I saw black men and women without fear. I saw them being bold and aggressive and protective, you know, of the community and I saw them escort and senior citizens to the grocery store and stuff you know, stuff like that you know. So that made a real impact on me and later on. . . of course, I was on the run. I had been a captive, I was in jail and [pause] the Panther 21 [as] they were known at that time was involved with the shoot-out with police. And four of the brothers came [to the jail I was in]. And there was hold, political classes every day and as I said earlier you know while I was listening to what they were saying I wasn't hearing what they were saying.

And another guy who was in prison doing 25 to life, okay now on the (inaudible) trying to get out and he had a book with him called *A Different Drummer* and he told me you should read this book, I think you'll enjoy it and I was for the first time in my life I picked the book up I read it from front to back and without putting it down. And all of a sudden, the thing that I have been listening to I started hearing and so that was kind of like the awakening of the man you see sitting here tonight.

**Bryonn:** Brother Robert, I finished your book yesterday, So it's all fresh in my mind. I couldn't put it down. You talked about a couple of moments that had a big impact on you but losing a loved one in partic-

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5. *Id.*

ular was a moment that you mentioned. I wonder if you wouldn't mind telling us if that or another moment had a significant impact in just your coming to consciousness and your decision to be involved with the Black Panther Party.

**Robert:** Yes, there was many things, a lot of things that cause my eventual and gradual consciousness, awareness a lot of things that happen[ed] in my life. And it was initially the struggle that my mom or grandmother had, but you know being a post you know World War-II baby, growing up in the south, Jim Crow was really everywhere. So, you know my consciousness and my learning was incremental and the window kind of gradually opened but once the window starts opening, whoa! I begin to see so many things and this was even before, of course, the Black Panther Party coming into knowledge of their existence, they put the icing on the cake but or prior to coming in contact with the Black Panther Party. There were a lot of things our thoughts and I imagine our thoughts were similar and this probably was the reason why I attached myself to the doctrine of the Black Panther Party because they were saying things and articulating things that I only felt and thought. And if we want freedom power to determine our destiny, I dawned on me you know, we didn't have power to determine our destiny. We want any immediate end to police brutality in the community. Well I had grew up and seen this even before the Black Panther Party was able to articulate this because they came years later but I saw it in the raw in the 50s but with my eventual coming into contact with members of the Black Panther Party and I love the ten point program, you know, and like I said we want the immediate [end] to policeman brutality, we want you know they want the right to vote. We wanted the right to be men, to be women, to be productive citizens in a society. **We say we want land, bread, housing, education, clothing, justice and peace as our major political objective.** United Nations supervised [plebiscites] to be held in the community in which black [people] alone. . . would be allowed to participate for the purpose of determining the will of black people, because prior to that time in my knowledge there weren't any thing of any power given to us to really articulate and to put our will out here into society, put the thing that we knew out here in to society to give something to society to make society better. But it was, like I said, they put the icing on the cake. And then I began to read and once I begin to see things before I came in contact with the Black Panther Party. I went to school I only

completed the eighth grade, I was so bored with school. I . . . only completed the 8th grade. The things that I eventually learned that were not in school, not the school that I went through. I didn't know anything about Richard Wright, didn't know anything about Harriet Tubman, Nat Turner, I didn't know anything about these people. This was something that wasn't taught in school. After coming in contact with those people and coming in contact with their work, my involvement just became gradually increased until it exploded. When I really saw that wind-up consciousness begin to open up, I began to embrace it. When the Panther[s] came along and Malcolm X stated before him but I didn't hear it until the Black Panther Party said it, when the Black Panther Party said it I heard and I felt it and I grasped it. I held on to it because I definitely wanted an immediate answer to police brutality in the community. I wanted justice for black people and so I embraced you know, the total struggle. I embraced many aspect[s] of the struggle but the struggle for self-determination and the struggle for equality is the thing that attracted me, and I understood that it was politics that . . . was the culprit.

**Bryonn:** From the classroom to the community to the correctional facilities, there's a whole new generation of folks that are calling on the very same principles that you championed for so long. So, I want to just acknowledge that and- (To the audience): any of y'all here? Any abolitionists, revolutionaries, activists, organizers? Anybody here fit that description? (applause) Justice Work Group? Narratives of Freedom? Beyond the Bars?

(applause)

Okay, so that's who we're talking to, just so that we're clear on that. I want to shift gears a little bit and just talk a little bit about your first impressions when you arrived at Angola and I want to just, by way of getting into that, share a little bit of information, we know Angola is named for the South West African nation, seventh largest country in Africa, where enslaved Africans were taken to work the fields. We know that we should put Louisiana into the context as well. So, Louisiana is the state with the highest incarceration rate in the nation, LA is the city with the highest incarceration rate in the nation, so we want to make that connection. One out of every 55 adults in Louisiana is incarcerated, over 67% of the prison population in Louisiana is black so the racial breakdown of his prisons is the inverse of the state popu-

lation. The average age of a person incarcerated at Angola Prison is 42 years old. You spent 40 [years]?

**Albert:** 44 years and 10 months in solitary confinement because of my membership in the party and my political belief and activities within the prison.

**Bryonn:** I'm just trying to wrap my mind on that, I just turned 43 you know so you know. . . please silence your cellphones. Okay. So, I have to ask, you know, I know so many folks are probably wondering like what do you find within yourself? What are the lessons you know there probably more there's certainly more than you can get into in the time we have here, but I want to just, I have to ask are there any lessons if [so many] folks here dealing with trauma in their lives in different ways, trauma that you know will not look, smell, act like the trauma you've experienced, but whether lessons or the jewels, whether the words of wisdom that were passed on to you throughout your experience that someone else might be able to draw on for them to actually understand and get through the trauma that they're experiencing they're dealing with? That's a big question but it's on my heart.

**Albert: Fight. You fight. (applause) You're gonna run into obstacles in life and they're gonna overwhelm you and if you allow it they will rob you of your hope, they will destroy your self-confidence, they will destroy your sense of self-worth. That's what America has been about . . . especially with its African-American and other minority populations. So, I was determined to define myself and not let the wall of the prison define who I would be.** And I think you know my experience with the Party, you know is the same in a lot of ways as Robert but in some ways it [was] different. To me, the Black Panther Party represented, you know, when they when they allowed me to join, here you got a young African-American man, who got a fifty year prison sentence and in prison but I was good enough for the Black Panther Party and for the first time outside of my immediate family, I felt that I was worth something, I had a value and under the most horrible conditions but still I was saying, okay, well we know what you did, we know where you're at, but we're going to show you a better way, you know, and it's only now some 57 years later that the true meaning of the Black Panther Party began to become known to the American people. All of the carefully crafted lies by the American government and the

FBI and other police agencies in the country. You know, finally I'm so sad that it's taking so long, but you know people began to see the Panthers in a different Black Panther Party in a different light now.

*In the United States, one in three adults has a criminal record—though black men are six times more likely than white men to be incarcerated. Over 60 percent of the formerly incarcerated will still be unemployed a year after release. Those who do find employment are typically in low-level jobs, earning 40 percent less pay than adults with no criminal background.<sup>6</sup>*

**Bryonn:** Right, that time is definitely coming in. The realization that this was a penitentiary built where four plantations, slave plantations were put together and existed as plantations until the end of the so-called emancipation happened. We know the hoax that the 13th Amendment was, which because it didn't actually abolish slavery, it just like except for as a punishment for crime. So, when did that realization come to you that this was a part of that system, is there a particular experience when you arrived at Angola that began to open you to that reality and to the Panthers?

**Robert:** Well, like I said when I first went to prison, the Panthers you know weren't in existence, not during the time when I first entered prison. But in joining the Panthers, I also didn't just join an organization. I joined the struggle and that struggle is ongoing. Organization or not, the concept you can't kill an ideology, you can't destroy an ideology. Of course, we know they devastated the Panthers, you know J. Edgar Hoover, COINTELPRO and in doing that they stopped an organization, but they didn't stop the struggle. Because what you see now, you know, ever succeeding effort by anyone black or white, you can attribute their mindset to a degree to some of the efforts of the Black Panther Party. So, when I first went through, when they first brought me to Angola and that was the prior to the existence of the party. And even though I was not politically aware, I knew something was wrong. I went into a prison at the time you said now is 60-some percent, I went into a prison in Angola and when I first went to Angola you were sort of like 94% black at that time and that was like

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6. *Id.*

5,000 prisoners and at least 4,500 of them were black, you know, or more.

So, I saw some things and felt something, and I got my impetus from thinking I used to love the think about my condition and when I incorporated my thinking with what I saw, I mean a mannerism. . .of the white guards and it was an all-white guarded situation. The mannerism was akin to that of what I learned to be later years as chattel. I mean the mannerism, they referred to people as “ole thang” and any other kind of derogatory name that they wanted to refer to as and this was something that I detested. Those were my first years in Angola and by the way I had two stints in Angola. I went there, I was sent to Angola, a robbery that was committed by two people and they ended up sending 4 people to Angola. I mean I’m of course ended up sending 4 people to Angola for and even though they had the person who had committed the robbery when they arrested the person that committed to robbery, there were three other Black men - well at least four others - and they ended up. . .I was at the time I just turned 18 and they came, I didn’t know anything about law. Ignorant about law at the time and they scared the death out of us saying that you’ll get 30 years in prison. I wasn’t 18 and 30 years in prison I took that literally and this scared me to death.

So, we all pled guilty, despite the fact that the person who committed the robbery ended up with seven and a half years. They ended up scaring us into also pleading guilty being ignorant of the law, saying that we would get thirty years. And as opposed to thirty years, getting ten years and thirteen, of course the rest of us pled guilty even though we were innocent at the time and we ended up with ten years in prison. And so, I had a working knowledge of prison and when I went, when they brought me to prison, I went through a lot of changes. I even became so proficient I read the Bible several times in doing that for [inaudible]. I read the whole 66 books, King James version. The 39 books in the Old Testament, the 27 in the new. I was able to go from Genesis to Malachi and from Matthew to Revelations and name them in succession. I mean, I was really all off into this but didn’t stop reading the Bible. I read the Bible and I read more, and I read more. I mean the Bible contributed, it was one of the biggest contributors to my awakening and to my, it was because I saw how people misinterpret the Bible. I taught it and I read it. I saw how people misinterpret



it, sometimes deliberately and I just felt that the thing that did was saying was just, I just disregarded that, I went to the read further. I read many other books. I mean when I say I read books, I mean read books, I read folklore, I read Greek mythology, Roman mythology, African mythology. I read, you know, all the books that I could find I just lost myself into this knowledge. I think this paid a part in my evolution at this point. I don't think I'm through you all, you know. I still got a ways to go. (Applause)

**Bryonn:** Amen. Now I have to ask because you write really powerfully about how Christianity was part of that, how reading the Bible, reading scriptures, opens you up to a whole other world and I have to ask if any of the Panther philosophy obviously influenced by Marx to a certain extent which has a very different take on religion, right? And the line most often quoted and probably seldom read is the line about the opiate of the people and religion being the opiate of the people, religion being used as a tool to oppress to enslave rather than to liberate. We know there's a whole rich tradition of liberation theology as well with Christ as revolutionary rather than Christ as submissive and gentle pacifists, afraid of confrontation. So, did that come up as you began to get into the scriptures? Did that come up in as you were also becoming part of the Panthers and looking at their philosophies that happen to emerge at all?

**Robert:** I didn't become a part of the Panthers at the time that I was off into the Bible. I was released from that first choice, you know, and I could say I learned more. Don't get me wrong, I loved the Bible. I walk, talk, ate it and slept it at the time that I did, but again I did not stop just with reading the Bible because it was much more. Then again, if you're going to interpret the Bible and I don't want to go sound like I'm preaching but a lot of people don't understand this. Jesus said that you'll do greater things than I'll do, and he said you're all of God and it goes back to what I was thinking earlier. You know the mind, they say the mind is a terrible thing to waste. It's terrible to waste a mind and to limit yourself to knowledge, to cut yourself off with knowledge, I felt that I was cutting myself off or just reading one book. I think they call it eclectic, I mean you get a lot of, get a lot of philosophies. This is what I felt that there was a little truth in everything, and I felt that godliness truth had been you know even though disseminated with people but it had been polluted. And I think the

people had to use their mind to understand just, you know, the mind plays a role in your conceptualization of things that are real, things that you can achieve. You can with the mind, like I said it's a terrible thing to waste, I tell you the only way any thought, anything that any person ever came up with, anything that they ever did it first existed here [the mind]. So, there is a connection and I think we have to understand that connection. I don't want to go to kind of philosophizing but that's my belief.

**Bryonn:** We need that, too. I think we need the theory and the practice, so I think that's much appreciated. I do want to focus for a moment on solitary confinement, specifically. I know in 2008, Amnesty International made the Angola 3 one of their priorities and they reported 80,000 people are held in isolation every day. They call for your release from solitary arguing: "It pushes the boundaries of cruel and inhuman and degrading treatment and flies in the face of international standards to which the US is a party. What evidence is there that these men are so dangerous that they must be subjected to these conditions? They have clean disciplinary histories and 4 decades of solitary confinement. There is no legitimate penal purpose for keeping these men in solitary." Wow. And Brother Robert you maintain in your book you say, "To be held guilty of a crime that one hasn't committed with exculpatory evidence to prove innocence willfully overlooked by the courts is an act of terrorism." (Applause) So I want to bring it back to you with a solitary confinement prior to entering solitary confinement, what did you know of this? What did you know of it, had it. . . was it something that you had been introduced to in anyway? What was that experience? How did that experience begin for you?

**Albert:** Well you know proud of being a center of the timing and Angola CCR, Closed Cell Restricted when I went to Angola, I had joined the Black Panther Party while I was in New Orleans and so I had been politicized, I had the time we use a level of constant which means basically meaning that I didn't accept things as they were. That's when things came to me no matter what form or shape or color or whether, I would apply whatever was to my head whatever basically what we call a gut instinct, you know, if it didn't feel right or if it didn't sound right or smell right or without you know then I would reject it. So, Herman and I, Robert was I think he was still in New Orleans at the

time. We helped establish the only recognized chapter for the Black Panther Party in a prison and we were very active in fighting prison corruption, racism. They had a thriving sex trade going on. We found the anti-rape squads from the guys who had joined on the prison chapter of the party in which we protected young kids 16, 17 years old coming into prison for being raped and being forced into sexual slavery and which the security staff benefited from it because they gave cover and protection to the guys, the sexual predators in the prison. So, things like that. I now forget. . . April 17th, 1972 the young correctional officer found dead in and one of the units, Pine Unit. And because of the political activity that I was involved in, Herman, and some of the other people I was the first one that they arrested and paraded before the entire prison population under the machine guns. And from there, that very next day April 18th, I was placed in CCR. CCR, for anyone who's not for me, was solitary confinement. You were housed in a nine-by-six cell, 23 hours out of day.

At the beginning it was very limited on what you could have. You could only have a Bible in your cell. You can only have so many items of clothing, just enough to help you endure the hardships of being held in a small space for 23 hours out of a day, you know they had an inmate guard system at the time. The brutality that they inflicted on other prisoners was-was encouraged and sanctioned by security. I think around that time you had something like 300 people working at Angola, we used to call them free men, supervising 5,000 or more prisoners. So these inmate guards they did a lot of the work that security people should [have] done or [should be doing].

*Over the course of more than two decades, extreme overcrowding in California prisons led to horrendous conditions coupled with a shortage of medical specialists, resulting in a likely preventable death at least every week.<sup>7</sup>*

**Bryonn:** Overseers?

**Albert:** Yeah. But these overseers had weapons instead of whips, you know. [They'd] give them rifles M16, the shotguns and stuff and you know, they used to man the towels and the work lines and all of that. They'd set up with guard lines around people working in the field and

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7. *Id.*

you know so those are some of the things that we were actively resisting. And eventually they brought King and because he was a member of the party because he knew Herman and I they placed him in CCR as well.

**Bryonn:** But he was 150 miles away? I mean how'd you magically 150 miles away snap your fingers and show up somewhere? I mean how did they explain that?

**Robert:** Well, you know, they explained for about 29 years, they explained it away that is. There wasn't any logic to it, Like Albert said. I was 150 miles away, had never met the man in my life. They sent me Angola 2 weeks after that incident and they placed me in solitary confinement. They placed me first in a dungeon, from the dungeon I was placed in solitary confinement, they placed me in closed cell restriction as they had placed Albert and Herman and other people whom they had picked up. Then I learned that I was under investigation, so they had me under investigation for a crime that had been committed [at] a prison that I was 150 miles away and we had never met [the] man and I was under investigation for 29 years for that crime.

**Bryonn:** So how old were you both when you went into solitary for the first time?

**Albert:** I was about 22 at the time.

**Robert:** I was about, at this particular time I was about 25 or 26, maybe about 25. It was my second [stint].

**Bryonn:** And, all the recent research we look at on brain development says that a person's brain is not fully developed until their mid-20s or even 30, so you're at that stage of forming. Can you tell us about Camp J?

**Albert:** Camp J was a punishment program designed by the security people at Angola. Its sole purpose was to break men, break their spirits, strip away their self-dignity and stuff. It was a brutal physical force and violence [inaudible] against anyone in that program on a daily basis, hourly basis, minute basis. Every minute, hour or whatever some man in Camp J was being beaten. As a matter of fact, the whole prison was a cesspool of violence and so you know, those were the kinds of things that we were fighting against, organizing against, edu-

cating, agitating and as a result of that, Robert did 29 years in solitary, Herman did 41 and you know because of Robert's campaign he was the first one in A3 [Angola 3] to be free in 2001. And he's walked out the front gate, he didn't walk, he ran out the front gate! (Laughter) But he wasn't running away from Angola, he was running to anyone that would listen about what was being done to Herman and myself personally, but the men being held in Angola as a whole. And so, you know basically it became. . . we were political prisoners under the time because we were being prosecuted and held in solitary confinement because of our political beliefs and our political activities. And as a result of that, we were forced to endure brutality unimaginable and we had to witness men lose. . . going insane. Men who hurt themselves, cut themselves. Men who actually committed suicide, because they could not stand the brutality and the confinement of solitary confinement. I mean for anyone who would love to have anything close to the experience try staying in your bathroom, because that's about the size of most cells, the size of a bathroom in a home. Try staying in there for 23 hours. So imagine what it's like to be held in that kind of a situation without any hope of being able to do anything to get you out of it. I mean, Herman, Robert, and myself we had impeccable conduct records. It wasn't because they had broken us, it was because we were living under the principles of the Black Panther Party. Our values and principles and code of conduct were those that had been taught with us and demanded of us from the Black Panther Party. So it wasn't a situation where the prison had broken us, or they had intimidated us. It was, if anything they just made us a thing, but I think what was more important than anything is that Robert, myself and Herman, **instead of turning towards the prison and becoming institutionalized, we turned to society**. So, the values and the moral principles and the code of conduct that we developed as a result of the impression of society, the things that was going on with society, you know we didn't turn inwards, we didn't become institutionalized. **We didn't live by the code of legalized slaves because that's what you are in America when you go to prison, you go from being a slave on a plantation to a slave of the state in a different kind of plantation**. So, those were the things that helped motivate and carry us for decades, and as I said earlier, my mom. . . I finally began to understand what she was trying to do. And I'm happy to say that before she passed away, I lost her to cancer, I was able to sit down and ask her forgiveness and tell her that I hope that the things she had instilled in me had helped me become the type

of man I was and you know it was one of the proudest moments of my life.

**Bryonn:** You said you wrote some poetry around that too, right? Is there any chance I could get you to share a little bit of verse with the people?

**Albert:** Well, I had this situation where. . .as I said, when I eventually caught up to the wisdom of my mom, I wrote a poem as a tribute to her and mothers like her.

**Bryonn:** [To the audience] Do you want to hear some poetry? Alright. We're going to get ready to open it up in just a moment so get your questions ready, please.

**Albert:** The poem is called Echoes.

*Echoes of wisdom I often hear, in mother's strength softly in my ears.  
Echoes of womanhood shining so bright, echoes of a mother within  
darkest night.  
Echoes of wisdom on my mother's lip, too young to understand it was in  
a gentle kiss. Echoes of love and echoes of fear, arrogance of manhood  
wouldn't let me hear.  
Echoes of heartache I still hold close, as I mourn the loss of my one true  
hero.  
Echoes from a mother's womb, heartbeat held so dear, life began with my  
first tears. Echoes of footsteps taken in the past.  
Echoes of manhood standing in the looking glass.  
Echoes of motherhood gently near, echoes of a lost mother I will always  
hear.*

[Applause]

**Bryonn:** Thank you. Thank you, brother. So, the Angola Three would not be the Angola Three without Brother Herman. Would you like to share?

**Robert:** Yes, I don't have any poetry at the moment, but I do want to share a Herman voice, Herman is always here with us as Albert points out even though he's gone but people don't hear his voice or the words that came from his soul. Anyway, he writes:

*On Saturday, August 1981, I was transferred to LSU (Louisiana State University) Hospital for graduation. I was informed that the*

## Solitary Survivors

*chemo treatment had failed, and it was making matters worse. And so, all treatment came to an end. An oncologist advised that nothing could be done for me medically with the standard care that they are authorized to provide. They recommended that I be admitted to hospice care to make my remaining days as comfortable as possible. I have been given two months to live. I want the world to know that I am an innocent man and that Albert Woodfox is innocent as well. We are just two of thousands of wrongfully convicted prisoners held captive in the America goullet. We mourned for the many families of Brent Miller and the many other victims of murder who will never be able to find closure for the loss of their loved one due to the unjust criminal justice system in the country. We mourn for the loss of the families unjustly accused who suffer the loss of their loved ones as well. Only a handful of prisoner globally have withstood the duration of years of harsh solitary confinement that Albert and myself have. The state may have stolen my life, but my spirit will continue to struggle along with Albert and the many comrades that have joined us along the way here in the belly of the best. In 1970 I took an oath to dedicate my life as a servant of the People, and although I am down on my back, I remain at your service. I want to thank all of you, my devoted supporters for being with me to the end.*

—Herman Wallace

[Applause]

**Bryonn:** So, I think we would like to open it up for questions, I want to be very welcoming and also very clear that we are looking for questions. So, if you have a comment, there will be a book signing afterwards. If you have a question, please raise your hand.

**Woman 1:** Hi, I just wanted to ask if there is one thing that kept you going, what was it?

**Albert:** For me, and for Robert as well, it was the love of humanity. We dedicated our lives to be revolutionary and [the] social struggle and our objective then and now is to protect and help build humanity so that at some point in time there would be no need for the economic oppression and now exploitation that [goes] on in this country, and there will be no need for human beings being judged on the color of their skin, ethnicity, hair texture or their physical features. We will. . . I'm sorry, I'll let Robert finish.

**Robert:** The question was what?

**Bryonn:** If there was one thing that kept you going, what was it?

**Robert:** Well it wasn't one thing that kept us going, it was many things. It was just as Albert pointed out, **I imagine if I was forced to single one thing out, I would have to say that it was my total rejection of a system that oppressed. It was my being politicized into learning who my enemy really was, and what was my enemy and my enemy was immersed in lies and discrepancies and hypocrisy.** And the fact that I felt that this was a wrong done to mankind and society and if I could do anything to right this wrong, to offset it in any manner I would do so, and I made a dedication within myself and I didn't make a promise to anyone else but to promise myself that in order for me to live fully and wholly and to contribute in a manner in which I want to. . . I have to do it the way I'm doing it now, and that is to continue struggling.

**Woman 2:** I read something that said that when people are in solitary confinement for a long period they sometimes hallucinate, and I wondered. . . just their brains start overacting., Did either one of you experience that?

**Albert:** Well yeah, I mean I still even though I have a greater movement I still suffer from claustrophobic attacks. It has been scientifically proven that anyone held in scientific confinement suffer brain damage and physical deterioration at a much greater speed than the normal gaining process would require.

**Robert:** I think I suffered some damage. It was mostly physical, and did I hallucinate? I meditated instead of hallucinating. I meditated and I continue to think about, I used to love to think. . . I used to spend hours and hours and hours thinking, dissecting our condition. So, no I didn't. . . you know they say solit —of course solitary confinement, scientists have proved this and we have been on panels in which I have appeared on, Albert has appeared on that American Association of Scientists have pointed out that solitary confinement, people held for prolonged periods in solitary confinement it can cause brain damage. I totally agree with that and I have no issues with their findings, but I think there are some people who can weather the storm. I mean people ask me a lot of the time how did we manage or how did we weather the storm and people want to know why you aren't crazy



and I look at them, I say ‘Wait a minute, I didn’t tell you I wasn’t crazy. Don’t conclude that.’ (laughter) I don’t think anyone could get dipped in waste and not come up smelling. But I’m not psychotic and I don’t hallucinate, you know but I still meditate. And I’m not saying that other people don’t, but you know.

**Bryonn:** To flip the question on its head though, it’s like if we are functioning in a society which is taking folks for decades at a time and putting them in the hole, right? Are we sane? Right? Because we’re financing this, right? Your tax dollars are financing this, so the question leaving this room today is, if we actually want to preserve our collective sanity, right, in this crazy world we’re living in right now, what can we do, what are we willing to do, what are we willing to give up, what sacrifices we’re willing to make to actually move the country. Angola is the largest prison in the country, but these. . . LA has. . . California has . . . across the country has their own versions of Angola and we have the ability to do something about that. I think we’re ready for another question.

**Woman 3:** Being a late 70s baby, I didn’t grow up experiencing the type of racism that you all did and so now that I’m seeing all of this go on, I feel like I should do something but I don’t really know what to do, and I hear so much commentary about what was done prior is not going to work now, and I just wanted to know how you feel about that being said and what can someone like me do? Because I’m like hella angry and I feel like I should do something, and I don’t want to do the wrong thing because sometimes I feel like popping off. (laughter)

**Bryonn:** Excellent question. Excellent question.

**Albert:** Well first of all, when you’re struggling for social justice, there is no wrong thing. If you’re struggling for personal gratification, or recognition then you achieve nothing so. . . there are others who feel like you, think like you. They could be your next-door neighbor, they could be in the church you go to, they could be one of the parents at the school where your kids or relatives may go to and you have to unite with them and fight. Fight to build a better humanity, fight to build a better world, a better society. As King and I always try to say **an individual can only create chaos, mass movements can create change**. So that’s what you have to do, you have to start trying—King has a very wise saying ‘throwing pebbles in a pond you cause waves

and if you throw enough pebbles, waves can become a tsunami” and we all know that tsunamis changes everything. So you know, that’s you can do. First of all believe in yourself and believe that what you’re doing what is right and be willing to fight for it.

**Robert:** I agree and briefly just to add onto that, or to coattail it, if you throw pebbles in the pond you get ripples. Keep throwing those pebbles in a pond. Some people throw rocks, some throw pebbles, some even throw a mountain, or try to throw a mountain. You get a big splash if you throw mountain. Like individual gratification, you may get that, and you see a lot of that, but in people’s movement, moving collectively, each continuing throwing the pebbles in the pond, those pebbles. . . you know those ripples become waves, and like Albert said it becomes tsunami. People will lack that the collective movement of a people. You know during chattel at the height of chain slavery, many people believe that the struggle was confined to a certain segment of people. The Underground Railroad was. . . the people who were in servitude didn’t have the ability to create an underground railroad, they needed allies, they needed help. It was when people who saw slavery, chattel slavery as being something that was immoral and reprehensible, even though it was legal. Legality and morality do not shake hands in a courthouse. (applause) It don’t. But it wasn’t until people felt chattel had been immoral, repugnant, that they lodged against us and it took all people coming together, fighting to rid themselves – of course, yeah they created another. . . they halted what was going on, but in the process because when you eliminated chattel slavery, the immediately instituted legal slavery in a much broader sense. Because again, you could be innocent of a crime, but found legally guilty, guilty of that crime and then you could die for that crime. And so, this is the reason why we have to make the distinction between legality and morality, and we have to understand it that one individual, or two individuals won’t accomplish this. It’s a process, it’s a prolonged—it’s a struggle, and it means just that. And I think for each individual who throws a pebble in the pond, it makes it possible for someone else to throw a pebble in the pond, to build up on that. Whatever you drop in a pond or throw in a pond, whether it’s a big pebble or a little pebble, remember this that in whatever you do, remember. . . make it effective. Make it meaningful, because again like I said anybody can come up with a big splash and then are instantly remembered, but in actuality they are totally forgotten. I think people

coming together and having a prolonged struggle, I think that means a lot. That makes a difference.

**Woman 4:** I appreciate you all being here. My question is about the privatization of prisons, that system, where sometimes judges are incentivized to continue to convict, convict, convict and these are private companies that profiting versus the federal government, state or city county government. How do we stop that? How do we fight that? Because that is a whole other issue where mostly people of color, minorities, are going into these privatized prisons or jails and there is a price tag on their heads. For every phone call, for every visit if they can even have a visit or the video visits. . .etc. It's cost every single thing for that person to be in there.

**Albert:** Prison is called a prison industrial complex. One of the biggest private prisons Wackenhut Corrections trades on Wall Street so that tells you private imprisonment has become one of the biggest economic institutions in this country. How do you stop it? Well, first of all we have to start being smart with our vote. (applause) We have situations where many women are voting for people because they agree with one issue, and we have to stop doing that. We have to start finding out what these people coming forward to us and ask us to put them in a position of power and authority to govern our lives daily. We have to see the whole person, not that one issue that I agree with. And then we put these people into power and then when they start doing things that hurt us, that hurt us individually, hurt our communities then we have to question how this happened. Right now, we've got a man who's the president of this country, openly a white supremacist. How did that happen?

**Robert:** Yes, to add to that, private prison is. . . yes, is a concern. Private Corporation, Wackenhut like Albert pointed out. . . how do we stop the private prisons? I think first we have to focus and pay more attention to state run prison, simply because if you look at the private sector of prisoners, and Obama while he was president, I think he kind of shut down, eliminated, or it may come back on a federal level, it may come back. But you have to understand this that private prisons are not the culprit, because of all the people incarcerated in America, private cooperation and those entities and sub-entities like Wackenhut and whatever they are now, they change the name frequently, they house only 200,000 - 350,000 inmates, if that many. The

biggest majority of prisoners are in state-run prisons. And there are some in federal, but the biggest majority are in state-run prison that is not a privately ran corporation. It is run by the state. So, in order to eliminate or to cut down on the proliferation of Wackenhuts. . . the private corporation sector, we have to focus first and foremost on the state ran prisons, because these are your biggest culprit. The United States Government and the federal government are your biggest private cooperation, they are your public cooperation and they house more people than any private cooperation could ever house in America.

[Applause]

**Bryonn:** Before we go to our last question, I would just add that the state prisons, the federal prisons, they also have private contracts with Starbucks, so when you get your lattes, that's where your money is going. To Victoria's Secret, Dell Computers . . . for a long time it was MCI, they got outed, right? And then they stepped out of it, right? But we've got to educate ourselves and do that research. There's going to be a lot of folks in the lobby space who are doing this kind of work, so I encourage you and invite you to introduce yourself to somebody if you see organizers handing out flyers, talk to folks and get some information about what else is going on. There's a lot is going on this week so we can continue to educate ourselves and work together and to collaborate on bringing down this oppressive system. I want to read one last quote from the book, *From the Bottom of the Heat*, which I recommend you get, along with *Panthers and the Hole* — they're two really brilliant books that will help put a lot of this in perspective, and a quote that I want to read which I think answers this question well says: "The Black Panther Party's slogan 'Power to the people' centered around the concept that power actually does belong to the people, but the people have relinquished that power to a small fraction of people called politicians, and in relinquishing power they have left themselves at the mercy of ever-changing restrictions defined as laws. Many of these laws deemed legal are in no way moral. In reality we are empowered in mass to direct or redirect our own course. In redirecting our own course, one of the main focuses must be the prison system and how it is connected to slavery."

**Man 1:** As Brother Bryonn mentioned earlier California has its own gulag which houses people in solitary confinement for decades, and

especially people of color. In 2012 there was one of the biggest hunger strikes here in California via the people in solitary confinement, which included blacks, brown and even white supremacists who were also incarcerated in solitary confinement. So, my question to you is, have you ever been in a situation in solitary confinement or in prison where you had to work with people of white race who were supremacists in order to work as a collective and get things done?

**Robert:** Yes, during our early years in CCR, when they placed us in CCR, out of the . . . I was trying to think of how many 80 – 90 some prisoners they had housed in CCR, they only had about 2 or 3 whites. Everyone else in there were black. So, we didn't have the problem with "white supremacy". If we did, they were self-suppressed. When they came on to the chair, it wasn't more white supremacy it was just people. So, that's how we sort of dealt with that and over the years, like I said when I was released from prison, when I was released in 2001 I don't think there were any whites in CCR. . . well they had some whites, maybe 3 or 4 but the majority of the people on the tier was black and the majority of people in CCR at the time were black for many years, especially during those early years. So we didn't have too much problems with white supremacists coming on the tier disrupting, again, because whoever came on the tier that we lived on, we constructed ourselves in a manner that we felt was dignified and that was in conjunction with the principles of the Black Panther Party and of being kind to the people, teaching the people, being polite and that was our only motive and people embrace us for that and the couple of few whites that they had on the tier most of the time or the few times in those early years, like I said they embraced our philosophy at the time.

**Albert:** Before we go, Ma'am please stand up. Yeah, you raise your hand. Yes, you're the very first one to raise your hand to ask a question and. . . before we leave tonight, I want to know what your question is.

**Woman 4:** Mr. Robert and Mr. Albert, I just wanted to pay so much respect, but I'm curious, I'm a librarian, and I'm curious - how you got your books in solitary confinement?

**Albert:** Well when we were first put in solitary, we were only allowed to have a Bible in our cell.

**Woman 4:** Really?

**Albert:** Yes, and as a result of both physical and eventful protests and struggles in the courts we won the right to have other books. Now the crazy thing about it is that the prison library was supplied with books from public libraries, and there was a wealth of books in the prison library that the prison administration didn't even know about. So, the first political book I read was called *Wretched of the Earth* by Frantz Fanon and that came out of the prison library, you know? So, you know I even, I remember one time someone had sent me a) COINTELPRO and they wouldn't let me have it. And so I filed, it was called ARP – Administrative Remnant Procedures, first step in filing a civil suit. So, I wanted to challenge the censorship, so one of the prisoners that work in the library made a personal trip to CCR and he said look, you know heard word through the grapevine that you're getting ready to drag these people into court over books. I have the book, I'll give it to you. He said all I'm asking is that you don't drop your suit, he said because if you file this suit then they're going to come in that library and they're going to in order to try and protect themselves, they're going to come in that library, and we have a treasure trove of books. So, I said okay. So, I took the book and let the appeal run out, you know.

**Bryonn:** Will you please give it up for Albert Woodfox, Robert King, the Library Foundation of Los Angeles? Thank you.

**Albert:** Alright my brother. Thank you.

**Bryonn:** Thank you.

## ESSAY

# A Call to Expand Protections for Activists

KHAAIR J. MORRISON\*

*This essay is meant as a brief survey and call to action to reimagine our view of privacy in the modern age and our duty to protect activist. Our society should balance speech, privacy, and safety in a way that allows a free flow of ideas but also has proper procedures in place to investigate illegal activity. There are so many issues that still need to be discussed in the age of President Donald Trump, Russian propaganda, and the commodification of a user's data on social media platforms. But for now, I would like to thank the Law Review staff at Howard University School of Law and faculty advisors for publishing a timely set of articles and essays, as well as for their hard work and valuable contributions.*

### INTRODUCTION

In *The Ballot or The Bullet*, a famous speech given by Malcolm X, he began by saying, “Mr. Moderator, Reverend Cleage, Brother Lomax, brothers and sisters, and friends and I see some enemies. In fact, I think we’d be fooling ourselves if we had an audience this large and didn’t realize that there were some enemies present.”<sup>1</sup> The FBI and other intelligence agencies have a history of using counterintelligence to disrupt the activities of political and activist organizations. A notable example of this is the FBI’s COINTELPRO program (a portmanteau derived from Counterintelligence Program).<sup>2</sup> More recently,

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\* It was my privilege to serve as the Editor-in-Chief for Volume II of the Howard Human & Civil Rights Law Review, and I am grateful for the excellent comments and feedback given by Professor Carmia Caesar and Professor Darin Johnson.

1. Malcolm X, *The Ballot or the Bullet* (Apr. 3, 1964), <http://xroads.virginia.edu/~PUBLIC/civilrights/a0146.html>.

2. Fed. Bureau of Investigation, *COINTELPRO* (May 5, 2011), <https://vault.fbi.gov/cointel-pro>.

these same agencies have used social media accounts to track activists in the virtual space. Many have written about the First Amendment implications of these acts, but what is often left out in this discussion is a much-needed dialogue on the potential threat to the right to privacy that flows through the Fourth Amendment. There is an interplay between having a reasonable expectation of privacy in furtherance of political activism and the right to freely associate, which this paper will explore.

Government disruption of these groups implicates both of these rights. This form of political surveillance appears to typically be used to dismantle groups with opposing ideologies rather than for political groups who are in power.<sup>3</sup>

This paper is divided into three parts. Part I outlines a detailed roadmap of the paper which provides an historical overview of the FBI's COINTELPRO program, the recent FBI classification of so-called black identity extremist, and the problems associated with counterintelligence of activist groups. Part II highlights the effects of surveillance on organizing activities. Part III encapsulates the Supreme Court's Fourth Amendment jurisprudence on the reasonable expectation of privacy and asserts that the current Fourth Amendment standard should govern activist organizations. Part IV discusses the need for lawmakers to create clear protections for people's information on social media. Thus, in order to balance civil liberties and safety, this article advocates for warrants to be issued before the surveillance of activist groups.

## I. COINTELPRO, BLACK IDENTITY EXTREMIST, AND THE HISTORY OF POLITICAL SURVEILLANCE

Throughout social justice movements in this country and in other nations across the globe, governments have covertly and sometimes not so covertly attempted to dismantle these movements through surveillance, informants, and other spy tactics.<sup>4</sup> Malcolm X understood that not everyone around him was a friend and that the government often infiltrated civil rights groups.<sup>5</sup> One such covert program that ran

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3. See Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 *YALE L.J. F.* 685 (2018).

4. FBI, *supra* note 2.

5. Malcolm X, *supra* note 1.



from the 1950s - 1970s was called Counterintelligence Program (“COINTELPRO”).<sup>6</sup>

According to the FBI, “The FBI began COINTELPRO . . . in 1956 to disrupt the activities of the Communist Party of the United States. In the 1960s, it was expanded to include several other domestic groups, such as the Ku Klux Klan, the Socialist Workers Party, and the Black Panther Party.”<sup>7</sup> Organizations, like the Ku Klux Klan, that committed criminal acts should have been investigated and disrupted; but there is a unique balance that needs to be made in order to not violate the rights of law-abiding groups. Admittedly, the FBI says the program was “. . . later rightfully criticized by Congress and the American people for abridging First Amendment rights and for other reasons.”<sup>8</sup>

Even after that admission, it appears that the FBI has not learned its lesson and still does not understand how devastating COINTELPRO was to communities of color; most recently releasing a report titled *Black Identity Extremists Likely Motivated to Target Law Enforcement Officers*.<sup>9</sup> The FBI has not internalized the lessons from COINTELPRO and remains interested in using hostile tactics. Foreign Policy Magazine first leaked this report,<sup>10</sup> which later became the subject of many questions asked to Attorney General Sessions during a Congressional Committee hearing.<sup>11</sup> In the report, the FBI identifies no current “black group” that it specifically considers promoting a “black identity extremist” ideology.<sup>12</sup> Instead, the report seems to loosely identify this ideology, identifies six different police attacks that have happened over the last five years, and unconvincingly creates a correlation between the two.<sup>13</sup> Further, the report appears to be research that will most likely later lead to justification for surveillance of black groups like Black Lives Matter. It is true that many pro-black

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6. FBI, *supra* note 2.

7. FBI, *supra* note 2.

8. *Id.*

9. Fed. Bureau of Investigation, *Black Identity Extremists Likely Motivated to Target Law Enforcement Officers*, COUNTERTERRORISM DIVISION (Aug. 2017), <https://assets.documentcloud.org/documents/4067711/BIE-Redacted.pdf>.

10. Jana Winter and Sharon Weinberger, *The FBI's New U.S. Terrorist Threat: 'Black Identity Extremists'*, FOREIGN POLICY (Oct. 2017), <http://foreignpolicy.com/2018/01/30/is-a-court-case-in-texas-the-first-prosecution-of-a-black-identity-extremist/>.

11. Stephen Crockett Jr., *How Come No One in the Justice Department Can Explain the Black Identity Extremists Report to Rep. Karen Bass*, THE ROOT (Dec. 2017), <https://www.the-root.com/how-come-no-one-in-the-justice-department-can-explain-1821266647>.

12. Fed. Bureau of Investigation, *supra* note 9.

13. Fed. Bureau of Investigation, *supra* note 9.

activist groups were created in response to police killings, but there has been no group identified in this report and there has been no evidence presented that connects them to criminal acts. These groups are merely protesting a system of institutionalized racism. The system is part and parcel of the reason that police violence has occurred with little to no ramifications for those officers who have killed unarmed men and women of color.

In what appears to be a return of COINTELPRO-like tactics, the FBI writes that “in all six targeted attacks since 2014, the FBI assesses it is very likely the BIE (“black identity extremist”) suspects acted in retaliation for perceived past police brutality incidents. Even though five of these attacks occurred following controversial police shootings of African Americans by white police officers, BIE targeting of officers was not, in every incident, based on their specific race.”<sup>14</sup> Six attacks, five of which occurred after controversial police shootings, and the FBI admits that they do not believe any of the attacks were based on race.<sup>15</sup> Looking at their report, these attacks do not appear targeted and they do not appear to be based on so-called black identity extremism. Many people in the Justice Department are unable define what a black identity extremist is. During an appearance before the House Judiciary Committee, Attorney General Jeff Sessions could not give an answer that defined what a black identity extremist is.<sup>16</sup> Attorney General Sessions said he was not aware of the report or if the FBI had issued a similar report on “White Identity Extremist.”<sup>17</sup> This report creates a pretext for future surveillance of black organizations, what can be seen as a return to COINTELPRO type tactics.

## II. COINTELPRO, BLACK IDENTITY EXTREMISTS, AND THE HISTORY OF POLITICAL SURVEILLANCE

Justin Hansford, a professor of law at Howard University School of Law and the Director of their Thurgood Marshall Civil and Human Rights Center, wrote an article discussing his experience as a Fergu-

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14. *Id.* at 4.

15. See Kate Irby, *White and far-right extremists kill more cops, but FBI tracks black extremists more closely, many worry*, McCLATCHY D.C. BUREAU (Jan. 24, 2018), <https://www.mcclatchydc.com/news/nation-world/national/article196423174.html>.

16. Crockett, *supra* note 11.

17. Sadie Gurman, *Session Unfamiliar with FBI Report on Black Extremist*, USANEWS: The Associated Press (Nov. 14, 2017), <https://www.usnews.com/news/politics/articles/2017-11-14/sessions-unfamiliar-with-fbi-black-extremists-report>.

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son activist and the way the First Amendment is used differently toward Black activist groups.<sup>18</sup> He wrote:

In addition to the inaccuracy of the label, the FBI's suggestion that people with extreme Black identities may attack law enforcement officers authorizes and incentivizes the agency to surveil, monitor, and deploy informants to gain intelligence on individuals and groups that it believes to be Black Identity Extremists. This could chill and criminalize activists and protesters in ways that have terrifying echoes of the FBI's infamous Cointelpro program, which investigated and intimidated a number of groups and resulted in the assassination of Black Panther Party leaders and playing a major role in the destruction of that organization. Perhaps even more effective than curbing freedom of assembly on the streets is destroying these civil society organizations from the inside so that no one is organized enough to take to the streets to begin with.<sup>19</sup>

Professor Hansford appropriately points out how this intelligence has led to the death of black activists or the dismantling of certain movements. Both Martin Luther King Jr. and Malcolm X were known to receive fake letters in the mail from the FBI.<sup>20</sup> Even my grandfather, James 67X, was subject to FBI investigation, in which no file says he committed a crime; but he was under surveillance solely because of his relationship with Malcolm X.<sup>21</sup>

Hansford continues by writing “[w]hen ideas on race that would disrupt the racial hierarchy of white over Black emerge, the First Amendment is disproportionately applied to trample that dissent.”<sup>22</sup> This becomes problematic on a First Amendment level because we should want equal standards to apply to speech; however, even on a Fourth Amendment level, activists (especially those challenging the government) should have a reasonable expectation of privacy in their meetings and other efforts that further their organizing. It is bad for democracy when government has free range to conduct surveillance

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18. Hansford, *supra* note 3, at 4.

19. *Id.*

20. David McCormack, *You Filthy, Abnormal Animal: Full Graphic Content of Anonymous Letter Sent by FBI to Martin Luther King FINALLY Revealed*, DAILY MAIL UK (Nov. 12, 2014), <https://www.dailymail.co.uk/news/article-2832413/You-filthy-abnormal-animal-graphic-content-anonymous-letter-sent-FBI-Martin-Luther-King-FINALLY-revealed-50-years-sent.html>.

21. *The Malcolm X Project at Columbia University: Abdullah Abdur-Razzaq*, COLUMBIA .COM, <http://www.columbia.edu/cu/ccbh/mxp/raazaq.html>.

22. Hansford, *supra* note 3, at 4.

and even disrupt groups with no criminal history or no immediate threat of violence.

The Court in *Brandenburg v. Ohio* ruled that “[t]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>23</sup> While this standard considers First Amendment implications, it could also be strengthened by considering the Fourth Amendment implications of surveilling political groups.

### III. THE FOURTH AMENDMENT & ACTIVIST’S REASONABLE EXPECTATION OF PRIVACY

The Fourth Amendment protects persons against unreasonable searches and seizures.<sup>24</sup> A search is an intrusion on a person or their possessions.<sup>25</sup> In *Terry v. Ohio*, a seminal case in Fourth Amendment jurisprudence, the Supreme Court ruled that a seizure is an act of detaining an individual and preventing that individual from leaving.<sup>26</sup> During an investigatory stop, an officer may pat down the outer layer of the clothing of a person they are encountering to ensure they are not armed or otherwise dangerous.<sup>27</sup> A lawful search is conducted upon the issuance of a warrant supported by probable cause.<sup>28</sup> “Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions. To establish the reasonableness of a search and seizure the Court looks to, “whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>29</sup> This lower standard of reasonable suspicion was created in *Terry*, where an officer can conduct a stop where there is reasonable suspicion based upon specific and articulable facts.<sup>30</sup>

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23. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

24. U.S. CONST. amend. IV.

25. *Terry v. Ohio*, 392 U.S. 1, 9 (1968); see also *Arizona v. Johnson*, 555 U.S. 323, 327(2009) (holding that the detainment of a vehicle constitutes a seizure for Fourth Amendment purposes).

26. *Terry*, 392 U.S. at 16.

27. *Id.* at 24.

28. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Katz v. United States*, 389 U.S. 347, 357 (1967).

29. *Terry*, 392 U.S. at 19-20.

30. *Id.* at 21.

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Additionally, the Supreme Court has recognized that privacy expands to many areas where an individual maintains a reasonable expectation of privacy.<sup>31</sup> In *United States v. Katz*, the Court ruled that the government's use of an electronic listening device in a phone booth without a warrant violated *Katz's* reasonable expectation of privacy.<sup>32</sup> In a concurring opinion that has ultimately become the standard, Justice John Marshall Harlan created a two-prong test to determine whether someone had a reasonable expectation of privacy.<sup>33</sup> The test relies on a subjective view of whether the person has exhibited an actual expectation of privacy, and an objective test of whether the expectation is one that society is reasonably prepared to recognize as reasonable.<sup>34</sup>

The reasonable expectation of privacy should be expanded to activist meetings, groups, and other activities in furtherance of their political advocacy. There is a subjective view that legal organizing efforts should not be thwarted by the police. Additionally, in the society we live in there is also an objective view that would be reasonable. Unless the group's activities are open to the general public or there is an informant, the government should not be allowed to infiltrate strategy meetings or the group's ranks without following the normal Fourth Amendment procedures. Some have argued that "[w]hen a government agency decides that there is a need to gather information concerning a person's or organization's political beliefs, opinions, or activities, that agency should be prepared to show a substantial relationship between the information sought and some compelling government interest."<sup>35</sup> This argument takes both the First and Fourth Amendments into account in order to balance civil liberties and security.

Further, "[s]uch an investigation should be conducted by a law enforcement agency only when there exists a reasonable suspicion based upon specific and articulable facts that the subject of the investigation has committed, is committing, or is about to commit a crime."<sup>36</sup> While the reasonable suspicion standard seems higher than any current standard being used – the court should go further to require

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31. *Katz*, 389 U.S. at 350.

32. *Id.* at 353.

33. *Id.* at 361.

34. *Id.*

35. Eric Lardiere, Comment, *The Justiciability and Constitutionality of Political Intelligence Gathering*, 30 UCLA L.REV. 976, 1018 (1983).

36. *Id.* at 980.

probable cause. Due to the United States' history of infiltrating movements, the First Amendment implications, and the need for flowing ideas in a democratic society, any government agency seeking to infiltrate groups should be required to obtain a warrant supported by probable cause. This heightened standard would require judicial review to balance the protection of political speech – instead of allowing the government to decide, without any reasonable justification, what groups they target and which groups they leave alone.

Sadly, the Court's jurisprudence on the Fourth Amendment continues to forget the real-life effects of their decisions. Even as policing tactics have been at the forefront of the news lately the Court still sides with law enforcement to the detriment of average citizens. In *Utah v. Strieff*, police stopped Mr. Strieff after Mr. Strieff exited a house that was under surveillance.<sup>37</sup> Police claimed they received an anonymous tip that drugs were being sold from the house, and Officer Fackrell watched the house for about three hours within a one-week span.<sup>38</sup> After stopping Mr. Strieff, with little suspicion of any crime being committed, Officer Fackrell said he wanted to ask Mr. Strieff some questions.<sup>39</sup> The officer did not know how long he was in the house.<sup>40</sup> Subsequently, Officer Fackrell obtained Mr. Strieff's identification and uncovered an outstanding warrant for his arrest for a minor traffic offense.<sup>41</sup> The officer arrested Mr. Strieff and upon a search found methamphetamines.<sup>42</sup>

At trial, Mr. Strieff moved to suppress the evidence because of the lack of reasonable suspicion to stop him in the first place, making any evidence found the fruit of an illegal search.<sup>43</sup> The exclusionary rule is long standing legal precedent that excludes evidence that was obtained during an illegal search.<sup>44</sup> In *Strieff*, his attorneys argued that the search was illegal and therefore the drugs found on him should be excluded from evidence. The state even conceded that it had no right to detain Mr. Strieff.<sup>45</sup> Following *stare decisis* (a *Terry* analysis) the Court should have suppressed the evidence, but instead, the Court

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37. *Utah v. Strieff*, 136 S. Ct. 2056, 2059-60 (2016).

38. *Id.* at 2059.

39. *Id.* at 2060.

40. *Id.* at 2063.

41. *Id.* at 2060.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 2060.

ruled that “evidence . . . seized as part of [a] search incident to [an] arrest is admissible because [the] discovery of the arrest warrant attenuate[s] the connection between the unlawful stop and the evidence seized . . . .”<sup>46</sup>

This ruling not only matters for everyday citizens, but it is relevant to activists. The ruling allows police officers to commit an illegal stop or search and then justify it later by finding a warrant even for something as minor as unpaid parking tickets. Justice Sotomayor eloquently dissented by discussing the effect of the Court’s decision on a person’s body.<sup>47</sup> Unlike many other Justices, Justice Sonia Sotomayor (along with Justices Elena Kagan and Ruth Bader Ginsburg) was willing to use a comprehensive approach in understanding the issue before the Court in *Strieff*; she went beyond simply articulating the theoretical Fourth Amendment implications to discuss the actual real-life issues and persons this ruling would affect.<sup>48</sup> Justice Sotomayor asserts that the Court’s ruling helps to validate conduct that disparately impacts people of color.<sup>49</sup>

Specifically, with the FBI already creating classifications of “Black Identity Extremist” this report offers more fuel to exploit black activist groups. Justice Sotomayor correctly, and with a poetic touch, reflects that the opinion “says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.”<sup>50</sup> The Court’s majority ruling greatly frustrates police-community relations at a time where we need police departments and communities to work together. We must reevaluate the Court’s position in solving the issues presented to them.

By heightening the standard to probable cause, we would protect activist groups and allow court review before infiltration or surveillance begins. This heightened standard does not argue for limiting police to attending rallies open to the public or conducting surveillance that does not require a warrant (photos out in the public). The standard just realizes that activists have a reasonable expectation of privacy in certain acts in furtherance of whatever their political movements are. In order to balance civil liberties and safety, police

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46. *Id.* at 2064.

47. *Id.* at 2064 (Sotomayor, J. dissenting).

48. *Id.* at 2069 (Sotomayor, J. dissenting).

49. *Id.* at 2070-2071 (Sotomayor, J. dissenting).

50. *Id.* at 2071 (Sotomayor, J. dissenting).

should be required to go through an additional step of receiving a warrant in order to infiltrate these groups.

#### IV. SOCIAL MEDIA AND ACTIVISM

Political surveillance extends not only to physical meetings or in person events but spans to social media as well. Many questions revolving around privacy stem from the extended space we are given by social media—a virtual space where people keep up with one another’s lives and share details about their own. We are inundated with information that we once considered private or intimate. Our sphere of privacy—that is—those we allow to know information about our lives, has expanded. This virtual space has been used to start revolutions across oceans,<sup>51</sup> share pictures of a baby shower with friends, plan a protest in Ferguson,<sup>52</sup> confess to a crime you’ve committed,<sup>53</sup> or find an old high school friend you haven’t seen in years. These distinct functions all happen in an almost undefined space as it relates to the law, and deserves the same level of privacy as physical space would. Increasing protections of privacy and speech on social media will be an additional tool to protect activists and political groups from government surveillance.

The Fourth Amendment and the Supreme Court’s jurisprudence should evolve to expand privacy protections and take into account the new cultural dimensions of privacy. On any given day a person is walking around with hundreds of their contacts, emails, text messages, phone calls, past locations, photos, and more.<sup>54</sup> A debate arises when defining what is public and what is private on social media, even if your account is private to the general public you are still revealing a lot of information to your “friends” or approved “followers.” Further, users enter into agreements with social media providers that allow providers to track their locations, communications, “likes,” and then

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51. Catherine O’Donnell, *New study quantifies use of social media in Arab Spring*, U. WASH. (Sept. 12, 2011), <http://www.washington.edu/news/2011/09/12/new-study-quantifies-use-of-social-media-in-arab-spring/>.

52. Joshua Tucker, *Tweeting Iran: How social media can (and cannot) facilitate protest*, WASH. POST (Dec. 21, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2014/11/25/tweeting-ferguson-how-social-media-can-and-can-not-facilitate-protest/?utm\\_term=.27f8242e862f](https://www.washingtonpost.com/news/monkey-cage/wp/2014/11/25/tweeting-ferguson-how-social-media-can-and-can-not-facilitate-protest/?utm_term=.27f8242e862f).

53. See Sowmya Krishnamurthy, *5 Murderers Who Made Chilling Confessions on Social Media*, OXYGEN: CRIME TIME (Sept. 21, 2017), <http://www.oxygen.com/criminal-confessions/blogs/5-murderers-who-made-chilling-confessions-on-social-media>.

54. Junichi P. Semitsu, *Arresting development: Facebook searches and the information superhighway patrol*, 65 ARK. L. REV. 99 (2012).



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sell this information to third parties.<sup>55</sup> Occasionally, the government is granted access to this information as well.<sup>56</sup> Many activists use Twitter, Facebook, WhatsApp, and other social media websites to communicate with other organizers – most not expecting that the government is reviewing this. Coupled with the arguable expansion of government power by the enactment of the Patriot Act<sup>57</sup>, the expansion of the National Security Agency wiretapping,<sup>58</sup> and government request to private companies about user data,<sup>59</sup> we need a more expansive view of the Fourth Amendment, which takes into account protecting privacy in the new age, especially when it relates to activists. There are vast negative First Amendment and Fourth Amendment implications of invading a person’s virtual space.

Despite advanced technology, the Court in some instances has recognized privacy interests to some degree but has recognized the new virtual spaces that people operate in. In *Kyllo v. United States*, 533 U.S. 27 (2001) the Court recognized using a thermal-imaging device to detect heat omission from someone’s home was an unreasonable violation of someone’s privacy without a warrant.<sup>60</sup> In more recent years, in *Riley v. California*, after officers conducted a search incident to arrest, the officers searched the suspect’s phone and found what appeared to be gang related material.<sup>61</sup> The Court ruled that “officers must generally secure a warrant before conducting a search” recognizing the privacy implications of going through someone’s phone.<sup>62</sup> This case is pivotal because it is an example of the Court attempting to modernize.

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55. Amanda Scherker, *Didn't Read Facebook's Fine Print? Here's Exactly What It Says*, HUFFINGTON POST (July 21, 2014), [https://www.huffingtonpost.com/2014/07/21/facebook-terms-condition\\_n\\_5551965.html](https://www.huffingtonpost.com/2014/07/21/facebook-terms-condition_n_5551965.html).

56. Spencer Ackerman and Dominic Rushe, *Microsoft, Facebook, Google and Yahoo release US surveillance requests*, THE GUARDIAN (Feb. 3, 2014), <https://www.theguardian.com/world/2014/feb/03/microsoft-facebook-google-yahoo-fisa-surveillance-requests>.

57. See UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM (USA Patriot Act) Act of 2001, 107 P.L. 56, 115 Stat. 272, 273.

58. Maria Godoy, *NSA Wiretapping: The Legal Debate*, NPR, <https://www.npr.org/news/specials/nsawiretap/legality.html>.

59. *Id.*

60. See also, *United States v. Jones*, 565 U.S. 400 (2012) (government’s use of a GPS device on a suspect’s vehicle used to monitor movement is a search because the police committed a trespass on defendant’s personal effects car); *United States v. Karo*, 468 U.S. 705 (1984) (ruling the use of a beeper to conduct surveillance of the defendant constituted an unlawful search and seizure in violation of the Fourth Amendment). *But see, California v. Ciraolo*, 476 U.S. 207 (1986) (holding that flying over a fenced area to observe marijuana plants was constitutional).

61. *Riley v. California*, 134 S. Ct. 2473 (2014).

62. *Id.*

Even with these protections, the Court has put social media in a gray area. For example, in *Smith v. Maryland*, the Court held that the warrantless collection of phone numbers that a person calls did not constitute a search and there was no reasonable expectation of privacy in those numbers.<sup>63</sup> Justice Harry Blackman in his opinion reasoned that people convey their numbers to telephone companies and that it would be hard to believe that people had an expectation of privacy.<sup>64</sup> This decision reinforces the notion that the Fourth Amendment protects people, not places.<sup>65</sup> This then becomes problematic because it begs the question of whether we have an expectation of privacy in who our friends are on Facebook or who the names of those we recently sent messages to. I, for one, think we should.

Justice Thurgood Marshall in his eloquent dissent wrote:

[E]ven assuming. . . that individuals ‘typically know’ that a phone company monitors calls for internal reasons; it does not follow that they expect this information to be made available to the public in general or the government in particular. Privacy is not a discrete commodity, possessed absolutely or not at all.<sup>66</sup>

Justice Marshall understands that, just because someone holds information out to third parties, it doesn’t stop it from being private to others. The dissent continues by saying:

[T]he Court determines that individuals who convey information to third parties have ‘assumed the risk’ of disclosure to the government. This analysis is misconceived . . . . Implicit in the concept of assumption of risk is some notion of choice. At least in the third-party consensual surveillance cases, which first incorporated risk analysis into Fourth Amendment doctrine, the defendant presumably had exercised some discretion in deciding who should enjoy his confidential communications. By contrast here, unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance. It is idle to speak of ‘assuming’ risks in contexts where, as a practical matter, individuals have no realistic alternative.<sup>67</sup>

The discussion in Justice Marshall’s dissent is analogous to social media, where people constantly give information to the third party. People sign the terms of the agreement, which also allow the company to

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63. *Smith v. Maryland*, 442 U.S. 735 (1979).

64. *Smith*, 442 U.S. at 735.

65. *Id.*

66. *Id.*

67. *Id.* at 749.

give your information to third parties, but people still do not assume the risk of the information going to the government. While unknowingly consenting to the distribution of a person's information to private third parties in a long boilerplate agreement filled with legalese is problematic, it is quite different than consenting to the government to have complete access to a person's information. We often sign standard form agreements where our private information, personal taste, and website views are freely sold to third parties. Social media has evolved into a modern-day necessity and is almost equivalent to a cellphone conversation. Facebook and other social media platforms have nearly all the capabilities of a telephone except the latter requires more sharing, and therefore deserves even more protection.

On most social media platforms, people can video chat and share locations, statuses, and photos as well as utilize the capabilities to do a phone call. Further, the Court should overturn *Smith v. Maryland*, because it allows for the government to use this precedent to see who someone is messaging and who their friends are, even if a person seeks to keep this information private. Marshall further writes,

. . . . I believe, constitutes such an extensive intrusion. To hold otherwise ignored the vital role telephonic communication plays in our personal and professional relationships, as well as the First and Fourth Amendment interest implicated by unfettered official surveillance. Privacy in placing calls is of value not only to those engaged in criminal activity.<sup>68</sup>

This becomes problematic for average citizens but even more daunting to activists who use social media to organize or activists who express political speech on the platform. With the changing of human interaction, we need to be more cautious about ensuring that our freedom to associate privately does not erode in the digital age. Justice Sotomayor in her concurring opinion in *United States v. Jones*, a case where the court ruled the use of a GPS tracking requiring a warrant supported by probable cause, powerfully wrote that:

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. E.g., *Smith*, 442 U.S., at 742, 99 S. Ct. 2577, 61 L. Ed. 2d 220; *United States v. Miller*, 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976). This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carry-

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68. *Id.*

ing out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. This approach recognizes that much of the information people give is often unintentional.<sup>69</sup>

This becomes dangerous when the government claims to have a national security interest in the information we post. The FBI has already laid the groundwork by identifying Black Identity Extremist - there is nothing stopping them from targeting these groups online.

The most recent example of an invasion of privacy in the name of National Security is the use of National Security Letters issued by the Federal Bureau of Investigations.<sup>70</sup> Pursuant to the Patriot Act, the FBI has the power to compel the disclosure of customer records held by Internet Service Providers, banks, telephone companies, and more.<sup>71</sup> Under the Patriot Act, the FBI can also compel these providers to keep confidential the receipt of any National Security Letters.<sup>72</sup> According to the American Civil Liberties Union, “The National Security Letter provision of the Patriot Act radically expanded the FBI’s authority to demand personal customer records from Internet Service Providers, financial institutions and credit companies without prior court approval.”<sup>73</sup> This power under the Patriot Act has dramatically expanded the ability of government to tap into social media users’ accounts and see their history and private data.

This process all takes place without a warrant and is kept secret. In a recent article, Kate Conger stated:

Twitter joined the ranks of Yahoo, Cloudflare and Google by announcing it had received two national security letters, one in 2015 and one in 2016. . . . The NSLs came with gag orders that prevented Twitter from telling the public or the targeted users about the gov-

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69. *Jones*, 565 U.S. at 420 (Sotomayor, J., concurring); see also *Smith*, 442 U.S., at 749 (Marshall, J., dissenting) (“Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes”); Ian Black, *NSA spying scandal: what we have learned*, THE GUARDIAN (June 2013), <https://www.theguardian.com/world/2013/jun/10/nsa-spying-scandal-what-we-have-learned>.

70. Ackerman & Rushe, *supra* note 56.

71. Godoy, *supra* note 58.

72. *Id.*

73. Am. Civil Liberties Union, NATIONAL SECURITY LETTERS, <https://www.aclu.org/other/national-security-letters>.

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ernment's demands. The FBI recently lifted these gag orders, allowing Twitter to acknowledge the NSLs for the first time.<sup>74</sup>

These orders do not even allow companies to discuss the contents and scope of data requested. Conger continued by writing "Although Twitter has disclosed these two letters and informed the targeted users, it's likely that the company has also received other NSLs that it is still gagged from discussing."<sup>75</sup>

Further, it is important to create protections that recognize that even in the social media space people have a reasonable expectation of privacy that would require government to receive a warrant before requesting consumer information from companies. People not only discuss things they most likely would not mind the public seeing, but they also have private discussions, visit different websites, have their locations stored, and other things that arguably the government should obtain a warrant in order to gain access to.

### CONCLUSION

We must advance our jurisprudence to balance civil liberties and security. With the history of COINTELPRO and other government surveillance of activist movements, the Court should develop standards that adequately reflect a reasonable expectation of privacy protection for activists. Particularly, in the new age of social media activism, we need to be more vigilant than ever to protect privacy and speech. In a democracy, we should not tradeoff less political speech for more safety. The Fourth and First Amendment can be viewed more broadly to protect activist. Activist have a reasonable expectation of privacy in organizing different political movements and that expectation is heightened when that speech is inherently a protest against government.

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<sup>74</sup>. Kate Conger, *Twitter releases national security letters*, TECH CRUNCH (Jan. 2017), <https://techcrunch.com/2017/01/27/twitter-releases-national-security-letters/>.

<sup>75</sup>. *Id.*



# ARTICLE

## A UK Bill of Rights Fit for Purpose

MERRIS AMOS

*For many years there has been a debate in the United Kingdom (UK) over replacing the Human Rights Act 1998 (HRA) with a bill of rights. The government has promised to return to the issue once the process of leaving the European Union concludes, and it is a debate unlikely to expire. Whilst a variety of reports and scholarship have been published concerning the prospect of a UK bill of rights, there has been little focus on the purposes a bill of rights for the UK would fulfil. In this article, it is contended that a bill of rights must be: an effective constraint on the exercise of power in order to protect human rights; an important mechanism to assist a State to comply with the legal commitments it has made at the international level; and an indication of what that State stands for. Using the HRA as a starting point, it is then determined what would be the features of a UK bill of rights fit for purpose.*

### A UK Bill of Rights Fit for Purpose

In late January 2017, Sir Oliver Heald, then Minister for Courts and Justice, disclosed in an oral answer in the House of Commons that whilst the Government was committed to reforming the United Kingdom's domestic human rights framework, it would only return to proposals "once we know the arrangements for our exit from the European Union."<sup>1</sup> It was later reported in *The Daily Telegraph* that plans may be "postponed" until after the General Election in 2020 or even "abandoned entirely" because Brexit "will significantly

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1. 620 Parl Deb HC (6th ser.) (2017) col. 153 (UK).

strengthen the sovereignty of British courts.”<sup>2</sup> Seeking a strong hand in Brexit negotiations, Prime Minister Theresa May brought the General Election forward to June 8, 2017 and this timetable was thrown off course. The Conservative Party, gaining the most seats in the House of Commons, but not a majority, formed a government. As set out in the Party’s 2017 Manifesto, the commitment remains to “consider [the national] human rights legal framework when the process of leaving the EU concludes.”<sup>3</sup>

Although the chances of the Government successfully piloting a bill through the current Parliament are very slim, and the heat has gone out of it, the “British” bill of rights debate is clearly not dead yet.<sup>4</sup> Whilst many contested the central conclusion of the majority of the 2012 Commission on a Bill of Rights that there is a “lack of public understanding and ownership of the Human Rights Act”<sup>5</sup> with their own assessments of the situation also not based upon any evidence,<sup>6</sup> almost five years later the HRA is still not secure. Late in the political campaign, responding to three separate terror attacks, Theresa May promised to “rip up” human rights law that stood in the way of possible new anti-terror measures.<sup>7</sup> The UK’s highest selling daily newspaper, *The Sun*, remains vehemently opposed to the HRA and the European Convention on Human Rights (ECHR” as does the second

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2. Steven Swinford *Theresa May Is Preparing to Abandon Plans for a British Bill of Rights*, THE TELEGRAPH: NEWS (Jan. 26, 2017, 8:16 PM), <http://www.telegraph.co.uk/news/2017/01/26/theresa-may-preparing-abandon-plans-british-bill-rights-sources>.

3. Theresa May, *Forward, Together: Our Plan for a Stronger Britain and a Prosperous Future: The Conservative and Unionist Party Manifesto 2017*, CONSERVATIVES (UK), at 37, [https://issuu.com/conservativeparty/docs/ge2017\\_manifesto\\_a5\\_digital/6?ff&e=16696947/48955343](https://issuu.com/conservativeparty/docs/ge2017_manifesto_a5_digital/6?ff&e=16696947/48955343) (The author points out that the Party will also “remain signatories to the European Convention on Human Rights for the duration of the next parliament.”).

4. See Colin Murray, *Bill of Rights for Northern Ireland*, NORTH EAST LAW TALK (Sept. 18, 2015), <https://blogs.ncl.ac.uk/nclr/tag/bill-of-rights-for-northern-ireland/>. As adopted by the Commission on a Bill of Rights, ‘UK Bill of Rights’ is the correct terminology. Whilst ‘British’ Bill of Rights has the benefit of alliteration, it leaves Northern Ireland out.

5. See Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, 1, 16 (Dec. 2012).

6. See, e.g., Mark Elliott, *A Damp Squib in the Long Grass: The Report of the Commission on a Bill of Rights*, 2 EUR. HUM. RIGHTS L. REV. 137 (2013). The author suggests the challenges facing the HRA are not only Euroscepticism but also antipathy towards the broader human rights project and a “scepticism about the universalist nature of human rights”, *id.* at 140 - 41 but cites no evidence in support of these gut feelings. See also Francesca Klug & Amy Williams, *The Choice Before Us? The Report of the Commission on a Bill of Rights*, PUB. L. 459 (2013); See generally Louis Blom-Cooper, *The Commission on a Bill of Rights: An English Approach to a UK Bill of Rights*, PUB. L. 209 (2013).

7. Rowena Mason & Vikram Dodd, *May: I’ll Rip Up Human Rights Laws that Impede New Terror Legislation*, THE GUARDIAN (June 6, 2017, 3:35 PM), <https://www.theguardian.com/politics/2017/jun/06/theresa-may-rip-up-human-rights-laws-impede-new-terror-legislation>.



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highest seller, *The Daily Mail*.<sup>8</sup> Opinion polls show that whilst there is strong support in the UK for a law which protects human rights, support for the HRA, ECHR and European Court of Human Rights (ECtHR) is weak. In a 2013 poll of 1,002 British adults conducted for Liberty, ninety-eight percent of respondents said that it was important that there was a law that protects rights and freedoms in Britain.<sup>9</sup> However, in a 2015 poll of 1,000 British adults for *The Daily Mail*, forty-six percent of respondents supported the policy of replacing the HRA with a British Bill of Rights (thirty-six percent opposed, eighteen percent did not know).<sup>10</sup> Support for international human rights law is also struggling. In a 2016 poll of 2,033 British adults for the United Nations Association, seventy percent of respondents agreed that when allies of the British government abuse human rights, the government should speak out; but fifty percent of respondents agreed that the British government should not always adhere to international laws (such as those set by the ECtHR or International Court of Justice) if doing so means changing our domestic laws (thirty-four percent agreed that the British government “should always adhere,” sixteen percent did not know).<sup>11</sup>

Chaney’s analysis of the period from 1945-2010 convincingly shows that human rights are “electorally salient” and have risen up the political agenda.<sup>12</sup> Political parties have adjusted their stance on human rights to “attract new voters and respond to world events”<sup>13</sup> and this process has not taken place against a background of facts supported by evidence. As Munce points out, the Conservative Party’s engagement with national human rights law reform has often not been based upon “the concrete circumstances of social, cultural and politi-

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8. See Dominic Ponsford, *Print ABCs: Seven UK National Newspapers Losing Print Sales at More Than 10 Per Cent Year on Year*, PRESS GAZETTE (Jan. 23, 2017), <http://www.pressgazette.co.uk/print-abcs-seven-uk-national-newspapers-losing-print-sales-at-more-than-10-per-cent-year-on-year/>; see also Susan Marks, *Backlash: The Undeclared War Against Human Rights*, 4 EUR. HUM. RIGHTS. L. REV. 319, 321 (2014).

9. COMRES, LIBERTY - HUMAN RIGHTS TRACKER 1 (2013), [http://www.comresglobal.com/wp-content/themes/comres/poll/Liberty\\_Human\\_Rights\\_Tracker\\_Data\\_Tables\\_November\\_2013.pdf](http://www.comresglobal.com/wp-content/themes/comres/poll/Liberty_Human_Rights_Tracker_Data_Tables_November_2013.pdf).

10. ComRes, *Daily Mail EU Poll*, COMRES GLOBAL, (Jun. 8, 2015), <http://www.comresglobal.com/polls/daily-mail-eu-poll-june-8th-2015/>.

11. COMRES, UNITED NATIONS ASSOCIATION – NOVEMBER 2016 14-15 (2016) [https://www.comresglobal.com/wp-content/uploads/2016/12/United-Nations-Association\\_-\\_UK-Values-Polling\\_-\\_Data-Tables.pdf](https://www.comresglobal.com/wp-content/uploads/2016/12/United-Nations-Association_-_UK-Values-Polling_-_Data-Tables.pdf).

12. Paul Chaney, *Electoral Politics and the Party Politicisation of Human Rights: The Case of UK Westminster Elections 1945-2010*, 67 PARLIAMENTARY AFF. 209, 223 (2014).

13. *Id.*

cal life in the world as it is.”<sup>14</sup> In particular, former Prime Minister David Cameron’s agenda on “constitutional reform [was] driven more by political constraints [. . .] and by the demands of his backbench MPs than by principle or a guiding constitutional telos.”<sup>15</sup> The perceived problems with the HRA were viewed by Cameron “first and foremost, as a political problem to be addressed rather than as a fundamental constitutional issue.”<sup>16</sup> This approach has been carried forward to both the 2015 and 2017 Conservative governments.

Taking all of this into account, the debate over replacing the HRA with a bill of rights is not going to go away any time soon, as Lester predicts, most likely not until the UK has a “stable and enduring constitutional framework that commands widespread popular support.”<sup>17</sup> Should the plans for a UK bill of rights progress, it will be important to have something to assess these against to determine whether or not what is proposed is fit for purpose and to ensure that national human rights law reform is based upon facts supported by evidence. In this light, the objectives of this article are twofold. First, to establish the purpose of a national bill of rights, and second, to determine what would be the key features of a UK bill of rights fit for purpose.

### The Purpose of a Bill of Rights

The purpose of a bill of rights and the purpose of the protection of human rights through law are two issues rarely discussed in the UK context and when these questions are considered, it is almost exclusively a debate between lawyers.<sup>18</sup> This leaves national human rights law vulnerable to attack as Douglas notes:

The absence of a clear coherent statement of a deeper theoretical foundation for rights has contributed to the lack of acceptance or ownership of the Convention rights, by leaving a positivist space where the nature of human rights is not recognised as distinct.<sup>19</sup>

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14. Peter Munce, *The Conservative Party and Constitutional Reform: Revisiting the Conservative Dilemma Through Cameron’s Bill of Rights*, 67 *PARLIAMENTARY AFF.* 80, 81 (2014).

15. *Id.*

16. *Id.*

17. Anthony Lester, *Five Ideas to Fight For*, 3 *EUR. HUM. RIGHTS. L. REV.* 231, 235.

18. Thornhill observes that the debate between the legal and political constitutionalists has been conducted “in something close to a sociological vacuum.” Christopher Thornhill, *The Mutation of International Law in Contemporary Constitutions: Thinking Sociologically About Political Constitutionalism*, 79 *MOD. L. REV.* 207, 212 (2016).

19. Benedict Douglas, *Undignified rights: the importance of a basis in dignity for the possession of human rights in the United Kingdom*, *PUB. L.* 241, 257 (2015).

Douglas sees the HRA as a rights document “without a proper foundation”<sup>20</sup> and suggests that a “fundamental basis for the rights, embodying and depicting their universal and inherent nature, be recognised in the UK.”<sup>21</sup> Hannant also argues that supporters of the HRA must appeal to the “pre-legal significance of human rights” before getting into the constitutional arguments for special status.<sup>22</sup> This is a valid and important point and it is agreed that it is important to “stop merely asserting the self-evident importance of human rights” and start engaging with the “serious moral arguments that underpin that assumption.”<sup>23</sup> But it must also be appreciated that philosophers have disagreed for a number of years about an appropriate justificatory theory for human rights protection and there a number of competing views with no agreement in sight.<sup>24</sup>

It is possible to find more consensus, although not complete consensus, on the question of the purpose of a bill of rights. Whilst the scholarly literature on this question is fairly limited,<sup>25</sup> since the White Paper concerning the HRA *Rights Brought Home: The Human Rights Bill*<sup>26</sup> was published in 1997, there have been a number of reports discussing the legal protection of human rights at the national level in the UK and the prospect of a bill of rights, some of which touch directly on this question. These include: the 2007 report from JUSTICE;<sup>27</sup> the 2008 report of the Joint Committee on Human Rights;<sup>28</sup> the 2008 report of the Northern Ireland Human Rights Commission on a bill of rights for Northern Ireland;<sup>29</sup> the 2009 Labour Government consulta-

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20. *Id.* at 242.

21. *Id.* at 257.

22. Tom Hannant, *Still undignified rights: a disagreement with Benedict Douglas*, PUB. L. 555, 556 (2016).

23. *Id.* at 563.

24. For example, Douglas basis his justificatory argument in human dignity but this is open to attack as elegantly demonstrated by Hannant. *Id.* Additionally, for an excellent account of competing theories read R. Cruft, S. Liao and M. Renzo (Eds.) *Philosophical Foundations of Human Rights* (Oxford: OUP, 2015).

25. With the exception of P. Alston, *A Framework for the Comparative Analysis of Bills of Rights* in P. Alston (ed.), *Promoting Human Rights Through Bills of Rights Comparative Perspectives*, Oxford: OUP (1999).

26. Parliament. House of Lords (1997) *Rights Brought Home: The Human Rights Bill*. (CM 3782). London: The Stationary Office.

27. See generally JUSTICE CONSTITUTION COMMITTEE, *A BRITISH BILL OF RIGHTS INFORMING THE DEBATE* (2007), <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/07/A-British-Bill-of-Rights.pdf>.

28. See generally *A Bill of Rights for the UK?*, HL 165 (2008) HC 150 (2008) <https://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf>.

29. See generally *A Bill of Rights for Northern Ireland*, Belfast: NIHRC, 2008, <http://www.nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf>.

tion paper *Rights and Responsibilities: Developing our Constitutional Framework*;<sup>30</sup> the 2012 report of the Commission on a Bill of Rights;<sup>31</sup> and the consultation paper published by the Conservative Party in 2014.<sup>32</sup> Utilising these reports and the relevant scholarship, the following purposes of a bill of rights are suggested. Each is discussed in more detail in the following paragraphs including the fact that some elements of each purpose, or the purpose itself, are contested. In essence, a bill of rights must be:

- An effective constraint on the exercise of power in order to protect human rights.
- An important mechanism to assist a State to comply with the legal commitments it has made at the international level.
- An indication, both nationally and internationally, of what a State stands for (symbolic value).

*An effective constraint on the exercise of power in order to protect human rights*

There is almost universal agreement in the academic literature,<sup>33</sup> and in the reports listed above, that one purpose of a bill of rights is to provide an effective constraint on the exercise of power in order to protect human rights. For example, in its report, JUSTICE observed that a purpose of a bill of rights was to “recognise, promote and protect” a set of fundamental rights “derived from international obligations and domestic traditions” in a way that confirms them as “part of our constitutional framework.”<sup>34</sup> The Joint Committee on Human Rights echoed this noting that the purpose of a bill of rights was to provide protection for all, in particular the vulnerable and the marginalised.<sup>35</sup> It added that protection was needed from “state power and commercial bodies” and that it was necessary to remedy individual grievances against such bodies.<sup>36</sup> The Labour Government

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30. See generally Parliament. Lord Chancellor (2009) *Rights and Responsibilities Developing Constitutional Framework*. (CM 7577) Ministry of Justice (UK).

31. See generally Commission on a Bill of Rights, *supra* note 5.

32. See generally CONSERVATIVE PARTY, *PROTECTING HUMAN RIGHTS IN THE UK* (2014) [https://www.conservatives.com/~media/files/downloadable%20Files/human\\_rights.pdf](https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf).

33. See generally M. Darrow and P. Alston, *Bills of Rights in Comparative Perspective*, P. Alston (ed) *supra* 24; D. Erdos, *Delegating Rights Protection: The Rise of Rights in the Westminster World*, (Oxford: OUP, 2010).

34. See generally *A British Bill of Rights Informing the Debate* (London: JUSTICE, 2007), *supra* note 26, at 21.

35. Commission on a Bill of Rights, *supra* note 5, at 9.

36. *A Bill of Rights for the UK?*, *supra* note 28, at 15-16.

placed particular emphasis upon protection in its 2009 consultation paper.

Human rights instruments, containing positive guarantees and balancing mechanisms, protect against the risk that majority or collective interests will be allowed to override the basic rights of individuals.<sup>37</sup>

The majority of the Commission on a Bill of Rights also listed protection as an objective noting that a new bill of rights offered the opportunity to provide even greater protection “against the possible abuse of power by the state and its agents.”<sup>38</sup>

Whilst at first glance “protection” appears relatively uncontroversial as a purpose for a bill of rights, within this purpose there are two contested issues. One is the definition of human rights which will enjoy the protection provided by a bill of rights; the other is the exercises of power that a bill of rights will control, in short, whether or not this is exclusively State power.

With respect to the definition of human rights, a simple comparison of the HRA and the EU Charter of Fundamental Rights<sup>39</sup> reveals that there is a wide divergence between the lists of rights considered to be “human rights” in both instruments. A further point of contention arises where human rights are further defined by an international institution whether that be a treaty body of the United Nations, such as the Human Rights Committee, or a regional human rights court such as the European Court of Human Rights (ECtHR). The ECtHR has adopted an “evolutive and purposive approach to the interpretation of the Convention” making it relevant to “contemporary European society” given that many aspects of “contemporary human activity” could not have been envisaged by the drafters of the ECHR in 1950.<sup>40</sup> As a result, some commentators have accused it of engaging in “rights inflation” or defining human rights in ways that were not expected at the time the international instruments, such as the ECHR, were drafted. Hannum, for example, states:

Human rights are on the verge of becoming a victim of their own success. Unless there is a conscious attempt to return to the principles of consensus and universality, the increasingly strident calls from European and other ‘Western’ human rights activists for ad-

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37. Lord Chancellor and Secretary of State for Justice, *supra* note 30, at 9.

38. Commission on a Bill of Rights, *supra* note 5, at 30.

39. Charter of Fundamental Rights of the European Union 2000 O.J. (C364), 18 Dec. 2000.

40. Sir Nicolas Bratza, *Living Instrument of Dead Letter – The Future of the European Court of Human Rights* 2 EUR. HUM. RTS. 116, 120 (2014).

herence to the contemporary liberal European construct of society is likely to create a backlash in the rest of the world.<sup>41</sup>

There has also been criticism of the definition of human rights adopted by national judges interpreting and applying a bill of rights and in doing so, drawing upon international jurisprudence. Thornhill summarises the critique as follows:

. . . it has been condemned as anti-democratic: it has been derided both as a legal order that uses judicial norms illegitimately to constrain acts of national self-determination, and as a legal order that holds democratic agents in national societies in thrall to the interests of international hegemonic actors. In addition, it has been criticised for its allegedly anti-political character.<sup>42</sup>

In response, it can be argued that States have agreed in advance as a part of the obligation undertaken in international law to abide by such judgments.<sup>43</sup> Furthermore, States with an independent and impartial national judiciary, and a bill of rights, must accept that judges may draw upon the jurisprudence of international institutions which have interpreted and applied human rights guarantees, as well as the jurisprudence of other national legal systems, regardless of international commitments made. The idea of human rights has caught on around the world and is not going to go away any time soon. The benefits of international human rights law and jurisprudence to the protection of human rights within a State must also be taken into account. As Amos concludes, States ostensibly committed to the protection of human rights through law at the national level cannot in good faith overlook the value of international law to achieving this objective.<sup>44</sup>

The second contested issue within this purpose is the definition of the type of “power” that a bill of rights should protect against and whether or not this should be exclusively State power. According to Nolan, the power and influence of non-state actors “such as multinational corporations, international financial institutions, and non-governmental organisations” is increasing.<sup>45</sup> Joseph has suggested that

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41. Hurst Hannum, *Reinvigorating Human Rights for the Twenty-First Century*, 16 HUM. RTS. L. REV. 409, 413 (2016). See also Silvia Adamo, *Protecting International Civil Rights in a National Context: Danish Law and its Discontents*, 85 NORDIC J. OF INT'L L. 119, 134 (2016).

42. Thornhill, *supra* note 18, at 209-10.

43. Council of Eur, Eur. Conv. on H.R. art. 46.

44. Merris Amos, *The Value of the European Court of Human Rights to the United Kingdom* 28 EUR. J. INT'L L. 835 (2017); Thornhill, *supra* note 17; Michael O'Boyle, *Emergency Government and Derogation Under the ECHR*, 4 EUR. HUM. RTS. L. REV. 331 (2016).

45. Aoife Nolan, *Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South-Africa and Ireland* 12 INT'L J. CONST. L. 61 (2014).

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private media companies should also be held to account under human rights guarantees as these may harm human rights “indirectly by promoting policies that are an anathema to human rights, and influencing governments to adopt or retain such policies.”<sup>46</sup> However, as Nolan observes, many objections have been raised under liberal theory to the direct application of human rights norms to the private sector<sup>47</sup> and the prospect is barely contemplated in any of the reports concerning a bill of rights for the UK. Only the Joint Committee on Human Rights has suggested that a bill of rights could also offer protection from “commercial bodies” as well as the State power.<sup>48</sup>

Given the competing viewpoints, rather than attempting to reach a position on these two contested issues which is applicable to all States, each is left open to be determined by States within the constraints of the commitments that State has made at the international level and serious existing threats to the interests of the people of that State. In short, a purpose of a bill of rights remains to provide an effective constraint on the exercise of power in order to protect human rights, but it is up to States to determine for themselves, within these limits, which human rights and what sorts of power.

*An important mechanism to assist a State to comply with the legal commitments it has made at the international level.*

The second purpose of a bill of rights suggested here is for the bill of rights to be a mechanism a State can utilise to assist it in complying with the legal commitments it has made at the international level. Attributing importance to international commitments in national bills of rights is reflected in contemporary constitutions around the world. According to Bartolini the trend is so pervasive that for a State drafting a new constitution (or, it is implied, a bill of rights) it cannot be ignored.<sup>49</sup> Furthermore, as Bartolini also notes, international courts and tribunals consistently confirm that States are not able to invoke constitutional provisions as an excuse for the non-fulfilment of international obligations.<sup>50</sup> Similarly, more than 25 years ago, Alston observed that

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46. Sarah Joseph, *Is Fox News a Breach of Human Rights? The New Media's Immunity from the Guiding Principles on Business and Human Rights*, 1 BUS. HUM. RTS. J. 229, 230 (2016).

47. Nolan, *supra* note 45, at 62.

48. *A Bill of Rights for the UK?*, *supra* note 28, at 15.

49. Giulio Bartolini, *A Universal Approach to International Law in Contemporary Constitutions: Does it Exist?* 3 CAMBRIDGE J. INT'L COMP. L 1287, 1316 (2014).

50. *Id.* at 1296.

“. . . it is becoming increasingly difficult for a state to demonstrate that it has taken all appropriate measures in the absence of some kind of constitutional recognition of human rights standards. The most common ways of doing this are either directly through a bill of rights or indirectly through provisions which ensure that international treaty obligations as well as international customary law will prevail over inconsistent municipal laws.”<sup>51</sup>

McCorquodale argues that such an approach is required by international law. He defines the “international rule of law” as including “legal order and stability; equality of application of the law; protection of human rights; and the settlement of disputes before an independent legal body.”<sup>52</sup> In his view, a State which respects the international rule of law, would protect human rights through providing access to a remedy given this is a “standard part of international human rights treaties and would also be seen as being customary international law.”<sup>53</sup> This purpose for a national bill of rights is already reflected in State practice before international institutions, including that of the UK. For example, in the UK’s recent 2017 report submitted for the Universal Periodic Review conducted by the Human Rights Council of the United Nations<sup>54</sup> it was stated that the UK domestic framework for protecting and promoting human rights and for combating discrimination is largely based on the HRA and the Equality Act 2010.<sup>55</sup>

But looking more widely than scholarship and State practice, there is not as much discussion of this purpose in recent UK reports as compared to other purposes. The majority of the Commission on a Bill of Rights reported that the most “frequently supported candidate” put forward by those advocating additional rights was for a UK Bill of Rights to explicitly incorporate the rights in other international instruments which had been ratified by the UK but not incorporated into national law, but did not put this forward as a recommendation.<sup>56</sup> The dissenting minority of the Commission believed a purpose of a

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51. Darrow and Alston, *supra* note 33, at 469-70.

52. Robert McCorquodale, *Defining the International Rule of Law: Defying Gravity?* 65 INT’L COMP. L.Q. 277, 292 (2016).

53. *Id.* at 294. Customary international law can also be given a more visible national effect through a bill of rights; see Hugh Thirlway, *Human Rights in Customary Law: An Attempt to Define Some of the Issues* 28 LEIDEN J. INT’L. L. 495 (2015).

54. HUMAN RIGHTS COUNCIL, NATIONAL REPORT SUBMITTED IN ACCORDANCE WITH PARAGRAPH 5 OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 16/21: UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, 2017 at 4.

55. *Id.* at 5. Similar observations are made in a variety of other reports to UN Bodies including the 2015 Report to the Committee of the Rights of the Child. *Id.* at 86.

56. London: Ministry of Justice, *supra* note 5, at 21.



bill of rights was to give effect to international commitments and was concerned that a UK Bill of Rights might lead to the UK's withdrawal from the ECHR.<sup>57</sup> It is also important to remember that the HRA itself was designed to “bring rights home” from the European Court of Human Rights in Strasbourg and is very much based on the substance and procedure of the ECHR system.<sup>58</sup>

This particular purpose for a bill of rights is contested by some in its entirety. Heydon, for example, states that it is not a function of a bill of rights to help a State in its compliance with international standards. In his view, the main purpose of a bill of rights is limited to a subset of the first purpose outlined above, “to protect minorities against both executive and legislative tyranny.”<sup>59</sup> There is also an overlap with a contested aspect of the first purpose of a bill of rights set out above, the definition of human rights. As already noted, some argue that human rights must be defined at the national level and only subject to interpretation by national judges with no reference to international law or jurisprudence.<sup>60</sup> In recent times some States have asserted that their bill of rights (or equivalent) is an important symbol of what that State stands for to the extent that if there is a clash between that and its commitments in international law, the former will prevail.<sup>61</sup> For example, the Russian Constitutional Court held in July 2015 that if a judgment of the European Court of Human Rights “collides with the Constitution,” Russia had the right not to comply with the judgment “if such a response remains the only possible means to avoid violating the principles and norms of the constitution.”<sup>62</sup> In December 2015, the Russian Parliament made amendments to constitutional law which gave legislative effect to this judgment. In April 2016, the Russian Constitutional Court ruled that it was impossible to enforce the prisoner voting judgment of the ECtHR directed at Russia

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57. London: Ministry of Justice, *supra* note 5, at 32.

58. Rights Brought Home: The Human Rights Bill, *supra* note 26.

59. J. D. Heydon, *Are Bills of Rights Necessary in Common Law Systems?*, (2014).

60. *Id.*; Lord Hoffmann, *The Universality of Human Rights* (2009).

61. Sarah Lambrecht, *Reforms to Lessen the Influence of the European Court of Human Rights: A Successful Strategy?*, 21 EUR. PUB. L. 257, 257-58 (2015). *See also A Serious Case of Strasbourg-Bashing: An Evaluation of the Debates on the Legitimacy of the European Court of Human Rights in the Netherlands*, 20 INT'L J. HUM. RTS. 407 (2016); Conservative Party, *supra* note 32.

62. Lauri Malksoo, *Russia's Constitutional Court Defies the European Court of Human Rights*, translated in EUR. CONST. L. REV., 12, 377, 381 (2016).

given that the ban on prisoner voting is contained in the Russian constitution.<sup>63</sup>

Given the level of commitment by States to international human rights law, the prominence and importance given to international law in the constitutions of democratic States, and the reality that regardless of the constitutional position, international law and jurisprudence will continue to influence national decision making, the actions of a handful of States on a handful of issues do not put into doubt one purpose of a bill of rights as an important tool to help a State to comply with its international commitments. As stated in relation to the first purpose, as this is a contested issue, the role played by a bill of rights in assisting a State to comply with its international obligations must be determined by States, within the constraints of the commitments that State has made at the international level, serious existing threats to the interests of the people of that State and additionally how that State uses its bill of rights in communication with international institutions. For example, should a State have no human rights commitments at the international level, there would be no need for its bill of rights to assist in helping it to fulfil its obligations. Should it be able to find other measures by which to convince international institutions that it can fulfil its commitments, perhaps a bill of rights is not really necessary.

*An indication, both nationally and internationally, of what a State stands for (symbolic value)*

Finally, there is almost universal agreement on the symbolic value of a bill of rights, particularly in the reports published in the UK to date. In 2008, the Northern Ireland Human Rights Commission advised the Secretary of State that the bill of rights must reflect “the particular circumstances of Northern Ireland,” including the principles of “mutual respect for the identity and ethos of both main communities and parity of esteem.”<sup>64</sup> In its report, JUSTICE stated that a bill of rights was “highly symbolic” and a mechanism for “unifying the population.” In its view, a bill of rights may remain the “symbol of a nation’s aspirations, even where the reality of rights protection may fall short.”<sup>65</sup> The Joint Committee on Human rights saw the adoption

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63. *See id.*

64. A Bill of Rights for Northern Ireland, *supra* note 29, at 3, 8.

65. JUSTICE, *supra* note 27, at 16.

## *A UK Bill of Rights Fit for Purpose*

of a bill of rights as providing a moment “when society can define itself” and that a bill of rights should set out a “shared vision of a desirable future society.”<sup>66</sup> In the Committee’s view, historic bills of rights have mapped where “people wanted to go, not where they were at.”<sup>67</sup> The Labour Government in its consultation paper emphasised the symbolic purpose of a bill of rights which would set out the “relationship between the citizen and the state” to protect fundamental freedoms and “foster mutual responsibility.”<sup>68</sup> It saw a bill of rights as having the potential to “bind all parts of the United Kingdom together” and to “strengthen and enhance them.”<sup>69</sup> The Commission on a Bill of Rights also appreciated this symbolic purpose with the majority recommending that it should be drafted in “language reflecting our own heritage and tradition” so as to “gain greater public ownership of the rights it contained.”<sup>70</sup>

### A UK Bill Of Rights Fit for Purpose - Preliminary Questions

Having established three purposes for a bill of rights and taken into account that elements of each purpose, or the purpose itself, may be contested, the next step is to determine the shape of a UK bill of rights fit for purpose. First the caveats made above in order to accommodate contested issues must be considered. It was observed that the definition of human rights to be protected, the type of power protection must be provided against and the role a bill of rights might play in assisting a State to fulfil its international obligations, must be determined by States, within the constraints of the commitments that State has made at the international level, and serious existing threats to the interests of the people of that State.<sup>71</sup> As discussed in more detail in the following paragraphs, it is concluded that any new UK bill of rights fit for purpose must reflect that the UK: remains committed to its obligations in international human rights law; is keen to fill any

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66. The Joint Committee on Human Rights, *supra* note 27, at 5.

67. *Id.* at 23.

68. Ministry of Justice, *supra* note 20, at 3.

69. *Id.*

70. London: Ministry of Justice, *supra* note 5, at 147.

71. For the purposes of this article it is assumed that any new UK bill of rights would operate in a legal system where judges remain independent and impartial and there is access to justice to implement the guarantees of the bill of rights although it is appreciated that serious questions have been raised over both issues in recent years. See Conor Gearty, *On Fantasy Island: British Politics, English Judges and the European Convention on Human Rights*, EUR. HUM. RTS L. REV. 1, 2 (2015); see also Helen Mountfield, *Judicial Review and Human Rights: Challenges to Court Fees and Legal Aid Changes Which Limit or Effectively Exclude Right of Access to Court*, 19 JUD. REV. 217, 217 (2014) (U.K.).

gaps in human rights protection resulting from Brexit; and also willing to explore how human rights law might avert the negative consequences of austerity policies and rising inequality. In order to ensure that a bill of rights would command widespread support, possibilities for accommodating some current criticisms of the HRA within a new bill of rights are also considered.

*The UK's relationship with international human rights law*

One of the most important questions for the UK before it proceeds with a new bill of rights is its relationship with international human rights law in particular, its commitment to the international human rights treaties it has ratified including the ECHR, European Social Charter and UN treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). Real commitment must be expressed in the bill of rights; no commitment must be similarly expressed.

The international human rights treaties ratified by the UK all include an effective remedies clause. For example, Article 13 of the ECHR provides that everyone whose ECHR rights are violated “shall have an effective remedy before a national authority.”<sup>72</sup> If the UK chooses to stay a committed Contracting State to the ECHR, and faithfully implement the judgments of the ECtHR as required by Article 46 of the ECHR, the options for a UK bill of rights offering less protection than the ECHR are limited. As Bamforth observes:

. . . the idea of an effective remedy within arts 13 and 35(1) entails the existence of certain minimum standards, with art.13 precluding the reduction below these minima of the protection granted to Convention rights in national law.<sup>73</sup>

At present, the UK's position on its international human rights commitments is not as clear as it could be. The judgment of the Grand Chamber of the ECtHR that the UK ban on prisoner voting was incompatible with Article 3 of Protocol No.1 to the ECHR, which was delivered in 2005,<sup>74</sup> has still not been implemented leading the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill to rightly

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72. For more on Article 13, *see generally* Annabel Lee, *Focus on Article 13 ECHR*, 20 JUD. REV. 33 (2015) (U.K.).

73. Nicholas Bamforth, *Articles 13 and 35(1), Subsidiarity and the Effective Protection of European Convention Rights in National Law*, EUR. HUM. RIGHTS L. REV. 501, 501 (2016).

74. *Hirst v. United Kingdom (No.2)* Eur. Ct. H.R. (2005).

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observe that the UK needed to implement the judgment or de-ratify the ECHR.<sup>75</sup> Bates is right to suggest that there must be a ‘mature debate’ about the role of the ECHR and the ECtHR “based on facts.”<sup>76</sup>

There has also been some high profile discussion about the UK de-ratifying the ECHR with Theresa May stating in her 2016 speech on Brexit (prior to becoming Prime Minister) that the UK should remain in the European Union but leave the ECHR,<sup>77</sup> this did not feature as a promise in the Conservative Party Manifesto for the 2017 General Election.<sup>78</sup> Nor has there been any discussion of the UK de-ratifying other international human rights treaties. It is therefore assumed that the UK remains committed to fulfilling the obligations in international human rights law it has undertaken and also carrying out its foreign policy commitment to “stand up for human rights.”<sup>79</sup>

### *Serious existing threats to the interests of the people of the UK*

As already noted, before proceeding with a national bill of rights it is also important to identify serious existing threats to the interests of the people of that State and determine how a bill of rights might protect against these. Such a review might also encompass consideration of whether or not such threats emanate solely from the State or also from the private sector. For the people of the UK, two threats which a bill of rights could help to address stand out at the present time: Brexit and rising inequality as a result of austerity measures.

The UK’s departure from the European Union presents a threat to interests of the people of the UK not experienced in a number of generations. Not only will UK citizens lose their right to freedom of movement and establishment in other EU States but also the protection of the institutions of the EU and the EU Charter of Fundamental Rights widely recognised as a far more modern human rights instru-

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75. HC 924, HL 103 (2013) [111]-[113].

76. Ed Bates, *Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg* 14 HUM. RTS. L. REV. 503, 532 (2014).

77. Conservative Home, *Theresa May’s Speech on Brexit* (Apr. 25, 2016), <http://www.conservativehome.com/parliament/2016/04/theresa-mays-speech-on-brexit-full-text.html>.

78. *Forward, Together: Our Plan for a Stronger Britain and a Prosperous Future: The Conservative and Unionist Party Manifesto*, *supra* note 3.

79. Human Rights Internationally, <https://www.gov.uk/government/policies/human-rights-internationally>.

ment than the HRA.<sup>80</sup> By contrast to the HRA, social rights are directly protected by the Charter including the right of access to preventative health care, the right to benefit from medical treatment<sup>81</sup> and the “entitlement to social security benefits and social services” in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment.<sup>82</sup> Whilst EU human rights law has not had a major impact at the national level, on occasion it has been a powerful source of rights protection particularly as a tool to address disproportionate state surveillance.<sup>83</sup> Furthermore, as Murphy notes, it is not only the types of human rights that are protected which is at stake. Where the Charter applies, national courts are not limited to the HRA declaration of incompatibility but can set aside Acts of Parliament in conflict with the Charter.<sup>84</sup>

A serious threat to the interests of the people of the UK also comes from rising inequality as a result of an overarching policy of austerity. In January 2017, the Resolution Foundation in its eighth annual state of the nation report on UK living standards concluded that inequality is only worsening and that the outlook is not positive.<sup>85</sup> According to the Foundation, significant cuts to working-age welfare are a key component of what looks set to be falling living standards “for almost the entire bottom half of the working-age income distribution” whilst incomes in the top half of the working-age household distribution are projected to grow.<sup>86</sup> It concluded as follows:

The result is that the parliament from 2015-16 to 2020-21 is on course to be the worst on record for income growth in the bottom half of the working age income distribution. At the same time, we

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80. The Charter and human rights jurisprudence of the CJEU will continue to have an indirect influence via an impact on the jurisprudence of the ECtHR. See further, Tobias Lock, *The Influence of EU Law on Strasbourg Doctrines* (2016) 41 EUR. L. REV. 804.

81. Council of Eur, Eur. Conv. on H.R. art. 35.

82. *Id.* at art. 34.

83. See Tuomas Ojanen, *Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights Under the Charter* 12 EUR. C. L. REV. 318, 328-329 (2016).

84. C. Murphy, *Bulletin on the EU Charter of Fundamental Rights: An Introduction (Part 1)* EUR. HUM. RIGHTS L. REV. 24, 29 (2016). See also C. Murphy, *Bulletin on the EU Charter of Fundamental Rights: An Introduction (Part 2)* EUR. HUM. RIGHTS L. REV. 273 (2016); R. Clayton and C. Murphy, *The Emergence of the EU Charter of Fundamental Rights in UK Law* EUR. HUM. RIGHTS L. REV. 469 (2014); and A. Oliveira and S. King, *A Good Chess Opening: Luxembourg's First Roma Case Consolidates Its Role as a Fundamental Rights Court*, 41 EUR. L. REV. 865 (2016).

85. A. Corlett and S. Clarke *Living Standards* (London: Resolution Foundation, 2017), <http://www.resolutionfoundation.org/app/uploads/2017/01/Audit-2017.pdf>.

86. *Liberty - Human Rights Tracker*, *supra* note 9.

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project the biggest rise in inequality since the 1980s, with inequality after housing costs reaching record highs by 2020-21.<sup>87</sup>

It recommended a shift in policy choices, in particular on benefit cuts that “are driving down income for the bottom of the income distribution and driving inequality up.”<sup>88</sup> Similarly, in its concluding observations on the UK’s sixth periodic report on the implementation of the International Covenant on Economic, Social and Cultural Rights,<sup>89</sup> the UN Committee on Economic, Social and Cultural Rights noted its concern about the “disproportionate, adverse impact that austerity measures introduced in 2010 are having on the enjoyment of economic, social and cultural rights by disadvantaged and marginalized individuals and groups.”<sup>90</sup> It recommended that the UK review its policies and programmes introduced since 2010 and conduct a comprehensive assessment of the cumulative impact of these measures on the enjoyment of economic, social and cultural rights by disadvantaged and marginalized individuals and groups, in particular women, children and persons with disabilities.<sup>91</sup>

### *Criticisms of the Human Rights Act*

Finally, to secure widespread support, it is also necessary to consider whether a bill of rights could be designed to address criticisms of the Human Rights Act whilst remaining fit for purpose. The HRA meets many of the purposes of a bill of rights outlined above. It operates as a generally effective constraint on the exercise of legislative, executive and judicial power in order to protect a range of human rights. The human rights of vulnerable and marginalised groups have been upheld by courts even in the most politically contested areas. For example, according to Wray, the HRA has “significantly dented government power to control family-related migration” in an area of policy that had “previously been almost entirely closed to successful legal

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87. *Daily Mail EU Poll*, *supra* note 10.

88. *Id.* at 12. See, e.g., Social Mobility Commission, *Time for Change: An Assessment of Government Policies on Social Mobility 1997-2017*, SOCIAL MOBILITY COMMISSION (2017), <https://www.gov.uk/government/publications/social-mobility-policies-between-1997-and-2017-time-for-change>.

89. CESCR, *Concluding Observations on the Sixth-Periodic Report of the United Kingdom of Great Britain and Northern Ireland*, UN ECONOMIC AND SOCIAL COUNCIL (July 14, 2016), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashxenc=4slQ6QSmIBEDzFEovLCuW3XRinAE8KCBF0qOHNz%2fvuCC%2bTxEKAI18bzE0UtfQhJkxxOSGuoMUxHGypYLjNFkwxnMR6GmqogLJF8BzscMe9zpGfTXBkZ4pEaigi44xqiL>.

90. *Id.* at para. 18.

91. *Id.* at para. 19.

challenge.”<sup>92</sup> It helps the UK to project an image abroad as a State which respects human rights, at least civil and political rights, and provides effective remedies for violations in the national legal system. Also, it assists the UK in complying with the commitments it has made under a variety of international human rights treaties including the ECHR and the International Covenant on Civil and Political Rights (ICCPR) although, as discussed further in the following paragraphs, its usefulness as a mechanism to assist compliance with treaties concerning economic, social and cultural rights is limited.

However, as the majority of the Commission on a Bill of Rights, and some commentators have observed, there is room for improvement.<sup>93</sup> The Labour Government in its 2007 consultation paper *The Governance of Britain*<sup>94</sup> described the HRA as a “first, but substantial step towards a formal statement of rights” and, as already discussed, a number of reports on a UK bill of rights were published subsequent to this. However, optimism on the subject disappeared when the Liberal Democrat and Conservative Coalition Government took office in 2010. Suspicious that the motives of this government were to replace the HRA with a bill of rights offering less protection for human rights, many, including the minority of the Commission on a Bill of Rights, argued that there was no need for a bill of rights and that the HRA provided sufficient protection. The majority of the Commission commented on this change in tone:

[I]t is not always easy to disentangle in the opinions expressed to us what are tactical positions rather than fundamental beliefs . . . Many of those putting forward their views self-evidently distrust the motives of others and have clearly tailored their own responses accordingly.<sup>95</sup>

Scepticism about the UK bill of rights project remains to the present day fuelled very much by the consultation paper published by the Conservative Party in 2014 where it set out plans for a reduction in the

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92. Helena Wray, *Greater Than the Sum of Their Parts: UK Supreme Court Decisions on Family Migration*, PUB. L. 838, 839 (Oct. 2013). See also Ian Turner, *Positive Obligations and Article 4 of the European Convention on Human Rights: A Defence of the UK's Human Rights Act 1998*, 18 INT'L J. HUM. RTS. 94, 108-09 (2014).

93. See, e.g., Dominic Grieve, *Can a Bill of Rights Do Better than the Human Rights Act?*, HONOURABLE SOCIETY OF THE MIDDLE TEMPLE HALL (Nov. 30, 2009), available at <http://www.dominicgrieve.org.uk/news/can-bill-rights-do-better-human-rights-act>; Andrew Williams, *Strasbourg's Public-Private Divide and the British Bill of Rights*, EUR. HUM. RTS. L. REV. 617 (2015); Andrew Williams, *The European Convention on Human Rights, the EU and the UK: Confronting a Heresy*, 24 EUR. J. INT'L L. 1157 (2013).

94. *Supra* note 29, at 4.

95. *Supra* note 5, at para. 66.



role of the ECtHR in the national legal system and called for a possible de-ratification of the ECHR should the Council of Europe not agree to this new approach.<sup>96</sup> There continues to be a reluctance to suggest improvements to the HRA for fear that any criticism will be used to reduce human rights protection via the replacement of the HRA with a bill of rights.

Whilst approaching the debate with some caution is warranted, it is also important that current reticence does not lead to UK human rights protection becoming stuck in a rut<sup>97</sup> or result in an absolutist position where it is the HRA or nothing, and nothing turns out to be the most popular option at the ballot box.<sup>98</sup> There are a number of criticisms of the HRA in circulation which it is important to address. These include the suggestions that there must be a re-balancing of the allocation of responsibilities under the HRA away from the courts and towards Parliament;<sup>99</sup> and that the role of ECtHR jurisprudence in the national legal system must be limited, in particular its judgments where it has utilised a “living instrument” approach to the interpretation and application of Convention rights.<sup>100</sup> Whilst it is appreciated that there are other criticisms, these are not considered in detail. These include the desire to pin down with more precision what particular rights mean.<sup>101</sup> As Greer and Slowe point out, human rights “are by nature vague and abstract.”<sup>102</sup> Attempting to prescribe what these mean, “other than in the course of litigation where specific facts are at issue” is likely to “produce more problems” than solve them.<sup>103</sup> Only the most detailed and prescriptive bill of rights, with little scope for judicial independence, would be able to cover in advance every possible fact situation engaging human rights guarantees. The debate over the extra-territorial effect of the HRA is also not considered

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96. *Supra* note 31, at 8.

97. *See, e.g.*, Danny Friedman, *A Common Law of Human Rights: History, Humanity and Dignity*, EUR. HUM. RTS. L. REV. 378, 379 (2016).

98. Mattias Kumm, *Taking ‘The Dark Side’ Seriously: Constitutionalism and the Question of Constitutional Progress*, 13 INT’L J. HUM. RTS., 777 (2015).

99. *See, e.g.*, Phillip Sales, *Partnership and Challenge: The Courts’ Role in Managing the Integration of Rights and Democracy*, PUB. L. 456; LORD SUMPTION, *ANXIOUS SCRUTINY* (2014) <https://www.supremecourt.uk/docs/speech-141104.pdf>.

100. *See, e.g.*, Lord Hoffmann, *The Universality of Human Rights* 125 L. Q. REV. 416 (2009); *see also* John Finnis, *Judicial Power: Past, Present and Future*, JUDICIAL POWER PROJECT (Oct. 21, 2015), <http://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/>.

101. *See, e.g.* Grégoire Webber, *Rights and The Rule of Law in the Balance*, 129 L. Q. REV., 399 (2013).

102. Steven Greer & Rose Slowe, *The Conservatives’ Proposals for a British Bill of Rights: Mired in Muddle, Misconception and Misrepresentation?*, 2015 EUR. HUM. RTS. L. REV. 372, 375.

103. *Id.*

given the assumption that the UK will remain committed to the ECHR and therefore mirror its approach to this issue at the national level.<sup>104</sup>

### An Effective Constraint on The Exercise of Power in Order to Protect Human Rights

Utilising the HRA as the starting point, and with the underlying assumptions that the UK will remain committed to its obligations in international human rights law, that the bill of rights will be designed to address at least two serious threats to the interests of the people of the UK, Brexit and rising inequality, whilst seeking to accommodate some criticisms of the HRA, it is important to now consider what features a UK bill of rights must have in order to be fit for purpose. The first purpose is for the bill of rights to be an effective constraint on the exercise of power in order to protect human rights. Within this purpose there are a number of elements requiring separate consideration.

#### *The definition of human rights*

For many years in discussions concerning a possible bill of rights for the UK, it has been suggested that the range of rights protected under the HRA is insufficient to deal with a variety of threats to human interests. For example, the Northern Ireland Human Rights Commission suggested in its report that given the history of Northern Ireland, the bill of rights should contain a much stronger right to equality and prohibition from discrimination and that the right to freedom from violence should be included.<sup>105</sup> The Joint Committee on Human Rights recommended inclusion of rights to health, education, housing, an adequate standard of living and the right to a healthy and sustainable environment.<sup>106</sup> The list of human rights protected by the HRA does not encompass all of the human rights which the UK has committed itself in international law to protect. As noted above, the need to afford protection to economic and social rights is now even more pressing given the UK's exit from the EU and rising inequality

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104. See, e.g., Tim Wood, *A Few Rotten Apples: A Review of Alleged Detainee Abuse by British Personnel in Iraq Following the Al Sweady Inquiry. Is There Still a Case to Answer?*, 21 J. CONFLICT & SECURITY L. 277 (2016); Duncan Fairgrieve, *Suing the Military: The Justiciability of Damages Claims Against the Armed Forces*, 73 CAMBRIDGE L. J. 18 (2014); Jane M. Rooney, *Extraterritorial Derogation from the European Convention on Human Rights in the United States Kingdom*, 2016 HUM. RTS. L. REV. 656.

105. *Supra* note 28, at 20 and 33-34.

106. A Bill of Rights for the UK?, *supra* note 28, at 59.

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as a result of austerity. Whilst some of these commitments may continue to be fulfilled indirectly, as Pillay notes, there is a much better chance for these additional rights to take root where judges enumerate and “state duties clearly and consistently.”<sup>107</sup>

Increasingly the UK is out of step with other democracies in not offering stronger legal protection to a broader range of human rights. For example, Kinney and Clarke state that 67.5 percent of the constitutions of the world have a provision addressing health or health care.<sup>108</sup> Similarly Young and Lemaitre note that at least 115 constitutions around the world have entrenched the right to health or health care “whether as justiciable claim-rights, aspirational guarantees, or a combination of the two.”<sup>109</sup> It is not necessary for all rights given effect by a UK bill of rights to have the same legal status. As a starting point, some may be declaratory and operate as a guide to Parliament in its law-making role. What is important is that the right is expressed in the bill of rights in some form:

[T]he presence of these constitutional provisions exhibits a national commitment to an important human right. They also establish a policy imperative for the legislative and administrative action.<sup>110</sup>

For any change to happen it clearly must proceed from the national level as this has been an area where the ECtHR has moved cautiously and there have been very few victories for applicants. The Court has consistently left ‘domestic courts at the forefront of legal developments’ in this field.<sup>111</sup> Similar accusations have been made regarding EU institutions.<sup>112</sup> Whilst a few claims under the HRA have been successful in combatting some of the worst features of austerity, it has been a difficult battle.<sup>113</sup> Were a bill of rights to include a justiciable free-standing equality guarantee, this would encourage national judges to go further than has been possible utilising Article 14 to ad-

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107. Anshari Pillay, *Revisiting the Indian Experience of Economic and Social Rights Adjudication: The Need for a Principled Approach to Judicial Activism and Restraint*, 63 *INT’L & COMP. L.* 385, 407 (2013).

108. Eleanor D. Kinney & Brian A. Clark, *Provisions for Health and Health Care in the Constitutions of Countries of the World*, *CORNELL INT’L L.J.*, 285, 291 (2004).

109. Katharine G. Young & Julieta Lemaitre, *The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Columbia and South Africa*, 26 *HARV. HUM. RTS. J.*, 179, 179 (2013).

110. Kinney & Clark, *supra* note 108, at 304.

111. Ionna Pervou, *Human Rights in Times of Crisis: The Greek Cases before the ECtHR, Or the Polarisation of a Democratic Society*, 5 *CAMBRIDGE J. INT’L & COMP. L.* 113, 126 (2016).

112. Margot E. Salomon, *Of Austerity, Human Rights, and International Institutions*, 21 *EUR. L.J.* 521, 522 (2015).

113. *See R. (Carmichael) v. Sec’y of State for Work and Pensions*, 58 *UKSC* (2016).

dress inequality. This would also help transparency and accountability by granting judges the power to adjudicate. There would no longer be distortions of civil and political rights, as protected by the HRA, to give protection to economic and social rights. There would be a debate from the outset about whether such rights should be subject to adjudication.

Human rights which would assist more effectively than civil and political rights in combatting inequality caused by austerity measures would be likely to have considerable public support<sup>114</sup> and offer some comfort to those concerned at the loss of protection for this type of right as a result of Brexit. However, it is important to note that there is a strong perception across the political spectrum, that adjudication over economic and social rights would involve courts in “politically sensitive matters that are outside both their constitutional mandate and institutional expertise.”<sup>115</sup> The Commission on a Bill of Rights did not reach any firm conclusions on additional rights but did not oppose this in principle. Whilst it was supportive of a right to equality and non-discrimination, a majority of members were not supportive of the inclusion of socio-economic rights such as a right to healthcare, education, or environmental rights. Although the minority concluded that as in other jurisdictions, this type of right could be drafted to make it suitable for application by judges,<sup>116</sup> it was not considered whether a bill of rights fit for purpose would include protection for economic social rights despite the convincing evidence that this is now the case.

*Effectiveness and reducing judicial power*

The second issue within this first purpose for a bill of rights is effectiveness. One of the main problems with the effectiveness of the HRA is that the section 4 declaration of incompatibility is not considered to be an effective remedy by the ECtHR although it has not yet found a violation of Article 13.<sup>117</sup> Rather than re-visit this debate, it is accepted that this is the best that can be achieved under the constitution and that declarations of incompatibility, with the exception of the

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114. See NAT'L CENTRE FOR SOCIAL RESEARCH, BRITISH SOCIAL ATTITUDES REPORT (2017), <http://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-34/key-findings/context.aspx>.

115. Pillay, *supra* note 107, at 385-386.

116. Commission on a Bill of Rights, *supra* note 5, at 34.

117. See Merris Amos, *Problems with the Human Rights Act and How to Remedy Them: Is A Bill of Rights the Answer?*, 72 MOD. L. REV. (2009).

one concerning prisoner voting, are always eventually implemented.<sup>118</sup>

In recent years a different critique of the HRA has emerged. It has been argued that in a new bill of rights, judicial power should be reduced and the power of the legislature increased and that this could be achieved by removing section 3 of the HRA, or precluding any equivalent in a bill of rights.<sup>119</sup> Section 4 of the HRA has been critiqued along similar lines with some maintaining that the HRA does not actually provide for “weak-form review” given the reluctance of the legislature to reverse section 3 interpretations and its willingness to act on section 4 declarations of incompatibility.<sup>120</sup> This has also found expression in the judgments of some justices of the Supreme Court. For example, in its judgment in *Nicklinson*,<sup>121</sup> a majority of the Supreme Court found a violation of Article 8 of the ECHR but only two judges were willing to issue a declaration of incompatibility.

Most arguments about the HRA affording too much power to the judiciary move little beyond the traditional critique of the role of courts in human rights adjudication and offer no new empirical insights or reflect in any detail upon the very limited use of sections 3 or 4 in practice and the fact that there is at least one declaration of incompatibility which remains not remedied. For example, Heydon, with no supporting evidence, concludes that the legislature’s ability to define rights is superior to that of the courts.<sup>122</sup> Similarly, with no evidence, Sales declares that the “indirect participation of everyone through deliberation in Parliament” may be more likely to provide “better protection” than courts “for the political equality of citizens and equal respect for their interests in the law-making process.”<sup>123</sup> But neglects to mention claimants under the HRA (or any new bill of rights) who might have no vote including serving prisoners, those aged

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118. Lord Chancellor and the Secretary of State, Responding to Human Rights Judgments (2016).

119. Sales, *supra* note 99, at 465; *see also* Conservative Party, *supra* note 32.

120. Aileen Kavanagh, *What’s So Weak About ‘Weak-Form Review?’ The Case of The UK Human Rights Acts 1998*, 13 INT’L J. CONST. L. 1008, 1020. (2015). *See also* Christian Chandrachud, *Reconfiguring the Discourse on Political Responses to Declarations of Incompatibility*, 624, 641 (2014).

121. *R. (Nicklinson) v. Ministry of Justice*, 38 UKSC (2014). *See also* Conor Gearty, *On Fantasy Island*, Ch. 5, (Oxford: OUP, 2016).

122. Heydon, *supra* note 59, at 400.

123. Sales, *supra* note 99, at 466-467.

under eighteen, and, at least in the Brexit Referendum, EU nationals living in the UK.<sup>124</sup>

It is possible to dismiss such arguments as “reductive, socially abstracted, and evidentially questionable”<sup>125</sup> and there is considerable evidence pointing in the opposite direction. For example, following a rigorous review of immigration judgments, Wray concludes that even though the government was forced to modify its policy in several areas, powers were used “cautiously and with a strong sense of constitutional propriety.”<sup>126</sup> In her view, the “court almost always checked executive not legislative power and grounded its decisions in statutory authority.”<sup>127</sup> Similarly, backed up by considerable evidence and research, Fredman describes a debate on prisoner voting which took place in Parliament as follows:

[I]t was conducted in highly emotive terms, with little supporting evidence or justification for many of the assertions made . . . it is difficult to consider the Parliamentary proceedings as having sufficiently deliberative credentials. While not all Parliamentary debates should be required to be deliberative, this standard is crucial in a case in which an elected majority is attempting to use its legislative power to deprive a part of the population of its very ability to voice its concerns through the political process.<sup>128</sup>

But despite the questionable nature of the assertions, as the voices in favour of reducing judicial power in human rights adjudication become more strident, it is important to consider whether or not a bill of rights leaning more in favour of the legislature than the courts would be an effective constraint. In short, is it possible for a bill of rights to be fit for purpose if it does not contain an equivalent of sections 3 or 4 of the HRA?

A bill of rights which reduced the ability of courts to address violations of human rights contained in primary legislation would clearly not provide for effective remedies where human rights are threatened by Parliament. Such a bill of rights would ensure that Parliament’s interpretation of human rights, despite any political motivation, was

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124. See Shai Dothan, *In Defence of Expansive Interpretation in The European Court of Human Rights*, 3 CAMBRIDGE J. INT’L & COMP. L., 508, 521-523 (2014); See also Richard Belamy, *The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and The European Convention On Human Rights*, 25 EUR. J. INT’L. L. 1019 (2014).

125. Thornhill, *supra* note 18, at 212.

126. Wray, *supra* note 92, at 838.

127. *Id.* at 846.

128. Sandra Fredman, *From Dialogue to Deliberation: Human Rights Adjudication and Prisoners’ Rights to Vote*, PUB. L. 292, 310 (2013).

even more difficult than it is under the HRA to remedy. It would also place the UK in direct breach of Article 13 of the ECHR. Furthermore, it is important to take into account Dixon's point that no process of constitutional design "can even hope fully to succeed without trust toward the constitutional judiciary as a basic ingredient."<sup>129</sup> The British judiciary has done nothing to indicate that its commitment to judicial independence and impartiality should be called into question on the basis of its use of section 3 and 4 remedies under the HRA. As the unresolved issue of prisoner voting demonstrates, Parliament still does hold all the power.

But whilst equivalents of sections 3 and 4 must be maintained to ensure effectiveness, it is possible to ensure that Parliament plays a far greater role in scrutinising laws for human rights compliance by writing this into a bill of rights. In determining compatibility, national courts and the ECtHR play close attention to how carefully Parliament has considered the human rights implications of a bill.<sup>130</sup> It is by enhancing this process that Parliament's power could be increased without comprising the effectiveness of the bill of rights. For example, Williams and Williams suggest that section 19 HRA statements of compatibility should be accompanied by reasons and a clearer indication that it remains possible for Parliament to override human rights guarantees.<sup>131</sup> Sales argues for a more formal requirement for 'detailed human rights impact assessments' to be presented by government in relation to proposed legislation and for the dedication of a set amount of parliamentary time to debate the human rights implications of a bill.<sup>132</sup> This was also an important feature of the Joint Committee's Report which included recommendations on "reasoned" statements of compatibility, making explicit the power of legislative override and the possibility of a timetable following a declaration of incompatibility.<sup>133</sup>

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129. Rosalind Dixon, *Constitutional Drafting and Distrust*, 13 INT'L J. CONST. L. 819, 846 (2015).

130. See Aileen Kavanagh, *Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory*, 34 OXFORD J. LEGAL STUD. 443, 479 (2014).

131. Alexander Williams & George Williams, *The British Bill of Rights Debate: Lessons from Australia*, PUB. L. 471, 487-488 (2016).

132. Sales, *supra* note 99, at 463-464.

133. *A Bill of Rights for the UK?*, *supra* note 28, at 60-64.

*The exercise of non-state power*

Finally, within the first purpose of a bill of rights it is necessary to consider what types of power should be subject to constraint in order to protect human rights. The HRA only has direct application to public authorities and those bodies which exercise functions of a public nature.<sup>134</sup> It has indirect application to the private sector via the section 3 duty to interpret primary legislation compatibly with Convention rights, so far as it is possible to do so, and via the duty on courts to act compatibly with Convention rights when developing the common law.

Concern continues to grow at the exercise of enormous power by non-state actors. For example, the “gig” economy or the new economic model “leaves a large portion of the workforce without the protections of workers’ rights and benefits intended for the broad workforce.”<sup>135</sup> The rights of the traditional workforce will be far more vulnerable as a result of Brexit and the loss of EU protection. Choudhry has called for the extension of section 6 of the HRA to private providers of children’s services.<sup>136</sup> Mead has written of the privatised regulation of peaceful protest and the need to reverse the extent to which private law might impinge upon the right of nonviolent protest.<sup>137</sup>

As Nolan observes, the UK would not be the first state to make its bill of rights even more effective by extending its reach to the private sector. In Malawi, Argentina and Ghana, “constitutional rights are (at least potentially) directly enforceable against private actors in some circumstances.”<sup>138</sup> However, the extension of human rights protection in this direction has not been a strong feature of past bill of rights debates. In its report, the Joint Committee on Human Rights did state that the bill of rights could protect people from “state power” and “commercial bodies” whilst strengthening the means of remedying individual grievances against such bodies<sup>139</sup> but there was little discussion of this issue in the rest of the Report. Imposing an obligation to protect human rights directly on the private sector re-

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134. Human Rights Act of 1998, c. 6 (U.K.).

135. Bartolini, *supra* note 49, at 1295.

136. S. Choudhry, *Children in Care After Y1 – The Ineffectiveness of Contract as A Means of Protecting The Vulnerable*, PUB. L. 519, 536-537 (2013).

137. *Id.*

138. Nolan, *supra* note 45, at 66, 91 (notes that non-enforceability at the international level is a ‘serious lacuna’ in the human rights framework).

139. *A Bill of Rights for the UK?*, *supra* note 28, at 15-16.



mains at the far end of the spectrum in terms of achievable goals for a UK Bill of Rights, but is an important issue requiring a place on the agenda and further research, analysis and debate.

An Important Mechanism to Assist A State to Comply with The  
Legal Commitments It Has Made at The International  
Level

As noted above, it is assumed that in drafting a bill of rights, account will be taken of the fact that the UK is bound in international law by a number of international human rights law treaties, including the ECHR. Here the HRA is already partially fit for purpose in that it assists the UK to comply with commitments predominantly in relation to civil and political rights under the ECHR and treaties such as the ICCPR. But, also already noted, it does not assist the UK in directly complying with its international commitments in relation to a number of other types of human right, in particular economic, social and cultural rights. This is a gap that a bill of rights fit for purpose could help to fill. In addition, it is also possible that a bill of rights fit for purpose might regulate the relationship between national and international human rights law a little differently to the model established by the HRA, yet still help the UK to achieve its commitments. This might go some of the way towards accommodating concerns about the encroachment of international standards to the detriment of national sovereignty. These possibilities are examined in the following paragraphs.

*The relationship between the UK bill of rights and international law*

As already noted, close adherence to international treaty commitments, in both the substantive and procedural features of a bill of rights, can help a State to meet the international commitments it has made. Furthermore, as examined below, when national courts take into account the jurisprudence of international courts, such as the ECtHR, this can help to secure a margin of appreciation for the national position before the ECtHR.<sup>140</sup>

But a national bill of rights need not replicate the exact wording of an international instrument by, for example, utilising the language of the ECHR such as occurs in the HRA. Similarly, it is not necessary to include in a national bill of rights a directive to courts as to how

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140. Lambrecht, *supra* note 61, at 257-258.

they are to interpret and apply the bill of rights, such as an equivalent of section 2 of the HRA, in order to meet this purpose. It is possible that section 2 has actually given the impression that UK courts are subservient to the ECtHR.<sup>141</sup> As Mahoney points out, in many instances the judgments of the Court need not be slavishly followed, but should be read as a “source indicating the interpretative, principled framework for resolving the human rights issue before them.”<sup>142</sup> An independent judiciary should be able to draw inspiration for interpretation and application from a wide range of sources whilst also mindful of a State’s international commitments such as Article 46 of the ECHR. What Article 13 of the ECHR requires is the same level of scrutiny as Strasbourg would offer “although the manner in which it is provided may vary.”<sup>143</sup>

With a new national language of rights protection, and no explicit directive to follow the judgments of an international court, there is of course a risk that the interpretation and application of the bill of rights will become too nationally focussed and potentially in breach of international guarantees. In the area of private law, for example, Giliker has observed that the courts and the legislature have played an important role in minimising the Europeanisation of the English common law and when UK judges decide to use comparative law, their ‘first port of call will still generally be that of other common law jurisdictions’.<sup>144</sup> But human rights law is very different, common standards have spread around the world. National and international judges everywhere are interpreting and applying human rights and developments are widely shared. As Lock has observed:

It is a well-documented phenomenon that decision-making bodies in the field of human rights law draw inspiration from the law and practice of other legal orders, be they domestic, regional or international. The main reason for this is that even though there are multiple sources guaranteeing human rights, these seem to be underpinned by the recognition of a common core.<sup>145</sup>

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141. Bates, *supra* note 76, at 522.

142. Paul Mahoney, *The Relationship Between the Strasbourg Court and the National Courts*, 130 L. Q. REV. 568, 579 (2014).

143. Bamforth, *supra* note 73, at 506.

144. Paula Giliker, *The Influence of EU and European Human Rights Law on English Private Law*, 64 INT’L & COMP. L. 237, 262.

145. Tobias Lock, *The Influence of EU Law on Strasbourg Doctrines*, 41 EUR. L. REV. 804, 804 (2016). See also David Thor Björgvinsson, *The Effect of the Judgments of the ECtHR before the National Courts – A Nordic Approach?*, 85 NORDIC J. INT’L L. 303 (2016).

*A UK Bill of Rights Fit for Purpose*

Even if a UK bill of rights were to include no guidance on international law, human rights adjudication by an independent and impartial national judiciary would continue to be influenced by the human rights jurisprudence of international courts, and that of other national courts. It would be an unusual bill of rights indeed, and totally contrary to the separation of powers, were it to ban national judges from having regard to a wide range of sources in its interpretation and application.

*International law must be a floor not a ceiling*

In the bill of rights, it is important to state, either expressly or implicitly, that international law operates as a floor rather than a ceiling for the interpretation of rights. This avoids the problem identified by Mazzone:

[R]ights obligations imposed at a higher level . . . can act as a ceiling rather than a floor. . . a top-level guarantee of rights, designed as the minimum level of protections that must exist, can end up as the maximum level of protection. . . Localised measures to augment rights beyond those mandated from above risk seeming extravagant or out of place.<sup>146</sup>

Utilising the example of sexual orientation discrimination, McGoldrick has pointed out that reforming initiatives at the national level are more likely to achieve change in this area than international human rights law and that the UK has been at the forefront of improving rights protection in this field whilst the Council of Europe has “proceeded incrementally”:

Even in a system with an underlying political consensus, a high-level political body with responsibility to monitor the implementation of ECtHR judgments and which is supported by a strong Secretariat, it has still taken decades for State practice in all 47 Member States to fall in line with the ECtHR’s jurisprudence on the criminalization of adult consensual same-sex relations.<sup>147</sup>

He rightly concludes that sometimes progress is only possible when it proceeds from within States “by strategic litigation and advocacy rely-

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146. Jason Mazzone, *The Rise and Fall of Human Rights: A Sceptical Account of Multilevel Governance*, 3 CAMBRIDGE J. INT’L & COMP. L. 931, 931-932 (2014). Although Mazzone’s case study concerning the common law protection of the right to a fair trial is overly optimistic and does not take account of the inability of the common law to effectively combat incursions on rights carried out via primary legislation. *Id.* at 932-933.

147. Dominic McGoldrick, *The Development and Status of Sexual Orientation Discrimination Under International Human Rights Law*, 16 HUM. RTS. L. REV. 613, 659-660 (2016).

ing on domestic constitutional and legislative equality or non-discrimination provisions” although sometimes international or transnational jurisprudence can assist “progressive interpretations.”<sup>148</sup> Similarly, Mahoney has observed that UK judges have been restrained feeling that they have had no mandate “to take the European Convention forwards in directions not safely supported by existing Strasbourg jurisprudence.”<sup>149</sup> There is the possibility that when interpreting and applying the bill of rights, UK courts will be able to stretch beyond ECtHR jurisprudence and offer improved protection for human rights through law at the national level. Regardless of the inclusion of a section 2 equivalent in any new UK bill of rights, optimistic scholars such as Ferriera see an opportunity for national courts to be more “autonomous, ambitious and demanding of their own legal framework.”<sup>150</sup>

*International human rights law standards remain important*

It is desirable for the national bill of rights to be independent of international guarantees should these not reach as far as national guarantees, and for national jurisprudence to move swiftly where required rather than being in lock step with a system which can only move forward very slowly as it must take account of the consensus in 47 Contracting States. However, this is not to suggest that a State must de-ratify international treaties in order to move forward on national human rights protection, particularly if there is no desire to move forward but to actually adopt regressive interpretations. Mazzone is right to conclude that it is possible that left to their own devices “without universal rights imposed from above,” the best performing States might “adopt stronger protections for rights”<sup>151</sup> but should also appreciate that left to their own devices, the best performing States might adopt lesser protections for rights in order to achieve political or ideological objectives such as securing an election win with a call to “reclaim” national sovereignty. As McGoldrick has also concluded, where States are isolated in their interpretation of a particular human rights guarantee, if they are part of a system of protection such as the ECHR system, it becomes difficult to maintain such views “if there is an overwhelming consensus of States, regional and interna-

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148. *Id.* at 664.

149. Mahoney, *supra* note 142, at 586.

150. Nuno Ferreira, *The Supreme Court in a Final Push to Go Beyond Strasbourg* PUB. L. 367, 375 (2015).

151. Mazzone, *supra* note 146, at 932.

tional human rights institutions and procedures against their interpretation.”<sup>152</sup> Remove the international commitment, and this particular pressure falls away.

*Securing respect for national sovereignty within the existing framework*

Finally, almost completely ignored by advocates for a bill of rights and critics of international supervision is the fact that a bill of rights fit for purpose can help a State meet its international commitments whilst also securing respect for the national position on particular issues. Over the years UK judges have become far more adept at carefully adjudicating in HRA cases so as to secure respect for their work should it end upon on review before the ECtHR. Amos notes that in some instances:

British courts can now exert strong influence [on the ECtHR], changing the course of Convention jurisprudence for all Contracting States, and help to ensure that where the UK wishes to maintain a national position on an important issue, such as its ban on political advertising, this is far more possible than might have otherwise been the case.<sup>153</sup>

Much of the criticism of the ECtHR emanating from the UK is very dated and stuck in a prisoner voting time warp with little appreciation that the ECtHR is itself changing and allowing far more freedom for States to adopt a more flexible and nationally focussed interpretation of international human rights guarantees and jurisprudence. Furthermore, criticisms of the living instrument approach of the ECtHR are also dated and fail to appreciate how the UK has actually utilised the concept of consensus and living instrument in ECtHR litigation to its advantage in order to halt a more expansive interpretation.<sup>154</sup> Spano writes of the ‘age of subsidiarity’ and states that the Court is consistently demonstrating its willingness to “defer to the reasoned and thoughtful assessment by national authorities of their Convention obligations” utilising the judgment of the Court in *Animal Defenders v UK*<sup>155</sup> and Protocols 15 and 16 to support his argument.<sup>156</sup>

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152. McGoldrick, *supra* note 147, at 658.

153. Amos, *The Influence of British Courts on the Jurisprudence of the European Court of Human Rights* in R. McCorquodale and J. Gauci (eds.) *British Influences on International Law 1915-2015* (London: BRILL, 2016).

154. See C. Draghici, *The Strasbourg Court between European and Local consensus: Anti-Democratic or Guardian of Democratic Process?* PUB. L. 11 (2017).

155. *Animal Defenders International v. United Kingdom*, 362 Eur. Ct. H.R. 57 (2013).

It is now clear that the ECtHR does take account of the processes of national authorities in its determination of the margin of appreciation. Saul has referred to the “growing body of case law that supports the thesis of deeper subsidiarity in relation to parliaments.”<sup>157</sup> Mahoney writes of the role played by national courts:

[T]he closer the analysis of the national courts reflects the European Convention and its case-law, the more likely the finding will be that the national courts have remained within the domestic margin of appreciation. . . . There will be less temptation for the Strasbourg Court to engage in micro-management of individual situations or even in reviewing the preceding policy-making and, thus, less inclination to disturb the rulings of the national courts if the national courts are visibly operating domestic remedies with an eye to compliance with Convention standards and case law.<sup>158</sup>

As Mahoney notes, UK courts have a much greater chance of retaining control of the interpretation and application of human rights law if a co-operative, rather than a “hierarchical or competitive relationship” is maintained.<sup>159</sup> Where State authorities do a good job, fulfilling their responsibilities as the primary guarantors of Convention rights, the ECtHR will respect this.<sup>160</sup> It is also becoming increasingly harder for applicants to access the Court, although this has also generated some criticism.<sup>161</sup>

A UK bill of rights fit for purpose could be drafted to take advantage of these opportunities by ensuring strong human rights consideration in the legislature and executive, and by allowing the courts to have the opportunity to test law policy and practice utilising the same tools as the ECtHR. Rather than becoming bogged down in debates about whether judges should be able to consult Hansard, it should be accepted that the ECtHR is impressed by parliamentary debates on human rights issues and that this plays an important role in its deci-

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156. Robert Spano, *Universality or Diversity of Human Rights: Strasbourg in the Age of Subsidiarity* 14 HUM. RTS. L. REV. 487, 491 (2014).

157. Matthew Saul, *The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments* 15 HUM. RTS. L. REV. 745, 773-774 (2015).

158. Mahoney, *supra* note 142, at 571. *See also* Spano, *supra* note 156, at 499-500.

159. *Id.* at 586. *See also* Bates, *supra* note 76, at 533.

160. *See also* Alastair Mowbray, *Subsidiarity and the European Convention on Human Rights*, 15 HUM. RTS. L. REV. 313 (2015); Matthew Saul, *Structuring Evaluations of Parliamentary Processes by the European Court of Human Rights*, 20 THE INT'L J. OF HUM. RTS. 1077 (2016); and Oddný Mjöll Arnardóttir, *The Procedural Turn Under the European Convention on Human Rights and Presumptions of Convention Compliance*, 15 INT'L J. CONST. L. 9 (2017).

161. *See* Andrew Tickell, *More “Efficient” Justice at the European Court of Human Rights: But at Whose Expense?*, PUB. L. 206 (2015).

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sion making in some instances widening the margin of appreciation it is willing to afford.<sup>162</sup> Whilst the subsidiary role the Court has adopted for itself has also been the subject of criticism,<sup>163</sup> it is difficult to understand why a bill of rights should not build on this and boost the UK's increasingly good record before the Court.

#### An Indication, Both Nationally and Internationally, Of What A State Stands For (Symbolic Value).

The final purpose to be served by a bill of rights is for it to have a strong symbolic value and signal to the people of the UK and those of other States, what the UK stands for. As already noted, this is a purpose on which there is unanimous agreement. A bill of rights is an important statement. It is likely to remain in place for many years so careful thought must go into its substantive content and what message this will send.

This purpose of the bill of rights is closely connected to the first and second purposes. For example, should it be determined that the courts will have no power to provide a remedy where Parliament chooses to legislate inconsistently with human rights guarantees, the message will be that the UK does not care about effective remedies for violations of human rights law. Should the bill of rights expressly contradict the guarantees of international human rights law, both treaty and jurisprudence based, the message will be that the UK does not respect the international rule of law. Should the bill of rights trample all over what the people of the devolved parts of the UK desire, particularly the people of Northern Ireland, the message will be that the UK is a unitary State, controlled from Westminster with little regard to or respect for the wishes of the people of its constituent countries and devolved executives and legislatures. Conversely, should the bill of rights offer protection to a much wider set of human rights, reflecting the UK's international commitments, the message will be that the UK is a progressive and outward looking nation, willing to embrace a modern human rights instrument.

Given the content of recent debates over a bill of rights, there are three messages it could potentially send which would, taken together, indicate that the UK has taken a step back from its foreign policy

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162. Kavanagh, *supra* note 130, at 445.

163. See *The observations of Lewis on Animal Defenders International v. UK: Tom Lewis, Animal Defenders International v. United Kingdom: Sensible Dialogue or a Bad Case of Strasbourg Jitters?*, 77 *MOD L. REV.* 460, 468-69, 474 (2014).

objective to ‘stand up for human rights’. These are explained in more detail in the following paragraphs.

*British exceptionalism*

“Britishness” has been a theme of politicians from all shades of the political spectrum in recent years. Former Labour Prime Minister Gordon Brown portrayed Britain as a “heroic leader willing to fight for the values” it believes in.<sup>164</sup> By contrast, former Conservative Prime Minister David Cameron “defined Britishness against the European ‘other.’”<sup>165</sup> Both perspectives could be captured in different UK bills of rights. Brown’s vision would translate to a bill of rights that went beyond the ECHR, placing the UK central on the world stage as a leader in the national protection of human rights. British exceptionalism in this context would symbolise the importance of respecting human rights through law and going beyond international guarantees at the national level. As noted above, whilst protection equivalent to that offered at the international level allows a State to fulfil its international commitments, it is also possible for a State to be a leader on particular human rights issues and in its national bill of rights go above and beyond the protection offered at the international level. For example, the UK has gone beyond the fairly limited Article 12 ECHR and extended the right to marry same sex partners.<sup>166</sup>

Whilst Cameron’s vision could also translate to more generous protection for human rights, distinguishing national human rights protection from European protection is more likely to be achieved via less generous protection at the national level as Europe has been consistently presented by Cameron, and other Conservative politicians as a threat to national sovereignty and identity.<sup>167</sup>

*Lack of respect for international law and institutions*

It has been suggested that as a result of UK history, there is a “strong resentment against any supra national body or court telling us what we ought to do.”<sup>168</sup> But for the UK to express through its bill of

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164. Judi Atkins, *(Re)imagining Magna Carta: Myth, Metaphor and the Rhetoric of Britishness*, 69 PARLIAMENTARY AFF. 603, 609-10 (2016).

165. *Id.* at 604.

166. With the exception of Northern Ireland. See Paul Johnson, *The choice of Wording Must be Regarded as Deliberate: Same Sex Marriage and Article 12 of the European Convention on Human Rights*, EUR. L. REV. 207 (2015).

167. Atkins, *supra* note 164, at 614.

168. Grieve, *supra* note 93, at 225.



### *A UK Bill of Rights Fit for Purpose*

rights that it has no regard or respect for international law or institutions would be setting an appalling example for the rest of the world, particularly those States the UK encourages to respect human rights themselves. As Grieve notes, the decisions on the part of the UK to ratify the ECHR and accept the right of individual petition “was because it was and remains in our national self-interest to promote the Convention’s values to our co-signatories and others.”<sup>169</sup> Such a message would also be in direct contrast to current Foreign Office policy.<sup>170</sup>

A UK bill of rights fit for purpose might resolve the UK’s currently ambiguous relationship with its international human rights commitments. But should the UK withdraw from the ECHR, and its UN human rights commitments, some have observed that this will not only make the UK a pariah state but lead to the eventual destruction of the ECHR system with disastrous consequences for the people of other Contracting States. Bratza, a former UK judge at the ECtHR, has observed that the “damage done by the withdrawal of support for the system by one of its key players would be simply incalculable” particularly for the newer democracies in Europe.<sup>171</sup>

#### *Elevating responsibilities above human rights*

Finally, whilst there has been little talk in recent years of making human rights protection dependent upon the fulfilment of responsibilities, some remain interested in including in a UK bill of rights a statement of responsibilities.<sup>172</sup> The Conservative Party stated in its 2017 election manifesto that “[w]e know our responsibility to one another is greater than the rights we hold as individuals” but made no further undertakings in relation to the inclusion of a statement of responsibilities in a bill of rights. Provided the legal protection of rights was not conditional upon the fulfilment of responsibilities, a statement of existing responsibilities, such as to pay taxes, educate children and to vote would be unproblematic and carry an important symbolic value both nationally and internationally. But to make the enjoyment of human rights contingent upon the fulfilment of responsibilities would

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169. *Id.* at 226.

170. The UK is not alone in this problem. Oomen states that human rights play an important role in Dutch foreign policies but are not “invoked as a frame for understanding domestic social and political problems.” Barbara Oomen, *The Rights for Others: The Contested Homecoming of Human Rights in the Netherlands*, 31 NAT’L Q.

171. Bratza, *supra* note 40, at 127-28.

172. *See, e.g.*, Williams & Williams, *supra* note 131, at 485.

be totally contrary to the fundamental tenants of human rights law. As Lord Hope stated in his judgment in *RB*:

The rights and fundamental freedoms that the Convention guarantees are not just for some people. They are for everyone. No one, however dangerous, however disgusting, however despicable, is excluded. Those who have no respect for the rule of law – even those who would seek to destroy it – are in the same position as everyone else.<sup>173</sup>

### Conclusion

Although there is only a vague commitment from the Government to consider the national human rights framework once the process of leaving the EU concludes, the UK bill of rights debate is unlikely to vanish forever. Calls for the replacement of the HRA with a bill of rights can be subject to a variety of triggers including a high-profile judgment of the ECtHR, a terror attack, or the desire to deport “foreign criminals” contrary to human rights guarantees. Should a hard Brexit not be achieved it may even be the case that the desire to “take back control” transfers to a new target making the HRA with its ECHR links particularly vulnerable. When the time comes, it will be important to examine proposals for a UK bill of rights against the purposes a bill of rights should fulfil in order to be considered as such.

In this article, three purposes for a bill of rights have been set out. It must be an effective constraint on the exercise of power in order to protect human rights. It must assist a State in complying with commitments made in international human rights law. And it must symbolise what that State stands for. To accommodate some of the most contested issues within this framework, it is up to States to determine for themselves which human rights and what sorts of power given the commitments that State has made at the international level and serious existing threats to the interests of the people of that State. In the current UK context, it is true that the HRA is already in many respects a bill of rights fit for purpose. However, against the backdrop of the UK’s commitments in international law, and the threats presented by Brexit and rising inequality, there is room for improvement whilst also accommodating some recent criticisms.

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<sup>173</sup>. *RB (Algeria) v. Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110 at [210].

*A UK Bill of Rights Fit for Purpose*

Building on the HRA, a UK bill of rights fit for purpose must expand the range of human rights protected in order to provide effective protection against current threats and assist the UK in living up the commitments it has made in international human rights law. But it is not necessary for the bill of rights to contain a direct link to international law and jurisprudence. This can be allowed to develop organically on the assumption that international standards operate as a floor rather than a ceiling. It is beyond doubt that a UK bill of rights would not be fit for purpose if it were to place primary legislation beyond the review of the courts although it is possible to retain effectiveness whilst securing a more detailed role for Parliament than that which currently exists under the HRA. Improving the processes for human rights consideration engaged in by both legislature and executive can improve effective protection, boost compliance at the international level and also secure more respect for the national perspective at the international level. A UK bill of rights fit for purpose will naturally send a strong symbolic message: that the UK respects and follows the international rule of law; is a world leader in the protection of human rights; and a strong advocate of the fundamental principle that human rights are for everyone.



# ARTICLE

## Human Hierarchy and High School Shootings

HAROLD McDOUGALL\*

### A. INTRODUCTION

2018 seemed to be a year of genuine alarm over high school shootings. This is most likely the result of the determined campaign waged by the survivors of the Parkland massacre in Florida this year. Certainly, we've been here before, but there seems to be more discussion than usual. At the same time, the pushback against gun control remains just as determined, including character assassination against the Parkland kids.

Just in case anyone missed the memo, there were more school shootings in 2018 than in any year in American history,<sup>1</sup> at least one per week.<sup>2</sup> The top killer of children remains the car crash, but the number of children killed by gun violence is the runner-up, and the gap is closing. "Since 2017, vehicular deaths are dropping and gun deaths are on the rise."<sup>3</sup> While gun control is the clearest and, absent NRA opposition, the quickest way to deal with this crisis, I want to suggest that gun control is a necessary, but not a sufficient condition for solving the problem. The problem is much deeper, much older.

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\* Special thanks to my present and former students Brya Adams, Breanna Bledsoe, Grace Brooks, Adrienne Ferrell, Alicia Frison and Marymagdalene Mouton. Their contributions are noted in the body of the article.

1. Matt Van Sol, *2018 Marked the Year for Most School Shootings Ever*, THE SOURCE (Dec. 28, 2018), <http://thesource.com/2018/12/28/2018-marked-the-year-for-most-school-shootings-ever/>.

2. Saeed Ahmed and Christina Walker, *There has been, on average, 1 school shooting every week this year*, CNN (May 25, 2018), <https://www.cnn.com/2018/03/02/us/school-shootings-2018-list-trnd/index.html>.

3. Van Sol, *supra* note 1.

America's gun culture makes it worse, and I will address that, but first I want to talk about what American society has become, and why.

A Huffington Post writer suggested that our children are disaffected and angry, and that no one is listening. They have entered a society that is “in blatant moral contradiction of what we teach them, and yet we deny it. We tell them ‘do unto others,’ to live equally, and in peace, while everything we do proves otherwise.”<sup>4</sup> Ironically, when our children first face this society as quasi-independent actors, in middle school and high school, they face intense pressure to fit in, to conform, to become part of a “a malignantly toxic culture of bullying.”<sup>5</sup>

According to a writer for Psychology Today, this pressure, which “seems to have increased in the last several decades,” makes those who do not fit in targets for “predators who use bullying and social alienation to enhance their own self-esteem.”<sup>6</sup> Rosalind Wiseman, author of *Queen Bees and Wannabees*, the book upon which the movie, *Mean Girls*, is based, has a lot to say about bullying and the pressure to fit in.<sup>7</sup>

Let's talk about that push to conform.

As I have written elsewhere, the need or desire to “fit in,” is arguably part of our DNA, expressed in neural pathways regulating empathy and attachment.<sup>8</sup> These have probably been with us since our emergence as the last of several human species, two hundred thousand years ago. For most of our history, living as free-ranging hunters and gatherers, our attachment and empathy served to bind us to a small group, a band no larger than twenty.

About fifteen thousand years ago, however, we stopped moving around and transitioned to “food production” as agriculture and animal domestication emerged.<sup>9</sup> Our numbers grew, our settlements became dense, and our means of self-governance changed from occasional conversations with relatives to multiple encounters with stran-

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4. Stephan Said, *The Cause of School Shootings: We're Missing the Mark*, HUFFINGTON POST (Oct. 9, 2015, 8:44 AM), [https://www.huffingtonpost.com/stephan-said/the-cause-of-school-shoot\\_b\\_8268078.html](https://www.huffingtonpost.com/stephan-said/the-cause-of-school-shoot_b_8268078.html).

5. George S. Everly, *The Perfect Storm: Why School Shootings are Increasing*, PSYCHOLOGY TODAY (May 19, 2018), <https://www.psychologytoday.com/us/blog/when-disaster-strikes-in-side-disaster-psychology/201805/the-perfect-storm-why-school-shootings>.

6. *Id.*

7. *See infra* note 29 and accompanying text.

8. *See* Harold McDougall, *Humans, Hierarchy and Human Rights*, 73 Nat'l Law. Guild Rev. 129 (2017).

9. JARED M. DIAMOND, *GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES* 264-65 (1997).

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gers. Elites emerged to tell us what to do in these cases, constructing “imagined realities”<sup>10</sup> to provide guidelines for our behavior.<sup>11</sup>

These constructs had some unfortunate features. First, the guidelines invariably served the narrow self-interest of the elites themselves. Second, they created a hierarchy with the elite at the top, enabling them to harvest the fruits of our labor for their own benefit.<sup>12</sup> Finally, the new constructs loaded our empathic and attachment “algorithms” with some new, false data, enabling the elites to control us by regulating all of our interactions with others.<sup>13</sup> They created an imaginary, intersubjective world for us to inhabit, in which we thought and did as we were told by our betters.

### B. HUMAN HIERARCHY

The new, false data fed into our empathic and attachment algorithms informs us that we cannot and should not direct our communal impulses to just anybody. Specifically, there are prized specimens who deserve our fealty, and “others” who do not. According to Marilyn French, the first group “othered” were women, who were subordinated to men in the new social order that developed alongside sedentary agriculture.<sup>14</sup> Women, and children, came to be viewed as men’s property; women were expected to show deference to men at every turn.<sup>15</sup>

Boys were separated from their mothers at puberty and passed through rigorous and symbolic, and often cruel initiation rites designed to disrupt boys’ empathy towards women and cement them into the male fraternity.<sup>16</sup> They were taught to reject “female” qualities of softness, love, nurturing and compassion,<sup>17</sup> and adopt “male” virtues of hardness, self-denial, obedience, and deference to “superior” males” instead.<sup>18</sup>

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10. See YUVAL HARARI, *SAPIENS: A BRIEF HISTORY OF HUMANKIND* 22-36 (Yuval Harari trans., Vintage Publishing, 2d ed. 2014) (2011).

11. Diamond, *supra* note 9, at 264-65.

12. *Op cit.*

13. See Arthur Munk, *Major Ancient Revolutions*, 53 *SOC. SCI.* 237, 237-42 (1977).

14. See generally MARILYN FRENCH, *FROM EVE TO DAWN, A HISTORY OF WOMEN IN THE WORLD, VOL 1: ORIGINS* (2008).

15. *Id.* at xi.

16. *Id.* at 11; see *id.* at 54-55 for the suggestion that male fraternity may have evolved primarily from the male hunt for big game.

17. *Id.* at 56.

18. *Op cit.*

Girls, on the other hand, were taught to accept their inferior positions, and to make the most of it by pleasing men<sup>19</sup> and following orders. They too occupy positions in a hierarchy, organized around their approximation of an artificially-constructed feminine ideal. They too learn to replicate and reproduce the hierarchy, striving to approximate the ideal and policing their daughters, sisters, friends, and rivals in the process.<sup>20</sup>

Such “othering” techniques were soon used to constitute new hierarchical imagined realities—race, religions, nationality, and more.<sup>21</sup> Subjects within these hierarchies were taught to empathize with their “own kind,” and to suppress their empathy for the “other.” And, just as with the subordination of women, each hierarchy ranked subordinators as well as subordinated, with an elite at the structure’s apex.<sup>22</sup> Subordination of one human being by, or to another continues to stain human society, and, until they are discredited, power cliques will always emerge, insisting that some people are better than others.<sup>23</sup>

Our brains, fashioned in our hunter-gatherer days, include various neural pathways of special importance to our discussion: attachment, empathy, and self-preservation. Hierarchy’s warping and twisting of our empathy and attachment algorithms creates serious psychological and social disturbances. It creates an imagined apprehension of danger from the “other,” for one thing, triggering the “fight/flight/freeze” syndrome of our self-preservation pathway. Mental trauma occurs, disturbing the frontal lobe of the brain, where the conscious mind resides. Two possible results can be “difficulty in interpreting feedback from the environment”<sup>24</sup> and a “dramatic change in social behavior,” including pseudo-depression (left frontal

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19. Cf. Sarah Kostoryz, *The Endorsement of College Hookup Culture*, COMMON PLACES (2014), <http://commonplaces.davidson.edu/vol5/the-endorsement-of-college-hookup-culture/>.

20. See generally *infra* note 29; see also Laura M. Crothers, Julaine E. Field & Jered B. Kolbert, *Navigating Power, Control, and Being Nice: Aggression in Adolescent Girls’ Friendships*, 83 J. COUNS. & DEV. 259, 349 (2005) (Stereotypically feminine girls more prone to social aggression: Gossiping, exclusion, and other types of social aggression are a type of bullying that girls often prefer over physical aggression. Female bullying triggered by a push to conform to hyperfeminine female stereotypes).

21. See McDougall, *supra* note 8.

22. See Diamond, *supra* note 9, at 266, 270; see also French, *supra* note 14, at 180-88.

23. See Diamond, *supra* note 9, at 49.

24. *Frontal Lobes*, CENTRE FOR NEURO SKILLS (2019), <https://www.neuroskills.com/brain-injury/frontal-lobes.php>.



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lobe) and pseudo-psychopathology (right lobe).<sup>25</sup> Narcissism and violence are two typical effects.<sup>26</sup>

In my 2017 article, *Humans, Hierarchy and Human Rights*, I called human hierarchy a “stubborn problem.” Its lingering psychological effects appear in people subjected to them. From here, we will see how high schools replicate and extend the social hierarchies forced upon their students, and how this process play into the tragedy of gun violence. As it was fifteen thousand years ago, patriarchy is at the problem’s core.

### C. THE HIGH SCHOOL SETTING

The patriarchal arrangements that originated 15,000 years ago continue to inflict trauma upon children today. Boys estranged from their mothers, and girls seeing their mother’s dependence on the father, experience a trauma that obscures their relationship to their “real” environment, substituting a relationship to the imagined reality of patriarchy. This social structure instructs them to attach to and empathize only with “suitable” subjects in the patriarchal order; pseudodepression is a possible outcome. At the same time, they learn to avoid and reject unsuitable “others,” to the point of scorn or even attack (i.e., pseudopsychopathology).

Fast forward to such children arriving in public schools in the United States. Their unbalanced relationship to their environment has made them susceptible to social media, and subliminal messages that instruct them to conform to the norms of the patriarchy, thereby ensuring their survival (self-preservation neural pathway) in patriarchy’s imagined reality. Boys and girls have both learned that whatever power and/or agency they achieve will be derived from men in the patriarchal order. Unsuitable others become necessary targets if the hierarchy is to be replicated and reproduced.

Gendered roles are supplied to both boys and girls to fit them into the patriarchal order. This role-fitting also make these children more susceptible to norm and role cues supplied by other social hier-

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25. *Id.*

26. See generally JEREMY RIFKIN, *THE EMPATHIC CIVILIZATION: THE RACE TO GLOBAL CONSCIOUSNESS IN A WORLD IN CRISIS* (2009); see also RSanimate, *Jeremy Rifkin: The Empathic Civilization*, YOUTUBE (May 6, 2010), <https://www.youtube.com/watch?v=I7AWnfFRc7g>.

archies, such as those based on race, class, national origin, and religion.<sup>27</sup>

Children's attempt to assume their proper role in this panoply of imagined realities is often accompanied by pseudo-depressive or pseudo-psychopathological behavior, and in some cases by both. Those children lucky enough to escape patriarchal/gendered/"othering" psychological trauma at home or in their neighborhoods are exposed to it at least by the time they reach high school; some will have their first encounter in middle school or even earlier.

One result is the superheated, gendered hierarchy of American high schools, chronicled by Rosalind Wiseman in several books. One of these, *Queen Bees and Wannabees*,<sup>28</sup> describing "Girl World" in U.S. high schools, inspired the movie, *Mean Girls*. Her other books include *Masterminds and Wingmen*,<sup>29</sup> describing "Boy World" in U.S. high schools, and "*Owning Up*", a curriculum designed to repair some of the damage.

Wiseman's work is of particular importance because it examines gendered hierarchies in motion, going so far as to identify roles that people play within them (She has constructed an "Act Like a Woman" Box," for the elements of girls' gendered roles<sup>30</sup> and an "Act Like a Man" Box," for the elements of boys' gendered roles<sup>31</sup>). She also explores the intersection of patriarchal roles, norms, and cues with those of other social hierarchies that have been overlaid upon the basic patriarchal structure—hierarchies of race, class, national origin, and religion, to name a few.

Teasing and ostracizing have likely always been present in our social structures, even during our hunter-gatherer days.<sup>32</sup> Hunter-gatherers, like all humans, are just as capable of cruelty as they are of

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27. Cf. *After Anti-Semitic Threat, Ilana Glazer Talks Hate Crimes, #MeToo and Midterm Elections*, DEMOCRACY NOW (Nov. 2, 2018), [https://www.democracynow.org/2018/11/2/after\\_anti\\_semitic\\_threat\\_ilana\\_glazer](https://www.democracynow.org/2018/11/2/after_anti_semitic_threat_ilana_glazer).

28. See generally ROSALIND WISEMAN, *QUEEN BEES AND WANNABEES: HELPING YOUR DAUGHTER SURVIVE CLIQUES, GOSSIP, BOYFRIENDS, AND OTHER REALITIES OF ADOLESCENCE* (3d ed.2016); see also YouTube Movies, *Mean Girls – Trailer*, YOUTUBE (May 14, 2012), <https://www.youtube.com/watch?v=KAOmTMctGKI> (a movie based on the first edition of Wiseman's book).

29. See generally ROSALIND WISEMAN, *MASTERMINDS & WINGMEN: HELPING OUR BOYS COPE WITH SCHOOLYARD POWER, LOCKER-ROOM TESTS, GIRLFRIENDS, AND THE NEW RULES OF BOY WORLD* (2014).

30. *Id.* (See Appendix A for full graphic)

31. *Id.* (See Appendix B for full graphic)

32. See, e.g., JAMES SUZMAN, *AFFLUENCE WITHOUT ABUNDANCE: THE DISAPPEARING WORLD OF THE BUSHMEN* 179 (2017).

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kindness.<sup>33</sup> Neither our ancient forebears, nor contemporary foraging cultures should be the subject of romantic notions of noble savagery.

But the Agricultural Revolution laid the groundwork for the socially constructed, large-scale, oppressive imagined realities that occupy us today. It is within these relatively recently-erected social structures that teasing and ostracizing have become truly weaponized. There are few better examples of this stark Machiavellianism than the high school cliques of Wiseman's work.

### D. A CLOSER LOOK AT HIGH SCHOOL HIERARCHY

#### 1. Girl World<sup>34</sup>

The Queen Bee occupies the top rank in the social hierarchy of "Girl World," organized around popularity and beauty.<sup>35</sup> The Queen Bee is "charismatic, forceful, pretty, manipulative," and "strategically affectionate," taking no responsibility for hurt feelings.<sup>36</sup> The Sidekick is her second in command; her power grows out of her relationship to the Queen Bee. The Sidekick can also be jealous of anyone approaching the Queen Bee; she sees everyone else in the clique as a threat to her position. The Queen Bee and Sidekick are often the first interested in boys—often older boys.<sup>37</sup>

Other slots in the hierarchy? The Banker keeps track of useful gossip, dispensing it at strategic intervals, strengthening her position while simultaneously causing conflict and upheaval. She's a master tactician, rarely attacked or excluded.<sup>38</sup> On the other hand, the Wannabe, on the peripheries of the group, will do almost anything to curry favor with the group's leaders. She lets down her guard and her personal boundaries, eager to please. She tries very hard to imitate their behavior, clothes, and interests but never gains unrestricted access.<sup>39</sup> But she's better off than the Target, an excluded victim, ridiculed and teased, a "loser."<sup>40</sup> Targets are generally outside of the clique but vir-

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33. Harari, *supra* note 10, at 53.

34. See generally Margaret Talbot, *Girls Just Want to Be Mean*, N.Y. TIMES (Feb. 24, 2002), <https://www.nytimes.com/2002/02/24/magazine/girls-just-want-to-be-mean.html>.

35. *Queen Bees and Wannabees- The Evolution of Club Girl Psychology*, THE SINNS OF ATTRACTION (Feb. 23, 2010, 8:23 AM), <http://sinnsfattraction.blogspot.com/2010/02/queen-bees-and-wannabees-evolution-of.html>.

36. Shannon Fable, *Pleaser, Queen Bee, Sidekick: Handling Class Cliques*, IDEA (Aug. 20, 2015), <http://www.idealife.com/fitness-library/pleaser-queen-bee-sidekick-handling-class-cliques>.

37. *Id.*

38. Fable, *supra* note 36.

39. *Queen Bees and Wannabees- The Evolution of Club Girl Psychology*, *supra* note 35.

40. *Id.*

tually any member can be targeted if they fall out of favor with the Queen Bee or the Sidekick. It's that precarious.

The Torn Bystander is constantly conflicted between doing the right thing and being loyal to the group. She doesn't want to go against the group, but empathizes with bullied Targets. Unable to choose, she vainly tries to accommodate everyone. The Floater associates with more than one group. Her independence earns the Floater a modicum of respect, independence, and influence.<sup>41</sup>

Wiseman's work follows research that girls' aggression manifests itself not in physical violence but in the deployment of superior social intelligence.<sup>42</sup> They wage complicated battles with other girls aimed at damaging relationships or reputations — leaving nasty messages by cellphone or spreading scurrilous rumors by e-mail, making friends with one girl as revenge against another, gossiping about someone just loudly enough to be overheard. Turning the notion of women's greater empathy on its head, Finnish professor Kaj Bjorkqvist showed the destructive uses to which such emotional attunement could be put.<sup>43</sup>

But ultimately, as girls compete with each other for status and power within a larger patriarchal order, they maintain the "status system that binds them all."<sup>44</sup>

## 2. Boy World<sup>45</sup>

"Boy World" is a warm-up, a training ground for participation in adult patriarchal systems. It is organized around power and control, the weaknesses of others and their susceptibility to public humiliation.

At its peak sits the Mastermind. This is the leader of the pack, who decides for the whole group what's cool and what isn't.<sup>46</sup> Second in command is the Associate, who is somewhat like the Banker of Girl

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41. See generally Fable, *supra* note 36.

42. Talbot, *supra* note at 34.

43. *Id.* ("Girls very much value intimacy, which makes them excellent friends and terrible enemies. They share so much information when they are friends that they never run out of ammunition if they turn on one another. Unlike boys, who tend to bully acquaintances or strangers, girls frequently attack within tightly knit friendship networks, making aggression harder to identify and intensifying the damage to the victims. Within the hidden culture of aggression, girls fight with body language and relationships instead of fists and knives.")

44. Talbot, *supra* note at 34.

45. See generally Linda Thomas, *Masterminds and Wingmen – the complicated emotional lives of teen boys*, MYNORTHWEST (Dec. 17, 2013, 11:02 AM), <http://mynorthwest.com/4967/girls-minds-and-wingmen-the-complicated-emotional-lives-of-teen-boys/>.

46. See Pamela L. Laney, *The New Rules of Boy World*, PEACE IN YOUR HOME (Sept. 26, 2013), <http://peaceinyourhome.com/peek-inside-the-secret-world-of-boys-masterminds-wingmen-by-rosalind-wiseman/>.

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World—“interested in everybody else’s business and how the group can use information about people to their advantage.” He maintains his place in the pack by being “buds” with the Mastermind.<sup>47</sup>

Other players in the hierarchy? There’s the Bouncer, the muscle of the group, physically intimidating, rude to outsiders; a bully who takes orders from the Mastermind and the Associate, often landing him in hot water.<sup>48</sup> Then there’s the Entertainer, a joker and wit who diffuses tension in the group, often by making fun of himself, under some pressure to always be on stage. Comic relief is his ticket into the group.<sup>49</sup> Uncomfortable within the hierarchy, the Conscience, somewhat like the Torn Bystander of *Girl World*, worries about the risks and consequences of group behavior, like getting caught.<sup>50</sup>

Look on the fringes, or outside, and you will find the rest of the crew. There’s the Fly, desperate to get into the group, like the *Girl World Wannabe*.<sup>51</sup> He hovers on the outside, trying to buy or brag his way in.<sup>52</sup> The Punching Bag, like the Target of *Girl World*, is relentlessly ridiculed.<sup>53</sup> Finally, the Champion, like the Floater of *Girl World*, is comfortable being himself, and not beholden to any group. Still, he has enough gender-positive characteristics that people respect him.<sup>54</sup>

Boys, seeking cues on male behavior in the upsetting milieu of high school hierarchy, are easy marks for advertising that offers exaggerations of male physical strength, and aggression; a “belief that violence is manly,” and “the experience of danger as exciting.”<sup>55</sup> These images are also associated with “callous sexual attitudes toward women,”<sup>56</sup> and in some cases sexual and physical aggression against them,<sup>57</sup> to “keep them in their place.”<sup>58</sup>

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47. Thomas, *supra* note at 45.

48. *The Secret Life of Boys*, FAMILY CIRCLE (2019), <https://www.familycircle.com/teen/advise/rosalind/rosalind-wiseman-masterminds-wingmen/>.

49. *Id.*

50. Thomas, *supra* note 45.

51. Laney, *supra* note 46.

52. *The Secret Life of Boys*, *supra* note at 48.

53. Thomas, *supra* note 45.

54. *Id.*

55. Dennis E. Reidy, et. al., *Men Who Aggress Against Women: Effects of Feminine Gender Role Violation on Physical Aggression in Hypermasculine Men*, 10 *PSYCHOL. MEN & MASCULINITY*, 1, 1 (2009).

56. *Id.*

57. See e.g., Dominic J. Parrot & Amos Zeichner, *Effects of Hypermasculinity on Physical Aggression Against Women*, 4 *PSYCHOL. MEN & MASCULINITY* 70, 70-78 (2003).

Modern advertising promotes such attitudes and feeds on them,<sup>59</sup> urging men to buy into a culture marked by male violence, recklessness,<sup>60</sup> and images of women as sexual objects.<sup>61</sup> These messages teach that power over others is more important than integrity or respect, and that if someone crosses you, you must seek revenge.<sup>62</sup> These patterns are hardly confined to high school. And the vitriol in our current national discourse is making things worse.<sup>63</sup>

### 3. The Link to Gun Violence

Without proper protection and intervention, schools and other vulnerable locations can become “dangerous and hostile environments where one is constantly on alert of being attacked.”<sup>64</sup> Gun fetishism is a big part of this picture.<sup>65</sup>

America’s “gun culture,”<sup>66</sup> a wide-spread culture idolizing firearms,<sup>67</sup> steeped in tradition and national identity,<sup>68</sup> makes the country

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58. Jay Peters, et. al., *Development and Testing of a New Version of the Hypermasculinity Index*, 31 SOC. WORK RES., 171, 171-182 (2007) (hypermasculinity a coping response to an increasingly “feminized” culture).

59. Nina Bahadur, *Be A Man: Macho Advertising Promotes Hyper-Masculine Behavior, Study Finds*, HUFFINGTON POST (May 7, 2013, 5:09 PM), [http://www.huffingtonpost.com/2013/05/07/be-a-man-macho-hypermasculine-advertising\\_n\\_3230402.html](http://www.huffingtonpost.com/2013/05/07/be-a-man-macho-hypermasculine-advertising_n_3230402.html).

60. Ross Douthat, *In Search of Non-Toxic Manhood: The Victorian novelists understood the problem before we did*, N.Y. TIMES (Jan. 19, 2019), 2019/01/19/opinion/sunday/toxic-masculinity.html.

61. *Id.*

62. See SHARON LAMB, LYN MIKEL BROWN & MARK TAPPAN, *PACKAGING BOYHOOD: SAVING OUR SONS FROM SUPERHEROES, SLACKERS, AND OTHER MEDIA STEREOTYPES* (2009).

63. See, e.g., Annie Fox, *Author, FCV090 Creating a Culture of Dignity – Guest: Rosalind Wiseman*, YOUTUBE (Oct. 29, 2016) (“vitriol, nastiness, racism, sexism, and xenophobia increased during the 2016 election cycle; this seems to have emboldened bullies in middle and high schools classrooms across the country”).

64. See generally JESSIE KLEIN, *THE BULLY SOCIETY: SCHOOL SHOOTINGS AND THE CRISIS OF BULLYING IN AMERICA’S SCHOOLS* (2012).

65. Special thanks to my former students Breanna Bledsoe, Grace Brooks, and Adrienne Ferrell for their research in this topic in this spring semester of 2013.

66. Bledsoe, *The Deadly Reigns of America’s Gun Culture* 1-2 (unpublished paper) (on file with author) (2013) (citing Richard Hofstadter, *America as a Gun Control*, AMERICAN HERITAGE (Oct. 1970)).

67. *Id.* (citing Joyce Lee Malcolm, *Arming America*, 79 TEX. L. REV. 1657, 1659 (2001)); see also Robert Dallek, *America’s gun culture needs to change: Column*, USA TODAY (March 5, 2013, 5:20 PM), <https://www.usatoday.com/story/opinion/2013/03/05/americas-gun-culture-needs-to-change-column/1965495/>.

68. Bledsoe, *supra* note 66, at 1-2 (citing Kylie Schultz, *America’s Gun Culture: A Revolution on the Horizon?*, (December 22, 2012)); see also Bob Cesca, *Breaking the American Gun Culture Once and For All*, HUFFINGTON POST (December 12, 2012, 5:18 PM), [https://www.huffpost.com/entry/breaking-the-american-gun\\_b\\_2348282](https://www.huffpost.com/entry/breaking-the-american-gun_b_2348282).

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unique among modern industrial nations.<sup>69</sup> Perhaps it should not be a surprise that American gun fetishism grows out of the profit motive. It is certainly clear that both the National Rifle Association and its formidable lobbying activities are financed and supported by the gun industry.<sup>70</sup>

Northern manufacturers (specifically, the Winchester company) began mass-producing guns to meet the Union's wartime needs during the Civil War.<sup>71</sup> After the war was over, Winchester became interested in selling its surplus product, and producing and selling more.<sup>72</sup> It turned to an emerging glorification of the Western "frontier," involving ex-soldiers from both sides of the War, and capitalized on budding "gun-slinging cowboy" icons with "Wild West" shows to promote gun sales.<sup>73</sup>

Soon, gun proficiency and expertise were seen as "manly and powerful."<sup>74</sup> In the early twentieth century, the film industry initiated a "Wild West" film genre.<sup>75</sup> By the 1950s, broadcast television had adopted the trope, depicting a violent frontier, with gun-toting men who symbolized power and patriotism.<sup>76</sup> This "shoot-em up Wild West"<sup>77</sup> never actually existed, but it remains a cornerstone of our country's fascination and obsession with guns.<sup>78</sup>

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69. *Id.* (citing Brian Masters, *Why Are Americans So Obsessed With Guns?*, BUSINESS INSIDER (December 16, 2012, 4:08 PM), <https://www.businessinsider.com/why-are-americans-so-obsessed-with-guns-2012-12>).

70. *Id.* at 4 (citing Rick Perlstein, *How the NRA Became an Organization for Aspiring Vigilantes (Part I): The turn in American firearms culture from the province of sportsman to one of macho revenge fantasies started in the 1960s*, THE NATION (Jan. 9, 2013), <http://www.thenation.com/blog/172100>).

71. *Gun Timeline*, PBS (2014), <http://www.pbs.org/opb/historydetectives/technique/gun-timeline/> (Winchester rifles were affordable, and produced in such great numbers, that the Winchester became the generic rifle).

72. Brooks, *Gun Violence* 9 (unpublished paper) (on file with author) (2013 ) (citing Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760-1865*, 83 J. AM. HIST., 425, 439 (1996)).

73. Adrienne Ferrell, *America's Gun Culture* 4, (2013) (unpublished paper) (on file with author) (citing BuzzFlash, *Joan' Burbick's 'Gun Show Nation' Explains How the "Gun Rights" Movement is a White Male Political Power Play*, BUZZFLASH (Oct. 16, 2006, 7:56 AM), <http://buzzflash.com/commentary/joan-burbicks-gun-show-nation-explains-how-the-gun-rights-movement-is-a-white-male-political-power-play>) (William Frederick Cody, also known as Buffalo Bill, became "the greatest gun marketer in American history").

74. Brooks, *supra* note 72, at 436.

75. Stanley F. Battle, *African American Males at a Crossroad*, 15 J. HEALTH & SOC. POL'Y 81, 85 (2002) (discussing the glorification of violence in the media).

76. Brooks, *supra* note 73, at 7-8.

77. *Id.*

78. *Op cit.*

In 2013, my student Breanna Bledsoe described a “tactical turn” of America’s gun culture.<sup>79</sup> This has led not only to a fascination with semiautomatic rifles and pistols with laser sights, flashlight mounts, and other tactical devices,<sup>80</sup> but also to increasing outbreaks of gun violence.<sup>81</sup>

The archetypal, tragic outcome of this confluence of social hierarchy and gun culture is the high school shooting, such as the murders at Parkland High School in Florida. Other instances followed the same script.<sup>82</sup> A number of mass shootings have been traced to bullying incidents, in which male bullying victims attempt to “resolve a [consequent] crisis of masculinity through violent behavior.”<sup>83</sup>

The shooter at Columbine, for example, had been ostracized and ridiculed, marginalized by his school’s social hierarchy. This pattern has been repeated innumerable times.<sup>84</sup> The majority of school shooters felt “persecuted, bullied, threatened, attacked or injured;” bullying victims are much more likely to bring weapons to school.<sup>85</sup> In this regard, they turn to the very cultural images and practices that have brought on the crisis in the first place: America’s obsession with guns and militarism, heightened by a fascination with violence found in the news, television programs, video games, film and the Internet.<sup>86</sup>

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79. Bledsoe, *supra* note 66, at 4; see also Justin Jouvenal, *Adam Kokesh, gun-rights activist, charged after raid*, WASH. POST (July 10, 2013), [http://www.washingtonpost.com/local/activist-adam-kokesh-reportedly-arrested-in-herndon/2013/07/10/73dbc8c2-e943-11e2-8f22-de4bd2a2bd39\\_story.html](http://www.washingtonpost.com/local/activist-adam-kokesh-reportedly-arrested-in-herndon/2013/07/10/73dbc8c2-e943-11e2-8f22-de4bd2a2bd39_story.html) (Libertarian activist Adam Kokesh arrested at his home in Herndon on gun and drug charges talked about “the final American Revolution” in a video posted on YouTube).

80. *Id.* at 4.

81. *Op cit.*

82. Ahmed and Walker, *supra* note 3.

83. Jeffrey M. Jenson, *Aggression and Violence in the United States: Reflections on the Virginia Tech Shootings* 31 NAT. SOC. WORKERS 131 (2007), see also Michael Kimmel, Matthew Mahler, *Adolescent Masculinity, Homophobia, and Violence: Random School Shootings*, 1982-2001 AMERICAN BEHAVIORAL SCIENTIST (2003), <http://abs.sagepub.com/cgi/content/abstract/46/10/1439>.

84. See, e.g., Stomp Out Bullying, *Standing Up Against Hate, Racism And Discrimination* (2019), <https://www.stompoutbullying.org/blog/stomp-out-bullying-supports-young-activists-end-school-shootings>; see also Tawnell D. Hobbs, et al., *After Santa Fe School Shooting, Texas Town Grapples with Bullying*, WALL STREET J. (May 29, 2018), <https://www.wsj.com/articles/after-shooting-texas-town-grapples-with-bullying-1527586200>. A Wall Street Journal analysis showed that more than half of school-shooting cases since 1990 were perpetrated by a bullying victim.

85. Taylor Swaak, *How We Talk About Bullying After School Shootings Can be Dangerous: Experts*, NEWSWEEK (Feb. 25, 2018), <https://www.newsweek.com/bullying-role-school-shootings-818753>.

86. *School Shootings The Result of Crisis of Masculinity*, SCIENCE DAILY (Feb. 18, 2008), <http://www.sciencedaily.com/releases/2008/02/080217133643.htm>.



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Not all high school shooters are loners, however. Some have seemed outwardly successful in the high school hierarchy.<sup>87</sup> But school shooters do all seem to have the vicious experiences of high school hierarchies in common. The way in which these cliques cause misery and psychologically prime children<sup>88</sup> to perpetuate adult hierarchies later in life provides grim insight into America's epidemic of gun violence.<sup>89</sup>

### 4. Other Volatile Social Hierarchies

Internally hierarchical peer groups, often close replicas of Boy World and Girl World, can be found in a variety of other settings in the U.S. They emerge among students at all levels, not just high school (middle school and college, for example). They also appear at the workplace, in religious institutions, in political organizations<sup>90</sup>, at universities, and in the military. There are many other examples.

Participants in Boy World and Girl World, and their “grown-up” equivalents, indeed, participants in all social hierarchies, are subject to anxiety and/or depression.<sup>91</sup> Some are depressed that they are not higher in the pecking order; others are anxious that they may be downgraded even further. Some suffer both disorders simultaneously. The turmoil caused among residents of these various social hierar-

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87. German Lopez, *Think school shooters are usually bullied and unpopular? You're wrong*, VOX (Nov. 3, 2014, 9:00 AM), <https://www.vox.com/2014/11/3/7132879/school-shooting-facts>.

88. It is important to note that any link between school shootings and mental illness itself is tenuous and deeply mired in misconception, given that the mentally ill are much more likely to be victims than shooters. See, e.g., Jonathan M. Metzler & Kenneth T. MacLeigh, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240 (2015); see also Video: John Oliver on Mental illness and mass shootings, HBO (Oct. 4, 2015), <https://www.youtube.com/watch?v=NGY6DqB1HX8>.

89. JESSIE KLEIN, *THE BULLY SOCIETY: SCHOOL SHOOTINGS AND THE CRISIS OF BULLYING IN AMERICA'S SCHOOLS* (2012).

90. Cf. Brya Adams, *How to Dismantle Police Brutality and Stop the Killings of Black People 5* (unpublished paper) (on file with author) (2018) (citing Paul Butler, *The Fraternal Order of Police Must Go*, THE NATION (Oct. 11, 2017), <https://www.thenation.com/article/the-fraternal-order-of-police-must-go/>; see also Earl O. Hutchinson, *It's Time for Cops to Break the Code of Silence*, HUFFINGTON POST (Sept. 24, 2016, 5:31 PM), [https://www.huffpost.com/entry/its-time-for-cops-to-brea\\_b\\_12173778](https://www.huffpost.com/entry/its-time-for-cops-to-brea_b_12173778)).

91. Swaak, *supra* note 85; see *Bullying and School Shootings*, STUDY.COM (March 3, 2018), <https://study.com/academy/lesson/bullying-school-shootings-statistics-facts.html> (Note that female students were often the targets of high school shooters, reminding us that authority over women is the essential ingredient of patriarchy, out of which Boy World and Girl World both arise); see also Peter Langman, *Statistics on Bullying and School Shootings*, SCHOOL SHOOTERS INFO (Nov. 25, 2014), [https://schoolshooters.info/sites/default/files/bullying\\_school\\_shootings\\_1.1.pdf](https://schoolshooters.info/sites/default/files/bullying_school_shootings_1.1.pdf) (Bullies themselves become the shooters after high school, with high percentages of this archetype being involved in college and workplace shootings. Might these be the “Bouncers” of Boy World?).

chies, the empathy distortions and disruptions, and the ensuing “relational aggression,”<sup>92</sup> is a “perfect storm” setting for violence.

Violent outbreaks have occurred in all these locations, often involving guns. In some cases, people are re-enacting their high school experiences, a blueprinting somewhat akin to the “birth order” patterns identified in some families.<sup>93</sup> Social isolation of any kind, even episodic, increases the danger even further.<sup>94</sup>

#### E. MEAN GIRLS (AND BOYS) GO TO COLLEGE

Campus fraternities and sororities, like the Mean Girl and Boy cliques of the high schools college students have just left, sometimes engage in bullying (called “hazing” at the college level) and various pranks that promote social hierarchies. For instance, at American University, to ridicule the historically black sorority (Alpha Kappa Alpha ) of the black female student government president, bananas hanging from a noose were placed around campus with the AKA logo on them.<sup>95</sup> At Oklahoma University Sigma Alpha Epsilon (“SAE”) fraternity members were caught on camera singing racist songs.<sup>96</sup>

Reflecting on such events through the lens of my “social hierarchy” analysis, two of my seminar students recently wrote papers about hierarchy and othering at the universities they attended as undergraduates. One attended UVA, the site of the Charlottesville “Alt-Right” riot, fomented by Richard Spencer, Alt-Right leader and UVA alum.<sup>97</sup> The other, a student at UCLA, described racist “othering” by on-campus fraternities and sororities.

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92. Margaret Talbot, *Girls Just Want to Be Mean*, N.Y. TIMES (Feb. 24, 2002), <https://www.nytimes.com/2002/02/24/magazine/girls-just-want-to-be-mean.html>.

93. Cf. WALTER TOMAN, *FAMILY CONSTELLATION: ITS EFFECTS ON PERSONALITY AND SOCIAL BEHAVIOR* (1992) (The firstborn follows the rules. The second rebels. The third fades into the woodwork. The fourth is the peacemaker, like the “entertainer” of Boy World). Perhaps the high school peer group has displaced the family order pattern? See this in *The Breakfast Club*. Cf. also Renee Schilling, *The Effects of Birth Order on Interpersonal Relationships*, <https://www.mckendree.edu/academics/scholars/issue1/schilling.htm>; Jocelyn Voo, *How Birth Order Affects Your Child's Personality and Behavior* PARENTS, <https://www.parents.com/baby/development/social/birth-order-and-personality/>; Kevin Leman, *How Birth Order Affects Sibling Conflicts* FOCUS ON THE FAMILY (2018), <https://www.focusonthefamily.com/parenting/building-relationships/how-birth-order-affects-sibling-conflicts>.

94. Swaak, *supra* note 85.

95. Marymagdaline Mouton, *Extreme Views: Are United States Universities Breeding Alt-Right Ideologies in students?* 3 (unpublished paper) (on file with author) (2018) (citing Sheena Jones, *Bananas Tied to Noose are Found Around American University Campus*, CNN (May 2017), <https://www.cnn.com/2017/05/03/health/american-university-racially-motivated-incident-trnd/index.html>).

96. *Id.* at 6.

97. Mouton, *supra* note 95 at 1.

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Both these stories bear deeper examination, as they conform to the bullying, abuse, and social patterning Dr. Wiseman observes in American middle schools and high schools, and may even be seen as a logical extension of that culture. It is important to remember, in this context, that America experienced a spate of active shooters on college campuses before high school shootings became commonplace.<sup>98</sup>

White nationalists, neo-Nazis and “alt-righters” descended upon the University of Virginia and the wider Charlottesville, Virginia area,<sup>99</sup> replete with confederate flags, torches, and neo-Nazi symbols. They chanted “you will not replace us,” and “white lives matter.<sup>100</sup>” Spencer, a featured speaker at the rally, conducts college tours to recruit new members.<sup>101</sup> My student sees this strategy as an attempt to roll back the anti-hierarchical thinking, diversity and inclusion pursued on many college campuses,<sup>102</sup> possibly seen by the right as a threat to the American social hierarchy upon which their identities are based. “You will not replace us.”<sup>103</sup>

My UVA student, using citations to my own work on social hierarchies, sees some white fraternities and sororities as heirs to a racist tradition that in some cases goes back to the founding of the university itself.<sup>104</sup> These organizations foster solidarity within their ranks by subordinating their members to the hierarchy of the “Greek system,”

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98. Matt Jones, *After Virginia Tech shooting, gun violence still claims victims on college campuses*, COLLEGIATE TIMES (Apr. 10, 2018), [http://www.collegiatetimes.com/news/after-virginia-tech-shooting-gun-violence-still-claims-victims-on/article\\_4c27a5f2-3a98-11e8-9165-4f568030151b.html](http://www.collegiatetimes.com/news/after-virginia-tech-shooting-gun-violence-still-claims-victims-on/article_4c27a5f2-3a98-11e8-9165-4f568030151b.html) (in the 11 years since the April 16, 2007, mass shooting at Virginia Tech, 320 people have been shot on college and university campuses in the U.S., 122 people were killed and 198 people were injured); see also *Study Finds Increase in School Shootings at Colleges in U.S.*, CAMPUS SECURITY (Oct. 4, 2016), [https://www.campusmagazine.com/news/study\\_finds\\_increase\\_in\\_school\\_shootings\\_at\\_colleges\\_in\\_u-s/](https://www.campusmagazine.com/news/study_finds_increase_in_school_shootings_at_colleges_in_u-s/).

99. Mouton, *supra* note 95 at 2 (citing Richard Fausset & Alan Feuer, *Far-Right Groups Surge Into National View in Charlottesville*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/far-right-groups-blaze-into-national-view-in-charlottesville.html>).

100. *Id.* at 2 (citing VICE, *Charlottesville: Race and Terror*, VICE NEWS (Aug. 14, 2017), <https://www.youtube.com/watch?v=RIrcB1sAN8I&vl=en>).

101. *Id.* at 2 (citing Susan Svrluga, *‘Antifa Is Winning’: Richard Spencer Rethinks His College Tour After Violent Protests*, WASHINGTON POST (March 2018), [https://www.washingtonpost.com/news/grade-point/wp/2018/03/12/antifa-is-winning-richard-spencer-rethinks-his-college-tour-after-violent-protests/?utm\\_term=.7b9f2527fb01](https://www.washingtonpost.com/news/grade-point/wp/2018/03/12/antifa-is-winning-richard-spencer-rethinks-his-college-tour-after-violent-protests/?utm_term=.7b9f2527fb01)).

102. *Id.* at 3.

103. Note, the American Psychological Association determined that hate crimes emerge upon an individual’s fear that their way of life may become threatened. See Frison, *infra* note 108, at 7 (citing *The Psychology of Hate Crimes*, AM. PSYCH. ASSOC. (2017), <https://www.apa.org/advocacy/civil-rights/hate-crimes.pdf>).

104. *Id.* at 4 (citing Casey Quinlan, *Fraternities Were Built on Racism. So Why Are We Surprised When They Do Racist Things?*, THINK PROGRESS (Feb. 22, 2016, 1:00 PM), <https://thinkprogress.org/fraternities-were-built-on-racism-so-why-are-we-surprised-when-they-do-racist-things-70db8f20aeec/>).

using non-members as the “other.”<sup>105</sup> This has particular force when the “other” is black.<sup>106</sup>

Once new recruits are admitted, they participate in racist tropes and pranks to prove they are “white enough” and racist enough to be true members. Individuals in this group setting, like the cast of characters in the Mean Girl and Boy cliques of high school, go along with commands from the leaders, because they are thinking inside the “Act Like a (White) Man” or the “Act Like a (White) Woman” box.

She sees this hierarchy “pushing itself out into the world post-graduation” as fraternity and sorority members move into high profile jobs, often on the basis of alumni connections to the college group. “These high-profile positions are some of the benefits to being a part of the ‘club’ or network. . . [Sharing in racist pranks and tropes] create[s] solidarity [among] the membership. . . [built and sustained] at the expense of ‘others’ in order to keep the hierarchy and status-quo in place.”<sup>107</sup>

My UCLA student described a divided campus, split between “desirables” and “undesirables.”<sup>108</sup> “Discrimination in this environment takes the form of micro-aggressions,” she says. “[T]hese indirect forms [are] difficult to punish and remedy. [D]iscrimination is bred on college campuses and cultivated in white fraternities and sororities.”<sup>109</sup>

Here are extended quotes from her paper, describing one recent incident at UCLA.

“In 2015, students [from UCLA’s] Sigma Phi Epsilon fraternity and Alpha Phi sorority hosted a “Kanye Western” party where students dressed as Black caricatures.<sup>110</sup> . . . [S]tudents donned outfits de-

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105. *Id.* at 6-7; McDougall, *supra* note 9.

106. Studies have also determined that hate crimes and bullying have similar psychological bases. See Frison, *infra* note 108 at 8 (citing ROSALIND WISEMAN, OWNING UP: EMPOWERING ADOLESCENTS TO CONFRONT SOCIAL CRUELTY, BULLYING, AND INJUSTICE (2016)).

107. Mouton, *supra* note 95, at 8-9.

108. Alicia D. Frison, *Social Justice Curriculum in High Education 1* (unpublished paper) (on file with author) (2018); see also Rosalind Wiseman, *Beta Theta Pi Hazing Reveals Cultural Problem*, USA TODAY (June 2, 2017), <https://www.usatoday.com/story/opinion/2017/06/02/beta-theta-pi-hazing-shows-indifference-normalized-rosalind-wiseman-mean-girls-column/102104412/> (“Beta Theta Pi hazing death was a predictable outcome of a social dynamic that normalizes dehumanization and sees someone’s vulnerability and pain as entertainment. [L]oyalty to the group equals participating, or at least silently going along with, whatever the group demands. This is the lifeblood and *raison d’être* of fraternities, but it is also the powerful undercurrent for many social groups.”).

109. Frison, *supra* note 108, at 1.

110. *Id.* at 14.

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picting ‘Kanye West’s image’. . .[lamprooning] ‘ghetto Black culture.’<sup>111</sup> Girls wore dresses with pillows stuffed up their skirts for huge butts. Boys wore long white tees with chains, baggy jeans and grills. Some even thought it was appropriate to but brown/black soot on their faces—black face. . . . The incident erupted across campus, Los Angeles and the country. Pictures also appeared on] social media sites like Instagram and Snapchat.”<sup>112</sup>

As an activist, my UCLA student sought to redress the situation by organizing her classmates to challenge powerful student groups that perpetuated the status quo as well as to build cultural competency throughout the University.<sup>113</sup> But she found University administrators lackluster in their response.

Offering some reasons why this may be the case, she observes that UCLA itself “has a well-documented history of racial tension on its campus” that the university administration has been “reluctant to address.”<sup>114</sup> But my UVA student brings another perspective. Too often, she writes, “white Greeks” sit at the top of the social hierarchies that exist on college campuses, with direct and favorable access to university administration.<sup>115</sup> In too many cases, university administrators and trustees rely on “Greek” alumni for financial support, including donations at levels rarely matched by “non-Greek” alumni.<sup>116</sup> This can create an atmosphere of “impunity where “white Greeks and their alumni do not fear punishment for their actions from the college,” she says.<sup>117</sup> “Thus, racist ideals [and] extreme ideology can fester and grow [unchecked] within these groups” and spread throughout

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111. *Id.* at 23 (citing Veronica Rocha, *Kanye West-themed frat party at UCLA sparks protests, claims of racism*, L.A. TIMES (Oct. 9, 2015), <http://www.latimes.com/local/lanow/la-me-ln-ucla-blackface-kanye-party-20151008-story.html>).

112. *Id.* at 14, 23.

113. *Id.* at 2.

114. *Id.* at 4 (citing Rupan Bharanidaran, *Afrikan Student Union releases list of demands for UCLA administration*, DAILY BRUN (May 11, 2017, 11:31 PM), <http://dailybruin.com/2017/05/11/afrikan-student-union-releases-list-of-demands-for-ucla-administration/>; see also Teresa Watanabe, *Racial tensions inflame UCLA student body election, driving calls for more representation*, L.A. TIMES (May 8, 2017, 7:00 PM), <http://www.latimes.com/local/lanow/la-me-uc-racial-tensions-20170508-story.html>).

115. Mouton, *supra* note 95, at 20.

116. *Id.* at 20 (citing Caitlin Flanagan, *The Dark Power of Fraternities*, THE ATLANTIC (March 2014), <https://www.theatlantic.com/magazine/archive/2014/03/the-dark-power-of-fraternities/357580/>).

117. *Id.*

the campus.<sup>118</sup> My UCLA student observed similar patterns of influence at UCLA.<sup>119</sup>

## F. A RESPONSE: FROM CULTURAL COMPETENCY TO THE SOCIAL JUSTICE ACADEMY

### 1. Owing Up in Middle and High School

Rosalind Wiseman's "Owing Up" curriculum,<sup>120</sup> devised to counter some of the problems she has encountered in America's middle and high schools, provides a playbook for navigating social hierarchies, challenging them wherever possible.<sup>121</sup>

Wiseman's approach to these issues draws from the study of privilege and of racism. She observes, for example, that the behavior and comments of popular high school students, at the apex of the social hierarchy, show "those who have privilege are so accustomed to their power that they don't recognize when they are dominating and silencing others."<sup>122</sup> She hopes to guide students to the realization that competition among them for status and power within the hierarchy only strengthens it and binds them to it.<sup>123</sup>

A reviewer of Wiseman's text says the book "takes on the ambitious task of talking to middle school students about some of the com-

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118. *Id.* (citing Julia Ryan, *How Colleges Could Get Rid of Fraternities*, THE ATLANTIC (March 2014), <https://www.theatlantic.com/education/archive/2014/03/how-colleges-could-get-rid-of-fraternities/284176/>).

119. Amanda Schallert, *Leaked emails reveal hidden sources of Bruins United campaign funds*, DAILY BRUIN (Dec. 11, 2014, 1:11 AM), <http://dailybruin.com/2014/12/11/leaked-emails-reveal-hidden-sources-of-bruins-united-campaign-funds/>.

120. Wiseman, *supra* note 106.

121. See ROSALIND WISEMAN, THE GUIDE MANAGING DOUCHEBAGS, RECRUITING WINGMEN, AND ATTRACTING WHO YOU WANT (2013); see also The Guide to Attracting Who You Want Library of Congress (2013), [https://www.loc.gov/today/cyberlc/feature\\_wdesc.php?rec=6006](https://www.loc.gov/today/cyberlc/feature_wdesc.php?rec=6006).

122. Talbot, *supra* note 34.

123. See, Rosalind Wiseman, *Welcome to High School: We Hate You*, ANTI-DEFAMATION LEAGUE (Aug. 2015), <https://www.adl.org/education/resources/tools-and-strategies/classroom-conversations/welcome-to-high-school-we-hate-you> (Students "pulling rank" on others sends a message: "'Your place is beneath mine. I am better than you and if you don't acknowledge that fact in the way I want you to, face the consequences.'" It means if you're a white student in 11th grade and you say that to a Latino ninth grader, you're not only exercising power because you're older but because of your race. If you're a wealthy student, this statement conveys to a poor student that having money in your school gives you the right to disrespect people who don't. Your privilege may blind you to the fact that this is what you are communicating. Moreover, it directly contributes to a school culture where bullying is more likely to occur, more tolerated and less likely to be reported because the targets believe the people with more power can abuse it without consequence").

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plex social situations adolescents encounter on a daily basis.”<sup>124</sup> Wiseman’s approach enables students to engage with “gender expectations, the role of gossip, how we create reputations, technology use, race and ethnicity issues, finding support groups, and relationships – and even touches on consent and understanding sexual harassment.”

The Owing Up program is carried on through seventeen lessons, mostly discussion but also including in-class writing assignments and “gallery walks, personal reflections, visualizing projects, videos, and “SEAL” role plays.”<sup>125</sup> Instructors using the text might also consider complementing group conversations with “grounding” activities such as martial arts, theater, and dance to treat the trauma inflicted by social hierarchy. This enables students to re-engage in a centered and positive way.<sup>126</sup>

The idea is for students to notice these issues in their own lives, and to empower them to “make a positive change.” With a “new eye for social justice,” students can become “more conscious of how their actions affect the others around them. . .find their voices and speak up for themselves and others.”<sup>127</sup>

## 2. Social Justice Curricula on College Campuses

### i. Cultural competency

According to my UCLA student, cultural competency,<sup>128</sup> one antidote to the bullying and harassment faced by many college students today, has been “a difficult topic for universities who deal with racial

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124. See Wiseman, *supra* note 106. According to the Owing Up website, the curriculum explores “critical topics” such as media analysis, gender, sexual harassment, racism, gossip, and self-image. It aims to teach young people to “understand their individual development in group behavior, the influence of social media, and the dynamics that lead to discrimination and bigotry.

125. See *id.* (“SEAL is an acronym that helps people talk to their friends about their negative behaviors. ‘Stopping’ means noticing an action that makes you uncomfortable. You then “Explain” why it makes you uncomfortable. Next, ‘Affirm’ that you will treat the person you are talking to well and expect the same in return. Last is the ‘Lock,’ that can go one of three ways: lock into the friendship, take a break from the friendship, or lock out of the friendship. The point of this is to make sure you are surrounding yourself with the best people possible.”).

126. Janeen Interlandi, *A Revolutionary Approach to Treating PTSD*, N.Y. TIMES (May 22, 2014), <https://www.nytimes.com/2014/05/25/magazine/a-revolutionary-approach-to-treating-ptsd.html>.

127. Maeghan Warburton, *Help Students Confront Social Cruelty & Injustice*, MIDDLE WEB (Mar. 30, 2017), <https://www.middleweb.com/34431/help-students-confront-social-cruelty-injustice/>.

128. Frison, *supra* note 108, at 6 (citing National Center for Cultural Competence, *Definitions of Cultural Competence*, GEORGETOWN UNIVERSITY (2018), <https://nccc.georgetown.edu/curricula/culturalcompetence.html> (The ability to connect and empathize with those of different backgrounds)).

hostility—no U.S. college campus is excluded from this group.”<sup>129</sup> Cultural competency goes beyond “diversity,” she says, which speaks only to the numbers or percentages of people from different ethnic, national, and religious groups. More is needed: the creation of a “socially habitable environment.”<sup>130</sup>

A very good example of a cultural competency approach is the “Creating Emory” project of Emory University, launched in 2013.<sup>131</sup> “Creating Emory” encourages dialogue among the university’s diverse inhabitants to confront the university’s history of racism and white supremacy and combat any further macro and micro racial or gender-based aggressions.<sup>132</sup> “During the program, [students are asked] to identify their identities and values and how these intersect with the identities and beliefs of others. [They] discuss what it means to build safe, supportive communities, addressing bystander behaviors and social justice action. . . .”<sup>133</sup>

A broad range of university departments<sup>134</sup> come together to present a curriculum to all freshmen and transfer students. The curriculum “focuses on skill development for incoming students around value congruence and leading with integrity, learning how to dialogue across differences, and intervening as a bystander<sup>135</sup> to disrupt and prevent interpersonal violence.”<sup>136</sup> The aim is to enable students, faculty and administrators to make connections otherwise unlikely to occur.

My former student Fatiah Touray-Dikite, now an Assistant Dean in NYU’s College of Arts and Sciences (CAS) shared with me a new approach she and her colleagues have developed that also goes to the “cultural competency” issue. The “Intergroup Dialogue Program”<sup>137</sup> is a 10-week, one or two- credit course that brings together small

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129. Frison, *supra* note 108, at 5.

130. See also Vivia Chen, *Your Diversity Effort Is a Dud. Now What?*, THE CAREERIST (Nov. 28, 2018), <https://thecareerist.typepad.com/thecareerist/2018/11/most-diversity-efforts-are-duds.html> (Very little results from “group therapy sessions . . . about hidden biases and micro-aggressions, moderated by an expensive diversity expert with all the answers . . . . The problem is that [bias training’s] cognitive behavior discussions . . . are interesting but not helpful”).

131. *Signature Programs-Creating Emory*, EMORY UNIVERSITY (2017), [http://www.emory.edu/CAMPUS\\_LIFE/departments/community/programs.html](http://www.emory.edu/CAMPUS_LIFE/departments/community/programs.html).

132. Frison, *supra* note 108, at 12.

133. *Id.*

134. *Id.*

135. Particularly important, I think in light of the “Torn Bystander” role identified by Wiseman.

136. Frison, *supra* note 108, at 12.

137. *Intergroup Dialogue Program*, NEW YORK UNIVERSITY (2017), <https://www.nyu.edu/students/communities-and-groups/student-diversity/multicultural-education-and-programs/what-we-do/social-justice-education/intergroup-dialogue.html>.



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groups of students from diverse backgrounds to share their experiences and gain new knowledge related to diversity, equity, and social justice. This approach intersects with a “Justice Zone”<sup>138</sup> that helps students understand these concepts through the lens of a “Cycle of Oppression” and the role all take in its reproduction. (This latter gets at important ingredients such as the history of social justice activism in the community and study of the “othering” environment in which racist and sexist bullying and harassment take place.)

### ii. Teaching methods

One high school student dismissed many “standard programs” that herd students into a “gymnasium, an auditorium, or a classroom,” to sit down to talk about “accepting one another” and “being inclusive.”<sup>139</sup> Students tune out “because what they learn in the presentation isn’t connected to their everyday lives.” The challenge is to create a format that can empower students to “talk about the hard things, the things that make us uncomfortable,” to have “the tough conversation with our peers, and even our friends. . .” Talking about these subjects “is a process, not just a presentation,” the student observed. “This issue can’t be fixed in an hour of discussion.”<sup>140</sup>

Student engagement and leadership is another key ingredient. *Creating Emory*, for example, uses a peer-teaching and mentoring model. Three hundred student leaders “receive 12 hours of diversity baseline and curriculum training by 30 staff members in Campus Life, who themselves receive 10 hours of the same training.” The students then teach the curriculum to fifteen hundred new students, in groups of thirty.<sup>141</sup>

This is sometimes referred to as a “training of trainers” or “tiered” model, involving techniques of “proximal learning,” in which people learn from others who have just completed a task or experience the trainees are about to begin. A further “proximal learning”/ “training of trainers” aspect could be introduced by having older students mentor younger ones. Sophomores might be on hand to assist in the freshman orientation and self-reflection process, for example, and

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138. *Zone Trainings*, NEW YORK UNIVERSITY (2017), <https://www.nyu.edu/students/communities-and-groups/student-diversity/multicultural-education-and-programs/what-we-do/social-justice-education/zone-trainings.html>.

139. Marley Martin, *The Truth About Diversity*, CULTURES OF DIGNITY (March 20, 2017), <https://culturesofdignity.com/the-truth-about-diversity/>.

140. *Id.*

141. *Id.*

might also assist in freshman periodic trainings. Juniors could, in turn, mentor sophomores, seniors would mentor juniors, and so forth. Graduate students might mentor seniors.

Another key ingredient is the use of small groups. My UVA student recommends bringing “students and Alumni and diverse faculty” together in using small-group format, to engage directly in the problem-solving and implementation of the University’s response to bullying, harassment, and racism. She sees such small groups becoming “a part of the social life of college campuses; every student should know about them and all universities should implement them. It should be as common as every student knowing that you need to take certain required courses in order to graduate.”<sup>142</sup> Everyone involved should understand the history and context of the problem, as specific to the University and as generally evidenced throughout the society. Courses supporting this knowledge should be a “prerequisite for graduation.”<sup>143</sup>

The NYU program uses small groups as well. Students form themselves into groups of six, select a name for their group, and work together throughout the course on “cross-cultural competency,” learning to create “opportunities to learn more about their own identities as well as how to work with and celebrate people who are different from them.” These skills help students not only in classrooms, but also in interactions with those whom they encounter in their “civic and social lives.” Throughout the training, participants reflect<sup>144</sup> on their own identities<sup>145</sup> and challenge their daily practices.

### iii. Assessment

Another key feature of *Creating Emory* is a “pre and post program” assessment to “gauge how much students have learned, grown and changed to foster a better campus community.”<sup>146</sup> Each student takes a subject-matter test before arriving on campus and a post-test after experiencing the training. “Each year, the data has indicated in-

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142. *Id.* at 22.

143. *Id.*

144. The Reflection Activity: A Letter to Myself, asks the students to consider “What your first-year story will look like,” asking questions such as “What type of community you want to be a part of, and what your role in it will be.”

145. Techniques employed here include exercises such as the “Story of Your Name.” See Chimamanda Adichie, *The Danger of a Single Story*, TED TALK (July 2009), [https://www.ted.com/talks/chimamanda\\_adichie\\_the\\_danger\\_of\\_a\\_single\\_story?language=en#t-4899](https://www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story?language=en#t-4899).

146. Mouton, *supra* note 95, at 17.

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creases in awareness regarding diversity, inclusivity, in policies on discrimination, harassment and sexual misconduct, and resources to support themselves or other experiencing harassment, discrimination, or sexual violence.”<sup>147</sup>

My UCLA student believes the Creating Emory approach could work at UCLA, if it went beyond entering students and instead followed their progress in diversity, inclusion and social justice terms throughout their time at the university. Pre testing and evaluation at entry would be followed by post testing at graduation. Trainings would be routinely conducted throughout the year, not just at entry, and they would “also be conducted in a different environment with different requirements for all fraternities and sororities; . . . Greek organization trainings should be conduct bi-annually to account for the new members.” She sees the goal is challenging and altering participants’ thinking, leading to “self-evaluation and hopefully self-correction. . . some type of action” during their time at UCLA.<sup>148</sup>

In reviewing her paper, I have suggested she take these proposals a step further. After the first pre-test upon entry unto the University, have the students evaluate *themselves* in terms of the cultural competency skills tested.<sup>149</sup> Provide them with a “learning agenda”<sup>150</sup> that lists the required skills and defines each in a paragraph, and ask them to “take a selfie,” describing their present level of comprehension and utilization of the specified skills.

During the year, as periodic trainings took place, the students would revise their learning agendas to measure their progress in terms of the cultural competency skills presented.<sup>151</sup> There would be a “post-test” at the end of the first year. Each following year at the University would begin with a self-evaluation via the learning agenda, followed by trainings focusing on the cultural competency skills, perhaps varying in format, employing skits and plays, public speaking, volunteer work, and the like as well as written essays. Each year would end

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147. Frison, *supra* note 108, at 13.

148. Frison, *supra* note 108, at 24.

149. It would be a useful exercise, beyond the scope of this paper, to precisely identify these skills. For further research, *see, e.g.*, Maria Rosario T. de Guzman, *et al*, “Cultural Competence: An Important Skill Set for the 21st Century,” Nebraska Extension, G1375 • Index: Youth & Families, Families, Issued February 2016, <http://extensionpublications.unl.edu/assets/html/g1375/build/g1375.htm> (suggesting active listening, empathy, and engagement as basic cultural competency skills. They also call for student self-assessment.)

150. *See generally* Harold A. McDougall, *Lawyering and Public Policy*, SSRN (Dec. 1, 1988), available at <https://ssrn.com/abstract=2502831>.

151. *Id.*

with a “post-test” at the end of the year, followed by a counselling session with the students’ Residential Life tutor. In addition, my UVA student suggests town halls take place “every semester” to ensure that students and faculty feel they are being heard and that things are changing for the better.<sup>152</sup>

### 3. Constructing a Social Justice Deliberation Network

Curricula, teaching/learning procedures, and periodic review and assessment of students’ understanding of social hierarchy, the operation of cliques, and the fetishism of guns, as well as other topics, can inform, warn, and hopefully protect students who will face bullying, hazing, harassment and violence. The next step is to organize to confront and neutralize hierarchical social subordination on a larger scale, and in society at large. One way to begin would be to establish “Social Justice Academies” meeting in various secondary schools, community colleges and universities around the country.

These academies would examine the origins and impact of the structural subordination dangers facing not only students in high school, but their parents, families, and the community at large. They would begin deliberation and dialogue, considering ways not only to navigate these constructs, but to counter them.

A study of the “othering” environment in which racist and sexist bullying and harassment take place would be an important tool for building the will for change. My UCLA student, for example, described the little-known racist underpinnings and history of the City of Los Angeles, for example, including housing segregation, police brutality, and the Watts Riot.<sup>153</sup> My UVA gave examples of Universities “Owning Up” to their historic collaboration with slavery,<sup>154</sup> including “scientific racist” faculty publications that supported Black inferiority and slavery<sup>155</sup> and buildings named after large donors who were also

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152. Mouton, *supra* note 95, at 16.

153. *Id.*

154. Looks at steps taken by the University of Virginia, UNC Chapel Hill, Brown University, Columbia, Georgetown and Harvard and Yale Universities, publicly recognizing their slavery ties through studies and reports, and their pledges to compensate with anti-slavery memorials. See Susan Svrluga, *Make It Right: Descendants Of Slaves Demand Restitution From Georgetown*, WASH. POST (Jan. 17, 2018), [https://www.washingtonpost.com/news/grade-point/wp/2018/01/16/\\_trashed-2/?utm\\_term=.d686d0226946](https://www.washingtonpost.com/news/grade-point/wp/2018/01/16/_trashed-2/?utm_term=.d686d0226946).

155. *How Slavery Shaped America’s Oldest and Most Elite Colleges*, NPR (Sept. 17, 2013), <https://www.npr.org/sections/codeswitch/2013/09/17/223>.

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white supremacists and slave owners.<sup>156</sup> She also cited the Southern Poverty Law Center's Guide: "The Alt-Right on Campus: What Students Need to Know" as a useful source.<sup>157</sup>

The contrary is also true: any history of social justice activism in the community should also be examined and celebrated. My UCLA student mentioned a history of Black student activism at UCLA, for example, going back forty years.<sup>158</sup>

The academies would eventually create a curriculum for discussion by adults as well as children, using the model of adult study circles and folk high schools from Sweden. To take the discussion to scale, we would network Social Justice Academies county by county, city by city, and state by state as well as nationwide. One way to organize the discussion would be to consider the topic of reparations for the damage done by various social hierarchies and by the gun industry.

Ultimately, social hierarchies offer us several options. We can try to avoid them. We can accept them and our place within them. We can approach them opportunistically and try to gain advantage through them. We can challenge them. Hopefully, our young people will be trained, encouraged, and empowered to take the latter course.

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156. Noah Remnick, *Yale Grapples With Ties to Slavery In Debate Over a Colleges' Name*, N.Y. TIMES (Sept. 11, 2015), <https://www.nytimes.com/2015/09/12/nyregion/yale-in-debate-over-calhoun-college-grapples-with-ties-to-slavery.html>.

157. Mouton, *supra* note 95, at 22.

158. Frison, *supra* note 108, at 8.

APPENDIX A

GIRL WORLD: THE “ACT LIKE A WOMAN” BOX

| OUTSIDE THE BOX             | INSIDE THE BOX         |                                    | OUTSIDE THE BOX              |
|-----------------------------|------------------------|------------------------------------|------------------------------|
| Tries too hard              | pretty                 | Right brand of clothes             | poor                         |
| Inexperienced with guys     | Popular                | Cellphone, etc                     | Uptight                      |
| Acne, bad skin              | thin but right curves  | Smart but not too intense about it | Wrong style/brand of clothes |
| Fat                         | Good hair              | Guys think she’s hot               | slut                         |
| Too masculine in appearance | Athletic but not bulky | Cool guy friends                   | disabilities                 |
| Lesbian, Gay                | confident              | happy                              | Too opinionated              |
|                             | Money                  | outwardly nice                     |                              |

APPENDIX B

BOY WORLD: THE “ACT LIKE A MAN BOX”

| OUTSIDE THE BOX                          | INSIDE THE BOX |                                       | OUTSIDE THE BOX                   |
|--|----------------|---------------------------------------|-----------------------------------|
| Backs down                               | Strong         |                                       | Physical Abuse                    |
| Weak                                     | verbal skills  | Funny (nothing is serious)            | Doesn’t like to play video games  |
| Short                                    | Tall           | Good style/right gear                 | Gay                               |
| poor                                     | Tough          | Confident                             | Snitch, tattletale                |
| Acts like a girl/ flamboyant/ effeminate | Athletic       | Respected                             | Learning or physical disabilities |
| bad style, wrong gear                    | Likes girls    | Aggressive                            | Nerd                              |
| whipped                                  | Girls like him | Rule breaker (but gets away with it), | Fat                               |
| awkward                                  | money          | good at video games but not obsessed  |                                   |

## NOTE

# “Does God Bless Your Transsexual Heart?”<sup>1</sup> Anti-Transgender Bathroom Bills as a Newer Form of State Sanctioned Violence

GABY WILSON

### INTRODUCTION

“They don’t know how terrifying a changing room can be when your gender is perceived as atypical . . . They have no clue what it feels like to retreat from society because your basic human needs aren’t met.”<sup>2</sup>

—Sophie Labelle

The headlines this year have been riddled with stories about transgender (“trans”) people being barred from using the restroom.<sup>3</sup> A great number of these news stories have been riddled with excuses and justifications for this particular type of discrimination that have only served to mislead the public. Of these seemingly endless narratives is one that has gained the attention of the Supreme Court. Gavin Grimm is a trans student at Gloucester County High School who has

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1. This is a lyric from the song “True Trans Soul Rebel” by the punk band Against Me! Against Me!, *True Trans Soul Rebel* (Total Treble Music 2014), <http://www.azlyrics.com/lyrics/againstme/truetranssoulrebel.html> (last visited Nov. 23, 2016).

2. Sophie Labelle, #242, *Assigned Male* (Sep. 7, 2016), <http://www.assignedmale.com/comic/2016/9/7/ndd52kl4rxsht4tzyavjofkedvvun8>.

3. See e.g., Dawn Ennis, *Trans Girl Barred from Using Girls’ Bathroom at U.S. Military Base School*, NBC NEWS (Oct. 21, 2016, 10:19 AM), [https://www.nbcnews.com/feature/nbc-out/trans-girl-barred-using-girls-bathroom-u-s-military-base-%20n670321?utm\\_content=buffer2d61e&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](https://www.nbcnews.com/feature/nbc-out/trans-girl-barred-using-girls-bathroom-u-s-military-base-%20n670321?utm_content=buffer2d61e&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer).

been denied using the boy's restroom because he is transgender.<sup>4</sup> The school denied him access because it has a policy that "prohibits him from using the boys restroom because they are not consistent with his 'biological gender.'"<sup>5</sup> Gavin's lawsuit alleges that this is a violation of the Equal Protection Clause of the Fourteenth Amendment as well as a violation of Title IX of the U.S. Education Amendments of 1972 "that prohibits schools receiving federal funds from discriminating on the basis of sex."<sup>6</sup>

The Supreme Court is set to hear Gavin's case next year.<sup>7</sup> However, with the recent election of Donald Trump and the likelihood that he will appoint a Supreme Court justice who is the antithesis of progress and LGBT equality among other things, it is almost certain that the court would not render a favorable ruling. Although the Department of Health and Human Services (HHS) has interpreted the prohibition on discrimination on the basis of "sex" in the Title IV provision of the Civil Rights act to include gender identity and sexual orientation (and, in doing this, HHS is specifically interpreting that section to include ban on discrimination on the basis of someone's transgender status<sup>8</sup>) the Supreme Court, through Gavin's case, could possibly stifle this progress and set a precedent that works against trans people and ensures that students like Gavin will neither be able to use the bathroom nor be respected in their schools. Even though Gavin's case is specifically about public schools' interpretation of Title IX, a Supreme Court decision on this case would likely have a persuasive effect on cases dealing with discrimination in public accommodations.

The terror and discomfort of being trans and needing to use the restroom in a public place has been best encapsulated in the comic

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4. Michael K. Lavers, *Supreme Court to Hear Gavin Grimm Case*, WASHINGTON BLADE (Oct. 28, 2016, 3:23 PM), <https://www.washingtonblade.com/2016/10/28/supreme-court-hear-gavin-grimm-case/>.

5. *Id.*

6. *Id.*

7. *Id.*

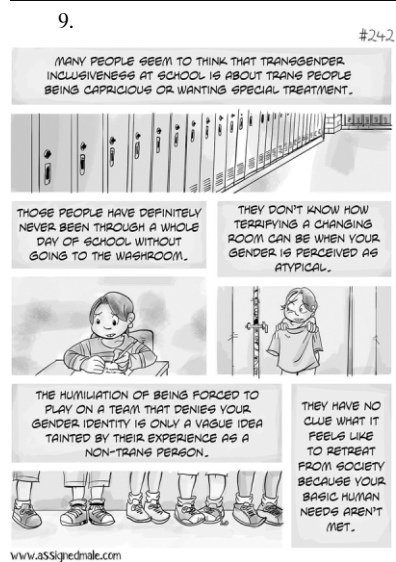
8. Timothy Jost, *HHS Issues Health Equity Final Rule*, HEALTH AFFAIRS BLOG (May 14, 2016), <https://www.healthaffairs.org/doi/10.1377/hblog20160514.054868/full/>.



“Does God Bless Your Transsexual Heart?”

strip<sup>9</sup> by Sophia Labelle. This comic strip helps to contextualize the lived experience of trans individuals in relation to House Bill 2 (“HB2”) and other bills like it. It also helps to show that there is a massive disconnect between the lawmakers and the trans community; there is a fundamental lack of understanding between the people who make these violent and bigoted laws and the people these violent and bigoted laws actually affect.

Before examining the plethora of issues that come with HB2 and other bills like it, much of the terminology and many of the concepts used when respectfully and accurately discussing trans issues and experiences need to be outlined and explained. The reader must first unpack the misconception taught in American society that sex and gender are contained only in a binary— that only two genders and two sexes exist. Oftentimes, people will conflate gender, sex and sexuality, making understanding trans issues more difficult. This graphic<sup>10</sup> provides an easier way of conceptualizing the differences. The conflation relies upon the fallacy that certain genitalia or the way a baby’s genitalia looks when born defines that baby’s gender for the rest of

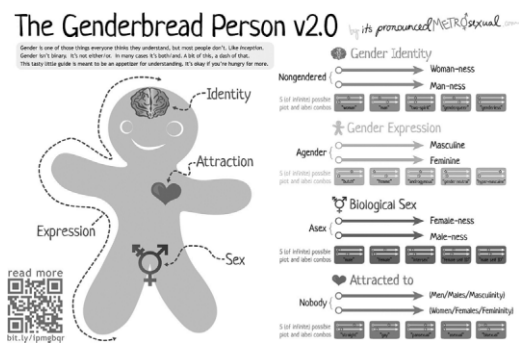


10. The text reads: “Gender is one of those things everyone thinks they understand, but most people don’t. Like inception, gender isn’t binary. It’s not either/or. In many cases as both/ and. A bit of this, a dash of that. This tasty little guy is meant to be an appetizer for understanding. It’s okay if you’re hungry for more.” Sam Killerman, *The Genderbread Person 2.0*, It’s PRONOUNCED METROSEXUAL, <https://itspronouncedmetrosexual.com/2012/03/the-%20genderbread-person-v2-0/#sthash.J1eBMeh.dpbs> (last visited Nov. 24, 2016).

their life. The core of this misconception is that, if a baby's genitalia looks a particular way, then they will grow up to wear certain clothes, to be attracted to certain people, and that they are predisposed to do things like become a homemaker or do yard work.<sup>11</sup>

In actuality, this is nonsensical and not at all a reflection of reality. Rather than being limited to one of two options, gender is something that has endless and infinite possibilities, which means that no one's gender is the same as another. Gender does not define who someone may or may not be attracted to. Gender does not mean that a person will look a certain way. Gender is a personal construction of oneself that can manifest itself in the way someone dresses, wears their hair, or their mannerisms. But gender is not something that is defined by the way someone looks when they are born into this world and it is certainly not defined by what someone's doctor or their parents pick out for that person. Because of the widespread nature of this misconception of how gender works, people who disagree with what gender they were coercively assigned at birth exist: transgender people. Simply put:

Transgender is a term used to describe people whose gender identity differs from the sex the doctor marked on their birth certificate. Gender identity is a person's internal, personal sense of being a man or a woman (or someone outside of that gender binary). For transgender people, the sex they were assigned at birth and their own internal gender identity do not match.<sup>12</sup>



11. See generally Naseem Jamnia, *The Dangers of the Gender Binary*, MEDIUM (Jan. 9, 2016), <https://medium.com/the-coffeelicious/the-myth-of-the-gender-binary-72ed2428c955#.fqrklec6u>.

12. GLAAD, *Transgender FAQ*, <https://www.glaad.org/transgender/transfaq> (last visited Nov. 26, 2016).

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People whose gender identity matches what they were coercively assigned at birth are called “cisgender.”<sup>13</sup>

Transgender people are being denied access to restrooms simply because they do not fit society’s normative standards of gender and because much of America still holds these antiquated notions of gender to be true. Negative responses to trans people are ultimately an effect of, as the U.S. Attorney General Loretta Lynch put it, “a recognizably human fear of the unknown and a discomfort with the uncertainty of change.”<sup>14</sup> The bottom line is this: a person’s gender is their own. It is not up to the government to regulate or define for people. But, unfortunately, transphobia is so ingrained in this society that laws and ordinances attempt to regulate individual identities with detrimental effects.

I. WHAT’S THE PROBLEM?

“HB2 is a law that forces transgender persons to deny, disclaim, and conceal their gender identity, particularly whenever they wish to use single-sex restroom facilities on state or local government property.”

—Theodore B. Olson<sup>15</sup>

On March 23rd of this year, the North Carolina state legislature passed House Bill 2 into law. Governor Pat McCrory subsequently signed the bill in the dead of night.<sup>16</sup> Formally named the “Public Facilities Privacy and Security Act,” this law restricts trans people’s access to public restrooms. It effectively bars trans people from using the restroom that aligns with their gender identity<sup>17</sup> unless they have

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13. Sunnvie Brydum, *The True Meaning of the Word ‘Cisgender’*, ADVOCATE (July 31, 2015, 6:00 AM), <https://www.advocate.com/transgender/2015/07/31/true-meaning-word-cisgender>.

14. See CNN, *Loretta Lynch’s Statement on North Carolina Bathroom*, YOUTUBE (May 9, 2016) <https://www.youtube.com/watch?v=QGcurCOBrZo>.

15. Sarah McBride, *68 Companies Sign HRC’s Amicus Brief to Block North Carolina’s Discriminatory HB2*, HUMAN RIGHTS CAMPAIGN BLOG (July 8, 2016), <https://www.hrc.org/press/68-companies-sign-hrcs-amicus-brief-supporting-doj-effort-to-block-ncs-disc>.

16. Mara Keisling, *In Shocking Action, North Carolina Legislature Passes Anti-Trans Bill in Under 9 Hours*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (Mar. 23, 2016), <https://transequality.org/blog/in-shocking-action-north-carolina-legislature-passes-anti-trans-bill-in-under-9-hours>.

17. “‘Gender identity’ refers to how people see and identify themselves; for example, some people identify as female; some people identify as male; some people as a combination of genders; as a gender other than male or female; or as no gender. For example, transgender girls identify as girls but were classified as males when they were born. Transgender boys identify as boys but were classified female when they were born. Everyone has a gender identity.” Sylvia Rivera Law Project, *Fact Sheet: Transgender & Gender Nonconforming Youth in School*, <http://srp.org/resources/fact-sheet-transgender-gender-nonconforming-youth-school/>.

had all of the sex markers on their government issued identification documents changed to reflect their identity.<sup>18</sup> In North Carolina, only those who have undergone gender-affirming surgery can change the sex marker on their documents.<sup>19</sup> Many states require a signed doctor's note in order to have the sex on certain documents changed, which is often not an easy task.<sup>20</sup> Finding a trans inclusive doctor can be extremely difficult as well as expensive.<sup>21</sup> Sophie Labelle, in her comic<sup>22</sup>, helps to outline some of the core issues of requiring surgery or identity documents to “prove one’s gender” in order to use a certain restroom. The comic also encapsulates the absurdity of requiring documentation to use the restroom.

18. David Kurtz, *What Just Happened in North Carolina?*, TPM (Mar. 24, 2016, 10:23 AM), <http://talkingpointsmemo.com/edblog/north-carolina-anti-lgbt-bill>.

19. See Catherine E. Shoichet, *North Carolina Transgender law: Is it discriminatory?*, CNN (Apr. 5, 2016, 10:00 AM), <https://www.cnn.com/2016/04/03/us/north-carolina-gender-bathrooms-law-opposing-views/>.

20. Lambda Legal, *FAQ About Identity Documents*, <http://www.lambdalegal.org/know-your-rights/article/trans-identity-document-faq> (last visited Nov. 26, 2016).

21. See Diana Tourjée, *For Trans People on Hormones, Doctors Can Be the Worst Part of the Treatment*, VICE: BROADLY (Mar. 3, 2016, 3:30 PM), [https://broadly.vice.com/en\\_us/article/for-trans-people-on-hormones-doctors-can-be-the-worst-part-of-the-treatment](https://broadly.vice.com/en_us/article/for-trans-people-on-hormones-doctors-can-be-the-worst-part-of-the-treatment).

22. This comic strip reads: “Trans women aren’t real women!! Why? They have male genitalia! Well, how do I know that you have the right kind of genitalia? Should I just believe you based on the way you look? I can show you some I.D.? That won’t prove anything. You will need at least one letter from a doctor.” Sophie Labelle, #275, Assigned Male <http://www.assignedmale.com/comic/> (last visited Nov. 23, 2016).

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“Does God Bless Your Transsexual Heart?”

This law disproportionately affects the majority of trans people who either cannot afford surgery or the paperwork process to change documentation papers, and those who simply do not feel the need to have surgery to affirm their identity or who choose to wait to have surgery for safety reasons.<sup>23</sup> Another part of this law has a preemption effect, which strips cities and municipalities within the state of North Carolina of their powers to create non-discrimination ordinances and renders void the ones that they have already created. Additionally, in the wake of HB2, high-school students have been allowed and encouraged to carry pepper spray into restrooms to “ward off attackers.”<sup>24</sup> In actuality, this exposes trans people to an even heightened risk of violent attack for simply trying to use the restroom.<sup>25</sup>

A study by the National Center for Transgender Equality (“NCTE”) has revealed the health risks and health effects that trans-genders face from being harassed in a public restroom or avoiding the public restrooms altogether. This study shows: (1) 59% of trans people have avoided the bathroom in the past year because they fear confrontation in public restrooms at work, school, or other places; (2) 12% reported that they have been harassed, attacked, or sexually assaulted in the public restroom in the past year; (3) 31% have reported that they avoided eating or drinking throughout the day so that they did not have to use the restroom; (4) 24% said that they were told by someone in the restroom that they were using the wrong restroom or generally questioned their presence in the restroom; (5) 9% reported actually being denied access to the appropriate restroom; and (6) 8% reported having kidney or urinary tract infections or other, kidney related medical issues from avoiding the restroom in the last year.<sup>26</sup>

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23. Kurtz, *supra* note 18.

24. Nico Lang, *N.C. School Board Member Encourages Students to Pepper Spray Trans Classmates*, ADVOCATE (May 11, 2016, 9:54 AM), <http://www.advocate.com/transgender/2016/5/11/nc-school-board-member-encourages-students-pepper-spray-trans-classmates>.

25. The reference to “perverts” and “pedophiles” clearly indicates an animus and distrust of trans people. Allowing students to have pepper spray to “protect themselves” would clearly lead to attacks on trans people that would easily be defended as simply protecting oneself. See Nina Golgowski, *NC Official Changes Stance on Pepper Spray in Trans-Friendly School Bathrooms (UPDATE)*, HUFFINGTON POST: QUEER VOICES (May 11, 2016, 12:07 PM), [http://www.huffingtonpost.com/entry/nc-school-official-wants-kids-to-carry-pepper-spray-in-trans-friendly-bathrooms\\_us\\_573259a1e4b016f378977bc0](http://www.huffingtonpost.com/entry/nc-school-official-wants-kids-to-carry-pepper-spray-in-trans-friendly-bathrooms_us_573259a1e4b016f378977bc0).

26. National Center for Transgender Equality, *Harassment of Transgender People in Bathrooms and Effects of Avoiding Bathrooms*, Preliminary Findings from the 2015 U.S. Transgender Survey (July 2016), <https://static1.squarespace.com/static/54f76238e4b03766696d8f4c/t/5782a8d9197aeaa57b589608/1468180715744/USTS-Preliminary-Findings-July-2016-2.pdf>.

HB2 “forces transgender people to deny a fundamental feature of their character and personhood in the name of safety concerns that are wholly illusory and a slap in the face to all transgender persons who are simply trying to live their lives consistent with who they really are.”<sup>27</sup> The NCTE study and all of these personal narratives show that bills like HB2 have lasting detrimental effects on not only the mental health and social wellbeing of trans people, but also measurable ramifications on the physical health of trans people who either fear or are denied access to the appropriate restrooms.

## II. WHERE DID IT COME FROM?

“[B]iology my ass. Do you have a degree or something? I’m biologically Trans. Also you can biologically go fuck yourself.”<sup>28</sup>

—Laura Jane Grace of Against Me!

Bills like HB2 do not exist in a vacuum. There is an extensive history of transphobia in the United States that has manifested itself in a myriad of ways. From physical violence and murder<sup>29</sup>, to violence from medical professionals and mental health care professionals by classifying trans identity as a mental disorder. Transphobia is deeply imbedded this society. These bathroom bills are simply a natural evolutionary step from the primordial ooze that is the American tradition of transphobic violence.

### A. Trans History in the US: Trans as Pathology and Deceit

For many decades, being transgender was considered a mental illness.<sup>30</sup> Previously called gender identity disorder, gender dysphoria was considered to be a disorder that caused people to disagree with the gender they were forcibly assigned at birth—to be trans.<sup>31</sup> Often, to get gender-affirming surgery, a patient must have a letter from a psychiatrist that affirms the patient’s “mental condition” and recom-

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27. McBride, *supra* note 15.

28. Laura Jane Grace (@LauraJaneGrace), Twitter, (Aug. 28, 2015, 8:37 AM), <https://twitter.com/laurajaneGrace/status/637257588523016192?lang=en>. Laura Jane Grace dismantling the premise that trans women are “biologically male” and are, therefore, not “real” women.

29. The Advocate.com Editors, *These are the Trans People Killed 2016*, ADVOCATE (Sep. 16, 2016), <http://www.advocate.com/transgender/2016/9/16/these-are-trans-people-killed-2016>.

30. See Katy Steinmetz, *Being Transgender is Not a Mental Disorder: Study*, TIME (Jul. 26, 2016), <http://time.com/4424589/being-transgender-is-not-a-mental-disorder-study/>.

31. See *Gender Dysphoria*, PSYCHOLOGY TODAY, <https://www.psychologytoday.com/conditions/gender-dysphoria> (last visited Nov. 26, 2016).

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mends surgery as a solution.<sup>32</sup> Of course, a doctor’s note for surgery is one of the less detrimental effects of “trans as pathology.” This effect has only come with a growing understanding of the trans community. Before this, such a diagnosis would be justification for torture (under the guise of treatment), which often led to death.<sup>33</sup>

Recently, the leading stance within the mental health care profession has changed to understanding that being trans is not a mental health condition. In fact, a recent study published in the medical journal, *The Lancet Psychiatry*, indicated that:

. . . the social rejection and violence that many transgender people experience appears to be the primary source of [trans individuals’] mental distress, as opposed to the distress being solely the result of being transgender. That distinction matters because it has implications for how transgender people are treated in a healthcare setting, as well as how they are viewed in society.<sup>34</sup>

This shift in viewpoint marks an important step towards transgender individuals receiving better treatment and respect in their healthcare.

Outside of the realm of psychology, physical violence towards trans individuals is still prevalent to this day. Each November, individuals observe the Transgender Day of Remembrance (“TDoR”). TDoR’s website best encapsulates the purpose behind this day, its history, and its continued significance.<sup>35</sup> This year has seen at least 21

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32. See generally Garden of Peace Project, *Sample Letter for Gender Reassignment Surgery*, available at [http://www.gardenofpeaceproject.org/uploads/8/4/7/9/8479015/sample\\_letter\\_for\\_gender\\_reassignment\\_surgery.pdf](http://www.gardenofpeaceproject.org/uploads/8/4/7/9/8479015/sample_letter_for_gender_reassignment_surgery.pdf) (last visited Nov. 26, 2016).

33. See generally Carl Charles, *A Firsthand Account of the Torture of ‘Conversion’ Therapy*, *ADVOCATE* (Nov. 2, 2015, 4:30 AM), <http://www.advocate.com/commentary/2015/11/02/firsthand-account-torture-conversion-therapy>.

34. Steinmetz, *supra* note 30.

35. “The Transgender Day of Remembrance was set aside to memorialize those who were killed due to anti-transgender hatred or prejudice. The event is held in November to honor Rita Hester, whose murder on November 28th, 1998 kicked off the “Remembering Our Dead” web project and a San Francisco candlelight vigil in 1999. Rita Hester’s murder — like most anti-transgender murder cases — has yet to be solved. Although not every person represented during the Day of Remembrance self-identified as transgender — that is, as a transsexual, crossdresser, or otherwise gender-variant — each was a victim of violence based on bias against transgender people. . . The Transgender Day of Remembrance serves several purposes. It raises public awareness of hate crimes against transgender people, an action that current media doesn’t perform. Day of Remembrance publicly mourns and honors the lives of our brothers and sisters who might otherwise be forgotten. Through the vigil, we express love and respect for our people in the face of national indifference and hatred. Day of Remembrance reminds non-transgender people that we are their sons, daughters, parents, friends and lovers. Day of Remembrance gives our allies a chance to step forward with us and stand in vigil, memorializing those of us who’ve died by anti-transgender violence.” International Transgender Day of Remembrance, *About TDoR*, <https://tdor.info/about-2/> (last visited Nov. 26, 2016).

murders<sup>36</sup> of trans individuals—that number only includes those that were reported properly.<sup>37</sup>

Until the passing of the Matthew Shepard and James Byrd Jr. Hate Crime Prevention Act<sup>38</sup> by Pres. Obama in 2009, “trans panic” was considered a valid legal defense to a murder charge. Essentially, the “main premise of trans panic is that a heterosexual man is so overwhelmed after realizing someone he had a sexual relationship with is trans that in a state of something like temporary insanity he ends up killing the person.”<sup>39</sup> This defense is a product of the belief that trans people, especially trans women, are out to “deceive” and “trick” people.<sup>40</sup> Essentially, it holds that trans people are responsible for their own murders. This notion has been reinforced as popular belief through (mis)representations of trans people in media and in popular culture.

## B. Trans Representation in Media and Popular Culture

There is nothing counter culture about transmisogyny. In fact, transmisogyny is so deeply ingrained in our society that it is literally everywhere. The most popular TV shows ranging from Bob’s Burgers to House and any TV show among all genres and networks all have that one episode. That one episode, or even a handful of episodes, where they drop the t-slur, make jokes about ‘men in dresses’ (in reference to trans women), or run of the ‘shock’ of a woman with a penis.<sup>41</sup>

A multitude of movies and television shows misrepresent trans women by employing a very violent and inaccurate method: the man in a dress trope. Often used in the comedy genre, one iteration of this

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36. Human Rights Campaign, *Violence Against the Transgender Community in 2016*, <http://www.hrc.org/resources/violence-against-the-transgender-community-in-2016> (last visited Nov. 26, 2016).

37. Misgendering is “referring to someone by the pronouns or honorifics of a gender that is not theirs.” Joli St. Patrick, *What You’re Really Saying When You Misgender*, THE BODY IS NOT AN APOLOGY (May. 26, 2017), <https://thebodyisnotanapology.com/magazine/what-youre-really-saying-when-you-misgender/>.

38. This law expands the definition of hate crime to include crimes that are motivated by the victim’s actual or perceived gender identity, sexual orientation, and disability. See Anne Marie Riha, *President Obama Signs Hate Crime Prevention Act*, FOX NEWS: POLITICS (Oct. 28, 2009), <http://www.foxnews.com/politics/2009/10/28/president-obama-signs-hate-crime-prevention-act.html>.

39. Meredith Talusen, *The Failed Logic Of “Trans Panic” Criminal Defenses*, BUZZFEED: LGBT (Aug. 25, 2015, 7:03 PM), [https://www.buzzfeed.com/meredithtalusan/trans-panic-criminal-defense?utm\\_term=.ai6pqwbv#.ogpreEaJ](https://www.buzzfeed.com/meredithtalusan/trans-panic-criminal-defense?utm_term=.ai6pqwbv#.ogpreEaJ).

40. *Id.*

41. Lucian Clark, *Drag, Counter Culture, and Transmisogyny*, GENDERTERROR (May 28, 2014), <https://genderterror.com/2014/05/28/drag-counter-culture/>.



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trope is the “Deceitful Seductress” where a “man” “disguises as a woman (up to and including getting genital surgery, sometimes) in order to use feminine sex appeal to seduce straight men into having intimate contact . . . Basically, straight trans women (i.e. “gay men”) trick straight men into having gay sex.<sup>42</sup> However, thinking that trans women are really just “men in a dress,” is not only wildly inaccurate, but also incredibly violent. It is this type of thinking that supports the idea of “trans panic” in one of the reasons that HB2 and other bathroom bills exist. It reinforces the myth of the trans predator.

Representations of trans woman through the “man in a dress” trope are not the only way that media and popular culture cosign and reinforce transmisogyny. The film *Silence of the Lambs* reinforces the idea of “trans as pathology” through the character of Buffalo Bill and the central storyline.<sup>43</sup> Other films, like *Boys Don’t Cry*, and a number of TV shows tell the stories of trans and queer individuals but almost always end with the death of its LGBTQ characters.<sup>44</sup> The effect of these deaths and the role of these deaths in the storyline are to convey sort of lesson: that being queer and trans ends in tragedy.

Only very recently have the representations of trans people in mainstream media and popular culture expanded to include accurate depiction of even positive narratives. From the rise in popularity of Laverne Cox through her portrayal of Sophia on “Orange is the New Black,” to the willingness of people like Janet Mock<sup>45</sup> and Carmen Carrera to share their stories on the mainstream news outlets, these representations have diluted the once singularly offensive and violent pool of misrepresentations and have aided an increasing awareness and understanding in the non-trans parts of society. These honest and respectful depictions that show trans people simply living their lives work to not only change the hearts and minds of cisgender people who were largely unaware of trans issues and experiences, but also

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42. Quæstiones from Lucrezia Contarini’s Online Salon, *Tropes vs. Trans Women* (July 1, 2014), <https://lucreziacontarini.com/2014/07/01/tropes-vs-trans-women/>.

43. Jos Truitt, *My Auntie Buffalo Bull: The Unavoidable Transmisogyny of Silence of the Lambs*, FEMINISTING (Mar. 10, 2016), <http://feministing.com/2016/03/10/my-auntie-buffalo-bill-the-unavoidable-transmisogyny-of-silence-of-the-lambs/>.

44. See TV Tropes, *Bury Your Gays*, <http://tvtropes.org/pmwiki/pmwiki.php/Main/BuryYourGays> (last visited Nov. 26, 2016).

45. Janet Mock’s staunch refusal to allow Piers Morgan, a self-proclaimed trans “ally,” get away with Miss Ginger ring her on live television under the excuse of “but I’m your ally!” was likely the greatest media event of 2014. See CNN, *Janet Mock rejoins Piers Morgan* (Feb. 5, 2014), <https://www.youtube.com/watch?v=0F8WiuxYoE4>.

work to provide positive “possibility models”<sup>46</sup> for young trans people and people who struggle with realizing and accepting their own trans identities.

But this increased visibility comes as a double-edged sword. While the positive effects are undeniable, this visibility also places a larger target on the trans community for bigots in their lawmakers who need a punching bag. It seems as if, after the *Obergefell v. Hodges*<sup>47</sup> decision took away bigots’ go-to rallying cry against same-gender marriage, their politicians needed another group to demonize and to rally against: the trans community.

### C. Regulating Trans Bodies and Trans Lives

Yet another, slightly more insidious way of inflicting violence against trans people is through laws that minimize and penalize people for simply being who they are laws that specifically target trans people. There were many anti-cross dressing laws used to target trans people dressing in a way that reflected their gender identity throughout the U.S. The most recent of these laws was only repealed in 1974 in Cincinnati, Ohio.<sup>48</sup>

This past 2015 legislative session has seen an unprecedented upswing in the introduction of specifically anti-trans bills.<sup>49</sup> This particular section has also seen a new type of anti-trans bill that is a variant of a First Amendment Defense Act (“FADA”) bill. The ramifications of this new type of bill are wide reaching and severe:

This legislative season has seen a new type of anti-transgender legislation emerge: it is a variation of a so-called “First Amendment Defense Act” (FADA) that protects a person or agency from the normal consequences of engaging in prohibited discrimination if the person or agency discriminating is doing so as a result of a sincerely held religious belief or moral conviction . . . This year, some of these bills additionally include a new provision which would also exempt people from the consequences of discrimination if they have a belief

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46. See Eboné Bell, *Laverne Cox Calls Herself a ‘Possibility Model’ on Katie Couric*, TAGG MAGAZINE (Jan. 8, 2014), <http://taggmagazine.com/arts-entertainment/laverne-cox-on-katie-couric/>.

47. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

48. Susan Stryker, *Transgender History* 32-33 (Seal Press 2008).

49. Human Rights Campaign, *Anti-Transgender Legislation Spreads Nationwide, Bills Targeting Transgender Children Surge* (2016), <http://www.hrc.org/resources/unprecedented-on-slaughter-of-state-legislation-targeting-transgender-american>.

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or conviction that there are “distinct and immutable biological sexes that are determined by anatomy and genetics at the time of birth.”<sup>50</sup>

Mississippi has its own version of North Carolina’s HB2,-HB 1523, which is far worse for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people.<sup>51</sup> HB 1523 is “an extensive law written to protect people who believe any of the following: that marriage is between a man and a woman; that sex should only happen in the context of marriage; and that the words ‘male’ and ‘female’ refer to ‘an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.’ The law claim [sic] these protections are a form of religious freedom.”<sup>52</sup> Religion as an excuse for discrimination and as a shield from the consequences bigotry is not new. Mississippi’s bill does, however, highlight the importance of reflecting upon the song “True Trans Soul Rebel” by Against Me! The question the song poses (and the lyric included in the title of this paper), “does God bless your transsexual heart?” juxtaposes religion as license to discriminate with the struggles of being religious and being transgender. This lyrical query calls into question the validity of religion as reason to discriminate.

D. Charlotte’s Non-discrimination Ordinance

The city of Charlotte, North Carolina decided to expand its non-discrimination policies in public accommodations, vehicles for hire, and in government contracting.<sup>53</sup> The new nondiscrimination provision prohibited discrimination on the basis of sexual orientation, gender identity, and gender expression.<sup>54</sup> North Carolina’s legislature “used Charlotte’s ordinance as an excuse to pass a sweeping anti-LGBT bill, which limits trans students’ ability to use the restroom at school, as well as all trans people in public buildings.”<sup>55</sup> A report from NCTE the day after the bill was signed highlights the speed with

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50. *Id.*

51. HRC Staff, *Siren: Today, Mississippi Senate to Vote on Appalling Anti-LGBT Legislation*, HUMAN RIGHTS CAMPAIGN (Mar. 30, 2016), <http://www.hrc.org/blog/siren-today-mississippi-senate-to-vote-on-appalling-anti-lgbt-legislation>.

52. Samantha Allen, *Mississippi’s Anti-LGBT Law Is Worse Than North Carolina’s*, DAILY BEAST (Mar. 31, 2016), <http://www.thedailybeast.com/articles/2016/03/31/mississippi-s-anti-lgbt-law-is-worse-than-north-carolina-s.html>.

53. Sunnvie Brydum, *Why The ‘Bathroom Predator’ Myth Is ‘Straight-Up Right-Wing B.S.’*, ADVOCATE (April 12, 2016, 1:37 PM), <http://www.advocate.com/transgender/2016/4/12/why-bathroom-predator-myth-straight-right-wing-bs-video>.

54. *Id.*

55. Mara Keisling, *In Shocking Action, North Carolina Legislature Passes Anti-Trans Bill in Under 9 Hours*, NATIONAL CENTER FOR TRANSGENDER EQUALITY: BLOG (Mar. 23, 2016), <http://www.nctc.org/blog/2016/03/23/in-shocking-action-north-carolina-legislature-passes-anti-trans-bill-in-under-9-hours>.

which the bill passed as well as how the people against the bill were blocked from having a fighting chance to defeat the bill:

As numerous legislators who voted “no” said today, they were simply not ready to understand the far-reaching consequences of this bill. But instead of giving legislators and the public the time to carefully consider this bill, its supporters rushed through the legislative process in a matter of hours. In sharp contrast with the careful deliberation before the Charlotte nondiscrimination ordinance was passed—an open debate that spanned over a year, including in a city-wide election—members of the House Judiciary Committee were given only five minutes to review the bill before launching into debate. Legislators had no time to consult with their constituents or research the impact of this law. And few members of the North Carolina public even had the chance to hear what the bill said before it passed into law. Sexual assault survivors and advocates, major businesses, and labor unions have all spoken out against this law, but today their voices were ignored. We prepared many trans people and allies to speak at the hearings, but unfortunately, only a handful were able to speak.<sup>56</sup>

It appears as if this bill is not at all representative of the majority mindset of North Carolina, given the amount of resistance it has received and is actually a mere tactic for McCrory to gain reelection later that year.<sup>57</sup>

#### E. Justifications: The Trans Predator and Protecting Privacy

Proponents of HB2 and many media sources have been espousing a mythological predator as justification for the necessity of HB2. This myth essentially states: Allowing trans people to use the restroom that best corresponds with their gender identity will open the door and allow male sexual predators into women’s bathrooms to assault women and girls.<sup>58</sup> In actuality, there has never been any report of this

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[/www.transequality.org/blog/in-shocking-action-north-carolina-legislature-passes-anti-trans-bill-in-under-9-hours](http://www.transequality.org/blog/in-shocking-action-north-carolina-legislature-passes-anti-trans-bill-in-under-9-hours).

<sup>56</sup>. *Id.*

<sup>57</sup>. See generally Ned Barnett, *A tangled plan ensnared McCrory in HB2*, THE NEWS & OBSERVER (Apr. 16, 2016), <http://www.newsobserver.com/opinion/opn-columns-blogs/ned-barnett/article72280037.html>.

<sup>58</sup>. Rachel Percelay, *Independent Investigation Debunks The Anti-LGBT “Bathroom Predator” Myth*, MEDIA MATTERS (Feb. 16, 2016, 11:14 AM), <http://mediamatters.org/blog/2016/02/16/independent-investigation-debunks-the-anti-lgbt/208605> [hereinafter *Independent*].

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kind anywhere in the U.S.<sup>59</sup> and certainly not in places that have gender identity protected in public accommodations.<sup>60</sup>

Other anti-trans bathroom bills have cited privacy in the text of the bill itself as justifications:

AN ACT relating to student privacy. Create new sections of KRS Chapter 158 to ensure that student privacy exists in school restrooms, locker rooms, and showers; require students born male to use only those facilities designated to be used by males and students born female to use only those facilities designated to be used by females; identify consequences for using facilities designated for the opposite biological sex; identify the Act as the Kentucky Student Privacy Act.<sup>61</sup>

Although these bills cite “privacy” reasons, the advocates of the bills reinforce and rely upon the trans predator myth. A proponent of a Kentucky anti-trans bathroom bill stated “cisgender students sharing a bathroom with a trans student would experience ‘psychological, emotional, and physical harm’ that opened schools to legal action unless they were explicit about their ‘biological sex’ segregation.”<sup>62</sup> It seems as if the only real purpose of these bills is to further demonize and stigmatize trans people.

### III. PREVIOUS SOLUTIONS AND THEIR DISADVANTAGES

#### A. Open letter to Governor McCrory

Discrimination is wrong and we believe it has no place in North Carolina or anywhere in our country. As companies that pride ourselves on being inclusive and welcoming to all, we strongly urge you and the leadership of North Carolina’s legislature to repeal this law in the upcoming legislative session.<sup>63</sup>

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59. Brydum, *supra* note 13.

60. Independent, *supra* note 9.

61. Kentucky Legislature, SB76, <http://www.lrc.ky.gov/record/15RS/SB76.htm> (last visited Nov. 23, 2016).

62. Mitch Kellaway, *Kentucky Lawmaker: Fine Schools \$2,500 Every Time a Trans Student Uses ‘Wrong’ Bathroom*, *ADVOCATE* (Jan. 18, 2015, 12:56 PM), <http://www.advocate.com/politics/transgender/2015/01/18/kentucky-lawmaker-fine-schools-2500-every-time-trans-student-uses-wr>.

63. The full text of the letter is as follows: “Dear Governor McCrory, we write with concerns about legislation you signed into law last week, HB 2, which has overturned protections for LGBT people and sanctioned discrimination across North Carolina. Put simply, HB 2 is not a bill that reflects the values of our companies, of our country, or even the overwhelming majority of North Carolinians. We are disappointed in your decision to sign this discriminatory legislation into law. The business community, by and large, has consistently communicated to lawmakers at every level that such laws are bad for our employees and bad for business. This is not a direction in which states move when they are seeking to provide successful, thriving hubs for business and

It is possibly too soon to gauge the effectiveness of this letter but so far, in the number of months since this letter has been written and signed, Gov. McCrory has made no moves to repeal HB2. In the recent election, Gov. McCrory has been voted out of office, largely because of his staunch refusal to repeal HB2.<sup>64</sup> However, he refuses to concede the election to his opponent who actually won the votes.<sup>65</sup> This should likely be attributed less to the open letter from businesses and companies to govern Gov. McCrory and more to the voter engagement and grassroots campaigning that was done in the state in the wake of HB2.

### B. Sports Conferences

Many large sports conferences that were scheduled to take place in North Carolina have backed out in the wake of HB2.<sup>66</sup> While the loss of potential revenue can be a large motivating factor for governments, this actually punishes cities like Charlotte who were attempting to expand their protections but, because of HB2, they are suffering from conferences like the CIAA pulling out of their city.

### C. Voting

“Trans people are not specifically targeted by any voter ID laws . . . However, voter ID laws have a disproportionate effect on transgender communities.”<sup>67</sup>

—Arl Christian, NCTE

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economic development. We believe that HB 2 will make it far more challenging for businesses across the state to recruit and retain the nation’s best and brightest workers and attract the most talented students from across the nation. It will also diminish the state’s draw as a destination for tourism, new businesses, and economic activity. Discrimination is wrong and we believe it has no place in North Carolina or anywhere in our country. As companies that pride ourselves on being inclusive and welcoming to all, we strongly urge you and the leadership of North Carolina’s legislature to repeal this law in the upcoming legislative session.” Equality North Carolina, *NEW in North Carolina: Momentum Continues as More Executives from Major Companies Join in Call for Repeal of HB 2*, [http://equalitync.org/latest/news/businesses\\_against\\_hb2\\_updated\\_4\\_21/](http://equalitync.org/latest/news/businesses_against_hb2_updated_4_21/).

64. Jeff Taylor, *Gov. Pat McCrory appears defeated in NC but won’t concede to Roy Cooper*, LGBTQ NATION (Nov. 9, 2016), <http://www.lgbtqnation.com/2016/11/gov-pat-mccrory-appears-defeated-nc-wont-concede-roy-cooper/>.

65. *Id.*

66. See Stephen Peters, *ACC Follows NCAA Lead in Moving Championship Games Out of North Carolina Over Anti-LGBTQ HB2 Law*, HRC: BLOG (Sep. 14, 2016), <http://www.hrc.org/blog/atlantic-coast-conference-moves-championship-games-out-of-north-carolina>.

67. German Lopez, *States are making it a lot harder for transgender people to vote*, VOX (Oct. 25, 2016, 9:20 AM), <http://www.vox.com/identities/2016/10/25/13375146/transgender-voter-id-laws>.

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Voter restriction laws prevent trans people from voting for candidates that would best represent their interests, or at the very least not actively work against their interests. Many states that have anti-trans bathroom bills also have voter ID laws on the books.<sup>68</sup> Voter ID laws specifically prevent trans people from voting.<sup>69</sup> For example, if a trans person shows up at the booth but has not yet had the chance or the means to get their license or birth certificate changed to reflect their gender identity, that is if their birth certificate or driver’s license still has the wrong sex marked on it, and the person checking the ID thinks that that person does not “look the way they expect them to look,” then they will likely be prevented from voting.<sup>70</sup>

D. The Equality Act

The Equality Act is by far the only solution that would prevent bills like HB2 from emerging again and into effect. However, it takes a long time for a bill to actually become a law. It could be years before the House and the Senate even begin to consider the Equality Act.<sup>71</sup> Interestingly, the Equality Act was actually originally introduced decades ago.<sup>72</sup> It got stripped of many of its provisions including the parts about sexual orientation and gender identity and eventually became the Employment Non-Discrimination Act (“ENDA”).<sup>73</sup>

Senators Jeff Merkley, Tammy Baldwin, and Cory Booker, and Representatives David Cicilline and John Lewis introduced this iteration of the Equality Act.<sup>74</sup> It would “explicitly prohibit discrimination based on gender identity and sexual orientation in employment, housing, education, credit, public accommodations, jury service, and federally funded programs. (Gender identity and sexual orientation are defined the same way they were in ENDA.)”<sup>75</sup> It would also “codify the existing interpretations of sexual orientation and gender identity bias as being forms of sex discrimination, which many courts and fed-

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68. *See id.*

69. *Id.*

70. *Id.*

71. *See generally* U.S. Constitution Online, *Constitutional Topic: How a Bill Becomes a Law*, available at [http://www.usconstitution.net/consttop\\_law.html](http://www.usconstitution.net/consttop_law.html) (last visited Nov. 26, 2016).

72. Mara Keisling, *The Equality Act is the LGBT Rights Bill We Want and Need*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (July 22, 2015), <http://www.transequality.org/blog/the-equality-act-is-the-lgbt-rights-bill-we-want-and-need>.

73. *Id.*

74. Human Rights Campaign, *Why the Equality Act?*, <http://www.hrc.org/resources/why-the-equality-act> (last updated Oct. 1, 2016, 4:08 PM).

75. *Id.*

eral agencies including the Equal Employment Opportunity Commission have already embraced.”<sup>76</sup> Even though the Equality Act would effectively put an end to the production of anti-trans bills like HB2, the length of time it takes for any bill to become a law makes it impractical to rely on it as a tangible solution.

#### IV. WHAT NEW APPROACHES HAVE BEEN DEVELOPED AND WHAT ARE THEIR ADVANTAGES?

Because the core of these anti-trans bathroom bills is not really “women’s safety” or the obscure and ironic excuse of “privacy”—ironic because they claim that by demanding to know people’s highly sensitive information, like what their genitals look like, they are protecting privacy—it should be noted that the only real solution to this problem is an immediate end to all transphobia and to smash the patriarchy. One of the steps in this process is to end the fallacy of the gender binary, much like the cat in this comic.<sup>77</sup>

Doing this would rid society of the erroneous presumption that people are born either male or female and to be anything other than that which one was assigned at birth is to warrant skepticism at best and violence and murder at worst. It is this presumption that fuels the belief and mindset that trans people are wrong, that they are “other,” and that they are inherently suspect. Their otherness warrants their mistreatment. Cisgender people’s unfamiliarity with transness and their fear of the unknown fuel the passing of laws like HB2. Doing

76. *Id.*

77. Sophie Labelle, *Nature knows best*, *Assigned Male* (Aug. 26, 2016), <https://m.facebook.com/assignedmale/photos/a.305470909635180.1073741828.300503316798606/585334401648828/?type=3&source=54>.





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away with these deeply rooted misconceptions is the only way to attack the problem at its root and to prevent other transphobic laws and regulations from coming up again. While the world awaits this miraculous day to mark the end of all transphobia, there are several direct-action tactics and grassroots ways to help trans people use the restroom safely and comfortably.

A. Municipal Gender-Neutral Bathroom Ordinances

Numerous municipalities and cities like the District of Columbia have implemented ordinances that require single-stalled public restrooms to be labeled as gender-neutral restrooms.<sup>78</sup> This gives trans people a safe place to use the restroom if they do not feel safe or comfortable going to the restroom that corresponds with their gender identity. Municipality and city ordinances like this also fill the hole left by any law that would allow binary trans people to use the restroom that corresponds with their gender identity because it would also give gender-non-conforming and non-binary people a safe place to use the restroom without forcing them to pick a restroom and therefore gender that does not correspond with their identity. Gender-non-conforming, non-binary and genderqueer are “catch-all categor[ies] for gender identities that are not exclusively masculine or feminine—identities which are thus outside of the gender binary and cisnormativity.”<sup>79</sup> Because of this, non-binary and genderqueer people often do not feel comfortable in restrooms that are labeled “Men” or “Women”. The presence and option of a restroom that is single-stalled and has a lock on the main door is a safe alternative for genderqueer and non-binary trans people.

Municipal gender-neutral bathroom ordinances effectively work around the preemptive effect of bills like HB2 because, in creating and enforcing these ordinances, the municipality is not engaging in making prohibited non-discrimination ordinances. Instead, the municipality is simply regulating the signs on public restrooms.

B. I’ll Go with You Campaign

There are also other, more grassroots solutions that only require people who are dedicated to working in solidarity with trans people.

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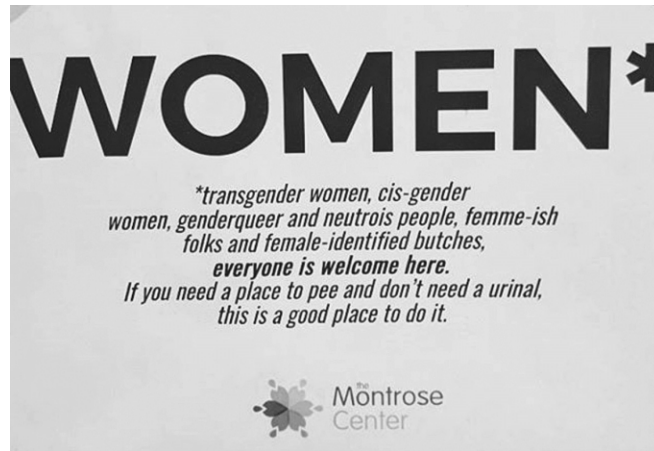
78. D.C. Office of Human Rights, *Safe Bathrooms DC*, <http://ohr.dc.gov/page/safe-bathrooms-dc>.

79. Raven Usher, *North American Lexicon of Transgender Terms* (2006).

These solutions fill the gaps left by the slug-like pace of the bureaucratic process attempting to catch up to this century. #IllGoWithYou is a grassroots campaign focused on facilitating trips to the restroom that are safer and less terrifying for trans people. In this campaign, trans allies go into bathrooms and other spaces with trans people who may be afraid or concerned about their safety.<sup>80</sup> People who are willing to go with trans people into gendered restrooms and gendered spaces can obtain buttons and lanyards that say “I’ll Go With You” over a design of the trans pride flag—a safe and quick way to identify any ally in a public space. “Our pledge, the pledge of #IllGoWithYou, is that those of us with passing privilege offer to be a bathroom buddy, a watch-your-back person, a stand-up-for-you person.”<sup>81</sup>

### C. Expansive and Inclusive Labeling

In the same vein as the #IllGoWithYou campaign, institutions and buildings that aim to be trans-friendly and accessible can install signs that clearly label restrooms as trans-inclusive. The image below is an example of an explicitly inclusive sign:



Signs like the one in the image above leave little room for interpretation and explicitly state that trans people and gender-non-conforming people are welcome to use that specific restroom.<sup>82</sup> This sign in partic-

80. #IllGoWithYou: An Ally Project, <http://www.illgowithyou.org/> (last updated Oct. 1, 2016, 11:09 AM).

81. *Id.*

82. Found restroom sign in the Montrose Center, an LGBT center in Houston, TX, <http://www.montrosecenter.org/hub/rentals/about-our-space/>.

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ular also clearly indicates that the restroom it describes does not contain a urinal, alleviating any sort of confusion that could occur. Signs like these can work to show trans people that they are in a safe environment. For other signs that are for single stalled, gender-neutral restrooms, the image<sup>83</sup> below is a very good example of a sign that would convey that trans people are welcome in that restroom:



The sign above utilizes the trans symbol to indicate its inclusion of trans individuals.

#### D. Safe2Pee/Refuge Restrooms

Going to the restroom in a public space as a trans person has long been a harrowing experience, well before HB2 was even a thought. In order to help trans people find safe restrooms, “a collective of like-minded activists” created safe2pee.org to offer “resources to find safe places to pee and activism to promote gender free public restrooms.”<sup>84</sup> These activists created a “new dynamic gender neutral bathroom resource” in the form of a phone app.<sup>85</sup> Similar to the Green Book<sup>86</sup> that was used from the 1930s to the 1960s to allow Black people to travel safely and to know which hotels and restaurants were safe to visit, Refuge Restrooms<sup>87</sup> (formerly known as Safe2Pee) is a guide app that shows the location of safe restrooms all

83. Dayna Evans, *California School to Add Gender-Neutral Bathrooms*, NY MAGAZINE (Sep. 4, 2015), <http://nymag.com/thecut/2015/09/california-school-goes-gender-neutral.html>.

84. Safe2Pee, <https://safe2pee.wordpress.com/about/>.

85. *Id.*

86. *The Negro Motorist Green Book, 1949*, available at [http://www.autolife.umd.umich.edu/Race/R\\_Casestudy/Negro\\_motorist\\_green\\_bk.htm](http://www.autolife.umd.umich.edu/Race/R_Casestudy/Negro_motorist_green_bk.htm) (last visited Nov. 26, 2016).

87. Emma O'Connor, *Finding A Public Bathroom Just Got Much Easier for Trans People*, BUZZFEED: LGBT (Mar. 6, 2015, 6:38 PM), [https://www.buzzfeed.com/emaconnor/everyone-need-to-pee-safe?utm\\_term=.XeGveQBk#.oaDRpMNE](https://www.buzzfeed.com/emaconnor/everyone-need-to-pee-safe?utm_term=.XeGveQBk#.oaDRpMNE).

over the world for trans people to utilize.<sup>88</sup> This app allows trans people to safely navigate the world around them.

#### E. Social Media Campaign

Another way to prevent bills like HB2 from being enacted and garner wider support for the aforementioned grassroots campaigns and tactics is by changing hearts and minds. Social media campaigns that share narratives of ‘trans people, by trans people’ could work to show cisgender people who are otherwise unfamiliar and/or afraid who trans people are and can be. However, only people who want to be educated and who want to understand would be receptive to this solution. Those that are adamant in their hatred would likely not be swayed by videos of trans people living their lives or sharing stories that highlight interests that are similar to their cisgender counterparts.

### V. IMPLEMENTATION OF NEW APPROACHES AND HOW TO MEASURE PROGRESS AND SUCCESS

Due to the very nature of grassroots campaigns and tactics, they are not easily tracked or reduced to numerical statistics to measure its “success.” Municipal laws, however, are easier to quantify.

The gender-neutral bathroom ordinances can be implemented through the regular processes that are specific to different municipalities. A way to convince/motivate those municipalities that want to be perceived as LGBTQ-friendly to implement these ordinances is through the Human Rights Campaign’s Municipal Equality Index (“MEI”). The MEI is a rating tool that “examines how inclusive municipal laws, policies, and services are of the LGBTQ people who live and work there.”<sup>89</sup> While the MEI does not rate every single city and municipality in the US, a large sampling of cities and municipalities from each state gets a scorecard that breaks down and rates the laws and protections for LGBTQ citizens, or lack thereof.<sup>90</sup> In fact, the MEI was designed to account for cities that are LGBTQ inclusive despite residing in a state with no statewide LGBTQ non-discrimination provision. It even includes an additional section where cities can earn

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88. Refuge Restrooms, <http://www.refugerestrooms.org/about>.

89. Human Rights Campaign, *2016 Municipal Equality Index*, <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/MEI-2016-Final-Online.pdf>.

90. Human Rights Campaign, *Municipal Equality Index* (2015), <http://www.hrc.org/resources/mei-2015-see-your-citys-score>.

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bonus points for being “pro-equality despite restrictive state laws.”<sup>91</sup> The current scorecard already includes a section for non-discrimination laws in public accommodations. A section could be added for the gender-neutral bathroom provision for municipalities in states that do not have LGBTQ non-discrimination provisions.

Perhaps the greatest measures of success would be the complete elimination of bills like HB2. The Equality Act would make it explicitly illegal for these bathroom bills to exist. However, as previously mentioned in Section III, these are fairly lofty goals which have become that much further from reach with the recent election of Donald Trump.

Additionally, because expecting every single person in this country to immediately change to love and accept trans people with open arms is as unrealistic as it is naïve, enactment of the Equality Act would also be in an ineffective way to measure success. Getting everyone to suddenly love trans people should not be the goal anyway. Oppressed people do not fight and struggle with the goal of convincing their oppressors and the people complicit in their oppression to love them; they fight and struggle to gain access to the rights that they have been denied into be treated respectfully. Thus, the overarching goal/measure of success is less ‘Kumbaya-like’ and more about ensuring that trans people have access to the fundamental things they need to not only survive in this world, but to *thrive*. Things like access to health-care, insurance, jobs and job security, housing and housing security are more tangible, realistic, and important goals. I think ensuring that trans people have access to the aforementioned fundamental rights while also ensuring that no politician can take away those rights is far more important than some idealistic notion of living in harmony. We need to make sure that trans people have access to the tools that will guarantee their survival.

## CONCLUSION

A government that functions to continue to oppress certain groups of people cannot be the tool for the liberation of those groups. While I do not think that true trans liberation can come from anything gained through a democratic process or through any means via our current government, I do think that having laws in place and having

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91. *Id.*

government officials understand the need for these laws is a very important step in the right direction.

It is extremely difficult to remain hopeful in light of the recent election. My life has become preoccupied with getting through almost daily panic attacks and trying to make sure that I get out of bed every morning. There is nothing harder than waking up every day knowing that the world hates you and people like you. In my opinion, America confirmed this hatred with the election of a Cheeto-colored demagogue. It is especially difficult to remain hopeful of the future knowing that the next Vice President would rather have a dead child than a child like me.<sup>92</sup> However, I have been able to take small comfort by repeating a part of a poem: “Do not go gentle into that good night . . . Rage, rage against the dying of the light.”<sup>93</sup>

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92. See Sean Mandell, *Here's a Recap of Mike Pence's Attacks on LGBT Rights Just in Time for Tonight's VP Debate*, TOWLEROAD (Oct. 4, 2016), <https://www.towleroad.com/2018/02/mike-pence-lgbt/>.

93. DYLAN THOMAS, *Do Not Go Gentle Into That Good Night*, in THE POEMS OF DYLAN THOMAS (New Directions 1952).



