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LETTER FROM THE EDITOR-IN-CHIEF

"*Is this not the fast that I have chosen: To loose the bonds of wickedness, to undo the heavy burdens, to let the oppressed go free, and that you break every yoke? Is it not to share your bread with the hungry, and that you bring to your house the poor who are cast out; when you see the naked, that you cover him, and not hide yourself from your own flesh? Then your light shall break forth like the morning, your healing shall spring forth speedily, and your righteousness shall go before you . . . .*"

—*Isaiah* 58:6-8[*]

Dear Reader:

As social engineers, we—the editors of the *Howard Human & Civil Rights Law Review* ("*HCR*")—are called to support the goals of fairness and freedom. These two values work hand in hand to elucidate the margins in which the overlooked and underrepresented are historically hidden. As of the writing of this Letter, federal[1] and state[2] governments are actively dismantling laws and policies that were initially created to promote fairness among those that have been historically mistreated, including women, Black Americans, and immigrants. The new anti-equity laws are restricting freedoms and rights that our parents and grandparents have heretofore enjoyed without worry of retrenchment. Through these changes, it is evident that fairness and freedom are not self-executing, nor do they last forever. Freedom is not free and comes at a high price.

The cost of fairness and freedom is seen in people like Rosa Parks, who was jailed for daring to go against an oppressive system that prioritized white luxury over her American citizenry, simply because she was Black. The cost is seen in people like Martin Luther King Jr., who was murdered for his peaceful activism and advocacy for racial equality, coupled with his fight for fairness, that eventually

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* *Isaiah* 58:6-8 (New King James).

1 Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 21, 2025). This Executive Order is entitled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." Just because the order called diversity, equity, inclusion, and accessibility ("DEIA") initiatives illegal does not mean they are so. Executive Orders serve as directives and guidance only to the executive branch and are, therefore, not federal law, especially when not authorized by Congress. It is the duty of the Court, not the president, to declare what the law is. *See Judicial Review of Executive Orders*, Fed. Jud. Ctr., https://www.fjc.gov/history/administration/judicial-review-executive-orders (last visited Apr. 7, 2025) (explaining that "[c]ourts may strike down executive orders" for lack of authority or unconstitutionality); *see also* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Indeed, the United States is a "government of laws, not of men." *Id.* at 163.

2 *See generally* H.R. 7, 124th Leg., Reg. Sess. (Fla. 2022) (prohibiting schools and businesses from teaching or training their students or employees about the historic injustices of people of color, the bill itself being called the Stop Wrongs to Our Kids and Employees Act or, more colloquially, the Stop WOKE Act). *But see* Honeyfund.com Inc. v. Governor, 94 F.4th 1272, 1283 (11th Cir. 2024) (declaring viewpoint discrimination "inherent in the design and structure" of the Stop WOKE Act and that the Act is therefore unconstitutional in that it violates the First Amendment freedom of speech).

led to the passage of the Voting Rights Act of 1964. The cost is seen in jurists like Thurgood Marshall, an alumnus of this Law School,[3] who spent years in the dissent, advocating for freedom and fairness as an Associate Justice of the Supreme Court.[4] He declared it his duty—and ours, too—to dissent when iniquity and oppression become the loudest voices in the room.[5] These architects of justice set the standard and provided the blueprint and the banner that this new generation of legal scholars is unfurling, in hopes of preserving and reinforcing these ever-important values of fairness and freedom.

Today, the cost of fairness and freedom is seen by the consequences and punishments that the federal government is levying on civilians, firms, political officials, and other entities that do not support its policies—both nationally[6] and internationally.[7] At a time when our commitment to fairness and freedom—and, therefore, human and civil rights—is challenged, we at *HCR* remember our duty to actively advocate for the rule of law and the values that have led to a fairer society. Lawyers are ethically bound to uphold the rule of law with integrity and fairness and "should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."[8] However, legal professionals are at a crossroads. Do we choose acquiescence to the unravelling of freedoms, even against our better judgment, or do we trouble the waters of injustice and advocate for equity and freedom, even when threatened by powerful people in high places? In keeping with our historic mission to be at the forefront of legal scholarship in the areas of human and civil rights and to encourage reflections on the most relevant causes of injustice through the law, *HCR* will not be silent. Indeed, "[a] time comes when silence is betrayal."[9] Now is that time.

HCR is honored to have the solemn opportunity to accept the charge to promulgate and proliferate the ideals of fairness and freedom across the globe, and with this Ninth Volume, we have done exactly that. Our Volume begins its international quest for fairness and freedom with "Recognizing all Victims of Racial and Gender Apartheid in the Draft Crimes Against Humanity Treaty," authored by Lisa Davis, Professor of Law at the City University of New York ("CUNY") School of Law, alongside Kirby Anwar, Senior Fellow at the CUNY School of Law Human Rights & Gender Justice Clinic. In their article, Davis and Anwar address and analyze the systematic oppression of Palestinians, Rohingyas, and Afghan women, girls, and

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3 Thurgood Marshall graduated first in his class from Howard University School of Law in 1933. *See* Cedric Mobley, *Howard's Extraordinary Legacy of Civic Leadership*, The Dig (Nov. 1, 2024), https://thedig.howard.edu/all-stories/howards-extraordinary-legacy-civic-leadership.

4 *Thurgood Marshall*, Nat'l Park Serv., https://www.nps.gov/features/malu/feat0002/wof/thurgood_marshall.htm#:~:text=In%20the%20conservative%20era%20of,violated%20human%20and%20civil%20rights (last visited Apr. 8, 2025).

5 Thurgood Marshall, Liberty Medal Acceptance Speech at Independence Hall (July 4, 1992) (transcript available at https://constitutioncenter.org/liberty-medal/recipients/thurgoodmarshall [https://perma.cc/D4AB-29Q5]).

6 *See, e.g.*, Exec. Order No. 14,244, 90 Fed. Reg. 13,685 (Mar. 21, 2025).

7 *Cf.* Exec. Order No. 14,203, 90 Fed. Reg. 9369 (Feb. 6, 2025) (imposing sanctions on the International Criminal Court).

8 *Model Rules of Professional Conduct: Preamble & Scope*, Am. Bar. Ass'n, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/#:~:text=A%20lawyer%20should%20use%20the,other%20lawyers%20and%20public%20officials (last visited Apr. 9, 2025).

9 Martin Luther King Jr., Beyond Vietnam: A Time to Break Silence (Apr. 4, 1967) (transcript available at https://www2.hawaii.edu/~freeman/courses/phil100/17.%20MLK%20Beyond%20Vietnam.pdf).

LGBTQI+ persons, advocating that these people be included within the definition of "victim group" in a new draft Crimes Against Humanity Treaty. Volume 9 continues its transnational sojourn with "International Law and the Rights to Freedom of Peaceful Assembly and of Association in Africa," by John Mukum Mbaku, a Brady Presidential Distinguished Professor of Economics and John S. Hinckley Fellow at Weber State University. In his work, Dr. Mbaku discusses the eminence of the right to peaceful assembly and explores the ways in which African nations are gradually developing a robust jurisprudence on the rights to freedom of peaceful assembly and of association. These foregoing masterpieces scrutinize the ongoing oppression present in modern international conflict and propose solutions based in fairness and freedom.

With the next two articles, Volume 9 swivels on its domestic axis to investigate and proffer ways to remedy the historic oppression of Black Americans and women in the United States. In "Prepare, Repair, Defend: A DIY Toolkit for Reparations 2.0," Professor Harold McDougall at Howard University School of Law reveals his curriculum for high school students that teaches them how to protect their legal rights in the face of racially-charged challenges, including hate crimes; police misconduct; discrimination in education, employment, and housing; gentrification; disproportionate exposure of Black communities to environmental hazards; and the protection of Black peoples' health outcomes in mental and maternal health as well as primary care. Additionally, Mary B. Trevor, an Emerita Professor of Law Mitchell Hamline School of Law, and Cynthia Bemis Abrams, the creator and host of the podcast *Advanced TV Herstory*, offer an interdisciplinary lens to Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 in their article, entitled "Powers Plays: Women and Progressive Television Battle Quid Pro Quo Sexual Harassment in the Twentieth Century." In their work, Trevor and Abrams elucidate how late twentieth-century television served a role in changing community attitudes toward sexual harassment at the same time that contemporary legislation and courts offered considerable pushback.

To accompany the aforementioned articles, Volume 9 invites the important perspectives and voices of law students who confront and address modern day threats to equity and freedom in their Student Notes. In his Note, entitled "Shades of Equity: The Students for Fair Admissions Cases and HBCU Financial Futures," Nas Lawal, 2025 Juris Doctorate Candidate and Lead Articles Editor of Volume 43 of the *Minnesota Journal of Law & Inequality* at University of Minnesota Law School, analyzes the effect that the Supreme Court decision in the Students for Fair Admissions Cases will have on the financial support of Historically Black Colleges and Universities ("HBCUs"). The next Student Note focuses on the importance of protecting the freedom of American children. Here, Onyinye Okeke, one of *HCR*'s very own staff editors and a 2025 Juris Doctor Candidate of Howard University School of Law, in her work, entitled "All Work and No Play: The History Behind U.S. Child Labor Regulations and the Problem with State Legislation Dialing Back Child Labor Protections," inspects the history of federal child labor laws and juxtaposes those with contemporary state-level child labor laws that violate federal employment law. Volume 9 concludes with a Note from our Pauli Murray Prize Winner, Warrington Sebree, an attorney and a 2024 graduate of Howard University School of Law. In his work, entitled "You *Might* Have to Lie to Kick it: Rap Lyrics at Trial and the Limitations on Freedom of Expression," Sebree celebrates Black

music and the Black experience while explaining that the societal bias and historical criminalization of Black people calls for a ban on using rap lyrics at trial.

Volume 9 stands on the strong shoulders of every previous volume and our predecessor publications: The *Human Rights & Globalization Law Review* (2007-2016) and the *Howard Scroll: The Social Justice Review* (1992-2006).[10] We extend our deepest gratitude to Dean Roger A. Fairfax, Jr., and our faculty advisors for this Volume: Professor Jasbir (Jesse) Bawa; Professor Tuneen Chisolm; and Professor Darin Johnson. We also thank the entire Howard University School of Law community, including faculty, staff, and students, for making this year engaging, even while dealing with the solemn issues of our time.

As Editor-in-Chief, it has been the honor of my law school experience to lead this publication but, even more so, to work alongside my incredible executive board members that have worked tirelessly to advance the goals of this publication and to advocate for human and civil rights, both inside and outside of the hallowed halls of Howard. Throughout the entirety of the editing process, and even months before, Managing Editor Tomara Dorsey has managed this publication with grace, grit, and determination, all while flawlessly balancing her own academic excellence. In her role, her integrity has been unmatched, and she has continued to advocate for truth and justice in every space she enters. Her leadership has risen our publication to its highest heights. To Managing Editor Dorsey, I send kudos along with my deepest appreciation, love, and respect for raising the bar of this publication.

Likewise, Executive Notes & Comments Editor Cyera Marion has left her indelible mark on *HCR* through her authenticity, her fairness, and her sense of care for those that are oppressed. From sunup to sundown, Cyera has assisted Volume 9 editors in being their best selves, both in their writing as legal scholars and in their lives as people. Cyera's presence on *HCR* has made everyone feel safer, more loved, and more empowered to fight for equity and freedom. Cyera has illuminated this year of *HCR*, even amid the dark truths that the world now faces.

This year, *HCR* hosted our tenth annual C. Clyde Ferguson Jr. Symposium, entitled *The Unseen Hand: AI's Quiet Control over Bias, Ballots, the Blackboard, and Beyond*, focusing on the critical intersections between artificial intelligence ("AI") and civil rights. We explored both of these pressing topics through three dynamic panels, each addressing a unique aspect of AI's impact on society and justice: (1) Bias and Social Justice; (2) Election Security and Voter Suppression; and (3) The Ethical Use of AI in Education and the Workforce. This Symposium was the brainchild of Executive Solicitations & Submissions Editor Prominence Akubuo-Onwuemeka, whose diligent work resulted in an informative, dynamic, and invigorating Symposium experience that was unparalleled. Prominence's contribution to *HCR* has left us more determined in our quest to find creative ways to upend oppression in all its forms.

To our Volume 9 editors, your edits were integral to this Volume. I appreciate all of your hard work and your dedication to truth and justice. This is your Volume. To our Volume 9 authors, this, too, is your Volume. We appreciate you sharing your ideas with us. We now share them with the world.

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10 The latter publication was referred to as the *Howard Scroll: The Social Justice Law Review* from 1995 to 2006.

This Volume is dedicated to the modern-day freedom fighters. The justice workers. The bondage breakers. Those who speak up for fairness and freedom and speak out against oppression in any way that it appears. We hope that you are inspired by our message and encouraged by the contents of this Volume.

In Truth and Service,

SAMUEL L. RHYMES
Editor-in-Chief
Volume IX, 2024-2025
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Recognizing All Victims of Racial and Gender Apartheid in the Draft Crimes Against Humanity Treaty

Lisa Davis[1] and Kirby Anwar[2]

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1. Senior Associate Dean of Clinical Programs and Professor of Law; Co-Director of the Human Rights and Gender Justice (HRGJ) Clinic at the City University of New York (CUNY) School of Law; Special Adviser on Gender and Other Discriminatory Crimes, International Criminal Court (ICC); former Special Adviser on Gender Persecution, ICC. Both authors extend their sincere gratitude to Professors Ibrahim Abadir, Victor Kattan, Carola Lingaas and Valerie Oosterveld, and international criminal law attorneys Maxine Marcus and Kathleen Roberts for their review, and to Shelby Logan for her research assistance. Authors also extend a heartfelt thanks to Professor William Schabas for his review of this Article.

2. Senior Legal Fellow and human rights attorney at the HRGJ Clinic at CUNY School of Law.

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INTRODUCTION

Apartheid in South Africa was "the very embodiment of injustice,"[3] and its harmful effects continue to reverberate in the form of entrenched social and economic inequality.[4] A system of institutionalized racist oppression and domination, apartheid is one of modern history's most egregious crimes. Grounded in a racist settler colonial project and enforced through torture, killing, and other violence, apartheid in South Africa stripped people of their personal identities. It systematically denied them human rights, including to self-determination; political participation; freedom of movement, expression and peaceful assembly; freedom from discrimination; and basic economic, social and cultural rights.[5]

3. NELSON MANDELA, LONG WALK TO FREEDOM 206 (1994).
4. *See generally* David Francis & Edward Webster, *Poverty and Inequality in South Africa: critical reflections*, 36 DEV. IN S. AFR. 6, 788-802 (2019).
5. *See generally* NANCY L. CLARK & WILLIAM H. WORGER, SOUTH AFRICA: THE RISE AND FALL OF APARTHEID (2022).

Apartheid's roots interlace with those of the Nazis in Germany, and there was significant cross-pollination between the two regimes.[6] Nazi policies were driven by a racist ideology that sought to isolate, dehumanize, and ultimately, exterminate the Jewish population.[7] South African apartheid policies and practices are frequently analogized to those under the Nazis.[8] The term "apartheid," meaning "apartness" in Afrikaans, encapsulates its essence in South Africa: a deliberate, systematic effort to separate and oppress racialized, non-white populations in favor of white minority rule.[9] While apartheid officially ended with Nelson Mandela's election in 1994,[10] the anti-apartheid movement's legacy continues to shape contemporary discussions about racism, inequality, and justice, including the development and understanding of international criminal and human rights law.[11]

Advocates and experts have alerted the world to apartheid conditions in contemporary contexts, including against Palestinians[12] and Rohingyas,[13] and have called for gender apartheid codification in response to extreme rights violations against women, girls and LGBTQI+[14] persons in Afghanistan.[15] Each of these groups faces systematic and

6. Sasha Polakow-Suransky, The Unspoken Alliance: Israel's Secret Relationship with Apartheid South Africa 15-16 (2010) [hereinafter Polakow-Suransky, The Unspoken Alliance]; Victor Kattan & Gerhard Kemp, *Apartheid as a form of genocide: Reflections on South Africa v Israel*, EJIL:Talk! (Jan. 25, 2024), https://www.ejiltalk.org/apartheid-as-a-form-of-genocide-reflections-on-south-africa-v-israel/.

7. Richard D, Heideman, *Legalizing Hate: The Significance of the Nuremburg Laws and The Post-War Nuremburg Trials*, 39 Loy. L.A. Int'l & Compar. L. Rev. 5, 5-6 (2017).

8. Polakow-Suransky, The Unspoken Alliance, *supra* note 6, at 15-16.

9. Robert Ross, A Concise History of South Africa 123, 126 (2d ed. 2008).

10. *Id.* at 206-13.

11. Despite this impact on international law, it is important to recognize that there has yet to be criminal accountability for the crime against humanity of apartheid in Southern Africa—an accountability gap largely absent from international legal critique or analysis. *See generally* Christopher Gevers, *Prosecuting the Crime of Humanity of Apartheid: Never, Again*, Afr. Yearbook on Int'l Humanitarian L. (2018) [hereinafter Gevers].

12. *E.g.,* John Dugard & John Reynolds, *Apartheid, International Law and the Occupied Palestinian Territory*, 24 Eur. J. Int'l L. 867, 867-68 (2013) [hereinafter Dugard & Reynolds]; Michael Lynk, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, ¶¶ 52-56, U.N. Doc. A/HRC/49/87 (Aug. 12, 2022) [hereinafter Lynk].

13. *E.g.*, U.N. Human Rights Council, *Report of the detailed findings of the Independent Int'l Fact-Finding Mission on Myanmar*, ¶¶ 1503-07, 1511, U.N. Doc. A/HRC/39/CRP.2 (Sept. 17, 2018) [hereinafter IIFFMM Report on Myanmar].

14. The acronym LGBTQI+, understood to stand for lesbian, gay, bisexual, transgender, queer, intersex and other identities, includes a broad range of persons; however, it is not exhaustive nor the universally standard acronym. Note that women and girls can also be LGBTQI+ persons.

15. *E.g.*, Working Group on discrimination against women and girls, *Draft Articles on prevention and punishment of crimes against humanity: Input from the Working Group on discrimination against women and girls*, ¶ 23, U.N. Doc. A/HRC/WG.11/40/1 (Feb. 19, 2024) [hereinafter Working Group on discrimination against women and girls report]; Richard Bennett (Special Rapporteur on the situation of human rights in Afghanistan), *Situation of human rights in Afghanistan*, ¶¶ 19, 53-55, 121(g)(iii), U.N. Doc. A/79/330 (Aug. 30, 2024) [hereinafter Bennett].

pervasive discrimination, segregation, and oppression.[16] Experts' recognition of these systems as apartheid has not led to criminal accountability, however, in part due to lack of political will. There are also shortcomings in the codification of apartheid as a crime under international law.

Two somewhat different definitions of racial apartheid were codified under international criminal law:[17] first in the Apartheid Convention[18] in 1973, and then in the 2002 Rome Statute.[19] Recently, United Nations (U.N.) entities have proposed two definitions of gender apartheid: one that utilizes the Rome Statute definition of racial apartheid (exchanging "race" for "gender"),[20] and a second that would modernize the definition of apartheid.[21]

The Apartheid Convention defines racial apartheid as a crime against humanity, consisting of certain "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them."[22] A significant facet of the Apartheid Convention was its affirmation that crimes against humanity can occur in peacetime, as opposed to just during war, which had been the view at Nuremburg.[23] Credit for this progressive development lies with the Global South states' delegates who drove the Apartheid Convention and led efforts

16. Lynk, *supra* note 12, ¶¶ 52-56; IIFFM Report on Myanmar, *supra* note 13, ¶¶ 1503-07, 1511; Working Group on discrimination against women and girls report, *supra* note 15, ¶ 23.

17. *See* discussion *infra* Section C.2. *"Racial groups" under the Apartheid Convention and the Rome Statute* for a discussion on the differences between these definitions and how they came about.

18. G.A. Res. 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid (Nov. 30, 1973) [hereinafter Apartheid Convention].

19. Rome Statute of the International Criminal Court [ICC], *opened for signature* July 1, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (entered into force July 1, 2002).

20. Special Rapporteur on the situation of human rights in Afghanistan & the Working Group on discrimination against women and girls, *Situation of women and girls in Afghanistan*, ¶ 95, U.N. Doc. A/HRC/53/21 (June 15, 2023) [hereinafter Special Rapporteur on Afghanistan and the Working Group on discrimination against women and girls joint report].

21. Working Group on discrimination against women and girls report, *supra* note 15, ¶¶ 3, 22.

22. Apartheid Convention, *supra* note 18, art. II.

23. Ronald C. Slye, *Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission*, 20 MICH. J. INT'L L. 257, 286-87 (1999) [hereinafter Slye, *Apartheid as a Crime Against Humanity*]. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which has only 56 States Parties, also recognizes crimes against humanity in peacetime, including inhuman acts resulting from the policy of apartheid. U.N. Treaty Collection, Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, Status as at: 26-02-2025 10:16:01 EDT, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-6&chapter=4&clang=_en; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, art. I(b), Nov. 26, 1968, 754 U.N.T.S. 73. For more on western governments' refusal to sign this treaty and to ensure accountability for apartheid, see generally Gevers, *supra* note 11.

against apartheid in the U.N.[24] The Rome Statute, which created the International Criminal Court ("ICC"), also codified the crime against humanity of apartheid when it went into force in 2002, and modified the definition. The Rome Statute defines apartheid as, "inhumane acts of a character similar to [crimes against humanity] committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."[25]

While the codification of apartheid as a crime against humanity was a vital achievement, the Apartheid Convention's and Rome Statute's definitions are limiting in a couple of ways. First, because they arose from the struggle to end racist practices of Southern African apartheid,[26] they solely address racist regimes of oppression. They do not address similar regimes that oppress based on any of the additional categories found under other Rome Statute crimes that include discrimination, like the additional three categories under genocide[27] and the additional four under persecution.[28]

Secondly, international criminal law jurisprudence has interpreted "racial group" as requiring victims to possess at least some "objective" (and largely undisclosed) characteristics, counter to the broad understanding of race as a social construct.[29] This article analyzes this jurisprudence as well as the *travaux préparatoires*[30] for, *inter alia*, the Rome Statute, the Genocide Convention, and the Apartheid Convention, and explains how this outdated requirement emerged and what its

24. As formerly colonized states gained a majority at the UN after gaining independence in the 50s and 60s, the General Assembly passed a series of resolutions against apartheid and also passed the Apartheid Convention—distinguishing itself from the UN Security Council, where traditional colonizing governments regularly exercised veto power over resolutions against apartheid. John Reynolds, *Third world approaches to international law and the ghosts of apartheid*, *in* The Challenge of Human Rights: Past, Present and Future 194, 205-08 (David Keane & Yvonne McDermott, eds., 2012).

25. Rome Statute, *supra* note 19, art. 7(2)(h).

26. The Apartheid Convention condemns as a "crime of apartheid" the "policies and practices of racial segregation and discrimination as practised in southern Africa." Apartheid Convention, *supra* note 18, art. II. This stemmed from recognition, including in U.N. resolutions, of racist policies in "[t]erritories under Portuguese administration and also in South West Africa and Southern Rhodesia," regions now forming Namibia, South Africa, Zimbabwe, Mozambique, Angola, and other countries. *See, e.g.*, Comm'n on Human Rights, *Report on the Twenty-Second Session*, para 163, U.N. Doc. E/4184, E/CN.4/916 (1966).

27. The Rome Statute prohibits genocide against national, ethnical, racial, or religious groups. Rome Statute, *supra* note 19, art. 6.

28. The Rome Statute prohibits persecution on "political, racial, national, ethnic, cultural, religious, gender … or other grounds." *Id.*, art. 7(1)(h).

29. Carola Lingaas, The Concept of Race in International Criminal Law 32-33 (2021) [hereinafter Lingaas, Concept of Race].

30. *Travaux préparatoires*, translated from French as "preparatory works," refers to "[m]aterials used in preparing the ultimate form of an agreement or statute, and esp. of an international treaty." Bryan A. Garner, Ed. in Chief, Black's Law Dictionary, 9th ed., 1638 (2022).

consequences are. This article also analyzes the subjective approach to interpreting victims' "groups" under international criminal law, which is based on the perpetrator's perception. It argues that this approach better aligns with contemporary understandings and international human rights law's recognition of categories like "race" and "gender" as social constructs.[31]

A new draft treaty on crimes against humanity (draft CAH treaty),[32] which states will negotiate and finalize over a planned four years,[33] presents an opportunity to strengthen approaches to preventing and prosecuting apartheid—a crime for which no one has yet been held accountable, despite its decades-long recognition as a crime under international law. The draft CAH treaty's criminal provisions, including apartheid, are drawn from the Rome Statute. The draft treaty offers a chance to address impunity for all crimes against humanity and to ensure recognition for victims[34] under international criminal law,

31. Valerie Oosterveld, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 67–70 (2005) [hereinafter Oosterveld, *The Definition of 'Gender'*] (discussing "gender" as a social construct under human rights law); Lisa Davis, *Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTI Persons*, 24 WM. & MARY J. WOMEN & L. 513, 537-40 (2018) [hereinafter Davis, *Reimagining Justice*] (explaining that delegates drafting the Rome Statute favored the human rights law understanding of "gender" as a social construction); LINGAAS, CONCEPT OF RACE, *supra* note 29, at 31-35 (explaining that contemporary understandings of race and ethnicity define these terms as social constructs); The International Convention on the Elimination of All Forms of Racial Discrimination does not define race, and instead indicates its social construction by defining racial discrimination to include that based on "race, colour, descent, or national or ethnic origin." International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(1), Mar. 7, 1966, 660 U.N.T.S 195 [hereinafter ICERD]. The Committee on the Elimination of Racial Discrimination (CERD) repeatedly affirms this construction through its General Recommendations that clarify the inclusion of numerous groups not named in the treaty as protected from racial discrimination. Gay McDougall, Introductory Note: International Convention on the Elimination of All Forms of Racial Discrimination, U.N. AUDIOVISUAL LIBR. OF INT'L L. (2021) [hereinafter McDougall, Introductory Note], https://legal.un.org/avl/ha/cerd/cerd.html. Further supporting the idea of the social construction of race, their recommendations include these groups without naming the categories they fall under. *See, e.g.*, Rep. of the CERD, Gen. Recommendation on the rights of indigenous peoples, U.N. Doc. A/52/18, at 122-24 (1997); CERD, Gen. Recommendation No. 32, U.N. Doc. CERD/C/GC/32 (2009). In 1947, a number of U.N. delegates discussing the drafting of the Universal Declaration of Human Rights remarked on the fact that "race" lacked a scientific basis and that drafters should add "colour" in the list of protected categories, as it may not be understood to be part of race. UNHCR, Sub-com'n on the Prevention of Discrimination and the Protection of Minorities, *Summary Record of the Fourth Meeting*, ¶ 2, U.N. Doc. E/CN.4/Sub.2/SR.4 (Nov. 26, 1947). Lingaas observes that these statements indicate, as early as 1947, a questioning of the scientific foundation and definition of "race." LINGAAS, CONCEPT OF RACE, *supra* note 29, at 157.

32. Int'l L. Comm'n, Rep. on the Work of its Seventy-First Session, U.N. Doc. A/74/10, at 11 (2019) [hereinafter Draft CAH Treaty], https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf.

33. U.N.G.A. Sixth Comm., *U.N. Conference of Plenipotentiaries on Prevention and Punishment of Crimes Against Humanity*, U.N. Doc. A/C.6/79/L.2/Rev.1 (Nov. 15, 2024). Adopted by the U.N.G.A. on Dec. 4, 2024, without a vote (U.N. Doc. A/79/PV.47) under item 168. 79/129. G.A. Res. 79/122 (Dec. 4, 2024).

34. This article uses both terms "victims" and "survivors," recognizing that some persons who have endured harms identify with the term "survivor" while others prefer the term "victim."

including through unique provisions on victim reparations and state party cooperation in prevention, investigation, and prosecution.[35]

Calls for accountability for current manifestations of apartheid persist. Advocates and experts have for decades called the abusive conditions Palestinians suffer a form of apartheid, for example.[36] Additionally, robust civil society support for the codification of "gender apartheid" in the new draft CAH treaty recently emerged largely in response to the Taliban's grave and systematic rights deprivations against women, girls, and LGBTQI+ people in Afghanistan.[37] Codifying gender apartheid as a crime against humanity in the treaty would ensure its availability as a tool to hold accountable future perpetrators who maintain such regimes. It would also send a strong international political message condemning the Taliban's oppressive regime.

A refresh of the legal language of apartheid in the draft CAH treaty requires not only considering additional protected categories but also revisiting the interpretation of "groups." The two definitions of gender apartheid proposed by U.N. entities present different approaches to the term. In 2023, the U.N. Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls, in a report focused on the Taliban's deprivations of women and girls' rights, proposed a gender apartheid definition that exchanges "race" for "gender" in the Rome Statute definition. The report proposes gender apartheid be understood "as inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination by one gender group over any other gender group or groups and committed with the intention of maintaining that regime."[38]

In 2024, the Working Group on discrimination against women and girls (Working Group) produced a report specifically for CAH treaty drafters, with recommendations regarding inclusion of gender apartheid in the draft treaty.[39] This time, they grappled more directly with

35. Draft CAH Treaty, *supra* note 32, arts. 4, 9, 12-14.

36. Edward W. Said, *How do you Spell Apartheid? O-s-l-o*, Ha'aretz (Oct. 11, 1998), https://www.edwardsaid.org/articles/how-do-you-spell-apartheid-o-s-l-o/; Rania Muhareb et al., Israeli Apartheid: Tool of Zionist Settler Colonialism 2-4 (2022), https://www.alhaq.org/cached_uploads/download/2022/12/22/israeli-apartheid-web-final-l-page-view-1671712165.pdf; Dugard & Reynolds, *supra* note 12, at 889.

37. *See, e.g.*, #EndGenderApartheid in Afghanistan, https://endgenderapartheidinafghanistan.wordpress.com/our-partners/; Bennett, *supra* note 15, ¶ 19.
U.N.G.A. Sixth Comm., Rep. on the workshop on a convention on the prevention and punishment of crimes against humanity, ¶ 17, U.N. Doc. A/C.6/78/INF/3 (Mar. 21, 2024). Afghan feminists also used the term "gender apartheid" to describe the Taliban's first reign in the 1990s. D. Lyn Hunter, *Gender Apartheid Under Afghanistan's Taliban*, Berkeleyan (Mar. 17, 1999), https://newsarchive.berkeley.edu/news/berkeleyan/1999/0317/taliban.html.

38. Special Rapporteur on Afghanistan and the Working Group on discrimination against women and girls joint report, *supra* note 20, ¶ 95.

39. Working Group on discrimination against women and girls report, *supra* note 15, ¶¶ 3, 9.

the problematic nature of apartheid's definition. The Working Group proposed the treaty incorporate a definition of gender apartheid that "employs consistent phrasing to that used by international legal bodies to outline gender-based crimes, such as in the policy of the Office of the Prosecutor of International Criminal Court on the crime of gender persecution."[40] They additionally called on the treaty drafters to ensure the definition "incorporates the human rights component of discrimination in such a way that is consistent with the legal context and framework."[41] To this end, the Working Group proposed a modernized definition of apartheid, namely "inhumane acts … committed in the context of an institutionalized regime of systematic discrimination, oppression and domination by one group over another group or groups, *based on gender,* and committed with the intention of maintaining that regime."[42] As explained in this article, the use of "based on gender" is consistent with the understanding of gender-based crimes in the International Criminal Court's Office of the Prosecutor's (OTP) policy on gender persecution and its grounding in the human rights legal framework.[43] This is because it reflects the social construction of "gender" as recognized by the gender persecution policy,[44] as well as the OTP's policy on gender-based crimes.[45]

The Working Group's 2024 definition thus offers a way for CAH treaty drafters to ensure an inclusive legal understanding of apartheid and its victims that reflects contemporary international human rights law. Treaty drafters should be cognizant of the need to clearly indicate a contemporary legal understanding of "group" under apartheid. This is especially key as the proposal to add the category "gender" to this provision[46] is considered. It further boosts the importance of ensuring the definition of apartheid includes all its victims. At stake is whether LGBTQI+ people will be recognized as victims if gender apartheid is

40. *Id.*

41. *Id.*

42. *Id*. (emphasis added).

43. "Gender refers to sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviours, activities and attributes. As a social construct, gender varies within societies and from society to society and can change over time." The Office of the Prosecutor [OTP], INT'L CRIM. CT., *Policy on the Crime of Gender Persecution*, 3 (Dec. 2022) [hereinafter OTP, Policy on the Crime of Gender Persecution], https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf. The Policy notes that this "understanding of gender is in accordance with article 21 of the Statute." *Id.* Article 21 of the Rome Statute requires the application and interpretation of its provisions be "consistent with internationally recognized human rights." Rome Statute, *supra* note 19, art. 21(3).

44. OTP, Policy on the Crime of Gender Persecution, *supra* note 43, at 3.

45. OTP, INT'L CRIM. CT., *Policy on Gender-Based Crimes*, ¶¶ 16-17 (Dec. 2023), https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf.

46. *See generally* Karima Bennoune, *The International Obligation to Counter Gender Apartheid in Afghanistan*, 54 COLUM. HUM. RTS L. REV. 1 (2022).

added to the treaty, and whether Palestinians, Rohingyas and others will receive legal status as victims of the crime of racial apartheid, a status recognized by scholars and U.N. experts.[47]

This article focuses on the understanding of "racial group," given the term's inclusion in the draft CAH treaty's apartheid provision and because it has a long history of interpretation under international criminal law. The article also examines and argues for including "gender" under the apartheid provision, in support of the growing movement to do so in the face of the extreme systematic oppression women, girls, and LGBTQI+ individuals face in Afghanistan and other countries.

The authors examine how "groups" are defined and understood under international criminal law; first under the crime of genocide, then under the crime against humanity of persecution. Given the absence of jurisprudence for the crime against humanity of apartheid, this article then examines the *travaux préparatoires* for the Apartheid Convention and the Rome Statute, as well as pertinent reports by U.N. international legal experts to analyze how a court may interpret "racial group" as used in the Apartheid Convention and Rome Statute. These sources indicate that the understanding of groups under apartheid may be construed narrowly, including in the draft CAH treaty, if the current provision, copied from the Rome Statute, remains unchanged. The next section describes what is at stake if "objective" criteria are required for group determination under apartheid.

To definitively avoid the risk of excluding apartheid victims from recognition, the authors propose options for CAH treaty drafters, including: (1) updating the definition of the crime of apartheid so that it reflects a modern understanding of race and gender and includes apartheid victims based on gender; and (2) adding a provision akin to that of Rome Statute Article 21(3) which requires interpretation of law applied under the statute to be consistent with internationally recognized human rights.

In accordance with the definition of gender apartheid recommended by the Working Group on discrimination against women and girls, a possible definition of apartheid based on race and gender is "inhumane acts … committed in the context of an institutionalized regime of systematic oppression and domination by one **group** over any other **group** or **groups, on the grounds of race or gender** and committed with the intention of maintaining that regime."[48] A second possible definition

47. *E.g.*, Dugard & Reynolds, *supra* note 12, at 867-68; Lynk, *supra* note 12; IIFFM Report on Myanmar, *supra* note 13, ¶ 1511.

48. The U.N. Working Group on Discrimination Against Women and Girls used this definition in its submission to the U.N.'s Sixth Committee. Working Group on discrimination against women and girls report, *supra* note 15, ¶ 9 (emphasis added). The Special Rapporteur on the

is: "inhumane acts … committed in the context of an institutionalized regime of systematic oppression and domination **on the grounds of race or gender** and committed with the intention of maintaining that regime." This definition avoids the need to define "group" altogether.

I. Defining Protected Groups Under International Criminal Law

Whether their membership in a group protected from discriminatory acts, oppressive regimes, or crimes is real "in fact" or simply perceived by the perpetrator makes no difference to a victim targeted for crimes against humanity. It is also irrelevant whether the perpetrator or members of a society believe such discriminatory acts are acceptable or justified. The fundamental right to be free from discrimination is enshrined in customary international law.[49] Under international criminal law jurisprudence, the understanding of which victims are protected from crimes committed on discriminatory bases can either be limited by a requirement to confirm the existence of "objective" group characteristics or can be based on the perpetrator's subjective perception.[50]

Three international crimes—genocide, apartheid, and persecution—protect victim groups from discriminatory acts.[51] Each crime is defined in key international instruments such as the Genocide and Apartheid Conventions, and more contemporarily, in the Rome Statute, which governs the International Criminal Court (ICC). In these instruments, each of these crime provisions sets out different recognized victims groups protected from discriminatory acts. When interpreting the scope of victims included in such groups, courts have relied heavily on *travaux préparatoires* and jurisprudence relevant to their jurisdiction. Yet some elements of jurisprudence can become outdated over time and *travaux préparatoires* can become less significant because they

situation of human rights in Afghanistan Richard Bennett, has also called for the "codification of gender apartheid, defined in a gender-inclusive way, as a crime against humanity." Situation of human rights in Afghanistan. Bennett, *supra* note 15, ¶ 19.

49. William Schabas, The Customary International Law of Human Rights 161-69 (Oxford Univ. Press, 2021) [hereinafter Schabas, Customary International Law].

50. *See infra* Section A.2., *Objective and subjective criteria: Determining protected group membership.*

51. Persecution and apartheid must be committed in the context of a "widespread or systematic attack against a civilian population." Int'l Crim. Ct. [ICC], *Elements of Crimes*, arts. 7(1)(h), 7(1)(j) (2013), [hereinafter ICC Elements of Crimes], https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf. Acts of genocide must occur "in the context of a manifest pattern of similar conduct directed against" a group or be "conduct that could itself effect" destruction of a group in whole or part. *Id*. art. 6. Other international crimes that can be committed based on discriminatory intent include the crime against humanity of forced pregnancy and torture as a war crime. Rome Statute, *supra* note 19, arts. 7(1)(g), 8(2)(ii); ICC Elements of Crimes, arts. 8(2)(a)(ii)-1(2) (war crime of torture).

do not reflect evolving understandings.[52] Courts such as the ICC, however, may turn to international human rights law for help interpreting its governing treaty, the Rome Statute. As international human rights law has evolved, the understanding of groups protected from discrimination has, by design, expanded, and the understanding of which victims qualify as group members has broadened.[53] This section discusses the interpretations of these groups under each crime.

A. Defining Protected Groups Under Genocide

Genocide was coined by Raphael Lemkin in his 1944 book, *Axis Rule in Occupied Europe*. "By 'genocide,'" he wrote, "we mean the destruction of a nation or of an ethnic group. . . . Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group."[54]

While the Nuremberg Charter[55] did not list the crime of genocide, the World War II tribunals laid the groundwork for its recognition as a

52. "The preparatory works to the Genocide Convention as a historical supplementary source of interpretation are not able to illuminate the meaning of race without leading to an offensive result for contemporary trials." LINGAAS, CONCEPT OF RACE, *supra* note 29, at 64. In noting the Polish delegate's equating of race with skin color in the U.N. Sixth Committee's Oct. 15, 1948 discussion on a draft definition of genocide, Professor Lingaas additionally reminds us of the nonbinding effect of "[s]uch individual statements on the meaning of certain provisions in a drafting process." *Id.* at 63.

53. The expansive nature of protected groups was recognized from the beginning of international human rights law and has manifested in its development. For example, the Universal Declaration of Human Rights used the words "such as" when listing categories protected from discrimination and concludes that list with "or other status." G.A. Res. 217 (III), A Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948) [hereinafter UDHR]. The Int'l Convention on Civil and Political Rights contains identical language, and the Int'l Convention on Economic, Social and Cultural Rights includes the words "or other status." G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 2(1) (Dec. 16, 1966) [hereinafter ICCPR]; G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 2(2) (Dec. 16, 1966). Additional treaties further clarified the universality of human rights and the categories protected from discrimination, focusing for example, on women, children, Indigenous Peoples and people with disabilities. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979); G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989); Int'l Lab. Org., *Indigenous and Tribal Peoples Convention*, Doc C169 (June 27, 1989); G.A. Res. 61/106, Optional Protocol to the Convention on the Rights of Persons with Disabilities (Dec. 13, 2006). Under international criminal law, protected categories have also expanded. The categories included in the persecution provision of the Rome Statute, are more expansive than those under the S.C. Res. 808, Statute of the International Tribunal for the Former Yugoslavia, art. 4 (May 25, 1993), and S.C. Res. 955, Statute of the International Tribunal for Rwanda, art. 2 (Nov. 8, 1994) [hereinafter The Statute of the ICTR] and include, for example, "gender," and "other grounds that are universally recognized as impermissible under international law." Rome Statute, *supra* note 19, art. 7(1)(h).

54. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 79 (The Lawbook Exchange, Ltd., 2nd ed. 2008).

55. Charter of the Int'l Military Tribunal [IMT], *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 U.N.T.S 279 (Aug. 8, 1945) [hereinafter Nuremberg Charter].

separate criminal offense under international law.[56] An indictment for war crimes at the Nuremberg Tribunal described a "deliberate and systemic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles, and 'Gypsies.'"[57] Picking up on Lemkin's work, the U.N. General Assembly, in its Resolution 96(1) of 1946 which affirmed that genocide was a crime under international law, described it as the "denial of the right of existence of entire human groups" that "results in great losses to humanity in the form of cultural and other contributions represented by these human groups."[58]

After rigorous discussion among states, the crime of genocide was codified with binding legal obligations for its enforcement under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[59] During the 1990s, the statutes for the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) both adopted the definition of genocide from the Genocide Convention.[60] In 1998, it was again codified as a crime under the Rome Statute.[61] Each time, the Convention's definition was adopted with minimal discussion despite being decades old.

According to the ICC Elements of Crimes, created pursuant to Article Nine of the Rome Statute to assist the Court in interpreting and applying the statute's criminal provisions,[62] to successfully charge the crime of genocide, an ICC prosecutor must prove that, *inter alia*, (1) "[t]he perpetrator intended to destroy, in whole or in part, [a] national, ethnical, racial or religious group, as such" and, as regards the perpetrator's target(s), (2) "[s]uch person or persons belonged to a particular national, ethnical, racial or religious group."[63]

The four protected groups under the Genocide Convention provoke pointed discussion in legal scholarship regarding both their meanings and their limitation to only those four groups. As Professor William

56. DAVID L. NERSESSIAN, GENOCIDE AND POLITICAL GROUPS 8-9 (2010) [hereinafter NERSESSIAN, GENOCIDE AND POLITICAL GROUPS].

57. IMT Indictment No. 1 in the Trial of Major War Criminals Before the IMT, Nuremberg, 12 Nov. 1945 – Oct. 1, 1946 (1947) Vol 11. at pp. 45-46.

58. G.A. Res. 96 (I), The Crime of Genocide, ¶ 1 (Dec. 11, 1946).

59. G.A. Res. 260 (III), Prevention and Punishment of the Crime of Genocide, art. 2 (Dec. 9, 1948) [hereinafter Genocide Convention].

60. The Statute of the ICTR, *supra* note 53, art. 2; S.C. Res. 808, *supra* note 53, art. 4.

61. Rome Statute, *supra* note 19, art. 6.

62. *Id*. art. 9. The ICC Elements of Crimes helps define and provide clarity to the crimes within the ICC's jurisdiction. The ICC Elements of the Crimes is a non-binding document and does not unduly restrict judicial discretion.

63. ICC Elements of Crimes, *supra* note 51, arts. 6(a)-(e).

Schabas observes, while the inclusion of "racial group" was the least problematic aspect for the drafters, "it may well be the most troublesome many decades later."[64] The debate stems from the disconnect between how protected groups are understood under contemporary social and legal analyses and how they are legally interpreted by courts making genocide determinations, which have largely relied on interpretations of the Genocide Convention drafters' intent.

Drafters of the 1948 Genocide Convention believed that individual group members had a certain "immutability" or "inevitability" of their group membership; that most were born into it and thus membership identity was beyond their control.[65] They understood racial, religious, ethnic, and national groups as retaining some key features of "permanence" or "enduring identity."[66] For example, one delegate to the U.N. 6th Committee discussions on the draft, distinguishing "political groups" from "national, racial groups or religious groups," said the latter should be protected under the Convention because "[t]hose who needed protection most were those who could not alter their status."[67]

While race is now understood as a social construct and racial discrimination is described in broad terms under human rights law, the legal interpretation of race as "inevitable" or "enduring" has yet to dissipate. It reemerged in a 2021 International Court of Justice (ICJ) interpretation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) —an interpretation that countered that of ICERD's monitoring body, the Committee on the Elimination of Racial Discrimination (CERD). ICERD defines racial discrimination "as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin" that nullifies or impairs equal enjoyment of human rights or fundamental freedoms.[68] This definition, which avoids defining "race" itself, is understood to allow for a broad interpretation.[69] In distinguishing and excluding "nationality"

64. William A. Schabas, Genocide in International Law: The Crime of Crimes 139 (Cambridge Univ. Press, 2nd Ed. 2009) [hereinafter Schabas, Genocide in International Law].

65. Lingaas, Concept of Race, *supra* note 29, at 63, 87; Schabas, Genocide in International Law, *supra* note 64, at 122-23; Claus Kress, *The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber's Decision in the Al Bashir Case*, 7 J. Int'l Crim. Just. 297, 478 (2009); Antonio Cassese et. al., *Genocide*, *in* The Oxford Companion to International Criminal Justice 332, 334 (Antonio Cassese ed., Oxford Univ. Press, 2009).

66. Lawrence J. LeBlanc, The United States and the Genocide Convention 60-61 (Duke Univ. Press, 1991); Lingaas, Concept of Race, *supra* note 29, at 61-63.

67. U.N.G.A. Sixth Comm., Seventy-Fifth Meeting, U.N. Doc. A/C.6/3/SR.75, at 111 (Oct. 15, 1948), https://digitallibrary.un.org/record/604083?v=pdf.

68. ICERD, *supra* note 31, art. 1.

69. CERD's General Recommendations clarify the inclusion of numerous groups not named in the treaty. McDougall, Introductory Note, *supra* note 31. These recommendations do so without naming categories the groups fall under. *See, e.g.*, Gen. Recommendation on the rights of indigenous peoples 23, *supra* note 31, at 122-24; Gen. Recommendation No. 32, *supra* note 31.

from "national origin" under ICERD, the ICJ claimed that "references to 'origin' denote, respectively, a person's bond to a national … group at birth, whereas nationality is a legal attribute which is within the discretionary power of the State and can change during a person's lifetime."[70] To justify this view, it went on to describe "race, colour and descent" under ICERD as "also characteristics that are inherent at birth."[71] The decision was subject to multiple dissents and spurred critique for its significant departure from CERD's understanding of racial discrimination, and from that under international human rights law more broadly.[72] That the ICJ used this understanding to interpret an international human rights treaty in contravention of the views of that treaty's monitoring body underscores the importance of an explicitly inclusive definition of "groups" within the draft CAH treaty. This is particularly important as "gender" is considered for inclusion under the draft apartheid provision, as explained further below in Section II.

The supposed immutable nature of "racial" groups appeared to be the least controversial idea for the Genocide Convention drafters—perhaps why there was little in the *travaux préparatoires* indicating what "racial" groups meant.[73] Their concept of "racial" groups came from a European-centered context,[74] and they generally understood race as a blurred mix of nationality, religion, ethnicity, and physical characteristics.[75] For example, for many drafters, "Jews," "Gypsies," "Armenians," and "Greeks" would be considered distinct "races."[76] Some drafters explicitly recognized members of "racial" groups by inherited physical

70. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Preliminary Objections, Judgment, 2021 I.C.J. 71, 81, ¶ 81 (Feb. 4).

71. *Id.*

72. *See, e.g.*, William Thomas Worster, *The Divergence Between the I.C.J. and the Committee on the Elimination of Racial Discrimination regarding Nationality-Based Discrimination*, ASIL INSIGHTS (Nov. 30, 2022), https://www.asil.org/insights/volume/26/issue/13. *See also*, CERD, Gen. Recommendation 30: Discrimination Against Non-Citizens, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Aug. 5, 2004). "At this jurisdictional stage of the proceedings, I see no reason to depart from the Court's earlier finding that at least some of the acts of which Qatar complains are capable of constituting acts of racial discrimination as defined by the Convention." Application of the Int'l Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E., 2021 I.C.J. at 126, ¶ 22 (Sebutinde, J., dissenting). "As far as the aim of the Convention is concerned, its Preamble and operative provisions make clear that its purpose is to eliminate racial discrimination in *all* its forms, an objective that would not be achieved if States were left entirely free to discriminate between citizens and non-citizens." Application of the Int'l Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), at 148, ¶ 11 (Robinson, J., dissenting). Also, see generally *id.* at 133 (Bhandari, J., dissenting).

73. *See* SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 64, at 139.

74. LINGAAS, CONCEPT OF RACE, *supra* note 29, at 58.

75. *See, e.g.*, LINGAAS, CONCEPT OF RACE, *supra* note 29, at 57-69; NERSESSIAN, GENOCIDE AND POLITICAL GROUPS, *supra* note 56, at 22; SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 64, at 140-143; CASSESE ET. AL., *supra* note 65, at 334.

76. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 64, at 129; LINGAAS, CONCEPT OF RACE, *supra* note 29, at 57-58.

characteristics, such as skin color or other physical features[77]—a stance that has since been scientifically debunked, as race is now understood as a social construct.[78] This limited discussion of the term should arguably lend weight to the idea that the understanding of it has changed over time to embrace its social construction, as many scholars argue.[79] This is particularly so if one compares drafters' limited discussion of "racial" groups with the more heated discussions that led to the exclusion of other groups, including "political" groups, from the Genocide Convention and affirmed their exclusion in the Rome Statute.[80]

Nationality and religion were more discussed among the drafters. While they were seemingly less immutable than race, drafters assumed "sentiment or tradition bound the members" to nationality, race, or religion, and that those "born" into their religion would have difficulty changing it.[81] This understanding of groups as retaining key features of "permanence" or "stability" is also reflected in drafters' debates about whether political and social groups should be protected from genocide.[82] Since, as some argued, those groups were not "stable" or "permanent," they were excluded from protection from genocide[83]—a position some

77. Lingaas, Concept of Race, *supra* note 29, at 63; Gerhard Werle & Florian Jessberger, Principles of International Criminal Law ¶ 906 & n. 71 (Oxford Univ. Press, 4th ed. 2020) (indicating that "race" continued to be interpreted this way after the drafting of the Genocide Convention, including by the ICTR).

78. Cassese, et al., International Criminal Law: Cases and Commentary 204 (Oxford Univ. Press, 2011). "Race is a notion whose scientific validity has been debunked by anthropologists; it must nevertheless be perforce interpreted and applied when used in a legal provision." Cassese et al., *supra* note 65, at 334; Lingaas, Concept of Race, *supra* note 29, at 64, 92; Schabas, Genocide in International Law, *supra* note 64, at 141-43.

79. *See, e.g.*, Lingaas, Concept of Race, *supra* note 29, at 100-02, 139-41.

80. Lingaas, Concept of Race, *supra* note 29, at 61-63; Schabas, Genocide in International Law, *supra* note 64, at 121. *See also, e.g.*, Sixth Comm., Seventy-Fifth Meeting, U.N. Doc. A/C.6/3/SR.75, at 110-16 (Oct. 15, 1948), https://digitallibrary.un.org/record/604083?v=pdf (recounting lengthy discussion among members and vote to include "political groups" in the draft Convention (later rejected in another vote (U.N. Doc. A/C.6/SR.128, 659-664 (Nov. 29, 1948)), https://digitallibrary.un.org/record/604798/files/A_C.6_SR.128-EN.pdf), as compared to the brief discussion preceding the vote to include "ethnical" groups.).

81. Lingaas, Concept of Race, *supra* note 29, at 61-63, 88; Schabas, Genocide in International Law, *supra* note 64, at 147. "The drafters of the Convention considered religious groups as closely analogous to ethnic or national groups, the result of historical conditions that, while theoretically voluntary, in reality circumscribed the group in as immutable a sense as racial or ethnic characteristics." *Id*.

82. Lingaas, Concept of Race, *supra* note 29, at 60-63; Schabas, Genocide in International Law, *supra* note 64, at 122-23; Fanny Martin, *The Notion of 'Protected Group' in the Genocide Convention and its Application*, *in* The UN Genocide Convention – A Commentary 112, 116 (Paola Gaeta ed., Oxford Univ. Press, 2009); Warwick McKean, Equality and Discrimination Under International Law 108 (Oxford Univ. Press, 1983).

83. Leo Kuper, The Prevention of Genocide 15 (Yale Univ. Press, 1985) (observing contradictions in some drafters' arguments that political groups were unstable or voluntary, while members of religious or national groups held permanent features). Note that "political groups" are protected under persecution (see more in *I.B. Defining "protected groups" under persecution* below). The broader understanding of protected "groups" under persecution was available to the Genocide Convention drafters; "[P]ersecutions on political, racial or religious grounds in

states were likely inclined toward because of their own attacks on political groups.[84]

International tribunals would ultimately grapple with these elements of drafters' intent as they attempted to define victims' membership in groups under genocide. A primary focus was the extent to which "objective" or subjective criteria for group membership should play a role.

1. Objective And Subjective Criteria: Determining Protected Group Membership

Courts use two primary approaches (and their hybrids) to determine a victim's membership in a protected group.[85] One approach is to evaluate the group by its "objective" criteria, meaning by "objective" characteristics that members share. For example, characteristics of a "racial group" may include "hereditary physical traits"[86] under this approach. This "objective" determination does not rest on the perpetrators' view, nor that of victims. Instead, a court may look to testimony from key experts such as anthropologists, historians, or religious scholars.[87] Once the court determines the group's membership criteria, it evaluates whether victims sufficiently meet them.[88]

The second approach is the subjective inquiry, where courts look to the perpetrators' perceptions to define the targeted group. Instead of attempting to define group membership based on debunked science and then determining whether the perpetrator intended to destroy it as proscribed under the crime of genocide, a court defines group membership as the perpetrator defines it, so long as the perpetrator's intent to discriminate falls within the named protected categories.[89] In other words, if a perpetrator targets a victim because of that victim's perceived race, then the victim is sufficiently a member

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execution of or in connection with any crime within the jurisdiction of the Tribunal…" Nuremberg Charter, *supra* note 55, art. 6. However, drafters made apparent their intent to narrow the understanding of "groups" under genocide from that under persecution: "Genocide is the deliberate destruction of a human group. This literal definition must be rigidly adhered to; otherwise, there is a danger of the idea of genocide being expanded indefinitely to include the law of war, the right of peoples to self-determination, the protection of minorities, the respect of human rights, etc." Slye, *Apartheid as a Crime Against Humanity*, *supra* note 23, at 297 (citing U.N. Economic and Social Council, *Draft Convention on the Crime of Genocide*, U.N. Doc. E/447 (June 26, 1947)).

84. The former USSR, for example, then ruled by Joseph Stalin, argued against including political groups. U.N. Doc. A/C.6/215/Rev.1 (Oct. 9, 1948).

85. LINGAAS, CONCEPT OF RACE, *supra* note 29, at 104.

86. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 514 (Sept. 2, 1998); The Proxmire Act, 18 U.S.C. § 1093(6) (1988).

87. NERSESSIAN, GENOCIDE AND POLITICAL GROUPS, *supra* note 56, at 27.

88. *Id.*

89. *Id.*

of the targeted racial group for purposes of holding the perpetrator accountable (because "racial group" is a protected category). It is irrelevant whether the targeted victim "objectively" belonged to the group. For example, if a perpetrator targets persons of African descent, under the subjective approach, the fact that the perpetrator targeted a victim based on membership in a protected group is sufficient to establish the victim's membership in the targeted group. It is irrelevant whether the victim shared any biological or other "immutable" characteristics with other group members. It is sufficient that the perpetrators believed the victim to be a member of the group they targeted.

A purely subjective approach has appeal, given it places the onus of discrimination on the perpetrator that committed genocide, a crime for which perpetrators' intent is a key element.[90] Courts and some scholars nonetheless assert that a requirement of "objective" criteria, or of at least some "objective" criteria, distinguishes genocide as a crime.[91] Schabas provides an analogy to objective victim characteristics required for patricide. If a perpetrator kills someone he erroneously believes to be his parent, the crime is simply murder and not patricide.[92] "The same is true for genocide," he writes, in that a perpetrator must carry out prohibited acts, not against just anyone, but specifically against "the group."[93] Balancing this against his rejection of an "objective basis for racist crimes," and working within the limitations of the governing statutes and the Genocide Convention, Schabas proposes what courts have affirmed—that group membership be determined using a mix of "objective" and subjective criteria and on a case-by-case basis.[94] While this has been the trend in how group membership for genocide cases has been established, international human rights law indicates that this approach to understanding racial discrimination is outdated.[95]

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90. *E.g.*, "[S]ubjective criteria alone may not be sufficient to determine the group targeted for destruction … for the reason that the acts … must be in fact directed against 'members of the group.'" Prosecutor v Brđanin, Case No. IT-99-36-T, Judgment, ¶ 684 (Sept. 1, 2004); s*ee also* SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 64, at 127. "Generally, it is the perpetrator of genocide who defines the individual victim's status as a member of a group protected by the Convention." *Id.* at 125.

91. NERSESSIAN, GENOCIDE AND POLITICAL GROUPS, *supra* note 55, at 30. "Taken to its logical extreme, the subjective test risks severing a fundamental link between the genocidaire's definition and the contours of the group as it existed in society before the genocide." SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 64, at 127-28.

92. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 63, at 128.

93. *Id.*

94. *Id.*

95. *See supra*, text and sources in note 31.

The ICTR *Akayesu*[96] case is pivotal to understanding the evolution of group determination in genocide jurisprudence. Its 1998 trial judgment, the first genocide conviction by an international tribunal, contains a few surprising determinations that have been subject to critique by legal scholars.[97] The court held that it was "particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of *any* 'stable and permanent' group."[98] *Akayesu* effectively reads "groups" under genocide as broader than the four enumerated categories to include *all* "stable and permanent" groups. However, the "stable and permanent" approach is an isolated one and genocide cases have effectively been limited to the four enumerated groups.[99] The *Akayesu* court concluded that a genocide determination must rely on exclusively "objective" criteria and that members should "belong to [the group] automatically, by birth, in a continuous and often irremediable manner."[100] It also laid out membership criteria for each enumerated group. For example, in determining membership in a "racial group" the court named "hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national, or religious factors."[101]

Relying exclusively on "objective" criteria to determine group membership proved challenging for the tribunal. Tutsis and Hutus in Rwanda, for example, spoke the same language, practiced the same religion, and shared common cultural values and the court did not consider

96. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

97. Scholars have critiqued the Akayesu decision for, among other things: (1) its heavy reliance on "objective" criteria. LINGAAS, CONCEPT OF RACE, *supra* note 29, at 90-91; WERLE & JESSBERGER, *supra* note 77, ¶¶ 901-03; (2) the Court's assignment of autonomous criteria to each enumerated group, understood to narrow group membership unnecessarily and contrary to the intent of the Genocide Convention drafters who saw group membership as overlapping. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 64, at 131; and (3) the Trial Chamber's conclusion that the "intention of the drafters of the Genocide Convention, … according to the travaux préparatoires, was patently to ensure the protection of *any* stable and permanent group" (emphasis added). LINGAAS, CONCEPT OF RACE, *supra* note 29, at 88-89 (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 516, 701 (Sept. 2, 1998) (stating that the protected groups went beyond the enumerated four to include *any* "stable and permanent group")); *see also* WERLE & JESSBERGER, *supra* note 77, ¶ 910-11 (noting that the "any stable and permanent group" framing has not been utilized by subsequent courts). *See also* William A. Schabas, *The Crime of Genocide in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, *in* INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 452-53 (Horst Fischer et al. eds., Berlin Verlag, 2001) [hereinafter Schabas, *The Crime of Genocide*].

98. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 516 (Sept. 2, 1998) (emphasis added).

99. William A. Schabas, *Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide,* 61 RUTGERS L. REV. 161, 170 (2008).

100. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 511 (Sept. 2, 1998).

101. *Id.* ¶ 514.

them to be physically discernable.[102] Because of the problematic nature of applying "objective" criteria, tribunals started moving away from *Akayesu's* approach to determining group membership and towards the inclusion of subjective criteria, which rely on the perpetrator's understanding of the protected group. A year after the *Akayesu* decision, the ICTY *Jelisić* court made its genocide determination, this time relying exclusively on subjective criteria.[103] The court rightfully noted:

> To attempt to define a … racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a … racial group from the point of view of those persons who wish to single that group out from the rest of the community.[104]

Two other cases, *Krstić* in the ICTY in 2001 and *Rutaganda* in the ICTR in 1999, also leaned into subjective criteria for determining group membership, though they did not claim it as sole criterion.[105] By 2006, however, the ICTY *Stakić* Appeals Court clarified that a *solely* subjective approach is not permissible for a genocide determination and that some degree of "objective" criteria is required.[106]

> [C]ontrary to what the prosecution argues, the *Krstić* and *Rutaganda* Trial Judgments do not suggest targeted groups may only be defined subjectively…. *Krstić* found only that "stigmatization… by the perpetrators" can be used as "a criterion" when defining targeted groups – not that stigmatisation can be used as the sole criterion. Similarly, while the *Rutaganda* Trial Chamber found national, ethnical, racial, and religious identity to be largely subjective concepts, suggesting that acts may constitute genocide so long as the perpetrator perceives the

102. Nersessian, Genocide and Political Groups, *supra* note 56, at 23; Werle & Jessberger, *supra* note 77, ¶ 899 (noting the Court's decision to extend the definition of genocide to include all "stable groups" may tread on the principle of legality).

103. Prosecutor v Jelisić, Case No IT-95–10-T, Judgment, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 14, 1999).

104. *Id*.

105. Prosecutor v. Rutaganda, Case No. ICTR-96-3, Judgment, ¶¶ 56, 57 (Dec. 6, 1999). *Krstic* utilizes the perpetrator's perspective, while also observing that both the 1963 Yugoslav Constitution and Bosnian Serb political authorities in the 1990s identified the Bosnian Muslims as a "nation," and does not say the perpetrator's perspective is the sole criterion. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶¶ 557, 559 (Int'l Crim. Trib. for the former Yugoslavia, Aug. 2, 2001). *Krstic* also recognized that the four groups protected by genocide should not be considered in isolation but may overlap. It found that "Bosnian Muslims" constituted a protected group, without naming a category, and following a discussion of the differing ways that the Bosnian Muslims had been identified over time. *Id.* ¶¶ 556-60.

106. Prosecutor v Stakić, Case No. IT-97-24-A, Judgment, ¶ 25 (Int'l Crim. Trib. for the former Yugoslavia, Mar. 22, 2006).

> victims as belonging to the targeted national, ethnical, racial or religious group, it also held that a "subjective definition alone is not enough to determine victims' groups, as provided for in the Genocide Convention."[107]

A year later, the ICJ echoed this view, stating that "international jurisprudence accepts a combined subjective-objective approach" to defining the group targeted for genocide.[108]

While courts may better adhere to modern understandings of categories like "race" as social constructs if they followed fully in *Jelisić*'s footsteps, the majority of subsequent genocide cases under the *ad hoc* tribunals, while relying on subjective criteria, have also relied on often undisclosed "objective" criteria.[109] Despite their predominant reliance on subjective criteria in practice, which may be read as tacit acknowledgment of problems inherent to the "objective" criteria approach, courts nonetheless continue to recognize an "objective" criteria requirement. They posit that the determination of the relevant protected group should be made on a case-by-case basis and include both subjective and "objective" criteria.[110] Figure 1, below, makes visible the preponderance of genocide cases requiring mixed "objective" and subjective criteria. As this Article explains elsewhere, requiring any "objective" criteria, however minimal, supports arguments for the exclusion of victims from certain protected groups, including "racial" groups.

While *Jelisić* may have been ahead of its time, the overwhelming drift away from an "objective" approach towards the infusion of more subjective criteria arguably indicates a jurisprudential trend

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107. *Id.* ¶ 25.

108. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. V. Serb. & Montenegro), 2007 I.C.J. 43, 124, ¶ 191, (Feb. 26).

109. *See* Figure 1. Some scholars support maintaining at least some "objective" requirements in determining group membership. *See, e.g.*, WERLE & JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW, *supra* note 77, ¶¶. 901-02, 910-11; "Race is a notion whose scientific validity has been debunked by anthropologists; it must nevertheless be interpreted and applied when used in a legal provision." CASSESE ET AL., OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 65, at 334; Schabas, *The Crime of Genocide*, *supra* note 97, at 455-56.

110. Tolimir, Case No IT-05–88/2-T. ¶ 735 (Dec. 12, 2012); Seromba, ICTR-2001-66-T, ¶ 318 (Dec. 13, 2006); Muvunyi, ICTR-00-55A-T, ¶ 484 (Sept. 12, 2006); Blagojević and Jokić, Case No IT-02–60-T, Judgment, ¶ 667 (Jan. 17, 2005); Prosecutor v Brđanin, Case No. IT-99-36-T, Judgment, ¶ 684 (Sept. 1, 2004); Prosecutor v. Gacumbitsi, Case No. ICTR-01-64, Judgment, ¶ 254 (June 17, 2004); Prosecutor v. Kamuhanda, Case No. ICTR-99-54A, Judgment, ¶ 630 (Jan. 22, 2004); Prosecutor v. Kamuhanda, Case No. ICTR-99-54A, Judgment, ¶ 630 (Jan. 22, 2004); Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment, ¶ 811 (Dec. 1, 2003); Prosecutor v. Semanza, Case No. ICTR-97-20, Judgment, ¶ 317 (May 15, 2003); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶¶ 56-58, 374 (Dec. 6, 1999). *See also* SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 64, at 128; LINGAAS, CONCEPT OF RACE, *supra* note 29, at 137.

towards the recognition that the "objective" criteria approach is deeply flawed. This tacit recognition manifests in other variations on the "objective" and subjective approaches utilized by a minority of courts and U.N. accountability mechanisms. Two are noted in Professor Carola Lingaas' chart below: the objectivized-subjective approach and the victim-based subjective approach. Under the objectivized-subjective approach, subjective beliefs, over time, are understood to become "objectivized" in that both the perpetrators and the victims believe the distinctions between the groups have always existed.[111] The victim-based subjective approach looks to the victims' self-perception instead of the perpetrator's perception of victims' group membership.[112]

These additional approaches, albeit not predominant, pose challenges that could exclude victims from recognition and thus do not resolve the "objective" approach's flaws. While a "victim-centered" or "survivor-centered" approach can be empowering in advocacy spaces,[113] or when discussing positive rights, such an approach in international criminal law can put the onus on victims to defend their status as victims.[114] This can disempower and disadvantage victims when group membership status is required for a finding of accountability.

111. Lingaas, Concept of Race, *supra* note 29, at 104-05. Another variation on this approach is the "double subjective," referring to perpetrators' & victims' perceptions "that together determine the contours of the protected group." *Id*.

112. *Id*.

113. For a discussion on a survivor-centered approach, see Lisa Davis, *Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 Nw. J. Hum. Rts. 1, 53-60 (2021).

114. See discussion *infra* Part II, noting the challenges to this approach for LGBTQI+ victims.

Figure 1[115]

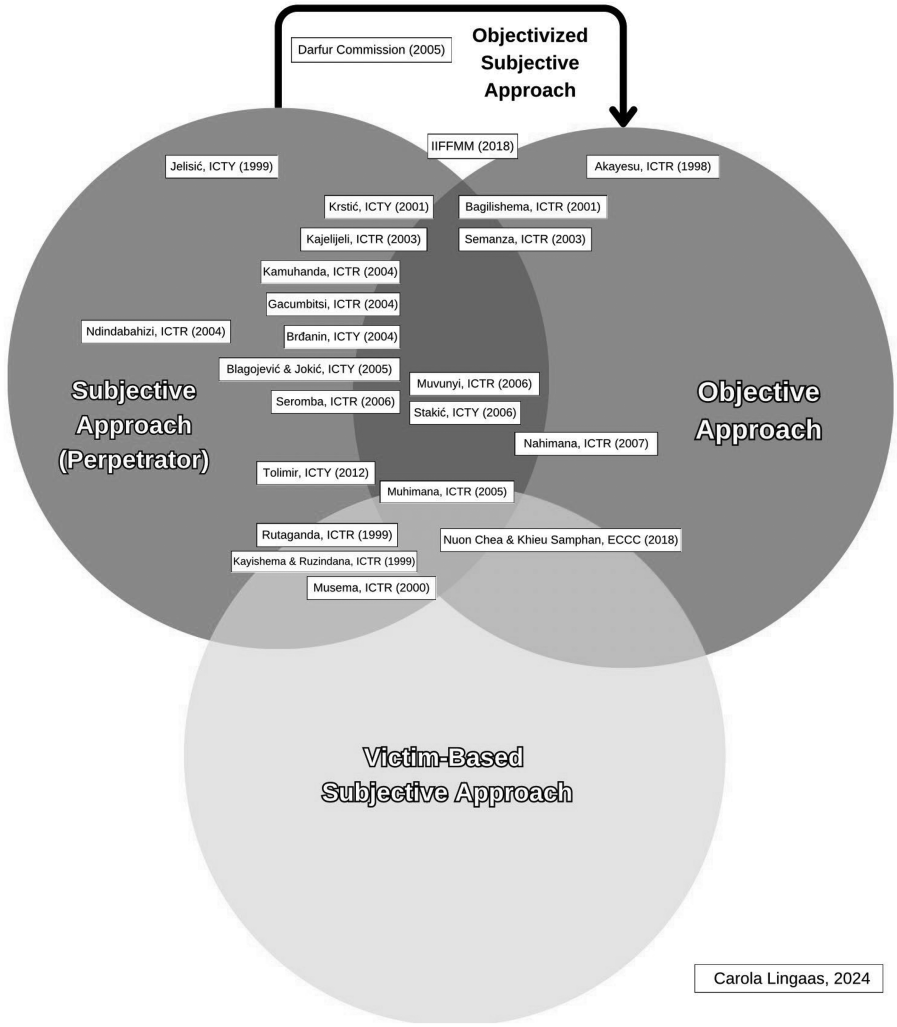

Figure 1, Approaches of the ICTR, ICTY, ECCC,[116] IIFFMM[117] and the International Commission of Inquiry on Darfur, to defining group membership (by case and year).

Another approach is the "ensemble approach," which has roots in drafters' intent.[118] Despite being influenced by mistaken ideas such as

115. LINGAAS, CONCEPT OF RACE, *supra* note 29, at 138 (updated in 2024).
116. The Extraordinary Chambers in the Courts of Cambodia (ECCC).
117. The Independent Int'l Fact-Finding Mission on Myanmar (IIFFMM).
118. LINGAAS, CONCEPT OF RACE, *supra* note 29, at 69-71; *see also* SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 64, at 143 (describing drafters' understanding of the overlapping nature

"inherited physical characteristics" for determining racial group membership, many drafters viewed the four protected groups as interwoven and helping to define each other.[119] An "ensemble" approach avoids limiting victims to a particular group and instead considers how they may be covered by a combination of the four groups protected from genocide.[120] In this view, group membership is not based on possessing the same characteristic, and group members may have characteristics of several categories since all four are equally protected.[121]

The ICJ used this approach in its 2024 order for provisional measures in *South Africa v Israel* when determining whether the "Palestinian group" is protected from genocide; finding that, "[t]he Palestinians appear to constitute a distinct 'national, ethnical, racial or religious group', and hence a protected group within the meaning of Article II of the Genocide Convention."[122] The court avoided commenting on "objective" criteria requirements. The ensemble approach, however, may not offer an advantage where protected groups are limited to one category; as with, for example, "racial group" under apartheid.[123]

2. *The Persistence Of The Genocide Convention's Outdated Limitations On Protected Groups*

Despite decades of scholarly literature critiquing the limited categories and the narrow framing of "groups" under the 1948 definition of genocide, the same categories and the problematic understanding of "groups" has ultimately made its way into domestic statutes with varying results.[124] For example, in 1988, the United States defined the

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of the four categories). Krstic also described the overlapping nature of the four categories. Krstic, Case No. IT-98-33, Judgment, ¶¶ 555-56 (Int'l. Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

119. Schabas, Genocide in International Law, *supra* note 64, at 128-29.

120. *See* Lingaas, Concept of Race, *supra* note 29, at 69-73; Schabas, Genocide in International Law, *supra* note 64, at 129-31; David Nersessian, *The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention*, 36 Cornell Int'l L.J. 293, 303 (2003).

121. Werle & Jessberger, Principles of International Criminal Law, *supra* note 77, ¶ 896.

122. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Order on the Request for the Indication of Provisional Measures, 2024 I.C.J. 192, ¶ 45 (Jan. 26).

123. Were "gender" a category under genocide or apartheid, an "ensemble" approach would also be unhelpful given its exclusion from drafters' understanding of the other genocide categories' interrelation.

124. Some domestic legislation and jurisprudence have expanded the crime of genocide, e.g., "national groups" has been understood to cover political and/or social groups in Bangladesh, Costa Rica, Colombia, Estonia, Ethiopia, Latvia, Lithuania, Paraguay, Peru, Spain and Switzerland. Int'l Crimes (Tribunals) Act, art. 3(2)(c), [1973] (Bangl.); The Criminal Code of the Federal Democratic Republic of Ethiopia 2004, § 3, art. 269 (Eth.); L. 599/2000, Julio 24, 2000, Código Penal [C. Pen.] art. 101 (Colom.); Código Penal, art. 375 (Nov. 15, 1970) (Costa Rica); The Criminal Law, § 71 (June 17, 1998) (Lat.); Criminal Code of the Republic of Lithuania, art. 99 (Sept. 26, 2000); L. 1160/1997, Junio 20, 1992, Código Penal Concordado art. 319; Código Penal, art. 319 (Apr. 3, 1991) (Peru); *In re Pinochet,* Audiencia Nacional (National Court of Spain), Judgment of Nov. 5, 1998, 119 ILR

term "racial group" under the crime of genocide as "a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent."[125]

Adopted at the Rome Conference on July 17, 1998, the Rome Statute, which also codified the crime of genocide, entered into force on July 1, 2002.[126] Instead of updating the definition of genocide, drafters relied on the Genocide Convention as the principal source for the definition under the Rome Statute.[127] Delegates briefly raised the possibility of expanding the four protected groups, but made no revisions.[128] Some delegates revisited the inclusion of social and political groups, but most supported retaining the 1948 Convention's definition, presumably to ensure consensus for the Statute's adoption,[129] and not based on analysis of customary international law, including international human rights law developments. Ultimately, like the drafters of the ICTY and ICTR Statutes, the Rome Statute U.N. Diplomatic Conference of Plenipotentiaries adopted the definition of genocide from the 1948 Convention without significant modification.[130] Professor Cherif Bassiouni called this a missed "historic opportunity" to broaden the scope of protected groups.[131]

3. Calls For A Subjective Interpretation Of Protected "Groups" Under Genocide

Courts struggle with the interpretation of groups under genocide, and rightfully so. Objective determinations of group membership will

331, 340 (2002); Penal Code, art. 264 (Switz.); *but see*, E.C.H.R. rejecting the Constitutional Court of Lithuania's finding that resistance fighters are protected under national groups. Vasiliauskas v. Lithuania, App. No. 35343/05, ¶ 183 (Oct. 20, 2015).

125. The Proxmire Act § 1093(6).

126. ICC, Core Legal Texts, Rome Statute of the International Criminal Court, *available at* https://www.icc-cpi.int/publications/core-legal-texts/rome-statute-international-criminal-court.

127. WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 126-28 (Oxford Univ. Press, 2nd. ed. 2016) [hereinafter SCHABAS, INTERNATIONAL CRIMINAL COURT].

128. LINGAAS, CONCEPT OF RACE, *supra* note 29, at 127; SCHABAS, INTERNATIONAL CRIMINAL COURT, *supra* note 127, at 136.

129. LINGAAS, CONCEPT OF RACE, *supra* note 29, at 127-28; SCHABAS, INTERNATIONAL CRIMINAL COURT, *supra* note 127, at 136; The Preparatory Committee Working Group also discussed similar proposals and landed on retaining the original Genocide Convention text. The proposal to retain the 1948 definition intact was made at the Diplomatic Conference and referred to the Drafting Committee without objection, which then returned it to the Committee of the Whole without modification. William A. Schabas, *Article 6*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES ARTICLE BY ARTICLE 107, 108 (Otto Triffterer ed., Nomos Verlagsgesellschaft Baden-Baden, 1999) [hereinafter Schabas, *Article 6*]; Slye, *Apartheid as a Crime Against Humanity, supra* note 23, at 297 (discussing Genocide Convention drafters' concern that an overly expansive definition of genocide may deter states from joining).

130. SCHABAS, INTERNATIONAL CRIMINAL COURT, *supra* note 127, at 127.

131. *See* M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: ANALYSIS AND INTEGRATED TEXT VOL. 1, 92 n. 208 (M. Cherif Bassiouni ed., Transitional Publishers 2005).

nearly always be arbitrary and fail to fully advance the interest of justice or to uphold a contemporary interpretation. The understanding of "race" and "racism" and thus "racial groups," for example, has evolved over the decades since the codification of genocide as a crime in 1948. As Schabas notes, "[t]o many of the delegates attending the General Assembly session of 1948, Jews, Gypsies, [*sic*] and Armenians might all have been qualified as 'racial groups', language that would be seen as quaint and perhaps even offensive a half-century later."[132]

While scholars recognize that courts still tend to rely on some "objective" criteria, many argue that "racial group" under genocide should be understood as a social construct and point out that the idea of a biological or hereditary basis for race has been scientifically debunked.[133] As Lingaas points out, "[t]here is overwhelming evidence that racial and ethnic categories are socially and historically constructed. They change over time and differ according to location."[134] This view finds support under customary international law, which understands categories such as "race," "ethnicity," and "gender" as social constructs.[135]

Courts have cited the Genocide Convention's *travaux préparatoires* when determining group membership,[136] but they should also look to latter developments in customary international law and international human rights law. A subjective approach based on perpetrators' perceptions, similar to the approach used under persecution,[137] would serve both the principles of international human rights law and drafters' intentions. This is particularly true given that many saw the enumerated groups as interwoven, rather than possessing distinctive individual meaning. In 1978, Nicodème Ruhashyankiko, a U.N. Special Rapporteur for the Commission on Human Rights,[138] noted drafters'

132. Schabas, Genocide in International Law, *supra* note 64, at 129.

133. *E.g.*, Lingaas, Concept of Race, *supra* note 29, at 57-69, 87-92; Cassese, Oxford Companion to International Criminal Justice, *supra* note 65, at 334; Schabas, Genocide in International Law, *supra* note 64, at 126.

134. Lingaas, Concept of Race, *supra* note 29, at 36. Gender has also been affirmed as socially constructed. OTP, Policy on the Crime of Gender Persecution, *supra* note 44, at 3.

135. *See, e.g.*, ICERD, *supra* note 31; McDougall, Introductory Note, *supra* note 31; "Just as social constructs and criteria are used to define the understanding of race, ethnicity or culture, so are social constructs and criteria used to define the understanding of gender." OTP, Policy on the Crime of Gender Persecution, *supra* note 44, at 3; *see also* Valerie Oosterveld, *The Definition of 'Gender'*, *supra* note 31, at 82 (discussing gender as a social construct under international law). Davis, *Reimagining Justice*, *supra* note 31, at 537-40 (explaining that delegates drafting the Rome Statute favored the human rights law understanding of "gender" as a social construction).

136. Schabas, *Article 6*, *supra* note 129, at 107.

137. Element Two under the crime against humanity of persecution provides for a subjective approach to establishing group membership. ICC Elements of Crimes, *supra* note 51, art. 7(1)(h)(2).

138. Note the role of this former U.N. Special Rapporteur, appointed for the Sub-Comm'n on Prevention and Protection of Minorities under the former U.N. Commission on Human Rights is distinct from the current U.N. Special Adviser on the Prevention of Genocide appointment, https://www.un.org/en/genocide-prevention.

expectation that the Genocide Convention would be revised over time, presumably in accordance with evolving customary international law.[139] Describing drafters' discussions about enumerated acts that would be considered genocide, he wrote that they observed that "an advantage of the exhaustive enumeration method would be that it allowed for the subsequent amendment of the Convention by the addition of further acts."[140] The same report described the unsettled nature of the enumerated protected groups' definitions.[141]

Schabas recalls that the Preparatory Committee's Working Group on the Definition of Crimes (for the Rome Statute) also called for the ICC to apply relevant international conventions and other sources of international law, including all provisions of the Genocide Convention, when interpreting the crime of genocide under the Rome Statute.[142] This part of the Rome Statute's *travaux préparatoires*, coupled with Article 21,[143] supports an argument that the ICC should approach genocide from a subjective criteria approach for establishing group membership, akin to the approach under persecution, described below under section B. *Defining protected "groups" under persecution*.

Judge Nawaf Salam's Separate Opinion for the ICJ's advisory opinion on legal consequences of Israel's policies and practices in the Occupied Palestinian Territory[144] guides the way towards a strategy for utilizing an exclusively subjective understanding of "groups" under the crimes of genocide and apartheid. Regarding the definition of "racial group" under genocide, he wrote, "in the absence of a scientific definition or an objective method to determine whether a person belongs to a supposed 'race', it is necessary to refer to the perception of the groups concerned," meaning a subjective understanding.[145] This interpretation acknowledges the requirement of "objective" criteria to establish group

139. Nicodème Ruhashyankiko (Special Rapporteur), *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, ¶ 48, U.N. Doc. E/CN.4/Sub.2/416 (July 4, 1978) [hereinafter, U.N. Study of the Question of Genocide, 1978].

140. *Id*. ¶ 48.

141. *Id.* ¶¶ 58-76. As Lingaas notes, "[t]he drafters deliberately decided to enumerate the protected groups, leaving a more detailed definition to the implementing legislation as foreseen in art. 5 Genocide Convention." LINGAAS, CONCEPT OF RACE, *supra* note 29, at 63. Arguably, this indicates that they did not presume the definitions were settled.

142. Schabas, *Article 6*, *supra* note 127, at 109.

143. Rome Statute, *supra* note 19, art. 21(3) (stating that the application and interpretation of the Rome Statute must be consistent with internationally recognized human rights law).

144. Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, 2024 I.C.J. 186 (July 19), https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf.

145. Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, 2024 I.C.J. 186 (July 19) (Declaration of President Salam, ¶ 21), https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-01-en.pdf.

membership, but offers that where it is not scientifically or objectively possible to determine objective criteria, such as in the case of a social construct like race, courts should look exclusively at subjective criteria for making membership determinations. This compromise would resolve the debate on whether courts should be required to use objective criteria when making determinations on whether genocide victims can be considered as such.

Scholars have argued for expanding the list of protected groups to include other recognized groups (e.g., political or cultural groups).[146] Others have argued that there is now a *jus cogens* prohibition on genocide of political groups.[147] During the discussions on the Geneva Conventions, one delegate went as far as to forewarn that future genocide crimes would primarily be committed on political grounds.[148]

While the Genocide Convention drafters shared what is now an outdated understanding of protected groups, their overall intent was to protect those targeted for destruction by the Nazis and who could be targeted for genocide in the future.[149] For example, the Genocide Convention drafters removed "linguistic groups" since they did not believe that such groups would be targets for genocide independently from racial, national, ethnic or religious groups.[150]

Understandings of vulnerable groups in need of legally recognized protection evolve and expand, leading to new legal understandings and forging customary international law over time.[151] This growing awareness, and the legal protections that come from it, should be reflected in the codification of genocide as well. At minimum, international human rights law's understanding of the current enumerated groups protected from genocide calls for a subjective approach.[152] Such an approach would serve drafters' intentions to ensure accountability and start to bring the crime of genocide into greater harmony with customary international law.

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146. *See, e.g.*, Martin, *supra* note 82, at 113; Antonio Cassese, *Genocide*, *in* The Rome Statute of the International Criminal Court: A Commentary 335, 336 (Antonio Cassese et al. eds., Oxford Univ. Press, 2002).

147. *E.g.*, Martin, *supra* note 82, at 113. "[C]ommentators have alternatively put forward definitions encompassing social and political groups, or tried to demonstrate that a jus cogens prohibition of genocide of political groups has emerged." *Id*. (citing *Revised and Updated Report on the Question of the Prevention of the Crime of Genocide prepared by Mr. B. Whitaker*, at 16-18, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985)).

148. Leo Kuper, Genocide: Its Political Use in the Twentieth Century 27 (Yale Univ. Press, 1981) [hereinafter Kuper, Genocide].

149. Lingaas, Concept of Race, *supra* note 29, at 59.

150. Schabas, Genocide in International Law, *supra* note 64, at 129-30; Schabas, *Article 6*, *supra* note 129, at 110.

151. *See generally* Schabas, Customary International Law, *supra* note 49.

152. *See* discussion *infra* Section I.B. (subjective approach for defining "protected groups" under persecution).

B. Defining Protected "Groups" Under Persecution

The persecution of Jews during World War II represents one of the most devastating chapters in human history. The development of persecution as an international crime resulted from the tribunals established to try Nazi war criminals. The Nazi Party institutionalized antisemitic prejudices that had plagued Europe for centuries into a toxic ideology to justify their extermination of millions of Jews as "racial purification."[153] Nazism also called for exterminating "homosexuality" and criminalized male-male sex, a rule enforced by a special police division.[154] By the end of World War II, the Nazis had sent an estimated 5,000 to 10,000 prisoners to concentration camps wearing pink triangle badges.[155]

Less documentation is available regarding the persecution of lesbians and transgender persons during the Third Reich. Accounts exist of Nazis arresting lesbians and transgender persons and sending them to prison or concentration camps, marked by a black triangle badge, though these are not comparable in number to those of gay men targeted.[156] The Nazis were less concerned with lesbianism largely because women were not given full citizenship and had been stripped of numerous rights.[157] Additionally, gender identity and sexual orientation were often conflated.[158] Other persecuted groups included the Roma and Sinti communities, persons with disabilities, and Jehovah's Witnesses, as well as communists and socialists, of whom an estimated hundreds of thousands were killed.[159] Persecution charges were fundamental at the Nuremberg trials, which found that systematic oppression, including discriminatory policies that deprived Jewish people of their fundamental rights, amounted to persecution.[160] These policies, persecutory in themselves, also built towards the persecutory and systematic acts of ghettoization, torture, enslavement, forced displacement, and mass

153. LINGAAS, CONCEPT OF RACE, *supra* note 29, at 18-19.

154. CLAYTON JOHN WHISNANT, QUEER IDENTITIES AND POLITICS IN GERMANY: A HISTORY, 1880-1945, 103-04 (2016).

155. Erik N. Jensen, *The Pink Triangle and Political Consciousness: Gays, Lesbians, and the Memory of Nazi Persecution*, 11 J. HIST. OF SEXUALITY 319, 343, 344 & n.122 (2002).

156. *Id*. at 334.

157. Davis, *Dusting Off the Law Books*, *supra* note 113, at 32-34.

158. *Id.* at 35.

159. U.N. Int'l Org. for Migration, *German Forced Labour Compensation Programme Holocaust Victim Assets Programme (Swiss Banks) Activity Report July 2000-December2001*, ¶ 51, U.N. Doc. MC/INF/248 (May 3, 2002).

160. The Ministries Case (*U.S. v. Weizsaecker et al*.), Case No. 11, Judgment, at 471 (Int'l Mil. Trib. Jan. 19, 1946). Persecution was recognized as a criminal charge in the Tokyo Tribunals. Charter of the IMT for the Far East, art. 5(c), Jan. 19, 1946, T.I.A.S. No. 1589; Adam J. Sacks, *Nazism's Political Victims Should Never Be Forgotten*, JACOBIN (Jan. 27, 2022), https://jacobin.com/2022/01/nazism-political-communist-socialist-victims-world-war-two-history.

murder.[161] The charge of persecution was pivotal in highlighting the widespread systematic acts of institutionalized racism perpetuated by the Nazis, especially since genocide was not yet codified. While gender persecution was not recognized as a crime in post-WWII trials, today, targeting women, girls, LGBTQI+ persons, or others because of their gender may amount to persecution.[162]

Just as recognition of persecution in WWII tribunals uncovered institutionalized discriminatory systems, recognition of gender persecution can uncover and hold accountable perpetrators of systems of institutionalized gender oppression. For example, experts characterize the anti-gender rights ideology of the Islamic State in Iraq and the Levant as "grounded on a systematic discrimination against persons on the basis of gender and gender expression, which has included torturing and killing those they deem not in conformity with their understanding of gender roles."[163] If proven, these acts would amount to gender persecution. More recently, the U.N. Special Rapporteur on the situation of human rights in Afghanistan said the Taliban's large-scale systematic rights violations constitute gender persecution.[164] In January 2025, the ICC Prosecutor applied for arrest warrants for Taliban leaders, accusing them of crimes against humanity for their systematic persecution of women, girls, and in an unprecedented step, LGBTQI+ persons.[165]

Today, the Rome Statute defines the crime against humanity of persecution as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity"[166] and prohibits persecution on "political, racial, national, ethnic, cultural, religious, gender … or other grounds that are universally recognized as impermissible under international law."[167] The Rome Statute's Elements of Crimes, a primary source of applicable

161. The Ministries Case, Case No. 11 at p. 471.

162. *See generally* OTP, Policy on the Crime of Gender Persecution, *supra* note 43.

163. Agnes Callamard (Special Rapporteur on extrajudicial, summary or arbitrary execution), *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Gender-Sensitive Approach to Arbitrary Killings*, ¶ 47, U.N. Doc. A/HRC/35/23 (June 6, 2017).

164. Bennett, *supra* note 15, ¶¶ 13, 18, 53, 58 & 117.

165. Int'l Crim. Ct., *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for warrants in the situation in Afghanistan*, ICC (Jan. 23, 2025), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-afghanistan; OHCHR, *Afghanistan: UN experts welcome ICC Prosecutor's application for arrest warrants for senior Taliban officials*, OHCHR (Jan. 24, 2025), https://www.ohchr.org/en/press-releases/2025/01/afghanistan-un-experts-welcome-icc-prosecutors-application-arrest-warrants. *See also* Artemis Akbary & Kirby Anwar, *Landmark ICC Arrest Warrant Application Seeks to Hold the Taliban Accountable for Homophobic and Transphobic Persecution*, Opinio Juris (Jan. 24, 2025), https://opiniojuris.org/2025/01/24/landmark-icc-arrest-warrant-application-seeks-to-hold-the-taliban-accountable-for-homophobic-and-transphobic-persecution/.

166. Rome Statute, *supra* note 19, art. 7(2)(g).

167. *Id*. art. 7(1)(h).

law for the ICC that assists it in interpreting and applying the statute's criminal provisions, breaks the definition into six elements, two of them elements common to all crimes against humanity.[168] Key to understanding protected groups under the Rome Statute crime against humanity of persecution is Element Two, which defines groups, and its relationship to Element Three, which defines perpetrator intent.[169] This section explains "group" determination under persecution through an examination of gender persecution.

1. Element Two: "The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such"[170]

Under Element Two of persecution, there are two options for determining membership in the "protected group:" (1) the perpetrator targeted such person or persons by reason of the identity of a group or collectivity, or (2) the perpetrator targeted the group or collectivity "as such."[171]

The first option, "the perpetrator targeted such person or persons by reason of the identity of the group or collectivity," allows a broad understanding of victims' membership in a protected group under persecution.[172] The OTP Policy on the crime of persecution makes clear that whether the victim is "objectively" a member of the group is irrelevant under this option.[173]

Commentary on the Rome Statute crime of persecution also affirms that, unlike under genocide, groups targeted for persecution do not require "objective" characteristics. It is sufficient that group members are targeted by the perpetrator because of their perceived membership, affiliation, or identification with a group.[174] Under the Rome Statute *any* group can be targeted for persecution, thus delinking it, in a sense, from the limitations of its enumerated grounds, though the persecutory conduct must be based on one of those grounds. Unlike

168. *Id.* arts. 9, 21; ICC Elements of Crimes, *supra* note 51, art. 7(1)(h).

169. OTP, Policy on the Crime of Gender Persecution, *supra* note 43, ¶¶ 41-55 (section on Element 2 describes "targeted groups" and section on Element 3 devoted to how to identify perpetrator's intent).

170. ICC Elements of Crimes, *supra* note 51, art. 7(1)(h).

171. *Id*. art. 7(1)(h)(2); *See also* OTP, Policy on the Crime of Gender Persecution, *supra* note 43, ¶ 41.

172. OTP, Policy on the Crime of Gender Persecution, *supra* note 43, ¶ 43.

173. *Id.* ¶ 44.

174. Niamh Hayes & Joseph Powderly, *Article 7: Crimes Against Humanity*, *in* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: ARTICLE-BY-ARTICLE COMMENTARY 226, ¶¶ 146, 148-49 (Kai Ambos ed., Hart Publ. 4th ed., 2022) [hereinafter Hayes & Powderly, *Article 7*]. *See also*, OTP, Policy on the Crime of Gender Persecution, *supra* note 43, ¶¶ 43-44.

genocide, groups under persecution do not need to mirror their protected grounds. This is further illustrated by the language: "by reason of the identity of a group," which refers to the perpetrator's perception of the victim.[175]

Group membership determinations are based on the perpetrator's perception; in other words, based on subjective criteria.[176] The characteristics of a group may overlap with the discriminatory grounds for targeting them, but this is not a requirement and has not been applied as one at the ICC.[177] However, while the absence of "objective" criteria does not negate group membership; its presence can serve as additional evidence of group membership.[178] If "objective" criteria were required for determining groups targeted with persecution, some of the grounds protected under the Rome Statute would be unworkable.[179] Niamh Hayes and Joseph Powderly ask, "[w]hile it is relatively easy to think of examples of national, ethnic or religious groups, what would constitute a 'cultural group' given the lack of any accepted international definition of the term?"[180] A similar question may arise for the terms "gender" or "race" which also lack internationally agreed upon definitions, despite their understanding as social constructs under international human rights law.

The second option, that the perpetrator must target the group or collectivity "as such" is a higher threshold. This is akin to the understanding of "protected groups" under genocide, in which membership in the group is established as a fact, including through some amount of "objective" criteria.[181]

It is worth noting that the language "identifiable group" in the Rome Statute definition of persecution creates a narrower understanding than that established by the International Military Tribunal's Charter, and the statutes of the ICTY and the ICTR, and that envisioned by International Law Commission.[182] Those refer to persecution on certain grounds (without referencing "groups").

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175. Machteld Boot & Christopher Hall, *(h) "Persecution"*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES ARTICLE BY ARTICLE 146-151, at 147 (Otto Triffterer ed., 1999) [hereinafter Boot & Hall, *(h) 'Persecution'*] (noting the implied "subjective notion in the word 'identifiable'"); Hayes & Powderly, *Article 7*, *supra* note 174, at 226.

176. OTP, Policy on the Crime of Gender Persecution, *supra* note 43, ¶ 44.

177. Hayes & Powderly, *Article 7*, *supra* note 174, at 226, ¶ 149.

178. OTP, Policy on the Crime of Gender Persecution, *supra* note 43, ¶ 44 n.57.

179. *Id.* ¶¶ 148-50.

180. *Id.* ¶ 149.

181. *Id.*; *See also* Boot & Hall, *(h) 'Persecution'*, *supra* note 175, at 147.

182. The IMT's Charter criminalized "persecutions on political, racial or religious grounds." Charter of the IMT, art. 6(c), (8 Aug.,1945). The Crimes Against Humanity provision of the ICTY statute criminalizes "persecutions on political, racial and religious grounds" when "committed in armed conflict, whether international or internal in character, and directed against any civilian

Unlike "groups" under genocide, the first option under persecution permits an inclusive understanding of group membership; *any* group or collectivity could be targeted and membership is determined exclusively from the perpetrator's perception.[183] The limit is the perpetrator's intent, which is a distinct element that must also be proven.[184] For the prosecution to bring a case, the perpetrator must target the victims based on one (or more) of the seven protected grounds. The group members, however, do not need to necessarily be members in fact of the group.[185]

Ultimately, when a perpetrator targets a person or persons by reason of the identity of a group or collectivity, it is enough, for purposes of proving persecution, that the perpetrator perceived the victims as part of the group.[186] The prosecution may therefore choose to only rely on subjective criteria for proving group membership.

Under persecution, group membership can extend beyond the victim perceived as a member of a targeted group to include victims who are not direct members of the group, such as allies, sympathizers or other affiliates.[187] For example, "if a perpetrator targets a school to prevent girls from attending, men who are teachers and staff at that school may form part of the targeted group, where the grounds for targeting are based on gender."[188]

Thus, victims of persecution can either be members of a group *in fact* (sharing some amount of "objective" criteria), or because the perpetrator *perceived* them as members or affiliates of a group (a purely

population." ICTY Statute, Arts. 5 & 5(h). The Crimes Against Humanity provision in the Statute of the ICTR criminalizes "[p]ersecutions on political, racial and religious grounds" when "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." Statute of the ICTR, *supra* note 53, arts. 3 & 3(h). The ILC's1996 Draft Code of Crimes against the Peace and Security of Mankind, which influenced the Rome Statute, listed "[p]ersecution on political, racial, religious or ethnic grounds," and its commentary noted it would apply to "acts of persecution which lacked the specific intent required for … genocide." ILC, Draft Code of Crimes Against the Peace and Security of Mankind with commentaries, art. 18(e) & Commentary ¶ 11, (1996). https://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf. Note that while it omits the language requiring targeting of a group "as such," these statutes and the ILC's proposed persecution definition are narrow in a different sense because they list fewer categories for protection than are currently listed under the Rome Statute's persecution provision.

183. *See* Boot & Hall, *(h) "Persecution"*, *supra* note 175, at 147. Note that this means that persecutory acts may therefore serve as evidence of genocide (under option one), or they may constitute acts of genocide (under option two), so long as all other required elements are met.

184. OTP, *Policy on the Crime of Gender Persecution*, ¶¶ 46-55.

185. *Id.* ¶¶ 41-45.

186. *Id.*

187. *Id.* ¶¶ 43-44 (citing the *Naletilić and Martinović* Trial Chamber holding "the targeted group does not only comprise persons who personally carry the (religious, racial or political) criteria of the group.); The targeted group must be interpreted broadly, and may, in particular, include such persons who are defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group." Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-T, Trial Chamber Judgement, ¶ 636 (Mar. 31, 2003).

188. OTP, Policy on the Crime of Gender Persecution, *supra* note 43, ¶ 43.

subjective test) and targeted them for it.[189] A prosecutor could theoretically also demonstrate that members of a targeted group were defined by both subjective and "objective" criteria. It is sufficient, however, to show that the perpetrator perceived the victim as a member of the targeted group (a purely subjective approach).

Take, for example, a case where a perpetrator beats two victims because they are wearing clothing that the perpetrator considers improper for women. The perpetrator targets the victims with the intent to discriminate based on gender. It is irrelevant whether the victims identify as women or are "objectively" defined as such because there is, as a matter of law, no need to apply any sort of "objective" criteria to determine their membership in the targeted group.[190] What matters under persecution is how the perpetrator perceived the victim and that the discrimination the perpetrator imposed was based on one or more prohibited grounds. It would be irrelevant whether the victims identify as transgender or whether the perpetrator misgendered the victim. They are members of the targeted group, since the perpetrator intentionally targeted them based on gender, a prohibited ground under the Rome Statute. This would mean victims who identify as transgender are included in the targeted group. This is particularly essential since there is no internationally agreed upon definition of gender.

The OTP Policy on the Crime of Gender Persecution (the Policy) underscores the absence of a requirement to "objectively" define gender, noting that if a perpetrator targets someone they believe to be, for example, gay or lesbian, whether or not the victim identifies as such is irrelevant to the conduct's discriminatory character.[191] The Policy further notes that "[i]f a perpetrator targets a person he perceives as a gay man, and the person also personally identifies as gay, this may provide evidence of the perpetrator's targeting of gay men. However, such an overlap is not required."[192]

2. *Element Three: "Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law."*[193]

Element Three of the crime of persecution requires that the perpetrator intentionally discriminated against the victim by reason of one or

189. *Id.* ¶¶ 41-44.
190. *Id.* ¶ 44.
191. *Id.*
192. *Id.* at n.57.
193. ICC Elements of Crimes, *supra* note 51, art. 7(1)(h).

more protected grounds. The prosecution must prove that (a) the perpetrator specifically intended to discriminate against a targeted group, meaning the perpetrator intended to treat a targeted group or member of that group unequally, and (b) the discriminatory treatment was based on a protected ground (political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law).[194]

The Policy explains that, in a context of crimes against humanity, "intent to discriminate is demonstrated when the perpetrator specifically intended to treat a targeted gender group or member of that group unequally" through a deprivation of fundamental rights.[195] The right to be free from certain forms of discrimination is a fundamental human right.[196] Irrelevant to the determination about unequal treatment is whether the perpetrators personally believe that their actions are discriminatory, or whether the society where the persecution took place (or any society) perceives the acts as discriminatory.[197]

To prove Element Three for gender persecution, the prosecution must establish that the discrimination was based on gender.[198] The Policy makes clear that "[g]ender refers to sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviours, activities and attributes."[199] The Rome Statute states that "it is understood that the term "gender" refers to the two sexes, male and female, within the context of society."[200] The Policy clarifies that the term "within the context of society" is synonymous with "social constructs" and refers to the group of social constructs and criteria used to define gender.[201] These include, for example, sexual orientation, gender identity and gender expression, including social constructions of "woman," "man," "girl," and "boy."[202]

All persons may be vulnerable to gender persecution because all persons can have or be perceived to have gender criteria, including

194. *Id*.; OTP, Policy on the Crime of Gender Persecution, *supra* note 43, ¶ 49.

195. *Id*.

196. All international human rights instruments prohibit discrimination. CETIM, THE RIGHT TO NON-DISCRIMINATION 7 (2011).

197. "Breaches of fundamental rights cannot be ignored, dismissed or justified on the basis of culture" OTP, Policy on the Crime of Gender Persecution, *supra* note 43, ¶ 27. The Policy also emphasizes the need to distinguish motive from the intent to treat a targeted group unequally, noting for example, that "personal motives to rape may include 'sexual gratification' or the 'opportunity' to commit rape. Such motives do not undermine discriminatory intent." *Id*. ¶ 49.

198. Rome Statute, *supra* note 19, art. 7(1)(h).

199. OTP, Policy on the Crime of Gender Persecution, *supra* note 43, at 3.

200. Rome Statute, *supra* note 19, art. 7(3). Note that this definition is absent from the draft CAH treaty. Draft CAH Treaty, *supra* note 32.

201. OTP, Policy on the Crime of Gender Persecution, *supra* note 43, at 3.

202. *Id*.

sexual orientation, gender identity and expression, or sex characteristics. Under law, these terms are not required to be synonymous with a known "group," such as "women." They are constructs and criteria that can be imposed on *any* group of persons. Gender constructs and criteria are often expressed differently within societies and from society to society.[203] They can also change over time.[204] In this way, gender can be a celebrated part of cultural diversity. To understand gender persecution, it is key to remember that perpetrators impose their own understandings of gender criteria, regardless of how targeted individuals or societies view gender criteria.

Thus, the prosecution must show that the perpetrator utilized social constructs and criteria that are generally understood as comprising gender as a basis to discriminate. However, *who* the perpetrator imposes the criteria on may be solely understood from the point of view of the perpetrator. Recall that under Element Two of persecution (targeted group), it is unnecessary to prove that the victim personally possessed the criteria but sufficient that the perpetrator perceived them as having (or missing) the required gender criteria and targeted them on that basis.[205] The same is true for persecution based on race, ethnicity, nationality, culture, politics or other protected categories. Constructs and criteria that are generally understood as defining race or ethnicity can include, for example, language, physical characteristics or social stereotypes, among others. Whether the victim "objectively" possesses these criteria is irrelevant to establish persecution.

3. Accountability For Gender Persecution

Currently, gender persecution is the only holistic charge that recognizes the severe deprivation of fundamental rights committed on the grounds of gender in the context of conflict and atrocities.[206] As such, it is a vital tool for holding perpetrators accountable for systematic discriminatory rights deprivations. For decades, despite its inclusion as a crime against humanity in the Rome Statute, a dearth of jurisprudence marked gender persecution. More recently, however, there are signs

203. *Id.*

204. *Id.*

205. While a victim's possessing the criteria may have value for proving intent, their lack of such criteria is not evidence of a perpetrator's lack of intent. *Id.* ¶ 42.

206. Other crimes under the Rome Statute that can explicitly recognize a perpetrator's intent to discriminate based on gender include the crime against humanity of forced pregnancy and torture as a war crime. *See* Rome Statute, *supra* note 19, arts 7(1)(g), 8(2)(ii); ICC Elements of Crimes, *supra* note 51, art. 8 (2) (a) (ii)-1(2) (war crime of torture). However, these crimes are limited to specific acts, whereas gender persecution may encompass these acts and other intentional and severe deprivations of fundamental rights contrary to international law, so long as its other elements are met. Rome Statute, *supra* note 19, art. 7(2)(g).

that tribunals are seeking to ensure justice for gender persecution. For example, Colombia's Special Jurisdiction for Peace has charged armed actors with crimes against humanity of persecution based on gender.[207] Additionally, in 2019 the ICC Pre-Trial Chamber in the *Al Hassan* case allowed charges of gender and religious persecution as crimes against humanity to move to trial.[208] It listed alleged crimes, including rape and other forms of sexual violence, torture, and murder, committed against civilians, particularly women, on "sexist grounds."[209]

The Court listed gender persecution and sexual violence charges separately, indicating that sexual violence should be charged cumulatively together with persecution and torture charges, rather than be subsumed under them. Doing so underscores both the gravity of sexual violence and that of discrimination driving the persecution for which sexual violence can be an underlying act. The Pre-Trial Chamber also observed the ways in which other forms of discrimination intersected with gender discrimination.

In its June 26, 2024, decision, while a majority of the Trial Chamber found that gender persecution occurred,[210] it did not agree to convict Al Hassan for gender persecution or any other gender violence crimes, including sexual violence or sexual slavery.[211] This resulted from a split majority. While two of the three judges agreed these crimes occurred, one of those two judges felt that the suspect had defenses—duress and, in some instances, mistake of law—to all the charges, including the gender charges.[212] The third judge disagreed that Al Hassan was responsible for gender crimes including rape, sexual slavery, forced marriage, or gender persecution.[213] She asserted that they were outside the armed groups' "common purpose," and called rapes of women detained by the armed groups for purported dress code violations "opportunistic," and

207. Jurisdicción Especial para la Paz, Sala de Reconocimiento de Verdad, de Responsabilidad, y de Determinación de los Hechos y Conductas, Auto No. 03, Caso 02, ¶¶ 413, 414, 911, 1428, 1429, 1477, 1481, 3198 (July 5, 2023), https://relatoria.jep.gov.co/documentos/providencias/1/1/Auto_SRVR-ADHC-03_05-julio-2023.pdf.

208. *See* Prosecutor v. Al Hassan, ICC-01/12-01/18, Decision relating to the confirmation of the charges brought against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Sept. 30, 2019) [hereinafter Confirmation of Charges], https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1808354d8.pdf.

209. *Id.* ¶ 707 (Sept. 30, 2019).

210. Prosecutor v. Al Hassan, ICC-01/12-01/18, Trial Judgment, ¶¶ 1574, 1580, 1658-59, 1736 (June 26, 2024).

211. *Id.* ¶ 1785. *See also* Rosemary Grey & Valerie Oosterveld, *Al Hassan: The International Criminal Court's First Judgment on Gender Persecution* (Parts I&II), OPINIO JURIS (Aug. 2, 2024); Kevin John Heller, *The Role of Gender Persecution in the Al Hassan Judgment*, OPINIO JURIS (June 27, 2024).

212. Prosecutor v. Al Hassan, ICC-01/12-01/18, Opinion Individuelle et Partiellement Dissidente du Juge Antoine Kesia-Mbe Mindua, ¶¶ 99-101, 113-18 (June 27, 2024); Prosecutor v. Al Hassan, ICC-01/12-01/18, Trial Judgment, ¶ 1785 (June 26, 2024).

213. Prosecutor v. Al Hassan, ICC-01/12-01/18, Trial Judgment, ¶ 1785 (June 26, 2024).

somehow akin to "extramarital sexual intercourse" prohibited by the armed groups.[214] The majority, however, disagreed with this judge's dismissal of gender crimes' gravity. Their analysis provides the ICC's first in-depth jurisprudence on gender persecution and builds the jurisprudence for other gender crimes.

Gender discrimination often intertwines with other forms of discrimination that reinforce systems of oppression, such as racism or xenophobia, and creates compounding forms of oppression for people who face these multiple forms of discrimination.[215] This is gaining recognition in tribunals. In Colombia, Indigenous and Afro-descendant women, girls and LGBTQI+ people often suffered conflict violence that was directed at them on the grounds of gender, racism and/or ethnicity.[216] In 2023, Colombia's Special Jurisdiction for Peace (JEP), in a decision in its Macro-Case 02, charged armed actors with crimes against humanity of persecution based on gender, racism and ethnicity, noting that these persecution grounds intersected in many cases.[217] The gender persecution charges were connected to an array of acts, including torture, enslavement, killing, sexual violence and other crimes.

C. Defining Protected "Groups" Under Apartheid

Under the Rome Statute, and in the draft CAH treaty, the crime against humanity of apartheid is defined as "inhumane acts … committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."[218] Prosecutors must prove the existence of such an institutionalized regime of systematic oppression by a "racial group" over any other "racial group/s" to demonstrate apartheid. The targets of the inhumane acts

214. Prosecutor v. Al Hassan, ICC-01/12-01/18, Separate and Partly Dissenting Opinion of Judge Tomoko Akane, ¶¶ 12, 16, 28, (June 26, 2024).

215. Davis, *Dusting Off the Law Books*, *supra* note 113, at 6; "Just as social constructs and criteria are used to define the understanding of race, ethnicity or culture, so are social constructs and criteria used to define the understanding of gender." OTP, Policy on the Crime of Gender Persecution, *supra* note 43, at 3.

216. Dejusticia, *Violencia sexual contra mujeres indígenas y afro en el marco del conflicto armado* (2021), https://www.dejusticia.org/wp-content/uploads/2021/08/Documento-de-investigacio%CC%81n-violencia-sexual-mujeres-indigenas.pdf; Davis, *supra* note 113, at 42-43; Centro Nacional de Memoria Histórica, *Aniquilar La Diferencia: Lesbianas, Gays, Bisexuales y Transgeneristas en el Marco del Conflicto Armado Colombiano*, (2015), http://www.centrodememoriahistorica.gov.co/descargas/informes2015/aniquilar-la-diferencia/aniquilar-la-diferencia.pdf.

217. Jurisdicción Especial para la Paz, Sala de Reconocimiento de Verdad, de Responsabilidad, y de Determinación de los Hechos y Conductas, Auto No. 03, Caso 02, ¶¶ 413, 414, 911, 1428, 1429, 1477, 1481, 3198 (July 5, 2023), https://relatoria.jep.gov.co/documentos/providencias/1/1/Auto_SRVR-ADHC-03_05-julio-2023.pdf.

218. Rome Statute, *supra* note 19, art. 7(2)(h). This definition is also found in the draft CAH treaty. Draft CAH Treaty, *supra* note 32, art. 3.

committed to uphold the oppressive regime do not have to be members of one of the groups that is targeted by the regime. The nature of the regime that the perpetrator is upholding is a separate element to prove.[219]

In other words, the victims of that institutionalized regime, and not just (or even necessarily) the victims of the inhumane acts, are meant to be recognized in the definition of the targeted group(s). This is true even though victims of inhumane acts designed to uphold the regime would still be victims of the crime against humanity of apartheid, whether or not they were part of the group(s) the regime targeted. The requirement to prove the existence of, and the perpetrator's intent to maintain a regime of systematic oppression over a "racial group," sets apartheid apart from other inhumane acts that would constitute crimes against humanity. This is why it is important that those targeted groups are understood in a way that recognizes all victims of institutionalized regimes of systematic oppression and domination.

While over the last few decades the terms "race" and "gender" have come to be understood as social constructs under international human rights law,[220] at issue with the crime of apartheid is how "racial group" is understood under international criminal law. Since racial apartheid has yet to be tried, there is no formal jurisprudence available to interpret how "racial group" is legally understood under the crime of apartheid.[221] There are, however, *travaux préparatoires* for the Apartheid Convention and the Rome Statute, which provide clues to how drafters understood "racial group" under the crime of apartheid. Additionally, U.N. experts, including on the situations in Myanmar and in Palestine, have discussed or applied an understanding of the crime of racial apartheid.[222] In all these contexts, "racial group" is generally understood to be in-

219. The Rome Statute definition of apartheid and the Elements of Crimes makes this clear. Elements 4 and 5 require a prosecutor show that "[t]he conduct" (meaning an inhumane act) was committed in the context of and with the intent to maintain "an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups." ICC Elements of Crimes, *supra* note 51, art. 7(1)(j). The context of such a regime forms its own element, separate from the elements requiring commission of an inhumane act.

220. "Gender," for instance, includes sexual orientation, gender identity, gender expression, and sex characteristics. OTP, Policy on the Crime of Gender Persecution, *supra* note 43, at 3.

221. While there has yet to be a conviction of apartheid as a crime against humanity, in 2021, the National Prosecuting Authority in South Africa indicted two individuals for the crime against humanity of apartheid. Gerhard Kemp & Windell Nortje, *Prosecuting the Crime against Humanity of Apartheid: The Historic First Indictment in South Africa and the Application of Customary International Law*, 21 J. INT'L CRIM. JUST. 405 (2023), https://academic.oup.com/jicj/article/21/2/405/7231934.

222. *See, e.g.*, IIFFMM Report on Myanmar, *supra* note 13; Lynk, Report of the Spec. Rapp. on human rights in Palestinian territories, *supra* note 12. Statement by Michael Kirby, Chair of the Comm'n of Inquiry on Human Rights in the Democratic People's Republic of Korea to the 25th Session of the Human Rights Council, Geneva, OHCHR, Mar. 17, 2014; *see generally* Beth Van Schaack, *Determining the Commission of Genocide in Myanmar: Legal and Policy Considerations*, 17 J. INT'L CRIM. JUST. 285 (May 2019).

terpreted using the mixed "objective"-subjective approach under the crime of genocide, with some U.N. experts and most criminal law scholars who address apartheid arguing that "racial group" should instead be interpreted as a social construct in line with international human rights law.[223]

While not explored in depth in this article, examining the draft CAH treaty through a lens of statutory interpretation principles may unveil possible arguments to both counter and affirm the presumption that "groups" under apartheid should be understood as it is under genocide. Statutory interpretation in international criminal law involves a balancing of principles of strict construction and legality,[224] with other principles, such as those promoting internal coherence, *e.g.* between lists of protected "groups" under different crimes in a single statute.[225] As the draft treaty is negotiated and finalized, however, there is an opportunity to affirm a purely subjective understanding of "groups" under apartheid by spelling out that understanding in its black letter text.

The 2021 ICJ interpretation of ICERD in *Qatar v. United Arab Emirates*, discussed under section I.A., underscores the need to clarify a subjective understanding of "groups" in the draft CAH treaty. The ICJ's interpretation countered CERD's broad understanding of "racial discrimination" under ICERD.[226] It parsed out "nationality" from "national origin" under ICERD and justified this interpretation by describing the treaty's terms "national origin," as well as "race, colour and descent" as "characteristics that are inherent at birth"[227] and thus distinct from "nationality," which may be changed. The decision, with its reference to "characteristics inherent at birth," arguably could be

223. *E.g.*, Lingaas, Concept of Race, *supra* note 29, at 57-69, 87-92; Cassese, *supra* note 65, at 334; Schabas, Genocide in International Law, *supra* note 64, at 126; Lynk, Report of the Spec. Rapp. on human rights in Palestinian territories, *supra* note 12, ¶ 32.

224. *See* Rome Statute, *supra* note 19, art. 22. The Draft CAH treaty lacks a provision similar to article 22 but has a provision on fair treatment of defendants, which guarantees their rights under "applicable national and international law, including human rights law and international humanitarian law." Draft CAH Treaty, *supra* note 32, art. 11.

225. Under VCLT Article 31(1), described as the underpinning or "holistic" interpretation method, (Prosecutor v. Katanga, Case No. ICC 01/04-01/07, Judgement Pursuant to Article 74 of the Statute, ¶¶ 44-47 (Mar. 7, 2014)), treaties are to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

226. CERD's Gen. Recommendations clarify the inclusion of numerous groups not named in the treaty. McDougall, Introductory Note, *supra* note 31. These recommendations do so without naming categories the groups fall under. *See, e.g.*, Rep. of the CERD, Gen. Recommendation on the rights of indigenous peoples, at 122-24, U.N. Doc. A/52/18 (1997); CERD, Gen. Recommendation No. 32, U.N. Doc. CERD/C/GC/32 (2009).

227. Application of the Int'l Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A. E.), 2021 I.C.J. at 126, ¶ 81. Preliminary Objections, Judgment, (Feb. 4, 2021).

weighed in favor of requiring "objective" characteristics to determine group membership and has been subject to dissents and critiques.[228]

Unless otherwise directed by policymakers (including the CAH treaty drafters), when prosecuting perpetrators of apartheid, prosecutors and courts may be inclined to follow the "objective"-subjective understanding of "groups" under genocide as opposed to the subjective understanding under persecution. As described below, this could further entrench the failed recognition of, for example, Palestinians and Rohingyas as victims of the crime against humanity of apartheid. Similarly, adding "gender groups" to the draft CAH treaty's apartheid provision without ensuring a broad understanding of victims, risks the exclusion of some women and other LGBTQI+ victims, as explained below under Section II.

1. The Apartheid Convention's Travaux Préparatoires

The Apartheid Convention is understood to derive much of its legal framing and meaning from the Genocide Convention.[229] Numerous U.N. documents and speeches spanning decades identify acts or policies of apartheid as forms of, or related to, genocide.[230] Apartheid Convention drafters relied on the Genocide Convention for understandings of

228. *See* sources cited *supra* note 72 and accompanying text.

229. "The Apartheid Convention was, as a matter of fact, modeled after the Genocide Convention." Carola Lingaas, *The Crime against Humanity of Apartheid in a Post-Apartheid World*, 2 OSLO L. REV. 86, 99 (2015); "[M]ost scholars refer directly to the corresponding scholarship or jurisprudence on the crime of genocide." LINGAAS, CONCEPT OF RACE, *supra* note 29, at 174; Roger S. Clark, *Apartheid*, *in* INTERNATIONAL CRIMINAL LAW, VOL. 1: SOURCES, SUBJECTS AND CONTENTS: 3d. ed., 599, 602 (M. Cherif Bassiouini ed., 2008) (noting that much of the definitional language in the Apartheid Convention derives from the Article II of the Genocide Convention); "Because it has some common elements with genocide it should not come as a surprise that the Apartheid Convention is modelled after the Genocide Convention." LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 59 (2004); "[I]t was to be expected too that apartheid would be equated with genocide…. There is in fact voluminous U.N. Literature seeking to establish the identification of apartheid with genocide." KUPER, GENOCIDE, *supra* note 148, at 199-200.

230. "There is in fact voluminous U.N. Literature seeking to establish the identification of apartheid with genocide." KUPER, GENOCIDE, *supra* note 148, at 200. *See, e.g.*, *Report of the Ad-Hoc Working Group of Experts set up under Res. 2 (XXIII) of the Comm'n on Human Rights*, ¶¶ 282-83, 666, 939, 949-50, 957, 1022, 1137, 1151, U.N. Doc. E/CN.4/950 (Oct. 27, 1967) [hereinafter U.N. Ad-Hoc Working Group under Res. 2, 1967]; *Question of the Violation of Human Rights and Fundamental Freedoms including Policies of Racial Discrimination and Segregation and of Apartheid, in all Countries, with Particular Reference to Colonial and other Dependent Countries and Territories including (b) Report of the Ad Hoc Working Group of Experts Established under Resolution 2 (XXIII) and 2 (XXIV) of the Commission*, ¶ 1-40, U.N. Doc. E/CN.4/984/Add.18 (Feb. 28, 1969) [hereinafter *U.N. Question of Human Rights, 1969*]; Report of the Ad Hoc Working Group of Experts under Comm'n Res. 8 (XXVII), *Study Concerning the Question of Apartheid from the Point of View of International Penal Law*, ¶¶ 125-135, 149, U.N. Doc. E/CN.4/1075 (Feb. 15, 1972) [hereinafter *U.N. Study Concerning the Question of Apartheid*, 1972]; U.N. Study of the Question of Genocide, 1978, *supra* note 139, ¶¶ 394-405; Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, ¶¶ 42-46, U.N. Doc. E/CN .4/Sub .2/1985/6 (July 2, 1985); Rep. of the G.A., at 7, U.N. Doc. A/49/PV.14 (Oct. 3, 1994).

legal elements likely for a few reasons, including to provide an understanding and framing of apartheid in South Africa. Apartheid policies were frequently analogized to the persecution, ghettoization, forcible relocation and other grave crimes committed against Jews under the Nazis—crimes which built towards and facilitated the Nazi's acts of extermination and genocide against them.[231] Because many considered apartheid acts in South Africa as genocidal acts (or at minimum a prelude to them), at one point U.N. experts suggested revising the Genocide Convention to make this clear.[232] Ultimately, the U.N. General Assembly determined that apartheid, like genocide, needed to be addressed through its own convention,[233] as a boost to the broader campaign to bring down the South African regime through economic and other sanctions.

As early as 1967, a U.N. *Ad Hoc* Working Group of Experts (Working Group), whose reports informed the drafting of the 1973 Apartheid Convention, began characterizing certain practices of apartheid in South Africa as genocide.[234] In the years following, U.N. experts continued to analogize apartheid acts to genocide. For example, in 1972, the Working Group commissioned a study on apartheid policies in view

231. *E.g.*,. G.A. Res. 2545 (XXIV), ¶ 1 (Dec. 11, 1969) ("*[r]enew[ed] its strong condemnation* of racism, nazism*, apartheid* and all other totalitarian ideologies and practices."); G.A. Res. 2438 (XXIII), preamb. ¶ 2 & ¶¶ 1-4 (Dec. 19, 1968); G.A. Res. 2839 (XXVI), preamb. ¶ 2, (Dec. 18, 1971) (*"[c]onsider[ed]* that contemporary manifestations of resurgent Nazism… combine racial … discrimination with terrorism, and that in some cases racism has been raised to the level of State policy, as in the case of South Africa,"); *U.N. Question of Human Rights, 1969, supra* note 230, ¶¶ 81, 86, 99. *Statement by Mr. Thabo Mbeki, son of Mr. Govan Mbeki, the African leader on trial in Pretoria, before a delegation of the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa in London*, ¶ 23, U.N. Doc. A/AC.115/L.65 (Apr. 13, 1964)*; Statement by Mr. Leslie 0. Harriman (Nigeria), Chairman of the Special Committee against Apartheid, on the proposal to declare the independence, of Transkei*, ¶ 3, U.N. Press Release GA/AP/596 (Sept. 21, 1976); *Address by President Nelson Mandela of South Africa to the forty-ninth session of the General Assembly*, ¶ 4, U.N. Doc. A/49/PV.14 (Oct. 3, 1994), *available at* https://docs.un.org/en/A/49/PV.14; *See also* KUPER, GENOCIDE, *supra* note 148, at 199-200 (1981); The Ministries Case, Case No. 11 at 470-71.

232. KUPER, GENOCIDE, *supra* note 148, at 200-01 (referencing the *U.N. Study Concerning the Question of Apartheid*, *1972*, *supra* note 230, ¶ 161).

233. "[T]he conclusion of a convention on the suppression and punishment of the crime of apartheid under the auspices of the United Nations would be an important contribution to the struggle against *apartheid*, racism, economic exploitation, colonial domination and foreign occupation," G.A. Res. 2786 (XXVI), Draft convention on the suppression and punishment of the crime of *apartheid*, preamb. ¶ 3, ¶ 2 (Dec. 6, 1971) (calling for the Comm'n on Human Rights and the Economic and Social Council to submit the draft convention to the Gen. Assemb.); "*Observing* that, in the Convention on the Prevention and Punishment of the Crime of Genocide, certain acts which may also be qualified as acts of apartheid constitute a crime under international law …. *Convinced* that an Int'l Convention on the Suppression and Punishment of the Crime of Apartheid would make it possible to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of apartheid." Int'l Convention on the Suppression and Punishment of the Crime of Apartheid, preamb. ¶¶ 5, 9, A/L.712/Rev.1 (Nov. 19, 1973).

234. U.N. Ad-Hoc Working Group under Res. 2, 1967, *supra* note 230, ¶¶ 950, 1022, 1137, 1151; *see also U.N. Study Concerning the Question of Apartheid*, 1972, *supra* note 230, ¶¶ 72(e), 72(g), 161.

of international criminal law, in which it called for apartheid acts to be considered genocide, and listed these acts:

> The institution of group areas …, which affected the African population by crowding them together in small areas where they could not earn an adequate livelihood, or the Indian population by banning them to areas which were totally lacking the preconditions for the exercise of their traditional professions;… forcible separation of Africans from their wives … thereby preventing African births;… deliberate malnutrition … for the non-white sectors…; imprisonment and ill-treatment of non-white … leaders and … prisoners … who often die in suspicious circumstances, …[as] acts designed to eliminate part of the black population; killing … through … slave or tied labour.[235]

The Working Group's report reiterated the recommendation that certain apartheid acts be made punishable under the Genocide Convention.[236] It also observed:

> [T]he Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the Genocide Convention contain important guidelines on how to consider from an international penal law point of view inhuman acts resulting from the policies of *apartheid*. This is because the former Convention refers expressly to apartheid policies and the latter is viewed more and more in its relationship with these policies… . The … rules of international penal law which can be applied to the policy of *apartheid* are also those which apply to the crime of genocide.[237]

The Working Group explained that certain practices intrinsic to the enforcement of apartheid violate the Genocide Convention.[238] The Apartheid Convention ultimately included elements from the Genocide Convention.[239]

Professor Ronald Slye posited that for purposes of genocide "racially and ethnically defined groups of Blacks and coloreds would qualify as protected groups" under the South African regime.[240] However, there was some doubt within the international community as to whether apartheid practices in South Africa met the threshold for

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235. *U.N. Study Concerning the Question of Apartheid*, *1972*, *supra* note 230, ¶¶ 80 (1)-(5), 122 (a)-(e), 129-135 (Feb. 15, 1972); *see also U.N. Question of Human Rights, 1969*, *supra* note 230.

236. *U.N. Study Concerning the Question of Apartheid*, 1972, *supra* note 230, ¶ 160. *See also U.N. Question of Human Rights, 1969*, *supra* note 230.

237. *U.N. Study Concerning the Question of Apartheid*, 1972, *supra* note 230, ¶ 72.

238. *Id*. ¶¶ 122, 130 & 149.

239. *See, e.g.*, Apartheid Convention, *supra* note 18, arts. II (a) & (b).

240. Slye, *Apartheid as a Crime Against Humanity, supra* note 23, at 299.

genocide largely because of the requirement under genocide that a perpetrator specifically intend to destroy a group *in whole or in part*.[241] Kuper explains that while numerous people had begun equating apartheid with genocide, some perceived the South African government to have not yet met that threshold, despite the similarities between apartheid policies and those that led to genocide in Europe.[242] This was attributed in part to the government's desire for exploitable labor, among other economic factors.[243] "Instead of a genocidal solution, the government has been obliged to fall back on two devices—the fragmentation of the African population and the denial of citizenship," Kuper wrote.[244]

2. "Racial groups" Under the Apartheid Convention and The Rome Statute

While the Ad Hoc Working Group was drafting its 1972 report, U.N. Special Rapporteur Nicodème Ruhashyankiko was working on a study analyzing the relationship between genocide, war crimes, crimes against humanity and apartheid which would be presented to the United Nations in 1978.[245] When examining the terms "ethnic groups" and "racial groups," Special Rapporteur Ruhashyankiko echoed the same outdated understandings of "race" and "ethnicity" that other U.N. Working Groups and the Genocide Convention drafters utilized.[246] For example, quoting a 1970s study, the Rapporteur stated, "[b]y race we mean a group of persons with certain physical characteristics which are hereditarily transmissible."[247] The study also quotes a UNESCO-sponsored study defining the term "race" as "a group of population characterized by… hereditary particles (genes) or physical characters,

241. *E.g.*, U.N. Ad-Hoc Working Group under Res. 2, 1967, *supra* note 230, ¶ 1137.

242. KUPER, GENOCIDE, *supra* note 148, at 203 (1981). *See also* SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 64, at 236-37. Witnesses testified before the U.N. that torture, killings and other inhumane acts in South Africa as a result of apartheid policies were precursors to or amounted to genocide. *E.g.*, U.N. Ad-Hoc Working Group under Res. 2, 1967, *supra* note 230, ¶¶ 282-83, 666, 950.

243. KUPER, GENOCIDE, *supra* note 148, at 206-77. "The policy of apartheid as a whole does not appear to have been primarily aimed at extermination, but rather at domination and exploitation." Slye, *Apartheid as a Crime Against Humanity, supra* note 23, at 299.

244. KUPER GENOCIDE, *supra* note 148, at 207.

245. In 1969, on the recommendation of the Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, the U.N. Economic and Social Council commissioned a study on the question of the prevention and punishment of the crime of genocide. G.A. Res. 1420 (XLVI) (June 6, 1969). The Sub-Comm'n appointed Ruhashyankiko, then-member of the Sub-Comm'n, as its Special Rapporteur. G.A. Res. 7 (XXIV), ¶ 3, (Aug. 18, 1971). U.N. Study of the Question of Genocide, 1978, *supra* note 139.

246. U.N. Study of the Question of Genocide, 1978, *supra* note 139, ¶¶ 56-57, 69-76. *See* discussion in *I.A. Definition of "protected groups" under genocide* above.

247. U.N. Study of the Question of Genocide, 1978, *supra* note 139, ¶ 73.

which appear, fluctuate, and often disappear in the course of time…."[248] The study makes no reference to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in its discussion of "ethnic and racial" groups.[249]

Since the drafting of the Genocide and Apartheid Conventions, international human rights law has clarified that terms such as "race," "ethnicity" and "gender" are social constructs, reflecting contemporary understandings of discrimination.[250] As a human rights violation under ICERD,[251] apartheid overlaps with its criminal version largely in terms of how it is understood as a form of wrongdoing. The difference between the two lies in the strict requirements under law for prosecution of crimes as opposed to what is required to demonstrate human rights violations. As a crime, apartheid is interpreted more narrowly and in accordance with international criminal law principles such as *nullum crimen sine lege*,[252] often referred to as the principle of legality. While international human rights law can be an interpretive aid for international criminal law, it cannot necessarily be transposed onto it.

When discussing apartheid as a crime against humanity akin to genocide, U.N. experts have reiterated that apartheid practices clearly amount to human rights violations, but that for acts to constitute crimes under international criminal law the standard must be higher and more rigidly interpreted.[253] A 1981 U.N. study on the implementation of the Apartheid Convention explains that not all human rights violations are described as criminal, and that racial discrimination is not required to amount to a crime under the ICERD, but is required to under the Apartheid Convention. "Accordingly," it noted, "the specific conduct

248. *Id.* ¶ 74.

249. The Report, however, invokes ICERD, an international human rights treaty, when discussing the understanding of "national groups" under genocide, citing the term "national origin" found under ICERD. *Id.* ¶ 59. It states, "Obviously, a national group comprises persons of a common national origin. The latter expression 'national origin' is used, for example in [ICERD]…." *Id.* The authors discuss ICERD's definition of "racial discrimination" below.

250. *See* sources cited *supra* note 31 and accompanying text.

251. ICERD, *supra* note 31, art. 3.

252. While observing that relevant human rights and other treaties can influence interpretation of the Apartheid Convention, a U.N. Study on its implementation noted that the principle of legality nonetheless requires a narrower interpretation than would be permitted under human rights law. Comm'n on Hum. Rts., *Study on Ways and Means of Insuring [sic] the Implementation of International Instruments Such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, Including the Establishment of the International Jurisdiction Envisaged by the Convention*, ¶ 51-52, U.N. Doc. E/CN.4/1426 (Jan. 19, 1981) [hereinafter *U.N. Study on Ways and Means, 1981*]. *See also* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 334 (1992); INTERNATIONAL CRIMINAL COURT: COMPILATION OF UNITED NATIONS DOCUMENTS AND DRAFT ICC STATUTE BEFORE THE DIPLOMATIC CONFERENCE 745 (M. Cherif Bassiouni ed., No Peace Without Justice, et al., (1998)) [hereinafter ICC COMPILATION OF U.N. DOCUMENTS].

253. *E.g.*, *U.N. Study on Ways and Means, 1981, supra* note 252, at ¶¶ 51-52; *U.N. Study Concerning the Question of Apartheid, 1972*, *supra* note 230, ¶¶ 72(f), 73.

elaborated in the Apartheid Convention's proscription is not merely a more detailed treatment of a human rights violation, but also a seminal description of a class of international crime."[254] The study drafters explain:

> [I]f the various human rights instruments touching upon racial matters are viewed simply as consequential arrangements among States parties, the *Apartheid* Convention appears duplicative …. However, when these instruments are considered as declarations regarding general rules of international law, the distinctive role of the *Apartheid* Convention becomes clearer. It strives to define the international crime of *apartheid* and to express the consequences for States of that crime, while at the same time extending particular attention and protective measures to that matter in a manner similar to that done under other human rights instruments.[255]

The Working Group had observed in 1972 that, "[t]he only acts which may be considered crimes under international law in the context of *apartheid* are those which are mentioned as crimes against humanity in documents referring expressly to crimes under international law."[256] The 1981 study on implementation reiterated these findings and stated that the international criminal and humanitarian treaties[257] partially incorporated into and relevant to interpreting the Apartheid Convention are used to define the conduct prohibited in Article II.[258] The 1981 study affirmed that apartheid acts are informed by, or at least reflected in, international human rights law prohibitions, but are prohibited under and follow the principles of international criminal law.[259]

The international criminal law principle that crimes should be strictly construed[260] may weigh against a court utilizing a broader

254. *U.N. Study on Ways and Means, 1981*, *supra* note 252, ¶ 26.

255. *Id.* ¶ 29.

256. *U.N. Study Concerning the Question of Apartheid, 1972*, *supra* note 230, ¶ 73.

257. *U.N. Study on Ways and Means*, *1981, supra* note 252, ¶¶ 49, 49 n. 5 (citing The Nuremberg Principles; Crimes Against Humanity (referring to VI (c) of the Nuremberg Principles); The Genocide Convention; The four Geneva Conventions of Aug. 12, 1949 and the 1977 Additional Protocols thereto; The Slavery Convention (Sept. 25, 1926); G.A. Res. 2391 (XXIII), The Convention of the Non-applicability of Statutes of Limitation to War Crimes and Crimes Against Humanity (Nov. 26, 1968), .

258. *Id.* ¶ 50. "The difference between the prohibition of article II and the prohibition stated in these other Conventions is that the *Apartheid* Convention prohibition refers to specific conduct done in furtherance of a policy of 'racial discrimination' while the other Conventions with the exception of the *Genocide Convention* do not limit their prohibitions and violation to that particular purpose." *Id.*

259. *U.N. Study on Ways and Means*, *1981, supra* note 252, ¶¶ 51-52. By emphasizing that human rights treaties are relevant to the Convention's interpretation in that they embody "a worldwide consensus of certain minimum standards," the 1981 study could nonetheless be argued to provide support to defining apartheid's "racial group" in line with ICERD. *Id.* ¶ 43.

260. Rome Statute, *supra* note 19, art. 22(2).

definition of, for example, racial discrimination, like that found under human rights law. This is particularly true if policymakers fail to make clear that "racial groups" should be understood broadly. An example of this type of clarification is Article 21 on applicable law under the Rome Statute, which states that "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights…."[261] While the draft CAH treaty borrowed much of its language from the Rome Statute, unlike the Rome Statute, it does not establish a court and it omits this applicable law provision.[262] However, this does not prevent drafters from including a provision to ensure application of international human rights law.

Without such a provision, under the current draft CAH treaty, prosecutors and courts may rely on existing international criminal law understandings of protected "groups" that are not informed by international human rights law. This is one reason it is essential that the draft CAH treaty be revised to clearly reflect contemporary understandings of legal terms from international human rights law.

In the years preceding the formation of the Rome Statute, many U.N. member states called for the crime of apartheid to be included in a treaty for a future international criminal justice accountability mechanism. For example, a substantial number of states urged the International Law Commission (ILC) to include apartheid in the Draft Code of Offences against the Peace and Security of Mankind (Draft Code).[263] The ILC's 1991 Draft Code included it.[264] While noting it was in essence

261. *Id*. art. 21(3). Note, however, that the ICC has not yet interpreted "racial group" in a trial for genocide and there is no court jurisprudence for apartheid, so the ICC has not yet indicated how Article 21(3) would impact its interpretation of "racial group" in a judgment. Pre-Trial Chamber I of the ICC referenced "immutable[] characteristics" and used an outdated definition of, e.g. "racial group" that centers "racial features," when determining that the Fur, Masalit and Zaghawa are not racial, national or religious groups, but are "ethnic groups" for purposes of an arrest warrant for genocide and other crimes against Omar Al-Bashir. It stated that "members of these three groups, as well as others in the region, appear to have Sudanese nationality, similar racial features, and a shared Muslim religion." Prosecutor v. Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/50-01/09, ¶¶ 135-36 (Mar. 4, 2009), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF.

262. Treaties like the Apartheid or Genocide Conventions also lack such a provision and refer interpretation disputes to the International Court of Justice. Genocide Convention, *supra* note 59, art. IX; Apartheid Convention, *supra* note 18, art. XII. As of 2019, the Draft CAH treaty refers to the International Court of Justice, at the request of one state party to a dispute, disputes not resolved through negotiation or referred by the state parties to the dispute to arbitration, but allows states to declare themselves not bound by that provision. Draft CAH Treaty, *supra* note 32, art. 15. Treaty drafters should consider methods for including language similar to that codified under article 21 of the Rome Statute in order to ensure the application and interpretation of the treaty's provisions are consistent with international human rights law.

263. ILC Draft Code of Offences against the Peace and Security of Mankind, Analytical paper prepared pursuant to the request contained in paragraph 256 of the report of the Comm'n on the work of its thirty-fourth session, ¶¶ 16, 30, 36, 65, 91, U.N. Doc. A/CN.4/365 (1983).

264. Int'l L. Comm'n, Rep. on the Work of Its Forty-Third Session, U.N. Doc A/46/10, at 103 (1991).

a restatement of the Apartheid Convention's article II,[265] the draft provision excluded the Convention's explicit reference to Southern Africa, making clear that the criminal prohibition against apartheid should also apply in other contexts. To further this point, the ILC also removed the enumerated list of examples of acts that constitute denial of life and liberty amounting to apartheid,[266] but kept the Convention's list of policies and practices. Its 1996 Draft Code included apartheid in all but name, calling it "institutionalized discrimination" and expanding the grounds on which it could be committed to include ethnic or religious grounds;[267] changes excluded from the Rome Statute.

The crime of apartheid was included in the Rome Statute draft at South Africa's insistence.[268] It was listed as a possible war crime in a draft reviewed by the Conference of Plenipotentiaries in June 1998, where Mexico's delegate called for it to be listed as a crime against humanity.[269] A small group of delegates, including from South Africa, worked together to develop the draft definition of apartheid for the Statute.[270] Drafters turned to the Apartheid Convention as a starting point for defining apartheid[271] and considered previous U.N. studies examining apartheid as a crime.[272] The working group members determined that the acts did not need to be defined in as much detail as they were in the Apartheid Convention, in part because crimes against humanity under the Rome Statute draft contained overarching *chapeau* elements that apply to all enumerated acts under article seven (essentially broadening the understanding of apartheid).[273]

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265. "The definition of the crime of apartheid contained in this draft article is based, both in letter and in spirit, on article II of the Int'l Convention on the Suppression and Punishment of the Crime of Apartheid." *Id*. at 103.

266. Int'l L. Comm'n, Rep. on the Work of Its Forty-Third Session, U.N. Doc. A/46/10, at 96-97, 102-03 (1991).

267. "It is in fact the crime of apartheid under a more general denomination." Int'l L. Comm'n, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, at 49 (1996).

268. Roger S. Clark, *Crimes Against Humanity and the Rome Statute of the International Criminal Court*, *in* The Rome Statute of the International Criminal Court: A Challenge to Impunity 87 (2001).

269. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Record of the 3rd Mtg. of 17 June 1998, ¶ 125 U.N. Doc. A/CONF.183/C.1/SR.3 (Nov. 20, 1998); Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998).

270. Timothy L.H. McCormack, *Crimes Against Humanity*, *in* The Permanent International Criminal Court: Legal and Policy Issues 179, 199 (Dominic McGoldrick, et al. eds., Hart Publishing (2004)) [*hereinafter* McCormack, *Crimes Against Humanity*].

271. *Id.* at 199.

272. *E.g.*, ICC Compilation of U.N. Documents, *supra* note 252 (citing *U.N. Study on Ways and Means, 1981, supra* note 252).

273. McCormack, *Crimes Against Humanity*, *supra* note 270, at 199. These *chapeau* elements for crimes against humanity require that the perpetrator's "conduct was committed as part of a widespread or systematic attack directed against a civilian population" and that the perpetrator

The primary controversy surrounding the inclusion of a definition of apartheid in the Statute was not related to how groups were to be understood, but rather to states' interests in jurisdictional issues. The U.S. delegation, for example, called for a narrowing of the text to clarify the meaning of apartheid as a crime, a move meant to protect its exclusive jurisdiction over crimes committed by U.S. nationals, including members of white supremacist organizations.[274]

The new wording of the crime of apartheid therefore departed in some ways from the language in the Apartheid Convention.[275] The crime against humanity of apartheid under the Rome Statute could be said to be defined both more narrowly and more broadly than in the Apartheid Convention. For example, it was broader in that it included the commission of an "inhumane act" in lieu of an enumerated list.[276] Meanwhile, the addition of an "institutionalized regime" narrowed the definition. The Apartheid Convention reads: "committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them," while the Rome Statute reads: "committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."[277] The Rome Statute essentially introduced the requirement of an existing policy of apartheid before the Court could hold an individual accountable.[278]

3. United Nations Experts on Apartheid

The Independent International Fact-Finding Mission on Myanmar (IIFFMM), operational from 2017-2019, when it handed its evidence over to the Independent Investigative Mechanism for Myanmar,[279] examined the crimes of genocide, apartheid and persecution in its 2018 report.[280] The IIFFMM's mandate was to investigate alleged human rights violations and other abuses by military and security forces in Myanmar.[281] In its 2018 report, the IIFFMM noted that "[p]ersecution

knew tor intended the conduct be part of such an attack. ICC Elements of Crimes, *supra* note 51, arts. 7(1)(a)-(k).

274. McCormack, *Crimes Against Humanity*, *supra* note 270, at 199-200.

275. *Id.*

276. *Id*. at 199.

277. Apartheid Convention, *supra* note 18, art. 2; Rome Statute, *supra* note 19, art. 2(h).

278. McCormack, *Crimes Against Humanity*, *supra* note 270, at 200.

279. U.N. Hum. Rts. Couns., *Independent Int'l Fact-Finding Mission on Myanmar*, https://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/index (last visited Jan. 25, 2025).

280. *See* IIFFMM Report on Myanmar, *supra* note 13.

281. U.N. Hum. Rts. Couns., *supra* note 279. The mandate of the IIFFMM ended in September 2019, and it handed over its evidence to the Independent Investigative Mechanism for Myanmar

is characterised by discriminatory intent,"[282] and cited subjective criteria as evidence of discriminatory intent, including the perpetrators' attitudes and behaviors.[283] In its analysis of how the facts meet persecution's legal elements, it discussed discrimination on the grounds of gender, religion and/or ethnicity,[284] and excluded "racial grounds" from its list, despite this being among the enumerated grounds protected from persecution. However, the IIFFMM did assert that the Rohingya may be considered a "racial group" for purposes of apartheid,[285] presumably because it is the only group listed under apartheid.

When discussing the scope and application of the term "racial group" under apartheid, the IIFFMM does not use the subjective understanding that derives from persecution. Instead, it refers to the understanding in its report of "racial group" under genocide.[286] When defining a "racial group" under genocide, the IIFFMM uses both "objective" and subjective (or perhaps "objective" and "objectivized-subjective")[287] criteria to define group membership.[288] Citing *Akayesu*, the IIFFMM notes, "[t]he Rohingya can be seen as an ethnic ('members share a common language or culture'), racial ('based on hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors') or religious ('members share the same religion, denomination or mode of worship') group, or a combination thereof."[289]

The IIFFMM concludes that the overall pattern of conduct of discrimination forms part of a system of "severe, systemic and institutionalised oppression, from birth to death, [that] amounts to persecution,"[290]

(IIMM), an accountability body that collects evidence of international crimes and serious human rights violations of international law in Myanmar. *Id*.

282. *Id.* ¶ 1471.

283. *Id.* ¶¶ 1472-74. "The use of such derogatory language and insults during the commission of rape and sexual abuse gives rise to an inference that these acts were indeed committed with discriminatory intent, indicating that the victims were at least in part targeted for their ethnic or religious backgrounds." *Id.* ¶ 1474.

284. *Id.* ¶¶ 1500, 1502.

285. *Id.* ¶ 1505.

286. *Id*.

287. *See* Lingaas, Concept of Race, *supra* note 29, at 105. The IIFFMM states that the "Rohingya also consider themselves as a distinct group, as do the Myanmar authorities and security forces," and "the differential treatment of the Rohingya, through the adoption of specific laws, policies and practices, supports the conclusion that they are a protected group as defined by the Genocide Convention." IIFFMM Report on Myanmar, *supra* note 13, ¶ 1391.

288. IIFFMM Report on Myanmar, *supra* note 13, ¶¶ 1390-91. "Legal doctrine and jurisprudence is not consistent, but a practice has emerged of making a case-by-case assessment that combines the objective particulars of a given social or historical context, and the subjective perceptions of the perpetrator." *Id.* ¶ 1390 (citing Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 65 (June 7, 2001); Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 684 (Sept. 1, 2004)).

289. IIFFMM Report on Myanmar, *supra* note 13, ¶ 1391 (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 512-15 (Sept. 2, 1998)).

290. *Id.* ¶¶ 572, 622.

and that "the systematic oppression and discrimination not only supports a finding of persecution but may also amount to the crime of apartheid."[291]

The struggle with strict interpretation in criminal law when determining a "racial group" is also apparent in writings by the former U.N. Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (Rapporteur on Palestine), Michael Lynk. Rapporteur Lynk acknowledges that the initial understanding of "racial group" under the Apartheid Convention was informed by perceptions of supposed inherited physical characteristics.[292] However, he points to advances in the understanding of race as a social construct, and to ICERD, arguing that "racial group" under the Apartheid Convention and the Rome Statute should be understood as a social construct.[293]

ICERD does not define the terms "race" (or "apartheid") and instead defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin," [294] thus placing "race" alongside other categories that may be subject to racial discrimination (and underscoring the social construction of race). This analysis lends important support to the notion that "racial group" should be understood as a social construct.

Certain arguments for avoiding the pitfalls of viewing "racial group" "objectively" would not resolve similar pitfalls for "gender groups," were gender added to the draft CAH treaty's apartheid provision. For example, Professor John Dugard, another former Rapporteur on Palestine, and Professor John Reynolds argue that Jews and Palestinians constitute distinct "racial groups."

> Of critical importance is whether they can be identified as groups whose membership is generally understood as fixed and incontestable from acquisition at birth, and which are entwined in a relationship of domination. Such an interpretation is compatible with contemporary race theory that now sees racial discrimination as the product of a process of 'racial formation', whereby a dominant group constructs a subordinate population as racially distinct in order to ensure its political and/or economic marginalization.[295]

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291. *Id.* ¶ 1511.

292. Lynk, Report of the Spec. Rapp. on human rights in Palestinian territories, *supra* note 12, at 32.

293. *Id.* ¶ 32-33. "As social constructions, racial identities should be seen as a matter of perception, particularly in the eyes of a dominant group that distinguishes itself from other groups based on these various social markers." *Id.* ¶ 33.

294. ICERD, *supra* note 31, art. 1(1).

295. John Dugard & John Reynolds, *Apartheid, International Law and the Occupied Palestinian Territory*, 24 EUR. J. OF INT'L L. 867, 889 (Aug. 2013).

They observe that "racial groups" is a social construct rather than a biological category. However, to retain the key features of "permanence" or "immutability," they note that "an appraisal of whether distinct racial groups exist must include consideration of whether two groups can be shown to hold separate identities acquired at birth that are generally immutable."[296] They find "sufficient grounds to conclude that Jews and Palestinians are constructed and perceived both by themselves and by external actors as stable and permanent groups."[297] While their arguments may provide a helpful means of weaving a subjective interpretation into "objective" characteristics to demonstrate apartheid against Palestinians, language like "fixed and incontestable from acquisition at birth," or even language such as "stable" or "permanent"[298] would present a challenge for the inclusion of LGBTQI+ victims if "gender groups" were included under apartheid.[299] These types of qualifiers have of course also long been contested with regard to "race" and other categories.[300]

The Special Rapporteur on Palestine and the IIFFMM's analyses and advocacy underscore a need for draft CAH treaty language that makes clear the understanding of "race" as a social construct under the crime of apartheid (and "gender" as a social construct if CAH drafters include it in the apartheid provision). This analysis also underscores the barriers to justice the legal term "gender groups" under apartheid may pose if the treaty lacks adequate language indicating that gender is to be understood as a social construct.

4. Victims of Inhumane Acts Under Apartheid

Under the Rome Statute, the crime of apartheid prohibits inhumane acts committed in the context of, and with intent to maintain, an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.[301] Such acts include crimes against humanity under the Rome Statute (such as rape, torture, murder, persecution, etc.) or other similar inhumane acts.[302] Thus, to prove apartheid, a prosecutor may not necessarily be required to prove the group membership of a victim of inhumane acts—so long

296. *Id.* at 890-91.
297. *Id.* at 891.
298. *Id.*
299. *See* discussion under Part II. "Objective" Criteria Requirements and the Danger of Excluding Women and LGBTQI+ People, Palestinians, Rohingyas and Others from Apartheid Victim Recognition.
300. U.N. Study of the Question of Genocide, 1978, *supra* note 139, ¶¶ 75, 76.
301. Rome Statute, *supra* note 19, art. 7(2)(h).
302. *Id.*

as the perpetrator intended to maintain such a regime when committing the inhumane acts against the victim.[303] For example, where a perpetrator committed an inhumane act against a white opponent of apartheid in South Africa in order to maintain apartheid, that opponent could be an apartheid victim despite not being recognized as part of the racialized group the regime targeted for systematic oppression.

It may be tempting to argue that this means that gender apartheid can be codified without language clarifying that gender is a social construct. Since some LGBTQI+ persons might still be recognized as victims of inhumane acts, it would be unnecessary to ensure their recognition as victims of the discriminatory regime which the perpetrator uses inhumane acts to maintain. Under this theory, if the objective-subjective approach is applied, individual LGBTQI+ victims could be recognized as apartheid victims if they are direct victims of inhumane acts intended to uphold gender apartheid, even if excluded from recognition as victims of the regime's gender-based discrimination.

The core of apartheid, however, is not the inhumane acts, which would simply be charged as crimes against humanity in non-apartheid contexts. Victims of inhumane acts may not be understood necessarily to form part of the "group" targeted for oppression. Apartheid's core, and a key element that prosecutors must demonstrate to prove it as a crime, is the institutionalized, oppressive, discriminatory regime that the perpetrator seeks to maintain. This is one of the great values of recognizing apartheid: it shines light on discriminatory regimes and the crimes committed to uphold them.

If gender and racial apartheid are not defined in the draft CAH treaty to reflect international human rights law's recognition of race and gender as social constructs, the qualification of the oppressive system may exclude the full range of its victims. This would erase many from the historical record and hinder meaningful reparations. For example, under the Taliban's oppressive gender ideology, women and girls are severely deprived fundamental rights,[304] while LGBTQI+ people are not permitted to exist.[305] Recognition of gender apartheid as a crime

303. Note that under the Rome Statute, to bring charges of the crime of apartheid all relevant elements should be established, including the chapeau elements for crimes against humanity.

304. *See generally* MADRE & Institute on Gender, Law, and Transformative Peace of CUNY Law School (IGLTP), *Gender Persecution in Afghanistan: A Crime Against Humanity, Part One: Severe Deprivation of the Fundamental Rights to Education, Assembly, and Expression* (Mar. 2023), [hereinafter *Gender Persecution and Rights to Education, Assembly and Expression in Afghanistan*]; MADRE and IGLTP, *Gender Persecution in Afghanistan: A Crime Against Humanity, Part Two: Severe Deprivations of the Fundamental Right to Work as acts of Gender Persecution* (Jan. 2024), [hereinafter *Gender Persecution and the Right to Work in Afghanistan*].

305. *See generally* Outright Int'l, *A Mountain on My Shoulders: 18 Months of Taliban Persecution of LGBTIQ Afghans* (Feb. 14, 2023).

against humanity is meant to ensure that all victims of perpetrators' oppressive regimes are recognized. There should be no test to determine whether victims of the Taliban's oppressive regime are in fact women and/or LGBTQI+ persons. The Taliban commits inhumane acts to maintain a system that oppresses all these people *on the grounds of gender*, and the legal understanding of apartheid should reflect that.

It would better serve justice to make clear from the outset of the development of racial and gender apartheid's legal definition in the draft CAH treaty that inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination are committed to maintain a system that discriminates on the *grounds of race or gender*. This will ensure the application of persecution's inclusive language on targeted groups and reflect international human rights law's understanding of "race" and "gender" as social constructs.

Note that while correctly qualifying the apartheid regime would ensure recognition of the true nature of its discriminatory oppressiveness, the widest recognition of direct victims of the crime of apartheid would likely emerge by cumulatively charging persecution and apartheid. Direct victims of the crime against humanity of apartheid are subject to inhumane acts, while direct victims of persecution could be understood to encompass all those a perpetrator intentionally subjects to severe fundamental rights deprivations on a discriminatory basis.[306] Persecution victims may in turn also be apartheid victims, as they were subjected to inhumane acts (persecution) used to maintain an apartheid system. An inclusive apartheid definition would still be necessary to ensure all victims' recognition. In proving the persecutory acts were meant to uphold a regime of oppression amounting to apartheid, a prosecutor would likely have to show the regime was discriminatory based on the same grounds charged for the persecution. Thus, if gender apartheid is codified inclusively, victims of, for example, torture meant to uphold a system that oppresses and dominates people based on gender could be recognized as apartheid victims. The prosecution could also include victims of severe deprivations of fundamental rights that amount to gender persecution as victims of apartheid, since acts of persecution meet the standard for inhumane acts. These persecution victims would include, for example, women and girls denied access to education, or LGBTQI+ people denied fundamental rights to expression or life. This interplay between the charges underscores the need for internal cohesion regarding how "groups" are understood throughout the draft CAH treaty.

306. *Gender Persecution and the Right to Work in Afghanistan*, *supra* note 304, at 6, 7.

The value of apartheid's codification as a crime is that can demonstrate how perpetrators enforce institutionalized regimes of systematic oppression that are racist, and if gender is added, misogynist and homo/transphobic. It signals that these discriminatory regimes are intolerable. To root out the discrimination that fuels cycles of violence, justice must do more than hold perpetrators accountable for individual crimes—it must demonstrate how they justify those acts.[307] This requires recognizing all forms of discrimination. This includes discrimination based on race, gender and other grounds under international human rights law, such as those for which U.N. experts have encouraged protection from persecution under international criminal law in the draft CAH treaty.[308] This recognition will address cyclical violence at its source to help ensure its non-repetition.

II. "Objective" Criteria Requirements and The Danger of Excluding Women, LGBTQI+ People, Palestinians, Rohingy as And Others From Apartheid Victim Recognition

For decades, international human rights law has defined terms like "race," "ethnicity" and "gender" as social constructs and as grounds protected from discrimination. At issue with apartheid's legal definition is not the definition of those terms but the definition of protected "groups" under international criminal law and the determination of group members. Protected "groups" and their members are defined in two different ways under international criminal law, as described in Section I.[309] As indicated above, the *travaux préparatoires* for the

307. Davis, *Dusting Off the Law Books*, *supra* note 113, at 3.

308. U.N. Special Rapporteur to the Int'l Law Comm'n, *Re: Comments Regarding the Persecutory Grounds in the Draft Crimes Against Humanity Convention,* at p. 2 (Nov. 30, 2018) (noting the enumerated list of protected grounds for persecution under the draft CAH treaty should include language, social origin, age, disability, health, Indigenous, refugee, migration, statelessness, sexual orientation, gender identity and sex characteristics and noting that these last three categories are covered under gender grounds, but also should be explicitly recognized.).

309. Emanuela Fronza provides a description of subjective and "objective" methods for determining group membership:

> Two possible ways of identifying the protected group arise from the international jurisprudence: an objective approach and a subjective approach. In light of the first one [under genocide], the ethnic, racial, national, and religious group should be considered as "fact" which was shaped in the social reality in a stable and permanent way. …[P]eople are irremediably members of the group by birth as inheritance is the key of the transmission of ethnic membership within the objective approach. In the subjective approach, on the contrary, the group should be identified on the basis of the perpetrator's viewpoint. In this perspective one argues that a group exists insofar as the members perceive themselves as part of that community or are being perceived as such.

Apartheid Convention indicate the understanding of "racial group" would align with that under genocide (the subjective-objective approach). The Rome Statute drafting history is silent on this term.

Emanuela Fronza argues that the existence of the group is not the sole protected interest of justice. She notes that "membership of the group can be interpreted from two different perspectives: social *fact* or social *construction*."[310] She also warns of the "risk of crystallising and fixing certain notions, like 'identity' or 'group' which, on the contrary, are 'fluid' and 'relative' concepts."[311] She emphasizes that there is a multiplicity of protected interests that genocide violates, including those of individuals, and the "*freedom of a group to exist*."[312] This understanding appears under the Elements of the Crimes of the Rome Statute for persecution, which allows for two options for determining group membership. It follows that apartheid and genocide should allow for the same.

Genocide jurisprudence's "objective" approach or "subjective-objective" approach requires at least some degree of "objective" criteria to establish that victims were "in fact" members of the targeted group. Attempting to prove that victims of discrimination were "in fact" members of the targeted group, instead of relying on who the perpetrator intended to target for discrimination, may obscure the multiplicity of protected interests violated and lead to the exclusion of victims.

Utilizing "objective criteria" to describe protected categories under international criminal law also reinforces racist, trans/homophobic and misogynist views. Schabas reflects: "[i]ndeed, efforts to define these so-called races have in themselves a racist connotation, in that generally they aim to demonstrate not only some common denominator of physical characteristics, such as type of hair and skin colour, but also purportedly scientific justifications for slavery and colonialism."[313] As the ICTY held in *Jelisić* when determining group membership for the crime of genocide, "[i]t is the stigmatization of a group as a distinct national, ethnical, or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical, or racial group in the eyes of the alleged perpetrators."[314] Nazis, for example, kept meticulous notes for identifying Jews based on purported "objective" criteria and imposed the identity regardless of whether the

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Emanuela Fronza, *Genocide in the Rome Statute*, *in* 1 Essays on the Rome Statute of the International Criminal Court 133 (Flavia Lattanzi & William A. Schabas eds., il Sirente 1999); *see also* Nersessian, Genocide and Political Groups, *supra* note 56, at 27.

310. Fronza, *supra* note 309, at 118.

311. *Id.* at 119.

312. *Id*.

313. Schabas, Genocide in International Law, *supra* note 64, at 142-43.

314. *Id*. at 127 (citing Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 70 (Dec. 14, 1999)).

victim identified as Jewish, an approach Lingaas identifies as "objectivized subjective."[315]

Schabas explains, "[t]rying to find an objective basis for racist crimes suggests that the perpetrators act rationally, and this is more credit than they deserve."[316] As discussed above, this is more than a theoretical issue when it comes to demonstrating the crime of apartheid against, for example, Palestinians and Rohingyas.[317] U.N. experts have faced hurdles in explaining what would be obvious under a subjective standard, which is that these groups have been subjected to racial apartheid.

If "gender" is added to the draft CAH treaty's apartheid provision and gender groups are interpreted in line with the interpretation of groups under genocide, "objective" criteria might rely on narrowing the understanding of gender to only include two groups: "women" and "men," or "male" and "female." This may lead to the erroneous exclusion or degrading categorization of transgender persons. It would also further shroud the brutality that lesbians and trans persons face because of multifaceted discrimination, including that against women, or against those perpetrators perceive as women. It may also reinforce or validate inhuman and degrading treatment of LGBTQI+ persons that is designed to "test" whether they are "in fact" members of their community.[318] Similar challenges could arise were there an attempt to apply "objective" criteria to define other LGBTQI+ "groups" or to define LGBTQI+ persons as a whole group.

The "objectivized-subjective" (a subset of "objective-subjective") approach could also lead to the exclusion of some women and/including LGBTQI+ persons. The "objectivized-subjective" approach considers the victim's perspective, with the view that subjective beliefs over time may become "objectivized," in that both perpetrators and their victims believe the distinctions between the groups have always existed.[319] This approach, while applied in only a limited number of cases, would not cure the exclusion of LGBTQI+ victims and would be problematic in cases where perpetrators refuse to recognize or lack the language for or understanding of LGBTQI+ identities. This

315. *Id*. at 125; LINGAAS, CONCEPT OF RACE, *supra* note 29, at 22-24, 105.

316. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 64, at 128.

317. *See* Section (I)(C)(3) above, which discusses arguments U.N. experts have made to show that Palestinians and the Rohingya are "racial groups" for purposes of recognizing them as victims of apartheid.

318. Attempting to confirm "in fact" that LGBTQI+ persons are members of their group has deeply troubling and problematic origins, connected to transphobic and homophobic discrimination and policing. Taken to its most extreme, this has manifested as state violence, including forced anal "examinations." *E.g.*, Finbarr Toesland, *Barbaric "gay tests" are still victimizing men across the world,* LGBTQ NATION (July 15, 2022), https://www.lgbtqnation.com/2022/07/barbaric-gay-tests-still-victimizing-men-across-world/.

319. LINGAAS, CONCEPT OF RACE, *supra* note 29, at 104-05.

approach is also problematic for LGBTQI+ persons who may not feel safe openly identifying as members of LGBTQI+ groups. Families may also not want their deceased loved ones identified as LGBTQI+ persons for a variety of reasons.

While both scientifically and legally erroneous, mischaracterizations like those perpetuated by use of "objective criteria" could receive unmerited weight in a debate on "gender groups," if gender is added to the crime of apartheid in the draft CAH treaty. In courts, the requirement of any degree of "objective" criteria would reinforce outdated understandings of "gender" as "binary" and "biological" and feed fundamentalist tropes about gender that fuel attacks on the LGBTQI+ community. Proponents of these tropes argue that "objective criteria" defines the term "gender" and claim the existence of only two gender categories, "male" and "female." They conflate sex characteristics and social constructs, selectively labeling some as objective characteristics and calling those who articulate the difference "gender ideologists." For example, some contend that men are more capable decision makers than women and that biology dictates this.[320] This erroneous argument, based on the belief that selective physical characteristics and social constructs "objectively" determine "gender groups" mischaracterizes "sex" and "gender" while simultaneously conflating them. Fundamentalist organizations continue to argue against the subjective understanding of "gender." Some of these organizations are actively calling for the reinstatement of the outdated definition of "gender" that the ILC removed from the draft CAH treaty.[321]

As the ICTY's Naletilić and Martinović Trial Chamber noted regarding the crime of persecution, "it is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status."[322] It is the perpetrator who commits discrimination in its worst forms through acts of persecution, apartheid or genocide. Victims' personal characteristics are irrelevant and do not change the discriminatory impact or gravity of the crime. Justice should recognize the experiences of victims who were subjected to racism, xenophobia, homophobia, transphobia or misogyny and include them in historical records.

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320. Trevor Salmon & Mark Imber, *Issues in International Relations 2nd ed.*, 196 (2008), https://examinia.com/wp-content/uploads/2023/10/Issues_in_International_Relations_pdf.pdf.

321. Lisa Davis & Danny Bradley, *Victory for Women and LGBTIQ Rights under International Criminal Law: Gender in the Draft Crimes against Humanity Treaty*, *in* Gender and International Criminal Law 187 (Indira Rosenthal, et al. eds., Oxford Univ. Press (July 2022) [hereinafter Davis & Bradley, *Victory for Women and LGBTIQ Rights*].

322. Prosecutor v Naletilić and Martinović, Case No. IT-98-34-T, Judgement, ¶ 636 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003).

III. How The CAH Treaty Drafters Can Ensure Inclusive Recognition Of Apartheid Victims

As new crimes in international law are contemplated, it is typical to begin by turning to previous definitions of crimes. This is because the recognition of rights (and the prohibitions of acts that violate them) must be grounded in understandings that have evolved in international law. Yet historical language can become outdated and no longer reflect customary international law. It may even contradict it.

After the first session of the ILC, the U.N. Secretary-General warned against "a mere registration…of the existing law [as] it may crystallize the law in matters in which the existing rules are obsolete and unsatisfactory."[323] This resonates today, as CAH treaty drafters consider draft language drawn from an existing treaty. If the draft convention leaves protected groups under apartheid to be interpreted "objectively," without explicit acknowledgment of the subjective approach as permitted under persecution, this may underscore inherent contradiction in the treaty, and lead to confusion. The convention in its current draft could be misread as promoting the misconception that the terms "race," "ethnicity" and "gender" have multiple understandings ("objective" and subjective), thus diminishing their consistent recognition as social constructs. The draft CAH treaty should instead adhere to contemporary understandings under international human rights law and customary international law.

Treaty drafters can, and often do, start by borrowing from old statute or treaty language to codify a crime, but this is not where they should end. When apartheid was expanded and included as a crime against humanity under the Rome Statute, drafters improved on the Apartheid Convention language. Twenty-five years later, it is time for the CAH treaty drafters to again modernize the language of apartheid by expanding the protected groups and ensuring they are understood subjectively from the perpetrator's viewpoint.

There are several ways to cure the opaque and outdated language of "groups" under the crime of apartheid in the draft CAH treaty. The drafters could consider, for example, these two options: (1) modernize the definition of the crime of apartheid, and (2) add a provision akin to Rome Statute Article 21(3).

323. U.N. Secretary-General, *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, ¶ 13, U.N. Doc. A/CN.4/1/Rev.1 (1949).

A. Modernize The Definition Of The Crime Against Humanity Of Apartheid

When referring to apartheid and other offenses characterized as international crimes, Cassese et al., noted, "[t]he gradual broadening of substantive criminal law has been a complex process. Among other things, when a new class of crime has emerged, its constituent elements … have not been immediately clear."[324] With no jurisprudence on apartheid as a crime against humanity, and outdated language passed down from treaty to treaty over the last half century, there is reason to modernize its understanding and broaden protections.

While international human rights precedents recognizing "gender" and "race" as social constructs are abundant, there is less jurisprudence under international criminal law. This significantly raises the importance of ensuring an inclusive definition of protected groups under apartheid in the new convention. Outdated and opaque language on protected groups could harm efforts to address impunity, or reverse gains in legal recognition of these categories as social constructs. The drafters should update the apartheid provision by ensuring "groups" are understood subjectively and by expanding protected categories to include, at minimum, gender.

1. Ensure "Group" Is Understood Subjectively

Under the Rome Statute and draft CAH treaty (as of April 2023), apartheid is understood as inhumane acts "committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."[325] It would better serve justice to use the "by reason of,"[326] or "based on"[327] or to mirror current treaty language with "on the grounds of"[328] language from persecution. Thus, racial apartheid would be defined as an institutionalized, systematically oppressive regime "on the grounds of race."

2. Expand The Protected Categories to at Minimum Include Gender

A critical mass of Afghan women and LGBTQI+ advocates and international allies and experts[329] are adding their voices to a call, first

324. Antonio Cassese et al., International Criminal Law: Cases and Commentary 115 (2011).
325. Rome Statute, *supra* note 19, art. 7(2)(h); Draft CAH Treaty, *supra* note 32, art. 2(h).
326. Rome Statute, *supra* note 19, art. 7(2)(g); ICC Elements of Crimes, *supra* note 51, art. 7(1)(h)(3).
327. ICC Elements of Crimes, *supra* note 51, art. 7(1)(h)(3).
328. Rome Statute, *supra* note 19, art. 7(2)(h).
329. *See, e.g.*, #EndGenderApartheid in Afghanistan, https://endgenderapartheidinafghanistan.wordpress.com/our-partners/; Working Group on discrimination against women and girls report, *supra* note 15, ¶ 9.

made during the Taliban's regime in the 1990s,[330] for the codification of gender apartheid as a crime against humanity. Since seizing power again in 2021, the Taliban has imposed grave discriminatory rights deprivations that impact every facet of life and that are enforced through violence.[331] The campaign to codify gender apartheid as a crime points to a gap in the current definition of apartheid. While gender persecution charges can capture systematic discrimination committed on gender grounds, the value of gender apartheid as a charge is that it would definitively name and condemn institutionalized regimes of gender oppression like that under the Taliban. Were gender apartheid codified, gender persecution could be used as evidence of apartheid (and vice versa), and the crimes could be charged cumulatively, a strategy that would ensure the widest recognition of apartheid victims. At minimum, CAH treaty drafters should add gender to the apartheid provision. They should also consider including other categories recognized under international criminal law, as well as those recognized under international human rights law.

Under the crimes of genocide and persecution, ethnicity, nationality and religion have been recognized for decades as protected categories, in addition to race. Three additional categories recognized for decades under the crime of persecution (gender, political and cultural) should also be considered for inclusion. Finally, drafters should consider assessing grounds protected from discrimination under international human rights law, particularly those categories that U.N. experts have encouraged protection for under international criminal law.[332] The draft CAH treaty includes an even broader list of categories under an extradition protection provision[333] than that under persecution, adding impetus for greater inclusion of categories throughout the treaty, including in the apartheid provision, in the interest of internal coherence.

A definition such as the one proposed by the Working Group on discrimination against women and girls that both ensures a subjective understanding of "groups" and includes "gender" could read: "inhumane acts … committed in the context of an institutionalized regime of systematic oppression and domination by one **group** over any other **group** or **groups on the grounds of race or gender**…"[334]

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330. *E.g.*, Lisa M. Ayoub, *The Crisis in Afghanistan: When Will Gender Apartheid End*, 7 TULSA J. COMP. & INT'L L. 513, 527 (1999).

331. *See generally Gender Persecution and Rights to Education, Assembly and Expression in Afghanistan*, *supra* note 304; *Gender Persecution and the Right to Work in Afghanistan*, *supra* note 304.

332. U.N. Special Rapporteur to the Int'l Law Comm'n, *supra* note 308.

333. Draft CAH treaty, *supra* note 32, art. 13(11).

334. This definition is based on the current definition of apartheid in the draft CAH treaty but changes it by replacing "one racial group over any other racial group or groups…" (Draft CAH

Another option would be to edit the definition of apartheid to read: "inhumane acts … committed in the context of an institutionalized regime of systematic oppression and domination **on the grounds of race or gender** …" This definition avoids the need to define "group." These examples demonstrate possible language adaptations that better adhere to human rights law's recognition of race, gender and other protected categories as social constructs. In doing so they would also, as the Working Group urges, be consistent with the understanding of gender crimes recognized by international legal bodies such as the ICC, manifest in the OTP's policies on the crime against humanity of gender persecution and the policy on gender-based crimes.[335]

B. Add A Provision to The Draft CAH Treaty Akin to That of Article 21 In The Rome Statute

Article 21(3) of the Rome Statute states: "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights." Article 21(1)(b) requires the Court to apply appropriate and applicable international human rights treaties.[336] Similar treaties meant to commit states to suppress grave crimes do not include applicable law provisions like Rome Statute Article 21.[337] However, their references to human rights treaties in their preambles,[338] which are understood to comprise a key part of each treaty as regards their interpretation,[339] can guide the way to inclusion of provisions like Rome Statute Articles 21(1)(b) and 21(3) in the draft

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Treaty, *supra* note 32, art. 2(2)(h)), with "one group over any other group or groups on the grounds of race or gender. …".

335. *See* discussion *supra* Introduction; Working Group on discrimination against women and girls report, *supra* note 15, at 3, 9.

336. Rome Statute, *supra* note 19, arts. 21(1)(b) & (3).

337. *Id.*

338. For example, the Apartheid Convention's preambular paragraphs reference the Charter of the United Nations, "in which all Members pledged themselves to take joint and separate action … for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion," as well as for the Universal Declaration of Human Rights ("UDHR"), the Declaration on the Granting of Independence to Colonial Countries and Peoples, and ICERD. Apartheid Convention, *supra* note 18, at preamb. ¶¶ 1-4. Its Article VI requires states to carry out decisions by the U.N. Security Council as well as other competent U.N. organs with a view to achieving the purposes of the Convention, presumably including human rights treaty bodies under ECOSOC. *Id.* art. VI. The Convention Against Torture references the principles in the U.N. Charter, the ICCPR, and the UDHR. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, preamb. ¶¶ 1-4, Dec. 10, 1984, 1465 U.N.T.S. 85.

339. VCLT, *supra* note 225, art. 31. The Int'l Law Comm'n, in commenting on the draft VCLT, observed: "[t]hat the preamble forms part of a treaty for purposes of interpretation is too well settled to require comment." Int'l L. Comm'n, Rep. on the second part of its seventeenth session and on its eighteenth session, U.N. Doc. A/6309/Rev.1, at 52 (1966), https://docs.un.org/en/A/6309/Rev.1(SUPP).

CAH treaty.[340] The draft CAH treaty currently contains a provision requiring protection of defendants' rights "under applicable national and international law, including human rights law,"[341] a phrase absent from the Rome Statute's rights of the accused provision, though implied with regard to human rights law through its Article 21(3).[342] This novel provision on applicable law in the draft CAH treaty also suggests a basis for including a provision making clear that the treaty as a whole should be interpreted in line with international human rights law.

Doing so would help ensure the interpretation of, for example, race and gender as social constructs (were gender added to the apartheid provision). Over the last two decades, numerous regional and U.N. human rights mechanisms, including treaty bodies, experts, and jurists have adopted language that recognizes the social construction of terms like "race," "ethnicity," and "gender."[343] As called for under Rome Statute Article 21(3) the OTP characterized "gender" as a social construct in accordance with international human rights law in its 2014 Policy Paper on Sexual and Gender-Based Crimes.[344] This was reaffirmed in the 2022 ICC Policy on the Crime of Gender Persecution and the 2023 ICC Policy on Gender-Based Crimes.[345] Accordingly, these policy papers distinguish "gender" from the term "sex."[346]

At the same time, the decades-old definition of gender contained in the Rome Statute is outdated and opaque.[347] Article 21(3) of the Rome Statute helps to overcome this contradiction and bring stagnant statutory language into congruence with international human rights law.[348] The requirement that the ICC interpret the statute in alignment with international human rights law, means that it should apply the understanding that categories like "gender," "race," "culture," and "ethnicity" are social constructs. A similar principle should be applied to any future relevant UN instruments governing international crimes.

Article 21 is also crucial to the understanding of and protection of the defendants' rights provided under article 22, *nullum crimen sine*

340. This is not to suggest that there is no need for a specific provision outside the preamble, but rather to note that adding applicable law to a suppression treaty would not be exceptional.

341. Draft CAH Treaty, *supra* note 32, art. 11.

342. Rome Statute, *supra* note 19, arts. 21(3), 67. The rights of the accused provisions of the ICTY and ICTR statutes also lack language on applying human rights law. *See* Statute of the ICTR, *supra* note 53, art. 20.

343. *See* sources cited *supra* note 31 and accompanying text.

344. OTP, Policy Paper on Sexual and Gender-Based Crimes, p. 3 (June 2014).

345. OTP, Policy on the Crime of Gender Persecution, *supra* note 43, at 3; OTP, Policy Paper on Sexual and Gender-Based Crimes, *supra* note 344, at 10.

346. *Id*. (citing OTP, Policy Paper on Sexual and Gender-Based Crimes, *supra* note 344, at 3).

347. *See* Davis & Bradley, *Victory for Women and LGBTIQ Rights*, *supra* note 321.

348. Rome Statute, *supra* note 19, art. 21(3).

lege.[349] The principle of legality defers to the interest of the accused in cases of ambiguity and weighs against courts utilizing human rights interpretations, absent a provision similar to Article 21.[350] This is why treaty drafters have a responsibility to make legal terms clear and reflective of customary international law: to put perpetrators on notice that the international community recognizes all victims and will not tolerate these crimes.

Conclusion: An Inclusive Definition of Apartheid

This is a pivotal moment in the discourse on gender crimes accountability, as well as on accountability for crimes committed based on other forms of discrimination. The proposed draft CAH treaty, if adopted, will impact victims' access to justice for years to come. As the draft proceeds through negotiations over the next few years,[351] it will likely be revised, offering opportunities to codify progressive understandings of international customary law and to create tools to ensure recognition of all victims.

Recognition of apartheid with a definition that includes categories contained in other crimes under the Rome Statute and that reflects international human rights law would have groundbreaking impact. As with other hard-fought wins in the field of international criminal law,[352] it would help visibilize institutionalized regimes of systematic oppression and domination based on race, gender, and other categories. Apartheid could be charged cumulatively with other crimes, helping to tell a fuller story of what happens to victims during conflicts and other atrocities. It would also contribute to the progressive development and codification of international law. However, a definition that fails to reflect developments in human rights law, including those recognizing gender

349. *Id*. art. 22; *Nullum crimen sine lege*:

> 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

350. *E.g.*, *id*. art. 22(1)-(2).

351. U.N.G.A. Sixth Comm., U.N. Conf. of Plenipotentiaries on Prevention and Punishment of Crimes Against Humanity, U.N. Doc. A/C.6/79/L.2/Rev.1, (Nov. 15, 2024).

352. *See generally* Davis & Bradley, *Victory for Women and LGBTIQ Rights*, *supra* note 321; Lisa Davis, *This is how we won a historic victory for women's and LGBTQ rights in international law*, Open Democracy (June 26, 2019) https://www.opendemocracy.net/en/5050/this-is-how-we-won-a-historic-victory-for-womens-and-lgbtiq-rights-in-international-law/ (discussing the successful effort to remove the outdated gender definition from the ILC's draft CAH treaty).

as a social construct, could negatively impact decades of hard-fought wins for gender and racial justice advocates and lead to the exclusion of victims from recognition.[353]

While it has momentum, the struggle for recognition of gender apartheid faces hurdles, making unified movement building more crucial. States historically deprioritize gender justice.

However, a movement that proposes a definition that ensures LGBTQI+ inclusion may further induce those states that have taken public stances to protect LGBTQI+ rights to ramp up support for codifying gender apartheid as a crime. And an apartheid definition that recognizes not only the social construction of gender, but also that of categories like race, could entice states that support the recognition of intractable apartheid elsewhere. Intersectional and inclusive movement building could expand civil society support while garnering broad state backing for codification of gender apartheid as a crime against humanity.

Recognition of an inclusive understanding of apartheid in the draft CAH treaty would further demonstrate to the world that targeting Palestinians and Rohingyas on the grounds of race, or targeting women, girls and LGBTQI+ persons because of gender, is a crime against humanity. This is more than verbiage. Victims of war crimes and crimes against humanity have the right to reparations and to meaningfully participate in and shape peace and transitional justice processes. Their right to participation stems from key U.N. resolutions, including U.N. Security Council Resolution 2467, which requires a gender violence survivor-centered approach to peacebuilding and transitional justice.[354] Recognizing all victims, and the reasons they were targeted, makes peacebuilding more effective. Durable peace requires disrupting the entrenched discrimination that fuels conflict. This is only possible when those targeted can help guide transitional justice processes. Thus, if successful, the movement for ensuring inclusive recognition of apartheid victims has transformative potential beyond the draft CAH treaty. It will provide tools to help uproot discrimination and build the inclusiveness that meaningful peace requires.

353. *See, e.g.*, Lisa Davis, Will the new draft crimes against humanity treaty protect women and LGBTI persons?, OPEN DEMOCRACY (Sept. 21, 2018) https://www.opendemocracy.net/en/5050/will-new-crimes-against-humanity-treaty-protect-women-and-lgbti-persons/.

354. S.C. Res. 2467 (Apr. 23, 2019).

International Law and the Rights to Freedom of Peaceful Assembly and of Association in Africa

John Mukum Mbaku*

Abstract

The rights to freedom of peaceful assembly and of association are human rights that are recognized by and entrenched in several international and regional human rights instruments. The right to peaceful assembly includes the right to hold meetings, engage in strike action, and protest both offline and online to achieve various objectives. For example, individuals can assemble to discuss the formation of a political party to participate in the public affairs of their communities or to protest against government policies that directly affect their lives. Throughout Africa, the rights to freedom of assembly and of association are enshrined in the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child, as well as in many national constitutions and statutes. Unfortunately, the enjoyment of these rights has been threatened throughout Africa by statutory provisions (e.g., notice requirements) that directly infringe on their exercise by individuals. Many national statutes grant the police and other security forces the power to interfere with these rights. The free exercise of the rights to freedom of peaceful assembly and of association is critical to the enjoyment of other human rights that are enshrined in national constitutions and international and regional human rights instruments. To protect these nationally and internationally recognized rights, individuals and non-governmental organizations are petitioning both regional and domestic courts to strike

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down those statutory provisions that violate either national constitutions and/or regional human rights instruments, such as the African Charter on Human and Peoples' Rights. Through this adjudicatory process, Africans are gradually developing a robust jurisprudence on the rights to freedom of peaceful assembly and of association.

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INTRODUCTION

According to the U.N. High Commissioner for Human Rights ("HCHR"), "[e]veryone has the right to freedom of peaceful assembly."[1] The right to peaceful assembly, notes the HCHR, "includes the right to

1 *OHCHR and the Right of Peaceful Assembly: About the Right of Peaceful Assembly*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS. https://www.ohchr.org/en/peaceful-assembly#:~:text=Everyone%20has%20the%20right%20to,protests%2C%20both%20offline%20and%20online (last visited Oct. 18, 2024).

hold meetings, sit-ins, strikes, rallies, events or protests, both offline and online."[2] This right serves as an important "vehicle for the exercise of many other rights guaranteed under international law, with which it is linked intrinsically and that form the basis for participating in peaceful protests."[3] The right to freedom of peaceful assembly implicates the right to freedom of expression and the right of everyone to participate in "the conduct of public affairs."[4]

Citizens can assemble for specific purposes. For example, citizens may assemble in public spaces, as a way to petition their government to address their grievances. Also, citizens may gather in private (e.g., in a private residence or online) to celebrate birthdays or other anniversaries; to articulate and discuss a business plan; to form a political party to participate in the public affairs of their communities, including competing for positions in their government, etc. Assemblies can take many forms, including protests, demonstrations, processions, rallies, sit-ins, candlelight vigils, flash mobs, and meetings.[5]

The rights to freedom of peaceful assembly and of association are enshrined in many international and regional human rights instruments. In the sub-section that follows, this article will provide an overview of the various international and regional human rights instruments that guarantee the right to freedom of peaceful assembly and of association.

I. International Law and the Right to Freedom of Peaceful Assembly and of association

According to Article 20(1) of the Universal Declaration of Human Rights ("UDHR"), "[e]veryone has the right to freedom of peaceful assembly and association."[6] The International Covenant on Civil and Political Rights ("ICCPR") also guarantees the right to peaceful assembly. According to Article 21,

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interest of national security or public safety, public

2. *Id*.
3. *Id*.
4. *Id*.
5. *Know Your Rights: International Standards on Freedom of Peaceful Assembly*, CIVICUS Glob. All., https://civicus.org/documents/ENG.KNOWYOURRIGHTS.pdf (last visited Oct. 18, 2024).
6. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 20, para. 1 (Dec. 10, 1948) [hereinafter UDHR].

> order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.[7]

This provision of the ICCPR guarantees the right to peaceful assembly and notes that this right is not absolute. Restrictions, which conform with the law and "are necessary in a democratic society" to safeguard societal interests such as national security, public safety, public order, and the protection of public health and the rights and freedoms of other persons within the jurisdiction of the State Party, can be placed on the exercise of the right to peaceful assembly and association.[8]

The ICCPR also guarantees other rights that are associated with the right of peaceful assembly and association. For example, Article 22 guarantees the right of individuals to freely associate with others. This includes the right to "form and join trade unions for the protection of [their] interests."[9] This right is also not absolute. States Parties can impose restrictions on this right as long as such restrictions are "prescribed by law" and they are "necessary in a democratic society" to protect certain listed public interests and the rights of other individuals.[10] In addition, lawful restrictions on members of the armed forces and the police in their exercise of the right of peaceful assembly is not prohibited by this provision.[11]

Article 22(3) of the ICCPR states that none of the provisions of the ICCPR in Article 22 "shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention."[12] Finally, the ICCPR, in Article 25, also guarantees every citizen the "right and opportunity" to participate in the "conduct of public affairs, directly or through freely chosen representatives"; to participate in their country's electoral system, for example, to vote for a candidate of his or her choice who is running for public office, or to participate in the electoral system as a candidate for public office; and finally, "[t]o have access, on general terms of equality, to public service in his [or her] country."[13]

The International Covenant on Economic, Social and Cultural Rights ("ICESCR") guarantees the right of peaceful assembly and

7. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 21 (Dec. 16, 1966) [hereinafter ICCPR].
8. *Id.*
9. *Id.* art. 22, para. 1.
10. *Id.*
11. *Id.* para. 2.
12. *Id.* para. 3.
13. *Id.* art. 25.

association, particularly with respect to the formation of and participation in trade unions.[14] Article 8(1)(a) provides that States Parties shall ensure "[t]he right of everyone to form trade unions and join the trade union of his [or her] choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests."[15] This right, however, is not absolute. States Parties may impose restrictions on the exercise of this right as long as these restrictions are prescribed by law and they are necessary in a democratic society pursuant to certain public interests or for the protection of the rights and freedoms of other individuals.[16]

Article 5(ix) of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICEAFRD") guarantees "[t]he right to freedom of peaceful assembly and association."[17] However, the ICEAFRD also prohibits the use of the right to peaceful assembly and association to promote propaganda based on "ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form."[18] The ICEAFRD also imposes an obligation on States Parties to "declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite discrimination, and recognize participation in such organizations or activities as an offence punishable by law."[19]

The Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") guarantees citizens the right "[t]o participate in non-governmental organizations and associations concerned with the public and political life of the country."[20] As part of this right, the CEDAW imposes an obligation on States Parties to take appropriate measures to "eliminate discrimination against women in the political and public life of the country" and most importantly, to "ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies."[21]

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14. ICESCR, *infra* note 15, art. 8.

15. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 8, para. 1(a) (Dec. 16, 1966) [hereinafter ICESCR].

16. *Id.*

17. G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(d)(ix) (Dec. 21, 1965) [hereinafter ICEAFRD].

18. *Id.* art. 4.

19. *Id.* art. 4(b).

20. G.A. Res. 34/180, International Convention on the Elimination of All Forms of Discrimination against Women, art. 7(c) (Dec. 18, 1979) [hereinafter CEDAW].

21. *Id.* art. 7(a).

The Convention on the Rights of the Child ("CRC") guarantees the child's right to "freedom of association and to freedom of peaceful assembly."[22] This right, however, is not absolute. States Parties can impose restrictions on its exercise, as long as these restrictions are permitted by law and they are necessary in a democratic society in the interests of well-defined public interests and the protection of the rights and freedoms of other individuals.[23] Similarly, the Convention on the Rights of Persons with Disabilities ("CRPD") guarantees the participation of persons with disabilities in political and public affairs.[24] Specifically, Article 29 of the CRPD states that:

> States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:a. Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected . . . .[25]

States Parties are expected to guarantee the full participation of persons with disabilities in political and public life on an equal basis with others by:

i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice.[26]

Finally, States Parties are required to create and promote an environment within which persons with disabilities can "effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in

22. G.A. Res. 44/25, Convention on the Rights of the Child, art. 15(1) (Nov. 20, 1989) [hereinafter CRC].
23. *Id.* art 15(2).
24. G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, art. 29 (Dec. 12, 2006) [hereinafter CRPD].
25. *Id.* art. 29(a).
26. *Id.* art. 29(a)(i–iii).

public affairs."[27] Governments of States Parties are also obliged to encourage the participation of persons with disabilities in the forming and joining of organizations that can be used to represent their interests at international, national, regional and local levels.[28]

The African Charter on Human and Peoples' Rights ("Banjul Charter") guarantees the rights of peaceful assembly and association but requires those who exercise these rights to do so only within the law.[29] Article 10 states that "[e]very individual shall have the right to free association provided that he abides by the law" and that "[s]ubject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association."[30] Additionally, the Banjul Charter also declares that "[e]very individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."[31]

The African Charter on the Rights and Welfare of the Child also guarantees the rights of peaceful assembly and of association.[32] According to Article 8, "[e]very child shall have the right to free association and freedom of peaceful assembly in conformity with the law."[33] As with other international and regional human rights instruments, the rights of peaceful assembly and of association granted to children are not absolute—their exercise must conform to the law.[34] In a similar manner, the American Declaration of the Rights and Duties of Man also guarantees the rights to freedom of assembly and of association.[35] Article XXI states that "[e]very person has the right to assemble peacefully with others in a formal public meeting or informal gathering, in connection with matters of common interest of any nature."[36] In addition, Article XXII guarantees the right to freedom of association and states as follows: "Every person has the right to associate with others to promote,

27. *Id.* art. 29(b).

28. *Id.* art. 29(b)(ii).

29. Org. of African Unity [OAU], 18th Assemb. of Heads of State and Gov't, African Charter on Human and Peoples' Rights, at arts. 10, 11 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (June 27, 1981) [hereinafter Banjul Charter].

30. *Id.* art. 10, paras. 1-2.

31. *Id.* art. 11.

32. Org. of African Unity [OAU], 26th Ordinary Sess. of the Assemb. of Heads of State and Gov't, African Charter on the Rights and Welfare of the Child, at art. 8, OAU Doc. CAB/LEG/24.9/49 (July 1, 1990) (hereinafter African Child Charter).

33. *Id.*

34. *Id.*

35. Org. of American States, American Declaration of the Rights and Duties of Man, arts. XXI, XXII (1948).

36. *Id*. art. XXI.

exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature."[37]

The American Convention on Human Rights ("Pact of San José") also guarantees the rights of peaceful assembly and of association.[38] Article 15 of the Pact of San José states as follows:

> The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.[39]

With respect to the right to freedom of association, Article 16 of the Pact of San José states as follows:

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.[40]

Finally, Article 11 of the European Convention on Human Rights provides for the freedom of assembly and of association as follows:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.[41]

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37. *Id*. art. XXII.

38. American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (1978) (hereinafter Pact of San José).

39. *Id.* art. 15.

40. *Id.* art. 16.

41. Convention for the Protection of Human Rights and Fundamental Freedoms § 1, art. 11, *opened for signature* Nov. 4, 1950, E.T.S. No. 005.

In guaranteeing the rights of peaceful assembly and of association, these international and regional human rights instruments make clear that the exercise of these rights can be restricted under certain conditions. These restrictions must be imposed in conformity with the law; they must be necessary in a democratic society and must serve certain specified public interests, including national security; public safety; public order; the protection of public health or morals; as well as the protection of the rights and freedoms of other citizens.[42]

In October 2010, the U.N. Human Rights Council adopted Resolution 15/21, which established the mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association.[43] The Special Rapporteur was charged with, inter alia, gathering relevant information from all U.N. Member States "relating to the promotion and protection of the rights to freedom of peaceful assembly and of association, to study trends, developments and challenges in relation to the exercise of these rights, and to make recommendations on ways and means to ensure the promotion and protection of the rights to freedom of peaceful assembly and of association in all their manifestations."[44] In the subsection that follows, this article will examine the latest report of the Special Rapporteur.

II. U.N. Special Rapporteur Clément Nyaletsossi Voule: Preserving the Gains and Pushing Back Against the Global Attack On Civil Space and Growing Authoritarianism

Every year, the Special Rapporteur is required to submit to the Human Rights Council and the U.N. General Assembly all "activities relating to his [or her] mandate, containing recommendations and providing suggestions on ways and means to better promote and protect the right[s] to freedom of assembly and peaceful protest."[45] The latest report of the Special Rapporteur on the rights to freedom of peaceful assembly and association, by Clément Nyaletsossi Voule, was issued on June 21, 2024.[46] In this report, the Special Rapporteur called for "urgent joint global action to respond to the global attack on civic space, to preserve the gains made, and push back against the emerging

42. *See, e.g.*, ICCPR, *supra* note 7, art. 21.

43. Hum. Rts. Council Res. 15/21, U.N. Doc. A/HRC/RES/15/21, para. 5 (Oct. 6, 2010);

44. *Id.* para. 5(a).

45. *Annual Thematic Reports: Special Rapporteur on Freedom of Peaceful Assembly and of Association*, U.N. Off. of the High Comm'r for Hum. Rts., https://www.ohchr.org/en/special-procedures/sr-freedom-of-assembly-and-association/annual-thematic-reports (last visited Oct. 20, 2024).

46. Clément Nyaletsossi Voule (Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association), *Preserving the Gains and Pushing Back Against the Global Attack on Civic Space and Growing Authoritarianism*, U.N. Doc A/HRC/56/50 (June 21, 2024).

and deepening threats against the rights to peaceful assembly and of association."[47] Noting that the rights to freedom of peaceful assembly and of association are "fundamental for safeguarding democracy, human rights and peace," Special Rapporteur Voule urged the global community to renew its commitment to ensuring the recognition and protection of these rights.[48]

Special Rapporteur Voule noted that the rights to freedom of peaceful assembly and of association are universally protected—under international and regional human rights laws, as well as by the constitutions of most States."[49] He then lists the various international and regional human rights instruments that enshrine and guarantee the rights to freedom of peaceful assembly and of association.[50] He explained that the rights to freedom of peaceful assembly and of association have been "recognised as essential pillars of democracy and for facilitating public participation and as enablers of civil, political, social, economic and cultural rights."[51] After noting that the mandate of the Special Rapporteur has been "instrumental for advancing the protection of the rights to freedom of peaceful assembly and of association online and through the use of digital technology," Voule "underlined the interrelationship between the exercise of these rights and the enjoyment of all human rights, including the role of these rights in advancing the implementation of the 2030 Agenda for Sustainable Development, climate justice and sustainable peace and democratic transitions."[52]

The Special Rapporteur also noted that individuals from all diverse backgrounds and communities have exercised the rights to freedom of peaceful assembly and of association to undertake activities (e.g., social protests and demonstrations) "to defend democracy, resist autocracy, repression and discrimination, build peace and ensure democratic and responsive governance institutions, advocate for climate justice, and express solidarity."[53] Throughout the world, social movements are emerging at local, national, and international levels, and they are finding innovative ways "to mobilize and evade ever expanding legal and other restrictions imposed by States."[54] In addition, noted the Special Rapporteur, grassroots movements, which are engaged in various activities to defend human rights, have emerged in many communities. Many of

47. *Id*. at Summary.
48. *Id*.
49. *Id.* para. 6.
50. *Id.*
51. *Id.* para. 9.
52. *Id.* paras. 15-16.
53. *Id.* para. 19.
54. *Id*.

these movements are being led by previously marginalized individuals and groups (e.g., women, indigenous people, and youth) and they are exercising their rights to freedom of peaceful assembly and of association to improve the domestic protection of human rights.[55]

However, since the establishment of the mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association in 2010, there have been significant gains in efforts to establish an "enabling environment for the exercise of these rights."[56] However, as noted by the Special Rapporteur, "there has been a growing global trend of systematic attacks on [the rights to freedom of peaceful assembly and of association] and civic space broadly, undermining the essence of these rights."[57] The Special Rapporteur then identified some of the global threats against the rights to freedom of peaceful assembly and of association including: (i) "increasingly severe stigmatization and attacks against civil society and social movements"; (ii) the "increased use of expansive restrictive legislation to suppress the legitimate exercise of the rights to freedom of peaceful assembly and of association"; (iii) "the criminalization of activists"; (iv) "indiscriminate and excessive use of force to counter or repress peaceful protests, including growing militarized approaches to peaceful protests"; (v) "restrictions targeting marginalised groups"; (vi) "crackdowns on freedoms during electoral periods"; (vii) "the negative impact of rising populism and authoritarianism"; and (viii) "obstructions and repression in the digital space and due to emerging technologies amid lack of human rights-based regulations."[58]

Finally, growing global authoritarianism around the world and the spread of hostile narratives and the anti-rights agendas continue to threaten the peaceful exercise of the rights to freedom of peaceful assembly and of association.[59] In many countries around the world, "civic space has become narrower as authorities have increasingly clamped down on dissent and silenced criticism, often for political gains."[60] In addition to the fact that in 2023, only "two per cent of the world's population can enjoy the freedoms to associate, demonstrate and express dissent without significant constraints," notes the Special Rapporteur, "democratic institutions and human rights protection systems face

55. *Id*.
56. *Id.* para. 20.
57. *Id*.
58. *Id.* para. 21.
59. *Id.* para. 24.
60. *Id*.

global erosion, amidst a broader political climate of backlash and attacks against human rights and pluralism."[61]

The rise of right-wing populist movements around the world has emerged as a major threat to "the pluralist foundations of diverse societies" and has often promoted public policies that "foster discrimination, marginalization, and exclusion of marginalised and minority populations."[62] Among some of the threats are "targeted attacks, restrictions, and spread of hateful rhetoric, including by public officials, to scapegoat and endanger those who are at particular risk, including LGBTQI+ persons, migrants and ethnic and religious minorities."[63] This makes it very difficult for members of these groups, as well as advocates, to engage in activities that advance these peoples and their rights. The Special Rapporteur cited a decision by the Constitutional Court of Uganda to uphold the Anti-Homosexuality Act 2023, which discriminates against members of the LGBTQI+ community and provides for the sentence of death for anyone who commits "aggravated homosexuality."[64]

In 2012 and 2013, Special Rapporteur Maina Kiai issued two reports on the rights to freedom of peaceful assembly and of association that dealt with specific issues associated with the exercise of these two rights. In the sub-section that follows, this article will examine those two reports. In the first report, the Special Rapporteur highlighted best practices that promote and protect the rights to freedom of peaceful assembly and of association.[65] In the second report, the Special Rapporteur addressed two issues, which he considered to be among the most significant ones of his mandate—funding of associations and holding of peaceful assemblies.[66]

III. Best Practices that Promote and Protect the Rights to Freedom of Peaceful Assembly and of Association

In his first thematic report to the U.N. Human Rights Council, Special Rapporteur Maina Kiai, provided an overview of his activities

61. *Id.* paras. 24–25.

62. *Id.* para. 30.

63. *Id*.

64. Voule, *supra* note 46, para. 30; *see also* Anti-Homosexuality Act, 2023 (2023) § 3(1) (Uganda).

65. *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai*, ch. 3, U.N. Doc. A/HRC/20/27 (May 21, 2012) [hereinafter U.N. Doc. A/HRC/20/27].

66. *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, ch. 3-4, U.N. Doc. A/HRC/23/39 (Dec. 24, 2013) [hereinafter U.N. Doc. A/HRC/23/39].

during the first year of his mandate and highlighted the "best practices that promote the rights to freedom of peaceful assembly and of association."[67] He noted that the right to freedom of peaceful assembly "covers not only the right to hold and to participate in a peaceful assembly but also the right to be protected from undue interference."[68] The right to freedom of association, Mr. Kiai explained, "ranges from the creation to the termination of an association, and includes the rights to form and to join an association, to operate freely and to be protected from undue interference, to access funding and resources, and to take part in the conduct of public affairs."[69]

While noting that the rights to freedom of peaceful assembly and of association are "clearly interrelated and mutually reinforcing," Mr. Kiai explained that they, however, are also "two separate rights."[70] In most cases, these rights are governed by two "different types of legislation" and often face different challenges.[71] Thus, concluded Mr. Kiai, each right should be treated separately—that is, *the right to freedom of peaceful assembly* and *the right to freedom of association,* should be treated as two separate rights and treated as such, even though they are "interrelated, interdependent, and mutually reinforcing."[72]

The Special Rapporteur began his analysis of these two rights by noting that they serve "as a vehicle" or framework for the "exercise" and enjoyment of many other human rights, which include "civil, cultural, economic, political and social rights."[73] Both the right to freedom of peaceful assembly and of association are critical elements of a democratic political system because they significantly enhance the ability of citizens to "express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable."[74]

The Special Rapporteur noted that U.N. Human Rights Council Resolution 15/21 has reaffirmed that "everyone has the rights to freedom of peaceful assembly and of association" and that this provision of

67. U.N. Doc. A/HRC/20/27, *supra* note 65, at Summary.
68. *Id*.
69. *Id*.
70. *Id*. para. 4.
71. *Id*.
72. *Id*.
73. *Id.* para. 12.
74. Hum. Rts. Council Res. 15/21, U.N. Doc. A/HRC/RES/15/21, pmbl. (Oct. 6, 2010).

the ICCPR[75] "must be read jointly with article 2 of the [ICCPR]"[76] and "article 26 thereof, which guarantees to all individuals equal and effective protection against discrimination on grounds identified in article 2."[77] These two rights "are key human rights in international human rights law, which are enshrined in article 20 of the [UDHR]."[78] After explaining that the rights to freedom of assembly and of association are enumerated in and guaranteed by the ICCPR, the UDHR, and the ICESCR, and in other regional and international human rights instruments, the Special Rapporteur then takes a closer look at some of the language that defines these rights.[79] For example, the Special Rapporteur makes reference to the phrase "can be subject to certain restrictions, which are prescribed by law and which are necessary in a democratic society . . . ." and explains that since Article 4 of the ICCPR uses the word "certain," that means that "freedom is to be considered the rule and its restriction the exception."[80]

The Special Rapporteur then referred to the Human Rights Committee's ("HRC") General Comment No. 27 on freedom of movement.[81] In this Comment, the HRC stated that:

> [i]n adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right (cf. art. 5, para. 1); the relation between right and restriction, between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.[82]

With respect to the above quote from the HRC's General Comment No. 27, the Special Rapporteur concluded that when States have decided to impose restrictions on the exercise of the rights to freedom of assembly and of association, they must meet the conditions enumerated

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75. ICCPR, *supra* note 7, art. 22.

76. ICCPR, *supra* note 7, art. 2 (noting that Article 2 of the ICCPR imposes an obligation on all States Parties to ensure that all individuals within their jurisdiction enjoy the rights enumerated in and guaranteed by the ICCPR, "without distinction of any kind").

77. U.N. Doc. A/HRC/20/27, *supra* note 65, para. 13 (noting that these groups include "minors, indigenous peoples, persons with disabilities, persons belonging to minority groups or other groups at risk, including those victims of discrimination because of their sexual orientation and gender identity, non-nationals including stateless persons, refugees or migrants, as well as associations, including unregistered groups"); s*ee also* ICCPR, *supra* note 7, art. 26.

78. U.N. Doc. A/HRC/20/27, *supra* note 65, para. 13.

79. *Id.* paras. 14-17.

80. *Id.* paras. 15-16.

81. Hum. Rts. Comm., General Comment No. 27: (Article 12) Freedom of Movement, U.N. Doc. CCPR/C/21/Rev. 1/Add. 9 (Nov. 1, 1999) [hereinafter General Comment No. 27].

82. *Id.* para. 13.

and elaborated in the HRC's General Comment No. 27.[83] In other words, any restrictions that States Parties impose on the exercise of these two rights must "be motivated by one" of these "limited interests" and they must "have a legal basis" (that is, they must be prescribed by law) and, finally, that they are "necessary in a democratic society."[84]

With respect to "necessary," explained the Special Rapporteur, this does not mean that the restriction must be "absolutely necessary" or "indispensable."[85] It means, however, that there must be "a pressing social need" to impose the restriction or for the government to interfere with the exercise of the rights to freedom of assembly and of association.[86] In the case where there is such a pressing social need, States Parties must then ensure that "any restrictive measures" imposed on those exercising their rights to freedom of assembly and of association "fall within the limit of what is acceptable in a 'democratic society.'"[87] According to longstanding jurisprudence, "pluralism, tolerance and broadmindedness" are critical elements or components of democratic societies and, as a consequence, States must not undermine "the very existence of these attributes when restricting" the exercising of the rights to freedom of assembly and of association.[88] The Special Rapporteur then refers to the U.N. Human Rights Committee's General Comment No. 31 on the nature of the legal obligations imposed on States Parties, which states that "[w]henever such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights."[89]

The Special Rapporteur made clear that "only propaganda for war or advocacy for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (art. 20 of the [ICCPR]) or acts aimed at the destruction of the rights and freedoms enshrined in international human rights law (art. 5) should be deemed unlawful."[90] Emphasis was placed by the Special Rapporteur on the right to life and the prohibition against "torture or to cruel, inhuman or degrading treatment or punishment."[91] He stressed that "under all circumstances

83. U.N. Doc. A/HRC/20/27, *supra* note 65, para. 16.
84. *Id*.
85. *Id.* para. 17.
86. *Id*.
87. *Id*.
88. *Id*.
89. Hum. Rts. Comm., General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 6, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (May 26, 2004).
90. U.N. Doc. A/HRC/20/27, *supra* note 65, para. 18.
91. ICCPR, *supra* note 7, art. 7.

and at all times, including in the context of the exercise of the rights to freedom of association and of peaceful assembly," States Parties must guarantee citizens the right to life and the prohibitions against torture, cruel, inhuman or degrading treatment or punishment embodied in Article 7 of the ICCPR.[92]

With respect to derogations, the Special Rapporteur stated that, in its General Comment No. 29, the Human Rights Committee had declared that during a state of emergency, the rights to freedom of assembly and of association shall not be derogated because "the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (art. 12) or freedom of assembly (art. 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation."[93]

In most countries, the rights to freedom of peaceful assembly and of association are constitutionally guaranteed, while in others, these rights are made possible by legislative acts. Yet, in others, domestic statutes often include "grounds" for exercising these rights that are additional to those provided or prescribed "by international human rights law."[94] The Special Rapporteur warns that these grounds must not be interpreted arbitrarily in an effort to restrict the enjoyment of the rights to freedom of peaceful assembly and of association and that States Parties must not create environments within which the exercise and enjoyment of these rights is seriously and significantly threatened or impeded.[95]

Many countries throughout history have used the pretext of legitimately combating terrorism and maintaining peace and security to justify the adoption of "a state of emergency or other stricter rules to void the rights to freedom of peaceful assembly and of association."[96] In some countries, governments have used emergency regulations to "clampdown on freedoms of peaceful assembly, of association and of expression."[97] With respect to best practices related to the right to freedom of assembly, the Special Rapporteur started the discussion by defining "assembly" as "an intentional and temporary gathering in a private or public space for a specific purpose" and includes "demonstrations, inside meetings, strikes, processions, rallies or even sits-in."[98] In terms of mobilizing people so that they can petition their governments

92. U.N. Doc. A/HRC/20/27, *supra* note 65, para. 19; s*ee also* ICCPR, *supra* note 7, art. 7.

93. Hum. Rts. Comm., CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, para. 5, U.N. Doc. CCPR/C/21/Rev. 1/Add. 11 (Aug. 31, 2001).

94. U.N. Doc. A/HRC/20/27, *supra* note 65, para. 20.

95. *Id*.

96. *Id*. para. 21.

97. *Id*.

98. *Id*. para. 24.

to meet their grievances, assemblies in the form of public protest can play a very important role. They can help aggrieved citizens formulate and articulate their "grievances and aspirations" and organize to influence and impact public policy.[99]

As a best practice, the Special Rapporteur recommends a presumption in "favour of holding peaceful assemblies" and that such a presumption should be "clearly and explicitly established in the law" and "enshrined either in constitutions or in laws governing peaceful assemblies."[100] International human rights law, however, "only protects assemblies that are peaceful," that is, "those that are not violent, and where participants have peaceful intentions, which should be presumed."[101] When States Parties allow and enhance the ability of citizens to realize and enjoy their right to freedom of peaceful assembly, they are fulfilling the positive obligation imposed on them by the ICCPR to "facilitate the exercise of this right."[102] The Special Rapporteur mentions and highlights Armenia's Law on Assembly, which states that "[i]f the assembly is peaceful, then the Police shall be obliged to facilitate the assembly."[103]

The Special Rapporteur further notes that the right of citizens to the "exercise of fundamental freedoms should not be subject to previous authorization by the authorities, . . . but at the most to a prior notification procedure, whose rationale is to allow State authorities to facilitate the exercise of the right to freedom of peaceful assembly and to take measures to protect public safety and order and the rights and freedoms of others."[104] However, such a notification must be subject to "a proportionality assessment," which must not be "unduly bureaucratic" and "be required a maximum of, for example, 48 hours prior to the day the assembly is planned to take place."[105] If the organizers of a public assembly fail to notify the authorities as required by law, the assembly should not be "dissolved automatically . . . and the organizers should not be subject to criminal sanctions, or administrative sanctions resulting in fines or imprisonment."[106] This is especially important in situations of "spontaneous assemblies where the organizers are unable

99. *Id*.
100. *Id*. para. 26.
101. *Id*. para. 25.
102. *Id*. para. 27.
103. *Id.*; Eur. Comm'n for Democracy Through Law, Draft Law on Public Assemblies of the Republic of Armenia, art. 32(2), Doc. No. CDL(2010)117 (Nov. 18, 2010).
104. U.N. Doc. A/HRC/20/27, *supra* note 65, para. 28.
105. *Id*.
106. *Id*. para. 29.

to comply with requisite notification requirements, or where there is no existing or identifiable organizer."[107]

As best practice, the Special Rapporteur maintains that States Parties should enact legislation expressly permitting the holding of spontaneous assemblies, which are to be exempted from the prior notification requirements.[108] For example, in *Bukta and Others v. Hungary*, the European Court of Human Rights held that:

> In special circumstances when an immediate response, in the form of a demonstration, to a political event might be justified, a decision to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly.[109]

In the situation where there are "simultaneous assemblies at the same place and time," notes the Special Rapporteur, it is "good practice" for governments "to allow, protect and facilitate all events, whenever possible" and that in the case of "counter-demonstrations, which aim at expressing discontent with the message of other assemblies, such demonstrations should take place, but should not dissuade participants of the other assemblies from exercising their right to freedom of peaceful assembly."[110] In these situations, the police and other enforcement agencies play a critical role in maintaining law and order and protecting the rights of both the assembly participants and the general public.[111]

Those who organize assemblies, the Special Rapporteur explained, "should not incur any financial charges for the provision of public services during an assembly (such as policing, medical services and other health and safety measures)."[112] More specifically, "assembly organizers and participants should not be considered responsible (or held liable) for the unlawful conduct of others," and should not be expected to take responsibility for "the maintenance of public order."[113] While the internet, particularly social media, and other information and communication technology have emerged as important tools for the organization of peaceful assemblies, many States have interfered with the utilization of these tools to prevent citizens from exercising their right to freedom

107. *Id*.
108. *Id*.
109. Bukta v. Hungary, App. No. 25691/04 (Oct. 17, 2007), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-81728%22]}.
110. U.N. Doc. A/HRC/20/27, *supra* note 65, para. 30.
111. *Id*.
112. *Id*. para. 31.
113. *Id*.

of peaceful assembly.[114] The Special Rapporteur recommends that all States Parties should ensure that internet access is fully maintained at all times, even during times of political unrest, and the blocking of any internet content should only be carried out with the approval of "a competent judicial authority or a body which is independent of any political, commercial, or other unwarranted influences."[115]

In its 2012 report, the Special Rapporteur stressed that "States have a positive obligation to actively protect peaceful assemblies" and that the obligation includes, inter alia, the protection of participants from anyone, whether individuals or groups, who seek to interfere with the assemblies.[116] The State must protect those who participate in assemblies from "provocateurs and counter-demonstrators," whether they are state or non-state actors.[117] As an example of good practice, the Special Rapporteur referenced Estonia's Police Rapid Response Unit, which was established and empowered "to protect peaceful demonstrators against attacks by provocateurs and counter-demonstrators and is trained in how to separate the main provocateurs from peaceful demonstrators."[118] With respect to the State's affirmative obligation to protect peaceful participants in assemblies, the Special Rapporteur stressed that the right to life, and the right to be free from torture or cruel, inhuman or degrading treatment or punishment, which is enshrined in the UDHR and the ICCPR,[119] "should be the overarching principles governing the policing of public assemblies.[120]

In 1990, the U.N. adopted its Basic Principles on the Use of Force and Firearms by Law Enforcement Officials ("Basic Principles"), which were designed to assist law enforcement when they performed their duties during peaceful protests.[121] In the Preamble to the Basic Principles, the delegates to the U.N. Congress on the Prevention of Crime and the Treatment of Offenders recognized the vital role law enforcement officials play "in the protection of the right to life, liberty and security of

114. *Id*. para. 32.

115. *Id*.; *see also* Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue*, para. 70, U.N. Doc. A/HRC/17/27 (May 16, 2011).

116. U.N. Doc. A/HRC/20/27, *supra* note 65, para. 33.

117. *Id*.

118. *Id*.

119. UDHR, *supra* note 6, art. 5; ICCPR, *supra* note 7, art. 7.

120. U.N. Doc. A/HRC/20/27, *supra* note 65, para. 35.

121. U.N., *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7, 1990*, https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-use-force-and-firearms-law-enforcement (last visited Oct. 4, 2024) [hereinafter Basic Principles].

person, as guaranteed in the [UDHR] and reaffirmed in the [ICCPR]."[122] The Special Rapporteur paid special attention to the Basic Principles' Articles 4, 9, and 13.[123] In addition, he cited *Caracazo v. Venezuela*, a case in which the Inter-American Court of Human Rights held that:

> The pretext of maintenance of public security cannot be invoked to violate the right to life. The State must, also, adjust operational plans regarding public disturbances to the requirements of respect and protection of those rights, adopting to this end, among other measures, those geared toward control of actions by all members of the security forces in the very field of action to avoid excess. Finally, the State must ensure that, if it is necessary to resort to physical means to face situations of disturbance of public order, the members of its armed forces and its security bodies will use only those means that are indispensable to control such situations in a rational and proportional manner, and respecting the rights to life and to humane treatment.[124]

Mr. Kiai also referred to a report of the Special Rapporteur, Christof Heyns, on Extrajudicial, Summary or Arbitrary Executions in which Heyns stated that, "[t]he only circumstances warranting the use of firearms, including demonstrations, is the imminent threat of death or serious injury, and such use shall be subject to the requirements of necessity and proportionality."[125] Regarding the use of tear gas to disperse demonstrators, Mr. Kiai noted that tear gas "does not discriminate between demonstrators and non-demonstrators, healthy people and people with health conditions" and strongly opposed the modification of the chemical composition of the gas as a means to inflicting more severe damage on protesters and even bystanders.[126]

The Special Rapporteur also noted that States "have a negative obligation not to unduly interfere with the right to peaceful assembly" and "holds as best practice 'laws governing freedom of assembly [that] both avoid blanket time and location prohibitions, and provide for the possibility of other less intrusive restrictions. . . . Prohibition should be a measure of last resort and authorities may prohibit a peaceful assembly

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122. *Id*. pmbl.

123. Article 4 states as follows: "Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the indented result." *Id*. art. 4. Article 13 states as follows: "In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary." *Id*. art. 13.

124. Caracazo v. Venezuela*,* Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 95, para 127 (Aug. 29, 2002).

125. Christof Heyns (Special Rapporteur on the Extrajudicial, Summary, of Arbitrary Executions), *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns*, para. 60, U.N. Doc. A/HRC/17/28 (May 23, 2011).

126. U.N. Doc. A/HRC/20/27, *supra* note 65, para. 35.

only when a less restrictive response would not achieve the legitimate aim(s) pursued by the authorities.'"[127] To reiterate, the Special Rapporteur explained that restrictions imposed on the exercise of the right to freedom of assembly must be necessary and proportionate "to the aimed pursued."[128]

Each State must build and strengthen the human rights capacity of its administrative and law enforcement officials. The State must ensure that its police and security officers are fully trained in how to recognize and protect human rights in general and the right to freedom of peaceful assembly in particular.[129] States should regularly undertake workshops to help the police and security forces upgrade their skills and improve their capacity in international human rights law, with particular emphasis on how to manage authorized and unauthorized assemblies. In addition, States should recognize that the realization of the right to peaceful assembly also requires the effective monitoring of peaceful assemblies, particularly, by human rights defenders, who include "members of civil society organizations, journalists, 'citizen journalists,' [sic] bloggers and representatives of national human rights institutions."[130]

With respect to best practices related to the right to freedom of association, Special Rapporteur Kiai defined "association" as "any groups of individuals or any legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interests."[131] Associations include, inter alia, "civil society organizations, clubs, cooperatives, NGOs, religious associations, political parties, trade unions, foundations or even online associations . . . ."[132] In recent years, the internet has become a very important facilitator of citizen participation in social, economic, and political affairs, including organizing to defend and promote democracy.[133]

The right to form and to join an association must be considered as an integral part of the right to freedom of association. This right also includes the right to form and join groups of associations (e.g., a trade union) that protect special interests. The right to "form trade unions and join the trade union of his [or her] choice," is enumerated in and

127. *Id*. para. 39.
128. *Id*. para. 40.
129. *Id*. para. 43.
130. *Id*. para. 48.
131. *Id*. para. 51; *see also* Hina Jilani (Special Representative of the Secretary-General on Human Rights Defenders) *Human Rights Defenders*, para. 46, U.N. Doc. A/59/401 (Oct. 1, 2004).
132. U.N. Doc. A/HRC/20/27, *supra* note 65, para. 52.
133. *See generally* Babatunde Okunoye, *Technologies of Freedom Enabling Democracy in Africa*, Council on Foreign Relations (Aug. 11, 2020, 12:19 PM), https://www.cfr.org/blog/technologies-freedom-enabling-democracy-africa (examining the impact of new technologies, including the Internet, on citizen participation in democracy in Africa).

guaranteed by the ICESCR.[134] International human rights law guarantees the right of freedom of association.[135] However, this right may be legally restricted for certain individuals and groups within a State. For example, members of a State's police force and its armed forces may have their right to freedom of association restricted.[136] However, any restriction imposed on the rights of these individuals or groups must comply with provisions of international human rights instruments—that is, these restrictions must comply with States Parties' obligations under international human rights law.[137]

In addition to the fact that individuals should not be compelled to join an association, associations should also be free to "choose their members and whether to be open to any membership."[138] In the *Case of Sidiropoulos and Others v. Greece*, the European Court on Human Rights held "[t]hat citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning."[139] Although the procedure to legally establish an association may differ from one State to another, each government must provide procedures for formation and registration that are "simple, non-onerous or even free of charge . . . and expeditious."[140] In addition, Special Rapporteur Kiai noted, instead of establishing a "prior authorization procedure," each State should instead provide for a "notification procedure," which simply "requests the approval of the authorities to establish an association as a legal entity."[141] The notification procedure, the Special Rapporteur explains, complies much better with international human rights law and, as such, it should be implemented by States.[142]

The government of each State, the Special Rapporteur noted, is obliged, by the right to freedom of association, to take positive steps to "establish and maintain an enabling environment" in which citizens can freely express and enjoy their right to freedom of association.[143] Most importantly,

134. ICESCR, *supra* note 15, art. 8.
135. ICCPR, *supra* note 7, art. 22(1).
136. U.N. Doc. A/HRC/20/27, *supra* note 65, para. 54.
137. *Id*.
138. *Id*. para. 55.
139. Sidiropoulos v. Greece, Eur. Ct. H.R., App. No. 26695/95, at para. 40, (1998) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58205%22]}.
140. U.N. Doc. A/HRC/20/27, *supra* note 65, para. 57.
141. *Id*. para. 58.
142. *Id*.
143. *Id*. para. 63.

> individuals exercising this right [must] be able to operate freely without fear that they may be subjected to any threats, acts of intimdation or violence, including summary or arbitrary executions, enforced or involuntary disappearances, arbitrary arrest or detention, torture or cruel, inhuman or degrading treatment of punishment, a media smear campaign, travel ban or arbitrary dismissal, notably for unionists.[144]

Finally, States must not unduly interfere with or obstruct the right to freely associate by those individuals living within their jurisdictions. Where associations have been formed as prescribed by law, the members of these entities must be allowed to freely manage the affairs of their organizations.[145] That is, members of associations should "be free to determine their statutes, structure and activities," and must be allowed to "make decisions without State interference."[146] In addition to respecting the privacy rights of associations, States should significantly improve the human rights capacity of their administrative officials, including ensuring that they function in ways that conform to the States' obligations under international human rights law.[147] Importantly, the Special Rapporteur contended, the government of each State must ensure that individuals within its jurisdiction are able to exercise their rights to freedom of assembly and of association.[148]

The Special Rapporteur has also issued a report in which he commented extensively on two issues which he considered to be critical to his mandate. These issues are: (i) funding of associations and (ii) holding of special assemblies.[149] This was Special Rapporteur Maina Kiai's second report on the rights to freedom of peaceful assembly and of association, which was submitted to the U.N. Human Rights Council ("HRC") pursuant to the HRC's Resolutions 15/21 and 21/16.[150] The Special Rapporteur began his examination of these issues by noting that the ability of associations "to seek, secure and use resources is essential to the existence and effective operations of any association, no matter how small."[151] In addition, the right to freedom of association includes not only "the ability of individuals or legal entities to form

144. *Id*.
145. *See generally id*. para. 64.
146. *Id*.
147. *Id*. para. 66.
148. *Id*. para. 82.
149. Maina Kiai (Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association), *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai*, U.N. Doc. A/HRC/23/29 (Apr. 24, 2013) [hereinafter U.N. Doc. A/HRC/23/29].
150. *Id*. para. 1; *see also* Hum. Rts. Council Res. 15/21, U.N. Doc. A/HRC/RES/15/21, para. 1 (Oct. 6, 2010); Hum. Rts. Council Res. 21/16, U.N. Doc. A/HRC/RES/21/16, para. 2 (Oct. 11, 2012).
151. U.N. Doc. A/HRC/23/39, *supra* note 149, para. 8.

and join an association but also [the right] to seek, receive and use resources—human, material and financial—from domestic, foreign, and international sources."[152]

The legal institutions of a State and its "policies related to resources have a significant impact on the freedom of association; they can strengthen the effectiveness and facilitate the sustainability of associations, or alternatively, subjugate associations to a dependent and weak position."[153] In the case of associations which are involved in advocating for and promoting human rights,[154] effective access to resources is critical—not only for the sustainability of the association but also for "the enjoyment of other human rights by those benefiting from the work of the association" in question.[155] Imposing restrictions on the ability of associations to access resources can significantly impact the "enjoyment of the right to freedom of association" and can also severely "undermine civil, cultural, economic, political and social rights as a whole."[156]

In the context of associations, resources include: "financial transfers;" "loan guarantees and other forms of financial assistance from natural and legal persons; [and] in-kind donations."[157] Throughout the world, and especially in Africa, many civil society actors and organizations have been facing significant challenges in their ability to access resources, especially from abroad. In 2019, Freedom House reported that during the last 15 years, there has been a significant increase in anti-NGO measures in Africa, including laws that have made it difficult for NGOs to secure resources for their operations.[158] Throughout Africa, these anti-NGO measures are designed to "silence the voices of dissent and critics" and effectively prevent civil society from participating fully and effectively in governance.[159] While governments have obligations under international law to protect associations operating within their jurisdictions, associations also have obligations to ensure, inter alia, that

152. *Id*.

153. *Id*. para. 9.

154. These include economic, social, and cultural rights. *See id*.

155. U.N. Doc. A/HRC/23/39, *supra* note 149, para. 9.

156. *Id*.

157. Financial transfers include, inter alia, donations, grants, contracts, sponsorships, and social investments. In-kind donations include "contributions of goods, services, software and other forms of intellectual property, real property." Resources also include "material resources," "human resources," and "access to international assistance, solidarity," as well as the "ability to travel and communicate without undue interference and the right to benefit from the protection of the State." *See id*. para. 10.

158. Godfrey Musila, *The Spread of Anti-NGO Measures in Africa: Freedoms Under Threat*, FREEDOM HOUSE, https://freedomhouse.org/report/special-report/2019/spread-anti-ngo-measures-africa-freedoms-under-threat (last visited Oct. 21, 2024).

159. U.N. Doc. A/HRC/23/39, *supra* note 149, para. 12.

they operate within the law and in an open and transparent manner, as well as, "according to the terms of their funding agreements."[160]

Special Rapporteur Kiai has also noted that "domestic, foreign and international donors also have responsibilities."[161] Donors, both domestic and international, should be familiar with and pay attention to the political, economic, and social environment within which the associations that they support operate. This is especially important in the case of associations that advocate for and serve the interests of marginalized and vulnerable peoples and groups (e.g., women, ethnic minorities, and persons with disabilities), as well as those working on issues that are considered unpopular (e.g., the rights of LGBTQI+ persons).[162] In order for associations to properly and effectively serve their populations, donors must not unnecessarily interfere with their autonomy. For example, donors should not impose conditions on associations that make it difficult for the associations to carry out their functions effectively and to properly serve the needs of their constituents.

In 2013, the U.N. Human Rights Council adopted Resolution 22/6: Protecting Human Rights Defenders, in which it called upon States Parties "[t]o ensure that reporting requirements placed on individuals, groups and organs of society do not inhibit [the] functional autonomy [of associations]" and, additionally, "[to] not discriminatorily impose restrictions on potential sources of funding. . . . ."[163] Other U.N. treaty bodies have also emphasized States' obligations "to allow civil society to seek, secure, and utilize resources, including from foreign sources."[164] The Special Rapporteur noted that Article 13 of the U.N. Declaration on Human Rights Defenders represents another "relevant frame of reference" on the ability of associations to access financial resources.[165] Article 13 states:

> Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration.[166]

It is important to note that the provision in Article 13 of the Declaration on Human Rights Defenders does not make any distinction

160. *Id*. para. 13.
161. *Id*. para. 14.
162. *Id*.
163. Hum. Rts. Council Res. 22/6, U.N. Doc. A/HRC/RES/22/6, at para. 9 (Apr. 12, 2013).
164. U.N. Doc. A/HRC/23/39, *supra* note 149, para. 16.
165. *Id*. para. 17.
166. G.A. Res. 53/144, art. 13 (Mar. 8, 1999) [hereinafter Declaration on Human Rights Defenders].

between domestic and international funding sources and, in addition, does not require associations seeking funding to be registered.[167]

The declaration, however, is not a legally binding instrument. Nevertheless, it is important to recognize the fact that the declaration was adopted by consensus by the U.N. General Assembly and its provisions are based on "human rights standards enshrined in other international [human rights] instruments which are legally binding."[168] Thus, the "guiding principles" set forth in the Declaration on Human Rights Defenders "emanate from the provisions of [A]rticle 22 of the [ICCPR] and can therefore be applied to other forms of associations, regardless of the goals they pursue."[169]

The Special Rapporteur then examined some of the obstacles that States impose on the ability of associations to secure funding for their activities. For example, by requiring associations to obtain approval from the government before they solicit and/or receive funds and banning or restricting foreign-funded NGOs from undertaking human rights work or advocacy domestically, States can greatly interfere with the ability of citizens to exercise their right to freedom of association. The ability of associations to effectively "access funding and other resources from domestic, foreign and international sources," noted the Special Rapporteur, "is an integral part of the right to freedom of association, and these constraints violate [A]rticle 22 of the [ICCPR] and other human rights instruments, including the [ICESCR]."[170] In many African countries, certain customary and traditional practices, such as patriarchy, as well as, authoritarian regimes, can seriously undermine the ability of associations to access the funds that they need to defray the costs of their operations and activities.[171]

The lack of funds is frustrating the ability of civil society organizations to advocate in favor of and defend human rights and fundamental freedoms. These challenges are compounded by the increasing criminalization of human rights and advocacy work. Studies by Amnesty International ("AI") have revealed increasing criminalization of human rights and advocacy work. In a 2023 report on human rights in Mexico, AI determined that "[t]he disproportionate use of criminal law is one of the main threats facing the right to protest peacefully in defense of land, territory and environment in Mexico" and that authorities routinely and disproportionately use "the justice system to deter, punish

167. *Id*.
168. U.N. Doc. A/HRC/23/39, *supra* note 149, para. 17.
169. *Id*.
170. *Id*. para. 20.
171. *Id*. para. 21.

and prevent defenders from protesting in demand of their rights."[172] The key is that States should not criminalize peaceful activities, such as the protection of human rights, the struggle for gender equality, and the fight for non-discrimination and equality before the law for all citizens, including especially historically marginalized groups (e.g., girls and women, and persons with disabilities).[173]

Some African countries have used laws to fight terrorism and religious extremism to punish legitimate political speech and peaceful protests, as well as significantly expand "police surveillance powers."[174] In 2021, Human Rights Watch argued that new counterterrorism laws enacted by Senegal could reclassify political speech and peaceful protest as "terrorist acts" and subject individuals involved in these activities to extremely harsh punishments.[175] Terrorism is a crime that destroys human rights and fundamental freedoms and hence, it is important for governments to combat it. However, in doing so, States must ensure that the measures they take do not violate human rights, including the rights to freedom of assembly and of association. Governments must not act opportunistically and interpret or enforce laws designed to provide state actors with the tools to combat terrorism in ways that violate human rights or hamstring the ability of human rights defenders to effectively advocate on behalf of citizens.

The ability to hold or carry out peaceful assemblies must be seen as an integral element or component of the "multifaceted" right to freedom of peaceful assembly.[176] Such freedom is critical to the work of civil society actors and organizations, including especially those that promote "the realization of economic, social and cultural rights" because it provides them with the wherewithal to "publicly voice their message, which ultimately benefits the realization of the right(s) they strive to promote and protect, especially in the context of the ongoing dire economic crisis."[177]

An important measure that States can take to enhance the realization of the right to freedom of peaceful assembly is to ensure that organizers and participants are able to have access to public space.[178]

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172. *Mexico: Land, Territory and Environmental Defenders are Being Criminalized for Exercising Their Right to Protest*, Amnesty Int'l (Sept. 13, 2023), https://www.amnesty.org/en/latest/news/2023/09/mexico-land-defenders-criminalized-right-to-protest/..

173. U.N. Doc. A/HRC/23/39, *supra* note 149, para. 21.

174. *Senegal: New Counterterror Laws Threaten Rights*, Hum. Rts. Watch (July 5, 2021, 2:00 AM), https://www.hrw.org/news/2021/07/05/senegal-new-counterterror-laws-threaten-rights [hereinafter *Senegal*].

175. *Id*.

176. U.N. Doc. A/HRC/23/39, *supra* note 149, para. 43.

177. *See id.*

178. *Id.* para. 65.

According to Human Rights Watch, "[h]uman rights law sets a high threshold for barring or punishing public demonstrations; unauthorized, annoying, or offensive peaceful protests can be perfectly legitimate."[179] Human Rights Watch then noted:

> In keeping with the very strong protections guaranteed in the Spanish Constitution, as well as the jurisprudence of the European Court of Human [R]ights, the Spanish Constitutional Court has said that a certain amount of disruption must be tolerated because 'in a democratic society, the urban space is not only an area for circulation, but also for participation.'[180]

In its report on the security of citizens and their human rights, the Inter-American Commission on Human Rights ("American Commission") has declared that "State authorities have an obligation to prevent and, where necessary, control any form of violent behavior that violates the rights of any other person subject to that State's jurisdiction."[181] In addition to holding that the right to freedom of assembly must be exercised peacefully and without the use of arms, the American Commission also recognized "the fact that the exercise of this right can sometimes be disruptive to the normal routine of daily life, especially in large urban centers."[182] However, declared the American Commission, "such disruptions are part of the mechanics of a pluralistic society in which diverse and sometimes conflicting interests coexist and find the forums and channels in which to express themselves."[183] In addition, in its Resolution 22/10, the Human Rights Council urged States "to facilitate peaceful protests by providing protestors with access to public space and protecting them, where necessary, against any forms of threats, and underlines the role of local authorities in this regard."[184]

The purpose of a public demonstration is to draw attention to the organizers' cause or grievances, as well as convince those who are not currently taking part in the action of the rightness of the protesters. Thus, the location of the protests is an important element of the rights to freedom of assembly and of association. According to the Kenya Center for Human Rights and Policy Studies, an effective protest is one that is held in "view of the public," but is also "in proximity to the object

179. Judith Sunderland, *Dispatches: Spain: No Excuse for Muzzling Protests*, HUM. RTS. WATCH (Mar. 28, 2014), https://www.hrw.org/news/2014/03/28/dispatches-spain-no-excuse-muzzling-protests.

180. *Id.*

181. Inter-Am. Comm'n H.R., Report On Citizen Security and Human Rights, OEA/Ser. L/V/II, doc. 57, para. 198 (Dec. 31, 2009) [hereinafter IACHR].

182. *Id.*

183. *Id.*

184. G.A. Res. 22/10, para. 4 (Apr. 9, 2013).

of the protest."[185] Thus, a regulation or law that requires that protesters be restricted to certain so-called "demonstration zones," as recommended by the High Court of Kenya in *Ngunjiri Wambugu v. Inspector General of Police and Others*,[186] could deny protesters "their ability to reach their target audiences" and render ineffective their rights to freedom of assembly and of association.[187] For example, a protest against legislative corruption would be more effective if it were held in front of Parliament or Congressional Buildings or, at the very least, in the vicinity. The Special Rapporteur noted:

> The issue of access to public space is all the more important in light of the increased privatization of public space in many States, where peaceful assemblies have been curtailed through the use by private bodies, both companies and individuals, of civil injunctions, which can be difficult to challenge, coupled with the issue of aggravated trespass . . . .[188]

Organizers and participants, argued the Special Rapporteur, should be able "to use public streets, roads and squares to conduct (static or moving) peaceful assemblies."[189] States must consider "spaces in the vicinity of iconic buildings such as presidential palaces, parliaments or memorials . . . public space, and peaceful assemblies should be allowed to take place in those locations."[190] States, therefore, must design legislation to enhance, and not obstruct, the ability of protesters to assemble peacefully around these important public structures.

The Special Rapporteur then called on States to create laws and institutions, as well as, establish environments that enhance and enable the ability of citizens to enjoy the rights of freedom to peaceful assembly and of association.[191] In addition, States must ensure that any restrictions imposed by the government comply with international and regional human rights "norms and standards," and particularly, they must be "in line with the strict test of necessity and proportionality in a democratic society, bearing in mind the principle of non-discrimination."[192]

The fundamental right of peaceful assembly is guaranteed in international law by Article 21 of the ICCPR.[193] The U.N. HRC is the body of

185. Brian Kimari, *High Court Decision on Demos Offends Constitutional Right of Assembly*, *Katiba Corner*, The Star (Sept. 1, 2019, 7:08 AM), https://www.the-star.co.ke/news/2019-09-01-high-court-decision-on-demos-offends-constitutional-right-of-assembly/.

186. Ngunjiri Wambugu v. Inspector Gen. of Police (2019) K.L.R. 5361 (H.C.K.) (Kenya).

187. Kimari, *supra* note 185.

188. U.N. Doc. A/HRC/23/29, *supra* note 149, para. 65.

189. *Id.* para. 66.

190. *Id.*

191. *Id.* para. 81(a).

192. *Id.* para. 81(b).

193. ICCPR, *supra* note 7.

independent experts empowered to monitor the implementation of the ICCPR by States Parties and interpret the treaty. The HRC has interpreted Article 21 in its General Comment No. 37.[194] To gain insight into this fundamental human right, especially as it is treated in international law, this article will examine the HRC's General Comment No.

IV. The Right of Peaceful Assembly in International Law

Article 21 of the ICCPR, which guarantees the right of peaceful assembly, states as follows:

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interest of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.[195]

HRC began its analysis of Article 21 by noting that the right of peaceful assembly "is important in its own right, as it protects the ability of people to exercise individual autonomy in solidarity with others."[196] If the right of peaceful assembly is combined with other related rights, the HRC explained, it forms the "very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism."[197] Peaceful assemblies provide citizens with the wherewithal to petition their governments for relief of their grievances, as well as enhance their ability to "advance ideas and aspirational goals in the public domain and to establish the extent of support for or opposition to those ideas and goals."[198] By providing a legal mechanism for citizens to "air [their] grievances, peaceful assemblies may create opportunities for the inclusive, participatory and peaceful resolution of differences."[199]

In addition to being a right in itself, the right of peaceful assembly can serve as an important tool to help and enhance the ability of citizens to realize other human rights, including economic, social, and cultural rights.[200] The right of peaceful assembly is especially important to

194. Hum. Rts. Comm., General Comment No. 37 (2020) on the Right of Peaceful Assembly (Article 21), U.N. Doc. CCPR/C/GC/37 (Sept. 17, 2020) [hereinafter General Comment No. 37 (2020)].

195. ICCPR, *supra* note 7, art. 21.

196. General Comment No. 37 (2020), *supra* note 194, para. 1.

197. *Id.* para. 4.

198. *Id.*

199. *Id.*

200. *Id.* para. 2.

marginalized groups (e.g., women and girls, persons with disabilities, and ethnic and religious minorities) who often do not have any other way but street protests to petition their governments to address their grievances.[201] The HRC explained that the first sentence of Article 21 provides as follows: "The right of peaceful assembly shall be recognized."[202] This right is articulated and enumerated in "similar terms" in several other international and regional human rights instruments.[203] The content of this right has been "elaborated upon by monitoring bodies, for example, in their views, concluding observations, resolutions, interpretive guidelines, and judicial decisions."[204]

In addition to the fact that States are bound by international law to recognize the right to peaceful assembly, many States also enumerate and guarantee this right in their national constitutions. The HRC estimated that about a total of 184 of the 193 Member States of the U.N. recognize the right to peaceful assembly in their national constitutions.[205] Although this right belongs to the individual, it allows him or her to gather with others similarly situated for "specific purposes, principally expressive ones."[206] It is an individual right that is usually exercised collectively, and, as a consequence, it has "an associative element."[207]

The right of peaceful assembly is available to all individuals within a State Party to the ICCPR—citizens, non-citizens, visitors, refugees, asylum seekers, stateless persons, and migrants, whether documented or not.[208] Peaceful assemblies are protected by Article 21, regardless of where they occur, whether they take place indoor, outdoor, or online.[209] In addition, individuals are protected regardless of whether they are "stationary, such as pickets, or mobile, such as processions or marches."[210] Although peaceful assemblies may create disruptions (e.g., traffic jams) and major risks for both participants and bystanders, the management of these problems must be undertaken according to laws that conform with provisions of international human rights instruments.[211]

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201. *Id*.
202. *Id.* para. 3.
203. *Id.*; *see also* UDHR, *supra* note 6; Banjul Charter, *supra* note 29, art. 11; G.A. Res. 44/25, art. 15 (Sept. 2, 1990); African Child Charter, *supra* note 32; ICESCR, *supra* note 15, art. 5(d)(ix).
204. General Comment No. 37 (2020), *supra* note 194, para. 3.
205. Ona Flores, *Case Law on Peaceful Protests*, Colum. Univ. Glob. Freedom of Expression 9 (2023), https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2023/06/Case-law-on-peaceful-protests.pdf
206. General Comment No. 37 (2020), *supra* note 194, para. 4.
207. *Id.*
208. *Id.* para. 5.
209. *Id.* para. 6.
210. *Id.*
211. *Id.* para. 7.

While the ICCPR (at Article 21) guarantees individuals the right to freedom of peaceful assembly, it also imposes an obligation on States Parties to ensure that individuals subject to their jurisdiction can exercise this right "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[212] Grounds under which States Parties can potentially impose restrictions on the exercise of the right of peaceful assembly are provided in the second sentence of Article 21.[213] These restrictions, however, "must be narrowly drawn," and must be understood as a constraint, even if a necessary one, on the ability of individuals to freedom of assembly.[214]

A State can successfully protect the right of peaceful assembly only if it is also able to protect other "often, overlapping, rights," which include "freedom of expression, freedom of association and political participation."[215] The protection of the right of peaceful assembly is "often also dependent on the realization of a broader range of civil and political rights, and economic, social and cultural rights."[216] Even when, for example, protesters are acting in a manner that "places them outside the scope of the protection of [A]rticle 21 [of ICCPR], it is important to note that they still "retain their other rights under the [ICCPR], subject to the applicable limitations and restrictions."[217]

Over the years, changes in technology, particularly information and communications technology ("ICT"), have significantly transformed the way in which assemblies are conducted.[218] For example, individuals now use online communication platforms (e.g., Instagram, Facebook) not only to organize their assemblies but also to gather signatures and deliver petitions to appropriate authorities.[219] In October 2020, Nigerian youth used the internet to bring thousands of people to the streets to protest the brutal and extremely abusive elite police unit known as the

212. ICCPR, *supra* note 7, art. 2(1).
213. General Comment No. 37 (2020), *supra* note 194, para. 8; *see also* ICCPR, *supra* note 7.
214. General Comment No. 37 (2020), *supra* note 194, para. 8.
215. *Id.* para. 9.
216. *Id*.
217. *Id*.
218. *New Technologies Must Serve, Not Hinder, Right to Peaceful Protest, Bachelet Tells States*, OFFICE OF U.N. HIGH COMM'R FOR HUM. RTS. (June 25, 2020), https://www.ohchr.org/en/press-releases/2020/06/new-technologies-must-serve-not-hinder-right-peaceful-protest-bachelet-tells ("New technologies can be used to mobilize and organize peaceful protests, form networks and coalitions, and help people to be better informed about demonstrations and the reasons they are happening, thus driving social change . . . .").
219. Mirjam de Bruijn, *ICTs and Emergence of International Protest in Central Africa*, PEACE & SECURITY, SAHEL WATCH (July 7, 2015), https://www.thebrokeronline.eu/article/icts-and-the-emergence-of-international-protest-in-central-africa-d12/ (noting the use of ICTS for the organization of protests in Central Africa).

Special Anti-Robbery Squad ("SARS").[220] The movement was eventually given the hashtag "#EndSARS."[221] The #EndSARS movement was successful in forcing the Nigerian government to abolish the notorious police unit.[222] Governments have been using these new technologies to gather information on potential sources of violence so that the public, including protesters, can be protected. However, the use of these surveillance technologies can "infringe on the right to privacy and other rights of participants and bystanders" and can have a constraining effect on the ability of individuals to participate in public assemblies, especially those that oppose government policies.[223]

In its General Comment No. 37, the HRC explained that determining and establishing "whether or not someone's participation in an assembly is protected under [A]rticle 21 [of the ICCPR] entails a two-stage process."[224] First, it must be established whether the person's conduct "falls within the scope of the protection offered by the right": is the person participating in a peaceful assembly?[225] If the person is participating in a peaceful protest, then the State must respect and protect the rights of such a participant.[226] Second, the State must make sure that any restriction imposed on the exercise of the right is legitimate, as spelled out in the second part of Article 21.[227]

The HRC explains that by definition, the right of peaceful assembly may not be exercised through the use of violence and that in the "context of [A]rticle 21," violence "entails the use by participants of physical force against others that is likely to result in injury or death, or serious damage to property."[228] While protesters who engage in violence may lose their Article 21 protections, they nevertheless do not lose their other rights under the ICCPR.[229] Hence, any police response to such an assembly must be conducted in ways that do not violate the participants' other human rights, for example, the right to life (Article 6), the prohibition against torture or cruel, inhuman or degrading

220. *Nigeria: A Year On, No Justice for #EndSARS Crackdown*, Hum. Rts. Watch (Oct. 19, 2021, 12:00 AM), https://www.hrw.org/news/2021/10/19/nigeria-year-no-justice-endsars-crackdown?gad_source=1&gclid=CjwKCAjwqMO0BhA8EiwAFTLgIDpM3gha6xYYAlnp_X9c_-z3u4sZGUb9PK1nlnObG-zG_sIc5TkKZhoCkUoQAvD_BwE.

221. *Id*.

222. Mayeni Jones, *SARS Ban: Nigeria Abolishes Loathed Federal Special Police Unit*, BBC News (Oct. 11, 2020), https://www.bbc.com/news/world-africa-54499497.

223. General Comment No. 37 (2020), *supra* note 194, para. 10.

224. *Id.* para. 11.

225. *Id.*

226. *Id*.

227. *Id*.

228. *Id*. para. 15.

229. *Id*. para. 9.

treatment or punishment (Article 7), and the right to liberty and security of person (Article 9).[230]

If participants in an assembly are conducting themselves peacefully, they do not necessarily place themselves outside the protections of Article 21, even if in organizing the assembly, the participants did not meet all the domestic requirements pertaining to such an assembly. The HRC noted that "[c]ollective civil disobedience or direct action campaigns can be covered by [A]rticle 21, provided that they are non-violent."[231] Of course, peaceful assemblies can be infiltrated by violent opportunists and can effectively create a situation in which some participants are covered by Article 21 while others within the same assembly are not.[232] The HRC explained that during any peaceful assembly, violence against participants by State agents or "agents provocateurs" acting on behalf of the State "does not render the assembly non-peaceful."[233] If the violence directed at the participants comes from other members of the public or counter-protesters, that also does not render the assembly non-peaceful.[234]

The HRC has stated that each State Party to the ICCPR has an obligation to respect all the rights entrenched in the Covenant and ensure "to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR]."[235] With respect to the exercise of the right of peaceful assembly, however, the HRC has noted that States must allow participants to freely determine "the purpose or any expressive content of an assembly."[236] In judging whether assemblies are peaceful, authorities must not use "the identity of the participants or their relationship with the authorities" as criteria to make the determination.[237] Regarding the location of an assembly, the HRC articulated in *Strizhak v. Belarus* that:

> The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience; no restriction to this right is permissible unless it is imposed in conformity with the law and is necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.[238]

230. ICCPR, *supra* note 7, arts. 6(1), 7, 9(1).
231. General Comment No. 37 (2020), *supra* note 194, para. 16.
232. *Id*. art. 17.
233. *Id*. art. 18.
234. *Id*.
235. ICCPR, *supra* note 7, art. 2(1).
236. General Comment No. 37 (2020), *supra* note 194, para. 22.
237. *Id*.
238. Strizhak v. Belarus, CCPR/C/124/D/2260/2013, para. 6.5 (Nov. 28, 2012); *see also* ICCPR, *supra* note 7, art. 21.

The ICCPR imposes both negative and positive duties on States Parties "before, during, and after assemblies."[239] With respect to the negative duty, there is an obligation on the State "not to prohibit, restrict, block, disperse or disrupt peaceful assemblies without compelling justification, nor to sanction participants or organizers without legitimate cause."[240] In terms of positive duties, States must enhance peaceful assemblies and create and maintain environments in which participants can fully and effectively exercise their right to peaceful assembly without discrimination.[241] As part of its duty to enhance the ability of participants to exercise their right to peaceful assembly, the State may be called upon to "block off streets, redirect traffic or provide security," as well as "protect participants against possible abuse by non-State actors, such as interference or violence by other members of the public, counterdemonstrators and private security providers."[242]

Groups that have historically been subjected to discriminatory practices and who are likely to face discrimination in the future must be granted necessary protection by the State so that they can effectively exercise their right to peacefully assemble.[243] Regardless of their nature, restrictions must not be discriminatory, and they must not interfere with the ability of participants in assemblies to exercise their right to freedom of assembly.[244] In addition, they must not be used as mechanisms to discourage participation in assemblies.[245]

With respect to notification regimes, the HRC believes that the requirement that individuals apply for permission in advance of assemblies "undercuts the idea that peaceful assembly is a basic right."[246] However, notification systems that require prospective participants in assemblies to provide the State with certain information, which can be used to help the authorities facilitate "the smooth conduct of peaceful assemblies" and protect the rights of by-standers[,] should be permitted.[247] The notification requirement must not be "misused to stifle peaceful assemblies" and must be justified on the grounds enumerated in Article 21.[248] Finally, notification requirements must be "transparent, not unduly bureaucratic, their demands on organizers must be

239. General Comment No. 37 (2020), *supra* note 194, para. 23.
240. *Id.*
241. *Id.* para. 24.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* para. 70.
247. *Id.*
248. *Id.*

proportionate to the potential public impact of the assembly concerned, and they should be free of charge."[249]

If organizers fail to notify the authorities of an upcoming assembly when they are supposed to do so, that should not "render the act of participation in the assembly unlawful, and must not in itself be used as a basis for dispersing the assembly or arresting the participants or organizers, or for imposing undue sanctions, such as charging the participants or organizers with criminal offences."[250] If State authorities decide to sanction organizers of an assembly for not obtaining prior authorization, the sanctions must be justified.[251]

Law enforcement officials are often called upon to police assemblies and protect both the participants and by-standers. However, in performing their jobs, the police and other security agents should act according to the law and respect the rights of all individuals within the jurisdiction of the State.[252] The overarching objective of security forces should be to enhance and facilitate peaceful assemblies and not to unnecessarily restrict the ability of individuals within the jurisdiction of the State to exercise their right of peaceful assembly.[253]

To ensure that the use of force and firearms against persons participating in assemblies by law enforcement officials conforms to international human rights norms, States Parties should incorporate the provisions of the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials in their training programs.[254] For example, in policing assemblies, law enforcement officials should "apply nonviolent means before resorting to the use of force and firearms" and that force and firearms should be used "only if other means remain ineffective or without any promise of achieving the intended result."[255] In addition, if it is necessary that firearms be used, then law enforcement officials must exercise restrain "in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved."[256]

Pursuant to "principles embodied in the [UDHR] and the [ICCPR]," all individuals within the jurisdiction of a State Party are

249. *Id.*
250. *Id*. para. 71.
251. *Id*.
252. *Id*. para. 74.
253. *See also* General Comment No. 37 (2020), *supra* note 194, para. 74.
254. *See generally Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, U.N., https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-use-force-and-firearms-law-enforcement?ControlMode=Edit&DisplayMode=Design#1 (last visited Apr. 19, 2025).
255. *Id*. para. 4.
256. *Id*. para. 5(a).

"allowed to participate in lawful and peaceful assemblies."[257] However, "force and firearms may be used only in accordance with principles 13 and 14" of the Basic Principles.[258] In dispersing "assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary."[259] If, however, the assemblies are violent, "law enforcement officials may use firearms" to disperse them but, they may do so "only when less dangerous means are not practicable and only to the minimum extent necessary."[260] Finally, in the case of violent assemblies, law enforcement officials must only use firearms "under the conditions stipulated in principle 9."[261]

Under international law, the State must take responsibility for the "actions and omissions of its law enforcement agencies."[262] Each State must consistently ensure that its agents function in conformity with the obligations imposed on the State by international human rights instruments. Moreover, each State should build and sustain a culture of "accountability for law enforcement officials during assemblies."[263] As part of an effective accountability regime, law enforcement officials must, in all their official functions, including assemblies, "display an easily recognizable form of identification."[264] If law enforcement officials are alleged to have used or are suspected of using excessive force, "including sexual or gender violence," States must expeditiously and effectively investigate, in an impartial manner, any such allegations and hold any official accountable under "domestic and, where relevant, international law."[265] Finally, the State must make available to all victims, without discrimination, effective remedies.[266]

The right of peaceful assembly, however, is not listed as one of the non-derogable rights enumerated in Article 4(2) of the ICCPR.[267] There are other rights which are potentially applicable to assemblies that are non-derogable which include those enshrined in Articles 6, 7, and 18 of the ICCPR.[268] If States decide to derogate from the right of peaceful assembly, for example, in response to:

257. *Id*. para. 12.
258. *Id*.
259. *Id*. para. 13.
260. *Id*. para. 14.
261. *Id*.
262. General Comment No. 37 (2020), *supra* note 194, para. 89.
263. *Id*.
264. *Id.*
265. *Id*. para. 90.
266. *Id*.
267. *See* ICCPR, *supra* note 7, art. 4(2).
268. General Comment No. 37 (2020), *supra* note 194, para. 96*; see also* ICCPR, *supra* note 7, arts. 6, 7, 18.

> [M]ass demonstrations that include acts of violence, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all measures derogating from their obligations under the Covenant are strictly required by the exigencies of the situation and comply with the conditions in article 4.[269]

The Banjul Charter and the African Child Charter guarantee the right to peacefully assemble.[270] The constitutions of many African countries (e.g., Constitution of the Republic of South Africa, 1996) also enshrine and guarantee the right to peacefully assemble.[271] South Africans consider the right to peacefully assemble and associate to be so fundamental, that they are included in their Bill of Rights.[272] According to section 17, "[e]veryone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."[273] Also, it states that "[e]veryone has the right to freedom of association."[274] Like South Africans, Kenyans have also enshrined the right of peaceful assembly in their Bill of Rights.[275] According to Article 37 of the Constitution of the Republic of Kenya, 2010, "[e]very person has the right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities."[276] In the following section, this article will examine the African Commission's guidelines on the rights to the freedom of peaceful assembly and of association in Africa.

V. The African Commission and the Right to Freedom of Peaceful Assembly and of Association

In Africa, the rights to freedom of peaceful assembly and of association are guaranteed at the regional level in the Banjul Charter and the African Child Charter and at the national level in the constitutions of various countries.[277] On September 21, 2017, the African Commission on Human and Peoples' Rights ("African

269. General Comment No. 37 (2020), *supra* note 194, para. 96.

270. Banjul Charter, *supra* note 29, arts. 10–11; *see also* African Child Charter, *supra* note 32, art. 8.

271. *See, e.g.*, S. Afr. Const. 1996, ch. 2, § 17 (enshrining the right to peacefully assemble, demonstrate, picket, and petition).

272. *Id.* ch. 2 (Bill of Rights).

273. *Id.* ch. 2, § 17.

274. *Id.* § 18.

275. Const. ch. 4 (2010) (Kenya).

276. *Id.* art. 37.

277. *See* Banjul Charter, *supra* note 29, arts. 10- 11; African Child Charter, *supra* note 32, art. 8; S. Afr. Const., 1996, ch. 2, § 17; Constitution art. 37 (2010) (Kenya).

Commission") adopted Guidelines on Freedom of Association and Assembly in Africa ("Guidelines").[278] According to the African Commission, these guidelines were "developed in accordance with the relevant provisions of the [Banjul Charter], which stipulates under Article 45(1)(b) that the African Commission is mandated 'to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms."[279]

In the Preamble to the Guidelines, the African Commission noted that Articles 10 and 11 of the Banjul Charter, which guarantee the rights to freedom of association and of assembly are "inextricably intertwined with other rights."[280] The African Commission also noted Articles 60 and 61 of the Banjul Charter, which "mandate" that the African Commission draw "inspiration from regional and international instruments and practice on human and peoples' rights."[281] The African Commission also recalled the Maputo Protocol, the African Child Charter, and the African Charter on Democracy, Elections and Governance.[282] It acknowledged "the major differences between states in terms of legal systems, socio-economic conditions, and political and historic influences on the legal regimes governing association and assembly."[283] (iii) showed concern for the "excessive restrictions imposed on the rights to freedom of association and assembly;" and (iv) was "conscious of "the need to provide guidance to states on the measures necessary in order to ensure respect for and the protection and fulfillment of human rights," and as a result, the African Commission adopted the Guidelines on Freedom of Association and Assembly in Africa.[284]

The African Commission introduced the Guidelines by noting that there are ten fundamental principles that must "be borne in mind throughout when contemplating and interpreting the rights in question and their specification as laid out in these guidelines."[285] These principles are:

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278. *Guidelines on Freedom of Association and Assembly in Africa*, Afr. Comm'n on Hum. & Peoples' Rts. (Sept. 21, 2017), https://achpr.au.int/index.php/en/soft-law/guidelines-freedom-association-and-assembly-africa. [hereinafter "Guidelines"].

279. *Id*. at 6.

280. *Id*.

281. *Id.* pmbl.

282. *Id*. at 6–7.

283. *Id*. at 7.

284. *Id*.

285. *Id*. at 8; The rights in question refer to the rights enumerated in the Banjul Charter, particularly the rights to freedom of assembly and of association. *See* Banjul Charter, *supra* note 29, arts. 21 & 22; *see also id.* arts. 10(1) & 11.

(i) a presumption in favor of the exercise of the rights to freedom of association and of assembly;
(ii) ensuring that all legal frameworks put in place relative to the rights to freedom of association and of assembly have as their primary purpose, the enhancement of the ability of individuals to exercise these rights;
(iii) the State must ensure that individuals can participate in the political, social, and cultural life of their communities;
(iv) all constitutional, legislative, administrative and other measures taken by the State must conform to and comply with the provisions of international and regional human rights instruments;
(v) all government agencies granted oversight authority must perform their duties impartially and fairly;
(vi) all procedures designed to govern associations and assemblies must be clear, simple and transparent;
(vii) decisions made by the State should be "clearly and transparently laid out, with any adverse decisions defended by written argumentation on the basis of law and challengeable in independent courts of law";
(viii) if the State imposes sanctions in the context of associations and assemblies, these must be strictly "proportionate to the gravity of the harm in question and applied only as a matter of last resort and to the least extent necessary";
(ix) the individual's right to a remedy should be protected in "cases of violation of the rights to association and assembly"; and
(x) if there is conflict between provisions of the Guidelines and other international and regional human rights standards arise, "the more protective provision takes place."[286]

The African Commission has indicated that the legal framework for the protection of the rights to freedom of assembly and of association in Africa consists of the Banjul Charter (Article 10), the African Child Charter (Article 8) and the African Charter on Democracy, Elections and Governance (Articles 12(3), 27(2) and 28).[287] The African Commission also states that "[n]ational constitutions shall guarantee the right to freedom of association, which shall be understood in a broad manner consistent with regional and international human rights law."[288] The African Commission instructs States Parties to draft legislation on freedom of association "with the aim of facilitating and encouraging the establishment of associations and promoting their ability to pursue

286. Guidelines, *supra* note 278, at 8.
287. *Id*. at 10, para. 4.
288. *Id*. at 10, para. 6.

their objectives."[289] Such legislation should be drafted through a "broad and inclusive process," which must include effective and "meaningful consultation with civil society."[290]

The African Commission notes that the right to freedom of association is a right both individuals and groups enjoy.[291] The decision to exercise this right, either as an individual or as part of a group, must be voluntary, and an individual must not be forced to join an association.[292] In addition, should an individual choose to voluntarily join an association, he or she should also be able to freely leave or separate himself or herself from the association.[293] In determining who should or should not join associations, organizers must not violate national laws and the State's obligations under international and regional human rights instruments against discriminatory practices.[294]

The Guidelines are divided into two parts—Part 1 is devoted to an overview of freedom of association and discusses various activities that are related to the exercise of this right, as well as the legal framework that defines and regulates it.[295] In Part 2, the African Commission provides an overview of the right to freedom of assembly.[296] It instructs States Parties to ensure that their national constitutions guarantee the right to freedom of assembly and that these constitutional provisions should be "understood in a broad manner consistent with regional and international human rights law."[297]

If States enact laws on freedom of assembly, the African Commission explains, the primary aim of those laws must be to facilitate the enjoyment of the right and that all legislation and regulations on assemblies must be "drafted and amended" through an inclusive and participatory process, involving adequate and meaningful dialogue with and consultation of civil society.[298] In Part 2, the African Commission also examines the notification regime and explains that "[p]articipating in and organizing assemblies is a right and not a privilege, and thus its exercise does not require the authorization of the state."[299] Thus, while a prior notification system may be imposed

289. *Id*. at 10, para. 7.
290. *Id*.
291. *Id*. at 10, para. 8.
292. *Id*.
293. *Id*.
294. *Id*.
295. *Id*. at 10–22.
296. The African Commission notes that the right to freedom of assembly is guaranteed under the Banjul Charter (Article 11), the African Child Charter (Article 8), the UDHR (Article 20(1)), the ICCPR (Article 21), and the Convention on the Rights of the Child (Article 15). *Id*. at 23, para. 64.
297. Guidelines, *supra* note 278, at 10, para. 6.
298. *Id*. at 10, para. 7.
299. *Id*. at 24, para. 71.

"to allow states to facilitate the exercise of this right and to take the necessary measures to protect public safety and rights of other citizens," the presumption must always be in favor of holding assemblies.[300] In addition, assemblies that are held without prior notification must not be considered illegal.[301]

The African Commission next examines the scope of the limitations that the State may impose on assemblies. In addition to speaking against blanket bans, the African Commission emphasizes the need for proportionality.[302] It states that limitations must be imposed only "in accordance with the principle of legality, have a legitimate public purpose, and be necessary and proportionate means of achieving that purpose within a democratic society, as these principles are understood in the light of regional and international human rights law."[303] With respect to the location of assemblies, the African Commission notes that State authorities must seek to "facilitate assemblies at the organizers' preferred location and at their preferred date and time" and that if restrictions must be imposed, authorities "shall facilitate the ability of an assembly to take place within sight and sound of its target audience."[304]

The African Commission explained that all States must ensure "the protection of all assemblies, public and private, from interference, harassment, intimidation and attacks by third parties and non-state actors."[305] With respect to sanctions, the African Commission states that sanctions:

> [S]hall be applied only in narrow and lawfully prescribed circumstances, on the basis of generally applicable civil and criminal law, shall be strictly proportionate to the gravity of the misconduct in question, and shall only be applied by an impartial, independent and regularly constituted court, following a full trial and appeal process.[306]

Courts at the regional and national levels in Africa have decided several cases on the rights to freedom of assembly and association. In the section that follows, this article will examine some of these cases to provide insight into the developing jurisprudence on the exercise of the rights to freedom of assembly and of association in African countries.

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300. *Id.*
301. *Id.* at 24, para. 71(b).
302. *Id.* at 27, para. 85.
303. *Id.* at 27, para. 85.
304. *Id.* at 28–29, para. 90(b).
305. *Id.* at 30, para. 94.
306. *Id.* at 31, para. 100.

VI. African Jurisprudence on the Exercise of the Rights to Freedom of Assembly and of Association

A. Introduction

During the last several years, courts at the continental and national levels in Africa have adjudicated many cases on the exercise of rights to freedom of assembly and of association. Many of these cases raise several issues, including the alleged violation of these rights by the police and security forces while they performed their duties to maintain law and order. In the sub-sections that follow, this article will examine some of these cases. Specifically, the article will examine cases from the ECOWAS Court of Justice, the Constitutional Court of South Africa ("ZACC"), and the Constitutional Court of Uganda ("UGCC").

The ECOWAS Court of Justice is officially known as the Court of Justice of the Economic Community of West African States ("ECOWAS"). It is an official organ of the ECOWAS, a regional integration community of 15 States in West Africa.[307] ECOWAS's main goal is "to promote economic cooperation among member states in order to raise living standards and promote economic development."[308] The ECOWAS Court of Justice was established under Article 15 of the Revised Treaty of ECOWAS, to serve as the sole judicial organ of the Community.[309] Its duty is to resolve "disputes related to the interpretation of the Community's Treaty, Protocols and Conventions."[310] According to Article 15(4), the judgments of the Court "shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies."[311]

The Court is empowered to consider cases brought to it by, inter alia, (i) individuals on application for relief for violation of human rights; and (ii) individuals and corporate bodies to determine whether their rights have been violated by an ECOWAS official.[312] The Court's decisions are not subject to appeal.[313]

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307. *Economic Community of West African States (ECOWAS)*, Off. of the U.S. Trade Representative, https://ustr.gov/countries-regions/africa/regional-economic-communities-rec/economic-community-west-african-states (last visited on Jan. 10, 2025).

308. *Id*.

309. ECOWAS Commission, *Revised Treaty*, Abuja, Nigeria, art. 15 (hereinafter "Revised Treaty").

310. *About Us*, ECOWAS Cmty. Court of Just., http://www.courtecowas.org/about-us-2/ (last visited on Jan. 10, 2025).

311. *Id*. art. 15(4).

312. *ECOWAS Community Court of Justice*, Open Soc'y Just. Initiative, https://www.justiceinitiative.org/publications/ecowas-community-court-justice#:~:text=The%20Court%20can%20consider%20cases,violated%20by%20an%20ECOWAS%20official (last visited on Jan. 10, 2025).

313. Revised Treaty, *supra* note 309, at 76(2).

The Constitutional Court of Uganda ("UGCC") is the country's Court of Appeal and the second highest court in Uganda.[314] The UGCC "came into being following the promulgation of the 1995 Constitution, and the enactment of the Judicature Statute, 1996."[315] The structure of the UGCC was established by Article 137 of the Constitution, with one of its functions being deciding questions as to the interpretation of the Constitution.[316]

The Constitutional Court of South Africa ("ZACC") is the country's highest court. It was established by South Africa's first democratic Constitution in 1994.[317] According to section 98(2) of the Constitution, "[t]he Constitutional Court shall have jurisdiction in the Republic [of South Africa] as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution."[318]

The first case examined in this article is *Registered Trustees of Faculty of Peace Organisations & Ors v. Federal Republic Nigeria*, which was decided by the regional human rights court, the ECOWAS Court of Justice.

B. Registered Trustees of Faculty of Peace Organisations & 3 Ors v. Federal Republic of Nigeria (ECOWAS Court of Justice)

In this case, *Registered Trustees of Faculty of Peace Organisations & 3 Ors v. Federal Republic of Nigeria (ECOWAS Court of Justice)*,[319] the applicants were the Registered Trustees of Faculty of Peace Organization, which is a non-governmental organization ("NGO") registered in Nigeria, and Nigerian human rights activists Comrade Kelly Omokaro, Maxist Kola Edokpayi, and Comrade Osemu Ogbidi.[320] The respondent in the case is the Federal Republic of Nigeria, which is a Member State of the Economic Community of West African States ("ECOWAS"), a signatory to the ECOWAS Treaty, a State Party to the Banjul Charter, and to other international human rights instruments.[321]

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314. *Court of Appeal*, REPUBLIC OF UGANDA, https://www.judiciary.go.ug/data/smenu/77//Court%20of%20Appeal.html (last visited on Jan. 10, 2025).

315. *Id*.

316. CONST. (1995) (rev. 2017) (Uganda) art. 137.

317. S. AFR. (INTERIM) CONST., 1993, § 98(1).

318. *Id*. § 98(2).

319. Registered Trs. of Fac. of Peace Org. v. Fed. Republic of Nigeria, No. ECW/CCJ/JUD/06/22, Judgment, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. J.], (Mar. 21, 2022), https://caselaw.ihrda.org/ar/entity/9x9k5frqkck?page=1&file=1655203933287w1oc6q7fdyr.pdf.

320. *Id.* para. 2.

321. *Id.* para. 3.

This case was brought before the ECOWAS Court of Justice by the applicants, alleging that the respondent "violated their rights to freedom of association and assembly when they were restricted from carrying out a protest against the high cost of living and the indefinite suspension of the activities of the National Council of Women's Societies in Edo State."[322] More specifically, the applicants alleged that the respondent violated their rights guaranteed under Articles 10 and 11 of the Banjul Charter and Article 21 of the ICCPR.[323] Before summarizing the facts of the case, the ECOWAS Court of Justice noted that the respondent did not file a response to the applicants' application, which was filed on June 18, 2021, and was subsequently served on the respondent that same day.[324]

With respect to the facts of the case, the Court noted that the first applicant was an NGO registered in Nigeria that advocates on behalf of women and girls, and that the second to fourth applicants were citizens of Nigeria who allege that they were "key promoters of a protest scheduled for 28 March 2021 to be held in Benin City, Edo State of Nigeria."[325] According to evidence the applicants adduced before the Court, the main purpose of the protest was "to draw Government's attention to the hike in fuel prices, sachet water and cement and its link with monopoly" and that the second to fourth applicants and other individuals traveled to different parts of the country to participate in protests about these issues.[326]

The applicants stated that on the day of the anticipated protest, they assembled at the grounds of the National Museum and that government security agents "stormed the premises and locked them in for hours."[327] In addition, the applicants noted, security forces prevented people who came to participate in the protest from entering the venue and hence, the event was not carried out as had been anticipated.[328] The applicants contended that (i) the respondent had failed to promptly and expeditiously communicate to them the decision prohibiting the assembly; (ii) locking them out of the venue and effectively preventing them from proceeding with the protest was an infringement on "their rights, their best interest and that of the public"; and (iii) that "the grounds for the interference [by State security agents] were not clear," were "overly

322. *Id.* para. 4.
323. *Id.*
324. *Id.* paras. 5-6.
325. *Id.* para. 8.
326. *Id.*
327. *Id.* para. 9.
328. *Id.*

broad and vague" and that the respondent was not "specific in regard to the nature [of the restrictions] and their [duration]."[329]

The applicants alleged further that the decision of the Edo State Government to ban the assembly of members of the National Council of Women Societies in May 2021 "through a public announcement" was not "in accordance with the principles of legality or legitimate public purpose and was unnecessary and disproportionate to achieving any meaningful purpose within a democratic society."[330] Finally, the applicants submitted that the respondent had violated their rights to freedom of association and assembly, which are provided in Articles 10 and 11 of the Banjul Charter; Article 21 of the ICCPR, section 40 of the Constitution of the Federal Republic of Nigeria, 1999; the African Commission's Guidelines on Freedom of Association and Assembly in Africa, 2017 and Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa, 2017.[331]

The applicants relied on several laws, including section 40 of the Constitution of the Federal Republic of Nigeria, 1999,[332] Articles 21 and 25 of the ICCPR,[333] Articles 10 and 11 of the Banjul Charter,[334] and many more.[335] The ECOWAS Court of Justice then listed the relief sought by the applicants and noted that the respondent had made no submissions even though it had been "served with the processes filed by the Applicants."[336] After dealing with procedural issues, such as the jurisdiction of the Court and the admissibility of the applicants' case, the Court then examined the merits of the Application.[337] However, in terms of admissibility, the Court held that the Application of the first applicant, Registered Trustees of Faculty of Peace Organisation ("Registered Trustees"), was not admissible.[338] The Court explained that Registered Trustees was not an individual but a legal person, and that since

329. *Id*. para. 10.

330. *Id*. para. 11.

331. *Id.* para. 12; *see also Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*, AFR. COMM'N ON HUM. AND PEOPLES' RTS. 8 (May 4, 2017), https://achpr.au.int/en/soft-law/guidelines-policing-assemblies-law-enforcement-officials-africa (affirming the right of everyone to freely assemble with others).

332. CONST. OF NIGERIA (1999), § 40 ("Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests. Provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which the Commission does not accord recognition.").

333. ICCPR, *supra* note 7, arts. 21, 25.

334. Banjul Charter, *supra* note 29, arts. 10, 11.

335. Registered Trs. of Fac. of Peace Org., No. ECW/CCJ/JUD/06/22, para. 15.

336. *Id*. paras. 15, 16.

337. *Id*. paras. 17–35.

338. *Id*. para. 32.

it did not fall within the established exceptions and was not bringing the case before the Court as a representative of a natural person, it was not a proper party to "file an action for the violation of their right to association and to assembly."[339]

The Court began analyzing the merits of the case by noting that, despite the fact that the respondent had been served with the applicants' Application and had been granted "ample time" to answer in accordance with Article 35 of the Rules of Court, the respondent had failed to file a defense.[340] After providing an overview of the facts the applicants adduced, the Court then addressed the issue of why it was the Federal Government of Nigeria and not the Government of Edo State that was the Respondent in the case before it.[341] The Court referenced "the principle of state responsibility under international law" and explained that under such a principle, "a State Party to an international human rights instrument is held responsible for the violation of the rights of its citizens by the conduct of any of its organ[s] empowered to exercise elements of governmental authority."[342] In other words, the acts of the Government of Edo State, which was acting as an organ of the Federal Government of Nigeria, even if the former "exceeded its competence according to internal [Nigerian] law or contravened instructions concerning its activity," must be considered acts of the Federal Government of Nigeria under international law.[343]

To support this interpretation, the Court cited *Tidjane Konte & Another v. Republic of Ghana*, a case in which the ECOWAS Community Court held that:

> [W]here the conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.[344]

The Court then referenced at least two of its other cases where it also held this principle.[345] After clarifying that the Edo State is a

339. *Id*.
340. *Id*. para. 35.
341. *Id*. para. 40.
342. *Id*. para. 41.
343. *Id*.
344. Tidjane Konte v. Republic of Ghana, No. ECW/CCJ/JUD/11/14, Judgment, ECOWAS Court of Justice [ECOWAS Ct. J.], para. 3 (May 13, 2014)), https, https://caselaw.ihrda.org/entity/h4gqm8hywjg?page=3&file=1584460196547lwplb18vhbh.pdf.
345. *See generally* Dasuki v. Fed. Republic of Nigeria, No. ECW/CCJ/JUD/23/16, Judgment, ECOWAS Court of Justice [ECOWAS Ct. J.], (Oct. 4, 2016), http://www.courtecowas.org/wp-content/uploads/2019/01/ECW_CCJ_JUD_23_16-1.pdf.

Federated State of the Federal Republic of Nigeria and that the actions of its government, which allegedly violated the rights of the current applicants,[346] will be attributed to the respondent in accordance with the principle of state responsibility under international law, the Court then proceeded to analyze the merits of the Application before it.[347]

The Court first examined the alleged violation of the rights to freedom of assembly and of association, which are guaranteed by Article 10 of the Banjul Charter.[348] The current applicants alleged that the respondent violated that right when the Edo State Government indefinitely suspended the activities of the National Council of Women's Societies ("NCWS").[349] The Court then explained that in order for the current applicants to have *locus standi* to bring the matter before it, they must "have sufficient interest in the subject matter" and that "only victims who have suffered personal damages due to the violation of their human rights can access the Court."[350] The Court then cited *Federation of African Journalists & 4 Others v. The Republic of The Gambia*, where it had held that "the strict application of *locus standi* denotes that a Plaintiff wishing to sue must have sufficient interest in the subject matter in order to have a standing to litigate same."[351]

In addition, the Court noted, "[i]n order to substantiate an action concerning the violation of human rights, it is necessary that the applicant be a victim and that the Respondent State be responsible for the alleged violations."[352] Hence, the Court concluded, "the essential criterion for human rights complaint is that the applicant is a victim of the human rights violation and that the applicant must prove his or her *locus standi* in the case."[353] The Court then held that it did not find any evidence that the current applicants were members of the NCWS that would have established "the existence of a relationship with the [NCWS]" and that, as a consequence, the current applicants had not established that "they

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Aircraftwoman Beauty Igbobie Uzezi v. Fed. Republic of Nigeria, No. ECW/CCJ/JUD/06/22, 2022, Judgment, ECOWAS Court of Justice [ECOWAS Ct. J.], para. 68, (Apr. 30, 2021), http://www.courtecowas.org/wp-content/uploads/2021/08/JUD-ECW-CCJ-JUD-11-21-Aircraftwoman-Beauty-Igbobie-Uzezi-vs.-FED.-REP.-of-NIGERIA-30_04_21.pdf.

346. *Registered Trs. of Fac. of Peace Org.*, No. ECW/CCJ/JUD/06/22, Judgment, ECOWAS Court of Justice [ECOWAS Ct. J.], para. 47 (finding that the first Applicant was dismissed as a party to the case, the Court chose to refer to the remaining Applicants as "Current Applicants").

347. *Id.* paras. 43-44.

348. Banjul Charter, *supra* note 29, art. 10.

349. *Registered Trs. of Fac. of Peace Org.*, No. ECW/CCJ/JUD/06/22, Judgment, ECOWAS Court of Justice [ECOWAS Ct. J.], para. 46.

350. *Id*. paras. 47, 48.

351. *Id*. para. 47.

352. *Id*. para. 49.

353. *Id*.; *see also* Tahirou Djibo v. Republic of Niger, ECW/CCJ/JUD/07/22, Judgment, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. Just.], at 25, (Mar. 22, 2022), https://caselaw.ihrda.org/entity/4uwytpqz7is?page=4&file=16552886253208tj2znqjq1u.pdf.

[were] victims of the conduct of the Respondent."[354] The Court also explained that the NCWS, who is the alleged victim, was not even a party to the application before the Court.[355] The Court concluded that the current applicants were "mere meddlesome interlopers."[356]

After holding that the current applicants had "not established any *locus standi* to bring an action for the violation of the right to association of the National Council of Women's Societies," the Court then proceeded to examine the alleged violation of the right to freely assemble.[357] The current applicants had argued before the Court that by preventing them from participating in a lawful protest against the hike in fuel prices, the respondent had violated their rights of peaceful assembly under the Banjul Charter, the ICCPR, and the Constitution of the Federal Republic of Nigeria.[358] The Court noted that, as with the right to freedom of association, the analysis of the alleged violation of the right to freedom of peaceful assembly would be examined only with respect to applicants 2, 3, and 4 ("Current Applicants") .[359]

The Court began the analysis of this issue by referencing Article 11 of the Banjul Charter, which guarantees the right to freedom of peaceful assembly.[360] This right is also guaranteed by the African Child Charter (Article 8), UDHR (Article 20(1)); the ICCPR (Article 21); and the International Convention on the Rights of the Child (Article 15).[361] After using the African Commission's Guidelines on Freedom of Association and Assembly in Africa to proffer a definition for "assembly,"[362] the Court then noted that the right to freedom of assembly is "a fundamental right in a democratic society" and that it "can only be restricted under certain circumstances."[363] More specifically, the Court explained that any restriction imposed on the exercise of the right to freedom of peaceful assembly "must be prescribed by law, necessary and proportionate for the purposes of protecting national security or public safety, preventing disorder or criminal activities, protecting the health or morals of the public, or protecting the rights and freedoms of other people."[364]

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354. *Id.* para. 50.
355. *Id.* para. 51.
356. *Id*. para. 51.
357. *Id*. paras. 52–53.
358. *Id*. paras. 53–54.
359. *Id*. para. 55.
360. *Id.* para. 56.
361. *Id.* para. 57.
362. *Id*. para. 58.
363. *Id*. para. 59.
364. *Id*.

In interpreting the right to freedom of assembly, there must be a presumption in favor of the exercise of this right by individuals within a given jurisdiction.[365] That is, "[s]tates must not only safeguard the right to assemble peacefully but [must] also refrain from applying unreasonable indirect restrictions upon the right."[366] That is, any legal measures the State takes relative to the right to freedom of assembly must have, as their primary objective, the enhancement of the exercise of this right and not its restriction.[367] This implies, inter alia, that there is a positive obligation on all States Parties to ensure that individuals can freely exercise the right to freedom of peaceful assembly.[368] The Court then cited the African Commission's Guidelines on Freedom of Association and Assembly where it is stated as follows:

> Participating in and organizing assemblies is a right and not a privilege, and thus its exercise does not require the authorization of the state. A system of prior notification may be put in place to allow states to facilitate the exercise of this right and to take the necessary measures to protect public safety and rights of other citizens.[369]

The failure of members of an assembly to provide prior notification, the Court explained, does not render the assembly illegal and that "isolated acts of violence" do not "render an assembly as being non-peaceful."[370] The Court concluded that the importance of these principles is that while citizens are granted significant levels of latitude in the enjoyment of the right to freedom of peaceful assembly, a much greater responsibility should be imposed on the State to ensure that all individuals within its jurisdiction can exercise this right with minimum levels of restraint.[371] After establishing that the facts the Current Applicants adduced had been proven, the Court then proceeded to examine the alleged violations to determine if they had equally been proven.[372]

The Court noted, however, that of the evidence adduced in court, none indicated the reason the security agents gave for interfering with the peaceful protest and subsequently, dispersing the participants.[373] However, the Current Applicants had contended that the Respondent had failed to promptly and expeditiously communicate its decision to

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365. *Id*. para. 60.
366. *Id*.
367. *Id*. para. 61.
368. *Id*.
369. Guidelines, *supra* note 278, para. 71.
370. *Registered Trs. of Fac. of Peace Org.*, No. ECW/CCJ/JUD/06/22, Judgment, ECOWAS Court of Justice [ECOWAS Ct. J.], para. 63.
371. *Id.*
372. *Id*. paras. 64-75.
373. *Id*. para. 78.

prohibit the assembly to them, that the grounds for interfering with the peaceful assembly were extremely "broad and vague" and "not specific in regards to the nature of the assembly nor the duration."[374] The Court explained, however, that the Current Applicants did not provide enough detail to help the Court "decide whether the reasons as alleged were indeed vague, broad, non-specific and not in accordance with the law thus amounting to the violation of the right to peaceful assembly."[375]

Because the Respondent did not offer a defense, the Court held that in the absence of such evidentiary proof, it had to give "credence to the facts submitted by the Applicants which is to the effect that the reason given by the Respondent to interfere with the gathering was unjustified as it was not in accordance with the law."[376] In addition, the Court noted that there was no evidence that the actions of the security agents to restrict the gathering was in furtherance of important public interests.[377] The Court held that public interests included protecting national security or public safety, preventing disorder or criminal activities, protecting the health or morals of the public, or protecting the rights and freedoms of other people.[378]

Actions taken by the security forces, the Court concluded, were clearly not intended to "facilitate or enable the exercise of the right of the Current Applicants to freely assembly as envisaged in the Guidelines."[379] Instead, the security agents acted to prevent the Current Applicants from exercising their fundamental right to protest and in doing so, the security forces violated that right.[380] The Court then concluded that the Respondent's interference was not in accordance with the law.[381] In addition, there was no evidence that the "interference and lock-in" were provoked by the Current Applicants, nor was there any evidence that the assembly "was violent or disruptive or had the potential to be" since, as the Current Applicants alleged, they only assembled to plan a protest.[382]

With respect to the proportionality of the measures taken by the Respondent, the Court cited the U.N. HRC General Comment No. 27 in which the HRC held that "[r]estrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those

374. *Id*.
375. *Id*. para. 79.
376. *Id*. para. 80.
377. *Id*.
378. *Id*. para. 81.
379. *Id*. para. 82.
380. *Id.*
381. *Id*.
382. *Id*. para. 83.

which might achieve the desired result; and they must be proportionate to the interest to be protected."[383] Since the Respondent did not defend its actions nor provide the Court with any justification for such actions, the Court held that "the restrictive measure applied by the Respondent was out of proportion and such action further violates the Applicants' right to peaceful assembly."[384] Finally, the Court held that "the Respondent by disrupting the gathering of the Current Applicants and locking them in for hours without justification violated the Current Applicants' right to assemble freely contrary to Article 11 of the [Banjul] Charter."[385]

Since the Respondent had ratified and domesticated the Banjul Charter, it was obliged to take measures to ensure the protection of the assembly of March 28, 2021, as guaranteed in Articles 10 and 11 of the Banjul Charter.[386] The Court then ordered the Respondent to refrain from preventing the Applicants from undertaking a lawful assembly and explained that any restrictions must be in accordance with the law.[387] The Court awarded the Current Applicants the sum of "$15,000 (fifteen thousand US Dollars) as moral damages suffered as a result of the violation of their right to freely assemble."[388] After citing authorities from the European Court of Human Rights, as well as some of its earlier cases, the Court denied the compensation claimed for exemplary damages by the Current Applicants.[389]

> The Court then summarized its decision on the merits as follows:
> The Court–
>
> iii. Declares that the Respondent violated the second, third and fourth Applicants' right to peaceful assembly contrary to Article 11 of the [Banjul] Charter;
> iv. Declares that the Respondent is not in violation of the Applicants' rights to association under Article 10 of the [Banjul] Charter;
> v. Declares that the Respondent [had] a duty to ensure the protection of the assembly of the 28 March 2021 as guaranteed by Article 11 of the [Banjul] Charter and other international human rights instruments;

383. General Comment No. 27, *supra* note 81, para. 14.

384. *Registered Trs. of Fac. of Peace Org.*, No. ECW/CCJ/JUD/06/22, Judgment, ECOWAS Court of Justice [ECOWAS Ct. J.], para. 65.

385. *Id*. para. 86.

386. *Id*. para. 93(ii).

387. *Id*. para. 97.

388. *Id*. para. 104.

389. *Id*. paras. 105–06; *see generally* Silver v. U.K. App. No. 7136/75, (Mar. 25, 1983) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57577%22]}; Chief Ebrimah Manneh v. Republic of the Gambia, No. ECW/CCJ/JUD/03/08, Judgment, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. Just.], (June 5, 2008), https://caselaw.ihrda.org/entity/hqdpfnt023yggnsfus74on7b9?page=1&file=1524743942446vogbqgycelri7hcopx7833di.pdf.

> vi. Orders the Respondent to refrain from interfering with the second, third and fourth Applicants' rights to freedom of assembly when conducted in line with the [Banjul] Charter.[390]

The case *Registered Trustees of Faculty of Peace Organisation & 3 Ors* raises several important issues that are worth noting. First is the clarification of the principle of state responsibility under international law. In this case, the Applicants were aggrieved by the conduct of the Edo State Government—that is, their rights were alleged to have been violated by the conduct of agents of the Edo State Government and not by that of the agents of the Federal Government of Nigeria.[391] Hence, persons who are not familiar with the principle of state responsibility under international law and the concept of the attribution of the conduct of the organs of the State to that State, may wonder why the Federal Government of Nigeria was the Respondent in this case instead of the Edo State Government. The Court clarified this confusion and held that under international law, Nigeria, which is a State Party to various international human rights instruments, including the Banjul Charter, was responsible for the violation of the rights of its citizens by the conduct of any of its organs, such as the Edo State Government, that is empowered to exercise state power.[392]

The Court held that "[s]uch organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity."[393] The Court also noted that it had earlier amplified this principle of state responsibility under international law in its decision in *Dasuki v. The Federal Republic of Nigeria*.[394] In *Dasuki*, the ECOWAS Court of Justice held that:

> A Member State as an abstract entity must necessarily act through its organs made up of human beings, its responsibility when questioned must a fortiori encompass the organs acting on its behalf. Thus, for the purpose of International law, though the State consists of different organs with different functions it is treated as a unit so that the

390. *Registered Trs. of Fac. of Peace Org.*, No. ECW/CCJ/JUD/06/22, Judgment, ECOWAS Court of Justice [ECOWAS Ct. J.], para. 34.

391. *Id.* paras. 41–43.

392. *Id.* paras. 40–43.

393. *Id.* para. 41; *see also Tidjane Konte*, No. ECW/CCJ/JUD/11/14, Judgment, ECOWAS Court of Justice [ECOWAS Ct. J.], para. 38.

394. Col. Mohammed Sambo Dasuki v. Fed. Republic of Nigeria, No. ECW/CCJ/RUL/04/16, Ruling, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. Just.], at 32 (Apr. 11, 2016), https://caselaw.ihrda.org/entity/eas1i5ao3c9?file=15838315040124gb1nts71ig.pdf&page=25.

> action of any of these organs is considered the action of that single legal entity.[395]

Although the ECOWAS Court of Justice did not reference the work of the International Law Commission ("ILC") on the responsibility of States for internationally wrongful acts, it is appropriate to note that the Court's jurisprudence reflects the ILC's general principles on responsibility of a State for its internationally wrongful acts. With respect to the conduct of organs of the State, the ILC states:

> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.[396]

Another issue in *Registered Trustees of Faculty of Peace Organisation & 3 Ors* dealt with was whether legal persons have the *locus standi* to sue for the violation of human rights under the Banjul Charter.[397] The first Applicant in this case is a *legal person* known as *Registered Trustees of Faculty of Peace Organisations*, an NGO registered in the Federal Republic of Nigeria.[398] The Court then cited its decision in *Osaghae and 3 Ors v. Republic of Nigeria*,[399] where it held that "[h]uman rights are human centered and the admissibility of an application is linked among other criteria to the status of the victim."[400] The Court then concluded that "as a general rule, a legal person cannot be accommodated within the term individual to bring an action for the violation of human rights under the [Banjul] Charter."[401] The Court had definitively determined whether a legal person could bring an action for the violation of human rights when it held:

> Human rights imply the rights that belong to all human beings irrespective of their nationality, race, caste, creed and gender amongst

395. *Registered Trs. of Fac. of Peace Org.*, No. ECW/CCJ/JUD/06/22, Judgment, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. Just.], para. 42.

396. *Id.*

397. *Id*. paras. 20–24.

398. *Id*. para. 20.

399. Nosa Ehanire Osaghae v. Republic of Nigeria, No. ECW/CCJ/JUD/03/17, Judgment, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. Just.], at 16 (Oct. 10, 2017), https://caselaw.ihrda.org/ar/entity/5rot9qij7oijzfuyfghr1i3sor?page=1.

400. *Id*.

401. *Registered Trs. of Fac. of Peace Org.*, No. ECW/CCJ/JUD/06/22, Judgment, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. Just.], para. 23.

> others; like right to life, right to health and right against torture, inhuman and degrading treatment which are specific to a human being. On the other hand[,] [the] right[s] of a corporate body, are rights that are fundamental and necessary for the existence of a corporate body which a legal entity can enjoy and be deprived of; for example right to freedom of speech as the corporation is entitled to speak about its product; right to property as the corporation generates profit in shares and, or cash and is entitled to the quiet enjoyment of same. The established exceptions under which corporate bodies can ground an action are; rights that are fundamental rights not [dependent] on human rights and they include right to fair hearing, right to property and right to freedom of expression.[402]

The Court then concluded that "an action for the violation of the right[s] to association and assembly not being within the contemplation of the established exceptions cannot be maintained by a legal person."[403] The Court then noted, however, that this principle has evolved and now "recognises the right of legal entities to bring action for the violation of *ANY* human rights when brought in a representative capacity on behalf of individual victim(s)."[404] The Court concluded that the first Applicant was not an individual (that is, it was not a *natural* person) but was a legal person, and "not falling within the established exceptions, nor suing in a representative capacity is not a proper party to file an action for the violation of their right[s] to association and to assembly."[405]

Section 3 of South Africa's Regulation of Gatherings Act 205 of 1993 mandates that anyone who intends to convene an assembly of more than fifteen people within a municipal area must notify the local authority.[406] The notice must be given in writing and must contain all the relevant information about the assembly.[407] The failure of a convener to provide the necessary notice as mandated by Section 3 of the RGA was considered a criminal offense in terms of Section 12(1)(a) of the RGA.[408] In *Mlungwana v. The State*, the High Court of South Africa, Western Cape Division, Cape Town (High Court), declared Section 12(1)(a) of the RGA to be unconstitutional.[409] The High Court held that criminalizing a convener's failure to provide prior notice in terms of Section 3 of a

402. Dexter Oil Ltd. v. Republic of Liberia, No. ECW/CCJ/JUD/03/19, Judgment, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. Just.], para. 72 (Feb. 6, 2019), https://caselaw.ihrda.org/entity/d5rhz7ifhj?page=1&file=1584100985881qhme3luo0n.pdf.

403. *Registered Trs. of Fac. of Peace Org.*, No. ECW/CCJ/JUD/06/22, Judgment, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. Just.], para. 28.

404. *Id.* para. 29.

405. *Id.* para. 32.

406. Regulation of Gatherings Act 205 of 1993, § 3 (S. Afr.).

407. *Id.* §§ 3(1)–(3).

408. *Id.* § 12(1)(a).

409. Phumeza Mlungwana v. The State and Another, 2019 (1) BCLR 88 (CC) para. 3 (S. Afr.).

planned assembly or protest infringed the right to freedom of assembly as provided in Section 17 of the Constitution of the Republic of South Africa, 1996.[410] The matter was then referred to the Constitutional Court to confirm the judgment of the Western Cape High Court.[411] In the sub-section that follows, this article will examine *Phumeza Mlungwana and Ors v. The State and Another*.

C. Phumeza Mlungwana and Ors v. The State and Ors (Constitutional Court of South Africa)

This case is "an appeal from and an application for the confirmation of the order of the High Court of South Africa, Western Cape Division, Cape Town" ("Cape Town High Court").[412] Writing for the Constitutional Court of South Africa ("ZACC"), Petse AJ began analyzing the case by stating the central issue in the application before the ZACC.[413] He posed the following question: "Is the criminalisation of a convener's failure, wittingly or unwittingly, either to give notice or give adequate notice to a local municipality when convening a gathering of more than 15 persons, which is what section 12(1)(a) of the Regulation of Gatherings Act (Act) does, constitutionally defensible?"[414] Petse AJ then declared that this is "the central issue in this application" and that "it rests on two further interrelated questions" and these were: (i) "does section 12(1)(a) limit the right entrenched in section 17 of the Constitution" and (ii) "if so, is that limitation reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom?"[415]

Acting Justice Petse then concluded that "for reasons that will be become apparent later, . . . section 12(1)(a) constitutes an unjustifiable limitation of the right in section 17" and that "[a]ccordingly, the declaration of constitutional invalidity made by the High Court falls to be confirmed."[416] Petse AJ then proceeded to review the background to the questions before the ZACC. He explained that the case concerned "an application for confirmation of a declaration of constitutional invalidity in terms of section 172(2)(d) of the Constitution read with rule 16(4) of the Rules of this Court, and section 15(1)(b) of the Superior

410. *Id.* paras. 3, 36.
411. *Id.*
412. *Id.* at 2.
413. *Id.* para. 1
414. *Id.*
415. *Id.*
416. *Id.* para. 2; *see also* S. AFR. CONST., 1996, ch. 2, § 17. ("Everyone has the right to freedom of association.").

Courts Act."[417] Petse AJ explained further that the Cape Town High Court had declared Section 12(1)(a) of the Regulations of Gatherings Act ("RGA") unconstitutional and invalid.[418] However, noted Petse AJ, the Minister of Police, who was the second respondent in the application, had opposed the confirmation and that both respondents—the State and the Minister of Police—had sought leave to appeal against the declaration of constitutional invalidity.[419]

Before the ZACC, the applicants had asserted that "the criminalisation of the failure to give notice or adequate notice is unconstitutional because section 12(1)(a) criminalises the convening of peaceful gatherings simply by reason of the fact that either no notice was given or inadequate notice was given."[420] The applicants argued further that this "constitutes an unjustifiable limitation of the right in section 17 of the Constitution."[421] The respondents, Petse AJ noted, contended that section 12(1)(a) of the RGA is constitutionally valid and that it does not limit any of the rights guaranteed in the Bill of Rights "because it amounts to mere regulation."[422] In the alternative, the respondents argued that if the "Court finds that there is a limitation, . . . the limitation is justifiable for a variety of reasons."[423]

Acting Justice Petse explained that the object of the RGA is "to regulate public gatherings and demonstrations" and that this "entails balancing the right to assemble freely and peacefully against the need to ensure that assemblies take proper cognizance of and do not unjustifiably infringe the rights of others."[424] Petse AJ then made reference to the RGA for definitions of "gathering," "demonstration," and "convener."[425] The learned justice then differentiated between a demonstration and a gathering—he explained that "a demonstration is an assembly that comprises 15 or fewer people, while a gathering is an assembly that comprises more than 15 people."[426] Section 3 of the RGA mandates that all conveners of gatherings give written notice of an intended gathering to local authorities.[427] For demonstrations, however, written notice is not required.[428] Petse AJ explained that the convener

417. *Phumeza Mlungwana*, 2019 (1) BCLR 88 (CC) para. 3.
418. *Id*.
419. *Id*.
420. *Id*. para. 4.
421. *Id*.
422. *Id*. para. 5.
423. *Id*.
424. *Id*. para. 7.
425. *Id*. para. 8.
426. *Id*. para. 9.
427. *Id*. para. 10; *see also* Regulation of Gatherings Act 205 of 1993, § 3 (S. Afr.).
428. Regulation of Gatherings Act 205 of 1993, § 7 (S. Afr.); *see also Phumeza Mlungwana* , 2019 (1) BCLR 88 (CC) para. 11.

of a gathering's duty is only to give written notice and does not include the obligation to "seek approval for the intended gathering."[429]

The RGA, Acting Justice Petse explained, provides for three types of conveners.[430] These are (i) individuals who, "of their own accord, convene a gathering"; (ii) individuals who are "appointed as conveners under 2(1) of the [RGA] by organisations intending to hold a gathering"; and (iii) "those who are deemed to be conveners under section 13(3) where their organisation has not appointed them as conveners under section 2(1)."[431] Petse AJ then explained the extent of the limitation imposed by section 12(1)(a).[432] He noted that if a gathering takes place without a formal notice, then, according to section 12(1)(a), such a gathering is a criminal offense.[433] While it is only the convener who is criminally liable for failing to give notice of a gathering pursuant to section 12(1)(a), he or she can invoke a defense that the gathering was spontaneous.[434]

After examining the relevant provisions in the RGA, Acting Justice Petse then provided an overview of the dispute between the parties. First, he explained that the definitions of a "gathering" and a "demonstration" were not an issue to be determined by the Court.[435] Second, the number of persons required to transform a demonstration into a gathering was also not in dispute.[436] Third, the importance of giving notice before one can convene a gathering is also not contested.[437] Fourth, also not being contested are the requirements that "must be complied with once written notice has been given to a responsible officer in a local municipality."[438] Petse AJ then concluded that the Court's judgment "has no bearing on the constitutionality or otherwise of these aspects of the [RGA]" but that "[w]hat lies at the heart of the dispute between the protagonists is the criminalisation of a failure by any person who convenes a gathering to give written notice or adequate notice as required in terms of section 3 of the [RGA]."[439]

With respect to the parties to the case before the ZACC, Petse AJ explained that the applicants were members of the Social Justice Coalition ("SJC"), which is a "membership-based organisation

429. *Phumeza Mlungwana,* 2019 (1) BCLR 88 (CC) para. 9.
430. *Id.* para. 11
431. *Id.*
432. *Id.* paras. 12–16.
433. *Id.* para. 16.
434. *Id.*
435. *Id.* para. 24.
436. *Id.*
437. *Id.*
438. *Id.*
439. *Id.*

operating within the City of Cape Town," including the environs of Khayelitsha, a township within the City of Cape Town Metropolitan Municipality.[440] The SJC was established as "a lobby group for provision of municipal services to areas where its members live, and in particular to promote the provision of clean and safe sanitation."[441] The respondents are the State of South Africa and the Minister of Police.[442] The State, Petse AJ explained, had prosecuted the applicants in the Magistrate's Court, charging them with "contravening section 12(1)(a) of the [RGA]."[443] In both the High Court and the ZACC, the State and Minister of Police had opposed the applicants' appeal and the relief that they sought, which was to have section 12(1)(a) declared constitutionally invalid.[444]

The High Court, Petse AJ recalled, admitted three entities as amici curiae—Equal Education, Right2Know Campaign, and the U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association ("Special Rapporteur").[445] All the three amici, Acting Justice Petse noted, supported the applicants' constitutional challenge.[446] The learned justice then provided an overview of the facts as presented in the *court a quo*.[447] The case originated from a protest that took place on September 11, 2013.[448] According to the facts, fifteen members of the SJC travelled from Khayelitsha to the Cape Town Civic Center with the intention of holding a gathering there.[449] Although the participants had limited themselves to fifteen persons in order to not render the gathering subject to the notification requirements of section 12(1)(a), they were aware that other members of the SJC might spontaneously join the gathering.[450]

Although other SJC members did join the gathering and hence, increased the number of participants to more than fifteen persons, the gathering was peaceful.[451] Petse AJ explained that "[m]embers of the public were not denied ingress or egress from the Civic Centre" and that the police who had come to the Civic Center had requested the protesters to disperse.[452] The protesters were subsequently arrested without resistance after they refused to heed the police's call to

440. *Id.* para. 25.
441. *Id.*
442. *Id.* para. 26.
443. *Id.*
444. *Id.*
445. *Id.* para. 27.
446. *Id.* para. 28.
447. *Id.* para. 29.
448. *Id.*
449. *Id.*
450. *Id.*
451. *Id.* paras. 29–30.
452. *Id.* para. 30.

disperse.[453] Twenty-one of the protesters were subsequently charged in Magistrate's Court with contravening section 12(1)(a) of the RGA and "alternatively attending a prohibited gathering in terms of the [RGA] in contravention of section 12(1)(e)."[454] At the end of the trial in the Magistrate's Court, "all of the accused persons were acquitted on the alternative count but ten of those who were found to have been conveners were convicted on the main count."[455]

After observing that the applicants had "caused no harm to anyone," that "[t]here were no threats made," and that "[t]here was no damage to any property," the trial Magistrate "cautioned and discharged" the applicants.[456] The trial Magistrate then granted the applicants leave to appeal to the High Court in order to enable them to pursue "their constitutional challenge to section 12(1)(a) as it was not competent for the Magistrates' Court to adjudicate on this challenge."[457]

The High Court held that "section 12(1)(a) constitutes a limitation of the section 17 constitutional right" and that this was due to the "'chilling' and deterring effect criminalisation had on the exercise of the right to assemble."[458] The High Court then held that "this limitation was unjustifiable under section 36 of the Constitution."[459] In its ruling, the High Court explained that the limitation was "unjustifiable" because of (i) "the importance of the right"; (ii) "the severity of the limitation occasioned by criminal sanction"; and (iii) "the existence of alternative means to incentivise the giving of notice."[460] These factors, the High Court concluded, "outweighed the legitimacy of section 12(1)(a)'s purpose, which is to ensure that the right in section 17 is exercised peacefully and with due regard to others."[461]

Petse AJ noted that at the ZACC, the applicants and the amici curiae had moved for "the confirmation of the declaration of constitutional invalidity made by the High Court."[462] However, the respondents had opposed the motion and, in addition, sought leave to appeal against the High Court's declaration of constitutional invalidity.[463] Acting Justice Petse then turned to an examination of whether the High Court's

453. *Id.*
454. *Id.* para. 31.
455. *Id.*
456. *Id.* paras. 32–33 (alteration in original).
457. *Id.* para. 33.
458. *Id.* para. 36.
459. *Id.*; *see also* S. AFR. CONST., 1996, ch. 2, § 36 (Section 36 deals with the limitation of rights in the Bill of Rights).
460. *Phumeza Mlungwana*, 2019 (1) BCLR 88 (CC), para. 36.
461. *Id.*
462. *Id.* para. 40.
463. *Id.*

declaration of invalidity should be confirmed by the Constitutional Court.[464] Petse AJ explained that the decision on the High Court's declaration would depend on "whether the right in section 17 of the Constitution is limited, and if so, whether that limitation is justified."[465]

Petse AJ began the analysis of the case by explaining that the right to "assemble peacefully and unarmed" guaranteed in Section 17 of the Constitution must be "interpreted generously."[466] However, the honorable justice noted, the meaning of the right is "clear and unambiguous."[467] First, according to Section 17, "[e]veryone has the right to assemble, demonstrate, picket, and present petitions," with the only internal qualification being that such a person must be unarmed and act peacefully.[468] With respect to the word "everyone," Petse AJ explains that it should be interpreted to include "every person or group of persons—young or old, poor or rich, educated or illiterate, powerful or voiceless."[469] Hence, concluded Petse AJ, any limitation that would interfere with or prevent "unarmed persons from assembling peacefully would thus limit the right in section 17."[470]

In their presentations to the ZACC, the applicants and the amici curiae had contended that section 12(1)(a) limits the right guaranteed in Section 17 of the Constitution because it "deters—on pain of a criminal sanction—the exercise of the section 17 right."[471] The respondents had argued, on the other hand, that section 12(1)(a) is a mere regulation of the right in section 17.[472] Petse AJ concluded, however, that the respondents' argument could not be sustained and that section 12(1)(a) is much more than a regulation.[473] After citing the ZACC's decision in *Garvas*,[474] Petse AJ concluded that "[d]eterrence, by its very nature, inhibits the exercise of the right in section 17."[475] In the matter before the ZACC, then, "the criminal sanction in section 12(1)(a) deters the exercise of the right in section 17."[476]

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464. *Id*. para. 41.
465. *Id*.
466. *Id*. para. 43; *see also* S. Afr. Const., 1996, ch. 2, § 17.
467. *Phumeza Mlungwana*, 2019 (1) BCLR 88 (CC), para. 43.
468. *Id.*; *see also* S. Afr. Const., 1996, ch. 2, § 17.
469. *Phumeza Mlungwana*, 2019 (1) BCLR 88 (CC), para. 43.
470. *Id*.
471. *Id*. para. 44.
472. *Id*. para. 45.
473. *Id*. para. 46.
474. *Id.*; *see also* SATAWU v. Garvas, 2012 (8) BCLR 840 (CC) para. 55 (S. Afr.) (In *Garvas*, the ZACC had found that deterring the exercise of the right guaranteed in Section 17 of the Constitution limits that right).
475. *Phumeza Mlungwana*, 2019 (1) BCLR 88 (CC), para. 46.
476. *Id*. para. 47.

More specifically, Petse AJ explained, under section 12(1)(a), "an assembly of 16 like-minded people cannot just be convened in a public space."[477] Section 12(1)(a) obliges the convener of such an assembly to give prior notice in order to avoid criminal liability and this represents a limitation of these individuals to "assemble freely, peacefully, and unarmed."[478] This limitation, the learned justice explained, applies not just to conveners, it also covers anyone who wants to participate in an assembly, and that this conclusion "accords with the findings of several international legal bodies to the effect that criminalising the failure to give notice of an intended assembly limits the right to freedom of assembly."[479]

After examining various international authorities, Petse AJ then returned to "the meaning of the 'degree of tolerance' required by the State when dealing with unlawful, yet peaceful protests."[480] Acting Justice Petse explained that the limitation of a right in the Bill of Rights requires that the limiting authority provide a justification under Section 36.[481] With respect to the justification analysis, Petse AJ explained that it "requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment."[482] However, Petse AJ noted, the "weighing-up must give way to a 'global judgment on [the] proportionality' of the limitation" and it is well-established that the onus is on the respondents "to demonstrate that the limitation is justified."[483]

Section 36 of the Constitution of South Africa provides five factors that should be used in the proportionality assessment, and these include:

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature of and extent of the limitation;

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477. *Id*.

478. *Id*.

479. *Id*. paras. 47–48. Petse AJ cited the U.N. Human Rights Committee's decision in *Kivenmaa v. Finland*, Communication No. 412/1990, U.N. Doc. CCPR/C/50/D/412 (1994), para. 9.2. The Human Rights Committee had been considering a case from Finland in which the government had arrested the complainant for convening a public gathering without notice to protest against a visiting Head of State. The learned justice also noted that South Africa's Constitution requires that international law, including non-binding international law, be considered when interpreting the Bill of Rights. *See Phumeza Mlungwana*, 2019 (1) BCLR 88 (CC), paras. 49–50 n.71. Petse AJ also cited Grand Chamber of the European Court of Human Rights decision in *Novikova v. Russia*, App. Nos. 25501/07, 80153/12, 5790/13 and 35015/13, § 106, ECHR (Dec. 9, 2016), *in Phumeza Mlungwana*, 2019 (1) BCLR 88 (CC), para. 52, n.80.

480. *Phumeza Mlungwana*, 2019 (1) BCLR 88 (CC), para. 54.

481. *Id*. para. 57. Section 36 deals with the limitation of the rights guaranteed in the Bill of Rights. *See* S. AFR. CONST.,
1996, ch. 2, § 36.

482. *Phumeza Mlungwana*, 2019 (1) BCLR 88 (CC), para. 57.

483. *Id*.

(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.[484]

After explaining that the word "including" in Section 36 implies that the list is not exhaustive, Petse AJ then proceeded to examine all five factors.[485] He noted that before the country's modern democratic constitution came into effect, the domestic legal system was rife with "draconian legislation" that was designed "to preserve the apartheid political order" and punished "people for assembling when it did not suit the State."[486] Petse AJ cited apartheid-era statutes that were used to "suppress anti-apartheid assemblies" and these include the Riotous Assemblies Act, the Suppression of Communism Act, and the Internal Security Act.[487] Petse AJ also noted that South Africa's history of suppressing assemblies "stretches even further back" as evidenced by the Riotous Assemblies and Criminal Law Amendment Act (1930), which was used to regulate relations between "Europeans and Natives."[488]

The Regulation of Gatherings Act 205 of 1993,[489] which was an outgrowth of the work of the Goldstone Commission, noted Petse AJ noted, "was an attempt to relax the constrictive regulation of assembly by the apartheid government."[490] In modern "progressive constitutional democracies," including South Africa's, the right to freedom of assembly "is central to . . . constitutional democracy."[491] The freedom of assembly is extremely important, especially to people who do not have political and economic power. It is a tool that they can use to transmit their legitimate grievances to the appropriate authorities. Petse AJ then concluded that taking away that tool from some South Africans "would undermine the promise in the Constitution's preamble that South Africa belongs to all who live in it, and not only a powerful elite" and that such action would seriously undermine "a stanchion of our democracy: public participation."[492]

Petse AJ then cited several South African cases in which the courts have ruled that the right to freedom of assembly "enables people to exercise or realise other rights."[493] The learned-justice then concluded that based on its examination of international law, "South Africa is not alone

484. *Id*. para. 58.
485. *Id*. para. 59.
486. *Id*. para. 65.
487. *Id*.
488. *Id.* paras. 65–67.
489. Regulation of Gatherings Act 205 of 1993 (S. Afr.).
490. *Phumeza Mlungwana*, 2019 (1) BCLR 88 (CC), para. 68.
491. *Id*. para. 69.
492. *Id*.
493. *Id*. para. 70, nn.103–108.

in entrenching and placing a high premium on the right to freedom of assembly" and that "the right is widely regarded as a cornerstone to any democratic society."[494]

With respect to the nature and extent of the limitation on the right to freedom of peaceful assembly, Petse AJ explained that "the more severe a limitation is, the more powerful the justification for that limitation needs to be."[495] Petse AJ also explained that the limitation's severity is determined by taking into consideration "the impact the limitation has on the right in question, the social position of those affected by the limitation, and whether the limitation is mitigated at all."[496]

With respect to the limitation in the case at bar, Petse AJ stated that it is severe for four reasons. First, the definitions of "gatherings" and "conveners" are relatively broad and these "broad definitions" significantly expand "the scope of criminal liability for contravening section 12(1)(a)."[497] Several international legal bodies, notes Petse AJ, "have condemned the categorical criminalisation of the failure to comply with notice requirements" and "the apparent standard required under international law is that every infringement of the right to freedom of assembly must be linked *on the facts* to a legitimate purpose."[498] Thus, Petse AJ concluded, "restrictions that are blanket in nature—that criminalise gatherings 'as an end in itself'—invariably fall foul of being legitimate"[499] as they "encroach on the right [to freedom of peaceful assembly] without linking the restriction to a legitimate purpose in every instance of encroachment."[500] This can be avoided by making certain that restrictions or limitations are "context and fact-sensitive."[501]

Second, when a convener is not "appointed" under Section 2 of the Regulation of Gatherings Act ("RAGA"), any person who "'has taken any part in planning or organising or making preparations for that gathering,' however marginal their participation might be, could be criminally liable."[502] This also applies to any individual who, acting by themselves "or through any other person, either verbally or in writing, invited the public or any section of the public to attend that gathering."[503]

494. *Id.* para. 73.
495. *Id.* para. 82.
496. *Id.* para. 82.
497. *Id.* para. 83.
498. *Id.* para. 85.
499. *Id.*
500. *Id.*
501. *Id.*
502. *Id.* para. 86.
503. *Id.*

Third, the limitation under Section 12(1)(a) imposes "a widespread chilling effect that extends beyond those who convene assemblies without notice."[504] Finally, the restriction does not distinguish between "adult and minor conveners," which means that children, who may not be aware of the notice requirements or have the capacity to meet the demands of notice, "are indiscriminately held criminally liable if they fail to give notice before convening a gathering."[505]

With respect to the relation between the limitation and the purpose, the key is to ensure that the "limiting means employed are rationally related to, or reasonably capable of achieving the purpose of the limitation."[506] Petse AJ concluded that "the limitation in question (the criminalization of a failure to give notice) is neither sufficient nor necessary for achieving the ultimate purpose of that limitation (peaceful protests through police presence)."[507] The learned justice then examined less restrictive means to limit a right and explained that "[a] limiting means is unlikely to be proportional if less restrictive means could be used to achieve the same purpose."[508] Petse AJ then held that section 12(1)(a) is not "appropriately tailored"[509]

In addition, Petse AJ declared that "the nature of the limitation is too severe and the nexus between the means adopted in section 12(1)(a) and any conceivable legitimate purpose is too tenuous to render section 12(1)(a) constitutional."[510] Petse AJ then held that "[t]he declaration by the High Court that section 12(1)(a) of the Regulations of Gatherings Act 205 of 1993 is constitutionally invalid is confirmed to the extent that it makes the failure to give notice or the giving of inadequate notice by any person who convened a gathering a criminal offence."[511] The declaration of constitutional invalidity, however, was not to apply with retroactive effect and hence, was not to affect "finalised criminal trials or those trials in relation to which review or appeal proceedings [had] been concluded."[512] Finally, the ZACC upheld the appeals of the Applicants in the Cape Town Magistrate's Court for contravening section 12(1)(a) of the RAGA and set aside the resultant convictions and sentences.[513]

504. *Id.* para. 88.
505. *Id.* para. 89.
506. *Id.* para. 92.
507. *Id.* para. 93.
508. *Id.* para. 95.
509. *Id.* para. 101.
510. *Id.*
511. *Id.* para. 112.
512. *Id.* para. 112.
513. *Id.* para. 112.

Mlungwana is a landmark case concerning the right to freedom of peaceful assembly in South Africa. The right to freedom of peaceful assembly is a human right that has been recognized by the international human rights community. For example, the U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association has declared that "[a]ll human rights are interdependent and indivisible, and the rights to peaceful assembly and of association are no exception."[514] The Special Rapporteur explained further that these rights are "instrumental to achieve the full enjoyment of other human rights, as they enable the exercise of a number of civil, political, economic, social and cultural rights."[515] The *Mlungwana* decision secured this fundamental freedom for South Africans and in doing so, it added to the growing jurisprudence in Africa on the right to freedom of peaceful assembly. Securing this right in each African country will significantly enhance the ability of citizens to participate in their governance institutions and, most importantly, fully and effectively enjoy other human rights.

In 2013, the Parliament of Uganda enacted the Public Order Management Act (Act 9 of 2013) ("POMA"), which was subsequently assented to on October 2, 2013.[516] POMA was enacted by the Parliament of Uganda after the Constitutional Court had ruled that a similar provision was unconstitutional and struck that provision down.[517] POMA imposes significant "restrictions on the individual's ability to exercise the right to hold public meetings, assemblies and processions."[518] The statute also grants the Inspector General of Police ("IGP") or any individual designated by the IGP, "absolute discretion and broad authority to stop, control and use force to disperse public meetings."[519] On December 10, 2013, three NGOs and two individuals—Member of Parliament Hon. Muwanga Kivumbi and prominent church leader, Bishop Dr. Zac Niringiye—filed a petition challenging the constitutionality of various sections of POMA.[520] In the sub-section that follows, this article will examine that Ugandan case—*Human Rights Network Uganda & 4 Ors v. Attorney General*.

514. U.N. Gen. Assembly, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, U.N. Doc. A/74/349 (Sept. 11, 2019), para. 18.

515. *Id.*

516. Public Order Management Act, 2013 (Uganda) [hereinafter POMA].

517. Muwanga Kivumbi v. Att'y Gen. (Constitutional Petition 6 of 2011) [2017] UGSC 4 (Feb. 14, 2017) (striking down Section 32(2) of the Police Act (Cap. 303)).

518. Hum. Rts. Network v. Att'y Gen. (Constitutional Petition No. 56 of 2013) [2020] UGCC 6 (Mar. 26, 2020), at 2.

519. *Id.*; *see also* POMA, *supra* note 517, § 8.

520. *Hum. Rts. Network* [2020] UGCC 6.

D. Human Rights Network Uganda & 4 Ors v. Attorney General (Constitutional Court of Uganda)

The Application before the Constitutional Court of Uganda at Kampala ("UGCC"),[521] Constitutional Application No. 56 (2013), was filed by three NGOs and two prominent Ugandans on December 10, 2013, challenging the constitutionality of various provisions of POMA.[522] Later, on June 27, 2016, they filed an amended petition.[523] The Attorney General, who was the respondent in this case, filed an answer in which he "denied all allegations in the [Applicants'] petition and contended that the . . . POMA does not violate any provision of the Constitution or fundamental rights."[524]

At the hearing of the petition on June 13, 2019, the counsel for the petitioners informed the Court that "he had filed written submissions and was abandoning all other issues raised in the petition except the two issues canvased in the written submissions."[525] Writing for the majority judgment of the five-judge UGCC, Barishaki JA/JCC explained that even though he had found the decision by the Counsel for the Petitioners "rather strange and unwise," he believed that the petitioners were free to "prosecute their petition as they deem fit."[526] Once the Petitioners had abandoned the rest of the allegations in the petition, what was really left for the UGCC to determine was the constitutionality of Section 8 of the Public Order Management Act of 2013.[527] Barishaki JA/JCC stated the two issues to be determined by the UGCC as (i) whether the enactment and subsequent assent to section 8 of POMA is inconsistent and in contravention of Article 92 of the Constitution of Uganda, 1995; and (ii) remedies available.[528] Barishaki JA/JCC began the analysis of the petition by highlighting what he referred to as the

521. The Court of Appeal of Uganda, which is also constituted as the Constitutional Court of Uganda, is the country's second highest judicial institution or organ. Its powers are derived from Article 134 of the Constitution of Uganda, 1995. It serves as an appellate court when it hears cases on appeal from the High Court of Uganda. It has original jurisdiction when it adjudicates the constitutionality of matters placed before it. All judgments rendered by the Court of Appeal are theoretically appealable to the Supreme Court of Uganda. *See* UGANDA CONST. 1995, art. 134.

522. *Hum. Rts. Network* [2020] UGCC 6, at 1–2. The three NGOs were Human Rights Network Uganda, The Development Network of Indigenous Voluntary Associations (DENIVA), and The Uganda Association of Female Lawyers (FIDA)).

523. *Id.* at 2.

524. *Id.*

525. *Id.* at 3.

526. *Hum. Rts. Network* [2020] UGCC 6, at 3.

527. *Id.*

528. *Id.* at 4; *see also* POMA, *supra* note 517. Section 8 of the POMA deals with powers of officers authorized by the Inspector General of Police to regulate public meetings or assemblies.

"most relevant" principles that guide constitutional interpretation in Uganda.[529]

Barishaki JA/JCC then explained that within Uganda, determining the constitutionality of legislation requires that the "purpose and effect" of that legislation be taken into consideration.[530] The purpose and effect of legislation "are relevant in determining the constitutionality of either the effect animated by the object the legislation intends to achieve."[531] Finally, also relevant to the constitutional analysis are the history of Uganda and particularly, legislative history of the Constitution.[532] Then, Barishaki JA/JCC cited *Trop v. Dulles*, a case of the U.S. Supreme Court in which Chief Justice Earl Warren held as follows in relation to constitutional interpretation:

> We are oath bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right . . . the safeguards of the Constitution should be examined with special diligence . . .
>
> If we do not, the words of the Constitution become little more than good advice.
>
> When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication.[533]

Justice Barishaki explained that he decided to reproduce the rather relatively long quote from *Trop* because "it applies to the unique circumstances of [the] petition [before the UGCC]."[534] He explained further that the issue raised before the court is fundamental because "it touches upon the constitutionally guaranteed right to demonstrate peacefully and unarmed and the extent to which this right can be limited or subject to regulation by law enforcement agencies[,] especially

529. *Hum. Rts. Network* [2020] UGCC 6, at 4.
530. *Id*.
531. *Id*.
532. *Id*.
533. Trop v. Dulles, 356 U.S. 86, 103-04 (1958).
534. *Hum. Rts. Network* [2020] UGCC 6, at 5.

the Uganda Police Force."[535] Barishaki JA/JCC noted that the petition before the court concerned the dispute over the validity of Section 8 of POMA on "the very narrow ground that it is a violation of Article 92 of the Constitution."[536] He noted further that Article 92 prohibits Parliament enacting any legislation "whose effect is to overturn a judgment of court as between two parties."[537]

The petitioners contended that the "impugned Section 8 of the [POMA] was passed to overturn the import of the decision of [the UGCC] in *Constitutional Petition No. 09 of 2005 Muwanga Kivumbi vs Attorney General*."[538] In addition, noted Barishaki JA/JCC, the issue before the Court also implicates "the extent to which the parliament and the executive can pass legislation in response to decisions of this Court."[539] According to the court, this issue is equally fundamental because it touches "on the doctrine of separation of powers."[540] The counsel for the petitioners submitted to the court that Article 92 of the Constitution "restricts parliament from enacting retrospective legislation and that the enactment of section 8 of the [POMA], which is in pari materia with section 32(2) of the Police Act Cap 303 that was ruled unconstitutional in *Muwanga Kivumbi versus Attorney General* has the effect of altering the said decision of the Constitutional Court contrary to Article 92 of the Constitution."[541]

The petitioners contended before the court that although Section 32(2) of the Police Act was successfully challenged as being unconstitutional by the fourth petitioner (i.e., Hon. Muwanga Kivumbi) in *Kivumbi*, the same provisions of this section of the Police Act were "re-enacted in section 8 of POMA" and grant the Inspector General of Government the "powers and discretion to prohibit gatherings, peaceful assemblies and to delegate his/her powers to an authorized officer."[542] The counsel for the petitioners had submitted to the court that Section 8 of POMA "is fundamentally similar both in form & effect to section 32(2) of the Police Act that was declared unconstitutional by [the UGCC] for being prohibitive rather than regulatory."[543] Counsel argued further "that if parliament is "allowed to pass a law to reverse a judicial decision whenever they are not happy with the decision of the

535. *Id*.
536. *Id*. at 6.
537. *Id*. at 6.
538. *Id*.
539. *Id*.
540. *Id*.
541. *Id*.
542. *Id*. at 6–7.
543. *Id*. at 8.

court, then this may bring the validity of the doctrine of separation of powers into disrepute and affect respect for the rule of law."[544]

In support of his arguments, counsel for the petitioners cited several cases from both the Supreme Court and the Court of Appeal of Uganda.[545] In his response, counsel for the respondent, Mr. George Kalemera, submitted that the purpose of POMA was "to provide regulation of public meetings; to provide for the duties and responsibilities of police, organizers and participants in relation to public meetings; to prescribe measures for safeguarding public order; and for related matters."[546] He further averred that "as people express their right to free speech, expression, assembly and demonstration, there is need by the law enforcers to ensure compliance with the Constitution."[547]

Finally, the counsel for the respondent submitted that one must not assume that all persons who set out to exercise their rights to freedom of assembly and of association would necessarily do so peacefully and in accordance with the law and that the provisions of POMA were designed to enhance the ability of the police to ensure that persons participating in public meetings do not act violently or outside the law.[548] Citing *Secretary of State for Social Security v. Tunnicliffe*,[549] the counsel for the respondent noted that "in order to illustrate that a law operates retrospectively, it must be expressly provided for in the impugned Act."[550] Counsel for the petitioners then submitted a rejoinder in which he argued that Section 8 of POMA is "fundamentally similar both in form & effect to section 32(2) of the Police Act that was declared unconstitutional by [the UGCC] for being prohibitive rather than regulatory."[551] Finally, counsel for the petitioners prayed the UGCC to find that the "entire Section 8 of POMA is inconsistent with and in contravention of Article 92 of the Constitution and accordingly declare the same null and void."[552]

Writing for the UGCC, Barishaki JA/JCC explained that he had carefully considered the submissions of both parties on the validity of Section 8 of POMA in light of Article 92 of the Constitution of Uganda and noted that "[t]he question of whether the impugned Section [8]

544. *Id*. at 7.
545. *Id*.
546. *Id*. at 7–8.
547. *Id*. at 8.
548. *Id*.
549. *See* Sec'y of State for Soc. Sec. v. Tunnicliffe [1990] AC 155 (PC) (appeal taken from Gr. Brit.). *Secretary of State for Social Security v. Tunnicliffe* is a case of the Court of Appeal of England and Wales.
550. *Hum. Rts. Network* [2020] UGCC 6, at 8.
551. *Id*.
552. *Id*. at 9.

violates the provisions of Article 92 in view of [the UGCC's] decision in *Muwanga Kivumbi vs Attorney General* . . . is not a difficult one."[553]

Article 92 of the Constitution of Uganda states as follows: "Parliament shall not pass any law to alter the decision or judgment of any court as between the parties to the decision or judgment."[554] Barishaki AJ/JCC then referenced Section 32(2) of the Police Act, which had been found unconstitutional and inconsistent with the Constitution and, hence, nullified, and made clear that this section had, indeed, been nullified by the UGCC.[555] He recalled that the petitioners had complained before the UGCC that Parliament had enacted Section 8 of POMA deliberately in order to "overturn the import of the [UGCC's] decision as between the 4th Petitioner and the Respondent" and that if this is true, it is "indeed a very grave contention," which requires a serious and "careful review of this court's decision in the Muwanga case."[556]

In order to place the petition before the UGCC in "its proper context," Barishaki JA/JCC decided to review the decisions of the individual judges who had participated in the adjudication of the petition in *Muwanga Kivumbi v. Attorney General*, the 2005 case in which the UGCC had unanimously struck down Section 32(2) of the Police Act for being unconstitutional.[557] He quoted generously from that decision and noted that Byamugisha JA, writing the lead judgment in *Kivumbi*, stated that "[t]hese rights are inherent and not granted by the State" and that "[i]t is the duty of all Government agencies who include the police to respect, promote and uphold these rights."[558] In addition, Byamugisha JA also declared that "[t]hese rights and many others taken together protect the rights of individuals not only to individually form and express opinions of whatever nature, but to establish associations of groups and like-minded people to foster and disseminate such opinions even when those opinions are controversial."[559] The important lesson from reviewing the decisions in *Kivumbi* is that the powers that Section 32(2) of the Police Act granted to the Inspector General of Police "were in clear contravention of the Constitution," and that in "a free and democratic society, the police is supposed to keep law and order," and that "in case the inspector general of police sees any possibility of a breach of peace at any assembly, the police should provide protection."[560]

553. *Id*.
554. Uganda Const. art. 92.
555. *Hum. Rts. Network* [2020] UGCC 6, at 10.
556. *Id*.
557. *Id*. at 11.
558. *Id.* (quoting *Muwanga Kivumbi v. Att'y Gen.*, (Constitutional Petition No. 9 of 2005) [2008] UGCC 34 (May 27, 2008)).
559. *Id*.
560. *Id*. at 14-15.

After citing Section 8 of POMA, Barishaki JA/JCC recalled that Article 92 of the Constitution of Uganda prohibits Parliament from enacting "any law to alter the decision or judgment of any court as between the parties to the judgment."[561] The learned justice noted that Article 92, includes the expression "parliament shall not," which "connote[s] or show[s] that the provision is couched in a mandatory manner."[562] Noting that the words in Article 92 were "plain and clear," Barishaki JA/JKCC accorded them the "same plain, ordinary or natural meaning."[563] After re-examining Section 8 of POMA, Barishaki JA/JCC concluded that the section is "prohibitory in nature" and that it grants the Police, through the Inspector General of Police, "new powers to stop, prevent and disperse public meetings as was provided in the Police Act in section 32(2)."[564] He then concluded that Section 8 of POMA "are in pari materia with the nullified Section 32(2) of the Police Act."[565]

Barishaki JA/JCC then returned to *Kivumbi* and noted that the judges in that case had gone to great lengths to explain why the police cannot be allowed or "permitted to have powers to stop the holding of a public gathering including a protest or demonstration ostensibly on grounds that such public meeting would cause a breach of the peace."[566] Barishaki JA/JCC remarked that "[i]t is a pity that their explanations for nullifying Section 32(2) of the Police Act were contemptuously ignored by parliament and the executive."[567] In *Kivumbi*, noted Barishaki JA/JCC, the judges had emphasized unanimously that "in the event the police anticipate a breach of the peace at a public gathering, their duty is to provide reinforced deployments and not to prohibit the planned gathering altogether."[568] Barishaki JA/JCC then explained that he did not believe the duty of the police to provide re-enforcements to "supervise the public meetings if the police have reasonable belief that a breach of peace might occur is an onerous one."[569]

A core duty of the police, Barishaki JA/JCC explained, is to supervise public order and that such a duty cannot be performed effectively simply by prohibiting "sections of the public from exercising their constitutionally guaranteed rights to demonstrate peacefully or hold public meetings of any nature."[570] Barishaki JA/JCC noted that this was the

561. *Id.*
562. *Id*.
563. *Id*. at 16.
564. *Id*. at 16-17.
565. *Id.* at 17.
566. *Id*.
567. *Id*.
568. *Id*.
569. *Id*.
570. *Id*.

"*ratio decidendi*" of the decision of the UGCC in *Kivumbi*.[571] However, this holding was "clearly limited and out rightly disregarded by the impugned Section 8 of POMA."[572] Thus, concluded Barishaki JA/JCC, Parliament enacted Section 8 of POMA "in blatant disregard . . . of Article 92 of the Constitution."[573]

Concluding that the impugned provision was designed to "water down the import of the [UGCC's] decision in [*Kivumbi*]," Barishaki JA/JCC held that based "[o]n this ground alone," he would "answer the framed issue in the affirmative and allow the present petition."[574] Section 8 of POMA, the learned justice concluded, is certainly and "clearly a 'reincarnation' of the nullified Section 32(2) of the Police Act for all intents and purposes."[575] When Parliament subverts "the import of a court's decision/judgment," as it did in enacting Section 8 of POMA, Barishaki JA/JCC explained, that "interferes with the doctrine of separation of powers contained in the Constitution."[576] Enacting legislation that "alters or undermines a judicial decision," Barishaki JA/JCC emphasized, "has dire implications for the future application of the checks and balances necessary for the functioning of a civilized democracy and prevention of peremptory behavior by the three pillars of government, namely, the Legislature, Executive and Judiciary."[577]

Barishaki JA/JCC explained further that the doctrine of the separation of powers has been "at the very core of Uganda's growing constitutional governance."[578] In addition, the honorable justice declared that "no room should be given to attempts to whittle down this growth and regress into the dark days of the political and constitutional instability," and that all organs of government must ensure that this "young constitutional democracy" is protected.[579] Thus, concluded Barishaki JA/JC, "to uphold Section 8 of POMA which authorizes the police to stop, prevent and disperse meetings when a similar provision was nullified in [*Kivumbi*] would be to acquiesce in undermining the authority of this court."[580]

After deciding that Section 8 of POMA violates Article 92 of the Constitution, Barishaki JA/JC proceeded to clarify "a number of concerns related to the exercise of freedom of assembly and the right to

571. *Id*. at 17–18.
572. *Id*. at 18.
573. *Id*.
574. *Id*.
575. *Id*.
576. *Id*.
577. *Id*.
578. *Id*. at 18.
579. *Id*. at 18–19.
580. *Id*. at 19–20.

demonstrate peacefully and unarmed in relation to police powers to ensure there is no breach of peace in exercise of such rights."[581] This clarification, noted Barishaki JA/JCC, is undertaken "for the sake of completeness and to give guidance to law enforcers."[582] He began by explaining that public processions, meetings, and gatherings are protected by the constitutionally guaranteed rights of freedom of peaceful assembly and association and that peaceful protests are "equally protected by the constitution."[583] In addition, Barishaki JA/JCC explained that Section 8 of POMA became a tool the police used "under the guise of preserving public order" to interfere with the ability of the people to exercise their rights to freedom of peaceful assembly and of association.[584]

While "public order is necessary in any society," noted Barishaki JA/JCC, "law enforcement organs in democratic states do not suppress public gatherings or peaceful protests in the name of protecting public order."[585] Barishaki JA/JCC recalled that in the past, Ugandan police have "suppressed numerous public gatherings of a political or social nature in the name of maintaining public order" and that this is an unfortunate use of police powers.[586] The learned justice added that the assumption that a public assembly "of a political nature, or social gatherings held by politicians, are more likely to cause a breach of the peace because they have not been authorized by police and should not be allowed to happen is not correct."[587] Barishaki JA/JCC also noted that the failure of conveners to notify the police of an intended public gathering of a political nature is not a good enough reason for the police to violently disperse the meeting.[588] In conclusion, Barishaki JA/JCC held that "[t]he blanket prohibition on holding of public meetings that have no police permission or prior notification is simply unconstitutional and a violation of Article 29 of the Constitution which among others guarantees the right to freedom of peaceful assembly and demonstration."[589]

He then took judicial notice of "the fact that certain social gatherings, such as sports competitions between rival teams, music shows inter alia also occasionally cause a breach of the peace but the law enforcers do not react by prohibiting such competitions or games from taking place in the future."[590] Finally, Barishaki JA/JCC concluded that "[t]he

581. *Id*. at 20.
582. *Id*.
583. *Id*.
584. *Id*. at 21.
585. *Id*.
586. *Id*. at 22.
587. *Id*. at 23.
588. *Id*.
589. *Id*. at 23–24.
590. *Id*. at 24.

refusal to extend the same favor to public gatherings of a political nature is simply a reflection of an unconstitutional animus by law enforcement against political activities."[591]

After referring to and considering passages from foreign and comparative case law regarding the exercise of the rights to peaceful assembly and association, Barishaki JA/JCC concluded that "in enacting and assenting to POMA with the impugned section 8, Parliament and the Executive acted in contravention of Articles 92 of the Constitution and therefore, it's null and void."[592] The learned justice then allowed the petition, "not only on the narrow ground that the impugned Section 8 violated Article 92 but also on the wider ground that it violates Article 29 that guarantees freedom of assembly and the right to demonstrate peacefully and unarmed."[593]

With respect to remedies, Barishaki JA/JCC declared:

> [T]he action of the Respondent in enacting and assenting to section 8 of the Public Order Management Act which section is materially similar to section 32(2) of the Police Act was declared unconstitutional by the constitutional court in Constitutional Petition No. 9 of 2005, *Muwanga Kivumbi vs Attorney General* is inconsistent with and in contravention of Articles 29, 43 and 92 of the Constitution.[594]

In her concurring judgment, Musoke JA/JCC considered much more than the issue of the constitutionality of Section 8 of POMA. Instead, she examined the constitutionality of POMA as a whole.[595] She referenced the U.N. Human Rights Committee's General Comment No. 37 on the right of assembly under Article 21 of the ICCPR and adopted its definition of "assembly."[596] She commented that the definition of "public meeting" in POMA represents the Parliament of Uganda's efforts to define "assembly in a restrictive manner," creating the room for "state actors" to selectively apply "the law in total abuse of the Constitution."[597] She concluded that she would have declared Parliament's definition of "public meeting" in Section 4(1) of POMA as unconstitutional.[598]

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591. *Id*.
592. *Id*. at 26–33.
593. *Id*.
594. *Id*. at 34.
595. *Hum. Rts. Network* [2020] UGCC 6, at 3-4. (Judgment of Musoke JA/JCC).
596. *Id*. at 5 (Judgment of Musoke JA/JCC).
597. *Id*. at 6 (Judgment of Musoke JA/JCC); s*ee generally* POMA, *supra* note 517, § 4.1 (defining the expression "public meeting").
598. *Hum. Rts. Network* [2020] UGCC 6, at 6 (Judgment of Musoke JA/JCC).

Musoke JA/JCC noted that "POMA embraces a regime of repression aimed at curtailing the citizens' enjoyment of their right to assemble and demonstrate" and that "the POMA legal framework . . . encourages the police to begin with a presumption that assemblies should be stopped unless authorized by the police."[599] Given that she would have ruled several provisions of POMA unconstitutional and inconsistent with the Constitution, Justice Musoke would have declared the entire statute unconstitutional.[600]

In his concurring judgment, Justice Kakuru agreed with Justice Musoke that even though the applicants had amended their petition and abandoned some of the arguments that they had adduced before the UGCC on the unconstitutionality of provisions of POMA, all these issues should have been considered by the Court.[601] He "disregarded the amended petition," which was dated June 27, 2016, and proceeded to examine the original petition, which had been submitted on December 10, 2013.[602] Kakuru JA/JCC stated that POMA served "no legitimate purpose or objective" because there already existing laws in Uganda that are "tailored to curb the mischief if any resulting from unfettered freedoms and rights to expression, association, speech and the press and media."[603]

He referred to the notification provisions of POMA and held that the restrictions that they impose on individuals rendered it "almost impossible for any person to hold a public meeting in Uganda" without first obtaining permission from the police, which cannot be justified in "a free democratic society."[604] Justice Kakuru then explained that the effect of POMA is "to curtail and criminalise the legitimate acts of the press and media, in the normal execution of duty," that it has "criminalised membership of political opposition and other members of society considered by the Police as being undesirable elements of society," and finally that, "[t]his is neither a legitimate nor a legal purpose of law."[605] Justice Kakuru concluded that he would have declared POMA unconstitutional in its entirety.[606]

Justice Kiryabwire also delivered a concurring judgment in which he adopted the "declarations and orders" of Justice Barishaki and, in addition, emphasized that Parliament must not be allowed to nullify

599. *Id*. at 10 (Judgment of Musoke JA/JCC).
600. *Id*. (Judgment of Musoke JA/JCC).
601. *Hum. Rts. Network* [2020] UGCC 6, at 6 (Judgment of Kakuru JA/JCC).
602. *Id*. at 6 (Judgment of Kakuru JA/JCC).
603. *Id*. at 17 (Judgment of Kakuru JA/JCC).
604. *Id*. at 21 (Judgment of Kakuru JA/JCC).
605. *Id*. at 29 (Judgment of Kakuru JA/JCC).
606. *Id*. at 38 (Judgment of Kakuru JA/JCC).

the effect of court judgments by using legislation to overturn them.[607] Finally, Justice Musota wrote a dissenting opinion in which he declared that he did not agree "with the submission that the impugned section 8 of the [POMA] is unconstitutional."[608] He declared further that he did not believe that "enactment and assent to [Section 8 of POMA] was in contempt of court orders or was an attempt to reverse the decision of [the CCU]."[609] He concluded that he did not interpret the "actions of the legislature in enacting or the president in assenting to the [POMA] as altering the decision of [the CCU] in the *Muwanga Kivumbi* case."[610] He explained that, unlike Section 32(2) of the Police Act, which "left the decision entirely to the Inspector General of [P]olice and his authorized officers," Section 8 of POMA "provides an objective test for regulating the public" and that it "standardized the requirements and created certainty of what is needed in order for persons to hold public meetings."[611]

This case is very important, not just because its decision adds to the evolving African jurisprudence on the exercise of the rights to peaceful assembly and association, but because it also clarifies the role that the police and other law enforcement officers must play in maintaining public order while, at the same time, regulating public gatherings and assemblies and ensuring that citizens are able to exercise their constitutionally granted fundamental rights.

Summary and Conclusion

According to former U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, the rights to freedom of assembly and association "are among the most important human rights we possess."[612] These rights protect and enhance the ability of all individuals in a society to "come together and work for the common good."[613] They provide members of any society with the wherewithal to exercise the other human rights enshrined in various international and regional human rights instruments.[614] More specifically, the rights to freedom of peaceful assembly and association enhance the ability of individuals to "express their political opinions, engage in . . .

607. *Hum. Rts. Network* [2020] UGCC 6, at 5-7 (Judgment of Kiryabwire, JA/JCC).
608. *Hum. Rts. Network* [2020] UGCC 6, at 11 (Musota, JA/JCC, dissenting).
609. *Id*. at 11–12 (Musota, JA/JCC, dissenting).
610. *Id*. at 16 (Musota, JA/JCC, dissenting).
611. *Id*. (Musota, JA/JCC, dissenting).
612. *What Are The Rights to Freedom of Peaceful Assembly and of Association?*, Former UN Special Rapporteur, http://freeassembly.net/about/freedoms/ (last visited Oct. 11, 2024).
613. *Id*.
614. *Id*.; *see, e.g*., ICCPR, *supra* note 7, art. 21.

artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions . . . and elect leaders to represent their interests and hold them accountable[.]"[615]

The rights to freedom of peaceful assembly and association are enshrined in many international and regional instruments.[616] These human rights instruments impose an obligation on states arties to ensure that all persons within their jurisdictions are able to fully exercise these rights. However, in exercising these rights, individuals must abide by the law. For example, the Banjul Charter guarantees the right to freedom of peaceful assembly and association.[617] However, individuals who exercise these rights must do so within the law. Article 10 states that "[e]very individual shall have the right to free association provided that he abides by the law."[618]

The international and regional human rights instruments that guarantee the rights to freedom of peaceful assembly and association make clear that the exercise of these rights by individuals within a jurisdiction can be restricted under certain conditions. However, these restrictions must be imposed only in conformity with the law; they must be necessary in a democratic society, and they must serve certain specified public interests.[619] In 2010, the U.N. Human Rights Council established the mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association through Resolution 15/21.[620] The Special Rapporteur was charged with, inter alia, ensuring "the promotion and protection of the rights to freedom of peaceful assembly and of association in all their manifestations."[621]

The present Special Rapporteur, Clément Nyaletsossi Voule, issued a report on June 21, 2024, in which he called for "urgent joint global action to respond to the global attack on civic space, to preserve the gains made, and push back against the emerging and deepening threats against the rights to peaceful assembly and of association."[622] In this report, Voule remarked that the rights to freedom of peaceful

615. Hum. Rts. Council Res. 15/21, *supra* note 74.

616. *See, e.g.*, G.A. Res. 27 (III) A, art. 20(1); Banjul Charter, *supra* note 29, arts. 10-11; African Child Charter, *supra* note 30, art. 8; Convention on the Rights of the Child art. 15, Nov. 20, 1989, 1577 U.N.T.S. 3.

617. Banjul Charter, *supra* note 29, arts. 10-11.

618. *Id*. art. 10.

619. *See, e.g.*, ICCPR, *supra* note 7, art. 21 (These public interests include national security, public safety, public order, the protection of public health or morals, as well as the protection of the rights and freedoms of other citizens).

620. Hum. Rts. Council Res. 15/21, *supra* note 74.

621. *Id*.

622. Voule, *supra* note 46, at Summary.

assembly and of association are "fundamental for safeguarding democracy, human rights and peace," and urged the international community to renew its commitment to ensure that these rights are recognized and protected.[623] Voule explained further that the rights to freedom of peaceful assembly and association have been recognized as critical and "essential pillars for democracy" and instruments for "facilitating public participation," as well as "enablers of civil, political, social, economic and cultural rights."[624]

Special Rapporteur Voule noted that throughout the world, people from various backgrounds have exercised the rights to freedom of peaceful assembly and association to defend democracy, challenge government impunity, advocate for climate justice, and generally improve the recognition and protection of human rights.[625] However, there remain significant threats against human rights in general and the exercise of the rights to freedom of peaceful assembly and association. For example, throughout the world, civil society and social movements continue to face stigmatization; police and other security forces are becoming increasingly intolerant to peaceful protests; and in many countries, there have been increased violent crackdowns on freedoms during electoral cycles, as well as, the use of emerging technologies by governments to interfere with the enjoyment of various human rights by individuals, especially minorities and persons with disabilities.[626]

In his report to the U.N. Human Rights Council, Special Rapporteur Maina Kiai noted that the rights to freedom of peaceful assembly and of association are "clearly interrelated, interdependent and mutually reenforcing" and that they must be treated as two separate rights.[627] These two rights, noted Kiai, "are key human rights in international human rights law, which are enshrined in article 20 of the [UDHR]," as well as in other international and regional human rights instruments.[628] While States are permitted under international law to impose restrictions on the exercise of these rights, they must meet the conditions enumerated and elaborated in the Human Rights Committee's General Comment No. 27.[629] Restrictions imposed on the exercise of these two rights must have a legal basis and must be motivated by one or more of the limited interests enumerated in General Comment No. 27.[630]

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623. *Id*.
624. *Id*. para. 9.
625. Voule, *supra* note 46, paras.12, 16, 19, 94.
626. *Id*. at paras. 21–25.
627. U.N. Doc. A/HRC/20/27, *supra* note 65, para. 4.
628. *Id*. para13.
629. *Id*. para 16.
630. *Id*.

Some African governments have used laws designed to help the police and other security forces fight terrorism and various forms of extremism to punish and restrict legitimate political speech and peaceful protests and in doing so, they have significantly expanded police surveillance powers.[631] For example, in 2021, Human Rights Watch ("HRW") argued that new antiterrorism laws enacted by Senegal's legislature could reclassify political speech and peaceful protests as "terrorist acts" and subject anyone involved in these activities to harsh punishments.[632] HRW noted that terrorism is a crime that destroys human rights and fundamental freedoms and hence, states must combat it.[633] However, HRW cautioned that in fighting terrorism, states must ensure that the measures that they take to combat these anti-democratic behaviors do not violate human rights, including the rights to freedom of peaceful assembly and of association.[634]

One way in which states can enhance the ability of citizens to realize the rights to freedom of peaceful assembly and of association is to ensure that organizers and participants in peaceful assemblies are able to have access to public space.[635] HRW has noted that "[h]uman rights law sets a high threshold for barring or punishing public demonstrations; unauthorized, annoying, or offensive peaceful protests can be perfectly legitimate."[636] The jurisprudence of the European Court of Human Rights, for example, has concluded that "a certain amount of disruption must be tolerated because 'in a democratic society, the urban space is not only an area for circulation, but also for participation.'"[637]

While states are bound by international law to recognize and protect the rights to freedom of peaceful assembly and of association, many of them also enshrine these rights in their national constitutions. The HRC has stated that about a total of 184 of the 193 Member States of the U.N. recognize the right to peaceful assembly in their national constitutions.[638] Although this right belongs to the individual, as noted by the HRC, the right, however, allows the individual to gather with others similarly situated for "specific purposes, principally expressive ones."[639] The right to freedom of peaceful assembly is available to all residents of a State Party to the ICCPR: citizens, non-citizens, visitors, including

631. *See Senegal, supra* note 174.
632. *Id*.
633. *Id*.
634. *Id*.
635. U.N. Doc. A/HRC/23/39, *supra* note 149, para 65.
636. Sunderland, *supra* note 179.
637. *Id*.
638. Flores, *supra* note 205.
639. General Comment No. 37 (2020), *supra* note 194, para 4.

refugees, asylum seekers, stateless persons, and migrants, whether documented or not.[640] Peaceful assemblies are protected by Article 21 of the ICCPR, regardless of where they take place, whether they are carried out indoors, outdoors, or online.[641] Although peaceful assemblies may create disruptions (e.g., traffic jams) and major risks for both participants and bystanders, the management of these problems by the police and other security forces must be undertaken according to national laws, and these laws must conform to the provisions of international human rights instruments.

Over the years, advancements in technology, particularly, information and communications technology, have significantly transformed the way in which assemblies are conducted. For example, individuals now use online communication platforms, such as Facebook and Instagram, not only to organize and conduct assemblies, but also to collect signatures and deliver petitions to appropriate authorities. For example, in October 2020, Nigerian youth used the internet to successfully organize street protests against impunity by the country's SARS.[642]

In Africa, the rights to freedom of peaceful assembly and of association are enshrined in the Banjul Charter and at the national level in the constitutions of various States.[643] On September 21, 2017, the African Commission adopted Guidelines on Freedom of Association and Assembly in Africa.[644] The African Commission noted that the "guidelines were developed in accordance with the relevant provisions of the [Banjul Charter], which stipulates under Article 45(1)(b) that the African Commission is mandated 'to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms.'"[645] The African Commission has explained that all Member States of the African Union must ensure "the protection of all assemblies, public and private, from interference, harassment, intimidation and attacks by third parties and non-state actors."[646] The African Commission stated that restrictions on these rights must be applied in "narrow and lawfully prescribed circumstances."[647] In addition, any restrictions must be based on "generally applicable civil and criminal law" and "shall be strictly proportionate to the gravity of the

640. *Id*. at para. 5.
641. *Id*. at para 6.
642. *See* Banjul Charter, *supra* note 29, arts. 10-11; African Child Charter, *supra* note 32, art. 8; S. Afr. Const., 1996 § 17; Constitution art. 37 (2010) (Kenya).
643. Banjul Charter, *supra* note 29, arts. 10-11.
644. Guidelines, *supra* note 278.
645. *Id*. at 4 (Foreword).
646. *Id*. para. 94.
647. *Id*.

misconduct in question."[648] Finally, restrictions must be applied only by "an impartial, independent and regularly constituted court, following a full trial and appeal process."[649]

There is a growing jurisprudence in Africa on the rights to freedom of assembly and of association. For example, in *Registered Trustees of Faculty of Peace Organisations & 3 Ors v. Federal Republic of Nigeria*, the ECOWAS Court of Justice was called upon to rule on the alleged violation of the applicants' rights to freedom of assembly and of association, which are guaranteed by Articles 10 and 11 of the Banjul Charter.[650] The Court held that Nigeria had violated the applicants' right to freely and peacefully assemble per Article 11 of the Banjul Charter.[651] The Court also held that since Nigeria had ratified and domesticated the Banjul Charter, it was obliged to take necessary measures to ensure the protection of the right of freedom to assembly and that any restrictions imposed on those undertaking peaceful assemblies must be in accordance with the law.[652]

The case *Registered Trustees of Faculty of Peace Organisations & 3 Ors* raised important issues that are worth noting. First, the Court clarified the principle of state responsibility under international law, particularly with respect to the conduct of a state's organs. In this case, the applicants' rights to freedom of peaceful assembly and of association are alleged to have been violated by the Edo State Government, a sub-national unit of the State of Nigeria. The Court held that under international law, Nigeria, as a State Party to various international and regional human rights instruments, including the Banjul Charter, bears responsibility for the violation of the rights of its citizens by the conduct of any of its constituent organs, such as the Edo State Government, which is empowered to exercise state power. Hence, it was appropriate that the Government of the Federal Republic of Nigeria be designated as the respondent in this case.

Second, the Court in *Registered Trustees of Faculty of Peace Organisations & 3 Ors* also dealt with the issue of whether legal (as opposed to natural) persons have the *locus standi* to sue for the violation of human rights under the Banjul Charter.[653] The Court noted that the first applicant in this case was a legal person known as *Registered Trustees*

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648. *Id*.
649. *Id*. para. 100.
650. *Registered Trs. of Fac. of Peace Org.*, No. ECW/CCJ/JUD/06/22, Judgment, ECOWAS Court of Justice [ECOWAS Ct. J.], para. 4.
651. *Id*. para. 86.
652. *Id*. para. 103.
653. *Id*. paras. 20–23.

of Faculty of Peace Organisations, an NGO registered in Nigeria.[654] The Court then held that "as a general rule, a legal person cannot be accommodated within the term individual to bring an action for the violation of human rights under the [Banjul] Charter."[655]

Section 3 of the RGA mandates that anyone who intends to convene a gathering within a municipal area must notify the local authority.[656] Such a notice must be given in writing and must contain all the relevant information about the assembly.[657] The failure of an individual convening a gathering to provide the necessary notice as mandated by Section 3 of the RGA was considered a criminal offense in terms of Section 12(1)(a) of the RGA.[658] In *Mlungwana v. The State*, the High Court of South Africa, Western Cape Division, Cape Town, declared Section 12(1)(a) of the RGA unconstitutional.[659] The High Court held that the criminalization of the failure of a convener of a gathering to provide prior notice in terms of Section 3 of the RGA of a planned gathering or protest infringed the right to freedom of assembly as provided for in Section 17 of the Constitution of South Africa.[660] After the High Court's ruling, the matter was then referred to the Constitutional Court of South Africa ("ZACC") to confirm the High Court's judgment. The ZACC held that "[t]he declaration by the High Court that section 12(1)(a) of the [RGA] is constitutionally invalid is confirmed to the extent that it makes the failure to give notice or the giving of inadequate notice by any person who convened a gathering a criminal offence."[661]

The ZACC's decision in *Mlungwana* secured the right to freedom of peaceful assembly for persons under South Africa's jurisdiction and added to the growing continental jurisprudence on the right to freedom of peaceful assembly. Securing this right in all African countries will significantly enhance the ability of individuals to participate in their country's public affairs, as well as to enjoy other human rights that are enshrined in national constitutions and various international and regional human rights instruments.

In 2013, the Parliament of Uganda enacted the Public Order Management Act (POMA) after the Constitutional Court ("UGCC") had ruled in *Kivumbi* that a similar provision in the Police Act (Cap. 303)

654. *Id*. para.20.
655. *Id*. para.23.
656. Regulation of Gatherings Act 205 of 1993, § 3 (S. Afr.).
657. *Id*. at §§ 3(1), 3(3).
658. Regulation of Gatherings Act 205 of 1993, § 12(1)((S. Afr.).
659. Phumeza Mlungwana v. The State and Another, 2019 (1) BCLR 88 (CC) para. 3 (S. Afr.).
660. S. Afr. Const., 1996 § 17.
661. *Phumeza Mlungwana*, 2019 (1) BCLR 88 (CC) para. 112.

was unconstitutional and struck it down.[662] On December 10, 2013, three NGOs and two individuals filed a petition challenging the constitutionality of various sections of POMA.[663] Writing for the majority in the UGCC, Justice Barishaki held that the impugned provision of POMA (Section 8) was designed to "water down the import of the [UGCC's] decision in [*Kivumbi*]" and that based on this ground alone, he would "answer the framed issue in the affirmative and allow the present petition."[664] Section 8 of POMA, Barishaki JA/JCC explained, "interferes with the doctrine of separation of powers contained in the Constitution."[665]

He declared further that enacting legislation that "alters or undermines a judicial decision has dire implications for the future application of the checks and balances necessary for the functioning of a civilized democracy and the prevention of peremptory behavior by the three pillars of government, namely, the Legislature, Executive and Judiciary."[666] He concluded that "to uphold Section 8 of POMA which authorizes the police to stop, prevent and disperse meetings when a similar provision was nullified in [*Kivumbi*] would be to acquiesce in undermining the authority of this court."[667] This case is important because it adds to Africa's jurisprudence on the rights to freedom of peaceful assembly and association. In addition, the UGCC used this case to clarify the role that the police and other security officers should play in maintaining public order, while at the same time, regulating public gatherings and assemblies, and ensuring that citizens are able to exercise their constitutionally enshrined human and fundamental rights.

Guaranteeing individuals within a state's jurisdiction the rights to freedom of peaceful assembly and association and ensuring their ability to freely exercise these rights is beneficial, not just for individuals, but also for the state as a whole. First, the free exercise of these rights is critical for the enjoyment of the other human rights that are enshrined in various national constitutions and international and regional human rights instruments. Second, through the exercise of these rights, individuals can freely participate in the public affairs of their communities, protest against government policies that directly affect their lives, check

662. POMA, *supra* note 517. The Constitutional Court of Uganda had struck down Section 32(2) of the Police Act through its ruling in *Kivumbi v. Attorney General* (Constitutional Petition No. 9 of 2005).

663. Hum. Rts. Network v. Att'y Gen. (Constitutional Petition No. 56 of 2013) [2020] UGCC 6 (Mar. 26, 2020), at 2.

664. *Id*. at 18.

665. *Id*.

666. *Id*.

667. *Id*.

on the exercise of government power, minimize public corruption, and force accountability in government.

Finally, combined with other related rights, the right to freedom of peaceful assembly can provide a solid and robust foundation for a system of participatory and inclusive governance that is undergirded by democracy, as well as the recognition and protection of human rights and peaceful coexistence. This was made clear by the U.N. HRC in its Resolution 15/21 that was issued in 2010. In its Preamble, the HRC recognizes that the rights to freedom of peaceful assembly and of association "are essential components of democracy, providing individuals with invaluable opportunities to, inter alia, express their political opinions, engage in artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions, elect leaders to represent their interests and hold them accountable."[668] To enhance democracy, the rule of law, and peaceful coexistence, each African country must ensure that all individuals within its jurisdiction are able to freely exercise their rights to freedom of peaceful assembly and association.

668. Hum. Rts. Council Res. 15/21, *supra* note 74.

Prepare, Repair, Defend: A DIY Toolkit for Reparations 2.0

Harold McDougall

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INTRODUCTION

Olli Tammilehto describes "phase shifts" as a way of charting the progress of movements and organizations dedicated to social justice.[1] For Tammilehto, phase shifts toward social justice proceed in stages, from awakening, to protest, to cooperation, to solidarity – to a new, autonomous social, economic, and political system, a polity based on mutual aid, innovation and self-defense.

Awakening occurs first, in small-scale settings within a community or network that can generate thinking and perceptions that contradict the established order. With broader exposure, awakening can spread, creating free, open public spaces where voices are raised to *protest* injustice. If hierarchy and elitism can be avoided in these larger groups, the movement can progress to the third stage, *cooperation* and mutual aid, aimed at improving the community from which the movement emerged rather than aggrandizing a chosen few.

The fourth stage, *solidarity*, emerges as these cooperative efforts build trust and support and grow stronger. Solidarity means the community is ready to defend itself and the progress it has made. This stage features small, independent, non-hierarchical groupings using participatory democracy to work toward socio-economic, cultural and political autonomy for the entire community. Confederated, such small groups can establish a network scaled large enough to manage state, national, and international-level complexity, "shadowing" existing formal political structures and holding them to account.

In this article, I will trace how such developments suggest a pathway for a "do-it-yourself" approach to reparations. This does not mean letting responsible parties off the hook. Instead, it aims to provide aggrieved communities with a lens through which to see their own path forward clearly, with their own eyes.

1. *See* Olli Tammilehto, *The Present is Pregnant with a New Future*, *in* SOCIAL ECOLOGY AND THE RIGHT TO THE CITY: TOWARDS ECOLOGICAL AND DEMOCRATIC CITIES 141, 141–42 (Federico Venturini et al. eds., 2019); *see also id.* at 143–44.

I. Awakening

My awakening to reparations came through N'COBRA[2] and similar organizations that were focused primarily on financial compensation for slavery and succeeding racist constructs and systems.[3] I was not sure how a strictly financial reward would work out; I was not sure if it would be individual payments or payments to Black institutions. However, when I heard of the success of Sir Hilary Beckles of the University of the West Indies gaining $20 million from the University of Gloucester in the UK through reparations efforts, I decided to take a closer look.

A. CARICOM On Reparations

As it turns out, Beckles led a reparations initiative organized by CARICOM, the twenty-country Caribbean Community integration movement that focuses on a lot more than money.[4]

CARICOM's ten-point plan proceeds as follows:

1. Full Formal Apology
2. Repatriation
3. Indigenous Peoples Development Program
4. Cultural Institutions
5. Public Health Crisis
6. Illiteracy Eradication
7. African Knowledge Program
8. Psychological Rehabilitation
9. Technology Transfer
10. Debt Cancellation

Points (4), (5), (7), and (8) piqued my interest in particular, as they connect with my own work on Cultural DNA.

B. Cultural DNA

In my article, *Reconstructing African American Cultural DNA: An Action Research Agenda for Howard University*,[5] I used the term "Cultural DNA" to describe a template that organizes the cultural

2. N'COBRA is the National Coalition of Blacks for Reparations in America. *See N'COBRA*, https://www.officialncobraonline.org/home-page (last visited Oct. 9, 2024).

3. *Id.*

4. *CARICOM Ten Point Plan for Reparatory Justice*, CARICOM, https://caricom.org/caricom-ten-point-plan-for-reparatory-justice (last visited Sept. 18, 2024) (calling upon European governments to participate in the CARICOM Reparatory Justice Programme).

5. Harold. A. McDougall, *Reconstructing African American Cultural DNA: An Action Research Agenda for Howard University*, 55 How. L.J. 63 (2011).

information of a particular community, gives it coherence, and passes it on to succeeding generations. [6] In this sense, culture is not just the way we sing and dance and the food we eat. It is the way we solve problems.[7]

Just as an organism's DNA contains the instructions needed for it to develop, survive, and reproduce, Cultural DNA permits human communities to pass analogous instructions to their successors, such as how to prepare food, practice faith, or provide for one's young.[8] In my book, *Black Baltimore: A New Theory of Community*, I examined the vernacular culture of Baltimore's African American West Side.[9] There I saw that Cultural DNA patterns include not only speech, work, music, cuisine, gender roles, home life, and gossip, but also the building of relationships and networks, modes of political and economic organization, and the ways in which problems are solved.[10]

A set of variables distinguish one culture from another, affecting not only how we solve problems, but also how we see them in the first place.[11] These variables shape and organize a community's Cultural DNA, which is handed down from generation to generation, refined and renewed by each. Thus, Cultural DNA, when introduced to new challenges and situations, serves as a springboard for creating new norms and values and new patterns of interaction, organization, and problem-solving. The informal leaders of the community help ground and accelerate this process.[12] The blog takes a decent dive into the topic, which is much more fully developed in the article.[13]

CARICOM points (4), (5), (7) and (8) relate directly to the mental and physical disruptions that slavery, Jim Crow, and systemic racism

6. *See id.* (citing JEFF HAWKINS & SANDRA BLAKESLEE, ON INTELLIGENCE: HOW A NEW UNDERSTANDING OF THE BRAIN WILL LEAD TO THE CREATION OF TRULY INTELLIGENT MACHINES (St. Martins Griffin 2005) (discussing how the brain's process of receiving and categorizing data creates culturally diverse ways of thinking and problem-solving)).

7. Harold A. McDougall, *Cultural DNA: Bringing Civic Infrastructure to Life*, HUFFPOST, https://www.huffpost.com/entry/animating-citizens-assembly_b_1656586 (last updated Sept. 9, 2012) [hereinafter *Cultural DNA*] ("It is community – not the market, not government – that is the crucible of culture, and culture is the root of problem-solving, of intelligence itself.").

8. McDougall, *supra* note 5, at 64.

9. *See, e.g.*, HAROLD A. MCDOUGALL, BLACK BALTIMORE: A NEW THEORY OF COMMUNITY 62 (1993) [hereinafter BLACK BALTIMORE].

10. *Id.* at 2.

11. Notions of context, participation, place, limits, and temporality create a matrix of patterns people have developed in their journey through history, reflecting a particular culture's way of seeing the world. *See Cultural DNA*, *supra* note 7.

12. "Go to" people would provide access to the community's cultural patterns, folkways, problem-solving history, and means of celebration. "Networkers" know where people gather and where aggregated civic capital can be found. "Boundary crossers" know the pathways between their own community and those of others. *See* Harold A. McDougall, *Social Change Requires Civic Infrastructure,* 56 How. L.J. 801, 821-22 (2013). As we shall see later, we will need to add "griots" to this equation.

13. *See* McDougall, *supra* note 5, at 66-70.

that call for reparations. Point (5) highlights the "health disaster" stemming from historical (and present) experiences of malnutrition, physical and emotional brutality, and overall stress associated with slavery and its offspring.[14] Point (8) notes the psychological trauma inflicted by laws and practices that classified enslaved people and their descendants as less than human.[15]

Point (7) highlights the consequent cultural and social alienation from identity and existential belonging that points (5) and (8) can produce. Point (7) shows how Cultural DNA must be repaired if true reparations is to take place.[16] Point (4), shows how reinvigorated cultural DNA can help move us toward cooperation and solidarity. It calls for the development of community institutions and systems to elevate community members' consciousness, understanding, and collaboration to enhance their potential as agents of change.[17]

1. Protests And Its Limitations

Student Nonviolent Coordinating Committee ("SNCC") Chair James Forman made a powerful public demand for reparations on May 4, 1969.[18] Forman interrupted a sermon at the prominent Riverside Church of New York City, citing it as one of several churches from which Black Americans could ask for reparations for slavery.[19]

> On the morning of May 4, as ministers processed through the nave to the hymn "When Morning Gilds the Skies", Forman climbed the

14. *CARICOM*, *supra* note 4 (calling upon European governments to participate in the CARICOM Reparatory Justice Programme by alleviating the public health crisis throughout the Caribbean).

15. *Id*. (calling upon European governments to participate in the CARICOM Reparatory Justice Programme by engaging in psychological rehabilitation for African descendants throughout the Caribbean) ("For over 400 years Africans and their descendants were classified in law as non-human, chattel, property, and real estate. They were denied recognition as members of the human family by laws derived from the parliaments and palaces of Europe. This history has inflicted massive psychological trauma upon African descendant populations. This much is evident daily in the Caribbean. Only a reparatory justice approach to truth and educational exposure can begin the process of healing and repair . . . . [including] greater Caribbean integration designed to enable the coming together of the fragmented community.").

16. *Id.* (calling upon European governments to participate in the CARICOM Reparatory Justice Programme by creating a program of action to build cultural bridges between descendants of the enslaved and their ancestral roots).

17. *Id*. (calling upon European governments to participate in the CARICOM Reparatory Justice Programme by investing in cultural institutions in the Caribbean to educate citizens on past crimes against humanity).

18. *The Black Manifesto at The Riverside Church*, The Riverside Church in the City of New York. https://www.trcnyc.org/blackmanifesto (last visited Oct. 16, 2024). Riverside Church is home to a large and progressive interdenominational association and is associated with American Baptist Churches USA and the United Church of Christ. *See also Riverside Church*, Wikipedia, https://en.wikipedia.org/wiki/Riverside_Church (last visited Oct. 16, 2024).

19. *Id.*

> steps to the chancel and began to read The Black Manifesto, a series of demands endorsed by the National Black Economic Development Conference. The Black Manifesto argued that white churches and synagogues of the United States must pay for their part – direct and indirect – in the historical subjugation of black people if they wished to maintain their moral authority. It cited their reliance on the patronage of wealthy whites enriched by slavery and the violent expropriation of resources from communities of color.[20]

Soon after Forman's historic demand for reparations, President Nixon issued the "Philadelphia Order," significantly expanding pre-existing affirmative action policies. Implementation was assigned to Assistant Secretary of Labor Arthur Fletcher, an African American, on September 23, 1969.[21]

Affirmative action began with President Franklin Roosevelt's Executive Order barring discrimination in the federal government and by war industries during World War II. [22] The order was issued to forestall a planned march on Washington that A. Philip Randolph, the President of the Brotherhood of Sleeping Car Porters, organized.[23] Later, in response to the Civil Rights Movement, President John F. Kennedy created a Committee on Equal Employment Opportunity in 1961 and issued Executive Order 10925, which used the term "affirmative action" to refer to measures designed to achieve non-discrimination.[24] In 1965, President Johnson issued Executive Order 11246 requiring federal contractors to take affirmative action to ensure equal employment opportunities without regard to race, religion and national origin.[25] In 1968, gender was added to the protected categories.

Nixon's move to expand affirmative action in the wake of Forman's demand for reparations led me to refer to affirmative action as

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20. *Id*.

21. *See* Marcus, Paul, *The Philadelphia Plan and Strict Racial Quotas in Federal Contracts*, 17 UCLA L. REV. 817 (1970); *see also* Jane Holzka, *Philadelphia Plan*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/philadelphia-plan#:~:text=The%20plan%20required%20Philadelphia%20government,how%20to%20meet%20the%20goals (last visited Feb. 16, 2025) ("With the implementation of the Philadelphia Plan in 1969, President Richard M. Nixon's administration changed the federal government's stance on affirmative action. For the first time, a specific industry was required to articulate a plan for hiring minority workers.").

22. Exec. Order No. 8802, 6 F.R. 3109 (1941).

23. "Randolph presented a list of grievances regarding the civil rights of African Americans, demanding that an executive order be issued to stop job discrimination in the defense industry." *Executive Order 8802: Prohibition of Discrimination in the Defense Industry (1941)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/executive-order-8802#:~:text=List%20of%20Documents-,Executive%20Order%208802%3A%20Prohibition%20of,in%20the%20Defense%20Industry%20(1941) (last visited Jan. 10, 2025).

24. Exec. Order No. 10925, 26 F.R. 1977 (1961).

25. Exec. Order No. 11246, 30 F.R. 12,319 (1968).

"reparations on the installment plan," a remedy less effective or significant than reparations itself.[26] Reparations then became a remedy promoted by the Black left,[27] while the Black middle class continued under the umbrella of affirmative action.[28] Nixon also promoted "Black capitalism" to the Black middle class.[29] "Focusing on '[B]lack capitalism' allowed Nixon to neutralize [B]lack resistance while also undermining the demand for reparations…." [30] But Supreme Court justices that Nixon and subsequent Republican presidents appointed soon undercut affirmative action itself, following the "Southern strategy," (actions taken to persuade Southern Democrats to the Republican Party in the wake of Democratic Party concessions to African Americans during the Civil Rights Movement).[31] The cases proceed thus:[32]

Regents of the University of California v. Bakke (1978) struck down the use of racial quotas in college admissions.[33] Still, the justices acknowledged that a university had legitimate interests in considering applicants' race to achieve the compelling educational benefits of a diverse student body, provided that the university's practices passed the Court's strict scrutiny.[34] This case is where Diversity, Equity, And Inclusion

26. This characterization was my own. I focused on the fact that affirmative action was not a community-based remedy like reparations but rather made available to individuals on the basis of "merit" rather than as compensation for slavery.

27. The National African American Reparations Commission and the National Coalition of Blacks for Reparations in America are both left-wing organizations that advocate for reparations for slavery. *See* The National African American Reparations Commission, *Reparations Plan*, NAARC, https://reparationscomm.org/reparations-plan/ (last visited Feb. 17, 2025); *see also* The National Coalition of Blacks for Reparations in America, *What is N'COBRA?*, N'COBRA, https://ncobra.org/aboutus/ (last visited Feb. 17, 2025).

28. *Affirmative Action in Education Matters for Equity, Opportunity, and the Nation's Progress*, NAACP, https://naacp.org/resources/affirmative-action-education-matters (last visited Feb. 17, 2025).

29. *See* Mehrsa Baradaran, *A Bad Check for Black America*, Bos. Rev. (Nov. 9, 2017), https://www.bostonreview.net/articles/how-nixon-swindled-black-businesses ("Nixon's embrace of 'black capitalism' was a canny move that ultimately decimated the black community and turned the wealth gap into a wealth chasm.").

30. *Id*.

31. L. Sue Baugh, *Southern Strategy*, Encyclopedia Britannica (Feb. 16, 2024), https://www.britannica.com/topic/Southern-strategy.

32. Margaret Kramer, *A Timeline of Key Supreme Court Cases on Affirmative Action*, N.Y. Times (Mar. 30, 2019), https://www.nytimes.com/2019/03/30/us/affirmative-action-supreme-court.html.

33. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); *see* Balrina Ahluwalia, *Regents of the University of California v. Bakke Case Study*, FindLaw, https://supreme.findlaw.com/supreme-court-insights/regents-of-the-university-of-california-v--bakke-case-study.html#:~:text=Bakke%20was%20a%20landmark%201978%20Supreme%20Court,influenced%20admissions%20policies%20across%20the%20country%20and (last visited March 12, 2025),

34. *Chapter 5: Diversity and the Law*, ADEA, https://www.adea.org/For-Sorting/dental-education-pathwaysAFASAtransformingPages/Chapter-5-Diversity-and-the-Law-11244 (last visited Feb. 17, 2025).

("DEI") originates.[35] It is a shaving back of affirmative action,[36] which as we have seen above, is itself a steering away from reparations.[37]

Grutter v. Bollinger reaffirmed the Court's position that diversity on school campuses is a compelling state interest.[38] However, Gratz *v. Bollinger*, which was decided on the same day and focused on the same university, ruled that the university's "point" system to achieve diversity did not meet the Court's standards of strict scrutiny established in previous cases.[39]

Fast forward to *Students for Fair Admissions v. Harvard University and the University of North Carolina*[40] ("*SFFA*"), which struck down diversity itself as a legitimate remedy to be pursued.[41] Ironically, *SFFA* caused less stir than the United States Supreme Court's *Dobbs* decision[42], perhaps because observers had already become used to the Court's conservative majority stepping into the right wing's batter's box.[43] But *SFFA* and *Dobbs* are very different. *Dobbs* was decided in the face of a robust defense of women's choices and women's bodies, countered by a fierce culture-war armada.[44] *SFFA*, on the other hand,

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35. *Id; see also* Kramer, *supra* note 32.

36. Joyce Orlando & James Ward, *What is a 'DEI hire? Diversity Initiatives Take Election Spotlight*, DESERT SUN (Aug. 1, 2024), https://www.desertsun.com/story/news/nation/california/2024/08/01/what-are-dei-initiatives-california/74533206007/ (DEI focuses on the general population while affirmative action focuses on remedying historical injustices).

37. *Cf.* Gary Orfield, *Higher Education Must Open a Bigger Door*, U. MICH. CTR. SOC. SOLS., https://lsa.umich.edu/social-solutions/news-events/news/in-the-wake-of-affirmative-action.html (last visited Feb. 17, 2025) ("Affirmative action was a band aid.").

38. *Grutter* v. Bollinger, 539 U.S. 306, 307 (2003).

39. Gratz v. Bollinger, 539 U.S. 244, 246 (2003).

40. Students for Fair Admissions, Inc. v. Univ. of N.C., 600 U.S. 181 (2023).

41. Bill Watson, *Did the Court in SFFA Overrule Grutter?*, 99 NOTRE DAME L. REV. 113, 113 (2023) ("The Supreme Court held that affirmative action programs designed to comply with the precedent set in *Grutter v. Bollinger* were unlawful.").

42. Nina Totenberg, Supreme Court Guts Affirmative Action, Effectively Ending Race-Conscious Admissions, NPR, https://www.npr.org/2023/06/29/1181138066/affirmative-action-supreme-court-decision (last visited June 29, 2023) ("The reaction to Thursday's decision may be consternation in some quarters, but public opinion on affirmative action is not like abortion, a subject on which virtually every poll shows the public completely at odds with the court. Public opinion on affirmative actions is more nuanced and more mixed. Polls on the subject conflict: some show upwards of 60% approval for affirmative action programs, and others show less than 50% support.") .

43. *Cf e.g.,* Sheldon Whitehouse, *A Right-Wing Rout: The Roberts Court's Partisan Opinions*, AMERICAN CONST. SOC. (Apr. 24, 2019), https://www.acslaw.org/issue_brief/briefs-landing/a-right-wing-rout-what-the-roberts-five-decisions-tell-us-about-the-integrity-of-todays-supreme-court/ ("Republican appointees to the Supreme Court have, with remarkable consistency, delivered rulings that advantage the big corporate and special interests that are, in turn, the political lifeblood of the Republican Party.").

44. *Cf e.g.*, *A Strange Tale from the Origins of the Abortion Culture War*, BBC, https://www.bbc.co.uk/programmes/articles/2DlBrS4vKk5StJqDK6yMZmt/a-strange-tale-from-the-origins-of-the-abortion-culture-war (last visited Feb. 17, 2025); Nicole Russell, *Did Conservatives Win the Battle on Abortion But Lose the Culture War on Life?*, USA TODAY (Apr. 11, 2024), https://www.usatoday.com/story/opinion/columnist/2024/04/10/roe-overturned-americans-anti-abortion-pro-life-conservatives/73265290007/.

is one more loss in a series of defeats suffered by an increasingly elitist, neoliberal, impotent defense of Black rights.

This elitism can be traced to middle-class and professional domination of the Civil Rights Movement and a consequent focus on integration into the political and economic infrastructure of white privilege and success.[45] Voices from other sectors of the Black community that focused on independence from such structures were disregarded and, in some cases, silenced by the middle class or by their white allies.[46] As liberal elements of the white infrastructure moved to the right and embraced neoliberalism,[47] the Black middle, upper, and professional classes traveled with them.

So, as left-wing and working-class Black groups called for reparations and economic independence, the white liberal establishment responded with affirmative action. Affirmative action, itself a compromise between left and center, has been steadily shaved down since then, limited to a shadow of its former self.[48] At the same time, the beneficiaries of affirmative action have come to reflect the Black privileged. Without the engagement and support of the broader Black community,[49] affirmative action became a sitting duck.[50] DEI, essentially "affirmative action light," is next on the chopping block for pretty much the same reasons.[51]

Instead of traditional reparations, to say nothing of the expanded versions offered by CARICOM and by human rights notions

45. *See generally* Harold A. McDougall, *Class Contradictions in the Civil Rights Movement: The Politics of Respectability, Disrespect, and Self-Respect*, 1 How. Hum. & C.R. L. Rev. 45 (2017) [hereinafter *Class Contradictions*].

46. *Id.*

47. For discussion of the embrace of Neoliberalism by the Democratic Party, see Thomas Ferguson & Joel Rogers, Right Turn: The Decline of the Democrats and the Future of American Politics (1987). For a definition of Neoliberalism, see David Harvey, Neoliberalism: A Brief History (Oxford Univ. Press 2005).

48. *See, e.g.*, Fisher v. University of Texas I, 570 U.S. 297 (2013) (a university may not consider race as a factor in admissions unless "available, workable race-neutral alternatives do not suffice," and that such a decision warrants strict scrutiny).

49. Aaron Blake, *Who's Okay With The Affirmative Action Decision? Many Black Americans*, Wash. Post (July 6, 2023), https://www.washingtonpost.com/politics/2023/07/06/whos-okay-with-the-affirmative-action-decision-many-black-americans/ (citing poll showing only 19% of Black people disapprove of the Supreme Court's SFA decision, believing affirmative action was not a benefit to them).

50. Opposition to affirmative action was crystallized and magnified by various Republican administrations, "labeling…affirmative action policies as "reverse discrimination" [against white males]..and advoca[ting] for a 'color-blind' society." Conservative Blacks like Clarence Thomas and Thomas Sowell joined the opposition. Philip C. Aka, *Affirmative Action and the Black Experience in America*, ABA Mag. (Oct. 01, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/fall2009/affirmative_action_and_the_black_experience_in_america/.

51. *See generally* Sheryll Cashin, *First Conservatives Came for Affirmative Action. Now They're Gunning for DEI Programs,* Politico (Aug. 10, 2023), https://www.politico.com/news/magazine/2023/08/10/affirmative-action-gop-culture-war-00110558.

of transitional and transitional justice, [52] thus far the best we have been offered is affirmative action. Even that was soon replaced by "diversity," its diminished derivative. Even that is now on the chopping block.

My own writing and research has focused on, among other things, the failure of the Civil Rights revolution of the 1960s to maintain engagement with the broad base of the Black population, indeed abandoning the working class and the poor.[53] This could have moved the struggle along the path towards cooperation, and eventually solidarity. Instead, the failure to build power within and accountable to the broad base of the Black community has been accompanied by a "disintegration" of that community,[54] as "transcendent elite" Black Americans embrace neoliberalism,[55] with the subsequent, ongoing cooptation of their youth into the Neoliberal project.[56]

This has led to underdevelopment and uneven progress among Black Americans, an enormous wealth gap within the US Black population,[57] and a lack of political, social and/or economic power in the Black community independent of institutions that the white ruling class dominate. At the same time, failure to challenge the white ruling class in a manner capable of supporting coalitions with the white non-ruling classes sets the stage for a successful counterrevolution by which the right wing of the white ruling class succeeded in demonizing Black American progress.[58] Such are the limitations of protest.

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52. The pillars of transitional justice include, besides reparations: truth seeking; justice, including criminal prosecution; institutional reforms; memorialization and guarantees of non-recurrence/non-repetition. U.N. Special Rapporteur on Truth, Justice, and Reparation, *Minimum International Legal Standards Underpinning the Pillars of Transitional Justice* (*Truth, Justice, Reparation, Memorialization and Guarantees of Non-recurrence*), U.N., https://www.ohchr.org/en/calls-for-input/2023/minimum-international-legal-standards-underpinning-pillars-transitional#:~:text=OHCHR%20%7C%20Minimum%20international%20legal%20standards,and%20guarantees%20of%20non%2Drecurrence (last visited Feb. 16, 2025) [hereinafter Call for Inputs].

53. *See Class Contradictions*, *supra* note 45.

54. *See generally* EUGENE ROBINSON, DISINTEGRATION: THE SPLINTERING OF BLACK AMERICA (Anchor 2011).

55. *See generally* LESTER K. SPENCE, KNOCKING THE HUSTLE: AGAINST THE NEOLIBERAL TURN IN BLACK POLITICS (Punctum Books 2015).

56. Judith Ohikuare, *When Minority Students Attend Elite Private Schools*, THE ATLANTIC (Dec. 17, 2013), https://www.theatlantic.com/education/archive/2013/12/when-minority-students-attend-elite-private-schools/282416.

57. This wealth gap among Black Americans is greater than the Black/white wealth gap or the wealth gap within the white population. Black upper-class wealth is more than a thousand times greater than that of the black poor. *See* Bertrand Cooper, *Affirmative Action's Blind Spot*, THE ATLANTIC (June 19, 2023), https://www.theatlantic.com/ideas/archive/2023/06/failure-affirmative-action/674439; *see also* Henry Louis Gates, Jr., *Black America and the Class Divide*, N.Y. TIMES (Feb. 1, 2016), https://www.nytimes.com/2016/02/07/education/edlife/black-america-and-the-class-divide.html.

58. *See generally*, KENNETH O'REILLY, NIXON'S PIANO: PRESIDENTS AND RACIAL POLITICS FROM WASHINGTON TO CLINTON (1st ed., Free Press 1995); *see also* Cashin, *supra* note 51.

II. Engaging The University To Support Community-Based Cooperation

In light of these developments, I decided to look beyond the protest campaigns for reparations and social justice from the perspective of a university faculty member. About ten years ago, I began to study the neoliberal takeover of "progressive" universities,[59] exacerbated by faculty's increasing distance from and failure to engage the community[60] and the decline in faculty internal solidarity and consequent failure to "guild" the faculty.[61]

According to one report, faculty "guilds"[62] comprise the university's "quality engine," and administrators should give them sufficient autonomy to ensure the integrity of their work and thereby, the success of the university.[63] On the other hand, the work of the "administrative shell" surrounding the guilds is essential to their success, supporting the recruitment and retention of students as well as faculty, to say nothing of "libraries, laboratories, computers, buildings, travel, research assistance, and the like."[64] The "defining function" of the shell is to raise money from donors and to facilitate "grant and contract application[s] and awards to expand the research base," as well as ensuring "the efficient and effective operation of the institution."[65]

Though the "administrative shell" surrounding the quality engine supplies crucial management and support, its hierarchical organizational structure should not spill over into the quality engine's academic core."[66] That upsets the university's balance, and that is the story of the neoliberal university. It is out of balance. Particularly disturbing developments

59. Joyce E. Canaan & Wesley Shumar, Structure and Agency in the Neoliberal University (Routledge 2008) (examining how universities reconfiguring in a corporate manner and becoming estranged from social movements is making them profoundly different from the universities of the 1970s and 1980s).

60. Harold A. McDougall, *The Rebellious Law Professor: Combining Cause and Reflective Lawyering*, 65 J. Legal Educ. 326, 329-30 (2015) [hereinafter *The Rebellious Law Professor*].

61. Harold A. McDougall, *The Challenges of Legal Education in the Neoliberal University*, 72 Nat'l Law. Guild Rev. 65, 71 (2015).

62. *Id.* at 72 (citing Lombardi et al., The Top American Research Universities, The Lombardi Program on Measuring Univ. Performance 7 (2002) (Guilds are "organized collections of individual experts" that "function as self-perpetuating communities.")).

63. *Id*.

64. *Id*. (discussing the relation between guild and administrative shell).

65. *Id.*

66. *Id.* at 73.

include managerialism,[67] de-professionalization,[68] precaritization,[69] and displacement of the mission and purpose of the university,[70] trends that are already underway[71] in the U.S., but are now accelerating.

To restore the balance, we as faculty need to "guild" our members in neoliberal universities. We must regain our lost autonomy by unionizing in public universities, putting real energy into American Association of University Professors ("AAUP") chapters in private universities, and generally stepping up when it comes to university governance.[72] By doing this, university faculty will be better able to use the university as a base from which to help protect the public at large from neoliberalism's onslaught, protect the communities from which we faculty have come, and empower our students as "social engineers."[73]

How might we proceed? By assisting community-based organizations and groups to build cooperative structures that might move us past protest and toward solidarity.[74] The Harvard Legacy of Slavery Initiative, an attempt to connect university and community, caught my attention in this regard.

III. The Havard Legacy Of Slavery Initiative And My Proposal

A. The Need for Reparations by Harvard

The Harvard Legacy of Slavery Report begins with the admission that during the colonial era slavery was commonplace, and "central to

67. *Id*. at 67 (citing Benjamin Ginsberg, The Fall of The Faculty: The Rise of the All-Administrative University and Why It Matters (2011)).

68. *Id*. at 69 (citing James M. Saslow, *Losing Our Faculties*, 98 Academe, no. 1 (May-June 2012) (reviewing Benjamin Ginsburg, The Fall of The Faculty: The Rise of the All-Administrative University and Why it Matters (Oxford Univ. Press 2011), Randy Martin, Under New Management: Universities, Administrative Labor, and the Professional Turn (Temple Univ. Press 2011), Gigi Roggero, The Production of Living Knowledge: The Crisis of the University and the Transformation of Labor in Europe and North America (Edna Brophy, trans., Temple Univ. Press 2011)*; see also Creative Destruction*, The Economist (June 28, 2014), https://www.economist.com/leaders/2014/06/28/creative-destruction.

69. *Id.* at 69-70; *see also* Garry Trudeau, DOONESBURY (Sept. 6, 2015), http://doonesbury.washingtonpost.com/strip/archive/2015/09/06.

70. McDougall, *supra* note 61, at 70.

71. *Id*. at 67.

72. *Id*. at 73.

73. McDougall, *supra* note 60, at 347.

74. *See, e.g.*, McDougall, *supra* note 12 at 801, 803 n.14, 821-23; Harold A. McDougall, *The Citizen's Assembly: A Civic Infrastructure for Progressive Social Change*, Huffington Post (Aug. 29, 2012), https://www.huffpost.com/entry/civic-engagment_b_1637398; *see also* Harold McDougall & Yaw Agyeman Boafo, *Vernacularizing Sustainability In Post-Colonial Ghana*, 34 Fordham Env't l. Rev. 1, 25 (2022) (describing the Root-Based Development project in the New Juaben traditional area of Ghana's Eastern Region, an extraordinary example of grass-roots democracy that could serve as a model for sustainable development worldwide).

life in Massachusetts and at Harvard."[75] Many Harvard faculty, staff, and administrators leaders held slaves from the University's very beginning in 1636 until slavery was abolished in Massachusetts in 1783.[76] Slaves were part of campus life for generations, working for and caring for Harvard presidents and professors and feeding Harvard students.[77]

Through connections to multiple donors, the University also had extensive financial ties to, and profited from, slavery during the 17th, 18th, and 19th centuries.[78] These financial ties include donors who accumulated their wealth through: slave trading; the labor of enslaved people on plantations in the Caribbean islands and the American South; the sale of supplies to such plantations and trade in goods they produced; and from the textile manufacturing industry in the North, supplied with cotton grown by enslaved people held in bondage in the American South.[79]

In the half-century before slavery was abolished nationally, five men made rich by slavery and by trading in "slave-produced commodities" accounted for more than a third of the donations Harvard received.[80] Their money supported the University as it built a national reputation, hired faculty, supported students, grew its collections, expanded its physical footprint, and developed its infrastructure.[81] Even today, these "benefactors with ties to slavery" are memorialized throughout Harvard's campus, with "statues, buildings, professorships, and student houses . . . ."[82]

Some prominent Harvard affiliates and campus residents worked against slavery, but they were too often countered by Harvard deans and Harvard Corporation leaders who worked to "moderate or suppress" their activities.[83] Their efforts were echoed in the academic life of the University, as prominent Harvard presidents and professors promoted "race science" and eugenics and conducted abusive research, including the photographing of enslaved and subjugated human beings.[84] These theories and practices were rooted in racial hierarchies of the

75. *Harvard & The Legacy Of Slavery,* Harv. Radcliffe Inst. 11-12 https://radcliffe-harvard-edu-prod.s3.amazonaws.com/43444f4b-d5f6-4d71-963d-e667b548a58d/HLS-whole-report_FINAL_2022-09-14FINAL-ua2.pdf (last updated Apr. 25, 2022).

76. *Id.* at 11.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

sort marshalled by proponents of slavery and would produce devastating consequences in the 19th and 20th centuries.[85]

The legacies of slavery—racial segregation, exclusion, and discrimination—continued well into the 20th century at Harvard, in the city of Cambridge and throughout the Boston metropolitan area. [86] Even today, the descendants of enslaved Black people in these areas face racially-charged challenges in education, health, criminal justice, and economic mobility on a daily basis.[87]

IV. The Initiative and My Proposal

Despite the shadow of the SFFA case, Harvard still managed to move forward with a much more progressive idea than affirmative action—reparations for its past misdeeds.[88] Calling for proposals, Harvard has opened a door for activists and scholars to think outside the box and examine remedies designed not only to protect and advance the rights and well-being of the entire Black community but also to engage that community in their construction and execution as well.[89] Transparency, accountability, and active democratic participation would be essential elements of the remedies developed under the Harvard Legacy of Slavery Initiative.

The analyses detailed in this article thus far led me to apply to the Harvard Legacy of Slavery Initiative to develop a curriculum along the lines I have set out below. I proposed that the curriculum be delivered to high school students who are members of communities of descendants of enslaved Black people in the Boston and/or Cambridge metropolitan area. That curriculum has now been completed and is awaiting acceptance and delivery, not only in the Boston area but in a number of other cities as well.

The curriculum, described in detail below, is designed to teach students their legal rights regarding the racially charged challenges they face in numerous areas of life. Teaching this to high school students is new for me. Still, the research grows out of many years of work by my Civil Rights Planning students at Howard University Law School, who have focused on the needs and lived experiences of Black communities impacted by slavery in the United States.

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85. "Records and artifacts documenting many of these activities remain among the University's collections." *Id.*

86. *Id.*

87. Irene Monroe, *Boston's Racist Past Haunts Its Present*, WGBH, (April 10, 2017) https://www.wgbh.org/news/commentary/2017-04-10/bostons-racist-past-haunts-its-present.

88. *Id.* at 60.

89. *Id.*

The curriculum includes a first-aid kit of how to respond to and navigate through each of these situations when confronted with them directly, as well as action strategies such as community organizing, social media campaigns, the protection of voting rights, and active citizenship in local politics. With exposure to certain analytical and expository techniques, participants can also write essays reflecting on what they have learned, the social context of legal rights, and how and why violations take place. Students might also share their insights through podcasts and social media. The overall dialogue would be enhanced by students engaging with adults in their community who have experience navigating these situations, as well as with community organizers.

The curriculum will soon be available on an e-platform, easily updated and revised in line with input from the teachers and community organizers who use it. Any of the e-components can be downloaded and printed as hard copies where needed. It can be delivered in a variety of settings and locations within different communities so it can be received by larger audiences. Examples include locations such as afterschool or summer school programs, community organizations, community colleges, and public libraries. Potential partners include nonprofits, educational institutions at all levels, community-based organizations, and thought leaders of all ages and backgrounds–students, community organizers and more.

Projects using the curriculum will use education to address systemic inequities in Black communities. They will provide access to the truth about the racially-charged challenges and harms that descendants of enslaved African-Americans have and continue to face. The curriculum can be shared and disseminated, to promulgate social justice strategies and tactics that can build and expand equity. The program's community locations will facilitate community engagement and collaboration, helping gather the insights, ideas, and experiences of community members. Let's walk through the steps.

V. Building A Cooperative Curriculum For The Community

A. What's The Problem?

The Black communities of Boston, like so many other Black communities,[90] have absorbed multigenerational trauma affecting a variety of emotional and tactical responses in people of African descent,

90. *Cf. CARICOM*, *supra* note 4 (compare with the African descended population in the Caribbean).

as well as an ongoing crisis in public health.[91] We can view this trauma through a number of lenses. In terms of housing, Black communities encounter redlining, environmental pollution, urban renewal, eminent domain, and regular interruptions of food and water supply.[92] Culture has also been affected; importantly, there has been an estrangement from community wisdom, legacy, and problem-solving techniques. Human physical, emotional, and mental health have suffered as a result. Today, these communities continue to face ongoing repression and subordination along racial and class lines,[93] appearing as racially-charged challenges in education, health, criminal justice, and economic mobility.

1. Where Did It Come From?

The problems stem from slavery, colonialism, and their social, economic, and ideological descendants. The roots of these issues include structural and attitudinal racism, racist exploitation and violence. These have manifested over time in many forms, ranging from capture, imprisonment, rape, and murder to elaborate schemes of profit and subordination of Black people which continue to this day.[94]

2. What Solutions Have Been Tried and What Have Been These Solutions' Limitations?

As discussed earlier, civil rights, affirmative action, and DEI strategies all wind up reinforcing or replicating the status quo.[95] In the United States, these previous solutions included attempts to protect civil and political, and occasionally, economic and cultural rights, though the latter were usually framed as individual advancement such

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91. Milton J. Valencia, *'We Have a Long Way To Go': Three Years After Boston Declares Racism a Public Health Threat, The Work is as Critical as Ever*, BOS. GLOBE (Dec. 18, 2023), https://www.bostonglobe.com/2023/12/18/metro/work-for-racial-equality-remains-critical-in-boston/#:~:text='We%20have%20a%20long%20way,is%20as%20critical%20as%20ever&text=Just%20over%20three%20years,public%20health%20crisis%20in%20Boston.

92. *See, e.g.*, D'Jenaiya Bowser, *6 Types of Environmental Racism*, DIVERSIFY OUTDOORS (July 20, 2022), https://www.diversifyoutdoors.com/blog/2022/7/20/6-types-of-environmental-racism.

93. Racially-charged challenges also face people of African descent throughout the world—in the Caribbean, Latin America, and Western Europe as well as the African Continent.

94. These factors take different forms in different locations on the African continent and in the African Diaspora, but it is useful to view them through lenses that help us see the connections among them, and to see how our struggles against these factors are related to one another. *See, e.g.*, Gimel Rogers & Thema Bryant-Davis, *Historical and Contemporary Racial Trauma Among Black Americans: Black Wellness Matters*, *in* HANDBOOK OF INTERPERSONAL VIOLENCE AND ABUSE ACROSS LIFESPAN 165 (Springers International Publishing 2021); Zoe Kinias & Felicia Henderson, *Unearthing the Roots of Systemic Racism,* INSEAD KNOWLEDGE (July 15, 2020), https://knowledge.insead.edu/responsibility/unearthing-roots-systemic-racism; *The Transatlantic Slave Trade*, EQUAL JUST. INITIATIVE (2022), https://eji.org/report/transatlantic-slave-trade/.

95. *See infra* notes 72-73 and accompanying text.

as affirmative action (providing jobs for individuals) and DEI (enhancing corporate culture).[96]

Besides the obvious limitation that all these remedies are temporary in the face of white backlash,[97] none of them address psychological and cultural trauma. This is a limitation faced by demands for reparations that focus on monetary and material compensation alone.[98] Many discussions on reparations involve legislative measures aimed at monetary compensation, an approach that carries merit in addressing the financial impacts of historical injustices.[99] However, this route also presents significant political and legal hurdles, which are briefly addressed in Part II. This article explores an alternative approach centered on community building and education, without dismissing or precluding the validity of other reparative strategies.

a. *The New Approach*

My proposal to the Harvard Initiative received a "seed" grant, to facilitate the development of "Liberation" schools for adults as well as youth in Black communities throughout the United States. I have begun by developing a curriculum for such Liberation Schools, detailed throughout the article. The curriculum is divided in three parts: (1) Know Your Rights and Prepare; (2) Know Your Roots and Repair; and (3) Know Your Resources and Rebuild.

This curriculum is designed for high school students (say ages sixteen to eighteen) and advises them of their legal rights in the face of certain recurring challenges that Black people face. It will also address the need for the truth about past abuses[100] as well as the need

96. Here are the thoughts of one student in DEI: "Since 2020, I have observed that DEI initiatives have dwindled, possibly because they have already served their profit-making purpose. As a 25-year-old woman of color entering the corporate world, I find that DEI initiatives often feel insincere and fail to create real equitable change. This, I believe, is because these initiatives do not align with the company's culture and mission statement." Zoom Interview with student applicant [name withheld], Student, Howard University School of Law.

97. *Cf. infra* note 72 and accompanying text.

98. *See, e.g.*, H. Steven Moffic, et al., *The Case for Psychiatric Reparations*, 38 Psychiatric Times (Aug. 11, 2021), https://www.psychiatrictimes.com/view/the-case-for-psychiatric-reparations.

99. Jodi Heckel, *Why is the Reparations Movement Gaining Momentum in the U.S.?*, Univ. of Ill. Urbana-Champaign (Apr. 18, 2024), https://news.illinois.edu/why-is-the-reparations-movement-gaining-momentum-in-the-u-s/ (While direct monetary compensation is part of the call for reparations, the types of restitution that the reparations movement is seeking are far broader.)

100. *See Statement Submitted by the United Nations' Working Group of Experts on People of African Descent, on the Conclusion of its Official Visit to USA, 19-29 January 2016*, U,N. (Jan. 29, 2016), https://www.ohchr.org/en/statements/2016/01/statement-media-united-nations-working-group-experts-people-african-descent [hereinafter Working Group Statement] ("The colonial history, the legacy of enslavement, racial subordination and segregation, racial terrorism, and racial inequality in the US remains a serious challenge as there has been no real commitment to reparations and to truth and reconciliation for people of African descent.").

for community-based insurgence[101] and state prevention of future atrocities,[102] eliminating laws and practices undergirding dual systems in punishment, health, education, and economy.[103] This accessible curriculum can also be used to engage adults in the community. The curriculum will be made accessible via a web-based platform, presently under construction.

i. Liberation 101: Know Your Rights And Be Prepared (First Aid Advice In 12 Racially Charged Emergency Situations) aka Protest

Liberation 101 examines the objective conditions faced by urban Black youth today. It will provide a primer on how to respond to and navigate through racially-charged situations when confronted with them directly, reviewing the racial challenges detailed earlier. The key questions here are: "What's the problem?" and "How do I respond when confronted with an emergency?"

I began examining this area in 2002, with an article examining "critical race practice."[104] Critical race practice traces the work of progressive lawyers working to address the systemic issue of racism that is embedded in legal, political, and social structures described by Critical Race Theory.[105] Liberation 101 addresses racism as an "ideology" more than a simple idea, helping students understand objective social, economic, and political conditions as elements of racism. To truly challenge these inequalities, we must understand that history is not predetermined but shaped by human decisions. A critical understanding of history can help us understand how racism has been reproduced over time and how it can be dismantled in the future.

Racism is a mix of ideas, customs, institutions, and organizational practices.[106] "Race" is the categorization of people by physical

101. *Id.* ("The US has a growing human rights movement which has successful [sic] advocated for social change. Following the epidemic of racial violence by the police, civil society networks calling for justice together with other activists are strongly advocating for legal and policy reforms and community control over policing and other areas which directly affect African Americans.").

102. *See, e.g.*, *The Attorney General's Smart on Crime Initiative*, U.S. DEPT. OF JUST., https://www.justice.gov/archives/ag/attorney-generals-smart-crime-initiative (last updated Nov. 29, 2023) (calling for a strengthening of community-police relationships across the country, reducing the use of solitary confinement at the federal level by prohibiting solitary confinement of juveniles, diverting inmates with serious mental illness to alternative forms of housing and establishing that inmates should be housed in the least restrictive setting, among other issues).

103. *See N'COBRA*, *supra* note 1.

104. Harold A. McDougall, *For Critical Race Practitioners: Race, Racism and American Law (4th ed.) by Derrick A. Bell, Jr.* 46 HOW. L.J. 1 (2002).

105. *Id.*

106. *See generally* Paul Costello, *Racism and Black Oppression in the United States: A Beginning Analysis*, 24 THEORETICAL REV. 12 (1981).

differences such as skin color and hair texture.[107] "Racialization" is the process by which individuals are assigned membership in these categories.[108] "Racism" is the product of the two working together.[109] Racism in the U.S. is deeply rooted in the nation's history of slavery, colonization, and economic exploitation. These historical events laid the foundation for the racial disparities that persist today. Early laws and policies, including those that restricted the rights of Black Americans, helped institutionalize these racial hierarchies.

Liberation 101 begins by teaching the foundations of systemic racism. Throughout U.S. history, numerous efforts have been made to address racial inequality, from legal reforms like the Civil Rights Act to social movements such as Black Lives Matter. While these efforts have made important strides, they have often faced significant resistance, and many of the gains have been rolled back over time. For instance, affirmative action policies have been undermined, and racial disparities in education, housing, and criminal justice remain. One key reason these efforts have fallen short is that they have focused too narrowly on legal and policy changes without addressing the deeper structural factors that perpetuate inequality. Legal reforms alone cannot dismantle the entrenched social, political, and economic systems that maintain racial injustice. Without addressing these broader structural issues, changes in the law are often superficial or temporary.

Liberation 101 teaches students that to effectively combat racism, it is essential to shift from theory to practice. Critical Race Theory has exposed the persistent nature of racial inequality, but its insights need to be applied in concrete ways. This requires a focus on grassroots organizing and political action that targets all levels of racism—beliefs, institutions, and laws.[110]

A key strategy for dismantling systemic racism is the formation of multi-class coalitions. These coalitions unite people from different racial, economic, and social backgrounds to challenge racial inequality. By focusing on shared struggles—whether related to economic inequality, labor rights, or political power—such coalitions can build broader support for anti-racist initiatives. Grassroots movements are also crucial, as they allow communities affected by racial injustice to take the lead in organizing for change.

107. Derrick A. Bell, Race, Racism and American Law 79 (Aspen Publ'g 4th ed. 2000) (1973).
108. *Id.*
109. *Id.*
110. *See* Costello, *supra* note 106.

While legal challenges and community organizing are important, they must be part of a broader strategy that targets the political and economic systems that sustain racism. This includes not only laws but also corporate practices, cultural norms, and economic policies. To achieve lasting change, we must confront these systems head-on. A comprehensive approach involves advocating for legal reforms and engaging in public education, direct action, and activism to challenge the broader structures of power that sustain racial inequalities. This can include campaigns to raise awareness about racial injustice, protests to disrupt harmful policies, or lobbying efforts to change the political and economic landscape. The fight against racism is not just a legal or political issue, but a societal one, requiring collective action and sustained commitment to justice. Liberation 101 exemplifies a comprehensive approach through which we can begin to address the deep-rooted racial injustices that continue to shape American society.

Further, in Liberation 101, we move beyond the studies of racial injustice writ large and synthesize it with some elements of Street Law. The street law curricula I have thus far encountered seem to focus on creating pipeline opportunities for high school students to become lawyers. They provide what is essentially a social studies curriculum, focusing on the Constitution and some aspects of the legislative process. Liberation 101 instead focuses on private and public racialized encounters that are ultimately managed by law, looking at them through the lens of a lay person, and proposing practical steps they can take when confronted with a race-based challenge.

The Liberation 101 materials are lodged within an e-book I have named "Social Justice Studies." It is designed to make it accessible to high school students and community members and will be made available "open source" through a variety of outlets, free of charge. The materials are divided into chapters. Liberation 101 is covered in chapters 1 through 10. Each chapter covers specific areas of racially-charged challenges, such as employment or housing discrimination, police encounters, maternal health, and discrimination in schools.

The condensed and simplified textual material in each chapter looks at several key questions: What's the problem? Where did it come from? What's the law? What policy solutions have been tried already and how can those be improved? We then address emergency situations, using infographics and videos that are helpful to launch role playing and simulation exercises, helping students prepare for emergency situations where their rights can be clearly compromised and when there is no lawyer in sight.

The curriculum includes a first aid kit on how to respond to and navigate through each of these situations when confronted with them directly. Small-group discussion and co-learning can facilitate this process. This feature could be enhanced if they engaged in dialogue with adults in their community with experience navigating these situations.

Students will respond, verbally and in writing, to specific questions given and study from an e-platform covering various topics that uses terminology geared toward students based on their respective grade levels. Materials on the platform include text documents, infographic guides, and whiteboard videos, all of which can be downloaded.

ii. Liberation 102: Know Your Roots and Repair (Using Proverbs To Reconstruct Cultural DNA, i.e., Problem-Solving Techniques Expressed In The proverbs) aka Cooperation

Liberation 102 addresses the need for reparations to repair the damage done by historical race-based trauma to community physical and mental health and financial and environmental ecosystems (including redlining, urban renewal, toxic waste, food deserts, racial violence), as well as present-day racially-charged challenges and harms that Black people continue to face. The key questions here are "what caused this damage?" and "how can we repair and heal?"

Liberation 102 has been deepened and enhanced by using the lens of "epigenetics"[111], a concept I have only recently encountered. The epigenetics lens enables us to focus on the need for rehabilitation stemming from generations of disturbance to physical and Cultural DNA[112] occurring in response to trauma and ecological abnormality. This includes the public health crisis descendant communities face, their need for psychological rehabilitation,[113] and their need to access both their

111. Physical epigenetics looks at the effect of physical injuries upon the descendants of the injured person, transmitted through DNA, including, for example, enhanced vulnerability to hypertension and high blood pressure. *See Epigenetics, Health and Disease*, CDC, https://www.cdc.gov/genomics-and-health/about/epigenetic-impacts-on-health.html (last visited Feb. 19, 2025). Social epigenetics looks at the effect of injuries to a person's self-worth, particularly as it affects one's ability to solve social, economic, political and cultural problems one enchanters. *See* Daniel A. Notterman & Colter Mitchell, *Epigenetics and Understanding the Impact of Social Detriments of Health*, 62 Pediatric Clinics of N. Am. 1227, 1228 (2015); Chantel L. Martin et al., *Understanding Health Inequalities Through the Lens of Social Epigenetics*, 43 Ann. Rev. of Pub. Health 235, 247 (2022). Social epigenetics can also be passed on to the descendants of the injured person, transmitted through "cultural" DNA. Epigenetics thus broadly defined could be addressed under the headings of cultural institutions, public health crisis, African roots and contemporary knowledge, and psychological rehabilitation.

112. Interview with Jonathan McDougall, in Columbia, Md. (May 23, 2024) ("An alarm system around the clock that affects digestion and sleep, causing cortisol overloads. Mood, memory, and concentration, problem solving skills are all affected, creating maladaptive versions of oneself merely to survive, producing a wary, jaded caged animal, enveloped by precarity and pain.").

113. *See CARICOM*, *supra* note 4.

African roots as well as contemporary problem-solving and knowledge that has developed throughout the African Diaspora.[114]

Research has consistently shown how Black Americans have suffered persistent transgenerational health disparities.[115] One study of the health disparities present in Black Americans has led researchers to conclude that environmental stressors can become "embodied as biological patterns that influence health and disease."[116] Epigenetics studies "how environmental stimuli modify the expression of individual genes without changing the DNA itself."[117] These changes in genetic expression have been linked to the presence of diseases and disorders, such as "hypertension, insulin resistance, and diabetes" in succeeding generations.[118] Studies have also linked epigenetic changes to the presence of pathological diseases "ranging from dominant genetic disorders to neurological conditions, including spontaneous schizophrenia and autism."[119] These alterations can pass to future generations through maternal or paternal inheritance.[120]

Epigenetics can track how environmental stimuli from slavery, such as abuse, "stress…pollution, or other environmental trauma" creates "cellular alterations constituting 'real' physical changes,"[121] including "post-traumatic stress and other health problems."[122] These disparities include a higher mortality rate due to a heightened presence of "cardiovascular diseases…hypertension, diabetes, and obesity."[123] Studies of pregnant Black American mothers has also shown how stressors

114. *See* Interview with Jonathan McDougall, *supra* note 112 (referencing the African adage of *Sankofa*) ("It is not wrong to go back for that which you have forgotten. . . . We must go back to the cultural and religious frameworks of our ancestors. Linguistic as well, because language is philosophy. Retrieve our identity from what time and trauma have done to obscure it. From what racist and ableist projections of colonizers and capitalists and collaborators have done over generations to our ancestors and to us. We will now always be able to find the path through the darkness should more come.").

115. William Chin, *Epigenetics and Reparations: How Epigenetics Can Help Federal Plaintiffs Meet the Constitutional Article III Standing Requirements in Reparation Lawsuits*, 22 SEATTLE J. FOR SOC. JUST. 3, 24 (2024) (citing Bridget J. Goosby & Chelsea Heidbrink, *The Transgenerational Consequences of Discrimination on African Am. Health Outcomes,* 7 SOC. COMPASS 630, 636-37 (2013)).

116. *Id.* at 36 (citing Christopher W. Kuzawa & Elizabeth Sweet, *Epigenetics and the Embodiment of Race: Developmental Origins of US Racial Disparities in Cardiovascular Health*, 21 AM. J. HUM. BIO. 2, 11 (2009)).

117. *Id*. at 5.

118. *Id.* at 8 (citing Goosby & Heidbrink, *supra* note 115, at 636-37, and Lucy A. Jewel, *The Biology of Inequality*, 95 DENV. L. REV. 609, 640 (2018)).

119. *Id*. at 14 (quoting Miguel João Xavier et al., *Transgenerational Inheritance: How Impacts to the Epigenetic and Genetic Information of Parents Affect Offspring Health,* 25 HUM. REPROD. UPDATE 519, 520 (2019)).

120. *Id*. at 31 (citing Meenu Ghai et al., *A Review on Epigenetic Inheritance of Experiences in Humans,* 60 BIOCHEMICAL GENETICS 1107 (2021)).

121. *Id*. at 7, 12 (citing *Epigenetics & Inheritance*, GENETIC SCI. LEARNING CTR., U. UTAH https://learn.genetics.utah.edu/content/epigenetics/inheritance (last visited Jun. 15, 2023)).

122. *Id*. at 14.

123. *Id*. at 35.

they faced during pregnancy led to their offspring "experiencing elevated risks of lower birth weight and subsequent chronic health conditions, such as cardiovascular disease."[124] Other studies have found that environmental stressors have led middle-aged Black women to have a "telomere[125] length [that is] shorter [on average] than white women,"[126] which could lead to "telomere biology disorders…including anemia, bone marrow failure, pulmonary fibrosis, or premature death."[127]

Connecting epigenetics with the concept of Cultural DNA helps us more fully understand the damage caused by slavery and its spinoffs. One of the principal points of damage has been to Cultural DNA–the way we solve problems and the way we transmit problem-solving algorithms and ecosystems from one generation to another. The action portion of Liberation 102 involves reconstructing not only our understanding of how we have resolved problems in the past, but how we can approach the future. It aims to empower us to reconstruct, renovate and rehabilitate the ecosystems we have developed as a community as we solve political, economic, social, and cultural problems.

In Liberation 102, the metaphor and syntax of the griot provides a medium by which traditional and received wisdom–from our ancestors, our families and fellow community members–can be transmitted to the next generation. Griots' historical social role was to serve as conduits of Cultural DNA through recitation of folk wisdom through parables, poetry, and song.[128] In our case, the griots will be teachers and storytellers in the community. They will pass along Cultural DNA using a collection of African and African diaspora proverbs that synthesize this wisdom.[129] Young people receiving these transmissions can take deep dives in peer-to-peer study circles similar to the operational techniques of the Algebra Project.

The Algebra Project, founded by Bob Moses of the Student Nonviolent Coordinating Committee ("SNCC"), operates through a "flexible

124. *Id*. at 18.

125. A telomere is a region of repetitive DNA sequences at the end of a chromosome. Telomeres protect the ends of chromosomes from becoming frayed or tangled. Each time a cell divides, the telomeres become slightly shorter. Eventually, they become so short that the cell can no longer divide successfully, and the cell dies. Lisa H. Chadwick, *Telomere*, Nat'l Hum. Genome Rsch. Inst. (Sept. 8, 2024), https://www.genome.gov/genetics-glossary/Telomere.

126. Chin, *supra* note 115, at 35 (citing Arline T. Geronimus et al., *Do US Black Women Experience Stress-Related Accelerated Biological Aging?*, 21 Hum. Nature 19, 31 (2010)).

127. *Id.* (citing Olivia Carlund et al., *DNA Methylation Variations and Epigenetic Aging in Telomere Biology Disorders*, 13 Sci. Rep. 1, 7 (2023)).

128. *See, e.g.*, *Griots*, Vocabulary.com, https://www.vocabulary.com/dictionary/griot#:~:text=In%20West%20Africa%2C%20a%20griot,genealogy%20of%20a%20particular%20tribe (last visited Feb. 19, 2025) ("In West Africa, a griot is a storyteller, poet, or musician. The performances of griots often involve relaying the history and genealogy of a particular tribe.").

129. *See, e.g.*, Kwaku Amoako Ampofo, The Ghanaba Day Name Heritage Book: A Short Guide To Your Ancestry (2025).

teaching/learning/earning"[130] model in which high-schoolers are paid, "as members of collectives," to "teach other what they know"[131] in a "parallel educational structure," [132] a functioning mini-society sustained by peers, [133] in which knowledge is naturally produced and exchanged. [134] Graduates of the program often continue as teachers or mentors. [135] Cultural DNA is also engaged, because the knowledge work involved in these peer-to-peer exchanges is "connected and integrated with other parts of [their lives.]" [136]

Thus enabled, students can begin to consider how such epigenetic damage has impaired physical and Cultural DNA over generations.[137] They can explore Black approaches to identity, belonging, mutual aid, problem-solving and decision-making to build capacity and rebuild a sense of wholeness and worth. An in-depth examination of all these is beyond the scope of this article.[138] Our present focus is on social justice strategies and tactics designed to build and expand capacity, restore and refurbish cultural problem-solving techniques, and rebuild political, economic, and civic infrastructure in the Black community. [139]

The Griot apprenticeship program curriculum, currently in development, will look through the lenses of self-worth and problem-solving techniques using proverbs and words of wisdom presented in book form (supplemented with social media avenues such as those used in Liberation 101.). Proverbs have already been organized into the following topics in a draft book manuscript: Time To Repair (Caring, Civility, Community, Continuity) and Time To Prepare (Conflict, Colonialism, Courage).[140]

Here are some examples.

Caring: "*Love makes your soul crawl out from its hiding place, Zora Neale Hurston*."[141]

Civility:"*Examine what is said, not who is speaking, African proverb."*[142]

130. See GILLEN, *infra* note 171, at 149.
131. *Id.* at 24.
132. *Id.* at 31.
133. *Id.* at 31.
134. *Id.* at 33.
135. *Id.* at 26.
136. *Id.* at 31.
137. *Cultural DNA, supra* note 5, at 65.
138. I have addressed many of these in other articles of mine. *See, e.g.*, *id.*, at 70-83.
139. *See* McDougall, *supra* note 12, at 803 n.14, 821-23; *see also* McDougall, *supra* note 74.
140. A book manuscript is presently being prepared for publication by my son Jonathan McDougall. It will be published in Ghana and subsequently made available worldwide as an e-book through Amazon.
141. *Zora Neale Hurston*, GOODREADS, https://www.goodreads.com/quotes/56210-love-makes-your-soul-crawl-out-from-its-hiding-place (last visited Feb. 19, 2025).
142. Maryn Liles, *150 of the Best African Proverbs About Life, Love and Family That Are Full of Poetic Wisdom*, PARADE, https://parade.com/1100530/marynliles/african-proverbs/#:~:

> Community: *If you want to go fast, go alone. If you want to go far, go together, African proverb.*[143]
>
> Continuity: *We are journeymen, planting seeds for someone else to harvest, Wallace Thurman.*[144]
>
> Courage: "*Power concedes nothing without a demand*." *Frederick Douglass.*[145]

As with Liberation 101, the focus will be on small-group discussion and co-learning but here there would be a greater focus on role-play, simulations, and artistic and musical interpretation. Students can be grouped in threes and fours to discuss and read proverbs aloud, responding to discussion questions, but also drawing pictures and studying the author or the location from which the proverb came. Students can also explore their cultural heritage through conversation with their elders.

Liberation 102 is covered by chapters 11 and 12 of the e-book. Chapter 12 provides materials for restoring Cultural DNA and for training "griots." Chapter 11 covers structural and residential challenges (e.g., gentrification, homelessness) and how to overcome them (e.g., community land trusts, cohousing). Chapter 11 also covers deprivations under existing economic conditions and possible ecosystems for response (e.g., mutual aid, cooperatives, and the sharing economy). The griots, communicators of Cultural DNA and community problem-solving energy and techniques, are critical to this entire process.

iii. Liberation 103: Know Your Resources and Rebuild (Community-Based Responses To The Problems Described In Liberation 101 and 102) aka Solidarity

Liberation 103 addresses the need to repair generations of damage to civic, financial, political, and environmental ecosystems. Topics include financial and retail redlining, food deserts, urban renewal, gentrification[146], unequally funded and under-funded schools, disproportionate exposure of Black communities to environmental hazards, and

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text=%E2%80%9CExamine%20what%20is%20said%2C%20not%20who%20is%20speaking.%E2%80%9D (last updated Feb. 1, 2023).

143. #PassItOn, https://www.passiton.com/inspirational-quotes/7293-if-you-want-to-go-fast-go-alone-if-you-want (last visited Feb. 19, 2025).

144. QuoteFancy, https://quotefancy.com/quote/1736375/Wallace-Thurman-We-are-mere-journeymen-planting-seeds-for-someone-else-to-harvest (last visited Feb. 19, 2025).

145. *(1857) Frederick Douglass, "If There Is No Struggle, There Is No Progress,"* BlackPast (Jan. 26, 2007), https://www.blackpast.org/african-american-history/1857-frederick-douglass-if-there-no-struggle-there-no-progress/.

146. Harold A. McDougall, *Gentrification: The Class Conflict Over Urban Space Moves into the Courts*, 10 Fordham Urb. L.J. 177, 177-79 (1981).

political gerrymandering. The key question here is "How best can the community respond and rebuild for the long term?"

I began examining this area in 2013, with an article in which I used the term "civic infrastructure" to describe the organizing work being done by Occupy Wall Street.[147] This term became an additional focus for the research and writing my students were doing in both the Civil Rights Planning and Sustainable Development Planning seminars. Civic infrastructure is best understood through the mechanism of the citizens assembly, a confederation of permanent caucuses of community members, each caucus having no more than eight members.[148]

After seeing this technique used by members of the Iroquois confederation, Thomas Jefferson developed the idea of ward republics, using confederations to assemble the residents of a congressional district into a series of concentric, linked caucuses in order to select their member of Congress. In the 1990s, Don Anderson, a Black descendant of Jefferson's[149] who was inspired by Jefferson's notes on the ward republics[150], created a contemporary version in Virginia called the National Association of the Southern Poor.[151]

Anderson created caucuses of seven families in one Virginia county.[152] Each caucus selected one representative to sit on a committee of seven which then represented forty-nine families. [153] Each committee then selected a delegate to sit on a council of seven, which now represented 343 families. Finally, each council's selected representative sat in session as an assembly, a legislature that would enact laws governing the entire county.[154]

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147. McDougall, *supra* note 74.

148. This number is based on my experiences with study circles, as a board member of the Study Circles Resource Center (now called Everyday Democracy, https://everyday-democracy.org/) from 2008-2012.

149. Story told to me by Don Anderson, now deceased.

150. *The Assembly: A Tool for Transforming Communities (Annual E. F. Schumacher Lectures Book 16),* AMAZON, https://www.amazon.com/Assembly-Transforming-Communities-Schumacher-Lectures-ebook/dp/B00TJCWB9S (last visited Apr. 22, 2025) ("Donald Anderson highlights the necessity in the fight against poverty to first and foremost organize communities and let them decide their courses of action for themselves rather than designing and imposing programs from outside of the community. He puts forth the Assembly as an organizational concept suited to this purpose. The Assembly is rooted in Thomas Jefferson's vision of wards acting as small, engaged republics.").

151. *Class Contradictions*, *supra* note 45, at 75-76, 85; *see also* Donald Anderson, The Assembly: A Tool for Transforming Communities, SCHUMACHER CTR., https://centerforneweconomics.org/publications/the-assembly-a-tool-for-transforming-communities/ (last visited Apr. 22, 2025).

152. *Id.*

153. *Id.*

154. *Id.* I estimated that employing a similar model in Baltimore's Sandtown neighborhood would yield an assembly of thirty people representing that community. Sandtown was the home of Freddie Gray, who was killed by police in 2015. *See* Harold A. McDougall, *What Happens When the Protests Are Over?* HUFFPOST (June 1, 2016), https://www.huffpost.com/entry/what-happens-when-the-protests-are-over_b_7222548.

Indigenous communities in other parts of the world have used similar approaches for many centuries. An updated version exists in India's southern province of Kerala. In that example, each small group has the authority to recall their delegate should they depart from the delegated authority. Another was proposed in Ghana's New Juaben region, called by the originator "root-based" development (discussed further below).[155]

Following the study format and delivery mechanisms of detailed above, students will examine how these problems developed and examine possible collective responses.[156] These include cohousing, community land trusts, cooperatives, Saturday schools, apprenticeship programs, study circles[157], citizen's assemblies[158], unions, and shared "third" spaces.[159] Action items also include political strategies such as those outlined in the original proposal: community organizing, social media campaigns, the protection of voting rights, and active citizenship in local politics. Here, students will consult with informal leaders of the community, as well as other elders, and consider how to spark mutual aid circles that then link up into citizen's assemblies. The scale of the problems requires the students and their mentors to engage as many actors as possible to avoid fatigue.[160]

This engagement requires a final lens for it to be effective– "vernacularization." [161] This is a term I encountered in the spring of 2014 while on sabbatical at the law Faculty of the University of the West

155. I examined this proposal in an article co-authored with a colleague from the University of Ghana. *See supra* note 74; *see also infra* text accompanying note 164.

156. Jackson, Mississippi is a good case study. *See About the People's Assembly*, JXN People's Assembly, https://jxnpeoplesassembly.org/about/ (last visited Feb. 19, 2025); *see also Jackson People's Assembly Holds Meeting*, WJTV (Jan. 13, 2024), https://www.wjtv.com/video/jackson-peoples-assembly-holds-meeting/9328174/.

157. *See, e.g.*, *Study Circles*, The Co-Intelligence Inst., https://www.co-intelligence.org/P-studycircles.html (last visited Feb. 19, 2025) ("are voluntary, self-organizing adult education groups of 5-20 people who meet three to six times to explore a subject, often a critical social issue.").

158. *See generally* McDougall, *The Citizen's Assembly*, *supra* note 74.

159. Asia Quizon-Colquitt, *Third Places: What Are They and Why Are They Important to American Culture?*, The Univ. of Chi. Eng. Language Inst. (Nov. 1, 2023), https://esl.uchicago.edu/2023/11/01/third-places-what-are-they-and-why-are-they-important-to-american-culture/#:~:text=Some%20of%20these%20spots%20can,and%20connect%20with%20their%20community ("[The] term . . . describe[s] the places outside of the home (the first place) and the workplace (the second place) where people go to converse with others and connect with their community. . . .[Examples include] coffee shops, bars, libraries, and parks . . . .").

160. For more on how to rebuild African American culture and community, see *Cultural DNA*, *supra* note 5, at 84-85 (discussing of techniques of cultural renovation, youth mentoring, social business, and engaging the University in "action research" such as Community Schools and University-Based Social Incubators). Many of these ideas came from my students. For a discussion of how these advances can lead to political and economic power, see my article on the role of city dwellers in such developments, *See Think Nationally, Act Locally: Cities and the Struggle for Social Justice,* 58 San Diego L. Rev. 849, 850, 860, 867 (2021) [hereinafter Think Nationally] (discussing the formation of citizens' assemblies, and the "phase shift" approach to mapping progress toward social justice).

161. *See* McDougall & Boafo, *supra* note 74 at 21-24.

Indies in Jamaica. My colleagues there introduced me to the work of Sally Engle Merry, a professor of law at Columbia University working in the area of women's human rights.

Merry's work showed that when well-meaning, cosmopolitan human rights advocates engaged with Indigenous populations and with residents of developing countries, they had to learn the "vernacular"–the local language–in order to communicate their ideas and concepts. As the human rights advocates examined the new words they were learning, they often found that the concepts, when expressed in the vernacular, were slightly different from those of their own cosmopolitan language. In some cases, the differences provided useful additions to their own understanding of women's rights. Thus, vernacularization becomes a dialectical exchange, in which local languages and practices (Cultural DNA, one might say), are infused with cosmopolitan concepts, and cosmopolitan language and approaches are expanded as well.

Interestingly, as I came off the sabbatical in the fall of 2014, I fortunately attended a conference sponsored to honor Gerald Lopez, met him, and became very interested in his concept of rebellious lawyering. His basic thesis–that social activist lawyers could learn a thing or two from the communities they serve–folded nicely into the vernacularization concept I had just encountered during my time in Jamaica. And, like my colleagues in Jamaica, I was very interested in how legal academics could become similarly engaged. The outcome was my 2014 article, *The Rebellious Law Professor*.[162]

These two concepts–vernacularization and rebellious lawyering–have informed the research and writing done by students in my Civil Rights Planning and Sustainable Development Planning seminars ever since, a period of about ten years. During that time, several of my newer articles have pursued these themes,[163] the two most recent being *Vernacularizing Sustainability In Post-Colonial Ghana*[164] and *Think Nationally, Act Locally: Cities and the Struggle for Social Justice.*[165]

The *Vernacularizing Sustainability in Post-Colonial Ghana* article introduces a final concept, "root-based development," pioneered by Professor Oti Boateng, an Ashanti chief and UN statistician. Similar

162. *The Rebellious Law Professor*, *supra* note 60 (exploring how law professors can create experiential learning opportunities for their students to connect them with social movements struggling with class and race issues, adding their insights, problem assessment, and problem-solving skills to our own).

163. *E.g.*, Harold McDougall, *The Policing Question: Protection vs. Service in 2020*, NAT'L LAWS. GUILD (Dec. 9, 2020), https://www.nlg.org/the-policing-question-protection-vs-service-in-2020/.

164. McDougall & Boafo, *supra,* note 74, at 24-25 (describing the Root-Based Development project in the New Juaben traditional area of Ghana's Eastern Region, an extraordinary example of grass-roots democracy that could serve as a model for sustainable development worldwide).

165. *Think Nationally*, *supra* note 160.

in many ways to the delegate circles of civic infrastructure traced back to the Iroquois confederation, this indigenous decision-making and empowerment structure envisions vernacular exchanges between community (in this case village) residents and cosmopolitan thinkers and powers. However, it adds an additional layer. It also observes and encourages dialectal and information-sharing exchanges between and among the delegate circles themselves. These lenses inform Liberation 103. It is with these community-based approaches in mind that my students in the last two years have developed the highly accessible materials described earlier, with some amazing infographics and whiteboard videos.

Liberation 103 is covered by Chapters 13 and 14 of the e-book, Citizen Action and Solidarity, respectively. Chapter 13 includes material on the transition from awakening to protest, to cooperation, to solidarity. Chapter 14 covers police accountability and community-based dispute resolution. In Liberation 103, high school students and community members could develop strategies and tactics along with their teachers and organizers. These would focus on rebuilding civic infrastructure, renovating Cultural DNA, and building a relational power base to protect their community and advance its well-being in the wider social, political, and economic context.

We thus "socially engineer"[166] root-based development[167]in the Black community. Root-based development involves the engagement of ordinary citizens in sustainable development policymaking. They meet in small "study circles" that are linked together by meetings of delegates from such meetings, creating a democratic structure much like a citizen's assembly. [168] We use reparations funding and crowdsourcing to support small mutual aid groups in Black communities.

We build civic infrastructure, linking mutual aid groups together into "ward republics"[169] capable of social, economic and political action. The ward republics would provide or secure education and training for the youth, healthcare, transportation, employment and housing for all within the community, setting an example for other oppressed/

166. "Social engineers" is Charles Hamilton Houston's term for "highly skilled, perceptive, sensitive lawyers" who know how to use the law to "solve the problems of local communities" and to "better the conditions of the underprivileged." *Howard University School of Law–Creating Accomplished Legal Professionals*, The Knowledge Rev., https://theknowledgereview.com/howard-university-school-of-law-creating-accomplished-legal-professionals/#:~:text=The%20Law%20School%20calls%20this,the%20conditions%20of%20the%20underprivileged.%E2%80%9D (last visited Oct. 15, 2024).

167. *See generally* McDougall & Boafo, *supra* note 74, at 24-36.

168. *Id.*

169. *Social Change Requires Civic Infrastructure*, *supra* note 74, at 837.

subordinated demographics to follow. Next step, build broader coalitions with other groups similarly marginalized, oppressed, and/or subordinated.[170]

VI. NEXT: IMPLEMENTING COOPERATION

I started work on the "Liberation School" curriculum for children descended from Africans colonized or enslaved by assisting in the development and execution of a "Prepare, Repair and Defend" symposium. This was cosponsored by the Harvard Legacy of Slavery Initiative and the Afrimerican Academy of Boston. It took place on Saturday, September 21, 2024, at the Boston Latin Academy, located in the Black community of Dorchester, Massachusetts.

With the relationships built during and after the symposium, participants have been empowered to carry the work forward, aided by the e-platform that was developed with the help of Howard University School of Law students in the Fall 2024 semester. The e-platform, described earlier, contains downloadable texts, infographics, and whiteboard videos. These can be used in classrooms and other spaces through school or community-based meetings, using study circles and "Algebra Project"-type mutual self-teaching.[171]

The Liberation School curriculum–"Know Your Rights," "Know Your Roots," and "Know Your Resources" –is now available for delivery in safe spaces within Black communities, and community partners such as the Algebra Project have already expressed interest. The Liberation School curriculum will help adults and youth in Black communities develop strategies and tactics on how to prepare, repair and defend, as well as spark mutual aid circles that link up into citizen's assemblies. It can be delivered in public schools, after-school programs, "Saturday Schools" at local third spaces[172] such as public libraries, and/or community-based organizations, including churches. It will be supported by law students and college students[173] as well as community organizers and formal and informal community leadership. Focusing on theory and practice, we should aim to engage the "whole village"[174] as teachers and learners, as advised by Martin Luther King Jr.[175]

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170. *See Think Nationally, supra* note 160, at 860-62.

171. *See generally* JAY GILLEN, THE POWER IN THE ROOM: RADICAL EDUCATION THROUGH YOUTH ORGANIZING AND EMPLOYMENT (Beacon Press 2019).

172. *See* Quizon-Colquitt, *supra* note 159.

173. The proposal could include stipends for them, or academic credit if that is an option.

174. *See Cultural DNA*, *supra* note 5.

175. Harold A. McDougall, *Economic Equality and Social Solidarity: MLK's Neglected Legacies*, 14 HARV. L. & POL'Y REV. 19, 43, 45 (2020).

Sessions would feature small-group, participatory learning modalities such as study circles[176] and self-learning teams like those used in the Algebra Project. Implementation strategies would also include solidarity and community organization[177] as well as lobbying and public information campaigns. Stakeholder engagement would involve some measure of self-help and mutual aid, both within the African American population and across boundaries to include the governments and peoples of other countries impacted by slavery, colonialism and neocolonialism, including immigrants to America from such countries.

Benchmarks of success include the emergence of a young cohort of cadre to continue the work, as has occurred with the Algebra Project. This would be complemented by the adoption and continued implementation of this curriculum by community-based organizations committed to collaborating with succeeding cohorts of college students, law students, community organizers and graduates of the program itself who returned to "give something back."

Summary & Conclusion: Moving Toward Solidarity

As we summarize and reflect, we can merge the CARICOM rubric and attendant information, and my notions of Cultural DNA into a do-it-yourself reparations rubric I call "*prepare, repair,* and *defend*", also expressed as "know your rights," "know your roots," and "know your remedies." The "rights" part means taking a close look at the conditions Black youth face today with a primer on how to respond—in a word, to be *prepared*. [178] These conditions are generally specific to the Black American experience, but such challenges are faced by others throughout the African Diaspora in England, France, and Brazil, to give only a few examples. The "roots" part of the solution means exploring African Cultural DNA–identity, belonging, mutual aid, problem-solving, and

176. *See Study Circles*, *supra* note 157. Compare mutual aid circles as described in *Think Nationally, supra* note 161, at 860. We could start with study circles of students—no more than 7 in each—engaging their parents as well.

177. *See Think* Nationally, *supra* note 160, at 869.

178. The primer is based upon my students' explorations of these topics over a 25-year period in upper-level law and policy seminars. I first wrote about this in my article on Critical Race Practitioners, then with the book *African American Civil Rights in the Age of Obama*, and most recently, with the help of my students, producing accessible pamphlets on about a dozen "know your rights" topics detailing first aid techniques when caught in the crosshairs of racial animus and subordination. These will be supplemented with infographics and YouTube videos, also created by my student partners. (This type of technological know-how is beyond my capabilities–I can provide content, but the delivery mechanisms are their territory. This gets back to my earlier suggestions about what wisdom means to a person my age. *See, e.g.*, Harold A. McDougall, *For Critical Race Practitioners: Race, Racism and American Law (4th ed.) by Derrick A. Bell, Jr.*, 46 How. L.J. 1 (2002).

decision-making–to rebuild a sense of wholeness and worth. [179] This is how we *repair*.

The "remedies" part means exploring ways to rebuild a community's civic, financial, and physical infrastructure[180] by employing such Cultural DNA and *defending* that which is thus achieved. Here, we explore new techniques for building solidarity and implementing mutual aid within Black communities here and abroad. Thus, we empower ourselves to preserve and protect that which we "rediscover" of our African roots and the wisdom and problem-solving techniques developed during our respective journeys through the African Diaspora.[181] Such approaches overlap with notions of "transformative justice"–a framework that focuses on community-building and collective solidarity against repressive mechanisms and structures.[182]

This project could not have come at a more needed time. America may be more divided now than at any time since the Civil War. Race is a big part of this. Even the United Nations has taken notice: the Working Group of Experts on People of African Descent in 2016 called for more vigorous efforts to end racism, racial discrimination, xenophobia, Afrophobia and related intolerance in America.

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179. This thought process is based on my Cultural DNA research and writing, as well as notions of "vernacular" found in a variety of articles, most importantly the sustainability in Ghana piece and the human hierarchy article. This thinking also goes back as far as Black Baltimore, which grew out of nostalgia for the sense of community I experienced in the student civil rights movement, reflected in my embedded journalist's writing for the Harvard Crimson and the Harvard Journal of Negro Affairs. Current iterations include a book on African day names I am publishing and a collection of African and African Diaspora proverbs my son Jonathan is editing. I would also include my writing on mental health here as well. *See* McDougall & Boafo, *supra* note 74 (discussing the role of vernacularization–translating global values into the everyday speech of communities not familiar with those values); *see generally* BLACK BALTIMORE, *supra* note 9 (discussing the impact of neighborhood-based communities in Baltimore and their potential for empowering change); Harold A. McDougall, *Neurodiversity and the Mental Health Dilemma*, 7 HOW. HUM. & CIV. RTS. L. REV. 1 (2024) (discussing the origins and impact of the current mental health crisis and proposing community-based solutions); *Cultural DNA, supra* note 5.

180. I have written a great deal about this. Ranging from my early studies of community-based organizations for the *Crimson*, above, my Black juries student note for the Yale Law Journal, and picking up steam and focus with articles on black land ownership, land reform, and then land as a commodity in metropolitan political economy. *See* Harold A. McDougall, Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970); Harold A. McDougall, *Black Landowners Beware: A Proposal for Statutory Reform*, 9 N.Y.U. REV. L. & SOC. CHANGE 127 (1979). Later, particularly after Black Baltimore, the focus shifted to community itself, particularly in my most recent article *Think Nationally*, *supra,* note 160, but reflected earlier in a series of Huffington post blogs as well, around the theme of civic infrastructure. *See infra* note 50. *See also* BLACK BALTIMORE *supra* note 9; *Act Locally: Cities and the Struggle for Social Justice*, 58 SAN DIEGO L. REV. 849, 850 (2021); Harold A. McDougall, *The Judicial Struggle against Exclusionary Zoning: The New Jersey Paradigm*, 14 HARV. C.R.C.L. L. REV. 625 (1979); Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.C.L. L. REV. 623 (1987).

181. *See, e.g.,* DAVID ABDULAI, SANKOFA: STORIES, PROVERBS & POEMS OF AN AFRICAN CHILDHOOD (1995) (discussing Sankofa parables and meaning).

182. *See* Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORM HARM (Jan. 11, 2019), https://transformharm.org/tj_resource/transformative-justice-a-brief-description.

To address systemic inequities in education, economic mobility, health, urban planning and criminal justice, the curriculum teaches how to immediately protect one's legal rights in the face of racially charged challenges in those areas. The curriculum prioritizes and centers on the following topics: hate crimes; police misconduct; discrimination in education, employment, and housing; "consumer racism;" gentrification; disproportionate exposure of Black communities to environmental hazards; and the protection of Black peoples' health outcomes in the areas of mental and maternal health as well as primary care.

To address these systemic inequities in Black communities, the curriculum exposes the truth about racially charged challenges and harms, past and present, that Black people have faced and continue to face due to structural and infrastructural racism. The curriculum can be shared and disseminated to advance social justice strategies and tactics in an effort to build and expand equity. Locating the program in the Black community facilitates collaboration in the critical work of repair. It furthers programmers' accountability to that community by offering an active and open ear for revision and expansion based on community participation and response, particularly in the form of "vernacular" exchanges stimulating, nourishing, and learning from community-based "cultural DNA"—the way the community solves problems.[183]

Thus, the curriculum aims to empower Black community members by

1. *preparing* them to respond to discrimination faced in inequitably designed and managed urban spaces like stores, schools, workplaces and housing as well as to gain power through voting and citizen action. (Liberation 101)
2. educating them about race-based trauma that has damaged community resources—e.g. redlining, gerrymandering, urban renewal, exposure to toxic waste, food deserts, and racial violence—and empowering them to *repair* the damage as it relates to physical health, mental health and civic, cultural, financial and environmental ecosystems (Liberation 102) and,
3. helping them organize to *defend* the resources repaired, strengthened and expanded under (1) and (2). (Liberation 103)

The curriculum is designed for execution by schoolteachers and community organizers. Their programs would use dialog and information-sharing to identify and address systemic inequities in Black communities, exposing the truth about the racially charged challenges and harms mentioned above. The community-based knowledge thus generated can then be shared widely among many communities, broadening

183. Harold A. McDougall, *Reconstructing African American Cultural DNA: An Action Research Agenda for Howard University*, 55 How. L.J. 63, 64 (2011).

the base of participation and also diversifying the Cultural DNA available to solve the problems at hand.

As my students and I have continued the work in my Civil Rights Planning and Sustainable Development seminars, we have continued to advance the curriculum, developing infographics, whiteboard videos, and new teaching and learning approaches. Through the Thurgood Marshall Center at Howard Law School, we are planning a roll-out of the curriculum in schools at a number of cities in addition to Boston, during Black History Month, 2025 and in the Fall 2025 semester.

I am presently looking for more ways to spread this idea and root it in different communities around the country. I plan to reach out to operators of high school networks, such as the Marshall Brennan Center at American University School of Law (reaching twenty high schools around the country), the Street Law project at Georgetown University Law School (reaching two hundred high schools around the country and around the world), the Algebra Project (reaching ___high schools around the country), and Howard University School of Law's Thurgood Marshall Justice Center (a project partner). The operators of the various local community organization websites are key partners. I am working with them to publish the curriculum through their web sites, to make it directly available to community members and students, free of charge.

In Erik Erikson's terms, I am moving from the penultimate stage of life—generativity—to the last, wisdom (hopefully).[184] That shift has led me to self-reflection and the realization that I am an "embedded journalist" in the struggle for African and African Diaspora freedom and self-determination. In a very real sense that has been my role for more than fifty years—beginning with my days as an editor of the Harvard Crimson and Managing Editor of the Harvard Journal of Negro Affairs. I have also been inspired and encouraged by many comrades and mentors along the way.[185]

184. Rhona Lewis, *Erikson's 8 Stages of Psychosocial Development, Explained for Parents*, HEALTHLINE (July 26, 2024), https://www.healthline.com/health/parenting/erikson-stages#8-reflection; Saul McLeod, *Erik Erikson's Stages of Psychosocial Development*, SIMPLY PSYCH. (Jan. 25, 2024), https://www.simplypsychology.org/erik-erikson.html; *Erik Erikson*, WIKIPEDIA, https://en.wikipedia.org/wiki/Erik_Erikson (last visited Sept. 18, 2024).

185. Namely: Bill Strickland, Larry Palmer, Haywood Burns, Sheila Rush, Gudo Calabresi, Martha Derthick, Master Crooks of Dudley House, Stokely Carmichael (a.k.a. Kwame Ture), Bob Brown, Robert S. Browne, Leroy Clark, Henry McGee, Hank Richardson, Arthur Kinoy, Nat Nakasa, Frances Moore Lappe, Wade Henderson, Sabine O'Hara, Rev. Dr. Tony Stanley, Roscoe Brown Jr., Warner Lawson, Jr., Harry Boyte, Bruce Adams, Jay Gillen, Martin Kilson, Rev. Vernon Dobson, Dominic Mouldin, and more.

I am writing this article to summarize my experiences and insights throughout my career as a student, lawyer, legal academic, and social activist as a step in the transition to wisdom. The current reparations debate has provided me with an idea of how to attempt that transition, using the lens of *prepare, repair* and *defend*. The "wisdom" part comes in using that lens to package my knowledge and experiences in such a way as to make them readily available to those who come after me. My hope is that the many young people who have been part of this process continue the work. If that happens, I will happily pass into the "wisdom" stage.

Powers Plays: Women and Progressive Television Battle Quid Pro Quo Sexual Harassment in the Twentieth Century

Mary B. Trevor and Cynthia Bemis Abrams[1]

Abstract

In her role as an art investment associate, Whitley Gilbert is excited to meet with her firm's Vice President of Finance, Mr. Holtworth, and present him with a major purchase opportunity. As she does so, he begins to invade her personal space and suggests they get better acquainted over dinner. He expresses support for her recommendation and says he will speak to the firm's owner. She says she has a personal policy against socializing with coworkers.

The next day Holtworth tells Whitley he's changed his mind; Whitley responds with the rationale that supports her recommendation. He compliments her perfume and asks about her undergarments. She responds by referencing a case about hostile workplaces, calling it Meritor v. Vinson, and tells him her father's a judge. If Holtworth persists, she tells him, she will report him to Human Resources.

The following day, the firm's owner tells Whitley to proceed with the purchase but admonishes her for what he's heard from Holtworth—that she was making suggestive remarks and coming on to him. He tells her to shape up. Whitley learns that Holtworth has arranged a trip for the two of them to purchase the piece.

Whitley also realizes that Holtworth's assistant, Ms. Lopez, knows about his harassing ways. Whitley tries to get Lopez to join her in filing a complaint with HR, but Lopez says she has a family to feed and really

1. Mary B. Trevor is an Emerita Professor of Law at Mitchell Hamline School of Law in St. Paul, MN, and a freelance legal editor and writer. Cynthia Bemis Abrams is a feminist television documentarian who, since 2015, has researched, written, and produced the podcast *Advanced TV Herstory*, which "connects the dots of TV and feminism to American politics and culture." *Advanced TV Herstory*, https://cynthiabemisabrams.com/advanced-tv-herstory (last visited Mar. 10, 2025). *Advanced TV Herstory* is an independent podcast with a worldwide audience of people from academia, the entertainment industry, media and gender activism, and television fans. Its nearly 200 episodes include interviews with prominent academics, performers, directors, and authors, such as 3-time Emmy Award winner Cady McClain, Oscar-nominated director Julie Cohen, and noted Black film and television scholars Robin Means Coleman and Charlene Regester.

needs the job. She explains that, in her experience, executives just get a warning, while the woman is labeled a troublemaker.

Whitley's sometimes-boyfriend Dwayne Wayne offers to intercede on Whitley's behalf. Instead, she sets up a video camera in Holtworth's office to record his remarks during her next presentation. The night before her session with HR, Whitley has a nightmare in which she sits at a bank of microphones while unseen people pummel her with questions so she cannot focus on any one of them. The story—a television episode—ends with overlay text that Holtworth has been warned about his behavior, but that Whitley will continue to report to him.[2]

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INTRODUCTION

The storyline described above is from episode 16, season 5 of the television situation comedy ("sitcom") *A Different World* (1987-1993),[3] entitled "Bedroom at the Top." It aired on January 30, 1992, with its nightmare scene evoking Professor Anita Hill's then-recent testimony before the Senate Judiciary Committee.[4] But as the #MeToo movement has shown us, the 1992 episode's workplace scenes could easily be found in a contemporary broadcast or cable television show about workplace sexual harassment. Despite the Supreme Court's 1986 holding in *Meritor Savings Bank v. Vinson*[5] that sexual harassment constitutes sexual discrimination and therefore is a violation of Title VII of the Civil Rights Act of 1964,[6] sexual harassment remains a problem.

The authors of this article, Baby Boomers who grew up in the mid-to-late twentieth century United States, experienced the impact of Title VII, Title IX,[7] *Roe v. Wade,*[8] and other women's rights milestones. These milestones did not alter women's lives overnight, and hoped-for progress still lagged by century's end.[9] But legal and cultural developments did gradually effect significant changes to women's status in many aspects of daily life, including, to some extent, the portrayal of women in contemporary popular culture—as exemplified, during the pre- and early Internet era, by television.[10] This article will describe how

3. *Id.*

4. During the fall before the episode's release, on Friday, October 11, 1991, law professor Anita Hill had testified before the Senate Judiciary Committee, describing various ways in which Supreme Court nominee Clarence Thomas had sexually harassed her while he was her boss at the Department of Education and at the EEOC. Her testimony, with her seated before a microphone and enduring harsh questioning, was televised live and widely watched. *See Anita Hill's Testimony*, WOMEN & THE AM. STORY, https://wams.nyhistory.org/end-of-the-twentieth-century/the-information-age/anita-hills-testimony/ (last visited Jan. 2, 2025).

5. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986).

6. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

7. Title IX of the Education Amendments Act of 1972, Pub. L. No. 92–318, 86 Stat. 235 (codified as amended at 20 U.S.C. §§ 1681–1688), amending Title VII, inter alia, to prohibit sexual discrimination in "any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

8. Roe v. Wade, 410 U.S. 113, 153-55 (1973) (recognizing abortion as a fundamental right under the Fourteenth Amendment of the U.S. Constitution), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

9. *See*, *e.g.*, Deborah L. Rhode, *Social Research and Social Change: Meeting the Challenge of Gender Inequality and Sexual Abuse,* 30 HARV. J.L. & GENDER 11, 11 (2007) (arguing that, despite Title VII and other measures, "[O]ur progress [addressing sexual harassment, acquaintance rape, and domestic violence] remains partial, and our studies to date have been far more successful in describing the problems than in identifying solutions."); Deborah Zalesne, *Sexual Harassment Law: Has It Gone Too Far, or Has the Media?*, 8 TEMP. POL. & CIV. RTS. L. REV. 351, 354-55 (1999) (arguing that, despite progress in getting sexual harassment to be taken seriously, better education of the public is still needed "to assure the workplace is free from unwelcome intimidation and abuse" and to address objections to sexual harassment law).

10. J. FRED MACDONALD, ONE NATION UNDER TELEVISION: THE RISE AND DECLINE OF NETWORK TV 110 (Nelson-Hall 1994) (quoting Leo Burnett, *Foreword* to HARRY WAYNE MCMAHAN, THE TELEVISION COMMERCIAL: HOW TO CREATE AND PRODUCE EFFECTIVE TV ADVERTISING, at viii (Hastings

prime-time television depictions of one type of sexual harassment—quid pro quo—reflected and supported those positive changes.

As twenty-first century activists work to rescind twentieth-century milestones of women's rights,[11] studying twentieth century popular culture can reveal and preserve critical information. The Baby Boomers, Gen Xers, and Millennials who grew up watching last century's television and absorbing its lessons, whether consciously or unconsciously, comprise many of today's leaders in business, government, and education.[12] Further, the accessible video record of twentieth-century television culture is currently found only on streaming services controlled by a few large corporations,[13] DVDs, and occasionally, YouTube and VHS cassettes. Should the few in charge of these resources decide they should be pulled from circulation, it could potentially obliterate our ability to analyze and learn from this historic storytelling.[14] Finally, as the authors confirmed while seeking interview subjects during their research, few people with first-hand accounts and reliable memories remain available.

Studying popular culture's storytelling is no mere pastime. Scholars have long recognized that popular culture profoundly affects people's understanding of how the world works, including their perceptions of

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House rev. ed. 1954)) ("From its beginnings, television played a convincing role in its relationship with the American public. As an electronic billboard it was welcomed warmly into the homes and private lives of almost every person in the nation. Although it was a source of constant commercial propaganda, it was embraced by most viewers as a prized possession, hailed as a wonderful wellspring for learning and escape. Americans accepted its one-way communication of material plenty, in the process helping to create . . . [a]'commercial culture in this vital country of ours where selling things and services and ideas to each other is part and parcel of our accepted, respected and dynamic way of life.'").

11. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (reaffirming *Roe*'s recognition of a woman's right to an abortion)).

12. The Baby Boomers, born from immediate post-World War II to the mid-1960s (1946-1964), are now about 60-78 years old. Generation Xers, born from 1965 to 1979, are now about 45-59 years old. Millennials, born from 1980 to 1994, are now about 30-44 years old. *See, e.g., Research Guides: Demographics*: *Age Groups,* USC Libbrs., https://libguides.usc.edu/busdem/age#:~:text=The%20Baby%20Boomer%20Generation%20%E2%80%93%20born,Z%20%E2%80%93%20born%201995%2D2012 (last visited Oct. 30, 2024).

13. *The 6 Companies That Own (Almost) All Media*, WebFX, https://www.webfx.com/blog/internet/the-6-companies-that-own-almost-all-media-infographic/ (last visited Feb. 4, 2025) ("[W]hile it may seem like you have limitless options, most of the media you consume is owned by one of six companies. These six media companies are known as The Big 6.").

14. *See* Sean Malin, *What Actually Happens When a TV Episode Gets Pulled?*, N.Y. Times (Aug. 17, 2020), https://www.nytimes.com/2020/08/17/arts/television/pulled-episodes-blackface.html (discussing the historically common practice of networks pulling episodes from circulation if controversial or seen as potentially controversial and noting "[The fact that] networks and streamers can now pull problematic episodes with such speed concerns those charged with maintaining television's historical record."). Should any episodes that delve into issues such as harassment, rape, or consent come to be viewed, regardless of underlying intent, as controversial, a small number of decision-makers will have the power to pull them from circulation.

law and legal rights.[15] Television is no exception.[16] In the legal context, for example, television has affected viewers' understanding of criminal and legal processes. *Perry Mason* (1957-1966), a show about a criminal defense attorney, influenced viewer perceptions about the conduct of criminal trials;[17] the police procedural *Dragnet* (1951-1959 and 1967-1970) made people aware of—and expect—a *Miranda* warning from police.[18] Recent studies, while not uniform in results, support the existence of a "*CSI* Effect" on criminal trial jurors, who may expect sophisticated forensic evidence because of watching *CSI: Crime Scene Investigation*[19] and other police procedurals.[20] The effects can go both ways, with popular culture depictions and attitudes influencing lawmakers' attitudes, in a process scholars refer to as a feedback loop or interpenetration.[21]

Regarding women and their status and rights, popular culture studies tend to focus on television's negative portrayals of women and how these portrayals might promote mistreatment of women by real-world viewers. There is no gainsaying the reality described in these studies: harassment of, diminishment of, and violence toward women have characterized many television shows (and movies) of both this century and the last.[22] Popular entertainment frequently dismisses the belittling,

15. *See generally* LAW AND POPULAR CULTURE (Michael Freeman ed., 2005) [hereinafter LAW & POPULAR CULTURE] (essays from an international interdisciplinary colloquium addressing interplay of law and movies, television, books, music, and other areas); *see also id.* at 1-9 (discussing some historical examples: the Old Testament's *Genesis*, Ancient Greece, and legal references in Shakespeare's plays).

16. Scholars started studying television's impact on viewers in its early years. George Gerbner, for example, developed "cultivation theory" in the 1960s. L.J. Shrum, *Cultivation Theory: Effects and Underlying Processes*, INT'L ENCYCLOPEDIA OF MEDIA EFFECTS 1 (2017), https://www.researchgate.net/profile/L-Shrum/publication/314395025_Cultivation_Theory_Effects_and_Underlying_Processes/links/59dbad4d458515e9ab451b33/Cultivation-Theory-Effects-and-Underlying-Processes.pdf ("[T]he original theory pertained to the overwhelming influence of US media in shaping US culture."); *see also* Molly Elizabeth Pratt, Comment, *"He Took* It *Out." How Comedic Television Shows Shape Jurors' Perceptions of Workplace Sexual Harassment,* 90 UMKC L. REV. 935, 937 (2022).

17. Pratt, *supra* note 16, at 938-39.

18. *See, e.g.*, MICHAEL ASIMOW & JESSICA SILBEY, LAW AND POPULAR CULTURE: A COURSE BOOK 9-11 (3d ed. 2020).

19. The first series *CSI* was *CSI: Crime Scene Investigation*. *CSI: Crime Scene Investigation* (Jerry Bruckheimer Productions & Alliance Atlantis Communications television broadcast 2000-2015).

20. *See*, *e.g.*, John Alldredge, *The* "*CSI Effect*" *and Its Potential Impact on Juror Decisions*, 3 THEMIS RSCH. J. JUST. STUD. & FORENSIC SCI. 114, 114 (2015) (noting that a pro-defense bias might result); *see also* Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and the Burden of Proof*, 41 NEW ENG. L. REV. 435 (2007) (discussing and critiquing various purported *CSI* effects); Pratt, *supra* note 16, at 939-40.

21. *See* ASIMOW & SILBEY, *supra* note 18, at xiii, 6, 9 (noting at p. xiii that course book is "intended to deepen [law] students' understanding of both law and popular culture and the many ways in which they influence each other."); *see generally* RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE (2000) (expressing concern that judges and legislators have been unduly influenced by popular culture).

22. *See, e.g.*, Elizabeth Grauerholz & Amy King, *Prime Time Sexual Harassment*, 3 VIOLENCE AGAINST WOMEN 129, 142 (1997) (addressing the large incidence of sexual harassment depictions

disempowerment, and mistreatment of women and other people of lesser power and may even play the treatment for laughs.[23] Such "entertainment" fails to acknowledge that such behaviors are—at the least—unacceptable, and in some cases, could form the basis for a lawsuit or criminal action were they to happen in real life.[24]

But the authors' research into twentieth-century depictions of women and women's issues, involving direct viewing of hundreds of television episodes from this era, shows that television's approach to portraying women during that time was not all negative. Our viewing experience has demonstrated instead that, as Professor Bonnie Dow has observed, television can be "an important ideological forum for public discourse about social issues and social change."[25] As a result of our research, we have identified more than 166 dramas and sitcoms from the 1960s through century's end whose plots reflected the influence of contemporary legal and cultural developments affecting women's rights and status.[26] These selected episodes depicted sex-based abuse of power directed toward women, including workplace and education harassment, assault, and predatory behavior. Often written from the woman's

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on television and how such depictions perpetuate myths about sexual harassment); *see also* Susan Faludi, Backlash: The Undeclared War Against American Women xi (1991) (describing depictions of women on prime-time television shows); *see generally* Lisa M. Cuklanz, Rape on Prime Time: Television, Masculinity, and Sexual Violence (2000); Courtney Fraser, Comment, *From "Ladies First" to "Asking for It": Benevolent Sexism in the Maintenance of Rape Culture,* 103 Calif. L. Rev. 141, 154 (2015) (discussing, inter alia, the disempowerment of women in television and stating, "Hollywood's romantic tropes reinforce the perception that men's benevolently sexist treatment of women is desirable despite its disempowering effects.").

23. Twentieth-century television examples of belittling dialogue include the derisive comments by Norm Peterson about his wife Vera in *Cheers* (NBC television broadcast 1982-1993) and by Niles Crane about his wife Maris in *Frasier* (NBC & Grammnet Productions television broadcast 1993-2004). An early example of disempowerment is found in *The Flintstones: The Happy Household* (Hanna-Barbera Productions & Screen Gems television broadcast Feb. 23, 1962), in which, due to Fred's complaints and actions, Wilma quits the job she obtained to support the household.

24. Grauerholz & King have argued that television's frequent treatment of sexual harassment as humorous trivialized its significance and impact. *See* Grauerholz & King, *supra* note 22, at 142. Recently, it has been suggested that twenty-first century comedic television depictions of sexual harassment may have "harmful effects" on jurors hearing sexual harassment claims. *See* Pratt, *supra* note 16, at 936.

25. Bonnie Dow, *Preface* to Prime-Time Feminism: Television, Media Culture, and the Women's Movement since 1970, at xi (1996). For examples of using television (and other) storytelling to effect positive change, particularly for girls and women, see *About*, Population Media Center, https://www.populationmedia.org/about (last visited Nov. 2, 2024) (discussing how "transformative stories" empower communities); *see also* Geena Davis Inst., https://geenadavisinstitute.org/ (last visited Nov. 2, 2024) (discussing research and data collection on television's depiction of under-represented persons including women and people from a range of minorities).

26. The authors' research entailed, first, extensive review of episode descriptions for series that aired from 1957-1999 that mentioned sex-based assault, harassment, toxic workplace conditions, and matters of women characters' agency and consent. We then culled from these descriptions episodes available for viewing in some form as of 2023-2025. After viewing hundreds of these episodes, we have selected 166 episodes that met our criteria, thereby enabling us to explore matters of abuse of power from a contemporary perspective.

perspective, however, the episodes explored how such experiences impact a woman's sense of well-being and leave her struggling to decide on a response.[27]

Thus, as the law changed, so changed certain segments of the television industry, creating a new television culture that challenged the male perspective. Notably, most of our target episodes appeared in series developed by powerful show runners—people who could stand up to both the societal power plays of sexual mistreatment and the television industry power plays of program sponsors and network executives. As heads of award-winning and popular series (or films), these show runners and their writing teams had reputations for pushing the limits of television "propriety," forging new paths for prime time to meet the rapidly changing definition of entertainment.[28]

Still, these innovators had to tread carefully. Early endeavors to address unacceptable treatment of women, therefore, used the same sponsor-friendly technique used to demean them: humor. Marlo Thomas, of 1960s sitcom *That Girl* fame, described how feminist issues were raised on the show. Differentiating her approach from the anger and directness of activists Belle Abzug and Betty Friedan, Thomas likened hers to that of Gloria Steinem: "We said it in a different way, maybe in a more 'feminine' way—something that was a little more acceptable.'"[29] Jane Fonda echoed Thomas's thought when she described the approach to women's workplace issues in the groundbreaking 1980 film *9 to 5*: "With *9 to 5*, we had cloaked the tough issues that office workers faced in comedy's softening mantle."[30] Early depictions were mild enough not to offend any viewer, and script writers did not acknowledge there might be legal redress for mistreatment such as harassment—still a complex question even for lawyers practicing in the discrimination field.[31]

But by the 1980s and 1990s, mistreatment of women had received substantial publicity, and courts started to enforce legal protections for women enacted in earlier decades. The interpenetration of law and cultural expectations was becoming clearer. Our extensive viewing of television episodes from this period revealed that while prime-time

27. Our curated 166 television episodes that addressed the subject matters of harassment, rape, agency, and consent include 1) in the 1960s and 1970s, 10 sitcom episodes and 6 drama episodes; 2) in the 1980s, 12 sitcom episodes and 49 drama episodes; and 3) in the 1990s, 6 sitcom episodes and 83 dramas episodes. Within these 166 episodes, we found six episodes in which a woman abused her power toward a male subordinate, as acknowledged i*nfra* note 37.

28. *See* MACDONALD, *supra* note 10, at 228-29.

29. Life Stories, *Marlo Thomas Interview: "That Girl" Who Changed Everything*, YOUTUBE, at 30:57–31:05 (Oct. 20, 2023), https://youtu.be/GuD2v4x_2HU?si=eJyeyJY42BDkHP38.

30. JANE FONDA, MY LIFE SO FAR 454 (2005).

31. *See* DOW, *supra* note 25, at xxi ("Television programming does not deal well with complex social issues."). Such depth in a sitcom would have been out of place even if the legal situation had been clearer.

television depictions addressing women's mistreatment at this time were still found in comedies, they had also moved to dramas. Further, stories delved more deeply into the issue, with some referencing a woman's legal right to challenge the behavior. But the stories we focus on here also suggested that, as in real life, law and society still had a long way to go before dealing with mistreatment would be anything other than a wrenching experience. The popularity of many of the shows we discuss suggests, contrary to network executives' myopic assumptions, that prime-time audiences were indeed interested in plots generated by women's real-life struggles.[32]

The world experienced a conservative turn in the century's last couple of decades, with some observers positing a "backlash" against harassment law development and feminism generally.[33] Depictions of the mistreatment of women largely shifted to the police-legal procedural setting, in which the storytelling focus changed to catching the "perp" and administering justice.[34] This approach removed much of the earlier focus on the victim or survivor's experience. Further, by the twentieth century's end, the increasingly powerful role of technology revolutionized how people learned about abuse of power, crime, and news generally, challenging prime time's cultural dominance.[35]

In this article, the authors explore one area of their research into twentieth-century prime-time depictions of women's mistreatment: quid pro quo sexual harassment in the workplace and in educational institutions, a discrete area with episodes spanning our focus era that illustrates the trends we have observed in our research. The episode recaps included in this article are based on the authors' own viewing and discussions of the episodes in light of our research focus.

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32. *See, e.g.*, *id.* at xviii (noting the "demonstrated popularity and influence among critics and general audiences" of her focus "feminist" series including *One Day at a Time* and *Designing Women*, shows discussed in this article); *see also* FALUDI, *supra* note 22, at 149-53 (describing the battle for survival of highly rated *Cagney & Lacey* as a series despite network pushback). This article includes two episodes of *Cagney & Lacey* as focus episodes.

33. *See, e.g.*, FALUDI, *supra* note 22, at xviii (observing in 1991 that "[t]he truth is that the last decade has seen a powerful counter-assault on women's rights, a backlash, an attempt to retract the handful of small and hard-won victories that the feminist movement did manage to win for women."); CARRIE N. BAKER, THE WOMEN'S MOVEMENT AGAINST SEXUAL HARASSMENT 134-61 (2008) [hereinafter BAKER, WOMEN'S MOVEMENT] (Chapter 7 is entitled "Fighting the Backlash: Feminist Activism in the 1980s").

34. *See generally* KEVIN DWYER & JURÉ FIORILLO, TRUE STORIES OF LAW & ORDER: THE REAL CRIMES BEHIND THE BEST EPISODES OF THE HIT TV SHOW (2006). Produced by Dick Wolf, *Law and Order* premiered in 1990 and spun off six additional series, several of which are still in production as of 2024.

35. *See* Jeff Greenfield, *From Wasteland to Wonderland: TV's Altered Landscape*, N.Y. TIMES (Oct. 3, 2015), https://www.nytimes.com/2015/10/05/business/media/from-wasteland-to-wonderland-tvs-altered-landscape.html ("When technology replaced scarcity with abundance, every core assumption about TV began to crumble. Everything about the medium — how we receive it, how we consume it, how we pay for it, how we interact with it — has been altered, . . .").

Workplace quid pro quo harassment involves a superior at work pressuring an employee for unwelcome sexual favors in return for an advance in employment or even to retain employment or employment status.[36] In the education context, quid pro quo harassment involves a professor pressuring a student for unwelcome sexual favors in return for an improved, or even passing, grade. In the era we discuss, television depictions of quid pro quo harassment were typically limited to heterosexual interactions that usually involved a white male superior or professor and a white female employee or student.[37]

Part I sets the stage for discussion of quid pro quo harassment with a description of the television industry as prime-time television became a cultural force in the early 1960s amid American technology development and ramped-up consumerism, birth rates, and prosperity. Television, a medium controlled by three networks run by white men,[38] became consumers' primary source of news and entertainment.[39] The discussion then moves decade by decade, establishing the relevant cultural context using U.S. Bureau of Labor Statistics (BLS) and other data concerning women as available. We then explain significant legal and social developments relevant to quid pro quo harassment before focusing on prime-time episodes exemplifying the patterns we found.[40]

Part II describes relevant legal developments of the 1960s, including the 1964 Civil Rights Act, and the beginnings of more women-oriented

36. *See* Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 3-8 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) [hereinafter MACKINNON & SIEGEL, DIRECTIONS] (discussing the subjection of enslaved women, free women in domestic service, and women in manufacturing and clerical jobs during the nineteenth and twentieth centuries to a range of unwanted sexual relations with little to no recourse available). A broader definition of sexual harassment at work is based on the centuries-long history of women's subjugation to such harassment: "unwanted sexual relations imposed by superiors on subordinates at work." *Id.* at 3.

37. While our prime-time research did not focus on quid pro quo harassment involving a woman superior pressuring a male subordinate, we uncovered six episodes using that plot: *Family*: *Labors of Love* (Icarus Productions & Spelling-Goldberg Productions television broadcast Nov. 29, 1977); *Perfect Strangers*: *Sexual Harassment in Chicago* (Miller-Boyett Productions television broadcast Oct. 7, 1987); *Melrose Place: Pushing Boundaries* (Darren Star Productions television broadcast Apr. 7, 1993); *Melrose Place: Til Death Us Do Part* (Darren Star Productions television broadcast May 18, 1994); *L.A. Law: Whose San Andreas Fault Is It Anyway?* (20th Century Fox television broadcast Mar. 24, 1994); *Just Shoot Me: In the Company of Maya* (Brillstein-Grey Entertainment & Steven Levitan Productions television broadcast Jan. 20, 1999). Our research did not uncover same-sex quid pro quo prime-time storylines during our focus era.

38. *See List of Presidents of ABC Entertainment*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_presidents_ABC_Entertainment (last visited Feb. 17, 2025); *List of Presidents of NBC Entertainment*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_presidents_of_NBC_Entertainment (last visited Feb. 17, 2025); *List of Presidents of CBS Entertainment*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_presidents_of_CBS_Entertainment (last visited Feb. 17, 2025).

39. *See* MACDONALD, *supra* note 10, at 132.

40. These episodes, listed in the Appendix, encompass 38 of the 166 we found in our broader research. All focus and appendix episodes are available via paid and free streaming services, DVD, or cable as of this writing.

prime-time television. Part III is dedicated to a decade of great progress for women in the law and in the workplace, the 1970s. Focusing on quid pro quo harassment as an act of sexual discrimination, we describe strides made in key court cases—many of them brought by women of color as plaintiffs—as well as significant federal law and policy advances. We further describe how storylines in a few progressive sitcom episodes started to reflect these changes.

Parts IV and V, covering the 1980s and 1990s, focus on the increased legal recognition and refinement of sexual harassment rights and related women's interests, as well as heightened expectations for women's equality and advancement. In the 1980s, role-model women television characters experienced quid pro quo harassment-related plots in both the workplace and educational settings. While fewer such instances are found in the 1990s, the quid pro quo harassment episodes that were produced during that decade brought an educated, more layered approach, with some influenced by the 1991 Clarence Thomas confirmation hearings and Anita Hill's historic testimony.

Throughout, we highlight the role of women of color,[41] the often-unrecognized catalysts whose pursuit of justice—when faced with both sexual devaluation and systemic racism at work—fundamentally changed workplace conditions.[42] Their courageous advocacy in courts, legislatures, and other venues played a critical role in achieving advances for women's rights whose impact was then depicted on television—in programs featuring middle-class, white women.[43] The Conclusion overviews our quid pro quo harassment analysis and sets up the authors' continuing plans to address the blended content of law, television, and women's issues. We challenge law students, historians, and scholars to consider how television's storytelling has impacted the quests for equality, equity, and safety that remain precarious even today.

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41. Our use of the phrase "woman of color" refers to a person who identifies as a woman who is not white. In instances where the historical source under discussion used different terminology, or a more specific reference promotes clarity, we have used different terminology.

42. An extended history of racial justice and systemic racism is beyond this article's focus. For more information about systemic racism and sexual harassment of Black women in the twentieth-century work world, see, for example, Kimberlé W. Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. Cal. L. Rev. 1467 (1992) [hereinafter Crenshaw, *Race, Gender*], and other works listed on her UCLA Law faculty web page: *Kimberlé W. Crenshaw*, UCLA Law, https://law.ucla.edu/faculty/faculty-profiles/kimberle-w-crenshaw (last visited Nov. 10, 2024).

43. This phenomenon is just one instance of Kimberlé Crenshaw's critique in her groundbreaking article *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal Forum 139, 140 [hereinafter Crenshaw, *Demarginalizing*] ("[I]n race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women.").

I. Television In The Late 1950s And Early 1960s

Starting just after the mid-twentieth century, television largely replaced radio as the main source of entertainment and news.[44] Television entertainment divisions, like other halls of power of the time, were largely controlled by white men and by the big three networks: NBC, ABC, and CBS.[45] All of these networks were governed by the need for good ratings to attract sponsors.[46] In 1959, the big three began to operate using the "least-objectionable program" approach to prime-time programming: they "sought viewers by airing shows less likely to offend . . . than those appearing simultaneously on the rival networks."[47]

A review of the twenty series with the highest ratings for 1960-1961, as determined by Nielsen Media Research,[48] reveals that all of them revolved around men and boys as primary characters. Prime-time television shows of the late 1950s and early 1960s were dominated by escapist television, such as male-dominated Westerns;[49] off-beat, sometimes surreal, comedies depicting women in stereotypical or sexualized roles;[50] and male-led variety shows.[51] "Realistic" shows involved white, middle-class nuclear families headed by a father, who worked

44. Television ownership leaped from 9% of households in 1950 to 90% of households by 1960. *American Women: Resources from the Moving Image Collections*, Libr. of Cong., https://guides.loc.gov/american-women-moving-image/television#:~:text=In%201950%20only%209%20percent,its%20effects%20is%20comparatively%20new (last visited Nov. 2, 2024).

45. Entertainment division presidents for each of the major networks: CBS—Hubbell Robinson (1947-1959 and 1962-1963), Louis Cowan (1958-1959), and James Aubrey (1958-1965); NBC—Sylvester Weaver (1953-1955) and Robert Kintner (1958-1966); ABC—James Aubrey (1957-1958), Thomas Moore (1958-1963), and Edgar Scherick (1963-1966). *See* sources cited *supra* note 38.

46. *See* Greenfield, *supra* note 35 ("The bigger the audience — and the more desirable in terms of buying power — the more the networks could charge."); Dow, *supra* note 25, at xix (calling television a "commercial system [designed] to deliver an audience for the messages of advertisers.").

47. MacDonald, *supra* note 10, at 196.

48. *See* Tim Brooks & Earle Marsh, The Complete Directory to Prime Time Network and Cable TV Shows 1946-Present 1682 (9th ed. 2007).

49. Top-rated *Gunsmoke* (Arness Production Company & CBS television broadcast 1955-1975), *Wagon Train* (NBC television broadcast 1957-1962, ABCtelevision broadcast 1962-1965), *Bonanza* (NBC television broadcast 1959-1973), and *Rawhide* (CBS television broadcast 1959-1965) featured white men, usually in conflict with Native American peoples.

50. In *Gilligan's Island* (Gladysya Productions, United Artists Television, & CBS television broadcast 1964-1992), the three series-regular women characters were stereotyped as a sexy but not very bright movie star (Ginger), a socialite wife of the millionaire (Lovie), and a wholesome girl next door (MaryAnn). In *Green Acres* (Filmways Television broadcast 1965-1971), the lead woman character was Lisa Douglas, a glamorous socialite ignorant of the ways of country life. In *Leave it to Beaver* (Gomalco Productions & Kayro-Vue Productions television broadcast 1957-1963), June Cleaver was the traditional at-home wife and mom who consistently deferred to her husband's and sons' opinions.

51. Led, for example, by former radio stars Ed Sullivan and Red Skelton. *See The Ed Sullivan Show* (CBS television broadcast 1948-1971); *The Red Skelton Hour* (CBS television broadcast 1962-1970). For a biography of Ed Sullivan, see *About Ed Sullivan*, The Ed Sullivan Show, https://www.edsullivan.com/about-ed-sullivan/ (last visited Mar. 17, 2025). For a biography of Red Skelton, see *Our Inductees: Red Skelton*, Nat'l Comedy Hall of Fame, https://nationalcomedyhalloffame.com/red-skelton/ (last visited Mar. 17, 2025).

outside the home, and a homemaker mother.[52] Regular or recurring child character stories tended to focus on sons or boys.[53]

During this era, few series examined social issues. One not currently available for viewing, multiple-Emmy winner *The Defenders* (1961-1965),[54] did address issues such as drug use, mental health, alleged child sexual assault, and poverty.[55] While this series revolved around a white father and son legal team, it broke new ground by wading into legal matters of interest to women, children, and persons of color. Starkly different from contemporary television offerings, *The Defenders* started off with promise but soon fell in the ratings.[56]

Television's emergence as a cultural force coincided with major changes in American society. It is not a coincidence that storylines discussed in this article first came forward during the years when women's liberation, Second Wave Feminism, federal legislation such as the 1964 Civil Rights Act and Title IX (the result of one of the 1964 act's subsequent amendments), and the quest for ratification of the Equal Rights Amendment (ERA) fueled protests throughout the United States.[57] It was also a period when women started making inroads into many employment and educational fields.[58] As television became a standard presence in homes, viewers expected programming to reflect their own experiences.

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52. *See*, *e.g.*, *Father Knows Best* (Rodney-Young Productions & Screen Gems television broadcast 1954-1960); *The Adventures of Ozzie and Harriet* (ABC, Stage Five Productions, & Volcano Productions television broadcast 1952-1966); *The Donna Reed Show* (ABC, Screen Gems, & Todon television broadcast 1958-1966); *Leave it to Beaver*, *supra* note 50; *Life with Elizabeth* (Guild Films television broadcast 1952-1955); *The Danny Thomas Show* (Marterto Productions, ABC, & CBS television broadcast 1953-1965).

53. Examples include *Dennis the Menace* (Darriell Productions & Screen Gems television broadcast 1959-1963), *My Three Sons* (CBS Broadcasting, CBS Paramount Network Television, & CBS Studios television broadcast 1960-1972), and *The Andy Griffith Show* (CBS, Danny Thomas Enterprises, & Mayberry Enterprises television broadcast 1960-1968).

54. *The Defenders* (Defender Productions television broadcast 1961-1965).

55. *The Defenders (1961 TV Series)*, CBS Wiki, https://cbs.fandom.com/wiki/The_Defenders_(1961_TV_series) (last visited Apr. 3, 2025); *see also The Defenders,* IMDB, https://www.imdb.com/title/tt0054531/?ref_=nv_sr_srsg_3_tt_8_nm_0_in_0_q_the%2520defenders (last visited Apr. 3, 2025).

56. In 1961, *The Defenders* ranked #26 behind *The Perry Como Show*, westerns, and sitcoms in the overall broadcast ranking. *1961-62 Top 30 TV Ratings*, The TV Ratings Guide, http://www.thetvratingsguide.com/1991/08/1961-62-top-30-tv-ratings.html (last visited Nov. 9, 2024). In 1962, it reached #18. *1962-63 TV Ratings*, The TV Ratings Guide, http://www.thetvratingsguide.com/1991/08/1962-63-ratings-history.html (last visited Nov. 9, 2024). The series did not appear in the top 30 ratings for its subsequent years.

57. For a few examples of protests during this era, see Linda Napikoski, *Significant Feminist Protests: Activist Moments in the US Women's Liberation Movement*, ThoughtCo. (Sept. 11, 2019), https://www.thoughtco.com/significant-american-feminist-protests-3529008.

58. *See, e.g.*, Baker, Women's Movement, *supra* note 33, at 12-13 ("[W]omen's participation in the civilian labor force jumped from 37.7% in 1960 to over 51% in 1980. Women moved into new types of jobs, entering traditionally male fields in higher numbers, such as mining, construction, and law.").

II. THE 1960S

Following World War II, and into the early 1960s, the white-collar jobs available to women were largely teaching, nursing, and secretarial—all support positions within hierarchies run almost entirely by white men.[59] By the end of the 1960s, though, working women of all backgrounds branched out to new roles beyond support positions.[60] In 1961, there were twenty women in Congress – two senators and eighteen in the House of Representatives.[61] Patsy T. Mink (D-HI House) became the first woman of color and Asian-American woman elected to Congress in 1964.[62] Shirley Chisholm (D-NY House) became the first Black woman elected to Congress in 1968.[63]

Women comprised a mere 3% of the legal profession.[64] Law schools, many of which had admitted only two, one, or no women in the 1940s and 1950s, started to admit more women in the 1960s, at least in part due to changes in the law and decreases in the number of male students during the Vietnam War.[65] But in 1960, one-fifth of law schools had no women students, another fifth had only one, and over half of law schools still had two or fewer.[66]

In 1960, the birth control pill came onto the market.[67] In 1965, in *Griswold v. Connecticut*, the Supreme Court held that a Connecticut statute prohibiting the use of contraceptives violated the right of marital privacy.[68] In that same year, reportedly 41% of married women under

59. *See generally* Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950–2050,* U.S. BUREAU OF LAB. STAT. (May 2002), https://www.bls.gov/opub/mlr/2002/05/art2full.pdf. The Bureau of Labor Statistics (BLS) did not track many of the decade-opening statistics presented later in this article until the 1970s. *See*, *e.g.*, *A Look at Women's Education and Earnings since the 1970s*, U.S. BUREAU OF LAB. STAT. (Dec. 27, 2017), https://www.bls.gov/opub/ted/2017/a-look-at-womens-education-and-earnings-since-the-1970s.htm#:~:text=In%202016%2C%2042%20percent%20of%20these%20women,a%20GED%E2%80%94down%20from%2034%20percent%20in%201970 [hereinafter *2017 BLS TED*] (presenting statistics and graphics starting in 1970).

60. BAKER, WOMEN'S MOVEMENT, *supra* note 33, at 12-13.

61. *See History of Women in the U.S. Congress*, CTR. FOR AM. WOMEN & POL., https://cawp.rutgers.edu/facts/levels-office/congress/history-women-us-congress (last visited Nov. 10, 2024) [hereinafter *Women in Congress*].

62. *See* Kerri Lee Alexander*, Patsy Mink (1927-2002),* NAT'L WOMEN'S HIST. MUSEUM, *https://www.womenshistory.org/education-resources/biographies/patsy-mink* (last visited Nov. 5, 2024).

63. *See* Debra Michals*, Shirley Chisholm (1924-2005),* NAT'L WOMEN'S HIST. MUSEUM, *https://www.womenshistory.org/education-resources/biographies/shirley-chisholm* (last visited Nov. 5, 2024). Mink and Chisholm each later ran for the U.S. presidential nomination.

64. *Demographics: Growth of the Legal Profession*, AM. BAR ASS'N, https://www.abalegalprofile.com/demographics.html (last visited Mar. 17, 2025) [hereinafter *ABA Legal Demographics*] (statistics covering the period 1950-1970).

65. Elizabeth D. Katz et al., *Women in U.S. Law Schools, 1948–2021*, 15 J. LEGAL ANALYSIS 48, 49, 52 (2023) [hereinafter Katz et al.].

66. *Id.* at 56.

67. Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730, 732 (2002).

68. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

the age of thirty were using birth control.[69] Use by unmarried women came more slowly, due in part to laws requiring parental consent for it to be prescribed.[70] Birth control's use increased once the age of minority changed and access to contraception by young women became legal.[71] By 1976, "73 percent of all ever-contracepting single women 18 and 19 years old" had used it.[72] The pill's ready and legal availability "altered women's career plans and their age at first marriage."[73]

A. 1960s Legal Developments

The main focus of the mid-century civil rights movement in the United States was on racial discrimination and segregation. Notwithstanding, that movement helped raise general awareness that other groups were subject to discrimination as well, including women. The Civil Rights Act of 1964,[74] more comprehensive than preceding civil rights acts,[75] signaled a major victory for equality. Its Title VII, "Equal Employment Opportunity," addressed discrimination in employment, prohibiting discrimination based on an "individual's race, color, religion, sex, or national origin."[76]

The inclusion of "sex" in Title VII's list of prohibited discriminations was unique among the 1964 Act's titles. Its addition resulted from a last-minute amendment proposed by Rep. Howard W. Smith of Virginia, a conservative Democrat, who (like many southern Democrats of that time) staunchly opposed civil rights legislation.[77] Sources disagree about why the proposal was put forward (and why it succeeded).

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69. Goldin & Katz, *supra* note 67, at 732.

70. *Id.*

71. *Id.*

72. *Id.* at 734.

73. *Id.* at 731; *see also* BAKER, WOMEN'S MOVEMENT, *supra* note 33, at 12 ("Women's increasing control over their reproductive lives freed them to engage more fully in the workplace.").

74. Pub. L. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e *et seq.*).

75. Earlier civil rights acts had been enacted in 1866, 1871, 1957, and 1960. *See The Civil Rights Act of 1964: A Long Struggle for Freedom, Legal Timeline*, LIBR. OF CONG., https://www.loc.gov/exhibits/civil-rights-act/legal-events-timeline.html (last visited Nov. 5, 2024). The 1964 Act itself would be amended numerous times.

76. 42 U.S.C. §§ 2000e-2000e17 (as amended). The 1964 act was not the first federal law to promote employment equality between men and women. The Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56, first suggested in 1945, amended a section of the Fair Labor Standards Act of 1938, 29 U.S.C. § 206, to "prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce." The EEOC calls it "the first national civil rights legislation focusing on employment discrimination." *EEOC History: The Law*, U.S. EEOC, https://www.eeoc.gov/history/eeoc-history-law#:~:text=The%20Equal%20Employment%20Opportunity%20Commission,one%20single%20piece%20of%20legislation (last visited Nov. 9, 2024) [hereinafter EEOC, *The Law*].

77. *See Howard Worth Smith (1883–1976)*, ENCYCLOPEDIA VA., https://encyclopediavirginia.org/entries/smith-howard-worth-1883-1976/ (last visited Feb. 16, 2025); *see also Landmark Legislation: The Civil Rights Act of 1964*, U.S. SENATE, https://www.senate.gov/artandhistory/history/

Many suggest Smith sought to undermine support for the bill's passage by adding a controversial provision.[78] Others argue that a growing movement to include a prohibition against sex-based discrimination was already underway.[79] The Supreme Court subsequently stated that the "principal" opposition to the inclusion of sex discrimination in the law was that such a prohibition needed its own legislation.[80] Regardless of which sources are correct, Title VII as enacted retained the reference to discrimination based on sex. However, the word's late addition meant there was virtually no debate about the inclusion of "sex" in either the House or the Senate, resulting in minimal legislative history to guide court interpretation.[81]

Title VII also created the Equal Employment Opportunity Commission (EEOC), charged with enforcing the act for all types of discrimination.[82] It started operations in July 1965, and was flooded in its first year with many more charges of discrimination than expected.[83] It did consider some sex discrimination issues and claims early on.[84] But the EEOC did not issue guidelines (Interim Guidelines) about sexual harassment as sex discrimination until 1980, when it was led by a woman of color, Eleanor Holmes Norton.[85]

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common/generic/CivilRightsAct1964.htm#:~:text=Since%20southern%20Democrats%20opposed%20the,needed%20to%20end%20the%20filibuster (last visited Feb. 16, 2025).

78. *See, e.g.,* JENNIFER ANN DROBAC ET AL., SEXUAL HARASSMENT LAW: HISTORY, CASES AND PRACTICE 7 (2d ed. 2020); BAKER, WOMEN'S MOVEMENT, *supra* note 33, at 14-15 (noting that some Southern Congress members were heard to ridicule any need to protect women against discrimination); Barnes v. Costle, 561 F.2d 983, 987 (D.C. Cir. 1977) ("It was offered as an addition to other proscriptions by opponents in a last-minute attempt to block the bill which became the Act . . . .") (citation omitted).

79. *See* CATHARINE A. MACKINNON, SEX EQUALITY 17 & n.4 (2001) (citing sources about the disagreement); *see also* CAROLYN CHALMERS, THEY DON'T WANT HER THERE: FIGHTING SEXUAL AND RACIAL HARASSMENT IN THE AMERICAN UNIVERSITY 48 (2022) ("[I]n fact, the amendment to add sex was preceded by persistent lobbying from women and civil rights advocates."); *see also* BAKER, WOMEN'S MOVEMENT, *supra* note 33, at 15 & n.19 (noting that a group of congresswomen spoke in favor of the amendment).

80. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63 (1986).

81. *See id.* at 64 (observing that "the bill quickly passed . . . and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'").

82. The EEOC was established in § 705 of Title VII, now codified as 42 U.S.C. § 2000e-4.

83. *EEOC History: 1964–1969*, U.S. EEOC, https://www.eeoc.gov/history/eeoc-history-1964-1969 (last visited Nov. 5, 2024) (stating that there were 8,852 charges rather than the nearly 2,000 expected).

84. *See id.* (noting, for example, in the *Milestones: 1965* section, "The Commission's first determination on a charge holds that any corporate policy requiring firing of female employees when they marry violates Title VII."); *see generally History of the EEOC*, U.S. EEOC, https://www.eeoc.gov/history (last visited Jan. 3, 2025) (listing developments by decade).

85. *EEOC History: 1970-1979*, U.S. EEOC, https://www.eeoc.gov/history/eeoc-history-1970-1979 (last visited Nov. 5, 2024) (In 1977, Norton became the first woman of color to chair the EEOC); *EEOC History*: *1980-1989*, U.S. EEOC, https://www.eeoc.gov/history/eeoc-history-1980-1989 (last visited Nov. 5, 2024) (In 1980, while Norton was still chair, the EEOC issued its Interim Guidelines on Sexual Harassment). For her Congressional biography, see *Full Biography*, CONGRESSWOMAN ELEANOR HOLMES NORTON, https://norton.house.gov/about/full-biography (last visited Jan. 26, 2025).

Title VII was not, and would not be, a panacea. As enacted, it recognized a private right of action for violations, but only the employing entity, rather than any individual bad actor in question, could be sued.[86] Furthermore, cases interpreting the Title, even when they recognized the plaintiff's claims as valid under Title VII, made it difficult to establish liability on the part of the employer.[87] Through the end of the century, court interpretation, legislative changes, and increasing employer understanding of the law and its limitations meant the chances of obtaining legal redress and compensation for its violations varied.[88] But its enactment changed societal perceptions and attitudes in fundamental ways, including in popular culture.

B. 1960s Television Developments

1. The Television Scene Starts to Change

In the midst of the turbulent changes of the 1960s, networks recognized a shifting demographic in their viewership as Baby Boomers, born from 1946 to 1964, increased in number during an eighteen-year explosive birthrate.[89] More than 90% of households owned TVs in 1964.[90] While white men still largely controlled all aspects of the television business, Dad no longer determined what the household would watch.

By mid-decade, television had modestly evolved from its white male focus to series with a female lead. *Bewitched* (1964-1972), a sitcom about a witch living among mortals, ranked #2, and *The Lucy Show*

86. The Title's Enforcement Provisions are found in § 706, now codified as 42 U.S.C. § 2000e-5. Subsection (b) references charges being brought against "an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs."

87. BAKER, WOMEN'S MOVEMENT, *supra* note 33, at 56-57 (discussing the courts' "narrow interpretation of employer liability"); *see also* discussion *infra* Part IV for an analysis of the Supreme Court's 1986 decision in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

88. For discussions of some of these variables by turn-of-the-century analysts, see, for example, Judith Resnik, *The Rights of Remedies: Collective Accountings for and Insuring Against the Harms of Sexual Harassment*, *in* MACKINNON & SIEGEL, DIRECTIONS, *supra* note 36, at 247 (celebrating sexual harassment "law's ability to reshape discourse and actions" but noting the continuing need "to reduce inequality in workplaces"); Cass R. Sunstein & Judy M. Shih, *Damages in Sexual Harassment Cases*, *in* MACKINNON & SIEGEL, DIRECTIONS, *supra* note 36, at 324 (analyzing "the problems raised by damages in sexual harassment cases.").

89. Charlie Giattino, *The "Baby Boom" Saw a Sharp Rise in the Fertility Rate in the United States*, OUR WORLD IN DATA (Oct. 10, 2024), https://ourworldindata.org/data-insights/the-baby-boom-saw-a-sharp-rise-in-the-fertility-rate-in-the-united-states#:~:text=During%20the%20baby%20boom%2C%20the,Today%2C%20it's%20just%20over%201.6.

90. *93% of American Families Reported to Own TV Set,* N.Y. TIMES (Aug. 22, 1964), https://www.nytimes.com/1964/08/22/archives/93-of-american-families-reported-to-own-tv-set.html#:~:text=According%20to%20a%20Census%20Bureau,76%20per%20cent%20had%20one.

(1962-1968), #8 for the 1964-1965 season.[91] Patty Duke in *The Patty Duke Show* (1963-1966)[92] was the first teenage woman to have a series in her own name; Sally Field also played a teenager in the title role of *Gidget* (1965-1966).[93] These sitcoms opened viewers' eyes, young and old, to storytelling from a woman's perspective. Programmers and advertisers smelled gold in the youth demographic.[94]

Sitcoms took the first steps in portraying sexual harassment, seeking a light touch to convey their message. The era's nearly ubiquitous laugh tracks for comedies, "designed to simulate the group viewing experience,"[95] were used even for conversations about topics modern viewers would view as offensive or controversial. The tracks were broadly criticized from their inception[96] and can make for jarring viewing. But despite the laugh track baggage,[97] certain shows and show runners took on the tricky balancing act of confronting the mistreatment of women.

2. That Girl

A series that fundamentally changed how adult women were portrayed was *That Girl* (1966-1971).[98] A comedy starring the glamorous, feminist, and second-generation Hollywood actor Marlo Thomas,[99] *That Girl* was the first series to focus on the life of a single, independent, employed woman.[100] Lead character Ann Marie was an actress and model who moved to New York City and formed a long-term relationship with Donald Hollinger, a magazine reporter who is open-minded and supportive of Ann's independence.[101] Thomas resisted efforts to have the

91. BROOKS & MARSH, *supra* note 48, at 1684 (listing television rankings for the 1964-1965 season).

92. *The Patty Duke Show* (Chrislaw Productions & United Artists Television broadcast 1963-1966).

93. *Gidget* (Screen Gems television broadcast 1965-1966).

94. *See* MACDONALD, *supra* note 10, at 170.

95. Nicole LaJeunesse, *The History of the Laugh Track*, VIDEOMAKER, https://www.videomaker.com/how-to/directing/film-history/the-history-of-the-laugh-track/ (last visited Nov. 3, 2024).

96. *See id.*

97. The laugh track's potential influence on audience perceptions is one area of concern in criticisms of demeaning depictions of women and others in television. *See*, *e.g.*, JENNIFER ANN DROBAC, SEXUAL EXPLOITATION OF TEENAGERS 38 (2016) [hereinafter DROBAC, EXPLOITATION] ("The laugh track that is heard after nearly every exchange in situation-comedies reinforces the idea that sexual harassment is acceptable, and even light-hearted behavior between men and women." (quoting Grauerholz & King, *supra* note 22, at 142)).

98. *That Girl* (Daisy Productions broadcast 1966-1971).

99. Thomas' father, Danny Thomas, was a popular mid-twentieth century entertainer, director, writer, and producer. *See Danny Thomas*, HOLLYWOOD WALK OF FAME, https://walkoffame.com/danny-thomas/ (last visited Nov. 4, 2024).

100. *See*, *e.g.*, Adrienne Faillace, *That Girl*, TELEVISION ACAD. FOUND., https://interviews.televisionacademy.com/shows/that-girl (last visited Feb. 14, 2025).

101. *Id.*

two marry, saving any discussion of marriage for late in the series, which ended with Ann taking Donald to a women's liberation meeting.[102]

Three episodes placed Ann in prime-time television's first known depictions of workplace quid pro quo harassment told from the woman's perspective, an important step forward by *That Girl* producers. Ann's reactions shift subtly from February

1967, when the first of the three episodes below aired, to December of that year when the two-part episode ran. In the first episode of the three, Ann unexpectedly finds herself chosen to do a solo interview with a man of power and prestige who has a reputation as a ladies' man. Focused on boyfriend reporter Donald fulfilling this important assignment, Ann commits to helping him, even at the cost of her own safety, by proceeding with the interview despite the warning signs. By the December episodes, which offer a very different situation, Ann not only confronts a man endeavoring to use his power over her but also resolves the situation herself. Through her company, Daisy Productions, Executive Producer Thomas thus started to change television.[103]

a. That Girl: A Tenor's Loving Care (Daisy Productions Broadcast Feb. 23, 1967)

Famous Italian tenor, Giuseppe Casanetti, comes to New York. Donald, a magazine writer, desperately wants to be selected by Casanetti for an exclusive interview, so Donald brings Ann, a knowledgeable opera fan, to Casanetti's press greeting. Casanetti spots her, the lone woman in the crowd, and declares he will give her the exclusive interview. Donald and Ann know of Casanetti's reputation as a womanizer, yet Ann accepts the assignment. Once the interview starts, Casanetti's makes his intentions clear, complete with barring Donald from the room, locking the door from the inside, offering Ann an aperitif, derisively mentioning his wife 4,000 miles away, and grasping Ann's hands whenever they speak. He doesn't know that Ann, evading his maneuvers, has a reporter's tape recorder in her purse capturing the incident. Subsequently, Ann calls Casanetti to inform him about the tape, using it to get Casanetti to agree that Donald interview him. Despite the twist that saves his job, Donald admonishes Ann that she has committed blackmail.

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102. *Id.*; *see also That Girl: The Elevated Woman* (Daisy Productions television broadcast Mar. 19, 1971).

103. *See* Marlo Thomas, Growing Up Laughing 305 (2010).

b. That Girl: It's a Mod, Mod World: Part 1 (Daisy Productions broadcast Dec. 7, 1967) and That Girl: It's a Mod, Mod World: Part 2 (Daisy Productions broadcast Dec. 14, 1967)

Renowned British photographer, Noel, takes a shine to Ann, who's unaware of his fame. Always looking for her next modeling gig, Ann seeks out Noel, and they meet at his hotel suite. With his staff present, Ann revels in his attention and returns the flirtation. After a whirlwind photo shoot, Noel treats Ann differently than he does his other models. Noel courts Ann grandly and lavishes attention on her in ways Donald never does. While enjoying the attention, Ann stays true to Donald. Eventually, Noel presents Ann with a quid pro quo: continued high-end modeling work, financial success in California, and an intimate relationship, or nothing. At the end of the 2-part episode, Ann boldly calls out Noel for his manipulative, shallow behavior, at about the same time a jealous Donald needlessly dashes to California to "save her" from Noel's clutches.

Following those three *That Girl* episodes, the series never waded into sexual harassment waters again. From our research of sitcoms and dramas from the 1960s available for viewing, no other series did either. But *That Girl*'s Ann Marie continued to assert herself and make her own decisions, demonstrating agency as we know it today. In interviews and her memoir, Thomas never cited the origins of most of the series' 137 episodes. But she did make it clear that her work was founded in feminist intent, though presented in a softer tone than was the movement's signature at the time.[104]

III. The 1970s

By the 1970s, the U.S. civilian workforce was in growth mode.[105] In 1970, 11% of working women had a bachelor's or advanced degree.[106] 34% of women had not earned a high school diploma or a GED.[107] In 1971, the number of women in Congress had dipped to fifteen, with two in the Senate and thirteen in the House of Representatives.[108] Women still comprised only about 3% of the legal profession.[109] If law firms

104. *See* Life Stories, *supra* note 29.

105. *See Labor Force Statistics from the Current Population Survey, Employment Status of the Civilian Noninstitutional Population, 1954 to date*, U.S. Bureau of Lab. Stat., https://www.bls.gov/cps/cpsaat01.htm (last modified Jan. 29, 2025) (showing significant increases in total number of people in the civilian labor force in the 1970s).

106. 2017 BLS TED, *supra* note 59.

107. *Id.*

108. *See Women in Congress*, *supra* note 61.

109. ABA Legal Demographics, *supra* note 64.

hired women at all,[110] they were generally assigned to areas other than litigation and employment.[111] But women "trailblazers" in the 1960s had helped increase women law student numbers, with the result that "virtually all law school classes had at least five women by the early 1970s."[112]

A. 1970s Legal Developments

While significant social change marked the 1960s and early 1970s, it was not until well into the 1970s that real legal change concerning sexual harassment followed, as understanding of quid pro quo harassment shifted from sexual attraction to abuse of power.

1. Initial Limited Influence of Title VII

Title VII represented a major step forward in protecting women from discrimination and harassment, but its reach initially had significant limits in a time when its provisions were sorely needed. As women entered the workforce in greater numbers in the 1960s and took on jobs previously assigned to men, many encountered workplace harassment, with women of color and working-class women often confronted by harassment significantly more disturbing than the limited depictions seen on television involving middle-class white women.[113] And when women experienced discrimination, they struggled to obtain recourse in their workplace or the courts.

Two main problems limited Title VII as a tool for challenging sex discrimination. First, the judges charged with the Title's enforcement faced the lack of legislative history, noted above, concerning its intended coverage. Second, the male judges hearing these cases generally only had a limited understanding, if any, of the discrimination women were

110. Some mid-twentieth century law firms famously rejected women now counted among America's most renowned lawyers, including Supreme Court Justices Sandra Day O'Connor (Stanford 1952) and Ruth Bader Ginsburg (Columbia 1959); U.S. Reps. Geraldine Ferraro (Fordham 1960) (also Walter Mondale's V.P. running mate in the 1984 election) and Patricia Schroeder (Harvard 1964) (who ran for U.S. President in 1988); U.S. Sen. Elizabeth Dole (Harvard 1964); and Clinton administration Attorney General Janet Reno (Harvard 1963). Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn From Their Experience About Law and Social Change?*, 61 Me. L. Rev. 1, 10 (2017).

111. *Id.*

112. Katz et al., *supra* note 65, at 49, 58 (stating that the 1960s "was a period in which trailblazer women increasingly gained access to law schools.").

113. *See, e.g.*, Carrie N. Baker, *Race, Class, and Sexual Harassment in the 1970s*, 30 Feminist Stud. 1, 6-8 (2004) [hereinafter Baker, *Race, Class*] (describing harassment experiences of women of color and working-class women including "raunchy sexualization of black women" and physical violence toward women working in blue-collar fields); Catharine A. MacKinnon, Sexual Harassment of Working Women 29 (1979) [hereinafter MacKinnon, Sexual Harassment] (describing "verbal and physical forms" of harassment including subjection to pornography and "repeated collisions that leave the impression of 'accident' to outright rape.").

experiencing. Furthermore, mirroring the male-oriented attitudes also reflected in much of the television of the era, the judges' focus tended to be on the men involved in the situation and how the allegations might result in harm to them or their employers.

Thus, when women first sued employers in the 1970s claiming violations of Title VII based on sexual harassment, judges typically dismissed their actions as not within the Title's intended coverage. The plaintiffs' claims, typically quid pro quo harassment, shared a pattern: their work supervisor had insisted on sexual favors. When the women refused, they received demotions or unfavorable reassignments, were belittled or humiliated by their supervisor and coworkers, or were fired.

Some opinions did identify arguably justifiable reasons for dismissing the claims, such as the lack of legislative history clarifying the Title's intended coverage,[114] or interpreting its language as intended only to prohibit employer policies using sex as a basis for employment-related decisions.[115] But the opinions' language and approach reflect, to a now-shocking degree, male bias. One judge dismissed the case before him in a single sentence.[116] Others viewed the situation as an instance (often, repeated instances) of harassing behavior where the harasser just happened to be male and the person harassed just happened to be female.[117] Absent an allegation of a discriminatory company policy, courts viewed the claim as a personal matter between two people. As the district court in *Barnes v. Train* put it: "This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does

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114. *See, e.g.*, Miller v. Bank of Am., 418 F. Supp. 233, 235 (N.D. Cal. 1976) ("The Congressional Record fails to reveal any specific discussions as to the amendment's intended scope or impact."), *rev'd & remanded*, 600 F.2d 211 (9th Cir. 1979).

115. *See, e.g.*, *id.* at 235 (describing the situation as involving "unauthorized isolated sex-related acts by one employee against another."); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) (listing examples of companies' policies held in earlier cases to constitute sex discrimination under the Title and holding that the Bausch & Lomb situation did not arise from "company-directed policy which deprived women of employment opportunities"), *vacated & remanded*, 562 F.2d 55 (9th Cir. 1977).

116. Garber v. Saxon Industries, Inc., 14 Empl. Prac. Dec. ¶ 7586 (E.D. Va., Mar. 18, 1976), *rev'd & remanded*, Garber v. Saxon Business Products, Inc., 552 F.2d 1032 (4th Cir. 1977). The single-sentence district court opinion no longer appears to be available, but it was cited as such in contemporary scholarly analysis. *See* Michigan Law Review, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007, 1013 (1978).

117. Some courts conceded that the behavior could constitute, at most, a possible tort not within Title VII's coverage. *See, e.g.*, Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976) (the supervisor's behavior "amounts to physical attack motivated by sexual desire . . . which happened to occur in a corporate corridor rather than a back alley."), *rev'd & remanded*, 568 F.2d 1044 (3d Cir. 1977). For a discussion of why tort law does not provide an adequate remedy for sexual harassment, see Ann Scales, *Nooky Nation: On Tort Law and Other Arguments from Nature*, *in* MACKINNON & SIEGEL, DIRECTIONS, *supra* note 36, at 307.

not evidence an arbitrary barrier to continued employment based on plaintiff's sex."[118]

Some opinions convey a definite whiff of "*let* boys be boys."[119] The judge in *Corne v. Bausch & Lomb, Inc.*, referred to the male supervisor's behavior as "a personal proclivity, peculiarity or mannerism. . . . [that was] satisfying a personal urge."[120] In *Tomkins v. Public Services Electric & Gas Company*, another judge "explained" the situation, starting with a quote from yet another recent dismissal of a quid pro quo harassment action in *Miller v. Bank of America*:

> "The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions." This natural sexual attraction can be subtle. If the plaintiff's view were to prevail, no superior could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time. And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or a raise is later denied to the subordinate, we would need 4,000 federal trial judges instead of some 400.[121]

Williams v. Saxbe,[122] an outlier in this early group, allowed the plaintiff's claim to proceed. The court held that "the retaliatory actions of a male supervisor, taken because a female employee declined his sexual advances, constitutes sex discrimination within the definitional parameters of [Title VII]."[123] In reaching his decision, Judge Richey rejected many of the defense arguments that had succeeded in other early cases. His opinion received extensive newspaper publicity and harsh criticism.[124]

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118. 13 Fair Empl. Prac. Cas. (BNA) 123, 1974 WL 10628, *1 (D.D.C. Aug. 9, 1974), *rev'd & remanded sub nom*. Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

119. Others have suggested that the phrase "boys will be boys" might be a way of characterizing the approach of most of the judges deciding the early cases. *See, e.g.*, Drobac et al., *supra* note 78, at 17. But the authors have tweaked this wording a bit to emphasize the granting of permission implied in some of the judges' opinions.

120. *Corne*, 390 F. Supp. at 163.

121. *Tomkins*, 422 F. Supp. at 556 (quoting Miller v. Bank of Am., 418 F. Supp. at 236). The *Tomkins* court did not, however, dismiss the plaintiff's Title VII claim that she was fired in retaliation for complaining about her supervisor's behavior, reasoning that the company's decision to fire her instead of investigating her complaint "may reflect a conscious choice to favor the male employee over the female complainant on the ground that a male's services are more valuable than a female's." *Id.* at 557.

122. Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976).

123. *Id.* at 657.

124. Baker, Women's Movement, *supra* note 33, at 22. Some criticized the court's analysis of how Title VII might apply to instances of harassment involving other gender identities. On appeal,

2. The Role of Women of Color

Throughout American history, race and social status contributed to a power dynamic that put women of color, in particular, in a no-win situation in the workplace: to accept a demand for sex in exchange for keeping or advancing in a job or refuse the demand at the risk of being fired, demoted, or assaulted. Stereotypes about Black, Asian, and Latina women and their sexuality frequently had negative effects on men's behavior and attitudes toward them in the workplace.[125] Contemporary statistics show that women of color subjected to this treatment were becoming increasingly important economic contributors to their households.[126] Noted scholars have appropriately tied the ultimate success of quid pro quo harassment claims to the resolve of early plaintiffs, a number of whom were women of color. Nonetheless, society and television framed the issue as a white woman's issue up until Professor Anita Hill's historic testimony.

Civil rights advocate and legal scholar Professor Kimberlé W. Crenshaw coined the term "intersectionality" for the experience of being both a woman and a member of a minority group.[127] Its original emphasis was on women with intersectional identities, who have historically experienced the dual impacts of racism and misogyny that manifested in degrading treatment and physical abuse.[128]

Empowered by a changing legal landscape, with little to lose and everything to gain, Black women filed a number of the early sexual

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Williams v. Saxbe was reversed and remanded for procedural errors under the name Willams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978), but ultimately resulted in judgment for the plaintiff in Williams v. Civiletti, 487 F. Supp. 1387 (D.D.C. 1980); *see also* Munford v. James T. Barnes & Co., 441 F. Supp. 459, 461-66 (E.D. Mich. 1977) (citing the original *Williams* district court and *Barnes* appellate court decisions favorably and carefully analyzing and rejecting the decisions in *Corne*, *Miller*, and *Tomkins*).

125. *See, e.g.*, Baker, *Race, Class, supra* note 113, at 8 (discussing how "[r]acist and sexist stereotypes melded in the harassment directed toward African American women.").

126. In 1972, Black women comprised nearly 45% of the Black work force. By 1980, Black women's share was just over 48%. And by 1987, Black women outnumbered Black men in the workforce. *See Black Women Made Up 53 Percent of the Black Labor Force in 2018*, U.S. BUREAU LAB. STAT. (Feb. 26, 2019) (including statistics starting in the 1970s).

127. Crenshaw, *Demarginalizing*, *supra* note 43, at 140 ("Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.").

128. *See* Kimberlé Crenshaw, *Stunned But Not Bowed*, *in* I STILL BELIEVE ANITA HILL 164-65 (Amy Richards & Cynthia Greenberg eds. 2013) [hereinafter BELIEVE] ("[S]exual harassment had been a staple of Black women's 'employment' since their arrival to the New World. . . . [T]heir gender and race made them vulnerable to a special kind of workplace injury."). *See also* Crenshaw, *Race, Gender*, *supra* note 42. Intersectionality or intersectional feminism now pertains to recognition of systemic inequities that overlap, such as gender or orientation, ethnicity, socio-economic status, and access to justice. *See, e.g., Intersectional Feminism: What It Means and Why It Matters Right Now*, UN WOMEN (July 1, 2020), https://www.unwomen.org/en/news/stories/2020/6/explainer-intersectional-feminism-what-it-means-and-why-it-matters.

harassment lawsuits.[129] In *Miller v. Bank of America*,[130] Margaret Miller, a Black woman, operated a proofing machine at Bank of America. Her white male supervisor made sexual advances to her at work and came to her home uninvited to further pursue her. He fired her when she rejected him.[131] In *Munford v. James T. Barnes & Company*,[132] Maxine Munford, a Black woman administrative assistant, was fired after she refused to have sex with her white male supervisor.[133] Two other cases involved federal government offices and Black male superiors, one at the Community Relations Service Office of the Justice Department and the other at the EPA's Office of Equal Opportunity. In *Williams v. Saxbe*[134] and *Barnes v. Train*,[135] respectively, Black women Diane Williams, a public information specialist, and Paulette Barnes, an administrative assistant, each alleged their superior sought sexual favors from them. Willams was eventually fired for resisting; Barnes was denied a promotion and eventually demoted.[136] When the issue of workplace sexual harassment ultimately reached the Supreme Court in *Meritor Savings Bank v. Vinson*, it was through a lawsuit brought by a Black woman, Mechelle Vinson.[137]

3. Feminist Activists, Academics, and Attorneys

In 1963, the publication of Betty Friedan's *The Feminine Mystique*, which challenged traditional perceptions of a woman's role, "galvaniz[ed] women across the country"[138] and arguably triggered feminism's Second Wave, acknowledged as starting around 1963.[139] During this wave,

129. While the cases discussed here often also alleged racial discrimination, they ultimately proceeded on the basis of the sexual discrimination claim.

130. Miller v. Bank of Am., 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd & remanded*, 600 F.2d 211 (9th Cir. 1979).

131. BAKER, WOMEN'S MOVEMENT, *supra* note 33, at 16-17.

132. Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977).

133. BAKER, WOMEN'S MOVEMENT, *supra* note 33, at 56.

134. Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976); *see supra* note 96, for its subsequent history.

135. 15 Fair Emp. Prac. Cases (BNA) 345 (D.D.C. 1974), *rev'd & remanded sub nom*. Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

136. *See* BAKER, WOMEN'S MOVEMENT, *supra* note 33, at 16.

137. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). This case is discussed *infra* Section IV.A.4. *See also* Bundy v. Jackson, 641 F.2d 934, 939, 946 (D.C. Cir. 1981) (court reverses dismissal of a hostile workplace harassment claim, alleging "sexual intimidation," brought by a Black vocational specialist working for the D.C. Department of Corrections); LINDA HIRSHMAN, RECKONING: THE EPIC BATTLE AGAINST SEXUAL ABUSE AND HARASSMENT 44 (2019) (describing *Bundy*). Black women were not the only women of color pushing back. Jean Y. Jew, a Chinese American professor at the University of Iowa College of Medicine starting in 1973, was subjected to years of sex- and race-based harassment by work colleagues. It took lawsuits in state and federal court spanning five years for her claims to be recognized. *See* CHALMERS, *supra* note 79, at 48.

138. *See* BAKER, WOMEN'S MOVEMENT, *supra* note 33, at 12.

139. *See, e.g.*, Sarah Pruitt, *What Are the Four Waves of Feminism?*, HIST., https://www.history.com/news/feminism-four-waves (last updated Feb. 25, 2025); *see also* Constance Grady, *The*

efforts to pursue legal redress for harassment coincided with, and were supported by, "broad and varied" activist groups, including feminist activists, lawyers, and academics.[140] Together with male allies, they increased awareness within the courts and broader society of harassment as abuse of power.

The very term "sexual harassment" was adopted by a group led by three feminists, two of whom were out as lesbians.[141] They chose it to describe the focus of a "speak out" they were planning and publicizing for March 1975 in Ithaca, New York.[142] The speak out was sponsored by the Ithaca chapter of the National Organization for Women, the Cornell University Human Affairs Program, and the new Working Women United organization (WWU).[143] A diverse group of over 275 women attended the event.[144] The WWU subsequently conducted grassroots publicity campaigns about sexual harassment.[145] Around the same time, the Alliance Against Sexual Coercion (AASC), in Cambridge, Massachusetts, was also working to spread awareness of sexual harassment as a problem.[146]

The activists' efforts resulted in widespread newspaper, magazine, and television coverage.[147] In January 1976, *Redbook* magazine invited

Waves of Feminism, and Why People Keep Fighting Over Them, Explained, Vox, https://www.vox.com/2018/3/20/16955588/feminism-waves-explained-first-second-third-fourth (last updated July 20, 2018, 9:57 AM).

140. Carrie N. Baker, *The Emergence of Organized Feminist Resistance to Sexual Harassment in the United States in the 1970s*, STUDY OF WOMEN & GENDER: FAC. PUBL'NS, Fall 2007, at 5, https://scholarworks.smith.edu/cgi/viewcontent.cgi?article=1010&context=swg_facpubs [hereinafter Baker, *Emergence*]. In addition to the women identified in the text, women working in traditionally male-dominated, blue-collar jobs were also significant advocates and agents fighting workplace harassment. Working alongside men in construction and coal mines, they encountered scorn, assault, sabotage, and other harassment. In response, they banded together in unions and employee associations, brought lawsuits, and testified, with effect, before law and policy makers. *See* BAKER, WOMEN'S MOVEMENT, *supra* note 33, at 67–81 ("Chapter 4: Blue-Collar Workers and Hostile Environment Sexual Harassment"); *see also* Nancy MacLean, *The Hidden History of Affirmative Action: Working Women's Struggles in the 1970s and the Gender of Class*, 25 FEMINIST STUD. 43, 50 (1999) ("[T]he first big challenges to sex discrimination in the 1960s . . . came from wage-earning women in factory jobs, who discovered a new resource in legislation won by the civil rights movement in 1964."). Their challenges usually involved hostile work environments.

141. The women were Lin Farley, Susan Meyer, and Karen Sauvigné. *See* BAKER, WOMEN'S MOVEMENT, *supra* note 33, at 31.

142. "'Speak outs,' as they were called at the time, were a common technique used in the women's movement to raise awareness about silenced issues, such as illegal and unsafe abortion, rape, and domestic violence." *See* DROBAC ET AL., *supra* note 78, at 3.

143. For more detail about the origins, preparation for, and conduct of the speak out, see BAKER, WOMEN'S MOVEMENT, *supra* note 33, at 27-34.

144. *See* Baker, *Emergence, supra* note 140, at 2 ("About twenty women testified passionately about the devastating impact of sexual harassment on their lives. The women who spoke were diverse, young and old, black and white, and from a variety of occupations. They included an administrative assistant who worked at Cornell, three waitresses, a mailroom clerk, a factory shop steward, a secretary, an assistant professor, and an apprentice filmmaker.").

145. *See* BAKER, WOMEN'S MOVEMENT, *supra* note 33, at 34-37.

146. *Id.* at 3-4.

147. For more detail, *see id.* at 10-14; *see also* Drobac et al., *supra* note 78, at 22.

readers, through a questionnaire accompanying a two-page article, to share how they handled sexual harassment on the job.[148] The volume of responses was so significant that a later commentator characterized the survey's results as providing the "the first nationwide statistics on sexual harassment at work."[149] 92% of the respondents "said sexual harassment at work was a problem, with a majority of respondents saying 'it is a serious one.'"[150] *Ms.* magazine published a cover story "Special Report" entitled *Sexual Harassment on the Job and How to Stop It* in November 1977.[151] By the mid-1970s, many women in America knew about sexual harassment on the job even if they had not experienced it themselves.

At about the same time, women lawyers and male allies started representing women pursuing lawsuits claiming that sexual harassment constituted sexual discrimination in violation of Title VII.[152] As the statistics noted at the start of this section of the article indicate, the pipeline of women lawyers in a position to advance cases brought by women seeking this redress was very small. But those in practice were often active in, or associated with, various feminist advocacy groups.[153] Some of these attorneys stepped in after lower-court dismissals of sexual harassment lawsuits to take on the appeals, and the attorneys' work was supported by feminist organizations.[154] The work of feminist academics who developed legal theories to support the argument that sexual harassment does constitute sexual discrimination under Title VII was also important, as discussed in the next paragraph.[155] These theories emphasized that harassment was a matter of abuse of power, not a problematic

148. *See* Kaitlin Menza, *You Have to See Redbook's Shocking 1976 Sexual Harassment Survey*, Redbook (Nov. 28, 2016), https://www.redbookmag.com/life/a47313/1976-sexual-harassment-survey/.

149. *Id.*

150. *See id. Redbook* subsequently joined forces with the *Harvard Business Review* to conduct a survey of *HBR* readers on the same topic covered by the earlier *Redbook* survey. *See* Eliza G.C. Collins & Timothy B. Blodgett, *Sexual Harassment…Some See It…Some Won't*, Harv. Bus. Rev. (Mar. 1981), https://hbr.org/1981/03/sexual-harassmentsome-see-itsome-wont (including the observation from one survey respondent, "Many women, in particular, despair of having traditionally male-dominated management understand how much harassment humiliates and frustrates them, and they despair of having management's support in resisting it.").

151. The magazine cover used puppets to depict a male hand reaching into a woman's top; designers figured newsstands might not display a cover using real people. *See* Aastha Jani, *Women's History: 10 of the Most Iconic Ms. Magazine Covers*, Ms. (Mar. 28, 2024), https://msmagazine.com/2024/03/28/ms-magazine-covers-womens-history/ (the puppet cover is the fourth one pictured in the article).

152. *See* Drobac et al., *supra* note 78, at 22-23 (listing women lawyers involved in the early cases discussed in this article).

153. *Id.* at 22.

154. *Id.*

155. *See id.* at 26-35 (discussing early feminist legal theories addressing sexual harassment).

personal interaction or the result of uncontrolled sexual urges, and they helped change the way courts viewed sexual discrimination.[156]

Catharine A. MacKinnon, a groundbreaking thinker and strategist for women's legal issues and feminist legal theory, is the best-known academic.[157] But MacKinnon was influenced by the work of Lynn Wehrli of the AASC. Wehrli's *Sexual Harassment at the Workplace: A Feminist Analysis and Strategy for Social Change* presented a "dominance" theory:[158] "that sexual harassment in the workplace is both an expression and a perpetuation of the unequal power relationships between men and women, and between employers and employees."[159]

In her 1979 *Sexual Harassment of Working Women,* which cites Wehrli's work several times, MacKinnon offered two approaches to arguing why workplace sexual harassment is sex discrimination as meant by Title VII. The "inequality" approach, the better approach in her view, emphasizes women's "enforced inferiority" in the workplace.[160] Sexual harassment at work imposes sexual requirements on a person who has unequal power.[161] In that context, women, "dependent upon their income and lacking job alternatives, are particularly vulnerable to intimate violation in the form of sexual abuse."[162] Thus, "[s]exual harassment [does not] derive its meaning and . . . impact upon women . . . from personality or biology, but from [the] . . . context" in which women live and work.[163] Ultimately, "[l]egal recognition that sexual harassment is sex discrimination in employment would help women break the bond between material survival and sexual exploitation."[164] The second, the "differences" approach, looks essentially at whether a woman, because of "preconceived and/or inaccurate" perceptions or attitudes, is arbitrarily subjected at work to different treatment than a man would be subjected to.[165] This approach can also establish that harassment is

156. *See, e.g.*, Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 370, 386 (1980).

157. *See* Fred Strebeigh, *Defining Law on the Feminist Frontier*, N.Y. TIMES MAG. (Oct. 6, 1991), https://www.nytimes.com/1991/10/06/magazine/defining-law-on-the-feminist-frontier.html ("Primarily through her work on sexual harassment and on pornography, [MacKinnon] became the law's most prominent feminist legal theorist."). For a few examples of her feminist works, see CATHARINE MCKINNON, SEXUAL HARASSMENT, *supra* note 110; CATHARINE MCKINNON, SEX EQUALITY (Found. Press 3d ed., 2001); CATHARINE MCKINNON, WOMEN'S LIVES, MEN'S LAWS (2005).

158. Lynn Wehrli, Sexual Harassment at the Workplace: A Feminist Analysis and Strategy for Social Change (Dec. 1976) (Master's thesis, Massachusetts Institute of Technology) (on file https://dspace.mit.edu/handle/1721.1/16358).

159. DROBAC ET AL., *supra* note 78, at 26 (describing Wehrli's theory).

160. MACKINNON, SEXUAL HARASSMENT, *supra* note 110, at 5.

161. *Id.* at 1.

162. *Id.*

163. *Id.* at 2.

164. *Id.* at 7.

165. *See id.* at 4.

discrimination, but it is susceptible to possible court reliance on biological differences between men and women to justify discrimination.[166]

In her book, MacKinnon also established the two main categories of sexual harassment still used today: quid pro quo harassment and "condition of work" harassment. She defined quid pro quo harassment as "more or less explicit exchange: the woman must comply sexually or forfeit an employment benefit."[167] She defined condition of work harassment as "the situation in which sexual harassment simply makes the work environment unbearable."[168] Subsequently, this concept has come to be called, variously, hostile, offensive, or toxic workplace harassment.[169]

4. The Crossroads: Legislative Revisions and Harassment Case Reversals

Following Title VII's enactment, concern grew about its limited effectiveness against sex discrimination. Both the legislative and judicial branches responded in the 1970s. In 1972, Congress enacted the Education Amendments Act of 1972,[170] which amended Title VII, inter alia, to increase the authority of the EEOC and to extend the title's coverage to educational institutions and government at the local, state, and federal levels. The most well-known part of the new act, Title IX, addressed educational institutions; in 1974, the federal department then known as Health, Education and Welfare (HEW) was tasked with its enforcement.[171] Title IX established, with certain exceptions, that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[172]

166. *See id.* at 4-5 (citing Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976), discussed *infra* as an example of how the "differences" approach can be misused to allow discrimination).

167. *See id.* at 32.

168. *See id.* at 40.

169. *See, e.g.,* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (using the wording hostile or offensive working environment throughout the opinion); Dana Florczak, *Liability for Toxic Workplace Cultures*, 56 U. Mich. J.L. Reform 247 (2022) (using the phrase toxic workplace cultures throughout the article).

170. *See* Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 20 U.S.C. §§ 1681–88). A report leading to the law's enactment stated, in part, "The time has come for Congress to correct the defects in its own legislation. The promises of equal job opportunity made in 1964 must [now] be made realities." *See U.S. EEOC*, *supra* note 83. *See also Title IX Legal Manual,* DOJ Civ. Rts. Div., § (II)(2), https://www.justice.gov/crt/title-ix#II.%C2%A0%C2%A0%20Synopsis%20of%20Purpose%20of%20Title%20IX,%20Legislative%20History,%20and%20Regulations (last visited Feb. 16, 2025).

171. In 1979, HEW was divided into the Department of Education (ED) and the Department of Health and Human Services (HHS). *See United States Department of Health, Education and Welfare Records,* John F. Kennedy Presidential Libr. & Museum Archives, Biographical/Historical Note, https://www.jfklibrary.org/asset-viewer/archives/usdhew (last visited Feb. 16, 2025).

172. 20 U.S.C. § 1681(a). Rep. Patsy T. Mink of Hawaii, a woman of color, was its main author and sponsor. At her death in 2002, Title IX was renamed the Patsy Mink Equal Opportunity

Title IX was not co-extensive with Title VII; it was modeled instead on Title VI of the 1964 Civil Rights Act, which had not referred to discrimination on the basis of sex.[173] Its enactment necessitated further clarification in the courts. By the end of the 1970s, the Supreme Court held that Title IX implies a private right of action,[174] and the Second Circuit applied Title IX to complaints brought by female students at Yale University alleging they were being sexually harassed.[175] HEW issued Title IX regulations that were approved and went into effect in 1975, and the Department of Education took on the Title's enforcement in 1980.[176] Title IX, like Title VII, would not be a panacea for sexual harassment in education. As discussed below, 1990s Supreme Court interpretations made the process of recovering under Title IX claims challenging.

As some of Title IX's parameters were being established, the coverage of Title VII was becoming clearer. By the late 1970s, many of the district court dismissals of Title VII lawsuits were reversed on appeal. In July of 1977, in *Barnes v. Costle* (*Barnes v. Train* at the district level),[177] the District of Columbia Circuit issued the first reversal that explicitly analyzed why sexual harassment violates Title VII's sex discrimination prohibition.[178] One of the three judges on the *Barnes* panel was George E. MacKinnon, Catharine MacKinnon's father, who wrote a concurring opinion in the case.[179]

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in Education Act. *See The 14th Amendment and the Evolution of Title IX,* U.S CTS., https://www.uscourts.gov/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix#:~:text=Title%20IX%20of%20the%20Civil,legislation%2C%20introduced%20it%20in%20Congress (last visited Nov. 22, 2024).

173. *See Title IX Legal Manual*, *supra* note 170.

174. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 688–89 (1979).

175. Alexander v. Yale Univ., 631 F.2d 178, 180 (2d Cir. 1980). For various reasons detailed in the Second Circuit's opinion, however, it affirmed the district court's dismissal of all of the plaintiffs' claims. Despite this result, "the lawsuit itself is widely credited with turning the tide of sexual harassment adjudication under Title IX." Eric T. Butler, *Alexander v. Yale: The Transformative Power of Social Forces to Bend Legal Doctrine,* 49 J. COLL. & UNIV. L. 49, 57 (2024). The plaintiffs were represented by the New Haven Law Collective, which included Catharine MacKinnon. *Id.* at 55. For a discussion of the lawsuit by a member of the Collective, see Anne E. Simon, *Alexander v. Yale University An Informal History, in* MACKINNON & SIEGEL, DIRECTIONS, *supra* note 36, at 56 ("The idea that sexual harassment was illegal sex discrimination in education went from being impossible before *Alexander* to being obvious after it with virtually no intermediate doctrinal steps—at least as to the most direct forms of harassment.").

176. *History of Title IX*, WOMEN'S SPORTS FOUND. (Aug. 13, 2019), https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/.

177. Barnes v. Costle, 561 F.2d 983, 989–90, 1001 (D.C. Cir. 1977), *rev'g* Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123, 1974 WL 10628, *1 (D.D.C. Aug. 9, 1974).

178. In February 1977, the Fourth Circuit had reversed and remanded the lower court's dismissal in *Garber*, but without including the reasoning for its decision. *See* Garber v. Saxon Bus. Prods., Inc., 552 F.2d 1032, 1032 (4th Cir. 1977) (per curiam).

179. *See Barnes*, 561 F.2d at 995. Linda Hirshman, who interviewed Catharine MacKinnon for her 2019 book *Reckoning*, reported in her book that MacKinnon told the author that she had not discussed the case with her father. HIRSHMAN, *supra* note 137, at 19.

In *Barnes*, Circuit Judge Spottswood W. Robinson, III, a former civil rights activist,[180] noted in his opinion that the Equal Employment Opportunity Act of 1972,[181] which amended Title VII to extend coverage to federal employees, included extensive legislative history that Title VII lacked. This history made it "evident that Congress was deeply concerned about employment discrimination founded on gender, and intended to combat it as vigorously as any other type of forbidden discrimination."[182] Further, recent cases interpreting Title VII and EEOC regulation in "analogous contexts" confirmed this Congressional intent.[183]

Concerning the discrimination claim at issue in *Barnes*, Judge Robinson flatly rejected the district court reasoning that Paulette L. Barnes had not been fired due to her sex. Instead, his opinion reflected the power-based feminist legal theories of MacKinnon and others:

> To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman *subordinate to the inviter* in the hierarchy of agency personnel. Put another way, she became the target of her superior's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job.[184]

Other circuit courts followed suit, with the Ninth Circuit vacating and remanding the *Corne* case in July 1977,[185] the Third Circuit reversing and remanding *Tomkins* in November 1977,[186] and the Ninth Circuit reversing and remanding the *Miller* case in June 1979.[187]

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180. Judge Robinson, civil rights icon and multi-talented lawyer, professor, and judge, understood the challenges of resisting discrimination created by power differentials. A graduate of, professor at, and eventually, Dean of Howard University School of Law, he also practiced in a progressive firm that brought one of the cases, Davis v. Cnty. Sch. Bd., 103 F. Supp. 337 (E.D. Va. 1952), that was consolidated with four others to bring Brown v. Bd. of Ed., 347 U.S. 483 (1954) before the Supreme Court. Robinson was the first Black judge appointed to the U.S. District Court for the District of Columbia (1964), to the Court of Appeals for the District of Columbia Circuit (1966), and as that court's first Black chief judge (1981). *See Spottswood William Robinson III*, *Shaping the Constitution*, Educ. at Lib. Va., https://edu.lva.virginia.gov/oc/stc/people/spottswood-william-robinson-iii-(1916-1998) (last visited Nov. 8, 2024); *see also* Brian Gann, *Spottswood Williamson Robinson (1916-1998)*, BlackPast (June 18, 2011), https://www.blackpast.org/african-american-history/robinson-spottswood-william-1916-1998/.

181. *E.g.*, Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq*.

182. *Barnes*, 561 F.2d at 987.

183. *Id.* at 991.

184. *Id.* at 990 (emphasis added).

185. Corne v. Bausch & Lomb, Inc., 562 F.2d 55 (Table) (9th Cir. 1977), *vacating and remanding* 390 F. Supp. 161 (D. Ariz. 1975).

186. Tomkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044, 1045 (3d Cir. 1977), *rev'g and remanding* 422 F. Supp. 553, 556 (D.N.J. 1976); *see also id.* at 1046 n.2 (stating that "the Supreme Court has taught that the purpose of Congress in enacting Title VII was 'the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.' Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L.Ed.2d 158 (1971).").

187. Miller v. Bank of Am., 600 F.2d 211, 214 (9th Cir. 1979), *rev'g and remanding* 418 F. Supp. 233 (N.D. Cal. 1976); *see also id.* at 213 (citing the *Barnes* and *Tomkins* appellate opinions favorably and as "involving conduct of a supervisor almost exactly like that which is alleged here").

The Supreme Court would not rule on workplace sexual harassment until the next decade in *Meritor Savings Bank v. Vinson*.[188] Its Title VII sex discrimination rulings in the 1970s gave mixed signals. In 1971, in *Phillips v. Martin Marietta Corp.*, the Court ruled that an employer policy allowing hiring of men, but not women, with pre-school children violated the Title.[189] But in 1976, in *General Electric Co. v. Gilbert*, the Court ruled that despite the contrary district court and court of appeals rulings below, a company's exclusion from its disability plan of coverage for disabilities resulting from pregnancy did not violate Title VII.[190] It reasoned that there was no showing that "the exclusion of pregnancy benefits is a mere 'pretex(t) designed to effect an invidious discrimination against the members of one sex or the other.'"[191] This ruling did not stand. In the Pregnancy Discrimination Act of 1978,[192] Congress amended Title VII again to establish that discrimination based on pregnancy does violate the Title—thereby reversing *Gilbert.*

5. 1970s Television Developments

a. Women of Color in Television

From television's first broadcast, women of color have been underrepresented and misrepresented, appearing on television almost exclusively in domestic support roles or as entertainers into the mid-1960s. A few series in the 1960s, with mostly white casts, featured young Black women in professional, credible roles. *Julia* (1968-1971) starred Diahann Carroll as a widowed Black nurse and mother.[193] In *Star Trek* (1966-69), Lieutenant Uhura was played by Black actor-dancer Nichelle Nichols,[194] and in *Marcus Welby, M.D.* (1969-1976), Mexican-American actress Elena Verdugo played nurse-office assistant Consuelo Lopez.[195]

By the early 1970s, viewers saw women of color in regular supporting roles on *Room 222* (1969-1974) (high school guidance counselor played by Denise Nicholas),[196] *The Courtship of Eddie's Father*

188. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986).

189. Phillips v. Martin Marietta Corp., 400 U.S. 542, 543–44 (1971); *see also* City of L.A. v. Manhart, 435 U.S. 702, 702 (1978) (holding that it is discriminatory to require women to make larger contributions to their retirement plan than men).

190. *E.g.*, Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 145-46 (1976).

191. *Id.* at 136-37 (relying heavily on the reasoning in Geduldig v. Aiello, 417 U.S. 484 (1974), which rejected a claim against a similar disability plan based on the Equal Protection clause).

192. Pub. L. 95-555, 92 Stat. 2076 (1978).

193. *Julia* (20th Century Fox & Hancarr Productions television broadcast 1969-1971).

194. *Star Trek* (Desilu Productions & Paramount Production television broadcast 1966-1969).

195. *Marcus Welby, M.D.* (Universal Television broadcast 1969-1976).

196. *Room 222* (20th Century Fox television broadcast 1969-1974).

(1969-1972) (live-in nanny played by Miyoshi Umeki),[197] and *Mannix* (1967-1975) (secretary played by Gail Fisher).[198] In 1974 and 1975, Norman Lear and Tandem Productions created two spin-offs of successful series that shifted the focus from a white household to a Black household. Favorite characters led Black families and nearly all-Black casts on *Good Times* (1974-1979), which moved Florida Evans (the Black housekeeper from *Maude*[199]) to Chicago with her family,[200] and *The Jeffersons* (1975-1985), which moved George and Louise Jefferson (the Black neighbors from *All in the Family*[201]) to Manhattan.[202] But despite Black women's roles in cases establishing workplace sexual harassment as a civil rights violation, the authors' research has revealed no prime-time television series depicting a woman of color standing up to such harassment until the 1992 episode of *A Different World* (1987-1993)[203] described at the start of this article and discussed *infra*.

b. Prime-time Television More Generally

A review of television's top twenty highest-rated television shows for the 1970-1971 season reveals a slight demographic shift toward youth and women, with rural sitcoms and westerns mostly relegated to the bottom of the list.[204] Lucille Ball and Doris Day starred in sitcoms as single mothers.[205] *The Mod Squad* (1968-1975) depicted three wayward teens, a white woman, a white man, and a Black man, who had been recruited as undercover police liaisons.[206] *Laugh-In*, a sketch show,[207] and Flip Wilson's variety show *Flip*[208] introduced diversity into the white-male-dominated world of television comedy.

The early 1970s brought a new wave of television, as CBS ditched its stable of rural-themed sitcoms for series that sought to reflect a changing American culture. The two series most often mentioned as pioneers of this new wave are *The Mary Tyler Moore Show* (1970-1977)[209]

197. *The Courtship of Eddie's Father* (MGM Television broadcast 1969-1972).
198. *Mannix* (Desilu Productions & Paramount Production broadcast 1967-1975).
199. *Maude* (Tandem Productions broadcast 1972-1978).
200. *Good Times* (Tandem Productions broadcast 1974-1979).
201. *All in the Family* (Tandem Productions broadcast 1971-1979).
202. *The Jeffersons* (Embassy Television broadcast 1975-1985).
203. *A Different World* (Carsey-Werner Productions broadcast 1987-1993).
204. Brooks & Marsh, *supra* note 48, at 1686.
205. *Here's Lucy* (Lucille Ball Productions & Paramount Productions broadcast 1968-1974); *The Doris Day Show* (Arwin Productions broadcast 1968-1973).
206. *The Mod Squad* (Thomas/Spelling Productions broadcast 1968-1975).
207. *Rowan & Martin's Laugh-In* (George Schlatter-Ed Friendly Productions & Romart, Inc. broadcast 1967-1973).
208. *Flip* (Bob Henry Productions, Inc. & Clerow Productions broadcast 1970-1974).
209. *The Mary Tyler Moore Show* (MTM Enterprises broadcast 1970-1977). Professor Bonnie Dow argues "that the debut of *Mary Tyler Moore* and a wave of media attention to women's

and *All in the Family* (1971-1979),[210] led, respectively, by formidable show runners, Grant Tinker (Moore's husband) and Norman Lear. It was Norman Lear, however, who tackled some of the women's issues addressed in this article.

Over the six decades of his influence, Lear used biting comedy to showcase social issues and the common threads of the human experience.[211] This approach enabled his writers to deliver universal plots to characters vastly different from those previously seen on television. In *All in the Family* spin-off series, *Maude* (1972-1978),[212] the ensemble cast consistently engaged in intelligent discussions about the rapid social changes happening in America.[213] By the mid-1970s, activists (at all levels of society), national publications, and judges had made quid pro quo harassment an emerging headline, and it returned to television screens through Lear and other television powerhouses.

i. Maude: Carol's Promotion (Tandem Productions broadcast Mar. 8, 1976)[214]

Maude's daughter, Carol Traynor, is a recently divorced adult with a school-aged son. They live with Maude and her husband Walter. After six years working in customer relations, Carol is up for promotion to manager. Firm president, Mr. Lambert, a married man who has repeatedly behaved inappropriately toward Carol at work, will decide the promotion. He informs Carol that she is too attractive to lead customer relations, so the job will go to a man—but her salary will increase. Later, Carol appeals the decision based on her qualifications and is met with Lambert's quid pro quo: sex in exchange for the promotion. Carol considers playing the boss's game, reasoning that if she gains a more powerful position, she may be able to help women down the ladder. Maude is apoplectic because this approach goes against everything she has taught Carol, and Maude herself has encountered quid pro quo

liberation in 1970 marked a qualitative shift in public consciousness of the presence of an organized feminist movement." DOW, *supra* note 25, at xvi.

210. *All in the Family* (Tandem Productions broadcast 1971-1979).

211. Lear "took the audience and put them on the [TV] set." Louis Bayard, *Norman Lear, Who Brought Social Commentary to the Sitcom, Dies at 101*, WASH. POST (Dec. 6, 2023), https://www.washingtonpost.com/obituaries/2023/12/06/norman-lear-dead-tv-obituary-archie-bunker/ (quoting screenwriter Paddy Chayefsky). On the back of Lear's memoir, NORMAN LEAR, EVEN THIS I GET TO EXPERIENCE (2014), President Bill Clinton is quoted as saying, "That Norman Lear can find humor in life's darkest moments is no surprise – it's the reason he's been so successful throughout his more than nine decades on earth, and why Americans have relied on his wit and wisdom for more than six."

212. *Maude*, *supra* note 199.

213. LEAR, *supra* note 211, at 262.

214. *Maude*, *supra* note 199.

scenarios in her work. Carol reveals the next day that she quit her job—much to Maude's relief.

Three years after the *Maude* episode, television quid pro quo harassment moved out of the private sector as Major Margaret Houlihan, an officer in the U.S. Army, encountered quid pro quos in the sitcom *M*A*S*H* (1972-83).[215] *M*A*S*H* depicted a mobile Army surgical hospital (the 4077th) during the Korean War (1950-1953).[216] The show tackled the serious side of war and military life while blending in humor.[217] Margaret, the unit's head nurse, was initially the butt of misogynistic jokes. Over the series run, however, she became a confident, moral, and professional leader of her nurses who advocated to improve their working conditions.[218]

Midway through the series run, two men from outside the immediate MASH compound presented Margaret with quid pro quos. In each episode, she exercised agency and asserted herself in ways that continued television's evolution in depicting quid pro quo.

*ii. M*A*S*H: Hot Lips Is Back in Town* (20th Century Fox television broadcast Jan. 29, 1979)[219]

Margaret receives word that her divorce is final. That evening, she celebrates with fellow officers Hawkeye and BJ in the officer's club. As a free woman, Margaret concludes that the Army is her calling and decides to pursue advancement. She invites Lt. Col. Weisskopf to the 4077th to review her process improvements in nursing operations. Weisskopf compliments Margaret on her staff and invites her to lead his Tokyo nursing staff as a lieutenant colonel. He responds to her enthusiasm with his own visions of moonlit strolls and romantic dinners. She rebuffs him, and he reminds her "how the game is played." She proceeds to kick him out of her tent. The scene ends with her toast, "Here's to me."

At the start of M*A*S*H's eighth season, Margaret encounters another quid pro quo. "Are You Now, Margaret" is set during the McCarthy era, when the FBI and members of Congress accused and

215. *M*A*S*H* (20th Century Fox television broadcast 1972-1983).

216. *See The Korean War (1950-1953)*, U.S. Army, https://www.army.mil/koreanwar/ (last visited Feb. 14, 2025). For more detail about the war, *see generally* Max Hastings, The Korean War (1987); David Halberstam, The Coldest War: America and the Korean War (2007).

217. Suzy Kalter, The Complete Book of M*A*S*H 199 (1984) (quoting Thad Mumford and Dan Wilcox, producers-writers, saying "M*A*S*H was a way to show that war is hell, and you show that war is hell by showing people in an insane situation acting crazy to try to maintain their sanity.").

218. *Loretta Swit,* The Television Foundation: The Interviews, https://interviews.televisionacademy.com/interviews/loretta-swit (last visited Nov. 9, 2024). Swit played Margaret Houlihan.

219. The statements in quotes in this episode synopsis are direct quotes from the episode.

jailed persons suspected of sympathies to the Communist Party.[220] The era lasted from 1950 to 1954[221] and fully overlapped with the Korean War years.[222]

*iii. M*A*S*H: Are You Now, Margaret?* (20th Century Fox television broadcast Sept. 24, 1979)

A congressional aide travels to the 4077th to investigate Margaret, who was named by others as having had a relationship in college with a man now alleged to be a Communist. After attempting to intimidate Margaret into believing it would be easier to name names, Margaret loudly resists his offer to close her file in exchange for a sexual encounter.

As the 1970s drew to a close, quid pro quo harassment stories first appeared in prime-time drama, in stories told through the lives of twenty-something women law students. These episodes aired after the enactment of Title IX and the appellate court reversals of harassment claim dismissals.

Family (1976-1980)[223] was an Aaron Spelling drama[224] created and often written by acclaimed playwright and screenwriter Jacqueline "Jay" Presson Allen. Set in California, the hour-long drama focused on the lives of a mid-life married couple, their two adult children, and a teenager still at home.

iv. Family: Expectations (Icarus Productions & Spelling-Goldberg Productions broadcast Dec. 7, 1978)[225]

Eldest daughter Nancy is a law student and divorced mother with a young child. With no support from her ex-husband, Nancy seeks work as a law clerk. Her application to a prestigious law firm results in an

220. *See, e.g.*, *McCarthyism / The "Red Scare"*, NAT'L ARCHIVES: DWIGHT D. EISENHOWER PRESIDENTIAL LIBR. & MUSEUM, https://www.eisenhowerlibrary.gov/research/online-documents/mccarthyism-red-scare (last visited Feb. 14, 2025) (describing the McCarthy era and listing numerous additional resources about the era).

221. *Id.*

222. For discussion of the interplay of these two aspects of American history at this time, *see generally* HASTINGS, *supra* note 216; HALBERSTAM, *supra* note 216.

223. *Family* (Spelling-Goldberg Productions broadcast 1976-1980).

224. As suggested by this article's descriptions of different Aaron Spelling productions, the prolific producer's output included both serious and lightweight television shows. He was better known for the lightweight examples, such as *Charlie's Angels* (Spelling-Goldberg Productions broadcast 1976-1981), *Fantasy Island* (Spelling-Goldberg Productions broadcast 1977-1984), and *The Love Boat* (Aaron Spelling Productions broadcast 1977-1987) from the 1970s and 1980s. But both *Family* in the 1970s and *Beverly Hills 90210* (Torand Productions and Spelling Television broadcast 1990-2000) in the 1990s, discussed *infra*, took on the serious topic of quid pro quo sexual harassment.

225. The statements in quotes in this episode synopsis are direct quotes from the episode.

interview with firm partner Mike Dunston. Sensing that she is not an ideal candidate due to her duties as a mother, Nancy declares she is desperate and that he will not be sorry to have taken a chance on her.

Dunston gives Nancy attention and opportunity, and she soon realizes it is meant to be in exchange for an intimate relationship. Nancy questions the only other woman at the firm, partner Roz Cornick, who explains that when she joined the firm, she knew quid pro quo might come with the territory. Roz tells Nancy, "It all boils down to what you're willing to do to get what you want. It got me what I wanted. I am a lawyer, and a successful one. In answer to the question that you're afraid to ask, what did it cost me? It cost me plenty." Nancy wrestles with her financial situation and her integrity. She consults her attorney father, Doug, who at first brushes off her description of Dunston's advances. After Nancy tells her father, Dunston continues to press her, and later, Doug tells her she will make a smart lawyer and does not need to put up with this situation. At the same time, Nancy also learns that her ex-husband will not be able to contribute financially for a long time. When she is summoned to Dunston's office, she confronts him about his demands and offers, admitting that she is just financially desperate enough to accept them. But, she says, she knows his actions are against the law and she may sue him. He backs down and tells her she will make a fine addition to the firm.

Based on the popular 1971 novel and 1973 film drama, *The Paper Chase* (1978-1986)[226] brought the lives of students at a prestigious law school to prime time. The group of classmates, predominantly white men, and the powerful and intimidating Professor Charles W. Kingsfield, wrestled with moral and social issues in a rapidly changing legal landscape. In an episode that aired on the cusp of the new decade, law student Elizabeth Logan encounters a quid pro quo.

v. The Paper Chase: Once More with Feeling (20th Century Fox television broadcast Feb. 27, 1979)[227]

Torts Professor Howard calls one of his first-year students, Elizabeth Logan, into his office and informs her that he is giving her a B. He encourages her to study harder and suggests, while complimenting her hair, that he would like to help her. Logan tenses as he touches her arm and strokes her hand and face. "I can promise you top grades from now on," he says.

226. *The Paper Chase* (20th Century Fox television broadcast 1978-1986).
227. The statements in quotes in this episode synopsis are direct quotes from the episode.

Logan learns the next day her grade has been lowered to a C. Angrily, she goes to Howard's office and calls him out. He maintains he senses an attraction between them. She asks, "If I'm not interested in you as a man, I flunk out of your course?" Logan tells Howard that she will talk to the dean, but the dean is of no help. When Logan tells her four male study mates, they initially presume Howard's innocence based on his reputation but eventually believe her.

The five classmates consider options, agree they need proof, and conclude that Logan may not be the first student Howard has propositioned. They recall a student, Sinclair, from the previous year whose grades inexplicably went down in all of her classes. It had been rumored that Sinclair propositioned Professor Howard. Logan visits Professor Kingsfield, head of the faculty disciplinary committee, who gives her a hard time. "You're over 21 and there are proper channels such as the dean," he says. He tells her to return with proof. Later, however, Kingsfield meets with Howard and initiates a conversation about female students who Kingsfield suspects have been Howard's victims. Kingsfield references "the perennial ardent feminist Logan," who he says reminds him of Sinclair, and lectures Howard about power and imbalance without accusing him of impropriety.

Logan has a hunch that Hutton, a Torts classmate, has been harassed by Howard. Hutton admits to having had an intimate relationship with him, but she tells Logan, "I used him. I cooperated and Howard gave me decent grades. I'm not as secure as you are. I'm doing what I have to do. It's not that high a price to pay, is it?" Hutton later agrees to help Logan by filing a complaint.

Howard then offers Logan an A, which she says she cannot accept. In another meeting between Kingsfield and Howard, Kingsfield cites the three women students who have made complaints against Howard. The episode ends as Logan watches Howard carry boxes from his office to his car.

Strikingly, although the setting was at a law school, Title IX was never explicitly mentioned despite it likely being the inspiration for the episode.[228] Nor does the episode explain the proper procedure for filing a complaint against Howard; instead, it relies on Kingsfield to pressure Howard to "resign." In both *Family* and *The Paper Chase*, it was the women's assertiveness rather than use of a legal process that yielded results.

228. *See* Christine A. Corcos, *Growing Up with Popular Culture in the Time of Title IX*, 83 LA. L. REV. 59, 60 (2022) (noting that "[television] characters who discuss the impact of the law rarely mention the actual statute").

Television depictions of quid pro quo harassment in the 1970s had progressed to explicitly recognize, as had the legal system, that demanding sex from employees in exchange for work retention and benefits, or from students in exchange for better grades, was no longer acceptable behavior. But to fight the quid pro quo abuse of power, the women characters largely relied on their wiles or persistence rather than still-novel legal claims or school disciplinary systems. Viewers never witnessed scenes questioning the harasser about his motivation or a disciplinary process as painful as what the women were experiencing in seeking justice. But viewers did start to hear references to using the legal system to stop harassment.

V. The 1980s

By 1980, Baby Boomers, now aged 16 to 34, impacted every aspect of American life and industry. The U.S Bureau of Labor Statistics reported that nearly 19% of working women held bachelor's or advanced degrees, 45% were high school graduates, and 18% had left school.[229] In 1981, there were 23 women in Congress—2 senators and 21 in the House of Representatives.[230] In 1980, women comprised 8% of the legal profession, an increase from earlier decades.[231] The 1970s had seen "rapid growth in women's enrollment as law students,"[232] and they constituted about a third of law students by around 1980.[233]

A. 1980s Legal Developments

In 1980, the EEOC issued guidelines specifically stating that sexual harassment at work constitutes sexual discrimination within the meaning of Title VII.[234] Its definition covered both quid pro quo and hostile workplace harassment and stated:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably

229. 2017 BLS TED, *supra* note 59.
230. *See Women in Congress*, *supra* note 61.
231. *See* ABA Legal Demographics, *supra* note 64.
232. *E.g.*, Katz et al., *supra* note 65, at 58.
233. *Id.* (referencing figure 2).
234. EEOC Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11(a) (1972).

> interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[235]

In 1986, in *Meritor Savings Bank v. Vinson*, the Supreme Court finally addressed sexual harassment on the job and held it constitutes sexual discrimination under Title VII.[236] Mechelle Vinson's supervisor pressured her into engaging in sexual relations and otherwise sexually harassed her both in private and in front of other employees.[237] Fearful of losing her much-needed job, she complied with his demands for several years but brought suit against him after she took sick leave and was fired.[238] Catharine A. MacKinnon wrote the brief for plaintiff Vinson, a Black woman who exemplified the economic and power victimization MacKinnon had written about.[239]

Referring to the EEOC interpretation of its 1980 guidelines as providing "guidance" but not binding,[240] the Court affirmed the holding of the D.C. Circuit below, that creating a hostile workplace is sexual harassment in violation of Title VII, and remanded the case for further proceedings.[241] Rejecting a defense argument that liability should be judged by whether the plaintiff's participation in sexual relations was "voluntary," the Court ruled that the right question is whether the harasser's attentions were "unwelcome."[242] It also rejected the defense argument that the harm alleged must be economic in basis rather than "purely psychological,"[243] holding "that harassment leading to non-economic injury can violate Title VII."[244] But its opinion was not all that women's advocates hoped for.[245] The Court set a high standard

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235. *Id.*

236. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

237. *Id.* at 57-58.

238. HIRSHMAN, *supra* note 137, at 41-60 (providing some additional information not detailed in the Court opinion).

239. *Meritor*, 477 U.S. at 58 (list of counsel). For a detailed account of the case's journey to the Supreme Court, see HIRSHMAN, *supra* note 137, at 41-52.

240. *Meritor*, 477 U.S. at 65.

241. While the case specifically addressed a claim of harassment causing a hostile workplace, it has been interpreted as covering workplace sexual harassment more broadly, including quid pro quo harassment. *See, e.g.*, *Policy Guidance on Current Issues of Sexual Harassment,* U.S. EEOC (Mar. 19, 1990), https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment. Much of the Court's analysis can apply to both types of claims. But proving damages can be more difficult for hostile workplace harassment actions, which do not always involve a negative employment status consequences. In quid pro quo harassment claims, the negative job action, or its threat, if proven, establishes damage. But establishing damages for hostile workplace harassment claims is more complex and led to further Supreme Court in the 1990s, as discussed *infra*.

242. *Meritor*, 477 U.S. at 68.

243. *Id.* at 64.

244. *Id.* at 65. Quid pro quo harassment cases typically involve economic injury due to negative job status consequences.

245. *See* HIRSHMAN, *supra* note 137, at 41, 51 (describing the *Meritor* outcome as both a "bittersweet victory" and a "dark victory").

to establish hostile workplace harassment,[246] and it ruled that the trial court had not erred in admitting evidence of plaintiff's "dress and personal fantasies."[247] Furthermore, the Court limited potential employer liability for sexual harassment by holding that employer liability for supervisor actions must be judged according to agency principles on a case-by-case basis, rather than establishing a strict liability standard.[248]

1. 1980s Television Developments

Any discussion of quid pro quo harassment and pop culture in this time frame must credit the social impact of the 1980 blockbuster movie *9 to 5*,[249] a comedy about three women office workers taking on their harassing boss. The film stemmed from the organizing work of Karen Nussbaum and the organization 9to5,[250] which focused on addressing working women's issues. The movie spawned an 85-episode television series, *Nine to Five* (88-1982),[251] which did not pack the film's punch, messaging, or star-filled cast. However, ground had been broken.

For the 1980-81 season, the list of the top-twenty-rated television series[252] reveals that many of them were sitcoms about women[253] or featured women co-stars.[254] Multiple episodes addressed quid pro quo harassment, and the authors observed in their review of the episodes that writers wrote characters who wrestled with agency, vulnerability, anger,

246. *Meritor*, 477 U.S. at 67 (stating that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'").

247. *Id.* at 73. The Senate Judiciary Committee employed this "trying the victim" approach to attack Professor Anita Hill's credibility in the Hill/Thomas hearings, discussed *infra*. *Compare Meritor*, 477 U.S. 57, *with* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (holding, in a Title VII employment case not based on harassment, that denying a woman a partnership in an accounting firm could constitute sex discrimination if based on gender stereotypes; denial was based in part on concerns that the female partnership applicant should behave "more 'femininely'").

248. *Meritor*, 477 U.S. at 73.

249. Seth Abramovitch, *Hollywood Flashback: Dolly Parton's '9 to 5' Anthem Becomes Her First Pop No. 1*, The Hollywood Rep. (Feb. 18, 2021), https://www.hollywoodreporter.com/movies/movie-news/hollywood-flashback-dolly-partons-9-to-5-anthem-becomes-her-first-pop-no-1-4133570/ (discussing how the movie made $103 million domestically in its initial release, the equivalent of $327 million in 2021).

250. *See* Karen Nussbaum https://www.karennussbaum.com/ (last visited Nov. 16, 2024) (describing how, in the early 1980s, Karen Nussbaum co-founded and led 9to5, National Association of Working Women. She also served as president of 9to5's sister organization, the union District 925, SEIU).

251. *Nine to Five* (IPC Films & 20th Century Fox television broadcast 1982-1988).

252. Brooks & Marsh, *supra* note 48, at 1,686.

253. *E.g., Alice* (D'Angelo-Bullock-Allen Productions & Warner Bros. Television broadcast 1976-1985); *One Day at a Time* (Embassy Television & TAT Communications Company broadcast 1975-1984); *Laverne & Shirley* (Henderson Productions, Miller-Millis Productions, & Paramount Television Studios broadcast 1976-1983).

254. *E.g.*, *The Jeffersons* (Embassy Television broadcast 1975-1985); *Three's Company* (DLT Entertainment, TTC, & The NRW Company broadcast 1976-1984); *Little House on the Prairie* (NBC broadcast 1974-1983).

and fairness.[255] The quid pro quo power play was becoming an engaging and timely dramatic plot.

In the comedy arena, Title IX's enactment in 1972 started to show its cultural influence on prime-time television. Shortly after *The Paper Chase*'s quid pro quo at a law school, two sitcom episodes offered plots where professors presented a similar ultimatum to women lead characters. *One Day at a Time* (1975-84),[256] a Norman Lear production, offered a glimpse of life in Indianapolis for a divorced working mom, Ann Romano, and her two teenage daughters. By the 1980 season, Barbara, the younger daughter, was in college and encountered quid pro quo harassment there.

a. One Day at a Time: Teacher's Pet (Allwhit Inc. & TAT Communications Company broadcast Nov. 9, 1980)

Barbara's government professor has given her a D on a term paper that Ann and their friend Duane Schneider both thought was good. Barbara visits the professor in his office to appeal the grade, at which time he makes a vague offer to improve her grade if she demonstrates "extra effort." When he massages her shoulders, she asks if he is making a pass. He replies with a double entendre: a pass is better than a fail. Ann encourages Barbara to file a complaint, which she does. Anonymous harassing phone calls and a college newspaper headline cause Barbara to second-guess her decision, but she sees hope in the willingness of another student, Sylvia, to support her. Sylvia has had sex with the professor in exchange for a better grade.

The professor visits the Romano family apartment just before Sylvia arrives to meet with Barbara to discuss the situation. Sylvia is intimidated by his presence and reneges on her commitment to support Barbara. Barbara proceeds with her complaint, knowing her case has just become weaker but recognizing its potential to change conditions for future students.[257]

The Golden Girls premiered in 1985 and ran through 1992,[258] with a twist on four women characters: they were "older" and lived under one roof.[259] Showrunner Susan Harris's career in sitcom development had

255. Some examples include *One Day at a Time: Teachers Pet* (Allwhit Inc. & TAT Communications Company broadcast Nov. 9, 1980); *Little House on the Prairie: Sylvia Part 1* (NBC broadcast Feb. 9, 1981); *Little House on the Prairie: Sylvia Part 2* (NBC broadcast Feb. 16, 1981); *Alice: Tommy's TKO* (Warner Bros. Television broadcast on Nov. 30, 1980).

256. *One Day at a Time* (Embassy Productions & TAT Communications Co. broadcast 1975-1984).

257. The series did not follow up on the situation depicted in this episode.

258. *The Golden Girls* (Touchstone Television & Witt/Thomas/Harris Productions broadcast 1985-1992).

259. *See* BETTY WHITE, HERE WE GO AGAIN: MY LIFE IN TELEVISION 248 (2010).

already delivered groundbreaking shows,[260] and her series featured candid conversations about controversial social issues of the day such as homosexuality, abortion, and infidelity.[261] In *The Golden Girls*, Blanche served the femme fatale role, with more sexually provocative lines and attributes than viewers were used to seeing from "older" women. Dorothy was the opinionated and most educated member of the group.

In a quid pro quo harassment episode, the show implicitly invites the question of whether Blanche exercises agency by choosing not to pursue a quid pro quo complaint. Maybe she had experienced enough harassment to think it unlikely the institution would address it. Blanche and Dorothy share a nearly universal dialogue in the episode that touches on quid pro quo themes, such as: Should she report the behavior to stop the harasser from propositioning someone else in the future? Shouldn't schools and workplaces be places where merit is recognized?

b. The Golden Girls: Adult Education (Witt/Thomas/Harris Productions & Touchstone Television broadcast Feb. 22, 1986)[262]

To finally earn her bachelor's degree and be eligible for a work promotion, Blanche returns to college to complete needed credits. Struggling in her psychology class, she fails the midterm, jeopardizing a passing final grade. When she visits her professor to ask how to improve her grade, he suggests an intimate relationship. She replies, "I'll think it over." Dorothy tells Blanche to report the professor and relates her own experience from earlier in her career. Blanche meets with the dean, who is overwhelmed by the cumbersome process but agrees to begin the paperwork for a complaint. Ultimately, Blanche decides the only way to ensure a better grade is to study harder for the final. "My self-respect is more important than passing this course. Best of all, I told him off."

Drama continued to address quid pro quo harassment in the workplace with *Cagney & Lacey* (1981-88),[263] which offered viewers the first

260. *Soap* (ABC & Witt/Thomas/Harris Production broadcast 1977-1981), and, following *The Golden Girls*, *Empty Nest* (Witt/Thomas/Harris Productions & Touchstone Television broadcast May 16, 1987) and *Nurses* (Witt/Thomas/Harris Productions broadcast 1991-1994).

261. *See* Kristen Baldwin, *How The Golden Girls Creator Susan Harris Changed TV Comedy Forever — and Why She Doesn't Watch It Now*, ENT. WKLY. (Oct. 15, 2018), https://ew.com/tv/susan-harris-golden-girls-soap-oral-history/ ("[b]etween 1975 and 1998, Harris was one of TV's most prolific writers, creating 13 comedies, including the trailblazing cult hit *Soap*, the future pop culture paradigm known as *The Golden Girls*, and the long-running family sitcom *Empty Nest*. Along with mentor Norman Lear, Harris and her brand of bold, brainy comedy brought the sitcom into the modern era — and she did it all at a time when women were barely represented in the room, let alone seated at the head of the table.").

262. The statements in quotes in this episode synopsis are direct quotes from the episode.

263. *Cagney & Lacey* (Orion Productions broadcast 1981-1988).

working women's partnership—New York police detectives Christine Cagney and Mary Beth Lacey. The show's predecessors had often been difficult to take seriously. For example, in *Police Woman* (1974-78),[264] Sergeant Pepper Anderson was frequently rescued from danger by her male partner. The three former-cops-turned-private-detectives known as *Charlie's Angels* (1976-81)[265] were regarded as eye candy, as the producers intended.[266] *Charlie's Angels*' scripts and plots were notoriously weak and wardrobe budgets rich, in keeping with other glossy, lightweight television developed by powerhouse showrunner Aaron Spelling.[267] Series co-star Kate Jackson and series producer Barney Rosenzweig unsuccessfully fought white male executives for less fantasy and better lines.[268]

Rosenzweig credited his experience on *Charlie's Angels* as formative to developing the serious female buddy cop drama that became *Cagney & Lacey*.[269] Its developmental years yielded their own amount of drama, as few in the industry thought the premise would succeed.[270] Airing from 1981 to 1988, *Cagney & Lacey* survived numerous challenges and cancellations to earn 36 Emmy nominations and 14 wins for acting, writing, directing, and production.[271]

Creators and main writers Barbara Corday and Barbara Avedon, along with Rosenzweig, developed two women characters who complemented each other in life, attitude, and style. Single, well-bred, and a college graduate, Christine Cagney was ambitious, a risk taker, and an alcoholic who had successfully entered recovery. She later became a police sergeant. Married, a mother, and distinctly more blue-collar, Mary Beth Lacey blended deliberate approaches with often naïve judgment and high standards. The series aimed to break new ground, as explained by Professor Georgia Jeffries, one of the series's writers and currently a tenured professor at University of Southern California School of Cinematic Arts:[272] "'Ground-breaking story arcs' were created by

264. *Police Woman* (David Gerber Productions & Columbia Pictures Television broadcast 1974-1978).

265. *Charlie's Angels* (Spelling-Goldberg Productions broadcast 1976-1981).

266. *See* AARON SPELLING & JEFFERSON GRAHAM, AARON SPELLING: A PRIME-TIME LIFE 110 (1996) (stating that "[t]he show was camp. Fantasy. We were just trying to have fun. *Charlie's Angels* was exactly what it set out to be: light, escapist entertainment. A glamorous, upbeat and colorful fantasy.").

267. *Id.*

268. *See* David Sheehan, '*Charlie's' Fallen 'Angel*,' PEOPLE MAG. (June 4, 1979, 12:00 p.m.), https://people.com/archive/cover-story-charlies-fallen-angel-vol-11-no-22/?utm_source=emailshare&utm_medium=social&utm_campaign=shareurlbuttons; BARNEY ROSENZWEIG, CAGNEY & LACEY AND ME 21-22 (2007).

269. ROSENZWEIG, *supra* note 268, at 18-23.

270. *Id.* at 30-32.

271. *Id.* at 367.

272. *See Full Bio*, GEORGIA JEFFRIES, https://georgiajeffries.com/about/ (last visited Feb. 16, 2025).

writer-producers willing to take risks and battle with the CBS Standards and Practices Department, which had the power to over-rule any story considered too 'controversial.'"[273] The series included plots involving unplanned pregnancy/abortion, alcoholism, domestic violence, condom usage, and other then-controversial issues.[274]

c. Cagney & Lacey: Rules of the Game (Orion Television broadcast Jan. 28, 1985)[275]

Captain Samuels informs the squad of a murder that may have international diplomatic implications. A special task force is being convened to work with the FBI and Detectives Cagney and Lacey will be on it. Captain Jack Hennessy, leader of the task force, assigns Lacey to desk duty and Cagney as his partner. Upon their second interaction, Hennessy presses Cagney for an intimate relationship. Cagney resists, stating she does not sleep her way to promotions. Hennessy is up for a promotion and solving this case would make him a shoo-in. Cagney reveals to him that she hopes to become the department's first woman chief detective. "Sometimes it pays to mix business with pleasure," Hennessy says, and threatens retribution in the form of a bad review if she does not comply. Undeterred, Cagney files a complaint and receives pressure from within the department. Inspector Knelman attempts to broker a deal where Cagney would get a good review for her work on the task force in exchange for withdrawing the complaint. Cagney stands firm and refuses his offer.

d. Cagney & Lacey: Con Games (Orion Television broadcast Mar. 11, 1985)

This episode picks up the internal complaint against Captain Hennessy six weeks later. Cagney has just taken the sergeant's exam and is confident of her result. Inspector Knelman meets with Cagney and assures her that Hennessy has learned his lesson. At one point, to be a team player, she considers withdrawing the complaint but does not. Cagney learns of and meets with another officer, Paula Eastman, whom Hennessy had promised advancement in exchange for a sexual

273. E-mail from Prof. Georgia Jeffries, USC School of Cinematic Arts, to authors Cynthia Bemis Abrams and Mary B. Trevor (Feb. 3, 2025, 12:41 p.m. CST) (on file with authors).

274. Unplanned pregnancy/abortion, *Cagney & Lacey: Choices* (Orion Television broadcast May 11, 1984); alcoholism, *Cagney & Lacey: Turn, Turn, Turn Part 2* (Orion Television broadcast Mar. 30, 1987); domestic violence, *Cagney & Lacey: A Cry For Help* (Orion Television broadcast May 2, 1983); and condom usage, *Cagney & Lacey: Rites of Passage* (Orion Television broadcast Dec. 1, 1986).

275. The statement in quotes in this episode synopsis is a direct quote from the episode.

relationship. To protect her career, Eastman refuses to testify. The internal hearing proceeds, featuring a "He Said/She Said" defense and scrutiny of Cagney's lifestyle. Detectives Isbecki and Lacey are character witnesses and are questioned about Cagney's habits and behavior. No one focuses on Hennessy's behavior. Cagney fears she will gain a reputation as a troublemaker who rats on another cop, dooming her chances of advancement on merit. Now understanding their humiliation and pain, she also regrets the times she encouraged rape victims to proceed with pressing criminal charges. But on the second day of the hearing, Eastman arrives to testify.

In this major story arc across two episodes, writers Georgia Jeffries, Terry Louise Fisher, and Steve Brown featured several common aspects of quid pro quo harassment found in the instances discussed in this article: a power move by the harasser, the institution's "let's just make this go away" response, and the victim's own second-guessing of her behavior. Like other women facing the difficult decision of whether to pursue a harasser, whether in a television storyline or the real world, Cagney held to the conviction that women pressing their complaint was the only way to prevent harassers from doing this to other women.

As the portrayal of sexual harassment moved from comedies and sitcoms to award-winning drama in the 1980s, one television writer encountered evidence of television's impact on its viewers. In an interview with the authors,[276] now-USC Professor Georgia Jeffries, who wrote the arc's first episode, shared a story of its impact. As an award-winning television writer and producer, Jeffries explained to us, she was frequently asked to serve on industry panels:

> I remember leaving one panel and a young woman came up to me and walked me out and thanked me very specifically for *Con Games/Rules of the Game*. She knew that I had written it, and I probably addressed some of the themes on the panel. Then she said to me, "You know, until I saw that show, I thought it was my fault." It was very specific, and she was quite emotional. I remember being so touched and humbled and grateful to be in her presence—to know that that show had made a difference in her life. It was really an extraordinary moment.[277]

VI. THE 1990s

In 1990, the oldest Baby Boomers were 44 and the youngest 26. Nearly 25% of working women held bachelor's or advanced degrees,

276. Interview with Georgia Jeffries, Professor at USC School of Cinematic Arts, via Zoom (June 14, 2024).

277. *Id.* (quote found on Zoom recording at 01:05:59.041-01:07:28.080).

42% had graduated from high school, and 11% had dropped out.[278] In 1991, 4 women served in the U.S. Senate and 28 in the House of Representatives, for a total of 32, about 6% of the entire body.[279] In that year, women made up an increasingly significant 20% of the legal profession.[280] The rapid growth in women attending law school slowed somewhat during the 1980s, but by 1990 over 40% of law students were women.[281] In the 1990s, mistreatment of women by powerful men hit the daily news cycle. Two scandals with great immediate and long-term impact were brought into people's homes, in significant part, via television news coverage. Both brought detailed examples of men's abuse of power in work relationships with women in direct, compelling coverage.

Television coverage of President Bill Clinton's impeachment hearings in early 1999 over his involvement with White House intern Monica Lewinsky was the culmination of a well-publicized investigation.[282] In addition to the live hearings, cable and network news bureaus delivered continuous analysis and interviews throughout the day, one of the first experiences of "wall-to-wall" coverage.[283]

In the other scandal, a woman of color changed the world's understanding of the connections between race and sexual harassment in the workplace.[284] In 1991, D.C. Circuit Judge Clarence Thomas was nominated to succeed Thurgood Marshall as a Justice on the U.S. Supreme Court. Law professor Anita Hill, who had previously worked for Thomas at the Department of Education and at the EEOC, testified for seven hours before the Senate Judiciary Committee on live television about his persistent sexual harassment during the two years she worked for him.[285] Her testimony had been allowed only after pressure was brought

278. 2017 BLS TED, *supra* note 59.

279. *See Women in Congress, supra* note 61.

280. ABA Legal Demographics, *supra* note 64.

281. Katz et al., *supra* note 65, at 58 fig. 2.

282. *See, e.g.*, *Clinton Impeachment*, C-SPAN, https://www.c-span.org/impeachment/?person=clinton (last visited Jan. 14, 2025) (searchable 1998–99 C-Span impeachment coverage); *see also* HIRSHMAN, *supra* note 109, at 93-112 (providing details of the Clinton scandal).

283. C-Span Panel, *Press Excesses* (Feb. 14, 1998), https://www.c-span.org/video/?100468-1/press-excesses (discussing the Hollywood Radio and Television Society media coverage of the Clinton allegations).

284. Baker, *Race, Class, supra* note 113, at 7 (observing, "[b]ecause sexual harassment ha[d] been seen as a white middle- class women's issue, Anita Hill took the country by surprise.") .

285. ANNE DEAVERE SMITH, *The Most Riveting Television: The Hill-Thomas Hearings and Popular Culture*, *in* RACE, GENDER AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS 248 (Anita Faye Hill & Emma Coleman Jordan eds., 1995) (describing the event as "one of the [then] most watched public events in [television] history") [hereinafter RACE, GENDER, AND POWER]. For details of Anita Hill's journey to testify before the Senate and how her appearance played out, see HIRSHMAN, *supra* note 137, at 61-92; *see also* TIMOTHY M. PHELPS & HELEN WINTERNITZ, CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION 261 (1992). For Professor Hill's own account, see ANITA HILL, SPEAKING TRUTH TO POWER (1997) [hereinafter HILL, SPEAKING TRUTH].

on the committee in various ways, including by members of the "Boxer rebellion," a diverse group of women House members led by Representative Barbara Boxer who publicly demanded that the committee take the allegations seriously,[286] and by Nina Totenberg of National Public Radio, who publicized Hill's story on television's *Nightline*.[287]

The all-white, all-male committee members aggressively questioned Hill, accusing her of perjury and of fantasizing her testimony.[288] Further, Thomas was allowed extensive time to testify after Hill's testimony.[289] "By all accounts, [Hill] was unexpectedly effective."[290] But despite her impressive professional credentials and demeanor, the support of family members who attended the hearing, the coherence and credibility of her accusations,[291] and potential corroborative evidence known to the committee,[292] the committee recommended that Thomas be confirmed. The Senate, with only two women members at the time, did so.[293]

The subsequent furor among women "in the government, in the press, [and] in the public at large," resulted in significant developments.[294] The following year, 1992, became known as the Year of the Woman.[295] Voters elected four new women to the Senate, and reelected a female

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286. Members in the group included (in alphabetical order): Barbara Boxer (D-CA), Nita M. Lowey (D-NY), Patsy T. Mink (D-HI), Eleanor Holmes Norton (D-D.C.), Patricia Schroeder (D-CO), Louise M. Slaughter (D-NY), and Jolene Unsoeld (D-WA). They stormed the Senate to insist that Anita Hill's allegations be heard. *See, e.g., Remembrances: The Anita Hill Hearings—Twenty Years Later, in* BELIEVE, *supra* note 128, at 164-65; *see also* Kimberlé Crenshaw, *Stunned But Not Bowed*, *in* BELIEVE, *supra* note 128, at 158-59 & n.2. Several of these trailblazing women are mentioned elsewhere in this article.

287. *ABC News Nightline* (ABC broadcast 1979 to present); HIRSHMAN, *supra* note 134, at 78–79.

288. Baker, *Race, Class*, *supra* note 113, at 9.

289. HIRSHMAN, *supra* note 137, at 83-85.

290. *Id.* at 81.

291. *Id.* at 81-83.

292. *See id.* at 84-85; HILL, SPEAKING TRUTH, *supra* note 285, at 231-34; *The Thomas Nomination; Excerpts From an Interview With Another Thomas Accuser*, N.Y. TIMES, Oct. 15, 1991, at A21, https://www.nytimes.com/1991/10/15/us/the-thomas-nomination-excerpts-from-an-interview-with-another-thomas-accuser.html (article containing excerpts of telephone interview with two potential corroborative witnesses).

293. The two women were Nancy Kassebaum (R-KS) and Barbara Mikulski (D-MD). *Year of the Woman*, U.S. SENATE (Nov. 3 1992), https://www.senate.gov/artandhistory/history/minute/year_of_the_woman.htm [hereinafter U.S. SENATE].

294. *See, e.g.*, PHELPS & WINTERNITZ, *supra* note 285, at 261; *see also* U.S. SENATE, *supra* note 293 (stating, "[t]he hotly contested 1991 Senate confirmation hearings for Supreme Court nominee Clarence Thomas troubled many American women. Televised images of a committee, composed exclusively of white males, sharply questioning an opposing witness—African American law professor Anita Hill—caused many to wonder where the women senators were.").

295. *"Year of the Woman,"* U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/year_of_the_woman.htm (last visited Feb. 16, 2025) (stating, "[t]o this [popular name for the year], Senator [Barbara] Mikulski responded, '[c]alling 1992 the Year of the Woman makes it sound like the Year of the Caribou or the Year of the Asparagus. We're not a fad, a fancy, or a year.'").

incumbent.[296] In the three months after Professor Hill's testimony, the EEOC received 1,244 sexual harassment complaints, a significant increase from the same period in the previous year.[297] The enactment of the Civil Rights Act of 1991, with, inter alia, the goal to amend the 1964 Civil Rights Act "to strengthen and improve Federal civil rights laws [and] to provide for damages in cases of intentional employment discrimination,"[298] has been attributed in part to legislators' efforts to appease voters upset by the Thomas hearing and his elevation to the Court.[299] Hill subsequently became an activist and prolific author and editor addressing sexual harassment in the workplace, employment discrimination, and gender violence.[300]

A. 1990s Legal Developments

By the 1990s, Title VII's coverage of sexual harassment claims was well established as a general matter, and legal developments affecting sexual harassment law built on earlier developments. In 1990, the EEOC issued its *Policy Guidance on Current Issues of Sexual Harassment* "to provide guidance on [various] issues in light of the developing law after [*Meritor Savings Bank v.*] *Vinson*."[301] The EEOC also clarified that "[a]lthough 'quid pro quo' and 'hostile environment' harassment are theoretically distinct claims, the line between the two is not always clear and the two forms of harassment often occur together."[302] As noted above, Congress enacted the Civil Rights Act of 1991 to strengthen discrimination protections.

Notably, in 1998, the EEOC resolved two actions it had brought against large corporations involving numerous women who had alleged

296. *See* RACE, GENDER, AND POWER, *supra* note 285, at xii; U.S. SENATE, *supra* note 280 (listing the changes to the Senate, including newly elected members: Barbara Boxer (D-CA), Carol Moseley Braun (D-IL), Dianne Feinstein (D-CA), and Patty Murray (D-WA) and reelected member Barbara Mikulski (MD)).

297. PHELPS & WINTERNITZ, *supra* note 285, at 422 (explaining that the EEOC had received 728 during the same time period in the previous year); *see* RACE, GENDER, AND POWER, *supra* note 272, at xiii (stating that in the year after the testimony, complaints to the EEOC more than doubled).

298. Civil Rights Act of 1991, PUB. L. 102-166, 105 STAT. 1071.

299. *See generally* PHELPS & WINTERNITZ, *supra* note 285, at 422-23.

300. Terry Gross, *Anita Hill Started A Conversation About Sexual Harassment. She's Not Done Yet,* NPR (Sept. 28, 2021), https://www.npr.org/2021/09/28/1040911313/anita-hill-belonging-sexual-harassment-conversation (containing excerpts of Terry Gross interview).

301. U.S. EEOC, *Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990), https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment [hereinafter 1990 Policy Guidance]; *see generally* U.S. EEOC, *Enforcement Guidance on Harassment in the Workplace* (Apr. 29, 2024), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace (stating that the 1990 Policy Guidance was superseded in 2024 by the EEOC).

302. 1990 Policy Guidance, *supra* note 301. (The scenario from *A Different World* described at the opening of this article is a good example of a situation involving aspects of both types of harassment.)

sexual harassment, resulting in multi-million-dollar payouts by the corporations.[303] In the action against Mitsubishi Motor Manufacturing of America involving 300-400 female employees, the company agreed to pay $34 million.[304] In the other action, against Astra USA, the company agreed to pay almost $10 million to a class of 80 to 100 female employees.[305]

During the 1990s, the Supreme Court decided a number of sexual harassment cases involving claims under both Title VII and Title IX. The Title VII cases were based on hostile workplace claims. With the exception of *Harris v. Forklift Systems, Inc.*,[306] the Court's holdings encompassed quid pro quo harassment as well. In *Faragher v. City of Boca Raton*,[307] and *Burlington Industries, Inc. v. Ellerth*,[308] the Court focused on affirmative defenses employers could use to avoid vicarious liability for sexual harassment inflicted by employees. In *Oncale v. Sundowner Offshore Services*,[309] the Court held that same-sex harassment is a violation of Title VII, demonstrating that, by the end of the century, U.S. courts were broadening their recognition of different types of sexual harassment.[310]

Concerning Title IX, in *Franklin v. Gwinnett County Public Schools*,[311] the Court held that damages are available under Title IX for student sexual harassment claims. However, towards the close of the decade, the Court made it more difficult for Title IX claims to succeed. In *Gebser v. Lago Vista Independent School District*,[312] the Supreme Court held that "damages may not be recovered in [harassment] circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice

303. *EEOC History: 1990 – 1999*, U.S. EEOC, https://www.eeoc.gov/history/eeoc-history-1990-1999#:~:text=Astra%20USA%20%2C%20the%20agency%20alleged,Northern%20Mariana%20Islands%20(CNMI) (last visited Feb. 16, 2024).

304. *Id.*

305. *Id.*

306. Harris v. Forklift Sys., 510 U.S. 17, 23 (1993) (holding that the standard established in *Meritor* did not require a showing of psychological harm to obtain damages resulting from a hostile environment. As discussed *supra*, the damages analysis for hostile work environment differs from that for quid pro quo).

307. Faragher v. City of Boca Raton, 524 U.S. 775, 775 (1998).

308. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 742 (1998).

309. Oncale v. Sundowner Offshore Services, 523 U.S. 75, 75 (1998).

310. *Id.* at 79 (stating, "[a]s some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII [in 1964]. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

311. Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1992) (addressing a Title IX claim by a high school student alleging sexual harassment and abuse by a male coach and teacher).

312. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

of, and is deliberately indifferent to, the teacher's misconduct."[313] One commentator has said that this ruling established an "onerous" condition for plaintiffs seeking to sue under Title IX. [314] Further, in *Davis v. Monroe County Board of Education*,[315] which recognized an action under Title IX for student-on-student harassment, the Court held "that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[316]

By century's end, legal frameworks were in place to allow legal actions to challenge quid pro quo sexual harassment in the workplace and in schools. The general public was aware of the possibility of challenging such harassment. But as public events of the 1990s and television showed, actually pursuing such actions and obtaining relief was difficult.

B. 1990s Television Developments

1. Response to Anita Hill

The widespread anger and distrust following the Hill/Thomas hearings was portrayed on prime-time television, although the duration was short-lived. As television veteran Anna Deavere Smith wrote after she talked with people in the television industry about the hearings, "I was reminded how difficult it is for television to be political."[317] Nonetheless, in October of 1991, the Fox network sketch comedy show *In Living Color*[318] aired two skits featuring a "Thomas" character. The first skit aired on October 6, before the October 11 Senate hearing.[319] The sketch depicted Thomas as a Black activist out for judicial reform and excited about his lifetime appointment. The second, which followed Hill's

313. *Gebser*, 524 U.S. at 277. *See also* Zalesne, *supra* note 9, at 374 (contemporary commentator stating that the ruling in *Gebser* "actually encourages schools to turn their backs on sexual harassment altogether as a means of avoiding liability.").

314. Drobac, Exploitation, *supra* note 97, at 186. For Professor Drobac's discussion of *Gebser*, *see also id.* at 186-92.

315. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999).

316. *Id.* at 633. *See also* Drobac, Exploitation, *supra* note 97, at 187 (observing that "[t]he standards of proof for liability delineated in both *Gebser* and *Davis* demonstrate that the law affords much more protection to working adults than it does to captive children at school.").

317. Smith, *in* Race, Gender, and Power, *supra* note 285, at 249.

318. *In Living Color* (Ivory Way Productions & 20th Century Fox television broadcast 1990-1994). *See In Living Color*, IMDB, https://www.imdb.com/title/tt0098830/?ref_=fn_all_ttl_1 (last visited Feb. 16, 2025) ("The Wayans siblings present an African-American focused sketch comedy show."). *In Living Color* (1990-1994) was created by Keenen Ivory Wayans and featured a multiracial and multigender sketch comedy troupe that included aspiring comics Jim Carrey and Jamie Foxx.

319. *In Living Color: Clarence Thomas' First Day* (Ivory Way Productions & 20th Century Fox television broadcast Oct. 6, 1991).

testimony and Thomas's Senate confirmation, aired on October 20, and parodied celebration of his achievement by depicting him going on an outing to "GirlieWorld."[320]

Possibly the only prime-time episode still available for viewing that directly addressed the outrage about Anita Hill's treatment was on the series *Designing Women* (1986-1993),[321] in its November 4, 1991, episode called *The Strange Case of Clarence and Anita*.[322] Series creator and feminist Linda Bloodworth-Thomason wrote an episode depicting its four white women characters watching and angrily arguing about the hearings, with occasional input from their male Black assistant. CBS received 1500 calls about the episode, then the most ever about a single episode of one of its shows, and most of the calls reportedly were positive.[323]

The episode of *A Different World,* "Bedroom at the Top," whose synopsis appears at the start of this article, aired two months after Clarence Thomas's confirmation.[324] Clearly inspired by Professor Hill's experience, the storyline shows Whitley exercising agency and taking appropriate steps to end her harassment, while also showing empathy for Professor Hill's experience. But Whitley, like Professor Hill, does not achieve her goal to stop the harasser from holding power: Whitley's harasser remains her supervisor.

2. Dramas Get Sophisticated

By the 1990s, the novelty of a plot focused on calling out quid pro quo harassment had faded. But those quid pro quo episodes that aired, within series largely aimed at a female audience, delved more deeply than had previous dramas and detailed the tactical steps of dealing with the situation. Using two or more episodes, writers presented material at a level previously only explored in two-hour made-for-TV movies of the 1970s and 80s.[325] Shows took time to detail the incident; the victim's response and thought processes; and input from other characters about

320. *In Living Color: The Adventures of Handi-Boy* (Ivory Way Productions & 20th Century Fox television broadcast Oct. 20, 1991).

321. *Designing Women* (Mozark Productions & Columbia Pictures Television broadcast 1986-1993).

322. *Designing Women: The Strange Case of Clarence and Anita* (Mozark Productions & Columbia Pictures Television broadcast Nov. 4, 1991).

323. Smith, *in* RACE, GENDER, AND POWER, *supra* note 285, at 250.

324. *A Different World: Bedroom at the Top* (Carsey-Werner Company broadcast Jan. 30, 1992).

325. Examples of such movies include: *A Case of Rape: NBC Wednesday Night at the Movies* (Universal Television broadcast Feb. 20, 1974); *Stand Against Fear: NBC Movie of the Week* (Libra Pictures & O'Hara-Horowitz Productions broadcast Dec. 16, 1996); and *Hostile Advances: The Kerry Ellison Story* (Diana Karew Productions & Hearst Entertainment broadcast May 27, 1996).

the moral, ethical, and practical aspects of her options, as well as to craft a scene that generated closure.

Following the sitcom tradition of four women primary characters, *Sisters* (1991-96)[326] depicted the suburban lives of four sisters in their thirties and forties, and of their widowed mother. Episodes delved into serious social and ethical topics, blended with some fantasy to soften the messaging.[327] A gimmick of the show is that their father had always hoped for a son, so each was given a gender-neutral name: Alexandra, Georgeanne, Theodora, and Francesca.

a. Sisters: Two Steps Forward, Three Steps Back (Cowlip Productions & Lorimar Television broadcast Dec. 14, 1991)[328]

Frankie, a 30-something financial advisor in a firm, learns she has been assigned to manage a $35 million account and will work closely with the fund's representative Max Weldon. When they meet, Max suggests they go out and Frankie turns him down. Max continues to press for a sexual encounter, suggesting, "Give a guy a chance to get you drunk." When she calls him out for inappropriate suggestions, he replies, "I was just kidding around. Sorry if you misinterpreted that." Frankie talks to her boss, Barry Gold, about Max's behavior and manipulation. Barry does not believe her and claims there must be a misunderstanding. Seeking more control, Frankie begins dressing more conservatively and tells her husband about Max.

Max's persistent provocative talk increases Frankie's discomfort, prompting sister Georgie's concern. Frankie says she can manage the problem, but Georgie says Frankie should not have to. Frankie says she knows Max is in the wrong, but she worries that a complaint will damage her office reputation.

b. Sisters: Working Girls (Cowlip Productions & Lorimar Television broadcast Jan. 25, 1991)[329]

During a strategy meeting, three white colleagues tell Frankie she owes a lot to Max, who has praised her work, prompting firm management to promote her to vice president. Administrative assistant Jill

326. *Sisters* (Cowlip Productions & Lorimar Productions broadcast 1991-1996).

327. Examples of topics included HIV/AIDS in *Sisters: Portrait of the Artists* (Cowlip Productions & Lorimar Productions broadcast Dec. 12, 1992), repressed memories of child molestation in *Sisters: Bombshell* (Cowlip Productions & Lorimar Productions broadcast Sep. 24, 1994), and medical ethics in *Sisters: A Good Deed* (Cowlip Productions & Lorimar Productions broadcast Jan. 21, 1995).

328. The statements in quotes in this episode synopsis are direct quotes from the episode.

329. The statements in quotes in this episode synopsis are direct quotes from the episode.

Perkins later seeks out Frankie, reporting that Max has verbally harassed her and touched her, and that he laughs it off when she asks him to stop. Jill says she is seeking Frankie's advice as the highest-ranking woman in the company. Frankie consults Barry, who fears Jill will file charges. He tells Frankie she has a fiduciary responsibility to the firm to defuse the situation. "You don't let a $35 million account walk out the door," he says. Frankie offers Jill two options: file a complaint, with no guarantee of its outcome, or put up with the situation for now and be transferred. Frankie advises coldly, "Sometimes we have to put up with things we don't like." Jill quits. Frankie admits to Georgie that Max moved on to Jill after Frankie's rejection. But Frankie stands by her actions, telling Georgie, "You don't understand how things work around here."

Georgie accuses Frankie of sacrificing her values to her ambition. Frankie maintains that she is pleased that she was able to limit the fallout, though later confides her sense of justice waned when she received the promotion to vice president. In Barry's presence, Frankie confronts Max about his behavior. He glibly calls it a little flirtation and is defensive about anyone making these types of accusations. Frankie delivers an ultimatum: if he removes himself as the fund representative, she will not sue him for sexual harassment. On Max's way out, he tells Frankie, "I do everything in my power to help you become vice president, and what do I get? Stabbed in the back? I don't need any morality lessons from you. If not for Jill, you would have kept your mouth shut." Frankie replies, "Maybe you're right, but I intend to learn."

The *Sisters*' story arc is the most sophisticated and multi-faceted television treatment of quid pro quo harassment the authors found in their research. Frankie first had to determine her response to the harassment and relied on her own forcefulness to resolve the issue. Yet, in a sense, she bought into the quid pro quo by not revealing the harasser's behavior at work, arguably to protect her work interests. Then, after the harasser moved on to another victim, Frankie faced a new dilemma when, due to her promotion to vice president, she became the person fielding a sexual harassment complaint. Her role meant she had responsibilities both to prevent the firm from being sued by an employee and to attempt to maintain a key client to ensure the firm's prosperity. As a woman in that position, she received male-centric advice to fulfill those duties yet ultimately opted for an approach that spoke to her own values. While showing respect for the workplace where she was a leader, she also revealed her knowledge about the tools available to declaw a harasser: at one point in the story, she credibly presented what realistic grounds for a lawsuit would be.

In the 1990s, the youth voice became a powerful source of social awareness on prime-time television. Showrunner Aaron Spelling struck a serious chord with *Beverly Hills 90210* (1990-2000),[330] which scored a hit with Gen Xers and Millennials.[331] *Beverly Hills 90210* was broadcast on Fox, a network created in 1986 that soon successfully competed with ABC, NBC and CBS.[332] The all-white cast of four men and four women provided weekly storylines that explored topics such as racism, homosexuality, sexuality, AIDS, drugs and alcohol, suicide, abortion, and sexual/domestic violence, and offered both male and female perspectives.[333]

Beverly Hills 90210 aired during the era recognized by various commentators as the Third Wave Feminism.[334] The show's scripts gave voice to ethics, fairness, process, the law, and values, enabling viewers to see themselves in the characters[335] and to observe sociologically the relational or serious dramatic situations every week.[336] The character Kelly Taylor appeared in all 292 episodes and was the only female who experienced consistent trauma, including a quid pro quo harassment situation that unfolded over four episodes. The arc offered female and male points of view and methodically walked the viewer through the experience of recognizing sexual harassment, documenting it, and reporting it to the proper authority.

c. Beverly Hills, 90210: Friends in Deed (Torand Productions & Spelling Television broadcast Dec. 3, 1997)

Beverly Hills, 90210: Comic Relief (Torand Productions & Spelling Television broadcast Dec. 10, 1997)

330. *Beverly Hills 90210*, *supra* note 224.

331. Spelling & Graham, supra note 266, at 173-75.

332. *See Rupert Murdoch: Chairman Emeritus*, FOX, https://www.foxcorporation.com/rupert-murdoch-chairman-emeritus/ (last visited Feb. 8, 2025) ("By 1996, the FOX network was the top-ranked television group in the country, a position it held for a record eight consecutive years.").

333. E. Graham McKinley, Beverly Hills 90210: Television, Gender and Identity 62 (1997). E. Graham McKinley has studied how concepts addressed in the show were understood by the 90s generation of American teens and young women. The concepts included "alternate ways of being female that resist aspects of the patriarchal culture not in [women's] interests." For episode descriptions and pictures of the cast members, see *Beverly Hills 90210*, IMDB, https://www.imdb.com/title/tt0098749/ (last visited Feb. 16, 2025).

334. *See*, *e.g.*, Pruitt, *supra* note 139; Grady, *supra* note 139 (identifying the start of the Third Wave of Feminism as sometime in the 1990s, with some linking it to the Hill/Thomas Hearings).

335. McKinley, *supra* note 333, at 174-75 (stating, "what viewers emphasized was their sense of community with the characters and their emotional involvement with them in terms of behavior. They sometimes said the show 'should' be like real life—that the exigencies of television production shouldn't get in the way of a real exploration of the consequences of doing drugs or getting pregnant—yet overwhelmingly, viewers didn't 'want' to see these negative consequences applied to these characters.").

336. *Id.* at 97.

Beverly Hills, 90210: Santa Knows (Torand Productions & Spelling Television broadcast Dec. 17, 1997)

Beverly Hills, 90210: Ready or Not (Torand Productions & Spelling Television broadcast Jan. 3, 1997)[337]

Kelly's first job out of college is as an administrator of a foundation's urgent care clinic that serves an impoverished area. The highly respected Doctor Monahan and a foundation board liaison, Audrey, run it. Monahan repeatedly touches Kelly suggestively and invades her personal space. She talks with her boyfriend, Brandon, about whether the harassment is real or imagined, and puts up her guard. Monahan also unloads personal baggage about his marriage on Kelly and remarks at one point that her "beauty is wasted on a younger, less experienced man."

Kelly continues to confer with Brandon, concluding she has not overreacted. They decide that her options are to talk to Monahan directly or file a complaint. Kelly tells Monahan his behavior is inappropriate and unprofessional. He immediately goes on the offense, saying she is new to the adult world and should find a different job. Friend Emma tells Kelly the doctor is not after sex. His behavior is all about power.

Kelly tells administrator Audrey about Monahan's behavior. Audrey, old enough to be Kelly's mother, points out that this is Kelly's first job out of college and this esteemed doctor is the first man she has worked with. How will this play out in future job interviews? After all, Audrey adds, "it's your word against his." Monahan continues to assert his importance in the organization and claims his departure would saddle the clinic with a less experienced doctor. Brandon and Emma tell Kelly she should not "let herself become victimized." The next day at the clinic, Monahan introduces Kelly to the woman who will replace her, having told everyone that Kelly resigned. Privately, she tells Monahan she is filing a complaint, and he fires her.

Emma encourages Kelly to sue him. While Kelly is packing up her desk, Monahan corners her, and she flips on the intercom switch. Everyone, including Audrey, overhears them discussing whether she will withdraw her complaint in exchange for a recommendation. Audrey fires him on the spot.

d. A Different World: Bedroom at the Top (Carsey-Werner Company broadcast Jan. 30, 1992). (Redux)

The other youth-oriented series to deal with quid pro quo was *A Different World* (1987-93), a spin-off of *The Cosby Show* (1984-1992)[338]

337. The statements in quotes in this episode arc synopsis are direct quotes from the episodes.

338. *The Cosby Show* (Bill Cosby & Marsey-Werner Company broadcast 1984-1992). Bill Cosby is credited as the creator of *A Different World*. Starting in 2005, numerous women made the

that presented relatable characters but dealt more directly with controversial social issues. It focused on students at the fictitious Hillman College, a historically Black college (HBCU) inspired by real-life Howard University.[339] Howard University alumna, Debbie Allen, produced and directed the show starting in its second season.[340]

The authors believe the episode *Bedroom at the Top*, from the fifth season of *A Different World*, is the first quid pro quo harassment episode involving a Black woman as its focus. In addition, it artfully weaves together many of the themes addressed throughout this article. Its reference to the *Meritor* case shows the influence of twentieth-century legal developments concerning sexual harassment on television—progressive writers had by then concluded that depicting and explicitly presenting workplace harassment as a legal claim had a place in a popular prime-time show. The episode also acknowledges both the stress and the often-frustrating outcome women encountered when attempting to deal with harassment, a recurring theme in the quid pro quo harassment episodes discussed in this article that continues to resonate today.

Finally, the episode's homage to Professor Anita Hill cements a key finding of this article: twentieth-century television creators, mostly white and many male, told only of the white woman's experience with quid pro quo harassment. It took Allen's writing team to remind viewers of the importance of the role of women of color in addressing harassment.

3. Shift to the Procedural

During the 1990-1991 television season, sitcoms with women-led casts were prevalent, and both sitcoms and non-scripted series dominated the top twenty rankings.[341] White women-centric sitcoms included

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first public accusations that they had been assaulted by Cosby. *See* Chris Francescani & Luchina Fisher, *Bill Cosby: Timeline of His Fall from 'America's Dad' to His Release from Prison*, ABC NEWS (June 30, 2021), https://abcnews.go.com/Entertainment/bill-cosby-trial-complete-timeline-happened-2004/story?id=47799458 (explaining that ultimately over 50 women accused him of assault, with allegations in some cases of him raping and of him drugging his victims).

339. Sholnn Z. Freeman, *Howard University Celebrates 'A Different World' for Popularizing HBCU Culture on Television*, HOWARD UNIVERSITY: THE DIG (Apr. 10, 2024), https://thedig.howard.edu/all-stories/howard-university-celebrates-different-world-popularizing-hbcu-culture-television (describing Howard's hosting of an event in April 2024 to celebrate the series as a "critically acclaimed and top-rated show that prompted audiences worldwide to fall in love with HBCUs.").

340. FoundationInterviews, *Debbie Allen Discusses Changes She Made to "A Different World",* YOUTUBE (July 30, 2015), https://youtu.be/Wm6P71Ms_vY?si=cmUgoUcYtWihXk3h (beginning at 1:40) (quoting Debbie Allen saying in an interview, "[w]e don't have time to do an episode at a Black university where their assignment is to take care of an egg. No, we're dealing with serious issues out here, between education, poverty, joblessness, pregnancy, drugs, gangs. We have a lot of issues and this is an historically Black college. We want to put ourselves on the level with other colleges. Howard University is the Harvard to us.").

341. *See* BROOKS & MARSH, *supra* note 48, at 1,692.

Murphy Brown,[342] *Roseanne,*[343] *The Golden Girls,*[344] *Designing Women,*[345] and *Who's the Boss?*[346] Black women were a key focus of *The Cosby Show*[347] and *A Different World*.[348] *Murder, She Wrote*, starring Hollywood legend Angela Lansbury,[349] was among the few sixty-minute dramas to rank in the top twenty.

As the 1990s proceeded, however, the business of prime-time television changed.[350] Cable television created more opportunities for original programming outside the big three legacy networks.[351] In the area of mistreatment of women, the focus also started to change. As the decade proceeded, sexual harassment and violent assaults became the plot fodder of police and legal procedural dramas. Viewers no longer experienced the moral dilemmas or introspection experienced by a favorite character; they became observers of a process. Produced, written, and told from a mostly white, male point of view, the procedural regarded crimes of power and control as "just another day at the office."

The 1990s marked the start of Dick Wolf's seven-series franchise, *Law & Order*. The original *Law & Order*[352] blended the traditional cop show with legal drama, often loosely drawing on headlines and cultural trends. Well-written and featuring a talented cast, *Law & Order* was considered a return to Quality Television, an industry and fan-based movement of the 1980s and 1990s.[353] However, *Law & Order* came under attack in 1993 by then-Attorney General Janet Reno, who believed that violence on television was having a corrosive effect on society.[354] As reported by *Mediaweek* in February, 1994:

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342. *Murphy Brown* (Shukovsky English Entertainment & Warner Bros. Television broadcast 1988-1998).

343. *Roseanne* (Carsey-Werner Company & Wind Dancer Productions broadcast 1988-1997).

344. *The Golden Girls*, *supra* note 258.

345. *Designing Women*, *supra* note 321.

346. *Who's the Boss?* (Embassy Television & Columbia Pictures Television broadcast 1984-1992).

347. *The Cosby Show*, *supra* note 338.

348. *A Different World*, *supra* note 203.

349. *Murder, She Wrote* (Universal Television broadcast 1984-1996).

350. *See* Greenfield, *supra* note 35.

351. *Id.*

352. *Law & Order* (Universal Television & Wolf Entertainment broadcast 1990-2010 and 2022-present).

353. *See generally* DOROTHY COLLINS SWANSON, THE STORY OF VIEWERS FOR QUALITY TELEVISION: FROM GRASSROOTS TO PRIME TIME 48 (2000) (explaining that Viewers for Quality Television was a grassroots and fan-based movement started in the 1980s by Dorothy Collins Swanson to lobby CBS to keep *Cagney & Lacey* on the air. Using the era's landline telephones and the U.S. mail, volunteers contacted networks to support series that demonstrated a "higher level" of creative or intellectual value).

354. Janet Reno, Att'y Gen., Statement Before the Committee on Commerce, Science and Transportation, United States Senate, Concerning Violent Programming on Television, Dep't of Justice (Oct. 20, 1993) https://www.justice.gov/archive/ag/speeches/1993/10-20-1993.pdf.

> Michael Moriarty, one of the stars of *Law & Order*, was among a group of representatives from the television community that met with Reno in November. Outraged at what he saw as Reno's blatant attempt at government censorship, Moriarty launched what some thought was a rather impolite public attack on the attorney general. Before the smoke had cleared, Moriarty had resigned from *Law & Order*. While the series' executive producer Dick Wolf, took issue with the tone of Moriarty's campaign, he agreed with him in principle. "Today I couldn't do the first six episodes of *Law & Orde*r that I did five years ago," Wolf said in February 1994, citing the new subject taboos.[355]

In another effort to compete with the increasing number of adult themes found on cable,[356] showrunner Steven Bochco pitched *NYPD Blue* (1993-2005). *NYPD Blue* cemented the macho male gaze as a 1990's procedural storytelling approach.[357]

The authors' research revealed two key observations about the decade of the 1990s on television: the procedural started to direct the focus on mistreatment of women away from the woman's personal experience of harassment,[358] while youth-oriented programming not only focused on the woman's experience, but also sought to teach women viewers more directly how to deal with it.[359]

Conclusion

For women, television's storytelling contributed powerfully to the social movements of the last half of the twentieth century. Although

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355. Eric Schmuckler, *The News is Good for NBC*, Mediaweek, Feb. 28, 1994, at 17.

356. Steven Bochco, Truth is a Total Defense: My Fifty Years in Television 153 (2016) (writing, "I felt that an adult themed one-hour drama with adult sexuality (nudity, in other words) and a far more liberal use of the kind of 'street' language we were all familiar with in our normal lives would bring viewers back to so-called free TV and rejuvenate the medium.").

357. *Id.* at 158 (Bocho writing that, "we finally agreed on how much nudity ABC would be willing to tolerate, and it pretty much conformed to my own thinking. As I'd said all along, I wasn't trying to make porno films. I just wanted to depict adult sexual relationships more realistically than anyone else on broadcast TV ever had."). *See also NYPD Blue: Full Cast and Crew*, IMDB, https://www.imdb.com/title/tt0106079/fullcredits/?ref_=tt_ov_ql_1 (last visited Feb. 17, 2025) (explaining that *NYPD Blue*'s adult sexual relationships and nude scenes were written by 62 men and 14 women).

358. *Compare*, *e.g.*, the approach of 1980s episodes *Cagney & Lacey: Rules of the Game* (Orion Television broadcast Jan. 28, 1985), and *Cagney & Lacey: Con Games* (Orion Television broadcast Mar. 11, 1985) (where the focus is on main character Christine Cagney's personal experience of quid pro quo harassment) *with* the approach of 1990s episode *JAG*: *Chains of Command* (Belisarius Productions & Paramount Network Television broadcast Mar. 3, 1998) (where, in the military procedural *JAG* (Belisarius Productions & Paramount Network Television 1995-2005), the military legal team addressing quid pro quo harassment investigates a non-regular character's claim).

359. *See, e.g., A Different World*'s *Bedroom at the Top* episode, discussed *supra*, which focused on main character college student Whitley's experience of workplace harassment and her efforts to deal with it, and the *Beverly Hills 90210* episode arc about quid pro quo harassment, discussed *supra,* which invested four episodes in depicting the quid pro quo harassment experience of one of the main characters, Kelly, in her first job out of college, as well as how she resolved the problem.

white men were still making most of the decisions in the entertainment and news divisions of television's three major networks, their ability to control the narrative changed over this time. Growing legal protections improved women's status and acknowledged their rights. The Baby Boomer, Gen X, and Millennial generations emerged with new expectations. And well-publicized political events that revealed powerful men's abuses of power over women showed that such men's power to engage in these behaviors was being increasingly challenged. From *That Girl*'s Ann Marie laughing off threats to her own safety in 1967 to *A Different World*'s Whitley Gilbert speaking truth to power and *Beverly Hills 90210*'s Kelly Taylor successfully removing a medical clinic's predatory doctor, certain parts of twentieth-century prime-time television saw significant progress in depicting a woman's experience of mistreatment at work and examining possible responses to it. So, too, did the legal system's recognition of women's rights and the need for legal protection from their mistreatment at work.

The quid pro quo harassment episodes analyzed in this article were products of their time, and various aspects may seem strange to the modern viewer.[360] Further, the harassment situations were occasionally left unresolved by the episode's end or were resolved in ways that current viewers may find frustrating or objectionable. Some women characters relied on their own wiles and judgment to challenge themselves, their harasser, or the system. Only occasionally did a character call the harassment an abuse of power, a relatively new concept at the time having nothing to do with romance or how the woman dressed. Only one threatened a lawsuit, and only a few initiated a complaint. But references to the possibility of legal action did increase as legal protections themselves increased. In the aggregate, the episodes demonstrate both the characters' awareness of legal protections being put in place and their lack of confidence in the power of the safeguards to help them in their daily lives. In that regard, perhaps the episodes will not feel strange to the modern viewer.

Yet, despite their shortcomings, the episodes discussed in this article represented a step forward. Many scenes highlighted the woman's agency, a liberation from what had been portrayed for women in the past. Discussions in many episodes assured women having similar experiences that harassing behavior from a superior (or anyone) is inappropriate and painful, and that if allowed to continue, might happen to other women. Women and girls who were uncomfortable with sharing

360. Dow, *supra* note 25, at xiii (author warning against the dangers of analyzing television programming of another era without taking into account "its historical, cultural, and televisual milieux").

these sorts of stories, or who were the first in their families to work outside the home, could learn through television that they were not alone. History could never document how many watercooler conversations about "last night's episode of ____" were also partly informed by a real-life situation left unshared. But recognition of the reality of harassment served an important role.

On television and in the real world, the changes discussed in this article were slow, but mostly steady. All the same, at century's end, much more progress was needed. Clarence Thomas became a member of the Supreme Court despite Professor Anita Hill's valiant efforts. Even the Supreme Court's recognition of sexual harassment as sexual discrimination in *Meritor* was a limited victory, and women of color such as Mechelle Vinson were not acknowledged for their real-life success in beating the odds in court. Television shifted significantly from shows depicting mistreatment of women from the point of view of familiar characters to one-off episodes that focused on the criminal process.

Viewers of the last half of the twentieth century grew up bombarded by images and stories that were often far from the reality of the lived experiences of women. The thirty-eight television episodes discussed in this article that took on quid pro quo harassment as a serious topic were in the minority.[361] They showed viewers that even by the end of the century, more than thirty years after Title VII's enactment, challenging sexual harassment at work remained a difficult battle that often had a frustrating outcome. The #MeToo movement and related stories in this century show us that now, sixty years after Title VII's enactment, workplace quid pro quo harassment continues to happen. It would seem that despite law and society's professed intolerance of the (mostly male) power play, some harassers still find indulging in abusive behavior to be worth the risk of criminal charges, public accusations, or civil lawsuits.

Television can teach us more about the shifting attitudes and laws around quid pro quo harassment, and help us understand why, even today, such power plays still happen in the workforce. A host of other progressive legal and social changes also bear study. The proliferation of streaming channels that need content to thrive gives us hope that more old series will become available. Television's storytelling serves as a time capsule enabling us to further understand how life influences art and how art can change life and society for the better.

361. As more television series become available on streaming or DVD, our quest for quid pro quo harassment episodes continues.

APPENDIX

Quid pro quo episodes available for viewing 2023-2025

- *A Different World: Bedroom at the Top* (Carsey-Werner Company broadcast Jan. 30, 1992).
- *Beverly Hills, 90210: Friends in Deed* (Torand Productions & Spelling Television broadcast Dec. 3, 1997).
- *Beverly Hills, 90210: Comic Relief* (Torand Productions & Spelling Television broadcast Dec. 10, 1997).
- *Beverly Hills, 90210: Santa Knows* (Torand Productions & Spelling Television broadcast Dec. 17, 1997).
- *Beverly Hills, 90210: Ready or Not* (Torand Productions & Spelling Television broadcast Jan. 3, 1998).
- *Cagney & Lacey: Rules of the Game* (Orion Television broadcast Jan. 28, 1985).
- *Cagney & Lacey: Con Games* (Orion Television broadcast Mar. 11, 1985).
- ++ *Designing Women: The Strange Case of Clarence and Anita* (Mozark Productions & Columbia Pictures Television broadcast Nov. 4, 1991).
- ++ *Family: Labors of Love* (Spelling-Goldberg Productions broadcast Nov. 29, 1977).
- *Family: Expectations* (Icarus Productions & Spelling-Goldberg Productions broadcast Dec. 7, 1978).
- ++ *It's a Living: Making the Grade* (Witt/Thomas Productions broadcast Jan. 15, 1981).
- ++ *JAG: Chains of Command* (Belisarius Productions & Paramount Network Television broadcast Mar. 3, 1998).
- ++ # *Just Shoot Me: In the Company of Maya* (Brillstein-Grey Entertainment & Universal Network Television broadcast Jan. 20, 1999.
- ++ *L.A. Law: Testing, testing 1, 2, 3* (20th Century Fox television broadcast May 7, 1993).
- ++ *L.A. Law: Hackett or Pack It* (20th Century Fox television broadcast May 27, 1993).
- ++ *L.A. Law: Eli's Gumming* (20th Century Fox television broadcast Dec. 9, 1993).
- ++ # *L.A. Law: Whose San Andreas Fault Is It, Anyway?* (20th Century Fox television broadcast Mar. 24, 1994).
- ++ *Laverne & Shirley: It's the Water* (Miller-Milkis Productions, Henderson Productions, & Paramount Television broadcast Apr. 6, 1976).
- *M*A*S*H: Hot Lips Is Back in Town* (20th Century Fox television broadcast Jan. 29, 1979).

- *M*A*S*H: Are You Now, Margaret?* (20th Century Fox television broadcast Sept. 24, 1979).
- *Maude: Carol's Promotion* (Tandem Productions broadcast Mar. 8, 1976).
- ++ # *Melrose Place: Pushing Boundaries* (Darren Star Productions & Torand Productions broadcast Apr. 7, 1993).
- ++ # *Melrose Place: Til Death Do Us Part?* (Darren Star Productions & Torand Productions broadcast May 18, 1994).
- ++ *Melrose Place: The Younger Son Also Rises* (Fox Television Network and Spelling Television broadcast Feb. 8, 1999).
- ++ *Melrose Place: Saving Ryan's Privates* (Fox Television Network and Spelling Television broadcast Feb. 15, 1999).
- ++ *Melrose Place: They Shoot Blanks, Don't They?* (Fox Television Network and Spelling Television broadcast Feb. 22, 1999).
- ++ *Moonlighting: Shirts and Skins* (ABC Circle Films & Picturemaker Productions broadcast Jan. 17, 1989).
- *One Day at a Time: Teacher's Pet* (Allwhit Inc. & TAT Communications Company broadcast Nov. 9, 1980).
- ++ *Perfect Strangers: Sexual Harassment in Chicago* (Miller/Boyett Productions & Lorimar Telepictures broadcast Oct. 7, 1987).
- *Sisters: Two Steps Forward, Three Steps Back* (Cowlip Productions & Lorimar Television broadcast Dec. 14, 1991).
- *Sisters: Working Girls* (Cowlip Productions & Lorimar Television broadcast Jan. 25, 1992).
- ++ *Spenser: For Hire: Consilium Abditum* (Warners Bros. Television broadcast on Nov. 15, 1987).
- ++ *Sports Night: Mary Pat Shelby* (Imagine Television & Touchstone Television broadcast Oct. 20, 1998).
- *That Girl: A Tenor's Loving Care* (Daisy Productions broadcast Feb. 23, 1967).
- *That Girl: It's a Mod, Mod World: Part 1* (Daisy Productions broadcast Dec. 7, 1967).
- *That Girl: It's a Mod, Mod World: Part 2* (Daisy Productions broadcast Dec. 14, 1967).
- *The Golden Girls: Adult Education* (Witt/Thomas/Harris Productions & Touchstone Television broadcast Feb. 22, 2986).
- *The Paper Chase: Once More with Feeling* (20th Century Fox television broadcast Feb. 27, 1979).
- ++ indicates an episode not analyzed or recapped in this article
- # indicates quid pro quo harassment by a woman supervisor of a male subordinate

Shades of Equity: The Students for Fair Admissions Cases and HBCU Financial Futures

Nas Lawal

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INTRODUCTION

In the symphony of higher education, Historically Black Colleges and Universities ("HBCUs") serve as the melodic notes that represent culture, resilience, and an unwavering pursuit of academic excellence. HBCUs are essential in providing an avenue to higher education for students from traditionally underrepresented backgrounds. However, financial support is critical. HBCUs have historically been given less funding, in stark contrast to the funding received by predominantly white institutions ("PWIs"). This is a result of systemic issues that date back to the inception of slavery in the United States. Amidst efforts to remedy these issues, the recent decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*[1] and *Students for Fair Admissions v. University of North Carolina* ("SFFA Cases") has complicated the matter.

This Note will analyze how the decision in the SFFA Cases will affect the existing fiscal concerns at HBCUs and create more concerns. This Note asserts that this decision will lead to adverse effects for underrepresented minority students applying to HBCUs as these institutions navigate this new and uncertain admissions landscape. Specifically, this Note proposes that the SFFA Cases decision should be reversed to faithfully fulfill the congressional intent of the Second Morrill Act of 1890. This analysis will consider factors such as the historical disparities in state and federal funding of higher education, affirmative action jurisprudence trends, remedies available to HBCUs, and how the SFFA Cases complicate these solutions.

1. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

I. The Historical And Contemporary Federal And State Funding Of Higher Education

A. The Historical Funding of Higher Education by The States

The history of funding higher education can be traced back to the founding of the United States. The first college in the U.S. was Harvard College, founded in 1636.[2] Shortly thereafter, more colleges were established, modeling themselves primarily from their English counterparts.[3] Early schools in New England were modeled after schools in England.[4] The first colonial colleges were primarily funded by "private aid, by taxation, and by royal endowment."[5] Following the U.S. declaring its independence in 1776, individual states began to see the utility and value of education, specifically in the fields of "science, literature, learning, etc."[6] Educating a populace is not cheap however, and the states had to find methods to fund their educational ambitions.

States generally funded higher education through various means. They granted charters with specific privileges and exempted officers and students from military service.[7] They also provided tax exemptions for individuals and property associated with higher education.[8] States also supported institutions by offering land endowments, enacting statutes to establish permanent monetary endowments, and allocating special appropriations from tax revenue.[9] Other methods of funding included granting proceeds from lotteries and bestowing special gifts, such as buildings and land, to support educational development further.[10]

These measures helped early colleges afford to educate their first students.[11] Of these initiatives, the most impactful was undoubtedly the exemption from taxation of college campus property.[12] Tax exemptions for colleges were historically one of the most universally used practices across the original thirteen colonies, and no other policy has consistently been applied across the states in higher education.[13] These tax

2. Harvard University, *The History of Harvard*, https://www.harvard.edu/about/history/ (last visited Mar. 7, 2024).

3. Frank Wilson Blackmar, The History of Federal and State Aid to Higher Education in the United States 22 (1890).

4. *Id.*

5. *Id.* at 22-23.

6. *Id.* at 25.

7. *Id.* at 24.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* (explaining that Harvard College, Yale, Columbia College, and the University of Virginia benefitted from the aforementioned methods).

12. *Id.* at 25.

13. *Id.*

breaks were often granted by "constitutional provision or state law" and helped save estimates of millions of dollars for the nation's first universities of higher education.[14]

B. The Historical Funding of Higher Education by The Federal Government

Despite the precedents set by state legislatures for how higher education would be funded, "as 'public sentiment grew in favor of [the] union,' so did the idea of increased federal involvement in higher education despite, the precedents set by early state legislatures for how higher education could be funded."[15] Today, land-grant universities are one of the principal ways the federal government provides for institutions of higher learning. The first mention of a seminary land grant appeared in the Ordinance of 1787.[16] The Ordinance provided some portion of the newly acquired lands to be reserved for "the maintenance of public schools."[17] The Ordinance marked the beginning of a new tradition of sections of townships being reserved for schools.[18] This remained law until the passage of the Morrill Land Grant Acts of 1862 and 1890 (hereinafter Morill Acts).[19] This marked the federal government's first significant measure in promoting the advancement of higher education.

The Morrill Act of 1862 was passed in the same year as the Homestead Act of 1862.[20] The Homestead Act was passed during the Civil War and gave prospective settlers who met certain criteria 160 acres of land.[21] The Homestead Act was one of many government efforts to encourage westward expansion. The Morrill Land Grant Act supplemented the Homestead Act. In the wake of the Industrial Revolution and the increased need for workers with competencies in agriculture, the sciences, and engineering, the Morrill Acts were seen as the solution. The Morrill Acts made it possible for states to establish colleges funded by federal land grants.[22] While the first Morrill Act of 1862 focused on allocating federal lands to build universities, the Second Morrill Act of

14. *Id.*
15. *Id.* at 29.
16. *Id.* at 43-44.
17. *Id.* at 43.
18. *Id.*
19. NAT'L ARCHIVES, *Milestone Documents: Homestead Act*, https://www.archives.gov/milestone-documents/homestead-act (last updated June 7, 2022).
20. NAT'L ARCHIVES, *Milestone Documents: Morrill Act (1862)*, https://www.archives.gov/milestone-documents/morrill-act (last updated May 10, 2022).
21. NAT'L ARCHIVES, *supra* note 19.
22. NAT'L ARCHIVES, *supra* note 20.

1890 was aimed at combating discrimination and segregation in higher education. It required states that received funds from the first Morrill Act to either admit Black students or establish new universities solely for Black students.[23] This would result in the creation of the nation's first HBCUs.[24] The Second Morrill Act provided a glimpse into some of the early illustrations of facially neutral laws post-Reconstruction. The Second Morrill Act allowed administrations to proclaim formal equality on its face while continuing to discriminate against Black students.[25]

C. The Contemporary Funding of Higher Education, The Goals of HBCUs, and Their Funding Struggles

HBCUs created during the late 1800s and early 1900s were founded to create a safe space for the education and advancement of Black students.[26] The importance of modern HBCUs cannot be understated. HBCUs comprise only about 2.3% of all institutions of higher learning but are responsible for 33% of science and engineering undergraduate degrees conferred to Black students.[27] Unfortunately, these institutions have historically not received "just or equitable funding," a result of the will of their administrators.[28] For example, in the 1890s, despite grants of land by the federal government to finance these institutions, states did not properly take advantage of these opportunities, much to the detriment of HBCUs.[29] This hindered the initial development of HBCUs' ability to catch up financially with PWIs.

1. Contemporary Funding Through Complex Sources and Structures

University funding after the passage of the Morrill Acts became increasingly complex and multifaceted. Modern universities rely on a combination of sources to fund their various research initiatives, programs, and overall operations. For the most part, the way universities

23. *Id.*
24. *Id.*
25. Philo A. Hutcheson, A People's History of American Education 61 (2019).
26. *Who We Are: Our Guiding Philosophy*, Cheyney Univ. of Pennsylvania, https://cheyney.edu/who-we-are/our-vision/ (last visited Sept. 20, 2024) (explaining that Cheyney University of Pennsylvania's (the first HBCU) mission is "to equip and empower students of diverse backgrounds to be visionary leaders in their chosen fields.").
27. Christine M. Matthews, Federal Research and Development Funding at Historically Black Colleges and Universities 6 (2008).
28. Hutcheson, *supra* note 25, at 61.
29. *Id.* ("Despite the apparent largesse of the federal government by granting federal land to finance the institutions, few states moved quickly to secure those funds, and even when they did, they did not necessarily use them well").

receive funding depends on whether they are a public or private institution, and whether they are a for-profit or a non-profit institution.[30]

Both public and private universities obtain funding through sources such as tuition and fees, endowments, donations, auxiliary services, and partnerships and sponsorships.[31] While private universities do not receive federal funding formally, they do receive some federal funds for specific purposes.[32] These include research grants, technology grants, and student financial aid.[33]

2. HBCU Funding Struggles

HBCUs are drastically underfunded compared to PWIs.[34] All but three of the country's Black land-grant universities have been underfunded by their state by estimates of up to $13 billion.[35] This problem can be traced back to systemic issues such as "state underinvestment, lower alumni contributions, and lower endowments."[36] The implications of this are consistent and predictable. Lack of funding has downstream consequences that affect the quality of academic programs, the quality of professors, financial aid, and research opportunities.

Before the passage of the Second Morrill Act, HBCUs received much of their funding from Black and white churches and other religiously-tied organizations.[37] While in theory, the Second Morrill Act was intended to bridge the gap between HBCUs and PWIs, it did quite the opposite. Under the Second Morrill Act, states received "an annual appropriation of $15,000 which after 10 years would grow to $25,000."[38] However, state legislatures, particularly in the South, mandated policies that ensured HBCUs and PWIs would remain separate, effectively excluding HBCUs from accessing these funds. This discrepancy in financial support would hinder the capability of these institutions to support the

30. Rebecca Lake, *How Colleges Make Money*, https://www.investopedia.com/how-colleges-make-money-5199835#:~:text=Colleges%20and%20universities%20can%20make,charging%20fees%20for%20international%20enrollment (last updated Aug. 9, 2023).

31. *Id*.

32. *Id*.

33. College Planning, *Do Private Universities Get Federal Funding?*, GRANTFORD (May 29, 2024) https://www.grantford.org/post/do-private-universities-get-federal-funding.

34. Katherine Knott, *States Underfunded Historically Black Land Grants by $13 Billion Over 3 Decades*, IHE (Sept. 20, 2023) https://www.insidehighered.com/news/government/2023/09/20/states-underfunded-black-land-grants-13b-over-30-years.

35. *Id*.

36. Richard Cunningham, *Why are HBCUs Underfunded?*, MARKETPLACE (June 22, 2023) https://www.marketplace.org/2023/06/22/why-are-hbcus-underfunded/.

37. Travis J. Albritton, *Educating Our Own: The Historical Legacy of HBCUs and Their Relevance for Educating a New Generation of Leaders*, 44 Urb. Rev. 311, 314-15 (2012).

38. *Id.* at 34.

same physical resources as PWIs,[39] and would lead to decades of unequal access to funds and resources by HBCUs that continue to this day.

II. Affirmative Action Jurisprudence To Date

The term "affirmative action" was first coined by President John F. Kennedy with the passage of Executive Order 10925.[40] The policy was used to ensure equal employment opportunities for all government employees who face discrimination and established the Committee on Equal Employment Opportunity ("CEEO").[41] The order was a precursor to subsequent civil rights legislation aimed at combating discrimination and ensuring equity in hiring.

Shortly thereafter, universities established their own policies to combat racial discrimination in their enrollment practices.[42] This led to a deluge of cases in the lower courts, with some making it to the Supreme Court.[43] The first was *Regents of the University of California v. Bakke*.[44] In this case, the Court stated that the racial-based quotas used by the University of California violated the Civil Rights Act.[45] *Bakke* was one of the early cases that utilized the doctrine of strict scrutiny and would mark the Court's stance on affirmative action for decades to come.[46]

Next, the Court ruled in *Grutter v. Bollinger* that schools could use race as one of the factors they consider in their admissions decisions.[47] Then, a decade later, the Court reaffirmed its decision in *Fisher v. University of Texas*.[48] In *Fisher*, the Court ruled that schools have reasonable discretion to consider race in their admission decisions so long as they have considered other methods to increase diversity as well.[49] The decision was the result of a slim four-three majority and was a signal to many of the beginning of the end of affirmative action in higher education. The Court, in *Grutter*, held a conservative majority, and the "25-year" expiration date for racial preference admissions policies was fast

39. *Id.*
40. Exec. Order No. 10,925, 26 C.F.R. 1977 (Mar. 8, 1961).
41. *Id.*
42. *See generally A Brief History of Affirmative Action*, Univ. of Cal.,Irvine, https://www.oeod.uci.edu/policies/aa_history.php (last visited Mar. 21, 2025) ("SP-1, SP-2, and Proposition 209 reiterated the intent that no preferential treatment be given to any individual or group on the basis of race, sex, color, ethnicity, or national origin.").
43. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
44. *Id.*
45. *Id.* at 278.
46. *Id.* at 290-91.
47. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).
48. Fisher v. Univ. of Tex. at Austin, 579 U.S. 365 (2016).
49. *Id.* at 388.

approaching.[50] Twenty-five years was famously stated by Justice Sandra Day O'Connor as the time it would take for affirmative action policies to no longer be necessary to ensure racial equity in higher education.[51]

In the SFFA Cases, the Court effectively gutted affirmative action in higher education. The Court ruled that a student "must be treated on his or her experiences as an individual — not on the basis of race."[52] The SFFA Cases could have detrimental impacts on how universities receive funding, especially those that already struggle to receive adequate funding, such as HBCUs. The decision will impact not only the enrollment of diverse students but also federal research grants, endowments, state appropriations, and private donations. HBCUs will be tasked with navigating this new admissions landscape while also grappling with their already extensive financial issues.

III. The SFFA Cases Explained

The SFFA Cases were the culmination of decades of litigation efforts by discontented students and organizations surrounding race-based admissions programs. [53] The cases were brought forward by a non-profit organization called Students for Fair Admission (SFFA).[54] SFFA is composed of a group of students and parents whose mission is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law."[55] The organization was founded by Edward Blum, a conservative legal activist who has litigated many cases on the issue of race-based admissions in higher education.[56]

SFFA brought several arguments in this case. Central to its arguments was the request that the Court should change the law to bar consideration of race in college admissions in the future by asserting that Harvard and UNC had failed to abide by existing laws. Specifically, it stated that their programs violate Title VI of the Civil Rights Act

50. *Grutter*, 539 U.S. at 343.

51. *Id.*

52. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 231 (2023).

53. *See e.g.*, Grutter v. Bollinger, 539 U.S. at 306.

54. *Id.* at 197.

55. *Id.*

56. Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done*, N.Y. Times (July 8, 2023), https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html (pointing out that Edward Blum has been litigating topics related to race-based admissions for years bringing over two dozen cases since the 1990s and most recently bringing a case in front of the Supreme Court in 2012 in the case of *Fisher v. University of Texas*, and *Shelby County v. Holder* in 2013).

of 1964 and the Equal Protection Clause ("EPC") in the Fourteenth Amendment.[57]

Under a strict scrutiny analysis, the Court found for the petitioner for three principal reasons. First, the Court concluded both universities do not operate their programs in a manner "sufficiently measurable to permit judicial review" and there is no "meaningful connection between the means they employ and the goals they pursue."[58] The Court noted that while universities are owed a certain level of deference in their admissions decisions, the universities have not brought forward an "exceedingly persuasive justification" for their practice that falls within "constitutionally prescribed limits."[59]

Second, the Court found that these race-based admissions systems do not comply with the EPC's twin commands that do not allow the use of race as a "negative."[60] Essentially, by some races being admitted at higher rates when race is considered in admissions, other racial groups are unequally disadvantaged. SFFA argued that this system encourages stereotyping, which is counter to the principles of *Grutter*.[61]

Third, the Court found that the admissions systems do not have a "logical end point" as required by *Grutter*.[62] The universities state that they measure success by comparing the racial makeup of their incoming class to previous classes.[63] The Court cites, in part to *Fisher,* claiming that this racial balancing metric is "patently unconstitutional"[64] because it is unclear how a court is to interpret when these goals are met.

The Court found these arguments persuasive and sided with SFFA.[65] Notably, the Court stated that UNC's policies did not meet the compelling interest prong under strict scrutiny, with Roberts describing the goal of diversifying a student body as "standardless" and "inescapably imponderable" despite being a worthy cause.[66] As Justice Ketanji B. Jackson's dissent argued, this reasoning can be classified as a method of avoiding accountability for what the justices had to have known would be a wildly unpopular decision.[67] Strict scrutiny, like all other methods of judicial interpretation, is a manufactured tool created by the courts

57. *Students for Fair Admissions, Inc.*, 600 U.S. at 198.
58. *Id.* at 214 (quoting Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 381 (2016)).
59. *Id.*at 217.
60. *Id.* at 218.
61. *Id.* at 220.
62. *Id.* at 221-23.
63. *Id.*
64. *Id.* at 223.
65. *Id.* at 230.
66. *Id.* at 215.
67. *Id.* at 357 (Sotomayor, J., dissenting).

to interpret the law.[68] As such, it seems disingenuous for the Court to hide behind this rationale, especially since the Court's precedent has never required the compelling interest prong to meet any "threshold level."[69] This justification is unjust and will lead to significant repercussions for institutions of higher education and other organizations that consider diversity, equity, and inclusion ("DEI") when hiring.

Moreover, this is not the end for Blum and others like him. He has stated that he will now turn his attention to other sectors, such as employment, research grants, internships, and scholarships.[70] The aftermath of this decision will disproportionately affect those universities that are most vulnerable, namely HBCUs. Proponents like Blum do not believe in ideas like systemic racism[71] and, given their proven capacity to provoke change in the courts, there is cause for much-needed anticipation of what the potential implications may be for HBCUs.

IV. Implications Of The SFFA Cases On Funding For HBCUs

A. Challenges In Federal Research Funding Distribution

Research is one of the primary tenets that universities pride themselves in and is at the forefront of their mission as institutions of higher learning. Universities conduct research as part of their mission of "learning and discovery."[72] However, HBCUs have historically faced challenges in their research pursuits.[73]

First, there is the issue of how federal research and development ("R&D") funds are distributed.[74] There is evidence that the allocation of R&D funds is not equitable.[75] The National Science Foundation ("NSF") conducted a study of 650 research institutions and found that "80% of all academic funding" was concentrated in the top 100 universities[76] and as of 2022, none of these universities were HBCUs.[77]

68. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

69. *Students for Fair Admissions, Inc.*, 600 U.S. at 357.

70. Garcia-Navarro, *supra* note 56.

71. *Id.* (noting that when Blum was asked about if he believes in systemic racism he answered, "[n]o, I do not believe in it. What your question implies is that in the American DNA there is racism. It was founded upon racism. It is part of what this country is. I reject that.").

72. David Rosowsky, *The Role of Research at Universities: Why it Matters*, Forbes (Mar. 2, 2022), https://www.forbes.com/sites/davidrosowsky/2022/03/02/the-role-of-research-at-universities-why-it-matters/?sh=3d7d4c2f6bd5.

73. Matthews, *supra* note 27.

74. *Id.* at 7.

75. *Id.* at 7-8.

76. *Id.* at 8.

77. National Science Foundation, *Rankings by Total R&D Expenditures*, NCSEDATA, https://ncsesdata.nsf.gov/profiles/site?method=rankingBySource&ds=herd (last visited Sept. 21, 2024) (noting that none of the top 100 schools include a HBCU).

HBCUs account for 5.9% of R&D universities in the U.S. but only receive 1.2% on average of federal R&D funds.[78] R&D funds are also concentrated and stratified among the top HBCUs.[79] In 2005, the top 10 HBCUs received slightly over half of all R&D funds received by all HBCUs.[80]

Second, research facilities at HBCUs are not up to par with those at PWIs. Investment in modernization and construction facilities is one of the largest capital investments for universities.[81] The quality of research facilities has a direct impact on the quality of the research and scholarship produced.[82] In 2000, NSF conducted a study that found 88% of HBCUs' science and engineering research spaces were "insufficient for meeting current research efforts."[83] However, HBCUs do not have the funding to start renovation projects or repair their existing facilities.[84] Federal funds are the primary source of funding for these construction projects, and this has slowed down over the past decades.[85] Without an increase in federal support, these research facilities will continue to sit in disrepair and remain inadequate.

The decision in the SFFA Cases could add another hurdle for universities seeking R&D funds. Universities receive R&D funds from the respective government agencies that support the type of work they do.[86] However, not many government agencies collaborate with HBCUs to support their research, but this is slowly changing.[87] For example, in 2023, the Department of Defense announced that Howard University would be their next research center for their work on "tactical

78. MATTHEWS, *supra* note 27, at 9.

79. *Id.*

80. *Id.* at 9 ("In FY2005, the top 10 HBCUs (in terms of receipt of federal R&D to HBCUs) accounted for approximately 52.7% of total federal R&D support, and the top 20 HBCUs accounted for approximately 72.3% of total R&D support.").

81. *Id.* at 11.

82. *Id.* ("Many in academia contend that the quality of an institution's facilities is directly linked to the quality of education offered.").

83. *Id.*

84. *Id.* ("In the 1998 survey, HBCUs reported $331.0 million in construction and repair/renovation projects and campus infrastructure projects that had to be deferred due to lack of funding.").

85. *Id.* at 12.

86. *Id.* at 13 ("(NASA) has established a University Research Centers (URC) program to fund research projects in space science and applications, advanced space technology, and advanced astronautics technology. Currently, NASA supports URC at 11 HBCUs and three other minority institutions. Each institution is eligible to receive up to $1.0 million per year for a period of five years, based on their performance and availability of funding.").

87. C. Todd Lopez, *Howard University Will be Lead Institution for New Research Center*, *DOD News,* U.S. DEPT. OF DEF. (Jan. 23, 2023), https://www.defense.gov/News/News-Stories/Article/Article/3275321/howard-university-will-be-lead-institution-for-new-research-center/;*see also* Erika Gimbel, *HBCUs Use Federal Funding to Connect Students and Communities*, ED TECH MAGAZINE (Feb. 11, 2025), https://edtechmagazine.com/higher/article/2025/02/hbcus-use-federal-funding-connect-students-and-communities.

autonomy."[88] Howard is the first HBCU to have a "university-affiliated research center" in the country.[89]

The SFFA Cases decision has been met with a mix of responses from HBCU administrations regarding how to handle the new precedent.[90] This could result from a variety of reasons, one of which being fear of expressing discontent with the decision due to potential backlash that may affect their ability in the future to lobby for more R&D funds. Despite this, the universities that have made statements have made their positions unequivocally clear.[91] For example, Howard University's former president, Wayne A. I. Frederick, had come out after the decision reaffirming his institution's commitment to racial diversity in admissions.[92] He states, "we all are going to be kind of avoiding lawsuits. . . .It is going to be almost impossible. . . ."[93] It may be difficult for HBCUs to keep their R&D funds as they must balance their desire to maintain a diverse student body while also keeping in compliance with federal law and the regulations promulgated by the agencies who fund their research.

Endowments at HBCUs are notoriously smaller than at PWIs.[94] Due to systemic and structural racism, endowments at public and private HBCUs are approximately "70% smaller" than their PWI counterparts.[95] Endowments are crucial for these institutions as there is a direct correlation between endowment size and efficiency.[96] Larger endowments allow institutions to "purchase improved human and physical capital . . . [and] more qualified administrative staff or faster machinery."[97] These factors are weighed into prospective students'

88. *Id.*

89. *Id.*

90. Sara Weissman, *As Affirmative Action Ends, HBCUs Wait or Plan for the Fallout*, INSIDEHIGHERED (July 12, 2023), https://www.insidehighered.com/news/diversity/race-ethnicity/2023/07/12/affirmative-action-ends-hbcus-wait-or-prepare ("David A. Thomas, president of Morehouse College, an all-men HBCU in Atlanta, described the court's [sic] blow to race-conscious admissions as a 'travesty" and said he feels a sense of 'responsibility' to serve students who will be affected by the ruling.").

91. HBCU SPORTS, *Howard President Explains How Supreme Court Ruling on Affirmative Action Impacts HBCUs*, HBCUSPORTS.COM (June 29, 2023), https://hbcusports.com/2023/06/29/howard-president-explains-how-supreme-court-ruling-on-affirmative-action-impacts-hbcus/.

92. *Id.*

93. *Id.*

94. Chris Woolston, *Cash Boost Looms for Historically Black US Colleges and Universities, Legal Wins and Federal Budget Proposals Could Address Years of Underfunding*, NATURE (Sept. 20, 2021), https://www.nature.com/articles/d41586-021-02528-0.

95. *Id.* (stating that in 2019 there was a 70% difference between the size of endowments at HBCUs and PWIs).

96. Jason Coupet & Darold Barnum, *HBCU Efficiency and Endowments: An Explanatory Analysis*, 10 INT'L J. OF EDUC. ADV. 186, 192 (2010).

97. *Id.*

decision of whether or not to attend an institution. This can perpetuate cycles that lead to less revenue for a university in the future.

Similar to other forms of federal funding, HBCU endowments experience unequal investment.[98] State governments take much of the responsibility for funding endowments for public universities through appropriations, while private universities obtain a larger portion of their funds from private donations.[99] The inequity present in private donations will be explored later in Part IV-C in "Private Donations," and the inequity in state appropriations will be explored in Part IV-B in "The Asymmetrical Allocation of State Appropriations."

States receive federal money allocated to them from their legislatures to invest in their state schools.[100] Unsurprisingly, there is inequity in the allocation of funds between HBCUs and PWIs, often a result of state legislation that perpetuates these inequalities.[101] For instance, an Association of Public Land Grant Universities ("APLGU") study found that for each federal dollar a PWI receives, "between $5 and $7" is distributed to the institution by the state.[102] For example, in the case of *Adams v. Richardson*, in 1973, the NAACP successfully received a ruling that ten states were operating under systems that had gross racial disparities that resulted in "dual systems of higher education."[103] HBCUs are already playing catch-up, and receiving inadequate funds from their respective states solidifies the inequities and issues plaguing these institutions.[104] To counteract these inequalities, measures have been taken by organizations such as The Coalition for Equity and Excellence in Maryland Higher Education to affirmatively increase funding at HBCUs to equal that of PWIs.[105] However, with affirmative action policies

98. Woolston, *supra* note 94.

99. *See* Toutkoushian & Hillman *infra* note 107.

100. Noah D. Drezner & Anubha Gupta, *Busting the Myth: Understanding Endowment Management at Public Historically Black Colleges and Universities*, 81 THE J. OF NEGRO EDUC. 107 (2012).

101. *Id.* at 109 ("Office for the Advancement of Public Black Colleges study found that for every federal dollar received by a public Black college the home state allocates only 50 cents. The funding disparity is even greater when looking at federal funds. On average, for each dollar a PWI receives from the federal government, states distribute between $5 and $7 to the institution.").

102. *Id.*

103. *Id.* at 108; *see also Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973).

104. Drezner & Gupta, *supra* note 100, at 109 (noting that there have been several "claims of inadequate funding of HBCUs by proponents of Black colleges" that harm these institutions).

105. *Id.* ("The Coalition for Equity and Excellence in Maryland Higher Education is suing the Maryland Higher Education Commission on behalf of the four public HBCUs in the state (Bowie State University, Coppin State College, Morgan State University, and University of Maryland-Eastern Shore) . . . The Coalition for Equity and Excellence in Maryland Higher Education and its co-litigants allege that the State of Maryland failed to live up to a 2000 desegregation agreement designed to ensure that parity was achieved between the funding of the state's PWIs and HBCUs by providing equitable funding. The Coalition claims that there continues to be both capital and program underfunding at HBCUs in comparison to their PWI peers.").

in jeopardy, these measures, as well as prospective new ones, are in a vulnerable position.

B. The Asymmetrical Allocation of State Appropriations

As mentioned in the previous section, there is inequity between the funds that HBCUs and PWIs receive from their respective states.[106] Funding from states typically manifests through appropriations and is the primary method by which states finance higher education in their jurisdictions.[107] Appropriations are funds that can either be broadly allocated to fund higher education or can be set aside for specific purposes, such as certain research initiatives.[108] These appropriations are given in the hopes that they will reduce the cost of tuition and that these savings will trickle down to prospective students.[109] Reduced costs are expected to encourage more students to acquire postsecondary degrees. However, this has not been the case. While one would assume tuition rates would rise in lockstep with inflation, data suggests that tuition rates have risen higher than inflation for the past decade.[110] This has served as a barrier that keeps many students from low-income households and people of color ("POC") from accessing higher education.[111]

Additionally, there has been a recent decline in state support for institutions of higher education.[112] In periods of economic downturn, state appropriations towards higher education have decreased.[113] HBCUs are impacted the most due to their high reliance on tuition and the lack of funding from other sources.[114] Another reason is that HBCU

106. Woolston, *supra* note 94.

107. Robert K. Toutkoushian & Nicholas W. Hillman, *The Impact of State Appropriations and Grants on Access to Higher Education and Outmigration*, 36 THE REV. OF HIGHER EDUC. 51, 52 (2012) (noting that 90% of the assistance given to higher education institutions is through appropriations).

108. *Id.* at 54. (describing appropriations as "a form of in-kind subsidy").

109. *Id.* at 52.

110. *Id.* (explaining this phenomenon by providing a formula "that price is equal to cost minus subsidies in higher education").

111. *Id.* ("Winston's (1999) notion that price is equal to cost minus subsidies in higher education helps explain why tuition rates have risen faster than inflation for the last decade (College Board, 2010), leading to concern that higher education will become less affordable to many students (see also Bound & Turner, 2007). This relationship between tuition and appropriations is complex (Calhoun & Kamerschen, 2010), and Rizzo (2006) and Koshal and Koshal (2000) found that, when state funding is constrained, tuition rates increase.").

112. David J. Weerts & Justin M. Ronca, *Examining Differences in State Support for Higher Education: A Comparative Study of State Appropriations for Research I Universities*, 77 THE J. OF HIGHER EDUC. 935, 935 (2006).

113. *Id.* ("There are many factors that explain the nationwide decline in state support for public colleges and universities, but the majority of the blame rests on painful economic recessions that have occurred in the last 25 years.").

114. *See Id.* at 937.

students are more likely than PWI students to be low-income and cannot afford school during periods of economic stagnation.[115]

Recently, there has been a conservative shift by the federal government regarding its responsibilities.[116] The result is "new federalism," where the federal government has transferred more responsibilities to the state and local levels in determining how to fund programs.[117] Central to this concept is the notion that higher education is "a private good that should be supported by students and donors, rather than a public good supported by the state."[118]

The negative correlation between state funding for higher education and rising enrollment could lead to two significant consequences. First, the push towards the privatization of higher education could lead to a decrease in enrollment numbers from low-income students. Second, if current trends continue, there will be a "quadruple deficit" in the operating expenses of these institutions.[119] As a result, higher education among all institutions will fall short of the annual budget required to adequately educate the student populace by over $30 billion.[120]

Consider these funding concerns and then magnify them twofold; this represents the financial challenges experienced by HBCUs. HBCUs historically receive significantly fewer state appropriations than PWIs.[121] As a result of this below-average state support, HBCUs heavily rely on other sources for their funding.[122] The federal government often intervenes and compensates these institutions that fall through the cracks, but some institutions receive below-average funding from both the state and federal governments.[123] Consequently, HBCUs are left to rely heavily on funding from other sources, such as tuition and private donations. Where these contributions cannot recompense their losses, the institutions are left with inadequate funding for their programs and initiatives.

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115. Robert A. Nathenson et al., *Moving Upward and Onward: Income Mobility at Historically Black Colleges and Universities*, Samuel DeWitt Proctor Inst. for Leadership, Equity & Just., 1, 4 (2019) (noting that "[f]ar more low-income students enroll in HBCUs and other MSIs than PWIs").

116. Weerts & Ronca, *supra* note 112, at 936.

117. *Id.*

118. *Id*. at 937.

119. *Id.* ("[H]igher education in the U.S. will fall $38 billion short of the annual budget needed to educate the student population expected in 2015.").

120. *Id.*

121. *See* Alberto Ortega & Omari H. Swinton, *Business Cycles and HBCU Appropriations*, 1 J. of Econ., Race, and Pol'y 176–77 (2018).

122. *Id.*

123. G. Thomas Sav, *Separate and Unequal: State Financing of Historically Black Colleges and Universities*, 15 J. of Blacks in Higher Educ. 101, 102 (1997).

While the SFFA Cases do not directly affect state appropriations, their impact on affirmative action policies could have broader implications for higher education. Affirmative action is more than specific policies aimed at promoting DEI. Affirmative action is also a method of thinking on how to remedy an American culture that has endured and facilitated centuries of chattel slavery, Jim Crow, and systemic racism toward Black people.[124] For instance, after the SFFA Cases decision, Texas Governor Greg Abbot signed a law that would force all state-funded institutions of higher education in Texas to close their DEI offices.[125] Republican state senator Brandon Creighton introduced the bill, echoing sentiments reminiscent of Justice Sandra Day O'Connor's comments in *Grutter*.[126] In his rationale, he argued that DEI offices have "failed to make progress advancing or increasing diversity,"[127] despite testimonies from students and faculty that suggest otherwise.[128] This will likely be the first of many laws introduced by Republican lawmakers to eliminate racial equity measures in areas such as academia and employment.

C. Private Donations

1. Deconstructing The Lack of Charitable Donations by Alumni

Public and private universities alike rely on charitable donations to fund their various initiatives.[129] Even through times of economic downturn, private contributions to higher education have not only remained steady, but have increased.[130] Of these donations, alumni are responsible for a large part.[131] While private universities may rely on these donations to a larger degree than their public counterparts, donations are a crucial part of any university budget. As a result of their long history of being underfunded, HBCUs often turn to the solicitation of donations

124. Exec. Order No. 10,925, *supra* note 40.

125. Maya Yang, *Gregg Abbott Signs Law Banning Diversity Offices in Texas Higher Education*, THE GUARDIAN (June 14, 2023, 7:55 PM), https://www.theguardian.com/us-news/2023/jun/14/new-texas-bans-law-diversity-offices-state-higher-education.

126. *Id.*

127. *Id.*

128. Leah Asmelash, *DEI Programs in Universities are Being Cut Across the Country. What Does This Mean for Higher Education?*, CNN (June 14, 2023, 11:01 AM), https://www.cnn.com/2023/06/14/us/colleges-diversity-equity-inclusion-higher-education-cec/index.html.

129. Noah D. Drezner, PHILANTHROPY AND FUNDRAISING IN AMERICAN HIGHER EDUCATION, 37 ASHE HIGHER EDUC. REP. 1, 2 (2011) ("Institutions of higher education, private and public alike, are turning to private giving to meet budgetary demands. As external support of higher education decreases and the cost to educate a student rises, the need for alumni support to maintain higher education's eminence and to increase access heightens.").

130. *Id.* at 11 ("Since 1965 giving to all aspects of education increased from $2.01 billion . . . to $40.01 billion in 2009, an increase of 1,891 percent (citation omitted).").

131. *Id*. at 10.

as a short-term solution.[132] Keeping with trends, however, there is little equity between the donations that HBCUs and PWIs receive.[133]

The motives that alumni may have for donating are often the result of a combination of certain psychological factors. These include: "(1) altruistic values and preferences, (2) a sense of perceived need and efficacy, and (3) satisfaction with the educational institution."[134] Outcomes that affect these factors are often: "(1) educational outcomes, (2) employment outcomes, and (3) level of alumni involvement."[135]

It can also be argued that alumni donations, even when made for altruistic reasons, may have roots in systemic racism. Alumni who earn higher salaries are more likely to donate to their alma maters than alumni who earn less.[136] One of the main reasons cited by alumni who choose not to donate is that they simply cannot afford to do so due to a lack of disposable income.[137] This discrepancy is evident when comparing alumni giving at PWIs compared to HBCUs. In 2018, the alumni donation rate for HBCUs was 10.8%, in contrast to the donation rate of 18.7% for PWIs.[138] Moreover, in 2022, Black students who graduated with bachelor's degrees, on average, made $20,000 less than white students with the same level of education.[139] HBCUs typically have fewer graduate programs that yield high incomes, and HBCU graduates have higher student debt on average than non-HBCU graduates.[140] A high debt-to-income ratio makes altruistic donations infeasible for many HBCU graduates.[141] While higher education is often touted as the

132. *Id.* at 34 (noting that HBCUs "do not raise as much money as their predominantly white counterparts in either operational or endowment dollars (citation omitted)" and as a result, rely on philanthropic funding to fill these gaps).

133. *Id.* at 35 ("As noted previously, alumni gifts at HBCUs are considerably lower than alumni giving at predominantly white institutions. Gasman (2006a) noted that this finding could be attributed to the fact that African Americans hold fewer appreciated assets and earn less income than white Americans.").

134. Jeff E. Hoyt, Understanding Alumni Giving: Theory and Predictors of Donor Status 3 (2004).

135. *Id.*

136. Sarah Wood, *15 Colleges Where the Most Alumni Donate*, U.S. News & World Rep. (Dec. 29, 2023), https://www.usnews.com/education/best-colleges/the-short-list-college/articles/colleges-where-the-most-alumni-donate#:~:text=Donors%20earning%20an%20annual%20salary,earning%20less%2C%20per%20Hanover%20data (stating that alumni "[d]onors earning an annual salary of at least $150,000 were more likely to have donated to their alma mater than those earning less, per Hanover data").

137. *Id.*

138. Matthew Lynch, *HBCUs Receive Alumni Donations at a Lower Rate Than PWIs*, The Pedagogue (May 9, 2023), https://pedagogue.app/hbcus-receive-alumni-donations-at-a-lower-rate-than-pwis/.

139. Veera Korhonen, *Mean Earnings in the United States in 2022, by Highest Educational Degree Earned and Ethnicity/Race,* Statista (July 5, 2024), https://www.statista.com/statistics/184259/mean-earnings-by-educational-attainment-and-ethnic-group/.

140. William J. Broussard, Fundraising at Public Regional Universities: Under the Radar, Below the Fold 119 (2023).

141. *Id.* at 118-19 ("It is also true of non-HBCU alumni, as public university alumni give at lower rates than private university alumni (5.5% vs. 18% respectively, according to Hanover

pathway to financial freedom, the racial wealth gap remains a pervasive vestige of the U.S.' history of systemic racism.[142] Consequently, HBCUs cannot rely on their alumni base to donate at the same rate as their PWI counterparts.[143]

Recently, there has been a noticeable increase in donations from non-alumni. Considering their financially weak alumni base, HBCUs have increased efforts to solicit external funding.[144] However, these efforts to solicit new donors are often unsuccessful due to a "lack of funds for travel, lack of staffing, and proper customer relationship software and donor prospecting."[145] There has been a recent trend of non-alumni, particularly celebrities and philanthropists, providing generous donations to HBCUs.[146] These donations have seen a surge in recent years, particularly after the summer of 2020 and the reaction to George Floyd's murder.[147] These donations have helped to close the gap between HBCU and PWI donations, but the SFFA Cases decision has the power to reverse this trend.

V. The SFFA Cases & The New Concerns They Raise For HBCUs

A. Harmful Impacts on HBCU Enrollment and Cultural Identity

The SFFA Cases have the potential to exacerbate old issues and create new ones. While HBCUs were initially created as a means of providing education and opportunity to Black students, HBCUs continue to admit non-Black students at increasing rates.[148] Approximately 24% of students enrolled in HBCUs as of 2020 were non-Black students,

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Research). This can be explained away in part by fewer degree programs that yield graduates with high disposable incomes at HBCUs (such as MBAs, law schools, and medical school programs), but also by higher student debt among HBCU graduates, and a historical mission to serve families and communities that yield fewer individuals who come from families with multi-generationally established wealth.").

142. *Id.* at 121 ("HBCUs lack megadonors willing to invest in them. Former Dillard University president Walter Kimbrough, in a 2015 op-ed "An Obscene Use of $400 Million," offers a scathing criticism of John Paulson, who donated $400 million to Harvard University. He argues that Harvard's endowment, which at the time was $36 billion, is so large that such new gifts are vanities that do not even help the 86% of students who do not receive financial aid to attend.").

143. *Id.*

144. *Id.* at 120.

145. *Id*.

146. *See* Danielle McLean, *HBCUs Level Up: Funding Pours in to Tackle Critical Needs and Rewrite History After George Floyd*, Higher Ed Dive (Apr. 14, 2023), https://www.highereddive.com/news/hbcus-funding-windfalls-needs-remain/647608/.

147. *Id.*

148. Kenneth R. Roth et al., Emancipatory Change in US Higher Education 221 (2023) ("HBCUs were solely established to educate Black students, but these institutions have been enrolling non-Black students for decades. As of 2020, as earlier noted, non-Black students represent about 24 percent of the student enrollment at HBCUs as compared to 15 percent in 1976.").

in contrast to 15% in 1976.[149] One reason a donor might donate to an HBCU is to aid Black students specifically. This presents a unique problem for these institutions. HBCUs are incentivized to increase their enrollment by accepting Black and non-Black students alike.[150] More students equals more tuition and revenue for the university.[151] However, an increase in non-Black students could signal to donors a trend towards the decrease in the number of Black students admitted. Consequently, donors may defer from donating either in protest or out of fear that admitting non-Black students could dilute the rich culture and traditions HBCUs try hard to cultivate and preserve.

B. There Are Hurdles to Black Faculty Recruitment and Retention

In addition to concerns about Black students being dissuaded from attending HBCUs, there are also concerns regarding selection committee bias at all universities despite strong Black faculty representation at HBCUs.[152] While the percentage of students of color at all universities has steadily increased over the years, the same cannot be said for university faculties.[153] This is in part due to a lower number of students of color completing doctoral degrees.[154] Diverse faculties have many positive effects on low-income and minority students at HBCUs.[155] These include mentoring, providing diverse outlooks on topics taught, and providing a welcoming and inclusive environment on campus.[156] HBCU faculties are known for being much more diverse than other universities.[157] Among all faculty in post-secondary institutions, approximately 20.8% of the faculty identified as non-white, in contrast to 73.4% specifically at HBCUs.[158]

Prestige hiring in academia is a well-documented phenomenon. Just 20.4% of U.S. institutions accounted for 80% of the tenured and tenure-track faculty at Ph.D.-granting institutions.[159] Attending an

149. *Id.*

150. *Id.* at 233 ("For example, the study reveals that the 23 HBCUs that have received donations from MacKenzie Scott, on average, attained a median enrollment of new students of more than 300 students greater than HBCUs that did not receive funding .").

151. *Id.* ("In most cases . . . HBCUs are only surviving with grants, student tuition, and limited corporate and individual donations.").

152. Andrés Castro Samayoa & Marybeth Gasman, A Primer on Minority Serving Institutions 26 (2019).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 28.

158. *Id*. at 26-27.

159. Laura Spitalniak, *80% of Professors at Ph.D.-Granting Universities Attended the Same Handful of Colleges*, Higher Ed Dive (Nov. 2, 2022), https://www.highereddive.com/news/

elite institution is vital for those aspiring to a career in academia.[160] The SFFA Cases may make it harder for prospective POC professors to earn admittance to these institutions.[161] As a result, it may be more difficult in the future for prospective POC professors to gain employment at HBCUs and other institutions, as universities may opt to hire their white peers with degrees from more prestigious institutions.

C. More Restrictions on Upward Social Mobility

Without the creation of HBCUs, Black Americans would not have made as many advancements socially and economically.[162] HBCUs, for years, have served as important socio-political institutions in the Black community.[163] They have opened the door to the attainment of degrees in traditionally lucrative career fields such as "medical sciences, engineering, law, and business administration" that would not have been available otherwise.[164] Given these institutions' importance, it is easy to anticipate the potential consequences of continued underfunding. The SFFA Cases work to preserve this underfunding structure by advocating for the use of race-neutral alternatives that disparately impact HBCUs.[165]

In addition, Black students at HBCUs are more likely to graduate than Black students at similar non-HBCUs.[166] As a result, Black students may be pushed to apply to more PWIs. The result is two potential consequences. First, the increased demand for both HBCUs and PWIs will inevitably result in some students not being admitted to either type of institution, limiting their access to higher education. Second, some students who fall between statistical margins may face unintended consequences. For example, certain students admitted to a PWI may struggle to graduate who would have flourished both academically and socially in an HBCU environment.

Berkeley-Harvard-Michigan-Wisconsin-Stanford-most faculty/633842/#:~:text=Just%20over%20one%20in%20eight,Wisconsin%2DMadison%20and%20Stanford%20University.

160. *Id.*

161. *Id.*

162. ROTH ET AL., *supra* note 148, at 226.

163. *Id.*

164. *Id.*

165. *Id.* at 226-27.

166. Gregory Prince & Angelino Viceisza, *What Can Historically Black Colleges and Universities Teach About Improving Higher Education Outcomes for Black Students*, NAT'L BUREAU OF ECON. RSCH., 3 (2023) (noting that when factors such as "size, selectivity, finances and the socio-economic demographics of students" was taken into consideration Black students were 33% more likely to graduate at HBCUs than other similar non-HBCUs).

D. A New Threat to Cultural Curriculum

HBCUs tend to tailor their curriculum to Black culture.[167] This is a large part of the draw for prospective students. At HBCUs, Black students are exposed to unique cultural experiences they cannot experience anywhere else.[168] For example, Spelman College is a women's only HBCU. At Spelman, there is a required course for first-year students titled "African Diaspora and the World."[169] The course is centered around teaching students about their place in the world and their unique experiences as Black women.[170] Alumnae have cited the course as being one of the "most formative educational influence[s] in their lives."[171]

Courses such as these could be put in jeopardy by the SFFA Cases. As HBCUs increasingly enroll a more diverse student body, they may feel pressure to adjust their curriculum to be more racially neutral. Universities naturally have an interest in ensuring their student body feels represented by courses and programs they offer. As HBCUs grow more diverse, this assimilation could dampen the experiences of Black students at these institutions and be the first of many methods to whitewash rich traditions and experiences at HBCUs.

VI. Potential Remedies

A. Continued Lobbying Efforts and Advocacy

The most evident solution to the HBCU funding dilemma would be through a change in state and federal laws. On a state level, this would mean states passing legislation that would close the state appropriation gap between HBCUs and PWIs. Unfortunately, in the wake of the SFFA Cases, some state legislatures have felt emboldened to resist efforts at equity.[172] This leaves HBCUs at the mercy of their state legislatures and their agendas. Most policymakers do not identify as Black or did not attend an HBCU and may not see their value as a result.[173] This lack of knowledge can result in little interest in advocating

167. *Id.* at 12.
168. *Id.* at 11.
169. *Id.* at 13.
170. *Id.*
171. *Id.*
172. Yang, *supra* note 125.
173. Katherine Schaeffer, *U.S. Congress Continues to Grow in Racial, Ethnic Diversity*, Pew rsch. ctr., (Jan. 9, 2023), https://www.pewresearch.org/short-reads/2023/01/09/u-s-congress-continues-to-grow-in-racial-ethnic-diversity/ (stating that "[d]espite growing racial and ethnic diversity on Capitol Hill, members of Congress are still far more likely than the overall U.S. population to be non-Hispanic White (75% vs. 59%). This gap is about as wide as it was in 1981, when 94% of members of Congress were White, compared with 80% of the U.S. population.").

to protect the needs of these institutions.[174] Thus, the advocacy to help HBCU students must come from the Black community.

Through active representation by Black organizations and leaders, HBCUs can successfully lobby for more funding.[175] The most prolific organization advocating for HBCU funding is the United Negro College Fund ("UNCF").[176] Since its inception, UNCF has "raised more than $4.8 billion and helped more than 450,000 students" attend college.[177] UNCF utilizes several strategies to achieve its goal of informing policymakers. These include: "(1) making informal and formal presentations to policymakers; (2) engaging in research, producing white paper reports; (3) posting the evidence from their research to their website, and (4) communicating this data to the press."[178] These strategies have been proven to work, and the UNCF has provided support and input on many policies that have gone on to help the fiscal situation of HBCUs.[179] In the wake of the SFFA Cases, more support for organizations such as UNCF is necessary to ensure they can continue their work efficiently.

B. Embracing Alternative Models to the Funding of Higher Education

Another solution to the higher education funding dilemma would be for the U.S. to take inspiration from other countries and model their system after them. This would not be the first time the U.S. modeled aspects of a legal system after another country, with social security and Medicare being poignant examples.[180] A lot can be learned from looking beyond U.S. borders and looking at other methods of financing higher education. While copying and pasting another country's funding

174. Sosanya Jones & Brandon Brown, *Changing the Narrative: UNCF and its Role in Policy Advocacy for Historically Black Colleges and Universities*, 9 INT. GRPS. & ADVOC., 451, 454 (2020).

175. *Id.* (defining active representation as "intentional and passionate advocacy for the interests and desires of those being represented").

176. *Id.* at 456.

177. *Id.* at 464.

178. *Id.*

179. *Id.* at 462 (quoting "The most prominent strategies used by UNCF to secure policy victories are: (1) the inside strategy of public lobbying by engaging bipartisan leadership in Congress using relationship building and networking; (2) the outside strategy of conducting research that highlights the impact of HBCUs and needs of Black students; (3) the inside strategy of providing lawmakers with evidence-based research and documentation to support policy recommendations and advocacy efforts; (4) the outside strategy popular power strategy of informing donors about current and upcoming policy legislation; (5) the outside strategy of applying indirect pressure by providing the general public and HBCU supporters with information about how to contact policymakers; and (6) the outside strategy of popular power by informing the public of top agenda policy items and needs through the media.").

180. *See, e.g.*, Dalmer D. Hoskins, *U.S. Social Security at 75 Years: An International Perspective*, 70 SOC. SEC. BULL., 79, 79 (2010), https://www.ssa.gov/policy/docs/ssb/v70n3/v70n3p79.html; Physicians for National Health Program, *Health Care Systems – Four Basic Models*, https://www.pnhp.org/single_payer_resources/health_care_systems_four_basic_models.php (last visited Sept. 27, 2024).

scheme is not recommended, it is useful in drawing inspiration and adapting funding systems accordingly.

1. Moving Towards Trust-Based Funding

In some institutions outside the U.S., higher education is often heavily subsidized by the government and more centralized, with the majority of funding derived from taxes.[181] This is a model that has been utilized heavily in Nordic countries.[182] In Sweden, for instance, they followed a system coined "[t]he Trust-Based Funding Regime" until 1993.[183] Under this system, universities received a fixed "block grant" to fund their education, which included all of their programs and research efforts.[184] There was no accountability measure built into how these funds were distributed, and funds were instead given "in proportion to the mission" of the university.[185] This system is notably far less discretionary than the state appropriations system used in the U.S.[186] This gives universities much more autonomy in determining their financial priorities.[187] While this system has fallen out of favor in the past decades, some merits to this model can be adopted in the U.S.' system.

The Trust-Based funding regime relies heavily on trust between the state and the university.[188] The state finances the system, and the universities focus on teaching.[189] While the level of freedom varied, this system ensured that funding would not follow "student numbers and pre-established divisions of labor . . ." to provide equity among institutions and the financing they receive.[190] The Europeans later left this model in favor of adopting elements of the U.S. system due to its high metrics in performance and quality.[191] The "wide array of funding portfolios" in the U.S. system, as we know, has led to a high degree of stratification regarding funds distributed to universities.[192] PWIs usually get

181. Sverker Sorlin, *Funding Diversity: Performance-based Funding Regimes as Drivers of Differentiation in Higher Education Systems*, 20 HIGHER EDUC. POLICY 413, 426 (2007).
182. *Id.* at 432.
183. *Id.* at 417.
184. *Id.*
185. *Id.*
186. Toutkoushian & Hillman, *supra* note 107, at 52.
187. Sorlin, *supra* note 181, at 418 ("Roles of institutions were given, as it were, by parliamentary decree, and 'funds followed function'").
188. *Id.*
189. *Id.* ("The state had a role in overseeing and steering the system on a macro level, but the criteria of success were largely defined and monitored within the academic community . . . The system was generally conceived as a solid container of freedom.").
190. *Id.* at 417.
191. *Id.* at 419.
192. *Id.*

the bulk of these funds, and HBCUs are left behind.[193] A more centralized funding scheme might help fix these problems.

That is not to say a more centralized funding scheme is not without its drawbacks. A Trust-Based funding scheme, if implemented in the U.S., may be highly susceptible to election cycles as conservatives will likely oppose an increase in taxes. However, a less centralized system could help remedy some parts of the U.S.' faulty system, a step forward toward remedying decades of systemic oppression.

VII. Implementing a Needs-Based Funding System

Another alternative funding scheme is needs-based funding. There is no federal needs-based funding system for institutions in the U.S. There exist some methods of needs-based funding at other levels for HBCUs, but there needs to be more.[194]

Despite the philanthropic donations that HBCUs receive regularly, these do little to serve the needs of these institutions' long-term viability.[195] Currently, there are two programs in place to support HBCUs. These are the Strengthening HBCUs Program[196] and the HBCU Capital Financing Program.[197] The former is run through the Department of Education ("ED") and has contributed between "$600-$750 billion" in non-competitive grant money to HBCUs in any given year.[198] The latter, also created by ED, provides "low-cost loans for campus repair, renovation, and construction" for HBCUs.[199] Despite these opportunities, data

193. *See, e.g.*, Ivory Phillips, *Opinion | Mississippi State Got More Than $257.8 Million Of Alcorn State Agricultural Funds*, Miss. Free Press (Feb. 14, 2024), https://www.mississippifreepress.org/39807/opinion-mississippi-state-got-more-than-257-8-million-of-alcorn-state-agricultural-funds ("Instead of state leaders in Mississippi equitably distributing its federal land-grant allocations between Alcorn State University and Mississippi State University, MSU has long gotten the lion's share of the funds. I have studied the robbery going back as far as the 1973 figures compiled for the Ayers litigation, including the 2024 allocations. In 2024, ASU received 7.8% of the agricultural funds, while MSU received 92.2%. If the figures are adjusted to count the veterinarian medical school funds separately, ASU would still have only received 10% of the funds.").

194. *See e.g.*, Rosowsky, *supra* note 72.

195. Nadrea Njoku & Lodriguez Murray, *Greater Funding, Greater Needs: A Report on HBCU Funding During COVID-19 and a Case for Continued Support*, Clark Atlanta Univ. Ctr. 91, 95 (2022) (stating that "HBCUs shifted their focus virtually overnight to address immediate needs, investments in physical infrastructure and facilities became a lower priority. The survey found that spending federal funds or philanthropic donations on facilities for maintenance and operations was at the bottom of the priority list. They focused on short-term needs, meaning institutions had less money to invest in existing infrastructure. In all, 60% of participating institutions indicated they had more than $5 million in deferred maintenance.").

196. Ivory A. Toldson & Amanda Washington, *How HBCUs Can Get Federal Sponsorship from the United States Department of Education (Editor's Commentary)*, 84 The J. of Negro Educ. 1 (2015).

197. GAO, *Historically Black Colleges and Universities: Action Needed to Improve Participation in Education's HBCU Capital Financing Program*, U.S. Gov't Accountability Off. at 2 (2018).

198. Toldson & Washington, *supra* note 196, at 1.

199. GAO, *supra* note 197, at 2.

shows that of the HBCUs eligible for these programs, a small number take full advantage of them.[200] This situation can largely be attributed to a lack of availability of these opportunities as well as HBCUs neglecting them.[201] Just because the resources are available does not mean they are readily accessible. There needs to be more of a concerted effort by the federal government to remedy the funding problems HBCUs face. This may take the form of creating new divisions and programs with a similar mission and ongoing reinforcement of existing programs, such as the President's Board of Advisors ("PBA") on HBCUs.[202]

The SFFA Cases may complicate these solutions. In their wake, it will be more difficult to maintain divisions such as the PBA that work to help minorities like Black people. As previously mentioned, some states have already disbanded similar DEI boards.[203] This raises concerns that federal agencies and other states could also do the same. The SFFA Cases have the potential to exacerbate an already dire situation for HBCUs and should be monitored closely going forward.

Conclusion

The importance of HBCUs in the broader scheme of higher education cannot be overstated. HBCUs play a vital role in educating future generations of Black leaders in many fields. Their persistent underfunding makes achieving this goal even more difficult and has far-reaching consequences. These consequences do not just hurt Black people, but the U.S. economy as well. While the SFFA Cases focused on affirmative action policies, the implications of the decision will affect how HBCUs fund themselves in the future. It is up to policymakers, educators, and the public to recognize the importance of HBCU funding disparities and to act accordingly.

Having colorblind admissions in institutions built for POC defeats the purpose these institutions were built for. HBCUs were built to remedy the U.S.' history of systemic racism towards Black people.[204] With the twenty-five-year benchmark quickly approaching, it is evident that race-based admissions are not just necessary but vital to the perseverance of institutions such as HBCUs. The SFFA Cases will be remembered as a vivid illustration of the efforts by a conservative Supreme

200. Toldson & Washington, *supra* note 196, at 6.
201. *Id.*
202. *Id.* ("HBCUs should work with the President's Board of Advisors on Historically Black Colleges and Universities and the WHIHBCUs to identify institutional strengths and establish partnerships with federal agencies.").
203. Yang, *supra* note 125.
204. Garcia-Navarro, *supra* note 56.

Court to preserve antiquated ideas about racial equity. As Justice Ketanji B. Jackson stated in her dissent, "deeming race irrelevant in law does not make it so in life."[205] The future of HBCU funding will lie in how future courts and legislators choose to interpret this new precedent. Their decisions will have reverberating effects on the ability of HBCUs to provide high-quality education and educate future generations of Black students.

205. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 407 (2023) (Jackson, J. dissenting).

All Work and No Play: The History Behind U.S. Child Labor Regulations and the Problem With State Legislation Dialing Back Child Labor Protections

Onyinye Okeke

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INTRODUCTION

At a child labor convention in 1999, Nelson Mandela said that "[t]here can be no keener revelation of a society's soul than the way in which it treats its children."[1] Over 20 years later, Nelson Mandela's quote is still relevant, especially in light of recently enacted legislation that loosens child labor laws at the U.S. state level. It is clear that there are still atrocious child labor practices occurring on a global scale, as well. The laptop used to write this paper was likely made, in part, by Congolese children forced to mine cobalt ore for rechargeable batteries.[2] The clothes this author wears are likely a product of child labor from Southeast Asia.[3] One could continue to list everyday items that companies produce with forced child labor. The fight to protect children across the globe began in the early 1900s and continues today.[4]

Although the Supreme Court ruled in *San Antonio ISD v. Rodriguez* (1973)[5] that children do not have a fundamental right to education, no child's educational journey should be cut short to be overworked and underpaid as a minor. Lawmakers need to keep the best interests of minors in mind when approaching child labor policies. Increased business revenues should not be prioritized over a child's safety, development, and joy. In understanding why lawmakers would want to weaken regulations for child labor, a common justification is that it is actually to benefit the children, as looser labor regulations will make it easier for minors to gain practical life skills.[6] However, the current regulations in place already allow this. In my experience working as a sixteen-year-old

1. Int'l Lab. Org., *Convention 182 and World Day Against Child Labour* (May 7, 2012), https://www.ilo.org/century/history/iloandyou/WCMS_180170/lang--en/index.htm [hereinafter ILO].

2. *See* Terry Gross, *How 'Modern-Day Slavery' in the Congo Powers the Rechargeable Battery Economy*, NPR (Feb. 1, 2023, 12:38pm), https://www.npr.org/sections/goatsandsoda/2023/02/01/1152893248/red-cobalt-congo-drc-mining-siddharth-kara.

3. *See List of Goods Produced by Child Labor or Forced Labor,* U.S. DEP'T LAB., https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods-print#:~:text=Some%20children%20are%20forced%20to,prohibited%20from%20leaving%20the%20worksite.&text=Bricks-,There%20are%20reports%20that%20children%20ages,17%20produce%20bricks%20in%20Iran (last visited Oct. 29, 2024).

4. ILO, *supra* note 1.

5. San Antonio ISD v. Rodriguez, 411 U.S. 1 (1973).

6. *States Are Loosening Restrictions on Child Labor,* U.S. NEWS (June 26, 2023, 1:01 PM), https://www.usnews.com/news/best-states/articles/2023-06-26/states-are-loosening-child-labor-laws.

at an amusement park in the summertime, I was already allowed to work twelve-hour shifts, with a one-hour break, for up to six days a week. Similarly, during the school year, I worked full afternoons into the midnight hour at a retail store on weekdays after school at seventeen years old. I learned plenty of life skills from working at the ages of sixteen and seventeen but attempting to rationalize that teenagers should start working more at younger ages in order to gain life skills is almost disingenuous. Young teenagers do not need to work themselves to the bone to learn moral values.

Another justification for loosening child labor laws is that it gives more parental control,[7] although in practice, it truly just gives businesses and employers more power and control.[8] The most common justification, however, is economic reasons.[9] Apparently, many conservative lawmakers see child labor as a means to lessen the economic impact of labor shortages.[10] Overall, the severe loosening of child labor regulations can be harmful to minors—we have child labor laws today because of how detrimental child labor conditions were before. Child welfare activist Grace Abbott once said "[c]hild labour and poverty are inevitably bound together and if you continue to use the labour of children as the treatment for the social disease of poverty, you will have both poverty and child labour to the end of time."[11] Abbott's words are still relevant today. The last thing any government should do is pass laws that make it easier for children to be exploited in the workplace—especially because laws like this are more likely to impact the most vulnerable children, such as those who migrated into the U.S. without their parents.[12]

This Note will take a historical approach to examine the current trends in child labor laws being passed in the U.S. Part I of this Note will address the historical background and context behind the origins of the movement for child labor reform, as well as the legislative purposes of long-standing U.S. child labor laws like the Fair Labor Standards Act (FLSA) of 1938. Next, Part II will address the problem with recently passed legislative acts that de-regulate child labor in several Republican-led states. Part II will also address the build-up behind the current push for weakened child labor regulations, as well as the current struggles with properly fighting and punishing employers who violate child labor laws. Lastly, Part III will propose solutions to protect

7. *Id.*
8. *See id.*
9. *See id.*
10. *Id.*
11. ILO, *supra* note 1.
12. *States Are Loosening Restrictions on Child Labor*, *supra* note 6.

minors in the workplace and advocate for the preservation of current child labor laws.

I. Background Information and History of Child Labor Reform

To fully understand how and why American legislators have gotten to this stage of rolling back labor protections for children, it is important to understand that this type of thinking is not new. Throughout the 1900s to now, lawmakers have pushed for the deregulation of child labor laws.[13] Some of the recently proposed and passed child labor laws in states like Arkansas, Iowa, and Ohio eliminate work permit requirements to verify an employee's age and extend the amount of hours that minors can work.[14] These recent laws and proposals of today are similar to the proposals to weaken child labor protections back in the early 1980s, during the Reagan Administration.[15] The Reagan-Era child labor law proposals were met with praise from restauranteurs, parents, and teenagers who sought opportunities for fourteen- and fifteen-year-old children to be more easily employed.[16] On the opposite end of the spectrum, the proposed child labor laws also faced harsh criticisms and protests from labor unions, educational rights groups, and some Congressmen, who accused the Reagan Administration of "schem[ing] to enable restauranteurs to exploit school age workers."[17] The proposed labor acts were ultimately never passed.[18]

Since Reagan's Era, there have been several other lawmakers, businesses, and citizens who have pushed for weaker child labor regulations.[19] Ultimately, the key viewpoints from those who push for *and* against weaker child labor laws have not changed much over the past century. While the fight for child labor reform continues, the opposition to such reform continues as well.

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13. *See generally* Gerald Mayer, *Child Labor in America: History, Policy, and Legislative Issues*, Congressional Research Service, 1 (Nov. 18, 2013), https://www.everycrsreport.com/files/20131118_RL31501_008741c7351fd72ae2a262198ba9c0e44921a60a.pdf (noting that there were multiple initiatives raised in Congress aimed at passing stricter child labor laws over the past century).

14. Harm Venhuizen, *Some Lawmakers Propose Loosening Child Labor Laws to Fill Worker Shortage*, PBS (May 25, 2023, 2:54 PM), https://www.pbs.org/newshour/politics/some-lawmakers-propose-loosening-child-labor-laws-to-fill-worker-shortage.

15. Mayer, *supra* note 13, at 13.

16. *Id.*

17. *Id.* at 14.

18. *Id.*

19. *See id.*

A. The Origins of Child Labor Reform

An array of economic, ethical, and societal concerns drives the desire to regulate child labor.[20] In the nineteenth and early twentieth centuries, especially during the Industrial Revolution, children were commonly viewed as an "alternative source of low-wage labor."[21] Child workers competed with their own parents and other adults for low-wage employment—even though it resulted in the sacrifice of their own health, education, and enjoyment of childhood.[22] The constant grappling for employment proved to cause a downward domino effect.[23] Child laborers produced goods that competed in quality and quantity with the goods adults produced, and the extremely high supply of people desperate for work meant employers could pay and treat employees quite poorly.[24] With so many people, from young children to aging adults fighting to work regardless of how low the pay was, "a downward pressure on wages and living standards" resulted.[25]

The low-wage working class faced "health and safety hazards" and suffered from inadequate sleep.[26] It became clear that these poor working and living conditions were having detrimental effects on adults and children alike.[27] Due to awfully long and intensive work shifts, children were left ill-equipped for educational affairs and school work.[28] Similarly, working parents were *also* exhausted from their own long, grueling work shifts, and it grew much more difficult for parents to support their children.[29] These patterns of sleep-deprived children struggling to stay awake in school worked in tandem to "extend[] the cycle of poverty and add[] to social-welfare costs."[30] With these poor working conditions becoming a cyclic issue across the states, child labor garnered attention from unions and lawmakers.

Child labor first became a legislative issue at the federal level over a century ago.[31] The first notable example dates back to 1906, with the introduction of the Beveridge proposal, which sought to regulate the

20. *Id.* at 2.
21. Mayer, *supra* note 13, at 2.
22. Michael Schuman, *History of Child Labor in the United States—Part 2: The Reform Movement*, U.S. Bureau of Lab. Stat. (Jan. 2017), https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-2-the-reform-movement.htm.
23. *See* Mayer, *supra* note 13, at 2.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *See generally* Schuman, *supra* note 22, at 8.
29. Mayer, *supra* note 13, at 2.
30. *Id.*
31. Schuman, *supra* note 22, at 12.

different "types of work in which children might be engaged [in]."[32] The 1906 Beveridge proposal ultimately was not adopted, but it did lead to the extensive study of the conditions under which children were employed or allowed to work.[33] From 1916 to 1924, Congress introduced various child labor initiatives, but none were successfully enacted.[34] For over a decade after these failed initiatives, attention shifted away from enacting child labor laws, up until the Fair Labor Standards Act ("FLSA" or "Act") was passed in the summer of 1938.[35]

B. Establishment of the 1938 Fair Labor Standards Act and Attempts at De-Regulation

Enacted in 1938, the FLSA is still the "primary federal law dealing with the employment of children," and is "amended periodically."[36] As touched on in Subpart A of this Section, it was a long road to establishing the FLSA. A lengthy "series of legislative proposals—some approved, others defeated or overturned by the courts—culminat[ed] in the…FLSA of 1938."[37] "The FLSA, as amended, protects children by setting conditions under which they may be employed and, in certain types of work, prohibiting their employment altogether."[38] The basic pattern of coverage for child labor under the FLSA is as follows:

> Under the FLSA, employers may not use "oppressive child labor in commerce or in the production of goods for commerce." "Oppressive" is defined in the act and left to the Secretary of Labor to administer. Persons under 18 years of age may not be employed in mining or manufacturing or "in any occupation which the Secretary of Labor shall . . . declare to be particularly hazardous for the employment of children . . . or detrimental to their health or well-being." Otherwise, 16 years of age is the usual minimum age for employment. The Secretary may permit the employment of persons 14 to 16 years of age in work not deemed "oppressive," that does not interfere with schooling, and that is not detrimental to "health and well-being." The Secretary has established hours during which children of various ages may work.[39]

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32. Mayer, *supra* note 13 (citing the Summary section).
33. Schuman, *supra* note 22, at 8-9 (noting that a study from 1907 found that children under the age of sixteen working in the mines were three times more likely to die than adults; as well as witness accounts of employers hitting child coal miners on their head for moving "too slow.").
34. *See id.* at 12.
35. *Id.*
36. Mayer, *supra* note 13 (citing the Summary section).
37. *Id.*
38. *Id.* at 7.
39. *Id.* (quoting direct language from the Fair Labor Standards Act of 1938).

Despite the groundwork over the decades that paved the way for the FLSA, the Act was not the "complete victory" that child labor regulation advocates were hoping for.[40] During the early 1940s, as enforcement of the FLSA commenced, the Department of Labor (DOL) found that the illegal exploitation of children as laborers was extremely difficult to eradicate where industrial homework persisted.[41] Industrial homework, also known as "piecework," is not schoolwork, but instead the at-home production of manufactured goods for an employer, typically performed by families and their children in their homes.[42] Similar to the struggles of reformers earlier in the twentieth century, the DOL's attempts to regulate the practice of industrial homework tasks were largely unsuccessful.[43] By the mid-1940s, the DOL had imposed an outright ban on industrial homework in certain garment-related fields.[44] Otherwise, the basic structure of the Act has changed little since 1938, other than Congress altering specific provisions of the statute and the DOL refining its administration through the rulemaking process.[45]

The FLSA "sets forth general policies and, at the same time, may specify in precise detail, either in the statute or through implementing regulations, how coverage is to be applied: namely, who is covered and who is exempt."[46] The FLSA, which derives its power from the Commerce Clause, "excludes from coverage children who are not involved in activities affecting interstate commerce—though such persons may be protected by state statutes."[47] Also excluded under the FLSA are "children employed by 'a parent or a person standing in place of a parent employing his own child or a child in his custody.'"[48] For example, children helping their parents with household chores "would not be covered under federal child labor law."[49] During the mid-1990s, the DOL administratively altered its regulations to "allow youths of 14 and 15 years of age to work in certain 'sports-attending services at professional sporting events.'"[50] Also, "[t]raditionally, the 'street trades' (such as newspaper delivery) have been regarded as appropriate for children

40. *Id.*
41. *Id.*
42. *See Industrial Homework,* U.S. Dep't Lab., https://www.dol.gov/general/topic/wages/industrialhomework#:~:text=Under%20the%20Fair%20Labor%20Standards,source%20(whether%20obtained%20from%20an (last visited Apr. 8, 2025).
43. Mayer, *supra* note 13, at 6.
44. *Id.*
45. *Id.* at 7.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*

and, thus, are not restrained by FLSA child labor provisions."[51] As illustrated, the Act's regulations lay out different standards that concern a child's "age and the types of work that children and teenagers may perform."[52]

However, agriculture is usually treated differently from nonagricultural employment when it comes to youth/child employment.[53] For example, a child working for their parent on a family farm would not be covered under the FLSA.[54] The difference in treatment between agricultural and nonagricultural employment has, unfortunately, assisted in opening the door to increased exploitation of migrant children in particular,[55] which is discussed in further detail in Part II of this note.

In the decades following the passage of the FLSA, up until now, it appears that the pendulum has swung far away from the concerns of child labor exploitation back in the early 1900s.[56] Merited concerns of abusive child labor have seemingly "faded as a public policy issue," and have instead been gradually replaced by concerns with "youth unemployment, training, and 'school-to-work' transition[s]" over the decades.[57]

II. The Problem with Recent Legislation De-Regulating Child Labor

"Child labor exploitation can disrupt a youth's health, safety, education and overall well-being, which are unacceptable consequences for any child."[58] When child labor regulations are weakened, not taken seriously, or go widely unenforced, this further opens the door to child labor exploitation running rampant. Child labor violations have been on the rise since 2015 after declining for years, according to data from the U.S. Labor Department's Wage and Hour Division.[59] The total

51. Mayer, *supra* note 13, at 7.

52. *Id.* at 8.

53. *Id.*

54. *Id.*

55. *See generally* Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, NY Times, https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html (last updated Feb. 28, 2023) (noting that over 200 children have been released to distant relatives or unrelated adults around Immokalee, Florida, "an agricultural hub with a long history of labor exploitation.").

56. *See generally* Mayer, *supra* note 13, at 6.

57. *Id.*

58. *Health and Human Services Announce Additional Steps to Tackle Child Labor Violations, Strengthen Coordination*, Dep't Labor (Mar. 24, 2023), https://www.dol.gov/newsroom/releases/osec/osec20230324.

59. Kaitlyn Radde, *Child Labor Violations are on the Rise as Some States Look to Loosen Their Rules*, NPR (Feb. 26, 2023, 7:05 AM), https://www.npr.org/2023/02/26/1157368469/child-labor-violations-increase-states-loosen-rules.

number of violations is much lower than it was two decades ago, but experts are still troubled.[60] Specifically, there has been a 69% increase in child labor violations since 2018.[61] In 2023 alone, there was a total of 955 child labor violations reported, which was a 14% increase from 2022.[62] A large contributing factor to the uptick in child labor violations is the huge influx of unaccompanied migrant children being sponsored and hired for jobs, which has increased drastically over the past two years.[63] Another factor has been the strict immigration laws that have driven out thousands of adult immigrant workers from the job market, where labor shortages have negatively impacted the hospitality and manufacturing industries.[64] These labor shortages were further exacerbated by the COVID-19 pandemic of 2020, which resulted in a mass exodus of employees from lower wage jobs over the course of two years.[65]

One would think that with child labor violations in the U.S. trending upwards after a longtime decline, lawmakers would be concerned and start introducing legislation to buckle down on child exploitation. Instead, several legislators are doing the exact opposite. In light of the increase in child labor violations, there has actually been an increase in legislative efforts to further *weaken* child labor regulations, a trend largely led by Republican lawmakers.[66] Particularly among the Republican party, the movement to weaken child labor regulations has been slowly brewing and gaining momentum for over a decade now.[67] For example, back in 2012 when Newt Gingrich, the former House Speaker, was campaigning to become a Republican presidential nominee, he attracted negative press when he called child labor laws "truly stupid."[68] Gingrich even suggested that children could work as janitors in schools.[69]

60. *Id.*

61. *Health and Human Services Announce Additional Steps*, *supra* note 58.

62. Arianna Johnson, *Florida Becomes Newest State to Propose Loosened Child Labor Laws: What to Know*, Forbes (Jan. 19, 2024, 5:05 PM), forbes.com/sites/ariannajohnson/2024/01/19/florida-becomes-newest-state-to-propose-loosened-child-labor-laws-what-to-know/?sh=73d1aa0a4b21.

63. Radde, *supra* note 59.

64. Johnson, *supra* note 62.

65. Stephanie Ferguson Melhorn & Makenizi Cooper, *Understanding America's Labor Shortage: The Most Impacted Industries*, U.S. Chamber of Commerce (Feb. 11, 2025), https://www.uschamber.com/workforce/understanding-americas-labor-shortage-the-most-impacted-industries.

66. *States Are Loosening Restrictions on Child Labor*, U.S. News (June 26, 2023, 1:01 PM), https://www.usnews.com/news/best-states/articles/2023-06-26/states-are-loosening-child-labor-laws.

67. *See generally id.*

68. *Id.*

69. *Id.*

A. Specific Examples of Legislators Weakening State Child Labor Laws in a Manner That Violates Federal Law

Employment is one of the fields where both the federal and state governments have the power to make laws, although federal employment laws will generally preempt state-level employment laws. This is why states have different minimum wages, as a state can set its minimum wage higher than the federal minimum wage of $7.25 an hour–but it cannot set it lower than the federal minimum wage unless it is specific to employers who are not covered by the FLSA.[70] This means that states have the authority to make employment laws stricter than those at the federal level, but the states cannot violate federal laws or regulations on employment, nor can they make employment laws that are less stringent than that of the federal government–which is exactly what Iowa and other states have done.

Of the states that have led the charge to diminish child labor protections, Iowa leads the pack after the act it passed in May 2023.[71] This recently passed law from Iowa expands the hours that minors are permitted to work, allowing fourteen- and fifteen-year-olds to work until 9 p.m. during the school year and until 11 p.m. during the summertime.[72] This is illegal, as the FLSA bans children under sixteen years of age from working past 7 p.m. during the school year and 9 p.m. during the summertime.[73] The Iowa law also "limits business liability for an underage worker's injuries, and allows teenage apprentices into jobs that have previously been deemed too hazardous, like in roofing, warehouse, and factory work."[74] It should be noted that allowing minors to work in hazardous industries like roofing violates the FLSA.[75] In fact, when the DOL was notified about an earlier version of the Iowa bill before

70. *See State Minimum Wage Laws,* DEP'T LABOR, https://www.dol.gov/agencies/whd/minimum-wage/state (last updated July 1, 2024).

71. Rebecca Rainey & Chris Marr, *State Child Labor Rollbacks Pose Enforcement Nightmare for DOL*, BLOOMBERG LAW (June 16, 2023, 5:25 AM), https://news.bloomberglaw.com/daily-labor-report/dol-hamstrung-in-response-to-state-child-labor-law-rollbacks; *see also* Iowa Code §§ 92.5-92.7 (2023) (these child labor statutes in the Iowa code reflect the new changes to how many work hours fourteen- and fifteen-year-olds can do).

72. Robin Opsahl, *Reynolds Signs Law Loosening Iowa's Child Labor Restrictions*, IOWA CAP. DISPATCH (May 26, 2023, 6:00 PM) [hereinafter *Reynolds Signs Law Loosening Iowa's Child Labor Restrictions*], https://iowacapitaldispatch.com/2023/05/26/reynolds-signs-law-loosening-iowas-child-labor-restrictions/.

73. Laura Strickler, *Child Labor Bill Passed by Iowa Legislature Appears to Violate Federal Law, Federal Officials Say*, NBC NEWS (May 19, 2023, 4:18 PM), https://www.nbcnews.com/news/us-news/new-child-labor-bill-iowa-may-violate-federal-law-rcna85321.

74. Rainey & Marr, *supra* note 71; *see also* Iowa Code §§ 92.8, 92.24 (2024) (describing the new apprentice jobs minors can work, as well as the limits on business liability for a child laborer's injuries).

75. Rainey & Marr, *supra* note 71.

its passage, it wrote a letter addressing the presence of numerous violations of federal law in the proposed law.[76]

In response to the DOL's warning, a representative for Iowa's Governor Reynolds said: "Iowa's new legislation and some of its current laws related to employment of minors differ with aspects of federal employment law."[77] Reynolds noted that "this is also the case with employment laws for 20 other U.S. states, including Illinois and Minnesota."[78] In essence, Iowa defended its proposed law by stating it merely "differs" from federal law, and since other states are also "differing" from federal law, they can too.[79] Could an ordinary citizen ever defend their violation of federal law by saying their actions simply "differed" from the law? This is an astonishingly nonchalant response to learning that a proposed state law violates federal law. As one can see, the DOL's letter was not particularly effective, considering that the law was still enacted with those federal law violations included in the finalized version.[80] This situation, where a state can so boldly enact a law that violates the federal regulations on child labor, even after receiving pushback from the federal government, speaks to a much larger issue. Holding state actors and employers responsible for child labor violations seems to be a serious challenge for the federal government.

Similar to other states following in Iowa's footsteps, the Iowa law also eliminated the requirement for child labor permits.[81] Eliminating the requirement for child labor permits also violates "federal regulations because . . . [f]ederal law requires training and work-study programs to register through the [DOL] or through a state agency before employing minors to ensure work conditions meet state and federal standards."[82] Fully deleting the requirement of child labor permits means there will no longer be any formal "registration of employers or student-learner programs that employ teens in potentially dangerous fields through

76. *Id.*

77. Strickler, supra note 73.

78. *Id.*

79. *See generally* Rainey & Marr, *supra* note 71.

80. Iowa Code § 92.7 (2024) (showing the Iowa child labor statutes that allow 14 and 15-year-olds to work until 9 p.m. on school nights and 11 p.m. in the summer, which violates the federal labor law that requires teens to be clocked out by 7 p.m. on school nights and 9 p.m. in the summer).

81. *See* Iowa Code §§ 92.10–92.16 (2024) (repealed by 2023 Iowa Acts, Ch. 92); *see also* Chris Marr, *Youth Work Permits Targeted in Broader Child Labor Law Rollbacks*, Bloomberg Law (July 10, 2024, 5:45 AM), https://news.bloomberglaw.com/daily-labor-report/youth-work-permits-targeted-in-broader-child-labor-law-rollbacks (noting that in 2024, Alabama, Arkansas, West Virginia, Missouri and Wisconsin had also passed laws to end work permit requirements for minors.).

82. Robin Opsahl, *Federal Officials: Iowa Child Labor Law Conflicts with National Restrictions on Dangerous Workplaces*, Iowa Cap. Dispatch (Sep. 1, 2023, 4:04 PM) [hereinafter *Federal Officials*], iowacapitaldispatch.com/2023/09/01/federal-officials-iowa-child-labor-law-conflicts-with-national-restrictions-on-dangerous-workplaces/.

learning programs."[83] Considering that states like Wisconsin have suffered from recent child deaths at work, it is a major problem that some of those same states have decided to dismiss the requirement for child labor permits.[84]

Additionally, the new Iowa law allows minors under sixteen years old to work for up to twenty-eight hours weekly during the school year.[85] To put this into perspective, at many U.S. law schools, full-time students are discouraged from working during their first year.[86] For one's second and third years of law school, most schools will not allow students to work more than twenty hours during the school year.[87] Law students are of the legal adult age of eighteen, but even at that, law schools set a twenty-hour capacity for students' jobs because any more hours than that would be too difficult to balance with the workload of full-time school.[88] Law schools do this because they know a student's academic success can be greatly hampered if they have too many work hours on top of schoolwork.[89] Yet, it seems that Iowa is not cognizant of the fact that the same logic applies to minors in K-12 schools. Somehow, Iowa finds it suitable for minors under sixteen years old to work more hours than a typical adult law student, despite these minors *also* being enrolled in full-time school and often having extracurriculars in addition to school. Although this new Iowa rule seemingly prioritizes business and economic interests over those of child well-being, it appears that even Iowa's businesses have been placed in a precarious position with the new child labor laws. Speaking on the newly passed legislation, Iowa's House Minority Leader Jennifer Konfrst mentioned that several local business owners in the state feel stuck at a crossroads, as they are unsure which labor regulations to abide by between the federal guidelines and Iowa's new rules (or lack thereof).[90] Unfortunately, it seems that the Iowan Republicans who enacted the new legislation did not take the necessary time to think through the implications of their new labor laws in regard to the federal labor laws in place, as Iowa runs the

83. *Id.*

84. *States Are Loosening Restrictions on Child Labor*, *supra* note 6; *see also* Kate Gibson, *Teen's Death in Wisconsin Sawmill Highlights "21st Century Problem" Across the U.S.*, CBS NEWS (Dec. 26, 2023, 5:00 AM), https://www.cbsnews.com/news/child-labor-laws-wisconsin-sawmill-florence-hardwoods/ (describing the story of a child who died while working at a sawmill factory in Wisconsin, and noting that child workplace accidents and deaths have increased in recent years).

85. *See* Iowa Code § 92.7 (2024).

86. *Financial Aid Options*, LSAC, https://www.lsac.org/choosing-law-school/paying-law-school/financial-aid-options (last visited Jan. 27, 2025).

87. *See id.*

88. *See id.*

89. *Id.*

90. Opsahl, *supra* note 72.

risk of facing penalties for breaking federal labor laws.[91] So, Iowa's legislation and similarly passed laws cause more confusion and more harm than good—even for the businesses these laws supposedly help.

Laws that de-regulate child labor are being introduced in other states and at the federal level.[92] At the time of this writing, ten states have put forward "bills to loosen child labor laws between 2021 and 2023," and Florida is one of the most recent states to bring such bills to its state legislature.[93] A prime example is the Employment and Curfew of Minors bill, which was signed into law in March 2024.[94] The law allows sixteen- and seventeen-year-olds to work up to forty hours a week, which is the same amount of hours as a full-time employee's work week, even when school is in session.[95] Sixteen- and seventeen-year-olds who are "not enrolled in school or are enrolled in homeschool or virtual programs [are] allowed to work during school hours."[96] This is a concerning point because this bill may incentivize lower-income families to have their teenagers drop out of school to instead get a full-time job with benefits, now that they would be allowed to work forty hours weekly and qualify as full-time employees.

Since the Employment and Curfew of Minors bill has been in effect for less than a year, it is too early to see the possible impact it will have on educational achievement in Florida. However, this author predicts that this bill-turned-law will result in harmful outcomes for lower-income students, such as higher drop-out rates in Florida high schools and widened achievement gaps in the K-12 education system. Before the Employment and Curfew of Minors bill was passed, the Florida law used to have a set maximum of thirty work hours a week for sixteen- and seventeen-year-olds,[97] which is already excessive for a full-time high school student. Most ordinary teenagers cannot manage a full-time job in conjunction with attending full-time high school—most people would start to perform poorly at school, work, or both. If it is clearly not feasible for a teenager to do well in high school while working a full-time job, why would Florida legislators push a bill that sets teenagers up for academic failure? The proposed bill is irresponsible and shows a lack of regard for the value of a minor's high school education, health, and safety. No child or teen should choose between getting an

91. *Id*.

92. *States Are Loosening Restrictions on Child Labor*, *supra* note 6.

93. Johnson, *supra* note 62.

94. Michael D. Michell & Zachary V. Zagger, *Florida Governor Signs Law Easing Hourly Work Restrictions on Minors*, Ogletree Deakins (Apr. 4, 2024), https://ogletree.com/insights-resources/blog-posts/florida-governor-signs-law-easing-hourly-work-restrictions-on-minors/.

95. Johnson, *supra* note 62.

96. *Id.*

97. *Id.*

education or getting a paycheck. Thus, Florida (and other states passing similar bills) opening the door to such detrimental circumstances is an issue that we should all be speaking about.

The Florida Policy Institute, a non-partisan organization, presented a letter signed by approximately 100 other advocacy groups that urged lawmakers to "reject the child labor bills introduced into the legislature."[98] The organization pointed out that "overworking teens and denying them breaks" would not be an appropriate solution to "labor shortages that have affected industries like construction and hospitality."[99] Other Florida representatives have also expressed frustration with the child labor bills.[100] Florida's "Democratic state Rep. Anna Eskimi criticized the 'hypocrisy' of Florida Republicans, saying they 'don't think teens can handle learning about sexuality and gender identity—but are happy to stick them on the graveyard shift at a 7-Eleven, even if they have an exam the next day.'"[101]

Furthermore, this revitalized push for weakened child labor laws has been seen in more moderate states like New Hampshire, where a bill that mirrors that of Florida's was enacted in 2022.[102] The old child labor law in New Hampshire was already quite loose to begin with, as sixteen- and seventeen-year-olds were "limited to 30 hours a week if they were in school five days a week and up to 48 hours if they were attending school less than that."[103] The new law increased the maximum number of hours from thirty to thirty-five work hours a week for sixteen- and seventeen-year-olds who attend school full-time.[104] Again, what business does a teenager have working thirty-five hours a week while attempting to earn a diploma? Thirty-five hours a week is only five hours short of working full-time—the way *grown adults* do.

The negative impact of these brutal work hours on children's educational attainment has already been seen throughout the country. At Union High School in Grand Rapids, Michigan, a "ninth-grade social studies teacher, Rick Angstman, has seen the toll that long shifts take on his students."[105] One of his students, Carolina, was working night shifts at a laundromat, and she started passing out in class from fatigue

98. *Id.*
99. *Id.*
100. *Id.*
101. Johnson, *supra* note 62.
102. Annmarie Timmins, *Sununu Signs Bill That Makes Changes to Youth Employment Rules*, SEACOASTONLINE (June 22, 2022, 5:14 AM), www.seacoastonline.com/story/news/2022/06/22/sununu-signs-bill-makes-changes-youth-employment-rules/7685588001/.
103. *Id.*
104. *Id.*
105. Dreier, *supra* note 55.

to the point that Carolina "was hospitalized twice."[106] Unable to quit working, the ninth-grade student dropped out of high school.[107] Stories similar to Carolina's are happening across the nation,[108] and it is disheartening that so many students have disappeared from the classroom in exchange for work in poor, sometimes dangerous conditions that some activists have compared to indentured servitude—especially for migrant children who come to the U.S. without parents. It is a state lawmaker's responsibility to uphold the balancing act between protecting children in the workplace and upkeeping labor laws that are still feasible and keep up with modern times. Yet, U.S. lawmakers continue to fail the children of the nation.

It should be noted that not all efforts to loosen child labor laws are inherently bad. For example, under New Hampshire's previous laws, "a student had to be 15 to clear tables if alcohol was served."[109] But "now, [under the new law,] a 14-year-old can do so in addition to helping stock supplies if someone at least 18 years old is present and supervising staff."[110] This is a reasonable way of loosening child labor laws, as the change is minor and there is still a requirement of adult supervision. This change is not extreme and will likely prove useful for many small and/or family restaurants. However, the changes that are being proposed and enacted in other states' child labor laws are not as protective of children.[111] For instance, in 2023, Wisconsin Republicans proposed a bill to allow children as young as 14 to serve alcohol in restaurants and bars.[112] If that bill passed, Wisconsin would have the "lowest such limit nationwide," as its current law sets the minimum age to serve alcohol at eighteen.[113] It can be dangerous to have minors serving alcohol for several reasons, such as harassment or even assault from drunk customers. Without any stipulations for adult oversight, this proposed law disregards the safety of these minors. Luckily, it is unlikely to be signed into law by Wisconsin's Democratic Governor Tony Evers, who has already struck down similar child labor bills.[114] However, the

106. *Id.*

107. *Id.*

108. *Id.* (mentioning the story of Oscar Lopez, a ninth grader working overnight shifts at a sawmill, and skipped school to sleep after an overnight shift, demonstrating another example of a child overworking to the point that they start falling behind in school).

109. Timmins, *supra* note 102.

110. *Id.*

111. *See generally* Scott Bauer, *Bill Would Allow 14-Year-Olds to Serve Alcohol in Wisconsin*, AP News (May 1, 2023, 2:34 PM), https://apnews.com/article/wisconsin-underage-alcohol-servers-31e0c73786d5489c626250a279760420.

112. *Id.*

113. *Id.*

114. Harm Venhuizen, *Wisconsin Republicans Propose Eliminating Work Permits for 14- and 15-year-olds*, AP News (Aug. 18, 2023, 6:27 PM), https://apnews.com/article/wisconsin-child-labor-laws-permit-8c549598fb4ee9a8a3495e3ce17829d2.

proposed bill is still worrisome and demonstrates a growing pattern in lawmakers across the country. Overall, New Hampshire and other state governments are frankly failing woefully in upholding the balancing act of protecting children in the workplace while also updating child labor laws to be modern with the times. Unfortunately, it appears that lawmakers across the country would rather turn a blind eye to the massive uptick in child labor violations in favor of using children to fill job vacancies.[115]

With more states jumping on the bandwagon to loosen child labor regulations, the phenomenon has caught the attention of U.S. House members. In a recent committee hearing in January 2024, Alexandria Ocasio-Cortez, a Democratic House Representative for New York, addressed the child labor issues and accused Republican lawmakers of "preferring lenient child labor laws over allowing 'immigrants into their community' to work during job shortages."[116] Rep. Ocasio-Cortez further elaborated on this point about the pendulum swinging backward on child labor laws and said:

> There are [] lawmakers in states like Wisconsin, Ohio, and Iowa, that are proposing the loosening of child labor laws in their state because they have so many jobs that are left unfulfilled. We have seen teenagers dying in states like Wisconsin, Missouri, and Michigan because so many jobs are going unfilled, and many of these Republican legislators would rather roll back child labor laws and put [eleven and thirteen] year-olds back in the workplace than allow immigrants into their [working] communit[ies] and do what they have always done.[117]

Rep. Ocasio-Cortez made a stellar point in connecting the dots and highlighting the "why" behind these concerning child labor laws: Republican lawmakers are so desperate to keep migrants out of the workforce and local communities, that they would rather have children fill the shoes of adult migrants in the workplace. There is enough evidence to point at this as a likely reason behind the current push for weakening child labor laws, and this reasoning will be addressed in further detail in Part III of this note. Nonetheless, it is overtly careless as a lawmaker to observe an increase in child labor violations and even deaths, yet still move to pass laws that would only make these violations and tragic deaths more likely to occur.

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115. Timmins, *supra* note 102.

116. Johnson, *supra* note 62.

117. *The Biden Administration's Regulatory and Policymaking Efforts to Undermine U.S. Immigration Law*: *Hearing Before the H. Comm. on Oversight & Accountability*, 118th Cong. (2024) (statement of Rep. Alexandria Ocasio-Cortez, Member, H. Comm. on Oversight & Accountability).

B. The issue of migrant children being exploited in the workforce and the need to increase protections for these child workers, regardless of their immigrant status

Although child labor violations have significantly increased within the past few years,[118] it must be acknowledged that the issue is even more prevalent and severe for migrant children and immigrant children who lack a legal resident/citizenship status in the U.S.[119] In 2022, there were 130,000 unaccompanied minors who sought asylum at the US-Mexico Southern Border.[120] That number is three times the amount of unaccompanied minors in 2017, which is a dramatic increase.[121] With those statistics in mind, it should not be too surprising that a huge portion of these unaccompanied migrant children seeking asylum end up being exploited in the American workforce.[122] Recently, researchers discovered that about 66% of unaccompanied migrant children work full-time.[123] After a "weekend expose by The New York Times, [their journalists] reported on an increased presence of migrant minors — some as young as 12 years old — working in sectors across the US economy, from car factories to construction sites and delivery services."[124] It is unacceptable and unfortunate that the majority of migrant children in the U.S., mere minors who should be in full-time school, are instead working full-time.[125] Even for migrant children who are enrolled in school, their academic performance is likely hindered by the twelve-hour work shifts that many of them rush off to after the school day ends.[126]

These children are extremely vulnerable, and some of the U.S.' biggest corporations have taken advantage of this vulnerability, as thousands of migrants as young as 12 and 13 years old are working grueling hours in dangerous jobs for companies such as Target, Walmart, General Motors Ford, and food processing giant Hearthside Food Solutions.[127] In Los Angeles, migrant child workers were discovered in textile factories stitching "Made in America" tags into J. Crew shirts

118. Radde, *supra* note 59.
119. *Why Are Migrant Children Working Dangerous Jobs in the US?* (Al Jazeera television broadcast Apr. 7, 2023).
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *US Announces Crackdown on Child Labour Amid Surge in Violations*, Al Jazeera (Feb. 28, 2023), https://www.aljazeera.com/economy/2023/2/28/us-announces-crackdown-on-child-labor-amid-uptick-in-violations.
125. *See Why Are Migrant Children Working Dangerous Jobs in the US?*, *supra* note 119.
126. *See* Dreier, *supra* note 55.
127. *Id.*

they likely can never afford.[128] Migrant children "bake dinner rolls sold at Walmart and Target, process milk used in Ben & Jerry's ice cream and help debone chicken sold at Whole Foods."[129] As recently as the fall of 2023, "middle-schoolers made Fruit of the Loom socks in Alabama, and in Michigan, children make auto parts used by Ford and General Motors."[130] These migrant child workers are at best overworked, and in the worst scenarios, knowingly and recklessly placed in harm's way. The dangerous work conditions these migrant children have been subjected to include roofing houses, working overnight shifts operating dangerous machinery and sawing huge planks of wood, and even working in slaughterhouses.[131] In fact, these work conditions are not merely dangerous, they are deadly. In 2022, a fifteen-year-old in Alabama died while laying shingles on a roof.[132] Similarly, in Georgia, a sixteen-year-old died after being crushed by a thirty-five-ton tractor scraper.[133] With slaughterhouses in particular, workers experience significantly higher levels of serious psychological distress (SPD) and substance abuse than the general population.[134] It is dangerous enough to subject grown adults to such work, but putting children in such a horrible work environment is just unfathomable.

III. Solutions for Preventing and Stopping the Exploitation of Working Children

Across the world, there is a growing focus on child exploitation and dangerous work conditions. Among the mining, chocolate, garment, and shoe industries, where children are forced to work brutal hours for little to no pay, consumers across the globe have begun to think more critically about their purchase decisions. Overall, people have started to pay more attention to these issues on a global scale, and large corporations such as Apple, Microsoft, and SHEIN have been increasingly scrutinized for their use of forced child labor in the manufacturing of their products.[135] However, one of the most severe obstacles in fighting the exploitation of child labor is the lack of enforcement of child labor laws.

128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. Dreier, *supra* note 55.
133. *Id.*
134. Oscar Heanue, *For Slaughterhouse Workers, Physical Injuries Are Only the Beginning*, ONLABOR (Jan. 17, 2022), www.onlabor.org/for-slaughterhouse-workers-physical-injuries-are-only-the-beginning/#:~:text=Some%20researchers%20have%20categorized%20the,Induced%20Traumatic%20Stress%20.
135. *See generally Shein Admits Working Hour Breaches and Pledges £12m to Improve Sites*, THE GUARDIAN (Dec. 5, 2022, 6:59 AM), https://www.theguardian.com/business/2022/

A. The Federal Government urgently needs to strengthen enforcement of child labor regulations in a concerted effort to protect children from exploitation

Both in the US and across the globe, employers and local governments simply do not face any real consequences for violating child labor law–and this is well known. How can anyone be shocked that child labor violations are rising exponentially when enforcement of child labor laws is so weak? Even children know that people in general can, and often will, do anything they can get away with. So why does the US government keep letting emboldened violators of child labor laws get away with nothing more than a warning letter and a slap on the wrist? The main statutory remedy the Department of Labor relies on is damages, which currently max out at "$15,318 per employee in a violation that does not result in serious injury or death, and injunctive relief."[136] It should be noted that the "DOL does not always pursue the statutory maximum [amount of damages], and even when it does, [larger] companies are often able to shrug off the fine as a cost of doing business."[137] For example, in August 2022, the DOL investigated Packers Sanitation Services (PSSI).[138] The DOL investigation found that PSSI hired at least 102 children spread across thirteen different facilities in eight states – one of which was Arkansas, which subsequently passed laws that further loosened child labor regulations.[139] The child laborers "were illegally hired to work overnight shifts and were required to do hazardous tasks" far beyond the bounds of what is permitted by law.[140] The jobs these children were subjected to "included cleaning dangerous equipment with corrosive chemicals and cleaning floors where animals are slaughtered."[141] Many "minors were injured including a thirteen-year-old who was burned by caustic chemicals."[142] The DOL required PSSI to pay the maximum of $15,318 per violation, which totaled $1.5

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dec/05/shein-admits-working-hour-breaches-and-pledges-12m-to-improve-sites; *see also* Lauren Irwin, *U.S. Appeals Court Dismissed Child Labor Case Against Major Tech Companies, including Apple and Google*, THE HILL (Mar. 6, 2024, 10:02 PM), https://thehill.com/regulation/court-battles/4511210-u-s-appeals-court-dismissed-child-labor-case-against-major-tech-companies-including-apple-and-google/ (explaining that former child miners sued Apple, along with other major technology companies like Microsoft and Google, for knowingly participating in the purchase of cobalt from companies that use forced child labor to mine cobalt in Congo).

136. Ian Kalil, *Parent Companies and Child Labor*, ONLABOR (Dec. 14, 2023), https://onlabor.org/parent-companies-and-child-labor/.

137. *Id.*

138. *Id.*

139. *Id.*; *see also* Venhuizen, *supra* note 114.

140. *Id.*

141. *Id.*

142. Kalil, *supra* note 136.

million.[143] But PSSI is no mom-and-pop small business—the company is "owned by Blackstone, the world's largest private equity firm," with over $1 trillion in assets under management.[144] Thus, a $1.5 million bill to a company like PSSI, owned under a $1 trillion-dollar portfolio, is almost laughable.[145]

At this point, warnings from the DOL are sheer white noise to most lawmakers and employers who feel comfortable violating child labor regulations with little risk of any significant consequences. As previously mentioned, the DOL issued warnings to Iowa that the state's new child labor laws violate federal child labor regulations, but Iowa paid the warnings no mind, and there were no consequences from the DOL.[146] It is worth noting that although federal employment law preempts state employment law, the DOL as a federal agency does not have the power to prevent Iowa and other states from passing laws.[147] However, the DOL has launched new initiatives meant to combat the increase in child labor violations in recent years.[148] Jessica Looman, the Principal Deputy Wage and Hour Division Administrator at the DOL said that employers who "hire young workers have a legal responsibility to know and abide by the federal laws that govern their employment[,]" and that these employers are obligated to eliminate "all exposures to hazardous occupations and prohibited equipment, and preventing young workers from suffering serious injuries or worse."[149]

The DOL is well aware of the severity of the issues the U.S. is facing regarding child labor violations and strongly urges employers to make responsible choices in their labor practices, which is a terrific starting point. However, the DOL cannot leave the fate of child labor exploitation fully in the hands of businesses. As discussed, merely hoping that businesses will behave responsibly and ethically in their child labor practices is quite impractical. Currently, most of the enforcement of child labor laws is driven by employee complaints to the Wage and Hour Division (WHD) of the DOL.[150] Many child advocates have argued that child workers might not complain about their poor working conditions, especially if "the children are employed illegally with

143. *Id.*
144. *Id.*
145. *Id.*
146. Rainey & Marr, *supra* note 71.
147. *See generally id.*
148. *Increases in Child Labor Violations, Young Workers' Injuries Prompts Enhanced Outreach, Strong Enforcement by US Department of Labor*, U.S. DEP'HT LAB., https://www.dol.gov/newsroom/releases/whd/whd20220729 (last visited Apr. 23, 2024).
149. *Id.*
150. Mayer, *supra* note 13, at 11.

parental knowledge or consent."[151] Since children are less likely than adults to report their illegal working conditions, some labor activists "have urged other forms of nonparental oversight of child labor."[152] Other forms of oversight include physicians detecting health issues in a pediatric patient that might be work-related, or teachers taking notice of a student with frequent truancy and/or academic problems indicative of "oppressive child labor."[153] Efforts to implement these forms of additional child labor oversight have been largely unsuccessful over the past couple of decades, but "systems of work permits—sometimes linking school attendance and performance to employment—continue to be urged, together with work injury reporting."[154]

On its face, it makes sense that most child labor law enforcement is driven by worker complaints and reports–how else would the DOL know of workplace issues if no workers submitted complaints? However, upon observing the severity of the child labor violations in the U.S., this complaint-driven approach is quite lazy and inefficient. For one, child workers are not as likely to complain as adults, especially factoring in migrant children, many of whom are here in the U.S. without parents.[155] A child is less likely to understand that their working conditions are indeed dangerous or inappropriate, so putting most of the burden of child labor law enforcement onto the child workers themselves can be quite inefficient. Additionally, even if children were aware that their work conditions are unacceptable, they may be scared to report it, face retaliation, and lose the income they need to survive. It is unfair to put the burden on children to speak up and report their employers.

Meanwhile, as the U.S. government continues to essentially put child labor law enforcement in the hands of minors with the complaint-driven system,[156] children are dying from working at jobs they should have never been employed at.[157] The DOL has several years' worth of child labor violation reports and findings, which would highlight which industries and companies are hot spots for dangerous child labor conditions, at least based on the number of violations.[158] This data demonstrates that the DOL has the tools and information to formulate a more aggressive approach to cracking down on child labor law violations. The DOL should be keeping a close eye on any company that

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*; *see also Why are Migrant Children Working Dangerous Jobs in the US?*, *supra* note 119.
156. Mayer, *supra* note 13, at 11.
157. *Why are Migrant Children Working Dangerous Jobs in the US?*, *supra* note 119.
158. *See Child Labor*, U.S. Dep't Lab., https://www.dol.gov/agencies/whd/data/charts/child-labor (last visited Jan. 27, 2025).

has been reported for child labor law violations in the past and any companies that are high-risk industries in general, such as meatpacking, industrial work, roofing, and the like. The additional costs of hiring more employees to develop and upkeep a tracking system for high-risk companies and regularly checking on them would be worth it to keep children safe. The complaint-driven system of today may have been sufficient a decade ago when child labor law violations were less frequent. But it is time for drastic, proactive changes to the enforcement system for child labor laws here in the U.S. How many children must die at work for the DOL to take a more proactive approach to child labor enforcement?

B. The U.S. needs to reform the current immigration policies and make it easier for adults to migrate here and work jobs that are too dangerous for children to do

Part of what is fueling the issue of decreased child labor protections, and more child labor violations, is the current immigration policies that make it much easier for children to migrate here than adults and families.[159] In what has been described as a "crisis of protection for children and their families," parents with children living in rougher parts of some Central American countries, such as Guatemala, Honduras, and Mexico, are sending their children to migrate to the U.S. to flee from the dangerous living conditions of gang activity and violence in their home country.[160] Under current immigration policies, families who are denied asylum at the border are faced with a horrifying, harrowing choice: allow the child to receive asylum, but the parents must return home, or the whole family must return home, and the child or children will return to the harm which they are trying to escape.[161] Consequently, over one hundred thousand children have arrived unaccompanied into the U.S., and these numbers are expected to keep growing.[162]

These children have not slipped into the country undetected, either. "The federal government knows they are in the United States, and the Department of Health and Human Services is responsible for ensuring sponsors will support them, [enroll them in school] and protect them from trafficking or exploitation."[163] However, the huge number of migrant children arriving has overwhelmed government

159. *Why are Migrant Children Working Dangerous Jobs in the US?*, *supra* note 119.
160. *Id.*
161. *Id.*
162. Dreier, *supra* note 55.
163. *Id.*

caseworkers, which has unfortunately caused many of them to rush through the vetting process for these child migrant sponsors, resulting in lost contact with over 85,000 migrant children.[164] This process is complex and clearly the government has struggled to ensure the safety of these unaccompanied migrant children.[165] However, considering the sponsorship process has safety concerns with losing children, this would be a great time to reform immigration policies and welcome in migrant children accompanied by their parents. Changing immigration laws to prioritize keeping migrant families together, and to make it easier for migrant adults to raise their children and work here in the U.S. This would reduce the pressure on the government to find sponsors for child migrants, and it would decrease the need for migrant children to work endlessly to send money back home, because their parents would be here in the U.S., working themselves. Immigration law reform is the key to keeping migrant children out of harm's way while still fulfilling economic needs with adult migrants instead of children.

Many experts have noted the link between immigration policies and child labor policies, and have attributed the new labor laws aimed at allowing children to work in dangerous industries and much longer hours to a clampdown on undocumented workers:

> "These issues are very closely intertwined," Jennifer Sherer, director of the Economic Analysis and Research Network at the nonprofit Economic Policy Institute, told the Tampa Bay Times. She added that Florida's anti-immigrations laws are "jeopardizing the workforce." Democratic state Rep. Ashley Gant told local digital media organization Local 10 these lenient child labor laws are "a blow back a shortage of workers due to the anti-immigration bill that was passed and signed into law last session."[166]

The anti-immigration bill that Florida's Democratic State Representative Ashley Gant was referring to was Senate Bill 1718, which Florida's Governor, Ron DeSantis, signed into law in May 2023.[167] Touted as one of the strictest immigration policies in the nation, the law criminalizes the act of transporting immigrants who lack a "permanent legal status into the state, invalidated any U.S. government identification [these immigrants] might have [had] and blocked local

164. *Id.*
165. *Id.*
166. Johnson, *supra* note 62.
167. Gisela Salomon, *Uncertain and Afraid: Florida's Immigrants Grapple with a Disrupted Reality Under New Law,* AP News (Sept. 16, 2023, 12:16 AM), https://apnews.com/article/florida-immigration-law-effects-immigrants-desantis-6997fe6cdbcfa9d0b309bb700690e747; *see also* Chapter 2023-40 (Fl. 2023) (describing the Florida Senate bill 1718 that was passed and enacted into state law).

governments from providing them with ID cards."[168] Additionally, hospitals in Florida that accept Medicaid are now required to "ask patients about their immigration status" and businesses with twenty-five people or more "must verify their workers' legal status" under the new law.[169] In essence, the anti-immigration bill has had a devastating impact on innocent families and a substantial impact on the state's economy.[170] Florida has at least 825,000 immigrants who lack permanent legal status, and about half of those immigrants contribute greatly to "Florida's workforce and economy in key industries including agriculture, construction, [and] hospitality."[171]

So, when Governor Ron DeSantis signed this brutally strict anti-immigration policy into Florida state law, this resulted in immigrant workers closing businesses, quitting jobs, and leaving the state out of fear of arrest, detention, and deportation.[172] However, as bad as the impact on the local state economy may be, the answer cannot and should not be to overwork teenagers, deny them breaks, and use them as a replacement for adult employees who were doing adult work duties. Florida demonstrates a clear example of how more immigrant-friendly laws would help migrants and businesses alike: more immigrant families get to stay together in the U.S., and the economy can flourish without placing children and teens in work situations that even adults can barely handle.

Many companies have gotten even *better* in their efforts to avoid liability for child labor law violations by utilizing labor brokers to employ migrant children, which removes legal liability for big companies.[173] Labor brokers are akin to employee staffing agencies, as they are usually subcontracted by an employer to recruit, hire, and sometimes manage migrant workers.[174] Labor brokers are supposed to act as facilitators between migrant workers and their eventual employers.[175] A labor broker's duties involve visa and travel arrangements, providing work training, and "even negotiating job contracts.[176] Unfortunately, some labor brokers are being used as middlemen to do the "dirty work" of getting child labor[177] Even

168. Salomon, *supra* note 167.
169. *Id.*
170. *See id.*
171. *Id.*
172. *Id.*
173. *Why are Migrant Children Working Dangerous Jobs in the US?*, *supra* note 119.
174. *Tool 2: Understanding the Role of Labor Brokers in the Human Trafficking and Forced Labor of Migrant Workers*, VERITÉ, https://ecommons.cornell.edu/server/api/core/bitstreams/c355c32a-f2a1-4d7b-8286-84debc51cfa4/content (last visited Oct. 12, 2024).
175. *Id.*
176. *Id.*
177. *Id.*

when labor brokers are investigated by the government, there is no criminal liability attached to such child labor violations. This lack of criminal liability allows brokers to disappear into the abyss, dissolving and reforming as new labor broker organizations with all the same social connections to the employers they were servicing before.[178] The "widespread system of labor brokerage is often opaque, sometimes corrupt," and largely lacks any sense of legal accountability.[179]

An example of the corrupt, reckless behavior observed in these labor brokers and employee staffing agencies can be seen with Hearthside Food Solutions, "[o]ne of the nation's largest contract manufacturers, [that] makes and packages food for companies like Frito-Lay, General Mills, and Quaker Oats."[180] Kevin Tomas, a migrant child who arrived in Grand Rapids, Michigan at age thirteen with his seven-year-old brother and no parents, sought employment through Forge Industrial Staffing, the employment agency Hearthside utilized.[181] Kevin was first "sent to a local manufacturer that made auto parts for Ford and General Motors."[182] Kevin's work shift did not end until "6:30 in the morning, so he could not stay awake in school, and he struggled to lift the heavy boxes."[183] After two years of working overnight shifts for the auto manufacturer, "Kevin had found a job at Hearthside, stacking 50-pound cases of cereal" at the mere age of 15.[184] Considering the role these employment agencies and labor brokers play in migrant child labor exploitation, the Department of Labor should launch a system to legally penalize these agencies and brokers for violating child labor laws, as well as proactively send government employees to investigate these middlemen agencies that are high risk or have a history of child labor violations.

C. Local citizens and grassroots organizations must continue advocating for strict child labor laws, especially in states where the regulations are actively being weakened

Barack Obama once said, "nothing can stand in the way of the power of millions of voices calling for change."[185] The responsibilities

178. *Id.*
179. *Id.*
180. Dreier, *supra* note 55.
181. *See generally id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. Barack Obama, *New Hampshire Primary Concession Speech*, American Rhetoric Online Speech Bank (Jan. 8, 2008), https://www.americanrhetoric.com/speeches/barackobama/barackobamanewhampshireconcessionspeech.htm.

of enforcing child labor regulations and proper prevention techniques mainly fall under the federal government. Although the Department of Labor (DOL) does issue hefty fines (into the millions) to companies caught with major child labor violations, [186] the fines are only served as a reactive measure, because the fines do not stop a company from exploiting children. A preventative technique the DOL can easily implement would be increasing the frequency of workplace safety inspections, even if it requires hiring more employees and spending more money. For something as serious as the safety of children, the federal government should be willing to expand the funding for the DOL and require field inspections for all large companies in the most at-risk industries on at least a quarterly, or even monthly basis.

Aside from what the government can do, local citizens, employers, parents, schools, and grassroots organizations can shift the needle in their local legislative bodies. Community members have to continue expressing their concerns over the weakening of child labor relations, stay informed, and use the power of their voices in the fight against child labor exploitation. In addressing the ordinary citizen's role in the pressing issue of children being taken advantage of in the workplace, Jessica Looman expressed that it is "important to hold employers accountable" in abiding by child labor laws, while also declaring child labor to be an issue that impacts our communities, schools, and individual families.[187] Looman placed some of the responsibility of protecting child laborers on the shoulders of the general public, stating that "[a]ll of us together as a society and an economy have to come together and make sure that we are protecting our kids. And when we look at the increase in child labor violations, we have to ask ourselves the question, how are we [still] letting this happen?"[188]

Whether it is through contacting local lawmakers or showing up to city hall meetings, parents, schools, and grassroots activists have to contribute to the fight to protect children in the workforce.[189] For example, Ohio currently does not even have a state department of labor.[190] Therefore, grassroots organizations and concerned citizens in Ohio have an opportunity to push for that and to ensure Ohio government officials understand that their constituents take child labor regulations and violations seriously. The public can also use their spending power

186. *See* discussion *supra* Section III. A.
187. Radde, *supra* note 59.
188. *Id.*
189. *See id.*
190. *Why are Migrant Children Working Dangerous Jobs in the US?*, *supra* note 119.

as consumers to pressure companies known for repeated child labor violations by boycotting these businesses and supporting local businesses instead. Most notably, many people have done this with SHEIN, a popular online clothing retailer, after discovering that forced, inhumane labor was involved in their textile factories.[191] The public outcry and subsequent boycott seem to have worked to an extent, as SHEIN admitted improper labor practices and pledged millions of dollars to improve labor conditions.[192] Staying informed goes hand in hand with consumers using their dollars to show they are serious about not supporting exploitative child labor. Social media has been a successful way to spread information about forced labor on a global scale, and it can work similarly to raise awareness for domestic child labor issues in the United States.

Conclusion

Stringent child labor regulation is crucial to mitigating the exploitation of children. Considering the uptick in child labor violations on a global scale and the United States' position as a world leader, the U.S. should be leading the pack when it comes to cracking down on child labor issues. Unfortunately, if grassroots organizations and the federal government fail to intervene, the recently revived movement for relaxing child labor laws across multiple states will simply continue to push the U.S. in the wrong direction. Enforcement of child labor regulations needs to be strengthened and taken seriously. Although the Department of Labor has addressed issues surrounding the increase in child labor violations, and advocacy groups are already fighting hard for more protective child labor laws and enforcement, something more monumental needs to occur.

The solution for such a widespread, complex issue requires an all-hands-on deck approach: the federal Department of Labor (DOL) must tighten its enforcement of child labor violations and give harsher punishments to companies that break these child labor laws. The DOL should also be tougher on states that have signed policies into law that directly violate the DOL child labor regulations. Additionally, the federal government should consider reforming immigration policies to allow for more migrant adults to come work in the U.S., as that would

191. See *generally* The Guardian, *supra* note 135; *see also* Ava Kidd & Arden Ericson, *Why I Boycotted Shein and Romwe*, Her Campus (Dec. 8, 2020), https://www.hercampus.com/school/psu/why-i-boycotted-shein-and-romwe/ (discussing why the author, a college girl who used to shop at SHEIN, stopped patronizing their business, in part due to the now confirmed rumors of SHEIN's improper labor practices).

192. *Id.*

likely help decrease the demand for exploitative child labor. Lastly, advocacy groups, grassroots organizations, and the public should continue to raise their voice as much as possible to push local and state governments to enact child labor laws that prioritize children's safety on the job. If all these initiatives are achieved, there should be a decrease in child labor violations. With a concerted effort from the government and people alike, the current movement to turn back time and loosen child labor protections can be stopped.

You *Might* Have to Lie to Kick it: Rap Lyrics at Trial and the Limitations on Freedom of Expression*

Warrington Sebree

Abstract

2023 celebrated fifty years of hip-hop, and the year has been packed with tributes to the genre's pioneers, great music, and a criminal prosecution of one of the genre's most iconic artists: Young Thug. Celebrating fifty years of hip-hop while rap lyrics are being used to prosecute a Grammy award-winning artist for criminal racketeering is just one of many examples of the dichotomies that embody the experience of being Black in America. One part of the Black lived experience, being historically criminalized, is directly correlated to why lyrics from one of the world's most popular genres of music are used to prove someone is guilty of a crime. Society has associated Black people with criminal activity and violence long before rap was invented. When a rapper has lyrics about crime and violence, people who believe that Black people are more likely to be criminals are comfortable to assume that the rapper is telling the truth. The criminal justice system is equipped with procedures and rules that are designed to keep trials fair and promote the pursuit of justice. The disproportionate use of rap lyrics at trial is interesting, however, as there is no other genre that allows people to affirm their implicit racial biases against a defendant like hip-hop. Additionally, rap lyrics have been used at trial

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despite the protections of the First Amendment. The KKK, the Westboro Baptist Church, white nationalists, and the like, have all been protected by the First Amendment. However, when rap lyrics come up, the decision to apply First Amendment protections suddenly becomes too complex. This makes perfect sense because rap music is complex. But the complexities do not mean that the solution cannot be simple. Music is a language that communicates across borders, political parties, religions, and languages. That is why this Note is important. We will never get to a place where everyone understands the intricacies of rap lyrics as a form of entertainment or their implicit racial biases because it is too comfortable to not confront our assumptions. This Note attempts to explain the comfort of these assumptions and illustrate how racism is perpetuated and reinvented, but in a language we can all understand: music. Unfortunately, during this time of celebration, hip-hop is at a pivotal moment of its survival. Young Thug's trial is symbolic of the fifty years hip-hop has endured society assaulting the genre to diminish its merit as a form of art. If Young Thug's lyrics are used against him and he is convicted, no rapper will be safe. Ironically, the most influential genre of music in the world will be silenced unless we do the unthinkable and ban the use of rap lyrics at trial.

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Introduction

The use of rap lyrics at trial illuminates a tension between the Federal Rules of Evidence and the First Amendment. Specifically, the evidentiary standard makes relevant rap lyrics admissible; however, when exactly do First Amendment protections outweigh admissibility? Limited judicial guidance in answering this question creates significant risks of prosecutors abusing discretion, the admission of character evidence, and a chilling effect on rap lyrics. Additionally, the way in which rap music is inextricably tied to Black identity raises serious questions as to the ability for judges and juries to mitigate their preconceived biases towards Black people. The inability for our current system of laws to consistently deal with the nuanced intricacies of rap as a genre makes an outright ban on admitting rap lyrics at trial, subject to exceptions, a favorable solution.

Much of the scholarship on rap lyrics at trial correctly identifies how rap music is inextricably tied to race.[1] This discussion supports the argument that rap music is "viewed through a racially biased lens" that it cannot escape.[2] However, limiting the discussion to the "social and political history of rap"[3] overlooks how society has misconstrued the art produced by Black creatives, specifically rappers, in an attempt to reduce the entire

1. *See generally* Renya Araibi, *Every Rhyme I Write: Rap Music as Evidence in Criminal Trials*, 62 Ariz. L. Rev. 805, 811 (2020) (discussing the history behind rap being connected to race in America); Erik Nielson & Andrea L. Dennis, Rap on Trial: Race, Lyrics, and Guilt in America 71 (2019) (discussing how rap music racialized primarily against Black men); Tricia Rose, Black Noise: Rap Music and Black Culture in Contemporary America 99 (1994) (contextualizing the racial, socio-cultural, and political history of rap music); Imani Perry, Prophets of the Hood 2 (2004) (describing how Black culture is embodied in rap music).

2. Araibi, *supra* note 1, at 832-33.

3. *Id.* at 832; *see also* Dre'Kevius O. Huff, Note, *Rap on Trial: The Case for Nonliteral Interpretation of Rap Lyrics*, 5 Savannah L. Rev. 335 (2018) (footnotes omitted); Charis E. Kurbrin & Erik Nielson, *Rap on Trial*, 4 Race & Just. 185, 198 (2014).

Black lived experience to existing as "poor, violent, and hopeless . . . ."[4] There is plenty of scholarship that connects sentiments of Black people being barbaric and predisposed to crime to the justifications for enslavement, lynching, disenfranchisement, Jim Crow laws, and mass incarceration.[5] Understanding the criminalization of Blackness outside the context of rap is essential for those who seek to put forward honest scholarship that adequately addresses racial biases in our society. The reality is that racial bias is not new, and rap music is just the latest installment to perpetuate systemic racism. As such, this Note operates under the understanding that racially implicit bias is present and builds on scholarship by attempting to explain how implicit racial biases against rap music and Black people may function in the context of the courtroom.

This Note argues that the fear induced by rap music was not because the lyrics were expressly true but rather because society has used rap as a vehicle to cement their preconceived expectations of Black identity—violent, gang-affiliated deviants. As such, when rap music is used in court to show someone is prone to violence or to prove their guilt, there is a significant risk that factfinders are unable to remove the pre-assigned social meanings they have unconsciously attributed to Blackness. In other words, using rap lyrics at trial presents inherent risks that a judge or jury will be unable to prevent their implicit biases from tainting what should be their objective analysis of rap lyrics. Pair this with the disproportionate use of rap lyrics against Black male defendants, and the fact that lyrics are tenuous sources of truth, and it becomes clear that the practice of admitting lyrics in the courtroom is extremely problematic.[6]

Moreover, it is unclear whether factfinders are mentally able to separate a rapper's real identity from their "rap persona."[7] I define a rapper's persona as a hyperbolic expression of an entertaining image that appeals to the masses. This is relevant because a rapper's real identity is arguably separate from the abstract personality presented whilst performing as a rapper. Consider a simple example: Johnny Cash, Taylor Swift, and Michael Jackson are household names associated with their music. However, the same is not readily evident for names such as Sheyaa Bin Abraham-Joseph (21 Savage), Nayvadius Wilburn (Future), and Dwayne Carter Jr. (Lil Wayne). Put a different way, Jay-Z

4. Mukasa Mubirumusoke, *Rapping Honestly: NaS, Nietzsche, and the Moral Prejudices of Truth*, 30 J. SPECULATIVE PHIL. 175, 182 (2016).

5. *Id.*; *see also* NIKOLE HANNAH-JONES, THE 1619 PROJECT 468 (2021); *see generally* MICHELLE ALEXANDER, THE NEW JIM CROW 262 (2010).

6. Ryan J. Bennett, *Rappers' Rhymes Are Not Admissions to Crimes: Eliminating the Unlawful Use of Rap Lyrics Against Rappers in Criminal Proceedings*, 48 OHIO N. UNIV. L. REV. 1, 6 (2021).

7. Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Complications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345, 357 (2005).

does not have a driver's license, Shawn Carter does; Lil Wayne does not have a right to vote, Dwayne Carter Jr. does. This is also readily evident at trial where prosecutors read the lyrics of the rapper under their performing identity while their rap name does not appear in the caption of the case. I do not offer speculations as to why some rappers go by pseudonyms nor do I suggest every artist go by their birth name. The point is that there are real world implications of using a real person's fictional extension of themselves to prove guilt beyond a reasonable doubt.

The federal evidentiary standard that allows the admittance of rap lyrics at trial is not equipped to recognize unconscious social stereotypes that factfinders may presume when they see a Black defendant enter the courtroom. The presumptive rhetoric condemning the Black identity to violent criminality blurs the line as to when lyrics are reliable sources of truth versus inadmissible character evidence.[8] Moreover, the fact that neither legal scholars nor the judiciary can provide clear guidance as to how to mitigate the implicit biases in evaluating rap lyrics as evidence leaves Black artists vulnerable to undue prejudice.[9]

This Note's focus is to connect the use of rap lyrics at trial to the larger systemic assault on Black identity. Part II offers a brief history of rap music and shows that it is inextricably tied to the Black identity—perpetuating Black criminality stereotypes. This Note argues that the way rap has been characterized into sub-genres, as well as the rap industry's commodification of violence in rap has reinforced historical associations of Black people to violence. Part III gives a brief overview of the First Amendment and discusses the implications raised by admitting rap lyrics at trial. Part IV explores performance theory, and rap music's presumption of truth to illustrate how the Federal Rules of Evidence fail to adequately protect rappers' artistic expression from being used against them. Part V explains how the use of rap lyrics at trial makes the genre susceptible to a chilling effect and argues that this chilling is already taking place. Finally, in Part VI, I review the various solutions proposed to solve this problem and offer direction as to how to combat the disproportionate use of rap lyrics against Black people.

I. History of Rap Lyrics and Black Criminality

Understanding the connection of Black identity and rap requires a review of the history of rap and the criminalization of Blackness. This

8. Luke Walls, *Rapp Snitch Knishes: The Danger of Using Gangster Rap Lyrics to Prove Defendants' Character*, 48 Sw. L. Rev. 173, 176 (2019).

9. *Id.* at 179-80.

chronology illustrates the way in which the *idea* of race is constantly being hardened into ideology.[10] Thus, the question is not if race is present, but how racial ideology has developed and is manifested in our everyday experiences.[11]

A. Brief History of Rap

The South Bronx is widely recognized as the home of rap.[12] It all started with DJ Kool Herc on the "ones and twos" who set the stage for the proliferation of rap as a cultural staple in modern America.[13] While the genre quickly spread throughout New York, introducing the world to rap pioneers such as Grand Master Flash, Run-D.M.C., and the Zulu Nation, what was happening inside their communities was nothing to be celebrated.[14] At this time, New York underwent disinvestment and increasing poverty in what was unprecedented urban decay.[15] The violence of this time resulted from the area facing dilapidated homes, a vanished manufacturing sector, and widespread unemployment.[16] In response, street gangs coalesced to serve a protective function in the community and provide social order.[17]

The tumultuous environments of Black urban communities partially fueled hip-hop's association with violence; however, during that time, violence did not dominate the genre and artists rejected violence altogether.[18] Nonetheless, the genre, which influenced social and cultural life in Black communities, attracted scrutiny by law enforcement, which led to cities investing millions of dollars in law enforcement to suppress the movement within these communities.[19] The disproportionate policing resulted in increased police brutality, and rap was instrumental as a political tool to call out the injustices being carried out in Black communities.[20] In the short period between the mid-1980s and early 1990s, rap in America spread coast to coast with the emergence of West Coast rap legends such as Ice-T and N.W.A. who helped spearhead the "golden

10. Barbara J. Fields, *Slavery, Race, and Ideology in the United States of America*, 1 NEW LEFT REV. 95, 101 (1990).
11. *Id.*
12. NIELSON & DENNIS, *supra* note 1, at 27.
13. Araibi *supra* note 1, at 811.
14. *Id.* at 811-12; NIELSON & DENNIS, *supra* note 1, at 30.
15. NIELSON & DENNIS, *supra* note 1, at 27.
16. *Id.* at 28.
17. *Id.* at 29.
18. *Id.* at 30-31 (identifying, for example, Afrika Bamaataa, who is one of the first hip hop DJs and leader of the Black Spades gang created the Zulu Nation which was a hip-hop awareness group based on shared political and religious doctrine).
19. *Id.* at 32.
20. *Id.* at 35.

age" of rap.[21] The criminalization of urban communities and the rap movement's direct challenge to American institutions of power in response gave rise to rap music being labeled as inherently controversial and problematic.[22] Rap music prompted negative responses and criticisms from high-ranking elected officials, including then-Congressman Newt Gingrich, and former Presidents Bill Clinton and George H.W. Bush.[23] However, the mid to late 1980s through the 1990s saw rap music consistently at the top of the charts, selling millions of records.[24] Ironically, while narratives of rap music's violent obscenity increased, so, too, did the popularity and economic success of the genre.[25]

B. Criminalization of Blackness

Another major piece of scholarship discussing the use of rap lyrics at trial involves the effects of implicit bias on a judge or jury.[26] However, scholarship that is overly focused on how implicit bias maintains racial disparities in society[27] misses the mark. As a general matter, because rap is inextricably tied to the Black identity, any discussion of rap on trial and implicit bias must specifically address implicit *racial* bias—anything short of this is colorblind and ineffective. There is empirical data on this very topic.[28] Scholars have consistently found that there are implicit racial biases towards Black people that characterize them as violent and dangerous.[29] It is generally accepted that implicit racial biases are present and influence societal perceptions and attitudes.[30] However, while these experiments provide tangible data that can be interpreted and used to make predictions, it is unclear how these studies can even account for the weight of determining the guilt of a real person. Assuming that the *voir dire* process rids jury trials of racial biases dismisses the

21. *Id.* at 37.
22. Araibi, *supra* note 1, at 818.
23. *Id.*
24. Nielson & Dennis, *supra* note 1, at 44-45.
25. *Id.* at 43.
26. Jerry Kang et al., *Implicitly Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1134-35 (2012); Araibi, *supra* note 1, at 810.
27. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1197 (2009).
28. *See generally* Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. Applied Soc. Psychol. 2135 (1996) [hereinafter Fried (1996)]; *see also* Carrie B. Fried, *Who's Afraid of Rap? Differential Reactions to Music Lyrics*, 29 J. Applied Soc. Psychol. 705 (1999) [hereinafter Fried (1999)]; Adam Dunbar & Charis E. Kurbrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. Experimental Criminology 507 (2018).
29. Fried (1996), *supra* note 28, at 2141; *see also* Fried (1999), *supra* note 28, at 716; *Dunbar & Kurbin. supra* note 28, at 508.
30. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465 (2011) (summarizing empirical evidence of implicit racial biases in the post-civil rights era).

reality that the advocates that select jurors do not also have implicit racial biases. In this sense, we can never know the extent to which racial bias played a role.

The lack of direction from implicit racial bias studies as to how we can mitigate its ever-present effect has resulted in a lack of clarity in understanding social hierarchy. Michelle Alexander reminds us that "[t]he genius of the current caste system, and what distinguishes it from its predecessors, is that it appears voluntary," which requires Black people to take on the burden of reclaiming the narrative of the identity that was stripped away from them.[31] The result is that race has moved beyond a social construct to assigning social meanings to the Black identity.[32] These social meanings materialize in a number of ways, but, particularly relevant here, are the ways in which the ideologies about Black identity are reified through society expecting these activities and functions of Black individuals.[33] One of the ideologies that has been reified by society is "black crime rhetoric." [34] Subscribers to black crime rhetoric use "objective measures" such as crime statistics as "a proxy for a national discourse on black inferiority."[35] In other words, people use statistics suggesting Black criminality as a shield to couch their implicit racial attitudes that Black people are self-destructive and "[their] own worst enemies."[36]

Black criminality is a myth that cannot be justified merely with crime statistics because doing so negates the reality that race is not determinative of who commits violent crime. However, society subscribing to notions of Black violence and deviance shifts the blame to Black people as the cause of our own disproportionate incarceration and perpetuates the exact same ideologies. As one scholar put it, "race becomes a perception of enacted behavior that was intolerable or resistant to White authority, . . . and thus needed to be disciplined."[37] There is not enough writing, especially from white people, about how people have wrestled with the myth of Black criminality. More of this writing would encourage others to also seek to understand their implicit racial attitudes. This work can be uncomfortable, but it is critical if we seek a criminal-legal system that is fair and just. Much work must be done

31. ALEXANDER, *supra* note 5, at 267.

32. BRYANT KEITH ALEXANDER, THE PERFORMATIVE SUSTAINABILITY OF RACE: REFLECTIONS ON BLACK CULTURE AND THE POLITICS OF IDENTITY 4 (Rochelle Brock & Richard Greggory Johnson III eds., 2012).

33. *Id.*

34. KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 8 (2011).

35. *Id.*

36. *Id.*

37. ALEXANDER, *supra* note 5, at 4.

to correct the Black criminality myth among mainstream society, but it is through understanding the Black criminality myth that is the foundation for recognizing the extremely problematic nature of using rap lyrics at trial. The general lack of willingness among individuals to interrogate their implicit racial attitudes prevents and discourages a more nuanced discussions on racialized topics like rap lyrics.

1. Subgenres and Hierarchies of Rap

The lack of nuanced discussion of Black criminality has resulted in rap being mischaracterized as a less valuable form of expression has led to the inability of factfinders to apply consistent standards amongst the different types and tiers of rappers. One of these nuances is the distinction between hip-hop and rap. "Hip-hop culture" is the umbrella that covers this hierarchy and various subgenres of rap. Hip-hop culture can be defined as a "cultural form that attempts to negotiate the experiences of marginalization, brutally truncated opportunity, and oppression within the cultural imperatives of African-American and Caribbean history, identity, and community."[38] The culture of hip-hop attempts to "symbolically appropriate[] urban space through sampling, attitude, dance, style, and sound effects."[39] Rap music is a prominent feature of hip-hop culture but there are various subgenres such as boom-bap, jazz-rap, trap, gangster rap, mumble rap, rap rock, country trap, drill, and many more.[40] While there may be differences between the styles and presentations, the reality is that rap, as it exists within hip-hop culture, is inherently tied to Black people and is thus politicized and criminalized. The consequence is that images of violent criminals, thugs, and gangsters dominate society's general perceptions of rap.[41]

The different styles of rap present the problem of certain sects of the rap community being targeted over others. Particularly, some scholars incorrectly try to highlight "gangster rap" as a subgenre of rap music that is specifically susceptible to being used as evidence.[42] While scholars that make this characterization are generally correct in their conclusions that certain content related to gang activity may result in undue prejudice against criminal defendants,[43] the misguided labeling of certain rap as "gangster" illuminates their limited understanding of

38. Rose, *supra* note 1, at 21.

39. *Id.* at 22.

40. Alex Lavoie, *22 Rap Genres That Defined the 50 Year Evolution of Rhyme and Beat*, Landr (July 15, 2024), https://blog.landr.com/rap-styles/.

41. Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, Colum. J.L. & Arts 1, 18 (2007).

42. Walls, *supra* note 8, at 175.

43. *Id.* at 183.

the genre and culture that is entwinned with hip-hop. "Gangster," when used as a label, reinforces and brings us back to the presumption of rap being factual. Using the term "gangster" connotes violence, perpetuates stereotypes of Black criminality,[44] and demonizes music that talks about gangs. Thus, scholars, lawyers, and judges must resist the urge to label certain rap as "gangster" because it inevitably places the defendant in a negative light.

On the contrary, there are certain types of rap that contain explicit violent threats but are not readily accepted as reality. A prime example is battle rap. Battle rapping is when two artists compete against one another by way of dissing them, trying to outwrite them, and putting on a show.[45] Battle rap can come in many forms, over a beat, *a cappella*, recorded in the studio, and in front of live crowds.[46] Battle rap contains some of the most vile and threatening lyrics in the industry, but it is unclear if lyrics from a rap battle have ever been used at trial. The same can also be said about poetry or spoken word. Alternatively, consider nine year-old rapper Lil RT who has generated much controversy by boldly and explicitly rapping about criminal activity.[47] The point here is that rap can be viewed differently depending on the context.

Context matters, specifically to distinguish the subgenres of rap, but these subgenres become largely irrelevant within the context of the courtroom. This is partly because lyrics are often read in court and the variations between subgenres are less evident when presented orally. The underlying thread is that the more closely music is regarded as rap or one is labeled a rapper, the more likely racialized assumptions will be applied, and the lyrics will be taken as literal and biographical. Contrarily, the more one deviates from rap, the less likely the lyrics will be associated with Black criminality. If the defendant is rapping, is labeled as a rapper, and raps about crime and violence, the racial stereotypes may be invoked regardless of the song's subgenre.

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44. Danielle M. Young et al., *Innocent Until Primed: Mock Jurors' Racially Biased Response to the Presumption of Innocence*, PLoS ONE (Mar. 18, 2014), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0092365 ("[U]sing priming words that are semantically associated with the racial category of Black (i.e., *gospel*, *hood*, and *segregation*) has been shown to alter legal judgments of police officers, juvenile probation officers, and judges in racially biased ways.").

45. Jay Caaspian Kang, *Battle Rap's Unwoke Representation Politics*, THE NEW YORKER (May 23, 2023) https://www.newyorker.com/news/our-columnists/battle-raps-unwoke-representation-politics.

46. *Id.*; *see also* Andres Tardio, *Your Introduction to Battle Rap: A New Viewer's Guide*, HIPHOPDX (Jul. 12, 2013) https://hiphopdx.com/editorials/id.2142/title.your-introduction-to-battle-rap-a-new-viewers-guide.

47. Sangamithra, *Who is Lil RT? Who Are Lil RT Parents? What is Lil RT's Real Name?*, FRESHERSLIVE, https://www.fresherslive.com/latest/articles/who-is-lil-rt-who-are-lil-rt-parents-what-is-lil-rts-real-name-1555217098, (last updated Nov. 24, 2023); Ayelen Pichardo Hernandez, *Lil RT: Only Nine and Already Naughty*, (Dec. 18, 2023) https://ehsnewsmagazine.org/12073/opinion/lil-rt-only-nine-and-already-naughty/.

2. The Rap Industry's Commodification of Violence

What cannot be forgotten is that rap is a multi-billion-dollar business empire.[48] The hierarchy amongst rappers across subgenres is driven and reinforced by the music industry pumping money to promote artists (aka "industry plants") who present a marketable image to audiences for a profit.[49] The commodification of rap has led to the proliferation of violent and threatening music that is used to judge defendants while also making record labels rich. We see this in the ways in which certain styles and sounds of rap are accepted and rejected from the industry. For example, Lil Nas X's hit single "Old Town Road" swept the nation in 2019, holding a spot on the US Billboard Hot 100 Chart for nineteen consecutive weeks.[50] Originally, Billboard had the record on its "Hot County Songs" list, but it was subsequently removed and went on to top the Hot R&B/Hip-Hop Songs chart.[51] This led to other country artists, including Billy Ray Cyrus, defending the Grammy award-winning song as a bonafide country record.[52] In a statement released months after the song's removal and public criticism, Billboard stated that the song was originally included on the country list because Lil Nas X labeled the song as such in the metadata.[53] However, this does not explain the song's removal. The fact that the song never returned to the country charts raises serious racial implications relating to the content of the record. One must wonder, if Lil Nas X mentioned more gunslinging and violent lawlessness, would it have ever made it to the country charts? Or maybe, if Lil Nas X was white, would the hit song be readily categorized as rap? This example highlights the industry's ability to set the stage for how music is characterized based on *who* presents it and the contents of the record.

An example of the music industry perpetuating the violent criminalization of rappers is the creation of Artificial Intelligence ("AI") rapper FN Meka. FN Meka is a computer-generated rapper created by

48. Julie Watson, *Hip-Hop: Billion-Dollar Biz*, ABC News (Feb. 24, 2004), https://abcnews.go.com/Business/story?id=89840&page=1#:~:text=It%20now%20generates%20more%20than,DVD%20section%20at%20Best%20Buy.

49. Amelia Vandergast, *The Controversy of Music Industry Plants in 2024*, A&R Factory (Mar. 22, 2024) https://www.anrfactory.com/the-controversy-of-music-industry-plants-in-2024/.

50. King Sukii, *Remember When: This Time in 2019, Billboard Quietly Removed "Old Town Road" from its 'Hot Country Songs' Chart*, Global Grind (Mar. 16, 2021), https://globalgrind.com/5022847/billboard-removes-lil-nas-x-old-town-road-country-chart/.

51. Chris Molanphy, *The "Old Town Road" Controversy Reveals Problems Beyond Just Race*, Slate (Apr. 12, 2019, 4:23 PM), https://slate.com/culture/2019/04/lil-nas-x-old-town-road-billboard-country-charts-hot-100.html.

52. Sukii, *supra* note 50.

53. Joe Levy, *Inside the 'Old Town Road' Charts Decision*, Billboard (Sept. 19, 2019), https://www.billboard.com/pro/inside-the-old-town-road-charts-decision/.

Factory New that is voiced by a human yet based on AI.[54] The digitized rapper has its own YouTube page,[55] is verified on Instagram,[56] and has millions of followers on TikTok.[57] Despite the mass following and publicity, the robot rapper has been widely criticized due to its use of the N-word and lyrics pertaining to violence and stereotypical mannerisms that derive from Black artists—while FN Meka was created by white creators.[58] The Capitol Music Group record label that originally signed FN Meka announced in a public statement that it was severing ties with its AI artists and issued an apology to the Black community for their endorsement of the insensitive appropriation of Black art and culture.[59] It is unclear what will be the fate of the AI rapper. Nonetheless, this example shows that the violence and obscenity of rappers that is ridiculed by some is actually pushed by the industry as a strategic revenue raising mechanism.

The presumption of rap being inherently violent and linked to factual events overlooks that rappers write their lyrics in a way for it to sell for the maximum profit.[60] While these motivations may not be the same for all people that write raps, there is a baseline understanding that rap can lead to a lucrative career. The problem is that rappers develop their presentation and content based off what the industry deems financially viable just to have this image attached to their real identity.[61] Are factfinders making spur-of-the-moment value judgments on what is "real" and what is artificial? When placing this factor in the context of interpreting lyrics, it is unclear whether commodified violence is even considered when lyrics are analyzed in the courtroom. The result is, yet again, that factfinders may not look at rap neutrally as a business industry and the result is the presumption that lyrics are true which justifies their admission in the trial.

Additionally, the commodification of violence in rap music has created a hierarchical structure that allows more popular artists, that generate more revenue, to receive more protections than less popular artists. Consider 21 Savage's 2016 hit song *No Heart,* which contains

54. Chris Willman, *Capitol Records Cuts Ties with FN Meka, an AI-Generated 'Virtual Rapper,' over Stereotypes, Lack of Black Creative Involvement*, VARIETY (Aug. 23, 2022, 4:21 AM), https://variety.com/2022/music/news/capitol-drops-fn-meka-artificial-intelligence-rapper-objections-1235348786/.

55. FNMeka (@FNMeka), YOUTUBE, https://www.youtube.com/@FNMeka (last visited Nov. 30, 2023).

56. FNMeka (@fnmeka), INSTAGRAM, https://www.instagram.com/fnmeka/?hl=en (last visited Nov. 30, 2023).

57. FNMeka (@FNMeka), TIKTOK, https://www.tiktok.com/@fnmeka?lang=en (last visited Nov. 30, 2023).

58. Willman, *supra* note 54.

59. *Id.*

60. Dennis, *supra* note 41, at 16.

61. *Id.*

lyrics such as "pull up on you, tie your kids up, pistol whip you while your bitch naked."[62] Or even Eminem's song *'97 Bonnie and Clyde,* where he says "Tie a rope around a rock . . . [t]here goes mama splashing in the water, no more fighting with dad," which was actually read in the United States Supreme Court by Chief Justice John Roberts, to which the deputy solicitor general argued they were not threatening due to Eminem saying them at a concert to entertain.[63] The list can go on. Even if the artists are not performing, their celebrity status generates the commonly accepted presumption that these threats will not be carried out.

The commercialization of violent themes in rap has permeated all levels of the music industry, rendering large corporations to promote an artist so long as they fit a mold that is financially palatable to the consumer.[64] This is concerning for up-and-coming artists because most model their image off of the success of those who have "made it"—be it local, regional, national, or global stardom.[65] Until recently in the case of Young Thug (Jeffery Williams),[66] we have seen very few Grammy award-winning artists have their lyrics used against them in trial. Does it logically follow that an undiscovered amateur rapper should get less protection than a famous rapper with a large social audience? Is there a "fame threshold" that an artist has to reach in order to have their lyrics presumed to be just entertainment rather than taken as fact? These are key questions that illustrate the unreliability of rap lyrics at trial due to the inequitable First Amendment protections offered to different artists.

II. Rap and the First Amendment

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[67]

62. 21 Savage & Metro Boomin, No Heart, at 01:54 (Epic Records 2016).
63. Nielson & Dennis, *supra* note 1, at 111.
64. Dennis, *supra* note 41, at 17.
65. *Id.*
66. XXL Staff, *Young Thug's YSL Trial Focuses on Rap Lyrics - See How This Affects Hip-Hop On A Larger Level*, XXL (Nov. 28, 2023), https://www.xxlmag.com/rappers-lyrics-on-trial/.
67. Cohen v. California, 403 U.S. 15, 26 (1971).

The proliferation of violence in rap lyrics fueled by the industry and the disproportionate use of rap lyrics at trial is increasingly problematic when considering First Amendment implications. It may be considered remarkable that in just forty-five words the Framers packed some of the most precious rights that rest at the core of democracy.[68] On the other hand, one may be equally surprised to know that so few words provide the breadth of speech protection that we enjoy in the United States.[69] Practically, this means that our constitutional speech protection has little to do with what the U.S. Constitution says in text, and it is particularly jarring to know the protection these words—supposedly offered to a broad, ever-evolving concept such as speech—s actually determined by judges interpreting what is and is not covered. It is undisputed that rap is a form of speech and speech is a form of artistic and creative expression. As such, courts' consistent denial of constitutional protections for rap lyrics in criminal trials makes the First Amendment critical to this discussion.[70]

In the most general sense, the protections afforded to speech depend on whether the restriction is content-based or content-neutral.[71] A content-neutral restriction means that the restriction is not based on the viewpoint or subject matter of the speech.[72] A content-based restriction is presumptively invalid unless the government shows that it is necessary to serve a compelling state interest and is narrowly tailored to achieve that end.[73] Nonetheless, despite the very clear language of "Congress shall make no law," there are certain times when rights to free speech and expression can infringe on another fundamental right. Under these circumstances, the Court allows the government to step in. In other words, there are certain times when we actually cannot say whatever we want and claim constitutional protection. The Court has laid out these exceptions to include inciting imminent lawless action, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and grave and imminent threats.[74]

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68. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

69. *Id*. ("Congress shall make no law . . . abridging the freedom of speech . . . .").

70. NIELSON & DENNIS, *supra* note 1, at 102.

71. R.A.V. v. St. Paul, 505 U.S. 377, 382-86 (1992).

72. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

73. Simon & Schuster, Inc. v. Members N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (citing Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).

74. United States v. Alvarez, 567 U.S. 709, 717 (2012).

The highly subjective nature of defining what speech society should accept versus what it should not is a key reason why analyzing and enforcing the First Amendment is so complex. It is not hard to imagine that any non-homogenous group of people would find different forms of expression threatening or offensive. This gray area is problematic because, when rap lyrics are admitted as evidence, factfinders are inserting their own subjective interpretations of lyrics that are more complex than they appear on paper. Moreover, placing rap in the context of society's negative perceptions of the genre alongside the racist ideologies that may pervade a factfinder's judgement raises critical questions as to the significant risk that rap lyrics are being used as character evidence under the guise of admissibility. In turn, this amounts to a content-based restriction that has the effect of chilling speech as artists will elect to not record altogether rather than risk having their lyrics used against them.

III. Performance Studies, the Presumption of Truth, and the Rules of Evidence

Understanding how the current procedures and justifications for admitting rap lyrics at trial undercut rappers' First Amendment protections requires exploring rap as a complex socio-cultural phenomenon. Scholarship on rap lyrics at trial has followed consistent threads of the Federal Rules of Evidence, and most connect rap music to the criminalization of Blackness. However, connecting the criminalization of Blackness and rap is limited to focusing merely on *how* Black people may be racially stereotyped. The more impactful conversation explores the epistemological dimensions of *why* Blackness and rap music are characterized the way they are. By limiting the discussion to simply chronicling history to show how Black people are criminalized through rap, the ways in which the Black body has been used as a vehicle to perpetuate systemic racial categorization and social meaning is a phenomenon left underdeveloped. As Professor Bryant Keith Alexander puts it, "social meaning is made palpable not just in the materiality of bodies, or the historicity and social recognition of raced Black bodies, but in the *expectedness* of who and what those bodies do: constructions of racial performance or performatives."[75] The social construct of race provides conceptual differences in identity and lived experience that informs the way in which we form perceptions about other racial identities. Constructions of racial performatives, discussed below, are essential to complete the understanding of race as a concept because it examines the

75. Alexander, *supra* note 5, at 4 (emphasis added).

psychological processes that effectuate physical expectations of racialized behavioral patterns that are used for racial demarcation.

A. Performance Studies

Performance studies is a necessary conceptual framework for understanding rap lyrics at trial because it seeks to highlight the interplay of a rapper's performative presentation of self and societal predeterminations of how a rapper behaves in real life. One of the more straightforward definitions of performance studies is "situated modes of action" that are ignited by various modes of language and action.[76] More specifically, "[r]acial performativity informs the process by which we invest bodies with social meaning."[77] Investing bodies with social meaning by way of race is simply racialization. It is important to understand that racialization has objective and subjective components.[78] The objective involves the outward categorization based on racial associations and the subjective addresses the internal recognition of racialized identities to restrain racial performance expectations.[79] Rap lyrics must be interrogated through both the objective and subjective. History must reconcile how racial objectification was achieved by situating Blackness in close proximity to criminality, and, at the same time, individuals must remain aware that they are responsible for limiting the subjective expectations they internalize and place on the Black body.[80] It is through this labor of critical reflection within all racial groups that outdated and discriminatory racial ideologies may be transformed to create space for Black people to control how we are depicted and create our own new images beyond the image of Blackness produced by the white imagination.

Moreover, it is not the rapper performing an authentic image but wanting their lyrics to be fiction in court that creates a dilemma. Conceptualizing rap as entertainment that is separate from the real-life experiences contained within the lyrics is more so the problem. Part of the issue lies in the fact that "record labels have always depended on a given rapper's 'authenticity' to sell records."[81] Scholars should be careful not to frame this phenomenon such that rappers are viewed as responsible for their art being viewed as true. Part of this is about the way

76. D. Soyini Madison & Judith Hamera, *Performance Studies at the Intersections*, in THE SAGE HANDBOOK OF PERFORMANCE STUDIES XV (D. Soyini Madison & Judith Hamera eds., 2006).

77. E. Patrick Johnson, *Black Performance Studies: Genealogies, Politics, Futures*, *in* THE SAGE HANDBOOK OF PERFORMANCE STUDIES 446 (D. Soyini Madison & Judith Hamera eds., 2006) (citation omitted).

78. ALEXANDER, *supra* note 5, at 140.

79. *Id.*

80. *Id.*

81. Wilson, *supra* note 7, at 356.

the rapper presents themselves, but society also plays a role in applying the authenticity image on rappers which is beyond their control. It may be argued that the more violent and criminal a rapper portrays themselves directly correlates to a bigger white audience.[82] In fact, it is projected that around 80% of people who buy rap music are white.[83] The result is that rap music has become a "cultural safari for white people" where "people will interpret it the way they want to and not necessarily the way [it was] intended to be."[84]

This is particularly relevant to rappers whose lyrics are used at trial as autobiographies while also battling the performance expectations of Blackness by white audiences. The performative dimensions of rap are intertwined with a rapper's personal narrative which places the rapper in the role of subject and object as a mode of artistic expression.[85] What is fascinating is the idea that at the same time a rapper presents their rap persona, which may draw on reality, audiences project their expectation that the performer presents what the viewer imagined while in private. Broadly speaking, rap as a genre is either celebrated for its commercial success or demonized due to associations with Blackness and violence, and there is no way of controlling these private presumptions. Additionally, each listener hears things differently and there is no way of consistently determining that the lyrics themselves are factually representative of the rapper's reality or mindset. Without this baseline understanding, it is difficult to ensure factfinders maintain the understanding that rap is a performance at the forefront of their minds, even despite having autobiographical components. The majority of individuals may never be able to achieve this level of consciousness. Without a systemic policy, rapper defendants will remain in danger of having their lyrics misconstrued by individuals with a predetermined subconscious that expects Black rappers to commit crimes, making the decision to assign guilt all the easier.

B. The Presumption of Truth

The performative dimensions of rap music directly impact the assumptions made about the defendant and how the alleged facts of the

82. David Samuels, *The Rap on Rap: the 'Black Music' that Isn't Either*, The New Republic (Nov. 11, 1991), https://newrepublic.com/article/120894/david-samuels-rap-rap-1991.

83. Carl Bialik, *Is the Conventional Wisdom Correct in Measuring Hip-Hop Audience?*, Wall St. J., (May 5, 2005, 12:01 AM), https://www.wsj.com/articles/SB111521814339424546.

84. Allison Samuels, *Minstrels in Baggy Jeans*, Newsweek (Mar. 13, 2010, 6:11 PM), https://www.newsweek.com/minstrels-baggy-jeans-137087.

85. Lynn C. Miller & Jacqueline Taylor, *The Constructed Self: Strategic and Aesthetic Choices in Autobiographical Performance*, *in* The SAGE Handbook of Performance Studies 1170, 170 (Soyini D. Madison & Judith Hamera eds., 2006).

case are digested. This issue is exacerbated by the fact that factfinders may allow these racial ideologies to unconsciously taint their interpretation of these lyrics.[86] Moreover, prosecutors present rap lyrics stripped of essential context that is necessary for a complete understanding of the lyrics as a form of expression.[87] The result is that rap lyrics are rendered truthful, accurate depictions of events and representative of an individual's mindset when in actuality these are conclusory presumptions that are rooted in racial stereotypes about the Black identity. [88]

One of the main issues with admitting rap lyrics is that the racist stereotypes associated with Black identity (i.e., violent, dangerous, obscene) are inherently and inseparably linked to rap music. As soon as a defendant is identified as a rapper in the courtroom they are subjected to criminalization—especially if they are Black. While rap is not the only genre of music where the artists are perceived as being truthful, rap is unique in that the presentation of authenticity in a rap song is rooted in performance. This performance becomes much more difficult to understand when one considers that consumers "give different verdicts on authentic performances."[89] This is difficult because it cannot be readily ascertained whether a consumer prefers a piece of art because the artist presented an "authentic" performance of their true artistic intent or whether the consumer appreciated a presentation of an "authentic" performance within the historical cannon of the art form.[90] Rap has elements of both: rappers situate their performances to display "fidelity to the sounds of past performances," while also imparting their own technical freedom to "cultivate individual interpretations of compositions."[91]

The commodification of violence within the rap industry drives the way in which rappers present themselves and their lyrics. The problem is that when rappers craft an authentic rap identity in line with the industry, their real identity becomes inseparable from their art. People want authenticity in almost anything we consume. Rap is unique in its own right with regard to its authentic storytelling features. While it may be conventional to assume that consumers place value on art that is more authentic, an artist's agency to craft authentic performances is

86. Dennis, *supra* note 41, at 4.

87. *Id.*

88. *Id.*

89. James O. Young, *Authenticity in Performance, in* ROUTLEDGE COMPANION TO AESTHETICS 452, 459 (Berys Gaut & Dominic McIver Lopes eds., 2013).

90. Somogy Varga & Charles Guigon, *Authenticity*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2014) https://plato.stanford.edu/entries/authenticity/#CriAut (last updated Feb. 20, 2020).

91. Young, *supra* note 89, at 455, 459.

also at play. With rap lyrics, there is an unspoken understanding that you should be truthful in your lyrics more than any other genre. As the youth say, "no rap cap"; in other words, you should not rap about something if you have not seen it, been through it, know someone that has been through it, or it has happened to your community.[92] The reality is that "keeping it real" may be artists performing their rap persona, highlighting the life of the inner city, telling fictional stories, or talking about personal experiences. Regardless, rappers are required to create an authentic artistic identity that has real life consequences. Even if everything in a rapper's lyrics is fiction, they must present them in a way that muddies the water between real and fiction to gain and maintain notoriety in the industry.

Contrarily, it could be argued that the presumption of Black criminality is mitigated by the criminal justice system's presumption of innocence. This is the idea that rapper's lyrics may be analyzed objectively and are not prejudicial because our criminal justice system deems all "innocent until proven guilty."[93] The issue is that rap exists at the intersection of "self-conscious *role-playing* (or 'performance') . . . and the centrality of *authenticity* (or 'keeping it real')."[94] The way in which rappers present their "authentic" rap persona conflicts with the fictional components a rapper consciously presents in their identity and music. The presumption of innocence and the presumption of rap's factuality are incongruent because they are based on two separate and contrasting intuitions. When an individual's liberty is at stake, "guilty or not guilty" carries a rigid finality that makes the presumption of innocence fairly simple to digest and intuitive to conceptualize—one is innocent until *proven* guilty. On the other hand, the presumption that rap lyrics are true is an intuition that is rooted in Black criminality—the thought process is that presuming Black people are violent criminals is an intuition that is justified by the large number of Black people arrested and incarcerated.[95] The performative nature of rap music is not intuitive to recognize because the intersection between role-play and authenticity is difficult to locate.[96]

92. Pedac, *Rap Cap,* Urban Dictionary (June 13, 2018), https://www.urbandictionary.com/define.php?term=rap%20cap (defining "rap cap" as "saying something in a song you wouldn't do in real life").

93. Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 Jurist: Stud. Church L. & Ministry 106, 108 (2003) (discussing the origins of the presumption of innocence in American law).

94. Annette J. Saddik, *Rap's Unruly Body: The Postmodern Performance of Black Male Identity on the American Stage*, 4 Drama Rev. 110, 111 (2003).

95. Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 Psychological Science 1949, 1949 (Aug. 5, 2014), https://journals.sagepub.com/doi/full/10.1177/0956797614540307.

96. Saddik, *supra* note 94, at 111.

Thus, racism and the multi-layered performance that exists within a rap persona makes the intuitions behind presuming rap lyrics true much more complicated than presuming innocence.

C. Federal Rules of Evidence ("FRE")

The performative elements within the rap genre, criminalization of Blackness, and the intuitions that can be made about rap lyrics in the courtroom are even further complicated when prosecutors introduce the lyrics. As an initial matter, the criminal justice system creates situations where prosecutors may use rap lyrics with no opposition such as in an affidavit for a warrant or grand jury proceedings. The Rules of Evidence provide lackluster protections for rap lyrics because they do not allow for rappers to offer any information or evidence to distinguish factual representations of reality from their mindset, or performance, without jeopardizing themselves.

1. Relevance

The first reason why the Rules of Evidence do not provide rap lyrics with sufficient protection is because of the inherently "low threshold" for relevance under FRE 401.[97] Rap music is interesting in this regard when one considers the general subject-matter of popularized mainstream rap: violence, drugs, money, women, and gangs. Of course, other genres share these motifs, and not all rap music includes these themes. The more salient point is that the socially deviant content of rap music, commodified by the industry, is generally characterized as negative which significantly diminishes the likelihood that rapper defendants will ever have viable relevance objections, not because rap lyrics are always relevant, but because rap as a genre inevitably contains, or is presumed to contain, some criminal content. This is not to advocate for revisions to the relevance standard. However, other forms of evidence, even other genre's lyrics, have relevance objections that are likely considered more seriously than an objection of rap lyrics' relevance. Thus, the inherent criminal subject matter of rap effectively renders FRE 401 objections null for rapper defendants, rendering an entire evidentiary protection useless simply because the person chose to rap.

97. Tennard v. Dretke, 542 U.S. 274, 285 (2004) (explaining that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

a. Montague v. State

An example of this problematic practice can be found in the case *Montague v. State*.[98] In this case, the defendant was arrested for homicide and wrote rap lyrics while awaiting trial.[99] The court held the lyrics were relevant and admissible because the defendant's act of writing lyrics "less than a year after the murder occurred and three weeks before trial" that resembled the facts of the case tended to prove that the defendant committed the homicide.[100] The timing is less problematic with regard to relevance as it logically follows that the closer lyrics are written to an alleged crime the more likely the lyrics will be deemed relevant. However, it is worth noting that writing lyrics in jail is not uncommon, nor exclusive to rap music.

Additionally, the factual resemblance the court espouses as a significant factor in the decision becomes less clear when critically examined. First, prosecutor proffered that the defendant saying "[i]t's a .40 when that bitch goin' hit up shit" refers to the .40 caliber casings found at the scene.[101] But even this raises the question of whether the defendant is a lawful gun owner and carries the presumption that rapping about a gun means that one has handled one before. Second, the prosecution argued that when the defendant wrote "I be playin' the block bitch," it was a reference to the victim purchasing cocaine with counterfeit money.[102] While "play" *could* refer to a drug deal, there are many assumptions that would have to be made to connect this word to the factual specificity of the case. Lastly, the prosecution argued that the defendant writing "[y]ou getting picked up by the ambulance" is a factual resemblance because the victim was dead on the scene.[103] As paramedics are generally involved after a murder, this factual resemblance seems rather tenuous. Nonetheless, the court concluded that the lyrics "mirror[ed] the details of the murder."[104] The court even notes rap lyrics contain inherent prejudice and that lyrics of only general references glorifying violence should be excluded even if they pass the low relevance threshold.[105] There is a strong argument that these lyrics are general, but the court did not agree. It is troubling to know the court based its decision on a number of tenuous factual inferences, and we will never know how racial biases contributed to this outcome. This is the problem.

98. Montague v. State, 243 A.3d 546 (Md. 2020).
99. *Id.* at 553-54.
100. *Id.* at 552, 567.
101. *Id.* at 567.
102. *Id.*
103. *Montague*, 243 A.3d at 567.
104. *Id.* at 569.
105. *Id.* at 566.

b. State v. Skinner

Consider a case with the opposite outcome: *State v. Skinner*.[106] In this case, the court reversed and ordered a new trial for a defendant's attempted murder charges because the rap lyrics admitted in the lower court provided little probative value and were unfairly prejudicial.[107] The State had already provided evidence to establish intent and motive, and the court held that the defendant's lyrics had little probative value because using them to prove intent was duplicative as intent was not in dispute.[108]

The repetitive nature of the lyrics as evidence contributed to the court finding prejudice, but the court further found that the lyrics, although glorifying violence and death, tended to elicit the presumption that the defendant wrote the lyrics because he acted in accordance with them.[109] This ruling is positive for advocates on the side of the rappers, but it highlights a clear jurisdictional conflict. Whereas the *Montague* court admitted rap lyrics that had factual similarities to the crime, the *Skinner* court calls for the prosecution to "clarify or explain" the lyrics; even after the lyrics were redacted and the trial judge gave limiting instructions to the jury.[110] Moreover, the *Skinner* court announced a high standard for probative value where lyrics must either mention the specific name of an involved party or victim or describe the phenomena in the "exact manner" in which it occurred in the case.[111] By requiring rap lyrics to be clarified or explained with exact specificity, the court provided the defendant some justice, but in order for structural racial deficiencies to be addressed, the court must go further.

2. Undue Prejudice

While the *Skinner* court brought a positive outcome to that specific defendant, the court's failure to mention race and the connection of Black criminality to rap music does little to protect rappers. The court's opinion does not mention race or Black criminality, which is a color-blind approach courts take to appear neutral so as not to provide "special" protections to a particular race[112]—especially rappers. Failing to discuss how rap, and its violent criminal progeny, is inextricably tied

106. State v. Skinner, 95 A.3d 236 (N.J. 2014).
107. *Id.* at 253.
108. *Id.* at 251.
109. *Id.*
110. *Id.* at 251-53.
111. *Id.* at 252.
112. CEDRIC MERLIN POWELL, POST-RACIAL CONSTITUTIONALISM AND THE ROBERTS COURT: RHETORICAL NEUTRALITY AND THE PERPETUATION OF INEQUALITY 7 (Cambridge Univ. Press 2023).

to implicit biases against Black people appears neutral. However, this approach ignores structural inequality and that our society remains racialized.[113] This is the primary issue and is the central reason why rap lyrics are disproportionately used at trial.

Two examples highlight this dilemma. First, the court's analysis of undue prejudice properly focuses on the extreme risk that the defendant's lyrics glorifying violence and human suffering would be attributed to the defendant's actual propensity for crime.[114] However, without centralizing that analysis around the history of the racial criminalization of Black people, the court omits that race is a key factor that intensifies the prejudice. This is illustrated by New Jersey's Attorney General ("AG") in *Skinner*, who argued that "gangsta rap" being a million-dollar industry despite the glorification of violence makes rap lyrics less likely to "inflame the passions of a jury."[115] As an initial matter, the AG's use of "gangsta rap" readily reveals his preconceived racialized biases by associating an entire genre with gang activity emanating from their limited understanding of rap music. Even if this is put aside, without specificity as to what passions will be inflamed by violent lyrics, the AG skirts around the issue. The AG essentially argues that because rap generally deals with violent themes and the genre has achieved global popularity, a jury should be able to weigh it objectively. The AG overlooks that our society remains racialized, and some people may not be aware of their implicit biases against rap music and Black people. Similarly, the court's failure to explicitly call attention to racial stereotypes that may be "inflamed" by rap music and intensify undue prejudice ignores the reality of racism in American society.

While colorblind analyses of rap lyrics' prejudice on a defendant's propensity for crime fail to adequately address the inherent racial prejudice the genre carries, race-sensitive analyses may also be insufficient. Even if all judges could understand the historical context of rap lyrics posing a risk of invoking racial stereotypes, articulating it with consistency is a different matter. Currently, judges have the discretion to include information about implicit racial bias in their jury instructions; however, there would be no way of knowing if this in itself triggers racial biases. Additionally, a race-sensitive analysis of rap lyrics that attempts to capture their prejudicial effect presents issues of how to weigh immeasurable racial prejudice against the abstract references and metaphors commonly found in rap lyrics.

113. *Id.*
114. *Skinner*, 95 A.3d at 251.
115. *Id.* at 245.

Second, the ACLU submitted an amicus brief arguing that the defendant's rap lyrics are entitled to heightened protection under the First Amendment.[116] Surprisingly, there is no other mention of the First Amendment in the opinion. This decision by the court to avoid discussion of the constitutional implications is a conscious tactic to cast race as irrelevant and give the appearance that neutral principles guide the court's decision-making.[117] However, this approach ignores the history of systemic attempts by society to criminalize and censor rap.[118] In addition, as noted in the previous paragraph, the outright omission of race misses a key connection between race and what society deems valuable with regard to artistic expression. Outside the court, rap is heralded as one of the world's primary genres of music.[119] But inside the court, this love and appreciation for the genre seems to disappear. The court cannot control jurors potentially projecting their social expectations of Black criminality on a defendant once rap lyrics are admitted, so it does not address it. The result is that the court turns a blind eye to the real potential for race and the racialized criminalization of rap to impact the artistic value society attributes to a defendant's rap lyrics. Thus, by completely ignoring the question of whether the First Amendment protects rap lyrics, the court abdicated its responsibility to articulate how rap is used as a proxy for implicit racial attitudes that reify Black criminality narratives and potentially diminishes the artistic value society gives the genre inside the courtroom. By declining this opportunity, the court fails to legitimize rap as a genre that deserves the basic, let alone heightened, protections of the Constitution.

The theoretical implications of using rap lyrics at trial are also supported by empirical data. Research testing the negative biases and perceptions of rap emphasizes the tenuous value of rap lyrics as evidence. A 1996 study conducted by psychologist Carrie Fried found that white participants who read identical lyrics that were randomly labeled either folk, country, or rap judged the song more negatively when the genre was rap.[120] Additionally, when participants were shown an image of a singer rather than being told the genre, the study found that when the composer was Black, the lyrics were more offensive and potentially violent.[121] Some eighteen years later, these studies were replicated and the findings

116. *Id.* at 245.

117. *See* POWELL, *supra* note 112, at 7.

118. NIELSON & DENNIS, *supra* note 1, at 119.

119. Unchained Music Team, *Top Music Genres in Order: The Most Popular Genres Worldwide*, UNCHAINED MUSIC (Sept. 16, 2024) https://www.unchainedmusic.io/blog-posts/top-music-genres-in-order-the-most-popular-genres-worldwide.

120. Fried (1996), *supra* note 28, at 2135.

121. *Id.* at 2139-40.

were more of the same: when participants know that lyrics are rap they perceive them more negatively than lyrics labeled as country or heavy metal.[122] The point here is, as prosecutors treat defendant-authored rap lyrics as evidence, this research shows that there is a consequential risk that factfinders' implicit racial stereotypes shape their interpretations of the lyrics and attitudes toward the defendant. While this empirical data sheds much-needed light on this issue, its application is inherently limited when it comes to conclusions that can be drawn in the courtroom. However, even the risk of implicit racial biases raises major concerns as to whether the content or subject matter of rap may be viewed neutrally. To be clear, I am not asserting that all individuals hold negative or racist biases against Black people. However, because there is no clear way to control for the inherent risks of said biases infiltrating the courtroom, the utility of rap lyrics as evidence must be seriously questioned, as there is no clear way to test whether a rap artist at trial is allotted the full constitutional protection of their art that they are entitled to.

IV. First Amendment, Federal Rules of Evidence, and Chilling Speech

The performative nature of rap music and the presumption of truth driven by the rap industry's commodification of violence render the genre too complicated to be consistently and fairly evaluated under the current Federal Rules of Evidence ("FRE"). The First Amendment increases this complexity as there is no clear judicial standard for when the First Amendment applies to prevent lyrics that would be otherwise admissible. It is worth noting that the Rules of Evidence yielding to the Constitution for special circumstances is not new. For example, Due Process prevents defense counsel from questioning a victim of sexual assault about their prior sexual history and the Confrontation Clause grants criminal defendants the right to confront the witnesses against them. The insufficiency of the FRE in consistently evaluating lyrics while considering their artistic expression opens the door for the Constitution to fill in the gaps.

122. Fried (1996), *supra* note 28, at 2142 (finding that when "Bad Man's Blunder" by the Kingston Trio and "Cop Killer" by Body Count were identified as rap, respondents judged the lyrics as offensive, promoting violence, and were harmful to society); *see also* Fried (1999), *supra* note 28, at 716 (replicating the 1996 study, the scholars used the same songs and showed respondents an identical picture of a singer that was either Black or white and found that respondents reacted more negatively to the lyrics when prompted with a Black artist); Dunbar & Kurbrin, *supra* note 28, at 28 (replicating Fried's study and finding that respondents were more likely to assume the songwriter of rap lyrics is in a gang, that rap lyrics made respondents not primed with race more likely perceive a Black artist with bad character and criminal propensity, and that lyrics labeled as rap were more associated with crime and violence than identical lyrics labeled as country or heavy metal).

A. Dawson v. Delaware

Dawson[123] is a unique case that provides an instructive framework as to how courts may use the First Amendment to preempt the Federal Rules of Evidence. In *Dawson*, the Court reviewed the sentencing of a white man convicted of capital murder of a white victim during a burglary.[124] At sentencing, the trial court allowed evidence of defendant's membership in the Aryan Brotherhood to be admitted.[125] The prosecution agreed to not call its expert witnesses in return for the defense stipulating that (1) the Aryan Brotherhood is a racist prison gang that began in response to other gangs of racial minorities, and (2) the Aryan Brotherhood existed in Delaware's state prison where the defendant was housed.[126] The jury sentenced the defendant to death.[127] On appeal, the Delaware Supreme Court rejected the defendant's claim that evidence of his membership in the Aryan Brotherhood should have been excluded because "it was desirable for the jury to have as much information before it as possible. . . ."[128] The Delaware Supreme Court reasoned that the defendant's membership was relevant to his character and did not punish the defendant for expressing the views of the group he associated with.[129]

The Supreme Court overturned the state's high court, finding that neither the evidence of defendant's association nor the stipulations about the Aryan Brotherhood's racist nature had any bearing on the sentencing because the victim was white.[130] As a result, the majority found that the evidence of the defendant's membership "cannot be viewed as relevant 'bad' character evidence in its own right."[131] The Court reasoned that the evidence of Dawson's membership proved nothing more than the defendant's "abstract beliefs."[132] In his dissent, Justice Thomas implied that evidence was relevant as it tended to show the "future dangerousness" of the defendant and rebutted the defendant's good character proffer.[133]

Justice Thomas' dissent is the exact reason why we need a framework specifically designed to protect rapper's expression. It is extremely

123. Dawson v. Delaware, 503 U.S. 159 (1992).
124. *Id.* at 166.
125. *Id.* at 162.
126. *Id.* at 162.
127. *Id.* at 163.
128. *Id.*
129. *Id.*
130. *Id.* at 166.
131. *Id.* at 168.
132. *Id.* at 167.
133. *Id.* at 171 (Thomas, J., dissenting).

problematic to use a form of expression as evidence of a person's character, especially when put in the context of assigning guilt. The principal takeaway from *Dawson* is that expression should start with the presumption of being an "abstract belief," and even if it is relevant, should generally not be used as bad character evidence. While the general principles of *Dawson's* majority opinion could apply to lyrics, it is important to draw some distinctions. First, there were no lyrics analyzed in this case. So, if we replace Dawson with a rapper and the Aryan Brotherhood with a street gang, the question becomes: what function should the lyrics play, if any, in proving the rapper's association? In Dawson's original case, tattoos and testimony served as evidence of his involvement with the Aryan Brotherhood, but the Supreme Court declined to presume Dawson held anything more than abstract beliefs. This presumption looks arguably different in the context of admitting rap lyrics in evidence due to words being easily attributed to a speaker. Indeed, the facts and circumstances of a particular case will always matter. Nonetheless, the First Amendment must protect rap lyrics as merely abstract beliefs due to the Rules of Evidence being unequipped to prevent implicit racial attitudes from assuming that rap lyrics are credible evidence of bad character.

Another distinction is that the prosecutors sought to introduce Dawson's association with the Aryan Brotherhood at the sentencing phase. Rapper-defendants do not have this luxury as prosecutors seek to introduce this evidence the moment they get their hands on it and as soon as they can. For example, in Grammy-award-winning rapper Young Thug's case, the judge read portions of his lyrics during jury selection.[134] Courts should presume that rap lyrics are merely "abstract beliefs" from the indictment through sentencing.

Additionally, the Aryan Brotherhood is cast in a different light by society as opposed to rappers and gangs. The majority in *Dawson* found that his membership in the Aryan Brotherhood was not particularly relevant because the defendant and the victim were both white. In other words, the racist nature of his group had no bearing because race was not a factor. However, when a Black rapper-defendant is in the courtroom, race is an inevitable factor. As the Black race has been criminalized, unlike *Dawson*, the race of the victim is irrelevant when Blackness is generally viewed as dangerous and violent. As Justice Thomas noted in his dissent, "[j]urors do not leave their knowledge of the world behind

134. Marc Griffin, *Judge Reads Young Thug Lyrics In Court As RICO Case Gets Underway*, VIBE (Jan. 9, 2023, 11:54 AM), https://www.vibe.com/news/national/judge-young-thug-lyrics-court-evidence-1234725178/.

when they enter a courtroom . . . ."[135] We are not in a place in our society where we can be confident that a rapper-defendant's race does not impact the way their expression is viewed.

B. Bey-Cousin v. Powell

The court in *Bey-Cousin v. Powell*[136] established a framework that is a useful starting point to secure full First Amendment protection for rap lyrics. In *Bey-Cousin*, the plaintiff was a rapper who alleged that officers planted a firearm on him during an arrest and sued for malicious prosecution.[137] The court did not allow the defendant-officers to introduce the lyrics because, although the lyrics had some factual resemblance to Bey-Cousin's arrest, the defense did not demonstrate that Bey-Cousin was attempting to tell a factual story.[138] The court reached this decision because the analysis first recognized that "artists base their art on experience, they also embellish, change, or distort their experience for purposes of their craft."[139] This baseline understanding is important because it allowed the court to "start with a presumption that art is art, not a statement of fact."[140]

From there, the court placed a rebuttable presumption on the defense to "demonstrate that the art is the artist's attempt to tell a factual story."[141] As an evidentiary matter, creating this presumption makes sense because, as the court notes, there is not clear precedent that outlines when artistic expression is relevant.[142] The court views relevance in light of the FRE's purpose of conducting fair proceedings "to the end of ascertaining the truth and securing a just determination."[143] With this purpose in mind, the court found that it was not enough to show "that an artist wrote in the first person about events that resemble real life."[144] Rather, the proponent of admitting the lyrics must show that the artistic expression is a truthful narrative that is "necessarily autobiographical."[145] Additionally, the court mentioned that this is not a proper question for a jury because its task would be reduced to

135. *Dawson*, 503 U.S. at 171 (Thomas, J., dissenting).
136. Bey-Cousin v. Powell, 570 F. Supp .3d 251 (E.D. Pa. 2021).
137. *Id.* at 254.
138. *Id.* at 254-56.
139. *Id.* at 253.
140. *Id.* at 254.
141. *Id.*
142. *Id.* at 255.
143. FED. R. EVID. 102.
144. *Bey-Cousin*, 570 F. Supp. 3d at 256.
145. *Id.* at 255.

"decid[ing] where the line is between inspiration and narration."[146] The court based its holding on the following two policies: (1) lyrics that draw on real world experiences while embellishing in fiction do not aid in ascertaining the truth; and (2) "if artists or budding artists know that their expression might put them in legal jeopardy, they *might* put down their pens, pocket their paintbrushes, or bite their tongues."[147] Here we see the court point out that the use of rap at trial has the implication of chilling the speech of other rappers.

While this is a good starting approach, it does have limitations. First, the court explains why artistic expression must be presumed as not factual, but the problem is the inability to know that people make or are even capable of making that presumption. It is hard to even know whether people have the awareness to make such a presumption. Additionally, the court mentions in dicta that the presumption that rap is art could be rebutted by the inclusion of "factual detail that is not publicly available."[148] However, this raises questions about when exactly that presumption is rebutted. Leaving this open to application on the basis of facts and circumstances will lead to inequitable and inconsistent applications of this analysis. Finally, the mere risk that the lyrics might undermine the goal of encouraging free expression in all forms was enough justification for the court to exclude them.

1. Chilling Effect

The fact that the *Bey-Cousin* court recognized that the use of rap at trial risked imposing a chilling effect on the genre is critical to this discussion. A chilling effect occurs when "[p]rohibitions on speech *have the potential* to chill, or deter, speech outside their boundaries."[149] Just as the *Bey-Cousin* court excluded the lyrics due to the risk of undermining the First Amendment, the Supreme Court recognizes that there does not need to be actual chilling. Rather, the uncertainty, worry, or concern that leads to "self-censorship" of speech is enough to constitute chilling and First Amendment protections must intervene.[150] Prosecutors may counter the risk of chilling speech with evidence that the artist intended what they meant in their lyrics. However, the abstract and theatrical nature of rap lyrics makes it exceptionally difficult to garner the true intent of the artist.

146. *Id.* at 256.
147. *Id.* at 255 (emphasis added).
148. *Id.*
149. Counterman v. Colorado, 600 U.S. 66, 75 (2023) (emphasis added).
150. *Id.*

The fact that rap is arguably the most popular genre of music in the world may lead skeptics to the conclusion that the genre's success makes it difficult to be chilled. However, the chilling is already occurring. For example, the preeminent Chicago rapper Lil Durk began his song "AHHH HA" with the following lyrics: "[e]verything I say in this motherfucker all props ([t]his shit is not real) just in case the police listening, you know? (Haha)."[151] Durk then goes on to reference something that actually happened in real life: the killing of his friend, King Von, and he mentions getting a gun.[152] Imagine if all entertainers such as comedians, wrestlers, stunt actors, etc. were required to give a disclaimer before performing that what the audience is witnessing is not real. Durk doing so in his song is just one example of measures taken by rappers to self-censor due to very real concerns that his lyrics may be decontextualized and manipulated to incriminate him—exactly what the First Amendment was designed to protect.

Another example can be found in the way in which rap has evolved over time. When tracking the substance of rap lyrics over time, a shift in the style that lyrics are presented becomes evident. Consider the lyrics of the first rap song to ever go number one on Billboard's Hot 100: Vanilla Ice's 1990 hit, "Ice Ice Baby."[153] In his song, Vanilla Ice has one reference to criminal activity, but activity does not imply that he was the criminal. He writes "Shay with the gauge and Vanilla with a nine ready for the chumps on the wall . . . [g]unshots rang out like a bell I grabbed my nine, all I heard were shells."[154] Vanilla Ice is a good example of the storytelling style of rap that was popular at that time.[155] Another example can be found in Coolio's "Gangsta's Paradise" which went number one in 1995.[156] The song has very few explicit references to criminal activity other than "[b]ut I ain't never crossed a man that didn't deserve it . . . [y]ou better watch how you talkin' and where you walkin' [o]r you

151. LIL DURK, AHHH HA at 0:01 (Alamo Records 2022); *see also* Ken Partridge, *Lil Durk Goes on the Offensive on New Song "AHHH HA,"* GENIUS (Feb. 22, 2022), https://genius.com/a/lil-durk-goes-on-the-offensive-on-new-song-ahhh-ha.

152. *Id.* at 0:12 ("[d]on't respond to shit with Von (yeah, yeah, yeah) I'm like, fuck it, you tripping, go get your gun (let's get it, yeah, gun)").

153. Barnaby Lane, *Here is Every Single Rap Song to Ever Reach No. 1 on the Billboard Hot 100, from Vanilla Ice to Doja Cat*, BUSINESS INSIDER (Sept. 14, 2023, 8:28 AM), https://www.insider.com/every-no-1-rap-song-billboard-hot-100#rapstar-by-polo-g-2021-94.

154. VANILLA ICE, ICE ICE BABY at 1:50 (SBK Records 1990).

155. I define storytelling rap as lyrics that a stream of consciousness and/or sense of chronology. Ice Ice Baby is the perfect example of storytelling rap. Ironically, the way Vanilla Ice completes the story after he "heard the shells" resembles reality: the cops passed by the white rapper ("Police on the scene, you know what I mean they passed me up . . . .") and instead "confronted all the dope fiends." Other popular examples of storytelling rap would be the "Today Was a Good Day" by Ice Cube (1992) and The Fresh Prince of Bel-Air by DJ Jazzy Jeff and the Fresh Prince (1992).

156. Lane, *supra* note 153.

and your homies might be lined in chalk . . . [a]s they croak, I see myself in the pistol smoke."[157] In general, the popular songs in the early years of rap consisted of very clear lyrics with elements of storytelling. The references to violence were limited and the lyrics were not too abstract.

The style of lyrics from today's rappers starkly contrasts their predecessors. One of the biggest differences is the genre's shift to mumble rap. "Mumble rap" is a style of rapping that prides itself on its lack of structure and being difficult to understand.[158] While who started mumble rap is not widely agreed on, and there are some examples from earlier eras that were not formally recognized as mumble rap, it is generally accepted that mumble rap moved into the forefront of mainstream popularity around 2016.[159] One of the best representations of mumble rap can be found in the Migos's 2017 number one hit "Bad and Boujee" featuring Lil Uzi Vert.[160] The song is riddled with abstract lyrics and esoteric references to criminal activity such as "Fuckin' on your bitch, she a thot, thot cookin' up dope in the crockpot"; "We got thirties and hundred-rounds too"; "Draco bad and boujee I'm always hangin' with shooters"; and "I hop out with all of the drugs and the good luck," to name a few.[161] A more recent example is found in Drake's "Way 2 Sexy" featuring Young Thug and Future, which went number one in 2021.[162] The song features lyrics like "Young niggas always ready to murk somethin', call them some smokers"; "Did a 360 windmill when I left the scene"; and "I pray to the chopper under my pillow, tooth fairy."[163]

These examples provide a high-level glimpse of how rap has had to adapt over time to acquiesce to societal pressures, including the risk of their lyrics being used at trial. While there are plenty more examples that can potentially make this evolution clearer, there is no scholarship that has taken on this endeavor. This lack of scholarly attention is connected to the performative dimensions of rap music and the presumption of truth that rap carries. As discussed above, rappers create artificial rap personas, and individuals who presume rap as factual may be evoking racist ideologies of Black criminality. To put it plainly, individuals who presume rappers are violent thugs are also more likely to conclude that rappers are not smart enough to craft lyrics that toe the line between fact and fiction. Additionally, the rap industry has an

157. Coolio, Gangsta's Paradise at 0:37 (Tommy Boy Music 1995).

158. Kathy Iandoli, *The Rise of 'Mumble Rap': Did Lyricism Take a Hit in 2016?*, Billboard (Dec. 21, 2016), https://www.billboard.com/music/rb-hip-hop/rise-of-mumble-rap-lyricism-2016-7625631/.

159. *Id.*

160. Lane, *supra* note 153.

161. *See generally* Migos, Bad and Boujee (Quality Control Music 2017).

162. Lane, *supra* note 153.

163. *See generally* Drake, Way 2 Sexy (OVO Sound 2021).

interest in remaining profitable and may take measures to steer rappers in a direction that will maintain the authenticity that sells, while also keeping their artists out of prison. When considering these factors, one can begin to understand how the unpredictable use of lyrics in court has chilled artists in the genre by forcing them to try to protect themselves by including disclaimers at the beginning of songs and rapping in an abstract, disjointed style.

This abstract style is the antithesis of the storytelling style of rap that was popular at the genre's inception. Interestingly, if showing that an artist intends to tell a story is a requirement to overcoming the protections of the First Amendment, thus allowing lyrics to be used at trial as it were in *Bey-Cousin*, then the rap of today should receive more protections. Nevertheless, as the genre has moved its storytelling style to the periphery for a more disjointed and esoteric style, rap lyrics continue to be used as evidence in court. Grammy award-winning rapper, Future, stated in an interview, "[w]hen I freestyle I know there are bits you don't really understand, but that's what you like it for—that's what it's all about to me, that's art."[164] Future's quote shows that some artists are conscious and deliberate in the way they present their lyrics. At the same time, the way lyrics are packaged may also depend on if an artist has people who help them write lyrics without being credited. This complexity culminates into an immeasurable risk of chilling rappers throughout the industry, which is already taking place. Thus, to ensure rap lyrics get full First Amendment protection and to avoid the chilling effect, stronger rules must be in place—i.e., a complete ban of rap lyrics at trial subject to exceptions.

V. SOLUTIONS

An outright ban on admitting rap lyrics at trial, subject to exceptions, has to be where we start. An outright ban overcomes implicit biases, nullifies presumptions of truth, and recognizes the systemic racism that has brought us to this point. The ban also sends a message to society that rap is entitled the same protections and dignity afforded to other forms of expression. Additionally, removing racial neutrality from the issue of rap lyrics' admissibility places race in the center of the dialogue. We cannot eradicate racism if we are afraid to talk about it.

164. *The Evolution: What is Mumble Rap?*, MN2S (May 15, 2020), https://mn2s.com/news/features/mumble-rap/#:~:text=Where%20did%20Mumble%20Rap%20Come,is%20spreading%20across%20the%20world.

A. Rule 403 of the Federal Rules of Evidence

Literature describing how rap is presumed to be truthful because it is viewed under a racially biased lens is also supported by empirical evidence showing that people tend to associate rap with Black people.[165] Scholars have identified that FRE 403 allows the judge to use their discretion to exclude the lyrics as unfairly prejudicial in light of the relationship between rap and implicit bias.[166] Specifically, admitting rap lyrics against Black defendants is inherently prejudicial because rap is "inextricably linked to Black culture."[167] The argument is that judges should use their wide-ranging discretion to deem rap lyrics as unfairly prejudicial due to the risk that the lyrics will trigger implicit biases and that "juries will misuse it to impart bad character on the defendant."[168] Additionally, scholars argue that the complexities of rap music make it difficult to determine the probative value of the lyrics due to rap lyrics often being seen as "literal admissions of guilt."[169] The probative value is also problematic when considering the fact that courts admitted rap lyrics for jurors to consider in almost 80% of cases examined from 2006 to 2013.[170]

The idea behind the 403 solution is the acknowledgment that rap lyrics create a risk of "double stereotypes" against rappers and people of color, and this should prompt the court to weigh against admitting the lyrics.[171] While this step could lead to temporary progress in protecting the artistic freedom of rappers, it operates under the assumption that judges do not hold their own anti-Black implicit biases. Additionally, this solution calls upon a power that judges already have available to them, yet it does nothing to address evidence that shows people are more likely to view rap lyrics more negatively than most other genres.[172] Without judges understanding that rap is a performance, it will always make more sense to them to admit rap lyrics because it is more comfortable to conclude that rap lyrics' probative value outweighs any undue

165. Fried, *supra* note 28.

166. Bryse K. Thornwell, *Lyrical Murderers: Why We Should Think Twice Before Admitting Rap Lyrics in Criminal Cases*, 52 Sw. L. Rev. 330, 338-39 (2023); *see also* Araibi, *supra* note 1, at 835-36; Hugh Toner IV, *Crazy Story: Admission of Guilt or Braggadocio? Defendant-Authored Drill Lyrics as Evidence in Trials*, 46 S. Ill. U. L.J. 377, 384-86 (2022); Dennis, *supra* note 41, at 4; Bennett, *supra* note 6, at 25.

167. Bennett, *supra* note 6, at 25.

168. Araibi, *supra* note 1, at 833.

169. *Id.*; Bennett, *supra* note 6, at 2.

170. Bennett, *supra* note 6, at 10.

171. Thornwell, *supra* note 166, at 399.

172. Adam Dunbar, *Rap Lyrics as Evidence: An Examination of Rap Music, Perceptions of Threat, and Juror Decision Making*, 39 (unpublished Ph.D. dissertation, University of California, Irvine) (2017), https://escholarship.org/content/qt2c6478vr/qt2c6478vr_noSplash_9599d1f0a61694f464534a9194c30a09.pdf (last visited Jan. 18, 2025).

prejudice to the rapper-defendant. However, these judges continue to contribute to the systemic oppression of Black people and the FRE cannot address this. Thus, providing rappers with full First Amendment protections will require taking these calls out of the judge's hands until absolutely necessary.

B. Statutory Efforts to Limit Use of Rap Lyrics at Trial

1. California

In 2022, California passed the Decriminalizing Artistic Expression Act ("Assembly Bill 2799" or "the Act") and became the first state to pass legislation that restricts the use of rap lyrics as evidence in court.[173] California's Assembly Bill 2799 amends the California's rules of evidence that are analogous to 403 in the Federal Rules of Evidence.[174] The Act states that it is intended to add a "sufficiently robust inquiry" to whether "creative expression . . . introduces bias or prejudice into the proceedings."[175] The new inquiry is designed to supplement the factors already considered when determining undue prejudice and includes the following additions for the court to consider when evaluating creative expression:

> (1) [That] the probative value of [creative] expression for its literal truth . . . is minimal unless that expression is created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available; and (2) undue prejudice includes, but is not limited to, the possibility that the trier of fact will, in violation of Section 1101, treat the expression as evidence of the defendant's propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.[176]

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173. Brenton Blanchet, *California Bill Limiting Use of Rap Lyrics in Criminal Trials Signed Into Law by Gov. Gavin Newsom*, PEOPLE (Oct. 2, 2022, 4:30 PM), https://people.com/music/california-bill-limiting-rap-lyrics-in-criminal-trials-signed-gov-gavin-newsom/.

174. FED. R. EVID. 403 states "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." CAL. EVID. CODE § 352 states "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

175. CAL. ASSEMB., AB 2799, 2021-2022 REG. SESS. (CAL. 2021).

176. *Id.*

The Act goes on to provide that once evidence is deemed relevant, the court is to consider the following along with any additional relevant evidence offered by either party:

> (1) Credible testimony on the genre of creative expression as to the social or cultural context, rules, conventions, and artistic techniques of the expression. (2) Experimental or social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings. (3) Evidence to rebut such research or testimony.[177]

The Act provides that the question of creative expression's admissibility "shall be heard in limine and determined by the court, outside the presence and hearing of the jury . . . ."[178] While the Act is worth celebrating and has support from defense attorneys and prosecutors, its limitations still highlight the need for a federal ban. First, the Act defines "creative expression" as "the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements, or symbols, including, but not limited to, music, dance, performance art, visual art, poetry, literature, film, and other such objects or media."[179] This is yet another example of racially neutral policies seeking to solve issues where race is at the heart of the problem.

It is worth noting that the California legislature includes that the Act intends to "recognize that the use of rap lyrics and other creative expression as circumstantial evidence of motive or intent is not a sufficient justification to overcome substantial evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice."[180] However, defendants still bear a heavy burden to produce *substantial* evidence. Moreover, the judge will continue to make these calls, which raises the question of how consistently this will be applied. For the same reasons that FRE 403 is ineffective, judges who may have racial biases and predispositions towards rap are still going to be making these calls. Lastly, if analyzing rap lyrics for prejudice was not difficult enough, the Act makes this inquiry even more difficult by adding more complex and multi-layered factors for judges to consider. This statute, while offering some noble provisions, increases the likelihood that rap lyrics will be part of a secondary trial that distracts from and delays adjudicating the merits of the case.

177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*

2. Federal RAP Act

In July 2022, Georgia Congressman Hank Johnson and New York Congressman Jamaal Bowman introduced the "Restoring Artistic Protection" Act ("RAP Act").[181] While the bill did not make it out of the House, the Congressmen re-introduced the bill in April of 2023.[182] The bill proposes to add a Rule 416 to the Federal Rules of Evidence titled "limitation on admissibility of defendant's creative or artistic expression."[183] The first provision offers that "evidence of a defendant's creative or artistic expression, whether original or derivative, is not admissible against such defendant" subject to exceptions.[184] Subsection (b) lays out the exceptions which provides the following:

> A court may admit evidence described in subsection (a) if the Government, in a hearing conducted outside the hearing of the jury, proves clear and convincing evidence – (1)(A) if the expression is original, that defendant intended a literal meaning, rather than figurative or fictional meaning; or (B) if the expression is derivative, that the defendant intended to adopt the literal meaning of the expression as the defendant's own thought or statement; (2)(A) in a criminal case, that the creative expression refers to the specific facts of the crime alleged; or (B) in a civil case, that the creative expression refers to the specific facts alleged in the complaint; (3) that the expression is relevant to an issue of fact that is disputed; and (4) that the expression has distinct probative value not provided by other admissible evidence.[185]

The language of the RAP Act provides very positive protections for rap lyrics, such as legislation providing for a presumption that the lyrics would be inadmissible. There is no doubt that this would be effective in protecting the most egregious use of rap lyrics at trial. Additionally, although the bill is named the "RAP" Act, the legislation could be more specific in its stated intent pertaining to rap as California did in its legislation. Both pieces of legislation offer "colorblind" policies, but they both trade features to counterbalance this. California does a better job stating its intent, and the federal law provides better protections. The RAP Act's protections also go a step further than California's in that it

181. Shirley Halperin & Ethan Shanfeld, *RAP Act Introduced in Congress Would Bar the Use of Lyrics as Evidence in Court Proceedings*, VARIETY (July 27, 2022, 4:09 PM), https://variety.com/2022/music/news/rap-lyrics-crimimal-evidence-congress-bill-legislation-1235327683/.

182. Press Release, Congressman Hank Johnson, Congressmen Johnson, Bowman Re-Introduce Bill to Protect Artists' 1st Amendment Rights (Apr. 28, 2023), https://hankjohnson.house.gov/media-center/press-releases/congressmen-johnson-bowman-re-introduce-bill-protect-artists-1st.

183. Restoring Artistic Protection (RAP) Act, H.R. 2952, 118th Cong. §2 (2023).

184. *Id.*

185. *Id.*

places the burden on the prosecution to show with clear and convincing evidence that rap lyrics are more than creative expression. Arguably, it could go further by requiring substantial evidence; strengthening the language, however, would doom the legislation's already unlikely passage. Putting aside the politics of the bill making its way through Capitol Hill, if passed, the bill's effectiveness would be largely dictated by the way in which state courts apply the law. Consider what is happening in Georgia with its extreme RICO laws.[186] Because the RICO laws in Georgia allow for evidence that would otherwise not stand against individuals,[187] the RAP Act would likely not be much help in that context. Nonetheless, the RAP Act is a positive gem of hope to get rappers their full protections, but the question remains if it will ever pass.

C. How the Outright Ban Works

The RAP Act is generally a good place to start and, as with any outright ban, there must be exceptions. Rap lyrics should be explicitly named in legislation and excluded unless they contain a clear fact match. The lyrics should still be presumed to be artistic expression at the outset by prosecutors. The prosecutors will have the burden to prove that the lyrics have exact similarity to the alleged crime with clear specificity (exact name, date, time, clothing, weapon, etc.). In the instances where a defendant alters a single fact or name, the prosecutor should be required to raise this argument specifically and provide evidence to support it. To overcome the artistic expression presumption, the prosecution must offer substantial evidence rather than abstract factual generalities that the lyrics were intended to be factual beyond a reasonable doubt. Also, this exception should really be limited to *malum in se* (murder, rape, robbery) crimes. Rap lyrics should never be used as proof of association with a gang as there is far too much evidence that may be used to justify infringing on a defendant's constitutional rights and risk chilling speech.

186. Georgia's Racketeer Influenced and Corrupt Organizations Act ("RICO") is known for defining racketeering more broadly than federal statutes by not requiring pecuniary profits, and the District Attorney may introduce evidence that would not stand on its own for individual crimes. *See* Tamar Hallerman, *What to Know About Georgia's RICO Law*, Atlanta Journal-Constitution, https://www.ajc.com/politics/what-to-know-about-georgias-rico-law/3Y2PBKLHWFDMLKYFEURTHLBVZY/ (last updated Sept. 6, 2023).

187. Ga. Code Ann. § 16-14-3 (2023); see also Dalia Perez, *Atlanta Rapper Young Thug pleads guilty to some charges in YSL RICO trial. Explaining the RICO Act.*, 11 Alive News (Oct. 31, 2024), https://www.11alive.com/article/news/crime/what-is-rico-charge-explained/85-7e468441-effd-4735-b14d-981a80938d27 (explaining that Georgia's RICO law "only requires the state to prove that some group of people is committing a pattern of other crimes").

In his article, *The Extremes of Rap on Trial: An Analysis of the Movement to Ban Rap Lyrics as Evidence*, Michael Conklin argues that an all-out ban on using rap at trial is too extreme.[188] Specifically, Conklin argues that focusing primarily on race and rap music undercuts the conclusion that rap on trial is largely about racial discrimination because white artists and other music genres are also viewed negatively.[189] In light of this, Conklin argues, a complete ban on rap at trial would provide "special protections" to Black artists that would not be afforded to all artists.[190] Additionally, Conklin highlights the difficulties in "defining 'rap lyrics, videos, or promotional materials' would likely prove insurmountable."[191]

As a preliminary matter, this argument is the metaphorical equivalent of someone responding to "Black Lives Matter" with "All Lives Matter." By raising the ancillary issues of white musicians and predominantly white genres, Conklin decentralizes race from the discourse. The effect is that the disproportionate use of rap lyrics against Black artists is co-opted by irrelevant non-Black interests. This misses the heart of the issue. The reason why a discussion of rap on trial must focus on race is because rap, along with our society, has been systematically racialized. Centralizing race in scholarship about rap on trial is necessary to understand that rap is just one of many vehicles used to sustain the violent and criminal narratives socially assigned to the Black identity.

Moreover, Conklin's argument that an all-out ban on rap lyrics at trial is problematic because "rap lyrics" are difficult to define actually highlights the need for the ban. This argument presents a clear misunderstanding of race and how the social construction of race is sustained by the imaginations of white audiences. Defining the boundaries of rap is one complexity of the genre, however, the inability to do so should not be detrimental to the effort to ban rap from trial. For example, Conklin argues that a complete ban would apply to hybrid genres such as "rap metal" and would lead to the absurd outcome of a rapper and a country musician's collaboration being admissible.[192] Aside from not including any citation to support the plausibility of this hypothetical, this concern is merely speculative because the disproportionate use of rap at trial indicates that artists' lyrics are offered more protections when they deviate from rap.

In addition, it is important to remember that being a "rapper" is equally about how the artist portrays themselves *and* about how society characterizes them. The difficulty of defining the boundaries of

188. Michael Conklin, *The Extremes of Rap on Trial: An Analysis of the Movement to Ban Rap Lyrics as Evidence*, 95 INDIANA L.J. 50, 50 (2020).
189. *Id.* at 52, 56.
190. *Id.* at 60.
191. *Id.* (citation omitted).
192. *Id.*

rap, as opposed to say country or metal, is actually a point that makes banning rap from trial a more viable solution. While we can accept that rap is a very complex genre, scholars are not arguing that country and heavy metal are not well-defined genres. That is because they are. There is some rap that is universally recognized but there are indeed some close calls, and our current structures of laws are ill-equipped to address these nuances. Moreover, without a complete ban, there is no control for society's implicit racial biases against rappers. Thus, raising hybrid genres is a color-blind consideration that is distracting and irrelevant because the inquiry in court will come down to whether the lyrics are assumed to be biographical due to them coming from a rapper.

Conklin also confuses the double standard that hovers over rap music where rappers are said to "keep it real" while also wanting the lyrics to be considered fictional in the courtroom.[193] Conklin misunderstands the cognitive dimensions of observing performative expression and how critical race is to this discussion. When race is centralized it is readily apparent that rap is a quasi-journalistic exercise where Black people draw on reality to broadcast the effects of life under systemic oppression. When a rapper performs, they are, just like artists in any other genre, partially removing themselves from reality. The conundrum, then, is that, regardless of how far from the truth the lyrics may be, if a Black person said it and it relates to violence, the more likely society is to believe it. Moreover, attacking the performative authenticity of rap music simply blames the victim. The rap industry has made billions on this very "dilemma" that scholars highlight. The result is that rap artists who reach a certain level of fame are less likely than amateurs to have their lyrics used against them at trial.[194] Fear that the amateur rapper will have their career stifled due to their lyrics being used against them is a reputable concern.[195] However, to ensure that we allow the fullest protection for rap, such that amateurs' careers are not stifled, is to not let the lyrics come into court altogether.

The last exception to the outright ban would allow a defendant to introduce their rap lyrics as if they are introducing character evidence. However, the prosecutor does not get free access to use the lyrics once the defendant opens the door. They must be restricted to use only what the defense proffers. The justification for this is due to the general inability for rapper-defendants to advocate for their art without jeopardizing themselves. If the defendant introduces the lyrics as to show good character, the prosecutor has many other avenues of evidence they may

193. *Id.*

194. *Id.* at 63 (the author concedes this point in arguing that the difference in the presumption of truth for famous rappers versus amateur's lyrics is a paradox that weakens arguments for a complete ban).

195. *Id.*

use to rebut. They do not need to be lazy and just look for lyrics about violence or criminal activity.

For the ban to work effectively, there must be limitations on who exactly it applies to. For starters, this protection must be for *rappers*. That is, people that are crafting words as "rap" for the purposes of entertainment and hold themselves out as a rapper. Things that people write in journals, books, and iPhone notes should be treated as normal expression until it is published by a rapper, as rap, and for the purposes of entertaining. We have to implement an all-out ban on *rappers'* rap lyrics to protect not only the famous but also the amateur. This may seem drastic, but this is what our society has come to and what is necessary, at least to start. If this policy were implemented and we found that there was an alarming increase in rappers getting acquitted for crimes that they rap about, then maybe Congress can revisit. But this is where we are, so these desperate times call for desperate measures.

Conclusion

The title of this paper starts with "you *might* have to lie to kick it," inspired by the colloquial phrase, "you don't have to lie to kick it"—a phrase used to encourage people to be themselves, as they will be more readily accepted than when trying to be someone they are not. The title implies that rappers battle acceptance on two fronts: the acceptance of the rap community as someone with an authentic narrative, and acceptance in society as a valuable source of pure entertainment. In the grand scheme of things, given the general themes of violence in rap lyrics, I could only hope that one day everything written in rap lyrics will be lies. This would mean that our society has eradicated violence. Until then, rap music exists as deeply rooted in the African American and global African Diasporic tradition of expressing the lived experience of our subjugated and oppressed people. Using rap lyrics at trial to prove someone's guilt is just another avenue to oppress Black people, erase our narratives, and perpetuate systemic racial inequality. Something must be done, and it cannot be done using the same tools that designed this situation. In addition to policies that provide rap lyrics the protections they deserve, we must continue to find ways to use the law to force people to confront and reckon with racism. An all-out ban on rap lyrics, subject to limited exceptions, is the most effective start to this process. It may not be perfect, and it may be difficult, but mass consciousness-raising requires disrupting the status quo. Until we start the process of reimagining who we are as a society, we will never know what we can become.