

HOWARD
HUMAN & CIVIL RIGHTS
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LETTER FROM THE EDITOR-IN-CHIEF

Dear Readers:

It is with great pleasure that we bring you the inaugural issue of the *Howard Human & Civil Rights Law Review*. The *Howard Human & Civil Rights Law Review* is a student-run publication that aims to be on the forefront of both human and civil rights discussions in the legal community. We welcome articles submitted by both academics and practitioners. Also, the *Howard Human & Civil Rights Law Review* hosts our annual C. Clyde Ferguson Lecture, in dedication to one of our school's most beloved Deans and social engineering pioneers. Howard University School of Law continues to be an instrumental leader in Human and Civil Rights, and it is with great pleasure that we carry the mantle of being the school's new voice that focuses on these issues. It was important to our staff that the rich legacy of civil and human rights advocacy at this institution was reflected not only in the mission of the Law Review, but also in its name.

The editorial board and staff of the *Howard Human & Civil Rights Law Review* have been working hard to bring forth a volume that is not only timely, but that seeks to speak to the pertinent human and civil rights issues of today. Volume 1 will present five pieces as well as a foreword by Judge Gabrielle McDonald that speaks to these issues both domestically and abroad. Furthermore, these pieces will give readers a unique look at the ways in which the law can help shape the dialogue of social justice around the world.

In order to commemorate the inaugural issue of the *Howard Human & Civil Rights Law Review*, Judge Gabrielle Kirk McDonald will begin with a foreword that highlights the need for human & civil rights advocacy in the legal profession. In this foreword, she will reflect on her experiences as a proud alumna of the law school and discuss how the school's mission shaped the need for the *Howard Human & Civil Rights Law Review*. Next, Darin E.W. Johnson's essay, entitled *U.S. Civil Rights Leaders, Human Rights, and the Creation of the United Nations*, highlights the incredible impact that U.S. civil rights leaders had on shaping the United Nations human rights framework. Harold A. McDougall's article, entitled *Class Contradictions in the Civil Rights Movement: The Politics of Respectability, Disrespect, and Self-Respect*, explores class tensions that have bedeviled the civil rights movement since its very beginning and the impact that these longstanding tensions

have on the movement today. The concluding article by Christopher J. Roederer, entitled *Remedies for Regulatory Takings (Constructive Expropriations), Deprivations, Expropriations or Custodianship in South Africa and the U.S.A.*, analyzes the contrasts between the U.S. and South Africa's property rights regimes with a focus on how the regimes' regulatory takings push the envelope of the takings doctrine too far.

In addition to the excellent Articles and Essays produced for the inaugural issue, we are proud to present two student Notes. First, one of our distinguished HCR alumna, Maleaha A. Brown, authors *The Unfair Choice: A Call for Reasonable Accommodations for Pregnant Workers*. This note focuses on workplace policies that give rise to pregnancy discrimination, the response domestically and internationally to these issues, and the pervasive impact that lack of accommodations specifically have on women of color. Finally, one of our Senior Editors, Brooke Y. Oki's Note, *Corporate Duty: Incentivizing Pharmaceutical Companies to Protect Human Rights in Their Foreign Clinical Trials through Public Opinion and Internal Codes of Conduct*, examines how current regulatory schemes are inadequately structured to protect human rights in testing nations, and proposes better measures to support and protect the human rights of clinical test subjects. On behalf of the *Howard Human & Civil Rights Law Review*, we invite you to fully engage the discourse as you read the articles, thinking critically about the ideas presented, and challenging their underlying assumptions.

As you can see, we have an excellent collection of legal scholarship in this issue. We extend our deepest appreciation to the Howard University School of Law faculty: Dean Danielle Holley-Walker, Dean Lisa Crooms-Robinson, Professor Olivia Farrar, Professor Darin Johnson, Professor W. Sherman Rogers, Mrs. Jacqueline Young, and the rest of the Howard University School of Law community. We also extend our profound appreciation to our predecessors, *The Human Rights & Globalization Law Review* and the *Social Justice Scroll*. The work of these previous publications provided the foundation for our current mission and we are grateful to the previous members and editorial boards for their contributions. As outgoing Editor-in-Chief I would be remiss to not highlight how hard all members of the *Howard Human & Civil Rights Law Review* have worked to produce Volume 1 of the *Howard Human & Civil Rights Law Review*. We have had a tremendously productive, enjoyable year and I am extremely proud to have served on this editorial board.

To our readers, we appreciate your continued support and hope that you find that this issue fulfills our obligation to publish timely, relevant pieces that make a meaningful contribution to the ongoing legal conversations across the world.

JOSHUA C. ALLEN
Editor-in-Chief
Volume 1, 2016–2017

FOREWORD

*Gabrielle Kirk McDonald**

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INTRODUCTION

Howard Law School has a tradition of recognizing the nexus between human rights law and civil rights law and using both to achieve racial and social justice. In the 1930s, Howard Law professors developed the first course in civil rights at any law school in the United States, and included international human rights law, as well as civil rights law. Professors sought to develop strategies, borrowing from both areas of the law, to overturn the separate-but-equal doctrine of the Supreme Court decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), that segregated African Americans in all facets of life in the United States.¹ Lawyers trained at Howard Law then devised and implemented the campaign that led to invalidating state-mandated racial segregation in public education, and ultimately forming the basis for an end to Jim Crow laws throughout this nation.

I enrolled at Howard Law School in 1963, to receive the best training available to become a civil rights lawyer, yet I ended my career in 2013, as an international judge. I came to understand that, at its core, international human rights law, is different than civil rights law mainly

* J.D., Howard University School of Law, 1966; NAACP Legal Defense & Educational Fund, Inc.; Federal District Judge, Southern District of Texas; Judge and President, International Criminal Tribunal for the former Yugoslavia; Arbitrator, Iran-United States Claims Tribunal. The author expresses her deep appreciation for initial research assistance provided by Rachel Ostchega and the competent guidance and editorial assistance provided by Stacy F. McDonald.

¹ This course was instituted in 1937 by James Nabrit, who later became president of the university. Elwood Chisolm, 11 HOW. L.J. 535, 537 (1965). The course sought to do three things: discover the parameters of the existing law on civil rights of blacks; develop techniques for raising constitutional questions to those limitations of civil rights; and determine which of those limitations required legislation to remove. J. CLAY SMITH JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944, 51 (1999).

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in that it is about bringing justice to a wider community, and the “social engineering” I learned at Howard embraces that purpose.

Three eminent African American lawyers, who were professors at Howard Law epitomize the intersection of human rights law and civil rights law. Charles Hamilton Houston, C. Clyde Ferguson, and Goler Teal Butcher remained steadfast to the Howard Law mission of obtaining rights of citizenship for African Americans. Yet, they saw racial injustice as an international issue, as well, as a part of the larger ongoing struggle for human rights and freedom that was not limited to African Americans in the United States. Houston used the U.S. courts to seek an interpretation of the Constitution to invalidate segregation laws. Ferguson used the United Nations system to promote the goals of the U.S. civil rights movement and to develop human rights protections. In congressional and federal agency hearings, and federal courts, Butcher challenged U.S. government policies on the economic development of Africa and its policies on apartheid in South Africa, asserting that they violated international human rights law. Yet, she also saw a link between international and domestic racism. Although their strategies may have been different, they were united by the same purpose of achieving racial and social justice. Their experiences, and their influence on mine, provide context for the emergence of the *Howard Human & Civil Rights Law Review*.

My career, as an example of the intersection of civil rights law and human rights law, was influenced by the achievements of these professors. It was the training at Howard that took me to the NAACP Legal Defense and Educational Fund, Inc. in New York City (“Legal Defense Fund,” “LDF,” or “Fund”). That experience, in turn, gave me the courage to practice civil rights law in Houston, Texas with my then-husband, Mark T. McDonald. This practice brought me to the attention of Senator Lloyd Bentsen and then President Jimmy Carter who appointed me to the United States District for the Southern District of Texas in 1979; and that judicial experience handling a large docket of federal criminal cases led to my nomination by the United States and the election by the United Nations to serve as a judge in the International Criminal Tribunal for the former Yugoslavia (“ICTY”), where I would later be elected its president by my fellow judges. Finally, I was selected by the U.S. State Department to serve as an Arbitrator-Judge in the Iran-United States Claims Tribunal because of my background with the ICTY. Each advance I have made was built upon knowledge I gained in the prior position, and the thread that runs through the tapestry of my

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career is that the law is not an end unto itself, rather it is to be used as both a sword and a shield. A sword to challenge the oppression of the less fortunate, and a shield to protect them from the tyranny of unjust power.²

African Americans need to tell our stories, and tell them again, not only to record what we did so as to assure it will be part of the larger history of Americans, but also to offer proof of what is possible by a people once characterized by Justice Taney in the dreaded Dred Scott opinion of the U.S. Supreme Court in 1856, as a “subordinate and inferior class of beings who . . . had no rights which the white man is bound to respect.”³ Our stories offer proof that he was wrong then and is wrong now. I offer a portion of the life’s work of Charles Hamilton Houston, C. Clyde Ferguson and Goler Teal Butcher as it relates to the Howard Law tradition of using the law as a force, with the hope that others will see some of themselves in their lives, as I have, and with the hope that this will inspire them to work for social change in their own way.

CHARLES HAMILTON HOUSTON
(SEPTEMBER 23, 1895 – APRIL 22, 1950)

I was introduced to Howard University School of Law at a conference held at the New School for Social Research in New York City for the commemoration of the 100th anniversary of the Emancipation Proclamation. Several professors from Howard Law were there. The litigation to desegregate schools in the South was among the topics discussed.⁴ The more I heard about Howard Law, the more I wanted to be a part of that world. With this sense of urgency, I quickly applied and was accepted. I looked forward to attending such an esteemed historically black law school.

When I arrived at Howard in 1963, I found a culture ready-made for a civil rights career. The foundation had been laid decades before by Charles Hamilton Houston, an African American graduate of Harvard Law School who joined the faculty of Howard Law in 1924 and became

² “If our people are to fight their way up out of bondage we must arm them with the sword and the shield . . .” Mary McLeod Bethune, *Clarifying Our Vision with the Facts*, 23 J. NEGRO HIST., Jan. 23, 1938, at 2, 10.

³ *Scott v. Sandford*, 60 U.S. 393, 404-05, 407 (1856).

⁴ Many years before when I was a high school student in Teaneck, New Jersey, I had seen on the news black students who braved jeering crowds trying to prevent them from entering Little Rock High School. During high school, I felt isolated, for while the doors were open to me by law, I was one of only two black students in a class of over 300. During college, I again found myself in the minority because, as I recall, there were not more than a dozen black students enrolled at the downtown campus of Hunter College.

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its Vice-Dean in 1929.⁵ In the eleven years he remained at Howard, Dean Houston transformed what had been a part-time, night law school,⁶ into a full-time, three-year school, accredited by the American Bar Association in 1931, that became known as the “West Point of civil rights.”⁷

Dean Houston was a scholar, a Phi Beta Kappa graduate of Amherst College, and the first African American member of the *Harvard Law Review*. Dean Houston was a tough task master who accepted no complaints about the great demands placed on students. He “proposed a program that would demonstrate Howard Law’s societal significance and establish its excellence in education”⁸ and vowed that Howard Law graduates would not be “mediocre,” but rather, “not only good, but superior.”⁹ Dean Houston gathered highly skilled professors who shared his vision.

What was unique, both when I arrived and perhaps today, is the role graduates were expected to assume in our nation. Of course, they were taught to be capable lawyers in the traditional way, but the emphasis was to train them on the “methodology hidden in the jurisprudence so that Howard University law graduates could render service to ‘the race as an interpreter’ of the law and thereby help to gain [African Americans] their full citizenship by whatever legal means necessary.”¹⁰

As Dean Houston put it, Howard lawyers were to be “highly skilled, perceptive, sensitive lawyer[s], who understood the Constitution of the United States” and that “discrimination, injustice, and the denial of full citizenship rights and opportunities on the basis of race and background of slavery could be challenged within the context of the Constitution if it were creatively, innovatively interpreted and

⁵ Vice-Dean Houston refused to accept the official rank and title of Dean though he was doing the work of one, preferring that the funds be used to hire the best qualified professors and to offer them competitive salaries. GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 64, 70, 79 (1983).

⁶ Despite being a part-time program, Howard Law had, by the 1920s, graduated over 700 men and women, black and white, and trained more than three-fourths of the nearly 950 black lawyers practicing in America. *Id.* at 64.

⁷ JACK GREENBERG, *CRUSADERS IN THE COURT: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 5 (1994); MCNEIL, *supra* note 5, at 75.

⁸ MCNEIL, *supra* note 5, at 70. Houston’s goal was to infuse Howard with the sense of scholarship he gained from his years at Harvard and to create a law school that would set it apart from the seven “white” law schools in Washington, D.C. *Id.*

⁹ *Id.* at 82, 83.

¹⁰ SMITH, *supra* note 1, at 50.

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used.”¹¹ As he famously proclaimed: “A lawyer’s either a social engineer or he’s [or she’s] a parasite on society.”¹²

Jack Greenberg, who followed Thurgood Marshall as Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., describes Houston thusly: “Charles Hamilton Houston [was] a towering intellectual; a law [D]ean on a magnificent scale, one who almost single-handedly changed the education, and so the expectations, of America’s black law students”¹³

Decades after the days of Charles Hamilton Houston, the law school curriculum I found in 1963 continued to be just as rigorous. I do not think I realized it then, but our professors were exacting because they wanted to prepare us for entry into a profession dominated by whites and a society still plagued with racial discrimination. They knew the road would be tough. Many of our professors were veterans of the litigation campaign that Houston waged while at the NAACP.¹⁴ The others were certainly his spiritual descendants, for they were equally demanding. The classes were formal: the men wore ties; professors insisted on regular class attendance and flawless preparation; detailed briefing was expected because “canned briefs” were not acceptable; and sloppiness in case presentations was met by the well-known refrain that “it’s better to be presumed stupid, then to open your mouth and remove all doubt.” While we learned the black letter law, we were also taught how to creatively interpret it. Moreover, the professors sought to prepare us to challenge the status quo and the laws and the practices that limited the opportunities of African Americans. There was no room for the thin-skinned amidst such rigor. I took to the library only to reappear for classes, the Ms. Howard Law School ceremony, and my duties as the Secretary of the Student Bar Association. My commitment paid off: I made my parents, grandparents, and friends proud by serving as the Notes Editor of the Law Journal, graduating first in my class, and receiving many American Jurisprudence awards for receiving the top grade in courses. Throughout all of these demands, my time at Howard Law completed my civil rights “coming of age” period. I left well-prepared to challenge the racial limitations of the times in any court of law.

Charles Hamilton Houston resigned from the law school in 1935 to become Special Counsel to the NAACP to design and launch a

¹¹ MCNEIL, *supra* note 5, at 84-85.

¹² *Id.* at 84.

¹³ GREENBERG, *supra* note 7, at 4.

¹⁴ As I recall, the professors included Julian Dugas, Herbert O. Reid, James Washington, and Elwood Chisholm.

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comprehensive legal strategy and campaign to end racial segregation.¹⁵ This campaign was the outgrowth of a study that had been commissioned by the NAACP to determine the state of the law in regards to blacks' civil rights and for the preparation of a plan for a legal challenge against the "separate-but-equal" doctrine.¹⁶ This became known as the "Margold Plan," named after Nathan Margold, the Harvard constitutional lawyer who developed it. This plan called for a direct attack on all public education at all levels.¹⁷ Disagreeing with Margold's strategy, tactics, and philosophy, Houston preferred to attack the educational system gradually, after establishing a series of precedents in cases challenging racial discrimination in graduate and professional schools.¹⁸ Houston prevailed and was selected to lead the campaign.¹⁹ His plan also called for a grass-roots component; one "for and with black people . . . to arouse and strengthen the will of the local communities to demand and fight for their rights; and . . . to work out model procedures through actual tests in court which can be used by local communities in similar cases brought by them on their own initiative and resources."²⁰ Houston regularly wrote articles to inform local blacks of the struggle and even made a film exposing racial discrimination in the rural schools of South Carolina.²¹

Houston argued and won *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), the first of these professional and graduate cases that established the precedent for *Brown* in the Supreme Court.²² The Supreme Court ruled that states had an obligation under the equal protection clause of the Fourteenth Amendment to "furnish . . . within its borders facilities for [the] legal education [of blacks,] substantially equal to those which the State there afforded for persons of the white race"²³ As with many civil rights rulings, states were slow to comply. I was told by some of my black classmates that their tuition was

¹⁵ MCNEIL, *supra* note 5, at 116, 117, 133-35; GREENBERG, *supra* note 7, at 6.

¹⁶ MCNEIL, *supra* note 5, at 114.

¹⁷ *Id.*

¹⁸ *Id.* at 116, 138.

¹⁹ *Id.* at 115.

²⁰ *Id.* at 116, 134.

²¹ *Id.* at 139, 140.

²² The other cases argued by Thurgood Marshall are: *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); and *Sweatt v. Painter*, 339 U.S. 629 (1950).

²³ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938). Houston rehearsed the oral argument in *Gaines* at Howard Law, allowing students to critique him, just as he did for all of his arguments in the Supreme Court. And when I was a student at Howard, the Legal Defense Fund continued that practice.

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paid for by the state of their residency if they would attend a law school elsewhere.

Before his argument in *Gaines*, Houston had brought on his former student, Thurgood Marshall, as Assistant Special Counsel of the NAACP in October 1936 because he was unable to handle his growing responsibilities alone.²⁴ As the docket of cases grew, funds to support those cases were being depleted.²⁵ A decision was made to create a tax-exempt entity to support litigation, separate from the advocacy activities of the NAACP, to facilitate tax-exempt contributions.²⁶ In 1939, the NAACP Legal Defense and Educational Fund, Inc. was established.²⁷ Marshall was then made Co-Special Counsel.²⁸ Houston resigned as Special Counsel of the NAACP in September 1940.²⁹ He continued, however, to handle civil rights cases as a partner in his father's law offices in Washington, D.C., establishing important Supreme Court precedent in labor and housing discrimination cases.³⁰

One final point should be made about Houston's work. Howard Law's tradition of eliminating racial barriers to the enjoyment of equal rights and opportunities was never confined to the United States. Charles Hamilton Houston's priority was to invalidate state-mandated racial segregation that denied African Americans their rights of citizenship. Yet, he saw racism as an international issue as well. Stating his support of the petition filed by the National Negro Congress to the U.N.'s Economic and Social Council on behalf of African Americans seeking the assistance of the U.N. "in the struggle to eliminate political, economic, and social discrimination imposed on them in the United States of America," he wrote: "A national policy of the United States which permits disenfranchisement of colored people in the South is just as much an international issue as the question of free elections in Poland, or the denial of democratic rights in Franco Spain."³¹

He was also active in African affairs. He called on the NAACP to picket the Italian Embassy in protest of the war against Ethiopia, and he challenged the National Education Association to include in its manual a discussion of the realities of African colonization. "In the

²⁴ MCNEIL, *supra* note 5, at 145, 149.

²⁵ *Id.* at 151.

²⁶ *Id.* at 152.

²⁷ *Id.*

²⁸ *Id.*; See GREENBERG, *supra* note 7 (regarding the establishment of the LDF that has slightly different timelines).

²⁹ MCNEIL, *supra* note 5, at 155.

³⁰ *Id.* at 220. See generally *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Hurd v. Hodge*, 334 U.S. 24 (1948).

³¹ MCNEIL, *supra* note 5, at 197-98.

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1940s he condemned the use of black troops in Africa and the imperialist roles of European nations and the United States on the continent of Africa.³² Further, his concept of the larger struggle for human rights and freedom was not limited to African Americans here in the United States.³³ In this larger struggle, “he proposed a role of leadership for African American people . . . , a spiritual responsibility to lead . . . white United States brethren into the real fellowship of nations.”³⁴ Thus, Butcher’s work was anticipated, in a sense, by Houston, and her focus on Africa was well within the tradition of Howard.

Charles Hamilton Houston had been in poor health for years; he died on April 22, 1950, of heart failure at the age of 54. He left a note to be read after his death by his son, Charles Hamilton Houston, Jr., who would go on to become a lawyer: “Tell Bo [his son] I did not run out on him, but went down fighting that he might have better and broader opportunities than I had without prejudice or bias operating against him and in any fight some fall.”³⁵ At his funeral, Judge William H. Hastie, who had served as Dean of Howard Law and worked with Houston in the NAACP campaign, described Houston as the “Moses who guided us through the journey of second class citizenship.”³⁶

C. CLYDE FERGUSON JR. (NOVEMBER 4, 1924 – DECEMBER 21, 1983)

C. Clyde Ferguson, the second example of the Howard tradition, was my Dean at Howard Law. Like Charles Hamilton Houston, Ferguson was from a middle-class family. He was born in North Carolina, the son of a prominent minister.³⁷ He was barred from attending the University of Maryland because of his race, as Thurgood Marshall had been earlier from attending its law school, and entered Ohio State University where he graduated Phi Beta Kappa and earned a

³² *Id.* at 201.

³³ *Id.*

³⁴ MCNEIL, *supra* note 5, at 202.

³⁵ MCNEIL, *supra* note 5, at 212.

³⁶ Greenberg, *supra* note 7, at 3.

³⁷ See Clarence Mitchell, *In Memoriam: C. Clyde Ferguson, Jr., A Brilliant Career*, 97 HARV. L. REV. 1253, 1253 (1984) (stating that as a youth, he was inspired by black leaders of the movement for racial equality addressing the dire state of race relations in the United States as well as the ills of colonialism in Africa.).

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nomination for a Rhodes Scholarship.³⁸ He attended Harvard Law School and graduated cum laude in 1951.³⁹

Ferguson is known primarily as a professor and diplomat. But like Charles Hamilton Houston, he was deeply disheartened by the continuing effects of racism in the United States, and used the law to challenge it.⁴⁰ Unlike Houston, who looked to the courts to reform interpretations of the Constitution, Ferguson used a mix of civil rights law and international human rights law to promote equal rights. To some, he was considered “one of the best civil rights legal brains in the country.”⁴¹ To some, he was a major figure in “international affairs . . . profoundly committed to finding ways of securing human rights around the world.”⁴² Still to others, he was an “international and constitutional lawyer.”⁴³

C. Clyde Ferguson, the educator, became the first African American professor in the law school at Rutgers University in 1955, and while there instituted the first course in international human rights to be offered at any school in the nation.⁴⁴

He was Dean of Howard’s Law School from 1963 through 1969. What I remember about him is the intensity he showed as he passed through the corridors with a furrowed brow, and yet how quickly he softened upon greeting a passing student. He cared genuinely about us and wanted to know how we were doing. His prominence was well known, but he carried it lightly. I also remember how appreciative and relieved I was when, thanks to his fundraising skills, I received a scholarship that made my education certain at a time of financially uncertainty. I remember that, in 1965, as a member of the Howard Law Journal, we published a special issue for the major international human rights law symposium he organized.

Ferguson joined the faculty of Harvard Law School in 1976, where he was the first African American to teach at the law school; for

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ The discussion in this forward of Ferguson’s work with the Sub-Commission is drawn from research for the forthcoming book by H. Timothy Lovelace, a Professor of International Law at Indiana University Maurer School of Law. H. TIMOTHY LOVELACE, *THE WORLD IS ON OUR SIDE: THE U.S. AND THE U.N. RACE CONVENTION* (forthcoming) (manuscript on file with author).

⁴² James Vorenberg, *In Memoriam: C. Clyde Ferguson, Jr., A Few Words from a Colleague and Friend*, 97 HARV. L. REV. 1253, 1255 (1984).

⁴³ Henry J. Richardson III, *Tribute: African Americans And International Law: For Professor Goler Teal Butcher, With Appreciation*, 37 HOW. L.J. 217, 220 (1994).

⁴⁴ Owen Thomas, *Law School Students Learn First-Hand About Human Rights*, CHRISTIAN SCI. MONITOR, Oct. 29, 1987, at 19, <http://www.csmonitor.com/1987/1029/dhum.html>.

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many years, he was the only full-time minority professor.⁴⁵ He taught at Harvard until his death in 1983, at the age of 59. Ferguson authored five books and many law articles. An annual lecture series at Howard Law that boasts some of the foremost legal authorities in their fields was named after him, as was the C. Clyde Ferguson Award presented by the Association of American Law Schools. He was the first and only African American president of the American Society of International Law from 1978 until 1980.⁴⁶

In 1963, C. Clyde Ferguson, the diplomat, was selected to serve as the U.S. mission's special adviser to the General Assembly.⁴⁷ In 1969, he joined the U.S. Department of State as Special Coordinator for Relief to the Civilian Victims of the Biafran Civil War.⁴⁸ His work there won international acclaim, receiving decorations from several international organizations.⁴⁹ He later served as the United States Ambassador to Uganda in 1970 and as Deputy Assistant Secretary of State for African Affairs in 1973.⁵⁰ From 1973 to 1975, he was the United States representative to the United Nations Economic and Social Council, playing an important role in the defense of human rights in Chile.⁵¹

C. Clyde Ferguson had real life experience in civil rights law as well as international law. In 1962, he was appointed General Counsel of the U.S. Commission on Civil Rights, the first black chief legal officer of a federal agency and served as a board member of the NAACP Legal Defense and Educational Fund.⁵² In 1963, the State Department appointed Ferguson, referring to him as "one of the best civil rights brains in the country," as an alternate to Morris Abram, the U.S. member to the U.N Sub-Commission on the Prevention of Discrimination and Protection of Minorities ("Sub-Commission").⁵³ The International

⁴⁵ Francis A. Boyle, *With Compassion*, 97 HARV. L. REV. 1259, 1260 (1984); Roy L. Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome?*, 20 U.S.F. L. REV. 419, 419 (1986).

⁴⁶ Foreword: The C. Clyde Ferguson Lecture Series, 37 HOW. L.J. 135, 137 (1994). I served as the ASIL Honorary President from 2013 until 2015.

⁴⁷ See Lovelace, *supra* note 41.

⁴⁸ Glenn Fowler, *C. Clyde Ferguson is Dead: Professor and Ex-Diplomat*, N.Y. TIMES, Dec. 22, 1983, at B 12, <http://www.nytimes.com/1983/12/22/obituaries/c-clyde-ferguson-is-dead-professor-and-ex-diplomat.html>.

⁴⁹ See Fowler, *supra* note 48.

⁵⁰ Foreword, 37 HOW L. J. 135 (1994).

⁵¹ *Id.*

⁵² See Lovelace, *supra* note 41.

⁵³ See Lovelace, *supra* note 41. A fourteen-member body comprised of racial experts from across the world. The Sub-Commission was established to draft a Declaration that would become the International Convention on the Elimination of All Forms of Racial Discrimination. International Convention on the

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Convention on the Elimination of All Forms of Racial Discrimination (“Convention on Race”) is the principal international human rights treaty for the elimination of racial discrimination.⁵⁴ It was adopted by the General Assembly on December 21, 1965, entered into force on January 4, 1969, and was ratified by the United States on October 21, 1994.⁵⁵

It was Ferguson’s civil rights background that was particularly important to this appointment, and ironically, his race was valuable also because it added to the image of leadership in race relations that the State Department wanted to convey to the Sub-Commission members during the Cold War, as it sought to influence African countries emerging from colonialism.

The U.S. selected Morris Abram, a white civil rights lawyer from Georgia, who had close personal ties with and had represented Dr. Martin Luther King, Jr. to be its member on the Sub-Commission.⁵⁶ Ferguson was named as his alternate.⁵⁷ Abram and Ferguson were charged with developing the U.S. draft that was used as the basis of the Sub-Commission’s debates for the adoption of Declaration.⁵⁸ Ferguson’s responsibilities included negotiating with the working parties, assisting with the drafting of this international legislation, and serving as the surrogate for Abram, the U.S. member, in his absence.⁵⁹

Ferguson believed his work with the Sub-Commission was his “signal achievement”⁶⁰ and considered himself “one of the major fathers of the whole concept of affirmative action.”⁶¹ Further, Ferguson’s work on the Sub-Commission shows how he advanced aspirations of the U.S. civil rights community by including many of their goals in the provisions in the Sub-Commission draft.⁶²

Ferguson had long considered that the full elimination of racial discrimination required “positive” action, beyond “prohibitory” measures designed only to stop ongoing racial discrimination.⁶³ In 1957, he delivered a keynote address to the National Bar Association, an

Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 66 U.N.T.S. 195, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> [hereinafter Convention on Race].

⁵⁴ See Convention on Race, *supra* note 53.

⁵⁵ See Lovelace, *supra* note 41.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *Law Professor Turned Down Several Foreign Policy Posts*, HARV. CRIMSON, Feb. 7, 1977, <http://www.thecrimson.com/article/1977/2/7/law-professor-turned-down-several-foreign/>.

⁶² See Lovelace, *supra* note 41.

⁶³ *Id.*

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association of black lawyers formed at a time when blacks were denied membership in the American Bar Association. He urged the federal government to expand the concept of non-discrimination by providing blacks racial preferences in hiring.⁶⁴ As General Counsel of the U.S. Civil Rights Commission, he supported President Kennedy's Executive Order No. 10925, requiring federal contractors to pledge non-discrimination, as well as to "take affirmative action to ensure" equal opportunity.⁶⁵ He had written several articles in support of the shift in "emphasis in civil rights . . . from prohibitory negative measures such as prohibitions against acting out racially discriminatory attitudes, to positive measures requiring affirmative actions designed to assure full opportunity in the society we now know."⁶⁶ His views became the affirmative action language of Article II of the U.S. draft to the Sub-Commission authorizing states to "take special concrete measures in appropriate circumstances in order to secure adequate development or protection of individuals belonging to certain racial groups" that had endured past discrimination.⁶⁷ The final language adopted in the Convention on Race is in Article 2.

Abram and Ferguson proposed language for Article III of the U.S. draft to the Sub-Commission that embraced goals of the U.S. civil rights movement. This article required that States "end without delay, governmental and other public policies of racial segregation and especially policies of apartheid."⁶⁸ This provision was designed to avert the adverse consequences of the "with all deliberate speed" language in the *Brown* decision by the Supreme Court that resulted in interminable delays in compliance with desegregation orders.⁶⁹ Article IV of the draft proposed by Abram and Ferguson picked up the sit-in movement's efforts to desegregate public accommodations, requiring states to "take effective measures, including adoption of legislation . . . to assure equal access to any place or facility intended for use by the general public."⁷⁰ Discrimination in public accommodations was subsequently outlawed in the Civil Rights Act of 1964.⁷¹

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* (emphasis added).

⁶⁹ *Id.* (emphasis added).

⁷⁰ See Lovelace, *supra* note 41; see also Convention on Race, *supra* note 53, at art. 5.

⁷¹ Civil Rights Act of 1964, 42 U.S.C. § 2000a (2012).

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After he completed his work with the Sub-Commission, Dean Ferguson organized the Howard Law Symposium on the International Law of Human Rights (“Symposium”), the first time in sixteen years that a symposium on this subject had been held at an academic institution in the United States. Dr. A. Luini del Russo, from whom I took a course in international law, addressed the group present and noted the historic role of Howard Law in advancing the human rights of people of color:

[T]his Symposium was, therefore, organized and held at the School of Law of Howard University, the natural habitat of the law of Human Rights, where as early as 1936 there was introduced in the curriculum a course in the law of Civil Rights by Professor James M. Nabrit, Jr., now President of Howard University. The historic role of the School of Law in the advancement of the cause of Human Rights in the United States and in the betterment of minorities through law is well evidenced by its past and continuing record in the formulation of the American jurisprudence of Human Rights.⁷²

Elihu Lauterpacht, Aharon Rabinowicz, Egon Schwelb and other luminaries in the field of human rights presented papers.⁷³ Dean Ferguson’s paper was entitled “The Nature and Dimensions of Human Rights in the United States.”⁷⁴

In his paper, Ferguson recognized that blacks continued to be denied the very human rights he had worked to have inscribed in the Convention on Race. For example, the Convention on Race protected rights to vote, to fair housing, and to an unbiased administration of justice as fundamental freedoms in Articles 5(a) and (b); 5(c); and 5(e)(iii) that the U.S. ratified in 1994.⁷⁵ The Voting Rights Act⁷⁶ and the Fair Housing Act⁷⁷ were enacted by Congress after Ferguson delivered his paper. Ferguson writes:

⁷² See Dr. A. Luini de Russo, *Symposium on the International Law of Human Rights*, 11 HOW. L.J. 257, 258 (1965).

⁷³ *Id.* at 257.

⁷⁴ See C. Clyde Ferguson, *The Nature and Dimensions of Human Rights in the United States*, 11 HOW. L.J. 452, 452 (1965).

⁷⁵ See Convention on Race, *supra* note 53.

⁷⁶ Voting Rights Act of 1965, 52 U.S.C. § 10301 (2012).

⁷⁷ Civil Rights Act of 1968, 42 U.S.C. §§ 3601-19 (2012).

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There is a problem with human rights in the United States and the root cause of the problem are the vestiges of racism: the sense of consciousness of race . . . and the blind and uncomprehending hatred of differences [that have] continued for over 300 years as a ‘hang-over’ from the slave system.⁷⁸

Ferguson then proposes, urges really, that a strategy be adopted, like the one devised by Charles Hamilton Houston, to use the courts to close the gap between promises of equality in the U.S. Constitution and the reality of the inequality.⁷⁹ This time, the “third revolution,” as he refers to it, will require positive action by the government to actually implement these rights.⁸⁰ In Dean Ferguson’s words:

I must confess a great deal of pride in bringing to your attention the role of this particular Law School in creating in a sense the very revolution that we may have now. This school has created the alternative to the articulations of Booker T. Washington—working within the constitutional system, as we know it, a scheme was devised for real equality—and for that many of us are indebted to one of my predecessors, Charles Houston, who to a large extent was the architect of the scheme. He made it possible, within this constitutional system, to move the society, through the operation of law, to the place where full human rights are afforded to all citizens without regards to race. I think the key lies in that conception of Houston. The law itself may be one of the solutions to not only our domestic problems, but to the problems of assuring human rights on an international level.⁸¹

I took up Dean Ferguson’s challenge upon graduation, and I joined the Legal Defense Fund that had been founded by Howard Law’s Charles Hamilton Houston. I traveled the South, as a staff attorney, using the law, “social engineering” as I learned at Howard, to enforce newly

⁷⁸ Ferguson, *supra* note 74, at 453, 455-57.

⁷⁹ *Id.* at 456-57.

⁸⁰ *Id.* at 460.

⁸¹ *Id.* at 456-57.

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enacted congressional civil rights legislation designed to provide African Americans their human rights that had been denied them by the Jim Crow laws in much of the United States.

GOLER TEAL BUTCHER
(JULY 13, 1925 – JUNE 9, 1993)

Goler Teal Butcher was a lawyer, administrator, and professor of law. She was also an African American woman activist who, in the tradition of Howard Law, pushed through limitations of color and used both international human rights and civil rights law creatively and innovatively to challenge obstacles to racial, economic and social justice. She strategically challenged policy decisions by the government with the understanding that such decisions involve value choices and the input of African Americans in the determination of such values was critical.

Butcher graduated from Howard Law in 1957.⁸² She was a brilliant and competitive student, who became the first woman to serve as editor-in-chief of the Howard Law Journal.⁸³ After she received her LL.M. in international law from the University of Pennsylvania, she clerked for Judge William Hastie of the Third Circuit Court of Appeals and was the first Howard graduate and the first black woman to clerk on the federal circuit level.⁸⁴

Goler Teal Butcher had a prodigious career, first joining the Office of the Legal Adviser of the State Department in 1963.⁸⁵ She then served as Counsel to the House Subcommittee on African Affairs from 1971 through 1974.⁸⁶ She went into private practice and later served as the Assistant Administrator in the U.S. Agency for International Development (“USAID”) from 1977 through 1981.⁸⁷ During her time at the law school, she was also chairperson of the District of Columbia Review Board.⁸⁸

She was a member and active participant in many organizations concerned with international law, including: Amnesty International, the

⁸² J. Clay Smith, Jr., *Tribute: United States Foreign Policy and Goler Teal Butcher*, 37 HOW. L.J. 139, 146-47 (1994).

⁸³ *Id.*

⁸⁴ *Id.* at 147-48.

⁸⁵ *Id.* at 151-52.

⁸⁶ *Id.* at 152-53.

⁸⁷ See *id.* at 153, 160; see also J. Clay Smith, Jr., *Professor Goler Teal Butcher: A Core of the Nation's Civil Rights Specialists* (1992), http://dh.howard.edu/jcs_speeches/148.

⁸⁸ See Henry J. Richardson III, *Tribute: African Americans And International Law: For Professor Goler Teal Butcher, With Appreciation*, 37 HOW. L.J. 217, 223 (1994).

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United Nations Association, District of Columbia TransAfrica, Lawyer's Committee for Civil Rights Under the Law, and the International Human Rights Law Group.⁸⁹ She was a member of the American Society of International Law ("ASIL"), holding every office, except President, and served as its Honorary Vice-President for many years.⁹⁰ As evidence of her outstanding work within ASIL, it created a medal in her honor, awarded for excellence in international human rights law.⁹¹ Professor Henry J. Richardson III, her longtime friend and colleague in the South Africa apartheid movement, aptly has called her "the mother of all international lawyers of color in America."⁹²

It is difficult to categorize her life's work, for it was so broad, and her passion for justice was so strong in everything she did. That said, three areas are prominent: (1) The South Africa apartheid movement; (2) global hunger; and (3) teaching.

Butcher was committed to the struggle against apartheid in South Africa. She saw South Africa as a "pariah among nations . . . the only country which has inscribed racism into its system and established its entire governmental, political, economic, social and legal structure on discrimination on race and color."⁹³ She had extensive experience in African issues. She was the first black person to be employed with the Office of the Legal Adviser for the State Department, where she worked from 1963 until 1967.⁹⁴ While there, one of the two positions she held was with the Bureau of African Affairs.⁹⁵

From 1971 until 1974, she was Counsel to the House Foreign Affairs Subcommittee on Africa, chaired by Congressman Charles Diggs, an African American from Detroit, who was a strong and relentless advocate for improving relations with developing countries in Africa and who pushed to make aid to Africa a major part of American foreign policy.⁹⁶ She developed the strategic underpinnings for the challenge to U.S. executive authority that was averse to the interests of black people. As Professor Richardson has observed:

⁸⁹ See Madelyn Squire, *A Tribute to Goler Teal Butcher and her Legacy to Howard University Law Students*, 37 How. L. J. 231, 234 (1994).

⁹⁰ See Richardson, *supra* note 88, at 224.

⁹¹ *Id.* at n.14. I humbly accepted this award as its second recipient in 1998.

⁹² Richardson, *supra* note 88, at 229.

⁹³ Goler Teal Butcher, *The Immediacy of International Law for Howard University Students*, 31 How. L.J. 435, 441-42 (1988).

⁹⁴ Smith, *supra* note 82, at 156.

⁹⁵ *Id.*

⁹⁶ *Id.* at 152; Irvin Molotsky, *Charles Diggs, 75, Congressman Censured Over Kickbacks*, N.Y. TIMES, Aug. 26, 1998, <http://www.nytimes.com/1998/08/26/us/charles-diggs-75-congressman-censured-over-kickbacks.html>.

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As Counsel to the House Subcommittee on African Affairs, Butcher was a prominent member of the legal team . . . She helped blaze the trail for black leadership in U.S. foreign policy, particularly by helping to devise the legal theory and strategy by which Congressmen Diggs, Dellums, and Crockett, among others, would oppose executive authority when it acted in ways that undercut the interests of Africans, African Americans and other peoples of color in American foreign policy. Her theories helped lead federal courts as far as they then dared go in preventing U.S. executive action that threatened the Zimbabwean, Namibian, and South African revolutions. In doing so, in cases such as *Diggs v. Schultz*,⁹⁷ she helped establish invaluable precedents on issues relating to the treaty power, the doctrine of political questions, and the standing of petitioners to bring such cases.⁹⁸

In 1974, Butcher resigned from the House Subcommittee on African Affairs and joined a law firm in Washington, D.C.,⁹⁹ continuing her advocacy against apartheid. Butcher was a skillful advocate who frequently appeared before Congress to challenge executive and legislative policies.¹⁰⁰ She testified before the Senate Subcommittee on African Affairs and asked Congress to “take the lead to end what is essentially a cover-up of U.S. policy on southern Africa.”¹⁰¹ She asserted that while the U.S. publicly denounced the racist regime, the country supported the status quo in its private dealings.¹⁰² She also opposed the Department of State’s emphasis upon “minority rights” in South Africa¹⁰³ and a policy that contended that the only way to change what she saw as a “cauldron of racism” was through the white minority for they were there to stay.¹⁰⁴ She also presented testimony on South Africa before the American Bar Association, as chair of the ABA Subcommittee on South Africa of the Section of Individual Rights and

⁹⁷ *Diggs v. Schultz*, 411 U.S. 931 (1973).

⁹⁸ See Richardson, *supra* note 88, at 227; *Diggs v. Schultz*, 470 F.2d 461, 464 (1972); *Diggs v. Richardson*, 555 F.2d 848 (1976).

⁹⁹ Smith, *supra* note 82, at 153.

¹⁰⁰ *Id.* at 152.

¹⁰¹ *Id.* at 154.

¹⁰² *Id.*

¹⁰³ *Id.* at 158.

¹⁰⁴ *Id.* at 155.

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Responsibilities and as co-chair of the Subcommittee on South Africa of the Lawyers Committee for Civil Rights Under the Law.¹⁰⁵ As a member of the Board of Directors of the Lawyers' Committee for Civil Rights Under Law, she worked closely with its Southern Africa Project, acting as co-counsel for most of its lawsuits filed in U.S. courts.¹⁰⁶

In 1977, she was appointed by President Jimmy Carter to serve as the Assistant Administrator of USAID with principal responsibility for Africa. She was the first black woman to hold this position and introduced new policies to involve women and minorities as contractors.¹⁰⁷ She remained in that position for the next four years, traveling often between Africa and Capitol Hill for numerous congressional hearings to fight for the Carter administration's development policies in Africa.¹⁰⁸ J. Clay Smith stated, "Her encyclopedic knowledge of the region and her mastery of detail won her the respect of many senators and congressmen, including men who opposed her proposals."¹⁰⁹

Butcher pushed relentlessly for economic assistance for Africa, asserting that "the African countries have been . . . the stepchildren of our foreign assistance program" and lagged behind the rest of countries in the developing world.¹¹⁰ She believed that equitable assistance would hasten the achievement of majority rule in those countries, but also strategically framed requests for funding in terms of U.S. interests.¹¹¹ Development assistance by the U.S. would protect itself from outside influence by communist countries and would benefit economically from the massive deposits of minerals.¹¹²

Butcher was committed to the problem of global hunger. As to the nature and scope of hunger, she observed: "In this era of exploration, more people have died from hunger in the past two years (1983-1985) than were killed in World War I and World War II combined."¹¹³ While at USAID, she "sounded an alarm regarding the lack of food production in Africa and the potential for great hunger." A major prong of her last budget request at USAID was for "food, employment, and health

¹⁰⁵ Squire, *supra* note 89, at 234.

¹⁰⁶ Smith, *supra* note 82, at 153 n.62.

¹⁰⁷ *Id.* at 160.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 162.

¹¹¹ *Id.* at 167.

¹¹² *Id.*

¹¹³ Butcher, *supra* note 93, at 439.

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care.”¹¹⁴ The right to food as a human right, and conquering hunger throughout the world, would become a passion that Butcher would advance for the rest of her life.¹¹⁵

Butcher joined the faculty of Howard Law in 1981.¹¹⁶ In 1986, with the assistance of her loyal students, “the Butcherites,” she organized the World Food Day Conference.¹¹⁷ Experts from around the world gathered at Howard Law and Butcher argued that hunger could be eradicated despite its pervasiveness and complexities.¹¹⁸ She challenged international human rights law that differentiated between civil and political rights on the one hand and economic and social rights on the other:

A mother whose baby is dying of disease which he succumbed to because of debilitating diarrhea caused by massive malnutrition—and half of the babies in Africa died before they are one for just this reason—would have little comprehension of our insistence on civil and political rights almost to the exclusion of other rights. Surely it is the luxury of the well-endowed to put civil and political rights before the life sustaining right of food and thus fail to understand their interdependence.¹¹⁹

While at Howard Law, she taught International Law, International Human Rights, International Business Transactions, and Immigration Law.¹²⁰ She was also director of the law school’s Master in Comparative Jurisprudence program that C. Clyde Ferguson started.¹²¹

In 1988, she wrote an article entitled “The Immediacy of International Law for Howard University Students.”¹²² As the title suggests, it was designed to encourage Howard Law students to study international law because of the law school’s tradition of training its students—change agents in their community—“to address problems of the downtrodden and dispossessed toward the achievement of human rights for all human beings.”¹²³ She specifically addressed African

¹¹⁴ Smith, *supra* note 82, at 170.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 173.

¹¹⁷ *Id.* at 181.

¹¹⁸ *Id.*

¹¹⁹ See Goler Butcher, *The Relationship of Law to Hunger*, 30 *How. L.J.* 193, 203 (1987).

¹²⁰ Squire, *supra* note 89, at 231.

¹²¹ *Id.*

¹²² Butcher, *supra* note 93, at 438.

¹²³ *Id.* at 435, 452.

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American students who, as “the underdeveloped in a highly developed country, are likely to be sensitive to the interrelationship of improving the lot of underprivileged people throughout the world and of advancing the welfare of underprivileged people at home and in the United States.”¹²⁴

Yet the article is more than an encouragement to study international law. It is a virtual exposition on the development of international human rights law that she considered had revolutionized civil rights law by developing “constitutional imperatives” to the Fourteenth Amendment that outlawed racism. Butcher believed that the problem of racism “permeates all levels of human endeavor, national and international.”¹²⁵ Informed by the emergence of international human rights law and considering her career of challenging apartheid, she urged the law students to use human rights law to challenge discrimination in the United States, declaring that “human rights [are] civil rights writ large on the international screen.”¹²⁶ In doing so, she was at the forefront of understanding the nexus between civil rights and human rights.¹²⁷ She brought her expertise in international human rights law to the District of Columbia Review Board, as proof positive of the relationship between civil rights and human rights.¹²⁸

Howard Professor Madelyn Squire described Professor Butcher in a tribute in her honor in 1992: “There is no better way to conclude this tribute than to focus on the optimism Butcher taught her students to retain in the face of monumental challenges which lay ahead of them.”¹²⁹ Recognizing the paucity of their ranks and numbers, Butcher directed her students to recall the “‘Ode’ of Arthur Shaunessey: ‘Three men with a dream at pleasure can turn the whole world round.’”¹³⁰ Butcher, herself, added the blueprint on how to accomplish this—through “nuisance persistence.”¹³¹ As a final tribute, The Goler Teal Butcher International Moot Court Team is named in her honor. Goler Teal Butcher died on June 9, 1993 of a heart attack at age 67.

I never knew Goler Teal Butcher. I do not know why we never met. I was often on Howard’s main campus, as a member of Howard’s

¹²⁴ *Id.* at 438.

¹²⁵ *Id.* at 446.

¹²⁶ *Id.* at 444, 451.

¹²⁷ See Hope Lewis, *Transactional Dimensions of Race in America*, 72 ALBANY L. REV. 999 (2009).

¹²⁸ Richardson, *supra* note 88, at 223.

¹²⁹ Squire, *supra* note 89, at 231.

¹³⁰ Goler Teal Butcher, *Call to Action*, 30, HOW. L. J. 489, 490 (1987).

¹³¹ *Id.* at 489; Squire, *supra* note 89, at 234.

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Board of Trustees, for twenty-three years, and many of those years she was at the law school just a few miles away. Knowing her colleagues and friends, learning how she labored in a soil that produced so much benefit for so many people of color and others in need, and reflecting on the careers I have been fortunate to have had in civil rights and human rights, however, makes me want to believe that we were sisters in the law. And I thank her for the spiritual inspiration she gave to me.

CONCLUSION

What sets Howard University School of Law apart from other law schools is that the study of law is not an end unto itself, rather it is to be used as an instrument to challenge racial discrimination and bring about social change. Charles Hamilton Houston, C. Clyde Ferguson and Goler Teal Butcher epitomize this tradition. Their work provides context for the emergence of the *Howard Human & Civil Rights Law Review*, for they used both human rights law and civil rights law to accomplish these goals.

Charles Hamilton Houston laid the foundation for this Howard tradition. His pronouncement that: “A lawyer’s either a social engineer or he’s [or she’s] a parasite on society”¹³² is more than a catchy phrase; it is a vision that has become the soul of the law school. Close to a century later, students and alumni know this admonition by heart. Howard Law professors who graduated from different law schools adopt it as their own.

Houston practiced what he taught. The NAACP campaign he devised to challenge the separate-but-equal doctrine in public education worked. Thirty years later, when I was at the NAACP Legal Defense and Educational Fund, we patterned our Title VII employment enforcement litigation campaign after Houston’s. His strategy continues to be a viable way to challenge entrenched discrimination. Yet, he saw racial injustice as an international issue and part of a larger struggle for human rights that was not limited to African Americans.

Although he was not a graduate of Howard Law, C. Clyde Ferguson was its Dean from 1963 until 1969 and much of his work reflects this tradition of the law school. I was a student there when he arrived. While with the United Nations, he drafted proposals for the protection and expansion of international human rights; proposals which, in some instances, mirrored the goals of the civil rights

¹³² MCNEIL, *supra* note 5, at 84-85.

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movement. In other words, Ferguson used international human rights law in a way that expanded the scope of civil rights law. This is an illustration of the creative, innovative use of the law to achieve social change; an example of Charles Hamilton Houston's "social engineering."

Goler Teal Butcher, a 1957 graduate of Howard Law, was committed to the struggle against apartheid in South Africa and the elimination of global hunger; and she pushed relentlessly and strategically for economic assistance for Africa. As a professor at Howard Law, she urged her students to study international law, explaining that the school's tradition of training its students to represent the less fortunate made them especially good candidates for this study.¹³³ She saw international law as a valuable tool in the fight against racial discrimination in the United States because advances in international human rights law held the power to expand the constitutional protections for African Americans; she declared "human rights [are] civil rights writ large on the international screen."¹³⁴ I came to understand the truth of this pronouncement while judging war criminals at the International Criminal Tribunal for the former Yugoslavia.

I went to Howard Law to receive the best training to become a civil rights lawyer. And I left as a "social engineer." In between a civil rights career and serving as a judge and president of the International Criminal Tribunal for the former Yugoslavia, I served as a federal judge. I was committed to providing a fair trial to all litigants who appeared before me, many of whom had learned from experience that such treatment was doubtful. I also taught law, passing on to my students what I learned at Howard Law—that the law was not an end unto itself, but rather should be used to make our country live up to its promises of equality. Whether a tax lawyer or an entertainment lawyer, the Howard Law tradition is about being sensitive to invidious discrimination and speaking up when it is seen.

When I graduated in 1966, as an award for giving the best appellate argument, I received a copy of *The Petitioners: The Story of the Supreme Court of the United States and the Negro* by Loren Miller ("The Petitioners") which chronicles decisions by the U.S. Supreme Court regarding the rights of African Americans from 1789 through

¹³³ Butcher, *supra* note 93, at 435-36.

¹³⁴ *Id.* at 451.

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1965.¹³⁵ It shows how the responses from the Supreme Court with respect to those rights were “uneven.”¹³⁶ For a period of time, African Americans were met with “rebuff and evasion,”¹³⁷ and in the mid-1930s the Court “began to return to the original meaning of the Civil War Amendments.”¹³⁸ Since the publication of *The Petitioners*, I believe the Supreme Court’s responses to issues disproportionately affecting African Americans has continued to be “uneven,” more recently moving towards a “rebuff,” as Loren Miller put it.

The Voting Rights Act of 1965¹³⁹ was vigorously enforced for a number of years and resulted in the removal of many barriers used historically to deny the vote to African Americans.¹⁴⁰ However, the recent decision of the Supreme Court finding Section 4 (of the Act) to be unconstitutional, threatens the viability of the entire Act.¹⁴¹ The Fair Housing Act of 1968¹⁴² made broad pronouncements about the right to be free from racial discrimination in housing, yet we continue to live in racially segregated communities. This is the mission that the Legal Defense Fund took on.

Even before this retrenchment, C. Clyde Ferguson believed that African Americans were denied equal rights to vote, to fair housing, and in the administration of justice. In the paper he presented at the Howard Symposium on International Human Rights Law,¹⁴³ he proposed the development of a well-considered scheme, like the campaign designed by Charles Hamilton Houston, to close the gap between promises of equality in the U.S. Constitution and the Universal Declaration of Human Rights, and the reality of ever-present racism that denied opportunities to African Americans because of their race or color.¹⁴⁴

The *Howard Human & Civil Rights Law Review* has a role to play in this never-ending uneven landscape. All law school scholarly publications offer expositions on legal issues. They are a valuable source for intellectual research. I am certain that this law review will be that. Yet, this law review should also broadcast the tradition of Howard Law I have discussed herein, as a challenge to this retrenchment. This law review is naturally situated to serve as a fountainhead for the

¹³⁵ LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* (1967).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Voting Rights Act of 1965, 42 U.S.C. § 1973 (1965).

¹⁴⁰ *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

¹⁴¹ *Id.*

¹⁴² Fair Housing Act of 1968, 42 U.S.C.A. §§ 3601-31 (1968).

¹⁴³ Ferguson, *supra* note 74, at 455-57.

¹⁴⁴ *Id.* at 456-57.

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publication of papers by scholars, but also papers from activists and strategists, who assess the status of civil rights and human rights of people of color and other marginalized groups and suggest plans that are designed to reform the practices and policies that limit their rights. This would be using law as a “social engineer” to restore the promise of inclusion and equality of opportunity and treatment.

Julian R. Dugas, a Howard Law graduate, member of Houston’s campaign, and a professor when I was a student at the law school and for many years thereafter, reminded Howard students of their obligation to reach for this tradition:

You are here to train to become leaders of tomorrow, not followers, creators of cutting edge initiatives designed to overcome the myriad problems faced daily by African Americans especially, and others similarly situated, as they struggle to enjoy the full rights of citizenship . . . When you begin this task, look beyond the terms of the past to new and innovative definitions and ways to combat the problems of today, not yesterday . . . You will hear much about the legacy of these giants and that of Charles Houston, William Hastie, and many others who were also giants in the law, a group too numerous to mention, who lived and toiled in the Valley of Howard’s law school to make these decisions possible. They should stand out to you as exemplars. They were the visionaries and leaders of the past. You are the visionaries and hope for the future . . . I remind you that every generation needs regeneration in order to move forward and that you are the new generation, expected to lead the charge for the next 25 or 50 years or as long as it takes. Do not stray from the responsibility of eliminating from our midst any and all racial, social, economic, or political restraints that now exist in this great nation. This must be done . . . if you are to be true to the legacy and mission of this law school.¹⁴⁵

The *Howard Human & Civil Rights Law Review* should take up this challenge.

¹⁴⁵ Julian R. Dugas, *What It Means To Be a Howard Law Student*, Keynote Oration to the Class of 2006, <http://law.howard.edu/content/what-it-means-be-howard-law-student>.

ESSAY

HOW U.S. CIVIL RIGHTS LEADERS' HUMAN RIGHTS AGENDA SHAPED THE UNITED NATIONS

*Darin E. W. Johnson**

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INTRODUCTION

This essay comprises remarks that I delivered as part of the Howard University School of Law C. Clyde Ferguson Lecture on March 31, 2016. The C. Clyde Ferguson lecture honors C. Clyde Ferguson, former Dean of Howard Law School, U.S. Ambassador to Uganda, U.S. Ambassador-at-Large and Coordinator for civilian relief in the Nigerian civil war, and U.S. Representative to the United Nations Economic and Social Council. Given C. Clyde Ferguson's distinguished history as both a U.S. civil rights lawyer and a human rights advocate within the United Nations, the lecture was a fitting forum to speak about the foundational role that U.S. civil rights leaders played in shaping the United Nations human rights system.

REMARKS

My remarks today focus on the central role that U.S. civil rights leaders played in creating the United Nations human rights system, which C. Clyde Ferguson helped to shape in later years. The decision to support a human rights agenda for the United Nations was a strategic

* Assistant Professor, Howard University School of Law. I would like to thank my research assistant, Stevaughn Bush, for his research assistance with this essay. I would also like to thank Khaair Morrison, Claudia Williams, and the editors of the *Howard Human and Civil Rights Law Review* for their editorial assistance with this piece. My essay and prior remarks draw upon the outstanding research that Emory University Professor Carol Anderson has conducted on the historic relationship between U.S. civil rights leaders and the United Nations. Her work, *Eyes Off the Prize*, *infra* note 2, inspired my interest in this subject.

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decision made by U.S. civil rights leaders in the 1940s. The NAACP, the National Negro Congress, and a constellation of domestic U.S. civil rights groups had been engaged in the fight against Jim Crow segregation, lynching, and the widespread mistreatment of African Americans for much of the early twentieth century. Their efforts had focused primarily on reform within the United States, appealing to U.S. courts, legislatures, governors and the White House for reform. U.S. civil rights leaders realized that the creation of the United Nations at the end of World War II presented a new opportunity to highlight at the international level the plight of African Americans. The atrocities of the Holocaust as well as the racism, Anti-Semitism, and aggression of Nazi Germany provided a global example of the horrors of state oppression and denial of human rights.

As governments negotiated the scope of the United Nations' power, African-American civil rights leaders soon learned that the U.S. government's default positions opposing the robust enforcement of human rights against states starkly reflected U.S. domestic politics, which too frequently accommodated Southern segregationist politicians' antipathy towards African-Americans, and the U.S. government's desire to hide its "race problem" and to project an untarnished image of America to the world. These dual pressures – Southern accommodation and American image – forced civil rights leaders to work behind the scenes with Administration officials, including President Truman and former First Lady Eleanor Roosevelt, to persuade the U.S. government to support an aggressive U.N. role in human rights protection. When necessary, civil rights leaders pressured the U.S. administration externally by taking their case to the public.

UNITED NATIONS CHARTER

The United States hosted the San Francisco Conference where the United Nations Charter was negotiated by fifty states.¹ NAACP Executive Secretary Walter White was particularly concerned that the post-war Truman Administration might waver in ensuring that the United Nations Charter specifically referenced racial equality. Senator Tom Connally, a Southern arch-segregationist, chaired the Senate Foreign Relations Committee and in Walter White's estimation more than sixty percent of the Senate and House Committees that shaped domestic legislation and foreign affairs following World War II, were

¹ 1945: *The San Francisco Conference*, UNITED NATIONS, <http://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html> (last visited Mar. 8, 2017).

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Southern segregationists.² White declared that “the plain bitter truth is that thinking and action on the problem of race in our own country are determined almost completely by the most fascist-minded element in the deepest and darkest South. This element – which practiced Nazism long before Hitler was born – almost completely dominates our federal government.”³ Civil rights leaders were frustrated by this group’s ability to filibuster legislation important to civil rights leaders, including anti-lynching legislation. They were also frustrated by the Roosevelt and Truman Administrations’ capitulations to this bloc.⁴ White feared that the Truman administration would strip the U.N. Charter of a racial equality and human rights mandate in order to get it through the segregationist bloc in the Senate.⁵ For this reason, White and the NAACP leadership felt that it was critical for the views of the NAACP to be represented in the negotiation of the UN Charter.⁶

The NAACP appointed its co-founder, the eminent W.E.B. Du Bois, to represent the organization at the 1945 San Francisco Conference.⁷ W.E.B. Du Bois began his work by reviewing the proposals for the structure of the United Nations that had been decided by the United States, United Kingdom, China, and the Soviet Union at the Dumbarton Oaks conference in 1944.⁸ The topic of human rights was the subject of significant debate between these world powers at the conference. While the Republic of China pushed for strong language on human rights, justice and racial equality, the Soviet Union, United Kingdom, and the United States were less enthusiastic.⁹ Each country had concerns about creating an international organization with a mandate to interfere with or discuss their internal affairs – the United Kingdom opposed explicit references to colonialism and the United States opposed explicit references to racial inequality.¹⁰ However, the United States and the United Kingdom also understood that it would be a farce to create a post-war international organization that did not acknowledge the importance of human rights and racial equality, particularly in light of Nazi Germany’s racist ideology and systemic

² CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS 31 (2003).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 32.

⁷ *Id.* at 34-35.

⁸ *Id.* at 38.

⁹ *Id.* at 37.

¹⁰ PAUL LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS, 166-70 (1998) (quoting Andrei Gromkyo).

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human rights violations.¹¹ The Dumbarton Oaks participants settled on a compromise proposal in the United Nations Charter, where the United Nations would “promote respect for human rights and fundamental freedoms” but have no power to enforce them.¹² The Dumbarton Oaks participants also included a provision which stated that the United Nations would not involve itself in the internal affairs of member states that did not involve a direct threat to world peace.¹³

W.E.B Du Bois was disappointed with the Dumbarton Oaks Proposals. With respect to human rights, the proposal gave the United Nations no power to investigate human rights abuses and complaints regarding human rights could only be raised by member states themselves, not colonies or subjugated peoples.¹⁴ He felt that the proposals disenfranchised the 750 million people living in the colonized world and Du Bois described the Dumbarton Oaks proposals as “intolerable, dangerous” and irreconcilable with “any philosophy of democracy.”¹⁵ Du Bois lobbied the State Department to name the NAACP as a consultant to the American delegation at the San Francisco Conference. The State Department hoped to build strong public support for the United Nations Charter, to ensure its passage in the Senate, so the Department supported the naming of the NAACP and forty-one other organizations as official consultants to the U.S. delegation.¹⁶ The State Department expected the forty-two consultant organizations to serve as cheerleaders for the United Nations Charter in a public relations campaign and to leave the heavy negotiation to the government.¹⁷ Secretary of State Edward Stettinius described his job in San Francisco as getting the Dumbarton Oaks proposals through with few changes, and not to take up subjects like the “Negro question.”¹⁸

The NAACP selected Du Bois, Walter White, and Mary McLeod Bethune, who was a vice chair of the NAACP board, to represent the organization in San Francisco. The leaders of the NAACP had a different agenda for the conference than Stettinius. They specifically wanted the issue of racial equality to be addressed at the Conference and ultimately within the United Nations Charter. Du Bois and the NAACP had surveyed 151 African American organizations for

¹¹ ANDERSON, *supra* note 2, at 37.

¹² *Id.* at 36.

¹³ LAUREN, *supra* note 10, at 169.

¹⁴ ANDERSON, *supra* note 2, at 38.

¹⁵ *Id.*

¹⁶ *Id.* at 40.

¹⁷ *Id.*

¹⁸ *Id.* at 41.

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their views and those organizations had urged the NAACP to push for an end to racial discrimination and the abolition of colonialism.¹⁹

The U.S. delegation, headed by Secretary of State Stettinius, included the segregationist Texas Senator and Foreign Relations Committee Chair Tom Connally. He was one of the most vocal members of the US delegation.²⁰ At the first meeting of delegation members and consultants, Stettinius announced that the American delegation had decided neither to introduce nor support a human rights declaration as an integral part of the United Nations Charter.²¹ In several blunt exchanges with the Secretary of State, the NAACP representatives, and other NGO consultants, including the American Bar Association and the American Jewish Committee, argued that millions had died in World War II for human rights and self-determination, and that after Nazi aggression and brutality, the conference was obligated to take up the issue of human rights and colonialism.²² They took the firm position that the NAACP and other consultant organizations would not support a United Nations Charter that did not establish a human rights commission nor address colonialism.²³ Unfortunately, the segregationist Senator Connally was an influential member of the delegation because he would be responsible for helping to steer the United Nations Charter through Senate Foreign Relations Committee hearings and Senate debate over ratification.²⁴ Connally's opposition to an affirmative U.S. position on human rights and racial equality, and the United Kingdom and France's opposition to a United Nations mandate on de-colonization were significant obstacles to the NAACP and consulting organization demands for the United States to take a forward-leaning position on racial equality and human rights.

The U.S. delegation's tepid position on human rights led to concerted and increasingly public criticism by the NAACP and consulting organizations, such as the American Bar Association and the American Jewish Committee.²⁵ As a result of the increased domestic pressure generated by the NAACP and allied organizations, Stettinius relented and the U.S. delegation agreed to their demands for the

¹⁹ Michael L. Krenn, *THE AFRICAN AMERICAN VOICE IN FOREIGN U.S. POLICY SINCE WORLD WAR II* 536 (1998).

²⁰ ANDERSON, *supra* note 2, at 41-42.

²¹ *Id.* at 42.

²² *Id.* at 41.

²³ *Id.* at 42.

²⁴ *Id.* at 45.

²⁵ Raymond M. Brown, *The Civil Rights Movement's Early Embrace of Human Rights*, 286 N.J. LAW. 54, 56 (2014).

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establishment of a UN commission on human rights and for references in the United Nations Charter to human rights.²⁶ In an attempt to accommodate both the civil rights organizations and Southern Democrats, John Foster Dulles (a member of the U.S. delegation and future Secretary of State) proposed that the United Nations Charter contain a provision guaranteeing “freedom from discrimination on account of race, language, religion, or sex” and another provision stating that “nothing in the Charter shall authorize intervention in matters that are essentially within the domestic jurisdiction of the state concerned.”²⁷ The U.S. and Soviet delegations embraced the compromise language but other negotiating states and U.S. consultant organizations were concerned.²⁸ While they had won the battle on securing a United Nations role on human rights, Du Bois, White and Bethune were concerned that under the domestic jurisdiction formulation the United Nations would be unable to prevent another Holocaust or address human rights abuses against African-Americans.²⁹

On the issue of de-colonization, Du Bois, White, NAACP official Roy Wilkins, and Ralph Bunche, the highest ranking African-American at the State Department and a staff expert on de-colonization to the U.S. delegation, pressed Secretary of State Stettinius to advocate for a U.S. position that insisted upon the independence of all colonized people as the aim of the United Nations.³⁰ The NAACP mounted a press campaign to pressure the U.S. administration to support a robust de-colonization proposal and White left San Francisco to lobby President Truman on a range of human rights proposals.³¹ Despite these efforts, the United States delegation continued to support the United Kingdom and other imperial powers’ preferred Trusteeship Council proposal that would only address three percent of colonized peoples.³² After the conference, Du Bois described the events in San Francisco as “a beginning, not an accomplishment” and noted that the United States would not take a “stand on race equality or for colonies” and instead “backed a contradictory statement on human rights” in the United Nations Charter.³³ Despite some immediate disappointment, civil rights leaders successfully pushed the United States to accept a United Nations Charter that created a role for the United Nations in evaluating human

²⁶ *Id.* at 57.

²⁷ ANDERSON, *supra* note 2, at 48.

²⁸ *Id.*

²⁹ *Id.* at 49.

³⁰ *Id.* at 53-54.

³¹ *Id.*

³² *Id.* at 54-55.

³³ *Id.* at 55.

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rights. After the approval of the Charter, civil rights leaders turned their attention to defining the human rights referenced in the Charter and shaping the United Nations' role in protecting them.

UNIVERSAL DECLARATION OF HUMAN RIGHTS

In February 1946, the U.N. Commission on Human Rights was formed and it selected former U.S. First Lady Eleanor Roosevelt as its first chair.³⁴ In June 1946, the United Nations Economic and Social Council determined that the United Nations Charter could only be fulfilled if an international bill of human rights was created to define the scope of human rights and the procedures for protecting them.³⁵ The United Nations Economic and Social Council decided that the very issues that the United States and other world powers had attempted to evade when the United Nations Charter was drafted – namely defining the scope of human rights and providing for their protection, must be addressed by the United Nations. The Commission on Human Rights, under Eleanor Roosevelt, was tasked with this responsibility. The Commission completed an initial draft of the Universal Declaration of Human Rights in December 1947.³⁶ The Declaration was the first international effort to detail the human rights to which all global citizens are entitled. The Declaration was a comprehensive document that encompassed civil and political rights such as the freedoms of speech, association, religion, and a fair trial, as well as economic and social rights, such as the rights to work, education, and an adequate standard of living, including food, housing, clothing, and medical care.³⁷ These latter “social and economic rights” caused the State Department under Secretary of State James B. Byrnes to make clear that the Declaration was not a legally binding document but rather an aspirational document laying out ideals.³⁸ While the document did not expressly prohibit racial discrimination, it expressly stated that all are entitled to “equal protection under the law against any discrimination.”³⁹

³⁴ Brown, *supra* note 25, at 57.

³⁵ COMMISSION ON HUMAN RIGHTS OF THE ECONOMIC AND SOCIAL COUNCIL: SUMMARY REPORT, Box 4587, File *Human Rights Commission, 1946 Roosevelt Papers* (May 6, 1946); COMMISSION ON HUMAN RIGHTS OF THE ECONOMIC AND SOCIAL COUNCIL: SUMMARY RECORD OF MEETINGS, TWELFTH MEETING HELD ON MONDAY, MAY 13, 1946 AT 2:00PM, Box 4589, File Mrs. Franklin D. Roosevelt (May 13, 1946); COMMISSION ON HUMAN RIGHTS: WORKING PAPER ON AN INTERNATIONAL BILL OF RIGHTS, E/CN.4/W.4, Box 4587, File “Human Rights Commission” (May 7, 1946).

³⁶ ANDERSON, *supra* note 2, at 131.

³⁷ Statement by Mrs. Franklin D. Roosevelt, Department of State Bulletin, Dec. 19, 1948, 751.

³⁸ Brown, *supra* note 25, at 56.

³⁹ U.N. Charter, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 78 (1948), un.org/aboutun/documents/ga/rews/3/ares3.htm.

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While the declaration itself did not have legal force, the Commission also prepared a legally binding draft covenant on human rights that, as a treaty, would have legal effect for signatories.⁴⁰ The State Department, under the instructions of President Truman, attempted to kill the covenant, but drafts of the document had already been distributed to other delegations, so it could not be pulled back.⁴¹ Eleanor Roosevelt, however, had already omitted any language in the covenant that would provide a basis for individuals or NGOs to petition the United Nations for the redress of human rights violations.⁴² President Truman and the State Department feared that African-Americans would petition the United Nations to address their grievances, an embarrassing situation for the Administration, which hoped to use the Declaration as a tool to position the United States as a moral exemplar in contrast to its emerging Cold War opponent, the Soviet Union.⁴³

Du Bois, White, and the NAACP legal team supported the inclusion of social and economic rights in the draft Declaration and associated covenant, believing that their inclusion would offer additional tools to address the economic and social plight of African-Americans. While the United States supported the inclusion of most civil and political rights in the Declaration and covenant, the United States government targeted “the right to vote” for removal, not because of offense to foreigners representing non-democratic political systems, but rather because it would offend Southern segregationists.⁴⁴ The Truman Administration opposed the inclusion of economic and social rights believing that universal economic security was unattainable and that such rights were associated with socialism and communism.⁴⁵ The U.S. opposition to economic and social rights, and the right to vote, motivated civil rights leaders to take a proactive stance in support of the Declaration. White decided that the NAACP would need to be represented at the 1948 U.N. General Assembly session in Paris where decisions regarding the Declaration would be made. The NAACP and 44 other organizations received invitations to attend the Paris General Assembly Session.⁴⁶ The session proved to be less incendiary than the 1945 San Francisco Conference. Given Soviet criticism of American treatment of African-Americans and pressure from civil rights

⁴⁰ Brown, *supra* note 25, at 56-57.

⁴¹ *Id.* at 58.

⁴² *Id.* at 58-59.

⁴³ *Id.* at 133.

⁴⁴ ANDERSON, *supra* note 2, at 153-54.

⁴⁵ *Id.* at 135.

⁴⁶ *Id.* at 138.

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organizations, President Truman and the State Department determined that in order to sustain the credibility of American democracy globally, the United States would have to champion the Declaration in order to head off any criticism of its human rights record.⁴⁷ In December 1948, the Universal Declaration of Human Rights was adopted. Decisions about the enforcement of human rights and the scope of social and economic rights were left for later resolution because the General Assembly decided to split the proposed Covenant on Human Rights into two documents: a U.S. preferred Covenant on Civil and Political Rights and a separate Covenant on Economic Social, Cultural Rights. The two covenants, completed in 1966, along with the Universal Declaration of Human Rights, form what is colloquially known as the "International Bill of Human Rights."⁴⁸

CIVIL RIGHTS LEADERS' APPEALS TO THE UNITED NATIONS

Despite ongoing efforts by the United States to limit the United Nations' role in assessing human rights, in 1946, shortly after the United Nations was formed, civil rights leaders decided to test the new organization's ability to address human rights concerns involving African-Americans. Former Howard University School of Law Dean Charles Hamilton Houston, the chief legal architect of the dismantlement of Jim Crow segregation through the U.S. courts,⁴⁹ supported the National Negro Congress in filing a petition with the United Nations Economic and Social Council about the plight of African-Americans.⁵⁰ The National Negro Congress petition was titled "A Petition to the United Nations on Behalf of Thirteen Million Oppressed Negro Citizens of the United States of America" and requested that the United Nations assist in the elimination of race-based discrimination in the United States.⁵¹ While the U.S. Administration and its allies argued that discrimination was purely an internal United States question, Houston defended the petition in a column in African-American newspapers. In his column, titled "An Appeal to the United Nations by Minorities In Order" Houston stated that:

⁴⁷ W.E.B. DU BOIS, THE CORRESPONDENCE OF W.E.B. DU BOIS: Volume III 188-89 (Herbert Aptheker ed., 1978).

⁴⁸ Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 11-12 (1982).

⁴⁹ See generally GENA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

⁵⁰ Brown, *supra* note 25, at 54.

⁵¹ DU BOIS, *supra* note 47, at 163 n.1.

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It may be true that the United Nations does not have jurisdiction to investigate every lynching . . . or denial of the ballot . . . but where the discrimination and denial of human and civil rights reach a national level, or where the national government either cannot or will not afford protection and redress for local aggressions for colored people, the national policy of the United States . . . becomes involved, and at the national policy level the United Nations can take jurisdiction and receive the complaints presented by national organizations. A national policy of the United States which permits disenfranchisement in the South is just as much an international issue as elections in Poland or the denial of democratic rights in Franco Spain.⁵²

While the National Negro Congress awaited a decision on its petition, the NAACP followed suit and in October 1947, W.E.B. Du Bois filed a petition with the Human Rights Commission's staff called an "Appeal to the World: A Statement of Denial of Human Rights to Minorities." Du Bois felt that the National Negro Congress petition, while well done, was lacking in documentation.⁵³ In his new appeal, Du Bois proclaimed:

Therefore, Peoples of the World, we American Negroes appeal to you, our treatment in America is not merely an internal question of the United States. It is a basic problem of humanity; of democracy; of discrimination because of race and color; and as such it demands your attention and action. No nation is so great that the world can afford to let it continue to be deliberately unjust, cruel and unfair to its own citizens. This is our plea to the world, and to show its validity; we are presenting you with the proof . . .⁵⁴

The appeal included information collected from four different scholars on the oppressive social conditions confronting African Americans and the discriminatory application of constitutional protections.⁵⁵

Both appeals met considerable opposition from the United States government. The opposition from Southern Democrats was not

⁵² LANGSTON HUGHES, *FIGHT FOR FREEDOM: THE STORY OF THE NAACP* 107 (1962).

⁵³ DU BOIS, *supra* note 47, at 163.

⁵⁴ *Id.*

⁵⁵ Brown, *supra* note 25, at 57-58.

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surprising, however, segregationist politicians were joined by President Truman and Eleanor Roosevelt, both supporters of civil rights for African-Americans. President Truman and Eleanor Roosevelt took the position that international criticism of the United States on civil rights and race was unpatriotic and served the interests of Communist States.⁵⁶ The NNC and NAACP petitions were referred to the Human Rights Commission which, under Eleanor Roosevelt's Cold War stewardship, failed to take action on either document at the behest of the United States. In fact, at its inaugural meeting, in an "anti-Marbury moment," the Human Rights Commission limited its purview, declaring that it lacked the authority to review complaints from individuals or NGOs.

Prior to the 1948 General Assembly meeting in Paris, where the Declaration of Human Rights was adopted, W.E.B. Du Bois met with Eleanor Roosevelt in an attempt to encourage her to add consideration of the NAACP appeal to the Human Rights Commission's agenda.⁵⁷ Du Bois later stated:

I thought that the world ought to know just exactly what the situation was in the United States, so that they would have factual statements before them so that they would not be depending on vague references . . . Mrs. Roosevelt thought that this would be embarrassing, that it would be seized upon by the Soviet Government as an excuse for attacking the United States. Mrs. Roosevelt said that already, several times, she had been compelled to answer attacks upon the United States for its race problem by pointing out the fact that other countries had made similar mistakes . . . The situation might be so unpleasant that she would feel it necessary to resign from the US delegation to the United Nations.⁵⁸

Ultimately, the State Department used diplomatic pressure to prevent discussion of the appeal at the 1948 General Assembly meeting. This marked Du Bois's last attempt to have the appeal considered.⁵⁹ Ultimately no action was taken on either the National Negro Congress or the NAACP petition by the United Nations.

⁵⁶ *Id.* at 58.

⁵⁷ *Id.*

⁵⁸ DU BOIS, *supra* note 47, at 189.

⁵⁹ Brown, *supra* note 25, at 58.

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CONCLUSION

Despite these temporary losses, U.S. civil rights leaders of the 1940s ultimately proved successful. Every primary objective that they sought in shaping the United Nations human rights architecture came to pass. Today, the United Nations Human Rights Council and other U.N. human rights treaty bodies have an explicit mandate to review the human rights situations in member states, and individuals and organizations have the ability to directly petition United Nations human rights treaty bodies about human rights violations. Dozens of international and regional human rights treaties specifically define the scope of human rights protections to which individuals are entitled. The United Nations human rights framework envisioned by the U.S. civil rights leadership in the 1940s has now come to pass. The United Nations system contains a robust body of conventions with specifically defined global human rights and the system contains mechanisms for the assessment of appeals from individuals regarding their government's protection of those rights. In the tradition of the civil rights heroes of the 1940s, the great work of ensuring the realization of these human rights for all continues.

ARTICLE

CLASS CONTRADICTIONS IN THE CIVIL RIGHTS MOVEMENT: THE POLITICS OF RESPECTABILITY, DISRESPECT, AND SELF- RESPECT

*Harold A. McDougall**

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INTRODUCTION

In 2014, nationwide protests over police harassment and brutality towards African-Americans surprised many, not only with their passion and broad base, but also by their general disconnection from the civil rights establishment. Similar to the student sit-ins of the 1960s, bright and passionate young people surged forward without the sanction—or even the knowledge—of established leaders. Much as their predecessors fifty years before,¹ the establishment in 2014 sought

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¹ See Harold McDougall, *I Have A Dream: Bring Back SNCC*, HUFFINGTON POST (Aug. 28, 2013, 2:12 PM), http://www.huffingtonpost.com/harold-a-mcdougall/sncc-civil-rights-movement_b_3828787.html.

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to get out in front of these young protesters, channel them into approved and controlled activities, minimize any damage to the establishment donor/patronage base, and exploit their energy to advance the establishment agenda.²

However, there has been pushback. These young people see their constituency as the poor and working class of the African-American community, the ghetto dwellers who occupy ground zero in conflicts with police, rather than the more affluent classes from which so many of them come.³ Moreover, a significantly larger number of today's protesters and protest organizers are from the affected communities themselves.⁴ These latter participants are often suspicious of established civil rights leadership as well.⁵

This paper will explore class tensions that have bedeviled the civil rights movement since its very beginning, yielding conflicting narratives and patterns of activity, and ultimately resulting in the disorder we see today. This paper will also address how we might identify the best these narratives and patterns of activity have to offer, marshalling, and synthesizing them into a more productive approach.

I believe the key is to develop "civic infrastructure" in the African-American community, so the raw energy of today's protests does not ebb and disappear, leaving behind no fundamental improvement. The National Association of the Southern Poor (NASP), discussed in the final section of the paper, provides an example of the kind of civic infrastructure I have in mind.

I. THE ROLE OF NARRATIVE IN HUMAN HISTORY

Human beings of various species have been on the planet for approximately 2.5 million years. Our own species, *Homo sapiens*, has been here for only 200,000 years. All previous species, and our own until just 12,000 years ago, lived as hunter-gatherers. Our biological

² See Harold McDougall, 'American Spring'? HUFFINGTON POST (Dec. 10, 2014, 9:57 PM), http://www.huffingtonpost.com/harold-a-mcdougall/american-spring_b_6292942.html.

³ My research assistant Tabias Wilson provides an example. Tabias was one of the founders of Occupy Boston, and went on to help start various antiracist offshoots, such as Occupy the Hood. See Stacey Patton, *Black Youth Respond to the Occupy Movement*, BLACK YOUTH PROJECT, (Nov. 25, 2011), <http://research.blackyouthproject.com/byp-presents/black-youth-respond-to-occupy-movement/>.

⁴ See, e.g., Kellan Howell, *Baltimore Riots Sparked not by Race but by Class Tensions Between Police, Poor*, WASH. TIMES (Apr. 29, 2015), <http://www.washingtontimes.com/news/2015/apr/29/baltimore-riots-sparked-not-by-race-but-by-class-t/page=all>.

⁵ Describing his work in Boston, Tabias Wilson experienced the "establishment, full-integrationist" civil rights leaders as overly concerned that the youth not "squander the moment" by their lack of "respect" and "respectability" vis-à-vis the white majority establishment.

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makeup, our DNA, evolved in congruence with this lifestyle⁶—few possessions, high levels of mobility, a spare diet, and living in small bands of about two dozen, bound together by empathic connection.⁷

This means our DNA programs us to trust people whom we know personally.⁸ The emergence of fictive language, of “narrative,” about 70,000 years ago (the “Cognitive Revolution”) made it possible for us to work together on slightly less intimate terms, knitted together by gossip into bands of about 150 people.⁹ This diminished our empathic connections somewhat,¹⁰ but our small-group DNA remained relatively undisturbed.

Twelve thousand years ago, an even more radical change occurred in human society, the “Agricultural Revolution.”¹¹ Humans domesticated animals and plants¹² and narratives emerged rationalizing human dominance over nature.¹³ Interestingly, these narratives also rationalized the dominance of some human beings over others, dwindling empathic connection even more.¹⁴

These new narratives enabled us to work together in groups of thousands, and eventually millions. They also assigned specific roles to their adherents, dividing them by gender and work function. Typically, these assigned roles formed a hierarchy, pyramidal in character, with a large number of people at the bottom doing the “grunt” work and the small elite at the top doing the planning, thinking, and relaxing.¹⁵ First

⁶ PAUL SHEPARD, *COMING HOME TO THE PLEISTOCENE* (2004), <http://www.amazon.com/Coming-Home-Pleistocene-Paul-Shepard/dp/1559635908> (“[O]ur essential human nature is a product of our genetic heritage, formed through thousands of years of evolution during the Pleistocene epoch, and . . . the current subversion of that Pleistocene heritage lies at the heart of today’s ecological and social ills . . .”).

⁷ Jeremy Rifkin, *The Empathic Civilization: Rethinking Human Nature in the Biosphere Era*, HUFFINGTON POST (Mar. 18, 2010), http://www.huffingtonpost.com/jeremy-rifkin/the-empathic-civilization_b_416589.html.

⁸ *Id.*

⁹ YUVAL NOAH HARARI, *SAPIENS: A BRIEF HISTORY OF HUMANKIND* 133 (2015) (Sapiens are distinguished by our ability to believe in fictions. The cognitive revolutions starts with the first set of hypothetical stories we allow ourselves to believe in whether they are true or not . . . Our fictions allow us to cooperate. They give us the imaginary order that is necessary for societies to act together. Amazon Customer Reviews: By Gary on Feb. 25, 2015).

¹⁰ HARARI, *supra* note 9, at 105 (“All these cooperation networks . . . were ‘imagined orders.’ The social norms that sustained them were neither based in ingrained instincts nor on personal acquaintances, but rather on belief in shared myths.”).

¹¹ HARARI, *supra* note 9, at 48.

¹² See JARED DIAMOND, *GUNS, GERMS AND STEEL* (1997), http://www.jarediamond.org/Jared_Diamond/Guns_Germs_and_Steel.html.

¹³ HARARI, *supra* note 9, at 92-93 (describing means of subordinating and controlling animals, eerily reminiscent of later techniques for controlling slaves: “In order to turn bulls, horses, donkeys and camels into obedient draught animals, their natural instincts and social ties had to be broken, their aggression and sexuality contained, and their freedom of movement curtailed.”).

¹⁴ HARARI, *supra* note 9, at 102.

¹⁵ See HARARI, *supra* note 9, at 81 (asserting that sedentary living begets cruelty and empathy issues).

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came the theocracies,¹⁶ monarchies and patriarchy of early agricultural society.¹⁷ As time went on, feudalism, capitalism,¹⁸ nationalism, slavery, colonialism, racism,¹⁹ imperialism, and many others emerged.

Whatever the prevailing narrative, our physiologically based empathic impulses²⁰ must be suppressed by education, training or a force to support it.²¹ We are not allowed to feel empathy for those lower on the ladder in our own social narrative, or for adherents to a social narrative that rivals our own. This compromises our ability to find our way through personal association, or even gossip, so more and more, we take the word of our leaders in the social narrative—priests, kings, and eventually politicians—instead of relying on empathic connection. This makes us even easier to manipulate, as suppressed empathy creates social and human space for violence and mistrust.²²

These narratives objectify us—by race, gender, class, sexual orientation, national origin, religion, and so forth.²³ This objectification prompts us to ask our fellow human beings *what* they are rather than *who* they are, marking the objectification of us all.

There is more. Not only must we ask “what meta-narrative describes you,” but also “where do you fit in the hierarchy it establishes?” Are you manly enough, womanly enough, black enough, white enough, rich enough, devout enough to stand at the top of the heap? If not, what lesser position do you occupy?²⁴ What is your role in driving the social, political, and economic machinery—beliefs, customs and practices, institutions, organizations, laws—the narrative coheres?²⁵

¹⁶ *Id.* at 218-19.

¹⁷ *Id.* at 172.

¹⁸ *Id.* at 352-53.

¹⁹ *Id.* at 134.

²⁰ See, e.g., Harold McDougall, *Empathy Depletion: An Environmental Hazard*, HUFFINGTON POST (June 17, 2014, 2:53 PM), http://www.huffingtonpost.com/harold-a-mcdougall/empathy-depletion-an-envi_2_b_5436807.html. (citing JEREMY RIFKIN, *THE EMPATHIC CIVILIZATION: THE RACE TO GLOBAL CONSCIOUSNESS IN A WORLD IN CRISIS* (2009)).

²¹ HARARI, *supra* note 9, at 111 (violence needed to maintain the existing order).

²² Indeed, our biologically based empathic impulses can atrophy without real ties to others; their suppression by “imagined” narratives that privilege elites can lead to violence. See, e.g., *Empathy Depletion*, *supra* note 20.

²³ Note the grounding of narrative classification in the first written languages, developed to count and classify in sedentary agricultural societies, about 12,000 years ago.

²⁴ With real human connection, at the genetically appropriate scale—a dozen or two—we can still ask questions, but they are relevant to real life. What are your likes and dislikes, strengths and weaknesses? How can your particular talents be of help to me and to the ones I love? Can I trust you? (Note that 80% of human communication is still nonverbal, seriously handicapping us in age of increasing electronic communication. See Sherry Turkle, *Reclaiming Conversation: The Power of Talk in a Digital Age*, THE DIANE REHM SHOW (Oct. 19, 2015, 11:00 AM), <http://thedianerehmshow.org/shows/2015-10-19/sherry-turkle-reclaiming-conversation-the-power-of-talk-in-a-digital-age>).

²⁵ See Harold McDougall, *For Critical Race Practitioners: Race, Racism and American Law* (4th ed.) by Derrick A. Bell, Jr., 46 HOW. L.J. 1 (2002) (citing Paul Costello, *Racism and Black Oppression in the United States: A Beginning Analysis*, 24 THEORETICAL REV. 11 (1981)).

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Such is the nature of the narrative about race, particularly in the United States, with its foundations in the slave south.²⁶ Despite the narrative's southern origins, the institution of slavery and the narrative that rationalized it was so central to the political economy and social life of all Thirteen Colonies²⁷ that they broke away from England rather than risk the abolitionism that was on the rise in the mother country.²⁸

II. RACISM IN THE UNITED STATES: NARRATIVE AND COUNTER-NARRATIVE

Race, class and gender narratives emerging in the ante-bellum slave south operated not only to support the institution of slavery itself, but also to rationalize the race, class, and gender hierarchies incidental to it.²⁹ Characters in these narratives included the white southern gentleman and the white southern belle, the subservient and emasculated "Uncle Tom," the "black mammy," the "bad Negro," the "black Jezebel,"³⁰ and "white trash."³¹

These characters and narratives assumed an importance beyond the Southern region. The South contributed a gendered and classed ideology of whiteness to the nation after slavery ended,³² becoming "ideologically dominant in shaping the narrative of national selfhood,"³³ providing a Rosetta Stone for American racism nationwide. The Great Migration spurred the nationalization of the black characters and the narratives they occupy, bringing large numbers of blacks to Northern, Midwestern, and eventually Far Western cities as well.³⁴ The

²⁶ Cf. HARARI, *supra* note 9, at 140-43 (race divisions in the Americas).

²⁷ Email from Professor Gerald Horne, John and Rebecca Moores Professor of History, Univ. of Houston, Texas to Professor Harold (Sept. 15, 2015) (on file with author). ("The US was a step forward from the religious axis of society that had bedeviled Europe but this was replaced with a different axis, 'white' vs. 'non-white'—but more than this, perpetual punishment of the descendants of mainland enslaved Africans.").

²⁸ See Interview with Gerald Horne, "Counter-Revolution of 1776": Was U.S. Independence War a Conservative Revolt in Favor of Slavery? *Democracy Now*, June 17, 2014, http://www.democracynow.org/2014/6/27/counter_revolution_of_1776_was_us (discussing Gerald Horne, *The Counter-Revolution of 1776: Slave Resistance and the Origins of the United States of America*, (2014); see also *Somerset v. Stewart*, 98 ER 499 (1772)).

²⁹ See generally RICHÉ RICHARDSON, *BLACK MASCULINITY AND THE U.S. SOUTH: FROM UNCLE TOM TO GANGSTA* 232 (2007) (Kindle version).

³⁰ See RICHARDSON, *supra* note 29, at 59-60, 71; see also Taylor Gordon, *Black Women in the Media: Mammy, Jezebel, or Angry*, ATLANTA BLACK STAR (Mar. 4, 2013), <http://atlantablackstar.com/2013/03/04/black-women-in-the-media-mammy-jezebel-or-angry/>.

³¹ No matter how low on the social scale they might be, they were still superior to every black person in the Southern narrative, now nationalized to the entire U.S. See RICHARDSON, *supra* note 29, at 125.

³² RICHARDSON, *supra* note 29, at 10, 67, 75.

³³ RICHARDSON, *supra* note 29, at 56; see also *id.* at 232-33.

³⁴ See generally Isabel Wilkerson, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (2010); cf. RICHARDSON, *supra* note 29, at 220.

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nationalization of the white characters and their supporting narratives is more complex; in this paper, we will touch on that phenomenon only lightly.³⁵ In short, Whiteness became a prized club to which only people of European descent could belong (if they played by the rules).³⁶

III. THE POLITICS OF RESPECTABILITY

Some years after emancipation, middle-class black males began striving to create a “gentleman” persona,³⁷ a counter-narrative to the prevailing slave stereotypes. Black women could not be “belles,” but they tried to be “ladies.” Elite black men and women thus sought to adhere to the rules of the “whiteness” club³⁸ as closely as possible (or rather, as closely as they were permitted). Herein, the *politics of respectability* was born.³⁹

Prof. Frederick C. Harris, Director of the Center on African-American Politics and Society at Columbia University, describes the politics of respectability as a philosophy first promulgated by “black elites to ‘uplift the race’ by correcting the ‘bad’ traits of the black poor.”⁴⁰ Indeed, as early as the beginnings of the Great Migration, middle-class black organizations, such as the National Urban League, distributed pamphlets to poor and new arrivals instructing them on “respectable” behavior. They were not to use profanity or talk loudly in public, for example.⁴¹ “Respectability” role-players invented a model black citizen/class, but they required no concessions from the white ruling class. Indeed, they often played their roles in the shadow of white intemperance and violence.⁴²

For black males, attempting to conform to the white narrative, despite this imbalance, meant “manliness” often had to take a back seat,

³⁵ See, e.g., RICHARDSON, *supra* note 29, at 9-10 (Birth of a Nation); see also *id.* at 74-75 (Southern “manly” military tradition incorporated into US Army).

³⁶ RICHARDSON, *supra* note 29, at 69. Cf. Karen Grigsby Bates, *The Whiteness Project: Facing Race In A Changing America*, NAT’L PUB. RADIO (Dec. 21, 2014), <http://www.npr.org/2014/12/21/371679777/the-whiteness-project-facing-race-in-a-changing-america>.

³⁷ RICHARDSON, *supra* note 29, at 75 (“[t]he class and cultural ambitions of some elite black men” were shaped by the ideology of white maleness, “even if it was premised on their very exclusion.”).

³⁸ RICHARDSON, *supra* note 29, at 69.

³⁹ RICHARDSON, *supra* note 29, at 28.

⁴⁰ Frederick C. Harris, *Rise of Respectability Politics*, DISSENT, (Winter 2014), at 2, <https://www.dissentmagazine.org/article/the-rise-of-respectability-politics>.

⁴¹ See RICHARDSON, *supra* note 29, at 77; see also *id.* at 144 (citing Ralph Ellison’s *Invisible Man* to similar affect.). Such approaches continued at least until the 1960s. See John McWhorter, *It’s About Time Obama Stuck up for His ‘Respectability Politics’*, WASH. POST (May 14, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/05/14/its-about-time-obama-stuck-up-for-his-respectability-politics/>.

⁴² Leland Ware and Theodore Davis, *Ordinary People in an Extraordinary Time: The Black Middle Class in the Age of Obama*, 55 HOW. L.J. 533, 535 (2012).

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suggesting a certain level of weakness.⁴³ The politics of respectability thus brought male practitioners dangerously close to the “Uncle Tom” stereotype,⁴⁴ a stereotype many black men take pains to avoid.⁴⁵ Black militants of the 1960s often perceived middle-class, “respectable” male civil rights leaders as “Uncle Toms” for precisely this reason.⁴⁶

Today, practitioners of the politics of respectability seek advancement through communion with prevailing majority group structures of political, economic, and social power.⁴⁷ They seek upper-middle class status within those structures by approximating white dialect, dress, profession and physical space.⁴⁸ “Respectability” practitioners who succeed in these endeavors gain access to mainstream “sociopolitical capital”—the ability to infiltrate “institutions, government and other organizations.”⁴⁹

Though respectability practitioners today have muted their overtly submissive response to white dominance, they continue to preach assimilation to white culture, apparently their only marker for true success. Blackness, on the other hand, is associated with laziness, with financially well-off black folks the exception to the rule.⁵⁰ Respectability politics seems quite comfortable with the idea that “problems for [unsuccessful] African-Americans are rooted in absent black fathers and failures of blacks to do enough to help themselves.”⁵¹

Bill Cosby’s diatribes against the black poor provided a particularly unfortunate example of respectability practitioners seeking to find “interest convergence” with upper-middle-class whites.⁵² In his

⁴³ RICHARDSON, *supra* note 29, at 6 (citing PHILLIP BRIAN HARPER, ARE WE NOT MEN: MASCULINE ANXIETY AND THE PROBLEM OF AFRICAN AMERICAN IDENTITY ix (1996)).

⁴⁴ Harold McDougall, *Guns, Machismo, Martin and Zimmerman*, HUFFINGTON POST (July 17, 2013, 12:43 PM), http://www.huffingtonpost.com/harold-a-mcdougall/george-zimmerman-guns-masculinity_b_3600456.html.

⁴⁵ RICHARDSON, *supra* note 29, at 6 (citing HARPER, *supra* note 43, at ix).

⁴⁶ RICHARDSON, *supra* note 29, at 49-52.

⁴⁷ Ware and Davis, *supra* note 43, at 537-38.

⁴⁸ Memorandum from Tabias Wilson for Professor Harold McDougall (Aug. 1, 2015) (on file with author); Ware and Davis, *supra* note 42, at 536-39.

⁴⁹ Tabias Wilson cites black entrepreneurs, HBCU leadership, and federal political leaders as examples. Memorandum from Tabias Wilson for Professor Harold McDougall (June 30, 2015) (on file with author).

⁵⁰ Memorandum from Tabias Wilson reflecting on Chapter 1 of BLACK BALTIMORE for Professor Harold McDougall, (July 8, 2015) (on file with author).

⁵¹ Jessica Washington & Perry Bacon Jr., *How ‘Black Lives Matter’ Activists Are Shaping the 2016 Campaign*, NBC NEWS (July 31, 2015, 5:00 AM), <http://www.nbcnews.com/news/nbcblk/how-black-lives-matter-activists-are-shaping-2016-campaign-n401146>.

⁵² Cf. Prof. Derrick Bell’s “interest convergence theory,” which “holds that whites will support minority rights only when it’s in their interest as well. For example, [Bell] saw the Supreme Court’s landmark 1954 school-desegregation decision, *Brown v. Board of Education*, as a part of a Cold War effort to improve America’s standing among Third World countries.” Will Oremus, *Did Obama Hug a Radical?*, SLATE (Mar. 2012),

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May 2004 speech at an NAACP event celebrating the fiftieth anniversary of the *Brown v. Board of Education* decision, Cosby characterized poor black males as “knuckleheads [who are] walking around [not wanting to] learn English.”⁵³ He scorned black vernacular speech as less than “respectable.”⁵⁴ Michael Eric Dyson, one of Cosby’s critics and a person with working-class origins, identified Cosby’s screed as especially dangerous because it “aggressively ignore[d] [w]hite society’s responsibility in creating the problems he want[ed] the poor to fix on their own.”⁵⁵

An important by-product of the politics of respectability is the spatial segregation of the black community by class.⁵⁶ The 1968 Fair Housing Act allowed Blacks to access white suburban neighborhoods for the first time.⁵⁷ “Black flight” ensued, as the black middle-class moved from the inner cities into suburban neighborhoods that better reflected their class position.⁵⁸

Since this transition, the proportion of Blacks in the middle class has more than doubled.⁵⁹ However, the number of poor Blacks living in extremely poor inner-city neighborhoods has also doubled.⁶⁰ In fact, the disparity between the top and bottom fifth of the Black population in terms of income, education, victimization by violence, and job status is now greater than the disparity between the top and bottom fifth of the white population.⁶¹

A class divide has thus emerged, with poor and working-class Blacks on one side, and the Black middle-class on the other. William Julius Wilson, for example, argues that “[t]he economic advancement of the most privileged members of the black community and the ongoing subordination of economically disadvantaged blacks means

http://www.slate.com/articles/news_and_politics/explainer/2012/03/derrick_bell_controversy_what_s_critical_race_theory_and_is_it_radical_.html.

⁵³ Steven King, *Bill Cosby on Civil Rights*, WASH. POST (May 23, 2004), www.washingtonpost.com/wp-dyn/content/audio/2005/05/02/AU2005050201059.html.

⁵⁴ Ms. Peterkin notes the irony of Cosby’s present crucifixion by the white media, exploiting the stereotype of the hyper-sexualized black male, placing Cosby outside the respectability politics he once preached. Memorandum from Monique Peterkin for Professor Harold McDougall (July 16, 2015) (on file with author).

⁵⁵ Michael Eric Dyson, *Is Bill Cosby Right? Or Has the Black Middle Class Lost Its Mind?*, HARV. EDUC. REV., <http://hepg.org/her-home/issues/harvard-educational-review-volume-76-issue-2/herbooknote/is-bill-cosby-right-11>.

⁵⁶ Ware and Davis, *supra* note 42, at 562-67.

⁵⁷ Karyn Lacy, *Race, Privilege and the Growing Class Divide*, 38 ETHNIC & RACIAL STUD. REV. 1246, 1247 (2015).

⁵⁸ *Id.* at 1248.

⁵⁹ See generally Zoltan L. Hajnal, *Black Class Exceptionalism: Insights from Direct Democracy on the Race Versus Class Debate*, 71 PUB. OPINION Q. 560 (2007); see Ware and Davis, *supra* note 42, at 533-35.

⁶⁰ Hajnal, *supra* note 59, at 560.

⁶¹ *Id.* at 561.

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that it no longer makes sense to think of blacks as one homogenous group.”⁶²

Low income and working class Blacks often have conflicting objectives with middle and upper class Black Americans, despite middle-class, “respectable” black organizations’ claims to speak for all. Many middle-class Blacks are “[h]omeowners, concentrated in suburbia and financially stable, allowing them to provide their children with luxuries such as their own car when they turn sixteen and a prestigious private school education.”⁶³ Middle-class Blacks who never resided in poor neighborhoods may not appreciate the experiences of poor and working-class Blacks.⁶⁴ Poor and working-class Blacks face issues such as lack of educational resources, employment opportunities, and neighborhood violence, for example.

Black flight from segregated, inner-city neighborhoods may have been a “necessary survival act for middle and upper class blacks.”⁶⁵ At the same time, the Black elite’s increasing stake in American capitalism has prompted its “most vocal leaders to [take] up the role of policing the majority of Blacks left behind,”⁶⁶ causing one author to postulate a “Black silent majority.”⁶⁷ Another author calls those left behind “the Abandoned,” referring to them as “a large and growing underclass concentrated in the inner cities and depressed pockets of the rural South . . . [in danger of] permanent pathology and underclass status”⁶⁸

In the wake of the “American Spring” protests around police violence toward members of the black community, “respectable” groups responded with myriad conferences, attended almost exclusively by establishment types.⁶⁹ Their primary approach is to appeal to the moral

⁶² Lacy, *supra* note 57, at 1248.

⁶³ Lacy, *supra* note 57, at 1249.

⁶⁴ Susan Welch & Lorn Foster, *Class and Conservatism in the Black Community*, 15 AM. POL. Q. 445 (1987) (suggesting middle-class Blacks are more conservative in their views compared with poor-working class Blacks).

⁶⁵ Wilson, *supra* note 50.

⁶⁶ Petersen-Smith, *infra* note 72.

⁶⁷ Khalil Gibran Muhammad, *Punitive Aspirations*, N.Y. TIMES SUNDAY BOOK REVIEW (Sept. 27, 2015), <http://www.nytimes.com/2015/09/27/books/review/black-silent-majority-by-michael-j-aven-fortner.html> (reviewing Michael Javen Fortner, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* (2015) (stating “Choosing ‘class-based values’ over racial solidarity [in the War on Drugs, the middle-class Black Silent Majority] cast their lot with cops and white suburbanites.”)).

⁶⁸ Raymond Arsenault, *The Great Unraveling*, N.Y. TIMES SUNDAY BOOK REVIEW (Dec. 29, 2010) (reviewing Eugene Robinson, *DISINTEGRATION: THE SPLINTERING OF BLACK AMERICA* (2011)), http://www.nytimes.com/2011/01/02/books/review/Arsenault-r.html?_r=0.

⁶⁹ See *CBCF ALC Town Hall 2014*, YOUTUBE (Sept. 25, 2014), <https://www.youtube.com/watch?v=5TDjhdshPIs&feature=youtu.be&t=1h13m54s>; see also Washington and Bacon, *supra* note 51.

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character of society's power brokers⁷⁰ and to stress voter participation and policy-making reforms.⁷¹ Many Black leaders "are more interested in folding any energy toward racial justice into electoral support for the Democratic Party, and shaming Blacks for failing to succeed . . . a perverse politics that blames most Blacks for their own condition."⁷²

African American youth are finding it increasingly difficult to conform to respectability politics, because of its basic premise that a black person is not permitted to behave spontaneously or authentically, but must always take time to consider what white people will think.⁷³ As my research assistant, Monique Peterkin, put it, "We must constantly monitor ourselves, our dialect, and our behavior to . . . quell whites' fear of [black rebellion]," and so whites can live their lives as if we black people weren't there.⁷⁴ One middle-class, "respectable" black man described the code of conduct he has prescribed for his "elite children," for example:

- Never run while in the view of a police officer or security person unless it is apparent that you are jogging for exercise, because a cynical observer might think you are fleeing a crime or about to assault someone.
- When you are the driver or passenger in a car (even in the back seat) and the vehicle has been stopped by the police, keep your hands high where they can be seen, and maintain a friendly and non-questioning demeanor.
- Always zip your backpack firmly closed or leave it in the car or with the cashier so that you will not be suspected of shoplifting.
- Never leave a shop without a receipt, no matter how small the purchase, so that you can't be accused unfairly of theft.

⁷⁰ Wilson, *supra* note 49, at 9.

⁷¹ *Id.*

⁷² See Khury Petersen-Smith, *Black Lives Matter: A New Movement Takes Shape*, 96 INT'L SOCIALIST REVIEW, <http://isreview.org/issue/96/black-lives-matter> (citing Aluned Shawki, BLACK LIBERATION AND SOCIALISM 238 (2006)).

⁷³ See Wilson, *supra* note 48. Tabias Wilson observes that the resources accessed by respectability practitioners "are available and dependent on the whims of the white gaze and its reading of whiteness, blackness and individual costs of recognizing a particular black body as 'whitened.' We must also think about the psycho-social costs of becoming 'whitened.' What community has been lost? What family? What culture? Safety net? Home? Where can the battered spirit return to, to be healed?"

⁷⁴ *Cf.* Ralph Ellison, INVISIBLE MAN (1952).

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- If going separate ways after a get-together with friends and you are using taxis, ask your white friend to hail your cab first, so that you will not be left stranded without transportation.
- When unsure about the proper attire for a play date or party, err on the side of being more formal in your clothing selection.
- Do not go for pleasure walks in any residential neighborhood after sundown, and never carry any dark-colored or metallic object that could be mistaken as a weapon, even a non-illuminated flashlight.
- If you must wear a T-shirt to an outdoor play event or on a public street, it should have the name of a respected and recognizable school emblazoned on its front.
- When entering a small store of any type, immediately make friendly eye contact with the shopkeeper or cashier, smile, and say “good morning” or “good afternoon.”⁷⁵

Monique observed that respectability politics could go so far as to “promote submissiveness as an ideal response to police misconduct.” As I suggested in a Huffington Post blog, that is too close to the behavior expected of slaves and is simply unacceptable.⁷⁶

The class dimensions of the politics of respectability have only deepened over time.⁷⁷ Indeed, an “elite self-image” designed in an attempt to overcome racial stigma might even have “required the “displacement of feelings of anger and shame” onto lower-class blacks.⁷⁸ Members of the middle class who thought putting the “best foot forward for purposes of racial uplift” meant emulating the speech, thinking and lifestyles of “white folks” would eventually—and inevitably—clash with the descendants of the anti-Uncle Tom, the “bad

⁷⁵ Lawrence Otis Graham, *I taught my black kids that their elite upbringing would protect them from discrimination. I was wrong*, WASH. POST, Nov. 6, 2014 (discussing the limitations of “respectability” politics, and the rules he must now impose on his children after the murders of Trayvon Martin and Michael Brown).

⁷⁶ *American Spring*, *supra* note 2.

⁷⁷ RICHARDSON, *supra* note 29, at 78.

⁷⁸ RICHARDSON, *supra* note 29, at 95 (quoting KEVIN K. GAINES, *UPLIFTING THE RACE: BLACK LEADERSHIP, POLITICS, AND CULTURE IN THE TWENTIETH CENTURY* 6 (1996)).

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Negro,”⁷⁹ whose first impulse was to “disrespect” whiteness and the white man. I call this the politics of *disrespect*.

IV. THE POLITICS OF DISRESPECT⁸⁰

The “bad Negro” evolves from African folkloric images of the trickster, who at first subverted slave codes by wiles.⁸¹ Later, emboldened by the uprisings in Haiti and Jamaica, these subversives organized slave rebellions (which usually failed due to the intervention of Uncle Toms).⁸² With organized resistance no longer possible, the “bad niggers” who faced white men individually paid a heavy price.⁸³ They were “shot, hanged, maimed, lynched, and generally hounded until they were dead or their spirits broken.”⁸⁴

With little room for badness in the South, the bad Negro re-emerged in segregated Northern ghettos during and after the Great Migration. Spatially separated from whites, they had little to fear from white retaliation.⁸⁵ Rejecting the ties of family, community, and religion, abusing drugs, alcohol, and women, they began to visit their badness on other blacks, eventually emerging as modern-day “thugs” and “gangstas”⁸⁶ who drive up the statistics of “black-on-black crime.”⁸⁷ This strain resonates powerfully with those “proximate to poverty,” who regularly experience violence⁸⁸ without “positive state-intervention,”⁸⁹

⁷⁹ RICHARDSON, *supra* note, at 29, 195.

⁸⁰ Cf. Anthony L. Brown, Jamel K. Donno, THE EDUCATION OF BLACK MALES IN A ‘POST-RACIAL’ WORLD, at 23 (2013).

⁸¹ RICHARDSON, *supra* note 29, at 189 (citing JOHN W. ROBERTS, FROM TRICKSTER TO BADMAN: THE BLACK FOLK HERO IN SLAVERY AND FREEDOM (1990)).

⁸² RICHARDSON, *supra* note 29, at 31-32 (Sam Sharpe’s rebellion in Jamaica, on the other hand, though ultimately quashed, displayed such solidarity that it led to the abolition of slavery throughout the British Commonwealth just seven years later. *see* Jamaica Information Servs., SAMUEL SHARPE, <http://jis.gov.jm/heroes/samuel-sharpe/>).

⁸³ RICHARDSON, *supra* note 29, at 34 (Bad Negroes were envied because they refused to submit to Jim Crow, were utterly fearless in the face of white intimidation, and generally rejected the ties of family, community, and religion.) (citing RICHARD WRIGHT, NATIVE SON ix (1940)).

⁸⁴ RICHARDSON, *supra* note 29, at 34 (citing RICHARD WRIGHT, NATIVE SON ix (1940)).

⁸⁵ RICHARDSON, *supra* note 29, at 35 (citing RICHARD WRIGHT, NATIVE SON xv (1940)).

⁸⁶ Todd Boyd, AM I BLACK ENOUGH FOR YOU?: POPULAR CULTURE FROM THE ‘HOOD AND BEYOND 74 (1997).

⁸⁷ A student in my Civil Rights Planning course, Bertram Lee, argued that the term “black-on-black crime” should no longer be used. Instead, he recommends the term “intra-communal violence,” supporting the assertion that people of color do not actively try to harm each other because the violence is a matter of proximity. *See* Edward Conlon, *The Racial Reality of Policing*, WALL ST. J. (Sept. 4, 2015). Contrast his stance with voices from the ‘hood asserting that black-on-black crime is real, “doing the work of the KKK.” *See, e.g.*, Interview with Kin Killin’ Kin artist James Pate, YOUTUBE, <https://youtu.be/FOgEAQdv5o> (Oct. 14, 2013); Kin Killin’ Kin James Pate Interview, YOUTUBE <https://youtu.be/HPA2gnlfe8Y> (Apr. 21, 2015); *see also* KKK – KIN KILLIN’ KIN, <http://blackartistnews.blogspot.com/2013/07/chicago-james-pate.html?m=1>; *see also* the MILLION YOUTH PEACE MARCH, <http://www.millionyouthpeacemarch.org/about-us.html> (against gun violence in the inner city).

⁸⁸ *See* Wilson, *supra* note 49.

⁸⁹ *Id.*

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making them “less likely to have faith in the ability and willingness of institutions, organizations and the state apparatus to safeguard their humanity and increase their sociopolitical power.”⁹⁰

The “Blaxploitation” films of the 1970s celebrated such characters, ultimately playing a “decisive role in fashioning popular notions of black masculinity.”⁹¹ These stereotypes were consolidated during the 1990s, a time of heightened discussion of “black male homicide and incarceration owing to drug and gang-related violence,” a time when “the posturing of rappers [as] ‘gangstas’ reinforced the media view” of black men as violent and dangerous.⁹²

“Gangstas” and their predecessors—“cool” blacks, actual gang members, many jazz musicians, etc.—began to dress and behave in a way intentionally departing from white standards of respectability to establish a narrative (if not the reality) of independence. This narrative intersected powerfully with suppressed white narratives of slave uprisings by physically powerful blacks bent on revenge for the atrocities committed against black people. Today, these young men are identified as “thugs,” whom frightened police officers are urged to whip, maim, or shoot into submission.

Ironically, at the same time that gangsta posturing evokes a frightening narrative of black insurgency, it also plays into a narrative of wider insurgency against a suffocating, “respectable” capitalist culture. It thus attracts the attention of young people of all races and nationalities who wish to rebel. In an ironic twist, capitalist consumer culture exploits these “dangerous” black stereotypes, marketing gangsta-like confidence and demeanor in the media for emulation by their target audiences: middle class black and white boys capable of purchasing such products.⁹³ To these young men who are not able to physically and spatially access this lifestyle, it is glamourized as cool and rebellious, while the poor blacks – and middle class blacks as well – who wear hoodies and white t-shirts are blamed for their injuries or death for dressing like “thugs.”⁹⁴

Hip-hop and rap—“gangsta” music—are “both an artistic response to and imitation and reflection of postindustrial conditions of

⁹⁰ See Malik Nashad Sharpe, *White Fragility Silence & Supremacy: Why All White Hands Are Bloody*, BLACK GIRL DANGEROUS (June 19, 2015), <http://www.blackgirldangerous.org/2015/06/white-fragility-silence-and-supremacy-why-all-of-your-hands-are-bloody/>.

⁹¹ RICHARDSON, *supra* note 29, at 54-55.

⁹² RICHARDSON, *supra* note 29, at 64.

⁹³ Peterkin, *supra* note 54.

⁹⁴ Peterkin, *supra* note 54.

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the city such as gangs, drugs, and violence.”⁹⁵ Dr. Riche Richardson celebrates Southern rappers for reclaiming the “quintessence of folk and vernacular aesthetics in the African-American context”⁹⁶ from Northern urban ideologues.⁹⁷ Yet the goal of Southern rap, according to Richardson, seems to be “to assert that Southern men can do all the criminal things that men in other regions are reputed to do,”⁹⁸ including “black-on-black crime,” “drastically [undercutting] the subversive potential of their agenda.”⁹⁹

Richardson herself concedes she is “troubled” by the “hegemony of hip-hop as a paradigm in contemporary African American music [and] culture,”¹⁰⁰ particularly because of its misogyny, violence,¹⁰¹ and materialism.¹⁰² This hegemony becomes even more troubling as hip-hop is commodified¹⁰³ by the industry that markets these objectionable features¹⁰⁴ globally and in “African diasporic contexts.” All the while, global consumer capitalism prunes the music’s “original subversive and oppositional content,”¹⁰⁵ so that all that remains is a process of rappers “showing the world their asses,” “defiantly parading their . . . crudeness as a sign of freedom . . .”¹⁰⁶ (Ironically, this process is eminently attractive to rebellious white youth.)¹⁰⁷ There is hardly a more clear

⁹⁵ RICHARDSON, *supra* note 29, at 211 (citing KELLEY, RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS 183-237 (1996)); see also *id.* at 226 (citing TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 2 (1994) (rap music a “black cultural expression that prioritizes black voices from the margins of urban America.”)).

⁹⁶ RICHARDSON, *supra* note 29, at 201.

⁹⁷ RICHARDSON, *supra* note 29, at 226.

⁹⁸ RICHARDSON, *supra* note 29, at 218, 236-37 (“[M]any African American men in and beyond the music world are posturing as gangstas . . . for purposes of black masculine validation and affirmation . . . [But the] gangsta is a very limited and questionable formula . . . [indeed] quite regressive . . . [for] it forecloses a broader and more diverse spectrum of black masculine representations.”). See also *id.* at 237 (gangsta artists perform “an intensely fetishized and commercialized violent bravado within an entertainment-dominated culture . . .”).

⁹⁹ RICHARDSON, *supra* note 29, at 220.

¹⁰⁰ RICHARDSON, *supra* note 29, at 202.

¹⁰¹ RICHARDSON, *supra* note 29, at 216 (“Southern guys, the song [Way Down South] suggests, carry weapons and are not afraid to fight or die.”).

¹⁰² RICHARDSON, *supra* note 29, at 202, 206, 212 (the theme of rap music generally includes “boasts related to money and other material possessions such as cars, jewelry, and drugs or to the sexual conquest of women.” [Note the narrative connection to the Blaxploitation films of the 1970s]).

¹⁰³ At least one rap mogul has been called the “ghetto Bill Gates” for marketing clothing, films, sports, toys and technology. RICHARDSON, *supra* note 29, at 204-06 (citing Tariq Muhanunad, *Hip Hop Moguls: Beyond the Hype*, BLACK ENTERPRISE (Dec. 1999), at 78g).

¹⁰⁴ Rappers ironically recast the “historically raced and gendered pathologies of black men as criminal, violent, and overly sexualized that have roots in southern [slave/racist] history.” RICHARDSON, *supra* note 29, at 202.

¹⁰⁵ RICHARDSON, *supra* note 29, at 202.

¹⁰⁶ RICHARDSON, *supra* note 29, at 207-08 (quoting Toure, *Juvenile, P and Biggie Rule Hardcore from the South and from the Beyond*, ROLLING STONE (Jan. 2000), at 59).

¹⁰⁷ RICHARDSON, *supra* note 29, at 262 n.23 (“[W]hite teenagers . . . represent 80% of gangsta rap’s consumers”).

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metaphor for disrespect than “showing your ass.”¹⁰⁸ In West Africa, where I believe the term originates, it compares the practitioner to a baboon that literally presents its hindquarters—hemorrhoids and all—to onlookers whom it seeks to “diss.”

In his speech, Cosby attacked black “thugs,” and criticized poor black mothers for not keeping a close enough eye on their sons, then crying when they are “standing there in an orange jumpsuit.”¹⁰⁹ Yet “Gangsta” blacks might deride Cosby as ultimately subservient to whites, when defiance is the proper response. It is important to consider, in this context, the processes by which poor, low-income and working-poor folks are “othered” and to consider ways in which they might find their paths back to the center and humanization,¹¹⁰ other than “the corner.”¹¹¹

In that regard, rappers and gangstas, from whatever region, still lack the material opposition to the racist, capitalist system and a defense of the community that are essential elements of what I call self-respect. Indeed, southern rappers, like their East and West Coast colleagues, have cultivated the image of the “bad nigger,”¹¹² who has little or no concern for family or community. In this sense, they are practitioners of the politics of disrespect, not of self-respect.¹¹³ (The role of the female practitioners of the politics of disrespect is beyond the scope of this article.)¹¹⁴

Ironically, it was not always that way. Before its absorption into neoliberal capitalism, rap and hip-hop focused much more closely on the social, political, and economic subordination of the African-American community, and called for resistance. My student, Vianca Simpson, has completed a paper detailing the shift from lyrics with

¹⁰⁸ See Red Ass Baboons, <https://www.youtube.com/watch?v=vi9TThwlyT4>; see also RICHARDSON, *supra* note 29, at 211 (quoting RICK KOSTER, LOUISIANA MUSIC: A JOURNEY FROM R&B TO ZYDECO, JAZZ TO COUNTRY, BLUES TO GOSPEL, CAJUN MUSIC TO SWAMP POP TO CARNIVAL MUSIC AND BEYOND 293 (2002)).

¹⁰⁹ Peterkin, *supra* note 54.

¹¹⁰ Memorandum from Tabias Wilson (July 2015) (on file with author) (citing John A. Powell, *Poverty and Race Through a Belongingness Lens*, POLICY MATTERS, Apr. 2012, <http://www.nwaf.org/content/uploads/oldsite/FileCabinet/DocumentCatalogFiles/Other/PMpowell.pdf>).

¹¹¹ Conlon, *supra* note 87.

¹¹² RICHARDSON, *supra* note 29, at 221 (“[T]he gangsta recuperates the outlaw sensibility associated with the ‘bad Negro’ in African American cultural history.”).

¹¹³ RICHARDSON, *supra* note 29, at 200 (suggesting that their posturing as “gangstas” and “playas” was a means to secure entrance into the lucrative rap industry).

¹¹⁴ Cf. Cinnamon Williams, *Examining Amber Rose: How Respectability Still Influences Black Feminism*, FORHARRIET (Sept. 20, 2015), <http://www.forharriet.com/2015/09/examining-amber-rose-how-respectability.html?m=1#axzz3mOjYYw9G> (noting hip-hop artists such as Amber Rose, Blac Chyna, and Nicki Minaj, who counter the “thorns of respectability politics [that] have flourished alongside the roses of Black feminism.”).

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“uplifting, encouraging undertones of black love, hard work, and overcoming hardships to achieve success” to lyrics that “glorif[y] criminal behavior, promiscuity, misogyny, drug use, and promote black stereotypes to the detriment of black youth.”¹¹⁵ Far from its 1970s beginnings in the underground music world of the South Bronx, where it expressed the collective voice of the black community, hip-hop has since become a commodified product of major corporations and mainstream pop culture.¹¹⁶ “The formula that is used in making movies successful has been applied to hip-hop music and videos: urban black life for white audiences.”¹¹⁷

On the other hand, Vianca has some very good suggestions on how to “redeem” rap, and rappers, such as “roots rap” focusing on the political, social and cultural issues that characterized the original form.¹¹⁸ Vianca also mentions Hip Hop Caucus (connecting hip-hop to civil rights advocacy)¹¹⁹ and Rap Rehab, which shares news in the rap world and highlights socially conscious artists.¹²⁰

V. THE POLITICS OF SELF-RESPECT

The politics of self-respect bases itself in the African-American minority community, its culture and social relations, and looks to the welfare of the poor, the working class, and the lower middle class. In its earliest incarnations, it took the form of “black nationalism.”

¹¹⁵ Vianca Simpson, *Commercialized Hip Hop as a Form of Predatory Advertising*, Nov. 30, 2015 (unpublished paper on file with author) (citing *What's Wrong with Rap and Hip Hop*, <http://www.newafricaradio.com/hip-hop.htm>).

¹¹⁶ Dr. Boyce Watkins, *Why Black People Must Take Commercialized Hip-Hop to Task*, <http://newsone.com/1895975/why-black-people-must-take-commercialized-hip-hop-to-task/> (2012) (last visited Nov. 2015); Dir. Byron Hurt, *Hip-Hop: Beyond Beats and Rhymes* (2006) (last visited Oct. 2015) (describing the beginnings of commercialized hip-hop); Rosalia Malvasi, *Is the “commercialization of hip-hop a positive or negative?”*, <https://prezi.com/ub1ljo3acqe/is-the-commercialization-of-hip-hop-a-positive-or-negative/> (describes the beginnings of commercialized hip-hop); *What Went Wrong With... Hip-Hop And Rap? (A Timeline)*, <http://whatwentwrongwith.com/2014/02/23/what-went-wrong-with-hip-hop-and-rap-a-timeline/>.

¹¹⁷ Simpson, *supra* note 115.

¹¹⁸ *Id.* (noting Bree Newsome’s “#Stay Strong,” a “love song to freedom fighters.”); Bree Newsome, *#StayStrong: A Love Song To Freedom Fighters*, <https://breenewsomelandcamp.com/track/staystrong-a-love-song-to-freedom-fighters/>; see also FED. TRADE. COMM’N, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A SIXTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES* (2009), <https://www.ftc.gov/sites/default/files/documents/reports/marketing-violent-entertainment-children-sixth-follow-review-industry-practices-motion-picture-music/p994511violententertainment.pdf>.

¹¹⁹ See HIP HOP CAUCUS, <http://www.hiphopcaucus.org/our-story/> (last visited Oct. 2015).

¹²⁰ Simpson, *supra* note 115 (citing GEORGE LIPSITZ, *FOOTSTEPS IN THE DARK: THE HIDDEN HISTORIES OF POPULAR MUSIC* (2007); The Hip Hop Hearings, at 158 (discussing *Music Lyrics and Commerce*, Hearing Before the H. Subcomm. on Commerce, Consumer Protection, and Competitiveness of the H. Comm. on Energy and Commerce, 103rd Cong. 6 (1994)).

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A. *The Black Nationalist Project*

Howard Law student Leon Humphrey, who has studied Black Nationalism extensively, believes this strain of “self-respect” has been part of Black sensibilities since “the very moment when European Americans introduced Blacks to American shores.”¹²¹ This discourse expresses “a property dispute with their European counterparts firstly for the right to own their own bodies and then the right to own without condition the environment in which they lived.”¹²² In this dispute, Blacks have sought *autonomy* (“the ability to be the masters of their own political and socioeconomic affairs”); a *discernible geographic sphere* from which to exercise this autonomy; and *freedom from white influence* (“the ability to exclude white influence from this geographic sphere.”)¹²³ Leon’s formulation makes a clear connection between Black Nationalism in the United States and the strivings of Pan Africanism worldwide. Each of these objectives have had their advocates among African-Americans, who formed groups to advance one or more of them.

The Black struggle for land (in Leon’s terms, “space; a discernible geographic sphere from which to exercise . . . autonomy” and from which to “exclude white influence”) is deep-seated.¹²⁴ Marcus Garvey eloquently addressed this yearning with his “Back to Africa” movement in the early 1900s.¹²⁵ In the 1930s, the American Communist Party (CPUSA) translated Garvey’s idea of land for black people in Africa into a demand for land, confiscated from white landowners in the rural South, where most black people still lived, to create a “Nation within a Nation.”¹²⁶

The CPUSA did not gain much purchase in the South, but the “Nation within a Nation” idea soon re-surfaced as a central platform of

¹²¹ Email from Leon Humphrey to Professor Harold McDougall (Aug. 26, 2015) (on file with author).

¹²² Humphrey, *supra* note 121.

¹²³ *Id.*

¹²⁴ See generally Harold McDougall, *Land Reform and the Struggle for Black Liberation*, LAND REFORM AMERICAN STYLE (Charles Geisler & Frank Popper eds., 1984).

¹²⁵ *Land Reform and the Struggle for Black Liberation*, *supra* note 124, at 176-77 (UNIA founded in Jamaica in 1914, launched in the U.S. in 1917). See also Bianca Bell, *The Failure of Reparations in America and the Need for Black Sovereignty in the 21st Century* (unpublished paper on file with author) (citing Lee A. Harris, *Political Autonomy as a Form of Reparations to African-Americans*, 29 S.U. L. REV. 25, 32 (2001) (“At its peak, UNIA boasted a membership of at least a million members, and Garvey is still recognized as the leader of the largest secular organization in black history.”)).

¹²⁶ This land reform was not to serve the Radical Republican idea of reparations, but rather Garvey’s notion of black self-determination. The CPUSA believed this demand would facilitate organizing among black agricultural workers and tenant farmers, whom they considered a “revolutionary vanguard” in the struggle against American capitalism. *Land Reform and the Struggle for Black Liberation*, *supra* note 124, at 178.

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the emerging Nation of Islam in the North, organizing among black urban migrants in Detroit in the 1930s.¹²⁷ When the U.S. government ignored their proposal, the Nation began buying land on its own. Within thirty years, they had acquired large farms in Georgia, Alabama, and Mississippi, despite court actions to nullify purchases by a “dangerous foreign nation.” With this land base, and aided by financing from Libya, the Nation created a robust agricultural development program, marketing their produce in the urban North along with fresh fish and copies of *Muhammad Speaks*, the organization’s newspaper. Muhammad Speaks was widely read by black intellectuals, especially for its coverage of foreign affairs—a bit like *Al Jazeera* today.¹²⁸

When Nation of Islam leader Elijah Muhammad died on February 25, 1975, his son Wallace, taking a “faith only,” anti-commercial posture, sold most of the Nation’s businesses and land holdings. The next contender for self-determination in the Black Belt South, also originating in Detroit, was the Republic of New Africa (RNA), founded by black labor organizers in that city.¹²⁹

The RNA was even more insistent on the idea of self-determination than the Muslims were; in turn, local government authorities and the FBI offered even greater resistance. In 1969, RNA President, Imari Obadele, a Yale Law University PhD, opened the fray with a diplomatic note to then-Secretary of State Dean Rusk. The note declared the RNA’s intention to found an independent black nation in the rural South. It called for a plebiscite to allow local blacks to renounce U.S. citizenship in favor of citizenship in the Republic of New Africa.¹³⁰

The resistance to the Muslims, who sought land only for commercial purposes, took place in state courts. In contrast, the RNA faced police and FBI raids after the Mississippi State Attorney General interpreted their presence in the state as an “armed invasion.”¹³¹ The RNA deployed its armed military wing, the “Malcolmites,” in the state to protect RNA organizers, much as the Deacons for Defense and Justice had protected civil rights marchers and demonstrators a decade before.

¹²⁷ It is important to note that a large number of Marcus Garvey’s former followers joined the Nation after his downfall. *Id.* at 184

¹²⁸ See generally *Land Reform and the Struggle for Black Liberation*, *supra* note 124, at 184-85

¹²⁹ See Raymond L. Hall, BLACK SEPARATISM AND SOCIAL REALITY: RHETORIC AND REASON ix (1977); see also Imari Obadele, *Republic of New Africa: The Struggle For Land In Mississippi*, BLACK WORLD, Feb. 1973, 66-68.

¹³⁰ Bell, *supra* note 125 (citing Imari Obadele, *What is the Republic of New Africa*, MISSISSIPPI DIGITAL LIBRARY, (Jan. 1976), <http://collections.msdl.org/cdm/ref/collection/tougaloo/id/364>) (unpublished 2014 student essay on file with author).

¹³¹ Nicholas Kimble, *Republic of New Africa*, BROWN-TOUGALOO EXCHANGE MISSISSIPPI FREEDOM PROJECT, (Dec. 3, 2014), <http://cds.library.brown.edu/projects/FreedomNow/themes/blkpower/>.

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In 1971, a gun battle between RNA members, FBI agents, and local police left one Jackson police officer dead at the RNA headquarters in Jackson, Mississippi. Eleven RNA leaders got prison terms, five for life.¹³² The RNA cadre joined a number of local organizations, focusing their attention on protecting the existing black-owned land base in the rural South (at the time, six million acres,¹³³ but the RNA itself disbanded.¹³⁴

There have been many efforts to achieve political and socioeconomic autonomy *without* a land base.¹³⁵ Leon cites “enslaved Blacks removing themselves from their bondage via Petit Marronage,” and the words of Fredrick Douglass in 1865 stating that Black people simply wanted to be left alone. Booker T. Washington’s creation of the Tuskegee Institute, and “Black settlements from Seneca Village to Rosewood, to Black enclaves from Harlem, New York to Tulsa, Oklahoma”¹³⁶ exemplify this trend. To Leon, this history, “clearly highlights the fact that the traditional aim of many blacks was never inclusion but unconditional, unqualified and absolute freedom from their European counterparts.”¹³⁷

“Black Wall Street” in Tulsa, to which Leon refers, is an example of a purely economic strategy.¹³⁸ A good example of a purely political strategy would be the Lowndes County (Alabama) Freedom Organization (LCFO). LCFO, organized in 1965 by Stokely Carmichael and other SNCC members,¹³⁹ originated the concept of a Black Panther Party¹⁴⁰ and the lunging Black Panther logo.¹⁴¹ The famous Oakland-based Black Panther Party for Self-Defense (BPP) that followed, appropriating the symbol,¹⁴² aimed at both political and social autonomy.¹⁴³ Because none of these organizations could be completely

¹³² *Id.*

¹³³ Harold McDougall, *Black Landowners Beware: A Proposal For Statutory Reform*, 9 N.Y.U. REV. L. & SOC. CHANGE 127 (1979-80).

¹³⁴ *Land Reform and the Struggle for Black Liberation*, *supra* note 124.

¹³⁵ Bell, *supra* note 125.

¹³⁶ Humphrey, *supra* note 121.

¹³⁷ *Id.*

¹³⁸ Josie Pickens, The Destruction of Black Wall Street, EBONY MAGAZINE, May 31, 2013, <http://www.ebony.com/black-history/the-destruction-of-black-wall-street-405#axzz4J1JmO4Kh>.

¹³⁹ *Social Activism Sound Project: Black Panther Party*, UC BERKELEY PUB. LIBRARY (July 13, 2011), <http://www.lib.berkeley.edu/MRC/pacificpanthers.html#1965>.

¹⁴⁰ Benjamin Hedin, *From Selma to Black Power*, THE ATLANTIC, (Mar. 6, 2015), <http://www.theatlantic.com/national/archive/2015/03/from-selma-to-black-power/386989/>.

¹⁴¹ Dorothy Zellner et. al., *The Black Panther Symbol: An Email Discussion*, (May-June 2006), <http://www.crmvet.org/disc/panther.htm>.

¹⁴² See Joshua Bloom & Waldo Martin, BLACK AGAINST THE EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY 39-44 (2014).

¹⁴³ The Oakland-based BPP engaged not only in gun-toting swagger and in campaigns against police harassment and brutality, but also provided free breakfasts for inner-city community children, medical

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separate from white America, I see this strain of Black Nationalism as seeking “relative” socioeconomic and/or political autonomy.¹⁴⁴

One variant remains: attempts to achieve freedom from white influence without a land base, political autonomy, *or* socioeconomic autonomy. These are more recent. The activities of the “cultural nationalists” of the 1970s provide examples—Amiri Baraka’s Congress of African People¹⁴⁵ and Ron Karenga’s¹⁴⁶ “US” organization.¹⁴⁷ The aim here was to promote a set of cultural practices, shared throughout the black community that would engender a sense of self-worth and pride in being black.¹⁴⁸ In some sense, this amounted to an attempt to subvert or replace the prevailing white racist narrative regarding the identity and worth of African Americans.¹⁴⁹

B. Stories of Self-Respect

Practitioners of self-respect politics combine a “respectable” commitment to family, community, and even religion, with the original Southern “bad Negro’s” refusal to submit to white intimidation, or even cater to white fears or needs for reassurance. The practitioners I found most impressive in my time were Malcolm X and Stokely Carmichael (Kwame Ture), at the height of their maturity and development.¹⁵⁰ (Both Stokely and Malcolm were of Caribbean heritage; Stokely first-generation from Trinidad, and Malcolm second-generation from Grenada).¹⁵¹

Confident and self-assured, the “self-respecting” black person does what is right, not to please, emulate, or even to infuriate white people, but to build the black community. For most of my student

clinics, and a Bobby Seale run for mayor of Oakland. *See, e.g.*, PBS, *A Huey P. Newton Story*, https://www.pbs.org/hueypnewton/actions/actions_platform.html (citing the Black Panther’s Ten Point Program).

¹⁴⁴ An unusual variant is “revolutionary” Black Nationalism, which targeted capitalism as well as racism. The Panthers dabbled in this, but the Revolutionary Action Movement (RAM) and the All-African People’s Revolutionary Party (AAPRP) are better examples. *See, e.g.*, The Malcolm X Project at Columbia University, *Max Stanford*, (RNA founder), <http://www.columbia.edu/cu/ccbh/mxp/stanford.html>, and the AAPRP website at <http://www.aarp-intl.org/>.

¹⁴⁵ *See generally* MICHAEL SIMANGA, AMIRI BARAKA AND THE CONGRESS OF AFRICAN PEOPLE: HISTORY AND MEMORY (2015).

¹⁴⁶ Dr. Maulana Karenga, *The Official Website of Dr. Maulana Karenga*, <http://www.maulanakarenga.org/>.

¹⁴⁷ THE ORGANIZATION US (2015), <http://www.us-organization.org/>.

¹⁴⁸ *Id.*

¹⁴⁹ Richardson critiques the Northern, urban aesthetic of “cultural” nationalism. RICHARDSON, *supra* note 29, at 272.

¹⁵⁰ Bell, *supra* note 125, at 9 (citing Michael C. Dawson, *Black Visions* 95 (2001)).

¹⁵¹ Stokely Carmichael was born in Trinidad, immigrating to the U.S. with his parents when he was in middle school. STOKELY CARMICHAEL, READY FOR REVOLUTION: THE LIFE AND STRUGGLES OF STOKELY CARMICHAEL (2003), at 12. Malcolm’s mother was born in Grenada. MALCOLM X AND ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X 8 (1964).

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researchers, Black Nationalism is only a concept from history; while I actually met Malcolm X, he was assassinated fifty years ago. Minister Louis Farrakhan is still around, but he has not made the impression that Malcolm did, despite such achievements as the Million Man March.¹⁵²

Before his induction into the Nation of Islam, Malcolm X, who grew up in a poor family with seven siblings, supported himself by stealing and gambling. His was the true “thug life,” and as “Detroit Red,” he made quite a name for himself before he wound up in prison. Emerging from there as a leader in the Nation of Islam, Malcolm carried his “thug” street confidence into the intellectual and political arena and began to confront the white establishment at every turn.¹⁵³ In this regard, he and his mentor Elijah Muhammad soon parted ways, as Elijah was not interested in confrontation. He felt Malcolm had become unnecessarily “disrespectful,” and went so far as to forbid him from making public statements after Malcolm’s famous “chickens coming home to roost” remark made in the wake of John F. Kennedy’s assassination.¹⁵⁴

Malcolm X did not have to operate in a postindustrial society, one in which police and FBI agents made war on gangs by introducing drugs to pacify and divert them, following with a war on drugs that placed them in prison. (The number of black prisoners in U.S. jails now exceeds the numbers of Africans enslaved during the height of the Ante bellum period.)

Still, Malcolm’s nationalist and radical rhetoric inspired a generation to recognize the limitations of “respectability” expressed only in white terms,¹⁵⁵ and to resist continued social, economic, political and cultural oppression by the white majority.¹⁵⁶ He also gave life to the Black Power and black cultural movements, grounded in the struggles of the black poor and working class.¹⁵⁷ Malcolm “decisively shaped a nationalist project of black uplift in the mid-twentieth century that prioritized [the] grassroots community.”¹⁵⁸

¹⁵² The Million Man March was an impressive demonstration of self-respect and community uplift, but failed to invest in the long-term community-building necessary to see its high ideals put into practice. See, e.g., Tom Rowley, *The Million Man March, revisited: Three stories*, WASH. POST, (Oct. 10, 2015).

¹⁵³ See John J. Simon, *The Achievement of Malcolm X*, MONTHLY REVIEW 2 (2005).

¹⁵⁴ Bell, *supra* note 125 (citing WILLIAM SALES, FROM CIVIL RIGHTS TO BLACK LIBERATION: MALCOLM X AND THE ORGANIZATION OF AFRO- AMERICAN UNITY (1994)).

¹⁵⁵ As I. F. Stone wrote in his review of *The Autobiography of Malcolm X*, “The sickness of the Negro in America is that he has been made to feel a nigger; the genocide is psychic.” See I. F. Stone, *The Pilgrimage of Malcolm X*, THE NEW YORK REVIEW OF BOOKS, Nov. 11, 1965.

¹⁵⁶ See generally MALCOLM X & ALEX HAILEY, THE AUTOBIOGRAPHY OF MALCOLM X (1965).

¹⁵⁷ See generally John J. Simon, *The Achievement of Malcolm X*, MONTHLY REVIEW (2005).

¹⁵⁸ *Id.*

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Martin Luther King was eminently “respectable.” His “speaking style and charisma” led him to prominence, not his ability to organize the black community in a lasting way, or his overt confrontation of white power.

Malcolm X was different. Richardson comments on the “upright” and “sober” manner of members of the Nation of Islam observed by onlookers, even in such cases as Malcolm’s “charismatic confrontation of police in Harlem on behalf of a police brutality victim.”¹⁵⁹ Richardson believes, however, that the “Euro-American style of suit” worn by Malcolm and other members of the Nation of Islam was meant to “evoke the manner and respectability conventionally associated with white men of the white-collar class.”¹⁶⁰ This strikes me as an erroneous conflation of self-respect with “respectability.” What she says may have been true for the Northern urban black bourgeoisie, but what is evoked by a suit has a lot to do with who is wearing it and how.

Miles Davis wore “Euro-American” styled suits for much of his career. Members of the Mafia wore such suits all the time. Black athletes wear such suits today. In none of these cases are the wearers seeking to emulate white-collar white men, nor do they give that impression. Anyone facing members of Elijah Muhammad’s security team, the Fruit of Islam (FOI), knew they were not dealing with white-collar white men, regardless of the suits they wore.

Malcolm, “Euro-American style of suit” and all, embodied a black man “whose disenfranchisement, invisibility, and poverty might [someday] erupt into violent revolutionary action against the dominant social order.”¹⁶¹ To be open to this possibility of reacting to oppression as any normal human would, is in my view the essence of self-respect.¹⁶²

Today, however, my students are concerned that the “relatively autonomous” and “cultural nationalist” strains of Black Nationalism, not having a land base, have only limited “avenues to economic comfort, largess and stability” and must ultimately engage with “white supremacists and/or anti-black spaces, politics and systems.”¹⁶³ Moreover, when they do so engage, they do not receive a warm

¹⁵⁹ RICHARDSON, *supra* note 29, at 163.

¹⁶⁰ RICHARDSON, *supra* note 29, at 162.

¹⁶¹ RICHARDSON, *supra* note 29, at 163.

¹⁶² Such ventures surfaced a shift from “‘genteel’ models of black masculine leadership,” (i.e., “respectable”) to models that were more militant and vocal, (I would say, “self-respecting”), RICHARDSON, *supra* note 29, at 195.

¹⁶³ Wilson, *supra* note 49.

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welcome. While “respectability” practitioners may encounter bemused contempt from whites, Black Nationalists are hated and feared.¹⁶⁴

At the same time, “self-respecting” blacks are unwilling to accept the cabined life of the “respectable” black. Instead, they are closer to Ta-Nahesi Coates’ worldview, expressed in the following advice to his young son¹⁶⁵ (sharply contrasted with that of the elite lawyer discussed earlier).¹⁶⁶

- You are human and you will make mistakes.
- You will misjudge.
- You will yell.
- You will drink too much.
- You will hang out with people you shouldn’t.
- You should feel no need to constrict yourself to make other people feel comfortable.
- Caution is futile, because there is no secure refuge from racism in America.

VI. FACING THE AFRICAN-AMERICAN NARRATIVE DILEMMA: CONVERSATIONS WITH HOWARD LAW STUDENTS

As we have seen, the African-American community contains conflicting narratives on how to resist continuing race and class oppression, as well as how to mitigate damage already done.¹⁶⁷ Each narrative is grounded in different definitions, different tactics, different present and future aspirations, historical recollections and hopes for “blackness.”¹⁶⁸ These conflicts have undermined the community’s overall effectiveness.¹⁶⁹ My students find the absence of grass roots community voices in the civil rights discourse, the absence of the voices of “little people,” particularly troubling.

¹⁶⁴ See, e.g., Stan. Univ. King Encyclopedia, *The Federal Bureau of Investigation (FBI)*, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_federal_bureau_of_investigation_fbi/.

¹⁶⁵ See Randall Kennedy, *A Caricature of Black Reality*, THE AMERICAN PROSPECT 88 (2015) (quoting Ta-Nahesi Coates, as he criticizes Coates for repudiating the “perfectionist strand in black respectability politics” in advising his teen-aged son in Coates best-selling book, BETWEEN THE WORLD AND ME).

¹⁶⁶ See Graham, *supra* note 75.

¹⁶⁷ See generally, McDougall, BLACK BALTIMORE: A NEW THEORY OF COMMUNITY (1992).

¹⁶⁸ Wilson, *supra* note 49.

¹⁶⁹ Ironically, then, Uncle Tom and the gangsta, the politics of respectability and the politics of disrespect, are mirror images of one another. Both use white sensibilities and reactions as the cornerstone of their effectiveness, cf. RICHARDSON, *supra* note 29, at 222 (“the ‘Uncle Tom’ and the ‘gangsta’ [are] two sides of the same coin.”).

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Tabias Wilson observes that black leaders, especially on the national scale, seem to “just emerge,” without a clear mandate and with little or no means of holding them accountable.¹⁷⁰ “Who,” Tabias asks, “in theory and practice, is given the franchise and the power to validate/authenticate these leaders? Does the franchise include the working poor, youth, LGBTQ, women, the college-educated, felons, the disenfranchised?”¹⁷¹ If not, and the franchise for choosing black leaders is given only to “professionals and/or establishment types,” this shrinks the actual base of such leaders dramatically, making it difficult to engage the full power of the black community.¹⁷²

Even worse, the existing process seems to select “leaders for life.”¹⁷³ “For more than 40 years our community has either been represented or guided from the grave by the Kings, Sharptons, Farrakhans and Jacksons,” Tabias observes.¹⁷⁴ Young people who identify with a “collective, systemic struggle against poverty and white supremacy” see this “unchanging, dynastic [black] leadership”¹⁷⁵ as part of the problem rather than part of the solution, and head out on their own, further weakening the community’s ability to cohere.

Ebony Johnson sees a similar outcome. Today’s youth do not respect leaders with whom they cannot identify—“they do not want someone from the suburbs to come fix ‘the hood’s’ problems.” Instead, they want “someone who can identify with their lives to fight for their lives.” Because “no one else in their community has stepped up to take the lead, they have decided to lead themselves.”¹⁷⁶

What to do? Tabias is concerned that “our movements seem to be more messages to white people than to ourselves.” Even Black Lives Matter seems focused on a white audience. “We seem unable, unwilling or afraid to think of a Blackness that has value on its own.”¹⁷⁷

¹⁷⁰ Wilson, *supra* note 50.

¹⁷¹ *Id.*

¹⁷² Such a narrow base of connection means, among other things, very low voter participation among the “little people” come election time. This might actually be acceptable for black incumbents in Congress, or state legislatures and/or local elections, who actually depend on low voter turnout to stay in office. However, this means very bad news in national elections where these same pols promise to “deliver” the black vote. Memorandum from Wilson, *supra* note 50.

¹⁷³ Argued by Tabias Wilson, *supra* note 50. I responded that in Africa, this is called the “big man” syndrome. Throughout the Diaspora and the Continent, we see this, arising as a function of civic/citizen underdevelopment, class-biased political processes, active suppression of the little people’s participation, and leadership alliance with the oppressor, or at least with the oppressor’s money.

¹⁷⁴ Wilson, *supra* note 50.

¹⁷⁵ *Id.*

¹⁷⁶ Memorandum from Ebony Johnson for Professor Harold McDougall (July 4, 2015) (on file with author).

¹⁷⁷ Wilson, *supra* note 48 (“This lends credence to Bell’s assertion that racism and white supremacy are permanent, they have become so part of our cultural DNA, that we understand ourselves in essentialist terms defined by white supremacy.”).

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A. *Black Lives Matter*

#BlackLivesMatter began soon after a Florida jury acquitted George Zimmerman, the killer of Trayvon Martin, in 2013. Alicia Garza,¹⁷⁸ a labor and community activist from Oakland, California, initiated a Facebook conversation “to express her anger and sadness.”¹⁷⁹ Garza joined forces with two friends, Patrisse Cullors and Opal Tometi,¹⁸⁰ to “spark nationwide discussion,”¹⁸¹ to respond to “the anti-Black racism that permeates our society,”¹⁸² and to “the way black lives are consistently undervalued in America.”¹⁸³ They issued a “call to action”¹⁸⁴ for people to work together to figure out how to change things.¹⁸⁵

A Wikipedia editor observes that, although all three run a stable website and organization, “the overall Black Lives Matter movement is a decentralized network, and has no formal hierarchy or structure.”¹⁸⁶ The movement reached national awareness with the protests and unrest in Ferguson in August 2014, although Garza, Cullors and Tometi were not initially involved in those events.¹⁸⁷ Originally avoiding the limelight, the three have been encouraged, particularly by older people, to “own” and “step into” leadership roles.¹⁸⁸ This is how we are now able to piece together a picture of what #BlackLivesMatter is, how it formed, and where it may be going.

All three were involved in Black Organizing for Leadership and Dignity (BOLD). “Access to that national network helped their message

¹⁷⁸ Liz Pleasant, *Meet the Woman Behind #BlackLivesMatter: The Hashtag That Became a Civil Rights Movement*, YES! MAGAZINE (May 1, 2015), <http://www.yesmagazine.org/issues/make-it-right/meet-the-woman-behind-black-lives-matter-the-hashtag-that-became-a-civil-rights-movement>.

¹⁷⁹ Liz Pleasant, *supra* note 178.

¹⁸⁰ Tometi remembers walking out of a screening of *Fruitvale Station* in Brooklyn when she heard of George Zimmerman’s acquittal in the murder of Trayvon Martin; Mychal Denzel Smith, *A Q&A With Opal Tometi, Co-Founder of #BlackLivesMatter*, THE NATION (June 2, 2015).

¹⁸¹ See, e.g., Janell Ross, *How Black Lives Matter Moved from a Hashtag to a Real Political Force*, WASH. POST (Aug. 19, 2015); Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, THE GUARDIAN (July 2015); Gene Demby, *The Birth of a New Civil Rights Movement*, POLITICO, (Dec. 31, 2014).

¹⁸² Alicia Garza, *A Herstory of the #BlackLivesMatter Movement*, THE FEMINIST WIRE, (Oct. 7, 2014), <http://www.thefeministwire.com/2014/10/blacklivesmatter-2/>.

¹⁸³ Liz Pleasant, *supra* note 178.

¹⁸⁴ Garza, *supra* note 182.

¹⁸⁵ Mychal Denzel Smith, *supra* note 180.

¹⁸⁶ *Black Lives Matter*, WIKIPEDIA, https://en.wikipedia.org/wiki/Black_Lives_Matter (citing Ben Collins and Tim Mack, *Who Really Runs #BlackLivesMatter?*, DAILY BEAST (Aug. 15, 2015)), <http://www.thedailybeast.com/articles/2015/08/15/who-really-runs-blacklivesmatter.html>.

¹⁸⁷ *Black Lives Matter*, WIKIPEDIA, *supra* note 184 (citing Shannon Luibbrand, *How the Events in Ferguson Sparked a Movement in America*, CBS NEWS (Aug. 7, 2015, 5:39 AM), <http://www.cbsnews.com/news/how-the-black-lives-matter-movement-changed-america-one-year-later/>).

¹⁸⁸ Mychal Denzel Smith, *supra* note 180.

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spread quickly.”¹⁸⁹ Activists and organizations nationwide were soon using the #BlackLivesMatter hashtag to “shine light on underreported incidents of black people being attacked or killed by police.”¹⁹⁰ Cullers observes,

Rosa Parks was not just a woman who sat at the front of the bus. She was a strategist; she was a tactician. I think what we are trying to push, because we have social media and they didn’t, is a new narrative. And we get to do that in this generation.¹⁹¹

Garza feels that BLM’s appeal is much broader than that of mainstream civil rights organizations because their leadership is diverse, unlike the prevailing model of charismatic leadership by straight males. Garza strongly believes in an approach that “goes beyond the narrow nationalism that can be prevalent within some Black communities, which merely calls on Black people to love Black, live Black and buy Black,” keeping “respectable” Black men in the forefront.¹⁹² In order to “(re)build” the Black liberation movement, Garza insists, it must include “queer and trans and disabled folk . . . Black-undocumented folks, folks with records, women and all Black lives along the gender spectrum” who in the past have been ignored, if not shoved aside.¹⁹³ Needless to say, “respectability” politics is not on the agenda.¹⁹⁴

When we discuss Black Lives Matter, Garza urges us to “credit [its] lineage,” “talk about its inception and political framing,” and “[l]ift up Black lives as an opportunity to connect struggles across race, class, gender, nationality, sexuality and disability.”¹⁹⁵ She and her co-founders are “looking to grow a movement that ensures liberation across sexual, gender, and class identity.”¹⁹⁶

For Opal Tometi,¹⁹⁷ it was “very important to have something that was broad enough [to] capture the state of black life” and the

¹⁸⁹ Liz Pleasant, *supra* note 178.

¹⁹⁰ *Id.*

¹⁹¹ Jane Little, *They Started a Hashtag and a Civil Rights Movement*, PRI’S THE WORLD (July 17, 2015, 6:45 PM), <http://www.pri.org/stories/2015-07-17/they-started-hashtag-and-civil-rights-movement>.

¹⁹² Garza, *supra* note 182.

¹⁹³ *Id.*

¹⁹⁴ *Black Lives Matter*, WIKIPEDIA, *supra* note 184 (citing Raven Rakia); see also Tod Seelie, *The Fight for the Soul of the Black Lives Matter Movement*, GOTHAMIST (Apr. 7, 2015, 1:55 PM), http://gothamist.com/2015/04/07/black_lives_matter_movement.php.

¹⁹⁵ Mychal Denzel Smith, *supra* note 180.

¹⁹⁶ *Id.*

¹⁹⁷ Executive Director of Black Alliance for Just Immigration (See Mychal Denzel Smith, *supra* note 180).

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violence all black people faced.¹⁹⁸ Of Nigerian heritage, Tometi particularly notes the diversity of Black immigrant experience she encounters in her BLM work.¹⁹⁹ She speaks to the increasing role of black immigrants in American society and in the social justice movement.²⁰⁰

Cullors, the third in the trio, focuses on “the roots of white supremacy and racism, in which black people become the face for all of the atrocities here in this country and [around] the globe . . . [We’re] asking to be able to live our lives with dignity, to live our lives without fear.”²⁰¹

BLM also struggles with attempts by straight, white, patriarchal and/or corporate actors to appropriate or co-opt their work and their symbols with watered-down slogans. Even progressive movements and actors sometimes “push for unity at the expense of really understanding the concrete differences in context, experience and oppression.”²⁰² It is not that “Black lives are more important than other lives,” Garza insists. BLM expresses and pursues “active solidarity with all oppressed people who are fighting for their liberation . . . [O]ur destinies are intertwined.”²⁰³

“[T]o keep it real,” Garza insists, “when Black people in this country get free, the benefits will be wide reaching and transformative for society as a whole,”²⁰⁴ because Black lives are at the core of the

¹⁹⁸ Mychal Denzel Smith, *supra* note 180.

¹⁹⁹ *Id.* (“When I speak at events these days and share that I have Nigerian roots, I will automatically have fifteen people come up to me after the talk and share with me, ‘I’m this. I’m actually from this. I’m from Ghana. I’m from Jamaica.’ These incidents “add . . . to . . . the broader community understanding of who is black and what is actually happening to them . . .”).

²⁰⁰ See Eugene Robinson, *DISINTEGRATION: THE SPLINTERING OF BLACK AMERICA* (2011) (discussing an “Emergent community . . . of mixed-race families and black immigrants from Africa and the Caribbean . . .”). A noted young immigrant leader in the movement is Rahiel Tesfamariam, a female Ethiopian minister from Yale Divinity School, the subject of a viral photograph of her arrest at a Ferguson, Missouri demonstration while wearing a Hands Up United t-shirt, https://www.washingtonpost.com/opinions/how-black-activism-lost-its-religion/2015/09/18/2f56fc00-5d6b-11e5-8e9e-dce8a2a2a679_story.html.

²⁰¹ Little, *supra* note 191.

²⁰² See Tometi, in Mychal Denzel Smith, *supra* note 178 (“We still experience resistance against including these [diverse] stories in the broader narrative. Black Lives Matter has been viral and people are taking it, appropriating it, and using it however they see fit. That’s part of the challenge in being able to shape the narrative when we are not necessarily around or when leaders from our network aren’t the ones sharing the stories.”).

²⁰³ Garza, *supra* note 182.

²⁰⁴ *Id.*

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White supremacist²⁰⁵/neoliberal capitalist narrative.²⁰⁶ It is therefore “appropriate and necessary to have strategy and action centered around Blackness without other . . . communities [of color, or White] needing to find a place and a way to center themselves within it.”²⁰⁷ “[W]e need less watered down unity and more active solidarities with us, Black people, unwaveringly, in defense of our humanity. Our collective futures depend on it.”²⁰⁸

Thus far, the three co-founders have organized a bus ride to Ferguson to support the St. Louis movement after Michael Brown’s murder,²⁰⁹ hosted national conference calls connecting activists around the country, and organized a national conference.²¹⁰ There are already at least two dozen chapters of BLM in the U.S. and Canada.²¹¹ “Activists in dozens of cities have marched onto highways to disrupt traffic; linked arms across railroad tracks to stop trains; sat down in urban intersections; delayed sporting events; and temporarily occupied shopping malls, major retail stores, police departments, and city halls.”²¹² A march in Seattle exceeded ten thousand people.²¹³ As BLM and their allies broaden the movement to go “beyond extrajudicial killings of Black people by police and vigilantes,”²¹⁴ new protests, from marches of a few dozen to several thousand have emerged, calling “for an end to stop-and-frisk, for more public school funding, and for an increase in the minimum wage”²¹⁵

BLM and their allies are now investigating the ways in which anti-Black racism manifests in individual communities. The BLM movement is in the process of holding “one-on-one or small community/town halls and panels to . . . engage . . . people in a deeper

²⁰⁵ *Id.* (“When we deploy ‘All Lives Matter’ . . . to correct an intervention specifically created to address anti-blackness, we lose the ways in which the state apparatus has built a program of genocide and repression mostly on the backs of Black people—beginning with the theft of millions of people for free labor—and then adapted it to control, murder, and profit off of other communities of color and immigrant communities. We perpetuate a level of White supremacist domination by reproducing a tired trope that we are all the same”).

²⁰⁶ *Id.*

²⁰⁷ *Op. cit.*

²⁰⁸ *Op. cit.*

²⁰⁹ More than 500 people participated, *Black Lives Matter*, WIKIPEDIA, *supra* note 182 (citing Solomon, Akiba, *Get on the Bus: Inside the Black Lives Matter “Freedom Ride” to Ferguson*, COLORLINES, (Sep. 5, 2014), Retrieved Feb. 5, 2015).

²¹⁰ Mark Winston Griffith, *Black Love Matters*, THE NATION (July 28, 2015) (“The original projections declared that ‘Hundreds of Black Freedom Fighters’ would attend, but final estimates put the gathering at well above a thousand people.”).

²¹¹ *Black Lives Matter*, WIKIPEDIA, *supra* note 187 (citing Segalov, Michael, *We Spoke to the Activist Behind #BlackLivesMatter About Racism in Britain and America*, VICE, Retrieved Feb. 5, 2015).

²¹² Petersen-Smith, *supra* note 72.

²¹³ *Id.*

²¹⁴ Garza, *supra* note 182.

²¹⁵ Petersen-Smith, *supra* note 72.

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conversation” about “[living] in a world where we are not murdered,” but also to raise questions about the structural oppression and subordination black people face.²¹⁶ “[I]t’s actually a lot of freaking work,” says Tometi. “Our days are 16-18 hours. We are barely getting any sleep because we are building out this political project and social movement network.”²¹⁷

More recent publicity, such as the protest at a Bernie Sanders rally²¹⁸ and a Twitter feed of BLM protesters chanting, “Pigs in a blanket, fry ‘em like bacon” at the Minnesota State Fair, have drawn attention and energy away from needed community organizing, and occasionally put BLM on the defensive.²¹⁹ Fox News has launched a campaign against them, calling them a “hate group.”²²⁰ As one article put it, the Black Lives Matter movement is “experiencing growing pains as it steps into national spotlight.”²²¹

The challenge now is to avoid media distractions and build capacity in black communities instead. This is what I call civic infrastructure, so that what the white and/or right wing media say about your movement or your work does not matter, or matters less. Social media alone cannot do that. As Robin Kelley, author of *Hammer and Hoe*, a history of black communists in Depression-era Alabama said in the *Nation* recently, “[s]trong community-based organizing really matters. Nowadays there’s so much mobility, so much displacement that [what takes its place is] [v]irtual organizing.” Social media has been “able to mobilize huge numbers of people,” but with virtual organizing alone, “it’s very hard to sustain the day-to-day organizational structure that is required for long-term struggles.”²²²

²¹⁶ Mychal Denzel Smith, *supra* note 180. (“Police are only one aspect,” [Tometti] says, pointing to “things like the immigration system . . . the education system . . . health care . . . the attacks on labor unions and what that has done to the standard of living, the employability of our people, the kind of wages that we are making, and the benefits. That to me is actually violence that’s sanctioned by the state . . . [We must] continue to rise up and fight back.”).

²¹⁷ *Id.*

²¹⁸ See John Wagner, *Protesters drove Bernie Sanders from one Seattle stage. At his next stop, 15,000 people showed*, WASH. POST (Aug. 8, 2015); cf. Sameer Rao, *Black Lives Matter Refuses Democratic National Committee Endorsement*, COLORLINES (Sept. 1, 2015).

²¹⁹ *Black Lives Matter*, WIKIPEDIA, *supra* note 187 (citing Gottfried, Mara. [1], ST. PAUL PIONEER PRESS, Aug. 31, 2015. Retrieved Aug. 31, 2015).

²²⁰ Danielle C. Belton, *Black Lives Matter Backlash Gets Real*, THE ROOT (Sept. 4 2015, 3:00 AM), http://www.theroot.com/articles/culture/2015/09/black_lives_matter_backlash_gets_real.html (“Bill O’Reilly is calling the movement a “hate group.”); Shantell E. Jamison, *Black Lives Matter Members Respond to FOX*, JET MAGAZINE (Sept. 3, 2015).

²²¹ Jesse J. Holland, *Black Lives Matter skipping 2016 endorsement*, USA TODAY, Sept. 1, 2015.

²²² See Sarah Jaffe, *What a Band of 20th-Century Alabama Communists Can Teach Black Lives Matter and the Offspring of Occupy*, THE NATION (Aug. 31, 2015); Adrian Florido, *Black Lives Matter Activists Meet in Cleveland to Plot Movement’s Future*, NPR (July 23, 2015, 4:39 PM),

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The BLM Movement is the first mass protest to emerge on black issues since “the decades-long racist backlash against the Black revolt of the 1960s.”²²³ It operates in a backlashed terrain of racial re-segregation, an eviscerated Voting Rights Act, a “so-called War on Drugs” and the “criminalization of . . . Black people.”²²⁴ Prominent individuals populating this terrain, ranging from conservative media pundits to prominent Black figures like Bill Cosby and President Obama, promote the view that Black people cause their own failure to succeed in US society.²²⁵

Police brutality in this terrain has had a “cross-class impact,” driving African Americans “into each other’s arms across class lines,”²²⁶ and producing a new cadre of young, African American activists, militant and antiracist.²²⁷ These new organizers are encountering unexpected “raw and amazing” energy in inner-city communities.²²⁸ However, the community itself needs to channel this energy.²²⁹ To achieve this goal, *Ebony* argues for more community-specific approaches that engage the broad base of the population. She cites a recent Black Entertainment Television (BET) special called “Baltimore Speaks,”²³⁰ that included citizens and activists from the community who were involved in the Baltimore protests. They debated police brutality, violent protests, and a lack of leadership within their communities. “Now that people in Black communities are willing to lead themselves, we need community based organizations . . . to empower them,” she says. In this regard, *Ebony* wants to know the specific goals of the #BlackLivesMatter movement. “[A]t what point do we stop having conversations, and start making long term and sustainable change in our communities? Action is what’s required, and it is long overdue.”²³¹

I believe the key is to give this new energy a chrysalis in which to develop, so “respectable” politicians and leaders do not exploit it, but neither does it deteriorate into chaos, or simply wane. Civic infrastructure is that chrysalis. Otherwise, we could wind up right here

<http://www.npr.org/2015/07/23/425654428/black-lives-matter-activists-meet-in-cleveland-to-plot-movements-future>.

²²³ Petersen-Smith, *supra* note 72.

²²⁴ *Id.*

²²⁵ *Op.cit.*

²²⁶ Home, *supra* note 28.

²²⁷ Petersen-Smith, *supra* note 72.

²²⁸ Wilson, *supra* note 50.

²²⁹ *Id.*

²³⁰ *Ebony* Johnson, *supra* note 176, (citing *BET’s News Special: Baltimore Speaks*, BET, <http://www.bet.com/video/news/national/2015/baltimore-speaks-a-bet-special-live.html>).

²³¹ *Id.*; *Cf.* Washington and Bacon, *supra* note 51.

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in another generation, wondering what happened, how the raw energy of today's protests ebbed and disappeared, leaving behind no fundamental improvement. The National Association of the Southern Poor (NASP), organized by Donald Anderson, provides an early example of the kind of civic infrastructure I have in mind.

B. The National Association of the Southern Poor

"[I]n order for masses of people to enter into collective decision-making they must be organized prior to any decisions having been made. [O]therwise it is likely that [any program that emerges] will be designed and controlled by persons outside the community."—Don Anderson.²³²

Anderson was the first black graduate of the University of Michigan Law School, and the architect of the War on Poverty Legislation that came out of Adam Clayton Powell's House Education and Labor Committee in the 1960s.²³³ He became dissatisfied with the community action concept in the legislation,²³⁴ and was concerned that "the community action . . . programs [in the legislation] . . . lacked the structure to keep them in touch with and accountable to their constituents."²³⁵

Anderson thought a solution might lie in Thomas Jefferson's "Assembly" model, founded on the notion that "grass roots democracy [can] only function in small units" that foster "communication and accountability between leaders and constituents."²³⁶ The Assembly, a coalition of small decision-making caucuses, meets individually and collectively to solve individual and communal problems.²³⁷ Anderson had studied the model earlier during a stint at the London School of Economics.²³⁸

²³² Donald L. Anderson, *The Assembly: A Tool for Transforming Communities*, SCHUMACHER CENTER FOR A NEW ECONOMICS, (Oct. 1996), <http://www.centerforneweconomics.org/publications/lectures/anderson/donald/the-assembly>.

²³³ Patricia Sullivan, *Donald Anderson Dies*, WASH. POST (Jan. 20, 2004) ("Mr. Anderson helped draft the initial anti-poverty legislation passed by Congress.").

²³⁴ Anderson, *supra* note 232.

²³⁵ Elliott Lee, *Power Begins Down Home*, BLACK ENTERPRISE, Sept. 1982 at 44.

²³⁶ *Id.*

²³⁷ Donald Anderson, *Letter to the Editor: Assemblies That Help the Southern Poor Help Themselves*, N.Y. TIMES, July 3, 1984, (Thomas Jefferson reconunended [the Assembly model to the Virginia Legislature June 5, 1821, stating: "Among other improvements, I hope they will adopt the subdivision of our counties into wards. Each ward would thus be a small republic within itself. And every man in the state would thus become an active member of the comunon government."]).

²³⁸ Lee, *supra* note 235, at 46.

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Following Jefferson's model, Anderson began organizing in predominantly black, rural counties in Virginia and North Carolina in 1968,²³⁹ in order to "strengthen neighborhood institutions and leadership at the grassroots level."²⁴⁰ Thus, NASP was born.

Anderson divided NASP counties and small cities in his catchment area into units of fifty people, called "conferences." Each conference selected seven representatives to a conference committee that caucused with the other forty-three conference members, in caucuses of six or seven, to identify problems and work on possible solutions.²⁴¹

Most problems were settled at the conference level, while remaining issues were addressed in an Assembly that was comprised of one conference committee member from each of the conferences in the jurisdiction. A Speaker elected by the Assembly presided over deliberations. The Assembly members also formed committees on matters such as housing, economic development, and education. At its apex, NASP oversaw thirty assemblies, and sought to expand into South Carolina and Georgia, and eventually, the rest of the Black belt.

In 1982, the Assembly was one of the most promising models for increasing black economic and political power, providing a means by which large numbers of people could engage in a common effort. According to Anderson, "[e]ach Representative is in touch with fifty members through seven committee-persons, each of whom, in turn, communicates with six other members. And it works! What we have done is transform entire communities."²⁴²

The NASP pilot program in southeastern Virginia's Surry County improved public schools and promoted the construction of a family health clinic, recreation center and library.²⁴³ One of the Surry County Assembly's first acts was to organize a voter registration drive, in 1971, to take advantage of the county's forty to sixty percent black majority.²⁴⁴ Within eleven years, the majority of officeholders in the county were black, and a new school and medical center had been

²³⁹ *Id.*

²⁴⁰ Anderson, *supra* note 232.

²⁴¹ Wendell Rawls Jr., *Southern Blacks Fight Rural Poverty*, N.Y. TIMES (Mar. 31, 1982) ("A member of the community fills out a 'problem sheet' provided by a conference committee member and gives it to his conference representative. If the representative cannot resolve the problem, it goes before the assembly's executive council, which is made up of a dozen chairmen assigned to problems in such areas as employment, [education], agriculture, housing, health and social services. According to Mr. Anderson, ninety percent of the problems are solved by the assembly. Often the solution involves directing the citizen to the correct Government agency, staying with him and making sure that action is taken.").

²⁴² Anderson, *supra* note 232.

²⁴³ Sullivan, *supra* note 233.

²⁴⁴ Lee, *supra* note 235, at 48.

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erected. Three hundred homes received weatherization, and social services delivery had dramatically improved.²⁴⁵

In 1984, Anderson offered the NASP model as a step toward filling the nation's need for more participatory institutions, envisioning a "nationwide system of neighborhood assemblies that would convert citizens from 'passive spectators' into active participants in their own government."²⁴⁶ By 2004, NASP operated in more than seventy counties in Virginia, North Carolina, Mississippi and Georgia.²⁴⁷ Focused on the "quarter-moon sweep of Southern counties in Alabama, Mississippi, Louisiana, Tennessee and Arkansas, where blacks make up at least thirty percent of the population,"²⁴⁸ the heart of Southern slavery, Anderson's project fell clearly into the "political and socioeconomic autonomy" genre of Black nationalism.

Anderson followed Jefferson's model closely, except that Jefferson would have had the conferences themselves built from the ground up. Each of seven families would select a representative to sit on a seven-person "council." One of the council's functions, but not the only one, would be to select a representative who would sit on a seven-person "conference" panel. Thus, the conferences were meetings of seven people, not fifty, and they represented fifty families, not fifty people. Finally, each conference selected a delegate to the Assembly, which functioned similarly to Anderson's NASP Assembly.

The Assembly "addresses some of the problems that have plagued other grass-roots groups, such as weak structure and a lack of accountability."²⁴⁹ Nevertheless, the model does require training and community buy-in.²⁵⁰ As Anderson himself put it,

Community . . . is more than a collection of people such as you might find in a shopping mall, more than members of the same audience, and even more than people who live near one another. [It is constituted by] people who have a particular sort of relationship: who are committed to common purposes, and people who

²⁴⁵ *Id.*

²⁴⁶ Anderson, *supra* note 232.

²⁴⁷ Sullivan, *supra* note 233.

²⁴⁸ Rawls, *supra* note 241 (quoting Anderson: "Those were the slave counties . . . In those counties, 44 percent of the black people live below the poverty level, and the number of black farmers has declined from 270,000 to 98,000 in the last decade.").

²⁴⁹ Lee, *supra* note 235, at 46 (quoting UNC anthropologist, Tony Whitehead, a program evaluator for the Ford foundation).

²⁵⁰ *Id.*

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know they need one another even when they might not particularly like one another . . . These relationships lead to a distinctive kind of action, to cooperative civic action, that is complementary and mutually reinforcing . . . It is unlikely that [social problems will be addressed] unless communities change, and unless citizens increase their capacity to band together and act together²⁵¹

Considering this, Tabias asked, “I wonder how we access that large group of black people who were never church-goers, [are not] affiliated with civic [organizations] and exist in small social islands? How do we touch those black men whose closest black institution is the barbershop?”²⁵² “Barbershops could work,” I responded.

Tabias then recalled that a very promising initiative had just emerged from the White House National Planning Committee for HIV/AIDS, of which he is a member, engaging barbers to talk to their customers about sex, have condoms accessible, and school them on HIV/AIDS. “The barbers loved it,” he said. “It gave them a sense of community leadership and it provided multiple educational and health benefits across the community”²⁵³

I added that a good format through which to provide the training and buy-in Anderson discussed is the “study circle” (a small-group discussion and deliberation format pioneered in Sweden).²⁵⁴ Study circles build civic capacity, increase autonomy and encourage ideas and strategies. Using this format, organizers could vet the Neighborhood Assembly concept during traditional meeting rituals such as Sunday dinner, family reunions, barbecues, birthdays, and Sunday football, as well as in “free spaces” such as barbershops, beauty parlors, and bible study groups. Meeting in such settings respects people’s time and trust.

Social media can help, but it does not easily communicate nuance across space and time. Some level of face-to-face interaction—like in a barbershop—is necessary to build the trust needed to support real social change.²⁵⁵ In the Feminist Movement, for example, “second wave” (1960s and 70s) feminists were known for their grassroots, face-

²⁵¹Anderson, *supra* note 232.

²⁵²Wilson, *supra* note 50.

²⁵³Wilson, *supra* note 50.

²⁵⁴See, e.g., Tore Persson, “The Swedish study circle,” <https://webb.folkbildning.net/~tore.persson/tore-english-adult1>.

²⁵⁵See Malcolm Gladwell, *Small Change: Why the Revolution Will not be Tweeted*, THE NEW YORKER (Oct. 4, 2010), <http://www.newyorker.com/magazine/2010/10/04/small-change-malcolm-gladwell>; see also McDougall, *supra* note 2.

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to-face advocacy while most contemporary “third wave” feminist activists do their work from behind a computer screen.²⁵⁶

Similar generational distinctions have appeared in the Black Movement. Perhaps the Black Movement’s “second wave” (my generation) can share their participatory, accessible decision-making models with the Black Movement’s third wave (the Black Lives Matter generation). These young people may well find such models more attractive than the bureaucratic, top-down organizational styles of our first-wave, the “respectable” Black organizations that still dominate national policy discourse. Similarly, the third wave can school us on the use of social media and remind us of what enthusiasm looks like.

A key “second wave” element is a cell structure, comprised of intermediate spaces like the Assembly’s family councils and conferences, linked concentrically. Thus, ideas and strategies generated in each space can be shared broadly in face-to-face discussion throughout the network. This is “small-d” democratic deliberation, allowing for nonverbal communication as well as verbal and electronic.²⁵⁷ (Note, the family, the basic unit of hunter-gatherer society, is also the basic unit of the Assembly.)

Might Anderson’s prototype re-emerge as a “Neighborhood Assembly” in some of the locations in which Black Lives Matter chapters have developed? In Freddie Gray’s West Baltimore neighborhood of Sandtown, for example, numbering about 7,000 people, an Assembly would contain about thirty representatives. They would appoint specialized committees to see to the concerns of the community, which came to them by face-to-face discussion, up through the ranks. Bottom-up. Not top-down. In addition, to make it even more interesting, everybody in this system has term limits, so that everyone in the neighborhood eventually takes part.

The Assembly model executed on the neighborhood level is a horizontal structure, peer-to-peer, in which “leadership” is not charismatic or electoral, but built on cascading personal relationships, consensus, and rotation of responsibility. The purpose of jury service, according to Professor Ferguson,²⁵⁸ was to “serve as a place of continuing education about legal and constitutional matters . . . Citizens

²⁵⁶ Cf. Harold McDougall, *What Feminism Can Teach the Black Movement (And Vice Versa)*, HUFFINGTON POST (Sept. 16, 2013, 3:16 PM), http://www.huffingtonpost.com/harold-a-mcdougall/what-feminism-can-teach-t_b_3890460.html.

²⁵⁷ Cf. Turkle, *supra* note 24.

²⁵⁸ This notion of citizen participation is consistent with the views of the Framers of the U.S. Constitution. See, e.g., Andrew Guthrie Ferguson, *The Jury As Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1121 (2014).

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would bring differing understandings about law, share it with other citizens, learn more, and then bring that enriched legal and constitutional knowledge back to their communities.”²⁵⁹ Their learning “would not all take place in the courthouse building, but would provide the lessons for a lifetime of civic participation.”²⁶⁰ The cells of Jefferson’s Assembly operate in a similar fashion regarding local affairs.

Such strategies are essential to enable black communities to quickly and efficiently deal with issues that are particular to black realities, providing a safe and familiar, equipped space to deal with them. Assembly councils and conferences could thus become laboratories and launching places for civic and social power.

CONCLUSION

Narrative and practice conflicts in the African American social movement continue today. Wilson argues that Black people have two choices. A “race-conscious society that allows for black pride, black difference and positive racialization—enabling the ability of full grappling with racial realities.” Alternatively, an imagined “colorblind or post-racial world, where race has no sociocultural, political, economic or legal meaning or ramifications, where black, brown and white are as meaningless as blonde, brunette and red.”²⁶¹

Respectability politics adheres to the “colorblind” view. Preached by conservative leaders, it leaves little or no room for one’s natural reaction to racism.²⁶² After the shooting at the South Carolina AME church, Fox News interviewed a Black pastor who stated that he did not know “why race was even in the conversation,” even though the shooter made postings online about starting a race war. After the uproar in Baltimore, many elders in the black community stated their disdain for the kids who burned down a CVS and ruined people’s cars, but one teenager said the protest did not get violent until whites in their cars called them “niggers” and tried to hit them for marching across the street. Monique strongly believes that respectability politics “cedes control over our own movement, allowing whites to characterize the ways in which blacks are supposed to behave when their own people are murdered for wearing hoodies, walking through middle class

²⁵⁹ *The Jury As Constitutional Identity*, *supra* note 258.

²⁶⁰ *Id.*

²⁶¹ Wilson, *supra* note 50.

²⁶² Peterkin, *supra* note 54.

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neighborhoods, selling loose cigarettes, walking in the street, and the list goes on.”²⁶³

Disrespectful, “gangsta” politics, on the other hand, is definitely not colorblind. However, it has been captured by the capitalist consumer machine, which exploits color for its own self-aggrandizing purposes. Ironically, the gangsta-consumerist machine directs its followers to some of the same material symbols of status pursued by the disciples of “respectability” —cars, money, Eurocentric females, even corporate influence.²⁶⁴

How might we synthesize the best of the conflicting approaches we have discussed into present practice?²⁶⁵ I answer that the politics of self-respect both selects from and departs from the other narratives. It rejects white culture and approval as a measure of success, but accepts that both black and white may share some values—care for family and community, a commitment to democracy, the importance of individual and community development and achievement. It rejects thuggish posturing for its own sake, or for individual advancement, but recognizes that the struggle against cultural appropriation, assimilation, and annihilation is a real one, and requires directness and force in response. It requires that we tell our stories to our children and teach them their history, and correct false and misleading narratives when they appear, regardless of the sponsor. It further recognizes that people of African descent have their own way of solving problems, rooted in their history and culture, and have the human right to assert them.²⁶⁶

The politics of self-respect has traditionally had strong adherents in the black working class and among black immigrants, who seek solidarity and autonomy without reference to what white people think or what they want. For the self-respecters, the reference point is African culture and its memes—the ideas, behavior, and style that spread from person to person within that culture—expressing themselves in mores, cuisine, music, styles of work, and approaches to solving problems. This is culture, not color. While colorblindness is not the way of self-respect,

²⁶³ *Id.*

²⁶⁴ RICHARDSON, *supra* note 29, at 227 (stating that the rap industry repackages and restores forms of corporate dominance “in blackface”).

²⁶⁵ See, e.g., BLACK BALTIMORE, *supra* note 167, at 22-24; see also Harold McDougall, *What Happens When the Protests Are Over?* HUFFINGTON POST (June 1, 2015, 5:41 PM), http://www.huffingtonpost.com/harold-a-mcdougall/what-happens-when-the-protests-are-over_b_7222548.html.

²⁶⁶ As I found when writing *Black Baltimore*, the black poor viewed welfare bureaucrats and judges as instruments of social control, but developed important networking skills while trying to get welfare workers to do their jobs. BLACK BALTIMORE, *supra* note 167, at 18. Black men used similar networking techniques to speed their release from prison. *Id.*

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neither is a “skin nationalism” that could trump progressive choices for social change, such as the Bernie Sanders campaign.

The dream of a separate nation in the Black South, or of massive migration back to Africa, has proven elusive for African Americans. Nevertheless, it may be possible to achieve a kind of relative solidarity and autonomy through some simple mechanisms.

The National Association of the Southern Poor experimented with local citizens’ assemblies, for example. CopWatch is doing some amazing work, already supplementing their police surveillance with community organizing and empowerment.²⁶⁷ Community Mediation provides a form of alternative dispute resolution that can rebuild a community’s social capital.²⁶⁸ The Sharing Economy already exists in inner-city neighborhoods: it could use a boost.²⁶⁹ African cultural leaders are eager to reconnect.²⁷⁰

The Sharing Economy is a “third way,” exemplified by community-based organizations that not only build up the African-American community but also protect it from interference. In the process, individual rights vis-à-vis the state can be asserted, including the right to public benefits and public protections.²⁷¹ At the same time, these organizations can encourage, support, and sustain needed community-based economic, social, and cultural innovation and development.

What motivates individuals and sub-communities to come together and begin this process of rebuilding (or imagining, for those who have never seen a strong black community)?²⁷² It starts in the free spaces, which are glowing embers in the community, which occasionally flare up, as in Ferguson and Baltimore. Waltrina Middleton, one of the Cleveland BLM conference organizers, called these free spaces “brush arbors, those places where slaves held secret meetings to organize, pray and express emotions. That’s what this gives us, a brush arbor experience to come together in love and support of one another.”²⁷³ “Middleton says even today these safe spaces can be

²⁶⁷ Muna Mire, *Here's How to Cop Watch*, THE NATION, Sept. 23, 2015, <http://www.thenation.com/article/heres-how-to-cop-watch/>.

²⁶⁸ See generally, Barbara J. Nelson, et al., *The Concord Handbook: How to Build Social Capital Across Communities*, THE CONCORD PROJECT: UCLA SCHOOL OF PUBLIC POLICY AND SOCIAL RESEARCH (2003).

²⁶⁹ Malcolm X linked political and economic autonomy. Bell, *supra* note 125, at 9 (citing Michael C. Dawson, *Black Visions* at 108 (2001)).

²⁷⁰ See, e.g., AFRICAN UNION, *The AU ECHO, Pan-Africanism and the African Renaissance*, Jan. 27, 2013, http://summits.au.int/en/sites/default/files/AUEcho_27012013_v2.pdf.

²⁷¹ BLACK BALTIMORE, *supra* note 167, at 21.

²⁷² Wilson, *supra* note 50.

²⁷³ Adrian Florido, *Black Lives Matter Activists Meet in Cleveland to Plot Movement's Future*, NPR NEWS, (July 23, 2015), <http://www.npr.org/2015/07/23/425654428/black-lives-matter-activists-meet-in-cleveland-to-plot-movements-future>.

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elusive for black people.”²⁷⁴ The task is to link these brush arbors and concentrate their power.

What is the incentive for the activists who take up these tasks?²⁷⁵ Part of the answer is who they are, and how they derive meaning in their lives. They are generally willing to do it without financial compensation, it comes so naturally. They are the community’s informal leaders and generally appear as networkers, “go-to” people, and “boundary crossers” (particularly adept at code switching). They are also many of my students, drawn into this kind of struggle for the first time in their lives.

The trick is to protect these new activists from exploitation by the established leadership class, because they are often naïve, or at least unfamiliar with the cutthroat tactics from behind the “lack of transparency” curtain that has unfortunately come to be associated with the politics of respectability. They also must be protected from “burn out” as they are so connected to community that they care less about being used, and more about saving the lives of the folks they care about.

The prevention of exploitation and burnout is best accomplished by sharing the load, through the civic infrastructure we have already discussed, especially Jefferson’s “sortition”²⁷⁶ mechanism of rotating leadership responsibility throughout the entire community. This not only conserves those most engaged, but also helps develop new talent and capabilities, for a “beautiful” struggle²⁷⁷ that might take generations.

This means an ever-increasing engagement by the broad base of the community, sharing the responsibility, sharing the joy, avoiding burn out and developing new (and younger) leadership all the time, in an organic and rejuvenating process. I do not think it can be done full-time, or for pay, other than expenses. I think it always has to be volunteered, which means you need many people involved.

It is possible that even those who continue to adhere to the other two narrative/practice streams will find something in this third way that they can support. Ebony Johnson observes that such a development

²⁷⁴ *Id.* (Waltrina Middleton’s cousin was DePayne Middleton, a doctor. She was one of the nine people killed during a prayer meeting at Charleston’s Emanuel AME Church.).

²⁷⁵ Wilson, *supra* note 50.

²⁷⁶ Michael Schulson, *Is It Time to Take a Chance on Random Representatives? Selecting legislators by lottery was good enough for the ancient Athenians. Why not good enough for Congress?* THE DAILY BEAST, Nov. 8, 2014, <http://www.thedailybeast.com/articles/2014/11/08/is-it-time-to-take-a-chance-on-random-representatives.html> (last visited Oct. 4, 2016).

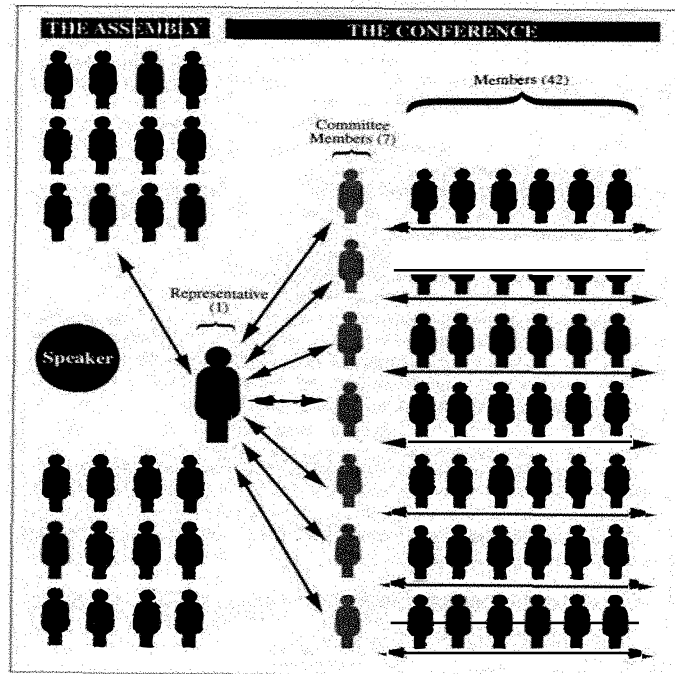
²⁷⁷ Cf. Ta-Nehisi Coates, *THE BEAUTIFUL STRUGGLE: A MEMOIR* (2009); see also the “Leaders of a Beautiful struggle” group in Baltimore, emerging in the aftermath of the Freddie Gray riots, “transforming Baltimore through policy action,” <http://lbsbaltimore.com/>.

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would require, among other things, a path for black middle class people to re-connect with their former communities and earn the trust and respect of those left behind. Perhaps community organizations such as the Neighborhood Assembly can act as mediators to aid this process.²⁷⁸

²⁷⁸ Ebony Johnson, *supra* note 176.

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Committees are organized into Conferences of 50 people each. Each Conference elects one representative who stays in touch with the Conference through seven committee members—each of whom stays in contact with six other members. Representatives meet at a community-wide assembly to discuss problems.

NASP ASSEMBLY STRUCTURE: Source: Donald L. Anderson, *The Assembly: A Tool for Transforming Communities*, Sixteenth Annual E. F. Schumacher Lectures, Oct. 1996, Stockbridge, Massachusetts.

ARTICLE

REMEDIES FOR REGULATORY TAKINGS (CONSTRUCTIVE EXPROPRIATIONS), DEPRIVATIONS, EXPROPRIATIONS OR CUSTODIANSHIP IN SOUTH AFRICA AND THE U.S.A.

*Christopher J. Roederer**

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“The United States Constitution is about power and liberty. The South African Constitution is about equality and reconciliation.”

-- Justice Sachs, South African Constitutional Court
(1994-2009)

[M]en suppose it requires no special wisdom to know what is just and unjust, because it is not difficult to understand the things about which the law pronounces . . . How an action must be performed, how a distribution must be made to be a just action or just distribution – to know this is a harder task than to know what medical treatment will produce health.

-- Aristotle, *Nicomachean Ethics*, Book V.ix.15.¹

“[N]or shall private property be taken for public use without just compensation.”

-- U.S. CONST. amend. V.

(1) [N]o law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application— (a) for a public purpose or in the public interest; and (b) subject to compensation . . .

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances”

-- S. AFR. CONST. Act 108 of 1996 Section 25

I. INTRODUCTION: GOING TOO FAR?

Oliver Wendell Holmes, writing for the Court in *Pennsylvania Coal Co. v. Mahon* (1922), started the regulatory takings tradition in the U.S. with his famous line that “if regulation *goes too far* it will be recognized as a taking” deserving of just compensation. As this paper

¹ ARISTOTLE, *NICOMACHEAN ETHICS* 311 (H. Rackham trans., 2nd ed. 1934).

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will show, how far is too far depends on where you are. Under the Fifth Amendment to the U.S. Constitution, regulations do not need to go as far as they once did, and under the law in states like Oregon and Florida, regulations do not need to go very far at all before one is entitled to compensation. Across the ocean in South Africa, the same regulation that went too far in *Mahon* would not constitute a taking at all under the South African Constitution's main property provision, Section 25, or at least not an expropriation that required compensation. Under South Africa's Constitution, it is very difficult for regulations to go too far, and South Africa's dominant political party, the African National Congress (ANC), has mooted the idea that Section 25 has stood in the way of it going far enough to effect transformation.²

Contrasts between the U.S. and South Africa's property rights regimes are readily apparent on the face of the respective property provisions. First, unlike in the U.S., South Africa did not need to wait so long after the passing of its final Constitution for the Courts to settle the questions of whether the state could expropriate property for public purposes or in the public interest.³ Section 25 of South Africa's Constitution explicitly authorizes expropriations for "public purposes" or in the "public interest."⁴ From the outset of its new constitutional dispensation, this arguably provided South Africa more leeway to effect land reform and socio-economic change than was allowed under existing U.S. constitutional law. Secondly, South Africa distinguishes between deprivations, which do not require compensation as a remedy and expropriations, which do require compensation. This has the potential to undermine any claim for the development of the doctrine of regulatory taking or constructive expropriation, again freeing up South Africa to regulate property without fear of incurring liability to affected property holders. Finally, while the U.S. Fifth Amendment requires just compensation, which has generally been interpreted to require market value compensation,⁵ South Africa's Constitution requires just and

² AJ VAN DER WALT, PROPERTY AND CONSTITUTION 8 (2012), http://www.pulp.up.ac.za/pdf/2012_10/2012_10.pdf (citing the ANC policy document, *The second transition: Building a national democratic society and the balance of forces in 2012*).

³ *Kelo v. New London*, 545 U.S. 469, 472, 477, 480 (2005) (holding that the Fifth Amendment does not require literal public use, but the "broader and more natural interpretation of public use as 'public purpose.'") A state may transfer property from one private party to another if future "use by the public" is the purpose of the taking). As Erwin Chemerinsky points out in CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (5th ed. 2015), this rule was well-established by *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

⁴ S. AFR. CONST., 1996; Section 28 of the Interim Constitution provided more limited scope than the Final Constitution, but it still provided that "such expropriation shall be permissible for public purposes only." S. AFR. (INTERIM) CONST., 1993.

⁵ See *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2431-32 (2015) ("The clear and administrable rule is that 'just compensation normally is to be measured by 'the market value of the property' at the time of the

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equitable compensation based on a whole host of factors in addition to market value. This also gives South Africa more leeway to affect land reform and to address the legacy of apartheid property law and policy.

For most of the twenty-plus years since the drafting of the Final Constitution, the South African government, be it the legislature or the Courts, has not taken full advantage of this leeway to affect the transformation of the South African property regime.⁶ However, there have been a number of important transformative shifts, both in terms of South African legislation⁷ and case law,⁸ that are not only making use of the leeway that is apparent on the face of Section 25, but are pushing towards the limits of those provisions. This has led some people, in particular Dr. Anthea Jeffrey, Head of Policy Research at the Institute for Race Relations, to argue that this is opening up South Africa for Zimbabwe-style land grabs, regulatory takings without any compensation, and expropriations with below market compensation.⁹ Business interests have echoed these concerns.¹⁰

Meanwhile in the U.S., a number of states have pushed back against the Supreme Court's decision to allow for the taking of private property for public purposes by enacting legislation that limits state-based takings to those done for public use, or for a more limited range of public purposes.¹¹ States have also reacted to what they consider to

taking.”) (quoting *United States v. 50 Acres of Land*, 469 U.S. 24, 29, 105 S. Ct. 451, 83 L. Ed. 2d 376 (1984)).

⁶ See, e.g., VAN DER WALT, *supra* note 2, at 8-9, 12-13. (van der Walt focuses on the need for policy and legislative reform and not merely common law reform); Pierre de Vos, *Willing Buyer, Willing Seller Works If you Have a Lifetime to Wait* (June 13, 2013), <http://constitutionallyspeaking.co.za/WILLING-BUYER-WILLING-SELLER-WORKS-IF-YOU-HAVE-A-LIFETIME-TO-WAIT/>.

⁷ For instance, the Mineral and Petroleum Resources Development Act, 28 of 2002, the recent Department of Agriculture, Forestry and Fisheries Draft Preservation and Development of Agricultural Land Framework Bill, 2015, Notice 210, No 38545, 60 (GG).

⁸ *Agri South Africa v. Minister for Minerals and Energy* 2013 4 SA 1 (CC) [hereinafter *Agri SA*].

⁹ Dr. Anthea Jeffrey, *South Africa has taken a big step towards abolishing property rights*, RAND DAILY MAIL (May 27, 2016), <http://www.rdm.co.za/politics/2016/03/11/sa-has-taken-a-big-step-towards-abolishing-property-rights>; see also Dr. Anthea Jeffrey, *LETTER: Expropriation Bill analysis flawed*, BUSINESSDAY (Mar. 01, 2016); and see Dr. Anthea Jeffrey, *Zuma's land grab urgings to traditional chiefs: desperate move by a declining force*, THOUGHT LEADERS (Mar. 17, 2015), <http://www.biznews.com/thought-leaders/2015/03/17/zumas-land-grab-urgings-to-traditional-chiefs-a-desperate-move-by-a-declining-force/>.

¹⁰ See *South Africa: In Need of an Opposition*, THE ECONOMIST 32 (June 18-24, 2016).

¹¹ Dana Berliner, *Looking Back Ten Years After Kelo*, 125 YALE L.J. F. 82 (2015), <http://www.yalelawjournal.org/forum/looking-back-ten-years-after-keho> (“In response to *Kelo*, a total of forty-four states changed their laws: Eleven changed their constitutions, while forty enacted a broad range of statutory changes.”). Note that while on one level the response was to protect private property from government regulation, on a deeper level much of the response was to protect poorer property owners from richer property owners who were using the state to expropriate property for their own private interest. For instance, legislative changes in Florida included: (1) creation of restrictions forbidding the transfer of condemned property to a private party within 10 years of the property's condemnation; (2) prohibitions on the use of eminent domain to either abate or eliminate a public nuisance, or to prevent or eliminate slum or blight conditions; and (3) an amendment to state's constitution that prohibits the transfer of condemned property to private parties absent a three-fifths majority vote of both legislative houses. In direct response

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be a too stingy approach to regulatory takings and have passed legislation to provide compensation for regulatory takings that fall short of the requirements set by the Supreme Court.¹² Finally, decisions by the Roberts Court over the last half-decade have expanded the protection of private property and further limited the ability of the government to regulate for the common good.¹³

The upshot is that, while the trend in the U.S. has been to further limit the power of government to interfere with individual liberty and property rights, the trend in South Africa is to expand governmental power to affect a more egalitarian property regime. This gives substance to the claim by Justice Sachs above.¹⁴ The starkness of this contrast might in fact be overblown. There has always been a counter-current of a strong regulatory state in the U.S., and a very strong conservative property rights current in South Africa. The former has reigned in the unbridled use of private property in the U.S., while the latter has significantly dampened the wave and effects of property rights reform in the Constitution and subsequent legislation.

Part II of this paper begins with a brief description of the political and economic context in which South Africa's Section 25 Property rights provision was drafted. It then moves on to provide a brief overview of Section 25, including the distinction between deprivations and expropriations as well as provisions calling for land reform. The paper then turns to case law evaluating the relationship between deprivations and expropriations and the negative impact of these decisions on the possibility of developing a doctrine of constructive expropriations, regulatory takings, and the possibility of providing compensations for deprivations that fall short of expropriations. Next, the paper addresses recent Constitutional Court decisions that interpret the term "expropriation" narrowly to require that the state acquire the

to the facts of *Kelo*, FLA. STAT. §73.014 forbids takings for the purpose of eliminating nuisances, slums, or blight.

¹² See text accompanying notes 179-247 below.

¹³ For instance, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tl. Prot.*, 560 U.S. 702 (2010); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); and *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015).

¹⁴ James E. Krier and Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WILLIAM & MARY L. REV. 35, 40 (2016). As James E. Krier and Stewart E. Sterk argue in their article, this depiction of the American model is perhaps overblown. Based on an empirical study of over 2,000 implicit takings cases in the U.S. from 1979 to 2012, they argue that the cases reflect a balance between the competing interests of "strong property rights on the one hand, and to the imperatives of an activist government on the other." *Id.* at 40. They argue that, "American history is marked throughout by an ongoing tension between the rights of private property owners and the rights of the public to govern property for the sake of a sound social order." *Id.* at 83 (citing the work of Gregory S. Alexander, *COMMODITY AND PROPERTY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* (1997) and William J. Novak, *The Myth of the "Weak" American State*, 113 AM. HIST. REV. 752, 758 (2008)). See also WILLIAM NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

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property or property right in question, while at the same time embracing the concept of state custodianship over property. The paper then evaluates recent legislation that capitalizes on the notion of custodianship, which significantly broadens the power of the state to affect land reform without incurring liability to pay compensation. Part II of the paper will address how compensation should be determined in cases where an expropriation has occurred.

Part III of this paper addresses the U.S. approach to takings, particularly regulatory takings. After noting the Supreme Court's approach to takings in the infamous case of *Kelo v. City of New London* and the state law response, the paper turns to regulatory takings pre-Roberts Court. This is contrasted with recent Roberts Court cases expanding protection for property rights by expanding the doctrine of regulatory takings, and in the most recent case of *Horne v. Department of Agriculture*, expanding the doctrine of physical takings into what is arguably the regulatory takings realm. The paper will then critically evaluate the failure of the Court in *Horne* to remand on the question of just compensation and the decision to award unanalyzed market value compensation. The paper then turns to a critical evaluation of state based legislative expansions of the doctrine of regulatory takings with an emphasis on the approaches taking in Oregon and Florida. This section concludes by briefly addressing a recent Florida case that is pending before the Supreme Court of Florida which could expand government liability for the impact of regulations on the value of property well beyond its present scope in Florida.

The paper concludes by summarizing the contrast between the expansive protection of private property in the U.S. and the remedies provided therein to the expansive room for the government in South Africa to regulate private property and effect land reform with the limited scope for compensation therein. As noted above, this stark contrast on the face of the law has not translated into the same sharp contrast in the application of the law.

II. SOUTH AFRICA: REMEDIES FOR DEPRIVATIONS, EXPROPRIATIONS AND CUSTODIANSHIP?

The Constitutional protection of property rights in South Africa reflects a negotiated compromise between forces seeking to redress the racist and grossly unequal distribution of property that resulted from apartheid, and those forces that wanted to enshrine the protection of

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property in a justiciable Bill of Rights.¹⁵ Parliamentary supremacy ruled during the apartheid era and ensured that the majority of South Africans, be they black, colored (mixed race), or of Asian descent, often could not buy, own, or sell what, in the civil tradition, is called immovable property, or what, in the U.S., we would call real estate.¹⁶ The forces seeking redress and redistribution included the African National Congress (ANC) among others, and those seeking protection for existing property rights included the apartheid National Party, or New National Party as they came to be known after the formal ending of apartheid, and the Democratic Party, or Democratic Alliance as it came to be known.¹⁷ Those arguing for the constitutional protection of property rights argued that this was necessary for investment, social and economic growth and for personal security, while those arguing for change and reform focused on the importance of land law to the apartheid system and therefore the need to directly address this area of the law in order to “address the legacy of poverty and marginalization caused by apartheid.”¹⁸ As AJ van der Walt notes, the issue was so contentious that the property clause was one of the last provisions of the 1993 interim Constitution to be drafted.¹⁹ This negotiated compromise was reflected in Section 28 of the interim Constitution (Act 200 of 1993) and then finally in Section 25 of the Final Constitution (Act 108 of 1996).

Although the term “property” is not clearly defined in the Constitution, Section 25 provides that “property is not limited to land.”²⁰ In the Roman Dutch tradition, which forms the basis for South African property law, otherwise known as “the law of things,” property rights are rights in things, both corporeal and incorporeal (e.g., rights to shares in a company).²¹

Section 25 addresses both arbitrary deprivations and expropriations of property. The remedy for the former, at least at

¹⁵ See, e.g., Mathew Chaskalson and Carole Lewis, *Property*, in MATHEW CHASKALSON EDS CONSTITUTIONAL LAW OF SOUTH AFRICA, 31.1 (1998).

¹⁶ See the Native Land Act 27 of 1913, Development Trust and Land Act 18 of 1936, the Group Areas Acts 41 of 1950, 77 of 1957, and 36 of 1966. Note that these laws and others during the apartheid era created these classifications. These Acts were all repealed by the Abolition of Racially Based Land Measures Act 108 of 1991.

¹⁷ Chaskalson and Lewis, *supra* note 15, at 31.1.

¹⁸ VAN DER WALT, *supra* note 2, at 3. The academic debate on this issue is lengthy and can be found in footnote 2 of his work. AJ van der Walt, who is a progressive, shifted from being anti-property clause to pro-property clause once he was convinced that it could be used to serve constitutional reform rather than obstruct them. *Id.*

¹⁹ *Id.* at 3 n.3.

²⁰ S. AFR. CONST., 1996 § 25(4)(b).

²¹ E.J. Marias, *When Does State Interference with Property (Now) Amount to Expropriation? An Analysis of the Agri SA Court's State Acquisition Requirement* (Part I) PER/PELJ 2015 (18); see also VAN DER WALT, *supra* note 2.

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present, is simply a declaration of invalidity of the law in question,²² while the remedy provided for the latter, expropriations, is considerably more complicated. Unlike in the U.S., where the remedy is generally the market value of the property at the time of the expropriation, South Africa's Constitution requires an amount, time and manner of compensation that is just and equitable. Of course one might argue that this should be the same thing as the market value, but Section 25(3) of the Constitution envisions something quite different. Under subsection 3, this must reflect an "equitable balance between the public interest and those affected, having regard to all relevant circumstances," including:

- a. the current use of the property;
- b. the history of the acquisition and use of the property;
- c. the market value of the property;
- d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- e. the purpose of the expropriation.²³

Subsection 4 further provides that the public interest within this balance includes "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources."²⁴

The remaining subsections of Section 25 explicitly contemplate legislation that may constitute deprivations and expropriations of rights for the purposes of proving equitable access to lands,²⁵ and to achieve land and water reform as a means to redress past racial discrimination.²⁶ Subsection 7 provides the authority for parliament to pass an Act providing the remedy of restitution or equitable redress for persons and

²² Although Roux has argued that the court could provide an "appropriate" remedy under its section 38 powers, thus far the only remedy provided for violations of Section 25(1) deprivations has been to declare the law invalid. Theunis Roux, *The 'Arbitrary Deprivation' Vortex: Constitutional Property Law After FNB*, CONSTITUTIONAL CONVERSATIONS 265, 277-78 (2009). As noted by Krier and Sterk, the federal rule in the U.S. prior to 1987 was to provide declaratory or injunctive relief for regulatory or implicit takings. Krier & Sterk, *supra* note 14, at n.49. Some state courts had provided compensation for regulatory takings since 1981, following the view of Justice Brennan in his dissent in *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 637-60 (1981). Krier and Sterk, *supra* note 14, at n.66.

²³ S. AFR. CONST., 1996 § 25(3)(a)-(e).

²⁴ S. AFR. CONST., 1996 § 25(4).

²⁵ S. AFR. CONST., 1996 (Subsection 5 requires that the state "take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.").

²⁶ S. AFR. CONST., 1996 (Subsection 8 further stipulates that "No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)" (the general limitations of rights provision)).

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communities who were dispossessed of their property after June 19, 1913 “as a result of past racially discriminatory laws or practices.”²⁷ Finally, Subsection 9 requires Parliament to pass an Act providing “security of tenure or comparable redress” for “person[s] or communit[ies] whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices [are] entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”²⁸

As noted, Section 25 distinguishes between deprivations in 25(1) and expropriations in 25(2).²⁹ The text of Section 25(1) only requires that deprivations be non-arbitrary and that they result from a law of general application. As the text of 25(1) states, “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”³⁰ Most regulations impacting one’s property or property rights would fall under Section 25(1) and thus, there would be no effective remedy for the deprivation.³¹ Under this provision there is no stated requirement for compensation and thus, the only remedy available is for arbitrary deprivations and that remedy is to invalidate the law in question.³² There would in fact be no remedy for deprivations that were not arbitrary unless they rose to the level of an expropriation under Section 25(2). However, as we will see, some expropriations may never make it past

²⁷ S. AFR. CONST., 1996 § 25(7).

²⁸ S. AFR. CONST., 1996 § 25(6), (9).

²⁹ The Constitutional Court in *Harksen v. Lane NO and Others*, [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para. 33 noted that “The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our law.”

³⁰ This language is reminiscent of the words of Justice McKenna in the pre-Moran Supreme Court case of *Haddock v. Sebastian*, 239 U.S. 394 (1915), concerning an ordinance by the expanding city of Los Angeles forbidding the use of the petitioner’s land for making bricks from the clay on his property (land that he purchased for that purpose before the ordinance was passed and the city extended to his property). When speaking of the police power to regulate Justice McKenna stated:

It is to be remembered that we are dealing with one of the most essential powers of government — one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. To so hold would preclude development, and fix a city forever in its primitive conditions. There must be progress, and if, in its march, private interests are in the way, they must yield to the good of the community.

Id. at 410.

³¹ E.J. Marias notes that deprivations are “sourced in the state’s regulatory police power” and usually effects large groups of people in society more or less equally. For these reasons deprivations are normally not compensated. Marias, *supra* note 21, at 2983.

³² van Der Walt notes that while invalidity would be the usual remedy for regulatory excess leading to an arbitrary deprivation, that excess could also be scaled down through regulatory or administrative compensation. VAN DER WALT, *supra* note 2, at 146 n.101. In other words, compensation may alleviate an otherwise arbitrary deprivation. Roux, *supra* note 22, at 277 (2009).

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Section 25(1) to Section 25(2).

A. Arbitrary Deprivations: Room for Regulatory Takings Doctrine?

The test for what constitutes an arbitrary deprivation was set out at length in the 2002 Constitutional Court decision of *First National Bank of SA Ltd t/a Wesbank v. Commissioner, South African Revenue Service & Another (FNB)*.³³ The plaintiff in *FNB* challenged Section 114 of the Customs and Excise Act because it authorized the Commissioner of the Revenue Service to detain and sell property in possession or control of a customs debtor even in cases where the property was owned by a third party, e.g., in this case, FNB.³⁴ While FNB argued that this was an uncompensated expropriation of property, the Court held that expropriations are a subset of deprivations and thus the Court first analyzed the case in terms of Section 25(1) to determine if the deprivation was arbitrary.³⁵

Coming from the U.S. perspective, one would expect that a standard of non-arbitrariness, much like the U.S. constitutional standard of rational basis review, would be a very low hurdle for the state to get over.³⁶ If South Africa followed this rather plain meaning approach to the term, most laws that resulted in the deprivation of property would be upheld. This would severely limit the possibility of any remedies for regulatory takings. There still may be some room for the doctrine in those cases where the deprivation was so severe as to amount to an expropriation.

The Constitutional Court in *FNB* did not, however, adopt mere rationality review. The Court held that a deprivation of property was arbitrary if there was not sufficient reason for the deprivation or if it was procedurally unfair.³⁷ Under U.S. rational basis review, laws do not need to be procedurally fair and do not require a sufficient reason for the deprivation beyond a conceivable rational relationship to the government's legitimate end.³⁸ The Court in *FNB* then went further and set out several different factors that would go into determining the

³³ *FNB* 2002 4 SA 768 (CC), 2002 7 BCLR 702 (CC) para. 100.

³⁴ *Id.* at para. 1.

³⁵ *Id.* at para. 57.

³⁶ Under rational basis review of governmental conduct if a law is any way rationally related to a legitimate governmental purpose it will be upheld. The law does not need to be a good law or a wise law. It does not need to have a good means – ends fit and therefore it may be both overly broad and under inclusive.

³⁷ *FNB* 2002 4 SA 768 (CC) at para. 100.

³⁸ Under rational basis review, the government is not required to justify the law in question. Rather, the burden is on the challenger of a law to disprove “every conceivable basis” for the legislation, regardless of what the actual basis for the law was. *Heller v. Doe*, 509 U.S. 312, 320-21 (1993).

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degree of scrutiny or exactness required to establish a “sufficient reason.”³⁹ These factors would determine whether the means-ends test of mere rationality review would suffice or if substantive proportionality review was required.⁴⁰ Substantive proportionality as reflected in the Section 36(1) limitations clause, requires that a limitation be reasonable and justifiable given a whole host of factors.⁴¹ The factors that go into determining the level of justification or scrutiny between mere rationality and substantive proportionality include:

- the relationship between the purpose of the regulation and the person effected;
- the relationship between the purpose of the deprivation and the nature of the property (with deprivations involving land and corporeal movables requiring more justification than deprivations of other property rights);
- the extent of the deprivation; and
- the number of incidents of ownership affected (i.e., the number and types of sticks in the bundle of rights) (with a more compelling purpose being required for all the incidents of ownership as opposed to fewer incidents and incidents only being partially impacted).⁴²

As Theunis Roux notes, this approach leaves the courts a great deal of discretion to either show deference to “important social reform programmes, such as land reform or black economic empowerment” or “to ratchet up the level of review” in cases where “the state overzealously regulates property in pursuit of questionable goals.”⁴³ Of course, like all multi-factor balancing tests and sliding scales, flexibility

³⁹ FNB, 2002 4 SA 768 (CC) at para. 100.

⁴⁰ *Id.* It should be noted that South Africa does not have what in the U.S. is called strict scrutiny or intermediate scrutiny. It rather has a fluid test that is set out in sections 36. *See supra* note 35.

⁴¹ *Id.* Proportionality review is the review required by the limitations provision in Section 36(1) of the Constitution, which requires:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

⁴² *Id.* para 100.

⁴³ Roux, *supra* note 22, at 274.

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comes at the expense of predictability.

This approach to Section 25(1) arbitrary deprivations leaves room for the possibility of regulatory takings or constructive expropriations. Theunis Roux suggests, and Frank Michelman accepts, that what might make a deprivation arbitrary is the lack of just and equitable compensation.⁴⁴ While this may be implied from the *FNB* case, I do not think that it clearly follows, and it is not entailed or required. If compensation was required to avoid a finding of arbitrariness, this would effectively collapse the distinction between section 25(1) deprivations and 25(2) expropriations. There is still ample room for laws that deprive individuals of their property in non-arbitrary ways that do not provide just and equitable compensation. As we will see below, the *Agri-South Africa* case provides one such example.⁴⁵

As noted above, the Court in *FNB* characterized expropriations as a subset of the larger category of deprivations.⁴⁶ This means that cases involving section 25(2) expropriations must also satisfy the requirements of section 25(1) deprivations. As Roux notes, this has the effect of getting rid of the problem of regulatory takings or constructive expropriations, because laws that “go too far” by destroying all economically viable use of the property, or which interfere with investment backed expectations, will be struck down as arbitrary.⁴⁷ Further, in cases like *FNB* where the state has expropriated property without compensation, one must first pass the section 25(1) analysis before ever reaching 25(2).

In *FNB*, the Court struck down the law in question as arbitrary, based upon the factors listed above. In particular, it held that while the legislative end of collecting customs debts was legitimate and important, the means used to satisfy the debt cast the net too wide.⁴⁸ Here there was no nexus between the property and the debt, nor the owner and the debt, and thus there was “no sufficient reason . . . for section 114 to deprive persons other than the customs debtor of their goods.”⁴⁹ As Roux points out, however, the law never would have been challenged if the legislative scheme had provided compensation to bank.⁵⁰ Thus, he concludes that the failure to compensate made the

⁴⁴ *Id.* at 277; Frank Michelman, Chapter 17, *Against Regulatory Takings: In Defense of a Two-Stage Inquiry: A Reply to Theunis Roux*, in CONSTITUTIONAL CONVERSATIONS 292 (2009).

⁴⁵ *Agri South Africa v. Minister for Minerals and Energy (Agri)* 2013 4 SA 1 (CC). See text accompanying notes 66-96 below.

⁴⁶ *FNB*, 2002 4 SA 768 (CC) at para. 57.

⁴⁷ Roux, *supra* note 22, at 277.

⁴⁸ *FNB*, 2002 4 SA 768 (CC) at para. 108.

⁴⁹ *Id.* at para. 108.

⁵⁰ Roux, *supra* note 22, at 277.

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scheme arbitrary.⁵¹

In his chapter, Roux speculates that while the usual remedy for an arbitrary deprivation would be invalidity, the courts could develop constitutional damages for violations of Section 25(1) under the courts' Section 38 power to grant appropriate relief.⁵² While I agree that this would be perfectly appropriate, at this stage the Courts in South Africa have not developed such a remedy. It is important to remember that the limited remedy that is available (invalidity) is only for arbitrary deprivations.⁵³ Non-arbitrary deprivations of property rights receive no remedy at all.

It is important to note that damages for one class of U.S. "regulatory" takings is not precluded by this analysis.⁵⁴ Cases where local government has harmed one's property through physical invasion, like flooding, damage caused by roadworks or what some have called government enterprise harms, can result in compensation, although not through the law of property per se, but through normal delictual (or tort liability) actions.⁵⁵ Because South Africa does not provide provincial or local immunity from delict actions,⁵⁶ there was no need to develop property law exceptions to these otherwise straightforward torts or delicts for wrongful, negligent or intentional causation of harm to

⁵¹ *Id.*

⁵² *Id.* at 278. He further notes that this would *approximate* the German approach of paying equalization payments for disproportionate regulations.

⁵³ There remains the possibility that an arbitrary deprivation could be justified under the Section 36(1) limitations clause analysis. As Roux points out it would be rare for a law that was found to be arbitrary was somehow reasonable and justifiable under Section 36(1). Roux p. 280. Nonetheless, it is theoretically possible. Frank Michelman discusses the possibility in his chapter 17 Reply to Roux. Michelman, *supra* note 41, at 298-302.

⁵⁴ Krier and Sterk rightly point out that these are not cases of regulatory takings at all, but are rather implicit takings that are treated much like tort cases under state law. Krier and Sterk note that "Courts often evaluate taking claims in the enterprise and flooding contexts in the same way they evaluate tort claims when the tortfeasor is someone other than the government." Krier and Sterk, *supra* note 14, at 72 (noting that the property claim is a way around sovereign immunity).

⁵⁵ See, e.g., *Abrahamse v. Municipality of East London and Another, Municipality of East London and Another v. Abrahamse* (483/95, 513/95) [1997] ZASCA 38; [1997] 2 All SA 651 (A) (12 May 1997) for a case involving suit against a municipality for a water pipe burst that damaged plaintiff's property. This is why these non-regulatory forms of "regulatory" takings, or implicit takings results in a much higher percentage of successful claims in the U.S. than actual regulation based regulatory takings claims. See Krier and Sterk, *supra* note 14, at table 2. The percentages are around triple those of Penn Central type balancing cases.

⁵⁶ South Africa followed English law on this point during the colonial period and continued the tradition after. It in fact went further and passed legislation abrogating Crown immunity for the executive branch of central government with the Crown Liabilities Act 37 of 1888 (Cape); Crown Suits Act 14 of 1894 (Natal); Crown Liabilities Ordinance 51 of 1903 (Transvaal); Crown Liabilities Ordinance 44 of 1903 (Orange River Colony); and after union the Crown Liabilities Act 1 of 1910. Immunity remains waived under the State Liability Act 20 of 1957 for vicarious liability, and as noted, the provinces and municipalities have never had immunity from delictual suit. See, e.g. Alistair Price, *State Liability and Accountability* (2015) Acta Juridica 313-335; *The Impact of the Bill of Rights on State Delictual Liability for Negligence in South Africa*, Obligations V Conference: Rights and Private Law, St Anne's College, Oxford University (2010), <http://uct.academia.edu/AlistairPrice/Papers>.

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property.

In cases where compensation is offered for an expropriation or where the parties have focused on the Section 25(2) expropriation requirements, the Court has skipped over Section 25(1) and gone directly to Section 25(2). This occurred in the cases of *Du Toit v. Minister of Transport*;⁵⁷ *Haffejee v. eThekweni Municipality*;⁵⁸ and in *Agri South Africa v. Minister for Minerals and Energy (Agri)*.⁵⁹

B. Distinguishing Expropriations from Deprivations and Closing the Door on Compensation?

In the Constitutional Court case of *Reflect All 1025 CC v. MEC for Public Transport, Gauteng*,⁶⁰ the Court addressed the purpose behind the distinction between deprivation and expropriations, noting that:

The purpose of the distinction between expropriation and deprivation by regulatory measures is to enable the state to regulate the use of property for public good without the fear of incurring liability to owners of property affected in the course of such regulation.⁶¹

These obiter dicta from the Constitutional Court signal that the failure of the government to provide compensation for deprivations would not, as a general rule, lead the courts to find the deprivation arbitrary. It also suggests that the Court would be hesitant to award constitutional damages.⁶² The Court went on to note that “courts should be cautious not to extend the meaning of expropriation to situations where the deprivation does not have the effect of the property being acquired by the state.”⁶³ It noted that the Supreme Court of Appeal, in a case with very similar facts, had considered whether there might be

⁵⁷ 2006 1 SA 297 (CC), 2005 11 BCLR 1053 (CC).

⁵⁸ 2011 6 SA 134 (CC). The plaintiffs in this case argued that sections of the Expropriations Act that allowed for expropriation and dispossession of property before the amount of compensation was determined violated the requirements of Section 25(2)(b). The Court held that requiring this in all circumstances would violate the Section 25(3) requirement that “The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances.” While the equitable balance would often require that this be determined in advance, this would not always be the case, e.g., in cases of emergency.

⁵⁹ 2013 4 SA 1 (CC). This case will be discussed below.

⁶⁰ 2009 (6) SA 391 (CC).

⁶¹ *Id.* at para. 63.

⁶² As noted above the federal rule in the U.S. prior to 1987 was merely to provide declaratory or injunctive relief for regulatory takings. *See supra* note 22.

⁶³ *Reflect All 1025 CC v. MEC for Public Transport, Gauteng* 2009 (6) SA 391 (CC) at para. 64.

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room to develop the doctrine of constructive expropriation for cases where “a public body utilises its power to regulate private property so excessively that it may be characterised as expropriation; in other words, when the regulation in a particular case goes too far.”⁶⁴ After noting that it was doubtful that this would be appropriate in the South African constitutional order, it held that the present case was not a proper case for developing such a doctrine.⁶⁵ It concluded that “If regulation in cases such as the present were to be characterised as amounting to expropriation, government would be crippled in discharging its obligations in regulating the use of private property for public good.”⁶⁶ The Court held that no compensation was due because the state did not acquire the applicant’s land, but rather, only impeded its use and development due to proposed road development plans.⁶⁷

Because deprivations do not give rise to compensation unless one can show an expropriation, there is a strong incentive for property rights holders to fit their claim into Section 25(2) where they at least have the chance of “just and equitable” compensation.

C. Agri South Africa: Expropriation or Custodianship

In the 2013 case of *Agri South Africa*, the parties agreed that the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) did not arbitrarily deprive the petitioners of their property.⁶⁸ Rather, it claimed that under the Act, the state had expropriated its mineral rights. Prior to the MPRDA, landowners in South Africa owned the exclusive rights to the minerals below their land which entitled them to fully use those rights, or to prevent the use of those rights.⁶⁹ The law

⁶⁴ *Id.* at para. 65 (citing to *Steinberg v. South Peninsula Municipality* 2001 (4) SA 1243 (SCA) at paras 6-8).

⁶⁵ *Id.* at para. 65.

⁶⁶ *Id.*

⁶⁷ The case involved applicants affected by preliminary designs for roads or highways under the regulatory scheme in the Infrastructure Act. *Id.* at para. 6. Note that this case is what in the U.S. would be termed a condemnation blight case. As Krier and Sterk note, landowners generally lose condemnation blight cases. See Krier and Sterk, *supra* note 14, at table 2. (Landowners are only successful about 20% of the time). This is so, they speculate because to allow compensation for such cases could result in officials shying away from “engaging in useful public discourse about construction of roads or public facilities.” *Id.* at 75.

In the present case of *Reflect All*, the effects on each of the eight applicants are detailed in footnote 6, but include: the denial of access to the properties on which the first applicant plans to construct a shopping centre; the prevention of the development of 600 luxury cluster houses by the second applicant; the encroachment onto significant amounts of land on proposed townships by the third, fourth and sixth applicants; the inability of the fifth and seventh applicant to sell their property for the previous market value given that due to the road plans the properties cannot be rezoned; and the eighth applicant’s property is affected by a proposed road that will allegedly limit the number of stands available for development. *Reflect All* 1025 CC v. MEC for Public Transport, Gauteng, 2009 (6) SA 391 (CC).

⁶⁸ See Items 6-8 of Schedule II to the MPRDA.

⁶⁹ *Agri South Africa v. Minister for Minerals and Energy* 2013 4 SA 1 (CC) at para. 7.

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developed to allow landowners to sever their mineral rights through notarial deeds,⁷⁰ register these deeds,⁷¹ and then to further alienate the rights through cession, leases, and mortgage bonds.⁷² The rights formed part of the estate and could be bequeathed as well.⁷³

The MPRDA froze the ability to sell, lease or cede these “old order” mineral rights until they were converted into new order mineral rights under the Act,⁷⁴ and the Act abolished the mineral rights owner’s right to “sterilize” the rights.⁷⁵ In other words, the right to not sell or exploit the minerals under the land were taken away by the Act. Under the MPRDA, mineral rights owners had a limited time period to use and convert their old order rights into new order rights or they would lose them.⁷⁶ The new order rights are still regarded as “limited real rights” under the Act,⁷⁷ but they cannot be transferred or encumbered without permission from the Minister,⁷⁸ and they are not perpetual but are limited in duration.⁷⁹

Given that these rights were taken away by the state, one may be led to believe that it logically followed that the property in question had been expropriated.⁸⁰ Professor Johan D van der Vyver argued that the Act resulted in the Nationalization of mineral rights and constituted an expropriation.⁸¹ The court of first instance, the High Court, in fact held that the petitioner had been deprived of a right and that the deprivation amounted to an expropriation.⁸² The Constitutional Court held, however, that since the state did not acquire the rights that it took, but merely held them as custodians for the South African people, there was no expropriation.⁸³ The Court held that to prove expropriation a claimant must establish “sufficient congruence” or “substantial similarity” between what was lost and what was acquired by the state.⁸⁴

⁷⁰ *Id.* at para. 8.

⁷¹ *Id.* at para. 9.

⁷² *Id.* at para. 10.

⁷³ *Id.*

⁷⁴ *Id.* at para. 2.

⁷⁵ *Id.* As the court further elaborates in para. 66, “What the MPRDA in effect did was to put an end to the: (i) ability to sterilise or not to exploit minerals; (ii) previously unfettered entitlement to sell, lease or cede the mineral right at any time; and (iii) mineral right or unused old order right for which a prospecting or mining right could not be acquired in terms of the transitional provisions.”

⁷⁶ Marias, *supra* note 21, at 3042.

⁷⁷ See MPRDA § 51.

⁷⁸ See MPRDA § 11(1).

⁷⁹ See MPRDA §§ 17-19.

⁸⁰ Under the previous Minerals Act, forced exploitation of mineral rights was considered an expropriation. *Agri South Africa v. Minister for Minerals and Energy* (Agri) 2013 4 SA 1 (CC) at para. 70.

⁸¹ Johan D. van der Vyver, *Nationalization of Mineral Rights in South Africa* 2012 DE JURE 125-42, 141.

⁸² *Agri South Africa v. Minister for Minerals and Energy* (Agri) 2013 4 SA 1 (CC) at para. 18.

⁸³ *Id.* at paras. 58-59.

⁸⁴ The Court stated, “To prove expropriation, a claimant must establish that the state has acquired the substance or core content of what it was deprived of. In other words, the rights acquired by the state do not

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As the Court concluded, “[t]here can be no expropriation in circumstances where deprivation does not result in property being acquired by the state.”⁸⁵

The Court contrasted the present case with classic cases of expropriation where the government takes land for roads or development or when it acquires mineral right to exploit them.⁸⁶ Here the State did not acquire these rights to exploit the minerals, but rather is a “a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised.”⁸⁷ Although the Court declined to analyze or explore the limits of the concept of custodianship, it held that custodianship under the Act did not amount to an expropriation.⁸⁸

The majority opinion took pains to emphasize that section 25 required a balance between private property rights and the public interest.⁸⁹ As the court stated, section 25 of the Constitution imposes the obligation “not to over-emphasise private property rights at the expense of the state’s social responsibilities.”⁹⁰ The Court also emphasized the role of the present legislation in addressing the legacy of apartheid. In the first paragraph the Court stated:

Regrettably, the architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining industry.⁹¹

Later in the judgment, the Court stated:

have to be exactly the same as the rights that were lost. There would, however, have to be sufficient congruence or substantial similarity between what was lost and what was acquired.” *Id.* at para. 58.

⁸⁵ *Id.* at para. 59.

⁸⁶ *Id.* at para. 68.

⁸⁷ *Id.* at para. 68.

⁸⁸ *Id.* at para. 71.

⁸⁹ *Id.* at paras. 61-62.

⁹⁰ *Id.* at para. 62.

⁹¹ *Id.* at para. 1. Namely the MPRDA.

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We must therefore interpret section 25 with due regard to the gross inequality in relation to wealth and land distribution in this country. By design, the MPRDA is meant to broaden access to business opportunities in the mining industry for all, especially previously disadvantaged people. It is not only about the promotion of equitable access, but also about job creation, the advancement of the social and economic welfare of all our people, the promotion of economic growth and the development of our mineral and petroleum resources for the common good of all South Africans.⁹²

Towards the end of its judgment the Court stated:

The MPRDA constitutes a breakthrough the barriers of exclusivity to equal opportunity and to the commanding heights of wealth-generation, economic development and power. It seeks to address the injustices of the past in the economic sector of our country in a more balanced way, by treating individual property rights with the care, fairness and sensitivity they deserve.⁹³

A few remaining points are worth noting. First, although the Court did not find an expropriation in this case, it did leave the door open to expropriation claims under the MPRDA. As the Court stated, “It would, however, be inappropriate to decide definitively, that expropriation is in terms of the MPRDA incapable of ever being established . . . I accept that a case could be properly pleaded and argued, to demonstrate that expropriation did take place.”⁹⁴ Secondly, three justices on the Court, Cameron, Froneman, and van der Westhuizen, concurred in the result but disagreed with the proposition that the state needed to acquire property in order for an expropriation to take place.⁹⁵ Froneman J concurred in the result of the case on the basis that the rights conferred on the applicant under the MPRDA constituted just and equitable compensation for the rights taken away and lost.⁹⁶

⁹² *Id.* at para. 61.

⁹³ *Id.* at para. 73.

⁹⁴ *Id.* at para. 75. This due in part to the fact that item 12 of Schedule II has an express provision for expropriations under the Act. Earlier in the judgment the Court held that item 12 was like the result of an overly cautious legislature rather than an indication that the Act worked an expropriation. *Id.*

⁹⁵ *Id.* at paras. 77-79.

⁹⁶ *Id.* at para. 79.

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Froneman J, in his rather strong concurrence, after pointing out that foreign jurisprudence “recognises that expropriation may take place even if the disposed rights or property have not been acquired by the state,”⁹⁷ warned of the consequences of the majority opinion’s rationale. In Froneman J’s opinion, under the majority’s reasoning, the state could abolish all private ownership of property without it amounting to an expropriation, and thereby without requiring just and equitable compensation, as long as the state was only transferring those rights to others as a custodian. As he stated:

If private ownership of minerals can be abolished without just and equitable compensation - by the construction that when the state allocates the substance of old rights to others it does not do so as the holder of those rights - what prevents the abolition of private ownership of any, or all, property in the same way? This construction in effect immunises, by definition, any legislative transfer of property from existing property holders to others if it is done by the state as custodian of the country’s resources, from being recognised as expropriation.⁹⁸

Froneman also argues that even if what is required is acquisition by the state, the state in this case acquired the right to allocate and dispose of the right to exploit the minerals.⁹⁹

In the conclusion to his 2012 DE JURE article, van der Vyver argued that nationalization of the mineral and petroleum resources under the MDRNA “clearly constitutes an instance of expropriation within the meaning of section 25 of the Constitution.”¹⁰⁰ He further argued that if expropriation required acquisition, then “vesting the ownership in the State, either as the personification of “all the people of South Africa” or as a public trustee of the people’s ‘common heritage,’

⁹⁷ *Id.* at para. 103.

⁹⁸ *Id.* at para. 105.

⁹⁹ *Id.* at para. 81, 106. Note that the result here can be contrasted with the result in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), a case involving the determination that the plaintiff’s property was subject to a federal navigable servitude. The Supreme Court held that since the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property,” this amounted to a taking. *Id.* at 176. Similarly, in *Hodel v. Irving*, the Supreme Court found that federal regulations that prevented Native Americans from devising small fractional interests in Indian trust lands, was also a taking since “the right to pass on property—to one’s family, in particular—has been “part of the Anglo-American legal system since feudal times.” *Hodel v. Irving*, 481 U.S. 704, 716 (1987).

¹⁰⁰ van der Vyver, *supra* note 81, at 141.

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fully satisfies this demand.”¹⁰¹ For better or worse, the majority of the Constitutional Court did not agree.

D. Contrasting Cases from the U.S.

Agri SA, can be contrasted to two U.S. Supreme Court cases, one concerning the abrogation of inheritance rights and the other involving the granting of public access to a privately developed waterway.

The first, *Hodel v. Irving* (1980), concerned a federal law preventing the inheritance of Sioux Nation land that consisted of less than two percent of the owner’s land and that had earned less than \$100 in the prior year. Any land devised in this way would revert back to the tribe.¹⁰² Because this abrogated the right to pass on property to one’s heirs, the Court held it to be a taking.¹⁰³ Here the taking was not based on the U.S. government taking title to property, nor even occupying the property, but of abrogating a right in the property. Remember in *Agri SA* one was no longer allowed to sell, lease or cede the “old order” mineral rights and even if converted to new order rights, one could not transfer or encumber the right and the right was no longer perpetual, but limited in duration. Nonetheless, the *Agri SA* Court did not find an expropriation had occurred.

The second case, *Kaesser Aetna v. U.S.*, involved a property owner that dug a channel connecting its pond to the ocean. Once this was complete, the U.S. Corps of Engineers determined that, under federal law, this made the water a navigable waterway that was open for use by the public at large.¹⁰⁴ Here the right to exclude others was taken from the property owner. Again, this can be contrasted to mineral rights owners in *Agri SA* who lost the right to sterilize, or in other words, who lost the right to exclude others from extracting minerals from their land, and who in fact lost much of the use of the right in question. Although more sticks in the bundle of rights were lost in *Agri SA* than in *Kaesser Aetna*, the Court found no expropriation.

E. Legislation in the Wake of Agri SA

In the aftermath of the *Agri SA* decision, South Africa drafted a

¹⁰¹ *Id.* at 141. He further notes that this was the position taken by the Supreme Court of Appeal in *Agri South Africa*.

¹⁰² *Hodel*, 481 U.S. at 704, 722-23.

¹⁰³ *Id.* at 715-17.

¹⁰⁴ *Kaesser Aetna*, 444 U.S. at 167.

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Preservation and Development of Agricultural Land Framework Bill,¹⁰⁵ a new Expropriations Bill,¹⁰⁶ and a Property Valuations Bill.¹⁰⁷ These Bills have caused a stir amongst some segments of the population, and especially by members of the Democratic Alliance, who opposed these bills.¹⁰⁸ The Draft Preservation and Development of Agricultural Land Framework Bill draws on the *Agri SA* decision by stating that “Agricultural land is the common heritage of all the people of South Africa and the Department of Agriculture, Forestry and Fisheries is the custodian thereof for the benefit of all South Africans.”¹⁰⁹ Under the draft Bill, the Department is empowered to “approve, reject, control, administer and manage any rezoning or subdivision of agricultural land.”¹¹⁰ The Expropriations Bill, which was passed by parliament in February 2016, largely tracks Section 25 of the Constitution. It defines expropriations as compulsory acquisitions, thus tracking the language of the majority opinion in *Agri SA* and it does not recognize “indirect” or “regulatory” takings.¹¹¹

This suite of draft legislation has led some people, in particular Dr. Anthea Jeffrey, Head of Policy Research at the Institute for Race Relations,¹¹² to argue that this is opening up South Africa to land grabs, regulatory takings without compensation and expropriations with below

¹⁰⁵ PRESERVATION AND DEVELOPMENT OF AGRICULTURAL LAND FRAMEWORK BILL, <http://www.nda.agric.za/docs/media/Draft%20Preservation%20and%20Development%20of%20%20Agricultural%20Land%20Framework%20Bill.pdf>.

¹⁰⁶ MINISTER OF PUBLIC WORKS, REPUBLIC OF SOUTH AFRICA, Expropriation Bill [B 4B—2015], https://www.parliament.gov.za/storage/app/media/Docs/bill/613881_1.pdf.

¹⁰⁷ MINISTER OF RURAL DEVELOPMENT AND LAND REFORM, REPUBLIC OF SOUTH AFRICA, Property Valuation Bill [B 54—2013], http://www.gov.za/sites/www.gov.za/files/36478_gen504.pdf, http://www.parliament.gov.za/live/commonrepository/Processed/20131114/554372_1.pdf.

¹⁰⁸ See the debates over the bill: see also National Assembly 2014, <https://pmg.org.za/hansard/18525/>.

¹⁰⁹ Draft Preservation and Development of Agricultural Land Framework Bill §3(1), <http://www.nda.agric.za/docs/media/Draft%20Preservation%20and%20Development%20of%20%20Agricultural%20Land%20Framework%20Bill.pdf>.

¹¹⁰ *Id.* § 3(2).

¹¹¹ See, e.g., E Du Plessis, *Criticism of Land Rights Bill is Off Target*, BUSINESS DAY (Feb. 26, 2016), <http://www.businesslive.co.za/bd/opinion/2016-02-26-criticism-of-land-rights-bill-is-off-target/>.

¹¹² Note that this institute is a right leaning Afrikaner Center. The Center for Race Relations promotes the following ideas:

- That the State should be small but effective in carrying out its core functions
- That people should be treated as individuals and not as members of groups
- That property rights should be protected so that the poor can accumulate wealth and assets
- That strong independent institutions in the media, judiciary, and civil society should be empowered to hold powerful interest groups in business and government to account
- That economic freedom is as important as political freedom and that people should be empowered to stand on their own feet to work, start businesses, invest, and own property in order to improve their lives.

SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, WHAT WE DO, <http://irr.org.za/about-us/what-we-do>.

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market compensation.¹¹³

While all of this is true, it is somewhat remarkable that it has taken until 2016 to replace the apartheid era Expropriations Act 63 of 1975. While it is true that the 1975 Act provided for market rate compensation,¹¹⁴ Section 25 of the Constitution, adopted in 1996, clearly contemplates a different mechanism for determining what compensation is just and fair for an expropriation. Thus, it would be odd in the extreme if the new legislation merely adopted the apartheid era mechanism. It would be even more off if that legislation ignored the interpretation of Section 25 by the Constitutional Court.

The values that animated compensation for expropriations under the 1975 law are not unfamiliar. As WJ Du Plessis argues, it was based on the idea that the legislator does not intend to take away rights without compensation and that no single individual should have to sacrifice their property without compensation for something that benefits the public at large.¹¹⁵ While the second consideration still animates the law, the first is put on shakier ground given the history of property rights under apartheid. Section 25 reflects this fact with the requirement to not only balance those rights against the public interest, but to scrutinize the given right's pedigree in the given case. Unfortunately, the Courts have not fully embraced the compensation requirements of the Section 25(3).

As du Plessis notes, post-apartheid decisions have largely returned to the pre-constitutional rationale for compensation and have endeavored to put the property owner in the same position he would have been, but for the expropriation.¹¹⁶ This has also resulted in the centrality of market value as the measure for compensation.¹¹⁷

¹¹³ Dr. Anthea Jeffrey, *South Africa has taken a big step towards abolishing property rights* Rand Daily Mail (May 27, 2016), <http://www.rdm.co.za/politics/2016/03/11/sa-has-taken-a-big-step-towards-abolishing-property-rights>; see also, Dr. Anthea Jeffrey, *LETTER: Expropriation Bill analysis flawed* BUSINESS DAY (Mar. 01, 2016). Dr. Anthea Jeffrey, *Zuma's land grab urges to traditional chiefs; desperate move by a declining force*, THOUGHT LEADERS (Mar. 17, 2015), <http://www.biznews.com/thought-leaders/2015/03/17/zumas-land-grab-urges-to-traditional-chiefs-a-desperate-move-by-a-declining-force/>.

¹¹⁴ See Expropriation Act of 63 of 1975 § 12(1) (S. Afr.).

¹¹⁵ WJ du Plessis, *Valuation in The Constitution Era* 18(5) POTCHEFSTROOM ELECTRONIC LAW JOURNAL, 1728 (2015).

¹¹⁶ *Id.* at 1731-32. Du Plessis analyzes the following cases in support of this proposition. *Du Toit v. Minister of Transport* 2006 1 SA 297 (CC) para. 22; *Cape Town v. Helderberg Park Development (Pty) Ltd* 2007 1 SA 1 (SCA) para. 21; *Khumalo v. Potgieter* 2000 2 All SA 456 (LCC) para. 22; *Hermanus v. Dep't of Land Affairs*: In Re Erven 3535 and 3536; *Goodwood* 2001 1 SA 1030 (LCC) para. 15; *Ex Parte Former Highland Residents*; In Re Ash v. Department of Land Affairs 2000 2 All SA 26 (LCC) paras. 34-35; *Hlaakdoornbult Boerdery CC v. Mphela* 2007 5 SA 596 (SCA) para. 48; and *Mhlenganiweni Community v. Minister of Rural Development and Land Reform* 2012 ZALCC 7 (19 Apr. 2012) (drawing on foreign dicta to show that the purpose of compensation is recompense).

¹¹⁷ *Id.* at 1733-34.

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The Court in *Ex Parte Former Highland Residents* devised a two-step approach that started with the market value and then determined whether that value should be adjusted upwards or downwards depending on the factors in Section 25(3).¹¹⁸ This approach makes some sense given that market value at least gives one a sum that can be worked with. The other factors don't give one much of a benchmark for getting the valuation going.

However, as du Plessis aptly argues, there are numerous ways for determining "market value" and these different approaches embody different substantive values, resulting in different valuations.¹¹⁹ Some ways of determining market value favor the property owner and some make it less onerous on the state.¹²⁰ Given this fact, she questions whether the market value approach is such a sure, or reliable, way of determining value and whether the "just and equitable" approach is actually less reliable.¹²¹ She also argues against the continued centrality of market value in calculating compensation.¹²²

Under Section 25(3) and the new Expropriations Bill, market value is just one factor among many. While some version of market valuation might be a starting point, it is important to remember that it is not the central point or the default point. The central point of Section 25(3) is not only just compensation, but just and equitable compensation. Neither the U.S. Constitution, nor the South African Constitution, require market value compensation for takings. In the U.S., the market value has been used to provide corrective justice, to give back in proportion to what was taken, but as noted at the outset, several factors complicate the analysis of what justice and equity may require in the South African context.

As the factors indicate, compensation may be impacted by the historical and current use of property, for instance if one is not putting the property to its full or best use, but is letting it go fallow.

¹¹⁸ *Ex Parte Former Highland Residents*; In Re: Ash v. Department of Land Affairs 2000 (2) All SA 26 (LCC) paras. 34-35. (S. Afr.).

¹¹⁹ Du Plessis, *supra* note 115, at 1743. Du Plessis not only address the three common approaches to determining market value in South Africa, namely the comparative sales approach, the income capitalization approach, and the cost approach (1737-1741), but also several approaches used in the U.S., namely harm versus benefit, highest and best use, permissible but unenacted regulations, and benefit offset and the average reciprocity of advantage (1743-1746).

¹²⁰ See, e.g., Du Plessis, *supra* note 115, at 1748-51. What properties are compared for market value, who bears the cost of litigation, who bear the risk of the highest and best use of the property, whether one allows unenacted but potential regulations to bear on the cost and when one sets the date for an expropriation (e.g., should the state compensate for lower property values that result from city planning before the expropriation takes place). For some of these considerations see Du Plessis at 1748-51. Du Plessis relies on C. Serkin "The Meaning of Value: Assessing Just Compensation for Regulatory Takings" 2004-2005 NWULR 688 – 692 for her analysis of U.S. market value approaches and the substantive values they entail.

¹²¹ Du Plessis, *supra* note 115, at 1728, 1743.

¹²² *Id.* at 1751.

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Underutilizing one's property is a luxury in a country where so much of the population is in need and thus if one is not fully using one's property, then perhaps the compensation should reflect the value of the property as used rather than what the market might provide if the property was put to its highest use. Further, if the history of the acquisition is dubious or was the result of apartheid policies that provided land to farmers at well below market rates, then perhaps that farmer should not receive a windfall as reflected in the current market price of the land. This would also be true if the value of land increased due to state investment or subsidies in capital improvement of the property. All of the considerations thus far arguably just go to determine what corrective justice might require. In other words, these considerations of what justice requires alone could justify considerable deviations from market value. Section 25 contemplates even further deviations once concerns over distributive justice, equity and the public interest are taken into account. Section 25(4) tells us that the public interest includes "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources."

As noted at the outset, the remaining subsections of Section 25 explicitly contemplate legislation that may constitute deprivations and expropriations of rights for the purposes of providing equitable access to lands, and to achieve land and water reform as a means to redress past racial discrimination. Subsection 5 reads, "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."¹²³ Subsection 8 clarifies that Section 25 cannot stand in the way of land and water reform that is designed to redress the results of past racial discrimination.¹²⁴ This contemplates legislation that goes beyond corrective justice for discrete or specific cases of past discrimination and to distributive justice to address the resulting systemic inequality that resulted from apartheid.

III. U.S. FEDERAL AND STATE REMEDIES FOR TAKING AND REGULATORY TAKINGS

The Fifth Amendment to the U.S. Constitution provides in

¹²³ S. AFR. CONST., 1996 § 25(5). For a treatment of at least one of the drafter's intentions behind this provision, see John G. Sprankling, *INTERNATIONAL LAW OF PROPERTY* 222 (2014).

¹²⁴ S. AFR. CONST., art. 25 § 8 1996. Subsection 8 states: "No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

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simple language “Nor shall private property be taken for public use without just compensation.”¹²⁵ Despite the simple language, this clause has generated considerable controversy, both in cases where the state has regulated property but has not literally taken, or acquired the property, and in the case of *Kelo* where property was taken for what some considered a dubious purpose. The Supreme Court in *Kelo v. City of New London*, held that the Fifth Amendment does not require literal public use, but the “broader and more natural interpretation of public use as ‘public purpose.’”¹²⁶ In *Kelo*, the City used its power of eminent domain to seize private property (15 homes owned by 9 people) to sell to private developers, in order to help increase taxes and job creation. The property owners argued that taking private property to sell to private developers was not a public use and thus a violation of the Fifth Amendment’s takings clause. The Supreme Court held that a state may transfer property from one private party to another if future “use by the public” is the purpose of the taking.¹²⁷

As noted in the introduction, this generated considerable backlash and prompted numerous states to pass legislation to stop their state and local government from taking for public purposes and particular from taking for the purpose of stopping blight, nuisances or for business development.¹²⁸ Under the U.S. federal system it is perfectly acceptable for states to restrict their own regulatory powers in order to protect private property. The literature on the state reaction to *Kelo* and what counts as a “public purpose” is vast and will not be addressed further below. Rather, the remainder of this paper will address what counted as a regulatory taking, before the time of the Roberts Court, what counts as a regulatory taking now under the Roberts Court and recent developments of what now counts as a regulatory taking at the state level.

A. Pre-Roberts Court Regulatory Takings

Although it is unclear that the founding fathers ever contemplated that the Takings Clause would apply to regulatory

¹²⁵ U.S. CONST. amend. V.

¹²⁶ *Kelo v. New London*, 545 U.S. 469, 472 (U.S. 2005). Erwin Chemerinsky in CONSTITUTIONAL LAW (5th ed. 2015) (noting that *Kelo* did not actually create a new rule with regards to the interpretation of public use. “The decision generated enormous controversy and the media presented it as a dramatic change in the law, while in reality the Court applied exactly the principle that was articulated decades ago: A taking is for public use so long as the government acts out of a reasonable belief that the taking will benefit the public. . . it is important to recognize that the case in no way changed the constitutional law in this area.” *Id.* at 693 (quoting *Berman v. Parker* 348 U.S. 26, 32-33 (1954)).

¹²⁷ *Kelo*, 545 U.S. at 475, 489-90.

¹²⁸ See *supra* note 11.

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takings,¹²⁹ as early as 1922, in an opinion written by Justice Oliver Wendell Holmes, the Supreme Court found that if a regulation goes “too far” it will be recognized as a taking.¹³⁰ In *Pennsylvania Coal*, a statute that prohibited the mining of coal in any manner that would cause the subsidence of the property was enacted to prevent companies from exercising mining rights in a way that was detrimental to the surface. They were required to leave columns of coal underground to support the surface. The issue before the court was whether the government regulation constituted a taking. The Court held that it was a taking because making it commercially impracticable to mine certain coal has nearly the same effect for constitutional purposes as appropriating or destroying it.¹³¹

The Court in *Penn Central Transportation Co. v. City of New York* introduced a balancing test to determine when regulations went too far.¹³² The three-part balancing test required a court to examine: (1) the character of the invasion, (2) the economic impact of the regulation as applied to the particular property, and (3) the property owner’s distinct investment backed expectations with respect to that property.¹³³ Two years later in *Agins v. City of Tiburon*, the Court adopted a two part test to determine if the regulation amounted to a taking, namely: (1) does the regulation substantially advance a legitimate governmental interest and (2) does the regulation deprive the owner of economically viable use of property?¹³⁴ In a unanimous decision, the court held that zoning ordinances that neither prevent the best use of the land nor extinguish a fundamental attribute of ownership are not takings.¹³⁵

In *Lucas v. South Carolina Coastal Council*, the Court held that the coastal protection plan, which prevented Lucas from developing the

¹²⁹ Most scholars agree that the Takings Clause was originally intended only to apply to physical takings, not regulatory takings. See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995); see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992) (stating “[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all.”). Cf. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). Of course, the founding fathers did not think the federal government would regulate to the extent that it does today, and the Fifth Amendment did not originally apply to the states.

¹³⁰ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

¹³¹ *Id.* at 412-15.

¹³² *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 124 (1978).

¹³³ *Id.* at 137-38 (holding that there was not a taking when the government designated a building as a historical landmark and prevented the owner from constructing a substantial expansion on top of the building). The Court emphasized that the regulation did not deny the owners all profitable use of the building and, in fact, had not even precluded all development of the air rights above the building. Because designating the building a historic landmark had the effect only of decreasing the value of the property, and because it served an important purpose, the Court concluded that there was not a taking requiring just compensation. The regulation was reasonable for the public welfare.

¹³⁴ *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

¹³⁵ *Id.* at 261-63.

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one million dollar property that he bought, amounted to a taking since it deprived him all economically or productive use of his land.¹³⁶ This arguably leaves a good deal of individual landowners without a remedy when their property carries a larger share of the burden of regulations designed for the public interest. As noted in the introduction, this somewhat stingy approach to regulatory takings prompted a number of states to pass much more extensive regulatory takings laws.

Before addressing the state law expansion of protection against regulatory takings, there have been a number of relatively recent decisions by the Supreme Court that are decisively more pro-property rights and considerably less government regulation friendly.

B. Roberts Court Regulatory Takings

John Sprankling in his recent review of property under the Roberts Court argues that the Roberts Court has been much more pro-property than the Rehnquist Court.¹³⁷ *Kelo* was the last property decision of the Rehnquist Court,¹³⁸ and since then, the Roberts Court has handed down a number of cases expanding the scope, and thereby, the protection of the Takings clause, thus providing remedies that were not available before. Notable cases include: *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,¹³⁹ *Koontz v. St. Johns River Water Management District*,¹⁴⁰ and *Horne v. Department of Agriculture*.¹⁴¹ Sprankling argues that these cases weaken the balancing approach of *Penn Central* as they usher in more “sweeping categorical rules” that make it more likely that the government’s action will be considered a taking.¹⁴²

Stop the Beach is important, not for its result, but for the fact that a majority of the Justices on the Court recognized that “a *judicial decision* which eliminates or substantially changes even a *minor* property right would violate the Constitution.”¹⁴³ *Koontz* is important because it expanded the *Nollan-Dolan* rule for conditions on development, from those that granted a permit but took an easement, to those that denied a permit for a failure to either limit the

¹³⁶ *Lucas v. South Carolina*, 505 U.S. 1003, 1016, 1019, 1027, 1032 (1992).

¹³⁷ John G. Sprankling, *Property and the Roberts Court*, 65 U. KAN. L. REV. 1, 1 (2016).

¹³⁸ *Kelo v. New London*, was decided in the final year of the Rehnquist Court.

¹³⁹ *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702 (2010).

¹⁴⁰ *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

¹⁴¹ *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419 (2015).

¹⁴² Sprankling, *supra* note 137, at 16.

¹⁴³ *Id.* at 17. Sprankling did a fair amount of intellectual work before arriving at this conclusion. As he notes, “Chief Justice Roberts and Justices Thomas and Alito would reach this result through the Takings Clause, while Justices Kennedy and Sotomayor would do so through the Due Process Clause.” *Id.*

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development or spend money.¹⁴⁴ Under the *Nollan-Dolan* cases, when the government conditions a discretionary granting of a permit or variance on a property owner the government must satisfy two requirements to avoid a finding that a taking has occurred: first, there must be a “nexus . . . between the legitimate state interest and the permit condition created,”¹⁴⁵ They must be rationally related. Secondly, the burden must be roughly proportional to the justification for the condition.¹⁴⁶ In the *Koontz* case, a bare majority of the Court held that “[t]he principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so.”¹⁴⁷ Further, it stated that “[s]uch so-called ‘in lieu of’ fees are utterly common-place and they are functionally equivalent to other types of land use exactions.”¹⁴⁸ It therefore held that “so-called ‘monetary exactions’ must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.”¹⁴⁹

Justice Kagan writing for the four dissenters made a strong case for the breadth of impact of the decision when she wrote:

By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the majority extends the Takings Clause, with its notoriously ‘difficult’ and ‘perplexing’ standards, into the very heart of local land-use regulation and service delivery. Cities and towns across the nation impose many kinds of permitting fees every day. Some enable a government to mitigate a new development’s impact on the community, like increased traffic or pollution—or destruction of wetlands. Others cover the direct costs of providing services like sewage or water to the development. Still others are meant to limit the number of landowners who engage in a certain activity, as fees for liquor licenses do. All now must meet *Nollan* and *Dolan*’s nexus and proportionality tests . . . And the flexibility of state and local governments to take the most routine actions to enhance their communities

¹⁴⁴ *Koontz*, 133 S. Ct. at 2586, 2595.

¹⁴⁵ *Dolan*, 512 U.S. at 374.

¹⁴⁶ *Id.* at 388-91.

¹⁴⁷ *Koontz*, 133 S. Ct. at 2595.

¹⁴⁸ *Id.* at 2599.

¹⁴⁹ *Id.*

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will diminish accordingly.¹⁵⁰

Koontz, therefore provides a potential remedy where none existed before.¹⁵¹

The more recent case of *Horne v. Department of Agriculture* is important for three reasons: (1) it establishes that personal property gets the same protection as real property,¹⁵² (2) it expanded the test for physical takings of property established in *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁵³ and (3) it awarded what it considered market value compensation, but ignored the government's impact on the market value. In *Loretto*, the Court found that a city ordinance that required building owners to provide a small amount of physical space for cable companies' equipment amounted to a "permanent physical occupation of property" and was therefore a taking.¹⁵⁴ *Horne* involved a Department of Agriculture program authorized under the Agricultural Marketing Agreement Act of 1937 that was designed to help raisin growers by stabilizing the national price for raisins. The agreement required growers to set aside a certain percentage of their crop for the account of the Government, free of charge. During the years in questions this amounted to forty-seven percent of the crops. The government would then sell, donate or dispose of them in accordance with program guidelines. If there were any profits left over, the government would distribute them to the growers. The Hornes declined this "help" claiming that this was an uncompensated taking. The Supreme Court agreed, holding that since the Hornes would lose "the entire 'bundle' of property rights in the appropriated raisins—the rights to possess, use and dispose of them," this was a taking.¹⁵⁵ Although the government could have placed a regulatory limit on production without it amounting to a taking, here the government appropriated the property and thus, there was a taking.¹⁵⁶

¹⁵⁰ *Id.* at 2607 (Kagan, J., dissenting).

¹⁵¹ Sprankling, *supra* note 137, at 20 (noting "Before *Koontz* it was widely believed that the Takings Clause did not apply to fees or other general monetary obligations." *Id.* Swartz criticizes the decision thus, "Under the Court's reading of the Clause, non-elected, essentially life-tenured judges hold the power to determine the best policy to preserve wetlands in Florida. To the contrary, the Fifth Amendment does not grant judges the authority to weigh developer profits against the public interest under any interpretive theory." Andrew William Schwartz, *No Competing Theory of Constitutional Law Justifies Regulatory Takings Ideology* 34 STAN. ENVTL. L.J. 247, 249 (2015).

¹⁵² The Court rejected the Ninth Circuit reasoning that the Takings Clause accords less protection to personal property than to real property. *Horne v. Dep't of Agric.*, 750 F.3d. 1128, 1140 (9th Cir. 2014).

¹⁵³ See *Loretto v. Teleprompter*, 458 U.S. 419 (1982).

¹⁵⁴ *Id.* at 441. One might query whether this would be a taking in South Africa since the government did not acquire the title itself.

¹⁵⁵ *Horne*, 135 S. Ct. at 2428 (citing *Loretto*, 458 U.S. at 435).

¹⁵⁶ *Id.*

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As Sprankling notes, the difference between *Loretto* and *Horne* is that *Loretto* eliminated all of the owner's rights, whereas here the only relevant right was the right to dispose of the raisins and this was not completely destroyed because of the residual right to share in the proceeds of an any government sales.¹⁵⁷ Sprankling argues that "After *Horne*, even a government "occupation" which leaves an owner with substantial property rights would seem to be a *per se* taking, regardless of the underlying policy basis."¹⁵⁸

Horne exemplifies a very pro individual property rights stance against a government program that was designed to not only help Horne, but all other raisin growers.¹⁵⁹ This effectively unravels a program that had been in place since the great depression and the New Deal. It is uncertain at this point whether or not this will turn out badly for the raisin industry, or other industries that are potentially impacted by this decision.¹⁶⁰

C. The Remedy?

The remedy delivered in *Horne* was that Horne would be relieved of the obligation to pay \$483,843.53 which represented the fair market value of the raisins that he did not turn over to the government.¹⁶¹ This fair market approach makes some sense given that this was the amount the government claimed from Horne.¹⁶² However, the government argued, and Justice Breyer in his concurrence agreed, that the case should have been remanded to determine whether Horne had been justly compensated.¹⁶³ The argument was that there may not have been any compensation due if the Hornes would have complied with the order given that they would have also received a share of the proceeds

¹⁵⁷ Sprankling, *supra* note 137, at 23-24. This is because the raisins were being farmed for commercial use, and thus the rights to possess and use them were not relevant. This point is echoed in Justice Sotomayor's lone dissent where she argued that "it is not a *per se* taking if it does not result in the destruction of every property right." *Horne*, 135 S. Ct. at 2419 (Sotomayor, J., dissenting).

¹⁵⁸ Sprankling, *supra* note 137, at 24.

¹⁵⁹ The Cato institute celebrated it. Michael W. McConnell, *The Raisin Case*, 2015 CATO SUP. CT. REV. 313, 313 (2015).

¹⁶⁰ As noted by Christopher E. Mills, in *Raisin Case: Takings Jurisprudence After Horne v. Department of Agriculture*, 23 GEO. MASON L. REV. 1 (2015). "At least thirty-seven agricultural marketing orders still exist, and at least nine of those authorize some type of volume control. Some use a reserve mechanism similar to the raisin order, and some otherwise restrict how growers can dispose of the fruits of their labor." *Id.* at 2. Of these two are most likely unconstitutional under *Horne*, while the others may be constitutional. *Id.* at 12-18.

¹⁶¹ *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2432 (2015).

¹⁶² Justice Roberts argues that "The Government has already calculated the amount of just compensation in this case, when it fined the Hornes the fair market value of the raisins: \$483,843.53. 750 F.3d, at 1135, n.6. The Government cannot now disavow that valuation." *Id.* at 2433.

¹⁶³ *Id.* at 2431-32; *id.* at 2433-35 (Breyer, J., dissenting) (with Justices Ginsburg and Kagan joining).

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of any profits, and more importantly, the market price of raisins was higher because the program, namely the price support program, increased demand due to the program's quality standards and promotional activities.¹⁶⁴ The government, in fact argued that the Hornes would have received a net gain.¹⁶⁵

The Majority rejected the argument with very little analysis.¹⁶⁶ If in fact the program was working, then the government's contention has merit. The program only makes sense if on average raisin producers are better off under the program than without it. What the court allowed, in effect, was a windfall for the Hornes. They received the benefits of the program without paying any of the costs. They were in fact free riders.¹⁶⁷

As noted, Justice Breyer with Justices Ginsburg and Kagan dissented with regards to Part III of the Court's decision not to remand the case for a determination of whether any compensation would have been due if the Hornes had complied with the California Raisin Marketing Order's reserve requirement.¹⁶⁸ Breyer argued that the marketing order may afford just compensation and if that is the case then no taking would have taken place.¹⁶⁹ As Justice Breyer notes:

The reserve requirement is intended, at least in part, to enhance the price that free-tonnage raisins will fetch on the open market . . . And any such enhancement matters. This Court's precedents indicate that, when calculating the just compensation that the Fifth Amendment requires, a court should deduct from the value of the taken (reserve) raisins any enhancement caused by the

¹⁶⁴ *Id.* at 2432.

¹⁶⁵ *Id.*

¹⁶⁶ As Justice Roberts stated, "The best defense may be a good offense, but the Government cites no support for its hypothetical-based approach, or its notion that general regulatory activity such as enforcement of quality standards can constitute just compensation for a specific physical taking. Instead, our cases have set forth a clear and administrable rule for just compensation: 'The Court has repeatedly held that just compensation normally is to be measured by 'the market value of the property at the time of the taking.'"
United States v. 50 Acres of Land, 469 U.S. 24, 29, 105 S. Ct. 451, 83 L. Ed. 2d 376 (1984) (quoting *Olson v. United States*, 292 U.S. 246, 255, 54 S. Ct. 704, 78 L. Ed. 1236 (1934)). *Id.* at 2432.

¹⁶⁷ See, e.g., Brief of Sun-Maid Growers of California and the Raisin Bargaining Association Amici Curiae Brief in Support of Respondent (the U.S. Dep't of Agriculture) No 14-275, at 12-13.

¹⁶⁸ As he states: "The question of just compensation was not presented in the Hornes' petition for certiorari. It was barely touched on in the briefs. And the courts below did not decide it. At the same time, the case law that I have found indicates that the Government may well be right: The marketing order may afford just compensation for the takings of raisins that it imposes. If that is correct, then the reserve requirement does not violate the Takings Clause." *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2433 (2015) (Breyer, J., concurring in part).

¹⁶⁹ This is similar to the concurrence of Froneman J in *Agri South Africa*, who felt that the new order rights were just and equitable compensation for the taking of the old order rights. See *Agri South Africa*, *supra* note 82, at para. 79.

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taking to the value of the remaining (free-tonnage) raisins. More than a century ago, in *Bauman v. Ross*, 167 U. S. 548 (1897), this Court established an exception to the rule that “just compensation normally is to be measured by ‘the market value of the property at the time of the taking.’”

. . . .

In my view, . . . the relevant precedent indicates that the Takings Clause requires compensation in an amount equal to the value of the reserve raisins adjusted to account for the benefits received. And the Government does, indeed, suggest that the marketing order affords just compensation.¹⁷⁰

Of course if the program is not succeeding and the value added to the market price of raisins by the program does not offset the value of the raisins taken then, while there may be a taking, the just compensation would still not require the full market value of the raisins.¹⁷¹ Michael W. McConnell, in *The Raisin Case*, makes a strong argument that it is doubtful that the raisin reserves actually increased the price of raisins.¹⁷² Even if this is true, that does not mitigate against the need to remand to actually have the issue thoroughly vetted.

It is worth noting that it is not clear that the program in *Horne* would amount to a taking in South Africa. Following the holding in *Agri, SA*, it is not clear that the government acquired the same or similar right that the *Horne*’s lost.¹⁷³ The Raisin Committee, composed primarily of raisin growers, which takes title to the raisins does not get to do whatever it wishes with the raisins, but rather it is limited to disposing of the raisins in ways consistent with the purposes of the Act, for instance it “sells them in noncompetitive markets, . . . to exporters, federal agencies, or foreign governments; donates them to charitable causes; releases them to growers who agree to reduce their raisin production; or disposes of them by “any other means” consistent with the purposes of the raisin program.”¹⁷⁴ The proceeds are often used to

¹⁷⁰ *Id.*

¹⁷¹ What is also odd about the decision is that the government never actually physically took the raisins. If they did, then the question would be what are the value of the raisins they took? Again, since the government (and taxpayer) was arguably responsible for the added market value of the raisins, it would be unjust to ask the government (and the taxpayer) to pay the full market value.

¹⁷² McConnell, *supra* note 159, at 328–31. He in fact criticizes justice Breyer for not being more skeptical of the government’s claims. *Id.* at 331.

¹⁷³ See *supra* note 84 (citing *Agri South Africa v. Minister for Minerals and Energy* 2013 4 SA 1 (CC) SA para. 58).

¹⁷⁴ *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2424 (2015) (citing 7 CFR § 989.67(b)(5) (2015)).

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subsidize the export of raisins and as noted the individual growers retain an interest in any net proceeds from Raisin Committee sales.¹⁷⁵ In fact, the Order “ensures that reserve raisins will be sold ‘at prices and in a manner intended to maxim[ize] producer returns.’”¹⁷⁶ The federal government never actually physically took the raisins, but rather civilly fined the Hornes for not setting aside raisins for the government.

Even if the program would be found to be an expropriation under South African law, the Court would have been required to factor in the benefits of the plan, as well as the government purpose of stabilizing and increasing the market price of raisins in determining what compensation would be fair and just. Again, the factors for determining just and equitable compensation in South Africa require that the Court consider “the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation.”¹⁷⁷

D. Critiques of Regulatory Takings

Not everyone has celebrated the Supreme Court expansion of regulatory takings,¹⁷⁸ and in fact some have argued that the remedy is not supported by “any of the competing theories of constitutional interpretation” but in fact stems “from a misunderstanding of the Clause as guaranteeing a laissez-faire political economy.”¹⁷⁹ As a judicially created doctrine that puts the weight of the Court behind individual property rights and against the power of political branches to enact land use laws and regulations for the common good, regulatory takings doctrine is arguably flawed from the perspective of political process.¹⁸⁰ Andrew W. Schwartz argues that “Reliance instead on

¹⁷⁵ *Id.*

¹⁷⁶ *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2449 (2015) (Sotomayor, J., dissenting) (citing § 989.67(d)(1)).

¹⁷⁷ Section 25(3) d-e.

¹⁷⁸ See J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89 (1995); Treanor, *supra* note 129. For praise of the *Horne* decision, see Brian T. Hodges and Christopher M. Kieseraa, *Horne v. Department of Agriculture: The Takings Clause and the Administrative State*, 16 *ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS* 49 (2015); McConnell, *supra* note 159, at 314-15.

¹⁷⁹ Schwartz, *supra* note 151, at 248. It is somewhat curious that Oliver Wendell Holmes, who is famous, for among other things, stating that the Constitution does not embody Herbert Spencer’s social statistics, is the one responsible for writing the majority opinion in the case that started the doctrine of regulatory takings. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). In 1905 Justice Holmes wrote in his dissent in *Lochner v. New York* (1905), “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics . . . a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”

¹⁸⁰ Treanor, *supra* note 129. Treanor argues that “The framers did not desire substantive protection of all property interests because, contrary to much legal scholarship, liberalism was not the dominant world view

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decisions by the political branches of government would promote key values of the Constitution, protect the community's interests in the environment, health, and safety, and result in greater overall fairness and efficiency."¹⁸¹ Schwartz argues for the end of the doctrine of regulatory takings in somewhat apocalyptic terms, as he states:

The Earth faces a stiff challenge in slowing environmental degradation: global warming, sea level rise, extreme weather, drought, loss of species, dying oceans and marine life, loss of arable soil, wildfires, groundwater contamination, air pollution, pandemics, congested cities, deforestation, and loss of open space. The United States suffers from a deficiency in affordable housing, homelessness, urban congestion, and dying cities . . . Drought and food shortages induced by climate change and contamination of air, water, and soils in poorer areas of the World have been, and will increasingly be, a catalyst for "global instability, hunger, poverty, and conflict." While these environmental and social problems may not wipe out civilization on Earth, a consensus in the scientific community indicates that unless developed countries change their patterns of consumption of natural resources, degradation of the Earth's natural systems may be unavoidable.¹⁸²

E. State Law Developments in Regulatory Taking

As noted, there were legislative responses by the states, both to the *Kelo* doctrine of taking for public purposes and the somewhat limited role of the Takings Clause in cases involving governmental regulation of property. While the former response gave property owners the remedy of limiting the government from being able to take property at all, the latter provides for the possibility of damages where none were available before. For the purposes of this paper, I will only address the latter response and the remedies provided under state law for regulatory takings. It should be noted at the outset, that this response was not nearly

at the time of the framing. Rather, republicanism continued to exert substantial influence on political discourse. Many of the framers believed that government could -- and in the interests of society often should -- limit individuals' free use of their property; balancing societal needs against individual property rights was left in large part to the political process." *Id.* at 783; See also Schwartz, *supra* note 151, at 248.

¹⁸¹ Schwartz, *supra* note 151, at 247-49.

¹⁸² *Id.* at 249-50.

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as widespread as the response to the *Kelo* decision. Efforts at passing legislative changes were only successful in a handful of states, namely, Texas, Louisiana Mississippi, Florida, Oregon, and Arizona.

While the legislation in these states was largely designed to provide damages for the disproportionate impact of regulations on an individual's property while leaving the regulation standing, the effect, in part, has been to discourage local and state land regulation efforts.¹⁸³

On the one hand, it is unfair for an individual property owner to carry a disproportionate burden for land use measures designed for the common good. On the other, this legislation has undermined the ability of state and local government to regulate for the common good and has also had the unfortunate consequence of reducing community input into land use decisions.¹⁸⁴

Because the remedy for compensation for physical takings was originally based on the idea that such takings were susceptible to process failure, Treanor argues that compensation for regulatory takings today should only be mandated when process failure is particularly likely "when there has been singling out or in environmental racism cases, where there has been discrimination against discrete and insular minorities . . . Except where process failure is likely, the decision about whether to compensate should be left to the political process."¹⁸⁵

Unfortunately, some of this legislation is actually causing process failures, as opposed to providing a remedy when such failures occur.¹⁸⁶ While there is often community input into land use regulations, there is not the same level of input into the waivers or variances often granted under this legislation.¹⁸⁷ These laws might actually have a negative effect on the ability of low income neighborhoods to change land use zoning to get out from under exiting detrimental land use regimes, which are the product of failed political processes, including

¹⁸³ John D. Echeverria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, 28 STAN. ENVTL. L.J. 439, 508 (2009) (stating "The Takings clauses in Florida and Oregon were supposed to generate financial awards for property owners without necessarily compromising the regulations themselves. The reality in Florida and Oregon has been quite different, with state and local regulators waiving, repealing, or simply not adopting land use and environmental regulations essentially across the board . . . The deregulatory effect of takings measures is partly attributable to the large size of certain claims, the lack of dedicated funding mechanisms for paying claims, and the limited budgets of state and local governments."). *Id.* at 501. The starkest example of this was the result of Oregon's measure 37. There were over 7,000 claims and the government paid compensation in only one case. *Id.* at 489-90. All the other claims were settle with a waiver of the regulation. *Id.* at 487-89.

¹⁸⁴ Jacobs, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 YALE L.J. 1518, 1549 (2007).

¹⁸⁵ Treanor, *supra* note 129, at 784. He goes so far as to argue that this should be the case even when there has been government seizure of property. *Id.*

¹⁸⁶ *Id.* at 513-16.

¹⁸⁷ Jacobs, *supra* note 184, at 1549.

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environmental racism.¹⁸⁸

F. State Legislation

Six states currently have statutes that provide compensation for land use regulations that do not “take” property, but instead, merely diminish property values. Several more have legislation that requires land use regulation impact analysis.¹⁸⁹

Legislators in Mississippi, Louisiana, and Texas all passed legislation granting landowners a remedy when land use regulations impact, but do not necessarily destroy, the fair market value of their property. Such laws risk opening up the floodgates of litigation since land use regulations often have an expansive and wide-ranging effect on the value of property, from removing all economic use of the property to a de minimis reduction in value. At the de minimis end of the spectrum, one could imagine a number of suits designed to thwart land use regulations rather than actually seeking damages for a loss in property value. These three states addressed the issue of de minimis claims and claims that may be designed to thwart regulations, rather than seek compensation, with significant thresholds. Mississippi, in 1999, was the first of three to pass this kind of legislation. The state enacted a relatively high threshold of a 40% reduction of fair market value for a landowner to bring this kind of statutory “takings” case.¹⁹⁰ Texas followed in 2000, with a lower threshold of 25%,¹⁹¹ and then Louisiana in 2005 with a threshold of merely 20%.¹⁹² As noted by Krier and Sterk, the Mississippi and Louisiana laws only apply to regulations that impact agricultural land and have not resulted in any published opinions.¹⁹³ They further note that while the Texas law is broader and has resulted in a few opinions, those opinions have not been sympathetic

¹⁸⁸ *Id.* at 1550-52. Since low income and minority neighborhoods carry a disproportionate burden of locally undesirable land uses, such as waste disposal sites, they need to be able to have a voice in future land use planning to rectify this. As noted by Jacobs, the literature firmly establishes this. See Jacobs, *supra* note 184, at 1552; see, e.g., Vicky Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L. J. 1384 (1994).

¹⁸⁹ See Steven J. Eagle, *The Birth of the Property Rights Movement*, POL’Y ANALYSIS, Dec. 15, 2005, at 1, 26-27, <http://www.cato.org/pubs/pas/pa558.pdf> (discussing takings impact assessment statutes in in Delaware, Idaho, Indiana, Kansas, Louisiana, Michigan, Montana, North Dakota, Tennessee, Texas, Utah, Washington, and West Virginia); see also JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW (2013) (stating that a dozen or so states require takings impact assessments.).

¹⁹⁰ MISS. CODE ANN. § 49-33-7(h) (1999).

¹⁹¹ TEX. GOV’T CODE ANN. § 2007.002(5)(B)(ii) (Vernon 2000).

¹⁹² LA. REV. STAT. ANN. § 3:3602(11) (2005).

¹⁹³ Krier and Sterk, *supra* note 14, at 78.

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to the landowners.¹⁹⁴ In states like Florida,¹⁹⁵ Oregon¹⁹⁶ and most recently in Arizona,¹⁹⁷ the legislation in question has no such threshold to bringing a claim.¹⁹⁸

Oregon's first attempt at this type of legislation, Measure 37, which came into effect in 2004, caused considerable problems for the state.¹⁹⁹ The legislation provided that:

Owners of private real property are entitled to just compensation, equal to the reduction in the fair market value or modification or removal of the regulation, when a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of private real property . . . and has the effect of reducing the fair market value of the property.²⁰⁰

Measure 37 also required that the landowner file a claim with the state and required the state to either settle the claim or waive the regulation within 180 days.

Pursuant to this law, landowners filed approximately 7,000 claims, worth around \$17 billion, that the state was able to process within the 180-day time limit.²⁰¹ Because the state was required to either waive the regulation in question or to pay compensation, and because the state had little time and less money to pay out the compensation, it met its deadline by waiving the regulations.²⁰² Under Measure 37, there was only one case in which compensation was made to a claimant.²⁰³

¹⁹⁴ *Id.* at text accompanying footnote 122.

¹⁹⁵ FLA. STAT. § 70.001(2012).

¹⁹⁶ OR. REV. STAT. § 197.352 (2015); *id.* § 195.305.

¹⁹⁷ Proposition 207 (Ariz. 2006) (ARIZ. REV. STAT. §§ 12-1131-1138), [http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20\(I-21-2006\)](http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20(I-21-2006)).

¹⁹⁸ According to Krier and Sterk, there has been no reported judgement requiring compensation under the Arizona statute, and the state may easily avoid liability based on a health and safety exception to the act. Krier and Sterk, *supra* note 14, at 80.

¹⁹⁹ As noted by John D. Echeverria & Thekla Hansen-Young, "Measure 37 also generated new land conflicts. Many neighbors of Measure 37 claimants filed lawsuits challenging the issuance of waivers by the state or local governments. In several instances, cities sued counties over their approval of Measure 37 claims.²⁰¹ The volume of controversy was even greater at the administrative level; neighboring landowners wrote over eighty-five thousand letters to the state registering objections or other comments on over two-thirds of the claims filed with the state." Echeverria & Hansen-Young, *supra* note 183, at 486.

²⁰⁰ OR. REV. STAT. § 197.352 (2005).

²⁰¹ See Oregon Department of Land Conservation and Development, Ballot Measures 37 (2004) and 49 (2007) Outcomes and Effects January 2011.

²⁰² *Making Regulatory Takings Reform Work: The Lessons of Oregon's Measure 37*, 39 ENVTL. L. REP. 10516, 10524, 10526, 10536 (2009). The authors similarly noted that "Landowners were routinely advised to reserve their Measure 37 rights by making a claim even if they had no actual plans of developing their land."

²⁰³ *Id.*

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The result was the passing of Measure 49, which significantly limited the scope of the land use regulations that would be considered takings. The people of Oregon were not likely impressed by the fact that adult establishments were getting land use regulation waivers and so Measure 49 excluded this type of regulation as well as others. Specifically Measure 49 provides in part that:

This does not apply to land use regulations that were enacted prior to the claimant's acquisition date or to land use regulations that: (a) Are public nuisances under common law; (b) Protect public health and safety; (c) Are required to comply with federal law; (d) That restrict or prohibit the use for the purpose of selling pornography or performing nude dancing; (e) Rezone land to an industrial zoning classification for inclusion within an urban growth boundary; or (f) Rezone urban growth boundary to industrial zoning classification.²⁰⁴

Even with these changes, however, the Oregon legislation has had and will continue to have the effect of undermining the ability of residents to have input into decisions regarding the character of their neighborhoods. While changes to neighboring properties generally required "public participation or proof that a land use change met a minimum standard, such as public welfare or unusual hardship" the new regime results in the waiver of regulations without any public input.²⁰⁵

Like Oregon, Florida did not impose a minimum for bringing a statutory takings claim. Florida's statute requires notice to neighboring landowners whenever one claim is submitted, and so there is potential for more community input than under the Oregon legislation.²⁰⁶ However, the notified neighbor cannot make a claim under the Act if the notifying neighbor was granted relief under the Act and that relief impacted the notified neighbor's property value.²⁰⁷

When it was adopted in 1995, Florida's law was the most far reaching legislation in the nation.²⁰⁸ Section 70.001, Florida Statutes

²⁰⁴ OR. REV. STAT. § 195.305 (2007). Other changes include a different mechanism for evaluating compensation, a limit on the number of dwelling places one could request to build, and it abolished claims that sought authority to develop new commercial or industrial uses. Echeverria & Hansen-Young, *supra* note 183, at 496.

²⁰⁵ Jacobs, *supra* note 180, at 1549. "Neighbors have no legally defined opportunity to voice their concerns about the effect of zoning waivers on neighboring properties or the surrounding community."

²⁰⁶ *Id.* at 1549.

²⁰⁷ FLA. STAT. ANN. § 70.001(3)(e) (West 2015).

²⁰⁸ Echeverria & Hansen-Young, *supra* note 183, at 447.

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(2012), provides in part:

(1) [T]he Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

(2) When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.

(3) For purposes of this section:

.....

(d) The term “action of a governmental entity” means a specific action of a governmental entity which affects real property, including action on an application or permit.

(e) The terms “inordinate burden” and “inordinately burdened”:

1. Mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.

On its face, the legislation is more limited than the Oregon legislation, which came after the Florida law, in that it limits claims to those effecting “existing use” and requires an “inordinate burden.” Also, unlike the Oregon statute it is not retroactive, does not apply to temporary limitations or moratoriums.²⁰⁹ Like Oregon’s Measure 49, it

²⁰⁹ FLA. STAT. ANN. § 70.001(3)(e) (West 2015).

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provides exemption for efforts to abate nuisances.²¹⁰ However, the term “existing use” is defined to include future uses that are reasonably foreseeable and are non-speculative.²¹¹ While the inordinate burden requirement does have a limiting effect, the inordinate burden requirement is a weak version of the Penn Central test in that it focuses on the part of the test most favorable to a claimant, namely the “reasonable investment-backed expectations” of the party.²¹²

Two cases in 2015 threatened to push the envelope further, resulting in the state legislature amending the Act:²¹³ *Smith v. City of Jacksonville*,²¹⁴ and *FINR II, Inc. v. Hardee County*.²¹⁵ Both cases raised the question as to whether the Act is limited to regulations that apply directly to a given property or if the Act also applies to regulations of neighboring properties.²¹⁶ On the one hand, one’s property value may be just as adversely impacted by a land use regulation on one’s neighbor’s property, as a land use regulation directed to one’s own property.²¹⁷ On the other hand, the damage to property values of any land use regulation could extend indefinitely with no clear break in the legal causation chain of harm to property values.

G. The Smith Case

In *Smith*, the Smiths purchased a parcel of undeveloped riverfront property in 2005, which was zoned “residential low density.” The undeveloped lot next door was owned by the City and was restricted to the leisure and recreation of Duval County employees.²¹⁸ As the dissenting opinion of Makar notes, “The easterly lot had a luxury home with dock and landscaping; the westerly lot was zoned residential and had been restricted by deed—for fifty years—to be “used solely and only for the recreation and enjoyment of such employees of Duval

²¹⁰ *Id.*

²¹¹ Under the Act, a future use is an existing use if five conditions are met: the use (1) is “reasonably foreseeable,” (2) is “non-speculative,” (3) is “suitable for the subject real property,” (4) is “compatible with adjacent land uses,” and (5) creates “an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.” *Id.* § 70.001(3)(b).

²¹² Krier and Sterk do not believe that the statute is more expansive than existing constitutional doctrine, and they note that “the few decided Florida cases have construed it narrowly.” Krier and Sterk, *supra* note 14, at 79. While this is generally true, the FINR case threatened this interpretation prompting legislative reform.

²¹³ Laws 2015, c. 2015-142, § 1, eff. Oct. 1, 2015.

²¹⁴ *Jacksonville v. Smith*, 159 So.3d 888, 889 (Fla. Dist. Ct. App. 2015).

²¹⁵ 164 So.3d 1260 (Fla. Dist. Ct. App. 2015).

²¹⁶ *Jacksonville v. Smith*, 159 So.3d 888, 889 (Fla. Dist. Ct. App. 1st Dist. 2015). The Florida Supreme Court accepted review of the above decision on May 22, 2016.

²¹⁷ Or, as argued above, by a waiver of a land use regulation.

²¹⁸ *Jacksonville v. Smith*, 159 So.3d at 889.

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County.”²¹⁹ After the Smiths purchased the property, the City obtained a cancellation of the deed restriction, and in 2007, the City rezoned its property so that it could construct a fire station which was built between 2010 and 2011.²²⁰

The Smiths filed a complaint under the Bert Harris Act for \$470,000 arguing that the construction of the fire station “inordinately burdened” [their] property because it effectively made the property unmarketable as a luxury home site.²²¹ As the dissenting opinion of Makar describes it:

The fire station, now in existence, is used to respond to general fire and rescue emergencies, as well as marine distress calls. It utilizes a commercial-level dock, which is used not only by two fire boats, but also port security and/or Florida Marine Patrol boats. The fire station property is now separated by the Smiths’ property by an eight-foot chain-link fence, which is immediately adjacent to the fire station’s parking lot. The dock, fence, and fire station height exceed the limits allowed by residential zoning. The fire station also has a balcony overlooking the Smiths’ property upon which fire fighters congregate. The parking lot is lighted throughout the night. There is a large generator placed near the Smiths’ property, and the building has speakers facing the property from which announcements are made. Claxons are also sounded when an emergency call is received at the fire station, and emergency vehicles may use sirens when departing from it. In short, the City has essentially created a light industrial use for its parcel, without notice to the Smiths.²²²

The City argued that the Act did not apply because the City had not taken any action directly against the Smith property, but only the property next door. The trial court rejected the argument and directed that a jury be impaneled to determine the total amount of compensation due.²²³

The City appealed and the Court of Appeals overturned the trial

²¹⁹ *Id.* at 897 (Makar, J., dissenting).

²²⁰ *Id.*

²²¹ *Id.* at 898.

²²² *Id.* at 899.

²²³ *Id.* at 889-90.

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court on the basis that the Smith's property was not itself subject to any regulatory action.²²⁴ As the DCA noted, the trial court's reading of the Act goes beyond the Act's intended purpose and would open the floodgates of litigations.²²⁵

In his partially dissenting opinion, Judge Swanson argued that, "The statutory phrase "directly restricted or limited the use of real property" is properly construed to refer to the issue of causation and simply requires the action of a governmental entity to immediately and detrimentally affect the value of real property without the intervention of other factors."

The dissent of Judge Makar argued that if the legislature intended the more limited application of the Act it could have used language similar to Texas, which explicitly limits the application of its Act to government action that "(i) affects an owner's private real property that is the subject of the governmental action."²²⁶ Makar further argued that the language requiring "direct impact" only applied to the first of two alternatives for making a claim.²²⁷ In other words, the definition of "inordinate burden" and "inordinately burdened" in section 70.001(3)(e)(1) provides two alternative ways to show the inordinate burden:

1. One is when the government has "directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property," and the other separated by "or" is
2. When a "vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large."²²⁸

²²⁴ *Id.* at 888-89.

²²⁵ *Id.* at 894. The majority opinion relied on the text and the State Attorney General opinion that the intent of the legislation was to require direct application of a regulation to the property in question before the Act applied. AGO Fla. 95-78 (1995).

²²⁶ *Id.* at 906 (Makar, J., dissenting).

²²⁷ *Id.*

²²⁸ *Id.* at 907 (Makar, J., dissenting).

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The second option does not include language requiring a “direct” restriction or limit and thus, since the Smiths’ claim satisfy the requirement that they were “left with existing or vested uses that are unreasonable such that the [they] bear[] permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large, there was a taking under the act.”²²⁹

H. The FINR Case

In the Second District Court of Appeal case, the reasoning of the dissenting opinions of Judges Makar and Swanson from the *Smith* case won the day. Here, the facts were even more stark. The Florida Institute for Neurological Rehabilitation (FINR) brought its Harris Act claim after Hardee County Florida approved a special exception for CF Industries, Inc., to operate a phosphate mine within 150 to 207 feet from FINR’s property, rather than the quarter mile under existing county codes and plans.²³⁰ FINR claimed that the noise, vibrations and dust made it virtually impossible to operate a brain treatment and vocational service facility for veterans and survivors of brain injuries with a resulting decrease in the land’s fair market value of \$38,000,000.²³¹ This was due to the fact that the exception reduced the use of the land to “merely agricultural and recreational land.”²³²

The Second District Court of Appeal rejected the reasoning in *Smith*, holding that the owner of the property adjacent to the property that was subject to Hardee County’s governmental action, can maintain a cause of action under the Bert Harris Act.²³³ As the court held:

To limit the Act to afford a cause of action only to a property owner whose property was subject to the direct action of a governmental entity would be to rewrite the statute to insert an additional requirement not placed there by the legislature and would defeat the legislature’s stated intent . . . section 70.001(2) contains no requirement that the regulation giving rise to the inordinate burden directly affect the burdened property. The Act establishes broad protection for property owners

²²⁹ Judge Makar notes that this was the basis for the decision below.

²³⁰ *FINR II, Inc. v. Hardee County*, 164 So.3d 1261-62 (Fla. Dist. Ct. App. 2015).

²³¹ *Id.* at 1262.

²³² *Id.*

²³³ *Id.* at 1263. It then certified a conflict with *Jacksonville v. Smith*, 159 So.3d 888 (Fla. 2015).

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who suffer economic loss from governmental property regulations and actions.²³⁴

The court expressly endorsed Makar J's argument that "if the Florida legislature had intended to enact a more narrow meaning of governmental action . . . they could have easily done so."²³⁵ As well as Judge Swanson's argument that 'directly restricted or limited the use of real property' is an issue of causation, simply requiring that "the action of a governmental entity . . . immediately and detrimentally affect the value of real property without the intervention of other factors."²³⁶ The Court debunked the claim by the Smith majority that this would "open a floodgate of litigation, [and] create a 'cataclysmic change in the law of regulatory takings.'"²³⁷ As the Court stated, "There is no language in the Act that would allow for its application to property that was only incidentally or remotely affected as a result of government action, and we do not read it to provide relief to those property owners who are so far removed from the action that the government could not reasonably anticipate their harm."²³⁸

Finally, the Court noted that should the Smith majority would allow for the government to disregard vested rights and legitimate interests of adjacent landowners for all sorts of land uses that could impact one's property value, e.g. "jails, landfills, airports, waste incinerators, sewage treatment plants, power plants . . . [as well as] excavation, blasting, and mining in areas previously protected from such intrusions."²³⁹

I. The Legislative Response

Despite the logic and assurances, the Florida Legislature, anticipating a flood of litigation, immediately passed a bill amending the Harris Act which was promptly signed into law by the governor.²⁴⁰ The relevant amendments changed the definition of "property owner" in section 70.001(3)(f) so as to limit the protection of the act to those who "hold[] legal title to the real property that is the subject of and directly impacted by the action of a governmental entity." The amendment also changed the definition of "real property" in subsection

²³⁴ *Id.* at 1264.

²³⁵ *Id.* at 1265.

²³⁶ *Id.*

²³⁷ *Id.* at 1266.

²³⁸ *Id.* (citing with approval Judge Makar's dissenting opinion at 908 n.26.).

²³⁹ *Id.* (citing with approval Judge Swanson's dissent at 896).

²⁴⁰ Laws 2015, c. 2015-142, § 1, eff. Oct. 1, 2015.

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(g) to clarify that it only includes, “parcels that are the subject of and directly impacted by the action of a governmental entity.”²⁴¹

J. Concluding Remarks

The Smith case is currently in front of the Florida Supreme Court and so it is hard to say whether the court will be sympathetic to the plight of the Smiths or the reasoning of the majority in the Smith case. Given the legislative change, there no longer any grounds to fear a flood of litigation. Of course, for cases brought before the amendment like Smith and *FINR*, the Court could limit its decision to the facts of Smith, given that Smith is the adjoining neighbor and at least in this context, clearly the most adversely impacted property in the neighborhood.

Critics of the Oregon and Florida legislation argue that the laws eviscerate regulatory authority,²⁴² undermine local democracy,²⁴³ benefits special interests, e.g. the timber industry in Oregon and huge landowners like the U.S. Sugar corporation, the St. Joe Paper company, and other large developers in Florida,²⁴⁴ works to the detriment of average homeowners²⁴⁵ and lower income and minority communities.²⁴⁶ As the authors of *Land Use Planning and Development Regulation Law*,²⁴⁷ point out, “[a]n arguable deficiency with these efforts to treat property owners more fairly is the notable omission of any effort to recapture for the public the windfall gains conferred on landowners by virtue of public improvements and government regulation.”²⁴⁸

While there were a few articles written in support of this legislation shortly after it was passed, there has been no defense since which evaluates the laws impacts, or which puts them in a positive light.²⁴⁹ While Krier and Sterk argue that this law and other similar legislative reforms (outside of Oregon) have had little impact, their empirical analysis is based strictly on decided cases and says little about

²⁴¹ *Id.*

²⁴² Echeverria & Hansen-Young, *supra* note 183, at 499. See, e.g., *Florida's Private Property Rights Protection Act: Does It Inordinately Burden the Public Interest?*, 48 U. FLA. L. REV. 695 (1996) and Sylvia R. Lazos, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 FLA. ST. UNIV. L. REV. 315 (1995).

²⁴³ Echeverria & Hansen-Young, *supra* note 179, at 513.

²⁴⁴ *Id.* at 504-05.

²⁴⁵ *Id.* at 505.

²⁴⁶ See *id.*; see also Jacobs, *supra* note 184, at 1550-54.

²⁴⁷ Julian Conrad Juergensmeyer & Thomas E. Roberts, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 10:11 (3d ed. 2016).

²⁴⁸ *Id.*

²⁴⁹ For a complimentary article, see Powell, Rhodes, & Stengle, *A Measured Step to Protect Private Property Rights*, 23 FLA. ST. U. L. REV. 255, 296 (1995) (authors were drafters of the bill).

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the chilling effect of such legislation on municipal land use and regulation generally.²⁵⁰ There may be less case law, and less cases won by property owners and developers, because there is less regulation and the regulations passed may be more cautious, if not more reasonable. Finally, there may be less case law because municipalities are settling or giving into the demands of developers and property owners.

IV. CONCLUSION

As detailed above, the United States and South Africa stand in sharp contrast to each other in how they balance the power of the state to regulate for the common good and individual property rights. States like Florida are pushing the envelope to the extreme of protecting individual property owners to the potential detriment of the people as a whole, while recent legislation in South Africa has the potential of over-correcting for the wrongs of the past through uncompensated takings under the guise of state guardianship. While it is too early to know how this recent legislation in South Africa will play out, the deleterious effects of the legislation in Florida and in Oregon is relatively well established. There is a need in both countries for a balanced approach, and each has arguably gone too far in opposite directions.

²⁵⁰ In fairness, Krier and Sterk noted that municipalities may be litigation averse and thus prone to making concessions to litigious developers. Krier and Sterk, *supra* note 14, at n.65. They cite with approval Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1680 (2006) (noting that the risk aversion of local governments with respect to taking claims may reduce the incidence of regulation). They do not, however, acknowledge that legislation like the Florida Harris Act may result in less case law, merely by virtue of the chilling effect of such laws on local regulations.

NOTE

THE UNFAIR CHOICE: A CALL FOR REASONABLE ACCOMMODATIONS FOR PREGNANT WORKERS

*Maleaha A. Brown**

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INTRODUCTION

In July 2006, after two unsuccessful rounds of *in vitro* fertilization, Peggy Young requested a Family and Medical Leave Act (FMLA) leave of absence from her part-time job at United Parcel Service (UPS) to try for a third time.¹ After a successful third round of *in vitro* fertilization, Ms. Young became pregnant.² In October 2006,

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¹ Young v. UPS, 784 F.3d 192, 195 (4th Cir. 2013), *vacated*, 135 S. Ct. 1338 (2015).

² *Id.*

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Ms. Young asked the occupational health manager at UPS for an accommodation that would allow her to lift no more than twenty pounds for the first twenty weeks of her pregnancy and no more than ten pounds thereafter, pursuant to the recommendations of Ms. Young's doctor and midwife.³

Despite her job's illusory seventy-pound lifting requirement, Ms. Young's job rarely needed her to lift over twenty-pounds.⁴ But, the collective bargaining agreement between UPS and UPS employees stated that a pregnant employee may continue working as long as she can perform the essential functions of her job. So, Ms. Young offered to work a light duty assignment in order to continue receiving pay and medical benefits.⁵

However, the collective bargaining agreement also noted that a pregnant employee is ineligible for light duty work for any limitations arising solely from her pregnancy.⁶ Consequently, Ms. Young offered to remain in her current air driver position, notwithstanding the lifting requirement, and her UPS coworkers agreed to assist her in lifting packages heavier than her doctor's recommended weight limit.⁷

UPS determined that Ms. Young was "unable to perform the essential functions of her job and ineligible for light duty assignment."⁸ Therefore, UPS prohibited Ms. Young from returning to her part-time job unless she could provide a medical certification that removed her lifting restriction and stated that she could perform the essential functions of her job.⁹ Additionally, the Capital Division Manager of Ms. Young's facility told Ms. Young that she was "too much of a liability" while pregnant and that she "could not come back . . . until [she] was no longer pregnant."¹⁰

By November 2006, Ms. Young's FMLA leave expired, forcing her to take an extended leave of absence without pay.¹¹ Eventually, Ms. Young lost the medical coverage of her health insurance during the last six and a half months of her pregnancy.¹² Ms. Young's previously "very happy pregnancy" quickly became "one of the most stressful times of

³ *Id.* at 195-96.

⁴ *Id.*

⁵ NAT'L WOMEN'S LAW CTR. & A BETTER BALANCE, IT SHOULDN'T BE A HEAVY LIFT 15 (2013), http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf.

⁶ *Young*, 784 F.3d at 195.

⁷ *Id.* at 196.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Young*, 784 F.3d at 197.

¹¹ *Id.*

¹² IT SHOULDN'T BE A HEAVY LIFT, *supra* note 5, at 15.

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[her] life” due to the loss of her income and health benefits.¹³ Sadly, this is not an isolated incident. Rather, it is the reality of many women in workplaces throughout the country.¹⁴

In *Young v. UPS*, the Supreme Court held that an employer must accommodate pregnant workers if the employer accommodates a large percentage of nonpregnant workers.¹⁵ While the Court’s holding was certainly a victory for women, it creates new challenges for employers and employees because the Court did not provide clarity as to when the Pregnancy Discrimination Act (PDA) requires accommodation.¹⁶ However, Congress can effectively correct the uncertainty by amending the PDA to explicitly grant pregnant employees the right to reasonable accommodations at work without the imposition of an undue hardship on the employer, similar to the Americans with Disabilities Act (ADA).¹⁷

This Note focuses on the Supreme Court’s ruling in *Young v. UPS*, and proposes that Congress can advance the rights of women in the workplace by passing the Pregnant Workers Fairness Act (PWFA). Part II examines the statistical data related to women in the U.S. workforce and reveals the problem that pregnancy discrimination disproportionately impacts minority women and families. Next, Part III dissects the statutory limitations of applicable federal legislation and the Supreme Court’s holding in *Young v. UPS*. Then, Part IV assesses how states and other countries have attempted to solve the issue of workplace pregnancy discrimination. Lastly, Part V provides an executive summary of the PWFA, discusses the advantages of the proposed bill to employers and employees, and recommends that Congress pass the PWFA to further women’s rights in the United States.

¹³ *Id.* (documenting Ms. Young’s experience during her pregnancy).

¹⁴ See Dina Bakst, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES (Jan. 30, 2012), <http://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html> (noting that pregnancy discrimination occurs everyday in the United States, such as when pregnant workers are fired for needing extra bathroom breaks).

¹⁵ *Young v. UPS*, 135 S. Ct. 1338, 1354 (2015) (stating that an employer’s policy could significantly burden pregnant workers when the policy accommodates most nonpregnant employees while categorically failing to accommodate pregnant employees with the same limitations).

¹⁶ A BETTER BALANCE, PREGNANT AND JOBLESS 5 (2015), <http://www.abetterbalance.org/web/images/stories/Documents/fairness/reports/PregnantandJobless.pdf>.

¹⁷ See generally ADA, 42 U.S.C. § 12112 (2012).

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II. THE TREND OF FORCING WOMEN OUT OF THE WORKFORCE IN THE U.S.

In the past, women in the United States have participated in the labor force much less than men.¹⁸ From the 1960s through the 1980s, women's labor force participation rose rapidly, reaching its' peak in 1999 with a rate of sixty percent.¹⁹ To this day, women's participation in the labor force remains relatively high at a rate of approximately fifty-seven percent.²⁰

The influx of women in the labor force in the 1960s fundamentally changed the composition of the overall workforce by introducing pregnant women and mothers to the labor force.²¹ By the late 1980s, sixty-four percent of women pregnant with their first child remained on the job one month or less before giving birth.²² Conversely, in 2006-2008, eighty-one percent of first-time mothers who worked while pregnant remained on the job into their last month of pregnancy.²³ Also, women are returning to work much sooner after their first birth than in previous decades, with seventy-three percent of women returning six months after their child's birth between 2005 and 2007 compared to twenty-one percent in the 1960s.²⁴

The percentage of working pregnant women and mothers has increased because women, whether married or single, are the primary breadwinners in forty percent of families in the United States.²⁵ Since women's incomes are critically important to today's families, new moms are less likely to quit jobs and more likely to use some form of leave than they were in the early 1980s.²⁶ Until the leave is required,

¹⁸ U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE I (2014), <http://www.bls.gov/opub/reports/cps/women-in-the-labor-force-a-databook-2014.pdf> (stating that both women's and men's labor force participation has decreased).

¹⁹ *Id.*

²⁰ *Id.* (documenting women's labor force participation at 57.7 percent in 2012 and 57.2 percent in 2013).

²¹ Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. J. 567, 573 (2009) (stating that women began to work more and longer while pregnant and returned sooner after childbirth).

²² U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS 3, (Table 3) (2014), <http://www.census.gov/prod/2014pubs/p70-128.pdf>.

²³ *Id.*

²⁴ George Gao & Gretchen Livingston, *Working While Pregnant is Much More Common Than it Used to be*, PEW RESEARCH CENTER (Mar. 31, 2015), <http://www.pewresearch.org/fact-tank/2015/03/31/working-while-pregnant-is-much-more-common-than-it-used-to-be/>.

²⁵ Wendy Wang, Kim Parker & Paul Taylor, *Breadwinner Moms*, PEW RESEARCH CENTER (May 29, 2013), <http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/> (according to the analysis of data from the U.S. Census Bureau).

²⁶ MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS, *supra* note 22, at 9 (Table 5) (proving that 35.7 percent of new mothers quit their jobs before or after the birth and 71 percent took paid or unpaid leave in the early 1980s while 21.9 percent quit their jobs and 93.2 took paid or unpaid leave between 2006 and 2008).

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however, many women are able to work without any changes in their jobs.²⁷

A. *The Unfair Choice*

While women have experienced considerable growth in the labor force, women continue to face structural inequities in the workplace.²⁸ Although women make up nearly half of the entire workforce,²⁹ women constitute two-thirds of the over twenty-three million workers in low-wage jobs.³⁰ Specifically, women make up forty-eight percent of the retail industry; seventy-four percent of the education and health services industry; fifty-one percent of the leisure and hospitality industry; and fifty-two percent of other industries such as personal and laundry services.³¹

Further, the disproportionality of the statistics weighs heavily on women of color. Black and Hispanic women are more likely than White women to work in lower paying service occupations.³² This poses serious concerns because low-wage workers in the service, wholesale, and retail industries file the majority of the pregnancy discrimination claims with the U.S. Equal Employment Opportunity Commission (EEOC).³³

Additionally, pregnant workers in physically demanding and inflexible jobs are particularly likely to need accommodations at some point during their pregnancies to continue working safely.³⁴ These physically demanding and inflexible jobs are often the low-wage jobs

²⁷ IT SHOULDN'T BE A HEAVY LIFT, *supra* note 5, at 5.

²⁸ See Rosa L. DeLauro, *Successes and Further Goals for Women in the Workplace*, HUMAN RIGHTS MAGAZINE, Summer 2010, http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2010/summer2010/successes_and_further_goals_for_women_in_the_workforce.html.

²⁹ U.S. BUREAU OF LABOR STATISTICS, ANNUAL TABLE: EMPLOYMENT BY DETAILED OCCUPATION AND SEX (2014), <http://www.bls.gov/cps/aa2014/cpsaat12.htm>.

³⁰ ANNE MORRISON & KATHERINE GALLAGHER ROBBINS, NAT'L WOMEN'S LAW CTR., WOMEN'S OVERREPRESENTATION IN LOW-WAGE JOBS 1 (2015), <http://www.nwlc.org/resource/chartbook-womens-overrepresentation-low-wage-jobs> (defining "low-wage jobs" as those that typically pay \$10.50 per hour or less).

³¹ U.S. BUREAU OF LABOR STATISTICS, ANNUAL TABLE: EMPLOYMENT BY DETAILED INDUSTRY AND SEX (2014), <http://www.bls.gov/cps/aa2014/cpsaat18.pdf>.

³² See WOMEN IN THE LABOR FORCE, *supra* note 18, at 46 (showing that 33 percent of Hispanic women and 28 percent of Black women work in the service industry compared to 20 percent of White women).

³³ Brigid Schulte, *New Statistics: Pregnancy Discrimination Hit Low-Wage Workers Hardest*, WASH. POST (Aug. 5, 2014), <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/08/05/new-statistics-pregnancy-discrimination-claims-hit-low-wage-workers-hardest/>. See also Bryce Covert, *Low-Wage Industries are Some of the Biggest Offenders in Pregnancy Discrimination*, THINKPROGRESS (Aug. 6, 2014), <http://thinkprogress.org/economy/2014/08/06/3468186/eoc-pregnancy-discrimination-data/> (noting that the retail, food services, and administrative support industries made up 509 of the 1,559 pregnancy discrimination complaints in 2013).

³⁴ IT SHOULDN'T BE A HEAVY LIFT, *supra* note 5, at 5.

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that are predominantly comprised of women.³⁵ For example, a pregnant woman working as a housekeeper, which entails physically demanding work and long periods of standing, may require accommodations like assistance with heavy lifting and the ability to sit more often during long shifts.³⁶ Furthermore, a pregnant woman working as a retail salesperson may need accommodations, such as altering start and end times or providing more frequent breaks because the inflexible work schedule prevents her from making those decisions on her own.³⁷

Yet, the low-wage jobs women typically hold are generally unwilling to make even the slightest accommodations.³⁸ The denial of workplace accommodations forces many pregnant workers to use their limited FMLA leave time, even though they wish to continue working and could do so with temporary adjustments to their jobs.³⁹ When pregnant workers are forced onto FMLA leave prematurely, the benefits of FMLA leave, like providing for recovery from childbirth and bonding with a new child, are no longer available once the twelve weeks of job-protected unpaid leave has expired.⁴⁰ If the female worker is unable to return to work after her FMLA leave has expired, she will often be fired at a time when her income and health benefits are needed the most.⁴¹ The workplace inflexibility that characterizes low-wage jobs presents pregnant women with an intolerable choice between healthy pregnancies and their families' financial stability.

Moreover, the disproportionate statistics have negative implications on the families of working women. Out of more than ten million low-income working families with children, single working-mothers headed about 4.1 million, or thirty-nine percent, of the families.⁴² Additionally, this statistic is compounded for women of color, who are far more likely to be single heads of households than

³⁵ *Id.*

³⁶ *Id.* (noting that accommodations are particularly important in physically demanding jobs because physically demanding work carries a statistically-significant increased risk of preterm delivery and low birth weight).

³⁷ *See id.* at 7 (stating that 40 percent of low wage workers report that their employers do not permit them to decide when to take their breaks; between two-thirds and three-quarters of low wage workers report that they are unable to choose their start and quit times; and roughly half report having very little or no control over the scheduling of hours more generally).

³⁸ *Id.* ("This general lack of flexibility motivates and reinforces some employers' refusal to make accommodations for pregnant workers in these types of jobs.").

³⁹ *Id.* at 9.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² DEBORAH POVICH, BRANDON ROBERTS & MARK MATHER, WORKING POOR FAMILIES PROJECT, LOW-INCOME WORKING MOTHERS AND STATE POLICY 1 (2014), http://www.workingpoorfamilies.org/wp-content/uploads/2014/02/WFPF_Low-Income-Working-Mothers-Report_021214.pdf.

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White women.⁴³ Since women of color are more likely to experience the dual responsibilities of solely providing for a family and working a full-time job, women of color often enter the labor force with significant barriers to success.

Furthermore, the disproportionate barriers to women of color in the labor force are heightened by the wage gap.⁴⁴ In 2014, White women earned seventy-eight percent of what White men earned while Black and Hispanic women faced a larger pay gap, earning sixty-three percent and fifty-four percent, respectively, of White men's earnings.⁴⁵ The multitude of systemic barriers in the lives of women of color lend themselves to the forty-six percent poverty rate for Black and Hispanic single-mother families, compared to a poverty rate of less than eight percent for married-couples with children.⁴⁶

III. SHORTCOMINGS IN THE FEDERAL GOVERNMENT'S HANDLING OF PREGNANCY DISCRIMINATION

Historically, employers have denied women workplace accommodations for pregnancy-related conditions.⁴⁷ This is due, in part, to the prevalence of outdated perceptions of pregnancy and women in the workplace.⁴⁸ Additionally, there is not a federal statute that has consistently provided pregnant women with adequate relief from discrimination in the workplace.⁴⁹

A. *Statutory Limitations of Federal Legislation*

Indeed, there has been federal legislation to combat workplace gender discrimination; however, the protections of the statutes are

⁴³ See U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2014: FAMILY GROUPS, Table FG10 (2014), <http://www.census.gov/hhes/families/data/cps2014FG.html> (showing that more than one-fourth – 27.8 percent – of African American families and 17.8 percent of Hispanic households were led by a single mother compared with 7.5 percent of white households in 2014).

⁴⁴ Milia Fisher, *Women of Color and the Gender Wage Gap*, CENTER FOR AMERICAN PROGRESS (Apr. 14, 2015), <https://www.americanprogress.org/issues/women/report/2015/04/14/110962/women-of-color-and-the-gender-wage-gap/>.

⁴⁵ AM. ASSOC. OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 11, Figure 4 (2015), <http://www.aauw.org/files/2015/09/The-Simple-Truth-Fall-2015.pdf>.

⁴⁶ JOAN ENTMACHER, KATHERINE GALLAGHER ROBBINS, JULIE VOGTMAN & ANNE MORRISON, NAT'L WOMEN'S LAW CTR., INSECURE AND UNEQUAL 4 (2012), http://www.nwlc.org/sites/default/files/pdfs/final_2014_nwlc_poverty_report.pdf (analyzing the Census Bureau's 2014 findings of national and state poverty and income data for 2013).

⁴⁷ Joan C. Williams, Robin Devaux, Danielle Fuschetti & Carolyn Salmon, *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97, 101 (2013).

⁴⁸ *Id.*

⁴⁹ *Id.* at 102.

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limited in their application.⁵⁰ Namely, the ADA, PDA, and FMLA have shortcomings, either as drafted, as applied, or both, that prevent pregnant workers from receiving workplace accommodations.⁵¹

The ADA, as amended by the ADA Amendments Act (Amendments Act), prohibits covered employers from discriminating against qualified individuals with disabilities in employment.⁵² It also obligates employers to accommodate employees and applicants who have a “disability” and can perform the essential functions of the job, with or without reasonable accommodation.⁵³ If the reasonable accommodation would not impose an “undue hardship” on the operation of the employer’s business, then that employer is required to make the reasonable accommodation.⁵⁴

While the Amendments Act broadened the coverage of the ADA, the Amendments Act introduced procedural hurdles for pregnant women attempting to establish coverage under the statute.⁵⁵ The Amendments Act reduced the amount of scrutiny involved in determining whether an employee had a qualifying “disability” by expanding the definition of “disability” to include temporary disabilities posing modest limitations on activities such as standing, lifting, and bending.⁵⁶ However, pregnancy is not a per se disability.⁵⁷ Thus, unless a pregnancy-related issue rises to the level of “disability” under the Amendments Act,⁵⁸ employers are not required to accommodate workers for pregnancy-related impairments.⁵⁹

Similar to the ADA, the PDA prohibits covered employers from discriminating against employees and applicants based on “pregnancy, childbirth, or related medical conditions” with respect to all aspects of employment.⁶⁰ Additionally, the PDA requires employers to make accommodations for pregnant women to the extent that they accommodate other employees “similar in their ability or inability to

⁵⁰ Bonnie Rochman, *Should Pregnant Women be Accommodated in the Workplace?*, TIME (May 11, 2012), <http://healthland.time.com/2012/05/11/how-much-should-pregnant-women-be-accommodated-in-the-workplace/>.

⁵¹ NOREEN FARRELL, JAMIE DOLKAS & MIA MUNRO, EQUAL RIGHTS ADVOCATES, EXPECTING A BABY, NOT A LAY-OFF 7 (2012), http://www.ncdsv.org/images/ERA_ExpectingABabyNotALay-off_2012.pdf.

⁵² 42 U.S.C. § 12112 (2009).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ EXPECTING A BABY, NOT A LAY-OFF, *supra* note 51, at 10.

⁵⁶ ADAAA of 2008 § 4, 122 Stat. 3555-56 (2008) (clarifying that the definition of “disability” will be construed in favor of broad coverage).

⁵⁷ EXPECTING A BABY, NOT A LAY-OFF, *supra* note 51, at 10.

⁵⁸ IT SHOULDN’T BE A HEAVY LIFT, *supra* note 5, at 14 (noting that individuals with pregnancy-related impairments like hypertension, severe nausea, or gestational diabetes are protected due to the Amendments Act).

⁵⁹ EXPECTING A BABY, NOT A LAY-OFF, *supra* note 51, at 10.

⁶⁰ 42 U.S.C. § 2000e(k) (2011).

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work,” or comparators.⁶¹ If the pregnant worker is unable to identify an appropriate comparator showing discriminatory treatment based on pregnancy, then the pregnant worker cannot rely on the PDA to challenge an employer’s accommodation refusal.⁶²

Although the PDA was modeled after the ADA, accommodations that are readily provided to a worker covered by the ADA are commonly denied to pregnant workers under the PDA.⁶³ This is due to the obstacles created by the “similar in their ability or inability to work” language in the PDA, which prompted some circuits to require plaintiffs to produce comparator evidence.⁶⁴ Comparator evidence provides courts with proof that similarly situated employees who are not pregnant were treated more advantageously than pregnant workers.⁶⁵ Yet, courts commonly conclude from an assessment of the comparator evidence that the proffered comparators are insufficiently similar to the plaintiff.⁶⁶ Therefore, pregnant women often lose suits under the PDA because no such comparator exists when comparing pregnancy to disability or sickness.⁶⁷

Lastly, the FMLA allows covered employees to take up to twelve weeks of unpaid, job-protected leave for pregnancy, a “serious health condition,” or to care for a newborn child or close family member.⁶⁸ If the worker is able to fully conform to the employer’s work expectations at the conclusion of the FMLA leave, then the employer must reinstate the worker in the same or similar job.⁶⁹ Since FMLA leave is unpaid, the primary benefit is job security.

The FMLA also falls short of solving problems faced by pregnant workers because the federal statute empowers employers to exclude employees who experience pregnancy-related job difficulties from the workplace.⁷⁰ For example, an employer can require a pregnant worker to take FMLA leave whenever she is unable to conform to all of the employer’s work expectations, even when it is the employer’s inflexible work rules, rather than the pregnancy itself, that prevents her continued employment.⁷¹ Often, women will use all or most of their

⁶¹ EXPECTING A BABY, NOT A LAY-OFF, *supra* note 51, at 8.

⁶² *Id.*

⁶³ EXPECTING A BABY, NOT A LAY-OFF, *supra* note 51, at 8.

⁶⁴ *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, *supra* note 47, at 106.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Rochman, *supra* note 53.

⁶⁸ 29 U.S.C. § 2612(a) (2011).

⁶⁹ 29 U.S.C. § 2614(a)(1) (2011).

⁷⁰ Jeannette Cox, *Pregnancy as “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 456 (2012).

⁷¹ *Id.* at 457.

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twelve weeks of FMLA leave before their babies are even born, leaving mothers without job-protected time off from work for childbirth and care of their newborns.⁷² Although FMLA leave is helpful for workers who can reserve the majority of the twelve-week period for childbirth, recovery, and care of their newborn child, it exacerbates the shortcomings of the ADA and PDA in providing reasonable accommodations for pregnant women who are unable to conform to their employer's inflexible work rules.⁷³

B. The Supreme Court's Solution

In *Young v. UPS*, there was a policy in the collective bargaining agreement between UPS and UPS employees that did not offer light duty work to a female employee for any limitations arising solely because of her pregnancy.⁷⁴ However, alternative assignment or light duty was offered to employees who 1) had a permanent impairment cognizable under the ADA; 2) suffered on-the-job injuries; or 3) lost their Department of Transportation (DOT) certification due to issues such as a failed medical exam, a lost driver's license, or involvement in a motor vehicle accident.⁷⁵ Since UPS determined that Ms. Young was "unable to perform the essential functions of her job and was ineligible for light duty assignment,"⁷⁶ UPS rejected Ms. Young's accommodation request which caused Ms. Young's FMLA leave to expire while she was pregnant.⁷⁷

The Fourth Circuit upheld UPS's policy as nondiscriminatory because the court did not find the policy to be facially discriminatory.⁷⁸ The Fourth Circuit reasoned that the policy was "pregnancy-blind," which means that the policy provided alternative assignments based on criteria unrelated to pregnancy.⁷⁹ The Fourth Circuit also held that, at the time these facts arose, Ms. Young was not regarded as having an ADA disability because of her reasonably manageable weight restriction and the short duration of her restrictions.⁸⁰ Since Ms.

⁷² IT SHOULDN'T BE A HEAVY LIFT, *supra* note 6, at 17.

⁷³ Cox, *supra* note 73, at 456-57.

⁷⁴ *Young*, 784 F.3d at 195.

⁷⁵ *Id.*

⁷⁶ *Id.* at 196.

⁷⁷ *Id.* at 196-97.

⁷⁸ *Id.* at 201 ("Such a policy is at least facially a 'neutral and legitimate business practice,' and not evidence of the UPS's discriminatory animus toward pregnant workers.").

⁷⁹ *Id.* ("By limiting accommodations to those employees injured on the job, disabled as defined under the ADA, and stripped of their DOT certification, UPS has crafted a pregnancy-blind policy . . .").

⁸⁰ *Id.* at 200 ("Given the relatively manageable weight restriction—twenty pounds—and the short duration of the restriction, there is no evidence that Young's pregnancy or her attendant lifting limitation constituted a disability within the meaning of the ADA.").

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Young's employer did not subjectively believe that her restrictions substantially limited a major life activity, Ms. Young was ineligible for a light duty assignment.⁸¹

Finally, the Fourth Circuit held that Ms. Young failed to establish a *prima facie* case of pregnancy discrimination under the *McDonnell Douglas* framework because Ms. Young did not identify any employees that were similarly situated in their ability or inability to work yet who were provided light duty or alternative assignments.⁸² Namely, Ms. Young was not similar to an employee with a disability under the ADA because her lifting limitation was temporary and she did not have a significant restriction on her ability to perform any major life activity.⁸³ Further, Ms. Young was not similar to an employee who was injured on-the-job because UPS did not have a heightened obligation to accommodate her as it would those injured on-the-job.⁸⁴ Moreover, Ms. Young was not similar to employees who lost a DOT certification because she was not legally prevented from operating a vehicle and employees who lost their DOT certification were able to perform demanding physical tasks that Ms. Young could not.⁸⁵

On grant of certiorari, the Supreme Court focused on the second clause of the PDA, which requires employers to treat "women affected by pregnancy, childbirth, or related medical conditions" the same as "other persons not so affected but similar in their ability or inability to work."⁸⁶ The Court found the words "other persons" to be ambiguous because they did not indicate the employees that a pregnant worker with a limitation should be compared.⁸⁷ While the Court did not directly answer the questions stemming from the second clause of the PDA, the Court provided a framework for pregnant employees to challenge workplace accommodation policies and practices under Title VII of the Civil Rights Act, as amended by the PDA.⁸⁸ The framework models the

⁸¹ *Id.* ("Because Young points to no more than the objective fact of her pregnancy, and offers no evidence tending to show that Martin subjectively believed Young to be disabled, Young cannot adduce evidence to raise a factual issue on her 'regarded as' claim.").

⁸² *See id.* at 206 ("Accordingly, we conclude that Young cannot establish that similarly situated employees received more favorable treatment than she did, and therefore cannot establish the fourth element of the *prima facie* case for pregnancy discrimination.") (emphasis added).

⁸³ *Id.* at 205.

⁸⁴ *Id.* at 206.

⁸⁵ *Id.* at 205-06.

⁸⁶ *Young*, 135 S. Ct. at 1348.

⁸⁷ *Id.* at 1348-49 ("Does this clause mean that courts must compare workers only in respect to the work limitations that they suffer? Does it mean that courts must ignore all other similarities or differences between pregnant and nonpregnant workers? Or does it mean that courts, when deciding who the relevant 'other persons' are, may consider other similarities and differences as well? If so, which ones?").

⁸⁸ Joseph P. Harkins, Alexis C. Knapp, Steven E. Kaplan & Eunju Park, *The Heavy Burden of Light Duty: Young v. UPS*, LITTLER (Mar. 31, 2015), <https://www.littler.com/heavy-burden-light-duty-young-v-ups>.

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familiar *McDonnell Douglas* burden-shifting analysis for disparate treatment cases,⁸⁹ which, in the Court's view, interpreted the second clause of the PDA in a way that is consistent with longstanding interpretations of Title VII.⁹⁰

Under the Court's approach to the *McDonnell Douglas* analysis, the plaintiff can establish a *prima facie* PDA claim by showing: 1) she is a member of a protected class; 2) she sought accommodation; 3) the employer did not accommodate her; and 4) the employer accommodated other employees who were "similar in their ability or inability to work."⁹¹ An employer may then articulate a legitimate, nondiscriminatory reason to justify the differential treatment.⁹² However, the Court noted that the employer's reason "cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those" whom the employer accommodates.⁹³

Lastly, a plaintiff may show that the employer's articulated reason is pretextual.⁹⁴ A plaintiff may reach a jury on this issue by providing sufficient evidence that an employer's policies impose a "significant burden" on pregnant workers.⁹⁵ Additionally, the plaintiff must provide evidence that an employer's "legitimate, nondiscriminatory reasons" are not "sufficiently strong to justify the burden" but rather "give rise to an inference of intentional discrimination."⁹⁶ The Court also stated that an employer's policy could significantly burden pregnant workers when most nonpregnant employees are accommodated while the policy categorically fails to accommodate pregnant employees with the same limitations.⁹⁷

The Supreme Court's decision has broad implications, both positive and negative. One of the positive implications is that many cases will be decided by a jury rather than dismissed on summary judgment, as would routinely have been the case if the Fourth Circuit's

⁸⁹ *Young*, 135 S. Ct. at 1353-54 ("That framework requires a plaintiff to make out a *prima facie* case of discrimination. But it is 'not intended to be an inflexible rule.' Rather, an individual plaintiff may establish a *prima facie* case by 'showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under' Title VII.").

⁹⁰ *Id.* at 1353 ("Our interpretation minimizes the problems we have discussed, responds directly to *Gilbert*, and is consistent with longstanding interpretations of Title VII.").

⁹¹ *Id.* at 1354.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Young*, 135 S. Ct. at 1354.

⁹⁶ *Id.* at 1354-55.

⁹⁷ *Id.* at 1354.

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decision regarding the determination of comparators had been upheld.⁹⁸ On the other hand, the imprecision of the Court-imposed standard creates uncertainty and confusion for employers, employees, and lower courts. This uncertainty makes it difficult for pregnant workers to prove discrimination in a timely manner.⁹⁹ Under the Court's new standard, before a pregnant woman can access any accommodation, she must gather enough evidence of how the majority of her coworkers have been treated, in order to show that her employer acted with intent to discriminate.¹⁰⁰

IV. DOMESTIC AND INTERNATIONAL STEPS TAKEN TO ERADICATE PREGNANCY DISCRIMINATION

The limitations on the application of the ADA, PDA, and FMLA were illustrated in *Young v. UPS*, where the Supreme Court questioned the circumstances in which the PDA requires an employer to provide work accommodations to pregnant employees.¹⁰¹ While the Court addressed the circuit split that caused confusion in federal pregnancy discrimination law,¹⁰² state legislatures passed laws that exceeded federal pregnancy discrimination protections in order to fill the gaps left by federal law.¹⁰³ Additionally, foreign countries provide further guidance concerning pregnancy accommodations in the workplace.

⁹⁸ Judy Greenwald, *Supreme Court's UPS Ruling Widens Scope of Accommodating Pregnant Workers*, BUSINESS INSURANCE (Mar. 29, 2015, 12:01 AM), <http://www.businessinsurance.com/article/20150329/NEWS06/150329845/supreme-courts-ups-ruling-widens-scope-of-accommodating-pregnant?tags=%7C70%7C302>.

⁹⁹ PREGNANT AND JOBLESS, *supra* note 16, at 3.

¹⁰⁰ *Id.* at 5.

¹⁰¹ Brief for the United States as Amicus Curiae Supporting Petitioner at 4-5, *Young v. UPS*, 135 U.S. 1338 (2015) (no. 12-1226), 2014 WL 4441528 ("The question presented is whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide [comparable] work accommodations to pregnant employees who are 'similar in their ability or inability to work.'").

¹⁰² See *Young v. UPS*, 135 U.S. 1338, 1348 (2015) ("In light of lower-court uncertainty about the interpretation of the Act, we granted the petition."); see also *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1227 (6th Cir. 1996) (holding that a prima facie case was established based on evidence that similarly situated limited-duty and light-duty employees received more favorable treatment); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998) (holding that a company does not violate the PDA by adopting a policy of only providing light-duty work to employees that suffer work-related injuries and refusing to make such an accommodation for pregnant workers); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 643 (6th Cir. 2006) (upholding summary judgment to an employer who refused to provide light duty work to a pregnant worker pursuant to its "pregnancy blind" policy); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011) (ruling that the employer's policy complied with the PDA because it denied light-duty accommodation for nonwork-related injuries for both nonpregnant and pregnant employees).

¹⁰³ Joe Boone, *States Require Reasonable Accommodation of Pregnant Workers*, LINKEDIN PULSE (Nov. 4, 2015), <https://www.linkedin.com/pulse/states-require-reasonable-accommodation-pregnant-mba-sphr-cpc>.

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A. *International Women's Rights*

Without a federal mandate of workplace accommodations for pregnant workers, the United States is lagging in international human rights standards for women.¹⁰⁴ Seemingly, there is a myth that women already enjoy these rights and protections under U.S. law.¹⁰⁵ However, the United States' resistance to ratification of the United Nation's Convention to End All Discrimination Against Women (CEDAW) reflects the federal government's lack of progress regarding women's rights in general.¹⁰⁶

CEDAW is an international human rights treaty that articulates the meaning of sex-based discrimination.¹⁰⁷ It lays out State obligations to eliminate discrimination and achieve substantive equality.¹⁰⁸ Specifically, CEDAW provides, in part, that countries "shall take all appropriate measures to eliminate discrimination against women in the field of employment."¹⁰⁹ Additionally, CEDAW asserts that women have the "right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction."¹¹⁰ Accordingly, reasonable accommodations for pregnant workers fall under CEDAW's umbrella of rights because such accommodations would ensure that women are able to safeguard their reproductive rights, while also protecting their right to be in the workforce.¹¹¹

While 187 countries have ratified CEDAW, the United States is among a minority of United Nations member countries that have not yet

¹⁰⁴ Eleonora Zielinska, Frances Raday, & Alda Facio, *UN Working Group on the Issue of Discrimination Against Women in Law and in Practice Finalizes Country Mission to the United States*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Dec. 11, 2015), <https://www.rt.com/usa/325742-women-us-human-rights/> (noting that the U.S. is allowing its women to lag behind international human rights standards for workplace accommodation for pregnant women, post-natal mothers, and persons with care responsibilities).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (stating that the U.S. needs to ratify the CEDAW in order to confirm the country's commitment to substantive equality in all spheres of life).

¹⁰⁷ Convention on the Elimination of All Forms of Discrimination against Women art. 1, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) ("[a]ny distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.") [hereinafter CEDAW].

¹⁰⁸ *Id.* at art. 2-3.

¹⁰⁹ *Id.* at art. 11 § 1.

¹¹⁰ *Id.* at art. 11 § 1(f).

¹¹¹ Olivia Licata, *Reasonable Pregnancy Accommodations as a Human Right* (2016) *Law School Student Scholarship*, Paper 759, http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1769&context=student_scholarship.

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ratified the treaty.¹¹² Moreover, the United States is the only Western and industrialized country that has not ratified CEDAW,¹¹³ the most comprehensive international agreement on the basic human rights of women. Although discrimination based on pregnancy is endemic everywhere,¹¹⁴ eighty-four countries have taken progressive measures to prevent such discrimination by providing an accommodation or alternative to work that involves risks to pregnant or nursing women.¹¹⁵ The overwhelming majority of the countries that provide some preventative measure against pregnancy discrimination have ratified CEDAW.¹¹⁶

For example, Iceland's employers must make arrangements to ensure a pregnant woman's safety if a special assessment determines that the safety and health of the pregnant worker is at risk.¹¹⁷ Arrangements can include a temporary change in her working conditions or working hours, a transfer to another post, or temporary paid leave.¹¹⁸ In Brazil, a pregnant worker must be transferred to a suitable alternative job if the performance of her job could pose a risk to her health.¹¹⁹ Further, the pregnant worker must be reinstated in her regular job as soon as medically practicable.¹²⁰ In Bulgaria, an employer must take necessary measures for temporary adjustments of the work conditions and working times for pregnant women.¹²¹ The provision also provides the right to monetary compensation for the difference in wage between the two jobs.¹²²

¹¹² Lisa Baldez, *U.S. Drops the Ball on Women's Rights*, CNN (Mar. 8, 2013, 11:34 PM), <http://www.cnn.com/2013/03/08/opinion/baldez-womens-equality-treaty/>.

¹¹³ *Id.* (including Tonga, Palau, Iran, Somalia, South Sudan, and Sudan).

¹¹⁴ INT'L LABOUR ORG., MATERNITY AND PATERNITY AT WORK x (2014), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_242615.pdf ("Discrimination based on pregnancy, maternity, and family responsibilities is endemic everywhere. Many formal and informal workplaces remain unsafe and unhealthy for all workers, especially pregnant and nursing women.").

¹¹⁵ *Id.* at xv ("Of the 160 countries with information, 84 provide some sort of alternative while 76 provide no alternative.").

¹¹⁶ UNITED NATIONS TREATY COLLECTION, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, <https://treaties.un.org/doc/Publication/MTDGS/Volume%201/Chapter%20IV/IV-8.en.pdf> (noting that Iceland ratified the CEDAW in 1985, Brazil in 1984, Bulgaria in 1982, Bosnia in 1993, Chile in 1989, Italy in 1985, and South Africa in 1995).

¹¹⁷ Act on Maternity/Paternity Leave and Parental Leave, Act No. 95/2000, as last amended by Act. No. 88/2015 (art. 11).

¹¹⁸ Act on Maternity/Paternity Leave and Parental Leave, Act No. 95/2000, as last amended by Act. No. 136/2011 (art. 11).

¹¹⁹ Consolidação das Leis do Trabalho [C.L.T.] [codification of Labour Legislation] art. 392 (4,1) (Braz.).

¹²⁰ *Id.*

¹²¹ Labour Code §309(1) and (3) (Bulg.).

¹²² *Id.*

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Conversely, a country that has not ratified CEDAW has also taken measures to prevent workplace pregnancy discrimination.¹²³ In Iran, a pregnant woman must be transferred to another place of work, without loss of income, if her job is dangerous to her health or pregnancy.¹²⁴ Similar provisions are found in United Nations member countries that have ratified CEDAW, including Bosnia,¹²⁵ Chile,¹²⁶ Italy,¹²⁷ and South Africa.¹²⁸

Considering the high labor force participation of women in the United States, an expert group representing the United Nations stated concerns that women's workforce involvement is not accompanied by equal economic opportunity.¹²⁹ Additionally, the expert group urged the U.S. to ratify CEDAW because "the complexity of federalism" should not be "a justification for failure to secure" women's human rights.¹³⁰

B. States' Solutions to Pregnancy Workplace Accommodations

In light of the shortcomings of federal legislation and the *Young v. UPS* holding, state legislatures offered solutions to the human rights issue of pregnancy discrimination. Many states and localities have enacted pregnancy accommodation laws to respond to the growing problem of pregnant workers being forced to choose between their health and their jobs and to address the limitations related to normal and completely healthy pregnancies.¹³¹ State pregnancy accommodation laws provide explicit guidance to employers and employees on the issue of reasonable work accommodations for pregnant workers.¹³² To fill the gap left by the PDA and ADA, state laws typically mirror longstanding ADA provisions that require some or all employers to provide certain types of accommodations to pregnant workers.¹³³

Currently, sixteen states and the District of Columbia have passed pregnancy accommodation legislation, often with bipartisan

¹²³ See generally INT'L LABOUR ORG., *supra* note 117, at 97.

¹²⁴ Rouznameh Rasmi [Labour Code] Tehran 1370 [1990], arts. 75, 77 (Iran).

¹²⁵ Labour Code of the Federation of Bosnia and Herzegovina §54.

¹²⁶ Código del Trabajo [Cod. Trab.] art. 202 (Chile).

¹²⁷ Decreto Legislativo 26 marzo 2001, n.96 G.U. 26 aprile 2001, n.151 §7 (It.).

¹²⁸ Basic Conditions of Employment Amendment Act 11 of 2002 § 26 (S. Afr.).

¹²⁹ UN Working Group on the Issue of Discrimination Against Women in Law and in Practice Finalizes Country Mission to the United States, *supra* note 107.

¹³⁰ *Id.*

¹³¹ *Id.* at 17.

¹³² See NAT'L P'SHIP FOR WOMEN AND FAMILIES, FACT SHEET ON REASONABLE ACCOMMODATIONS FOR PREGNANT WORKERS (2015), <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf>.

¹³³ Joe Boone, *supra* note 103.

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support and unanimity or near unanimity.¹³⁴ While state pregnancy accommodation laws vary in approach and coverage, the underlying element of each law is to reasonably accommodate pregnant employees without imposing an undue hardship on the employer.¹³⁵ Covered employers vary between states. Some state pregnancy accommodation laws apply to public-sector employers, while others apply to both private and public-sector employers.¹³⁶ The accommodations typically available vary between a transfer to a less strenuous position;¹³⁷ a “reasonable accommodation,” sometimes specifying a wide range of accommodations that must be considered;¹³⁸ or the same accommodation that is available to employees with injuries or disabilities.¹³⁹

With the most comprehensive laws protecting pregnant workers, California has led the way in providing workplace support to expecting

¹³⁴ NAT’L P’SHIP FOR WOMEN AND FAMILIES, FACT SHEET ON THE PREGNANT WORKERS FAIRNESS ACT 3 (2015), <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/fact-sheet-pwfa.pdf> (stating that many of the state laws have passed with bipartisan or unanimous support). See also ALASKA STAT. § 39.20.520 (2013); CAL. GOV’T CODE §§ 12945 (a)(3)(A)-(C) (West 2012); CONN. GEN. STAT. § 46a-60(A)(7) (2011); DEL. CODE ANN. tit. 19, § 711(a)(3) (2014) (unanimous support and bipartisan passage); Protecting Pregnant Workers Fairness Act of 2014, D.C. Act. 20-458 (2014) (unanimous support); HAW. CODE R. §§ 12-46-106-107 (LexisNexis 1990); 775 ILL. COMP. STAT. 5/2-102(J) (2014) (unanimous support and bipartisan passage); LA. REV. STAT. ANN. §§ 23:342 (1997); MD. CODE, STATE GOV’T § 20-609 (2013) (bipartisan passage in response to the lower court’s decision in *Young*); MINN. STAT. § 181.9414 (2014); Neb. Laws § 48-1107.02(2) (2015) (unanimous support); N.J. STAT. ANN. § 10:5-12(s) (West 2013) (nearly unanimous support and bipartisan passage); 2015-S8, to be codified at N.Y. EXEC. LAW §§ 292, 296 (2014) (unanimous support); N.D. CENT. CODE § 14-02.4-03 (2015) (nearly unanimous support and bipartisan passage); R.I. GEN. LAWS § 28-5-7.4 (2015) (unanimous support and bipartisan passage); TEX. LOC. GOV’T CODE ANN. § 180.004 (West 2001); W. VA. CODE § 5-11B-2 (2014) (bipartisan passage).

¹³⁵ Joe Boone, *supra* note 103.

¹³⁶ Compare CAL. GOV’T CODE §§ 12945 (a)(3)(A)-(C) (West 2012) (applying to both private- and public-sector employers), with ALASKA STAT. § 39.20.520 (2013) (applying only to public-sector employers).

¹³⁷ ALASKA STAT. § 39.20.520 (2013) (requiring covered employers to transfer a pregnant employee to a position that is less strenuous or hazardous); CONN. GEN. STAT. § 46a-60(A)(7) (2011) (requiring “a reasonable effort” to transfer a pregnant employee to a temporary position); LA. REV. STAT. ANN. §§ 23:342 (1997) (requiring a transfer to a temporary position if the employer has a policy authorizing the transfer of temporarily disabled employees); TEX. LOC. GOV’T CODE ANN. § 180.004 (West 2001) (requiring alternative temporary work assignment).

¹³⁸ CAL. GOV’T CODE §§ 12945 (a)(3)(A)-(C) (West 2012) (including transfer to less strenuous or hazardous position as a reasonable accommodation); Protecting Pregnant Workers Fairness Act of 2014, D.C. Act. 20-458 (2014) (listing breaks and an appropriate place to express breast milk); HAW. CODE R. §§ 12-46-106-107 (LexisNexis 1990) (providing for broad “reasonable accommodations”); 775 ILL. COMP. STAT. 5/2-102(J) (2014) (listing water and bathroom breaks and providing a private, non-bathroom place to express breast milk); MD. CODE, STATE GOV’T § 20-609 (2013) (listing changing the employee’s duties or work hours, relocating the work area, and providing leave); MINN. STAT. § 181.9414 (2014) (listing limits to heavy lifting, more frequent breaks, and temporary transfer); Neb. Laws § 48-1107.02(2) (2015) (listing light-duty assignment and seating); N.J. STAT. ANN. § 10:5-12(s) (West 2013) (including, but not limiting to, help with manual labor and job restructuring); N.D. CENT. CODE § 14-02.4-03 (2015) (providing for broad “reasonable accommodations”); R.I. GEN. LAWS § 28-5-7.4 (2015) (listing breaks, seating, and a non-bathroom location to express breast milk); W. VA. CODE § 5-11B-2 (2014) (providing for broad “reasonable accommodations”).

¹³⁹ DEL. CODE ANN. tit. 19, § 711(a)(3) (2014); 2015-S8, to be codified at N.Y. EXEC. LAW §§ 292, 296 (2014).

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and new parents by improving upon FMLA, PDA, and ADA protections.¹⁴⁰ In an effort to allow pregnant employees to remain in their current positions for longer periods of time,¹⁴¹ California entitles both public and private-sector pregnant workers, who work for an employer with five or more employees, to a reasonable accommodation for a pregnancy-related condition, upon the advice of the worker's physician.¹⁴² Further, the accommodation may include a transfer to a less strenuous or hazardous position if the transfer can be reasonably accommodated.¹⁴³ The law also prohibits employers from retaliating against employees for exercising their rights under the state law.¹⁴⁴

Although opponents to California pregnancy accommodation law raised concerns that it would unduly burden employers or spur litigation, only a few cases have been litigated under the law and the accommodations sought are generally modest, reasonable, and easily met by employers.¹⁴⁵ Additionally, while pregnancy discrimination claims under federal law are increasing, California has seen the opposite trend since the enactment of their pregnancy accommodation law in 2000.¹⁴⁶ The low number of court decisions involving the statute and the decrease in the number of pregnancy discrimination charges filed under California law since the legislation was enacted exemplify the success of California's pregnancy accommodation law.¹⁴⁷

V. THE PWFA AND ITS ADVANTAGES

Currently, Congress has the opportunity to pass federal legislation that will provide clarity and certainty to the current U.S. pregnancy discrimination landscape. States that ensure workplace accommodations for pregnant workers, such as California, provide model statutes that are worth replicating at the national level because they provide important protections for pregnant workers without causing a flood of litigation or burdening employers.¹⁴⁸ The success of state laws requiring pregnancy accommodations lends support for the

¹⁴⁰ NAT'L P'SHIP FOR WOMEN AND FAMILIES, EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF LAWS THAT HELP NEW PARENTS 25 (2014), <http://www.nationalpartnership.org/research-library/work-family/expecting-better-2014.pdf> (awarding California the highest score out of all states, an A-, in a thorough assessment of state policies that support new parents with the arrival of a new child).

¹⁴¹ EXPECTING A BABY, NOT A LAY-OFF, *supra* note 51, at 14.

¹⁴² CAL. GOV'T CODE §§ 12945 (a)(3)(A) (West 2012).

¹⁴³ CAL. GOV'T CODE §§ 12940 (2)(h) (West 2012).

¹⁴⁴ CAL. GOV'T CODE §§ 12945 (a)(4) (West 2012).

¹⁴⁵ EXPECTING A BABY, NOT A LAY-OFF, *supra* note 51, at 15.

¹⁴⁶ *Id.* at 25.

¹⁴⁷ See *generally* EXPECTING A BABY, NOT A LAY-OFF, *supra* note 51.

¹⁴⁸ EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF LAWS THAT HELP NEW PARENTS, *supra* note 140, at 7.

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need of Congress to pass the PWFA, a proposed federal bill that provides similar, expanded protections for pregnant workers.¹⁴⁹ Additionally, the PWFA would add the United States to the list of progressive countries that provide accommodations to work that involves risks to pregnant or nursing women.

A. *The PWFA*

The purpose of the PWFA is to “eliminate discrimination and promote women’s health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.”¹⁵⁰ Similar to the ADA, Section Two of the PWFA makes it an unlawful employment practice to not make reasonable accommodations for pregnancy-related limitations unless the employer “can demonstrate that the accommodation would impose an undue hardship on the operation of the business.”¹⁵¹ Additionally, the PWFA prohibits the denial of employment opportunities to a job applicant or employee if the denial is based on the need to make a reasonable accommodation to the pregnancy-related limitation.¹⁵²

Also, the PWFA prohibits employers from requiring a pregnant job applicant or employee to accept an accommodation that the applicant or employee chooses not to accept if such accommodation is unnecessary to enable the pregnant employee or applicant to perform her job.¹⁵³ Likewise, employers are prohibited from requiring an employee to take leave, whether paid or unpaid, when another reasonable accommodation can be provided to the pregnant employee.¹⁵⁴ Finally, Section Two of the PWFA precludes employers from taking adverse action against an employee because the employee requests or uses a reasonable accommodation to a pregnancy-related limitation.¹⁵⁵

The PWFA includes several other sections in pursuit of its purpose. Section Three establishes that both private and public-sector employees, who are already covered under Title VII of the Civil Rights Act of 1964 and other federal legislation, are protected from violations

¹⁴⁹ PREGNANT AND JOBLESS, *supra* note 16, at 27.

¹⁵⁰ PWFA, S. 1512, 114th Cong. (2015); H.R. 2644, 114th Cong. (2015).

¹⁵¹ S. 1512 § (2)(1) (2015); H.R. 2644 § (2)(1) (2015).

¹⁵² S. 1512 § (2)(2) (2015); H.R. 2644 § (2)(2) (2015).

¹⁵³ S. 1512 § (2)(3) (2015); H.R. 2644 § (2)(3) (2015).

¹⁵⁴ S. 1512 § (2)(4) (2015); H.R. 2644 § (2)(4) (2015).

¹⁵⁵ S. 1512 § (2)(5) (2015); H.R. 2644 § (2)(5) (2015).

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of Section 2 of the PWFA.¹⁵⁶ To the extent available under Title VII and the other enumerated laws, a court may award lost pay, interest, compensatory damages, costs, reasonable attorneys' fees, and experts' fees.¹⁵⁷

Further, Section Three prohibits retaliation against individuals who express opposition to acts or practices made unlawful by the PWFA, or who participate in an investigation, proceeding, or hearing concerning the PWFA.¹⁵⁸ Section Three also forbids coercion, intimidation, threats, or interference with individuals who have exercised, or aided or encouraged another to exercise, their rights under the PWFA.¹⁵⁹ Lastly, Section Three of the PWFA provides the aggrieved individuals with the same remedies and procedures for violations of Section Two.¹⁶⁰

The final sections of the proposed federal legislation cover various procedural and applicability matters. Section Four of the PWFA instructs the EEOC to issue regulations implementing the PWFA no later than two years after its enactment and requires the EEOC to provide examples of reasonable accommodations that employers must provide to employees under the PWFA.¹⁶¹ Next, Section Five of the PWFA defines terms consistently with other federal employment statutes, and Section Six of the PWFA waives state immunity for instances when the state is the employer.¹⁶² Finally, Section Seven establishes that the PWFA does not supersede or invalidate any other law providing greater or equal protections.¹⁶³

Despite the growing momentum behind reasonable accommodation laws for pregnant workers, the PWFA has been introduced to Congress twice before with little support.¹⁶⁴ In 2012, Representative Jerrold Nadler, over fifty other Democratic co-sponsors in the House of Representatives, and Democratic Senator Robert Casey introduced the PWFA to Congress for the first time.¹⁶⁵ However, the

¹⁵⁶ S. 1512 § (3)(a)-(e) (2015); H.R. 2644 § (3)(a)-(e) (2015).

¹⁵⁷ S. 1512 § (3)(a)(3), (b)(3), (c)(3), (d)(3), (e)(3) (2015); H.R. 2644 § (3)(a)(3), (b)(3), (c)(3), (d)(3), (e)(3) (2015).

¹⁵⁸ S. 1512 § (3)(f)(1) (2015); H.R. 2644 § (3)(f)(1) (2015).

¹⁵⁹ S. 1512 § (3)(f)(2) (2015); H.R. 2644 § (3)(f)(2) (2015).

¹⁶⁰ S. 1512 § (3)(f)(3) (2015); H.R. 2644 § (3)(f)(3) (2015).

¹⁶¹ S. 1512 § (4) (2015); H.R. 2644 § (4) (2015).

¹⁶² S. 1512 § (5)-(6) (2015); H.R. 2644 § (5)-(6) (2015) (adding that the definitions of "reasonable accommodation" and "undue hardship" include "the interactive process that will typically be used to determine an appropriate reasonable accommodation").

¹⁶³ S. 1512 § (7) (2015); H.R. 2644 § (7) (2015).

¹⁶⁴ Abigail Bar-Lev, *A Win for Peggy Young Means the PWFA is More Critical Than Ever*, NAT'L WOMEN'S LAW CTR. (Apr. 1, 2015), <http://nwlc.org/win-peggy-young-means-pregnant-workers-fairness-act-more-critical-ever/>.

¹⁶⁵ Abigail Bar-Lev, *Now There's Really No Excuse: Pass the PWFA!*, NAT'L WOMEN'S LAW CTR. (June 24, 2015), <http://nwlc.org/now-theres-really-no-excuse-pass-pwfa/>.

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PWFA stalled in Congress because only Democrats supported the bill.¹⁶⁶

In 2013, the PWFA was reintroduced to Congress.¹⁶⁷ The proposed bill gained 128 co-sponsors in the House of Representatives and twenty-six co-sponsors in the Senate; yet, not a single Republican in Congress supported the PWFA.¹⁶⁸ Although President Obama publicly endorsed the bill and urged Congress to “pass the PWFA without delay,”¹⁶⁹ the PWFA died in Congress again due to the lack of bipartisan support.¹⁷⁰

Notwithstanding prior attempts, the PWFA was reintroduced to Congress for a third time in 2015.¹⁷¹ For the first time, the PWFA garnered bipartisan support in both chambers of Congress.¹⁷² Republican Senators Kelly Ayotte, Dean Heller, and Mark Kirk were among the first Republican Senators to join their fellow Democratic Senators in promoting women’s health and economic security through the assurance of reasonable accommodations in the workplace absent undue hardship on the employer.¹⁷³ In the House of Representatives, Republican Representative Mike Coffman was the first Republican to co-sponsor the PWFA.¹⁷⁴

The bipartisan support of the PWFA in Congress is a promising sign that the proposed bill will finally move forward in the legislative process.¹⁷⁵ If the PWFA is ultimately passed and signed into law, the bill will be advantageous to both employers and employees alike.

B. Advantages of the PWFA

There is a sound, well-grounded business case for employers to accommodate pregnant workers.¹⁷⁶ The PWFA will reduce employee turnover and related hiring and training costs of new employees by

¹⁶⁶ *Id.*

¹⁶⁷ See Bar-Lev, *supra* note 164.

¹⁶⁸ Lauren Khouri, *Can We All Agree? Pregnant Workers Deserve Fair Treatment*, NAT’L WOMEN’S LAW CTR. (June 16, 2014), <http://nwlc.org/can-we-all-agree-pregnant-workers-deserve-fair-treatment/>.

¹⁶⁹ President Barack Obama, Address at the White House Summit on Working Families (June 23, 2014).

¹⁷⁰ *Now There’s Really No Excuse: Pass the PWFA!*, *supra* note 165.

¹⁷¹ S. 1512 (2015); H.R. 2644 (2015).

¹⁷² Emily Martin, *Democrats and Republicans Agree: Time for Fairness for Pregnant Workers*, NAT’L WOMEN’S LAW CTR. (June 4, 2015), <http://nwlc.org/democrats-and-republicans-agree-time-fairness-pregnant-workers/>.

¹⁷³ *Id.*

¹⁷⁴ *Now There’s Really No Excuse: Pass the PWFA!*, *supra* note 165.

¹⁷⁵ Martin, *supra* note 172.

¹⁷⁶ PREGNANT AND JOBLESS, *supra* note 16, at 15.

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allowing an employee to stay on the job.¹⁷⁷ It will also improve employee morale, engagement, and productivity by cultivating worker loyalty.¹⁷⁸ The PWFA also benefits the bottom line because short-term pregnancy accommodations are likely to be low- or no-cost accommodations, such as allowing a pregnant employee to keep a water bottle or take more restroom breaks.¹⁷⁹ Additionally, the PWFA benefits employers by creating clear guidelines for employers facing a pregnant worker's request for accommodation.¹⁸⁰ The clarity will help avoid costly and time-consuming litigation because employers can anticipate their responsibilities, which will lessen the discrimination claims brought by pregnant workers.¹⁸¹

The PWFA is clearly advantageous to women and, specifically, pregnant workers because it promotes healthy pregnancies and supports a necessary work-life balance for pregnant workers and their families.¹⁸² While reasonable accommodations for pregnant workers benefit all women in the workforce, low-wage hourly workers stand to benefit the most because they lack the flexibility and control afforded to most professional, managerial, and white-collar employees.¹⁸³ The flexibility of their counterparts to work from home, for example, allows professional workers the ability to handle pregnancy-related restrictions without requesting accommodations.¹⁸⁴ Under the PWFA, which promotes economic security, low-wage workers will be allowed to continue working and supporting their families during pregnancy without relying solely on their employers' goodwill and cooperation.¹⁸⁵

There is a compelling need for the passage of the PWFA because it benefits both employers and employees. In order to challenge the cultural norms and workplace realities of women who become pregnant, there must be a mobilization of a revitalized social movement surrounding pregnancy discrimination laws.¹⁸⁶ In the aftermath of *Young v. UPS*, Congress must ensure the federal legislation's speedy adoption so that the United States becomes a progressive force in women's human rights.

¹⁷⁷ JOB ACCOMMODATION NETWORK, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 3 (2015), <http://askjan.org/media/downloads/LowCostHighImpact.pdf>.

¹⁷⁸ *Id.*

¹⁷⁹ PREGNANT AND JOBLESS, *supra* note 16, at 16.

¹⁸⁰ *Id.* at 2.

¹⁸¹ NAT'L BUS. GRP. ON HEALTH, HEALTHY PREGNANCY AND HEALTHY CHILDREN 3-5, <https://www.businessgrouphealth.org/pub/f3001fa-2354-d714-51dc-3ab1dbf0ae6e>.

¹⁸² EXPECTING A BABY, NOT A LAY-OFF, *supra* note 51, at 28.

¹⁸³ *Id.* at 6.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Deborah L. Brake, *On Not "Having it Both Ways" and Still Losing: Reflections on Fifty Years of Pregnancy Litigation Under Title VII*, 95 B.U. L. REV. 995, 1014 (2015).

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CONCLUSION

Historically, pregnancy discrimination has been a pervasive reality in the American workforce, affecting women of color at a disproportionate rate. Today, pregnancy discrimination is embodied in employers' inflexible policies that preclude pregnant workers from securing reasonable accommodations. Before pregnant workers ask their employers for an accommodation, they are faced with an intolerable decision: a job or a healthy pregnancy. When employers deny the accommodation requests, pregnant women are forced out of the workplace at a time when they need their income and health benefits the most.

While the Supreme Court attempted to solve the problem in *Young v. UPS*, the Court created confusion surrounding when workplace accommodations are required for pregnant workers. Foreign countries have also endeavored to tackle the international human rights issue of pregnancy discrimination by providing alternatives to work that involves risks to pregnant or nursing women. Seemingly, states have successfully resolved the issue through pregnancy accommodation laws, which require employers to reasonably accommodate pregnant employees if it would not constitute an undue hardship on the employer. In order to eradicate the nationwide culture of workplace inflexibility, Congress should pass the PWFA, which is modeled after successful state pregnancy accommodation laws.

NOTE

CORPORATE DUTY: INCENTIVIZING PHARMACEUTICAL COMPANIES TO PROTECT HUMAN RIGHTS IN THEIR FOREIGN CLINICAL TRIALS THROUGH PUBLIC OPINION AND INTERNAL CODES OF CONDUCT

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INTRODUCTION

In April 1996, two hundred Nigerian children were used as clinical test subjects for an experimental meningitis treatment produced by American pharmaceutical company Pfizer, Inc.¹ In the months after, eleven of these children died from the treatment and many more were left blind, deaf, paralyzed, or brain-damaged.² Under the Alien Tort Claims Act, their parents filed suit against Pfizer in 2001 in the U.S. District Court for the Southern District of New York.³ After ten years of litigation, the case settled for an undisclosed amount in 2011.⁴

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¹ Steven W. Postal, *After Guatemala and Nigeria: The Future of International Clinical Research Regulation* 24 No. 1 HEALTH L. 1, 9 (2011).

² *Id.*

³ Sue Reisinger, *Pfizer Settles Lawsuits Over Drug Trials on Children in Nigeria*, CORPORATE COUNSEL, Feb. 23, 2011, <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202482854504>.

⁴ *Id.*

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Unfortunately, such a botched clinical trial is not an isolated incident and it illustrates the failure of current regulations intended to protect the health and human rights of clinical trial participants.

Using children and adults in developing countries as clinical test subjects for newly developed drugs is an increasingly common practice for large pharmaceutical companies.⁵ According to ClinicalTrials.gov, a website maintained by the National Institutes of Health, as of 2017, 110,182 or 47% of all clinical trials registered with the website took place outside of the U.S.⁶ As of 2008 in the United States, a third of Phase 3 trials—typically the largest and most significant trial in the development of a drug—were being conducted entirely outside the country.⁷ This growth has been exponential; in 1990, only a mere 271 trials for drugs intended for American use were being conducted in foreign countries, but by 2008, that number had risen to 6,485 trials.⁸

The incentive for these companies to conduct this research outside of the United States and Western Europe stems from a number of sources. First, pharmaceutical companies can research at less expense if they take their business overseas.⁹ In the United States, a drug trial will cost a company approximately \$180 million.¹⁰ In other countries, a company can pay less than half of that amount.¹¹ In particular physicians, nurses, and study coordinators in other countries are paid lower salaries: in India a first-rate academic center charges approximately \$1,500 to \$2,000 per case report; this is one-tenth of the cost at a second-tier center in the United States.¹²

Second, the host (usually developing) country that pharmaceutical companies choose will often have less stringent regulations leaving pharmaceutical companies free to test their drugs without government oversight.¹³ Pharmaceutical companies can iron out

⁵ Of the world's ten largest pharmaceutical companies, six are based in the United States and four in Europe. World Health Organization, *Glossary of Globalization, Trade and Health Terms: Pharmaceutical Industry*, WORLD HEALTH ORGANIZATION.COM, Feb. 20 2016, http://www.who.int/medicines/areas/coordination/English_Glossary.pdf; Amanda Gardner, *Many Clinical Trials Moving Overseas: Study Says Trend Raises Ethical, Medical Issues*, U.S. NEWS & WORLD REPORT, Feb. 18, 2009, <http://health.usnews.com/health-news/managing-your-healthcare/research/articles/2009/02/18/many-clinical-trials-moving-overseas>.

⁶ U.S. NAT'L INSTITUTES OF HEALTH, DEP'T OF HEALTH & HUM. SERVS., CLINICALTRIALS.GOV, <https://clinicaltrials.gov/ct2/resources/trends>.

⁷ Gardner, *supra* note 5.

⁸ Donald L. Barlett & James B. Steele, *Deadly Medicine*, VANITY FAIR, Jan. 2011, at 2, <http://www.vanityfair.com/news/2011/01/deadly-medicine-201101>.

⁹ Jennifer S. Bard, *A Taxonomy for Analyzing Legal and Ethical Issues Arising When Conducting Human Subject Research Outside the Borders of One's Own Country*, 37 HOUS. J. INT'L L. 1, 9 (2015).

¹⁰ Breanne M. Schuster, *For the Love of Drugs: Using Pharmaceutical Clinical Trials Abroad To Profit Off The Poor*, 13 SEATTLE J. SOC. JUST. 1015, 1022 (2015).

¹¹ *Id.*

¹² *Id.*

¹³ Barlett & Steele, *supra* note 8.

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problems that arise with their products without having to disclose them.¹⁴ For example, if studies in the United States suggest that a drug has no benefit, trials taken abroad can be used in its place to secure Federal Drug Administration (“FDA”) approval.¹⁵ In 2008, 80% of the applications for FDA approval for new drugs contained data from foreign clinical trials.¹⁶

Finally, in the United States, pharmaceutical companies seek to develop new medicines to increase profit and to respond to pressures from regulators, Congress, and lobbyists.¹⁷ This demand requires large pools of clinical test subjects.¹⁸ In developing countries it is easier to recruit participants because these clinical trials are frequently the only access a participant may have to medical care (although they are often unknowingly given placebos).¹⁹

These incentives to conduct trials outside of the United States will only increase the number of trials conducted abroad.

There are four main actors that play a role in protecting the human rights of the clinical trial test subjects: the country where the trials occur (called the host nation), the country where the pharmaceutical company is based (usually the U.S. or a Western European nation), international organizations (like the World Medical Association [“WMA”]), and the pharmaceutical companies themselves. However, the current regulatory scheme for foreign clinical trials primarily places the burden of protecting the human rights of test subjects on the first three (the host nations, the pharmaceutical company’s home nation, and international organizations and laws). This note will illustrate the shortcomings of the current regulatory scheme and argue that pharmaceutical companies should bear the burden of protecting the human rights of their test subjects by implementing internal codes of conduct.

Part I of this note illustrates how this current regulatory scheme has failed to protect human test subjects in three separate clinical trials in three different nations.²⁰ Therefore, the notion that the responsibility

¹⁴ Bard, *supra* note 9, at 9.

¹⁵ *Id.*; Barlett & Steele, *supra* note 8, at 3.

¹⁶ Barlett & Steele, *supra* note 8, at 2.

¹⁷ Joe Stephens, *Where Profits and Lives Hang in Balance Finding an Abundance of Subjects and Lack of Oversight Abroad, Big Drug Companies Test Offshore to Speed Products to Market*, WASH. POST, Dec. 17, 2000, at 1, http://www.washingtonpost.com/wp-dyn/content/article/2007/07/02/AR2007070201255_pf.html.

¹⁸ *Id.* at 3.

¹⁹ Barlett & Steele, *supra* note 8, at 2.

²⁰ The failure to protect human test subjects stems, in part, from trial administrators failing to report ethical violations. See Elizabeth A. Sweetman & Gordon S. Doig, *Failure to Report Protocol Violations in Clinical Trials: A Threat to Internal Validity?*, TRIALS, Sept. 28 2011, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3192675/> (In a study seeking to explore how often protocol

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for protecting human rights should lie only with the host nation, the pharmaceutical company's home nation, or through international standards is flawed. Part II of this note explores two solutions proposed by scholars: (1) using the Alien Tort Claims Act to aid litigants whose human rights have been violated, and (2) assigning corporate responsibility to companies according to their capacity to harm human dignity. Finally, Part III of this note will propose a method to hold pharmaceutical companies responsible for their human rights violations by supplementing current hard law principles like national or international laws or regulations. This final section will argue that nongovernmental organizations ("NGOs") should shine a spotlight on the human rights violations by pharmaceutical companies, and to rid themselves of the public disapproval that will likely follow from this publicity, pharmaceutical companies should begin to protect the human rights of their clinical test subjects through internal codes of conduct.

I. REGULATORY FAILURE

A. *Regulations by the Pharmaceutical Company's Home Nation*

In 1996, an epidemic of meningococcal meningitis spread through the northern Nigerian state of Kano.²¹ Pfizer, Inc. had recently developed a new orally administered drug called Trovafloxacin Mesylate ("Trovan") which was intended to cure the bacterium *Neisseria meningitidis*, the main cause of the meningococcal meningitis disease.²² In an effort to test its new drug, Pfizer recruited two hundred sick children from Kano as test subjects in a Phase III clinical trial of Trovan ("Trovan trials").²³ Since the Trovan trials were filed with the FDA and involved a clinical investigation of a drug intended for use in the cure, mitigation, or treatment of disease in humans, the trials were subject to FDA regulations.²⁴

These regulations required that all new investigational drugs to undergo clinical trials on human subjects to demonstrate that the drug is

violations occurred, researchers found that thirty-two percent of included trials failed to provide explicit reporting of any type of protocol violations. Such protocol violations included enrollment violations when a member of the research team failed to appropriately apply the study's eligibility criteria resulting in the enrollment of an inappropriate patient into the trial).

²¹ Abdullahi v. Pfizer, Inc., 562 F.3d 163, 169 (2d Cir. 2009).

²² *Id.*

²³ *Id.*

²⁴ Postal, *supra* note 1, at 9; Trovan Fact Sheet, PFIZER.COM, 1, http://www.pfizer.com/files/news/trovan_fact_sheet_final.pdf.

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safe and effective for its prescribed use.²⁵ The FDA's Food, Drug, and Cosmetic Act required that an Institutional Review Board ("IRB")—a group formally designated to review and monitor biomedical research involving human subjects—oversees the trial.²⁶ An IRB is expected to scrutinize study protocols before testing begins, monitor the progress of a trial, maintain records, and assure clinical testing meets ethical standards including using simple and clear patient/subject informed consent forms.²⁷ The three sections in the Code of Federal Regulations pertaining to the FDA's jurisdiction in human subjects are 21 C.F.R. § 56 (Institutional Review Boards), 21 C.F.R. § 50 (Protection of Human Subjects), and 21 C.F.R. § 50.55 (Requirements for permission by parents or guardians and for assent by children).²⁸ These three sections state in relevant part that IRB's must review clinical applications for drugs intended for human use, the IRB must assure that the assent of children participants is obtained if children are capable of providing assent, and that a trial shall not begin absent the legally effective informed consent of the subject or the subject's legally authorized representative in a language that is understandable.²⁹

After recruiting the two hundred minor test subjects, Pfizer violated these FDA regulations applicable to such foreign testing. First, as the regulations state, a drug company must obtain clearance by an IRB or an ethical committee before beginning trials.³⁰ The Trovan trials lacked ethical approval as required by 21 C.F.R. § 56 because Pfizer orchestrated a fabricated ethical confirmation.³¹ Before the trials began, Pfizer named Nigerian doctor Isa Dutse the Principal Investigator of the

²⁵ Office of Inspector Gen., Dep't of Health & Hum. Servs., OEI-01-08-00510, Challenges to FDA's Ability to Monitor and Inspect Foreign Clinical Trials i (June 2010), <http://oig.hhs.gov/oei/reports/oei-01-08-00510.pdf>.

²⁶ U.S. FOOD & DRUG ADMIN., INSTITUTIONAL REVIEW BOARDS FREQUENTLY ASKED QUESTIONS, <http://www.fda.gov/RegulatoryInformation/Guidances/ucm126420.htm>.

²⁷ *Id.*

²⁸ [A]n Institutional Review Board (IRB) . . . reviews clinical investigations regulated by the Food and Drug Administration . . . as well as clinical investigations that support applications for research . . . including . . . *drugs for human use* . . . 21 C.F.R. § 56.101 (2017) (emphasis added).

[A]ny clinical investigation . . . shall not be initiated unless that investigation has been reviewed and approved by, and remains subject to continuing review by, an IRB . . . 21 C.F.R. § 56.103.

[T]he IRB must determine that adequate provisions are made for soliciting the assent of the children when in the judgment of the IRB the children are capable of providing assent. 21 C.F.R. § 50.55.

[N]o investigator may involve a human being as a subject in research covered by these regulations unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative. An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information . . . shall be in language understandable to the subject or the representative . . . 21 C.F.R. § 50.20.

²⁹ See 21 C.F.R. § 56.101; 21 C.F.R. § 56.103; 21 C.F.R. § 50.20.

³⁰ See 21 C.F.R. § 56.103.

³¹ Federal Ministry of Health, *Report of the Investigation Committee on the Clinical Trial of Trovan by Pfizer, Kano*, 22 (Mar. 2001) [hereinafter Trovan Report].

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trial.³² At the time of the trials neither an ethical committee nor an IRB even existed at Dr. Dutse's hospital.³³ However, at Pfizer's request, six months *after* the trials ended Dr. Dutse created a backdated authorization letter for "Ethical Committee Clearance" on his hospital's letterhead.³⁴ It has been alleged that Pfizer paid Dr. Dutse \$20,000 to forge the letter and submit it to the FDA for approval under 21 C.F.R. § 56, but Pfizer denies these allegations.³⁵

Second, the Trovan trials lacked written informed consent as required by 21 C.F.R. § 50. In fact, there were no informed consent forms signed during the Pfizer trials at all.³⁶ According to Dr. Duste, forms existed but most of the families in the rural region were illiterate.³⁷ Local nurses who attempted to communicate with the children and their parents only received verbal consent.³⁸ Furthermore, the families did not know they were participating in an experimental drug trial only that the drug was 'new.'³⁹

In addition to these aforementioned FDA violations, there were no adequate patient records of the trial, no adequate follow-up activity and no record on how much Trovan was brought into Kano and used.⁴⁰ A Nigerian Investigation Committee (charged in 2001 by the Nigerian government to uncover the Trovan violations) concluded that Pfizer only obtained approval from the Nigerian authorities to *import* Trovan into Nigeria not to clinically test the drug.⁴¹ Upon their visit, the Nigerian Investigation Committee described the hospital where the trial took place as being in a "sorry state" and "generally dirty" with dilapidated beds without mattresses and no treatment cards.⁴² It eventually became clear to the Nigerian Investigation Committee that Pfizer's only objective in Kano was to test Trovan and not, as Pfizer claimed, "a strictly . . . humanitarian gesture aimed at saving lives . . . devoid of any commercial overtone . . ."⁴³

The Trovan trials illustrate that the FDA lacks the ability to monitor the procedures and practices that pharmaceutical companies

³² *Id.*

³³ *Id.* at 22-23.

³⁴ *Id.* at 23.

³⁵ Postal, *supra* note 1, at 10.

³⁶ Stephens, *supra* note 17, at 3.

³⁷ *Id.*

³⁸ Trovan Report, *supra* note 31, at 21.

³⁹ Stephens, *supra* note 17, at 3.

⁴⁰ Trovan Report, *supra* note 31, at 38.

⁴¹ Trovan Report, *supra* note 31, at 73.

⁴² *Id.* at 36.

⁴³ Trovan Report, *supra* note 31, at 18.

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implement when they submit trials for federal approval.⁴⁴ What is more, FDA regulations may not apply if the host nation has clinical trial methodology procedures that a U.S. department or agency head deems equivalent to the FDAs.⁴⁵ As scholar William DuBois explains, “it seems difficult to argue that the protection of human subjects is a necessary part of ensuring valid experimental data. Under the FDA’s regulations, protecting human subjects instead seems to be a more supplemental government interest.”⁴⁶

B. Regulations by the Host Nation

In addition to the inadequacy within the U.S. regulatory scheme for clinical trials, host nation regulations are insufficient as well. This next example will illustrate how a pharmaceutical company violated Indian regulations on clinical trials conducted within India.

In India, two regulatory bodies seek to control the activities of pharmaceutical companies. The Indian Council of Medical Research (“ICMR”) is the primary medical research body in the country and the Drugs Controller General of India (“DCGI”) regulates pharmaceutical and medical devices within the National Central Drugs Standard Control Organization.⁴⁷ The ICMR is funded by the Government of India through the Department of Health Research, Ministry of Health & Family Welfare and its priorities coincide with a long list of national health concerns.⁴⁸ Both the DCGI and the ICMR issue mandatory guidelines for clinical trials on human participants in India.⁴⁹

In July and August 2009, the Program for Appropriate Technology in Health (“PATH”), a nonprofit based in Seattle, Washington launched a \$3.6 million human papillomavirus (HPV)

⁴⁴ André Ourso, *Can The FDA Improve Oversight Of Foreign Clinical Trials?: Closing The Information Gap And Moving Towards A Globalized Regulatory Scheme*, 21 ANNALS HEALTH L. 493, 501 (2012).

⁴⁵ 45 C.F.R. § 46.101(h) (2005).

⁴⁶ William DuBois, *New Drug Research, the Extraterritorial Application of FDA Regulations, and the Need for International Cooperation*, VAND. J. TRANSNAT’L L. 161, 193 (2003).

⁴⁷ See *About Us, Central Authorities*, Central Drugs Standard Control Organization, <http://www.cdscn.in/forms/contentpage1.aspx?lid=962> (last visited Dec. 26, 2015); *About Us*, Indian Council of Medical Research, http://www.icmr.nic.in/About_Us/About_Us.html (last visited Dec. 26, 2015).

⁴⁸ See *About ICMR*, Indian Council of Medical Research, http://www.icmr.nic.in/About_Us/About_ICMR.html (last visited Mar. 1, 2017).

⁴⁹ INDIAN COUNCIL OF MEDICAL RESEARCH, ETHICAL GUIDELINES FOR BIOMEDICAL RESEARCH ON HUMAN PARTICIPANTS (J.N. Mathur ed., 2006) [hereinafter ICMR Guidelines]; N B Sarojini et al., *The HPV Vaccine: Science, Ethics and Regulation*, ECONOMIC & POLITICAL WEEKLY, Nov. 27, 2010, at 28; Central Drugs Standard Control Organization, *supra* note 62.

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clinical trial in India.⁵⁰ The trial tested Gardasil, manufactured by Merck Sharpe & Dohme Pharmaceuticals Private Limited (the Indian subsidiary of US-based pharmaceutical company, Merck & Co., Inc.). They also tested Cervarix, manufactured by GlaxoSmithKline Biologicals (“GSK”) of Belgium.⁵¹ Both vaccines combat HPV—a leading cause of cervical cancer among women around the world.⁵² The Bill & Melinda Gates Foundation funded the trial which tested 24,777 adolescent girls in India’s Andhra Pradesh and Gujarat states.⁵³ However, on April 7th 2010, the trial came to an abrupt halt after numerous ethical violations surfaced to the Indian media voiced by civil society groups.⁵⁴ Soon after, on April 29th 2010, V.M. Katoch, the Secretary of the Department of Health Research and the Director General of the ICMR, admitted to the Indian Parliamentary Standing Committee on Health that, “the Drugs Controller General of India’s guidelines had not been adhered to in the clinical trial of the Human Papilloma Virus (HPV) vaccine.”⁵⁵ An Inquiry Committee was formed to investigate the trials and concluded that PATH violated numerous Indian regulations regarding testing on vulnerable populations and obtaining informed consent.⁵⁶

During the Gardasil trial, the adolescent girls qualified as a vulnerable group due not only to their age, but to the fact that many were

⁵⁰ Pallava Bagla, *Indian Parliament Comes Down Hard on Cervical Cancer Trial*, AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE MAGAZINE (Sept. 9, 2013), <http://news.sciencemag.org/asiapacific/2013/09/indian-parliament-comes-down-hard-cervical-cancer-trial>.

⁵¹ N B Sarojini & Anjali Sheno, *Gardasil Research Targets Girls from Vulnerable Communities*, SANEVAX, INC. (Jan. 21, 2011), <http://sanevax.org/gardasil-research-targets-girls-from-vulnerable-communities/>.

⁵² Bagla, *supra* note 50.

⁵³ *Id.*

⁵⁴ Sarojini & Sheno, *supra* note 51, at 27.

⁵⁵ Sarojini & Sheno, *supra* note 51, at 27.

⁵⁶ First, ICMR guidelines hold that for vulnerable populations: “adequate justification is required for the involvement of [such] participants” Moreover, consent is always required for clinical trials: “Every adult participant in the research should voluntarily give informed consent. [A] parent or legal guardian of each child has given proxy consent.” “[T]he assent of the child should be obtained to the extent of the child’s capabilities such as in the case of mature minors from the age of seven years up to the age of 18 years.” ICMR Guidelines, *supra* note 49 at 28, 29, 31.

The DCGI’s Drugs and Cosmetics Act states similar requirements for vulnerable populations and informed consent for adults and children: “The ethics committee should exercise particular care to protect the rights, safety and well being of all vulnerable subjects participating in the study, e.g., . . . minors or others incapable of personally giving consent.” “In all trials, a freely given, informed, written consent is required to be obtained from each study subject. The Investigator must provide information about the study verbally as well as using a patient information sheet, in a language that is non-technical and understandable by the study subject. The Subject’s consent must be obtained in writing using an ‘Informed Consent Form’.” “Paediatric [*sic*] Subjects are legally unable to provide written informed consent, and are dependent on their parent(s) legal guardian to assume responsibility for their participation in clinical studies. Written informed consent should be obtained from the parent/ legal guardian. However, all paediatric [*sic*] participants should be informed to the fullest. Mature minors and adolescents should personally sign and date a separately designed written assent form.” Drugs and Cosmetics Rules, Requirements and Guidelines for Permission to Import and / or Manufacture of New Drugs for Sale or to Undertake Clinical Trials, Schedule Y(2)(4)(i), Y(2)(5)(i), Y(3)(3)(vii) (1945) (India) [hereinafter Drugs and Cosmetics Rules].

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from poor economic groups and other disadvantaged classes.⁵⁷ Despite the ICMR requirement to do so, PATH never publically justified why such a vulnerable population was used in their clinical trials.⁵⁸ Additionally, the ‘particular care’ required by the DCGI regulations was not exercised.⁵⁹ After its investigation, the Inquiry Committee eventually concluded that, “since the population under study was vulnerable, utmost caution should have been exercised in the implementation of the study.”⁶⁰

Thousands of informed consent forms were missing, lacked dates, or were signed by wardens at the girls’ boarding schools.⁶¹ Some forms were in English—a foreign language to many of the tribal region girls and their parents.⁶² The participants did not know that they could have refused the vaccine.⁶³ And they were told that the vaccine would provide lifelong protection and no side effects or possible long-term problems associated with the vaccine were mentioned.⁶⁴ PATH’s numerous violations led the Inquiry Committee to declare in a scathing report that:

[I]t is established that PATH by carrying out the clinical trials for HPV vaccines in Andhra Pradesh and Gujarat under the pretext of observation/ demonstration project has violated all laws and regulations laid down for clinical trials by the Government. While doing so, its sole aim has been to promote the commercial interests of HPV vaccine manufacturers This act of PATH is a clear cut violation of the human rights of these girl children and adolescents. It also deems it an established case of child abuse. The Committee, therefore, recommends action by the Government against PATH.⁶⁵

The Investigation Committee added that, “DCG(I) has played a very questionable role in the entire matter by remaining a *mute spectator*

⁵⁷ Sarojini, *supra* note 49, at 28.

⁵⁸ *Id.*

⁵⁹ DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON HEALTH AND FAMILY WELFARE, SEVENTY SECOND REPORT: ALLEGED IRREGULARITIES IN THE CONDUCT OF STUDIES USING HUMAN PAPILLOMA VIRUS (HPV) VACCINE BY PATH IN INDIA 22 (2013) [hereinafter SEVENTY SECOND REPORT]

⁶⁰ *Id.* at 25.

⁶¹ *Id.* at 21-23.

⁶² Sarojini & Sheno, *supra* note 51, at 28.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ SEVENTY SECOND REPORT, *supra* note 59, at 36.

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to violations of its own rules and regulations”⁶⁶ The most disturbing fact about the Gardasil trials is that but for the outrage and demands from female advocacy groups that publicized the trials, PATH’s unethical work would have continued.⁶⁷

Host nation regulations often fail to protect human rights for the same reasons pharmaceutical companies travel to the host nations in the first place. The regulations are typically less stringent, medication takes less time to gain approval, and there are immense economic incentives for doctors in developing countries to heed to the wishes of the large companies by turning a blind eye to human rights violations.⁶⁸ Thus, solutions that would seek to assign responsibility only upon the host nations would primarily face enforcement problems.

C. Regulation through International Standards

Finally, pharmaceutical companies bypass international standards set up to protect clinical trial participants. The Declaration of Helsinki (“the Declaration”) is a set of international ethics principles aimed at protecting human rights in human subject testing.⁶⁹ Originally drafted in 1964 by the WMA, the Declaration has been called the “cornerstone statement of ethical principles in biomedical research” despite the fact that it is a non-legally binding document.⁷⁰ The source of its power is its incorporation and codification in many international and national instruments, guidelines, laws, regulations, and non-binding texts on human subjects research.⁷¹ The Declaration stems from the Nuremberg Code—a set of research principles written after the systematic torture, mutilation, and killing of the concentration camp prisoners in Nazi biomedical experiments during World War II.⁷² With the Declaration, the WMA intended “to provide physicians all over the world with recommendations to guide them in biomedical research

⁶⁶ DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON HEALTH AND FAMILY WELFARE, EIGHTY FIRST REPORT: ACTION TAKEN BY GOVERNMENT ON THE RECOMMENDATIONS/OBSERVATIONS CONTAINED IN THE SEVENTY-SECOND REPORT ON ALLEGED IRREGULARITIES IN THE CONDUCT OF STUDIES USING HUMAN PAPILLOMA VIRUS (HPV) VACCINE BY PATH IN INDIA 36 (2014).

⁶⁷ Heidi J. Larson et al., *The India HPV Vaccine Suspension*, THE LANCET, Aug. 1, 2010, at 572.

⁶⁸ Barlett & Steele, *supra* note 7, at 4.

⁶⁹ FRANCIS WEYZIG & IRENE SCHIPPER, SOMO BRIEFING PAPER ON ETHICS IN CLINICAL TRIALS #1: EXAMPLES OF UNETHICAL TRIALS EXAMPLES OF UNETHICALS 11 (2008); Delon Human and Sev S. Fluss, *About Us: The World Medical Association’s Declaration of Helsinki: Historical And Contemporary Perspectives*, WORLD MEDICAL ASSOCIATION, July 24, 2001, http://www.wma.net/en/20activities/10ethics/10helsinki/draft_historical_contemporary_perspectives.pdf, at 3.

⁷⁰ Robert V. Carlson et al., *The Revision of the Declaration of Helsinki: Past, Present and Future*, 57 BRIT. J. CLINICAL PHARMACOLOGY 695, 695-96 (2004).

⁷¹ Human & Fluss, *supra* note 69, at 2.

⁷² Carlson, *supra* note 70, at 696.

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involving human subjects.”⁷³ The Declaration does not apply directly to pharmaceutical companies but they do look to it for ethical goals.

The pharmaceutical company in this final example violated a principle of the Declaration which states that,

In advance of a clinical trial, sponsors, researchers and host country governments should make provisions for post-trial access for all participants who still need an intervention identified as beneficial in the trial. This information must also be disclosed to participants during the informed consent process.⁷⁴

In the early 2000's, Novartis, a pharmaceutical company based in Switzerland, developed an innovative cancer treatment for chronic myeloid leukemia called Glivec.⁷⁵ After successful approval in the United States, Novartis initiated a special program where it provided Glivec to 7,500 patients around the world for free during clinical trials in an effort to win regulatory approvals in certain countries.⁷⁶ However, in violation of the Declaration, the company failed to inform the participants on how they could access Glivec or other beneficial intervention after the drug gained approval in their respective country. Then, immediately after the drug received approval, Novartis would abruptly stop supplying Glivec thereby forcing patients to seek the drug through private or government insurance or other channels.⁷⁷ For example, in South Korea, after approving Glivec, the government set the price for the drug lower than what Novartis wanted, and the company refused to sell the drug at that price.⁷⁸ While the government and Novartis bickered over the price, needy patients held demonstrations encouraged by Novartis (the company promised to reimburse patients for a portion of their co-payments).⁷⁹ The government eventually conceded and sold Glivec at Novartis' desired price—a 20% increase from the original price.⁸⁰

⁷³ World Medical Association, *Declaration of Helsinki*, (last visited Apr. 1, 2016), <http://www.wma.net/en/60/about/70/history/01declarationHelsinki/>.

⁷⁴ WORLD MEDICAL ASSOCIATION, DECLARATION OF HELSINKI—ETHICAL PRINCIPLES FOR MEDICAL RESEARCH INVOLVING HUMAN SUBJECTS (1964), <http://www.wma.net/en/30publications/10policies/b3/>.

⁷⁵ WEYZIG & SCHIPPER, *supra* note 69, at 11.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Stephanie Strom & Matt Fleischerblack, *Drug Maker's Vow to Donate Cancer Medicine Falls Short*, N.Y. TIMES, June 5, 2003, at 5.

⁷⁹ *Id.*

⁸⁰ *Id.*

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Similarly, in Hong Kong, Novartis sent a letter to 53 clinical trial participants informing them that their free supply of Glivec was ending.⁸¹ Then, in an effort, to force the government to sell Glivec at Novartis' desired price, the company hired a public relations firm to help the cancer patients pressure their own government to accept Novartis' price and the government eventually agreed.⁸² To abide by the Declaration, Novartis should have informed its 53 patients at the beginning of the clinical trial that their free supply of Glivec would end after approval, not four months before they terminated disbursement.⁸³

In India, cancer patients began to receive Glivec for free, but Novartis warned the Indian government that, if a generic version of Glivec was developed, they would stop the program.⁸⁴ After a generic version of Glivec was approved in India and began to eat away at Novartis' sales, Novartis held true to its threat and ended its free special program.⁸⁵

The Novartis trials indicate that despite international standards, the economic will of large pharmaceutical companies is often insurmountable and host nations can do little to control it.

Part I of this note illustrates how the three main sources of rules, guidelines, and regulations for foreign clinical trials are wholly inadequate. The regulations from host nations, the pharmaceutical company's home nation, and international institutions merge and intersect in a convoluted web and accountability are ultimately lost. Common to all scenarios, however, is not a lack of regulations but a lack of enforcement of those regulations. In Pfizer's case, American medical teams did not abide by U.S. statutes once operations began in Nigeria. In Merck and GlaxoSmithKline Biologicals' case, both companies disregarded Indian laws meant to protect human test subjects. And Novartis disregarded international principles in failing to provide clear post-trial access. No viable enforcement mechanisms currently exercise control at the ground level.⁸⁶ Until the news media's involvement or advocacy group outrage, these trials basically go unnoticed and people's rights are continuously violated. For example, without the female

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 6.

⁸⁵ *Id.* at 7.

⁸⁶ Stephens, *supra* note 17, at 2.

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advocacy group's outrage in India, the Gardasil trials would have likely continued. Until *The Washington Post's* six-part investigative article in 2000, Pfizer may have very easily avoided any retribution for its human rights violations in Nigeria.⁸⁷

We must now ask whether responsibility can be assigned to the pharmaceutical companies themselves. Is there ever a point at which they are obligated to take an active role in protecting the human rights of their test subjects? What hindrances arise when corporate responsibility is assigned to pharmaceutical companies? Part II of this note will explore two proposed solutions that explore these questions.

II. THE NATURE OF MULTINATIONAL CORPORATIONS AND CURRENT PROPOSED SOLUTIONS

Large pharmaceutical companies are considered multinational or transnational corporations.⁸⁸ They have a parent company that is usually associated with single country and various subsidiaries that operate around the globe.⁸⁹ Since the end of World War II, multinational corporations have grown in size and number due to new investment opportunities and technological developments.⁹⁰

Large multinational pharmaceutical companies exist in a market worth \$300 billion a year and within the next three years it is expected to rise to \$400 billion.⁹¹ These pharmaceutical companies currently spend one-third of all sales revenue on marketing their products which is roughly twice what they spend on research and development.⁹²

Legally, multinational corporations evade regulatory schemes for a number of reasons. First, their various outpost locations exist under diverse legal systems with conflicting demands.⁹³ Second, multinational corporations are so wealthy, that sovereign states often have less economic power—measured in terms of control over human, natural, financial and other resources—than the corporations they are

⁸⁷ *Id.* at 1.

⁸⁸ Laurence Dubin, *The Direct Application of Human Rights Standards to, and by, Transnational Corporations*, GLOBALISATION, HUMAN RIGHTS AND THE RULE OF LAW: THE REVIEW, 1999, at 35 (quoting Institute of International Law, *Yearbook*, 65, Part 1, Session of Milan 1993, Preparatory Work, ed. Pedone, Paris, p. 28) (“A group of companies operating under common ownership or control, usually . . . for a common purpose or in related economic sectors, usually . . . employing a common trade mark, sometimes with local variations.”).

⁸⁹ *Id.* at 35-36.

⁹⁰ Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 7-8 (1993).

⁹¹ Breanne M. Schuster, *For the Love of Drugs: Using Pharmaceutical Clinical Trials Abroad to Profit Off the Poor*, 13 SEATTLE J. SOC. JUST. 1015, 1015 (2015).

⁹² *Id.* at 1035.

⁹³ Dubin, *supra* note 88, at 36.

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supposedly regulating.⁹⁴ Third, since the majority of international law focuses on the relationships between states, multinational corporations avoid regulation at the international level.⁹⁵ Finally, private actors such as trade unions, consumer groups, and environmental organizations, which traditionally interact with corporations on a national basis, are being forced to transnationalize so that they can interact with them in a meaningful way.⁹⁶

In relation to human rights and human rights violations, international legal mechanisms that attempt to require individuals and nations to respect human rights do not apply to multinational corporations.⁹⁷ Often, only nations are held accountable for curtailing the human rights violations within their borders.⁹⁸ But as Professor Steven Ratner suggests,

simply extending the state's duties with respect to human rights to the business enterprise ignores the differences between the nature and functions of states and corporations. Just as the human rights regime governing states reflects a balance between individual liberty and the interests of the state (based on its nature and function), so any regime governing corporations must reflect a balance of individual liberties and business interest.⁹⁹

However, pharmaceutical companies are special cases because their business decisions directly impact human health.

Two solutions intend to target the pharmaceutical companies and end their inhumane treatment of human test subjects. The Alien Tort Claims Act (ATCA) has been proposed as a means to subject multinational corporations to damages for human rights violations (specifically failures to obtain informed consent).¹⁰⁰ The act states that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹⁰¹ In *Sosa v. Alvarez-Machain*, 542 U.S.

⁹⁴ Grossman & Bradlow, *supra* note 90, at 8.

⁹⁵ Grossman & Bradlow, *supra* note 90, at 9.

⁹⁶ Grossman & Bradlow, *supra* note 90, at 8.

⁹⁷ Dubin, *supra* note 88, at 37.

⁹⁸ *Id.*

⁹⁹ Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 493 (2001).

¹⁰⁰ Samantha Evans, *The Globalization of Drug Testing: Enforcing Informed Consent Through the Alien Tort Claims Act*, 19 TEMP. INT'L & COMP. L.J. 477, 478 (2005).

¹⁰¹ See Alien Tort Statute, 28 U.S.C. § 1350 (1948).

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692 (2004), the Court interpreted “law of nations” violations as failures to follow “specific, universal, and obligatory” laws.¹⁰² Such laws must arise from the “customs and usages of civilized nations” and be “resorted to by judicial tribunals... for trustworthy evidence of what the law really is.”¹⁰³ However, the Court severely limited the application of the ATCA by reasoning that it only provided a means of redress if the abuse complained of had been recognized as a violation of international law when the statute was enacted.¹⁰⁴ Scholars have asserted that the right to informed consent has attained the level of binding customary international law and qualifies as a ‘law of nations.’¹⁰⁵ Thus, “violating informed consent should be recognized as a new substantive cause of action under the ATCA.”¹⁰⁶

In application, however, the ATCA has serious drawbacks. First, the ATCA could disrupt the international comity doctrine. The international comity doctrine “counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.”¹⁰⁷ While, comity is not an obligatory notion, it is an important factor the U.S. has considered previously when applying U.S. law extraterritorially.¹⁰⁸ Thus, as a U.S. federal law, imposing the ATCA could undermine comity if a foreign jurisdiction already has a legitimate claim.

Second, the ATCA is a remedial solution coming into play only after clinical patients have been wronged. While the threat of an ATCA lawsuit may deter some pharmaceutical companies, such a solution fails tackle the problem before participants are harmed.

Finally, the ATCA failed the Nigerian plaintiffs in the *Abdullahi v. Pfizer*. The court held that “[t]he law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations.”¹⁰⁹ Thus, while the court recognized that, “non-consensual medical experimentation violates the law of nations, and therefore, the laws of the United States,” there was still no private

¹⁰² *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 (2004).

¹⁰³ Evans, *supra* note 100, at 484; *Sosa*, 124 S. Ct. at 2766.

¹⁰⁴ Fazal Khan, *The Human Factor: Globalizing Ethical Standards in Drug Trials Through Market Exclusion* 57 DEPAUL L. Rev. 877, 904 (2008).

¹⁰⁵ Evans, *supra* note 100, at 482-83.

¹⁰⁶ Evans, *supra* note 100, at 504-05.

¹⁰⁷ DuBois, *supra* note 46, at 196 (quoting *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1997)).

¹⁰⁸ *Id.* at 197.

¹⁰⁹ *Abdullahi v. Pfizer, Inc.*, No. 01-Civ.-8118, 2005 U.S. Dist. LEXIS 16126, at *26 (S.D.N.Y. Aug. 9, 2005) (quoting *Kadic v. Karadzic*, 70 F.3d 232, 246 (1995)).

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cause of action and plaintiffs lacked standing.¹¹⁰ After litigating under the ATCA for nearly fifteen years, the lawsuit was dismissed for lack of subject matter jurisdiction and *forum non conveniens*.¹¹¹

Professor Steven Ratner suggests another solution. Ratner would assign differing levels of corporate responsibility to companies according to their capacity to harm human dignity.¹¹² Determining that capacity would depend on four factors: the corporation's relationship with the government, its nexus to affected populations, the particular human right at issue, and the position an individual who has violated human rights is within the corporate structure.¹¹³

Under the first factor, the corporation's relationship with the government, Ratner asserts that, "where an enterprise has close ties to the government, it has *prima facie* a greater set of obligations in the area of human rights."¹¹⁴ Additionally, corporations that act as agents of the government or are complicit with government actions also incur liability for human rights violations.¹¹⁵ Some nations like the U.S. already have domestic laws that determine whether the acts of private individuals were so closely linked with the state as to make them liable for certain civil rights violations.¹¹⁶ This technique would hold private enterprises liable for human rights violations where the government has instructed them to engage in those violations.¹¹⁷ Thus, in the corporate responsibility balance, corporate duties would increase the closer a corporation is to the nation's government and governmental functions.¹¹⁸

Second, the corporations nexus to the affected populations revolves around Ratner's idea of the corporation's spheres of influence.¹¹⁹ A corporation would have the greatest obligation to protect the human rights of those individuals closest to the corporation—like affected employees.¹²⁰ That obligation would decline the further out the nexus connection is (affected family members of the employee, affected local community members, affected state citizens).¹²¹ Thus, the further away the affected population is from the corporation (physically or

¹¹⁰ *Id.* at *25; Khan, *supra* note 104, at 904.

¹¹¹ *Abdullahi*, 2005 U.S. Dist. LEXIS 16126, at *2.

¹¹² Ratner, *supra* note 99, at 496-97.

¹¹³ *Id.*

¹¹⁴ *Id.* at 497.

¹¹⁵ *Id.* at 499.

¹¹⁶ *Id.* at 497-98; 42 U.S.C. § 1983 (1994).

¹¹⁷ *Id.* at 500.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 507.

¹²⁰ *Id.* at 508.

¹²¹ *Id.*

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legally) the less responsibility the company would have to protect their human rights.¹²²

Third, Ratner then considers the particular human right(s) at issue and argues that corporate duties turn on a balancing of these human rights with the business's interests.¹²³ This method, Ratner explains, preserves the financial objective of a business entity and assigns responsibility differently than it would be assigned to states.¹²⁴ By way of example, Ratner explains that free speech may be infringed upon when balanced with private business interests in certain contexts:

[T]he right to free speech requires governments to refrain from penalizing individuals for speech critical of the government (as well as much other speech); but it would not require a company to refrain from penalizing employees for public speech that insults the company to consumers, lures away employees, or gives away trade secrets, since these actions impinge on core interests of the company.¹²⁵

Finally, Ratner suggests that assigning responsibility on a corporation depends upon the degree of control that corporation has over the agents involved in the human rights abuses.¹²⁶ The agency relationship between corporation and agent includes, but is not limited to, subsidiaries, contractors, distributors, franchisees, joint venture partners or any relationship where the, "economic dependence of one party upon the other effectively requires compliance with the dominant party's wishes."¹²⁷ The corporation would have a varying level of control over each.¹²⁸

Ratner's framework is a practical method for global and domestic actors to develop a set of duties under international law for business enterprises.¹²⁹ However, while it acknowledges the economic self-interests of multinational corporations and recognizes the fallacy of attempts to treat multinational corporations like states for the protection of human rights, without strict enforcement, unethical practices will continue.

¹²² *Id.*

¹²³ *Id.* at 511.

¹²⁴ *Id.*

¹²⁵ *Id.* at 514.

¹²⁶ *Id.* at 525.

¹²⁷ *Id.* at 519.

¹²⁸ *Id.*

¹²⁹ *Id.* at 524.

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More recent data on multinational corporations is promising; it illustrates that (1) reputation matters to multinational pharmaceutical companies, and (2) that multinational corporations are willing to spend substantial amounts of money towards maintaining or repairing their reputation. In 2015, two Johns Hopkins Bloomberg School of Public Health researchers published a study on multinational corporations that explored their mechanisms and motivations for ensuring corporate social responsibility.¹³⁰ The researchers interviewed representatives and reviewed publically-available corporate responsibility documents from GlaxoSmithKline, Janssen, Merck, Novartis, Pfizer, and Roche.¹³¹ At the time of the study, all of the companies had corporate social responsibility projects related to health in what the researchers called low-middle income countries.¹³² They all utilized differential pricing schemes for their products, whereby the same product was sold at different prices according to a country's economic viability.¹³³ And all but one company offered product donations.¹³⁴ The majority of companies were motivated to implement these programs due to the reputational benefit they derived, the competitive advantage it afforded them, and the philanthropic health impact.¹³⁵

However, as the report mentions, pharmaceutical companies are each at their own stage of understanding and implementing corporate responsibility.¹³⁶ In the study, participating companies admitted that they did not have a clear consensus on what corporate social responsibility meant and they identified the lack of key performance indicators, best practices, transparency and data as major challenges to achieving corporate social responsibility objectives.¹³⁷

III. INCENTIVIZING PHARMACEUTICAL COMPANIES TO PROTECT HUMAN RIGHTS

As Professor Ratner explains, any solution that seeks to hold pharmaceutical companies accountable for their human rights violations must keep in mind their economic self-interests.¹³⁸ Multinational

¹³⁰ Hayley Droppert & Sara Bennett, *Corporate Social Responsibility in Global Health: An Exploratory Study of Multinational Pharmaceutical Firms*, 11:15 *GLOBALIZATION AND HEALTH* 2, 1 (Apr. 5, 2016) <http://globalizationandhealth.biomedcentral.com/articles/10.1186/s12992-015-0100-5>.

¹³¹ *Id.* at 3.

¹³² *Id.* at 2.

¹³³ *Id.* at 4.

¹³⁴ *Id.* at 3-4.

¹³⁵ *Id.* at 6.

¹³⁶ *Id.* at 6.

¹³⁷ *Id.* at 7.

¹³⁸ Ratner, *supra* note 99, at 513-14.

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corporations generally do not act unless the benefits will outweigh the costs.¹³⁹

This note proposes that public opinion coupled with internally established corporate codes of conduct can enhance the safety of human subject participants in clinical trials by forcing companies to adhere to safety and ethical practices.

This solution would begin with NGOs. Instead of spending time and money on attempts to regulate multi-billion dollar corporations whose grandiose power surpasses even nations, NGO campaigns can shed light on clinical human rights violations to make consumers aware of the venality that stocks their medicine cabinets. With the spotlight shown brightly on the human rights abuses, public disapproval will lower the demand at least for non-life saving medications. Alternatively, continuous bad publicity would at least tarnish the image of large pharmaceutical companies and executives would make attempts to repair it.¹⁴⁰

After their unethical nature has been revealed, pharmaceutical companies could take two pathways towards voluntary compliance: a pharmaceutical industry heavy weight can take the opportunity to publically establish an internal code of conduct or ethics on human rights standards. To avoid more public shaming, such a company could enforce such a code on its medical personnel working in developing countries where trials take place. It would also publicize its efforts to quell the public's concerns. In light of the economic nature of pharmaceutical companies, economic competition will create an incentive for other pharmaceutical companies whose sales have been harmed by bad publicity to follow suit.

Alternatively, large pharmaceutical companies can collectively agree to establish codes of conduct together so that no single company is left to benefit from cheaper unethically performed trials.

This solution would not only protect the human rights of clinical trial participants, but it could also make drugs that enter the U.S. and Western Europe safer. About 128,000 patients in the United States die from prescription drugs each year and 200,000 die in Europe.¹⁴¹ These numbers are easily comparable to deaths from strokes (128, 978 in the U.S.), accidents (130, 557 in the U.S.), and chronic lower respiratory

¹³⁹ Dublin, *supra* note 88, at 65.

¹⁴⁰ Mark Kessel, *Restoring the Pharmaceutical Industry's Reputation*, NATURE BIOTECHNOLOGY (Oct. 9, 2014), <http://www.nature.com/nbt/journal/v32/n10/full/nbt.3036.html>.

¹⁴¹ Donald W. Light, *New Prescription Drugs: A Major Health Risk With Few Offsetting Advantages*, HARV. CTR. FOR ETHICS BLOG (June 27, 2014), <http://ethics.harvard.edu/blog/new-prescription-drugs-major-health-risk-few-offsetting-advantages>.

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diseases (149, 205 in the U.S.).¹⁴² Moreover, these are prescription drugs that have been deemed ‘safe’ by the FDA.¹⁴³ Regardless of how tenuous, there may be a correlation between these high numbers of deaths from prescription drugs and the haphazard clinical trials and FDA approvals illustrated by this note. Thus, even if Americans and Europeans turn a blind eye to the human rights violations of people from developing nations, an NGO spotlight should ignite public outrage for the correlation between American and European death and unregulated clinical trials.

Harnessing public disapproval to catalyze corporate change is not a new idea.¹⁴⁴ When diamond consumers began to learn about and fear ‘conflict diamonds’ in Africa, the World Diamond Council established a public-private partnership, called the Kimberley Process Certification Scheme (“Kimberly Process”). The Kimberly Process had an auditable certification protocol to assure consumers that profits from the sale of gems would not support governments or paramilitary groups that violated the human rights of civilians in conflict zones.¹⁴⁵ The Kimberly Process has since expanded and now covers most of the world’s trade in diamonds.¹⁴⁶ Starbucks Corporation similarly developed its “fair trade” coffees under its Coffee and Farmer Equity Practices program which guarantees that its coffee’s production and marketing does not harm workers or the environment.¹⁴⁷ Levis Strauss & Co. developed its Country Assessment Guidelines which amongst other items, determines whether the human rights environment of a particular country would prevent Levis Strauss from “conduct[ing] business activities in a manner that is consistent” with company policies that seek to protect community conditions.¹⁴⁸ Lastly, public awareness of sweatshop conditions prompted workplace codes of conduct in the apparel industry.¹⁴⁹

Using public criticism to instigate corporate ethics was also a method implemented in South Africa during Apartheid.¹⁵⁰ African-American minister Leon H. Sullivan created The Sullivan Principles

¹⁴² Centers for Disease Control and Prevention, National Center for Health Statistics, DEATHS AND MORTALITY, <http://www.cdc.gov/nchs/fastats/deaths.htm> (last updated Feb. 25, 2016).

¹⁴³ Barlett & Steele, *supra* note 8, at 8.

¹⁴⁴ Ralph G. Steinhardt, *Soft Law, Hard Markets: Competitive Self-Interest and The Emergence of Human Rights Responsibilities for Multinational Corporations*, 33 BROOK. J. INT’L L. 933, 939 (2008).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 940.

¹⁴⁸ *Id.* at 939 (quoting Levi Strauss & Co., Global Sourcing and Operating Guidelines, <http://www.levistrauss.com/Downloads/GSOG.pdf>).

¹⁴⁹ *Id.* at 940.

¹⁵⁰ Stratford P. Sherman, *Scoring Corporate Conduct in South Africa*, FORTUNE, July 9, 1984, at 168.

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which was a grading system where companies were evaluated based on how well they battled racism within their institutions.¹⁵¹ While many companies were reluctant to commit to ending discrimination, by signing the Sullivan Code (which bound them to The Principles), they needed to do so to fend off public relations battles, maintain stockholders, and avoid criticism from corporate superiors.¹⁵² In 1984, 125 companies included heavy weights like Exxon, Mobil, IBM, Citicorp, and Merck had all signed the Sullivan Code.¹⁵³

The Johns Hopkins corporate social responsibility research study further illustrates the power of public disapproval and provides a recent presentation of how the pharmaceutical industry is changing.¹⁵⁴ Strong public illuminations uncovered by NGOs can affect more reputation-saving behavior by multinational pharmaceutical companies and protect the human rights and dignities of clinical patients.

CONCLUSION

The number of clinical trials conducted in developing nations is slated to continue to rise. Large pharmaceutical companies will expand financially as well. This combination calls for a system which holds the most affecting actor in clinical trials responsible for protecting human rights. The pharmaceutical industry should follow the various industries in the past which have accepted their corporate responsibility to protect human rights in their business endeavors. Assigning corporate responsibility in this manner seeks a morally just objective placing the rights of human beings over the economic objectives of a multinational corporation. The current regulatory scheme offers remedial and ineffective solutions to haphazardly conducted foreign clinical trials. As illustrated in Part I, these regulations are often not enforced abroad. By implementing harmful publicity and prompting the development of internal codes of conduct, those who seek to protect human rights may have an effective opportunity to incite long-term change to the pharmaceutical industry.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Droppert and Bennett, *supra* note 130, at 1.

