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HOWARD HUMAN & CIVIL RIGHTS LAW REVIEW

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Howard Human & Civil Rights Law Review
Howard University School of Law
Notre Dame Hall, Rm. 419
2900 Van Ness Street, NW
Washington, DC 20008
202-806-8134
hersolicitationseditor@gmail.com

HOWARD HUMAN & CIVIL RIGHTS LAW REVIEW

TABLE OF CONTENTS

LETTER FROM THE EDITOR-IN-CHIEF	<i>Khaair J. Morrison</i>	v
---------------------------------------	---------------------------	---

FOREWORD.....	<i>Olivia M. Farrar</i>	vii
---------------	-------------------------	-----

ARTICLES & ESSAYS

EMPOWERING UP: REVERSING THE ECONOMIC LEGACY OF RACIAL SEGREGATION	<i>Kevin D. Judd</i>	1
---	----------------------	---

SOWING THE SEEDS OF HUMAN RIGHTS UPON “STONY PLACES” — THE STATE OF STATE REPORTING UNDER THE CHARTER OF THE AFRICAN HUMAN RIGHTS SYSTEM	<i>Eugene Kwadwo Boateng Mensah</i>	69
---	-------------------------------------	----

BANNING THE STARS AND BARS: HOW BANNING THE CONFEDERATE FLAG FURTHERS INTERNATIONAL LAWS ON HATE SPEECH	<i>Tiffany M. Cebrun</i>	103
---	--------------------------	-----

THE AFRICAN COURT AND HUMAN RIGHTS: WHAT LIES AHEAD FOR THE MERGED COURT?	<i>Florence Shu-Acquaye</i>	139
--	-----------------------------	-----

ESSAY: JUSTICE THURGOOD MARSHALL, GREAT DEFENDER OF FIRST AMENDMENT FREE-SPEECH RIGHTS FOR THE POWERLESS	<i>David L. Hudson, Jr.</i>	167
--	-----------------------------	-----

LETTER FROM THE EDITOR-IN-CHIEF

Dear Readers:

It is an honor and a pleasure to showcase a number of articles for Volume 2 of the Howard Human & Civil Rights Law Review. Our Law Review annually hosts the C. Clyde Ferguson Lecture, in dedication to one of our school's most beloved Deans and social engineering pioneers. Our lecture and Volume 2 of the Howard Human & Civil Rights Law Review continues to uphold his legacy of advocacy against social ills that plague our society and the broader global community.

As a law review still in our infancy, our editorial board and staff worked tirelessly to bring forth a volume that is not only timely but seeks through scholarship to boldly tackle the human and civil rights issues of our time. In this age of mass incarceration, growing income inequality, wars that are dismantling whole societies, and other troubling human rights violations in the U.S. and abroad, it is important that we acknowledge these problems and propose solutions for them. Volume 2 will present five pieces that add to the discussion of social justice in our global society.

Volume 2 begins with an essay by Kevin Judd, the former President of the National Bar Association and our illustrious keynote speaker for the 2017 Ferguson Lecture, entitled "*Empowering Up: Reversing the Economic Legacy of Racial Segregation*," which critically examines black economic infrastructure through a legal lens. Next, an article written by Eugene Kwadwo Boateng Mensah, entitled "*Sowing the Seeds of Human Rights upon 'Stony Places' - The State of State Reporting under the Charter of the African Human Rights System*," examines reporting human rights violations under Article 62 of the African Charter of Human and People's Rights. Tiffany Cebrun, our distinguished HCR alumnae and the winner of the prestigious Pauli Murray prize, authored an article entitled "*Banning the Stars and Bars: How Banning the Confederate Flag Furthers International Laws on Hate Speech*," critically examines banning the Confederate flag through international law. Florence Shu-Acquaye's article, entitled "*The African Court and Human Rights: What Lies Ahead for the Merged Court?*," discusses the history of the merged court's formation and its relationship to other regional African courts. The concluding essay by David L. Hudson Jr. is entitled "*Justice Thurgood Marshall, Great Defender of First Amendment Free-Speech Rights for the Powerless*," and analyzes Justice Marshall's opinions on the First Amendment.

I am sure you will find 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 Darin Johnson, Professor Lenese Herbert, and the rest of the Howard University School of Law community. I would also like to give special thanks to Professor Olivia Farrar & Ms. Jacqueline Young who will be departing the Law school but have been the bedrock on which HCR has rested year after year. 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 2 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, I would like to invite you to fully engage the discourse as you read the articles, thinking critically about ideas presented, and challenging their underlying assumptions. We look forward to your 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 conversation across the world.

KHAAIR J. MORRISON
Editor-in-Chief
Howard Human & Civil Rights Law Review

FOREWORD

OLIVIA M. FARRAR, HCR FACULTY ADVISOR

This issue of the *Howard Human & Civil Rights Law Review* exemplifies the multi-dimensionality of the human and civil rights space where practitioners, researchers, activists and lawyers can come together to do rights, assess rights, and research rights.

To begin with, the reality of rights is inherently pragmatic – what needs doing? how can we roll up our sleeves and get to work doing it? what combination of great ideas will truly effectuate change? There is a long and illustrious history of human and civil rights strategizing, from Gandhi to Charles Hamilton Houston, and in that tradition Kevin Judd’s article outlines very practical tactics for economic justice in the U.S.

Nevertheless, effectuating rights is a historically and culturally contingent task. In this next-generation moment in the history of rights, the first-generation rights Charters and institutions created during the Twentieth Century often need adaptation. To that end, the article by Eugene Kwadwo Boateng Mensah describes the difficulties with implementing the African Charter of Human and People’s Rights, candidly assessing the political and cultural shifts necessary to make this Charter take root effectively. Similarly, the article by Florence Shu-Acquaye on a merged court of human rights in Africa is a next-generation analysis of the obstacles that various human rights courts have faced in Africa.

And finally, human and civil rights are so often a question of perception: to move the rights conversation forward often requires a paradigm shift, a willingness to see what has been invisible or to hear the deafening silences. In this volume, Tiffany Cebrun’s article on the Confederate flag reframes the meaning of the flag in the context of free speech rights, allowing us to re-see this symbol as hate speech. Equally potently, David Hudson offers a new view of Thurgood Marshall’s jurisprudence on free speech, showing the Justice as an unsung hero of the First Amendment especially in his dissents and concurrences.

Pragmatism, adaptation, and rethinking – these are the hallmarks of effective rights research as well as activism, and all are present in the articles offered here. As faculty advisor for the *Howard Human & Civil Rights Law Review*, I am proud of the work the *Law Review*’s members have done to curate this Volume 2, and the thought-provoking contributions that the

authors make to the human and civil rights conversations happening around the world. We hope you find these pieces informative and intriguing, and that their seeds take root.

ARTICLE

Empowering Up: Reversing the Economic Legacy of Racial Segregation

KEVIN D. JUDD*

CONTENTS

I. INTRODUCTION	2
II. CURRENT ECONOMIC STATUS OF THE BLACK COMMUNITY	5
III. HISTORICAL – HOW DID WE GET HERE.....	6
IV. NECESSARY BUT INSUFFICIENT CONTEMPORARY EMPOWERMENT MODELS IN URBAN COMMUNITIES	9
V. SOLUTIONS – MOVING FORWARD AND THE IMPORTANCE OF REDRESS	17
A. The Economic Fund	21
B. The Educational Fund	38
C. The Political Fund	55
VI. PROPOSAL – NATIONAL BAR ASSOCIATION AND BLACK LAWYERS ACTIVISM ENTREPRENEURSHIP	65
VII. CONCLUSION.....	68

* Kevin D. Judd is an attorney, prominent bar leader and legal advocate, where he serves as a bankruptcy counselor, Arbitrator for the Financial Industry Regulatory Authority, member on the Local Rules Advisory Committee for the United States Bankruptcy Court for the District of Columbia and a Fellow of the American Bar Association Foundation. Mr. Judd and Mr. Waterhouse would like to extend special thank you to their research assistants, DeVon Barnett, Leon Horton, IV, and Chayanne Tweh, who are recent graduates of Howard University School of Law. He would also like to give a special thank you to Carlton Waterhouse for serving as a senior adviser in preparation for his remarks.

I. INTRODUCTION:

Imagine this, several hundred black communities across the country without substantial criminal activity or over policing and with an abundance of black judges and prosecutors, excellent schools, healthy food sources, and excellent medical services. Despite rampant cynicism and pessimism, this is possible. For more than six generations, America's dominant educational, economic, and political structures have avoided significant investment in predominantly African American communities.¹ Through public and private partnerships between government and private businesses, predominantly African American communities have been denied the public and private investments essential to prosperity—not to mention equal public services. Instead, these communities have been targeted by political and business leaders to provide a surplus of low wage labor force, rent, taxes, and policing profits from fines, fees, and court costs. From South Central Los Angeles to Baltimore, black communities have been shaped by a lack of public and private resources in their educational, economic, and political infrastructure. Poverty, low educational attainment, criminal activity, and deteriorating infrastructure characterize too many African American neighborhoods that are hyper-segregated by race and class. Although predominantly black communities reveal a range of educational outcomes, property values, criminality, and economic status, they all experience the adverse effects of America's racialized valuation of spaces and places. Accordingly, middle and upper-middle class black communities lack comparable property valuations, amenities, and investments in education and infrastructure.²

Under the nation's current paradigm of colorblind racism and dog whistle politics, this reality is fixed.³ The adversity and hardships faced by black community residents is viewed by many whites as an intractable result of black pathology and cultural inferiority.⁴ However, this paradigm and the reality it maintains can change if black communities are empowered to become economically self-sufficient

1. See generally DANIEL IMMERGLUCK, *CREDIT TO THE COMMUNITY: COMMUNITY REINVESTMENT AND FAIR LENDING POLICY IN THE U.S.* (2015); see also Daniel Immergluck, *Neighborhoods, Race, and Capital: The Effects of Residential Change on Commercial Investment Patterns*, 34 URB. AFF. REV., 397, 397-411 (1999).

2. Amy Helling & David S. Sawicki, *Race and residential accessibility to shopping and services*, 14 HOUSING POL'Y DEBATE 69 (2003).

3. See generally, EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS* (5th ed. 2018); IAN HANEY LOPEZ, *DOG WHISTLE POLITICS* (2015).

4. BONILLA-SILVA, *supra* note 3, at 7.

Reversing the Economic Legacy of Racial Segregation

and imbued with the institutional structures to foster economic empowerment and economic independence. Independence in this sense does not mean divorced from the broader economic system of the locale or region. Instead, it means that these institutions would drive economic opportunities in and around the communities. This idea is not new. During Martin Luther King's historic mountain top speech, he spoke of strengthening black institutions and economic independence as a key component to the uplifting of black communities.

But not only that, we've got to strengthen black institutions. I call upon you to take your money out of the banks downtown and deposit your money in Tri-State Bank. We want a "bank-in" movement in Memphis. Go by the savings and loan association. I'm not asking you something that we don't do ourselves at Southern Christian Leadership Conference (SCLC). Judge Hooks and others will tell you that we have an account here in the savings and loan association from the SCLC. We are telling you to follow what we are doing. Put your money there. You have six or seven black insurance companies here in the city of Memphis. Take out your insurance there. We want to have an "insurance-in." Now these are some practical things that we can do. We begin the process of building a greater economic base.⁵

Rather than a call for black separatism, Dr. King emphasized strengthening black institutions. This was a pragmatic response to the persistent and pervasive marginalization of African Americans within white social, political, educational, and economic spaces. With exceptions, America's white majority today still inhabits highly segregated social and educational worlds. Research shows that most whites today view spaces with too many African Americans as dangerous or undesirable.⁶ Accordingly, when the influx of black residents into predominantly white areas becomes too great, white residents disinvest resources from those communities in the form of business patronage, school attendance, property ownership, and property tax payments. Similarly, most whites who move into predominantly black spaces as urban pioneers only do so when a racial gentrification of the neighbor-

5. Martin Luther King Jr., *I've Been to the Mountaintop*, Address at Mason Temple Church of God in Christ Headquarters (Apr. 3, 1968).

6. "A large literature on neighborhood preferences consistently finds that Whites report unwillingness to move into neighborhoods with even a small African-American population" Jeffrey M. Timberlake & Elaina Johns-Wolfe, *Neighborhood Ethnoracial Composition and Gentrification in Chicago and New York, 1980 to 2010*, *URB. AFF. REV.*, 53, 238 (2016) (citing Bobo & Zubrinsky 1996; Farley et al. 1978; Farley et al. 1994; Krysan & Bader 2007; Timberlake 2000; Zubrinsky & Bobo 1996).

hood is anticipated.⁷ Consequently, predominantly black communities will have to purposefully invest in the institutions within these spaces to secure their success, as most whites will create an economic undercurrent that pulls financial and other resources in the opposite direction.

This article contends that legal racial discrimination excluded African Americans from wealth creation and transfer for over three centuries of American history. Racial discrimination in banking, real estate, commerce, employment, and the criminal justice system limited the wealth and skills acquired by African Americans individually and collectively over the course of seventeen generations. Research makes clear that the most significant disparities resulted from discriminatory policies during the twentieth century. Moreover, well-documented racial discrimination in lending, housing, employment, and criminal enforcement continue to suppress African American spending power, opportunities, and competitiveness. Hyper-segregation represents a particularly pernicious problem for many African Americans by limiting educational achievements, employment outcomes, and wealth.

Although, some African Americans have made significant financial accomplishments individually and through business enterprises, they represent exceptions. Reversing these longstanding economic realities requires a threefold approach: first, there must be governmental redress for past practices of racial discrimination during the Jim Crow Era that directly curtailed the economic well-being of African American families alive today to atone for those past practices; second, African American organizations must dedicate more time and resources to increasing the numbers and capacities of successful African American owned businesses; and third, everyone committed to equality and racial justice must recognize the relationship between their personal spending habits and these goals.

During the National Bar Association's (NBA) 2016 Annual Convention, the NBA took a stance on economic empowerment, because they realized that it is a social justice item, which will become the next big civil rights fight that African-Americans must contend with to ensure that black children will have a promising future. If successful, the

7. See Derek Hyra, *The back-to-the-city movement: Neighbourhood redevelopment and processes of political and cultural displacement*, 52 URB. STUD. 1753, 1757 (2015), for a discussion on the racial transformation of Washington D.C.'s historic African American Shaw U Street neighborhood to a majority white population).

Reversing the Economic Legacy of Racial Segregation

efforts will lead to: (a) the creation of new businesses in underserved neighborhoods, where these businesses will hire people who live in underserved communities; (b) decreased violence by providing folks with an alternative to crime and boosting self-esteem; and (c) decreased overbearing police practices in these neighborhoods, which foster police brutality.

II. CURRENT ECONOMIC STATUS OF THE BLACK COMMUNITY

High rates of ethnic immigrant family owned businesses in predominantly black communities can create an inverse relationship between purchasing and community member wealth creation when business owners live outside the community and limit or exclude African Americans from employment.⁸ This phenomenon coupled with the low African American business ownership rate contributes to a substantial deficit between African American purchasing power and African American wealth creation, which necessitates change in the economic advancement of black community residents.⁹

In 2013, African American spending power was \$1 trillion, and is expected to increase to \$1.3 trillion this year.¹⁰ At the same time, black families have significantly less wealth than whites. In 2013, white net worth (\$141,900) was 13 times greater than black net worth (\$11,000).¹¹ While black people make up 13% of the U.S. population, only 9.4% of all firms are black-owned, while 78% of all firms are white-owned.¹² According to the U.S. Census Bureau's Survey of Business Owners, from 2002 to 2007, the number of black-owned businesses increased by 60.5% to 1.9 million, more than triple the national

8. See Benjamin Means, *Wealth Inequality and Family Businesses*, 65 EMORY L.J. 937, 979 (2016).

9. James Clingman, *The Growing Black Trade Deficit*, HOUSTON FORWARD TIMES (June 29, 2016), <http://forwardtimes.com/growing-black-trade-deficit/>.

10. Nielsen, *African-American Consumers Are More Relevant Than Ever*, Nielsen (Sep. 19, 2013), <http://www.nielsen.com/us/en/insights/news/2013/african-american-consumers-are-more-relevant-than-ever.html>.

11. Rakesh Kocchar & Richard Fry, *Wealth inequality has widened, along racial, ethnic lines since end of Great Recession*, Pewresearch.org (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/>.

12. U.S. Census Bureau, *Statistics of All U.S. Firms by Industry, Gender, Ethnicity, and Race*, United States Census, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2012_00CSA01&prodTtype=table (last visited Apr. 1, 2018).

rate of 18%.¹³ Over the same period, receipts generated by black-owned businesses increased by 55.1% to \$137.5 billion.¹⁴ In 2012, the number of black-owned business increased to 2.6 million.¹⁵ However, the highest percentage of African American businesses are in “other services”—repair and maintenance (automotive, consumer electronics, etc.) and personal services (hair/nail salons, dry cleaning, pet care), followed by the health care and social assistance sector.¹⁶

Large retail establishments are deserting African American communities, creating “retail deserts.” Similarly, many African American neighborhoods lack healthy fresh produce, milk, and meat, earning them the title of “food deserts.”¹⁷ Black communities have, previously, relied on major chains to help with this problem. In 2011, Michelle Obama announced that stores, such as Walmart pledged to open more stores in communities where finding healthy food was difficult.¹⁸ However, in 2016, Walmart closed 154 stores, creating three new food deserts and leaving 31 neighborhoods in 15 states without anywhere to buy fresh produce and meat.¹⁹ Also, two years ago, Walmart pulled out of an agreement to build two new stores in the Northeast and Southeast sections of Washington, D.C.

III. HISTORICAL – HOW DID WE GET HERE:

When the first slaves were brought to the New World in 1619, their bodies and intellectual capital were exploited for the benefit of white landowners. This exploitation of black bodies and minds continued in a vicious system of chattel slavery that was the backbone of the

13. U.S. Census Bureau, *Census Bureau Reports the Number of Black-Owned Businesses Increased at Triple the National Rate*, United States Census (Feb. 8, 2011), https://www.census.gov/newsroom/releases/archives/business_ownership/cb11-24.html.

14. *Id.*

15. U.S. Census Bureau, *Los Angeles County a Microcosm of Nation's Diverse Collection of Business Owners*, *Census Bureau Reports*, United States Census (Dec. 15, 2015), <https://www.census.gov/newsroom/press-releases/2015/cb15-209.html>.

16. U.S. Census Bureau, *FFF: Black (African-American) History Month: February 2016*, United States Census (Jan. 1, 2016), <https://www.census.gov/newsroom/facts-for-features/2016/cb16-ff01.html>.

17. Bonnie Ghosh-Dastidar et al., *Distance to Store, Food Prices, and Obesity in Urban Food Deserts*, 47 AM. J. OF PREVENTIVE MED. 58 (2014).

18. Beth Marlowe, *Michelle Obama joins forces with Walmart, Walgreens to battle food deserts*, WASH. POST (July 20, 2011), https://www.washingtonpost.com/blogs/44/post/michelle-obama-joins-forces-with-walmart-walgreens-to-battle-food-deserts/2011/07/20/gIQAkn7oPI_blog.html?utm_term=.882d3c204339.

19. CBS News, *Walmart Shutdowns Create New Food Deserts*, CBS NEWS (Jan. 27, 2016), <http://www.cbsnews.com/news/walmart-shutdowns-create-new-food-deserts/>.

Reversing the Economic Legacy of Racial Segregation

American economy for two and a half centuries.²⁰ By 1840, slaves in the American South produced over 60% of the world's cotton.²¹ As black Americans currently struggle to obtain and retain wealth, we must look to American chattel slavery as a starting point. Slavery redistributed income and wealth earned through black labor to generations of white Americans. Some estimates show that the stolen income from black Americans, from slavery alone, ranges from \$2 to \$10 trillion of today's dollars.²²

Reconstruction was one of the most progressive periods for African Americans in American history due to advancements in education, land ownership, and political representation.²³ However, immediately after the Civil War, pervasive discrimination, exclusions, and terrorism of the Jim Crow Era destroyed much of economic progress achieved by African Americans. One Associated Press report detailed 406 cases of land theft against black landowners encompassing over 24,000 acres in the first three decades following Reconstruction.²⁴ Post Reconstruction, the vast majority of African Americans continued to live in the South.²⁵ However, segregationist policies were pervasive throughout American society. Sports, entertainment, education, industry, and the military were all segregated entities that limited the participation of blacks or excluded them altogether, thereby curtailing their opportunities to create or acquire wealth.²⁶

Even as laws have changed to help improve the predicament of African Americans, there have been many obstacles to overcome. Housing discrimination, systemic racism, limited access to credit and

20. See Robert S. Browne, *The Economic Case for Reparations to Black America*, 62 AM. ECON. REV. 39, 41 (1972).

21. Jack Klipfel, *International Economies and Slavery*, Washington State University (Aug. 31, 2014), <https://history105.libraries.wsu.edu/fadll2014/2014/08/31/economy-and-slavery-2/>.

22. William Darity & Dania Frank, *The Economics of Reparations*, AM. ECON. REV. 326, 328 (2003).

23. Library of Congress, *The African American Odyssey: The Quest for Full Citizenship – Reconstruction and Its Aftermath*, Library of Congress, <https://www.loc.gov/exhibits/african-american-odyssey/reconstruction.html>.

24. Todd Lewan & Delores Barclay, *When They Steal Your Land, They Steal Your Future*, LA Times (Dec. 2, 2001), <http://articles.latimes.com/2001/dec/02/news/mn-10514/3> (Part one of *Torn From the Land*, an Associated Press series on the systematic taking of land from African Americans after Reconstruction).

25. LIBRARY OF CONGRESS *supra* note 23.

26. See generally, RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017); PAULI MURRAY, *STATES LAWS ON RACE AND COLOR* (1997); DONALD G. NIEMAN, *AFRICAN AMERICANS AND THE EMERGENCE OF SEGREGATION 1865-1900* (1994); THOMAS SUGRUE, *THE SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* (2008); GERALD AS-
TOR, *THE RIGHT TO FIGHT* (1998); KENNETH L. SHROPSHIRE, IN *BLACK AND WHITE: RACE AND SPORTS IN AMERICA* (1998).

capital, predatory lending, and the prison industrial complex all mark reality for most African Americans today.²⁷ These realities are what continue to exacerbate the racial wealth gap that was started during slavery but grew exponentially during the Jim Crow Era.²⁸ The typical white household has 16 times the wealth of the typical black household.²⁹ One major contributor to wealth is the equity acquired through home ownership. Over the life of the average mortgage, homes in predominantly white neighborhoods appreciate \$28,000 more than homes in black neighborhoods.³⁰ Even when African Americans are able to own homes, they are at a disadvantage in how this most important asset appreciates in value.³¹

The historic recession of 2008 affected various aspects of the United States economy, including home ownership, inadequate education, and employment. These aspects played a significant role in widening the racial wealth gap.³² Currently, there are only 24 banks in the United States that have majority Black ownership, which counts for less than half of one percent of all U.S. banks.³³ This is a decline from the 45 majority black-owned banks that existed in 2007, prior to the recession.³⁴ These banks serve a critical role in African Americans' access to banking resources and financing for homes and businesses.

27. See Devah Pager & Hannah Shepard, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 181-89 (2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2915460/> (article defines and determines methodology for measuring discrimination, then reviews the findings of major studies on discrimination in the four areas).

28. Governmentally sanctioned housing discrimination drastically grew racial wealth disparities; Laura Shin, *The Racial Wealth Gap: Why A Typical White Household Has 16 Times The Wealth Of A Black One*, FORBES (Mar. 26, 2015, 8:00 AM), available at: <https://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/#10de8efaf45>.

29. *Id.*

30. NPR, *The Hidden Cost of Being African American*, NPR.org (Feb. 2, 2004), <http://www.npr.org/templates/story/story.php?storyId=1629067> (Recorded interview of Thomas Shapiro speaking on how wealth perpetuates inequality).

31. See Katrin B. Anacker, *Still Paying the Race Tax? Analyzing Property Values in Homogeneous and Mixed-Race Suburbs*, 32 J. URB. AFF. 1 (2016); Katrin B. Anacker, *Shaky Palaces? Analyzing Property Values and their Appreciation in Minority First Suburb*, 36 INT'L J. URB. & REGIONAL RES. 791, 791-816 (2012).

32. See Gillian B. White, *The Recession's Racial Slant*, THE ATLANTIC, [www.theatlantic.com](http://www.theatlantic.com/business/archive/2015/06/black-recession-housing-race/396725/) (June 24, 2015), <https://www.theatlantic.com/business/archive/2015/06/black-recession-housing-race/396725/>.

33. Michael A. Fletcher, *The Country's Last Black-Owned Banks are in a Fight for Their Survival*, WASH. POST (Feb. 13, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/02/13/the-countrys-last-black-owned-banks-are-in-a-fight-for-their-survival/?utm_term=.36a19c0bec9.

34. *Id.*

Reversing the Economic Legacy of Racial Segregation

Legal professionals and others committed to racial justice should evaluate how they can use existing policies and current economic empowerment models, coupled with creative social engineering to address historic and contemporary inequities.

IV. NECESSARY BUT INSUFFICIENT CONTEMPORARY ECONOMIC EMPOWERMENT MODELS IN URBAN COMMUNITIES

Communities that are distressed lean on different entities to support the commerce, housing, health, and education sectors. Although this article's discussion focuses on the empowerment of black communities, a correlation can be made between the lack of stability and growth in these areas with other communities experiencing economic instability. Research demonstrates that depending on the city, each sector plays a different role in establishing the platform for economic growth. For long-term empowerment, there is a harmonious effort between the government, capital investors, and the institutions that sit at the center of the economic empowerment process.³⁵ Private equity firms designate private investments in small businesses that affect broader economic activity. These small businesses include those that sell consumer goods and provide basic services. This section surveys contemporary economic models that could be used to enhance the quality of life in black communities as a response to the harms caused by the pervasive discrimination of the Jim Crow Era and the continued marginalization experienced by African Americans since then.

1. Anchor Institutions - Colleges and Universities

An anchor institution is a large organization that is geographically and economically cemented in the community. For example, universities and hospitals are currently major job creators in major metropolitan areas.³⁶ What is important to note is that these institutions need the city just as much as the inner cities need them.³⁷ To go a little further, small universities are economic stimulators in local econ-

35. Rural areas, which are also disenfranchised, will not be addressed due to space limitations and the heavy concentration of African Americans in the country's metropolitan service areas.

36. Eugenie Birch, et. al., *Universities as Anchor Institutions*. 17 J. HIGHER EDUC. OUTREACH & ENGAGEMENT 7 (2013).

37. See generally, TRACEY ROSS, CTR. FOR AM. PROGRESS, EDS, MEDS, AND THE FEDS: HOW THE FEDERAL GOVERNMENT CAN FOSTER THE ROLE OF ANCHOR INSTITUTIONS IN COMMUNITY REVITALIZATION 1-2 (2014).

omies.³⁸ Most students stay at schools after they graduate and seek jobs or at least stay in the area to find work.³⁹ Student spending was used in a study to determine the impact of small universities.⁴⁰ Moreover, historically black colleges and universities not only produce jobs, but they curate entrepreneurs through tech start-up incubators.

- Howard University recently received a million-dollar grant to fund underrepresented small businesses that operate in the technology space.⁴¹ The University of Pennsylvania partners with other anchors in the city for a Home Buy Now program to purchase homes in nearby neighborhoods.⁴² This program has made 384 matching grants, totaling \$1.2 million for employees to purchase homes in targeted neighborhoods.⁴³ The University of Pennsylvania's Netter Center for Community Partnerships has taken local public schools and turned them into neighborhood "hubs" that provide important services for the local community.⁴⁴ Baltimore has a revitalization program started by Johns Hopkins University that gives preference of new housing to predominantly black, East Baltimore residents who were forced to relocate.⁴⁵

2. Community Development Corporations

A **community development corporation (CDC)** is a not-for-profit organization incorporated to provide programs, offer services, and engage in other activities that promote and support **community development**.⁴⁶ CDCs usually serve a geographic location such as a neighborhood or a town. Economic development institutions

38. *Id.*

39. *Id.*

40. Annette Steinacker, *The Economic Effect of Urban Colleges on their Surrounding Communities*, *Urban Studies*, Vol. 42, No. 7, 1161–1175, 2005. <http://www.uky.edu/ie/sites/www.uky.edu.ie/files/uploads/Urban%20Studies%20-%20University%20Impact.pdf>.

41. Carolyn M. Brown, *Howard University Breaks Ground On \$1 Million Incubator For Startups*, *Blackenterprise* (Dec. 20, 2016), <http://www.blackenterprise.com/small-business/howard-university-breaks-ground-on-1-million-innovation-incubator-for-startups/>.

42. Chris Schildt and Victor Rubin, *Leveraging Anchor Institutions for Economic Inclusion*, *PolicyLink* (2015), http://www.policylink.org/sites/default/files/pl_brief_anchor_012315_a.pdf.

43. *Id.*

44. *Universities-Communities-Schools: Partners for Change*, Netter Center for Community Partnerships (2014), https://www.nettercenter.upenn.edu/sites/netter_internal/files/Netter_Center_Case_Statement_2014.pdf.

45. *Johns Hopkins Lives Here: City of Baltimore*, Johns Hopkins, (2011), http://web.jhu.edu/administration/gcpa/EIR_PDFs/JH%20Baltimore%20Apr5-11%20lowres.pdf.

46. *Community Development Corporations: Information Guide*, University of Alabama, (2013).

Reversing the Economic Legacy of Racial Segregation

originated during the worst times of urban distress. The need for economic stimulation led to the creation of CDCs.⁴⁷ CDCs, along with financial intermediaries, assist local residents of economically distressed areas to improve their quality of life.⁴⁸

Examples:

- A 1980 organization called Local Initiatives Support Corporation (LISC) was established through a \$9 million grant from the Ford Foundation to establish the LISC.⁴⁹ Up to 2008, LISC has assisted in \$33.9 billion in total development of 277,000 affordable homes.⁵⁰
- In 1995, Harlem initiated community development projects called the Harlem Urban Development Corporation to help create economic stability in Harlem, NY. Established in 1967, Bedford Stuyvesant Restoration Corporation fosters economic self-sufficiency and promotes the arts and culture in Brooklyn, NY.⁵¹

3. Community Development Financial Institutions

Community development financial institutions (CDFIs) are private financial institutions that are dedicated to delivering responsible, affordable lending to help low-income, low-wealth, and other disadvantaged businesses and communities join the economic mainstream.⁵² There is a list of over 600 CDFIs. These institutions were created to provide capital access to underserved markets in major inner cities across the country.⁵³ To ensure this capital access, CDFIs

47. David P. Varady et al., *Community Entrepreneurship in Deprived Neighbourhoods: Comparing UK Community Enterprises with US Community Development Corporations*, (2015), <http://ftp.iza.org/4P8777.pdf>.

48. *Id.*

49. Sahar Rakin, *Building Sustainable Communities: A Progress Report on Meeting LISC's Next Generation of Challenges and Fulfilling the Promise of Community Development* (2015), <http://www.stablecommunities.org/sites/all/files/library/762/building-sustainable-communities-lisc.pdf>.

50. *Id.*

51. Daniel L. Coleman, *How Fleet Development Ventures Invests in Underserved Markets*, Community Affairs OnLine News Articles, (Nov. 11, 2016, 10:00 AM), https://occ.gov/static/community-affairs/community-developments-newsletter/CD_winter03/images/howflex.pdf.

52. *Ensuring a Safe and Sound Federal Banking System for All Americans*, Office of the Comptroller of the Currency, <https://www.occ.gov/topics/community-affairs/resource-directories/cd-bank-and-financial-institution/index-cd-bank-and-financial-institution.html>.

53. Dennis Rondinelli, *The Changing Forces of Urban Economic Development: Globalization and City Competitiveness in the 21st Century*, (Nov. 11, 2016, 11:00 AM), <http://www.nsl.ethz.ch/displus/140/docs/article4.pdf>.

create programs that provide incentives for private equity to make investments in small businesses in these areas of need.⁵⁴

4. Community Land Trusts

Community land trusts are nonprofit, community-based organizations whose mission is to provide affordable housing in perpetuity by owning land and leasing it to those who live in houses built on that land.⁵⁵ In the classic community land trust model, membership is comprised of those who live in the leased housing, leaseholders; those who live in the targeted area, community members; and local representatives from government, funding agencies and the nonprofit sector, public interest.⁵⁶ Community land trusts are unique among U.S. community-based organizations in that their concerns are geographically focused and include economic relationships, the governance structure of the organization, and the provision of direct services.⁵⁷ A good example of a Community Land Trust is the Black Family Land Trust, Inc., an organization that was started in 2004, which is dedicated to the preservation and protection of African American landowner assets.⁵⁸

5. Co-operative Ownerships

A co-operative ownership is an autonomous association of people united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly owned and democratically controlled business.⁵⁹

Examples:

- The Bronx-based, worker-owned Co-operative Home Care Associates (CHCA) started in 1985 with 12 home health care providers, dedicated to a quality care through quality jobs

54. *Id.*

55. Overview: Community Land Trusts, Community-Wealth, <http://community-wealth.org/strategies/panel/clts/index.html>

56. Emily Thaden, et al, *Land Banks & Community Land Trusts: Not Synonyms or Antonyms. Complements, Roofline: The Shelterforce Blog*, (Nov. 9, 2016), http://www.rooflines.org/4684/land_banks_community_land_trusts_not_synonyms_or_antonyms_complements.

57. Rosalind Greenstein, *Community Land Trusts: Leasing Land for Affordable Housing*, (Dec. 19, 2016, 12:15 PM), <http://www.lincolnst.edu/publications/articles/community-land-trusts>.

58. Sheila McGroarty-Klyza, *Preserving African-American Land Heritage*, Land Trust All., <http://www.landtrustalliance.org/success-story/preserving-african-american-land-heritage>. (last visited Dec. 20, 2016).

59. *Co-operative Identity, Values & Principles*, Int'l Co-operative All., <https://ica.coop/en/whats-co-op/co-operative-identity-values-principles> (last visited Oct. 1, 2017).

Reversing the Economic Legacy of Racial Segregation

mission. Today, the agency employs more than 2,050 staff, nearly all Latina and African American women, and stands as the largest worker co-operative in the United States. CHCA improves care for thousands of low-income city residents, provides protection, economic control (control over income, work rules, and asset ownership) by the dispossessed and landless, services for the underserved.⁶⁰

- SSC Employment Agency in Baltimore, Maryland, is a worker-owned co-operative temporary services agency. It was sponsored by Baltimore BUILD, a community organizing and advocacy organization, that was developed in 1997 to assist businesses which help employ “hard to employ” local residents, develop their skills and mobility, and provide good jobs with ownership possibilities.⁶¹ In 2000, the agency placed 260 employees in hospitality jobs. An important part of the SSC’s mission is to help employees become owners and give them a voice in the agency. After 160 hours as an employee, workers are eligible to apply to become members at an investment of \$100. The co-operative is working to help educate worker-owners about business management and plans to transition to a fully worker owned company in the near future.⁶²

6. Capital Investors

Large to medium sized startups need funding to be successful. Capital Investors are key entities that infuse the necessary capital to these businesses. Below, are examples of Capital Investors that have been leading the industry in providing capital in urban communities.

- The Initiative for a Competitive Inner City (ICIC) is a national nonprofit research and advisory organization. This organization commands a strong foothold in directing capital investments to distressed urban areas with emerging businesses.⁶³
- The Inner-City Capital Connections, partnered with Bank of America, is a program that supports the development of inner

60. Cooperative Home Care Associates (CHCA), B Lab, <https://www.bcorporation.net/community/cooperative-home-care-associates>. (last visited Dec. 22, 2016.)

61. Jessica G. Nembhard, *Coop. Ownership in the Struggle for African American Econ. Empowerment*, 11, Univ. of M.D., <http://staging-community-wealth.org/sites/default/files/downloads/paper-nembhard04.pdf> (Sept. 2004).

62. *Id.*

63. COOPERATIVE HOME CARE ASSOCIATES, *supra* note 60.

city businesses through private economic prosperity. This ICIC program has developed an impressive decade-long portfolio of raising \$1.32 billion in capital investments and creating 11,000 jobs in distressed communities.⁶⁴

- Community Preservation Corporation (CPC) is a nonprofit community developer that redevelops dilapidated homes in New York, Connecticut and New Jersey. Thus far, CPC has produced over 120,000 housing units.⁶⁵
- The Bay Area Smart Growth Fund is a \$65 million private equity fund formed in 2001 to invest in commercial and residential real estate projects in 46 low and moderate-income neighborhoods in the nine-county “Bay Area” of Northern California.⁶⁶
- JP Morgan Bay Area Equity Fund (BAEF) is a venture capital fund that invests in small businesses in California’s Bay Area. BAEF provides low-income jobs by investing in companies that effectively have impact on broader economic activity. These companies include companies that sell consumer products. Other companies can provide similar opportunities.⁶⁷
- JP Morgan offers a program called Small Business Forward. Since minority owned businesses struggle to get access to traditional capital through loans from private lenders and even the Small Business Administration, JP Morgan has pledged \$75 million dollars to support minority owned businesses.⁶⁸
- Yucaipa Corporate Initiatives Fund invests in minority owned businesses through pension funds. They also represent a

64. Leveraging Colleges and Universities for Urban Economic Revitalization: An Action Agenda. (Nov. 12, 2016), http://icic.org/wp-content/uploads/2016/04/ICIC_Leveraging-Colleges.pdf?x96880.

65. Letter from The Community Pres. Corp. on the Community Reinvestment Act and Interagency Questions Regarding Community Reinvestment to the Office of the Comptroller of the Currency, The FDIC, Board of Governors of the Federal Reserve System and the Office of Thrift Supervision (Sept. 7, 2007), (on file with author). Paul Ong.

66. *New Frontiers in Mission-Related Investing*, THE F.B. HERON FOUND. 8 (2004), <http://www.heron.org/engage/publications/new-frontiers-mission-related-investing>.

67. *Id.*

68. *JPMorgan Chase & Co. Commits \$75 Million to Increase Access to Capital for Women, Minority and Veteran-Owned Small Businesses*, JPMorgan Chase & Co., <https://www.jpmorgan.com/corporate/news/pr/sbf-supports-new-capital-referral-program-for-loans.htm> (Oct. 17, 2016).

Reversing the Economic Legacy of Racial Segregation

strong intermediary between other companies and investment capital for minority owned businesses.

7. Tax Incremental Financing

Tax Incremental Financing (TIF) is when local governments freeze property taxes that go to local budgets and then redirects tax increments to economic development. This leads to increased private investment in the area in the form of new small businesses and housing development.⁶⁹ Forty-nine states have enacted TIF legislation. Local governments in Chicago and Minneapolis have taken advantage of this for decades.⁷⁰

8. Public Investment

Public investment in business is imperative to maintaining longevity for entrepreneurial ventures in their communities. It is a pledge to the community that the government supports their business. Although African Americans have historically applied for and or been granted very low numbers of public grants and loans, they remain a viable source of support. Maintenance of ownership leads to greater opportunities for wealth. There are methods to maintain that ownership and then leverage this ownership to spur more growth in the African American community.

9. Small Business Administration

An underutilized source of capital for many African American entrepreneurs is the Small Business Administration (SBA), a federal entity that increases the availability of small business loans by limiting the risk exposure of participating lenders.⁷¹ The SBA screens and approves participating lenders to control for the quality of both the lenders and the products it supports. Community Advantage is a program that also targets minority and underserved borrowers. Community Advantage seeks improved portfolio performance by placing more

69. T. Williams Lester, *Does Chicago's Tax Increment Financing (TIF) Program Pass the 'But-For' Test? Job Creation and Economic Development Impacts Using Time Series Data*, Univ. of N.C. (April 2013).

70. See LESTER *supra* note 69; see also Atang Gilika, *Does Tax Increment Financing (TIF) Favor Properties Adjacent to the Development Site*. Forthcoming in *Urban Studies*, (Nov. 10, 2016, 9:00 PM), <https://www.minneapolisfed.org/~media/files/mea/contest/2009papers/gilika.pdf?la=EN>.

71. *Investing in the Success of African-American-Owned Small Businesses: Recommendations for Increasing Access to Capital*, 3 VDEC (Oct. 2015).

emphasis on technical assistance and encouraging participation by mission focused lenders.⁷²

The foregoing tools reveal that America's legal and economic structures are replete with instruments that could have been, and still can be, used to empower predominantly black communities. Long-standing and contemporary hardships facing many African American urban neighborhoods result more from a lack of interest and willingness to invest in those communities and their residents than a shortage of vehicles to do so. The panoply of mechanisms above, which are used routinely in the gentrification process to transform communities, have worked effectively in New York, Washington, D.C., Atlanta, and other cities across the country with one drawback. The infrastructure and institutional transformation of these tools produced, have also been accompanied by a racial transformation in the community makeup. Unfortunately, under the current paradigm, although these tools may be necessary to facilitate the transformation of black communities to routine sites of abundant wealth characterized by sustainable environments, employment, civic and commercial amenities, and institutions of financial and social capital, they are not sufficient to do so.

African American community uplift in the post-civil rights era has been hindered by the same forces that restricted it in the decades and centuries beforehand. White racial dominance and racism remain significant though surmountable hurdles to development within black communities that place them on par or competitive with desirable white spaces. The history of Greenwood, Oklahoma and Wilmington, North Carolina, during the Jim Crow Era sufficiently make the point. Each of these cities, like many others across the country, had thriving black communities that were destroyed through white mob violence at the cost of the lives and property of many black residents. Racial resentment of African American prosperity by nearby whites was a strong undercurrent of mob violence in each case. Although white mob violence against African Americans is less common today, there is still measured resentment and resistance to African American prosperity not comparably provided to whites. In fact, while transforming the most impoverished black communities into spaces of prosperity and wealth is deployed as political rhetoric, it is rarely a political priority that becomes reality. To overcome the gravity that racism and

72. *Id.* at 4.

Reversing the Economic Legacy of Racial Segregation

racial dominance exert over such efforts a concerted effort, and systematic mechanism that creates and sustains economic, educational, and political capital to black community residents will be required.

V. SOLUTIONS - MOVING FORWARD AND THE IMPORTANCE OF REDRESS:

As a crime against humanity, slavery based claims have no statute of limitations under international law. America retains an outstanding debt for roughly two and a half centuries of enslavement of African Americans. Past and current federal and state government refusals to honor those obligations have in no way removed them. The nation and the states are manifestly recalcitrant in acknowledging and fulfilling their responsibility to the enslaved and their descendants.

How do we move forward? This article maintains that counteracting the Jim Crow Era mistreatment and ongoing discrimination today is a complex and multifaceted challenge beyond the scope of one law review article. However, in the remaining sections some essential steps along the path to racial justice are considered. Discrimination against African Americans in the Jim Crow Era encompassed all aspects of life, from the hospital where one could be born to the cemetery where one could be buried.⁷³ In each of those arenas, alone, the effect and totality of discrimination can be seen by government and private actors and institutions. The state and federal governments collaborated with private individuals and institutions to determine what spaces African Americans could begin and end their lives and governed every space in between.⁷⁴ Discrimination guided the specific construction of the roads leading to a hospital that allowed African American women to give birth. It, likewise, determined who was allowed to attend college and medical school to become a physician. In addition, discrimination determined the education requirements to become a nurse and who was hired among those with the requisite education.⁷⁵ Discrimination determined which doctors had “privileges” to see patients and the respect and authority they had to prac-

73. See generally PAULI MURRAY, STATES' LAWS ON RACE AND COLOR (Pauli Murray ed., Women's Division of Christian Service 1951).

74. See generally, Richard Rothstein, *The Color of Law a Forgotten History of How Our Government Segregated America* (Liverlight Publ'g Co. 2017).

75. See generally MURRAY, *supra* note 73.

tice medicine.⁷⁶ It also determined where people of color could live, where their children could attend school, as well as the parent's employment and educational opportunities.⁷⁷ These few points ignore a score of other ramifications, including who could get or acquire bank loans to manufacture or distribute the supplies used in the hospital. Racial discrimination across the country completely excluded or severely constrained African Americans before they were born, after they died, and at every step in between. Racially restrictive covenants, authorized by federal courts along with local ordinances and state laws, proscribed the "place" that every African American was "put in" or got "out of."⁷⁸

Meaningful redress and reparation would take these experiences, and their impact on generations of African Americans, as a starting point to construct a comprehensive remedy for the victims of Jim Crow America.⁷⁹ While the elaboration of a comprehensive remedy exceeds the scope of this article, some of the essential components of such a remedy are explored. These remedies focus on the long-term remediation of the economic, educational, and political harms caused by Jim Crow America.⁸⁰ A comprehensive remedy program would also examine the physical and mental health impacts related to Jim Crow America and would dictate the scope of meaningful redress. Further attention would also be given to the criminal justice system. It would delve into the history of policing, prosecution, and mob violence and the proper way the local, state, and federal government would act to remedy subtle and blatant disregard for African American life and well-being during the Jim Crow Era.⁸¹

Due to the scope of the harms and the duration of the wrongful treatment, individual responses seem insufficient to account for the breadth and depth of injuries inflicted.⁸² In most reparations cases the harms addressed are confined to shorter timeframes, so individuals

76. See generally ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (Random House, Inc. 2010), (discussing the life experiences of Robert Joseph Pershing Foster).

77. See generally ROTHSTEIN, *supra* note 74.

78. See generally MURRAY, *supra* note 73; see generally ALFRED BROPHY, *INTEGRATING SPACES: PROPERTY LAW AND RACE* (Aspen Publishers 2011).

79. See Ta-Nehisi Coates, *The Case for Reparations*, *THE ATLANTIC* (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

80. *Id.*

81. *Id.*

82. See ROY L. BROOKS, *ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS* 156-172 (2004).

Reversing the Economic Legacy of Racial Segregation

bear the brunt of the harms and the benefits of the remedy. Jim Crow America, however, was exceptional in severity, scope, and duration. The effects were, likewise, exceptional in severity, scope, and duration.

Following Reconstruction, for more than a century, the federal and state governments systematically and intentionally deprived African Americans equal protection. Rather, these governments, in concert with private actors, deprived African Americans of healthcare, employment, education, financing, housing, security, and political participation afforded to whites. In addition, the governments deprived African Americans protection from arbitrary and capricious arrest and enslavement. While not always as dehumanizing as slavery, these Jim Crow Era harms are immediate to the economic deficits facing African Americans collectively. Research clearly shows that the vast gaps in wealth, education, and business receipts during the Jim Crow Era and afterward far outstripped those based in the preceding two centuries of enslavement.⁸³ The reason is straightforward; the direct benefits of slavery accrued disproportionately to the wealthiest whites and the nation's collective economic well-being. In contrast, the fruits of the Jim Crow Era, and subsequent racial discrimination accrued; with greater benefits to middle and lower income white Americans.⁸⁴

In the twentieth century, the white middle class, as we know it, was created through policies and practices that unapologetically excluded and exploited African Americans.⁸⁵ White wealth gains for recent European immigrants and native-born white Americans, took place within the context of the pervasive exclusion of African Americans and Latinos. A common misconception says that racial discrimination against people of color had little relevance to the creation of white prosperity during the twentieth century. History, however, shows that much white prosperity resulted from systemic discrimination against blacks and other people of color.⁸⁶ Accordingly, the story

83. See Lawrence D. Bobo, *How America Built the Racial Wealth Gap*, THE ROOTS (Apr. 9, 2014, 12:31 AM), See <http://www.theroot.com/how-america-built-the-racial-wealth-gap-1790895965>; see also Thomas Shapiro et al., *The Roots of the Widening Racial Wealth Gap*, INSTITUTE ON ASSETS AND SOCIAL POLICY (Feb. 2013), <http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf>.

84. See Lawrence D. Bobo, *How America Built the Racial Wealth Gap*, THE ROOTS (Apr. 9, 2014, 12:31 AM), <http://www.theroot.com/how-america-built-the-racial-wealth-gap-1790895965>.

85. BOBO, *supra* note 83.

86. See generally DARIA ROITHMAYR, *REPRODUCING RACISM* (2014). See Sheryll Cashin, *The Failures of Integration*, CENTER FOR AMERICAN PROGRESS (June 15, 2005, 9:00 AM), <https://www.americanprogress.org/issues/courts/news/2005/06/15/1497/the-failures-of-integration/>.

of European immigrants working their way up the economic ladder one generation after arrival, in contrast with the socioeconomic stagnancy of people of color, conveniently omits the fact that African Americans and Latinos were the rungs upon which their white counterparts climbed.⁸⁷

Reparations for Jim Crow Era discrimination should rectify these wrongs and remediate these harms. Although victims of the earliest phase of this Era have passed away, many survivors of the better part of the century, of blatant governmental and private discrimination, remain with us. These survivors, their immediate families, and their communities should be the targets and the chief beneficiaries of reparations. Reparations can take many forms.⁸⁸ They can range from the restitution of lost property and the creation of public memory sites to the provision of educational and medical services, in addition to a range of other compensation based mechanisms.⁸⁹ Compensation programs can range from individual payment plans and the creation of reparations bonds and pensions to the development of trusts or other funds to support beneficiaries.⁹⁰ Scholars have shown that even the federal tax code could be used to provide meaningful reparations.⁹¹

Jim Crow Era harms, inflicted upon African Americans, are distinct from the internment of Japanese citizens, treaty violations against American Indian tribes, the extermination of Jews and Roma during the Holocaust, and the torture and assassinations in Latin America. The most significant difference of the Jim Crow Era harms is the combination of the identity and generational nature of the harm. While the internment of Japanese citizens, treaty violations against American Indian tribes, and the Holocaust all grew out of identity, rather than ideology, they reflected discrete events connected with a particular generation of victims. Latin American harms receiving redress in many cases were rooted in ideology rather than a racial

87. *Race: The Power of an Illusion*, Kanopy (Apr. 2003), <http://www.kanopy.com/product/race>. Eduardo Bonilla-Silva said, "The idea of the melting has a long history in the American tradition, but it really was a notion that was extended exclusively to white immigrants. That pot never included people of color: Blacks, Chinese, Puerto Ricans, etc., could not melt into the pot. They could be used as wood to produce fire for the but pot, but they could not be used as material to be melted into the pot."

88. See generally PABLO DE GREIFF, *THE HANDBOOK OF REPARATIONS* (2006).

89. *Id.*

90. *Id.*

91. See generally Andre Smith & Carlton Waterhouse, *No Reparation Without Taxation: Applying the Internal Revenue Code to the Concept of Reparations for Slavery and Segregation*, 7 PITT. TAX REV. 159 (2010).

Reversing the Economic Legacy of Racial Segregation

or ethnic identity.⁹² Jim Crow Era harms are distinct in that they connect multiple generations in a line of continuing injuries across life experiences. The intergenerational injuries of African Americans, as a socially and geographically segregated group, had compounded collective effects. An ideal individual mechanism would not necessarily attend to the collective nature of the harms that were inflicted. Institutional reparations would focus on remediating collective harms across multiple generations of victims.

The Federal Republic of Germany and the state of Israel modeled one approach to institutional reparations through a set of annual payments from Germany to Israel from 1953 onward. These payments enabled Israel to build an infrastructure necessary to rehoming Holocaust victims. These long-term payments to Israel are not without controversy in light of the state's displacement of Palestinians. This example demonstrates how reparations can be used at an institutional level to address the collective needs of a group.

This article proposes that institutional based remedies will be necessary to rectify the long term harms inflicted across roughly five generations from the end of the civil war to the passage of the last major civil rights legislation in 1972.⁹³ Under the proposal, outlined below, building and strengthening educational, economic, and political institutions provides the indispensable foundation to a successful redress program for the survivors of Jim Crow America and their families and communities.⁹⁴

A. THE ECONOMIC FUND

Beneath education, beneath politics, even beneath religion itself,
there must be for my race, as for all races, an economic foundation.

Booker T. Washington

This section attempts to construct a way in which black institutions can work within the existing market system, day to day, to provide assets, capital, skills, products, services, and opportunities for black communities. While we recognize the veracity of many critiques of classical economics, and support a heterodox economics philoso-

92. Indigenous identity based conflicts are a clear exception. Past conflicts in Colombia, Guatemala, and elsewhere between the state, paramilitary actors and tribal members provide a counterexample.

93. See *infra* pp. 19-60.

94. See *infra* pp. 19-60.

phy, the proposed program functions within the current economic context to enhance the life chances and material well-being of black communities. Calling for black self-help and black business as principal components of racial uplift for blacks, dates back to some of the earliest experiences of Africans in America.⁹⁵ Since that time, diverse black leaders have often agreed on the importance of black self-help and black business, despite other disagreements.⁹⁶

This article joins historic and current voices calling for attention to economics as a foundation for individual and communal black prosperity. [1] Despite this article's attention to the range of hopeful possibilities, its perspective is grounded in basic contemporary realities. African Americans have the least developed business sector of any racial group. African American businesses hire the smallest number of employees and have the lowest level of business receipts of all racial groups. [2] Black communities continue to depend on white owned businesses to provide them with their essential needs: food, clothing, and shelter.⁹⁷ The black middle class lacks the experience and capital to develop large-scale business enterprises.⁹⁸ The overwhelming majority of the black middle class is utterly dependent on white owned businesses or governmental institutions for their daily livelihood.⁹⁹ In comparison to other racial groups, the rate of business ownership among blacks is the lowest in the country.¹⁰⁰ Even though blacks far outnumber all racial groups other than whites and Hispanics, they have a much smaller representation among business owners than any other group.¹⁰¹

95. Some of the earliest manifestations of economic self-help can be seen in the lives of free blacks who established trades and commercial enterprises during the eighteenth century.

96. See generally DR. MARTIN LUTHER KING JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING JR. (James Washington ed., New York: Harper Collins Publishers, 1990); MALCOLM X, MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS (George Breitman ed., New York: Grove Press 1994). Although Dr. King prioritized governmental policy over black business in improving the lives of black people, both King and Malcolm X advocated for black advancement through the development and expansion of black business.

97. See E. FRANKLIN FRAZIER BLACK BOURGEOISIE: THE RISE OF A NEW MIDDLE CLASS IN THE UNITED STATES 43 (1962). According to Frazier, Blacks' dependency on white owned businesses was shown in both rural and urban areas. During this time period, three fourths of Blacks involved in southern agriculture were tenant farmers or sharecroppers rather than owners of their own farms and independent of Whites.

98. See *id.* at 165.

99. *Id.* at 43.

100. OFFICE OF ADVOCACY U.S. SMALL BUS. ADMIN., MINORITIES IN BUSINESS (2001).

101. *Id.*

Reversing the Economic Legacy of Racial Segregation

Moreover, many African American neighborhoods lack a significant African American business presence. Instead, white, Asian, and Latino businesses dominate African American neighborhoods. Large chain stores, such as Walmart and CVS, routinely hire African Americans; however, small nonblack family businesses have historically failed to provide similar employment opportunities for African American residents. Consequently, African American residents in these communities suffer some of the highest unemployment rates.

E. Franklin Frazier's book, *Black Bourgeoise*, examines the primary reasons why African-American businesses were unable to overcome the economic challenges facing African American communities in the early to mid-twentieth century. He proposes four reasons, all of which remain relevant: (1) blacks lack an intergenerational tradition of business ownership and operation; (2) black professionals and white-collar workers lack the capital necessary to develop large scale business enterprises; (3) most of the black middle class derived its income from services it provided as white-collar workers; and (4) blacks were an integrated and not separate part of the American economy. In terms of business development, black businesses have not progressed very far beyond Frazier's 1950s analysis. Accordingly, the necessary creation and strengthening of these institutions must account for these challenges to achieve success.

Blacks own a very small percentage of the businesses that provide food, clothing, residential construction, and multifamily property ownership.¹⁰² Thus, black businesses provide few goods for black communities. As a result, the purchase of food, clothing, and other goods is done almost exclusively through businesses owned by whites and others. Some of these retail establishments hire black employees while many others do not. Nonetheless, over the past 50 years, black opportunities to attain middle class status, within the public and private sector, have substantially increased. These opportunities, however infrequently, place blacks in the position to create jobs for others.

We present data regarding black wealth and occupational profiles below:

Black Wealth¹⁰³

102. Despite the low rate of homeownership few black businesses are involved in residential property management or ownership.

103. The Federal Reserve Board, 2001 Survey of Consumer Finances (Dec. 2001), <http://federalreserve.gov/pubs/oss/oss2/2001/scf2001.information.html>.

- At the highest quintile blacks have 18% of white non-home equity wealth
- At the fourth quintile blacks have 25% of white non-home equity wealth
- At the third quintile blacks have 19% of white non-home equity wealth
- At the second quintile blacks have 10% of white non-home equity wealth
- At the lowest quintile blacks have no non-home equity wealth compared with \$3466 for non-Hispanic whites and \$50 for Hispanics
- Whites in the lowest quintile have non-home equity wealth greater than that of blacks in the third quintile
- In 2013, the net worth of white households was \$144,200, roughly 13 times that of black households¹⁰⁴
- Blacks have the highest percentage of wealth invested in home ownership, rental property, and vehicles
- Blacks have the lowest percentage of wealth in business/professional assets, stocks/mutual funds and 401k/savings plans. Black assets in 401k/ savings plans dropped from the highest percentage at 10% in 1998 to the lowest in 2000 at 6.7%
- In 2015, white home ownership was 72% compared to 43% for blacks¹⁰⁵
- In 2013, median wealth for blacks was about \$11,000 compared to \$141,900 for whites¹⁰⁶
- Median white homeowners house is worth \$85,800 compared to \$50,00 for black homeowners¹⁰⁷
- African Americans make up 13.2% of the U.S. population but account for only 2.5% of the nation's total wealth¹⁰⁸

104. PEW RESEARCH CENTER, *On Views Of Race And Inequality, Blacks And Whites Are Worlds Apart* (June 27, 2016), <http://www.pewsocialtrends.org/2016/06/27/1-demographic-trends-and-economic-well-being/>.

105. *Id.*

106. Tanzina Vega, *Why the racial wealth gap won't go away*, CNN (Jan. 26, 2016), <http://money.cnn.com/2016/01/25/news/economy/racial-wealth-gap/>.

107. Lauren Shin, *The Racial Wealth Gap: Why A Typical White Household Has 16 Times The Wealth Of A Black One*, FORBES (Mar. 26, 2015), <https://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/#521f24071f45>.

108. Chuck Collins & Josh Hoxie, *Billionaire Bonanza: The Forbes 400 and the Rest of Us*, INST. FOR POLICY STUDIES (Dec. 1, 2015), <http://www.ips-dc.org/billionaire-bonanza/>.

Reversing the Economic Legacy of Racial Segregation

- Nearly 40% of African American homes in the U.S. have zero or negative net-worth.¹⁰⁹

Black Occupation Statistics:¹¹⁰

- Blacks represent 3.4% of the chief executives in the work force — less than Asians, Hispanics, and whites
- Blacks represent 5.3% of the marketing and sales managers in the work force — less than Asians, Hispanics, and whites
- Blacks represent 6.3% of computer hardware engineers — significantly less than Asians and whites
- Blacks represent 4.2% of those with architecture or engineering occupations
- Blacks only represent 6.5% of the biological scientists
- Blacks represent 4.4% of the lawyers
- Blacks represent 8% of the secondary school teachers
- Blacks represent 1.9% of the editors and 3.4% of the writers and authors
- Blacks represent 3.2% of the dentists, 10.1% of the pharmacists, and 7.5% of the physicians
- Blacks represent 11.9% of the registered nurses, 3.2% of the physicians' assistants, and 5.2% of the dental hygienist
- Blacks represent 6.8% of the firefighters, 6.9% of the criminal investigators, and 21% of the probation officers
- Blacks represent 39.9% of the barbers, and 12.4% of the hairdressers
- Blacks represent 23.9% of the postal service clerks, 18.6% of the mail carriers, and 34.3% of the mail sorters
- Blacks represent 3.8% of the construction managers, 5.4% of the carpenters, and 6.4% of the brick/block/stonemasons
- Blacks represent 8.7% of the operating engineers/equipment operators, 8.7% of the electricians, and 10.7% of the structural iron and steel workers
- Blacks represent 61.5% of the labor force participation, which is amongst the lowest in the nation¹¹¹

109. Antonio Moore, *America's Financial Divide: The Racial Breakdown of U.S. Wealth in Black and White*, HUFFINGTON POST (Feb. 13, 2015), http://www.huffingtonpost.com/antonio-moore/americas-financial-divide_b_7013330.html.

110. BUREAU OF LABOR STATISTICS, Table 11 (2017), <https://www.bls.gov/cps/cpsaat11.htm>

111. See BUREAU OF LABOR STATISTICS, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY (2016), <https://www.bls.gov/opub/reports/race-and-ethnicity/2015/pdf/home.pdf>.

- Employed black men are more likely than any other employed men to work in transportation and utilities (12%).

These profiles illustrate why the black middle class still lacks the capital needed to develop large-scale business enterprises. The statistics show African Americans only have liquid assets comparable to those of the poorest whites. Additionally, the profiles show that the black middle class today, as during Frazier's time, includes a substantially smaller percentage of business owners and professionals. Today, blacks still lack the capital resources and intergenerational experience to develop large scale business operations and the vast majority of blacks depend entirely upon white businesses and government for their material substance.

Credit has always been an integral part of economic development in America. Under the Reign of Terror, blacks were routinely denied credit for business and home ownership loans. The availability of credit affected blacks across the board from farming to retail.¹¹² Black farmers, like their white counterparts, regularly needed credit to buy land, purchase seeds, feed, livestock, and more. However, unlike their white counterparts, black farmers were regularly denied credit to finance their enterprises.¹¹³ Consequently, blacks working in agriculture represented a disproportionate number of field hands and sharecroppers because of their lawful exclusion from the ranks of credit recipients. By limiting African American opportunities, whites secured a class of laborers pressed into service under the worse conditions. Through penal laws of vagrancy, any black person not employed by a local white employer was subject to arrest by sheriffs and deputies. After arrest, an employer would pay the bail and court costs for such persons and require that they work "the debt" off along with the costs of their food and lodging. Needless to say, blacks under such arrangements rarely escaped them. Moreover, few blacks were able to parlay hard work and thrift in this area into viable business enterprises that could sustain the needs of communities. Instead, blacks *en masse* migrated away from southern agricultural life to urban ghettos with little or no material benefit from generations of agricultural labor.¹¹⁴

112. See Carlton Waterhouse, *Avoiding Another Step In A Series of Unfortunate Legal Events: A Consideration of Black Life under American Law from 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. THIRD WORLD L.J. 207, 232-246 (2006).

113. *Id.*

114. WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE* 111-112 (1978).

Reversing the Economic Legacy of Racial Segregation

The SBA report indicates that black business receipts account for 0.39% or less than one-half of one percent of white business receipts, 38% of Hispanic business receipts, 23% of Asian business receipts, and roughly twice that of Native American business receipts.¹¹⁵ When compared with the relative population within the society, the uneasy condition of black business is most apparent. Whites make up six times the number of blacks within the society, but their business receipts amount to 253 times that of black businesses.¹¹⁶ Hispanics have a comparable population to blacks, but have 2.5 times the business receipts.¹¹⁷ There are more than 3 times as many blacks in America as Asian and Pacific Islanders, nonetheless, the latter's business receipts are 4 times that of black businesses.¹¹⁸ In the American population, there are 12 blacks for each Native American yet, black business receipts amount to only twice those of Native American businesses.¹¹⁹ If black business receipts were divided among all blacks in America, they would provide \$2,000 per person.¹²⁰ In contrast, white business receipts would provide \$92,000 to each white American and Asian business receipts would provide roughly \$29,000 to each Asian-American.¹²¹ In their current state, existing black businesses offer little hope for the employment of large numbers of unskilled or other black labor as 90% of them have no employees whatsoever.¹²² In total, relative to the total American economy, black business payroll accounts for less than one-half of one percent of all payroll paid by firms within the country.¹²³

Despite this phenomenon, blacks receive less SBA funding to capitalize their business than any other group besides Native Americans.¹²⁴ The SBA's report "Minorities in Business 1999" from the Of-

115. OFFICE OF ADVOCACY U.S. SMALL BUS. ADMIN., MINORITIES IN BUSINESS Table 8 (2001). See https://www.sba.gov/sites/default/files/advocacy/Minority-Owned_Businesses-in-the-US.pdf (2016).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. See *id.* at Table 16.

123. See *id.* at Table 7.

124. See *id.* at Tables 22, 23 (Black businesses receive a substantially smaller amount of credit through the SBA both in number and in dollar amount than any other group with the exception of Native Americans).

fice of Advocacy provides a clarifying picture to understand the current state of black business. We quote it at length:¹²⁵

The National Survey of Small Business Finances allows a detailed picture of the financing patterns of businesses owned by Blacks. There is a striking contrast in the financing patterns of Black-owned small business when compared with all small businesses. While 76 percent of all businesses used some type of credit in 1993, only 63 percent of Black-owned businesses did so. A little more than one-third of them used traditional financing, compared with 55 percent of all firms. And just over one-half of businesses owned by Blacks used non-traditional sources for their credit needs, compared with 58 percent of all businesses. Perhaps the most notable difference is the use of commercial banks: only 15 percent of Black-owned businesses used them as a source of credit, compared with 37 percent of all small firms. However, commercial banks were still the traditional source used most often by businesses, including those owned by Blacks. Finance companies were the second most common traditional source, at 10 percent. Black-owned businesses had slightly lower rates of reliance for financing on friends and family and personal credit cards, but a slightly higher rate of business credit card use. The types of traditional loans used most frequently were vehicle loans (used by 16.9 percent of Black-owned businesses), equipment loans (13.9 percent), and lines of credit (11.8 percent). Again, businesses owned by Blacks used all types of loans except equipment loans less frequently than businesses in general.

A 2000s study found that, after controlling for differences in creditworthiness and other factors, black-owned firms were about twice as likely to be denied credit. In addition, blacks were much more likely to withhold a loan application due to fear of denial. Another study found that rates of initial and ultimate loan denials were dramatically higher for blacks in comparison with white-owned firms, even after controlling for differences in firm characteristics.¹²⁶

The foregoing shows that undercapitalization has drastically limited the development of black business. Accordingly, an increase in capitalization will allow a significant expansion of existing businesses and the development of additional ones. This article proposes the de-

125. U.S. SMALL BUS. ADMIN., OFFICE OF ADVOCACY: MINORITIES IN BUSINESS 14-15 (1999).

126. Alicia Robb, Access to Capital among Young Firms, Minority-owned Firms, Women-owned Firms, and High-tech, Firms (2013), [https://www.sba.gov/sites/default/files/rs403tot\(2\).pdf](https://www.sba.gov/sites/default/files/rs403tot(2).pdf). See Ken S. Cavaluzzo & Linda C. Cavaluzzo, Market Structure and Discrimination: The Case of Small Business, 30 J. MONEY, CREDIT AND BANKING 771, 772 (1998).

Reversing the Economic Legacy of Racial Segregation

velopment of black financial institutions with the purpose of providing financing for black businesses.¹²⁷ These institutions will provide loans at varying amounts, from major loans to micro lending and a small number of individual development grants used to match an individual's savings. Those savings will be used to finance a small business.

Discrimination and subordination during the Jim Crow Era robbed black individuals, families, and communities of needed financial resources and economic opportunities. Reparations dictates that resources be made available to create opportunities in communities that were historically denied. Strong financial institutions committed to financing businesses tied to providing employment and skills in key communities across the country is an important part of economic reparations. Frazier's analysis also underscores the need for managerial expertise to increase the success rate of black businesses.

Accordingly, this article proposes the establishment and funding of a nonprofit organization devoted exclusively to providing business expertise and consulting to black businesses receiving loans from these newly established financial institutions. Participation in a business training and development program would be one of the conditions for receiving a loan. Other conditions relating business activity to the communities they serve would be developed by the trust board responsible for administering the program. It is clear, however, that many of these businesses will have to develop plans for employing teenagers and other local residents in their enterprises to make the desired impact.

The development of businesses, however, does not guarantee their success. As a potential measure of success, this article suggests that black businesses employ enough blacks to create employment parity rates with whites. The ability of black businesses to employ roughly four hundred thousand additional workers after two years and eight hundred thousand in five years would indicate a meaningful improvement in the quality of life of many black communities and in the number and impact of black businesses.¹²⁸ To succeed, however, black businesses will have to be competitive. Like T. Thomas Fortune, Booker T. Washington, Carter G. Woodson, and others, Charles Lind-

127. Professor Charles Pouncy, of Florida International University College of Law, noted the superiority of this approach over community funding mechanisms through traditional lending institutions.

128. These figures represent increases of roughly 50% and 100%, respectively, over contemporary employment levels.

bloom points out the necessity of business for meeting the needs of human societies.¹²⁹ Under capitalism, Lindbloom explains that governments depend on businesses to provide the food, clothing, and shelter of their citizens.¹³⁰ Moreover, the basic system of exchange under capitalism coordinates the innumerable interactions of people on a daily basis. At both a macro and a micro economic level, American society follows this principle of operation. All American institutions are affected by this capitalist system of operation and participate in it to some degree.¹³¹

Due to the influence of these market forces, racial pride alone is inadequate to establish support for black businesses.¹³² Consumers buy based on perceived quality, convenience, and cost.¹³³ These are strong forces in influencing consumer behavior. Under segregation, black businesses were not in open competition with white businesses because of Jim Crow segregation. Following integration, black businesses lost a form of competitive advantage formerly enjoyed with black customers. Calls for racial pride as the sole basis for supporting black businesses lack adequate force to control black consumers who in all other respects, act according to market logic in their spending practices. Therefore, to foster black patronage, black businesses will have to compete with other businesses on market terms: quality, convenience, and cost.

Through the development of a membership system that enables black and other customers to offer goods and services to their members at a competitive price, black businesses can increase their customer base and develop brand loyalty. Of course, these businesses will still have to compete regarding quality and convenience to develop a customer base.

This article advances a multifaceted proposal for economic reparations orchestrated by an economic reparations trust. The proposal

129. CHARLES LINDBLOM, *THE MARKET SYSTEM: WHAT IT IS, HOW IT WORKS, AND WHAT TO MAKE OF IT* (Yale Univ. Press 2001) (2002).

130. *Id.*

131. Michael Walzer demonstrates the distinction in market logic and that of other spheres of life in society. His work notes the internal logic of differing spheres and the aberration of commercial logic in governing the interactions of those spheres. Purchasing an office in government or a position in the church along with the exchange of money for grades all stand out as examples of "boundary violations" contrary to the values of educational, religious, and governmental institutions.

132. Due to the influence of these market forces, racial pride alone is inadequate to establish support for black businesses.

133. See generally LINDBLOM, *supra* note 129 (for consideration of the relationship between consumer purchasing and product availability).

Reversing the Economic Legacy of Racial Segregation

envision the systematic development of black business in discrete sectors of the economy, nurturing and funding black entrepreneurship, and the acquisition of controlling interests in select enterprises and companies. The Economic Fund would set up offices in strategic locations targeted for business development discussed below.

These offices would facilitate the creation of viable small businesses committed to serving the needs of the largest black communities in the United States, which are concentrated in 95 counties in the southern corridor from Maryland to Texas and a few major cities with substantial black populations (i.e., New York, Philadelphia, Chicago, Detroit, Los Angeles, and Gary Indiana).¹³⁴ To accomplish this, the Economic Fund would make credit available to businesses meeting standard financial and trust fund criteria. To help promote the success of businesses, the Economic Fund would condition some loans upon the successful completion of a managerial training program offered by the nonprofit organization described above. This program would serve to enhance the management skills of loan applicants whose applications reflect the need for the program.¹³⁵ Although program details would be worked out by the Economic Fund's program development staff, the purpose of the program would be to assess the business plan or existing business operation and provide the expertise that would assist that business in becoming more effective.

One of the Economic Fund's chief goals will be the employment and skill development of black laborers from ages 17 to 40 in specific sectors of the economy including, transportation, construction, and technology. The employment of black laborers in positions that develop their skill base and marketability is a critical part of economic reparations. As mentioned above, black businesses provide only a small number of jobs in the American economy. The development and expansion of black businesses that provide job opportunities to black youth is critical to overcoming the economic isolation and marginalization experienced by many black workers and especially black youth.

This article does not suggest, here, that all economic problems will fall away for black workers as a result of this proposal. Rather,

134. The only city with over 100,000 blacks not otherwise covered. See Jesse McKinnon, *The Black Population: (2001)*, <https://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>.

135. A common analog for this can be found in the numerous first-time homebuyer programs offered by banks and mortgage companies across the country that place program completion requirements on loan applicants.

this article maintains that this proposal would result in a meaningful increase in employment opportunities for unskilled and low skilled workers while providing them with skills and training they can use in future employment. William Julius Wilson has consistently maintained that the lack of employment opportunities for black youth in many cities has resulted in high teenage pregnancy, high dropout rates, and high levels of incarceration.¹³⁶ Mary Patillo McCoy points out in her book *Black Picket Fences* that significant numbers of black middle-class families living in the near suburbs have similar experiences to blacks in the cities.¹³⁷ She notes that many of the adult children from these families have not been able to replicate the relative economic success of their parents.¹³⁸ One key aspect of this phenomenon pointed out by McCoy is the lack of meaningful employment opportunities available in or near these communities.¹³⁹

Robert Bullard and others have noted that job creation patterns in metropolitan areas have been to the outer suburbs and outlying areas.¹⁴⁰ The lack of accessible jobs represents a key factor in the disadvantaged situation for many blacks that Wilson describes. By providing meaningful job opportunities in black communities, the Economic Fund and black businesses can address a longstanding problem that characterized the Jim Crow Era. Space does not allow a full articulation of the types of projects the Economic Trust should support, however, two examples follow for illustration purposes.

Economic reparations for blacks in the United States have significant ramifications for black people worldwide, as business opportunities go unfulfilled every day in black communities across the country and around the world. As Marcus Garvey pointed out over 80 years ago, technical expertise needed in Africa is supplied by almost everyone but blacks from America. Based on the unique relationship between blacks in America, the Caribbean, and Africa, the Economic Fund should attempt to seed business ventures that connect technical expertise and resources to meet the needs of black communities in the

136. WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 20-35 (Univ. of Chi. Press, 2d ed. 2012).

137. MARY PATILLO-McCOY, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS* 45-47 (1999).

138. *Id.*

139. *Id.*

140. ROBERT D. BULLARD ET AL., *SPRAWL CITY: RACE, POLITICS, AND PLANNING IN ATLANTA* XVII (2000).

Reversing the Economic Legacy of Racial Segregation

U.S. and abroad.¹⁴¹ The Economic Fund should have a division devoted to international black business development and enterprise that operates separately from its local offices providing loans to small businesses. This office could offer seed money toward the development of viable business plans establishing collaborative ventures in these regions and countries. In light of the significance of globalization on internal employment, product manufacturing, and distribution, this division will have significant import on many local businesses and their opportunities for success.

Local Economic Fund offices should also offer small grants to religious and civic organizations to establish youth business clubs. The Economic Fund would seek to support clubs that develop both, the education and the skills of youth while connecting them with local business leaders. This article envisions a cross between Junior Achievement, the National Black Business Council's Youth Entrepreneurship Program, and Black Enterprise's Kidpreneurs conferences. With startup funds, this youth will establish and operate a business together with the assistance of one or more adults. This experience has great value to young people by helping them develop self-esteem, learn about teamwork and collaboration in business, and discover and meet community needs through economic enterprise. Just as many churches today work actively to seek federal grants to carry out ministries, these business grants can also assist many churches in developing youth based program to reach black young people. As with the loan process discussed above, grant applicants will have to show that their programs will further the goals of the Economic Fund. Under this proposal, black businesses create vital and essential parts of communities for the development of skills, shaping of aspirations and organization of community members, and the coordination of the wants and needs of community residents. Not in isolation, but together with educational and political institutions, these business entities represent the foundation of community life.¹⁴²

141. Although space does not allow an exploration of the genetic, cultural, and kinship linkages between blacks in America and elsewhere, the full remediation of the harms of slavery and segregation endorsed in this dissertation includes the repair of cultural and kinship bonds broken through black enslavement.

142. Additional attention should be given to the following institutions essential for everyday life such as financial institutions, banks, investment/financial planning firms, grocery stores, and farmers/vertical farming. Vertical farming is the practice of producing food in vertically stacked layers, such as in a skyscraper, used warehouse, or shipping container. The modern ideas of vertical farming use indoor farming techniques and controlled-environment agriculture (CEA) technology, where all environmental factors can be controlled. One such proposal would include

The fund should support the creation of technology hubs and incubators as a critical part of community industry and opportunity. The tech industry will continue to grow and provide jobs and extremely profitable business opportunities and black communities should benefit from that growth. For the fund's long-term success, the following challenges will have to be overcome. Americans have lower broadband adoption than in other countries with comparable gross domestic product.¹⁴³ Moreover, of the one-third American adults who had not adopted broadband in 2010, non-adopters were disproportionately black and Hispanic.¹⁴⁴ The ability to use technology is becoming increasingly important in the workplace and jobs in the rapidly growing information technology sector pay almost 80% more than the average private sector wage. The number of STEM jobs will grow at a rate of double to non-STEM jobs, but there will be an estimated 1.2 million unfilled STEM jobs.¹⁴⁵ Likewise, in Silicon Valley, blacks are almost non-existent despite diversity efforts from many tech companies.¹⁴⁶

The Tech Hubs and Funds can serve as, both, training centers aimed at teaching black community residents the ins and outs of software engineering, coding, and a Venture Capital vehicle. The Venture Capital vehicle will support black tech start-ups.¹⁴⁷

Every HBCU should have an innovation hub to help start and support start up and business ideas. An example is the Innovation Hub created at Howard University. At Howard University, Mayor

vertical farming in cities/counties that have large African-American populations and suffering from food deserts. Creating vertical farming (possibly through co-op ownership) is a way to create a business that provides healthy food, jobs, and profits for the community. Food that is grown in the vertical farm can then be harvested and sent to local community owned grocery stores/restaurants. Of course, restaurants and eateries, auto dealerships, parking services, dry cleaners, laundromats, fashion companies, textile mills/production factories, department stores, tailors, and media and technology firms all represent important sectors warranting institutional development in black communities.

143. U.S. DEPT. OF COMMERCE, EXPLORING THE DIGITAL NATION: HOME BROADBAND INTERNET ADOPTION IN THE UNITED STATES (2010), https://www.ntia.doc.gov/files/ntia/publications/esa_ntia_us_broadband_adoption_report_11082010_1.pdf.

144. David Honig, *The Digital Divide and the Racial Wealth Gap*, Huffington Post, http://www.huffingtonpost.com/david-honig/the-digital-divide-and-th_b_1317953.html (last updated May 5, 2012).

145. David Butcher, *Employment Outlook for STEM Professionals Is Robust*, THOMAS.NET.COM (Jan. 22, 2013), <https://news.thomasnet.com/imt/2013/01/22/employment-outlook-for-stem-professionals-is-robust-and-moving-beyond-traditional-occupations>.

146. Salvador Rodriguez, *Diversity reports show tech industry doing little after talking a lot*, CHI. TRIB., (July 22, 2016, 2:48 PM), <http://www.chicagotribune.com/business/success/inc/tca-reports-show-tech-industry-doing-little-after-talking-a-lot-about-diversity-20160722-story.html>.

147. Black Angel Tech. Inv. Fund, *Black Angels: The Antidote To Silicon Valley Diversity Syndrome*, BLACK ANGEL TECH FUND (June 19, 2016), <https://www.blackangeltechfund.com/single-post/2016/03/22/Title-Title-2>.

Reversing the Economic Legacy of Racial Segregation

Muriel Bowser announced a partnership to establish DC's first Technology and Innovation Hub, which will expand the District's growing technology and innovation ecosystem.¹⁴⁸ The District's partnership with Howard University will focus on leveraging University resources for venture capital firms to support medium to late-stage technology and innovation startups.

Similarly, Cofound Harlem, a nine-month startup incubator in Harlem, New York, offers office space, mentorship, services, and \$50,000 of funding to new start-ups.¹⁴⁹ One approach is to focus progressively on increasing public and private sector funding for STEM programs in school districts that are poor STEM performers. An example of this is the nation's largest STEM program provider in the U.S., Project Lead the Way (PLTW), and its partnership with Lockheed Martin to provide \$6 million to urban school districts throughout the country for math and science education.¹⁵⁰ Another very productive approach is to teach black students to code. There are currently two great not-for-profit organizations (Black Girls Code and The Knowledge House) taking the lead on accomplishing this. Both organizations aim to "build a STEM education-to-jobs pipeline in underserved neighborhoods," as well as "fixing the underrepresented minority demographic within the technology industry" by offering programs such as computer programming, coding, as well as website, robot, and mobile application-building courses.¹⁵¹

Co-operatives are a big, structural reform that blacks can implement right where they live, giving the Black community a practical and effective way to push back against the greed of the centralized, hierarchical corporate model. If blacks can create more co-op businesses, member accounts would translate into individual assets (equity share and investment refund) while the net worth of the business contributes to individual wealth, and is a communal asset. The wealth and

148. Carolyn M. Brown, *Howard University Breaks Ground On \$1 Million Innovation Incubator For Startups*, BLACK ENTERPRISE (Mar. 11, 2016), <http://www.blackenterprise.com/small-business/howard-university-breaks-ground-on-1-million-innovation-incubator-for-startups/>.

149. Jessica Leber, *Meet The 23-Year-Old Turning Harlem Into A Startup Hub Without All The Whiteness*, FASTCOMPANY.COM (Mar. 2, 2016), <https://www.fastcompany.com/3056638/meet-the-23-year-old-turning-harlem-into-a-startup-hub-without-all-the-whiteness>.

150. Michael Allison Chandler, *D.C. Schools to Expand STEM Courses with \$2 million Lockheed Martin grant*, THE WASHINGTON POST (Nov. 8, 2014), https://www.washingtonpost.com/local/education/dcps-to-expand-stem-courses-thanks-to-a-2-million-lockheed-martin-grant/2014/11/07/90c16cea-66be-11e4-836c-83bc4f26eb67_story.html?utm_term=.be77d194599c.

151. Jodi Gralnick, *'Black Girls Code' aims to reboot diversity in tech*, CNBC, <https://www.cnbc.com/2016/02/19/black-girls-code-aims-to-reboot-diversity-in-tech.html> (last updated Feb. 23, 2016, 7:06 AM).

assets accumulated through co-operatives can be passed along from generation to generation. This approach supports the following range of economic development projects. These include creating model developments where black communities own businesses and housing, through co-operative ownership and buying apartment buildings and homes in non-gentrified, underdeveloped portions of communities.

Community Land Trust

Community land trusts are nonprofit, community-based organizations designed to ensure community stewardship of land. Community land trusts can be used for many types of development (including commercial and retail), but are primarily used to ensure long-term housing affordability. To do so, the trust acquires land and maintains ownership of it permanently. With prospective homeowners, it enters into a long-term, renewable lease instead of a traditional sale. When the homeowner sells, the family earns only a portion of the increased property value. The remainder is kept by the trust, preserving the affordability for future low- to moderate-income families.

Venture Capital

Nowhere is the lack of diversity more evident than in venture capital, which is dominated by white men who fund very few startups founded by women and minorities. African American men receive two percent of the venture capital funding other startups get, while black women get a tiny fraction.¹⁵² The Greenwood Project, founded by a Howard University Alumnus, is crowdfunding an incubator that invests funds to build startups managed by the most ambitious minority entrepreneurs in the world, with the aspiration of pumping billions of dollars back into black communities by establishing a successful technology company owned by the black middle class.

The mission of the Greenwood Project is to build generational Black wealth by creating more black tech startups, funding them with African American investments, and keeping the profits in black communities. They espouse the use of African American collective resources to create more Black millionaires. Therefore, African Americans must redirect a greater portion of the \$1.2 trillion of annual income back to black communities via African American businesses.

152. Richard Kerby, *Why Are There So Few Black Investors?*, TECHCRUNCH (Mar. 10, 2015), <https://techcrunch.com/2015/03/10/why-are-there-so-few-black-investors/>.

Reversing the Economic Legacy of Racial Segregation

Small Business Administration

The Small Business Administration (SBA) is an important player in this area. However, changes are needed to address disparities in African Americans borrowing from the SBA.¹⁵³ These efforts include improving SBA's responsiveness to African American businesses and preparing more black community residents on how to take advantage of the SBA's resources and services.

Promoting and Expanding Current Enterprises

Existing majority black-owned enterprises like Oprah's OWN network, TV/Radio One, Revolt TV, TIDAL, Macro Ventures, and professional firms need continued support and ever-increasing opportunities to remain competitive. To more significantly affect employment, however, most of these current enterprises require a mechanism to greatly expand their share of the market.

Expand Partnerships with African and Caribbean countries

Utilizing partnerships with African and Caribbean countries and business leaders to combat undercapitalization of black businesses is one approach to spur and support business growth and development. In 2014, Tony Elumelu, one of Africa's richest businessmen, helped organize a three-day summit in Washington, D.C. with 50 African heads of state and hundreds of business leaders from the U.S. and Africa.¹⁵⁴ The goal was to strengthen the economic bond and opportunity for all involved. Furthermore, Mr. Elumelu's foundation launched an entrepreneurship program with 100 million dollars that will touch 10,000 entrepreneurs across Africa and the United States.¹⁵⁵ The goal is to train and mentor minorities and create platforms for them to have commercial business engagements.

Three barriers to black business development present challenges to the proposal above—access to capital, access to credit, and low good will. Each of these has roots in the historic and contemporary reality of white racial dominance. The discriminatory practices of the

153. The Great Paper Chase: Minority Access To Employment And Capital." *Diversity Connection*. Risha Grant LLC, n.d. Web. 23 June 2015.

154. KuramoCap, U.S. -Africa Leaders Summit In Washington DC, KURAMO CAPITALMANAGEMENT (Aug. 17, 2014), <https://kuramocapital.com/u-s-africa-leaders-summit-in-washington-dc-august-4th-to-6th-2014/>.

155. Freddie Ra, *African Billionaire Launches \$100 Million Dollar Program for African & African-American Entrepreneurs*. URBAN INTELLECTUALS (July 30, 2015), <https://urbanintellectuals.com/2015/07/30/african-billionaire-launches-100-million-dollar-program-for-african-african-american-entrepreneurs/>.

Jim Crow Era substantially obstructed wealth creation, political engagement, educational equity for African Americans.¹⁵⁶ The reparations proposals that follow provides institutional redress for those and other harms.

B. EDUCATIONAL FUND

“Without education, there is no hope for our people, and without hope our future is lost.”

– Charles Hamilton Houston

Background: Education represents an almost intractable problem in black communities. Redressing the 245-year legacy of education deprivation followed by 100 years of educational discrimination serves as one of reparations biggest challenges.

After the Civil War, the denial of education to most blacks became a matter of social policy enshrined in legislation. Although the law no longer proscribed black education, for most blacks their states refused to provide them with equal educational opportunities. Slavery was over, but that simply put over 90% of the blacks that lived in the South in the same degraded posture of their Northern counterparts. Unfortunately, for most, it was even worse. That legacy of educational discrimination continues with us today as black students continue to lag behind their white counterparts despite gains in black family income.

More than 50 years after the Supreme Court’s decision in *Brown v. the Board of Education*, black schools remain separate and unequal in many respects.¹⁵⁷ Redressing the two hundred and 45-year legacy of educational deprivation followed by 100 years educational discrimination serves as one of reparations biggest challenges.¹⁵⁸

156. See Carlton Waterhouse, *Avoiding Another Step In A Series of Unfortunate Legal Events: A Consideration of Black Life under American Law from 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. THIRD WORLD L.J. 207, 232-246 (2006).

157. See *Brown v. Board of Ed.*, 347 U.S. 483 (1954).

158. *Id.*

Reversing the Economic Legacy of Racial Segregation

A. Black Education¹⁵⁹

- Black student's reading scores at 9 years old are 35 points below whites and 7 points below Hispanics
- Black student's reading scores at 13 years old are 29 points below whites and 6 points below Hispanics
- Black student's reading scores at 17 years old are 31 points below whites and 7 points below Hispanics
- Black student's math scores at 9 years old are 28 points below whites and 2 points below Hispanics
- Black student's math scores at 13 years old are 32 points below whites and 8 points below Hispanics
- Black student's math scores at 17 years old are 32 points below whites and 10 points below Hispanics
- Black student's science scores at 9 years old are 41 points below whites and 7 points below Hispanics
- Black student's math scores at 13 years old are 39 points below whites and equal to that of Hispanics
- Black student's math scores at 17 years old are 52 points below whites and 18 points below Hispanics
- On average black students scored 96 points below whites and 1 to 27 points below all Hispanic groups on the Verbal section of the SAT
- On average black students scored 106 points below whites and 25 to 39 points below all Hispanic groups on the Math section of the SAT
- The black student dropout rate is 13.6% compared with 6.9% for whites and 27.8% for Hispanics.

Despite the great legal significance of the *Brown* decision to desegregation in America, its educational relevance is almost negligible. *Brown* and its progeny simply failed in two key respects.¹⁶⁰ It provided neither integrated schools nor equal educational resources for the vast majority of black children since its issuance.¹⁶¹ A vital aspect of this underscores the claim that reparations has not and will not

159. NATIONAL INSTITUTE FOR EDUCATION STATISTICS, STATUS AND TRENDS IN THE EDUCATION OF BLACKS, (2003). The most recent data from the study is cited. Dropout rates were computed based on graduation from ages 16-24.

160. See generally *Brown*, 347 U.S. at 483.

161. See Bullard, Robert, et. al. *Sprawl City* 139-56 (2000).

come for black Americans through the courts.¹⁶² Derrick Bell has similar misgivings about *Brown*, based on his theory of interest convergence and racial realism.¹⁶³ Regardless of the reason for the *Brown* decision, however, its failure to bring about equitable funding or integrated classrooms for most black children is almost unquestioned.¹⁶⁴ The reason *Brown* failed, in those respects, however, rests with the majority of white parents of America more so than the courts.¹⁶⁵ These parents and their elected officials immediately and consistently take initiative to prevent *Brown* from accomplishing its intended goal.¹⁶⁶ They shut down entire school systems, began a massive private school movement that withdrew substantial numbers of white students from the public schools, moved away from their homes and neighborhoods into all white suburbs, and fiercely opposed busing.¹⁶⁷ In large part, the racialized pattern of education that resulted from those actions is the norm for today. With the exception of a small percentage of black children in predominantly white public and private schools, most schools across the country remain separate with unequal educational resources.

Roy Brooks' solution to this draws from what he sees as successful educational models in black "independent" or "community" schools focused on the educational needs of black children.¹⁶⁸ Many of these schools, Brooks points out, are associated with the Council of Independent Black Institutions (CIBI) or the Institute for Independent Education (IIE).¹⁶⁹ They emphasize black heritage along with academic excellence. Growing out of black educational activism of the 1970s, these schools connect with a "spiritual and intellectual genealogy" of black schools dating back to the early nineteenth century, Brooks points out.¹⁷⁰ Brooks contends that a black public school sys-

162. *Id.* at chapter 1.

163. Derrick Bell argues that the *Brown* court's decision on flowed largely from executive branch pressures to respond to communist attacks on American segregation that hindered America's progress in the cold war. His theory is that white courts will act in the perceived interest of the white majority and the "civil rights" advancements for blacks only occur when they converge with what is understood as the perceived interest of the majority. Racial realism, according to Bell, is acceptance that as long as blacks are a racial minority in this country the will experience some degree of mistreatment and discrimination.

164. See *Brown*, 347 U.S. at 483.

165. *Id.*

166. *Id.*

167. See DERRICK BELL, *SILENT COVENANTS* 94-113 (2005).

168. ROY L. BROOKS, *INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY* 223 (1996).

169. *Id.* at 225.

170. *Id.* at 226.

Reversing the Economic Legacy of Racial Segregation

tem should be developed on the model of these black independent schools.¹⁷¹

The school system, proposed by Brooks, has four key ingredients: parental and community involvement, strong leadership, prepared and committed teachers, and a comprehensive curriculum.¹⁷² Parental and community involvement provide a critical underpinning of the successful independent and community schools serving black needs today. A black school system, as envisioned by Brooks, will look to parents and communities as essential ingredients of effective schools.¹⁷³ A dynamic principal plays a vital role in Brooks' proposal. He explains:

She must take the initiative in identifying and articulating goals and priorities; set instruction as the first priority; hand pick the staff; supervise and evaluate teacher performance; spend half the school day in the classrooms and the halls; find ways to reward excellent teachers with greater responsibilities; and set a consistent tone of high academic expectations and a non-patronizing attitude.¹⁷⁴

Along with strong principals, Brooks calls for a cadre of African American teachers who can "understand the needs and conflicts the children face. . . [and] have the ability to infuse African American children with pride through positive reinforcement and high expectations of academic and personal excellence."¹⁷⁵ Brooks believes these teachers will identify with many of the struggles of the students and will both challenge and inspire them to excel.¹⁷⁶ Another critical element of Brooks' African American school system is the curriculum. Unlike some of the independent black schools he identifies, Brooks' school system would not adopt an Afrocentric curriculum. Instead Brooks posits that, "education must. . . include traditional Eurocentric philosophies and ideas, in addition to knowledge about the culture and heritage of all ethnic minorities in this country."¹⁷⁷ Brooks does not define what he means by Afrocentric or multicultural curricula. On the other hand, the academic focus for the curriculum is clearly

171. *Id.* at 227.

172. *Id.*

173. *Id.* at 225.

174. *Id.* at 226.

175. *Id.* at 227.

176. *Id.*

177. *Id.* at 229. Brooks calls for the use of a multicultural curriculum in his proposed school system that includes black history and culture. This curriculum does not differ from what he argues should be used in predominantly white public schools, as well, but sees little hope in its acceptance.

stated. He explains, “African American public schools will emphasize basic skills—reading, writing, math, and critical thinking—and, recognizing the importance of building self-esteem and developing racial survival skills, will teach personal values, conflict resolution, family issues, and health related topics.”¹⁷⁸ His basis for the schools would be educational necessity as opposed to neighborhood makeup.¹⁷⁹ While Brooks supports white schools based on the particular needs of white students, he opposes racially isolated schools based on neighborhood characteristics as “smack[ing] of bigotry.”¹⁸⁰

While Brooks’ proposal makes a significant contribution to the educational challenges facing most African American K-12 school systems, Brooks’ approach fails to account for the inner-city schools that have majority black staff, including principals and teachers, who work hard and do their very best to offer a quality education to the children they serve but still fail to qualify as the kind of school Brooks hopes to create.¹⁸¹ A return to the small segregated schools of the 1950s with equalized funding could result in the development of Brooks’ black school system, but the sheer number of students and the vast city, county, and state institutional structures make that all but impossible today. Achieving Brooks’ school system in almost any major American city would require the reform of the entire school system.¹⁸² Laws, regulations, and policies governing everything from lunchroom staff salary to the curriculum would have to be reformed across America’s cities.

We propose that black children and parents be offered more alternatives to meet their educational needs. To create these alternatives, a reparations educational trust fund would be established. The fund would provide grants in the major areas of black concentration identified above for the development of public charter schools and independent schools designed to meet the needs of black children. Charter schools operate free of most of the bureaucracy and budget obligations of public schools. Across the country, charter schools have galvanized parents and students with enthusiasm. In their develop-

178. *Id.* at 228.

179. *Id.* at 230.

180. *Id.*

181. *Id.*

182. Brooks’ main point, that blacks need to be in control of black schools at all levels to transform the educational experience of their children, is not lost on me. Some means of overcoming the educational bureaucracy in public schools is needed to effect the change that Brooks seeks. I believe charter schools can provide that mechanism.

Reversing the Economic Legacy of Racial Segregation

ment and their operation, charter schools hearken back to the neighborhood schools that black parents sought to create in the 1970s. Because of their structure, charter schools generate and mandate parental involvement. Moreover, a child's attendance requires an active decision by parents that often reflects an investment in a child's education that public schools simply do not require. Moreover, charter schools result from parental initiative to start the school and operate without the bureaucracy that intimidates many parents due to their increased autonomy. Additionally, the ability to organize the school around a particular set of principles and values, establish curricula, attendance schedules, and uniforms in accordance with the school charter provides an enhanced incentive for parental involvement and focus for children that breeds excitement. It is not surprising that many charter schools today have waiting lists for children to attend.¹⁸³

As public schools, charter school funding would be limited to the start up costs of the parents organizing the school including consulting and administrative costs. By making this funding available while providing parents with a successful model, the fund would seed the creation of thousands of charter schools around the country. For support, these schools would have to demonstrate a commitment to the reparative principles articulated above. Accordingly, students would be educated in a way that reflects the principles of the reparations charter. An Afrocentric curriculum would also be an important aspect of supported schools, though this article would make that a preferential rather than a mandatory requirement. Committed educators understanding the reparative objective of the school will be the best judges

183. There are, nonetheless, many persons who frown upon charter schools. The three major complaints are that they increase racial separation (most charter schools are primarily single race schools with blacks and Latinos), they lack funding comparable to public schools, and they do not improve the scholastic performance of the students. Responses are limited to two of these three concerns since the third — racial isolation in these schools helps to underscore their appropriateness for these purposes. The national teachers' union and other organizations of public school workers express concern that charter schools receive less funding and may pay teachers lower wages. This is a legitimate concern for public school teachers but is not an educational based concern. Most private schools also pay lower wages for teachers, yet teachers choose to work in these schools because of the increased job satisfaction. I empathize with teachers and believe that they job do warrants higher pay, but that shortcoming in the charter school system call for a political response at the state legislative level rather than a change in the schools themselves. Opponents also claim that student test scores do not improve in charter schools. The relationship of student test scores to race and income is highly documented. Schools can impact those numbers in the right environment. Just as black independent schools help decrease the disparity in test scores, black charter schools will serve likewise. These schools can't undo the fullness of the systemic challenges of American society, by they can certainly improve the quality of education for many more black children.

of the comprehensive educational profile of schools and their ability to succeed. Nonetheless, from the perspective of this article, an Afrocentric education is preferable over a multicultural model. This article's concept of an Afrocentric education does not exclude education about European, South American, Asian, or other contributions to world history, philosophy, science, law, etc.

Under this proposal, supported charter schools are designed with a reparative purpose. Although admissions will be open to children of all races, the purpose of the charter schools is to provide an education that best addresses the harms of slavery and segregation. For reasons presented below, an Afrocentric education is best suited to this task. Nevertheless, these schools would operate autonomously and would reflect the particular character of the parents and the areas in which they operate.

From the perspective of this article, the primary distinction between an Afrocentric curriculum and a multicultural curriculum is the lens through which study takes place. The traditional educational model assumes the white male as the lens and examines everything from that perspective. A multicultural model operates without a center point, focusing on the inclusion of sources and stories from diverse groups. An Afrocentric educational lens, in a reparative context, views things from the perspective of the black community. It specifically seeks to address the miseducation regarding black life, culture, and history propagated under the Reign of Terror. Multicultural education, in contrast, focuses on a model of inclusion for broader educational purposes. As I explain below, the particular history of blacks in America necessitates a more intentioned educational approach to correct the historic and contemporary fallacies regarding black life. Under this proposal, supported charter schools are designed with a reparative purpose.

Although admissions will be open to children of all races, the reason for the schools is to provide the education that best addresses the harms of slavery and segregation. For reasons presented below, an Afrocentric education is best suited to this task. Nevertheless, these schools would operate autonomously and would reflect the particular character of the parents and the areas in which they operate.¹⁸⁴

184. The hallmark and primary strength of charter schools is the investment of parents, students, and administrators to the charter, mission, and purpose of the school. To maintain those vital characteristics this article suggests that outside the broad model provided by the educational trust fund, sponsored schools have the freedom to design their charters to meet the partic-

Reversing the Economic Legacy of Racial Segregation

Research shows that charter schools are no panacea.¹⁸⁵ Their performance can and, in too many cases, do fall below that of traditional public schools.¹⁸⁶ Beyond this, charter schools typically exclude many special needs students who may require accommodations and greater support for their educational success.¹⁸⁷ Moreover, political ideologies have used charter schools as means to reduce educational funding for cities which tend to have larger numbers of African American and Latino students.¹⁸⁸ In openly hostile opposition to current educational professionals, some have maintained that professional preparation of charter school teachers is unnecessary or optional, presumably to suppress teachers' wages and benefits.¹⁸⁹ This proposal rejects that or any model of charter schools that proposes less qualified staff and diminished support services for students. These advocates have often endorsed charter schools as wholesale alternatives to traditional public education with suspect motivations contrary to the values of a reparative educational model. Notwithstanding these shortcomings, charter schools can provide important educational benefits along with traditional public and private schools.

Beyond the development of charter schools, increased educational alternatives mean building on the success of existing independent and community schools. As mentioned above, black private schools provide a vital and effective service to black students and communities. It is estimated that independent black schools currently educate 53,000 students.¹⁹⁰ Many of these schools offer important models for charter and new private schools. Along with seed money for charter schools, the fund would also finance the development of some 20 black academies in target areas of the country. These academies would accept students from the sixth through the twelfth grades

ular needs of their local communities. This means that schools may differ in some significant ways. One school may choose to focus on group projects, another school may have longer days, and another school may have longer classes that meet less frequently.

185. See generally *National Charter School Study 2013*. <http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf>

186. Lisa Lukasik *Deconstructing a Decade of Charter School Funding Litigation: An Argument for Reform*, 90 N.C. L. REV. 1885, 1889 (2012).

187. *Id.*

188. *Id.*

189. Amazingly, the persons adopting these views send their children to private schools with the highest credential teaching staff while proposing a dollar store model of education for students of color and struggling whites.

190. BROOKS *supra* note 168, at 223-25.

and would build on the model of the Frederick Douglass Academy in Harlem.¹⁹¹

The Frederick Douglass Academy, considered one of the best high schools in America, is 83% black, 14% Hispanic, and 2% Asian and white.¹⁹² The school employs a creed and a set of established rules for students, employs attendance in a summer enrichment program, and demands four hours of academic work per night for its students.¹⁹³ Student performance on the state Regents Examination exceeds the average of New York City schools by 30% to 40% in each subject area.¹⁹⁴ In conjunction with schools developed on the Frederick Douglass Model, the fund should support the creation of schools focusing on the needs of black children and organized specifically around science and technology. America suffers from a current, and anticipates a continued, shortage of citizens able to provide the highest levels of technical expertise. This shortage provides an opportunity for black students with high levels of training to develop companies and consulting firms able to meet those needs. Success in those fields, however, requires an early decision to provide the requisite skills at the primary and secondary level, recognition and support of students gifted in those areas and nurturing interest and excitement of students around science, technology, and engineering. The creation of academies that instill students with the skills to perform in these areas and the commitment to use their gifts to further the well-being of their communities is a long-term investment that will pay huge dividends for black communities.

As with charter schools, the fund would make grants available to establish independent schools in particular communities. Unlike charter schools, however, the fund would provide the primary financing for the school's development, initial operating costs and endowments. As with charter schools, the fund would use a board of expert educa-

191. In the alternative, the fund could focus its support on independent high schools that would stress academic excellence and personal development for black children.

192. BELL *supra* note 163, at 172-74.

193. The student creed states:

The community of scholars at The Frederick Douglass Academy is dedicated to personal and academic excellence. Choosing to live in the community obligates each member to a code of civilized behavior. Allegiance to these ideals requires each Frederick Douglass Academy Student to refrain from and discourage behaviors which threaten the freedom and respect every individual deserves. As a Frederick Douglass Academy Student: I will practice personal integrity; I will respect the rights and property of others; I will discourage bigotry, while striving to learn the differences in people, ideas and opinions; I will demonstrate concerns for others, their feelings, and their needs for conditions that support their work and development.

194. FREDERICK DOUGLASS ACADEMY, <http://www.fda1.org/> (last visited Feb. 18, 2018).

Reversing the Economic Legacy of Racial Segregation

tors with diverse experiences to evaluate grant submissions and funding plans for schools. The criteria for funding, however, would necessarily include a demonstrated commitment to the reparations principles articulated above, just as with the charter schools. Although 20 academies, with 700 to 1,000 students each, represent a small percentage of black school-aged children, it again increases the choices that black children and parents have and drastically improves the quality of education for thousands of black children.

This inculcation of black self-hatred was standard fare in American educational institutions and popular culture. Cornel West articulates the breadth of these views in the thought of the most revered Western scholars from Immanuel Kant to David Hume.¹⁹⁵ Thomas Jefferson, the great Western advocate of equality, himself said:

Comparing them [Negroes] by their faculties of memory, reason, and imagination, it appears to me that in memory they are equal to the whites; in reason much inferior, as I think one could scarcely be found capable of tracing and comprehending the investigations of Euclid, and that in imagination they are dull, tasteless, and anomalous.¹⁹⁶

Abraham Lincoln, who is viewed as the great liberator in American society, made the following statement regarding black inferiority:¹⁹⁷

I agree with Judge Douglas he [a black] is not my equal in many respects—certainly not in color, perhaps not in moral or intellectual endowment. But in the right to eat the bread, without the leave of anybody else, which his own hand earns, he is my equal and the equal of Judge Douglas, and the equal of every living man. . . I have no purpose to introduce political and social equality between the white and the black races. There is a physical difference between the two, which, in my judgment, will probably forever forbid their living together upon the footing of perfect equality, and inasmuch as it becomes a necessity that there must be a difference, I, as well as Judge Douglas, am in favor of the race to which I belong having the superior position.¹⁹⁸

195. CORNEL WEST, *PROPHESY DELIVERANCE: AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY* 47-68 (Anniversary ed. 2002).

196. THOMAS JEFFERSON, *Notes on the State of Virginia*, Query XIV, at 202 (1784), <https://quod.lib.umich.edu/e/evans/N20681.0001.001/1:20?rgn=div1;submit=go;subview=detail;type=simple;view=fulltext;q1=comparing+them>.

197. See generally DAVID HERBERT DONALD, *LINCOLN* (1995); STEPHEN B. OATES, *ABRAHAM LINCOLN: THE MAN BEHIND THE MYTHS* (HarperPerennial 1994) (1984).

198. Abraham Lincoln, First Debate: Ottawa, Illinois (Aug. 21, 1858) (transcript available at <https://www.nps.gov/lih/learn/historyculture/debate1.htm>).

Even John Marshall Harlan, in his famous dissent from the majority decision upholding segregation in *Plessy v. Ferguson*, wrote:

The white race deems itself to be the dominant race in this country. And so, it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.¹⁹⁹

The foregoing examples exemplify the views of white superiority and supremacy that are dominant within American society. Beliefs contrary to this view by whites, as often by blacks, were aberrations of American thought. Accordingly, whites who taught blacks in the Freedman's bureau and other settings, like the foregoing "advocates," in no way rejected the dominant notions of black inferiority and white supremacy.²⁰⁰ Unfortunately, this ideology has also penetrated the thoughts of many blacks concerning themselves and their African heritage.

Malcolm X captured the sentiment in one of his final speeches:

And by the colonial powers of Europe having complete control over Africa, they projected the image of Africa negatively. They projected Africa always in a negative light: jungles, savages, cannibals, nothing civilized. Why then naturally it was so negative [that] it was negative to you and me, and you and I began to hate it. We didn't want anybody telling us anything about Africa, much less calling us Africans. In hating Africa and in hating the Africans, we ended up hating ourselves, without even realizing it. Because you can't hate the roots of a tree and not hate the tree. You can't hate your origin and not end up hating yourself. You can't hate Africa and not hate yourself.

You show me one of these people over here who have been thoroughly brainwashed, who has a negative attitude toward Africa, and I'll show you one that has a negative attitude toward himself. You can't have a positive attitude toward yourself and a negative attitude toward Africa at the same time. To the same degree that your understanding of and attitude toward Africa becomes positive, you'll find that your understanding of and your attitude toward yourself will also become positive. And this is what the white man knows. So they very skillfully made you and me hate our African identity, our African characteristics. You know yourself — and we

199. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

200. See GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914*, at 165-97 (1987).

Reversing the Economic Legacy of Racial Segregation

have been a people who hated our African characteristics. We hated our hair, we hated the shape of our nose — we wanted one of those long, dog-like noses, you know. Yeah. We hated the color of our skin, hated the blood of Africa that was in our veins. And in hating our features and our skin and our blood, why, we had to end up hating ourselves.

And we hated ourselves. Our color became to us a chain. We felt that it was holding us back. Our color became to us like a prison, which we felt was keeping us confined, not letting us go this way or that way. We felt that all of these restrictions were based solely upon our color. And the psychological reaction to that would have to be that as long as we felt imprisoned or chained or trapped by Black skin, Black features, and Black blood, that skin and those features and that blood that was holding us back automatically had to become hateful to us. And it became hateful to us. It made us feel inferior; it made us feel inadequate; it made us feel helpless.

And when we fell victims to this feeling of inadequacy or inferiority or helplessness, we turned to somebody else to show us the way. We didn't have confidence in another Black man to show us the way, or Black people to show us the way. In those days we didn't. We didn't think a Black man could do anything but play some horn — you know, some sounds and make you happy with some songs and in that way. But in serious things, where our food, clothing, and shelter was concerned and our education was concerned, we turned to the man. We never thought in terms of bringing these things into existence for ourselves, we never thought in terms of doing things for our selves. Because we felt helpless. What made us feel helpless was our hatred for ourselves. And our hatred for ourselves stemmed from our hatred of things African.²⁰¹

The extensive mis-education of African Americans resulted in the majority of American blacks disassociating themselves with the affairs of Africa, the Caribbean, and other blacks across the diaspora. The Black Power Movement of the 1970s and the Afrocentricity movement of the 1980s both represent strong symbolic efforts to re-associate black Americans with Africa and the larger black world. These efforts, though they have made cultural inroads in art, music, and hair-styles, have not resulted in the substantive association of most blacks with other diaspora communities nor with Africa. The educational fund can play a critical role in advancing the development of substan-

201. Malcolm X, *After the Bombing: Speech at Ford Auditorium* (Feb. 14, 1965) (transcript available at http://malcolm-x.org/speeches/spc_021465.htm).

tive associations among people of African descent. Through the support of Afrocentric curriculum in black educational institutions, much of the mis-education of the past three centuries can be confronted head on.²⁰² The fund can further concretize re-association through the development and support of sustained educational exchanges with black institutions across the diaspora and in Africa.

One such program would be the establishment of black Educational Collaboratives in the United States, Nigeria, South Africa, Kenya, Ghana and the Caribbean.²⁰³ An Educational Collaborative would be a cross between a think tank, a summer abroad program, and a Jewish Kibbutz. The Collaboratives would bring together black youth from around the world, ages 17 to 21, for a summer. Academically, students would undergo a course of study for college credit. Students' time would be balanced between class, local community service projects, and strategy sessions where students would develop mechanisms for strengthening relations in the political, economic, and educational spheres. The coursework would be focused on political science, economic theory, and history. The goal would be to promote black cooperation on a global scale by identifying the need and opportunities for joint projects and partnerships. These Collaboratives would operate as funded programs, housed at select HBCUs in the United States, the University of the West Indies in the Caribbean, and the premier universities in Nigeria, Kenya, Ghana, and South Africa, respectively.

The fund would also play a major role in strengthening HBCUs. HBCUs play a vital role in the well-being of African Americans. They, along with the black churches, represent the strongest black institutions in the United States. From their inception after the Civil War, many HBCUs began with a reparative notion.²⁰⁴ One of the principal goals was to provide educational opportunities to those who had been denied them. Many of these institutions' founding and current missions reflect the role of education in addressing the harms done by slavery. Beyond their missions, these schools play a crucial

202. In this regard, a multicultural curriculum provides less opportunity to address the uniqueness of black children and the relationship between their education and their personal and communal restoration.

203. Based on language, political stability, infrastructure and contemporary relationships with America, I recommend these countries as initial sites for program development.

204. STEPHEN PROVASNIK & LINDA L. SHAFER, NAT'L CENTER FOR EDUCATION STATISTICS, NCES 2004-062, HISTORICALLY BLACK COLLEGES AND UNIVERSITIES, 1976 to 2001, at 1 (2004), <https://nces.ed.gov/pubs2004/2004062.pdf>.

Reversing the Economic Legacy of Racial Segregation

role in black lives. Despite the well-publicized financial troubles of a few, most of the more than 81 schools are financially sound, and as a whole, they play an indispensable role in promoting black well-being. Sixty-seven of the schools have a majority of students who qualify for the Pell Grant.²⁰⁵ This federal grant is mostly limited to families with incomes below \$35,000, while half of Pell Grant recipients are from families with incomes below \$15,000 a year.²⁰⁶ Even at the schools with the fewest Pell Grant recipients (Howard, Spelman and Hampton), one-quarter to one-third of those student bodies receive Pell Grants.²⁰⁷ These schools clearly play a pivotal role in offering opportunities to many low-income black students. Despite representing only three percent of the country's two-year and four-year institutions, HBCUs graduate 28% of black bachelor degree students.²⁰⁸ Over 75% of blacks with doctorate degrees attended an HBCU.²⁰⁹ A few additional statistics regarding HBCUs are as follows:

- Seven of the top eight producers of African American baccalaureates overall were HBCUs, including Florida Agricultural and Mechanical University (#1) and Howard University (#2).
- Eight of the top eleven producers of African American baccalaureates in agriculture, agriculture operations and related sciences, were HBCUs, including Tennessee State University (#1) and Tuskegee University (#3).
- 16 of the top 21 producers of African American baccalaureates in biological and biomedical sciences were HBCUs, including the entire top six: Xavier University of Los Angeles (#1), Hampton University (#2), Howard University (#3), Morgan State University (#4), Jackson State University (#5) and Tennessee State University (#6).
- Six of the top ten producers of African American baccalaureates in education were HBCUs, including Alabama State University (#1).
- Seven of the top eleven producers of African American baccalaureates in engineering were HBCUs, including North Carolina A&T State University (#1).

205. 44 J. BLACKS HIGH. EDUC. (2004).

206. At 24 schools, 75 or more students receive Pell Grants. *Id.*

207. BLACKS HIGH. EDUC., *supra* note 205.

208. H.R. REP. NO. 107-797, at 98 (2003) (Conf. Rep.).

209. *Historically Black Colleges and Universities and Higher Education Desegregation*, U.S. DEPARTMENT OF EDUCATION (Oct. 4, 2017, 4:11 PM), <http://www.ed.gov/about/offices/list/ocr/docs/hq9511.html>

- The top three producers of African American baccalaureates in health professions were HBCUs: Southern University and A&M College (#1), Florida A&M University (#2) and Howard University (#3).
- Eight of the top nine producers of African American baccalaureates in mathematics and statistics were HBCUs: #1 Morehouse College, (#2) South Carolina State University, (#3) Alabama State University, (#3) Spelman College, (#5) Southern University and A&M College, (#6) Tennessee State University, (#7) Hampton University and (#9) Howard University.
- The twelve top producers of African American baccalaureates in the physical sciences, including (#1) Xavier University of Louisiana, were all HBCUs.
- Three of the top five producers of African American baccalaureates in psychology were HBCUs: (#1) Florida A&M University, (#3) Hampton University and (#5) Howard University.²¹⁰

Overall, HBCUs play a major role in providing education for blacks. Yet, HBCUs need to be strengthened to serve a reparative purpose. Despite their ability to do more with less, many HBCUs have attrition rates that are far too high. Generally, HBCUs suffer from inadequate resources to accomplish their missions. Even the best schools are underfunded to compete successfully with many white schools for the best prepared black high school graduates. Further, these schools often place greater teaching demands on their faculty, providing them fewer resources and less time to develop their scholarship. At many schools, faculty have heavier teaching loads because there are too few faculty members relative to the number of students. These types of constraints routinely hinder schools in their competition for the most prolific scholars and hinder their reputations for supporting scholarship. For many schools, limited resources hamper their administrative efficiency and the improvement of their infrastructure and facilities. As shown above, HBCUs have a vastly disparate number of students receiving financial aid. This phenomenon places a huge and unique administrative burden on these schools. Because of

210. F. Erik Brooks & Glenn L. Starks, *Historically Black Colleges and Universities: An Encyclopedia* 207-08 (2011).

Reversing the Economic Legacy of Racial Segregation

the foregoing, there is often a feeling that these schools are inferior to their white counterparts. National college rankings, such as U.S. News and World Report, consistently rank HBCU schools in its lower tiers.²¹¹ No HBCU ranks in the first or second tier of the U.S. News ranking of America's Top National Universities.

This broader societal impression of inferiority to predominantly white or majority schools goes along with a feeling of inferiority that some blacks have regarding HBCUs. In fact, among American-born blacks there is a generally acknowledged sentiment that black businesses and schools are inferior to their white counterparts. Rather than the result of careful study or extensive experience, this sentiment flows from the undervaluation by whites of such entities and the entities' actual shortcomings that may or may not be greater than comparable majority institutions.²¹² A general presumption of poor service and inferior quality often attaches to black business and educational entities. To be competitive, HBCUs must shed this perception. Most of the actual shortcomings of HBCUs can be tracked to resources. Greater resources focused toward specific reparative educational objectives and financial baselines that allow improvements in infrastructure, faculty support, and administrative management will more fully enable these schools to realize their reparative missions.

To accomplish this, the reparations educational trust fund would establish an HBCU division devoted solely to strengthening these institutions. This article proposes that the fund make grants available to schools with demonstrable success toward fulfilling their missions that show a need for infrastructure and administrative management support to function more effectively and enhance their competitiveness. As with primary and secondary education, a board of qualified professionals would make decisions about funding for schools. Beyond general funds, the board would be tasked with responsibility for funding programmatic and department specific funding in priority areas. These would include funds for equipment, endowed chairs, research,

211. Spelman College entered the top 100 ranking of national liberal arts colleges in 2003. Its current ranking at 72 of 104 schools is the sole inclusion of an HBCU in the top 100 in a national ranking. Howard University is currently ranked 124 among National Universities. At the regional level, HBCUs have fared better. In the most recent rankings of Southern schools Hampton University, Tuskegee University, and Xavier University of Louisiana, currently rank at 18, 24, and 27, respectively. *Historically Black Colleges and Universities*, U.S. NEWS AND WORLD REPORTS (May 24, 2017), <https://www.usnews.com/best-colleges/rankings/hbcu>.<https://www.usnews.com/best-colleges/rankings/hbcu>.

212. The basis of assertion rests in the author's experiences attending and teaching in HBCUs and other institutions.

and post-doctoral fellowships. Funding would also be directed toward the creation of fellowship programs for students in particular areas of study critical to developing and maintaining strong black institutions and communities. These include law, medicine, engineering, computer and digital technologies, environmental sciences, political science, education, business management and finance. Under these fellowships, schools can better compete for new students and better support the existing students in those areas of study. The added finances and prestige of fellowships can go a long way toward producing future success.

Finally, the board would seek to expand and deepen the top professional schools and graduate programs. Increasing the number and the caliber of students graduating from HBCU graduate and professional programs increases the numbers of professionals who can create and sustain the institutions that serve the needs of the black community. Lawyers, doctors, and business managers are critical to reparations. As stated above, the “black middle class” today creates few jobs and job opportunities for others.²¹³ Although, black lawyers and doctors tend to create jobs with relative stability their small numbers correlate with too few jobs.

As with primary and secondary education much of the funding would require that institutions demonstrate their commitment to the reparative goals of the trust and communal responsibility. So, for example, if North Carolina A&T were to apply for a \$100 million-dollar grant for research, equipment, fellowships, etc. for their college of engineering, their application would have to identify how the research done, equipment used, and fellowships awarded would serve a reparative purpose while promoting communal responsibility. One of the many possible college grant programs could address technological issues that face one or more black communities in the Caribbean, Africa, or the United States. Through the purchase of equipment, students and faculty could gain experience using the equipment that supports research vital to one or more black communities. Concomitantly, fellowships could be used to attract competitive students by requiring applicants to articulate how their future course of study advances the goals of the reparations trust. There are numerous ways that grant criteria can be shaped to further the goals of the trust. Even research in areas unrelated to the perceived interest of black commu-

213. See generally E. Franklin Frazier, *The Black Bourgeoisie: The Book That Brought the Shock of Self-Revelation to Middle-Class Blacks in America* (1997).

Reversing the Economic Legacy of Racial Segregation

nities can provide black businesses and technologists with some competitive advantage in the marketplace. This article does not suggest that research agendas be constrained to a simplistic formula, but applicants must be required to think in terms of the explicit and implicit goals of the trust and meaningfully relate their proposals to those goals.

As a final charge for HBCUs, some funding should be used to establish meaningful relationships with universities in Nigeria, South Africa, Kenya, Ghana, as well the University of the West Indies. Grants should establish requirements for meaningful collaboration on research, joint projects, technology transfers, student exchanges, and visiting professorships where feasible. These along with other criteria articulated above and developed by the board will help institutionalize practices that will further the Educational Fund's reparative charter.

C. POLITICAL FUND

The Negro demands less by his ballot, not only in actual results but even in mere respect for himself as a voter, than any of all the groups that go to make up the American citizenry; although some of these groups are far smaller in numbers and even weaker economically.

Relative to our numbers in the American population, blacks are still substantially underrepresented in national office. There are three black senators, out of one hundred, in the United States Senate.²¹⁴ Only 48 out of 435 members of the House of Representatives are black.²¹⁵ Although black representation in some state legislatures is much better, black representation in statewide offices is even worse. There are no black governors, and only Virginia and Massachusetts have elected a black governor in the past 130 years. Black people's greatest political advances have been in local elections. In this regard black representation has increased dramatically in mayoral, city council, and city commission posts.²¹⁶ This increase in political power over the past 30 years in large cities like Chicago, Philadelphia, Atlanta, New Orleans, Memphis, and Detroit, has coincided with a decrease in

214. The Upcoming 115th Congress Will Open With The Most African-Americans In History, NAACP (Oct. 4, 2017, 5:22 PM) <http://www.naacp.org/latest/upcoming-115th-congress-will-open-african-americans-history/>

215. *Id.*

216. MELISSA MARSHALL & ANNA MIKULSKI, *The Process of Minority Incorporation*, Rice University Kinder Institute for Urban Research, Jan. 10, 2013, at 3-5.

the economic base of American cities as suburbs developed as the principal sites of new economic opportunity.²¹⁷ Leadership in many large cities today means struggling to address education, transportation, unemployment, housing, crime and pollution problems with a dwindling tax base.²¹⁸ For the past 20 years, the suburbs have been the center of job growth and job creation in America.²¹⁹ These suburbs, which are predominantly white, often develop around cities with predominantly black populations.²²⁰ In these situations, mayors and city councils spend much of their time in crisis mode—demonstrating that political power without a corresponding economic base functions like an empty promise.²²¹ This article identifies this as the problem of “political impotence.”

Black communities reflect a host of political ideologies: Marxists or social democrats, conservatives, feminists, disillusioned liberals, nationalists, and others.²²² This article adopts the position that, developing strong black political institutions will result from recognizing the importance of these diverse views for promoting the well-being of black communities rather than seeking to marginalize them as “traitors.” This phenomenon weakened black political development in the late 1960s and 1970s through the castigation of black feminists as “race traitors” for raising concerns about sexism and the mistreatment of black women within black communities and organizations.²²³ This article suggests that the insight offered from these diverse perspectives be recognized and valued. Growth and maturity bring an ability to see beyond one’s frame of reference and appreciate the views and experiences of others. This recognition represents a foundational part of reparative black politics.

217. For a discussion of economic changes in American cities over the past three decades. See WILLIAM JULIUS WILSON, *THE BRIDGE OVER THE RACIAL DIVIDE: RISING INEQUALITY AND COALITION POLITICS*, 59-63 (1999).

218. An examination of the current problems facing Atlanta and other American cities and its relationship to the growth of suburbs as dominant economic forces. See generally ROBERT ET AL. *supra* note 140.

219. *Id.*

220. See ROBERT ET AL. *supra* note 140.

221. BROOKS, *supra* note 168 at 168-84. (explaining that the failure of black towns in the late 19th and early 20th century was because of an inadequate economic base to support the needs of the residents).

222. MICHAEL C. DAWSON, *BLACK VISIONS THE ROOTS OF CONTEMPORARY AFRICAN-AMERICAN POLITICAL IDEOLOGIES* 316 (2001).

223. JOHNETTA B. COLE & BEVERLY GUY-SHEFTALL, *GENDER TALK: THE STRUGGLE FOR WOMEN’S EQUALITY IN AFRICAN AMERICAN COMMUNITIES* 83-85, 90-94 (2003).

Reversing the Economic Legacy of Racial Segregation

Political scientist Ron Walters offers a valuable reflection on the three historic black political agenda conferences in 1972, 1976 and 1980.²²⁴ Walters' detailed portrayal allows us to see how the tension between accommodation and struggle described by Marable was manifest in each conference.²²⁵ Walters makes clear that black elected politicians opposed efforts towards political independence and militancy.²²⁶ In the 1972 conference, the militant and uncompromising agenda developed by delegates was revised by the steering committee following criticism from outside forces.²²⁷ By 1980, the conference had become almost exclusively accommodationist. It was sponsored by a Democratic Party based organization that resisted making statements considered harmful to the party.²²⁸ After the democratic candidates participating in the primary elections snubbed the conference by not showing up for a scheduled forum with conference attendees; Jesse Jackson offered reporters a soliloquy, with his usual rhetorical flourish, on the matter along with a veiled threat of protest.²²⁹ This type of politics has unfortunately characterized black political life since the end of Reconstruction.²³⁰ Historian Dr. Carter G. Woodson made the following observation about black political operatives in his classic 1933 work *The Mis-education of the Negro*:

*These Negro workers are supposed to tell their people how one politician seeking office has appointed more Negro messengers or charwoman in the service than the other or how the grandfather of the candidate stood with Lincoln and Grant through their ordeal and thus brought the race into its own. Another important task of these Negroes thus employed is also to abuse the opposing party, showing how hostile it has been to the Negro while the highly favorable party was doing so much for the race.*²³¹

The names have changed but the practices are still the same. Democratic and Republican appeals to black voters are still based in past practices of political patronage and historical support of black

224. RONALD W. WALTERS, *BLACK PRESIDENTIAL POLITICS IN AMERICA: A STRATEGIC APPROACH* 86-101 (1988).

225. *Id.* at 88-89, 95, 97, 99.

226. *Id.* at 144-45.

227. *Id.* at 89-92.

228. *Id.* at 97-99.

229. *Id.* at 98.

230. MANNING MARBLE, *BLACKWATER: HISTORICAL STUDIES IN RACE, CLASS CONSCIOUSNESS, AND REVOLUTION*, 184-91 (1974).

231. CARTER G. WOODSON, *THE MIS-EDUCATION OF THE NEGRO* 92 (1933).

civil rights.²³² Woodson's view was that politics as a primary means of advancement was foolhardy. He wrote:

*It is unfortunate, too, that such a large number of Negroes do not know any better than to stake their whole fortune on politics. History does not show that any race, especially a minority group, has ever solved an important problem by relying altogether on one thing, certainly not by parking its political strength on one side of the fence because of empty promises.*²³³

Woodson's assessment characterizes too much of black politics from Reconstruction to the present. The issue of voting strength is a perennial issue for blacks in America. Despite civil rights gains enfranchising the majority of black adults; black political strength is still hamstrung by vote dilution and political impotence. Viable black political institutions are essential to overcoming political marginalization in national and state legislative bodies while promoting a black political and economic agenda that sufficiently enhances the resources of predominantly black cities to meet the needs of their residents.

Although all politics are "local" politics, perhaps more than any of the above considered issues, anticipates involvement in a system of governance that extends beyond black communities. Unlike the history of community-based black economics and education that developed during the Reign of Terror, black political participation outside local offices necessarily extends beyond black communities. From the city councils and the county commissions to the state legislatures and United States congress, black elected officials represent particular communities, but are entrusted with the collective governance of the whole and not just their legislative districts. These politicians draft legislation and vote on bills that involve the entire electorate. In the same way, mayors, governors, state-wide office-holders, and the president are duty bound to execute the laws for the benefit of the whole. If the majority of that whole is black, as with some cities, that job has much less racial tension. But, when black communities make up a political minority these officials are bound to work well beyond the bounds and needs of black communities. The question that naturally follows, for some, is the viability of black political institutions outside of majority black electoral districts. Still others, accepting the possibility, may ask about the nature of such institutions and their relationship to the larger political community.

232. Sadly, the campaigns for Bush, Kerry, and Clinton in recent history all come to mind.

233. *Id.*

Reversing the Economic Legacy of Racial Segregation

Black politics and black political institutions would do well to concentrate their resources in black communities. This in no way prohibits expenditures in other places but the development of strong political institutions in the areas where the majority of blacks live will produce many more benefits than the election of, say, a black president. Although blacks make up a large percentage of the population of the South their votes for president, U.S. Senator, and Governor have often had little influence in these southern states. This is Brooks' dilution problem—because blacks constitute a numerical minority their votes are diluted, and they are unable to influence the outcome of certain elections. This article's response to this in a most basic sense is to worry less about choosing the winner and more about choosing the policy. An understanding of political power limited to deciding who wins elections is overly simplistic and short sighted. It is that very approach to political organizing reflected in "get out the vote campaigns" every two to four years in black communities that perpetuates a simplistic view of politics that consists primarily in voting once every few years. Even the black agenda conferences, laudable in their initial conceptualization, devolved into a means of influencing Presidential elections every four years rather than an organ for the political development of black communities.²³⁴

Walters's examination of black presidential politics makes clear that: (1) black politicians have limited leverage within parties because they lack an organizational based relationship to the black electorate; (2) they are bound by party loyalty in order to receive political patronage (get out the vote funds and political appointments); and (3) they have focused on selecting candidates for office over influencing the party platform.²³⁵ What Walters identifies as essential to blacks exercising greater leverage in the national political arena is absent in black politics. Instead there is institutionalization that provides for a systemic political participation.²³⁶ It bears repeating here that blacks' inability to achieve institutional political power in the United States flows from their exclusion from meaningful participation in the political process in the North before the Civil War and in the South following reconstruction.²³⁷

234. WALTERS, *supra* note 224, at 107-08

235. *Id.* at 106-07

236. *Id.* at 186.

237. See Carlton Waterhouse, *Avoiding Another Step In A Series of Unfortunate Legal Events: A Consideration of Black Life under American Law from 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. Third World L.J. 207, 232-246 (2006).

But for the Reign of Terror, blacks today would be the beneficiaries of over 100 years of substantial political participation which certainly would have included several United States Senators, governors, and a host of other elected officials. In light of this history, a reparative political institution will need to foster the “political development” of black communities denied during the Reign of Terror.

Blacks make up significant numbers of the residents of key states across the South: Mississippi 37%; Louisiana 33%; South Carolina 30%; Maryland 29%; Georgia 29%; and Alabama 26%.²³⁸ Black political institutions should begin with a local and regional focus organizing the black electorate in these southern states and a selection of large cities with substantial black populations.²³⁹ Rather than relying on the race of the candidate, these institutions will have to develop support by crafting local and regional objectives from the political ideologies of black communities. As noted above, these ideologies cover a spectrum that includes disillusioned liberals, nationalists, feminists/womanists, Marxists/egalitarians, and conservatives.²⁴⁰ Although a disillusioned liberal/radical egalitarian ideology is the most supported, community nationalism most heavily structures black public opinion because its adherents control the community organizations and information networks.²⁴¹ Social democrats, feminists/womanists, and conservative ideologues make up the balance though there is only weak support for a conservative vision.²⁴² Black political institutions will need to craft a political agenda and platform that takes seriously the ideologies of black communities in guiding public policy in their local context. This will constitute a deepening and broadening of policy analysis for black communities. One result of that process will be the ability to readily find and form coalitions across party and racial lines. This article identifies this process of political development as “political sophistication.” It is the political organizing and development that began under reconstruction but was shattered by the Reign of Terror. Political sophistication may threaten black Democratic candidates who take their support in black communities for granted. In that regard, however, this article suspects that it will serve to develop more

238. U.S. CENSUS BUREAU, QUICK FACTS (2010), available at <https://www.census.gov/quickfacts/fact/table/US/PST045216>.

239. Cities would include Chicago, Detroit, New York, Philadelphia, Houston, and Los Angeles.

240. DAWSON, *supra* note 222, at 316.

241. *Id.*

242. *Id.*

Reversing the Economic Legacy of Racial Segregation

responsive Republican and Democratic candidates who will be forced to deal with a more dexterous electorate.

Strong political institutions will not always secure the victory of a black supported candidate but should always result in the development of policies at a state and local level that supports the development of black communities irrespective of election results. The hegemony of liberal integrationist ideology in black politics in many respects has prevented the development of national and regional structures that use political influence to support the development of the independent black institutions necessary to create healthy black communities. Instead, black political interests are almost exclusively viewed in terms of civil rights and public welfare legislation.

As long as blacks represent 26% of America's poor and racial discrimination continues, blacks will have a substantial interest in such legislation. Nonetheless, a wide array of public policy issues including trade policies with African nations and the Caribbean, tax relief for small businesses, local control of schools, and increased research grants for HBCUs are germane to the long-term development of black communities. Black political representation, by and large, however, has not moved beyond party loyalty to form strategic alliances on legislative issues that also help black constituents. In other words, black Democrats should vote with Republicans when doing so furthers the interest of black communities and black Republicans should do likewise. When black politicians have the financial and electoral support to be more committed to the diversity of their constituents' interests than party loyalty, they will increase their level of influence and respect in the political arena. Discussions on this problem have often degraded into a debate about affiliation with the Republicans, Democrats, or some third party. This debate really misses the point.

Under this proposal, party affiliation is much less significant than the political sophistication that ensures that black communities' needs are being addressed regardless of the party in power. A reparations political trust will have to be established with a requisite board of directors to create the political institutions necessary to provide black communities with a meaningful voice in the American political system. The board will be expected to follow the guiding principles of the reparations charter described above to create and fund the organizations, discussed below. Political sophistication begins at the local grass roots level. In many respects, black politicians of both major parties have neglected the political education of the electorate. The first step

for building black political institutions is the creation of a nonpartisan, issue-oriented membership organization. This organization would operate through local chapters and a national policy office. It would conduct grassroots organizing to inform residents about the political process and then support the residents' involvement in local and regional issues. Organizing would utilize existing informational networks in black communities including churches, schools, civic organizations, and event venues. In addition to these more traditional networks, the internet and radio could provide critical channels of communication to reach diverse sectors of communities.

Radio broadcasting is a primary source for local news and information in black communities. This article proposes two means for using radio to support the groups' efforts. First, local chapters should advertise and promote a daily local radio broadcast featuring interviews with local politicians and on-air radio personalities as a means of informing the electorate. Second, the national policy office should sponsor a syndicated daily one-hour national broadcast with a nationally known personality to meet with black leaders and others to discuss reparations.

Young adult involvement, education, and organizing should be a fundamental strategy of this organization.²⁴³ By training and involving youth, the organization furthers two critical objectives: (1) strengthening its volunteer workforce; and (2) building a foundation for future political organizing. This article suggests that the organization establish a separate youth division led by young adults that develops and follows through on coordinated projects and activities. The story of the Civil Rights Movement in America cannot be told without discussing the role and activities of the Student Nonviolent Coordinating Committee (SNCC)-the youth counterpart to the Southern Christian Leadership Conference (SCLC). SNCC not only conducted a great deal of organizing and education, but many of its members developed into important leaders and activists.²⁴⁴ Imparting a sense of purpose and possibility to young adults will continue to pay dividends well into the future of black communities.

243. These efforts would be focused on promoting the interests of black communities and guided by the tenants of the community.

244. John Lewis, Julian Bond, Eleanor Holmes Norton, James Foreman, and many other former SNCC members continue to play important leadership roles in black communities across the country some 49-years after the death of Dr. King.

Reversing the Economic Legacy of Racial Segregation

Local chapters would serve as clearinghouses on local, county, and regional political information including political office, bills being considered, zoning and development plans, etc. To facilitate this capacity, a political database development project would be created and maintained. The project would develop a database of political information incorporating state, county, and local government activities that would be available to members through generated reports and web based access. The national policy office of this organization would work with the local chapters to coordinate activities within and across states, establish and maintain an active web presence featuring the political information database, and facilitate citizen communication with congressional representatives through dinners, forums, letter writing and call in campaigns. The national office would also keep local chapters aware of developments in Washington relating to their local areas, create a legislative score card, and interface with the reparations think tank, described below, to gain insight into political issues facing communities.

To advance the far-reaching objectives of the reparations charter above, substantial scholarship would have to be undertaken. Discussions above regarding HBCUs address some of these needs but far from all. This article proposes the creation of the Bethune Washington Institute to support the scholarship mandate of the reparations charter. The Institute would operate like the Brookings Institute as a non-partisan organization committed to supporting the research of a wide range of scholars on issues related to questions of reparations. Scholars with full time commitments at other institutions would serve as affiliates, working along with the Institute fellows in conducting research, publishing findings, and making policy recommendations based on that research. Beyond governmental policy, the Institute's scholarship would address the economic, educational, legal and political policies of private groups and individuals as well. Through its work, black economic, political, and educational institutions committed to reparations would receive meaningful insights into fulfilling their objectives. Furthermore, relevant questions regarding cultural, medical, and familial reparations will be addressed through research, publication, and the use of developed networks of dissemination. American discourse regarding politics, economics, and education routinely addresses race in an explicit or implicit fashion. The development of a well-funded institute of noted scholars providing focused scholarship relating to these issues could significantly influence those

discourses and the way questions of race are framed more broadly.²⁴⁵ To accomplish this, the Institute will have to develop substantial public inroads into the primary media outlets through the use of press releases and media contacts. Moreover, this article propose that the Institute establish and operate its own press in order to facilitate the distribution and dissemination of work done by its fellows and affiliates.

To foster political maturity in black communities, the Institute would also operate a program focused specifically on the development of black political leaders. The program would provide funding to religious organizations, community centers, and civic organizations to establish a youth political club, like the Scouts, that would educate high school students on the role and responsibilities of political leadership and its relationship to community well-being. The clubs would take regular field trips to observe local, state, and national politicians in the process of governing and meet with their representatives to learn about what they do and how decisions are made. In conjunction with the trips, the youth members would be required to develop legislation for their community's that they would attempt to pass in an annual mock legislative session with other students from their state. The clubs would then send a small delegation to a National Youth Congress in Washington, D.C. where they would observe the Congress, and either meet with their Congressional representatives, federal agency executives, or White House staffers in conjunction with a national legislative session with other students from around the country. By establishing this organization as an affiliate group, the Institute would make an important stride towards the growth and development of future black political leadership.

While each of the foregoing organizations plays an important role in the development of political maturity for black communities, neither is structured to conduct lobbying on important political issues. To fulfill that role, this article endorses Brooks' proposal of a Black Political Action committee or Black PAC to provide a traditional lobbying function in the United States Senate and House of Representatives on political issues regarding black communities. A Black PAC operating in the context of a well-developed think tank and a national

245. This organization would differ from the Joint Center for Political Studies in the same way a well-run university differs from a quality liberal arts college. Its mission, programming, and resources would allow it to address a broader range of issues, employ a much larger cohort of scholars and affiliates, and thereby have greater influence on public policy.

Reversing the Economic Legacy of Racial Segregation

grassroots organization could effectively undertake the daily lobbying efforts necessary to educate and solicit the support of representatives on issues important for black communities. In this capacity, Black PAC could also develop and fund political advertising when and where necessary to educate the electorate and generate support for its issues.

The final step towards political maturity that I propose is the Candidate Fund. The Candidate Fund would operate like the Club for Growth. Its purpose would be to work toward the election of national and local candidates supporting policies that promote or allow the reparative objectives identified in the reparations charter. The Candidate Fund would function as a bipartisan multiracial organization promoting the election of candidates of all races supporting the reparations objectives above.²⁴⁶ Through a strong web presence, the Candidate fund would disseminate information during elections about candidates and their positions on issues, advise its members, and offer advocacy on particular ballot initiatives. The Fund's primary goals would be to provide financial support to candidates from its members and others and use that support to make connections with candidates for its members through dinners, galas, forums, and other sessions. The organization would also work together with other political groups across racial and party lines in coalitions to elect and remove candidates from office.

VI. NATIONAL BAR ASSOCIATION AND BLACK LAWYERS ACTIVISM IN BLACK ENTREPRENEURSHIP

Economic empowerment and independence allows African Americans to better develop their own communities and retain the spending power that would usually benefit other communities. Typically, the idea of supporting Black-owned businesses simply means buying their products or services. However, Black attorneys are in the position to provide a service to Black businesses. They can use their knowledge, skills and resources to help Black businesses thrive, keeping more money in the Black community. Through a combination of long and short-term strategies, the National Bar Association can increase the economic power and self-sufficiency of the Black commu-

246. The Fund would also prioritize the use of resources to support the election of black candidates in need of financing with a bias toward the election of black women to office.

nity through increasing the number of strategically-located, successful Black businesses. For instance, the long-term strategy is to encourage and facilitate the development of commercial areas within Black communities. This idea was inspired by the Black Wall Streets of Durham, NC and Tulsa, OK. The short-term strategy includes providing legal services and other support to Black businesses who already exist or are in the process of getting started. For example, providing low-cost and pro bono legal services to potential Black entrepreneurs to assist in setting up businesses and working with Black business organizations like the National Association of Black Accountants, National Black Chamber of Commerce, National Black MBA Association and other National Black Associations to set up free educational clinics for young African Americans during the summer months to teach Black high school students about entrepreneurship.

Engaging the Executive Branch:

During the first month of the 45th President's tenure, NBA President Kevin Judd sent a first 100 days agenda to the administration, which mirrored the NBA's legislative agenda and economic empowerment agenda. It read in part:

Economic Equity and Empowerment.

The National Bar Association supports and prioritizes the Administration's policies, regulations and support for legislation that protects the economic interests of African Americans and all economically disenfranchised minorities. The National Bar Association opposes the disparate treatment and disparate compensation of people of color and women in the workplace. For this reason, the Association proposes that there be a substantial increase in attention, policies and funding for implementation and enforcement of equal pay for equal work. Moreover, the National Bar Association proposes that President Trump make this goal a part of his Inaugural Address, issue regulations to accomplish the goal, and to support legislative within the first 100 days.

Black Economic Empowerment.

The National Bar Association recognizes that there is a growing wealth gap between African American families and White families, and understands that economic empowerment and independence al-

Reversing the Economic Legacy of Racial Segregation

low African Americans to better develop their own communities and retain the spending power that would usually benefit other communities. For this reason, the Association proposes that there be a substantial increase in attention, policies and funding for implementation of efforts directed to Black Economic Empowerment. Moreover, the National Bar Association proposes that President Trump make this goal a part of his Inaugural Address, issue regulations to accomplish the goal, and to support legislation within the first 100 days as follows:

1. Develop a mentor-protégé program and network among Black entrepreneurs;
2. Help develop plans for potential Black business owners to find and develop industries that are unique and provide needed services to minority communities so that we do not overly saturate particular business sectors in our communities;
3. Work with Black business organizations to set up free educational clinics that teach Black high school students about entrepreneurship;
4. Provide educational clinics to imprisoned and formerly imprisoned individuals about starting businesses and support legislation that advances these types of efforts;
5. Provide workshops for professionals to establish service-oriented businesses in Black communities – law firms, dentist and doctor offices, accounting offices, real estate broker offices etc.;
6. Assist Black entrepreneurs with developing better business connections on the African continent, Caribbean nations and South America to develop international independent economic growth that is mutually beneficial to African Americans, Afro-Latino and African communities; and encourage their members to financially support Black-owned businesses and majority Black-owned banks;
7. Continue to grow the small business sector through increased government contracts to recognized small businesses. One way to accomplish growth in this sector is to work with Congress to exceed the current small business government contracting set-aside minimum from 16% to 23% and increase the target goals of 23% to 30%;
8. Continued support of the Small Business Technology Transfer (STTR) program which expands funding opportunities in the federal innovation research and development arena through expansion of the public/private sector partnership to include the joint venture opportunities for small businesses and nonprofit research institutions. This program has the vast ability to make

- America more competitive on the technological front globally, while stimulating small business and the investment market; and
9. Encourage small businesses to participate in global procurement opportunities through focused investment in seed funding programs for the costs associated with doing business abroad. Diversifying small business opportunities abroad would increase the economic stability of this sector by providing more revenue streams that can then be invested in domestic markets.

Women's Economic Agenda.

The National Bar Association recognizes that substantially more work is required to empower women in the workforce, particularly Black women, who fall at the bottom of most economic matrixes. For this reason, the National Bar Association proposes that President Trump make these following goals a part of his Inaugural Address and issue regulations to accomplish the goals within his first 100 days in office and support the following legislative initiatives:

1. Increase minimum wage (including tipped workers);
2. Establish adequate tools to investigate wage discrimination;
3. Institute paid sick-leave;
4. Institute paid family and medical leave;
5. Expand family and medical leave;
6. Establish affordable and high-quality child care options for low and moderate-income families;
7. Institute adequate training and pay for child care workers;
8. Expand the child care tax credit, and efforts to make the child tax credit permanent and indexed to inflation;
9. Increase funding for early childhood education and expanded pre-kindergarten;
10. Expand Medicaid;
11. Increase Social Security; and
12. Fund more workforce development opportunities for women.

VII. CONCLUSION

In conclusion, this article advances the argument that if we establish ourselves economically, we will enhance our ability to cure many of the social ills that plague our communities and we as black lawyers have a significant role in making this happen. We must step up to the plate and make it happen. This is our new revolution.

ARTICLE

Sowing the Seeds of Human Rights Upon “Stony Places” – The State of State Reporting Under the Charter of the African Human Rights System

EUGENE KWADWO BOATENG MENSAH*

CONTENTS

ABSTRACT	69
I. INTRODUCTION – THE HISTORY AND THE OBJECTIVES OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS	70
II. A STONY PLACE: THE SOCIOLOGICAL AND POLITICAL ENVIRONMENTS IN WHICH HUMAN RIGHTS ARE PROTECTED IN AFRICA.....	73
III. THE LEGAL BASIS FOR WHICH STATES’ REPORTS AND PROBLEMS WITH ARTICLE 62...	76
IV. EXAMINATION OF GHANA’S STATE’S REPORTS IN THE AFRICAN HUMAN RIGHTS SYSTEM	90
V. CONCLUSION.....	100

ABSTRACT

In this paper, I discuss the problems that face the State Reporting system of the African human rights system under Article 62 of the African Charter of Human and People’s Rights. I conclude that because of lack of human rights consciousness on the part of large sec-

* Eugene Kwadwo Boateng Mensah is a professor at School of Law, Chonnam National University. He would like to thank Mr. Henry A. Mensah of the Department of Linguistics of the National University of Lesotho for reading and commenting on an earlier draft of this paper.

tions of people in Africa and because of the neo-patrimonial nature of African States, there is not sufficient pressure on African governments to honor their human rights obligations. The result is that most African States fail to honor their obligations under Article 62 of the Charter. They fail to provide their State Reports on time. When Reports are submitted they tend to be of low quality. States also fail to participate in the State Report examination process on time and when they participate, their delegations, sometimes, include persons who have no expertise on human rights issues.

This paper will confirm all of these failures when it makes a detailed examination of Ghana's participation in the State Reporting system under the Charter.

I conclude by stating that the fight to ensure that African States take their human rights obligations seriously, is part of a longer and more tenacious battle to ensure greater liberalization and deeper democratization in African politics. It would take a multiplicity of policies and strategies to succeed and so this should be seen, really, as a long-term project; and to be realistic, it is not likely to succeed in the near term because presently, politically and sociologically, Africa is a stony place to sow the seeds of human rights.

The same day went Jesus out of the house, and sat by the sea side. And great multitudes were gathered together unto him, so that he went into a ship, and sat; and the whole multitude stood on the shore. And he spake many things unto them in parables, saying, Behold, a sower went forth to sow; And when he sowed, some seeds fell by the way side, and the fowls came and devoured them up: Some fell upon stony places, where they had not much earth: and forthwith they sprung up, because they had no deepness of earth: And when the sun was up, they were scorched; and because they had no root, they withered away. And some fell among thorns; and the thorns sprung up, and choked them: – Matthew Chapter 13. 1-7 KJV

PART I

1.0 INTRODUCTION – THE HISTORY AND THE OBJECTIVES OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS

The African Charter on Human and People's Rights – the Charter – is the primary regional human rights instrument of the African

States system. It was adopted by African States and The Organization of African Unity (OAU) in 1981 and came into force in 1986.¹ Under Article 45 of the Charter, the African Commission on Human and People's Rights – the Commission – is presently, the main human rights institution of The African Union – (AU).² The Commission is tasked with responsibility for protecting and promoting human rights on the African continent.

1.1 PROMOTING HUMAN RIGHTS THROUGH STATE REPORTS

Generally, under international human rights treaties, States are required to submit Periodic Reports to their treaty monitoring bodies to indicate how they are meeting their human rights obligations.³ State Reporting is thus a central monitoring device for protecting and promoting human rights. It is a minimum obligation that States must meet and it is an important obligation because it is one of the primary mechanisms for determining whether a State is complying with its human rights obligations.⁴ This is also the objective of the State Reporting system under the Charter.⁵

1.2 CONCLUSIONS OF COMMENTATORS ON THE EFFECTIVENESS OF THE AFRICAN STATE REPORTING SYSTEM

The general consensus among commentators on the Reporting system under the Charter is that it has been ineffective. Kofi Quashigah is critical of the Reporting system; he concludes that, "... a review of the process. . . does not depict a very bright picture."⁶ Frans Viljoen is equally censorious. He states that the record on State Reporting has not been impressive and concludes that it will require the continuous

1. See African Commission on Human and Peoples' Rights, African Charter on Human and Peoples (1988), <http://www.achpr.org/instruments/achpr/>.

2. The AU replaced the OAU in 2001 as the Pan-African Institution of the African continent.

3. Kofi Quashigah, *The African Charter on Human and Peoples' Rights: Towards a more effective Reporting mechanism*, 2 African Human Rights L.J., 261, (2002), Malcolm Evans and Rachel Murray, *The State Reporting Mechanism of the Africa Charter*, in *The African Charter on Human and Peoples' Rights, the System in Practice, 1986-2006* (eds.) Malcolm Evans and Rachel Murray, 2d. 49, (2008).

4. Evans & Murray, *supra* note 3, at 50-51.

5. Frans Viljoen, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA*, 369, (2007).

6. KOFI QUASHIGAH, *supra* note 3, at 261.

attention of all players to ensure its effectiveness.⁷ Malcom Evans and Rachel Murray are even more damning. They say that “There is no doubt that the existing system is far from effective in attaining even these minimal prescribed and desired goals.”⁸ “In the past, so great a premium has been placed upon securing cooperation and avoiding confrontation [between the Commission and States] that there has been a danger of the process spilling over into collaboration. . . .”⁹

1.3 OBJECTIVES OF THE PAPER – SOWING THE SEEDS OF HUMAN RIGHTS IN STONY PLACES

Why have African States failed to take the Reporting system seriously? In trying to answer this question, I shall use Ghana’s participation in the Reporting system as a point of reference. I shall demonstrate the weaknesses of the State Reporting process of the African human rights system, by analyzing Ghana’s participation in the State Reporting process. This is because Ghana is one of the countries on the African continent that should be committed to honoring its international human rights obligations as Ghana seems to be committed to liberalism and democracy.

Michael Bratton and Nicolas van de Walle define political liberalization as the process of reforming authoritarian regimes. It involves relaxing the controls that regulate political activity. Particularly, it is about the State increasingly recognizing the basic human rights and liberties of its citizens.¹⁰ Democratization is about the process of constructing better participatory and competitive political institutions in a society.¹¹

In terms of liberalization, Ghana’s 1992 Constitution was founded broadly on liberal principles and it contains strong human rights protecting provisions.¹² Ghana also has an extremely robust press, which criticizes the government, openly and generally, without untoward consequences.¹³ In terms of democratization, since 1992, Ghana has had six progressively free and fair elections.

7. FRANS VILJOEN, *supra* note 5, at 390.

8. Malcom Evans and Rachel Murray, *supra* note 3, at 53-54.

9. *Id.* at 75.

10. Michael Bratton and Nicholas Van De Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*, 159, (1997).

11. *Id.* at 194.

12. See generally Const. Rep. Ghana Ch. V, art. XII-XXX.

13. Const. Rep. Ghana Ch. XII, art. CLXII.

Sowing the Seeds of Human Rights

So, if an African State would take its human rights obligations—both domestic and international—seriously, then it is a State like Ghana. But as I shall demonstrate in the course of this paper, despite Ghana's seeming commitment to liberalism and democracy, Ghana has failed woefully to meet its Reporting obligations under Article 62 of the Charter.

Why has Ghana not taken its Article 62 responsibilities seriously? In this paper, I shall argue that the sociological and political environments of a typical sub-Saharan African country make it easy for African States to disregard their human rights obligations.

This paper is divided into five parts. Part I has introduced the central concerns of this paper. Part II will examine the sociological and political environments in which human rights are supposed to be protected in Africa. Part III discusses the nature and problems of the State Reporting system within the African human rights system. Part IV discusses how the problems of State Reporting in the African human rights system is manifested in Ghana's participation in the State Reporting process and explains why Ghana has not met its obligations under Article 62 of the African Charter. Part V concludes the paper.

PART II

2.0 A STONY PLACE: THE SOCIOLOGICAL AND POLITICAL ENVIRONMENTS IN WHICH HUMAN RIGHTS ARE PROTECTED IN AFRICA

Article 62 of the Charter, states that:

Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.¹⁴

Consequently, States that have ratified the African Charter must submit Reports to the Commission every two years indicating how they are protecting and promoting human rights within their jurisdictions. But are African States disposed to honor their human rights obligations, domestically and internationally?

14. Rachel Murray & Malcolm Evans, *African Charter on Human and Peoples' Rights in Documents of The African Commission on Human and Peoples' Rights*, vol. II, (1999-2007 eds.), at 13.

2.1 HUMAN DIGNITY AND LACK OF HUMAN RIGHTS CONSCIOUSNESS

Berger makes a distinction between the consciousness which forms the basis of identity in non-industrialized societies and the consciousness that forms the basis of identity in modern capitalist societies,¹⁵ and argues that they have implications for human rights protection. In non-industrialized societies, because of the stability of institutions, individual identity is strongly influenced by the institutional roles that society assigns to individuals, and concepts such as honor are central to the consciousness of individuals and motivates their behavior.¹⁶

In contrast, modern societies are relatively egalitarian. Here, institutional holds on people are comparatively weak, and the individual has to develop his own subjective identity to survive.¹⁷ Consequently, concepts such as honor are obsolescent and have been replaced with concepts like human dignity. Human dignity lies at the heart of human rights. It is the fundamental consciousness of human dignity in modern societies that has resulted in the creation of institutions that aim to and effectively promote and protect human rights.¹⁸

Ghana is a relatively unindustrialized society, where communitarian values dominate social life. Although sophisticated individualism is developing in the urban areas of Ghana, it faces the headwinds of the strong communitarian ethos that prevails in the more rural parts of the country. This means that human dignity, while found in the Ghanaian consciousness, usually gives way to communitarian values. It also means that the sophisticated individualism which is required to ground human rights protection in Ghana, is relatively undeveloped. In fact, as I shall show below, Ghana's Report addresses this issue and suggests that this lack of human rights consciousness is one of the reasons that explain the difficulties of protecting human rights in Ghana.

2.2 NEO-PATRIMONIALISM

Politically, States in Africa are neo-patrimonial. Bratton and van de Walle argue that neo-patrimonialism combines the patrimonialism of traditional authority with the written laws and bureaucracy of mod-

15. See generally Peter Berger, *On the Obsolescence of the Concept of Honor*, 11 EUR. J. SOC. 339-47 (1970).

16. *Id.*

17. *Id.*

18. *Id.*

ern legal-rational authority.¹⁹ Like a patrimonial society, authority in a neo-patrimonial state is personalized. Patronage and clientelism are the dominant feature of the political system. Unlike the situation in modern bureaucracies, state officials in neo-patrimonial political systems are not loyal to the rules of the bureaucratic institution in which they work. Their allegiance is to the ruler personally, and the ruler and his coteries undermine the effectiveness of the administrative State by using the State for patronage and clientelist practices.²⁰

Another feature of neo-patrimonial political systems is that state resources are the central means of acquiring political support and state officials will stop short of nothing and will misuse public resources to garner political support.²¹ Misuse of public resources, however, means that neo-patrimonialist regimes lack developmental capacity and political legitimacy, and are prone to economic crises.²² The result is that public infrastructures are poorly maintained and officials lack operating funds.²³

What are the consequences of neo-patrimonialism for protecting and promoting human rights? Under-investments in public human rights institutions undermine human rights protection because public human rights institutions such as the courts, ombudsmen, and the police do not have the required resources to carry out their human rights mandates. When it comes to meeting the State's international human rights obligations, such as preparing and submitting State Reports, under-resourced and under-paid officials are unlikely to approach their work with any enthusiasm.

I shall argue that lack of human rights consciousness and neo-patrimonialism are the main reasons why African States fail to meet their legal obligations under the Reporting system of the African human rights system.

19. MICHAEL RATTON AND NICOLAS VAN DE WALLE, *supra* note 10, 61-66.

20. *Id.*

21. *Id.* at 66-67.

22. *Id.* at 67.

23. *Id.*

PART III

3.0 THE LEGAL BASIS FOR STATES' REPORTS AND
PROBLEMS WITH ARTICLE 62

As I have already indicated, Article 62 of the Charter is the legal basis upon which the Commission receives and examines State Reports. Interestingly, as stated, Article 62 does not specifically mention the Commission as the institution with authority to receive and examine such Reports. Article 62 merely states that after a State ratifies the Charter, it must submit a Report, every two years, providing information on the legislative and other measures that it has taken to honor its obligations under the Charter.²⁴ Since, it was unclear to whom a State was to submit its Report and what was to be done after the Report had been submitted, a gap had been created in the State Reporting part of the African human rights system. This gap had to be closed. In 1988, at its third session, the Commission asked the African Assembly of Heads of States and Government to assign it with the responsibility of receiving and examining State Reports. In 1988, at their 24th Ordinary Session, the Assembly of Heads of States and Governments acceded to this request and granted the Commission the power to receive and examine States' Reports. The Assembly also gave the Commission power to provide general guidelines that would assist States to prepare their Reports.²⁵

3.1 GUIDELINES FOR PREPARING STATE REPORTS

In line with the authority granted to the Commission by the Assembly of Heads of States and Governments, the Commission issued general guidelines on how States should prepare and submit their Reports. The first guidelines were the "Guidelines for National Periodic Reports under the African Charter"²⁶ and they were adopted in 1989.²⁷

The "Guidelines for National Periodic Reports under the African Charter," hereinafter to be called the First Guidelines, require that a State must submit two types of Reports.²⁸ First, a State must submit

24. RACHEL MURRAY & MALCOLM EVANS, *supra* note 13, at 13.

25. KOFI QUASHIGAH, *supra* note 3, at 263.

26. RACHEL MURRAY & MALCOLM EVANS, *supra* note 13, at 37-56.

27. FRANS VILJOEN, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA*, *supra* note 5, at 371.

28. RACHEL MURRAY & MALCOLM EVANS, *Guidelines for National Periodic Reports*, *supra* note 13, Introduction, para 3-4.

Sowing the Seeds of Human Rights

an Initial Report. In the Initial Report, a State must indicate the basic conditions, the basic programs and the basic institutions of the State that assist it in fulfilling its Charter obligations.²⁹ Subsequently, the State must submit a Periodic Report every two years.³⁰ The object of a Periodic Report is to provide up to date information on how the State has implemented the Charter during the two years since it submitted its last Report.³¹

3.1.2 Initial Report

The Initial Report must be made up of two sections. It must be made up of a section on civil and political rights and a section on economic and social rights.

3.1.2.1 Initial Report: Civil and Political Rights

The section of the Initial Report devoted to civil and political rights must itself be divided into two parts.³² First, there must be a general part, which must indicate the general legal framework within which, civil and political rights are protected by the State.³³ In the second part, the State must indicate the legislative, administrative or other measures that it has taken to protect Articles 2 to Articles 13 of the Charter within the State's jurisdiction.³⁴ The Initial Report must include copies of laws that protect civil and political rights and where texts cannot be included, information that explain, such laws.³⁵

3.1.2.2 Periodic Reports: Civil and Political Rights

The section of the Periodic Report devoted to civil and political rights must also have two parts.³⁶ The first part must provide information on the political and legal framework within which the Charter's civil and political rights are protected within the State.³⁷ The second part must show how the individual substantive civil and political rights

29. *Id.* Introduction, 4, at 49 and 37.

30. *Id.*

31. *Id.*

32. *General Guidelines Regarding the Form and Contents of Reports from States on Civil and Political Rights*, I Para 4, at 38.

33. *Id.* Para I(4)(a) - Para I(4)(a)(v).

34. *Id.* Para I(4)(b)(i) - Para I(4)(b)(iv).

35. *Id.* Para I (5).

36. *Id.*

37. *Id.* Para I (7)(a).

of the Charter are protected by the State.³⁸ The State must also provide information on the measures that it has adopted to implement the Charter, as a result of interactions between the Commission and the State.³⁹ It must also provide information about any difficulties⁴⁰ and any progress⁴¹ it has faced in implementing the Charter.

Since the aim of the Reporting process is to determine how the State is actually promoting and protecting the Charter, the State must include in its Periodic Reports, decisions of its courts and its administrative bodies that show how it is protecting civil and political rights.⁴² Again, copies of legislation and other texts relevant to civil and political rights protection in the country must be attached to the Reports.⁴³

3.1.2.3 Economic and Social Rights

A State must also provide information about how it is protecting economic and social rights in its Initial and Periodic Reports.⁴⁴

3.1.2.4 Initial Report: Economic and Social Rights

In its Initial Report, a State must provide information about how it is protecting and promoting economic and social rights.⁴⁵ The State must also provide information about the basic conditions, institutions and programs that the State is using to promote economic development.⁴⁶

The information that a State is required to provide in its Initial Report, in relation to economic and social rights, is both specific and detailed. So, for example, the State must provide information about its principal laws, administrative regulations, collective bargaining and court decisions that protect and promote the right to work.⁴⁷ The State is expected to provide information on how it is protecting workers' rights to freely choose their employment, freedom from forced labor and from discrimination in employment.⁴⁸ The State also has to

38. *Id.* Para I (7)(b).

39. *Id.* Para I (8)(a) - Para I (8)(d).

40. *Id.* Para I (8)(e).

41. *Id.* Para I (8)(f).

42. *Id.* at 4 ¶ (9).

43. *Id.* at 4 ¶ (10).

44. *Id.* at 4 ¶ (1).

45. *Id.*

46. *Id.* at 10 ¶ (40).

47. *Id.* at 4 ¶ (3).

48. *Id.* at 4 ¶ (4)(a).

provide information on its policies that promote full employment in a political environment that protects civil and political liberties.⁴⁹ The State must indicate the measures that it has taken to ensure that the best possible employment market prevails within its economy; these measures must include information on manpower planning procedures, collection and analysis of employment statistics, and organization of employment services.⁵⁰ The State must provide information on its technical and vocational guidance and training programs.⁵¹ It also has to show evidence about how it is protecting workers from arbitrary termination⁵² of employment and its policies against unemployment.⁵³ The State must provide statistical information on the extent of unemployment and underemployment in the country and the difficulties that it faces in protecting the right to work.⁵⁴

3.1.2.5 Periodic Reports: Economic and Social Rights

In its Periodic Reports, a State is expected to provide information on the extent to which it has protected the individual economic and social rights guaranteed under the Charter.⁵⁵ It must indicate, especially, any progress or any difficulties that it has faced in fulfilling its Charter's economic and social obligations.⁵⁶ Principal laws, regulations, collective bargaining agreements and court decisions referred to in the Periodic Report must also be submitted with the Report.⁵⁷ Again, since the aim of the Reporting process is to determine how the State is actually promoting the Charter's economic and social rights, the State must include decisions of the courts and administrative bodies that protect economic and social rights in its Periodic Reports.⁵⁸ Copies of legislation and other texts relevant to the protection of economic and social rights must be attached to Periodic Reports.⁵⁹

49. *Id.* at 4 ¶ (4)(b).

50. *Id.* at 4 ¶ (4)(c).

51. *Id.* at 4 ¶ (4)(d).

52. *Id.* at 4 ¶ (4)(e).

53. *Id.* at 4, ¶ 4(f).

54. *Id.* at 4, ¶ 5.

55. *Id.* at 6, ¶ 20.

56. *Id.* at 6-7, ¶ 20-21(e).

57. *Id.* at 7, ¶ 23.

58. *Id.* at 10, ¶ 39.

59. *Id.* at 10, ¶ 3940.

3.2 The Umozurike Amendments

The Commission adopted amendments to the First Guidelines in April 1998, because the Commission recognized that the First Guidelines were too detailed and too lengthy and could serve as a disincentive to States submitting Reports.⁶⁰ The official title of the Amendments to the First Guidelines is "Guidelines to Periodic Reporting Under Article 62 of the African Charter on Human and Peoples' Right by U O Umozurike"⁶¹, but they have come to be better known as the Umozurike Amendments.

Under the Umozurike Amendments, a State still has to submit Initial and Periodic Reports. In the Initial Report, a State has to provide a brief account of its history, its form of government and the relationship that exists between the various branches of government.⁶² The Initial Report must include basic documents such as the State's constitution, criminal code, criminal procedure code, and any landmark decisions, that courts have made on human rights.⁶³ It also has to provide information on the major human rights instruments that it is a party to and the steps that it has taken to ensure that these instruments are enforced domestically.⁶⁴

A State also has to provide information on how it is protecting civil and political rights,⁶⁵ economic, social and cultural rights,⁶⁶ and group rights.⁶⁷ The Report must also provide information about how it is improving the conditions of women,⁶⁸ children,⁶⁹ and the disabled,⁷⁰ and the steps it has taken to protect the family and improve its cohesion.⁷¹

A State must provide information on how it is ensuring that individuals honor their duties under the Charter.⁷² The State must also discuss the problems that it is facing in implementing the Charter.⁷³ It

60. See DOCUMENTS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 80 (Rachel Murray & Malcolm Evans eds., 2001).

61. *Id.*

62. *Id.* at 80, ¶ 1.

63. *Id.* at 80, ¶ 2.

64. *Id.* at 80, ¶ 3.

65. *Id.* at 80, ¶ 4(a).

66. *Id.* at 80, ¶ 4(b).

67. *Id.* at 80, ¶ 4(c).

68. *Id.* at 80, ¶ 5(a).

69. *Id.* at 80, ¶ 5(b).

70. *Id.* at 80, ¶ 5(c).

71. *Id.* at 80, ¶ 6.

72. *Id.* at 80, ¶ 7.

73. *Id.* at 80, ¶ 8.

also has to show how it is promoting human rights education within the country,⁷⁴ and the Charter in its international relations.⁷⁵

3.3 Criticisms of the Guidelines

The First Guidelines and the Umozurike Amendments have been subjected to considerable and justified criticisms by commentators. Evans and Murray suggest that the First Guidelines are “complex, repetitive and lengthy.”⁷⁶ Ankumah also claims that they are inadequate because they are unnecessarily detailed in some areas and not sufficiently comprehensive in other areas.⁷⁷ Ankumah also criticizes the First Guidelines on the grounds that they are difficult to follow. For example, as I have shown above, Initial and Periodic Reports are repeatedly discussed under the same heading. Ankumah does not think that these suggestions about how States should prepare their Reports is appropriate because they are confusing. She argues that it would have been better to discuss all the issues relating to Initial Reports under one heading and then all the issues relating to Periodic Reports discussed under another heading.⁷⁸ Evans and Murray also criticize the Umozurike Amendments as “brief, to the point of being vacuous.”⁷⁹

3.4 Preparing State’s Report

I must now discuss the process of preparing a Report by a State under the Charter. Viljoen argues that the process of preparing a State’s Report should be an opportunity for the State to assess the extent to which it is honoring its obligations under the Charter. A State, must therefore involve all the human rights institutions in the country in the process of writing the Report. The process of Report writing should be a process of introspection for the State and through this process, the State should examine its laws to ensure that they comply with its human rights obligations.⁸⁰ Ankumah also believes that the involvement of NGOs in preparing State Reports, is likely to improve the quality of Reports because excellent Report writing re-

74. *Id.* at 80, ¶ 9.

75. *Id.* at 81, ¶ 10.

76. EVANS & MURRAY, *supra* note 3, at 58.

77. EVELYN A. ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLE’S RIGHTS: PRACTICE AND PROCEDURES 83 (1996).

78. *Id.* at 87.

79. EVANS & MURRAY, *supra* note 3, at 58.

80. VILJOEN, *supra* note 5, at 369-370.

quires adequate and quality staff, access to information and critical analysis, time and material resources, which many African State bureaucracies lack.⁸¹

3.5 Record of States in following the Guidelines for State Reports

It seems that it is only in exceptional circumstances that States follow the formal and substantive requirements of the Guidelines. Viljoen argues that generally, States merely list their legislative provisions and policies in their Reports.⁸² Evans and Murray are also not sure how much the Umozurike Amendments have influenced State Report writing. This uncertainty may be due to the fact that the Umozurike Amendments are so vague that it is difficult for States to know exactly what the Commission requires from them.⁸³

Reform of the Guidelines

After about 27 years of operating the First Guidelines and the Umozurike Amendments, and after all the criticisms that they have faced, it may be time for the Commission to re-issue new guidelines. I suggest a procedure that is likely to lead to a formulation of new and better guidelines. NGOs interested in developing new guidelines should take the initiative in the process. This is because the Commission is not likely to have the time and resources to lead the process and if States or the AU led the process, it would drag on for years.

The development of new guidelines should be guided by the experiences of the Commission and the work of other treaty bodies, such as the Human Rights Committee of the International Covenant on Civil and Political Rights and the Committee on Economic, Social and Cultural Rights of the International Covenant on Economic and Social Rights. The aim should be to develop guidelines that States could adhere to. The process of creating new guidelines should especially examine whether it is realistic to expect States to submit Reports every two years. After the new guidelines have been developed, a workshop should be organized between States, the Commission, and NGOs to debate and adopt the Guidelines.

81. ANKUMAH, *supra* note 70, at 81-82.

82. VILJOEN, *supra* note 5, at 373.

83. EVANS & MURRAY, *supra* note 3, at 62-64.

3.7 Late Submission of Reports

As I have already stated, Article 62 also requires that States provide Periodic Reports every two years after presentation of their Initial Reports. No State has been able to meet this requirement. One reason for this poor record could be the time interval during which States are expected to prepare and submit Reports; two years is probably too short a time for States to prepare adequate Reports and if States met this requirement, the Commission would be unable to examine all the Reports in a timely manner. Malcolm Evans and Rachel Murray believe that the two-year Reporting cycle is an unrealistic expectation.⁸⁴

To encourage States to meet their Reporting obligations, the Commission decided that States could consolidate their past Reports. The present situation therefore is that States must provide Reports every two years, but they could consolidate their past Reports if they are unable to meet this legal requirement. Consequently, it is not likely that any State would ever meet the two-year Reporting requirement.

3.8 Non-Submission of Reports

Late Reporting, however, is not the only problem that the African human rights Reporting system faces. Some States just refuse to meet their Reporting obligations. Evelyn A. Ankumah believes that this is “the most glaring and difficult problem undermining the effectiveness of the examination process. . . .”⁸⁵ Viljoen blames States; he suggests that States do not submit Reports because of weak domestic bureaucracies.⁸⁶ Evans and Murray, on the other hand, partly blame the Commission; they believe that failure to submit Reports is due mainly to the fact that the Commission is determined to use non-confrontational methods to encourage States to take human rights obligations and the work of the Commission seriously.⁸⁷

In order to pressurize States to submit their Reports on time, the Commission, in its 5th Annual Report, requested the Assembly of Heads of States and Governments to pass a resolution to encourage

84. *Id.* at 75.

85. ANKUMAH, *supra* note 70, at 108.

86. VILJOEN, *supra* note 5, at 375.

87. EVANS & MURRAY, *supra* note 3, at 56-57.

States to submit their Reports on time. The Assembly of Heads of States and Governments passed the resolution in 1993.⁸⁸

3.9 Preparation for Examining States' Reports and the Role of NGOs in this Process

The process of examining Reports under the Charter is as follows: for the Commission to examine a Report, the Commission must receive the Report at least 3 months before the coming session. A legal officer of the Commission will study the Report and prepare a questionnaire in relation to the Report. The Commissioner, who acts as the rapporteur for that country, will review the questionnaire. Sometimes, questions are sent to the Reporting State, and the State is expected to provide its answers in writing before the Report is examined.⁸⁹

If the Commission relied exclusively on States to provide the information upon which it would examine how States are honoring their human rights obligations, the information available to the Commission would be skewed in favor of States. Consequently, the Commission must have information from other sources to supplement the information provided by States. NGOs are the most likely sources of such information. If the Commission receives information from an NGO, on a State whose Report is to be examined, it evaluates the information and if the information is useful, it incorporates the information into the questionnaire and uses the information as the basis for posing questions to the State.⁹⁰

3.9.1 The Process of Actually Examining States' Reports and Its Problems

Examination of a State's Report occurs publicly, and a representative of the State introduces the Report. The Commissioner, who acts as the rapporteur for the State, comments on the Report and then poses questions to the State delegation. Other Commissioners could also pose questions at this stage. The State's delegation then makes oral responses to the questions after they have been given opportunities to prepare their responses. After the "questions and answers" ses-

88. QUASHIGAH, *supra* note 3, at 267.

89. VILJOEN, *supra* note 5, at 377.

90. *Id.* at 382.

sion, the Chairman thanks the delegation and the examination is concluded.⁹¹

The quality of the deliberations depends very much on the quality of a State's delegation. Often the head of the delegation is a Minister of State and usually, he will be the person to introduce the Report. However, it is important that the delegation includes senior officials and experts who could answer substantive questions involving facts and policy.⁹² If members of the delegation are not senior officials they will have difficulty answering questions with authority. If the delegation does not include persons who have expertise on the human rights situation in the country, they may not be able to answer questions in sufficient detail even if they could deal with policy issues.⁹³

There are a number of problems with the actual examination of the Report process. First, some States' representatives fail to turn up when their Reports are to be examined. The problem of the non-presence of State representatives has led the Commission to postpone examination of particular States' Reports, sometimes for more than two years, such that by the time the Report is actually examined, the information in the Report is outdated.⁹⁴

Another problem with the examination process is the quality of States' representatives. Ankumah claims that, oftentimes, States' representatives are hesitant when it comes to answering specific questions. She suggests that this may be due to the fact that they lack the knowledge that allows them to contribute positively to the substance of the discussions.⁹⁵

A third problem is the structure of the examination process itself. Viljoen contends that the manner in which the examination of States' Report is conducted is hardly conducive to a genuine dialogue. Instead of the State presenting a summary of the Report—highlighting the salient aspects of the Report—considerable time is taken up by presentation of the Report.⁹⁶ The Commissioners then pose questions to the State's representatives for about two hours and then the State representatives are given 30 minutes in which to reply.⁹⁷ The result is

91. *Id.* at 377-78.

92. *Id.* at 378.

93. EVANS & MURRAY, *supra* note 3, at 66-67. MALCOLM EVANS AND RACHEL MURRAY, *supra* note 3, at 66-67.

94. ANKUMAH, *supra* note 94, at 96-97.

95. *Id.* at 107.

96. VILJOEN, *supra* note 5, at 380.

97. *Id.* at 380.

that representatives avoid the difficult questions posed and engage in platitudes and vague statements.⁹⁸

Quashigah also believes that the Commission's financial constraints affect the effectiveness of the examination of the Report process. Inadequate finances mean that the Commission is not able to provide the secretarial and translation services that are required for effective Reports examination. Financial difficulties also mean that the Commission cannot sit a sufficient number of times within a year and a sufficient number of days during its sessions for it to deal adequately with Reports.⁹⁹

3.9.2 The Role of NGOs During Actual Examination of States' Reports

The fact that NGOs are encouraged to participate in a State's Report writing process and are allowed to comment on a Report before it is submitted to the Commission, does not mean that they cannot submit 'shadow' Reports, which provide their views about the human rights situation in a country, as part of the Reporting process. NGOs can approach the Commission's Secretariat and submit information and questions or 'shadow' Reports as part of the Reporting process.¹⁰⁰

Initially, NGO involvement in the preparation of shadow Reports was constrained by the fact that NGOs did not have access to State Reports locally before they were sent to the Commission. Consequently, Viljoen suggested that the Commission should provide NGOs copies of State Reports before the examination of the Report commenced. This is because State Reports are public documents and they should be available to the public even before the Report is examined.¹⁰¹ This weakness has been corrected and presently State Reports are posted on the Commission's website quite some time before a State's Report is examined.

3.9.3 Concluding Observations

Viljoen believes that the object of the Reporting process is to make an objective assessment of how a State is honoring its human

98. *Id.* at 380-81.

99. QUASHIGAH, *supra* note 3, at 279-80.

100. VILJOEN, *supra* note 5, at 381-82.

101. *Id.* at 382.

rights obligations so that it could improve the human rights situation in the country. A way to achieve this objective would be for the Commission to provide the State with Concluding Observations after it has reviewed the State's Report. Concluding Observations will form the basis of a continuing dialogue between the State and the Commission. They would also provide NGOs with benchmarks through which they could monitor the human rights situation in the country.¹⁰²

Even though the Charter is silent on the issue of Concluding Observations, Rule 85(3) and 86(1) of the Commission's 1988 Rules of Procedure could be the basis for the Commission's Concluding Observations. Unfortunately, at the initial stages of the Reporting process, the Commission did not often apply this rule and so it did not issue Concluding Observations. Viljoen does not think that this should be a reason to be critical of the Commission. He suggests that the Commission may not have initially issued Concluding Observations because it wanted to avoid confrontation with States. These days, the Commission seems more willing to issue Concluding Observations. As it has gained confidence, it seems more willing to enforce its mandate.¹⁰³

Generally, the Concluding Observations that have been issued include a summary of the Commission's findings, the positive factors in the Report, the factors constituting obstacles to a State honoring its human rights obligations, areas of concern and recommendations. Some of the recommendations allow for future assessments. Others are however, vague, too deferential, too idealistic, or too extensive to act as benchmarks to States for compliance and to the human rights community for monitoring.¹⁰⁴

3.9.4 Follow Ups

Viljoen also states that the Commission has not had a consistent policy on 'Follow Ups', after it has examined a State's Report. Sometimes it follows up by requesting supplementary information from the State—information to be provided at the next examination.¹⁰⁵ Most States, however, fail to provide the information that is requested from them by the Commission and unfortunately, the Commission also does not send reminders to States about the supplementary informa-

102. *Id.* at 385-86.

103. *Id.* at 387.

104. *Id.* at 388.

105. *Id.* at 389.

tion that they are expected to provide, so there is not a continuous dialogue between the Commission and States.¹⁰⁶

3.9.5 Closer Relationship between the Commission and the AU
and other International Human Rights Bodies
to Improve States' Reports

Generally, Quashigah believes that a closer relationship between the Commission and the AU would improve observance of human rights in Africa.¹⁰⁷ He suggests that a way to improve the States' Reporting process is for the AU to publicize issues relating to the Reporting process and for the AU to sanction States that fail to implement the Commission's recommendations.¹⁰⁸ Quashigah believes that the Commission and the AU could take a cue from the manner in which the political organs of the Organization of American States (the OAS) participate in the Inter-American human rights system and the role that European States play in the European Social Charter system. According to Quashigah, the political organs of the OAS actively participate in the Inter-American human rights system by highlighting human rights violations to OAS States and NGOs. Through this publicity, a forum is provided for human rights violations to be discussed and monitored.¹⁰⁹ He also suggests that the Assembly of African Heads of States and Governments, the Executive Council of the AU and the Pan-African Parliament, etc., could play similar roles in the African State Reporting system to improve it.¹¹⁰

Quashigah also argues that the Pan-African Parliament could play a role similar to the role that is played by the European Parliament, in promoting human rights in Europe. It could do this through monitoring whether States are implementing the recommendations of the Commission.¹¹¹ Quashigah concedes that the Pan-African Parliament cannot sanction recalcitrant States. However, he believes that through the publicity that the Pan-African Parliament gives to States' Reports, States could be forced to honor their human rights obligations.¹¹²

106. ANKUMAH, *supra* note 70, at 109.

107. QUASHIGAH, *supra* note 3, at 284-85.

108. *Id.* at 282.

109. *Id.* at 282-83.

110. *Id.* at 286-90.

111. *Id.* at 288-90.

112. *Id.* at 290.

3.9.6 A General Evaluation of the State Reporting System

Let us now make a general evaluation of the State Reporting system under the Charter and provide explanations about why it has been generally ineffective. What accounts for the general ineffectiveness of the Reporting process?

At the beginning of this paper, I argued that two factors explain this situation. First, because of the general lack of human rights consciousness in Africa, there is little pressure from citizens of African States to force their States to honor their human rights obligations. Secondly, African States are neo-patrimonial States and such States, by their very nature, do not take their human rights obligations seriously. I also suggested that because of their propensity to mismanage their economies, neo-patrimonial States are prone to fiscal crises and this leads to chronic under-investments in their public institutions. Under-investments make it difficult for public human rights institutions to carry out their mandates such as submitting State Reports according to Article 62 of the Charter.

It is also for these reasons that I am skeptical of Quashigah's suggestion that, like the situations in Europe and in the Americas, the AU and its institutions could bring pressure on African States to honor their human rights obligations. The European human rights system is very effective because citizens of Council of Europe States, recognize the importance of human rights and put sustained pressure on their States to promote and protect human rights both in their domestic and foreign policies. This, generally, pro-human rights attitude is also reflected in the way Council of Europe institutions treat European States that are tempted to dishonor their human rights obligations. A State that is a member of the Council of Europe, that persistently dishonors its human rights obligations will be subject to considerable pressure from Council of Europe institutions. This will make it difficult for such a State to be a persistent violator.

Nothing like the European situation prevails in Africa. Generally, there is at best, an indifference to human rights protection in African States. This indifference to human rights and civil liberties is manifested in many aspects of African intra State relations in which States turn a blind eye to other States that persistently violate human rights. Until the state of human rights consciousness and the present neo-patrimonial nature of politics change significantly, human rights pro-

tection in Africa would continue to look like a situation of sowing seeds in stony places; they are not likely to germinate and flourish.

PART IV

4.0 EXAMINATION OF GHANA'S STATE'S REPORTS IN THE AFRICAN HUMAN RIGHTS SYSTEM

In this part of the paper, I shall evaluate the State Reporting system by analyzing in detail how Ghana has participated in the process. As I have already explained, I have chosen to analyze Ghana's participation in the Reporting system, because Ghana is a country that seems to be committed to liberal democratic constitutionalism and its 1992 Constitution contains strong provisions that protect human rights. If a country in Africa should take its human rights obligations seriously, then it should be Ghana.¹¹³

4.1 History and Problems with Ghana's Reporting Obligations

Ghana is a West African State. In 1957, it was the first African country south of the Sahara to gain independence from European colonialism. After a checkered political history, in which there was considerable political instability, Ghana returned to a constitutional democracy and multi-party politics in 1993. Ghana ratified its Charter in 1989.

4.2 Failure to Meet its Reporting Obligations under Article 62 of the Charter

The first problem with Ghana's participation in the Charter's Reporting system, is that Ghana has failed to meet its legal obligation to submit a Report to the Commission and take part in the examination of its Reports every two years, as required by Article 62 of the Charter.

As I have already indicated, Ghana ratified the Charter in 1989. This means that under Article 62, Ghana should have presented its Initial Report by 1991, and its subsequent Periodic Reports every two years beginning in 1993. It is unclear when Ghana presented its Initial Report because there is no Initial Report from Ghana on the Com-

113. See discussion at Part 1.3 above of this paper.

mission's website.¹¹⁴ There is, in fact, only one Report from Ghana and it is described as Ghana's Second Periodic Report covering the years 1993-2000.¹¹⁵ It is also unclear whether Ghana presented a first Periodic Report after its Initial Report. It may well be that the Report posted on the Commission's website and described as Ghana's 'Second Periodic Report' is the first Report after the Initial Report, because Ghana was supposed to have submitted its first Periodic Report in 1993. It is also possible that the Report is, in fact, a combination of the Initial Report and the first Periodic Report. It is difficult to know the exact status of the Report from the information gleaned from the Commission's website.

Interestingly, the Commission's website indicates that the Report was supposed to cover the years 1993-2000. However, from the Commission's website, the Report was submitted in September 1998. How the Report submitted in September 1998 could also cover the years 1999 and 2000 is difficult to understand. However, if indeed the Report was supposed to cover the years 1993-2000, then it consolidates four (4) Periodic Reports, 1993-1994, 1995-1996, 1997-1998 and 1999-2000. Although it was submitted in September 1998, the Report was, in fact, examined at the April-May 2001 Ordinary Session of the Commission. This means that it took almost three years for the Report to be examined. It is certain that by the time the Report was examined, the information contained in the Report had become outdated.

Since then, Ghana has not presented any Reports. This means that as of 2016, Ghana has nine Reports outstanding. It is not clear when Ghana will submit these outstanding Reports. If its past record is a guide to its future actions, it is not likely that Ghana will satisfy its Reporting obligations any time soon.

4.3 Contents of Ghana's Report

Ghana's Report does not indicate the years that it was supposed to cover. It is merely titled "Report on Ghana's Compliance with its Reporting Obligations Pursuant to Article 62 of the African Charter on Human and People's Rights." Taking into consideration the fact that by the time the Report was submitted, Ghana had at least three (3) Reports outstanding, one could have expected the Report to ex-

114. *Ghana: 2nd Periodic Report, 1993-2000*, African Commission on Human and Peoples' Rights (last visited Oct. 22, 2017), <http://www.achpr.org/states/ghana/Reports/2nd-1993-2000/>.

115. *Id.*

plain why Ghana had not met its Reporting obligations in 2000. But, the Report does not explain this. The Report, also, does not indicate the Ministry or Government Department that prepared the Report. Further, it does not indicate the person or persons who presented the Report during the examination process.

4.3.1 Background

The Report begins with a background; it provides a brief history and geography of Ghana. At the time the Report was submitted, Ghana had a population of 18.5 million people. Ghana had also transitioned from the military government of the Provisional National Defense Council (PNDC) to the constitutional administration of the National Democratic Congress (NDC).¹¹⁶

The Report provides a brief description of Ghana's political and constitutional system; Ghana's political system is divided between an Executive, who is responsible for executing the laws passed by a multi-party Parliament, and an independent judiciary, who guarantees the rule of law.¹¹⁷ This is the general legal framework within which Ghana is supposed to protect human rights.

4.3.2 Ghana's Report on Civil and Political Rights

Ghana's Report discusses how Ghana is protecting the Charter's civil and political rights.¹¹⁸ The Report proceeds as follows: first, a civil or political right protected under the Charter is identified. The Report then identifies the equivalent right that is protected under Ghana's 1992 Constitution. Where possible, legislations passed by Ghana's Parliament and cases decided by Ghanaian courts that protect the civil or political right are also identified.¹¹⁹

For example, the Report refers to Articles 2 and 3 of the Charter, which prohibit discrimination and ensure equal protection to all under the law. The Report then refers to Article 12 of the 1992 Ghana Constitution, which protects the fundamental human rights of all persons. Article 12 of the 1992 Ghana Constitution also prohibits discrimina-

116. African Commission on Human and Peoples Rights [ACHPR], Report on Ghana's Compliance with its Reporting Obligations Pursuant to Article 62 of The African Charter on Human and People's Rights, at 1 (May 7, 2001), http://www.achpr.org/files/sessions/29th/state-reports/2nd-1993-2000/achpr29_staterep_ghana_2001_eng.pdf. *Id.* at 1

117. *Id.* at 2-4.

118. *Id.* at 5.

119. *Id.*

Sowing the Seeds of Human Rights

tion when it comes to enjoyment of human rights.¹²⁰ The Report then refers to the Ghana Public Order Act (1994), the Directive Principles of State Policy of the 1992 Ghana Constitution and two cases – the *NPP v. Attorney General* and the *New Patriotic Party v. Ghana Broadcasting Corporation* – and argues that these legislation, constitutional provisions and case law, protect the rights guaranteed under Articles 2 and 3 of the Charter in Ghana.¹²¹

The Report also discusses how Ghanaian law, institutions and processes protect the Charter's other civil and political rights.¹²²

4.4 Economic Rights

The section on economic rights begins with an outline of the recent economic history of Ghana starting from 1983, when Ghana launched its Vision 2020 program aimed at ensuring that Ghana attained middle-income status in 2020.¹²³ The Report then discusses the substantive economic rights that Ghana protects. Again, it follows the approach of the section that deals with civil and political rights. First, the Report refers to an economic right that is guaranteed by the Charter; then it discusses the equivalent economic right that is protected under Ghanaian law.

For example, the Report refers to Article 15 of the Charter – the right to work – and then it refers to Article 24 of the 1992 Ghana Constitution, which protects the right to work. The Report identifies the Industrial Relations Act, the Workmen's Compensation Law, the Factory, Offices and Shops Act, the Labor Decree, the Investment Code, etc. as the laws that protect the right to work in Ghana. It also refers to Article 36 of the 1992 Ghana Constitution, which states the Directive Principles of State Policy, which require the government of Ghana to manage the economy so that it could maximize the rate of economic growth in a manner that is compatible with personal freedoms.¹²⁴

120. *Id.* The Report refers, mistakenly, to Article 17 of the Ghana Constitution, when in fact it should have referred to Article 15 of the 1992 Constitution, which protects dignity of persons, the right to liberty and prohibition against torture, cruel, inhuman and degrading treatment and punishment.

121. *Id.* at 6-8.

122. *Id.* at 8-24.

123. *Id.* at 26-27.

124. *Id.* at 26.

4.5 Social and Cultural Rights

The Report also has a section on protection of social and cultural rights in Ghana. It refers to Articles 16 and 17, as the provisions that protect the right to health and the right to education respectively in the Charter. The Report then identifies Articles 25, 26(1) and 38 of the 1992 Ghana Constitution as the Ghanaian constitutional provisions that protect the right to health and the right to education.¹²⁵

The Report discusses the educational programs that the Ghanaian government has implemented to ensure that Ghana's obligation to promote education under the 1992 Ghana Constitution and under the Charter are honored.¹²⁶ The Report discusses the impact that these programs have had on literacy in Ghana. Between 1970 and 1995, the Report claims that the literacy rate in Ghana doubled from 30% to 64%. However, the Report also concedes that there is a serious gender disparity in the literacy rate; for example, as at 1995, while 76% of men were literate, only 53% of women were literate.¹²⁷

Interestingly, there is no discussion on the right to health in the Report.

4.6 Cultural Rights and the Right to Dignity

The Report discusses how Ghana is protecting cultural rights and human dignity. As usual, it begins by referring to the Charter.¹²⁸ Articles 17(2) and 17(3) of the Charter protect the right to culture and human dignity. The Report then identifies Article 15 and Article 26 of the 1992 Ghana Constitution as the articles that protect human dignity. Article 26(2) ensures that practices that dehumanize or injure the physical and mental well-being of persons are prohibited. It then identifies some harmful cultural rights that have been abolished and the strategies that Ghana is using to promote human dignity.¹²⁹

4.6.1 The Rights of the Women

The Report also discusses the rights of the family, the rights of women, the rights of children and the rights of the disabled. Article 18(3) of the Charter and Article 27 of the 1992 Ghana Constitu-

125. *Id.* at 28.

126. *Id.*

127. *Id.* at 28-29.

128. *Id.* at 29.

129. *Id.*

tion protect the rights of women.¹³⁰ The Report suggests that gender equality has improved significantly as a result of socio-economic developments in Ghana and the activities of gender advocates. The Report surmises that due to the activities of gender advocates, the Ghana government has adopted affirmative action programs to increase the presence and role of women in decision-making at the higher echelons of Ghanaian society.¹³¹

4.6.2 The Rights of Children

Article 18(3) of the Charter protects the rights of children. The Report states that Article 28 of the 1992 Ghana Constitution protects the rights and dignity of children. This is to ensure their well-being and development.¹³² The Report discusses the programs that Ghana has developed to protect the rights of children.¹³³

4.6.3 The Rights of the Disabled

The rights of persons with disabilities are also discussed in the Report. Again, Article 18(4) of the Charter protects the rights of the disabled. Article 29 of the 1992 Ghana Constitution prohibits discrimination against persons with disabilities, especially when it comes to access to employment and accommodation. Homes are also required to be modified to be so that persons with disabilities could be accommodated in such buildings. However, the Report recognizes that discrimination against persons with disabilities continues to be a major challenge and this has made it difficult for such persons to receive education and employment.¹³⁴

4.6.4 The Rights of the Aged

There is no discussion about the rights of the aged in the Report.

4.7 Evaluation of the Report

Does Ghana's Report satisfy the Commission's guidelines on how Reports should be prepared? I have already indicated that it would be difficult to establish whether a Report satisfies the Umozurike

130. *Id.* at 32.

131. *Id.* at 33.

132. *Id.* at 34.

133. *Id.* at 35.

134. *Id.* at 35-36.

Amendments because the requirements of the Umozurike Amendments are very imprecise. It is also difficult to ascertain whether Ghana's Report satisfies the First Guidelines. This is because, as we have already indicated, it is not clear whether Ghana's Report is an Initial Report or a Periodic Report and the First Guidelines have somewhat different requirements for Initial and Periodic Reports. However, since the Report is described as a second Periodic Report, I will assess it on the basis that it is a Periodic Report.

As a Periodic Report, the Report does not satisfy the First Guidelines because it does not provide some of the information required by the First Guidelines. For example, it does not provide any information about the measures that Ghana has adopted to implement the Charter as a result of interactions between the Commission and Ghana.¹³⁵

There are also other weaknesses in Ghana's discussion about how it is protecting Charter rights. The Report merely lists the institutions created and the laws that Ghana has enacted to protect both civil and political rights, as well as economic and social rights. The Report, however, does not provide any in-depth analyses about how effective these institutions and laws have been in protecting Charter rights in Ghana. I note, for example, that in relation to civil and political rights, the Report states that within the broad legal framework in which human rights are protected, the judiciary is responsible for guaranteeing rule of law.¹³⁶ Also, in relation to the economic right to work, the Report lists the institutions and the laws that protect the right to work.¹³⁷ However, the Report does not tell us whether, in fact, the judiciary is able to effectively protect the rule of law and human rights in Ghana, nor does it tell us how effectively the right to work is protected in Ghana. In spite of the huge problem of unemployment in Ghana, there is in fact, no discussion about the problem of unemployment in the Report.

It must be acknowledged that there are more in-depth discussions on social rights, the rights of women and children, and the rights of the disabled. There are also attempts to grapple with some of the specific problems within these areas. But again, the Report is not sufficiently

135. Ghana's response to these failings could be that since the Report was Ghana's first Report to the Commission, there had been no prior issues raised by the Commission about Ghana's past Reports. This response would however be adequate if the Report under examination was Ghana's Initial Report. As has been argued, the status of the Report is not clear.

136. *Id.* at 3-4.

137. *Id.* at 24-27.

detailed for us to know whether progress is really occurring or not. It is also not satisfactorily critical of the situation in Ghana. For example, the Report states that the government is implementing programs to ensure that all children receive basic education and healthcare.¹³⁸ But the Report does not inform us about how successful these programs have been. At best, the Report presents an unduly positive view of government efforts, without contending with the problems that the government faces in meeting these obligations.

4.8 Problems with Protecting Human Rights in Ghana

The Ghana Report also identifies the general problems that Ghana faces in protecting human rights.¹³⁹ It identifies illiteracy as the first major problem. It argues that illiteracy undermines rights because a significant number of people are unaware of their rights and do not appreciate the rights of others. They are also unaware of their duties and obligations.¹⁴⁰

The second problem is cultural. The Report claims that, generally, Ghanaian culture is patriarchal. People also venerate authority and therefore do not assert their rights. They fail to demand accountability and transparency from officials. As a result, Ghanaians tend to tolerate rights abuses.¹⁴¹

A third difficulty is the financial constraints that face government institutions charged with protecting human rights. Many of these institutions such as the Ghana Commission on Human Rights and Administrative Justice (CHRAJ) and the National Commission on Civic Education (NCCE) do not have sufficient resources to mount public programs to promote human rights.¹⁴²

Finally, the Report identifies the criminal libel law as one of the hurdles that Ghana must surmount if it is going to be able to promote human rights.¹⁴³ The Report argues that freedom of expression is a foundation upon which protection of human rights is founded. The media ought to be able to publish stories about human rights abuses without fear of prosecution and possible incarceration. However, the

138. *Id.* at 34-35.

139. *Id.* at 37.

140. REPORT ON GHANA'S COMPLIANCE WITH ITS REPORTING OBLIGATIONS PURSUANT TO ARTICLE 62 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS, *supra* note 130, at 37.

141. *Id.*

142. *Id.* at 38.

143. *Id.*

existence of laws that criminalize libel make journalists timorous and this undermines the promotion of human rights and human rights education in Ghana.¹⁴⁴

4.9 Evaluation of the Problems of Protecting Human Rights in Ghana

In the course of this paper, I have noted that one of the reasons why African States do not honor their human rights obligations, is that human rights consciousness is relatively under-developed amongst large segments of Africa's populace. Another reason is that politics in Africa is of a neo-patrimonial nature. Although Ghana's Report does not identify the problems in the way I have stated them here, it nevertheless raises these issues in indirect ways and argues that these issues are why it is difficult to protect human rights in Ghana.

For example, the Report identifies illiteracy, patriarchy, and lack of rights assertiveness as some of the reasons that make it difficult for Ghanaians to avow their rights.¹⁴⁵ These problems could be classified as issues related to lack of the human rights consciousness. The Ghana Report also refers to the existence of laws such as criminal libel laws that are used to cower the press. Criminal libel laws make it difficult to expose human rights violations in Ghana. Again, in our earlier discussion on neo-patrimonialism, I stated that neo-patrimonial States do not take rights seriously. It should therefore not be surprising that a government in a neo-patrimonial State, like the Ghanaian government, would deploy instruments such as criminal libel laws to harass and intimidate the press. Thus, making it difficult for the press to highlight human rights violations in Ghana, even though, formally, it is committed to political liberalization and democratization.

Finally, the Report identifies the weak financial positions of public institutions, like the Ghana Commission on Human Rights and Administrative Justice ("CHRAJ") and the National Commission on Civic Education ("NCCE") that have mandates to protect and promote human rights, as another reason why it is difficult to protect human rights in Ghana.¹⁴⁶ Weak finances make it difficult for these

144. *Id.* In July 2001, the Ghanaian Parliament unanimously abolished Ghana's criminal libel laws, <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/Criminal-libel-law-repealed-17009>.

145. *Id.* at 38.

146. *Id.* at 39.

Sowing the Seeds of Human Rights

institutions to carry out their mandates. Again, throughout this paper, I have addressed the issue of the chronic financial crises that public institutions face in neo-patrimonial States and have suggested that this makes it difficult for public institutions to carry out their mandates. It is therefore not surprising that the Ghana Report would emphasize the under-investments in these institutions as a major reason why Ghana's human rights institutions, are unable to carry out their objectives.

I believe that these are the same reasons – underdeveloped human rights consciousness and neo-patrimonialism – that explain why Ghana has failed to take its international human rights obligations and consequently failed to honor its obligation of presenting adequate State Reports every two years as required by Article 62 of the Charter.

4.9.1 How to Improve the Human Rights Situation in Africa

“But other [seeds] fell into good ground, and brought forth fruit, some an hundredfold, some sixtyfold, some thirtyfold.” – Matthew Chapter 13. 8 KJV

How can the seeds of human rights be planted in good grounds, so that they would bear fruit hundredfold, sixtyfold and thirtyfold, so that States will honor their human rights obligations, especially their State Reports as required by Article 62 of the Charter?

For this to happen, there must be sustained pressure from citizens of African States to force State institutions to honor their human rights obligations. Legal-rational administrative systems must be developed in place of the prevalent neo-patrimonial administrations to ensure that State bureaucracies operate within the law and protect the rights and properties of their citizens. Legal-rational administrations are more likely to recognize their obligations to prepare adequate State Reports that satisfy the requirements of Article 62 of the Charter.

These are long-term objectives and success cannot be guaranteed. No single policy can achieve these objectives on its own because it would require a multiplicity of strategies and policies. Among the revolutions that must occur are mental revolutions in which people take human rights seriously and governance revolutions that move away from authoritarian rule to deeper political liberalization and democratization. Until these occur, Africa will continue to be a very stony

place to plant the seeds of human rights protection, and States participation in the Charter's Reporting system, will at best be perfunctory.

PART V

5.0 CONCLUSION

In this paper, I have discussed the problems that face the State Reporting system of the African human rights system. Under Article 62 of the Charter, African States that have ratified the Charter must submit Reports to the African Commission every two years showing how they are implementing the Charter within their jurisdictions.

The Reporting system has been subjected to considerable and justified criticisms. It has been argued that the Reporting system is ineffective. First, the guidelines issued by the Commission to assist States to prepare their Reports are not helpful to States. Secondly, States do not take the process seriously. Generally, they fail to meet their legal obligations as required by Article 60 of the Charter.

Some of these criticisms have been borne out in our analysis of Ghana's participation in the Reporting process. In spite of the fact that Ghana ratified the Charter in 1989, as of 2016, Ghana has participated in the Reporting process only once, even though it should have submitted a minimum of nine Reports and should have participated in the examination process about the same number of times. And the only Report that Ghana submitted failed to meet the standards required by the guidelines issued by the Commission. Basically, Ghana's Report merely lists Ghana's constitutional provisions and legislative enactments that protect Charter rights. There are only very brief discussions about the programs that the Ghana government has implemented to protect the rights guaranteed under the Charter. One would have expected such a Report to provide an in-depth analysis of the state of human rights protection in the country, including the problems associated with protecting rights.

I argued in this paper that one of the reasons why African States do not take their human rights obligations seriously is the relative lack of human rights consciousness among a significant part of Africa's populace. Thus there is little pressure from African citizenry on African State institutions to take their human rights obligations seriously. Secondly, African States are neo-patrimonial States and neo-patrimonial States, by their very nature, do not take human rights seriously. Also because of the mismanagement of their economies, which is as-

Sowing the Seeds of Human Rights

sociated with neo-patrimonialism, neo-patrimonial States face chronic under-investment in public institutions and this makes their public institutions, including those charged with human rights protection, ineffective. This explains why States submit shoddy Reports, are usually out of time when they submit their Reports, and fail to appear before the Commission when their Reports are being examined or include persons in their delegations that have no human rights expertise when they appear before the Commission.

I conclude by stating that the fight to ensure that African States take their human rights obligations seriously, is part of a longer and more resolute battle to ensure greater liberalization and deeper democratization in African politics. It would take a multiplicity of policies and strategies to succeed and so this is really a long-term project; and to be realistic, it is not likely to succeed in the near term because presently, politically and sociologically, Africa is a stony place to sow the seeds of human rights.

Banning the Stars and Bars: How Banning the Confederate Flag Furthers International Laws on Hate Speech

TIFFANY M. CEBRUN*

CONTENTS

INTRODUCTION	103
I. HISTORY OF THE CONFEDERATE FLAG	106
II. THE INCITEMENT TO VIOLENCE DOCTRINE: AN APPROPRIATE VEHICLE FOR ADDRESSING HATE SPEECH?	115
III. ADOPTING AN INCITEMENT TO HATRED AND DISCRIMINATION STANDARD TO REACH THE CONFEDERATE FLAG	119
IV. TIME TO SHOW OUR VALUES: WHAT CONTINUING TO ALLOW THE CONFEDERATE TO FLY SAYS ABOUT US AS A PEOPLE	133
CONCLUSION	136

INTRODUCTION

It's August 2017, and a rally in Charlottesville, Virginia, to preserve a monument of confederate general Robert E. Lee has just erupted in violence.¹ It's July 2015, and the Charleston Church

* J.D. Howard University School of Law, 2017; B.S. Political Science, Minor African American Studies, University of Houston, 2014. I would like to thank my professor and adviser Attorney Olivia Farrar for her supervision, direction and encouragement throughout my research and drafting of this note. I would also like to thank my colleagues on the Howard Human and Civil Rights Law Review for their edits and assistance in preparing this note for publication.

1. Joe Heim, *Recounting a day of rage, hate, violence and death. How a rally of white nationalists and supremacists at the University of Virginia turned into a "tragic, tragic weekend."*, THE WASHINGTON POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.8ab3b760789.

shooter, Dylann Roof, has just been seen sporting the Confederate flag on his Facebook page.² It's April 2001, and an overwhelming majority of Mississippians have just voted to keep a portion of the Confederate flag emblem on their state flag despite the comments from several Black Mississippi residents that it is a "symbol of racism and slavery."³ It's 1954, *Brown v. Board of Education* has just been decided and the state of Georgia has just redesigned its state flag in response to the Court's decision, adding the Confederate flag.⁴

These events are just a few events from a long history of incidents featuring the Confederate flag. Given the flag's inception during the Civil War, its association with conflict and controversy may not seem surprising. The Confederate flag initially debuted during the years when the United States' very union was threatened. It made a major resurgence in the 1950s, during the Civil Rights Movement, also a critical turning point in United States history. Controversy seems to follow the Confederate flag. Recently, an attorney sought to have the Confederate flag emblem removed from the Mississippi state flag as a violation of the Equal Protection Clause of the Constitution.⁵ California passed a law in 2014 banning images and the flag itself from sale and display by the state government.⁶ As the 2016 presidential race raged on, a polling site in the town of Troy, North Carolina, hoisted the flag despite protests from many locals saying that the flag intimidated them on their way to the polls.⁷ The Charleston church shooting spurred a major turning point in the flag's debate. That infamous event attracted more attention to the Confederate flag in the new millennium than arguably any other event.

The debate, thus, is neither new nor surprising. But over 150 years after its creation it seems like we are still asking the same ques-

2. Katie Rogers, *Charleston Shooting Reignites Debate About Confederate Flag*, N.Y. TIMES (June 19, 2015), https://www.nytimes.com/2015/06/20/us/charleston-shooting-reignites-debate-about-confederate-flag.html?_r=0.

3. *Mississippi Keeps Confederate flag*, BBC (Wednesday, 18 April, 2001, 10:21 GMT 11:21 UK), <http://news.bbc.co.uk/2/hi/americas/1282784.stm>.

4. Anna Bruzgulis, *Confederate flag wasn't flown at South Carolina statehouse until 1961, pundit claims*, POLITIFACT (June 22, 2015), <http://www.politifact.com/punditfact/statements/2015/jun/22/eugene-robinson/confederate-flag-wasnt-flown-south-carolina-state-/>.

5. Ariane de Vogue, *Federal judge: Mississippi flag offends more than just African-Americans*, CNN (Sept. 12, 2016), <http://www.cnn.com/2016/09/12/politics/mississippi-confederate-flag/>.

6. Melanie Mason, *California lawmakers OK bill that would ban Confederate flag displays*, L.A. TIMES (Nov. 9, 2016), <http://www.latimes.com/local/political/la-me-pc-confederate-flag-bill-20140820-story.html>.

7. Jeff Tiberii, *Rural Montgomery County In Confederate flag Flap*, WUNC, (Sept. 23, 2016), <http://wunc.org/post/rural-montgomery-county-confederate-flag-flap#stream/0>.

tion: is this flag a form of hate speech that should be subject to regulation or is it merely an expression of southern pride and culture? The Confederate flag debate does more than address preservation of the Confederate flag, it illuminates the limits of First Amendment jurisprudence relating to hate speech and, therefore, can shape how we understand the balance between hate speech and freedom of speech enshrined in the First Amendment.

The right to speech may be protected more strongly in the United States than any other nation. This freedom is protected to such an extent that the United States takes reservations on key treaties to preserve it.⁸ Consequently, proponents of banning the Confederate flag as hate speech face several challenging hurdles. However, these hurdles can be overcome by reworking the incitement to violence doctrine in a way that is analogous to both international treaties and other nations hate speech laws. This note advocates that adopting an incitement to discrimination and hatred doctrine would bring the United States in line with the majority of nations in the international community, help the United States come in full compliance with key international anti-discrimination and hate speech treaties, and most crucially finally create an effective channel for the United States to address hate speech like the Confederate flag.

Part I of this note gives a brief history of the Confederate flag. This segment presents, not only the factual history of the flag, but also how courts have treated the Confederate flag. Part II introduces the incitement to violence doctrine, including its development and application. Part III compares the United States' incitement exception to international incitement doctrines, focusing on how those doctrines differ from the United States' exception. This section brings the information in the previous sections together by demonstrating how the United States' incitement doctrine can be adapted, much like international incitement doctrines, to reach hate speech like the Confederate flag. The final section, Part IV, briefly discusses the social implications of adopting an incitement to hatred and discrimination exception that would be capable of reaching the Confederate flag.

8. *Id.* (making a reservation to the prohibition of "propaganda for war and advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence" in Art. 20 of the ICCPR).

I. HISTORY OF THE CONFEDERATE FLAG

A. A Less than Glamorous Beginning

The Confederate flag has been controversial since its inception. Indeed, it came to being in an era of extreme controversy: the Civil War. But its history is less romantic than would be assumed, given current events. The flag was initially created for the practical purpose of ensuring separate southern state militias fighting during the Civil War on behalf of the south knew they were on the same side.⁹ Prior to its creation, the various southern states flew their own separate state flags on the battle frontier.¹⁰ This approach proved problematic since the confederate militias often fired on one another, unsure if they were looking at the flag of an enemy state fighting to preserve the union or that of their fellow confederates.¹¹ To solve this problem the southern states decided that a single flag representing the confederate south should be adopted.¹²

The symbols on the flag were also adopted more for practicality than decisive symbolism. For example, the red backdrop of the flag was selected rather than the original white backdrop because the white backdrop led to the flag becoming dingy on the battlefield.¹³ The St. Andrews cross was adopted for the purpose of distinguishing it from the straight lines on the United States flag and traditional cross of the British flag.¹⁴ The only real symbolic feature is the presence of the thirteen stars symbolizing the confederate states of the slave-holding south.¹⁵ Despite this rather uneventful inception, the Confederate flag was quickly used to rally tired and frustrated confederate troops on the battlefield during the Civil War.¹⁶

Immediately following the Civil War, the Confederate flag was treated as contraband, especially by radical reconstructionists.¹⁷ While the Ku Klux Klan (KKK) would not take up the flag until the 1940's, an analogous organization did adopt it during the reconstruction era: the Carolina Rifle Club of Charleston, South Carolina.¹⁸ The

9. John Coski, *The Confederate Battle Flag: America's Most Embattled Emblem*, 7 (2005).

10. *Id.*

11. *Id.* at 8.

12. *Id.*

13. *Id.*

14. *Id.* at 4, 14-15.

15. *Id.* at 5.

16. *Id.* at 17.

17. *Id.* at 46, 49.

18. *Id.*

club's mission was similar to that of the KKK, namely to "[provide] an organized defense of the White race against negro aggression" under the banner of the stars and bars.¹⁹

However, when reconstructionists removed the flag, it had more to do with the negative war-related connotation they associated with it than for any animus towards its symbolism as a banner of racial inferiority of Blacks.²⁰ Not surprisingly, as zeal for reconstruction waned, so did resistance to the Confederate flag.²¹ Between 1865 and 1915, the United States prioritized reducing the sectional tensions between north and south over racial justice.²² In 1877, after the presidential election, a compromise was struck and the flag, which may otherwise have been banned, was allowed to remain.²³ The existence of this compromise is no clearer than the nation ignoring the South's almost immediate imposition of Jim Crow laws, the very laws that necessitated the Civil Rights Movement almost a century later which, then spurred the resurgence of the Confederate flag in the 1950s.²⁴

The years between 1915 and the 1950 were relatively silent where the Confederate flag was concerned,²⁵ but the flag was neither abandoned nor forgotten.²⁶ During this time period, the flag was periodically resurrected by individuals seeking to demonstrate resistance to actions taken by the federal government or to show support for states' rights.²⁷ Between 1915 and 1950 the flag was frequently unfurled by students on college campuses.²⁸ It was used by the Dixiecrat party.²⁹ During the First World War the flag was used by southern troops seeking to uphold their distinct southern culture when they found themselves suddenly mixed with men from across the nation.³⁰

19. NOTE: The stars and bars is a very common name for the Confederate flag. I will occasionally employ it, especially when emphasizing cultural links or southern heritage.

20. Tiberii, *supra* note 7, at 49.

21. *Id.*

22. *Id.* at 65.

23. Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 *TEMP. L. REV.* 539, 584 (2002).

24. *Id.*

25. Ben Brumfield, *Confederate Battle Flag: Separating the Myths from Facts*, CNN (June 24, 2015), www.cnn.com/2015/06/24/us/confederate-flag-myths-facts/.

26. *Id.*; Tiberii, *supra* note 7, at 78-96 (giving several examples of largely isolated uses of the Confederate flags between the years following reconstruction till 1948. During that period, when the flag was used, it largely due to the Dixie Crat Party's adoption of the flag).

27. Coski, *supra* note 9, at 119.

28. *Id.*

29. *Id.* at 104-06.

30. *Id.* at 116-20.

The flag's resurgence in the 1950s, however, had the irreversible effects of erasing, at least for the majority of Americans, its other uses of the flag by replacing it with its current use as a racial symbol. After the landmark *Brown v. Board of Education* decision, several southern states resurrected the Confederate flag as a symbol of resistance to federal efforts to desegregate the South.³¹ Georgia was the first, altering their state flag to embody the Confederate flag.³² South Carolina followed suit six years later by flying the flag above its state capital building.³³ An Alabama governor, blatantly and alarmingly, raised the flag as part of his "Segregation Forever" campaign in 1958.³⁴ Since its resurgence in the 1950s the flag continues to be used in as a symbol of White supremacy.³⁵ This behavior is especially prevalent in European nations where the Nazi flag and symbols have been banned as a viable alternative.³⁶ Currently, many people who know little of the flag's history see White supremacy as the flag's predominant, if not exclusive, message apart from its use as a symbol of southern pride.

What Does the Flag Mean to Americans

For several decades following the Civil Rights Movement, the Confederate flag took another lull from public attention. Recently it has made another major resurgence. The Charleston shooting drew everyone's attention back to the confederate battle flag.³⁷ The ensuing debate about whether the flag should be banned spurred Gallup and CNN to issue polls to Americans to determine how public opinion views the Confederate flag. According to the poll, 57% of those surveyed see the flag as a symbol of southern pride.³⁸ But what is south-

31. James Forman, Jr., *Driving Dixie Down: Removing the Confederate flag from Southern State Capitals*, 101 *YALE L. J.* 505, 505 (1991).

32. *Id.*

33. *Id.*

34. *Id.*

35. Rmuse, *Confederate flag Designer Said it is a Symbol of White Supremacy – Not Southern Heritage*, *POLITICUSUSA* (July 3, 2015) <http://www.politicususa.com/2015/07/03/confederate-flag-designer-symbol-white-supremacy-southern-heritage.html>.

36. Matthew Speiser, *Here's why the Confederate flag is flown outside the US*, (June 24, 2015) <http://www.businessinsider.com/why-is-the-confederate-flag-flown-outside-the-us-2015-6>.

37. Erik Ortiz, *Charleston Church Shooting Renews Confederate flag Debate*, <http://www.nbcnews.com/storyline/confederate-flag-furor/charlotte-church-shooting-renews-debate-over-removing-confederate-flag-n378651>.

38. Jennifer Agiesta, *Poll: Majority sees Confederate flag as Southern Pride Symbol, not Racist*, *CNN* (July 2, 2015), available at <http://www.cnn.com/2015/07/02/politics/confederate-flag-poll-racism-southern-pride/>. (However, this statistic alone fails to tell the whole story. The poll results are sharply divided by race and educational attainment. For example, among Blacks 72%

ern pride? The term, especially when used as a justification for the Confederate flag, is treated as self-evident and is therefore rarely defined. When the Confederate flag is taken into consideration, particularly the idea that it is not discriminatory because it simply expresses southern pride, it is evident how “southern pride” may be invoked as a socially acceptable expression to conceal a socially undesirable expression of discrimination. This is where history becomes critical. Deconstructing an ideology as amorphous as “southern pride” requires a close analysis.

Almost immediately following the South’s defeat in the Civil War, the Confederate flag began to be used as a proxy for racial superiority under the guise of southern pride. Edward A. Pollard, an editor for the *Richmond Examiner* and more commonly known as the author of *The Lost Cause*, wrote shortly after the South’s defeat in the Civil War that the South must:

Submit fairly and truthfully to what the war has properly decided only what was put in issue: the restoration of the Union and the exercise of slavery; and to those two conditions the South submits. But the war did not decide negro equality; it did not decide negro suffrage. . . and these things which the war did not decide, the southern people still cling to, still claim, and still assert them in their rights and views.³⁹

Pollard created the basis for what would become the concept of southern pride in an attempt to reconcile his pro-confederacy ideals with the new realities of the post-Civil War south.⁴⁰ By admitting defeat in the Civil War to some issues, but not others, Pollard was asserting key elements of what he felt were the South’s essential cultural elements, which could not be conceded, i.e. southern pride.⁴¹ It was this ideology that inspired, shaped, and defined the South’s post war political and social life.⁴² In so doing, the South was boldly asserting that if they had been wrong in severing the Union, they were at least

see the flag as a symbol of racism, while just 25% of Whites do. Additionally, 75% southern Whites see the flag as a symbol of southern pride while 75% of southern Blacks take the opposite view. When educational attainment is considered, the number of those who see the flag as a symbol of southern pride drops among Whites to 51%).

39. Edward A. Pollard, *The Lost Cause* 752, (New York: E.B. 1866).

40. *Id.* at 71. See also Rebecca Graf, *Origins of the Lost Cause: Pollard to Present*, 4 *Saber and Scroll* 69, 71 (Spring/Summer 2015) (stating that Pollard and others were successful in indoctrinating both north and south with their ideologies and definitions of southern pride.).

41. Pollard at 50 (stating that slavery and White supremacy contributed to the creation in the south of a “noble type of civilization”).

42. Janet Ruscher, *PREJUDICE COMMUNICATION* at 59 (2001).

right in their belief in White superiority over Blacks.⁴³ This is the ideology that continues to persist.

“Despite the well documented history of the Civil War, legions of Southerners still cling to the myth of the *Lost Cause* as a noble endeavor fought to defend the region’s honor and its ability to govern itself in the face of Northern aggression. This deeply rooted but false narrative is the result of many decades of revisionism in the lore and even textbooks of the South that sought to create a more acceptable version of the region’s past. The confederate monuments and other symbols that dot the South are very much a part of that effort.”⁴⁴

For current speakers, asserting the southern pride argument as the sole interpretation behind the flag while failing to define the parameters and particulars of what exactly southern pride means and how the Confederate flag stands solely for that, Pollard’s statements provide a poignant point of reference for this largely elusive term.⁴⁵ Southern pride prepared the South for Jim Crow, legitimized segregation, and created a culture of discrimination that only really began to be deconstructed in the 1950s.

One need not rely on history alone to support the idea that the Confederate flag may merely be a proxy for racial discrimination. Recent incidents in Charlottesville, Virginia and events in Anaheim, California demonstrate how the Confederate flag can stand independently of southern pride. Recently, in 2017 White supremacists held a Unite the Right rally in the college town of Charlottesville. The rally, composed of several white supremacist groups, including the neo-Nazi’s featured, not only the Confederate flag, but also the Nazi Flag, the European Identitarian Flag, the Vanguard American Logo, and several other flags of white supremacist hate groups.⁴⁶ The Confederate flag’s association with these flags and use by such groups illustrates, at the very least, the flag’s power as a symbol of white supremacy. At the rally the groups chanted phrases like “White lives

43. *Id.* at 63.

44. SPLC, *Whose Heritage? Public Symbols of the Confederacy*, Southern Poverty Law Center (April 21, 2016) <https://www.splccenter.org/20160421/whose-heritage-public-symbols-confederacy>.

45. Indeed, when conducting a search of the term southern pride, there are very few sources within the first 50 results in Google, that feature the term absent any mention of the Confederate flag, slavery, the civil war or the confederacy. The term seems tied to the confederacy.

46. *Deconstructing the Symbols and Slogans Spotted in Charlottesville*, WASH. POST (Aug. 18, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-videos/?utm_term=.579f54aedae0; <http://www.newsweek.com/who-are-white-nationalist-groups-who-demonstrated-charlottesville-650162>.

matter,” “You will not replace us” and “Jews will not replace us.”⁴⁷ While the protestors rallied over the removal of a confederate statue, the overwhelming theme of the rally was white supremacy and the Confederate flag was a star player.

Anaheim, California was never a part of the confederacy and still today no one would consider it part of the South. Yet at a rally held by the Ku Klux Klan for what was deemed the “White lives matter” movement, the Confederate flag was used.⁴⁸ Southern pride is a tenuous argument to make in a western state in a city just minutes from Disneyland. Even abroad, in nations where the Nazi flag has been banned, White supremacists hoist the Confederate flag to demonstrate their beliefs in White supremacy.⁴⁹ While many nations have adopted the flag as a symbol of rebellion, the flag’s most prevalent use both in the United States is a symbol of White supremacy.⁵⁰

Many, however, assert that for some the flag can be severed from this negative interpretation and use. Though the broad concept of southern pride itself is not so limited. (For example, a southerner myself, I share my own pride in my southern roots linked to rich and flavorful food, relaxed and slower paced society, and friendly interaction among strangers). However, when southern pride is asserted as a counter interpretation of the significance of the Confederate flag, that is likely not the sole message the user is seeking to convey, especially considering there are other readily available avenues to express southern pride that are readily available.⁵¹

Under this idea of southern pride “support for the confederate battle flag stems from deep pride in the culture of the Southern United States, [and] can be discussed best in terms of social identity theory.”⁵² According to this theory, support for the Confederate flag

47. Heim, *supra* note 1.

48. Liam Stack, *Seven Face Charges After Melee at Klan Rally in Anaheim*, N.Y. TIMES (Feb. 28, 2016), http://www.nytimes.com/2016/02/29/us/seven-held-after-melee-at-klan-rally-in-anaheim-california.html?_r=0..

49. See *Confederate flags Spotted Outside United States*, BBC (July 10, 2015); see also Matthew Speiser, *Here's Why the Confederate flag is Flown Outside the US*, Business Insider (June 24, 2015, 11:19 AM), <http://www.businessinsider.com/why-is-the-confederate-flag-flown-outside-the-us-2015-6>.

50. Speiser, *supra* note 49.

51. For example, I frequently say “y’all” when other words would be just as effective. But I continue to say “y’all” to demonstrate my Texas heritage and southern pride. I also frequently mention my love of grits and BBQ to show my pride in my southern heritage. Southern pride is not limited to the Confederate flag.

52. Joshua Wright et al., *Support for the Confederate Battle Flag in the Southern United States: Racism or Southern Pride?*, 5 JOURNAL OF SOCIAL AND POLITICAL PSYCHOL 224, 225 (2017).

can exist independent of negative racial attitudes if “the groups pride is imbedded within its symbolism, and support for this symbolism is a mechanism for exhibiting one’s positive distinctiveness.”⁵³ Unfortunately, there is a critical weakness with this theory. What is at the heart of this positive distinctiveness? The events in Charlottesville and Anaheim reveal that the positive ingroup association mandates a negative outgroup association. The superiority of Whites (the positive ingroup association) necessarily depends on the inferiority of other races (the negative outgroup association). If this is the social identity of southern pride embodied in the Confederate flag, then, especially given our history and current events involving violent race relations, it can never be severed from negative racial attitudes. Thus, although it may be a way to “orient oneself to the rest of the United States,” such a view constitutes willful ignorance, and is far from a “healthy national self-concept.”⁵⁴

B. Legal Treatment of the Confederate flag

While history and current events are telling for the symbolic meaning of the Confederate flag, it is also critical to note how courts view the Confederate flag. From employment discrimination cases to student speech cases, courts in the United States have repeatedly found that the flag symbolizes White supremacy and the racial inferiority of Blacks.

United States courts have upheld restrictions of the Confederate flag in limited forums and in schools, holding that local governments have a right to forbid the flying of a flag whose message they “would rather not hoist above the city.”⁵⁵ In such cases courts claim that the use of the Confederate flag by a municipality provides citizens with a “bully pulpit.”⁵⁶ To courts in the United States, the Confederate flag is “clearly discriminatory and offensive,” even in cases where the discrimination or offensiveness does not rise to the level required to prove a prima facie case, such as in employment discrimination cases.⁵⁷ Courts have repeatedly found that having a Confederate flag

53. *Id.*

54. *Id.*

55. *Sons of Confederate Veterans, Virginia Div. v. City of Lexington*, 894 F. Supp. 2d 768, 776 (W. D. Va 2012); *aff’d Sons of Confederate Veterans v. City of Lexington*, 722 F.3d 224 (4th Cir. 2013).

56. *Id.*

57. *Bishop v. Tysons Foods, Inc.*, 660 F. Supp. 2d 1004, 1021 (W.D. Ark. 2009) *aff’d*, 373 F. App’x 649 (8th Cir. 2010).

in the workplace subjects minorities to racial animus and discrimination.⁵⁸ Likewise, in cases relating to student speech, United States courts find that the flag demeans individuals because of their race and can therefore be banned if it results in substantial disruption.⁵⁹ Thus, the courts have not been shy about stating their view that the Confederate flag is a symbol of hatred and racial inferiority.⁶⁰ Even though courts have recognized that the flag may serve as a symbol of southern pride, they conceded that a significant portion of the population views it as innately offensive.⁶¹

58. See *Devers v. SNC – Lavalin Generation, Inc.*, 2014 U.S. Dist. LEXIS 141296, 10:12; see also *Kemp v. CSX Transportation, Inc.*, 993 F. Supp. 2d 197, 212 (N.D.N.Y. 2014).

59. See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); see also *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

60. See *United States v. Virginia*, 518 U.S. 515, n. 16 (1996) (noting that progress in race relations was linked to no longer saluting the Confederate flag on VMI's campus); *Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2258 (2015) (upholding the state of Texas's rejection of the Confederate flag as a license plate design because "public comments have shown that many members of the general public find the design offensive, and because a significant portion of the public associate the Confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups" was well in line with constitutional limits.); *Wynder v. McMahon*, 360 F.3d 73, 79 (2004) (finding that the lower court had improperly granted dismissal of a Black employee's discrimination case since he had indeed proven a prima facie case for discrimination by the use of the flag in addition to other incidents. Among the factors that the court considered in making its determination was "that when he was interviewed for a position with the Bureau of Criminal Investigation, he was made to stand facing a picture depicting a Civil War battlefield and a Confederate flag, thereby being subjected to racial animus."); *West v. Philadelphia Electric Company*, 45 F.3d 744 (3rd Cir. 1995) (once again a United States court found that the presence of the Confederate flag was significant evidence of racial discrimination. In that case the plaintiff alleged a violation of Title VII had occurred due to the fact that he had received a card with KKK figures drawn on it, there was a large noose hanging in the work entrance, repeated racial slurs and a Confederate flag was painted on the side of a co-workers helmet all subjected the plaintiff to racial discrimination while on the job. Though the principle issue was essentially an evidentiary one, the court still found that the actions taken on the part of his co-workers constituted racial harassment.). See *United States v. Virginia*, 518 U.S. 515, 41 n.16 (1996) (noting that progress in race relations was linked to no longer saluting the Confederate flag on VMI's campus); see also *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2258 (2015) (upholding the state of Texas' rejection of the Confederate flag as a license plate design because "[p]ublic comments have shown that many members of the general public find the design offensive and because a significant portion of the public associate the Confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups." was well in line with constitutional limits); see also *Wynder v. McMahon*, 360 F.3d 73, 79 (2004) (finding that the lower court had improperly granted dismissal of a Black employee's discrimination case since he had indeed proven a prima facie case for discrimination by the use of the flag in addition to other incidents. Among other facts that the court considered in making its determination was "[t]hat when he was interviewed for a position with the Bureau of Criminal Investigation, he was made to stand facing a picture depicting a Civil War battlefield and a Confederate flag, thereby being subjected to racial animus.").

61. *NAACP v. Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990).

The most analogous example from the global community is the Nazi flag in Germany after the Second World War⁶² Prior to its use by the Nazis the Swastika was a symbol of good luck.⁶³ In fact, swastikas are still a good luck symbol in some parts of Asia. However, in Germany the weight of the Holocaust has overshadowed that interpretation of the symbol.⁶⁴ Likewise, the rising sun flag from imperial Japan, though not banned, is not welcome in China or South Korea. The rising sun flag's connection with the atrocities committed by the Japanese empire during that period, taint any prior positive connotations of that flag.⁶⁵

These examples demonstrate a general acknowledgment that the Confederate flag can and does in fact symbolize White supremacy and consequently, the racial inferiority of Blacks. The Confederate Flag has historically been linked to discrimination because the Civil War was, among other things, focused on maintaining the institution of slavery in the South, the very system that contributed to infected race relations in the United States. As is frequently asserted, these cases

62. The swastika is extremely analogous to the Confederate flag. It was created by a politically tyrannical party. That party, like the confederacy, among other things, preached the superiority of Whites and the inferiority of other races (while the most popular group was the Jews, but Gypsies and other populations suffered as well). And like the Confederate flag, the swastika has also been adopted by White supremacy groups today. Where the two differ is that few contest banning the swastika as hate speech in spite of its alternative symbolism as that of good luck, recognizing that the atrocities suffered by the population have permanently tainted the symbol.

63. See generally Mukti Jain Campion Kiev, *How the world loved the swastika - until Hitler stole it*, BBC (Oct. 23, 2014), www.bbc.com/news/magazine-29644591. See e.g., *History of the Swastika*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, (July 2, 2016), <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007453>; John Black, *The symbol of the Swastika and its 12,000-year-old history*, ANCIENT ORIGINS (Feb. 6, 2014), www.ancient-origins.net/myths-legends/symbol-swastika-and-its-12000-year-old-history-001312. See generally Steven Heller, *The Swastika: Symbol Beyond Redemption* (New York: Allworth Press, 2000); Malcolm Quinn, *The Swastika: Constructing the Symbol* (London: Routledge, 1994). See Mukti Jain Campion, *How the World Loved the Swastika - until Hitler Stole it*, BBC (Oct. 23, 2014) www.bbc.com/news/magazine-29644591; see also *History of the Swastika*, U.S. Holocaust Memorial Museum, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007453>; see also John Black, *The Symbol of the Swastika and its 12,000-year-old History*, Ancient Origins (Feb. 6, 2014, 11:45) <http://www.ancient-origins.net/myths-legends/symbol-swastika-and-its-12000-year-old-history-001312>; see generally STEVEN HELLER, *THE SWASTIKA: SYMBOL BEYOND REDEMPTION?* 8,14,20 (ALLWORTH PRESS 2000); see generally Malcolm Quinn, *THE SWASTIKA CONSTRUCTING THE SYMBOL* 11 (ROUTLEDGE 1994).

64. Mukti Jain Campion Kiev, *How the world loved the swastika - until Hitler stole it*, BBC (Oct. 23, 2014), www.bbc.com/news/magazine-29644591; see also *History of the Swastika*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM (July 2, 2016), Kiev, *supra* note 64.

65. Adam Taylor, *Japan has a flag problem, too*, THE WASH. POST (June 27, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/06/27/japan-has-a-flag-problem-too/>; see also Dongwoo Kim, *Why One Should Never Use the Japanese Rising Sun Flag*, THE WANDERER (July 3, 2013), <http://thewandereronline.com/why-one-should-never-use-the-japanese-rising-sun-flag-by-dongwoo-kim/>.

demonstrate that any assertions that the Confederate flag is *solely* a symbol of southern pride, as is frequently asserted, is fallacious and clearly contradictory to the findings of several courts. Since United States courts have recognized this effect, it is logical to determine that the Confederate flag, does in fact act as a form of hate speech. Where the dilemma lies, however, is in the United States' treatment of hate speech under our liberal speech regime. Incitement may hold the key to a solution.

II. THE INCITEMENT TO VIOLENCE DOCTRINE: AN APPROPRIATE VEHICLE FOR ADDRESSING HATE SPEECH?

Like the Confederate flag itself, hate speech can be a controversial topic. This controversy is not only shaped by precedential cases like *R.A.V. v. City of St. Paul*, but also by ideologies and convictions deeply rooted in United States' culture. Though it is generally agreed that hate speech does not fall outside the realm of protected speech in the United States, it would be inaccurate to say that speech that is considered hate speech is automatically protected by the First Amendment.

One of the leading definitions of hate speech, offered by Mari Matsuda, defines hate speech as a prosecutorial, hateful or degrading message of inferiority based on race, sex, nationality or religion and is directed against a historically oppressed group.⁶⁶ It is usually not enough that the speech in question be offensive to qualify as hate speech, rather the listener receiving the message must also fall into a historically oppressed class of people. The character of the listener is just as significant as the speech itself.

The legal definition of hate speech in the United States, however, rarely allows for courts to provide recompense to victims of hate speech. The leading cases on hate speech prohibit United States courts from considering the harms the victims of hate speech suffer.⁶⁷ In *R.A.V. v. City of St. Paul*, the Court stated that restrictions on the content of speech are only allowed where the speech is of "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and

66. Mari Matsuda, *Public Response to Racist Speech: Considering the Victims Story*, 87 MICH. L. REV. 2320, 2357-58 (1989).

67. See generally *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

morality.”⁶⁸ No focus was placed on the classification of the victim at all, a marked difference from most international laws on hate speech. In this way hate speech law in the United States has been cobbled. The focus on the speaker by United States courts, with little consideration of the victim, is not only contrary to the majority of hate speech exceptions, but it also results in the United States failing to align with the majority of nations in the international community.

Hope, however, is not lost nor out of reach. The incitement to violence doctrine may serve as a ready and willing vehicle to address hate speech situations, like the Confederate flag issue in the United States. The three-part incitement to violence doctrine was adopted in *Brandenburg v. Ohio*, but that is not how the First Amendment exception began. In *Schnek v. United States*, the Court set the stage for the doctrine by creating the clear and present danger test.⁶⁹ There, the Court concluded that the defendant’s distribution of leaflets to encourage men to evade the draft created “a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”⁷⁰ The clear and present danger test, first offered in *Schnek* and the predecessor of incitement, was again refined in *Gitlow v. New York*.⁷¹ In *Gitlow* the Court adopted a standard that closely resembles the incitement to violence doctrine, stating that “a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace.”⁷² In *Stromberg v. California*, a case involving the advocating of communism, the Court reiterated the doctrine from *Gitlow* stating that “the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means,” further refining the incitement doctrine.⁷³ Following the ruling in *Stromberg*, courts repeatedly upheld statutes restricting speech that advocated a violent overthrow of the government.⁷⁴ For example, in *Dennis v. United States*, the Court found that “overthrow of the government by force

68. *Id.* at 383.

69. See *Schenck v. United States*, 249 U.S. 47 (1919).

70. *Id.* at 52.

71. See *Gitlow v. New York*, 268 U.S. 652, 670-72 (1925).

72. *Id.* at 667.

73. See *Stromberg v. California*, 283 U.S. 359, 368-69 (1931).

74. See *Dennis v. United States*, 341 U.S. 494, 544-45 (1951).

and violence is certainly substantial enough for the government to limit speech. Indeed, it is the ultimate value of any society.”⁷⁵

However, nine years later in *Cantwell v. Connecticut*, the Court examined the incitement to violence exception. This time the Court found that the defendant’s conduct of playing anti-Catholic records in a predominantly Catholic neighborhood did not rise to the level of intentional incitement.⁷⁶ By the 1940s, courts raised the incitement to violence exception bar to the current *Brandenburg* standard. This heightened *Brandenburg* standard is rarely satisfied, and, in the opinion of many, is impossible to breach, thereby making the incitement exception moot.⁷⁷

In the *Brandenburg* decision, the Court found that a KKK leader had been wrongfully charged under an Ohio syndicalism statute.⁷⁸ The statute prohibited “advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.” In this case, the defendant was charged with violating the statute when he made a film advocating for vengeance on the state for its suppression of the White race.⁷⁹ The Court stated that the leader’s speech was not incitement but merely advocacy to take *later* action.⁸⁰ Under *Brandenburg*, in order for the First Amendment exception to apply only if three elements are present. First, the speaker must intend for their speech to incite others to imminent lawless action.⁸¹ Second, the violent action advocated for must be imminent and likely to occur.⁸² Third, the action the speaker is advocating must be illegal.⁸³ The court found that these conditions were not satisfied in *Brandenburg* since the defendant was not advocating for imminent action.⁸⁴

Since *Brandenburg*, courts have been hesitant to use the incitement exception. Plaintiffs frequently fail to satisfy the intent element or fail to prove the immediacy of violence. Consequently, courts tend

75. *Id.* at 509.

76. See *Cantwell v. Connecticut*, 310 U.S. 296, 308-09 (1940).

77. Tanya Hernandez, *Hate Speech and the Language of Racism in Late America: A Lens for Reconsidering Global Hate Speech Restrictions and Legislation Models*, 32 U. PA. INT’L L. 805, 815 (2011).

78. See *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969).

79. *Id.*

80. *Id.* at 449.

81. *Id.* at 447.

82. *Id.*

83. *Id.* at 447-48.

84. *Id.*

to conclude that the speech in question is mere advocacy. As in *Brandenburg*, the Court in *Bible Believers v. Wayne County* again found that a group's action did not rise to incitement. In *Bible Believers*, the group attended an Arab festival marching with a severed pigs head and shouting statements like, "Islam is a religion of blood murder" over a megaphone.⁸⁵ In failing to find incitement, the Sixth Circuit focused on the fact that police could protect the speakers from the anger of the predominantly Arab crowd, who only began to throw things at the Bible Believers in the absence of police protection.⁸⁶ The court found that the group's conduct was "peaceful" at all times.⁸⁷ The court also found that the crowd was the one threatening to breach the peace rather than the Bible Believers, explicitly stating that "the speaker is not the one threatening to breach the peace or break the law."⁸⁸

To suggest that incitement has never been satisfied would be false. For example, in *Gitlow v. New York*, the Court used the incitement to violence exception to uphold a state statute that forbid advocating the violent overthrow of the government.⁸⁹ In *Schnek*, the Court upheld the clear and present danger test to uphold the criminal convictions of men distributing pamphlets to oppose the draft.⁹⁰ Here, the court found that obstructing the draft was a sufficiently important interest to invoke a First Amendment exception.⁹¹ Likewise, in *Dennis*, the Court upheld the Smith Act, which prohibited any person from advocating the overthrow of the government, because such advocacy posed an immediate threat.⁹²

During the Civil Rights movement, the incitement doctrine began to be broken down and the strict bar we are now familiar with was introduced to protect civil rights organizers. In *Edwards v. South Carolina*, the Court found that the students' actions did not constitute incitement merely because it "stirred people to anger, invited public dispute, or brought about a condition of unrest."⁹³ Consequently, the Court overturned the convictions of these student protestors. Also, in

85. *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 238-39 (6th Cir. 2015).

86. *Id.* at 240.

87. *Id.* at 257.

88. *Id.* at 253.

89. See generally *Gitlow v. New York*, 268 U.S. 652 (1925).

90. See generally *Schenck v. United States*, 249 U.S. 47, 49, 52 (1919).

91. *Id.* at 52-53.

92. *Dennis v. United States*, 341 U.S. 494, 499 (1951).

93. *Edwards v. South Carolina*, 372 U.S. 229, 238 (1962).

Gregory v. City of Chicago, the Court overturned convictions of civil rights protestors although the crowd was on the verge of rioting and the protestors were assaulted by listeners throwing eggs and rocks.⁹⁴ In Justice Douglas' concurrence, he noted that the state cannot restrict a peaceful speaker merely because their speech attracts an angry mob of hecklers.⁹⁵

This shift from the focus on the preservation and protection of the state to the protection and focus on the speaker illustrates how the doctrine shifts with the needs of the era. When incitement was used as a tool to protect the state, the country was facing fear of overthrow by communist parties (whether this fear was legitimate or not). However, in an effort to improve and advance the nation during the Civil Rights Era, the focus shifted to protect the speakers challenging the legitimacy of the long-held tradition of segregation. Thus, the incitement to violence doctrine is flexible and can be adapted to fit the needs of the nation at critical junctures.

Treating the two uses of the incitement doctrine as the same, however, fails to make a critical distinction on how the latter use advanced the nation while the former use did not. Despite its limited reach in the United States, internationally incitement is frequently invoked to address hate speech. The focus on incitement to discrimination and hatred rather than limiting the doctrine to violence, creates an exception to speech that is capable of addressing the Confederate flag.

III. ADOPTING AN INCITEMENT TO HATRED AND DISCRIMINATION STANDARD TO REACH THE CONFEDERATE FLAG

After years of defining the parameters of the First Amendment incitement to violence exception, the United States' position on hate speech remains in direct conflict to several other nations speech laws. Unlike abroad, restrictions on speech in the United States do little to protect against listener's competing human rights. This section looks at the incitement to hatred and discrimination exception in general to examine how other nations have worked the exception into their speech laws. It then goes on to address the deficiencies of the current First Amendment exceptions in United States, which impact hate

94. *Gregory v. City of Chicago*, 394 U.S. 111, 123-24 (1969) (Douglas, J., concurring).

95. *Id.* at 123-24.

speech. After looking at these deficiencies, this section demonstrates how adopting an incitement to hatred and discrimination exception can be a legitimate option for the United States. The section concludes with an illustration of how incitement could apply to the Confederate flag using an example out of Mississippi.

A. How Other Nations Address Hate Speech

The modern trend abroad regarding hate speech is to exempt it from constitutional speech protections through an incitement to discrimination and hatred doctrine. Some nations pair this with criminal provisions for enforcement purposes while other nations include it in their constitutions. Whatever the approach, incitement to discrimination and hatred is a common exception to free speech clauses. Unlike incitement to violence, incitement to discrimination and hatred exceptions remove speech protections for speech that is deliberately intended or reasonably likely to result in perpetuating discrimination and hatred against specific populations (though it is not limited to specific populations in all cases). These exceptions are not intended to reach merely sensitive or offensive statements, but only statements that have an extreme impact on society. Hence, the doctrine is usually limited to public speech, even if uttered by individuals. Unlike incitement to violence doctrines, incitement to discrimination and hatred doctrines are not limited to the harm such speech causes the individual offended but the harms such speech causes society are factored in as well. One need not look outside the United States to realize that hate speech can step beyond mere offense and cause actual actions, some of which are violent.⁹⁶ In nations where these laws are present, the laws exist to avert future racially motivated hate crimes.

Despite the United States' fears that such an exception would have a severe quelling effect on speech, examples from other nations demonstrate that this fear is unfounded. Canada, whose Constitution resembles the United States' in many ways, limits speech when it conflicts with other fundamental liberties. Under Section 2(b) of the Ca-

96. See Liam Stack, *Seven Face Charges After Melee at Klan Rally in Anaheim*, N.Y. TIMES (Feb. 28, 2016), http://www.nytimes.com/2016/02/29/us/seven-held-after-melee-at-klan-rally-in-anaheim-california.html?_r=0; see also Ben Norton, *White supremacists yelling "Heil Hitler," waving Confederate flag wallet attack Latino teens at LA park: local media*, (Feb. 29, 2016, 03:45 PM), http://www.salon.com/2016/02/29/white_supremacists_yelling_heil_hitler_waving_confederate_flag_wallet_attack_latino_teens_at_la_park_local_media/.

nadian Constitution, everyone is entitled to freedom of expression.⁹⁷ However, Section 12 of the Canadian Human Rights Act bars the display of any symbol or emblem that expresses or implies discrimination or that is “calculated” to incite others to discriminate.⁹⁸ Like many other countries relying on an incitement to discrimination and hatred exception, Canada includes enforcement provisions within its criminal code.⁹⁹

In an important Canadian case, (*Human Rights Comm.*) v. *Taylor*, the defendant violated Section 13(1) of the Canadian Human Rights Act which prohibits sending hate messages by phone.¹⁰⁰ The defendant asserted that the law violated Section 2(b) of the Canadian Constitution as his primary defense.¹⁰¹ The Canadian court agreed with the defendant but decided that even though the law did violate the free speech provisions of the Canadian Constitution, the language of the Charter was a justifiable limitation.¹⁰² The Canadian court noted that promoting equality and preventing the harms caused by hate propaganda outweighed the freedom of expression interest in that case.¹⁰³ The Canadian court also upheld the criminal enforcement provisions for hate speech violations in *Regina v. Keegstra*.¹⁰⁴ There, the defendant was charged with willfully promoting hatred.¹⁰⁵ The court upheld both the conviction and the code, stating that protecting against hate warranted “overriding the constitutional guarantee to freedom of expression.”¹⁰⁶ Though the Canadian constitutional protection on speech and the provisions limiting speech seem to be in conflict, Canada has reconciled their competing goals.

Canada is not an outlier when it comes to balancing freedom of speech with limitations on hate speech through incitement to discrimination and hatred. The global community is filled with countries that

97. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Art. 2, c. 11 (U.K.).

98. Canadian Human Rights Act, Art. 12 (R.S.C. 1985) (Can.).

99. Canadian Criminal Code R.S.C. ch. C-46, § 318(1) (1985) (Can.).

100. Canada (Human Rights Comm.) v. *Taylor* (1990), 13 C.H.R.R. D/435 (S.C.C.) [Eng./Fr. 53 pp.], available at http://www.hrcr.org/safrica/expression/hrc_taylor.html.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Regina v. Keegstra*, [1990] 3 S.C.R. 697 (Can.).

105. *Id.*

106. Lauren Oliveros, *Sacrificing People, Protecting Hate: An Analysis of the Anti-Militia Statutes and the Incitement to Violence Exceptions to Freedom of Speech as Legal Protections for Members of Groups Targeted by Hate-Motivated Violence*, 30 N.M.L. REV. 253, 280 (Spring 2000).

have liberal speech regimes but still manage to carve out an exception for hate speech through incitement style doctrines. Article 11 of the French Constitution states that, “the free communication of ideas and opinions is one of the most precious of the rights of man.”¹⁰⁷ However, just as Canada, Article R645-2 of the French Penal Code restricts speech by making it a crime to display, exchange or sell memorabilia from the Third Reich, including the Nazi flag.¹⁰⁸ In a recent French case, *Ass’n Union des Etudiants Juifs de France v. Yahoo!*, *TGI Paris* the French court held that Yahoo’s selling of Nazi memorabilia online to French citizens was a violation of the Penal Code.¹⁰⁹

South Africa, having adopted its current Constitution fairly recently in 1997, employed the best practices of other nations and wrote within their Constitution an exception for hate speech through an incitement to hatred doctrine. Section 16 of the South African Bill of Rights states that everyone has the right to freedom of expression.¹¹⁰ But like France and Canada, South Africa also limits this freedom. Section 16 of the South African Constitution states that speech protections do not extend to propaganda for war or to any advocacy of hatred that is based on race which, constitutes incitement to cause harm.¹¹¹ This language creates a lower threshold than the United States’ “incitement to violence” doctrine.¹¹²

Although Germany’s Basic Law, *Grundgesetz*, guarantees freedom of expression, Article 1 lays a foundation for placing limitations on speech by making human dignity paramount to all other rights.¹¹³ Article 1 Section 1 of the *Grundgesetz* states that, “human dignity shall be inviolable to respect and protect it shall be the duty of all state authority.”¹¹⁴ Given this backdrop, limitations on hate speech in Germany are hardly surprising. Germany’s criminal hate speech laws do not contain intent or violence requirements in direct contrast to United States law. In Germany, Section 130 of the Criminal Code

107. Declaration des droits de l’homme et du 26 août 1789 [The Declaration of the Rights of Man and the Citizen, Aug. 26, 1789] Art. 11.

108. Criminal Code (C. Pen) R.645-2 (Fr.).

109. *Ass’n Union des Etudiants Juifs de France v. Yahoo!*, TGI Paris, rd. Rf., D. 2000, IR172.

110. S. AFR. CONST. art. 19 § 16 1997.

111. *Id.*

112. Thomas J. Webb, *Verbal Poison - Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 WASHBURN L. J. 445, 463 (Winter 2011).

113. Grundgesetz Für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGB1.1 (Ger.).

114. *Id.*

makes it a crime to incite hatred in any manner capable of disturbing the peace.¹¹⁵ Germany, in fact, has special laws in place that ban the Nazi flag since it is a symbol of not only racial hatred but also of a politically tyrannical party.¹¹⁶

While nations like Germany, Canada, and South Africa have structures and histories analogous to the United States, even in nations whose constitutions or history do not closely mirror the United States', freedom of speech and restrictions on hate speech coexist. The Australian Constitution does not have an equivalent to the United States' Bill of Rights. The 1995 Racial Hatred Act of Australia, intended to combat the nation's history of discrimination against the aboriginal population, is the instrument that prohibits hate speech.¹¹⁷ If the speech is reasonably likely to "offend, insult, humiliate, or intimidate another person or a group of people," then under the 1995 Act, that speech is prohibited.¹¹⁸ The Australian court ruled that a variety of behaviors violate the Act,¹¹⁹ including yelling racial epithets to aborigines and making racist comments in speeches.¹²⁰

India, a rapidly developing country, also has strong free speech laws that work in tandem with constitutional limitations on hate speech. Article 19 of the Indian Constitution extends and protects the right of free speech but it also includes a caveat.¹²¹ Article 2 of India's Constitution states that nothing within Article 19 "shall affect the operation of any existing law, or prevent the State from making any law, [which] imposes reasonable restrictions on the exercise of the right. . . in the interests of. . . public order, decency or morality."¹²² This Indian exception is distinct from those in other nations due to the ambiguous terms. The law states that "public order, decency, and morality" grant the government much more liberty to regulate speech than any of the other laws previously mentioned.¹²³

International treaties also address hate speech through an incitement to hatred and discrimination exception. Enacted in 1966, the International Covenant on Civil and Political Rights (ICCPR) has been

115. GER. CRIMINAL CODE § 130 (2013).

116. *Id.*

117. *Racial Hatred Act 1995* pt IIa (Austl.).

118. *Id.*

119. *McMahon v Bowman* [2000] FMCA 3 (13 Oct. 2000) (Austl.).

120. *Jacobs v Fardig* [1999] HREOCA 9 (27 Apr. 1999) (Austl.).

121. INDIA CONST. art. 19.

122. *Id.*

123. See generally Abhinav Chandrachud, *Speech, Structure, and Behavior on the Supreme Court of India*, 25 COLUM. J. ASIAN L. 222 (2012).

adopted by most nations and is the embodiment of international custom on a variety of issues relating to civil rights.¹²⁴ Even though the ICCPR does not directly define hate speech, Article 20(2), which prohibits “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,” is generally seen as a bar on hate speech.¹²⁵

The ICCPR is not the only international law limiting hate speech. Article 4 of the Convention on the Elimination of all Forms of Racial Discrimination (CERD) also prohibits hate speech. The United Nations (UN) enacted CERD in the 1960’s in response to the explosion of racial discord in the United States and abroad. CERD defines hate speech as “all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.”¹²⁶

Internationally, limitations on hate speech are seen as legitimate and frequently coexist with liberal speech laws. These nations are able to hold to the ideal of freedom of speech without such regulations resulting in the rampant quelling of speech by the state that many proponents of unrestricted speech fear.¹²⁷ There is something that the United States could take from these countries and try and expand its incitement doctrine or adopt an equivalent capable of dealing with hate speech, particularly where the Confederate flag is concerned.

124. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

125. *Id.* (In fact, the United States reservation on Article 20(2) basically recognizes this article as such. In its reservation, the United States declares that “Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech . . . protected by the constitution.”).

126. International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Dec. 21, 1965, 660 U.N.T.S. 195.

127. Indeed, in many challenges, the courts in these nations will side with free speech. They invoke the provisions and set aside free speech only in the case of gross violations, those that have far reaching effects or that substantially impact human dignity. For example, there is Australian case in which fines were imposed when a public official commented that the way to solve the aborigine problem was to just shoot them all. In India, despite the provisions, courts are still slow to invoke them, continuing to render judicial decisions reminiscent of the United States. Thus, the United States’ fears of a big brother state controlling all speech it deems offensive or threatening is simply unfounded in light of the evidence from abroad.

B. The Deficiencies of the Incitement to Violence Doctrine

The provisions in the ICCPR on speech, and those in other nations' constitutions, present a viable option for addressing hate speech like the Confederate flag in the United States. Article 4 of CERD, Article 20(2) of the ICCPR, and other nations' doctrines addressing hate speech differ from the United States' incitement exception in terms of the speech they reach and how they reach it. These laws all take the rights of the listeners and society into consideration rather than solely the rights of the speaker. By contrast, United States law only accounts for listeners to the extent that the doctrine requires the listener to take some violent reaction before the court can even apply the exception.

The United States' incitement to violence doctrine also differs from the incitement to hatred and discrimination doctrines in terms of the harm that it is trying to prevent. In the United States, the only harm recognized is violence. Abroad, both hate and discrimination are recognized as harms. The United States' approach implies that any harm that comes short of instant violence is not sufficiently negative for the state to protect. Incitement to hatred and discrimination doctrines acknowledge a broader range of harms caused by hate speech.¹²⁸ In this way, international regulations of hate speech are also distinct from the United States since rarely do they require physical harm. Rather, discrimination itself is considered a sufficient harm to justify regulation. Additionally, international laws on hate speech construe intent broadly, whereas the United States incitement to violence doctrine practically requires a smoking gun before intent can be found. This essentially renders the incitement to violence doctrine moot.

Limiting the doctrine solely to violence, as the United States does, creates a paradox. On one hand, it requires victims to violate the law before the state will even recognize the harmful nature of the speech. Thus, the doctrine is rarely applicable because victims of hate speech seldom have violent reactions when faced with such speech,

128. See generally Tanya Hernandez, *Hate Speech and the Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions and Legislation Models*, U. PA. J. INT'L L., vol. 32, Iss. 3 [2014] Art. 2; see also Richard Delgado et al., *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, CAL. L. REV., vol. 82, Iss. 4, pg. 878 (July 1994); Meera Chandramouli, *Protecting Both Sides of the Conversation: Towards a Clear International Standard for Hate Speech Regulation*, U. PA. J. INT'L L., vol. 34, Issue 4 (2013) (stating generally that hate speech laid the foundation for many of the world's most notorious genocides).

due to the normalization of hate speech that exists under the current law.¹²⁹ On the other hand, limiting the doctrine to violence leads to a heckler's veto, a predominant reason courts have been reluctant to apply the incitement to violence doctrine in cases involving hate speech.¹³⁰ A heckler's veto occurs when offended listeners, in an effort to silence the speaker, threaten or pursue actual violence.¹³¹ Since such a veto is clearly repugnant to our First Amendment, it usually neutralizes any use of the incitement to violence doctrine.

Bible Believers v. Wayne County clearly illustrates the problems posed by the incitement to violence exception. A group of Christians known as the Bible Believers marched at the local Arab International Festival.¹³² The festival was intended to be a showcase of Arab unity and culture.¹³³ The Bible Believers marched with a severed pig's head and carried various posters, proclaiming that Mohammed was a false prophet and stating that Muslims were damned to hell. A group of teenagers began to throw bottles and food items at the Bible Believers.¹³⁴ Despite interventions by the police to stop "heckling," the teenagers began to throw milk crates at the Bible Believers, at which point the police at the festival forced the group to leave.¹³⁵ The Bible Believers initiated a lawsuit alleging that the county, in silencing them by asking them to leave the festival, violated their right to free speech.¹³⁶ On appeal, the court found that the incitement to violence doctrine did not apply, despite the fact that the teenagers were so incensed by the Bible Believers' speech they took violent actions to silence them.¹³⁷ It specifically stated "the hostile reaction of a crowd does not transform protected speech into incitement" and that there was "absolutely no indication that the Bible Believers subjective intent was to spur their audience to violence."¹³⁸ Ignoring the weakness of the court's reasoning in finding that there was no intent to incite violence, the court paradoxically held that if a crowd is so incensed

129. Matsuda, *supra* note 66, at 2536.

130. *Bible Believers v. Wayne Cty.*, 805 F.3d 228 (6th Cir. 2015).

131. *Id.* at 252-53.

132. *Id.* at 235.

133. *Id.*

134. *Id.* at 239-40.

135. *Id.* at 241.

136. *Id.* at 241-242.

137. *Id.* at 246.

138. *Id.*

and angered by speech, even when they resort to violence the incitement exception is not available to them.¹³⁹

Bible Believers illustrates the problems posed by requiring violence to occur for the incitement doctrine to apply. When the teenagers reacted to the Bible Believers by throwing things at them, they became the violators of law under the incitement doctrine. Though this should have no legal effect, requiring listeners to have a violent reaction has a psychological effect on judges: Placing victims of the hate speech in a negative light and distracts from any harms that they suffered as recipients of the hate speech and turns the speaker into the victim. The other side of the paradox is that it replaces the very rationale of incitement with a hecklers veto, allowing those utilizing hate speech to not only go overlooked but to also gain the sympathy of the court.

C. Using Incitement to Address Hate Speech Like the Confederate Flag

To rework the incitement doctrine laid down in *Brandenburg* and reach hate speech in a way similar to much of the international community, the intent requirement needs to be relaxed and the doctrine must be expanded to reach speech that incites discrimination and hatred rather than just violence.

Proving intentional discrimination is often a challenge.¹⁴⁰ Rarely is there a smoking gun demonstrating a party's true motivations. This is true not only in cases involving incitement, but also housing and employment discrimination cases. Indeed, plaintiffs face a heavy burden of proving intent in any case alleging discrimination where intent is a requirement.¹⁴¹ Thus, the burden of proving intent has been called into question, especially when the goal of the legislation is curbing discrimination.¹⁴²

139. *Id.*

140. See *Gitlow v. New York*, 268 U.S. 652 (1925).

141. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (distinguishing mere advocacy from the intent to cause actual harm). It is easy to avert saying that you merely advocated, but intent is a challenging element to prove. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("[T]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

142. *Desert Palace, Inc., v. Costa*, 539 U.S. 90 (2003) (holding that direct evidence is not necessary to obtain a mixed motive jury instruction); *St. Mary's Honor Ctr.*, 509 U.S. at 521 (noting that when asserting a legitimate business reason for discriminating, some employers will blatantly lie about their intent); *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004).

To even begin to adequately address hate speech like the Confederate flag in the United States, the intent requirement should be replaced with a substantial certainty approach, understanding that proxy discrimination in the Twenty-First century has replaced the intentional discrimination prevalent in the pre-Civil Rights Movement era. As overt discrimination became taboo after the Civil Rights Movement, those left clinging to antiquated ideas of racial superiority had to employ ever new and clever masks.¹⁴³ This is often referred to as proxy discrimination. Proxy discrimination occurs when a party uses an allowable classification, incarceration or credit worthiness for example, to screen for another protected classification, race for instance, that is otherwise a violation of law.¹⁴⁴

Consider the terms “urban” or “inner city” for example. Though both terms have their own independent definitions, the majority of Americans know that those terms are both a proxy for the less socially desirable expression “ghetto.” Thus, when someone wants to say “ghetto,” but also wants to remain politically correct or hide less desirable beliefs, they would employ either the term “urban” or “inner city.”

Under the Restatement Third of Torts, there is an option for a bar lower than intent. Recognizing that harms can occur from reckless behavior, the Restatement Third allows courts to make a finding that a person can act with the intent to produce a consequence even if they don’t have the specific purpose of producing the consequence when the person acts knowing that the consequence is substantially certain to result.¹⁴⁵ “The application of the substantial certainty test should be limited to situations in which the defendant has knowledge to a substantial certainty that the conduct will bring about harm to a

143. *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) (stating that Title VII cases also allow for discriminatory effects “because clever men may easily conceal their motivations”); see generally Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1954 and 1964*, 37 *RUTGERS L. REV.* 673, 687-692 (1985).

144. *Barr v. Lafon*, 538 F.3d 554, 564-69 (6th Cir. 2009) (acknowledging that the Confederate flag was disruptive as a racially discriminatory symbol, despite the plaintiff’s assertion that the flag was merely a symbol of southern pride); *Greater New Orleans Fair Housing Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 571 (E.D. La. 2009) (finding that references to “ghetto,” “crime,” “blight,” and appeals to uphold the “shared values” amounted to little more than “camouflaged racial expressions”); *Atkins v. Robinson*, 545 F. Supp. 852, 871-72 (E.D. Va. 1982) (acknowledging that terms like “ghetto children” also served as a masked expression for racial discrimination); Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 *CAL. L. REV.* 315 (1998), http://digitalcommons.law.umaryland.edu/fac_pubs/285/.

145. *RESTATEMENT (THIRD) RESTAT 3d OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM* § 1 (AM. LAW INST. 2010).

particular victim. . . .”¹⁴⁶ The substantial certainty approach or one similar is the best available mechanism to combat proxy discrimination, the modern form of overt racism, hatred, and discrimination.

Some nations do not even require proof of intent in hate speech cases, recognizing that the harmfulness of the speech is sufficiently negative, regardless of the speaker’s intent. Canadian courts reject an intent-based approach when upholding criminal hate speech laws, and instead focus on the impact of the hate speech on the recipient and society at large, instead of looking at the speaker’s intent.¹⁴⁷ In order to reduce the weight of the intent requirement under the 1965 Act, the United Kingdom amended its Race Relations Act to make hate speech punishable if it amounts to harassment, regardless of the speaker’s intent.¹⁴⁸ While Ireland’s Prohibition of Incitement to Hatred Act of 1989 includes an intent requirement, it also carves out an exception for cases in which the speech in question will likely stir up hatred despite the speaker’s specific intent.¹⁴⁹ Similarly, South Africa’s hate speech law accounts for both intent and impact by providing for a finding of intent if the speech in question can “reasonably be construed to demonstrate a clear intention” to promote hatred.¹⁵⁰

Still, many nations and international conventions rely to some extent on an intent-based approach, reasoning that an individual cannot effectively advocate or incite hatred without having some form of an intent to do so.¹⁵¹ This is reasonable. The ICCPR has clearly upheld the intent requirement because both the Human Rights Committee and the UN Rapporteurs state that intent must be present in order to penalize hate speech.¹⁵² CERD however, has been less clear about the requirement of intent in its speech laws. More clarity is required to determine how strong of a role intent plays in CERD’s hate speech provisions.¹⁵³ Unfortunately, these approaches do not account for the now prevalent use of proxy discrimination. By replacing or relaxing

146. *Id.*

147. *Regina v. Keegstra*, [1990] 3 S.C.R. 697687, 746-747 (Can.).

148. Public Order Act 1986, c. 64 (Eng.).

149. Prohibition of Incitement to Hatred Act 1989 (Act No. 19/1989) (Ir.), <http://www.irishstatutebook.ie/eli/1989/act/19/enacted/en/html>.

150. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2003 (PEPUDA) §10 (S. Afr.).

151. *Written Contribution to the thematic discussion on Racist Hate Speech and Freedom of Opinion and Expression Organized by the United Nations Committee on Elimination of Racial Discrimination* (Aug. 28, 2012), AMNESTY INTERNATIONAL, <http://www.ohchr.org/Documents/HRBodies/CERD/Discussions/RacistHateSpeech/AmnestyInternational.pdf>

152. *Id.*

153. *Id.*

the intent requirement in favor of a substantial certainty approach, the incitement to hatred and discrimination exception can become a more practical tool used to combat hate speech in the twenty-first century.

In addition to altering the intent requirement, the incitement doctrine should be expanded to include speech that incites discrimination and hatred, rather than solely violence. The Canadian criminal code prohibits individuals from inciting hatred.¹⁵⁴ England's Race Relations Act forbids the incitement of racial hatred.¹⁵⁵ The Hungarian criminal code penalizes the incitement of hatred against racial and ethnic groups of the population.¹⁵⁶ The New Zealand Human Rights Act punishes the incitement of hostility or contempt against anyone in New Zealand.¹⁵⁷ Even international conventions like the ICCPR and CERD limit hate speech, not only when it leads to an incitement of actual violence, but also when it incites hatred or discrimination. It is not uncommon for countries to limit speech when it incites racism, hatred, and discrimination. The United States' incitement doctrine, however, only applies to violence, thus severely limiting the speech that it can control.¹⁵⁸

Expanding the incitement to violence doctrine to include public discrimination and hatred would solve problems presented by the heckler's veto and the current requirement for law violation created by the incitement to violence exception because incitement would no longer depend on a listener's violent attempt to silence a speaker. Instead, courts must look at the facts presented in each case and determine if the speech would incite hatred or discrimination by the broader community toward the attacked group. This may seem like a challenging determination for courts to make, but in actuality, it is not. For instance, it does not take a lengthy analysis to understand that the symbolic power of a burning cross stems from a history of violence and racial discrimination against minorities by the KKK.¹⁵⁹ It does not require much analysis or thought to realize that such

154. Criminal Code, R.S.C. 1985, c. C-46.

155. Race Relations Act 1968, c. 71 (Eng.).

156. 1978. évi IV. törvény a Büntető Törvénykönyvről (Criminal Code) (Act IV of 1973 on the Criminal Code) (Hung.).

157. Human Rights Act 1993, s 63 (N.Z.).

158. Hernandez, *supra* note 77, at 815.

159. Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 Wis. L. Rev. 1425, 1467 (1994).

speech perpetuates racist beliefs.¹⁶⁰ Indeed, courts have made findings about hate speech and racist comments in other civil rights contexts that are tantamount to recognizing how hate speech can incite discrimination and hatred.¹⁶¹ Under the Australian Racial Hatred Act, the Australian court in *McMahon v. Bowman* heard the defendant shouting racial slurs at his aboriginal neighbor and found that this constituted an incitement to racial hatred because it encouraged future discrimination against the aboriginal population.¹⁶² Similarly, a Brazilian court found that a defendant violated Brazil's law against racism because his publication of anti-Semitic literature and his denial of the Holocaust encouraged and legitimized future acts of racism.¹⁶³

Hate speech like the Confederate flag, has already been shown to perpetuate inequality. Refusing to regulate such speech often results in continuing the privilege of more powerful groups to dominate less powerful groups or viewpoints.¹⁶⁴ Such speech also perpetuates hate crimes.¹⁶⁵ Perhaps most critically, hate speech, especially in a subtle forms like the Confederate flag, have the most influence on perpetuating racist beliefs.¹⁶⁶ Such speech "propagates and recycles racist stereotypes and ideologies," making the goals and values enshrined in our Constitution even further out of reach.¹⁶⁷ The Confederate flag creates this effect and produces harms that are not limited to discrimination against African Americans, but all Americans who are consequently forced to live in a society where racism and discrimination are allowed to prevail.

160. Teun van Dijk, *Racism and Discourse in Spain and Latin America* 5-6 (2005) (stating that mass media is one of the primary sources through which prejudices are created and promulgated).

161. See generally *Sons of Confederate Veterans*, Virginia Div. v. City of Lexington, 894 F. Supp. 2d 768 (W.D. VA 2012); *aff'd Sons of Confederate Veterans v. City of Lexington*, 722 F.3d 224 (4th Cir. 2013); *Bishop v. Tysons Foods, Inc.*, 660 F. Supp. 2d 1004, 1021 (W.D. Ark. 2009) *aff'd*, 373 F. App'x 649 (8th Cir. 2010); See *Devers v. SNC – Lavalin Generation, Inc.*, 2014 U.S. Dist. LEXIS 141296, 10:12; see also *Kemp v. CSX Transportation, Inc.*, 993 F. Supp. 2d 197, 212 (N.D.N.Y. 2014).

162. *McMahon v. Bowman* [2000] FMCA 3 (Austl.), <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FMCA/2000/3.html>.) <https://www.humanrights.gov.au/our-work/race-discrimination/publications/guide-racial-hatred-act>;

163. Hernandez, *supra* note 77, at 828.

164. Hernandez, *supra* note 77, at 812.

165. *Id.* at 813.

166. *Id.* at 813-14.

167. *Id.* at 815.

D. An Example of the Incitement to Hatred Doctrine in Action:
The Mississippi Flag Case

Under the ICCPR, the Confederate flag would be banned as speech that incites discrimination, hatred, and in several cases violence, against a group based on race. Likewise, CERD would ban the Confederate flag as propaganda that advocates one race's superiority over another and as speech that incites discrimination. In South Africa, the UK, Canada and Australia, the flag would be banned because it advocates for discrimination for race-based discrimination. Examples from current events involving the Confederate flag reveal how susceptible the flag is to regulation under an incitement to discrimination and hatred standard. The families of the victims of Emanuel AME Church in Charleston, South Carolina could easily prove the elements of an incitement to discrimination claim against the Confederate flag. As previously shown, the flag has a history rooted in hatred and discrimination. The Charleston shooter affiliated himself with it for that very reason. Additionally, looking at events surrounding the Confederate flag within the past two years, it can be shown that the flag spurs hate and discrimination since many of the groups use the flag to perpetuate beliefs of White supremacy.

Charleston is not the only case where the Confederate flag was linked to violence. During the 2016 presidential election, many voters going to polling sites in the South had to deal with the Confederate flag being used to intimidate them on their way to vote.¹⁶⁸ Under an incitement to hatred and discrimination exception to free speech, these voters could contest the use of the Confederate flag pointing out that the users knew that the flag would be intimidating to many voters, particularly minorities. This coupled with the inflammatory rhetoric used by not only the Trump supporters utilizing the flags, but Trump himself, demonstrates how the flag is used to perpetuate discriminatory beliefs and hatred. In the past, school cases involving the Confederate flag also demonstrate how the flag would be subject to regulation under the incitement to discrimination and hatred doctrine. In many of those cases, the Confederate flag's specific purpose was to serve as a proxy for racial discrimination and White superiority, in the delicate context of schools. Schools, more than many other institutions, are seen as the spaces where young minds are shaped, thus, the

168. DailyMail.com, (Nov. 2016), <http://www.dailymail.co.uk/news/article-3915140/Confederate-flag-waving-parade-cars-trucks-drive-early-polling-stations-Florida.html>.

courts finding that the Confederate flag perpetuates hate and discrimination was not challenging.

In the past, and even now, the Confederate flag has served as an ever-ready symbol of hate and discrimination. It was used as a battle flag in a war spurred by the South's determination to maintain the institution of slavery. Its modern resurgence was spurred by federal mandates to integrate segregated schools. Neo-Nazi's currently use it to symbolize their beliefs in White superiority: for example, the Charleston shooter sported it on his Facebook account and in August of 2017, several White supremacists sported the Confederate flag at the Charlottesville rally. Applying incitement to hatred and discrimination to the Confederate flag demonstrates the feasibility of adopting such an exception to protected speech in the United States. Incitement to hatred and discrimination is a popular doctrine amongst the international community, including nations who pride themselves on having broad speech protections like United States. The main difference between these nations and the United States is how the nation in question has decided to prioritize the importance of dealing with hate speech. Changing a policy or a law is simple, creating the political and social will power to bring about that change is where the challenge lies.

IV. TIME TO SHOW OUR VALUES: WHAT CONTINUING TO ALLOW THE CONFEDERATE FLAG TO FLY SAYS ABOUT US AS A PEOPLE

By refusing to recognize the Confederate flag as a form of hate speech and recognizing hate speech as a broader category of unprotected speech, United States courts have made a value judgment on the legitimacy of such speech that is tantamount to condoning all of the values and ideas hate speech, like the Confederate flag, conveys. Through the Equal Protection Clause, the various Civil Rights Acts, and our response to current events, the United States has already demonstrated that it does not value discrimination or hatred. Reworking incitement to reach speech like the Confederate flag not only allows the United States to come in line with the ICCPR, customary international law, and the rest of the international community, it allows the United States to tell the victims of such speech and society at large, that hatred and discrimination are not things that our society is prepared to continue to uphold.

The United State Supreme Court recognizes that the right to free speech is not absolute and therefore at times it can be regulated, especially in instances where regulating such speech outweighs the value of the expression.¹⁶⁹ When limiting obscenity, the Court stated that obscenity is utterly without redeeming *social importance*.¹⁷⁰ Likewise, fighting words are not protected by the First Amendment because such words are of “no essential part of any exposition of ideas, and are of such slight *social value* as a step to truth that any benefit that may be derived from them is clearly outweighed by the *social interest* in order and morality.”¹⁷¹ Moreover, we have determined that children should not be exposed to patently offensive speech, and thus, the Court ruled that such language as measured by contemporary community standards can be restricted without constitutional violation.¹⁷² Each of these modes of speech are limited because their content is either without or of such limited social value that the Court determined the regulation outweighed the value of the speech. In such cases, the court is not shy to take societal interest into account, stand face to face with First Amendment, and subject these forms of offensive speech to regulation.

The implications in each of these exceptions that have been carved out imply that the harms produced by hate speech are not as severe as fighting words, obscenity, slander or any other First Amendment unprotected speech. This idea is simply erroneous. It is erroneous in general and it is erroneous when we consider the Confederate flag specifically. The Confederate flag has proven to perpetuate hatred and in several cases it provoked violence. The effects of living in a society where racial hatred and discrimination is allowed to flourish impacts everyone who lives in that society. With the passage of the 13th, 14th, and 15th Amendments along with landmark decisions like *Brown v. Board of Education*, our society has shown we do not value discrimination and hatred.

The arguments presented for regulating the Confederate flag, as a mode of speech, may sound extreme. No doubt supporters of the Confederate flag, or even complacents find such a proposal radical and view it as a potential threat to the entire free speech regime. It is

169. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 800 (Vicki Been et al. eds., 3rd ed. 2006).

170. *Roth v. United States*, 354 U.S. 476, 484 (1957).

171. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

172. *See generally* FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

critical to remember that at one time segregation, slavery, and discrimination against women and people with disabilities were all legal. In *Korematsu v. United States*, the Court even found that Japanese internment camps were justified for the purpose of ensuring national security.¹⁷³ The United States value system has always been in flux, and consequently so has our jurisprudence. Our views on liberty, security, and even speech have advanced with time.

The incitement to hatred doctrine is not new. Thus, it is important to remember the changes proposed represent an incremental step in reform rather than a radical one. Such changes should be viewed as a natural progression in tandem with changing societal values, an indication of continued development. There are some flaws in expanding the incitement to violence doctrine and applying it to the Confederate flag and similar forms of hate speech. Such an application may suffer from over breadth or constitute a content-specific ban. This, however, could easily be averted by applying incitement the way it has been applied by members of the international community, on a case-by-case basis and to all forms hate speech, not merely the Confederate flag.

Also, fears of a slippery slope of speech regulation, with the state acting as a rampant and uncontrollable regulator of speech, are not likely to occur. First, empirical evidence has shown that this fear is unfounded. Even in states that have similar laws, like South Africa and Australia, there has been no such quelling of speech or extreme censorship by the state. Even though these countries' laws have recognized the legitimacy of restricting and regulating hate speech, litigation involving speech is a relatively rare occurrence in most of these nations.¹⁷⁴ This demonstrates that fears of an overly regulated state are unfounded.¹⁷⁵ In many of these countries, symbolic speech like the Nazi flag and similar symbols are also banned. Second, hate speech, the Confederate flag included, is rarely directed against the state. It is usually directed at individuals. Thus, when states employ the doctrine they would not be acting in their own self-interest, but seeking to preserve societal values that have already been enshrined in our Consti-

173. See generally *Korematsu v. United States*, 323 U.S. 214 (1944).

174. Yared Mingistu, *Shielding Marginalized Groups from Verbal Assaults Without Abusing Hate Speech Laws*, 371 – 372, in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, edited by Michael Hertz, Cambridge University Press (2012).

175. Hernandez, *supra* note 77, at 812.

tution and give some form of redress to a set of victims that previously went ignored by the courts.¹⁷⁶

CONCLUSION

Now is a critical time to reflect on the Confederate flag. It is time for proponents to ask themselves if it is possible to sufficiently sever the racial subjugation associated with the flag from its alleged use as a symbol of southern pride. Can Germany ever sever the holocaust sufficiently from the swastika for it to only symbolize good luck? The debate will no doubt continue. The flag's presence in violent altercations, its convenience as a proxy for racial superiority, and the ban of the Confederate flag from many popular internet retailers demonstrate the United States is beginning to question the validity of the flag as just a mere symbol of southern pride.

Placing the Confederate flag in the realm of unprotected speech can send a clear message about our values at a crucial point in our history as a nation. The *Brown v. Board of Education* decision seized a similar opportunity to show our values. The reasoning in *Brown* rested not on rigid legal interpretations of existing law or precedent, but essentially relied on a social test that demonstrated how school segregation retarded the equality of opportunity central to our value system. Court decisions make qualitative value judgments on what is acceptable for our society.¹⁷⁷ Even the Constitution allows for amendment based on societal progress.¹⁷⁸ To deny progress and con-

176. This illustrates a key issue that cannot be sufficiently addressed in this note; that is the value that it is being placed on the individuals offended by the flag. These other forms of speech are restricted because the value of the speech is low in comparison to the expression. By allowing the confederate to continue to be utilized despite overwhelming support from the Black community to ban what they view as a racist symbol demonstrates that the value hateful speech (banning a symbol that was used in a war is very limited and thus does not likely threaten the whole speech regime, in this way it is like pornography or obscenity that can be limited) outweighs the value of living free from hateful expressions. This is also linked to the full enjoyment of other liberties and thus can be said to have an impact on more than just speech, many of which are enforced under the equal protection clause of the constitution. Citation needed.

177. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (rejecting the ban on gay marriage based on societal changes); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the separate but equal doctrine); *Brown v. Board of Education*, 347 U.S. 483 (1954) (rejecting segregation based on the damaging effects it had on Black students.); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing women's rights to an abortion within the first two trimesters); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (recognizing the spousal notification requirement creates an undue burden).

178. U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three

Banning the Stars and Bars

tinue to allow the Confederate flag to fly, despite its racist implications and continued presence in violent altercations, sends a clear message about what we value. We should ask ourselves whether what the Confederate flag is communicating is what we really want to say about our democracy.

fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

ARTICLE

The African Court and Human Rights: What Lies Ahead for the Merged Court?

FLORENCE SHU-ACQUAYE*

CONTENTS

ABSTRACT	139
I. INTRODUCTION	139
II. HISTORICAL BACKGROUND	140
III. SOME RELEVANT ISSUES IMPACTING THE EVOLUTION OF THE COURT UP TO THE MERGED COURT	150
IV. CONCLUSION	164

Abstract

This paper examines the African Court of People's and Human Rights, the historical evolution, criticism, and explores issues that the Court may deal with as it assumes its new and envisioned role and form as the Merged Court.

I. Introduction

The African Union's ("AU") recent adoption of an amended draft Protocol on the Statute of the African Court of Justice and the African Court of Human and People's Right to the Merged Court and the addition of a criminal jurisdiction to the Court, have called into question, the implications on domestic law, the relationship with the

* Professor Shu-Acquaye is a Professor of Law at the Shepard Broad College of Law of Nova Southeastern University, Fort-Lauderdale, Florida, where she teaches the Business, Commercial, Comparative and International law courses. She would like to thank her research assistant, Mr. Timothy Shields for his excellent research assistance.

ICC, and whether the appropriate process was employed.¹ This is especially true given the speed with which the proposed draft was approved by the ministerial meeting and subsequently recommended to the African Union for adoption.² This Paper examines the historical development of the Court from the African Court of Human and People's Right to the envisaged Merged Court, to show the gains and losses that the Court experienced leading up to the Merged Court, and whether lessons learned have been incorporated in the evolving revised Protocols. Furthermore, this paper examines important issues like the costs of running the courts, who may have access to the courts, the State Government's role in fostering the tenets of the Protocols, conflicting state and regional treatises, and the decision to grant the Court power over international crimes and the effect that this has on the International Criminal Court ("ICC"). Further, this paper looks at the politics of the ICC and the AU by examining the recent cases of Kenya and Zimbabwe.

II. HISTORICAL BACKGROUND

A. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights was adopted by the United Nations General Assembly on December 10, 1948.³ This adoption came at the heels of the end of the Second World War whereby the United Nations Charter reaffirmed in its preamble. The preamble provides, "faith in the fundamental human rights, and the dignity and worth of the human person, in equal rights of men and women and of all nations large and small."⁴ Further, the Universal Declaration recognizes "the inalienability of the dignity and equality of the human family as the foundation for freedom, justice and peace in the world."⁵ Consequently, the member states pledged to declare

1. See generally African Commission on Human and People's Rights, *Protocol on the Statute of the African Court of Justice and Human Rights*, <http://www.peaceau.org/uploads/protocol-statute-african-court-justice-and-human-rights-en.pdf> (last visited Nov. 13, 2016).

2. Max Du Plessis, *Implications of the AU Decision to give the African Court Jurisdiction over International Crimes*, INST. FOR SECURITY STUD. 1 (June 2012), <http://issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf>. (The draft was prepared in November 2011 and reviewed and adopted in May 2012 in Addis Abba by Ministers of Justice and Attorney Generals before being subsequently recommended to the African Union Assembly for adoption).

3. UNITED NATIONS, *The Universal Declaration of Human Rights*, <http://www.un.org/en/universal-declaration-human-rights/> (last visited Nov. 11, 2016).

4. *Id.*

5. *Id.*

The African Court and Human Rights

the Universal Declaration as the platform and standard for the achievement by all people and nations in promoting respect and rights and freedoms.⁶

Unfortunately, during the adoption of the United Nations Charter (“UN Charter”) in San Francisco in 1945, only two African countries (Ethiopia and Libya) took part in the conference.⁷ In the same vein, many African countries were colonies or trusteeship territories under the international trusteeship system whereby the trusteeships were forced under the UN Charter and in conformity with the UN Charter and its principles to “accept as a sacred trust the obligation to promote to the utmost the well-being of the inhabitants of these territories . . .” and also to “promote the political, economic, social and educational rights.”⁸ The advancement of the inhabitants of the trust territories, and their progressive development towards self-governance or independence.⁹ Although the request for freedom and independence was gaining ground with the African colonies because of the Declaration of Human Rights, the colonial powers were still reluctant to allow colonial self-governance, and therefore, degraded the principles of equality and respect for human rights as preserved in the United Nations Charter.¹⁰ That is why in the 1960s and later, the United Nations adopted a number of instruments embodying the principles enunciated under the Universal Declaration of Human rights.¹¹

1. Africa’s contribution to the evolution of international human rights law

The independence and democratization for Africans are invariably connected to the realization of human rights.¹² Looking at the historical development of Africa from the Organization for African Unity (“OAU”) to where it stands today would shed light on the

6. *Id.*

7. Universal Declaration of Human Rights, *Dignity and Justice For All Of Us* 9 (2007), <http://unpan1.un.org/intradoc/groups/public/documents/cpsi/unpan034007.pdf>

8. *Id.* at 8-9.

9. *Id.*

10. *Id.*

11. *Id.* These include the international Convention on the Elimination of all Forms of Racial Discrimination, the international Covenant on Civil and Political Rights, the 1979 Convention on the Elimination of all Forms of Discrimination against Women, and the Rights of the Child were all created as a result of the Universal Declaration of Human Rights and prompted because of the one-time colonies and African States. *Id.*

12. See generally *United Nations*, *supra* note 3.

evolution of Human Rights, the courts and the present system of Justice as anticipated by the AU as a whole.

a. The OAU

The OAU was created in 1963 with the intent, among other things, to “promote unity and solidarity” among African States and to wipe out the remnants of colonization while it safeguards the “sovereignty and territorial integrity of Member States.”¹³ Consequently, the Organization took various important steps, strategies, and initiatives over the subsequent years that resulted in the establishment of the African Union in 1999.¹⁴

These initiatives, and others, were the impetus that translated into the establishment of the African Union when the Assembly of the AU organized a session to accelerate the “process of economic and political integration in the continent.”¹⁵ Thereafter, a number of summits were held and which eventually crystalized the formal launching of the African Union,¹⁶ with the ultimate goal of creating “[a]n inte-

13. Dan Kuwali and Frans Viljoen, *Africa and the Responsibility to Protect*, Article 4 (h) of the African Union Constitutive Act at 14, 16; see Roger Claude Liwanga, *From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies*, 41 *BROOK. J. OF INT'L L.*, 1, 104 (2015); see also African Union in Official website available at <https://au.int/utshell>.

14. Some of these steps and initiatives include the 1980 Lagos Plan of Action (“LPA”), which promoted programs and resources for “a self-reliant development and cooperation among African countries.” The African Charter on Human and People’s Rights (Nairobi 1981) and the Grand Bay Declaration and Plan of Action on Human rights: two instruments adopted by the OAU to promote Human and People’s Rights in the Continent. The Human Rights Charter led to the establishment of the African Human Rights Commission located in Banjul, The Gambia Africa’s Priority Program for Economic recovery (“APPER”) –1985; OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes taking place in the World (1990), which demonstrated Africa’s resolve to determine its destiny and to address the challenges to peace, democracy and security. The 1991 Treaty establishing the African Economic Community (“AEC”) (commonly known as the Abuja Treaty, which “seeks to create the AEC through six stages culminating in an African Common Market using the Regional Economic Communities (“REC”) as building blocks”; The Mechanism for Conflict Prevention, Management and Resolution (1993): a practical expression of the determination of the African leadership to find solutions to conflicts, promote peace, security and stability in Africa and the Cairo Agenda for Action (1995), a program for relaunching Africa’s political, economic and social development. African Common Position on Africa’s External Debt Crisis (1997), a strategy for addressing the Continent’s External Debt Crisis and The New Partnership for Africa’s Development (“NEPAD”): adopted as a Program of the AU at the Lusaka Summit (2001).

15. See Liwanga, *supra* note 13.

16. These submits were: Sirte Extraordinary Session (1999) which decided to establish an African Union—The Lomé Summit (2000) adopted the Constitutive Act of the Union. -The Lusaka Summit (2001) drew the road map for the implementation of the AU -The Durban Summit (2002) launched the AU and convened the 1st Assembly of the Heads of States of the African Union.

The African Court and Human Rights

grated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena.”¹⁷

Notable and practical accomplishments of the OAU include mediation in border disputes between countries within the continent, for example, the 1963-1964 dispute between Algeria and Morocco, and the Kenya and Somalia dispute from 1965-1967.¹⁸ In the same vein, the OAU during apartheid, acquiesced to international economic sanctions imposed on South Africa, should South Africa continue with the ongoing policy of apartheid. One of the listed initiatives by the OAU in 1993 for the promotion of peace and security in the continent was instrumental in the AU’s authority to the investigation of the 1994 genocide in Rwanda.¹⁹

b. The African Union

The Constitutive Act, which provided for the establishment of the African Union, was ratified by two-thirds of the OAU’s members, and came into force on May 26, 2001. The African Union replaced the OAU in July 2002. In envisioning a Union like the European Union, the African Union was expected to be more economic in nature.²⁰ Some of the organs of the African Union, created to help carry out its vision of “[a]n integrated, prosperous, and peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena,”²¹ included the Assembly of the Heads of States,²² AU Com-

17. Liwanga, *supra* note 13.

18. Kuwali & Viljoen, *supra* note 13; see also African Union Official Website, *supra* note 15.

19. Kuwali & Viljoen, *supra* note 13 at 18; see also *African Union*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/African-Union> (last visited Jan. 26, 2018).

20. See *Profile: African Union*, BBC: News (Aug 24, 2017), <http://www.bbc.com/news/world-africa-16910745> (The late Muammar Gaddafi of Libya was said to have conceived the idea of a “United States of Africa,” like the European Union).

21. *Id.*

22. The Assembly is the African Union’s (AU’s) supreme organ and the Assembly is made up of the Heads of State and Government from all Member States and therefore a vital organ that does not only determines its policies but also tracks its implementation and decisions; see also African Union Official Website, *supra* note 13.

mission,²³ financial institutions, Peace and Security Council,²⁴ the Court of Justice,²⁵ and an all-Africa parliament.²⁶

The principal objective of the AU was consistent with the goals, strategies, and initiatives set out under the OAU and includes amongst others:²⁷

- To achieve greater unity and solidarity between the African countries and the peoples of Africa;
- To defend the sovereignty, territorial integrity, and independence of its Member States;
- To accelerate the political and socioeconomic integration of the continent;
- To promote and defend African common positions on issues of interest to the continent and its peoples;
- To encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;
- To promote peace, security, and stability on the continent;
- To promote democratic principles and institutions, popular participation, and good governance;
- To promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;
- To coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;
- To advance the development of the continent by promoting research in all fields, particularly in science and technology;
- To work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.

23. The Commission is the principal organ of the AU, and occupied with the day-to-day management of the Union. Among the many things, it represents the Union and defends its interests. See African Union Official Website, *supra* note 13.

24. In 2004, the Peace and Security Council was created and has the authority to intervene in conflicts as oppose to the AOU old and criticized principle of non-interference in sovereign nations. Hence, the Council has the power to intervene in for example in cases of Genocide and crimes against humanity. AU Peace keepers have therefore served in Darfur, Sudan, Somalia and Burundi, to name a few. See *Profile: African Union*, *supra* note 20.

25. See discussions below.

26. Created to ensure the African people participate in governance, development and economic integration of the Continent.

27. *AU in a Nutshell*, AFR. UNION COMMISSION, <https://au.int/en/history/au-and-au> (last visited Jan. 26, 2018).

The African Court and Human Rights

c. The African Charter.

In 1981, the OAU adopted the *African Charter on Human and People's Rights* (the African Charter).²⁸ The OAU also established the African Commission on Human and People's Rights (hereinafter "The Commission").²⁹

The African Charter on Human and People's Rights came into force in October 1986. Adding to Europe and the Americas,³⁰ this regional charter heralded Africa as one of the three major world regions with its own human rights convention.³¹ The Charter takes into consideration a wide array of political, civil, economic and cultural rights, and the rights of groups and duties for individuals.³² In short, the African Charter is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent.³³ In addition, in 1987, the OAU also established the Commission on Human and People's Rights in accordance with Article 30 of the African Charter.³⁴

d. The African Commission on Human and Peoples' Right (The Commission)

The African Commission is a quasi-judicial body, comprised of 11 members,³⁵ that handles matters arising from the 54 member states in the continent. It is primarily responsible for the protection of human rights, the promotion of human rights, and the interpretation of the African Charter on Peoples and Human Rights. The Commission may

28. Sonya Sceats, *Africa's New Human Rights Courts: Whistling in the Wind?* 1, 4 (Mar. 2009), CHATHAM HOUSE, <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bp0309sceats.pdf>.

29. *Id.*

30. *Id.* at 7 (discussing that the regional human rights systems of Europe and Americas were established in 1950 and 1948 respectively); Carolina Garcia Hervas, *The European Human Rights System*, THE HEART OF EUROPE (June 4, 2014), <http://theheartofeurope.ideasonneurope.eu/2014/06/04/the-european-human-rights-system/>; UNITED NATIONS, *International Norms and Standards Relating to Disability: The Regional Human Rights System: The Americas*, <http://www.un.org/esa/socdev/enable/comp302.htm> (last visited Nov. 11, 2016).

31. Paul J. Magnarella, *Achieving Human Rights in Africa: The Challenge for the New Millennium*, 4 AFR. STUD. Q., 17, 17 (2000). Many of the African States had already ratified the United Nations Convention on Civil and political rights and the convention on Economic, Social and Cultural Rights. *Id.*

32. *Id.*

33. AFRICAN COMMISSION ON HUM. & PEOPLES' RTS., *African Charter on Human and Peoples' Rights*, <http://www.achpr.org/instruments/achpr/> (last visited Nov. 11, 2016).

34. *Id.*

35. *Id.* Per Article 36, these commissioners serve for a renewable term of 6 years. Members of the commission are elected to serve in their individual capacities Article 32, and therefore, to act independently.

also consider individual complaints brought before it.³⁶ In addition, the Commission would deal with any matter that may be entrusted to it by the Assembly of Heads of State and Government.³⁷ The Commission reports to the Assembly of Heads of State and Government of the African Union, formerly the Organization of African Unity.³⁸ In order to reach its goals, the Commission is required to “collect documents, undertake studies and researches on African problems in the field of human and peoples, rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples’ rights and, should the case arise, give its views or make recommendations to governments.”³⁹

Each state party is required to cooperate with the Commission and to submit a report (every two years). Additionally, the state party will explain in the report, the measures the state has taken and plans to take to ensure its citizens are covered by the rights and freedoms provided in the charter.⁴⁰ Apparently, African states have been said to have not given the commission the required cooperation.⁴¹ States have failed to meet their reporting obligations, and even when the Commission has requested information, states have not responded to the Commission.⁴² In other cases, State parties have refused to allow commissioners on mission to even enter their countries, and the OAU’s inadequate budget to support the Commission has been said to have contributed to the ineffectiveness of the Commission’s mission.⁴³

State parties have refused to allow commissioners on mission to even enter their countries and the OAU’s inadequate budget to support the Commission has been said to have contributed to the ineffectiveness of the Commission’s mission.⁴⁴ The Commission has been viewed and called “a toothless bulldog that only barks but cannot

36. OPEN SOC’Y JUSTICE INITIATIVE, *Fact Sheets: African Commission on Human and Peoples’ Rights*, (June 2013), <https://www.opensocietyfoundations.org/fact-sheets/african-commission-human-and-peoples-rights>.

37. African Commission on Hum. & Peoples’ Rts., *supra* note 33

38. *Id.*

39. African Charter, art. 45.

40. Magnerella, *supra* note 31, at 22.

41. *Id.*

42. *Id.*

43. *Id.* at 22.

44. *Id.*

The African Court and Human Rights

bite. . . .”⁴⁵ The Commission is said to have been more concerned with involving the States in its work, instead of efficiently exercising oversight over them in procuring the reports for example.⁴⁶ Consequently, the failures of the human rights charter and the commission in achieving its intended human rights goals lead the African leaders to believe that solving the problems lie in the creation of an African Court on Human and People’s Right. Consequently, in June 1998, the members of the OAU met in Burkina Faso and voted to begin the process of creating an African Court on Human and People’s Rights.⁴⁷

e. The African Court of Human & People’s Rights

The African Court on Human and People’s Rights was established by the Protocol to the African Charter on Human and Peoples’ Rights, as part of the African Union.⁴⁸ The 1998 Protocol to the Bangui Charter paved the way for the creation of the African Court on Human and People’s Rights (“ACHPR”) in 2004. To date, 28 countries have ratified the Protocol for the African Court.⁴⁹ The first set of judges were installed in 2006.⁵⁰ On the authority of Article 5, the Court could entertain petitions from State Parties, NGOs, inter-governmental organizations, and individual citizens regarding the interpretation and the application of the Bangui Charter, as well as any other human rights treaty as ratified by the State under Article 3.⁵¹ The Court is to complement the mandate of the African Commission on Human and People’s Rights, and to apply the tenets of the African Charter on Human and People’s Rights, as well as “any other relevant Human Rights instruments ratified by the State concerned.”⁵² This provision extended the powers of the Court to incorporate other

45. Timothy Ewa Yerima, *Comparative Evaluations of Challenges of African Regional Human Rights Court*, 4 J. POL. & L., 120, 120–28 (2011). This statement is even more significant given that the decisions of the Commission were not binding on the State parties. *Id.*

46. Christian-Jr Kabange Nkongolo, *The Justiciability of Socio Economic Rights*, 22 AFRICAN J. INTERNATIONAL & COMPARATIVE L., 492, 499 (2014).

47. Magnarella, *supra* note 31, at 23.

48. See *Protocol on the Statute of the African Court of Justice and Human Rights*, *supra* note, 1 at 5.

49. *Id.*

50. African Court in Brie, AFRICAN COURT ON HUMAN & PEOPLES’ RIGHTS, available at <http://www.african-court.org/en/index.php/about-the-court/brief-history> (last visited Mar. 23, 2018).

51. Beth Van Schaak, *Immunity before the African Court of Justice & Human & People’s Rights—The Potential Outlier*, JUST SECURITY (June 10, 2014), <https://www.justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/>.

52. Magnarella, *supra* note 31, at 23.

United Nations Human Rights Conventions ratified by States.⁵³ Many African States have ratified such conventions including, but not limited to, the United Nations Convention on the Elimination of Discrimination Against Women, the Convention on the Right of the Child, and many others.⁵⁴ Unfortunately, at the time of ratification, only two members of the OAU's fifty-one members ratified the Protocol to create the Court.⁵⁵ Between 2008 and 2014, the Court has received only 27 applications.⁵⁶ The Court was operational in 2011, its seminal year during which at least eleven cases were filed.⁵⁷ The Court received its first application in 2008 in the case of *Michelot Yogogombaye v. The Republic of Senegal*.⁵⁸

f. The African Court of Justice

In the same vein, an inter State Court of the African Union, the African Court of Justice ("ACJ") was created by the Constitutive Act of the African Union of 2002.⁵⁹ This was expounded upon in the Protocol of the Court of Justice of the African Union, in 2003, and became effective in 2010.⁶⁰ However, in 2004 when the 1998 Protocol to the African Charter, discussed above, became effective, the Assembly of the Heads of States and Governments began the discussions on the merger of the two courts—The African court on Human and Peoples Rights and the African Court of Justice, which should then lead to the ultimate successor Court—the "Merged" Court.⁶¹ In a July 2004 decision, the AU Assembly resolved that the future Court on Human and Peoples' Rights would be integrated with the African Court of Justice.⁶² The African Court of Justice's role would have been to handle matters of economic integration and political matters like border disputes.⁶³

53. *Id.*

54. *Id.*

55. *Id.* at 24.

56. Schaak, *supra* note 51.

57. Don Deya, *Is the African Court Worth the Wait?*, OPEN SOC'Y INITIATIVE FOR S.AFR. 3 (Mar. 6, 2012) <http://www.osisa.org/openspace/regional/african-court-worth-wait>.

58. Charles Chernor, *International Decision: Michelot Yogogombaye v. The Republic of Senegal*: App. No. 001/2008: Judgment, 104 AM. J. OF INT'L. 620, 620 (2010).

59. Constitutive Act of the African Union (2002), *available at* http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf.

60. *Id.*

61. *Id.*

62. *Id.*

63. Frans Viljoen, *Advancing the Rule and Role of Law in Africa*, AFRICLAW (May 2012), <https://africlaw.com/>.

The African Court and Human Rights

g. The African Court of Human & People's Right and the African Court of Justice -The Merged Court

The protocol to this Court (the Merged Protocol) was adopted in 2008, and requires a 15 country ratification to bring it into force.⁶⁴ The court is to be comprised of two main sections: (1) a general affairs section which is to deal with interstate matters that was originally intended for the ACJ; and (2) a Human and People's Right section, which inevitably inherits the role of the African Court on Human and People's Right, alongside jurisdiction over a number of Human Rights treaties.⁶⁵ Further, in 2009, the General Assembly of the Heads of States and Government of the African Union considered the addition to the arm of the uniformed African court of Justice and Human Rights.⁶⁶ As a result, the Merged Court would also have a section with the authority to handle criminal matters such as war crimes and crimes against humanity.⁶⁷ These discussions were culminated in 2011 with negotiations, a draft report, and a statute provisionally adopted by the Ministers of Justice and Attorney Generals.⁶⁸ Logically following this provisional adoption, in 2012, the draft protocol on the Amendments to the protocol on the Statute of the merged court was finalized.⁶⁹ Two years later, in May of 2014, the Special Technical Committee ("STC") of the African Union went ahead and adopted the Draft Protocol that included the draft Statute of the ultimate three successor courts.⁷⁰ These courts were the African Court of People's and Human Rights, the African Court of Justice, and the International Criminal Division.⁷¹ In other words, the proposed court has three major mandates: general affairs, human and people's rights, and international crimes.⁷² The full Assembly of the African Union formally endorsed

64. *Coalition for an Effective African Court on Human and Peoples' Rights, Ratification Status: Protocol on the Statute of the African Court of Justice and Human Rights, African Court Coalition* (July 12, 2014), http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87:ratification-status-protocol. Only five states have thus far ratified: (1) Benin, (2) Burkina Faso, (3) Congo, (4) Brazzaville, (5) Libya, and (6) Mali.

65. Schaack, *supra* note 51.

66. *Id.* at 4.

67. Du Plessis, *supra* note 2, at 4. The AU Assembly requested the AU Commission and the African Commission on Human and People's Rights examine the implications of the courts being entrusted with power "to try international crimes like genocide, crimes against humanity and war crimes" and then report to the assembly in 2010.

68. Schaack, *supra* note 51.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

this adoption in June 2014, in Equatorial Guinea.⁷³ This arguably means that this new Protocol supersedes the one that merged the African Court of Human and People's Rights and the African Court of Justice. Therefore, the protocol extends the jurisdiction of the yet to be established Merged court to crimes under international and transactional crimes. To be effective, at least 15 States ratifications are required for the Protocol and Statute to come into force.⁷⁴ Although in January 2015, the AU Assembly proposed the ratification of the Malabo Protocol be fast-tracked, only five countries (Kenya, Benin, Congo Brazzaville, Guinea-Bissau, and Mauritania) had signed the Protocol, possibly indicating the lack of political will of the States.⁷⁵

III. SOME ISSUES WITH THE AFRICAN COURTS (AFRICAN COURT ON HUMAN & PEOPLE'S RIGHT AND THE AFRICAN COURT OF JUSTICE) TO THE MERGED COURT⁷⁶

A. Individual v. State Access to the Court

With the adoption of the Charter on Peoples and Human Rights under the auspices of the OAU in 1986, there was a kind of euphoria in the African continent as it was an indication that Africa, in emulating the example of the European Human Rights Court and Inter-American Human Rights, would be a step towards the advancement to deal with Human Rights issues embedded and plaguing the continent.⁷⁷ Human rights violations tend to impact mostly individuals in Africa and, for the most part, these individuals may not be aware of their rights or the fact that their rights have been violated.⁷⁸ Even when they are aware, they would likely want to pursue them in domestic courts mainly through the use of NGOs.⁷⁹ Besides, based on Article 30 of the 2008 Protocol, direct access to the Human rights institution was available only to State Parties, the Commission, and in-

73. *Id.*

74. *Id.*

75. See *Protocol on the Statute of the African Court of Justice and Human Rights*, *supra* note 1.

76. It is also referred to as the Permanent Court, African Court of Justice and Human Rights, but I will refer to it as the "Merged Court" in this paper.

77. Yerima, *supra* note 45, at 123; (This was the author's perception and understanding at the time.).

78. *Id.*

79. *Id.*

tergovernmental bodies and African Human Rights institutions.⁸⁰ Consequently, it is not common for individuals to have access to the human rights courts, a situation likely to continue even with the merged African Court.⁸¹ Therefore, it is inevitable that as a result, access to the Merged Court by individuals is likely going to still be a hurdle as exemplified by some cases. The 2009 well-known and the first case of the African Court of People & Human Rights, *Michelot Yogogombaye v. The Republic of Senegal*, illustrates this difficulty to a certain extent.⁸² Mr. Hissein Habre was the former Head of State of Chad and in 2008, had been granted asylum in Senegal since 1990.⁸³ Mr. Habre was suspected of war crimes and acts of torture during his time in power.⁸⁴ Senegal came under pressure to find a solution to criminally prosecute Mr. Habre. In 2008, the Parliament of Senegal adopted a law to permit the retroactive application of its criminal laws to him.⁸⁵ Mr. Michelot Yogogombaye, a Chadian national, submitted an application to the African Court on Human and People's Rights (African Court), alleging Senegal was violating not only its own Constitution, but the African Charter on Human and People's Rights through its intentions to retroactively prosecute Mr. Habre.⁸⁶ Mr. Yogogombaye prayed for a list of 12 actions from the Court, ranging from a suspension of the actions against Mr. Habre and the establishment of a reconciliation commission for Chad.⁸⁷

The response filed by Senegal raised several objections, the primary one being that the African Court did not have jurisdiction to hear the application.⁸⁸ Article 5 (3) and Article 34 (6) of the Courts' Protocol were reviewed by the Court.⁸⁹ Article 5 (3) allows the direct submission of applications by individuals against State parties.⁹⁰ But,

80. See *Protocol on the Statute of the African Court of Justice and Human Rights*, *supra* note 1 (They could only bring such a case if the issue involves a state and the State has officially accepted the competence of the court as it relates to the matter); see also Yerima, *supra* note 45, at 123.

81. Yerima, *supra* note 45, at 123.

82. See generally *Michelot Yogogombaye v. The Republic of Senegal*, No. 001/2008, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (Dec. 15, 2009), <http://www.african-court.org/en/images/Cases/Judgment/Judgment%20Appl.001-2008%20Michelot%20Yogogombaye%20v%20Senegal-%20English.pdf>.

83. *Id.* at 18.

84. *Id.*

85. *Id.* at 19-20.

86. *Id.* at 20-21.

87. *Id.* at 23.

88. *Id.* at 9.

89. *Id.*

90. *Id.*

more troubling for the question of jurisdiction is Article 34 (6), which states that a State party must have made a declaration accepting the competence of the Court to receive cases under Article 5 (3).⁹¹ Mr. Yogogombaye had stated in his application, that Senegal had made such a declaration when the country ratified the Protocol.⁹² Senegal, on the other hand, argued no such declaration was made.⁹³ The Court secured a list of State parties who have made Article 5 declarations from the African Union Commission.⁹⁴ After a review of the list, the Court determined that Senegal, in fact, was not on the list of countries.⁹⁵ Consequently, the Court determined it had no jurisdiction to hear a case brought by an individual under Article 5 (3) against a country who had not made an Article 34 (6) Declaration, allowing the Court to hear such applications.⁹⁶ This case demonstrates how difficult it is for an individual to bring a human rights violation action to the court. Assuming a State has standing in bringing an action against another State, it is very unlikely to effectively do so, and especially given it is not a common judicial trend in Africa.⁹⁷ This is buttressed by the fact that since the establishment of the African Commission, it has heard only one case against another state.⁹⁸

B. Cooperation of African Governments

African governments should be committed to comply with their obligations under the African Charter. This means they should seriously undertake their financial obligations, follow the decisions of the court, and provide their State reports regarding their human rights undertakings and protections.⁹⁹ Most importantly and troubling would be the needed compliance of States with court rulings to give the court its effectiveness and integrity. The Court under the African Rights Court Protocol for example, may address human rights violations by ordering reparation or compensation, as well as employ any

91. *Id.* at 10.

92. *Id.* at 5.

93. *Id.* at 10.

94. *Id.*

95. *Id.*

96. *Id.*

97. Yerima, *supra* note 45, at 123.

98. *Id.*; see also Democratic Republic of Congo v. Burundi, Rwanda & Uganda, Communication 227/99, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (May 29, 2003), http://www.achpr.org/files/sessions/33rd/communications/227.99/227_99_democratic_republic_of_congo_burundi_rwanda_uganda.pdf.

99. Yerima, *supra* note 45, at 126.

The African Court and Human Rights

provisional measures in case of emergency, as it may deem appropriate and necessary.¹⁰⁰ The conundrum of such enforcement by the Court is with the fact that the violators of human rights in Africa tend to be mostly government agents, which makes enforcement of a court order potentially doubtful.¹⁰¹ As scholar Makau Mutua aptly stated, “the Modern African State, which in many respects is colonial to its core, has been such an egregious violator that skepticism about its ability to create an effective regional human rights is appropriate.”¹⁰² Accordingly the question looms as to whether the court will be able to try African Head of States and if the governments will obey court judgments.¹⁰³ It is therefore quintessential that the Member States be willing to pursue investigations, conduct trials and enforce judgment.

The case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir of Sudan* is a clear example of how the failure of Member States to cooperate may lead to unenforceable consequences.¹⁰⁴ Al Bashir, former President of Sudan was suspected of crimes against humanity, war, and genocide allegedly committed in Darfur, Sudan.¹⁰⁵ Pursuant to the Security Council resolution 1564, which established an International Commission to inquire into these alleged crimes in Sudan, determined that indeed crimes against humanity and war crimes were committed and logically therefore referred the case to the ICC.¹⁰⁶ Investigations culminated in a warrant of arrest issued by the Pre-Trial Chamber I in 2009 for Omar Al Bashir for charges of war crimes, crimes against humanity, and another arrest subsequently extended to include the charge of genocide in July 2010.¹⁰⁷ Surprisingly, and perhaps embarrassingly for both the AU and the ICC, in spite of these existing arrest warrants, Al Bashir is still at large, even though he has been traveling freely to several different African countries. The re-

100. *Id.* at 123; see *Protocol on the Statute of the African Court of Justice and Human Rights*, *supra* note 1.

101. *Id.* at 124.

102. *Id.*

103. See also, *supra* note 28, at 14.

104. Situation in Darfur, Sudan, Int'l Crim. Ct., <https://www.iccpi.int/darfur/albashir/Documents/AlBashirEng.pdf>.

105. From March 2003 to about July 2008, a protracted armed conflict not of an international character existed in Darfur between the Government of Sudan (“GOS”) and several organized armed groups, in particular the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). See *Case Information Sheet: Situation in Darfur, Sudan*, INT'L CRIM. CT., <https://www.icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf>

106. *Id.* Consequently, using its authority under the Rome Statute, the UN Security Council referred the situation in Darfur, since July 1, 2002, to the Prosecutor of the International Criminal Court in March 2005.

107. *Id.*

fusal of these countries to pay heed to the ICC request has been nothing short of astounding. For example, the Pre-trial Chamber 1 concluded that the Republic of Malawi failed to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir during his visit on October 2011. The Republic of Chad failed to cooperate with the Court in the arrest and surrender of Omar Al Bashir during his visit on August 7-8, 2011, and again during his second visit there in February 2013. In April 2014, the Pre-Trial Chamber II found that the Democratic Republic of the Congo also failed to cooperate with the Court by not arresting and surrendering Omar Al Bashir to the Court during his visit to the DRC on February 26-27 2014. In March 2015, the Pre-Trial Chamber II concluded that Omar Al Bashir's own country, the Republic of Sudan, failed to cooperate with the Court by not arresting and surrendering him to the Court over the last years; and that in July 2016, the Pre-Trial Chamber II decided that the Republics of Uganda and Djibouti failed to comply with the request for arrest and surrender of Omar Al Bashir to the ICC.

This failure of the African countries to cooperate with the ICC has been a topic of debate and criticism. It has even been suggested that the AU has given a carte blanche to its Member States to ignore or undermine the ICC.¹⁰⁸ This view was heightened by the recent incident in 2015 that took place in South Africa involving, Al Bashir of the Republic of Sudan.¹⁰⁹ Al Bashir, in spite of the arrest warrant, attended the 2015 African Union talks in South Africa. The issues of whether he could be arrested per the ICC issued warrants were to be decided by a South African Court. By the time that ruling was made, Al Bashir, under the apparent watch of the South African government, had already left South Africa. Needless to say, this sparked tension between the ICC and the South African government, with the latter attempting to pull out of the ICC.¹¹⁰

108. Konstantinos Magliveras, Panelist at the 6th European Conference on African Studies: Substituting International Justice for an African Criminal Justice? (July 8, 2015) (abstract available at <http://www.ecas2015.fr/africa-and-international-justice-contestation-resistance-or-support/>).

109. O Dire Tladi, Interpretation and International Law in South African Courts: The Supreme Court of Appeal and Al-Bashir Saga, 16 AFR. HUM. RTS. J., 310-338, 311-313.

110. President. Zuma's decision to pull out of the ICC was blocked by the country's High Court as "unconstitutional and invalid" because it was not approved by Parliament. See O Dire Tladi, *Interpretation and International Law in South African Courts: The Supreme Court of Appeal and Al Bashir Saga*, 16 AFR. HUM. RTS. J., 310-338, 311-313. (2016); Konstantinos Magliveras, *Substituting International Criminal Justice for African Criminal Justice*, 13 (2015); see also

The African Court and Human Rights

The underlying question is whether a sitting head of state, wanted on charges of crimes against humanity, should be held accountable under international law? Apparently, there should be no claim to immunity by Al Bashir, and that South African diplomats, upon consulting the court before Al Bashir's arrival in South Africa, were informed of the country's obligation, as a member of the ICC court, to arrest and hand over Al Bashir.¹¹¹ South Africa, a one-time champion of the ICC, wants to withdraw from the ICC citing it can no longer tolerate the court's denial of immunity to incumbent leaders.¹¹²

This tense relationship of the African countries and the ICC is kind of paradoxical, especially given that the African countries initially and overwhelmingly supported the launch of the ICC. Specifically, 34 of the 60 country signatures required for the ICC to be launched in 2002 were African. The question then is, why this change of attitude and a failure to cooperate with the ICC? Perhaps it was reiterated in 2013, at the extraordinary Assembly of the African Union, where the AU passed the "Decision on Africa's relationship and the criminal court" attacking the ICC's constant investigation of African leaders and how that impacts reconciliation.¹¹³ In fact, Bashir's indictment is said to have been the triggering factor for the conflict between the AU and the ICC, and consequently dampening the AU's support for the ICC and African States.¹¹⁴ This dampening spirit was confirmed by the swift action of the AU in approving a resolution of non-cooperation because of Al Bashir's arrest warrant.¹¹⁵

Marlise Simons & Jeffrey Gettleman, *International Criminal Court Drops Case Against Kenya's William Ruto*, NY TIMES: AFRICA (Apr. 5, 2016), <http://www.nytimes.com/2016/04/06/world/africa/william-ruto-kenya-icc.html>.

111. Roger-Claude Liwanga, *From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies*, 41 BROOK. J. INT'L L. 128-29 (2015).

112. Phillip Apuuli Kasaija, *Kenya's Provisional Warrant of Arrest for President Omar Al Bashir of Republic of Sudan*, 12 AFR. HUM. RTS. L.J. 623, 623-640 (2012); see also Ed Cropley, *ICC's Toughest Trial: Africa vs. 'Infamous Caucasian Court'*, REUTERS: WORLD News (Oct. 28, 2016, 10: 44 AM), <https://www.reuters.com/article/us-africa-icc/iccs-toughest-trial-africa-vs-infamous-caucasian-court-idUSKCN12S1U3>. The President of Kenya, Uhuru Kenyatta, made history in 2013 as the first sitting head of state to appear before the ICC, on charges of crimes against humanity. *Id.*

113. W. Chadwick Austin & Michael Thieme, *Is the International Criminal Court Anti African?* (Apr. 5, 2016), <http://www.tandfonline.com/doi/full/10.1080/10402659.2016.1201952?scroll=top&needAccess=true>.

114. The International Criminal Court and the Politics of Prosecutions, the INTERNATIONAL JOURNAL OF HUMAN RIGHTS, V. 18, iss 4-5, May 2014 available at. <http://www.tandfonline.com/doi/abs/10.1080/13642987.2014.901310>

115. *Id.*

C. Costs of running the Courts

One of the major advantages of having the merged court is that it minimizes the costs from having to run two courts, the African Court on Human and People's Rights and the African Court of Justice, and therefore saves the African Union millions of dollars. The idea of a merged court was floated by the then President of Nigeria, President Obasanjo in 2004, who worked to convince the other Heads of States as to why it will be efficient, cost-wise and resource-wise, especially given the limited resources of the African Union.¹¹⁶ However, this rationale may be undermined by the fact that adding the third division (criminal division) to the merged court invariably results in even more costs involved than would be to the African Human Rights Courts. This fact is buttressed when one looks at the mere U.S. \$6 million budget in 2011 for the African Human Rights Court versus the U.S. \$270 million in the 2006-2007 budget for the International Criminal Tribunal for Rwanda.¹¹⁷ It is argued that the creation of the African Court should not be a draw back to the existing human rights defenses, and this must be realized whether the merged court is to function independently from a judicial institution devoted to criminal justice.¹¹⁸

Perhaps this is why it has been suggested that a provision be made giving States the choice to accept the jurisdiction of only the general Affairs Section and Human Rights.¹¹⁹ Some genuine questions asked and important to be constantly considered include:¹²⁰ Where will the money to run the court come from? Will international partners be willing to fund the expansion of the court? Was a cost evaluation made by the drafters of the protocol? If any, what will be the likely impact on the work of the African Court?

D. African Sub-Regional courts and the Decisions of the Courts

Besides the Human Rights Court and the Merged Court, there exist other established bodies in Africa embodying mandates that handle human rights, such as the Economic Community of West African

116. Viljoen, *supra* note 63, at 6.

117. *Id.* Of course, this stark difference in amount in criminal cases explains the obvious emanating from a trial of a criminal case requiring "extensive fact-finding, presentation of extensive evidence, opportunities to question witnesses, careful assessment of evidence and lengthy judgements. *Id.*

118. *Id.*

119. *Id.*

120. See Duplessis, *supra* note 2, at 10.

The African Court and Human Rights

States (“ECOWAS”) Court of Justice. Such courts tend to have conflicting mandates to that of the African Human Rights Court.¹²¹ Although ECOWAS’s court’s jurisdiction is to handle disputed matters arising under the ECOWAS treaty, it also has the authority to interpret other international human rights treaties including the African Charter. This right to interpret the human rights treaties is also justified given that State Members of ECOWAS have also acceded to the African Charter and the African Charter has been incorporated as an integral part of their different Constitutive Acts.¹²² For example, the preamble to ECOWAS, treaty (as revised) provides for the “respect, promotion and protection of human rights of the African Charter.”¹²³ This is also reiterated in Article 4 (g) as a fundamental tenet of the treaty.¹²⁴ Thus, ECOWAS could be said to have concurrent jurisdiction with the Human Rights Court that will inevitably extend to the Merged Court. That is, the African Court and the subsequent Merged Court would have jurisdiction over any instrument dealing with human rights, which has been ratified by all the concerned States.¹²⁵ This invariably means that such jurisdiction would be exercised over sub regional courts like ECOWAS.¹²⁶ However, there appears to be a conflict between ECOWAS Court Protocol and the Human Rights Courts and the Merged Court, in that Article 22 (1) of the ECOWAS provides that “no dispute regarding interpretation or application of the provisions of the treaty may be referred to any other form for settlement except that which is provided by the treaty or this Protocol.”¹²⁷ On the other hand, Articles 3 and 7 of the Human Rights Court and Article 28 of the Merged Court Statute permits these Courts to entertain other human rights instruments, with particular reference to the Protocol of the ECOWAS Court of Justice.¹²⁸ Therefore, the Court of Human Rights could technically find itself in a quandary if it were to claim that it has jurisdiction on a matter brought

121. Yerima, *supra* note 45, at 124.

122. *Id.*

123. *Id.* See Also African Charter on Humans and Peoples’ Rights. Pmb. <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>.

124. *Id.*

125. Yerima, *supra* note 45, at 124–25.

126. *Id.* at 125.

127. *Id.*

128. *Id.*

to it concerning the interpretation of Human Rights based on the ECOWAS Treaty provision.¹²⁹

In the same vein, and unlike under the Human Rights Court and the Merged Court, where individuals do not have direct access, under the additional Protocol to the ECOWAS Treaty, an individual could bring suit against a State Member.¹³⁰ Whether these conflicts could encourage forum shopping remains to be determined.

E. Wisdom in establishing the Merged Court?

The wisdom in creating the Merged Court has been challenged. Some argue that the process by which the Protocol was developed and drafted was hastily done and consequently did not indulge proper consultation of experts. In February 2010, the African Union began the process to merge the courts with consultants and by June 2010, they had already produced a draft Protocol.¹³¹ Soon thereafter, the draft protocol was adopted in June of 2012, by the Ministers of Justice and Attorney Generals. Consequently, and in reality, the State governments did not really have any meaningful debate or enough time to study the draft content (only one year). Worse still, non-governmental entities barely had access to the draft document to do so.¹³² This undoubtedly leaves behind a sour feeling in these entities and the public as they have simply been excluded from an important matter which potentially impacts their lives, communities, and countries. Thus, embracing the Merged Court may be difficult for some States as they may feel they did not have an adequate voice in the process or were imposed upon. This is, perhaps, one of the reasons why so many States have not ratified the Protocol.

129. Yerima, *supra* note 45, at 125. Also, besides Ecowas, there is also the regional court of the East African Community Court of Justice.

130. *Id.* at 124. From the African Court of Human & People's Right and the African Court of Justice and Human Rights, Articles 30(f) and 8(3) requires the court to accept complaints from individuals and NGOs, but only where the state in question has made a declaration accepting to do so. The NGO will need to be accredited to the African Union before it can submit complaints to the court.

131. Ghetnet Metiku Woldegiorgis, *The African Court of Justice and Human Rights: Pitfalls in the Protocol on the ACJHR*, at 6 (2004).

132. *Id.*

F. Decision of the African Union to Give the African Court Jurisdiction over International Crimes

As mentioned above, the Merged Court has jurisdiction over three areas: general affairs, human rights, and international crimes. The International Criminal Law section will have three Chambers: A Pre-trial Chamber, a Trial Chamber, and an Appellate Chamber.¹³³ The Protocol makes expansive extensions of issues relating to international crimes beyond genocides, crimes against humanity, and war crimes to include unconstitutional change of government, piracy, terrorism and more, it is said to overstretch the court and its resources and is, therefore, a potential problem for an efficient court operation.¹³⁴ What this expanded jurisdiction invariably requires is a “full complement of staff and institutional resources to ensure justice can be done to that jurisdiction. . .” and to run international criminal trials.¹³⁵ Consequently, “the fiscal implications raise questions about the effectiveness, independence and impartiality of the court.”¹³⁶ Also, the reorganized African Court, with a criminal division, will need the intuitional facility to protect victims and witnesses and be able to collect and preserve evidence effectively.¹³⁷ In following the ICC standards, there needs to be an established defense or legal aid fund to ensure the impoverished accused have proper representation.¹³⁸

The ICC provisions may have conflicts with domestic laws, for example, the elements of a crime under the protocol may be quite different from the elements under domestic law, which may then force the African states to re-write their domestic laws.¹³⁹ In the same vein, crimes enumerated under the Protocol may be non-existent under the African domestic laws and, therefore, again cause the African states to amend their laws or introduce these laws in their domestic laws.¹⁴⁰ One other overly expressed criticism is the relationship between the African Court of Justice and Human Rights and the ICC; in particular the relationship of the African leaders to the Rome Statute of the

133. INT'L CRIM. CT, *Understanding the International Criminal Court* 9, <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>.

134. Woldegiorgis, *supra* note 131, at 6–7.

135. Du Plessis, *supra* note 2, at 9.

136. *Id.*

137. *Id.* at 10.

138. *Id.* The Protocol apparently has this taken care of as it talks in Article 46 M about a Trust Fund “for the benefit of victims of crimes within the jurisdiction of the court, and the families of such victims.” *Id.*

139. *Id.*

140. *Id.*

ICC.¹⁴¹ This relationship is important, given that about 43 African countries are signatories to the Rome Statute, the treaty that established the ICC.¹⁴² Surprisingly, the Protocol, itself, is silent about the ICC, leaving no clear pathway as to how the African States will deal with the ICC,¹⁴³ although the Amended Protocol impliedly refers to it when it refers to “complementarity with national courts and courts of regional economic communities.”¹⁴⁴ This relationship between the African Union and the ICC was made tense when the ICC referred and indicted sitting heads of African States, creating hostility among some African Union Members against the ICC.¹⁴⁵ This was also compounded by the fact that the African Union advised its States members against cooperating and complying with the ICC.¹⁴⁶ The Office of the Prosecutor (“OTP”) of the ICC has been criticized as being biased against African states inappropriately.¹⁴⁷ The ICC has mustered its resources to prosecute mostly African cases while undermining violations from “diplomatically, economically, and financially strong countries” and consequently is said to be applying “selective justice.”¹⁴⁸ Hence, it is also important that the relationship between the court and the ICC be clearly defined, especially given that the ICC seemingly has the authority to entertain cases pertaining to individual criminal responsibility of African Leaders.¹⁴⁹ Besides, under the complementarity principle of Article 17 of the Rome Statute, the prosecution of a case by the African court does not necessarily prevent the ICC from still prosecuting the same case.¹⁵⁰ To have an effective symbiotic relationship, the African Court should complement the work of ICC in a comprehensive manner, but to do so would require

141. *Id.* at 1.

142. John Mukum Mbaku, *International Justice: The international Criminal Court and Africa*, THE BROOKINGS INST., AFR. GROWTH INITIATIVE 9, <https://www.brookings.edu/wp-content/uploads/2016/07/03-foresight-international-criminal-court-africa-mbaku-1.pdf>.

143. Du Plessis, *supra* note 2, at 10.

144. *Id.*

145. Beth van Schaak, *African Heads of State Before the International Criminal Court*, INTERNATIONAL CRIMINAL JUSTICE TODAY, (June 21, 2015), available at <https://www.international-criminal-justice-today.org/arguendo/african-heads-of-state-before-the-international-criminal-court/>.

146. Mbaku, *supra* note 142, at 9.

147. *Id.*

148. *Id.* The ICC has investigated at least eight incidences involving Africa, including, the Democratic Republic of Congo, Central African Republic, Uganda, Darfur/Sudan, Kenya, Libya, Ivory Coast and Mali. See ICC FORUM, *Is the International Criminal Court (ICC) Targeting Africa Inappropriately?*, <http://iccforum.com/africa> (last visited Nov. 19, 2016).

149. Mbaku, *supra* note 142, at 9.

150. Du Plessis, *supra* note 2, at 10.

the ICC to restore trust in the African continent by engaging them in an effective and reconciliatory dialogue.¹⁵¹ Perhaps the appointment of Fatou Besouda of Gambia, as the Chief Prosecutor of the ICC, may be a starting point towards amending the strained relationship between Africa and the ICC.¹⁵² Looking at some recent issues dealing with African leaders and the ICC would illuminate the “politics” of the relationship between these two parties.

G. The ICC, the AU, and Politics: The recent cases of Kenya and Zimbabwe

i) Kenya

In 2008, the ICC started investigations into Kenya’s 2008 post-election violence that resulted in 1,300 deaths, others wounded and/or raped, and with others (about 600,000) forced to flee.¹⁵³ Six individuals were issued summonses and in 2012 charges were ultimately brought against four of them, including Uhuru Kenyatta and William Ruto, the now sitting President and Deputy President of Kenya, who were elected in the 2013 presidential election.¹⁵⁴ The four were charged with crimes against humanity for apparently having participated in directing and inciting political and ethnic violence,¹⁵⁵ for which they all denied. In 2015, the case ended in a mistrial as prefaced by the presiding judge, “due to a troubling incidence of witness interference and intolerable political meddling.”¹⁵⁶

In the same vein, the prosecution stated that:

[I]ts office had no choice but to suspend the case against President Uhuru Kenyatta even before the trial began. That case, on charges similar to those against Mr. Ruto, was hampered because the government was blocking most avenues of investigation and witnesses were threatened and bribed.¹⁵⁷

151. Mbaku, *supra* note 142, at 10.

152. *Id.*

153. Evelyn Asaala, *Transitional Justice in Kenya & the UN Special Rapporteur on Truth and Justice: Where to From Here*, 13 AFR. HUM. RTS. L.J., 325, 326 (2013); see also Marlise Simmons & Jeffrey Gettleman, *International Criminal Court Drops Case Against Kenya’s William Ruto*, NY TIMES: AFRICA (Apr. 5, 2016), <http://www.nytimes.com/2016/04/06/world/africa/william-ruto-kenya-icc.html>.

154. Asaala, *supra* note 153, at 345. The case against Mr. Ruto and Mr. Kenyatta was extraordinary given they were both sitting leaders not only facing criminal prosecution, but they were actually indicted in 2011, which was well in advance of their being elected in 2013.

155. *Id.*

156. Simmons & Gettleman, *supra* note 153.

157. *Id.*

While most of Kenya and perhaps the African Union was jubilating at this decision, the ICC came to grips with the challenge to its authority.¹⁵⁸ Even though the ICC had maintained its credibility by refusing to bow to Kenyan domestic politics and pressure to dismiss the charges or the AU's position favoring dismissals & trials,¹⁵⁹ this decision obviously left no doubts that the Kenyan government vehemently refused to cooperate with the tribunal. It believed the court was preventing Kenyans' political stability as well as encroaching on its sovereignty.¹⁶⁰ Without doubt, in September 2013, Kenya's parliament took the step of withdrawing its membership from the ICC jurisdiction. This decision may also strengthen the perception that the ICC is not "subservient to domestic political interests or in tipping the domestic balance of power."¹⁶¹ The rulings also undoubtedly demonstrate the frustration of the ICC in obtaining reliable evidence against high-ranking officials accused of committing atrocities.¹⁶² This situation is likely going to remain a prevalent challenge with the AU member countries, especially because the ICC has no enforcement agency at its disposal.¹⁶³ The ICC cannot execute arrest warrants, nor gain access to crime scenes as well as the ability to search official records without the assistance of the national or local authorities.¹⁶⁴

ii) Zimbabwe

The recent overthrow of Zimbabwe's president, President Robert Mugabe, in November 2017, who had been in power since the country gained independence from the United Kingdom in 1980, has also sparked questions about the AU and its authoritative policy stance against tolerance for the unconstitutional change of government by a coup d'état or "out of the barrel of the gun."¹⁶⁵ Initially, under the predecessor organization of the AU, the general policy rule, referred

158. Alana Tiemessen, *The International Criminal Court and the Politics of Prosecutions*, 18 INT'L J. HUM. RTS. 444, 457-58 (2014).

159. *Id.* at 457.

160. *Id.*

161. Max Du Plessis, *Implications of the AU Decision to give the African Court Jurisdiction over International Crimes*, 235 INST. FOR SECURITY STUD. 1 (June 2012), <http://issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf>.

162. See ICC: Kenya Deputy President's Case Ends, HUM. RTS. Watch (Apr. 5, 2016, 3:02 AM), <https://www.hrw.org/news/2016/04/05/icc-kenya-deputy-presidents-case-ends>.

163. *Id.*

164. See Roger-Claude Liwanga, *From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies*, 41 BROOK. J. INT'L L. 100, 136 (2015); W. Chadwick Austin & Michael Thieme, *Is the International Criminal Court Anti African?* (Apr. 5, 2016).

165. *Id.*

to as the capital city rule, simply meant that whoever controlled the capital city, regardless of how that person acceded to the throne, was recognized as the sovereign representative by the other governments.¹⁶⁶ Consequently, a spate of a coup d'états rocked across the continent as principles of democracy were not respected or honored with the ultimate result of civil wars, weak economic growth, and instability.¹⁶⁷ Hence, the city capital rule was denounced by the OAU in 2000 under the Lomé Declaration.¹⁶⁸ The Declaration recognized that the city rule was a great threat to peace and democracy, especially as prompted by the coups that took place in Burundi and Sierra Leone in removing duly elected officials from power.¹⁶⁹ The OAU's successor organization, the AU, was quick to embrace this denial of the city rule and its Constitutive Act made provisions to not recognize governments that accede to power through unconstitutional means.¹⁷⁰ The AU, therefore, empowered its Peace and Security Council ("PSC") to monitor, sanction, or suspend any government that carried out an unconstitutional change of a government.¹⁷¹ In the same vein, and under Articles 23 and 4 of the 2007 AU African Charter on Democracy, Elections and Governance, the PSC was granted authority to monitor incumbent "infringement on the principles of democratic change of governments."¹⁷² The relevance and importance of this declaration was tested publicly in the recent case of Zimbabwe and put the AU under the microscope as possibly inconsistent with its own policy rules. Was the overthrow of Mugabe a coup d'état, which is denounced by AU policy? Even if it is not considered a coup d'état, was the seizure of power by the military, as accepted by the AU, a legitimization of the use of force in politics? In other words, was the overthrow of President Mugabe through unconstitutional means and

166. Solomon A. Desso, *Unconstitutional Changes of Government and Unconstitutional Practices in Africa*, AFR. POL. & AFR. PEACE. 3 (June 2016); see also Philip Roessler & Layla Ab-Falah, *Blurry Lines: The African Union's Imbalanced Regime of Constitutionalism and Its Consequences*, 6 (Oct. 21, 2017); Philip Roessler, *How the African Union Got It Wrong*, NEW ZIMBABWE: OPINION (May 05, 2017), <http://www.newzimbabwe.com/opinion-40518-How+Afri+can+Union+got+it+wrong+on+Zim+opinion.aspx>.

167. Roessler, *supra* note 166. See Desso *supra* note 166, at 3 (51% of the successful coup d'états out of 169 attempted coups took place in Africa between 1950 and 2010. Between 1952 and 2014, there were 91 successful coups in Africa, and many of them being the predominant method of political change of power before the 1990's).

168. *Id.*

169. *Id.* at 6.

170. *Id.*

171. *Id.* at 6, 7. Roessler, *supra* note 166.

172. *Id.* at 6.

therefore should not be recognized? The AU faced this conundrum but it apparently and tacitly condoned the removal of Mugabe and ultimately stated that the military intervention was, nevertheless, not a coup, even though it had initially stated the contrary. The AU has been criticized for this stance because it was intentionally limited to the narrow position that an incumbent head of state was removed as a defining feature of the coup d'état as opposed to focusing on "the unconstitutional use of force to coerce an elected leaders to relinquish power."¹⁷³ This stance of not recognizing the overthrow as a coup that is apparently in support of the Zimbabwe military and its former Vice President (the coup perpetrators) and who are also now the post Mugabe government, is in contradiction with the tenets of African Charter on Democracy, Elections, and Governance.¹⁷⁴

IV. CONCLUSION

Looking forward, one sees that the Merged Court really exists only on paper, pending the actual merger of the African Court of Justice and the Court of Human and People's Rights. This also means the third leg of the three-legged stool, the criminal division within the Merged Court, has to be created. Likewise, many legal instruments have yet to be ratified for the court to enter into force. Thus far, only five countries have actually ratified the treaty to allow for the proposed Merged Court. This in itself is very troubling and leaves one wondering why the States are reluctant to ratify. Perhaps the African leader's quid pro quo is based on the search for some immunity for the African leaders. At the African Union Summit in 2014 in Equatorial, Guinea, the African Union members voted to grant to themselves (the African Leaders) immunity from the prosecution from the envisaged Merged Court.¹⁷⁵ Needless to say, there is a general outcry

173. Roessler, *supra* note 166. (This stance is said to set a dangerous precedent and that it would have been more rational for the AU's PSC to condemn the de facto coup, and inform Zimbabwe that it would be thrown out of the AU if the military did not release Mugabe from under house arrest, and hand over power to a transitional post Mugabe government and disappear from the scene).

174. Ademola Abass, *Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges*, EUR. J. INT'L L. 933, 940 (2013); see also *Zimbabwe Takeover Seems Like a Coup, African Union Says*, BBC NEWS: AFRICA (Nov. 15, 2017), <http://www.bbc.com/news/world-africa-42004816>.

175. Beth Van Schaack, *Immunity Before the African Court of Justice & Human & Peoples Rights—The Potential Outlier*, JUST SECURITY (July 10, 2014), <http://www.justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/>. The proposed immunity clause reads: "No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such

against the Immunity Clause across the continent and even beyond, pointing to the fact that the draft protocol was in conflict with the African Union Constitutive Act.¹⁷⁶ In particular, the portion that states the obligation of members is to “[p]romote and protect human and peoples’ rights in accordance with the African Charter on Human and People’s Rights and other relevant human rights instruments.”¹⁷⁷ Along with the portion that allows the African Union “to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity. . .”¹⁷⁸ The latter is what has plagued the African countries like Sudan, Ivory Coast, Rwanda, Sierra Leone, and many others. If the Immunity Clause is effective then the government leaders who commit or allow such atrocities to take place under their watch, will not be held accountable. What human rights are then protected under all these proposed or ratified instruments? Perhaps this may help explain why African Union members have been antagonistic towards the ICC’s work to bring some sitting African Heads of States to justice, by objecting to jurisdiction over African defendants.¹⁷⁹ Perhaps a regional criminal court is the model to follow as in the case of *Habre* with the creation of a special court in Senegal. In fact, that case is said to serve as a model for how the implementation of African solutions to African problems may be carried out.¹⁸⁰ One thing that is clear is that the existing Court on Human and People’s Rights will simply continue to function until the Merged Court becomes operational.¹⁸¹ Although Africa has made progress over the years on how to handle human rights issues, one cannot predict, with certainty, what lies ahead for the Merged Court. However, hopes and expectations are on the rise as Africans are scrutinizing the evolution of the regional Merged Court. Nonetheless, as one scholar stated, “the mere establishment of a Court empowered legally to condemn State Parties for human rights violations, is no guarantee of success. An effective

capacity, or other senior state officials based on their functions, during their tenure of office.”
Id.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* The president of Kenya, Uhuru Kenyatta and the President of Sudan were being prosecuted by the ICC for International Crimes, and an AU resolution passed called for “non-cooperation by African ICC member states in the arrest of al-Bashir.” *Id.* On the other hand, Kenyatta spearheaded the efforts to amend a similarly ICC Session of the Assembly of States Parties in 2013. *Id.*

180. *Id.*

181. Deya, *supra* note 57.

human rights mechanism requires more.”¹⁸² Consequently, the true issue is “whether or not the coming into being of the Court will promote or aggravate the situation of human rights on the continent.”¹⁸³ Relatively, one cannot help but notice and wonder why more African countries have ratified the Rome Statute than have been bothered with the African Court. Should one expect an increase in the number of African countries seeking to exit the jurisdiction of the ICC? If this was to happen, it would be troubling for the ICC, which has been trying hard to counter the allegations of anti-African bias and “neo-colonialism.” However, one thing is for sure – even when the ICC admits it is rattled by these potential exits, it is “determined to keep going, and in particular to counter the allegations of anti-African bias.”¹⁸⁴ The issue is whether the AU’s somewhat dislikes for the ICC are some catalysts for strengthening the African Court.

182. Yerima, *supra* note 45, at 121 (quoting Anne Pieter V.D.M., *The New African Court on Human and Peoples’ Rights: Towards an Effective Human Rights Protection Mechanism for Africa?* 18 LEIDEN J. INT’L L. (2005).

183. Woldegiorgis, *supra* note 131, at 8–9.

184. *ICC Debate: Africa vs ‘Infamous Caucasian Court’?*, AL JAZEERA MEDIA NETWORK: NEWS (Oct. 28, 2016), <http://www.aljazeera.com/news/2016/10/icc-debate-africa-infamous-caucasian-court-161028142708060.html>.

Essay: Justice Thurgood Marshall, Great Defender of First Amendment Free-Speech Rights for the Powerless

DAVID L. HUDSON, JR.*

CONTENTS

INTRODUCTION	167
INMATES	169
PUBLIC EMPLOYEES.....	172
PUBLIC SCHOOL STUDENTS	174
CONCLUSION	176

INTRODUCTION

When considering the U.S. Supreme Court Justices who are most protective of the First Amendment, a standard litany of names is listed: Oliver Wendell Holmes and Louis Brandeis are referred to as the fathers of the First Amendment;¹ Hugo Black² and William O.

* David L. Hudson, Jr. is a Jackson Legal Fellow for the Foundation for Individual Rights in Education (FIRE) and a Newseum Institute First Amendment Fellow. He teaches classes at Vanderbilt Law School, Belmont University School of Law, and the Nashville School of Law. He would like to thank Leslie Gielow Jacobs, Stephen Wermiel, Azhar Maheed, and Peter Joy for reading earlier versions of the essay.

1. David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 862 (1986) (referring to Justices Holmes and Brandeis as “two strong fathers of the First Amendment.”); Bernard Schwartz, *Supreme Court Superstars: Ten Greatest Justices*, 31 TULSA L.J. 93, 117-18 (1995) (praising Justice Holmes for the development of the clear and present danger test in First Amendment jurisprudence); Thomas Healy, *The Great Dissent: How Oliver Wendell Holmes Changed His Mind – and Changed the History of Free Speech in America* 7 (2013) (“Holmes’s dissent in *Abrams* marked not just a personal transformation but the start of a national transformation as well.”); Elizabeth Todd Bryan, *Louis D. Brandeis: An Interdisciplinary Retrospective A Progressive Mind: Louis D. Brandeis and the Origins of Free Speech*, 33 TULSA L. REV. 195, 210 (2017) (concluding that “Brandeis played the key role in the shaping of the jurisprudence for the freedom of speech.”).

2. Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1234-39 (2002) (describing Justice Black’s commitment to the First Amendment as part of his significant legacy on the Supreme Court).

Douglas³ receive kudos for their defenses of free-speech; William J. Brennan deservedly receives a lion's share of attention;⁴ and the oft-overlooked Frank Murphy receives praise for his usually keen defense of civil liberties.⁵

John Paul Stevens has received kudos for his free-speech populism.⁶ In more recent times, Anthony Kennedy⁷ and Chief Justice John G. Roberts, Jr.⁸ have emerged as something of free-speech defenders. Even Clarence Thomas has received praise for his strong defense of commercial speech.⁹

One Justice who has been underappreciated for his First Amendment jurisprudence is Justice Thurgood Marshall. Perhaps this is because some pay more attention to Marshall's pivotal role as a Supreme Court advocate in school desegregation and as "Mr. Civil Rights,"¹⁰ focus on his opinions on racial discrimination,¹¹ consider his

3. Hon. Stephen Reinhardt, *William O. Douglas Lecture: Whose Ox is Gored?*, 35 GONZ. L. REV. 1, 10 (1999) (describing Justice Douglas as a "free speech purist."); Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480, 1482 (describing Justice Douglas as moving toward an absolutist position on the First Amendment).

4. Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech: A First Amendment Odyssey*, 139 U. PA. L. REV. 1333, 1333 (1991) ("During his long tenure on the Court, Justice Brennan established himself as one of the staunchest defenders of the freedom of speech the Court has ever known."); David H. Souter et al., *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 23, 25 (1997) ("In his equal protection and First Amendment jurisprudence, Justice Brennan elaborated a broad conception of democratic political culture, as expansive as the idea of a democratic way of life.").

5. David L. Hudson, Jr., Justice Frank Murphy: 'Champion of First Amendment Freedoms', NEWSEUM INSTITUTE (Nov. 26, 2001), <http://www.newseuminstitute.org/2001/11/26/justice-frank-murphy-champion-of-first-amendment-freedoms/>.

6. See Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens' Free Speech Jurisprudence*, 74 FORDHAM L. REV. 2201, 2202 (2006) ("This substantively pragmatic approach to free speech controversies, filtered through a pragmatic judicial methodology, has led Justice Stevens to a populist focus on disparities in social power that can exclude economically and politically marginal speakers from public debate.").

7. See Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994-2000*, 48 UCLA L. REV. 1191 (2001) (ranking Justice Kennedy as the Justice most often who votes to protect freedom of speech).

8. See David L. Hudson, Jr., Chief Justice Roberts and the First Amendment, Knoxville News Sentinel (April 27, 2011) <http://archive.knoxnews.com/opinion/columnists/david-l-hudson-jr-chief-justice-roberts-and-the-first-amendment-ep-404857472-357886211.html>.

9. See generally David L. Hudson, Jr., *Justice Clarence Thomas: The Emergence of a Commercial Speech Protector*, 35 CREIGHTON L. REV. 485 (2002).

10. See James O. Freedman, *Thurgood Marshall: Man of Character*, 72 WASH. U. L.Q. 1487, 1494-95 (1994) (noting Marshall's advocacy in Brown as his "crowning achievement" and noting the press called him "Mr. Civil Rights."); see also Sherilynn Ifill, *Thurgood Marshall*, 68 N.Y.U. L. REV. 220, 220 (1993) ("It is impossible to work as a civil rights attorney without feeling the enduring presence of Thurgood Marshall.").

11. Gay Gellhorn, *Justice Thurgood Marshall's Jurisprudence of Equal Protection of the Laws and the Poor*, 26 ARIZ. ST. L.J. 429 (1994).

path-breaking work for public interest advocacy,¹² or diminish his jurisprudence as a follower of Brennan.¹³

This is a tragedy of sorts because Justice Thurgood Marshall consistently defended free-speech principles in his years on the U.S. Supreme Court.¹⁴ This essay explains that Marshall's passionate defense of freedom of expression can be seen most clearly in his defense of free-speech rights even when the government acts not as sovereign, but as warden, employer, or educator. In other words, Marshall's commitment to free-speech is shown most forcefully by how he consistently protected the free-expression rights of inmates, public employees, and public school students.

INMATES

Justice Marshall's jurisprudence reveals a consistent pattern of expanding the constitutional rights of prison inmates. He wrote the Court's opinions establishing a right to medical care¹⁵ and the right to a law library to ensure access to the courts.¹⁶ Marshall consistently emphasized that prisoners do not forfeit all of their First Amendment free-speech rights by virtue of their incarceration. As Professor Melvin Gutterman explained: "He had a sense, perhaps more than most of his colleagues, that there are real people living in the overcrowded facilities and that they matter."¹⁷

His commitment to prisoner rights can be seen most directly by his concurring opinion in *Procunier v. Martinez*, a case involving challenges to the California Department of Corrections mail censorship provisions and bans on law students and paralegals interviewing in-

12. Julius Chambers, *A Tribute to Justice Thurgood Marshall: Thurgood Marshall's Legacy*, 44 STAN. L. REV. 1249, 1250-55 (1992).

13. Donna F. Coltharp, *Writing in the Margins: Brennan, Marshall, and the Inherent Weaknesses of Liberal Judicial Decision-Making*, 29 ST. MARY'S L.J. 1, 3 (1997) (noting that some of Justice Brennan's law clerks referred to Justice Marshall as Justice Marshall-Brennan.).

14. Judge Lynn Adelman, *The Glorious Jurisprudence of Thurgood Marshall*, 7 HARV. L. & POL'Y REV. 113, 129 (2013) ("On the Supreme Court, Marshall almost always voted for the free-speech claimant."); N. Douglas Wells, "Thurgood Marshall and 'Individual Self-Realization' in First Amendment Jurisprudence," 61 TENN. L. REV. 237, 238 (1993) ("A careful reading of Justice Marshall's writing reveals that he was a vigorous and principled proponent of the First Amendment."); David L. Hudson, Jr., "Justice Marshall: Eloquent First Amendment Defender," Newseum Institute, Feb. 4, 2013, at <http://www.newseuminstitute.org/2013/02/04/justice-marshall-eloquent-first-amendment-defender/>.

15. *Estelle v. Gamble*, 429 U.S. 97 (1976).

16. *Bounds v. Smith*, 430 U.S. 817 (1977).

17. Melvin Gutterman, *The Prison Jurisprudence of Justice Thurgood Marshall*, 56 M.D. L. REV. 49, 49 (1997).

mates.¹⁸ The Court subjected prison regulations to a form of intermediate scrutiny and found that many of the regulations were unconstitutional.¹⁹

In his concurring opinion, Justice Marshall went further than his colleagues in criticizing the State's justifications for reading inmate mail. "The mails provide one of the few ties inmates retain to their communities or families—ties essential to the success of their later return to the outside world," he wrote.²⁰

Marshall explained in beautiful language,²¹ the importance of First Amendment freedoms for inmates who are otherwise cut off from the outside world:

The First Amendment serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. . . . When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded.²²

Procunier v. Martinez represented the high point for prisoner rights.²³ Sadly, the Court reduced prisoner constitutional protections more than a decade later in *Turner v. Safley*.²⁴ In this decision, the Court significantly reduced the standard of review to a form of rational basis – a "reasonably related to legitimate penological interests" standard.²⁵ Marshall joined Justice John Paul Stevens' dissenting opinion.

Marshall continued his passionate defense of inmate First Amendment rights in his dissenting opinion in *Jones v. North Carolina Prisoners' Labor Union*.²⁶ The case involved a prison labor union's challenges to several regulations adopted by the state of North Caro-

18. *Procunier v. Martinez*, 416 U.S. 396 (1974).

19. *Id.* at 416.

20. *Id.* at 426.

21. Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L.L. REV. 443, 456 (1998).

22. *Procunier*, 416 U.S. at 427.

23. David L. Hudson, Jr., *Remembering the High Point of Prisoner Rights*, NEWSEUM INSTITUTE (Apr. 29, 2011) <http://www.firstamendmentcenter.org/remembering-the-high-point-of-prisoner-rights/>.

24. *Turner v. Safley*, 482 U.S. 78 (1987).

25. See David L. Hudson, Jr., *Turner v. Safley: High Drama, Enduring Precedent*, NEWSEUM INSTITUTE (May 1, 2008) <http://www.newseuminstitute.org/2008/05/01/turner-v-safley-high-drama-enduring-precedent/>.

26. See *Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119, 139 (1977).

lina. These regulations included: (1) a ban on inmates soliciting other inmates to join the prison labor union, Prisoners' Labor Union; (2) a ban on inmates meeting with other inmates about the union; and (3) a ban on bulk mailings concerning the union.²⁷

A three-judge federal district court enjoined prison officials from instituting the regulations, writing: "There is not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions."²⁸ On appeal, the U.S. Supreme Court reversed, upheld the policies, and ruled in favor of prison officials. The majority reasoned that the lower court started off incorrectly by not according appropriate deference to prison officials.²⁹ The majority determined that group activity of prisoners in union activities "would pose additional and unwarranted problems and frictions in the operation of the State's penal institutions."³⁰ The majority also dismissed the challenge to the prohibition on bulk mailings, writing that there were still other means of sending mail to inmates.³¹

Marshall dissented. He accused his colleagues of "tak[ing] a giant step backwards" towards the view that prisoners were simply "slaves of the state."³² He acknowledged that running a prison was a challenging undertaking,³³ but explained that courts cannot "blindly defer to the judgment of prison administrators."³⁴ According to Marshall, prison wardens naturally want to suppress disorder to avoid public criticism; "[c]onsequently, prison officials inevitably will err on the side of too little freedom."³⁵

Addressing the regulations, Marshall deemed them easily unconstitutional. He wrote that the solicitation ban was "particularly vulnerable to attack."³⁶ He said it made little sense to allow the inmate to exist in principle but then prohibit inmates from soliciting other inmates to join. He also found little trouble in determining the bulk

27. *Id.* at 121.

28. *Id.* at 124.

29. *Id.* at 125.

30. *Id.* at 129.

31. *Id.* at 131.

32. *Jones*, 433 U.S. at 139, citing *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871) (J. Marshall, dissenting).

33. *Id.* at 141.

34. *Id.*

35. *Id.* at 141-42.

36. *Id.* at 144.

mailing ban unconstitutional, because it clearly was being used to bolster the solicitation ban.³⁷

Finally, Marshall addressed the ban on union meetings in the prison. He noted that the prison's two expert witnesses testified at the district court level that union groups generally play a constructive role in prisons.³⁸ Prison officials claimed that union meetings are risky and could lead to disruption. Marshall responded in classic First Amendment lore: "The central lesson of over a half century of First Amendment adjudication is that freedom is sometimes a hazardous enterprise, and that the Constitution requires the State to bear certain risks to preserve it."³⁹ He acknowledged that prison officials could regulate the time, place, and manner of union meetings, but "cannot outlaw them altogether."⁴⁰

As indicated earlier, Marshall later joined in Justice Stevens' dissent in *Turner v. Safley*,⁴¹ a predictable result for the Justice who seemingly cared most about inmates' individual self-fulfillment and ability to express themselves. In *Safley*, the U.S. Supreme Court adopted a rational-basis type standard for evaluating restrictions on inmates' constitutional rights. Under this standard, prison regulations were constitutional as long as they are "reasonably related to legitimate penological interests" such as safety or rehabilitation.⁴² The standard has led to a near insurmountable hurdle in many prisoner rights cases.⁴³

PUBLIC EMPLOYEES

Justice Marshall consistently voted for public employees in First Amendment free-speech cases while on the Court. Most notably, he wrote the Court's seminal public employee, free-speech decision *Pickering v. Bd. of Education*.⁴⁴ In that decision, the Court ruled that public school officials in Illinois violated the free-speech rights of former science teacher Marvin Pickering, when they fired him for writing a letter-to-the-editor, critical of the school board's allocation of mon-

37. *Id.* at 144-45.

38. *Id.* at 145.

39. *Id.* at 146.

40. *Id.*

41. *Turner v. Safley*, 482 U.S. 78 (1987).

42. *Id.* at 89.

43. HUBSON, *supra* note 25.

44. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

ies.⁴⁵ Pickering had criticized vehemently, the building of a new football field, instead of completed classrooms.⁴⁶

Pickering lost in the Illinois state courts but appealed all the way to the U.S. Supreme Court. Some initially dismissed the dispute as an insignificant case about a public school teacher.⁴⁷ However, the Court's decision remains the landmark decision for public employee First Amendment cases.⁴⁸

Marshall explained that "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."⁴⁹ Marshall explained that Pickering's letter touched on matters of public concern, or importance, to the community and that his statements did not detrimentally impact "close working relationships."⁵⁰ Marshall noted that public school teachers are the persons most likely to be the most informed members of the community on school finance and funding issues.⁵¹

Marshall joined Justice Brennan's dissenting opinion in *Connick v. Myers*,⁵² a case which emphasized the power of public employers to punish public employees when they engage in speech that causes disruption or impairs harmony in the workplace. The case involved the legendary New Orleans District Attorney Harry Connick, Sr. (the father of the famous musician⁵³) who fired one of his assistant district attorneys for circulating a questionnaire critical of the office's functioning. Brennan wrote in his dissent that the majority in *Connick* had "distorted" the balancing that Marshall had envisioned in *Pickering*.⁵⁴

In a lesser known case, Marshall filed the solitary dissent in *Smith v. Arkansas State Highway Employees*.⁵⁵ The Court determined that the Arkansas State Highway Commission could require employees to

45. *Id.* at 566.

46. *Id.* at 566.

47. David L. Hudson, Jr., *Teacher Looks Back On Letter That Led To Firing – And Supreme Court Victory*, NEWSEUM INSTITUTE (July 10, 2001), <http://www.newseuminstitute.org/2001/07/20/teacher-looks-back-on-letter-that-led-to-firing-and-supreme-court-victory/>.

48. *Id.*

49. *Pickering*, 391 U.S. at 568.

50. *Id.* at 570.

51. *Id.* at 572.

52. *Connick v. Myers*, 461 U.S. 138 (1983).

53. Harry Connick, Jr. is one of the world's best known jazz musicians and a popular actor. See <https://www.harryconnickjr.com/>.

54. *Myers*, 461 U.S. 138, 157-58 (Brennan, J., dissenting).

55. *Smith v. Arkansas State Highway Emp.*, Local 1315, 441 U.S. 463, 466-67 (1979).

submit grievances directly to the employer rather than through its union, rejecting the idea that this requirement violated employees' First Amendment rights of speech, petition, and association.⁵⁶ Marshall questioned his colleagues' summary handling of the case writing: "I decline to join a summary reversal that so cavalierly disposes of substantial First Amendment issues."⁵⁷

Marshall also wrote the Court's majority opinion in *Rankin v. McPherson*, protecting the free-speech rights of a clerical employee in a Texas constable's office who was fired for making a negative remark about President Ronald Reagan.⁵⁸ Ardith McPherson allegedly told her boyfriend and co-worker upon learning of an assassination attempt on the President: "Shoot, if they go for him again, I hope they get him."⁵⁹ She also spoke negatively about the President cutting welfare, Medicaid and similar programs.⁶⁰ Constable Walter Rankin fired her for her speech.⁶¹

Marshall determined that McPherson clearly spoke on a matter of public concern, the initial requirement in public employee free-speech cases.⁶² He noted that much of her speech was political speech critical of a political leader.⁶³ As for the Constable's interest, Marshall noted that the comment was made in private, out of the public eye and that the comment was "unrelated to the functioning of the office."⁶⁴ Marshall also noted that, as a clerical employee, McPherson's statements would not be attributed to the Constable's office.⁶⁵

PUBLIC SCHOOL STUDENTS

Justice Marshall also consistently voted for public school students in First Amendment cases. He joined the majority of the Court in the landmark student-speech decision, *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, in which seven justices ruled that public school officials violated the free-speech rights of three Iowa students who wore black peace armbands to school to protest the Vietnam War.⁶⁶ The

56. See generally *Smith*, 441 U.S. 463.

57. *Smith*, 441 U.S. 463, 467 (Marshall, J., dissenting).

58. See *Rankin v. McPherson*, 483 U.S. 378 (1987).

59. *Id.* at 381.

60. *Id.* at 381.

61. *Id.* at 382.

62. *Id.* at 386.

63. *Id.*

64. *Id.* at 389.

65. *Id.* at 391-92.

66. *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969).

Court declared that public school officials could not censor student expression unless they could reasonably forecast that the student speech would cause a substantial disruption of school activities or invade the rights of others.⁶⁷

While Marshall did not write the Court's opinion in *Tinker*, he made his presence felt at the oral argument with his incisive questioning of the school board's attorney. At oral argument, Marshall questioned whether the student's wearing of the armbands really caused a disruption. He asked how many students wore the armbands. Upon receiving the answer of seven, Marshall asked: "Seven out of eighteen thousand, and the school board was afraid that seven students wearing armbands would disrupt eighteen thousand. Am I correct?"⁶⁸ Legal historian John W. Johnson wrote that, "Marshall was another sure vote for the students in the *Tinker* case."⁶⁹

Tinker represented the high-water mark of student free-speech rights. In the 1980s, a more conservative Court created exceptions to the *Tinker* standard.⁷⁰ The Court created the first exception in *Bethel Sch. Dist. v. Fraser*, ruling that public school officials could punish students for speech that was vulgar, lewd, or plainly offensive.⁷¹ Matthew Fraser delivered a speech nominating a fellow student for elective office that was filled with sexual innuendo. While students giggled and some officials were upset, the speech caused no real disruption. However, school officials suspended him for violating the following no-disruption rule: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."⁷²

Because his speech caused no real disruption, a federal district court and the 9th U.S. Circuit Court of Appeals ruled in favor of Matthew Fraser.⁷³ However, the school district appealed to the U.S. Supreme Court and prevailed. Writing for the majority, Chief Justice Warren Burger declared that "[t]he undoubted freedom to advocate unpopular and controversial views in school . . . must be balanced

67. *Tinker*, 393 U.S. at 508.

68. DAVID L. HUDSON, JR., LET THE STUDENTS SPEAK!: A HISTORY OF THE FIGHT FOR FREEDOM OF EXPRESSION IN AMERICAN SCHOOLS 64 (2011).

69. JOHN W. JOHNSON, THE STRUGGLE FOR STUDENT RIGHTS: *TINKER* v. DES MOINES AND THE 1960s, LANDMARK LAW CASES & AMERICAN SOCIETY 150 (Peter Charles Hoffer & N. E. H. Hull eds., 1997).

70. Hudson, *supra* note 68, at 85-88.

71. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

72. *Id.* at 678.

73. *Id.* at 679-80.

against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."⁷⁴ He added that a chief mission of the public schools was to inculcate moral values.⁷⁵

Justice Marshall, one of only two dissenting votes along with Justice Stevens, wrote a short dissenting opinion because he believed that the school district failed to show that Fraser's speech was disruptive of school activities.⁷⁶ He noted that school officials should have wide latitude in determining what speech is appropriate, but added that "where speech is involved, we may not unquestioningly accept a teacher's or administrator's assertion that certain pure speech interfered with education."⁷⁷

The U.S. Supreme Court created another exception to *Tinker* in *Hazelwood School District v. Kuhlmeier*, ruling that a school principal had the authority to censor articles in the student newspaper that dealt with teen pregnancy and the impact of divorce upon teens.⁷⁸ The Court created a new standard for what it termed "school-sponsored" student speech, or speech that bears the imprimatur of the school: "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."⁷⁹ This rational basis standard creates an easy path to censorship.

Justice Marshall signed on to Justice Brennan's powerful dissenting opinion, which accused the majority of sanctioning "brutal censorship,"⁸⁰ and notably left off the adverb respectfully from his closing two words: "I dissent."⁸¹

CONCLUSION

Justice Thurgood Marshall receives deserved laudation for his civil rights advocacy and his defense of equal-protection values. He certainly receives well-deserved respect as a true racial pioneer. However, he also should be lauded as a First Amendment hero. His colleague and friend, Justice William Brennan, wrote eloquently about

74. *Id.* at 681.

75. *Id.* at 683.

76. *Id.* at 690 (Marshall, J., dissenting).

77. *Id.*

78. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

79. *Id.* at 273.

80. *Id.* at 289 (Brennan, J., dissenting).

81. *Id.* at 291 (Brennan, J., dissenting).

Justice Marshall upon his retirement from the Court stating: “More than any other Justice on the Court, Thurgood Marshall knew what it was like to stand up for unpopular ideas.”⁸² Justice Marshall’s free-speech heroism and commitment to unpopular ideas is best shown by his consistent defense of freedom of speech for those often most vulnerable—the inmate, the public employee, and the public school student.

82. William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 28 (1991).

