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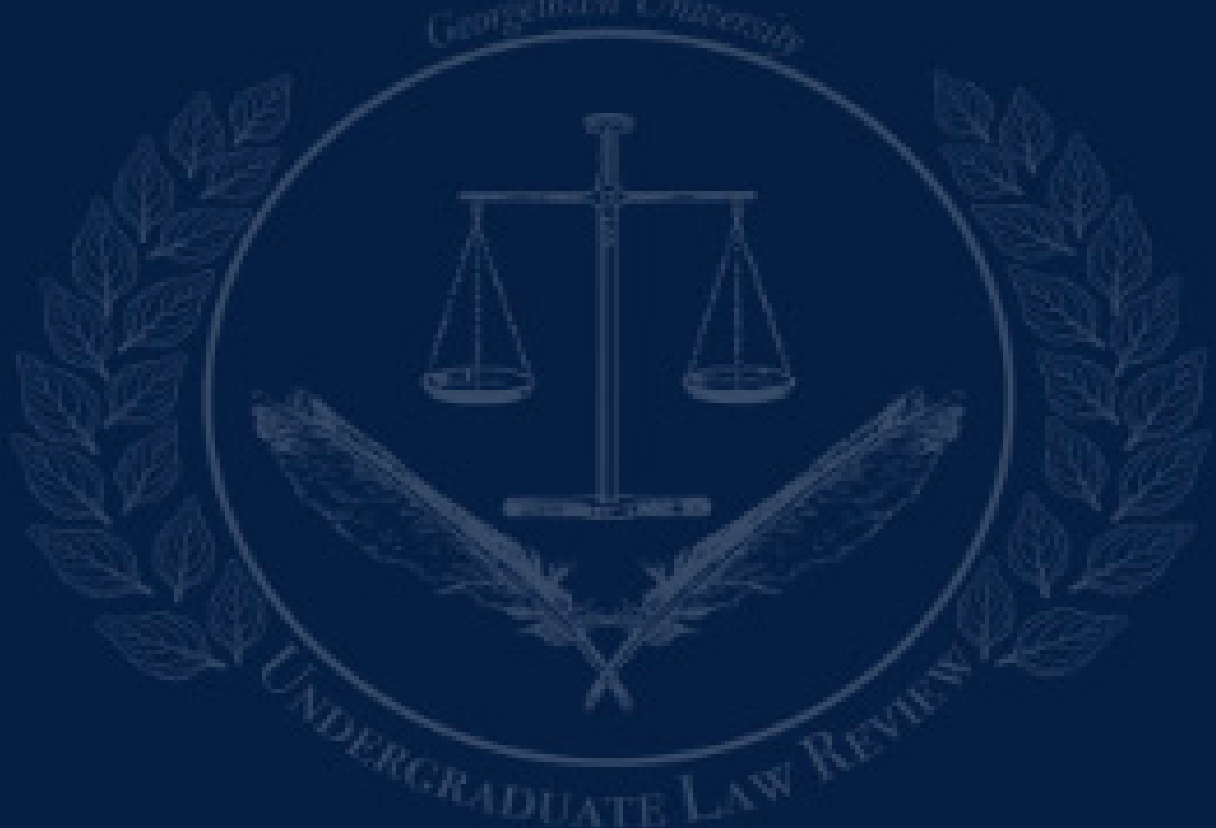

Editor's Note

Dear Reader,

Our editors conducted a rigorous review of graduate and undergraduate submissions to compile Volume VIII of the Georgetown University Undergraduate Law Review. We are thrilled that this edition covers a diverse set of topics ranging from the First Amendment, discrimination in the law, equal pay, and antitrust law to legal issues surrounding Ethiopian genocide and resistance in Kashmir.

We open our edition with articles focused on American constitutional and statutory law. Adam Ginsburg argues that the Supreme Court made a mistake in upholding the Tinker standard on school regulation of speech. Darby Bubp will then analyze the short life of the Line-Item Veto Act and the lessons it reveals about conservative ideology.

We then turn to the intersection of identity and American law in our next section. Irene Chun will begin this section by tracing back the legislative history of Asian American discrimination and how this history ties to the mass shooting of Asian Americans in Atlanta in March, 2021. Siena Hohne will then discuss the Equal Rights Amendment and the impact that LGBTQ+ narratives have had in supporting or opposing the amendment. Finally, Katie Kroft will argue for the need for further legislative action in order to succeed in closing the gender pay gap.

Next, we will explore an intersection of American policies that invoke international law and could have impacts around the world. Ethan Greer, Kelly Anderson, Katherine Martinez, and Bernard Medeiros will examine a new "hipster" approach to antitrust that could have substantial effects on the world's largest corporations. Jack Little will then advocate for some of the most notorious terrorists currently housed in Guantanamo Bay to be moved and prosecuted in civilian criminal courts.

Finally, we will explore various international issues. John Fentener will introduce international jurisprudence through the lens of Kant, and he will apply Kant's work to modern international legal issues. We'll then move to Ethiopia, and Dylan Rothschild will demand that the international community recognize the humanitarian crisis and genocide occurring in Ethiopia. Finally, Anchita Dasgupta will use the horrors experienced in two villages in Kashmir to make larger claims about the multifaceted and complex nature of legal resistance. Please note that these final two articles will discuss sexual assault and violence.

Our management team is grateful for the contributions of our authors. We would also like to thank our editorial staff for their work on this edition. As our editorial staff navigated the return to a somewhat more "normal" life, they displayed great dedication and commitment during the months of rigorous editing they completed to make this edition possible while also supporting our authors.

We hope that you enjoy this edition as a critical reader. The views expressed by the authors do not necessarily represent the views of Georgetown University, GUULR, our management, or our editors. We present these articles not as the final word on these topics, but as the beginning of a thoughtful dialogue we hope you will be spurred to engage in.

Sincerely,

Lauren Scarff

Table of Contexts

“I’m Afraid to Death of Writing a Standard:” Tinker around the edges, or fundamentally alter precedent? B.L. v. Mahanoy and the implications for free speech

Adam Ginsburg
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Abstract

Last year, the U.S. Supreme Court was faced with a case, B.L. v. Mahanoy, that threatened to upend decades of precedent regarding free speech standards. The Court was at a crossroads: cement the status quo, or imagine a new, updated vision of the First Amendment compatible with the digital age we currently live in. It chose the former path. I argue that this decision, while understandable, was nearsighted. The Court should have chosen to update the vaunted Tinker standard while ruling against the plaintiff, B.L., in the case. Instead, it did the opposite, leaving the standard and ruling for the plaintiff. The decision will have ramifications on schoolchildren—and First Amendment rights for everyone—for decades to come.

I. INTRODUCTION

Just over fifty-five years ago, Christopher Eckhardt had an idea. Disgusted with America's actions in Vietnam, he gathered with two like-minded friends, Mary Beth and John Tinker, and hatched a plan. To protest the war, they would wear black armbands to their Des Moines high school from December 16 through New Year's Day, but before they could even put their plan into action, the school caught wind of it, hastily passing a policy forbidding such actions and symbols. Nevertheless, they persisted; they carried through with the plot, and Eckhardt even immediately turned himself in to the principal's office upon arrival.[1] The school followed through on its threat to suspend the perceived miscreants. The students responded by filing suit. Thus, the seeds of a seminal Supreme Court case—one that would shape the lives of millions of children from 1970 through today—were sown.

This case, Tinker v. Des Moines Independent Community School District (colloquially known as Tinker), held that absent any evidence that specific speech or expression contributed to "substantial disruption," schools could not punish students for simply expressing their views. In other words, although it took several years for the case to wind its way through the federal courts, Eckhardt and the Tinkers were eventually vindicated. No longer were schools to be mini autocracies;[2] no longer would students need to fear reprisal for non-disruptive on-campus protest; no longer, as Justice Abe Fortas wrote in the majority opinion, would students be forced to "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[3] Instead, students were free, specifically in the cases of political and religious speech, to express themselves in school without fear of punishment so long as they did not spur substantial disruption with their on-campus speech.

In practice, Tinker forced courts to apply a two-part test in school speech cases: first, ensuring that the challenged behavior amounts to substantial educational disruption, and second, determining if the speech occurred on-campus, which, if it did, would place it under the jurisdiction of school authorities. If speech meets those standards, it may be regulated by schools under Tinker. If not, schools can neither regulate nor punish the speaker.

These guidelines seem simple, but they carry a major problem inherent to them: 2022 is not 1969. What constitutes off-campus speech—or the schoolyard gate, for that matter—is muddled by the social media-driven world in which students live. Does a message sent from off-campus but received on-campus constitute on-campus speech? What about a disappearing message sent under the same circumstances? What even counts as a "campus" in the world of virtual schooling? Given that the distinctions are so hard to parse, should we simply apply Tinker off-campus anyway?

Over the past few years, school administrators have been left to grapple with these difficult questions on their own, and a 2021 Supreme Court case, B.L. v. Mahanoy Area School District unfortunately failed to sufficiently update the standard.

II. BACKGROUND

In late May 2017, high school freshman Brandi Levy was despondent. She was anxious about final exams, had failed to make her local softball team, and worst of all, she had just been relegated to the junior varsity cheerleading team for a second straight season even after trying out for varsity. Frustrated and angry, she commiserated with a friend on a Saturday at the local Cocoa Hut, where they posted a picture—middle fingers raised—to Brandi's snapchat story with the fateful caption, "Fuck school fuck softball fuck cheer fuck everything."[4] The snapchat was visible only to approximately 250 of Brandi's friends and peers and would disappear on Sunday after twenty-four hours—long before, her lawyers note, school would resume on Monday. But that did not stop another cheerleader from saving the image by screenshotting the snap and sharing it with her mother, one of two cheerleading coaches.[5]

The situation escalated. Cheerleaders and non-cheerleaders alike "express[ed] their concerns" about Brandi remaining on the team. In fact, the comments were so controversial that "students were visibly upset and repeatedly for several days brought B.L.'s messages up with the coaches," while one coach's algebra class was regularly interrupted throughout the week.

1 David L. Hudson Jr., Christopher Eckhardt left his mark as student-speech litigant. (January 3rd, 2013), https://www.freedomforuminstitute.org/2013/01/03/christopher-eckhardt-left-his-mark-as-student-speech-litigant/.

2 In 1943, West Virginia State Board of Education v. Barnette held that schools could not compel speech (specifically in the case of forcing students to salute the flag during the pledge of allegiance). That did challenge the 'autocratic' nature of schools; I argue that Tinker, by allowing students to express themselves freely, represented the bursting of an autocratic dam in that sense.

3 Tinker v. Des Moines Independent Community School District, 393 US 503 (1969).

4 Brandi also posted a second snap shortly afterwards, which said, "Love how me and [another student] get told we need a year of jv before we make varsity but that's doesn't matter to anyone else?" This school said it did not rely on this message for its punishment.

5 Mahanoy Area School District v. BL, Brief for Brandi Levy, No. 20-255: 4-5.

As such, "to avoid chaos and maintain a team-like environment," the coaches took action. They claimed Brandi's profane comment violated two team rules: one that prohibits "foul language and inappropriate gestures" and obligates students to "have respect for your school, coaches, teachers, other cheerleaders, and teams when at games...and other events" and another that asserts "[t]here will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet." Invoking these standards—and a general school personal conduct rule which stipulated that "during the sports season," team members must "conduct themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner"—the coaches suspended Brandi from the cheer team for the year but told her she could try out again without restrictions the following year.

Brandi's parents urged the school to reconsider its punishment but to no avail. Outraged and unsatisfied, they filed suit against the district in federal court, alleging Brandi's First Amendment rights had been violated. The trial court, after issuing a temporary injunction reinstating Brandi to the team, eventually agreed, holding that Fraser, a case that created an exception to Tinker allowing schools to punish vulgar speech, could not apply off-campus because Tinker itself did not apply off-campus. Notably, the Court also stated that even if Tinker did apply off-campus, the disruption created by Brandi's actions was not "substantial" enough to warrant the punishment administered by the school. Both lines of reasoning—that Tinker cannot apply off-campus and Brandi's behavior did not pass the "substantial disruption test"—were upheld in the U.S. Circuit Court of Appeals, which in a Fortas-esque manner decreed that Brandi did not "waive her First Amendment rights as a condition of joining the [cheerleading] team."[6] The school district then appealed to the Supreme Court, which granted certiorari to resolve a circuit split, as the Fifth Circuit had held in January 2021 that Tinker does indeed apply off-campus.[7]

Can Schools Regulate Off-Campus Speech?

It is difficult to overstate just how completely school consumes a high school student's life. First, high school students may attend class for seven hours a day. Add sports or theater or other extracurricular activities, and that number may balloon to ten hours a day or even longer spent on the school's campus itself. Students then arrive at home only to allocate hours to homework and studying, tasks which often entails communication with their fellow classmates. Naturally, studies and extracurricular activities such as sports games, theater practice, and more may often spill over into weekends, allowing the school environment to become an omnipresent entity in the average high school student's life. All of this, of course, only comprises the 'official' events associated with the school.

When students are not studying, going to class, or engaging in extracurricular activities, they're likely talking about and engaging in the social aspects of attending high school: going on dates with classmates, feuding with other groups of friends, commiserating over terrible teachers, and the list goes on. Often, such social behavior, and thereby any speech associated with it, can be traced back to some aspect of school.

Even if there were some separation between school and personal life, the nature of our technology-saturated world, especially in the virtual school world during the COVID-19 pandemic has completely blurred those boundaries. Snapchats or texts sent from outside of school may be viewed in school and vice versa. Bullying was once typically confined to the bounds of the school's hallways, but today, the internet enables cyberbullies to reach their victims from anywhere and at any hour of the day. When combined with the fact that different courts have had contradictory rulings on school speech, this lack of clear boundaries between off-campus and on-campus speech has profound consequences. For school officials, it makes investigating punishable infractions and doling out punishment immeasurably harder. For conscientious students, it surely has a "chilling effect," as those afraid of the long arm of school punishment hold their tongues when they otherwise might criticize an aspect of school life.

If the Supreme Court had held that Tinker can apply off-campus, schools would have officially been able to regulate off-campus speech that pertains to them. This, of course, would have had the potential to limit the speech of students who could be punished for speaking out against the school or for simply causing a disruption while also bringing school administration in line with twenty-first-century technological realities.

However, the Court did hold that Tinker does not apply off-campus (as the Third Circuit and Brandi's lawyers assert), and, as such schools will be forced to desist from governing off-campus speech. This result, at first, appears to be a decisive victory for students, who would no longer have to worry about the heavy hand of the school in their off-campus life. Yet, the decision could cause chaos in doling out punishment, as the disputed boundaries of "campus" would be fodder for future

6 Mahanoy Area School District v. BL, Brief for United States, No. 20-255: 3.

7 Kimberly Strawbridge Robinson, U.S. Supreme court takes up CHEERLEADER free Speech Dispute. January 8th, 2021, https://news.bloomberglaw.com/us-law-week/u-s-supreme-court-takes-up-cheerleader-free-speech-dispute.

lawsuits.[89]

It also should be noted that the Court did have the option to avoid the question of the regulation of off-campus speech. The Justices could have ruled that, regardless of whether or not Tinker applies to off-campus speech, Brandi's behavior and the aftermath would not have constituted "substantial disruption" to the school's functioning under Tinker.[10] If they had wanted to avoid the central question without even challenging the definition of a "substantial disruption," they could also have simply ruled that those involved in extracurricular activities are subject to a heightened standard of behavior commensurate with the privilege of engaging in such non-essential activity and that this case was not a school speech case at all. In other words, for Justices "frightened to death of writing a standard," as Chief Justice Roberts said during oral argument, there was indeed a way out.[11]

The District and U.S. Government's Main Argument

The school district's lawyers argued that the First Amendment cannot have an "on/off switch;" rather, schools have always been, and should continue to be, able to regulate off-campus speech "that targets the school environment and substantially disrupts school activities or interferes with other students' rights."[12] They insisted that public schools have always had the ability to do so, and that Tinker did not eliminate that "pre-existing authority." Instead, Tinker clarified that students' First Amendment rights, which they always retain, "must be applied in light of the special needs of the school environment," and any disciplinary authority the school retains is solely related to its interest in avoiding substantial on-campus harm.[13] As such, if preventing such harm is the goal, it should not have mattered where the speech in question occurred, but rather that it occurred at all.

The district also maintained that schools can neither engage in viewpoint discrimination nor unreasonably intrude upon students' home lives. In fact, the only speech schools should be able to regulate, under the school district's proposed standards, is anything specifically directed at the school environment. Any other protected political speech, like a controversial pro-life Instagram post or a political rant, cannot be punished by the school even if it does cause a disruption.

Moreover, free speech is not the only constitutional right that schools have been able to limit. Students eligible to own a gun generally cannot carry it on campus, and the burden of proof needed to search belongings is considerably lower in schools than in the outside world. There is precedent, specifically in Fourth Amendment cases, for searches related to off-campus conduct. The Court should treat the First Amendment the same way.

Critically, the decision to limit Tinker's reach to on-campus behavior invalidated numerous state and local laws, specifically those that pertain to off-campus bullying, the school district argued. According to the district's lawyers, "laws in the District of Columbia and at least 23 States require schools to address off-campus harassment or bullying that substantially disrupts the school environment or interferes with other students' rights."[14] If Tinker were solely applicable on-campus, those rules would be wholly unenforceable. And any "territorial approach," like the one the Third Circuit suggested, would simply sow confusion; after all, what defines "any context owned by the school" or "any school-controlled setting"?[15] Those murky boundaries would risk numerous lawsuits for administrators who simply "guessed wrong."

Precedent has thus allowed schools to govern off-campus speech and reasonably curb students' constitutional rights. Common sense would dictate that schools should be able to regulate such speech if it causes substantial disruption, and any decision to limit Tinker to campus would lead to confusion and the potential repeal of dozens of laws.

Brandi's Lawyers' Main Argument

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8 Mahanoy Area School District v. BL; Brief for School District, No. 20-255: 44.

9 The 3rd Circuit did create a test to determine whether speech occurred off-campus or on-campus, but it does seem vague. The test is as follows: "Campus includes (1) school grounds, (2) any "context owned" by the school, (3) any school-controlled setting, (4) any school-sponsored setting, and (5) speech "that is… reasonably interpreted as bearing the school's imprimatur.""

10 I will address this point later in the paper.

11 Mahanoy Area School District v. B.L. (n.d.). Oyez., oral argument; https://www.oyez.org/cases/2020/20-255.

12 Mahanoy v. B.L.; Brief for School District: 9-10.

13 Id.

14 Id. at 12

15 A territorial approach means allowing Tinker to apply in some areas (territories) while not applying in others.

On the other hand, Brandi's lawyers argued that Tinker has never applied off-campus and that changing that standard would inevitably result in discrimination against students. In fact, the only reason students are subject to reduced speech protections in school is so that they can speak freely outside of school. Subjecting them to the same scrutiny outside of school would limit students' speech and allow schools to overreach in controlling students' lives. Brandi's lawyers argued the current structure of Tinker's "substantial disruption" test is also so vague that it would surely result in content and even viewpoint discrimination, allowing schools to stifle speech that is merely uncomfortable and not truly disruptive. For example, schools have justified punishing students who wore clothing that denounced homosexuality, harsh immigration laws, and slavery itself. With the ability to apply these same punishments to similar conduct outside of school, administrators would have unheard-of power to police and shape student speech.

Brandi's proponents have a convincing argument at face value. If we had expanded Tinker, what lessons would we teach our children? Not to speak out against authority? Not to formulate their own ideas, and to always be looking over their shoulder when they speak? It appears so. Ultimately, engaging in content-based discrimination outside school is antithetical to the purpose of the First Amendment, would have a "chilling effect" on student speech, and would stunt the growth of students' minds.

Furthermore, contrary to what the school district's lawyers argued, this court did not need to expand Tinker to allow schools to address off-campus threats, bullying, and harassment, because those actions are not protected under the First Amendment. As such, the opposition's argument is specious.

The Court's Decision

In an 8-1 decision, the Court held that, while schools do have a limited interest in regulating "some off-campus student speech, the special interests offered by the school are not sufficient to overcome [Brandi's] interest in free expression in this case."[16] The majority opinion, penned by Justice Breyer, went on to point out that schools can, in certain circumstances, regulate off-campus speech, but that in this situation, the district overstepped. Breyer writes, "We do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances."[17] However, they noted that Brandi's behavior and the resulting kerfuffle did not rise to level of significant interest for the school district, for five reasons: (1) Because Brandi's speech "did not involve features that would place it outside the First Amendment's ordinary protection;" (2) because "she did not identify the school in her posts or target any member of the school community with vulgar or abusive language;" (3) because the "the school did not stand in loco parentis," the principle that Brandi's parents deferred parental responsibilities to the school; (4) because Tinker's standard of "substantial disruption" was not met; and (5) because team morale was not significantly harmed by the speech.[18] Due to the reasons outlined above, the Court ruled in Brandi's favor.

III. ANALYSIS

Should Tinker Apply Off-Campus?

For a recent high school student, it is clear that the Tinker standard is outdated, and the current court, while it did not adopt a wholly unreasonable stance, did make a mistake by not updating it. Social media and the internet completely blur the distinction between on-campus and off-campus behavior to the point that efforts to parse tough cases become exercises in futility. Take this realistic thought experiment: if a student sends a Snapchat message from a school bus on the way to school that causes a substantial disruption, he or she would be eligible for punishment under Tinker, but if a student sends the exact same message in his mother's car on the way to school, they could not be punished under Brandi's lawyer's conception of Tinker. Why should the different location or transportation mode matter? In short, it should not. As the school district argued and the majority opinion partially concurred with, the First Amendment should not have an on/off switch. When speech is substantially disruptive—whether it originated on-campus or off-campus—school administrators should be allowed to punish the speaker so long as the speech is specifically directed at the school environment. Any other standard is inconsistent, liable manipulation, and would lead to countless court cases about the exact boundaries of school territory and jurisdiction.

Moreover, we should think of this expansion of Tinker not as the regulation of off-campus speech, but rather as an acknowledgment of the reality that online speech directed at the school is, at this point, impossible to disassociate from

16 Mahanoy Area School District v. B.L., 20-255 Syllabus, 594 U.S. __ (2021).

17 Mahanoy Area School District v. B.L., 20-255, Majority Opinion (2021).

18 Id.

in-person, on-campus speech with that same purpose. School administrators—especially those who are not technologically savvy—cannot be expected to parse the distinction between a Snapchat sent off-campus and received on-campus or vice versa. As such, the Court should have eliminated all ambiguity and simply let Tinker apply in all school speech cases, whether the speech in question occurs on-campus or off-campus. Instead, while it did agree that Tinker could apply outside of school grounds, it watered down such application by arguing that disruptive comments outside of school should be subject to parental discipline first.

That being said, when it comes to bullying, Brandi's lawyers did have a valid argument. Bullying, harassment, and threats have never fallen under Tinker but instead under criminal statutes. The school district cannot justify this argument as a reason to apply Tinker off-campus, but that does not invalidate their entire argument. Instead, the Court, in its opinion, did right by making abundantly clear that Tinker applies to cases that cause "substantial disruption" but do not fall under the realm of the aforementioned criminal penalties.[19]

What Does "Substantial Disruption" Even Mean?

Brandi's lawyers argued that a simple Snapchat message sent on a Saturday that disappeared by Sunday and caused a relatively small disturbance for a few days does not meet the standard of "substantial disruption" to school activities, and the majority opinion agreed. After all, small electronic squabbles happen all the time; this one just happened to involve a coach who became unreasonably offended by a comment that was clearly not directed at her. Moreover, as Justice Kavanaugh noted during the April 28th oral argument, do high school kids not have the right to privately "bl[o]w off steam like millions of other kids have when they are disappointed about being cut from the high school team[?]"[20, 21] On the other hand, both cheerleaders and non-cheerleaders were clearly shaken by the comment, which went on to interrupt a cheerleading coach's algebra class numerous times and was cause for consternation and debate during other class periods.

This entire debate raises an important point: what amounts to "substantial disruption?" The answer is that it is almost completely up to schools, and, unfortunately, in the way this test is currently applied, it provides too much leeway to schools to determine what counts. Should a t-shirt with an ostensibly pro-life Bible verse, if it causes distraction, be subject to this standard? If we agree that Tinker should be applied off-campus, how about a similar pro-life comment on someone's Facebook post? In these situations, regulation by schools would contravene the exact point of Tinker in the first place: to allow students to express their political beliefs peacefully in a school environment. But in the case of the first hypothetical, schools have disciplined students for such attire, illustrating that the "substantial disruption" standard is too broad and especially so if it applies to off-campus speech.

Though the Court agreed Tinker does apply off campus, it should have adopted the standard set forth by Brandi's lawyers: "limit [Tinker's] application to situations where students intend to cause substantial disruption."[22] This solution would have addressed the problem of an overly broad standard while also still giving schools an avenue to discipline substantially disruptive speech. If the intent of the pro-life t-shirt is simply to protest abortions, it should be allowed, but if, for example, the intent of wearing the shirt is to mock a group of girls the perpetrator knows have had abortions, it would amount to a substantial disruption. Of course, having to prove intent in such cases could be difficult for school administrators, but certainly not impossible. After all, students acting in that manner would probably want to make their intent known to the targets. This "heightened substantial disruption" standard would have threaded the needle between overly broad applications of Tinker and not punishing actions that cause "substantial disruption."

Unfortunately, the Court failed, leaving the current Tinker standard as is. Justice Alito, in a concurring opinion, recognized the issues this may cause, writing,

> There are more than 90,000 public school principals in this country and more than 13,000 separate school districts. The overwhelming majority of school administrators, teachers, and coaches are men and women who are deeply dedicated to the best interests of their students, but it is predictable that there will be occasions when some will get carried away, as did the school officials in the case at hand.[23]

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19 Mahanoy v. B.L.; Brief for B.L.; pg. 11.

20 Ian Millihiser, The free speech case so complicated it seems to have stumped the Supreme Court. April 28th, 2021, https://www.vox.com/2021/4/28/22407813/supreme-court-cursing-cheerleader-mahanoy-school-free-speech-tinker-kavanaugh-sotomayor.

21 Kavanaugh himself is a youth basketball coach.

22 Mahanoy v. B.L.; Brief for B.L.: 11.

23 Mahanoy Area School District v. B.L., 20-255, Concurring Opinion (2021).

In other words, because the power to determine "substantial disruption" stays in the hands of school administrators and the standard remains as is, school administrators will inevitably and repeatedly overstep their bounds and violate student rights.

How Should the Case Have Been Decided?

Now that I have argued that the Court should have extended Tinker off-campus with a "heightened substantial disruption" standard, how should the Court have ruled on the specifics of Brandi's petition? Did her speech meet the heightened standard? Or was it a case of the school district and her coaches overreacting?

Actually, the Court should have taken a third, invisible option, ruling that Brandi's disruptive speech, because it occurred in the context of an extracurricular activity (which can have heightened standards for participation) and the punishment itself was limited to that extracurricular activity, is not school speech at all, and the coaches thus have a right to punish it.[24] Justice Gorsuch, during oral arguments, opened up this line of thought, asking, "Why doesn't it make a difference that the—that the speech here was addressed by—in the context of an extracurricular activity and that the standards there may be different from, higher than what may be required of all students in the school environment?" [25]

His inquiry made sense; participating in extracurricular activities is a privilege and not a right. Schools can and do have the authority to revoke such privileges—for instance, in the case of academic probation. Considering that they are reflecting upon the school through their participation, participants in these activities must inherently understand that, by joining an extracurricular activity, they are subject to higher standards; if they do not meet them, they can be punished. But schools cannot abridge the right to attend school in the first place just because they do not like certain political speech. In Tinker, Christopher Eckhardt and the Tinkers were suspended from school. In the case currently presented before the Court, Brandi was merely suspended from the cheerleading team. That distinction between the right to attend the school and the privilege of participating in extracurricular activities is at the heart of this dispute, and the reason why this case does not actually fall under Tinker. It is also the reason why the Court should have ruled against Brandi.

Let us think further on the nature of cheerleading as a sport. Even if we put aside the reality that a major qualification of cheerleading is enthusiastically supporting one's school, cheerleaders depend on their teammates for their physical safety. No coach would or should allow an obviously and vocally disgruntled cheerleader to stand at the bottom of the pyramid where she could, with a subtle movement, put her teammates in danger and cause it all to crash down. Thus, it is logical for the coaches to not want Brandi on their team, where she could lower morale and potentially put other girls in danger.

There is no known standard asserting that athletes have a right, no matter how talented they are, to be on a certain athletic team. All decisions to keep or cut players are solely at the coach's discretion. If a cheerleading coach decides to cut a talented flyer during tryouts because it seems the girl has a negative attitude and will harm team chemistry, they are well within their rights not to take her on the squad.[26] There is nothing different about the coach's decision in Brandi's case. Her judgment was that the best and most cohesive junior varsity team did not include Brandi that year, and so she cut her. It does not matter what caused her to make that decision. As the coach of an extracurricular activity, it was her decision—and hers alone—to make.

IV. CONCLUSION

The coach's decision to kick Brandi off the team does not fall under Tinker, a reality the Court failed to recognize when it ruled in her favor. While the Justices should have ruled against Brandi on the grounds that coaches have the authority to decide who is on the team, they failed to address the looming question of Tinker: should it apply off-campus or not? There are too many confusing snap decisions that school administrators have to make every day to leave this issue muddled by a circuit split and the realities of modern technology. For the sake of clarity, the Court should have provided clear guidance to update the existing Tinker standard for the present day. As outlined above, the Court should have allowed Tinker to apply off-campus but tightened the standard from simple "substantial disruption" to "heightened substantial disruption" that

24 The majority opinion in Vernonia (another school-related Supreme Court case) stated: "By choosing to 'go out for the team,' [athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." That is the legal justification for the argument I am making.

25 Mahanoy Area School District v. B.L. (n.d.). Oyez. Retrieved May 3, 2021, from https://www.oyez.org/cases/2020/20-255

26 The term "flyer" denotes the girl who is usually one of the lightest and is sent "flying" by her other team members.

Conservative Lessons Learned from the Line-Item Veto's Birth and Demise

Darby Bubp

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Abstract

On April 9, 1996, President Bill Clinton used a total of 16 pens to sign the Line-Item Veto Act into law. In accordance with tradition, President Clinton awarded these pens to "those who did the most for its passage": former presidents Reagan, Ford, Bush, and Carter (the last of whom, ironically, did not support the veto during his presidency). Although Clinton himself was a Democrat, he posited a fiscally conservative argument for an executive item veto, and the Line-Item Veto Act likely would not have made its way to the president's desk in 1996 had it not received support from fiscally conservative Republicans in both houses. However, two years later, the Supreme Court found Clinton's executive item veto unconstitutional, and they justified their decision with a textualist majority opinion that made conservative appeals to tradition. This essay seeks to answer two fundamental questions about the 1996 Line-Item Veto Act: (i) why did Republicans support an executive item veto when a Democrat held the presidency? and (ii) how does each "conservative" argument—that of the supporters of the Line-Item Veto Act and of the textualist Supreme Court majority—satisfy or fail to satisfy the conditions of conservatism?

I. INTRODUCTION

Its name cannot be found in the Constitution, but the presidential veto is a staple of American politics. The veto began as a somewhat ceremonial power only used by early presidents to terminate laws which clearly violated the Constitution, but the fourth president to use the veto, Andrew Jackson, shocked the nation in 1832 by declaring publicly that he would use his presidential veto to pursue his personal political agenda.[1] Just like that, the modern presidential veto was born. Nearly 200 years later, the veto has become a cornerstone of the presidency. However, there is one veto that will likely never find its way to the Oval Office again: the line-item veto.

The presidential line-item veto was established in 1996 under the presidency of Democrat Bill Clinton. Ironically, most of the support for Clinton's Line-Item Veto Act came not from the president's own party, but from fiscally conservative congressmen on the other side of the aisle. In fact, of the bill's twenty-nine cosponsors, twenty-eight were Republicans.[2] Furthermore, of the twenty-seven senators who ultimately voted "nay," all but two were Democrats.[3] The bill was signed into law on April 9, 1996, and on the following day, six members of Congress—five of whom were Democrats—challenged the constitutionality of President Clinton's line-item veto.[4] Two years later, the Supreme Court declared the Line-Item Veto Act unconstitutional. In the majority opinion, Justice Stevens justified the Court's decision to strike down the act, which had been championed by fiscal conservatives, with conservative appeals to the Constitution.

This essay analyzes the curious history of the 1996 Line-Item Veto Act. Section I provides a background of the line-item veto and posits an explanation for why the 1996 Republican-majority Congress chose to strengthen the legislative veto of Democrat Bill Clinton. Then, Section II examines arguments from the act's supporters in Congress and from its opponents on the Supreme Court to determine which group embodies the more "conservative" ideology regarding the line-item veto.

II. BACKGROUND

The Road to the Line-item Veto

In principle, the line-item veto, or "item veto," allows an executive to reject a specific aspect or "line" of a bill while signing the remaining sections into law. When the Confederacy seceded from the United States in 1860, a provision granting the presidential line-item veto was included in the Confederate Constitution. Although Jefferson Davis, the president of the Confederacy, never used this power,[5] Georgia and Texas included similar line-item veto provisions in their Reconstruction constitutions after the Civil War. By 1900, two-thirds of all states had granted the line-item veto to their governors.[6]

In 1876, President Ulysses S. Grant became the first U.S. president to formally request that Congress grant him the line-item veto. Following Grant, every subsequent president except William Howard Taft and Jimmy Carter replicated this request,[7] but none succeeded in pushing line-item veto legislation through Congress until 1996. Although Bill Clinton was ultimately the president who signed the Line-Item Veto Act into law, this essay credits a different president with sparking the executive item veto's success: President Ronald Reagan.

Angered by the frequent passage of omnibus legislation, Reagan claimed that the modern legislative branch lacked the fiscal discipline necessary to significantly reduce the federal deficit. He accused Congress of having grown increasingly reliant on pork-barreling techniques to construct voting majorities, and he presented as evidence a bill that was so stuffed with legislative pork that it was 3,296 pages long and weighed 43 pounds.[8] Reagan's solution to this issue was the line-item

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1 History.com Editors, Veto, HISTORY.COM (Nov. 17, 2017), https://www.history.com/topics/us-government/veto.

2 Roll Call Vote 104th Congress - 1st Session, U.S. Senate: U.S. Senate Roll Call Votes 104th Congress - 1st Session (Jan. 16, 2020), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=1&vote=00115#top.

3 Roll Call Vote 104th Congress – 1st session, supra note 4.

4 Raines v. Byrd, 521 U.S. 811 (1997).

5 Marcia Lynn Whicker & Raymond A. Moore, The Presidential Line Item Veto: A Computer Simulation Analysis, 18, Pres. Stud. Quart. 143, 143-55 (1988).

6 Id. at 3.

7 Gerhardt, supra note 2, at 235.

8 George Will, Line-Item Foolishness, Politico (Oct. 21. 2007), https://www.realclearpolitics.com/articles/2007/10/lineitem_

veto, a "powerful tool against wasteful and extravagant spending"[9] that he had wielded firsthand during his tenure as the governor of California.

President Reagan relentlessly pursued the executive line-item veto. In his 1984 State of the Union Address, he formally requested that Congress pass a constitutional amendment to establish the veto. Then, he peppered Congress with further requests in his 1984 annual budget message and his 1985 State of the Union Address.[10] When this strategy was not successful on its own, President Reagan articulated his argument for the line-item veto directly to voters in interviews, speeches, and public statements, evoking his presidential bully pulpit.

Much of Reagan's success with the line-item veto came from his astonishing popularity among voters. Reagan's 1980 campaign capitalized on conservative dissatisfaction with issues like excessive government, low defense spending, and the corruption of traditional values to build a winning conservative coalition of rural whites, employers of all sizes, and worshipers of almost every western organized religion (except Islam).[11] In his 1984 landslide presidential victory, Reagan received the most electoral votes of any American presidential candidate (525 of the possible 538),[12] bringing a newfound confidence to Conservative voters and making the strength of his coalition undeniable. In the words of Newsweek's cover story on the topic, "grown men don't tend to worship other grown men—unless, of course, they happen to be professional Republicans, in which case no bow is too deep, and no praise too fawning, for the 40th president of the United States: Saint Ronald Reagan."[13] At the conclusion of his presidency, President Reagan had an overall end-of-term job approval rating of 63%—the highest approval rating of any president in recent history—and his approval among Republicans was an astonishing 93%.[14] Reagan's remarkable popularity among voters translated to an extraordinarily powerful presidential bully pulpit; when "the Great Communicator"[15] appealed directly to his constituents, he had an unprecedented ability to pressure Congress toward his desired policies. So, when President Reagan voiced his desire for a presidential line-item veto, the American people listened.

Reagan's efforts brought the line-item veto to center stage and sparked a wave of action. Conservative authors, organizations, and analysts began publishing articles in support of Reagan's request, and statistical studies and simulations were funded to predict the impact of a presidential line-item veto on the federal debt.[16] Finally, after nearly 110 years of fruitless presidential requests, Republicans in both houses introduced a wave of proposals to establish the executive line-item veto.[17] Although the proposed bills eventually all failed—likely because Democrats had long held a majority in the House—President Reagan's efforts had laid the foundation for the Line-Item Veto Act of 1996.

Prior to Reagan's presidency, congressmen from either party generally supported the line-item veto only when the sitting president was of the same party.[18] However, after President Reagan, the executive line-item veto became a core priority of the Republican Party, and Republican members of Congress continued to advocate for the policy even when Democrat Bill Clinton became president. This change likely occurred because Reagan's public support for the line-item veto framed the policy as a Republican issue. Reagan's predecessor, Democratic President Jimmy Carter, did not support the executive item veto,[19] so when Reagan was elected, no Democratic president had advocated for a presidential line-item veto since President Lyndon B. Johnson 25 years prior. Like most presidents, Johnson's requests for the line-item veto were far less public than Reagan's, and the policy was never listed as a priority in any of Johnson's State of the Union addresses.[20]

foolishness.html.

9 Whicker & Moore, supra note 7, at 3.

10 Id. at 5.

11 Reagan's Record (Reagan Bush Committee television broadcast 1980).

12 Steven Hayward, Ronald Reagan: Conservative Statesman, 9 The Heritage Foundation 1, (Jun. 4 2013), https://www.heritage.org/political-process/report/ronald-reagan-conservative-statesman.

13 John Moore, The Cult of Reagan, National Post, (Feb. 7 2011), https://nationalpost.com/news/the-cult-of-reagan.

14 Tom Murse, Which President Was the Most Popular at the End of Their Term?, ThoughtCo., Jan. 20 2021, https://www.thoughtco.com/presidential-approval-ratings-4074188.

15 Ken Collier, Behind the Bully Pulpit, 26 p.s.q. 805, 805 (1996).

16 Whicker & Moore, supra note 7, at 3.

17 Whicker $ Moore, supra note 7, at 147.

18 Whicker & Moore, supra note 7, at 145.

19 Kathy Gill, How Does the Line Item Veto Work?, ThoughtCo., (Mar. 18 2017), https://www.thoughtco.com/the-1996-line-item-veto-act-3368097.

20 Lyndon B. Johnson Presidential Speeches, Miller Center (Jul. 14, 2020), https://millercenter.org/the-presidency/presidential-speeches.

Thus, when voters heard Reagan's requests for a line-item veto, they likely associated the policy with the Republican Party. Furthermore, after witnessing Reagan's monumental popularity, Republican politicians made appeals to the former president's conservative coalition by pursuing issues Reagan had prioritized while in office like the war on drugs, job creation, and, of course, the line-item veto. Consequently, the line-item veto became a prominent tenet of the GOP platform.

For ten years after Reagan's presidency, the Democratic stronghold in the House kept Republican members of Congress from passing a line-item veto bill. However, in the 104th Congress, Republicans finally established majorities in both chambers for the first time since 1954.[21] The Congressional Session began on January 3, 1995, and on January 4, Senator Robert Dole, a Republican from Kansas, presented the Line-Item Veto Act to the Senate.[22] If passed, the act would grant a president the right to "cancel in whole—(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit" so long as the president concludes that such a cancellation will "(i) reduce the Federal budget deficit;" "(ii) not impair any essential Government functions;" and "(iii) not harm the national interest."[23] If a president were to use this power, Congress could only override the veto with a majority vote in both chambers to pass a "disapproval bill." If the president were to veto the disapproval bill, Congress would have to vote by a two-thirds majority in both chambers to override the president's veto. The bill passed in the House and the Senate. President Bill Clinton then signed the Line-Item Veto Act into law on April 9, 1996.[24]

Clinton v. New York

One day after President Clinton signed the Line-Item Veto Act into law, six U.S. congressmen—led by Democratic Senator Robert Byrd from West Virginia—challenged the act's constitutionality.[25] The District Court granted summary judgment and agreed that the act violated the Presentment Clause and unconstitutionally handed legislative powers to the president. However, the Supreme Court held that the congressmen lacked standing and dismissed the case.[26]

A few months later, President Clinton used the line-item veto to cancel provisions from the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997.[27] In response, New York City and several private organizations challenged the constitutionality of these cancellations. The District Court held Clinton's use of the line-item veto to be unconstitutional, and the Supreme Court expedited review of the case.[28]

Ultimately, the Supreme Court affirmed the judgment of the lower court and declared the Line-Item Veto Act unconstitutional.[29] The Court's majority justified its decision with an argument rooted in both constitutional textualism and originalism—the judicial ideologies commonly associated with conservatism. However, this "conservative" decision is at direct odds with the "conservative" arguments Republican congressmen offered in support of the Line-Item Veto's passage. Was the argument made by Republican members of Congress conservative? Or did the decision of the Supreme Court highlight the fundamentally anti-conservative nature of this argument?

III. IDEOLOGICAL ANALYSIS

The Question of Conservatism

Today, many mistakenly use the term "conservative" interchangeably with "Republican" or "originalist." Although conservatism shares several core principles with both of these ideologies, it is in no way their synonym. But what, then, is conservatism? This question has long been contested by political theorists, politicians, and the general public alike, but a singular definition of conservatism is yet to earn universal acceptance.

21 1994 Midterm Elections, University Of California, Berkeley, https://bancroft.berkeley.edu/ROHO/projects/debt/1994midtermelection.html.

22 S. 4 (104th): Line Item Veto Act, GovTrack.us (Mar. 21, 1996), https://www.govtrack.us/congress/bills/104/s4/summary#libraryofcongress.

23 Line Item Veto Act, Pub. L. No. 104-130, 1996 U.S.C.C.A.N. (110 Stat.) 1200, invalidated by Clinton v. New York, 524 U.S. 417 (1998).

24 Statement on Signing The Line Item Veto Act, 32 Weekly Comp. Pres. Doc. 640 (Apr. 9, 1996).

25 Raines, 521 U.S. at 811.

26 Clinton v. New York, 524 U.S. 417 (1998).

27 Clinton, 524 U.S. at 417.

28 Clinton v. New York Procedural History, Legal Dictionary. (Feb. 12 2019), https://legaldictionary.net/clinton-v-new-york/.

29 524 U.S. at 417.

This essay adopts a two-part definition, inspired by the writings of Martin Krygier,[30] which characterizes conservatism as containing two fundamental elements: the normative and the positional. Normative conservatism adheres to a certain set of core beliefs such as limited federal government, economic freedom, and privacy, while positional conservatism embodies a reactionary desire to preserve tradition in response to social or political change. Actors, events, or ideologies are considered "conservative" if they satisfy the conditions of either form of conservatism.

However, if two arguments each employ one form of conservatism without satisfying the other, the positional and normative ideologies stand at odds with one another in an irresolvable ideological standstill. This section will analyze the primary argument made by supporters of the 1996 Line-Item Veto Act, and that made by Justice Stevens in the Court's majority opinion to frame Clinton v. New York as such an ideological standstill.

Supreme Court

In a 6–3 decision delivered by Justice Stevens, the Supreme Court affirmed the judgment of the District Court and ruled the Line-Item Veto Act unconstitutional.[31] After summarizing the facts of the case, Justice Stevens noted that the Constitution contains no provisions granting the president the right to enact, repeal, or amend statutes.[32] Instead, according to the Constitution's Presentment Clause, "every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it."[33] This "return" of a bill, otherwise called a "veto," differs from Clinton's line-item veto in two substantial ways. First, the return takes place before a law is passed while a line-item veto occurs after a law is passed. Second, the return rejects an entire bill while the line-item veto rejects one portion of a bill.[34] Furthermore, according to the precedent established by INS v. Chadha, a statute must go through a "finely wrought and exhaustively considered procedure" to be legitimately enacted or repealed under the Presentment Clause.[35] However, the president's use of the line-item veto would transform a "finely wrought" bill passed by both houses of Congress into an entirely new proposal that had gone through no such consideration process. Thus, because the Line-Item Veto Act allowed the president to unilaterally cancel portions of statutes, Justice Stevens concluded that the executive item veto violated the Presentment Clause's "finely wrought" procedure, making the law unconstitutional.[36]

Justice Stevens employed a textualist approach to constitutional analysis by conducting a close reading of the Constitution's language and taking note of the document's "silence"[37] on the topic of a president's ability to unilaterally repeal, amend, or enact legislation. Textualism—an approach to constitutional analysis that focuses primarily on the text of the Constitution[38]—does not necessarily indicate conservatism, but Justice Stevens's textualist approach ultimately complies with positional conservatism. After finding no provision in the Constitution explicitly granting presidential line-item veto authority, Justice Stevens did not consider if the Framers would have supported a presidential item veto within the contemporary context of incessant legislative pork-barreling; instead, he focused only on the text itself and concluded that the Constitution's silence on the issue was "equivalent to an express prohibition."[39] This approach encapsulates positional conservatism by appealing to the traditional text of the Constitution instead of paying heed to contemporary political changes.

Justice Stevens made further nods to positional conservatism through appeals to history such as evidence of George Washington's personal understanding of the Presentment Clause and a description of the "great debates and compromises that produced the Constitution itself."[40] These appeals to history embody a positionally conservative desire to preserve tradition.

Advocates of the Line-Item Veto

30 Martin Krygier, Conservative-Liberal-Socialism Revisited, 11, The Good Society 6, 6-8 (2002).

31 Clinton, 524 U.S. at 417.

32 Id. at 438.

33 U.S. Const. art. I § 7, cl. 2.

34 524 U.S. at 439.

35 INS v. Chadha, 462 U.S. 919, (1983).

36 524 U.S. at 439.

37 Clinton, 524 U.S. at 417.

38 Bhanodai Pippala, The 4 Ways To Interpret The Constitution: Originalism, Textualism, Pragmatism And Stare Decisis, Odyssey (May 30, 2017), https://www.theodysseyonline.com/interpretations-constitution-originalism-textualism-pragmatism-stare-decisis.

39 524 U.S. at 439.

40 Id. at 439.

Like President Ronald Reagan, supporters of the 1996 Line-Item Veto Act primarily advocated for the policy on the basis of fiscal conservatism. The bill's advocates blamed the high deficits of the 1980s and 1990s on Congress's lack of fiscal discipline,[41] and they presented the line-item veto as a tool to combat pork barreling and, in the words of the Republican Contract with America, to "restore fiscal responsibility to an out-of-control Congress."[42]

By emphasizing a reduction of the federal deficit and a cutback on unnecessary government spending—two beliefs that are foundational to conservatism in the United States—the bill's supporters employed a normatively conservative argument. This case for the line-item veto as a tool for fiscal responsibility mirrors many conservative arguments throughout U.S. history, ranging from President Andrew Jackson's immense skepticism of the national debt[43] to Senator Barry Goldwater's warning that "we are faced with a threat, in my opinion, far more destructive than anything the Soviets can throw at us…the federal deficit."[44] Thus, the primary argument for the Presidential Line-Item Veto Act embodies normative conservatism by engaging with core conservative issues.

Although most conservative members of Congress supported the Presidential Line-Item Veto Act, some stood against the bill in doubt of its constitutionality. Senator Hatfield, one of only two Republican members of the Senate who voted against the Line-Item Veto Act,[45] represented this conservative minority by claiming that he was "appalled that my colleagues on the Republican side should help by leading the effort to give more power to the White House, more power to the President of the United States… we should not tinker with something that has worked very well for over 200 years."[46] This criticism of the Presidential Line-Item Veto Act perfectly exemplifies a positionally conservative ideology; in response to a sudden shift away from the constitutionally established balance of powers, Hatfield offered a reactionary argument for the preservation of tradition. Consequently, Hatfield's statement attacks not only the bill's constitutionality, but also its conservatism. The guiding principle of positional conservatism is a desire to preserve tradition. However, as Senator Hatfield noted, an executive item veto would substantially alter the constitutionally established balance of power between the executive and legislative branches, thereby disrupting a 200-year-old tradition of checks and balances. The Presidential Line-Item Veto Act, therefore, not only fails to satisfy the conditions of positional conservatism, but it also violates the ideology's guiding principle.

Senator Hatfield's criticism of the item veto highlights a critical difference between a breach of positional conservatism and a breach of normative conservatism. In the context of the Presidential Line-Item Veto Bill, a breach of normative conservatism has little-to-no impact on the conservatism of the breacher's argument. For example, one could accuse Justice Stevens of neglecting to pursue the core conservative priority of reducing the federal deficit because he struck down the Presidential Line-Item Veto Act, which aimed to address this priority. However, this accusation does not call the overall conservatism of Justice Stevens's argument into question. Normative conservatism does not require that an argument appeal to every core conservative value, so an argument's neglect to follow one core value is not enough to question that argument's overall normative conservatism. However, in the context of the Presidential Line-Item Veto Bill, if one neglects to follow the Constitution or its traditions, they violate the guiding principle of positional conservatism. Thus, an argument that breaches an aspect of normative conservatism may still satisfy the conditions of a normatively conservative ideology, but an argument that breaches positional conservatism necessarily fails to embody the positionally conservative ideology.

IV. CONCLUSION

On its face, Clinton v. New York was a dispute between defenders of the 1996 Presidential Line-Item Veto Act and challengers of the act's constitutionality, but on an ideological level, the case was a conflict between normative and positional understandings of conservatism. Justice Stevens employed a positionally conservative ideology by focusing his analysis on the text of the Constitution, while the supporters of the Presidential Line-Item Veto Act employed a normatively conservative ideology by appealing to core conservative beliefs like cutbacks on government spending and a reduction of the federal deficit. The positionally conservative argument ultimately reigned victorious in Clinton v. New York, but both

41 Jasmine Farrier, Passing the Buck 167, 169 (2004).

42 The Republican "Contract With America" (1994).

43 Andrew Jackson and the Elimination of the National Debt, World History (May 21, 2017), https://worldhistory.us/american-history/andrew-jackson-and-the-elimination-of-the-national-debt.php.

44 David C. Morrison, Defense Spending and the Federal Deficit, Mother Earth News (Nov. 1, 1984), https://www.motherearthnews.com/sustainable-living/nature-and-environment/defense-spending-federal-deficit-zmaz84ndzraw/.

45 Roll Call Vote 104th Congress – 1st Session, S. 4, 1994 Sess. https://www.senate.gov/legislative/LIS/roll_call_votes/vote1041/vote_104_1_00115.htm.

46 S. Rep. No. 104-142, at S2929 (1996).

Ugly before American Law & Society The Asian Female Body, Differences in Physical Conformation, & the Georgia Shootings

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Abstract

Recognizing the overlapping areas of inquiry from various intersecting areas of academic study when studying the treatment and categorization of minorities, this paper aims to take into account prior work done in fields of interdisciplinary social science while contextualizing the discussion of what it means to be considered as "ugly" in the United States. The implications of the 2021 hate crimes towards Asian diaspora, specifically the March mass shooting of Asian Americans in Atlanta, Georgia, will be used as the primary case study. The implications of the March Atlanta shootings upon race, politics, and gender studies are tremendous as there has yet to have been a mass killing inflicted upon the Asian American community that caused for the nation to collectively reevaluate the social and cultural positioning of Asian diaspora in the understanding of a group that would otherwise be habitually characterized as the "model minority." The discussion regarding how Asian diaspora, and even more specifically, Asian women, fit into the black and white binary understanding of race politics is crucial to developing an intersectional analysis of the Georgia shootings. As a result, although the deaths of six Asian American women at the hands of a white man represent yet another case that proves the undeniable privilege that a white man possesses to be given the benefit of the doubt of having a "bad day" in front of criminal charges, this poignant time is also a constructive case to prove how Asian American women are "ugly" before American law and society.

I. INTRODUCTION

The study of the treatment and categorization of minorities (including racial, ethnic, gender, sexual, and religious identities) involves many intersectional areas of academia. As a result, there is widespread agreement regarding how discrimination operates from multiple and interconnected systems of inequality.[1] Famous examples include investigating how discrimination operates at the intersection of sex and race (e.g. analyzing the experiences of black women) or gender and disability in healthcare (e.g. long-term disabilities being more prevalent in women and sex differences in health services use).[2]

This paper discusses what it means to be considered as "ugly" in the United States through the analysis of "othering" of Asian female diaspora and the 2021 targeted hate crimes towards Asian diaspora (specifically the March mass shooting of Asian Americans in Atlanta, Georgia). Asian Americans have been historically considered as "ugly" before American law and society for their foreignness and "othered" within minority politics because of their "model" status. Historically anti-Asian laws (e.g. Chinese Exclusion Act of 1882) and associations of minority women with sexual promiscuity provide important context in understanding what lay ground for the Georgia shootings to occur and result in the deaths of six Asian American women.

II. BACKGROUND

The March 2021 Atlanta, Georgia Mass Shooting of 6 Asian American Women

On March 16, 2021, a series of mass shootings at three spas in the metropolitan Atlanta area resulted in the deaths of six Asian women and two customers of white descent.[3] Following the mass killings, a manhunt commenced, and authorities charged Robert Aaron Long, age 21, with eight counts of murder and one count of aggravated assault.[4] Long was charged with four of the murder counts from the first shooting in Cherokee County and the other counts in two other spas in Atlanta less than an hour later.[5] Both the sheer number of individuals killed by Long and the lack of cohesion and clarity in police investigations were befuddling for the Asian American and Pacific Islander ("A.A.P.I.") community.

According to the New York Intelligencer, Cherokee County investigators had first proposed the theory that Long was a sex addict and, therefore, the shootings were not a hate crime.[6] However, Cherokee County investigators neglected the fact that the spas were Asian-run and the majority of the victims were Asian females. USA Today revealed that the three businesses that were targeted by Long (Gold Spa, Aromatherapy Spa, and Young's Asian Massage) may have been illicit, seeing as that they were listed on Rubmaps, a review site where users are able to review and search for illicit massage parlors.[7] According to Polaris, the nonprofit group that operates the National Human Trafficking Hotline, Rubmaps is one of the most popular of such sites where buyers will call themselves "hobbyists" and share information according to their experiences.[8] However, since 2013 there have been no charges against the spas.[9]

Captain Frank Reynolds of the Cherokee County Sheriff's Office defended Long by stating that Long's actions were not racially motivated.[10] It was reportedly his addiction to sex that caused for him to see the spas as establishments worthy of elimination.[11] Cherokee County Sheriff's Captain Jay Baker was heavily criticized for his past racist comments towards

1 Catherine E. Harnois, Jeopardy, Consciousness, and Multiple Discrimination: Intersecting Inequalities in Contemporary Western Europe, 30 Sociological Forum 971, 971 (2015).

2 Lois M. Verbrugge, Gender and Health: An Update on Hypotheses and Evidence, 26 Journal of Health and Social Behavior 156, 162 (1985).

3 Atlanta Spa Shootings: Who Are the Victims? BBC News (Mar. 22, 2021), www.bbc.com/news/world-us-canada-56446771.

4 Nicholas Bogel-Burroughs et al., 8 Dead in Atlanta Spa Shootings, With Fears of Anti-Asian Bias, The New York Times (Mar. 26, 2021), www.nytimes.com/live/2021/03/17/us/shooting-atlanta-acworth.

5 Id.

6 Attacks on Atlanta-Area Spas Leave 8 Dead, Including 6 Asian Women: What We Know, Intelligencer (Mar. 21, 2021), nymag.com/intelligencer/2021/03/7-dead-after-shootings-at-multiple-spas-in-atlanta-updates.html.

7 Cara Kelly et al., Atlanta Spa Shootings: Illicit Reviews Raise Red Flags That Shooter Targeted Vulnerable Women, USA Today (Mar. 18, 2021), www.usatoday.com/story/news/investigations/2021/03/17/atlanta-spa-shootings-illicit-reviews-massage-parlors/4737755001/.

8 Id.

9 Attacks on Atlanta-Area Spas Leave 8 Dead, Including 6 Asian Women: What We Know, supra note 6.

10 Id.

11 Id.

Asian Americans (e.g. sharing an image of a Corona beer label T-shirt on Facebook and commenting "Covid 19 IMPORTED VIRUS FROM CHY-NA") and for stating that Long had had just a "really bad day."[12]

On March 17th, the ongoing investigation caused much confusion amongst the public because of the lack of coordination between various levels of enforcement. FBI Director Christopher Wray proposed that the motive may not have been racially motivated, but Atlanta's deputy police chief Charles Hampton maintained that "nothing was off the table" under the state's hate-crimes statute.[13] The inconsistency of analysis within law enforcement and the repeated attribution of Long's actions to only sexual motives indicated two things. First, law enforcement was ignorant of the fact that violence, misogyny, and racism influence one another and are phenomena that do not occur independently. Second, their rhetoric failed to identify Long's privilege as a white man to not be suspected of inherent criminality. It is privilege that allowed for him to be preliminarily considered to have had a "bad day" by the Georgia police force and privilege to have had Georgia law enforcement rule that the crime was motivated by solely sex.[14]

What is "Othering" in Relation to the Asian American Identity?

The term "othering" is defined as a "set of dynamics, processes, and structures that engender marginality and persistent inequality across any of the full range of human differences based on group identities," operating across a number of dimensions to uphold a conception of a "virtuous Self" and a "lesser Other."[15] "Othering" is admittedly a broad conceptual framework that encompasses a wide range of prejudice and discriminatory behaviors on the basis of difference. And yet, it assists in identifying that the sense of belonging is so strong within a society that it can reflect the power hierarchy and structure of a population. "Othering," however, is not to be confused with stereotyping, as elaborated upon by Susan J. Stabile.[16] In her 2016 paper "Othering and the Law," Stabile clarifies that stereotyping requires the creation of judgements about a person that are not assessments of the individual alone, but rather ones that are made depending on the particular group that the individual associates with.[17] Stereotyping is a result of "othering" and can be both a conscious or an unconscious act.[18]

Sociologists in the 1950s created a theory to explain racial "othering" called the "group position theory," which suggests that "group definitions, boundaries, and meanings are the product of complex collective and social processes rather than a result of individual interactions or bias."[19] The potential danger of group-based identities, however, is when a society will consider them so fundamental that there will be the delusion of naturalness of the identity.[20] In the case of group-identities (e.g. race), the biological classification of difference from the normative (e.g. darker skin) will also be imbued with meanings that are attached through stigmas of how one identity will be more susceptible and capable of committing acts of disorder or crime.[21]

This is not to state that the process and act of "othering" is unique to those who are vigilant in their distaste for non-normative populations. The process of "othering" is quite benign as it most commonly begins with identifying what someone arguably is or is not.[22] The controversiality begins when favoritism is practiced depending on what identities an individual either actively, or subconsciously elects to associate with. In social psychology, this is a phenomenon that is referred to as in-group and out-group behavior. An in-group is defined as a social group or category one identifies with strongly, while an outgroup is the converse—a social group or category that one does not identify with.[23] One of the most important determinants of understanding group biases, and therefore "othering," is taking into account the psychological reason as to why the bias is so strong.[24] Oftentimes, it will be the need to improve or protect one's self esteem that individuals will find

12 Id.

13 Id.

14 Id.

15 Susan J. Stabile, Othering and the Law, 14 University of St. Thomas L. J. 381, 381 (2016).

16 Id.

17 Id. at 383.

18 Id.

19 John A. Powell and Stephen Menendian, The Problem of Othering: Towards Inclusiveness and Belonging, Othering & Belonging (Aug. 2018), otheringandbelonging.org/the-problem-of-othering/.

20 Id.

21 Id.

22 Stabile, supra note 15, at 384.

23 Howard Giles and Jane Giles, Ingroups and Outgroups, Inter/Cultural Communication: Representation and Construction of Culture 412 (Anastacia Kurylo ed., 2013).

24 In-Groups and Out-Groups, UC Davis (Feb. 20, 2021), socialsci.libretexts.org/Bookshelves/Sociology/Introduction_to_So-

a reason (regardless of whether it is significant or insignificant) to prove to themselves as to why their group is superior to another.[25] If the in-group is challenged or is felt to be threatened, they will justify aggression towards the out-group by dehumanizing the out-group (otherwise known as intergroup aggression).[26] The fascinating insight gained from this theory is the out-group homogeneity effect. Out-group homogeneity is present and practiced in various political, racial, or social groups, and is best described as when an individual will recognize more similarities within a group that is not their own (an out-group) than their in-group.[27] In the case of race, an example of out-group homogeneity would be when a white individual were to generalize all sub-groups of Asian descent into the category of Asian American, arguing that the phenotypical and country-based stereotypes are enough to refer to all diaspora as Asian American (instead of utilizing specific language like second generation Asian, Korean-American, etc.)

Extreme "othering" in the United States has ostracized minority diaspora from mainstream comprehensions of normativity and affluence. It is pertinent to note the proposal by sociologists regarding the theory of "othering" and the phenomenon of racism. According to sociologists, it is most likely that the symbols of race, not race itself, is what leads to subjugation based on the difference of skin.[28] Race in the United States is considered as a "bounded and durable trait" and regularly refers to the black and white binary as a measure of "othering."[29]

W.E.B DuBois's coining of the "double consciousness" best assists in the comprehension of how identity in the United States is multifaceted and is maintained on the individual level with a constant struggle to retain minority identity uniqueness while also maneuvering oneself in a white normative society.[30] Though DuBois speaks about the two warring selves of a minority American in the context of African American identity, the sentiment is the same for those who are considered as Asian American. In fact, the diversity of Asian diaspora is much more complex than meets the eye (e.g. generational differences of affiliation to mother countries). This is a group that is regularly stereotyped as the less-discriminated minority (at the very least less discriminated against in contrast to black bodies) or the most capable of performing whitehood which has led to insufficient efforts towards recognizing institutional wrongs towards the Asian diaspora. One of the largest offenses to Asian diaspora in the United States is the tendency to equate their experience to that of black or brown bodies. Asian Americans live in between several "worlds"—in between "tradition and contemporary life, between religious institutions and secular society, between Asia and the United States."[31] Not only does this diaspora have to perform code-switching between American specific sociocultural traditions and practices (e.g. speaking in the primary language (English)) and the traditions native to their mother-country in Asia, they must also make the decision to either play into the "model minority" stereotype or contradict it.

The "othering" of Asian diaspora in the United States was first recorded in 1565 when Chinese and Filipino men on the Manila Galleons were subjected to European slave labor upon arrival.[32] However, the first set of laws that was explicitly anti-Asian came from the Californian government in the form of taxes (the 1852 Foreign Miners Tax followed by the 1852 Commutation Tax and the 1862 Police Tax).[33] The government demanded a monthly payment from individuals of Chinese descent through these laws as a form of deterring Chinese immigration and excluded European miners from having to pay it.[34] Similar efforts to bar Asian diaspora from entering the United States and gaining legal status, were pursued in legislation like the 1882 Chinese Exclusion Act and the Immigration Act of 1924, despite active efforts to increase immigration from northwestern European countries from the United States government (Immigration Act of 1990).[35] "Othering" of Asian dias-

ciology/Book%3A_Sociology_(Boundless)/06% A_Social_Groups_and_Organization/6.01%3A_Types_of_Social_Groups/6.1D%3A_In-Groups_and_Out-Groups.

25 Id.

26 Id.

27 Id.

28 Theoretical Perspectives of Race and Ethnicity, Lumen Learning, courses.lumenlearning.com/wm-introductiontosociology/chapter/theoretical-perspectives-of-race-and-ethnicity/.

29 Riva Kastoryano, Codes of Otherness, 77 Social Research 79, 79 (2010).

30 W.E.B. Du Bois, Double Consciousness, DuBoisopedia (Dec. 18, 2013), scua.library.umass.edu/duboisopedia/doku.php?id=about%3Adouble_consciousness.

31 Naomi Southard and Rita Nakashima Brock, The Other Half of the Basket: Asian American Women and the Search for a Theological Home, 3 Journal of Feminist Studies in Religion 135, 135 (1987).

32 Mary Yu Danico, Asian American Society: an Encyclopedia (2014).

33 Charles McClain, Chinese Immigrants and American Law (1994).

34 Foreign Miner's License SHEC: Resources for Teachers, Social History for Every Classroom, CUNY, shec.ashp.cuny.edu/items/show/1714.

35 Ailsa Chang, A Sociologist's View On the Hyper-Sexualization of Asian Women in American Society, NPR (Mar. 19, 2021),

pora on the basis of their race was not only economically or immigration driven, it also influenced the way in which an Asian individual was considered as credible before the law. In the 1854 case, People v. Hall, a Chinese man's witnessing of a white man's murder was considered as inadmissible because of his Chinese identity.[36] His race was considered as an indication of his "inferiority" and according to the Chief Justice of the case, a sign of his "incapability of progress or intellectual development beyond a certain point, as their history has shown," as they are "differing in language, opinions, color, and physical conformation."[37] The same derogatory and dehumanizing language is found in the California Alien Land Law of 1913 ("aliens (who are) ineligible for citizenship") and Chae Chan Ping v. United States ("too different, too foreign, and too competitive to be allowed to remain").[38] Even if the American legal system possesses a unique exclusionary impulse to allow for the assertion of the "ethnic superiority of Anglo-Saxons as legal actors," it does not explain why the American legal system has been averse to even Asian Americans.[39] The cases, Yasui v United States (1943), Hirabayashi v. United States (1943), Korematsu v. United States (1943) and Endo v. United States (1943) demonstrated the inability for the American legal system to recognize Asian diaspora as separate from their mother country.[40] It is both horrific and fascinating how the United States legal system and government allowed for the internment of 120,000 individuals of Japanese descent, regardless of the fact that a third of those interned were American citizens.[41] If the argument were that the aversion to Asian diaspora was period-specific (e.g. in the time of war like in the case of internment of Japanese diaspora), then Asian diaspora should not have been legally barred from entering higher education institutions or segregated within academic structures.[42] States should not have been given the right to legitimize discrimination against a Chinese student by defining a Chinese student as a "non-white," like in the Supreme Court case, Lum v. Rice (1827).[43]

If race is the primary marker of difference and belonging in the United States, the question becomes, what has assisted in maintaining the idea that performing whitehood is the primary way to prove one's fealty to the nation? The law has played a tremendous role in promoting "othering," regulating, and creating a pedagogic ideology or vision of how members of a society should live amongst one another.[44] Constitutional law, in particular, provides legitimacy and rationalizes racism in the United States through its use of strict scrutiny—an inappropriate assumption that racism is capable of being a rational act.[45] Considering that the United States still continues to refer to the Constitution as a living document and the Founders' ideologies as representative of the core ideologies that dictate American-hood, it is difficult to defend a legal system and politique that was built upon the "othering" of those who were deemed as "ugly" (not a white male and criteria of difference determined by the heteronormative nature of anti-racist discourse).[46] The U.S. Constitution explicitly reserved citizenship for white men who owned property and this original intent has left a legacy in modern racial politics.[47] As argued by Lisa Sun-Hee Park, the term "model minority" does not imply access to full citizenship rights, but instead grants access to only a secondary one that is "reserved for particular minorities who 'behave' appropriately and stay in their designated secondary space without complaint".[48] In other words, this secondary space that the Asian diaspora possesses is a socially marginal area that maintains that though an Asian American may be legally a citizen, they will still hold a foreigner status.[49]

How has "Ugliness" been Understood in American Law?

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www.npr.org/2021/03/19/979340013/a-sociologists-view-on-the-hyper-sexualization-of-asian-women-in-american-societ.

36 Ancestors in the Americas: The People vs. Hall, www.cetel.org/1854_hall.html.

37 Id.

38 Agnelo Ancheta, Asian American Studies Now: A Critical Reader, (Jean Yu-wen Shen Wu & Thomas C. Chen eds., 2015); Mark E. Steiner, Inclusion and Exclusion in American Legal History, 23 Asian American L. J. Berk. Law 69, 90 (2016).

39 Mark E. Steiner, Inclusion and Exclusion in American Legal History, 23 Asian American L. J. Berk. Law 69, 90 (2016).

40 Yasui v. United States, 772 F.2d. 1496 (9th Cir. 1985); Hirabayashi v. United States, 320 U.S. 81, 63 S. Ct. 1375 (1943); Korematsu v. United States, 323 U.S. 214, 65 S. Ct. 193 (1944); Endo v. United States, 323 F.2d. 283.

41 Japanese-American Internment During World War II, National Archives and Records Administration, www.archives.gov/education/lessons/japanese-relocation.

42 Theresa R. Richardson, Race, Ethnicity, and Education: What Is Taught in School 197 (2003); Hyung-chan Kim, Asian Americans and the Supreme Court: A Documentary History 904 (1992).

43 Hyung-chan Kim, Asian Americans and the Supreme Court: A Documentary History 63 (1992).

44 Stabile, supra note 15, at 392.

45 Sonu Bedi, How Constitutional Law Rationalizes Racism, Polity (Oct. 2010), doi:10.1057/pol.2010.13.

46 Darren Lenard Hutchinson, Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti- Racist Politics 109 (1999).

47 Lisa Sun-Hee Park, Continuing Significance of the Model Minority Myth: The Second Generation, 35 Social Justice 134, 135 (2008).

48 Id.

49 Id.

"Ugly laws" were first coined to refer to laws that targeted those with visible disabilities, the poor, and the homeless as an increasing number of municipal statutes in the United States made it illegal to be in any way deformed or other. A regularly referred to statute in studies regarding "ugly laws" is from the eventually repealed Section 36034 in the Chicago Municipal Code, which states:

> No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, or shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.

Similar statutes were enacted and regularly enforced during the American Civil War and World War I when the eugenics movement targeted those who were socioeconomically disadvantaged and physically different from the normative body.[50] The first "ugly law" was implemented in 1867 in San Francisco, in extension to an already existing, more general prohibition on begging, as the city dealt with Civil War veterans who had been maimed and destitute miners.[51] Anti-beggar legislation was not uncommon for this era, as the United States had just seen the worst economic depression in its history.[52] Pervasive laissez-faire ideology in combination with high levels of unemployment made it difficult for the general public to understand poverty as much more than the failure of individual people to gain employment for wages.[53] There was little sympathy for unemployment—a sentiment leading to the argument that begging on the streets should be "absolutely forbidden" because this would display "vicious idleness."[54] Many smaller Midwestern towns and cities like Omaha, Chicago, Cleveland would soon follow suit, while the early 1890s witnessed Pennsylvania pass a statewide ugly law, and many others at least attempted to pass such a statute up to 1913 (Los Angeles).[55]

The fascinating part about Chicago's ugly law was that there was nothing that explicitly stated "crippled beggars," though it did bar any "diseased, maimed, mutilated" person from the streets.[56] Considering the time when the most infamous ugly law was passed (1870s-1880s), the disabled people could have been "venerated Civil War veterans, revolting and duplicitous beggars, wondrous freak show performers, foolhardy victims of industrial accidents, or experienced workers."[57] This indicated that lawmakers had taken for granted the wide spectrum of understanding that continues to exist regarding what disability is, how disabled bodies are viewed socially versus institutionally, and whether or not disabled bodies were worth public assistance.[58] These laws criminalized any "quality of life" that was deemed ugly, whether that be sleeping, practicing religion, or making noise in a public space.[59]

As these "ugly laws" were passed, an urban reform philosophy called the "City Beautiful movement" was in effect—one that had emerged in response to the 1893 World Columbian Exposition in Chicago.[60] The idea behind the movement was to create a Chicago that was no longer simply an iconic symbol of industrialization, economic development, and societal affluence, but instead, an aesthetic environment.[61] The first issue came with the desire to disassociate an entire city's culture, visuals, and its constituents from the supposedly cold image of industrialization. The chosen aesthetics of an ideal city as determined by Chicago architects (e.g. Daniel Burnham) in collaboration with New York architects (e.g. McKim, Mead, and White) was one that was intended to reach the "level of European predecessors" and that of a "magical white city."[62] Under

50 Mary I. Unger, 'Dropping Crooked into Rhyme': Djuna Barnes's Disabled Poetics in The Book of Repulsive Women, 30 Legacy 124, 128 (2013), doi:10.5250/legacy.30.1.0124.

51 Nina Renata Aron, In the 1800s, There Were Literally Laws against Being Ugly (and No Surprise Who Suffered Most), Timeline (July 13, 2017), timeline.com/in-the-1800s-there-were-literally-laws-against-being-ugly-and-no-surprise-who-suffered-most-c0b7a26ba8c9.

52 Adrienne Phelps Coco, Diseased, Maimed, Mutilated: Categorizations of Disability and an Ugly Law in Late Nineteenth-Century Chicago, 44 Journal of Social History 23, 23 (2010), doi:10.1353/jsh.2010.0025.

53 Id.

54 Coco, supra note 52, at 26.

55 Susan M. Schweik, The Ugly Laws: Disability in Public (2010).

56 Coco supra note 52, at 24.

57 Id. at 26.

58 Id.

59 Paul Boden and Terry Messman, The Right to Rest: Homeless Coalition Challenges Criminalization of Life on the Street, 20 Race, Poverty & the Environment 6, 94 (2015).

60 Digital Discussion: The City Beautiful Movement, New York Transit Museum (July 29, 2020), www.nytransitmuseum.org/program/digitaldiscussioncitybeautiful1/.

61 City Beautiful Movement, The New York Preservation Archive Project (NYPAP) (2021), www.nypap.org/preservation-history/city-beautiful-movement/.

62 Id.

the guise of a desire to increase visual elements of urban cities (dissipating the soot and smoke) and improve public welfare, the movement ushered in a series of legislative proposals that not only regulated billboard advertisements, but also affected the understanding of which populations assisted in the beautification of a city versus dirty it.[63]

The 1916 zoning resolution would proceed to divide Chicago into specific areas that would be for public use versus private property. However, the regulation that was originally based on the belief that limiting billboard signage would seep into the division of society based on phenotypic beauty and the prioritization of private land for aesthetics.[64] These initial efforts led to the creation of the Bard Act, which passed in 1956, permitting local municipalities to pass laws that regulate the aesthetics of the city and extending police purview over whatever was deemed necessary to the regulation of the physical environment of the city.[65] Under the Bard Act, aesthetics were considered as a "basis for the exercise of police power" and in the interest of the community as a "legal exercise of police power."[66] On the other hand, the reach of police power was unchecked and by "beautifying the city" the government introduced a tension between public and private interests.[67] The combination of purely architectural ambitions and regulation of citizens, by proxy, created an idealized constituent, one that was English-speaking, able-bodied, white, and financially independent.[68] This idealized image of the "average citizen" reinforced the idea of "norm," which hypothetically "permits the idea of individual variation while enforcing a homogeneous standard or average."[69]

There is some similarity between the Victorian poor laws and "ugly laws" that targeted the disabled and poor during this time period. Victorian poor laws were first introduced in 1834 with the central objective to withdraw poor relief from men who were thought to be capable of working (the "able-bodied").[70] However, the policy-makers who created the 1834 Poor Law Amendment Act operated under the assumption that unemployment was voluntary and therefore unemployed able-bodied males were the root cause of poverty at the time.[71] This created a systematic distinction between "unworthy" and "worthy" poor, differentiating sentences depending on whether their actions were criminal or their "unseemliness" or "unsightliness" was the criminal act.[72]

Such regulation could not be compared to the scale of the American bias against disability, as British scholar Stuart Murray identified.[73] Murray claims that the American ideologies of liberty were so fundamentally challenged and threatened by the way that disability presented a "double movement: a seemingly anomalous and deviant version of humanity that nevertheless focuses all too uncomfortably for many on the central issues of the human condition," which caused the unprecedented attempt to control the "ugly" through municipal ordinance.[74] Schweik identifies Brad Bryom's insight regarding the tension around disability and dependency as one that became increasingly problematic for the nation's image as the United States became increasingly urban, industrial, and individualistic.[75]As detailed above, the understanding of what it means to be "ugly" before the law, was formalized by Disability Studies scholars, and primarily, Susan Schweik in her book The Ugly Laws. However, the term "ugly" is too general in nature to simply refer to historically legal discrimination against those who were phenotypically considered as unpleasing to the eye or as public disturbances. The term "ugly" should not be attached to "law" and limited in academic inquiry or advocate work to encompass only those legal statutes that address the phenotypical "other." The term "ugly laws" should instead be a term that is utilized in a variety of areas of minority studies to argue that "ugliness" in the American legal system is applied in the evaluation and treatment of any individual or behavior that is not in line with the phenotypical and sociocultural success of the white male identity. An example of an applicable law because

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63 Id.

64 Id.

65 Id.

66 Carol Clark and Albert S. Bard, The Origin of Historic Preservation in New York State, 18 Widener L. Rev. 323, 324 (2016).

67 City Beautiful Movement, supra note 61.

68 Aron, supra note 51.

69 Diane Price Herndl, Politics and Sympathy: Recognition and Action in Feminist Literary Disability Studies, 30 Legacy 187, 193 (2013), doi:10.5250/legacy.30.1.0187.

70 Pat Thane, Women and the Poor Law in Victorian and Edwardian England, 6 History Workshop Journal 29, 30 (1978), doi:10.1093/hwj/6.1.29.

71 Id.

72 Schweik, supra note 55.

73 Id.

74 Id.

75 Id. at 5.

of one's perceived "ugliness" would be the Chinese Exclusion Act.[76] Chinese immigrants at the time of this act were defined as "unwelcome invasions," "undesirables," "diseased," in short, "ugly".[77] As "aliens" who would threaten the opportunity for labor, this law that discriminated against the perceived "ugliness" of Chinese immigrants was justified in the eyes of the American public.[78]

To be "ugly" in American law and society is a phenomenon and classification that encompasses a population much larger than one that is phenotypically "other." To be "ugly" is anything that is anti-establishment, not white, not male. The combination of creating statutes that explicitly bar the equity and equality between men and women was proven most infamously in the case of voting rights and the inability for women to claim their right to reproduction. As detailed further in the "Project on A Mechanism to Address Laws that Discriminate Against Women" by Dr. Fareda Banda, discrimination against women is present not only through historically societally learned behavior and understandings of cultural structures of power, but in concrete laws that explicitly discriminate against women.[79]

However, there is a specific work, Dorothy Roberts' Killing the Black Body, that helps to establish the relationship between American law and the deeming of ugliness of a minority woman's body in the law. It is important to assert the inappropriateness of utilizing an example of legal subjugation of a slave woman's body to compare and contrast the experience of a woman of Asian diaspora. Though there may be parallels, the direct comparison of the two populations demeans the unique experience of an Asian woman versus a Black woman. On the other hand, discussing the legal subjugation of the Black woman in relation to her body, her reproduction, and horrific combination of gender and racial domination, assists in contextualizing the idea that the Georgia shootings were not motivated by standalone prejudices against race and/or gender, but is a case that is laced with prejudices both legal and societal regarding the Asian female body. These prejudices caused Long to commit the horrific crimes, in addition to clouding the institutional and societal process of uncovering the underlying causes of the shootings and implications for race politics thereafter. The legal precedent additionally justified and continues to legitimize the othering of the Asian female body in the form of microaggressions and hate crimes like the Georgia mass shootings.

III. ANALYSIS

What Killing the Black Body Helps Highlight in Understanding Legal Control and Othering

Through analyzing the Black female experience of being treated as an object throughout American history, Roberts proves that inhumane treatment of minority individuals was encouraged, sanctioned, and condoned by American law. One of the first laws passed in the American colonies was a 1662 Virginia statute that legally categorized children born to white fathers and slave mothers as slaves. Roberts contends it was this statute that set a precedent of anti-Black and anti-minority female rhetoric within the American legal system and society because a slave woman was providing an economic advantage for her owner by procreating.[80] Effectively gaining an additional worker free of charge, a slaveowner could then expect to generate up to five to six percent more in profits than usual by either selling the child, or using them on his property.[81] According to records, a "breeding woman is worth from one-sixth to one-fourth more than one that does not breed"—a valuation that only increased as the 1808 ban on importation of slaves inflated a slave's purchase price.[82] Female slaves who were "jeunes et vigoreux" (young and vigorous) were coveted, and depending on their beauty, their price could further increase or decrease.

The economic aspect of enslaving a fertile Black woman assisted in justifying, creating, and maintaining anti-minority laws that defined a Black woman as sub-human because of the lack of legal protections from criminal acts inflicted upon them, such as regular and repeated acts of sexual exploitation that they suffered, as a way of reinforcing white slave owners'

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76 Chinese Exclusion Act, National Archives and Records Administration, www.ourdocuments.gov/doc.php?flash=-false&doc=47.

77 Erika Lee, The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 21 Journal of American Ethnic History 36, 41 (2002).

78 Id.

79 Fareda Banda, Project on a Mechanism to Address Laws that Discriminate Against Women, Office of the High Commissioner for Human Rights – Women's Rights and Gender Unit (Mar. 6, 2008), www.ohchr.org/Documents/Publications/laws_that_discriminate_against_women.pdf.

80 Dorothy E. Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 43 (2017).

81 Id. at 42 and 44.

82 Id.

domination over their supposed (human) property.[83] If American law truly were not discriminatory towards minorities like Black females, why did Louisiana's rape law explicitly exclude Black women from the purview of protection?[84] Why did Virginia's rape law's language apply to all women but not used in prosecuting a white man for raping a Black female slave even once? [85] Why did most slave-holding states disqualify Black men and women from testifying against whites?[86] And, the only way a Black man or woman could testify in Missouri or Indiana was if they were to testify on the behalf of another minority defendant in a criminal prosecution.[87] In Delaware, a white man or woman could use a minority's testimony in a case against a minority, but a minority could not use the testimony of minority witnesses against a white man or woman.[88] Slaves and white individuals were thus considered two distinct classes for legal regulation because they were so different in their duties, positions, and rights.[89]

As shown in George v. State (1859), the American legal system has historically failed to recognize that minorities deserve the same fundamental human rights that the white majority enjoys. In that case, the Court held that minority on minority violence was not considered criminal, despite the clear violation of human dignity and rights.[90] The language that the Mississippi court used when the indictment was dismissed was also problematic. The court stated that "the crime of rape does not exist in this State between African slaves."[91] And yet, the same court ruled that sexual intercourse between those of white and minority descent was not relevant to the understanding of regulation or crime when involving minority plaintiffs.[92] This indicates that the understanding of crime within the United States legal system was born from the fundamental belief that only when the victim is white is retribution and adjudication warranted.

Again, American law did not independently discriminate within the realms of reproductive rights or race; there was overlap. Minority women and white women were regularly pitted against one another with minority women painted as seductive temptresses. For example, when Black women were involved in divorce trials between a white man and his wife, they were positioned as the "exotic temptress" even if the Black woman had suffered abuse from the white woman's husband.[93] Black women were and continue to be seen as negative racial stereotypes; they are either obese, asexual, dark-skinned, mother figures named "Mammy," or "Jezebel," the "shameless, oversexual, schemer."[94] The publicization of a white husband's infidelity through a divorce trial did not always occur.[95] Instead, black women often faced whipping, taunting, and other forms of cruel physical treatment from the vengeful white woman without any chance to seek legal retribution.[96] In Medical Bondage: Race, Gender, and the Origins of American Gynecology, Deidre Cooper Owens substantiates this claim with insights that she found in a Dr. R.S. Bailey's journal from the 1830s.[97] According to Dr. Bailey's journal entries, white women would even beat the slave mistress and then imprison her in a smokehouse for two weeks.[98] The ideology that black women were "lascivious" was so "firmly entrenched in the white psyche" that in Mississippi and South Carolina, it was declared that black women could not be categorized as having been raped; in the eyes of the law, it was "mere assault and battery."[99]

It is curious that although a Black (or any minority) woman and a white woman are both "female," their polar positioning on the race spectrum prevents them from uniting against anti-female legal discrimination. It is naive to argue that this inability for white and minority women to actively work together to combat misogynistic legal precedent and practice is

83 Roberts, supra note 80, at 52.

84 Id. at 54.

85 Id.

86 Id.

87 Id.

88 Alfred Alvins, The Right to Be a Witness and the Fourteenth Amendment, 31 Miss. L. Rev. 471, 474 (1966).

89 Mark Tushnet, The American Law of Slavery, 1810-1860: A Study in the Persistence of Legal Autonomy, 10 Law Soc. Rev. 119, 133 (1975), doi:10.2307/3053160.

90 Roberts, supra note 80, at 54.

91 Id.

92 Id.

93 Id. at 57.

94 Valerie N. Adams-Bass, et al., That's Not Me I See on TV . . .: African American Youth Interpret Media Images of Black Females, 2 Women, Gender, and Families of Color 79, 80 (2014), doi:10.5406/womgenfamcol.2.1.0079.

95 Roberts, supra note 80, at 57.

96 Id.

97 Deirdre Cooper Owens, Medical Bondage: Race, Gender, and the Origins of American Gynecology 73 (2018).

98 Id. at 74.

99 Id. at 76.

due to pure socialization. The law granted white males in futuro interest and possession over any children they fathered with a minority woman and Banks' Administrator v. Marksberry (1823) helped introduce the legal and social concept of commodifying the reproductive capacity of a female body.[100] When a white woman took an interest in combatting the institution of slavery, it was not for the grievances against basic human rights, it was instead to prevent her husband from committing infidelity and herself from suffering public humiliation.[101] A well-known example of such rhetoric was found in Mary Boykin Chesnut's diary in 1861, where she cited that her hate for the "monstrous system" of slavery was due to the fact that white women and "[their] men lived in one house with their wives and their concubines… and the mulattoes ones sees in every family partly resemble the white children."[102] In reaction to this type of thinking, the twentieth century ushered in a generation of eugenic beliefs where the proposal of government programs to reduce the birthrate of racial minorities was justified by the ideas that the "colored races [were] pressing the white race" and the inappropriate belief that interracial marriage would cause the "deterioration on the whole for either race."[103] Under the belief that interracial mating was fundamentally a "biological wrong" that would prevent the "nation's blood" from being kept "pure," thirty states passed anti-miscegenation laws by 1940.[104]

For those who doubt that white women and women of color experience the law differently, one should look to the history of legally mandated sterilization of minority women in the United States. Not only were such measures indicative of an active "othering" of minority female bodies, but they also signaled the deeming of ugliness of minority individuals who could pass as white. Anti-minority female legislation did not stop with the abolition of institutionalized slavery in the United States. In 1958, Representative David H. Glass helmed "An Act to Discourage Immorality of Unmarried Females by Providing for Sterilization of the Unwed Mother." The Act passed 72 to 37 and clearly targeted single minority mothers (the majority of whom were Black).[105] Many other state legislatures followed suit, associating sterilization with the "save[ing of] America from its shame, squalor, and various miseries of human or social instigation (especially poverty)."[106] Notably doctors were reluctant to sterilize middle-class white women, signaling that the minority female body was being specifically othered.[107] Court cases regarding sterilization of minorities are regularly understood as medical malpractice and are not seen as an opportunity to expose the lack of monitoring mechanisms, criminal or civil sanctions, or prohibition of utilizing federal funds to sterilize those who were deemed "ugly" in American society (e.g. minority women who were institutionalized for supposed mental incompetency, minors, socioeconomically disadvantaged).[108] Even when the Department of Health, Education, and Welfare issued rules restricting sterilizations under federally funded programs in 1978, there was no evidence that this prevented or deterred federal involvement in paying for modern sterilization practices.[109]

This indicates that minority female bodies were historically considered an ugliness that would taint the "purity" of America. It was the primary argument utilized in the creation of the Racial Integrity Act of 1924 and a series of other legislation that focused on preventing the "contamination of white blood."[110] The "othering" of minority female bodies was not just political, it was an argument rooted in biological claims. Such legislation argued that individuals with "inferior" genetic characteristics should stop having children.[111] Marriage applications and laws required applicants to pledge that they did not fall under the category of "ugliness," and were not "a habitual criminal, idiot, imbecile, hereditary epileptic, or insane."[112] During the 1920s, Dr. Walter Plecker of the Virginia State Registrar of Vital Statistics was one of the leading enforcers of this law. Dr. Plecker referred to minority women as "mixed stock" and wrote letters to county clerks to check the marriage licenses and birth certificates of those who he suspected were "near white people" that were the result of "abhorrent deeds" (mixed

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100 Roberts, supra note 82, at 58.

101 Id. at 57.

102 Id. at 55.

103 Id. at 116 and 117.

104 Id. at 117.

105 Id. at 151.

106 Id. at 152.

107 Id. at 153.

108 Id.

109 Id. at 156 and 157.

110 Richard B. Sherman, 'The Last Stand': The Fight for Racial Integrity in Virginia in the 1920s, 54 The Journal of Southern History 69, 69 (1988), doi:10.2307/2208521.

111 Virginia Health Bulletin: The New Virginia Law to Preserve Racial Integrity, March 1924, Library of Virginia, edu.lva.

112 Id.

marriage).[113] Similar demonizing of minority females continued for a number of decades as the Racial Integrity Act was not overturned until 1967 through Loving v. Virginia (1967).[114] Loving v. Virginia held that having a mixed marriage was a right protected by the Fourteenth Amendment's Equal Protection Clause.[115]

Supposed Sexual Promiscuity of Asian Females: The Page Act, Military Practices, & Stereotyping

One needs to only look as far as the Chinese Exclusion Act and other anti-Asian immigration statutes to realize that members of the Asian diaspora have undeniably been "othered" in American history. However, what has yet to be researched or analyzed are the instances of "othering" that Asian American women face. There is plenty of research regarding the over-sexualization and commodification of the Asian diaspora female as exotic within popular media. There is also plenty of research and advocacy done regarding the subjugation of Asian Americans based on race, but they have been positioned in American politics and legal history as a population that can be pushed to the periphery of race politics without much rebuke because they are the "model" minority.[116] The reality of the Asian diaspora female is that she is demeaned in every way the Black woman is while also being erased from the history of building or contributing to the United States. Loving v. Virginia assisted in stopping anti miscegenation laws but did little to stop the demonizing of Asian females as individuals who could corrupt American society.

It must be recognized that the most infamous example of "othering" of the Asian female diaspora, the Chinese Exclusion Act of 1882, was not the first. The Page Act of 1875 was born from the racial threat that Chinese immigrants were deemed to pose to a "pure white America."[117] As Dr. Mellisa May Borja of the Department of American Culture at the University of Michigan puts it, anti-Chinese rhetoric was based on the idea that Chinese immigrants were disease-ridden, filthy, and religious heathens or moral threats who "threatened a Christian America."[118] This act was passed on the explicit presumption that women from Asian countries would be entering the country for "lewd and immoral purposes" as prostitutes.[119] In other words, Chinese Americans were seen as "ugly." The Page Act of 1875 was specific in its "othering" as it on paper prohibited the recruitment of laborers from "China, Japan or any Oriental country [unless] free and voluntary," "the importation into the United States of women for the purposes of prostitution," and for "lewd and immoral purposes."[120] Violators of the law were fined two thousand dollars and imprisoned.[121] In practice, Chinese women were prevented from migrating to the United States through denial by consul at port cities, all because of the mid-19th century ideology that Chinese women were the causes of sexually-transmitted diseases.[122] Because of the stereotyping of Chinese women as "promiscuous," even if the reason for immigrating to the United States was not related to sex work, Chinese women were subjected to invasive and oftentimes humiliating interrogation procedures by U.S. immigration officials.[123]

These interrogations were part of the reason why Chinese women declined to immigrate to the United States and, according to K. Ian Shin of the University of Michigan, resulted in a severe skewing of the gender ratios of the Chinese American community to mostly male.[124] Prior to the passage of the Page Act, for every 78 Chinese women, there were 1,000 Chinese men in the United States.[125] Following its passage, Shin observed that the ratio dropped to 48 Chinese women per 1,000 Chinese men.[126] Due to this lack of female immigrants, the Chinese immigrant population as a whole was unable to settle down in America. As a result, male Chinese immigrant laborers would attempt to earn money and return to China to

113 Id.

114 Loving v. Virginia, 388 U.S. 1 (1967)

115 Id.

116 Dana Y. Takagi, 'Asian Americans and Racial Politics: A Postmodern Paradox,' 20 Social Justice 115, 115 (1993).

117 Jessica Pearce Rotondi, Before the Chinese Exclusion Act, This Anti-Immigrant Law Targeted Asian Women, History (Mar. 19, 2021), www.history.com/news/chinese-immigration-page-act-women.

118 Id.

119 Jessica Contrera et al., Atlanta Spa Killings Lead to Questions about Sex Work and Exploitation, The Washington Post (Mar. 26, 2021), www.washingtonpost.com/dc-md-va/2021/03/19/asian-massage-business-women-atlanta/.

120 Rotondi, supra note 117.

121 Page Law (1875), The University of Texas at Austin Department of History (July 18, 2019), immigrationhistory.org/item/page-act/.

122 Id.

123 Id.

124 Id.

125 Id.

126 Id.

join their female partners, making them appear "driftless" and incapable of being "full Americans."

For five decades in the 19th and early 20th century, the kidnapping and auction of Chinese women into sex slavery was openly practiced in San Francisco because the Page Act introduced a precedent of societal acceptability of fetishizing Asian women.[127] Since the military is one of the most respected and celebrated sects of American society, their fetishization of the Asian female diaspora did not bode well for the general public's conception of whether or not Asian females were respectable beings. These examples further prove that the combination of degradation based on sex and race (through simultaneous forces of fetishization, slavery, and "model minority" image privilege) places the Asian female body in a state of limbo within American race politics. Though other discriminatory anti-Asian legislation followed suit, the Page Act was specific in its "othering" of the Asian female diaspora. It specified the American societal and institutional distaste in the Asian female body by denying them entry into the country. Blatantly put, members of the Asian female diaspora were denied entry because of their "ugliness"—their Asianness, supposed ability to spread sexually-transmitted diseases, and promiscuous behaviors.

In the context of the March 2021 Georgia mass shooting, analyzing the historical relationship between minority women and their perceived sexuality is necessary. Robert Long was mainly criticized for his actions and motives being anti-Asian, but in popular media, he has yet to face criticism for his aversion to Asian female sexuality in particular. The first step in expanding the understanding of Long's motivations is to look at the investigation process. Police and researchers have failed to properly investigate first, whether or not these spas were sites where Asian women are exploited. As stated by Catherine Chen, Polaris' chief executive officer, the idea and business of an Asian massage parlor depends upon the concept that it is possible to reduce Asian women down to their sexuality which can then be bought and paid for.[128] According to the Chief Operating Officer of Restore NYC, a nonprofit that aims to provide economic solutions and housing to trafficking survivors, illicit spas and massage parlors are violent.[129] Over the past 12 years, Restore NYC has serviced over a thousand Asian women who were exploited in such businesses with 50 percent of these women having worked at businesses that fell into the criteria of trafficking destinations.[130] As a result, it would be callous to assume that Long's killing of these Asian American women was somewhat justified because they were criminal, not model contributors to American society. These women could have been victims of a system much larger than themselves and unable to escape as workers because of threats they faced or because of the inability to gain employment at other institutions due to their illegal immigration statuses.

Without proper investigation, it is inappropriate to assume that the Georgia spas that were attacked were illicit businesses. Even if the three businesses are deemed to have had knowingly involved illegal trafficking or sex work, it would require specialists and advocates to properly investigate and analyze under what circumstances the sex work was completed. Because of the stereotypical association of Asian run massage parlors or spas with sex work, it is crucial for proper steps to be taken to double-check the report regarding the charging of the twelve individuals by the prosecution and whether any sex work was done through free-will or under coercion. Executive Director Camila Zolfaghari of Streetgrace revealed the importance of taking into consideration the following: how many exploited workers have very few contacts with the community, their families are often being threatened, and that they continue working in order to avoid being reported for visa fraud.[131] Such threats keep trafficking victims from reporting violence at the hands of buyers, and as Leng Leng Chancey, executive director of 9to5 National Association of Working Women reveals, there is a significant amount of fear that local law enforcement will work with the U.S. Immigration and Customs Enforcement to deport them.[132]

In an article for The Washington Post, there is discussion about how the Atlanta killings have called into question not only anti-Asian hate, but also sex work and sex exploitation.[133] Although the police gave no indication that any of the victims were sex workers, due to Long's statement referring to the victims and other workers at the spas as "temptations" and his need to "eliminate" them, there was an implied nuance that the victims were all sex workers. This was unjustly applied in the publicization of the crime. Professor of Sociology at Biola University, Nancy Wang Yuen, spoke to NPR's Ailsa Chang about her frustration that Long labeled the Asian American women as temptations that needed to be excised despite the fact that this was not an established truth and instead an externalization of his personal issues.[134] Long's belief that Asian

127 Gary Kamiya, Shame of the City: When Chinese Sex Slaves Were Trafficked in SF, San Francisco Chronicle (Jan. 6, 2018), www.sfchronicle.com/bayarea/article/Shame-of-the-city-When-Chinese-sex-slaves-were-12477457.php.

128 Kelly, supra note 7.

129 Id.

130 Id.

131 Contrera et al., supra note 119.

132 Id.

133 Id.

134 Ailsa Chang, A Sociologist's View On the Hyper-Sexualization of Asian Women in American Society, NPR, (Mar. 19, 2021),

American women are an "ugliness" is rhetoric that Professor Wang Yuen labels as a result of the U.S.'s imperialist attitudes towards Asia. She argues that the U.S. military actively participated in the associating of hypersexuality with Asian females by incorporating sex workers into camp towns in Korea and Vietnam. Professor Wang Yuen further states that because of the "easy access and inexpensive access and continual access through those camp towns," American military institutional practice has "contributed to the idea that Asian women's bodies are just for white male pleasure."[135] Her discussion regarding the exoticization and objectification of Asian female diaspora contribute to the idea that this population was prevented from integrating into American society on both ethnic and civic grounds. Civic elements of American identity such as serving on a jury or voting are viewed as some of the most defining elements of American identity. Ethnic markers of being able to define someone as American require an ability to assimilate into norms that are most commonly associated with Caucasian identities (e.g. skin color, mother country, religious affiliation to Christianity).[136] Because the trafficking of Asian women as commodities was widespread, one is able to conclude that the Asian female diaspora were distanced institutionally as well as socioculturally from the ability to associate with the American identity on civic and ethnic grounds.[137] The United States tourist industry also actively profited off of sex tours in Asia by creating a mail-order bride business, allowing "Oriental" brides to be selected through the internet or catalogs.[138] White society continues to see the Asian woman as a passive service to male desires and "hyperfeminine erotic exotics."[139] This, in turn, has affected the modern conception of the Asian female and desensitizes the public to hate crimes that are clearly a result of distaste towards the Asian race as well as the perceived hypersexuality of the Asian female.

Atlanta Mayor Keisha Lance Bottoms warned against drawing any conclusions regarding shaming or blaming the victims, but her speech did little to stop stigmatization of Asian female owned businesses or the general public from assuming that the victims were in some way complicit in illegal sex work. Anti-sex trafficking groups and sex worker advocates have vocalized how the dehumanization of shooting victims in the media is quite concerning as these are mothers, sisters, and wives who were killed because a white man had a "bad day."[140] For example, Michael Webb, Xiaojie Tan's friend and an American businessman who met Tan while traveling for work in China in the early 2000s, helped humanize Tan by describing her as someone who was "full of smiles and laughter" and that she "was just a pleasure to be around."[141] Tan was a Chinese-born proprietor, also known as Emily, who moved to the United States after marrying an American citizen in 2004. She was a woman who was enthralled by the idea of business ventures, including a nail salon; she was a "petite, fierce feminist (without meaning to be)."[142] Ms. Park was an immigrant from Seoul, South Korea who moved to the United States as a widow. She lived in New York, New Jersey, and then Georgia. She at one point ran a jewelry business and remarried in 2018 to Mr. Lee.[143] Her sons revealed to the Wall Street Journal how Yue sent gifts and money for the boys when they were living with their father overseas.[144] When they visited her, she taught them Buddhism, cooked them kimchi stew, sang Korean ballads at karaoke bars, and spent all her time with them, prioritizing their well-being.[145] Though these details do not encompass the entirety of the lost women's personalities, personal relationships, or ties to their respective communities, it is enough to indicate that before they were victims of a shooting or potentially complicit in prostitution or other illicit activities, they were mothers, wives, and friends.

Although the slain Asian American women were all of older age, their ages did not preclude them from being associated with a hypersexualized image of Asian identity. In a society where youth is often associated with phenotypical sexual appeal and sexual viability, it is odd that these older Asian American women were still targeted as a "sexual model minority."

www.npr.org/2021/03/19/979340013/a-sociologists-view-on-the-hyper-sexualization-of-asian-women-in-american-societ.

135 Id.

136 Deborah J. Schildkraut, Boundaries of American Identity: Evolving Understandings of 'Us,' Department of Political Science at Tufts University (Jan. 22, 2014), www.annualreviews.org/doi/10.1146/annurev-polisci-080812-144642.

137 Linda Trinh Võ & Marian Sciachitano, Introduction: Moving beyond 'Exotics, Whores, and Nimble Fingers': Asian American Women in a New Era of Globalization and Resistance, 21 Frontiers: A Journal of Women Studies 1, 4 (2000).

138 Id.

139 Id.

140 Contrera et al, supra note 119.

141 Trevor Hughes et al., Xiaojie Tan Dreamed of Traveling the World and Celebrating Her 50th Birthday with Her Daughter. Then the Atlanta Shooter Ended Her Life, USA Today (Mar. 23, 2021), www.usatoday.com/story/news/nation/2021/03/18/stop-asian-hate-atlanta-shooting-victim-mother-business-owner/4754151001/.

142 Esther Fung et al., For Atlanta Shooting Victims, American Life Was Often a Lonely Struggle, The Wall Street Journal (Mar. 28, 2021), www.wsj.com/articles/atlanta-shooting-victims-anti-asian-violence-11616947628.

143 Id.

144 Id.

145 Id.

The term "sexual model minority" was first utilized by Sumi Cho (1997) and Susan Koshy (2004) to describe a representation of the Asian woman as an ideal figure because of her "union of sex appeal with family-centered values and a strong work ethic."[146] Cho rightfully points out that the "sexual model minority" stereotype pits the Asian female diaspora against the White female who endorses feminist ideologies of autonomy and independence and the Black woman characterized as lazy and politically demanding.[147] Put another way, this stereotype pits the Asian female diaspora against her fellow female comrades.[148]

Outside the context of the Georgia mass shootings, those who support decriminalizing sex work have butted heads with law enforcement agencies' regarding the legitimacy of businesses that profit from sex work.[149] The reality is that the circumstances of the people involved vary widely; some are there by choice, some because of trafficking, and still others are coerced into working .[150] As a result, "illicit" businesses are frequently targets for sting operations, which most commonly end in arrests of the very individuals police forces claim they are working to free and protect.[151] And yet, the truth is that many, if not most, immigrant-run spas and massage establishments perform legitimate business transactions and aesthetic services.[152] It is simply most convenient for the general public and institutional powers to lean into the exotic Asian prostitute stereotypes of Miss Saigon or Suzie Wong and combine it with Asian immigrant ownership of a business in a low-wage industry to produce an image of sex work.[153] Thus, one of the two primary reflections to be taken from the Georgia mass shootings is that the victims were killed not only for their affiliation to the Asian race, but also due to their perceived susceptibility of being sexually deviant.

IV. CONCLUSION

The Georgia mass shootings have been utilized as a catalyst for advocates and academics to rally under a national anti-Asian hate campaign, but the campaign fails to recognize that the hate crime was discriminatory on the basis of gender as well as race. The crime stands as proof of the potential life consequences of a non-intersectional approach. In order to further discuss the positioning of the Asian female diaspora in American race politics, it is crucial to recognize the subjugation of women in the historicization of contributions to social movements as well as the displacement of Asian bodies in the American conception of race and race politics through legal means. The six Asian American women who were killed in Georgia were victims of discrimination based on their perceived sexual promiscuity as well as their racial identity.

Though the idea of what it means to be a minority has been broached by various identities' personal narratives and public outcries for justice, the Asian American experience is often not remembered. The most referenced cases have been in relation to the subjugation of Black and brown bodies. Repeated racist institutional practices that reinforce the idea that Black and brown bodies lay at the bottom of the American sociocultural hierarchy gave birth to a totem pole of social value as well as the Black and white binary. The issue with the Black/white paradigm is that it maintains the common-knowledge doctrine of race: that "racial divisions" are informed by "perceptions… grounded in physical appearance."[154] Social consensus over what markers are to be associated with a specific race (e.g. hair texture, skin color, mental or temperamental qualities) informed common-knowledge of what groups possessed which characteristics.[155] Through these associations, the races were ranked in order of inferiority and superiority of characteristics.[156]

The binary does little to situate non-Black identities in American race politics because of its linear nature.[157] Thus,

146 Robin Zheng, Why Yellow Fever Isn't Flattering: A Case Against Racial Fetishes, 2 Journal of the American Philosophical Association 400, 405 (2016), doi:10.1017/apa.2016.25.

147 Id.

148 Id.

149 Contrera,et al., supra note 119.

150 Id.

151 Id.

152 Angie Chuang, Two Stereotypes that Diminish the Humanity of the Atlanta Shooting Victims–and All Asian Americans, The Conversation (May 3, 2021), theconversation.com/two-stereotypes-that-diminish-the-humanity-of-the-atlanta-shooting-victims-and-all-asian-americans-157762.

153 Id.

154 John Tehranian, Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America, 109 Yale L. J. 817, 821 (2000), doi:10.2307/797505.

155 Lawrence Blum, Racialized Groups: The Sociohistorical Consensus, 93 The Monist 298, 298 (2010), doi:10.5840/monist201093217.

156 Id.

157 Juan F. Perea, The Black/White Binary Paradigm of Race: The 'Normal Science' of American Racial Thought, 85 Cal. L. Rev.

the Black/white paradigm should be utilized as a frame of reference to understand race and race relations. It should not dictate that all racial identities in the United States are best understood through the paradigm.[158] Assuming the paradigm is correct leaves non-Black and non-white individuals to question where they lie in the spectrum of domination and can make minorities feel ignored altogether.[159] In response, Perea argues that the focus of white racism against Black bodies in history may have helped to centralize the norms of humanity and civil rights, but it has come at the expense of "othering" non-Black bodies.[160] The issue with the paradigm is that it suggests that non-white groups other than Blacks are not truly victims of racism.[161] When the remembrance of a national identity is defined upon a binary, those who do not fit on either side of the imaginary line of acceptance will not find their story. There is no recognition of their suffering for history because institutions refuse to acknowledge the severity of their oppression. Perea actively goes against the theory that "non-White immigrant ethnics are essentially Whites-in-waiting who will be permitted to assimilate and become White" and proposes that perhaps LatinX and Asians are excluded from American race politics because these two populations' struggles are framed as unique to recent immigration.[162]

If the LatinX and Asian diasporas are considered recent additions to the American public, the question then becomes, could non-biological Caucasian individuals be considered as "white" in American law and society if they were forced to abide by the common understanding of race? According to Ozawa v. United States (1922), even if the Asian diaspora were to abide by the common-knowledge standard of whiteness, it would not be enough to qualify for naturalization.[163] United States v. Thind (1923) introduced the inappropriateness of utilizing the scientific evidence approach of proving race but did little to establish the wrongs of prior legislation that was explicitly anti-Asian.[164] Asian Americans are regarded as "inauthentic people of color" and have been comprehended in the American legal system as "near-whites," "honorary whites," or "constructive blacks."[165] On the other hand, this does not mean that it is appropriate to expect the Asian diaspora to actively attempt to "become white."[166] Allowing the Asian diaspora to perform whiteness ignores the systemic issue of comparing minorities against the Black and white paradigm.[167]

Victims of the Georgia shootings were portrayed as individuals who made considerable efforts to become "American."[168] But of the six women, four were already legal United States citizens, one held a green card, and only one was a Chinese national.[169] Even in death, the six Asian American women were not perceived as American enough. Specific behaviors, such as going to church, had to be highlighted to prove their allegiance to the United States. As poignantly identified by Professor Angie Chuang, the media also failed to refer to the victims of the Georgia mass shootings as "Asian American women" and instead, predominantly referred to them as "women of Asian descent."[170] It is necessary to stay vigilant regarding inappropriate tendencies in language, particularly because there is a dearth of information regarding the case. What seems at first glance to be a synonymous way of describing Asian American women is actually indicative of the desire to not associate the victims with the "model minority" stereotype of this diaspora.[171] In reality, Asian Americans are the most economically diverse group in the United States and represent a large proportion of low-wage service workers in the nation.[172] In reflection of the myriad of anti-Asian legislation, understanding, and misrepresentation, it is imperative to realize that the hate crime in Georgia was not a unique or independent act of discrimination; it was an act of hatred, violence, and "othering" that resulted from decades of legal and societal "othering" of the Asian female diaspora. The crime occurred because the Asian American women were

127, 156 (1997), doi:10.2307/3481059.

158 Id.

159 Id.

160 Id. at 134.

161 Id.

162 Id. at 137 and 144.

163 Tehranian, supra note 154, at 822.

164 Id.

165 Robin J. Diangelo, The Production of Whiteness in Education: Asian International Students in a College Classroom, 108 Teachers College Record 1983, 1984 (2006), doi:10.1111/j.1467-9620.2006.00771.x.; Ancheta, supra note 38.

166 Linda Martín Alcoff, Latinos, Asian Americans, and the Black-White Binary, 7 Visible Identities 5, 21 (2006), doi:10.1093/0195137345.003.0011.

167 Id.

168 Hughes et al., supra note 141.

169 Fung et al., supra note 142.

170 Chuang, supra note 152.

171 Id.

172 Id.

Narratives Surrounding the Equal Rights Amendment: How Queerness Has Permeated Discussions of the E.R.A.

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Abstract

This paper examines the narratives used by supporters and opponents of the Equal Rights Amendment ("E.R.A.") throughout the 1920s, 1970s, and the present day. Historically, narratives constructed by E.R.A. advocates in the 1920s and 1970s called into question existing assumptions and norms surrounding gender, whereas narratives constructed by E.R.A. opponents used homophobic and transphobic rhetoric to spark fear and confusion surrounding its purpose and potential consequences. Recently, the E.R.A. has returned to the national spotlight due to its ratification by Nevada, Illinois, and Virginia, causing the LGBTQ+ community to enter the narratives pushed by supporters of the E.R.A. In examining these narratives as they relate to Bostock v. Clayton County, it becomes clear that the LGBTQ+ community has much to gain through the E.R.A. and is an integral part of the current political landscape.

I. INTRODUCTION

Though nearly a hundred years have passed since the Equal Rights Amendment ("E.R.A.") was introduced in 1923 and nearly fifty years have passed since it was approved by Congress in 1972, the E.R.A. was recently thrust again into the limelight by Pat Spearman, a queer, black, Nevadan preacher.[1] The rise of the third wave of feminism created a social climate in which ratification of the E.R.A. was finally made possible on January 15, 2020, when Virginia became the 38th state to ratify the E.R.A..[2] The E.R.A. could further LGBTQ+ rights by ensuring protection against discrimination based on sexual orientation or gender identity. However, the current narrative surrounding the potential passage of the E.R.A. is far different from that of the 1920s or 1970s. In fact, groups such as STOP E.R.A., led by Phyllis Schlafly, used homophobic and transphobic rhetoric to turn public opinion against the E.R.A. This paper examines how E.R.A. proponents and opponents have made references to queerness in their activism surrounding the Equal Rights Amendment from its introduction to today. I will demonstrate that anti-LGBTQ+ sentiment was utilized by anti-E.R.A. activists to prevent the passage and ratification of the E.R.A. before the expiration of the ratification deadline. However, as public sentiment has become increasingly favorable to the LGBTQ+ community and the legality of discrimination based on sexual orientation and gender identity has come into question, supporters of the ratification of the E.R.A. have adopted pro-LGBTQ+ language into their rhetoric, suggesting that there may be potential for a partnership between pro-E.R.A. and LGBTQ+ activism.

II. HISTORY OF NARRATIVES SURROUNDING THE EQUAL RIGHTS AMENDMENT

Protection or Restriction? Debate Over the E.R.A. in the 1920s

The Equal Rights Amendment has been a source of controversy since it was first written by Alice Paul, suffragette and founder of the National Women's Party ("N.W.P."), in 1921.[3] The E.R.A. declared: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[4] The aim of the E.R.A. was to target the abundance of state policies that restricted women's rights and liberties, including state laws that restricted women's rights to own property and gave them inferior guardianship rights over their children.[5] Paul determined that following the Nineteenth Amendment, the next step to furthering women's rights was to eliminate the existing legal discrimination against women through another constitutional amendment. Hence, the N.W.P. defined equality as equality of opportunity, driven by Paul's vision of a world that was not widely accepted in her time: a world in which women were seen as naturally inferior to men.[6] Other women's rights activists of the time, however, disagreed on this definition of equality, sparking a backlash against the E.R.A.[7]

Florence Kelley, along with allies in the National Consumers' League, the Women's Trade Union League, and the League of Women Voters, were the first voices of opposition to the E.R.A. Kelley was a strong advocate for protective labor laws for women, only joining the suffrage movement after she was persuaded that women would need to obtain the right to vote to continue fighting for this type of legislation.[8] Protective labor laws were based on the assumption that men and women were physiologically different and played different roles in society. While Kelley supported protecting women in the workforce, she was also a strong proponent of the traditional role she believed women should play in family life. These laws limited the number of hours and types of jobs women could work.[9] The E.R.A. would eliminate the legal standing these protections were based on, as they assume that women and men do not have equality of rights under the law. By the time the E.R.A. was introduced in 1923, Paul's and Kelley's factions had become irreversibly opposed. Kelley's faction argued that the courts could use the E.R.A. to strike down protective legislation, whereas Paul became convinced that any exemption in the E.R.A. could be misconstrued, rendering it entirely ineffective at ensuring that equality under the law would be protected.[10]

1 Kate Kelly, The E.R.A. Is Queer and We're Here For It!, The Advocate (February 23, 2019, 9:03 AM), https://www.advocate.com/commentary/2019/2/23/E.R.A.-queer-and-were-here-it.

2 Bill Chappell, Virginia Ratifies The Equal Rights Amendment, Decades After The Deadline, NPR (January 15, 2020, 3:36 PM), https://www.npr.org/2020/01/15/796754345/virginia-ratifies-the-equal-rights-amendment-decades-after-deadline.

3 Jo Freeman, Social Revolution and the Equal Rights Amendment, Sociological Forum, 145 (1988).

4 Donald T. Critchlow and Cynthia L. Stachecki, Politics, Policy, and Social Mobilization in a Democracy, 20 Journal of Policy History, 157 (2008).

5 Freeman, supra note 3, at 145-146.

6 Id.

7 Id.

8 Id.

9 Id.

10 Id.

Paul's view of the world can be classified as one in which gender is nothing more than a social construct that may be torn down with the effective protection of rights and liberties by the law, whereas Kelley's worldview reinforces gender norms and roles as a means of protecting women's rights. Ultimately, the E.R.A. was continuously struck down and vigorous debate surrounding the proposed amendment did not reappear until the second wave of feminism in the late 1960s and 1970s.

New Hope: The Return of the E.R.A. in the Second Wave

The women's liberation movement of the 1960s and 1970s provided the N.W.P. the perfect opportunity to bring the Equal Rights Amendment into the national limelight once again. The NWP infiltrated the National Organization for Women ("N.O.W."), leading NOW to endorse the E.R.A. in 1967.[11] The second wave of feminism was focused on women's role in the workforce and the world outside the home, and unlike in the 1920s, the majority of feminist reformers focused their efforts on equality of opportunity rather than workplace protections. Title VII of the Civil Rights Act prohibited employment discrimination, causing the courts to find protective labor legislation to be illegal.[12] Therefore, the civil rights-influenced feminist movement of the 1970s focused its efforts on opportunity and fighting discrimination, creating a perfect avenue for the E.R.A. to reenter the national conversation. Though the E.R.A. had been introduced in every Congress since 1923, it was not debated on the House floor until 1970-71, and by 1972, most legal scholars agreed that ratification was possible.[13] In 1972, the E.R.A. finally passed both chambers of Congress and the race for it to be ratified by the necessary 38 states began, bringing arguments for and against its ratification to the forefront.

The narrative used by supporters of the E.R.A. was heavily focused on opportunity and oppression. Senator George McGovern effectively summarized the view of the E.R.A.'s supporters in his statement that "the barrier that restricts a woman's life is invisible, based on unspoken assumptions. It is like a glass wall."[14] This glass wall enclosed women in the traditional home life enforced by gender norms—the expectation of marriage and reliance on men for economic support. It also closed off women from the ample opportunities of society such as economic self-sufficiency and freedom to make their own decisions regarding their career, their bodies, and their future. In her analysis of the rhetoric generated by the proponents and opponents of the E.R.A., Foss notes that for those who supported the E.R.A., "[t]he sacred ground is the new, ready-to-be-explored world, a world which gives rise to the opening of gates to women and to grassroots participation in this world."[15] This focus on a socially constructed barrier to full participation in society demonstrates how the second wave of feminism framed prejudices once accepted as natural as socially constructed methods of oppression. Moreover, proponents framed opposition to the E.R.A. as a reaction to the potential dismantling of a power structure from which men have historically benefitted.[16] By basing the narrative surrounding the E.R.A. in terms of oppression and the struggle against it, proponents of the E.R.A. were able to link the E.R.A. to larger themes of justice and equality. However, as in the 1920s, the fight for the passage of the E.R.A. sparked a significant backlash.

Radical Departures: How Gender and Sexuality Entered E.R.A. Debates

The anti-E.R.A. movement used homophobic and transphobic rhetoric as well as a glorification of gender norms to advocate against its ratification. Bette Jean Jarboe, the founder of the International Anti-Women's Liberation League, went as far as to claim that the E.R.A. would eliminate desegregated public bathrooms.[17] This outrageous and false claim is rooted in trans panic and the concept of the sanctity of the home for women. Opponents of the E.R.A. viewed its ratification as a threat to the role of women as homemakers and mothers. This claim regarding bathrooms is rooted in gender norms that portray women as potential victims in need of protection from men who are not liable for their sexual and violent urges. Penis panics, defined in the article Bathroom Battlegrounds and Penis Panics by Kirsten Schilt and Laurel Westbrook as "moments where people react to a challenge to the gender binary by frantically asserting its naturalness," result from a glorification of the bathroom as a safe space for cisgender women.[18] Hence, anti-E.R.A. activists used penis panics to spread fear

11 Freeman, supra note 3, at 147-148.

12 Id.

13 Sarah A. Soule and Susan Olzak, When Do Movements Matter? The Politics of Contingency and the Equal Rights Amendment, 69 American Sociological Review, 473, 475 (2004).

14 Sonja K. Foss, Equal Rights Amendment Controversy: Two Worlds in Conflict, 65 Quarterly Journal of Speech, 275, 277 (1979).

15 Id. at 278.

16 Id.

17 Id. at 283.

18 Kristien Schilt and Lauren Westbrook, Bathroom Battlegrounds and Penis Panics, Sociology for the Public (August 20, 2015), https://contexts.org/articles/bathroom-battlegrounds-and-penis-panics/.

and misunderstanding regarding the E.R.A.[19] Furthermore, Foss claims that E.R.A. supporters were viewed by opponents to be loud-mouthed females who "wish[ed] they were born male," demonstrating that the opponents used language related to the trans experience as a means of painting supporters of the E.R.A. as "the other."[20]

Moreover, anti-E.R.A. activists accused proponents of being "masculine and homosexual" as well as "promoters of free sex."[21] This homophobic rhetoric was used to link the E.R.A. to such "un-American" notions as lesbianism and childless marriages so that the E.R.A. itself would also be viewed as un-American. This method was incredibly effective; Foss argues that by painting proponents of the E.R.A. as violators of norms surrounding gender and sexuality, "the focus of the conflict shifts so that the supporters must defend themselves as legitimate persons rather than concentrate on issues directly relevant to the battle over the E.R.A."[22] Furthermore, in his testimony to the Senate Judiciary Committee, Harvard Law Professor Paul Freund claimed that the E.R.A. would allow for same-sex marriage to be legalized. In response to this, Senator Sam J. Ervin, Jr. stated, "this matter illustrates as well as any the radical departures from our present system that the E.R.A. will bring about in our society," effectively using the potential legalization of same-sex marriage as an argument against the passage of the E.R.A..[23] Despite these bold claims, same-sex marriage was not even on the agenda for the majority of LGBTQ+ activists in the 1970s—in fact, campaigns to legalize marriage equality did not begin in earnest until the 1990s.[24] Hence, the arguments of Professor Freund and Senator Ervin were nothing more than fear-mongering outside of reality. Anti-E.R.A. activists, therefore, tied the E.R.A. to homosexuality and transgenderism in order to delegitimize it and place proponents on the defensive.

Additionally, anti-E.R.A. activists of the 1970s promoted narratives that encouraged traditional gender roles and norms to argue against the passage of the E.R.A. Groups such as STOP E.R.A. primarily saw the E.R.A. as a threat to home life for women. Anti-E.R.A. activists glorified the roles of homemaker and mother—in direct contrast with proponents of the E.R.A. who argued that the E.R.A. focused on the world outside of the home itself. Phyllis Schlafly went as far as to claim that "no more radical piece of legislation [than the E.R.A.] could have been devised to force women outside of the home."[25] The opponents of the E.R.A. glorified women whose gender performance aligned with traditional values surrounding motherhood and marriage and demonized women who did not conform to gender norms. Narratives used by anti-E.R.A. activists stoked fear surrounding the workplace. It is important to consider the demographics of the proponents and opponents to the E.R.A. when it comes to this narrative. Opponents to the E.R.A. were overwhelmingly white women who were privileged enough to not have to work, whereas many supporters of the E.R.A. effectively included working-class women and women of color in their activism.[26] Therefore, this narrative demonstrates the privilege that white women held in not having to work to support themselves. While opponents to the E.R.A. fought against being forced into the workplace, supporters of it fought for its passage to increase opportunities in the workplace they had no choice but to enter. Foss argues that ultimately, opponents to the passage of the E.R.A. in the 1970s fought to maintain customs and institutions such as "the family, marriage, [and] financial support of women by men," and this narrative glorifying traditional values was effective in preventing the ratification of the E.R.A. prior to the 1982 deadline.[27]

III. ANALYSIS OF THE E.R.A.'S RELEVANCE FOR LGBTQ+ RIGHTS TODAY

The Alice Paul Institute argues that concerns regarding whether the E.R.A. would allow for same-sex marriage or other protections for LGBTQ+ individuals have been rendered irrelevant given the legalization of same-sex marriage nationwide and the advent of court decisions and laws against discrimination on the basis of sexual orientation and gender identity.[28] Furthermore, though the Institute's website has an extensive page detailing why one should support the E.R.A., this webpage makes no mention of LGBTQ+ rights.[29] This rhetoric paints the perceived potential of the E.R.A. to further

19 Id.

20 Foss, supra note 14, at 284-285.

21 Id.

22 Id.

23 Phyllis Schlafly, E.R.A. and Homosexual 'Marriages,' Eagle Forum (September 1974), https://eagleforum.org/publications/psr/sept1974.html.

24 Erik Eckholm, The Same-Sex Couple Who Got a Marriage License in 1971, The New York Times (May 17, 2015), https://www.nytimes.com/2015/05/17/us/the-same-sex-couple-who-got-a-marriage-license-in-1971.html.

25 Foss, supra note 14, at 282.

26 Allison Lange, The Equal Rights Amendment Has Been Dead for 36 Years. Why It Might Be on the Verge of a Comeback, The Washington Post (June 18, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/06/18/the-equal-rights-amendment-has-been-dead-for-36-years-why-it-might-be-on-the-verge-of-a-comeback/.

27 Foss, supra note 14, at 283.

28 FAQ, Equal Rights Amendment, https://www.equalrightsamendment.org/faq.

29 Why, Equal Rights Amendment, https://www.equalrightsamendment.org/why.

LGBTQ+ rights as a threat rather than a potential benefit. It thus appears at first glance that the narrative currently pushed by E.R.A. proponents is that the E.R.A. would not do anything to further gay rights in response to homophobic and transphobic arguments historically pushed by E.R.A. opponents. However, in examining other groups supporting the passage of the E.R.A., it becomes clear that divisions exist in the current pro-E.R.A. movement as well.

In "Is the Equal Rights Amendment relevant in the 21st Century?," an article on the National Organization for Women's official website, authors Bonnie Grabenhofer and Jan Erickson argue that the E.R.A. could further LGBTQ+ rights. Grabenhofer and Erickson claim that in Obergefell v. Hodges (2015), the Supreme Court failed to state that discrimination on the basis of sexual orientation or gender identity is subject to heightened judicial scrutiny or that LGBTQ+ people are a protected class.[30] Moreover, this narrative that the E.R.A. could further LGBTQ+ rights is not entirely new. In 1974, John Singer and Paul Barwick argued before the state Supreme Court that the Washington State Equal Rights Amendment prohibited the state from denying marriage to same-sex couples, though the court ultimately rejected this argument.[31] In 2011, Pema Levy argued in her article, "The Gay Equal Rights Amendment," that the E.R.A. could be used to further LGBTQ+ rights, and if it were construed to protect LGBTQ+ people, laws against discrimination in employment and housing against LGBTQ+ people would vanish.[32] Despite these potentially incredible gains for LGBTQ+ activists, Levy ultimately concluded that including LGBTQ+ activism in the fight for the E.R.A. was not politically viable at the time. However, a decade later, LGBTQ+ activism has proven to be politically viable, yet the need for protections against discrimination persists.

Consequently, two major proponents of the E.R.A., the Alice Paul Institute ("A.P.I.") and the National Organization for Women, appear to support contradictory narratives regarding the E.R.A. and LGBTQ+ rights. Where the A.P.I. presumes that linking LGBTQ+ rights and the E.R.A. would draw conservative backlash, N.O.W. sees the connection as an opportunity to draw liberal activists already supporting LGBTQ+ rights to the E.R.A. cause. This divide is representative of tensions between older feminist movements that prioritized victories over inclusion and newer feminist movements that aim to be intersectional in their activism. The push for modern activist movements to be inclusive thus appears to have influenced N.O.W. to embrace LGBTQ+ rights in their E.R.A. activism. Furthermore, as attacks on LGBTQ+ rights have become increasingly high-profile, it has become clear that the E.R.A. could serve as a method of ensuring protections for LGBTQ+ rights on a federal level, and thus a potential partnership between pro-E.R.A. and LGBTQ+ activists could be mutually beneficial.

A New Road to Ratification?

In 2017, Nevada became the first state to ratify the E.R.A. after the expiration of the 1982 deadline, bringing the E.R.A. back into the national conversation. Illinois became the 37th to ratify in 2018, followed by Virginia as the 38th in 2020.[33] Allison Lange of the Washington Post attributes this resurgence of the E.R.A. to the 2016 presidential election and the wave of women's activism it inspired, though this claim likely ignores a confluence of other factors that could have attributed to the E.R.A.'s resurgence, such as movements inspired by the persistence of the wage gap over fifty years after the passage of the Equal Pay Act.[34] Furthermore, E.R.A. activists maintain that while the Civil Rights Act, Title IX, and the Equal Pay Act provide protections against sex discrimination, these are all pieces of legislation that can be weakened or overturned by the courts.

In examining the 2019 Supreme Court cases regarding discrimination on the basis of sexual orientation and gender identity in the workplace, the potential implications of ratifying the E.R.A. for LGBTQ+ activism become clear. On October 8, 2019, the Supreme Court heard three cases regarding discrimination against LGBTQ+ identifying people in the workplace. In their decision in Bostock v. Clayton County (2020), the Supreme Court determined that Title VII of the Civil Rights Act's ban on discrimination on the basis of sex protects against discrimination on the basis of sexual orientation and gender identity. This decision came as a surprise to many, including and especially LGBTQ+ rights advocates who did not anticipate

30 Bonnie Grabenhofer and Jan Erickson, Is the Equal Rights Amendment Relevant in the 21st Century?, National Organization for Women, https://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/.

31 History of Marriage Equality in Washington State: McKinley Irvin Divorce Guide, McKinley Irvin Family Law, https://www.mckinleyirvin.com/resources/same-sex-marriage-parenting-divorce-in-washingto/history-of-marriage-equality-in-washington-state/.

32 Pema Levy, The Gay Equal Rights Amendment, The American Prospect (January 27, 2011), https://prospect.org/article/gay-equal-rights-amendment./.

33 Russell Berman, The Equal Rights Amendment Is An Artifact No More, The Atlantic (November 8, 2019), https://www.theatlantic.com/politics/archive/2019/11/virginia-equal-rights-amendment-women-constitution/601609/.

34 Allison Lange, The Equal Rights Amendment Has Been Dead for 36 Years. Why It Might Be on the Verge of a Comeback, The Washington Post (June 18, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/06/18/the-equal-rights-amendment-has-been-dead-for-36-years-why-it-might-be-on-the-verge-of-a-comeback/.

Justices Neil Gorsuch and Chief Justice John Roberts to side with liberal justices Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor.[35] Prior to this decision, there were no explicit workplace protections for LGBTQ+ individuals at the federal level. The Bostock v. Clayton County decision is promising and could serve as precedent in future cases regarding LGBTQ+ rights, such as discrimination in housing and healthcare.

However, since the Bostock v. Clayton County decision was passed down, Supreme Court Justice Ruth Bader Ginsburg passed away and was replaced swiftly by President Donald Trump's conservative nominee, Justice Amy Coney Barrett. With the current 6-3 conservative-liberal balance on the court, it will be even more difficult for LGBTQ+ advocates to further their rights through the judicial branch. In fact, the Bostock v. Clayton County decision could be overturned. LGBTQ+ activists have argued that this demonstrates the need to pass the Equality Act, which would enshrine protections for LGBTQ+ individuals in legislation at the federal level.[36] However, though the Equality Act passed the House, it has been blocked in the Senate since its introduction and Democrats may still face roadblocks to passing it in the 117th Congress with their slim Senate majority. The courts and Congress thus may not be viable methods of obtaining sweeping protections for LGBTQ+ individuals at the federal level in the current political climate.

IV. CONCLUSION

Adding the E.R.A. to the Constitution could expand LGBTQ+ protections on the federal level. Some current case law affirms that discrimination based on gender identity and sexual orientation counts as sex discrimination and is therefore subject to intermediate scrutiny under the Equal Protection Clause.[37] In ensuring equality of rights under the law on the basis of sex, the E.R.A. could indeed ensure that discrimination on the basis of sexual orientation and gender identity in the workplace is unconstitutional and thus subject to much higher judicial scrutiny. Furthermore, these rights would expand beyond the workplace and into housing, healthcare, education, and more. Members of the LGBTQ+ community living in the states with the most discriminatory legislation would have the most to gain from this expansion of rights at the federal level. Activists have generally failed to make the connection between the Bostock v. Clayton County decision, the appointment of Amy Coney Barrett to the Supreme Court, and the potential addition of the E.R.A. to the Constitution, or perhaps have hesitated in making this connection in order to avoid conservative backlash. As the Supreme Court hears even more cases concerning LGBTQ+ rights while courts battle over whether the E.R.A.'s ratification is valid, it is important to continue analyzing the narratives that E.R.A. proponents, LGBTQ+ activists, and E.R.A. opponents use in their activism.

Since the Equal Rights Amendment was first introduced, its supporters and opponents have been outspoken in fighting for its passage or defeat. Historically, narratives constructed by supporters of the E.R.A. in the 1920s and 1970s called into question existing assumptions and norms surrounding gender. However, narratives constructed by opponents to the passage and ratification of the E.R.A. regularly included homophobic and transphobic rhetoric intended to spark fear and confusion surrounding the purpose and potential consequences of the passage of the E.R.A. Recently, as the E.R.A. has returned to the national spotlight due to its ratification by Nevada, Illinois, and Virginia, the LGBTQ+ community has entered the narratives pushed by supporters of the E.R.A. In examining these narratives as they relate to Bostock v. Clayton County, it becomes clear that the LGBTQ+ community could have much to gain through the support of pro-E.R.A. activists and the E.R.A. The fate of the E.R.A. itself remains unclear—the United States House of Representatives passed a bill in 2020 to retroactively remove the 1982 ratification deadline, but some legal experts claim that the 1982 deadline stands, and the fact that five states rescinded their ratification of the E.R.A. prior to the 1982 deadline further complicates matters.[38] Nevertheless, this is not the end of the E.R.A. In fact, late Justice Ruth Bader Ginsburg stated that she would like to see Congress start from scratch and pass a new E.R.A.[39] However Congress decides to proceed, the manner in which the LGBTQ+ community enters pro-E.R.A. and anti-E.R.A. narratives will provide insight into how the LGBTQ+ community factors into the current political landscape and what it could potentially gain through the E.R.A. Ultimately, should pro-E.R.A. activists continue to argue that the E.R.A. is a pathway to further LGBTQ+ rights, their risks could bring incredible rewards to the LGBTQ+ community.

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35 Pete Williams, In Landmark Case, Supreme Court Rules LGBTQ Workers Are Protected from Job Discrimination, NBC (June 15, 2020), https://www.nbcnews.com/politics/supreme-court/supreme-court-rules-existing-civil-rights-law-protects-gay-lesbian-n1231018.

36 German Lopez, The House Just Passed a Sweeping LGBTQ+ Rights Bill, Vox (May 17, 2019, 12:14 PM), https://www.vox.com/policy-and-politics/2019/5/17/18627771/equality-act-house-congress-LGBTQ+-rights-discrimination.

37 Kelly, supra note 1.

38 Danielle Kurtzleben, House Votes To Revive Equal Rights Amendment, Removing Ratification Deadline, NPR (February 13, 2020, 12:35 PM), https://www.npr.org/2020/02/13/805647054/house-votes-to-revive-equal-rights-amendment-removing-ratification-deadline.

39 Id.

The Historic Fight for Equal Pay: Combatting the Gender Wage Gap Through Legislation, Litigation, & Federal Regulation

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Abstract

The persistence of the gender wage gap decades into the twenty-first century, despite legislation such as the Equal Pay Act of 1963 and Title VII, demonstrates the failure of past legal tactics to adequately protect women's economic rights. Given the continued prevalence of such wage discrimination, many stakeholders highlight the need for further government action. However, widespread consensus on the proper pathway forward has yet to be established, necessitating a thorough analysis of the triumphs and failures of past advocates for wage parity. This paper will examine the legislative, litigative, and regulatory tools employed throughout the history of the battle for pay equity, evaluating which strategies hold the most promise for modern feminist coalitions. Based on these findings, this piece will argue that the complaint-based model established during the 1960s places too heavy a burden on female plaintiffs, restricting their capacity to utilize these laws' full protections. The litigation strategies of both feminist and labor groups have ultimately failed to accomplish their goal of completely closing the gender wage gap, and efforts on the part of regulatory agencies like the Equal Employment Opportunity Commission have proven similarly ineffective in alleviating the plight of working women. Thus, by tightening provisions that have historically weakened female plaintiffs' claims, legislative strategies like the Paycheck Fairness Act and wage transparency laws serve as the most promising solution to closing the gender wage gap.

I. INTRODUCTION

On an otherwise unassuming day of congressional debate in 1964, Representative Howard Smith offered an amendment to Title VII of the Civil Rights Act that would forever alter the American legal landscape for claims of gender discrimination. With the addition of "sex" to the protections listed under Title VII, most scholars contend that Smith sought to kill the bill entirely, characterizing his proposal as one of "satire and ironic cajolery."[1] However, while the "sex" amendment was initially intended as a poison pill,[2] the representative from Virginia ironically provided the growing female workforce with the tools necessary to pursue charges of employment discrimination, sexual harassment, and pay inequality in court. Nonetheless, despite the amendment's revolutionary nature, its unconventional proposal reflected a flaw that would critically limit Title VII's potential for the feminist cause. Women were an afterthought in the very legislation undergirding their right to fair employment.

Various excuses have been proffered to explain the disparity between male and female income levels throughout our nation's legal history with most relying heavily on outdated stereotypes about women's levels of education and work experience. However, extensive research has demonstrated that a significant pay differential remains even after accounting for these factors, asserting that a larger bias exists in the wage-setting process.[3] Given the continued prevalence of such gender-based pay discrimination, many stakeholders highlight the need for further government action to fully remedy this inequality, but widespread consensus on the proper path forward has yet to be established.[4] This enduring injustice necessitates a thorough analysis of the triumphs and failures of past efforts to achieve wage parity, asking which strategies have proven most successful to women's rights advocates between 1963 and 2019.

This paper argues that the complaint-based model established under the Equal Pay Act (E.P.A.) and Title VII in the 1960s has historically placed too heavy a burden on female plaintiffs, restricting their capacity to utilize these laws' full protections. While the litigation strategies of both feminist and labor groups have generated significant legal mobilization, these attempts to close the wage gap were critically weakened throughout the second half of the twentieth century by legislative loopholes such as the free-market defense and the "equal work" requirement.[5] Efforts on the part of regulatory agencies like the Equal Employment Opportunity Commission (E.E.O.C.) have proven similarly ineffective in alleviating the plight of working women since the 1960s, owing to these groups' increasing backlog of cases and narrow focus on conciliation rather than enforcement.[6] In contrast, legislative proposals such as the Paycheck Fairness Act (P.F.A.) and wage transparency initiatives serve as the most promising path toward achieving pay equity. By increasing employer accountability and tightening provisions that have traditionally weakened female plaintiffs' claims, this proactive approach would narrow the pay gap while

1 Susan Gluck Mezey, In Pursuit of Equality: Women, Public Policy, and the Federal Courts 37 (1992).

2 Clinton Jacob Woods, Strange Bedfellows: Congressman Howard W. Smith and the Inclusion of Sex Discrimination in the 1964 Civil Rights Act, 16 S. Stud. 9 (2009).

3 For further commentary on the composition of the gender wage gap, see Kevin Miller and Deborah J. Vagins, Am. Ass'n of Univ. Women, The Simple Truth about the Gender Pay Gap (2018), https://www.aauw.org/app/uploads/2020/02/AAUW-2018-SimpleTruth-nsa.pdf; Francine D. Blau and Lawrence M. Kahn, The Gender Wage Gap: Extent, Trends, and Explanations, Nat'l Bureau of Econ Rsch (2016), https://www.nber.org/system/files/working_papers/w21913/w21913.pdf. It is imperative to recognize the continuing role of discrimination in the gender wage gap, refuting critics that attribute this disparity solely to women's choices in education, occupation, or motherhood. A 2018 study conducted by the American Association of University Women found a seven-percent wage differential between male and female college graduates one year after graduation, even after accounting for factors such as marital status, age, geographic region, occupation, and hours worked. Ten years after graduation, this disparity had increased to twelve percent, providing strong evidence for the existence of discrimination in the wage-setting process. Additional research conducted by Cornell professors Francine Blau and Lawrence Kahn examined the influence of various factors on the gender wage gap between 1980 and 2010, such as occupation, experience, and industry. In their analysis, thirty-eight percent of the wage differential in 2010 was attributed to "unexplained factors," again suggesting the presence of gender-based discrimination.

4 The Paycheck Fairness Act and Raise the Wage Act Will Help Women Build Economic Security, Nat'l Women's Law Ctr. (Jan. 28, 2021), https://nwlc.org/press-releases/the-paycheck-fairness-act-and-raise-the-wage-act-will-help-women-build-economic-security/; Cosponsor and Support Swift Passage of the Paycheck Fairness Act, Nat'l League of Women Voters (February 3, 2021), https://www.lwv.org/sites/default/files/2021-02/PFA%20Coalition%20Letter%20117th%20Congress%20Sign%20On.pdf; Chelsea Janes, Sen. Kamala Harris vows as president to fine companies that pay men more than women, Wash. Post. May 20, 2019, https://www.washingtonpost.com/politics/sen-kamala-harris-vows-as-president-to-fine-companies-that-pay-men-more-than-women/2019/05/19/af151a96-7a7f-11e9-a5b3-34f3edf1351e_story.html.

5 See Equal Pay Act of 1963, 29 U.S.C. § 206(d).

6 Linda G. Morra, U.S. Gen. Acct. Off., GAO/T-HRD-93-30, EEOC: An Overview iii (1993).

simultaneously reducing the number of suits that victims must file themselves. Thus, legislative proposals that depart from the onerous framework of Title VII and the E.P.A. would sharpen the legal tools available to victims of discrimination and alter the pay structures that have burdened, rather than benefitted, women in pursuit of economic justice.

Despite the innovative reforms contained in this legislation, previous proposals of the P.F.A. and other pay discrimination laws repeatedly failed to secure the support necessary to attain passage. While this raises significant questions about the historical and present-day efficacy of legislative legal tactics, this paper argues that such setbacks reflect flaws in past advocacy efforts rather than the proposals themselves. Sources from both feminist and labor coalitions reveal that these organizations have largely concentrated their efforts on reactive litigation tactics operating within the complaint-oriented framework, rather than legislative proposals that would have amended this broken system.[7] These groups' successful mobilization behind the Lilly Ledbetter Fair Pay Act ("F.P.A.") in 2009 illustrates the promise of such tactics when promoted by a broad-based coalition, suggesting that equal pay bills' past failures were due in large part to lacking advocacy initiatives from these groups. Therefore, since Representative Smith's ill-conceived addition of "sex" to Title VII's protections, legislative strategies for reform have demonstrated the strongest potential for change in the historic fight to close the gender wage gap.

II. BACKGROUND

While the E.P.A. and Title VII provided unprecedented levels of protection to female workers in the late 1960s, these laws contained critical faults that severely diminished their ability to serve women's interests. This section briefly outlines the historical limitations of this complaint-oriented approach, identifying the legislative origins of these problematic provisions as well as the courts' role in creating this burdensome system. After analyzing the judiciary's early interpretations of the "equal work" requirement and the fourth affirmative defense, this piece will demonstrate how these factors have manifested themselves within the legislative, litigative, and regulatory spheres to weaken the strength of equal pay statutes' intended protections.

Legislative Deficiencies: Loopholes in the E.P.A.

Passed as an amendment to the Fair Labor Standards Act in 1963, the E.P.A. mandated that "no employer…shall discriminate in the payment of wages within any establishment … on the basis of sex for equal work on jobs the performance of which requires equal skill, effort, [and] responsibility."[8] This provision defined the burden of proof required for a female plaintiff to establish her initial prima facie claim in court. In order to move to the next stage of the trial, the plaintiff had to produce a male comparator employed at her establishment who performed work "equal" to her own for a higher rate of pay.[9] Since the law's enactment, this ambiguous yet demanding "equal work" standard has proven to be one of the primary factors limiting the efficacy of equal pay claims, leaving plaintiffs without legal recourse in spite of the law's supposed protections.

In 1970, the E.P.A. came before the appellate courts for the first time with the Third Circuit's ruling in Shultz v. Wheaton Glass Co.[10] Turning to legislative histories for guidance, the judges emphasized the E.P.A.'s purpose "as a broad charter of women's rights in the economic field" and argued that any other interpretation of the "equal work" requirement would "destroy the remedial purposes of the Act."[11] However, despite the favorable nature of this ruling, the Third Circuit highlighted the dangers lurking in the ambiguities of the E.P.A., observing that "problems of construction … leap up from the reading of its language."[12] Without a formal job classification system to outline the responsibilities required of every position within an establishment, it was exceedingly difficult for plaintiffs to produce the evidence necessary to satisfy the courts. Plaintiffs were often forced to "rely upon the court's subjective determination that jobs were substantially equal," leading to increasingly narrow interpretations of the law that terminated many otherwise legitimate claims.[13] Furthermore, as industries moved away from standardized manufacturing jobs toward a system with individualized positions and responsibilities, plaintiffs faced

7 See Ruth B. Cowan, Women's Rights through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976, 8 Colum. Hum. Rts. L. Rev. (1976); Naomi Baden, Developing an Agenda: Expanding the Role of Women in Unions, 10 Lab. Stud. J. (1986); Marion Crain, Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech, 82 Geo. L. Rev. (1994).

8 Equal Pay Act of 1963, 29 U.S.C. § 206(d).

9 Kimberly J. Houghton, The Equal Pay Act of 1963: Where Did We Go Wrong, 15 Lab. Law. 155, 162–64 (1999).

10 Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970).

11 Id.

12 Id at 264.

13 Houghton, supra note 9, at 167; Stephanie Bornstein, Equal Work, 77 Md. L. Rev. 581, 606 (2018).

greater challenges in identifying male comparators employed in "substantially equal" roles.[14] Thus, in a display of striking foresight, the federal judiciary's first interpretation of the E.P.A. identified one of the flaws that would plague female plaintiffs for the rest of the Act's legal history.

If the plaintiff somehow manages to satisfy the rigorous "equal work" standard, the burden of proof shifts to the employer, who must then justify the wage differential based on one of four defenses outlined under the E.P.A. The law dictates that unequal payments must be made "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex."[15] This last condition, referred to as the "factor other than sex" (F.O.T.S.) defense, created a major loophole that has allowed employers to avoid liability for countless equal pay claims.[16]

At its broadest interpretation in the courts, the F.O.T.S. defense has been construed as a "'catch-all' exception [that] embraces an almost limitless number of factors," providing employers with wide latitude to justify pay disparities between male and female workers.[17] Three years after the decision in Shultz, the Third Circuit demonstrated the clear dangers of this loophole through its ruling in Hodgson v. Robert Hall Clothes (1973).[18] At issue were the disparate wages paid to male and female salespersons in Robert Hall's clothing departments, with company policy segregating all sales personnel into their respective clothing departments by sex.[19] Despite the fact that female workers were denied the opportunity to sell this merchandise, Robert Hall Clothes asserted that the higher profitability of men's clothing served as a "legitimate business reason" for paying male employees a higher wage—an interpretation with which the Third Circuit concurred.[20] By ignoring the fact that the employer's "reasoned business judgment" was directly related to their own policies of sex-segregation, this decision represented a significant step backward for the equal pay cause and paved the way for future defendants' reliance on the free market defense to justify wage differentials.

This ruling illustrates one of the most widely accepted—and detrimental—applications of the F.O.T.S. defense: the free market. Proponents of this approach argued that "relying on prevailing market rates … [was] a neutral, nondiscriminatory wage mechanism based on supply and demand," and courts that sought to scrutinize these motives were committing "an unjustified intrusion into employer prerogatives."[21] However, legal scholars Nelson and Bridges' thorough analysis of the rationale behind these economic principles casts significant doubt upon this argument. Their work highlights the courts' reliance upon theory rather than empirical data to justify employers' use of the free market defense, suggesting that the judiciary's longstanding deference to this approach has failed to consider the realities of the workplace.[22] Thus, the vague language surrounding the F.O.T.S. defense, combined with the courts' endorsement of the free market theory, has severely diminished the efficacy of litigative strategies for reform and silenced numerous victims of wage discrimination.

Further Setbacks in Early Case Law

Moving beyond the appellate courts, the Supreme Court considered an E.P.A. claim for the first time in Corning Glass Works v. Brennan, a 1974 ruling that presented mixed outcomes for the women's rights movement. Ruling in favor of the female plaintiffs, the Court rejected the employer's claims that shifts during the day and night constituted different working conditions under the "equal work" requirement.[23] Although the company's reasoning for the wage differential was "phrased in terms of a neutral factor other than sex," the Court recognized that the policy "nevertheless operated to perpetuate the effects of the company's prior illegal practice of paying women less than men for equal work."[24] However, while the

14 Deborah Thompson Eisenberg, Shattering the Equal Pay Act's Glass Ceiling, 63 S. Methodist L. Rev. 17, 21–24 (2010).

15 Equal Pay Act of 1963, 29 U.S.C. § 206(d).

16 Id.

17 Fallon v. Ill., 882 F.2d 1206, 1211 (7th Cir. 1989).

18 Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589 (3d Cir. 1973).

19 Id. at 591.

20 Id. at 594–97.

21 Mezey, supra note 1, at 99; Deborah L. Brake, Reviving Paycheck Fairness: Why and How the Factor-Other-Than-Sex Defense Matters, 52 Idaho L. Rev. 889, 900 (2016).

22 Robert L. Nelson and William P. Bridges, Legalizing Gender Equality: Courts, Markets, and Unequal Pay for Women in America 41 (1999).

23 Corning Glass Works v. Brennan, 417 U.S. 188, 209–10 (1974).

24 Id.

justices' rationale suggested a narrower interpretation of the E.P.A.'s F.O.T.S. defense, the Court's failure to take a clear position on this standard opened the door for a wide range of interpretations in the lower courts and deprived female plaintiffs of a potentially valuable legal tool in the courtroom.

The Court heard another foundational equal pay case in 1981, this time addressing elements of Title VII rather than the E.P.A. In County of Washington v. Gunther, female guards working at a county jail filed suit against their employer for paying their male counterparts a higher wage. Starting off as a simple charge of Title VII wage discrimination, this case quickly evolved into an assessment of the Bennett Amendment, a provision intended "to resolve any potential conflicts between Title VII and the Equal Pay Act."[25] While the Supreme Court's decision did exempt Title VII claims from the burdensome "equal work" requirement, it also bound these cases to the pitfalls of the F.O.T.S. defense, seriously diminishing Title VII's power as an instrument for change.

Further illustrating the judiciary's sustained deference to this defense, the Ninth Circuit dealt a devastating blow to the equal pay cause in the 1985 case of American Federation of State, County, and Municipal Employees (AFSCME) v. Washington. After a comprehensive job study found a twenty-percent pay gap between predominantly female and male positions in the state of Washington, AFSCME filed suit against the state, alleging that the government's failure to implement a comparable worth plan to remedy this disparity constituted sex-based wage discrimination.[26] Vehemently rejecting any notion of comparable worth, Justice Anthony Kennedy, acting in this case as a judge, ruled against the plaintiffs, asserting that "Title VII does not obligate it [the state] to eliminate an economic inequality that it did not create."[27] Ignoring the inherent bias at play in the wage-setting process, then-Judge Kennedy's explicit endorsement of the free market defense created yet another hurdle for female plaintiffs to level, proclaiming that "neither law nor logic deems the free market system a suspect enterprise."[28] However, his assessment neglected to consider the economic hardships already endured by working women under the lacking protections of the complaint-oriented system.

While these rulings represent only a sample of the cases involving equal pay, they clearly demonstrate the ways in which the "equal work" requirement and F.O.T.S. defense have operated to restrict female plaintiffs' victories in court. Claims brought through both litigative and regulatory channels have continuously struggled to meet these exacting requirements, and victims of discrimination have continued to carry the burden of closing the wage gap alone. Therefore, this policy history highlights legislative strategies that move away from this approach as the strongest tools for future reform.

III. LITIGATION, REGULATION, & LEGISLATION: EXPLORING POTENTIAL TOOLS FOR REFORM

While litigation efforts did generate greater public awareness for the equal pay cause, the comparable worth movement's failure to gain traction in the courts illustrates the limited utility of litigation as a tactic for substantive reform. Under the complaint-oriented system established by the E.P.A. and Title VII, female plaintiffs carry the sole burden of discovering and contesting discrimination in court. In a business culture fraught with information asymmetry, it can take years for employees to realize that wage discrimination has occurred, and even after this discovery, plaintiffs still must contend with the legislative deficiencies of the E.P.A. and Title VII.[29] Thus, both legal scholarship and historical case studies demonstrate the limitations of relying on litigation as a mode of reform.

The Pitfalls of Litigation: The "Equal Work" Requirement

Angelo v. Bacharach Instrument Co. (1977) illustrates how seemingly airtight claims have been repeatedly dismantled by the "equal work" requirement.[30] The court's ruling turned on the two parties' differing conceptions of the "skill, effort, and responsibility" assigned to male and female assembly workers at a Pennsylvania manufacturing plant. The plaintiffs filed suit against the company for paying disparate wages to male and female employees, asserting that their work was substantially equal to that of their male comparators.[31] Workers of both sexes supplied detailed testimony regarding the similar functions of their positions, and the plaintiffs also called on an expert industrial engineer to formally evaluate the types of

25 Cnty. of Wash. v. Gunther, 452 U.S. 161, 170 (1981).

26 AFSCME v. Wash., 770 F.2d 1401, 1403–04 (9th Cir. 1985).

27 Id. at 1407.

28 Id.

29 Bilma Canales, Closing the Federal Gender Pay Gap Through Wage Transparency, 55 Hous. L. Rev. 969, 973 (2018).

30 Angelo v. Bacharach Instrument Co., 555 F.2d 1164 (3d Cir. 1977)

31 Id. at 1167.

work performed under each job classification.[32] After intense scrutiny of the exertions required by each position, the engineer determined that the "skill, effort, and responsibility" associated with the female position was substantially equal to the work performed by the men, directly conforming with the "substantially equal" standard established in Shultz.[33]

However, in spite of the incredible similarities present in the plaintiffs' evidence, the Court sided with the employer, arguing that "Gottlieb [the engineer]'s testimony established no more than that the positions at issue were 'comparable.'"[34] Pointing to slight variations in the rigor and types of cutting employed by each worker, the court invalidated the plaintiffs' claim on the grounds that "a showing of comparability of positions was not sufficient to give rise to an inference that those positions were 'equal.'"[35] Thus, this decision adopted an extremely restrictive interpretation of the "equal work" standard, underscoring the increasingly demanding nature of the evidentiary standards imposed upon E.P.A. plaintiffs. Many women simply did not have the resources or legal expertise to analyze the degree to which their duties conform to those of a male comparator, and as seen in the text of Angelo, their evidence could still be proven inadequate even with the guidance of field experts. These findings emphasize the importance of efforts that focus on tools outside of the judiciary to remedy this disparity.

The Pitfalls of Litigation: The Realities of the Fourth Affirmative Defense

Decided in 2005, Wernsing v. Department of Human Services highlights the limitations imposed upon equal pay litigation by the free-market defense.[36] An employee at the Illinois Department of Human Services, Jenny Wernsing, filed suit against the agency for paying her a salary substantially lower than that of a male coworker who performed equal duties.[37] The pay differential stemmed from the agency's use of prior salary history to determine new hires' wages, a practice claimed by the employer to serve as a valid "factor other than sex."[38] Wernsing's line of argumentation directly challenged the free market defense, asking the court to recognize the biases repeatedly documented in the wage-setting process and adopt a narrower interpretation of the F.O.T.S. defense. [39] Instead, the Seventh Circuit rejected both components of the plaintiff's claim and embraced the free market theory, denying yet another plaintiff "equal pay for equal work."

This pronouncement underscored the difficulty of prevailing in a system under which "an almost limitless number of factors" can justify wage differentials, even those directly impacted by the historic cycle of discrimination against female workers.[40] By characterizing market forces as "impersonal" factors that "have no intent," the Seventh Circuit ignored the very intentional biases that had influenced the market wage rate throughout the legal history of the wage gap.[41] Furthermore, illuminating the disproportionate burden borne by female plaintiffs under E.P.A. claims of wage discrimination, the judges then demanded expert evidence recounting such practices' impact on Wernsing's prior salary.[42] The Department of Human Services was never asked to demonstrate the validity of their own wage-setting practices, yet the plaintiff was expected to produce comprehensive proof of her employer's motives.[43] Legal scholarship on the gender wage gap has long documented the persisting information asymmetry between female plaintiffs and their employers, emphasizing the immense difficulty of gathering the evidence necessary to prove one's own claim, much less that of women at other establishments.[44] Thus, the Wernsing ruling demonstrates the nearly insurmountable challenges faced by those seeking relief under the complaint-oriented system and the courts.

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32 Id. at 1171.
33 Id. at 1169; Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970).
34 Angelo, 555 F.2d at 1176.
35 Id. at 1176.
36 Wernsing v. Dep't of Human Servs., 427 F.3d 466 (7th Cir. 2005).
37 Id. at 467–68.
38 Id.
39 Id at 468.
40 Fallon v. Illinois, 882 F.2d 1206, 1211(7th Cir. 1989).
41 Wernsing, 427 F.3d at 469.
42 Id. at 470.
43 Id.
44 Marianne DelPo Kulow, Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Law–A Necessary Tool for Closing the Residual Gender Wage Gap, 50 Harv. J. on Legis. 385, 386 (2013; Orly Lobel, Knowledge Pays: Reversing Information Flows and the Future of Pay Equity, 120 Colum. L. Rev. 547 (2020); Canales, supra note 29, at 973.

Regulation: A Flawed Tactic for Reform

In addition to the litigative remedies provided to plaintiffs under Title VII, victims of wage discrimination can also appeal to the E.E.O.C., the government agency responsible for enforcing all federal laws related to employment discrimination. Established under Title VII, the E.E.O.C. was initially granted only limited enforcement powers, excluding "the authority to sue employers who failed to comply with Title VII."[45] This provision's emphasis on voluntary negotiation rather than decisive regulation reflected representatives' failure to recognize the widespread, systemic nature of sex-based discrimination; one scholar noted that the satirical proposal of the "sex" amendment reinforced early E.E.O.C. commissioners' belief that this poison pill "did not constitute a mandate to equalize women's employment opportunities."[46] While the Equal Employment Opportunity Act of 1972 later empowered the agency to file suit against private employers, the views expressed at the commission's outset proved to be a major obstacle for female plaintiffs seeking relief under the regulatory system.[47] Since the agency's establishment, the E.E.O.C.'s lacking resources and failure to prioritize claims of gender-based discrimination have prevented working women from fully utilizing the legal tools outlined under Title VII.

These setbacks have only been compounded by the commission's increasing case backlog with the public's demands for justice outstripping the agency's available resources. Originally charged with resolving all Title VII complaints of unlawful employment discrimination, the E.E.O.C. also became responsible for claims filed under the E.P.A., the Age Discrimination in Employment Act (A.D.E.A.), and the Pregnancy Discrimination Act during the late 1970s.[48] These added duties divided the commission's resources and time between an even larger range of causes, resulting in lengthy case processes that dissuaded many plaintiffs from appealing to the commission for support. In their 2005 account of the commission's history, E.E.O.C. attorneys Anne Noel Occhialino and Daniel Vail noted that "the EEOC actually had to reduce its staff—just as the number of charges it was receiving skyrocketed" in the 1980s.[49] Testimony delivered to Congress by an official at the Government Accountability Office in 1993 revealed concerns about "the increasing time it takes E.E.O.C. to investigate and process charges,"[50] finding that the E.E.O.C.'s average investigation time for private sector charges had increased from 254 to 292 days between 1991 and 1992. [51] These accounts illustrate the significant drawbacks, and even implausibility, of pursuing wage parity through regulatory strategies for reform. The commission simply did not have the resources or staffing to represent all victims of discrimination, no matter how legitimate their claims. Therefore, the limited methods of recourse offered under this approach accentuate the comparative viability of legislative initiatives that propose broader, systemic solutions to the wage gap.

Legislation as the Most Promising Path to Reform

In response to Justice Ginsburg's striking dissent from the bench in Ledbetter v. Goodyear Tire & Rubber Co. (2007), Congress passed the Ledbetter Fair Pay Act to amend the statute of limitations for wage discrimination claims brought under Title VII.[52] Under the Court's ruling in Ledbetter, the limited time frame for pursuing these suits severely curtailed employees' ability to discover the existence of this inequality.[53] Seeking to correct this imbalance, the F.P.A. clarified that "the time limit for suing an employer for pay discrimination restarts each time a paycheck is issued, rather than running solely from the original discriminatory action of the salary decision."[54] Therefore, although Ledbetter's claim was initially rejected within the litigative setting, she managed to bypass the Court's narrow interpretation of Title VII through an appeal to Congress.

Representing a major win for the feminist coalition, this law demonstrates the real possibility of achieving legal change through legislation. During this period, scholars emphasized the work of advocates at the National Women's Law

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45 Anne Noel Occhialino and Daniel Vail, The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium: Why the EEOC Still Matters, 22 Hofstra Lab. & Emp. L.J. 671, 672–73 (2005).

46 Cynthia Ellen Harrison, On Account of Sex: The Politics of Women's Issues, 1945-1968 187 (1988).

47 Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-5(f)(1).

48 Occhialino & Vail, supra note 45, at 682.

49 Id. at 683.

50 Linda G. Morra, U.S. Gen. Acct. Off., GAO/T-HRD-93-30, EEOC: An Overview iii (1993).

51 Id. at 8.

52 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting) ("Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII.").

53 Id. at 621–24 (majority opinion).

54 Lobel, supra note 44, at 566.

Center in promoting Justice Ginsburg's dissent and persuading the public to join the equal pay cause.[55] Furthermore, the Democratic party's resounding endorsement of the F.P.A. elevated Lilly Ledbetter's story to public prominence, allowing the F.P.A. to dodge several of the same criticisms leveled at the P.F.A.[56] Therefore, these findings strengthen this paper's claim in favor of legislative tactics for reform, suggesting that the failed passage of other historical proposals merely reflects a lack of support rather than efficacy or merit. However, while the F.P.A. did increase the number of women eligible to pursue Title VII suits, many plaintiffs remained unaware that such a wage differential existed in the first place, preventing them from fully utilizing the protections provided under the new law.[57] Thus, while this Act highlighted the potential of legislative avenues for reform, it ultimately failed to correct many of the critical deficiencies of the complaint-oriented approach, necessitating further reform through the P.F.A. and wage transparency laws.

Alternatively, the unenacted Paycheck Fairness Act, introduced in every Congress since 1997, has remained one of the most promising legislative solutions to the defects of the E.P.A. and Title VII.[58] Beginning with its first iteration, the P.F.A. included a nonretaliation provision that shielded employees who wished to openly discuss their salaries.[59] Given the historical difficulties associated with discovering wage discrimination, this amendment would have significantly eased female plaintiffs' initial burden in obtaining relief.[60] According to Deborah Thompson Eisenberg's expert testimony to Congress in 2014, this provision would effectively combat norms of "pay secrecy [that have] allowed unlawful pay disparities between men and women performing the same jobs to flourish, undetected and undeterred" throughout history.[61] Furthermore, increased access to wage data would have greatly assisted plaintiffs in meeting the rigorous evidentiary standards necessary to satisfy their prima facie claims. Thus, this reform would have represented a crucial step in identifying and eradicating wage inequality.

First appearing in the House's 2007 draft of the bill, another provision of the P.F.A. would have tightened the E.P.A.'s fourth affirmative defense to cover only pay differentials based on "a bona fide factor other than sex, such as education, training, or experience."[62] Employers could only rely on this defense if the wage disparity was "job-related" and "consistent with business necessity," compelling them to justify this inequality based on factors outside of market forces.[63] Quickly adopted as a permanent component of the bill, this change would have minimized one of the most exploited loopholes in the E.P.A. and required courts to scrutinize the defense that has unjustifiably decimated plaintiffs' claims throughout legal history. Other notable elements of the P.F.A. included appropriations for further research and training on the national wage gap, as well as an annual award recognizing employers for their efforts to ensure fair payment schemes.[64]

However, despite the bill's clear benefits for working women, proponents of the free market have uniformly condemned it, leading to its repeated rejection in Congress. These critics contend that the P.F.A. would expose employers to unwarranted lawsuits and burden them with excessive regulations and paperwork, decreasing the overall efficiency of the market and harming—rather than helping—female plaintiffs.[65] Although discriminatory employers would certainly face greater scrutiny under this amendment, those operating under legitimate, "business-related" wage-setting criteria would receive stronger protection from the P.F.A.'s new standard. By "separat[ing] defenses that truly are justifiable reasons for a difference in pay from those that actually discriminate," this provision would still have provided employers significant latitude in their employment decisions, only questioning payment schemes unrelated to valid business concerns.[66] Therefore,

55 Lani Guinier, Courting the People: Demosprudence and the Law/Politics Divide, 89 Bos. Univ. L.R. 54 (2009).

56 Id. at 53.

57 Kulow, supra note 44, at 412.

58 Lobel, supra note 44, at 609.

59 Paycheck Fairness Act, H.R. 2023, 105th Cong. (1997).

60 Kulow, supra note 44; Lobel, supra note 44; Canales, supra note 29.

61 Access to Justice: Ensuring Equal Pay with the Paycheck Fairness Act: Hearing on S. 84 before the S. Comm. on Health, Education, Labor, and Pensions, 113th Cong. (2014).

62 Paycheck Fairness Act, H.R. 1619, 114th Cong. (2014); Paycheck Fairness Act, H.R. 7, 116th Cong. (2019).

63 Paycheck Fairness Act, H.R. 7, 116th Cong. (2019).

64 Paycheck Fairness Act, H.R. 2023, 105th Cong. (1997); Paycheck Fairness Act, H.R. 7, 116th Cong. (2019).

65 Romina Boccia, The Unintended Consequences of the Paycheck Fairness Act, Indep. Women's F. (2010), https://women.ca.gov/wp-content/uploads/sites/96/2017/12/Boccia.pdf.

66 Catherine Lerum, Equal Pay for Women Can Become a Reality: A Proposal for Enactment of the Paycheck Fairness Act, 34 N. Ill. U.L. Rev. 221, 237 (2014).

the P.F.A.'s alteration of the fourth affirmative defense would serve both plaintiffs and defendants in equal pay claims.

While the P.F.A. would alleviate many of the technical issues limiting female plaintiffs' success under the complaint-oriented system, including wage secrecy norms and the F.O.T.S. defense, the bill has failed to address the disproportionate burdens imposed upon employees under this framework. Fortunately, scholars throughout history have offered other legislative solutions to correct these deficiencies, proposing a structural shift toward a system in which employers are held accountable for the fairness of their wage-setting decisions. Therefore, in tandem with these proactive proposals, the legislative reforms contained in the P.F.A. still represent one of the strongest legal strategies employed to achieve wage parity.

Shifting the Framework: Proactive Legislative Proposals for Reform

Throughout history, wage transparency and mandatory reporting laws have served as some of the most popular proposed reforms among legal scholars, endorsed as promising methods to reduce information asymmetries and lower the number of claims that women must file themselves.[67] While bills like 10146the P.F.A. sought to strengthen the existing legal tools provided to female plaintiffs under Title VII and the E.P.A., newer proposals have recognized the inherent flaws in this historical framework and aimed to alter, rather than repair, this broken system. Thus, although these ideas have yet to be formally proposed in Congress, these solutions present another example of the strength of legislative legal tactics offered to close the gender wage gap.

Wage transparency laws would create even greater responsibility on the part of the employer in justifying existing pay differentials, rectifying the persisting information imbalance between employees and their supervisors by requiring businesses to publish salary records for their entire workforce.[68] This strategy would allow female workers to regularly compare their pay schemes with male comparators, alerting them to potentially discriminatory practices and equipping them with the data necessary to negotiate with their employers before ever resorting to litigation.[69] Under the heightened scrutiny of these laws, employers would also be more likely to institute their own pay equity plans and recognize the concerns of their female employees in order to minimize the risk of wage discrimination suits in court.[70] Shifting away from "the litigation framework of traditional discrimination law to a governance approach that encourages dynamic, ongoing, and proactive efforts by private organizations,"[71] this structure would have held employers—rather than plaintiffs—accountable for promoting fairness in the workplace.

Representing a slight variation on wage transparency proposals, mandatory reporting laws would have obligated employers to regularly file their payment schemes with a regulatory body like the E.E.O.C.[72] Proponents of these policies contend that wage reporting requirements would create a powerful incentive for employers to monitor their own practices, asserting that individual suits pursued through litigative avenues for reform have been "piecemeal and erratic, driven by inadvertent discoveries of wage inequities."[73] Mandatory reporting laws would therefore compel employers to assume a larger role in mitigating these discrepancies in order to avoid sanctions from the E.E.O.C. or further action in court. Substantively addressing challenges faced by working women throughout the existence of the wage gap, such sweeping reforms have only been considered within the legislative context given that litigative and regulatory legal strategies are largely confined to working within the existing system. Therefore, proposed wage transparency and mandatory reporting laws highlight the unique power of legislation to amend our entire legal framework in favor of the equal pay cause.

Despite the merit of these innovative ideas, wage transparency and mandatory reporting laws have fallen victim to many of the same arguments leveled at the P.F.A. and failed to gain traction in Congress. Critics of these reforms contend that publishing wage data would expose employers to a flood of lawsuits based in misunderstanding rather than discrimination, mirroring the previously refuted allegations regarding the P.F.A. However, demonstrated through Deborah Thompson Eisenberg's thorough analysis of existing transparent pay systems, these policies have actually had "measurable benefits" throughout legal history.[74] Eisenberg found that Whole Foods' open book pay practices fostered stronger loyalty and satisfaction

67 Deborah Thompson Eisenberg, Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination, 43 Ariz. State L.J. 951, 997 (2011); Kulow, supra note 44; Lobel, supra note 44.

68 Canales, supra note 29, at 984–87.

69 Eisenberg, supra note 67, at 961.

70 Lobel, supra note 44, at 602.

71 Id. at 549.

72 Kulow, supra note 44, at 420.

73 Id. at 428.

74 Eisenberg, supra note 67, at 1008.

among employees, making them feel included in company dialogue and providing them with tangible goals for promotion and salary increases.[75] Directly contradicting one of the central arguments against these reforms, business leaders referenced in Eisenberg's study identified pay secrecy policies—rather than wage transparency laws—as the cause of greater "resentment and lower productivity" within the workplace.[76]

These sources indicate that many of the most common objections to historical equal pay proposals originated from misguided perceptions of the wage gap or unfounded assumptions about employee satisfaction. Advocacy groups' role in the consideration and eventual passage of the Ledbetter F.P.A. evidences their ability to effectively dismantle these arguments, highl

ighting the power of legislative tactics for reform when promoted by a broad coalition. Throughout the next section, this piece will argue that these coalitions' failure to capitalize on promising legislative legal reforms reflects a flaw in their mobilization strategies, not the laws themselves. Thus, with the support of prominent feminist and labor groups, proposals like the Ledbetter F.P.A. and the yet unenacted P.F.A. still serve as the most promising tools for future activists to close the gender wage gap.

Feminist Coalitions of the Past: On the Road to Equity

Traditional women's rights organizations such as the American Civil Liberties Union (A.C.L.U.) and the National Organization for Women (N.O.W.) have played a critical role in promoting legal change for the gender equality cause. While these groups have made significant progress on issues like reproductive health and education, their involvement with pay equity claims largely dissipated after the comparable worth movement peaked in the 1980s.[77] Labor unions have also served as guardians against gender-based workplace discrimination, utilizing collective bargaining as a tool to negotiate better pay and conditions for female workers.[78] Despite the fact that both groups' litigation efforts have raised greater awareness for women's rights issues, their engagement with legislative proposals such as the Paycheck Fairness Act fails to reflect the same levels of energy and cohesion. The powerful forces mobilized during the Ledbetter era illustrate both feminist and labor groups' commitment to the equal pay cause, but these organizing tactics have yet to be fully applied in support of legislation like the P.F.A. or wage transparency laws, providing one explanation for the failure of such promising proposals. Therefore, these findings bolster the historical credibility of legislative strategies for reform, suggesting that these legal tools have been underutilized rather than merely ineffective.

Within the past ten years, feminist organizations like the A.C.L.U. and N.O.W. have made significant progress in joining forces with labor groups like the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) in support of the P.F.A. A long list of sponsors has signed coalition letters and funded data collection initiatives since May 2012, indicating the viability of uniting these disparate groups in our modern political and social climate.[79] However, legal history has proven these organizations' surface-level engagement with the equal pay cause to be inadequate. Statistical reports and letters urging Congress to pass the P.F.A., with the most recent being signed in February of 2021, have not been enough to ensure that representatives will take heed of this persisting problem.[80] Thus, these sources suggest that the equal

75 Id. at 1010.

76 Id. at 1011–12.

77 Michael W. McCann, Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization 59 (1994).

78 Ruth Milkman, Two Worlds of Unionism: Women and the New Labor Movement, in The Sex of Class: Women Transforming American Labor 64–67 (Dorothy Sue Cobble ed., 2007).

79 Coalition Letter in Support of the Paycheck Fairness Act, Am. C.L. Union (May 9, 2012), https://www.aclu.org/letter/coalition-letter-support-paycheck-fairness-act; Paycheck Fairness Act Coalition Polling Data with Graphs 2012, Am. C.L. Union (2012), https://www.aclu.org/other/paycheck-fairness-act-coalition-polling-data-graphs-2012?redirect=womens-rights/paycheck-fairness-act-coalition-polling-data-graphs-2012; Cosponsor and Support Swift Passage of the Paycheck Fairness Act, Am. C.L. Union (Feb. 3, 2021), https://nnedv.org/wp-content/uploads/2021/02/PFA-Coalition-Letter-117th-Congress-Sign-On.pdf.

80 See Cosponsor and Support Swift Passage of the Paycheck Fairness Act, Nat'l League of Women Voters (February 3, 2021), https://www.lwv.org/sites/default/files/2021-02/PFA%20Coalition%20Letter%20117th%20Congress%20Sign%20On.pdf; The Wage Gap: The Who, How, Why, and What to Do, Nat'l Women's L. Ctr. (Oct. 2020), https://nwlc.org/wp-content/uploads/2019/09/Wage-Gap-Who-how.pdf; The Paycheck Fairness Act and Raise the Wage Act Will Help Women Build Economic Security, Nat'l Women's L. Ctr (Jan. 28, 2021), https://nwlc.org/press-releases/the-paycheck-fairness-act-and-raise-the-wage-act-will-help-women-build-economic-security/; August 13 is Black Women's Equal Pay Day. NOW Demands that the Road to Racial Justice MUST Include Economic Justice for Black Women, Nat'l Org. for Women (Aug. 13, 2020), https://now.org/media-center/press-release/august-13-

pay movement has continued to underestimate the power of legislative avenues for reform, investing their time and resources in other causes or strategies and failing to correct the tactical errors of the past. To fully realize the power of past legislative proposals, history suggests that these feminist organizations must go beyond their traditional advocacy tactics and form a coalition comparable to that of the Ledbetter era.

Turning to the work of labor groups within this field, the AFL-CIO has employed similar strategies in its initiatives to combat the wage gap. As more women have assumed executive roles on union leadership boards,[81] the AFL-CIO has increasingly prioritized issues of gender equality, engaging in efforts to promote the P.F.A. and conducting surveys to highlight the perspectives of working women. While this research presented crucial information about the needs and priorities of working women, the AFL-CIO stopped their endeavors for wage parity too soon. Given that a majority of survey respondents in a 2016 study were willing to support stronger measures for equality, further mobilization efforts on the union's part could have played a critical role in attaining passage of legislative reforms. [82]

Both labor unions and traditional feminist organizations possess unique resources and expertise to be deployed in the advocacy arena, yet these groups have devoted much of their time and resources to litigation efforts or failed to mobilize behind the cause altogether. However, the success of the Ledbetter coalition demonstrated the viability of these legal strategies when supported by influential voices within the legal field. Therefore, these sources suggest that the rejection of past legislative proposals had little to do with their strength, supporting this paper's assertion that these tactics have consistently represented the most promising mode of reform within the equal pay sphere.

IV. CONCLUSION

While Representative Smith's addition of "sex" to Title VII of the Civil Rights Act of 1964 served as a major turning point in the legal history of women's rights, the satirical nature of his proposal exposed flaws in equal pay legislation that would severely limit their utility to female plaintiffs. A close reading of judicial opinions, litigation statistics, and regulatory reports illustrates a clear historical trend of deficiencies in the complaint-oriented framework established under these laws, emphasizing the reactive nature of both litigative and regulatory avenues for reform. In contrast, successive drafts of the P.F.A. and other proactive legislative reforms have presented clear solutions to the "equal work" requirement and the F.O.T.S. defense, leaving the obstacles of the complaint-oriented framework behind. Thus, these sources illuminate legislative proposals as the most promising strategy to amend this system and finally close the gender wage gap. If the tools of legal and policy history have taught us anything about this issue, it is that our best hope lies with the "people's branch" rather than the courts.

While some may argue that these laws' failure to attain passage discredits their strength as a historical reform tactic, sources documenting the work of feminist and labor groups suggest otherwise. Blog posts, coalition letters, and records of resource expenditures demonstrate these groups' sustained influence within the women's rights policy sphere, yet these organizations consistently failed to mobilize their full capacity behind equal pay laws and too often concentrated their efforts on reactive litigation efforts.[83] In spite of these shortcomings, the Ledbetter FPA managed to attain passage with the support of a broad-based coalition of feminist groups and Democratic politicians, demonstrating the potential of legislative strategies for reform when promoted by prominent advocacy organizations and figures. These sources underscore the unrealized potential of historical legislative proposals and explain why these legal tactics have failed despite their seeming viability.

Far from being an issue of the past, the gender wage gap continues to impact the lives and economic freedoms of women today. Nearly sixty years after the passage of the E.P.A., women working full-time jobs still receive only eighty-three cents for every dollar paid to their male counterparts, and this disparity only widens for women of color.[84] By analyzing the successes and failures of historical methods employed to combat pay discrimination, this paper provides important insight for wage parity advocates seeking to correct the missteps of the past. To remedy the flaws embedded in the texts of Title VII and the E.P.A., modern coalitions must pursue legislative strategies that can definitively alter this restrictive framework and proactively protect female plaintiffs. As historic "firsts" continue to be written in our nation's story every day, champions of

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is-black-womens-equal-pay-day-now-demands-that-the-road-to-racial-justice-must-include-economic-justice-for-black-women/.

81 Milkman, supra note 78, at 67–80.

82 Our Voices: A Snapshot of Working Women, Am. Fed. Of Lab. & Cong. of Indus. Org. (March 16, 2016), https://aflcio.org/sites/default/files/2017-03/1662_WWSurvelReport2_webready.pdf.Error! Hyperlink reference not valid.

83 Cowan, supra note 7; Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976"; McCann, supra note 77.

84 Emily A. Shrider et al., Income and Poverty in the United States: 2020, Current Population Reports, U.S. Census Bureau (Sept. 2021), https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf.

Too Cool for School? Hipster Antitrust and its Boomer Counterpart: Charting A New Future

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Abstract

Novel theories of antitrust in academic circles have resulted in a profound change in enforcement over the past five years. These new approaches to antitrust, characterized by strong skepticism of corporate power, have been referred to by some as "hipster antitrust." Hipster antitrust has been poorly received by some scholars who have robustly defended antitrust's traditional hallmarks. The resulting debate has been polarizing with most scholars either defending no change or jettisoning the status quo entirely. This article synthesizes the critiques of status quo antitrust with critiques of hipster antitrust and proposes a new framework that is more attentive to market structure while maintaining context-specific analysis. As the political appetite for antitrust reform grows among lawmakers, the theories of antitrust accepted within the academy will prove influential towards enforcement. This article hopes to temper demands for structural change while recognizing the need for reform.

I. INTRODUCTION

Antitrust reform has dominated national headlines in recent months as a wave of animosity towards large technology companies has gained popularity among lawmakers, regulators, and the American public. Progressive proponents of increased antitrust enforcement center their arguments around anticompetitive conduct of tech giants—including Google, Amazon, Apple, and Facebook—who, critics allege, stifle innovation and nascent competitors. These advocates, who have proposed new theories of antitrust that some refer to as "hipster antitrust," often call for solutions such as forced divestiture of large companies' assets or lowered legal standards for plaintiffs in antitrust litigation.

Opponents of heightened antitrust enforcement argue that changing competition law portends massive business uncertainty and threatens to shock the business environment. These advocates often encourage a non-interventionist approach to antitrust, insisting that status quo protections are sufficient to prevent anticompetitive conduct.

This article will argue that both sides are mistaken in their approach to antitrust reform. Hipster antitrust in tech markets relies on mistaken legal assumptions and dramatic regulatory steps. However, free-market-oriented conservatives fail to offer practical alternative options and staunchly defend even the most egregious instances of abuse by tech companies.

Part II will explain the historical and contemporary context surrounding antitrust reform. Part III will articulate the shortcomings of both progressive and conservative approaches to antitrust reform. Part IV will propose an alternative framework that increases antitrust enforcement while utilizing case-by-case adjudication.

II. HISTORICAL CONTEXT

Defining "Hipster Antitrust"

"Hipster antitrust" emerged from the "New Brandeis" school of antitrust thought, which emphasizes the dangers of bigness and economic concentration.[1] Hipster antitrust began to enter mainstream academic circles in the late 2010s when Lina Khan, then a Yale Law School student, published an article in the Yale Law Journal titled "Amazon's Antitrust Paradox" that criticized antitrust law for its narrow focus on consumer welfare.[2] Khan argued that instead of focusing on lower prices and increased output, antitrust policy should address broader unfair business practices, including low wages, unemployment, and even non-economic harms.[3]

Typically, antitrust addresses the effects of individual business transactions. However, Khan and other progressives argue that antitrust should view market power itself as portending a series of negative effects. For instance, antitrust hipsters have commonly argued that antitrust should be used as a punitive measure against social media companies that allow users to spread misinformation, incur privacy violations, and create "news monopolies."[4] Hipster antitrust advocates argue that forced breakups of these companies would prevent the market dominance and size that allows Facebook, Twitter, and other tech giants to exert massive influence over the proliferation of conspiracy theories, election information, and the health of American democracy.

Another common grievance among hipster antitrust advocates relates to technology companies that utilize platform-based business models. These scholars argue that firms such as Amazon, YouTube, and Apple's App Store dilute market competition by operating a digital platform and simultaneously using it to sell their own products.[5] Amazon, for example, uses self-preferencing tactics to ensure its own goods appear before those of other sellers when a user does a search on its website.[6] Additionally, large tech firms often simply purchase competitors to foreclose the possibility of losing market dominance. Internal emails from Mark Zuckerberg revealed that Facebook's purchase of Instagram in 2012 was driven by the CEO's desire to eliminate the photo-sharing app's "threat" to Facebook, which antitrust advocates point to as evidence that acquisitions by tech giants create a "kill-zone" that stymies potential innovation by competitors.[7]

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1 Jake Walter-Warner and Jonathan H. Hatch, A Brief Overview of the 'New Brandeis' School of Antitrust Law, Antitrust Update, Patterson Belknap Webb & Tyler LLP (blog), November 2018, https://www.pbwt.com/antitrust-update-blog/a-brief-overview-of-the-new-brandeis-school-of-antitrust-law/.

2 Lina Khan, Amazon's Antitrust Paradox, Yale Law Journal 126 (2017): pp. 716-717.

3 Id.

4 Francis Fukuyama, Barak Richman, and Ashish Goel, How to Save Democracy from Technology, Foreign Affairs, January/February 2021, https://www.foreignaffairs.com/articles/united-states/2020-11-24/fukuyama-how-save-democracy-technology.

5 Lina M. Khan, The Separation of Platforms and Commerce, Columbia Law Review 119 (2019): 973.

6 See infra pt. III.

7 Mark Zuckerberg Bought Instagram as It Was a 'threat' to Facebook, Business Standard News, July 2020, https://www.business-standard.com/article/international/mark-zuckerberg-bought-instagram-as-it-was-a-threat-to-facebook-120073000324_1.html.

The Consumer Welfare Standard as a Rebuttal to Hipster Antitrust

Free-market-oriented conservatives have responded to the growing hipster antitrust movement with a robust defense of the consumer welfare standard ("C.W.S."). The C.W.S. has long been considered the "lodestar" of antitrust law and continues to serve as the dominant guidepost for most antitrust enforcement.[8]

Before examining the specifics of the C.W.S., it is first necessary to examine the history and political assumptions underpinning the development of competition law. The Sherman Act of 1890 is generally considered the first law aimed at regulating the market economy in the United States.[9] During the late 19th century, it was used as a tool to counter corporate power. Infamous monopolies including Standard Oil and United States Steel were targeted by the Federal Trade Commission ("F.T.C."), one of the agencies charged with enforcing antitrust statutes, in efforts to break up massive conglomerates that dominated labor and supply markets.[10]

The late 20th century saw a dramatic conservative backlash to the use of competition policy for progressive purposes. The origin of this movement is usually attributed to a group of academics at the University of Chicago Law School whose scholarship in the 1970s and 1980s was used as the basis for conservative, free-market-oriented ideas in antitrust.[11]

The "Chicago School," as this group of scholars is commonly called, criticized antitrust's embrace of government intervention and advocated instead for antitrust focused on market distribution.[12] This was the context in which the C.W.S. emerged as the defining principle of antitrust. Under the C.W.S., a corporate merger is deemed anticompetitive "only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality."[13] In other words, actions are only deemed anticompetitive if they raise short-term market prices or lower market output.

The C.W.S. was a massive shift away from previous antitrust doctrine; previously, antitrust had considered nearly all mergers as detrimental to consumers and anticompetitive. The most important implication of this new definition was that corporate consolidation was not necessarily considered harmful in the view of regulators. The effects of this change were felt immediately.[14]

The 21st century equivalent of the Chicago School is a group of economists and law professors at George Mason University's Antonin Scalia Law School who have responded to antitrust hipsters' push for change in the 2010s.[15] Antonin Scalia Law School and its affiliates have largely succeeded in championing the C.W.S. and beating back proposals to expand the scope of antitrust laws. Prior to the Biden administration, regulators had not enacted substantive changes to competition law for decades. The C.W.S. has become the norm de jure. Firms have latched onto the standard due to its consistency and longevity. A move away would be revolutionary and tremendously impactful on the business environment.

Hipster Antitrust Under the Biden Administration

Hipster antitrust has gained new momentum under the Biden administration. Khan was appointed Chair of the FTC, and the President has stacked the Department of Justice ("D.O.J.") with well-known progressive antitrust advocates, such as Jonathan Kanter, who have promised to reinvigorate enforcement.

President Biden also signed a sweeping executive order in July, titled "Promoting Competition in the American Economy," that encouraged the F.T.C. and D.O.J. to increase enforcement of current antitrust laws across all sectors of the economy.[16] The current public policy moment presents a unique, revolutionary moment in antitrust law. The Biden administration's early actions on antitrust policy have indicated it will likely be remembered as one of the most aggressive periods in the history of competition law enforcement. Khan's time as chair of the F.T.C. promises to unleash a wave of regulatory changes and new enforcement prior-

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8 Joshua D. Wright et al., Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust, Arizona State Law Journal 51 (2018): 293–369, https://doi.org/10.2139/ssrn.3249524.

9 The Antitrust Laws, Federal Trade Commission, June 11, 2013, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

10 K. Sabeel Rahman, Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?, Texas Law Review 94 (2016): 1338–52.

11 Jay L. Levine and Carrie Garrison, 1990s to the Present: The Chicago School and Antitrust Enforcement, Antitrust Law Source, June 1, 2021, https://www.antitrustlawsource.com/2021/06/1990s-to-the-present-the-chicago-school-and-antitrust-enforcement/.

12 Ianni Drivas, Reassessing the Chicago School of Antitrust Law, University of Chicago Law School News, June 2019, https://www.law.uchicago.edu/news/reassessing-chicago-school-antitrust-law.

13 Jonathan H. Hatch and Meghan Larywon, Congress Hears Challenges to the Consumer Welfare Standard, JD Supra, March 2019, https://www.jdsupra.com/legalnews/congress-hears-challenges-to-the-95586/.

14 See infra pt. IIB.

15 Daisuke Wakabayashi, Big Tech Funds a Think Tank Pushing for Fewer Rules. For Big Tech. The New York Times, July 24, 2020, https://www.nytimes.com/2020/07/24/technology/global-antitrust-institute-google-amazon-qualcomm.html.

16 Executive Order 14036 of July 09, 2021, Promoting Competition in the American Economy, 86 Federal Register (2021): 36987-36999, https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy.

ities for the agency, including expanded use of its authority to pursue anticompetitive conduct under Section 5 of the F.T.C. Act.[17]

Now is a particularly important moment to address antitrust policy. Concentration in the pharmaceutical industry has allowed drugmakers to artificially inflate prices for essential medical products during the pandemic.[18] Consolidation of small farms has sent food prices through the roof, reducing the quality of output and hurting workers.[19] Social media companies' control over the flow of information has created hyper-partisan, toxic divides in American politics.[20] Antitrust enforcement will be invaluable in confronting these threats to society. The question is: how should we attune policy to reflect the best interests of Americans?

III. A COMPARATIVE ANALYSIS OF HIPSTER ANTITRUST VERSUS THE CONSUMER WELFARE STANDARD

Hipster Antitrust

A. The Pitfalls of Hipster Antitrust

The proposals forwarded by proponents of hipster antitrust are rife with pitfalls. Indeed, antitrust applicability to non-economic harms is dubious at best. Though this article will primarily analyze the application of hipster antitrust to dominant tech platforms, these criticisms remain true in several other contexts.

First, for antitrust law to apply to a given practice, there must be evidence that said practice has adverse consequences for competition in a clearly defined market.[21] However, hipster antitrust proposals view the existence of market power as itself a problem.[22] Both macro- and micro-level trends indicate that this view is false. Market concentration can be measured using the Herfindahl-Hirschman Index ("H.H.I."), which measures firm size as related to industry size.[23] Recent analysis of major sectors of the U.S. economy indicates that, for all analyzed industries, the H.H.I. was less than 1000.[24] For context, as of 2010, federal antitrust enforcement policies generally do not consider any value below 1500 to be of any concern.[25] As such, though concentration measures have been trending upwards in recent years, the majority of antitrust economists do not consider this itself to be a problem.[26]

The most significant implication of this data is that applying antitrust to firms that have not been proven to have detrimental effects on competition would greatly dilute the efficacy of antitrust as a competition remedy. Although there are frameworks in place for courts to assess the economic power of firms, there is no such framework for assessing more abstract measures of political or social power. As such, a shift in the framework of antitrust away from competition and towards other, more socially-defined factors would engender corruption in antitrust courts. The inherently malleable nature of such measures would give the executive branch a means for rewarding allies and punishing enemies through selective antitrust prosecution—all but ensuring rampant corruption in competition law.[27]

Furthermore, antitrust hipsters' proposed remedies for anticompetitive behaviors are ineffective and harmful.[28] These remedies, known as structural remedies (as opposed to conduct remedies), require asset divestiture.[29] The few instances in which structural remedies have empirically been mandated demonstrate its ineffectiveness. One prominent example is the 1982 structural breakup of AT&T into a smaller parent company and several regional holding

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17 Michael L. Sibarium, Client Briefing: Biden's Blueprint for Aggressive Antitrust Enforcement, Pillsbury Winthrop Shaw Pittman LLP, November 15, 2021, https://www.pillsburylaw.com/en/news-and-insights/biden-antitrust-enforcement.html.

18 Robin Feldman, The Price Tag of 'Pay for Delay,' UC Hastings (paper forthcoming), May 12, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3846484.

19 Philip H. Howard and Mary Hendrickson, Corporate Concentration in the US Food System Makes Food More Expensive qnd Less Accessible for Many Americans, The Conversation, February 8, 2021, https://theconversation.com/corporate-concentration-in-the-us-food-system-makes-food-more-expensive-and-less-accessible-for-many-americans-151193.

20 Sally Hubbard, Fake News is a Real Antitrust Problem, CPI Antitrust Chronicle, December 2017, https://www.competitionpolicyinternational.com/wp-content/uploads/2017/12/CPI-Hubbard.pdf.

21 Carl Shapiro, Antitrust in a Time of Populism, International Journal of Industrial Organization 61 (November 2018): 740.

22 See supra pt. I.

23 Shapiro, supra note 22, at 723.

24 David Autor et al., Concentrating on the Fall of the Labor Share, American Economic Review 107, no. 5 (May 2017): 182.

25 Shapiro, supra note 22, at 729.

26 Shapiro, supra note 22, at 729.

27 Shapiro, supra note 22, at 716.

28 Khan, supra note 5, at 980.

29 Sumit K. Majumdar, Stick Versus Carrot: Comparing Structural Antitrust and Behavioral Regulation Outcomes, The Antitrust Bulletin 66, no. 3 (September 1, 2021): 434.

companies called Baby Bells. Though this breakup did not result in long-term increases to competition, the telecommunications market was restructured and near-monopolized a mere two decades after the structural remedy was imposed.[30] As solutions that only mandate a single action, structural remedies often fail to account for future changes in market structure, making them ineffective means of sustaining improving competition.[31] In the dominant tech platform context, the rapidly shifting nature of the information technology sector makes these problems even worse.[32]

B. The Chilling Effect of Hipster Antitrust

The truly unprecedented nature of the reforms for which hipster antitrust scholars advocate cannot be understated; such proposals, which would require alterations in the fundamental framework of antitrust, would upend decades of antitrust precedent.[33] Because changes in antitrust law are so scarce, every phrase of each antitrust decision is closely scrutinized by courts and antitrust enforcers throughout the country.[34] Furthermore, alterations to competition law cascade throughout sectors of the economy. Even if a given proposal may seem only to target dominant tech platforms, for instance, other companies will inevitably take note of increased scrutiny, such that even slight substantive changes could have outsized effects on the national economy.[35] Alterations to competition law ensure that the American business environment would experience unprecedented shocks. There are large risks inherent to any changes to competition law; even those policies that seem reasonable are likely to engender substantial shifts in business practices of companies throughout the economy.

Antitrust law's unique idiosyncrasies further magnify the chilling effect of hipster antitrust reforms on the American business environment. Section 4 of the Clayton Act states that "any person injured in his business or property by reason of anything forbidden in the antitrust laws" is permitted to sue for recovery.[36] This section provides for a private right of action, the ability for private plaintiffs to sue for damages under antitrust law. This makes antitrust a potent deterrent of anticompetitive conduct because it holds firms accountable both to executive agencies responsible for enforcing the antitrust laws and to many private plaintiffs.[37]

Antitrust also provides for treble damages—successful private plaintiffs are awarded three times the amount of compensatory damages.[38] Treble damages and the private right of action are deeply interconnected and were intended to bolster the deterrent effects of the antitrust laws. Treble damages were originally put into place to encourage private antitrust suits, as without additional compensation in the form of treble damages, private plaintiffs would have little incentive to invest the time and money necessary for successful antitrust litigation.[39]

Because of their potent deterrent effects, these idiosyncrasies of antitrust law make overdeterrence of procompetitive conduct significantly more likely.[40] Unless antitrust law is very carefully calibrated, companies may opt not to engage in procompetitive practices for fear of treble damages.

In spite of the above-outlined pitfalls of hipster antitrust, the broader sentiments underpinning hipster antitrust advocates' desires for alterations to the status quo antitrust framework are certainly not without merit. Indeed, while antitrust's idiosyncrasies demand imperative caution in reform, the status quo of antitrust law is unquestionably not without problems, and the next section will demonstrate the inability of current antitrust norms to effectively police anticompetitive conduct.

The Consumer Welfare Standard and its Depleting Utility in the Digital Economy

At the time of its introduction in the 1960s, the C.W.S. significantly shifted away from prior legal frameworks for evaluating claims under antitrust law. The Court's role was narrowed to determining whether or not particular businesses'

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30 Majumdar, supra note 30, at 451.

31 Tracy Miller, Evaluating Arguments for Antitrust Action against Tech Companies, Mercatus Research (Arlington, VA: Mercatus Center at George Mason University, May 2021), 40.

32 David J. Teece and Mary Coleman, The Meaning of Monopoly: Antitrust Analysis in High-Technology Industries New Issues Raised by Information Technology Industries, Antitrust Bulletin 43, no. Issues 3-4 (1998): 813.

33 See supra part I.

34 R. Hewitt Pate, Antitrust Law In The U.S. Supreme Court (address, British Institute of International and Comparative Law Conference, London, England, May 2004), https://www.justice.gov/atr/speech/antitrust-law-us-supreme-court.

35 Thomas De Meese et al., Antitrust in the Digital Age: How Antitrust Investigations into Big Tech Impact Companies in Every Industry, Regulatory Forecast 2020, February 2020, 8.

36 Clayton Antitrust Act, 15 U.S.C. § 15 (2006).

37 Edward D. Cavanagh, The Private Antitrust Remedy: Lessons from the American Experience, Loyola University Chicago Law Journal 41, no. 3 (2010): 634.

38 Herbert J. Hovenkamp, A Primer on Antitrust Damages, University of Iowa Legal Studies Research Paper, 2011, 7.

39 Cavanagh, supra note 38, at 633.

40 City of Oakland v. Oakland Raiders, Brief of the United States of America as Amicus Curiae in Support of Neither Party, October 2020, https://www.justice.gov/atr/case-document/file/1328216/download.

behavior is anticompetitive based on its impact on consumers, typically measured by its effects on prices and output quality.[41]

However, the evolving nature of the digital economy has significant implications for the future of the CWS as a guiding principle for antitrust jurisprudence. Dominant tech platforms use a vertical integration strategy "to control their own suppliers, distributors, or retail stores in order to control their value or supply chain."[42] This practice can take many forms, such as the recent launch of Amazon's delivery services to outcompete rivals like UPS.[43] In the dominant tech platform context, evidence of discriminatory or anticompetitive conduct would only be found legitimate if there is clear evidentiary harm to consumers.[44] This fact undergirds one of the many significant gaps in antitrust law's current application. Specifically, it is difficult to determine whether the acquisition of an independent entity necessarily constitutes an abuse in market power as related increases in prices or output are nebulous at best.[45] This indeterminacy may result in false positives, where fixation on pricing ignores that high prices reflect more innovative technologies.[46] It also may result in false negatives, where anticompetitive conduct has occurred, but the effects are either too short-term or negligible enough that they cannot be found illegitimate, despite stifling future innovation.[47]

The chilling effect C.W.S. has on innovation cannot be understated as reflected by the increasing downturn in business dynamism.[48] Studies on Google's entry into mobile application markets illustrate rising fears from developers about its ability to thrive which has resulted in tendencies to raise prices and reduce updates on apps. Even in cases where Google had not entered a relevant market, the threat of entrance alone has a profound effect on the psychology of mobile application developers, resulting in price increases of roughly 1.8% and decreases in updates by 5%.[49] Platforms, therefore, retain the ability to control and abuse market power, as developers necessarily require their platforms to access consumers in the first place.[50] Therefore, the CWS not only reduces the propensity for developing novel technologies by startups and entrepreneurs, but it also harms consumers, as claims of non-economic gains to consumers are outright rejected in cases where price increases or output decreases cannot be numerically quantified.

This is not a categorical condemnation of the concentration of market power or increasing firm size; however, these gaps reflect the need for a tailored and updated approach to antitrust adjudication especially in the context of dominant tech platforms.

IV. A MIDDLE-GROUND SOLUTION

Competition and Consumer Welfare

The C.W.S.'s failure to police dominant firm conduct necessitates an alternative standard. The rise of conglomerates exemplifies the pitfalls of a legal standard focused solely on prices and output: a single firm can lower prices in the short term despite harming the market overall.[51] For instance, predatory pricing was once recognized as a tactic used by firms with market power to lower prices to unsustainable levels with the intent of driving rivals from the market.[52] However, consumer welfare antitrust has labeled predatory pricing as almost always justifiable since it lowers prices.[53] A standard that pays more attention to the potentially anticompetitive effects of market structure is necessary to reinvigorate competition in the 21st century.[54]

The C.W.S. in actuality protects only a narrow subset of consumer interests: low prices. However, consumers also value product quality and variety as well as long-term economic health.[55] The innovation necessary to produce better products and ensure a dynamic economy disproportionately comes not from dominant firms, but from na-

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41 Joshua D. Wright and Douglas H. Ginsburg, The Goals of Antitrust: Welfare Trumps Choice, 81 Fordham L. Rev. 2405 (October 2013): 2409, https://ir.lawnet.fordham.edu/flr/vol81/iss5/9.

42 Elijah Ajuwon, Apple Silicon: Why Tech Giants Engage in Vertical Integration, The Common Sense Network, September 8th, 2020, https://www.tcsnetwork.co.uk/apple-silicon-why-tech-giants-engage-in-vertical-integration/.

43 Id.

44 Kevin Caves; Hal Singer, When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer-Welfare Standard, George Mason Law Review 26, no. 2 (2018): 395-426, https://ssrn.com/abstract=3205518.

45 Caves and Singer, supra note 45, at 395-429.

46 Caves and Singer, supra note 45, at 399-400.

47 Caves and Singer, supra note 45, at 399-400.

48 David Wessel, Is Lack of Competition Strangling the U.S. Economy?, Harvard Business Review, March 2018, https://hbr.org/2018/03/is-lack-of-competition-strangling-the-u-s-economy.

49 Caves and Singer, supra note 45, at 505.

50 Rebecca Haw Allensworth, Antitrust's High-Tech Exceptionalism, Yale Law Journal 130 (2021): 589.

51 Khan, supra note 2, at 716-717.

52 Khan, supra note 2, at 722-726.

53 Khan, supra note 2, at 727-728.

54 Khan, supra note 2, at 717.

55 Khan, supra note 2, at 739.

scent competitors.[56] Because large firms have both the incentive and capacity to destroy nascent firms that represent potential competitive threats, antitrust doctrine should more robustly scrutinize their attempts to neutralize competition.[57]

However, many hipster antitrust scholars take this framework too far, falling into appeals to economic populism. In other words, new scholars replace "rigorous economic analysis" with the axiom that "big is bad."[58] Such proposals should be rejected given the potential chilling effects of overbroad antitrust enforcement.[59] For all the flaws of the C.W.S., it brought with it objective analysis of economic harms and benefits instead of blanket condemnations of market power.[60] Clearly, antitrust needs a more nuanced standard than reflexive rejection of either market power or government intervention.

The Rule of Reason and Case-by-Case Analysis

Another central part of contemporary antitrust analysis is the rule of reason.[61] When plaintiffs allege anticompetitive conduct, courts must have a framework for comparing the claims made by the plaintiffs and the defense. Different frameworks are more favorable to one side or the other. For instance, the "per se" approach holds that certain actions are inherently anticompetitive and are thus illegal in all circumstances.[62] This approach is much more favorable to the plaintiff who must only prove that an illegal act occurred to win.

Courts traditionally use the rule of reason, which is extremely defendant-friendly.[63] The rule of reason uses a multistage analysis to balance the procompetitive and anticompetitive effects of specific actions. Instead of categorically condemning exercises of market power, it balances an action's procompetitive and anticompetitive effects to produce inquiries tailored to the facts of a specific case instead of making broad assumptions about categories of conduct.

The benefit of such a framework is that it is attentive to context. If the goal of antitrust is to protect competition, then courts should care about whether actions that seem anticompetitive at the outset have compelling procompetitive justifications. Antitrust poses the risk of both false positives and false negatives. The rule of reason is the best framework for balancing these tradeoffs because it compares the countervailing effects on both parties.[64]

Protection of Competition

This article's proposed framework balances the need to account for structural harms while preserving fact-specific evaluation. At first glance, these aims seem irreconcilable; condemning market dominance as a structural problem could result in a per se rejection of all exercises of market power. However, it is possible to afford more weight to market structure in antitrust analysis without foregoing the rule of reason.

The best middle ground is to view the role of antitrust as protecting competition, where the question at issue is not whether consumers benefited in the abstract, but instead whether an action was meant to suppress competition. Such a standard allows for courts to consider a wider range of anticompetitive conduct since their goal would be to protect a process rather than a set of values.[65] Specifically, it would be more conducive to addressing collusion, barriers to entry, predatory pricing, and more.[66]

This standard is easy and practical for courts to implement. The question courts must ask is simple: is the conduct at issue a normal part of the competitive process or a deliberate attempt to suppress competition?[67] A standard that is more attentive to preserving the competitive process can also identify anticompetitive conduct more precisely; threats to competition regularly attract the scrutiny of regulators, but harms to consumer welfare require speculative economic analysis.[68]

Finally, this standard avoids the concerns about the chilling effects of hipster antitrust proposals. First, it remains within antitrust's economic framework and avoids structural remedies such as breakups, both of which are uniquely harmful. Second, preserving the rule of reason mitigates harm such as the unprecedented nature of reform. While reformers

56 Scott Hemphill and Tim Wu, Nascent Competitors, University of Pennsylvania 168 (2020): pp. 1886-18889.

57 Hemphill and Wu, supra note 57, at 1889-1890.

58 Joshua Wright and Aurelien Portuese, Antitrust Populism: Towards a Taxonomy, Stanford Journal of Law, Business, and Finance 21, no. 1 (2020): pp. 3.

59 See supra part IIA.

60 Wright and Portuese, supra note 59, at 11-12.

61 Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests, Bona Law, https://www.bonalaw.com/insights/legal-resources/antitrust-standards-of-review-the-per-se-rule-of-reason-and-quick-look-tests, accessed November 30, 2021.

62 Antitrust Standards of Review, Bona Law.

63 Antitrust Standards of Review, Bona Law.

64 Erik Hovenkamp, Platform Antitrust, Journal of Corporation Law 44, no. 4 (2019): 751.

65 Tim Wu, After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice, The Journal of Competition Policy International (2018): pp. 2.

66 Wu, supra note 66, at 9-10.

67 Wu, supra note 66, at 9.

68 Id.

should not underestimate businesses' fear of antitrust, the rule of reason is defendant-friendly enough to avoid its wanton application.[69] Indeed, "the maximal possible number of type 1 errors [i.e., false positives] is capped by the number of judgements issued in plaintiffs' favor. And that number is already minuscule under the traditional burden shifting rules."[70]

V. CONCLUSION

Scholars and practitioners should take seriously the chilling effects of new antitrust applications. These risks are particularly pronounced with hipster antitrust proposals, which make no distinction between beneficial and harmful exercise of dominant firm power. Instead of adopting per se rules for evaluating anticompetitive conduct, courts should use the rule of reason to adjudicate a modified antitrust standard. This standard would afford more weight to preserving the competitive process rather than output and price effects, allowing enforcers to address a wider range of anticompetitive harms. Maintaining the rule of reason is critical to preventing overbroad application of this standard, balancing the incentives of large and small firms to innovate.

69 Hovenkamp, supra note 65, at 752.

70 Hovenkamp, supra note 65, at 752.

includes intent to disrupt. That way, schools could have addressed the issues raised by twenty-first-century technological realities while also not casting such a wide net as to embroil students' off-campus First Amendment rights significantly.

Prosecuting Guantanamo Bay Detainees in Civilian Criminal Courts: A Legal and Policy Proposal

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Abstract

National security experts debate what the United States can and should do with the remaining detainees at the Guantanamo Bay Detention Camp — in particular, the ten detainees who face trial before military commissions established under the Military Commissions Act of 2009 rather than civilian criminal courts established under Article III of the Constitution. Which court system is preferrable for both legal and policy reasons? This debate is complicated by the fact that Congress has effectively prohibited detainees from being tried before civilian criminal courts through funding restrictions. This essay will argue that the President can and should transfer detainees to the federal civilian court system in the U.S. mainland despite statutory prohibitions.

I. INTRODUCTION

Like other aspects of the War on Terror, the Guantanamo Bay Detention Camp has been marred in controversy since its inception in 2002. National security experts now debate what the United States can and should do with the remaining detainees, especially those eligible for prosecution. Of the thirty-nine detainees that remain today, ten face trial before military commissions established under the Military Commissions Act of 2009 rather than civilian criminal courts established under Article III of the Constitution.[1] Which court system is preferrable for both legal and policy reasons?

This essay argues that the President can and should transfer detainees to the federal civilian court system in the U.S. mainland despite statutory prohibitions by Congress. My scope is limited; ignoring the political considerations of transferring detainees to the U.S. mainland, I will focus on the group of ten detainees who currently face prosecution through military commissions.[2] Although this proposal would only immediately remove these ten detainees from Guantanamo Bay, it is a step in the right direction and establishes a precedent to transfer other detainees currently "held without charges" whose prosecution may later become feasible.[3] Indeed this number may grow as three detainees were charged with war crimes in 2021.[4] Importantly, this essay will not cover the fourteen detainees currently held indefinitely or the thirteen detainees recommended for transfer.[5]

The first section of this essay will make a legal argument in support of the President's constitutional prerogative to transfer detainees to the U.S. mainland. It will examine the statutory prohibition on transfers, constitutional separation of powers principles related to the President's and Congress's war powers, and the procedural hurdles that Congress must overcome to challenge this action in the judicial system. The second section will argue, from a policy standpoint, in favor of prosecuting detainees in the civilian court system by examining the major benefits of this judicial system compared to the military commission system and by addressing the concerns of those who oppose trying detainees in the civilian court system. It will end by briefly examining United States v. Ghailani, which exemplifies the benefits of transferring and prosecuting Guantanamo Bay detainees in the civilian criminal court system.

II. BACKGROUND

Typically, criminal defendants in the United States are tried in civilian criminal court systems established under Article III of the Constitution. However, Congress has restricted the transfer of Guantanamo Bay detainees to the U.S. mainland since it passed the Supplemental Appropriations Act of 2009.[6] Congress also passed the Military Commissions Act of 2009 the same year, establishing the procedures for a military commission.[7] Since 2014, annual National Defense Authorization Acts have prohibited the use of funds to construct or modify facilities within the U.S. mainland to hold Guantanamo Bay detainees or to transfer Guantanamo Bay detainees to the U.S. mainland.[8] Because no civilian courts operate at the Guantanamo Bay Naval Base, this statutory limitation effectively prohibits the government from trying any detainees in the civilian court system.[9]

The President's Constitutional Prerogative to Transfer Detainees to the U.S. Mainland

1 The Guantanamo Docket, NY TIMES (December 9, 2021), https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html; Military Commissions Act of 2009, 10 U.S.C. §§ 948-950 (2018).

2 Id.

3 The Guantanamo Docket, supra note 1; Guantanamo Review Task Force, FINAL REPORT 23 (2010). https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf.

4 Carol Rosenberg, Three Guantánamo Detainees Charged in 2002 Bali Bombing, NY TIMES (August 31, 2021), https://www.nytimes.com/2021/08/31/us/politics/guantanamo-bali-bombing.html.

5 Guantanamo Review Task Force, supra note 3, at 22.

6 Supplemental Appropriations Act of 2009, Pub. L. No. 111-32, tit. XIV, § 14102, 123 Stat. 1920 (2009); U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GUANTÁNAMO BAY DETAINEES 56 (2012).

7 Military Commissions Act of 2009, 10 U.S.C. §§ 948-950 (2018).

8 National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, tit. X, § 1033-4, 127 Stat. 850-1 (2013); William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, tit. X, § 1041-2, 134 Stat. 3846-7 (2021).

9 Jennifer K. Elsea, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT 4 (2014).

Congress retains the constitutional war powers "To declare War" and "To raise and support Armies."[10] These abilities give Congress certain explicit war powers and arguably imply a right for Congress to be involved in high-level decisions involving the use of armed forces. However, the Constitution does not provide Congress with the power to make tactical decisions in war, such as where to hold and how to transfer enemy combatants captured in a time of war. The President's constitutional role as Commander in Chief makes him the ultimate arbiter of war tactics and strategy. This power is found in the Commander in Chief Clause, which states that "The President shall be Commander in Chief of the Army and Navy of the United States."[11] Tactical wartime decision-making powers are vested in a single authority—the President—for good reason. The executive branch is best equipped to deal with tactical decisions, whereas Congress, now consisting of hundreds of members, could not possibly direct decisions that often demand speed and decisiveness. It was for this exact reason that the Constitutional Framers empowered the President to make tactical wartime decisions. Alexander Hamilton wrote, "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."[12] Hamilton distinguishes wartime decisions from other decisions as especially demanding of a single authority. The President's power over tactical decisions under the Commander in Chief Clause starkly contrasts with Congress's more general war powers under the Declare War and Raise and Support Armies Clauses. While the Constitution reserves some war powers to Congress, it does not seem to do so for tactical decisions.

Of Congress's other constitutional war powers, the Captures Clause most directly relates to the issue of whether it may prohibit the transfer of Guantanamo Bay detainees. This clause states that Congress has the power to "make Rules concerning Captures on Land and Water."[13] At first glance, the clause seems to offer Congress the ability to regulate the capture of persons in conflict, including where Guantanamo Bay detainees may be held and how they may be transferred. However, there is significant dispute over whether the Captures Clause covers individuals or only property.[14] What did the Constitutional Framers mean by "capture?" Legal scholar Ingrid Wuerth has examined this question by comprehensively tracing "the meaning of captures through British and Colonial Admiralty documents, prominent works of international law, the Revolutionary War and Articles of Confederation, and the drafting and ratification of the Constitution."[15] She finds that the meaning of "capture" likely did not include the capture of individuals prior to the Revolutionary War and that the "Continental Congress used the word 'captures' in a significantly different way to authorize what goods—but not what people—could be taken by both public and private vessels. This is also the best reading of the Constitution's text."[16] The Captures Clause, the most directly relevant constitutional provision to the issue at hand, was thus likely not intended to and does not give Congress the power to prohibit the transfer of detainees from Guantanamo Bay to the U.S. mainland.

The differences between Articles I and II clearly demonstrate that tactical war powers reside with the President, not Congress. Notably, Congress has not made similar prohibitions to the transfer of wartime detainees at military prisons other than Guantanamo Bay. Presumably, Congress acted out of concern that trying detainees in civilian criminal court would risk public safety and be less likely to result in a conviction because of greater constitutional protections. A heated political environment surrounding the War on Terror likely also had an effect. The peculiarity of Congress's statutory prohibition found in annual National Defense Authorization Acts demonstrates how it has strayed from its typical and constitutional role of refraining from directing war tactics. Therefore, the President can legally exercise his constitutional prerogative to transfer detainees to the U.S. mainland for prosecution in a civilian criminal court because this statutory prohibition violates important separation of powers principles.

Potential Procedural Hurdles for Congress to Challenge the President's Transfer of Detainees

Congress may still sue the President if he decides to transfer the detainees; however, this lawsuit would run into at least two major procedural hurdles that would complicate its success: standing and justiciability concerns. First, Congress might only have the proper standing to challenge this action in certain situations. Congress would likely have to sue as an institution since Raines v. Byrd constrained the standing of individual members of Congress to sue for an institutional injury

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10 U.S. Const. art. I, § 8, cl. 11-12.

11 U.S. Const. art. II, § 2, cl. 1.

12 Alexander Hamilton, The Federalist Papers: No. 74, YALE LAW SCHOOL, https://avalon.law.yale.edu/18th_century/fed74.

13 U.S. Const. art. I, § 8, cl. 11.

14 Benjamin Wittes, The Great Guantanamo Showdown, LAWFARE (November 9, 2014), https://www.lawfareblog.com/great-guantanamo-showdown.

15 Ingrid Wuerth, The Captures Clause, 76 U CHI L REV 1683 (2009).

16 Id.

to Congress.[17] Thus, at least one house of Congress would likely have to pass a resolution authorizing a lawsuit on behalf of that house. This is a high, but still not insurmountable, bar to meet. For example, in U.S. House of Representatives v. Burwell, the Court found that the House of Representatives had standing to sue the executive branch over its implementation of the Affordable Care Act in part because it voted to authorize the lawsuit on behalf of the institution.[18]

Raines also constrained Congress's standing to sue the executive branch when it has other political tools at its disposal. For this reason, courts often find that the legislative branch does not have standing to sue the executive branch for war powers issues.[19] Campbell v. Clinton primarily used Raines to reject the standing of members of Congress who sued President Clinton for using armed forces in the Federal Republic of Yugoslavia without congressional approval.[20] The court noted that members of Congress had other methods of restraining the President's war powers, such as impeachment.[21] For these reasons, Congress may find serious difficulty in establishing standing to sue the President for transferring detainees from Guantanamo Bay.

Even if Congress could establish standing, this issue would likely involve a political question and thus be nonjusticiable under the political question doctrine. Established under Baker v. Carr, the political question doctrine states that courts do not have jurisdiction over inherently political issues because of "a court's impotence to correct that violation."[22] In Baker's majority opinion, Justice Brennan described six situations in which an issue would involve a political question, including "a lack of judicially discoverable and manageable standards for resolving it."[23] The judicial branch necessarily lacks jurisdiction over disputes between the legislative and executive branches involving war powers because it cannot possibly be expected to hold sufficient information or expertise to opine on these types of issues. Courts have used this reasoning several times to rule that cases involving war powers brought by the legislative branch against the executive branch are nonjusticiable. For instance, the Court in Holtzman v. Schlesinger ruled that the "inquiry involves diplomatic and military intelligence which is totally absent in the record before us, and its digestion in any event is beyond judicial management."[24] In Campbell, Judge Silberman wrote in a concurring opinion that the issue at hand "too obviously calls for a political judgment to be one suitable for judicial determinations."[25] Even if a court does not reject this type of lawsuit for standing reasons, it will likely reject its own jurisdiction to hear such a case under the political question doctrine.

It can be concluded from the above reasoning that a court will likely not consider the merits of this type of dispute between the legislative and executive branches because of the procedural hurdles that Congress must first surmount. Still, if Congress can somehow persuade a court that it has standing and that the court has jurisdiction, this type of lawsuit would likely fail on its merits because of the President's constitutional prerogative to make tactical wartime decisions. The constitutional and legal precedents thus strongly favor the President's ability to transfer detainees from Guantanamo Bay to the civilian criminal court system despite the statutory prohibition.

III. ANALYSIS

Since the President has the legal authority to transfer detainees from Guantanamo Bay to the civilian criminal court system, the decision of whether he should do so comes down to a policy decision. From a policy perspective, the President should transfer detainees because of the major benefits of the Article III court system compared to the military commission system established under the Military Commissions Act of 2009. This section will argue that civilian criminal courts are preferable to military commissions because of their legitimacy, efficiency, and wider array of eligible crimes. It will then address two concerns about trying detainees in civilian criminal court: that it would risk public safety and be less efficacious.

The Benefits of Prosecuting Detainees in Civilian Court

First, the civilian criminal court system offers greater legitimacy through the fundamental protections afforded to

17 Raines v. Byrd, 521 U.S. 811, 829 (1997).

18 U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 67 (D.D.C. 2015).

19 Vicki C. Jackson, Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy, 93 IND. L.J. 878 (2018).

20 Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000).

21 Id. at 23.

22 Baker v. Carr, 369 U.S. 186, 5 (1962).

23 Id. at 12.

24 Holtzman v. Schlesinger, 484 F.2d 1307, 1312 (2d Cir. 1973).

25 Campbell v. Clinton, supra note 20, at 25.

defendants. This is most plainly obvious from the basic structure of each court. Whereas the juries in civilian courts must be "chosen from a fair cross-section of the community,"[26] military commission juries consist solely of members of the military.[27] Military commission judges are also members of the military rather than the judicial branch,[28] which exposes them to the "potential domination by other branches of government" from which Article III judges are free.[29] These factors could create inherent biases in criminal trials that the system of representative juries and independent judges are designed to avoid. Civilian court jury decisions must be unanimous,[30] while only two-thirds of military commission juries must find a defendant guilty in most cases, significantly lowering the bar of conviction.[31] Additionally, military commissions do not require a grand jury indictment, a right provided in the civilian court system by the Fifth Amendment.[32]

The structure of the civilian courts also favors greater transparency than that of military commissions. Military commissions may close all or part of a trial to protect the public or national security interests and may restrict access to classified information from defendants.[33] In practice, military commissions at Guantanamo Bay have applied inconsistent and complex rules that allow military prosecutors and judges to mute court proceedings to observers and redact court filings, severely constricting the public's ability to monitor court proceedings.[34] Conversely, the Sixth Amendment guarantees the right to a public trial in civilian criminal courts while the Classified Information Procedures Act sets a much higher bar for restricting access to information from defendants or the public.[35] Civilian criminal trials ensure proper public scrutiny and restrict a prosecutor's ability to hide behind security clearance issues.

The standards of evidence are also far more stringent in civilian criminal courts than in military commissions. Unlike the civilian criminal court system, the military commission system does not require Miranda warnings notifying defendants of their right to remain silent,[36] does not provide freedom from unreasonable searches and seizures,[37] does not expressly prohibit adverse inferences to be drawn from a defendants refusal to testify,[38] generally permits the admission of hearsay,[39] and permits the admission of a defendant's confession "elicited through coercion or compulsory self-incrimination" unless "through torture or cruel, inhuman, or degrading treatment."[40] While both court systems guarantee the right to an attorney, military commissions differ because attorneys must meet certain criteria, including holding a secret security clearance, which can narrow down a defendant's options.[41] Military commissions also do not guarantee attorney-client privilege as civilian courts do.[42] Finally, military commissions can try defendants for crimes committed ex post facto, meaning that actions once deemed innocent may be retroactively labeled as criminal, which the Constitution prohibits in the civilian court system.[43]

These distinctions demonstrate how the Military Commissions Act of 2009 has seriously diminished the fundamental constitutional protections afforded to defendants in the military commission system that are otherwise standard in the civilian court system. The military commission system violates several basic democratic principles, including the rule of law, an independent judiciary, due process, and civil liberty. As a result, many perceive military commissions and their inevitable

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26 Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

27 Elsea, supra note 9, at 25.

28 Id. at 24.

29 United States v. Will, 449 U.S. 200, 218 (1980).

30 Elsea, supra note 9, at 20.

31 Id.

32 Elsea, supra note 9, at 17; U.S. Const. amend. V.

33 Elsea, supra note 9, at 20-23.

34 Rosenberg, The Growing Culture of Secrecy at Guantánamo Bay, NY TIMES (April 4, 2020), https://www.nytimes.com/2020/04/04/us/politics/the-growing-culture-of-secrecy-at-guantanamo-bay.html.

35 Classified Information Procedures Act, 18 U.S.C. App. III (2018).

36 Elsea, supra note 9, at 13.

37 Id. at 15.

38 Id. at 21.

39 Id. at 22.

40 Id. at 14.

41 Id. at 16.

42 Id.

43 Elsea, supra note 9, at 18; U.S. Const. art. I, § 9, cl. 3.

convictions as a "sham process."[44] Therefore, prosecuting Guantanamo Bay detainees in the civilian court system rather than military commissions would improve the legitimacy of these proceedings.

Second, civilian courts are much more efficient than military commissions. The civilian criminal court system has developed its procedures over hundreds of years, creating a predictable system for trying terrorism suspects. The Sixth Amendment and the Speedy Trial Act of 1974 guarantee defendants in civilian courts the right to a speedy trial,[45] thereby also improving the legitimacy of criminal trials. Not only does the military commission system not guarantee the right to a speedy trial,[46] the Supreme Court has not yet settled which constitutional rights apply in the military commission system, which means that judges, prosecutors, and defense attorneys must figure out the proper procedures for this new judicial system on the go.[47] The Supreme Court might later decide that military commission procedures are unconstitutional only after trials have already taken place, further delaying the process of accountability for detainees.

Speedy and efficient trials serve a major benefit to victims and the public by allowing them to receive closure in a timely manner. Unfortunately, the families of victims and the public have not been able to fully receive closure from the military commission system in Guantanamo Bay. Military commission trials have lagged on for years, creating a system of "forever prisoners."[48] John Clodfelter, whose son died in the bombing of the USS Cole in 2000, said in 2009 he was "about ready to bite bullets" because trial proceedings were "taking so darn long."[49] To this day, the case against Abd al-Rahim al-Nashiri, who is accused of organizing the bombing, remains in pretrial proceedings before a military commission.[50] Similarly, the trial of the five detainees accused of planning 9/11 will also not begin until sometime after the 21st anniversary of the attacks.[51]

A more efficient process would also drastically reduce government spending. The New York Times calculated that the cost of holding detainees at Guantanamo Bay totaled over $540 million in 2018;[52] assuming that amount has stayed constant, the U.S. military spends over $13.8 million annually per detainee in Guantanamo Bay, compared to only $78,000 annually per prisoner in ADX Florence, the Bureau of Prisons facility reserved for the country's highest-risk prisoners.[53] As military commission trial proceedings slowly inch forward, the government continues to waste money that it could easily save by prosecuting detainees in the faster, more efficient civilian court system. For these reasons, all involved parties—detainees, taxpayers, and victims—would benefit from a more efficient and speedier trial process by transferring Guantanamo Bay detainees to civilian criminal court.

Third, the civilian criminal court system is preferable to the military commission system because there are more crimes eligible for trial in civilian criminal court than in the military commission system. There are about thirty crimes that can be tried in a military commission, most of which focus on war crimes or terrorism.[54] While comparable crimes can be tried under the criminal code in civilian courts,[55] the civilian criminal court system can also hear cases for crimes not eligible for trial under the military commission system. About 60% of the Department of Justice's terrorism convictions, between September 11, 2001 and March 18, 2010, were charged for crimes not facially related to terrorism, including "fraud, immigration, firearms, drugs, false statements, perjury, and obstruction of justice, as well as general conspiracy charges" that could not be heard by a military commission.[56] Prosecuting detainees in a civilian criminal court would allow them to be held

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44 Charlie Savage, POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL AUTHORITY AND SECRECY 124 (2017).

45 U.S. Const. amend. VI; Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (2018).

46 Elsea, supra note 9, at 14.

47 Id. at 5.

48 Kelsey Vlamis, 'Forever prisoners': 39 remain at Guantanamo Bay 20 years after 9/11, including some who have never been charged, BUSINESS INSIDER (August 28, 2021), https://www.businessinsider.com/guantanamo-bay-9-11-how-many-prisoners-charges-details-history-2021-8.

49 Savage, supra note 44, at 114.

50 The Guantanamo Docket, supra note 1.

51 Carol Rosenberg, Judge at Guantánamo Says 9/11 Trial Start Is at Least a Year Away, NY TIMES (September 13, 2021), https://www.nytimes.com/2021/09/13/us/politics/gitmo-9-11-trial-start-date.html.

52 Carol Rosenberg, The Cost of Running Guantánamo Bay: $13 Million Per Prisoner, NY TIMES (September 16, 2019), https://www.nytimes.com/2019/09/16/us/politics/guantanamo-bay-cost-prison.html.

53 Id.

54 10 U.S.C § 950(t) (2018).

55 18 U.S.C. §§ 2331-2339 (2018); 18 U.S.C. §§ 2441-2442 (2018).

56 Introduction to National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions, DEPARTMENT OF JUSTICE, https://irp.fas.org/agency/doj/doj032610-stats.pdf (last visited March 8, 2022).

accountable for more of their alleged crimes than just those relating to the laws of war and terrorism.

Concerns About Prosecuting Detainees in Civilian Criminal Court

One of the primary concerns about transferring detainees to the U.S. mainland is that it would risk public safety;[57] indeed, military commissions are isolated in Guantanamo Bay, while Article III courts are located in populated civilian centers. If terrorists somehow escaped custody, they could threaten public safety, and a public terrorism trial could attract other terrorist attacks. However, the government can still protect public safety while prosecuting detainees in civilian criminal court. This argument from critics ignores the longstanding history of alleged terrorists being prosecuted in civilian court without incident. Between September 11, 2001, and December 31, 2016, at least 549 individuals were convicted of international terrorism-related charges.[58] These cases demonstrate that the Department of Justice (D.O.J.) has developed the proper procedures to protect public safety during the prosecution of such dangerous and high-profile individuals. Moreover, the D.O.J. has repeatedly and explicitly stated that it could continue protecting public safety if detainees were transferred to the U.S. mainland, writing in a 2009 press release that "[t]he Attorney General and the Secretary of Defense are confident that detainees now held at Guantanamo Bay can be detained securely in U.S. detention facilities and that their trials can be conducted effectively and safely in the United States."[59] In a 2012 letter, a D.O.J. official wrote, "the Bureau of Prisons and Marshals Service have the correctional expertise to safely and securely house detainees with a nexus to terrorism."[60] Surely, the official opinion of the D.O.J., which is best equipped to assess the government's ability to protect public safety while prosecuting Guantanamo Bay detainees in the U.S. mainland, should be accorded greater weight than skeptics outside of the Department. The argument that transferring detainees to the civilian criminal court system would risk public safety does not stand up to scrutiny.

Another common concern is that the government might lose its cases because of the greater constitutional protections for defendants. However, the prosecution of detainees in the civilian criminal system would be efficacious because of the D.O.J.'s significant experience prosecuting terrorism cases and its success in securing convictions despite greater constitutional protections. Between September 11, 2001, and June 2, 2009, the D.O.J. achieved a 91.1% conviction rate for terrorism cases, 88% of which were sentenced to prison.[61] During this period, the D.O.J. secured eleven life sentences, and excluding these life sentences, an average prison sentence of 100.98 months.[62] This data shows that civilian criminal court, despite its greater legitimacy, is at least as efficacious a venue for prosecuting Guantanamo Bay detainees as the military commission system.

The Prosecution of Ahmed Khalfan Ghailani

This section has thus far given three reasons why the civilian criminal court system is preferable to the military commission system for prosecuting Guantanamo Bay detainees and responded to two primary concerns about public safety and efficacy of civilian courts. It will now apply these issues to the trial of Ahmed Khalfan Ghailani, who was transferred from Guantanamo Bay in 2009; prosecuted for the 1998 bombings of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania; convicted in 2010; and given a life sentence in prison.[63] Because the jury found him guilty of one conspiracy charge but acquitted him on more than 280 other charges, critics have used this case to argue against transferring detainees

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57 U.S. Congress, House of Representatives, Subcommittee on Oversight and Management Efficiency of the Committee on Homeland Security, Transferring Guantanamo Bay Detainees to the Homeland: Implications for States and Local Communities, 114th

58 DOJ, DHS Report: Three Out of Four Individuals Convicted of International Terrorism and Terrorism-Related Offenses were Foreign-Born, U.S. DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS, (January 16, 2018), https://www.justice.gov/opa/pr/departments-justice-and-defense-announce-forum-decisions-ten-guantanamo-bay-detainees.

59 Departments of Justice and Defense Announce Forum Decisions for Ten Guantanamo Bay Detainees, U.S. DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS (November 13, 2009), https://www.justice.gov/opa/pr/departments-justice-and-de-

60 Lee J. Lofthus, Letter with Comments from the Department of Justice, in GUANTÁNAMO BAY DETAINEES (2012).

61 Richard B. Zabel and James J. Benjamin, Jr., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE

62 Id. at 5.

63 Ahmed Khalfan Ghailani Found Guilty in Manhattan Federal Court of Conspiring in the 1998 Destruction of United States Embassies in East Africa Resulting in Death, US ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK (November 17, 2020), https://archives.fbi.gov/archives/newyork/press-releases/2010/nyfo111710a.htm.

from Guantanamo Bay to the civilian criminal court system.[64] However, this case can actually be viewed as success because it demonstrates the benefits of transferring detainees. First, despite being acquitted of most charges, Ghailani was still sentenced to life in prison, sufficiently holding him accountable for his crimes. Although the jury acted peculiarly in this case by imposing such a harsh sentence for one charge, the civilian criminal court system overall served the interest of justice. Second, Ghailani was able to appeal his conviction by alleging a violation of his constitutional rights under the Speedy Trial clause of the Sixth Amendment because of the long duration between his original detention and his ultimate conviction.[65] Although he ultimately lost this appeal, it nonetheless made Ghailani's conviction more legitimate than if it were obtained under a military commission since it demonstrated that Ghailani was protected by the Sixth Amendment in his civilian criminal trial. Had he been prosecuted in a military commission, he would not have had this mode of appeal in the first place because these same protections do not apply. That his conviction was upheld also demonstrated that prosecution in civilian criminal court could still be efficacious, resulting in convictions, despite public concerns that granting detainees greater constitutional rights might allow them to escape justice.[66]

Third, the trial was speedy. The period between Ghailani's transfer to the U.S. mainland (June 9, 2009) and his conviction (November 17, 2010) took just over one year.[67] If the government had prosecuted him in a Guantanamo Bay military commission, he might remain in pretrial proceedings today like other detainees. Finally, no public safety incidents occurred during the trial, demonstrating how the D.O.J. has continued to protect the public during high-profile terrorism cases. The Ghailani case exemplifies the benefits of prosecuting Guantanamo Bay detainees in civilian criminal court and how the government should continue doing so for other detainees. Although this section has analyzed the civilian prosecution of only one detainee, the D.O.J. has a long history and extensive experience with prosecuting terrorism cases, as does the civilian criminal court system. Therefore, the benefits exemplified by Ghailani's case are not unique, applying to the transfer of other detainees as well.

IV. CONCLUSION

As the United States enters a new phase of the War on Terror following its withdrawal from Afghanistan, the Guantanamo Bay Detention Camp has become a relic of the past. It is now pertinent to review legal and policy issues related to the prosecution of detainees in civilian criminal court rather than the faulty military commission system. As this paper has shown, the President retains the constitutional prerogative to transfer detainees and need not wait for congressional approval. Although this would only immediately remove the ten detainees currently facing prosecution from Guantanamo Bay, it is a step in the right direction. The cases of the other detainees require separate legal and policy analysis that lie outside the scope of this paper. This is also the right policy choice to make because of the significant benefits of Article III courts compared to military commissions.

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64 Charlie Savage, Terror Verdict Tests Obama's Strategy on Trials, NY TIMES (November 18, 2010), https://www.nytimes.com/2010/11/19/nyregion/19detainees.html?_r=1.

65 United States v. Ghailani, 733 F.3d 29 (2d Cir. 2013).

66 Id. at 37.

67 Ahmed Ghailani Transferred from Guantanamo Bay to New York for Prosecution on Terror Charges, U.S. DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS (June 9, 2009), https://www.justice.gov/opa/pr/ahmed-ghailani-transferred-guantanamo-bay-new-york-prosecution-terror-charges; US ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK, supra note 63.

The Relevance of Kant's Perpetual Peace to the Contemporary Theories of International Jurisprudence

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Abstract

This piece of international law jurisprudence explores and evaluates post-Enlightenment documents while discussing contemporary political themes. These themes include, inter alia, universalism; realism; cosmopolitan right; Westphalian sovereignty; and Kant's public sphere. Through such an evaluation, this paper attempts to portray Kant's work as an interlocutor of modern thought.

I. INTRODUCTION

Written in 1796, Immanuel Kant's Perpetual Peace may seem like a quaint piece relegated by the constraints of time to no more than a footnote in history. It remains true that Kant was a man of his era, sharing many of the moral afflictions that plagued his environment.[1] Indeed, Kant propagated many prejudices that formed the nucleus of the euro-centric male expression. His view on women, for example, belonged firmly in the cesspool of the views of like-minded patriarchal sympathizers of the period. Yet, through this thicket of prejudice and outdated words lies a bastion of modern concepts and ideas that remain pertinent to our contemporary outlook. While it is essential that we remember and learn from Kant's ethical infirmities, it is equally important that we not hastily discard his worthwhile opinions and analytical observations. To do so would leave jurisprudence without a vital voice of hope and render the foundations of our political understanding emptier than before. Although Kant's piece may have been written more than 200 years ago, his political and philosophical thoughts remain eerily appropriate for our time. Ted Humphrey encapsulates the relevance of Kantian thought in his claim that "few essays can more probingly stimulate thought about our present condition [than Perpetual Peace]."[2]

Through his emulation of a constitutional document, Kant attempts to bring about a movement in the empirical world. This movement strives to achieve a seemingly intractable yet enduring objective of humanity: perpetual peace. While it would be comforting to read his piece simply within the constraints of his own arcane world, doing so would be a disservice to the reader and author alike. Instead, it is important to use his essay as a comparative tool of analysis—as a sextant towards our current structure of politics, allowing us to navigate our understanding of the contemporary world. Such is the aim of this paper—not to critique Perpetual Peace for its inconsistencies with modern times but to temporarily adopt Kant's perspective of humanity and use it as a guide to question our present reality. For this reason, this essay will take a reconstructive approach, labeling Kant a pioneer of the modern world in unison with Jürgen Habermas's aptly worded "200 years of hindsight."[3] Thus, the analytical goal of this paper will be to use Kantian theory derived from Perpetual Peace to interpret pertinent questions within the political and social structures of our modern world. These include the seemingly obstinate questions of whether international law necessitates coercion, whether social media is a threat to modern republicanism, and whether human rights are truly universal and defense of them can provide a justification for armed conflict. Intuitively, providing insight into these multifaceted enigmas will display this paper's central argument. Kant is not only relevant to contemporary international law but is one of its very authors.

II. IS COERCIVE INTERNATIONAL LAW BENEFICIAL/FUNCTIONAL IN OUR MODERN WORLD?

The question of whether coercion is beneficial—or would function at all—on the international plane is one of the central concepts of Kant's philosophical sketch. This section will discuss whether international coercion and sovereign republicanism are mutually exclusive in Kantian thought, and whether these ideas can be grafted onto our modern conception of intentional law. Such an evaluation will include reference to Kant's justification for the genesis of international law without coercion in addition to his warning against coercion outside of national legal architecture.

Does the International State of Nature Necessitate the Presence of Coercion?

Kant wrote Perpetual Peace in the context of a world ravaged by a heinous and yet seemingly endless sense of self-conflict. The storming of the Bastille, the crossing of the Delaware, and the fortification of the Rhine persuasively gripped the minds of philosophers of the time. Not only had war brought the death of millions through endless continental dissension, but the destruction of Europe's infrastructure and trade potential was also immeasurable. These events help justify Kant's negatively encoded lawful condition: the abolition of all war ("there is to be no war").[4] This section of the essay evaluates, in a modern setting, one of his principal remedies to war: a complex and voluntary system of decentralized republican states (Second Definitive Article). Though novel at the time, Kant's advocacy for a foreshadowed quasi-United Nations was truly "avant la lettre," according to Fernando Tesón.[5]

While this paper strives to evaluate our modern world through the lens of Kant's theory, it is important to first provide a descriptive overlook to ground his ideas on coercion. According to Perpetual Peace, social cooperation requires law for stability. To support this conclusion, Kant introduces a conceptual device, derived from interpretations of Hobbesian princi-

1 Kurt Mosser, Kant and Feminism, 90, Kant-Studien, 322-253 (1999).

2 Ted Humphrey, Perpetual Peace, And Other Essays On Politics, And Morals, 45 (1983).

3 Jürgen Habermas, Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years Hindsight, MIT, 114 (1997).

4 Immanuel Kant, Perpetual Peace: A Philosophical Essay (1795).

5 Fernando Tesón, The Kantian Theory of International Law, 92, Colum. L. Rev. 53-102 (1992).

ples and figures such as Jean-Jacques Rousseau.[6] This is the notion of the state of nature. The state of nature is a pre-legal state in which social cooperation is not possible.[7] The human propensity for violence and self-gain renders humanity "wolves to each other's throats."[8] Such a state is not livable; our evil instincts, affinity to lawlessness, and capacity for destruction require us to seek sovereign coercion as the only tonic to humanity's thirst. However, Kant claims fear of a sovereign is not enough to eliminate the state of nature; we need morality and legitimacy as justifications for collaborating with and accepting coercive order.[9] This leads to the emergence from the state of nature of republican states under social contracts. Yet, every emergence of a state is a standing offense to others.[10] The very notion of Earth's spherical nature condemns humanity to competition or collaboration—endless fleeing from one's foe is logically impossible. The newfound plurality of states once again descends humanity into a state of nature, albeit on a larger scale, between nations rather than individuals. At the national level, meanwhile, a republican state's power is preciously bound to the law of the nation. Put simply, there exists a fragile equilibrium between political power and the constraints of law.[11] Yet, the fulcrum of this constellation—coercive power—is absent in the international theatre. While law may contour how states interact on an international stage, the shackles of domestic restrictions are not present; this is thus an international lawless condition.[12]

Hence, to Kant, it is imperative that humanity undergoes a second emergence; however, in a way that is not directly analogous to the first. Intuitively, one could call for a centralized super state, akin to a world government, that cures the international state of nature through international coercion. Yet in doing so, one would be wrong. Without descending into a semantic conversation on whether international law is truly law, Kant calls for a surrogate universal league in which all states preserve their supreme sovereign authority yet voluntarily make perpetual moral commitments to the negative prohibition of war. [13] These commitments are moral concepts; they do not retain supreme judges akin to law nor place a coercive hierarchal power upon states, for to do so would be wholly inconsistent with the very basis of the republican state—the right of nations. [14, 15] This commitment to sovereignty is not a deficiency in Kant's argument; rather, he defends its value through his liberal peace theory. This theory dictates that pure republican nations will not be able to justify war against one another.[16] Not only do structural constraints, such as checks and balances and authorization, make war improbable, the very nature of a democracy's requirement of public consent renders it impossible.[17] Simply put, citizens will not vote in favor of their own demise. This theory, which parallels the work of Thomas Paine, is one of the central reasons why coercion is necessary to cure the national state of nature but not the international consent-based regime. Coercion is, therefore, not present nor required according to Kant's conception of international law, as republicanism is sufficient to prevent conflict.

Some, such as Carl Friedrich, have reconstructed Kant's federation into modern terminology—namely, a coercive super state under a unified sovereign.[18] Tesón rightfully points out that Kant "expressly disavowed such an idea," and that the dogmas of universal hospitality and free trade are clearly inconsistent with such a view.[19] Yet others, like Habermas, have claimed that "without an element of obligation," the federation is doomed to "remain hostage to an unstable constellation of interests and will inevitably fall apart."[20] In layman's terms, Habermas believes that coercion is required to combat international capriciousness. Kant expressly deals with this argument when he pays reference to the nation of devils—a nation who acts only in self-interest akin to the state of nature—clearly foreshowing political realism.[21] Realism is built on the notion that all states desire power to ensure self-preservation and enact their rational self-interest.[22] According to Kant, the republican state and the international order cannot rely on angelic principles; rather, we must remain pessimistic, yet realistic, about the

6 Michael Doyle, Kant and Liberal Internationalism, Yale Univ. Press. 201-242 (2008).
7 See supra note 4 at 12.
8 Preston King, Thomas Hobbes, Assessment, Routledge. 58 (2002).
9 See supra note 4 at 12.
10 See supra note 4 at 13.
11 Michael Doyle, Kant, Liberal Legacies, and Foreign Affairs, 12, Wiley. 205-235 (1983).
12 Robert Ginsberg, Kant and Hobbes on the Social Contract, 5, Univ. Ark. Press. 115-119 (1974).
13 See supra note 4 at 14–15.
14 See supra note 4 at 14.
15 Peter Kleingeld, Toward Perpetual Peace And Other Writings On Politics, Peace, And History (2006).
16 See supra note 4 at 7.
17 See supra note 4 at 7.
18 Carl Friedrich, Inevitable Peace 76 (1948).
19 See supra note 5 at 55.
20 See supra note 3 at 115.
21 See supra note 4 at 12.
22 Joseph Nye, Neorealism and Neoliberalism, 40, Cambridge Univ. Press. 235-251(1988).

human condition.[23] Peace alone would not be the motivating factor to a devil, as he holds no moral inclination. Yet, even if not morally good in himself, a devil is compelled to be peaceful as peace maximizes his capital through trade and commerce governed by rules. By agreeing to these rules and wishing to gain financially, we can be corrupt yet accept a system of republicanism and universalism without the need for coercion. This is an early Cobdenism argument that helps portray Kant's ability to answer a modern question with a dated text.

The contemporary political arena seems to parallel this lack of coercive force, thereby supporting the narrative that Kant correctly foreshowed the current political climate. While states retain moral duties framed in international law, there is no sovereign to truly enforce compliance. A common counterargument to this narrative highlights the UN's reliance on customary international law as potential proof of quasi-coercion being used and required by international actors. This argument is simply inaccurate. While unwritten, customary law remains irreversibly bound to the primordial concern of Kantian philosophy—the right of nations and its derivative, state consent. While one may be inclined to view custom as an imposition of substantive law, it is rather formed by tacit consent—put simply, implicit consent derived from one's acceptance of it in practice. This can be observed in the principle of persistent objection. While there remains a rebuttable presumption of acceptance, states have the right to opt out of any custom through positive actions of objection or contradiction in opinio juris and state practice. This ability to remove oneself from custom displays the fact that the nation-state remains the bastion of power. Hence, international coercion is not present. In fact, the UN, by its nature, is essentially non-coercive, which becomes clear in examining its response to the United Kingdom's lack of intention to 'decolonize' the Chagos Archipelago, a flagrant violation of international opinion.[24] A similar lack of coercion appears in the interpretation of treaties. While the Aegean case determined treaties would be construed by substance over form—thereby binding nations to documents they expressly do not wish to be treaties—the intention of parties to be bound by law remains the crux of this legal interpretation.[25] Similar to before, this narrative expressly pays reference to Kant's belief in republicanism over international coercion and thereby agrees with his analysis that global coercion is not present nor required. Rather, the coexistence of republican states is sufficient to enact lasting peace.

Would a Coercive International Order Be Beneficial?

We can also use Kant's warnings to interpret whether international coercion in the form of a federation would be desirable in the modern world. According to Kant, a universal sovereign order runs the risk of being "overrun by a superior power that melds it into a universal monarchy," thus turning the state into "a soulless despotism" and ultimately "into anarchy."[26] Consequently, peace is evidently not achievable through this level of integration. Reconstructing his theory, one could claim that the state is not only a political term for citizens under constitutional law, but also a collective community of people, often forged by a common language, religion, or custom. Each state provides a sanctuary for its people's collective identity that would be lost under a coercive world polity. States thus propagate diversity between them and hence the loss of states to an international republic would jeopardize the autonomy individuals enjoy within their independent collectives. Such a narrative would paint a grave picture for peace. Diversity offers different perspectives and fuels mutual enrichment though dialogue and public disagreement. Forcing international integration could lead to artificial cultural uniformity. Such normative uniformity would strip the public sphere of its ability to establish moral rights (conceptually explained in section III) and would lead to minorities being placed under a totalitarian grip of Foucault's "normalization" and the opinions of the median. [27] This conclusion finds its basis in Kant's empirical conjecture on the "dictatorship of the masses."[28]

Such notions are pertinent to our modern question on the value of international coercion. States remain instances of individual and unique cultures that must be safeguarded for peace. While it is true that peace may be more practical within the constraints of a modern super state, the cultural repercussions make it questionable. An example of this cultural safeguarding through sovereignty is visible in treaty reservation principles of international law, which allow states to contract out of the adoption of specific legal items through a consistent and uniform rejection in writing. Through such an act, states can protect their citizens from the abrogation of particular customs insofar as they do not contradict jus cogens.[29] While this does

23 See supra note 4 at 12.

24 Andrey Harding, UK Misses Deadline to Return to Chagos Islands, BBC News (Nov. 19, 2019), https://www.bbc.com/news/uk-50511847.

25 Aegean Sea Continental Shelf (Greece v. Turkey), Judgement, 1978 I.C.J. 3 (December 19). 96.

26 See supra note 4 at 14.

27 Margaret Paternek, Norms and Normalization: Michael Foucault's Overextended Panoptic Machine, 10, Human Studies. 97-121(1987).

28 See supra note 4 at 14.

29 United Nations Convention on the Law of Treaties, May 27, 1969, UNTS vol. 1155, p. 331. (Jus Cogens is a

amplify the quagmire of complicated nuance in international law application, it allows diversity to mold the Westphalian system to every unique republican state and their relations. Hence, a loose alliance of republican states is preferable, as it can maintain and proliferate diversity on the global stage without a fear of war.

Further evaluating these principles in the present international legal landscape provides a stern warning against the gentrification of cultures and practices. Forced cultural uniformity through coercion is not only a risk to those forced to convert their practices, but it is also a risk to the world itself, as it has the potential to damage our collective public sphere. Such a warning not only portrays the weaknesses of modern conceptions of a world federation, but it also questions some of the world's existing state models and the criteria for self-determination. While the right to self-determination is currently enshrined without definition in Article 1 of the UN charter, its de jure application is somewhat nebulous and subject to political determination. [30] According to Kant's theories, intra-national regions where minority cultures clash with the national hegemonic identities are perhaps better off separated from the national body to promote a durable public sphere. [31] Whether this be through autonomy, institutions that guarantee true diversity, or independence, cultural suppression is clearly not an option. [32] These ideas are somewhat paralleled in the albeit strict case of Quebec where self-determination was found to exist in any population which faces oppression or restriction from the republican instruments of a nation. [33] Hence, not only is global coercion unfavorable, certain instances of national coercion may also need to be questioned. It is our duty, not only as humans under cosmopolitan ideas, but as architects of peace, to make sure the minority voice is heard in our modern world.

Another argument Kant raises against a central international state highlights the unattractive effect it could have on an individual's freedom. Kant argues that central states carry the potential of solidifying a tyrannical world order.[34] This claim relies on the functional idea that resistance to an international sovereign would be inherently more difficult than resistance to national sovereigns, as the international sovereign would attain a global monopoly on force.[35] This would mean resistance movements would not be able to receive foreign funding or shelter in offshore jurisdictions, away from the coercive force of the sovereign's law. Furthermore, there would be no other voice in the international arena to condemn the actions of the central state if they abrogate against republican values.[36] Global institutions that instill republican architecture provide states in the modern world with the foundations upon which they can criticize the actions of others. In turn, this can create public pressure and lead to worthwhile policy changes. A Kantian analysis is thus important for the modern world and suggests that the peaceful cohabitation of republican states is preferable to a central international state. As such, further centralization is not needed; rather, the world must follow the inevitable march toward republicanism.

III. DOES THE MODERN PUBLIC SPHERE BENEFIT REPUBLICANISM?

The rise of social media as a vehicle and catalyst of political change has the potential to leave a profound impact on republicanism. Kant's essay can help one determine whether these changes should be welcomed or feared. Public citizenries hold republican administrations, by the very notion that they are republican, to the constitutional standards that mark their inception. According to Kant, such states thus cannot "base their policies publicly on opportunistic machinations alone."[37] Rather, they must tailor their policy to fit within the constraints of the national ideas of morality. Kant claims that even in his times, governments attempted to justify their actions with legal and moral discourse, irrespective of blatant self-interest. [38] He believes that such attempts indicated the human will to master our corrupt inclination towards evil with reason and reliance on law.[39] The public sphere, as Kant conceives of it, actualizes this will. Put simply, the public sphere is the body of citizens and rationally minded thinkers that bring the republican government to account. Through the public sphere, the populace retains

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fundamental principle of international law where no derogation is permitted. While there is no international consensus on which norms are peremptory, it is generally accepted that they encompass the bans on torture, genocide, piracy, slavery, and wars of aggression.)

30 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, (July 27).

31 See supra note 4 at 14.

32 GA Res. 541 (XV), at 29 (Dec. 15, 1960).

33 Secession of Quebec (1998), 2 S.C.R 217 (Can.).

34 See supra note 4 at 14.

35 See supra note 4 at 6.

36 See supra note 4 at 30.

37 See supra note 4 at 18.

38 See supra note 4 at 25.

39 See supra note 4 at 19.

a surveillance function, meticulously preventing the regime from implementing morally compromised policies through the introduction of public criticism.[40] Therefore, through disagreement, the people will repulse regime actions that do not coincide with publicly held maxims.

Habermas makes a compelling argument that the public sphere theory no longer fits our modern context. He claims that Kant's theory rests "on the transparency of a survey-able public sphere shaped by literary means," which would be formed by "a relatively small stratum of educated citizens."[41] Social media has evidently transformed and expanded this sphere, yet this paper will argue that such a transformation is not a threat to republican nations. Rather, Kant's public sphere theory can be restructured for our time to provide compelling arguments for its benefits in the modern world.

It is true that Kant did not foresee the metamorphosis of the elite public sphere into an unstructured domain ruled by the infamous grasps of social media. While the widening of the sphere to encompass the average citizen should be celebrated, social media offers uncertainty. Counterfactual statements, false narratives, and indoctrinating images pervade the internet and present themselves as benevolent truths.[42] Not only can depraved populists harness the untapped power of social media, but social media has also served to indoctrinate the masses, bypassing a political leader's need to develop legitimacy—the very opposite of the public sphere's purpose.[43] Hence, the cracks and imperfections in our modern society seem to surface yet again through social media and Kant's discomforting truths open our reality for criticism. However, reconstructing Kant's view for the modern environment can offer hope going forward. The public can and should criticize degenerate parts of the public sphere, parts that don't hold moral aptitude. The transcendental idea of publicness dictates that through mutual criticism, we can reform the public sphere and display the false narratives that penetrate it, particularly if Kant is right in his claim that moral evil has the inherent quality of being self-destructive so that it makes way for goodness.[44] Morally evil elements are intrinsically unstable and incoherent, as they rely on oppression and violence to validate their claims. Hence, evil will merely slow good's permeation of the public sphere. While this is an empirical speculation, it offers hope against the rising monsters of political immorality. It dictates that the pervasive untruths of social media will inevitably degenerate and allow for the truth to break through, however long it may take. Hence, while the short-term corruptions social media poses can and will inflict pain, it is nevertheless a platform that will self-heal and repulse the false narratives that plague it.

The modern public sphere and the social media it contains can also be a positive catalyst of change, forcing autocracy to fall and the flower of republic to grow from its ashes. Evaluating our modern environment in line with Kantian thought, it appears that associations and organizations can use the public sphere for the greater good. Bodies such as NGOs can harness social media to place their agenda at the forefront of political change. Examples, such as global summits on various issues including inter alia climate change, deforestation, and world hunger, can exploit the interconnected global nature of the public sphere to enact constructive change within states. Further, social media can perpetuate the safeguarding of global commitments that republican states have entered. A prime example can be seen in the Rainbow Warrior case, where the French government admitted to a breach of Article 7 of the Articles on the Responsibility of States for Internationally Wrongful Acts due to a hostile media backlash.[45] As international law does not contain an instrument of sovereign coercion and state responsibility principles are capricious at best, public sphere pressure will only become increasingly important in holding republican nations to their moral commitments. While social media may prove a problem in the short-term, it has the potential to spread the call of republicanism and peace across the globe, without the need for war.

Yet, the modern public sphere's power also provides a somber warning about the potential proliferation of rebellion. Kant believed that rebellion did not pass the idea of publicness. According to Kant, "rebellion is never legitimate" and one must "endure the most unbearable abuse of supreme authority."[46] This is not to say he believed a population should remain silent in the face of abusive coercion; rather, he believed that non-violence was the only means upon which a successful republic could be founded, as the injustice of rebellion defeats its very purpose. Put simply, one cannot use immoral tactics to undo an immoral state of affairs, as doing so will only perpetuate the same political condition. Therefore, Kant rejects

40 See supra note 4 at 25.

41 See supra note 3 at 117.

42 Alistair Coleman, Ukraine Conflict: Further False Images Shared Online, BBC News (February 25, 2022), https://www.bbc.com/news/60528276.

43 Shiru Wang, Cyberdualism In China: The Political Implications Of Internet Exposure Of Educated Youth (2017).

44 See supra note 4 at 20.

45 U.N. Secretary-General, Case concerning the differences between New Zealand and France arising from the Rainbow Warrior affair, Rep. of International Arbitral Awards, Vol. XIX(1986). 199.

46 Arnaulf Zweig, Kant's Philosophical Correspondence 208-210 (1966).

revolution due to the violence it entails, even if it attempts to overcome unjust conditions.[47] While the benefits of a revolution should be preserved, it is important to remember that violent rebellion is against the fundamental cosmopolitan rights of the injured.[48] Hence, he calls on his readers to not be impatient; we must not violently impose those principles which we find morally right, even if the public sphere condemns us to hate.[49] Accordingly, social media's ever-present ability to provide a spark to a flame must be carefully nurtured. Platforms such as Facebook have a unique ability to instigate emotional affinities and strife through powerful imagery not seen in Kant's time. Images of child soldiers or videos of public executions have an innate ability to sow the seeds of rebellion in a populace.[50] Yet, universalism requires incremental reform; it does not ask us to violently abolish any practice or custom that does not correspond to universal republican ideas. When tamed and well managed, the public sphere provides moral insight and allows a community to thrive and march incrementally towards republicanism. However, when hijacked by those who wish to do harm, it offers the potential to spread and cause irreversible damage through rebellion and anti-establishment ideas. This threat only furthers Kant's call for the rise of republicanism as a vehicle of peace.

IV. IS THE MODERN IDEA OF HUMAN RIGHTS A UNIVERSAL CONCEPT, AND CAN IT JUSTIFY ARMED CONFLICT?

The debate on whether human rights are truly universal and whether they provide a valid pretext for armed conflict is omnipresent in the chambers of international law. Although written more than a hundred years before the declaration of human rights, Kant's work provides compelling insights that can be used to strengthen the argument that human rights are universal and rather ironically a justification for limited armed conflict.

According to Tesón, Kant's argument in favor of human rights rests on the purity of its foundations—namely, "a purity whose source is the pure concept of right."[51] Rather than adhering to more common hypothetical moral systems, such as utilitarianism, Kant's deontological approach relies on the categorical imperative: absolute, unconditional requirements which constitute ends in themselves.[52] He also believed that the protection of categorically imperative cosmopolitan rights was the primordial duty of the state as a guarantor of personal freedom.[53] This belief constitutes the revolutionary idea of cosmopolitan law, a notion which transforms international law from the law between states into the law of individuals.[54] A citizen therefore not only enjoys rights prescribed by his state but also enjoys rights by virtue of his normative individualism.[55] Put simply, this idea renders the individual as the primary unit of international law. This is a version of the Kantian categorical imperative, the construction of which is eerily similar to our present conception of human rights and jus cogens.[56] It suggests that anyone who has the mental faculties needed for reason will accept certain ideas as universal and binding on all men. For example, irrespective of creed, race, religion, or custom, we can all accept freedom of conscience as an expression of universal morality. Unlike political questions about the market economy or the welfare state, the moral question is not contingent on circumstance.

This suggestion is part and parcel of the liberal theory and a grave concern to contextualist ideas. A contextualist would claim that rights are interpreted through the lens of the culture in which they fall. Hence, one's fundamental rights are contextually determined. Boas summarizes the contextualist claim when he posits "civilization is not something absolute;" rather, "our ideas and intentions are true only so far as our civilization goes."[57] This conclusion finds justification in the idea that cultures have different priorities in law and values that are asymmetrical to one another — this is cultural relativism. The modern institutions of the United Nations often embrace this idea, an example being the Cairo Declaration on Human Rights, a document which sought to combine Islamic law with the wider ideas of human rights doctrine.[58] Kant's work can

47 See supra note 4 at 23.

48 See supra note 4 at 23.

49 See supra note 4 at 20.

50 Adam Smidi and Saif Shahin, Social Media and Social Mobilisation in the Middle East: A Survey of Research on the Arab Spring, 73 India Q. 196 (2017).

51 See supra note 5 at 81.

52 Immanuel Kant, Kant: Groundwork Of The Metaphysics Of Morals (1998).

53 See supra note 4 at 24.

54 See supra note 5 at 80.

55 See supra note 2 at 201.

56 See supra note 4 at 24.

57 Thomas Johnson, Culture Relativism: Interpretations of a Concept, 80, Anthropological Q. 791-800 (2007).

58 Id. at 793.

suggest an answer to the apparently pertinent contemporary question of whether human rights are truly universal or rather are Judeo-Christian tenants being imposed through the asymmetry of world power. Kant claims that there is a cultural morality that we share as members of humanity, that we share from a cosmopolitan perspective.[59] Therefore, regardless of context, claims to moral universality can be vindicated through the aforementioned categorical imperative.

Yet, how do we know whether a policy meets the requirements of transcendental concepts of public right? The only requirement that we have is the formal and negative attribute of publicness mentioned earlier; every claim upon what is right must have this public quality — it must stand a test of public criticism.[60] Put simply, the concepts must expose themselves to the public and be capable of being vindicated through an inclusive process of public justification. Each and every citizen is invited to join the process and make a valid contribution to it. Hence, the Kantian process is a deeply egalitarian idea. While one may appear tolerant by rejecting such an idea, for instance by treating others as contextually unalike, in truth you treat them as different, as non-members of our universal community. Relativism, by its very nature, does not allow public criticism and common humanity to flourish through the cosmopolitan idea. As such, Kant affirms that cultures are not shields to be used against public wrongs.[61] The true determinant factor of a public conception of right is the test of criticism and debate. This is a purely negative test that does not prescribe what we should do, nor does it attempt to offer a philosophy of life. Rather, it is only a test through which one uses maxims to discover if an idea is a morally sound construction.

Cosmopolitan rights parallel closely to the ideas of human rights and peremptory jus cogens. Yet, Kant's aforementioned theories suggest that our political system has not gone far enough to protect individual citizens of the globe. States have systematically rejected rights of asylum and various other rights that Kant would term as universally binding on all states and individuals.[62] This is especially evident in the treatment of peremptory norms, which are plagued by fierce criticism and asymmetric definitions on refoulment and torture.[63] Further, Kant's theories provide an intriguing insight into the application of human rights extraterritorially in the Bankovic case.[64] As such, Kant's utopian thinking yet again draws a path for humanity to cure its modern delinquency. His ideas suggest that the world must do more to combat the spread of moral corruptions. For example, Kant's league of nations would bar entry to any nation that does not accept the morally binding nature of cosmopolitan ideas.[65] Hence, Kant's interpretation of the modern question is evidently positive—human rights are intuitively universal and not constrained by context.

While not answering it directly, Perpetual Peace also provides insight on whether armed human rights intervention is justifiable through the responsibility to protect or otherwise. While Kant offers a predominantly pacifistic message throughout his text, Tesón posits that the non-intervention principle must depend on the compliance with the first definitive article of Perpetual Peace if it is to maintain consistency.[66] In layman's terms, it only applies to interactions with liberal democracies. Individuals, as holders of cosmopolitan rights, are the primary unit of consideration in international law. As governments are only legitimate republics insofar as they protect these rights, "governments […] who seriously violate [human] rights undermine the one reason that justifies their political power, and thus should not be protected by international law."[67] As such, borders do not contain the moral force required to repel a justifiable act of armed intervention, as a nation's external sovereignty is dependent on its internal legitimacy.

This finding is acutely valuable as it supports a humanitarian intervention school of thought in current debates on armed conflict. State practice and Article 2(4) of the UN charter do not provide a definitive answer as to whether such intervention is legally admissible in international law. As such, scholarly writing is imperative in the pursuit of a consensus. Tesón's conclusion gives a definitive answer for Kant's view on whether humanitarian intervention is a justifiable exception to the prohibition of the use of force when Article 51 (self-defense) does not apply. While that conclusion is evidently not a subsidiary source of law under Article 38(1) of the Statute of the International Court of Justice, it nevertheless remains a key

59 See supra note 4 at 20.

60 See supra note 4 at 20.

61 See supra note 4 at 21.

62 Jennifer Rankin, Refugees Told "Europe Is Closed" as Tensions Rise at Greece-Turkey Border, The Guardian (Mar. 6, 2020, 13:05 EST).
https://www.theguardian.com/world/2020/mar/06/refugees-europe-closed-tensions-greece-turkey-border.

63 Prosecutor v. Furundzija, Case No. IT-95-17/1, Trial Chamber Judgement (Dec. 10, 1998).

64 ECHR, Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, (December 19, 2001), https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-470135-471261%22]}.

65 See supra note 4 at 10.

66 Fernando R. Tesón, Humanitarian Intervention: Loose Ends, J. Mil. Ethics. 192, (2011).

67 Id.

interlocuter of modern thought that offers the potential to upset established rhetoric and broaden our limited understanding on the prohibition of the use of force. [68] It could also help broaden our current legal concepts of boundaries on immunities and state responsibility through an argument by analogy.

V. CONCLUSION

This paper has demonstrated that while Perpetual Peace may retain inconsistencies with the modern world, it remains astoundingly pertinent to our modern political afflictions. Through his acute understanding of the political intricacies of his time, Kant successfully foreshadowed the naissance of a global community and the formation of human rights while also evaluating issues that remain a thorn in the side of many polities to this day. Although Kant may not have foreseen the astonishing pace of globalization that has gripped modern markets, his theories still prompt us to evaluate our present circumstances. While it is true that many will not agree with them, these theories nevertheless pose interesting dilemmas that can help bourgeon well-intentioned debate between nations. This essay has not only displayed the value of Kant as a voice of modern ideas, but it has also shown that his work has the potential to answer intrinsically complex questions of international law. These include, but are not limited to, whether coercion is required or even desired on the international plane, whether social media is a threat to modern republicanism, and whether human rights are universal and can justify armed conflict.

Nevertheless, it remains prudent to mention that the modern world also offers the reader insight into regions where Kant's piece does not extend. A main shortfall comes from Kant's overemphasis on the state as an instrument of peace. Kant mainly defines war within the constraints of state-contra-state intrigue.[69] Yet, as recent years have taught us, problems such as inter alia, inequality, climate change, and education pose significant barriers to peace, as it is modernly conceived. Are individuals truly at peace in a world where they cannot afford to pay for their healthcare, or in a world where crimes such as rape, homicide, and theft permeate society? Peace on an individual level relies on much more than just the absence of war between nations. Our world thus remains a deeply divisive and unfair environment that has yet to truly understand and experience the essence of peace. Still, it is important to remember that Kant's paper is not the only interlocutor for guidance going forward. Rather, it should be read in unison with an abundance of other works currently in circulation to provide hope, inspiration, and direction for future generations seeking peace.

68 Widely (though not exclusively) considered the definitive statement on what constitutes the sources of international law.

69 See supra note 4 at 5.

Before It's Too Late:
A Demand to Recognize Ethiopian Genocide

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Abstract

From Nobel Peace Prize to Civil War, Ethiopian Prime Minister Abiy Ahmed has launched a systematic invasion into the northern region of Ethiopia, Tigray, against the Tigrayan ethnic group. As articulated in the Genocide Convention, the Rome Statute, and enforced through the International Criminal Tribunal for Rwanda ("I.C.T.R.") and the International Criminal Tribunal for Yugoslavia ("I.C.T.Y.") cases, international laws of genocide directly apply to the mass atrocities inflicted on the Tigrayan people. Nevertheless, the international community is turning a blind eye to Ethiopian and Eritrean forces in the Tigray region. While global leaders debate whether the Tigrayan people are engaged in a Civil War or are the victims of genocide, the Tigrayans face one of the worst humanitarian crises of the 21st century.

Content Warning: This article contains discussion of sexual violence and assault.

I. INTRODUCTION

Ethiopian Prime Minister Abiy Ahmed was awarded the Nobel Peace Prize in 2019 for championing democratic values and dismantling an authoritarian regime in the country. However, since he won, Ethiopia has fallen back into the repressive methods that have shadowed the country for centuries. According to an investigation conducted jointly by the United Nations and the Ethiopian state-appointed human rights commission, Ahmed has "committed violations of international human rights, [and] humanitarian and refugee law."[1] His political motives have transformed Ethiopia into a state of "civil war, violence, death of thousands, massacres, mass rape, IDPs [internally displaced persons], refugee crisis, and human rights violations."[2] The epicenter of the violence is in the Tigray region of northern Ethiopia along the border of Eritrea. International humanitarian groups, world leaders, and media outlets are now venturing to define the Ethiopian military's invasion of Tigray as one of ethnic cleansing. What started as a state-led invasion to quell dissent from the Tigray regional government has since become much more sinister than a mission of national security. Although Prime Minister Ahmed still holds that the violence is minimal and only directed at rebellion groups, it is evident that Ethiopian and Eritrean soldiers are committing acts of genocide with genocidal intent against the Tigrayan people.

The international community is turning a blind eye to the mass atrocity occurring in Ethiopia. While global leaders debate whether the Tigrayan people are engaged in a civil war or are the victims of genocide, the Ethiopian and Eritrean forces continue to traumatize the region and displace millions of people.[3] Ethiopia is composed of diverse and vibrant cultures, traditions, languages and identities; however, Prime Minister Ahmed's efforts to unify the country place the individuality of the ethnic groups at risk of extinction. The "diverse ethnicities [are] forcefully marginalized, subjugated, and assimilated to accept the system that does not represent them."[4] By critically analyzing international law and judicial precedent on the international stage, this research will prove that there is a current war of genocide occurring in Ethiopia.

II. DEFINING GENOCIDE

International Code

Genocide was first codified as an international crime during the Genocide Convention of 1948. The convention formalized an international treaty to define and criminalize all acts of genocide whether "committed in time of peace or in time of war."[5] Article II of the treaty is entirely dedicated to defining genocide:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;

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1 Max Bearak, Joint U.N. Report on Ethiopia Civil War Atrocities Blames All Sides for Violations, The Washington Post (Nov. 3, 2021), https://www.washingtonpost.com/world/2021/11/03/ethiopia-war-crimes-report/.

2 Dedefo Bedaso, Human Rights Crisis in Tigray Region of Ethiopia: The Extent of International Intervention and PM Abiy Ahmed's Denial of Humanitarian Access into the Region, SSRN Electronic Journal 1, 3 (2021).

3 Ethiopia's Tigray Refugee Crisis Explained, USA For UNHCR (Jul. 6, 2021), https://www.unrefugees.org/news/ethiopia-s-tigray-refugee-crisis-explained/.

4 Bedaso, supra note 2, at 3.

5 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

(e) Forcibly transferring children of the group to another group.[6]

The Genocide Convention was the first human rights treaty unanimously adopted by the United Nations General Assembly and was the first legal instrument to define genocide as an enforceable international crime.[7] Ratified in 1998, the Rome Statute is a treaty that established the International Criminal Court ("I.C.C.") and has since been adopted by over 120 countries.[8] The purpose of the treaty is to "set up the highest legal standards, the equality of arms, the impartiality of the judicial process, and [create] a basis for the model of civil administration in the service of fair and equitable justice."[9] Article 6 of the treaty is entirely dedicated to adapting the definition of genocide as inscribed during the Genocide Convention.[10]

National Code

While the Genocide Convention and the Rome Statute define genocide on an international scale, Ethiopia also defines the crime in their 2004 Criminal Code. Genocide is the first crime listed under Title II of the Criminal Code, titled "Crimes in Violation of International Law."[11] Article 269 defines genocide:

> Whoever, in time of war or in time of peace, with intent to destroy in whole or in part, a nation, nationality, ethnical, racial, national, colour, religious, or political group, organizes, orders or engages in
>
> (f) killing, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever or causing them to disappear; or
>
> (g) measures to prevent the propagation or continued survival of its members or their progeny; or
>
> (h) the compulsory movement or dispersion of peoples or children or their placing under living conditions calculated to result in their death or disappearance,
>
> (i) is punishable with rigorous imprisonment from five years to twenty-five years, or, in more serious cases, with life imprisonment or death.[12]

Ethiopia's definition of genocide extends further than the international code as it includes more protected groups (nation, nationality, color, political). During the argument section of this research, evidence will be presented establishing the Tigrayan people as a group protected against genocide by the Rome Statute as an established ethnic group and a political group as defined by the Ethiopian Criminal Codes.

III. HISTORICAL CONTEXT

Although violence between the Tigray and the Ethiopian national government did not begin until November 2020, conflict has been present for centuries. Beginning in the 13th century,[13] Ethiopia was ruled by an emperor who conquered nations and treated the new ethnic groups as second- and third-class citizens. [14] In 1974, the emperor was replaced by a brutal communist regime, nicknamed the "red terror," which killed at least 30,000 Ethiopians under its rule.[15] In response, militias took arms across the country in an attempt to overthrow the oppressive regime. During the Civil War, two militias became the largest and most influential: the Eritrean People's Liberation Front ("E.P.L.F.") and the Tigray People's Liberation Front ("T.P.L.F."). When the communist dictator was finally overthrown in 1991, "the E.P.L.F. declared independence from the

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6 Id. at Article II.

7 Id.

8 The States Parties to the Rome Statute, International Criminal Court, https://asp.icc-cpi.int/states-parties.

9 Id. at Section III.

10 The United Nations Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.

11 Id. at Title II.

12 Id. at Article 269.

13 Edmond J. Keller, Revolutionary Ethiopia: From Empire to People's Republic 3 (1991).

14 Behind the News, Ethiopia Tigray Conflict & Famine Explained: Eritrea, Abiy Ahmed, War Crimes & Latest News, YouTube (July 9, 2021), https://www.youtube.com/watch?v=z0cYHw-joZI.

15 Keller, supra note 13, at 234.

Ethiopian polity and became a new independent nation, Eritrea."[16] Consequently, the T.P.L.F. became the sole powerful force in Ethiopia and took control of the country's government. The coalition united with other political parties to maintain their control for almost 30 years under the title Ethiopian People's Revolutionary Democratic Front ("E.P.R.D.F."). [17] The E.P.R.D.F., with support of its political allies, formed a one-party state with the Tigrayans at the head of the coalition. Although the Tigrayans held almost all of the political power, they consisted of only six percent of the Ethiopian population.[18] The Tigrayan elite created a repressive authoritarian system that jailed political opponents, restricted free press, and rigged elections. Although the T.P.L.F. was accused of favoring Tigrayans while in power, the region of Tigray and the rest of Ethiopia suffered from extreme poverty. Ethiopian journalist Samuel Getachew reported while visiting the Tigray region, "the people are the poorest people I've ever seen."[19] As a result, protests and riots erupted against the T.P.L.F. and E.P.R.D.F. Ethiopian academic, author, and lecturer Dr. Awol Allo reported first-hand, "there was a persistent protest movement that began in 2015 and went all the way up to 2017 forcing the [Tigrayan] Prime Minister to resign."[20]

The outgoing administration chose Abiy Ahmed to succeed as Prime Minister because he was not Tigrayan and had widespread popularity from the populace yet was a part of the E.P.R.D.F. so he could keep Tigrayan power stable. However, Ahmed immediately removed corrupt Tigrayan politicians from power, released political prisoners, and established more freedoms for journalists. He even established a new political party, the Prosperity Party, which the T.P.L.F. refused to join. For his efforts in creating a more transparent government and honoring human rights, Ahmed won the Nobel Peace Prize in 2019.[21]

While the international community applauded Ahmed for disassembling the Tigrayan stronghold on power and authoritarian regime, internal violence between ethnic groups was growing rapidly. Ahmed responded to the conflict by putting pressure on the media and arresting political opponents. During the COVID-19 pandemic, tensions within the country heightened as Ahmed postponed his election. Opponents of the regime criticized Ahmed for withholding the pillar of their democratic process and submitted that he was scared to face re-election. In an act of defiance, the Tigray region held their own election. In response, the Ethiopian government mobilized their military forces and began a quasi-war against Tigray.

The onset of violence between the Ethiopian regime and the Tigrayan ethnic group has already killed thousands of Ethiopians and has displaced an estimated 2.1 million people.[22] Under the direction of Prime Minister Ahmed, the Ethiopian National Defense Forces ("E.N.D.F."), their allied Eritrean forces, the Amhara regional forces, and affiliated militias have joined together against the Tigray Defense Forces ("T.D.F.").[23]

IV. THE TIGRAYANS AS AN ETHNIC GROUP

To effectively define the mass atrocities occurring in Ethiopia as genocide, as previously listed by the Rome Statute, the Tigrayan people must first be defined as an ethnic group. The book Ethnic Stratification: A Comparative Approach, authored by American sociologist Tamotsu Shibutani, defines an ethnic identity as a group "composed of individuals who conceive themselves 'as being alike by virtue of their common ancestry, real or fictitious, and who are so regarded by others.'"[24] According to the I.C.T.R. in the case The Prosecutor v. Jean-Paul Akayesu, "an ethnic group is generally defined as a group whose members share a common language or culture."[25] Tigrinya is the common language of the "Tigray people of northern Ethiopia" and was spoken by approximately 5.8 million people in the 21st century.[26] Although the language of Tigrinya is spo-

16 Matthew J. McCracken, Abusing Self-Determination and Democracy: How the TPLF Is Looting Ethiopia, 36 Case Western Reserve Journal of International Law 183 (2004).

17 Id. at 183.

18 Behind the News, supra note 14, at 02:51-02:54.

19 Id. at 03:32-03:37.

20 Id. at 03:42-03:53.

21 The Nobel Peace Prize 2019, The Nobel Prize (2019), https://www.nobelprize.org/prizes/peace/2019/summary/.

22 Ethiopia, Global Centre for the Responsibility to Protect (Mar. 1, 2022), https://www.globalr2p.org/countries/ethiopia.

23 Id. at Section V.

24 Tamotsu Shibutani, Kian Moon Kwan & Robert Henry Billigmeier, Ethnic Stratification: A Comparative Approach 42 (1965).

25 Prosecutor v. Akavesu, Case No. ICTR-96-4-T, Judgement, ¶ 514 (September 1998).

26 Tigrinya Language, Encyclopedia Britannica (Aug. 5, 2013), https://www.britannica.com/topic/Tigrinya-language.

ken by more than just citizens of the Tigray state, it is best known and associated with this region. Yet, it is important to note that the Akayesu case defined the Tutsi victims as an ethnic group "despite the fact that they shared a common language and culture with the predominantly Hutu perpetrator group," so the fact that people outside of the Tigrayan group speak Tigrinya does not inhibit their classification as an ethnic group.[27]

The Tigray people also have a distinct culture that ties them together as an ethnic group. In War & The Politics of Identity in Ethiopia, Kjetil Tronvoll discusses the central tenants of Tigrayan identity and their origin. "Habbo," a trait of determination or integrity, is believed to be exclusively held by the Tigrayan people. Tronvoll, in conversation with a Tigrayan intellectual, explained "habbo has thus been throughout history as a sort of ethnic identifier, a character trait we Tigrayans pride ourselves in having and that we suspect other Ethiopians lack, or less of."[28] The Tigrayans also have a culture rich in music and dance, specific to their heritage.

In another relevant judgement, the 1999 case Kayishema and Ruzindana defined an ethnic group as "one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification of others)."[29] It has already been established above that the Tigrayan people share a common language.[30] According to this new definition, enforced by the I.C.T.R., an ethnic group can also be defined by their distinction from themselves and opposing parties. Ethiopia is split into several federal states, divided by religious, tribal, and administrative boundaries. Tigray, the northernmost region of Ethiopia, is populated by the Tigrayan people, "one of about eight major ethnic groups in Ethiopia."[31] Citizens of Ethiopia possess an identification card that states what ethnic group one is a part of.[32] Thus, the creation of the T.P.L.F., which represents the citizens of the region, is evidence of the fact that Tigray is populated by a set group of identifiable people.

Furthermore, the Akayesu case established a 'stable and permanent threshold.' The judgement brief interprets Article 6 of the Rome Statute to expand beyond the four enumerated groups if it is "stable" and "permanent." The decision reads:

> [In] the travaux préparatoires of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.[33]

The Tigrayans trace their origin to early Semitic-speaking people whose presence in the region dates back to at least 2000 BC, based on linguistic evidence.[34] Therefore, even if the Tigrayan people do not meet the definition of an ethnic group, despite the conclusive evidence following the precedent set by the International Court, the 'stable and permanent threshold' includes the Tigray people as a protected group.

V. APPLICATION OF ROME STATUTE ARTICLE 6 VIOLATIONS

The election of Ahmed as Ethiopia's prime minister "directly fostered more targeted criticisms and condemnations of the T.P.L.F."[35] Since the authoritarian regime had been removed from power and more freedoms were granted to the media, Ethiopians felt safer in acting and speaking out against the T.P.L.F. However, "public discourse in Ethiopia soon overtly

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27 Carola Lingaas, Defining the Protected Groups of Genocide Through the Case Law of International Courts, International Crimes Database 1, 6 (2015).

28 Kjetil Tronvoll, War & the politics of identity in Ethiopia: Making enemies & allies in the Horn of Africa (2009).

29 Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgement, ¶ 98 (May 21, 1999).

30 David Hamilton Shinn & Thomas P. Ofcansky, Historical dictionary of Ethiopia 257 (2004).

31 Simon Marks & Abdi Latif Dahir, As War Goes on in Ethiopia, Ethnic Harassment is on the Rise, The New York Times (Dec. 12, 2020), https://www.nytimes.com/2020/12/12/world/africa/Ethiopia-Tigray-ethnic.html.

32 Id.

33 Prosecutor v. Akavesu, Case No. ICTR-96-4-T, Judgement, ¶ 511 (September 1998).

34 Stuart Munro-Hay, Aksum: An African civilisation of Late antiquity (1991).

35 Romina Istratii, On the Conflict in Tigray, 2 Public Orthodoxy (2021).

conflated the T.P.L.F. with the whole of the Tigrayan people."[36] This onslaught of violence against the Tigrayan people directly violated four of the five definitions of Genocide, as defined in the Rome Statute. Specifically, (a) killing members of the group, (b) causing serious bodily or mental harm to members of the group, (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and (d) imposing measures intended to prevent births within the group.[37]

Killing Members of the Group

The first enumerated crime of genocide currently being committed against the Tigrayan people is Article 6(a), "killing members of the group."[38] As defined in the Rome Statute and the Ethiopian Criminal Codes, intent must be determined in order to prosecute crimes of genocide. To prove there is dolus specialis (special intent),[39] case law requires the existence of a State or organizational plan or policy that outlines clear intent of a crime. [40] The I.C.T.Y. Prosecutor v. Ratko Mladić case provides precedent on the implementation of what constitutes intentional killing of members of a group. In this case, the trial chamber convicted Mladić, a former Commander of the Main Staff of the Bosnian Serb Army, of genocide for his murder, terror, and persecution of civilians.[41] Similar to what the Ahmed government is executing against the Tigrayan people, the I.C.T.Y. found that the terror inflicted upon Bosnian Muslims was genocide because they were targeted based on their religion. The Ethiopian government has used genocidal language, providing evidence that the attacks on Tigrayans are intentionally based on their ethnic background. For example, members of the Ethiopian government who organize the military attacks have publicly referred to Tigrayans as "weeds," "cancer," and "daytime hyenas."[42] Ahmed has also stated, "the [weeds are] being removed from our country," directly referencing that the government's goal is to remove the Tigrayan people.[43]

The I.C.T.R. Akayesu case also provides useful precedent in the understanding of dolus specialis. The tribunal determined that Akayesu was guilty of genocide because the "offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator[...] Thus the victim is chosen not because of his individual identity, but rather on account of his membership of [ethnicity]."[44] The invasion of the Tigray region is based upon the group's shared ethnicity and each crime of mass atrocity is systematically executed across the Tigray region. For example, frequent bombings in the Tigray capital of Mekelle, especially near churches and universities, have killed and injured many.[45] The E.N.D.F. and allied forces' deliberate targeting of areas highly populated by Tigrayan civilians is evidence of their goal to wipe out the ethnicity. Dolus specialis has also been demonstrated by a massacre carried out in a church in Dangelat, Tigray, where the "government official warned 'no mercy' during offensive action."[46]

During the mass killings that riddle the Tigray region, Ahmed has continuously told the Ethiopian parliament and the international community that "not one civilian had died in Tigray."[47] However, this is known to be false. Journalists and aid workers have risked their lives to share their eyewitness accounts of massacres in churches, carcasses mounting the earth

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36 Id.

37 The United Nations Rome Statute of the International Criminal Court, supra note 10, at Article 6(a)-6(d).

38 Id. at Article 6(a).

39 Janine Natalya Clark, Elucidating the Dolus Specialis: An Analysis of ICTY Jurisprudence on Genocidal Intent, 26 Criminal Law Forum 497 (2015).

40 Genocide, United Nations Office on Genocide Prevention and the Responsibility to Protect, https://www.un.org/en/genocideprevention/genocide.shtml.

41 ICTY Convicts Ratko Mladić for Genocide, War Crimes and Crimes Against Humanity, United Nations International Criminal Tribunal for the former Yugoslavia (Nov. 22, 2017), https://www.icty.org/en/press/icty-convicts-ratko-mladi%C4%87-for-genocide-war-crimes-and-crimes-against-humanity.

42 Mawi Asgedom, Opinion | Why the U.S. Should Call the Famine and Violence in Tigray a Genocide, The Washington Post (Oct. 6, 2021), https://www.washingtonpost.com/opinions/2021/10/06/why-us-should-call-famine-violence-tigray-genocide/.

43 Tom Collins, Genocide Fears after Ethiopian PM Vows to Crush 'Weeds' of Tigray , The Times (Jul. 19, 2021), https://www.thetimes.co.uk/article/abiys-pledge-to-crush-weeds-of-tigray-raises-fears-of-genocide-in-ethiopia-sx0xkqb2v.

44 Prosecutor v. Akavesu, Case No. ICTR-96-4-T, Judgement, ¶ 518-521 (September 1998).

45 Bethlehem Feleke et al., Practically Genocide: Doctors Say Rape Used as Tool of War in Ethiopia, CNN (Mar. 22, 2021),

46 Bedaso, supra note 2, at 17.

47 Asgedom, supra note 42, at 6.

scavenged by hyenas, and bombings by Ethiopian warplanes in marketplaces.[48] The international community has yet to take substantial action to protect the genocidal crimes from occurring, despite recognizing them as "acts of 'ethnic cleansing,'" as noted by United States Secretary of State Anthony Blinken.[49]

The massacres in Tigrayan churches and schools, bombings of Tigrayan marketplaces, and the intentional murdering of civilians in the region prove that the E.N.D.F., the Eritrean forces, and their allies are killing members of the Tigrayan ethnic group with the goal of destroying them in whole or in part. These acts are punishable under the Rome Statute's Article 6(a), as the Ethiopian Criminal Codes' Article 269(a).

Causing Serious Bodily or Mental Harm to Members of the Group and Imposing Measures Intended to Prevent Births within the Group

The Europe External Program with Africa ("E.E.P.A.") Horn Programme predicts that "tens of thousands of women" have been raped by federal and ally militant members.[50] The rampant sexual violence that is being conducted against Tigrayan women is punishable under the Rome Statute Article 6(b) and (d): "causing serious bodily or mental harm to members of the group"[51] and "imposing measures intended to prevent births within the group."[52] Sexual violence, as it pertains to genocidal intent, is also punishable in the Ethiopian Criminal Code. Article 269 defines the cause of "bodily harm or serious injury to the physical or mental health of members of the group" as genocide.[53]

The Akayesu case marked the first time an international tribunal ruled that rape and other forms of sexual violence can be considered components of genocide.[54] Dominic McGoldrick, in his book The Permanent International Criminal Court: Legal and Policy Issues, writes, "the Trial Chamber emphasized that rape and sexual violence 'constitute genocide in the same way as any other act' so long as they are committed with the dolus specialis of genocide."[55]

Primary sources from Ethiopia provide evidence that the sexual violence on Tigrayan women is in fact an intentional act 'to destroy in whole or in part.' According to a doctor working at a Tigrayan refugee camp, "many say they were raped by Amhara forces who told them they were intent on ethnically cleansing Tigray."[56] Actions have also been taken by the Amhara forces to prevent Tigrayan women from becoming pregnant—a direct violation of Rome Statute Article 6(d). An 18-year-old Ethiopian high school graduate reported after an attempted rape, "soldiers are targeting Tigrayan women to stop them [from] giving birth to more Tigrayans."[57] Other women have been directly told that "their Tigrayan wombs must never again bear children."[58] The Amhara forces have added sexual violence to their arsenal as a weapon of war.[59] These are punishable under Articles 6(b) and (d) of the Rome Statute, as well as Article 269(a) and (c) of the Ethiopian Criminal Codes.

Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about its Physical Destruction in Whole or in Part

In alignment with Article 8(2)(b)(xxv), the Rome Statute defines 'starvation' as "not only the more restrictive meaning of starvation (death by hunger or depriving of nourishment), but also a more general meaning encompassing deprivation or insufficient supply of some essential commodity or something necessary to live."[60] This definition is important as "starva-

48 Id.

49 Jennifer Hansler, Blinken: Acts of 'Ethnic Cleansing' Committed in Western Tigray, CNN (Mar. 10, 2021), http://www.cnn.com/2021/03/10/politics/blinken-tigray-ethnic-cleansing/index.html.

50 Istratii, supra note 35, at 3.

51 The United Nations Rome Statute of the International Criminal Court, supra note 10, at Article 6(b).

52 Id. at Article 6(d).

53 The Criminal Code of the Federal Democratic Republic of Ethiopia, Title II, Chapter I, Article 269(a).

54 Prosecutor v. Akavesu, Case No. ICTR-96-4-T, Judgement (September 1998).

55 Dominic McGoldrick, Eric Rowe & Eric Donnelly, The Permanent International Criminal Court: Legal and policy issues (2004).

56 Feleke, supra note 45.

57 Simon Marks & Declan Walsh, 'They Told Us Not to Resist': Sexual Violence Pervades Ethiopia's War, The New York Times (Apr. 1, 2021), https://www.nytimes.com/2021/04/01/world/africa/ethiopia-tigray-sexual-assault.html.

58 Asgedom, supra note 42, at 7.

59 Marks, supra note 57, at 21.

60 The Crime of Starvation and Methods of Prosecution and Accountability 1–36, 6 World Peace Foundation (2019).

tion intent shares some characteristics with the intent required for genocide."[61]

Across the Tigray region, Amhara forces have burned crops and stripped communities bare.[62] More than 5,000,000 people do not have enough food to eat and 400,000 are facing "catastrophic" hunger levels.[63] Hospitals across the Tigray region are also being destroyed and looted by Amhara forces, depriving the starving population of vital medicines and healthcare. As of early 2021, only thirteen percent of health facilities in the Tigray region were functioning normally.[64] As a result, there have been many deaths of "patients in need of urgent medical support and the inability of victims of rape to receive medical aid."[65] A nocturnal curfew has also been imposed, making it very difficult to seek medical care after hours."[66]

The Global Rights Compliance in conjunction with the World Peace Foundation published the policy paper, "The Crime of Starvation and Methods of Prosecution and Accountability" to improve accountability of prosecuting deliberate starvation of groups on the international scale.[67] Specifically, it aims to set more specific guidelines on defining starvation and the deprivation of objects indispensable to survival ("O.I.S.") as there is "a gap in the available International Criminal Court law, namely the lack of a specific provision criminalizing starvation in non-international armed conflicts under the Statute of the I.C.C. (the Rome Statute)."[68] The policy frames the I.C.C.'s definition of starvation as "a range of illness and disease resulting from a lack of food, medicines and other essential commodities."[69] Mark Lowcock, a top humanitarian emergency official at the United Nation, warns that the starvation rates are "'going to get a lot worse [...], recalling the 1980s famine in Ethiopia that caused an estimated 1 million deaths," fitting within the ICC's definition of starvation.[70]

Precedent established in the I.C.T.Y. and the I.C.T.R. interpret the intent to destroy as "the dolus specialis that 'is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged.'"[71] It is evident that these conditions are a "deliberate attempt by the Ethiopian government to starve its own citizens" as the government refuses to accept international aid.[72] Since the invasion of Tigray in November 2020, Ahmed's government "severed all communication and restricted access to Tigray."[73] The United Nations has designated that the Ethiopian government has imposed "a de facto humanitarian aid blockade," preventing foreign resources from being delivered to curb the starvation rates.[74] Article 8(2)(b)(xvv) of the Rome Statute "envisages that the deprivation of OIS includes the willful impediment of 'relief supplies as provided for under the Geneva Conventions.'"[75]

The deliberate burning of crops in the Tigray region has caused famine that is expected to be the worst in the nation's history. In addition, the destruction of health facilities in the region alongside the blockade of Tigrayans reflects the Ethiopian government's objective of destroying their ethnic group. As a result, the Ethiopian and Eritrean governments are criminally responsible for genocide under Article 6(c) of the Rome Statute and Article 269(b) and (c) of the Ethiopian Criminal Codes.VI. VI. CONCLUSION

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61 Id. at 9.

62 Associated Press, 'I Just Cry': Dying of Hunger in Ethiopia's Blockaded Tigray Region, NPR (Sep. 20, 2021), https://www.npr.org/2021/09/20/1038858345/i-just-cry-dying-of-hunger-in-ethiopias-blockaded-tigray-region.

63 Ethiopia is Deliberately Starving its Own Citizens, The Economist (Oct. 19, 2021), https://www.economist.com/leaders/2021/10/09/ethiopia-is-deliberately-starving-its-own-citizens.

64 Press Release: Health Facilities Targeted in Tigray Region, Ethiopia: MSF, Médecins Sans Frontières (MSF) International (Mar. 15, 2021), https://www.msf.org/health-facilities-targeted-tigray-region-ethiopia.

65 Istratii, supra note 35, at 3.

66 Fasika Tadesse, Ethiopia's Oromia Region Imposes Curfew Due to Tigray Conflict, Bloomberg (Nov. 14, 2021), https://www.bloomberg.com/news/articles/2021-11-14/ethiopia-s-oromia-region-imposes-curfew-due-to-tigray-conflict.

67 The Crime of Starvation and Methods of Prosecution and Accountability, supra note 60.

68 Id.

69 Id. at 6.

70 Rick Gladstone, Famine Hits 350,000 in Ethiopia, Worst-Hit Country in a Decade, The New York Times (Jun. 10, 2021), https://www.nytimes.com/2021/06/10/world/africa/ethiopia-famine-tigray.html.

71 "The Crime of Starvation and Methods of Prosecution and Accountability," supra note 60, at 12.

72 Ethiopia is Deliberately Starving Its Own Citizens, supra note 63, at 2.

73 Asgedom, supra note 42, at 5.

74 Associated Press, supra note 62, at 2.

75 The Crime of Starvation and Methods of Prosecution and Accountability, supra note 60, at 7.

The acts of mass atrocity by the Ethiopian and Eritrean governments fall under the internationally recognized and nationally ratified definitions of genocide. The Tigrayan people, the Ethiopian government, as well as the international community, agree that the Tigrayans are classified as an ethnic group.[76] The actions in Tigray are "guided by ethnicity-based antagonisms" as the Ethiopian and Eritrean forces believe they are returning the oppression that the Tigrayan people implemented while in power and in prior conflicts.[77] These crimes are punishable under Article 6 of the Rome Statute, as previously enumerated.[78] Members of the Ethiopian government, including Prime Minister Ahmed and military officers, have publicly stated that their intention is to rid the country of Tigrayans, providing probative evidence that the acts of mass atrocity are with the intent to destroy the ethnic group 'in whole or in part.' Military officers as well as soldiers have also vocalized their intentions of ethnic

cleansing when committing the egregious acts, further proving that the Tigrayan people are being targeted based on their ethnicity.

In order to help solve the humanitarian crisis in Tigray, it is essential for the international community to take a strong stance against the Ethiopian government. For example, as the Ethiopian government imprisons journalists and closes their borders to humanitarian aid, less factual information is able to be released and shared with the international community. Without an active media presence, there is a failure to report on the genocide and, therefore, no internal pressure from citizens to influence policy makers. Global media outlets need to commit to sending journalists to the front lines of the war to publicize the atrocities being executed.

There also must be a greater commitment to protecting Tigrayan refugees who are fleeing the conflict. The U.N.H.C.R. reported that as of March 2021, 62,300 refugees had crossed into the neighboring country of Sudan.[79] According to U.N.I.C.E.F., many of the refugees who arrive at these camps are malnourished and with children.[80] While Ahmed's government is blocking aid from entering Tigray, it can be redirected to the surrounding refugee camps to provide humanitarian support.

The parties of the conflict need to adhere to an immediate ceasefire to protect civilians at risk. They should also allow unfettered delivery of emergency aid to protect the civilians and refugees.[81] These efforts are most likely to occur if the international community and United Nations assist in the negotiations of a ceasefire. This can potentially be done by imposing "an arms embargo and sanction on those prolonging the conflict and committing atrocities."[82] Also, the Eritrean forces must withdraw from Ethiopia as currently Tigray is under attack on all sides and has no place to turn. Ethiopia's neighboring polities must also "openly and strongly condemn violence as a political solution and call out leaders who choose such means."[83]

Finally, the I.C.C. must create a tribunal in Ethiopia to investigate and prosecute all acts of genocide, crimes against humanity, and war crimes. The sooner these steps occur, the stronger the message will be received that the international community holds a firm stance in protecting humanitarian principles.

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76 Ethiopia, supra note 22, at 4.

77 Istratti, supra note 35, at 4.

78 The United Nations Rome Statute of the International Criminal Court, supra note 10, at Article 6(a-d).

79 Bedaso, supra note 2, at 22.

80 Henrietta Fore, 2.3 Million Children in Tigray Region of Ethiopia Need Humanitarian Assistance, as Thousands Flee Across Border into Sudan, UNICEF (Nov. 19, 2020), https://www.unicef.org/press-releases/23-million-children-tigray-region-ethiopia-need-humanitarian-assistance-thousands.

81 Ethiopia, supra note 22, at 17.

82 Id. at 19.

83 Istratti, supra note 35, at 4.

The Rape of Kunan Poshpora: The Diffusion of Categories of Resistance

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Abstract

The law is a weapon of the state used to inflict violence upon those who oppose the state. Yet there is also a proclivity among those marginalized by the law to employ the law for emancipation. This apparent paradox of using the law to resist the law has often been attributed to the resistor's dependence on the oppressive state for sustenance. This is the case even though the ethically incongruent alliance between resistance and law adds legitimacy and power to the law as an effective and accessible means of justice. However, this is ultimately a myopic view; it stems from a hegemonic irreverence of legal resistance and an ensuing perception that resistance through law is an unthreatening and irrelevant form of protest. It is an unwarranted denial of the agency of those partaking in legal resistance. To challenge this premise, I draw from recent developments in the study of lawfare in subaltern studies that is inspired by Foucauldian post-structuralism. It argues that resistance is a layered series of negotiations between power and protest—two forces that constitute a dialectical spectrum rather than acting in insular and collective opposition to each other. In this paper, I examine a case of mass rape perpetrated by a specialized unit of the Indian military in 1991 in two villages in Indian occupied Kashmir—Kunan and Poshpora. In 2013, a group of survivors from the villages and their supporters filed a public interest litigation (PIL) against the Indian army in pursuit of justice. Through a critical examination of such an 'emancipatory' employment of the law, I argue that legal resistance works in tandem with rather than in opposition to political protest. The petitioners in the Kunan Poshpora case exercise a distinct form of agency; they fight in court to wrangle acknowledgment from the occupation system by day and join protests at the frontlines to decry the occupation of justice by night. The contradictory nature of legal resistance stirs questions about power structures within movements, reimagining subaltern agency as inconsistent, complex, and contradictory.

Content warning: sexual violence, child abuse

I. INTRODUCTION

> There were 20–21 army men. Some entered the house. [...] They had kept the weapons on the ground while raping me. I refused to be examined by the military doctor and gave my statement to the police only, who came after seven days.[1]
>
> —[redacted],
>
> Survivor of Kunan Poshpora mass rape

> Many people in Kashmir keep asking us why we have filed the petition, how we can expect to get justice from the oppressors in their own courts [...] We filed the petition not because we expect justice from the system but to make the Indian army answerable, to make it understand that its personnel cannot go scot-free and repeat the same crime. Our struggle is not about outcomes, but about developing a culture of resistance where impunity will be questioned by the people, where we will not remain silent in the face of oppression.[2]
>
> —Samreen Mushtaq,
>
> Co-founder of Support Group for Justice for Victims of Kunan Poshpora, a sub-committee of the Jammu and Kashmir Coalition of Civil Society

Two Kashmiri women of disparate ages, experiences, and backgrounds, [redacted] and Samreen, align in their negotiation of an uncompromisable anti-state posture with the pragmatic mobilization of the state's justice system as a weapon of resistance. The tension of resisting the law—which permits and perpetuates the injustices perpetrated under military occupation—through the law palpable in these narratives is far from unique to these two women. In July 2010, as the Jammu and Kashmir (J&K) High Court convened for the hearing for Mian Qayoom, the highly respected president of the Kashmir Bar Association (KBA) who was accused of sedition, more than a hundred members of the KBA—all Kashmiri legal practitioners—packed the courtroom to witness, protest, and support a writ petition that challenged Qayoom's arrest.[3] A "protest against the state in an officially sanctioned space" symbolizes the paradox of resisting injustice in Kashmir through the law, argues legal scholars Haley Duschinski and Bruce Hoffman.[4] This argument, developed in the context of the KBA protest, is not exclusively applicable to the legal community in Kashmir but also to individuals who participate in, institutionalize, and radicalize the legal system itself.

In 1991, a senior regiment of the Indian army conducted a midnight military raid in the villages of Kunan and Poshpora in the Indian occupied territory of Kashmir. The regiment proceeded to rape up to a hundred women and torture and assault men into early morning hours. After much protest, a report of the case was registered by the local police. A few weeks later, however, the police closed the case without a thorough investigation on the grounds of having been provided inconclusive and insufficient evidence in the first place. In 2013, a group of Kashmiri activists and civil society actors sought to reconstruct the botched investigation efforts surrounding the case. They filed a public interest litigation at the Jammu and Kashmir High Court, which is part of the centralized Indian judiciary system, seeking retribution on behalf of the surviving families. Much like the KBA case, seeking accountability for the Indian military's impunity from the Indian court system appeared paradoxical to most. The legal resistance of the activists and survivors behind the PIL was met with pessimism. For most, legal resistance against mass crimes such as Kunan Poshpora seemed to betray resigned acceptance of the Indian military occupation for only a small legal victory. As a result, any form of Kashmiri participation in Indian law was perceived

1 Essar Batool, et al., Do You Remember Kunan Poshpora? (2016).

2 *Id.*

3 Haley Duschinski & Bruce Hoffman, *On the Frontlines of the Law: Legal Advocacy and Political Protest by Lawyers in Contested Kashmir*, 5 Anthropology Today 8, 12 (2011) (The High Court of Jammu and Kashmir established in 1928 was the highest court of the disputed state of Jammu and Kashmir, that the Indian union claims as its northernmost state. In 2019, the Indian parliament passed a Reorganisation Act that paired down the status of Jammu and Kashmir from a federal and autonomous state to the bifurcated union territories of Jammu and Kashmir, and Ladakh under the direct governance of the central union government in New Delhi. Since 2019, the J&K High Court has been renamed the Common High Court for the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh, and functions as the second highest court of justice for the residents of Jammu, Kashmir and Ladakh, second to the Supreme Court of India.).

4 *Id.* at 8.

as legitimization of the Indian legal system. This position is based upon a hierarchical conception of resistance that characterizes legal resistance as morally inferior to more idealistic forms of protest.

This paper addresses the two kinds of state violence in Kashmir. First is the violence most evidently innate in the state systems of criminal justice and retribution that denied the survivors of Kunan Poshpora an acknowledgment of their experiences. Second, state violence also resides in the artificial splintering of Kashmiri resistance into the binary of the 'civilian,' who would dissent through legal channels, and the 'militant,' who would dissent through violent, non-legal means. The state embraces the former while criminalizing militancy, for it can choose to disregard legal dissent institutionally as it did with Kunan Poshpora. The state-led bifurcation of this imagination of resistance forms leads to internal discord within a movement. It also represents a classic form of colonial suppression that cements the state's control over the anti-state movement. This serves to sow seeds of dissent along the lines of legal and non-legal resistance, which are internalized and reiterated by resistance actors. The common perception is that legal resistance is less morally consistent than non-legal resistance. This, therefore, becomes an internalization of reductive categorizations of resistance by the state.[5]

This paper's second portion provides a nuanced and deliberate consideration of the Kunan Poshpora case that steers clear of the monolithic narrative through which people have historically perceived legal resistance. It brings into the dialogue legal and non-legal sources that reflect on the Kunan Poshpora case, particularly the abundant non-legal primary evidence often overlooked in the study of the law: recorded testimonies, diary entries, newspaper and television reports, police files, and the original texts of the legal petitions. All of these are testaments to the nuanced political circumstances that envelop the exercise of legal resistance; they demonstrate the complex and contradictory ways in which legal and other radical forms of protest have coincided.

The binary and hierarchical perception of resistance, one that evaluates resistance as a function of its radical potential, is myopic. It represents an institutionalized and hegemonic understanding of resistance that denies agency to Kashmiri resistors who operate in incongruous ways.[6] For instance, the Kunan Poshpora case highlights how the petitioners maneuvered retribution from the state through the law (legal resistance) while simultaneously boycotting and picketing elections that sought consent for Indian rule in Kashmir (non-legal resistance). Further, legal resistance surrounding Kunan Poshpora used the space carved out by the institutional acceptance of legal resistance—one that is not afforded to "militants"—to mobilize public awareness on the injustices of the Indian legal system as well as to contest the state cultivated amnesia of the mass rape. The complex, incommensurable nature of resistance manifested in Kunan Poshpora helps reimagine the agency of legal resistance. The process not only substantively challenges the Indian military occupation but also disrupts the constricted enumerations of resistance categories. This approach embraces the paradigmatic chaos of all forms of resistance and their cohabitation in contention and communion.

II. A CASE OF STATE VIOLENCE: THE MASS RAPE OF KUNAN AND POSHPORA

The Night of February 23, 1991

Now remembered as Kunan Poshpora, the villages of Kunan and Poshpora, until 1991, were two neighboring villages in the Trehgam block of Kupwara, the northernmost district of Indian-administered Kashmir. The villages were located only forty kilometers from the disputed Line of Control (LOC), the internationally accepted boundary between India and Pakistan, that runs through the center of Kashmir. It was only after the mass rape of February 1991 that the two villages were morphed into one in collective memory.[7]

Between the late hours of February 23 and the early hours of February 24, 1991, 125 soldiers from the fourth battalion of one of the most prestigious rifle regiments of the Indian army, the Fourth Rajputana Rifles, raped between twenty-three and one hundred women in the villages of Kunan and Poshpora while conducting a "cordon and search operation," also known locally as a military raid or crackdown, to locate what they referred to as "anti-national elements" in the villages.[8]

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5 Partha Chatterjee, The Nation and Its Fragments: Colonial and Postcolonial Histories (2007).

6 Uday Chandra, *Rethinking Subaltern Resistance*, 45 Journal of Contemporary Asia 563, 573 (2015), https://doi.org/10.1080/00472336.2015.1048415.

7 Batool, *supra* note 1, at 45.

8 Asia Watch Committee and Physicians for Human Rights, Rape in Kashmir: A Crime of War (1993), at 87; Amnesty International, *Rape and Ill-Treatment of Women in Kashmir* (Mar. 21, 1991), https://www.amnesty.org/en/documents/ASA20/010/1991/en (Anti-national element is the military jargon used to refer to Kashmiri militants—usually Kashmiri men who participate in the armed struggle demanding separation from India. In the 1990s, during the heightened stages of the armed insurgency,

The army left the military camps at Trehgam at nine o'clock that evening, informed the local police at Trehgam police station about the prospective operation, and then arrived at the villages at eleven o'clock.[9] The soldiers proceeded to storm into houses, breaking and kicking down doors, waking up sleeping villagers with guns pointed to their faces.[10]

Rape and Torture of Survivors

Then, search parties of about five to ten soldiers broke into each house, assaulted the men, and dragged them out of the house to the make-shift interrogation centers they had set up in a local barn.[11] After the men were forcibly separated from the women and children, soldiers from the search party who had broken into the houses pounced upon the women and gang-raped them. The men recall that through the night, as they awaited interrogation and stood in the snow, they could hear the screams of the women coming from different houses in the village.[12] Occasionally the screams would stop, only to start again in a few minutes.[13] The youngest survivor was thirteen years old while the oldest was eighty.[14] Women who were physically disabled—one of them undergoing treatment for polio and another who was hearing and speech impaired—were also not spared.[15] A twenty-one year old pregnant woman was raped by seven soldiers.[16] She gave birth to a baby with a fractured arm four days after she was assaulted. Activists who interviewed the survivors in 2013 described their blood-curdling scenes of helplessness:

> Pushed to the walls, they shouted and screamed for help, for mercy. Their screams were not answered. Guns were pointed at their chests and mouths. They were told not to shout or else they would be shot. The army men were drunk and were seen drinking during the operations. They smelled of liquor. They tore the women's pherans (long traditional gowns worn over the clothes). They pulled down their trousers and raped them. While raping them they continued to consume liquor. They took turns, and sometimes took two rounds of a particular house. [...] Mothers were raped in front of their daughters. Grandmothers and their granddaughters were raped in the same room.[17]

Another survivor, whose pregnant daughter was raped in the neighboring room, while she herself was being raped said:

> When the army men entered, I saw they had zips of their pants already opened and they had clearly come with the intention of raping us. Three army men caught hold of me and 8-10 army men raped me in turns. They had huge battery torches with them and they used them to see my naked body, while making lewd remarks. They raped me for several hours. After some time I fell unconscious because of the pain.[18]

One of the survivors, who was raped by six soldiers, claimed that the soldiers had forced her five-year old son to watch as they raped her.[19] Other young children were also abused. A six-month old toddler was thrown out of a window into the snow as the soldiers raped her mother, sister, and grandmother.[20] Even after the soldiers had left, the women, who were in a state of delirium, were unable to bring the child back inside, and the infant was left in the snow for many hours until one of the accompanying police officers noticed her crying and rescued her.[21] Another two-year old was trampled on by multiple soldiers and was permanently disabled as a consequence.[22]

Kashmiris would often cross the border to Pakistan, receive training and weapons from the Pakistani intelligence, and return to Indian Kashmir to participate in anti-India militancy in Kashmir. *See* Basharat Peer, Curfewed Night (2009).).

9 *Id.*

10 Batool, *supra* note 1, at 75-86.

11 *Id.* at 76. ("These centers were established in the house of [redacted], situated near the village shrine; in the kuthar (cattle shed and rice/fodder store, barn) of [redacted] and that of [redacted]. These kuthars were made of wood and mud with thatched roofs.").

12 Batool, *supra* note 1, at 76-77.

13 *Id.*

14 Amnesty International, *supra* note 8 at 1.

15 Batool, *supra* note 1, at 75-86; Asia Watch Committee and Physicians for Human Rights, *supra* note 8.

16 *Id.*; Amnesty International, *supra* note 8.

17 *Id.* This testimony was recorded by members of the Support Group for Justice for Kunan Poshpora conducting on-the-spot investigations in Kunan and Poshpora in 2013.

18 *Id.*

19 Asia Watch Committee and Physicians for Human Rights, *supra* note 8; Amnesty International, *supra* note 8.

20 Batool, *supra* note 1, at 84.

21 *Id.*

22 *Id.* at 100.

The mass rapes in the villages of Kunan and Poshpora in 1991 were a part of the category that the Indian army calls "cordon and search operations"—particularly ruthless military raids that the Indian army can conduct at its discretion, often accompanied by mass atrocities such as sexual violence and civilian torture.[23] In the 1990s "cordon and search" operations were a routine aspect of Kashmiri life under the Indian military occupation.[24] In 1989, after the Indian government meddled in one of the most significant legislative elections in Kashmiri history, resistors had risen up in a sweeping, anti-India militant insurgency, demanding freedom from the Indian state.[25] The Indian government, seizing the opportunity to consolidate its long-contested rule, deployed the Indian army to the disputed territory and equipped it with the impunity to shoot to kill anyone who questioned its claim over Kashmir.[26]

India's territorial claim over Kashmir is rooted in the British colonial-era law titled the Government of India Act of 1935. The act offered Kashmir's local ruler at the time, Maharaja Hari Singh, a choice between the following: to accede to either of the newly independent states of India or Pakistan or to obtain independent statehood once British rule ended.[27] A few months after India's and Pakistan's independence in August 1947, before Kashmir's status had been determined, a handful of Pakistani tribesmen infiltrated Kashmir through its northwest border with Pakistan in an effort to coerce Hari Singh into acceding to Pakistan.[28] Hari Singh was thus compelled to turn to India for military assistance for Kashmir's survival.[29] Indian prime minister Jawaharlal Nehru agreed to send troops to Kashmir on the condition that Hari Singh sign an official legal document, the Instrument of Accession, that would make Kashmir part of India subject to some conditions.[30]

In the first Indo-Pak War of 1947-48 that followed, the Kashmir region was divided into Azad Kashmir to the west, which was governed by Pakistan, and Jammu and Kashmir (J&K) to the east, which was governed by India.[31] The two regions were separated by the Line of Control (LOC), the internationally recognized boundary endorsed by the United Nations that runs through Kashmir, between India and Pakistan.[32] Although the people of Kashmir were promised that their views on the accession would be legally considered after the war through a popular referendum, to date the latter has not taken place.[33] A political deadlock between India and Pakistan lies behind this: India refuses to allow a vote until Pakistan's

23 United Nations High Commissioner for Human Rights, *Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019,* United Nations (Jul. 2019), https://www.ohchr.org/Documents/Countries/IN/KashmirUpdateReport_8July2019.pdf; Patricia Grossman, et al., *The Human Rights Crisis in Kashmir: A Pattern of Impunity*, Human Rights Watch (Jun. 1993), https://www.hrw.org/sites/default/files/reports/INDIA937.PDF.

24 Patricia Gossman, *India's Secret Army in Kashmir: New Patterns of Abuse Emerge in the Conflict*, Human Rights Watch/Asia (1996), https://www.hrw.org/legacy/reports/1996/India2.htm.

25 Praveen Donthi, *How Mufti Mohammad Sayeed Shaped the 1987 Elections in Kashmir*, The Caravan (Aug. 29, 2018), https://caravanmagazine.in/vantage/mufti-mohammad-sayeed-shaped-1987-kashmir-elections.

26 Special Powers Act (Act No.21/1990) (India: Jammu & Kashmir), https://www.refworld.org/docid/3ae6b52a14.html (Article 4(a) of the act states: Article 4(a) of this act empowers armed personnel to even kill civilians at their discretion: "[...]if he [armed personnel] is of the opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person [...]". A more detailed understanding of AFSPA follows in Chapter 2. *See also* Seema Kazi, et al., The Initial Years in India after Independence: 1947-2000 (2002), at 2, 9. For a detailed analysis on military impunity in Kashmir, *see* Parvez Imroz, Alleged Perpetrators: Stories of Impunity in Jammu and Kashmir (2012).).

27 Kazi, *supra* note 25 at 80, 171, 181, 206.

28 Sumantra Bose, The Challenge in Kashmir: Democracy, Self-Determination and a Just Peace (1997), at 26; Sumantra Bose, Kashmir: Roots of Conflict, Paths to Peace (2005), at 33, 45.

29 Kazi, *supra* note 27.

30 *Id.*

31 Kazi, *supra* note 26, at 188-89 (Several United Nations resolutions most important of which were UN Security Council Resolutions 47, 51, and 96 called for the plebiscite, but to no avail. *See* UN Security Council, *UN Documents for Jammu and Kashmir: Security Council Resolutions,* https://www.securitycouncilreport.org/un_documents_type/security-council-resolutions/page/1?c-type=Jammu+and+ Kashmir.).

32 Kazi, *supra* note 26, at 3 (In 1972, after the Simla Agreement the UN ceasefire line became the official de-facto boundary that was accepted by both India and Pakistan. *See* Ministry of External Affairs, *Simla Agreement*, Government of India (Jul. 2, 1972), https://mea.gov.in/in-focus-article.htm?19005%2FSimla+Agreement+July+2+1972.).

33 Kazi, *supra* note 26, at 188-89; Sumantra Bose, Kashmir: Roots of Conflict (2005), at 38 (Several United Nations resolutions most important of which were UN Security Council Resolutions 47, 51, and 96 called for the plebiscite, but to no avail. See: UN Security Council, *UN Documents for Jammu and Kashmir: Security Council Resolutions*, https://www.securitycouncilreport.org/

troops return to pre-1947 lines, while Pakistan refuses to withdraw troops until the vote is held.[34]

India's anxiety over holding onto the rest of Kashmir stems in part from colonial sentiments and a fear of losing more land to a historic adversary. This conviction manifests in the colonial-style tactics that the Indian state, and by extension its military, has employed to control the Kashmiri population.[35] Even during the 1950s to the 1980s, the relatively peaceful period in recent Kashmiri history, the Kashmiri people, especially the middle class, were extended limited opportunities to participate in the national economy outside the state or to serve in political and bureaucratic roles within the state.[36] Further, the Indian government barred political speech that was antagonistic to Indian national interests; it bribed Kashmiri politicians into adopting a conciliatory position towards the central government.[37] After the rigged election of 1987—an attempt by New Delhi to pre-empt the victory of a political party that could enable Kashmir to secede from India—Kashmiris launched an armed struggle against the Indian state.[38] Since then, India has held a free pass to terrorize the Kashmiri population in order to protect its own national security interests. Nearly 50,000 people have died, while another 10,000 have been forcibly disappeared.[39] Indian security forces routinely employ sexual assault, kill peaceful protestors, and torture civilians in custody to humiliate and punish the Kashmiri population.[40] One of the most egregious tactics of violence by the military with impunity has been the use of pellet guns to blind innocent Kashmiris, including children, at any time that a soldier deemed them a threat to Indian security interests.[41]

The Public Interest Litigation over Kunan Poshpora

In March 2013, more than two decades after the mass rape of Kunan Poshpora, five Kashmiri women began to collect evidence on the Kunan Poshpora case in preparation for the filing of a public interest litigation case before the J&K High Court in Srinagar, Kashmir's capital.[42] These women, named Essar Batool, Ifrah Butt, Samreena Mushtaq, Munaza Rashid, and Natasha Rather, were affiliated with the Kashmiri human rights and civil society organization—the Jammu and Kashmir Coalition of Civil Society (JKCCS). The five petitioners, joined by fifty other Kashmiri women including some Kunan Poshpora survivors, sought compensation for survivors' families and a reinvestigation of the prematurely dismissed 1991 criminal case. The petition was denied by the court after three hearings in 2013.[43] In 2014, a redrafted version of the same PIL was

un_documents_type/security-council-resolutions/page/1?ctype=Jammu+and+ Kashmir (last visited Aug. 16, 2020).).

34 Kazi, *supra* note 26, at 188, 189; Bose, *supra* note 32, at 42.

35 *Id.* ("Indian official ideology has claimed that India's identity as an inclusive, secular state would be grievously damaged without IJK (Indian 'administered' Jammu and Kashmir), the only Muslim-majority unit of the Indian Union. Why retention of Kashmir, apparently by any means necessary, should be indispensable to the validation of India's tolerant, civic credentials is not clear, since nearly 150 million Muslims live in India outside IJK, and their status and treatment could equally serve to validate those credentials (or otherwise).")

36 Prem Shankhar Jha, Frustrated Middle Class, Roots of Kashmir's Alienation, in Asghar Ali Engineer, Secular Crown on Fire (1991), at 34, 37.

37 Bose, *supra* note 32, at 44, 102.

38 Praveen Donthi, *How Mufti Mohammad Sayeed Shaped the 1987 Elections in Kashmir*, The Caravan, Aug. 29, 2018, https://caravanmagazine.in/vantage/mufti-mohammad-sayeed-shaped-1987-kashmir-elections.

39 Office of the United Nations High Commissioner for Human Rights, *Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan,* United Nations (June 14, 2018), https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf.

40 Association of Parents of Disappeared Persons (APDP) and Jammu Kashmir Coalition of Civil Society (JKCCS), *Six Monthly Review of Human Rights Situation in Indian Administered Jammu and Kashmir (January to June 2020),* JKCCS (July 1 2020), https://jkccs.net/wp-content/uploads/2020/07/Bi-Annual-HR-Report-2020-JKCCSAPDP.pdf; Amnesty International, *Rape and Ill-Treatment of Women in Kashmir*, Amnesty International (Mar. 21, 1991), https://www.amnesty.org/en/documents/ASA20/010/1991/en/.

41 Human Rights Watch, *India: Stop Using Pellet-Firing Shotguns in Kashmir*, Human Rights Watch (Oct. 28, 2020), https://www.hrw.org/news/2020/09/04/india-stop-using-pellet-firing-shotguns-kashmir.

42 Batool, *supra* note 1 (PIL is a form of litigation that can be filed by anyone at a state high court or the Supreme Court of India to expedite the legal process by bypassing local courts, in cases that have a demonstrably large impact on a socially or economically marginalized group.).

43 Batool, *supra* note 1 (The case was presumed to be closed in 1991 after a short police investigation. However, the J&K police had not filed a closure report to the Kupwara magistrate as is needed to close the case. Upon receiving intelligence about the preparation of the PIL, the police filed the closure report in 2013 to the magistrate. As the closure report was pending before the magistrate, the J&K High Court could not rule on the case and dismissed it as "premature.").

submitted again, where the same group of petitioners sought the J&K High Court's intervention against what they viewed as the state police's deliberate delay in conducting investigations.[44] The court issued notices to the army personnel that had been accused and confirmed in July 2014 that rape had in fact occurred.[45] The court also ordered the J&K state government to pay compensation to the families.[46] However, in 2015, the J&K state government, as well as the Indian Ministry of Defense acting on behalf of the Indian army, appealed to the Supreme Court of India and obtained a stay order on this ruling. Seven years later, at the time of publication of this article, the case remains buried in the Supreme Court registry, awaiting a hearing.[47]

However, the defining contribution that the PIL made to Kashmiri resistance transcended this legal impasse. The five petitioner-activists who drove the PIL wrote an expository book on the case called Do You Remember Kunan Poshpora?, a journalistic account highlighting testimonies of hundreds of survivors and witnesses of the incident that followed the trajectory of the Indian state and military's successful silencing of the case between 1991 and 2013. They also founded the Support Group for Survivors of Kunan and Poshpora (SGKP), which launched a political campaign in Kashmir in 2013 to smear and boycott all individuals associated with the perpetration and whitewashing of the case.[48] The work of these five activists—the legal case, the book, and the political activism—has since set in motion renewed legal activity around the case. Activist Essar Batool wrote, "The PIL was the start of another parallel struggle of sorts: a legal struggle, a struggle to expose the continuing impunity and lies of the Indian state, a struggle against forgetting and criminal cover-ups, a struggle to bring back public memories, and a struggle of support for Kunan Poshpora."[49] It threw light on the energy, effort, and resources that have collectively gone into the Indian state's careful ploy to silence the Kashmiri voice—not only from the survivors and witnesses of the crime itself but also from Kashmiri officials who worked for the Indian state. The PIL represents the primary form of legal resistance in Kashmir for Kunan Poshpora.

The Calculated Failure of State Justice Mechanisms

The Indian state's response to what transpired in Kunan Poshpora on February 23, 1991 is by no means extraordinary when situated amongst the countless untried cases about military sexual violence in India.[50] Neither is this an attempt to exceptionalize the incident of Kunan Poshpora or the tales of its survivors. Rather, the clash between the survivors' tenacious quest for justice and the state's unmasked attempts to impede the former has been widely broadcasted in the case of Kunan Poshpora because of the PIL. This helped highlight patterns in the practices that were adopted by the state's legal and criminal justice systems when Kashmiris were at the receiving end of military violence.

A. Unjust Law

Since the 1990s insurgency in Kashmir, India has subjected Kashmiris to an onslaught of emergency legislation sanctioned by the Indian Parliament but indefensible under international human rights law.[51] These include the Armed Forces Special Powers Act (AFSPA), the Disturbed Areas Act (DSA), the Public Security Act (PSA), and the Terrorism and Disruptive Activities Act (TADA).[52] Having categorized Kashmir as an area facing permanent emergency, these laws legally buttress military impunity in Kashmir and sanction the military's right to violate Kashmiri civil and political rights under the pretext of protecting national security. Of these, the AFSPA is particularly pernicious and has faced criticism from several international human rights agencies.[53]

In the context of the Kunan Poshpora case, two elements of AFSPA are most relevant. First, the Indian government through AFSPA authorizes the security forces in Kashmir to have unrestrained and unaccounted power in "disturbed areas"

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44 *Id.*

45 *Id.*

46 *Id.*

47 *Kunan-Poshpora Case: SC Stays High Court Proceedings*, The Hindu, Jun. 4, 2016, https://www.thehindu.com/news/national/kunanposhpora-case-sc-stays-high-court-proceedings/article6975871.ece.

48 *KunanposhporaCampaign (@KunanposhporaCampaign)*, Facebook (Feb. 14, 2014) https://www.facebook.com/KunanposhporaCampaign/.

49 Batool, *supra* note 1.

50 James Goldston and Patricia Gossman, *Kashmir Under Siege: Human Rights in India*, Human Rights Watch (1991).

51 Seema Kazi, *supra* note 26 at 1-36.

52 *Id.* at 9.

53 Allard Lowenstein, *The Myth of Normalcy: Impunity and the Judiciary in Kashmir,* International Human Rights Clinic at Yale Law School, (2009).

to undertake operations to "maintain public order."[54] In the case of Kunan and Poshpora, this manifested in the ruthlessness of the "cordon and search operation" that was justified in terms of the military's need to search for "anti-national elements."[55] Second, the AFSPA extends de facto immunity to the members of all armed personnel for committing criminal acts. In turn, the Ministry of Defense is required to sanction prosecutions of armed personnel by the state and Supreme Court. Therefore, the police and state courts have no onus to prosecute crimes committed by armed personnel.[56] In this regard, the mass rape of Kunan and Poshpora, was largely sanctioned and perhaps even incentivized by the Indian legal apparatus in place in Kashmir.

B. Violently Employed Law

Once the case entered the courtroom, violence manifested through the ways in which the rule of law was employed. For instance, different courts heard multiple parallel petitions and counter-petitions; the judicial magistrates who were assigned to the cases would often go on indefinite leave as the cases hung in balance. The legal system essentially allowed the defense parties to employ loopholes in the law to harass and exhaust the survivors.[57] The book by the SGKP activists shows that the case first hit a snag even before it had been filed. Initially, over a hundred women in Kashmir had participated in the petition; however, when the registry of the Srinagar High Court required petitioners to submit their identity cards to court officials, fifty women backed out of the petition.[58] This, far from insinuating a lack of seriousness on the part of the petitioners, reified the way in which the bureaucratic state becomes unapproachable to Kashmiris. It is common knowledge that identity cards are precious possessions for people living under military occupation, who are subject to arbitrary searches by the military and can be asked to produce identifying documentation at any juncture. The court's refusal to soften its documentation requirements for filing a case, despite the precarious living situation of Kashmiris, exposed its unwillingness to equitably dispense justice.

C. Criminal Justice System Failures

The state was blatant in its refusal to follow the rule of law in the criminal justice arena. The police concealed medical evidence, refused to file the first information report when approached by survivors in February 1991, and in many cases did not follow due practice that the law mandates on sexual assault cases for investigation collection.[59] For instance, even after two rounds of medical investigation were conducted on a total of thirty-two women, which was a procedure mandated by the police, the police filed a closure report in 1991 stating that the case was inconclusive.[60] In a letter dated September 23, 1991 and addressed to the Kupwara police, the J&K Director of Prosecutions in the state capital Srinagar wrote, "inability of the witnesses to [identify] the alleged accused has introduced a fatal and incurable lacuna in the prosecution story."[61] This decision was made despite the existence of documented medical evidence in the form of a series of letters that was exchanged between station house officers (SHO) at the Trehgam police station and the block medical officer (BMO) Dr. Mohammad Yaqoob Makhdoomi.[62] The SHO asked about the women in the following statement, "Were the victims examined raped or not? If yes, then how many days before and were there any marks of resistance? Was hymen torn or intact and other genital area injuries or marks around the vagina?"[63] The BMO Makhdoomi replied in the affirmative to each of these questions, claiming all the women had been raped "repeatedly, many a times, by multiple persons [...] against their will."[64] The author

54 The DSA decides disturbed areas in this Act, 'disturbed area' means an area which is for the time being declared by notification under section 3-to be a disturbed area'. Jammu and Kashmir Disturbed Areas Act, 1992; Per Section 4 of AFSPA, 'The army can arrest anyone without a warrant under section 4(c) who has committed, is suspected of having committed, or of being about to commit, a cognizable offense and use any amount of force 'necessary to effect the arrest.' Act No. 21 of 1990, Armed Forces (Jammu and Kashmir) Special Powers Act, 1990.

55 Sharma, H K. Rep., Confidential Investigation Report on Incident Dated 23/24 Feb 91 In Village Kunan and Poshpora (Trehgam) (2016), in Batool, *supra* note 1.

56 Imroz Parvez, *Alleged Perpetrators: Stories of Impunity in Jammu and Kashmir*, International People's Tribunal on Human Rights and Justice in Indian-administered Kashmir and Association of Parents of Disappeared Persons (2012).

57 KunanposhporaCampaign, *supra* note 48.

58 Batool, *supra* note 1.

59 *Id.*

60 *Id.*

61 Batool, *supra* note 1, at 207.

62 Batool, *supra* note 1, at 99-100.

63 *Id.* at 99.

64 *Id.* at 99-100.

wrote that Makhdoomi further concluded, "They had injury marks all over their bodies including on their chest and limbs. One woman had bite marks on her face. Others had multiple abrasions and contusions on their lower bodies, their thighs, abdomens, buttocks, and chests."[65] Despite the clear documentation of incriminating medical records, the case was closed in 1991 on the grounds of having inconclusive evidence.

State-Constructed "Civilian-Militant" Dichotomy

The Indian state in Kashmir has created a binary of the stone-pelting, arms-hoarding, anti-state "militants" and the terrorized, voiceless, victimized "civilians" into which all Kashmiris are neatly dichotomized and fitted—at least on paper.[66] The state has rendered these categories nearly interchangeable with "anti-national elements" or terrorists and a trapped people blackmailed and brainwashed by militants, constituting an atoot ang (integral part) of India, who must be rescued from militancy and integrated into the national mainstream.[67] Subaltern studies scholars, who study the Indian colonial and postcolonial experience, have argued that a colonial obsession exists in the continued creation and enumeration of categories within the overall group of the "colonized."[68] This, in turn, enables the colonizer to argue that because the subject community is broken into smaller groups with insular and impermeable boundaries, they cannot be merged into the larger political community that is needed for the nation-building project.[69]

Such subgroups, therefore, must either forego their discordant political identities to participate in the nation or must be capitulated to do so because they are considered to constitute threats to national integrity. Subaltern scholars have studied this trend in the context of communal divisions in postcolonial South Asia in terms of class, caste, gender, and race, which are all categories that override national identity.[70] In the case of Kashmir, such an analysis from the subaltern school offers a relevant insight into India's analogous colonial behavior—the curation and exaggeration of the binary categories of the "civilian" and "militant" Kashmiri.[71]

III. EXERTION OF AGENCY THROUGH THE LAW

The Paradox and Hierarchies of Legal Resistance

Resistance movements that agitate against violent institutions and that advocate for social and political justice have found common ground in their collective faith that the law can be weaponized in an emancipatory fashion. Yet, the law's intricate and often undivorceable relationship with violence and power renders this reliance curious.[72] The law as an origin of violence has been the subject of much anthropological and legal debate. Some scholars have argued that the law precedes violence, and the violence becomes the legal endpoint.[73] If so, then what is legitimate and legal also criminalizes, punishes, and violates what it sees as the illegitimate, illegal, or the "other."[74] George Bisharat, a Palestinian legal scholar, argues that violence is not only at the legal endpoint but also at its beginning.[75] In other words, what is law is produced and legitimized

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65 *Id.* at 100.

66 In reality, the military is empowered to shoot at will anyone who is Kashmiri. They will often later claim on paper that a civilian killed was a terrorist. *See* The Kashmiri Guy*, Rare video of Kashmir 1992 Indian army brutalising Kashmiris*, YouTube (May 22, 2018), https://www.youtube.com/watch?v=voo2AKQlAeg.

67 Ather Zia, *I'm A Kashmiri. This Is What I Thought When Kanhaiya Said Kashmir Is Integral to India*, Huffington Post, Mar. 24, 2016, https://www.huffpost.com/archive/in/entry/im-a-kashmiri-this-is-wha_b_9530656.

68 Chatterjee, *supra* note 5 at 223-224.

69 *Id.*

70 *Id.*

71 This is exemplified by the irreverent interactions of the Indian army lawyers with the activists during hearings of the petition. They alleged that the army lawyer had nicknamed them "girls from human rights". See Batool, *supra* note 1, at 181.

72 A thesis of Foucault's philosophy about the prison as a tool of violence that imposes institutional understandings of order on society has shaped most legal theory discourse around the law and its relationship with violence and power. A synopsis of Foucault's contributions to the field of law can be found in Gerald Turkel, *Michel Foucault: Law, Power, and Knowledge*, Journal of Law and Society (2nd ed. 1990), at 170, 193. He summarizes Foucault's argument on law: "In modern society, law combines with power in various locations in ways that expand patterns of social control, knowledge, and the documentation of individuals for useful ends."

73 Hoebel Adamson, The Law of Primitive Man (1979).

74 *Id.*

75 George Bisharat, *Violence's Law: Israel's Campaign to Transform International Legal Norms*, 42 Journal of Palestine

through violence.[76] On the other hand, Robert Cover questions if and how violence that is conducted by or in the name of the law differs from illegal or extralegal violence.[77] The relationship between violence and law, irrespective of its nuances, is irrefutable. Consequently, the acts of resistance contesting these institutions that monopolize the law through the law appear to be paradoxical.

A recent development in subaltern studies scholarship confronts the assumed paradox about such legal resistance—the act of mounting resistance through the law.[78] A term called "lawfare" has emerged in recent years, which has been defined by the anthropologists Jean Comaroff and John Comaroff as the "use of legal means for political and economic ends."[79] The current wave of "judicialization" of resistance, they argue, has an "insurgent potential" because it permits subaltern and marginal populations of the world to use the law and its instruments strategically.[80] In other words, people can assert agency through legal institutions against those who violently exercise the law. Therefore, lawfare, which is a within-system form of resistance, does not seek revolution. Rather, "it denotes a set of strategies through which subaltern actors turn the law and its institutions into sites of contestation and negotiation with varying degrees of success."[81] Historically, the discourse of legal resistance has iterated misgivings about the paradox of using the law to resist law.[82] In more contemporary scholarship, however, people have challenged the dualism between power and resistance, opening space for the deconstruction of resistance itself as a structure of these hierarchies.[83] Thus, resistance is perceived as entangled with power rather than acting exclusively in opposition to it.[84] In lieu of this, lawfare or legal resistance challenges reductive binaries of legal and non-legal resistance as well as the subsequent paradox that arises. In turn, this legal resistance subsequently pushes for people to reimagine how others exert resistant agency.

The theoretical framework developed by legal scholars of subaltern studies can be appended to the Kunan Poshpora case, where subaltern resistors agitating against state-embodied violence engage legal institutions like the PIL to resist state violence. However, even within the movement for Kashmiri liberation and justice, a hegemonic tendency exists. Legal resistance is widely perceived as morally inferior to more idealistic forms of resistance. This, in part, has stemmed from the aforementioned internalization of the civilian-militant dichotomy within Kashmir that has been created and propelled by the Indian state. For instance, the testimonies collected by the five journalists from Kunan Poshpora, as well as the secondary literature centering them, recurrently wrestle with the dilemma of employing the Indian state's legal system to resist state violence. Essar Batool, one of the petitioners, asks, "Why reopen the case after 23 long years? What did we hope to achieve?"[85] Samreena Mushtaq, Batool's co-author, explained why they sought to reopen this case. "We filed the petition not because we expect justice from the system but we wanted to make the Indian Army answerable, to make them understand that they

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Studies 68, 84 (2013) https://doi.org/10.1525/jps.2013.42.3.68. In this article, Bisharat exemplifies his argument by pointing to Israel's employment of international humanitarian law which employs legal entrepreneurialism, an institutionalized, persistent, and internally coherent campaign to alter the laws norms, and thereby justify its right to exercise violence against Palestinian civilians.

76 *Id.* at 70

77 Robert Cover, *Violence and the Word*, On Violence (2007), at 293, 313, https://doi.org/10.2307/j.ctv120qr2d.25.

78 Uday Chandra, *Rethinking Subaltern Resistance*, 45 Journal of Contemporary Asia 563 (2015) https://doi.org/10.1080/00472336.2015.1048415.

79 Jean Comaroff and John Comaroff, *Law and Disorder in the Postcolony*, 15 Social Anthropology 133 (2007) https://doi.org/10.1111/j.0964-0282.2007.00010.x; Lila Abu-Lughod, *The Romance of Resistance: Tracing Transformations of Power through Bedouin Women,* 17 American Ethnologist 41 (1990) https://doi.org/10.1525/ae.1990.17.1.02a00030, 42.

80 Comaroff and Comaroff, *supra* note at 55. This concept has been explored by Kenneth Bo Nielsen in the context of force land acquisition in West Bengal. *See* Kenneth Bo Nielsen, *Law and Larai: The (De)Judicialization of Subaltern Resistance in West Bengal,* 45 Journal of Contemporary Asia 618 (2015) https://doi.org/10.1080/00472336.2015.1040821. It has also been explored by Heather Bedi to show how the subaltern employed the law in the western Indian state of Goa to resist the state's attempt to privatize land. *See* Heather Plumridge Bedi, *Judicial Justice for Special Economic Zone Land Resistance*, 45 Journal of Contemporary Asia 596 (2015) https://doi.org/10.1080/00472336.2015.1048406. Comaroff and Comaroff's theory on lawfare and judicialization of politics has been examined largely in the field of economic resistance movement. This article is an attempt to extend this concept to political resistance.

81 Chandra, *supra* note 78 at 567.

82 *Id.* at 564.

83 Timothy Mitchell, *Everyday Metaphors of Power*, 19 Theory and Society 545 (1990) https://doi.org/10.1007/bf00147026, 547.

84 Douglas Haynes and Gyan Prakash, Contesting Power: Resistance and Everyday Social Relations in South Asia (1992), at 2-3.

85 Batool, *supra* note 1 at 174.

cannot go scot-free and repeat the same crime."[86] This critical, unforgiving, and often public introspection that is implicitly demanded of and subsequently internalized by Kashmiris seeking legal justice attests to the dichotomous and reductive lens through which occupation forces law and resistance are to be perceived. This stems from the hypothesis that resistance against the upholders and enactors of the law through the law appears to be paradoxical. Subaltern studies scholars who view power and resistance as a dialectic would refute such a view; they call instead for a more radical imagination of resistant agency that transcend enumerable categories of legal and non-legal resistance.

The collection of non-legal primary source evidence—largely interviews with the survivors and witnesses of Kunan Poshpora—helped to dissolve the clean divide between legal and non-legal categories of resistance. It is seen that those who report violence to state institutions, for instance through local criminal justice mechanisms, simultaneously reject the state through other forms of political action. In fact, survivors of violence often file reports knowing they will be denied justice, which raises the question of why they report at all. Herein lies the strategy of legal resistance: the creation of tangible, written memory within the public sphere and strategic noise-making that draws the attention of non-local civil society actors such as journalists, non-governmental organizations, and international human rights advocates. Moreover, the legal resistance actors exert agency through instrumentalization of the law, often wrangling small victories that sustain their longer and larger revolutionary efforts. Thus, a nuanced, disorganized, and uncalibrated relationship between legal and non-legal resistance develops. This relationship not only mounts a distinct resistance against the hegemonic violence of state institutions, but it also rejects the hegemonic categorizations of the resistance imaginary—one that relegates legal resistance to a position inferior to that of revolution.

The Internalization of Resistance Categories in Kashmiri Resistance

Resistance actors in Kashmir, frustrated by the Indian legal and criminal justice systems, either hold intransigent positions against the law or feel compelled to acknowledge that the law will only bring piecemeal respite and not the broader liberation of the Kashmiri people. In Do You Remember Kunan Poshpora?, activist-writer Ifrah Butt interviewed Syedah Asiyeh Andrabi, the founder of Dukhtaran-e-Millat (Daughters of the Ummah)—an all-women, separatist political group that embodies what Butt called "radical Islamic [feminism]."[87] Syedah's partner was arrested and sentenced to life imprisonment under the Terrorist and Disruptive Activities Prevention Act (TADA) of 2003 by India—a sacrifice both were willing to make for the Kashmiri freedom struggle.[88] In March 1991, Syedah had been one of the first local community leaders in Kashmir to travel to Kunan and Poshpora after accounts of the mass rape were leaked to investigate and collect testimony from the survivors. When Butt interviewed her in 2013, she registered skepticism at the law's effectiveness as a means for justice. Butt wrote of the interview: "She also feels that justice will never be delivered in the present system. She feels that the only justice which we can deliver to thousands of survivors is freedom from Indian occupation."[89]

Mohammed Yasin Malik, the chairman of the Jammu and Kashmir Liberation Front (JKLF), a formerly militant separatist political outfit that renounced violence in 1994 and a household name in Kashmir, has also expressed similar views on Kunan Poshpora. In a statement released in 2016, Malik expressed resentment towards the Indian criminal justice system, which he held responsible for denying justice to the survivors.[90] The Greater Kashmir reported that Malik titled Kashmiri politicians as "stooges" of India who, despite believing in democracy and the rule of law, still shielded the criminals.[91] He concluded the statement by reaffirming his commitment to Kashmiri independence: "Today we pledge that we will do everything possible to take the mission of our great martyrs to its desired end."[92] Actors like Syedah and Malik, resistance leaders who are criminalized by the Indian state and constitute the category of "militant," exhibit an explicit aversion to other people who employ the law in resistance. They stand in principled opposition to the legal resistance performed by the activists who filed the PIL.

Scholars of postcolonial nationhood have noted that the state weaponizes internal discord within an anti-state movement to undermine and overpower collective dissent. Partha Chatterjee has demonstrated in his work that the state has incited internal divisions within the "colonized" or the "subject" state in order to illustrate that divisions within resistance

86 *Id.*

87 Batool, *supra* note 1 at 161-162.

88 *Id.*

89 *Id.*

90 Yasin Malik, *Kunan-Poshpora 'Black Stain on Indian Democracy'*, Greater Kashmir, Feb. 23, 2016, https://www.greaterkashmir.com/news/kashmir/kunan-poshpora-black-stain-on-indian-democracy-yasin-malik/.

91 *Id.*

92 *Id.*

are far too numerous to ever pose a serious threat to the premise of the Indian nation-state.[93] Syedah and Malik's dismissal of legal resistance serves to the benefit of the Indian state, which seeks to augment its hold over Kashmir by denying the existence of a coherent political aspiration across Kashmiri society. To instigate the splintering of Kashmiri resistance, the state has invented and imposed this theoretical civilian-militant binary. This allows the state to justify post facto violence upon any Kashmiri by labelling them as militant. Given the latitude of Kashmiri dissent, the civilian category becomes practically non-existent beyond helping the state crystalize who is perceived as a militant and to stir dispute between these two artificial categories.

Through the imposition and internalization of this civilian-militant binary, the state has erased the space where resistance actors can find commonality. Actors like Malik and Syedah, who endorse violence, and the SGKP activists, who resist through legal means, have failed to identify the overlap in their ultimate cause—Kashmiri freedom—despite holding divergent views about which means are necessary to achieve that end. Rather, it helps pit the petitioner, the Kashmiri who respects the rule of law, against the Kashmiri militant, who challenges the law. This produces an internal reckoning within the resistance movement itself, each category competing with the other for the monopoly over what defines effective resistance. This relegates the other to a position of moral subordination. In a 1992 video interview, some Kashmiri villagers pointed out that when Kashmiri militants attacked the Indian army, the army's retaliatory wrath was directed at the civilian houses—families and friends of the militants.[94] One of the interviewees said, "These people [the army] force themselves into the houses of innocent people and beat them up. When there was militant firing, they barged into our houses. The militants got away but two of our people were killed."[95] The interviewee employed the term "our" to distance herself from the militants; she betrayed the resentment that she harbored towards them for subjecting her community to the repercussions of state violence that followed militancy. This highlights the interviewee's internalization and regurgitation of a state-manufactured artificial binary to essentially divide and conquer; it also reveals the deliberate incitement of hostility by the Indian army along the civilian-militant binary.

Further, village Chowkidar Juma Sheikh's letter, which was then taken to District Magistrate S.M. Yasin and used to file the FIR in March 1991, sought to similarly distance civilians from militants in the context of Kunan Poshpora. Sheikh wrote that the rapists on the army "made no difference between houses with male family members who were Pakistani trained militants or houses which were not sympathetic to militants."[96] The SGKP activists wrote that Yasin's words showed that Kashmiris suffered from "a desperate sense of terror," fearing being labeled a "militant" by the Indian state."[97] Kashmiris had internalized the oppressive and state-sharpened wedge between the so-called "civilian" on the one hand and the so-called "militant" on the other so deeply that they invoked their civilian status as a defense against the state and military crackdown on their human rights.

The Indian state's infiltration of Kashmir's imagination of resistance, a deliberate consequence of its exaggeration of categories within the resistance, heightens the essentialism of the binary of legal and other resistance. "Militants" like Syedah and Malik harbor disdain toward the employment of legal channels as an effective means of justice. "Civilians" like the interviewee express frustration with militancy, distancing themselves from explicitly non-legal forms of resistance such as anti-state violence. Both actions unintentionally reinforce the legal and non-legal resistance binary. In the process, the state continues to fuel discontent along this binary; legal resistance is allowed, at least on paper, whereas non-legal resistance is criminalized. It is important to note that the state sets the terms of this categorization. The actions that constitute harmless, legal resistance and those that constitute terroristic, non-legal resistance are not democratically or even rationally decided. In effect, the state-created categories shift continually until the state can justify criminalization of all dissent forms by labelling dissent overall to be illegal.

Thus, the polarization of legal and non-legal resistance is predicated upon the internalization of hegemonic, state-oriented understandings of resistance—that one is either a militant or a civilian, and that resistance must either embrace the law or reject the law. As poststructuralists have argued, resistance constitutes a series of negotiations at different levels within this hegemonic framework. To deny a particular form of resistance its radical potential, as extremist resistors in Kashmir have done, is to deny the legal resistor their agency. For instance, Kashmiri activists who filed the Kunan Poshpora PIL felt compelled to explain to themselves and their community why they sought justice through legal means despite rejecting the occupier's legal system. To this end, both legal and non-legal resistors must see legal resistance as an equal and inseparable

93 Chatterjee, *supra* note 5.

94 The Kashmiri Guy, *supra* note 67.

95 *Id.*

96 Batool, *supra* note 1, at Annexure.

97 *Id.* at 90.

counterpart to the more revolutionary forms of protest. As it were, the legal resistance in Kunan Poshpora packed the petitioners' agency and demonstrated their unflinching relationship with the non-legal form of resistance.

The Case for Agency Within Legal Forms of Resistance

The SGKP petitioners who filed the PIL over the Kunan and Poshpora rape intended to expose and publicly critique the Indian criminal justice and legal systems that had attempted to silence survivors' voices. To that end, the petitioners mobilized Indian law in complex, even contradictory ways to document in publicly accessible spaces like court records that violence was committed and to seek institutional acknowledgement of harm. The case had far more profound objectives beyond striving for mere redressal. It curated a space within the Indian legal arena where the voices of the silenced survivors of Kunan Poshpora specifically, and Kashmir at large, were heard for the first time.

The reclamation of agency took place outside of the courtroom and often did not directly involve the SGKP petitioners. Rather, the PIL helped to legitimize a space that was exclusively for Kashmiris outside of Kashmir that at once sought recognition and inclusion of their experiences within the discourse against state violence on minorities. It exposed, critiqued, and evaluated the structures of violence at play behind the scenes that sanctioned the dismissal of the Kunan and Poshpora rape. As an act of resistance, this was not limited by the law even though the resistance was situated within the petitioners' participation in the law. It overrode and transcended the limited justification for resistance through the law that the petitioners had proffered. Not only did it confront state violence behind Kunan and Poshpora, but it also challenged the binary of legality and illegality, coinciding with redundancy and criminality, that the Indian state had injected into the imagination of Kashmiri resistance.

A. A Public Critique of the Court System

In their expository book on Kunan Poshpora, the SGKP activists used the legal battles that comprised the Kunan and Poshpora case to illustrate and expose how the legal and criminal justice systems had failed the survivors of Kunan Poshpora at every stage. The events that transpired around the first few J&K High Court hearings of the PIL in 2013 represent one example.

First, the high court's initial denial of the PIL was predicated on a string of procedural justifications. SGKP activists, using the court's own language, described why the court considered the case to be premature, including their documented references to the delayed filing of the closure report by the Kupwara police and the state's purported overcompensations to the victims. Second, the SGKP activists refuted the court's claims by drawing from primary source non-legal evidence that they gathered through field research. Invoking voices of the villagers that they interviewed, the activists asserted the survivors named in the FIR were given a reduced sum as compensation by a local political representative, Mir Saiffulah, in 2011, contrary to what was claimed by the J&K advocate general at court.[98] Third, they reflect upon the dissonance between the actions of the state and the broader aspirations of the Kashmiri people, latent in which are larger themes of the injustices of military occupation. Regarding the compensation, the authors exposed the incongruence between the state and survivor accounts and referenced their own struggles when tracing documents on the compensation.[99] They questioned whether the state's denial that compensation had been paid was both a refusal to accept responsibility and an attempt to silence the survivors' pursuit of justice. The authors considered the following: "Was it given to buy the survivors and ensure their silence? Was it a signal to the rape survivors that they have received blood money and should not pursue further investigations?"[100] This was a reflection on the impunity that was enjoyed by army personnel in Kashmir and the state's willingness to shield the army. Additionally, it was a time-tested tale of colonial recalcitrance—the unwillingness of the oppressor to register a public acknowledgment of the violence perpetrated by its enactors. Furthermore, the authors argue that it is absurd that the court chose not to intervene and monitor the case, especially considering the odd circumstance surrounding the police closure report, which was being filed twenty-two years after the case was believed to have been closed.

The documentation of the court's decision-making helped bring to the forefront the limits of the system within which SGKP's legal resistance was compelled to operate. There was only so much that survivors could get out of a justice mechanism that was operating politically; they suffered from a jaundiced incapacity to address the case with no bias. Among other things, legal resistance publicly documented and interrogated the Indian court system's failure at protecting the survivors of Kunan and Poshpora.

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98 *Id.* at 135.

99 *Id.* at 136-37.

100 *Id.* at 136.

B. Occupying Public Space and Memory

The act of mounting resistance in the form of a PIL against the military personnel who raped and tortured the villagers in Kunan and Poshpora was the first and most direct exertion of agency by the petitioners. Agency, however, was exerted also through the mere occupation of space—both tangible and intangible—within the legal system by Kashmiri survivors. The PIL helped survivors break out of the state caste mold of the docile "civilian" and make noise against the state even within the state-sanctioned arena of legal resistance.

For a first, the five women of SGKP refused to succumb to their own social and political circumstances that made it dangerous for them to become the face of such a controversial case and routinely overcame impediments to their legal crusade. They were derided as "the women from human rights" by the defense lawyers as they walked into court every day.[101] Yet they attended court day after day, defying the colonial misogyny and paternalistic dismissal inflicted upon them by the army, the state, and the state's legal machine.[102] At first, wrote the SGKP activists, the initial denial of the PIL felt like a setback; however, they soon realized that the goal of the PIL was not merely to obtain legal victory, but also to give a voice to the story of Kunan Poshpora and its characters. They wrote that the results represented a victory in terms of creating a space for young Kashmiri women to speak about their experiences:

> For a moment, when we heard what the court had to say, disappointment spread among many of us, legally naive people who had thought that victory was close. However, we were to realize later that even with the case being disposed of, we had won in many ways. There were small struggles won and people, especially young women, were now drawn in to speak as women of Kashmir.[103]

By extending a voice to the survivors and carving out a space for them into academic, journalistic, and political discourse, the activists discovered that justice for Kashmir did not necessarily mean victory only inside the courtroom.

This meant there was a deliberate and intentional creation of "public accountability" around the case.[104] In a political site whose reality is sheathed from the national eye and where lies and doublethink are both ubiquitous and unchallenged, solutions inside the courtroom are easier found than freedom from the power structures that impede access to this justice. Take, for instance, the report by nationally renowned journalist B.G. Verghese of the Press Club of India (PCI) who visited Kashmir after the incident transpired, stayed at an army base camp for three days, and returned to Delhi and wrote and disseminated an account of events in Kunan Poshpora. The report blatantly discredited the survivors' account of the mass rape and was widely seen as the gold standard of truth on the case in the 1990s.[105]

To this end, the petitioners were successful. Under the watchful gaze of the media, state denial could no longer be directed at Kashmiris alone. The SGKP petitioners wrote:

> There was renewed interest in a case that was presumed to be dead and forgotten. Kunan Poshpora now appeared in the local dailies in bold letters adorning the front page, it flashed on Indian and international news channels, bringing back the ghosts of a forgotten past. People now reacquainted themselves with the villages and the crimes committed in them.[106]

Additionally, as the Kashmiri advocate and founder of the Jammu and Kashmir Coalition of Civil Society, Parvez Imroz stated, "This united people around the fundamental premise of human rights. The PIL not only refreshed the memories of the public, but it also brought together women's and civil society groups to work on the case."[107]

C. Developing the Survivor-Led Narrative

More importantly, the space for agency that the petitioners had negotiated enabled the survivors to assert their truth

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101 *Id.* at 173.

102 *Id.* at 173.

103 *Id.* at 174.

104 *Id.* at 173-74.

105 *Id.* at 158.

106 Id. at 174; Irfan Mehraj, Kunan Poshpora Victims Unlikely to Get Justice': Support Group, Wande Magazine, Feb. 24, 2019, https://www.wandemag.com/kunan-poshpora-victims-unlikely-to-get-justice-support-group/.

107 Batool, *supra* note 1, at 174.

more fearlessly than they ever had the opportunity to do. They publicly drew attention to all the convenient gaps in the reports, files, and police records that the state had visibly sought to erase. One consequence of the PIL was that previously classified documents held by the police were surrendered to the courts and became visible to the petitioners as part of their case file, which they in turn made publicly available.[108] The police case diary had documented nineteen statements made by survivors as early as March 1991. The case diary also contained medico-legal reports signed by government doctors confirming rape, and it documented records of physical evidence turned in by the survivors to the police such as empty alcohol bottles and bloodstained and torn clothes.[109] This information became public knowledge because of the activism around the PIL.[110]

Through the petition and the legal and political activity surrounding the petition, such as the writing of the book and lectures and interviews covering it, the activists could make public the specific instances in which the state gaslit the survivors. A common argument made by the Indian government and the military around the time of the incident to cast doubt on the authenticity of the survivors' account was that the incident had been reported far too late after the alleged date it transpired.[111] Here again, the survivors help fill the gaps.

The pages of Tehsildar (a local official) Sikander Malik's diary confirm that it had snowed heavily on February 23 and March 3 and 4, 1991, which had delayed the visit of the Divisional Commissioner to Kunan and Poshpora. This, in turn, delayed investigation.[112] Ifrah Butt's interview with the government medical officer Dr. Makhdoomi, who had examined the survivors in 1991, also proved that the decisive medical reports confirming rape had mysteriously disappeared from the police files.[113] Makhdoomi told Butt during the interview about the fear experienced by villagers and officials around taking too controversial a stand on the case.[114] Makhdoomi was not alone in making this claim; several voices that the activists have elevated have spoken of repercussions as a consequence of speaking up about the incident. Even an official as high up as the District Commissioner of Kupwara, S.M. Yasin, who registered the 1991 FIR against the perpetrators, spoke of the death threats and transfer orders that he received as a consequence of publishing an unflattering investigative report on the incident.[115] In an interview with India Today, Yasin painted a gloomy picture of the corrupt internal workings of the government in Kashmir.[116] He claimed that after he had the FIR registered, the station house officer in charge of the case at the Trehgam police station was transferred to Auquaf, Jammu by the higher-ups.[117] He also claimed on national television that the Indian army had blackmailed him.[118]

Similar fears were expressed by other residents of Kunan and Poshpora when the petitioners approached them with requests for interviews. One villager said to the interviewers, "There are chances that people from some agencies might be following you and as soon as you leave some gunmen may barge in and kill me in an encounter, like they did with Constable Abdul Ghani. You all will go away back to Srinagar, but I have to live here."[119] When the State Human Rights Commission published its ruling in 2011, it noted the military's murder of Head Constable Abdul Ghani for being privy to too many army secrets: "There was a policeman from the village namely Abdul Ghani who tried to raise SOS alarm for help from loudspeaker of the local mosque but later [in 1993] he was too killed by army personnel so that evidence against them is whipped off."[120] In addition to responding to the constructed gaps in the state records, the Kashmiris in Kunan Poshpora also contested the lies that had been peddled by the state.

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108 Freny Manecksha, *Kunan-Poshpora: Reconstructing Truth*, Himal Southasian, Oct. 14, 2020, https://www.himalmag.com/kunan-poshpora-reconstructing-truth/.

109 *Id.*

110 *Id.*

111 Press Council of India, Crisis and Credibility (1991); Habibullah, Confidential Report of Divisional Commissioner (1991).

112 Batool, *supra* note 1, at Annexure 6.

113 *Id.* at 145, 152

114 *Id.* at 148.

115 Ex-Kupwara Dy commissioner breaks his silence on Kunan-Poshpora, India Today, Feb. 24, 2014, https://www.indiatoday.in/india/video/sm-yasin-former-deputy-commissioner-of-kupwara-breaks-his-silence-on-kun an-poshpora-450949-2014-02-24.

116 *Id.*

117 Mir Basit Hussain, Kunan Poshpora to Kathua: Shielding Perpetrators Through Institutional Disinformation Campaign, Free Press Kashmir, May 27, 2018, https://freepresskashmir.news/2018/04/27/kunan-poshpora-to-kathua-shielding-perpetrators-through-institutional-disinformation-campaign.

118 *Ex-Kupwara Dy commissioner breaks his silence on Kunan-Poshpora*, *supra* note 116.

119 Batool, *supra* note 1, at 167-68.

120 *Id.* at 87.

One powerful contribution from the petition was the opportunity that it extended to Kashmiris to point out what was simply not true. One such instance where the Kashmiri voice challenged the state concerned the PCI report written by Indian journalist Verghese in 1991 decrying the allegations of rape "a massive hoax," which colored the national perception around the case.[121] The activists questioned Verghese's findings and emphasized his misogynistic nationalism. On the other hand, the villagers in Kunan and Poshpora persistently claimed that Verghese and the PCI investigation team had never set foot in the villages.[122]

Convergence of Categories of Resistance

A study of the survivor and witness narratives of the Kunan Poshpora mass rape that the SGKP activists meticulously documented shows that the assertion and reclamation of their agency took place largely outside of the realm of the law. In other words, the testimonies themselves may have been collected with the end goal of the legal petition in mind, and the interviewees may have spoken because they wanted legal retribution; yet the acts of resistance manifested through the collection of testimonials, the creation of a public space to acknowledge and heal, and a critical evaluation of the structures that collaborated to perpetrate and then forget. The rampage for justice in the court was exclusive in its legal pursuit: to punish the criminals and avenge the crime. The battles that took place outside the courtroom, however, were the ones that challenged the structures of violence that enabled the crime—military occupation, military impunity, and denial of self-determination.

Political resistance triggered by the objective of legal justice has a long and winding history in Kashmir, especially in Kunan Poshpora. For instance, the FIR was registered in 1991 only after villagers from Kunan Poshpora protested outside the police and army headquarters for days.[123] As noted earlier, the two-week period between February 24, the night of the raid, and March 8, the day the FIR was filed, was marked by widespread protests and retaliatory curfews in Kupwara.[124] The 2014 protests, which were triggered by the PIL to reopen the case and that similarly sought to hold the court accountable to its commitment to the rule of law, were not unprecedented. In many instances, the resistance that took place outside of the courtroom was not explicitly connected to the legal dimension of the PIL. Rather, they were spontaneous outbursts of solidarity and resistance that found common ground with the petitioners' work against the state, largely divorced from the details of the case itself. In 2013-14, when the army's revision petition was heard in the Kupwara sessions court, symbolic protests were routinely held outside the court.[125] Protestors included members of civil society groups, village committees, petitioners, and survivors.[126] The SGKP activists also joined these protests after the court hearings.[127] Protests were not specifically about Kunan Poshpora or the failure of due process inside the courtroom. Rather, these demonstrators were united in their resistance to the Indian state. Kunan Poshpora was an incident and the court case surrounding it was the vehicle that had led to the orchestration of the protest itself, but nothing more.

There were also protestors who used the space to voice their grievances against other forms of administrative violence that they faced under the Indian military occupation. In the 2014 run-up to the J&K state legislative elections, Mir Saifullah, the incumbent candidate from Kupwara, set up electricity distribution systems in several villages in his district in the hopes of securing more votes.[128] However, as soon as the transformers were set up, the power department snapped the electricity supply.[129] This led to widespread outrage amongst residents.[130] The army revision petition hearing coincided with this occurrence; as the SGKP activists drove up to the sessions court, they would often see local protestors clamoring for infrastructural improvements.[131] Often such local demonstrators, demanding electricity in Kupwara, showed up at the protests outside the courthouse staged by the Kunan Poshpora petitioners.[132] Interestingly, there were often militants at these protests,

121 Press Council of India, *supra* note 112.

122 Batool, *supra* note 1, at 158.

123 *Id.* at Annexure 3.

124 *Id.*

125 Batool, *supra* note 1, at 181-82.

126 *Id.*

127 *Id.*

128 Rouf Pampori, Kupwara Villagers Suffer from Respiratory Diseases in Absence of Electricity, 5 Dariya News, Mar. 17, 2017, https://www.5dariyanews.com/news/187170-Kupwara-villagers-suffer-from-respiratory-diseases-in-absence-of-electricity.

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

including those who disavowed the usefulness of Indian law in securing justice for Kashmiris and who stood in solidarity with the survivors. These militants viewed the case's public-facing court hearings as an opportunity to draw attention to and repudiate the broader frameworks of Indian state violence in Kashmir.[133]

It would be shortsighted to discard the location of such voices as irrelevant to the Kunan Poshpora incident. The ex-militants and the civilian protestors demanding electricity supply in Kupwara were both integral parts of the larger resistance launched because of the Kunan Poshpora PIL. This provided Kashmiris from disparate experiences an opportunity to collectively demand justice for their respective situations. Even if they disagreed on the means that needed to be employed, they found solidarity in resisting the common oppressor, the Indian state.

In another instance reported by Greater Kashmir on December 2, 2014, Kunan Poshpora survivors and their supporters surrounded the polling booth at the Government High School in the village, demanding that justice be administered.[134] Holding black flags and sticks, they picketed the polling booth and registered their protest by boycotting the elections. Some of the protestors told reporters that they had also boycotted the 2014 parliamentary elections that put Indian prime minister Narendra Modi into office.[135] The story of the survivor whose two-year-old daughter was permanently disabled because the soldiers had trampled on her during the rape was particularly harrowing:

> The soldiers looted my chastity and even trampled a leg of my two-year old daughter, rendering her physically challenged. My son crossed Line of Control for arms training to avenge my rape and he too fell to bullets of army in an encounter, after his return. They shattered my happy family and are yet to be punished.[136]

Other protestors claimed the following: "By boycotting the elections, we want to protest [the] indifferent attitude of the government towards us." Another woman at the protest observed, "It has been over three decades since our lives were shattered by army soldiers and still, we are awaiting justice."[137] The faith in institutional forms of justice, however, was neither absolute nor consistent. Another survivor harangued those who chose to vote in the same elections that some other survivors were campaigning to boycott. She said, "Those who voted do not have any respect for women and have bartered our chastity and sufferings for jobs and other petty benefits. This indelible ink on their finger will continue to haunt them."[138] Another survivor was even more forthcoming in her position on the Indian state and the pro-India political parties that ran for elections in Kashmir: "No money can compensate our sufferings. [...] The pro-India leaders and successive regimes have added insult to our injuries by denying us justice. By voting, we cannot trade our plight in lieu of so-called development."[139] The diversity of protestors who attended rallies and boycotts around the Kunan Poshpora case emphasized that the categories of legal and non-legal resistance in the context of state violence in Kashmir were largely united in its end goal—liberation from state violence.

The contradictions that riddled the political positions held by different protestors highlighted the complex ways in which legal and non-legal resistance interacted and coincided. The paradox of one survivor of mass rape seeking justice through the Indian criminal justice mechanism while simultaneously picketing at local elections is unmistakable. Unlike the scientific rationale that lies behind the organized state administration, resistance is structurally incoherent and even at times contradictory. Therefore, the lines that separate resistance categories are artificial and redundant; they seek to quantify, sanitize, and restrain a fundamentally incommensurable act. It becomes clear from the nuances of resistance in the Kunan Poshpora case that the same actor may resist in legal and non-legal ways at different points in time. Thus, legal and non-legal resistance must act in communion to effectively mount resistance at all. One survivor of Kunan Poshpora illustrates this Foucauldian idea perfectly:

> We have chosen to resist in ways that range from a simple curse or a kangri thrown at an armed officer trying to molest us, to participation in stone throwing, street protests, and mass funerals, to supporting the armed struggle and organizing and working in civil society to express our political opinions and affiliations.[140]

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133 Batool, *supra* note 1, at 182-83.

134 Kunan-Poshpora Rape Victims Lock Polling Booth, Stage Protest, Greater Kashmir, Dec. 16, 2014, https://www.greaterkashmir.com/news/kashmir/kunan-poshpora-rape-victims-lock-polling-booth-stage-protest-2/.

135 Batool, *supra* note 1, at 88.

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 Batool, *supra* note 1, at 4.

In sum, the actions of Kunan Poshpora survivors and petitioners demonstrated the ways in which artificially curated categories of resistance, fostered by the state to wrest control over protest, operate in contention and collaboration with each other.

IV. CONCLUSION

Historically, skeptics have repeated misgivings about the paradox of resisting the violence of law through the law.[141] In more contemporary scholarship, however, the dualism between power and resistance has been challenged, opening space for the deconstruction of resistance itself as a structure of hierarchies.[142] Most subaltern legal scholars have drawn from the following Foucauldian truism on resistance and power: "where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power."[143] In other words, resistance and power can be seen as a dialectic where resistance is a counterpart of power rather than its opposition.[144] State power and legal resistance and non-legal resistance to it are not discrete. Resistance is ambiguous, and the acts of resistors are ambivalent.[145]

This is evident in the case of Kunan Poshpora, where the pursuit of justice through legal and non-legal means often emanated from an identical anti-India premise. The fuzziness of these two categories was underscored by their overlap at the level of the individual; a resistor can act in both legal and non-legal ways. The petitioner who attends court during the day attends anti-India protests at night; the survivor who refused to allow the military doctor to examine her after rape allowed the police to record her testimony for the case weeks later; the village elder who speaks out against Indian rule in Kashmir also demands that the rapists in the military be thrown into Indian prison. Ultimately, the pursuit of legal justice carves out a diffused arena where resistance resides in all its contraventions and complexities. Here, resistors claim and exercise agency in the movement by breaking out of the state-manufactured, reductive categories associated with Kashmiris resisting through and against the law.

In lieu of this, legal resistance challenges the reductive binaries of legal and non-legal resistance. Its contingent paradox, in turn, allows people to reimagine categories of resistant agency. Agency can be fully exerted only when Kashmiris can express their contrary and incongruous pursuits of justice within the uncompromised framework of anti-India resistance. This challenges the blind spot within the Indian-manufactured conception of binary Kashmiri resistance. The dichotomy fails to include the idea that a Kashmiri's pursuit of criminal justice through the rule of law can occur in conjunction with their political resistance, both violent and otherwise, to India's monopoly over the legal system itself. The political resistance around the Kunan Poshpora PIL, much like most other legal battles by Kashmiris against the Indian state, amplified the complementarity of resistance forms and purged its imagination of artificially fostered divisions. Ultimately, this broke the restrains of consistency that have historically constrained acts of resistance

141 Chandra, *supra* note 6, at 563, 573.

142 Mitchell, *supra* note 84 at 547.

143 Michel Foucault, The History of Sexuality (1976).

144 Douglas Haynes and Gyan Prakash, Introduction: The Entanglement of Power and Resistance, in Contesting Power: Resistance and Everyday Social Relations in South Asia (1992), at 2, 3.

145 Sherry B. Ortner, Resistance and the Problem of Ethnographic Refusal, 37 Comparative Studies in Society and History 173, 193 (1995), https://doi.org/10.1017/s0010417500019587.