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Digital Identity Entrepreneurs

KHALED A. BEYDOUN*

INTRODUCTION

> "Analog girl in a digital world."
>
> — Erykah Badu, *… & On*[1]

> "He allowed himself to be swayed by his conviction that human beings are not born once and for all on the day their mothers give birth to them, but that life obliges them over and over again to give birth to themselves."
>
> — Gabriel García Márquez, *Love in the Time of Cholera*[2]

Identity entrepreneurship has taken on dramatic new digital forms. Since Nancy Leong first articulated the phenomenon in 2016 as the process whereby "out-group members leverage their out-group status to derive social and economic value for themselves," identity entrepreneurship has expanded into a booming enterprise that penetrates every dimension of contemporary life.[3]

Today, identity entrepreneurship converges with a proliferating diversity and inclusion mandate and market, where big businesses are capitalizing on it–or the mere appearance of it–to "boost" their profits.[4] This is particularly the case within a digital landscape, where the presentation of diversity and inclusivity is easier to curate on timelines and a cottage

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1 ERYKAH BADU, *… & On*, on MAMAS GUN (Motown Records 2000).

2 GABRIEL GARCIA MARQUEZ, LOVE IN THE TIME OF CHOLERA 232 (Edith Grossman trans., Alfred A. Knopf 1988).

3 Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. REV. 1333, 1334 (2016).

4 *See* Bianca Miller Cole, *8 Reasons Why Diversity and Inclusion Are Essential to Business Success*, FORBES (Sep. 15, 2020, 7:00 AM EDT), https://perma.cc/HZ3S-UC7B.

industry of individuals prepared to put their skin in the game is growing and in seemingly endless supply. Online and on our screens, the longstanding order of "racial capitalism" is being warped by a new frontier of "surveillance capitalism," where the product is both the digital consumer and the digital identity entrepreneur.[5]

This digital capital exchange is readily on display on our social media feeds. Global brands like Adidas showcase Muslim women with headscarves on their Instagram timelines to meet mainstream sensibilities of multiculturalism.[6] Abercrombie & Fitch, a clothing company with a track record of anti-Asian racism, features Asian models on their Instagram page to appear inclusive.[7] This new order of digital marketing creates avenues for social media "influencers" who fit the mold to fill these roles. This is the brave new stage of identity entrepreneurship, where the *analog* observations made by Nancy Leong in her book, *Identity Capitalists*, are digitally unfolding on screens to the tune of high social, economic, and existential stakes.[8]

In living color, and in real time, social media platforms have emerged into consequential terrain where the cross-industry enterprise of diversity and inclusion is shaping a new cottage industry for identity capitalists. This marketplace is not limited to private businesses, but also civic, advocacy, and other realms of virtual life where the value of subaltern identity–for both sides of the racial capitalist exchange–is at its apex. While digital identity entrepreneurship may appear to be a symbiotic relationship that benefits both parties in the exchange, its effects–echoing the observations made by Leong–are just as damaging online as they are beyond it.

The rise of digital media, converging with the expanding economy of diversity and inclusion, has birthed a new breed of identity capitalist–the digital identity entrepreneur. Upon the Internet, "the most unregulated social experiment of our time," the market of digital identity capitalism and exchange gives Leong's book even greater urgency in these strange times

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[5] *See generally* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2194 (2013) [hereinafter Leong, *Racial Capitalism*] (articulating how the law drives the process of institutions, such as colleges and universities, deriving social and economic value from racial identity); SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019) (explaining the leading study on surveillance capitalism—the regime spearheaded by Google whereby Big Tech entities use predictive algorithms to ascertain individual consumption and behavioral patterns).

[6] *E.g.*, Adidas, Instagram (June 9, 2021), https://perma.cc/EEQ9-969F.

[7] *E.g.*, Abercrombie, Instagram (Jan. 10, 2022), https://perma.cc/2P79-YYNR.

[8] *See generally* NANCY LEONG, IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY (2021) [hereinafter LEONG, IDENTITY CAPITALISTS].

unfolding before our eyes, and on our screens.[9]

I. The Cost of Identity

I first heard the term "influencer" in 2019. I was in Nairobi, Kenya, as part of a humanitarian trip raising awareness and funds for cataract-stricken refugees in the northeastern part of the country. The mission's head introduced me, and other members of the collective, as "influencers." It was a curious title, stripped of what we actually did as musicians and professors, actors and advocates. Our myriad roles were flattened into an ability to effect opinion or influence followers to pay attention to the plight of blinded Somali refugees and donate money for their corrective surgeries.

The cause was a noble one. But the term and title "influencer" introduced me to a developing market, off and particularly *online*, that capitalized on the social reach of online personalities. The more followers an influencer has, the more eyes on the cause or product featured on the individual's platform.[10] *Mediakix*, one of the first marketing agencies to focus on influencers, defines this new class of pitchmen and women accordingly:

> Social media influencers develop a following by sharing quality content that inspires, entertains, informs, and connects them with their followers. Influencers start social conversations, drive engagement, and set trends among a receptive audience, which positions them to work with brands on sponsored content.[11]

Individuals with significant followings on digital media platforms like YouTube, Twitter, and Instagram are the coveted new pitch-people for global brands like Nike, Nestle, and Microsoft, and their platforms are the visible terrain for product peddling and placement. The substance of what they do, in terms of vocation, is secondary to their ability to affect financial

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[9] SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 6 (2018).

[10] *See* CATHY O'NEIL, WEAPONS OF MASS DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 70 (2016) ("We are ranked, categorized, and scored in hundreds of models, on the bases of our revealed preferences and patterns."). Algorithms stratify digital identity entrepreneurs, and oftentimes formally or informally rank them by the size of their following or their resonance and reach with a coveted demographic or market. This ranking system is part and parcel of a digital numerical order spawned by the rise of surveillance capitalism, whereby companies invest millions of dollars in online marketing campaigns based on algorithmic models.

[11] *What Constitutes An Influencer?*, MEDIAKIX, https://perma.cc/ZCK3-D2RZ (last visited Apr. 14, 2022).

gain for companies and influence consumerism.[12] But this binary in the billion-dollar business of digital influencing is a linked one, whereby the financial incentives tied to online performance directly shape the substance of one's presentation. In an age where the cost of online identity is rising alongside one's following, the lucrative potential tied to influencing has made it a new kind of career.[13]

The convergence of diversity consciousness and influencer marketing is ripe with opportunity for out-group online personalities. The diversity business is booming, and major, midlevel, and local companies are spending billions of dollars to feature their products alongside racial, sexual, and religious minority influencers.[14] Brands are paying for an "appearance of diversity [to] bolster[] their standing among customers," but are generally averse to the personal and political substance behind the coveted optic.[15]

In short, influencers, and their platforms (turned ad spaces), are "commodified" to sell a product, an idea, or a brand.[16] Thus, identity capitalism has a double-commodification effect online: first, of the person, or influencer; and second, of the person's platform and following. What effect does this have on the out-group influencer, and beyond that, the dominant perceptions of the group he or she belongs to?

The effects, within a digital capitalist landscape, are predictable and ripe with existential peril. Beyond just contracting to sell a product and become a product, the digital identity entrepreneur is also signing up to perform a role that gradually changes the entrepreneur's bona fide identity. Leong writes,

> If there is a market for identity, then we can think of identity as a commodity we all produce. . . . Identity production is complex and nuanced. Some identity characteristics are visible and mostly immutable–the color of someone's skin, the shape of their eyes, whether they can walk. Other identity characteristics are visible but can be changed–hair style, clothing, mannerisms. . . . While some characteristics are predetermined, how someone performs identity deeply

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12 *See* Paris Martineau, *Inside the Weird, and Booming, Industry of Online Influence*, WIRED (Apr. 22, 2019, 6:00 AM), https://perma.cc/T6HK-MYZ5.

13 *See* Peter Suciu, *Is Being A Social Media Influencer a Real Career*?, FORBES (Feb. 14, 2020, 7:00 AM EST), https://perma.cc/2W8V-XURC.

14 Pamela Newkirk, *Diversity Has Become a Booming Business. So Where Are the Results?*, TIME (Oct. 10, 2019, 6:10 AM EDT), https://perma.cc/UW6R-UTQ5.

15 Leong, *Racial Capitalism*, *supra* note 5, at 2165.

16 LEONG, IDENTITY CAPITALISTS, *supra* note 8, at 77–79.

influences the way that others perceive that identity.[17]

Within the world of digital identity entrepreneurship, how someone performs an out-group identity in line with mainstream diversity and inclusion sensibilities makes that individual more attractive to a brand. In turn, opening up financial opportunities that shape online performances can cause identity entrepreneurs to deviate from their genuine senses of self, or alienate them from members of their communities, among other identity costs and compromises that come with the digital identity entrepreneurship tap-dance.

II. Beyond Influence

Shortly after Donald Trump announced a "total and complete shutdown of Muslims entering the United States,"[18] I met with a young Muslim journalist interested in my thoughts on the proposal. We were in contact via Twitter for years, but finally met offline to discuss Trump's presidential bid and the renewed moment of popular Islamophobia it inspired. Fifteen years after the 9/11 terror attacks, Muslim identity was the subject of intense political and popular scorn.

The journalist fielded questions while seated across from me, typing notes, and wearing the very light blue *hijab*[19] she featured on her social media profile photo. We discussed a range of topics tied to the presidential election, surveillance, the Black Lives Matter protests, and the basis of our meeting–or what I thought was the basis–the proposed "Muslim Ban."[20] I shared a response to a question that spurred a perplexing response from the journalist, who had built sizable followings on Twitter and Instagram over the years. "I try to stay away from politics," she said. Deadpan, and without pause.

I stopped. Not knowing what to say, or whether I could say anything to make sense of an absurd play that had no script. There we were, a Muslim American journalist seated across from a Muslim American law professor, in a Lebanese restaurant in the heart of the most concentrated Arab and Muslim community in the United States, during a moment when a presidential candidate had just announced an immigration measure that

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[17] LEONG, IDENTITY CAPITALISTS, *supra* note 8, at 77–78.

[18] *See* Jessica Taylor, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering' U.S.*, NPR, (Dec. 7, 2015, 5:49 PM ET), https://perma.cc/2KB8-PVQD (recounting a real time description of the proposal that would become the "Muslim Ban" Executive Order signed by President Trump during the first week of his administration).

[19] Headscarf (Arabic).

[20] The name many attributed to Trump's proposal, turned Executive Order 13769.

targeted our very identities and communities, which proved to be the hallmark of his campaign and eventual administration.[21]

Our very being, particularly then, was political. Our terrestrial and digital activities, since the inception of the War on Terror fifteen years earlier, were assessed through a pointedly political lens.[22] The faith we adhered to, especially when conspicuously expressed or exercised, was tied to terror by surveillance programs introduced by Republican and Democratic presidents. However, what I learned in the days after that interview crystallized what the journalist meant by that curious revelation.

More than a journalist, the young Muslim woman I met was a digital identity entrepreneur. She "worked" her identity to fit in with powerful institutions and actors at the very top, conscious of the costs that a political pivot would have with the out-group communities on the ground.[23] Certainly, choosing to be "apolitical"–particularly during that moment–was in and of itself a powerfully revelatory political position. And one, in line with my research into identity performance and digital citizenship, I was keen on investigating. So, I returned to the platforms where I first encountered the journalist: Twitter and other social media platforms where she plied her trade.

A careful examination of her social media pages and online activity revealed what she meant by "I stay away from politics." First, she took no clear political stances, taking "cover" from the ascriptions and associations specific positions would invite.[24] Second, she avoided politically provocative issues, such as the Israel-Palestinian conflict or supporting a specific presidential candidate. Third, she stood aloof of mainstream Muslim American civic and advocacy organizations, and sometimes, openly criticized them. Fourth, her online platform–particularly Instagram–featured meticulously curated scenes with herself, and her hijab, at the center. Fifth, her followings were primarily made up by celebrities, prominent fashion brands, personalities with large followings, and other

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[21] *See* Khaled A. Beydoun, *"Muslim Bans" and the (Re)Making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733, 1756 (2017).

[22] *See* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 295 (2002). For a comprehensive account of the anti-Muslim policy and popular animus that took shape in the two decades after 9/11, *see generally* KHALED A. BEYDOUN, AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR (2018).

[23] *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1266 (2000) (crafting the concept and theory of working identity, which is the process by which minorities negotiate identity performances in line with workplace culture).

[24] *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002).

influencers. Sixth, and cumulatively, her online presentation and performance successfully lured partnerships with global brands. The online person she curated resulted in partnerships with popular magazines, fashion brands, hotels, gatherings with socialites, and more.

As much influencer as journalist, the woman performed an identity that would entice companies seeking to capitalize on her brand of Muslim womanhood and invite brand partnerships stripped of the political baggage other online Muslim personalities may bring. In *Acting Muslim*, a law review article in conversation with Leong's racial capitalism/identity entrepreneur framework, I label the journalist's (apolitical) presentation and performance as "conforming Islam."[25] This is "conduct whereby a Muslim American actor manipulates a disfavored expression of identity so that it coalesces with mainstream societal sensibilities or political norms."[26] Off and particularly online, the journalist stripped her Muslim identity and the hijab of its imputed political meaning by staving clear of hot-button political issues, flattening the article and her identity into a commodity availed for the bidding of brands, corporations, and others. This digital identity entrepreneurship, during a moment of *trumped* up Islamophobia when the majority of Muslims took to online platforms to protest the "Muslim Ban" and like spirited measures, distinguished her as the kind of Muslim corporate brands could safely partner with.[27]

This digital identity entrepreneurship enterprising is hardly unique to Muslim Americans. As Leong carefully documents in *Identity Capitalists*, personal performance ties to incentives spans the existential and intersectional spectrums. Furthermore, let me be very clear, this emergent market of digital identity entrepreneurship is not exclusively confined to commercial interests and financial incentives. The very same process is unfolding within government, the educational context, and perhaps most troublingly, the nonprofit industrial complex.[28] Diversity and

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[25] *See* Khaled A. Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1, 12–14 (2018).

[26] *Id.* at 50.

[27] The perils associated with online protest for out-group online users are worth mentioning. Social media platforms are sites of pervasive and piercing cyber hate, which often pointedly violent on members of racial, religious, and sexual minority groups. For an early treatise documenting the rise of cyber hate, *see* Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship For Our Information Age*, 91 B.U. L. REV. 1435 (2011); *see also* Sahar F. Aziz & Khaled A. Beydoun, *Fear of a Black and Brown Internet: Policing Online Activism*, 100 B.U. L. REV. 1151, 1153 (2020) for an analysis of how federal and local law enforcement surveil the online activism of Muslim and Black people.

[28] For a typology of modern activist nonprofits that challenge the nonprofit industrial complex, *see* Michael Haber, *The New Activist Non-Profits: Four Models Breaking from the Non-*

multiculturalism are hot commodities within these disparate halls of power, and individuals and influencers keen on trading a safe, assimilable and uncontroversial brand of diversity are, in the words of Curtis Mayfield, "moving on up"[29] but leaving so much of their community, loved ones, and *selves* behind.

III. So Far Gone

Beyond influence and the financial bounty and fame that comes with it, the opportunity costs associated with out-group digital identity entrepreneurialism can be considerable. For the Muslim journalist, members of the broader Muslim American population openly criticized her "apolitical" posture, her following and influence within the online faith group community declined, and within activist spaces, her name was often raised as a cautionary tale. The stigma inflicted upon out-group communities breeds a collective memory that can be harsh and unforgiving, and oftentimes, that persists long after the financial incentives associated with digital identity entrepreneurship have dried up. The risks and trade-offs are plenty for the enterprising digital personality looking to build streams of income into an online platform.

For the digital identity entrepreneur, the costs of the identity exchange are usually outweighed by its social and financial value. As Leong observes, "Identity entrepreneurship is perilous in ways that extend far beyond the individual identity entrepreneur. As a condition of their continued success, identity entrepreneurs may find themselves defending behavior and policies that are, they come to believe, indefensible."[30]

There is a permanence to digital identity entrepreneurship that generally evades analog manifestations. Virtual footprints, old posts, and, even after past tweets are erased and old posts removed, screenshots can capture missteps and digital history forever. These new tools can freeze the identity of an online influencer, even when the individual has pivoted away from a perspective, or more wholly, a particular online performance or presentation.

Perhaps even more ominously, the digital identity entrepreneur's performance is no longer performance but who that person is, and who that person has become. The identity entrepreneur's physical appearance and views, and political perspectives and associations, are remade by the powerful digital pull of economic incentives, brand deals, and diversity

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profit Industrial Complex, 73 U. MIAMI L. REV. 863 (2019).

[29] CURTIS MAYFIELD, *Move on Up*, *on* CURTIS (Curtom Records 1970).

[30] LEONG, IDENTITY CAPITALISTS, *supra* note 8, at 93.

driven campaigns where *the entrepreneur* is as much the product as the item being pitched.

The person remade by the digital performance, for clicks and dollars, may be so far gone from the person looking at a profile from behind the screen. The reflection in that black mirror, turned marketing tool, may offer a picture that looks little like the person standing before it.

CONCLUSION

> "Choose your self-presentations carefully, for what starts out as a mask may become your face."[31]

We have entered into a new phase of identity capitalism, one where social media, video, and digital interactive platforms are the new marketplaces. For groups stigmatized because of their race or religion, gender or sexuality, the converging moment of diversity and inclusion presents new opportunities to sell a most prized commodity: themselves.

Race is never static, and its contours are being blurred even further by digital stimuli. In *Race After Technology*, Ruha Benjamin observes, "[R]ace itself is a kind of technology–one designed to separate, stratify, and sanctify the many forms of injustice experienced by members of racialized groups, but one that people routinely reimagine and redeploy to their own ends."[32] Global brands and corporations have "reimagined" race, and other stigmatized identities, to the tune of diversity and inclusion–a song and dance that reduces identity into a highly coveted optic, but little else. This optic, carefully packaged and promoted alongside sneakers, sodas, and sedans, comes with considerable financial reward for those who want to fit the racial mold. Enter the digital identity entrepreneur, keen on reshaping and "redeploying" an online identity to play the role and reap the benefits.[33]

The performances are the same, but the stages are different. These digital stages, unlike their analog predecessors and counterparts, come with distinct pitfalls and perils for the identity entrepreneur. These dangers may

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[31] ELIOT R. SMITH, DIANE M. MACKIE & HEATHER M. CLAYPOOL, SOCIAL PSYCHOLOGY 123 (Psychology Press 4th ed. 2015) (attributing this point to sociologist Erving Goffman); *see* ERVING GOFFMAN, PRESENTATION OF SELF IN EVERYDAY LIFE 236 (Anchor Books 1959) ("[T]o the degree that the individual maintains a show before others that he himself does not believe, he can come to experience a special kind of alienation form self and a special kind of wariness of others.").

[32] RUHA BENJAMIN, RACE AFTER TECHNOLOGY 36 (2019).

[33] *Id.*

prove even more costly than Leong documents in her important book, which will prove to be even more foundational as new fronts of racial capitalism unfold and warped frontiers of digital identity entrepreneurship take form.

A Real Seat at the Table: Identity Capitalism and State Law Efforts to Diversify Corporate Boards

ELLEN E. FARWELL*

INTRODUCTION

In January 2020, Goldman Sachs announced that it would no longer underwrite initial public offerings for companies without at least one "diverse" board member, "with a focus on women."[1] Goldman CEO David Solomon described the new policy "as the best advice for companies that want to drive premium returns for their shareholders" because new public companies with a female director performed "significantly better than those without a woman on their board."[2] Like new state corporate laws requiring corporations to diversify their boards of directors, Goldman's policy came in the context of a growing consensus that businesses are more profitable when their leaders and workers have diverse life experiences.[3] It

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[1] *Goldman's Playbook for More Diverse Corporate Boards*, N.Y. TIMES (Jan. 24, 2020), https://perma.cc/G2HM-VR9P. Goldman is not alone in driving change through investor-focused policies. In 2017, both Blackrock and State Street Global Advisors announced they would each vote against boards that were not making progress in diversifying their membership. Anthony Goodman & Rusty O'Kelley, *Institutional Investors Lead Push for Gender-Diverse Boards*, HARV. L. SCH. F. CORP. GOVERNANCE (Apr. 26, 2017), https://perma.cc/429Q-MJA2. Both firms made their expectations more concrete in the years since 2017. *See, e.g.*, BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP: PROXY VOTING GUIDELINES FOR U.S. SECURITIES (2022), https://perma.cc/5U7Z-98G5; Billy Nauman, *State Street to Insist Companies Disclose Diversity Data*, FIN. TIMES (Jan. 10, 2021), https://perma.cc/6XME-AZ76.

[2] Squawk Box, *Goldman CEO Says Firm Won't Take Companies Public that Don't Have at Least One Diverse Board Member* (CNBC video Jan. 23, 2020), https://perma.cc/4GP4-XDVP.

[3] *See, e.g.*, SUNDIATU DIXON-FYLE ET AL., DIVERSITY WINS: HOW INCLUSION MATTERS (2020), https://perma.cc/R5UL-4RDW (describing an increased likelihood of above-average

makes good business sense to include women and people of color at the table, including the board table.[4] There is a risk, though, that policies and new state laws that mandate a minimum number of diverse board members create the appearance of diversity without necessarily leading to meaningful change in the decisions made at the highest levels.

In *Identity Capitalists: The Powerful Insiders Who Exploit Diversity to Maintain Inequality*, Professor Nancy Leong makes a compelling, detailed, and personal argument that the commodification of diversity demands a high price of diverse "outgroup" members, while reaping a distinct profit for "ingroup identity capitalists" who leverage the identities of others.[5] Professor Leong explains that by "showcasing their affiliations with members of . . . outgroups" for their own benefit, identity capitalists hinder "deeper and more authentic relationships among members of different groups" and impede "real substantive reform."[6] After laying bare the countless (and now seemingly omnipresent) ways in which businesses, schools, and individuals exploit the identities of racial, gender, and sexual orientation outgroup members, Professor Leong describes with painful clarity ways in which existing U.S. laws enable the harms of identity capitalism.[7] Professor Leong's forceful explanation of the law's embrace and propping up of identity capitalism begins with antidiscrimination laws, but extends into affirmative action, copyright and trademark law, jury selection, abortion, and free speech.[8] In each context, Professor Leong argues convincingly that the law should be changed to protect against ingroup manipulation of the identity capital of outgroup members. The law, Professor Leong argues, can be reformed to "provide a foundation for replacing superficial identity capitalism with deeper, more substantive progress toward equality."[9]

In this brief response, I extend Professor Leong's analysis to the issue of corporate board membership, suggesting that here too the law can either enable harmful identity capitalism or be a powerful tool for real progress. While Professor Leong primarily focuses on areas where the law could better protect outgroup members, in the area of corporate board membership there

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profitability for companies across the globe in the top quartile of gender diversity within their boards compared to those companies with the least gender diverse boards).

[4] *See* Goodman & O'Kelley, *supra* note 1.

[5] NANCY LEONG, IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY (2021).

[6] *Id.* at 5–6.

[7] *See, e.g.*, *id.* at 17, 108–10, 115–17, 121–25, 130–33.

[8] *Id.* at 135, 138, 140, 143, 147–48, 154.

[9] *Id.* at 159.

is an opportunity for the law to go beyond protection. At the corporate board table where such great power resides, the law could instead generate greater "returns" for outgroups by ensuring that their members have seats of meaningful power and influence. I begin by describing current trends relating to the composition of public company boards of directors. Next, I turn to recent statutory efforts, specifically in California, to move the needle on the diversity of these boards. Finally, through the lens of identity capitalism, I argue that lawmakers have a chance to proactively solidify the power and influence of outgroup directors of corporate boards and limit the inadvertent reinforcement of identity capitalism.

I. Corporate Board Composition and the Push for Change

The size and composition of a public company's board of directors is shaped, among other things, by the law in its state of formation and the standards of the stock exchange on which it is listed. The American Bar Association's Model Business Corporation Act, which has been adopted in some form by the majority of states, requires only that a business corporation have at least one director.[10] The same is true in Delaware,[11] the state in which the greatest number of corporations are formed.[12] The scant membership requirements of the New York Stock Exchange and Nasdaq focus largely on there being at least three independent members of a company's audit committee.[13] Governance experts suggest that corporate boards should include between nine and twelve directors and should limit director tenure.[14] While the standards are limited, there is a great deal of consistency in the size and composition of public company boards. In May 2021, the average size of the board of directors of S&P 500 corporations was 10.8.[15] The boards of the Top 100 companies had between seven and seventeen

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[10] MODEL BUS. CORP. § 8.03(a) (AM. BAR. ASS'N 2021); *see* Am. Bar Ass'n, *Corporate Laws Committee*, ABA, https://perma.cc/7H2E-YJF7 (last visited Apr. 6, 2022) (regarding enactment by states).

[11] DEL. CODE ANN. TIT. 8, § 141(b) (2020).

[12] Elaine Zelby, *How Delaware Became the State Where Companies Incorporate*, MEDIUM (Jan. 30, 2019), https://perma.cc/FG8B-EFK4.

[13] *See* Nasdaq, *5600. Corporate Governance Requirements*, LISTING CENTER: NASDAQ IM-5605-3, IM-5605-4, https://perma.cc/5G8Y-599H (last visited April. 6, 2022); *Listed Company Manual: 303A.07 Audit Committee Additional Requirements*, NYSE § 303A.07(a), https://perma.cc/MZM8-YYSN (last visited Apr. 6, 2022).

[14] *See, e.g.*, Robert Reiss, *The 10 Best Practices for an Effective Board*, FORBES (Nov. 25, 2015, 8:47 AM EST), https://perma.cc/7XZ7-7BY7.

[15] SPENCER STUART, 2021 U.S. SPENCER STUART BOARD INDEX 9, 43 (2021), https://perma.cc/4B6D-E6ZD [hereinafter BOARD INDEX].

members, with over 70% of those companies having boards with ten to thirteen directors.[16] The question is then, who is sitting in those board seats?

According to a 2020 analysis by the Environmental Social and Governance ("ESG") division of Institutional Shareholder Services, Black directors made up 4% of the membership of boards of the Russell 3000, with Black women making up just 1.5%.[17] In the same year, 13.4% of those companies still did not have a single woman on their board.[18] At the same time, less than 15% of board leaders, including in this case the independent board chair, audit committee chair, and compensation committee chair, identified as being from historically underrepresented racial or ethnic groups.[19] These somber statistics are, regretfully, signs of progress.

Between 2019 and 2020, the number of new Black directors joining Fortune 500 company boards tripled.[20] The following year the percentage of directors within the Russell 3000 who identified as Black, Asian, Hispanic, Middle Eastern or from another nonwhite ethnic group increased from 14% to 17%.[21] For women, the glass ceiling in Fortune 500 companies finally broke in 2019 when for the first time there were no all-male boards.[22] This notable benchmark came near the end of a decade of significant, but inconsistent, progress.[23] Between 2011 and 2021, the percentage of women serving as directors of S&P 500 companies increased from 16% to 30%.[24]

This progress, admittedly insufficient and inconsistent, has been demanded by shareholders, employees, customers, and the broader community.[25] In many cases, spurred by protests that followed the murder

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[16] SHEARMAN & STERLING LLP, CORPORATE GOVERNANCE AND EXECUTIVE COMPENSATION SURVEY 2021 33 (2021), https://perma.cc/UG72-FKXN.

[17] Peter Eavis, *Diversity Push Barely Budges Corporate Boards to 12.5%, Survey Finds*, N.Y. TIMES (Sept. 15, 2020), https://perma.cc/P83U-79ZS [hereinafter Eavis, *Diversity Push*].

[18] Matteo Tonello, *Corporate Board Practices in the Russell 3000 and S&P 500*, HARV. L. SCH. F. CORP. GOVERNANCE (Oct. 18, 2020), https://perma.cc/3G38-VWDU.

[19] BOARD INDEX, *supra* note 15, at 23.

[20] Jeff Green, *Black Directors Gained Ground in the Boardroom as Others Slipped*, BLOOMBERG (June 18, 2021, 7:00 AM EDT), https://perma.cc/ES8K-VY5J.

[21] Peter Eavis, *Board Diversity Increased in 2021. Some Ask What Took So Long.*, N.Y. TIMES (Jan. 3, 2022), https://perma.cc/T6YG-AEEN.

[22] Vanessa Fuhrmans, *The Last All-Male Board on the S&P 500 Is No Longer*, WALL ST. J. (July 24, 2019, 5:20 PM EST), https://perma.cc/D3HF-REUC.

[23] *See* Tonello, *supra* note 18.

[24] BOARD INDEX, *supra* note 15, at 4.

[25] *See* Chauncey Alcorn, *George Floyd's Death Was a Wake-up Call for Corporate America. Here's What Has—And Hasn't—Changed*, CNN, https://perma.cc/NGN3-LC47 (last updated Oct. 7, 2021, 7:00 PM EDT).

of George Floyd in June 2020, companies have made and acted on commitments to add Black directors to their boards.[26] We can construe efforts by companies to make changes to the composition of their boards in a number of ways. At best, these changes reflect meaningful, purposeful, and earnest efforts to expand and enhance the representation and influence of historically underrepresented groups in a company's leadership. At worst, some companies may be checking a box, and in doing so leveraging the identity capital of outgroup directors to avoid potential scorn (and financial penalties) for holding onto their all-white or all-male boards.[27] Blatant identity capitalism, as described by Professor Leong, exists at every level and in every realm of our society.[28] To the extent that some public companies are exploiting the identities of their directors, the law may be part of the solution.

II. State Corporate Law as an Invitation to the Table

In laying out principles for undermining the power of identity capitalism, Professor Leong explains that "the law itself is . . . a powerful tool for addressing identity capitalism."[29] This notion, that the law can help to dismantle and then reconstruct racist and sexist structures that permeate business, education, and society, is evident in recent legislative efforts to increase board diversity. The question though, as Professor Leong insists we ask, is whether these new legal tools are weakening or buttressing the power of identity capitalism.

In 2018, California enacted SB-826 with the worthy goals of accelerating gender parity and gender equity in the workplace.[30] The means of achieving

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[26] For example, in September 2020, three Silicon Valley executives founded The Board Challenge, "a movement to improve the representation of Black directors in corporate U.S. boardrooms . . . ." Approximately twenty-five companies joined The Board Challenge, committing to add one Black director to their board in the next year. *About Us*, THE BOARD CHALLENGE, https://perma.cc/MR6T-MZDG (last visited Apr. 6, 2022). Others, like Best Buy, Merck, Southwest, and Verizon, which each already had at least one Black director, joined as Charter Pledge Partners and committed to using their resources to accelerate change more generally. *See The Board Challenge Mission Is Clear*, THE BOARD CHALLENGE, https://perma.cc/FJM9-US72 (last visited Apr. 6, 2022).

[27] *See* LEONG, s*upra* note 5, at 7 (defining identity capitalism as "an effort to gain the [benefit] associated with diversity without doing any of the difficult work to make substance racial progress a reality").

[28] *See, e.g.*, LEONG, *supra* note 5, at 4, 13–16, 24, 32 (describing acts of identity capitalism by Senator Bernie Sanders, the University of Wisconsin, Facebook, and Nike).

[29] LEONG, supra note 5, at 157.

[30] *See* CAL. CORP. CODE §§ 301.3(a), 2115.5 (West 2021) (codifying the bill); *SB 826: Women on*

these goals was to require that public companies whose principal executive offices were in California have at least one woman on their board by the end of the following year or be subject to a fine of $100,000.[31] This initial requirement was followed by an expectation that by the end of 2021 any public companies with five board members would have at least two women on their boards and that companies with six or more board members would have at least three women serving as directors.[32] SB-826 specifically allows for companies to increase the size of their board in conjunction with satisfying the law's requirements.[33] According to at least one initial report, SB-826 appears to have succeeded in spurring an increase in the number of women on the boards of public companies based in California.[34] Between 2018 and the end of 2021, the number of women serving on public company boards in California increased from 766 to 1844, decreasing the percentage of boards without a single woman director from 30% to 1%.[35]

Two years after adopting SB-826, California enacted AB-979, which required that by the end of 2021 public companies headquartered in the state include on their boards at least "one director from an underrepresented community," defined as an individual who self-identifies as Black, Latino, Hispanic, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native or as lesbian, gay, bisexual, or transgender ("LGBT").[36] In 2022, AB-979 requires companies with four or more board members to have minimum of two directors from underrepresented communities and those with nine or more board members to have a minimum of three directors from underrepresented communities.[37]

Corporate Boards, NAWBO: NAT'L ASSOC. WOMEN BUS. OWNERS, https://perma.cc/6YP7-2K9D (last visited Apr. 6, 2022).

[31] CAL. CORP. CODE §§ 301.3(a),(e), 2115.5.

[32] CAL. CORP. CODE § 301.3(b).

[33] *Id.* at 301.3(a).

[34] *See* Samantha Burdick et al., *Legal or Not, It's Working: Mandatory Board Diversity for Publicly-held Companies Headquartered in the Golden State*, JD SUPRA, (Apr. 15, 2021), https://perma.cc/5BRH-Z97Q.

[35] *Women on Boards: Just the Facts*, CAL. PARTNERS PROJECT, https://perma.cc/XY77-TVGV (last visited Apr. 6, 2022). While this data suggests there has been substantial change since the law was passed, a March 2021 report from the California Secretary of State's office tells a less clear picture—less than half of the corporations subject to the law submitted their statutorily required filings. *See* Women on Boards: March 2021 Report 3 (Cal. Sec'y of State Mar. 2021), https://perma.cc/GQS3-QLDL.

[36] CAL. CORP. CODE § 301.4(a), (e)(1) (codifying the language of the bill); 2020 Cal. Stat. ch. 316.

[37] CAL. CORP. CODE § 301.4(b).

Though not the first legislative efforts to impact board diversity,[38] SB-826 and AB-979 have prompted significant attention—both positive and negative. Several states followed California's lead by adopting resolutions and statutes that urge or require companies to diversify the membership of their boards.[39] Others passed or are considering bills that, like recently approved Nasdaq diversity disclosure rules,[40] require companies to disclose the racial and gender composition of their boards.[41] Washington state combined the two approaches, requiring that public companies that do not "have a gender-diverse board of directors" with women constituting at least 25% of directors must provide a report to shareholders on the company's plans and policies relating to the development and maintenance of board diversity.[42]

At the same time, SB-826 and AB-979 have faced various and anticipated legal challenges.[43] The first challenge, *Crest v. Padilla*, was filed on behalf of

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[38] In 2013, California's legislature adopted a resolution encouraging public companies to increase the number of women on their boards by the end of 2016. S. Con. Res. 62, 2013–2014 Legislature, Reg. Sess. (Cal. 2013). This non-binding resolution failed to convince more than one-quarter of public companies based in California to add women to their boards. 2018 Cal. Stat. ch. 954, § 1(b), (e)(2). In 2017, Colorado passed a similar non-binding resolution encouraging companies to include a minimum number of women on their boards. H.R.J. Res. 17-1017, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017).

[39] *See, e.g.*, 805 ILL. COMP. STAT. 5/8.12 (2022); 805 ILL. COMP. STAT. 5/14.05(k) (2021); WASH. REV. CODE § 23B.08.120 (2020); S. 2080, 192d Gen. Court, Reg. Sess. (Mass. 2021).

[40] *See* Allison Herren Lee & Caroline A. Crenshaw, *Statement on Nasdaq's Diversity Proposals – A Positive First Step for Investors*, U.S. SEC. & EXCHANGE COMMISSION (Aug. 6, 2021), https://perma.cc/SJ9G-LNZR (announcing Securities Exchange Act Release No. 34-92590).

[41] *See, e.g.*, *Gender Diversity in the Boardroom – Annual Report*, 2019 Md. Laws ch. 513, https://perma.cc/9QNV-WEWU (requiring domestic corporations to report the number of women on their board on their personal property tax filing); S. Res. 4278, 2019-2020 Legislature, Reg. Sess. (N.Y. 2019) (requiring domestic and foreign companies, whether public or private, to report on the number of women serving on their board of directors to facilitate a study by Departments of State and Taxation and Finance).

[42] WASH. REV. CODE § 23B.08.120.

[43] *See, e.g.*, Meland v. Weber, 2 F.4th 838, 849 (9th Cir. 2021) (reversing District Court dismissal for lack of standing of challenge by shareholder of SB-826); Compl. for Declaratory & Injunctive Relief, Nat'l Ctr. for Pub. Policy Research v. Weber, https://perma.cc/KEA4-CD6F (E.D. Cal. Nov. 22, 2021) (No. 2:2021CV02168); Compl. for Declaratory & Injunctive Relief, Crest v. Padilla, https://perma.cc/Q3QW-5X39 (Ca. Super. Ct. Aug. 6, 2019) (No. 19STCV27561) (hereinafter Crest I Complaint). Both the legislature and Governor Brown acknowledged in adopting these laws that they would likely be challenged. *See, e.g.*, Michael Burdick, *SB 826*, Assemb. Floor Analysis No. 0004503, 2017–2018 Legislature, Reg. Sess. 4 (Cal. 2018), https://perma.cc/7XZD-NQYK; S. Rules Comm., *AB 979*, S. Floor Analyses, 2019–2020 Legislature, Reg. Sess. 6–7 (Cal. 2020), https://perma.cc/M8HF-4PNH; Letter from Edmund G.

three California taxpayers who claim that enforcement of SB-826 requires the state to illegally use taxpayer funds to enforce a law that discriminates on the basis of gender in violation of the California constitution.[44] More recently, the Alliance for Fair Board Recruitment filed a complaint in July 2021 arguing that SB-826 and AB-979 violate the Equal Protection Clause of the 14th Amendment, 42 U.S.C. § 1981, and the internal affairs doctrine.[45] Interestingly (and perhaps not surprisingly), the Alliance for Fair Board Recruitment (the "Alliance") was formed by Edward Blum,[46] who Professor Leong describes as being "on a crusade to reshape laws relating to race" by assuming "the mantle of a crusader for racial justice," all the while usurping the voice of outgroup members.[47] Here again we see Blum's strategy of forming straw organizations to speak on behalf of those allegedly disadvantaged by laws that aim to create greater equality and opportunity. With respect to SB-826 and AB-979, the Alliance argues that it represents a "former corporate board director," who by virtue of these laws and his being a white male is being "deprived of an equal playing field on which to compete for board positions at corporations headquartered in California."[48] Unlike his attacks on university affirmative action programs, in the argument against SB-826 and SB-797 Blum does not deploy window dressing (in the form of outgroup member plaintiffs) around his opposition to these laws that take prior racial and sex discrimination and disadvantage into account. Despite not recruiting them as plaintiffs, the Alliance makes brief mention in its complaint of theoretical outgroup allies[49], who might

Brown, Jr., Governor of Cal., to the Members of the California State Senate (Sept. 30, 2018), https://perma.cc/JPN7-ZMR6.

[44] *See* Crest I Complaint, *supra* note 43, at ¶19. In April 2022, the same plaintiffs were granted summary judgment by the Los Angeles County Superior Court in a challenge to SB-979 based on similar grounds. *See* Ct. Order, Crest v. Padilla, https://perma.cc/RZL4-PSRQ (Ca. Super. Ct. Apr. 1, 2022) (No. 20STCV37513). This decision is expected to be appealed to California Court of Appeal. *See* John P. Stigi III, Alejandro E. Moreno & Chloe Chung, *Los Angeles Superior Court Invalidates California Board Diversity Statute, Rendering It Ripe for Review by the California Court of Appeal*, NAT. L. REV. (Apr. 8, 2022), https://perma.cc/EK69-XZT8.

[45] Compl. for Declaratory and Injunctive Relief ¶¶45–65, Alliance for Fair Bd. Recruitment v. Weber, https://perma.cc/7NDC-FXPY (C.D. Cal. July 12, 2021) (No. 2:21CV05644) (hereinafter Alliance Complaint).

[46] Jody Godoy, *Activist Behind Harvard Race Case Takes Aim at Calif. Board Laws*, REUTERS (July 13, 2021, 5:56 PM EDT), https://perma.cc/KEU8-LLYJ.

[47] LEONG, *supra* note 5, at 137, 139–40.

[48] Alliance Complaint, s*upra* note 45, at ¶10.

[49] *See* Alliance Complaint, *supra* note 45, at ¶¶ 38–39 (noting that the definition of underrepresented communities does not include certain ethnic groups or gender non-conforming individuals).

improve the optics of "white people complaining that groups they have systematically disadvantaged for decades or centuries might now have that disadvantage taken into account."[50] According to the Alliance, the California laws fail to include Arabs, Armenians, those who identify as gender non-conforming or intersex, and others within the definition of those from underrepresented communities.[51] Whether members of these groups were unwilling to participate in the Alliance or if Blum did not have the gall to seek them out is of little importance. The interests of these outgroup members is not, we can be sure, Blum's real fight. Instead, the Alliance's prime argument against SB-826 and AB-979 focuses on the harm to white men who have long sat at the most powerful tables in our country.

While analysis of the legal arguments offered by the parties in these cases (and in the other pending challenges) is beyond the scope of this response, Professor Leong's identity capitalism framework poses a different and compelling question about whether laws like SB-826 and AB-979 are structured to effectively dismantle inequities or instead carry the risk of encouraging identity capitalism at the highest corporate levels.[52]

III. A Voice at the Table

Getting seats at the corporate board table for women, Black people, and other outgroup members is a necessary step in the direction of true equity in corporate America. But it is not enough.[53] If complying with a new state law by adding more diverse members to a company's board of directors is a mere "business strategy," further commodification of outgroup member identity may be an unintended side effect.[54] Authentic efforts to include outgroup members will require that relevant laws and policies acknowledge the risks

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[50] *Cf.* LEONG, *supra* note 5, at 138–39 (discussing a similar "optical improvement" in Blum's affirmative action case where Blum is ostensibly advocating for "hardworking Asian Americans who suffered discrimination at the hands of elite universities").

[51] Alliance Complaint, *supra* note 45, at ¶39.

[52] For scholarly discussion of SB-826, *see, e.g.*, Christopher J. Riley, *An Equal Protection Defense of SB 826*, CALIF. L. REV. ONLINE (2020), https://perma.cc/3P8X-75FV; Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826* 1 (Rock Ctr. for Corp. Governance, Working Paper No. 232, Sept. 12, 2018), https://perma.cc/HF7V-ATNM. For a thoughtful piece on alternatives to state corporate law changes, *see* Sunitha Malepati, *The Future (Public Company Boardroom) Is Female: From California SB 826 to a Gender Diversity Listing Standard*, 28 AM. U. J. GENDER SOC. POL'Y & L. 493 (2020).

[53] *See* LEONG, s*upra* note 5, at 25 (addressing the incremental value and inadequacy of mandates to diversify).

[54] LEONG, *supra* note 5, at 23 (describing identity capitalism as a business strategy for counteracting negative publicity).

of tokenism and proactively ensure that outgroup directors are sitting in seats of real power. To extend Professor Leong's analogy of capital, we should ask whether new efforts and evolving laws leverage the capital of outgroup members to increase their principal or if they instead subject that capital to unnecessary or excessive risk.

By requiring a fixed number of diverse board members, SB-826 and AB-979 may allow for the perception by some that female, LGBT, and racially diverse board members have been selected primarily for their outgroup identity and secondarily for their expertise and knowledge.[55] This has the potential to limit the power of these laws to undermine the stronghold of identity capitalism. Even beyond the risk of their substantive contributions being dismissed or undervalued, there is the risk that, without a critical mass, outgroup directors will not be positioned to meaningfully impact the boards on which they sit.[56] The California legislature acknowledged this reality, describing that "going from one or two women directors to at least three women directors, creates an environment where women are no longer seen as outsiders and are able to influence the content and process of board discussions more substantially."[57] And yet, a company with a small board may comply with SB-826 and AB-979 with only one woman and one person from an underrepresented community on its board. Alternatively, a larger board may expand significantly and inadvertently (or intentionally) dilute the critical mass achieved by meeting the laws' minimum requirements.[58] For example, the influence of three women on a nine-member board is potentially quite different from their influence on a board of fifteen or more members. While it is clear the California legislature intended to address the issue of tokenism, the thresholds in laws like SB-826 and AB-979 should be monitored and adjusted as needed to ensure that new directors do not become isolated or find their power diluted. One simple approach to the

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[55] *See* Mariateresa Torchia, Andrea Calabrò & Morten Huse, *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 J. OF BUS. ETHICS 299, 301 (2011).

[56] *See* VICKI W. KRAMER, ALISON M. KONRAD & SUMRU ERKUT, CRITICAL MASS ON CORPORATE BOARDS: WHY THREE OR MORE WOMEN ENHANCE GOVERNANCE (EXECUTIVE SUMMARY) 2-4 (2006), https://perma.cc/8WQ7-NXDZ; Torchia et al., s*upra* note 55, at 311.

[57] 2018 Cal. Stat. ch. 954. Assembly Bill 979 did not include similar language addressing the need for a critical mass among directors from underrepresented communities. *See*2020 Cal. Stat. ch. 316. Presumably, the same theory applies, but is perhaps more difficult to demonstrate when the pool of potential board members and the variety of their lived experiences is so much broader than in the context of gender.

[58] *See* CAL. CORP. CODE §§ 301.3(a), 301.4(a) (West 2021) (outlining the requirements); s*ee also* Maria Moats & Paul DeNicola, *You Say You Want a More Diverse Board. Here's How to Make it Happen.*, HARV. BUS. REV. (Mar. 11, 2021), https://perma.cc/5LX6-DUZ8.

dilution challenge would be setting minimum numbers to address the actual number of the largest companies subject to any particular law.

In conjunction with monitoring the relative number of outgroup directors serving on corporate boards, attention must be paid to the seats in which those directors sit.[59] According to the ESG division of Institutional Shareholder Services:

> directors from underrepresented groups [are] much less likely to have positions with the most influence over the direction of companies and their boards. Nine out of 10 people in those positions — the board chair, the head of the committee that recruits top executives and new board members, and the head of the committee that sets compensation for senior executives — are white.[60]

Women, and other outgroup directors, who are not occupying the board or committee chair seats risk being sidelined while providing those in power with an arguable claim that diversity matters to them.[61] As legislatures consider corporate diversity threshold and disclosure laws, turning attention beyond simple membership numbers to the specific roles played by board members has the potential to undercut the ability of identity capitalists to tell a story of diversity without real substance. More detailed disclosure requirements relating to leadership positions and to director tenure, while not necessarily ensuring the ascendance of outgroup directors to committee and board chair positions, have the potential to shed additional light on this issue and in so doing to create greater power in the hands of outgroup directors.

CONCLUSION

The drumbeat for representation and inclusion in the corporate board room has been building for some time and rightly is not getting any quieter. Investors, employees, and customers—and in the passage of laws like California's SB-826 and AB-979 lawmakers and citizens—are expecting progress. As outlined by Professor Leong, real progress, rather than identity

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[59] Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J.145, 196 (2019) (asserting need for more substantive diversity disclosure requirements, including the leadership roles played by men and women).

[60] Eavis, *Diversity Push*, *supra* note 17.

[61] Professor Leong artfully demonstrates this risk in her description of the treatment by the Senate Republicans of Rachel Mitchell, the prosecutor retained to interrogate Christine Blasey Ford during the hearings on the nomination of Supreme Court Justice Brett Kavanaugh. *See* LEONG, *supra* note 5, at 177.

capitalism in the cloak of progress, will require both legal and social reform. Laws aimed at reshaping corporate boards to better reflect the expertise and experiences of the nation's best leaders have shown initial success in increasing the number of individuals from traditionally underrepresented groups. The true test of our will to topple identity capitalism at the corporate board table will depend on the vision of policymakers in crafting standards that generate meaningful representation of and engagement with outgroup corporate directors.

Disability Diversity and Identity Capitalism

NICOLE BUONOCORE PORTER*

INTRODUCTION

I first read Professor Nancy Leong's compelling book *Identity Capitalists: The Powerful Insiders Who Exploit Diversity to Maintain Inequality*[1] when I was asked to provide a pre-publishing peer review.[2] I was equal parts captivated and troubled by the numerous examples of identity capitalism (and its counterpart, identity entrepreneurialism) that I had never thought about, and perhaps even acquiesced in.

So, what is identity capitalism? As explained by Leong, identity capitalism is when members of an "ingroup" (think: white, straight, able-bodied, male) benefit through their interactions with members of an "outgroup."[3] Leong draws the reader in with a simple example—white people using their personal friendships or relationships with people of color to show that they are not racist. In Leong's case, the white person was an old college friend who invited Leong (a person of color) to the friend's wedding and, at said wedding, admitted to Leong that she (the friend) was glad Leong could attend the wedding because, if Leong had not, all of the wedding

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1 NANCY LEONG, IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY (2021).

2 For those unfamiliar, before most (if not all) academic books are published, the manuscript gets sent to a few scholars that are knowledgeable about the subject area. Those reviewers are then asked to provide a written commentary about the manuscript—what they liked, what might need improvement, etc. The author then makes final edits to the manuscript considering the peer reviewer's comments. This, of course, does not mean the author agrees with or accepts all suggestions. It is, after all, the author's book. But sometimes it gives the author a new perspective to consider.

3 LEONG, *supra* note 1, at 7.

guests would have been white.[4] At an institutional level, some of the more troubling examples of identity capitalism involve educational institutions doctoring photos in college brochures to make a college seem more diverse than it is[5] or politicians whose policies clearly harm most people of color emphasizing their relationships with a select few people of color to send the message that they are not racist (despite policies and other evidence that demonstrate otherwise).[6]

But in all honesty, I was troubled after my initial review of the manuscript because I had the sense that Leong was suggesting that diversity itself is bad, or at least that concentrating on diversity is bad. Upon my review of the published book, I was happy to see that my concerns were unwarranted. In the published book, Leong takes care to argue that it is not diversity itself that is bad—it is the fact that people and institutions capitalize on that diversity in a way that benefits the institution and harms the members of the groups that are supposed to be the beneficiaries of diversity efforts.[7]

Accordingly, with that concern addressed, my second read of this book highlighted a different issue—what about disability? And, more specifically, what does it mean to include disability as part of diversity initiatives? I will use this essay to address that issue. But first, I will briefly summarize the book in Part I and provide my thoughts and impressions of the arguments Leong makes. Then in Part II, I will explore what identity capitalism means for disability diversity.

I. Leong's Book

To start, let me provide my overall impression of this book:[8] It is thought-provoking and entertaining. It expertly weaves the personal with the political, and individual relationships with institutional hierarchies. It exposes a problem that is ubiquitous but has not been explored for a general audience. But instead of just exposing the prevalence and problem of identity capitalism and entrepreneurism, Leong helps the reader think about practical solutions.

Using examples from her personal life, along with examples from history, entertainment, politics, and other public places (e.g., corporations

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4 LEONG, *supra* note 1, at 1.

5 LEONG, *supra* note 1, at 26.

6 LEONG, *supra* note 1, at 18–20.

7 *See* LEONG, *supra* note 1, at 15.

8 *See* LEONG, *supra* note 1 (deriving summary in part from Porter's blurb written for the book jacket).

and universities), Leong explores what identity capitalism is and why it is harmful. As discussed above, identity capitalism occurs when members of an ingroup (generally: white, heterosexual, able-bodied, male) use members of an outgroup (those who differ on one or more measures of sex, race, sexual orientation, etc.) to benefit the ingroup. Leong explains in this book why identity capitalists are harmful to both the members of the outgroup (who often recognize that they are being used as a tool to benefit the ingroup), but also harmful for attempts to actually create a more inclusive society. Below I will provide a quick summary of each chapter before turning to my general impressions.

A. *Chapter Summary*

The introductory chapter sets the stage; the wedding example I mentioned briefly above introduces the concepts of identity capitalism to the reader and explains why it is harmful. Leong also introduces the concept of identity entrepreneurs in this chapter, the most prominent example being Diamond and Silk, two black women who have made a career out of vouching for the Republican party and, specifically, for Donald Trump. These women "actively leveraged their identity as black women and used it to their advantage."[9] Moreover, Leong describes the harm caused by identity entrepreneurs like Diamond and Silk—they damage the "interests of their own outgroup while yielding rewards for a few privileged outgroup members."[10]

1. Fake Diversity

In this chapter, Leong explores the most obvious examples of identity capitalism—when people or institutions embellish their relationships with members of an outgroup in order to achieve some benefit. For instance, universities might embellish actual minority enrollment by doctoring photos. In one particularly egregious example, the University of Wisconsin photoshopped the face of a black student into a picture taken at a football game, but this student had never attended a football game. The admissions booklet with this photo on the front cover was sent to over 100,000 prospective students.[11] Another example is when presidential candidate John McCain chose Sarah Palin for his running mate, with the hope that she would attract some female voters that might otherwise have voted for Obama. Law firms and other companies plastering their websites with

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[9] LEONG, *supra* note 1, at 7–8.
[10] LEONG, *supra* note 1, at 9.
[11] LEONG, *supra* note 1, at 13.

photos of employees of color are also identity capitalists.[12] Individuals who rebut a claim of racism, homophobia, or sexism by pointing to their one black friend, their one gay friend, or, in the case of Justice Kavanaugh, the parade of women who supported him, are all identity capitalists.[13] Leong rightfully points out why these attempts at identity capitalism are nonsensical. Trump can still be (and is, in my opinion) a racist even though he has a few black friends. Someone can vehemently oppose any laws that provide rights to LGBTQ+ individuals while at the same time having one gay friend (even if that friendship is genuine). And Justice Kavanaugh clearly could have assaulted his high school acquaintance despite the fact that there are many women who he treats well enough to have earned their support. Finally, this chapter explains why this "fake diversity" is harmful. I address this more below.[14]

2. All-American Exploitation

This chapter starts with the history of identity capitalism, explaining how identity capitalism has been around for centuries. Specifically, Leong discusses the "lies of slaveholders," who attempted to justify slavery by using identity capitalism—falsely claiming that actual slaves reported being happy as slaves.[15] Another historical example is male anti-suffragists using their wives and other women to make the claim that women should not have the right to vote. Even back then, politically astute men understood that it was better to have a woman say "I don't want to vote and I think voting would be bad for me and bad for all women" than it was for the men themselves to make the same argument.[16] Historically, Leong pinpoints the 1978 Supreme Court decision in *Regents of the University of California v. Bakke*,[17] where Justice Powell's opinion accepted diversity as a lawful rationale for affirmative action in higher education, as the moment in time when diversity became so popular.[18] Finally, this chapter turns to the age of Trump to illustrate the connection between racism and misogyny and to demonstrate that identity capitalism is often about an ingroup being anxious to keep the power they have, even if that power was gained on the backs of

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[12] LEONG, *supra* note 1, at 23–29.

[13] LEONG, *supra* note 1, at 19–21.

[14] *See infra* Part II(B).

[15] LEONG, *supra* note 1, at 41–46.

[16] *See* LEONG, *supra* note 1, at 46–49.

[17] 438 U.S. 265 (1978).

[18] LEONG, *supra* note 1, at 54–59.

an outgroup.[19]

3. Anxiety and Absolution

Building on the theme of anxiety about loss of power, Chapter 3 explores the psychology behind identity capitalism. Specifically, most people are anxious about their status, and some of this anxiety surrounds race. In other words, white people are deeply afraid of being considered racist. Men are anxious about being considered sexist.[20] Leong also describes what she calls "status leaks," which is when an ingroup's use of a relationship with someone in an outgroup improves the reputation of the ingroup member while simultaneously harming the reputation of the outgroup member.[21] Here and throughout the book, Leong uses pop cultural references (television shows, movies, famous musicians, etc.) of people engaging in identity capitalism to demonstrate her point. I believe it makes the book more relatable for a broad audience (and more entertaining).

4. Identity Entrepreneurs

As the title demonstrates, this chapter is devoted to the other side of the problem—identity entrepreneurs, those outgroup members who use their identity as an outgroup member to gain some social capital. Sarah Palin used her gender, the five stars of the Queer Eye use their sexual orientation, Asian porn stars use their ethnicity to become more famous porn stars, many of us use our outgroup status to get invited on to a panel at a conference to avoid the panel being all white men, and so on.[22] Although Leong is careful to note that identity entrepreneurs are not inherently bad or doing something wrong, she also identified problems with identity entrepreneurship. Specifically, it often reinforces stereotypes about a particular identity, making life more difficult for other outgroup members who do not match such stereotypes.[23]

5. Unequal Protection

This chapter explores how the law reinforces identity capitalism. Although there are many examples, I want to highlight the ones I am most familiar with—sexual harassment and sex discrimination in the workplace.

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19 LEONG, *supra* note 1, at 59–62.

20 LEONG, *supra* note 1, at 63–67.

21 LEONG, *supra* note 1, at 69.

22 LEONG, *supra* note 1, at 83–98.

23 LEONG, *supra* note 1, at 106–07.

In the sexual harassment context, men engage in identity capitalism by using their power over women to make them the subject of their "crude jokes and sexualized power plays."[24] And women who tolerate harassment in order to avoid negative job consequences can be seen as identity entrepreneurs, albeit very sympathetic ones.

In the anti-discrimination context, the problem is more evident. Courts engage in at least two practices that harm employees who bring discrimination claims against their employers. First, employers use the fact that someone in a decision-making process is a member of the same outgroup as a plaintiff to successfully defend against a discrimination claim. In other words, if an employer has a black person on a committee that made a promotion decision, a black woman who does not get the promotion and believes discrimination was the reason will have an uphill battle in winning her claim. The assumption is that a black person will not discriminate against another black person, a woman will not discriminate against a woman, etc. And yet we know this is not true.[25] The second practice employers use to win discrimination claims is to make sure they treat well individuals who are of the same outgroup as a plaintiff; when this happens, courts often have a difficult time seeing the adverse decision as discriminatory. For example, a law firm might promote four black female attorneys and refuse to promote one black female attorney. Even if there is evidence that the decision was race-based (the attorney who was not promoted was the "wrong kind of black woman"),[26] the court will often be blinded by the fact that four black women were promoted. As Leong states, "The result is a particularly ugly form of identity capitalism: using favored members of an outgroup to mask discrimination against a disfavored member."[27]

6. The Law of Identity Capitalism

This chapter moves beyond anti-discrimination law to demonstrate the influence of identity capitalism throughout the laws and legal system of the United States.[28] First, opponents of affirmative action have made efforts to find a few Asian Americans who oppose affirmative action, knowing that the arguments against race-based affirmative action will be more compelling from a plaintiff who is a person of color.[29] Second, despite a law prohibiting

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[24] LEONG, *supra* note 1, at 109–10.

[25] LEONG, *supra* note 1, at 112–15.

[26] LEONG, *supra* note 1, at 119.

[27] LEONG, *supra* note 1, at 120.

[28] LEONG, *supra* note 1, at 137.

[29] LEONG, *supra* note 1, at 137–41.

it, it is very easy for attorneys to strike potential jurors based on their race, leading to the situation that many black criminal defendants are tried before juries that do not look anything like them.[30] Third, women who regretted their abortions have been used to convince the Supreme Court to allow more stringent abortion restrictions despite the fact that those women speak for only a minority in the same position.[31] As Leong sums up, "Identity capitalism permeates both the substantive law—the statutes, regulations, and doctrines that govern us—and the legal process itself—the way the law is invoked, enforced, applied, and modified."[32]

7. Boycott

This chapter begins a two-chapter exploration of possible solutions. After exploring how and why identity capitalism is problematic, Leong turns to what efforts can be made to discontinue (or at least decrease) the use of identity capitalism in the law and in our lives. She suggests four guiding principles that should apply equally to individuals and institutions: honesty, apology, education, and authenticity. There are plenty of examples in this chapter of good and bad apologies, ways to educate yourself, identifying when education might be more helpful than punishment, and recognizing how politicians and others should be authentic about who they are and what they believe in.[33]

8. Conclusion: We, Identity Capitalists

This final chapter brings the book full-circle and back to a more personal perspective, where Leong recognizes that all of us (even Leong) might, at times, be identity capitalists or identity entrepreneurs. While doing so, she reinforces the lessons learned in the prior chapter.[34]

B. *The Good and Bad of Diversity*

As I mentioned in the introduction, despite really loving the manuscript on my first read (as much as one can "love" a book that exposes and explores such a difficult topic), my main concern was that it seemed to me Leong was suggesting that diversity itself is bad, and certainly that highlighting diversity (even a completely accurate portrayal) is bad. I wondered why it

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[30] LEONG, *supra* note 1, at 141–44.

[31] LEONG, *supra* note 1, at 148–51.

[32] LEONG, *supra* note 1, at 157.

[33] LEONG, *supra* note 1, at 157–80.

[34] LEONG, *supra* note 1, at 181–90.

was not better to attempt to have a diverse institution (whether a student body or workforce) than to not care about diversity at all. In other words, although I was deeply troubled by educational institutions photoshopping pictures for their brochures to make their pictures appear more diverse, I was not quite sure why it was harmful for an educational institution to attempt (through legitimate, non-photoshopping means) to highlight the actual diversity of the institution. For instance, if an educational institution has a student body that is 10% minorities, it seemed unobjectionable to me for that institution to ensure that a photo that has 10 students in it has one student of color (assuming the person of color is actually a student and was actually present for the taking of the photo). Of course, most institutions over-emphasize their diversity, so even with only a 10% minority student body, a picture of four students might have one black student and one Asian student, which is a misrepresentation of the actual diversity of the student body. I understood the problem with misrepresentations of diversity, but not truthful representations of diversity.

In the final published book, Leong takes care to explain that diversity itself is not necessarily harmful.[35] In fact, research reveals that "diversity improves outcomes in many areas of human endeavor."[36] And she states that even "showcasing diversity is not necessarily a bad thing" as it "communicates that diversity is important to the institution doing the showcasing . . . ."[37] But problems arise when the displays of diversity misrepresent reality and mislead the viewer.[38]

Moreover, even when statements or pictures marketed to the public accurately represent the actual diversity, it still might be problematic. As Leong explains, diversity mandates might "create incentives for an identity capitalist to game the system rather than actually make substantive changes such as hiring more outgroup members or creating the conditions that organically attract a diverse work force."[39] For instance, a diversity statement might mean that the company assumes that it has solved the problem and does not need to care or try any longer. Or perhaps a company hires many women but does not treat them well, making it a toxic environment for women and interfering with diversity at the highest

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[35] LEONG, *supra* note 1, at 25 ("Mandates to diversity—whether formal or informal—unquestionably have value.").

[36] LEONG, *supra* note 1, at 10.

[37] LEONG, *supra* note 1, at 16.

[38] LEONG, *supra* note 1, at 16.

[39] LEONG, *supra* note 1, at 25.

echelons of the company.[40] Another problem with highlighting diversity is that it might send a subtle message that those outgroup members are only there because of diversity and affirmative action, regardless of reality.

Finally, Leong emphasizes that part of the problem with diversity is that concentrating on it becomes a way of avoiding more difficult topics.[41] Instead of talking about whether workplaces or universities are equitable and inclusive, the focus is simply on diversity. As Leong discusses in Chapter 7, instead of just highlighting diversity, institutions should be authentic about their strengths and their shortcomings. So, a company might state that it is proud that it has increased the diversity of its workforce by hiring or promoting a particular number of minorities but that it also recognizes that it still has a deficit of minorities in the top leadership of the company.[42] This would be a more authentic way to highlight diversity while avoiding the identity capitalism trap.

As I stated in the introduction, I really like this book. It explains the ubiquitous problem of identity capitalism in an accessible and entertaining way. But instead of just exposing the prevalence and problem of identity capitalists and entrepreneurs, Leong helps the reader think about practical solutions. We should not value diversity for the benefits it brings to an ingroup, but instead, we should be trying to achieve true equality and inclusiveness.

Having said that, Leong's book did not have much of a focus on disability[43] and certainly not disability diversity.[44] Because much of my scholarship addresses disability issues, Leong's book made me think about what identity capitalism means for disability diversity. I turn to that next.

II. Disability Diversity

In some ways, Leong's book and this essay are coming at the perfect time. Recently, there has been a fairly expansive effort to get people to

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[40] LEONG, *supra* note 1, at 25.

[41] LEONG, *supra* note 1, at 55.

[42] LEONG, *supra* note 1, at 162–63.

[43] *But see* LEONG, *supra* note 1, at 24, 79.

[44] To be clear, disability as a diversity initiative is often not discussed so I do not intend this as a criticism of Leong's book. *See, e.g.*, Andrew Scheef, Cyndi Caniglia & Brenda L. Barrio, *Disability as Diversity: Perspectives of Institutions of Higher Education in the U.S.*, 33 J. POSTSECONDARY EDUC. & DISABILITY 49, 51–53 (2020) (stating in a study of institutions of higher education that mentioned diversity in their mission statement, only 4.6% of them specifically included disability).

include disability in diversity initiatives.[45] These diversity initiatives are often called "Diversity, Equity, and Inclusion" or "DEI." Here are a few examples of this increased attention to disability diversity. First, my own university has established a university-wide Disability Justice Advisory Board to discuss DEI issues for students, faculty, and staff with disabilities. Second, in legal academia, several law professors (including myself) have established the first ever Section of Law Professors with Disabilities and Allies as part of our national association of law schools, Association of American Law Schools. Our panel at the annual meeting in January 2022 was titled "The Forgotten Demographic: Law Professors with Disabilities in Legal Academia."[46] And the American Bar Association, the national association for lawyers and the accrediting agency for law schools, has begun a more vigorous effort to increase the number of people with disabilities in the legal profession.[47]

But all of these instances of attempting to include disability in diversity efforts raise the following questions: (1) Does disability diversity matter, and if so, why?; (2) If disability diversity does matter, what does diversity mean with respect to disability?; and (3) How does identity capitalism play out in disability diversity efforts? The remainder of this essay will attempt to answer these questions.

A. *Does Disability Diversity Matter?*

Disability diversity matters for many of the same reasons diversity matters for other identity groups. First of all, focusing on diversity often means there will be less discrimination in hiring and promotion decisions (of course, this is not always true, as well examined in Leong's book). Furthermore, there is evidence that companies benefit from hiring people with disabilities. As one example, companies who were identified as "Disability Inclusion Champions" experienced (on average) 28% higher revenue than their peers, double the net income, and 30% higher economic

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[45] *See, e.g.*, Robert Gould, Sarah Parker Harris, Courtney Mullin & Robin Jones, *Disability, Diversity, and Corporate Social Responsibility: Learning from Recognized Leaders in Inclusion*, 52 J. VOCATIONAL REHABILITATION 29, 30–31 (2020) (criticizing the fact that disability diversity is not normally considered by human resource and management professionals or researchers and stating that prior research has shown "limited attention to disability within . . . diversity planning").

[46] *See* ASS'N OF AM. LAW SCH., AALS 2022 ANNUAL MEETING: FREEDOM, EQUALITY, AND THE COMMON GOOD 3 (2022), https://perma.cc/2QZH-MXPA (outlining the program schedule for the annual meeting, including the different panels).

[47] *See generally* Am. Bar Ass'n, *Commission on Disability Rights*, ABA, https://perma.cc/3RN5-W9FW (last visited Apr. 2, 2022).

profit margins—they also experienced significantly higher shareholder returns.[48] Businesses that adopted diversity and inclusion strategies also benefited by having "greater employee retention, reduced recruiting costs, higher productivity, and increased morale."[49] In a national survey, 87% of customers reported a preference for doing business with companies that routinely employ people with disabilities.[50] Additionally, because the percentage of Americans who are disabled is increasing, employees with disabilities might have better insight into those customers' needs.[51]

Moreover, scholars have made the argument that increasing the number of people with disabilities in any setting will lead to a greater acceptance of people with disabilities.[52] This is certainly one of the arguments behind mainstreaming children with disabilities in the primary and secondary educational context.[53] But it is also an argument made with respect to adults.[54] As Katie Eyer has argued, increased interaction with people with disabilities has the potential to reduce biases against those individuals.[55]

Finally, for some employers, disability diversity is the law. Sections 501 and 503 of the Rehabilitation Act have affirmative action requirements for federal agencies (§ 501) and for federal contractors (§ 503).[56] Federal contracts in excess of $10,000 must contain a provision stating that the contractor will take "affirmative action to employ and advance in employment qualified individuals with disabilities."[57] For federal agencies,

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48 Nancy Geenen, *Corporate Diversity Efforts Often Leave Out an Important Group: People with Disabilities*, FORTUNE (Aug. 23, 2019, 5:30 AM EDT), https://perma.cc/QG68-TAP8.

49 *Id.*; *see* Gould et al., *supra* note 45, at 32 (discussing the benefits of hiring workers with disabilities include lower turnover, higher productivity, increased employee morale, and decreased stress levels).

50 Gould et al., *supra* note 45, at 30.

51 Gould et al., *supra* note 45, at 30.

52 *See, e.g.*, LISA SCHUR, DOUGLAS KRUSE & PETER BLANCK, PEOPLE WITH DISABILITIES: SIDELINED OR MAINSTREAMED? 216 (2013) (discussing the idea that increased exposure to people with disabilities leads to greater acceptance of them).

53 *Cf.* Scheef et al., *supra* note 44, at 55–56 (stating that institutions of higher education who include disability in their diversity statements "can be very inclusive as the number of students with disabilities increase in their student population" and noting that it is better to house services for students with disabilities in a diversity-focused department in order to reduce the stigma of disability and support the notion that "disability is just one of the many forms of human diversity").

54 *See, e.g.*, Gould et al., *supra* note 45, at 38 (discussing the push for mainstreaming and integrating people with disabilities).

55 Katie Eyer, *Claiming Disability*, 101 B.U. L. Rev. 547, 581–86 (2021).

56 29 U.S.C. §§ 791, 793 (2014).

57 29 U.S.C. § 793(a) (2014).

each department or agency must have an affirmative action plan "for the hiring, placement, and advancement of individuals with disabilities . . . ."[58]

What about the counter-arguments? Leong would likely argue that focusing on disability diversity is problematic if it is being done for the wrong reasons. In other words, it would be problematic if institutions were engaging in disability diversity and publicizing the initiative only for the optics of it. There is some evidence that this is happening.[59] Disability scholars have noted that some companies use people with disabilities in visual materials for marketing purposes.[60] Some universities recruit students with disabilities, just as they might recruit other minority students.[61] Some might see this as a positive—as evidence that attitudes are changing and society is beginning to embrace people with disabilities.[62] But some of the language used in these discussions of disability diversity really rings of identity capitalism. For instance, "disability is starting to become more sexy, and I think diversity professionals in corporations see . . . an interesting diversity thread that they can't really afford to ignore . . . ."[63] Moreover, "simply acknowledging disability as a category within diversity does little to ameliorate the additional barriers to inclusion that many employees with disabilities and their family members face."[64]

Although achieving disability diversity for the wrong reasons is problematic, on balance, I believe the pros outweigh the cons, especially if we can persuade institutions to concentrate on disability diversity without engaging in identity capitalism. Assuming we should care about disability diversity, we need to figure out what disability diversity means. I turn to that next.

B. *What Does Disability Diversity Mean?*

As I believe that disability diversity does matter, the next inquiry is what does disability diversity mean and how do we measure it? Is it based on the total number of individuals employed or enrolled as students who have

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[58] 29 U.S.C. § 791(b) (2014).

[59] *See, e.g.*, Gould et al., *supra* note 45, at 34 (stating that there is a "growing consensus about the value of visible organizational commitments to diversity").

[60] SCHUR ET AL., *supra* note 52, at 217.

[61] SCHUR ET AL., *supra* note 52, at 218.

[62] SCHUR ET AL., *supra* note 52, at 217; *see* Scheef et al., *supra* note 44, at 49 ("Including disability as a form of diversity reinforces the notion that there is no *normal* and reduces the *othering* of individuals with disabilities.").

[63] SCHUR ET AL., *supra* note 52, at 223 (quoting Andy Imparato).

[64] Gould et al., *supra* note 45, at 38.

identified as disabled? Does it include all individuals with disabilities regardless of the type or severity of disability? The problem that arises is that individuals with disabilities are a very heterogeneous group. Compare it to race: most institutions will report their total racial diversity, including all races. So, an employer might say that 15% of our employees are people of color. Large institutions might also break it down by race, but the percentage that is more often promoted is the total percentage of all racial minorities. Similarly, most institutions report or promote the total percentage of individuals who identify as LGBTQ+. Certainly, both racial minorities and LGBTQ+ individuals do not all share the same experiences. But I think there is even more heterogeneity among people with disabilities. The experience of someone with diabetes is very different from the experience of someone who uses a wheelchair, etc.

More importantly, if a student with a disability is deciding which university to attend, that student is likely to be curious or concerned about whether there are others that share the student's particular experience. Someone with a learning disability might want to know how many students attend the university who also have a learning disability, someone with a mental illness might want to know how many students have a mental illness, and so on. This is because these experiences vary so much, and prospective students would want to know whether the university will be a welcoming environment for individuals with their particular type of disability. Someone who uses a wheelchair is likely concerned about building accessibility, while a student with a learning disability is likely more worried about academic accommodations and the stigma the student might face if there is not a critical mass of students with learning disabilities.

The other issue with disability diversity is that, regardless of how we define and report the percentage of disabled persons, we have a serious under-reporting problem. Many people with disabilities do not identify as such. As Katie Eyer has noted, despite the fact that the majority of Americans have an impairment that would likely be considered a disability under the expanded definition of the ADA Amendments Act of 2008,[65] the number of people who self-identify as disabled is very low.[66] In fact, one study revealed that only 14% of those people who had an impairment that would likely qualify as a disability under federal law actually identified as disabled.[67] Even among the 48% of respondents who rated their impairments as

[65] Eyer, *supra* note 55, at 564–65.

[66] Eyer, *supra* note 55, at 565.

[67] Eyer, *supra* note 55, at 565–66.

"severe," few identified as disabled.[68] And even among those individuals who have what we might call a "traditional" disability, such as someone who uses a wheelchair, significant numbers do not identify as disabled.[69] And of course, those with invisible disabilities are especially reluctant to identify as disabled.[70]

The reasons are complex and varied. I explore some of those reasons in a recent article, *Disclaiming Disability*,[71] but for our purposes here, I will summarize them briefly. The most significant reason disabled people do not self-identify as such is the fear of stigma.[72] This stigma can take many different forms, causing "exclusion, prejudice, stereotyping, and neglect."[73] Doron Dorfman has argued that being labeled as disabled can create stigma that manifests in "fear, disgust, and misunderstanding."[74]

Some people might avoid identifying as disabled because their impairment is particularly stigmatizing. Mental illnesses are probably the most common impairments that result in significant stigma.[75] Other stigmatized impairments include HIV and learning disabilities.[76] And in the employment context, some disabled people do not self-identify as such because of the stereotype that being disabled means that they are not capable of doing their jobs.[77]

Another reason some might not identify as disabled is because it makes them feel vulnerable, and most people want to avoid feeling vulnerable.[78] The fear of vulnerability surrounding disability is often the fear of death or dependency.[79] As Michelle Travis notes: "Our highly resilient 'illusion of invulnerability' combined with the general existential anxiety triggered by

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[68] Eyer, *supra* note 55, at 566

[69] Eyer, *supra* note 55, at 566.

[70] Eyer, *supra* note 55, at 567.

[71] *See generally* Nicole Buonocore Porter, *Disclaiming Disability*, 55 U.C. DAVIS L. REV. 1829 (2022) [hereinafter Porter, *Disclaiming Disability*].

[72] *Id.* at 1855.

[73] *Id.* at 1858.

[74] Doron Dorfman, *Disability Identity in Conflict: Performativity in the U.S. Social Security Benefits System*, 38 T. JEFFERSON L. REV. 47, 51 (2015).

[75] Porter, *Disclaiming Disability*, *supra* note 71, at 1860. *See generally* PAUL HARPUR, ABLEISM AT WORK: DISABLEMENT AND HIERARCHIES OF IMPAIRMENT (2020); Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1, 18–19 (2010) (discussing the animus against people with mental illness).

[76] Porter, *Disclaiming Disability*, *supra* note 71, at 1861.

[77] Porter, *Disclaiming Disability*, *supra* note 71, at 1861–62; Eyer, *supra* note 56, at 568.

[78] Porter, *Disclaiming Disability*, *supra* note 71, at 1862.

[79] Porter, *Disclaiming Disability*, *supra* note 71, at 1862.

stereotypic notions of disability create a strong force pushing most individuals not only to resist taking on the disability label, but to deny that the label will ever apply to them."[80]

The urge to not identify as disabled is so strong that both employees and students are often reluctant to admit they have a disability even if the question is asked as part of basic demographic information on a form that promises that the answers will remain confidential. Alternatively, some students might not respond to demographic questions about disability because they believe that the universities are only asking for diversity purposes, which they sometimes find offensive.[81] But let us assume we can get past this under-reporting problem. The next question brings us back to the subject of Leong's book—how identity capitalism will play out in the disability diversity context.

C. *Identity Capitalism and Disability Diversity*

Our final inquiry (and really the primary one) is how identity capitalism might play out in the disability context. In other words, if businesses are engaging in efforts to hire or promote more individuals with disabilities for the optics of it (rather than because it is the right thing to do), what do those optics mean for which individuals with disabilities will benefit and which will not? And more importantly, even if we cannot get rid of identity capitalism, do the benefits of disability diversity outweigh the disadvantages of identity capitalism?

The answer to the first question (which individuals with disabilities will be favored) will likely depend on how companies and educational institutions choose to promote their disability diversity. If they highlight their employees or students who have disabilities through pictures (on brochures or websites), they will likely favor those who have visible disabilities, usually those who use wheelchairs or perhaps have missing limbs. On the other hand, if employers and educational institutions promote their disability diversity through published statistics (percentages, etc.), then their approaches might vary. Some institutions might try to hire or admit individuals with a wide variety of physical and mental impairments that are visible and invisible. There are a great many disabilities that are, in fact, invisible—not only mental illnesses and learning disabilities, but all kinds of diseases, including diabetes, heart disease, many types of cancer (unless,

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[80] Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 989 (2012).

[81] Sue Eccles et al., *Risk and Stigma: Students' Perceptions and Disclosure of 'Disability' in Higher Education*, 20 WIDENING PARTICIPATION AND LIFELONG LEARNING 191, 200–01 (2018).

perhaps, the person is going through chemo and losing their hair), rheumatoid arthritis, multiple sclerosis (if not advanced), seizure disorders, and many others. Taking pictures of these individuals and putting them on websites or brochures would likely not tell the viewer that they are disabled. And identity capitalists care about sending that message to the public. But they might hire these individuals if they are promoting their diversity through statistics rather than publicizing their disability diversity through pictures.

There is already a great deal of evidence that institutions are identity capitalists when addressing disability diversity. In other words, many institutions favor people who use wheelchairs over people with invisible disabilities, especially if those invisible disabilities are highly stigmatized. As evidence of this, note that our universal sign of disability is someone in a wheelchair. And if television shows or movies choose to highlight someone with a disability, they often highlight a character who uses a wheelchair.[82] Some examples: Artie Abrams, a paraplegic who uses a wheelchair in the Fox musical comedy-drama *Glee*,[83] and more recently, Isaac, a quadriplegic wheelchair user in Netflix's *Sex Education*.[84] And, in one classic identity capitalism example, in the NBC comedy *Superstore*, the character Garrett McNeil, a black man who uses a wheelchair, spends an entire episode trying to avoid a reporter and photographer who are writing a story about the store.[85] Garrett specifically acknowledges that because he is a black, disabled man, photographers love to get him in pictures.

Other scholars have discussed the privileging of those who use wheelchairs over those with other disabilities, such as people with mental illnesses, because of the fear and stigma surrounding mental illness. For instance, Michael Stein and Ryan Nelson, in an article reviewing a book by disability scholar Paul Harpur (*Ableism at Work: Disablement and Hierarchies of Impairment*),[86] argue that employment law entrenches a hierarchy of impairments, with physical impairments at the top, and mental impairments

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[82] *But see* Michelle Diament, *Max From NBC's 'Parenthood' Talks Asperger's*, DISABILITYSCOOP (Nov. 9, 2010), https://perma.cc/WP35-QWJ6 (showing there are counter-examples, such as the NBC TV show "Parenthood," which depicted a character with Asperger's Syndrome).

[83] *See Artie Abrams*, WIKIPEDIA (last modified Mar. 18, 2022, 9:09 PM UTC), https://perma.cc/L4DG-4DGD.

[84] *See* Alex Taylor, *Sex Education: Isaac Actor George Robinson Gets Intimate About Disability*, BBC NEWS (Sept. 21, 2021), https://perma.cc/RL8V-F9KJ.

[85] *See Superstore (Season 1)*, WIKIPEDIA (last modified Feb. 19, 2022, 09:04 AM UTC), https://perma.cc/A9LX-49VF; *Superstore: Magazine Profile*, IMDB, https://perma.cc/SWU5-GWQY (last visited Apr. 2, 2022).

[86] HARPUR, *supra* note 75.

marginalized below out of bias against workers with mental illnesses (what they call "psychosocial disabilities").[87]

Is privileging people with visible physical disabilities a problem? Some might argue that having an impairment that necessitates using a wheelchair is more disabling than many other impairments, so such individuals should be given preference in hiring or admission decisions. But this argument depends on how we determine which impairments are more serious or disabling. Is it the significance of the functional limitations? Or is it which impairments cause the most stigma? Or is it which impairments cause the most pain? Or which impairments make it more difficult to obtain gainful employment?

These issues are likely to arise in what we call "intra-class discrimination" claims. In the employment context, intra-class discrimination claims involve more than one person with a disability competing for some employment benefit,[88] whether that benefit is being hired for a position, promoted for a position, or given a particular accommodation. Because there are very few cases addressing intra-class discrimination claims, in prior work, I discussed this issue by using a hypothetical generated from one of my former exam questions in my disability law class.[89] Briefly, the (modified)[90] hypothetical states:

> *A private manufacturing employer with 100 employees has an employee (Larry) who has worked for the shipping/receiving department for 10 years. This department has twenty-one employees and operates all three shifts—days (7:00 a.m.–3:00 p.m.); afternoons (3:00–11:00 p.m.); and nights (11:00 p.m.–7:00 a.m.). The employees must rotate through all three shifts—one week on the day shift, one week on the afternoon shift, and one week on the night shift. Larry was recently diagnosed with kidney failure and must go on kidney dialysis indefinitely until he gets a kidney transplant. The dialysis schedule makes it impossible for him to work the afternoon shift (because the dialysis is scheduled in the afternoons), but he also cannot work the night shift because he needs to recover from the dialysis, which is very fatiguing. Accordingly, Larry asks his employer to allow him to work only the day shift rather than rotating through all three shifts. The employer believes that rotating shifts are an essential function of the*

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[87] Ryan H. Nelson & Michael Ashley Stein, *Ability Apartheid and Paid Leave*, 120 MICH. L. REV., (forthcoming 2022).

[88] *See generally* Jeannette Cox, Disability Stigma and Intraclass Discrimination, 62 FLA. L. REV. 429 (2010).

[89] Nicole Buonocore Porter, *Cumulative Hardship*, 25 GEO. MASON L. REV. 753, 756, 806–07 (2018) [hereinafter Porter, *Cumulative Hardship*].

[90] The full hypothetical that I use for class has many other issues than the one I'm exploring here, so I've modified it to center the intra-class discrimination issue.

> *job and therefore refuses to give Larry the accommodation.*[91]
>
> *Larry then asks for a transfer to another position in the company that works a straight day shift. There is only one such position in the company for which Larry is qualified. It is a position working the register in the on-site cafeteria. However, this position is highly coveted (because it's less physically arduous, not because it has more prestige, status, or pay) and one other employee, Mack, has also applied for this position. Mack has also been with the company for 10 years, so seniority will not play a role. Mack wants the job because he has a back injury and his job on the plant floor has caused him to be in constant pain. Mack knows that there is not an accommodation that would allow him to work on the plant floor without standing and walking so his only option would be to transfer to another position, and the only available one is the cashier position in the cafeteria.*[92]

Assuming both Larry and Mack have a disability as defined by the ADA, the question is how the employer should choose between giving the vacant position to Larry or to Mack.

In my 2018 *Cumulative Hardship* article, I suggested several factors that courts should use when deciding these intra-class discrimination issues. First, employers should consider the severity of each impairment.[93] This usually refers to a person's limitations. While we often think of this in terms of people who have mobility impairments (and use wheelchairs), not all persons who use wheelchairs will be more impaired than other individuals with other limitations. For instance, a former student of mine had an impairment that affected her mobility, but she used a walker, not a wheelchair. Importantly, she also had significant limitations on the use of her arms and hands, making it difficult for her to type, eat, and perform many other everyday activities. Her disability was more severe and was more difficult to accommodate[94] than another student I had who was a paraplegic. This latter student used a manual wheelchair, so he needed accessible entrances and exits from buildings and accessible bathrooms, but he did not require any other accommodations. In most workplaces (especially office jobs), he would be easier to accommodate and likely suffers

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[91] Porter, *Cumulative Hardship*, *supra* note 89, at 806. I believe this conclusion is wrong, but most of the caselaw says otherwise.

[92] Porter, *Cumulative Hardship*, *supra* note 89, at 806–07.

[93] Porter, *Cumulative Hardship*, *supra* note 89, at 791–92.

[94] To be perfectly clear, as someone who considers herself a disability rights advocate, I am always happy to provide the accommodations my students need, and I often make an effort to help them in other ways. I realize in saying this that I might be an "identity capitalist," but I thought it was more important to run that risk than to have the reader think I was complaining about accommodating any of my former (or current) students.

from fewer daily limitations than the first student I described. Moreover, how much pain someone is in might also be part of the severity inquiry. In other words, someone who lives with day-to-day severe pain is likely more severely disabled than someone who has mobility or functional limitations but no or little pain.[95] Even if we think employers who care about disability diversity should prioritize by severity of impairment, they should be thoughtful in how they do that and not automatically assume that a person who uses a wheelchair is the most disabled.

The second factor I recommended considering when deciding issues of intra-class discrimination is the stigma surrounding each disability. Scholars have criticized courts for not considering stigma when determining issues of intra-class discrimination.[96] And because most of the stigmatized disabilities are invisible (HIV, mental illness, learning disabilities), it is easy to see how identity capitalist employers would avoid hiring people with these disabilities and instead hire individuals with visible physical disabilities (like those who use wheelchairs). And yet, people with the most stigmatized disabilities might have the most difficult time finding and keeping jobs in situations where they must disclose their disabilities in order to receive accommodations.[97]

The final factor I recommended considering is the overall employability of competing employees. In other words, using the example I discussed above, where the employer must decide which employee with a disability should get the cafeteria cashier position as an accommodation, the employer should consider what the employment prospects would be for both employees if they lose their jobs.[98] This is because, for both workers, the cafeteria position is an accommodation of last resort; there are no other jobs that these employees can perform considering their limitations. So, for instance, if we consider the consequences of Larry not getting the cashier job and therefore losing his job while he is on kidney dialysis with the consequences of Mack not getting the cashier job with his back impairment, which employee will have a more difficult time finding other employment? Most likely, that would be Larry. Not only is his dialysis schedule limiting, but a prospective employer would know that eventually, he would need to go through a kidney transplant surgery and that would likely involve a lengthy leave of absence.[99]

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[95] Porter, *Cumulative Hardship*, *supra* note 89, at 792.

[96] *See, e.g.*, Cox, *supra* note 88, at 434–35.

[97] Porter, *Cumulative Hardship*, *supra* note 89, at 792–94.

[98] Porter, *Cumulative Hardship*, *supra* note 89, at 800–01.

[99] Porter, *Cumulative Hardship*, *supra* note 89, at 808.

This intra-class discrimination analysis can also be used in the disability diversity context. When employers[100] prioritize hiring individuals with disabilities as part of a diversity initiative, they must determine which individuals should be given priority, assuming there is more than one qualified, disabled applicant. In these cases, based on the analysis above, an employer should consider the severity of each disability, the stigma surrounding it, and perhaps most significantly, the employment prospects of both employees if they are not hired. An identity capitalist employer might only consider the perceived severity of a disability (whether or not that perception is accurate). Thus, an identity capitalist would almost always prioritize someone who uses a wheelchair over someone with a more stigmatizing disability. This is problematic for the reasons I have explored above.

Having said that, an employer who takes disability diversity into consideration but does so using identity capitalism (e.g., favoring a wheelchair user) is nevertheless better than employers who either (1) avoid hiring all people with known disabilities; or (2) hire people who have relatively minor disabilities (but still fall into the ADA's broad protected class) who would be easy to accommodate and whose impairments are not stigmatizing. This might include individuals who have high blood pressure, irritable bowel syndrome, asthma, osteoarthritis (for a desk job), carpal tunnel syndrome, etc.

Instead, I believe institutions can and should consider disability diversity by hiring (or admitting) a wide range of people with disabilities and (importantly) making efforts to have an inclusive environment for them. One guidepost employers might use if they choose to make efforts towards disability diversity is the regulations issued by the Equal Employment Opportunity Commission ("EEOC") with respect to the affirmative action requirements for federal agencies under the Rehabilitation Act that I mentioned earlier. The EEOC issued regulations in 2017 addressing affirmative action plans for federal agencies and published guidance to help federal employers understand the regulations.[101] As it relates to affirmative action based on disability, the regulations implementing Section 501 of the Rehabilitation Act use a concept called "targeted disabilities." Targeted

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[100] I am focusing on employment here because, generally speaking, institutions of higher education usually can admit all disabled students that meet their admission criteria, so it is unlikely they would be deciding between the admission of two different students with disabilities.

[101] *Questions & Answers: The EEOC's Final Rule on Affirmative Action for People with Disabilities in Federal Employment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Jan. 3, 2017), https://perma.cc/59JJ-LC9Y.

disabilities are those that cause the person to "face significant barriers to employment, above and beyond the barriers faced by people with the broader range of disabilities."[102] The targeted disabilities include: developmental disabilities (including autism and cerebral palsy), traumatic brain injuries, deafness or serious difficulty hearing (such as someone who uses American Sign Language), blindness, missing extremities, significant mobility impairments (use of wheelchair, scooter, walker, leg braces), partial or complete paralysis, epilepsy or other seizure disorders, intellectual disabilities, significant psychiatric disorders (bipolar, schizophrenia, PTSD, or major depression), dwarfism, and significant disfigurement (burns, wounds, accidents, or congenital disorders).[103]

If employers care about disability diversity but want to avoid engaging in identity capitalism, this list of targeted disabilities is a good place to start, for several reasons. First, it includes both visible and invisible disabilities, so an employer would not capitalize on the few (or only) employees who use a wheelchair. Second, using the criteria I identified above—severity, stigma, and employability prospects—all three are intrinsically considered if employers hire people with disabilities on this list (as long as not all individuals hired only fall into one category). Many of these impairments cause severe restrictions (such as paralysis and significant mobility impairments). Many of them are highly stigmatized (such as schizophrenia or disfigurements). And many, if not most, of them would mean the person would have a hard time finding another job.

In sum, I believe it is possible and beneficial for institutions to place an emphasis on disability diversity without engaging in identity capitalism. These institutions need to be thoughtful in making hiring or admission decisions and need to avoid the temptation to capitalize on individuals with visual disabilities. Moreover (and more importantly), these institutions need to do more than just hire and admit people with disabilities—they need to create an inclusive, accommodating environment for all people with disabilities.

CONCLUSION

I hoped to accomplish two goals with this essay. First, I hope I have convinced you to read Leong's book (if you haven't already). And I hope we all can use this opportunity to think critically and thoughtfully about areas in our lives where we might have engaged in identity capitalism (or identity

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[102] *Id.*

[103] *Id.*

entrepreneurism). This is not so that we feel bad or guilty, but rather so that we can think about where we can improve. This includes apologizing more sincerely (when necessary), educating ourselves about the experiences of those who are different from us, and trying to be more authentic in our interactions with outgroup members.[104]

Second, I hope I have contributed to an important conversation about disability diversity. Although I am in favor of actively considering diversity based on disability, institutions need to be very careful to avoid identity capitalism when doing so. And perhaps, even more important in this space than with respect to diversity based on other protected classes, diversity without inclusion and equity might be worse than not attempting to have disability diversity at all.

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104 If you are an outgroup member, you might be thinking this does not apply to you. But as Leong explores, outgroup members are sometimes identity entrepreneurs. Moreover, even if you are a member of one or more outgroups (perhaps a woman who is a person of color), you are likely an ingroup member with respect to some other part of your identity (perhaps sexual orientation, gender identity, religion, or disability status).

Response to Nancy Leong's *Identity Capitalists*: Implications for Property, Academia, and Affirmative Action

NATASHA VARYANI*

INTRODUCTION

Professor Leong's work[1] is extraordinary in its effortless combination of data, legal theory, and personal narrative. As someone who strives to incorporate those very different lenses into my own teaching and scholarship, Professor Leong's ease and skill in weaving these various approaches to illustrate a concept and craft a framework has left me in a state of awe.

In responding to her work, I will strive to strike a similar balance. Using Property as my legal framework, I will examine the ways in which I speak to my students about the policy for protecting rights in property and examine the way in which varying identities or characteristics may impact the strength of those protections. Next, I will look to the tenets of Critical Race Theory,[2] as I discuss in my seminar, to explore ways to balance a data driven approach to policy making with a narrative one. Then, following the lead of Critical Theorists like Professor Leong, because so much of this work resonated so personally, I will share the way in which my own identity, essence, and experiences fit into the nuanced concept of "Identity

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[1] NANCY LEONG, IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY (2021).

[2] *See generally* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 8–10 (3d ed. 2017). Describing and categorizing the tenets is difficult because of the way the world and the doctrine are shifting. In this context, the tenets include: (1) race is normative; (2) interest convergence / material determinism; (3) social construct of race; (4) intersectionality; and (5) differential racialization.

Entrepreneurship."

Between the publishing of Professor Leong's work and the date of this symposium, the U.S. Supreme Court has granted certiorari to consolidated petitions examining appeals relating to affirmative action in higher education.[3] Within days of granting that petition for certiorari, the retirement of Justice Breyer[4] unleashed a debate about affirmative action at the level of the Justices themselves when the Biden administration confirmed its commitment to appointing a Black woman to the Supreme Court.[5] Professor Leong's work provides a powerful lens and structure through which to view this very layered examination of racial identity.

I. Personal Property ("Values")

The law of Property, though pulled out as its own course in the first year of law school, is a doctrine that underlies almost every other area of law. In setting the tone for his widely used textbook, Professor Singer reminds students that Property is not the law of our things, but instead the law of our relationships with regard to those things.[6] Property is a pillar of both our legal education and our system of laws because of the way that claiming ownership has become central to our collective identity. In other words, our property is so much more than what we have—it is who we are.

In order to underscore this point, I have started asking students to share with me their stories of property that has a value that cannot be easily measured. The trend that quickly emerged was that these stories about items and places had very little to do with the bundle of sticks and exchange value and other concepts we traditionally apply in Property class, but they have everything to do with the identity of the individuals writing about them. Heirlooms gifted from ancestors. Talismans that are worthless but for the memories contained. Even more complex are the stories that come from students with multiple identities–items that have come from ancestral lands never visited, handwritten notes or items from past generations, or clothing or jewelry passed down for generations–most of the stories that students share are about items that are imbued with emotional value regardless of the

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[3] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. 980 F.3d 157 (2020), *cert. granted*, 142 S. Ct. 895 (2022).

[4] Nina Totenberg, *Justice Stephen Breyer, an Influential Liberal on the Supreme Court, to Retire*, NPR, https://perma.cc/BU4Q-44TJ (last updated Jan. 26, 2022, 3:48 PM ET).

[5] Michael D. Shear & Charlie Savage, *Biden Expected to Nominate a Black Woman to the Supreme Court*, N.Y. TIMES (Jan. 26, 2022), https://perma.cc/8XQ4-A822.

[6] *See* JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES 3 (7th ed. 2017) ("Many rights go along with ownership or possession of property.").

exchange value. And, as is consistent with psychological research, items that represent difficult or marginalized parts of individual identities carry a disproportionate weight. Whether a trinket purchased in a hospital gift shop reminding someone of a serious obstacle that was overcome many years ago, or an heirloom from a great-grandparent with an ethnic identity representing a fraction of the individual, the parts of our identities that demonstrate tests of character are those that are remembered. Collecting these stories of "personal property" has made clear that the "personal" is more valuable than the "property."

This concept is illustrated time and again in the first year Property class. Courts build a system to evaluate what is predictable and fair with regard to disputes over property and in doing so create a structure that reflects some collective "values" about what we "value." Examples of the psychology associated with property include a recognition that real property is unique and may require some equitable remedies,[7] that property that is rare or unique is more valuable,[8] and that residential property is worth more than just its exchange value. In other words, the concept of "home" has value that the law cannot always easily measure but must account for.[9]

The relative value of property can be found throughout our first-year doctrinal course and indeed in modern practice. Accounting for that relativity is an essential element that underlies Professor Leong's ideas about Identity Capitalism. Understanding, as Professor Leong does, the social construction of race, individuals, entities, and institutions find ways to capitalize on various identities by promoting diversity, thus reinforcing and strengthening the foundations of hierarchies based on subordinating identities. The concept of differential racialization[10] explains the ways in which "dominant society racializes different minority groups at different times, in response to shifting needs such as the labor market."[11] This concept makes clear the ways in which the value of different races or identities may

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[7] *See* Somerville v. Jacobs, 170 S.E.2d 805, 808–15 (W. Va. 1969); *When Specific Performance May Be Ordered in a Real Estate Transaction*, HG.ORG, https://perma.cc/5MAU-L9DR (last visited Apr. 15, 2022).

[8] *See* Charrier v. Bell, 496 So. 2d 601, 603–05 (La. Ct. App. 1986); Popov v. Hayashi, No. 400545, 2002 Cal. Super. LEXIS 5206, at *1 (Dec. 18, 2002) (musing that the financial value of Barry Bonds' record setting home run baseball reflected the fame of the man who hit it).

[9] *See generally* Mohrlang v. Draper, 365 N.W.2d 443, 446 (Neb. 1985) (explaining that specific performance should be granted where a valid contract exists and a remedy at law is inadequate); Lucy v. Zehmer, 84 S.E.2d 516, 522 (Va. 1954) (explaining that where there is no fraud, misrepresentation, or other inequity, specific performance is appropriate).

[10] DELGADO & STEFANCIC, *supra* note 2, at 8.

[11] DELGADO & STEFANCIC, *supra* note 2, at 8.

be fluid in their definition and, accordingly, their value. The ways in which various marginalized identities have shifted in response to world events and economic needs has an impact on the "capital" held by each identity. People who are ethnically Irish, Japanese, or South Asian, for instance, have been portrayed, stratified, and commodified in different ways in response to trends in immigration, labor needs, and global conflicts.

Professor Leong demonstrates that Identity Capitalists and Identity Entrepreneurs are driven in many cases by self-interest and opportunity. Whether these individuals who are taking advantage of this system are explicitly aware or intending to or not, participating in structures that capitalize on various identities reinforces those same structures. Yet, the way that identity is valued makes identity capitalism distinct from the other ways in which property is used to generate income. The cost of identity capitalism, like the cost of identity itself, is something different than our collective values. Identity capitalism comes at the cost of upholding structures and systems that are built on stratifying people based on race. The way in which Professor Leong demonstrates concepts that sit at the intersection of psychology, sociology, and economics is astute and skilled. Doing so through the lens of the law provides an opportunity to examine the ways in which we can choose to participate in or dismantle the system of identity capitalism.

II. Data, Narrative, Calling Out, & Calling In

Beginning with her own very personal anecdote at a wedding, Professor Leong weaves together examples and parties that demonstrate her concepts to illustrate the ways in which our legal system and institutions are a fertile ground for identity capitalism.[12] In addition to her own story about one relationship and event, Professor Leong also calls upon interactions and concepts that are likely familiar to readers, and accordingly, help to fill in the way a reader understands Identity Capitalism.

In the discussing the "Fifth Black Woman" hypothetical crafted by Devon Carbado and Mitu Gulati,[13], Professor Leong explores different tactics in uncovering the nuances of Identity Capitalism.[14] Professor Leong

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[12] LEONG, *supra* note 1, at 1–23.

[13] *See* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 714–21 (2001) (detailing a hypothetical of four Black women who were promoted and the fifth who was not and including a short analysis of the ways in which each woman shows or "covers" parts of her identity, which reveals a much different picture of what "diversity" is in an institution than just the mere numbers).

[14] LEONG, *supra* note 1, at 117–21.

showcases her understanding of the ways in which, in addition to balancing data and narrative in consideration of a subject, considerable nuance can be uncovered by understanding a bit of the cognitive impacts of race.[15] Understanding the relationship between collecting data and the problems with "essentialism"[16] in our practices helps to clarify the challenges of defining and achieving productive diversity. Discussing this scenario helps to illustrate the ways in which data can sometimes fall short of explaining a phenomenon. Professor Jerry Kang's descriptions of "Racial Mechanics,"[17] racial schema,[18] racial meaning and racial mapping,[19] and automaticity[20] highlight the ways in which race is a relevant factor in both personal interaction and also in the aggregate of ways that we collectively interact with one another. This collective action serves to build and perpetuate systems that are built on racist assumptions, both implicit and explicit.

In the first piece of his article *Trojan Horses of Race*, Professor Kang makes a note that resonated while reading Professor Leong's work:

> Recognizing our self-understanding to be provisional, we must still confront the difficult choices to come. As social cognitionists further demonstrate the possibility of altering levels of implicit bias . . . we will encounter difficult philosophical and legal questions about our autonomy, our normative commitments to racial equality, and the proper role of explicit collective action by private and public actors to decrease implicit bias.[21]

Ultimately, understanding the relationship between the use of data and narrative for the creation of law and policy, but also those less visible and more fundamental social structures, is crucial. Though there are no clear answers and no established and predictable rules regarding balancing data

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[15] *See generally* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490, 1498, 1500 (2005) (explaining cognitive impacts on race, such as implicit bias).

[16] Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 19 (1995) ("Essentialism is the notion that there is a single woman's or Black person's, or any other group's, experience that can be described independently from other aspects of the person – that there is an 'essence' to that experience. An essentialist outlook assumes that the experience of being a member of the group under discussion is a stable one, one with a clear meaning, a meaning constant through time, space, and different historical, social, political, and personal contexts.").

[17] Kang, *supra* note 15, at 1497–98.

[18] Kang, *supra* note 15, at 1498–1500.

[19] Kang, *supra* note 15, at 1500.

[20] Kang, *supra* note 15, at 1504.

[21] Kang, *supra* note 15, at 1539.

and narratives, Professor Leong's recognition of that tension and modeling a way forward is a remarkable feature of her work. Personal narratives are incredibly impactful on our brains and biases, and the way that we collectively respond to those narratives shapes the nature of what parts of their stories that others feel at liberty to share. Professor Loretta Ross[22] examines the dynamics of how the expression of criticism may or may not be productive:

> "I have no problem calling out politicians who aren't living up to the oaths that they swore to," she said. She cited Colin Kaepernick, someone who quite effectively called out a powerful organization, the N.F.L. "The thing I am sharply critical of is punching down, calling out people who have less power than you *simply because you can get away with it*. But there is a very *strategic use of punching up*."[23]

In the aggregate, the way we decide to respond, the choices we make about "calling out" or "calling in," will inform the direction of narrative, which in turn will change the data points that our brains have to craft our biases that will shape our implicit responses. Connecting the work of Professors Leong, Kang, and Ross helps to illuminate with research and terms of art that which many viscerally know: our small interactions have a big impact and should be treated with care.

III. Identity Entrepreneurs: Voices & Choices

As noted above, the work of Activist and Professor Loretta Ross is informed and compelling. I came to know of Professor Ross because she teaches at my alma mater, Smith College. In my experience, Smith is a relatively progressive all-women's college that makes authentic efforts to diversify, and even recognizes the ways in which racism has been a part of the systems in which it operates.[24] Owning my personal biases, which are, admittedly, based on a great deal of personal experience as a student at that institution and as a member of the Smith community, it is my belief that these efforts are as thoughtful and as effective (if still flawed) as I have seen in the diversity space.

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[22] *Loretta J. Ross: Associate Professor of the Study of Women & Gender*, SMITH C., https://perma.cc/DN8V-V5RP (last visited Apr. 15, 2022).

[23] Jessica Bennet, *What If Instead of Calling People Out, We Called Them In?*, N.Y. TIMES (Nov. 19, 2020), https://perma.cc/K898-R629 (emphasis added).

[24] *See Toward Racial Justice at Smith*, SMITH C., https://perma.cc/4A2Z-UH8Q (last visited Apr. 15, 2022) ("Because Smith was not originally designed for the diverse students, staff and faculty that we have now, we are called to reflect on our past and present to build a more just and inclusive future.").

Hiring Professor Ross is such a positive step in this work; I am particularly interested in seeing people with Professor Ross' background and experience in race, gender, and activism represented in academia. Professor Ross' perspective and leadership in the classroom is consistent with why representation in academia is incredibly important.[25] Despite having a rational understanding and positive feelings about all of these individuals and institutional goals, something about the thought of Professor Ross gives me pause. Smith College should highlight its work on racial justice, especially as it is thoughtful and informed. Professor Ross, who has stated that she never expected to have a life in academia, is deserving of her accolades and should enjoy the fruits of her labor. Her non-traditional path to the front of a lecture hall with a captive audience that is far beyond her classroom is earned. Still, in my personal narrative, I am hesitant about the threat of 'toxic positivity' that may distract from the larger problem of the demographics of academia.

As someone from a background not well represented in academia, I can hold the contradiction of being happy and proud of the good work done by Professor Ross and Smith College with the warning and sadness in my heart about the status quo. In the most personal version of my story, I worry that I do not have the strength of character or experience that Professor Ross does as I struggle sometimes with the particular loneliness that accompanies the incredible personal connections made with countless students and young lawyers. While I am honored and fortunate to be in the position that I am, to have the opportunity to teach and learn and bond with students and new associates, I have sometimes been acutely aware that the ways in which I exist on a faculty, or in a senior position at a predominantly white law firm, are different than the vast majority of my colleagues. And yet it is complicated: the mix of pride, humility, and feelings both of being socially overwhelmed while also lonely are not just a product of my gender, race, and class, but also of my lived experiences and most importantly my choices.

So, when I consider the importance of representation, and how I have seen time and again how some students have parts of their identities activated in such positive ways, I want to highlight the victories, like Professor Loretta Ross, while simultaneously modeling and validating the feeling of caution. Reading Professor Leong's work gave me the words and tools, including the concept of Identity Entrepreneurship, to hold all of these contradictions and find ways to name them that are helpful and productive.

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[25] *See* Meera E. Deo, *LSSSE at Fifteen: Celebrating Our Success and Planning Our Future*, 69 J. LEGAL EDUC. 396, 397–400 (2020).

IV. More Identity Entrepreneurs: Layers of Affirmative Action

The concept of Identity Entrepreneurship takes many different forms. Where, in the previous section, I began to uncover my own grappling with the feeling of what it means to take advantage of the existing system of identity capitalism, others may do the same in a very different way and with a very different result. The concept of Identity Entrepreneurship is embedded in the cultural, psychological, and legal questions related to affirmative action, and in our current moment, the question of the value of race in our systems is receiving multiple levels of scrutiny.

Regardless of the U.S. Supreme Court's holding on the issue of Affirmative Action brought by Edward Blum and Students for Fair Admissions ("SFFA"), the concepts and vocabulary relating to Identity Capitalism provide an incredibly useful framework for viewing the decision around this issue.[26] As Professor Leong indicates, Edward Blum is a skilled Identity Entrepreneur who has been able to identify and respond to shifting cultural values regarding identity.[27] The U.S. Supreme Court has weighed in on the complex topic of considering racial diversity in admissions to institutions of higher education[28] as demographics,[29] public opinion, and cultural movements[30] have shifted. Mr. Blum has carefully navigated and crafted legal arguments and media representations around existing structures and institutions. After failing to accomplish his desired result with plaintiff Abigail Fisher, Mr. Blum has changed strategy and capitalized on Asian identity.[31] The way in which SFFA has used the identity of some Asians to craft a legal position whose aim is to dismantle a practice designed to achieve real diversity is an example of an innovation in Identity Entrepreneurship.

In the same week that the U.S. Supreme Court granted a petition for

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[26] *See id.* at 398 (emphasizing the importance of data and scholarship in understanding the necessity of affirmative action).

[27] LEONG, *supra* note 1, at 137–41.

[28] *See* Fisher v. University of Tex., 570 U.S. 297, 303 (2013); Grutter v. Bollinger, 539 U.S. 306 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[29] *2020 Census Statistics Highlight Local Population Changes and Nation's Racial and Ethnic Diversity*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://perma.cc/RT3R-6TW3.

[30] *See generally About*, BLACK LIVES MATTER, https://perma.cc/8DR9-ZJHA (last visited Apr. 15, 2022) ("We are a collective of liberators who believe in an inclusive and spacious movement. We also believe that in order to win and bring as many people with us along the way, we must move beyond the narrow nationalism that is all too prevalent in Black communities. We must ensure we are building a movement that brings all of us to the front.").

[31] *See generally* LEONG, *supra* note 1, at 137–41.

certiorari to review the appeals of SFFA,[32] Justice Breyer announced his departure from the bench.[33] President Biden's promise to Representative James Clyburn, in advance of securing an endorsement that may have impacted the electoral outcome in South Carolina,[34] has since been the subject of great scrutiny as it sits at the nexus of Identity Capitalism, Identity Entrepreneurship, and Identity Politics. The U.S. Supreme Court will explicitly consider the legality and extent to which race should play a role in admission to institutions like Harvard in the challenges brought by Students for Fair Admissions, which are scheduled for oral arguments before the court in October of 2022. In a very direct way, this appeal will call on individual justices and legal scholars to examine their own identities and articulate a legal argument that is based in the sum of their very personal experiences.

The nomination and confirmation of Justice Ketanji Brown Jackson was historic and rife with identity capitalism from start to finish. Now that Justice Jackson is confirmed to the bench, her presence at the Court is bound to be influential. In reflecting on Justice Thurgood Marshall's tenure on the Court, his colleagues noted that though he was not the most prolific author of opinions, his impact on the jurisprudence of the time is difficult to overstate. His presence on the Court served as a moral compass as an individual with experience of being Black in the United States while considering issues related to the Civil Rights movement during a time of racial reckoning. The parallels with Justice Ketanji Brown Jackson are clear: through a nomination and confirmation process that put her race and gender in the front and center of her identity, she joins the Court in a time of a new kind of racial reckoning. Nominating a justice who may have experienced the feeling of having gained access to elite spaces after scrutiny on her race and gender, Justice Brown-Jackson is poised to serve a similar role as Justice Thurgood Marshall. As our country and the Court continue to navigate social and legal issues that will attend to fundamental questions about qualifications and the value of diversity, the vocabulary and tools given to us by Professor Leong will help provide clarity and structure to a difficult and nuanced issue.

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[32] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022).

[33] *See* Joseph R. Biden, President of the United States, Remarks by President Biden on the Retirement of Supreme Court Justice Stephen Breyer (Jan. 22, 2022), (transcript at https://perma.cc/Q5QD-HZ57).

[34] Chris Dixon, *Before the Clyburn Endorsement, an Elderly Church Usher with a Question*, N.Y. TIMES (Mar. 8, 2020), https://perma.cc/2SFF-GELN.

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When Diversity Is Not Enough: A Reflection on *Identity Capitalists*

NANCY LEONG*

INTRODUCTION

Since I completed the manuscript for *Identity Capitalists* in 2019, the ground has shifted under our feet. We have borne witness to a pandemic, a racial reckoning in the wake of the murder of George Floyd, and an attempted coup. Each day we watch the rise in white nationalism. The #MeToo movement continues to face new questions and challenges. Advocates press for greater protections for LGBTQ+ and disabled people, even as the rights of these groups are under threat at the Supreme Court. And the legality of affirmative action hangs by a thread.[1]

In the wake of this upheaval, identity is at the forefront of legal and social discourse as never before. As the threats around us have intensified, the need for careful critique and informed dialogue has never been so urgent. The #MeToo movement and racial reckoning have brought welcome introspection. To an extent unprecedented in American history, members of ingroups—for example, white people, men, heterosexual people, the wealthy, the non-disabled—have incentives to demonstrate their acceptance of socially marginalized groups—for example, non-white people, women, LGBTQ+ people, the poor, and the disabled. Research has documented the pressures on businesses, colleges and universities, government, entertainment, the media, and other institutions to demonstrate their commitment to the wellbeing of marginalized groups. Likewise, individuals—politicians, entertainers, and everyday folks—face social and political pressure to demonstrate similar commitments.

This environment offers considerable incentives for *identity capitalists*—the term I have coined to describe individuals or institutions that use

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1 Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S.Ct. 895 (2022), https://perma.cc/6VZH-4L4P.

outgroup identity to benefit themselves.[2] From the white person who parades a Black friend to the company that features diverse photos on its website, identity capitalists are not a new phenomenon.[3] But as the pieces comprising this symposium make clear, our current moment offers new and evolving opportunities for identity capitalists to profit from the identities of others.

To be clear, increased attention to the circumstances of outgroup members, and awareness of the historical conditions that have advantaged some groups while oppressing others, are both necessary. Yet diversity measures should also be evaluated critically. Many stakeholders—businesses, politicians, educational institutions, regular people—want credit for doing their part to remedy the country's injustices without actually doing anything that will improve material inequality.

At core, *Identity Capitalists* is about the gap between show and substance, between signal and virtue. The responses to my book, accumulated as this symposium, clearly, powerfully, and sometimes painfully demonstrate the way that diversity is sometimes treated as an end in itself rather than as a means to an end of equity.

I. The Limits of Diversity

From the beginning, I have linked identity capitalism and the preoccupation with diversity. This preoccupation can be traced to the Supreme Court's decision in *Regents of the University of California v. Bakke*, in which the Court narrowly held that an affirmative action program could be constitutionally justified by a school's interest in diversity.[4] As Professor Asad Rahim has shown, Powell was drawn to the rationale because he believed it would combat intellectual radicalism. Surely a rationale that could include both descendants of slaves and "farm boys from Idaho" deserves caution.[5]

In the wake of *Bakke*, advocates have understandably emphasized the importance of diversity because it is the only way for an affirmative action program to be upheld. Yet critical race theorists have, for years, expressed concern about a focus on diversity as an end in itself rather than as a means to an end. In the context of affirmative action in higher education, Professor

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[2] NANCY LEONG, IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY 15–16 (2021).

[3] *See generally id.* ch. 1 (cataloging many examples of identity capitalism).

[4] 438 U.S. 265, 317 (1978) ("In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file . . . .").

[5] Asad Rahim, *Diversity to Deradicalize*, 108 CALIF. L. REV. 1423, 1425 (2020).

Derrick Bell has described diversity as a "distraction" from substantive and systemic reforms because it "avoid[s] addressing directly the barriers of race and class."[6] In the context of college admissions, for example, "[d]iversity . . . is less a means of continuing minority admissions programs in the face of widespread opposition than it is a shield behind which college administrators can retain policies of admission that are woefully poor measures of quality, but convenient vehicles for admitting the children of wealth and privilege."[7] That is, the focus on diversity is a way of avoiding bigger and harder questions about the reasons that some racial groups are systemically disadvantaged and how a just admissions process might take account of that. Why do some students have access to resources such as test preparation classes and admissions counselors? How should the admissions process take account of these disparities? Not only does the diversity rationale fail to answer these questions—it also fails even to ask them.

To be clear—and as I have said many times—diversity is a good thing, not a bad thing. Diversity furthers many important aims, both for dominant and marginalized groups. But it is not an end in and of itself. Problems arise when institutions focus on diversity *instead of*, as opposed to *in addition to*, substantive equality.[8] We need to look further: in a diverse group, how are historically marginalized groups treated, and how do they benefit?

To understand the limits of diversity, compare two hypothetical law schools:

> Each year Law School #1 graduates 100 students, of whom ninety-five are white and five are not. The five students of color receive grades below the school's median and fail the bar significantly more frequently than the white students. The students of color report depression, anxiety, and feelings of isolation at far higher rates than their white peers. Despite the struggles of its students of color, half of the photos on Law School #1's website and promotional materials are of its small number of non-white students.
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> Each year Law School #2 graduates 100 students, of whom fifty are white and fifty are not. The fifty students of color receive grades below the school's median and fail the bar significantly more frequently than the white students. The students of color

[6] Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).

[7] *Id.* at 1632. *See* LEONG, *supra* note 2, at 10.

[8] Nick Anderson & Susan Svrluga, *How Do Colleges Use Race in Admissions Decisions?*, WASH. POST, https://perma.cc/6P5L-G7VL (last updated Jan. 24, 2022, 6:35 PM EST) (analyzing whether Harvard and UNC treat applicants of different racial backgrounds fairly when reviewing their applications); LEONG, *supra* note 2, at 184 (describing the demographic situation in educational institutions as being "frankly alienating" for non-white students).

> report depression, anxiety, and feelings of isolation at far higher rates than their white peers. Despite the struggles of its students of color, half of the photos on Law School #2's website and promotional materials are of its non-white students.

This simple example shows why diversity is, if not (per Derrick Bell) a distraction, also not the whole story. It is easy to say what is wrong with Law School #1: it should improve its racial diversity. Yet diversity is not enough. Law School #2 is highly diverse, yet it is *also* failing its students of color.

In addition to failing to prompt answers to the hard questions, the diversity rationale incentivizes identity capitalism. *Both* Law School #1 and Law School #2 are identity capitalists. They are *capitalizing* on their students by generating benefits for themselves from their students of color—and the students of color are not similarly benefiting.

In a thoughtful essay for this symposium, Professor Ellen Farwell demonstrates how a similar dynamic emerges in the business world. She examines two California laws: SB-826 requires at least two women on boards of five or fewer, and at least three women on boards of six or more; and AB-979 requires that "public companies headquartered in the state include on their boards at least 'one director from an underrepresented community,'" referring to both racial identity and sexual orientation.[9] The example both captures why diversity is important, and it also captures why it is not enough. Farwell explains that presence is not the same as substantive influence: within boards, members of underrepresented groups are less likely to occupy positions of influence such as the board chair or the head of recruitment or compensation.[10]

The case of corporate boards demonstrates the insufficiency of institutional diversity as an end goal. Professor Farwell astutely observes: "Getting seats at the corporate board table for women, Black people, and other outgroup members is a necessary step in the direction of true equity in corporate America. But it is not enough."[11] Stakeholders in these companies—and in other institutions—must take care to ensure that individuals held up as evidence of diversity are also treated equitably.

II. When Diversity Does Not Fit

In other arenas, trying to fit social justice into a diversity framework is again like trying to fit a round peg into a square hole.

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[9] Ellen E. Farwell, *A Real Seat at the Table: Identity Capitalism and State Law Efforts to Diversify Corporate Boards*, 56 NEW ENG. L. REV. 141, 146–47 (2022).

[10] *Id.* at 151.

[11] *Id.* at 149.

In her contribution to this symposium, Professor Nicole Porter makes the case for promoting "disability diversity" by "increasing the number of people with disabilities in any setting."[12] She cites research showing that companies that are more inclusive of disabled employees are more successful on a number of business metrics, and she reasons that increasing the number of (presumably openly) disabled people in a particular setting "will lead to a greater acceptance of people with disabilities."[13]

I am entirely convinced by Professor Porter's work that acceptance of people with disabilities in institutional settings is an important goal. I also agree that identity capitalism with respect to people with disabilities is real—for instance, we have all seen promotional materials featuring individuals with visible disabilities—and that this sort of identity capitalism can be problematic if not accompanied by efforts to welcome those with disabilities into workplaces, schools, and other institutions.[14]

Yet the case of disability also exposes the limits of the diversity rationale. The diversity rationale fails to account for fundamental differences between disability and some other identity categories that we consider protected classes, such as race, gender, and sexual orientation. I think that most people would say that a law school that failed to enroll any Black people had not been successful in its diversity efforts; I think that most people would not say the same thing about a law school that failed to enroll any people with an anxiety disorder. This is so even given the relative frequency of these categories: 18.1% of the population suffers from an anxiety disorder, while 12.4% of the population is Black. I think that this intuition likely stems from the different histories of Black people and people with anxiety and the different social standing that those groups currently occupy. The failure of diversity to take account of this difference is, I think, a failure of the diversity rationale itself. A rationale rooted in remedial or distributive justice would help us think through why we might or might not wish to affirmatively recruit those with disabilities to particular settings. Diversity, however, is not the right tool for this job.

III. Diversity's Distortions

One of my greatest concerns with respect to diversity—and the incentives it creates for identity capitalism—is the way it affects members of outgroups. In my book, I explain that identity entrepreneurs are outgroup

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[12] *See* Nicole Buonocore Porter, *Disability Diversity and Identity Capitalism*, 56 NEW ENG. L. REV. 153, 163 (2022).

[13] *See id.*

[14] *Id.* at 167–68.

members who "leverage their outgroup status to derive social and economic value for themselves."[15] The racial reckoning has amplified opportunities for outgroup members to profit from their outgroup status. The phenomenon is particularly salient in the commercial marketplace. Brands that previously had never before expressed sympathy for or solidarity with Black people suddenly featured Black models in their print and online catalogs and their social media. The drive to showcase diversity has spread from Black individuals to those of other races, as well as to individuals embodying diversity along lines of gender, identity, sexual orientation, and beyond.

Corporate America's newfound appreciation for diversity creates incentives not only for ingroup members, but also for outgroup members. Performances of identity that are acceptable to the ingroup become the performances with which mainstream America is most familiar. The result is a system that rewards performances of outgroup identity that are different, but not *so* different that they are challenging to the status quo or alienating to members of ingroups.[16]

These distortions of identity are amplified by the Internet. In his symposium essay, Professor Khaled Ali Beydoun describes the effects of the identity marketplace among digital influencers and the businesses and other interests they serve.[17] He poignantly narrates the story of meeting with a young Muslim woman—a self-described journalist—with a substantial social media following who told him that she "stay[s] away from politics" in her online content.[18] Her apolitical stances paid off: "her online presentation and performance successfully lured partnerships with global brands," including "popular magazines, fashion brands, hotels, gatherings with socialites, and more."[19]

While I do not wish to criticize any *individual* performance of identity, in the aggregate, we should be concerned if the identity performance of individual outgroup members is not representative of—or is even contrary to—the interests of the class as a whole. As with the Muslim journalist Professor Beydoun describes, the risk is that the outgroup members who are rewarded by the ingroup will be those who mostly do what the ingroup likes, resulting in a reinforcement of—rather than a challenge to—the status

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[15] LEONG, *supra* note 2, at 84; *see* Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. REV. 1333, 1334 (2016) [hereinafter Leong, *Identity Entrepreneurs*].

[16] *See* Leong, *Identity Entrepreneurs*, *supra* note 15, at 1337–38.

[17] Khaled A. Beydoun, *Digital Identity Entrepreneurs*, 56 NEW ENG. L. REV. 131, 134 (2022).

[18] *Id.* at 135.

[19] *Id.* at 137.

quo.[20] And when identity is mediated through the Internet, the reach of the favored version of identity is amplified and, sometimes, distorted.

CONCLUSION

The core message of *Identity Capitalists* is that diversity is both essential and insufficient. I have struggled with this duality throughout my career. Professor Natasha Varyani's essay eloquently captures these blended feelings of accomplishment and dissatisfaction, of being both "happy and proud of the good work done," and "acutely aware that the ways in which I exist on a faculty . . . are different than the vast majority of my colleagues."[21] As Professor Varyani's poignant reflection demonstrates, *Identity Capitalists* is a book that prompts personal stories. Many readers (including the talented scholars included in this symposium) have shared with me stories of times they have been pulled into photos, visually showcased on websites, or paraded at social events. Yet when it comes time to ensure whether outgroup members—whether *we*, the participants in the symposium—are thriving, members of ingroups are often nowhere to be found. My hope is that, as we continue to consider how identity does, and should, function in our society, that we—all of us who are outsiders in one way or another—are able to recover some of our identity capital for ourselves.

[20] Beydoun, *supra* note 17, at 138–39; *see* LEONG, *supra* note 2, at 106-07.

[21] Natasha Varyani, *Response to Nancy Leong's* Identity Capitalists: *Implications for Property, Academia, and Affirmative Action*, 56 NEW ENG. L. REV. 175, 181 (2022).

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Governments Are Built on More Than Hope: The Importance of Human Rights in Transitions of Power

Anna Hagg[*]

INTRODUCTION

A triumphant C-3PO exclaims, "They did it!" while watching the second Death Star explode over the forest moon of Endor with friends—Chewbacca, R2-D2, and the ewoks—in the conclusion to the *Star Wars* original trilogy.[1] The celebration on Endor remains one of the most iconic scenes of all the *Star Wars* movies, as it represents the triumph of the good and the light over the evil and the dark.[2] C-3PO's jubilance and relief over finally defeating the evil emperor leaves the audience with the impression that the galaxy is on track for a happy ending.[3] However, the war with the Empire did not end with the Battle of Endor, and approximately thirty years later, the First Order rose to replace the Empire and obliterated the seat of the New Republic's government with one shot of its super weapon, Starkiller Base.[4] The New Republic met the same fate that many

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[*] J.D., New England Law | Boston (2022). B.A., History and Political Science, Simmons College (2018). I want to say a special thank you to Volume 55 editor-in-chief Brie Mainiero for approving this passion of mine. Thank you to the executive editorial board of Volume 56 for your hard work and ingenuity in guiding this Note throughout the editing process. I would like to thank my dearest friends Allison and Laura for helping me brainstorm for this Note. Finally, I'd like to thank George Lucas and all creatives continually expanding the lore of Star Wars for crafting a universe open to imagination and exploration.

[1] STAR WARS EPISODE VI: THE RETURN OF THE JEDI (Lucasfilm 1983) [hereinafter THE RETURN OF THE JEDI]. This Note contains spoilers for the plotlines of various *Star Wars* films, books, and television programs.

[2] *See id.*; Sean T. Collins, *The 50 Greatest* Star Wars *Moments, Ranked*, VULTURE, https://perma.cc/H7R5-TYN5 (last updated Dec. 30, 2019) (ranking the celebration on Endor scene as the fourth greatest *Star Wars* moment).

[3] *See* THE RETURN OF THE JEDI, *supra* note 1.

[4] STAR WARS EPISODE VII: THE FORCE AWAKENS (Lucasfilm 2015) [hereinafter THE FORCE

newly formed democracies face as they transition away from authoritarian rule.[5]

The exuberance of the rebels on Endor can be juxtaposed against the defeated Resistance fighters as the handful of them that survive pile into the Millennium Falcon and escape the triumphant First Order.[6] The New Republic's failure to properly remedy the victims of the Empire's many human rights abuses helps to explain why the level of support that the Rebellion experienced did not translate into the same level of support for the Resistance.[7] From its creation, the New Republic lacked the legitimacy that it needed to last longer than the generation of people who initially fought against and defeated the Empire in the Galactic Civil War.[8] A new regime's focus on transitional justice while recovering from an autocratic regime is an essential factor in building popular support and legitimacy to protect against the resurgence of authoritarianism.[9] The fate of the New Republic is a cautionary tale of what can happen to a transitional government that does not or cannot properly remedy the victims of the previous regime.[10]

This Note will argue that a new government's focus on the prosecution of perpetrators or the reform of laws and institutions is not enough to give the new regime the legitimacy it needs to survive relapsing back into authoritarian control. This Note will illustrate the argument by using the example of the transition between the Empire and the New Republic in the *Star Wars* universe. This Note will argue that the New Republic's failure to institute societal reform calibrated to increase legitimacy and belief in the government in addition to military and legal reforms contributed to the

AWAKENS]. *See generally* CHUCK WENDIG, STAR WARS: AFTERMATH: EMPIRE'S END (2017) [hereinafter WENDIG, EMPIRE'S END] (depicting the Battle of Jakku, which happened approximately a year after the Battle of Endor, as the official end of the Galactic Civil War between the Empire and the New Republic).

5 *See* Monika Nalepa, *Transitional Justice and Authoritarian Backsliding*, 32 CONST. POL. ECON. 278, 278–300 (2021), https://perma.cc/L6G8-YQBS.

6 STAR WARS EPISODE VIII: THE LAST JEDI (Lucasfilm 2017) [hereinafter THE LAST JEDI]; THE RETURN OF THE JEDI, *supra* note 1.

7 *See generally* STAR WARS EPISODE IX: THE RISE OF SKYWALKER (Lucasfilm 2019) [hereinafter THE RISE OF SKYWALKER] (illustrating that the galaxy at large failed to respond to the Resistance's call for help).

8 *See* Ana Dumaraog, *The Mandalorian Is Already Showing Why* Star Wars*' New Republic Wasn't Good*, SCREEN RANT (Dec. 4, 2019), https://perma.cc/8JUR-HNTM (explaining why some *Star Wars* characters viewed the New Republic as a joke).

9 *See* INT'L CTR. FOR TRANSITIONAL JUSTICE, WHAT IS TRANSITIONAL JUSTICE?, (2009), https://perma.cc/LL7Z-BYTS [hereinafter WHAT IS TRANSITIONAL JUSTICE?].

10 *See* THE FORCE AWAKENS, supra note 4.

downfall of the New Republic a mere thirty years after the fall of the Empire. This Note will then compare and contrast transitional justice approaches taken in countries such as Taiwan, Colombia, and Solomon Islands to further illustrate that in order for a new regime to be successful in the long-term, it must be legitimate in the eyes of the people, and one way to help accomplish that is by growing civil society and the rule of law.

Part I of this Note provides an overview of international human rights laws related specifically to transitional justice and a brief history of events leading to the destruction of the New Republic. Part II discusses why newly formed democratic regimes are fragile and the relevance of preventing authoritarian backsliding in the current political climate. Part III explores the transition between the Empire and the New Republic under the transitional justice framework and the shortcomings of the New Republic's approach. Part IV argues that the most successful transitional justice regimes focus on building popular support and legitimacy through civil society reform in addition to institutional and military reforms by considering modern-day successes and failures.

I. Background

A. *Historical Background and Evolution of Transitional Justice*

1. Historical Development of Human Rights

The United Nations defines "human rights" as rights inherent to all human beings that the state has a duty to protect.[11] The concept of human rights gained international prominence and significance and entered permanently into the global consciousness in the aftermath of World War II.[12] However, the origin of human rights has more ancient roots, as the concept of innate rights of humanity can be traced back to the teachings of Mohamad, the Magna Carta (1215), and the Bill of Rights to the U.S. Constitution (1789).[13] The end of the 1940s witnessed the extension of human rights from existing primarily at the state level to the international stage, culminating in the Universal Declaration of Human Rights in 1948.[14]

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[11] *Human Rights*, UNITED NATIONS, https://perma.cc/A2WZ-72EK (last visited Mar. 22, 2022) (identifying the right to life and liberty, freedom from slavery, freedom of expression, and the right to education as examples of core human rights).

[12] *See* Frans Viljoen, *International Human Rights Law: A Short History*, UNITED NATIONS: UN CHRON., https://perma.cc/A8WA-9W6K (last visited Mar. 22, 2022).

[13] Meer Khan, *Evolution of Human Rights*, COURTING THE L. (June 16, 2019), https://perma.cc/4MQL-36Q8.

[14] Viljoen, *supra* note 12.

International understanding of what constitutes human rights has evolved since the 1940s.[15] The so-called first generation of human rights encompasses civil and political rights.[16] Civil and political rights promise human beings' freedom from governmental interference with their liberty, safety, and security.[17] The second generation of human rights includes social and economic rights, which includes protections for workplace safety and an emphasis on financial security.[18] Collective rights such as the right to a healthy environment and self-determination comprise third-generation rights.[19] Western democracies at the end of World War II advocated for human rights most in line with first-generation rights, though over time, their notion of human rights slowly began to include second- and third-generation rights as well.[20] The emergence of the concept of transitional justice in the 1980s and 1990s reflects the international community's awareness that human rights beyond first-generation rights deserve protection.[21]

Transitional justice grew, in part, out of the transitions of many Latin American, Eastern European, and Asian countries from authoritarian rule to democratic rule in the 1980s and the 1990s.[22] The Nuremberg Trials that sought to hold some high-ranking Nazi officials responsible for the atrocities and genocide they conducted during World War II are seen as a historical precursor to the modern discipline of transitional justice.[23] Other key events that influenced both the emergence and evolution of transitional justice include: a meeting in 1979 with scholars discussing how to deal with the legacy of authoritarian regimes, the fall of the Argentinian dictatorship in 1983, the collapse of the Soviet Union in 1989, the creation of the International Criminal Tribunal for Yugoslavia in 1993, and South Africa's

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15 *See* NYSUT & RFK Ctr. for Justice & Human Rights, *A Short History of Human Rights*, SPEAK TRUTH TO POWER (2010), https://perma.cc/TY4X-BAZM.

16 Viljoen, *supra* note 12.

17 *See* "International Covenant on Civil and Political Rights," A/RES/2200A (XXI) (16 Dec. 1966), https://perma.cc/6LMG-7TU4.

18 Viljoen, *supra* note 12.

19 Viljoen, *supra* note 12.

20 *See* Viljoen, *supra* note 12.

21 Marcos Zunino, *The Origins of Transitional Justice*, INT'L L. UNDER CONSTR. (July 9, 2019), https://perma.cc/7JBM-ATHU; Viljoen, *supra* note 12.

22 *See* Zunino, *supra* note 21; *see* Kora Andrieu, *Transitional Justice: A New Discipline in Human Rights*, SCIENCESPO (Jan. 18, 2010), https://perma.cc/QM4Z-UUFU.

23 *See, e.g.*, Nir Eisikovits, *Transitional Justice*, STAN. ENCYCLOPEDIA OF PHIL., https://perma.cc/M45D-ADG8 (Jan. 26, 2009) (identifying the Nuremberg Trials as one of the most prominent historical examples of a war tribunal).

Truth and Reconciliation Commission created in 1995 after the end of apartheid.[24] At its core, transitional justice grew out of the belief that past authoritarian regimes responsible for human rights abuses and atrocities needed to be held responsible to the people most harmed by their actions.[25]

2. The Modern Transitional Justice Framework

The doctrine and practice of transitional justice has grown beyond a singular focus on holding authoritarian regimes and their leaders responsible through trials and tribunals.[26] A successful exercise of transitional justice requires both a new regime and the international community to work closely together to protect the rights and dignities of human rights victims from past abuses.[27] Though a general framework for what transitional justice could encompass exists, there is no set formula or theory.[28] One common feature of different transitional justice frameworks is a commitment to respect and remedy past human rights abuses and atrocities.[29]

Criminal prosecutions for high-ranking officials of a former regime responsible for human rights crimes and atrocities is one commonly used framework for transitional justice.[30] The basic theory behind war tribunals and criminal prosecutions is that they support a new regime's focus on instilling the rule of law by punishing those in charge ordering the commission of mass atrocities.[31] Criminal prosecutions represent one of the most visible portions of transitional justice, and victims often demand them to hold their abusers responsible.[32] Though popularized by the Nuremberg Trials at the conclusion of World War II, criminal prosecutions are controversial for both logistical and substantive reasons.[33] Other thorny

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[24] MARCOS ZUNINO, JUSTICE FRAMED: A GENEALOGY OF TRANSITIONAL JUSTICE 59–61 (2019).

[25] *See* WHAT IS TRANSITIONAL JUSTICE?, *supra* note 9.

[26] *See* Zunino, *supra* note 21.

[27] *See* WHAT IS TRANSITIONAL JUSTICE?, *supra* note 9.

[28] Susanne Buckley-Zistel et al., *Transitional Justice Theories: An Introduction*, *in* TRANSITIONAL JUSTICE THEORIES 1–4 (Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun & Friederike Mieth eds., 2014).

[29] *See* Dustin N. Sharp, *Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice*, 26 HARV. HUM. RTS. J. 149, 152 (2013) (arguing that a community level approach focused on the victims should characterize effective transitional justice).

[30] WHAT IS TRANSITIONAL JUSTICE?, *supra* note 9.

[31] Int'l Ctr. for Transitional Justice, *Criminal Justice*, ICTJ, https://perma.cc/5H5U-Q7LR (last visited Mar. 22, 2022) [hereinafter *Criminal Justice*].

[32] *Id.*

[33] *See* Eisikovits, *supra* note 23 (listing criticisms of criminal prosecutions, including the

issues about criminal prosecutions include whether the state or individuals should be held accountable, or whether the new regime should extend amnesty in the name of reconciliation and moving on.[34]

A second popular transitional justice approach is that of truth-seeking commissions by non-judicial bodies.[35] Truth-seeking aims to provide acknowledgement and recognition of the traumas suffered by victims by seeking out the specific facts and circumstances related to the human rights abuses.[36] In contrast to criminal prosecutions, truth-seeking commissions do not seek to punish but rather to identify past abuses and make recommendations to ensure they do not happen again.[37] Additionally, truth-seeking attempts to deal with past abuses as a way to move forward.[38] Truth-seeking is more symbolic in nature, and some critics argue that it functions to overshadow the institutional problems of states by focusing on the most gruesome of atrocities.[39]

Reparations are another commonly used tool of transitional justice.[40] Often seen as one of the most direct methods of transitional justice, reparations can take a monetary or symbolic form and provide a state with the opportunity to directly make amends for the suffering it caused.[41] The concept of remediation in the context of human rights violations is especially important because it provides a state with a direct mechanism to redress its victims.[42] Despite reparations' central role in transitional justice efforts, logistical challenges related to finding a proper program to distribute them plagues the implementation of reparation programs.[43] Reparations are also criticized because of their backward facing nature and the risk that they

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appearance of victor's justice and the selectivity of holding only certain officials responsible).

[34] *See* Laurel E. Fletcher, *A Wolf in Sheep's Clothing? Transitional Justice and the Effacement of State Accountability for International Crimes*, 39 FORDHAM INT'L L.J. 447, 453 (2016); Milena Sterio, *Rethinking Amnesty*, 34 DENV. J. INT'L L. & POL'Y 373, 387 (2006).

[35] WHAT IS TRANSITIONAL JUSTICE?, *supra* note 9.

[36] *See* Int'l Ctr. for Transitional Justice, *Truth and Memory*, ICTJ, https://perma.cc/XB2G-BWFM (last visited Mar. 22, 2022) [hereinafter *Truth and Memory*].

[37] *See* Andrieu, *supra* note 22 (explaining that truth finding belongs to the field of restorative justice that aims to create social transformations).

[38] *See* Andrieu, *supra* note 22.

[39] Eisikovits, *supra* note 23.

[40] WHAT IS TRANSITIONAL JUSTICE?, *supra* note 9.

[41] Int'l Ctr. for Transitional Justice, *Reparations*, ICTJ, https://perma.cc/74N6-A5ZW (last visited Mar. 22, 2022) [hereinafter *Reparations*].

[42] *See* Lisa J. Laplante, *Negotiating Reparation Rights: The Participatory and Symbolic Quotients*, 19 BUFF. HUM. RTS. L. REV. 217, 220 (2012).

[43] *See* Lisa J. Laplante, *Just Repair*, 48 CORNELL INT'L L.J. 513, 518 (2015).

might trivialize the suffering of victims.[44]

A final typical feature of transitional justice plans is institutional and legal reforms.[45] Common types of reform performed in transitional justice initiatives include structural reform, judicial reform, demilitarization, ethical reform, and educational reform.[46] Institutional reform, especially to help develop a governmental and judicial system capable of performing successful transitional justice, is a traditional hallmark of transitional governments.[47] Reforms can be less successful when new regimes focus on trying to ensure the physical security of the state before working to establish a domestic rule of law.[48] Lustration, the institutional process of screening former government officials into the new regime, also plays an important role in institutional reform, as it regulates how and if old governmental officials can participate in the new government.[49] Critics of lustration argue that it prevents a clean break from the past that many citizens need to restore trust in the government.[50] The above listed approaches are not exclusive of one another and are often used together in many transitional justice efforts.[51]

B. *Transitional Governments Are Especially Vulnerable to the Return of Authoritarian Rule*

Human rights are often considered in tandem with the concept of democracy.[52] For example, the U.S. government lumps human rights and democracy together as one of its most paramount foreign policy objectives.[53] Historically, the international community often believed that a democratic form of government was the only governmental structure that could

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[44] Andrieu, *supra* note 22.

[45] Int'l Ctr. for Transitional Justice, *Institutional Reform*, ICTJ, https://perma.cc/ZE3Q-2AQM (last visited Mar. 22, 2022) [hereinafter *Institutional Reform*].

[46] *Id.*

[47] *See* Markus Schultze-Kraft, *Security and the Rule of Law in Colombia and Guatemala: Priorities, Trade-Offs, and Interdependencies*, 4 HAGUE J. ON THE RULE OF L. 135, 136 (2012).

[48] *See id.* at 135.

[49] Eisikovits, *supra* note 23.

[50] Eisikovits, *supra* note 23.

[51] WHAT IS TRANSITIONAL JUSTICE?, *supra* note 9.

[52] *See, e.g.*, Peter G. Kirchschlaeger, *The Relation Between Democracy and Human Rights*, *in* GLOBALISTICS & GLOBALIZATION STUDIES 112, 112–13 (Leonid E. Grinin, Ilya V. Ilyin & Andrey V. Korotayev eds., 2014) (explaining that democracy is, in part, built on the idea that human rights inherently belong to all people).

[53] *See Human Rights and Democracy*, U.S. DEP'T OF ST., https://perma.cc/BEF7-E6V3 (last visited Mar. 22, 2022) (stating that the concept of human rights in the United States has its roots in the establishment of American democracy).

adequately promote and protect people's human rights.[54] Recently, some international law experts criticize the assumption that only democracies can successfully coexist with individualized human rights as displaying too much Western and Liberal influence.[55] Underlying this criticism are the inherent risks that democratization presents to countries emerging from years of authoritarian rule and human rights abuses.[56]

The term democratic backsliding describes the increasingly common phenomenon of both established and new democracies eroding back towards some form of autocratic control.[57] Democratic backsliding does not necessarily mean a complete reversion or transition back to autocratic rule, but rather the gradual breakdown of the institutions that serve as a democracy's backbone.[58] Newly transitioned states need time to build up the capacity and institutions necessary for democracy to flourish.[59] The absence of stable public institutions, the rule of law, norms regarding free and fair elections, and trust in the newly elected government creates a greater risk for newly transitioned states to slide back into authoritarian rule.[60] The fragility of newly transitioned states presents risks of additional human rights abuses as such states are not yet strong enough to promote and protect the human rights of their people, even if the states might still be considered democracies.[61]

Recently, the fields of international law and political science have shown more awareness of the relationship between democratic backsliding and transitional justice.[62] For example, political science professor Monika Nalepa and her colleagues have created a data set designed to track the role that

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[54] *See* Pauline H. Baker, *The Dilemma of Democratization in Fragile States*, UNITED NATIONS: UN CHRON., https://perma.cc/9AYZ-RPZ8 (last visited Mar. 22, 2022).

[55] *See, e.g.*, THANDIWE MATTHEWS, TO BE EQUAL AND FREE: THE NEXUS BETWEEN HUMAN RIGHTS AND DEMOCRACY 17, 22 (2019) (arguing that when Liberal democracies focus solely on individualized human rights it limits the society wide protections that human rights should provide).

[56] *See* Baker, *supra* note 54.

[57] *See, e.g.*, Aziz Huq, *This Is How Democratic Backsliding Begins*, VOX (Mar. 15, 2017, 9:00 AM EDT), https://perma.cc/F2SC-N83H (asserting the erosion of democracy happens gradually through small reforms rather than through big, dramatic events).

[58] Ellen Lust & David Waldner, *Unwelcome Change: Coming to Terms with Democratic Backsliding*, 21 ANN. REV. POL. SCI. 93, 95 (2018).

[59] Baker, *supra* note 54.

[60] *See* Baker, *supra* note 54; Huq, *supra* note 57.

[61] *See* Baker, *supra* note 54.

[62] *See generally* Nalepa, *supra* note 5 (explaining how the lack of transitional justice may lead to authoritarian backsliding).

personnel transitional justice plays in strengthening democratic institutions.[63] Utilizing the new data set, Nalepa concludes that the process of vetting unknown collaborators of the old government is more conducive for democratic state-building than simply conducting purges of known collaborators.[64] Ultimately, transitional justice provides another avenue that newly transitioned states can take to help build the institutions necessary to help protect from a resurgence of authoritarian rule.[65]

C. *The Rise and Subsequent Fall of the New Republic*

A long time ago, in a galaxy far, far away, Sheev Palpatine consolidated power when as a senator from the planet of Naboo he won election as the Supreme Chancellor of the Galactic Republic.[66] Over the next thirteen years, in part by orchestrating the Clone Wars, Chancellor Palpatine kept himself in control by invoking emergency powers to stay on as Supreme Chancellor after his term expired.[67] Chancellor Palpatine transformed himself into Emperor Palpatine when he implemented Order 66 to kill all the Jedi and transitioned the Galactic Republic into the Galactic Empire.[68] Though he kept the senate for strictly ceremonial purposes, Emperor Palpatine began a rule of the galaxy that focused on gaining subservience through fear and violence.[69]

Throughout the reign of Emperor Palpatine, groups of citizens across the galaxy began to form small cells to resist the Empire's tyranny, and eventually these small cells consolidated into the Rebellion.[70] The Rebellion

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[63] Genevieve Bates, Ipek Cinar & Monika Nalepa, *Accountability by Numbers: A New Global Transitional Justice Dataset (1946-2016)*, 18 PERSPS. ON POL. 161, 162 (2020) (defining personnel transitional justice as transitional justice policies that are not criminal in nature).

[64] *Id.* at 179.

[65] *See generally* Nalepa, *supra* note 5; WHAT IS TRANSITIONAL JUSTICE?, *supra* note 9.

[66] STAR WARS EPISODE I: THE PHANTOM MENACE (Lucasfilm 1999).

[67] *See generally* STAR WARS EPISODE II: ATTACK OF THE CLONES (Lucasfilm 2002) (depicting Jar-Jar Binks voting to give Chancellor Palpatine emergency powers at the outset of a galactic conflict commonly known as the Clone Wars); STAR WARS EPISODE III: REVENGE OF THE SITH (Lucasfilm 2005) [hereinafter REVENGE OF THE SITH] (illustrating how Chancellor Palpatine retained his power by bringing Anakin Skywalker to his evil side).

[68] REVENGE OF THE SITH, *supra* note 67.

[69] *See generally* STAR WARS EPISODE IV: A NEW HOPE (Lucasfilm 1977) [hereinafter A NEW HOPE] (explaining that the Chancellor maintained his rule by mandating that all Jedi were to be killed and that the Imperial Senate was finished, which gave the Chancellor full power over the galaxies).

[70] *See generally Star Wars Rebels* (Disney XD television series 2014–2018) (chronicling how one of these rebel cells, led by pilot Hera Syndulla, became integrated into the larger Rebellion to

struck their first major victory against the Empire when a group of Rebels stole the plans of the Emperor's superweapon, the Death Star, which enabled them to blow up the Death Star during the Battle of Yavin.[71] The destruction of the Death Star ignited the five-year Galactic Civil War between the Empire and the Rebellion that culminated in the Empire's official surrender to the New Republic.[72] Unbeknownst to the New Republic, high-ranking officials of the Empire followed coordinates to the unknown regions of the galaxy to begin training a new regime and army to control the galaxy.[73]

As the First Order began to consolidate its power undetected from the New Republic, the New Republic government began to weaken and fracture along ideological lines after its first Chancellor resigned.[74] The First Order successfully wiped out the seat of the New Republic when it obliterated the planet Hosnian Prime, prompting the newly formed Resistance to attempt to stop the First Order from reinstating the Empire's rule.[75] After suffering many casualties and losses, the Resistance eventually prevailed over the First Order and sought to reverse the authoritarian rule that the First Order reintroduced into the galaxy.[76]

II. The Issues Being Addressed

In November 2020, the United States held one of the most unusual elections in its history—not because of the way the COVID-19 pandemic altered voting procedures, but rather because the sitting U.S. president spent the months leading up to the election invoking baseless fears of voter fraud.[77] Months of disinformation about election fraud and Donald Trump's refusal to concede his election loss to then President-Elect Joe Biden coalesced in the form of an angry, riotous mob that stormed the U.S. Capitol Building as both houses of Congress met to officially confirm Biden's electoral victory.[78] The

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oppose the Empire's tyranny over the galaxy).

[71] ROGUE ONE: A STAR WARS STORY (Lucasfilm 2016); A NEW HOPE, *supra* note 69.

[72] *See generally* WENDIG, EMPIRE'S END, *supra* note 4; STAR WARS EPISODE V: THE EMPIRE STRIKES BACK (Lucasfilm 1980); THE RETURN OF THE JEDI, *supra* note 1.

[73] WENDIG, EMPIRE'S END, *supra* note 4, at 85–88.

[74] *See generally* CLAUDIA GRAY, STAR WARS: BLOODLINE (2016) [hereinafter GRAY, BLOODLINE] (revealing that a senator of the New Republic helped fund the creation of the First Order without being detected).

[75] *See generally* THE FORCE AWAKENS, *supra* note 4.

[76] *See generally* THE LAST JEDI, *supra* note 6; THE RISE OF SKYWALKER, *supra* note 7.

[77] *See* Ishaan Tharoor, *Trump's Bitter Fight and the Fragility of U.S. Democracy*, WASH. POST (Jan. 6, 2021, 12:00 AM EST), https://perma.cc/AZ9Z-PUCG.

[78] Julian Borger, *Insurrection Day: When White Supremacist Terror Came to the US Capitol*, THE GUARDIAN (Jan. 9, 2021, 11:22 EST), https://perma.cc/CFA2-876F.

storming of the U.S. Capitol building was a jarring image for a myriad of reasons, but chief among them was its signaling of how fragile the United States' democracy became under the Trump presidency.[79] Thus, the election of 2020 represented the first time in the two hundred plus year history of the United States' democracy that a peaceful transition of power between different parties did not occur.[80]

The Capitol riots of January 6, 2021, illustrate that the concepts and ideals underpinning transitional justice can have application in established democracies in addition to newly transitioned regimes.[81] Transitional justice can help build back trust in the rule of law and the power and security of elections that democracies require in order to survive the pull of authoritarianism.[82] Thus, transitional justice represents one way that a new government can help build back the trust of the people to ensure that further encroachment of authoritarian rule does not continue.[83] The events in the United States could have been far more catastrophic if the mob actually succeeded in overturning the results of a free and fair election, but nonetheless demonstrate why the procedures of transitional justice should be considered even in states with an entrenched democratic tradition.[84]

Exploring the application of transitional justice in unique settings can better equip the global community to deal with human rights abuses in all situations.[85] Likewise, applying the various tools of transitional justice to a set of facts unblemished by the real-world politics that may color attempts at transitional justice, in this case the fall of the New Republic from the *Star Wars* universe, provides an important opportunity to develop a more concrete model of transitional justice ready to be applied in all situations that implicate human rights abuses.[86] Works of fiction, especially *Star Wars*, often reflect anxieties from the so-called real world and provide an important framework for examining problems plaguing present-day society, such as non-peaceful transitions of power and the human rights abuses they can

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[79] *See* Patrick J. McDonnell et al., *After Attack on the U.S. Capitol, Some Wonder About the State of Democracy Around the World*, L.A. TIMES (Jan. 9, 2021, 2:00 AM PT), https://perma.cc/7E9M-AMTN.

[80] Craig Bruce Smith, *Transition of Power: Greatness Meets Infamy*, THE HILL (Jan. 10, 2021, 2:00 PM EST), https://perma.cc/28XZ-6EJS.

[81] Kelebogile Zvobgo, *'This Is Not Who We Are' Is a Great American Myth*, FOREIGN POL'Y (Jan. 8, 2021, 6:13 PM), https://perma.cc/Y3XB-4LT3.

[82] *See id.*

[83] *See* WHAT IS TRANSITIONAL JUSTICE?, *supra* note 9.

[84] *See* Zvobgo, *supra* note 81.

[85] *See generally* WHAT IS TRANSITIONAL JUSTICE?, *supra* note 9.

[86] *See infra* Part IV.

produce.[87] Accordingly, studying the *Star Wars* universe through a transitional justice lens will provide answers that will better equip the international community to remedy human rights abuses.[88]

ANALYSIS

III. The New Republic Failed to Fully Utilize the Transitional Justice Framework

A. *The New Republic Focused Primarily on Demilitarization and Secondarily on Criminal Prosecutions*

1. The New Republic Pursued Demilitarization and Democratic Reform

After the Rebellion defeated the Empire and its two highest ranking officials, Emperor Palpatine and Lord Darth Vader, the Rebellion faced the challenge of transitioning from opposing an autocratic government to actually governing the galaxy.[89] As the Rebellion transformed into the New Republic and re-established the Galactic Senate, the New Republic immediately faced the dual challenge of soundly defeating the remnants of the Empire while showing the galaxy how different its regime would be from the Empire, similar to the challenges faced by many newly transitioned regimes.[90] Mon Mothma, the newly appointed chancellor of the nascent New Republic, decided to advocate for and pursue a policy of demilitarization to help ensure a peaceful transition of power from the Empire.[91] Even though demilitarization often focuses on disbanding paramilitary groups, the New Republic's military reform focused more on reducing the regime's military

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[87] *See* Christopher Klein, *The Real History That Inspired "Star Wars"*, HIST. (Dec. 17, 2015), https://perma.cc/US9C-K4G4 (identifying historical influences on George Lucas's vision of Star Wars, including Nazi Germany, the Vietnam War, and Ancient Rome).

[88] *See infra* Part III.

[89] THE RETURN OF THE JEDI, *supra* note 1. *See generally* CHUCK WENDIG, STAR WARS: AFTERMATH (2015) [hereinafter WENDIG, AFTERMATH] (documenting in this first book of the Aftermath Trilogy how the leadership of the Rebellion established the New Republic while fighting Imperial remnants).

[90] *See* CHUCK WENDIG, STAR WARS: AFTERMATH: LIFE DEBT 194–98 (2016) [hereinafter WENDIG, LIFE DEBT]; WENDIG, AFTERMATH, *supra* note 89, at 84–88; *see also* TED PICCONE, PEACE WITH JUSTICE: THE COLOMBIAN EXPERIENCE WITH TRANSITIONAL JUSTICE (2019), https://perma.cc/8AD2-WKYN (explaining how Colombia faced a dual challenge of continuing to fight against militia groups while trying to redress the needs of its population).

[91] WENDIG, AFTERMATH, *supra* note 89, at 84–88.

presence.[92]

The New Republic's demilitarization reform movement culminated in the Military Disarmament Act.[93] First proposed by Chancellor Mothma, the New Republic Senate passed the Act to go into effect after the official defeat of the Empire.[94] The Act reduced the New Republic's centralized military force by ninety percent.[95] As a result of this policy, the majority of the ships of the New Republic military were stationed with the seat of the New Republic's government on Hosnian Prime and used primarily in diplomatic and non-military functions.[96] Chancellor Mothma viewed this policy as the New Republic's best tool to restore democracy and peace to the galaxy in the wake of the Empire's atrocities because of the message demilitarization would send to the people.[97]

In actuality, the New Republic's demilitarization efforts ultimately left the New Republic government vulnerable to the rise of the First Order.[98] The decision to emphasize demilitarization as the government's main tool of transitional justice was controversial at the time the New Republic first implemented it because of fear that remaining imperial regiments still posed a serious risk to the New Republic and its people.[99] This initial ideological divide deepened as the New Republic grew to the point of a complete political stalemate that rendered the government practically useless.[100] In

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[92] *Institutional Reform*, *supra* note 45; *see* WENDIG, AFTERMATH, *supra* note 89, at 84–88.

[93] PABLO HIDALGO, STAR WARS THE FORCE AWAKENS: THE VISUAL DICTIONARY 8 (2015).

[94] *See* WENDIG, AFTERMATH, *supra* note 89, at 84–88.

[95] *See generally* ALEXANDER FREED, STAR WARS: SHADOW FALL (2020) (depicting that the New Republic's scaled down forces were the result of the Military Disarmament Act).

[96] *See generally* GRAY, BLOODLINE, *supra* note 74 (describing how a New Republic lieutenant complained about the lack of exciting military action he participated in with the New Republic military).

[97] WENDIG, AFTERMATH, *supra* note 89, at 88; *see Disarmament, Demobilization, Reinsertion, and Reintegration: Definitions and Conceptual Issues*, PEACE BUILDING INITIATIVE, https://perma.cc/2VRP-PQ8Z (last visited Mar. 23, 2022) (illustrating the important role that demilitarization has in modern conceptions of effective peacebuilding and transitional justice movements).

[98] *See* Chris Wermeskerch, *What the New Republic Should Have Learned from the Old Republic*, ELEVEN-THIRTYEIGHT (Sept. 5, 2016), https://perma.cc/2BDH-9ZS8. *See generally* GRAY, BLOODLINE, *supra* note 74 (documenting how unbeknownst to the rest of the Senate, a senator used the political stalemate to her advantage and began funding what would turn into the First Order military).

[99] *See* WENDIG, AFTERMATH, *supra* note 89, at 84–88; WENDIG, LIFE DEBT, *supra* note 90, at 194–98.

[100] *See generally* GRAY, BLOODLINE, *supra* note 74 (illustrating that the ideological divide between the Populists and Centrists is so deep that the government cannot act to combat

addition to the political ramifications of demilitarization, the policy left the New Republic and later the Resistance, a military group that operated independently of the New Republic, without the military resources necessary to protect the galaxy from the rising threat of the First Order.[101] Instead of protecting the many victims of the Imperial military and its might, the New Republic's policy of demilitarization and disarmament had the opposite effect, leaving those victims at the mercy of criminal organizations and imperial remnants that grew powerful under the New Republic.[102]

2. The New Republic's Flawed Approach Towards War Criminals

The official end of the Galactic Civil War occurred when the Empire formally surrendered to the New Republic by signing the Galactic Concordance.[103] The Concordance designated that all Imperial officers who did not abide by the terms of the surrender would be considered war criminals.[104] Further, the Concordance also granted conditional pardons to non-combatant functionaries.[105] Thus, the Concordance attempted to balance the competing interests of holding perpetrators responsible for their actions, which is inherent in criminal prosecutions of war criminals, with the desire to forgive and move on.[106]

Criminal prosecutions of Imperial officers did not play the most prominent role in the New Republic's transition of power because of both the new regime's desire to focus on establishing democracy and peace and the fact that the most notorious and highest-ranking Imperial officials died during the Galactic Civil War.[107] Nevertheless, the New Republic carried out

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growing threats, such as an increase in organized crime).

[101] *See* JASON FRY, STAR WARS THE FORCE AWAKENS: INCREDIBLE CROSS-SECTIONS 12 (2015) (explaining that because of the New Republic's demilitarization efforts, finding manufacturers to produce X-Wings posed a problem for the Resistance); *see also* Matthew Rudoy, *The Mandalorian Shows the New Republic's Weaknesses*, DORK SIDE OF THE FORCE, https://perma.cc/6XMW-FCYW (last visited Mar. 22, 2022) (arguing that the Military Disarmament Act resulted in New Republic prisons being primarily staffed by droids instead of people).

[102] *See generally* THE FORCE AWAKENS, *supra* note 4; GRAY, BLOODLINE, *supra* note 74.

[103] WENDIG, EMPIRE'S END, *supra* note 4, at 404.

[104] WENDIG, EMPIRE'S END, *supra* note 4, at 404.

[105] WENDIG, EMPIRE'S END, *supra* note 4, at 404.

[106] *See* Eisikovits, *supra* note 23; *cf.* Sterio, note 34, at 87 (comparing the values the Geneva Convention saw in holding war criminals responsible for their actions to the interests of the fictional post-war Concordance).

[107] THE RETURN OF THE JEDI, *supra* note 1; *see* WENDIG, AFTERMATH, *supra* note 89, at 84–88

the terms of the Concordance by imprisoning ex-imperial officers and interviewing and assessing ex-imperial personnel in "Imperial Shantytowns" to determine how valuable each person could be to the New Republic's interests balanced against the risk that person posed to the new government.[108] Ex-imperials were limited in how they could interact with the New Republic, as they were barred from voting or taking government contracts.[109] However, the New Republic did not hesitate to work with ex-imperials–even those directly involved in horrific human rights violations–if the New Republic believed a specific person renounced all allegiances to the Empire and he or she had knowledge that could help the New Republic defeat the Empire.[110]

Criminal prosecutions are often criticized for their retroactivity and selectiveness, which the New Republic's approach to war criminals and their treatment demonstrates.[111] On the one hand, the New Republic faced criticism for working with an ex-imperial pilot who participated in an air campaign that conducted a genocide of a planet instead of prosecuting her for the crimes she committed.[112] However, the Rebellion, and later the New Republic, had a long history of providing refuge for ex-imperials who could not stand by the Empire's continued atrocities and allowing these people the opportunity to show their commitment and dedication towards making the galaxy a more just place.[113] Thus, criminal prosecutions of ex-imperials

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(2015); *see also Criminal Justice*, *supra* note 31 (explaining that criminal prosecutions produce the most effective results for victims of human rights abuses when it focuses on the "planners and organizers" of such abuses).

[108] *See* ALEXANDER FREED, STAR WARS: ALPHABET SQUADRON 8–9 (2019) [hereinafter FREED, ALPHABET SQUADRON] (describing a former rebel base converted into a so-called imperial shantytown where imperial defectors were detained while the New Republic assessed their threat levels); CLAUDIA GRAY, STAR WARS: LOST STARS 537 (2015) [hereinafter GRAY, LOST STARS] (depicting former Imperial Officer Cienna Ree imprisoned in a New Republic facility).

[109] *See* ALEXANDER FREED, STAR WARS: VICTORY'S PRICE 460 (2021) [hereinafter FREED, VICTORY'S PRICE].

[110] *See generally* FREED, ALPHABET SQUADRON, *supra* note 108 (depicting that the New Republic willingly worked with former imperial pilot, Yrica Quell, to take down her old squadron despite the fact she participated in the burning and bombing of the planet Nacronis during Operation Cinder).

[111] *See* FREED, VICTORY'S PRICE, *supra* note 109, at 435–39 (depicting a conversation between two New Republic officials discussing how best to discipline former imperial soldiers); Eisikovits, *supra* note 23.

[112] *See generally* FREED, *supra* note 95 (describing how Quell's squadron mates reacted very negatively when they discovered Quell's role in Operation Cinder).

[113] *See* REBECCA ROANHORSE, STAR WARS: RESISTANCE REBORN 147–48 (2019) (showing a scene where Resistance members share their imperial pasts and where Resistance pilot Poe

played a secondary role in the New Republic's transitional justice approach and illustrated the New Republic's struggle between punishing imperials and forgiving imperials to promote a more peaceful government.[114]

3. The New Republic Did Not Meaningfully Pursue Truth-Seeking or Reparations

The New Republic did not meaningfully seek the truth surrounding the Empire's human rights abuses and atrocities and instead focused their transitional justice approach primarily on demilitarization.[115] Truth-seeking commissions often encompass non-judicial bodies probing the root causes and effects of a prior regime's abuses to help bring closure and peace to the victims.[116] The New Republic did create a reconciliation project that sought to give victims a chance to heal by introducing them to ex-imperials that caused their suffering.[117] However, the project was limited in scope, and the New Republic instead primarily focused on disarming New Republic military to demonstrate the difference between the new government and the former Empire.[118] This strategic decision was motivated in part by obviousness to many of the Empire's human rights violations and the New Republic's desire to move forward into an era of democracy and peacefulness.[119]

Nor did the New Republic provide an opportunity for many of the Empire's victims to receive financial reparations, in part because of the lack of resources the New Republic faced during its transition.[120] In addition to money, reparations often take the form of symbolic measures, including apologies or constructing memorials.[121] The only instance of monetary reparations offered by the New Republic was to individuals enslaved by the Empire.[122] One of the New Republic's only other attempts at reparations was

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Dameron remarks, "My point . . . is that many of us have dubious beginnings, but it is how we end that counts").

[114] *See* Sterio, *supra* note 34, at 386. *See generally* FREED, VICTORY'S PRICE, *supra* note 109.

[115] WENDIG, AFTERMATH, *supra* note 89, at 84–88.

[116] *Truth and Memory*, *supra* note 36.

[117] *See* FREED, VICTORY'S PRICE, *supra* note 109, at 455–60 (describing Senator Wyl Lark's role in spearheading the New Republic's reconciliation project).

[118] WENDIG, AFTERMATH, *supra* note 89, at 84–88.

[119] *See* WENDIG, AFTERMATH, *supra* note 89, at 84–88; *see also* A NEW HOPE, *supra* note 69 (blowing up the planet Alderaan represents one of the most obvious and egregious examples of the Empire's human right abuses and served as a reason to defect for some imperials).

[120] *See* WENDIG, EMPIRE'S END, *supra* note 4, at 56–61.

[121] *Reparations*, *supra* note 41.

[122] *See* GRAY, LOST STARS, *supra* note 108, at 490 (describing how an individual who received

when it erected a statue of the famous rebel and Alderaanian Senator Bail Organa, who died when the Empire blew up his home planet with the Death Star.[123] The dedication of Bail Organa's statue provided the highly partisan New Republic Senate with a moment of unity, thus showing the power that reparations of any form can have on the victims of human rights abuses.[124] Despite the statue dedication ceremony's brief power to unify, the New Republic did not fully utilize reparations in its transitional justice approach.[125]

B. *The People Did Not Have Faith in the New Republic*

Enthusiasm and belief in the New Republic's ability to successfully replace the Empire as a more just government characterized many rebels' beliefs immediately after the Rebellion's victory on Endor.[126] The founders of the New Republic genuinely believed that establishing a democratic government would help lead the galaxy in a more positive direction towards peace.[127]

However, approximately twenty years later, the majority of senators and other New Republic government officials no longer shared an optimistic view of the New Republic.[128] Senator Leia Organa's observations of the state of the New Republic suggests that the structural weaknesses and shortcomings of the New Republic date back to the New Republic's transition away from the authoritarian rule of the Empire.[129] In particular, the focus on demilitarization during the New Republic's transition served as an ideological divide between the two factions of the New Republic.[130] Thus,

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reparations planned to spend the money upgrading his ship).

[123] *See* GRAY, BLOODLINE, *supra* note 74, at 5–8.

[124] GRAY, BLOODLINE, *supra* note 74, at 5–8.

[125] *See* GRAY, BLOODLINE, *supra* note 74, at 5–8. *See generally* JUDY BARSALOU & VICTORIA BAXTER, THE URGE TO REMEMBER: THE ROLE OF MEMORIALS IN SOCIAL RECONSTRUCTION AND TRANSITIONAL JUSTICE 9–10 (2007) (criticizing transitional justice movements that overlook the positive effects that memorialization can have in supporting other transitional justice strategies).

[126] *See* GRAY, LOST STARS, *supra* note 108, at 489–90 (describing a rebel's point of view that establishing the New Republic was worth the sacrifice and lives lost because it righted the worst wrongs of the Empire).

[127] *See* WENDIG, AFTERMATH, *supra* note 89, at 88.

[128] *See* GRAY, BLOODLINE, *supra* note 74, at 5–6 (illustrating that many senators, including Leia Organa, became disillusioned with the gridlock, partisanship, and inaction of the New Republic).

[129] *See* GRAY, BLOODLINE, *supra* note 74, at 7–12.

[130] *See generally* GRAY, BLOODLINE, *supra* note 74.

the New Republic's decision to focus its transitional justice efforts primarily on military reform demonstrates the limitations of focusing on just one aspect of transitional justice, especially a controversial aspect, as such a narrow focus works to politicize and weaken a new regime rather than strengthen it.[131]

On the whole, people throughout the galaxy did not meet the establishment of the New Republic government with the same level of enthusiasm and optimism that members of the New Republic initially shared.[132] While the New Republic focused on securing peace and stability on a larger, galaxy-wide scale, organized crime and gang activity exploded in areas where these criminal enterprises no longer feared the Empire and did not believe the New Republic was powerful enough to stop them.[133] Organized crime rose to become more and more of a threat to the financial and physical security of many worlds far away from New Republic oversight; the New Republic did not have the resources necessary to effectively combat many of the new cartels and gangs that rose to power in the vacuum that occurred after the defeat of the Empire.[134] The New Republic's failure to live up to its promise to effectively combat and curtail the devastating effects of organized crimes represents one example of why many people throughout the galaxy lost their trust in the capability of the New Republic to protect them as promised.[135]

The New Republic's lack of resources and its inability to follow through on its promises contributed to the popular belief that the New Republic was

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[131] *See* GRAY, BLOODLINE, *supra* note 74, at 7–12; *see also* Kora Andrieu, *Confronting the Dictatorial Past in Tunisia: The Politicization of Transitional Justice*, JUST. INFO.NET (Aug. 31, 2015), https://perma.cc/HU3F-785P (arguing that for transitional justice to be successful in Tunisia, it needs to focus on the victims and avoid focusing on political hierarchies and divisions).

[132] *See* FREED, ALPHABET SQUADRON, *supra* note 108, at 158–59 (depicting a man who expresses doubt that the New Republic would help him defend his town against gang activity within the first year of the New Republic's transition).

[133] *See* WENDIG, AFTERMATH, *supra* note 89, at 166–68.

[134] *See* GRAY, BLOODLINE, *supra* note 74, at 20–22 (showing a representative from a world overrun with cartel activity accusing the New Republic of failing to enforce its own regulations on organized crime and of breaking its promise of protecting the victims of organized crime under the Empire's reign).

[135] *See* GRAY, BLOODLINE, *supra* note 74, at 20–22. *See generally* INT'L CTR. FOR TRANSITIONAL JUSTICE, JUSTICE MOSAICS: HOW CONTEXT SHAPES TRANSITIONAL JUSTICE IN FRACTURED SOCIETIES 9, 19, 26 (Roger Duthie & Paul Seils eds., 2017) (identifying history of violence and organized crime as a factor that should be considered while engaging in transitional justice, highlighting the severity of organized crime on violating people's human rights).

ineffective.[136] One specific example is when a Mandalorian bounty hunter, Din Djarin, decides to take matters into his own hands when he suspects an old imperial remnant on the planet Nevarro was doing nefarious things to a bounty he recently turned over to them.[137] Djarin refers to the New Republic as a joke and regularly defies New Republic regulations and laws when he believes they will be more of a hindrance than a help to his mission to protect his adopted son Grogu, popularly known as Baby Yoda.[138] Additionally, local, planetary governments and security forces reluctantly worked with the New Republic also out of the belief of the government's irrelevance to local matters.[139] For example, when a New Republic security officer arrives on the moon Yavin IV to conduct an investigation into a spice running cartel, the planetary security forces deliberately delay meeting and cooperating with the New Republic out of reluctance of getting involved with New Republic bureaucracies.[140] These examples provide more evidence that the New Republic's reputation and lack of resources led to a general distrust in the New Republic's ability to assist other planets.[141]

C. *The Absence of the Jedi Hampered the New Republic's Transition*

The most successful transitional justice initiatives utilize all available resources, including non-governmental organizations (hereinafter "NGOs") and the international community.[142] Newly transitioned states usually are weak and fragile and benefit immensely from having a stable organization

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136 *See* Dumaraog, *supra* note 8.

137 *See The Mandalorian: The Sin* (Disney + streaming service broadcast Nov. 22, 2019) [hereinafter *The Sin*] (showing that the bounty in question was a living being).

138 *See id.*; *see also The Mandalorian: The Prisoner* (Disney + streaming service broadcast Dec. 13, 2019) (breaking into a New Republic prison ship to release a prisoner with no fear of the New Republic stopping him); *The Mandalorian: The Believer* (Disney + streaming service broadcast Dec. 11, 2020) (using the help of a New Republic marshal to retrieve a New Republic prisoner from a work camp out of belief he could help Djarin rescue Grogu).

139 *See* ALEX SEGURA, STAR WARS: POE DAMERON: FREE FALL 34–39 (2020).

140 *Id.*

141 *See id.*; *see also* Habib Nassar, *The Failure of Top-Down Approaches to Transitional Justice: What Iraqis and Syrians Teach Us*, PEACE LAB (Dec. 13, 2018), https://perma.cc/K6DM-SF3A (explaining that transitional justice approaches that do not take victim's needs and desires into account, such as Djarin who is a survivor of the purge on his adopted home world, will not generate the support needed to build a successful transitional justice movement).

142 *See, e.g.*, Int'l Ctr. for Transitional Justice, *Sustainable Development Goals*, ICTJ, https://perma.cc/M62B-NQMP (last visited Mar. 23, 2022) (summarizing the organization's goal of coordinating governments, NGOs, and other international organizations to help address human rights violations in transitioning countries).

provide them the resources necessary to move on from past atrocities.[143] NGOs and other external actors can play an especially important role in helping to establish truth-seeking commissions by mobilizing popular support and engagement in the overall transitional justice process.[144] Non-governmental assistance does not relieve a new government from pursuing any institutional reforms, prosecutions, or reparation programs to redress human rights victims, but rather it bolsters a government's transitional justice approach by strengthening the rule of law and thus helping build trust and legitimacy in the new government.[145]

The lack of NGOs or any other non-governmental support for its transitional justice efforts represented the New Republic's greatest challenge in successfully undergoing transitional justice.[146] The New Republic often gets compared to the so-called Old Republic, the government that existed prior to the Empire, but one of the biggest differences is the absence of the Jedi Order.[147] Historically, the Jedi Order served as peacekeepers and visited all different kinds of worlds to provide humanitarian aid and relief.[148] Even in more recent Republic history, before the start of the Clone Wars, Jedi knights were sent to worlds to assist with local conflicts and help local governments maintain peace as much as possible.[149] Though not entirely independent from the government, the Jedi Order could have served a role

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[143] *See* Melissa Ballengee, Comment, *The Critical Role of Non-Governmental Organizations in Transitional Justice: A Case Study of Guatemala*, 4 UCLA J. INT'L L. & FOREIGN AFF. 477, 479 (2000).

[144] KIRSTEN MCCONNACHIE, TRUTH COMMISSIONS AND NGOS: THE ESSENTIAL RELATIONSHIP 9 (2004).

[145] *See id.* at 32 (explaining that NGOs can help bolster civil society in transitional justice movements by connecting with people who are not usually involved in the government); *see also* Eric Brahm, *Transitional Justice, Civil Society and the Development of the Rule of Law in Post-Conflict Societies*, 9 INT'L J. OF NOT-FOR-PROFIT L., Aug. 2007, https://perma.cc/4K77-EA5R (arguing that NGOs can help bolster civil society and the rule of law by allowing victims to better put pressure on the government to address their grievances, thus increasing the legitimacy of the new government).

[146] *See generally* GRAY, BLOODLINE, *supra* note 74 (illustrating that the New Republic Senate did not have any NGOs to assist with its governance).

[147] *See, e.g.*, Wermeskerch, *supra* note 98. *See generally* THE FORCE AWAKENS, *supra* note 4 (focusing on the search for missing Jedi, Luke Skywalker, as it is believed he is the last known Jedi in the galaxy).

[148] *See generally*, CHARLES SOULE, STAR WARS: THE HIGH REPUBLIC: LIGHT OF THE JEDI (2021) (introducing the High Republic era of *Star Wars* and documenting the traditional role of the Jedi as peacekeepers).

[149] *See* CLAUDIA GRAY, STAR WARS: MASTER & APPRENTICE 64–69 (2019) (showing Jedi Master, Qui-Gon Jinn and his padawan, Obi-Wan Kenobi, being assigned to the planet Pijal to help with a potentially violent political dispute).

in the New Republic's transitional justice effort akin to that of an NGO's role in helping to build civil society.[150]

As a part of his plan to consolidate power and establish his rule as emperor, Supreme Chancellor Palpatine planned and executed Order 66 to eliminate the Jedi by implanting mind-control chips in the clone troopers who served under the Jedi in the Clone Wars.[151] Consequently, the Jedi Order did not exist when the New Republic formed, as the few known Jedi who survived Order 66 were not involved in the creation of the new government.[152] Even though Luke Skywalker, the only known Jedi with any sort of ties to the New Republic government, attempted to restart the Order, his efforts were quashed when his student and nephew, Ben Solo, turned to the dark side and murdered all his students.[153] The New Republic, therefore, did not have the benefit of an outside organization that could have played an essential role in the transitional period.[154] The absence of the Jedi or any similar organization left the New Republic's institutional and military reform vulnerable to erosion without corresponding support at a more micro-level to directly support the victims of human right abuses.[155]

Ultimately, the New Republic's transitional justice focus on institutional and military reform was incomplete because it lacked the needed mechanisms to ensure individual victims felt properly remedied.[156] A lack of popular support and trust in the New Republic resulted as a consequence of the incomplete and uneven transition of power.[157] The overall weakness of the transitional period left the New Republic vulnerable to its eventual demise at the hands of the First Order.[158]

IV. A Successful Transitional Justice Approach Should Focus on

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[150] *See id.*; Brahm, *supra* note 145.

[151] *Star Wars: The Clone Wars: Orders* (Lucasfilm television broadcast Mar. 7, 2014).

[152] *See generally* REVENGE OF THE SITH, *supra* note 67 (showing that Yoda and Obi-Wan survived Order 66).

[153] THE LAST JEDI, *supra* note 6.

[154] *See* JO-MARIE BURT, TRANSITIONAL JUSTICE IN THE AFTERMATH OF CIVIL CONFLICT: LESSONS FROM PERU, GUATEMALA AND EL SALVADOR 84 (2018) (identifying that external organizations dedicated to advancing and protecting victim's human rights should be important attributes for transitional justice movements); *see also* THE FORCE AWAKENS, *supra* note 4.

[155] *See* Eric Brahm, *supra* note 145 (explaining the important role non-governmental organizations play in promoting transitional justice during periods of civil conflict).

[156] *See* BURT, *supra* note 154, at 84; *see also supra* Part III(A).

[157] *See* Nassar, *supra* note 141; *see also supra* Part III(B).

[158] *See* THE FORCE AWAKENS, *supra* note 4.

Building Popular Support and Trust

An analysis of the New Republic's transitional justice failures provides important insights and lessons that can be applied in both identifying and assessing transitional justice efforts.[159] One of the New Republic's ultimate failures stems from a sense of complacency that emerged among many New Republic government officials because they truly believed that defeating the Empire and enacting the Military Disarmament Act would lead to peace.[160] In fact, the regime change and demilitarization did not have the society-altering impact needed to ensure the long-term success and stability of the New Republic.[161] The New Republic's failure to change the daily realities of people throughout the galaxy illustrates the importance of conducting transitional justice reforms on a smaller scale in addition to large scale institutional reform.[162]

The experiences of Colombia during its transitional justice movement mirrors the shortcomings of the New Republic's approach by focusing too narrowly on the physical security of the country.[163] In 2016, Colombia signed a peace treaty with the country's largest paramilitary group, FARC, to end fifty years of armed conflict and to begin the healing process for its citizens impacted by the decades of violence.[164] However, the transitional justice movement in Colombia has its roots in the 2005 Justice and Peace Law ("JPL"), which provided for the demobilization and subsequent reintegration into society of members of paramilitary organizations.[165] The JPL faced criticism for being too lenient on former militias without focusing strongly enough on individual truth and reconciliation.[166]

Similarly to the New Republic, Colombia's focus on securing the demobilization of opposing forces limited the government's overall effectiveness in transforming society, as it took until the 2016 peace treaty to

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[159] *See supra* Part III.

[160] *See* HIDALGO, *supra* note 93, at 56–57 (describing how the New Republic Senate branded Leia Organa as an alarmist and warmonger for suggesting that the New Republic did not take enough steps to protect the galaxy against the resurgence of Imperial rule).

[161] *See* SEGURA, *supra* note 139, at 207–08 (showing that a space station's quality of life was not improved by New Republic rule because the New Republic did not have the resources to effectively govern Outer Rim planets).

[162] *See* Nassar, *supra* note 141.

[163] *See* Schultze-Kraft, *supra* note 47, at 137.

[164] PICCONE, *supra* note 90, at 3.

[165] Int'l Ctr. for Transitional Justice, *Colombia*, ICTJ, https://perma.cc/6NFG-6YKL (last visited Mar. 23, 2022) [hereinafter *Colombia*].

[166] *See* Schultze-Kraft, *supra* note 47, at 142.

address the causes of the conflict with the paramilitary groups in the first place.[167] But unlike the New Republic, the Colombian government continued implementing transitional justice, albeit at a slow pace, rather than accepting the JPL as the country's main transitional justice law.[168] Colombian efforts at transitional justice demonstrate a more long-term commitment than the New Republic displayed and show the importance of implementing reforms beyond demilitarization and demobilization.[169]

Colombia's experience with transitional justice illustrates the important role that NGOs and the international community play in the demobilization of military forces.[170] After the 2016 peace treaty, representatives from the UN assisted with the implementation of the demobilization requirements for the FARC to ensure the group's compliance with the terms of the peace treaty.[171] This represents another difference between Colombia's methods and the New Republic's approach—the New Republic did not have any external support in both demobilizing former imperials and demobilizing its own forces.[172] International support, in addition to Colombia's long-term commitment to transitional justice, provides another reason why its transitional justice efforts were ultimately more successful than the New Republic's.[173]

The history of transitional justice in Taiwan shows the importance of truth-seeking and long-term commitments to transitional justice.[174] The year 1987 marked the beginning of Taiwan's democratization as the government lifted martial law and abolished free speech restrictions.[175] Prior to 2016, the Taiwanese government conducted only limited transitional justice policies, including apologies and monetary reparations to victims and their families.[176] In 2018, democratically elected president Tsai Ing-wen helped

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[167] PICCONE, *supra* note 90, at 1 (identifying the underlying causes of the conflict as "rural poverty, marginalization, insecurity, and lawlessness").

[168] *Colombia*, *supra* note 165.

[169] *See* HIDALGO, *supra* note 93, at 56; *Colombia*, *supra* note 165.

[170] *See* PICCONE, *supra* note 90, at 4.

[171] PICCONE, *supra* note 90, at 4.

[172] *See* WENDIG, AFTERMATH, *supra* note 89, at 84–88.

[173] PICCONE, *supra* note 90, at 4 (demonstrating that Colombia's own transitional justice efforts were bolstered by UN assistance).

[174] *See* Hung-Ling Yeh & Ching-Hsuan Su, *Never Too Late—The Work of the Transitional Justice Commission in Taiwan*, 28 WASH. INT'L L.J. 609, 610 (2019) (explaining that Taiwan experienced two phases of transitional justice, the first from 1987 to 2016 and the second from 2016 to the present).

[175] *Id.* at 613.

[176] Huang Yu-zhe, *Transitional Justice Requires Time*, TAIPEI TIMES (June 17, 2020),

create the Transitional Justice Commission ("TJC") to complement the reparations to victims of horrific government atrocities and to identify the truth and those responsible for those human rights violations.[177] The TJC includes four divisions that work to create a more comprehensive transitional justice approach in Taiwan.[178]

Both Taiwan and the New Republic faced the challenge of implementing transitional justice against a polarized political backdrop.[179] Transitional justice had long been considered controversial in Taiwan because the political party implementing the policies was the same party that inflicted the human rights abuses that warranted transitional justice in the first place.[180] Thus, in this respect, the New Republic actually was better positioned to carry out transitional justice than Taiwan because the New Republic was not responsible for the atrocities that occurred under the Empire.[181] However, the experiences in Taiwan and the New Republic began to diverge because the New Republic government became more polarized about transitional justice policies over time, whereas Taiwan became more unified in pursuing comprehensive transitional justice policies after the 2018 transfer of power.[182]

Even though Taiwan's democracy and the New Republic lasted for roughly the same amount of time, Taiwan's democratic traditions strengthened over time while the New Republic's began to erode.[183] Taiwan's initial transitional justice efforts were limited in scope, but they grew and evolved as Taiwan successfully enjoyed its third peaceful transition of power, securing its position as one of the most successful East

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https://perma.cc/8DS9-2GYN.

[177] *Id.*; Yeh & Su, *supra* note 174, at 611.

[178] Yeh & Su, *supra* note 174, at 611–13 (identifying the four departments as: The Historical Truth Restoration, Department of Authoritarian Relics Handling, Department of Redressing Past Judicial Wrongs, and the Department of Rebuilding Social Trust).

[179] *See* THOMAS J. SHATTUCK, TRANSITIONAL JUSTICE IN TAIWAN: A BELATED RECKONING WITH THE WHITE TERROR 44 (2019); WENDIG, LIFE DEBT, *supra* note 90, at 194–98.

[180] SHATTUCK, *supra* note 179, at 39 (explaining that the controversy over transitional justice became exacerbated after the 2018 elections).

[181] *See* WENDIG, AFTERMATH, *supra* note 89, at 87 (announcing plan to demilitarize the government by 90% and keep the remaining 10% as a peacekeeping force).

[182] *See* Yu-zhe, *supra* note 176. *See generally* GRAY, BLOODLINE, *supra* note 74 (characterizing the New Republic senate as full of partisan gridlock with no further commitment to transitional justice policies).

[183] *See* Yu-zhe, *supra* note 176. *See generally* GRAY, BLOODLINE, *supra* note 74 (showing a deadlocked and democratically fragile government).

Asian democracies.[184] In contrast, the New Republic's approach to transitional justice was more stagnant because many New Republic senators believed the Galactic Concordance and demilitarization were sufficient to protect against the resurgence of the Empire.[185] Transitional justice is best understood as an evolving and changing field, so regimes that utilize a more dynamic transitional framework, such as Taiwan, are more successful at maintaining stability and fostering legitimacy among its people than regimes that do not.[186]

The Solomon Islands witnessed violent conflicts and land disputes between 1998 and 2003 that included beatings, arsons, kidnappings, and extrajudicial detentions.[187] The conflict ended when an international envoy titled Regional Assistance Mission to Solomon Islands ("RAMSI") arrived at the Solomon Islands to help facilitate transitional justice.[188] RAMSI, through both its physical presence and financial assistance, helped aid the transitional justice movement in the Solomon Islands.[189] In 2008, the Solomon Islands' government passed legislation that established the country's Truth and Reconciliation Commission (hereinafter "TRC") to investigate the human rights abuses that occurred during the conflict years.[190]

One of the biggest criticisms of the TRC is that it did not adequately capture the indigenous culture of the Solomon Islands.[191] Even though the Solomon Islands had an opportunity to craft the TRC with its own culture as a blueprint, the government opted to adopt the TRC model from external sources.[192] The lack of creating transitional justice policies that adequately reflect the culture and concerns of the people the government seeks to remedy represents one way that governments fail to properly build the

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[184] Yu-zhe, *supra* note 176.

[185] *See* HIDALGO, *supra* note 93, at 66 (explaining that Chancellor Villecham of the New Republic believed that the First Order did not pose a significant threat to peace in the galaxy).

[186] *See* Yeh & Su, *supra* note 174, at 617.

[187] Int'l Ctr. for Transitional Justice, *Solomon Islands*, ICTJ, https://perma.cc/7RTD-LRJU (last visited Mar. 23, 2022) [hereinafter *Solomon Islands*].

[188] LOUISE VELLA, TRANSLATING TRANSITIONAL JUSTICE: THE SOLOMON ISLANDS TRUTH AND RECONCILIATION COMMISSION 3 (2014), https://perma.cc/T8EB-WWLR.

[189] *See generally* Nicole Dicker, *Aiding Transitional Justice in Solomon Islands*, 21 BUFF. HUM. RTS. L. REV. 77, 84–85 (2014) (explaining that RAMSI played significant roles in carrying out criminal prosecutions, establishing a truth commission, and assisting with institutional reform of the judiciary).

[190] VELLA, *supra* note 188, at 1, 8.

[191] *See* VELLA, *supra* note 188, at 14.

[192] VELLA, *supra* note 188, at 14.

support and trust of the people.[193] Echoes of this failure can also be seen in the New Republic because the New Republic Senate adopted one uniform transitional justice approach without considering individual planets and cultures.[194] However, despite the international community's limitations in helping the Solomon Islands implement effective transitional justice, the existence of this external support provided the Solomon Islands with a greater chance of success than the New Republic.[195]

Despite its overall mixed success in implementing meaningful transitional justice, the Solomon Islands demonstrate the integral role that external actors play in the transitional justice process.[196] In addition to complementing the transitional justice movement itself, the international community also played an integral role in ending the conflict and helping to hold accountable those responsible for the atrocities.[197] The New Republic did not have the same level of external support available to it as the Solomon Islands did, thus limiting the New Republic's ability to build a comprehensive transitional justice framework.[198] In particular, external assistance provided the Solomon Islands with the support needed to establish an integrated, long-term transitional justice mechanism that continued beyond the official end of the conflict.[199] The New Republic's transitional justice approach lacked both of the above listed qualities, helping to explain why the New Republic was particularly vulnerable to collapse and the resurgence of authoritarianism.[200]

The above examples of transitional justice movements illustrate that there is not a definitive blueprint for successfully addressing the horrors of past human rights abuses, and that even the most successful movements will fail to adequately remedy and appease everyone.[201] However, comparing the

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[193] *See* Brahm, *supra* note 145.

[194] *See* WENDIG, AFTERMATH, *supra* note 89, at 84–88.

[195] *See* Dicker, *supra* note 189, at 127–28.

[196] *See generally* Dicker, *supra* note 189 (chronicling how important foreign aid and involvement was to the transitional justice movement in the Solomon Islands while also identifying the limitations of this external support).

[197] *Solomon Islands*, *supra* note 187.

[198] *See generally* THE FORCE AWAKENS, *supra* note 4 (depicting the overall absence of the Jedi and the isolation of the Resistance from the New Republic).

[199] *See* VELLA, *supra* note 188, at 3–4.

[200] *See generally* GRAY, BLOODLINE, *supra* note 74 (showing a gridlocked government that is in a poor position to implement more transitional justice reform beyond what the government did initially after the fall of the Empire).

[201] *See* Dicker, *supra* note 189, at 125 (arguing that although RAMSI and its foreign aid played a significant and important role in institutional reform in the Solomon Islands, the influx of

New Republic to the experiences of Colombia, Taiwan, and the Solomon Islands highlights just how essential a varied and comprehensive approach focused on individuals is in promoting long-term peace and stability.[202] The New Republic lacked the trust and support of its constituents needed to properly come to terms with the horrors the Empire caused.[203] Though the fall of the New Republic occurred more dramatically and suddenly than most democratic regimes, the lack of comprehensive transitional justice mechanisms gradually eroded support and trust in the government that facilitated the First Order's rise to power.[204]

CONCLUSION

No perfect solution exists for the thorny issues that states face as they emerge from periods of authoritarian rule or military conflicts that resulted in human rights abuses. This case study of the New Republic presents an objective analysis that constitutes successful transitional justice practices without the real world politicization that sometimes colors analyses of important topics. The failure of the New Republic's transitional justice strategy demonstrates that institutional reform of a very political nature is not sufficient itself to create a stable, long-term government. Institutional reform, such as demilitarizing after a costly war, is an important step on the path to recovery. But it is not the only step that must be taken. After the initial conflict with the Empire ended, the New Republic lost sight of what truly mattered: ensuring that all species under its jurisdiction felt safe and secure in the new regime. A macro-level approach to reform and reconciliation without a corresponding micro-level approach will alienate people from the new regime, lessening its legitimacy and trust in the eyes of the public.

The New Republic's ultimate failure also reflects the importance of external actors and NGOs in creating strong transitional justice programs. An organization, such as the Jedi, could have helped the New Republic effect

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foreign aid will make it more difficult for the government to be self-sufficient in the future); *see also* PICCONE, *supra* note 90, at 23 (explaining that even though Colombia's newly established TRC commission is an important bedrock of its transitional justice initiative, its complexity may render it unable to effectively prevent new conflicts); Yu-zhe, *supra* note 176 (chronicling the successes of Taiwan's TRC in making data about investigations into past abuses fully accessible to the public while still being concerned about the long-term success of regaining public trust because of the political nature of the commission).

[202] *See* Yu-zhe, *supra* note 176.

[203] *See The Sin*, *supra* note 137.

[204] *See* THE FORCE AWAKENS, *supra* note 4; *see also* Huq, *supra* note 57.

change on a more individual level that could have led to greater legitimacy for the regime. The absence of the Jedi or an equivalent organization was out of the New Republic's control, but their absence further underscores the importance of utilizing external resources in implementing transitional justice policies. The Resistance movement eventually defeated the resurgent First Order, thus presenting the successor to the New Republic with a second chance at implementing a more successful transitional justice approach.

Lessons from failure of transitional justice and transitional justice's best practices are incredibly relevant to the current political climate. Further, the policies and ideologies behind transitional justice can be utilized even in countries with well-established democracies. The example of the New Republic emphasizes this point. Analyzing and applying transitional justice practices in non-traditional contexts will make the practice more accessible to a greater number of victims of human rights abuses. Ultimately, the New Republic fell in part because of its inadequate transitional justice approach in the wake of the Empire's mass atrocities. Studying and understanding what went wrong with the New Republic can help ensure other states do not suffer a similar fate. May the Force be with future transitional justice movements.

The Rising Tide in Wrongful Convictions: The Shortcomings of *Brady* and the Need for Additional Safeguards

Chouleng Soun[*]

INTRODUCTION

Picture this—it is 1978, you have been arrested, convicted of first-degree murder, and sentenced to life in prison without parole.[1] You maintain your innocence over the next twenty years.[2] You ask the Innocence Project to review your file, and it uncovers sealed police reports that reveal other individuals admitted to committing the very crime for which you are in prison and these statements were made during the initial stages of police investigation.[3] You and your attorney were never made aware of these reports.[4] It turns out that before trial, the prosecutor asked the court for a secret hearing without your or your attorney's presence and convinced the court to seal these police reports under the pretense of protecting an anonymous informant.[5] It is blatantly apparent that the prosecution and investigators colluded to violate your constitutional right to exculpatory information.[6] When this came to light, the judge who issued a report in your case recommending that your conviction be overturned stated that, "[t]he prosecution was so successful in violating the trial court's orders and its constitutional obligation that by the time the exculpatory evidence came to light—nearly three decades later—many of the important

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1 *See Michael Hanline*, CAL. INNOCENCE PROJECT, https://perma.cc/G9E8-2WU4 (last visited Feb. 23, 2022) (demonstrating that these hypothetical facts replicate the facts in Michael Hanline's case).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

witnesses had died or disappeared."[7] After serving thirty-six years in prison for a crime you never committed, you are finally set free.[8]

The prosecutorial misconduct described in the hypothetical above should require little imagination because it happened to Michael Hanline.[9] Michael Hanline's story is not an anomaly—there are numerous cases in which intentional and unintentional prosecutorial acts resulted in a wrongful conviction.[10] Prosecutors are the most powerful officials in the criminal justice system.[11] Although police officers have the power to bring individuals into the system, it is ultimately the prosecutor who holds the power to keep individuals firmly ingrained in it.[12] To level the playing field in criminal trials, the U.S. Supreme Court ("Supreme Court") held in *Brady v. Maryland* that prosecutors are required to disclose materially exculpatory evidence in the government's possession to the defense.[13] Despite *Brady's* fifty-year history, its promise of fairness in criminal discovery has yet to materialize.[14]

This Note will argue that the conflicting standards that prosecutors

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[7] *Michael Hanline*, *supra* note 1.

[8] *Michael Hanline*, *supra* note 1.

[9] *Michael Hanline*, *supra* note 1.

[10] *See* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 688 (2006) ("[I]t is readily apparent that *Brady* violations are among the most pervasive and recurring types of prosecutorial violations. Indeed, *Brady* may be the paradigmatic example of prosecutorial misconduct. Numerous studies have documented widespread and egregious *Brady* violations."); *Historic* Brady *Rule Doesn't Always Hold Up*, INNOCENCE PROJECT (May 14, 2013), https://perma.cc/9RE4-3QN7; *see also* Tiffany M. Joslyn & Shana-Tara Regan, *Faces of* Brady*: The Human Cost of* Brady *Violations*, THE CHAMPION, May 2013, at 46, https://perma.cc/DLC8-FW28 (describing various cases where the government's failure to comply with *Brady* resulted in wrongful convictions); Innocence Staff, *2018: A Record Year in Exonerations*, INNOCENCE PROJECT (Nov. 19, 2018), https://perma.cc/45L3-3MJB (describing various clients of the Innocence Project and their exonerations).

[11] Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 823 (2013).

[12] *Id.* at 832.

[13] 373 U.S. 83, 86–88 (1963).

[14] *See* Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 654–55 (2007) ("Cases in which DNA evidence demonstrated wrongful convictions revealed a host of sources of inaccuracy in criminal trials. Among these have been failures by police and prosecutors to disclose exculpatory information . . . ."); Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1321 (2011); Tom Jackman, *More than Half of All Wrongful Convictions are Caused by Government Misconduct, Study Finds*, WASH. POST, (Sept. 16, 2020), https://perma.cc/G9BE-YJCA (citing to the concealment of exculpatory evidence as a cause of wrongful convictions).

follow for guidance on when and whether to disclose, coupled with the lack of discipline imposed on prosecutors and unchecked mental processes, has largely left prosecutors to self-regulate in fulfilling their *Brady* obligation. But self-regulation has not been a viable solution to the problems *Brady* sought to solve. This Note will analyze possible solutions to the inadequacies of *Brady*, specifically through judicial involvement by the creation of an Ethical Rule Order motion and additional rules of criminal procedure. Part I of this Note will discuss the *Brady* obligation, the role of prosecutors in the criminal justice system, and the mechanisms meant to hold them accountable for prosecutorial misconduct. It will also discuss examples of conflicting standards that prosecutors are subject to. Part II of this Note will discuss the importance of this issue. Part III will discuss the use of an Ethical Rule Order in criminal cases to prevent *Brady* violations. Part IV will discuss the use of an adverse inference jury instruction, inspired by the Federal Rules of Civil Procedure Rule 37(e)(2), as a means to prevent intentional *Brady* violations. Finally, Part V will discuss the use of special masters, which are predominantly utilized in civil adjudication, as a way to combat both intentional and unintentional *Brady* violations. The ultimate objective of this Note is to explore possible solutions to the shortcomings of *Brady* in order to prevent or mitigate the risk of wrongful convictions.

I. Background

A. Brady *and Its Current State*

In 1963, the Supreme Court held in *Brady v. Maryland* that suppression of favorable evidence by the prosecution that is material to either guilt or punishment violates a defendant's Fifth and Fourteenth Amendment rights.[15] In delivering the majority opinion, Justice William O. Douglas stated that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair."[16] With a goal of making criminal trials fairer, the Court created an obligation that prosecutors disclose evidence to the defense that is material to guilt or punishment.[17] Disclosing such evidence is a duty that belongs to prosecutors because they are ultimately responsible for the evidence known to agents acting on behalf of the government.[18] Qualifying evidence is often called "*Brady* material," and the failure to disclose such

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[15] 373 U.S. at 86–88.

[16] *Id.* at 87.

[17] *Id.*

[18] *Id.* at 87–88.

material is a "*Brady* violation."[19] Evidence is deemed material if there is a reasonable probability that a conviction or sentence would have been different had the evidence been disclosed.[20] *Brady* was extended in *Giglio v. United States* to require prosecutors to disclose to the defense any information relevant to the credibility of a prosecutor's witness.[21]

While the Supreme Court's acknowledgment of the policies underlying *Brady* and the duty subsequently imposed on prosecutors sounded and appeared promising, several obstacles have prevented *Brady* from fulfilling its promises in application.[22] First, prosecutors are subject to *Brady* disclosure obligations under state and federal constitutional provisions, statutory laws, court rules, and state ethics rules.[23] At times, however, these standards conflict with one another, resulting in unclear obligations for prosecutors.[24] Additionally, prosecutors enjoy absolute and qualified immunity and thus are rarely punished for misconduct under 42 U.S.C. § 1983, the federal statute that provides individuals the right to sue government employees acting under the color of state law for civil rights violations.[25] Prosecutors can also suffer from confirmation bias, resulting in an inadvertent failure to disclose qualifying information.[26] Exacerbating the issue is the lack of

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[19] *See, e.g.*, Youngblood v. West Virginia, 547 U.S. 867, 869–70 (2006); Tiffany R. Murphy, *Futility of Exhaustion: Why* Brady *Claims Should Trump Federal Exhaustion Requirements*, 47 U. MICH. J.L. REFORM 697, 701 (2014) ("Qualifying evidence comes in many forms, including a confidential informant's prior criminal history, an eyewitness's identification of another person, or a plea deal with a key state witness that was never disclosed."); *Misconduct: Failure to Disclose*, PROSECUTORIAL ACCOUNTABILITY, https://perma.cc/A5E7-VU38 (last visited Feb. 23, 2022).

[20] Strickler v. Greene, 527 U.S. 263, 296 (1999).

[21] 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule.").

[22] *See Brady*, 373 U.S. at 87–88 ("'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused . . . does not comport with standards of justice . . . ."); Yaroshefsky, *supra* note 14, at 1321.

[23] Yaroshefsky, *supra* note 14, at 1321.

[24] *See* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 533 (2007) ("The manner in which *Brady* is treated in federal and state courts reveals a confusing and inconsistent understanding and application of its objectives."); Blaise Niosi, Note, *Architects of Justice: The Prosecutor's Role and Resolving Whether Inadmissible Evidence Is Material Under the* Brady *Rule*, 83 FORDHAM L. REV. 1499, 1513–17 (2014).

[25] 42 U.S.C. § 1983 (1996); Imbler v. Pachtman, 424 U.S. 409, 427–28 (1976).

[26] Peter A. Joy & Kevin C. McMunigal, *The Ethics of Prosecutorial Disclosure*, 30 CRIM. JUST., Fall 2015, at 41, 41 ("Confirmation bias predicts that prosecutors will tend to seek information that confirms a preexisting position, such as a belief that a defendant is guilty, and ignore information, such as exculpatory evidence, that contradicts the preexisting position.").

punishment and accountability imposed on prosecutors from their respective state bar associations in response to misconduct.[27]

B. Brady *and the Federal Rules of Criminal Procedure*

Rule 16 of the Federal Rules of Criminal Procedure contains extensive coverage of the disclosure requirements applicable to prosecutors in federal court.[28] While state courts are not subject to the federal rules, it is helpful to note the federal requirements since they can indicate what state courts may require for disclosure.[29] Rule 16 requires the government to disclose the defendant's oral statements, the defendant's written or recorded statements, the defendant's prior criminal record, certain documents and objects, certain examination and test reports, and the content and basis of any expert testimony the government intends to offer during its case-in-chief.[30]

On October 21, 2020, President Donald Trump signed into law the "Due Process Protections Act," which sought to "balance . . . the power dynamic between the prosecution and the defense by requiring federal courts at the outset of a case to place the government on notice of its constitutional discovery obligations and the potential consequences for flouting those obligations."[31] By directly amending the Federal Rules of Criminal Procedure instead of waiting for the Judicial Conference of the United States to recommend an amendment, the enactment of "this new law suggests a sense of urgency" among lawmakers to reduce prosecutorial misconduct.[32]

C. *Prosecutors and the Mechanisms That Hold Them Unaccountable for Their* Brady *Obligation*

A prosecutor is the primary "representative of the state in all matters related to [criminal adjudications]."[33] The prosecutor controls "virtually every decision made in the course of every case that comes before criminal courts."[34] This includes deciding whether to charge an individual and what

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[27] Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297, 314 (2019).

[28] *See* FED. R. CRIM. P. 16.

[29] Brady *Disclosure Requirements*, IACP NAT'L LAW ENFORCEMENT POLICY CTR. 2 (Aug. 2008), https://perma.cc/CA36-ELWQ.

[30] FED. R. CRIM. P. 16.

[31] Edward J. Loya Jr., *What Good Will the "Due Process Protections Act" Do?*, 11 NAT'L L. REV., Dec. 2020, https://perma.cc/U9GY-2MDP.

[32] *Id.*

[33] NAT'L RESEARCH COUNCIL ET AL., WHAT'S CHANGING IN PROSECUTION?: REPORT OF A WORKSHOP 7 (Carol Petrie & Philip Heymann eds., 2001).

[34] *Id.*

those charges will be, deciding to offer plea bargains, deciding how the trial for the state will be conducted, and providing sentencing recommendations.[35] The prosecutor also has an investigative function when they provide advisory assistance to the police in an investigation.[36] This breadth of discretion as to how cases move forward means that prosecutors have a uniquely powerful role in criminal cases and highlights the importance of effective oversight.[37]

1. Prosecutorial Immunity

Under the federal civil rights statute, 42 U.S.C. § 1983, two types of immunity apply to prosecutors: absolute immunity and qualified immunity.[38] In *Imbler v. Pachtman*, the Supreme Court held that prosecutors who acted within the scope of their duties in initiating and pursuing a criminal prosecution have absolute immunity.[39] Absolute immunity is applicable even where a prosecutor knowingly uses perjured testimony at trial, fails to make a full disclosure of all facts that cast doubt on the state's case, or deliberately withholds exculpatory information.[40] Prosecutors have qualified immunity when acting in an administrative or investigative capacity and are immunized unless the misconduct clearly violated an established rule of law of which a reasonable prosecutor would have known.[41] These immunities leave those who have been wrongly convicted due to prosecutorial misconduct with no civil remedies.[42]

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[35] *Id.* at 8; Davis, *supra* note 11, at 832.

[36] NAT'L RESEARCH COUNCIL ET AL., *supra* note 33, at 8.

[37] Angela J. Davis, *Meet the Criminal Justice System's Most Powerful Actors*, THE APPEAL (May 29, 2018), https://perma.cc/E9EN-C9RE ("The power and discretion of prosecutors cannot be overstated.").

[38] Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 53 (2015).

[39] 424 U.S. 409, 431 (1976).

[40] *See* Kalina v. Fletcher, 522 U.S. 118, 124 (1997); *Imbler*, 424 U.S. at 425 ("The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and ultimately in every case the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. The presentation of such issues in a § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury.").

[41] *See* Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993).

[42] *See* Johns, *supra* note 38, at 54.

2. The Subtle and Pervasive Effect of Confirmation Bias on Prosecutors

Brady violations are also attributable to cognitive processes that can impede a prosecutor's awareness of the exculpatory nature of evidence and the importance of disclosing such evidence to the defense.[43] Researchers have identified these processes as cognitive biases, which encompass both explicit and implicit biases.[44] Explicit bias refers to a category of attitudes of which an individual has self-awareness, while implicit bias involves "evaluations that are automatically activated by the mere presence (actual or symbolic) of the attitude object and commonly function without a person's full awareness or control."[45] Implicit biases are likely to differ from one's open and conscious beliefs.[46] Confirmation bias, an example of an implicit bias, is believed to cause prosecutors to dismiss the exculpatory quality of evidence or discount its value, leading to the failure to disclose.[47] Prosecutors under the influence of unconscious confirmation bias may identify and interpret evidence in a manner that only supports their beliefs and may undervalue or disregard evidence that contradicts those beliefs.[48] In other words, once a prosecutor is convinced that a defendant is guilty, it is difficult for the prosecutor to perceive an alternate theory of how the defense might use information differently.[49] Confirmation bias is dangerous

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43 Kate Bloch, *Harnessing Virtual Reality to Prevent Prosecutorial Misconduct*, 32 GEO. J. LEGAL ETHICS 1, 4 (2020).

44 *Id.* at 4–5.

45 John F. Dovidio, Kerry Kawakami & Samuel L. Gaertner, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 62 (2002), https://perma.cc/C5F9-NA62.

46 *See* BERNICE B. DONALD & SARAH E. REDFIELD, FRAMING THE DISCUSSION: ENHANCING JUSTICE: REDUCING BIAS 14 (Sarah E. Redfield ed., 2017).

47 Bloch, *supra* note 43, at 5; *see* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594 (2006) ("When testing a hypothesis's validity, people tend to favor information that confirms their theory over disconfirming information. Good evidence suggests that this information-seeking bias results because people tend to recognize the relevance of confirming evidence more than disconfirming evidence."); Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165, 179 (2016) (stating that prosecutors approach the *Brady* obligation "through a lens clouded by cognitive bias" and therefore, exculpatory evidence appears "meaningless or unconvincing, and the materiality element [of *Brady*] makes it easy to suppress").

48 Bloch, *supra* note 43, at 5.

49 Ellen Yaroshefsky, *Why Do* Brady *Violations Happen?: Cognitive Bias and Beyond*, THE CHAMPION, May 2013, at 12, https://perma.cc/9F9Y-2KJY.

because it is largely an unconscious process that is subtle, pervasive, and difficult to overcome through the "force of will, good intentions, or even training."[50]

3. The Lack of Disciplinary Action and the State Bars' Propensity to Impose the Proverbial Slap on the Wrist

Like other attorneys, prosecutors must adhere to the standards of professional conduct required of them within the state where they practice.[51] However, it is evident that courts and the American Bar Association ("ABA") view prosecutors as "ministers of justice" with a responsibility to uphold higher professional standards than other attorneys.[52] Rule 3.8 of the Model Rules of Professional Conduct imposes special obligations on prosecutors.[53] Rule 3.8(d) specifically states that prosecutors must

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[54]

As of January 2, 2020, all fifty states and the District of Columbia have

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[50] *Id.*; *see The Confirmation Bias: Why People See What They Want to See*, EFFECTIVIOLOGY, https://perma.cc/VT9C-VXHA (last visited Feb. 23, 2022) (stating that confirmation bias promotes various problematic patterns of thinking and does so through the biased search for information, biased favoring of information, biased interpretation of information, and biased recall of information).

[51] Neil Gordon, *Misconduct and Punishment*, CENTER FOR PUB. INTEGRITY (June 26, 2003), https://perma.cc/2VSY-M22F.

[52] *See* MODEL R. PROF'L CONDUCT 3.8 cmt. 1 (AM. BAR ASS'N 2010) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."); *see, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935) (stating that prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done"); People v. Jones, 375 N.E.2d 41, 44 (N.Y. 1978) ("[T]he responsibilities of a prosecutor for fairness and open-dealing are of a higher magnitude than those of a private litigant . . . .").

[53] MODEL R. PROF'L CONDUCT 3.8.

[54] *Id.*

adopted some version of subsection (d) of Rule 3.8.[55] An attorney's failure to abide by the state's standards of professional conduct can result in disbarment, suspension, probation, public or private censure, an order to pay restitution, or other sanctions.[56]

Despite the adoption of some form of Rule 3.8(d) in all fifty states and the District of Columbia, prosecutorial misconduct commonly goes unpunished by state Bar Associations.[57]For example, in 2015, appellate courts in New Orleans overturned at least thirty-six convictions caused by prosecutorial misconduct—nine of which involved defendants on death row.[58] This prompted defense attorneys to file a series of complaints with Louisiana's Office of Disciplinary Counsel.[59] It took more than two years for these defense attorneys to even be given notice that the Office received their complaints.[60] Another survey conducted by the Innocence Project, Resurrection After Exoneration, and the Veritas Initiative analyzed five states over the 2004–2008 period and found that, in 660 cases of prosecutorial misconduct, only one prosecutor was disciplined.[61] Another 2003 report by the Center for Public Integrity examined 11,400 allegations of prosecutorial misconduct between 1970 and 2003.[62] Prosecutorial misconduct in 2,012 of those cases resulted in dismissals, sentence reversals, or sentence reductions.[63] However, only forty-four prosecutors were sanctioned for the violations, and even then, seven of those violations were dismissed.[64] Overall, the consensus from various studies shows very few instances where

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[55] *See Variations of the ABA Model Rules of Professional Conduct: Rule 3.8: Special Responsibilities of a Prosecutor*, ABA: AM. BAR ASS'N, https://perma.cc/FJ6R-3572 (last updated Nov. 2021) [hereinafter *Variations of Rule 3.8*].

[56] *See* MODEL R. PROF'L CONDUCT 10; *see also Discipline, Sanction, Disqualification*, LAW SHELF, https://perma.cc/ZV9C-8F6G (last visited Mar. 1, 2022).

[57] David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. Online 203, 205 (2011) ("In reality, prosecutors have rarely been subjected to disciplinary action by state bar authorities.").

[58] Radley Balko, *New Orleans's Persistent Prosecutor Problem*, WASH. POST (Oct. 27, 2015), https://perma.cc/YTC3-E32Y.

[59] *Id.*

[60] *Id.*

[61] Emma Zack, *Why Holding Prosecutors Accountable Is So Difficult*, INNOCENCE PROJECT (Apr. 23, 2020), https://perma.cc/64BQ-9GGY.

[62] Christopher Zoukis, *Prosecutorial Misconduct: Taking the Justice out of Criminal Justice*, PRISON LEGAL NEWS (Nov. 8, 2014), https://perma.cc/6S3J-6HL8.

[63] *Id.*

[64] *Id.*

prosecutorial misconduct resulted in disciplinary action, with the majority of sanctions being a proverbial slap on the wrist.[65] Moreover, as a result of "infrequent [reports of misconduct] due to arcane complaint procedures, lax enforcement, and a culture of secrecy and indifference by regulatory agencies, one must conclude that the problem of prosecutorial misconduct in our nation's criminal justice system is much greater than the official numbers reflect."[66]

D. *The Lack of Uniformity Surrounding the* Brady *Obligation*

1. The Conflict Between State Standards and Federal Standards

As noted, prosecutors are subject to *Brady* obligations imposed under state and federal constitutional provisions, statutory laws, court rules, and state ethics rules.[67] When these standards conflict with one another, the *Brady* obligations for prosecutors become unclear.[68] One example of this is the conflict around standards of ethics and professional responsibility.[69] Rule 3.8(d) of the Model Rules of Professional Conduct states that prosecutors must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[70] There is ongoing debate as to whether this rule requires prosecutors "to disclose 'more' than is required by *Brady v. Maryland*."[71] In 2009, the ABA proclaimed that the disclosure obligation

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[65] Monroe H. Freedman, *Professional Discipline of Prosecutors: A Response to Professor Zacharias*, 30 HOFSTRA L. REV. 121, 122 (2001) ("Numerous authorities on prosecutorial ethics and discipline have maintained for many years that prosecutors are far too infrequently subjected to professional discipline and that courts cannot responsibly defer to disciplinary authorities to oversee prosecutorial misconduct that deprives individuals of fundamental rights."); Zoukis, *supra* note 62.

[66] Zoukis, *supra* note 62.

[67] *See* Yaroshefsky, *supra* note 14, at 1321.

[68] Niosi, *supra* note 24, at 1513–17.

[69] Zachary H. Greene & Jenna W. Fullerton, *Separation of Powers in the Trenches: Using Ethical Rules to Expand Criminal Discovery*, ABA: AM. BAR ASS'N. (Oct. 16, 2019), https://perma.cc/MV9H-CQXN.

[70] MODEL R. PROF'L CONDUCT 3.8 (AM. BAR ASS'N 2010).

[71] Dennis A. Rendleman, *Perhaps the Toughest Job with the Toughest Questions: Professional Responsibility and Criminal Prosecutors*, ABA: AM. BAR ASS'N (Jan. 2020), https://perma.cc/9DRW-YW7G; Joy & McMunigal, *supra* note 26, at 41 ("A key issue that has emerged in applying Model Rule 3.8(d) and its state counterparts is whether the materiality limitation found in *Brady* doctrine should be read into state versions of Model Rule 3.8(d) despite the fact that the text of these rules routinely sets forth no such materiality limitation.").

under Rule 3.8(d) is a separate obligation that is broader than *Brady*.[72] Although the majority of states also view the ethical duty as a separate obligation from the one imposed by *Brady*, there are a substantial number of states that conclude that Rule 3.8(d) does not impose more than what is required by *Brady*.[73]

The tension surrounding Rule 3.8(d) can be seen in Tennessee.[74] In 2018, "the Tennessee Board of Professional Responsibility issued Formal Ethics Opinion 2017-F-163 [in an effort] to clarify a prosecutor's duty of disclosure . . . ."[75] The Opinion stated that Rule 3.8(d) extended far beyond the constitutional requirements to disclose only material exculpatory information as promulgated by *Brady*.[76] Because the U.S. District Court for the Eastern District of Tennessee ("Eastern District") followed the Tennessee Rules of Professional Conduct, the Opinion had the ability to affect federal courts.[77] When the Opinion was published, the U.S. Attorney's Office asked the Board to withdraw its Opinion.[78] Ultimately, the Tennessee Supreme Court vacated the Opinion because having two standards—the *Brady* standard and Rule 3.8(d)—would bring a myriad of conflicts.[79] However, despite the Tennessee Supreme Court's decision, Chief Judge Pamela Reeves of the Eastern District sent a letter to U.S. Attorney Doug Overby stating that the Tennessee Supreme Court is free to insist on higher standards than state standards and thus, would expect the U.S. Attorney's office to abide by the

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[72] Peter A. Joy & Kevin C. McMunigal, *ABA Explains Prosecutor's Ethical Disclosure Duty*, 24 CRIM. JUST., no. 4, Winter 2010, at 1, 1 (stating that the ABA found that constitutional law cases "establish a constitutional minimum but do not purport to preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct").

[73] Rendleman, *supra* note 71; *see* Justin Murray & John Greabe, *Disentangling the Ethical and Constitutional Regulation of Criminal Discovery*, HARV. L. REV. BLOG (June 15, 2018), https://perma.cc/TB4Q-HV3K (noting jurisdictions that conclude that Rule 3.8(d) does not impose more than what is required of *Brady* include "Ohio (2010), Wisconsin (2013), Oklahoma (2015), and Louisiana (2017)").

[74] Greene & Fullerton, *supra* note 69.

[75] Greene & Fullerton, *supra* note 69.

[76] Greene & Fullerton, *supra* note 69 (expressing that disclosure is to be made as reasonably practicable and must be made before guilty plea proceedings).

[77] Greene & Fullerton, *supra* note 69.

[78] Bert, *TN: Prosecutors Resist State Bar's Ethical Ruling*, PROSECUTORIAL ACCOUNTABILITY (Aug. 2, 2018), https://perma.cc/J26H-NKRR. S*ee generally* Greene & Fullerton, *supra* note 69.

[79] *Tennessee Supreme Court Vacates Board of Professional Responsibility Formal Ethics Opinion 2017-F-163*, TN COURTS.GOV (Aug. 23, 2019), https://perma.cc/U7CH-BM5F. *See generally* Greene & Fullerton, *supra* note 69.

rule that was vacated.[80] Attorney Overby countered that he would only follow the discovery policy promulgated by the Department of Justice.[81] As a result, the consequences of Opinion 2017-F-163 in the Eastern District are unclear.[82] This tension regarding the inconsistent *Brady* standard in the Eastern District could represent a national trend.[83]

2. The Circuit Split on the *Brady* Obligation During Plea-Bargaining

In 2002, the Supreme Court held in *United States v. Ruiz* that prosecutors do not need to disclose impeachment evidence during the pre-trial plea-bargaining process.[84] The decision left lower courts with the question of whether *Brady* required pre-trial disclosure of exculpatory evidence during the plea-bargaining stage.[85] While some circuit courts hold that impeachment evidence constitutes exculpatory evidence, others do not.[86] In 2018, the U.S. Court of Appeals for the Fifth Circuit held in *Alvarez v. City of Brownsville* that prosecutors are not constitutionally obligated to disclose exculpatory evidence to defendants during the plea-bargaining process.[87] This decision places the Fifth Circuit in the company of the First, Second, and Fourth Circuits and distinguishes it from the holdings of the Seventh, Ninth, and Tenth Circuits.[88] After the Fifth Circuit rendered its decision, Alvarez filed a petition for a writ of certiorari to the Supreme Court.[89] The Supreme Court denied the writ despite the circuit split and the implication it could have on the fairness of plea-bargaining.[90]

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[80] Greene & Fullerton, *supra* note 69; *see Update on Tennessee Ethics Battle*, NAFUSA: NAT'L ASS'N OF FORMER U.S. ATTORNEYS (Aug. 30, 2019), https://perma.cc/UEE9-2KU6.

[81] Greene & Fullerton, *supra* note 69.

[82] Greene & Fullerton, *supra* note 69.

[83] Greene & Fullerton, *supra* note 69 ("Opinion 2017-F-163 and the tension in the Eastern District of Tennessee could represent a national trend. Ethics panels and courts in a significant number of jurisdictions—including Michigan, Texas, Virginia, and Utah, among others—have interpreted similar rules of professional conduct to extend prosecutor's duty of disclosure beyond constitutional standards.").

[84] 536 U.S. 622, 633 (2002).

[85] *See, e.g.*, United States v. Ohiri, 133 F. App'x 555, 561–62 (10th Cir. 2005); McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003).

[86] *See* Cameron Casey, Comment, *Lost Opportunity: Supreme Court Declines to Resolve Circuit Split on* Brady *Obligations During Plea-Bargaining*, 61 B.C. L. REV. E-SUPPLEMENT II. 73, 74 (2020).

[87] 904 F.3d 382, 394 (5th Cir. 2018).

[88] Casey, *supra* note 86, at 74.

[89] Alvarez v. City of Brownsville, 139 S.Ct. 2690, 2690 (2019).

[90] *Id. See generally* Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J.

The Seventh, Ninth, and Tenth Circuit courts hold that *Brady* requires prosecutors to disclose exculpatory information during the plea-bargaining process.[91] The reasoning of these courts lies in the distinction between impeachment and exculpatory evidence.[92] In *McCann v. Mangialardi*, the Seventh Circuit found that the *Ruiz* decision implied that there is a difference in treatment between exculpatory evidence and impeachment evidence.[93] The Court found that under *Ruiz*, impeachment evidence is not essential for a defendant to voluntarily and knowingly enter a plea bargain.[94] However, the Seventh Circuit believed that the Supreme Court intended for *Ruiz* to only apply to impeachment evidence because a defendant cannot knowingly and voluntarily enter a plea bargain without crucial information such as exculpatory evidence.[95]

On the other hand, as mentioned, the First, Second, Fourth, and Fifth Circuit courts hold that criminal defendants are not entitled to exculpatory information prior to entering guilty pleas.[96] In *United States v. Mathur*, the

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Empirical Legal Stud. 448, 448 (2019), ("Intercircuit splits occur when two or more circuits on the U.S. Court of Appeals issue different legal rules about the same legal questions. When this happens, federal law is applied differently in different parts of the country. Intercircuit splits cause legal nonuniformity, are an impediment to lawyering and judging, and have practical consequences for American law.").

[91] *See, e.g.*, Smith v. Baldwin, 510 F.3d 1127, 1148 (9th Cir. 2007); United States v. Ohiri, 133 F. App'x 555, 562 (10th Cir. 2005); McCann v. Mangialardi, 337 F.3d 782, 787–88 (7th Cir. 2003); *see also* Casey, *supra* note 86, at 83–86.

[92] Casey, *supra* note 86, at 84–85 (noting that the Ninth Circuit in *Smith v. Baldwin* did not mention *Ruiz* in its decision and instead applied *Brady* in the context of plea bargains, suggesting that *Ruiz* is not controlling in situations involving exculpatory evidence); *see, e.g.*, *McCann*, 337 F.3d at 787–88 (suggesting that if exculpatory and impeachment evidence are distinct concepts, the Court's ruling in *Ruiz* would mean that defendants are constitutionally entitled to exculpatory evidence before entering a guilty plea).

[93] Casey, *supra* note 86, at 84 ("In *Ruiz*, the Court . . . conclude[d] that disclosure of impeachment evidence is not necessary to eliminate the risk that an innocent person might plead guilty. The Seventh Circuit reasoned that, when the Supreme Court acknowledged the value that required disclosure of exculpatory evidence has in protecting against wrongful convictions, it confirmed that such a disclosure is constitutionally required under *Ruiz*.").

[94] *McCann*, 337 F.3d at 787; *see* United States v. Ruiz, 536 U.S. 622, 633 (2002).

[95] *McCann*, 337 F.3d at 788 ("[I]t is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.").

[96] *See, e.g.*, United States v. Mathur, 624 F.3d 498, 507 (1st Cir. 2010); Friedman v. Rehal 618 F.3d 142, 154 (2d Cir. 2010) (noting that the Supreme Court treats exculpatory and impeachment evidence in the same way for defining the obligation of a prosecutor to provide *Brady* material and therefore the ruling of *Ruiz* supports denying the defendant's argument); United States v.

First Circuit Court of Appeals interpreted *Ruiz* to affirm that *Brady* did not protect criminal defendants from entering a guilty plea without knowledge of all relevant facts.[97] Consequently, the policies of fairness in criminal trials underlying *Brady* disappear when criminal defendants decide to enter a guilty plea.[98] In *Alvarez v. City of Brownsville*, the Fifth Circuit ruled that the Constitution did not require disclosure of exculpatory evidence because no Supreme Court case firmly established that a failure to disclose evidence during the plea-bargaining process constituted a *Brady* violation.[99] Until the Supreme Court takes a stance on the matter, the circuit split will continue to produce uncertain and unequal application of the *Brady* obligation in the plea-bargaining process.[100]

II. The Importance of the Issue

The record of wrongful convictions in the United States has repeatedly shown that prosecutors can withhold exculpatory evidence for long periods of time while an innocent person spends years or decades in prison.[101] *Brady* disclosures are necessary to an impartial criminal justice system because they contribute to an accurate determination of guilt or innocence.[102] Unfortunately, the National Registry of Exonerations found that official misconduct contributed to a wrongful conviction in 56% of 2,991 cases since

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Moussaoui, 591 F.3d 263, 285 (4th Cir. 2010) (stating that the *Brady* protections are only a trial right and exist to preserve the fairness of a trial verdict and prevent innocent persons from being found guilty; therefore, when a defendant pleads guilty, those concerns are almost completely eliminated because their guilt is admitted).

[97] 624 F.3d at 507.

[98] *See id.* (noting that when a *Brady* claim is raised, the relevant concern is whether the defendant received a fair trial, which is not explicitly defined by the court, despite not having access to the suppressed evidence).

[99] 904 F.3d 382, 392–94 (5th Cir. 2018).

[100] *Cf.* Johnathan M. Cohen & Daniel S. Cohen, *Iron-ing out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF. L. REV. 989, 996 (2020), https://perma.cc/3Q8P-SHSC ("[C]ircuit splits create uncertain and disparate applications of federal legal rights."); Kelly Rader, *Circuit Splits Project*, YALE UNIV., https://perma.cc/KP5U-NWZD (last visited Mar. 1, 2022) (stating that "many active and important [circuit] splits persist indefinitely and continue to generate significant litigation").

[101] *See* THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 10–16 (2007), https://perma.cc/RHA5-SYZ2; *see also* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 96 (2008) (examining claims brought by exonerated individuals, including claims of *Brady* violations).

[102] FED. R. CRIM. P. 16 Advisory Comm. Notes on 1974 Amendment.

1989.[103] In 2018, a study found that a record number of exonerations in that year involved misconduct by government officials and that the average time an exonerated person spends in prison is more than eight years and ten months.[104] Alarmingly, the rising tide of wrongful convictions has reached a peak within the past seven years.[105] Exacerbating this issue is the difficulty in gauging the full extent of *Brady* violations given that prosecutors control access to evidence.[106] Therefore, official findings on prosecutorial misconduct represent merely a fraction of misconduct that has been uncovered and do not paint a full picture of the misconduct that actually occurs.[107]

In *Berger v. United States*, Justice Sutherland described prosecutorial misconduct as "overstepp[ing] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[108] Due to the increasingly high record of wrongful convictions, it is no surprise that advocates for those wrongly convicted are increasingly focused on *Brady* violations, which they view as "one of the most harmful and pervasive forms of prosecutorial misconduct."[109]

ANALYSIS

III. The Use of an "Ethical Rule" Order in Criminal Cases to Combat Intentional *Brady* Violations

A. *The Mechanics of an Ethical Rule Order Motion*

All fifty states have adopted some form of the ABA's Model Rules of

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[103] *% Exonerations by Contributing Factor*, NAT'L REGISTRY OF EXONERATIONS, https://perma.cc/7P9U-K9UW (last visited Mar. 1, 2022).

[104] *Wrongful Convictions*, EQUAL JUST. INITIATIVE, https://perma.cc/2SXQ-TSJ8 (last visited Mar. 1, 2022).

[105] *See* Lara Bazelon, *The Rising Tide of Wrongful Convictions*, https://perma.cc/6HGS-QXJ5 (last visited Mar. 1, 2022) ("In 2014, a record-setting 147 people were exonerated. That record was broken in 2015, when 160 people were freed. It was broken again in 2016, when the number rose to 168, an average of more than three people per week. In a 2017 report, the National Registry of Exonerations came to this sobering conclusion: 'Exonerations used to be unusual; now they are commonplace.'"); *Exonerations by State*, NAT'L REGISTRY OF EXONERATIONS, https://perma.cc/E9G8-W284 (last visited Mar. 1, 2022).

[106] Zack, *supra* note 61.

[107] Zack, *supra* note 61.

[108] 295 U.S. 78, 84 (1935).

[109] Zack, *supra* note 61.

Professional Conduct Rule 3.8(d).[110] Rule 3.8(d) states that prosecutors must disclose all evidence or information tending to negate the guilt of the accused or mitigate the offense.[111] The ABA has made it clear that the disclosure obligation under this rule is broader than the *Brady* obligation.[112] Therefore, one solution to prevent intentional *Brady* violations is to create a Rule 3.8(d) Ethical Rule Order, which was first articulated by former president of the National Association of Criminal Defense Lawyers, Barry Scheck, and former U.S. District Judge, Nancy Gertner.[113]

In an Ethical Rule Order motion, the defense attorney files a pre-trial order requesting that the prosecutor disclose all information related to the defense's theory of the case tending to negate guilt.[114] This motion should cite to Rule 3.8(d)'s relevant jurisdictional counterpart.[115] The defense should strategically and specifically state its theory of the case to place the prosecution on notice of what it seeks.[116] The defense can address timeliness and request that the prosecutor disclose certain information sooner because it is reasonable or appropriate.[117] Rule 3.8(d) recognizes that a prosecutor can seek an appropriate protective order from the court if disclosing information to the defense would result in substantial harm to the public interest or an individual; a Model Rule Ethical Order motion would thereby "allow[] the prosecutor to delay disclosure by making an *in camera ex parte* production and a showing of 'good cause'" with a judge who will not preside at the trial.[118] Lastly, the motion should request that the prosecutor's "willful and

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[110] *See Variations of Rule 3.8*, *supra* note 55.

[111] MODEL R. PROF'L CONDUCT 3.8 (AM. BAR ASS'N 2010).

[112] Joy & McMunigal, *supra* note 72, at 1 (stating that the ABA found that constitutional law cases "establish a constitutional minimum but do not purport to preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct").

[113] Barry Scheck & Nancy Gertner, *Combatting* Brady *Violations With an 'Ethical Rule' Order for the Disclosure of Favorable Evidence*, THE CHAMPION, May 2013, at 40, https://perma.cc/35HP-EBG2.

[114] *Id.*

[115] *Id.*

[116] *Id.* (stating that within the bounds of what makes sense strategically, the defense should be specific about its theory of the case and the information that would tend to negate the guilt of the accused or mitigates the offense).

[117] *Id.*

[118] *Id.*; *see* MODEL R. PROF'L CONDUCT 3.8 cmt. 3 (Am. Bar Ass'n 2010); *Ex Parte In Camera Hearing Definition*, QUIMBEE, https://perma.cc/XA8A-XMTG (last visited Mar. 1, 2022) ("Also known as an in camera *ex parte* hearing, a private court proceeding involving only one of the parties to a case, conducted by the judge to review one aspect of the case. The fact the hearing was held, but not the contents of the hearing, becomes a matter of public record."); *see, e.g.*,

deliberate failure to comply" be punishable by contempt.[119]

B. *How an Ethical Rule Order Can Mitigate the Shortcomings of* Brady

While defendants may request evidence during discovery and ask that the prosecution turn over material exculpatory evidence in what is typically known as a *Brady* motion, the creation of an Ethical Rule Order provides other advantages.[120] The motion is based on each pertinent jurisdiction's ethical rules and, therefore, has authority to direct a prosecutor's actions even if the motion's disclosure requirement is broader than the constitutional requirement under *Brady*.[121] Additionally, because *Brady* violations have resulted in the conviction of innocent persons, the creation of such an order may bolster public confidence in the integrity of the criminal justice system.[122]

The Ethical Rule Order motion can deter prosecutors from withholding material exculpatory evidence because it is not subject to many of the procedural hurdles that have hindered punishment for deliberate *Brady* violations.[123] The typical remedy for a *Brady* violation is the reversal of a conviction when material exculpatory evidence that was withheld would have led to a different outcome such that the integrity of the verdict is undermined.[124] The general belief is that once a *Brady* violation is discovered,

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MASS. R. PROF'L CONDUCT 3.3 (2013) (providing that "[i]f disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera").

[119] Scheck & Gertner, *supra* note 113.

[120] *See* Scheck & Gertner, *supra* note 113; *see, e.g.*, People v. Lewis, 240 Cal. App. 4th 257, 261 (2015) (stating that the defense filed a *Brady* motion seeking from the prosecution "[a]ny evidence that would tend to exonerate . . . [the defendant], minimize his probable sentence, or that constitutes information that the defense might use to impeach or contradict prosecution witnesses").

[121] Scheck & Gertner, *supra* note 113 ("Judges and prosecutors may be startled initially when they see the 'ethical rule' motion as opposed to the usual request to turn over all *Brady*/*Kyles* material. But upon reflection, what can a prosecutor credibly say in opposition? That the state does not recognize the ethical rule, invariably a state statutory obligation, as binding?").

[122] *See* Scheck & Gertner, *supra* note 113. *See generally* Candice Crutchfield, *Week 11: Wrongful Convictions*, MEDIUM (Sept. 9, 2019), https://perma.cc/SEL9-CFLN ("Criminal justice issues impact entire communities and public confidence in the system is (rightfully) diminished when innocent people are convicted."); *% Exonerations by Contributing Factor*, *supra* note 103 (showing that 1,684 of 2,991 wrongful convictions were caused by prosecutorial misconduct).

[123] Scheck & Gertner, *supra* note 113.

[124] *See, e.g.*, United States v. Pasha, 797 F.3d 1122, 1139 (D.C. Cir. 2015) (stating that "a *Brady* violation requires a remedy of a new trial [and] such new trial may require striking evidence, a special jury instruction, or other additional curative measures tailored to address persistent

the district attorney will punish the prosecutor or "fix the systemic breakdown that caused the failure to disclose in the first place."[125] However, it is not very likely that a district attorney will punish a prosecutor or fix the systemic breakdown in cases where the intentional withholding of evidence was deemed a harmless error, since public outrage for action is not likely to arise.[126] Therefore, prosecutors in those cases are likely to escape public scrutiny and public punishment.[127] Accordingly, the benefit of an Ethical Rule Order is that it would allow defense attorneys to "take direct action against individual prosecutors who deserve to be sanctioned . . . [by] the judge whose order was violated."[128] The use of an Ethical Rule Order creates another avenue in which prosecutors are disciplined for *Brady* violations and would serve as additional deterrence against them, regardless of whether those violations are harmless errors.[129] Consequently, a prosecutor would not only worry about withholding evidence that prejudices the defendant and warrants a reversal of conviction, but also contemplate the repercussions of intentionally withholding exculpatory evidence under the Ethical Rule Order even if withholding that evidence is ultimately deemed

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prejudice"); People v. Springer, 122 A.D.2d 87, 90 (N.Y. App. Div. 1986) (reversing the conviction where prosecutor intentionally destroyed surveillance videos relevant to the critical issue at trial).

[125] Scheck & Gertner, *supra* note 113. *But see* Joaquin Sapien et al., *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, PROPUBLICA (Apr. 3, 2013, 5:30 AM EDT), https://perma.cc/97SB-MC8Q (discussing how prosecutors who were cited for prosecutorial abuse by courts were not punished by their superiors in the cities' district attorney offices and records showed that several received promotions and raises soon afterwards).

[126] Elizabeth Napier Dewar, Note, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450, 1462 (2006) (expressing that when prosecutors "suffer lost convictions, jury nullification, or public outcry, their offices might be provoked into developing better bureaucratic infrastructures for gathering and disclosing *Brady* evidence, both within their offices and their relationships with police departments"); Scheck & Gertner, *supra* note 113 (stating that "[c]ases involving obviously guilty defendants are not likely to engender much public outrage or impetus for action"); *see also* United States v. Agurs, 427 U.S. 97, 111–12 (1976) ("[T]he judge should not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless-error standard. Under that standard when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his 'conviction is sure that the error did not influence the jury' . . . .").

[127] Scheck & Gertner, *supra* note 113.

[128] Scheck & Gertner, *supra* note 113.

[129] *See* Mike Fawer, *Misconduct by Prosecutors Is Rampant—How Do We Deter It?*, THE LENS (Apr. 11, 2019), https://perma.cc/RP5S-J3TJ ("[T]he court's suggestion that the use of disciplinary sanctions by bar associations would suffice to deter the errant prosecutor is nonsensical.").

a harmless error.[130]

Barry Scheck and Nancy Gertner posit that a violation of an Ethical Rule Order motion is more likely to result in contempt citations, bar discipline, and even criminal prosecution because it would allow judges to issue a contempt citation without having to wait on the district attorney to do so.[131] Another benefit to the Ethical Rule Order is that contempt citations for violations can be immediately appealed and would generate precedent quickly, which could then be used to direct prosecutors on how they should conduct themselves regarding Ethical Rule Orders.[132] Furthermore, because "contempt is a continuing offense, the statute of limitations in most states would not bar prosecution" of a prosecutor.[133] Finally, because such a motion would be premised on a jurisdiction's ethical rule, the motion would serve as concrete evidence of willfully disregarding the state's rules of ethics.[134] Accordingly, such a motion would provide deterrence twofold—through the consequences both for potential violations of court orders and for the willful aberration of the prosecutor's professional and ethical responsibility as promulgated by the prosecutor's respective state bar.[135]

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[130] *See generally* David E. Singleton, Brady *Violations: An In-Depth Look at "Higher Standard" Sanctions for a High-Standard Profession*, 15 WYO. L. REV. 139, 158–59 ("Indeed, the prosecutor rarely suffers a serious penalty for his or her misconduct. Often, however, when courts take remedial measures, the government easily overcomes such measures by showing that the prosecutor's conduct was harmless error.").

[131] Scheck & Gertner, *supra* note 113; *see* Rosalind D. Anderson, *Comments: A Pragmatic Look at Criminal Contempt and the Trial Attorney*, 12 U. BALT. L. REV. 100, 100–01 (1982) (stating that "[c]ontempt of court is any act calculated to embarrass, hinder, or obstruct a court in its administration of justice" and is a sanction falling primarily within the trial judge's discretion).

[132] Scheck & Gertner, *supra* note 113.

[133] Scheck & Gertner, *supra* note 113.

[134] *See Model Ethical Rule Order*, NACDL: NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, https://perma.cc/ZC4H-JZAZ (last visited Mar. 1, 2022) (demonstrating that a Model Ethical Rule Order should cite the local ethics rules that require the prosecutor to disclose the evidence the defense seeks).

[135] *See* MODEL R. OF PROF. CONDUCT 8.4 cmt. 1 (AM. BAR ASS'N 2016) ("Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct . . . ."); Anderson, *supra* note 131, at 100 (describing the power to punish contempt as "an inherent right necessary to preserve the dignity and authority of the courts, and ultimately the integrity of the judicial system").

IV. The Creation of an Adverse Inference Jury Instruction to Combat *Brady* Violations

A. *The Relationship Between the Prosecutor's Duties to Preserve and Disclose*

The prosecutor has a duty under the Sixth and Fourteenth Amendments to preserve certain types of evidence during the investigation and prosecution of a defendant.[136] The responsibility to preserve evidence is imputed to those formally working for or with a law enforcement agency.[137] This can include prosecutors, police officers, detectives, investigators, and scientific labs.[138] "The duty to preserve evidence starts as soon as the evidence is obtained and continues after a conviction."[139] The evidence that must be preserved is limited to evidence "that might be expected to play a significant role in the suspect's defense."[140] To meet the constitutional standard of materiality, such evidence must possess an exculpatory value[141] and "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."[142] In *Arizona v. Youngblood*, the Supreme Court held that in cases involving only potentially

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[136] *Preserving Evidence in Criminal Cases*, JUSTIA, https://perma.cc/2FUZ-WM9J (last updated Oct. 2021).

[137] *Id.* (identifying a scientific lab that is regularly retained by the prosecutor's office to examine evidence as an example of an agency that could be charged with preserving evidence).

[138] *Id.*

[139] *Id.*

[140] California v. Trombetta, 467 U.S. 479, 488 (1984); *see Preserving Evidence in Criminal Cases*, *supra* note 136 (stating that examples of evidence that must be preserved can include an alibi, recorded statements of the defendant or witnesses, photographs, blood samples, and tangible evidence from the scene of the crime).

[141] *Trombetta*, 467 U.S. at 489; *see, e.g.*, United States. v. Rastelli, 870 F.2d 822, 833 (2d Cir. 1989) (holding there was no due process violation where government lost audio tapes because testimony did not establish tapes had apparent exculpatory value before they were lost, and FBI summaries of tapes did not have exculpatory value); United States v. Ramos, 27 F.3d 65, 71 (3d Cir. 1994) (finding no due process violation where government destroyed agent's witness interview notes because government included all information in reports, examination of other interview notes revealed no *Brady* material, and defendants offered only speculation as to notes' exculpatory value).

[142] *Trombetta*, 467 U.S. at 489; *see, e.g.*, Olszewski v. Spencer, 466 F.3d 47, 58–59 (1st Cir. 2006) (finding no error where police did not recover written statement corroborating defendant's alibi from trash after witness discarded it and made new statement because defense could recreate substance of original statement through testimony); *Rastelli*, 870 F.2d at 833 (ruling there was no error where audio tapes destroyed because defendant could have used contemporaneously prepared FBI notes of same meetings).

exculpatory evidence, a defendant must show bad faith in order to establish a denial of due process.[143] To prove bad faith, a defendant must prove the government's intent to destroy evidence and its specific intent to spoil possibly exculpatory evidence.[144] If a defendant is successful in showing such bad faith prior to trial, the court may suppress the government's use of the related evidence or limit testimony about it.[145] Accordingly, the duty to preserve relates to the requirement that prosecutors disclose material exculpatory evidence to the defense under their *Brady* obligation.[146] After all, such evidence cannot be disclosed if it is not properly preserved.[147]

Although the duty to preserve is related to the prosecutor's *Brady* obligation, the government's intentions are irrelevant in determining whether the government violated its *Brady* obligation.[148] The Supreme Court justified its requirement that defendants show bad faith for a denial of due process on the grounds that "whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often disputed."[149] The Court also noted that the fundamental fairness requirement of the Due Process Clause should not be read to impose an absolute duty to retain and preserve all materials that might be of conceivable evidentiary significance in a prosecution.[150] However, by emphasizing an instrumental approach to government misconduct in this respect, the Supreme Court adopted an unjustifiably narrow view of due process.[151] Such an instrumental approach leads to the conviction of the innocent.[152] Requiring a bad faith showing for

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[143] 488 U.S. 51, 58 (1988).

[144] Joseph Hays, Comment, *The Rejection of "Good Faith" Rights Violations: The Case for a Negligent Standard in Death Penalty Spoliation Issues*, 56 HOUS. L. REV. 1151, 1157 (2019) ("In other words, the destroyed evidence must shout 'Save me!' to prove its exculpatory nature before its destruction becomes a due process violation under *Youngblood*.").

[145] *See Trombetta*, 467 U.S. at 486; *Preserving Evidence in Criminal Cases*, *supra* note 136 ("Proving bad faith requires showing intentional misconduct by the government, rather than mere carelessness.").

[146] *Preserving Evidence in Criminal Cases*, *supra* note 136.

[147] *See Litigation Hold Triggers and the Duty to Preserve Evidence (2020 Edition)*, PERCIPIENT (Oct. 7, 2020), https://perma.cc/3ENS-CLH2 ("For a party to meet its obligation to produce relevant evidence in litigation . . . they must first meet their duty to preserve evidence.").

[148] Brady v. Maryland, 373 U.S. 83, 87 (1963); *Youngblood*, 488 U.S. at 58.

[149] *Trombetta*, 467 U.S. at 486.

[150] *Id.* at 488–89.

[151] Norman C. Bay, *Old Blood, Bad Blood, and* Youngblood*: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 245 (2008).

[152] *Id.* at 243 ("The loss of such evidence, even though it may preclude a claim of actual

a Due Process Clause claim, for what can be viewed as a procedural requisite to fulfill one's *Brady* obligation, erodes the right *Brady* was meant to give to the defense.[153] Part of the issue is that the rule under *Youngblood* provides too little deterrence.[154] Therefore, if there is a good faith basis to believe that before or during trial the prosecution or its agents lost or destroyed potentially exculpatory evidence in bad faith, the defense should be able to request an adverse inference jury instruction.[155]

B. *How Rule 37(e) of the Federal Rule of Civil Procedure Is Instructive on Combatting Intentional* Brady *Violations*

This proposal draws inspiration from Rule 37(e)(2) of the Federal Rules of Civil Procedure.[156] An adverse inference instruction outlines permissible inferences a jury may make against a party that has lost, altered, or destroyed evidence.[157] This instruction generally provides that the jury may draw an inference that a specific piece of evidence, which no longer exists, was harmful to the spoliator's case and or helpful to the opposing party.[158] Rule 37(e)(2) states that

> [i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: . . . (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the

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innocence, cannot result in a due process violation unless the accused shows that the police acted in bad faith. This is so despite the fact that forensic DNA typing has exonerated more than 200 individuals . . . .").

[153] *See* Hays, *supra* note 144, at 1156–57 ("'It's frightening how easy it is to convict an innocent person in this country . . . . And it's overwhelmingly difficult to release an innocent person.' The *Youngblood* doctrine is a large reason for that overwhelming difficulty. Proving bad faith has created an almost functionally impossible burden except in the most egregious examples of police and government misdeeds.").

[154] *See* Hays, *supra* note 144, at 1157 ("As of August 2006, courts found that defendants met the bad faith standard in only 7 of 1,675 published cases citing *Youngblood*.").

[155] *See* FED. R. CIV. P. 37(e)(2).

[156] *See id.*

[157] *See, e.g.*, Meredith v. Paccar, Inc., No. 4:03-CV-959 CAS, 2005 U.S. Dist. LEXIS 45728 (E.D. Mo. Aug. 18, 2005).

[158] *See* FED. R. CIV. P. 37 Advisory Comm. Notes on 2015 Amendment; Bruce V. Miller, *What Is the Difference Between an Adverse Sanction and an Adverse Instruction?*, CASETEXT (July 31, 2013), https://perma.cc/UG5Z-3NA8.

> information was unfavorable to the party . . . .[159]

As indicated by Rule 37(e)(2), the use of adverse inference instructions applies to electronic discovery in civil litigation.[160] The Committee Note on Rule 37(e) states that "[a]dverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence" and that the opposing party was prejudiced from loss of information that would have favored its position.[161] It was meant to address and deter failures to preserve electronically stored information on a finding that a party lost the information "with the intent to deprive another party of the information's use in the litigation," and "to provide a uniform standard in federal court for use of these serious measures when addressing the failure to preserve electronically stored information."[162] Under Rule 37(e)(2), a finding on whether a party acted with the intent to deprive another party of evidence at trial could be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial.[163]

1. The Mechanics of a Rule 37(e)(2) Counterpart in the Federal Rules of Criminal Procedure

If there is a good cause basis to believe that before or during trial the prosecution or its agents lost or destroyed potentially exculpatory evidence in bad faith, the defense should be able to request an adverse inference jury instruction.[164] The government has acted in bad faith when it knows or has reason to know that the evidence is potentially exculpatory and purposefully, knowingly, or recklessly loses or destroys it.[165] In bringing such a request, the defense should articulate the reasons for why there is good cause to believe potentially exculpatory evidence was lost or destroyed in bad faith, and if applicable, present evidence that supports that belief.[166]

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159 FED. R. CIV. P. 37(e)(2).

160 *See id.*

161 FED. R. CIV. P. 37(e)(2) Advisory Comm. Notes on 2015 amendment.

162 *Id.*

163 *Id.*

164 *See* FED. R. CIV. P. 37(e)(2)(B).

165 *See generally Mens Rea*, LEGAL INFO. INST., https://perma.cc/K3Q9-JD6M (last visited Mar. 3, 2022) (defining the Model Penal Code's culpable states of mind into four hierarchical categories).

166 *See generally Good Cause*, LEGAL INFO. INST., https://perma.cc/MJY4-NQEX (last visited

The defense should additionally state why the evidence was potentially exculpatory to its case.[167] If both these requirements are established by clear and convincing evidence, a rebuttable presumption should arise that the government has lost or destroyed potentially exculpatory evidence in bad faith.[168] The prosecution would then be afforded the opportunity to rebut this presumption by clear and convincing evidence.[169]

The model adverse inference jury instruction should state: "In determining the verdict, you should consider that the government acted in bad faith by losing or destroying potentially exculpatory evidence. In doing so, you should deem that the lost or destroyed evidence was unfavorable to the government's case."[170] Although adverse inference instructions generally instruct jurors that they *may* consider the missing evidence to mean that it was unfavorable to the party who lost or destroyed the evidence, the model adverse inference instruction here states that jurors *should* consider the missing evidence and deem the evidence unfavorable to the government.[171] Such a strong proposition comes from the fact that criminal trials generally involve higher stakes than civil trials, and the model adverse inference instruction requires the defense to demonstrate both that the evidence was potentially exculpatory and that the government purposefully, knowingly, or recklessly lost or destroyed it.[172] Similarly to the

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Mar. 3, 2022) (defining good cause as a legally sufficient reason for a ruling by a judge).

[167] *See* California v. Trombetta, 467 U.S. 479, 488–89 (1984) (stating that evidence that must be preserved includes that which might be expected to play a significant role in the suspect's defense).

[168] *See generally Rebuttable Presumption*, LEGAL INFO. INST., https://perma.cc/BKU5-L4YQ (last visited Mar. 3, 2022).

[169] *See generally* Francis H. Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. & AM. L. REG. 307, 307 (1920) (stating that the rebuttable presumption of law is an evidentiary rule, and its only effect is to shift the burden of producing evidence).

[170] *Cf.* JUDICIAL COUNCIL OF CAL. CIV. JURY INSTR. 204 (2020) (stating the willful suppression of evidence instruction for civil cases in California).

[171] *See, e.g.*, 1 FLA. FORMS OF JURY INSTR. § 2.07 (2021) ("If you find that: (Name of party) [lost] [destroyed] [mutilated] [altered] [concealed] or otherwise caused the (describe evidence) to be unavailable, while it was in [his] [her] [its] possession, custody, or control; and the (describe evidence) would have been material in deciding the disputed issues in this case; then you may, but are not required to, infer that this evidence would have been unfavorable to (name of party).").

[172] *See* Brian P. Fox, Note, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 429 (2013) ("Unlike modern discovery in civil trials, criminal discovery is very restricted. There are many reasons to be critical of this dichotomy, the most prevalent of which is the injustice of placing a greater importance on cases involving money than on cases 'where the freedom and, sometimes, the life of the defendant are at stake.'").

Federal Rules of Civil Procedure Rule 37(e)(2), the determination on whether to use an adverse inference instruction can be made pretrial, during a bench trial, or at trial.[173]

In deciding whether to grant the defense's request for such an adverse inference jury instruction, the judge should consider the applicability of the following factors: whether the missing evidence was materially exculpatory; whether an effort was made to preserve such evidence and how reasonable those efforts were; whether the failure to preserve was the result of bad faith; whether the request to preserve and disclose that information was received by the prosecution; and whether the prosecution was on notice that the information was discoverable by the defense.[174]

2. How Use of an Adverse Inference Jury Instruction is Beneficial to Preventing *Brady* Violations

Codifying this remedy in the Federal Rules of Criminal Procedure would discourage prosecutors from the willful alteration, destruction, and loss of exculpatory evidence, making it more difficult to avoid their *Brady* obligations.[175] Such an instruction strongly incentivizes strict compliance with the prosecution's preservation duties because detecting a willful and reckless failure to preserve evidence sways the jury in the defense's favor.[176] Along the same vein, an adverse inference jury instruction strongly deters the prosecution from the willful or reckless destruction or the loss of potentially exculpatory evidence because the use of such a jury instruction acts as punishment for that misconduct.[177] Most importantly, this remedy decreases the risk of willful or reckless destruction of potentially exculpatory evidence during the pretrial and trial phase, which prevents wrongful convictions from happening in the first place.[178] There is likely nothing more

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[173] *Cf.* FED. R. CIV. P. 37(e)(2) Advisory Comm. Notes on 2015 amendment.

[174] *Cf.* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF ADVISORY COMMITTEE ON CIVIL RULES (2014), https://perma.cc/7CBP-WPMM.

[175] *See Why Codify?*, AM. LEGAL PUBL. CORP., https://perma.cc/KB7C-JZ3F (last visited Mar. 3, 2022) (stating that codifying rules and laws allows for the public to determine the standards of law and allows for ease of enforcement).

[176] *Cf.* Morris v. Union Pacific R.R., 373 F.3d 896, 900 (8th Cir. 2004) (demonstrating that the giving of an adverse inference instruction brands one party as a bad actor, creating a difficult hurdle for the spoliating party to overcome).

[177] *Cf. id.*

[178] *See, e.g.*, *Former Prosecutor, Now on Arkansas Supreme Court, Cited for 'Bad Faith' Destruction of Exculpatory Evidence in Death Penalty Case*, DEATH PENALTY INFO. CENTER (May 14, 2020), https://perma.cc/X3H5-QFG4 (stating that "[t]he United States Court of Appeals for the Eighth

persuasive to a juror than hearing a judge tell the juror to look at the facts or evidence a certain way.[179]

V. Using Special Masters in Criminal Cases to Prevent *Brady* Violations

Special masters are professionals predominantly hired or appointed by the court to assist in resolving disputes in civil adjudication.[180] Courts can utilize special masters in the pretrial phase, during trial, or in the post-trial phase.[181] They are known to perform various functions including: managing discovery, adjudicating particular issues, facilitating discussion between parties or settlement, providing expertise, evaluating specialized issues, determining damages, dealing with complaints of ethical violations, and almost anything else that requires professional assistance to aid resolution.[182] Special masters have also been called to handle unique tasks such as monitoring corporate governance issues; supervising prison reforms ordered by the court; and developing best practices for resolving disputes within educational institutions, transportation systems, and disability rights.[183] When appointed by the court, "special masters [virtually] become temporary or quasi-judges."[184] However, because they are not a judicial officer with a formal court docket, a special master can have one-sided conversations with an attorney outside the presence of the other party.[185] The advantages of special masters in civil litigation include that their

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Circuit . . . found that a former prosecutor now serving as a justice on the Arkansas Supreme Court deliberately destroyed exculpatory evidence in a case in which he had sought the death penalty against the defendant"). *See generally* EMILY M. WEST, COURT FINDINGS OF PROSECUTORIAL MISCONDUCT CLAIMS IN POST-CONVICTION APPEALS AND CIVIL SUITS AMONG THE FIRST 255 DNA EXONERATION CASES 4 (2010), https://perma.cc/6EC3-TZCV (noting that prosecutorial misconduct included the destruction of evidence).

[179] *Cf.* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 160 (2010) (noting that, in one judge's experience, jurors almost always say what they think the judge wants to hear).

[180] Shira Scheindlin, *How Courts and Litigants Can Benefit from Special Masters*, LAW360 (Jan. 8, 2020, 3:09 PM EST), https://perma.cc/RQ32-KR7M.

[181] David B. Keller, *Court-Appointed Special Masters: Dispute-Resolvers?*, MEDIATE.COM (Jan. 1998), https://perma.cc/A6WX-SBYL; Peter F. Vaira, *Increased Use of Special Masters and How They Can Help*, WGP LLP (Nov. 21, 2018), https://perma.cc/E9W8-46YJ.

[182] Vaira, *supra* note 181; *see* Shira Scheindlin, *The Use of Special Masters in Complex Cases*, LAW360 (Aug. 15, 2017, 11:36 AM EDT), https://perma.cc/CEU9-XRC5 [hereinafter *Special Masters in Complex Cases*].

[183] Scheindlin, *supra* note 180.

[184] Keller, *supra* note 181.

[185] Vaira, *supra* note 181.

appointments are beneficial in resolving disputes quickly, streamlining discovery, relieving courts of the burden of managing pretrial process, providing expertise in cases that involve specialized issues, handling delicate settlement negotiations, and, in certain instances, reducing cost and delay.[186]

The appointment of special masters in civil cases is permitted under Rule 53 of the Federal Rules of Civil Procedure.[187] Under Rule 53(a), a court may appoint a special master to perform a duty that is consented to by the parties; to "hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by [either] some exceptional condition[] or [] the need to perform an accounting or resolve a difficult computation of damages"; or "to address pretrial and posttrial matters that cannot be effectively and timely addressed" by a judge of the court.[188]

A. *The Potential Benefits of Using Special Masters in Criminal Cases*

Although primarily used in civil cases, special masters can provide invaluable service in criminal cases.[189] In 2018, a federal district court judge appointed a special master to look for attorney-client communications in documents seized by the FBI in a search warrant for the law offices of David Cohen, long-time attorney of President Donald Trump.[190] In *State ex rel. Woodworth v. Denney*, the Supreme Court of Missouri hired a special master to determine whether the state had violated its *Brady* obligation to the defendant.[191]

The use of special masters in criminal cases can be a viable solution to the many problems left unresolved by *Brady*.[192] One of the benefits of the appointment of a special master in civil cases is the assurance of procedural compliance by the parties through the strict monitoring of their adherence to the governing rules.[193] Therefore, if consented to by the prosecution and defense, the parties should have the option to appoint a special master to

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[186] Scheindlin, *supra* note 180; *Special Masters in Complex Cases*, *supra* note 182.

[187] FED. R. CIV. P. 53.

[188] *Id.*

[189] Vaira, *supra* note 181.

[190] Allan Smith & Sonam Sheth, *A Federal Judge Just Sided with Michael Cohen on the Biggest Issue in His Case—And Added Another Wildcard*, BUS. INSIDER (Apr. 26, 2018, 12:55 PM), https://perma.cc/WU9L-NB9A.

[191] 396 S.W.3d 330, 333 (Mo. 2013).

[192] *See, e.g.*, *id.*

[193] Scheindlin, *supra* note 180.

look through the prosecutor's evidence during pretrial to determine whether any information falls under the *Brady* obligation.[194] Alternatively, if the prosecutor declines the use of a special master, the defense should have the option to request the appointment of a special master to investigate the prosecutor's evidence.[195] The defense must have made a good cause showing for making the request.[196]

"Special masters are also valuable in solving conflict of interest issues among defense attorneys in criminal cases since special masters can interview attorneys and clients confidentially about issues and facts that could constitute a conflict and that a judge may not learn about in a normal conflict hearing."[197] Additionally, special masters are unbiased to the litigation, and their use would take away the prosecutor's discretion to disclose.[198] Prosecutors may not recognize that the evidence or information they possess tends to negate guilt or mitigate the offense due to their confirmation bias.[199] Therefore, appointing special masters to review the prosecution's evidence before trial could prevent both intentional and unintentional *Brady* violations, and could prevent a wrongful conviction from happening in the first place.[200]

B. *Addressing the Costs of Using Special Masters in Criminal Cases*

The main drawback to the appointment of special masters in civil litigation, which is likely to carry over to criminal cases, is the cost of

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[194] *Cf. Denney*, 396 S.W.3d at 333.

[195] *See* Vaira, *supra* note 181("Even if only one party requested such an appointment, and made a good case for making the request, the judge would likely be amenable to such an appointment.").

[196] Vaira, *supra* note 181; *see infra* Part V(B) (discussing when there might be good cause).

[197] Vaira, *supra* note 181.

[198] Cobell v. Norton, 334 F.3d 1138, 1142 (D.C. Cir. 2003). *See generally* AM. BAR ASS'N, ABA-JUDICIAL SPECIAL MASTERS COMMITTEE CHECKLIST FOR MAKING USE OF SPECIAL MASTERS TO HELP DEAL WITH THE NEW NORMAL (2020), https://perma.cc/952B-CZ6L [hereinafter ABA SPECIAL MASTERS CHECKLIST] ("Those who serve as Special Masters must do conflict checks with their law practice and disclose any potential conflicts to the court and the parties consistent with the rules applicable to Special Masters.").

[199] *Id.*

[200] *Cf.* Zachary Parkins, *Electronic Discovery: Why The Appointment of Special Masters in All Large Electronic Discovery Disputes Is Vital to the Progress of American Civil Justice*, 2011 AM. J. MEDIATION, no. 5, at 1, 4, https://perma.cc/Z8K9-T88H ("The problem inherent in this system, and exasperated by electronic discovery, is that a special master appointed under FED. R. CIV. P. 53 is ordinarily appointed after problems have already arisen. Often, millions [have] been spent throughout a litigation only to find that evidence has been hidden, or worse, destroyed.").

appointment.[201] The constraints of judicial resources are why this Note suggests making the appointment of special masters optional, either through consent of both parties or by the defense's request upon a good cause showing, such as when the case involves a capital or serious offense or there is reason to believe the prosecutor is in possession of materially exculpatory evidence and has failed to disclose it.[202] Capital crimes are punishable by the death penalty, and the severity of this punishment justifies a prophylactic remedy for a *Brady* violation through the appointment of a special master to investigate the prosecutor's evidence.[203] Although there will be a cost for the appointment of special masters in criminal cases, those costs will not substantially overburden the system given that their use is optional and warranted through the consent of both parties or by the defense when there is a showing of good cause.[204] Thus, it is very likely that the use of special masters will be utilized only in a selective number of cases such as those involving complex issues of fact or law, serious charges, or where there is good cause to believe the prosecution is committing a *Brady* violation.[205] Such an expense is worthwhile given that it could prevent wrongful convictions.[206] Additionally, one way to minimize the costs of implementing the use of special masters is to create a pro bono registry and appoint pro

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[201] *See* Scheindlin, *supra* note 180.

[202] *See* Michael W. Drumke, *TIPS Toolkit for Fair Court Funding*, ABA: AM. BAR ASS'N (June 1, 2016), https://perma.cc/6WGV-X2SJ (discussing how federal and state courts are under attack from ever-increasing budget cuts resulting in underfunding).

[203] *See Capital Offense*, LEGAL INFO. INST., https://perma.cc/E3MQ-Y9J9 (last updated June 2020).

[204] *See* David R. Cohen, *The Judge, the Special Master, and You*, 40 LITIG., no. 4, Summer 2014, at 1, 2, https://perma.cc/5WHR-AN7W ("Put simply, both judges and litigants almost never regret the appointment of a special master. Litigants sometimes start out fearing the unknown additional cost, and judges sometimes initially are apprehensive about what they assume is a ceding of their authority. But neither of those concerns proves valid.").

[205] *See, e.g.*, *id.* at 3 (stating that there are three types of cases where the benefits of appointing a special master exceeds costs such as cases requiring the review of thousands of documents because it requires time the court lacks).

[206] *See generally* Marvin Zalman et al., *Citizens' Attitudes Toward Wrongful Convictions*, 37(1) CRIM. JUST. REV. 51 (2012), https://perma.cc/26DH-ZF5L ("Overall, the results of this exploratory study suggest that respondents not only recognize the incidence of wrongful conviction but also believe that such errors occur with some regularity. Further results show that respondents believe wrongful convictions occur frequently enough to justify major criminal justice system reform."); *How Much Does it Cost to Incarcerate an Inmate?*, LAO: LEGIS. ANALYST'S OFF., https://perma.cc/L4VV-QQBB (last updated Jan. 2022) (stating that it costs an average of $106,000 to incarcerate an inmate in prison in California); *Michael Hanline*, *supra* note 1 (stating that the cost of the wrongful conviction of Michael Hanline totaled $2,923,308).

bono special masters who are versed in the *Brady* obligation.[207]

CONCLUSION

When it comes to wrongful convictions, even one is one too many. We cannot rely on *Brady* to prevent all wrongful convictions because through the conflicting standards prosecutors are subject to—coupled with the lack of discipline imposed upon them and unchecked mental processes such as confirmation bias—prosecutors are largely left to regulate themselves. Self-regulation has proven inadequate. If we are to affirm one of the most sacred principles in the American criminal justice system—that a defendant is innocent until proven guilty—we cannot sit idly by while innocent persons have guilt imposed upon them. We must implement the necessary safeguards to our system to ensure that wrongful convictions never happen again. These safeguards can come in the form of the Ethical Rule Order motion, the use of an adverse inference instruction when exculpatory evidence is destroyed, or through the use of special masters to inspect the prosecution's evidence.

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[207] *See* ABA SPECIAL MASTERS CHECKLIST, *supra* note 198, at 4; *see also, e.g.*, Vince Pisegna & Tony Cichello, *The Holy Grail for Litigation—Appointment of a Special Master*, THE LITIGATORS' BLOG (Feb. 22, 2013), https://perma.cc/H3VT-UWCN ("In this instance, the parties were quite fortunate that a retired superior court judge had volunteered to take matters like this on a pro bono basis so the cost to the parties for the special master was zero.").

Higher Standards for Reasonable Suspicion to Frisk: Fostering a Better Relationship Between Law Enforcement and the Community

Christopher Upperman[*]

INTRODUCTION

A pat frisk is a limited search of a person's outer garments to find evidence of a crime or weapons.[1] Police officers are legally justified in stopping a person when they reasonably suspect that person is engaged in criminal activity.[2] A subsequent search for weapons, however, must be based on a reasonable, articulable suspicion that the person is armed and dangerous.[3] Ascertaining what exactly the standard is for such a search has troubled courts for decades.[4]

This Comment will propose that the Massachusetts Supreme Judicial Court's (hereinafter "SJC") decision in *Commonwealth v. Torres-Pagan* will benefit community interactions with law enforcement. Part I of this Comment will discuss the evolution of the pat frisk standard since its inception in 1968 and the effects of pat frisks on individuals. Part II will summarize the SJC's decision, explaining why the Court did not consider Torres-Pagan's actions as furtive movements and found that there was no reasonable suspicion that Torres-Pagan was armed and dangerous. Parts III and IV will analyze the effects of a heightened pat frisk standard and how it will help foster a better law enforcement-community relationship by clarifying the standard for police officers so they can make more informed

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[1] Terry v. Ohio, 392 U.S. 1, 8 (1968).

[2] *Id.* at 30.

[3] *Id.*

[4] *See, e.g.*, Commonwealth v. DePeiza, 868 N.E.2d 90, 96 (Mass. 2007); Commonwealth v. Stampley, 771 N.E.2d 784, 787–88 (Mass. 2002).

decisions in fast-paced, high-risk situations.

I. Background

A. *Articulation of the Pat Frisk Standard*

The sanctity of the individual is held in high regard in our society as the Fourth Amendment protects people from warrantless searches of their persons.[5] While reasonable suspicion of any criminal activity justifies an investigatory stop by the police, a subsequent search of a stopped individual requires further suspicion that the suspect is also armed with a weapon.[6] In *Terry v. Ohio*, the U.S. Supreme Court was confronted with a situation where a police officer saw what appeared to be criminal activity, approached the suspicious individuals, and then patted their outer clothing because he feared they had a weapon.[7] Since the officer found a weapon during this warrantless search, the Court had to decide whether to admit the weapon into evidence by questioning whether such a warrantless search was an arrest without probable cause.[8]

The Court held that a limited search of a suspect's outer clothing—a pat down or frisk—did not constitute an arrest within the Fourth Amendment.[9] The Court said this limited search is reasonable:

> where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[10]

By articulating this standard, the Court clarified that when a police officer has reasonable suspicion that a person is engaged in criminal activity, a limited search of that person is reasonable to protect the safety of the officer and the public if the police officer reasonably believes that the person may

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[5] U.S. CONST. amend. IV.

[6] *Terry*, 392 U.S. at 27.

[7] *Id.* at 27–28.

[8] *Id.* at 15–16.

[9] *Id.* at 30–31.

[10] *Id.* at 30.

be armed with a weapon.[11]

B. *Massachusetts Interpretation of the Pat Frisk Standard*

Although *Terry* created a national standard for warrantless searches, the Massachusetts legislature added extra protection for individuals who interact with police.[12] The *Terry* decision confused Massachusetts courts because reasonable suspicion that an officer's safety is in danger was the valid articulation for an exit order during a traffic stop, but some courts mistakenly conflated this standard with the *Terry* standard.[13] Adding further to this confusion was the question of how to determine whether a suspect is armed and dangerous and how specifically a police officer needs to articulate this determination.[14] Before and after *Terry*, Massachusetts courts often deferred to a police officer's experience when the officer could not articulate exactly why the officer thought a suspect was armed and dangerous.[15]

Recently, most courts have strayed away from the *Terry* standard and have required specific, articulable facts that a person is armed and dangerous to justify a frisk and have also required that the search must be for weapons.[16] This clarification is important because police officers often

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[11] *Id.*

[12] *See* MASS. CONST. pt. 1, art. XIV; Commonwealth v. Pierre, 893 N.E.2d 378, 380 (Mass. 2009) ("Under the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights, warrantless searches and seizures are presumptively invalid."); *see also* Commonwealth v. Cruz, 945 N.E.2d 899, 906 (Mass. 2011) (stating that under the Massachusetts Declaration of Rights, in the Fourth Amendment context, officers cannot issue routine exit orders to passengers in stopped vehicles); Commonwealth v. Matthews, 244 N.E.2d 908, 910 (Mass. 1969) (explaining that the "[s]tate is free to develop its own law of search and seizure to meet the needs of local law enforcement, and in the process it may call the standards it employs by any names it may choose").

[13] Commonwealth v. Torres-Pagan, 138 N.E.3d 1012, 1016 (Mass. 2020).

[14] *See generally* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.6(a) (6th ed. 2020).

[15] *See* Commonwealth v. Sumerlin, 469 N.E.2d 826, 828 (Mass. 1984) (deferring to officer's experience in drug situations); Commonwealth v. Ballou, 217 N.E.2d 187, 189–90 (Mass. 1966) (deferring to officer's knowledge of suspect's previous behavior).

[16] *See, e.g.*, Arizona v. Johnson, 555 U.S. 323, 327 (2009) ("To justify a patdown of the driver or a passenger during a traffic stop, . . . just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous."); United States v. Romain, 393 F.3d 63, 72 (1st Cir. 2004) (acknowledging deference to officer's experience but explaining that the circumstances warranted a pat frisk due to the suspect's actions); Commonwealth v. Narcisse, 927 N.E.2d 439, 447–48 (Mass. 2010) (complying with officers and doing nothing furtive does not give

cite suspicion that individuals are armed and dangerous to initiate a search and then use the "plain feel" doctrine to justify seizing contraband that is not a weapon.[17] The "plain feel" doctrine allows a police officer to reach into a suspect's pockets if, during a pat frisk, the police officer feels an object that may reasonably be a weapon.[18] Even if the object is not a weapon, a court will consider it to have been lawfully discovered if it reasonably appeared to be a weapon.[19] "In fact, an officer who feels something during a *Terry* frisk that obviously [is not] a weapon, but is obviously contraband, can seize it."[20] Thus, even where a pat frisk is only justified because a police officer (wrongly) suspects that a person has a weapon, a seizure of other non-weapon contraband can still be valid.[21]

Further confusing a court's analysis of whether a police officer reasonably suspected that an individual was armed and dangerous is the evidentiary weight of the police officer's assessment of the suspect's "furtive movements."[22] Webster's Dictionary (which the *Torres-Pagan* Court cited to) defines furtive as "done by stealth" or "secret."[23] Stealthy movement may justify an officer's suspicion that a suspect is armed, but the circumstances must be analyzed in totality, not as incidents in isolation.[24] In *Commonwealth v. DePeiza*, the SJC found that the defendant, who walked with his right arm stiff and straight against his body, engaged in furtive movements, which justified the officer's suspicion that the defendant was armed.[25] In *Commonwealth v. Narcisse*, the SJC declined to find that a suspect's presence in a high-crime area constituted furtive action without any further stealthy conduct by the defendant.[26] Further, while in *Commonwealth v. Torres* the SJC

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reasonable suspicion that suspect was armed even though pat frisk did in fact reveal suspect had weapons).

[17] *See* Micah Schwartzbach, *Limits to Frisks by Police Officers*, NOLO, https://perma.cc/KG4R-D2AH (last visited Feb. 16, 2022).

[18] *See id.*

[19] *Id.*

[20] *Id.*

[21] *See* Minnesota v. Dickerson, 508 U.S. 366, 373–74 (1993).

[22] Commonwealth v. Torres-Pagan, 138 N.E.3d 1012, 1018–19 (Mass. 2020).

[23] *Id.* at 1018; *Furtive*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 924 (1963).

[24] *See* Commonwealth v. DePeiza, 868 N.E.2d 90, 96 (Mass. 2007) (explaining that walking with right arm stiff and straight against the body justified suspicion that defendant was armed); *but see* Commonwealth v. Torres, 674 N.E.2d 638, 642 (Mass. 1997) (alighting from vehicle insufficient to support defendant's continued detention); Commonwealth v. Brown, 915 N.E.2d 252, 256 (Mass. App. Ct. 2009).

[25] 868 N.E.2d at 97.

[26] 927 N.E.2d 439, 448 (Mass. 2010).

held that exiting a vehicle was not furtive movement,[27] in *Commonwealth v. Stampley* the SJC found that the suspect's stealthy (but not threatening) movement within the car was furtive.[28]

C. *Intrusive Power Balance of Pat Frisks*

Rejecting the argument that a stop and frisk amounts to a mere "minor inconvenience and petty indignity," the U.S. Supreme Court characterized a frisk as a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."[29] While frisks are reasonably necessary in some situations to protect an officer's and the public's safety, it is important that officers do not wield too much power in interpreting who should be subject to a frisk, as the humiliating effects of such an intrusion can have lasting impacts on an individual.[30] "The pat or feel method will achieve partial results for the detection of bulky weapons and objects, but the officer must feel with sensitive fingers every portion of the [suspect's] body."[31]

The power balance in these scenarios resides with the officer—even a reasonable objection to inappropriate touching can result in an officer considering the conduct as resisting arrest.[32] In New York City, where stop and frisks have been the most prevalent, asking an officer for a reason for a stop has resulted in unnecessary police brutality even before a suspect is subjected to a frisk.[33] Further, empirical data shows that people of color are disproportionately affected by a relaxed pat frisk standard.[34] To ensure that vulnerable groups are not disproportionately harmed by police officers, some have argued that the government must clarify the standard to protect the sanctity of the individual and alleviate any ambiguity to allow police

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27 674 N.E.2d at 642.

28 771 N.E.2d 784, 787–88 (Mass. 2002).

29 Terry v. Ohio, 392 U.S. 1, 10, 17 (1968).

30 *See generally* CTR. CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT 5–6 (2012), https://perma.cc/7UAV-LH7C [hereinafter STOP AND FRISK: THE HUMAN IMPACT] (illustrating the impact stop and frisk policies have on everyday life).

31 L.L. Priar & T.F. Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 481, 481 (1955), https://perma.cc/9TBT-3UJK.

32 *See* STOP AND FRISK: THE HUMAN IMPACT, *supra* note 30, at 5.

33 *See* STOP AND FRISK: THE HUMAN IMPACT, *supra* note 30, at 5.

34 *See* JEFFREY FAGAN ET AL., FINAL REPORT: AN ANALYSIS OF RACE AND ETHNICITY PATTERNS IN BOSTON POLICE DEPARTMENT FIELD INTERROGATION, OBSERVATION, FRISK, AND/OR SEARCH REPORTS 3 n.8, 8 (2015), https://perma.cc/3KQP-CJG4 ("Some 29.5% percent of White subjects were frisked/searched during an FIO relative to the 45.4% percent of Black subjects, 40.5% of Hispanic subjects, and 35.6% of Asian/other race subjects.").

officers to uniformly enforce laws without fear of violence.[35] The necessity of this clarification is emphasized by the recent police killings of Black Americans that began as routine traffic stops and quickly escalated to fatal incidents.[36]

II. The Court's Opinion

A. *Facts and Procedural History*

In the early evening of May 3, 2017, two Springfield police officers pulled over Manuel Torres-Pagan after they witnessed him driving with a cracked windshield and an expired registration sticker.[37] Torres-Pagan pulled into a residential driveway and exited his car before he realized he was being pulled over.[38] As the officers walked towards Torres-Pagan, he "stood between the open door and the front seat, facing the officers."[39] Torres-Pagan complied with all of the officers' orders and kept his hands visible at all times.[40] Because he looked back into the car on more than one occasion, the officers interpreted his conduct as furtive; therefore, they determined there was a reasonable suspicion that Torres-Pagan was armed and dangerous.[41] Accordingly, the officers placed Torres-Pagan in handcuffs and conducted a pat frisk, which revealed a knife in Torres-Pagan's pocket.[42] The officers then asked Torres-Pagan if he had other weapons in his vehicle; when he responded that he did, the officers searched his car and seized a firearm from the driver's seat floor.[43]

Torres-Pagan was subsequently charged with two motor vehicle infractions and three firearms charges as a result of the evidence found after the pat frisk.[44] He motioned to suppress the firearms charges and claimed

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[35] *See* Brief and Addendum for the Appellee/Defendant at 24–25, Commonwealth v. Torres-Pagan, 138 N.E.3d 1012 (Mass. 2020) (No. SJC-12697).

[36] *See* Commonwealth v. Buckley, 90 N.E.3d 767, 781 n.3 (Mass. 2018) (Budd, J., concurring) (noting that Philando Castile, Walter Scott, Samuel Dubose, and Sandra Bland were all killed by police or died in police custody following car stops for motor vehicle infractions).

[37] *Torres-Pagan*, 138 N.E.3d 1012, 1014 (Mass. 2020); Brief and Addendum for the Appellee/Defendant at 10–11, Commonwealth v. Torres-Pagan, 138 N.E.3d 1012 (Mass. 2020) (No. SJC-12697).

[38] *Torres-Pagan*, 138 N.E.3d at 1014–15.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 1015.

[42] *Id.*

[43] *Id.*

[44] Brief and Addendum for the Appellee/Defendant at 9–10, Commonwealth v. Torres-

that the officers discovered the concerning evidence after they conducted an unlawful pat frisk.[45] A judge from Springfield District Court granted the defendant's motion, and the Commonwealth filed an interlocutory appeal; the Appeals Court reversed the order of the motion judge.[46] Torres-Pagan appealed to the SJC to determine if a pat frisk is permissible when the suspect voluntarily exits the car during a traffic stop, follows all of the officers' orders, keeps both hands in plain sight, and does nothing other than occasionally look back into his car.[47]

B. *The Court's Holding and Reasoning*

The SJC was called on to clarify what constitutes a reasonable suspicion that an individual is armed and dangerous.[48] One major hurdle the SJC had to clear in making this determination was the conflation of standards for exit orders and pat frisks.[49] In a 2001 decision, the SJC inaccurately stated that the standard for a pat frisk is the same as that which is required to justify an exit order.[50] The SJC also mistakenly described a pat frisk as "constitutionally justified when an officer reasonably fears for his own safety or the safety of the public . . . *or* when the police officer reasonably believes that the individual is armed and dangerous."[51] To clarify the issue here, the SJC articulated the two standards:

> Accordingly, we clarify today that an exit order is justified during a traffic stop where (1) police are warranted in the belief that the safety of the officers or others is threatened; (2) police have reasonable suspicion of criminal activity; or (3) police are conducting a search of the vehicle on other grounds. . . . Thus, in the absence of reasonable suspicion of a crime or justification to search the vehicle on other grounds, an exit order is justified during a traffic stop if officers have a reasonable suspicion of a threat to safety. A lawful patfrisk, however, requires more; that is, police must have a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous.[52]

Pagan, 138 N.E.3d 1012 (Mass. 2020) (No. SJC-12697).

[45] *Torres-Pagan*, 138 N.E.3d at 1014.

[46] *Id.*

[47] *Id.* at 1014–15.

[48] *Id.* at 1017–18.

[49] *See id.* at 1016–17.

[50] *See id.* at 951.

[51] *Torres-Pagan*, 138 N.E.3d at 1017 (citing Commonwealth v. Johnson, 908 N.E.2d 729, 732 (2009), quoting Commonwealth v. Isaiah I., 882 N.E.2d 328, 334 (2008)).

[52] *Id.* (citations omitted).

Because a pat frisk is a "severe . . . intrusion upon cherished personal security [that] must surely be an annoying, frightening, and perhaps humiliating experience[,]" the only legitimate reason for an officer to subject a suspect to a pat frisk is to determine whether he or she has concealed weapons on his or her person; therefore, such an intrusion is not allowed without reasonable suspicion that the suspect is dangerous *and has a weapon*.[53]

While acknowledging that the original traffic stop was permissible because the officers witnessed Torres-Pagan driving with a cracked windshield, the SJC noted that even during a stop for which there is constitutional justification, a pat frisk is only permissible when an officer has reasonable suspicion that a suspect is armed and dangerous.[54] The Commonwealth argued that the officers had reasonable suspicion that Torres-Pagan was armed and dangerous, thus making the pat frisk permissible: Torres-Pagan exited his vehicle without instruction from the police officers, and his actions were furtive.[55] The SJC disagreed that Torres-Pagan's actions were furtive and that the officers were justified in pat frisking Torres-Pagan solely because he exited his vehicle.[56]

The SJC concluded that Torres-Pagan's conduct did not warrant a reasonable suspicion that he was armed and dangerous, and thus, there was no justification to pat frisk him.[57] Referring to Webster's definition of furtive as "done by stealth" or "secret," the SJC found that Torres-Pagan's actions did not constitute furtive movements that would justify a suspicion that he had a weapon.[58] While exiting the car without being told to do so may be unexpected, it can hardly be characterized as furtive; either way, "surprise in response to unexpected behavior is not the same as suspicion that the person is armed and dangerous."[59] The SJC analyzed Torres-Pagan's actions against a backdrop of pat frisk cases and found that he did not act furtively or stealthily: he was not secreting or attempting to reach for anything, and he was facing the officers, neither of whom observed any indication of weapons.[60] "The fact that the defendant turned to look into the front seat of

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[53] *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 24–28 (1968)).

[54] *Id.* at 1015–16 (citing Commonwealth v. Narcisse, 927 N.E.2d 439 (2010); Arizona v. Johnson, 555 U.S. 323, 326–27 (2009)).

[55] *Torres-Pagan*, 138 N.E.3d at 1018.

[56] *Id.*

[57] *Id.* at 1020.

[58] *Id.* at 1018.

[59] *Id.*; *see* Commonwealth v. Stampley, 771 N.E.2d 784, 788 (Mass. 2002).

[60] *Torres-Pagan*, 138 N.E.3d at 1018.

his vehicle more than once after he got out adds little if anything to the analysis. At most, such action would suggest that the defendant had something of interest in his vehicle, not that he had a weapon on his person."[61]

Responding to the Commonwealth's last-ditch effort to preserve the assertion that the officers had reasonable suspicion because the stop occurred in a high-crime area, the SJC provided clarity on the weight of such evidence in the reasonable suspicion analysis.[62] "At the suppression hearing, an officer testified regarding numerous reports of shots fired, individuals being shot, and gang activity as well as arrests, including for violent crimes, in the vicinity of three specific streets in Springfield within a week of [Torres-Pagan's] arrest."[63] Thus, the motion judge was provided with information that showed a direct connection between the specific location and the investigated activity.[64] Presence in a high-crime area is given weight in deciding whether there is reasonable suspicion that a person is armed and dangerous, but the SJC was careful to emphasize that this factor alone cannot justify a pat frisk.[65] Although Torres-Pagan was in a high-crime area, the factors surrounding the traffic stop did not justify the officers' belief that Torres-Pagan was armed and dangerous when the officers pat frisked him, and the evidence seized as a result of the unlawful pat frisk was suppressed by the SJC.[66]

ANALYSIS

III. The SJC Clarified the Pat Frisk Standard and the Evidentiary Weight of Furtive Movements and High-Crime Areas

A. *The SJC Articulated and Differentiated the Pat Frisk Standard from the Exit Order Standard*

In past decisions, the SJC created confusion regarding the proper articulation of the pat frisk standard because the Court conflated it with the exit order standard.[67] In 2007, the SJC stated, "under our State Constitution, neither an exit order nor a patfrisk can be justified unless 'a reasonably

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[61] *Id.* at 1019.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Torres-Pagan*, 138 N.E.3d at 1019.

[67] *See id.* at 1016.

prudent man in the policeman's position would be warranted in the belief that the safety of the police or that of other persons was in danger.'"[68] In 2016, the SJC stated that "[w]here an officer has issued an exit order based on safety concerns, the officer may conduct a reasonable search for weapons in the absence of probable cause to arrest."[69] However, the *Torres-Pagan* Court noted that while both are technically correct statements of the law—a pat frisk is not justified unless an officer has safety concerns, and a pat frisk may be conducted in the absence of probable cause—the SJC did not (in either case) specify that an officer needs more than safety concerns to justify a pat frisk; thus in *Torres-Pagan*, the SJC clarified that in addition to safety concerns, an officer must have a reasonable suspicion that a suspect is armed and dangerous.[70]

In *Torres-Pagan*, the SJC was careful to note the distinction between an exit order and a pat frisk.[71] While both scenarios implicate an officer's safety concerns, in an exit order such concerns may be resolved once a suspect exits the vehicle.[72] Thus, the SJC correctly clarified that the standards for exit orders and pat frisks are different: the former can quickly ameliorate any suspicion that a suspect could use the vehicle as a weapon, whereas the latter constitutes a "severe intrusion" on the sanctity of the individual.[73]

This clarification will change the way police officers interact with citizens during traffic stops, as an exit order now does not justify an automatic pat frisk.[74] The reason for the change is logical: an exit order resolves a safety concern related to the car—without the greater intrusion of putting hands on the suspect to check the suspect's body for weapons.[75]

> As much as a person's body, clothing, and hand-held belongings make good places to hide weapons, a car certainly provides more opportunity to store and conceal weapons . . . . Once an officer issues the exit order for safety concerns and removes the driver or passengers, their ability to use the car as a weapon or to access

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68 Commonwealth v. Washington, 869 N.E.2d 605, 612 (Mass. 2007) (citations omitted).

69 Commonwealth v. Amado, 48 N.E.3d 414, 420 (Mass. 2016).

70 138 N.E.3d at 1016.

71 *Id.*

72 *Id.*

73 *Id.* at 37; Terry v. Ohio, 392 U.S. 1, 24–26 (1968).

74 John Sofis Scheft, *Officer Safety During MV Stops, January 30, 2020: Important Update for the Massachusetts Law Enforcement Community*, LAW ENFORCEMENT DIMENSIONS (Jan. 30, 2020), https://perma.cc/USU7-862E; *contra* Commonwealth v. Torres, 745 N.E.2d 945, 951–52 (Mass. 2001) (allowing officers to automatically frisk an occupant once they ordered him to get out because he posed a safety risk).

75 Scheft, *supra* note 74.

hidden weapons is eliminated.[76]

Police officers remain free to give an exit order when they see abnormal behavior inside a car or notice a driver scanning the surroundings or perhaps leaving the car in drive in a manner suggesting possible flight (endangering officers and the public).[77] At the same time, officers must decide whether what they saw or learned about an occupant equates to a reasonable suspicion that the person is armed and dangerous.[78] That separate assessment is necessary to perform a pat frisk.[79]

In clarifying the difference between the two standards, the SJC provided clear guidance to police officers by confirming a single standard for every pat frisk: wherever police stop a person, whether on the street or in a car, police must have a reasonable suspicion that the person is armed and dangerous before officers may pat frisk that person for weapons.[80] This clarification will help both police officers and the public because "police work is fast-paced, can be dangerous at times, and requires [an] understanding of a broad set of rules in order to ensure that the rights of citizens are upheld."[81]

B. *The SJC Clarified the Evidentiary Weight of Furtive Movements and High-Crime Areas*

In *Torres-Pagan*, the SJC also clarified how to factor furtive movements and presence in a high-crime area into the reasonable suspicion of weapons analysis.[82] The SJC noted that neither factor on its own justifies a frisk but must be assessed "[g]iven the other circumstances presented."[83] Torres-Pagan's ordeal makes evident the dangers of deferring to an officer's view of a suspect's movements as furtive and the idea that presence in a high-crime area justifies the belief that a suspect is armed and dangerous.[84] While the police officers justified their suspicion that Torres-Pagan was armed and dangerous because of his presence in a high-crime area coupled with his

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[76] Scheft, *supra* note 74.

[77] Scheft, *supra* note 74.

[78] Scheft, *supra* note 74.

[79] Scheft, *supra* note 74.

[80] Commonwealth v. Torres-Pagan, 138 N.E.3d 1012, 1015 (Mass. 2020).

[81] Brief for Manuel Torres Pagan at 24, Commonwealth v. Torres-Pagan, 138 N.E.3d 1012 (Mass. 2020) (No. SJC-12697) (quoting Commonwealth v. Gonsalves, 711 N.E.2d 108, 113 (Mass. 1999)).

[82] 138 N.E.3d at 1019.

[83] *Id.*

[84] *See id.*

actions of exiting and looking into the car, the SJC dispelled these arguments, relying on the facts and not the officers' subjective beliefs.[85]

In finding that Torres-Pagan's actions created no reasonable suspicion that he was armed and dangerous, the SJC noted that while his actions may have been "unexpected" they could hardly be considered furtive.[86] This effectively rebutted the Commonwealth's argument that deference should be given to the police officers because the situation unfolded rapidly.[87] In finding that Torres-Pagan's presence in a high-crime area "did not carry the day" with regard to whether he was armed and dangerous, the SJC, following its own advice, urged caution in the use of this consideration—many honest, law-abiding citizens live and work in high-crime areas, and those citizens are entitled to the same protections of the federal and state constitutions, regardless of the character of the area.[88]

Hereafter, courts should hesitantly approach factoring in presence in a high-crime area into the reasonable suspicion analysis, as Fourth Amendment protections should not be different simply because of the neighborhood in which the police observation occurs.[89] The high-crime designation is hardly ever supported by empirical data, and the arresting officers are rarely attacked on their subjective belief of being in a high-crime area.[90] Rarely is there any analysis of why a particular area has a high-crime designation, and officers do not state if they knew the designation before they made the stop.[91] "In fact, trial courts rarely seem to question whether there is even an official definition of a high-crime area in their jurisdiction, on what facts that definition is based, whether the definition changes over time, and whether there are different types of offense-specific areas."[92]

Restricting the evidentiary weight of presence in a high-crime area will result in better policing, as officers will thus need "specific" and "objective" reasons to articulate reasonable suspicion that a person is armed and

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[85] *Id.* at 41.

[86] *Id.* at 40.

[87] *Id.* at 41.

[88] *See Torres-Pagan*, 138 N.E.3d at 1019–20; Brief for Manuel Torres Pagan at 32–33 Commonwealth v. Torres-Pagan, 138 N.E.3d 1012 (Mass. 2020) (No. SJC-12697) (citing Commonwealth v. Cordero, 477 Mass. 237, 245 (2017) (quoting Commonwealth v. Gomes, 453 Mass. 506, 512 (2009))).

[89] *See* Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1588 (2008).

[90] *Id.* at 1591.

[91] *Id.*

[92] *Id.*

dangerous; whether the person is standing on a street corner in a poverty-stricken neighborhood or a gated community should not change that analysis.[93] The reasonable, articulable pat frisk standard, strengthened by the SJC's clarification of the evidentiary weights of facts considered in that assessment, will foster better decision making by police officers, and thus a better law enforcement-community relationship.[94]

IV. The SJC's Decision Will Foster a Better Relationship Between Law Enforcement and the Community

A. *Excluding Evidence Obtained in Violation of the Clarified Standard Will Deter Illegal Police Conduct*

The single and distinct purpose of excluding illegally obtained evidence is to deter law enforcement officers from the forbidden behavior.[95] The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against a defendant is weakened or destroyed.[96] Being stopped and frisked by the police can have lasting emotional, psychological, social, and economic impact on the lives of the people subjected to such police interaction.[97] Requiring police officers to have a reasonable articulable suspicion that a person is armed and dangerous before they can justifiably search the person will reduce the number of unjustified arrests that occur each year.[98] The drop in arrests will likely not harm the governmental interest in curbing criminal activity; as an example, the New York City stop and frisk policy—the most aggressive frisk policy aimed at confiscating illegal weapons— yielded a confiscation rate of only 1.14% in all stop and frisks.[99]

The deterrent effects of changes in policing are evident by the

[93] *See id.* at 1591–95.

[94] *See infra* Part IV.

[95] Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI L. REV. 665, 666 (1970).

[96] *See* Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and Lost Cases: The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1039 (1991).

[97] STOP AND FRISK: THE HUMAN IMPACT, *supra* note 30, at 1.

[98] *See* STOP AND FRISK: THE HUMAN IMPACT, *supra* note 30, at 4 ("These numbers are all the more significant in light of evidence that an alarming number of these stops, frisks, and searches are illegal, in part because they are not based on the required level of suspicion of criminal activity.").

[99] STOP AND FRISK: THE HUMAN IMPACT, *supra* note 30, at 4.

implementation of the exclusionary rule by the states following the *Mapp v. Ohio* decision.[100] After the U.S. Supreme Court ruled that impermissible searches would result in the exclusion of illegally obtained evidence, police departments issued sweeping changes in training and dramatically increased the number of search warrants issued in order to comply with the requirements of legal searches.[101] On the other hand, the exclusion of illegally obtained evidence results in trial delays and extra hearings, clogging up the criminal justice system.[102] This delay can be avoided by curbing the number of illegal searches that yield excluded evidence.[103]

Requiring officers to have an articulable suspicion that a suspect has a weapon, and subsequently excluding evidence obtained without officers meeting this standard, might result in some guilty individuals walking free; however, condemning these illegal searches will "maintain respect for [the] law and promote confidence in the administration of justice."[104] Under the New York City Stop, Question, and Frisk policy, about 40% of the stops made by the police were based on observations or other factors that had only a 1% chance of finding a weapon, and these low-yield stops disproportionately affected Black and Latino communities.[105] By contrast, stops that were based on more reliable factors were 6% more likely to result in the discovery of weapons and simultaneously mitigate racial disparities.[106] A higher, more articulable standard will reduce the use of ineffective, subjective observations that do not infer that a person has weapons.[107]

"A stop and frisk can leave people feeling unsafe, fearful of police, afraid to leave their homes, or re-living the experience whenever they see police."[108] By clarifying the standard as a reasonable articulable suspicion that a person is armed and dangerous, the deterrent effect on over-policing will result in fewer instances of police paranoia, as citizens in low-income areas will have less fear of random police interactions where "they just pull

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[100] *See* Uchida & Bynum, *supra* note 96, at 1038–39 (citing U.S. v. Calandra, 414 U.S. 338 (1974)).

[101] *See* Uchida & Bynum, *supra* note 96, at 1037.

[102] *See* Oaks, *supra* note 95, at 667, 742–45.

[103] *See generally* Oaks, *supra* note 95, at 667, 742–45.

[104] Oaks, *supra*, note 95, at 669 (quoting Justice Brandeis).

[105] David Rudovsky & David A. Harris, Terry *Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 OHIO ST. L.J. 501, 517 (2018).

[106] *Id.*

[107] *See id.*

[108] STOP AND FRISK: THE HUMAN IMPACT, *supra* note 30, at 6.

you . . . no matter what, any reason[,] [a]nd they won't tell you anything."[109] The clarification will yield positive results because lower reasonable suspicion standards make policing less effective at controlling crime while the heightened probable cause standard actually results in reductions in crime.[110] Effectively showing the public that the new standard is being taken seriously will improve police-community relations by building trust with the community.[111]

B. *The* Torres-Pagan *Decision Will Change the Approach of Policing with Lasting Beneficial Effects for Over-Policed Communities*

Proactive policing has radically changed how America experiences public safety.[112] "Instead of reacting to calls for service as was typical through the 1950s, police agencies now seek to prevent crimes by proactively deploying officers in places where crime is likely to be reported and interacting with the people most likely to be accused of crimes."[113] Allowing a person's presence in a high-crime area to be a factor in considering whether the person is armed and dangerous results in a disproportionate number of citizens in low-income areas being targeted by the police.[114] These police contacts in high-crime areas are premised on a deterrence theory; general deterrence "predicts that the publicity of punishment indirectly deters all individuals' engagement in future crime, whereas specific deterrence argues that the punishment of individuals who engage in crime will deter those individuals' future lawbreaking behavior."[115]

Increased police contacts with people in high-crime areas actually have the opposite effect, according to one study.[116] In a study of over 600 nonwhite high school students in an urban environment, over 40% of the students reported being stopped by the police during the two years of the study.[117] The students stopped by the police were more likely to participate in subsequent delinquent behavior, while inversely, those who reported prior

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[109] STOP AND FRISK: THE HUMAN IMPACT, *supra* note 30, at 6.

[110] Rudovsky & Harris, *supra* note 105, at 517–18.

[111] *See* Rudovsky & Harris, *supra* note 105, at 518.

[112] Juan Del Toro et al., *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, 116 PROC. OF THE NAT'L ACAD. OF SCI. 8261, 8261 (2019), https://perma.cc/S4CB-CTPB.

[113] *Id.*

[114] *See* Rudovsky & Harris, *supra* note 105, at 516–17.

[115] Del Toro et al., *supra* note 112, at 8261.

[116] Del Toro et al., *supra* note 112, at 8261.

[117] Del Toro et al., *supra* note 112, at 8262, 8267.

subsequent delinquency were not more likely to be stopped by the police.[118] In other words, boys who reported little or no delinquent behavior at one point were just as likely to be stopped six months later as were boys who reported any or a great deal of delinquency.[119] "Moreover, regardless of whether a boy had committed any prior delinquent acts, a police stop was associated with more frequent delinquent behavior in the future."[120]

If police officers stop using presence in a high-crime area as a justification to pat frisk a person, it may actually deter criminal activity, as the people who used to be subject to the most stops will no longer face psychological and social effects stemming from embarrassing police interactions.[121] When police officers harass non-rule breakers, it actually creates more distrust of law enforcement and exacerbates the problems in community relations.[122] Limiting the use of the high-crime area factor, while requiring police officers to have a more articulable suspicion that an individual is armed and dangerous before stopping and frisking the individual, will result in more trust between the community and law enforcement and will subsequently result in less crime—a goal that helps both sides of the relationship.[123]

CONCLUSION

Commonwealth v. Torres-Pagan resolved the conflation between the pat frisk and exit order standards.[124] Reviewing the past inconsistent articulations of the standard, the SJC provided a clear and simple-to-follow rule that will improve police interactions with the community.[125] In determining that exiting a car, without more, does not constitute a furtive movement that justifies a pat frisk, the SJC provided clarity as to what constitutes behavior raising suspicion of possession of weapons.[126] The SJC went further, explaining the evidentiary weight of furtive movements and presence in a high-crime area in the reasonable suspicion analysis, and

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[118] Del Toro et al., *supra* note 112, at 8266–67.
[119] Del Toro et al., *supra* note 112, at 8266–67.
[120] Del Toro et al., *supra* note 112, at 8266–67.
[121] *See* Del Toro et al., *supra* note 112, at 8267.
[122] *See* Del Toro et al., *supra* note 112, at 8267.
[123] *See* Del Toro et al., *supra* note 112, at 8267.
[124] 138 N.E.3d. 1012, 1020 (Mass. 2020).
[125] *Id.* at 1017.
[126] *Id.* at 1018.

noting that these factors cannot, by themselves, justify a frisk.[127] These clarifications will have a positive effect on the relationship between law enforcement and the community; the higher standard should result in fewer arrests and fewer police interactions, and limiting the evidentiary weight of furtive movements and high-crime areas will benefit the psyche of people in high-crime areas while also potentially decreasing the amount of future crime.[128]

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[127] *Id.* at 1018–20.

[128] *See* Del Toro, *supra* note 112, at 8267.