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1970-2021

VOLUME 46 | FALL 2021 | NUMBER 1

TABLE OF CONTENTS

HUMAN TRAFFICKING OF ATHLETES: AN UNSEEN URGENCY IN THE WIDE WORLD OF SPORTS

Amanda Franklin

I. Introduction

Human trafficking has emerged as one of the most serious crimes and grave violations of human rights.[1] Trafficking affects nearly every country in the world, whether as a country of origin, transit, or destination for trafficking victims.[2] Every year, human traffickers exploit thousands of people domestically and abroad, forcefully denying them the fundamental right to freedom. Because human trafficking remains largely an issue of women and children, it is most often women and children who are trafficked and exploited for sex, forced labor, slavery, and organ removal.[3] However, true data on the extent of human trafficking is limited and difficult to quantify[4] due to the intricate and covert nature of the crime. And to further compound the issue, there remains a lack of consensus on the exact contours of the legal definition of trafficking[5] despite uniform denunciation of the criminality.

The most documented form of human trafficking is sexual exploitation, accounting for 79 percent of reported cases.[6] In contrast, trafficking for forced labor is reported less frequently, but is likely more prevalent than sex trafficking because the worldwide labor market is far greater than the market for sex.[7] Still, there remains a

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[1] UNITED NATIONS OFFICE ON DRUGS AND CRIME, *Human Trafficking*, https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html (last visited Dec. 19, 2020).
[2] *Id*.
[3] Jini L. Roby et al., *U.S. Response to Human Trafficking: Is it enough?*, 6:4 J. IMMIGRANT & REFUGEE STUDIES 508, 510 (2008).
[4] Jennifer Gustafson, *Bronze, Silver, or Gold: Does the International Olympic Committee Deserve a Medal for Combating Human Trafficking in Connection with the Olympic Games?*, 41 CAL. W. INT'L L.J. 433, 439 (2011).
[5] Julie Dahlstrom, *The Elastic Meaning(s) of Human Trafficking*, 108 CALIF. L. REV. 379, 389 (2020).
[6] Gustafson, *supra* note 4 at 439-40.
[7] *Id*. at 440.

lesser-known form of human trafficking that occurs across the globe: human trafficking of athletes. In many cases, reported by media outlets but substantially absent from academic, political, and social discourse, athletes are trafficked into the profitable, global sports industry.

And it all starts with a dream: a dream of becoming a professional athlete, drawn into the industry by multi-million-dollar contracts, fame, and prominence, lucrative brand endorsements and sponsorships, or opportunities to travel the world;[8] a dream that is further driven by desperation and the simple need to have a better life. Whatever the reason, the growing number of athletes eager to sign the next greatest deal inevitably lures human traffickers posing as sports agents, looking to make a profit from the exploitation of a player's dream.[9] Too often, unscrupulous agents operate unchecked and without any accountability because of insufficient oversight by sport governing bodies and a lack of government enforcement of anti-trafficking laws.[10] This lack of regulation, oversight, and enforcement creates favorable conditions for athlete trafficking. Likewise, the complexity, multi-jurisdictional nature of the crime, and the sports industry's resistance to legal and ethical obligations to regulate and protect the interest of its stakeholders, especially that of minors, further facilitate athlete trafficking.[11] As a result, governments, law enforcement, national sports associations and leagues, and international sports federations have not successfully addressed the growing incidence of human trafficking of athletes. And efforts to even respond to and regulate recruitment schemes, expanding global migration, and immigration monitoring, have proven inadequate to thwart human trafficking of athletes domestically and internationally. But it is certainly not for lack of trying.

Over 20 years ago, world governments finally recognized that human trafficking was a legitimate problem that warranted a legitimate solution. In response to a clear mandate to resolve the growing concern

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[8] U.S. DEP'T OF ST., TRAFFICKING IN PERSONS REPORT 20TH EDITION, 26 (2020), https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf.

[9] *Id.*

[10] *Id.*

[11] GLOBAL INITIATIVE AGAINST TRANSNATIONAL ORGANIZED CRIME, *Living the Dream? Human Trafficking, the Other Organised Crime Problem in Sports* (Apr. 27, 2015), https://globalinitiative.net/analysis/living-the-dream-human-trafficking-the-other-organized-crime-problem-in-sports/.

and ensure traffickers did not continue to act with relative impunity, the United States government, in collaboration with non-governmental organizations, identified specific legislation to address human trafficking. For example, federal anti-trafficking laws, such as the Trafficking Victims Protection Act (TVPA) and the Justice for Victims of Trafficking Act (JVTA), were passed. The TVPA was the first comprehensive federal law designed to protect victims of human trafficking, prosecute trafficking offenders, and prevent human trafficking domestically and globally.[12] Similarly, the United Nations General Assembly enacted legislation. The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, commonly referred to as the "Palermo Protocol,"[13] marked a significant milestone in international efforts to prevent human trafficking. Most significantly, the Protocol defined "trafficking in persons" for the first time under international law.[14] Unfortunately, there is almost universal consensus that anti-trafficking laws, although well-intentioned, have failed to make good strides in addressing the problem of human trafficking.[15] And for this exact reason, anti-trafficking laws have been equally unsuccessful in addressing the issue of human trafficking of athletes. Because human trafficking of athletes is a multifaceted problem that crosses domestic borders, involves athletes in nearly every sport, and is often widely undetected and unreported, the question remains: what can be done to stem the surge of athlete trafficking domestically and abroad?

This note will explore that question in depth. Part I will explore the definition of athlete trafficking and detail the complexities of defining athlete trafficking within the scope of current anti-trafficking laws. It will also analyze how these difficulties present challenges to prosecutors, judges, and law enforcement. Part II will examine how current anti-trafficking laws address the scope of athlete trafficking in the U.S. and abroad. In Part III, this note will explore factors that influence human trafficking, specifically the human trafficking of athletes. It will demonstrate how the global nature of the sports

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[12] U.S. DEP'T OF ST., 2020 REPORT ON U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS REPORT, (2020), https://www.state.gov/2020-report-on-u-s-government-efforts-to-combat-trafficking-in-persons/.

[13] *Id.*

[14] Julie Dahlstrom, *Trafficking to the Rescue?*, 54 U.C. DAVIS L. REV. 1, 15 (2020).

[15] Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2978 (2006).

industry, the autonomous network of national sports associations and international sports federations, and low socioeconomic status create a medium for sports agents looking to capitalize on inconsistently enforced anti-trafficking laws. In Part IV, this note will discuss the role of government and what it can do to protect athletes adequately. Lastly, Part V considers the responsibility of sports associations and organizations to provide a framework to understand and prevent the human trafficking of athletes.

II. Definition of Athlete Trafficking and Current Anti-Trafficking Laws

Human trafficking is not a novel problem. During the 1990s, it became a topic of public concern due, in part, to the fall of the former Soviet Union, the migration that followed, and an increasing unease around the surge of globally operating transnational criminal organizations.[16] Because criminal organizations found their largest sources of profit in sex trafficking and forced labor, initial efforts to combat human trafficking focused heavily on combating sex trafficking of women and girls.[17] And until recently, most efforts focused heavily on international trafficking, with scarce attention given to domestic trafficking. In fact, the United States., the only country to monitor and evaluate the progress of human trafficking in other nations, realized very late that domestic trafficking had reached unimaginable proportions and thus required immediate attention and swift action.[18] Thus, domestic trafficking is often overlooked, and because it is not frequently reported, the scope of the problem is elusive.[19] Nonetheless, through concerted efforts by state agencies and non-governmental organizations, the understanding of human trafficking expanded; the U.S. continued its anti-trafficking efforts, and as a result, emerged as an ascendant leader in the global campaign to fight human trafficking in all forms.

The most comprehensive effort to address human trafficking in the U.S. was the Trafficking Victims Protection Act (TVPA). This anti-trafficking framework articulated a narrower definition of human

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[16] U.S. DEP'T OF ST., *supra* note 8, at 3.
[17] *Id.*
[18] VEERENDRA MISHRA, COMBATING HUMAN TRAFFICKING: GAPS IN POLICY AND LAW 3 (2015).
[19] *Id*.

trafficking than the "Palermo Protocol" but focused on perpetrators who engaged in force, fraud, and coercion in connection with commercial sex and labor.[20] The Act was intended to offer federal statutory protection to victims of human trafficking, to increase criminal penalties for trafficking offenders, and to foster international cooperation in efforts to combat human trafficking.[21] Because Congress recognized that human trafficking was a modern form of slavery, the TVPA essentially criminalized and attempted to prevent human trafficking and involuntary servitude for commercial gain.[22] The TVPA was later reauthorized through the Trafficking Victims Protection Reauthorization Acts (TVPRA) of 2003, 2005, 2008, 2013, and 2017.[23] These subsequent laws reflected significant progressions in victim protection and famously adopted the "3P paradigm"—Prevention, Prosecution, and Protection—which the U.S. government actively promoted worldwide.[24] The goal of subsequent legislation was to combat the trafficking of all persons and to establish a civil remedy for trafficking victims. Other enacted anti-trafficking laws included the Preventing Sex Trafficking and Strengthening Families Act of 2014 and the Justice for Victims of Trafficking Act of 2015. The Preventing Sex Trafficking and Strengthening Families Act aimed to reduce the incidence of sex trafficking among youth involved in the foster care system.[25] The following year, the Justice for Victims of Trafficking Act of 2015 improved the U.S. response to human trafficking and contained several important amendments that strengthened services and provided restitution for victims.[26]

Also, under the TVPA, the U.S. State Department is required to submit an annual Trafficking in Persons Report (TIP Report) to Congress, which operates as a unilateral, global-scale monitoring and evaluation mechanism.[27] The reports are primarily used to monitor

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[20] Dahlstrom, *supra* note 5, at 390.
[21] Chacon, *supra* note 15, at 2978.
[22] United States v. Evans, 476 F.3d 1176, 1179 (11th Cir. 2007) (Congress recognized that human trafficking was a modern form of slavery).
[23] NAT'L HUMAN TRAFFICKING HOTLINE, https://humantraffickinghotline.org/what-human-trafficking/federal-law (last visited Dec. 15, 2020).
[24] YOON JIN SHIN, A TRANSNATIONAL HUMAN RIGHTS APPROACH TO HUMAN TRAFFICKING: EMPOWERING THE POWERLESS 70 (2018).
[25] NAT'L HUMAN TRAFFICKING HOTLINE, *supra* note 23.
[26] *Id.*
[27] Shin, *supra* note 24, at 69.

international human trafficking practices, but they also serve as a tool for diplomats and human trafficking advocates.[28] Diplomats and advocates use the reports to proactively apply pressure on foreign governments to encourage them to prioritize human trafficking.[29] The report then makes counter-trafficking recommendations tailored to the specific issues of each country.[30] When a country fails to comply with the recommendations, failures are published in the annual TIP Report and/or the U.S. sanctions the country by restricting U.S. foreign aid.[31] Yet despite legislative milestones such as those mentioned above, the expansion of knowledge and legislation on human trafficking does not adequately encompass the breadth nor seriousness of trafficking athletes.

Athlete trafficking involves the recruitment of players from foreign countries solely for their athletic abilities. Athletes are recruited under a false promise of future profits or, in some cases, the promise of an education. Most often, agents seeking to take advantage of young people exploit athletes from underprivileged countries.[32] The agent transfers the athlete from his or her native country to a foreign country. If the athlete performs his or her sport successfully, the agent makes a profit from the transfer.[33] If the athlete does not perform successfully, the agent abandons the athlete, and the athlete must pay his or her own ticket home.[34] Although this type of conduct intuitively seems exploitative in nature, there remains one lingering question among governments and sports associations: is this type of exploitation considered trafficking? To answer that question, we must look to the U.S. and international anti-trafficking laws. However, U.S. and international anti-trafficking laws do not create a federal crime called "athlete trafficking." Rather these laws define human trafficking in broad terms and, as we will see, appears to encompass athlete trafficking.

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[28] U.S. DEP'T OF ST., *supra* note 16.
[29] *Id*.
[30] Gustafson, *supra* note 4 at 445.
[31] *Id*.
[32] Michael Weinreb, *Traffickers Lure Athletes With Dreams of Sporting Glory Only to Abandon Them Far From Home*, GLOBAL SPORTS MATTER, (Mar. 29, 2019) https://globalsportmatters.com/youth/2019/03/29/traffickers-lure-athletes-with-dreams-of-sporting-glory-only-to-abandon-them-far-from-home/.
[33] *Id*.
[34] *Id*.

A. Global Efforts to Define Trafficking

In response to the threat of human trafficking globally, U.S. Congressional efforts to craft domestic legislation—the TVPA—were closely intertwined with the United Nations General Assembly efforts to adopt international legislation—the Palermo Protocol.[35] Under the TVPA, the ultimate goal of the legislation was broad: to combat the trafficking of *all* persons.[36] Congress's vision of trafficking was no longer limited to traditional forms of trafficking, like sex slavery or forced labor.[37] Rather, Congress advocated for an expansive definition of human trafficking, which was subsequently endorsed by federal court decisions.[38] For example, in *United States v. Townsend*, the Eleventh Circuit took note of the broad scope of the TVPA when it held that the legislative history of the TVPA did not solely focus on international sex slavery.[39] The court further held that the statutory language of the TVPA was broader than this one, specific purpose.[40] Unsurprisingly, "many anti-trafficking advocates viewed this expansion of human trafficking law as a welcome development that recognized the complex, contemporary nature of the crime in applying the concept to more subtle, nuanced forms of exploitation,"[41] such as athlete trafficking.

The general definition of human trafficking under the TVPA involves the forced movement of a person between countries or within the same country,[42] whether the person or people transported consent to their movement or transport.[43] Forced movement does not necessarily include a physical act of abduction; threats, coercion, fraud, or deceit are sufficient to satisfy the element of force.[44] It, therefore, involves the "elements of fraud, force, or coercion that result in the victim's inability to escape the traffickers' control."[45]

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[35] Dahlstrom, *supra* note 14 at 17.
[36] *Id*. at 17-18.
[37] *Id*. at 18.
[38] *Id*.
[39] United States v. Townsend, 521 F. App'x 904, 906 (11th Cir. 2013) (court recognized the broad scope of the TVPA).
[40] *Id*.
[41] Dahlstrom, *supra* note 5 at 384.
[42] Gustafson, *supra* note 4 at 437.
[43] *Human Trafficking*, WOLTERS KLUWER BOUVIER LAW DICTIONARY (2012).
[44] Gustafson, *supra* note 42.
[45] State v. Logan, 2017-Ohio-8932, 101 N.E.3d 577.

Additionally, a trafficker can "violate the statute either as a primary offender or simply by benefitting financially from participation in a venture with the primary offender."[46] This particular provision seems especially applicable to the human trafficking of athletes given the clandestine nature and collective network of individuals required to successfully traffic athletes.

These definitions certainly encompass athlete trafficking, and athlete trafficking is precisely the pattern of conduct Congress and foreign governments meant to address when enacting anti-trafficking laws. In fact, the federal district court in *United States v. Estrada-Tepal*, wrote that federal anti-trafficking legislation criminalized a broad spectrum of conduct because expansiveness was the legislative goal in enacting the statute.[47] Ultimately, as a result of legislative advocacy and judicial interpretation, the legal definition of human trafficking in the U.S. has broadened to include a remarkably wide variety of actors and conduct.[48] As such, every state in the U.S. expanded the legal definition of human trafficking to include state trafficking crimes that vary in scope and objective.[49]

The definition of trafficking under international law is also notably broad in scope.[50] The United Nations Palermo Protocol established the most widely accepted definition of human trafficking.[51] The Protocol defines human trafficking as:

> The recruitment, transportation, transfer, harboring, or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[52]

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[46] Gilbert v. United States Olympic Comm., No. 18-cv-00981-CMA-MEH, 2019 U.S. Dist. LEXIS 166957, at *17 (D. Colo. Sep. 27, 2019).
[47] United States v. Estrada-Tepal, 57 F. Supp. 3d 164, 169 (E.D.N.Y. 2014).
[48] Dahlstrom, *supra* note 20.
[49] *Id*.
[50] Dahlstrom, *supra* note 14.
[51] Gustafson, *supra* note 4 at 437-38.
[52] *Id*.

Under the Protocol's definition, trafficking "applies to diverse—although at times not fully defined and likely not fully appreciated—forms of exploitation."[53] Under this definition, the international community was no longer concerned only with sex trafficking, even though sex trafficking had been a principal component of prior international trafficking efforts.[54] Because efficient international cooperation was necessary to investigate and prosecute cases of human trafficking, the Protocol intended this definition to simplify and streamline national approaches to trafficking so that the establishment of domestic criminal offenses related to trafficking would support those processes.[55] The definition under the "Palermo Protocol" was a salient attempt to harmonize and promote international cooperation to address human trafficking.[56] However, nearly two decades after the Protocol was enacted, agreement on the parameters of what constitutes "trafficking" is not yet firmly established.[57] It seems that the broadened concept of trafficking injected some uncertainty into the development of domestic and international criminal law, as governments struggled to implement consistent anti-trafficking laws.[58] And this uncertainty is emblematic of the larger, continual challenge that courts, prosecutors, and law enforcement face in athlete trafficking cases. Ultimately, these uncertainties only increase the frequency at which athlete trafficking occurs.

B. Challenges To Define and Identify Trafficking

Anti-trafficking laws are largely constructed around the criminal law system and are penal in nature.[59] Their primary aim therefore, is to criminally prosecute human trafficking offenders, and the victim protection measures contained within them must be viewed against this background as well.[60] But just because conduct is clearly

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[53] Dahlstrom, *supra* note 14 at 16-17.
[54] *Id*. at 16.
[55] ANA ISABEL PÉREZ CEPEDA & DEMELSA BENITO SÁNCHEZ, TRAFFICKING IN HUMAN BEINGS: A COMPARATIVE STUDY OF THE INTERNATIONAL LEGAL DOCUMENTS, 9 (2014).
[56] *Id*.
[57] Dahlstrom, *supra* note 14 at 17.
[58] *Id*.
[59] MARGARET MALLOCH & PAUL RIGBY, HUMAN TRAFFICKING: THE COMPLEXITIES OF EXPLOITATION, 65 (2016).
[60] *Id*.

delineated legally and laws are passed to criminalize the conduct, this does not ensure compliance with the laws by individual states or governments. In fact, because anti-trafficking laws function as an instrument of criminal law, a government has discretion when deciding whether a trafficking crime has occurred. The government will prosecute or provide protection to victims only in cases it deems appropriate and only to the extent it deems possible.[61] In most cases, a government will decide not to prosecute at all. If a government does decide to prosecute, disagreement on how to define trafficking makes it difficult for law enforcement officials to identify victims of trafficking.[62]

The expanding definition of trafficking comes with other challenges, such as sowing confusion among juries and courts.[63] This challenge undermines anti-trafficking prosecutorial and protection efforts.[64] The expanding definition also poses challenges to prosecutors. Attorneys find it difficult to prosecute trafficking offenders, especially those who traffic athletes, and it is even more difficult to secure victim cooperation.[65] Moreover, as trafficking models continue to expand in scope and purpose, attorneys struggle with applying these models in real-time.[66] And because "broad trafficking statutes grant relatively untethered discretion to prosecutors, prosecutors may be tempted to wield anti-trafficking statutes as swords to compel cooperation by victims."[67] Attorneys in civil cases face challenges to secure important protections for victims of trafficking, and defense attorneys are challenged with defending traffickers who do not consider their conduct trafficking.[68] Even more, judges are challenged with interpreting anti-trafficking statues and must consider whether a specific legal definition or legal application of a trafficking statute has deviated beyond its intended scope.[69] Consequently, these challenges make oversight and enforcement particularly difficult when it comes to athlete trafficking.

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[61] Dahlstrom, *supra* note 14.
[62] Gustafson, *supra* note 4 at 441.
[63] Dahlstrom, *supra* note 5 at 429.
[64] *Id*.
[65] Dahlstrom, *supra* note 5 at 385.
[66] Dahlstrom, *supra* note 5 at 435.
[67] Dahlstrom, *supra* note 5 at 432.
[68] Dahlstrom, *supra* note 66.
[69] *Id*.

International and domestic law has evolved to define trafficking with a broader focus but a wider lens furthers the complex nature of athlete trafficking because it allows private individuals and government entities to view trafficking laws in more comprehensive and sometimes, inconsistent ways.[70] For example, sports associations, governments, courts, and law enforcement seem undecided on whether athlete trafficking meets the legal definition set out in anti-trafficking legislation, whether it is a sports issue at all or simply a matter of human migration, and which entity should have legal authority to enforce the law.[71] One question that comes up is whether the issue can be defined as trafficking if someone, even over the age of majority, willingly pays fees to travel to a foreign country and at what point then, is a crime committed.[72] To illustrate this point, attorneys lost a case in Belgium involving minor athletes after an investigation revealed that fake passports were used; and in a Nigerian sports academy, sports agents signed contracts with athletes despite terrible conditions enumerated throughout the contract, after the athletes revealed they wanted to go to Europe to play.[73] So despite considerable achievements in anti-trafficking legislation, there are persistent deficiencies that allow traffickers to continue to exploit athletes under a veil of immunity: conflicts in defining athlete trafficking, inconsistencies in judicial interpretation of trafficking, deficiencies in the inherent subjectivity of prosecutorial discretion, under-prosecution of athlete trafficking cases, difficulties in victim identification and victim cooperation, and failures of victim protection.

III. How Anti-Trafficking Laws Address Athlete Trafficking in the U.S. and Abroad

Because the TVPA framework has remained an international influence in trafficking legislation, the United States is now the global marshal on human trafficking.[74] Accordingly, "there is now a robust legal infrastructure on the international, federal, and state levels

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[70] Dahlstrom, *supra* note 5 at 383.
[71] Matthew Hall, *Foreign Policy: The Scramble for Africa's Athletes*, (Apr. 20, 2018, 11:13 AM) https://foreignpolicy.com/2018/04/20/the-scramble-for-africas-athletes-trafficking-soccer-football-messi-real-madrid-barcelona/.
[72] *Id*.
[73] *Id*.
[74] Dahlstrom, *supra* note 5 at 394.

regarding trafficking."[75] This infrastructure has elicited targeted, legal actions against the more complex, subtle evils of human trafficking.[76] Additionally, efforts to expand the definition of trafficking have filled gaps in federal law, and promoted greater awareness about trafficking as a crime. Yet, these efforts have not adequately addressed athlete trafficking nor promoted greater awareness about it. Sadly, this failure perpetuates the hidden but high-profit industry of human trafficking in the sports industry. Take for instance, the recent case of Kesselly Kamara, a young athlete from Liberia who was trafficked to Laos in hopes of playing soccer:

> Kesselly Kamara left Africa and his home country of Liberia when he was 14, lured by the promise of a career in soccer. Because Liberia had no soccer academy, Kamara went to Laos, having been promised, he later said, a six-year contract with the "IDSEA Champasak Asian African Football Academy" that included salary and accommodations. But Kamara claimed he was never paid. He slept on the floor of the stadium with 30 other young players. They ate bread and rice, they had no coach or medical staff or class schedule, and they played no games. And, in the end, it appears the academy Kamara signed with never existed. When Kamara and his teammates tried to leave, they were told that they could not unless they paid for their accommodations and food. In essence, they were trapped in a strange country, with no promise of a future.[77]

Kamara's story is not unique and is just one part of a much broader problem. In fact, the number of stories like his continue to develop in other countries abroad. However, these cases are not limited to borders beyond the United States. They often occur in the U.S. and quite possibly within our own communities. Recently in North Carolina, children and teenagers were recruited from Nigeria with the promise of an education and money to play sports at a local high school:

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[75] Dahlstrom, *supra* note 5 at 434.
[76] *Id*.
[77] Weinreb, *supra* note 32.

> According to Alamance County Sheriff, a student from Nigeria was fraudulently enrolled into the Eastern Alamance High athletic program. The student played basketball and football while enrolled at the school. False documents from Nigeria and false custody agreements were presented at different places in the county. The student was used for the possibility of future profit and for his athletic ability. During the investigation, the student was found living with four other student-athletes in a house with no adult supervision. An investigation was also launched into the four other student-athletes that were discovered. "Joe McCann, Director of the anti-human trafficking organization, World Relief High Point, said "It's not unusual for people to be lured under false pretenses. And just like any other form of trafficking, the victim is usually exploited in some fashion."[78]

Then there is the story of an investigation into athlete trafficking at a New Jersey high school:

> Eastside High School in Paterson, New Jersey, came under investigation for trafficking athletes to play on their basketball team. Both the boys and girls' basketballs teams filled their rosters with international students, from Nigeria and Puerto Rico, sometimes risking the players' immigration statuses. They were provided poor living conditions with a "coach" who failed to provide adequate protection and even food, and at least one international player's transcript was altered. The school district suspended the coach and commissioned an investigation into the basketball teams' recruiting and living arrangements. Ultimately three district employees were fired from their coaching

[78] Hope Ford, *What is Athletic Trafficking?*, (May 17, 2016, 8:57 PM) https://www.wfmynews2.com/article/news/local/what-is-athletic-trafficking/83-199891949.

> positions, but all were permitted to retain their teaching positions.[79]

There was also a report by the Department of Homeland Security in Georgia:

> Last year in March, the Department of Homeland Security discovered 30 young boys in Georgia, living in a school gym and sleeping on the floor. The boys, mostly Dominican, were recruited to America and had been living in the gym for almost three years.[80]

These stories do not exist in a vacuum. Moreover, because there is a lack of global public awareness around athlete trafficking, anti-trafficking laws are inept at addressing the problem. The issue is further compounded by the fact that people in the U.S. are likely less informed about the domestic extent of trafficking, and continue to harbor myths about it, notwithstanding efforts to combat human trafficking through legislation.[81] Consequently, athlete trafficking does not receive nearly as much attention as sex trafficking or forced labor. Until it is given equal attention and equal resources are expended to counter the trafficking of athletes, anti-trafficking laws will remain inadequate to combat the emerging crisis in the sports industry. Moreover, as long as there remains an impediment for athletes to legally migrate to countries with premier sports leagues or a legal pathway does not exist, human traffickers remain compelled and lured by the promise of the success of the athletes they exploit.[82]

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[79] Laura Wagner, *Report: N.J. High School Under State Investigation For Treatment Of International Basketball Players*, DEADSPIN, (May 3, 2017 3:31 PM), https://deadspin.com/report-n-j-high-school-under-state-investigation-for-1794886162.
[80] Ford, *supra* note 78.
[81] YANA HASHAMOVA, SCREENING TRAFFICKING: PRUDENT AND PERILOUS, 35 (2018).
[82] U.S. DEP'T OF ST., *supra* note 8 at 27.

IV. Factors That Influence Athlete Trafficking

A. Globalization

The crux of athlete trafficking is its exploitative purpose. Thus, factors that influence it only buttress this objective. Just like other forms of human trafficking, certain factors and conditions promote the prevalence of athlete trafficking both here in the U.S. and abroad. One factor that largely influences athlete trafficking is the expansive, global nature of the sports industry. A progressively globalized world is more profitable for traffickers who exploit athletes.[83] Broadly speaking, globalization is significantly and increasingly aided by improved transportation infrastructures, perpetual movement that spans geographical borders, and advances in communication technologies.[84] Globalization, therefore, drives migration patterns. And although migration patterns differ from sport to sport, the exploitative enterprise of athlete trafficking is ubiquitous.[85]

Globalization and a billion-dollar sports industry give traffickers a secure gateway to use athletes as an expendable commodity while simultaneously avoiding scrutiny or attention. Even more, it gives traffickers a platform for continual exploitation of the athlete under circumstances that are ripe for considerable profit. And global competition also promotes athlete trafficking. Global competition for sponsors, stakeholders, allegiant fans, and media revenue puts increased pressure on sports teams, leagues, and associations to maintain power and influence in a worldwide market. Sports clubs become so driven by the desire to have a winning team, that they are often willing to circumvent rules and/or laws in order to find and recruit young talent.[86] And in the "global economic context where there is a focus on the pursuit of profit, globalization, and human rights of athletes find themselves in a complex and contradictory situation."[87] Consequently, traffickers flourish under an invisibility of exploitation while athletes are further victimized.

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[83] MALLOCH & RIGBY, *supra* note 59 at 194.
[84] *Id*.
[85] U.S. DEP'T OF ST., *supra* note 82.
[86] Weinreb, *supra* note 32.
[87] PÉREZ CEPEDA & SÁNCHEZ, *supra* note 55 at 6.

B. Autonomous Network of National Sports Associations and International Sports Federations

Another factor that influences athlete trafficking is the autonomous network of national sports teams, leagues, and associations and international sports federations. Multilateral and decentralized structures within these associations make enforcement of anti-trafficking laws extremely difficult,[88] because each entity is responsible for its own compliance and enforcement. Lax regulations and oversight and inconsistent enforcement create favorable conditions for human trafficking. A notable example of the difficulties that arise under autonomous sports governance is that of the International Federation of Association Football (FIFA), the international governing body of football. In 2008, reports surfaced of human trafficking in organized soccer under FIFA.[89] In response to the reports, FIFA swiftly implemented regulations that required all agents to be licensed by a sports association.[90] Then in 2010, after FIFA learned several players "had paid exorbitant fees to join a team, it mandated teams" and agents to "register all international player transfers with FIFA's online system."[91] However, some sports associations refused to work only with licensed agents; "some agents and clubs failed to report transactions at all, and discrepancies proliferated between countries' national regulations on recruitment."[92] Challenges such as those experienced by FIFA are commonplace among many sports associations in the U.S. and internationally. As a result, agents who traffic athletes both recognize and understand the complexities and inconsistencies in compliance and enforcement of anti-trafficking regulations. For traffickers, this systematic failure provides the perfect opportunity for exploitation, and a means to take advantage of it.

C. Socioeconomic Status

Socioeconomic status also influences athlete trafficking. Persons of lower socioeconomic status living in economically vulnerable communities are more likely to be victims of trafficking

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[88] U.S. DEP'T OF ST., *supra* note 82.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*

because absolute or relative poverty, often places people in situations where they have few alternative opportunities.[93] Desperation not only increases vulnerability to deception and coercion, but it may also increase a victim's "powerlessness to extricate themselves once they find themselves in a highly exploitative situation."[94] Agents often charge fees to families who are "willing to pay to send their children overseas to seek an opportunity.".[95] "A family in desperate need of money is inclined to say yes, even without knowing the full nature and circumstances" of the endeavor.[96] That is precisely why low socioeconomic conditions lure athlete traffickers. In underprivileged countries, traffickers covertly exploit these vulnerabilities and freely capitalize on the family's desperation. Ultimately, the "confluence of athletes' desire to play, their families' hopes of escaping poverty, agents' desire to profit, leagues' interest in marketing competitive players and games, and teams' eagerness to find young talent all create an environment that, if left unregulated, is ripe for traffickers to exploit."[97] Sadly, most exploited athletes end up as silent victims, "reluctant to speak publicly about their experiences," with "little pressure on authorities to take meaningful action."[98]

V. What Governments Can Do to Protect Athletes Adequately

Considering the societal, economic, health, and legal implications of athlete trafficking, there is a natural inclination to focus on what governments can do to protect athletes. Yet, governments have not "successfully addressed the growing incidence of human trafficking of athletes.".[99] In the U.S., the government's lack of criminal prosecution, victim protection, and trafficking prevention programs "begs the question of the level at which anti-trafficking efforts are effective."[100] Internationally, laws and protocols equally fall short. Thus, governments have an explicit mandate to protect athletes,

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[93] SALLY CAMERON & EDWARD NEWMAN, TRAFFICKING IN HUMANS: SOCIAL, CULTURAL AND POLITICAL DIMENSIONS 22 (2008).
[94] *Id.*
[95] Weinreb, *supra* note 32.
[96] CAMERON & NEWMAN, *supra* note 93.
[97] U.S. Dep't of State, *supra* note 82.
[98] Weinreb, *supra* note 32.
[99] U.S. Dep't of State, *supra* note 82.
[100] ERIN C. HEIL, SEX SLAVES AND SERFS: THE DYNAMICS OF HUMAN TRAFFICKING IN A SMALL FLORIDA TOWN 20 (2012).

prevent trafficking, and exhaustively pursue all cases where individuals violate anti-trafficking laws.

Domestically, efforts to protect victims of "trafficking are divided among numerous U.S. government agencies including the Departments of Labor, State, Justice, Homeland Security, Health and Human Services," and Defense.[101] The TVPA also established the Interagency Task Force to Monitor and Combat Trafficking in Persons (PITF) to improve coordination efforts among these agencies,[102] and "facilitate cooperation among countries of origin, transit, and destination."[103] The Interagency Task Force to Monitor and Combat Trafficking is a "cabinet-level entity within the Department of State, which consists of 20 agencies across the federal government."[104] The force measures and evaluates the progress of the United States and other countries to prevent, protect, and assist victims of trafficking.[105] But the dispersion of effort among so many different agencies has impeded effective action despite the establishment of the interagency task force.[106] Therefore, when strategic objectives to combat trafficking are juxtaposed with real results, a system mired in bureaucracy is left exposed. As a result, government response to athlete trafficking leaves young athletes' skills and labor vulnerable to exploitation.

Due to shifts in government efforts, the hidden nature of trafficking crimes, dynamic global events, and a lack of uniformity in national reporting structures, aggregate data on trafficking fluctuates from one year to the next.[107] Frequently, trafficking data exposes the scope of trafficking only as it pertains to sex trafficking and forced labor. And the more glaring issue is that this data does not specifically quantify the extent of athlete trafficking. For example, in 2019, reported trafficking data among the Department of Justice (DOJ)

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[101] LOUISE SHELLEY, HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE 260 (Eric Crahan ed., 2010).
[102] *Id.*
[103]22 U.S.C. § 7103.
[104] U.S. Dep't of State, *The President's Interagency Task Force*, U.S. DEP'T OF STATE, https://www.state.gov/the-presidents-interagency-task-force/#:~:text=The%20President's%20Interagency%20Task%20Force%20to%20Monitor%20and%20Combat%20Trafficking,government%2Dwide%20efforts%20to%20combat (last visited Dec. 25, 2020).
[105] 22 U.S.C. § 7103.
[106]Shelley, *supra* note 101.
[107] U.S. Dep't of State, *supra* note 8, at 43.

showed trafficking convictions either in terms of sex trafficking or labor trafficking noting, "the Department of Justice (DOJ) secured convictions against 475 defendants in federal human trafficking prosecutions. Of these convictions, 454 involved sex trafficking predominantly and 21 involved labor trafficking predominantly."[108] Governments, domestic and foreign, must identify better methods to research, gather, and track data on athlete trafficking, which in turn will improve governmental capacity to accurately convey the extent of athlete trafficking through statistical reporting. Accurate statistics are necessary to determine the appropriate resources and the appropriate response when cases of athlete trafficking arise. Additionally, to facilitate and improve combat efforts, governments should assertively promote public awareness about athlete trafficking, especially at the state and local levels, and share information through integrated systems and platforms. It is well understood that "traffickers succeed because groups from different parts of the world cooperate."[109] Therefore, governments need integrated systems, which span the continuum of monitoring and reporting, including robust immigration monitoring across numerous countries. Governments should require consolidated initiatives that establish systematic global guidelines to identify athlete traffickers and victims, and collaborative programs to train foreign national personnel and encourage them to prioritize athlete trafficking. Governments should increase the number of prosecutions related to athlete trafficking to hold traffickers accountable. To demonstrate, "in the decade after Congress passed the TVPA, few human trafficking prosecutions moved forward relative to conservative estimates of the crime."[110] In fact, from 2000 to 2008, only half of the agencies that investigated human trafficking cases filed criminal charges against alleged traffickers.[111] Considering the elusive nature of athlete trafficking, criminal charges against alleged athlete traffickers were likely filed even less. Domestic and foreign governments must also take swifter action against traffickers once they are identified and implement a standardized system for follow-up investigations to ensure trafficking is not repeated.[112]

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[108] U.S. Dep't of State, *supra* note 12.
[109] Shelley, *supra* note 101, at 111.
[110] Dahlstrom, *supra* note 5, at 423.
[111] *Id.*
[112] Weinreb, *supra* note 32.

The government's role in combating athlete trafficking is ongoing. They must do more to hold the sports industry accountable for athlete trafficking through strict enforcement and robust sanctions for non-compliance with anti-trafficking laws. Even more, government efforts to combat athlete trafficking must also lie at the state level, not just the federal level. Florida, for example, has proven itself as a trailblazer in its efforts to curb athlete trafficking by agents who traffic Cuban baseball players.[113] Florida enacted HB 1095, a law, which requires Major League Baseball (MLB) to "allow Cuban baseball players to sign with MLB teams without forcing them to first seek residence in another country if they wish to sign lucrative free agent deals."[114] "Laws, such as HB 1095 or similar variations of the law, can complement changes" to current federal anti-trafficking laws.[115] This has the potential to disincentivize professional sports franchises from transacting with traffickers and agents behind closed doors.[116] Because of the ever-increasing use of public funds to subsidize new stadiums for MLB clubs, laws like HB 1095 are a positive first step toward aligning the interests of the U.S. government with sports associations to stifle athlete trafficking.[117]

Federal governmental agencies, such as the DOJ and FBI, fund anti-trafficking forces and train officers on how to spot trafficked persons and how to react to trafficking situations.[118] The U.S. government has also increased aid to trafficking victims by increasing funding to non-government organizations, in efforts to combat trafficking.[119] Although these efforts are laudable, governments should acknowledge flaws in their systems, especially when national sports leagues or associations in their country do not do enough to adequately protect their athletes. Governments should consider: "increasing coordination between their youth or child services programs and their

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[113] Drew M. Goorabian, *Baseball's Cuban Missile Crisis: How The United States And The Major League Baseball Can End Cuban Ballplayer Trafficking*, 20 UCLA J. INT'L L. & FOREIGN. AFF. 425, 459-60 (2016).
[114] Darren Heitner, *Florida Focuses On Curbing Trafficking of Cuban Baseball Players*, FORBES (Jun 22, 2014, 08:45am EDT), https://www.forbes.com/sites/darrenheitner/2014/06/22/florida-focuses-on-curbing-trafficking-of-cuban-baseball-players/?sh=19d02c9448b2.
[115] Goorabian, *supra* note 113, at 460.
[116] *Id.*
[117] *Id.*
[118] HASHAMOVA, *supra* note 81, at 34.
[119] *Id.*

sports programs; training consular officers on common indicators or schemes traffickers used within student or sports visas programs; and pursuing partnerships or dialogues with sports agencies and leagues to begin to address athlete trafficking, such as through nationwide public awareness initiatives."[120] One scholar suggests that governments should also consider regulating youth academy sports systems, subject them to strict age limits, and force them to adhere to United Nations guidance on the human rights of young individuals.[121]

VI. The Responsibility of Sports Associations and International Sports Federations

Years after the passage of anti-trafficking legislation, human trafficking still survives on a significant scale, with large numbers of U.S. citizens and foreign nationals subject to various forms of exploitation in the United States.[122] This is especially true of athlete trafficking. Athlete trafficking continues because traffickers exploit athletes with impunity and make significant profits doing it.[123] But is the sports industry responsible for athlete trafficking? Do sports teams, leagues, and associations, and international sports federations share some degree of culpability when young players are "recruited" into organizations but never reach the organizations allegedly seeking their talents and instead are abandoned in their own continent or trafficked abroad and left in foreign countries without passports or money? The simple answer to this question is yes. Sports associations and international sports federations do share some degree of culpability for athlete trafficking simply because they have a moral obligation to protect their athletes. However, the real answer is more elusory.

A. Recruitment, Transport, Exploitation

To understand the culpability of sports associations domestically and abroad, it is important to understand how athletes are trafficked into sports organizations. A typical trafficking case has three steps: "recruitment of the victim in the source country; transfer through transit countries; and exploitation in the destination country."[124]

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[120] U.S. Dep't of State, *supra* note 82.
[121] Weinreb, *supra* note 32.
[122] Shelly, *supra* note 101, at 230.
[123] *Id.*
[124] Gustafson, *supra* note 4, at 441.

Significant time and effort are spent by traffickers to recruit the athletes they will subsequently exploit, and oftentimes they are already acquainted with the victim.[125] When athletes are trafficked, traffickers frequently masquerade as agents, often claiming affiliation to high-profile sports organizations.[126] They then extort payments from very desperate and vulnerable families in the promise of future sporting glory.[127] The agent may offer to arrange for the athlete to train at a sports club, sports academy, or school, for a fee, with the promise of signing the athlete with a professional team.[128] Unfortunately, "many of these families will do whatever it takes to meet the agent's price."[129]

Some agents immediately abandon the young athletes while in transit or shortly after arrival at the destination.[130] Other agents have a longer-term plan in mind, where they vie to establish trust with the young athlete and "instill a sense of dependency as early as possible."[131] If an athlete does not advance to the next level in the sport, the agent abandons the athlete without a means to return home.[132] If the agent abandons the athlete abroad, the athlete will likely stay in the country unlawfully, with no way to contact family or too afraid to contact them because of distrust in law enforcement and fear of deportation.[133] Young athletes are often relocated from country to country where they find themselves in an unfamiliar locality and with an uncertain legal status, which binds them to the agent.[134] In many cases, agents compel or trick the athletes into endorsing exploitive agreements that contain numerous kickback clauses that further bind the athlete to the agent.[135] Once the athlete signs the agreement, the athlete relinquishes control to the agent; the agent then uses this control

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[125] SHELLEY, *supra* note 101, at 95.
[126] Newsroom, *Child Trafficking In Sport: Launch of Framework to Safeguard Children*, AROUND THE RINGS (July 12, 2021), http://aroundtherings.com/site/A__100569/Title__Child-trafficking-in-sport-launch-of-framework-to-safeguard-children/292/Articles.
[127] *Id.*
[128] U.S. Dep't of State, *supra* note 8, at 26.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] Child Trafficking In Sport: Launch of Framework to Safeguard Children, *supra* note 124.
[135] U.S. DEP'T OF ST., *supra* note 126.

to extort the athlete.[136] Because the agents control of the athlete often goes unchecked, agents frequently manage the athletes' passports and identity documents to ensure the athlete cannot leave the country or the agent may exert coercive control by exploiting a debt that the athlete or his family accrued.[137] Ultimately, the athlete may be traded from club to club and forced to train intensively, under the threat of losing an opportunity or finding themselves undocumented, having their dreams crushed, and with no resources."[138] Even though traffickers are more inclined to target children and youth, they also approach young adults.[139] In these instances, traffickers follow the same plan: sign an exploitative contract if the athlete is selected or abandon the athlete upon failure.[140]

B. No Matter the Sport, Athletes Are Vulnerable to Trafficking

The most notable commentary around athlete trafficking involves the sports of soccer and baseball, but the problem extends well beyond that. Athletes are trafficked in other sports, including basketball, and track and field. In hockey, young athletes are trafficked into certain junior teams.[141] Even in the sport of camel racing, which is similar to horse racing in the rest of the world in terms of popularity, "young jockeys who race camels on the Saudi peninsula are either bought or kidnapped from countries, such as Pakistan and Bangladesh because young children often make the best riders due to their size."[142] In soccer, most athletes are trafficked from underprivileged African countries.[143] The problem worsened in the 1980s and 1990s after African teams started to perform strongly in youth world championship events.[144] Sometimes, agents lure the soccer players to countries like Laos or Nepal, which allows visitors from nearly any country to get a visa on arrival; other times, the young soccer players

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[136] *Id.*
[137] *Id.*
[138] Child Trafficking In Sport: Launch of Framework to Safeguard Children, *supra* note 124.
[139] U.S. DEP'T OF ST., *supra* note 82.
[140] *Id.*
[141] Weinreb, *supra* note 32.
[142] *Id.*
[143] *Id.*
[144] *Id.*

end up in major European cities such as Paris, where they are promised trials with major clubs, such as Marseille and Real Madrid before their agents abandon them.[145] On occasion, athletes will get a tryout with no guarantees of making a club team; but often, the agent lures the athlete under false promises, and the athlete is left in a foreign country to fend for him or herself.[146] Sometimes though, athletes do not enter the countries legally. In some cases, unlicensed agents bring the young athletes through illegal means: some are brought over in boats, some get limited visas for travel purposes, and sometimes embassy employees issue passports that raise the player's age for bribes.[147] If the young athletes are not selected for a team, they are often left without legal papers and no way back home.[148] And even after FIFA passed stricter transfer regulations governing minors in 2001, athlete trafficking in soccer persists.[149]

For years, the sport of baseball has been at the center of allegations of athlete trafficking, with one reporter calling it "baseball's ugliest secret."[150] Most often, the focus of these allegations is MLB teams' international dealings that involve athlete trafficking of Latin Americans, primarily Cuban athletes. Nonetheless, the MLB continues to avert its eyes from the problem.[151] In fact, MLB officials have made statements that the athlete trafficking problem is a government problem and not a MLB problem.[152] According to one expert reporter, "the silence from the league and the union, the two parties charged with protecting the sport's sanctity and the players' health, is deafening."[153] Loopholes created by MLB rules further provide a compelling financial incentive for traffickers to profit from

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[145] *Id.*
[146] *Id.*
[147] Christina Lembo, *FIFA Transfer Regulations and UEFA Player Eligibility Rules: Major Changes in European Football and The Negative Effect on Minors*, 25 EMORY INT'L L. REV. 539, 569 (2011).
[148] *Id.*
[149] Weinreb, *supra* note 32.
[150] Anna Kaminsky, *A Major Smuggle Struggle: It's Time for Major League Baseball to Step Up To The Plate and Alleviate Its Cuban Smuggling Problem*, 24 CARDOZO J. INT'L & COMP. L. 193, 212-13 (2015).
[151] *Id*. at 212.
[152] *Id.*
[153] *Id.*

the MLB's leniency.[154] Often, traffickers capitalize on these loopholes to traffic players without committing any material violations of the law.[155] It has been argued that athlete trafficking continues to be a problem in the MLB because the MLB is a multinational corporation and is not technically, legally obligated by any international law but rather only by the domestic laws of the states in which it does business.[156] Therefore, because international corporations are regulated under an anemic system of state governance, many violations are not addressed.[157] This international legal ambiguity and the lack of an external organization to enforce legal sanctions against the MLB, partly because there is uncertainty as to whether the MLB is culpable, ensures that potential violations of international laws continue without penalty.[158] But even if the MLB does not have an unambiguous legal obligation, many argue that the MLB's moral obligation requires them to take action and perhaps change their rules.[159]

The problem of athlete trafficking is also evident in basketball. As U.S. coaches increasingly comb the world for young talent, unscrupulous agents are eager to exploit athletes seeking an opportunity to play in the United States.[160] For athletes playing basketball, African countries are typically a target for agents looking to exploit young players. Teams at all levels—high schools and colleges—are stocked with African players.[161] And the National Basketball Association (NBA) has even leaned into this, sending delegations to hold camps in Africa to recruit players.[162] Although there are basketball players from Africa who make it big in the U.S., stars like Pascal Siakam, Serge Ibaka, Joel Embiid, and Tacko Fall, the

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[154] Eric Beinhorn, *An Uneven Playing Field: The Evolving Legal Landscape of Baseball Relations Between Cuba and The United States*, 43 FORDHAM INT'L L.J. 819, 837 (2020).
[155] *Id.*
[156] Kaminsky, *supra* note 150 at 216.
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] Weinreb, *supra* note 32.
[161] L. Jon Wertheim, Oriana Zill De Granados & Emily Gordon, *For African Players, Chasing Hoop Dreams Is a Risky Proposition*, SPORTS ILLUSTRATED (Mar. 27, 2020), https://www.si.com/nba/2020/03/27/nba-african-players-trafficking.
[162] *Id.*

majority of players come to America only to be exploited by corrupt agents, coaches, and recruiters motivated by a huge payoff.[163] In fact, after a year-long 60 Minutes investigation, which followed the Africa-to-U.S. basketball trail, there is one inescapable conclusion: "it is littered with corrupt fly-by-night high schools and shadowy middlemen and academies that mislead families, run roughshod over immigration laws and sometimes committed federal crimes."[164] In one case:

> One middleman in the Midwest recruited two teenage basketball players from Africa and became their legal guardian. Once they arrived in the United States, he made the boys—who have since found new guardians and are playing in college—sign a contract entitling himself to 40% of their future earnings.[165]

And in another case:

> As his African peers celebrated at Oracle Arena, Clifford Etadafimue, a 7'2" mountain of a man from Nigeria, watched the Finals in New Jersey. "Or check that," he says, "Maybe it was Texas." "Or was it Pennsylvania?" He is forgiven for his hazy recollections because he was left homeless and has been wandering ever since he was recruited to come to the U.S. to play as a 17-year-old in 2015. Since the school he was attending closed, he has lived in seven different states.[166]

These cases are not uncommon. But because they are not, sports associations and international sports federations unquestionably have a responsibility to prevent athlete trafficking and address the problem head-on.

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[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*

C. Why Sports Associations and International Sports Federations Are Responsible for Athlete Trafficking

Sports associations and international sports federations are responsible for athlete trafficking because they have the capacity to put greater pressure on teams and their agents to conduct more due diligence on the agents they work with to ensure their talent acquisition is free of exploitation.[167] They are responsible because they are in a position to know how athletes arrive at their facilities and under what premises.[168] They are responsible because they are in a position to know how their agents recruit and control the athletes they exploit.[169] They are responsible because they control what steps they proactively take or what steps they do not take to identify and prevent athlete trafficking.[170] They are responsible because they possess the ability to dictate and disseminate information to promote awareness about athlete trafficking and what factors contribute to its perpetuation. They are responsible because they have the authority to conduct risk assessments of their current organization practices, policies, and compliance programs within the organizations,[171] which will help identify flaws or loopholes that traffickers can take advantage of. Sports associations and international sports federations are responsible because they are in a position to know whether their organization is subject to anti-trafficking regulation requirements and whether they have violated these regulations, domestically or internationally.[172] Ultimately, sports associations and international sports federations are responsible for athlete trafficking because they have the greatest power to improve oversight in a billion dollar industry that has resisted regulation despite repeated links to athlete trafficking.

VII. Conclusion

The expansion of the trafficking definition has marshaled new energy and focus against a broad array of criminal conduct that

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[167] U.S. DEP'T OF ST., *supra* note 8 at 27.
[168] David Lisko & Tony Farina, *Traffick Control: Are Sports Organizations Liable for Human Trafficking?*, SBLA (Oct. 26, 2020), https://nationalsbla.com/2020/10/26/sports-organizations-human-trafficking/.
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*

previously fell through definitional cracks.[173] While there is much discussion about trafficking, the issue is typically cast as a foreign problem with unfortunate domestic manifestations.[174] Perhaps, therefore, domestic efforts to reduce human exploitation have never truly mirrored the zeal of anti-trafficking rhetoric[175] or anti-trafficking legislation. Although a broadened framework to address trafficking has the potential to address long-standing challenges,[176] it has served only as a stopgap solution for athlete trafficking. Because of this, anti-trafficking laws do not adequately deter athlete trafficking. Athlete trafficking requires greater awareness, especially at the state and local level, and all those involved must actively engage in the issue. If not, athlete trafficking will continue to plague societies domestically and abroad. Athlete trafficking will continue to test the integrity of the sports industry. And athlete trafficking will remain to be an unseen urgency in the wide world of sports as long as it is allowed to persist beyond the boundaries of the law.

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[173] Dahlstrom, *supra* note 5 at 437.
[174] Chacon, *supra* note 15 at 2991.
[175] *Id.*
[176] *Id.*

KNOT TODAY: A LOOK AT HAIR DISCRIMINATION IN THE WORKPLACE AND SCHOOLS

Chasity Henry

I. Introduction

Take a second and do a google search of "unprofessional hairstyles." How many images are of Black men and women? Across the nation, Black students and employees are being policed for their natural hair. If it is not straight or does not conform to European beauty standards, natural hair can cost you your education, and even more, it can cost you your job. Under the appearance of maintaining professionalism or limiting distractions, school dress codes and workplace grooming policies are embedded with biases that Black hair is inferior and has no place in specific spaces.

Part I of this article addresses Black hair's history, detailing its importance and the roots of implicit bias it has faced for the past 600 years. Part II addresses federal law that should combat hair discrimination. Still, courts have had alternative interpretations that have not provided relief to Black students to exist as themselves in schools and the workplace. Part III provides an analysis of hair discrimination, arguing it is a violation of individual constitutional rights and how employees can present their arguments under Title VII. Lastly, Part IV proposes solutions to minimize and even eliminate hair discrimination in the workplace and schools. Courts and administrators should consider these solutions to create more diversified spaces.

A. It's More Than "Just Hair": A History of Black Hair

Much like with anything in Black culture, the story of Black hair began in Africa.[1] Dating back to the early fifteenth century, "hair functioned as a carrier of messages in most West African societies."[2] Different hairstyles could "indicate a person's marital status, age,

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[1] AYANA BYRD & LORI THARPS, HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA 2 (2002).
[2] *Id.*

religion, ethnic identity, wealth, and rank within the community."[3] In West African communities, "[a] woman with long thick hair demonstrates the life-force, the multiplying power of profusion, prosperity, a 'green thumb' for raising bountiful farms and many healthy children."[4]

When Europeans infiltrated Africa, taking many Africans with them, they shaved their new cargo's heads.[5] While slave traders claimed they shaved heads for sanitary reasons, it "was the first step the Europeans took to erase the slave's culture and alter the relationship between the African and his or her hair."[6] Having no time to style their hair as they did in the past, under their new "inhumane and unhealthy conditions," women and men's hair became tangled and matted.[7] Tools like the combs, once used in Africa, were non-existent, forcing slaves to use sheep fleece to detangle their hair.[8]

As slaves, intricate styles were a thing of the past.[9] Cornrows, braids, and plaits became the most convenient hairstyles for slaves to maintain "neat" hair for a week.[10] On Sundays, slaves would get a small break to prepare for the week, and these styles became the most practical.[11] The name cornrows came to be because it resembled the rows of corn in the field, and slaves used oils like kerosene to condition these styles.[12] While braids, plaits, and cornrows were the most practical styles, they also served as a way to pass along secret messages between slaves without their masters knowing.[13] Hence, slaves used braids to create "map[s] to freedom."[14]

The negative stigmas of Black hair can be easily traced back to the roots of slavery. In the Americas, a land "dominated by pale skin and straight hair, African hair was deemed wholly unattractive and

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[3] *Id.*
[4] *Id.* at 4.
[5] *Id.* at 9.
[6] *Id.*
[7] *Id*. at 12.
[8] *Id.*
[9] *See* Siraad Dirshe, *Respect Our Roots: A Brief History of Our Braids*, ESSENCE (June 27, 2018), https://www.essence.com/hair/respect-our-roots-brief-history-our-braids-cultural-appropriation/.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*

inferior by the Europeans."[15] Some even described African hair as "wool."[16] It was during this time that "long straight hair, with fine features" was established as the ideal of beauty.[17] As a result, slaves whose hair closely resembled European hair received better treatment.[18] Furthermore, in 1865, emancipated slaves found themselves on a journey for straight hair because European hair was seen as "good hair," while African hair was "bad, foreign, and unprofessional."[19] To achieve this look, wigs and chemical relaxers became popular, and Madam C.J. Walker's straight hair empire was born.[20]

For over 600 years, Black men and women have been conditioned to believe their hair is "unprofessional," "unmanageable," "dirty," or "nappy." Many Black men and women have believed European features to be the poster child for beauty, subjecting their Black hair to chemical processing and overused heat. By confronting these stereotypes, there has been some progress that resulted in the natural hair movement, but today the negative stigmas and biases of Black hair still stand.

II. Does Current Law Protect Black Hair?

This part of the note discusses current federal and case law relating to hair discrimination in the workplace and schools. Each sub-section begins by outlining the protections under the Civil Rights Act of 1964, and then follows with an overview of jurisprudence relating to Black hair. Exploring major cases provides an understanding of the court's failure to combat hair discrimination against Black professionals and students, and why the Supreme Court should take on this issue. Finally, discussing state laws and the CROWN Act demonstrates how states have responded to this issue and have recently become the first line of defense for Black hair.

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[15] BYRD & THARPS, *supra* note 1, at 13.
[16] *Id.* at 14.
[17] *Id.*
[18] Madison Horne, *A Visual History of Iconic Black Hairstyl*es, HISTORY (Feb. 28, 2018), https://www.history.com/news/black-hairstyles-visual-history-in-photos.
[19] *Id.*
[20] *Id.*

A. An Avenue for Relief? Federal Law and Case Law Tackling School Dress Code Policies

1. Federal Law: Title VI

Title VI provides "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[21] Programs receiving federal financial assistance cannot "utilize criteria or methods of administration which have the effect . . . of subjecting individuals to discrimination because of their race, color, or national origin."[22]

2. A House Divided Against Itself Cannot Stand: Circuit v. Circuit

School dress code policies have been no stranger to courtrooms. Students and their families have relied on the First, Ninth, and Fourteenth Amendments to establish their rights against such policies. While some lower courts have recognized these rights, others have chosen to deny such rights exist for students against school dress code policies. However, presently the Supreme Court has yet to set a standard on this issue.

In 1969, the Supreme Court examined the constitutionality of a school's policy that prohibited students from wearing black armbands to "publicize their objections to the hostilities in Vietnam and their support for a truce."[23] Writing for the majority, Justice Fortas stated, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[24] The Court outlined the state's burden for justifying its prohibition of First Amendment rights stating "it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[25] Additionally, the prohibition cannot be upheld unless "the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline

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[21] 42 U.S.C. § 2000d (1964).
[22] *See* 28 C.F.R. § 42.104(b)(2) (2003).
[23] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 504, 504-05 (1969).
[24] *Id.* at 506.
[25] *Id.* at 509.

in the operation of the school.'"[26] Justice Fortas found that the school could not produce evidence that the armbands would cause a disruption.[27]

While the Court's analysis did not involve the "regulation of the length of skirts or the type of clothing . . . hairstyle, or deportment,"[28] they understood the dangers of limiting a student's freedom of expression. Quoting Justice Brennan, the Court stated:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton* v. *Tucker*, [364 U.S. 479,] at 487. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.[29]

Ultimately, the Court ruled the school's prohibition was unconstitutional, violating students' First Amendment rights.[30]

In *Tinker*, the majority articulated what is now known as the Tinker Standard—absent a showing of substantial distribution or material interference, schools cannot prohibit students' freedom of expression.[31] However, because the case did not decide school policies in the context of hairstyles, schools have been left with a gray area as to whether their hairstyle policies are discriminatory. Because of this, many lower courts are divided over whether hair is protected under the Constitution.

i. The Constitution Protects Hair

Students' constitutional right to choose their hair length has been recognized by the First, Fourth, Seventh, and Eighth Circuits. In *Breen v. Kahl*, the court recognized this right is "within the penumbras" of the First Amendment freedom of speech or within the

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[26]*Id.* (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
[27]*Id.*
[28]*Id.* at 507-08.
[29]*Id.* at 512 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).
[30]*Id*. at 514.
[31]*Id.* at 509.

Ninth Amendment.[32] The court found "the right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution . . . and that to limit or curtail this right, the state bore a 'substantial burden of justification.'"[33] Finding that the students' long hair did not create a disturbance and the state did not satisfy its burden of justification, the court held the hair regulation unconstitutional.[34]

While the First Circuit recognized students' constitutional right to choose their hair length in *Richard v. Thurston*, they did so under the "liberty" protections of the Fourteenth Amendment Due Process Clause.[35] The court found that the First Amendment did not apply. However, it noted, "the Due Process Clause of the Fourteenth Amendment establishes a sphere of personal liberty for every individual, subject to reasonable intrusions by the state in furtherance of legitimate state interests."[36] Ultimately, the court found the state's justification insufficient to uphold the regulation, stating:

> We see no inherent reason why decency, decorum, or good conduct requires a boy to wear his hair short. Certainly eccentric hair styling is no longer a reliable signal of perverse behavior. We do not believe that mere unattractiveness in the eyes of some parents, teachers, or students, short of uncleanliness, can justify the proscription. Nor, finally, does such compelled conformity to conventional standards of appearance seem a justifiable part of the educational process.[37]

Because the defendant had the burden and failed to satisfy that burden, the district court's decision was affirmed.[38]

In *Bishop v. Colaw*, the Eighth Circuit found that the Ninth Amendment provided students with constitutional protection against school hair regulations.[39] The court held that because the hair

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[32] Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969).
[33] *Id.*
[34] *Id.* at 1036-37.
[35] *See* Richards v. Thurston, 424 F.2d 1281, 1284 (1st Cir. 1970).
[36] *Id.*
[37] *Id.* at 1286.
[38] *Id.*
[39] *See* Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971).

regulation violated a student's Ninth Amendment "right to govern his personal appearance," it could not be upheld.[40] Defendants attempted to make the argument that their policy was aimed at minimizing distractions; however, the court rejected this argument.[41] Subsequently, the court reasoned: "toleration of individual differences is basic to our democracy, whether those differences be in religion, politics, or life-style. Finally, we cannot accept the argument that uniformity of appearance must be maintained in order to prevent 'polarization' in the St. Charles student body."[42]
Therefore, the court found that the school could impose less restrictive rules to advance their goals and held the school's regulation to be invalid.[43]

Lastly, the Fourth Circuit in *Massie v. Henry* stated that the right to wear one's hair as one pleases is "an aspect of the right to be secure in one's person guaranteed by the due process clause" with "overlapping equal protection clause considerations."[44] Even though these circuits recognize such rights exist, others have maintained these students' rights are non-existent.

ii. The Constitution Doesn't Protect Hair.

The Fifth Circuit was one of the first courts to address whether the Constitution provided students with protection for their hairstyles in *Ferrell v. Dallas School District*.[45] Three male students were denied enrollment into a Dallas high school because they failed to comply with the school's regulation banning long hair.[46] The school's principal reasoned that denying the students' enrollment was because "the boys' hair would cause commotion, trouble, distraction and a disturbance in the school and, therefore, it was necessary for their hair to be cut or trimmed before admittance would be allowed."[47] Parents brought suit on behalf of the students arguing that the school's policy violated (1) the State of Texas's Constitution, the Fourteenth

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[40] *Id.*
[41] *Id.* at 1076-77.
[42] *Id.*
[43] *Id.*
[44] Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972).
[45] *See* Ferrell v. Dallas Indep. Sch. Dist., 392 F.2d 697 (5th Cir. 1968), cert. denied, 393 U.S. 856 (1968) (mem.).
[46] *Ferrell*, 392 F.2d at 698.
[47] *Id.* at 699.

Amendment's Due Process Clause and, (3) 42 U.S.C. §§ 1981 and 1983.[48] The court declined to decide whether hair is "a constitutionally protected mode of expression" but assumed for the purpose of the Constitution that it was not.[49] It went on to note, "[t]he Constitution does not establish an absolute right to free expression of ideas [and that right] may be infringed by the state if there are compelling reasons to do so."[50] Furthermore, the state has an interest in "maintaining an effective and efficient school system [and] [t]hat which so interferes or hinders the state in providing the best education possible for its people, must be eliminated or circumscribed as needed."[51] Thus, the state's interest outweighed the students' fundamental rights, and the court affirmed the district court's judgment.[52]

The hair length issue arose once again two years later in the Fifth Circuit decision *Karr v. Schmidt*.[53] Once again, the court declined to recognize hair as a protected right under the Constitution.[54] Like the students in *Ferrell*[55], plaintiffs brought the suit to challenge the school's hair length policy under the Fourteenth Amendment.[56] The court applied a similar test as it did in *Ferrell*[57] and decided the First, Eighth, Ninth, Tenth, and Fourteenth Amendments do not give students the right to wear their hair as they please in public schools.[58]

Relying on *Ferrell* again, the Sixth Circuit did not recognize constitutional claims brought by students to prohibit school hair regulations.[59] In *Jackson v. Dorrier* and *Gfell v. Rickelman*, the courts found that the school's dress code did not deprive students of any

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[48]*Id.* at 698.
[49]*Id*. at 702.
[50]*Id.* at 702-03.
[51]*Id.* at 703.
[52]*Id.* at 703-04.
[53] *See* Karr v. Schmidt, 460 F.2d 609, 610 (5th Cir. 1972).
[54] *Id.* at 613 (deciding there is no constitutionally protected right to wear one's hair in a public high school in the "length and style that suits the wearer.").
[55] *Ferrell*, 392 at 698.
[56]*Id.* at 611.
[57]*Ferrell*, 392 at 702-03.
[58]*Karr*, 460 F.2d at 613.
[59]*E.g.*, Jackson v. Dorrier, 424 F.2d 213, 218 (6th Cir. 1970); *E.g.*, Gfell v. Rickelman, 441, 446 F.2d 444, 446 (6th Cir. 1971).

constitutional rights,[60] and the principles articulated in *Griswold v. Connecticut* were inapplicable.[61]

These circuits have relied on the 50-year-old decision outlined in *Tinker* to deny students' constitutional rights under the premise that the states, particularly the school districts, have a compelling interest. The lower courts' division on this issue further demonstrates why everyone should take this issue seriously. Most jurisprudence governing this issue is over 30 years old. Therefore, courts must develop a uniform standard that limits and ultimately prohibits hair discrimination in schools.

B. Where Relief is Sought but Not Found: Federal Law and Case Law Tackling Workplace Policies

For over 40 years, Black employees have attempted to take claims to court in the hopes of being provided some form of relief. However, courts have consistently failed to protect Black hair, ruling that Title VII affords no protection, and employers are free to create and implement their grooming policies as they please. Even when specific policies have banned natural hairstyles, the courts have always seemed to have the employers' back, making it difficult for Black employees to exist in such spaces.

1. Federal Law: Title VII

Title VII provides the basis of many claims for employment discrimination. Enacted with the Civil Rights Act of 1964, Title VII provides:

> (a) Employer practices
> It shall be an unlawful employment practice for an employer -

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[60] *See Jackson*, 424 F.2d at 218 (holding students First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendment rights have not been impaired); *See also Gfell*, 446 F.2d at 446 (affirming the district court's ruling that the students first, fourth, fifth, sixth, eighth, ninth, tenth and fourteenth amendment rights haven't been impaired).

[61] *See Jackson*, 424 F.2d at 218 (stating "In our opinion Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, has no application here."); *See also Gfell*, 441 F.2d at 446 (noting We are unable to agree with some courts that the freedom of choosing one's hairstyle is a fundamental right protected under the principles expressed in the separate opinions in Griswold v. Connecticut").

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
> (b) Employment agency practices
> It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.[62]

However, as discussed below, many Black employees have not found relief under this law.

2. Case Law

Federal courts' interpretation of Title VII has yielded little to no results for providing Black employees protection against hair discrimination in the workplace. Even though these policies disproportionately impact Black employees, courts have found facially neutral grooming policies not to violate Title VII because hairstyles, unlike skin color, are not immutable characteristics. Without a clear definition of race or national origin, interpretation of Title VII has left federal courts to promote racist grooming policies under the guise of "professionalism."

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[62] 42 U.S.C. § 2000e-2 (1964).

i. Afros Are Unprofessional: Jenkins v. Blue Cross Mutual Hospital

Decided in 1976, *Jenkins v. Blue Cross Mutual Hospital* is one of the first notable cases to tackle this issue.[63] Plaintiff brought suit "based on the termination of her employment because of her 'race, sex, black styles of hair and dress,' in violation of Title VII of the Civil Rights Act of 1964."[64] The court noted that Title VII should "be construed and applied broadly."[65] Under this premise, the court found that the plaintiff might be able to recover under a Title VII claim to prevent employer bias against afros in the workplace.[66]

ii. Banning Braids Does Not Violate Title VII: Rogers v. American Airlines

Five years later, in 1981, a New York court found itself also taking on a hair discrimination claim in *Rogers v. American Airlines*.[67] Plaintiff, Renee Rogers, a Black woman and airport operations agent for the defendant, American Airlines, sought "declaratory relief against enforcement of defendant['s] [grooming policy] . . . that prohibits employees in certain employment categories from wearing an all-braided hairstyle."[68] Plaintiff claimed the policy was racially discriminatory and violated Title VII because it denied her "the right to wear her hair in the 'corn row' style,"[69] which "has a special significance for black women," historically and culturally.[70] While the court acknowledged the plaintiff's arguments for the hairstyle's significance to Black women, it found that the grooming policy equally applied to all races and the all-braided hairstyle is not "exclusively or even predominantly [worn] by Black people."[71] The court went on to

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[63] *See generally* Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164 (7th Cir. 1976).
[64] *Id.* at 165.
[65] *Id.* at 167. (quoting Motorola, Inc. v. McLain, 484 F.2d 1339, 1344 (7th Cir.1973)).
[66] *Id.* at 166.
[67] *See generally* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981).
[68] *Id*. at 231.
[69] *Id.*
[70] *Id.* at 231-32.
[71] *Id.* at 232.

say that the all-braided hair is not an immutable characteristic to warrant any violation of Title VII.[72] Specifically, the court reasoned:

> Plaintiff may be correct that an employer's policy prohibiting the "Afro/bush" style might offend Title VII and section 1981. But if so, this chiefly would be because banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics. In any event, an all-braided hairstyle is a different matter. It is not the product of natural hair growth but of artifice. An all-braided hair style is an "easily changed characteristic," and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer.[73]

Under this rationale, the court dismissed the plaintiff's claims.[74]

iii. Dreadlocks Are Not "Business-like": Eatman v. UPS

In *Eatman v. United Parcel Service*, Eatman "began wearing locks in February 1995 as "an outward expression of an internal commitment to [his] Protestant faith as well as [his] Nubian belief system."[75] UPS appearance guidelines for drivers required that "[h]air styles should be worn in a businesslike manner."[76] Drivers who did not comply with this policy because their hair was "unbusinesslike" were permitted to "retain their hairstyles as long as they cover them with a hat while driving."[77] After refusing to wear a hat, Eatman was fired.[78] He sued, claiming that the company violated Title VII.[79] The court rejected Eatman's facial discrimination argument because "African–Americans are not the only persons who lock their hair and there is no evidence that UPS differentiates . . . between 'black' locked hair and

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[72] *Id.*
[73] *Id.*
[74] *Id.* at 234.
[75] Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 259 (S.D.N.Y. 2002).
[76] *Id.*
[77] *Id.*
[78] *Id.* at 260.
[79] *Id.* at 261-62.

what she refers to as 'imitation' locked hair."[80] Citing *Rogers*, the court also found that Title VII does not protect against hair discrimination.[81]

iv. Cornrows Are Not "Pretty": Pitts v. Wild Adventures, Inc.

In *Pitts. v. Wild Adventures, Inc*., the white female Guest Services Manager suggested to the plaintiff, an African-American female member of the Guest Services staff, that she get her hair done in a "pretty style" because the manager "disapproved of her cornrow style."[82] Plaintiff re-styled her hair, placing in extensions and styling them into "two strand twists" which had the appearance of dreadlocks, but the manager disapproved of this style also.[83] Subsequently, the defendant introduced a policy that "prohibited 'dreadlocks, cornrows, beads, and shells' that are not 'covered by a hat/visor.'"[84] After complaining several times for what she believed to be a discriminatory policy, the plaintiff was written up for numerous violations.[85] Months later, the plaintiff was terminated.[86] Plaintiff sued, claiming the company's grooming policy violated Title VII under the disparate treatment theory.[87] The court found the plaintiff's claim to be without merit.[88] Following the *Rogers* court, the court reasoned:

> [Title VII] prohibits discrimination on the basis of the immutable characteristics of race. Dreadlocks and cornrows are not immutable characteristics, and an employer policy prohibiting these hairstyles does not implicate a fundamental right. The fact that the hairstyle might be predominantly worn by a particular protected group is not sufficient to bring the grooming policy within the scope of [Title VII]. On its face, the policy applies to all races and there is no evidence that

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[80] *Id.* at 262.
[81] *Id.*
[82] Pitts v. Wild Adventures, Inc., No. CIV.A.7:06-CV-62-HL, 2008 WL 1899306, at *1 (M.D. Ga. Apr. 25, 2008).
[83] *Id.*
[84] *Id.*
[85] *Id.* at 2.
[86] *Id.* at 3.
[87] *Id.* at 4.
[88] *Id.* at 5.

> the policy was only enforced against African-Americans.[89]

Thus, summary judgment was granted in favor of the defendant.[90]

v. Dreadlocks Have No Place in the Workplace: EEOC vs. Catastrophic Management Solutions

Black hair found its way back to the courts once again when Chastity Jones accepted a job offer from Catastrophe Management Solutions (CMS) as a customer service representative on the condition that she cut her dreadlocks.[91] The Equal Employment Opportunity Commission (EEOC) filed suit on behalf of Ms. Jones, alleging that "CMS' conduct constituted discrimination on the basis of Ms. Jones' race in violation of Title VII of the Civil Rights Act of 1964."[92] EEOC presented both a cultural and biological argument under the disparate treatment theory arguing "dreadlocks are a natural outgrowth of the immutable trait of Black hair texture" and "dreadlocks can be a symbolic expression of racial pride."[93] The court noted that when arguing a disparate treatment case, the question is "whether the protected trait actually motivated the employer's decision."[94] Furthermore, the court acknowledged that Title VII does not define the term race, and it has been up to the courts to determine the meaning of the word.[95] Consequently, the court defined race as the "common physical characteristics shared by a group of people and transmitted by their ancestors over time," rejecting any arguments that race is a social construct.[96] The court then found that "EEOC's proposed amended complaint did not allege that dreadlocks themselves are an immutable characteristic of Black persons."[97] With support from other circuits, the court rejected "the argument that Title VII protects hairstyles

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[89] *Id.* at 6.
[90] *Id.*
[91] Equal Employment Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1020 (11th Cir. 2016).
[92] *Id.*
[93] *Id.* at 1024-1026.
[94] *Id*. at 1026 (quoting Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003)).
[95] *Id.*
[96] *Id.* at 1027-28.
[97] *Id*. at 1031.

culturally associated with race."[98] While the court did acknowledge the pressure to expand Title VII interpretations and embrace race as more than a biological concept, because these arguments are not unanimous and culture is an "ever changing concept," it declined to do so.[99] Hence, CMS prevailed.[100]

vi. Nelson v. Town of Mt. Pleasant Police Department

In *Nelson v. Town of Mt. Pleasant Police Department*, a police department's grooming policy came under fire because the plaintiff alleged: "her supervisors 'disapproved of the natural texture of unprocessed African-American hair.'"[101] The court found that the plaintiff failed to establish a prima facie case for racial discrimination.[102] Like other courts, it noted that "hair is not an immutable characteristic," and Title VII protection does not extend to hairstyles.[103] Thus, the court ruled in the defendant's favor.[104]

C. Light at the End of the Tunnel: State Regulations and Congress' Response

1. State Laws

Although federal courts and laws have failed to protect against hair discrimination, some states have begun to provide some form of relief for African-Americans. Just recently, in 2019, California, New Jersey, and New York passed legislation to protect individuals from hair discrimination in the workplace and at school. California was the first state to pass legislation that outlawed hairstyle-based discrimination in July 2019.[105] California's Governor passed the CROWN Act, making it illegal for employers and public schools to

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[98] *Id.* at 1032.
[99] *Id.* at 1033.
[100] *Id.* at 1034.
[101] Nelson v. Town of Mt. Pleasant Police Dep't, No. 2:14-CV-4247-DCN-MGB, 2016 WL 11407774, 1, 1 (D.S.C. June 28, 2016).
[102] *Id.* at 4.
[103] *Id.*
[104] *Id.*
[105] *See* S.B. 188, 2019 Leg., Reg. Sess. (Cal. 2019).

create and enforce grooming policies that directly prohibit hairstyles such as twists, cornrows, dreadlocks, braids, and afros.[106]

Not even a week later, the State of New York followed in California's footsteps, passing the New York City Human Rights Law. The law:

> protects the rights of New Yorkers to maintain natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities. For Black people, this includes the right to maintain natural hair, treated or untreated hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state.[107]

Governor Cuomo signed the bill into law with the purpose of protecting Black people from policies "addressing natural hair or hairstyles most commonly associated with Black people."[108]

As of 2020, over 20 states have considered enacting hair discrimination laws. New Jersey, Virginia, Colorado, Washington, and Maryland have passed their versions of the CROWN Act to help put an end to hair discrimination.[109]

2. The CROWN Act

As previously mentioned, California was the first state to tackle anti-discrimination hair laws in the workplace and schools.[110] The CROWN Act, which stands for Create a Respectful and Open World for Natural Hair, represents a long-overdue yet important step in combating racial discrimination. Until recently, the Act had only been making headway in states, but as of September 21, 2020, the House of

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[106] *Id.*

[107] *NYC Commission on Human Rights Legal Enforcement Guidance on Race Discrimination on the Basis of Hair*, NYC COMMISSION ON HUMAN RIGHTS (Feb. 2019), https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf.

[108] *Id.*

[109] Danielle Jackson, *Here's a List of States That Have Passed Anti-Discrimination Hair Laws So Far*, POPSUGAR (Jul. 9, 2020), https://www.popsugar.com/beauty/states-that-have-passed-hair-discrimination-laws-47308523.

[110] *See* S.B. 188, 2019 Leg., Reg. Sess. (Cal. 2019).

Representatives passed the bill at the federal level.[111] The bill is awaiting Senate approval, stating:

> This bill prohibits discrimination based on a person's hair texture or hairstyle if that style or texture is commonly associated with a particular race or national origin. Specifically, the bill prohibits this type of discrimination against those participating in federally assisted programs, housing programs, public accommodations, and employment. Persons shall not be deprived of equal rights under the law and shall not be subjected to prohibited practices based on their hair texture or style. The bill provides for enforcement procedures under the applicable laws.[112]

The Act addresses federal courts' misinterpretation of current federal anti-discrimination laws such as the Civil Rights Act of 1964.[113] Further, the Act notes that the narrow interpretation of race and national origin have permitted "employers to discriminate against people of African descent who wear natural or protective hairstyles even though the employment policies involved are not related to workers' ability to perform their jobs."[114] It also notes, "[a]pplying this narrow interpretation of race or national origin has resulted in a lack of Federal civil rights protection for individuals who are discriminated against on the basis of characteristics that are commonly associated with race and national origin."[115]

Additionally, unlike past laws, the CROWN Act makes clear that "[l]ike one's skin color, one's hair has served as a basis of race and national origin discrimination."[116] Overall "[t]he purpose of this Act is to institute definitions of race and national origin for Federal civil rights laws that effectuate the comprehensive scope of protection Congress intended to be afforded by such laws and Congress' objective to eliminate race and national origin discrimination in the

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[111] *See* The Crown Act of 2020, H.R. 5309, 116th Cong. (2020).
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*

United States."[117] All in all, the CROWN Act represents a step in a new direction to eradicate systematic racism and protect Black people in all spaces.

III. Analysis: The Implications of Grooming and Dress Code Policies

This part of the note argues the effects hair discrimination has on Black employees and students. Whether it's violating a student's constitutional rights or creating a space where Black people cannot exist, these policies are discriminatory and have no place in schools and the workplace.

A. Infringement of Constitutional Rights

1. Fourteenth Amendment: Arguing Discriminatory Purpose

The Fourteenth Amendment gives rise to hair discrimination claims in classrooms, more precisely, school dress code policies that target hairstyles typically worn by African-Americans. Ratified in 1868, the Fourteenth Amendment states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[118]

Courts have stated that a racial discrimination case can be made "when there is a proof that a discriminatory purpose has been a motivating factor in the decision."[119] Applying this standard to school policies across the nation, it is hard to deny race is a "substantial or motivating factor" in school dress code policies when they seem to disproportionately impact African-American students.[120] While

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[117] *Id.*

[118] U.S. CONST. amend. XIV, § 1.

[119] Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp. 429 U.S. 252, 265-66 (1977).

[120] Veasey v. Abbott, 830 F.3d 216, 231 (5th Cir. 2016) (stating plaintiff has the "burden to show that racial discrimination was a 'substantial' or 'motivating' factor behind the enact of the law").

disproportionate impact "is not the sole touchstone of an invidious racial discrimination," it is "not irrelevant."[121] Just by looking at the recent instances in the last two or three years, it is easy to see that Black students are being targeted and kept from classrooms under the disguise of "professionalism" and minimizing distractions. To name a few examples, look back at August 2018, when a school sent a 6-year old Black boy home because he violated school policy, which stated boys are not permitted to have dreadlocks.[122] Also, take a look back to December 2018, when a white referee forced a Black New Jersey teenager to cut his dreadlocks in order to continue participating in his school's wrestling match.[123] Or look more recently, when in January 2020, cousins DeAndre Arnold and Kaden Bradford were both suspended from Barbers Hills High School in Texas for dreadlocks.[124] These instances highlight the criminalization of Black hairstyles to give rise to Fourteenth Amendment claims, as school policies attack Black students with no justification.[125]

Moreover, discriminatory motive is evident when Black hairstyles are criminalized on Black people but praised them on their white counterparts. Under a Fourteenth Amendment analysis, this means whether the action "bears more heavily on one race than another."[126] In other words, how does school dress code policy affect

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[121] Washington v. Davis, 426 U.S. 229, 242 (1976).

[122] *See generally* Katie Mettler, *Mass. School Punishes Twins for Hair Braid Extensions. Their Parents Say It's Racial Discrimination*, THE WASHINGTON POST (May 15, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/05/15/mass-school-punishes-twins-for-hair-braid-extensions-their-parents-say-its-racial-discrimination/ (discussing a public charter school's policy that prohibits hair extensions, which kept twins Deanna and Mya Cook from the softball team and attending prom).

[123] Michael Gold and Jeffery C. Mays, *Civil Rights Investigation Opened After Black Wrestler Had to Cut His Dreadlocks*, THE NEW YORK TIMES (Dec. 21 2018), https://www.nytimes.com/2018/12/21/nyregion/andrew-johnson-wrestler-dreadlocks.html#:~:text=New%20Jersey%20state%20officials%20said,hair%20or%20forfeit%20his%20match.

[124] Arnold v. Barbers Hill Indep. Sch. Dist., 479 F. Supp. 3d 511, 527 (S.D. Tex. 2020).

[125] *E.g.*, Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969) ("[T]he right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution . . . and that to limit or curtail this right, the state bore a 'substantial burden of justification'").

[126] Vill. of Arlington Heights, 429 U.S. at 265-66 (1977) (citing Washington v. Davis, 426 U.S. at 242.).

white students compared to their Black counterparts? Answering this question, it is helpful to look at how Black hairstyles are viewed when other races wear them. For example, Kim Kardashian has been praised for inventing "boxer braids," a style that is known to the Black community as cornrows and is deeply imbedded in African heritage.[127] On the other hand, Olympic gold medalist Gabby Douglas was crucified on Twitter for her natural hair during the Olympics.[128] With reference to the Fourteenth Amendment, these altering viewpoints are carried over into the classrooms and embedded into school dress code policies.

Students are forced to assimilate to white beauty standards and deprived of their liberty to govern their personal appearance in order to maintain what is seen as societal order. Additionally, the Supreme Court has ruled "students have a legitimate entitlement to public education as a property right," therefore, schools' dress code policies keep Black students out of classrooms at higher rates infringing on these rights under the Fourteenth Amendment.[129] Recently, in *Arnold v. Barber Hill Independent School District*, a Texas school district enforced its hair-length policy disproportionately against African-American students.[130] In that case, African-American students "were three times more likely than their white classmates to lose at least one day of instruction to hair-related in-school suspension."[131] This is representative of the many school districts that create a policy based on ignorant and dense stereotypes violating students' Fourteenth Amendment rights.

Lastly, although facially neutral, school policies under the *Arlington Heights* analysis are intentionally discriminatory because of the link between hair texture and race.[132] Like skin color,

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[127] *MTV UK Credits Kim Kardashian for Making Cornrows Popular*, THE GRIO, (Feb. 21, 2016) https://thegrio.com/2016/02/21/mtv-uk-credits-kim-kardashian-for-making-cornrows-popular/.

[128] *See generally* Renee Martin, The *Real Reason People Keep Making Fun Of Gabby Douglas' Hair*, THE ESTABLISHMENT (Aug. 17 2016), https://medium.com/the-establishment/the-real-reason-people-keep-making-fun-of-gabby-douglas-hair-124fffc1fb14.

[129] Goss v. Lopez, 419 U.S. 565, 574 (1975).

[130] *Arnold*, 479 F. Supp. 3d 511, 518 (S.D. Tex. 2020).

[131] *Id.* at 526.

[132] *See generally Vill. of Arlington Heights*, 429 U.S. at 265-67 (describing the courts analysis of racial discrimination under the Fourteenth Amendment using Washington v. Davis).

"[h]istorically, the texture of hair has been used as a substantial determiner of race."[133] Notably, in *Hair Story: Untangling the Roots of Black Hair in America*, authors Ayana Byrd and Lori Tharps wrote:

> Curiously, the hair was considered the most telling feature of Negro status, more than the color of the skin. Even though some slaves ... had skin as light as many Whites, the rule of thumb was that if the hair showed just a little bit of kinkiness, a person would be unable to pass as White. Essentially, the hair acted as the true test of blackness, which is why some slaves opted to shave their heads to try to get rid of the genetic evidence of their ancestry when attempting to escape to freedom.[134]

When courts consider the biological differences that characterize Black hair, it will be easy to understand why these facially neutral policies have a discriminatory purpose, bringing hair discrimination claims under the Fourteenth Amendment's purview. Fortunately, a Texas court seems to be moving in the right direction to find school hair policies impermissible.[135]

2. First Amendment: Freedom of Expression & Freedom of Speech

At an early age, school dress code policies promote racial discrimination, teaching African-American students their freedom of expression and speech must not go past the Eurocentric standards of beauty. The Constitution guarantees freedom of speech under the First Amendment, prohibiting government interference with an individual's right to speak freely.[136] Within the concept of freedom of speech as protected by the First Amendment, Black hair can be considered an expression because it is symbolic speech. Symbolic speech is not limited to verbal expression but includes conduct or action.[137] Like words, hairstyles communicate ideas and statements. The symbolism

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[133] *Equal Employment Opportunity Comm'n*, 852 F.3d at 1022.
[134] S*ee* BYRD AND THARPS, *supra* note 1, at 17-18.
[135] *See generally* Arnold, 479 F. Supp. 3d at 528 (S.D. Tex. 2020).
[136] U.S. CONST. amend. I.
[137] *Tinker*, 393 U.S. at 505 (recognizing students wearing armbands to express certain views is closely related to "pure speech" which enjoys the protections of the First Amendment).

of Black hair expresses the freedom to defy the stereotypes, microaggressions, and discriminatory practices used in spaces like classrooms to water down black culture and promote the idea "white is right."[138] The ignorant idea that Black hair represents nothing more than an expression of individuality fails to recognize the political and sociological viewpoints of Black hair. For Black men in the 1970s, "[t]he Afro was Black beauty personified without white validation, and it did not care about critics. For many Black men, it was [also] about cool pose and hyper-masculinity in the face of police brutality and constant oppression."[139] Comparatively, for Black women, hair is a symbolic part of their identity. In the Black community, "black girls and women use hair as a medium to understand complex identity politics that intersect along the lines of race, gender, class, sexuality, power, and beauty"[140] This means that many women see hair as the definer of her femininity, racial identity, and sexual preference.

Today, much like the afro in the 1970s, Black hair is intended as an act of protest, challenging rules meant to foster oppression.[141] In a society that continually targets the appearance of Black men and women[142], Black hair intentionally defies white beauty standards and creates a space where diversity thrives. The intention to freely express a sense of cultural identity, defiance, and Black pride, and Black hair's messages that other Black community members understand, satisfy the court's First amendment standard in *Spence v. Washington*.[143] The individual and unique experiences with Black hair binds the Black

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[138] *See* Brick v. Bd. Of Educ., 305 F. Supp. 1316, 1320 (D. Colo. 1969).
[139] Princess Gabbara, *The History of the Afro*, EBONY (Mar. 2, 2017), https://www.ebony.com/style/the-history-of-the-afro/.
[140] INGRID BANKS, HAIR MATTERS: BEAUTY, POWER, AND BLACK WOMEN'S CONSCIOUSNESS 148 (2000).
[141] *See generally* Robyn Autry, *Naomi Osaka's Hair Reveals the Burdens Carried by Black Bodies in White Spaces*, YAHOO (Sept. 12, 2020), https://www.yahoo.com/lifestyle/why-naomi-osakas-bold-beautiful-175728447.html.
[142] *See generally* Shannon Doyne, *Should Schools or Employers Be Allowed to Tell People How They Should Wear Their Hair?* THE NEW YORK TIMES (Nov. 16. 2020), https://www.nytimes.com/2020/11/16/learning/shouldschools-or-employers-be-allowed-to-tell-people-how-they-should-wear-their-hair.html.
[143] *See* Spence v. Wash., 418 U.S. 405, 410-12 (1974) (deciding the two-part standing for expressive conduct is protected under the First Amendment if there was an "intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it").

community and send a message that Black pride is powerful and something to be celebrated, not criticized. Therefore, this intentional message and its understanding fall squarely within the Court's standard of freedom of speech and expression to guarantee Black hair's protection under the First Amendment.[144]

If Black hair doesn't constitute freedom of expression, then why do white spaces try so hard to hide it? For centuries, Black boys have been pressured to cut their hair or shave their beards to appear less threatening, while young girls have been told their braids, afros, and twist-outs are "nappy," "dirty," or "unmanageable."[145] While these messages are far from the truth, they are still messages nonetheless spoken by Black hair's texture, proving it deserves the protections of the First Amendment.

The misconceptions behind Black hair, fueled by the ignorance white hair is good while Black hair and its many textures are "bad," fuels negative stereotypes and reinforces African-Americans' inferiority. The ignorance or misconception surrounding Black hair further proves it is a form of freedom of expression. If it can communicate that an individual who chooses to wear his or her natural hair is "dirty" or "unpresentable," it can convey messages as an expressive symbol.

C. Employees Potential Argument: Proving Disparate Impact

Proving disparate treatment under Title VII is extremely difficult for employees seeking to assert discrimination claims because it requires plaintiffs to prove intent.[146] Employees seeking to bring hair discrimination claims against their employer should do so under Title VII's disparate impact theory. "An employer violates Title VII under the disparate impact theory if it maintains a 'specific employment practice,' that, although facially neutral, 'in fact fall[s] more harshly on one group than another and cannot be justified by business necessity.'"[147] It is not necessary for a plaintiff to prove discriminatory intent, however "a plaintiff must make out a prima facie case by

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[144] *See Id.*

[145] *See generally* Areva Martin, *The Hatred of Black Hair Goes Beyond Ignorance,* TIME (Aug. 23, 2017), https://time.com/4909898/black-hair-discrimination-ignorance/.

[146] *See* Rudin v. Lincoln Land Cmty. Coll., 420 F.3d 712, 719 (7th Cir. 2005).

[147] *Eatman*, 194 F. Supp. 2d at 265 (quoting Griggs v. Duke Power Co. 401 U.S. 424, 431 (1971)).

presenting 'statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'"[148]

Under this theory, Black employees can argue that facially neutral grooming policies are discriminatory when applied. This can be done through a few approaches. One, plaintiffs can present evidence, as discussed below, that outlines Black employees spend more time, money, and effort to comply with these policies as compared to their white counterparts.[149] As a result of doing so, Black employees suffer physical and mental conditions like alopecia,[150] hair breakage,[151] depression, and anxiety[152] at higher rates. Legal scholarship and studies reflect this information and can be presented to the court to show that certain employment practices place the heaviest burden on the Black employee population.

Another approach is for the plaintiff to demonstrate that specific hairstyles are unique and commonly associated with Black people. Although the court has recognized in the past that "African–Americans are not the only persons who lock their hair," the argument is not that specific hairstyles are worn only by Black people, but that certain hairstyles are more commonly associated with Black people and perceived negatively when worn by Black people. History is proof of the hairstyles commonly associated with Black people[153], and while white employees may engage in wearing afros, braids, twists, and dreadlocks, they are less likely to do so or lose their job because of it. As mentioned below, African-American women are more likely to be

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[148] *Id.* at 267 (quoting Smith v. Xerox Corp., 1967 F.3d 358, 365 (2d Cir. 1999)).
[149]Kari P., *Please Research the Beauty Market Value (U.S.) of African American Women. What Do They Spend, And What Brands Target Them?*, WONDER (Aug. 3, 2017), https://askwonder.com/research/please-research-beauty-market-value-u-s-african-american-women-spend-brands-7vwf9jyh2.
[150] See ELTON XAVIER TINSLEY, SKINSIDE OUT: BEAUTY ETHNICITY & COSMETIC SURGERY 130 (2020) (ebook).
[151] AUDREY DAVIS-SIVASOTHY, THE SCIENCE OF BLACK HAIR: A COMPREHENSIVE GUIDE TO TEXTURED HAIR 40 (2011).
[152] *See* Study: Black Women Have Workplace Hair Anxiety, JJ BRAIDS https://jjbraids.com/hair-news/study-black-women-workplace-hair-anxiety-face-natural-hair-bias/ (last visited Jan. 5, 2020) (detailing the Perception Institute's Good Hair Study which found that "black women suffer more anxiety around hair issues than their white peers").
[153] Horne, *supra* note 18.

sent home from work because of their hair.[154] Also, the biological makeup of Caucasian hair compared to Black hair prevents white counterparts from wearing such styled afros.

Lastly, when arguing disparate impact, it is necessary to show that little to no research has shown the correlation between Black hairstyles and job capability or competence.[155] This is a weak justification employers use to enforce their policies and to rebut it plaintiffs can, in fact, demonstrate employers who encourage Black hairstyles that boost their company's productivity and profitability because they are promoting freedom of expression.

In *Garcia v. Gloor*, the court stated, "there is no disparate impact if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference."[156] Using this analysis, Black employees cannot "readily observe" grooming policies because doing so is not without delay or difficulty when the financial, emotional, and physical conditions are considered. All-in-all, employees should be successful in arguing disparate impact because workplace grooming policies are more burdensome to Black employees than they are to their white counterparts.

D. Gatekeeping White Spaces: Are School Dress-Code and Workplace Grooming Policies the New White's Only Signs?

Schools and workplaces have served as gatekeepers to tyrannize Black people and advance white supremacy. Gatekeeping can be defined as "the activity of controlling, and usually limiting, general access to something."[157] Public spaces such as schools and jobs have a history of choosing to establish and maintain the racial discrimination that has given rise to wealth disparity between Black and white Americans.[158] Usually, higher levels of education and income translate to higher wealth, which leads to lower poverty levels; however, the policies instituted specifically to vilify Black people maintain today's income gap and white dominancy.

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[154] Dove, *The CROWN Research Study* https://static1.squarespace.com/static/5edc69fd622c36173f56651f/t/5edeaa2fe5ddef345e087361/1591650865168/Dove_research_brochure2020_FINAL3.pdf (2019).
[155] *See* Maya allen, *Natural Hair and Job Interviews*, BYRDIE https://www.byrdie.com/natural-hair-job-interviews (last updated Sept. 16, 2020).
[156] Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980).
[157] *Gatekeeping*, LEXICO.COM, https://www.lexico.com/en/definition/gatekeeping.
[158] *See generally* Plessy v. Ferguson 163 U.S. 537 (1896).

The higher rates at which Black students are targeted allows them to be kept out of classrooms furthering ideologies based on Black inferiority. Furthermore, racist dress code policies have allowed schools to "intentionally or unintentionally rely on discriminatory factors in administrating disciplinary actions."[159] Accordingly, African-American students are punished at higher rates than their white counterparts. For example, "r"[r]esearch using administrative datasets and longitudinal samples clearly show that Black American students are far more likely to be suspended or expelled and, conditional on an office referral, more likely to receive stiffer punishments." [160] Courts have dealt with this issue in the past, specifically in *Hawkins v. Coleman*[161], where African-American students were disproportionately suspended because of "institutional racism."[162] The court went on to note that "white controlled institution[s]," such as schools districts occur "when a large majority of the decisions about resource distribution is made by white administrators."[163] As a result, institutional racism exists "when the standard operating procedures of an institution are prejudiced against, derogatory to, or unresponsive to the needs of a particular racial group. This is distinguished from 'personal racism'-- which exists within a given individual and do not become involved in the administration of an institution's normal operations."[164] This subtle yet prevalent form of racism keeps a student from their fundamental right to an education, as required by many state constitutions.[165] Thus, white administrators

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[159] Floyd D. Weatherspoon, *Racial Justice and Equity for African-American Males in the American Educational System: A Dream Forever Deferred*, 29 N.C. CENT. L.J. 1, 21 (2006).

[160] Travis Riddle and Stacey Sinclair, *Racial Disparities in School-Based Disciplinary Actions are Associated with County-Level Rates Of Racial Bias*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA (Apr. 23, 2019), https://doi.org/10.1073/pnas.1808307116.

[161] Hawkins v. Coleman, 376 F. Supp. 1330 (N.D. Tex. 1974).

[162] Weatherspoon, *supra* note 161 at 21; *See also* Hawkins v. Coleman, 376 F. Supp. At 1336 (stating "institutional racism exists . . . when the standard operating procedures of an institution are prejudiced against, derogatory to, or unresponsive to the needs of a particular racial group.").

[163] *Hawkins*, 376 F.Supp. at 1336.

[164] *Id.*

[165] *See* Roni Reed, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582, 583 (1996) (arguing

act as gatekeepers instituting racist policies that keep students from the traditional white spaces known as classrooms.

Comparatively, like school administrators, employers act as gatekeepers to preserve the white dominancy of the workplace arena. As a result, Black employers are forced to assimilate to not violate employee policy. A recent study found that "Black women are 1.5 times more likely to be sent home from the workplace because of their hair."[166] Additionally, 80% of women found that they had to change their hair from its natural state in order to fit in at the office.[167] Arguing the societal impact of Black hair being deemed unprofessional, Venessa Simpson noted:

> Regarding these [black] hairstyles as 'unprofessional' 'non-business like' or 'excessive' without regard to whether the style is 'neat, clean, or well-groomed' operates to keep black women [and men] out of the workplace in disproportionate numbers and the biases against these styles qualify as an unnecessary, artificial, and arbitrary barrier to employment equality in direct violation of Title VII.[168]

Although workplace policies are necessary, Black employees are forced to choose between their job and healthy hair and/or their cultural identity.[169] Of course, they are going to choose their job because it'll improve their financial situation, which is already less favorable to Black employees compared to their white counterparts.[170]

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for alternative education for students who have been suspended or expelled, because failing to provide such an alternative can lead to other problem such as "drug abuse, crime, and increased utilization of public assistance.").

[166] Dove, *The CROWN Research Study* (2019).

[167] *Id.*

[168] Venessa Simpson, *What's Going on Hair?: Untangling Societal Misconceptions That Stop Braids, Twists, and Dreads from Receiving Deserved Title VII Protection*, 47 SW. L. REV. 265, 287 (2017).

[169] *See* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016) (discussing Black job applicant Chastity Jones whose employment offer was rescinded by Catastrophe Management Solutions ("CMS") pursuant to its race-neutral grooming policy when she refused to cut off her dreadlocks).

[170] John Creamer, *Inequalities Persist Despite Decline in Poverty For All Major Race and Hispanic Origin Groups*, UNITED STATES CENSUS BUREAU (Sept. 15,

Through these discriminatory workplace grooming policies, employers dangle financial security in the face of Black employees, contributing to the already unequal racial income and wealth gap that haunts America.[171] The US Census Bureau noted that "["[i]n 2019, [the] median household income for black households was $45,438 compared to . . . $76,057 for non-Hispanic White households."[172] Therefore, workplace grooming policies act as a post-slavery barrier to wealth accumulation. If an employee is unable to comply with such policies, he or she is forcibly removed from their job and forced to suffer financial anguish.

By limiting access to education and employment through racist dress codes and grooming policies, white supremacy achieves its goal of furthering class inequality among races. Therefore, the rates at which these policies keep Black students and employees outside of predominately white spaces begs the question, are they the new sign of segregation: "For Whites Only?'

IV. Proposal

This part of the note proposes solutions on how hair discrimination can be combated from all angles. The courts and administrators can work together to do their parts to lessen the target placed upon Black people when they enter schools and workplaces. It is not just up to the courts to create legislation that provides protection, but also employers and school administrators to create true neutral policies that reflect diversity and inclusivity.

A. Legislative Efforts

1. Expanding the Reach of the First Amendment Beyond the State Action Doctrine

Under present law, private actors such as employers can infringe on freedom of speech and expression rights due to the state action doctrine. Currently, "[t]he First Amendment only limits governmental actors—federal, State, and local—but there are good reasons why this should be changed. Certain powerful private entities

2020), https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html.

[171] *Id.*

[172] *Id.*

. . . can limit, control, and censor speech as much or more than governmental entities."[173] During the *Civil Rights Cases of 1883*, the court developed what is now understood as the state action doctrine.[174] In response to the plaintiffs' claim that a privately-owned facility violated the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court responded, stating, "[i]t is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."[175]

Concerning the First Amendment, in 2018, a Texas federal district court applied the doctrine to dismiss a case filed by a private citizen against Facebook.[176] The court noted that "the First Amendment governs only governmental restrictions on speech."[177] It is necessary to abandon the state action doctrine that allows employers to escape liability from their attack on constitutional rights. Like government censorship, private censorship is detrimental. Applying this principle to the freedom of speech, Erwin Cherminsky argued the doctrine should be readdressed, writing:

> Freedom of speech is defended both instrumentally—it helps people make better decisions—and intrinsically—individuals benefit from being able to express their views. The consensus is that the activity of expression is vital and must be protected. Any infringement of freedom of speech, be it by public or private entities, sacrifices these values. In other words, the consensus is not just that the government should not punish expression; rather, it is that speech is valuable and, therefore, any unjustified violation is impermissible. If employers can fire employees and landlords can evict tenants because of their speech,

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[173] David L. Hudson Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-socia-media-first-amendment/.

[174] *See* Civil Rights Cases, 109 U.S. 3, 11 (1883).

[175] *Id.*

[176] *See generall*y Nyabwa v. Facebook, 2018 U.S. Dist. LEXIS 13981, Civil Action No. 2:17-CV-24 (S.D. Tex.) (Jan. 26, 2018).

[177] *Id.* at 2.

> then speech will be chilled and expression lost. Instrumentally, the "marketplace of ideas" is constricted while, intrinsically, individuals are denied the ability to express themselves. Therefore, courts should uphold the social consensus by stopping all impermissible infringements of speech, not just those resulting from state action.[178]

Revisiting the state action doctrine would be beneficial to private actors like employers. Censoring employees' freedom of expression through grooming policies limits their creativity and personal growth. In 2013, a study found that "[r]educed employee motivation resulting from restricted employees' workplace self-expression reduces work productivity by 50% to 70%."[179] Allowing self-expression through hairstyles will produce a motivated workforce, which can lead to an increase in work productivity, thus increasing the company's profitability. Furthermore, when an "employer engages in censorship, individuals don't get to participate in the marketplace of ideas and are not allowed the liberty to engage in individual self-fulfillment— just like when a governmental entity engages in censorship."[180]Currently, some state constitutions have provided First Amendment protections to individuals against private actors. For example:

> The New Jersey Supreme Court has applied the free expression provision of its state constitution to allow individuals to challenge restrictive bylaw provisions of private homeowner associations. The State high court wrote: 'In New Jersey, an individual's affirmative right to speak freely is protected not only from abridgement by government, but also from

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[178] Hudson Jr., *supra* note 1 (citing Erwin Chemerinsky, *Rethinking State Action*, 80 N.w. UNIV. L. REV. 503, 533–34 (1985)).
[179] Heather Cavise, *Strategies for Managing Employee Self-Expression in the Workplace*, WALDEN UNVIERSITY SCHOLAR WORKS 2 (Mar. 2019), https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=7591&context=dissertations.
[180] Hudson Jr., *supra* note 173.

> unreasonably restrictive and oppressive conduct by private entities in certain situations.'[181]

While Section 7 of the National Labor Relations Act (NLRA) does protect some First Amendment rights, it does so only under the idea of collective bargaining or concerted activity.[182] Therefore, the NLRA's protections are not enough to protect all aspects of employees' First Amendment rights. To protect employees in all 50 states, the Supreme Court should follow the efforts of state courts. Employees will not only benefit from this expanded protection, but employers will be left with more satisfied employees, which will reflect positively on their business. Thus, it is necessary to revisit the state action doctrine to limit employee grooming policies that discriminate against Black hair, infringing on Black employees' First Amendment rights.

2. Revisiting the Definition of Race: Hairstyle is an Immutable Characteristic

Outdated laws, like Title VII, fail to keep up with the present times, and because of it, Black employees are suffering. A law passed more than 55 years ago only protects certain rights, giving employers a loophole for discrimination to still exist. Title VII needs to reflect the current understanding of race as a social construct and not based on biological characteristics.[183] Immutability is no longer enough to protect Black employees from the discrimination they face in the workplace. The ambiguity of race in Title VII needs to be revisited and ultimately changed.

Proof that race is a social conduct is evidenced by the experiences that one faces based on their skin color. Arguing this point, Jacqueline Frank notes, "[b]ecause of race, one might be faced with different experiences when confronted by a police officer or be treated differently in school or at the supermarket. Even a light-skinned Black

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[181] *Id.*; *See also* Mazdabrook Commons Homeowners Association v. Khan, 210 N.J. 482, 493 (2012).

[182] 29 U.S.C. § 157 (1982); *See also* National Labor Relations Act, 29 U.S.C. § 7 (providing that employees have the right to self-organize, join or form labor union, and to engage in concerted activities "for the purpose of collective bargaining or other mutual aid or protection").

[183] ASHLEY MONTAGU, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE 496-98 (6th ed.1999) (arguing the ordinary concept of race is social without any biological or genetic basis).

male could have different experiences than a dark-skinned Black male."[184] This is because, "[d]istinguishable, physical markers signifying "whiteness" and "non-whiteness," generated the creation of a hierarchical social system based on race and color, whereby whiteness represented the superior status and non-whiteness the inferior."[185] Unlike ethnicity, race assigns illogical and unscientific differences between Blacks and whites. These differences based on race are not fact and cannot be proven. Race is a social construct because it places limitations on individuals within society, confining them to adapt to specific societal roles according to their race. In other words, society and cultural racial roles are viewed as specific behaviors or characters for a person of a specific race. The concept is always evolving or changing like trends, depending on what culture or society is in charge of defining it. The conversation and litigation surrounding Black hair and it being "unprofessional," "dirty," or even "unmanageable," because it is too Black for certain spaces, reflect the social construction of race. Thus, a perceiver's racial biases toward Black hair determine and reinforce the racial socialization of racial categories.

Over the past forty years, courts have upheld grooming policies that prohibit certain hairstyles associated with a particular race, reasoning that hairstyles are not an immutable characteristic of race.[186] While an employee can change their hair to conform to employer regulations, race includes not only immutable characteristics like skin color, but also mutable characteristics such as hairstyles and hair texture. Currently:

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[184]*See* Jacqueline Frank, *The Eleventh Circuit Dreadlocks Ban and the Implications of Race Discrimination in the Workplace*, 23 BARRY L. REV. 27, 37 (2017) (citing See Phillip Williams, Shades of Black, COLUMNS: ONLINE NEWSPAPER FOR THE UNIVERSITY OF GEORGIA COMMUNITY (Oct. 2, 2006), http://columns.uga.edu/news/article/shades-of-black/.

[185] D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1365 (2008).

[186] *See Rogers*, Inc. 527 F. Supp. at 232 (ruling Title VII focuses on discrimination based on characteristics that is beyond the victim's power to alter. The court noted "[a]n all-braided hair style is an "easily changed characteristic," and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer.").

> it seems as if Title VII's plain language, which states that employment discrimination is prohibited on the basis of race, is too broad, too ambiguous, and freely open to any interpretation of the courts. This interpretive flexibility could counteract the entire point of the statute, which is designed to protect people from employment discrimination on a large scale.[187]

Failing to expand Title VII to define race as a social construct with mutable characteristics, employers will be free to implement their race-targeted grooming policies under outdated standards of "professionalism." Therefore, amending Title VII to provide a definition of race that includes mutable characteristics would prevent courts from erroneously promoting racial discrimination and protect employers from discrimination suits in the long run.

3. Setting a New Standard for Title VII Claims: Undue Burden vs. Disparate Treatment

One of the most common ways of proving discrimination under Title VII is disparate treatment. Under a disparate treatment claim, the plaintiff must establish intentional discrimination by the employer.[188] Where circumstantial evidence is used to prove intent, the Supreme Court's three-part test in *McDonnell Douglas Corp. v. Green* analyzes where discrimination cases apply.[189] First, the plaintiff must establish a prima-facie case of discrimination.[190] The burden of proof then shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for their actions.[191] If the defendant can satisfy this burden, the burden shifts back to the plaintiff to show that the asserted reasons "are a mere pretext for its true discriminatory motives, and that the actions of the defendant were really based on the plaintiff's race."[192]

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[187] Ra'Mon Jones, *What the Hair: Employment Discrimination Against Black People Based on Hairstyles*, 36 HARV. BLACKLETTER L.J. 27, 42 (2020).
[188] *See Rudin*, 420 F.3d at 719.
[189] *See* McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973).
[190] *Id*. at 802.
[191] *Id.*
[192] Nelson v. Town of Mt. Pleasant Police Dept., No. 2:14-CV-4247-DCN-MGB, 2016 WL 11407774, at 2 (quoting McDonnell Douglas Corp. v. Green 411 U.S. 792, 802-05 (1973)).

To meet the first prong of this three-part test and establish a prima-facie case of discrimination, the plaintiff must show (1) he or she is a member of a protected class; (2) he or she satisfactorily performed their job duties and was qualified for the position; (3) he or she suffered an adverse employment action; and (4) other employees who were not members of his or her protected class were treated more favorably, or there is further evidence that gives rise to an inference of discrimination.[193] Proving these elements has proved quite difficult for plaintiffs combating hair discrimination because courts have recognized hairstyles not to be immutable and beyond the scope of Title VII.[194] Requiring plaintiffs to prove intent under the disparate treatment analysis is problematic and should be revisited. Therefore, the courts should consider a new standard under an undue burden analysis.

Applying this new standard looks at the burden Black employees face complying with grooming policies compared to their white counterparts. For example, "Black women, in particular, spend an estimated $7.5 billion annually on beauty products, shelling out 80% more on cosmetics and twice as much on skin care as their non-Black counterparts."[195] In *Nelson v. Town of Mt. Pleasant Police Department*, the court noted that the plaintiff "could have kept her job if she had cut her hair or chemically straightened it, [but] [s]he chose not to do neither," and as a result, she was fired.[196] This is just one instance of pressure Black employees are faced with to conform to mainstream expectations. Minorities, specifically Black men and women, devote a lot of time and effort to fit into dominant white spaces, especially the workplace. Courts should recognize that Black employees conform to mainstream standards in the workplaces to do what Ashleigh Rosette & Tracy Dumas described as minimizing Black people's perceived differences, avoiding negative stereotypes, and covering and shifting.[197] As a result, "women of African descent spend

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[193] Simpson, *supra* note 170, at 279.
[194] *See Eatman*, 194 F.Supp.2d at 262; *See also* Rogers, 527 F.Supp. at 232.
[195] Taylor Bryant, *How the Beauty Industry Has Failed Black Women*, REFINERY 29 (Feb. 27, 2016, 5:00 PM), http://www.refinery29.com/2016/02/103964/black-hair-care-makeup-business.
[196] Nelson, No. 2:14-CV-4247-DCN-MGB, 2016 WL 11407774, at 4.
[197] Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL'Y 407, 412-16 (2007).

collectively and globally over a billion dollars annually on hair weave products," not including hair care and maintenance.[198] A lot of time and expense is required to transform Black hair into what is traditionally accepted in the workplace. If financial burden isn't enough, physical and emotional damage is also the price many Black employees pay to be "professional." The constant manipulation of Black hair from weaves and chemical relaxers can cause hair to break and produce chemical burns, skin diseases, and irreversible heat damage.[199] Adopting an undue burden standard will make it easier for plaintiffs to prove their Title VII claims, and employers will no longer be able to dispute discrimination claims under the guise of "professionalism." Proving intent under a disparate treatment theory requires too much of plaintiffs and allows employers to escape liability. Thus, courts should work toward a new standard that tackles hair discrimination adequately.

E. An Avenue for Change: What Employers & School Administrators can do to Eliminate Hair Discrimination

Legislation is just one method by which Black students and employees can be protected against hair discrimination in the workplace and schools. In addition to the courts, schools and employers can do their part to eliminate the stigmatization and discrimination against Black hair. Arguing for new-age standards of professionalism, Ra'Mon Jones noted, "new standards of professionalism that reflect the current culture of our society are absolutely necessary. The outdated Eurocentric standards perpetuate discrimination, disparate impact, and many other negative notions."[200] Therefore, school administrators and employers need to be educated on cultural and racial differences to promote a space of diversity and inclusion in schools and the workplace.

1. Schools Need to be Responsive to the Needs of Black Students

Much attention needs to be placed on diversity and inclusion in the classroom. Arguably, school administrators are in a better position to eliminate hair discrimination in all spaces. Teaching students at a young age that hair comes in all textures will transform

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[198] Tinsley, *supra* note 151, at 130.
[199] *See* GOOD HAIR (HBO Films and Chris Rock Productions 2009).
[200] Jones, *supra* note 189, at 43

them into culturally competent adults who recognize and appreciate the characteristics that make everyone different.

One suggestion would be to eliminate punishment for dress-code violations. Schools should not punish students for their self-expression or natural characteristics. Criminalizing this behavior at such an early age stifles students' creativity and sends the message that Black hair is illicit. Further, punishing students for minute infractions such as hairstyles increases students' chances of dropping out and fuels the school-to-prison pipeline. Instead, school administrators should eliminate words like "distracting" and "appropriate" from their policies and work to minimize any subjective or vague terms. Also, hairstyles and other grooming practices should be left out of these policies. Thus, schools should embrace the cultural differences that make up their classrooms.

Another suggestion would be to make school board meetings engage the community in developing a new school policy. Parents should become active throughout the policymaking process, reviewing any drafts and openly communicating ideas. Administrators should not pass school policies without the approval of at least one non-school board member or administrator, such as a parent or community leader.

Using these suggestions, schools should work actively to minimize hair discrimination. Hair discrimination should no longer exist in any space, especially in the classroom.

2. Employers Need to Be Responsive to the Needs of Black Employees

Responding to the needs of Black employees begins with understanding what those needs are. Companies should host town hall meetings to create a space where Black employees can share their experiences and detail what their hair means to them. This dialogue ignites a conversation about race, cultural identity, and the importance of Black hair. White employees, executives, and HR personnel will get a better understanding of not only issues in the workplace, but how to deal with them effectively.

Additionally, employers should make it their goal to hire more Black employees at all levels, but specifically in high positions of

power. In 2020 only 5% of managers and 3.8% of CEOs were Black.[201] Employers must adopt policies that reflect inclusivity and diversity. Hiring more Black executives and policymakers will force companies to adopt race-neutral grooming policies because the policy is made by someone whose racial identity is vital to their life experience. Further, allowing a Black employee to influence policy decisions will help alleviate the stigma against Black hair and compel employers to understand the importance of Black hair and its minimal effects on one's job performance or professionalism. Therefore, grooming policies should precisely reflect that natural hair is permitted, and more importantly, encourage their employees to embrace their cultural differences.

Lastly, employers should also focus their efforts on education. Companies must provide mandatory cultural competency training to help correct Black hair bias and the race discrimination Black employees face because of it. Therefore, employers should proactively attempt to understand the Black experience and what it means to be Black in the United States. In the workplace, this could possibly mean having a diversity calendar that outlines different cultural holidays. This would force employers and other employees to know their employees or colleagues' cultural backgrounds and create an environment where microaggressions and biases struggle to exist. Employers cannot make new policies if they don't understand the cultural differences of their employees. Moreover, education doesn't just include training but also providing company policymakers with access to information on how to be culturally competent, such as information in employee handbooks.

V. Conclusion

Hair discrimination has no place in society. It's sad that this note even has to be written. Even more so, it is baffling that legislation needs to be passed just so Black hair is permitted in all arenas. Among all of the issues in the world, hair discrimination should not be one of them. Once again, Black bodies are being policed at substantial rates, and Black people have nowhere to turn for consolation. Laws and rights meant to protect Black students and employees have failed time

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[201] *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LABOR STATISTICS, https://www.bls.gov/cps/cpsaat11.htm (last modified Jan. 22, 2021).

and time again, begging the question, is it the hairstyle that is necessarily prohibited, or is it the person who is wearing it? Hopefully, legislators, administrators, and judicial officials can take a step back and really create change. I challenge these individuals to not only learn about Black hair and Black culture, but work towards creating an environment that promotes cultural diversity. All in all, while this issue shouldn't be an issue, it is one that cannot go unnoticed or ignored.

BIG BROTHER'S FALL BRINGS LIBERTY TO ALL: ADDRESSING THE URGENCY FOR STRICT REGULATION GOVERNING LAW ENFORCEMENT USE OF FACIAL RECOGNITION TECHNOLOGY IN TEXAS.

Caroline Lovallo

I. Introduction

"Always eyes watching you and the voice enveloping you. Asleep or awake, indoors or out of doors, in the bath or bed—no escape. Nothing was your own except the few cubic centimeters in your skull."[1] Living in today's digital world, technology is transforming faster than society can sustain. However, technology's development techniques are not quite progressing at the same speed, creating gaps in technology's execution. To succeed in this digital society, our world must adopt an innovative attitude.

On December 3, 2020, President Donald Trump signed Executive Order #13960, Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government.[2] The Trump administration made a commitment to modernize government operations while emphasizing the significance of federal agencies' lawful use of artificial intelligence.[3] President Trump's Executive Order provides that "[a]rtificial intelligence promises to drive the growth of the United States economy, enhance our economic and national security, and improve the quality of life of all Americans."[4] The purpose of this Executive Order is to "more effectively deliver services to the American people and foster public trust in the critical technology."[5] This Order will "direct agencies to ensure that the design,

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[1] GEORGE ORWELL, 1984 29 (Oberon Books Ltd. 1949).
[2] OFFICE OF SCI. & TECH. POLICY, PROMOTING THE USE OF TRUSTWORTHY ARTIFICIAL INTELLIGENCE IN GOVERNMENT (2020).
[3] Maintaining American Leadership in Artificial Intelligence, 84 Fed. Reg. 31, 3967 (Feb. 14, 2019).
[4] OFFICE OF SCI. & TECH. POLICY, PROMOTING THE USE OF TRUSTWORTHY ARTIFICIAL INTELLIGENCE IN GOVERNMENT (2020).
[5] *Id.*

development, acquisition, and use of artificial intelligence is done in a manner that protects privacy, civil rights, civil liberties, and American values."[6]

Federal and state law enforcement agencies use facial recognition technology. Facial recognition tools differ from other identification tools traditionally used in law enforcement, like DNA analysis and fingerprinting.[7] This technology provides law enforcement the ability to identify individuals absent their notification or consent. For example, a police officer conducting a stop to check someone's identification requires reasonable suspicion.[8] Making an arrest requires probable cause.[9] However, as exhibited by the Detroit Police Department in January 2020, law enforcement entities using facial recognition technologies are not required to possess *any* suspicion of wrongdoing before pursuing an arrest.[10] This was the case of Robert Williams, an African American father of two. His case is the first known account where an American citizen was "wrongfully arrested based on a flawed match from a facial recognition algorithm."[11]

To date, Texas legislation lacks oversight and proper guidance in using facial recognition technology in policing. Texas must pass legislation limiting law enforcement's use of facial recognition and biometric data for racially based cases by devising regulatory measures to gauge police control over biometric data to ensure constitutional and effective public safety practices while safeguarding personal privacy.

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[6] *Id.*

[7] Jake Laperruque, *Facial Recognition Technology: Strong Limits Are Necessary to Protect Public Safety & Civil Liberties*, POGO (Apr. 22, 2020), https://www.pogo.org/testimony/2020/04/facial-recognition-technology-strong-limits-are-necessary-to-protect-public-safety-civil-liberties/.

[8] Terry v. Ohio, 392 U.S. 1, 27 (1968) (in determining whether an officer acted with reasonable suspicion, "weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience").

[9] Henry v. United States, 361 U.S. 98, 102 (1959) ("Probable cause exists when the facts and circumstances known to the officer warrant a prudent man in believing that the offense was committed.").

[10] Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.

[11] *Id. See* MICHAEL KEARNS & AARON ROTH, THE ETHICAL ALGORITHM: THE SCIENCE OF SOCIALLY AWARE ALGORITHM DESIGN, 4 (2019) (ebook) (defining 'algorithm' as a specified series of instructions given prior to performing some task; like one to sort numbers).

This note focuses on the lack of regulation evidenced by Texas's current enactment of the Business and Commerce Code § 503.001. This statute governs the collection, possession, and transfer of Texans' biometric information in commercial entities. It fails to provide any regulatory measures for state and local government agencies such as law enforcement. Several constitutional concerns emerge from the desirable use of facial recognition technology in policing, which have been disputed among legal scholars, activists, courts, and city councils nationwide. Legal scholars advocating privacy from facial recognition often compare the adoption of this technology with George Orwell's *1984*, a dystopian novel criticizing the "mass surveillance of common activities by 'Big 'Brother."[12] Civil rights activists argue that facial recognition technology utilized by law enforcement acts as a spying tool. Civil rights advocates argue that facial recognition "in the hands of government is primed for abuse" due to its disproportionate error and misidentification rate.[13] City Councils have begun banning the use of facial recognition in local law enforcement as more research on the technology reveals racially discriminatory results.[14] Texas must ban this technology in law enforcement. It is unreliable and inaccurate. Any accuracy rate other than 100% when identifying a person for a law enforcement purpose is unacceptable. Constant surveillance and collection of this data by law enforcement is incompatible with several provisions of the United States Constitution and depletes individual liberty. Therefore, a ban of facial recognition technology in Texas state and local law enforcement agencies would eliminate any issues of police transparency and secure people's civil liberties and constitutionally given rights to protest, privacy, and due process of law.

Part II of this note provides definitions of artificial intelligence and facial recognition technology. Further, it addresses the development of facial recognition technology while defining and addressing biometric data and its role within the law enforcement and

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[12] Susan McCoy, Comment, *O' Big Brother Where Art Thou?: The Constitutional Use of Facial-Recognition Technology*, 20 J. MARSHALL J. COMPUTER & INFO. L. 471 (2002).

[13] Sasha Ingber, *Facial Recognition Software Wrongly Identifies 28 Lawmakers as Crime Suspects*, NATIONAL PUBLIC RADIO (July 26, 2018), https://www.npr.org/2018/07/26/632724239/facial-recognition-software-wrongly-identifies-28-lawmakers-as-crime-suspects.

[14] BOS., MASS., CITY OF BOS. MUN. CODE ch. XVI, § 16-62 (June 24, 2020).

big-tech communities. Part III of this note identifies the current legislative framework surrounding facial recognition technology. Specifically, Part III addresses the Facial Recognition and Biometric Technology Moratorium Act of 2020, relevant constitutional concerns, and Texas state legislation in effect today. Part IV of this note discusses the need for Texas to enact a legislative ban on facial recognition technology, as evidenced by the events following the Boston Marathon Bombing. Finally, Part V of this note proposes that the Texas Legislature must go beyond limiting law enforcement to only using facial recognition in connection to high-profile crimes. By enacting a ban on facial recognition technology in law enforcement, the Texas Legislature would drastically reduce risks of racially induced misidentifications and false arrests and promote individual liberty for all.

II. Background

A. What is Artificial Intelligence?

To understand facial recognition technology, one must understand the role of artificial intelligence. Artificial intelligence (hereinafter "A.I.") is a branch of computer science that directly provides machines with the capability to imitate intelligent human behavior.[15] A.I. functions as the brain behind the operation of facial recognition's internal software systems.[16] However, because A.I. software is a manmade tool and intentionally mimics human-like qualities, it is "only as smart as the data that is used to train it."[17]

B. What is Facial Recognition Technology?

"Facial recognition is the process of identifying or verifying the identity of a person based on specific measurements of his or her facial

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[15] *Artificial Intelligence*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/artificial%20intelligence (last updated Jan. 8, 2021).
[16] *Facial Recognition: Top 7 Trends (Tech, Vendors, Markets, Use Cases and Latest News)*, THALES, https://www.thalesgroup.com/en/markets/digital-identity-and-security/government/biometrics/facial-recognition (last updated Dec. 7, 2020).
[17] Steve Lohr, *Facial Recognition Is Accurate, if You're a White Guy*, N.Y. TIMES (Feb. 9, 2018), https://www2.cs.duke.edu/courses/spring20/compsci342/netid/readings/facialrecnytimes.pdf.

features."[18] Facial recognition "captures, analyzes, and compares patterns based on the person's facial details."[19] Similar to fingerprints, facial recognition systems will use biometrics to map face geometry detected either in a photo, video, or real-time surveillance.[20] Within just a few seconds, sensors will detect, capture, and measure facial details such as "spacing of the eyes, bridge of the nose, the contour of the lips, ears, chin, etc."[21] Each face in the system will be assigned a specific numerical code based on the facial measurements.[22] The digitally recorded code then becomes an individual representation of that person's face, also known as a faceprint.[23] A faceprint can also be understood as a "facial signature" and "can be used for security purposes because it is as individual as a fingerprint."[24]

i. Why Does Facial Recognition Technology Matter?

A variety of issues emerge from the ubiquitous use of facial recognition technology in modern-day America. In today's world, this technology blurs the line between privacy protection and police obstruction. Americans are so heavily persuaded by technology. For example, high technology corporations and manufacturers constantly develop 'safety' features, such as scanning one's face to unlock their cell phone or Amazon's Rekognition tool, allowing anyone to gain access to facial recognition software for personal use.[25] Yet, people still constantly express concerns about their privacy and do not realize all the ways that their personal information is used when they unknowingly give it out. Facial recognition tools are becoming

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[18] *Ingber*, *supra* note 17.
[19] Ingber, *supra* note 17.
[20] Steve Symanovich, *What is Facial Recognition? How Facial Recognition Works*, NORTON (Aug. 20, 2021), https://us.norton.com/internetsecurity-iot-how-facial-recognition-software-works.html.
[21] *Facial Recognition: Top 7 Trends (Tech, Vendors, Markets, Use Cases and Latest News)*, *supra* note 16.
[22] Symanovich, *supra* note 20.
[23] *Faceprint*, DICTIONARY.COM https://www.dictionary.com/browse/faceprint (last visited Oct. 8, 2021).
[24] Samuel D. Hodge, Jr., *Big Brother is Watching: Law Enforcement's Use of Digital Technology in the Twenty-First Century,* 89 U. CIN. L. REV. 30, 58 (2020).
[25] Amazon Rekognition: Automate Your Image and Video Analysis With Machine Learning, AMAZON, https://aws.amazon.com/rekognition/?blog-cards.sort-by=item.additionalFields.createdDate&blog-cards.sort-order=desc (last updated 2021).

increasingly popular with modern technology, especially in the realm of policing. Facial recognition allows law enforcement officers to do just that: capture a person's photo without any reasonable suspicion and have it analyzed for identification purposes, all in the name of public welfare. Other means of probable cause must be shown and recorded prior to relying on a facial recognition match to make an arrest. Facial recognition technology is everywhere, and its dominance "subjects people to unwanted tracking" and leaves them vulnerable to "invasive surveillance."[26] Retail stores use facial recognition technology to identify shoplifters and track shoppers.[27] Schools are beginning to install facial recognition to control entry into buildings.[28] Facial recognition provides law enforcement with access to track and identify anyone from a potential crime suspect to an average citizen despite the technology's inherent biases, fostering unreliable and inaccurate results.[29]

There are an estimated 117 million American adults in law enforcement face recognition networks.[30] "Driven by artificial intelligence, facial recognition allows officers to submit images of people's faces, taken in the field or lifted from photos or video, and instantaneously compare them to photos in government databases — mugshots, jail booking records, driver's licenses."[31] While these government databases are compounded sources of public record and freely accessible, surveilling and fortuitously collecting photos and real-time videos of citizens for personal identification raises concerns

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[26] Nathan F. Wressler, *A Federal Court Sounds the Alarm on the Privacy Harms of Face Recognition Technology*, ACLU (August 9, 2019), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/federal-court-sounds-alarm-privacy-harms-face.

[27] Annie Lin, *Facial Recognition is Tracking Customers as They Shop in Stores, Tech Company Says*, CNBC (Nov. 23, 2017), https://www.cnbc.com/2017/11/23/facial-recognition-is-tracking-customers-as-they-shop-in-stores-tech-company-says.html.

[28] Sidney Fussell, *Schools Are Spending Millions on High-Tech Surveillance of Kids*, GIZMODO (March 16, 2018), https://gizmodo.com/schools-are-spending-millions-on-high-tech-surveillance-1823811050.

[29] Wressler, *supra* note 26.

[30] Lohr, *supra* note 17.

[31] John Schuppe, *How Facial Recognition Became a Routine Policing Tool in America,* NBC NEWS (May 11, 2019), https://www.nbcnews.com/news/us-news/how-facial-recognition-became-routine-policing-tool-america-n1004251.

regarding consent and imposes on individual liberty and privacy delineated by the United States Constitution.[32] Even as misidentification rates decline and reliability and accuracy improve, our constitutionally-protected rights as Americans will eternally be compromised as this technology becomes more prevalent in the police force.

C. Development of Facial Recognition Technology

Modern technology plays an amplified role in everyday life and is ultimately unavoidable as society progresses. The development of facial recognition technology has redefined the term "convenience," especially in law enforcement. Artificial intelligence's impact on facial recognition software is seemingly unexpected. However, developments in facial recognition and use for police identification dates back to the nineteenth century. Its rapid progression has been inevitable ever since.[33]

Federal, state, and local law enforcement agencies have adopted and used biometric technologies to aid in the identification and verification of personal identities. Large bureaus were first introduced to a structured identification system when Alphonse M. Bertillon developed the Bertillon System in 1882.[34] Bertillon's creation aided in the classification of photographs based on the idea that "certain parts of the human anatomy remain unchanged during adult life" and focused primarily on "measurements of certain bony structures of the body."[35] Shortly thereafter, the Bertillon system was established in the United States by law.[36] As the system was highly dependent on measurements of human features, it was deemed deficient and no longer considered reliable in the criminal identification process.[37] It could not be used on persons under twenty-one and over sixty years old because their features and bone structure are constantly transforming.[38]

The downfall of the Bertillon system led to law enforcement's interest in fingerprinting as a more reliable means of criminal

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[32] *See* U.S. CONST. amend. I, IV, V.
[33] J. Edgar Hoover, *Criminal Identification*, 2 AM. J. POLICE SCI. 8 (1931).
[34] *Id.* at 9.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*

identification.[39] Fingerprints are permanent. Fingerprinting, among all biometric techniques, is the oldest method of human identification, but it was not until 1999 that the Automatic Fingerprinting Identification System became central to police work worldwide.[40] Fingerprinting dramatically increased the potential for successful identification of a suspect and fundamentally changed how authorities approach investigations.[41]

Shortly after that, in 1986, British professor Alec Jeffreys revolutionized the criminal identification process when he introduced DNA evidence.[42] Jeffreys used DNA recognition to assist police in solving a high-profile murder.[43] Jeffreys and the police collected saliva samples from more than 4,000 men in the area, leaving Jeffreys to analyze the DNA by comparing the collected saliva samples to the DNA found at the crime scene.[44] "Today, investigators can retrieve DNA profiles from skin cells left behind when a criminal merely touches a surface. This improved sensitivity combined with new data analysis approaches has made it possible for investigators to identify and distinguish multiple individuals from the DNA in a mixed sample."[45] While DNA evidence is considered the gold standard in forensic science, it can be costly and take laboratories days to produce results. This brings us to the development of modern facial recognition technology. Unlike DNA evidence, facial recognition allows law

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[39] *Id.* at 10 J. Edgar Hoover, *Criminal Identification*, 2 AM. J. POLICE SCI. 8, 10 (1931).

[40] Privacy Impact Assessment Integrated Automated Fingerprint Identification System National Security Enhancements, FBI, https://www.fbi.gov/services/information-management/foipa/privacy-impact-assessments/iafis (last visited Oct. 8, 2021).

[41] Facial Recognition: Top 7 Trends (Tech, Vendors, Markets, Use Cases and Latest News), THALES (last updated Dec. 7, 2020), https://www.thalesgroup.com/en/markets/digital-identity-and-security/government/biometrics/facial-recognition.

[42] Celia Henry Arnaud, *Thirty Years of DNA Forensics: How DNA Has Revolutionized Criminal Investigations*, C&EN (Sept 18, 2017), https://cen.acs.org/analytical-chemistry/Thirty-years-DNA-forensics-DNA/95/i37. *See* Ronald J. Rychlak, DNA Fingerprinting, Genetic Information, and Privacy Interests, TEX. TECH. L. REV. 245 (2015).

[43] Celia Henry Arnaud, *Thirty Years of DNA Forensics: How DNA Has Revolutionized Criminal Investigations*, C&EN (Sept 18, 2017), https://cen.acs.org/analytical-chemistry/Thirty-years-DNA-forensics-DNA/95/i37.

[44] *Id.*

[45] *Id.*

enforcement officers to submit images of people's faces, whether out of field observation or lifted from photos and videos, and instantaneously compare them to photos in government databases.[46] For the last twenty years, law enforcement agencies throughout the nation have utilized facial recognition tools to identify initial suspects or to proceed in a thorough criminal investigation.[47] Police forces have teamed up with technology companies such as NEC, Rank One Computing, and Clearview AI, which are among just a few of the most common facial recognition software systems created for both legal and commercial security purposes.[48] These facial recognition vendors have yet to submit their algorithms to a continuous quality test called Facial Recognition Vendor Test Ongoing (hereinafter "FRVT") for analysis, and "therefore, these algorithms should never be used for facial verification."[49] FRVT operates to evaluate performance levels of facial recognition technology.[50] However, these facial recognition vendors are still utilized by commercial entities and local agencies worldwide. This is problematic because if a test specifically designed to detect problems in performance still cannot test for such biases, how is this a reliable tool?

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[46]John Schuppe, *How Facial Recognition Became A Routine Policing Tool in America,* NBC NEWS (May 11, 2019), https://www.nbcnews.com/news/us-news/how-facial-recognition-became-routine-policing-tool-america-n1004251.

[47] Ian Sample, *What Is Facial Recognition- And How Sinister Is It?*, THE GUARDIAN (July 29, 2019), https://www.theguardian.com/technology/2019/jul/29/what-is-facial-recognition-and-how-sinister-is-it.

[48] Kashmir Hill, *Wrongfully Accused by an Algorithm*, THE NEW YORK TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.

[49] Brendan, *Rank One Stands Alone With Top-Tier Performance In NIST FRVT Ongoing Benchmark*, RANK ONE COMPUTING (Aug. 26, 2020), https://blog.rankone.io/2020/08/26/rank-one-stands-alone-with-top-tier-performance-in-nist-frvt-ongoing-benchmark/.

[50] Face Recognition Vendor Test (FRVT), NIST (last updated Nov. 30, 2020), https://www.nist.gov/programs-projects/face-recognition-vendor-test-frvt.

D. What is Biometric Data?

Biometry is the statistical analysis of biological observations and phenomena.[51] The term 'biometrics' is derived from the Greek words "bio" (life) and "metrics" (to measure).[52] Like fingerprints and DNA, a person's facial features are distinct biological characteristics used for identification.[53] By simply looking at another person's face with the naked eye, you can identify that person by the width of their nose, the distance between their eyes, and even by their bone structure. Through A.I., facial recognition systems generate measurements of biometric identifiers, i.e., unique physical or behavioral characteristics which verify personal identity, known as facial biometrics.[54] "Th[is] technology can be applied to everything from emotion tracking to animation, but the most controversial involves using facial features as biometric identifiers; that is, to identify individuals based on just a photo or video of their face."[55] In the State of Texas, "biometric identifiers" are defined as "a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry."[56]

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[51] *Biometry*, MERRIAM-WEBSTER DICTIONARY (last updated Jan. 8, 2021), https://www.merriam-webster.com/dictionary/biometry#:~:text=1%20%3A%20the%20statistical%20analysis%20of,corneal%20topography%20on%20the%20other.%E2%80%94.

[52] Stephen Mayhew, *History of Biometrics*, BIOMETRIC UPDATE (last updated 2021), https://www.biometricupdate.com/201802/history-of-biometrics-2.

[53] *Facial Recognition: Top 7 Trends (Tech, Vendors, Markets, Use Cases And Latest News)*, THALES (last updated Dec. 7, 2020), https://www.thalesgroup.com/en/markets/digital-identity-and-security/government/biometrics/facial-recognition.

[54] HANDBOOK OF BIOMETRICS, 1 (Anil K. Jain et al. eds., 2008).

[55] Alex Hern, *What Is Facial Recognition - And How Do Police Use It?*, THE GUARDIAN (Jan. 4, 2020), https://www.theguardian.com/technology/2020/jan/24/what-is-facial-recognition-and-how-do-police-use-it.

[56] Tex. Bus. & Com. Code Ann. § 503.001.

E. Biometric Data in Policing: How Law Enforcement Uses Facial Recognition Technology

Increasingly, biometric data is the preferred method of identification as it is faster to deploy and implement.[57] This makes face detection and the face match processes for verification and identification in policing exceptionally speedy.[58] Efficiency in policing is undoubtedly increased, providing an advantage to our local communities; however, speed does not always equate to accuracy. Such expedited processes are prone to error because they lead to rushed investigations and allow officers to freely make inaccurate assumptions based on the results, especially when the facial recognition system suggests several different matches.[59] Officers must not rely on a 'match' brought by facial recognition alone. It is not a means for positive identification.[60]

The use of biometric data in policing has stolen both local and national news spotlight. In January 2020, a Michigan police department brought forth what is now recognized as the first known wrongful arrest following an incorrect facial recognition match.[61] According to an investigation in Detroit, Michigan, state police uploaded a "probe image" from a local boutique's security footage.[62] Michigan State Police uploaded this photo to its facial recognition database using DataWorks Plus.[63] A resident of Detroit, Michigan, Robert Williams, was accused of shoplifting at a local upscale boutique called Shinola after police facial recognition software

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[57] *Biometrics: Definitions, Trends, Use Cases, Laws And Latest News*, THALES (last updated Dec. 29, 2020), https://www.thalesgroup.com/en/markets/digital-identity-and-security/government/inspired/biometrics.

[58] *Id.*

[59] Kashmir Hill, *Wrongfully Accused by an Algorithm*, THE NEW YORK TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.

[60] *Id.*

[61] Reuters, *Facial Recognition Leads to First Wrongful U.S. Arrest, Activists Say*, NBC NEWS (June 24, 2020), https://www.nbcnews.com/tech/security/facial-recognition-leads-first-wrongful-u-s-arrests-activists-say-n1231971.

[62] Kashmir Hill, *Wrongfully Accused by an Algorithm*, THE NEW YORK TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.

[63] *See Wrongfully Accused By an Algorithm*, NEW YORK TIMES (JUNE 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html (DataWorks Plus first offered mugshot management software in 2000 and added face recognition tools developed by outside vendors in 2005).

produced a potential identification match to Shinola's surveillance video.[64] Williams was arrested at his home in Detroit in front of his wife and two young children.[65] State police pursued his arrest after a "still image from a surveillance video, show[ed] a heavy-set man, dressed in black, and wearing a red St. Louis Cardinals cap, standing in front of a watch display."[66] The photo was blurry.[67] The police were presented with several potential matches with confidence scores, which tell officers the likelihood this is, in fact, the accused.[68] The facial recognition software presented the officers involved in Williams' arrest with several potential matches based on the blurry surveillance footage.[69] With those possible matches, they literally guessed." After [Mr. Williams] held the surveillance video still next to his face, the two detectives leaned back in their chairs and looked at one another."[70] One detective, humiliated, said to the other: "I guess the computer got it wrong."[71]

DataWorks Plus software is ubiquitous among police agencies. DataWorks Plus is an aggregate of tools from outside software companies like NEC and Rank One Computing.[72] "When one of the subcontractors develops an algorithm for recognizing faces, DataWorks Plus attempts to judge its effectiveness by running searches using low-quality images of individuals who are knowingly present in the system."[73] In 2019, algorithms from both NEC and Rank One Computing were included in a federal study of over one hundred facial recognition systems that found they were biased and falsely identified African American and Asian faces anywhere between ten

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[64] Kashmir Hill, *Wrongfully Accused by an Algorithm*, THE NEW YORK TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] Kashmir Hill, *Wrongfully Accused by an Algorithm*, THE NEW YORK TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.
[72] *Id.*
[73] *Id.*

and one hundred times more than Caucasian faces.[74] Nicole Kirkwood, a Detroit police spokeswoman, reported that the police department has since updated its facial recognition policy as of July 2019 so that it is used to investigate only violent crimes.[75] However, states still lack laws or regulations governing what databases can be accessed, as well as "who is included in those databases, the circumstances in which police can scan people's photos, how accurate the systems are, and how much the government should share with the public about its use of the technology."[76] Thus, facial recognition should be banned from law enforcement.

F. Amazon, IBM, and Microsoft

Some of the world's most renowned leaders in advanced technology have developed remarkable tools and resources that have revolutionized the way people think, interact, and acquire information. Top technology manufacturers like Amazon, IBM , and Microsoft are refusing to sell facial recognition equipment to law enforcement, understanding there is a likelihood that their technology may not work with 100% accuracy and could be used improperly amongst the police forces.[77] While "outcry from privacy and civil rights groups has not stopped law enforcement from pursuing the technology," manufacturers of this technology empathize with their consumers, enabling protests against law enforcement's use of facial recognition against ordinary citizens.[78]

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[74] *Id. See generally* Dorothy Roberts Collateral Consequences, Genetic Surveillance and The New Bio Politics of Race, HOWARD L. J., 567 (2011) ("Blacks [] have greater odds of being genetically profiled largely because of discriminatory police practices.")

[75] *Id.*

[76] John Schuppe, *How Facial Recognition Became A Routine Policing Tool in America,* NBC NEWS (May 11, 2019), https://www.nbcnews.com/news/us-news/how-facial-recognition-became-routine-policing-tool-america-n1004251.

[77] Jay Greene, *Microsoft Won't Sell Police Its Facial-Recognition Technology, Following Similar Moves By Amazon and IBM*, THE WASHINGTON POST (June 11, 2020), https://www.washingtonpost.com/technology/2020/06/11/microsoft-facial-recognition/.

[78] Sasha Ingber, *Facial Recognition Software Wrongly Identifies 28 Lawmakers as Crime Suspects*, NATIONAL PUBLIC RADIO (July 26, 2018), https://www.npr.org/2018/07/26/632724239/facial-recognition-software-wrongly-identifies-28-lawmakers-as-crime-suspects.

In November 2016, Amazon introduced its facial recognition software, Rekognition.[79] Rekognition was created as an easy-to-use tool that provides "extremely accurate facial analysis through photos and videos."[80] Initially, Amazon designed its Rekognition software as an integral component of its 'Prime Photos' application to detect persons, objects, and scenes from images and provide a tracking option for video content uploaded through Amazon.[81] However, Amazon then began to subtly market its Rekognition software for government surveillance.[82] According to Amazon in 2018, "Rekognition provides highly accurate facial analysis and facial search capabilities that you can use to detect, analyze, and compare faces for a wide variety of user verification, *people counting,* and *public safety use* cases."[83] Rekognition can "monitor 'all faces in group photos, crowded events, and public places such as airports,' at a time when Americans are joining public protests at unprecedented levels."[84]

In 2018, the American Civil Liberties Union (ACLU) tested the accuracy of Amazon's Rekognition software by using it on all

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[79] Amazon Rekognition: Automate Your Image And Video Analysis With Machine Learning, AMAZON (last updated 2021), https://aws.amazon.com/rekognition/?blog-cards.sort-by=item.additionalFields.createdDate&blog-cards.sort-order=desc.

[80] Sasha Ingber, *Facial Recognition Software Wrongly Identifies 28 Lawmakers as Crime Suspects*, NATIONAL PUBLIC RADIO (July 26, 2018), https://www.npr.org/2018/07/26/632724239/facial-recognition-software-wrongly-identifies-28-lawmakers-as-crime-suspects.

[81] *Amazon Rekognition FAQs*, AMAZON (2021), https://aws.amazon.com/rekognition/faqs/.

[82] Matt Cagle & Nicole Ozer, *Amazon Teams Up With Government to Deploy Dangerous New Facial Recognition Technology*, ACLU (May 22, 2019), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazon-teams-government-deploy-dangerous-new.

[83] *Amazon Rekognition: Automate your Image And Video Analysis With Machine Learning*, AMAZON (last updated 2021), https://aws.amazon.com/rekognition/?blog-cards.sort-by=item.additionalFields.createdDate&blog-cards.sort-order=desc.Amazon Rekognition: Automate your Image And Video Analysis With Machine Learning, AMAZON (last updated 2021), https://aws.amazon.com/rekognition/?blog-cards.sort-by=item.additionalFields.createdDate&blog-cards.sort-order=desc.

[84] Cagle, *supra* note 82. Matt Cagle & Nicole Ozer, *Amazon Teams Up With Government to Deploy Dangerous New Facial Recognition Technology*, ACLU (May 22, 2019), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazon-teams-government-deploy-dangerous-new.

members of U.S. Congress.'[85] The ACLU used the software to scan photos of U.S. Congress members into Rekognition's database of thousands of public arrest photos.[86]. This trial revealed erratic results when Amazon misidentified twenty-eight members of U.S. Congress as people who had been previously arrested for crimes.[87] This contradicted Amazon's confident marketing of an accurate facial recognition tool. Especially alarming in the study was that nearly 40 percent of these mismatches were U.S. Congress members of color, who made up only 20 percent of U.S. Congress at the time. One member falsely cited as a criminal suspect was a prominent civil rights leader and African American, Rep. John Lewis, D-Ga.[88] Lewis was among one of the "Big Six" leaders [89] who participated and spoke at the March on Washington in 1963, advocating for African Americans.[90] Yet, Rekognition incorrectly identified him as a criminal.[91] The ACLU joined forces with a coalition of civil rights organizations and demanded that Amazon stop allowing governments to use Rekognition because of the software's high rate of misidentifying people of color.[92]

Following the killing of George Floyd,[93] by Minneapolis police in May 2020 and the resulting nationwide protests for police reform, Amazon initiated a moratorium the next month on the use of its

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[85] Ingber, *supra* note 80.
[86] Cagle, *supra* note 82.
[87] *Id.*
[88] *Id.*, Jacob Snow, *Amazon's Face Recognition Falsely Matched 28 Members of Congress With Mugshots*, ACLU (July 26, 2018), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28.
[89] *Congressman John Lewis*, ACLU (2021), https://www.aclu.org/congressman-john-lewis (Big Six leaders included John Lewis, Whitney Young, A. Phillip Randolph, Martin Luther King Jr., James Farmer and Roy Wilkins).
[90] *Id.*
[91] Jacob Snow, *Amazon's Face Recognition Falsely Matched 28 Members of Congress With Mugshots*, ACLU (July 26, 2018), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28.
[92] Jay Greene, *Microsoft Won't Sell Police Its Facial-Recognition Technology, Following Similar Moves by Amazon and IBM*, WASH. POST (June 11, 2020) https://www.washingtonpost.com/technology/2020/06/11/microsoft-facial-recognition/.
[93] *Id.*

Rekognition technology by police.[94] Amazon released a statement "advocat[ing] that governments should put in place stronger regulations to govern the ethical use of facial recognition technology."[95] Amazon believed it was necessary to give time for federal laws to be initiated, and protect human rights and civil liberties in this domain.[96] IBM and Microsoft quickly followed suit that month.[97] IBM said it would no longer offer facial recognition technology and would stop its related research and development activities.[98] Similarly, Microsoft removed its facial recognition solutions from law enforcement agencies in the United States.[99] "When even the makers of face recognition refuse to sell this surveillance technology because it is so dangerous, lawmakers can no longer deny the threats to our rights and liberties," the ACLU said in a June 2020 statement.[100]

III. Legislation Framing Facial Recognition Technology

Part III of this Note identifies and compares the different levels of facial recognition and biometric technology regulations. First, this section discusses an act proposed to U.S. Congress limiting federal government use of biometric and facial recognition surveillance. This section also deconstructs and analyzes the several Constitutional provisions that conflict with the implementation of facial recognition technology in law enforcement. Most importantly, this section examines the Texas Business and Commerce Code § 503.001 on biometric data collection in commerce and weighs its language and purpose against the First, Fourth, Fifth, and Tenth Amendments.

A. Facial Recognition and Biometric Technology Moratorium Act of 2020

On June 25, 2020, Senator Ed Markey, D-MA, and Senator Jeff Merkley, D-OR, introduced the Facial Recognition and Biometric

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[94] *We Are Implementing A One Year Moratorium On Police Use Of Rekognition*, AMAZON (June 10, 2020), https://www.aboutamazon.com/news/policy-news-views/we-are-implementing-a-one-year-moratorium-on-police-use-of-rekognition.
[95] *Id.*
[96] Green, *supra* note 92.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*

Technology Moratorium Act of 2020 to the United States Senate.[101] This proposed act limits federal use of biometric surveillance systems, such as facial recognition systems, by federal government entities.[102] This proposed act states that it "shall be unlawful for any Federal agency or Federal official, in an official capacity, to acquire, possess, access, or use in the United States: (1) any biometric surveillance system; or (2) information derived from a biometric surveillance system operated by another entity."[103] The law would not apply to "entities permitted to use the biometric surveillance system, the specific type of biometric authorized, the purposes for such use, and any prohibited uses."[104] Congress, in its official capacity, has the power to enact this law for the purposes of prohibiting federal agencies and officials from acquiring, possessing, or using facial recognition systems or the information obtained by such for surveillance purposes.[105] Until Congress passes an act specifically authorizing such use, the Tenth Amendment of the United States Constitution reserves the power to the states to regulate the use of biometric and facial recognition surveillance systems.[106] Thus, the people of Texas rely on state legislators to stop the harmful practice of facial recognition technology in law enforcement and act to promote our civil liberties – not demote them.

B. Constitutional Concerns

The implementation of facial recognition technology in law enforcement poses a grave threat to constitutionally protected civil rights enumerated by the First, Fourth, and Fifth Amendments, including the right to protest, the right to privacy, freedom against unreasonable search and seizure, and the right to due process of law.

i. First Amendment

Permitting facial recognition devices in law enforcement conflicts substantially with activities that are protected by the First

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[101] Facial Recognition and Biometric Technology Moratorium Act of 2020, S. 4084, 116th Cong. (2020).
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] U.S. CONST. amend. X.

Amendment of the Constitution. The First Amendment protects our freedom of speech and our right to peacefully assemble.[107]

Unrestricted use of facial recognition technology is incompatible with the idea of a 'free society.' From churches embracing facial recognition technology for "accurately track[ing] attendance for various events like Bible studies, worship services and Sunday school," to being recorded and tracked by law enforcement while exercising your right to peacefully protest: "the use of [facial recognition] 'threatens citizens First Amendment rights to free speech and freedom of assembly. Because the right of anonymity is the backbone of this amendment, facial recognition technology threatens this fundamental civil liberty.'"[108] Citizens will be afraid to exercise their right to join peaceful protests because of the possibility that law enforcement may target them for simply attending the protest.[109]

ii. Fourth Amendment - Do We Have a Reasonable Expectation of Privacy in Public Places?

In the seminal Fourth Amendment case decided in 2012, *United States v. Jones*, the United States Supreme Court held that installing a GPS tracking device on a vehicle to track the vehicle's movements for an extended period of time constituted a search under the Fourth Amendment.[110] The Fourth Amendment establishes the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and requires all warrants to be supported by probable cause.[111] While GPS is not a facial recognition tool, its utilization is highly comparable to facial recognition technologies in law enforcement. In a concurring opinion, Justice Samuel Alito noted that "society's expectation has been that law enforcement agents and others would not – and indeed, in the

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[107] U.S. CONST. amend I.

[108] Sarah Pulliam Bailey, *Skipping Church? Facial Recognition Software Could Be Tracking You*, WASH. POST, (July 24, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/07/24/skipping-church-facial-recognition-software-could-be-tracking-you/; RODERICK S. GRAHAM & 'SHAWN K. SMITH, CYBERCRIME AND DIGITAL DEVIANCE (2020).

[109] RODERICK S. GRAHAM & 'SHAWN K. SMITH, CYBERCRIME AND DIGITAL DEVIANCE (2020).

[110] United States v. Jones, 565 U.S. 400 (2012).

[111] U.S. CONST. amend. IV. *See generally* Mark Elmore, Big Brother Where Art Thou, Electronic Surveillance and The Internet: Carving Away Fourth Amendment Privacy Protections, TEX. TECH. L. REV. 1053 (2001).

main, simply could not –secretly monitor and catalogue every single movement of an individual" over an extensive period of time.[112] This demonstrates law enforcement's power to covertly use such invasive tools against people when they least expect it.

iii. Fifth Amendment

The Fifth Amendment states that "No person shall be deprived of life, liberty, or property, without due process of law."[113] Robert Williams' case is a perfect example. He was falsely identified, falsely accused, and falsely arrested because law enforcement facial recognition "got it wrong." [114] Police picked his image out of several potential matches based on his skin color. He had an alibi, if only Detroit Police asked for one.[115] Mr. Williams was on his way home from work when he arrived only to have the police accuse him of shoplifting, solely based on a computer's recommendation.[116] Increased use of facial recognition creates a concern for Black Americans as they are more likely than White Americans to be misidentified by facial recognition.[117]

iv. Tenth Amendment

It is within Congress's power to enact a federal law governing facial recognition technology.[118] The Tenth Amendment states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[119] There are no federal laws specifically governing the use of facial recognition technology. Additionally, there are no current federal laws governing state regulation of facial recognition technology. Therefore, the Tenth Amendment of the U.S. Constitution

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[112] *Jones*, 565 U.S. at 430.
[113] U.S. CONST. amend. V.
[114] Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y.TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.
[115] *Id.*
[116] *Id.*
[117] Drew Harwell, *Federal Study Confirms Racial Bias of Many Facial-Recognition Systems, Casts Doubt on Their Expanding* Use, WASH. POST (Dec. 19, 2019), https://www.washingtonpost.com/technology/2019/12/19/federal-study-confirms-racial-bias-many-facial-recognition-systems-casts-doubt-their-expanding-use/.
[118] U.S. CONST. amend. X.
[119] *Id.*

reserves power to each individual state to regulate law enforcement use of biometric/facial recognition surveillance systems.

C. Current Texas Legislation

In 2009, Texas passed the Texas Business & Commerce Code that restricts how commercial entities can collect, store, trade-in, and use biometric data.[120] This statute requires any person collecting biometric identifiers for a commercial purpose to first inform the individual and "receive the individual's consent before capturing their biometric information."[121] Notwithstanding consent prior to capture, any possessor of another's biometric information captured for a commercial purpose is prohibited from initiating any sale or disclosure of biometric identifiers for identification purposes unless it is in the event of (1) disappearance or death, (2) if the disclosure is required by federal or state statute, or (3) "disclosure is by or to law enforcement for a law enforcement purpose in response to a warrant."[122] The Tex. Bus. & Com. Code Ann. § 503.001 provides:

> (b) A person may not capture a biometric identifier of an individual for a commercial purpose unless the person: (1) informs the individual before capturing the biometric identifier; and (2) receives the individual's consent to capture the biometric identifier. (c) A person who possesses a biometric identifier of an individual that is captured for a commercial purpose may not sell, lease, or otherwise disclose the biometric identifier to another person unless:(A) the individual consents to the disclosure for identification purposes in the event of the individual's disappearance or death; (B) the disclosure completes a financial transaction that the individual requested or authorized; (C) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552, Government Code; or (D) the disclosure is made by or to a law enforcement

[120] Tex. Bus. & Com. Code Ann. § 503.001.
[121] Tex. Bus. & Com. Code Ann. § 503.001(b)(1) to (2).
[122] Tex. Bus. & Com. Code Ann. § 503.001(c)(1)(A), (C) to (D).

> agency for a law enforcement purpose in response to a warrant. [123]

Here, the language of the statute revolves around *capturing* the data for *commercial purposes,* not capturing it for law enforcement purposes. This is an issue because no other regulation exists for law enforcement's use and capture of biometric data. However, this section of the statute does provide that despite capturing data with consent for commercial purposes, it can still be transferred to law enforcement officials without the consent of the individual for "a law enforcement purpose." There is no language requiring a warrant or showing of probable cause to possess this data. In turn, law enforcement may not feel compelled to disclose to the defendant or judiciary despite an obligation to disclose under the Due Process Clause of the Fifth Amendment.

IV. Facial Recognition Bans: Why We Need One

While often used to combat local crime, facial recognition technology is also a highly acquired instrument used by law enforcement in the relentless fight for national security. In the last decade, the Department of Homeland Security (hereinafter "DHS") funded "hundreds of millions of dollars in grants to state and local governments" to create facial recognition databases in the name of anti-terrorism.[124] DHS has compiled photos of driver's licenses, among other forms of identification, to form "a massive library of residents."[125]

On April 15, 2013, during the annual Boston Marathon, two brothers carried out a lethal attack at the Marathon's finish line.[126] Dzhokhar Tsarnaev and his older brother, Tamerlan, created widespread terror after killing three people and injuring more than 260

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[123] Tex. Bus. & Com. Code Ann. § 503.001.
[124] Sean Gallagher, *Why Facial Recognition Tech Failed In The Boston Bombing Manhunt*, ARS TECHNICA (May 7, 2013), https://arstechnica.com/information-technology/2013/05/why-facial-recognition-tech-failed-in-the-boston-bombing-manhunt/.
[125] *Id.*
[126] *Id.*

runners and spectators at the finish line.[127] Boston and the surrounding communities were in a state of panic for the next five days while the bombers remained at large.[128] Three days after the two homemade bombs detonated, the brothers attempted to flee the city.[129] The Boston Police Department, with aid from state and federal agencies (including the FBI and ATF), strove to establish the potential suspects' identities while vigorously searching for them.[130]

Facial recognition technology had extreme potential to determine the suspects' identities. Lead FBI investigators and Boston Police depended on facial recognition at such a desperate time. However, facial recognition failed for both the FBI and local Boston police departments in their unsuccessful attempt to establish the attackers' identities. According to then Boston Police Commissioner Ed Davis, the facial recognition software which officers utilized "did not identify the men in the ballcaps."[131] He additionally recounted that "the technology came up empty even though both Tsarnaevs' images exist in official databases: Dzhokhar had a Massachusetts driver's license; the brothers had legally immigrated, and Tamerlan had been the subject of some FBI investigation."[132] The Tsarnaev brothers were also present in the DHS-funded database, and yet, "despite having an array of photos of the suspects, the system could [not] come up with a match before the Tsarnaev brothers had been identified by other means."[133] The FBI and Boston Police were at a standstill with facial recognition. The agencies made no progress in identifying the bombers

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[127] Nate Raymond, *Boston Marathon Bomber Dzhokhar Tsarnaev's Death Sentence Overturned by Appeals Court*, REUTERS (July 31, 2020), https://www.reuters.com/article/uk-boston-bombings-appeal-idUKKCN24W2Z2?edition-redirect=uk.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] David Montgomery, Sari Horwitz & Marc Fisher, *Police, Citizens And Technology Factor Into Boston Bombing Probe*, THE WASHINGTON POST (April 20 , 2013), https://www.washingtonpost.com/world/national-security/inside-the-investigation-of-the-boston-marathon-bombing/2013/04/20/19d8c322-a8ff-11e2-b029-8fb7e977ef71_story.html.

[132] *Id.*

[133] Sean Gallagher, *Why Facial Recognition Tech Failed In The Boston Bombing Manhunt*, ARS TECHNICA (May 7, 2013), https://arstechnica.com/information-technology/2013/05/why-facial-recognition-tech-failed-in-the-boston-bombing-manhunt/.

until they finally surrendered surveillance footage and photos to the public. The public, in unrelenting cooperation, anonymous callers to the FBI tip line, and eyewitnesses all provided consistent information, which ultimately gave authorities evidence to identify Dzhokhar and Tamerlan Tsarnaev as the lead suspects.[134] This opened Boston's eyes to facial recognition technology's propensity to be unreliable, and instead, they relied on eyewitness descriptions such as the following:

> In the intensive-care ward, Bauman, who had been near the finish line to see his girlfriend complete Monday's race, wrote words that would help lead to quick resolution of the bombing that killed three and injured 176 others: 'Bag. Saw the guy, looked right at me.' FBI agents quickly came to Bauman's bedside. A man in sunglasses and black baseball cap had walked right up to him, placed a black backpack on the ground, and stepped away, Bauman remembered. His tip became a critical lead, according to law enforcement officials. [135]

What is the point, then? Why is the federal government funding hundreds of millions of dollars in grants to back facial recognition technology in state and local governments when it cannot successfully produce a match of two terrorists that were already in the database?

On June 24, 2020, seven years after the Boston Marathon Bombing and in the wake of Robert Williams' misidentification and false arrest, Boston City Council members unanimously voted to ban facial recognition technology in police departments because it "puts Bostonians at risk for misidentification."[136] The Boston City Council's ordinance bans the use of facial surveillance technology by the city of Boston or any official and prohibits entering into agreements to obtain

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[134] David Montgomery, Sari Horwitz & Marc Fisher, *Police, Citizens And Technology Factor Into Boston Bombing Probe*, THE WASHINGTON POST (April 20 , 2013), https://www.washingtonpost.com/world/national-security/inside-the-investigation-of-the-boston-marathon-bombing/2013/04/20/19d8c322-a8ff-11e2-b029-8fb7e977ef71_story.html.

[135] *Id.*

[136] Sean Philip Cotter, *Boston City Council Votes To Ban Facial-Recognition Technology*, BOSTON HERALD (June 24, 2020), (https://www.bostonherald.com/2020/06/24/boston-city-council-votes-to-ban-facial-recognition-technology/.

facial surveillance from third parties.[137] The ordinance states that the Boston Police Department does not use facial recognition technology because it is unreliable and notes its inaccuracies and discriminatory tendencies.[138] Boston is the second-largest city to vote for a ban on facial recognition technology in policing, after San Francisco.[139]

Facial recognition technology has the strong potential to be immensely powerful. It also creates an unprecedented potential for surveillance. Even if the technology vastly improved in reliability, with higher accuracy to identify criminals, Constitutional rights remain at stake. "Surveilling the population at large [is] not [] the way we want to go in a free society."[140] Imagine your own photo captured and collected during a Constitutionally protected peaceful protest, in a large crowd, or caught by street surveillance while driving in your car. Anonymity plays a significant part in our First Amendment rights to free speech, assembly, and association.[141] "Facial recognition is at its core a tool for de-anonymization — when used on protests it risks chilling our Constitutionally protected right to engage precisely in that activity."[142]

Therefore, despite massive improvements in reliability and accuracy in years to come, Texas must stop overlooking the detrimental misuse of facial recognition technology in law enforcement.

V. Proposed Texas Legislation

The state of Texas must ban facial recognition technology in local and state policing. Texas legislation banning the use and sale of facial recognition software and tools in law enforcement would

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[137] Boston, Mass., Ordinance Banning Facial Recognition Tech. in Boston (June 24, 2020).
[138] Boston, Mass., Ordinance Banning Facial Recognition Tech. in Boston (June 24, 2020).
[139] Sean Philip Cotter, *Boston City Council votes to ban facial-recognition technology*, BOSTON HERALD (June 24, 2020), (https://www.bostonherald.com/2020/06/24/boston-city-council-votes-to-ban-facial-recognition-technology/.
[140] *Id.*
[141] U.S. CONST. amend I.
[142] Alex Odor-Lee, *Privacy expert Clare Garvie Explains Why Your Face Is Already In A Criminal Lineup*, DOCUMENT JOURNAL (Oct. 12, 2020), https://www.documentjournal.com/2020/10/privacy-expert-clare-garvie-explains-why-your-face-is-already-in-a-criminal-lineup/.

promote community welfare by drastically reducing the risk of racially influenced misidentifications while complying with our Constitutional rights to individual liberty and privacy.[143] It will also protect government interests against enraged civil rights activists because our individual liberty and privacy are instilled in us as Americans. We should not have to beg the government not to breach our Constitutionally enumerated rights.

Facial recognition has great potential to keep us safe against crime. Though, the prevalence of recognition bias (relating to the idea that people of different races are less able to recognize and distinguish between people of a different race than to recognize and distinguish between people of their own race) in facial recognition technology has empirical societal costs.[144] Signified by Detroit Police's misidentification of Robert Williams, continued use of facial recognition in policing will prospectively intercept our goal to promote racial equality as facial features are ostensibly more common among one race. Facial recognition technology poses a serious threat to our individual liberty and also poses grave danger to Black Americans and other minority populations nationwide. Using this technology in high-profile arrests instead of frequent misdemeanors (as seen by Michigan legislators) cannot be a feasible solution, as demonstrated by the Boston Marathon case. That is why Texas must enact legislation banning facial recognition tools in state and local police agencies. No matter how frequent the necessity, as an instrument of surveillance, identification increases the government's power to control individuals' behavior. The sensation of constantly feeling watched by the government will undeniably cause strains on public trust, security, and confidence in the community, while public figures dedicated to the mission of protecting and serving that same community rob citizens of individual liberty.

As of September 24, 2020, there is no developed federal framework regulating facial recognition technology.[145] There are several relevant federal statutes addressing privacy or collection of facial or other biometric data. At the state level, most regulations deal

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[143] *See* U.S. CONST. amend I, IV, V.
[144] *See* Kelsey Y. Santamaria, Facial Recognition Technology and Law Enforcement: Select Constitutional Considerations, Congressional Research Service (Sept. 24, 2020), https://crsreports.congress.gov/product/pdf/R/R46541.
[145] *Id.*

in the collection and storage of biometric data in private sectors and commercial entities, though many regulations involving law enforcement use vary between individual states and localities.[146] For example, cities including San Francisco, California, and Somerville, Massachusetts, have completely banned the use of facial recognition technology by city agencies, including in police departments.[147] Whereas, in Detroit, Michigan, police are limited to only using facial recognition to investigate violent crimes, including murder, rape, assault, and battery.[148] To date, only thirty states nationwide have pending legislation for purposes of regulating, limiting, or banning facial recognition in law enforcement.[149] Texas is not one of those states. This abuse of facial recognition technology is a growing concern across the United States. Texas desperately needs to act.

The United States Constitution provides "baseline parameters" governing law enforcement use of facial recognition technology. Equal protection concerns under the Fifth and Fourteenth Amendments are implicated:

> While [facial recognition technology] has the potential to reduce the likelihood that human error leads to mistaken arrest, [] algorithmic biases or other factors may lead to the erroneous matching of images of persons belonging to certain racial and ethnic groups. This misidentification [] may lead law enforcement to wrongfully target those persons for investigation or arrest. [150]

This framework does not automatically translate to automated facial recognition algorithms that make independent determinations without

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[146] *Id.*

[147] *State Facial Recognition Policy*, Electronic Privacy Information Center (last updated 2021), https://epic.org/state-policy/facialrecognition/.

[148] Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y.TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.

[149] *State Facial Recognition Policy*, Electronic Privacy Information Center (last updated 2021), https://epic.org/state-policy/facialrecognition/.

[150] Kelsey Y. Santamaria, Facial Recognition Technology and Law Enforcement: Select Constitutional Considerations, Congressional Research Service (Sept. 24, 2020), https://crsreports.congress.gov/product/pdf/R/R46541.

close human involvement.[151] This makes citizens vulnerable to the capture of data by law enforcement without consent. To date, Texas only has a law restricting how commercial entities can collect, store, trade-in, and use biometric data.[152] It does not currently govern law enforcement's use of facial recognition. Rather, the transfer of another person's biometric information for a law enforcement purpose is among just a few of the exceptions.[153] Specifically, this exception allows disclosure of a person's biometric information "by or to a law enforcement agency for a law enforcement purpose in response to a warrant."[154] Texas must prohibit state agencies and law enforcement from collecting or using biometric identifiers, specifically facial recognition, as facial recognition technology allows law enforcement officers to capture a person's photo without any reasonable suspicion or probable cause, and have it analyzed for identification purposes all in the name of public welfare. This contravenes the constitutional provision specifically requiring a warrant supported by probable cause without first providing notice and obtaining an individual's consent.

Facial recognition matches should not be relied upon as a lone source for probable cause because of the growing discrepancies in the technology. Texas must mandate by law that definitive means of probable cause must be shown and recorded prior to relying on *any* artificially intelligent tool to make an arrest since these kinds of tools make people susceptible to intrusive agency practices. The United States Constitution's Fourth Amendment requires all warrants to be supported by a showing of probable cause.[155] In 2018, the Supreme Court indicated in *Carpenter v. United States* that Fourth Amendment violations are triggered due to elongated surveillance into a citizen's public activities due to the use of advanced technologies where such surveillance becomes so pervasive as to "provide[] an intimate window into a person's life."[156] Fourth Amendment implications additionally arise where facial recognition leads to erroneous arrests of

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[151] *Id.*
[152] Tex. Bus. & Com. Code Ann. § 503.001.
[153] Tex. Bus. & Com. Code Ann. § 503.001(c)(1)(A), (C) to (D).
[154] *Id.*
[155] U.S. CONST. amend. IV.
[156] *Carpenter v. United States*, No. 16-40, slip op. (F.3d June 22, 2018).

misidentified persons.[157] This begs the question: was there any probable cause? Or is law enforcement becoming overly dependent on artificial intelligence so much as to abandon their duty to abide by our supreme law?

VI. Conclusion

Technology continues to develop and improve at an incomprehensible speed. Implementing a ban on facial recognition technology is necessary until technology manufacturers can fulfill their promises of 100% accuracy and reliability rates. Without such a ban, ignorance of facial recognition's impact when used against its own citizens will continue to pose significant dangers against non-white, minority communities. Even as facial recognition technology inevitably improves in accuracy and reliability, our fundamental right to liberty is gone. So long as facial recognition technology envelops law enforcement strategy, "Big Brother is watching you."[158]

[157] Kelsey Y. Santamaria, Facial Recognition Technology and Law Enforcement: Select Constitutional Considerations, Congressional Research Service (Sept. 24, 2020), https://crsreports.congress.gov/product/pdf/R/R46541.
[158] GEORGE ORWELL, 1984 3 (Oberon Books Ltd. 1949).

GET OUT OF JAIL FREE CARD: DOCTRINE OF QUALIFIED IMMUNITY

Sydney Merrell

ABSTRACT

> If I right now, decided that I wanted to play Monopoly with you, and for 400 rounds of playing Monopoly, I didn't allow you to have any money, I didn't allow you to have anything on the board, I didn't allow for you to have anything, and then, we played another 50 rounds of Monopoly, and everything that you gained, and you earned, while you were playing that game of Monopoly, was taken from you. That was Tulsa, that was Rosewood, those are places where we built Black economic wealth, where we were self-sufficient, where we owned our stores, where we owned our property. And they burned them to the ground.[1]

The above quote is from Kimberly Jones, who created a video that went viral for explaining how centuries of economic hardship have impacted Black Americans. These words were a reaction to the Minneapolis police officer who was filmed kneeling on George Floyd's neck for nine minutes while he called out that he could not breathe. Although it may appear that those who take a life should be prosecuted, that is rarely the case for those who wear a police badge. There have been countless deaths by police officers, from Breonna Taylor, George Floyd, Eric Garner, and Philando Castile, who were sworn in to protect and serve.[2] Police officers who brutalize or even kill others while wearing a badge are seldomly found guilty during

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[1] Debarati Sanyal, *The Social Contract and the Games of Monopoly: Listening to Kimberly Jones on Black Lives,* CRITICAL TIMES (June 29, 2020), https://ctjournal.org/2020/06/29/the-social-contract-and-the-game-of-monopoly-listening-to-kimberly-jones-on-black-lives/.

[2] KEITH DOBBINS, DO ALL LIVES REALLY MATTER, 3 (2020).

many of their trials.[3] The estimated number of Americans killed by the police is close to 1,000 people per year.[4] We also cannot forget that Black and Brown Americans are killed by police officers at a much higher rate than white Americans.[5]

Police officers do not face justice for several reasons, such as powerful police unions and the blue wall of silence. However, a significant reason is that the Supreme Court has provided officers a nearly limitless immunity. A police badge has become a "get out of jail free card" for far too long. The Doctrine of Qualified Immunity should be reformed for police officers to be held accountable for their wrongdoings. In the book Six Amendment by John Paul Stevens, he urges that the Constitution be amended for it not to "be construed to provide any state, state agency or state officer with an immunity from liability for violating any act of Congress, or any provision of the Constitution."[6] Yet, the way qualified immunity is applied for police officers today does just that.

This paper will address whether qualified immunity should be reformed for police officers when some have brutalized or killed innocent civilians and faced little to no consequences because of qualified immunity. Part two of this paper will begin with the background of the doctrine of qualified immunity and its origination from the United States Supreme Court's decision in *Pierson v. Ray*. The second part of the background will discuss the debate over qualified immunity. Lastly, the third part of the background will discuss new considerations for qualified immunity. Part three of the paper will analyze the negative impact the doctrine has on police officers, why it should be reformed or abolished, and alternatives to the doctrine for police officers. Part four will conclude by answering the issue with recommendations for replacing the doctrine of qualified immunity.

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[3] *Id*.

[4] THE WASHINGTON POST, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (last visited Sep. 9, 2020).

[5] *Id.*

[6] JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 106 (2014).

BACKGROUND

A. History of the Doctrine of Qualified Immunity

After the Civil War, Congress enacted the Civil Rights Act (Title 18 U.S. Code §242 [1866]).[7] The Civil Rights Act was enacted to end the lawless activities of the Ku Klux Klan. The Act offers federal criminal penalties for local and state officials who violate the guaranteed rights of citizens.[8] Later, in 1871, Title 42 United States Code § 1983 (§1983) was passed by Congress.[9] Section 1983 provides a tool for citizens to sue for violations of constitutional rights and added civil remedies to criminal penalties enacted in 1866.[10]

Before the reconstruction period, there were only a few constitutional provisions that gave protection against actions by state and federal governments.[11] State courts and common law were the only protections available for citizens' lives, liberty, and property.[12] However, the end of the civil war changed this.[13] Congress enacted three constitutional amendments between 1866 and 1870: The Thirteenth Amendment, the Fourteenth Amendment, and the Fifteenth Amendment.[14] Section 1983 was enacted towards the end when Congress was moving quickly to pass and enforce laws that protected the constitutional rights of citizens and provide remedies for violations of those rights.[15] Before § 1983, the only way of redressing a violation of a constitutional right was through common law, and those actions could only be heard in state court.[16] Section 1983 permitted these cases to be heard in federal court.[17]

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[7] DARRELL L. ROSS, CIVIL LIABILITY IN CRIMINAL JUSTICE, 76 (7th ed. 2018).
[8] *Id*.
[9] *Id*.
[10] *Id.*
[11] *Id.*
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] Ross, *supra* note 7, at 77.
[16] *Id*.
[17] *Id*.

B. What is the Doctrine of Qualified Immunity?

The Supreme Court has scolded lower courts for its application of qualified immunity that is more favorable to plaintiffs and therefore ignores the "importance of qualified immunity 'to society as a whole.'"[18] After observation of the Supreme Court decisions regarding qualified immunity, Noah Feldman stated that the Supreme Court has sent a clear message to the lower courts: "The Supreme Court wants fewer lawsuits against police to go forward." [19] The assumption that qualified immunity protects government officials establishes how little we know about the role qualified immunity plays in the litigation of constitutional claims.[20]

The Doctrine of Qualified Immunity grants government officials immunity from civil suits unless the plaintiff can establish statutory or constitutional rights of which a reasonable person would have known.[21] It does not protect the government itself; but rather applies only to government officials in civil litigation. Qualified immunity is intended to protect officials who make reasonable but mistaken judgments regarding open legal questions. It is a form of sovereign immunity but not absolute immunity.[22] Qualified immunity applies to "all [officials] but the plainly incompetent or those who knowingly violate the law."[23] The Court's reasoning for conferring qualified immunity for police officers was to lessen the tension between a police officer's duties and their obligation to comply with the Constitution.

Under § 1983, to determine whether a government official is entitled to qualified immunity, an official has to violate a federal statutory; or constitutional right, and the right has to be clearly established at the time of the challenged government conduct.[24]

In *Pierson v. Ray*, the Supreme Court first introduced the Doctrine of Qualified Immunity. There the Court justified the need for qualified immunity by arguing that, "a policeman's lot is not unhappy

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[18] City & Cnty. of S.F. v. Sheehan, 575 U.S. 600, 135 S. Ct. 1765, 1774 (2015).
[19] Noah Feldman, *Supreme Court Has Had Enough with Police Suits*, BLOOMBERG VIEW (Jan. 9, 2017, 3:08 PM), https://www.bloomberg.com/opinion/articles/2017-01-09/supreme-court-has-had-enough-with-police-suits.
[20] Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 7 (2017).
[21] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
[22] Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).
[23] Malley v. Briggs, 475 U.S. 335, 341 (1986).
[24] LANDMARK PUBLICATION, THE AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY FOR LAW ENFORCEMENT 2 (2018).

that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being [punished] in damages if he does."[25] The doctrine was first enacted during the peak of the civil rights movement to protect law enforcement officials from frivolous lawsuits and financial liability in cases where the officials acted in good faith.[26] In 2005, courts increasingly applied qualified immunity to cases involving excessive or deadly force by police.[27] The increasing application of the doctrine has created criticism that the doctrine "has become a nearly failsafe tool to let police brutality go unpublished and deny victims their constitutional rights."[28]

The majority of lawsuits involving qualified immunity arise in civil rights cases under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Fed*. 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured…[29]

Bivens v. Six Unknown Named Fed. is the federal effect to the damages suits available under § 1983.[30] There, the Court recognized that plaintiffs may sue for damages if federal officials violated their constitutional rights.[31] The Supreme Court also noted Bivens' claims

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[25] Pierson v. Ray, 386 U.S. 547, 555 (1967).
[26] Schwartz, *supra* note 20.
[27] Andrew Chung, Special Report: *For Cops Who Kill, Special Supreme Court Protection*, U.S LEGAL NEWS (May 8, 2020), https://web.archive.org/web/20200612051417/https://www.reuters.com/article/us-usa-police-immunity-scotus-specialrep-idUSKBN22K18C.
[28] *Id*.
[29] 42 U.S.C.S § 1983.
[30] Derek Warden, *A Helping Hand: Examining the Relationship Between (1) Title II of Theada's Abrogation of sovereign immunity cases and (2) The Doctrine of Qualified immunity in 1983 and Bivens Cases to Expand and Strengthen Sources of "Clearly Established Law" in Civil Rights Actions*, 29 GEO. MASON U. CIV. RTS. L.J. 43, 51 (2018).
[31] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 408 (1971).

for violation of the Fourth, Fifth, and Eighth Amendments.[32] Two important points were associated with both § 1983 and Bivens.[33] One important point was that the constitutional rights that were enforceable under Bivens are also enforceable under § 1983.[34] Second, courts and scholars have agreed that the holding in Bivens and § 1983 are interchangeable.[35]

C. Reexamination of the Doctrine of Qualified Immunity

Qualified immunity permits law enforcement to violate people's constitutional rights. The battle over qualified immunity has reached an inflection point after the death of George Floyd in Minneapolis. George Floyd was one instance of police brutality that went global. However, we cannot forget about the numerous other victims of police brutality who did not go viral.

Qualified immunity for police offices was to protect the police from frivolous lawsuits and to allow police officers to make mistakes that have to be made in seconds of intense and dangerous situations.[36] As a result of a 2009 Supreme Court decision in *Pearson v. Callan,* it allowed judges to no longer have to ask whether or not a police officer used excessive force.[37] Courts instead only had to consider whether or not the conduct violated clearly established law.[38] Studies have shown that several cases similar to George Floyd have been dismissed because there was no clearly established court precedent forbidding such conduct.[39]

Two Justices on the U.S. Supreme Court have called for a reexamination of the Qualified Immunity Doctrine. Justice Sonia Sotomayor has regularly dissented when other Justices have excused police misconduct in police brutality cases. In her dissent in *Mullenix v. Luna,* she stated other Justices were swift to reverse lower courts

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[32] *Id*.
[33] Warden, *supra* note 30, at 52.
[34] *Id*.
[35] *Id*.
[36] Nina Totenberg, *Supreme Court Weighs Qualified Immunity for Police Accused of Misconduct,* NPR (June 8, 2020), https://www.npr.org/2020/06/08/870165744/supreme-court-weighs-qualified-immunity-for-police-accused-of-misconduct.
[37] Pearson v. Callahan, 555 U.S. 223, 231 (2009).
[38] *Id*.
[39] Totenberg, *supra* note 36.

that refused to grant qualified immunity to police officers but would not get involved when lower courts wrongly granted qualified immunity.[40] Justice Clarence Thomas has also called for a reexamination of the doctrine of qualified immunity. In his concurring opinion in *Ziglar v. Abbasi,* he stated, "regardless of what the outcome would be, we at least ought to return the approach of asking whether immunity was historically accorded the relevant official in an analogous situation at common law." [41]

Since qualified immunity is judicially created, the Supreme Court may choose to revise the doctrine or not. For the Supreme Court to decide different standards for hearing a case, it takes four of the nine justices to agree.[42] However, for limiting or abolishing qualified immunity as it currently exists, there will have to be a fifth vote. Since 2015, the Supreme Court has revisited qualified immunity five times.[43] On June 15, 2020, the Supreme Court refused to reexamine the Doctrine of Qualified Immunity.[44]

D. New Considerations for the Doctrine of Qualified Immunity

There has been a debate over qualified immunity and which branch of government should be responsible for reforming the doctrine. If the Court does not take action in abolishing or reforming the Qualified Immunity Act for police officers, Congress also has the authority to make changes.[45] One consideration is to amend 42 U.S.C. § 1983 of the act by abolishing the "good faith defense along with the defense that the law was not clearly established."[46] In the Justice In Policing Act of 2020, a similar proposal was made.[47] Another proposal to 42

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[40] Mullenix v. Luna, 136 S. Ct. 305, 314 (2015) (Sotomayor, J., dissenting).
[41] Zinlar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring).
[42] Nina Totenberg, *Supreme Court will not Reexamine Doctrine That Shields Police in Misconduct Suits*, NPR (June 15, 2020) https://www.npr.org/2020/06/15/876853817/supreme-court-will-not-re-examine-doctrine-that-shields-police-in-misconduct-sui.
[43] *Id*.
[44] *Id*.
[45] Policing the Police: Qualified Immunity and Considerations for Congress, CONGRESSIONAL RESEARCH SERVICE (updated June 25, 2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10492.
[46] *Id*.
[47] 28 U.S.C. § 280(h).

U.S.C. § 1983 is to reform the Reforming Qualified Immunity Act.[48] This proposal would place the burden on 42 U.S.C. § 1983 defendants to affirmatively show that the conduct at issue was authorized by law.[49] More importantly, the proposal would help remove the "existing doctrine of qualified immunity and instead provide that an individual defendant 'shall not be liable' if the defendant reasonably believed that his or her conduct was lawful."[50]

Another approach would be to scale back qualified immunity to only certain circumstances.[51] Examples would be for the doctrine to only apply to certain government actors, or in cases where certain rights are at issue. Similarly, an option would be choosing a new statutory test to apply to state and local actors. Additionally, the Court could abolish recent Supreme Court decisions requiring a finding for "clearly established" law. There are several different alternatives for qualified immunity for police officers; however, how it is currently applied gives police a "get out of jail free card."

I. Police Officers Should be Held Liable for Excessive Force They Use on Citizens

The doctrine should be limited to only certain government actors, excluding law enforcement agents, in certain situations when rights such as the Fourth Amendment excessive force claims are at issue. In the unfortunate killing of George Floyd, Minneapolis police officers placed serious deficiencies on 42 U.S.C. §1983 (§1983) excessive force law. The Supreme Court so heavily weighs in favor of police officers and municipalities who are sued under §1983 that individuals with claims under this section do not have a real chance of recovery. From 2000 to 2016, the Supreme Court heard eighteen qualified immunity cases, and sixteen of those cases involved excessive force in violation of the Fourth Amendment.[52] In each of those cases, the Court found that the police officers were entitled to qualified immunity because they did not act in violation of clearly established law.[53] Over 27 years ago, the U.S. Supreme Court decided *Graham v. Connor,* which established that the claim for excessive force by law

[48] *Id*.
[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*.

enforcement officers should be judged under an objective reasonableness standard.[54]

Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.[55]" However, §1983, as applied to the conduct of police officers, provides a legal remedy for individuals who claim that police officers violated their right to be free from excessive force under the Fourth Amendment.[56] "Under [U.S. Supreme Court] precedent[], officers are entitled to qualified immunity under §1983 unless, (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'"[57]

In other words, in a §1983 case, the established right for qualified immunity must be defined with specificity.[58] The U.S. Supreme Court has frequently told courts not to define clearly established law with generality.[59] In excessive force cases, this is particularly important. Specifically, it is important in the Fourth Amendment context where the Supreme Court has recognized that it is often difficult for an officer to determine how the doctrine will apply to conduct by a police officer.[60] Since the use of excessive force is an area of law in which the outcome depends heavily on the facts of each case, police officers are entitled to qualified immunity unless there is existing precedent that governs the facts at issue.[61] It is not enough for a court to state that an officer could not use excessive force and deny qualified immunity based on reasonableness.[62] An officer does not violate a clearly established right unless the rights were sufficiently definite that any reasonable officer in the defendant's situation would have agreed that he was violating it.[63]

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[54] Graham v. Connor, 490 U.S. 386, 388 (1989).
[55] 42 U.S.C. § 1983.
[56] Policing the Police: Qualified Immunity and Considerations for Congress, CONGRESSIONAL RESEARCH SERVICE (updated June 25, 2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10492.
[57] District of Columbia v. Wesby, 138 U.S. 577, 589 (2018).
[58] City of Escondido v. Emmons, 139 U.S. 500, 503 (2019).
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*.
[63] *Id*.

Examples of how the court considers whether an officer is granted qualified immunity when excessive force is used may be found in *City of Escondido, California v. Emmons*, *Kisela v. Hughes*, and *McCoy v. Alamu*. In *Emmons*, Marty Emmons alleged the police used excessive force in arresting him when they responded to a domestic disturbance call.[64] When the police officers arrived at the apartment, they knocked on the door, and no one answered.[65] After that, the officers spoke to Maggie Emmons through a side window and attempted to convince her to open the door.[66] Marty Emmons opened the door, and thereafter a police officer took him to the ground, handcuffed him, and injured him. [67]

The district court rejected the claim of excessive force. The court stated that the police officers' body camera showed that the officer acted professionally and respectfully.[68] Further, the court said that the law was not clearly established as to whether, under the circumstances, the officer could take down an arrestee.[69] In response to a domestic dispute, the encounter escalated when the officer could not enter the apartment for a welfare check.[70] When Marty Emmons opened the door, the officers did not know whether he was armed, dangerous, or if he was the one who injured someone on the inside.[71]

The appellate court reversed, and the Supreme Court explained that the question was not whether the officer violated the man's clearly established right to be free from excessive force, but whether clearly established law prohibited the offers from taking down a man in these circumstances.[72] The Supreme Court rejected the lower court's attempt to compare this case to *Gravelet- Blondin v. Shelton,* which involved the use of excessive force in response to passive resistance by a criminal suspect.[73] However, the Court cited *Kisela v. Hughes,*

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[64] *Id*. at 501.
[65] *Id*.
[66] *Emmons,* 139 U.S. at 501.
[67] *Id*.
[68] Id. at 502.
[69] *Id*.
[70] *Id*.
[71] *Id*.
[72] Id. at 503.
[73] *Id*. *See also*, Gravlet-Blondi v. Shelton, 728 F.3d 1086, 1093 (9th Cir. 2013).

which stressed the need to "identify a case where an officer under similar circumstances was held to violate the Fourth Amendment.[74]"

This case is an example of an individual injured by a police officer's use of excessive force. Emmons was unable to recover not because it was not a violation, but because no prior precedent existed that clearly established the conduct was unlawful. The issue with the court's reasoning is that an officer will rarely, if ever, be charged if there is no prior precedent. However, how will there ever be clearly established precedent if they are not held liable?

Additionally, in *Kisela v. Hughes*, Hughes sued a police officer for a Fourth Amendment violation under §1983, alleging the police officer used excessive force.[75] The officer shot Hughes four times while she held a kitchen knife six feet from her roommate.[76] The district court granted the police officer qualified immunity, but the court of appeals reversed their decision.[77] The Supreme Court later reversed the court of appeals' decision holding that the officer did retain qualified immunity and did not violate any established law during his actions.[78]

The Court reasoned that the officer did not knowingly violate clearly established law, therefore, retaining qualified immunity.[79] The Court noted that for an individual to establish excessive force, it looks at reasonableness and whether an officer reasonably knew that the use of force violated the Fourth Amendment under clearly established law.[80] The issue with this holding is that just because an officer did not know it was a violation does not mean that he did not violate clearly established law. This reasoning further provides police protection simply because they did not know.

In *McCoy v. Alamu,* the Court again granted a police officer qualified immunity.[81] There, the Court found that the plaintiff's allegations that the police officer used pepper spray on him without reason were reasonable for a jury to find that excessive force was used.[82] However, the Court still granted qualified immunity because

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[74] *Id*.
[75] Kisela v. Hughes, 138 U.S. 1148, 1151 (2018).
[76] *Id*.
[77] *Id*.
[78] *Id*. at 1154.
[79] *Id*.
[80] *Id*.
[81] McCoy v. Alamu, 950 F.3d 226, 229 (5th Cir. 2020).
[82] *Id.*

the right not to use pepper spray without a reason was not clearly established.[83] In the dissent, Justice Costa stated, "despite recognizing that an unprovoked assault violated the constitution, the majority grants the guard immunity because we have not decided a similar case involving pepper spray."[84]

The cases above show a growing tendency, influenced by the Supreme Court, as to whether a police officer is granted qualified immunity for the use of excessive force. Courts continue to ignore the question of whether cops have violated a plaintiff's constitutional rights. Instead, the plaintiff has to show a previous, nearly identical case that clearly establishes an officer's actions as illegal. In *City of Escondido, California v. Emmons,* the police officer was granted qualified immunity because the plaintiff was unable to show clearly established law that prohibited the officers from taking down a man in similar circumstances to be a violation.[85] Again, in *Kisela v. Hughes,* the police officer who used excessive force was granted qualified immunity because the police officer did not knowingly violate clearly established law.[86] Lastly, in *McCoy v. Alamu,* the officer was granted qualified immunity because no law clearly established that there was a violation.[87]

Section 1983 should be limited in situations when an individual's Fourth Amendment right was at stake; because an individual can only receive justice if there was precedent that showed that any reasonable officer in the officer's situation would have agreed that the right was violated. The Supreme Court has continued to avoid establishing any specific preconditions for the excessive force used by police officers and has instead only required that their actions be "reasonable" under the surrounding circumstances.

The reasonableness standard for whether police officers are granted qualified immunity for the use of excessive force is a catch-22. It prevents the law on excessive force from being developed and allows misconduct without accountability. Many civil rights plaintiffs cannot be heard even when judges agree that the conduct alleged, if proven, would be illegal. However, there is no recovery because there

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[83] *Id*.
[84] *Id.* at 234 (Costa J., dissenting).
[85] *Emmons,* 139 U.S. at 504.
[86] *Kisela*, 138 U.S. at 1151.
[87] *McCoy*, 950 F.3d at 234.

is no precedent for the excessive force a police officer used. Therefore, the Court should limit the doctrine's application in certain situations when rights such as the Fourth Amendment excessive force claims are at issue for civil rights individuals to recover.

II. Qualified Immunity Does Not Protect Government Officials from Financial Liability

The Supreme Court has stated that qualified immunity is intended to balance two important interests; "the need to hold government officials accountable when they exercise power irresponsibly and need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[88] However, the qualified immunity doctrine is not necessary to protect government officials from harassment, distraction, and liability when they perform their duties.

Qualified immunity is unnecessary to serve some essential goals and is poorly suited for others. In *Harlow,* the Supreme Court stated that qualified immunity was necessary to protect government officials from four harms. The harm that will be addressed in this paper is the first harm, the "expenses of litigation."[89] The Court has not proven that there is evidence in support of the threat mentioned above, or that qualified immunity can protect against them.

Addressing the first harm, qualified immunity does not protect government officials from the expense of litigation. One of the most frequent justifications for qualified immunity is that it protects government officials from the burden of financial liability. Qualified immunity was meant to protect government officials from financial liability when they violated constitutional rights unless the conduct was clearly established as unconstitutional. However, this notion is untrue.

Nearly all law enforcement defendants are provided free counsel and are indemnified for settlements and judgments entered against them.[90] Within six years, from 2006 to 2011, forty-four of the seventy largest law enforcement agencies paid 0.02% of the dollars awarded to plaintiffs in police misconduct suits. [91] In smaller midsize agencies, no officer contributed to settlements or judgments to plaintiff

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[88] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[89] Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

[90] Schwartz, *supra* note 20, at 59.

[91] Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

awards.[92] Even when officers were disciplined, fired, and criminally prosecuted for their misconduct, they were still indemnified.[93] Additionally, no officer paid any amount of the punitive damages awarded to the plaintiffs.[94]

In *Person,* the Supreme Court stated that the two-step qualified immunity analysis in *Saucier* "disserve[s] the purpose of qualified immunity' when it 'forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily.'"[95] With the costs associated with qualified "immunity," the doctrine arguably disserves its own purpose. This evidence establishes that qualified immunity cannot be justified as a means of protecting officers from personal liabilities.

III. The Most Common Defenses to the Doctrine of Qualified Immunity

One of the most popular defenses of qualified immunity is that it is necessary to protect police officers from hesitation when they have to make split-second life or death decisions.[96] Further, it would be unfair and unwise for courts to think twice about these decisions and hold officers personally liable whenever they make a "wrong call."[97] Essentially, stating that holding a police officer responsible under these circumstances will discourage them from carrying out their duties.

While it is true that police officers have to make difficult decisions under dangerous situations, this argument has nothing to do with qualified immunity. The legal standard for determining whether a constitutional violation occurred is already highly deferential to police having to make on-the-spot decisions.[98]*Graham v. Connor* set out an "objective reasonableness" standard for excessive-force claims, making it clear that the courts cannot think twice regarding on-the-spot

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[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Pearson*, 555 U.S. at 231.
[96] Jay Schweikert, *The Most Common Defenses of Qualified Immunity, and Why They're Wrong*, CATO AT LIBERTY, (2020) https://www.cato.org/blog/most-common-defenses-qualified-immunity-why-theyre-wrong.
[97] *Id*.
[98] *Id*.

policing decisions.[99] Specifically, this decision has nothing to do with qualified immunity. In *Graham,* the court explained that unless an officer acts objectively unreasonable, they have not violated the Fourth Amendment.

Remember that qualified immunity only matters in situations where: (1) there was a violation of a constitutional right, and (2) those rights were not clearly established at the time of the violation. If a police officer never committed a constitutional violation to begin with, then they would not need qualified immunity to protect them. Therefore, qualified immunity is not necessary to guarantee that police make quick, split-second decisions because that protection is already enumerated into our Fourth Amendment jurisprudence.

Another defense for the doctrine of qualified immunity is that it is necessary to prevent frivolous lawsuits against police officers. Regardless of whether someone believes that frivolous civil lawsuits are a problem, the doctrine is incapable of addressing such issues.

Generally, there are two situations when a lawsuit may be "frivolous." First, a frivolous lawsuit is not legally meritorious, meaning that the facts alleged do not constitute a constitutional violation.[100] If this is the case, the doctrine is unnecessary to dismiss the lawsuit because qualified immunity is for someone who has committed a constitutional violation. Additionally, if the lawsuit is meritless, it can be dismissed for failure to state a claim upon which relief can be granted, and there would be no need for qualified immunity.[101]

Second, a frivolous lawsuit occurs when it is not factually supported. Specifically, it occurs when the facts alleged would be a constitutional violation, but the plaintiff either lied or was mistaken about the facts.[102] However, in that situation, qualified immunity does little to help dismiss the case because a plaintiff could ideally lie about facts that are closely related to those of a prior case. But there are other tools used to address frivolous lawsuits that are separate from qualified immunity.

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[99] *See* Graham v. Connor, 490 U.S. 386, 397 (1989).
[100] Jay Schweikert, *The Most Common Defenses of Qualified Immunity, and Why They're Wrong*, CATO AT LIBERTY, (2020) https://www.cato.org/blog/most-common-defenses-qualified-immunity-why-theyre-wrong.
[101] *Id*.
[102] *Id*.

Rule 11 of the Federal Rules of Criminal Procedures requires attorneys to attest that they have made a good faith basis for factual and legal arguments, and if they fail to do so, they could get sanctioned.[103] Additionally, Rule 9(b) of the Federal Rules of Civil Procedures enacts extra pleading requirements for alleging fraud.[104] If there is a problem with frivolous civil rights litigation, it will involve rules such as these to address it. The idea that if qualified immunity is eliminated will result in frivolous litigation is a baseless fear. Currently, qualified immunity does not prevent such litigation, and major change cannot be expected if it is abolished or reformed.

IV. Recommendations for Reform of Qualified Immunity

Altering the qualified immunity doctrine will help ensure that police officers are held accountable. Civil remedies are a good starting point, because as we have seen, even when there is video footage that shows police misconduct, there has been little to no action taken under criminal law.[105] Prosecutors are usually opposed to bringing charges against law enforcement officers, and grand juries are likewise hesitant to indict them.[106]

One way to amend qualified immunity is to alleviate the confusion of what "clearly established" means. Several cases are disposed of because a right was not "clearly established."[107] However, lower courts have struggled with what "clearly established" actually means.[108] If courts use qualified immunity cases to show what qualifies as a "clearly established" right by accurately outlining in its reasoning whether a particular set of facts implicates such right, this would improve confusion.[109] Instead of the Court overturning the lower court's denial of immunity, it could use those cases to affirm the

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[103] S*ee* MICHIGAN LEGAL PUBLISHING LTD, FEDERAL RULES OF CIVIL PROCEDURES, 21 (2021).
[104] *Id.* at 15.
[105] Lindsey De Stefan, *No Man is Above the Law and No Man is below it: Qualified Immunity Reform Could Create Accountability and Curb Widespread Police Misconduct*, 47 SETON HALL L. Rev. 543, 565 (2017).
[106] *Id.*
[107] *Id.* at 556.
[108] See John C. Jeffries, Jr., *What's Wrong With Qualified Immunity*?, 62 FLA. L. REV. 851, 852 (2010).
[109] *Id*.

denials or reverse the lower court's grant of immunity.[110] This would permit the Court the opportunity to give examples of what constitutes a right that is "sufficiently clear that every reasonable official would have understood that what he is doing violated that right," and provide lower courts more guidance.[111]

Another way to amend the doctrine of qualified immunity is to not apply the doctrine of qualified immunity to all classes of officials the same. Courts continue to stray away from complicating qualified immunity even though the doctrine is already complicated.[112] Separating the doctrine into more particularized classes of officials with standards of immunity that are more appropriate to each class would help lower courts properly analyze immunity and promote justice in constitutional tort litigations.[113] An example is classifying officials based on the number of people with whom they come in contact with. The threat of litigation would become less stringent on governmental functions, and immunity protection would not need to be so severe.[114] In cases involving Fourth Amendment violations, immunity may be inappropriate altogether.[115]

Amending the doctrine of qualified immunity will allow more civil suits to succeed under constitutional rights. If more civil suits are to move forward against qualified immunity, it will establish an important reminder to civilians and law enforcement that they are not above the law and will be held accountable for wrongdoings. By adopting different immunity standards and clarifying the vagueness of the definition "clearly establish" the Court can begin to repair flaws in the qualified immunity doctrine. Civil suits are the fastest and most effective way of balancing the scale when criminal liability of police officers is nearly impossible in many situations.

A. Changes That Are Being Proposed

State and federal officials have started to admit the current injustice of the Doctrine of Qualified Immunity and are working towards change. Colorado has become the first state to recently enact changes

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[110] *Id*.
[111] Taylor v. Barkes, 135 S. Ct. 2041, 2044 (2015).
[112] Anderson v. Creighton, 483 U.S. 635, 643 (1987).
[113] Stefan*, supra* note 105, at 566.
[114] *Id*. at 567.
[115] *Id*.

to qualified immunity in a broader package of police reform immediately after the death of George Floyd.[116] The new Colorado law, known as the Enhance Law Enforcement Integrity Act, eliminates qualified immunity as a defense in state court, but still includes some financial protection for police officers.[117] The law further requires state and local police departments to pay the legal costs arising out of the majority of cases so long as the officer was acting in good faith and capping liability at $25,000.[118] Police unions have spoken out in opposition of the inclusion of the immunity charges in the reform, but were neutral on the bill as a whole.[119] The police unions also spoke positively about the broader changes of the reform, taking into consideration that the package will help ensure policing and increase the ability of local departments to get rid of bad police officers.[120]

On the federal level, the Justice in Police Act (Act) that was passed by the house in June 2020 will change qualified immunity for police officers.[121] This Act will affect both state and federal law enforcement officers.[122] The Act will eliminate the defense in the second factor discussed above, stating that the law needs to be clearly established.[123] By eliminating the defense in the second factor, the Act will allow victims to obtain relief in civil court if they can prove that their constitutional rights have been violated.[124]

These new laws would begin to open the door for police accountability. Qualified immunity has proven to be unworkable as a matter of judicial doctrine because it continues to deny justice to victims who faced misconduct. Whether through judicial reconsideration or legislative action, it is time to reform qualified immunity.

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[116] Nathan Kasai, Et. Al., *What is Qualified Immunity & Why Does it Need Reform*?, (2020) https://www.thirdway.org/memo/what-is-qualified-immunity-why-does-it-need-reform.
[117] Enhancement Law Enforcement Integrity Act (SB20-217).
[118] *Id*.
[119] Kasai, *supra* note 116.
[120] *Id*.
[121] George Floyd Justice in Policing Act of 2020, 166 Cong. Rec. H. 2439.
[122] *Id*.
[123] *Id*.
[124] Kasai, *supra* note 116.

V. CONCLUSION

For meaningful criminal reform, accountability is an absolute necessity. For far too long, some officers have been able to violate constitutional law without being held accountable under criminal or civil liability. If the doctrine of qualified immunity is reformed, it will hold officers who have violated constitutional law to be held liable under civil law. Currently, the doctrine protects state and local officials from liability even when they act unlawfully, as long as their actions do not violate "clearly established law." The doctrine, as applied today, is a significant obstacle for civil rights plaintiffs because it requires plaintiffs to identify not just a clear legal rule but also prior cases with functionally identical facts. With no accountability, the doctrine harms the connection between law enforcement and the community by denying the police officers public trust and confidence they need to do their jobs safely and effectively. It is one of the reasons why police are reassured to use excessive force without fear of repercussions. However, it is time for a change, which begins with reforming the doctrine of qualified immunity.

Many Justices are making a stand for qualified immunity reform, and changes have started at a state and federal level. Reforming qualified immunity is necessary for change in police reform. Examples of reform would be for the doctrine to only apply to certain government actors or when certain rights are at issue. Also, creating a new statutory test to apply to local and state actors. Additionally, it could abolish recent Court decisions on the issue of finding "clearly established law." There are numerous alternatives to reforming qualified immunity, and any one of these options would be sufficient to begin accountability for police officers.

In closing, the Doctrine of Qualified Immunity should be reformed because, as Justice Sotomayor has explained, "it renders the protection of the Fourth Amendment hallow." When the Supreme Court grants qualified immunity for officers who shoot people without justification or shoot people against orders to stand down, it sends a clear message that officers can shoot first and think later, providing officers essentially a "get out of jail free card."

HYBRID FILM DISTRIBUTION: HOW WARNER BROTHERS CHANGED THE WAY WE SEE FILMS IN THE COVID-19 ERA

Amber Murphy

I. INTRODUCTION

Nothing beats the experience of settling into the perfect seat at the movie theater with a bucket of popcorn as the lights go down, and you are waiting anxiously for your movie to start. In the '70s, you would have been on the edge of your seat as you watch a shark terrorize beach-goers in Steven Spielberg's *Jaws,* or cheering as Luke Skywalker defeats the Death Star in George Lucas's *Star Wars*.[1] Fast-forward to 2019, where you watch in awe as your favorite superheroes battle tirelessly to defeat Thanos in *Avengers: End Game,* the second highest-grossing film of all time.[2] For decades, the movie theater has served as a place to experience the beauty and grandeur of cinema and to create lifelong memories with your loved ones.

Throughout the years, the film industry has proven its ability to adapt and thrive. It has managed to survive The Great Depression, World War II, the rise of television programming, and the introduction of streaming.[3] The film industry is currently facing a new crisis with the rapid spread of the COVID-19 virus. The COVID-19 pandemic has rocked the film industry and forced major film studios to make tough decisions about the creation and distribution of their upcoming projects. Some Hollywood executives have chosen to release their movies directly onto streaming platforms for purchase, while others

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[1] JAWS (Universal Pictures 1975); STAR WARS: EPISODE IV – A NEW HOPE (20th Century Fox 1977).

[2] List of *Highest-grossing films*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_highest-grossing_films#Highest-grossing_films (last updated Jan. 2, 2021).

[3] *See* Benjamin Hale, *The History of Hollywood: The Film Industry Exposed,* HISTORY COOPERATIVE (Nov. 12, 2014), https://historycooperative.org/the-history-of-the-hollywood-movie-industry/.

have opted to delay the release of their movies altogether.[4] Recently, Warner Brothers (Warner Bros.) introduced its "innovative, hybrid distribution model" that includes exhibiting all of their 2021 projects in theaters while simultaneously making them available to stream on HBO Max at no additional cost.[5] The announcement by WarnerMedia was met with surprise and opposition from industry leaders who argued that the decision was a "blatant attempt to self-deal" at the expense of the talent involved.[6]

This note will discuss how the Warner Bros. hybrid-distribution model undermines the film industry and will ultimately lead to the extinction of movie theaters. Part II of this note will detail the history of the film industry, including the introduction of the Paramount Decrees and the development of antitrust law. Part II will also address the effects of COVID-19 on the film industry. Part III will address the Warner Bros. decision and how it affects the relationship between studios, talent, producers, and consumers. Lastly, Part IV will predict the long-term consequences of the Warner Bros. decision and possible litigation.

II. THE HISTORY OF THE FILM INDUSTRY

Although the origin of movies and motion pictures dates back to the late 1800s, the 1920s was when the movie industry began to flourish.[7] During this time, the first movie studio was founded in the United States, Warner Brothers Pictures.[8] In the mid-1920s, Sam Warner convinced the other Warner Bros. founders to purchase a sound-on-disc system, called the Vitaphone, and the rights to sublease the system to other producers.[9] The studio planned to use the

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[4] Dawson Oler, *Netflix, Disney+, & A Decision of Paramount Importance*, U. ILL. J.L. TECH. & POL'Y 481 (2020).

[5] Warner Bros. Pictures Group Announces Innovative, Hybrid Distribution Model for Its 2021 Theatrical Slate, (2020), https://www.warnerbros.com/news/press-releases/warner-bros-pictures-group-announces-innovative-hybrid-distribution-model.

[6] Dave McNary, *Endeavor Chief Blasts WarnerMedia's HBO Max Plan: 'A Blatant Attempt to Self-Deal'*, VARIETY (Dec. 11, 2020, 2:06 PM), https://variety.com/2020/film/news/endeavor-chief-warnermedia-hbo-max-1234852040/.

[7] Hale, *supra* note 3.

[8] *Id.*

[9] Britannica, *Warner Brothers*, ENCYCLOPEDIA BRITANNICA (last visited Jan. 23, 2020), https://www.britannica.com/topic/Warner-Brothers.

Vitaphone to provide synchronized orchestral accompaniment for all their films which, had previously all been silent.[10] Warner Bros. debuted the system on August 6, 1926, with *Don Juan,* the first movie to include a completely synchronized musical soundtrack.[11] They followed up this production with the debut of *The Jazz Singer*, the first film with synchronized dialogue.[12] The introduction of sound to their productions proved to be a successful strategy and transformed Warner Bros. from a small struggling movie studio to a major player in Hollywood. Other studios followed Warner Bros. lead and began to integrate sound into their productions as well.[13] Soon, a "Big Five" was established of the five largest, fully-integrated studios operating in Hollywood: MGM, Warner Bros., 20th Century Fox, Paramount, and RKO.[14] The "Big Five" revolutionized the filmmaking landscape and ushered in the "Golden Age of Hollywood."

A. The End of the Golden Age

For decades, the five major studios – Paramount, Loew's, 20th Century Fox, Warner Bros., and RKO – purchased movie theaters in order to show their own movies.[15] These studios owned most first-run theaters in both large and small cities through sole or joint ownership, leases, or franchise agreements with independent theaters.[16] By purchasing the movie theaters, these major studios dominated the film industry through their control of production, distribution, and exhibition.[17] It was this unrestricted control that caught the attention of the newly formed Federal Trade Commission (FTC) in 1921.[18] In

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Oler, *supra* note 4 at 481, 483.
[15] Audrey W., *The Rise and Fall of Hollywood's Golden Age*, ARCADIA PUBLISHING, https://www.arcadiapublishing.com/Navigation/Community/Arcadia-and-THP-Blog/June-2019/The-Rise-and-Fall-of-Hollywood%E2%80%99s-Golden-Age (last updated "include date").
[16] Stanley I. Ornstein, *Motion Picture Distribution, Film Splitting, and Antitrust Policy*, 17 HASTINGS COMM. & ENT L.J. 415, 432 (1995).
[17] Oler, s*upra* note 4.
[18] Alexandra Gil, *Breaking the Studios: Antitrust and the Motion Picture Industry*, 3 NYU J.L. & LIBERTY 83, 98 (2008); *See In re Famous Players-Lasky Corp.*, 11 F.T.C. 187 (1927).

the *Famous Players-Lasky* case, Adolph Zukor and Jesse Lasky had merged their production companies to form Famous Players-Lasky and later acquired Paramount Pictures to handle the distribution of Famous Players-Lasky films.[19] In their complaint against Famous Players-Lasky, the FTC referenced the studio's "conspiracy to acquire and distribute film of such quality and popularity that they were in great demand."[20] By acquiring Paramount Pictures, Famous Players-Lasky gained unprecedented access to the production, distribution, and exhibition of their own movies.[21] Famous Players-Lasky was accused of "threatening to build or lease theaters to compete with uncooperative exhibitors, secretly offering different pricing to exhibitors based on their level of cooperation, and deliberately lowering admission prices of theaters in direct competition with those who refused to cooperate."[22] The case against Famous Player-Lasky focused on the practice of block booking.[23] Block booking is the practice of licensing one film or group of films with the condition that the exhibitor will also license another film or group of films released by the distributors during a given period.[24] This industry practice caused problems with the smaller theaters because it required them to show a specific group of movies produced by a major studio instead of allowing them to select the movies they wanted to show based on profitability, and the needs of their specific market.[25] The *Famous Players-Lasky* case concluded with the court ordering them to stop block booking and cease efforts to purchase more theaters.[26]

B. The Introduction of the Paramount Decrees

Hollywood's Golden Age ultimately came to an end because of two main factors: antitrust action and the invention of television.[27] Antitrust laws condemn unlawful mergers and business practices in

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[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 99; *See In re Famous Players-Lasky Corp.,* 11 F.T.C. 194 (1927).
[23] *See In re Famous Players-Lasky Corp.*, 11 F.T.C. 187 (1927).
[24] United States v. Paramount Pictures, 334 U.S. 131, 156 (1948).
[25] Oler, *supra* note 4 at 481, 498.
[26] Gil, *supra* note 18 at 83, 99.
[27] Audrey W., *supra* note 15.

general terms, leaving courts to decide which ones are illegal based on the facts of each case.[28] The Sherman Act, the first antitrust law passed by Congress, is the core of antitrust law.[29] The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade" and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize."[30] One of the main challenges to the Sherman Act occurred in *U.S. v. Paramount Pictures*.[31] "In 1938, the Department of Justice brought an antitrust action against eight companies– Paramount Pictures, Inc. (Paramount), 20th Century Fox Film Corp. (Fox), Warner Brothers Pictures, Inc. (Warner Bros.), Loew's Incorporated (Loew's), Radio-Keith-Orpheum (RKO), Universal Corp. (Universal), Columbia Pictures Corp. (Columbia), and United Artists Corp. (United Artists")."[32] "The companies fell into groups: (1) those that produced, distributed, and exhibited movies and (2) those that produced or distributed films, but did not exhibit them."[33] The "Major Defendants" – Paramount, Loew's, Warner Bros., RKO, and Fox – were members of the first group who produced, distributed, and exhibited their own movies.[34] The defendants categorized all movie theaters by their "run" status.[35] The first-run theaters were ones that had exclusive rights to exhibit new movies within the first few weeks of their release when they were the most profitable.[36] At the end of the first run, the movies were then passed on to the discounted, second-run theaters for exhibition.[37] Since these major companies owned the majority of the large movie theater circuits in the United States, they designated their own theaters with first-run status.[38] They designated smaller, independent theaters as second and third-run theaters.[39] This classification system only benefitted the defendants

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[28] FEDERAL TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Dec. 21, 2020).
[29] *Id.*
[30] *Id.*
[31] *See* United States v. Paramount, 334 U.S. 131, 140 (1948).
[32] United States v. Paramount Pictures, Inc., No. 19 MISC. 544 (AT), 2020 WL 4573069, at *1 (S.D.N.Y. Aug. 7, 2020).
[33] *See Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*

and effectively shut independent theaters out by limiting their ability to profit from popular, highly anticipated movies.[40] The Court in the *Paramount* case found that "Defendants had (1) monopoly power in the distribution market for first-run motion pictures; and (2) engaged in a conspiracy to fix licensing practices including, admission prices, run categories, and 'clearances' for substantially all theaters located in the United States.".".".[41] As a result, the defendants "entered into a consent decree with the Department" of Justice referred to as "The Paramount Decrees.".".[42] The Paramount Decrees, supported by the Supreme Court, accomplished several objectives. The Decrees prohibited the defendants from "both distributing movies and owning theaters without" court approval, and it ended common industry practices such as block booking, circuit dealing, resale price maintenance, and granting overbroad clearances.[43] For clarification, the following definitions are provided:

- "Resale price maintenance – setting minimum movie ticket prices
- Unreasonable clearances – granting exclusive film licenses for overly broad geographic areas
- Block booking – bundling multiple films in one theatrical license
- Circuit dealing – licensing a film to all theaters under common ownership or control instead of theater by theater.." [44]

C. The End of the Paramount Decrees

After reigning supreme over the film industry for seventy years, the necessity for the Paramount Decrees was questioned by the

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[40] *Id*.

[41] *Id.*; *Paramount*, 334 U.S. 131 at 170–71.

[42] *See* U.S. Department of Justice, *The Paramount Decrees* (last visited Aug. 7, 2020), https://www.justice.gov/atr/paramount-decree-review.

[43] *Id.*

[44] United States v. Paramount Pictures, Inc., No. 19 MISC. 544 (AT), 2020 WL 4573069, at *2 (S.D.N.Y. Aug. 7, 2020).

Justice Department in 2018.[45] The Antitrust Division of the Justice Department announced it would review legacy antitrust judgments "to identify those that no longer serve their purpose [of protecting market competition]."[46] This included petitioning the court for the modification or termination of the Paramount Decrees.[47] They mentioned that the motion picture industry had "undergone considerable change" since the Paramount Decrees were signed and none of the original *Paramount* defendants owned "a significant number of movie theaters" anymore.[48] They also noted that single-screen first-run theaters have been replaced by multiplex theaters and consumers can now view movies on a variety of mediums including: "cable and broadcast television, DVDs," and streaming services.[49] In its motion, the Justice Department also proposed a two-year sunset period before the studios can engage in any block booking or circuit dealing in order "to minimize market disruption."[50]

When reviewing the Paramount Decrees, the issue before the Southern District of New York was whether terminating the Decrees was in the public interest.[51] The Court ultimately decided to terminate the Decrees for four reasons: (1) the Decrees had achieved their goal of ending the defendant's conspiracy to monopolize the motion picture industry,; (2) changes in the motion picture industry made it unlikely that the defendants would be able to monopolize the movie theater

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[45] U.S. Department of Justice Press Release, *Department of Justice Opens Review of Paramount Consent Decrees* (Aug, 2, 2018), https://www.justice.gov/opa/pr/department-justice-opens-review-paramount-consent-decrees.

[46] U.S. Department of Justice Press Release, *Department of Justice Seeks to Terminate "Legacy" Antitrust Judgments in Federal District Court in Washington, D.C.* (July 9, 2018), https://www.justice.gov/opa/pr/department-justice-seeks-terminate-legacy-antitrust-judgments-federal-district-court.

[47] *Id.*

[48] U.S. Department of Justice Press Release, *Department of Justice Opens Review of Paramount Consent Decrees* (Aug, 2, 2018), https://www.justice.gov/opa/pr/department-justice-opens-review-paramount-consent-decrees.

[49] *Id.*

[50] U.S. Department of Justice Press Release, *Department of Justice Announces Initiative to Terminate "Legacy" Antitrust Judgments* (Apr. 25, 2018), https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments.

[51] United States v. Loew's Inc., 783 F. Supp. at 213 (S.D.N.Y. 1992); See United States v. Int'l Bus. Machines Corp., 163 F.3d 737, 740 (2d Cir. 1998).

market,; (3) developments in antitrust law undermine the provisions of the Decrees; and (4) without the Decrees, the defendants are still "subject to liability under" other antitrust laws such as the Sherman Act.[52] In its discussion, the Court highlighted the many changes that the film industry has undergone since the Decrees were enacted.[53] The most notable of these changes is the introduction of major distributors who are not subject to the provisions of the Decrees–Lionsgate, Focus Features, Roadside Attractions, STX, Netflix, Amazon, and Apple–and the surge in popularity of internet streaming.[54] The Court noted that since the new distributors are not bound by the Decrees, the remaining defendants are forced to abide by provisions that "do not apply to their competitors."[55]

D. The Impact of COVID-19 on the Film Industry

Despite all the hardships the film industry has overcome, it is currently facing its biggest challenge yet: COVID-19. As of December 2020, Texas has 1.74 million confirmed COVID-19 cases and 27,539 COVID-19 related deaths.[56] Before COVID-19 (also referred to as the coronavirus) became a global pandemic, Hollywood was already preparing itself for a "bad box office year."."."[57] The rapid increase in the popularity of streaming services, like Netflix, has drawn crowds away from the movie theater and into the comfort of their own living rooms.[58] Additionally, some studios decided to end their major franchises the previous year, most notably "*Avengers: End Game*, *Star Wars: The Rise of Skywalker*, *[*and*] Toy Story 4*."[59] These circumstances primed Hollywood to experience the "worst year in movie theater history." [60] As the coronavirus began to spread,

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[52] *See* United States v. Paramount Pictures, Inc., No. 19 MISC. 544 (AT), 2020 WL 4573069, at *3 (S.D.N.Y. Aug. 7, 2020).
[53] *Id.*
[54] *Id.* at 5.
[55] *Id.*
[56] *Texas Coronavirus Map and Case Count,* N.Y. TIMES (last visited Dec. 20, 2020), https://www.nytimes.com/interactive/2020/us/texas-coronavirus-cases.html.
[57] Eliana Dockterman, *Streaming Was Already Up 13% Last Weekend. Can Movie Theaters Survive COVID-19?,* TIME (Mar. 18 2020, 9:58 PM), https://time.com/5806060/coronavirus-movie-theaters-streaming/.
[58] *Id.*
[59] *See Id.*
[60] *Id.*

Hollywood studios were forced to reconsider the production and distribution of their films.[61] In March, the producer of Universal Picture's *James Bond: No Time to Die* pushed the movie's release from April to November, hoping to debut around the lucrative holiday season.[62] In October, they ultimately made the decision to push the release of the highly-anticipated movie to April 2021, when it became evident that the coronavirus would last longer than expected.[63]

In March 2020, Universal decided to collapse the theatrical window in response to the coronavirus.[64] The studio announced that it would make its movies available on demand the same day as their global theatrical release.[65] This plan also included making movies that were already in theaters available on demand, starting with *The Invisible Man*,"*, The Hunt*," and *Emma*.".[66] The movies would be made available for a 48-hour rental period on a variety of services, including iTunes, Google Play, Amazon Prime, and FandangoNow.[67] This release strategy, known as video-on-demand, has been criticized by movie theaters who believe that it destroys their business model.[68] Universal also decided to postpone the ninth installment of the popular franchise, *Fast & Furious*, to May 2021.[69]

Disney, another major player in the film industry, was also forced to make several vital decisions regarding its distribution. It started by stopping the production of all its live-action films.[70] The debut of the highly-anticipated live-action remake of *Mulan* was postponed indefinitely and instead released exclusively on Disney+ for

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[61] Ahiza Garcia-Hodges, *Amid film delays and movie theater closings, can Hollywood be saved?,* NBC NEWS (Oct. 5 2020, 7:42 PM), https://www.nbcnews.com/business/business-news/amid-film-delays-move-theater-closures-can-hollywood-be-saved-n1242206.
[62] Dockterman, *supra* note 57.
[63] See *Id.*
[64] Ryan Faughnder, *Coronavirus: Universal to make current theatrical movies available for home viewing on Friday,* LOS ANGELES TIMES (Mar. 16, 2020, 1:55 PM), https://www.latimes.com/entertainment-arts/business/story/2020-03-16/coronavirus-universal-to-make-current-theatrical-movies-available-for-home-viewing-on-friday.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*

an additional fee.[71] The releases of the newest additions to *Star Wars* and *Avatar* were delayed until next year.[72] Movies that were already released to the theaters, such as *Frozen II*, were released on Disney+ sooner than originally planned in order to attract new subscribers.[73]

III. ANALYSIS

A. The Warner Bros. Decision

In what is being described as "the most seismic shift by a Hollywood studio yet during the pandemic," Warner Bros. Pictures made the controversial announcement that it would be releasing all of their 2021 films on HBO Max, a streaming service, the same day they debut in theaters.[74] Warner Media chief WarnerMedia Chief Executive, Jason Kilar, called the decision an "extraordinary moment" that would give the fans the opportunity to choose between going to their local cinema or opening HBO Max.[75] To kick off the start of this hybrid-distribution model, Warner Bros. released the highly-anticipated *Wonder Woman 1984* worldwide in theaters on Christmas Day.[76] In addition to its theatrical release, the film was made available on HBO Max the same day at no additional cost to subscribers.[77] Mr. Kilar lists several benefits of the choice to release *Wonder Woman 1984* in this way.[78] First, it gives the fans the opportunity to choose where they want to see the movie.[79] With theaters starting to cautiously reopen with new safety protocols in place, some fans will be able to see *Wonder Woman 1984* on the big screen. Fans that would prefer not to go to the theater and would rather enjoy the movie from their homes will be able to see the movie on HBO Max with their paid subscription.[80] Kilar is of the impression that "super fans" of the

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[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] Warner Media, *Wonder Woman 1984, This Christmas, Movie Theaters and HBO Max*, WARNER MEDIA (Nov. 18, 2020), https://medium.com/warnermedia/wonder-woman-1984-this-christmas-movie-theaters-and-hbo-max-c28537aac0c5.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*

franchise will choose to see it in both formats.[81] Second, movie theaters will benefit from the opportunity to premier a highly-anticipated movie at a time when most theaters are struggling to stay in business.[82] Finally, both Warner Bros. and its creative partners benefit from the positive fan response they anticipate they will receive.[83] In this case, the movie performing well would mean significant box office revenue, as well as an increase in HBO Max subscriptions.

B. Hollywood Reacts

The responses to Warner Bros.'s new hybrid-distribution model were overwhelmingly critical. Exhibitors, filmmakers, talent agents, and producers all chimed in to express their shock and disdain at the decision. One of the most scathing takes on the decision came from one of Warner Bros.'s' most important filmmakers, Christopher Nolan.[84] Nolan has had a long, profitable relationship with Warner Bros., having directed many box office heavy-hitters for the studio, such as *Insomnia,*" *The Dark Knight* trilogy, *Inception*," and *Dunkirk*.".[85] Nolan deemed the Warner Bros. distribution model as a "mess" and stated that Warner Bros. was "dismantling the incredible machine they used to get filmmaker's work out everywhere."[86] In his own words,

> Some of our industry's biggest filmmakers and most important movie stars went to bed the night before thinking they were working for the greatest movie studio and woke up to find out they were working for the worst streaming service.[87]

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[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] Lindsey Bahr, *Christopher Nolan calls Warner's streaming plan 'a mess',* THE ASSOCIATED PRESS, (Dec. 7, 2020), https://apnews.com/article/christopher-nolan-warner-streaming-mess-4a1b65e170d4ed5f70b6163f01fe63c5.
[85] *Id.*
[86] Kim Masters, *Christopher Nolan Rips HBO Max as "Worst Streaming Service," Denounces Warner Bros.' Plan*, THE HOLLYWOOD REPORTER (Dec. 7, 2020, 4:36 PM), https://www.hollywoodreporter.com/news/christopher-nolan-rips-hbo-max-as-worst-streaming-service-denounces-warner-bros-plan.
[87] *Id.*

Nolan's frustrations with the studio come from the lack of transparency around the distribution decision, as well as its botched handling of his newest project: *Tenet*.".". *Tenet* was Warner Bros.'s' first major movie to premiere in theaters during the pandemic.[88] Warner Bros. hoped that by releasing a potential blockbuster by a well-known filmmaker, it would drive up the fans' desire to return to the theater after months of closures.[89] Unfortunately, after multiple delays, *Tenet* was released in theaters to lackluster results.[90] The movie cost $200 million to produce, grossed $360 million worldwide, but only made about $60 million domestically.[91] The studio ultimately decided to offer both digital and physical versions of the film in the form of a streaming debut on multiple platforms, Blu-ray, and DVD.[92]

Another disgruntled filmmaker joining Nolan in his criticism of Warner Bros. is *Dune* director Denis Villeneuve. Echoing Nolan's feeling of betrayal by the studio, Villeneuve stated,

> Warner Bros.' sudden reversal from being a legacy home for filmmakers to the new era of complete disregard draws a clear line for me. Filmmaking is a collaboration, reliant on the mutual trust of team work and Warner Bros. has declared they are no longer on the same team.[93]

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[88] Rebecca Rubin, *Christopher Nolan's 'Tenet' Coming to Home Entertainment in December,* VARIETY (Nov. 5, 2020, 12:12 PM), https://variety.com/2020/film/news/christopher-nolan-tenet-digital-blu-ray-home-entertainment-1234823914/.

[89] *Id.*

[90] Nick Statt, *You can finally watch Tenet from the safety of your home in December,* THE VERGE (Nov. 5, 2020, 2:34 PM), https://www.theverge.com/2020/11/5/21551390/tenet-home-release-date-dvd-blu-ray-digital-nolan.

[91] Daniel Arkin, *Christopher Nolan, key Warner Bros. director, blasts studio over release strategy,* NBC NEWS (Dec. 8, 2020 10:57 AM), https://www.nbcnews.com/pop-culture/movies/christopher-nolan-key-warner-bros-director-blasts-studio-over-release-n1250369.

[92] Statt, *supra* note 90.

[93] Denis Villeneuve, *'Dune' Director Denis Villeneuve Blasts HBO Max Deal (Exclusive),* VARIETY (Dec. 10, 2020, 5:00 PM), https://variety.com/2020/film/news/dune-denis-villeneuve-blasts-warner-bros-1234851270/.

He further explains that although streaming is a "positive and powerful addition to the movie and TV ecosystems," it is not enough to sustain the film industry.[94] Villeneuve shares the opinion of many other filmmakers, including Steven Spielberg, that some movies are only meant to be seen in a movie theater.[95] Every aspect of *Dune*," from the image to the sound, was designed for a complete cinematic experience that does not translate as well in a consumer's home.[96] Not only does Warner Bros.'s' distribution plan go against the vision of the filmmaker, but it also strips the film of the opportunity to generate significant box office revenue and puts it at risk for piracy.[97]

In addition to the filmmakers, another vital group has been affected by Warner Bros.'s decision: the talent. When Warner Bros. announced that all its upcoming projects would be released both in the theaters and on HBO Max, actors and actresses rightfully worried about what the decision meant for their paychecks.[98] Since Warner Bros. wanted to kick off their new distribution plan with *Wonder Woman 1984* on Christmas Day, they needed the support of the film's star, Gal Gadot, and director, Patty Jenkins.[99] Agents for both Gadot and Jenkins argued that their clients would need to be paid the same amount they would have received had the film been released exclusively in theaters before being made available on an online platform.[100] In return, their clients would publicly support the hybrid release of their film.[101] After negotiation with Warner Bros. and its parent company AT&T, it was decided that both Gadot and Jenkins would receive more than $10 million in compensation for the film.[102]

After hearing about the deal Gadot and Jenkins struck with Warner Bros., talent agents questioned if their clients would receive the same treatment. Richard Lovett, president of Creative Artists Agency, commented on the decision:

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[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] Brooks Barnes & Nicole Sperling, *Trading Box Office for Streaming, but Stars Still Want Their Money,* N.Y. TIMES (Sept. 5, 2021), https://www.nytimes.com/2020/12/07/business/media/warner-bros-hbo-max-movies-pay.html.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*

> [The Warner Bros. decision] plainly violates the rights of our clients who hold approval rights over distribution plans. [Warner Bros.] unilaterally determined a value for our clients and their work to benefit the long-term prospects of HBO Max and the finances of AT&T, a choice that our clients did not make and a value decision that is out of sync with the marketplace and other streaming platforms. The bottom line is that you are trying to take advantage of our clients to benefit your company…To insult talent this way is to redefine your company in a way that is a major setback.[103]

Patrick Whitesell, executive chairman of Endeavor, mirrored these statements by calling the decision "a blatant attempt to self-deal" and stated that "the simultaneous release on HBO Max will cannibalize the domestic box office and torpedo the traditional waterfall of economics that make movies profitable in the near and long-term for the studio and for our clients."."."[104]

One of the primary concerns from the actors and actresses involved in Warner Bros.' films is how the transition from strictly box office sales to a hybrid model will reflect in their pay packages.[105] Since an actor's salary is negotiated on a film-by-film basis, it is nearly impossible to determine a uniform amount that will apply to every actor on the Warner Bros.' roster. The pay package is composed of the actor's upfront salary before the film is made in addition to "back-end" pay that an actor earns depending on the success of the film at the box office.[106] Some actors opt to accept a lower salary upfront in order to reduce production costs and receive a higher back-end payment.[107] While Warner Bros. says it will be "generous" in its negotiations of talent pay packages, it is unlikely that every actor or actress, regardless of celebrity status, will receive packages as lucrative as the ones offered to Gadot and Jenkins.

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[103] Dave McNary, *CAA President Blasts WarnerMedia Streaming Plan: 'You Are Trying to Take Advantage of Our Clients',* VARIETY (Dec. 10, 2020, 3:21 PM), https://variety.com/2020/film/news/caa-blasts-warner-bros-hbo-max-1234851004/.

[104] McNary, *supra* note 6.

[105] Barnes & Sperling, *supra* note 98.

[106] *Id.*

[107] *Id.*

Adding to the long list of aggrieved parties in the Warner Bros.'s' decision is the production company, Legendary Entertainment. Legendary worked with Warner Bros. and co-financed their highly-anticipated upcoming projects *Dune* and *Godzilla vs. Kong*.".[108] Legendary has accused Warner Bros. of not fully disclosing their distribution plan for these projects to them before making the public announcement, despite the fact that Legendary funded the majority of the production costs.[109] Also, Legendary was considering selling *Godzilla vs. Kong* to Netflix for around $250 million – a price they felt represented the value of the film – but Warner Bros. blocked the deal from happening.[110] Legendary faces a similar dilemma to the actors and actresses involved in these films. Producers are one of the many entities who depend on box office revenue to recoup their costs from making the film. By splitting the revenue between box office sales and HBO Max subscriptions, Warner Bros. is isolating part of the profit for themselves since the producers do not receive any compensation from HBO Max subscribers. Making films available on HBO Max the same day they debut in theaters will inevitably lure consumers away from the theaters, significantly lowering Legendary's opportunity to profit from their films on the back-end. Also, by not disclosing their distribution plan upfront, Warner Bros. did not give Legendary the opportunity to negotiate their contract with the studio and alter the provisions regarding payment.

The last group to be affected by the Warner Bros. decision is one that may never recover: the movie theater chains. As some movie theater chains are reluctantly beginning to reopen during the COVID-19 pandemic, others have had to close completely. Regal Cinemas, the second-largest film exhibitor in the U.S., was forced to shut down all 536 locations just two months after they tried to reopen.[111] They made

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[108] Rebecca Rubin & Brent Lang, *'Dune' Producer Legendary Entertainment May Sue Warner Bros. Over HBO Max Deal,* VARIETY (Dec. 7, 2020, 9:50 AM), https://variety.com/2020/film/news/legendary-entertainment-warner-bros-hbo-max-deal-dune-godzilla-1234847605/.

[109] *Id.*

[110] *Id.*

[111] Bill Chappell, *Regal Movie Chain Will Close All 536 U.S. Theaters on Thursday,* NATIONAL PUBLIC RADIO (Oct. 5, 2020, 1:38 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/10/05/920367787/regal-movie-chain-will-close-all-536-u-s-theaters-on-thursday.

the decision after receiving the news that the release of the newest James Bond movie, *No Time to Die*," would be delayed until 2021.[112] With dozens of potential blockbusters being pushed to 2021 and many states still under mandatory lockdown, Regal was not able to provide its customers with the major films they were hoping to see on the big screen.

AMC Theatres, the largest film exhibitor in the U.S., is facing a similar fate. In a press release to its investors, AMC's CEO, Adam Aron, warned that if the popular movie chain does not raise $750 million by the middle of January 2021, they will have to file for bankruptcy.[113] AMC was hoping to revive its struggling business with a host of new 2021 films from Warner Bros. and other studios, but that hope was dashed after Warner Bros. announced its new distribution model. In a recent statement, Aron recognized that Warner Bros. is partly to blame for AMC's looming bankruptcy:

> Clearly, Warner Media intends to sacrifice a considerable portion of the profitability of its movie studio division, and that of its production partners and filmmakers, to subsidize its HBO Max start up. As for AMC, we will do all in our power to ensure that Warner does not do so at our expense.[114]

Although Warner Bros. is not abandoning the movie theaters completely, it is apparent that their decision hurts AMC's chances of surviving through the pandemic. The option to watch movies for $15 in the safety of your home during the pandemic is more than enough to keep many moviegoers from the theater. Many theaters in major markets–like Los Angeles and New York–remain closed.[115] These two factors alone spell disaster for AMC and other theater chains hoping

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[112] *Id.*
[113] *Id.*
[114] Herb Scribner, *AMC has already reacted to Warner Bros. releasing films on HBO Max,* DESERETNEWS (Dec. 7, 2020, 5:00 AM), https://www.deseret.com/entertainment/2020/12/7/22153719/amc-theatres-hbo-max-warner-bros.
[115] Brent Lang & Rebecca Rubin, *Struggling Movie Theaters See Glimmer of Hope Following Coronavirus Vaccine News,* VARIETY (Nov. 9, 2020, 3:54 PM), https://variety.com/2020/film/news/movie-theaters-coronavirus-vaccine-1234826324/.

to recover and remain a vital part of the film industry. In light of the distribution decision, AMC has begun "urgent talks" with Warner Bros. to renegotiate the terms of their contracts.

IV. THE FATE OF THE FILM INDUSTRY

A. Long-Term Consequences for Warner Bros.

The early circulation of the COVID-19 vaccine offers some hope to struggling movie theater chains. Still, it is difficult to predict how long it will take to distribute the vaccine fully and how long it will take for it to become safe to reopen movie theaters.. COVID-19 cases are beginning to surge again in Europe in the short term, causing many theaters to close down again.[116] Public health experts predict that the United States will face another spike in cases again.[117] If this occurs, movie theater chains in the United States which, are already fighting to stay above water, will have to shut down again, possibly for good. If the theaters do not have to close down, they explore reducing ticket prices for Warner Bros. films to generate revenue and avoid bankruptcy.[118] Some theaters may drop the ticket price down to $3-$5 and keep the majority of the sales, choosing to give only about 25 percent back to Warner Bros.[119] AMC and Cinemark, two of the largest movie theater chains, have decided to review Warner Bros.' films on a case-by-case basis to determine if they are going to screen them.[120] These responses by the movie theater chains are in response to Warner Bros.'s hybrid-distribution model. By not consulting the movie theater chains before announcing their decision, Warner Bros. has essentially destroyed the long-standing relationship between movie theaters and movie studios. Movie theaters lowering ticket prices for Warner Bros.' movies, choosing whether they want to show Warner Bros.' movies at all, and turning over significantly less profit back to the studio will be

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[116] *Id.*
[117] *Id.*
[118] Grace Dean, *Movie theaters may slash ticket prices to $3 for Warner Bros. films, according to a report, after the studio said it would debut movies on HBO Max alongside cinemas,* BUSINESS INSIDER (Dec. 17, 2020, 7:45 AM), https://www.businessinsider.com/cinemas-cut-warner-bros-ticket-prices-hbo-max-streaming-movie-2020-12.
[119] *Id.*
[120] *Id.*

a devastating blow to Warner Bros. bottom line. With fewer people going to the theaters, Warner Bros. could lose around $1.2 billion in 2021.[121]

In addition to losing a significant amount of money in 2021, Warner Bros. may be facing possible litigation from both Legendary Entertainment and talent agents. Legendary Entertainment, the producers behind *Dune* and *Godzilla vs. Kong*," are worried that Warner Bros.'s decision to make the films available for streaming immediately will "tarnish the long term viability of the franchises.".."[122] Legendary funded 75 percent of both projects and expected to see a return on their investment after the films debuted in theaters.[123] By making the switch to simultaneous streaming, Warner Bros. has undermined Legendary's ability to make a profit in the box office. If Legendary was aware of the decision beforehand, they would have been able to negotiate their contracts with Warner Bros. for a higher upfront fee to at least cover the production costs. Although it is uncertain exactly what grounds Legendary will attack Warner Bros. on, it will most likely be a breach of contract claim. In order to avoid litigation, Legendary and Warner Bros. are currently negotiating the possibility of Warner Bros. purchasing both films from Legendary.[124] Legendary has indicated that if a sufficient deal is not struck between the parties, they will pursue legal action against the studio.[125]

Talent agents may also pursue breach of contract claims against the studio. In addition to negotiating back-end payment agreements into their employment contracts, many actors and actresses have the right to determine how the films are distributed. If any of the talent involved in Warner Bros. 2021 slate of movies have these provisions in their contracts, they are well within their rights to pursue legal action against the studio.

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[121] *Id.*
[122] Zack Sharf, *Legendary Set to Challenge Warner Bros.' Move of 'Dune' and 'Godzilla' to HBO Max – Report,* INDIEWIRE (Dec. 7, 2020, 12:15 PM), https://www.indiewire.com/2020/12/legendary-fights-warner-bros-dune-hbo-max-1234602812/.
[123] *Id.*
[124] Rubin & Lang, *supra* note 108.
[125] *Id.*

V. CONCLUSION

While Warner Bros. has stated multiple times that their hybrid-distribution model is just a unique one-year plan in response to the pandemic, they have already dealt a devastating blow to the already struggling film industry. This single decision has managed to destroy the valuable industry relationships between Warner Bros. and other entities that have otherwise lasted for decades. Their hybrid-distribution plan calls into question the role of the movie theater, the value placed on actors and actresses, and the hierarchy of production. In response to this decision, talent agents and producers will have to create a new structure for contracts that places a higher value on upfront fees and streaming revenue over back-end compensation. Since it appears that films will continue to become more streaming-oriented over time, these parties may also begin to demand a stake in the subscription services where their films will be debuted. With so many factors to consider and the amount of negotiations that will be taking place over the next year, it is possible that a compromise will be reached that will mutually benefit the studio, the producer, the movie theater, and the talent.