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CONTEMPORARY STATE ANTI-“SLAVERY” EFFORTS:
DISHONEST AND INEFFECTIVE

Karen E. Bravo*

Abstract: Contemporary state anti-“slavery” efforts are dishonest with respect to the types of anti-“slavery” methodologies that states implement, including the use of slavery terminology.

State anti-“slavery” efforts demonstrate three types of dishonesty: (1) the rhetorical misrepresentation to the public, and within state entities themselves, of the nature of the contemporary exploitation targeted by states; (2) hypocritical protestations of concern, coupled with the pretense that the types of initiatives that states support can succeed (this despite state failure to address the root causes and the fundamental interrelationships of the exploitation with state-supported and -implemented policies and structures); and (3) a form of willful innocence that refuses to acknowledge or deliberately ignores the interrelationships among state policies and the types of exploitation that are targeted by the anti-“slavery” initiatives.

In addition, state efforts are ineffective in addressing the types of exploitation that states purport to target. State anti-“slavery” efforts are largely ineffective because the conceptual paradigms supported by states do not challenge the role of states or existing modalities of wealth and resource allocation upon which they depend.

Keywords: human trafficking, slavery, modern slavery, anti-slavery, exploitation, anti-exploitation, Trafficking Protocol

PRELUDE: EXPLOITATION AND ANTI-“SLAVERY”

Toward the end of 2017, international media excitedly reported the existence of real live slave markets in Libya.* The reports justifiably elicited widespread and breathless expressions of horror, and condemnation of the perpetrators of the violations. However, deeper examination of the context and background of the slave markets point to state indifference to, and complicity in, their existence. For

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example, journalist David Kirkpatrick reported in the New York Times that: “The response from the European Union, however, has been notably muted. That may partly reflect the gratification among European Union officials over Italy’s success at reducing the influx of migrants across the Mediterranean. Italy has been helping Libyans stop them at sea or keep them in Libya, despite the dangers they face there.” He further noted that the markets were no surprise, after all: “As early as the spring of 2015, journalists who visited migrant detention camps in Western Libya reported that the jailers routinely sold captives to local farmers or others for temporary use as laborers.”

Human rights non-governmental organizations (NGOs) and their leaders are aware of and have expressed concerns about state roles in the Libyan crisis. Kirkpatrick reported on the expression of those very concerns from within Human Rights Watch: “The European policy ‘is looking an awful lot like complicity,’ said Judith Sunderland, a researcher for Human Rights Watch. The sale and exploitation of African migrants in Libya has been well known ‘for a very long time, frankly,’ she said.”

Ivanka Trump, the daughter of the incumbent U.S. president, officially an unpaid adviser to her father, condemned “slavery” in a high-profile appearance, accompanied by anti-slavery NGOs such as the New Underground Railroad. Shortly thereafter, the production lines of one of her businesses were revealed to be participants in labor exploitation.

I. INTRODUCTION

“Slavery” and anti-“slavery” rhetoric and efforts resonate strongly in the public consciousness. Throughout the world, states, inter-governmental organizations, non-governmental organizations (NGOs), and anti-slavery activists are engaged in a new, pitched war against an enemy thought to be long-vanquished. The signs and reports of these efforts are memorialized and

4. Id.
celebrated in governmental and intergovernmental reports, glossy magazines, and celebrity-studded performances of anti-slavery zeal.\textsuperscript{7}

In this Article, I claim that contemporary state anti-“slavery” efforts are dishonest and ineffective in addressing the exploitation that states claim to target. The dishonesty and ineffectiveness of state efforts stem from collective failure (or refusal) to acknowledge conceptually, rhetorically, and in policy implementation the complexity of the origins and nature of the forms of contemporary exploitation targeted by their anti-“slavery” efforts.

I draw inspiration for my critiques from the parable of the river. According to one version of the parable:

Imagine a large river with a high waterfall. At the bottom of this waterfall hundreds of people are working frantically trying to save those who have fallen into the river and have fallen down the waterfall, many of them drowning. As the people along the shore are trying to rescue as many as possible, one individual looks up and sees a seemingly never-ending stream of people falling down the waterfall and begins to run upstream. One of the other rescuers hollers, “Where are you going? There are so many people that need help here.” To which the man replied, “I’m going upstream to find out why so many people are falling into the river.”\textsuperscript{8}

To effectively combat normalized human rights abuses, contemporary anti-exploitation efforts must focus on the “whys,” not only the “hows.” Anti-exploitation efforts must look upstream.

By using the image and rhetoric of slavery, coupled with affirmations of slavery’s illegality under state and international law, the state directs attention toward individual bad-guy perpetrators and away from state policies and structures that contribute to the exploitation it purports to target. The state’s rhetoric and efforts highlight “transnational organized crime” but pay little attention to the contributory roles of state policies and the international legal regime, or of powerful non-state actors, such as multinational corporations.

Ineffective methodologies proceed from the problematic diagnosis of “slavery.” The focus on the language of “slavery” and slavery’s abolition under international and domestic law appears to blind the states and their policymakers to the structural foundations (economic, political, and cultural) of extreme forms of contemporary human-to-human exploitation. The rhetoric is also convenient, as it avoids addressing Western countries’ contributions (both historic and


ANTI-“SLAVERY” EFFORTS

contemporary) to the exploitative conditions suffered by those the states claim to protect.

The dominant paradigm is one wherein the perception is that state and private party identification of perpetrators and victims, together with criminalization, disgorgement, and reporting requirements will lead to the eradication of the targeted forms of exploitation. State anti-“slavery” efforts will continue to be dishonest and ineffective until states focus on the “whys” and not just the “hows” of the exploitation, acknowledge their roles in facilitating and sustaining human trafficking and other forms of severe contemporary exploitation (“today’s slaveries”), and deploy policies and interventions that target the root causes.

Terminology

I use the formulation “state anti-‘slavery’ efforts” to signal both my skepticism of the use of the word “slavery” to describe severe forms of contemporary exploitation, and my claims that states do not effectively or wholeheartedly engage in anti-exploitation efforts. I have previously pointed out the incoherent use of the word “slavery” and that it appeared that the word was now “shorthand for a potentially infinite variety of contemporary types of exploitation and abuse.” I further noted a movement away from the longstanding legal understanding of the term: “slavery” is now used interchangeably with “human trafficking.”

In this Article “[t]he term ‘today’s slaveries’ invokes pluralities – of perceptions, of exploitation forms, and of meanings of the term.”

The “state,” as used in this Article, refers to states in both the Global North and the Global South. Accusations of dishonesty and ineffectiveness may resonate most strongly with respect to states in the Global North that have staked out strong rhetorical anti-“slavery” positions (such as the United States of America (U.S.) and the United Kingdom (U.K.)). However, states in the Global South that adopt anti-slavery legislation and rhetoric, while failing to address fundamental causes of exploitation within their borders and spheres of influence also are appropriate subjects of such critiques. Within any individual state, the term encompasses the policies, laws, and implementation by different branches of individual governments – executive, legislative, and judicial. With respect to the international sphere, the term refers to the exercise of power outside of the borders of a state, whether through the deployment of rhetoric or of a state’s economic or military power. For states in both the Global North and Global South,

11. Id.
12. See id. at 28 (explaining my formulation and use of the term).
corruption of officials and the capture of state resources by national and transnational elites also lead to anti-"slavery" efforts that are dishonest and ineffective, and that rely on eye-catching and emotion-inducing anti-trafficking performances.

This Article is organized as follows: Part II provides a background and summary of the "re-discovery" of human trafficking and other contemporary forms of exploitation; explores the causes of such exploitation; and describes the principal types of state anti-"slavery" efforts. Part III addresses the nature and meanings of "dishonesty" as used in this Article, and describes the types, subjects, audiences, and methodologies of the dishonesty used by states. Part IV identifies the ineffectiveness and effects of state efforts, including an explanation of the basis of my claims of ineffectiveness. Part V offers recommendations for the adoption of anti-exploitation methodologies that will more effectively combat the targeted forms of exploitation.

II. CONTEMPORARY FORMS OF EXPLOITATION AND STATE ANTI-"SLAVERY" EFFORTS

The origins and structure of the contemporary anti-trafficking regime evidence that human rights and the protection of humans against severe forms of exploitation were not a first order of priority for state actors. State prioritization of state security interests, is evidenced by (1) the language and architecture of the United Nations (U.N.) Trafficking Protocol; 13 (2) the decades-long, severe endemic exploitation had not elicited active state responses (such as the adoption of either domestic or international anti-exploitation action, for example); 14 (3) the subordination of state attention to severe forms of exploitation, including the purchase and sale of human beings, to state attention to national security and border threats; and (4) the perception and treatment of severe forms of exploitation denominated under the term "human trafficking" as, primarily, issues of international and domestic criminal law, not violations of international human rights law. The dominant paradigm of aberrational exploitation ("slavery" and "slavery"-like practices), where the exploitation is portrayed as unusual and outside the norm, continues to obfuscate the reality that the now-targeted forms of exploitation have been and are embedded in and essential to the economics, politics, and cultures of contemporary human existence around the globe.

13. For example, according to Louise Shelley, "[the Trafficking Protocol's definition] represents the interests of governments rather than individuals. Its focus is on border security, illegal migrants, and organized crime." LOUISE SHELLEY, HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE 10 (2010).

A. Background

Long after the nineteenth century’s legal abolition of slavery in domestic law and slavery’s prohibition under international law, severe labor and sexual exploitation continued worldwide, and were structurally integrated into economic, political, and social activities and practices, often pursuant to government sponsorship or acquiescence. Examples include labor exploitation by colonizers in Africa and India;\(^{15}\) re-enslavement of Blacks in the American South;\(^{16}\) Japan’s enslavement of “comfort women” during World War II;\(^{17}\) and sex tourism, including the exploitation of minors in the Philippines, Thailand, and other parts of Asia.\(^ {18}\)

The contemporary emergence into public view of severe forms of exploitation owes much to a confluence of events that raised concerns about threats to the national security of powerful states.\(^ {19}\) Previous and coexisting exploitation of persons from the Global South was (and continues to be) inadequately explored and addressed.\(^ {20}\) Women’s rights activists and anti-slavery NGOs (such as the Anti-Slavery Society, the Minority Rights Group, and International Federation of Women Lawyers)\(^ {21}\) had identified and decried ongoing forms of severe exploitation with little success: despite U.N. reports, states had done little to adopt legislative or policy changes that could effectively address the exploitation.\(^ {22}\)

From the beginning of the modern anti-trafficking movement, state efforts were subordinate to anti-crime and border protection concerns. In the 1990s, the dissolution of the Soviet Union led, among other things, to a seeming explosion of transnational criminal activity by “Russian gangs,” and the traffic and sexual exploitation of Eastern European women to countries around the world, including to Western Europe, Israel, and the U.S., to name prominent examples.\(^ {23}\) Responding with alarm, under the auspices of the U.N., states negotiated, drafted, and opened for signature the U.N. Convention on Transnational

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22. Id.
The activist efforts of women's groups led to the simultaneous opening for signature in 2000 of the Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the U.N. Convention Against Transnational Organized Crime. The U.N. Trafficking Protocol defined "human trafficking" and imposed transborder anti-crime coordination obligations on states parties. The instrument further required that states decriminalize trafficked persons who had violated the state's immigration laws, and provide rehabilitation services to such persons. States also agreed to refrain from repatriating trafficked persons who would be harmed by such repatriation.

The U.S. Trafficking Victims Protection Act 2000, and its reauthorizing legislation, have also been highly influential. Pursuant to the extraterritorially directed provisions of the legislation, the United States Department of State (DOS) annually ranks the anti-trafficking efforts of countries throughout the world. States have responded by adopting forms of the model legislation demanded by the U.S., and have acceded to the international instruments that the U.S. Trafficking in Persons (TIP) Report list is crucial to anti-human trafficking efforts.

The U.N. Trafficking Protocol and the U.S. anti-trafficking legislation and their ardent embrace by NGOs and civil society groups led to greater and ever-increasing public and state awareness of human trafficking. As political and civil society awareness increased, influential voices, such as Kevin Bales and E. Benjamin Skinner, spearheaded a change in rhetorical framing: the severe forms of exploitation where not just "human trafficking," but "modern slavery" or new
kinds of slavery.\textsuperscript{31} Further, this new slavery was even worse than the global enslavement of Africans which had been legally abolished in the nineteenth century.\textsuperscript{32} The rhetorical transformation has made the terminology of “trafficked person,” “human trafficking,” and “trafficking in humans” virtually synonymous with “slavery.” For example, the 2017 TIP Report, under the heading “What is Trafficking in Persons” provides, with no introductory text, a description of various forms of human trafficking under the subheading “The Face of Modern Slavery.”\textsuperscript{33} Another example is the website of Polaris, an influential U.S.-based NGO, that, under the heading “The Typology of Modern Slavery,” analyzes 32,000 cases of human trafficking.\textsuperscript{34}

I have argued elsewhere that the use of the term “slavery” provides emotional and rhetorical focus for state anti-“slavery” initiatives.\textsuperscript{35} Pursuant to this methodology we are guided to adjust our perceptions such that the labels “slave,” “slavery,” and “enslavement” (whether “modern,” “contemporary,” or just plain “slavery”) appropriately capture the contemporary exploitation of millions of persons throughout the globe.\textsuperscript{36} The emotionally appealing usage is catchy, and has come to dominate understanding of discussions about severe forms of contemporary exploitation.\textsuperscript{37} Despite cautionary words about the risks and offensiveness of the definitional dilution, the use of “slavery” appears to be triumphant: “human trafficking” is “slavery,” and “slavery” is “human trafficking.”\textsuperscript{38}

Against a backdrop of state legal abolition and prohibition of chattel, slavery in both the international and domestic spheres, the movement reinforced in public perception and in state policy a law enforcement paradigm pursuant to which the targeted exploitation (1) is outside the norm and violates the human rights of individual persons; (2) breaches international law and domestic law; and (3) will be fought primarily through (i) criminal law, and (ii) services to persons

\textsuperscript{31} See, e.g., KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY (2d ed. 2004); & E. BENJAMIN SKINNER, A CRIME SO MONSTROUS: FACE-TO-FACE WITH MODERN SLAVERY (2008). According to Kamala Kempadoo, “The modern-day or anti-slavery campaign, also referred to here as modern day abolitionism, was substantially formed through the work of the American Kevin Bales in the late 1990s.” Kamala Kempadoo, The Modern-Day White (Wo)Man’s Burden: Trends in Anti-Trafficking and Anti-Slavery Campaigns, 1 J. HUM. TRAFF. 8, 9 (2015).

\textsuperscript{32} See BALES, supra note 32.

\textsuperscript{33} U.S. Dep’t of St., supra note 31, at 17.

\textsuperscript{34} POLARIS, The Typology of Modern Slavery, https://polarisproject.org/typology.  


\textsuperscript{36} See Walk Free Foundation, Global Slavery Index 2016 Report (2016).


\textsuperscript{38} Chuang, supra note 38, 609-649.
victimized by the criminal perpetrators. Professor Vijeyarasa notes that "The annexing of the Trafficking Protocol to a convention focused on organized crime prevention and criminal justice was a deliberate step that continues to shape the mainstream trafficking framework and the idea that trafficking 'is a form of organized crime.'"40

B. The "Whys" of Human Trafficking

However, the rhetoric of aberrational criminal enslavers tends to ignore the upstream aspects of the exploitation. The causes of human trafficking and other severe forms of contemporary exploitation are inherently economic.41 I identified some of the systemic conceptual and structural tensions and inconsistencies that create the preconditions for human trafficking. These include the rhetorical and implementation contradictions surrounding trade liberalization and globalization, failure to conceptualize and protect humans as both rights bearers and economic actors, and the dominance of state sovereignty interests (control over borders and imposition of human immobility).42 Other upstream contributors include the disruption created by civil and international wars; economic inequality; and the subordination of some groups (based on age, gender, racial and ethnic identities, for example) within individual states and societies.

C. State Anti-"Slavery" Efforts

Analysis of the state priorities revealed by treaties, legislation, and initiatives identify a focus on the how (but insufficiently on the why) of severe forms of contemporary exploitation. Some of the drowning may be pulled from the river and saved. However, the origins and the entry points of the victimized have not yet been adequately mapped or addressed. For example, despite acknowledgement of the connection between irregular migration flows and severe forms of exploitation, state policies do not connect the dots to the surrounding economic, political, and cultural causes of migration flows. Downstream anti-exploitation and anti-slavery efforts would include state cooperation in economic development, general education policies and programs, and the economic, social, and other empowerment of vulnerable groups within source countries.

State anti-"slavery" efforts fall within different categories, including: (1) international instruments and cross-border cooperation through intergovernmental organizations; (2) domestic legislation and policies; (3)

40. Id.
41. Bravo, supra note 20.
42. Id.
cooperation with international NGOs; and (4) cooperation with domestic NGOs and civil society.

The principal international instruments are the U.N. Convention on Transnational Organized Crime and the U.N. Trafficking Protocol. Together with other regional instruments adopted by states (such as the Council of Europe Convention on Action against Trafficking in Human Beings and the South Asian Association for Regional Cooperation's Convention Preventing and Combating Trafficking in Women and Children for Prostitution), the instruments attempt to modernize and implement the *ius cogens* norm prohibiting slavery.

The intergovernmental agencies whose mandates include anti-human trafficking and anti-slavery are the International Labour Organization, the United Nations High Commission on Refugees (UNHCR), the United Nations Office of Drugs and Crime (UNODC), and the International Organization of Migration (IOM), among others. The work of these intergovernmental agencies, each of which has a specialized remit (as reflected in their names) touches upon different aspects of human trafficking and other severe forms of exploitation. However, their efforts are affected by low levels of coordination and information sharing among these agencies. Further, because these agencies do not have power to sanction states or other actors, they cannot compel action from states or other agencies with relevant mandates and great economic and regulatory power (such as the World Trade Organization, the International Monetary Fund, or the World Bank) that undermine the effectiveness of their work. For example, the trade liberalization, currency regulation and international policies effected by the World Trade Organization, the International Monetary Fund, and the World Bank

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46. Under international law, a *ius cogens* norm is a mandatory customary norm from which no state may lawfully derogate. For example, no state may legally create or implement “slavery” in its domestic laws or in its international relations. However, the prohibition does not target state laws and policies that create *de facto* versus *de jure* conditions akin to slavery.


may result in economic, political, and social dislocations that increase vulnerability and irregular migration flows.

States may also support (through grant funding mechanisms), and/or rhetorically coordinate efforts with, prominent international and domestic NGOs such as Polaris, a domestic U.S. NGO; Walk Free Foundation, an Australian NGO; International Justice Mission (IJM), a U.S. NGO; and Anti-Slavery International, a U.K.-based NGO.

Domestically, states such as the U.S. and the U.K. have adopted legislation that identify and criminalize severe forms of exploitation as either, or both, human trafficking or modern slavery and put corporate actors on notice that they must monitor their supply chains (including requiring the submission of reports regarding those efforts). Such legislation also provide for civil remedies such as the “clawing back” from trafficker- perpetrators of the proceeds of criminal enterprises using concepts of unjust enrichment; and have eliminated provisions that required the indictment and punishment of persons trafficked for sex, including minors engaged in the trade. Together with the U.K. Modern Slavery Act, the U.S. William Wilberforce Act, U.S. PROTECT Act, and Survivors of Human Trafficking Empowerment Act are examples of such legislation. Other states have adopted domestic anti-human trafficking legislation.

The U.S., on the federal level, is committed to a philosophy of the Four “Ps”: prevention (through education), prosecution (of perpetrators), protection (of trafficked/enslaved persons), and partnership (with civil society). The component states of the U.S. follow similar policies, and have been the source of innovations directed at inflection points such as hotels, corporate supply chains, and decriminalization and rehabilitation of prostituted minors. Domestic U.S. efforts have also included the funding of federal anti-trafficking task forces; as well as competitive awards for the creation of task forces by individual states.

49. https://www.walkfreefoundation.org/
50. https://www.Ijm.org/
51. https://www.antislavery.org/
53. U.S. Dep’t of St., supra note 31, at 17.
54. U.S. Dep’t of St., supra note 31, at 1.
The U.K.'s Modern Slavery Act of 2015\textsuperscript{57} embraced the rhetoric of slavery and abolitionism. The legislation consolidates and updates offences related to slavery, enhances carceral punishment, and empowers the judiciary to provide for forfeiture of properties as well as reparations to trafficked person. The Modern Slavery Act also expands law enforcement powers with respect to anti-slavery and anti-human trafficking, including expansion of maritime interdiction efforts. The mandate for transparency in corporate supply chains, which requires reporting by corporate actors, and the new protections (including non-criminalization) and creation/recognition of independent child advocates rounds out the scope of the new legislation.

Analysis of the variety of types of anti-“slavery” or anti-trafficking initiatives reveals a focus on criminalization and punishment; identification of, and the provision of services to, those victimized; and the imposition of reporting requirements to a selection of actors, with the goal of achieving transparency and, it is hoped, prevention. Other prevention efforts include the provision of educational materials to civil society, professionals (doctors, teachers, social workers, for example), and to groups who are potentially vulnerable to severe forms of exploitation.\textsuperscript{58} In the meantime, the provision of social services and, sometimes, even the legalization of undocumented immigrant status will help restore a selection of victims to their former or better lives. For example, the U.S. Trafficking Victims Protection Act created a specific visa category for which trafficking victims may apply.\textsuperscript{59}

However, despite rhetoric that emphasizes a victim-centered approach,\textsuperscript{60} the criminalization model is \textit{not} victim-centered so as to empower and protect the potentially vulnerable. The model requires that the enslaved/trafficked person \textit{not} be criminalized. In other words, it creates a negative, as opposed to a positive, obligation to protect. Prevention is limited to educational awareness campaigns that rely on a stereotype of ignorant victims\textsuperscript{61} and does not require the adoption of the kinds of holistic initiatives I propose in Part V, which focus on structural vulnerability to exploitation. State anti-slavery efforts are performative—suggesting anti-slavery zeal but being, in reality, attention-getting and superficial—with limited possibilities (or intentions) of engagement with fundamental exploitative structures.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{58} Vijeyarasa, \textit{supra} note 40, at 11.
\item \textsuperscript{59} U.S. Trafficking Victims Protection Act, 22 U.S.C. § 7101 §§ 6(e)(3)(A) & (B) (2000).
\item \textsuperscript{60} For example, the 2017 U.S. TIP Report speaks of “the victim centered approach, first and foremost.” (2017 TIP, Letter of the Ambassador-at-Large). U.S. Dep’t of St., \textit{supra} note 31.
\item \textsuperscript{61} Vijeyarasa, \textit{supra} note 40, at 98-100.
\end{itemize}
\end{footnotesize}
III. Dishonesty: Types, Subjects, Methodologies, and Audiences

What is "dishonesty" in the context of this Article's analysis? I use the term to convey failure to tell "truth" (not "the truth") through the use of disingenuousness and misrepresentation, willful blindness, and hypocrisy. "Truth," in this context, would go upstream to identify and address the complex structures and web of factors that lead to severe forms of exploitation. While the cruel, desperate, and criminal take advantage of those made vulnerable by these factors, virtually all of the global "us" benefit from, and are a part of, these systems.  

A. Types of Dishonesty

Despite the ardency displayed by governmental actors and the apparent commitment and goodwill of many state officials, such as legislators, prosecutors, law enforcement, and other members of the civil service, the conceptual frameworks used to understand the exploitation, and the methodologies deployed by states, reek of hypocrisy and dishonesty. In the state's anti-trafficking performance, rhetorical expressions of concern and horror and adoption of the criminalization model are coupled with the indifference exposed through the adoption of cynically contradictory legislative and policy initiatives. The contradictions reveal that the anti-"slavery" efforts are not intended to challenge and meaningfully combat the underlying economic, political, and other roots of the targeted exploitation.

Examples of such contradictions are not difficult to identify: The European Union (E.U.)'s initiative to fight the smuggling and trafficking of migrants across the Mediterranean through the use of military force demonstrates the prioritization of law enforcement and border security over human vulnerability. Australia's detention of unauthorized asylum seekers in abusive offshore detention facilities also demonstrate its overriding commitment to border protection and prevention, barely masked by the rhetorical goal of protecting the vulnerable asylum seekers from exploitation by criminal non-state actors.  

Another example is the U.S.'s detention and deportation of undocumented child migrants fleeing violence and exploitation in their home countries, together with agreements with Mexican authorities that Mexico will intercept and return such

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62. In our capacities as consumers, for example. Bravo, supra note 10, at 25-43 (exploring the roles of the average person in severe forms of exploitation).
migrants to the exploitative conditions from which they seek asylum. The latter is ironic, in light of the ever more expansive and synonymous use of “human trafficking” and “slavery” terminology to describe child soldiers and sexual exploitation of children. The forced returns and withholding of protection also contradict U.S. anti-“slavery” and anti-human trafficking rhetoric. For example, a mere few days after U.S. security forces deployed tear gas on Central American migrants, including women and children, who were seeking asylum at the militarized U.S.-Mexican border, Ivanka Trump triumphantly touted the Trump administration’s anti-human trafficking efforts. Ms. Trump’s curiously timed op-ed was accompanied by a “sexy” image of scantily dressed Asian women photographed during a police raid of a Thai karaoke bar, implying that human trafficking occurs “over there,” not over here, and certainly is not connected to contradictory U.S. governmental policy and/or actions.


68. The op-ed was curiously timed because it was published a mere few days after the tear gassing of asylum seekers and ongoing anti-asylum border action. The op-ed also came less than two weeks after the revelation that Ms. Trump had used personal emails to conduct government business. Carol D. Leonnig & Josh Dawsey, Ivanka Trump used a personal email account to send hundreds of emails about government business last year, WASH. POST, Nov. 19, 2018, https://www.washingtonpost.com/politics/ivanka-trump-used-a-personal-email-account-to-send-hundreds-of-emails-about-government-business-last-year/2018/11/19/6515d1e0-e7a1-11e8-a939-9469f1166f9d_story.html?utm_term=.95473bf013d. A generous interpretation is that Ms. Trump and the administration cannot see the connection between human trafficking, migration flows, and U.S. anti-immigrant policies. A more critical interpretation would be that the anti-human trafficking actions and op-ed are a useful distraction from the effects of those policies.
The principal types of dishonesty used in state anti-“slavery” efforts are interrelated, disingenuousness, and misrepresentation. The state is disingenuous and/or misrepresents truth when it rhetorically and effectively moves the focus away from state roles (such as legislation and implementation of policies) that are implicated in or create exploitation. The state is willfully blind when it refuses to acknowledge its own underlying assumptions and priorities. These underlying assumptions are a laser focus on state primacy, as opposed to the primacy of the protection of the human individual and the individual's human rights. It is true that state concerns about the state’s security and the security and safety of those under its protection are essential to the role of the state. However, contemporary policy implementation does not give equal attention to the protection of human rights, including human rights of the most vulnerable.

This focus may also stem, in part, from path dependence. The structures and institutions of the state resist easy modification, and the types of tools traditionally used by states—criminalization and law enforcement, for example—are easier for state institutions and actors to adopt and (attempt to) adapt. An individual state itself may be reluctant or unable to try new, more innovative, and holistic tools, particularly if those have not been adopted by more powerful states. Other causes of path dependence may include capture of the state by some of the powerful interests that benefit from the exploitation, and the possibility that an individual state just does not have either the will or resources to effectively prevent the targeted exploitation. This possibility emerges, in part, from the nation state’s origins as an entity that drew its powers from historic forms of exploitation such as colonization, nationalism, and slavery. Some states may be dependent on the continuation of contemporary forms of exploitation. Examples include labor-exporting states that rely on the remittances sent home by their nationals and are unable to respond adequately to their exploitation. The Philippines, for example, is dependent on the remittances of its expats, but has limited options with which to offer them protection from severe, even fatal, exploitation. Although the Philippines has banned the deployment of Filipinos to Kuwait, activists are concerned that, due to economic hardship, Filipinos will use more dangerous informal mechanisms to migrate for work. Further, the structures and doctrines of international law, which cherishes positivism, state sovereignty, and non-interference in domestic affairs, limit the types of initiatives that states may adopt. Respect for an individual state’s sovereignty and reluctance to openly interfere in domestic matters results in failure to protect the human rights of the residents of abusive or failed states. The civil war in Syria is

70. Id.
an emblematic example of such consequences. So do the difficulties of collaborating internationally, particularly where the collaboration centers on human protection, instead of the usually dominant state interests.  

My critique of hypocrisy as a feature of the dishonesty of state anti-"slavery" efforts stems from the dissimulation practiced by states. The inherently contradictory policies and legislation discussed elsewhere in the Article indicate that both the rhetorical stance and the efforts by states are hypocritical and limited to the performance (or appearance) of anti-slavery zeal, not the implementation of effective anti-exploitation methodologies.

B. Subjects of Dishonesty

States are dishonest about a variety of aspects of contemporary "slavery" and their own anti-"slavery" efforts.

1. Nature of the exploitation

In using the term "slavery," the states signal that contemporary anti-exploitation efforts are modeled on nineteenth century slavery abolition. Invoking "slavery" and "anti-slavery," evokes the international legal regime's formal abolition of slavery, and self-congratulatory accolades regarding some Western states' perceptions of their selfless and heroic nineteenth century roles. However, although legal abolition of slavery was an essential step toward the implementation of concepts of human freedom, on its own it was insufficient to eliminate contemporaneous and contemporary forms of severe exploitation by both state and non-state actors. Historic examples of these include post-abolition exploitation in British India, the European colonization of Africa, and forced labor extracted by the colonizers; and the U.S.'s post-Reconstruction South, among others. Contemporary examples include: the continued subordination of minority groups and the control of land in formerly colonized states and territories (South Africa and Australia, for example) and metropolitan states (the mass incarceration of Blacks in the U.S., for example); the global racial hierarchy, with whiteness at its apex; the "natural" subordination of formerly colonized states with majority non-white populations within the international political

72. A cursory review of U.N. Security Council resolutions since the inception of the U.N. indicates that human rights is not the subject area of most pressing interest to the powerful states.

73. The eradication of slavery on the African Continent was one of the rationales used to support the division and colonization by European powers.

regime; and the dispossession of rural populations by collusion of government officials, corrupt elites, and multinational agribusinesses, for example.\textsuperscript{75}

2. Contradiction between the state’s rhetoric and the exploitation targeted by the state

The state hides, ignores, refuses, or is unable to acknowledge inherent conflict between state anti-“slavery” policies and other policies and strategies pursued by the state. In addition to the consequences of the conflict among the state-supported trade liberalization versus the human immobilization efforts discussed earlier, the conflict is manifested in the contradictions between the policies of different arms of the state. These include the externally-focused emphasis on punitive anti-immigrant and anti-refugee policies versus states’ protection and prevention rhetoric, as well as conflicts in domestic policies, such as: excessive law enforcement and prosecution versus the provision of victim service agencies and policies.\textsuperscript{76} The contradiction is further revealed by analysis of state funding directed toward law enforcement and border militarization versus anti-human trafficking spending.\textsuperscript{77} Rather than committed anti-“slavery” actors, state efforts reveal prioritization of the preservation and reinforcement of existing relationships of power and subordination among and between racial, national, and socioeconomic groups, among powerful and less powerful states, as well as the subordination of humans to legal entities such as corporations, or the state itself.

3. State- versus victim-centered interests of the state and its efforts

The state is dishonest when it ignores or fails to acknowledge its prioritization of state interests. The anti-“slavery” rhetoric and performance create a perception of state moral authority in, and commitment to, the fight against severe forms of contemporary exploitation. However, the contradictions


discussed earlier reveal that the feigned moral authority disguises state indifference to, or participation in, the creation of exploitative conditions. The state’s interests predominate, not the interests of either “enslaved” or trafficked persons or of the persons vulnerable to severe forms of exploitation.

The Libyan situation described in the Prelude is not singular as an example of state indifference to, or complicity in, the severe forms of exploitation that are targeted by state anti-“slavery” initiatives. Rhetoric and condemnations issued by states in regards to that exploitation omits exploration of the ongoing destabilizing consequences of the North Atlantic Treaty Organisation (NATO) and E.U. military intervention in Libya during the throes of the Arab Spring as a major contributing precondition to the exploitation.\textsuperscript{78} Other examples are the apparently intentionally cruel anti-refugee policies that target civilians fleeing exploitation and violation in the Syrian conflict zones.\textsuperscript{79} At the same time, however, dire reports are issued by, for example, NGOs and the U.S. (which has adopted specific anti-Syrian refugee policies), describing and condemning the exploitation of Syrian refugees in the countries where they have sought refuge.\textsuperscript{80}

C. Methodologies

The foregoing methodologies that states use are rife with dishonesty and hypocrisy, and can be characterized as “Look what we are doing” and “Don’t look at what we are not doing or could be doing.” The creation of an anti-“slavery” industrial complex is riveting and emotionally satisfying. However, the reward for the state and the greatest impact is performative theater – the appearance of commitment and passion in the fight against human exploitation even while upholding systems and ideologies that support continued subjugation and exploitation.\textsuperscript{81}

\textsuperscript{78} SUSANNAH O’SULLIVAN, MILITARY INTERVENTION IN THE MIDDLE EAST AND NORTH AFRICA: THE CASE OF NATO (London: Routledge 2017).

\textsuperscript{79} Griff Witte, Conditions are horrific at Greece’s ‘island prisons’ for refugees. Is that the point?, WASH. POST, (Jan. 15, 2018), https://www.washingtonpost.com/world/europe/conditions-are-horrific-at-greeces-island-prisons-for-refugees-is-that-the-point/2018/01/15/b93765ac-f546-11e7-9af7-a50bc3300042_story.html?utm_term=.c8d218f3966c. Writing for The Washington Post, Griff Witte points out that the cruelty appears to be intentional, aimed at deterring Syrian civilians from seeking safety outside the borders of their countries of origin.


\textsuperscript{81} This includes acceptance as “normal” of the subjugation and exploitation of formerly colonized and enslaved territories and peoples. Such perspectives are betrayed, for example, by the incumbent U.S. President’s use of the term “shithole/shithouse countries” to characterize formerly colonized non-white countries. See, e.g., Josh Dawsey, Trump derides protection for immigrants from ‘shithole’ countries, WASH. POST, Jan. 12, 2018.
I categorize extreme examples as anti-"slavery" performance porn. (I use "porn" in the sense of the evocation of an intense reaction that may be gratifying to both the audience and the performer, but does little to stimulate real change.)\(^8\) In these cases, graphic images and glossy publications are disseminated, bearing jaw-dropping statistics and deeply affecting narratives of human exploitation and degradation.\(^8\) However, are those stories and images "real?" The authors of the TIP Report admit that: "In most cases, the photographs that accompany the stories are not images of confirmed trafficking victims."\(^8\) That is, images of ordinary people going about their lives have been used and made available worldwide to further particular state-supported narratives and images of "slavery" and exploitation. Further, "the victim stories included in the Report are meant to be illustrative .... Many are based on real experiences."\(^8\) In other words, it is impossible for the reader to know whether any individual human trafficking narrative or accompanying photographic image in the report is factually true. Although the explanation is highlighted in a text box on page three of the 2018 TIP Report, it is likely that most casual readers of the Report will not see the limiting language.

The publications are often accompanied by celebrity spokespersons or other high-profile figures, who teleogenically express horror at the exploitation and declare a commitment to end the exploitation. The 2017 appearances and the 2018 op-ed of Ivanka Trump, the daughter of the incumbent U.S. president described \textit{supra} is an example of such performances. Similarly, despite the anti-"slavery" performances of the U.S. and the U.K., the two states’ anti-immigrant and anti-refugee policies continue to reinforce the exploitability and enslavement of the very groups who those states claim to protect.

These performances powerfully influence public understanding of today's slaveries in ways that impede the development of more critical analysis and more effective methodologies to combat them. Enthralled by the spectacle of attention-getting efforts to rescue the drowning, the actors neglect to go upstream.

\textit{D. Audiences}

The audiences of state dishonesty in anti-slavery efforts are internal and external to the state; and are both domestic and international.

\begin{itemize}
\item \textsuperscript{82} Other similar widespread uses of "porn" include "poverty porn" and "violence porn," for example.
\item \textsuperscript{83} See, \textit{e.g.}, Walk Free Found., Global Slavery Index 2016 Report (2016); U.S. Dep’t of St., Bureau of Democracy, H.R. & Lab., Trafficking in Persons Report (2018).
\item \textsuperscript{84} U.S. Dep’t of St., \textit{supra} note 84.
\item \textsuperscript{85} Id.
\end{itemize}
1. Domestic

The domestic internal audiences are the actors who conceive of, and carry out, state legislation and policy. Those actors understand and act regarding today’s slaveries in accordance with the dominant paradigms of aberrational criminality and the power of the law enforcement model created by the state’s own dishonesty to itself. Deceived by, and using those dominant paradigms, these state actors create and implement initiatives that address the “hows” of exploitation. The linkages to the fundamental “whys” of the exploitation remain underappreciated, and therefore are not addressed. This, despite excellent analytical contributions of academics and of NGOs such as openDemocracy, that have gone upstream and identified the linkages among economic inequality, irregular migration flows and border militarization, armed conflict zones, and the subordinated status of women and children, among other factors.

Examples of the results of the failure to grapple with the “whys” include the “rescue” of child trafficked victims and their protective incarceration, followed by exasperation that the victims often escape to be reunited with their exploiters. The linkage of the children’s exploitation to the inadequate investments in state social welfare systems, such as meaningful educational opportunities, economic support of the socioeconomically challenged, and the creation of entrepreneurship and job opportunities among under-resourced communities is not addressed, other than in superficial “prevention” efforts centered on “educating” the vulnerable about their exploitability. These efforts fail because they do not provide meaningful escape hatches from the conditions that give rise to exploitability.

2. International

States’ international audiences are other states, intergovernmental organizations, multinational corporations (MNCs), and international NGOs. The state focuses those audiences’ attention on the criminal actors who directly perpetrate the exploitation. In order for the state to maintain its moral authority, those audiences must be convinced of the accuracy of the states’ diagnosis of the causes of today’s slaveries, and of the states’ commitment to anti-slavery eradication efforts. At the same time, however, the state’s dishonest rhetoric and the potent ineffectiveness of the anti-“slavery” efforts reassure fellow states and powerful non-state actors (such as influential MNCs) that the power subordination dynamics upon which they and the states depend will not be systematically challenged. An MNC whose profit margins are increased by low

labor costs and exploitative labor conditions is not overly worried about the inconvenience of reporting about its best efforts to cleanse its supply chains. The requirement neither targets fundamental contributions to exploitability such as unfair or unimplemented labor, property, or environmental laws, nor imposes meaningful positive obligations to prevent either exploitation or exploitability.

IV. INEFFECTIVENESS AND EFFECTS

The dishonesty at the heart of state anti-“slavery” efforts means that those efforts are ineffective. My conclusion is based on my understanding that the invoked goals of state anti-slavery efforts — prevention and eradication of contemporary “slavery” (severe forms of human exploitation) — provide the source of the standards against which the effectiveness of state efforts should be assessed.

A. Ineffectiveness

I use the following criteria to assess “effectiveness”: (1) decreases in vulnerability to exploitation; and (2) decreases in cases of “slavery” or severe forms of exploitation. If the goal is prevention and eradication, then the numbers of victimized or enslaved persons should have decreased as a consequence of anti-slavery efforts. For this analysis, although acknowledging that state and NGO reports indicate that the number of reported prosecutions or even convictions have increased, I decline to focus on these indicators. These numbers do not indicate, and are distinct, from decreases in either vulnerability to exploitation or cases of severe forms of exploitation. The prosecutions and convictions identify wrongdoers who have committed crimes of exploitation that fall within the operative legal definitions. These wrongdoers are usually situated, and commit the atrocities, at the tail end of the chain of exploitation and exploitability. That is, they prey upon a stream of vulnerable persons who are readied by other, structural conditions (socio-economic inequality, subordinated social or political status, political upheavals, flights from zones of armed conflict, and militarized borders, for example) that create and maintain their vulnerability. As these preconditions are left unaddressed, the stream of vulnerable persons continues unabated, even after the identification, prosecution, and even conviction of the end-stage wrongdoers.

Available evidence indicates that state efforts have achieved no decrease in the number of cases of exploitation or enslavement. According to the U.S. 2018
TIP Report, in 2017, states prosecuted 17,880 human traffickers worldwide and convicted 7,045. (The prosecution and conviction figures for 2016 are reported as 14,939 and 9,072 respectively, showing an increase in prosecutions accompanied by a decrease in convictions.) Similarly, 100,453 persons were identified as victims in 2017 as compared to 68,453 identified in 2016 (marking a forty-seven percent increase in victim identification). The TIP Report's table and accompanying text do not indicate whether the victims identified were released from their exploiters and/or rehabilitated. This lack of transparency regarding the fate of these detected trafficked persons creates concerns about the functioning of the “victim-centered” approach.

Further, there is no evidence of a potential decrease in severe forms of exploitation or “slavery.” Instead, greater numbers of individual humans have been identified as being vulnerable to exploitation or enslavement, and the reports of NGOs and intergovernmental organizations with whom states collaborate claim that there is a significant expansion in the number of persons identified as enslaved, exploited or trafficked. Indeed, between 2013 and 2016, Walk Free Foundation's Global Slavery Index identified a significant increase in global slavery. The organization identified 29.8 million enslaved persons in 2013 and 45.8 million in 2016. A 2017 report produced by Walk Free Foundation in collaboration with the International Organization of Migration and the International Labour Organization announced that more than 40 million persons are enslaved around the globe, with more than 152 million children victimized by child labor. The methodologies utilized by Walk Free Foundation have been challenged by experts in the field. As such, the increase may reflect merely an expanded (and potentially flawed) definition of slavery and enslavement, instead of an actual increase in the numbers of severely exploited humans. Nevertheless, to the extent that these numbers are accepted by policy makers, other intergovernmental organizations and NGOs, the public, and the media, they contribute to the constructed “reality” of contemporary slavery.

dismally low (in contrast to the expansive claims regarding the extant scope of human trafficking and slavery), strongly suggests the ineffectiveness of the anti-slavery efforts.

89. U.S. Dep't of St., supra note 84, at 43. For context, the 2015 figures for prosecutions and the 2018 figures for victim identification are the highest reported in the eight-year period covered by the chart.


92. Int’l Org. of Migration, supra note 91.

B. Effects

The dishonesty and ineffectiveness of state anti-“slavery” efforts result in the institutionalization of unwittingly or deliberately ineffective efforts and the growth of an anti-human trafficking industrial complex. The perverse consequence of the failure to go upstream is to leave unchallenged—and even reinforce—the structural bases of vulnerability to the severe forms of exploitation characterized as contemporary “slavery.”

The rhetoric of “slavery” reinforces idealized perceptions about existing state-supported and state-implemented legal, political, and economic structures—that they prioritize the human person and support values of fairness and neutrality. States are able to play both sides: rhetorical champions of human rights and of victims, and supporters of exploitative systems through passive or active support, or through failure to take positive action against these contributing factors.

The anti-“slavery” efforts are designed as visually and emotionally appealing performance, while being minimally disruptive to existing systems of exploitation. The horrifying rhetoric and imagery attempt to detach human trafficking and the targeted forms of exploitation from other endemic forms of exploitation that are essential to global systems of power and subordination, and from the would-be trans border movement and attempted intra-state immobilization of peoples. As mentioned earlier, the inherent conflict between trade liberalization (and its consequent subjection of weak domestic markets to global competition) and rigid anti-immigrant policies and laws create great vulnerability. The human person who seeks opportunity to live and work outside her national borders as a result of domestic economic stresses is criminalized and coerced by the state into the ambit of often exploitative people movers.

A significant proportion of state anti-“slavery” efforts are a bread-and-circuses performative endeavor. The dishonest methodologies allow states to appear to be champions of human rights and victims of exploitation, even while they deploy and support contradictory policies that facilitate exploitation. Despite rhetorical invocations of commitment to prevention and eradication of severe forms of contemporary exploitation, states avoid commitment to meaningful change in existing power-subordination relationships. The superficial “protective” mechanisms, the funding of NGOs for optics, and the benefit of some

94. “Anti-human trafficking industrial complex” riffs on the term “military industrial complex” against whose growth U.S. President Eisenhower futilely warned the United States. The term denotes a system with inherent incentives and internal logic toward self-perpetuation and growth, often to the detriment of its own stated mission, and despite the lack of evidence of effectiveness. The term is used in other contexts, such as the futile and ever-expanding anti-drug trafficking industrial complex. The anti-slavery industrial complex is likely to achieve as much (or as little) as the War on Drugs’ anti-drug trafficking industrial complex.


96. Bravo, supra note 20 at 545-616.
"deserving" (i.e., perfect victims), allow states to ignore other, more inconvenient victims.

V. CONCLUSION: TOWARD A HOLISTIC APPROACH

If the dishonesty at the heart of state anti-“slavery” efforts is allowed to continue unchallenged, we are assured of continued bread-and-circuses performances: horror at the exploitation, contemptuous pity for the victims, and rage at the perpetrators.

We must use structural analysis and understanding of the root causes of exploitation to effectively combat the exploitation, including the severe forms of exploitation invoked by states in their anti-“slavery” rhetoric and efforts. State framing of the phenomenon of “modern slavery” as the result of violations committed by bad-guy transgressors limits the anti-exploitation methodologies under consideration. This framing points the finger to transnational criminals and looks away from true prevention that would target vulnerability caused by state-supported economic, social, and political structures. The parable of the river urges a more holistic approach: While some responders focus on the rescue efforts directed at the immediately vulnerable, other responders must go upstream to the sources to identify the causes and truly prevent the crisis.

States and other anti-“slavery” actors must identify and map out contradictory state incentive structures, including linkages to, and dependence on, systems of exploitation – such as corporatization and cheap labor – that undermine the state’s ability or willingness to address the new slaveries effectively. Further, and perhaps even more challengingly, the anti-“slavery” actors must critically confront and develop strategies to respond to the possibility that the state just may not have the power to create and implement honest and effective anti-“slavery” efforts in the face of the shift of power from states to non-state actors.97

To be effective, anti-slavery efforts must focus on why as well as how the exploitation is conducted and must follow the money and power to identify the beneficiaries. The efforts must identify intervention points, and demonstrate a willingness to make structural economic and political changes to address endemic subordination and vulnerability to exploitation. Such efforts will require the adoption of new holistic methodologies that incorporate the intertwined factors that lead to and maintain severe forms of exploitation. These would include, for example, coordination through the World Trade Organization and regional economic and trade liberalization organizations to decrease or eliminate the contradiction between international trade liberalization and domestic immigration law. This innovation would liberalize the movement of human persons so that they may respond lawfully to trans border economic and other incentives and, while benefiting from human rights protection, receive the

97. Examples are multinational corporations and other powerful non-state actors.
protective national treatment and most favored nation statuses given capital, manufactured goods, and intellectual property under the international trade liberalization regime.\textsuperscript{98}

There may be some hope of a more structural approach: in 2017, a new type of anti-"slavery" collaboration/initiative was announced by the U.K. and the U.S.. The two states pledged GB £20M and U.S. $25M respectively, to a new entity, the Global Fund to End Modern Slavery.\textsuperscript{99} "Incubated" by Global Development Incubator, the entity is described as a "public-private initiative focused on sustainably ending modern slavery by making it economically unprofitable."\textsuperscript{100} Its goal is to raise U.S. $1.5B in furtherance of that mission.\textsuperscript{101}

However, the new initiative appears to embrace the paradigm of aberration and criminality, albeit with the offering of economic and market-based solutions to combating the exploitation. For example, the CEO of the new fund characterized "modern slavery" as:

\begin{quote}
[A] crime of economic opportunity. Addressing it in a sustainable way requires a coherent global strategy and mobilisation of resources commensurate with that strategy. This includes close engagement with the private sector as allies and partners. We believe that sustainably ending modern slavery will require market-based solutions and proactive business leadership. There is potential for businesses and investors to drive change like we have never seen before.\textsuperscript{102}
\end{quote}

It is too early to tell whether this initiative represents a paradigm shift away from mere criminalization and toward targeting the economic causes of vulnerability, with the promise of more effective anti-exploitation methodologies. Unless the Global Fund adopts a more structural approach than the one supported by its state funders, its efforts will be similarly flawed (dishonest and ineffective): a review of its website does not indicate a fundamental evaluation of the economic or other preconditions that lead to today's slaveries.

States, activists, NGOs, and intergovernmental organizations must address and frame effective responses to the hard questions about the goals of state anti-"slavery" efforts and their priorities (Is it the state and other powerful actors? Is

\begin{footnotes}
\item 98. Bravo, \textit{supra} note 20 at 545-616.
\item 102. Mortimer, \textit{supra} note 100.
\end{footnotes}
it the human being? The human being of every nationality, ethnicity, and citizenship, or those of more powerful states?). Further, they must determine whether state efforts mask the primacy of the state and nationalism, while performing anti-“slavery.”
WHAT CAN INTERNATIONAL TRANSITIONAL JUSTICE OFFER U.S. SOCIAL JUSTICE MOVEMENTS?

Laurel E. Fletcher*

I. INTRODUCTION

We find ourselves in a moment in which progressive causes for social justice are facing increased political resistance in the United States (U.S.). This time calls upon activists and their allies to reflect on the traditional tools employed by social justice movements. It is time to reconsider their utility measured against the present challenges of resurgent government support for white nationalism, nativism, and denial of the existential imperative posed by climate change. This is a time to look beyond our accustomed horizons to enlist new ideas, strategies, and constituents that can support domestic activism in these times. As someone who has spent her professional career working in international human rights, I am aware that, in many parts of the world, the “new normal” for U.S. social justice activists has been the norm for a long, long time. This is an opportune time for domestic advocates to ask what can the “international” and the struggles of human rights activists in foreign countries offer their U.S. counterparts in this moment?

This is the question that I take up here in my remarks.

II. ESTABLISHING THE CONTEXT

The United States, along with many other countries, has committed mass human rights violations against those within its borders. Like many other countries, these ruptures of fundamental respect for human dignity have legacies. These legacies manifest in culture, law, in the distribution of economic gains, and in political and social power. These legacies are what many social movements harness law to address. Thus, the first question that legacies of mass violations raise for me is: what do U.S. social justice movements have in common with those outside the U.S.? To begin, it is instructive to consider three canonical episodes of mass violations of human rights, with which I am sure we are all familiar:

First, consider the backdrop against which the modern human rights movement emerged: the Nazi genocide of European Jews. In response to the horrors of the Second World War, world powers established the United Nations and with it an international infrastructure to maintain world peace.¹ Respect for

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individual human rights was at the heart of this commitment and offered a universal standard to judge subsequent episodes of mass violence. The second episode followed the war when, in 1948, the South African regime instituted Apartheid, a racist system of governance designed to preserve minority white rule and privilege by legal, economic, and social disenfranchisement of Black South Africans. The Apartheid system lasted for over four decades and made South Africa a pariah state in the eyes of the international community. The third illustration comes from Cambodia. There, from 1975-1979, the Khmer Rouge regime controlled the country. It instituted a brutal system of governance, forcibly rounding up the civilian population into camps and massacring perceived enemies. Hundreds of thousands were murdered in the killing fields and over two million died of starvation and disease during the regime.

Closer to home, the United States has also perpetrated mass violence. Slavery was part of the founding of the nation and endured for almost 250 years on our soil. Just prior to the American Civil War that ended the practice, almost four million individuals were enslaved. Over half of those were forced to work in cotton and a third of slave labor was children. Also, as part of the American project of colonization, the U.S. government systematically disenfranchised Native Americans. As the new republic consolidated power in the 1830s, the government carried out mass forced removal of native peoples from settled areas to territory east of the Mississippi River. Approximately 100,000 were forced from their lands. Thousands died during the trip from disease, famine, or were killed resisting U.S. forces. A further example comes from the Twentieth Century. During the Second World War, the U.S. government forcibly relocated between 110,000 and 120,000 Japanese Americans, mostly from the west coast, to detention centers in the western interior of the U.S. Authorities justified this
program by the concern that these residents had divided loyalties and might aid the enemy.12

What do these episodes in the U.S. and around the world have in common? As a thought exercise, let us consider the possibility that the answer is: nothing. Each of these episodes arose from a unique set of circumstances, particular to a moment in time, and geographic and geopolitical space. There is nothing in the natural world that connects them. This proposition allows us to see the power of theory. To begin to see these all as related is to construct a framework in which they all fit and from which we can examine their relationship to each other. Transitional justice is one such framework that can do this work. So what is clarified in so doing? What might be helpful to domestic social justice advocates to consider their work in light of transitional justice?

III. WHAT IS TRANSITIONAL JUSTICE?

Transitional justice is a term that was coined in the early 1990s. It emerged from the experiences of reckoning with the fall of military dictatorships in South America.13 These regimes had committed mass human rights violations, including torture, extrajudicial killings, and enforced disappearances.14 These were also crimes that violated international law. In the examples of mass violence I introduced, only in the case of Germany were those who planned and ordered mass violence held accountable in the immediate aftermath of their misdeeds. For most of the modern period, state leaders have been able to commit atrocities and escape punishment. This is what international human rights advocates refer to as impunity. Although the commitment to accountability for violations of individual rights is a fundamental component of the human rights system, Cold War geopolitics prevented international cooperation necessary to restrain repressive and authoritarian states from committing mass violations in the first place, much less from holding perpetrators accountable.

The practice of impunity for leaders responsible for state-sponsored mass violence begins to evolve after the fall of the Berlin Wall. An international consensus begins to emerge that states that had committed bloodshed and repression could not simply “turn the page” and start over. Two guiding principles took hold: (1) the idea that states must reckon with the past and (2) that

wrongdoing committed by leaders of past regimes should be considered and addressed not as the inevitable detritus of political upheaval but as criminal behavior.\textsuperscript{15} Thus in its paradigmatic form, transitional justice is a project focused on interventions designed to promote justice and social construction after a period of conflict.\textsuperscript{16}

Over the last three decades, transitional justice has developed as a field and is now defined by the United Nations as consisting of four elements, or pillars, based on human rights.\textsuperscript{17} The first is the right to truth. Victims\textsuperscript{18} and societies cannot move forward unless they understand what happened in the past and who was responsible, as state violence is so often denied or hidden. The state has a duty to victims to investigate who was responsible for wrongdoing but also a responsibility to society as a whole to make public the record of how government committed mass violations. Truth commissions are one way to satisfy this demand. The second pillar is the right to justice. This is the straightforward proposition that perpetrators of crimes must be held accountable to deter violations and to show that no one is above the law.

The third pillar is the right to reparation. Victims have the right to be made whole from the damage caused by state wrongdoing. As a juridical matter, reparations generally refer to measures of repair that may include restoration of rights and property (restitution); monetary payments (compensation); and provision of social, legal, and medical services (rehabilitation). Reparation extends beyond material measures to individuals and may include community reparations. The term also includes symbolic measures of repair like official apologies and memorials that promote society-level awareness of the past.\textsuperscript{19} These responses publicly acknowledge the wrongful injuries inflicted on victims and socialize the community to reject attitudes and policies that could reignite old conflict.

Finally, the fourth pillar is called "guarantees of non-recurrence." These are measures, mandated by international law, which the state must implement in order to prevent the violence from recurring in the future. Examples include

\begin{quote}
18. I use the term "victim" in its legal sense and not as term of identity.
19. Memorialization has been defined as "a process that satisfies the desire to honor those who suffered or died during conflict and as a means to examine the past and address contemporary issues." UNITED STATES INSTITUTE OF PEACE, TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., vol. 1: General Considerations 1995).
\end{quote}
governments adopting constitutional protections of individual rights to ensure victims of discrimination have access to justice. The United Nations has adopted these pillars with the aim of “preventing the recurrence of crises and future violations of human rights, to ensure social cohesion, nation-building, ownership and inclusiveness at the national and local levels and to promote reconciliation.”

In sum, transitional justice as codified by the United Nations is conceived as a broad framework, based on international law, that aims to guide states to adopt a holistic approach to repair the damage of mass violence and to prevent its recurrence. It advances multiple goals and incorporates retributive and restorative justice approaches. It offers flexibility and encourages states to curate interventions for their particular contexts, allowing for grounded, bottom-up solutions to be implemented.

IV. TRANSITIONAL JUSTICE AND THE U.S. CASE

So why is starting from the premise that transitional justice does not unite the historic injustices in the United States with modern examples of global mass violence—Germany, Cambodia, and South Africa—helpful in thinking about how transitional justice may advance domestic social justice struggles? The application of the transitional justice framework is not obvious. An important distinction is that the United States is not in a period of political transition—at least not of the kind that transitional justice conventionally is thought to cover. Many would be puzzled to think of the United States as in need of transitional justice in the same way we think of Germany having an urgent need to shed its Nazi past, of Cambodia’s necessity to confront the mass destruction of its population, or of South Africa’s imperative to reckon with decades of a regime of racial segregation. And cases of mass injustices of the distant past do not generally lead to states pledging an array of measures to respond to the causes and aftermath of those wrongs.

The United States Civil War ended over 150 years ago, and our “transitional justice measures” implemented at the time—Reconstruction—proved short lived and inadequate to redress the injustice of slavery. And we see the active legacy of this failure. We have not as a country fully and adequately addressed the causes and the lasting effects of our country’s violence that served to preserve the power of the culturally white, male, heterosexual community. The United States is what we can think of as a case of historic transitional justice, an injustice that remains to be redressed. The current political moment underscores how much we are in need of what the legal scholar Michelle Alexander calls a refounding of our nation based on a commitment to equity and inclusion of all of

us who live within these borders. Thus, the distinction between “classic” transitional justice contexts and cases of historic transitional justice is important but is not dispositive. Although the United States is not a typical candidate for transitional justice, U.S. social justice movements may find that the concepts and tools of transitional justice offer ideas and strategies to advance the project of social transformation that is at the heart of both contemporary transitional justice efforts and movements to redress historic injustice.

V. TRANSITIONAL JUSTICE BENEFICIARIES

If the United States is a candidate for transitional justice, what does this form of “justice” mean, and for whom? Over the last twenty years, some scholars have begun to advocate for a conception of transitional justice that is victim-focused and addresses the structural inequities that led to mass violence and the production of vulnerable groups in the population. This perspective emphasizes a bottom-up approach to change that involves those who have been impacted by repression or violence in constructing policies, and strategies that will transform their societies. There is increasing emphasis on incorporating distributive justice into periods of political transitions. This thinking may be based explicitly or implicitly on an expansive vision of peacebuilding.

For example, scholar Erin Daly notes that the idea of transition is top-down while transformation occurs at the roots of a society, enabling real change, reconciliation, and deterrence. Wendy Lambourne proposes a shift in the goals of transitional justice toward “transformation,” which she defines as “long-term sustainable processes” with “adoption of psychosocial, political and economic, as well as legal perspectives on justice.” Her model emphasizes cultural relevance as well as local ownership and capacity building. Paul Gready and Simon Robins have articulated a new paradigm for the field, which seeks “transformative change that emphasizes local agency and resources.” They emphasize a participatory action model. In these schemes, space is created for local

23. This section incorporates text and ideas published in L. Fletcher & H. Weinstein, Transitional Justice and the “Plight” of Victimhood, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE (Lawther, Moffett & Jacobs, eds. 2017).
communities of survivors to initiate processes of societal change with no preconceived notions of how to achieve the desired results and where outside intervention is limited to "creating space" and "facilitating change through the provision of resources, material, and intellectual."\textsuperscript{28}

These scholars move the idea of transitional justice away from a model centered on individual accountability toward a model based on the broader goals of victim empowerment and changing social inequities. The move is from a "victim-centered transitional justice" to a "victim-initiated" approach that incorporates Rami Mani's three frames of transitional justice – legal, reparative (or rectificatory), and distributive – with the caveat that a long-term perspective becomes the paramount driver of the process of change.\textsuperscript{29} Such a model restores agency to victims and recognizes an elevated role for domestic civil society actors and social movements.

VI. POLITICS OF TRANSITIONAL JUSTICE

It is with the transformative potential of transitional justice in mind that I revisit the examples of incidents of mass violence and repression, and ask how might U.S. social justice movements think about transitional justice interventions to promote or consolidate larger, structural change driven by affected communities and their allies? If the goal is social transformation, and transitional justice interventions are the result of political choices designed to achieve these ends, we should ask what kinds of politics do transitional justice interventions open up or assist? I outline four types of public deliberation that social justice advocates may yoke to transitional justice: the politics of political accountability; the politics of information; the politics of victim-centered justice; and the politics of the past.

A. Politics of Political Accountability

Advocates have leveraged the concept of transitional justice to generate a politics of political accountability. The leaders of the Khmer Rouge regime retreated to the jungle after they were overthrown from power in 1979.\textsuperscript{30} It took over twenty-five years before they would face justice. It was not until 2005 that the United Nations-sponsored tribunal to prosecute the former Khmer Rouge leaders was established.\textsuperscript{31} There are many ways in which this tribunal has fallen short of expectations, but the sustained efforts of international and domestic

\textsuperscript{28} Id.
\textsuperscript{29} Rama Mani, Beyond Retribution: Seeking Justice in the Shadows of War (Malden, MA: Polity Press, 2002).
\textsuperscript{30} Khmer Rouge History, supra note 4.
actors and institutions to press for accountability helped to create space for, and to focus, national attention on who is responsible for the mass destruction beyond the regime leadership. This has prompted attention to former Khmer Rouge officials who have blood on their hands but who are ensconced, even now, in government positions. The ability to protect officials from legal accountability has become a public issue and raises inevitable questions about the relationship between crimes of the past and endemic corruption among government officials in the present. In this way, transitional justice works to elevate the continuities of power and bring attention to the ways in which wrongdoers of the past maintain privilege in the present.

B. Politics of Information

Transitional justice also generates a politics of information. State-sponsored truth commissions, like the South African Truth and Reconciliation Commission investigate past conflicts in which the state may have committed violence but covered up these facts and denied responsibility. These bodies make findings and provide official acknowledgment of “who did what to whom and why.” For survivors, the “truth” of such commissions is not necessarily a revelation, but often more of an acknowledgment of truths long denied. And these disclosures can catalyze further calls and action to do something about the crimes and complicity of state actors once these events are in the open. Truth commission reports contain recommendations for reparation measures, which survivors and human rights advocates may leverage to press for new policies. In this way, the public acknowledgement of past wrongs gives social justice movements new moral, if not legal, purchase on demanding that the government attend to the causes and to the ongoing effects of past violence.

C. Politics of Victim-Centered Justice

Transitional justice places survivors at the moral center of this project. And survivors and their advocates have used this commitment to make visible their material and social needs and to make rights claims for reparation. This politics of victim-centered justice has brought change to international criminal justice. The creation of a restorative justice arm of the International Criminal Court (ICC) was the result of years of effort from human rights advocates. But they gained leverage by exploiting the political opportunity created by elevated international attention to the right to reparation enshrined in international law. As a result, the ICC is the first international criminal court to have a specialized unit, the Trust

Fund for Victims, which provides material assistance to victims of international crimes.\textsuperscript{33}

\textbf{D. Politics of the Past}

Finally, transitional justice generates a politics of the past. Germany has, more than any other state responsible for genocide, taken sustained action to weave into its national fabric a commitment to “never again.” The Holocaust Memorial in Berlin irrevocably marks the symbolic center of a united Germany with a permanent reminder of the country’s Nazi period.\textsuperscript{34} This installation has powerful echoes in the United States. In Alabama we now have a powerful memorial to lynching, a commemoration of our nation’s terrorization of African American communities.\textsuperscript{35} These sites of conscience powerfully remind us of the magnitude of horror that racist ideologies can lead to, and draw our attention to their ongoing manifestations. The walls at the museum at the Lynching Memorial, pronounce the connection: “From Slavery to Mass Incarceration,” underscoring for visitors that racial discrimination continues to undermine the country’s formal commitment to equality and equal opportunity.

\textbf{VII. WHAT A TRANSITIONAL JUSTICE FRAMEWORK CAN OFFER U.S. SOCIAL MOVEMENTS}

I am not prepared to offer a prescription for what U.S. social justice advocates should incorporate from transitional justice. Each cause arises from a unique context, and there are not easy, one-size-fits-all models for how to accomplish social transformation. However, I want to offer three observations about transitional justice that I think are worth keeping in mind as movement leaders consider how to employ transitional justice.

First, focus attention and action to systemic causes of injustice. The goal of transitional justice is not to implement discrete interventions for their own sake. At its most ambitious, transitional justice aims to address the root causes of state violence and to establish conditions of social equality. As the example of the Lynching Memorial and Museum illustrates, memorialization projects can excavate links between past and present. Part of rectifying the legacy of slavery is drawing the connections between its practice and its outworkings today in our system of mass incarceration.

\textsuperscript{33} See International Criminal Court, Trust Fund for Victims, https://trustfundforvictims.org./


Second, center a change agenda on the needs of affected communities and individuals. Transitional justice offers an international vocabulary and conceptual tools to advocate for social transformation that is centered on the priorities of victims and affected communities. The international human rights framework incorporated into transitional justice centers on individual rights and as such, offers a moral and legal orientation to ground advocacy focused on what justice looks like from the perspective of victims. For example, international human rights can ground calls to end discriminatory immigration policies that unfairly target communities of color for surveillance, arbitrary police practices, and overcriminalization of migrants. Migrants are recognized as rights-bearers in international law in ways that U.S. domestic law and policy deny.

And third, create a holistic approach to transformative justice. Transformative justice involves change in multiple dimensions. If mass incarceration is an effect of slavery, ending this system requires dismantling not only the legal infrastructure that maintains mass incarceration but also the racism and implicit bias that support it. We need to tackle systemic problems holistically. To take another example, the #MeToo Movement is giving a moniker to pervasive sexism and misogyny in the workplace. But calling out offenders to be removed from their professions is not enough; the #TimesUp initiative and broader efforts to ensure equal pay for equal work and gender equity are needed if we are going to end the economic inequality that enables sexual harassment.

VIII. CONCLUSION

I return to my opening. The violence of the discriminatory ideologies, like white supremacy, transcends borders and links episodes of mass violence and repression. An international vocabulary, legal framework, and strategic tools are available resources for domestic advocates to adopt, innovate, and harness. Whether and under what conditions criminal prosecutions, truth commissions, memorials, or other transitional justice interventions make sense will be up to advocates for social justice. The South African and Greensboro truth commissions speak to different contexts. But what this moment of crisis at

home offers is the opportunity to reflect on what unites social movements around the globe. We have more in common than we may realize, and seeing the ways we are connected not only provides solidarity, it enables us to learn from each other and makes stronger our global movements for social change.
Equality has long been expounded to be one of the bedrocks that the United States was built upon. Since the country's founding we have continually sought to craft a more equal society for all, where people are judged for who they are and not how they look or how they were born. There have been problems and hurdles along the way in the march towards greater inclusion and equality. The aspiration toward equality has been enshrined in law, together with institutions been empowered to secure equality for all.

One such organization is the Equal Employment Opportunity Commission ("EEOC"), which protects employees and potential employees from discrimination by their employers and potential employers. When individuals believe they have suffered discrimination they can report the offender to the EEOC with the hope that a thorough investigation will be conducted and, if discriminatory practices are found, disciplinary measures will be enacted to dissuade similar actions in the future.

While few would call into question the morality or the overarching legality of such pursuits, safeguards must be in place to ensure that an investigation does not lower itself to the level of a witch hunt. One such safeguard is a clear indication of when the investigation ends so that the individuals and entities being investigated are not forever subjected to the perceived whims of the EEOC. Unfortunately, this very safeguard is missing for many Americans, and millions more are left guessing as to whether the investigation ends or if it continues into perpetuity. This uncertainty is the result of an as yet unaddressed circuit split, the result of which is an unequal standard being applied based on jurisdiction or the persuasive ability of the litigator.

This note will review the existing statutory law, case law by circuit, regulatory law, and policy arguments regarding when the EEOC's investigation terminates. This survey will demonstrate that the EEOC's
investigatory power should be limited to ensure uniformity and consistency across jurisdictions.

II. AUTHORITY AND INVESTIGATORY PROCESS OF THE EEOC

The EEOC was initially created under Title VII of the Civil Rights act of 1964.\(^2\) It was tasked with preventing discrimination in employment practices "because of race, color, religion, sex, or national origin."\(^3\) The EEOC had to make a determination for each charge filed, and issue a notice of the right to sue within a maximum of 60 days.\(^4\) The EEOC could only refer cases of discrimination to the Attorney General and had no enforcement capacity itself.\(^5\) Congress rectified these weaknesses in 1972 with the \textit{Equal Employment Opportunity Act of 1972}.\(^6\) The right to sue notice was extended to one-hundred eighty days and the EEOC gained its own enforcement procedures, meaning it no longer had to rely on the Attorney General or the Department of Justice for many of its charges/cases.\(^7\) These changes have helped to make the EEOC into the agency a more effective route for justice.

The typical process that the EEOC follows when it receives a charge of discrimination is dictated in Title 42, Chapter 26, Subchapter VI of the United States Code. When individuals believe they have been victims of discrimination, they file a charge with the EEOC within one-hundred eighty days after the event.\(^8\) Upon receiving the complaint, the EEOC notifies the accused party within ten days of the charge being filed and it begins its investigation.\(^9\) During this investigatory period, the EEOC has "access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices."\(^10\) Using this broad authority, it is to determine the reasonableness of the charge within one-hundred twenty days from it being filed, so long as it is practicable.\(^11\) If the EEOC determines that the charge is valid, it will pursue "informal methods of conference, conciliation, and persuasion" to prevent further discrimination from

\(^3\) Id. § 703(a)(1)-(2).
\(^4\) Id. § 706(e).
\(^5\) Id. § 705(g)(6).
\(^7\) Id. at section 4, § 706.
\(^8\) 42 U.S.C.A. § 2000e-5(e)(1) (West 2018) (The amount of time changes if the individual first files their claim with the relevant state or local agency).
occurring. \textsuperscript{12} If the EEOC and the party against whom the charge was filed are unable to reach a reconciliation agreement, the EEOC can file a civil charge against the party if it believes it is an efficient use of resources to effectuate its mandate. \textsuperscript{13} If a determination has been made and the EEOC has dismissed the charge, or if it has failed to institute a civil action within one-hundred eighty days, the EEOC issues the charging party with a notice of the right to sue. If the individual chooses to pursue civil litigation on their own the litigation must be commenced within ninety days from receipt of the notice. \textsuperscript{14}

III. DIVISION

When two great ideals of society are in conflict, it may be nigh impossible to rationally decide between the two. The two great ideals locked in conflict here are the desire for equality and the desire for privacy. If we truly desire for the EEOC to uphold the ideals of equality, then an employer has no right to privacy. Every decision that the employer makes should be examined to ensure that it has not been influenced by a prejudicial motive. The results of any action must be considered to ensure it will not cause the disenfranchisement of any group or protected class. Only by doing this can we truly hope to ensure equality for everyone in the workforce.

However, if every decision were scrutinized and there could be no expectation of privacy, then innovation would likely be stymied. Every action and decision would become a long-drawn-out process that is subject to analysis of countless attorneys and experts to ensure that a non-prejudicial motive and result will occur. This would have a devastating effect on businesses, employment, and the larger economy.

To prevent either scenario from occurring, a middle ground must be found that allows the EEOC to investigate a claim of discrimination while also allowing a business to retain its privacy and independence. Currently, there are two divergent views on how to answer this question which relate to the length of the investigation of the EEOC.

The first view is that the EEOC has broad investigatory power until it issues a notice of the right to sue. At this point its investigatory power terminates in regards to that charge. Only if another charge is filed will it regain its investigatory authority.

The second view is that the EEOC has broad investigatory power until it voluntarily terminates or litigates the investigation. The issuance of a notice of the right to sue is simply a statutory requirement and has no bearing or impact on the EEOC's authority, nor does any litigation that

\textsuperscript{12} Id.
\textsuperscript{13} Id. § 2000e-5(f).
\textsuperscript{14} Id. § 2000e-5(f)(1).
comes about as a result of the notice. The EEOC can only lose its investigatory power if it voluntarily ceases the investigation or if it decides to litigate it itself.

A thorough examination of both points of view is below. After the survey of statutory law, case law, regulatory law, and policy reasoning behind both sides the final section will find that the EEOC's investigatory power terminates with the issuance of a notice to sue.

A. "Absolute Power Corrupts Absolutely"\(^5\)

The Fifth Circuit Court of Appeals was the first to rule that the EEOC's investigation period had a definitive end in *EEOC v. Hearst*.\(^6\) This is still the preeminent case for the limitation side of the debate because of the thorough analysis of the legislative history. When the ruling in *Hearst* is supplemented with the rulings and rational of the District Court of the Eastern District of Virginia, the Eleventh Circuit Court of Appeals, and the D.C. Circuit a substantial argument on the side limiting the investigatory period is formed.

1. Fifth Circuit

The Houston Chronicle, a division of the Hearst Corporation, had two EEOC charges filed against it by its employees.\(^7\) The EEOC began investigating.\(^8\) As a part of its investigation, the EEOC requested the personnel files of the employees, "copies of any internal investigation documents, a list of employees in the Advertising Department, and permission to conduct an on-site investigation and to review certain other records."\(^9\) Hearst only turned over the personnel files and refused the other requests.\(^10\) The EEOC issued administrative subpoenas to acquire the requested information, along with additional information that it had determined was necessary.\(^11\) Hearst petitioned to revoke the subpoenas through the EEOC's internal procedures which were subsequently denied.\(^12\) After learning that Hearst was not going to comply with the subpoenas, the EEOC filed suit to compel Hearst to comply with the

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17. Id. at 463.
18. Id.
19. Id.
20. Id.
21. Id.
22. Hearst Corp., 103 F.3d at 463-64.
subpoenas.\textsuperscript{23} During this time the employees who had filled the charges with the EEOC had also instituted a civil action against Hearst and were issued notices of their right to sue by the EEOC.\textsuperscript{24} Hearst argued that since the EEOC had issued right to sue notices to the employees, it had terminated its investigation and thus the EEOC’s subpoena power had expired.\textsuperscript{25}

The Fifth Circuit determined that an EEOC’s involvement was broken into four distinct and separate stages, “filing and notice of charge, investigation, conference and conciliation, and finally, enforcement.”\textsuperscript{26} The different stages correspond with the different roles and powers that the EEOC has during the entire process, namely, as the “administrator, investigator, mediator, and finally, enforcer.”\textsuperscript{27} Each stage proceeds in order and only occurs after the termination of the prior stage.\textsuperscript{28} While the EEOC has broad investigatory powers during the investigation stage these powers terminate once the case proceeds to the conference and conciliation stage of the proceedings.\textsuperscript{29} The EEOC had allowed the case to advance to the enforcement stage when it granted the charging employees with right to sue notices.\textsuperscript{30} Even if this was not sufficient to move the case from the investigation stage, the employees had begun their own enforcement through a civil action against Hearst.\textsuperscript{31}

Considering the case had advanced past the investigatory stage and to the enforcement stage, the EEOC had lost its investigatory powers.\textsuperscript{32} Therefore, the administrative subpoenas issued by the EEOC were null and void.\textsuperscript{33} Since the existing charge could not be used to continue the investigation after notices to right to sue and private litigation had begun, the Court found in favor for the Hearst Corporation.\textsuperscript{34}

\textsuperscript{23.} Id. at 464.
\textsuperscript{24.} Id. at 463.
\textsuperscript{25.} Id. at 464.
\textsuperscript{26.} Id. at 468 (citing Occidental Life Ins. Co. of Cal. v. Equal Emp’T Opportunity Comm’n, 432 U.S. 355, 359 (1977)).
\textsuperscript{27.} Id. at 469.
\textsuperscript{28.} Hearst Corp., 103 F.3d at 468-69.
\textsuperscript{29.} Id. at 469.
\textsuperscript{30.} Id.
\textsuperscript{31.} Id.
\textsuperscript{32.} Id. at 469-70.
\textsuperscript{33.} Id.
\textsuperscript{34.} Hearst Corp., 103 F.3d at 470.
2. Fourth Circuit: Eastern District of Virginia

The Eastern District of Virginia adopted the logic in *Hearst* in *EEOC v Federal Home Loan Mortgage Corporation*. The EEOC investigated the Federal Home Loan Mortgage Corporation ("Freddie Mac") after charges of racial discrimination were filed against it by a former employee. During the course of its investigation, the EEOC requested an unredacted version of an internal "Diversity Assessment" which Freddie Mac refused to produce even after the EEOC issued an administrative subpoena for it. Before a court could issue a ruling regarding the issue of enforcing the subpoena, the EEOC issued a determination letter, a notice of the right to sue, and the employee filed a claim against Freddie Mac. Only then was the subpoena once again brought to the attention of the court.

The District Court chose to adopt the reasoning proffered by the Fifth Circuit in *Hearst*. The EEOC had chosen of its own volition to move from the investigatory stage and into the conciliation stage. If the EEOC still desires the document, nothing prevents it from joining in the lawsuit filed by the employee or filing its own suit and request the documents through the litigation process. Permitting the EEOC to retain its investigatory powers after it has transitioned to a subsequent phase would undo Congress' attempt to separate the charge into distinct phases. Thus, the subpoena was denied by the Court for the Eastern District of Virginia.

While there has been no ruling by the Fourth Circuit Court of Appeals, the fact that this decision has been adopted by one of its districts and has remained unchallenged for over a decade indicates satisfaction by the circuit as a whole.

3. Eleventh Circuit

The Eleventh Circuit Court of Appeals expressed a clear desire to adopt a similar hard line ending to the investigation in *Crawford v. City of Fairburn*, when it stated that "An EEOC investigation ... ends when the EEOC either dismisses the charge or issues a letter of determination that

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36. Id. at 770.
37. Id. at 770-71.
38. Id. at 771-72.
39. Id. at 772.
40. Id. at 773.
42. Id. at 774.
43. Id.
44. Id.
states its final findings about the charge." Officer Crawford had been tasked with an internal investigation of two complaints of sexual harassment in the police department, the first of which had also come to the attention of EEOC. The EEOC had concluded its investigation into the first complaint and had issue a letter of determination. Crawford continued his investigation regarding the second complaint for several weeks, but he was terminated shortly after reporting on his findings. Crawford asserted that this was a result of his investigation and that he was protected under Title VII against discrimination stemming from any assistance he provided to the EEOC’s investigation. The Court ruled that this protection ended when the investigation terminated. Its decision was based on the language of U.S.C. 42 §2000e-5(b) which states that “if the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” The distinction between the investigation and the conciliation is sufficient to show that the two are separate stages and protection under the investigation stage does not apply to subsequent stages.

While this decision has since been vacated because the appeal was reconsidered, it is still relevant because it shows that the Eleventh Circuit Court of Appeals is in favor of a strict ending to the EEOC’s investigatory period. It is likely that the Eleventh Circuit Court of Appeals will adopt this standard the next time it is presented with this issue again. When that happens, the Eleventh Circuit might have an even earlier termination than the Fifth Circuit because the investigatory period would end upon the issuance of the letter of determination, which occurs prior to the notice of the right to sue.

4. D.C. Circuit

While the District of Columbia Circuit Court of Appeals has yet to issue a ruling directly on the subpoena power of the EEOC after a notice of the right to sue, it has issued another ruling regarding the EEOC in which it has

45. Crawford v. City of Fairburn, 479 F.3d 774, 777 (11th Cir. 2007) (vacated by Crawford v. City of Fairburn, 482 F.3d 1305 (11th Cir. 2007).
46. Id. at 775-76.
47. Id. at 775.
48. Id. at 776.
49. Id. at 777.
50. Id. at 777-78.
51. Crawford, 479 at 778 (citing 42 U.S.C. § 2000e-5(b)).
52. Id. at 778 (discussing 42 U.S.C. § 2000e-5(b)).
53. Crawford v. City of Fairburn, 482 F.3d 1305, 1306 (11th Cir. 2007).
expressed its view regarding the EEOC’s investigatory powers, giving an indication on how it will rule if faced with the subpoena issue. In *Martini v. Federal National Mortgage Association* the Court confronted the issue of whether the EEOC could grant an early right to sue notice before the required one-hundred eighty day period from the date of the charge had expired.\(^{54}\) An employee filed a sexual discrimination charge against her employer, the Federal National Mortgage Association with EEOC.\(^{55}\) The EEOC provided a right to sue notice “twenty-one days” after the charge was filed, at the request of the employee who subsequently filed a civil lawsuit against the Federal National Mortgage Association “101 days after filing the EEOC charge.”\(^{56}\) Although the early notice to sue was objected to during the trial the court allowed the case to proceed, resulting in an order against the Federal National Mortgage Association.\(^{57}\) The issue of the early right to sue notice emerged again on appeal.\(^{58}\)

The EEOC has a “mandatory and unqualified” duty to investigate a charge filed with it.\(^{59}\) Since the filing of an early notice to sue normally “terminates EEOC investigation of the charge,” certain charges may not be properly investigated.\(^{60}\) This goes against Congress’ explicit intent in establishing the EEOC.\(^{61}\) The intent was to have the majority of charges handled through the EEOC conciliatory process or through a lawsuit led by the EEOC, rather than through private lawsuits.\(^{62}\) This reasoning and the legislative history, led the Court to rule that the EEOC cannot issue early notices of the right to sue, thereby vacating the judgment against the Federal National Mortgage Association.\(^{63}\)

The importance and the distinctness that the Court placed on the investigatory period indicates that it would likely be favorable towards a line of logic similar to the one the Fifth Circuit chose to adopt in *Hearst*. Since the D.C. Circuit Court of Appeals placed such emphasis on a thorough investigation during the Congressionally allotted one-hundred eighty day period prior to the issuance of a notice of the right to sue, it is likely that they will view the termination of the investigation with a similar finality.

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55. Id. at 1338-39.
56. Id. at 1339.
57. Id. at 1339-40.
58. Id. at 1340.
59. Id. at 1346.
60. *Martini*, 178 F.3d at 1346.
61. Id.
62. Id. at 1347-48.
63. Id.
5. Statutory Interpretation

The statutory language emphasizes the investigatory period as a crucial step in the EEOC’s process regarding claims of discrimination in the workplace. Only after an investigation shall the commission dismiss the charge or “endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”64 This language places the investigation as a crucial unique step in the process that must take place before any further action can be undertaken. “The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge.”65 It must also be noted that a notice of the right to sue can only be issued to the aggrieved party if the charge (1) “is dismissed by the Commission”; (2) if the commission has not filed a civil action “within one hundred and [sic] eighty days from the filing of such a charge”; or (3) “the Commission has not entered into a conciliation agreement to which the person aggrieved is a party.”66 When these two sections are read together it becomes apparent that a right to sue letter should only be issued after the EEOC has completed its investigation of the charges. Since the EEOC cannot delay the issuance of the notice it must then complete its investigation prior to its issuance. Therefore, its investigative powers should terminate with, if not prior to, the issuance of the notice to sue.

While the Fifth Circuit Court of Appeals has offered the most in depth and detailed analysis of why the EEOC’s subpoena power terminates after the issuance of a notice of the right to sue, it is by no means the only court to have adopted this view or that has expressed a significant preference towards this point of view. There is statutory evidence to indicate that this interpretation is accurate. These factors coalesce into a powerful argument as to why the EEOC’s investigatory power terminates with the issuance of a notice to sue.

B. Unlimited Power

Multiple courts have given the EEOC a significant degree of latitude in its investigatory power even after a notice of the right to sue has been issued. This point of view was originally championed by the Ninth Circuit Court of Appeals, but it has since been adopted by other courts and is reinforced by other case law and regulations.

64. 42 U.S.C. § 2000e-5(b) (West 2018).
65. Id.
1. Ninth Circuit

An employee for the Federal Express Corporation ("FedEx") filed a discrimination charge with the EEOC alleging that a skills test given to FedEx employees to determine eligibility for promotion "had a statistically significant adverse impact on African American and Latino employees" and that he had personally been discriminated against in other ways because of his race.67 After the one-hundred eighty days had passed, the EEOC issued a notice of right to sue but continued to investigate the claim.68 While the employee joined a larger action against FedEx, the EEOC continued to investigate the claim and issued a subpoena for information.69 FedEx refused to comply with this subpoena and had to be taken to Court by the EEOC which resulted in the district court enforcing the subpoena.70 FedEx appealed.71

The Ninth Circuit Court of Appeals considered the issue of whether the EEOC could issue a subpoena after it had previously issued a notice of right to sue.72 The EEOC's own regulations dictate that when it "issues a right-to-sue notice, it terminates its processing of the charge, but not always."73 The EEOC is empowered to continue investigating the charge if it believes it is necessary.74 This occurs when it is necessary to "Effectuate the Purposes of Title VII/ADA."75 The EEOC's own interpretive regulations and codes grant it the right and ability to continue an investigation after a notice of right to sue has been issued.76 The various stages in the process are not separate.77 Instead the entire process is an "'integrated' procedure 'that enables the Commission to detect and remedy instances of discrimination.'"78 While there might be separate stages, moving from one stage to the next does not terminate the preceding stage and the investigation can continue during the entire process.79

68. Id.
69. Id. at 845.
70. Id. at 846.
71. Id.
72. Id. at 848.
74. Id.
76. Id. at 850.
77. Id. at 851.
78. Id. at 851 (citing Equal Emp’t Opportunity Comm’n v. Shell Oil Co., 466 U.S. 54, 62 (1984)).
The EEOC does not act as a proxy for the employee that filed the initial charge, rather it acts for the broad public interest.\textsuperscript{80} If the EEOC had to cease its investigation and its entire process every time the charging party reconciled with the employer, it would fail to carry out its public mandate.\textsuperscript{81} The EEOC goes beyond simply advocating for one individual, but advocates for society as a whole as well in an effort to reduce and ultimately eliminate discriminatory employment practices.\textsuperscript{82}

The court concluded that the EEOC retains its investigatory powers after a notice of right to sue has been issued and even after a civil lawsuit has commenced. The Court ruled against FedEx and affirmed the lower court’s ruling that it had to comply with the subpoena.

2. Seventh Circuit

While the Ninth Circuit Court of Appeals was the first circuit to rule that the EEOC’s investigatory power did not end with the issuance of a notice to sue it, it was not the last. The Seventh Circuit Court of Appeals has recently issued a similar ruling in \textit{EEOC v. Union Pacific Railroad Company}.\textsuperscript{83} Two African American employees of the Union Pacific Railroad Company (“Union Pacific”) applied to take a skills test in order to receive a promotion.\textsuperscript{84} They were denied the opportunity to take the test and had their employment terminated shortly thereafter.\textsuperscript{85} After their termination, both employees filed charges with the EEOC alleging racial discrimination.\textsuperscript{86} The course of the EEOC’s investigation took long enough that it issued the former employees with notices of right to sue which they subsequently used to file a civil claim against Union Pacific.\textsuperscript{87} This litigation ultimately resulted in summary judgement for Union Pacific because of a lack of evidence produced by the former employees.\textsuperscript{88} However, while the litigation was underway, the EEOC continued its investigation and issued a subpoena for information.\textsuperscript{89} Union Pacific petitioned to have it revoked.\textsuperscript{90} The District court rejected Union Pacific’s “arguments that the EEOC lost its investigatory authority either (1) after the issuance of a right to sue

\textsuperscript{80} Id. (citing Equal Emp’t Opportunity Comm’n v. Goodyear Aerospace Corp. 813 F2d 1539, at 1542 (9th Cir. 1987)).
\textsuperscript{81} Id. at 852.
\textsuperscript{82} Id.
\textsuperscript{83} Equal Emp’t Opportunity Comm’n v. Union Pac. R.R. Co., 867 F.3d 843 (7th Cir. 2017).
\textsuperscript{84} Id. at 845.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 846.
\textsuperscript{88} Id.
\textsuperscript{89} Union Pac. R.R. Co., 867 F.3d at 846.
\textsuperscript{90} Id.
notice to Jones and Burks or (2) when the district court granted judgment in favor of Union Pacific. 91 Union Pacific appealed both of these rulings. 92

Once a claim is properly filed with the EEOC there is no explicit nor implicit limit to the EEOC investigatory authority. 93 This includes the one-hundred eighty day period before the notice of the right to sue can be issued. 94 An argument that it should be limited because the EEOC has alternative avenues to pursue an investigation is also insufficient to limit its investigatory power. 95 While it is true that the EEOC can file a commissioner’s charge, in essence bringing its own charge against a party, this could result in an untimely charge. 96 Alternatively, if the EEOC decided to join in an existing lawsuit of a charging party, it would be subject to the Federal Rules of Civil Procedure which are a significant constraint on the EEOC’s traditional investigatory power. 97 Since textual support for either of these actions is absent, there is no compelling reason that the EEOC’s authority should be limited in such a way. 98 Therefore, the issuance of a notice of a right to sue does not terminate the investigatory authority of the EEOC. 99

Union Pacific also urged, unsuccessfully, that once a court has ruled on the merits of the charge, the EEOC loses its investigatory authority. 100 The EEOC retains control over the investigation and any enforcement efforts relating to it. 101 Furthermore, if a ruling on the merits regarding an individual claim were sufficient to terminate the EEOC’s investigation then it would lead to a respondent settling just to prevent an investigation of a larger case that might be in the public interest. 102 The EEOC’s mandate goes beyond any singular individual and extends to the entirety of the public. 103 The public would be unfulfilled if the actions of one person were allowed to determine the results for the general public. 104 For these reasons, a determination on the merits in a charging party’s civil case has no impact on the investigatory authority of the EEOC. 105

91. Id.
92. Id.
93. Id. at 849.
94. Id. at 849-850.
95. Union Pac. R.R. Co., 867 F.3d at 850.
96. Id.
97. Id.
98. Id. at 850-51.
99. Id.
100. Id. at 851.
102. Id.
103. Id.
104. Id.
105. Id.
Since neither of Union Pacific’s assertions held merit, the Court determined that the EEOC retained its investigatory power despite issuing a notice of the right to sue and despite a court having ruled on the merits in a case that resulted from a notice of the right sue.106 This decision has placed the Seventh Circuit firmly within the expansive investigatory power of the EEOC camp. This is the broadest ruling to date since it also determines how courts should handle a situation where a decision on the merits has already been made regarding an individual case. Since this is a relatively new ruling it is unclear if other courts will adopt the secondary line of logic regarding judgements.

3. United States Supreme Court

It must be determined if the charging party or the EEOC has control and authority over a filed charge. The Supreme Court considered this question in *EEOC v. Waffle House, Inc.* and ruled that the EEOC has control over a charge.107 An employee suffered a seizure shortly after beginning work at Waffle House and was subsequently fired.108 He filed a charge with the EEOC which determined that the event violated the American’s with Disabilities Act (“ADA”) and subsequently filed an enforcement actions with the court.109 Waffle House asserted that the EEOC had no authority because of an arbitration agreement between its employees and itself which prevented the EEOC from intervening.110 The district court ruled in the EEOC’s favor because it found insufficient evidence that such an arbitration provision existed in the contract.111 On appeal, the Court determined that there was an arbitration provision, but determined that it could not prevent the EEOC’s enforcement action.112 Still, the Court did bar “victim-specific relief.”113 The EEOC appealed to the Supreme Court.114 The Supreme Court examined the statutory construction of Title VII and was unable to find any language that limited the function or statutory powers of the EEOC if an arbitration agreement existed between the charging party and the employer.115 “Once a charge is filed ... the EEOC is in command of the process” and retains “exclusive jurisdiction over the

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106. *Id.* at 845.
108. *Id.* at 283.
109. *Id.* at 283. (It is important to note that the EEOC’s enforcement power for the ADA is the same as its power under Title VII).
110. *Id.* at 284.
111. *Id.*
112. *Id.* (Discussing lower court ruling).
114. *Id.* at 285.
115. *Id.* at 288.
claim for 180 days."\textsuperscript{116} Therefore, it is the exclusive decision of the EEOC if it wishes to seek relief on a societal level or for a specific victim.\textsuperscript{117} The Supreme Court ruled that the EEOC retained exclusive jurisdiction and could therefore seek whatever enforcement it wanted under Title VII, and by effect, the ADA.\textsuperscript{118}

The Supreme Court’s determination that the EEOC retains its authority independent of any action or decision by the charging party is important because it means that nothing the charging party independently does can end the investigative process or divest the EEOC of its authority. Specifically, if the charging party brings a lawsuit after it is issued with a right to sue, that does not divest the EEOC of its authority. This means that it retains its investigatory powers until such a time that the EEOC itself acts.

4. Regulatory Interpretation

Similar to many agencies, the EEOC has a catalogue of its own internal regulations that it is has developed to accomplish the task that has been appointed to it by Congress. While a notice of a right to sue will typically terminate the investigation of the EEOC, this is not always the case.\textsuperscript{119} The EEOC retains discretionary authority to continuing processing a charge if “it would effectuate the purpose of title VII.”\textsuperscript{120} The EEOC’s own regulations show that it retains control of the charge and reserves the right to continue its own independent processing of the charge, which can include continuing the investigation. The EEOC retains a similar right in regards to its determination and dismissal of a charge which it can reconsider if it believes it is necessary.\textsuperscript{121}

These regulations demonstrate the EEOC’s desire to retain control over a case even after it might traditionally be perceived to have ended. Neither the of issuing a right to sue nor the actions of a charging party are sufficient to divest the EEOC of this authority. The retention of this authority allows it to ensure that it can effectively insure the civil rights of protected classes under Title VII.

The Ninth Circuit was the first circuit to propose that the investigation did not terminate with the issuance of the notice of the right to sue, and subsequent case law supports that the EEOC’s investigatory period does not end with the issuance of a notice of the right to sue.

\textsuperscript{116} Id. at 291.
\textsuperscript{117} Id. at 291-92.
\textsuperscript{118} Id. at 297-98.
\textsuperscript{119} 29 C.F.R. § 1601.28(a)(3) (2018).
\textsuperscript{120} Id.
\textsuperscript{121} 29 C.F.R. § 1601.19(b) (2018); 29 C.F.R. § 1601. 21(d) (2018).
III. ANALYSIS

Does the investigatory power of the EEOC end when it issues the notice of the right to sue, or does it only end when the EEOC either terminates the investigation or files a complaint with the court itself? The short answer is that the EEOC’s investigatory authority terminates when it issues a notice of the right to sue.

This conclusion was reached upon the consideration of three factors: first, the statutory language of the act itself; second, the existing case law; and third, the policy implications of either interpretation.

A. Statutory Analysis

The Commission is broadly empowered with the authority to “have access to... any evidence of any person being investigated or proceeded against that relates to unlawful employment practices.” To ensure that this authority is followed, the EEOC is empowered with the ability to subpoena witnesses and evidence for the purpose of its investigation. If a subpoena is not obeyed the EEOC is further permitted to bring a case in court to have the court order the production of such evidence or testimony with the possibility of being punished for contempt of court if the order continues to be refused. These are broad powers that can bring not only the force of an administrative agency but also the courts to bear upon anyone that attempts to hide evidence of their wrongdoing. It is widely accepted that the EEOC has these powers during its investigation of a charge. This extensive power is the core of the problem. Because the power is so vast it seems natural that Congress created some limit to this power to prevent its abuse, which Congress did.

The investigation is one of the key functions of the EEOC and it makes sense that it would be granted with such broad power to carry out its purpose of eliminating discrimination. However, the investigation is also tied into the rest of the EEOC process. Only after an investigation will the commission make a determination to either dismiss the charge, or choose to pursue it itself. Any further action taken by the EEOC is only done after the investigation.

The investigation itself is limited to “one hundred and [sic] twenty days” which is clear evidence that Congress intended to have a clear ending. While, the same sentence does provide some flexibility “so far
as practicable” in reference to the length of the investigation, this allowance is not an unlimited amount of time.\textsuperscript{127} This view is reinforced by the “one hundred and [sic] eighty day[]” period from the date of the charge until the EEOC must either bring a charge or issue a notice of the right to sue.\textsuperscript{128} Congress thereby limits the time for both the EEOC to complete its investigation and its reconciliation process, if necessary. The reason for these limits is to ensure that the process has some finality as does any adjudication in Article I or Article III courts. The common argument that the limited time period is only included so that aggrieved individuals could seek reprieve in court is incorrect and lacks a statutory basis. The argument is further weakened by the fact that the EEOC has the right “to intervene in such civil action upon certification that the case is of general public importance,” thus allowing the Commission to continue rooting out discriminatory employment practices.\textsuperscript{129}

The statutes pertaining to the EEOC show a strong inclination towards limiting the duration of the investigatory powers of the EEOC. While the first element of the three-element analysis has supported this position, this alone is insufficient to validate the conclusion. An examination of the existing case law that has been created since the formation of the EEOC must now occur.

\textbf{B. Case Law Analysis}

Restricting the time limit of the EEOC’s investigation would fit nicely into existing case law. The Supreme Court has stated that “Congress [has] established an integrated, multistep enforcement procedure.”\textsuperscript{130} The Ninth Circuit seemed to equate “integrated” with “concurrent” in its decision in \textit{Federal Express}.\textsuperscript{131} This is mistaken since “integrate” means “to form into a more complete, harmonious, or coordinated entity often by the addition or arrangement of parts or elements.”\textsuperscript{132} Therefore, the sentence can more appropriately be interpreted as simply being a reference to the fact that all of the steps in the EEOC’s process are part of its larger framework on how it handles a complaint.

\begin{itemize}
\item \textsuperscript{127} Id.
\item \textsuperscript{128} \S 2000-e(f)(1).
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Occidental Life Ins. Co. of Cal. v. Equal Emp’t Opportunity Comm’n, 432 U.S. 355, 359 (1977) (This is the same argument made by the Hearst Court discussed above).
\item \textsuperscript{131} Equal Emp’t Opportunity Comm’n v. Fed. Express Corp., 558 F.3d 842, 851-52 (9th Cir. 2009).
\item \textsuperscript{132} \textit{Integrate}, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1964).
\end{itemize}
The Supreme Court’s decision in *Waffle House* held that an individual filing a charge cannot terminate the EEOC’s investigatory power.\(^{133}\) This is correct, but, it is also inconsequential. "[T]he EEOC [is] the master of its own case."\(^{134}\) The Supreme Court explains that this means that only the EEOC can decide how to proceed once a charge has been filed during the initial one-hundred eighty days from when the charge is made.\(^{135}\) If the EEOC declines to file a claim during this period, then it must issue a notice of the right to sue.\(^{136}\) This notice of the right to sue is a deliberate action by the EEOC which causes the case to move past the investigation stage. The fact that it is required to give this notice by statute makes no difference since the Supreme Court made no distinction between voluntary actions of the EEOC and actions that it is compelled to undertake by statute.

The Seventh Circuit postulated that the existence of alternative means for the EEOC to pursue its investigation was insufficient to allow the termination of the EEOC’s investigatory authority because the subsequent investigations would be subject to various limitations.\(^{137}\) While this assertion may or may not be true, it is not a valid reason to permit the EEOC’s expansive investigatory power to continue unabated. The fact that an alternative form of investigation might be more cumbersome is actually a motivator for the EEOC to complete its investigation in an expeditious manner. The Seventh Circuit fails to recall the Supreme Court’s instructions that federal courts have a right to provide relief if there is an “inordinate EEOC delay in filing an action.”\(^{138}\) If the investigation and conciliatory period take too long, the EEOC still might be prevented from pursuing legal action.

The question must be also asked as to why the EEOC is permitted to join in the lawsuit of an individual if Congress intended for it to retain its broad investigatory power.\(^{139}\) It is doubtful that this was designed as a way for the EEOC to push the burden of investigating and bringing a case to trial onto an aggrieved individual. Instead, it is more likely that Congress gave the EEOC the ability to intervene in a private civil trial as a way for the EEOC to stay involved in a case and attempt to continue to reduce discriminatory employment practices even after it has lost its investigatory authority and its exclusive control of the charge.

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135. *Id.* at 291-92.
The existing case law given by the Supreme Court supports a limited duration to the EEOC’s investigatory authority. While there will certainly be conflict with the exiting law in some circuits the decisions of the Supreme Court that are most often cited to bolster the argument against a limited duration are not of as much assistance as they first appear. Since existing precedent allows for limitation, it is yet another hurdle cleared indicating that this is the correct conclusion.

C. Policy Considerations

While it is tempting to simply allow the EEOC’s investigation to continue perpetually and to allow its investigatory power to go unchecked in order to achieve the goal of eliminating discriminatory employment practices, this would not have the desired result. Allowing the investigation to continue perpetually simply allows more and more charges to accumulate which reduces the likelihood that important charges will ever even be considered. The EEOC is a small agency employing only 1,968 employees. Yet, it is tasked with ensuring that the nearly one-hundred fifty-seven million employees across the United States are treated fairly. This is a monumental task at best and an impossible task at worst. If the EEOC is tasked with both handling new charges in addition to continuing to process prior charges, the agency will soon become overwhelmed. It is hard to argue that the charges it receives in one year alone would not overwhelm it since over eighty-thousand were filed in 2017 alone. In order to prevent the EEOC from losing its effectiveness it must have clear lines for when part of its role terminates.

If we examine the alternative where the EEOC’s investigation terminates after one-hundred eighty days and the issuance of the notice of a right to sue, the EEOC’s workload becomes more manageable. The clear line will force the EEOC to prioritize the most important cases to ensure that the public is receiving the largest benefit from its actions. It will not accrue such a backlog of tasks because it will have to continually process them and focus on the most important. This will also allow the recipient of a charge to know when they won’t be subject to the EEOC’s investigation. While there is the risk that too many valid charges could be ignored and never properly investigated, Congress could authorize the EEOC to hire more personnel to fill the need.


It is also more appropriate for Congress to rectify this issue than the courts. It is not the role of the judicial branch to cover Congress’ shortcomings in allocating personnel. Instead of allowing Congress to fix the problem, courts such as the Seventh and Ninth Courts of Appeals have provided a stopgap by allowing the EEOC to continue an investigation into perpetuity. Eventually, this temporary solution will be insufficient to handle the backlog of charges.

IV. CONCLUSION

The Equal Employment Opportunity Commission is charged with protecting the millions of workers across the United States from discrimination. To do this it has been granted a wide, but not limitless, latitude regarding its investigatory authority. The EEOC’s extensive investigatory power can normally only be brought to bear during the initial one-hundred eighty day period after a charge is filed. There are multiple and compelling statutory, precedential, and policy reasons why this is true. The investigatory period should terminate upon the right to sue which should be adopted by Courts at large.

Were all Courts to adopt this interpretation, then there would not be nearly as much confusion as to how long the investigatory process lasts. The uncertainty of an investigation’s duration based on where an entity is located would disappear. It would encourage the EEOC to work more efficiently and to prioritize the most important charges to focus on. It would signal to the employer when it could return to regular operations as opposed to wondering if it would continue to be compelled to turn over information to the EEOC for years to come. It might even compel Congress to allocate more resources and most importantly personnel to the EEOC. For all of the aforesaid reasons the Equal Employment Opportunity Commission’s investigatory power should terminate after the initial one-hundred eighty days from the filing of the charge.
[NORTH] AMERICAN HORROR STORY: ASYLUM
AN ANALYSIS OF RECENT RECONSIDERATIONS FOR BATTERED WOMEN AS A PARTICULAR SOCIAL GROUP

Kati Massey*

Abstract: Asylum has been a long-standing tradition in European countries, as well as the United States, that serves as a streamlining technique to assist refugees displaced from their country of origin because of persecution.1 With origins reaching back to such dark times in our world’s history as the Holocaust, asylum protections serve to create stability for those who are pushed from their homes, figuratively and literally, on account of their race, religion, nationality, political opinion, or membership of a “particular social group.”

While the permeability of the country’s borders has fluctuated in recent years, the most recent construction, in terms of asylum, has created flow. The Board of Immigration Appeals (BIA) and U.S. Circuit Courts have decided cases in ways which construe battered women as members of a particular social group. This precedent, in recent months, has been challenged by Former Attorney General Sessions. Sessions has condemned the notion that battered women constitute a particular social group and instead suggested they be denied asylum on such grounds.

This note analyzes Former Attorney General Sessions’ position on whether battered women constitute a particular social group and suggests that victims of domestic abuse should continue to fall under the “particular social group” category based on years of precedent, explicit definitions laid out by both BIA and U.S. Circuit Courts, and past memoranda issued to asylum officers stating that domestic abuse victims do constitute a particular social group.3 This note also discusses the social and moral implications of turning away battered women when they are on the verge of death or serious harm.4

I. INTRODUCTION

Immigration. Refugees. Asylum. Major news outlets have these buzzwords on constant rotation. But what does any of it mean? And why should it matter to those who are not seeking entry into the United States? This note examines the

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2. Id. at 529.
3. Id.
history and evolution of asylum in the United States and analyzes the current controversy surrounding battered women as an admissible group for its protections.

To establish an asylum claim, the applicant must first "prove either past persecution or a well-founded fear of future persecution." 5 "Second, the persecution must have been or is expected to be committed by a proper source: either the government or forces that the government is unwilling or unable to control." 6 Lastly, the past or future persecution must have been or is expected to be motivated by one of the five protected grounds as a 'central reason.'" 7 The protected grounds include race, religion, nationality, political opinion, and membership in a particular social group. 8

A. History of Asylum

The underlying parameters constructing modern asylum go back decades. 9 After World War II, there was a flood of refugees fleeing the Holocaust and political oppression in Eastern Europe. 10 In response, European diplomats met in Geneva in an attempt to streamline the placement process for the millions of displaced refugees who were not able to return to their home countries. 11 Those present at what came to be known as the 1951 United Nations Convention agreed that protections were necessary for individuals experiencing persecution on account of race, religion, nationality, or political opinion. 12 While these characteristics were a great start, the present-diplomats decided to include a broader category, something to encompass those who did not fall neatly into one of the aforementioned characteristics, but instead were persecuted based on circumstances outside the perfectly labeled boxes. 13 "Particular social group" was added to the list of admissible grounds for asylum. 14 With that addition came decades worth of uncertainty concerning its interpretation. 15

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7. Id. at 529.
8. Wald, supra note 1, at 532.
12. Id.
13. Id.
14. Id.
15. Id.
B. U.S. Adoption of Asylum

The United States later followed suit, adopting the framework and definitions laid out in Geneva, in the Refugee Act of 1980 (The Act). The Act expanded the definition of refugee from the United States' previous guidance, the Immigration and Nationality Act of 1965, which included only those individuals fleeing natural disaster or Communist areas. The Act included language that resembled the ideas discussed in Geneva; a refugee, by definition, became:

any person who is outside his or her country of residence or nationality, or without nationality, and is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

While the Act's revisions greatly broadened the definition of refugee, they did nothing to address the uncertainties surrounding the interpretation of the "particular social group" category.

In recent years, the courts and governmental agencies overseeing immigration have begun fleshing out the intentions of the 1951 diplomats, and subsequently, the Carter administration in what constitutes "particular social groups." For example, gender, once strictly excluded as a viable particular social group, became admissible under certain circumstances. One such circumstance being the case of battered women who reside in countries where their government or police are not able to properly prevent the abuse.

II. ASYLUM REQUIREMENTS

The ways in which asylum may be granted are detailed in a variety of documents. Federal Codes provide the guidelines used for those seeking and enforcing asylum. However, there are numerous terms laid out in the Federal Codes that require additional supplementation to accurately interpret their meaning. This supplementation comes in the form of Immigration Court documents, Immigration Board correspondence, and case law.

16. Id.
19. Rose, supra note 11.
21. Id.
23. Id.
A. Persecution

With the Geneva framework as a blueprint, United States’ legislators further developed Federal Code, establishing the specific requirements for those seeking asylum. The result was a three-part test that individuals must meet to qualify for asylum protections. First, applicants must prove either past persecution or a well-founded fear of future persecution. The term “persecution” is not expressly defined in the statute, regulations, or by the Board of Immigration Appeals (BIA), an authority on immigration. According to pertinent case law, persecution “has come to mean physical or emotional suffering or harm inflicted ‘without legitimate reason.’” The meaning of, “well-founded fear” of persecution, also developed through case law. “The Supreme Court held that ‘well-founded fear’ of persecution is a lower standard than ‘clear probability’ of persecution. The Court, however, acknowledged that the phrase is inherently ambiguous and that the standard should be further clarified on a case-by-case basis.”

B. Proper Source

“Second, the persecution must have been or is expected to be committed by a proper source: either the government or forces that the government is unwilling or unable to control. Third, the past or future persecution must have been or is expected to be motivated by one of the five protected grounds as a ‘central reason.’” The protected grounds include race, religion, nationality, political opinion, and membership in a particular social group. Because “particular social group” is not statutorily-defined, there is some debate as to its meaning. “The definition has solidified into a three-part test: to form the basis of an asylum claim, the social group must be: (1) ‘composed of members who share a common immutable characteristic,’ (2) ‘socially distinct,’ and (3) defined with particularity.”

Using ejusdem generis, the doctrine governing court interpretation when general words are listed with specific words, the BIA decided courts should interpret the general words to be consistent with the specific words. Using this
doctrine, the finding that race, religion, nationality, and political opinion all
describe immutable characteristics, it follows that membership in a particular
social group must also be an immutable characteristic. 36 Second, the particular
social group must be “socially distinct.” 37 This second element was originally
“social visibility”; this distinction required that the civilization in which the
prospective group interacted recognize the individuals as members of the
group. 38 The BIA has held that such groups as “Filipinos of mixed Filipino-Chinese
ancestry, former landowners, and people recorded as homosexual by the
government” meet this standard and are “sufficiently visible to others in society
to constitute a particular social group.” 39 The BIA also held that to meet the
requirements of “socially distinct”, an asylum applicant must show that the
civilization with which the applicant interacts commonly “perceives, considers, or
recognizes persons sharing the particular characteristic to be a group.” 40 This,
however, does not demand that the surrounding-civilization be able to identify
which specific individuals belong to the group. 41

The BIA clarified this requirement by reaffirming that homosexuals as well as
“women who oppose female genital mutilation”, constitute social groups even
though establishing which individuals fit into these categories is not readily
apparent and would take effort to determine their placement in the group. 42
Further, a social group must be perceived, considered, and recognized as such by
the civilization in which the group interacts, and not solely by “the perception of
an applicant’s persecutors,” because “a social group may not be defined based
solely on the fact that the members have been targeted or harmed” (i.e.,
persecuted). 43

C. Particularity

Third, and finally, social groups must be “particular.” 44 The BIA defines
particularity as “whether the proposed group can accurately be described in a
manner sufficiently distinct that the group would be recognized, in the society in
question, as a discrete class of persons.” 45 The group must be “discrete, have
definable boundaries,” and may not be diffuse or amorphous. 46 The BIA and
courts may use the size of the proposed social group as an indicator as to whether

37. Wald, supra note 1, at 533-34.
38. Id. at 534-35.
39. Id. at 535.
40. Id. at 534.
42. Id.
43. Id. at 218.
44. Wald, supra note 1, at 534.
46. Id.
it is sufficiently distinct. Because “particularity” is analyzed as a function of the society “out of which the claim for asylum arises,” the terms used in describing the group must have “commonly accepted definitions” within that society.

In Matter of S-E-G-, the BIA held that an asylum seeker “failed to demonstrate membership in a particular social group because he could not concretely describe the group without resorting to terms about which reasonable minds could differ.” In particular, “male children who lack stable families and meaningful adult protection, who are from middle and low income classes, who live in the territories controlled by the MS-13 gang, and who refuse recruitment.” The BIA also held that another asylum seeker in Matter of S-E-G-belongs to an amorphous social group that was not able to be defined with sufficient particularity: “family members of Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang.” Here, the BIA found the use of “family member” to be overbroad and amorphous because it was not clear whether the term could include more distant relatives, such as mothers, siblings, aunts and uncles, nieces and nephews, or cousins.

III. BATTERED WOMEN AS AN ESTABLISHED “PARTICULAR SOCIAL GROUP”

In recent years, “particular social group” has been expanded to include battered women. The United States lacked any policy regarding domestic violence as a basis for claiming asylum until 1995, when the Immigration and Naturalization Service (INS) issued guidelines addressing the issue of gender violence. The guidelines were directed towards the INS Asylum Officer Corps and attempted to improve “uniformity and consistency in procedures and decisions.” The guidelines stated that although gender alone could not constitute membership in a particular social group, women who have experienced domestic violence might have an asylum claim based on their experiences. Although these guidelines were a great start, they were not binding on the BIA or any court.

47. Id.
50. Id.
51. Id.
52. Id.
54. Id.
55. Id.
56. Id.
This has been detailed explicitly in case law, as well as correspondence of governments and boards. The recent expansion of "particular social group" to include battered women was not a blanket, overarching revision. There were particular circumstances tied to the successful petition of women who have been the victims of domestic abuse. One such circumstance concerns the applicant's government's involvement; it either must not have had the power or ability to do anything about the persecution or simply did not care to do anything about it. Another circumstance that can lead to women's successful asylum petitions includes persecution involving a particular kind of harm—like rape and other sexual violence—that either befalls women more often than men or is unique to women.

A. Circuit Courts

Some Circuits' decisions specifically adhere to interpretations of "particular social group" that would include battered women. The Ninth Circuit has a similar approach as that used by BIA, requiring a "particular social group" to involve immutable characteristics, and the Third Circuit further confirmed that the immutable characteristic may include gender.

The Ninth Circuit, in Mohammed v. Gonzalez, held that women of a particular nationality, "or even in some circumstances females in general," may constitute a social group. The court acknowledged that the persecution at issue, female genital mutilation, was not clan-specific and was deeply embedded in Somalian culture and performed on nearly ninety-eight percent of all females. The agency could then categorize the particular social group as "Somalian females." The court describes this decision to allow women—especially those in the face of drastic persecution involving physical harm—as "simply a logical application of our law." The court goes so far as to state that few would even argue that "sex or gender, combined with clan membership or nationality, is not an 'innate characteristic,' 'fundamental to individual identity.'"

The Third Circuit held similarly in Fatin v. INS, that persecution based on gender may constitute persecution based on membership in a particular social group. The court discusses that the particular social group petitioner identified: Iranian women who refuse to conform to the government's gender-specific laws

58. Id.
59. Coven, supra note 54.
60. Id.
61. Mohammed v. Gonzalez, 400 F.3d 785, 797 (9th Cir. 2005).
63. Gonzalez, 400 F.3d at 797.
64. Id.
65. Id.
66. Id.
67. INS, 12 F.3d at 1241.
and social norms, may well satisfy the BIA’s definition of that concept. This is especially so because “the routine penalty for noncompliance is ‘74 lashes, a year’s imprisonment, and in many cases brutal rapes and death.”

B. BIA Decisions

Federal Code supplements include court and governmental board’s correspondence and guidelines as well as case law. Most asylum cases come down to the interpretation of the term “particular social group.” The BIA has defined members of a “particular social group” as those with a “common, immutable characteristic” that they cannot, or should not be required to, change. As previously mentioned, the BIA determined that to qualify as a particular social group, the characteristic in question requires immutability.

On August 26, 2014, the BIA decided Matter of A-R-C-G-, which, for the first time, addressed “the question of granting asylum to domestic violence victims on the basis that domestic violence is a form of persecution.” The BIA found the asylum-seekers, a Guatemalan woman and her three minor children who had illegally entered the United States to escape an abusive husband, “were eligible for asylum based on past persecution or a well-founded fear of future persecution on account of their belonging to a ‘particular social group.’” The BIA agreed with the respondent’s claim that the “particular social group” in question: “married women in Guatemala who are unable to leave their relationship” was a valid group to establish a successful asylum claim because it contained immutable characteristics (i.e., gender and marital status), particularity (i.e., “the terms used to describe the group have commonly accepted definitions with Guatemalan society”), and social distinction.

The BIA distinguished this finding from past decisions which found proposed groups such as “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination” to be lacking. The latter did not meet the standard for “particular social group” because “the proffered social group was defined principally, if not exclusively, for purposes of the asylum case and that it was unclear whether anyone in Guatemala perceives this group to exist.”

68. Id.
69. Id.
70. Marsden, supra note 54.
71. Wald, supra note 1, at 532.
72. Id.
73. Id. at 529.
74. Id.
76. Id. at 391.
77. Id.
Matter of A-R-C-G- “expanded the particular social group category for asylum eligibility” and opened the door for certain victims of domestic violence to qualify for asylum. This case represented progress towards greater protection for domestic violence victims but did not completely eliminate the uncertainty and confusion surrounding domestic violence as grounds for asylum. One of Former Attorney General Jeff Sessions’ first orders of business, however, was to overturn Matter of A-R-C-G-.  

IV. RECONSIDERATION OF BATTERED WOMEN AS RECOGNIZED PARTICULAR SOCIAL GROUPS

Although battered women had made progress in their efforts to obtain asylum protections, not everyone believed that they should be entitled to such protections and have made great strides to remove such protections. Among those who hold this view is Former Attorney General Jeff Sessions, who had direct oversight of the Immigration Courts and who single-handedly attempted to roll-back the progress of battered spouses. Part of Sessions’ duties as Former Attorney General is to oversee the nation’s immigration courts. Through this role, he is able to intervene in individual cases, thereby setting precedent that can affect all asylum-seekers.

A. Former Attorney General Sessions’ View of Asylum

Former Attorney General Sessions believes that battered women do not fall into a particular social group because, although they are in difficult situations, he does not believe the categories for asylum were intended to include such broad characterizations. Sessions argues that victims of domestic abuse should not fall within these definitions and, therefore, should not be considered for asylum protections based solely on such grounds. He asserts that such a broad interpretation of “particular social group” goes against the intentions of the legislators who laid out the guidelines.

Former Attorney General Sessions believes that the drafters intended the group to include things more closely related to race, religion, and nationality, and

78. Wald, supra note 1, at 529.
79. Id. at 529-30.
81. Rose, supra note 11.
82. Id.
83. Id.
86. Id.
87. Id.
that gender, or a group comprised of battered women, does not fall under that strict interpretation. 88 Sessions’ intervention is most notable in a case currently making its way through the Immigration Courts. 89 A case in which the asylum-seeker, Ms. A.B., has already won on appeal. 90

B. The Case of Contention

Ms. A.B., as she has come to be known, fled El Salvador in 2014 and has been residing in the Carolinas while her asylum case proceeds. 91 She came to the United States illegally when she finally managed to escape her now ex-husband’s abusive grasp. 92 Ms. AB suffered years of physical abuse from her ex-husband, who beat her with beer bottles, threatened her at gunpoint, and even raped her. 93 On one occasion, when she was pregnant with her second child, he had her on the floor and was repeatedly kicking her while Ms. AB shielded her unborn baby, turning away from his forceful blow so that her back would endure the onslaught of force. 94 She sought the assistance and protection of local law enforcement, but they did nothing. 95 It is well established that this region of the world has widespread corruption in government and police on top of the nearly-accepted perception that there is little protection for women in El Salvador. 96

Before fleeing to the United States, she moved to another area of El Salvador in an attempt to leave her abusive husband. 97 But again, he found her and raped her. 98 Her only option for survival was to travel farther the next time, to a place where there is protection from men who beat their wives: America. 99 Once there, she applied for asylum, exercising her right to legally start down the path towards citizenship. 100 Her effort encountered its first obstacle when the Immigration Judge presiding over her case, V. Stuart Couch, rejected her claim because, while the abuse appeared criminal, he did not feel that it reached a level worthy of asylum. 101

88. Rose, supra note 11.
89. Rose, supra note 86.
90. Id.
92. Id.
93. Rose, supra note 11.
94. Id.
95. Id.
96. Id.
97. Id.
98. Rose, supra note 93.
99. Id.
100. Id.
101. Rose, supra note 11.
Ms. A.B. refused to pack up and move back to a man who she feared would kill her.\textsuperscript{102} She appealed Judge Couch’s decision to the Immigration Board of Appeals and won.\textsuperscript{103} Despite the successful appeal, Judge Couch still refused to grant Ms. A.B. asylum, and now, for reasons that are not clear, Former Attorney General Sessions decided to step in and oversee the case.\textsuperscript{104} Sessions does not believe that being a victim of private criminal activity—what he classifies the abuse afforded Ms. A.B.—constitutes a cognizable “particular social group” for purposes of an application for asylum or withholding of removal in the vast majority of cases.\textsuperscript{105} This finding reaches back to pre-A-R-C-G-, reenlisting the argument that proffered classifications such as Ms. A.B.’s: “Guatemalan women who are unable to leave their domestic relationship where they have children in common” lack “sufficient social distinction” and therefore are not “cognizable as a distinct social group.”\textsuperscript{106}

V. **BATTERED WOMEN SHOULD REMAIN A “PARTICULAR SOCIAL GROUP” UNDER ASYLUM LAW**

If the United Nations Diplomats, and subsequently the U.S. Congress, intended for only discreet groups like race and nationality to constitute particular social groups, as Sessions claims, the addition of the fifth ground for asylum would have been wholly unnecessary. There would have been no need to include the catch-all category, “particular social group,” if every viable group were summed up in the other four grounds. If such grounds as race or religion were the only permissible options, and the only characteristics capable of signifying immutable characteristics, the drafters likely would have left it at that.

There is finally a trend toward defining “particular social groups” in a way that sheds light and creates some predictability concerning the types of groups that constitute particular social groups.\textsuperscript{107} Numerous cases, decided by both U.S. Circuit Courts as well as the BIA, provide precedent for battered women to constitute a particular social group under certain circumstances.\textsuperscript{108} To remove this distinction now will provide only more confusion in interpreting the statute. There are also social and moral cautions to removing protection for these women, namely, the threats of separation violence.\textsuperscript{109}

\begin{itemize}
  \item 102. Id.
  \item 103. Id.
  \item 104. Id.
  \item 106. Id. at 336.
  \item 107. Wald, \textit{supra} note 1, at 529-30.
  \item 108. \textit{See}, e.g., \textit{Gonzalez}, 400 F.3d 785; \textit{INS}, 12 F.3d 1233.
  \item 109. Cianciarulo & David, \textit{supra} note 4, at 341-42.
\end{itemize}
A. Precedent

Explicit definitions laid out by the BIA allow for battered women as a "particular social group." The BIA has defined members of a "particular social group" as those with a "common, immutable characteristic" that they cannot, or should not be required to, change. In Matter of A-R-C-G-, the BIA expanded the particular social group category for asylum eligibility and opened the door for certain victims of domestic violence to qualify for asylum. After which, the BIA issued memoranda to asylum officers stating that domestic abuse victims do constitute a "particular social group."

B. Separation Violence

When the battered woman leaves the relationship, she is "engaging in the ultimate challenge to her abuser's power, authority, and control." This action is, in effect, "pulling the trigger" on violence that may befall her, potentially inciting "an escalation of the violence, sometimes even leading to murder of the battered partner". "Regardless of whether the abuser forces her to return or whether she returns on her own, the abuser now knows that she is capable of leaving him." His goal then becomes punishing her for challenging his authority in an attempt to "ensure that such a challenge does not happen again." Because of this separation violence, and the risk of violence and death upon the battered woman increasing dramatically, there is even more motivation to make that separation permanent (i.e. grant asylum to the victims).

This separation violence falls into the "Cycle of Violence" that occurs in domestic abuse relationships. This cycle includes three phases: tension-building, acute battering, and calm respite, and serves to demonstrate that those who abuse their partners do so in an attempt to remain dominant in the relationship while establishing complete control over the abused. This cycle is similarly seen in more traditional refugee cases, where a dictator or the like seeks to establish control over a citizen and dominate their every move. This similarity further correlates the lack of randomness in both attacks. Simply
because domestic abuse occurs in the privacy of the individuals’ homes, while a dictator’s abuse occurs in public does not distinguish the two occurrences as driven by different motivations.123

Use of the separation violence theory in analyzing battered women as a particular social group proves fitful. It provides grounds to establish a new particular social group capable of withstanding defeat in the courts: “women who have left severely abusive relationships.”124 With an understanding of the psychology underlying domestic violence, as well as the societal underpinnings of the foreign governments in question, this category meets the standards of the test in Matter A-B- to establish particular social groups: “(1) membership in a group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question; and (2) that membership I the group is a ventral reason for her persecution.”125

Feminist scholarship has furthered these ideas and categorized domestic violence not as “an isolated act between private actors, but rather as part of a broader societal conception of appropriate gender roles.”126 Renowned scholars in this field have discussed the “necessary role of violence and threat of violence in the perpetuation of patriarchic systems.”127 To remove safeguards from abusers who are arguably the most dangerous, because it is said to be committed in “private,” is illogical. If the goal of asylum is to provide refuge for those in need of such protections due to their—restricted—role in society or because of their government’s inability to provide such protection, battered women in circumstances similar to those discussed throughout this note should be among the top of the list.

VI. CONCLUSION

Immigration Courts, BIA, and related entities should continue to allow battered women to apply for asylum as particular social group members because there is precedent as to its relevance, and the social and moral implications of discontinuing that protection are vast. This note examined the history and evolution of modern asylum in the United States and analyzed the current controversy surrounding battered women as an admissible group for its protections.

To establish an asylum claim, the applicant first “must prove either past persecution or a well-founded fear of future persecution”.128 Second, the

123. Id.
124. Id. at 343.
126. Wald, supra note 1, at 532.
127. Id.
128. Wald, supra note 1, at 531.
persecution must have been or is expected to be committed by a proper source: either the government or forces that the government is unwilling or unable to control.\textsuperscript{129} Lastly, the past or future persecution must have been or is expected to be motivated by one of the five protected grounds as a "central reason."\textsuperscript{130} The protected grounds include race, religion, nationality, political opinion, and membership in a particular social group.\textsuperscript{131}

Particular social groups, as a potential category for asylum-seekers, has been interpreted in different ways throughout the years. In recent years, courts and the immigration authorities have begun unpacking this difficult area of the statute and providing guidance as to ways in which the category should be interpreted.\textsuperscript{132} Definitions that encompass battered woman have been established, recognizing victims of domestic abuse as individuals persecuted as a result of their membership to a visible group of individuals with an immutable characteristic.\textsuperscript{133}

Recent efforts by Former Attorney General Sessions to roll back these developments create two main problems. First, precedent relied upon by immigration officials has now become less certain, which may lead to unpredictability in asylum cases.\textsuperscript{134} Second, refusing to recognize battered woman as a particular social group has moral and social implications. If uniformly-adopted, Sessions' position will likely lead to increased violence toward past-victims, and potentially death, as a result of separation violence and the cycle of violence it entails.\textsuperscript{135} This threatens to undermine the protections asylum is intended to provide to vulnerable people worldwide.

\textsuperscript{129} Javaherian, \textit{supra} note 5, at 428-29.
\textsuperscript{130} \textit{Id.} at 529.
\textsuperscript{131} Wald, \textit{supra} note 1, at 532.
\textsuperscript{133} Wald, \textit{supra} note 1, at 529.
\textsuperscript{134} \textit{Id.} at 529-30.
\textsuperscript{135} Cianciarulo & David, \textit{supra} note 4, at 345.